

Order Decision

Hearing held on 9 September 2015

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 3 November 2015

Order Ref: FPS/C1245/7/35M1

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Dorset County Council (Public Bridleways at Batcombe and Leigh) Definitive Map and Statement Modification Order 2010¹.
- The Order is dated 9 July 2010 and proposes to add restricted byways to the Definitive Map and Statement on a route known as Seiver's Lane, within the Parishes of Batcombe and Leigh. The central section of Seiver's Lane is not proposed to be recorded by the Order. Full details of the route are set out in the Order Plan and Schedule.
- In accordance with paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 I have given notice of my proposal to confirm the Order subject to modifications.

Summary of Decision: The Order is proposed for confirmation subject to modifications set out in the Formal Decision.

Preliminary matters

1. There continues to be concern that the Committee procedures of Dorset County Council as the order-making authority ("the OMA") make the Order invalid. The OMA confirmed that there had been no legal challenge to the Order and, therefore, it remains to be determined. I would note that my decision is made by reference to the evidence, argument and case law relating to the route itself, not procedural matters, for which there is alternative recourse.

Procedural Matters

2. The Interim Order Decision ("the IOD"), issued on 21 October 2014, was made following an accompanied site visit, carried out on 5 August 2014, and taking account of the written representations submitted at that time. In the IOD I proposed a modification to record the central section of the Order route, B – C², with the status byway open to all traffic. Modifications were also proposed to widths and descriptions of the original Order sections A – B and C – G.
3. Following notice of the proposed modifications three objections and representations were duly made. A late objection was also received. One of the duly made objections raised matters relevant to both the modified and unmodified part of the Order and contained some new evidence. As a result I considered it appropriate to deal with the matter by way of a hearing in order to clarify the matters raised and view the documents referred to.
4. I held a public hearing under paragraphs 7 and 8 of Schedule 15 to the Wildlife and Countryside Act 1981 ("the 1981 Act") on 9 September 2015. I made an

¹ Subject to the proposed modifications

² Letters A – G are used to identify the Order route(s) in the Order plan, reference 09/41/1

unaccompanied site visit on 8 September. No-one requested a further accompanied site visit following the close of the hearing.

Main issues

5. The main issue is whether the new evidence indicates that the proposed modifications should be amended or removed; additional modifications should be made or proposed; or the Order should not be confirmed.
6. The objectors³ questioned the weight to be given to certain documents. I was asked to place more weight on the current physical features of the route as indicative of the past condition and use. In closing it was argued that the evidence showed that part of the route, A – D, could be a public footpath but that no public rights had been shown on the section D – G.
7. The OMA had requested some minor modifications to those proposed, so that any confirmed Order accorded with the way in which other routes were recorded in Definitive Map and Statement. The OMA did not believe that great weight should be placed on the current conditions and were satisfied, taking account of the evidence as a whole, that the proposed status should be confirmed.
8. I shall take account of all the evidence presented, including that referred to in the IOD, in making this decision, on the balance of probabilities.

Reasons

Documentary evidence

An Act for Dividing, Allotting and Inclosing a certain Tract or Piece of Commonable Land, called Leigh Common, situate in the Tything of Leigh, in the Parish of Yetminster, in the County of Dorset, 1799

9. No evidence had been provided of the Inclosure Act at the IOD stage and, therefore, I made the reasonable assumption that the 1804 Inclosure Award had been made under the provisions of the Inclosure Consolidation Act 1801. The 1799 Act provides new evidence to be considered in this case.
10. I agree with the objectors that page 12⁴ of the 1799 Act shows that old roads were discontinued and, therefore, if there had formerly been a route west of Wriggle River Lane ("WRL") within an awarded allotment, any rights, public or private, would have been stopped up.
11. Changes to this landscape occurred at the end of the eighteenth and beginning of the nineteenth century driven by the 1799 Act, which sets out at page 10 that the Commissioners were "*...required, before making any Allotment or Allotments by virtue of this Act, to set out and appoint such public Highways and Carriage Roads, and such public and private Horse and other Roads, Drovers, Ways, Paths, Bridges, and such Gates, Stiles, Hedges, Sewers, Drains, Ditches, Watercourses, and other Requisites, to be made in, over, upon and through the said Tract or Piece of Commonable Land, hereby directed to be divided and allotted, as they shall judge proper, useful, and convenient.*"

³ The main case in objection was led by Mrs Cooke, on behalf of herself and other neighbouring landowners. Both Leigh and High Stoy Parish Councils supported the case in objection.

⁴ Of the typed version of the 1799 Act

12. Therefore, before the allotments were made, which was the important part of the process so far as the landowners were concerned, the Commissioners had to set out these features. It seems that what was shown in the Award plan, including on the alignment of Woolcombe Drove ("the Drove"), was in place by the time of 1805 Ordnance Survey ("OS") survey drawing. The survey does not show anything on the alignment E – F – G at that time. Although argued that the 1805 OS survey showed the situation prior to the Inclosure, it should be remembered that the point of the Act and Award was to 'inclose' the land. It must, at some point prior to the Act and Award, have been common land.
13. As noted in the IOD, the OS survey does not show the boundary south-west of the Drove, which is seen on the Award map. This was referred to in the 1804 Award in relation to allotment 42 which was bounded "...on the south by an old inclosure belonging to Mary Allenbridge...". The objectors note that there is no public record of legal inclosure of this land to the south, but clearly the 1804 inclosure was bounded by it. I understand that Brookfield Farm, to the south-west, was formerly part of Mary Allenbridge's land.
14. The objectors argue that prior to inclosure, the route to the west of Woolcombe Gate would only have been a cattle drove, giving access to the former boundary of the Common. It is noted that allotment 37 was made to the Earl of Ilchester, "...for an in respect of divers tenements within the Manor of Woolcombe now thrown together and occupied as one farm called Woolcombe Farm...". I agree that Seiver's Lane ("the Lane") and the Drove provide the clear and obvious access from Woolcombe Farm to this land, which lies to the north-east of the Order route.
15. However, the 1799 Act provided powers for the Commissioners to set out and appoint private roads, should they consider that '*proper, useful and convenient*,' and they set out other routes as private within this Award. Had the Lane only been for the private use in connection with Woolcombe Farm then I consider it unlikely that the Commissioners would have sought to create a public route leading to it. As a result, I remain of the view that the Inclosure Act and Award, taken together, provide strong evidence that the Drove, referred to in the Award as a public carriage road, was intended to be the continuation of an existing public highway. That continuation existed on the western section of the Lane, A – E, as shown by the other mapping, including the 1805 OS survey.

Batcombe & Leigh Tithe Maps, 1838 & 1840

16. It is argued that the tithe maps both show gates, at points B and G and so differ from other roads in this area. In comparing the Lane to local roads, on all the mapping available to me, I agree that they seem to differ. The OMA indicated that gated public roads are not unknown in the county.
17. Both public and private roads had the capacity to diminish the productiveness of land for the assessment of tithe. On balance, the tithe maps provide good evidence of the topography of the route, as a through-route from at least 1840, although inconclusive on the assessment of public rights.

Sherborne Highway District map, 1869

18. Copies of the original document were provided to the hearing and show that the record of the publicly maintainable highways within the Sherborne Highway

Board District area showed 'halter paths', 'highways' and 'turnpike roads'. I consider that the hierarchy suggests that 'highways' in this document are more than halter paths but less than turnpike roads. I have also considered whether a halter path is consistent with bridleway rights, the definition for which includes leading a horse and so may involve a 'halter'; however, this is not clear.

19. The OMA reasonably argue that if the section E – G was not in place prior to the 1835 Highways Act, which appears to be the case from the mapping, then it might not have been publicly maintainable. However, this does not seem to explain why WRL was not recorded as publicly maintainable at that time.
20. Whilst the objector argues that the recording on this map is 'erroneous', I consider that weight can be fairly placed on this document as a record of the view of the relevant highway authority. Although only relating to maintenance, rather than a record of public rights, I consider it highly unlikely that a public authority would admit to public liability in relation to a route not understood to be legally available for public use. Whilst there may be little or no evidence of maintenance, the general users of such a minor rural route would be able to manage on unmetalled surfaces, or 'green lanes'.

Annotation 'Ford' by Ordnance Survey

21. The OS indicate that their current definition of fords is where a road passes through a watercourse which for at least some part of the year passes over and/or along the carriage way. Fords do not have to be useable by vehicles and those just used by pedestrians, cyclists or ridden horses would be defined as such, therefore, maps will also show fords on tracks and unmade paths. The OS indicated that they were unable to comment on whether that definition would have been different for early OS maps.
22. I accept entirely that the annotation 'Ford' may not denote a currently used or useable feature but there must have been usable fords at some point for the OS to record them in the first instance.
23. I agree with the objectors that the current conditions, certainly of the crossing of the Wriggle River, point C, would not be passable with a horse and cart. However, it is argued that the route west of Woolcombe Gate was used as a cattle drove and I do not consider that cattle could traverse up and down a drop of between 0.9 – 2 metres in the geological survey letter dated 29 May 2015⁵, without breaking back the banks as they currently exist. Therefore, I give no weight to the current physical conditions at either the stream or river crossing as indicative of conditions almost two centuries ago, even if it appears to objectors from the mapping that the water-course may not have altered.
24. Although it is argued that the apparent location of the footbridge on the 1887 OS map would be likely to prevent use of the ford, both a footbridge and a ford are shown; it is reasonable to presume both existed at the time of the survey.
25. I consider that the OS mapping as a whole provides evidence of the Lane as a through-route with fords, which are not normally associated with passage only on foot, formerly providing passage over the water-courses on that alignment.

⁵ Or the other suggested heights of 4 – 7 metres, according to the geological survey letter of 19 August 2015

Indication of guideposts by Ordnance Survey

26. The location of guideposts appears not to assist with regard to the existence, or otherwise, of public rights.

Finance (1909 - 1910) Act

27. I agree with the objectors that the Finance (1909 - 1910) Act could have excluded the Lane for reasons other than public vehicular use. In conjunction with the rest of the evidence, including the recording as an occupation road in the OS name book, this would not be incompatible with a public bridleway in conjunction with higher rights for the owner.

The Definitive Map and Statement - Special Review

28. I am satisfied that I have given appropriate weight to the findings of the Inspector under the Special Review, bearing in mind the legal constraints which were placed upon him in considering all of the evidence; constraints which are not placed upon the evidence before me.

29. It was argued that a document should be given weight as showing a survey in the 1950s, finding that "*Seivers Lane MR617062 - 620062, Leigh, and MR608057 - 611057, Batcombe, are not County Roads...*". I am satisfied that the title of this document clearly shows it to be associated with the "*Review of Definitive Map of Rights of Way*" which was carried out in the 1970s. I do not consider that it is referring to a physical survey but re-stating information already known, that the eastern and western-most sections of the Lane, A - B and C - G, were not recorded as County highways on the list of streets. I do not agree that this comment in relation to the two ends implies a similar view of the central section as, if that were the case, then the whole could be easily referred to. I do not consider that this provides any additional evidence.

Claimed use

30. I remain of the view that there is very little evidence of use over the route as a whole. There is wider evidence of use on foot over the western section. I give very little weight to the evidence of use but have considered it in conjunction with all the evidence.

Land ownership

31. It was argued that whilst the Ilchester Estates did not claim ownership of the Lane, it could be part of the Lordship of the Manor of Woolcombe Matravers. That is possible, however, it would remain a matter to be claimed by the relevant owners. Ownership is not a bar to public rights, which can co-exist with private rights.

Physical conditions

32. There is an understandably strong inclination to place weight on the current physical conditions as demonstrative of the past. In my experience physical conditions of land can alter within extremely short periods of time and, therefore, I do not give weight to the current conditions.

33. It is noted that changes to the Wriggle River, arising due to waterworks under The Yeovil Improvement Act, 1870, led to compensation being paid to the owner

of Withyhook Mill, to the north of the Order route. Although '*Leigh, A Dorset Village*' refers to a court case in 1835, and the mill going out of business in 1870, the case reported in *The Western Gazette* in April 1879 relates to a case then, which can only have arisen after the Act gave provision for the works. It seems that payments were made in the period 1870 - 1879.

34. It is argued that the changes in this period would mean that the water table would not be such as to cause significant changes to the river subsequently, such that weight could be placed on the current conditions at point C. I have set out at paragraph 2322 why I do not place weight on this argument.
35. I agree that there are oak trees within the Lane, at least some of which appear to be in alignment. However, the suggested planting timescale over 100 - 200 years seems a very long time for a deliberate planting. I agree that the trees would be an obstruction to use of a highway and therefore, a public nuisance. However, unless complaint was raised then, much as today, an authority may not bother to take action to resolve the issue. There remains sufficient room to easily pass alongside the trees; one hundred plus years ago they would have been smaller and may not have been thought a problem. I note that the 1889 OS map, surveyed in 1887, shows trees along the hedge line but does not seem to show them in the Lane.
36. Although argued that the actions of West Dorset District Council demonstrated a typical mistake in identifying the extent of the Lane, I am satisfied that the mapping as a whole provides a clear indication of the Lane as a through route and a separate feature from Seiver's Copse.
37. I remain of the view that even the greatest gradient, section C - E, is not excessive and the overall conditions during my visits were not the marshy, boggy, unforgiving ground suggested. However, these visits were in August and September and, therefore, perhaps at more commodious times of year; the suggested difficulties may explain why the route fell into general disuse.

Summary

38. The objectors wish to prevent the recording of higher public rights, and of any rights at all on the section adjacent to Brookfield Farm. As such there has been a detailed critique of the IOD. I do not consider it necessary to reconsider every point of the IOD in this decision and have concentrated on the main new evidence and issues raised. However, I have reconsidered the evidence as a whole in light of the matters raised.
39. The Lane has existed in the landscape for at least one hundred and seventy-five years on the current alignment, with the western section in that location for over two hundred years. I am satisfied that the Inclosure process in the early nineteenth century combined with the Highway Board map provides evidence in relation to the public status of the western section B - E and by inference A - B. The question then arising is whether the evidence as a whole is sufficient on the balance of probabilities to show that the eastern-most section E - G was also subject to public rights. I agree that the evidence is more limited here, however, in my view this has been a minor public highway, used as a through route. Whilst the objectors argue that there is no evidence of public use, the mapping as a whole indicates that there has been a physical route, which I consider would be used as a continuation of the western section.

40. The question then arising is whether the evidence supports the vehicular rights which I considered appropriate in the IOD. The Inclosure Act and Award gives a strong inference of higher rights, but I bear in mind that the Highways Act 1835 sets out that "*...the Word "Highways" Shall be understood to mean all Roads, Bridges (not being County Bridges), Carriageways, Cartways, Horseways, Bridleways, Footways, Causeways, Churchways, and Pavements...*". The Sherborne Highways Board maps record the route as a 'Highway'.
41. I do not give weight to the arguments with regard to current physical conditions of the route as being indicative that public use could not have been feasible in the past, but I agree that use has fallen away and use by vehicles would have been difficult. On balance, I consider that the evidence taken together is indicative of public rights higher than footpath, but not quite sufficient, on the balance of probabilities, to show a full vehicular highway.
42. Section 66 of 1981 Act sets out that a "*bridleway" means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway*".
43. Reviewing and rebalancing the entirety of the evidence in the light of the new matters put before me, I am satisfied, on the balance of probabilities, that this indicates the appropriate status of the Order route, A – G.

Grid references

44. Concerns were raised that the grid reference for point G was on the driveway to Brookfield Farm, rather than the Order route. The OMA confirmed that, having checked that point, they were satisfied that the grid reference ST 6196 0609, was correct and so I do not intend to modify this grid reference.

Description in Order

45. There was concern that I may have given weight to reference to a culvert across the route in the Order as indicative of public rights; I had not done so. I shall modify the Order to remove this reference, as there was no culvert at this point during my site visits.
46. The objectors argue that the pinch points are 2.1 metres and the OMA have not indicated disagreement on this. I shall modify the Order to refer to pinch points of 2.1 – 2.5 metres on the Leigh section.

Other matters

47. I do not consider the views of the OMA's District Highways Engineer provide relevant evidence. As the OMA stated at the hearing, his concern is maintenance and budgets.
48. As pointed out by the OMA matters of desirability, suitability, safety and sensitivity cannot be taken into account, although I am of course aware that these are the main points of concern for the objectors.

Conclusion

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

to proposed modifications to record the status as bridleway, including the section B – C, with some minor modifications in relation to width and others as requested by the OMA.

Formal Decision

50. I propose to confirm the Order subject to the following modifications:

- In the title to the Order:
 - replace “*...Restricted Byways...*” with “*...Public Bridleways...*”;
- In Article 3 to the Order:
 - replace “*...Restricted Byways...*” with “*...Public Bridleways...*”;
- Within Part I of the Schedule:
 - replace “*...restricted byway...*” with “*...public bridleway...*” throughout;
 - replace “*...Footpaths 12 and 13, Batcombe...*” with “*...Footpath 12, Batcombe, and the public road...*”;
 - after text “*...Redford Farm...*” add text “*..., Batcombe...*”;
 - remove text “*...where the route crosses a culvert...*”;
 - replace “*...is 10 metres throughout, narrowing to 8 metres at point B.*” with “*...varies from 8 – 10 metres with a pinch-point of 2.5 metres, as shown on the 1902, second edition, 25”:1 mile OS map.*”;
 - after “*...junction with the...*” insert “*...public bridleway at Batcombe, point B (national grid reference ST 6112 0575), generally north-east via its junction with Footpath 31 at national grid reference ST 6125 0584 to its junctions with Footpaths 32 and 62 at the ford at ST 6151 0614, east-north-east to the...*”;
 - in relation to point C alter the grid reference to “*...ST 6165 0618 ...*”;
 - delete “*...and Footpath 57 at...*”;
 - after “*The width of the...*” replace “*...restricted byway varies from 9 metres at point C, widening to 12 metres at point F and narrowing to 10 metres at point G.*” with “*...public bridleway varies between 3.9 and 12 metres, subject to pinch points of 2.1 - 2.5 metres, as shown on the 1902, second edition, 25”:1 mile OS map and excluded from the adjacent hereditaments on the Finance Act 1910 map.*”
- Within Part II of the Schedule:
 - replace “*...restricted byway...*” with “*...public bridleway...*”;
 - for the ‘*public bridleway at Batcombe*’ replace “*...Footpaths 12 and 13, Batcombe...*” with “*...Footpath 12, Batcombe, and the public road...*”;
 - after text “*...Redford Farm...*” add text “*..., Batcombe...*”;
 - remove text “*...where the route crosses a culvert...*”;

- replace “...restricted byway is 10 metres throughout, narrowing to 8 metres at ST 61120575.” with “...public bridleway varies from 8 – 10 metres with a pinch-point of 2.5 metres, as shown on the 1902, second edition, 25”:1 mile OS map.”;
- for the ‘public bridleway at Leigh’ replace ‘From’ “ST 61640618” with “ST 6112 0575”;
- after “...junction with the...” insert “...public bridleway at Batcombe, point B (national grid reference ST 6112 0575), generally north-east via its junction with Footpath 31 at national grid reference ST 6125 0584 to its junctions with Footpaths 32 and 62 at the ford at ST 6151 0614, east-north-east to the...”;
- delete “...and Footpath 57 at national grid reference ST 6120620...”;
- after “The width of the...” replace “...restricted byway varies from 9 metres at point C, widening to 12 metres at point F and narrowing to 10 metres at point G.” with “...public bridleway varies between 3.9 and 12 metres, subject to pinch points of 2.1 - 2.5 metres, as shown on the 1902, second edition, 25”:1 mile OS map and excluded from the adjacent hereditaments on the Finance Act 1910 map.”
- On the Order plan:
 - show the entirety of the route, points A - B - C - D - E - F - G as a broken line with cross bars at intervals;
 - alter the grid reference for point C to ST 61650618;
 - in the Key indicate the “PROPOSED BRIDLEWAY, A - G” with the appropriate symbol;
 - remove the indication of “PROPOSED RESTRICTED BYWAYS” .

51. Since the confirmed Order would affect land not affected by the Order as submitted and show as a highway of one description a way which is shown in the Order as a highway of another description, 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

For the Order Making Authority, Dorset County Council:

Ms S Meggs Solicitor

Mr R Bell Case Officer, Community and Highways

In Objection to the Order:

Mrs C Cooke

Mrs A Awdry

Interested Parties in objection to the Order:

Mr K Waterfall

HEARING DOCUMENTS

- 1 The Order
- 2 Speaking notes on behalf of the objectors
- 3 Letter, T.D. Evans, 19 August 2015
- 4 OS maps
- 5 Extract from Sherborne Highways Board Document
- 6 Closing submissions on behalf of Dorset County Council
- 7 Letter, Brian Read, 7 September 2015