

# Broads Local Access Forum

09 June 2021

Agenda item number 8

## Lost Paths in the Broads

Report by Richard Atkins (BLAF member)

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### Summary

A report highlighting two footpaths within the Broads National Park currently regarded by Norfolk County Council (NCC) Highways as being “lost to the river”. This report aims to highlight this issue.

### Recommendation

For members to discuss the paths being lost within the Broads and agree on proposals for the next steps to prevent more loss or reverse the status of these paths.

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## 1. Introduction

- 1.1. Norfolk County Council, as the local Highways Authority have ascertained that two footpaths within the Broads executive area have been “Lost to the River”.
- 1.2. The two footpaths are Surlingham footpath 1 and Bramerton footpath 5. Both have been discussed for many years with input from the landowner, Highways officers, BA officers, the Environment Agency, the local parish councils and county councillors without resolution.
- 1.3. Appendix 1 provides some background information on these two footpaths that the author has become aware of.
- 1.4. There may be other paths lost or at risk within the Broads area.

## 2. Conclusion

- 2.1. The two footpaths mentioned in the report are currently classed as being “Lost to the River” by the Highways Authority but have not been formally extinguished. This report

is for the attention of the Forum and to open a discussion on any other paths that may also be classified or at risk from falling into the same category.

Author: Richard Atkins

Date of report: 25 May 2021

[Broads Plan](#) objectives: 5.1, 6.1,

Appendix 1 – NCC Highways – “Lost Paths”

**Broads Local Access Forum - 09-06-2021**

NCC Highways - "LOST PATHS"

Richard Atkins

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## Introduction.

Norfolk County Council Highways team have asserted that two paths in the Broadland National Park have been “Lost to the River” . There may be others. This paper gives some background on these two paths namely Surlingham FP1 and Bramerton FP5. It is the view of the author that the assertion by NCC Highways that these paths have been “lost” and that as such they no longer have a duty to maintain them in good repair is unsound. In order to assess the scope of the issue in the Broads National Park area I would like to request that the BLAF submit a formal request to the NCC Highways team to identify all paths shown on the Definitive Map that they assert have been “Lost to the River” and their reasoning against each, so that a plan for their protection can be agreed..

### Background Case 1

#### Definitive Statement

**Surlingham FP1 Footpath No. 1 (St. Mary's Church to Ferry House Public House). Starts from the public highway at St. Mary's Church at its junction with the eastern end of Footpath No. 12 and runs north north-westwards to the south bank of the River Yare. The path then follows the course of the river along this bank to the Ferry House Public House, then turns south eastwards along Ferry Lane passing the north eastern end of Footpath No. 2 to join the public highway.**

#### Overview-

- A request was made to the NCC Highways and Boundaries team (ref 19767) to determine the status of Surlingham FP1 over the section between its junction with Surlingham FP3 and the Ferry House public house. The highway is shown on the definitive map and was formerly part of the Wherryman's way trail. Its position against the current river bank and the route of the “permissive path” is required in order to establish how best to secure and protect public access for the future.
- The research was undertaken by NCC using historic O/S mapping, the definitive map and old aerial photography. The research concluded that the majority of this section of the highway's route as depicted on the definitive map had been subject to riverbank erosion such that it is now covered by water on all but the lowest river levels.
- Whilst the NCC highways team (Lawrence Malyon - Senior legal orders officer @ NCC Community and Environmental Services) have confirmed that the path has not been legally extinguished, it is their assertion that the section of the path in question

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(approximately 300m of a 1.5km path) has been “Lost to the River” and as such the Highway department no longer have a duty to maintain it.

- The NCCs position has been challenged based upon my own research - Highways Act, Ramblers Association “Rights of way a guide to law and practice” and discussion with other PC’s the Broads Authority and at the Parish Paths seminar managed by the Norfolk Local Access Forum
- The NCC have maintained their view that the path is Lost to the River

### **Additional Information -**

At Surlingham PC Meeting held 18-02-2020 the PC unanimously supported the following statement - “Surlingham PC in recognising the outstanding amenity value of footpath No1 and its importance to parishioners, visitors and local businesses are committed to retaining this public right of way and will reject and oppose any attempt to extinguish it either in whole or in part.”

### **Background Case 2**

#### **Definitive Statement**

**Footpath No. 5 (Bramerton Footpath No. 1 to Surlingham Footpath No. 4). Starts from Mill Road, Bramerton Footpath No. 1, ia a gate to the garden of Kingfishers Old House and runs north easterly for 53 metres through the garden of Kingfishers Old House to a gate, then follows the river bank along open marshland, for 430 metres in a north easterly direction, and finally turns south easterly for 45 metres to the north west corner of O.S. No. 134 to join Surlingham Footpath No. 4. The length of the path is approximately 528 metres and its width varies but is not less than 1 metre.**

- Bramerton FP5 was also formerly part of the Wherryman's Way Trail.
- It has not been maintained by the NCC Highways team for many years such that it now has several areas of flooding and is impassable in summer due to overgrown brambles. It has also been deemed by NCC to be “Lost to the River”.
- The landowner took NCC to Norwich Magistrates Court (Case 1445 18-01-1993) under the provisions of section 56 (4) of the Highways Act 1980 which ordered NCC to put the said portion of the Highway into proper repair. This order was met but the path hasn’t subsequently been adequately maintained.

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## Supplementary Information -

- **Highways Team - Extract from e-mail received 18-05-2020 referencing - Maisemore case Mrs Justice Hallet 01-12-2000** “The Maisemore case provides that the weight of authority is against there being any general duty upon highway authorities to repair river banks for the purposes of stopping their footpaths eroding away. Sections 77 and 102 provide a power to do so but not a duty. In any case these sections would appear not to be of relevance any more bearing in mind the contention that the path has been lost”.
- **Ramblers Association** - Advice received 14-05-21 The law is in a rather uncertain state for dealing with this sort of case. By the “Maisemore” case the council means *R (on the application of Gloucestershire County Council) v Secretary of State for the Environment, Transport and the Regions* [2001] JPL 1307. It appears that where the erosion is so gradual that people continue to walk above flood level, a right of way can continue to be established through common law dedication. It also appears that the duty of a highway authority to maintain a way ceases to exist only once the path itself has physically ceased to exist, for example where the bank has completely collapsed. It seems from the Maisemore case that it will be a question of fact and degree, to be determined by a court, as to whether the duty really has ceased to apply. It seems that where the erosion, or the flooding of the path, is gradual, the court is entitled to find that the duty still applies. It could well be that a section 56 notice case would succeed here. We suppose it would take a technical expert to be called as an expert witness in order to persuade the court of the continuing existence of the duty to maintain.

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It's interesting that it was the landowners themselves who brought section 56 proceedings in the past. Does this mean that the landowner is sympathetic to the issue? If so, then it would be open to the landowner to dedicate a right of way on their land, further away from the river. Or, would the highway authority be persuaded to make an order under section 26 of the Highways Act 1980 creating a new right of way away from the river? – this provision empowers the making of such an order where it appears to a council that there is a need for a public footpath (or bridleway, or restricted byway), having regard either to the extent that the new path or way would add to the convenience or enjoyment of a substantial section of the public, or would add to the convenience of persons resident in the area. It sounds like both, but certainly the first, of those criteria engage here, in that the flooded path had been very popular, and led to a specific public place (namely a pub which we should think is a popular one). This is a discretionary power, and councils can be reluctant to use it, not least because compensation can be payable, though our limited experience suggests that in a case like this (where there was a path already which has become unusable) it is unlikely to be very great. So it may be that what is needed is a good bit of political lobbying of elected councillors, to get them to use the power, rather than a legalistic approach with an esoteric case about whether the old path is still a public right of way or not.

## **Conclusion**

- **Riverside Paths are a rare and extremely important asset in the Broads National Park.**
- **These paths are particularly vulnerable due to the recent increased footfall on their soft and muddy surfaces and rising water levels throughout the Broads.**

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- **The current NCC Highways policy means that Public Rights of way are effectively “silently disappearing” without the scrutiny and opportunity to challenge afforded by the Highways Act extinguishment process.**
  - **Continued lack of clarity surrounding NCC Highways duty to maintain these paths and their legal status as Public rights of way is inhibiting attempts to repair them.**
  - **It is important to understand how many paths depicted on the Definitive Map are deemed to have been “Lost to the River” or at risk of being labelled so by NCC Highways.**
  - **I request that the BLAF submit a formal request to the NCC Highways team to identify all paths shown on the Definitive Map that they assert have been “Lost to the River” and their reasoning against each, so that a plan for their protection can be agreed.**