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| **Order Decision** |
| Inquiry opened on 15 October 2024 |
| **by Nigel Farthing LLB** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 31 October 2024** |

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| **Order Ref: ROW/3313653** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Norfolk County Council (Neatishead – Alderfen Broad) Modification Order 2022. |
| * The Order is dated 18 May 2022 and proposes to modify the Definitive Map and Statement (DMS) for the area by adding a footpath as shown on the Order map and described in the Order Schedule. |
| * There was one objection outstanding at the date of the commencement of the inquiry. |
| **Summary of Decision: The Order is confirmed.** |
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Preliminary Matters

1. I held an inquiry at Horning Village Hall, Mill Hill, Horning, Norfolk commencing on 15 October 2024.
2. I made an unaccompanied site visit on the afternoon of 12 October. At the conclusion of the inquiry, it was agreed that no further site visit was necessary.
3. This Order seeks to add to the DMS a public footpath along the northern and eastern boundaries of a parcel of land with existing public rights of way along the western boundary (Neatishead FP12) and along the southern boundary (Neatishead R20)
4. One objection to confirmation of the Order was recorded which has not been withdrawn.
5. In this decision I have found it convenient to refer to the Order map and for ease of reference a copy is attached. The Order map is annotated with points A to C which I shall refer to in this decision.

**The Main Issues**

1. The Order has been made under section 53(3)(b) of the 1981 Act which requires the expiration of any period such that enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path.
2. The standard of proof to be applied is the balance of probabilities.
3. The Council, in making the Order, rely upon a presumption of dedication arising further to the tests laid down in Section 31 of the Highways Act 1980 (the 1980 Act).
4. Accordingly, I must establish the date when the public’s right to use the Order route was brought into question. The evidence must then be examined to determine whether there has been use by the public and that such use has been as of right and without interruption for a period of not less than 20 years ending on that date. Finally, it is necessary to consider whether there is sufficient evidence that there was no intention on the part of the landowners to dedicate public rights during this 20-year period.
5. In the event that the requirements for a presumption of dedication under the 1980 Act are not met, I will need to consider whether there is sufficient evidence for an inference of dedication at common law.

Reasons

***Site visit***

1. I made an unaccompanied site visit in the afternoon of 12 October.
2. I began my visit at Point A on the Order Map and walked in an easterly direction towards point B. A short distance after starting the land became increasingly overgrown with a profusion of nettles and scrub. There was no readily discernible path.
3. After a relatively short distance I came across a piece of farm equipment (a cultivator) which appeared to have been placed deliberately across what I took to be the Order route. The overgrowth was so thick at this point that I was unable to bypass the equipment and instead had to scramble over it which was made more difficult because of the nettles growing through it.
4. Beyond the cultivator the scrub became even more dense with no apparent trails. As it was at this point raining, and the undergrowth very wet, I abandoned my walk in this direction and returned to point A.
5. I then walked to point C via FP12 and R20. From point C I walked the Order route towards point B. There was evidence of some recent pedestrian use along the edge of the field. Approximately half-way to point C there is a ditch and hedge running diagonally across the field broadly back towards point A. At this point there is a gap between trees within the hedge. The gap appeared to have been used by walkers, but no obvious track continued along the field margin. I continued walking a short distance before encountering the same extent of undergrowth that had caused me to turn back between points A and B. At this point I was unable to continue and thus was not able to access point B from either direction.

***Documentary evidence***

1. The Order was made under section 53(3)(b) of the 1981 Act and does not rely on documentary evidence. In researching the application Norfolk County Council (‘NCC’) has consulted usual archival sources, relevant Ordnance Survey maps and available aerial photography.
2. The archival sources consulted disclosed no evidence of the existence of the Order route. There appears to be no evidence that the Order route was claimed for inclusion on the First DMS or subsequently until the application leading to this Order was made in 2019.
3. The OS from the First Edition to the 1970s edition showed nothing more than a ditch on the alignment of the Order route. The 1971 – 77 edition does not depict the Order route but shows the line of the route apparently bisected by a drain. The current edition does depict a continuous feature consistent with a path on the alignment of the Order route, suggesting that when surveyed for this edition there was evidence of pedestrian use. The path was added to the OS in October 2018. The inclusion of a path on an OS map is some evidence of its physical existence, but not of its status.
4. Aerial photography appears to show that by at least 2003 a continuous route was available on the ground unobstructed by the drain.

Conclusions on documentary evidence

1. The documentary evidence gives no support for the historic existence of a path consistent with the Order route, instead suggesting that until at least 1977 the route was obstructed by a ditch and therefore not capable of use. The evidence does however suggest that a used path has been created since that time and was sufficiently evident to be included on the OS in 2018.

***User Evidence***

1. The application for a modification order was supported by 17 user evidence forms (UEFs) representing 19 individuals. Proofs of evidence relating to use of the Order route were submitted on behalf of sixteen individuals, eight of whom had completed a UEF. At the inquiry I heard evidence from seven individuals, each of whom had either completed a UEF or a proof of evidence. Accordingly, a total of 27 people gave evidence of use in some form.

Twenty-year period

1. For the purposes of a statutory presumption of dedication under section 31 of the 1980 Act it is necessary to establish when the right of the public to use the route was first brought into question. The display of notices followed by the obstruction of the route in two places (by the cultivator and a tree trunk) in 2019 were agreed to be events which brought into question the right of the public to use the route and it was this which led to the making of the application for a modification order. Accordingly, the relevant twenty-year period for consideration was agreed to be 1999 to 2019 and it is necessary for me to examine the evidence of use and of the landowners’ actions for that period.

Use as of right

1. Use is only as of right if it is undertaken without force, secrecy or permission. In this case there is no suggestion that use was undertaken in secret nor forcibly.
2. One witness, who completed a UEF and three other statements, refers to having been invited by a previous tenant farmer to walk the route to assist in retaining pheasants on the land. The extent of the permission given to him is unclear, and it would have been helpful to have the opportunity to clarify this with him, but he was not well enough to attend the inquiry.
3. The current tenant farmer described a situation where he had seen a person hiding behind a tree on the Order route and he assumed they did not want to be observed. This could amount to secretive behaviour, but all the users described using the route openly.
4. Some witnesses recounted the previous, and present, tenant farmers remonstrating with people using the Order route, but they considered this was directed at those with dogs which were either not on a lead or under control rather than at use of the Order route in general. Some of these incidents occurred at the time the route was blocked in 2019 or thereafter. Of those who completed a UEF, only one acknowledged having been challenged and that was when a pheasant shoot was underway. That individual is the person who was subsequently given permission to be on the land.

Sufficiency of use

1. For a statutory presumption of dedication to arise the evidence must demonstrate, on a balance of probabilities, that the Order route was throughout the full relevant 20-year period used as of right and without interruption by a sufficient number of people to bring to the attention of a reasonable landowner that a right to use the route was being asserted.
2. Analysis of the UEFs shows that in 1999 use was claimed by nine individuals. The frequency of use described varies from twice daily to weekly, with most referring to use more than once a week. There was a significant increase in claimed use after 2012. It was at about this time that the tenant farmer, as part of a stewardship scheme, created grass strips around the margins of the field. These were created as buffer or conservation strips, but it would seem to have encouraged people to walk the Order route.
3. By 2015 and through to 2019 use was claimed by 19 individuals, with all but three describing regular or very frequent use.
4. The evidence provided by the UEFs was bolstered by the proofs of evidence and oral testimony given at the inquiry. Five of the additional witnesses gave evidence of use from the beginning of the twenty-year period whilst the other three began use at or about the time the grass strips were sown.
5. Most of the witnesses describe regular, open and uninterrupted recreational use of an established path. Many had seen others using the route, and some named those they had seen. Some recalled the field being ploughed to the edge of the dyke but did not recall precisely when this occurred. This had not deterred them from walking the route and they said that a worn path along the field margin was quickly re-established.
6. Some recalled the previous tenant farmer having remonstrated with users whose dogs were not under control. Others recalled the current tenant farmer and his son challenging users but thought this was at the time that notices were first put up and the obstructions placed across the route.
7. The current tenant farmer drew attention to a section of the Order route between points B and C where a dyke within the field comes to within 2m of the drain alongside Alderfen nature reserve. He said this area got very wet and muddy resulting in it being slippery and potentially dangerous, with deep water on either side. None of the users recognised any feature obstructing or preventing use and I must conclude that they were able to negotiate this section.

Conclusions on user evidence

1. I must take into account all of the evidence before me, including the UEFs and all proofs of evidence, whether or not the witness was able to be cross-examined at the inquiry. The weight that I can attach to the different classes of evidence will vary, with greatest weight being afforded to that of a witness who has given oral evidence and been cross-examined.
2. It is necessary for the level of use to meet the threshold throughout the full twenty-year period. In this case there is a marked increase in the level of use after 2012 and this would seem to coincide with the creation of the grass margins. It was this increased level of usage which prompted the landowner and tenant farmer to take steps to prevent use, which in turn led to the application for the modification Order.
3. I am satisfied that the level of use from 2012 to 2019 adequately meets the threshold for demonstrating use by the public. The more difficult question is whether use in the earlier years (1999 – 2012) is sufficient. In 1998 the UEFs demonstrate use by eight individuals which could be on the borderline although the regularity of the use is significant. I must add into the evidence from the UEFs the further evidence given in the additional proofs of evidence which extends the number of users in the early years of the period to thirteen. Of the seven witnesses who gave oral evidence at the inquiry, five have used the Order route from 1999 or before. Generally, their evidence was undiminished after cross-examination, and I must attach significant weight to this.
4. I am required to reach a conclusion on a balance of probability. Having regard to all of the evidence I am satisfied, on a balance of probabilities, that there was sufficient use of the Order route throughout the full twenty-year period to constitute use by the public.

Lack of intention to dedicate

1. Evidence of a lack of intention on the part of the landowner to dedicate the Order route as a footpath would preclude any statutory presumption of dedication from arising. To constitute an effective demonstration of a lack of intention to dedicate the landowner, during the relevant twenty-year period, must have acted in a way which would have brought home to users of the route that he did not wish it to become a public right of way.
2. The previous tenant farmer had used the field for fruit growing and for game shooting. He put down pheasants which he wanted to retain on his land. He dug and landscaped a large pond to draw in ducks from the neighbouring broad. He was described as a difficult man. Incidents were described where he had challenged people walking on the Order route. It would seem that a principal concern was that his pheasants and any ducks on the pond should not be disturbed by dogs off leads and not under control. I accept that he guarded the land jealously, but I accept also that most users walked the route regularly without any encounter with him.
3. The current tenant farmer took over the tenancy of the field in 2012 at which time he described it as having been very overgrown. He cleared the scrub using a mechanical flail and introduced the grass buffer strips on the field margin B – C. He believes the presence of the buffer strip encouraged people to walk the Order route. The extent of use was apparent, and this resulted in a discussion with the trustees of the charity which owns the field who did not want a public footpath to become established. This led to notices being erected on the route and when these were torn down, to the blocking of the route with a cultivator and a tree trunk.
4. The tenant farmer explained that before the installation of the buffer strips he had ploughed the field to the edge of the ditch, leaving no space for pedestrian access. He believed this demonstrated that he did not want a public footpath to become established. I have referred earlier to evidence given by users in relation to the ploughing of the field to the edge of the ditch. It is apparent from their evidence that this was not seen as a challenge to their entitlement to walk the route and the path was quickly re-established. In the absence of any follow-up action by the tenant farmer I do not consider ploughing to the field margin was, on its own, sufficient to demonstrate to the public a lack of intention to dedicate.
5. The current tenant farmer said that he had challenged people he had seen on the route but agreed that this did not include anyone present at the inquiry. One specific incident recounted in the evidence occurred in September 2020 (well after the date the right to use the route was brought into question) and involved an individual walking diagonally across the field and thus not on the Order route.
6. The tenant farmer explained that he was involved in farming in other locations and the time that he spent on the field in question was limited. He would generally only be on the land when specific farming operations were taking place or for periodic inspection. He accepted that use may have been taking place when he was not present.
7. I heard evidence from the present and a former Chair of the trustees of the charity which owns the field over which the Order route passes. They explained their duty to preserve the value of the charity’s assets and that to allow a public right of way to be established over the charity’s land would be inconsistent with that duty. It was for this reason they had agreed with the tenant farmer that steps should be taken to prevent a public right of way being established by first displaying signs and then blocking the route.
8. I accept the both the trustees and the tenant farmers had no intention of allowing a public right of way to become established. However, the test that I must apply is whether that intention was sufficiently communicated to those people who used the route. Until the notices were displayed in 2019 there was nothing tangible which would alert a user of the Order route to the fact that they should not be there. What steps that were taken by the tenant farmers depended upon them being present to challenge a user. I accept that this did happen, but I recognise that the tenant farmer’s presence on site was very limited and there were long spells when users could, and did, walk the route unchallenged. For this reason, I find that a lack of intention to dedicate was not sufficiently communicated to users of the Order route.

Conclusions on presumed dedication under section 31 of the 1980 Act

1. Having regard to the foregoing I am satisfied, on a balance of probability, that the Order route was used by the public, as of right and without interruption for the 20-year period 1999 to 2019 and that during this period the landowner did not sufficiently demonstrate a lack of intention to dedicate. Accordingly, I find that a presumption of dedication of the Order route as a public footpath arises pursuant to section 31 of the 1980 Act.

***Common law***

1. Having concluded that the requirements for a statutory presumption of dedication have been met, it is not necessary for me to consider the position at common law.

**Other matters**

1. A feature of the evidence from some users was a belief that the land over which the Order route passes was given to the parish many years ago and that the parishioners had a right to use the land. It was apparent from the evidence that this issue has caused significant concern and anxiety within the village. Ownership of the land over which a claimed public right of way passes is not generally relevant to consideration of whether a statutory presumption of dedication has arisen, and in this case, it was not material. However, the current Chair of the trustees of the charity which owns the land in question gave evidence helpfully setting out the history of the ownership of the land and the terms upon which it is held. Although not material to my decision, the evidence will, I hope, have been useful to resolve any misunderstandings within the community.
2. Evidence was given about environmental issues and about the value of having a route where dogs can be walked after they were excluded from the Alderfen Broad nature reserve. These are not issues which I am able to take into account.

**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**

**APPEARANCES**

For the Council Mrs Katherine Webb

For the Applicant Mrs Margaret Phillips who called: -

Marilyn Stone

Stanley Stone

Stewart Tubby

Andrew Beattie

Gill Young

Tess Palma

The Objector Stuart Pairpoint

Supporters of the

Objector Louis Baugh

Nicholas Fowle

**DOCUMENTS PRODUCED AT THE INQUIRY**

Inquiry Bundle

Louis Baugh Notes titled ‘Statement of Case’ and ‘Response to Norfolk County Council Statement of Case’

ORDER MAP – COPY NOT TO SCALE

