PINS Logo

|  |
| --- |
| **Order Decision** |
| Hearing opened on 21 June 2021 |
| **by Heidi Cruickshank BSc (Hons), MSc, MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 11 April 2022** |

|  |
| --- |
| * **Order Ref: ROW/3224688** |
| * This Order is made under Section 53(2) of the Wildlife and Countryside Act 1981 and is known as North Somerset District Council (Upgrade part of Footpath AX20/8 to Bridleway AX20/9 and addition of Bridleway AX20/9 Locking Head Drove, Locking) Definitive Map and Statement Modification Order No. 5 2018. |
| * The Order is dated 13 April 2018 and proposes to upgrade a footpath to the status of bridleway and record a bridleway on the Definitive Map and Statement. Full details of the routes are set out in the Order Map and Schedule. |
| * There were two objections outstanding when North Somerset District 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.** |

Preliminary Matters

1. This Order undertakes to carry out two modifications to the Definitive Map and Statement (DMS) for the area: to add a bridleway between points A – B – C, as shown on the Order map; and to upgrade to bridleway the section of Footpath AX20/8 (FPAX20/8) running between points C and D to the status of bridleway. This Order arises from a direction following an appeal under Schedule 14 of the Wildlife and Countryside Act 1981 (WCA).
2. In objection it was noted that at the Schedule 14 stage the test of reasonable allegation, under section 53(3)(c)(i) would only apply to the section to be added to the DMS. A different test under section 53(3)(c)(ii) should apply in relation to the test of whether a higher right subsisted over the already recorded footpath. The Order is made by refence to those two sections and, given that my decision under Schedule 15 to the 1981 Act must be only on the matter of whether or not the claimed rights subsist over the route I am satisfied that no prejudice has arisen from the treatment of the matter at any earlier stage.

Procedural Matters

*The application and related matters*

1. On 22 March 1994 Mrs V Craggs of Woodspring Bridleways Association (WBA) made an application to Avon County Council under WCA for the ‘*Upgrading to Bridleway/Byway Locking Head Drove*’. Following Local Government reorganisation the application passed to North Somerset Council, the Order making authority (the OMA). The application was investigated and a report to the relevant Sub-Committee on 28 March 2017 recommended, and it was agreed, that no Order should be made.
2. The successful appeal against that decision led to the making of the Order by the OMA, who then objected to it. An objection was also made on behalf of two affected landowners. The case in support of the Order was led by Axbridge Bridleways Association (ABA), which I understand to be the renamed WBA. At the close of the hearing ABA confirmed that they supported the status of restricted byway, rather than bridleway.

*Hearing matters*

1. This case was due to be heard on 1 April 2020 but the introduction of Covid-19 Government Health Restrictions meant that the hearing was postponed at relatively short notice. Rearranging the event to run as virtually meant that instead of travelling, participants were able to take part from their own home, office or other location that best suited them. Case conferences were held to clarify technical issues and timings on 22 March 2021 and 19 April 2021.
2. I opened a hearing into the Order on 21 June 2021, which was adjourned to, and closed on, 22 November 2021. The resumed event was organised by the OMA, following a change in procedure on the part of the Planning Inspectorate to return organisational matters back to authorities. I thank them for their assistance on this.
3. The Start Notice for the case included the timetable and statements of case were submitted to the Planning Inspectorate within that timetable, that is by 5 February 2020. Through the course of rearranging the hearing a number of late documents were submitted, which is unhelpful in management of any event of this type.
4. I made an unaccompanied site visit on 18 May 2021. No-one requested a further site visit following the close of the hearing.

*Costs*

1. A costs application was made at the close of the hearing on 22 November 2021. That application is dealt with in a separate decision.

Main issues

1. The Order is made under section 53(2) of WCA by reference to: section 53(3)(c)(i) which refers to whether a right of way which is not shown in the Map and Statement subsists over land in the area to which the map relates; and, 53(3)(c)(ii) which relates to whether there has been a discovery of evidence which, when considered with all the other relevant evidence, shows that a highway shown in the DMS as a highway of a particular description ought to be there shown as a highway of a different description.
2. This case relies upon the common law, with the documentary evidence said to show that dedication had taken place. A highway was argued to have been accepted by the public since beyond memory with the legal presumption that, at some time in the past, the landowner dedicated the way to the public either expressly, with evidence of such dedication now being lost, or impliedly, by making no objection to use of the way by the public. There were three distinct sets of documents: Inclosure Acts and Awards and documents arising prior to and subsequent to those processes. The burden of proof at common law lies in this case with ABA.
3. In objection it was argued that the documentary evidence did not show that any public rights existed other than those already recorded on the footpath section, FPAX20/8. It was said that the documents could and should be read to show that any higher rights over the Order route related only to private rights.
4. Regarding the support for the status of the route to be recorded as restricted byway, the provisions of the Natural Environment and Rural Communities Act, 2006 (NERC) would be relevant. Section 67(1) of NERC sets out that:

*An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement–*

*(a) was not shown in a definitive map and statement, or*

*(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.*

*But this is subject to subsections (2) to (8).*

1. There was no argument that any of the exceptions set out in subsections (2) to (8) of NERC Act applied and so, if satisfied that there were historically vehicular rights over the Order route, restricted byway would appear to be appropriate.
2. In considering such matters it is necessary to keep in mind the requirements of section 32 of the Highways Act, 1980 (HA80), which sets out in relation to *Evidence of dedication of way as highway* that:

“*A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced*.”

1. This decision needs to consider whether to confirm the Order as made, to confirm subject to requested modification to the recorded status or not to confirm the Order. The decision will be made on the balance of probabilities, taking account of the submitted evidence and caselaw.

Reasons

*Description*

1. Locking Head Drove lies to the north of the village of Locking and runs generally north-easterly from the A371 to Churchland Way. It is situated south-east of the A370, which bypasses Weston-Super-Mare. The Order route runs between two cul-de-sac sections of highway recorded on the list of highways maintainable at public expense. This list, often referred to as the list of streets (LoS), arises from duties under section 36(6) of HA80. Those sections which are recorded on the LoS are generally tarmac and appear in similar condition to other local minor roads.
2. The Order route runs through an area treated as part of the farmyard of Drove Farm at point A passing through a locked gate, which was unlocked for the site visit. Note that points A – D are those shown on the Order map. Other letters relate to letters as used in the Inclosure Awards and maps.
3. The section between here and another locked gate near Locking Head Farm runs between drains, which are common in the Somerset levels. There is a hardened surface with grass growing in the centre between tyre tracks for most of the length. Locking Head Farm lies to the south-east, gaining access from the Order route, where it is already recorded as a footpath on the DMS. A Motte & Bailey castle is marked on the map to the south of Locking Head Farm.
4. The general area has been subject to development with roads, businesses and houses over the years. The M5 motorway now runs to east of the area. RAF Locking was formerly situated to the east of the Order route.

*Pre-Inclosure evidence (<1800)*

*Society of Merchant Venturer’s Map, 1745 (also referred to as the Wilstar map)*

1. A photograph of part of the Society of Merchant Venturer’s (SMV) Map, understood to be held in the Merchant Venturer’s Hall, Clifton, was submitted, with the OMA providing a photograph of the full map on request. The title states it to be ‘A Survey of the Manor of Locking’. The ‘Remark’ sets out that it shows:

*‘All the Lands marked with red are Hospitall Lands*

*All the Lands marked with Yellow are the severall intermixed Freeholds*

*All the Lands with Gray are either Church or glebe land*

*The green is Locking moor, with the roads and Wasts’.*

1. The Order route was shown in green, with the land to the west annotated ‘Locking Moor’ and the route in and through Locking village running from the south-east corner of the moor. To the north of Locking Parish is World, or Worle, Parish. I agree with the ABA that the part of the route which continues north from point D, and which I understand now passes under the A370, was annotated ‘World Road’.
2. The section east from Locking Head Cottages, shown on the Order map to the north of point D, was annotated and, although difficult to read it seems that this and the entry at the bottom of the map say, ‘Field Road’, which may indicate roads only to fields or alternatively roads which continue and pass through fields. To the south of Locking the road to Hutton and Elbrow, now Elborough, is annotated as a road ‘to’ those destinations and the south-eastern map edge shows ‘Hutton to Banwell’, part of which now passes underneath the M5. This demonstrates a difference in the way roads were identified.
3. In objection it was argued that the route running south from point D, through Locking Head Farm, past the Motte & Bailey, would have been the connecting route for Worle to Locking. That route differs, not being coloured green throughout, which the key indicates to show ‘roads’, although there was a feature annotated in red in that field.

*Day & Master’s Map, 1782*

1. The map shows a stub of road running north from Locking and a stub south from Worle with the central area part of the ‘Moor’. ABA suggested that there was a route over common land, which perhaps was not passable at all times of the year. It is surprising that the Order route was not shown, given that less than forty years earlier it was shown on the alignment, which has a strong correlation to the existing alignment and field layout, some 275 years later.
2. The OMA submitted information relating to the production of maps by Day and Masters, with an advertisement in the Bath Chronicle and Weekly Gazette, 21 October 1773. This set out that they would produce a map showing many features, including public and private roads.
3. It was argued by ABA that the cartographers would not have produced a commercial map showing roads for public use and roads for private use but that the term ‘private’ in this context meant a route which was private for repair, not exclusively for use by the frontagers. The map ‘Explanation’ does not refer to public and private roads but gives descriptions to aid travellers, such as ‘Turnpike Roads…’ or ‘Open Roads over Commons or Downs’.
4. [*Dunlop*](https://horizonweb.planninginspectorate.gov.uk/otcs/cs.exe?func=ll&objId=29766766&objAction=browse) *v SSE and Cambridgeshire County Council (QBD) [1995] 70 P & CR 307* (*Dunlop*) sets out, “*In my judgment there was a true distinction, certainly into the eighteenth century, between private or common roads and public roads or highways…so far as rights of access were concerned, these differed by definition, being limited in the case of a private or common way to a class which might be defined by any of a number of factors or criteria. By the beginning of the nineteenth century, however, it appears that legal usage had changed so as to conflate common ways with highways and to distinguish these from private ways: see Hawkins Pleas of the Crown, 19 and Tomlins' Law Dictionary*….”.
5. This was a route intrinsically linked to the common land, according to the SMV map. Prior to enclosure common land was that which was left for local people to use with respect to their rights of common. It would be most likely to be used by local people in the terms referred to in *Dunlop*, which provides a useful overview of what may be taken from older cases also referred to by ABA, such as *Katherine Austin's case (1683) 1 Ventris. 189* and *R. v. Saintiff (1704) 6 Mod. 255.* This also accords with the argument that private at one time meant something different to understanding today, being for example ‘Of a city or town’ or a road maintained at private expense, to which public access may or may not be limited.

*Time immemorial*

1. ABA claimed that that route should be seen as having existed from time immemorial due to historical links between the Manors of Locking and Worspring (now Woodspring Priory), north-west of the Order route, with the route across the moors being the most direct route between them. Locking Head Farm was noted to be close to the site of a mediaeval Motte & Bailey castle, with another in sight at Castle Batch, Worle, north of the Order route. As the OMA indicate, there is no evidence that the Order route was part of such a public network.

*Conclusion*

1. There is a conflict in this evidence with the earlier SMV map indicating a physical route in the same way as other routes, which are now recorded as highways. The land crossed by the Order route appears to fall into the category of ‘*roads and wasts*’. However, the later map showed all this area as ‘Moor’, despite the evidence of enclosure of at least some of this land at an earlier date.
2. People had to be able to travel from place to place and the Order route provides an obvious link for that purpose, although the jump to refer to it as a highway from time immemorial is simply not supported by this limited early evidence. The area sits within the levels, which would be a flood plain at certain times, therefore the suggestion that perhaps it was not passable at all times – and so was not shown on the Day and Masters map - is not unreasonable. However, the cartographic convention referred to in *Commission for New Towns & Worcestershire County Council v JJ Gallagher Ltd* [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3 (*Gallagher*) is more likely; that being “…*not marking a non-metalled highway (or, presumably, private road) when it crossed a common or a heath*.”
3. There was a route here from at least the mid-eighteenth century, which was a ‘road’, however, on the balance of probabilities that related to use as a private or common way, open to a limited section of the public, rather than as the King’s highway for all men, *et communis strata.* The suggestion of a highway from time immemorial is speculative rather than supported by the evidence. It is possible that any public route ran on the ‘Ancient Road’ south-east of the Motte & Bailey at Locking Head Farm as much as it may have run on the Order route.

*Inclosure evidence (early 1800s)*

1. Between 1545 and 1880 the farming of scattered arable strips of land and grazing animals on common pasture was replaced as landowners sought to improve productivity. The inclosure process began by agreement but by the early eighteenth century, a process developed by which a Private Act of Parliament could be promoted to authorise inclosure where the consent of all those with an interest was not given. The relevant Act would set out the powers of the Inclosure Commissioners with the Award then setting out how the land was enclosed and awarded to the interested parties.
2. In 1801 Parliament simplified the process by standardising the most common clauses so that these would be automatically incorporated into Local Acts, allowing for more efficient passage through the Parliamentary process. It is agreed that neither the Locking nor Worle Inclosure Acts come under 1801 Act provisions, being drawn up just prior to the implementation of those provisions. As such the powers of the Commissioners rest on the relevant local Acts.

*Locking Inclosure Local Act (1800) & Award (1801)*

1. This was an “*Act for Dividing, Allotting, and Inclosing, the Moor, Commons, and Waste Lands, lying within the Manor and Parish of Locking, in the County of Somerset”*. The Act related to those “…*several Persons* [who] *are entitled to Right of Common in and upon the said Moor, Commons, and Waste Lands…are desirous that the same may be divided and inclosed, and specific Parts and Shares thereof assigned, allotted, and awarded to each of the Parties interested..”.*
2. In relation to roads the Act said that the Commissioners were “…*authorised and required, to set out and appoint such public Carriage Roads in, over, and upon the said Moor, Commons, and Waste Lands…as they shall think necessary and proper; all which public Roads shall be and remain of the Breadth of Forty Feet* [12.2 metres] *at the least, which said Breadth…as to such public Carriage Roads so to be set out and appointed as aforesaid, and also to any public Carriage Roads already made and used in and over or through the said Moor, Commons, and Waste Lands, or any Part thereof, is hereby declared to be sufficient, any Act or Law to the contrary notwithstanding…and that it shall not be lawful for any Person to erect any Gate across any of the said public Roads…”*.
3. ABA draw attention to the fact that the Commissioners were “…*authorised and required to set out and appoint, or cause to be made, erected and completed, such other public Roads and Footways, and private Roads and Ways…in, over, and upon the said Moor, Commons, and Waste Lands…as they shall think requisite…”.* This appears to allow public roads to be set out as a separate feature to public carriage roads, nevertheless it also allows them to set out private roads.
4. In relation to “*Old Roads &c. (which may be continued) to be repaired as heretofore)*” it was set out that “…*all such Roads, Ways, Paths, and Bridges in, over, or upon the said Moor, Commons, and Waste Lands as are at present maintained and repaired by or at the Expence of any Parish or Parishes, Place or Places, shall (if set out or directed by the said Commissioners to remain as Roads, Ways, Paths, or Bridges for the Purposes of this Act) continue to be repaired and maintained by such Parish or Parishes, Place or Places respectively, as now maintain or of Right ought to maintain, repair, and support the same*.”
5. It was agreed that no public Carriage Roads were appointed by the Award. ABA took the view that the Order route fell into the category of an old road and it therefore continued to have public access. However, the allotment to SMV was made under the heading 'Private Roads or Drove Ways', Lockinghead Drove “*And also one other private Road or Drove way of the breadth of twenty five feet to be kept open from the said drove or way called Moor Drove from a place there in the said plan marked with the letter E to a place in the said plan marked with the letter F and called by the name of Lockinghead Drove*.” This is not the 12.2m (40 feet) required for a public road to be set out under this Act. Moor Drove, following the alignment that later became the A371, and Laneys Drove, which appears to now be the cul-de-sac route to West End Farm, were also set out under this heading.
6. Points E and F relate only to a short section of to the south-west of point A on the Order map and seems to have been enclosed as an addition to the end of the road seen in the SMV 1745 map. Although there have been further alterations to the roads in the area it approximates to the first section of the Drove now leading off the A371. Lockinghead Bridge was referred to as having been erected at point E, which was to be kept in repair by the owners, tenants and occupiers, at a rate proportionate to the allotments made. This does not indicate it was for the benefit of the public as opposed to those entitle to use of the route.
7. These 3 routes were “….*for the benefit use and enjoyment of all and every the owners tenants and occupiers of the several and respective divisions and allotments plots and parcels of land hereinafter mentioned to be by us allotted inclosed and awarded with free liberty for them and every of them and all other person and persons who shall or may have occasion to travel there to go pass and repass in thro’ upon and over the same to and from such their divisions and allotments plots and parcels of land either on foot or horseback with horses cattle carts and carriages loaded or unloaded at their and every of their free will and pleasure or otherwise howsoever when and as often as they any or either of them shall think proper*”.
8. The award to the ‘Society of Merchants, Lockinghead’ included “*All that part or parcel of Ground in the said annexed plan numbered 47 and used as a private Way or Drove from a place in the said plan marked with the letter F to another place in the said plan marked with the letter L the same nevertheless to continue open and be used as a Road or Way*.”
9. This was the continuation from the new section set out to point F (point A on the Order map). The Award sets out and allots new areas of enclosure and exchanges various plots of land between a number of parties, who would then need to access their land. Those who could legally access point A following the Award were limited to those referred to above, paragraph 42; this is not as was found in *Craggs v Secretary of State for the Environment [2020] EWHC 3346 (Admin)* (*Craggs*)to have been so broad, despite being set out under private roads and ways, that it effectively opened use to all “*having any occasion whatsoever to go travel pass and re-pass through upon and over the same roads and ways*”. It was held in *Craggs* that the intent of that Award was to give the public unfettered rights to use the roads described as ‘private’ but that does not apply in this case.
10. Considering the argument that Lockinghead Drove was an old road, which was saved by being set out, despite reference to it being “…*used as a private Way or Drove…”,* the same problem of legitimate use arises*.* Once reaching point F there would be no legal right to use the route west unless it was related to the “…*the several and respective divisions and allotments plots and parcels of land hereinafter mentioned…”.* This does not support the contention that the route was an old road which was saved by the Inclosure processes.

*Worle Inclosure Local Act (1801) & Award (1803)*

1. The Local Act contains clauses similar to those in the Locking Act about Roads and Ways and pre-existing Public Roads. In the Award, the Commissioners again did not find any public carriage roads were necessary. A transcript of part of the Award was submitted, against which there was no argument that it was incorrect. This referred to “*Locking Drove, We do in pursuance and according to the directions of the said act award order direct set out and appoint a private road or drove way of the breadth of twenty four feet wide at the northwestward end and of thirty feet wide at the south eastward end to be kept open from the westward part of the said moor or common called Worle Moor marked on the said plan with the Letter B to a place marked on the said plan with the letter C and there called Locking Drove*.”.
2. This plot, numbered 45 was awarded to Edward Ash, Lord of the Manor and referred to in the transcript provided as “…*part of the Moors Commons and waste Lands called by the name of Lockinghead Drove bounded on the east and westward by old inclosures Northward by Moor Drove aforesaid and Southward by Locking Drove Gate*”. Locking Drove gate lies at point L on the Locking Award map and so the drove is linked. However, the user clauses are the same, as set out in paragraph 42, meaning that the use was limited to those with those legitimate interests in the land and not so broad as to imply general public use.

*Conclusion*

1. The evidence arising from the Inclosure Awards made at in the very beginning of the nineteenth century clearly set out, or save, private rights over the land in question. There is nothing within the Acts or the Awards to show that the Order route had public rights either saved or created by the process.
2. *Rex v Marquis of Downshire, 1836* related to a case involving the 1801 General Inclosure Act. The OMA are correct to say that the powers to divert or stop up public or private carriage-roads, highways, or footpaths existed in the Acts under consideration here but there were still requirements to follow in terms of application to Quarter Sessions. No evidence has been found of such stopping up but this no more shows that public rights remain as suggests that such were never recognised to exist in the process which deliberately set out a private carriage way over part of Locking Head Drove and thereby limited users over the Order route as a whole.
3. The laying out of Moor Drove, which later was recorded as highway, in the same manner does not indicate that the Order route must also have been public. The reasons for Moor Drove being recorded as highway are not known, with the Inclosure Acts and Awards not supporting a public status at that time.

*Post-Inclosure evidence (>early 1800s)*

*Greenwood map, 1822*

1. Great reliance was placed on this map by ABA. It depicts the Order route according to the ‘*Explanation*’ as ‘*Cross Roads*’. The map also shows the route running generally south from Locking Head Farm and a cul-de-sac route running north from between points A and B, in the same manner. Neither of these routes were shown on the Inclosure Award mapping, although they were on the SMV map and the early OS mapping, discussed below.
2. A research paper ‘*What Is a Cross Road?*’ was presented by the author, having originally been attached to another ABA representative’s statement of case, with an argument that any cross road shown on a Greenwood map should be accepted as a public carriageway. In comparison, the OMA submitted some information relating to the production of maps by Greenwood. An advertisement in the Leeds Mercury, April 15, 1815, related to the ‘*Proposals for publishing by subscription a new map of the County of York, from an actual survey…In this map…the course of…public and private roads…will be correctly exhibited*…”. Although not relating specifically to the Somerset map it is not unreasonable that a similar process would be followed in relation to the production of these maps, which were a commercial venture.
3. Reference was made to caselaw, such as *Trafford v St Faith’s Rural District Council (1910)* (*Trafford*), *Hollins v Oldham (1995)*, unreported, *Gallagher* and *Fortune and others v Wiltshire Council and Taylor Wimpey* [2010] EWHC B33 (Ch) [[2012] EWCA Civ334](https://horizonweb.planninginspectorate.gov.uk/otcs/cs.exe?func=ll&objid=29793109&objAction=browse&sort=name) (*Fortune*).
4. These judgments assist in the assessment of the weight to be given to evidence, including that of the Greenwood. However, none of the caselaw provides the ‘magic bullet’ on which support seems to rest; that the depiction of a cross road in a Greenwood, or similar, map is irrefutably an indication of a public carriageway. In each judgment there was an assessment of the depiction of the relevant route on the Greenwood map in conjunction with the rest of the evidence and it was the totality of the evidence which led to the findings.
5. *Trafford* refers to the 1826, Bryant’s map, giving some indication of reputation and a little bit of evidence to indicate that this road was considered to be a “…*good cross or driving road…*[and] *was considered to be a public road”*. However, the judgment also refers to evidence from a number of other maps, a sales plan indicating it as a public road and evidence from users.
6. *Hollins v Oldham* is unreported but apparently the judge said that a cross road “…*must mean a public road in respect of which no toll is payable*…”. However, he also said that “*Pingot Lane must have been considered, rightly or wrongly, by Burdett* [the map maker] *as being either a bridleway or a highway for vehicles*” [my emphasis], indicating that the depiction was only what that map maker thought. It is understood that Finance (1909 - 1910) Act (FA1910), Tithe, Ordnance Survey (OS), sale and conveyance documents were also considered in this judgment.
7. In *Gallagher*, there was in the Inclosure Award a private carriage road and driftway. What influenced the finding that Beoley Lane was a public carriageway was that “*the weight of the evidence the other way leads to the conclusion either that an error was made in the Inclosure Award and Map or that Beoley Lane became a public carriageway subsequent to* [Inclosure]”. This later evidence of public status included the Tithe Map, where it was an enclosed route with no tithe payment apportionment, FA1910, where it was shown uncoloured and excluded from adjacent hereditaments and user evidence.
8. The length of the *Fortune* judgment in the High Court is itself testament to the extent of evidence considered therein. The Court of Appeal decision noted that Greenwood’s map of Wiltshire, 1829, showed a thoroughfare which included the lane in question as a “cross road”. In “*old maps and documents, a “cross road” included a highway running between, and joining other, regional centres*”. McCahill, J, concluded that Greenwood’s map supported “the emerging picture” of an established thoroughfare. The Court of Appeal noted that in their judgment the label “cross road” added further support. They noted that “…*the consistency of treatment of Rowden Lane and Gipsy Lane in commercially produced maps for well over a century showed, if nothing else, the reputation enjoyed by Rowden Lane*…[the judge tested] *each provisional conclusion against what had come before and what came after* [and his] *approach to “consistent depiction” was fully justified.*
9. The objectors indicated known private roads in the locality, which were shown on this map, some of which have been recorded as a bridleway, apparently in relation to user evidence. In relation to this Greenwood map for this particular area the existence of a cul-de-sac route, leading only to fields shown as a cross road, does not support the argument of ABA that all routes shown as cross roads on this map were public. These factors lessen the weight to be placed on this Greenwood map as demonstrating a public road over the Order route in the early nineteenth century.

*Tithe Map, 1838*

1. The Tithe Commutation Act 1836 (amended in 1837) converted tithes to a fixed money rent. Tithe documents are concerned with identifying titheable land and consist of the apportionment, the map and the file. Tithe maps are generally good evidence of the topography of the area but can give no more than an indication as to whether a route is public or private, as a private right of way can also diminish the productiveness of the land for tithe assessment.
2. The Order route is shown as an enclosed route, leading from the road, which approximates the position of the A371 and is coloured. The Order route is uncoloured and there is a line at the junction with the route to the south-west as well as a line across just south of where Locking Head Cottages are located, north of D; these could indicate gates or simply ownership boundaries. Close to point B there is a feature suggestive of a gate, which is shown in a different way.
3. This section, between the probable gates south-west of A and north of D, is numbered 11a, which is shown in the apportionment as in the ownership of The Society of Merchant Venturers of the City of Bristol, occupied by Arthur Bishop, who also occupied Locking Head Farm. Locking Head Drove was named and identified as ‘Road etc’ with tithe payable.
4. The tithe evidence indicates route was privately owned and occupied, subject to tithe payment, uncoloured rather than ochre in colour, as the highway to the south-east was shown, and gated in at least one, if not three places. Bearing in mind the purpose of the tithe documents this does not assist greatly in relation to status, as roads can be grazed, which would give rise to a tithe rent charge, and would require gates to control animals. However, in comparison with the known highways in the area this evidence does not, on the balance of probabilities, support the existence of public rights.

*Ordnance Survey maps*

1. The formation of OS was a response to a military need for accurate maps. Over the years, OS developed a variety of maps, with the production of maps for sale to the public of increasing importance to OS from the early twentieth century. Since the late nineteenth century OS maps have carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way. OS surveys and maps, especially the larger scale plans, provide an accurate representation of routes on the ground at the time of the survey.
2. The earliest OS map, 1809, shows the Order route in a similar manner to the later Greenwoods map. The 1811 OS map was not a good copy but also showed the Order route. Both these early maps, predating the documents referred to above in this section, also show the route running south from Locking Head Farm, although it appears to have been a track within the fields, rather than bounded, like the Order route.
3. The first edition 1880 and second edition 1903 OS maps of the south-eastern side of the route show similar features of a defined route, with a gate at the south-eastern end. The 1931 OS, showing the area around Locking Head Farm, annotates a field gate north of point D, near Locking Head Cottages. There are solid line features near points B and C, which could indicate gates, although they are not annotated as such. This map also shows the route running north, which is now recorded as part of FPAX20/8.
4. The OS mapping demonstrates the continued existence of the Order route as a defined feature, with gates at certain points, at certain times. Despite the argument of ABA that these must have been public, particularly in the earlier mapping, the OS maps do not purport to show whether the routes recorded were public or private.

*OS Object Names Book*

1. This was used to check the spelling of features on the OS maps, as confirmed by the ‘owners, occupiers and others interested’. One of the submitted pages is dated March 1902 with the name Locking Head Drove, which “*Applies to a road extending from junction of roads at Lypstone Farm to junction of roads south west of Drove Farm*.” The authority for that spelling was given by the District Surveyor.
2. The Handover Map, referred to below, shows the interest of the highway authority in the north-eastern end of the route, north of point D. The Object Name Book (ONB) evidence, which does not say whether the road was public or private, is not sufficient to show that the District Surveyor had interest in the entirety of the route and, therefore, that the route was subject to public rights throughout its length.

*Finance (1909 - 1910) Act*

1. FA1910 provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and subsequent sale or transfer. Each area of land, or hereditament, was identified on a map and information recorded in a Field Book.
2. There was agreement between the parties that the Order route was in the ownership of Drove Farm. This was hereditament 1, a farm of 85 acres for which under ‘Fixed Charges, Easements, Common Rights and Restrictions’ ‘1 Driving & 1 footpath’ were noted. In ‘Deductions…Public Rights of Way or User’ an amount of £100 was included. If this deduction related to the Order route, which seems likely, the objectors took the view that it referred to driving livestock along the drove and a private easement, whilst ABA believed it to relate to public rights.
3. In relation to Locking Head Farm, hereditament 5, there was also noted to be ‘1 Driving way 1 footpath’ with the ‘Deductions…Public Rights of Way or User’ £100, which ABA suggested could relate to the ‘Ancient Road’ marked on the OS base map, leading south from the Order route. In the Field Book the deduction was set out as ‘*Rights of Way £4.0.0 x 25 = 100*’ but even the provision of a copy of the Act itself and the ‘Instructions to Valuers’ does not assist to see how this calculation was made. ABA suggested that the value of the land was around £47 per acre, on which basis £100 would equate to the value of 2 acres. Other deductions in the area for £25 for a footpath, £25 for 2 footpaths and £50 for 1 ‘path’ do not assist to show how the calculations were made.
4. The inclusion of the Order route within a specific hereditament, not excluded from it, weighs against public vehicular status. The deduction for rights of way or user could have included either or both public and private use. A public footpath was later recorded over part of the Order route, as discussed below, whilst private rights, as referenced only a short time after this, would also have affected the market value of the property under FA1910. On balance the FA1910 evidence does not support higher public rights.

*Ownership information*

1. The SMV map, 1745, shows the ownership at that time and the objectors indicated that a deed of 25 November 1708 showed that Edward Colston made over the Manor of Locking to the SMV at that time. Plans from the SMV archives, one undated, one from 1883 and one 1904, showed the Order route. The two earlier plans identified the Drove with the number 11a, which was also used in the tithe and apportionment. The two later plans show gates to the west of point A, near the junction with the road in that location, and near point B.
2. In 1919 the land was sold, with the sales entry for Drove Farm, Lot 6, including ownership of part of Locking Head Drove, noted in the schedule as Pasture. This lot was “…*sold with a right of way to the Purchaser for all purposes to, from and over the portion of Locking Head Drove included in Lot 7, and subject to a right of way to, from and over the portion of Locking Head Drove included in this lot for all purposes for the owners and occupiers of Lots 3 and 7, and for agricultural purposes for the owners and occupiers of Lots 36 and 37*.” The plan shows this lot includes the Drove between the road west of point A to the gate at point B. Lot 7 was Locking Head Farm and Lot 3 Locking Farm, with mutual private rights of way granted on the Drove to those lots. Lots 36 and 37 were parcels of grazing land, situated north-east of the Order route and would require agricultural access.
3. ABA suggested that claims were made in FA1910 and so the Drove was public, which information should have been included in the sales particulars, however, the FA1910 does not support this contention, as set out above. The inclusion of mutual private rights would be unnecessary if the Order route was a highway and so the sales particulars provide further weight against public rights on the route and are supportive of the FA1910 information. Rights on foot, which were later recorded on the DMS, may have existed at this time but they would not meet the requirements of access ‘…*for all purposes…’* referred to in this process.

*Maintenance and the Handover map, 1930*

1. Under the Local Government Act 1929 County Councils across England and Wales gained increased powers as highway authorities, acquiring direct responsibility for roads in the Rural District Council (RDC) areas, in this case Axbridge RDC. This led to the production of what are referred to as handover maps, on which the RDC would mark the highways which they believed to be maintainable at public expense and were ‘handing over’ to the County Council for maintenance.
2. The OMA confirmed that the handover maps match the current highway records, with the sections to points A and D recorded as maintainable highways and the Order route not so recorded, indicating that it was not seen as maintainable by the RDC. Whilst this would not prevent the Order route having public rights it does not support the case being made by ABA.
3. The section at the south-west, to point A, differed from the section to point D as it was made up in 1925 by the landowner, who bought Drove Farm just 6 years earlier, with agreement that it would then be taken on by the RDC. The August 1927 RDC minutes refer to the making up of Legg’s Lane, which was a reference to the landowner and notably not ‘Locking Head Drove’. This gives further weight to the argument that the ONB did not represent an interest in the entirety of the Order route by the District Surveyor.
4. The section to point D may relate to the continuation of the ‘ancient road’ south of Locking Head Farm. On the balance of probabilities, the existence of these two cul-de-sac sections of highway maintainable at public expense are separate coincidental features, providing no weight to show public rights on the Order route.

*War records, 1940 on*

1. Land now developed as part of the village of Locking to the north of the A371 and generally easterly of the Order route, was once a Royal Air Force (RAF) station, RAF Locking. There appeared to be agreement that the changes made under Defence Regulations 1939 did not affect the Order route. The reference to Locking Head Lane was suggested by ABA to potentially relate to the ‘ancient road’ at Locking Head Farm.
2. It was suggested that there may be a footpath in this location which should now be recorded on the DMS but it is not relevant to this Order.

*The Definitive Map and Statement, 1956*

1. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS and set out the legal procedure to be followed in their production. The DMs carried a relevant date of 26 November 1956 and the OMA indicated that the routes were recorded following a survey by members of the Parish Council. FPAX20/8 was claimed and runs from point D along the Order route to point C, from where it then runs generally northerly through the fields. There was no claim to record other public rights over the Order route nor any objection during the stages of drafting the DMS in this respect.

*Other evidence*

1. One user evidence form (UEF) was submitted in 1994 (the year of application) indicating use on horseback, as part of a riding school, between 1942 and 1980. The UEF indicated that there were two locked gates. A statement by the younger sister of this person indicated use by the riding school in the 1950s and 60s and referred to the need to unlock and relock the gates, returning the key.
2. The owner of Lypstone Cottage, whose parents purchased Lypstone Farm in 1965, referred to occasional permission granted by his father to the person who completed the UEF. This involved getting a key to unlock and relock the gates. He ran the farm from 1968 and does not recall this person using, or asking to use, the Drove from that time. There were horses at Locking Head Cottage Farm in the late 1960s/early 1970s and so may have been some use, which he considered would have been private, but there was no recollection of public use, with the gate at point B padlocked from at least 1965.
3. The owner of Drove Farm, born in 1922 at that farm, provided a statement that the route had not been used as a public right of way in that time, being gated at several points. The gate at point B had been padlocked in agreement with the tenant of Locking Head Farm, with each property having a key to exercise their mutual private rights. He also recalled granting permission for use by the riding school. A few walkers had tried to use the route but had been stopped.
4. The tenant of Locking Head Cottage Farm from 1967 referred to a private right from the north, via Moor Lane and Lypstone Farm. He had a right over the Order route but did not think the Drove was a public right of way. He referred to a closed, as opposed to locked, gate and was not aware of any public use. He also recalled occasional use by the riding school. A former resident of Moorland Farm referred to the use of the drove for grazing and recalled locked gates.
5. The picture arising from the twentieth century was of a route that local people accepted as not having the free access that would be expected of a public right of way. There was no indication of challenge to that belief or to the associated actions of locking gates across the route.

*Conclusion*

1. The evidence post Inclosure is either unclear as to status, such as the OS maps which certainly show the existence of the route and sometimes gates at particular points or is supportive of private rights. Taking all the evidence together it sits on the balance of probabilities as supportive of private rights over the Order route as a whole, with the exception of the rights on foot over the section C – D, FPAX20/8.

*Overall Conclusion*

1. The documentary evidence shows that there has been a physical feature in the landscape from at least the mid-eighteenth century. The route does appear to have been an important one in the landscape and survived the Inclosure process, being set out as a private Road or Drove way. The subsequent evidence of a continued physical feature on the ground sits alongside continued preservation of private rights during the sale of land and as suggested in the FA1910 documentation. Such evidence of use as there is has been in relation to those private rights or by permission.
2. On the balance of probabilities, the evidence as a whole is insufficient to show that a public right of way subsists over the Order route, other than the already recorded public footpath. This decision has taken account of the wide range of caselaw and argument made by the parties, albeit that not all of that has needed to be specifically referred to in the decision.

Other matters

1. Whether or not the recording of the Order route would be helpful or unhelpful to prospective users, landowners or occupiers is not a relevant matter under WCA. The decision has been taken only on the evidence available.

Conclusion

1. Having regard to these and all other matters raised at the hearing, and in the written representations, I conclude that the Order should be not confirmed.

Formal Decision

1. I have not confirmed the Order.

Heidi Cruickshank

**Inspector**

**APPEARANCES**

|  |  |
| --- | --- |
| **For the Order Making Authority:** | |
| Mrs E Bowman | Principal Access Officer, North Somerset Council |

|  |  |
| --- | --- |
| **In Support of the Order:** | |
| Ms A Gawthorpe | *on behalf of* Axbridge Bridleways Association |
|  |  |
| |  |  |  |  | | --- | --- | --- | --- | | Ms J Roseff |  |  | on behalf of Axbridge Bridleways Association | |  |  |  |  | | *on behalf of* Axbridge Bridleways Association |
|  |  |
| Ms S Taylor |  |

|  |  |
| --- | --- |
| **In Objection to the Order:** | |
| Mr J Cheal | Mogers Drewett *on behalf of* Mr & Mrs Edwards and Mr DK Legg |
|  |  |

**INQUIRY DOCUMENTS**

|  |  |
| --- | --- |
| 1 | The Order |
| 2 | Copy of Merchant Venturers Map |
| 3 | Information on lots from Estate sale |
| 4 | North Somerset Council highway adoption information |
| 5 | Newspaper advertisements for mapping |
| 6 | Extract from Sauvain on Highways |
| 7 | Dunlop transcript |
| 8 | Finance Act 1910 information |
| 9 | List of documents/judgments (and the documents) submitted by ABA with proof of evidence, statement of case and comments on objectors’ evidence |
| 10 | Bridges Act 1530 with partial transcript |
| 11 | Further documentation associated with research on cross roads |
|  |  |

O