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| **Order Decision** |
| Inquiry Held on 14 & 15 November 2023  Site visit made on 15 November 2023 |
| **by Paul Freer BA (Hons) LLM PhD MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 7 February 2024** |
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**Application for Costs**

1. At the Inquiry, an application for costs was made by Mrs Sine Garvey McInally against Norfolk County Council. This is the subject of a separate Decision.

Background and Procedural Matters

1. The Order proposes to modify the DMS for the area by adding a Restricted Byway. A Restricted Byway includes the right to pass and re-pass on foot with "normal accompaniments", the right to ride or lead a horse, and the right to use non-mechanically propelled vehicles.
2. The Schedule to the Order refers to the Restricted Byway starting from the public road named Mill Common (U33068). There was some debate at the Inquiry as to whether this was correct and whether it should properly refer to the Restricted Byway starting from St James Road. However, NCC subsequently confirmed that the road does appear on The List of Streets as Mill Common numbered as U33068, and is described there as ‘JUNC A1065 CASTLEACRE RD TO BRIDGE AT JUNC U22068 SAINT JAMES RD’. I am therefore satisfied that the Schedule to the Order is correct.
3. The primary position adopted by the Objectors in this case is that the Order Route passes over land which includes excepted land for the purposes of the Countryside and Rights of Way Act 2000 (CROW Act). Section 1(1) of the CROW Act defines ‘access land’ in subsections (a) to (e) but does not (in any of those cases) include excepted land. The latter is defined in Part 1 of Schedule 1 of the CROW Act. The definition includes land within 20 metres of a dwelling. It is upon this that the Objectors rely.
4. Section 2(1) of the CROW Act provides that any person is entitled by virtue of that subsection to enter and remain on any access land for the purposes of open-air recreation, if and so long as— (a) he does so without breaking or damaging any wall, fence, hedge, stile or gate, and (b) he observes the general restrictions in Schedule 2 and any other restrictions imposed in relation to the land under Chapter II. This is the right of access that is disapplied if land qualifies as excepted land.
5. The corollary of the definitions set out above is that excepted land must relate to land that would, apart from the exception, be access land as defined in Section 1(1) of the CROW Act. Furthermore, on any plain reading, it follows from the wording of Sections 1(1) and 2(1) of the CROW Act that the designation as access land (and therefore also excepted land) only applies for the purposes of that Act and not for the purposes of any other legislation. Moreover, if the use of a way can be presumed to have been established by reason of the historical use of that way as of right (in other words, without secrecy, force or permission), by definition that right already exists, albeit not recorded on the DMS. There is nothing in the wording of the CROW Act to the effect that any such rights are extinguished by the subsequent designation of land as excepted land for the purposes of the CROW Act. The two are therefore not mutually exclusive.
6. It follows that the primary position adopted by the Objectors in this case is misconceived. I have therefore approached the determination of this Order having regard to Section 53 of the 1981 Act and Section 31 of the Highways Act 1980 (the 1980 Act).
7. For the same reason, the secondary point taken by the Objectors, that the Order Route is not a highway, is similarly misconceived. In this context, the objectors rely on the judgment in *Kotegaonkar v SSEFRA and Bury Metropolitan Borough Council* [2012] EWHC 1976 (Admin), in which it was held that a way to which the public has no right of entry at either end or at any point along its length cannot be a highway at common law.
8. The judgment in *Kotegaonkar* followed the principle that, under Section 31 of the 1980 Act, the relevant way must not be “a way of such character that use of it by the public could not give rise at common law to any presumption of dedication”. The court emphasised the need for a highway to be connected to another highway, or to other land to which the public had access. This is authority for the principle in common law that the absence of such a connection meant that a right of way could not be a public highway.
9. In this case, if the use of the way can be presumed to have been established by reason of the historical use of that way ‘as of right’, including across land designated under CROW Act as excepted land, access would be possible between Mill Common and where RB3 commences. The way would therefore be connected to another highway at each end and would be connected to land designated as access land under CROW Act. The latter would fall into the category of ‘other land to which the public had access’. The Order route would then constitute a way of such character that use of it by the public could give rise at common law to a presumption of dedication. It follows that a highway (the Restricted Byway) would then exist between Mill Common and RB3, and eventually to the A1095.
10. The application was made by Mr Ian Mitchell on behalf of The Ramblers and was supported by 69 forms giving evidence of use (UEFs) and by documentary evidence. At the Inquiry, NCC adopted a neutral stance and the case for the confirmation of the Order was presented on behalf of the applicant by Mrs Rosalinde Emrys-Roberts.

**Main Issue**

1. The main issue here is whether the evidence is sufficient to show that a right of way which is not shown in the DMS subsists as a Restricted Byway.
2. The Order was made under the 1981 Act on the basis of events specified in sub-section 53(3)(c)(i). If I am to confirm it, I must be satisfied that, on a balance of probability, the evidence shows that a Restricted Byway subsists along the route described in the Order.
3. The case in support is partly based on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the 1980 Act. For this to have occurred, there must have been actual use of the claimed route by the public as a Restricted Byway, as of right and without interruption for a full period of 20 years immediately prior to its status being brought into question, thereby raising a presumption that the route had been dedicated as a Restricted Byway. This may be rebutted if there is sufficient evidence to show that there was no capacity or intention on the part of the relevant landowner during this period to dedicate the way for use by the public; if not, a Restricted Byway will be deemed to subsist.
4. Section 32 of the 1980 Act requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it appropriate weight, before determining whether a way has been dedicated as a highway.

**Reasons**

***The documentary evidence***

1. The earliest map provided to me is the Map of the Manor and Estate of Lord Phipps in West Lexham, dated 1575. It is suggested by supporters of the Order that this map shows the Order Route as part of long-distance route crossing Newton Heath and Common. The Thomas Coke Map of Castleacre Parish, dating from 1714-1719, specifically names Newton Mill but is otherwise too faded to discern whether or not the Order Route is recorded. The Map of Lexham West, dated 1745, shows fields and highways similar to the 1575 map but does not specifically show the Order Route. These early maps all require a degree of interpretation, and I am not satisfied that these maps bear the interpretation placed upon them by the supporters of the Order.
2. The Order Route appears more clearly on Faden’s 1797 map of Norfolk and is depicted there as a ‘cross road’ extending from Newton Mill to the Swaffham to Fakenham Road. The Order Route is then shown on Bryant’s 1826 map of Norfolk, where it is depicted in the manner of ‘lanes and bridleways’.
3. The Ordnance Survey (OS) Old (One Inch) Series of 1824 depicts the Order Route as a continuous route between Lexham Heath and Newton Mill, and is similarly shown on the OS Boundary Sketch Map produced in or around 1882. However, the Order Route is absent on the Greenwood Brothers Map of Norfolk produced in 1834 and on the James Pigot Map of Norfolk produced in 1840.
4. The 1838 Tithe Map depicts the Order Route as pecked lines between Water Mill (Newton Mill) and an enclosed lane numbered 122 listed as Lexham Road. The latter follows the alignment of what is now Restricted Byway No.3 (RB3). The implication is therefore that enclosed lane 122 was a long-distance route between the Water Mill and Lexham to the north-east, and that the Order Route shown by the pecked lines was part of that route.
5. Bartholomew’s Map of 1903 shows the Order Route as a ‘secondary road and good’, albeit this was later downgraded to ‘inferior road’ in the 1921 version of the map.
6. The Order Route is clearly shown on the OS Map of England & Wales: Norfolk Sheet of 1906, where it is shown as a pecked line between Newton Mill and a group of buildings that includes what is now the property known as ‘Byways’. The Order Route is again shown linking to a route having the same alignment as what is now Restricted Byway No.3.
7. The Finance Act map shows the majority of the Order Route as uncoloured, one possibility being that it could have been regarded as a public highway at that time. That part of the route directly adjoining Newton Mill is shown coloured. The applicant suggests that one possible explanation for this might be because a large deduction was claimed in relation to Rights of Common in relation to Newton Heath, such that the then landowner may have considered that claiming a deduction for residual sporting rights was not worthwhile. NCC consider that this may have been a drafting error. In any event, I have difficulty in reconciling why only a small portion of the route is not subject to deductions whereas the vast majority is. On balance, I consider it more likely than not that the Order Route formed part of a public highway at that time.
8. The map prepared for the 1941 – 1943 National Farm Survey shows the Order Route as uncoloured. Whilst this does not provide evidence of the status of the Order Route, it does show that the route did not form part of the adjoining farmland.
9. An aerial photograph taken in 1946 shows the Order Route as a single entity on the same alignment as now existing and of consistent width. Whilst this again does not provide evidence of the status of the Order Route, it does clearly show that the Order Route existed as a physical feature on that date.
10. The Order Route appears on the Ordnance Survey 1:25000 Map of 1955 as a pecked line. In contrast, the remainder of what is now Restricted Byway No.3 is shown on this map as a solid line.
11. In summary, overall the documentary evidence supports the existence of the Order Route as a physical feature since at least 1797. Both Faden’s 1797 map of Norfolk and Bryant’s 1826 map of Norfolk show that the Order Route was a public carriageway of some description, as does Bartholomew’s Map of 1903. The 1838 Tithe Map, and to a lesser extent the Finance Act Map, also indicate that. Consequently, on the balance of probability, I conclude that the documentary evidence is in itself sufficient to show that the Order Route has been a public carriageway since at least 1797.
12. For completeness, I go on to consider the evidence of use by the public.

**Statutory Dedication**

***Bringing into question***

1. The date of effective challenge must be taken as the date on which the right to use the way in question is challenged in such a manner that it brings home to a significant proportion of those using the way that their right to do so is being challenged. It is therefore necessary to consider when the right to use the way as a Restricted Byway was brought into question.
2. In 1999, two sets of posts were erected across the way by the then landowner of the property known as ‘Byways’. One set was, and still is, positioned across RB3, just to the east of ‘Byways’ (according to maps produced by NCC). The placing of these posts amounted to an obstruction to a recorded Restricted Byway (RB3) and therefore did not bring the use of the Order Route into question.
3. The other set of posts was, and still is, positioned across the Order Route to the west of Byways. It is stated by Mrs McInally, the current occupier of ‘Byways’, that the purpose of these posts was to prevent vehicles such as cars and motorbikes from continuing along the (then) road used as a public path (RUPP). It is apparent from the UEFs and the oral evidence of those supporting the Order that the posts were no hindrance whatsoever to those using the Order Route on foot or on bicycle, and usually only a slight inconvenience to those riding or a leading a horse. However, the posts are closely spaced and, in addition to preventing access by cars and motorbikes, the posts are completely effective in preventing access by non-mechanically propelled vehicles.
4. In August 2020, cross bars were added to the two sets of posts already in position. This completely prevented access to those using the Order Route on foot and on bicycle, as well as to those riding or a leading horse. Ten years prior to that, in or around 2000, signs were erected by the occupier of ‘Byways’ stating “No Public Access Excepted Land”. However, based on the UEFS and oral evidence at the Inquiry, these signs appear to have been singularly ineffective in deterring use of the route on foot, on bicycle or riding/leading a horse.
5. The placing of the posts to the west of ‘Byways’ did not prevent the use of the route on foot, on bicycle or riding/leading a horse, but it did prevent the higher right of taking a non-mechanically propelled vehicle along it. I am therefore satisfied that it was the installation of those posts that first challenged the rights of the public to use the route as a Restricted Byway and therefore brought the use of the way into question. There is no specific date recorded for the installation of those posts. However, in her letter dated 27 August 2019, Mrs McInally refers to these posts being erected “20 years ago”. I will therefore take August 1999 as being the most likely date for the erection/installation of these posts. Consequently, I need to examine use by the public during the period between August 1979 and August 1999.

***Assessment of the user evidence***

*Whether the evidence is sufficient to show that in the past the Order route has been used in such a way that a public footpath can be presumed to have been established*

1. Of the 69 UEFs submitted with the application, 22 record use during the relevant period. Of those, 4 used the route by right (in other words, with permission to do so) for most of that period before using it as of right towards the very end of the period. A total of 8 record use throughout the relevant period, four of whom began using the route in the 1940’s or the 1950’s. The remainder record use of between 1-16 years. The frequency of use is recorded as “daily”, “weekly” and “frequently”, or in some cases just “occasionally”. The mode of use includes on foot, on bicycle, on horseback, on motorcycle as well as by horse and cart. The stated purpose is mostly for recreation, including for walking, jogging, cycling, horse riding and dog walking, although some used the route to go to the shops/public house. A significant number state that they used the route to avoid walking on the busy A1065.
2. Some of those who completed UEFs also provided statements setting out additional evidence to corroborate that evidence. For example, Mr Niels Olesen provided a photograph of family members in a pony and trap at Newton Mill taken in 1960. Whilst not taken on the Order Route itself, evidence of the use of a non-mechanically propelled vehicle in such proximity to the Order Route tends to corroborate his evidence that he used the Order Route at this time and before.
3. At the Inquiry, I heard evidence in support of the application from a total of seven witnesses, including the applicant himself. The applicant has no personal knowledge of the Order Route beyond visiting for the purposes of the application, and his evidence was concerned with matters raised in his Statement of Case.
4. The evidence of the other witnesses expanded upon that given in their respective UEFs. For example, Mrs Helen Breach, who claimed use the route weekly between 1980 and 1988 and then monthly from 1988 onwards, explained that she used the Order Route for walks with family and friends, relating the dates she used the route with various dogs that she had at those times (specifically identified by breed and name). She also provided an extract from an OS map showing the routes she took from the various properties she has occupied in the area, including those which she occupied during the relevant period. These routes all encompassed the Order Route. Given the level of detail given and the association with specific animals, dates and properties, I found that evidence to be compelling.
5. Other witnesses provided similarly compelling evidence of their use of the Order route, albeit in some cases that use was outside of the relevant period as I now find it to be. I have not taken the latter into account. None of the evidence given by those supporting the Order was challenged to any meaningful extent.
6. In addition, a letter was submitted at the Inquiry from a Mrs Ingrid Franks. The letter, dated 26 September 2023, confirmed the information supplied in her UEF that she frequently used the route for walking and riding over a period of twenty-five years from 1950. However, the use described is outside of the relevant period and I am therefore unable to take this into account for the purposes of statutory dedication.

*Lack of intention to dedicate*

1. No evidence has been provided to demonstrate actions by or on behalf of the owner of the land affected by the Order Route during the period August 1979 to August 1999 to show the public at large that there was no intention to dedicate a right of way for the public as a Restricted Byway. None of the UEFs that cover the relevant period record being stopped or challenged when using the Order route, or refer to any signs or notices indicating that it was not a right of way. The erection of signs by the occupier of ‘Byways’ took place later. There is passing reference to efforts being made to prevent access by the travelling community through the erection of a single post on the way, but that evidence is short on detail and is far from being clear. I therefore conclude that the statutory presumption of dedication of the way as a highway has not been rebutted.

***Conclusion on statutory dedication***

1. On the evidence that is before me, I conclude on the balance of probabilities that the Order Route was actually enjoyed by the public as a Restricted Byway as of right and without interruption for a full period of 20 years between August 1979 and August 1999. The intention to dedicate a right of way for the public as a Restricted Byway is presumed to have taken place. Accordingly, a Restricted Byway is deemed to subsist.

**Other matters**

1. The objectors raise concerns about the implications of confirming the Order route as a Restricted Byway on the enjoyment of their properties. The principal concern is loss of privacy, including views into their properties from elevated positions by people using the route on horseback. I recognise that safeguarding the privacy of occupiers of dwellings located on common land was one of the purposes behind the designation of excepted land as part of the CROW Act. However, this application is made under the 1981 Act. Consequently, whilst loss of privacy is clearly a matter of paramount importance to the objectors, it is not relevant to my consideration of this Order which seeks to determine whether or not the right to use the way as a Restricted Byway has already been established in law through long unchallenged use.

**Conclusion**

1. I have concluded that the documentary evidence suffices to show that public rights over the Order Route have existed since at least 1797, including rights to use the way on foot, on bicycle, on horseback and by non-mechanically propelled vehicles. Notwithstanding that conclusion, I have further found that the user evidence suffices to demonstrate statutory dedication of the Order Route as a restricted byway pursuant to section 31 of the 1980 Act.
2. Having found that the Restricted Byway is deemed to subsist, the legal maxim of ‘once a highway always a highway’ applies. The subsequent designation of part of the route as excepted land under the CROW Act does not alter that position.
3. Consequently, having regard to the above and all other matters raised, I conclude on the balance of probabilities that the Order should be confirmed and the DMS modified accordingly.

**Formal Decision**

1. I confirm the Order.

Paul Freer

INSPECTOR

**APPEARANCES**

**For the Order Making Authority**

Mr Lawrence Malyon Senior Legal Orders Officer

**For the Applicant**

Mrs Rosalinde Emrys-Roberts Routewise Consulting

*She called:*

Mr Ian Mitchell Applicant

Mrs Virginia Ker-Gibson

Mr Niels Olesen

Mrs Brigid Fairman

Mr Ian Spencer

Mrs Helen Breach

Mr Desmond Pickering

Mrs Julie Whales

**In support of the Order**

Mr David Ormerod

**In objection to the Order**

Mr Mark Zipfell

Mr A C Bell

Mrs Sine Garvie McInally

**DOCUMENTS SUBMITTED AT THE INQUIRY**

1/ Opening Statement on behalf of Norfolk County Council

2/ Opening Statement on behalf of the applicant.

3/ Proof of Evidence of Mrs Sine Garvie McInally.

4/ Proof of Evidence of Mr David Ormerod (in part only)

5/ Signed copies of the Proofs of Evidence of Mrs Virginia Ker-Gibson, Mr Niels Olesen, Mrs Brigid Fairman, Mr Ian Spencer and Mrs Helen Breach

6/ Copy of leaflet produced by Norfolk County Council describing the Nar Valley Way (with map), referred to in Mr Spencer’s evidence.

7/ Extracts from the 1955 OS Map showing routes taken by Mrs Breach, as referred to in her evidence.

8/ Extract from the CRoW & Coastal Access Map depicting the location of Access Land.

9/ Letter from Mrs Ingrid Franks, dated 26 September 2023.

10/ Copy of written advice provided to Mr Ormerod by Mr Hugh Craddock, Case Officer, Open Spaces Society.

11/ Closing submissions by Mrs Sine Garvie McInally.

12/ Response by Norfolk County Council to the application for costs made by Mrs Sine Garvie McInally.

**DOCUMENTS SUBMITTED ELECTRONICALLY**

1/ Copy of The List of Streets for Norfolk.

2/ Copy of the leaflet produced by Norfolk County Council describing the Nar Valley Way (with map).

3/ Closing submissions on behalf of the Applicant.

4/ Application for costs made by Mrs Sine Garvie McInally, together with supporting papers.

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