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| **Order Decision** |
| Site visit made on 24 May 2022 |
| **by Alan Beckett BA MSc MIPROW** |
| **An inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 22 June 2022** |

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| **Order Ref: ROW/3261101** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Wiltshire Council Grafton 29 (Part), 29A, 30 and 31, Burbage 1 (Part) and Collingbourne Kingston 34 Definitive Map Modification Order 2019.
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| * The Order is dated 6 December 2019 and proposes to modify the Definitive Map and Statement for the area by (a) adding a Restricted Byway in Grafton; (b) upgrading footpaths in Grafton and Collingbourne Kingston to Restricted Byways; and (c) deleting a footpath in Burbage. The proposed modifications are shown in the Order plan and described in the Order Schedule.
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| * There were 2 objections outstanding when Wiltshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The Order is confirmed.** |
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Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the Order routes on Tuesday 24 May 2022.
2. The Order has been made in consequence of an application made to the Council in 2004. The application sought the upgrading of the footpaths at issue to the status of Byways Open to All Traffic (‘BOAT’) on the basis of historic documentary evidence. The application listed the documents on which reliance was placed but did not contain copies of those documents. As such, the application was not strictly compliant with the requirements of paragraph 1 (b) of Schedule 14 to the 1981 Act.
3. In the case of *Winchester College and others v Hampshire County Council and others* [2008] EWCA Civ 431, Dyson LJ held that applications for BOATs which were not made in strict compliance with paragraph 1 (b) did not trigger an exemption from the extinguishment of public mechanically propelled vehicular (‘MPV’) rights under section 67(1) of the Natural Environment and Rural Communities Act 2006. It is common ground between all the parties that the application could not result in the recording of a BOAT.
4. Although fatal to the preservation of public MPV rights, Dyson LJ also held that the failure to strictly comply with the paragraph 1 (b) requirements was not fatal to the ability of the Council to consider and determine the application. The outcome of such a determination could, at its highest, be that the route at issue was considered to be a Restricted Byway; that is, a carriageway over which the public have a right to pass and re-pass with non-mechanically propelled vehicles.
5. There is no user evidence presented in support of the application. It is the Council’s case that the documentary evidence adduced is sufficient to demonstrate, on a balance of probabilities, that the order route was, and is, a public carriageway which should be recorded in the definitive map and statement (‘DM&S’) as a Restricted Byway. Although 2 objections were made to the Order, neither objection challenged the Council’s interpretation of the documentary evidence adduced nor was any contrary documentary evidence submitted.
6. The Council has considered the documentary evidence according to the evidential weight which can be attached to those documents as opposed to considering the documents in chronological order. For the purposes of this decision, I will adopt the Council’s approach.

 **Legal Framework**

1. The Order has been made under Section 53(2)(b) of the 1981 Act in consequence of the occurrence of events specified in Section 53(3)(c)(i), (ii) and (iii) of that Act. Section 53 (3) (c) provides that a modification order shall be made where evidence is discovered which (when considered with all other relevant evidence available) shows:

(i) that a public right of way which is not shown in the DM&S subsists over land in the area to which the map relates;

(ii) that a highway shown in the DM&S as a highway of a particular description ought to be there shown as a highway of a different description; and

(iii) that there is no public right of way over land shown in the DM&S as a highway of any description,

1. Section 53 (3) (c) requires there to have been a ‘discovery’ of evidence for the provisions of the section to be engaged. That evidence has been discovered is not disputed in this case.
2. The evidence adduced in this case is documentary. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.

The Main Issues

1. The main issues are therefore whether the documentary evidence adduced is sufficient to show, on the balance of probabilities, that the claimed Restricted Byways subsist such that the DM&S require modification, and that there is no right of way over the route currently recorded as Burbage footpath 1.

Reasons

***Documentary evidence***

*Inclosure Records 1763 - 1824*

1. Land at Aughton in the Manor of Collingbourne Kingston was inclosed by agreement dated 17 January 1763. Allotments made out of the Aughton Field to named individuals are described as being ‘*bounded on the East by the Grafton Road*”; in the case of the land allotted to Thomas Cannon, that land parcel was also bounded ‘*on the south by the Oxford Road and on the west by the Marlbro’s Road’.*
2. There is no map which accompanies the inclosure agreement to show the position of the roads mentioned. From the known position of the modern Salisbury – Marlborough Road, and from the depiction of the local road network shown on tithe documents for Collingbourne Kingston and an estate map of 1807, the Council contends it to be more likely than not that the ‘Oxford Road’ is Restricted Byway 6A in Collingbourne Kingston (‘CKIN6A’) and ‘Grafton Road’ is that part of the Order route between points F and E.
3. An Act of 1792 provided for the inclosure of lands in Grafton; public roads set out and appointed by the Inclosure Commissioners were to be at least 40 feet (12.19 metres) in width. Once the new roads had been set out and appointed and any objection heard and determined, other routes not set out under the Award were to be stopped up.
4. The Great Bedwyn (Grafton Tithing) Award plan of 1792 shows the route E – D2 – C2 – B – A annotated ‘*Southgrove Lane*’ and as a ‘*Public Road 40ft’*. The Award plan does not show the continuation of the route E – F, as the lands in Collingbourne Kingston were not part of the lands being inclosed. However, the continuation of the route beyond the parish boundary is indicated by the annotation ‘*to Collingbourne*’ where the route crosses the parish boundary at a point which accords with the northern part of the Grafton Road described in the 1763 inclosure agreement.
5. In the Grafton Award, Southgrove Lane is identified as the ‘*Road from West Grafton to Collingbourne*’ and described as ‘*One other public Carriage Road and Drift Way of the breadth of forty feet beginning at the southern end of South Grove Lane near the north-west corner of an old Inclosure to the Right Honourable Thomas Bruce Earl of Ailesbury called little Thorney Down and from thence extending Southward until it comes to the South-West Corner of an Allotment to the said Earl of Hazelditch at which place it assumes and eastward direction and so continues unto the place of its usual Entrance into the Parish of Collingbourne the same being a Public Carriage Road and Drift Way leading from West Grafton towards Collingbourne’*.
6. The text of the Award and the Award map demonstrate that the Order route between A and E was set out as a public carriageway by the Inclosure Commissioners.
7. Land in Collingbourne Kingston and Burbage was inclosed under an Act of 1815. On the Award plan, F – E of the Order route is shown as a hedged or fenced road east of the River Bourne leading from what is now CKIN6A in a northerly direction. The Award map for the parish of Burbage also shows most of the Order route as a hedged or fenced feature within Grafton parish with nothing being identified as a physical feature between points D1 and C1 within Burbage.

*Railway deposited Plans 1845 – 1859*

1. Four railway schemes were proposed by different railway companies during the mid-nineteenth century. The statutory process which governed the authorisation of railway schemes required an accurate survey of the proposed lines, and the production of deposited plans and books of reference regarding the lands which would be affected by the proposed railways.
2. The deposited plan for the Manchester and Southampton Railway (1845) shows F – E as a fenced road leading north from what is now CKIN6A. Although outside the ‘limits of deviation’ and unnumbered, F – E is shown in the same manner as CKIN6A which was to be crossed by the railway. In the book of reference CKIN6A is described as a ‘Public Highway’ in the ownership of the Surveyor of Highways.
3. An alternative scheme for the Manchester and Southampton Railway was proposed in 1846. This railway was to run further to the east than that proposed in 1845. The deposited plan shows a significant length of the Order route between C2 and A as a road enclosed by fences or hedges; this route is shown as being wholly within Grafton. At the limits of the plan the road is annotated “*From Collingbourne*” and “*To Grafton*”. The road to be crossed by the railway is identified in the Book of Reference as a ‘*Public Highway*’ in the ownership of the Surveyor of Highways. The railway was projected to cross the road at or around point B; the sectional plans describe this intersection as “*Highway to be passed on level of Rails. Level unaltered*”.
4. A further scheme for the Manchester and Southampton Railway was proposed in 1847. This route ran to the west of the Order route although part of F - E (shown to the east of the River Bourne) is shown to be within the limit of deviation of the scheme. This section is numbered 152 on the deposited plan and is described as a ‘Road’ in the ownership of the Surveyor of Highways.
5. The deposited plan for the proposed Andover and Redbridge Railway (1859) shows the railway running on a similar course to that which had been proposed in 1846, crossing the Order route at or about point B. The Order route is shown as hedged or fenced on both sides with the route between C2 and A being described as a ‘*Public Road or driftway*’ in the ownership of the Surveyor of Highways. Where the railway was proposed to cross the road, the sectional plan indicates that the gradient of the land was to be altered from 1:30 to 1:20.

*Other inclosure records*

1. The plan attached to an 1874 Order of the Inclosure Commissioners relating to the drainage and improvement of lands in Collingbourne Kingston, Burbage, Great Bedwyn and other areas shows that part of the Order route between C2 and B as an enclosed road to the east of lands affected by the Order.

*Tithe records*

1. The Order route between F – E – D2 is shown as a hedged or fenced road coloured ochre on the 1843 Collingbourne Kingston tithe map. The Order route is shown as part of the ordinary highway network of the parish and in numbered 41 at the intersection with CKIN6A; parcel 41 is described as ‘*Road thro’ village below Turnpike Road and waste’*.
2. The tithe documents for Burbage show a hedged or fenced road coloured ochre running on the Grafton side of the parish boundary. There is no indication of a route of any description running on the Burbage side of that boundary.

*Finance Act 1910*

1. Whilst the tithe records show the F – E - D2 - C2 – B - A as an enclosed route, the Ordnance Survey base sheet used for the preparation of the 1910 Finance Act plans depict the route as an unfenced track within hereditaments 469, 677 and 8. No reduction in site value due to public rights of way was made by the valuer. No feature of any kind was recorded as being visible on the Burbage side of the parish boundary on the base map used for the valuation.

*Parish survey of public rights of way*

1. Neither Grafton nor Collingbourne Kingston Parish Councils claimed F – E – D2-C2 – B – A as part of the parish surveys carried out under the National Parks and Access to the Countryside Act 1949. However, Burbage Parish Council identified a route along the parish boundary as a 30 feet wide hedged and fenced bridleway although the line of the claimed route was drawn on the Grafton side of the parish boundary. There was no route which reflected D1 to C1 claimed by Burbage Parish Council.
2. The Ramblers’ Association objected to the omission of Grafton Fps 29, 30, 31 and Collingbourne Kingston34 which were added to the provisional map following a determination of the objections at a public inquiry in July 1955. The objection noted that “*although a step stile at one point indicates that these tracks are now used only by pedestrians, old maps show all these tracks as old roads*”. Notwithstanding this assertion of a higher status, the routes were added to the maps as public footpaths. Although Burbage parish council had shown the path claimed as a bridleway as being on the Grafton side of the parish boundary, what appeared on the draft and subsequent maps was shown on the Burbage side of the boundary as a public footpath (C1 – D1) to which the footpaths recorded in Grafton connected.

*Estate Plans 1807 – 1880*

1. The part of the Order route F – E is shown as an enclosed, sienna coloured road on an 1807 Estate plan of lands in Collingbourne Kingston, leading out of ‘Duckpuddle Lane’ (CKIN6A) running to and crossing over the Grafton parish boundary. F – E is shown in a similar manner on an 1880 plan of lands belonging to the Marquis of Ailesbury, with the route running to the east of the river.
2. An 1880 plan of Lord Ailesbury’s lands in Grafton shows E - D2 – C2 – B – A as an enclosed track coloured green. On this plan, roads are coloured either sienna or green; the use of colour to differentiate between roads may relate to their physical condition, with green routes denoting an unmetalled road or track.

*Ordnance Survey maps*

1. The Ordnance Survey (‘OS’) 1-inch to 1-mile map of 1817 shows the claimed route as a wide track or road, enclosed by fences or hedges for the majority of its length. The first edition 25-inch to 1-mile map of 1878 shows A – B as a wide fenced road; B – D2 as a fenced road wholly on the Grafton side of the Grafton / Burbage parish boundary; D2 – E as an unfenced road and E – F as a wide fenced road. Whilst OS maps do not provide evidence of the status of routes shown, they demonstrate the continued existence as a physical feature in the landscape of the routes set out at inclosure a hundred years previously.

*Small scale commercial maps*

1. The key to Greenwood’s maps of Wiltshire (1820 and 1829) only shows two types of road; turnpikes and cross roads. The whole of the Order route is shown as enclosed by hedges or fences in Collingbourne Kingston and between Grafton and the southern end of Southgrove Copse; other parts of the route are shown as an unenclosed track running over fields. Cary’s maps of 1823 and 1832 show the Order route as a ‘parochial road’, enclosed between Grafton and the southern end of Southgrove Copse.

*Saxon Charters 961 & 968 AD*

1. A paper entitled “*The Ancient Highways and Tracks of Wiltshire, Berkshire and Hampshire, and the Saxon Battle-fields of Wiltshire*” was published in Volume 75 of the Archaeological Journal (1918). The paper was the result of a study of 95 Saxon Charters in Wiltshire, from which the author (G.B. Grundy DLitt. M.A.) identified a number of roads present in pre-Conquest Wiltshire.
2. Grundy identified his road 30 (‘*Weale Weg’* and *Waelu Weg’*) from the Burbage and Bedwyn Charters as running “*along the line of the lane which now bounds these two parishes. It runs up the side of the big wood in the S.E part of Burbage”.* It is highly likely that the term ‘Weg’ means ‘Way’ with the Bosworth-Toller Anglo-Saxon Dictionary defining ‘Wealh’as meaning ‘foreigner’. Whilst the Council does not place great weight on this evidence (not being expert in Saxon Charters), it is suggested that the description given by Grundy could refer to a route open and available to a wider group than just local people.

**Conclusions on the documentary evidence**

1. There is a substantial body of evidence which demonstrates that the Order route is of a higher status than a public footpath. Collectively, the inclosure records provide conclusive proof of the status of the Order route as a public carriageway which has been in existence since at least 1763.
2. The description of the route in the Grafton Inclosure Award as commencing at the southern end of Southgrove Lane and crossing the parish boundary into Collingbourne Kingston “*at its usual place of Entrance*” strongly suggests that the Commissioners acknowledged that there was an existing public road running between West Grafton and Collingbourne Kingston which would otherwise be stopped up if it was not set out under the Award.
3. Whilst the academic work by Grundy suggests that the Order route may be of Saxon origin and has been a feature of the landscape for over one thousand years, it is beyond question that the order route was a public carriageway by at least the eighteenth century.
4. The proposals for the construction of railways in the mid-nineteenth century provide supporting evidence of the existence of public carriageway rights over the Order route; it is consistently recorded as a public highway in the ownership of the Surveyor of Highways. Collectively, the evidence from the deposited plans and books of reference demonstrates that in the mid-nineteenth century the Order route’s status as a public carriageway remained unchanged from that which had been in existence since at least 1763.
5. Small scale commercial maps describe the route as a ‘cross road’ or ‘parochial road’ and whilst OS maps do not provide evidence of status, they demonstrate that the route remained hedged and fenced for much of its length into the early twentieth century.
6. It is highly likely that with the passage of time and the improvement of other roads linking major centres that the Order route declined in importance with a consequential reduction in traffic using it, both in terms of the nature of that traffic and the frequency of use. The absence of recent or current use of the road by the public with vehicles does not however mean that those rights have been lost or removed.
7. I place significant weight upon the inclosure evidence as demonstrating that public vehicular rights subsist over F – E – D2 – C2 – B – A. There is no evidence from the Quarter Sessions records of those public rights having been formally stopped up; consequently, those public rights acknowledged and preserved by the inclosure agreements and awards remain extant. It follows that I conclude that the DM&S require modification.
8. None of the documentary sources demonstrate that there has ever been a public right of way running through Southgrove Copse within Burbage parish. The route is consistently shown in all documentary sources as a boundary road running alongside Southgrove Copse on the Grafton side of the boundary; Burbage parish council recorded it as such (albeit as a bridleway) as part of the parish survey of public rights of way.
9. On the basis of the evidence before me, I am satisfied, on a balance of probabilities, that there is no public right of way of any description on the route D1 – C1 within Burbage parish and that the DM&S require modification.

**Other matters**

1. As noted above, the objectors did not challenge the Council’s interpretation of the documentary evidence or the conclusions which might be reasonably drawn from that evidence. The objectors note that if the Order were to be confirmed, it would impact upon 1.35ha (3.34 acres) of arable land; that land may have to be taken out of production with consequences for the future profitability of the farming business.
2. Whilst these concerns are acknowledged, the width of the Order route to be recorded is that which was recorded in the 1797 inclosure award and which defined the lateral extent of the public right of way. The documentary evidence is consistent in showing a wide hedged or fenced route up until the early twentieth century. Whilst encroachment upon that width may have occurred gradually as the road declined in use and importance, the public right of way extends across the width set out in the 1797 award.
3. The objectors also note that they may have to reconsider the permissive use of the former railway line if the Order route is re-instated at its awarded width. As a permissive path, access along the former railway line could be rescinded at any time, and its availability or otherwise is not a matter which I have taken into account in reaching my decision.
4. The objectors also raised concerns regarding the potential for a Restricted Byway to be used by motorised vehicles and for the route to be used by those engaged in unlawful activity such as hare coursing. It was also submitted that the nature of the ground crossed by the Order route was wet and unsuitable for cyclists and horses.
5. Whilst I acknowledge the concerns which have been raised, these are not matters which I can take into consideration in reaching my decision, as my remit is limited to a determination as to whether the public right of way shown in the Order subsists; the future maintenance and management of the Restricted Byway is a matter for the Council as the Highway Authority.

**Overall Conclusion**

1. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.

 **Formal Decision**

1. I confirm the Order.

Alan Beckett

Inspector

