



Order Decision

Inquiry held on 28 August 2019

Site visit on 28 August 2019

by Paul Freer BA(Hons) LLM PhD MRTPI

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

Decision date: 25 September 2019

Order Ref: ROW/3211944

- This Order is made under Section 53(2)(a) of the Wildlife and Countryside Act 1981. It is known as the Restricted Byway No 15.50/24 Billy Lane, Great Timble Modification Order 2010.
- The Order is dated 2 February 2010. It proposes to modify the definitive map and statement for the area by adding a Restricted Byway linking Back Lane with Main Street as shown on the Order map and described in the Order schedule.
- There were thirteen objections outstanding at the commencement of the Inquiry. There were also four representations in support of the Order outstanding at that time.

Summary of Decision: The Order is confirmed.

Background to the Order

1. The application was submitted by Washburn Parish Council on 18 August 2005 and initially sought the addition of the Order route as a byway open to all traffic (BOAT). The application was submitted after the deadline for such applications of 20 January 2005 established by the Natural Environment and Rural Communities Act 2006 (2006 Act). Accordingly, North Yorkshire County Council, as the Order-Making Authority (OMA), determined to record the Order route as a restricted byway.
 2. The effect of section 67(1) of the 2006 Act is to extinguish public rights of way for mechanically propelled vehicles unless certain defined exceptions apply. One those exceptions is that set out at section 67(3)(a) of the 2006 Act which provides that the provisions of section 67(1) of that Act do not apply where an application was made under Wildlife and Countryside Act 1981 (1981 Act) to show the way as a BOAT before the 'relevant date' of 20 January 2005.
 3. The objectors to the Order point out that correspondence about the recording of Billy Lane as a BOAT was underway before the deadline for the submissions of applications in January 2005. The objectors then rely on the exception that arises under section 67(3)(a) of the 2006 Act and assert that it is still possible to record the Order route as a BOAT on the basis of that correspondence.
 4. The Court of Appeal decision in *The Queen on the application of Warden and Fellows of Winchester College and Humphrey Feeds Limited v Hampshire County Council and The Secretary of State for Environment, Food and Rural Affairs* [2008] EWCA Civ 431 made it clear that, in order for the exception under section 67(3)(a) of the 2006 Act to apply, the application must comply with the requirements for a full application set out in Schedule 14 of the 1981
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Act. The correspondence with the OMA prior to the cut-off date of 20 January 2005 does not meet the requirements for a full application under the Schedule 14 of the 1981 Act and is therefore insufficient to amount to an application for the purposes of the 1981 Act. Accordingly, the exception set out at section 67(3)(a) of the 2006 Act does not apply in this case and I am not able to consider recording the Order route as a BOAT on this basis.

5. A further exception to the provisions of section 67(1) of the 2006 Act arises from section 67(2)(a) of that Act. This exception provides that section 67(1) of the 2006 Act does not apply to an existing public right of way whose main lawful use by the public during the period of 5 years ending with commencement of the Act was for mechanically propelled vehicles. The relevant date in relation to this exception is 2 May 2006, and the use of Billy Lane between that date and 2 May 2001 became the focus for the Inquiry. I am, however, mindful that a BOAT affords a right for all traffic but is mainly used by the public as a footpath or bridleway. The corollary is that, even if I found the main lawful public use of the way during that period to have been by mechanically propelled vehicles, the main use by the public would then not have been as a footpath or bridleway. It therefore follows that the Order route could not be recorded as a BOAT in any event.

Main Issues

6. Having regard to the above, the main issues here are:
 - whether the evidence is sufficient to show on the balance of probabilities that in the past the Order route has been used in such a way that a restricted byway can be presumed to have been dedicated, and
 - whether, in relation to the exception at section 67(2)(a) of the 2006 Act, the main lawful use by the public in the five years preceding 2 May 2006 was for mechanically propelled vehicles.

Whether the Order route has been used in such a way that a restricted byway can be presumed to have been dedicated

7. The evidence in this case is derived primarily from user evidence forms submitted with the application, together with representations made in relation to the Order and evidence given at the Inquiry. There is, however, no dispute that public rights to use the way subsist: it is the nature of those rights that is in contention.
8. A total of 15 user evidence forms were submitted with the application. Some of the signatories indicated that they had private rights but, of the remainder, 11 stated that they had used the Order route on foot. The same number indicated that they had used the Order route by car, and 10 indicated use by cycle. Only 2 respondents indicated use riding or leading a horse. A significant proportion of the respondents, nearly two-thirds, had used the Order route over the full twenty years prior to the date of the application, and some had used it from dates beginning in or around 1950.
9. The evidence given at the Inquiry generally accorded with that provided by the user evidence forms. It was generally accepted by those who gave evidence that the route had been used on both foot and by motor vehicles in the 20 years prior to the submission of the application, but less so by cycle and by those riding or leading a horse.

10. The Order route does appear on a number of historical maps of the area. On some of those maps, the Order route is depicted in the same way as routes that now form part of the highway network, such as Back Lane and Main Street. This would, I accept, tend to suggest that the Order route may historically have been used by vehicles at those times. However, I must balance the evidence in this respect against that in the user evidence forms, which are consistent in indicating that the Order route has been used on foot, by cycle and by mechanically propelled vehicles (and to a lesser extent for riding or leading a horse) throughout the relevant period.
11. Having regard to the above, I am satisfied on the balance of probability that the Order route has been used on foot, by mechanically propelled vehicles, by cycle and to some extent for riding or leading a horse throughout the twenty-year period leading up to the submission of the application. I must therefore now go on to consider whether the Order route was used mainly by mechanically propelled vehicles during the relevant five-year period stated in the 2006 Act (the five-year period).

Whether the main lawful use by the public in the five years preceding 2 May 2006 was for mechanically propelled vehicles

12. Before considering the evidence in this respect, it is necessary to understand what is meant by the term 'main lawful use' in the context of section 67(2)(a) of the 2006 Act. The term 'main lawful use' is not defined in the 2006 Act. However, the Department for Environment, Food and Rural Affairs guidance on Part 6 of the 2006 Act and Restricted Byways¹ indicates that authorities should take a pragmatic approach and should assess the evidence available on the relative *volumes* of walkers, horse riders, cyclists and motor vehicles to see whether the lawful use has been predominantly by mechanically propelled vehicles (my emphasis). The guidance goes on to confirm that the onus lies on anyone seeking to use mechanically propelled vehicles to prove that rights have not been extinguished. The test is again the balance of probabilities.
13. To my mind, two key points emerge from this guidance. Firstly, the guidance is clear in indicating that the relative volume of walkers, horse riders, cyclists and motor vehicles is the test to be applied. That connotes a purely statistical exercise rather than a purposive one. Secondly, the threshold indicated in the guidance is 'predominantly'. The Oxford English Dictionary defines 'predominant' as being present as the main element. Combining those two terms, in order to show that the exception at section 67(2)(a) of the 2006 Act applies in this case, the objectors must show on the balance of probability that mechanically propelled vehicles were numerically the main element of use of Billy Lane in the five-year period leading up to 2 May 2006.
14. A number of the residents of Timble have commented on the use of Billy Lane during the relevant period. Speaking at the Inquiry as a representative of Washburn Parish Council, Mr Campbell recounts that the status of Billy Lane was raised with the Parish Council in or around June 2004 as a result of passage along it by motor vehicles being blocked. Whilst this is evidence of use of Billy Lane by mechanically propelled vehicles, it does not quantify that use or use of Billy Lane by foot or cycle during that same period.

¹ Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways: A guide for local authorities, enforcement agencies, rights of way users and practitioners.

15. The occupiers of Plum Tree Farm, Mr and Mrs Shields, explain that during the five-year period they used Billy Lane as a route to move livestock from their farm holding on the north side of the village to their land to the south of the village. This was initially using a pick-up truck but during the five-year period quad-bikes were used as well as a tractor and a four-wheel drive vehicle. It was explained that they use Billy Lane at least once a day to check on their livestock but that at other times, such as at lambing, several trips would be made. Their evidence was supported by datable photographs and this adds to the reliability of their evidence.
16. There is also evidence that other farmers in the area used Billy Lane by mechanically propelled vehicles for the purpose of moving livestock and transporting equipment during the five-year period. In this context, Mr Lupton describes in his written representation how he carried out building work on several properties in Timble at that time and noted how often the local farming community would use Billy Lane with quad-bikes and tractors. Mr Lupton estimated that as being 20 to 30 trips daily. However, Mr Lupton did not give evidence to the Inquiry and his evidence was therefore not tested.
17. In his written representation, Mr Lumley explains that he purchased the property at Book End Farm in 1999 and relates that the rebuilding of the property resulted in numerous vehicular movements using Billy Lane. However, I note that rebuilding works were completed by November 2000 which would place those movements outside the five-year period.
18. In giving evidence to the Inquiry, Mrs Lumley explained that her work required travel to York three times a week on average during the five-year period. This involved the use of Billy Lane on each of those occasions and, notwithstanding that she was not using a four-wheel drive vehicle, I noted that Mrs Lumley was not dissuaded from using Billy Lane by the condition of the surface. The fact that Mrs Lumley was able to associate those movements with a specific period of employment during the relevant period adds to the reliability of that evidence.
19. Against this evidence, Mr and Mrs Steele, occupiers of The Smithy, whilst not disputing that Billy Lane was used by mechanically propelled vehicles during the relevant period, point out that the Order route was also used by people on foot. This was said to include use by large groups of walkers, a use which whilst accepted as not being a frequent occurrence at the present time was said to be more commonplace during the five-year period in question.
20. The evidence given by Mr and Mrs Steele was disputed by others, including by the occupiers of Plum Tree Farm. In that context, whilst Plum Tree Farm also affords views towards Billy Lane, The Smithy is located at the junction of Billy Lane with Back Lane and has windows facing onto both. It therefore seems to me that Mr and Mrs Steele are uniquely placed in a position where the use of Billy Lane on foot and by mechanically propelled vehicles would be apparent from within their property. Consequently, I have no reason to doubt the evidence given by Mr and Mrs Steele in this respect.
21. The occupiers of Lucy's Cottage, Mr and Mrs Priestley, indicate in their written representation that Billy Lane is used predominantly by people on foot. However, they were not resident at Lucy's Cottage during the five-year period and consequently that observation does not assist me.

22. In considering the above evidence, I firstly go back to the user evidence forms and the use of Billy Lane described therein. A number of those who gave evidence at the Inquiry also completed user evidence forms in 2005. These user evidence forms were therefore completed within the five-year period and, in my view, are likely to accurately reflect the pattern of movements taking place at that time. It is instructive to compare the use of Billy Lane described in those user evidence forms with the evidence given at the Inquiry and in recent written representations.
23. In describing their use of the Order route in the user evidence form, Mr and Mrs Shields indicate that they used Billy Lane on foot, by motor vehicle and by pedal cycle. They expand upon the questions set out in the user evidence form by stating that they used Billy Lane at least twice daily, including by quad bike and tractor. That is entirely consistent with the evidence that they gave at the Inquiry. They also indicate that on their completed user evidence form that they witnessed others using the Order route by a variety of means, including by cycle, on foot, by car, by tractor, on horseback, by motorcycle, and by lorry/van. This would suggest use more by mechanically propelled vehicle than by other means, albeit the various modes are not quantified.
24. In completing their user evidence form, Mr and Mrs Steele describe that they used Billy Lane to access their own property at The Smithy. I am not able to take that use into account but Mr and Mrs Steele also describe use of the Order route by others using a variety of means, including on foot, by bicycle, by car, by quad bike and by delivery van. That is again entirely consistent with the evidence that they gave at the Inquiry.
25. Others who completed user evidence forms, but who did not attend the Inquiry, also describe use of Billy Lane by a variety of means. There are, however, a few respondents who have expanded upon the basic questions to describe their perspective on the relative proportion of the various uses of Billy Lane that they observed. Where this has occurred, some respondents state use on foot as being the most observed use: I note the use of phrases such as "on foot -occasional vehicle" and "walkers mainly – few vehicles except when Back Lane is blocked". Moreover, one user evidence form records only use on foot and another records use only on foot and by bicycle.
26. The design of the user evidence forms issued by the OMA was criticised during the Inquiry, and I accept that there are limitations on the evidential value of such forms. However, to my mind, the value of the user evidence forms in this case lies in their contemporaneity with the five-year period in question. The information provided therein, whilst limited in scope and in some cases not able to be tested, has an inherent quality of being fresh in the minds of the respondents. There is also no reason to doubt that the information recorded in the user evidence forms is an honest record of the observations of the respondent(s).
27. Two points emerge from an analysis of the user evidence forms in the context of this main issue. Firstly, it bears repetition that the information therein is largely consistent with that given at the Inquiry. The evidence at the Inquiry revealed particular aspects of the use of Billy Lane that are not apparent from the user evidence forms: for example, the more frequent use of Billy Lane by Mr & Mrs Shields during lambing. Generally, though, many of the movements by mechanically propelled vehicles described during the Inquiry are already recorded on the user evidence forms rather than being new evidence.

28. The other, perhaps more salient, point is that the user evidence forms describe use of the Order route by a variety of means during the five-year period. In my reading of the user evidence forms, nowhere is there any indication that the use of Billy Lane was mainly by mechanically propelled vehicles during that period. Indeed, if anything, the user evidence forms tend to suggest that use on foot was the predominant use.
29. Taking the evidence given at the Inquiry and the user evidence forms in the round, together with all the other written representations received, the picture that emerges is use of Billy Lane during the five-year period on foot and by mechanically propelled vehicles in broadly equal measure, together with some use by bicycle and to a lesser extent by those riding or leading a horse. Consequently, on the balance of probability, I am not persuaded that mechanically propelled vehicles were numerically the main element of the use of Billy Lane in the five-year period leading up to 2 May 2006. It follows that the exception at section 67(2)(a) of the 2006 Act does not apply in this case.

Other matters

30. The consistent theme that emerged from the evidence at the Inquiry and in the letters of objection was the importance of Billy Lane for use by mechanically propelled vehicles. For example, the oft-repeated point was made that Billy Lane is invaluable when snow or ice make negotiating Back Lane difficult, or when it is blocked by delivery vehicles. I also recognise the importance of Billy Lane to farmers for moving livestock between fields on the north and south side of the village, and at times when livestock require more frequent attention. Concern was also expressed about the potential legal consequences of using Billy Lane in a mechanically propelled vehicle should it be confirmed as a restricted byway.
31. Whilst the above are clearly matters of considerable importance to the residents of Timble and to local farmers, they are not relevant to my consideration of whether a restricted byway can be presumed to have been dedicated along Order route. I must make my decision solely on the actual use of the Order route as shown by the evidence available to me. The merits of Billy Lane to the village of Timble and the other concerns expressed cannot form part of my considerations in that respect.

Conclusion

32. I am satisfied that the evidence is, when taken as a whole and on the balance of probability, sufficient to show that a restricted byway can be presumed to have been dedicated on the Order route. Consequently, I conclude that the Order should be confirmed.

Formal Decision

33. The Order is confirmed.

Paul Freer

INSPECTOR

APPEARANCES

In Support of The Order

For the Order-Making Authority

Miss Stephanie Hall

Of Counsel

She Called:

Ms Penny Noake

Principal Definitive Map Officer,
North Yorkshire County Council

Also supporting the Order

Mr Graham Steele

Occupier, The Smithy

Mrs Patricia Steele

Occupier, The Smithy

Opposing the Order

Mr Andrew Campbell

Representing Washburn Parish
Council

Mr Mark Shields

Occupier, Plum Tree Farm

Mrs Stephanie Shields

Occupier, Plum Tree Farm

Mrs Alison Lumley

Occupier, Book End Farm

Documents

1. Submissions on behalf of the Order-Making Authority.

