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| **Final Order Decision** |
| First inquiry opened on 14 October 2020  Unaccompanied site visits undertaken on 13 and 15 October 2020  Second inquiry opened on 1 February 2022 |
| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 27 July 2023** |

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| **Order Ref:** **ROW/3221975M2** |
| * This Order was made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) and is known as the Suffolk County Council (Parish of Newmarket) Modification Order 2018. |
| * The Order was made by Suffolk County Council (“the Council”) on 25 October 2018 and proposed to add a footpath to the definitive map and statement, as detailed in the Order Map and Schedule. * The Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs. |
| * In accordance with Paragraph 8(2) of Schedule 15 to the 1981 Act I have given notice of my proposal to confirm the Order with modifications. |
| **Summary of Decision:**  **The Order is confirmed subject to the modifications set out below in the Formal Decision.** |
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Procedural Matters

1. This Final Decision should be read in conjunction with my first and second Interim Decisions (“ID1” and “ID2” respectively) with the numbers in square brackets representing particular paragraphs in these Decisions. In essence, I proposed in each case to confirm the Order with modifications. I concluded in ID2 that the claimed route should be recorded as a restricted byway on a straighter alignment than originally proposed with a revised width of 4.2 metres (14 feet).
2. Network Rail Infrastructure Limited (“NR”) have objected to the proposed modifications and also the unmodified part of the Order. Newmarket Town Council (“NTC”) and the applicant (Mr Smy) continue to support the confirmation of the Order. I have reached my Final Decision on the basis of the evidence and submissions made at the two public inquiries and the further written submissions in response to ID2.

**Main Issues**

1. I have outlined the relevant matters in relation to the Order [ID1 4-8] and the main issues arising from the advertisement of the initial modifications (ID2 3-5]. Two main considerations addressed in ID1 and ID2 related to whether public rights existed over the claimed route and whether any historical public rights were subsequently diverted onto a substitute road.
2. It remains NR’s position that the Order should not be confirmed, and their further submissions focus to a large extent on the interpretation of Section 16 of the 1845 Railway Clauses Consolidation Act (“the RCCA”) in relation to the substitute road point. NR’s alternative position is that the route should be recorded as a footpath with a lesser width. Whilst Mr Smy supports the confirmation of the Order, he also objects to the revised width set out in ID2.

**Reasons**

***Whether a highway was dedicated prior to the opening of the railway line***

1. Having reviewed the available evidence, I concluded in ID1 that the evidence as a whole was supportive on balance of the claimed route being a historical public road which pre-dated the Newmarket to Chesterford railway and that it should now be recorded as a restricted byway [72 & 73]. The additional and previously considered evidence was addressed in ID2, but my conclusion on this issue remained the same [42].
2. NR have provided further details regarding the process undertaken in relation to railway bills. Attention is drawn to the limited opportunity for amendments to be made when errors were found in the deposited documents. However, I do not consider that this issue weakens the reliance I have previously placed on the railway documents which consistently record the claimed route as a public road.
3. In relation to the proposed recording of the claimed route as a restricted byway, NR point to the evidence of use by pedestrians following the opening of the railway and the lack of evidence of use prior to the construction of the railway. Whilst use by pedestrians would not be inconsistent with the existence of a vehicular highway, I have placed significant weight on the railway documents. The clear inference to be drawn from these documents is that the claimed route was viewed as a public road rather than a footpath. In essence the dedication of a vehicular highway can be inferred from the documentary evidence.
4. Overall, no new evidence has been provided to persuade me to revise my view regarding the historical public status of the claimed route.

***Whether the public rights were diverted onto a substitute road***

1. The parties agree that the two issues which need to be resolved are whether the railway company had the capability to divert the route and whether this actually happened [ID2 28]. I have found it useful to re-visit my previous conclusions on these issues before considering the more recent submissions.
2. This issue is outlined in ID1 [37] by reference to the claimed route (road 29) and a route going east to west from the claimed route (road 26). It is evident that various maps which post-date the railway show the continued existence of the claimed route along with the disappearance of road 26 and the physical creation of a route on the northern side of the railway (the alleged substitute road) [ID1 39]. It cannot be determined from the map evidence when the road on the northern side of the railway was completed, but there is support for it being in existence (in part at least) on an 1851 deposited map [ID1 41].
3. I expressed reservations regarding whether the construction of the substitute road was undertaken under Section 16 of the RCCA [ID1 44], and also whether this would have fallen under Section 25 of the Act for this railway [ID1 45]. These issues and the lack of any contemporaneous documentation meant that I only acknowledged that it was possible that public rights were diverted onto the substitute road [ID 47]. Nonetheless, I took the view that the later evidenceis not supportive of the removal of public rights in relation to the claimed route [ID1 71]. Clearly, this conclusion related to the second of the two issues outlined in paragraph 9 above.
4. I outlined in ID2 that I interpreted Section 16 of the RCCA as permitting various works to be undertaken for the purpose of constructing the railway or associated accommodation works [32]. By virtue of Section 25 of the Newmarket and Chesterford Railway Act 1846 (“N&CRA”) the company had seven years to complete the railway [ID2 33]. I moved on to find it likely that the Section 16 powers ceased to be applicable once the railway became operative [ID2 35]. In terms of what actually happened, I outlined various factors [ID2 36] that contributed tomy later conclusion that there was little merit in the substitute road point pursued by NR.
5. In light of the further submissions by NR, I accept that there may have been works still to be completed when the railway opened to the public in 1848. Given the representation of a section of the substitute road on the 1851 railway plan, it is probable that the construction of this road had commencedbefore the end of the limitation period specified in Section 25 of the NCRA. The wording of the latter part of Section 25 means that there was also the potential for works to be completed after the end of the limitation period.
6. Additionally, NR point to the potential for ongoing works to be carried out in accordance with Section 16 well after the construction of the railway subject to these works falling within the limits of deviation for the railway. This is supported by the case of *Emsley v North Eastern Railway Company 1895*. It was found in *Emsley* that alterations to a station, including the removal of a parcel office and the erection of a new one on a different site, fell within clause 5 of Section 16, namely that the railway company ‘*may from Time to Time alter, repair, or discontinue the before-mentioned Works or any of them, and substitute others in their Stead’*.
7. I now take the view that there were statutory powers available for the railway company to construct a substitute road following the opening of the railway in 1848. However, it is not for me to determine at this point in time whether any such works would have lawfully fallen within these statutory powers. If the evidence is supportive of the claimed route being diverted onto a substitute road I shall proceed on the basis that this was undertaken in accordance with the relevant statutory provisions highlighted by NR. I also consider that there was the potential for the public rights to be diverted away from the crossing subject to the retention of private rights of access.
8. The issue to be determined in light of the above is whether the public rights I have found to have existed over the claimed route were diverted onto the road that was later constructed on the northern side of the railway. I note the points raised about the diversion of highways generally and the legal proceedings involving the road to the east of the claimed route. However, I consider it appropriate to proceed on the basis that the railway company could have potentially diverted the claimed route. At this point in time the lack of specific records in support of NR’s position does not mean that the route was not diverted. There nevertheless needs to be sufficient evidence put into the balance to infer that the claimed route was diverted. This is the case irrespective of the reasons put forward by NR regarding why they consider the route would have been diverted.
9. The main factors to be taken from the post railway evidence is that the claimed route continued to exist as a physical feature with evidence that the route was used by the public and the railway company were aware of this use [ID1 57]. This is distinct from the position with road 26 which ran parallel to the southern side of the railway line and the substitute road. A road was clearly constructed on the northern side of the railway line and NR have put forward reasons why they consider the claimed route would have been diverted onto this road. Nonetheless, the evidence points in favour of public rights continuing to exist in relation to the route.
10. I have recognised the potential for the claimed route to have been diverted onto the road subsequently constructed on the northern side of the railway. However, I am not satisfied on balance that it can be determined from the evidence that this happened. Overall, the post railway evidence is more supportive of the claimed route continuing to be regarded as a highway.

***Whether the Order should be modified as proposed***

1. In light of my conclusion regarding the historical status of the claimed route I consider that on balance the route should be recorded as a restricted byway rather than a footpath. No issues have been raised in response to the revised straighter alignment of the route [ID2 44]. However, the Council have provided details of the grid reference for point B on the modified Order Map, and this should be incorporated into the Order.
2. In terms of the proposed revised width contained in ID2, Mr Smy draws attention to the width shown on the deposited plan for the railway. He has also undertaken a comparison exercise in respect of Woodditton Road. However, as outlined in ID2 [46], the construction of the railway is likely to have had an impact on the width of the claimed route. It is additionallyshown narrowing on some of the plans where it crosses the railway. Whilst reference is made to the decision of another Inspector (ROW/3196947M), I agree with NR that the circumstances are different to the present case.
3. It remains my view that I should have regard to what would be a reasonable width in this location. Nothing has been provided to suggest that the width proposed for a restricted byway in ID2 [47] is not reasonable given that the route crosses an operational railway line. The specific gating arrangement at the crossing would be a matter for NR to determine.

**Conclusion**

1. Having regard to these and all other matters raised at the inquiries and in the written representations I conclude that the Order should be confirmed subject to modifications.

**Formal Decision**

1. I confirm the Order subject to the following modifications:

* Delete all references to “*footpath*” and insert“*restricted byway”*.
* Replace the grid reference specified in Parts I and II of the Order Schedule at point B with “56471 26297”.
* Delete “*a gate at*” from the second and third lines in Part II of the Order Schedule.
* Delete “*11 metres to a gate and a*” from the third line in Part II of the Order Schedule and insert “*approximately 18 metres to the”.*
* Delete the final three lines of Part II of the Order Schedule and insert “*Width: 4.2 metres (14 feet)”.*
* Include the notation for a restricted byway on the Order Map rather than the notation for a footpath and amend the map key accordingly.
* Show the restricted byway by means of a revised alignment towards its north-western end on the Order Map.

Mark Yates

**Inspector**

