



Order Decision

Site Visit on 15 December 2015

by Sue Arnott FIPROW

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

Decision date: 22 January 2016

Order Ref: FPS/U1050/7/85

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Derbyshire County Council (Byway Open to All Traffic along Bamford Clough between Taggs Knoll and New Road – Parish of Bamford) Modification Order 2012.
- The Order is dated 29 March 2012. It proposes to modify the definitive map and statement for the area by recording a byway open to all traffic at Bamford Clough, also known as Leaside Road, in the Parish of Bamford, as shown on the Order map and described in the Order schedule.
- There were two objections outstanding¹ when Derbyshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: The Order is confirmed subject to the modifications set out in the Formal Decision below.

Procedural Matters

1. As the applicant for this Order, the Trail Riders' Fellowship (TRF) supports its confirmation although there are some points on which it takes a different view to the order-making authority, Derbyshire County Council (DCC). In this decision I have considered submissions from both parties and noted these differences only where relevant to the outcome.
2. The TRF has requested that two minor modifications be made to the Order schedule so as to better and more accurately record descriptive information about the route. I address this issue below at paragraphs 33 and 34.

The Main Issues

3. There are three main issues here: the first is whether the evidence shows that a public right of way for vehicles was once established along the Order route; the second is whether any such rights still exist for motor vehicles that should be shown on the definitive map and statement. The third matter concerns the width of the way and how it is to be recorded.
4. The Order was made under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(i). If I am to confirm it, I must be satisfied that evidence has been discovered which shows, on a balance of probability, that the public rights intended to be recorded do subsist.

¹ One of these has since been withdrawn.

5. If confirmed, the Order would record the route in question (shown on the Order map as A-B) as a byway open to all traffic (BOAT), that is "a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used".²
6. On the basis of the historical evidence it discovered, DCC concluded that public vehicular rights of way do exist along the Order route. Further, it considered that Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) does not affect the continued existence of such rights.
7. Sub-section 67(1) of that Act provides that upon commencement on 2 May 2006 any existing public right of way for mechanically propelled vehicles (MPVs) was extinguished if it was over a way which, immediately before that date, was not shown in the definitive map and statement or was shown as either a footpath, bridleway or restricted byway, unless such rights were saved by virtue of falling into one of the categories for exemption.
8. DCC took the view that public MPV rights were not extinguished, having been saved by sub-section 67(2)(b) which provides as follows: "(2) Sub-section (1) does not apply to an existing public right of way if ... (b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 ... (list of highways maintainable at public expense)".
9. Consequently the Order was made to record a BOAT on the basis that a public vehicular right of way exists, that rights for MPVs have been saved, and that the route has the character of a way mostly used in the manner in which a public footpath or bridleway is used. In fact none of these conclusions have been challenged.

Reasons

10. The evidence in this case is in two main parts. The first is the historical documentary evidence which consists of maps, awards, plans and highway records dating mostly from the mid-nineteenth to the mid-twentieth centuries. DCC's case rests primarily on this evidence and I propose to analyse this first.
11. The second bundle of supporting material consists of evidence from individuals who claim to have used the Order route with vehicles for varying periods extending back from the date of the application to DCC for the Order (3 November 2005) as far as 1962. In addition to this, there is other evidence to support use by motor cyclists taking part in various motor trial events dating as far back as 1937, and in particular the event known as 'the Edinburgh Trial'.

Nineteenth century inclosure evidence

12. The mainstay of the case in support of the existence of a public vehicular right of way is the 1857 Bamford Enclosure³ Award and Plan. This was compiled under the provisions of the 1845 General Inclosure Act together with a Public General Act which followed on 23 July 1855 through which a list of twenty six inclosures in England and Wales were authorised. This included the inclosure of land at

² Section 66 of the 1981 Act

³ Whilst the title appears to use the word 'Enclosure' as opposed to 'Inclosure', I intend to use the latter throughout this decision although no particular differences between the two have been highlighted to me.

Bamford in Derbyshire, the date of the Provisional Order for this being 5th April 1855. In the ensuing Award and Plan the appointed Valuer, acting under the direction of the Inclosure Commissioners, set out a part of the Order route along Bamford Clough as a "Public Carriageway and Drift Road or Highway of the width of twelve feet..." leading to "Lees End Road" (now known as "New Road").

13. The southernmost section from the point marked A on the Order map in the village rising up to the junction of the Order route with the private access road to Clough House, lay outside the inclosure area at that time⁴ although the Award Plan does suggest that the road continued beyond the inclosure boundary.
14. Records from the Quarter Sessions show that in 1856 inclosure highway certificates were issued by the Justices in relation to four public carriageways in Bamford, including "Bamford Clough Road" noted there as being "12 feet wide".
15. In support of the Order the TRF submits that the setting out of this public carriage road by a statutory process, together with the road's statutory 'adoption' recorded by the Justices, is unimpeachable evidence of the road's existence in 1856 and thereafter.
16. I do not have before me details of the full text of the Award (or Act) to be confident that its precise terms were satisfied as regards the point at which the newly awarded highway would come into existence. However I do accept that this is ostensibly conclusive evidence of the existence of a public vehicular road as at 1856.

Pre-inclosure evidence

17. Although it adds little to that conclusion, it is worth noting that evidence of a through-route along this alignment before that date is sparse. It is not shown at all by Burdett on his Map of Derbyshire dating from the 1760s. By 1836 Sanderson's Map of Derbyshire and, in the same period, the 1":1 mile map produced by the Ordnance Survey (OS) c1840 both suggest short stretches of road from the north and south existed but were unconnected at that time.
18. The 1842 Bamford Tithe Plan shows a road leading from the village (via Point A) to the group of buildings now known as Clough House (previously Clough Farm). This road ran through the land at Bamford Clough that was later inclosed in 1855 but which lay outside the area subject to tithe in Bamford in 1842.
19. DCC concludes it is plausible that, pre-inclosure, the Order route began as a cul-de-sac access road to what is now Clough House. The TRF points out that without the corresponding tithe apportionment, the tithe plan has limited value and that the road to Clough House may just as easily have been public or private. Whilst I would agree that either is possible, in this case the evidence does not point to this being a public road before the inclosure of Bamford Clough.

Post-inclosure evidence

20. Whilst there may be doubt over the pre-existence of a vehicular highway, all the evidence which post-dates the 1855 inclosure records appear to be entirely consistent with a road of that status and one which continues to the village.

⁴ The TRF submits that the Valuer had powers to set out and make roads beyond the footprint of the inclosure but it is not argued here that there is any evidence he did so.

21. From the first detailed map in 1880, the 25":1 mile First Edition, and the 1898 Second Edition (on which it is named "Leeside Road") to the 1962 1":1 mile Buxton and Matlock map, the OS has consistently shown a vehicular width road between Bamford and 'New Road'. DCC draws attention to what is probably a gate shown by the OS at its eastern end but I agree that in this context this was most probably for stock control purposes and not a barrier that would preclude the existence of a public road.
22. The working plan from the records prepared under the 1910 Finance Act shows the full length of the Order route excluded from adjacent hereditaments for valuation purposes. That alone is not proof of a vehicular highway but it is consistent with a road of that status.
23. When in or about 1929 responsibility for maintaining highways was 'handed over' to the County Council, the documentation transferred from Chapel en le Frith Rural District Council recorded the Order route as a publicly maintainable road named simply "The Clough".
24. The route was not recorded by Bamford Parish Council in the 1950s when surveys for the preparation of the first definitive map and statement were being conducted. The reason is not documented but this would be consistent with the road being recognised as a full vehicular highway as opposed to the "road used as public paths", bridleways and footpaths that were to be shown on the definitive map and statement. Indeed the 1956 Bartholomew's half inch map of the Peak District showed it in the category "other roads and trackways" rather than "footpaths and bridleways".
25. It is not disputed that the Order route is included in the current 'list of streets', the list of publicly maintainable highways required under sub-section 36(6) of the Highways Act 1980.
26. It appears that in 1937, following a query from Bamford Parish Council concerned about the impact of the Bamford Clough Motor Trials, the Chapel en le Frith County Roads Advisory Sub-Committee of DCC began an investigation into the status of the road. The Clerk subsequently reported that the road was set out as a public carriage road in the Bamford Enclosure Award and that concerns over any damage caused by the motor trial would be addressed through negotiation.

Conclusions from the historical documentary evidence

27. I am left in no doubt that the route in question is a public vehicular road, established through the inclosure process in the mid-nineteenth century, and that it has been accepted as having that status by the highway authority.
28. Since it is clear the road is included in DCC's list of highways maintainable at the public expense, as explained in paragraphs 6 to 8 above, any public rights to use the road with MPVs will remain, unaffected by sub-section 67(1) of the 2006 Act.

Width of the Order route

29. The TRF has highlighted the tension between the awarded width of this road ("12 feet" / 3.66 metres) and the width between walls within the bounds of the 1855 inclosure area. To resolve this, I am referred to the 1845 General Inclosure Act and the 1835 General Highway Act.

30. DCC addresses the question raised by the 1845 Act (which required “every public cartway leading to any market town (to be) twenty feet wide at the least ...”⁵) by pointing out that the Order route could not be construed as leading to a market town and thus the requirement that it be set out at “20 feet wide at the least” (a minimum of 6.1 metres) would not apply. The TRF agrees and I accept that in 1855 the Valuer was acting within his powers in setting out the inclosure road as “12 feet wide”.
31. However a detailed survey carried out jointly by the TRF and DCC has shown that the width between walls and fences along the route varies from 3.66m to 5.18m with a pinch point of 2.64m at the gateposts noted in Part II of the Order schedule.
32. This schedule records the “Approx. Width” of the Order route as “Varying between 6.1 and 3.6 metres, widening out to 11.5 metres at entrance to Knoll House and narrowing to 3.6 metres S of Clough House”.
33. The TRF submits that a better way to record the width of this highway would be by reference to the physical boundaries of the highway and suggests adding to the description “*as shown in the 1:2500 1st Edition Ordnance Survey map of 1880*”. I agree this modification would assist in defining more accurately the extent of the public right of way along the Order route and follows recommended good practice.
34. However the TRF also highlights the use of the word “Approx.” in the heading for the ‘Width’ column in Part II of the Order schedule, submitting that this is *not* in accordance with accepted practice and requesting that the word be deleted. Whilst I fully agree that the use of approximate measurements are to be discouraged when recording the width of public rights of way because of the uncertainty it can create, in this case “Approx. Width” is a heading transposed directly from the definitive statement for the Parish of Bamford. I accept that its removal from the Order will ensure that, should any dispute ever arise, there is absolutely no doubt about the width of this lane, but deleting “Approx.” from the Order clearly can have no effect as regards the remainder of the existing definitive statement.

The appropriate status to be recorded for this road

35. The TRF highlights the fact that the “bare finding that the order route was and is a public vehicular highway does not of itself mean the road inevitably becomes a byway open to all traffic.” As I noted above at paragraph 5, a BOAT is a highway where all types of traffic have a right of way but it is “used by the public mainly for the purpose for which footpaths and bridleways are so used”. Thus there is what the TRF describes as “a balance of user” test to be applied here.
36. In the case of *Masters v Secretary of State for the Environment, Transport and the Regions [2001]*⁶ the Court of Appeal considered the issue and concluded that this test relates to the character of the way or its type and in particular whether it is more likely to be used by walkers and horse riders than vehicles, thus giving it the character of a way mostly used in the manner in which a public footpath or bridleway is used.

⁵ Section 80 of the 1845 Act

⁶ *Masters v SSETR [2000] 2 All ER 788, (CA) [2000] EWCA Civ 249, (CA)[2000] 4 All ER 458, (CA)[2001] QB 151.*

37. DCC submits that the Order route satisfies the criteria for inclusion on the definitive map as a BOAT. Whilst the TRF does not openly disagree with that conclusion, it raises two questions in relation to this test.
38. Firstly, as regards the 'balance of user' approach, it draws attention to the significant quantity of user evidence from claimants who have used the route with motor cycles dating as far back as the 1930s, yet there is no corresponding evidence from pedestrians or horse-riders.
39. Secondly it highlights the need for evidence to satisfy the 'character' test in the alternative and that there is no such evidence submitted in this case, although it concedes that the application itself may provide some evidence in that respect.
40. It is true that the statutory definition implies that what is required is evidence of use (in the present tense) which shows more journeys by people on foot and with horses than with vehicles. Yet where such a precise assessment is not a practical option, the Court of Appeal has allowed a judgement to be made based on the character of the way.
41. Whilst I have before me 258 completed user evidence forms from people who have driven along Bamford Clough in or on a motor vehicle, there is indirect evidence from other users amongst the submissions from the objectors, from others responding to earlier consultation and reported to DCC, and in fact a good many of the numerous claimants have themselves either used, or seen others using the route on foot, on horseback or pedal cycle. A strict mathematical calculation is difficult here and in any case may not be truly representative of the 'balance of user' but I am quite clear the route is not used solely by motor traffic.
42. As regards the character of the way, having walked the route and seen for myself its features in a visual sense⁷, combined with references in the material provided in relation to the Order and the lack of any submissions to the contrary, I have no hesitation in finding that, on a balance of probability, the Order route (known as Bamford Clough Road and previously Leaside Road) is a public carriageway which has the character of a way used mainly for the purposes for which footpaths and bridleways are so used. I therefore conclude that the evidence supports the recording on the definitive map and statement of a byway open to all traffic between points A and B as shown on the Order map and consequently that I should confirm the Order.

Other matters

43. In support of its case the TRF has analysed the substantial number of user evidence forms and provided submissions in relation to a possible claim for the establishment of a public right of way as provided in Section 31 of the Highways Act 1980, should this be necessary. Since I have concluded that the inclosure award and plan, the highway records and the other documentary evidence submitted are sufficient to demonstrate the existence of a vehicular highway, there is no need for me to address the issue of presumed dedication under statute. Nevertheless, this evidence is clearly consistent with acceptance of the inclosure road by the public although that point is already made through other documentation.

⁷ I note here that the majority of the route has been temporarily closed to the public for some months by traffic regulation order due to the danger presented by exposed electricity cables along the way. I therefore attribute no weight whatsoever to the absence of any traffic at all during my pre-arranged visit.

44. The objectors raise serious concerns about the effects of motor vehicles using the Order route on other users. Safety and nuisance issues, potential for accidents and the likely costs of maintaining the route as a highway for motor vehicles are all understandable fears. However these are not matters I can take into account in determining the legal status of the Order route. Having now established that motor vehicles do have a right to use Bamford Clough Road, management of the route in the future will be a matter for the highway authority.

Conclusion

45. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed subject to modification of the width as described in the Order schedule and as noted in paragraphs 33 and 34 above.

Formal Decision

46. I confirm the Order subject to the following modifications which do not require further advertisement:

In the Order schedule: Part II: Modification of Definitive Statement

In column entitled "Approx. Width"

- Delete from title "Approx."; and
- Add to description of the width: "as shown in the 1:2500 1st Edition Ordnance Survey map of 1880".

Sue Arnott

Inspector