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# Order Decision

Inquiry held on 10 April 2018

**by Barney Grimshaw BA DPA MRTPI(Rtd)**

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

**Decision date: 10 May 2018**

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## Order Ref: ROW/3174351

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Devon County Council (Restricted Byway No. 27, Berryarbor) Definitive Map Modification Order 2016.
- The Order is dated 23 August 2016 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway running from a point on the Sterridge Valley county road just south of Footpath 16 and re-joining the same road roughly 250 metres further to the south as shown on the Order Map and described in the Order Schedule.
- There were 3 objections outstanding at the commencement of the inquiry.

## Summary of Decision: The Order is confirmed.

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### Procedural Matters

1. I held a public inquiry into this Order on Tuesday 10 April 2018 at Combe Martin Community Hall. I made an unaccompanied site inspection on Monday 9 April when I was able to walk most of the Order route and view the rest. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary.
2. The Order was made to comply with a direction issued on behalf of the Secretary of State following consideration of an appeal under Schedule 14 of the 1981 Act. The Order Making Authority, Devon County Council, subsequently decided to adopt a neutral position with regard to the confirmation of the Order and therefore the applicant for the claimed route, Mr Graham Sanders, took the lead in support of the case for its confirmation.
3. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

### The Main Issues

4. The requirement of Section 53(3)(c)(i) of the 1981 Act is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
5. As this Order is concerned with a possible unrecorded vehicular route, it is also necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) which

extinguished rights of way for mechanically propelled vehicles (MPVs) subject to certain exceptions.

## **Reasons**

6. Very limited evidence of recent use of the Order route was submitted and the determination of the Order therefore depends on the interpretation of the documentary evidence available.
7. A large quantity of documentary evidence was submitted both in support of the Order and opposing its confirmation. Although I have considered all of this evidence in reaching my conclusions I have concentrated in this Decision on those elements which I regard as most relevant to the determination of the status of the Order route.

## **Documentary Evidence**

### *Early Maps*

8. Early maps including the 1809 Ordnance Survey (OS) map and Greenwood's map of 1827 appear to show a route similar to the Order route but not the present county road between Points A and D, although the small scale of these maps makes it difficult to identify the precise alignment shown.
9. The Tithe Map of 1840 is clearer and shows the Order route apparently unnumbered and accordingly not subject to payment of tithe. Again, the present road between A and D is not shown on this map. The route is shown shaded on the map in the same way as roads which are undeniably public carriageways. However, other routes which are not public, including cul de sac access routes are also shaded. It was argued on behalf of the objectors that the shading is used to identify routes not subject to tithe rather than to indicate the existence of public rights.
10. A map of the Watermouth Estate of 1854 shows similar information. This map also shows that the Order route provided the only access to a number of properties, not all of which were owned by the Estate. However, the OS map of 1891 shows both the Order route and the present county road between A and D. Accordingly it can be presumed that the present road was constructed at some time between 1854 and 1891.
11. Although these maps did not purport to indicate the existence or otherwise of public rights over routes shown, it was part of the applicant's case that, as they show that the Order route was for a lengthy period part of the only route from Berrynarbor up the Sterridge Valley and as it was the only means of access to a number of properties, it would have been likely to be used by the public. On behalf of objectors it was pointed out that the maps also showed another route up the valley on the other side of the river.

### *Vestry Minutes*

12. A minute from 1844 records a decision to let out roads to be kept in repair. One of the roads referred to was described as "*from the church gate to Combe Martin and from the church to Stinty Bridge*". The location of 'Stinty Bridge' is unclear but it seems likely that the route described might include part of the present road up the Sterridge Valley although probably not the Order route.

13. A minute of 1847 discusses the repair of routes maintainable by individuals by reason of tenure ('rationa tenurae'). On behalf of objectors it was noted that the minutes include no reference to repair of the Order route either by individuals or the inhabitants at large.

#### *Parish Council Minutes*

14. Berrynarbor Parish Council first met in December 1894. In 1897 and 1898 the parish considered the taking over and repair of various roads and in March 1898 it was recorded that 'the Sterridge Road' would in future be a parish road. However, by this time the present county road between Points A and D had been built and it may be that this formed part of 'the Sterridge Road' referred to. In any event, the applicant considers that, as the Order route had existed since before 1835 and would have been used by the public, it would already have been publicly maintainable in accordance with the provisions of the 1835 Highways Act.
15. More recently, in 1929, the parish council resolved to write to a Mr GD Smith to the effect that a road "by the Woodlands" was an occupation road not under the control of the parish council. This reference may refer to the Order route which runs past a property known as 'Woodlands' but the applicant points out that there are two roads leading to this property and that there is another area in Berrynarbor parish also known as 'Woodlands'. However, a statement given by Mr PI Thomas, son of a former owner of Venture Cottage, describes the second access road to Woodlands as 'new' in 1936 which would suggest it may not have been in existence in 1929.
16. Then, in 1951, the parish council resolved to write to the Surveyor regarding "the bridge between Woodlands House and Venture Cottage". This is a more specific reference to a point on the Order route and suggests that at that time the parish council might have considered the route public. This view appears to be confirmed in 1955 when the parish council decided to write to Devon County Council "enquiring if old road opposite Lower Rows and leading on to the rear of Venture Cottage and then joining the main Sterridge road again had been reserved as a public right of way". They then stated that they were very anxious that it should be recorded. Again, this is a specific reference to the Order route and clearly indicates the parish council's view that the route was public. At the time of this decision the chairman of the parish council was W Thomas, the owner of Venture Cottage.
17. Despite the decisions described above, it seems that the parish council had not previously claimed the Order route as a right of way of any sort when they had the opportunity to do so. The explanation for this is not known but it is possible that, if the route was considered to be a route for all traffic, it was not appropriate for it to be included in the definitive map.

#### *1910 Finance Act Records*

18. The 1910 Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. This survey was carried out by the Board of Inland Revenue under statutory powers and it was a criminal offence for any false statement to be made for the purpose of reducing liability. The existence of public rights of way

over land had the effect of reducing the value of the land and hence liability for the tax; they were therefore recorded in the survey.

19. In this case, the survey map shows the Order route between Points B and D excluded from adjacent hereditaments and therefore not subject to tax. Between Points A and B the route crosses hereditament 15, as does the present road. It is not clear to me from the map whether the routes were excluded from the hereditament or not but both routes are shown in the same manner. The associated Field Book entry notes the presence of a public right of way in OS parcels 962 and 964 which clearly relate to the presence of Footpath 16 across these fields but no reference is made to the Order route.
20. The exclusion of a route from hereditaments in a Finance Act survey raises the possibility that it was regarded as a public highway and probably one of a higher status than footpath or bridleway, which were usually dealt with by deductions from value rather than exclusion. However, practice varied and some private roads were also sometimes excluded especially where a number of properties were served and no single owner was known. In this case it was pointed out on behalf of objectors that a number of other routes and other areas of land not regarded as being subject to any public rights also appear to have been excluded for valuation purposes.

#### *Other Evidence*

21. In 1858, a court case was brought by Richard Charley against George Beer, a gamekeeper employed by Mr Basset, owner of the Watermouth Estate, for assault. Mr Charley had been discovered walking on a road which led to a farm called Cockhill. This may refer to part of the Order route. Although Mr Beer was found guilty of assault it is interesting to note that in his defence it was argued that the road was private property and Mr Charley had been trespassing. However, it is not clear from the finding of the court whether Mr Beer was found guilty because the road was in fact public or simply because the assault was unjustified.
22. Written and oral evidence was given by Mr PW Thomas and Mrs PJ Scudamore, who have visited Venture Cottage since the 1950s when it was occupied by their grandparents. They both stated that in the 1950s and 60s there was no evidence of the existence of the middle section of the Order route north of a well near Point C as it was so overgrown. They believed the accessible section of the route (Points C-D) to be a private access track and not a public right of way. Accordingly, Mrs Scudamore had been surprised to learn that in 1955 the parish council, then chaired by her grandfather, had expressed a wish to have the route recorded as a right of way.
23. When the Watermouth Estate was sold by auction in 1920 both the Order route and the county road were excluded from any of the lots sold on either side. All the lots were described in the Sales Particulars as "*adjoining or near Main or Parish Roads*". Lot 19 offered for sale was Middle Cockhill which appears to have had no other access than by way of part of the Order route but the Lot included no right of way through other land suggesting according to the applicant that the route must have been regarded as being public. Other Lots included the properties Venture Cottage and Knacker's Hole which also had access from the Order route and no right of way reserved.

24. Land Registry records reveal no reference to ownership of any part of the Order route. The title relating to Middle Cockhill Farm includes the access road to the west of Woodlands Cottage but not the Order route. However, this title includes a note to the effect that the owners claim that their land has the benefit of an easement over that part of the Order route between Points A and B. This is supported by a Statutory Declaration that free and unrestricted access over this route had been enjoyed from September 1970 until March 2016 (the date of the Declaration) subject to no adverse claim or any request to contribute to the maintenance of the route. Although the perceived need for such a declaration might indicate a belief that the route was not public it may also reflect the fact that its status was unclear and already the subject of some dispute.

### ***The 2006 Act***

25. As mentioned before, this act extinguished rights of way for MPVs subject to certain exceptions. In this case, none of the exceptions apply and accordingly, if public rights for vehicular use had been established before 2006, those relating to MPVs were extinguished.

### **Other Matters**

26. The applicant suggested that, as Footpath 16 joined the Order route, this indicated that it too carried public rights. However, although Footpath 16 at one time approached very close to the Order route it then turned to the north and joined the county road north of Point A. There is no evidence that this footpath has ever been recorded as linking directly to the Order route.

### **Conclusions**

27. Although a large quantity of documentary evidence has been submitted it is my view that no single document provides a conclusive indication of whether or not the Order route carries public rights. The evidence must therefore be considered in total in order to reach a balanced conclusion as to the status of the route.

28. Early maps indicate that the Order route has existed since before 1809 and formed part of a through route up the Sterridge Valley. It may not have been the only through route but it does appear to have been the only means of access to a number of properties. The construction of the present county road in the second half of the 19<sup>th</sup> century provided a more direct and less steep link between Points A and D for through traffic but the Order route would have continued to be the access road for some properties.

29. The ownership of the route is not known and does not appear to have been claimed by any party at any time. There is no evidence of the route having been deliberately obstructed before 2007 although part of it may have been so overgrown as to be impassable before that date.

30. Overall, it is my view on the balance of probability that, as the route existed and was not obstructed for a long time, it is likely that the public would have used it and that such use would have been by all forms of traffic. The Tithe and 1910 Finance Act records are consistent with this view. References in vestry and parish council minutes are to some extent inconsistent and open to different interpretation but, it seems that in the 1950s the parish council was

concerned that the route should be recorded as a public right of way of some sort.

31. No evidence has been produced to suggest that any public rights over the Order route have been extinguished and therefore, if such rights were ever established, even if they have not been exercised for a long time, the route would still be a public highway.
32. Having regard to these and all other matters raised, I conclude that the Order should be confirmed.

**Formal Decision**

33. I confirm the Order.

*Barney Grimshaw*

**Inspector**



