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| **Appeal Decision** |
| **by A Behn Dip MS MIPROW** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 16 April 2025** |

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| **Appeal Ref: ROW/3351480** |
| * This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Suffolk County Council (the Council) not to make an Order under Section 53(2) of that Act. |
| * By application dated 20 January 2021, John Andrews on behalf of the Ramblers (the applicant) sought to add to the Definitive Map and Statement, a Byway Open to all Traffic (BOAT) between the B1116 and the A1065, in the parishes of Elveden, Wangford and Lakenheath. * The application was refused by the Council on 3 September 2024 and the applicant was formally notified on 3 September 2024. |
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| **Summary of Decision: The appeal is allowed.** |
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**Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal on the basis of the papers submitted. I have not visited the site, but I am satisfied that I can make my decision without the need to do so.

**Main Issues**

1. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority, (in this case Suffolk County Council) to keep their Definitive Map and Statement (DMS) under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
2. Where no public right of way is presently recorded, Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that *“a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist…”.*
3. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) therefore comprises two separate questions, one of which must be answered in the affirmative before an Order is made: has a right of way been shown to subsist on the balance of probability or has a right of way been reasonably alleged to subsist? Both these tests are applicable when deciding whether or not an Order should be made, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify the making of the modification order requested by the appellant (notwithstanding that for the Order to be confirmed subsequently only the higher test will apply).
4. Accordingly for the purposes of this appeal, I need only be satisfied that the route is reasonably alleged to subsist.
5. The claim was based solely on historical documentary evidence. For documentary evidence, section 32 of the Highways Act 1980 (the 1980 Act) requires consideration of any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
6. The Council were concerned that the making of an Order based primarily on evidence that has mostly been before 2 Inquiries, could be perceived as ‘unreasonable’ action by them. While I understand their apprehension, should the legislative requirements be met, the Council have an unavoidable statutory duty to make an Order.

**Reasoning**

1. The claimed route has previously been the subject of 2 separate Definitive Map Modification Orders (DMMO’s), each claiming a slightly different alignment on one particular section of the route. The initial Order was considered at Inquiry in 2002, the second Order was considered at Inquiry in 2013. On both occasions the Inspector declined to confirm the Order.
2. A further application was made in 2021 and is the subject of this appeal. The route claimed on this occasion includes both of the alignments from the previous Orders plus an additional alignment also indicated on the historical documents. The application also includes new evidence, not previously considered.
3. With respect to the existing evidence that formed part of the previous applications, the Council considered that, as the majority had been assessed at the past Inquiries, it would be unreasonable not to respect and consider the outcomes of those Inquiries.
4. Correspondingly, the Council were of the view that the previously considered evidence could not now be deemed to satisfy a reasonable allegation, being that it was determined as insufficient at Inquiry. In line with this, they considered that the ‘new evidence’ submitted with the current claim was ‘weak,’ and when added to the previous evidence, was insufficient to raise ‘even a reasonable allegation’ of public rights subsisting across the claimed route.
5. Although I understand the Council’s approach, the previous decisions were determined following an Order having been made, and as such the evidence considered was subject to the higher and more stringent test of the ‘balance of probabilities.’ As pointed out by the applicant, the legislation is clear, that at this stage of the process, the new evidence, when combined with the existing evidence, only has to satisfy the test of a reasonable allegation to justify the making of an Order.

*New evidence*

1. The new evidence submitted comprises of an 1813 Ordnance Survey (OS) Manuscript Map, aerial photography from 1945 and 2005, and a comparison of known public routes that were not shown on the Finance Act 1910 map *‘as one might have expected a public highway to be depicted’*.
2. The applicant stated that the previous Inspectors had placed significant reliance on the Finance Act 1910 plans. They had not seen the new evidence, which he considers demonstrates that their interpretation of the plan was unsustainable. Conversely the Council were of the view that non-depiction of other routes on that plan that have since been recorded as highways, does not mean that non-depiction of the claimed route can be treated the same way, as there were many reasons why other routes may have become public highways.
3. The alignment of the claimed route was a point of evidence that was significant in the previous decisions. The OS Manuscript Map from 1813, at a scale of two inches to a mile, gives a clear depiction of the route on one of its claimed alignments and the applicant feels that it is relevant that the depiction closely resembles that of later maps and provides an increased certainty of the relationship between the earlier and later documents.
4. The photography appears solely relevant to the existence of the route at the point in time that the photographs were taken.
5. Whilst the applicant made further comments in his appeal about the assessment by Inspectors of some documents in the previous decisions, this does not necessarily form new evidence or information. The Council felt that any disagreement with Inspectors Order Decisions should have been challenged at the time, rather than the applicant submitting small amounts of new evidence with little relevance, *‘to allow the entirety of the evidence to be relitigated.’*
6. I recognise the frustration felt by the Council and the ongoing uncertainty for the owners and occupiers of the land crossed by the route and I agree with the Council that the new evidence is a little thin and does not necessarily provide direct evidence of public rights existing on the route. Caselaw however, has made it clear that consideration of the evidence should not be restricted to new evidence, or evidence that has not previously been considered. The application must be looked at in light of all of the evidence available, which includes new evidence and existing evidence.
7. With that in mind, it is my view that, while the combined evidence is insufficient to meet the balance of probabilities test, it is sufficient to satisfy a reasonable allegation of public rights existing across the claimed route. As the Council acknowledged in their Committee Report for this application, the applicant *‘put forward a compelling case in his summary analysis’* and they further noted that if this had been his first submission, and without the previous determinations by other Inspectors, their recommendation would have been to make an Order.

**Other Matters**

1. Center Parcs, who occupy land along which the claimed route crosses, were strongly opposed to the claim, stating that it would affect their business, security and their guest’s enjoyment of the area. I recognise these as genuine concerns, however they are not matters that can be taken into consideration under the relevant legislation of the 1981 Act.

**Conclusions**

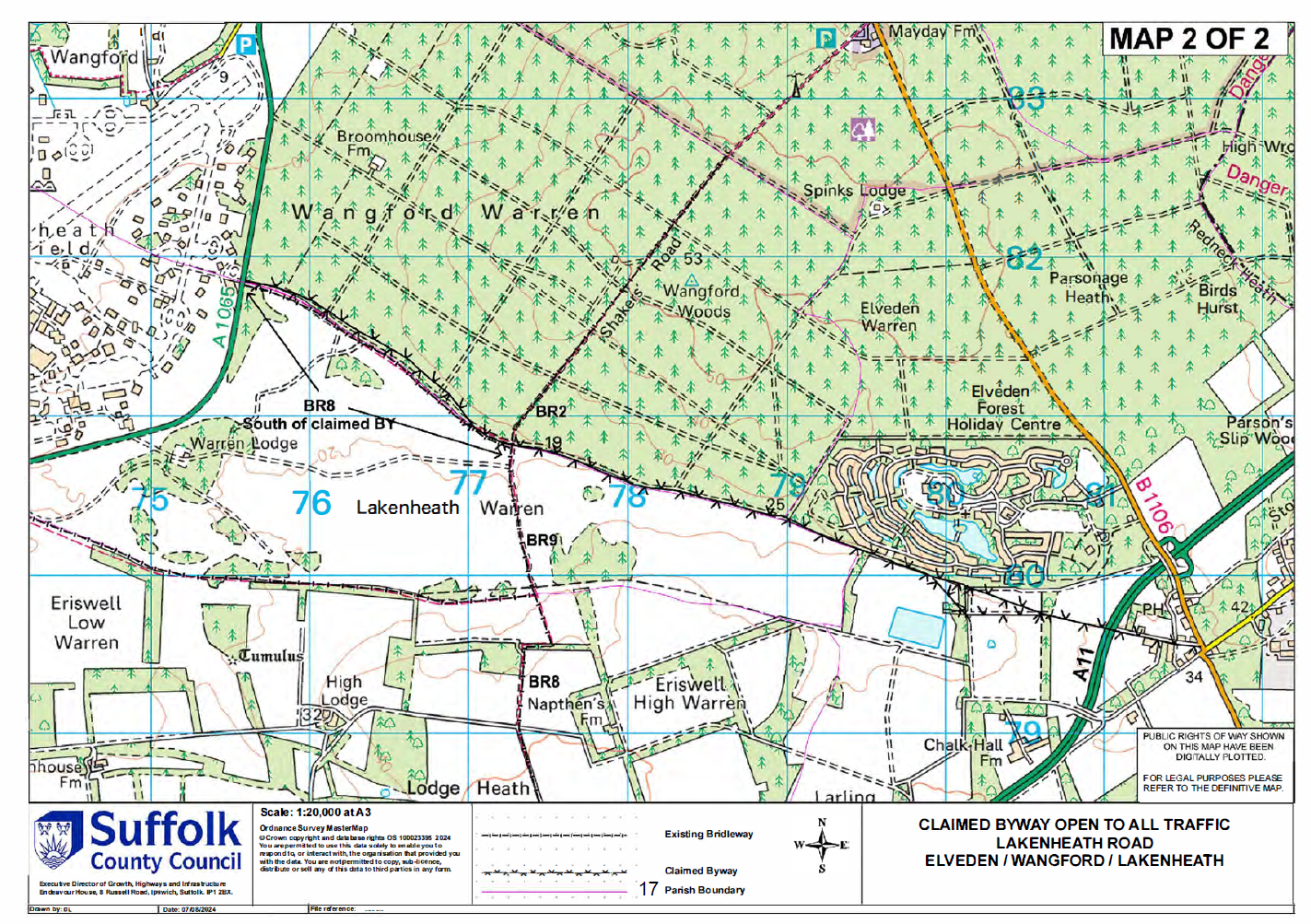
1. I am satisfied that there is new evidence and information. The application also includes a third alignment of the section of route that was not claimed previously. I do not consider that the totality of evidence meets the balance of probabilities test, however, it is sufficient to tip the balance in favour of the lower test of a reasonable allegation of a public right of way subsisting along the claimed route. As that is the minimum required by legislation to justify the making of an Order, then the appeal must be permitted. Having regard to all matters raised in the written representations, I conclude that the appeal should be allowed.

**Formal Decision**

1. The appeal is allowed and in accordance with Paragraph 4(2) of Schedule 14 of the 1981 Act, Suffolk County Council is directed to make an Order under Section 53(2) and Schedule 15 of the Act, within 12 months, to modify the Definitive Map and Statement for the area by adding a Byway Open to all Traffic (BOAT) between the B1116 and the A1065, in the parishes of Elveden, Wangford and Lakenheath.
2. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

A Behn

**Inspector**

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