



Order Decision

Site Visit on 11 January 2011 : Inquiry on 7 December 2011

by S M Arnott FIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 9 January 2012

Order Ref: FPS/V3500/7/309M

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Suffolk County Council (Former County Borough of Ipswich Definitive Map and Statement) Modification Order 2010.
- The Order is dated 19 January 2010. It proposes to modify the definitive map and statement for the area by adding a footpath from Valley Road, Ipswich, to Lower Road, Westerfield, with links to The Grove and Westerfield Road, as shown on the Order map and described in the Order schedule.
- There was one objection outstanding when Suffolk County Council (SCC) submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.
- Having considered the matter on the basis of written representations, in accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981, notice was given of my proposal to confirm the Order with modifications to delete part of the Order route from the Order.
- Six objections were submitted in response to advertisement of these proposed modifications, all of which were outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed as originally made.

Preliminary Matters

1. If confirmed with the modifications proposed in paragraph 29 of my interim Order Decision issued on 2 February 2011, the Order would record the route in question on the definitive map and in the definitive statement but omitting the section of the claimed route between grid references TM16714704, TM16814720 and TM16894784 (the junction with Lower Road).

The Main Issues

2. The main issue remains whether the evidence shows that in the past the Order route has been used in such a way that a public footpath can be presumed to have been established.
3. In paragraph 11 of the interim decision, I noted my conclusion that dedication of the claimed public right of way could be implied from the facts but with the exception of the short section that crosses the railway, being land currently owned by Network Rail. This led to my proposal to modify the Order to delete the section of footpath of which the railway crossing forms an integral part.
4. The matter in dispute at the inquiry was whether the additional evidence provided to me, together with new submissions on the interpretation of that evidence, should lead to a conclusion that a public footpath can be shown, on a

balance of probability, to subsist across the railway such that the Order should be confirmed as originally made.

Reasons

5. Network Rail had previously drawn my attention to the effects of Section 55 of the British Transport Commission Act 1949 (the 1949 Act) which made trespass on operational railway lines an offence.
6. SCC had responded by asserting (but not substantiating) the view that long-standing public use of such a well established physical feature must lead to a presumption of dedication. Indeed the claimants considered the path had always been a public right of way and an official railway crossing.
7. At paragraph 17 of my interim decision I reached the conclusion that it was certainly possible the Order route had come into existence as a public footpath before the 1949 Act took effect although (at paragraph 23) I found that, on balance, there was insufficient evidence before me at that time to demonstrate that had occurred. However I also noted that if a public footpath had been established before the 1949 Act, all subsequent use would be in exercise of that right and therefore not an offence.
8. For Network Rail, Mr Day referred to earlier legislation to show that the same principle (of unauthorised use of a crossing being a trespass and an offence) applied as far back as the Railway Regulation Act 1840. Section 16 of that Act provided for "punishment of persons" for "wilfully" trespassing upon a railway and refusing "to quit" when asked. In this case it was necessary to prove the intention of the trespasser and for that person to be asked to leave.
9. Later, Section 23 the Regulation of Railways Act 1868 provided a penalty for 'being or passing upon any railway line' except if using an authorised crossing and after receiving a warning from the railway company.
10. In 1924 the London and North Eastern Railway Act provided for trespass on this railway to be punishable by fine, but only where it was proven that "public warning has been given to persons not to trespass upon the railway by notices ... clearly exhibited...". This was further strengthened by Section 55 of the 1949 Act. Whilst this also requires warning notices to be displayed to deter potential trespassers, Mr Day submitted that this was only necessary for a penalty to be recoverable, not for a trespass to occur.
11. All the above provisions remain in force today.
12. Mr Day submitted that trespass on railway land by pedestrians is against the criminal law, unlike on most non-railway land where trespass merely leads to liability for damages. Further, the continuing necessity to prevent trespass throughout the history of the railways is demonstrated by this continuing recognition in the legislature.
13. I do not disagree with the general point made by Mr Day, that for obvious safety reasons the public have generally been prohibited from operational railway land, or that consequently the scope for establishing public rights of way across railways is very narrow indeed. However, one of the arguments in this case is that the claimed public footpath was established before the railway, and that the crossing point was provided to accommodate this public use, not any private interest. I therefore intend to examine this possibility first.

Evidence deriving from the establishment of the railway

14. The Ipswich and Bury Railway (Woodbridge Extension) Act 1847 was accompanied by the deposited plan and book of reference, both of which acknowledged the existence of a "footpath" in this vicinity before the railway was constructed. Details for a revised scheme in 1853 went a little further by showing on the plan the extent of this "footpath" beyond the limit of deviation. The line shown concurs with the Order route, and in the documentation reference is again made to a "footpath".
15. Land for the construction of this section of railway was then purchased by conveyance dated 16 January 1858, there being no mention in this of any public footpath. However the accompanying plan does show a dashed line along the Order route, north, south and crossing the railway land.
16. For Network Rail, Mr Day highlighted a clause in this conveyance entitling the vendor, Mrs Edgar, to any accommodation works "as shall be necessary for the purpose of making good any interruptions caused by the railway", as provided by Section 68 of the Railway Clauses Consolidation Act 1845. In general terms this would have entitled an affected landowner to the provision of whatever gates, bridges, fences or other facilities were needed to remedy problems caused by the railway unless these could otherwise be compensated.
17. When, in 1888, additional land on the south side of the railway was purchased (from a different landowner¹), no crossing on the line of the Order route was shown on the plan accompanying the conveyance although another (possible) crossing, closer to Westerfield Road was indicated on the plan.
18. It seems clear that none of the documents associated with the construction of, and extension to, the railway state whether this footpath was public or private.
19. Whilst Network Rail submitted that the lack of any reference to this footpath being in the ownership of the Surveyor of Highways is significant, I accord this very limited weight since I have seen little in the way of evidence for this being the expected practice for lesser highways recorded in this book of reference.
20. On the other hand, the objectors argue that the footpath shown in the railway documents was already in existence before the 1850s; the very fact a crossing was provided indicates this is more likely to be a public path than a private one since the latter could more simply (and cheaply) be accommodated via the Westerfield Road level crossing or by financial compensation.
21. Whilst Network Rail submitted that this footpath was provided for private use, Mr Day accepted the company had no record of exactly who is entitled to exercise this right though he suggested the most obvious candidates would be the successors in title of Mrs Edgar, the adjacent landowner at the time the railway land was purchased in 1857. The objectors submitted that there is no logic to this assertion and in fact no evidence to support it.
22. It is not disputed that there has been a crossing at the relevant point on the Order route since construction of the railway towards the end of the 1850s, or that this has been maintained by all the subsequent rail management companies as an "authorised crossing". A question remains over who was, and is, authorised to use it.

¹ I note this indenture states the then vendor (Thomas Neale Fonnereau) purchased the land on 30 June 1888 from Elizabeth Edgar and another.

23. SCC produced a very recent list of railway crossings supplied to it by Network Rail on which this particular crossing was identified as having the status "public footpath"; Mr Day stated this was simply a typing error and that it is regarded as an authorised crossing for private pedestrian use only.
24. Taken on its own, I find the railway evidence very finely balanced. Nowhere does the documentation specifically acknowledge the footpath as public but, I find nothing wholly inconsistent with that status. However, the objectors argue that there is evidence both before and after the construction of the railway from which the public nature of the path can be deduced.

Pre-railway evidence

25. Mr Grimwade asserted that the claimed footpath lies on the line of an Anglo-Saxon track but had no documentary evidence to support this. However he produced a hactured map of uncertain date which was said to have originated before the railway (although this had been a later addition to it). Whilst tracks along the northern and southern ends of the Order route are discernable, the scale of this map, and the position of the join between two sheets, makes the identification of any footpath across the railway impractical.
26. Mr Andrews submitted extracts from the 1808 Inclosure Map for this area. This confirms that the route set out as a "footway" was not the Order route but led to a point on it, two fields north of the railway. Mr Andrews argued that logically there must have been a pre-existing "footway" otherwise there would have been no reason to set out a path to that point².
27. Since the Award appears to distinguish between a "right of passage" and a "footway", and fails to identify any individual users of the "footway", I am inclined to interpret the latter as implying a public right of way in this context and the former as an easement available only to specified users.
28. Even if there were no doubt at all over the public nature of the inclosure footway it is not disputed that this did not extend as far as the land on which the railway was constructed. Yet whilst there is nothing within the inclosure documents to confirm the continuation of this footway southwards towards Ipswich, there is a clear inference that it did continue and a strong implication that this was a public right of way. However other evidence is needed to establish the line of its continuation.

Post-railway evidence

29. Mr Andrews submitted that the route shown as a footpath on the 1882 (25" : 1 mile) OS map, which concurs with the northernmost section of the Order route, must be the diverted line of the awarded path although his research had revealed no record of any formal diversion through the Quarter Sessions during the intervening period.
30. In fact the 1882 map shows the Order route in its entirety, together with another path³ leading diagonally across a field from the south side of the railway to Westerfield Road. This same network of paths appears on the 1905 edition (all annotated "FP"), despite the extension to the railway causing the crossing to be widened, and remains unchanged on later maps published by

² This being a necessary part of the inclosure process to avoid the extinguishment of any public rights over land being inclosed as a result of Section 11 of the 1801 Inclosure Act.

³ This path does not form part of the Order route and its status is not at issue here.

the OS at smaller scales well into the mid-twentieth century. I note the 1901 instructions to OS surveyors (quoted by Mr Andrews) that "Only footpaths that are habitually used by the public should be shown" although this was qualified in 1924 with the caveat that "the OS does not concern itself with rights of way". Aside from any similar assumptions that may have been made by the OS in 1882 or later in 1905 about the path's status, I consider the fact that the whole of the Order route is shown, from Lower Road southwards to Ipswich, does not lend support to a private right of way across the railway but is more likely to indicate a public one as part of a well-used footpath.

31. Indeed, correspondence from the late 1940s shows parts of this path were suggested for recording as public rights of way (under the Rights of Way Act 1932) but, as explained by Mr Walsh, probably failed due to complications arising from their position in relation to the parish and borough boundaries.
32. At the inquiry I heard from Mr Grimwade who recalled using this footpath in the 1950s, including the section across the railway. I have also received additional written evidence from four people⁴: from Mrs Nellie Parker whose use dates back to 1936; from Mr John Cooper who first used the path in 1944; from Mr R B Whiting who walked and cycled the route between 1945 and 1949; and Mr John E Gilbert whose father worked for LNER and who recalls first being taken along the path in 1947. All believed this to be a crossing point for the use of the public.
33. I previously concluded that the present signs are ambiguous. I heard evidence from people who went further, saying that the signage at this point had always given the impression that access across the railway was authorised but venturing along the line in either direction was regarded as trespass for which there would be serious penalties.
34. I heard from Mr George who, since the 1970s, has published maps for walkers. His very detailed records showed he had surveyed this path on 9 January 1981, noting "stiles and 10/8 steps down to line" at the railway crossing. He was adamant that had he gained any impression at all that the path was not open to the public, he would not have included it on his map. However, it had been shown on the first edition of his Fynn Valley map and successive revisions through to the 5th edition in 2003; with over 4000 sold over a 30 year period, no query had ever arisen in relation to the public nature of this footpath.
35. Putting all this evidence together in chronological order in order to reach a conclusion, I am still not satisfied that there is sufficient evidence pre-dating the construction of the railway to show, on a balance of probability, that the footpath identified in the railway documents was a public one although there is little to counter that conclusion. At this point, the weight is evenly balanced.
36. However, adding into the equation all the subsequent evidence, and the consistent treatment of this crossing as an authorised one, I consider the balance tips in favour of this having been a public path at least since the 1840s when the land was first surveyed for the proposed railway.
37. Mr Day continued to argue that whilst this had always been an authorised pedestrian crossing, the only authorised users were those entitled to a private

⁴ I understand a further form was completed by Mr Stringer and sent to SCC but no copies could be located. Also I was told (by Mr Miller) of use by a Mrs Melton and also a Mr Walne but I do not have full details of the dates and circumstances of their use of this path.

right of access; anyone else would still be classed as a trespasser and guilty of an offence. Yet it seems neither Network Rail nor its predecessors recorded exactly who is authorised to use this crossing or the precise terms of this right.

38. The objectors pointed out that no-one had come forward to submit evidence from their deeds to claim entitlement to such a private right. On the contrary, there is evidence of the continued depiction of the Order route as a footpath on OS maps since 1882, together with use by the public as far back as living memory can recall.
39. In conclusion I find insufficient clarity over the alleged private right for which this authorised crossing of the railway was said to have been installed. Whilst the case for this being provided for the public is not overwhelming, on balance I find it sufficient to conclude that it was more likely to have been intended to facilitate a public path than a private one. Overall I reach the conclusion that use by the public of the railway crossing has, since its construction, most probably been in the exercise of a pre-existing public right.
40. It follows from this that my earlier findings in paragraphs 24-27 of the interim decision cannot stand and the reasons for deleting from the Order the northernmost branch of the Order route can no longer be supported. I therefore conclude the Order should be confirmed as it was originally made and without the modifications to delete the section of the claimed route between grid references TM16714704, TM16814720 and TM16894784 (the junction with Lower Road) as was proposed.

Other issues

41. I previously took the view that there was insufficient evidence of a public right of way having been established before it became an offence to trespass on the line. I therefore discounted the user evidence for the section that crosses railway land on the basis that such use could not have been 'as of right'. As a result of the additional evidence provided and the further submissions made, I have now concluded that a public footpath pre-dated the railway and was accommodated by means of an authorised crossing such that path users were not to be regarded as trespassers committing an offence after all.
42. I received detailed submissions from Mr Knight and Mr Andrews in relation to the 'as of right' point but, in view of my conclusions above, I do not now need to consider it in this case. However I acknowledge the work put into these objections to address this issue, and by Network Rail in providing a response. As it is no longer relevant to my decision, it would not be appropriate to comment further.

Conclusion

43. Having regard to the above and all other matters raised at the inquiry and in the written representations, I conclude that the Order should be confirmed without the modifications previously proposed.

Formal Decision

44. I confirm the Order as originally made.

Sue Arnott

Inspector

APPEARANCES

Supporting the modifications but opposing the Order

Mr S Day Liability Negotiations Advisor; Network Rail (land owner)

Opposing the modifications but supporting the Order as made

Mr P Miller Chairman of Westerfield Parish Council
Mr R Wolfe
Mr J Walsh
Mr G Knight Ramblers' Association; also representing Mr J Andrews
Mr S Grimwade
Mr W George

Also opposing the modifications:

Cllr Mrs Lockington
Mr A Caldwell
Mr J Richards

Supporting the Order but taking a neutral stance in respect of the modifications

Mr D Last Definitive Map Officer; Suffolk County Council

DOCUMENTS

1. Copies of statutory notices and certification
2. Copy of the statutory objections to the Order (1) and the proposed modifications (6)

Submitted prior to the Interim Order Decision

3. Statement of case submitted by Suffolk County Council including user evidence forms (which accompanied the original application) considered by SCC in its Report of 11 January 2010
4. Network Rails' statement of case submitted by email on 27 August 2010
5. Submission dated 26 August 2010 from Jones Day

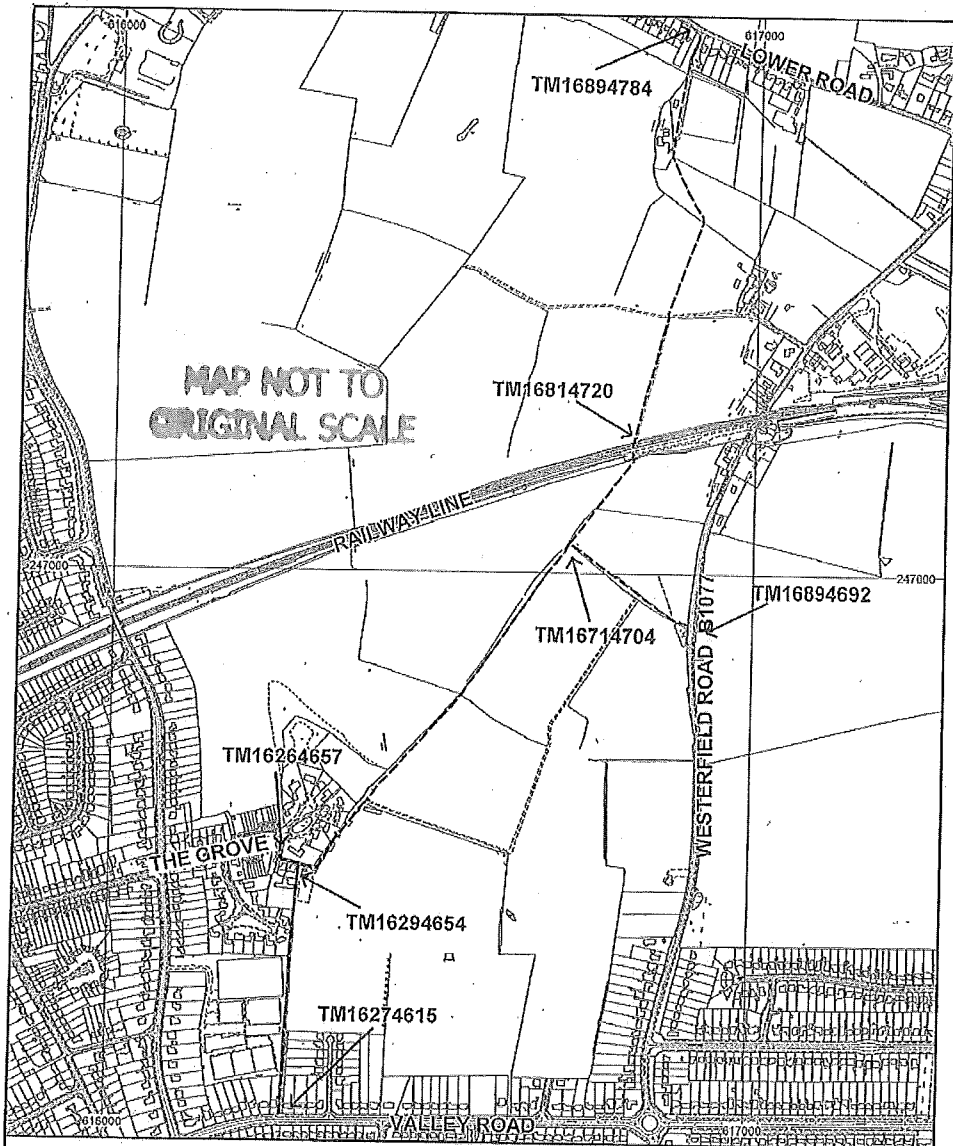
Submitted after the Interim Order Decision

6. Letter to the Planning Inspectorate dated 21 July 2011 from Suffolk CC attaching a copy of Network Rail's list of planned railway crossing closures
7. Statement of case of Mr J Andrews submitted 2 August 2011 with appendices A - T⁵
8. Proof of evidence of Mr J Andrews
9. Statement of case of Westerfield Parish Council submitted 24 August 2011 including letters from Mr J E Gilbert and Mrs N F Parker
10. Proof of evidence of Mr P Miller
11. Letter to the Planning Inspectorate dated 25 August 2011 from Jones Day supporting the proposed modifications
12. Email to the Planning Inspectorate dated 25 August 2011 from Mr G Knight attaching evidence from Mr J Cooper
13. Statement of case by Steve Day, Network Rail dated 19 September 2011

Submitted at the inquiry

14. Proof of evidence of Mr S Day with exhibits 1-7 including extracts from the Ipswich & Bury Railway (Woodbridge Extension) Act 1847, the deposited plans and Book of Reference, & conveyances dated 16 January 1857, 14 September 1888 and 11 March 1901
15. Legal opinion of Malcolm Dowden, Solicitor, provided to Network Rail
16. Early (hatched) Ordnance Survey map (with railway added)
17. Public right of way evidence form completed by Mr R B Whiting
18. Comments on Network Rail's statement of case submitted by Mr Knight
19. Extracts from Mr George's walking diary for 9 January 1981 & survey sketches and extracts from his Fynn Valley walking maps 1st edition April 1981, 2nd edition April 1988, 3rd edition 1991, 4th edition 1996 and 5th edition 2003
20. Copies of extracts from OS 1" maps of 1940 1946 1956
21. Copies of extracts from Ipswich Street maps from 1970s and 1980s
22. Copies of extracts from Ordnance Survey 25" maps dated 1880 and 1905

⁵ Additional copies of some documents were provided by Mr Walsh



PROPOSED PUBLIC FOOTPATH - FONNEREAU WAY - IPSWICH



**Suffolk
County Council**

Lucy Robinson, Director of Environment & Transport,
Endeavour House, 8 Russell Road, Ipswich, Suffolk, IP1 2BX.

----- Proposed Public Footpath

Ordnance Survey Landline 29 March 2001
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