

**Appeal Decision**

**by Paul Freer BA (Hons) LLM PhD MRTPI**

**an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 09 July 2025**

# Appeal Ref: ROW/3354779

* 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 not to make an order under Section 53(2) of that Act.
* By application dated 16 December 2021, Mr Michael James Peachey claimed that a route from Footpath 30 to Footpath 2, Mildenhall should be added to the definitive map and statement for the area.
* The application was refused by Suffolk County Council and the appellant was formally notified of the decision by letter dated 22 October 2024.

**Summary of Decision: The appeal is allowed and Suffolk County Council is directed to make the Order**

**Procedural matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act)
2. The appeal has been determined on the papers submitted**.** I have not seen all the documents but no one has disputed how they have been described by Suffolk County Council (SCC). I have not visited the site, but I am satisfied that I can make my decision without the need to do so.
3. The route runs in a generally south easterly direction from Footpath 30 (Gravel Drove) to Footpath 2, in the parish of Mildenhall. In effect, the route ‘cuts the corner’ between those two perpendicular footpaths.
4. SCC was a former owner of the land over which the claimed route passes, acquired by the County in 1913. Their ownership amounted to more than half of the total length of the claimed route. This was the position at the decision was taken to omit the route from the Definitive Map. Although SCC subsequently disposed of its interest in the land, the applicant notes that the authority did not declare a conflict of interest at the time the Definitive Map was produced, this being that the authority itself was the main affected landowner.
5. SCC responds by explaining that the available records it is not possible to know whether the fact that the county council owned this land played a part in the decision not to include the route on the first definitive map. SCC also notes that a section of another footpath crosses through a current county landholding was still depicted on the first definitive map, as were other routes.
6. There is no evidence before me to suggest that the interest in the land held by SC in any way influenced the decision not to include the claimed route on the Definitive Map. My view in that regard is reinforced by the fact other footpaths crossing land owned by SCC have been included on the Definitive Map. I therefore consider that there has been no conflict of interest in this respect.

# Main issues

1. The application was made under section 53(2) of the 1981 Act which requires the surveying authority to keep their definitive map and statement under continuous review, and to modify them upon occurrence of specific events cited in section 53(3)
2. The need for an Order to be considered when evidence is submitted in support of a claim that a public right of way which is not shown in the definitive map subsists is dealt with under section 53 of the 1981 Act. Section 53 (3)(c)(i) of the 1981 Act provides that a modification 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 subsists or is reasonably alleged to subsist over land in the area to which the map relates.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties, the relevant part of the 1981 Act and the findings of the Courts in the cases of *Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402 [1995] (*Bagshaw and Norton*) and *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367 (*Emery*).
4. As made clear by the High Court in *Bagshaw and Norton* this involves two tests:

Test A - Does a right of way subsist on the balance of probabilities?

Test B - Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

1. In relation to Test B, the Court of Appeal recognised in the *Emery* case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*, Roche LJ held that “…*The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.”*
2. Roche LJ also held that “*Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it could not give rise at common law to any presumption of dedication*”.

**Reasons**

1. The evidence submitted with the application is entirely in the form of documentary evidence. I need to consider if the evidence provided is sufficient to infer the dedication of public rights over the claimed route at some point in the past. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as highway.
2. At this stage, I need only to be satisfied that the evidence meets test B, the lesser test.

***Assessment of the evidence***

*Mildenhall Tithe Map and Apportionment*

1. The claimed route is not depicted on the Mildenhall Tithe map although I understand that, with very few exceptions, the tithe map for Mildenhall did not include footpaths.

*County Maps*

1. The claimed route does not appear on Hodskinson’s map of 1753, although this map simply distinguishes between inclosed roads and open roads, depending on whether they were bounded by hedging or open to the surrounding fields. Gravel Drove, which cuts across the claimed route, is depicted on this map as an inclosed road running east-west.
2. Bryant’s map of 1824/5 distinguishes between three categories of road: turnpike or mail roads, good cross or driving roads and lanes or bridleways. A route is depicted on a similar alignment to Gravel Drove and another route appears to correspond with the current Pamments Lane, both being shown as lanes and bridleways. There is no indication of a route corresponding to the claimed footpath on Bryant’s map.
3. The Greenwood map of 1825 distinguishes between two categories of road: turnpike roads or cross roads. This map depicts Gravel Drove and what appears to be Pamments Lane as cross roads. The claimed footpath is not depicted on Greenwood’s map.

*Finance Act 1910*

1. Sections of the claimed route are shown coloured, albeit the middle section of the claimed route has been left uncoloured. The accompanying schedule has a column to record a possible tax deduction for a public right of way but this column has been left blank.

*Mildenhall Estate Plan, 1911*

1. The claimed route is visible onthis sale plan as part of Lot 18 and is depicted by double pecked lines. However, there isno further description of Lot 18 or mention of any public route on the conveyance or “declaration as to title”, whereas some of the other plots are described in more detail**.** Gravel Drove is labelled to the north.

*Ordnance Survey mapping*

1. The claimed route is not depicted on the Old Series Ordnance Survey Map of 1836. Gravel Drove is visible to the north on this map.
2. The claimed route appears on the first edition of Ordnance Survey (OS) 6 inch 1st County Series map published in 1886, on which it is depicted between double pecked lines indicating a route with open boundaries which links Gravel Drove and another double pecked line which corresponds with Footpath 2.
3. On the second edition, published in 1903, the claimed route is again depicted by double pecked lines but with the annotation ‘F.P.’ indicating a footpath. Footpath 2 is depicted by double pecked lines at the eastern end of the claimed route and Gravel Drove is indicated by double solid lines at its western end.
4. The claimed route is depicted on Ordnance Survey 25 inch 2nd County Series of 1903by double pecked lines and labelled with three ‘F.P’. annotations. Gravel Drove is represented by double solid lines at the western endand Footpath 2 by double pecked lines and a ‘F.P’ annotation at the eastern end.
5. The Ordnance Survey 6 inch National Grid Map Published in 1959also depicts the entire claimed route between double pecked lines with the ‘F.P.’annotation. Gravel Drove is again portrayed by two solid lines and Footpath2 by double pecked lines.

*The Rights of Way Act 1932*

1. The claimed route was scheduled under the Rights ofWay Act 1932 (the 1932 Act). The records for the 1932 Act have not survived, and it is not known what evidence was provided in support of this route or whether there were any objections to its inclusion.

*The Definitive Map*

1. The Mildenhall parish survey map shows the claimed route as marked red on the map and labelled as a footpath number 4. Gravel Drove (which is now recorded on the definitive map as Footpath 30) is also depicted in red and numbered 68. The route now recorded as Footpath 2 is shown red and numbered 5. The routes 4 and 68 are both highlighted in yellow. In Suffolk, red lines on parish survey maps are usually an indication that considered by officers to be claimed public footpaths, with the yellow highlighting added by West Suffolk County Council officers meaning the route should be omitted from the first definitive map.
2. The Mildenhall Parish Survey Statement was published in May 1951.This document has a page for claim number 4 which is described as: *“Leaving Gravel Drove 200 yds west of its junction with Shop Drove, the path runs* *South-East across arable fields towards Jude’s Ferry reaching the road from West* *Row to Jude’s Ferry some 200 yds North of Jude’s Ferry Bridge.”*
3. By 1951, the path had been ploughed and there is a comment in the Parish Survey Statement stating that: “The path now serves no useful purpose”. The relevant page is labelled at the top with the letter “O” which I understand usually signified the route was to be omitted from the first definitive map.
4. The appellant makes the point that in the production of the Definitive Map a nearby parish council was encouraged to dismiss ‘useless’ routes. The applicant believes that this shows a clear intention on behalf of the authority to omit routes that they considered undesirable to preserve. SCC accepts that the county-level authority did give misleading advice in that case to the relevant parish council which could have caused some historic routes to be lost. However, it is impossible to know retrospectively which objectives the different parish councils pursued in recording routes in their parish and whether they also followed this instruction.
5. The definitive map was reviewed in 1979. The claimed route in was not claimed as part of the 1979 review of the definitive map, whereas Gravel Drove was claimed as a Road Used as a Public Path (RUPP), the claim being recommended by the review panel.
6. The claimed route is not shown on the Tithe map or any of the county maps. Given that other routes do not appear on these maps either, I attach only limited weight to this evidence one way or the other.
7. The claimed route is also not depicted on the OS Map of 1836, and first appears on the first edition of OS map published in 1886. Thereafter, the claimed route consistently appears on OS maps in 1903, 1953 and 1959. These maps are an accurate and reliable source for establishing alignments and for showing the physical existence of a route, but they do not provide evidence of the status of a route.
8. In this case, the Finance Map 1910 is of only limited evidential value. Whilst the uncoloured or “white” routes on this map may be considered to indicate that the route was a public right of way, this only applies to the middle section of the route, the end sections being coloured. This raises the question as to why the middle portion of the route was depicted differently, for which no explanation has been provided. It is relevant that the accompanying schedule to record a possible tax deduction for a public right of way has been left blank although, given that I have no evidence that other routes were recorded differently, this is again a matter to which I attach only limited weight.
9. Similarly, the inclusion of the claimed route on the Mildenhall Estate sale plan of 1911 is not necessarily an indication of it bearing public rights. The appellant points out that the sales plan included many parcels of land to be sold over a wide area, and that many other footpaths were depicted crossing land being sold. The appellant goes on to advise that the majority of those were later found to be public footpaths, in spite of none of them being mentioned in the particulars either. The appellant considers that that this undermines the County Council’s argument against the claim in this respect.
10. This goes to the appellant’s wider point that, in reality, the claimed route formed part of an interconnected network of footpaths. The appellant notes that the historic evidence for the adjoining footpaths (later accepted as being public footpaths) is practically identical (in his view) to the available evidence for the claimed route, with (in his view) the sole difference being that the claimed route had been ploughed up shortly before the first Definitive Map was compiled.
11. However, the omission of other public rights of way in the particulars is only one piece of evidence amongst many. This is true of the other routes later found to be public footpaths. It is therefore necessary to consider one piece of evidence alongside the other evidence to reach a conclusion based on the totality of the available evidence. This other evidence of course may differ in relation to the other routes, leading to a different conclusion.
12. This was the exactly the situation with the Definitive Map. The claimed route was omitted from the Definitive Map when first produced. The 1950’s parish survey documents prepared for the production of the Definitive Map in the 1950’s show that the parish originally claimed the route as a public footpath, which suggest that the claimed route was recognised locally as being a public footpath. However, it is instructive that the decision was taken to omit it the claimed route from the first Definitive Map.
13. In contrast with claimed route, the other interconnected routes (namely Footpaths 2, 3 and 4) were included on the first Definitive Map. The records for the Mildenhall Parish Survey Statement have not survived in full, and those that have survived fail to give any formal explanation for the omission of the claimed route from the Definitive Map. However, several of the similarly marked with an “O” also have the words “no outlet” written on them, in the same pencil. One possible explanation for the omission of the claimed route from the Definitive Map is therefore that the route that had no public outlet and accordingly would have been considered to be a cul-de-sac. This could also explain why footpaths FP2, FP3 and FP4 were included on the Definitive Map, whereas the claimed route was not.
14. In this context, it is significant that Footpath 30 was similarly included in the parish survey statement but omitted from the first Definitive Map. It was later claimed as part of the 1979 review of the definitive map, as a result of which Gravel Drove has subsequently been recorded as a public right of way because it was supported by evidence that may have been overlooked at the time the Definitive Map was first produced. This included a number of user evidence forms, mention on the Inclosure Award and its depiction on the Tithe Map, private county maps and a railway plan dating to 1842.
15. This is not the case with the claimed route. The appellant has not been able to point to any historic evidence in relation to the claimed route that was not before SCC when the Definitive Map was first produced. In that respect, the claimed route can be distinguished from the subsequent inclusion of Gravel Drove on the Definitive Map.
16. The inclusion of Gravel Drove on the Definitive Map following the review in 1979 is relevant insofar as it provides a plausible explanation for the existence of the footpath. The appellant speculates that the claimed route served as a shortcut between Gravel Drove (now recognised as a public right of way) and the nearby river crossing at the Judes Ferry pub, where there was an established ferry crossing, in order to access the towpath on the opposite side of the River Lark.
17. I fully recognise that there is no evidence to support the appellant’s hypothesis. However, in *Fortune and Others v Wiltshire Council and Another* [2012] EWCA Civ 334, Lewison LJ said that:

*“In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless.”*

1. This is such a situation, and it is reasonable to infer from surrounding features in the landscape (in particular, the nearby ferry crossing providing access to the towpath on the opposite side of the River Lark) that the claimed route may have existed as a shortcut linking two public rights of way. However, in the absence of supporting evidence, I put it no higher than that.
2. Although no user evidence was submitted with the application, the two landowners have subsequently indicated that in their opinion there is no route. This was confirmed by the previous owner. The landowners report having never seen public use of the route and have not needed to stop anyone walking there. This is further evidence that points away from the claimed route being a public footpath.
3. Considering the evidence as a whole, I conclude that, on the balance of probability, a right of way has not been shown to subsist. Accordingly, Test A is not met.

***Conclusions on the evidence***

1. There is good evidence that the claimed route was a footpath and was physically in existence for some 70 years before being ploughed over in the 1950s. There has been a significant change in circumstances since the Definitive Map was first produced, namely that the claimed route is now known not to be a cul-de-sac as believed to be the case at the time. There is also some circumstantial evidence to support the existence of public rights, insofar as there is a plausible explanation for the existence of a footpath in this location in terms of a shortcut linking two rights of way.
2. Against this, no user evidence has been provided and it is unlikely that any will now be forthcoming. The current landowners confirm that they have not seen anyone using the route. Whilst the OS mapping is good evidence that the claimed route was a footpath for many years, this is in itself is no indication that the public had the right to use it. Furthermore, the claimed route can be distinguished from other routes omitted from the first Definitive Map that were subsequently included on it (i.e. Gravel Drove), in that there is no user evidence available and there is no known documentary evidence to support its inclusion on the Definitive Map.
3. There is no incontrovertible evidence to indicate that the claimed route was not a public right of way. There is, however, one significant change in circumstances from when the claimed route was omitted from the Definitive Map when first produced: the subsequent inclusion of Gravel Drove on the Definitive Map. As a result of that change, the claimed route now connects to a public of right of way at both ends. It is no longer a cul-de-sac. As such, what appears to be one the main reasons for the claimed route not being included on the Definitive Map (‘No Outlet’) is no longer the case.
4. I recognise that no new historical evidence of significance has been discovered, and that no new user is evidence is likely to be forthcoming. The new evidence that has been provided is largely circumstantial and open to interpretation. Nevertheless, those factors must be weighed against the fact that the claimed route was physically in existence for many years and the change of circumstances that has occurred since the Definitive Map was first produced. For these reasons, having considered all the relevant evidence available I conclude that is reasonable to allege that a right of way subsists. Accordingly, the lower threshold for evidence under Test B is met.

**Conclusion**

1. I conclude that a public right of way along the full length of the appeal route has not been shown to subsist on the balance of probability but can be reasonably alleged to subsist. Accordingly, I conclude that the appeal should be allowed and SCC directed to make the Order.
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.

**Formal Decision**

1. The appeal is allowed and Suffolk County Council is directed to make the Order within 3 months of the date of this Decision.

Paul Freer

INSPECTOR