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| **Order Decision** |
| Inquiry opened on 17 September 2024 |
| **by Nigel Farthing LLB** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 08 October 2024** |

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| **Order Ref: ROW/3315329** |
| * 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 Council (Winterton-on-Sea and Hemsby) Modification Order 2022. |
| * The Order is dated 2 February 2022 and proposes to modify the Definitive Map and Statement (DMS) for the area by adding two footpaths as shown on the Order map and described in the Order Schedule. |
| * There were five objections outstanding at the date of the commencement of the inquiry. |
| **Summary of Decision: The Order is not confirmed.** |
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Preliminary Matters

1. I held an inquiry at Hemsby Village Hall, Waters Lane, Hemsby, Norfolk commencing on 17 September 2024.
2. I made an unaccompanied site visit on the afternoon of 14 September. At the conclusion of the inquiry, it was agreed that no further site visit was necessary.
3. This Order concerns what is in effect a single route (the principal route) with a partial alternative route commencing and terminating on the principal route (the alternative route).
4. Five objections to confirmation of the Order were recorded which have not been withdrawn.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 J which I shall refer to in this decision.

**The Main Issues**

1. The Order has been made under sections 53(3)(c)(i) and (ii) of the 1981 Act which require me to consider whether evidence has been discovered which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the DMS subsists, or is reasonably alleged to subsist.
2. At this confirmation stage a reasonable allegation is not sufficient, and the right of way must be shown to subsist. The standard of proof is the balance of probabilities.
3. The Council, in making the Order, rely in part 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 routes 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 14 September.
2. I began my visit at point J at the southern end of the Order route where it connects to Beach Road, Hemsby. I walked along Long Beach Road to point E via points I, H and F. This section of the Order route has the appearance and character of a road with a tarmac surface. The road is lined by residential chalets and bungalows, many having provision for car parking. The road is the only means of vehicular access to these properties. At various points there are tracks between chalets on the eastern side giving access to the dunes of Winterton valley and thence to the sea.
3. At point E the tarmac road comes to an end and the Order route continues along a track enclosed on both sides by fencing and hedging. Within the track are a series of staggered barriers presumably to prevent use by cars and motorcycles. This section of the route is perhaps 20 metres long. At the northern end of the track the route opens onto a tarmac road which runs east to west. The Order route runs in a westerly direction along this road for 37 metres to point D where it turns north and follows another tarmac road to point C. The character of this section of the Order route is very similar to that of the section J to E which I have described. At point D there is a building which appeared to house various communal facilities.
4. At point C the Order route turns to the west alongside a fence enclosing the property 1 Bush Road. I could make out the path alongside the fence, but it was completely blocked with branches and other material making it impossible for me to continue along the Order route.
5. I returned south along Long Beach Road to the first point where I could cut through to Winterton Valley and thereby gain access to Winterton-on-Sea FP1. I then headed north to FP18 which I used to access the Order route at point A. The Route from FP1 to point A ascends steeply such that the land is several metres above beach and sea level.
6. Point A is located on a tarmac road running on a broadly north / south alignment. The Order route follows the road to the point where it comes to an end, contiguous with the southern boundary of the final house on the eastern side of the road. At this point a chain link fence, mounted on concrete posts, runs at right angles across the end of the road thus blocking further progress. On the chain link fence, facing north, is a sign which I shall refer to in detail later, but which includes the words ‘PRIVATE No Public Right of Way’.
7. To proceed along the Order route from this point it is necessary to walk around the western end of the fence before returning to the route (the fence straddles and thus blocks the straight line of the Order route).
8. Once beyond the fence the Order route runs in a straight line towards point B. Most of this section of the route is over open, well-maintained grass and alongside a series of brick-built holiday chalets forming the Winterton Valley Estate. The route passes very close to some of these chalets. The site is very neat and tidy and at the time of my visit a number of the chalets were occupied.
9. A short distance before point B is reached the grass gives way to one of the estate roads. There is a post and rail fence separating the grass from the road and this blocks the Order route. It is necessary to walk around the fence to resume the remainder of the walk to point B which is over a concreted area used as the access to the three residential properties to the east (which include No. 1 Bush Road).
10. Point B is at the western end of the path from point C which is only a few metres away. The path was blocked by post and rail fencing and vegetation making access impossible.
11. There was a further sign to the west of point B which again I shall refer to later, but which included the words ‘PRIVATE ROAD NO PUBLIC RIGHT OF WAY’.
12. On my return to Hemsby I walked to the alternative route F- G -I. The nature of this route was identical to that of the route I - H - F - E.
13. The character of the route A to B is very different to that of C to I. The routes south of point C are effectively estate roads through a residential area consisting of a wide variety of different types of dwelling. The route A to B is over grass being part of the landscaped and well-maintained holiday estate consisting of a large number of uniform chalets. I shall refer to the route A to B as the Winterton Valley Estate (WVE) and the route C to I as the Long Beach Estate.
14. I have described the signs I saw on WVE. For completeness, within the Long Beach Estate there were several signs, all of similar style and appearing to be relatively new. These signs included the words ‘Private Land and Roadways’.

***Documentary evidence***

1. The Order was made under section 53(3)(b) of the 1981 Act and relies upon both user evidence and historical documentary evidence.
2. The documentary evidence shows no evidence of the existence of the Order routes prior to the 1938 OS. This showed separate roads had been constructed within WVE and Long Beach Estate. These did not align and there was no connection between them.
3. During the Second World War most of the site over which the Order routes pass was requisitioned and used as an RAF radar station and associated camp. During this period a link was built between the two roads. The link was in the vicinity of the Order route section B – C but on a different alignment, slightly to the east. The site ceased to be occupied as a military camp in 1947.
4. In 1961 planning permission was given for the construction of a bungalow immediately to the north of points B – C. The property was initially known as No. 1 Bush Road. The planning permission contained a condition ‘Provision shall be made for a footpath link between the estate road and Long Beach Estate Road to the south-east’. The reason given for this condition was ‘In order that pedestrians may have an unrestricted passage along this section of the coastline’. When the bungalow at 1 Bush Road was constructed in 1962, a three feet wide footpath link was constructed alongside the southern boundary of the property, and this is represented by the Order route section B to C. This link replaced the wartime link between the two roads which was subsumed within the development of the bungalow.
5. The legal effect of re-routing the link was to create a different route and thus to prevent prior use of the original link being relied upon as evidence to support dedication of a route which incorporated the new link.
6. The development of chalets on WVE began in the 1970s at which time the removal of the original road began. This was undertaken in stages as new estate roads were built to a different layout. The documentary evidence indicates that the removal of the roadway was complete by 1974 and the area grassed over, since which time there has been no defined route A to B.

***User evidence***

1. The application for a modification order was supported by 133 user evidence forms (UEFs). Twenty-six proofs of evidence were submitted by users, most of whom had completed a UEF. Together these gave evidence of use on foot and bicycle over varying periods between 1938 and 2015.
2. At the inquiry I heard evidence from seven witnesses attesting to their use of the Order routes.

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. Various dates were postulated. The obstruction of the route between points B and C in 2015 is agreed as an event 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.
2. There is evidence of various signs at various dates and at various locations on the Order route. There is photographic evidence from 1971 of a sign, south of point A, which included the words ‘No Public Right of Way’. These words represent an unequivocal challenge to the right of the public to use the route. Provided I am satisfied this sign was in place in 1971, the effect would be to bring into question the right of the public to use the route and would result in the relevant 20-year period being 1951 to 1971.
3. A further calling in to question arose as a result of the reconfiguration of the route between point B and C in 1962 when No. 1 Bush Road was built. This would give rise to a relevant 20-year period of 1942 to 1962 but this includes a period when the site was requisitioned by the RAF and was not accessible to the public. Accordingly, there could not have been twenty years continuous use,
4. It will be necessary for me to examine the evidence of use and of the landowners’ actions for each of the periods 1995 to 2015 and 1951 to 1971.

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. Of the 133 user evidence forms, 96 were provided by people who are either leaseholders of a chalet at WVE or associated with a leaseholder. A copy of the standard form of lease was provided to me at the inquiry and evidence was given that this form has been used unchanged since the commencement of the chalet development in the early 1970s. The standard form includes a grant of a right to ‘the Tenant his servants and licensees: -

(b) on foot only to pass and repass to and from the demised premises or any part thereof over and along the pathways and approaches to the said chalet formed made and opened upon the Estate as and when the same shall be opened for use

(c) on foot to pass and repass to and from the seashore over the dunes lying between the said estate and the seashore but only by the tracks provided for that purpose

TOGETHER ALSO with the right of using (in common with all other persons to whom a like right may be granted by the Landlord) for himself his assigns tenants or occupiers for the time being of the demised premises and his and their guests the gardens pleasure grounds and play areas formed and made and opened on the said estate as and when the same shall be opened for use’.

1. The wording of the lease operates to give the leaseholder and those associated with them, the right to use any pathways, gardens, play areas and the like. In consequence use by such persons of the Order route, insofar as it lies within WVE, will have been permissive use and thus not use as of right. Such evidence cannot be relied upon in support of the acquisition of a prescriptive right and must be disregarded.
2. There is evidence that the owners of WVE challenged unauthorised users of their site. I have been provided with a record of challenges made between 2000 and 2016. Any person who had been challenged would not be using the route as of right.

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 96 were provided by persons having private rights over WVE as outlined above. As use by such persons of the Order route within WVE must be characterised as permissive, I must disregard that evidence.
3. Analysis of the remaining 37 forms (which represent 39 users) shows that these were submitted in support of the original application to record 5 separate routes within the same vicinity. An Order has been made and confirmed in respect of one of the routes (Route 5) and no order has been made in respect of a further two routes (Routes 3 and 4). In analysing the UEFs it is necessary to abstract the evidence which relates to the two Order routes (Routes 1 and 2) rather than to the other three.
4. Analysis of the UEFs has been carried out by NCC and discloses that 12 users give evidence of using the principal route on foot and three using the alternative route. The earliest date of use of the principal route was 1938 and 1942 for the alternative route. There is no evidence of use during the period the land was requisitioned. After the RAF vacated the site in about 1947 use resumed and continued until 2015 when the Order route was blocked between points B and C.
5. Twenty-six proofs of evidence were submitted in support of confirmation of the Order and six people who had submitted proofs gave oral evidence at the inquiry. Oral evidence was also given by one person who had not submitted a UEF or proof.
6. Seven of those who submitted proofs owned or were associated with ownership of chalets within WVE and thus had the benefit of the rights given in their lease. The remaining proofs were given mainly by local people from the villages of Hemsby and Winterton-on-Sea who had no connection with WVE.
7. 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.
8. The impression given by the totality of the evidence is that the principal route was available and used on a regular basis from the time that the RAF vacated the site after the war until it was blocked in 2015. Much of that use was by WVE chalet owners and those associated with them. Use was greater within the summer season. There was however also a significant level of use by local people not associated with WVE and this could be sufficient to demonstrate use by the public.
9. Evidence of use of the alternative route was less than for the principal use. The impression I took from the evidence was that the principal route was used most commonly, but the alternative was used for a change. There is little difference in the length of the two options and it is understandable that people would use both routes according to how the moment took them.
10. I am required to consider the sufficiency of use within the two periods, 1995 – 2015 and 1951 – 1971. Dealing first with the period 1995 to 2015, I am satisfied that there was sufficient qualifying use. For the earlier period, 1951 to 1971, the available evidence of use is inevitably diminished by the passage of time. The qualifying evidence for this period is somewhat less than for the later period. I heard evidence from one local person who was born in 1951 and remembers using the Order route as a young child and thereafter. Another local person moved to Hemsby in 1963 when he was 8 and has used the Order route from that time. Both referred to witnessing use by others. This evidence is bolstered by others who provided proofs of evidence, although the earliest claimed use is 1947, with two others stating their use commenced in the 1950s and four in the 1960s. Reliable evidence of use in the early years of this period is sparse.

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. WVE, in objecting to confirmation of the Order rely, inter alia, upon the presence of signs along the Order route having the effect of sufficiently demonstrating a lack of intention to dedicate the route as a public right of way. Although other signs were present, those principally relied upon by the Objector are the sequence of signs located at or in the vicinity of point A.
3. The earliest evidence of a sign in this location is from before 1970. A photograph, dated 1969, depicts a sign mounted on a chain-link fence supported by concrete posts. The sign faced north and read: -

PRIVATE

RIGHTS OF WAY ACT 1932

THIS LAND IS PRIVATE

NO PUBLIC RIGHT OF WAY

1. In 1970, during the development of WVE, this sign was moved to a different location and was replaced in the original position by a sign, similarly orientated, which read: -

WINTERTON VALLEY ESTATE

PRIVATE ESTATE

NO PUBLIC RIGHT OF WAY

1. In 1981 the sign was replaced with a new version in the same location. This sign read: -

PRIVATE

WINTERTON VALLEY ESTATE

RESIDENTS ONLY

NO PUBLIC RIGHT OF WAY

1. By 2009 this sign had again been replaced in the same location, this time with a sign which contained rather more instructions but included the words ‘NO PUBLIC RIGHT OF WAY / PRIVATE ESTATE’. This sign was in place until a time between May 2011 and April 2012 when it was replaced by a further version incorporating the same words. This sign remains in place. At this time a similar sign was also installed in the vicinity of point B.
2. Photographic evidence was provided of each of the signs in situ. I am satisfied that for a continuous period from at least 1969, and probably before, to the present day a succession of signs has been displayed at point A, each bearing the words NO PUBLIC RIGHT OF WAY. The photographs demonstrate that each version of the sign was of substantial size and located on the chain-link fence at about eye-level. I have previously described that the chain-link fence obstructed the line of the Order route such that the sign was directly in front of anyone using the route from north to south. A person using the route from south to north would have seen only the back of the sign. The vast majority of those giving relevant evidence of use refer to using the route in both directions.
3. For a sign to qualify as sufficient evidence of a lack of intention to dedicate it must be in a position where it would come to the attention of persons using the route, be present during (not necessarily throughout) the relevant twenty-year period, and it must make clear to the public that it seeks to prevent a public right of way arising.
4. I have found that the successive signs were continually present from at least 1969 to the present day. Accordingly, whichever twenty-year period is taken, a sign would have been present during that period. The positioning of the sign was such that it would have been blatantly apparent to any reasonably alert member of the public using the route from the north. The use of the words NO PUBLIC RIGHT OF WAY is unequivocal.
5. In addition to displaying signs the owner of WVE regularly challenged unauthorised users of the Order route. From 2000 these challenges were documented, and the records were produced in evidence. I accept that from at least 2000 regular challenges were made and these were a further demonstration of lack of intention to dedicate.
6. For these reasons I find that the landowner has sufficiently met the requirements of the proviso and that no presumption of dedication under section 31 of the 1980 Act can arise.
7. I recognise that a lack of intention to dedicate has been demonstrated only by the owner of WVE and that this cannot be imputed to the owners of the Long Beach Estate, nor the owner of the land B to C. I have been provided with no evidence to suggest that the owners of the Long Beach Estate have done anything within the relevant twenty-year periods to demonstrate a lack of intention to dedicate. However, the Order seeks to record the principal route as a single through way connecting to a public right of way at each end. The effect of the WVE signs is to prevent such a through route. A route from point J to point C would be a cul-de-sac with no obvious purpose.

Conclusions on presumed dedication under section 31 of the 1980 Act

1. For the period 1995 to 2015 no presumption of dedication can arise because the owner of WVE has sufficiently demonstrated a lack of intention to dedicate by the display of signs and the regular challenge to users.
2. For the period 1951 to 1971 there can be no presumption of dedication because in 1961 / 62 the route was changed and the new section B – C was created. There was thus no single way over land for the full 20-year period. Furthermore, I am not satisfied that there is sufficient evidence of use in the early years of the period and in any event, during that period a sign was displayed on the route which had the effect of sufficiently demonstrating a lack of intention to dedicate.

***Common law***

1. Dedication at common law requires evidence from which an inference can be drawn that the landowner has in fact dedicated the route in question as a public right of way. Use can be part of the evidence but there is no presumption of dedication and no fixed period. The burden of proof rests with the person asserting that dedication has taken place.
2. It has been argued by the Applicant that an inference of dedication arises as a result of the condition attaching to the 1961 planning permission. The basis of the argument is that, properly construed, the condition required the new link to be available for public use and that by developing the land in accordance with this condition the landowner accepted that the link B to C was dedicated as a public footpath.
3. The wording of the condition leaves room for argument as to the real intention. It reads ‘Provision shall be made for a footpath link between the estate road and the Long Beach Estate Road to the south.’ The reason for the condition is ‘In order that pedestrians may have an unrestricted passage along this section of the coastline.’ There is no reference to the public and it is arguable that the footpath link was intended for the benefit of the WVE and the Long Beach Road estate. However, the reason for the condition may suggest something more was intended by the reference to ‘unrestricted access along this section of the coastline.’
4. In practice it is not necessary for me to decide this point. Any inference of dedication arising from the planning permission could be attributed only to the owner of the land to which the permission related, No. 1 Bush Road. It can have no relevance to the remainder of the Order routes. I have already found that no presumption of dedication arises in relation to the WVE land and thus to find that the section B to C has been dedicated at common law would at best create a slightly longer cul-de-sac route and otherwise an isolated section of public footpath 22 metres in length.

**Overall Conclusion**

1. Having regard to these and all other matters raised I conclude that the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order.

Nigel Farthing

**Inspector**

**APPEARANCES**

For the Council Mrs Katherine Webb

For the Applicant Miss Rebecca Durant and Dr Richard Verschoyle who called: -

Paula Aspland

Rev. Sian Reading

Jane Roberts

Geoff Roper

Heidi Lawson—Bunn

Andrew Reddington

Stephen Ashton

For Winterton Valley Estates – Objector - Katherine Barnes of Counsel who called: -

James Cole

Ailsa Bell – Objector – who called: -

Joanna Richardson

Colin Richardson

**DOCUMENTS PRODUCED AT THE INQUIRY**

Inquiry bundle

Specimen chalet Lease for Winterton Valley Estates

Objector Winterton Valley Estate closing submissions

Objector Ailsa Bell closing submissions

Applicant’s closing submissions





