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| **Order Decision** |
| Site visit made on 20 August 2024 |
| **by Nigel Farthing LLB** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 09 September 2024** |

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| **Order Ref: ROW/3318754** |
| * This Order is made under Section 53(3)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Norfolk County Council (South Acre (EH002)) Modification Order 2021.
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| * The Order is dated 22 September 2021 and proposes to modify the Definitive Map and Statement (DMS) for the area by the addition of a restricted byway in the parish of South Acre, as shown on the Order Map and described in the Order Schedule.
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| * There was one objection outstanding when Norfolk County Council (NCC) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The Order is confirmed.** |
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Procedural Matters

1. I made an unaccompanied site inspection on 20 August 2024 when I was able to walk the whole of the Order route and view the immediately surrounding area.
2. In writing this decision I have found it convenient to refer to points A and B marked on the Order Map. I therefore attach a copy of this map.
3. The Order was made by NCC under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(i). It proposes to add to the DMS a restricted byway between the points marked A and B on the Order map.

**The Main Issues**

1. The requirement of Section 53(3)(c)(i) of the 1981 Act is in two parts. The first is that there has been a discovery of evidence, being material that has not been considered previously in the context of the status of the Order route. The second element is that the ‘discovered’ evidence, when considered with all other relevant evidence available, should show that a right of way which is not shown in the DMS subsists, or is reasonably alleged to subsists over land in the area to which the map relates.
2. At this confirmation stage of the procedure a reasonable allegation is not sufficient and for the Order to be confirmed it is necessary for me to be satisfied, on a balance of probabilities, that the right of way subsists.
3. Section 32 of the Highways Act 1980 (the 1980 Act) requires me to take into consideration any map, plan or history of the locality or other relevant document provided, giving it such weight as is appropriate, before determining, on a balance of probabilities, whether or not a way has been dedicated as a highway of the appropriate status.
4. For the Order route to be confirmed as a restricted byway I would need to be satisfied on the evidence that the route had the status of a byway but that the right to use it with mechanically propelled vehicles was extinguished by operation of the Natural Environment and Rural Communities Act 2006 (NERC) s. 67.

Reasons

Discovery of evidence

1. The discovery of evidence is a prerequisite to the making of an order in reliance upon section 53(3)(c). There must be something more than simply a redetermination of evidence considered previously. However, once there has been a discovery of evidence, this new material is to be considered together with all other evidence available.
2. The discovered evidence must be relevant to the status of the route under consideration, but it is not a requirement that it should, on its own, be determinative of that status.
3. NCC has made the Order in reliance upon the evidence of various documentary sources which I shall address in detail later. There is no suggestion that this documentary evidence has been considered previously in connection with the status of the Order route. In this context I have no difficulty in finding that the requirement for the discovery of evidence is met.

Physical characteristics

1. The Order route is approximately 855 metres in length. At the southern terminus (point A on the Order map) it forms a crossroads with Fincham Drove (recorded on the DMS as South Acre Restricted Byway 6 (RB6)) joining from the south and east and South Acre Restricted Byway 2 (RB2) joining from the west.
2. From point A the Order route proceeds uphill in a northerly direction. At this point the Order route has the appearance of an unmade vehicular track with a central strip of vegetation. To the west of the track is a steep bank surmounted by a hedge. The area to the east is open but overgrown and, at the time of my visit, there was a large pile of building rubble. There is no gate or other structure, but a notice was displayed on the west bank, reading ‘Private Road. Farm Access only’.
3. As the track proceeds north, it is enclosed by the hedge to the west and a hedge and more substantial trees to the east. As the track levels out the hedge to the east comes to an end and the track is then open to a large field to the east. The track passes beside a metal pylon and underneath the cables it supports. For this section the Order route has the appearance and character of a farm track consisting of parallel tyre tracks over the sandy soil with a central grass strip.
4. As the end of the field is reached the Order route becomes again enclosed on both sides by a bank and hedge and continues in this fashion to the junction with Big Wood Lane (also known as Southacre Road) at point B. At this point there is a metal barrier hinged on a post on the eastern side of the track. At the time of my visit the barrier was open. Attached to it is an almost identical notice to that at point A, reading ‘NOTICE Private Road. Farm access only’.
5. Throughout its full length the Order route has a useable width consistent with use by agricultural machinery. Within the two enclosed sections, at each end of the route, the width is constrained by banks and hedging. At the southern end there are open areas both to the east and west where the available width is not so limited.

Documentary evidence

*County Maps*

1. The Order route is depicted on a number of County maps, the earliest representations being on James Corbridge’s Map of Norfolk (1730) and James Goddard and William Chase’s map of 1731. It is also shown on Robert Morden’s map of 1753, Bowen’s map of 1760, John Cary’s map of 1793, Faden’s map of 1797 and Bryant’s map of 1825. On each of these maps the Order route is depicted in the same manner as other routes which are today recognised as public vehicular highways.
2. The key to Faden’s map indicates that the Order route is depicted as a ‘cross road’. There is lack of agreement between the Applicant and NCC as to the depiction of the Order route on Bryant’s map. The Applicant considers that it is depicted as a ‘good cross or driving road’ whereas NCC consider the depiction of the route with one solid and one dashed boundary does not fit with any of the routes shown in the key. Examination of Bryant’s map shows that other routes, which are today recognised as public vehicular highways, were represented in the same fashion as the Order route.
3. Privately published maps of this nature are not conclusive evidence as to the status of the routes depicted and thus the weight that can be attached to these sources in determining status is limited. However, the consistent representation of the Order route is compelling evidence of its existence as a physical feature which has linked to the network of public highways since at least the early eighteenth century.

*Tithe Records*

1. The South Acre Tithe Map (1838) shows the Order route with a hedge to the west and an open boundary to the east, tinted sienna and with no apportionment number, in the same manner as other roads. For the majority of its length the Order route is shown being narrower than some routes which now form part of the local highway network, but it is not materially different to the depiction of Fincham Drove and RB2 to which it links at point A (both of which are established to be public vehicular highways).
2. Unlike many tithe apportionments, that which accompanies the South Acre map does not list individual roads which are depicted. Instead, an aggregated approach is taken whereby no rent is charged for any of the ‘public roads’ within the parish. Whilst the map does not have a key to identify those routes considered to be public roads, the only distinguishing feature is likely to be those which are tinted sienna.
3. It was not the purpose of the tithe maps to distinguish between public and private routes, but rather to distinguish between productive and unproductive land. Private occupation roads could be unproductive and thus excluded from tithe. The value of this evidence is accordingly limited, particularly as this is a second class map. It does corroborate the existence of the Order route as a physical feature and one that was connected to routes now recognised as vehicular highway. Whilst this evidence cannot prove public status it does not suggest anything contrary to such status.

*Ordnance Survey (OS) records*

1. The OS Old Series 1” of 1824 depicts the Order route with a solid western boundary and a pecked eastern boundary, suggesting a route enclosed by a hedge to the west and open to the adjoining land to the east. The depiction is similar to that of RB2 and Fincham Drove.
2. The OS County Series 1st Edition (1885) depicts the Order route in the same manner as on the 1824 Old Series. It is shown narrower than Big Wood Lane but identical to RB2. The southern section of the Order route is shown to be enclosed on both sides and to be wider than the remainder of the track. At point B, the junction with Fincham’s Drove is shown to widen significantly, possibly consistent with the area where the pile of building rubble was seen on the site visit.
3. The OS 1” to the mile (1898) depicts the Order route on the same alignment as the Old Series map but, due to scale, shows it as a feature of uniform width. There is a lack of agreement between NCC and the Applicant as to the application of the key to this route. The Applicant believes the depiction is consistent with the key for a third-class road whereas NCC consider the route too narrow for this classification and suggest instead it is shown as an unmetalled road. The physical standard of the route is not necessarily material to its status.
4. All subsequent editions of the OS, to the current day, have depicted the Order route in the same manner. Most OS maps carry a disclaimer as to the status of routes shown and the weight that can be attached to this evidence is limited accordingly. However, the series of OS maps are consistent in their representation of a route with the capacity to carry vehicles, on the alignment of the Order route, since the early nineteenth century.

*Bartholomew’s Half-Inch Map (1903)*

1. Bartholomew’s maps do not purport to identify public highways (and carry a disclaimer to that effect) but were intended for practical use and were especially popular with cyclists. This map shows the same network of routes as the OS 1” to the mile map of 1898, including the Order route. The key indicates that the Order route was depicted as an ‘inferior road, considered unsuitable for cyclists. This is a reflection of the condition of the route rather than its status. Other routes, now part of the public highway network (including Big Wood Lane and the southerly leg of Fincham’s Drove), are shown in the same manner as the Order route.

*The Finance Act 1910*

1. The Order route is shown on the Finance Act map as unnumbered and uncoloured and thus excluded from taxable hereditaments. Of particular relevance in this case is the fact that there is a break in the coloured line identifying the adjoining hereditament where it crosses the junction of the Order route and Big Wood Lane. This would suggest a deliberate intention to exclude the Order route from the dutiable hereditament. There are various explanations for this treatment of the route. The most common reason is that the route was a public vehicular highway. The same approach was sometimes taken with a route in various or unknown ownership, and used in common to access adjacent lands, but in this case, there is no evidence that the land adjoining the Order route was in more than one ownership and indeed evidence of current ownership indicates all of the land served by the Order route to be in single ownership.
2. The scheme of the Act was to exclude a vehicular highway from taxable hereditaments whilst lesser public rights would be dealt with by deduction. Thus, the fact that the Order route is shown to be excluded, and it is unlikely to have been a shared occupation road, is strongly suggestive that it was considered to be a public vehicular way.

*Highway Records and Definitive Map and Statement*

1. There is no evidence before me of public expenditure on maintenance of the Order route, nor is there any evidence of public complaint about the condition of the route.
2. There is no evidence that the Order route was claimed as a public right of way of any description at the time of compilation of the First DMS. Correspondence held by NCC suggests that in 1975 an attempt was made to record Fincham Drove and the Order route as public rights of way. It seems the application was supported by only three user evidence forms and there was no suggestion that historical documentary sources had been investigated. The application was not progressed.

*National Farm Survey 1941 - 42*

1. The survey was conducted to provide a comprehensive record of agricultural land. Maps were prepared of agricultural holdings and where these were separated by a public vehicular route, that route would generally be shown excluded from the adjoining holdings although, in the Swaffham area, it would appear to have been the practice to colour all but main roads, regardless of status.
2. The Applicant has provided images of the survey for the area covering the Order route. Unfortunately, the colouring of the map is insufficiently precise to ascertain with any certainty whether the Order route is shown coloured or excluded. In any event it was not the purpose of the survey to identify public rights of way and little weight can be attached to this evidence.

*Land Ownership*

1. Land Registry records demonstrate that ownership of the Order route is not registered but ownership of the adjoining parcels of land is. An occupation track used by a single landowner to access their adjoining lands would usually be included within a registered title. Accordingly, the lack of registration of the Order route can be some evidence that it was considered a public right of way, but such evidence would carry limited weight.

*Conclusions on documentary evidence*

1. There is no single piece of evidence which is conclusive as to the status of the Order route, but a number of the documents considered are suggestive of it being a public vehicular way whilst not precluding the possibility that it is a private occupation road. My task is to assess the relevance and weight of each piece of evidence and to reach a conclusion on a balance of probability.
2. The approach I must take to analysis of the documentary evidence was set out by Pollock CB in *R v Exhall (1866) 4 F&F 922* where he likened the individual pieces of evidence to cords in a rope rather than links in a chain. It is not necessary for all the evidence to point in the same direction such that if one link failed the chain would break. Rather each piece of evidence will support other evidence to the same effect and the stronger rope will generally meet the balance of probabilities test.
3. The evidence consistently shows the Order route to have been in continuous physical existence for three hundred years or more. Looked at in context, the Order route connects at both ends to routes which are recognised public vehicular highways and provides a logical and direct northerly extension of Fincham’s Drove from point A towards the historically significant village of Castle Acre and beyond.
4. The early privately produced County maps all represent the Order route in a similar manner to other recognised public highways. Faden shows the Order route as a ‘cross road’ and Bryant may show it as a ‘good cross or driving road’. Both suggest a vehicular way. The series of OS maps produced in evidence bring the picture up to the present time and are consistent with the earlier private maps.
5. The evidence of the Finance Act map is strongly suggestive of the Order route having public vehicular status and being an integral part of the local highway network and this is bolstered by the Tithe map. The private County maps and OS representation of the route are consistent with this proposition.
6. The absence of direct evidence of public expenditure on maintenance of the Order route, and the fact that it was not claimed for inclusion on the first DMS, do not lend positive support to highway status, but are not in themselves factors which carry significant weight in favour of status as an occupation way only.
7. The Applicant postulates that the Order route was part of a network of drove roads, something of significance until the twentieth century, but as droving as a means of transporting livestock came to an end, so the use of roads for that purpose has ceased. The cumulative impression given is that the nature and utility of the Order route has changed over the past century, possibly since the rise of the motor vehicle and the advent of the sealed tarmacadam road, which caused a decline in use of those routes which were not improved.
8. Having regard to the totality and consistency of the various strands of the documentary evidence, I am persuaded that it provides compelling support for the Order route having the historical status of a public vehicular highway and there is no substantive evidence to the contrary. More recent evidence may suggest that public use of the order route has declined, but the established common law principle ‘once a highway, always a highway’ means that once dedicated, that status cannot be lost other than through formal stopping up or diversion and there is no evidence of either having occurred. Applying the balance of probabilities test to the documentary evidence I am satisfied that the test for confirmation of the Order is met.

Evidence of use

1. There is very little direct evidence of use of the Order route by the public. Three user evidence forms were submitted in 1975 when the status of the route was brought into question. These forms refer to use on foot and cycle. They were not considered to provide sufficient evidence to pursue a claim to add the Order route to the DMS on the basis of long use.
2. Two publications have been produced in evidence, both including the Order route as part of a promoted walk for the public. Whilst these do not provide direct evidence of use, they do suggest that the Order route had a reputation as a public right of way, and it is reasonable to infer that the route was in fact used as a result of this promotion. It may be that it was such use that led to a barrier being installed at point B and the signs displayed at each end of the route. This Order has been made on the strength of historical documentary evidence alone. It does not rely upon evidence of use for confirmation, and it is therefore not necessary for me to consider the relevance of any use that has taken place or any actions of the landowner in recent times.

**NERC**

1. The effect of NERC section 67, subject to certain exceptions, was to extinguish the right for mechanically propelled vehicles to use an existing public vehicular right of way which was not shown in a definitive map and statement, or was shown only as a footpath, bridleway or restricted byway.
2. The Order route is not shown in the DMS and in consequence the provisions of section 67 are engaged.
3. It would seem to be common ground that none of the exceptions set out in section 67(2) to (8) apply and in consequence the right to use the Order route with mechanically propelled vehicles has been extinguished and the correct status of the route is a restricted byway.

**Width**

1. I agree with the approach taken by NCC and the Applicant whereby the width of the Order route is to be derived from relevant physical boundary features as identified on OS mapping. There being no objection to this approach I shall confirm the Order with the widths as stated therein.

**Overall Conclusion**

1. Having regard to these and all other matters raised I conclude that the Order should be confirmed.

**Formal Decision**

1. I confirm the Order.

Nigel Farthing

Inspector

