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| **Order Decision** |
| Site visit made on 20 May 2025 |
| **by Claire Tregembo BA (Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 04 June 2025** |

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| **Order Ref: ROW/3343562** |
| * This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Norfolk County Council (Whinburgh, Yaxham & Garvestone) Modification Order 2023. |
| * The Order is dated 24 September 2023 and proposes to modify the Definitive Map and Statement for the area by adding a restricted byway as shown on the Order plan and described in the Order Schedule. |
| * There was one objection and two representations outstanding when Norfolk County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is confirmed subject to the modifications set out below in the Formal Decision.** |
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Procedural Matters

1. I made an unaccompanied site visit to the area on 20 May 2025. I started my site visit from the existing Garvestone Restricted Byway 1 (RB1). The vegetation on the first half of RB1 had been cut but after this it was too overgrown for me to continue to point D of the Order route. I also had a look at the Order route from the roadside at point A but was unable to walk along this section due to the vegetation and hedge. Documentary evidence is submitted in support of the Order, and I am satisfied that I can determine it without the need to see more of the route.
2. The Order includes a modification to the statement for the existing RB1. However, the Order has only been made in consequence of an event set out under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act). The event set out under section 53(3)(c)(iii) which allows for the modification of any other particulars contained in the statement is not included. Therefore, if I confirm the Order, I will need to remove the modifications to the statement for the existing RB1. This modification would not require advertising.
3. I will refer to various points shown on the Order map in my decision. For ease of reference, I have appended a copy of the Order map to the end of my decision.

The Main Issues

1. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of an event under section 53(3)(c)(i) which requires me to consider if on the balance of probabilities, the evidence shows that a public restricted byway subsists along the Order route. This is a higher standard of proof than the reasonably alleged to subsist test to determine if an Order should be made.
2. The Order has been made on the basis of documentary evidence. Section 32 of the Highways Act 1980 requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
3. I shall examine the evidence as a whole to establish whether a public right of way for vehicles exists along the Order route. However, the Natural Environment and Rural Communities Act 2006 (the 2006 Act) extinguished rights for mechanically propelled vehicles subject to certain exceptions set out in section 67 of that Act. In this case, it is not argued they have been saved by any of these exceptions. Accordingly, should I find in favour of public vehicular rights existing, the way should be recorded as a Restricted Byway.

Reasons

1. The Order route runs between Dereham Road and the existing RB1. It crosses a heritage railway at point B which runs along the line of the former Dereham Branch Railway.

*Commercial Maps*

1. Fadden’s 1797 map of Norfolk shows a *‘cross road’* on a similar line to the Order route and RB1. The book William Faden and Norfolk’s Eighteenth Centuryby Tom Williamson and Andrew Macnair states *‘Faden makes a simple division… between what he describes as ‘Great Roads’ and ‘Cross Roads’… the latter, which comprised the majority of routes shown, were minor roads and lanes of the County. Most were public vehicular rights of way, although not all’*.
2. Bryant’s 1826 map of Norfolk shows the Order route and RB1 with double solid edges labelled *‘Tollars Lane’*. The key indicates routes shown in this way are *‘Lanes and Bridleways’*.
3. Bartholomew’s Half Inch map of England and Wales 1903 shows the Order route and RB1 with double solid edges and uncoloured. The key states *‘the uncoloured roads are inferior and not to be recommended for cyclists’*. Footpaths and bridleways are shown with dotted lines.
4. Commercial maps were produced for sale to the travelling public and it is unlikely they would have shown routes which the public could not use. The routes are shown in ways that would suggest at least bridleway rights and other public roads are shown in the same ways.
5. The quality of commercial maps and the weight that can be given to them varies. They are rarely sufficient in their own right to infer the routes shown on them are public highways. However, when considered with other evidence, they can tip the balance in favour of public rights.

*The Yaxham, Westfield, Whinburgh, and Garvestone Inclosure Award 1812*

1. A map was produced for each parish. On the Garvestone map the very eastern end of the Order route is shown with RB1 as *‘Tollers Lane’* and they appear to be enclosed by hedges. RB1 joins *‘Public Road No. 7’* which is coloured sepia. On the Yaxham map the Order route between points B and D, and RB1 are coloured sepia and labelled *‘Tollers Lane’*. They appear to be enclosed between hedges. The Whinburgh map shows the full length of the Order route in the same way.
2. In the Award, Public Road No. 2 is described as continuing in an *‘east direction in the route of the present road passing by Whinburgh Church and crossing the first described road to Tollers Lane’*. Public Road No. 7 is described as *‘one other Road beginning at the East end of Tollers Lane’*. The parish boundary descriptions for Yaxham, Whinburgh, and Garvestone all refer to *‘a Lane called Tollers Lane’*.

*Tithe Maps*

1. The 1839 Yaxham Tithe map shows the Order route and RB1 with double solid edges coloured sepia. Brakefield Green Road, which is set out in the Inclosure Award as *‘Public Road No. 7’* is shown in the same way.
2. On the 1839 Garvestone Tithe map the very eastern end of the Order route and RB1 are shown with doubled solid edges and coloured sepia. It is labelled *‘from Yaxham’* just west of point B. Brakefield Green Road, which is set out in the Inclosure Award as *‘Public Road No. 7’* is shown in the same way.
3. The 1840 Whinburgh Tithe map shows the Order route and western end of RB1 with double solid edges coloured sepia. The roads at the western end which are set out as *‘Public Road No. 1’* and *‘Public Road No. 2’* in the Inclosure Award are shown in the same way.
4. The purpose of tithe records was to identify titheable land capable of producing crops. They were not produced to record public rights of way, although they can sometimes be helpful in determining the existence and status of routes.

*Ordnance Survey Maps and Records*

1. The 1800 Ordnance Survey (OS) Boundary Remark Book shows RB1 and the eastern end of the Order route as an enclosed route labelled *‘Tollers Lane’*.
2. An OS map from 1817 shows the Order route and RB1 as an enclosed route. They are shown in the same way on the 1838 OS one inch map.
3. The 1883 OS 25 Inch map shows the Order route as an enclosed route labelled *‘Tollers Lane’* with trees in the hedges alongside section B to D and the railway crossing it at point B. It is shown in the same way on the 1979 1:2500 OS map.
4. The OS object name books from 1905 refer to *‘Toller’s Lane’* as *‘a public road extending from S.E. corner of Manor Yards to junction of roads ½ mile E of Yaxham Wood’* and *‘a public lane extending from the road a short distance north from Brick Kiln Farm to Whinburgh Village’*. The spelling and description of Tollers Lane were authorised by the Rev. A J Shepherd, who was likely to have local knowledge of the Order route.
5. The OS maps provide evidence of the physical existence of the Order routes. However, since the late 19th Century, OS maps have carried a disclaimer stating that tracks and paths shown provide no evidence of the existence of public rights.

*Railway Plans and Records*

1. On the Norwich and Brandon Railway Dereham Branch Railway Plan 1844, the Order route is shown as parcel number 15 which crosses the railway at 8 miles and 4 furlongs. The Book of Reference records this parcel as an *‘Occupation Road’* owned by John Marcon and George Webb. However, the cross sections for the railway show *‘Public Road No. 9’* crossing it at the 8½ miles mark (there are 8 furlongs in a mile). It was to be raised by 2 feet and crossed on the level.
2. Section 21 of the 1845 Norwich and Brandon Railway Act (the 1845 Act) which authorised the construction of this line, *‘enacted that it shall be lawful for the Company to construct… the said Branch Railway by this Act Authorized* (sic) *to be made… across and on the Level of several Roads or Highways designated on the plan’* and referred to parcel 15 as a road. The 1845 Act incorporated powers of the Railway Clauses Consolidation Act 1845 which only gave powers to substitute a road or highway, not extinguish it.
3. A transcript of the ‘Railway Records of the British Isles’ which originates from the London North East Railway (LNER) infrastructure records circa 1924 records Toller’s Lane crossing as an Occupation crossing *‘annotated ‘public’ on LNER 1939 mileage diagram shown as undefined on OS map’*.
4. The crossing at Tollers Lane is also shown on the Dereham Central Signal Box Diagram as a ‘User Worked Crossing’. This was used to aid the signaller in managing telephone calls from the public.
5. I have been advised that there is no record of the Order route in the Mid-Norfolk Railway Order dated 23 September 1997 which brought the heritage railway into operation.

*Finance Act Maps 1910*

1. The Order route and RB1 are excluded from the surrounding parcels on the Finance Act maps of 1910 except where it crosses the railway line. The roads at the western end which are set out as *‘Public Road No. 1’* and *‘Public Road No. 2’* in the Inclosure Award are shown in the same way. The exclusion of most of the appeal route from the adjoining hereditaments could indicate public rights which were more likely to be vehicular. However, it could also be argued that private rights had the same effect on the land.

*Definitive Map Records*

1. Tollers Lane was originally added to the draft definitive map as a *‘Carriage Road Footpath’*. The British Transport Commission (the BTC) objected to its inclusion in a letter dated 15 October 1958. The Council’s response confirmed that no documents were taken into consideration when showing this route on the draft map.
2. A letter from Whinburgh Parish Council dated 1 September 1959 states that *‘little interest was shown in the existence or otherwise’* of this route and the objection from the BTC was likely to be upheld by default. Extracts from the Parish Council minutes from 31 July 1959 confirm that no one in the village felt strongly enough about the existence of the route to oppose the BTC. The Order route was subsequently deleted from the map on 10 May 1960. However, the removal of the Order route from the draft definitive map and statement did not extinguish any public rights over it, and it appears to have been deleted because there was insufficient evidence to show public rights at this time.
3. The deletion of the Order route from the draft map means RB1 is shown on the provisional and first definitive map as a cul-de-sac Carriage Road Footpath starting at the parish boundary and Tollers Lane. There are no places of public resort or interest at this point.

*Conclusions on the Documentary Evidence*

1. The commercial and OS maps show the physical existence of the Order route and RB1 as a continuous through route since at least 1797. The OS object name book refers to Tollers Lane as public lane and public road indicating its reputation as a public highway. I consider the commercial and OS maps are suggestive of public rights of at least bridleway status and more likely vehicular.
2. The Order route is shown in the same way as other public roads, including those set out in the Inclosure Award, on the Inclosure and Tithe maps. It is also referred to as a lane in the Inclosure Award and awarded public roads are referred to as ending at Tollers Lane. I also consider the Tithe maps and Inclosure Award are suggestive of public vehicular rights.
3. The deposited railway documents record the Order route as an occupation road in the book of reference and a public road in the cross sections. Later railway documents suggest public rights.
4. The exclusion of the Order route from the surrounding hereditaments in the Finance Act map is also suggestive of public rights which are more likely to be vehicular.
5. The Order route was claimed as a CRF on the draft Definitive Map and Statement along with RB1 suggesting a continued reputation as a public carriage road, although mostly used on foot.
6. The Order route has been a named lane since at least 1812 and one of the Tithe maps indicates it continues to Yaxham. Case law has previously considered a named lane to be a minor road between main roads, and labelling a route as leading to a place is also suggestive of public rights. I consider this suggests public rights but needs to be considered with all other evidence.
7. All of the documents before me indicate the Order route is part of a through route with RB1. Case law has found that if one part of a route is shown to be a public way, the presumption is that it continues along the rest of that way with the same status.
8. There are no documents before me to show that the Order route has been extinguished by due legal procedure.
9. None of the evidence before me provides conclusive evidence of public vehicular rights over the Order route, but this is not unusual when relying on historical records. However, the Order route and RB1 have been consistently shown as a through route for over 200 years in a manner that suggests public vehicular rights. Taken as a whole, I consider the evidence indicates that, on the balance of probabilities, public vehicular rights exist.

**Other Matters**

1. Issues concerning suitability and desirability are raised including the impact on wildlife, public safety, railway safety, and the cost of installing a crossing, gates and safety measures on the heritage railway. Although I understand these concerns, they are not matters I can legally take into consideration when determining the Order.

Conclusions

1. Having regard to these and all other matters raised in the written representations, I conclude the Order should be confirmed with modifications.

Formal Decision

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

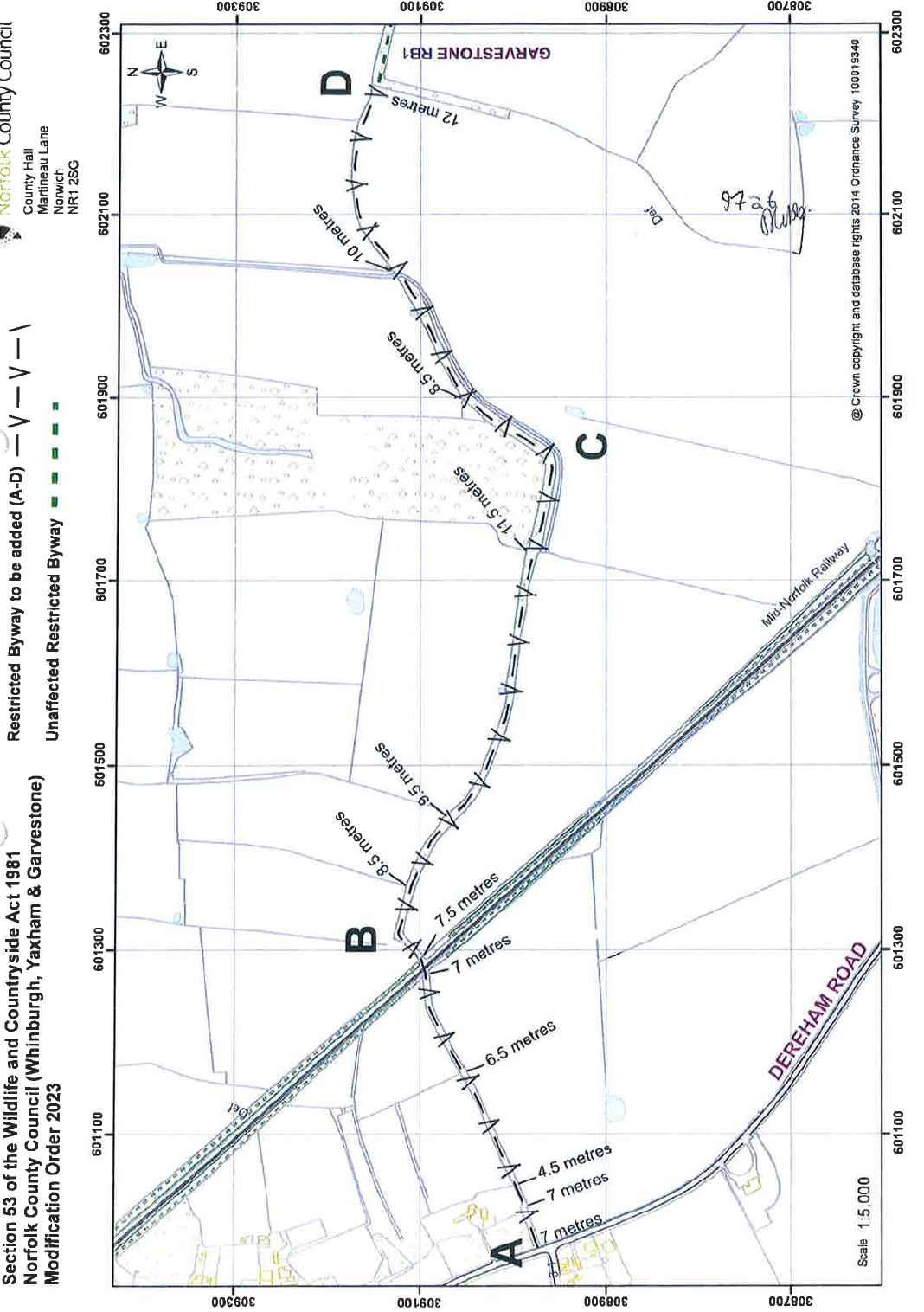
In Part II of the Schedule to the Order:

* Delete the heading ‘PARISH OF GARVESTONE’ and everything concerning Restricted Byway No. 1 underneath it.

Claire Tregembo

INSPECTOR

**Order Map**

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