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| **Interim Order Decision** |
| Inquiry opened on 22 September 2021 |
| **by Heidi Cruickshank BSc (Hons), MSc, MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 23 May 2022** |

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| **Order Ref: ROW/3229117** |
| * This Order is made under Section 53(2) of the Wildlife and Countryside Act 1981 and is known as The Somerset County Council (No. 6) Modification Order, 2016. |
| * The Order is dated 2 December 2016 and proposes to upgrade two footpaths and part of one footpath to the status of restricted byway on the Definitive Map and Statement. Full details of the routes are set out in the Order Map and Schedule. |
| * There were six objections and representations outstanding when Somerset County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. One has since been withdrawn. |
| **Summary of Decision: The Order is proposed for confirmation subject to**  **modifications set out in the Formal Decision.** |

Procedural Matters

*The application and related matters*

1. On 24 June 2009 the South Somerset Bridleway Association (SSBA) made three applications to Somerset County Council, the Order Making Authority (the OMA), under the Wildlife and Countryside Act 1981 (WCA) to upgrade footpaths L23/6, L23/7 and part of L23/12 to the status of byway, indicating that whether that was a byway open to all traffic (BOAT) or a restricted byway was dependant on the provisions of the Natural Environment and Rural Communities Act, 2006 (NERC).
2. The applications were considered by the Council’s Regulation Committee on 5 November 2015 and it was determined that no Orders should be made. This decision was appealed by SSBA under paragraph 4 of Schedule 14 to the WCA (the S14 Appeal) and by a decision of 11 July 2016 the OMA were directed to make this Order. The OMA took a neutral stance at the Inquiry and the case in support was led by SSBA with other interested parties, including from Axbridge Bridleways Association (ABA) also speaking in support of the Order.

*Inquiry matters*

1. This case was due to be heard on 6 October 2020 but the introduction of Covid-19 Government Health Restrictions meant that the Inquiry was postponed. Although satisfied that the Inquiry could have run entirely virtually at an earlier date, with attempts made to accommodate this, or potentially dealt with by reference to written representations only, one party requested that certain original documents be produced to the Inquiry. This delayed the date for opening the Inquiry to 22 September 2021.
2. Following changes to restrictions, arrangements were made for the event to run as a blended event, with some parties in the venue – Othery Village Hall – and others attending virtually, using the Microsoft Teams platform. Although taking a neutral stance, the OMA assisted in the organisation of the Inquiry, for which I thank them.
3. The Inquiry closed on 23 September 2021. I made an unaccompanied site visit on 20 September 2021, walking the Order route and driving in the surrounding area. No-one requested a further site visit following the close of the Inquiry.

*Decision delay*

1. It is recognised that all parties desire the outcome of matters as soon as is reasonably practicable. In this instance a number of professional and personal matters meant that the time available for making the decision following on from the close of the Inquiry was unavoidably pushed back. The decision has been taken by reference to all the evidence and arguments submitted as part of the Inquiry process and, therefore, I am satisfied that there has been no prejudice to the cases of any of the parties. However, I would like to personally apologise for the delay.

Main issues

1. The Order is made under section 53(2) of WCA by reference to section 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 Definitive Map and Statement (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 of higher rights than the existing recorded footpaths had occurred. The primary documents relied upon were the Inclosure Act and Award but the documents arising prior to and subsequent to that process are part of the overall picture of evidence to be considered.
3. SSBA originally supported confirmation of the Order as made, with the status of the routes as restricted byway. They fairly revised their position by reference to caselaw arising since the making of the application, *Craggs v Secretary of State for the Environment [2020] EWHC 3346 (Admin)* (*Craggs*) and supported the status of restricted byway for Footpath L 23/7 (FPL23/7) and Footpath L 23/12 (FPL23/12) but argued for a modification of the Order to record a bridleway on Footpath L 23/6 (FPL23/6). ABA continued to support the recording of the status restricted byway.
4. In objection it was argued that the evidence did not show that there were higher public rights than the already recorded public footpaths. It was argued that there was no new evidence which would allow the status of the routes to be revisited.
5. In recording a route with the status restricted byway, the provisions of NERC are 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 applied and so, if satisfied on the existence of historic vehicular rights over any of the Order routes, restricted byway would 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. The decision will consider whether to confirm the Order as made, to confirm it subject to the requested modification to the proposed 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. Reference in this decision to points A – F, including B1, B2, etc, refer to the points on the Order map. The Order routes lie to the north-west of the village of Pitney, which lies to the north-east of the town of [Langport](https://en.wikipedia.org/wiki/Langport) and west of [Somerton](https://en.wikipedia.org/wiki/Somerton,_Somerset). There is a relatively gentle rise in elevation from the village towards the area where the routes are situated, with a steeper drop towards Leazemoor Rhyne on the other side of Woodbirds Hill (the hill), on which Pitney Wood (the wood) is situated. The highway Leazemoor Lane lies at the base of the hill to the north.
2. One route proposed for upgrading, FPL23/12, runs generally parallel to, and a field away from, Leazemoor Lane but higher up the slope, generally below the wood. This is Underwood Lane and at the eastern-most end, point D just north of Pitney Wood Farm, joins a section already 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. The western-most end, point F runs into Woodbirds Hill Lane, which is also recorded on the LoS. The OMA, which is the highway authority, accept these sections as highways open to all public users.
3. FPL23/7, Dyer’s Piece Lane, similarly follows the contours of the hill but lies to the south of the wood, at the top edge of the steeper section of land. The eastern end, point C, runs from the restricted byway L23/43, Stowey Hill, which is a continuation of the highway Stowey Road, running north from Middlegate Road. At the western end, point B, the claimed route runs southerly over FPL23/6 to join Westerngate Road, recorded on the LoS and running to Middlegate Road. A footpath unaffected by the Order runs through the wood from point B, crossing Underwood Lane to Leazemoor Lane, providing a more direct walking route between Pitney and the village of High Ham to the north-west.

*Discovery of evidence*

1. It is important that there is a level of certainty for landowners and users regarding the rights recorded on the DMS. Caselaw indicates that the recording of a route on the DMS should not be revisited unless there is new evidence that was not previously considered. In objection, information was provided of the documents which Somerset County Council, as the relevant surveying authority, should have taken into account in drawing up the first DMS under the National Parks and Access to the Countryside Act 1949, noting that the ‘Enclosure Award’ was one of the listed documents.
2. Nevertheless, as already set out in the decision in relation to the S14 Appeal, there was new evidence to the process in the form of the 1885 Ordnance survey (OS) Parish Boundary Remarks Books, the Finance (1909 - 1910) Act (FA1910) documents and the 1941 Farm Survey map. Whilst it is argued that these have little evidential value by themselves the point is that they give rise to a need to consider the evidence as a whole.
3. This does not nullify any presumption of regularity that may be relevant nor require investigation to see whether there was irregular or illegal procedures. A change to the DMS does not remove the weight to be placed on the proper procedures having been followed by those charged with the production of it in the 1950s, such as is supported by the report of an interview with the former Parish Clerk. Neither does it suggest the actions of authorities on the basis of information before them was improper at the time of their decision or understanding.
4. However, it should be remembered that WCA specifically allows for changes to the DMS in certain circumstances, taking account of all relevant evidence. Relevant caselaw has arisen since the 1950s, for example with respect to the documents under consideration, which may alter the interpretation now placed on the documents individually and as a whole. Caselaw in the form of *Craggs* has also arisen even since the making of the decision on the S14 Appeal.

*The Pitney Inclosure Act, 1802 and Award, 1807*

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. By way of the General Inclosure Act 1801 (GIA1801) 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 Parliamentary procedures. Paragraph 44 of GIA1801 makes clear that the powers were effective and binding insofar as they were not otherwise provided for and enacted in subsequent Acts. The 1802 “…*Act for Dividing, Exchanging, Allotting, and Inclosing the Open and Commonable Land and Fields, within the Parish of Pitney, otherwise Pitney Lortie, in the County of Somerset”* (the Pitney Act) makes limited provision for certain matters, for example simply indicating that the commissioner “*…shall have set out and appointed the roads and highways* …”. However, despite initial differences in opinion on this, it seems to be agreed that the Pitney Act imports relevant provisions from GIA1801.
3. The Inclosure process was dealing with a large area, by estimation three hundred acres of open commonable pasture land and six hundred acres of open or commonable arable fields. The 1807 Award, arising from the Pitney Act, set out the public carriage roads Pitney Road and Gore Road as well as a number of private carriage roads. Some of these are now recorded on the LoS and accepted by the highway authority and the public as vehicular highways, for example Woodbirds Hill Lane (set out as Middle Hedge Road in the 1807 Award), Middlegate Road and Stowey Road.
4. Western Gate (now Westerngate) Road was set out, awarded and appointed as a “…*Private Carriage Road and Drift Way…of the breadth of twenty feet…extending northward…until it enters a certain ancient Lane called Dyers Lane at the north west corner of an old enclosure numbered 325…”* (reliance is placed on the 1807 Award transcript supplied by ABA, to which no objection was raised as to accuracy)*.* The southern section of Westerngate Road is now recorded on the LoS but the section from point A, coinciding with the south-western corner of the old enclosure noted, to B at the north-western corner became recorded as FPL23/6.
5. In relation to the routes awarded in the same manner in the 1807 Award the commissioner does “…*hereby order direct and award that the said Private Carriage Roads and Ways herein before particularly mentioned and described to be set out and appointed on through and over the South Field Middle Field and North Field aforesaid shall always be and remain of the breadth aforesaid between the boundary ditches thereof for the use benefit and enjoyment of all and every the owners and occupiers for the time being of the several and respective divisions and allotments hereinbefore mentioned to be set out and allotted and awarded to them in the respective fields aforesaid AND ALSO for the use benefit and enjoyment of all and every other person or persons whomsoever having any occasion whatsoever to pass and repass thereon*.” (my emphasis)
6. This provides a comparable situation to that in *Craggs*,where those entitled to the use had been allotted in such a broad manner that, despite being set out under private roads and ways, it effectively opened use to all. The Shipham and Winscombe Inclosure Award of 1799, relevant in the *Craggs* case, was even more explicit in the use to be allowed, setting out that “…*and every or any or either of them on foot or on horseback with horses cattle carts and other carriages loaded or unloaded at their and every of their free wills and pleasure or otherwise howsoever as and when and as often as they or any or either of them shall think fit and proper…”* could use the route. Nevertheless, a reasonable person reading the 1807 Award would understand that the user clause allowed broad use, with neither the use for owners and occupiers nor for any other persons being set out or limited to any particular type of use.
7. There does not seem to be any reason why the reference to GIA1801 removes the relevance of *Craggs* to the Pitney Act or 1807 Award*.* The user allowed is broader than simply the affected “…*owners and occupiers…*” as would be expected if these were truly just private ways or farm tracks. Following *Craggs* it seems reasonable to infer that the intent of the Commissioner through the 1807 Award was to give the public unfettered rights to use the roads described as ‘private’. The question then arising is whether the creation of a narrower public carriage road would be ultra vires, following *Craggs,* with reference to *Buckland v Secretary of State for the Environment Transport and the Regions* [2000] 1 WLR 1949 and *Dunlop v Secretary of State for the Environment* (1995) 70 P&CR 307 (*Dunlop*).
8. Leaze Moor Road (now Leazemoor Lane) was awarded in the 1807 Award as “*One Private carriage road and Drift Way on Leaze Moor of the breadth of thirty feet with a public bridleway in the centre thereof of the breadth of five foot…”.* Three other named droves in the 1807 Award were similarly awarded with public bridleways in the centre. This appears relevant to the comment in *Craggs,* paragraph 33, that “…*there is nothing inconsistent or unlikely about the Commissioners creating private rights to drive carriages and carts along the routes, and public rights on horseback along the same routes. Such a legal arrangement would have been common in the 18th century and remains common today*.”
9. The specific setting out of routes as bridleways in the centre of a private carriage road and drift way in the 1807 Award raises the question why the commissioner did not do the same in relation to Westerngate Road if thought requisite. However, there are differences in the way in which routes were set out with Leazemoor Lane at thirty feet whilst Westerngate Road was set out at twenty feet, suggesting a difference in relation to expectations of use and maintenance. Broadacre Drove was a twenty feet route with a public bridleway in the centre and this differs in that there was a requirement for a gate “…*to prevent Wagons Carts Carriages from passing to and from the parish of High Ham or elsewhere into the said Moor*…”, with no apparent intention to prevent users of the bridleway passing onto the moor. On balance, the apparent inconsistencies within the 1807 Award do not override the very specific user provision, as referred to in *Craggs*.
10. Taking account of all these matters the argument of SSBA, that the creation of a public bridleway over the route remains intra vires, not being prevented by the Pitney Act, GIA1801 - section 10 being relevant to private roads, bridleways, footways, etc - or the Pitney Award, appears to be the correct approach. As a result, section A – B should be proposed to be recorded with the status of bridleway, not restricted byway as set out in the Order.
11. ABA continued to support confirmation of the Order as made, with all routes to be recorded as restricted byways. It was suggested that *Rex v Marquis of Downshire, 1836,* 111 E.R. 950 meant that unless closure of highways was undertaken through the enabling legislation they continued to subsist. It was said that the lack of inclusion of GIA1801 s8 in the Pitney Act for authority to apply to the justices for a stopping up order if a route extended through any 'old or accustomed road' through the old enclosures meant that pre-existing higher rights over the routes remained.
12. In objection it was said that *Hall v Howlett [1976] EGD 247* showed that where commissioners set out a new private road, it was almost conclusive that they did not that there was already a public highway there. Each Inclosure Act and Award needs to be considered on its own particular facts and so, whilst that may have been the finding on the facts in relation to that Inclosure process it does not take away from the conclusions in relation to this Inclosure process, taking account of all the associated relevant evidence. Whilst agreeing that *Hall v Howlett* provides some support against the argument that Westerngate Road was a pre-Inclosure route, the overall findings on the Inclosure in this case turn on similar wording within the *Craggs* case to that in the 1807 Award. As a result, that is the preferred judgment to apply in relation to this Order with respect to Westerngate Road*.*
13. Dyer’s Piece Lane and Underwood Lane are outside the area to be enclosed and so would not be ‘saved’ by the argument of ABA, although neither would they be ‘lost’ as a result. Westerngate Road is set out as a new private carriage road in the 1807 Award and differs from Stawey (now Stowey) Road, which is said to follow ‘…*in its usual course*…’ over the fields. It is reasonable to presume that the northern end of Stawey Road pre-dated the inclosure process, with the newly laid out road simply following the old alignment, the continuation for vehicles from Stowey Road, just south of point C.
14. Stowey Road and Underwood Lane are the most consistently shown routes in the early mapping whilst Westerngate Road was not so consistently shown. On the balance of probabilities Westerngate Road was newly set out by the 1807 Award and was not an ‘ancient lane’ which would be saved. Therefore, there would be no rights over the route other than those considered to be set out by the Inclosure process itself, unless the evidence shows that they were subsequently dedicated and accepted.
15. Turning then to Dyer’s Piece Lane, B – C, which lies alongside the old enclosures and is referred to in the 1807 Award as “…*a certain ancient lane called Dyers Lane…”* in relation to its western junction with Westerngate Road, point B*.* The eastern end, point C, is the junction with the restricted byway at Stowey Hill. Dyers Lane is also referenced in the 1807 Award in relation to Pitney Wood Road, which runs to the east as a cul-de-sac leading to allotment 330. There are enclosures to the south of Dyers Piece Lane which must have required access over these ancient and awarded lanes.
16. Underwood Lane, D – F, lies alongside old enclosures and is not so named in the 1807 Award. What is now known as Woodbirds Hill Lane and recorded on the LoS was, with the exception of a very short section, set out in the 1807 Award as a private carriage road and driftway known as Middle Hedge Road. The continuation of this route over “...*ancient lane called Woodbirds Hill Lane*…” appears to refer to what is now called Underwood Lane; the naming of the route on ‘Plan A’ runs from the northern side of point F, supporting this conclusion.
17. It was argued that these ‘ancient lanes’ may not have been public. However, the effect of the user clause in the 1807 Award, see paragraph 26 above, was to allow such broad use of the connections to them that it is reasonable to presume that the commissioner was satisfied that the particular ‘ancient lane’ was appropriate for such use.
18. On the balance of probabilities these ancient lanes provided the continuation of access to and from the old and new enclosures arising from the Award. The weight to be placed on these routes, which were not directly set out in the Inclosure process is necessarily less than can be afforded to Westerngate Road. However, the process still provides information supporting the status of the routes.
19. It is noted in the 1807 Award “*That the Right Honourable George Augustus Henry Cavendish commonly called Lord George Augustus Henry Cavendish* (Lord Cavendish) *was Lord of the Manor of Pitney cum Wearn lying partly within this said parish of Pitney otherwise Pitney Loire And was also entitled to divers farms lands tenements and hereditaments with the said Parish*…”. It is therefore reasonable to presume that he, or his agents, were satisfied as to the way in which any routes created, recorded or referred to over any land in which he had interest was correct. If this was not the case then there were procedures for objecting to the Inclosure processes and there is no evidence that this occurred.

*Conclusion*

1. The evidence arising from the Inclosure at the beginning of the nineteenth century provides important evidence in this case. It set out certain rights over Westerngate Road, which by extension lends weight to the conclusion that FPL23/6 should be recorded as a public bridleway. The reference to ‘ancient lanes’ also means that some weight can be reasonably placed on there being higher public rights over Dyer’s Piece Lane, FPL23/7, and Underwood Lane, FPL23/12, as the routes over which the broad user allowed by the connecting routes could continue.

*Other Documentary Evidence*

*Marriage Settlement*

1. It was argued in objection that the lands in Pitney were settled on the 1782 marriage of Lord Cavendish and Lady Elizabeth Compton, such that Lord Cavendish acquired the Somerset Estates. As a result, it was argued, he was a tenant for life, there was no one with the capacity to dedicate and the land shown in the Day & Masters 1782 map and the Greenwoods 1822 map was settled land only. The law of trusts is a complicated area and the provisions of an individual trust, including the extent of the relevant land, would need to be clarified where relying on it. It was also suggested that the land had been tenanted since time immemorial, with no tenant able to dedicate a public right of way.
2. It is unreasonable to suggest that there were no highways over settled land in general or this land in particular as otherwise the public could never have travelled through the countryside, on foot, horseback, cart or carriage. The suggestion that there could be no acquisition of public rights prior to the 1919 sale, discussed below, at which point the land became freehold, does not explain how a number of routes set out as private carriageways in the 1807 Award were apparently recorded as highways maintainable at public expense by 1929 – the date of the handover map – just ten years after the sale. It is more likely, on the balance of probabilities, that these routes were already recognised as highways at an earlier stage.
3. An objector 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 setting out that they would produce a map showing many features, including public and private roads. However, due to its scale the Day & Masters map shows no features in the relevant area, identifying only High Ham, Low Ham and Pitney. This map pre-dates the Inclosure processes which themselves lay out and/or identify routes in the area, as discussed above.
4. The Cary map, 1791, similarly pre-dates the Inclosure processes. Although there was an 1811 Cary pocket map this was at such a scale that minor lanes were not shown. The objectors fairly do not deny that the disputed lanes exist, and existed historically, with Underwood Lane shown on the 1832 Cary map. It is argued that the routes were shared unmetalled commonways, or farm tracks, not subject to public vehicular rights. That needs to be balanced against the terms used regarding these routes in the 1807 Award. The Greenwood map will be discussed below but it is important to note that it post-dates the changes arising from Inclosure, which is presumed to have gone through due process. The landowners, trustees and beneficiaries of any trust relating to Lord Cavendish would have known of the Inclosure process; in the absence of dissent it seems that they agreed with the intent and the outcome.

*Greenwood map, 1822*

1. This map depicts all three of the Order routes as ‘*Cross Roads*’ and provides a good correlation to existing road patterns. The author of ‘*What Is a Cross Road?*’ argued that all routes depicted as cross roads on the Greenwood map must be public, not being turnpike roads, in order to facilitate travel around the countryside.
2. It was argued in objection that certain routes in High Ham were private routes/roads but still shown on the Greenwood map. An interested party submitted 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. The caselaw, such as *Trafford v St Faith’s Rural District Council (1910)* (*Trafford*), *Hollins v Oldham (1995)*, unreported, *Norfolk County Council v. Mason* [2004] EWHC B1 (Ch) (12 January 2004) (*Mason*) 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*), assists in the assessment of the weight to be given to evidence such as this type of commercial map.
4. *Trafford* refers to the 1826, Bryant’s map, giving some indication of reputation to indicate that this road “…*was considered to be a public road”*. In *Hollins v Oldham* the judge apparently 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. *Mason* also refers to a Bryant’s map, 1826, indicating that a “*Good cross or driving road” is…not a technical legal term. On its face as a matter of language it refers to capability…by itself* [it] *is anything but a firm indicator and not too much reliance should be placed on it.*
5. The decision in *Fortune* noted that Greenwood’s map of Wiltshire, 1829, showed a thoroughfare including the lane in question as a “cross road” and concluded that the 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.”*
6. The Greenwood map for this area shows some cul-de-sac ‘cross roads’, which appear to lead only to fields, not to places of public interest, supporting the suggestion in the advertisement that the map showed what would be reasonably understood to be private routes as well as public ones. Nevertheless, the Order routes were already set out by, or referred to as ancient lanes in, the Inclosure process. Therefore, the depiction on the Greenwood map of open routes, reasonably connecting village to village, allowing travel for all purposes around the hill, is supportive of higher public rights in relation to the Order routes. The advertisement reference to setting out of private roads does not support the idea that A – B would have gained the dedication of higher public rights just fifteen years after the effective setting out of a public bridleway in conjunction with private carriageway rights over that route.
7. Arguments were made by interested parties regarding the historical meaning of ‘private’ particularly in relation to highways, carriage ways, roads, lanes, tracks, etc. It was said that the term had altered over time and that there was nothing to prevent a private carriage road also being open to the public, with an example given of a route in Ripponden, Yorkshire, apparently set out as private in an Award 1807 Award but open to the public. The research into the development of the term private is interesting but cannot override the relevant caselaw. Taking account of *Dunlop* the true construction exercise is to determine the meaning of “private carriage road” in the context of the 1807 Award, which has been undertaken with the more recent judgment of *Craggs* in mind.

*Tithe Map and Apportionment, 1876*

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. This map and apportionment were late in comparison to most, which were completed in the 1840s. This was because the payment of tithes had already been commuted to a monetary payment by the Inclosure process. The purpose of this Apportionment, which is likely to have been made under the Tithe Amendment Act of 1860, was to alter the way in which the annual payment was calculated.
3. The Order routes are shown on both the Parish and Diocesan copies of the mapping, with the Parish copy showing them coloured sienna in the same manner as other roads. They were untithed tracks separated from the adjacent land, with no indication of any gates of barriers. The maps provide evidence of the features of the routes in 1876 but the determination of status was not the purpose for which the documents were produced. However, taking account of what was seen in the Inclosure process, identifying them as ‘ancient lanes’ and effectively setting out a public bridleway, this gives a little weight to support the continued existence of those higher public rights over these routes almost seventy years after the making of the 1807 Award.

*Ordnance Survey information*

*OS 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 evidence is the surveyor’s drawing, 1811 which clearly shows Woodbirds Hill Lane/Underwood Lane. Parts of both Westerngate Road and Dyer’s Piece Lane appear to be shown, although the detail is obscured by shading. The 1809-1811 OS ‘old series’ map, Cassini Timeline reprint, would be based on the surveyors drawing. Woodbirds Hill Lane/Underwood Lane is shown encircling the hill in conjunction with Stowey Road and Stowey Hill. Westerngate Road and Dyer’s Piece Lane are not shown, which is a potential anomaly, given their respective recognition in the 1807 Award; it could be that even the original copy of the surveyor’s drawing was insufficient in this respect.
3. The 1885/87 OS County Series 1st Edition Map clearly shows and names the Order routes. Underwood Lane was now named separately to Woodbirds Hill Lane, with the property Smokeham at approximately point F, the point at which the change in the now recorded status of these routes occurs. There were no apparent barriers to use across any of the Order routes. The 1904 mapping shows little difference in depiction.
4. The 1898-1900 OS, Cassini Timeline reprint, includes some information on the perceived status of the routes. Westerngate Road and Dyer’s Piece Lane are depicted as unmetalled roads while Underwood Lane is shown as a third class metalled road, which included ‘metalled roads which, for want of repair are not fit for fast traffic’. The OS, 1937, recorded Westerngate Road and Dyers Piece Lane as ‘Minor roads in towns. Drives and Unmettalled Roads’’, with Underwood Lane was a road with a width of less than 14 foot in ‘bad’ condition. By 1946 all were shown as ‘minor roads in towns. Drives and Unmetalled Roads’.
5. The OS mapping shows the physical existence of the routes, with the noted early exception for Dyers Piece Lane and Westerngate Road, although other evidence suggests they existed. The depiction tends to be consistent with that of a ‘road’, whether public or private and where the maps attempt to classify them the routes were all consistently shown in a similar manner to local public roads. Bearing in mind that since 1888 all OS maps have included a disclaimer stating that the representation of a route on their maps is not evidence of the existence of rights of way, they cannot be relied upon in relation to the question of whether a road is public or private, *Attorney*[*-General v Antrobus*](https://horizonweb.planninginspectorate.gov.uk/otcs/cs.exe?func=ll&objId=29767511&objAction=browse) *[1905] 2 Ch 188*. Nevertheless, they provide good evidence of their character and show that the Order routes were of similar character, and so likely put to similar use, as the surrounding roads. Underwood Lane appears to be the wider and better surfaced route.

*1882 OS Boundary Remark Book and 1885 Boundary Sketch Map*

1. These arose from a time when OS were responsible for recording public boundaries, such as parish, district and county boundaries. Once produced the map was advertised for public inspection but they were intended for the resolution of disputes between parishes, not as a record of highways.
2. The parish boundary in this area lies to the north of Underwood Lane, with a section running along Stowey Hill so Underwood Lane and the eastern part of Dyers Piece Lane feature. The routes were depicted in a similar way to other roads, such as Leazemoor Lane and Stowey Road. Westerngate Road was not shown but neither were other roads central to the boundary, such as those within the village.
3. A route running east from Stowey Hill was identified as an ‘Accommodation Road’ in the Remark Book. Neither of the Order routes was so identified, although they lie further from the boundary and so were not as relevant to the purpose of the map.

*OS Object Names Book, 1901*

1. This was used to check the spelling of features on the OS maps, as confirmed by the ‘owners, occupiers and others interested’. In relation to OS sheet number 63:13 the Order routes are recorded as ‘public roads’ – Underwood Lane being a “…*public road extending from the south junction of Touch Lane to a cottage called Smokeham*.” It was noted that of the other ‘public roads’ referred to in this extract of the Object Name Book (ONB) four have public vehicular rights, one is a bridleway and one has no recorded public rights. It was noted that some other routes were referred to only as ‘roads’, not ‘public roads’.
2. As the western edge of Underwood Lane is on a different OS sheet, number 62:16, it is also recorded in that ONB sheet. There it is described as an ‘occupation road’ rather than a ‘public road’. Both entries were given authority for the description and spelling of the roads by the same person. It is also noted that Woodbirds Hill Lane was apparently referred to as an occupation road but recorded as a publicly maintainable highway from at least the 1929 handover maps, suggesting the understanding of definitions may have been imprecise.
3. The split of the route onto two OS map sheets means that a very short section is included in the western sheet with the majority of Underwood Lane in the eastern section. Whilst the evidence is contradictory, on balance, it is more likely that an error would be made in relation to something on the edge of a map than where it was shown and named, as is the case on the eastern map.

*Conclusion*

1. The general picture arising from the OS information as a whole shows the continued physical existence of the routes with no evidence of anything to physically prevent use. In general they are shown in the same way as other known vehicular roads, with the ONB entry supporting a reputation of public road notwithstanding the difference in relation to the reference to an occupation road. SSBA acknowledge this might neutralise the ONB evidence if not for the consideration of all other evidence in relation to the Order route as a whole.
2. Overall, the reputation arising from the OS evidence tends towards the Order routes being understood and used as vehicular routes. This use probably declined as time went by due to deteriorating surface conditions, as suggested by the categorisation in the mid-twentieth century. The OS evidence overall provides a little weight in support of the Order.

*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. The FA1910 valuation plans show the whole of Underwood Road excluded from the surrounding hereditaments. Dyer’s Piece Lane and Westerngate Road are mostly outside of the adjoining hereditaments except for a short section where the routes meet, point B. As SSBA note there is an unusual situation here as the plots have 2 plot numbers, but no dividing line between them. It seems reasonable to assume that the use of two hereditament numbers meant there was a split but the documents failed to explicitly show the defining boundary or boundaries. The OMA report suggests that the working copy plans excluded Westerngate Road, however, that is not clear from the document copies before the Inquiry.
3. Case law accords strong weight, in the context of all of the evidence, to excluded roads being subject to public vehicular rights. The FA1910 evidence supports such rights being recognised over Underwood Lane. There is less clarity with regard to the western section of Dyer’s Piece Lane and the northern section of Westerngate Road. However, it should be noted that part of Westerngate Road immediately south of point A was similarly not excluded but is now recorded on the LoS. The Field Book record for plot 64, to the east of this section of Westerngate Road was subject to a deduction for ‘Public Rights of Way or User’ of £50. It may be that a private road could be recognised in the same manner and excluded from the hereditament but the deduction could reasonably relate to an amount for user for occupiers alongside a deduction for public bridleway rights.

*Bartholomew’s maps, 1911 and 1927*

1. These maps depict all three of the Order routes as roads in poor condition in the earlier map and inferior roads in the later version. It seems that the depiction was an indication of character, rather than from knowledge of rights thereover. The inclusion suggests that the routes all had the appearance of a public road, albeit not well maintained, and the public may have relied on the depiction on these maps to traverse the countryside. A very small weight towards reputation of the status of these routes arises from these maps.

*Handover map and Schedule, 1929 and Roads Records, 1930 and current*

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. 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 report confirmed that the Order routes were not recorded in the handover maps with the southern section of Westerngate Road, now recorded on the highway records, also not shown. Parts were referred to in the Schedule but the overall evidence shows that the routes were not thought to be publicly maintained. A potential anomaly arises in work apparently undertaken at public expense in 1934 to fill in a pond on Underwood Lane, although the agreement for the RDC to retain rights to use water from the subsequent trough may indicate a private agreement.
3. The subsequent Roads Records also did not record the routes as maintainable highways, with the southern part of Westerngate Road apparently recorded after 1950, with no indication of how that decision was made. It was noted that a handwritten note ‘CRF’ – carriage road used mainly as a footpath – was put on the 1930 map in relation to Dyers Piece lane but it is not known when or by whom. It would not have been prior to 1949 when this terminology came about. Unless there was some reason an external party could have tampered with the map it is at least suggestive of what the status of that route was thought to be by a Council officer at some point in time.
4. It is understood that signs ‘No Through Road for Motor Vehicles’ were erected south of point C and at the eastern end of Woodbirds Hill Lane. These show that the highway authority were content at that time that there were no public vehicular rights on the Order routes.

*The Definitive Map and Statement procedures, 1950s*

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 process led to the recording of the routes as footpaths and there is nothing to suggest that there was any procedural issue arose. Whilst the definition CRB – carriage road used mainly as a bridleway – suggests a local reputation higher than footpath the objectors indicate that this arose from a misunderstanding that use by tractors as part of any private rights to access land would not be relevant to the recording of public vehicular rights. The outcome from this process indicates the understanding of the relevant parties to the legal situation at that time.

*Sales evidence*

1. The auction documents relating to the sale of The Somerset Estate, 1919, show the Order routes, simply because they were on the OS base map. Reference was made to Manor Farm, in the ownership of one of the objectors, having been bought in 1919 and inherited through the family. The sale plans shows this related to dispersed plots, one of which would only have been accessible from either Dyer’s Piece Lane or Westerngate Road. Others lie between Underwood Lane and Leazemoor Road and so could have been accessed from either route, providing there was a legal right to do so.
2. The conditions of sale show that each lot was sold to any existing easements whether mentioned or otherwise. It was said that those buying Manor Farm were former tenants, and so would have known the routes needed to access the fields. This is undoubtedly the case but does not indicate that the routes were subject to any private right to do so, simply that local people knew which routes they could use to traverse the countryside.
3. The map attached to the sale of Glebe Lands at High Ham, 1934, showed Underwood Lane, Westerngate Road and the western section of Dyer’s Piece Lane in the same manner as other roads, such as Leazemoor Lane. The land sold lay to the north of Leazemoor Land and south of Pitney (from the extract provided) and so it would have been useful for any potential purchaser to know the connections available between the land parcels. The way in which the Order routes are shown is suggestive of availability for vehicular use, albeit that this may not relate to public use, as it was not the point of the map to show that information.

*Conclusion*

1. The documentary evidence supports the Order routes having existed as longstanding landscape features and/or being set out in the landscape as part of the Inclosure process. Whilst the condition of the routes appears to have deteriorated over the years there has been a consistent depiction of the routes in a similar manner to other known highways, including those which were set out and/or referred to in the 1807 Award in the same way. The routes have remained unobstructed by gates until quite recently.
2. The Inclosure documents are the most important supporting the contention that the majority of the routes should be recorded with the status restricted byway. Although public vehicular rights could have arisen over Westerngate Road, section A – B, subsequent to the 1807 Award, the evidence as a whole is just insufficient to show that this occurred and, therefore, this section should be recorded with the status bridleway.
3. Over the course of over two hundred years there are, unsurprisingly, some contradictions, either internally in the documents or in comparison between them. However, taking account of those matters, and applying appropriate weight to each piece of evidence as a result, does not override the synergy arising between these individual pieces of evidence. The overall picture which emerges is of minor highways providing public access to and through the area.

***Other evidence***

1. There was some limited evidence regarding use by horse-riders and reference to use by cyclists over the Order routes prior to people being stopped by individuals and/or gates from around 2015. There was no indication of such use being permissive. Although very limited in evidential terms such use provides a small amount of supporting evidence with regard to the type of public use of the routes. The landowners, on the other hand argue that their use has been the main, if not only, use of the routes and that points towards private rights.
2. There is no strong evidence in either direction to assist with the interpretation of how local people have viewed and used the routes. However, the claims appear to have arisen as a response to new gates being put in, which prevented the use by horse riders in particular, as well as off-road vehicular users who apparently also made use of the Order routes. The making of the claims leading to this Order suggests a belief that the routes should not be closed off to public use.

Other matters

1. Whilst there may be concern as to the effect recording of the Order route may have on the environment or health and safety matters these factors are not relevant to decisions under WCA. Similarly, concerns that equestrians require more access for safety reasons cannot influence decisions under WCA. These matters have not been considered in reaching this decision.

Conclusion

1. On the balance of probabilities, the evidence as a whole shows that the claimed public rights of restricted byway subsist over the Order routes FPL23/7, Dyer’s Piece Lane, B – C and FPL23/12, Underwood Lane, D – F. For FPL23/6, Westerngate Road, A – B, the status that subsists is that of bridleway. For those restricted byways there was no argument that any of the exceptions in NERC would apply such that the routes should be recorded with the status BOAT. This decision has taken account of the wide range of caselaw and argument made, albeit that not all of it has needed to be specifically referred to in the decision.
2. Having regard to these, and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be confirmed subject to the modification of the status of the section A – B to bridleway.

Formal Decision

1. The Order is proposed for confirmation subject to the following modifications:
   * Within Part 1 i) of the Schedule:
     + replace text “…Restricted Byway…” with text “…bridleway…”;
   * Within Part II i) of the Schedule:
     + replace text “…Restricted Byway…” with text “…bridleway…”;
   * Within Part II ii) of the Schedule:
     + replace text “…footpaths…” with text “…footpath…”;
     + between text “…and…” and “…L 23/6…” add text “…bridleway…”;
   * On the Order map:
     + alter the line A – B to show the route as a bridleway;
     + remove ‘A – B’ from “Footpaths to be upgraded to Restricted Byways” in the key;
     + add “Footpath to be upgraded to Bridleway (A – B)” and appropriate notation in the key.
2. Since the confirmed Order would show as a highway of one description a way which is shown as a highway of another description in the Order as submitted I am required, by virtue of paragraph 8(2) of Schedule 15 to the 1981 Act, to give notice of the proposal to modify the Order and to give the opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Heidi Cruickshank

**Inspector**

**APPEARANCES**

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| --- | --- |
| **In Support of the Order:** | |
| Mr A Kind | *on behalf of* South Somerset Bridleway Association |
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| |  |  |  |  | | --- | --- | --- | --- | | Mrs S Bucks |  |  | on behalf of Axbridge Bridleways Association | |  |  |  |  | | *on behalf of* South Somerset Bridleway Association |

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| --- | --- |
| **In Objection to the Order:** | |
| Mrs M Masters | *on behalf of* Mr & Mrs J Meaker, Mr & Mrs Coombes and the Executors of the late Mr W Higgins |
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| --- | --- |
| **Interested Parties in Support of the Order:** | |
| |  |  |  |  | | --- | --- | --- | --- | | Ms J Roseff |  |  | on behalf of Axbridge Bridleways Association | |  |  |  |  | | *on behalf of* Axbridge Bridleways Association |
| Ms S Taylor |  |

|  |  |
| --- | --- |
| **Interested Parties in Objection to the Order:** | |
| Mr A Dunlop  Mrs Legge  Mr Poingdestre |  |

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| --- | --- |
| **For the Order Making Authority (neutral stance – no evidence presented):** | |
| Mr A Saint | Rights of Way Officer, Somerset County Council |

**INQUIRY DOCUMENTS**

|  |  |
| --- | --- |
| 1 | The Order |
| 2 | SSBA Addendum to legal submission |
| 3 | SSBA, amended map with additional coloured line |
| 4 | SSBA Opening statement |
| 5 | SSBA Legal submission amendment |
| 6 | SSBS proposed modified Order |
| 7 | SSBA Closing submission |
| 8 | ABA Opening statement |
| 9 | ABA, amendments to case by reference to 1801 Act |
| 10 | Additional legal documentation |
| 11 | ABA Closing submission |
| 12 | Re: Greenwoods’ map of Yorkshire, Leeds Mercury Advertisement |
| 13 | Ms S Taylor, Sketch map |
| 14 | Ms S Taylor, Closing submission |
| 16 | Email from Jill White |
| 15 | Mrs M Masters, submissions arising from Schedule 14 appeal stage |
| 16 | Matters relating to whether a highway is publicly repairable and to determine public rights of way (Somerset County Council documents) |
| 17 | Submissions relating to the Marriage Settlement of the Duke of Devonshire |
| 18 | Roads on OS 1:2500 plans 1884 – 1912, July 1999 |
| 19 | The Inclosure (Consolidation) Act, 1801 |
| 20 | Photographs (Inclosure map detail) |
| 21 | Copy of Day & Masters map, marked up |
| 22 | Closing submission on behalf of Mr & Mrs J Meaker, Mr & Mrs Coombes and the Executors of the late Mr W Higgins Cary map, 1832 |
| 23 | Newspaper advertisements for mapping |
| 24 | Photographs tithe apportionment and mapping |
| 25 | Mr A Dunlop, Closing submission |

Order Map


**PLAN NOT TO ORIGINAL SCALE**