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| **Order Decision** |
| Hearing held on 29 October 2024  Site visits undertaken on 28 and 29 October 2024 |
| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 2 December 2024** |

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| **Order Ref:** **ROW/3308476** |
| * 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 (Smeeth Bank in the Parishes of Terrington St John, Walpole Highway, West Walton & Walsoken) Modification Order 2022. |
| * The Order was made by Norfolk County Council (‘the Council’) on 5 April 2022 and proposes to add a restricted byway (‘the claimed route’) to the definitive map and statement. |
| * There was one objection and four representations outstanding at the commencement of the hearing. |
| **Summary of Decision:**  **The Order is Confirmed.** |
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Procedural Matters

1. The Council confirms that it complied with all of the statutory requirements of Schedule 15 to the 1981 Act following the making of the Order. This included making provision for further notices to be erected on site in more visible locations. The process undertaken in accordance with Schedule 14, prior to the making of the Order, is not relevant to my determination of the Order.
2. All of the points referred to below correspond to those delineated on the Order Map.
3. The Council has taken a neutral stance on whether the Order should be confirmed and the case in support was made at the hearing by the applicant (Ms Chester). I have listed the main parties who spoke during the hearing at the end of this Decision. However, there were others who contributed at times, in particular in relation to the potential to restrict access for those engaging in certain activities (see below).
4. It is evident that there have been incidents in the area, including use by off-road motor vehicles and fly tipping, and there was a desire by people at the hearing for some form of barrier or barriers to be placed on the claimed route to limit the scope for such activities. The objector (Mr Niemiec) has previously indicated that he would consider withdrawing his objection if the present oil drum, or similar structure, which restricts the width near to point A could be retained. I appreciate the concerns expressed at the hearing and in the written representations. However, for any limitation to the public’s use to be included in an Order it needs to be shown that itwas in place when the route was dedicated. This is a matter to be determined from the relevant evidence. I am unable to impose a limitation to address the issues that could arise if the Order were confirmed. The Council outlined at the hearing the powers that may be available if the Order is confirmed.
5. Mr Niemiec has drawn attention to a previous Order Decision by me (case reference ROW/3306775) in respect of the issue of safety. That case involved a claimed right of way that crossed an operational railway, and evidence was presented in relation to the issue of statutory incompatibility by reference to Section 31(8) of the Highways Act 1980 (‘the 1980 Act’). This issue does not arise in the present case, and I am unable to consider safety concerns when reaching my decision.
6. The claimed route comprises of sections of restricted byways within four parishes adjacent to the watercourse known as the Smeeth Lode. It is continuous in the sense that it would enable a person to travel between points A and I in conjunction with the existing public roads. Whilst the claimed route links with roads at various points, the Order does not include these roads. There is nothing to prevent an Order from being confirmed in these circumstances. This issue appears to bedifferent from the matter that arose in relation to Order Decision (ROW/3278538) cited by Mr Niemiec.

**Main Issues**

1. The Order relies on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act. Therefore, I need to determine whether the discovered evidence shows that a right of way which is not shown in the definitive map and statement subsists on the balance of probabilities.
2. Reliance is placed by Ms Chester on various historical maps and documents in support of the dedication of a highway at some point in the past. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.
3. None of the exemptions in Section 67(2) or (3) of the Natural Environment and Rural Communities Act 2006 are stated to be applicable and therefore any public right of way for mechanically propelled vehicles is extinguished. This means that if historical vehicular rights are shown to subsist, the appropriate status for the route would be a restricted byway.

**Reasons**

***Enclosure evidence***

1. A map in relation to the Walsoken Enclosure Award of 1823 depicts a section of the claimed route and the adjacent watercourse. This indicates that the route is a feature of some antiquity, but it cannot be determined from the map or the award whether any public rights were considered to exist over the route. The same applies to the references contained in earlier enclosure evidence from 1803. Overall, no reliance is placed on this evidence in support of the claimed route being a highway.

***Early commercial maps***

1. A feature is shown on Faden’s map (1797) which closely follows the alignment of the claimed route. This feature is set out in the same way as other roads shown on the map. From looking at this map and the associated key it is evident that the claimed route is represented as a cross road running adjacent to a watercourse. A cross road in this context meaning a road running between two other roads. There is no annotation in respect of the route, but it is shown linking with other present day public roads. I have noted above the representation of a proportion of the route on an enclosure map.
2. The claimed route is also shown on Bryant’s map (1826) as one of the lanes and bridleways. Whilst the representation of the route in this manner means it could have been considered a bridleway, there is the potential for the route to have been a lane used by vehicular traffic at the time. It is also evident that the claimed route is again shown linking with other known public roads.
3. The legal authorities cited highlight that the depiction of a route as a cross road provides some support for it being a highway. The depiction of the claimed route on the Faden map is therefore supportive of the route having public status. Although this may be more indicative of a vehicular way, it could potentially have been a bridleway. The Bryant map is also supportive of the route being a highway. Nonetheless, the purpose of these maps was to show the physical features which existed when the land was surveyed, including all roads. This will invariably lessen the weight that can be attached to them.

***Tithe maps***

1. The claimed route is shown on the tithe maps covering the parishes it passes through. It is shown running to the north of the watercourse and this is most evident on the colour map for the parish of Terrington St John of 1841. This map shows the claimed route coloured in the same way as the connecting public roads, and it is distinct from the adjacent watercourse which is coloured blue. The route is shown on this map on the alignment delineated on the Order Map leading to point A. Whilst Mr Niemiec refers to the representation of a present-day bank to the south-east in a similar manner, the colour copy of the Terrington St John tithe map clearly shows the claimed route as a road.
2. The claimed route is excluded from the tithed parcels of land in the same way as other roads in the locality and it could be viewed as forming part of the local road network. However, the exclusion of a road in this way could be indicative of a public or private road as both would have impacted upon the productivity of the land being assessed. This will generally limit the weight that can be attached to the tithe maps.

***Railway documents***

1. Documents have been submitted in relation to a proposed railway serving Wisbech. The information provided at the hearing revealed that the railway opened on 1 February 1848, and it closed for freight trains in 1964 and passenger trains in 1968.
2. As part of the Parliamentary process a book of reference and plans were drawn up in relation to railway schemes. In this case, a deposited plan shows that the proposed railway crossed a section of the claimed route. This section of the route fell within the plot numbered 19 and this plot is described in the book of reference as ‘*public road and bank*’ in the ownership of the surveyor of highways. These entries are supportive of the claimed route being viewed as a public road under the control of the surveyor of highways prior to the construction of the railway. No evidence has been provided to cast doubt on the reliance that canbe placed on these documents. Given the scrutiny involved in such proposals, I consider this evidence carries a significant amount of weight in support of the claimed route being a vehicular highway.

***Ordnance Survey (‘OS’) map***

1. The 1886 First Edition OS map, surveyed between 1879 and 1886, generally shows the claimed route bounded to the south by the watercourse and to the north by some form of boundary feature. The dashed lines present in places would not typically depict a physical feature that served to restrict access, and the route appears to be open where it meets the connecting roads. An enclosed area south of point A and the buildings to the north indicate that any users of the route would have travelled between these features on the same alignment as the claimed route in this locality. This route is shown in the same manner on the 1905 OS map.
2. Copies have been provided of more recent OS maps at a smaller scale which typically show the existence of the claimed route. The OS map at Figure 10 of Mr Niemiec’s statement of case is a modern map showing recorded public rights of way. It does not impact on any unrecorded public rights which might exist over the route.
3. The evidential value of OS maps is that they generally provide a reliable indication of the presence of particular physical features on the date of the survey. They do not provide clarification regarding the status of the paths and roads shown. The OS maps indicate that the route had the appearance of a road, but no reliance can be placed on the OS maps as to whether the route had public status.

***Bartholomew’s map***

1. The 1903 edition shows the claimed route as an uncoloured road, which the map key states to be ‘*inferior and not to be recommended to cyclists’*. Further, a disclaimer appears on the map which states, ‘*The representation of a road or footpath is no evidence of the existence of a right of way’*. This disclaimer will mean that limited weight can be attached to this map.

***1910 Finance Act map***

1. The claimed route and the watercourse are shown excluded from the surrounding numbered hereditaments on this map. The exclusion of a route in this manner can provide good evidence of highway status and is more likely to be indicative of a vehicular highway. No evidence has been provided in support of an alternative explanation for the depiction of the claimed route outside of the adjacent hereditaments.
2. Overall, I consider that this map carries a significant amount of weight in support of the claimed route being a vehicular highway and it is consistent with the earlier railway documents which specifically addressed the status of the route.

***Other evidence***

1. A 1946 aerial photograph shows signs of a worn track in relation to the claimed route.I find this to be the case irrespective of whether an additional means of access existed to the south of the route.In my view, the relevant feature to the south is more likely to correspond to the watercourse.However, it cannot be determined whether any worn track arose from public or private use. Accordingly, the aerial photograph will be of limited value.
2. I also consider that limited weight should be attached to the hearsay evidence involving a former resident of School Farm given that there is no corroborating statement.It is apparent that the person’s knowledge dates back to the early 1940s and relates to the route that was used in this locality. However, the earlier map evidence shows the existence of a road which corresponds to the claimed route towards point A.This is clearly evident on the large scale OS mapping.Further, the presence of a gate at School Farm to the west of point A only indicates that a means of access to the land was put in place for the benefit of those living at the property.
3. Although there was some discussion at the hearing about the origins of the words ‘*gate*’ and ‘*lode*’, I do not consider that they assist me to any meaningful extent in terms of determining the status of the claimed route.
4. Two deposits made by the Kings Lynn Internal Drainage Board in 2014 under Section 31(6) of the 1980 Act do not impact upon any historical public rights deemed to exist. This is also applicable to the bylaws made under the Land Drainage Act 1991.

***Conclusions***

1. The map evidence reveals that the claimed route was a through route of some antiquity linking with known public roads. The evidence when taken as a whole provides support for the route being a historical vehicular highway. I attach particular weight to the railway documents and the Finance Act map. In light of my conclusions regarding the various pieces of evidence, I find on balance that the claimed route was dedicated at some unknown date in the past as a public road and should now be recorded as a restricted byway.

***Limitations and width***

1. I have found that the historical evidence is supportive of the dedication of a vehicular highway at some unknown date in the past. The map evidence shows that the route was in existence by 1797 and it could already have been a highway by that date. The railway documents are supportive of the route being viewed as a highway prior to the opening of the railway in 1848. Therefore, regard should be given to whether there is evidence by reference to the historical plans to suggest that there was some form of structure across the route when it was dedicated which should now be recorded as a limitation.
2. I find the tithe maps and large-scale OS maps to be of greater assistance than the earlier small scale maps when considering this issue. There is a feature shown on the Terrington St John tithe map and 1886 OS map near to point C. However, on closer inspection, it is apparent that this is not across the claimed route, which runs to the north-west of this feature. The 1905 OS map shows a channel leading out of the watercourse at this point. Therefore, I do not consider thatit can be determined that there was a feature such as a gate across the route in this locality. The maps also show no apparent sign of a feature across the claimed route at any other point.
3. Although there are differing views regarding what is represented by particular markings shown on the small scale twentieth century maps, no barrier is shown across the claimed route on the earlier mapping. In light of the historical map evidence, I find it more likely that there were no structures in place across the claimed route when the route was dedicated. I cannot therefore modify the Order in the manner requested at the hearing.
4. The widths specified in the Order reflect those shown on the 1905 Second Edition OS map that were available between the watercourse and the boundary features to the north. Reliance is therefore placed on the boundary to boundary presumption. The issue to be determined is whether the boundary features were put up by reference to the highway, in order to separate it from the adjoining landholdings, or for another reason.
5. In this case, there has historically been a watercourse to the south, and therefore consideration needs to be given to the boundaries that existed on the northern side of the claimed route. There is nothing to suggest that any boundary feature was put up other than to separate the land from the highway. It is apparent from the map evidence that the route is a feature of some antiquity, and the boundary features are depicted on the historical maps. This is a different situation to the Order Decision cited by Mr Niemiec (ROW/3239339), most notably due to the absence of a boundary on one side of the route in that case.
6. I accept on balance that it is appropriate to record the widths by reference to the boundary features shown on the 1905 Second Edition OS map.

**Overall Conclusion**

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

**Formal Decision**

1. I confirm the Order.

Mark Yates

**Inspector**

**APPEARANCES**

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| **Supporter**  Ms H. Chester Applicant for the British Horse Society | |
| **Objectors**  Mr S. Niemiec  Mr S. Markillie  **Interested Parties**  Ms K. Webb  Ms C. Brady | Landowner  Case Officer for the Council  King’s Lynn Internal Drainage Board |
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