

|  |
| --- |
| **Order Decision** |
| Site visit made on 25 May 2021 |
| **by C Beeby BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 8 October 2021** |

|  |
| --- |
| **Order Ref: ROW/3224099** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Somerset County Council (No.2) Modification Order, 2016.
 |
| * The Order is dated 15 July 2016 and proposes to modify the Definitive Map and Statement for the area by recording public footpaths CH 33/34, CH 33/35 and CH 33/36 along Butts Quarry Lane and Higher Easthams Lane as restricted byways, as shown in the Order plan and described in the Order Schedule.
 |
| * There were three objections and one representation outstanding when the Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
 |
| **Summary of Decision: The Order is not confirmed.** |
|  |

Procedural Matters

1. The Definitive Map Modification Order (DMMO) was scheduled to be determined by means of a public inquiry that was due to be held on 15 September 2020. However, the introduction of restrictions due to the Covid-19 pandemic meant that a physical event of this nature could not be held as planned. Thus, in view of ongoing pandemic-related restrictions, the written representations procedure (including an accompanied site visit by the Inspector) was selected as the most appropriate means to progress the matter without delay.
2. I am grateful to all concerned for their assistance in making this alternative arrangement. For my inspection of the Order route I was joined by Mr Saint on behalf of Somerset County Council (the Council), Ms Bucks (applicant) and Mr Danks (objector). Mrs Masters-Harding (objector) attended at the start of the site visit.
3. I am satisfied that I am properly able to make a determination on the evidence before me. I have taken into account all of the submissions in reaching my decision.
4. In writing this decision I have found it convenient to refer to points marked on the Order Plan. I therefore attach a copy of this plan.
5. The Order was made following a successful appeal under Schedule 14(4) of the 1981 Act against a decision by the Council not to make a DMMO. Notwithstanding the position at the Schedule 14 stage, in this decision I am required to apply the “balance of probability” standard of proof. The burden of proof is on those who assert the existence of restricted byways.

The Main Issues

1. Somerset County Council made the DMMO under Section 53(2)(b) of the 1981 Act on the basis of events specified in sub-section 53(3)(c)(ii). As a result, the main issue is whether the discovery by the Council of evidence (when considered with all other evidence available) is sufficient to show that highways shown in the map and statement as highways of a particular description ought to be there shown as highways of a different description.
2. As this Order is concerned with possible unrecorded vehicular rights, it is also necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006, which extinguished rights of way for mechanically propelled vehicles subject to certain exceptions.

Reasons

***Background***

1. The Order route comprises three sections: public footpath CH 33/36 annotated A-B on the Order map, public footpath CH 33/35 annotated B-C and public footpath CH 33/34 annotated C-D.
2. Documentary and landowner evidence has been submitted in support of the Order.

***Documentary Evidence***

*Map of the estate of BM Donne*

1. The Order route is shown on this map from approximately 1772 between double solid lines which are crossed near Point D by the continuation of a land boundary, perhaps indicating the presence of a gate.

*Ordnance Survey (OS) Maps*

1. Some of the public footpaths which currently appear in the vicinity within the Definitive Map and Statement (DM&S) are shown by single or double pecked lines on the OS maps. A proportion of these are annotated “F.P.” or “Path”. However, the Order route is generally depicted by double solid lines and unannotated.
2. The 1807 Ordnance Surveyor’s Drawing and 1809-1811 Old Series OS Map show section A-C on a different alignment to its current location, although C-D is similar. The route is depicted by double solid lines.
3. The route is shown between double solid lines and uncoloured on OS reprints of 1898-1900 and 1919. Modern day carriageways are depicted by an orange colouring. Public footpaths 33/37 and 33/38, which appear to be shown on the earlier Tithe map, are not shown.
4. The 1 inch to the mile OS Map of 1919 depicts the route between double solid lines and uncoloured. Modern carriageways such as Yeovil Road are coloured orange or red. According to the key the route is a minor road. The key further states that private roads are uncoloured.
5. The 1:2500 1929 OS Map shows the route between double solid lines. Butts Quarry Lane is annotated with a parcel number and an acreage measurement, although this is likely to refer to both lanes as they form a continuous route on the map.
6. The 1:25,000 OS Map which was compiled from sheets revised over the period 1901-1928 shows the route between double solid lines, and uncoloured. Modern day carriageways are coloured orange or by orange dashes.
7. The 1 inch to the mile 1946 OS Map shows the route between double solid lines. It is depicted according to the key in the same manner as “minor roads in towns, drives and unmetalled roads”. Footpaths and bridle paths are shown by a pecked line.
8. The 1:10,000 1978/1982 OS Map shows the names of the routes, and additionally marks section A-B as a track.

*Greenwoods Map*

1. This map is dated 1822, and depicts the approximate Order route according to the key as a “cross road”. The track to Easthams Farm is shown in the same way. The appellant has submitted copies of advertisements for maps of other English counties produced by C Greenwood, amongst others. One of these states that “public and private roads….will be correctly exhibited”.

*Second Quarter Map of the Manorial*

1. This map is dated 1835, and is taken from Donne’s Survey of 1772. The Order route is shown uncoloured between double solid lines and a number of gates are marked off it. Yeovil Road is coloured yellow. The map’s purpose is unknown and it marks Higher Easthams Lane by the name “Fox Ditch Lane”, a name which is not associated with the Order route in any of the other evidence and which is attributed to a route at a nearby different location in OS mapping.

*Tithe records*

1. Two maps showing land which was subject to the tithe rent-charge include the land crossed by the Order route. The “Map of the Rectory or District of Easthams within the Tithing of Easthams in the Parish of Crewkerne” is dated 1839 (the 1839 Map). The “Map of a District comprising all the Titheable Lands within the Parish of Crewkerne in the County of Somerset” is dated 1844 (the 1844 Map).
2. The 1839 Map shows only section C-D of the Order route, and a short part of section B-C. The route is shown by double solid lines, ungated and with no parcel number. Whilst the map extract has only limited colouring, it is uncoloured. It does not appear to form private access to buildings at the modern-day Higher Easthams Farm and cottages, as a separate track to that property is depicted by double pecked lines running south from Yeovil Road. Gates into some adjacent fields are marked. A route along a similar line to public footpath 19/21 is marked, apparently by a single pecked line.
3. On the 1844 Map the Order route is shown enclosed by double solid lines, ungated, and with no parcel number. It appears uncoloured, although it is not possible to discern any colouring on the map extract as a whole. The route seems to provide access to the numbered land parcels which lie adjacent to it, due to the apparent presence of gates marked at some points. Two similar copies of this map are submitted, one of which is from the National Archives. This copy additionally depicts the definitive footpath 33/37 by a dashed line parallel to a boundary.

*Estate Map*

1. The Map of an Estate (Property of Mrs Donisthorpe) is dated 1846. It shows the route between double solid lines, ungated and apparently coloured in a similar tone to Yeovil Road. Gates appear to lie off the route at some points. The start of the track to Easthams Farm and public footpath 19/27 is shown gated where it leaves the Order route. According to the key the route is a road, which is the only type of route depicted in the key.

*Highway District Map*

1. This map is dated 1862. The Order route is shown enclosed by double solid lines and appears uncoloured. Routes which are now carriageway such as Yeovil Road are coloured orange or red. The “slip road” from which Higher Easthams Lane travels south is marked A and B at its ends, and appears coloured grey. The Order route is not recorded as liable to be maintained by the Highway Board.
2. Some routes recorded in the DM&S as public footpaths such as 19/27, 19/29 and 33/37 are not depicted, whilst other definitive public rights of way are. Dashes adjacent to the route correspond approximately with the locations of some of the gates marked on the Tithe maps.

*Highway Board Map*

1. This 1862 map shows Yeovil Road coloured orange, the “slip road” in red and the Order route by a pale blue or green colouring. The key states that “parish roads” are coloured red, “turnpike roads” in orange, “occupation roads” in green and “church paths” in yellow. Dashes are marked adjacent to the route.

*Highways Board Minute Books*

1. The 1873 extract concerning Eastham’s Farm is locationally imprecise and therefore it is not possible to say with sufficient certainty that it relates to the Order route.
2. The 1883 extract concerning Higher Eastham’s Farm concerns “the condition of the roads near” the house. The authority’s surveyor is recorded as having assisted in their repair.

*Exchange of Lands Agreements*

1. These documents concern exchanges of land carried out in 1871 and 1880. Both documents show the Order route between ungated double solid lines and coloured sienna in the same way as Yeovil Road.

*Crewkerne Urban District Council Highways Committee Minute Book*

1. Minutes of a meeting held in 1895 record a resolution to seek legal advice on the matter of whether the Council was liable to repair occupation lanes. A subsequent legal Opinion states that an occupation lane was a way formed for the convenience of the owners of land which was not publicly repairable. It then sets out the circumstances in which an occupation lane may become a highway.

*Ordnance Survey Name Book*

1. This is dated 1901. The Crewkerne Urban District Council Surveyor provided the authority for the descriptions.
2. The authority for the recorded modes of spelling is listed as “Form 230 attached” for Butts Quarry Lane. The lane is described as “a road extending from Yeovil Road to Higher Easthams Lane”.
3. The authority for the spelling of Higher Easthams Lane is also recorded as “Form 230 attached”. The lane is described as “a road extending from junction of roads a short distance N.W. of Lower Eastham’s Farm to a sharp turn westward where it joins Butts Quarry”.
4. Descriptions used for routes recorded in the Name Book include Public Road, Road, Occupation Road, District Road, Footpath and Private Road. Whilst many of the routes described are modern-day carriageways, a number are currently recorded as public footpaths.

*Finance Act 1910 records*

1. On the map most of the route is excluded from surrounding land parcels. However, the eastern half of section B-C is included within parcel number 1582. Some of the land parcels which lie off section A-B are unannotated with colour, or there is a gap in the colouring. The boundary of a land parcel marked in green extends over the Order route approximately halfway along section C-D.
2. The accompanying Field Book records a deduction from the tax of £175 for public rights of way or user in respect of hereditament 1582 (Eastham’s Farm). The farm is described as “a compact dairy and grazing farm close to Town of Crewkerne approached by a private road of a rough nature…a number of footpaths”.

*Bartholomew’s Map*

1. This 1927 map shows the Order route as uncoloured between double solid lines. The key sets out that “the uncoloured roads are inferior and not to be recommended”. It further states that “the representation of a road or footpath is no evidence of the existence of a right of way”.

*Aerial photograph*

1. This is dated 1946 and shows the Order route to be an enclosed and defined way.

*Parish Survey records*

1. The parish survey was the first stage in the production of the DM&S. This survey was carried out in 1950. It records the route as a footpath. Points A-C are described as a “green lane of cart width”. Points C-D are described as following “a well metalled lane for whole length”. The route is shown coloured brown on the parish survey map. The survey was approved by the Clerk to the Crewkerne Urban Council.

*Draft Map*

1. This document from a later stage in the DM&S process is dated 1954. The route is coloured purple/pecked green. Purple represented a public footpath, and pecked green a Road Used as a Public Path (RUPP), which according the National Parks and Access to the Countryside Act 1949 was “a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used”. There were no objections to the draft map.

*Provisional Map*

1. This is dated 1962, and shows the route coloured purple.

*Definitive Map and Statement*

1. The route is coloured purple on the map, and given path numbers 33/34, 33/35 and 33/36. These were originally described in the typewritten accompanying statement as “C.R.F.” (public carriage or cart road or green unmetalled lane mainly used as a footpath), however this has been struck through by hand and replaced with the word “footpath”.

*Other records*

1. The 1969 Chard Urban District Council map, List of Streets information and INSPIRE online mapping extract do not provide any additional information regarding the status of the Order route.

*Landowner Evidence*

1. The owner of land crossed by sections A-B-C of the Order route has submitted evidence which states that they have owned the land for 7 years and believe the Order route to be a footpath.
2. An owner of land crossed by or adjacent to section A-B for 23 years has submitted evidence which states that they have owned the land for 23 years and believe the way to be a byway open to all traffic.
3. The owner of adjoining land has submitted evidence which states that they believe that Butts Quarry Lane is a bridleway, and that this is shown on Land Registry documents from the early twentieth century.
4. The owner of land to which the section A-B forms access has submitted evidence which states that they understand the route to be a private road and a public footpath.

Reasoning

1. The evidence consistently depicts the Order route in a different manner from some routes which were later recorded in the DM&S as public footpaths. The question before me is consequently whether this difference in depiction reflects the existence along the route of public rights of a higher status than those recorded, or whether it may be explained by the coexistence of public and private access.
2. The Order route is enclosed on one or both sides by mature hedgerow and banks. It currently provides access to a number of field entrances, and this also appears to have been the case historically according to the documents considered.
3. The OS maps demonstrate the existence of the route as a physical feature over many years. However, they do not purport to record the status of the ways shown.
4. The key which accompanies the extract from Greenwood’s Map provides for only two classifications of route: turnpike roads and cross roads. The definitive footpath 33/40, to the south of the Order route, is shown as a cross road. The track leading to Easthams Farm is also shown in this way, although it is not currently a recorded public right of way and the other documentary evidence before me suggests that it is a track leading to a dwelling. The approximate Order route is also shown as a cross road. Given the limited classifications of route shown on the map and the variation in the modern-day status of the cross roads shown, the map provides evidence only of the existence of the Order route on the ground at the time. It does not illuminate its status.
5. The Second Quarter of the Manor Map ascribes the name “Fox Ditch Lane” to part of the route. However, this is the name of another route in the vicinity according to some of the evidence and the Council’s records. On balance, this name consequently appears to be an error, which brings into question the accuracy of the map. Furthermore, there is no indication that the map was produced with the purpose of depicting highways. As a result, I attach only minimal weight to the relevance of this document.
6. No key or apportionment is provided with the submitted Tithe documents. Additionally, there is no annotation on the map extracts to provide any indication of the believed status of the route. Whilst the extracts show the physical existence of the route, Tithe maps make no distinction between a public and a private road. Their object is to show what is titheable, and roadways are marked on them as untitheable pieces of land whether they are public or private, or both. As a result, the Tithe maps do not provide clear evidence of the existence of a public road along the route at the dates concerned.
7. The only status of route which the Donisthorpe estate map records, according to the key, is road. The Order route is shown in this way, as is Yeovil Road. The map shows the physical existence of the route, but was not produced for the purpose of depicting highways and is of limited evidential value as a result.
8. Whilst the Highway District map depicts the Order route, the Board is not recorded as liable for its maintenance. The reason for the route’s inclusion on the map when it is not publicly maintainable is unclear.
9. The Highway Board carried out some repairs to “the roads near” Higher Eastham’s Farm in 1883. Nevertheless, this evidence is locationally imprecise. Moreover, it is preceded by a Highway Board map which records the route as an occupation road, and followed by evidence which shows that the Council later sought clarification on any liability to repair occupation roads. This last evidence suggests that the Council may have been carrying out maintenance of routes including those which it considered to be occupation roads. Furthermore, footpaths were also publicly maintainable at the time and the repair evidence is silent on whether the “roads” might have been considered to carry this status. For these reasons the Highway Board evidence does not provide unequivocal support for the hypothesis that the board maintained the route at the time because it was considered to carry public vehicular or equestrian rights.
10. The exchange of lands agreements extracts are limited and it is not possible to say with any clarity why a private easement is not recorded to the land in question. The existence of public vehicular rights could be an explanation, but there could equally be other reasons. The document was not produced for the purpose of depicting the status of the routes shown.
11. Given the variety of route descriptions used and the variation in their modern-day status from carriageway to footpath, it is difficult to draw conclusions regarding the believed status of the routes concerned from the OS Name Book.
12. An extract from instructions to OS surveyors from the start of the twentieth century is provided. This sets out that footpaths should be marked “F.P.” so as to avoid “their being mistaken on the plans for roads traversable by horses or wheeled traffic”. Nevertheless, OS maps generally provide a reliable indication of particular physical features when the land was surveyed. They do not set out to record the status of any paths or tracks shown. The depiction of an enclosed lane without the “F.P” initials is consequently of limited value in support of the way being a vehicular highway.
13. The boundaries of hereditaments on the Finance Act map have been marked relatively clearly, suggesting that care was taken in its production. Nevertheless, a satisfactory explanation for matters such as the lack of colouring of some parcels and the extension of colouring over the Order route at some points is not apparent. These leave aspects of the approach to producing the map equivocal, and reduce the evidential weight which I am able to apply to it.
14. Whilst the majority of the route is shown on the Finance Act map as excluded from surrounding land parcels, a section of it is shown to lie within parcel 1582. This reduces the ability of the Finance Act evidence to support the assertion that the route is a vehicular highway, because it introduces ambiguity regarding the ability of public vehicular traffic to pass and repass over the entirety of the route at that time.
15. The submission that parcel number 1582 is the only land parcel where ownership is the same on both sides of the route fails to account for the exclusion of a section of the southern end of Higher Easthams Lane from the same parcel. Hence it does not adequately explain the difference in the recording of the Order route through parcel 1582.
16. It is unclear whether deductions for “public rights of way or user” claimed in respect of the parcel concerned relate to the Order route, other public rights of way which cross the land, or all of these. The existence of a vehicular highway is one explanation which could account for the route’s exclusion from surrounding land parcels. Nevertheless, the existence of highways was incidental to the Finance Act and there may be other reasons for its exclusion.
17. I note the submission that case law[[1]](#footnote-1) provides support for an interpretation of Bartholomew’s Map as showing a public carriageway along the route. Nevertheless, I treat this submission with some caution as that case considered different map editions from the 1927 map submitted in this case, with different accompanying legends. Furthermore, the judgment notes that “one cannot place much weight on Bartholomew’s maps, or indeed any map which does not have the positive function of identifying public carriageways”.
18. The uncoloured road designation on the Bartholomew’s Map relates to the condition of the route at the time of the survey. There is nothing to suggest that the legal status of roads shown on the map was investigated. Furthermore, the map carries a disclaimer that “the representation of a road or footpath is no evidence of the existence of a right of way”.
19. The aerial photograph shows the physical existence of the route at the time, but does not provide evidence of its status.
20. It was open to the parish surveyors to record the route in their survey cards as one carrying additional rights such as a bridleway or RUPP, however it was recorded as a footpath.
21. Section 28 of the National Parks and Access to the Countryside Act 1949 required the Town Council to consider the contents of the parish survey prior to the publication of the Draft Map in 1954, which took into account all evidence discovered. It is therefore likely that the alteration in the recording of the route from a footpath in the survey to a footpath/RUPP in the Draft Map arose either as a result of the Town Council’s checking of the survey information, or from evidence supplied by another party.
22. The Ministry of Town Planning’s Circular 91, paragraph 5 of 30 June 1950 advised authorities that “all the paths likely to come forward to serious consideration should, if possible, be included in the draft map and border-line cases should be decided in favour of inclusion rather than omission at the first stage”. It is consequently possible that the route was considered such a border-line case, giving rise to its dual depiction in the Draft Map.
23. Public notice was given of the Draft Map and Statement, and anyone could object to their contents. The equivocal depiction on the Draft Map of the route as both a footpath and a RUPP was open to challenge by anyone who considered that it carried the “higher” status of the two. However, no objections were received to the Draft Map.
24. It is suggested that case law[[2]](#footnote-2) supports the submission that the route is part of the local road network. That case suggested that historic use of the lane concerned must have been “either…as part of a network of highways (i.e. as a thoroughfare) or they were visiting some particular place simply as members of the public”.
25. The Order route forms a loop which leaves and then rejoins Yeovil Road. There are no submissions before me to suggest a reason why the public might have historically elected to leave the Yeovil Road in carts and wagons to follow a longer and apparently less suitable route for such use and then to rejoin Yeovil Road. Definitive paths which adjoin the route to the south have the status of footpath, so that the Order route would have formed a connecting route to these for pedestrian use only. Thus, the route has no public vehicular destination other than the same section of highway as that from which it departed. As the route is at least twice the distance of that between Points A and D, it forms a significantly more circuitous route than use of Yeovil Road. There is no suggestion that it offered, for example, a less founderous way than Yeovil Road in wet weather. For these reasons the route is consequently unlikely to have formed a public vehicular thoroughfare which formed part of a network of highways as envisaged by the *Fortune* case.
26. Turning to the other considerationreferred to in *Fortune*, there is no evidence that members of the public were using the route to visit some particular place. Thus, the extracted points from the *Fortune* case do not provide support for confirmation of the Order before me.
27. Case law[[3]](#footnote-3) referred to in submissions concerning the meaning of the term “lane” defines the term as usually meaning a minor road between one main road and another. However, the definition distinguishes between two main roads. In this case the route returns to the same section of road from which it departed. Thus, whilst the Order route is named as a lane, it is materially different from the type of route referred to in the cases. They consequently do not provide support for confirmation of the order.
28. A parish boundary exists along Higher Easthams Lane. I concur with the submission that many such administrative boundaries follow relatively permanent landscape features. The lane is a track between banks and hedgerow of some age, and there is no dispute that it has historically carried public rights. Nevertheless, the coexistent parish boundary does not assist in ascertaining the status of these.
29. Whilst I note the comparison of the numbers of different types of definitive rights of way in the area, the likelihood or otherwise of this providing support for the existence of unrecorded public vehicular or equestrian rights along the route is conjecture. As a result, it cannot provide support for the order before me.

**Other Matters**

1. Whilst I acknowledge concerns raised regarding the suitability of the route for equestrian use, the effect on wildlife, maintenance of the route and the Council’s approach, I cannot give them weight in reaching my decision as they lie outside the criteria set out within the relevant legislation.

**Conclusion**

1. The Order route has physically existed for centuries and the documents indicate a level of public access over it historically. Whilst the Finance Act documents could suggest public vehicular rights over part of the route, the majority of the evidence from before and since then does not demonstrate the existence of any such rights. The evidence is consequently equivocal concerning any “higher” public rights than those currently recorded in the DM&S. For this reason, the application fails to pass the balance of probability test. Thus, having regard to all the evidence before me, I conclude that the DMMO should not be confirmed.

**Formal Decision**

1. I do not confirm the DMMO.

*C Beeby*

INSPECTOR



1. Commission for New Towns & Worcestershire County Council v JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3 [↑](#footnote-ref-1)
2. Fortune and others v Wiltshire Council and Taylor Wimpey [2010] EWHC B33 (Ch) [2012] EWCA Civ334 [↑](#footnote-ref-2)
3. A-G v. Council of the Metropolitan Borough of Woolwich [KBD] JP & LGRR, 5 October 1929 and *Fortune* [↑](#footnote-ref-3)