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| **Order Decision** |
| First inquiry opened on 22 February 2022  Second inquiry opened on 26 November 2024 |
| **by Mark Yates BA(Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 30 April 2025** |

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| **Order Ref: ROW/3227322M1** |
| * This Order was made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Norfolk County Council (Thompson, Pockthorpe Lane) Modification Order 2018. |
| * The Order was made by Norfolk County Council on 6 April 2018 and proposed to add to the definitive map and statement a byway open to all traffic from Pockthorpe Lane to Sparrow Hill, Thompson, as detailed in the Order Map and Schedule. * Norfolk County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs. |
| * In accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 notice has been given of the proposal to confirm the Order with modifications. |
| **Summary of Decision:**  **The Order is confirmed subject to modifications set out below in the Formal Decision.** |
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Procedural Matters

1. Inspector Sue Arnott held a public inquiry into the Order and proposed in her Interim Decision (‘ID’) of 27 March 2023 to confirm the Order with modifications. These modifications were to record the route claimed (‘the claimed route’) as a footpath rather than a byway open to all traffic and amend the widths included in the Order for the route. I have been appointed to consider the objection made in response to the advertisement of the proposed modifications. This Decision should be read in conjunction with the ID with the numbers in square brackets corresponding to the relevant paragraphs in the ID.
2. The second inquiry was held in accordance with paragraphs 7 and 8 of Schedule 15 to the Wildlife and Countryside Act 1981 (‘the 1981 Act’). Whilst the objection could be viewed as opposing the designation of the route as a footpath, it is argued that no public right of way subsists over the claimed route. This means that the paragraph 7 element may be more relevant in this case.
3. An application for an award of costs was made at the second inquiry and this will be the subject of a separate decision. The two applications submitted at the first inquiry [6] will be addressed in additional Decisions.

***Documents***

1. I have read the documents and written submissions tendered at the first inquiry. Further submissions have been submitted in relation to the second inquiry. Norfolk County Council (‘NCC’), Mrs Mallinson, Mr Mitchell and others support the confirmation of the modified Order. The sole objection to the confirmation of the Order was made by Mr Dunlop on behalf of Mr and Mrs Scott.
2. Referenceis made by Mrs Scott in her proof of evidence to a number of documents contained in four files. I explored this matter with Mr Dunlop as a number of these documents did not appear to have been previously submitted. Nor were they included with her statement of case or proof of evidence for the second inquiry. I distinguish these documents from those previously provided by NCC.
3. I made it clear during the first day of the second inquiry that I needed to know the extent to which any of the documents were new and whether it was requested that particular documents should be accepted at the inquiry. This request was followed up in writing during an adjournment in the inquiry. Whilst the information was not immediately forthcoming, it became apparent that these documents had not been previously provided.
4. When the inquiry resumed, I again asked Mr Dunlop whether he wished any new documents to be accepted. I drew attention to some documents and particularly the issue of settled land (see paragraphs 22-23 below). No request was made for any additional documents to be submitted by Mrs Scott. Mr Dunlop highlighted that their case relied on events that followed on from the original definitive map of 1964.

***Evidential weight***

1. I set out at the end of this Decision the parties who participated at the second inquiry (both the advocates and witnesses). Mrs Mallinson did not speak to her statement of case or proof of evidence, and these were treated as written representations. She did cross-examine Mrs Scott and make a closing statement. Whilst her evidential points may be ascribed less weight as they were not tested, some of the points raised stray into legal matters that would not ordinarily be subjected to cross-examination.
2. Given the broad nature of the evidence contained in the proof of evidence of Mrs Scott, I feel it necessary to make a general observation before considering the evidence below. I find that a number of points within her evidence were based more on supposition. There are also some matters that have no apparent direct relevance to the status of the claimed route and accordingly I give them little weight.

***Site visit***

1. Rule 22 within The Rights of Way (Hearing and Inquiries Procedure) (England) Rules 2007 specifies:

‘(*1) The inspector may make an unaccompanied inspection of the land to which the order relates before or during the inquiry without giving notice of his intention to the persons entitled or permitted to appear at the inquiry.*

*(2) During the inquiry or after its close, the inspector—*

*(a) may inspect the land to which the order relates in the company of the authority and any person entitled or permitted to appear at the inquiry; and*

*(b) shall make such an inspection if so requested before or during the inquiry by the authority or any person entitled or permitted to appear at the inquiry*.’

1. The above clearly sets out that an Inspector may make a visit to the site but that they shall do so if particular parties request that a visit is undertaken. Inspector Arnott carried out unaccompanied and accompanied visits to the site [3 and 4]. When I raised this matter, none of the main parties considered there to be a need for me to visit the site in order to look at any features or locations referred to in the evidence. Reference was also made to sections of the claimed route being inaccessible. The same responses were made when I asked this question on the second day of the inquiry. Further, nothing was apparent when I reviewed the evidence to indicate that I should undertake a visit to the site.

**Main Issues**

1. The relevant matters in relation to the Order, as made, were set out in the ID [24-25]. In considering the historical documentary evidence, Inspector Arnott outlined the requirements of Section 32 of the Highways Act 1980 (‘the 1980 Act’) [37]. The main issues now are whether the new evidence and/or argument presented, when taken in conjunction with the previously considered evidence, has a bearing on the conclusions reached in the ID. I also consider it useful to set out below how dedication can arise under statute or common law.
2. The relevant statutory provision, in relation to the dedication of a public right of way, is now found in Section 31 of the 1980 Act. This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
3. Three main issues need to arise for the inference of the dedication of a public right of way to be drawn at common law: whether the owner of the land had the capacity to dedicate a highway, whether there was express or implied dedication by the landowner and whether there has been acceptance of the dedication by the public. Such an inference can be determined from documentary sources and/or user evidence.

**Reasons**

***Background***

1. Inspector Arnott addressed the legal submissions made by Mr Dunlop in relation to the validity of the Order [10-14] and the impact of a route being recorded in the definitive statement (‘DS’) but not shown on the definitive map (‘DM’) [15-23]. No new points have been raised on these matters in order for me to depart from the conclusions reached by the previous Inspector on these specific points. However, the evidential position has now changed in terms of the second issue as set down in paragraph 18 below.
2. Inspector Arnott concluded that the evidence was not supportive on the balance of probabilities of the route being a public carriageway [123]. However, she found the route had been established as a public footpath during the first half of the twentieth century [124]. This has to be taken to mean that the route was dedicated at some unknown date in the first part of the twentieth century and this is consistent with the findings from the evidence and submissions set out in the ID.
3. The ID addressed the documents available at the first inquiry in relation to the preparation of the definitive map and statement (‘DMS’) in accordance with the National Parks and Access to the Countryside Act 1949 (‘1949 Act’) [75-95]. It is apparent that the route was initially included in the draft version of the DMS as a footpath at the instigation of the parish council. The evidence at the first inquiry also indicated that this path had subsequently been removed and was not shown on the first published edition of the DM in 1964. However, it was included in the original published version of the DS.
4. Further evidence has been provided to show that the path was shown on the 1964 DM as well as being included in the DS and I will have regard to this matter when assessing the evidence. No new evidence has been provided in support of the existence of public vehicular rights over the claimed route or for the route to have a greater width than that proposed in the ID.
5. Some documents mentioned by Mrs Scott have already been considered by the previous Inspector and certain comments in her statement do not add anything new in relation to the reliance that can be placed on these documents. In respect of additional documents mentioned but not provided, in many cases it is not evident how these would be relevant to my decision.

***Whether dedication had occurred by the first half of the twentieth century***

1. Firstly, it is important to note that a finding of dedication at common law will usually be inferred from the actions (or more often lack of action) by a landowner with the capacity to dedicate and acceptance of the dedication by the public. It will rarely be the case that a landowner expressly dedicates a public right of way. Secondly, statutory provision has been made for the dedication of a right of way to be found from evidence of use during a particular period. This was initially contained in Section 1 of the Rights of Way Act 1932 and is now found in Section 31 of the 1980 Act.
2. Property deeds are concerned with matters arising out of the ownership of land and not the identification of public rights of way. The alleged lack of any reference to a public right of way in deeds does not prevent a finding of dedication from now be found over the claimed route. Additionally, matters such as annual visits by members of the royal family to the locality and periods where there was an absentee landowner would not prevent a right of way from being dedicated over the land.
3. Mrs Scott has drawn attention to certain references in documents she believes shows that land crossed by the claimed route was held in settlement. Settlement was a means of protecting the ownership of land for future generations with the land usually passing to the eldest son as a tenant for life. This meant that they only had a life interest and were not free to dispose of the land or grant rights over it without the agreement of the other interested parties or unless specific provision was made in the trust deed.
4. Where land was held in a strict settlement, there would be no person with the capacity to dedicate a right of way under common law and it would usually be the case that dedication could not have occurred. The position was different after 1932 in terms of statutory dedication where dedication could be found over settled land, originally following a period of forty years use by the public. This was amended to a period of twenty years by the 1949 Act. I highlighted at the inquiry that these assertations needed to be supported by evidence in order to determine the extent of any land that was held in settlement and the period involved. The burden of proof on this issue rests with Mrs Scott. Despite highlighting this matter, no evidence has been provided to show that land crossed by the claimed route was held in settlement during a period that would have prevented the dedication of a footpath by the middle of the twentieth century.
5. The inclusion of the claimed route in the original DMS is wholly supportive of the previous Inspector’s finding that the route had been dedicated during the first half of the twentieth century. It was clearly viewed as being a public footpath by the parish council [76] and recorded by NCC at different stages of this process. Evidence in support of the dedication of the route is contained in statements from longstanding users [93] and a landowner [94].

***The removal of the claimed route from the DMS***

1. The claimed route was recorded as Thompson Footpath No. 1 in the DMS published on 10 November 1964. At some point between the commencement of a review of the DMS in 1966 and the completion of the review in 1983, the path was removed from the DM, although it continued to be recorded in the DS until 2016. The submissions of the Council and Mrs Mallinson focus on the assertion that the claimed route was removed from the DM without regard to due process.
2. Section 33 of the 1949 Act made provision for periodic views to be undertaken of the DMS to take account of events which had occurred between the relevant date of the DS and the relevant date to be determined for the purpose of the review. It appears in this case that it related to the occurrence of events between 9 November 1957 and 1 April 1966. However, a right of way could only be removed from the DMS if one of the relevant grounds specified in Section 33(2) of the 1949 Act (as amended)were applicable, namely:

* where there had been a legal event that served to extinguish or divert it;
* that there was a legal or other event whereby a highway of a particular description had ceased to be highway of that description; or
* there is new evidence to show that no public right of way existed.

1. There is no evidence to show that this path was removed as part of the review process. However, it is apparent that it was not included on the revised DM of 1983. I therefore consider it more likely that it was removed as a consequence of the review and NCC have previously expressed this view when the removal of the path from the DM has been questioned. As outlined above, there would have been limited grounds for the removal of a path from the DMS.
2. In terms of the first ground above, NCC has undertaken research of the London Gazette archives and no notice has been found in relation to this path. Nor has any other evidence been provided to show that the route was removed in these circumstances.
3. The Ministry of Housing and Local Government Circular 22/1970 provided guidance in relation to the third ground. Paragraph 5 states that it required some new evidence that had not been previously considered. The evidence must show that there was no right of way on the date when the right of way was recorded. This evidence needed to have been discovered between the relevant date of the DMS and the date of the review. Paragraph 6 of the circular stresses the need for conclusive evidence to show that there was no right of way over the land. Again, there is no evidence in support of this ground being applicable.
4. Consideration was given in the ID to various highway records which focus on whether the claimed route was listed as a publicly maintained highway. However, it should be borne in mind that this does not necessarily demonstrate that a route is a vehicular highway. Whilst the dates of certain entries are not clear, it seems to be the case that during the 1960s the route was listed by NCC as a ‘soft road’ [64-66]. It was included as an unclassified road in NCC’s list of maintained highways and listed as a soft road until at least 1974 [100].
5. Further, at some stage Footpath 1 was annotated on a draft revised map of 16 September 1966 as ‘*UC ROAD*’. Given the references in highway records this is likely to refer to an unclassified road. The earlier provisional map of 21 July 1961 carries red crosses to suggest that it would potentially be removed, although the route was subsequently included in the 1964 DMS. NCC have undertaken a comparison exercise in relation to ten routes that were treated in the same way. This indicates that consideration was given to whether these routes should be included in either the DMS or the road schedule.
6. The most credible reason for the removal of the claimed route from the DM was that NCC believed it was part of the local road network and should not be recorded as a public footpath. This was also the view of the previous Inspector [107] albeit the evidence presented to her indicated that the path was removed before the DM was published.
7. There may be the potential for the second ground to be viewed as covering circumstances where a route ceases to be a footpath if there has been an event which led to it becoming a carriageway during the period concerned. However, there is no record to support the occurrence of such an event. The maintenance records only acknowledge that a route is publicly maintained.
8. NCC previously considered the claimed route to be a vehicular highway, but now concedes that this is not the case. The previous Inspector also concluded that public vehicular rights do not exist over the route. Therefore, if the reason for its removal was that the route was considered to be part of the local public road network then this view is likely to have been reached in error.
9. The period for challenging the validity of the 1983 review has long since passed. However, in light of the above, it can be concluded that there is no evidence to show that Footpath 1 was removed from the DM by reference to one of the three relevant statutory grounds. Secondly, any decision to remove the path from the DM on the basis that it was a carriageway has subsequently been found on the balance of probabilities to be in error. NCC also confirmed at the inquiry that Footpath 1 was removed from the DS without the requisite Order being made under the 1981 Act. This does not install confidence that NCC always followed the proper processes in the past when making modifications to the DMS.

***Post review evidence***

1. I have set out the position regarding the removal of the claimed route from the DM. It cannot be determined exactly when this occurred. However, it had clearly occurred by the date of the completion of the review of the DMS in 1983. This matter is important given the advice contained in Defra Circular 1/09 where it is outlined in paragraph 4.35 that ‘*use of the way in such circumstances cannot be seen to be as of right, as rights that cannot be prevented cannot be acquired. It [is] not possible for a right of way to be dedicated for the purposes of section 31 of the Highways Act 1980 when use of the way is by virtue of it having been shown on the definitive map but subsequently removed’.*
2. I interpret the above guidance to mean that any use made of a route during the period it was recorded on the DM cannot support the dedication of a public right of way after the path has been removed from the DM. It does not in my view prevent dedication from being found to have occurred under either statute or common law where reliance is placed on use that occurred after a path had been removed from the DM. The previous Inspector addressed the submissions made at the first inquiry in relation to the route continuing to be recorded in the DS [15-23]. I find on balance that it would be unsafe to consider any use of the route prior to the completion of the review in February 1983 in support of the more recent dedication of a footpath.
3. There is no registered owner of the land crossed by the claimed route where it passes Mr and Mrs Scott’s property. They claim to own the land by way of the *ad medium filum* rulewhereby there is a presumption an adjacent landowner owns the subsoil to the middle of the highway, although they do not accept that the claimed route is a highway of any description. Nonetheless, it is not my role to determine the extent of their ownership. No issue has been raised in relation to the lack of capacity of any landowner to dedicate a right of way under common law after 1983. Further, for the purpose of determining when the status of the route was brought into question in accordance with Section 31 of the 1980 Act, such action does not need to have been instigated by an owner of the land in question.
4. Twenty user evidence forms (‘UEFs’) have been submitted in support of use of the claimed route. There are some references to use by walking groups and additional people gave evidence in support of use of the route at the two inquiries. Whilst the evidence of use remains largely untested, it is not generally disputed that people have previously used the route. The relevant issues raised by Mrs Scott largely focus on the assertations that after they bought their property this use was challenged or was of a permissive nature.
5. Turning first to the issue of statutory dedication, NCC refer to the status of the claimed route being brought into question by the application to add the route to the DM in 2014. None of the UEFs refer to challenges being made prior to 2014. However, other action has been mentioned that could have brought the route into question at an earlier date.
6. There is correspondence from the end of 1997 between NCC and members of the Ramblers locally in relation to the omission of the route from the DM. A letter of 23 December 1997 from Mr Harris raises a question regarding a statement made by NCC that the route was not a registered footpath. In a letter of 15 December 2001, Mrs Pallister outlines that in relation to the maintenance of the route she had contacted the parish clerk regarding this path and was informed that it was not on the DM. This matter was again raised by Mr Harris later in December 2001 and NCC responded to Mr Pallister and Mr Harris confirming that the route was not on the DM.
7. The early correspondence reveals that there were some people who became aware that the route was not shown on the DM, and this was also the case for the parish council. It is unclear whether other people who used the claimed route were aware of the status of the route at that stage. However, I note that Mrs Scott has referred to minutes from parish council meetings in 1998 (copies not supplied) where the omission of the path from the DM is noted and there wasa request for it to be put back on the DM.
8. Mr Bingham wrote to NCC in 2004 regarding the removal of a footpath sign and the enclosing of land in the locality of Mr and Mrs Scott’s property. An undated letter from Ms Norris to NCC states that Mr and Mrs Scott had erected a gate and a no entry sign stopping people from walking the route. Mrs Pallister wrote to NCC later in 2004 stating that the new owner now alleges that it is not a registered footpath. I note that a Wayland walk leaflet of 2003 includes the claimed route as a parish walk rather than the category of public footpath.
9. I find there to be uncertainty regardingwhen Mr and Mrs Scott first took action to challenge users of the route after they acquired their property. This was difficult to determine to any reasonable degree from Mrs Scott’s oral testimony. However, I acknowledge the difficulties faced by witnesses trying to recall the nature of events that occurred over twenty years ago.
10. The correspondence from 2004 indicates that action was taken that is likely to have alerted observant users of the route that its status was being brought into question. These measures should have been sufficient to bring the status of the route into question. Mrs Scott’s assertion that she challenged people after moving into the property conflicts with the user evidence, including the few users who spoke to use of the claimed route. However, there is clearly correspondence from people questioning the status of the route and some references that point to this issue being before the parish council.
11. I do not consider that I can reach a firm conclusion from the evidence on exactly when the status of the claimed route was first brought into question. However, it seems to me that it would be unsafe to find that there was a full twenty year period of use available between the potential removal of the path from the DM in early 1983 and an event that first brought the status of the route into question for some members of the public. The available correspondence and Mrs Scott’s evidence indicates it could have occurred in late 1997. Other correspondence is suggestive of this matter being raised again in 2001 and 2004.
12. I now turn to the issue of dedication under common law involving a lesser period of use following the completion of the review in 1983. Around ten of the UEFS provide evidence of use to varying degrees prior to 1997 or 2001. These people also refer to observing use by others on occasions. Additional statements have been supplied in support of use prior to any potential event that brought the status of the route into question and some of these people have given evidence at the inquiries.
13. There is no suggestion of any overt action being taken to challenge users before Mr and Mrs Scott purchased their property. On the contrary, there is evidence of a footpath sign and structures being in place which would have served to encourage people to use the route. If a landowner had not wished to dedicate the route an obvious step would have been to remove the sign. Further, other landowners do not dispute that the route is a footpath or accept that it is a footpath [112]. The evidence indicates that following the removal of the path from the DM people continued to walk the route.
14. Mrs Scott refers to Lord Walsingham withdrawing permission for the Thomson Five run (the reference to five is likely to relate to the distance of the run) over his land. However, the withdrawal of permission for this event to take place over the land is distinct from action being taken to make it clear that no public right of way exists over a particular route.
15. I have highlighted my concerns about reaching a finding that there was public use of the claimed route for a full period of twenty years prior to the status of the route being brought into question in order to satisfy Section 31 of the 1980 Act. However, it is evident that use of the route continued after the claimed route was removed from the DM, which would have occurred by 1983. This use continued unchallenged until at least the latter part of 1997. The signing of the route as a public footpath and unchallenged use by the public is consistent with the route being viewed as a public footpath.
16. There remains some doubt regarding when the use was first challenged, but there was a window of around 15 years during which the use of the route was as of right and unchallenged. I find on balance that the evidence is supportive of the common law dedication of a footpath following theremoval of the claimed route from the DM.

***Conclusions***

1. Nothing has been provided to cast doubt on the previous Inspector’s conclusion that a public footpath had been dedicated by the middle of the twentieth century. The further evidence presented to the second inquiry reveals that the route was originally included in the DMS. However, there would need to be sufficient grounds for the subsequent removal of the path from the DM. It is also apparent that it was not removed from the DS in 2016 in accordance with the 1981 Act.
2. There is uncertainty regarding when the path was removed from the DM and the reason for its removal. All that can be said is that it was removed by the time of the completion of the review in 1983. However, there is no evidence to show that the path was removed from the DM by reference to one of the relevant statutory grounds. I consider it more likely that the path was removed on the basis that it was considered to be a carriageway, but this has subsequently been found to not be the case.
3. The uncertainty regarding when certain events have occurred means that I have exercised caution in terms of the potential for the path to have been dedicated under statute. However, the evidence would be supportive on balance of the dedication of a public footpath after its removal from the DM under common law.
4. Overall, nothing has been provided to justify the removal of the path from the DM and given the limited grounds to remove a right of way from the DMS, it is more likely that it was removed in error. Secondly, the evidence is supportive on balance of the subsequent dedication of a public footpath. It is also worth noting that each of these two factors could alone support the path being added to the DMS. In the event that one of these grounds for confirming the Order were not applicable, the Order should in my view still be confirmed.

**Overall Conclusion**

1. Having regard to these and all other matters raised at the inquiries and in the written representations I conclude that the Order should be confirmed subject to the modifications previously proposed and set out below.

**Formal Decision**

1. I confirm the Order subject to the following modifications:

In the Order schedule

In Parts I and II:

* Delete “Byway Open to All Traffic” and substitute “Public Footpath”;
* Amend width of Sections B to C, C to D, D to F and F to G to 2 metres in each case;

In Part II: Delete lines 11-14 and, after “Grid reference TL 9147 9669 to TL 9143 9670 – 5.5 metres” add “as shown bounded by solid lines on the Ordnance Survey map of 1905 Scale 1:2,500”;

On the Order map

* Amend the notation used to depict the Order route to “Public Footpath” using a broken black line;
* Amend width of Sections B to C, C to D, D to F and F to G to 2 metres in each case.

Mark Yates

**Inspector**

**APPEARANCES**

**For NCC**

Mr J. Crosskill Solicitor employed by NCC

He called:

Mr L Malyon Senior Legal Orders Officer

**Other Supporters**

Mr I. Mitchell For the Norfolk Ramblers

Ms J. Westall

Mr P. Rudling

Mrs D. Mallinson

Mrs B Tyler BEM

**In Objection**

Mr A Dunlop Representing Mr & Mrs Scott

He called:

Mrs A. Scott

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| **DOCUMENTS TENDERED AT THE SECOND INQUIRY**   1. Letter to the inquiry, dated 7 November 2024, from Mr Harrold 2. Extract from ‘*Ordnance Survey Maps a concise guide for historians*’ 3. Statement of Mrs Tyler 4. Chronology of events 5. Closing statement of Mr Mitchell 6. Closing submissions on behalf of Mrs Scott 7. Closing submissions of Mrs Mallinson 8. Closing submissions for NCC 9. Costs application and response | |
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