



Order Decision

Site Visit on 28 August 2019

by Sue M Arnott FIPROW

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

Decision date: 26 September 2019

Order Ref: ROW/3209328

- 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 Clough Lane and Oldfield Lane – Parishes of Birchover and South Darley) Modification Order 2016.
- The Order is dated 14 April 2016. It proposes to modify the definitive map and statement for the area by recording a byway open to all traffic between Birchover and Darley Bridge, as shown on the Order map and described in the Order schedule.
- There were three letters of objection outstanding together with four letters in support when Derbyshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is confirmed.

The Main Issues

1. The Order was made by Derbyshire County Council (DCC) under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(i). It proposes to add to the definitive map and statement a byway open to all traffic in two parts: as shown A-B on the Order map (in the parish of Birchover) and B-C (in South Darley parish).
2. If I am to confirm it, I must be satisfied that the evidence shows that the public rights of way described in the Order subsist on a balance of probability.
3. The route(s) in question are recorded by the highway authority (DCC) as a 'non-classified highway' (NCH). This designation recognises the public responsibility for maintenance of the way although it is not conclusive evidence of any particular class of highway. In this case, none of the objections dispute that the Order route carries a public right of way for vehicles (although I must nevertheless be satisfied sufficient evidence subsists to support such a conclusion).
4. The main issue here is whether or not the Order route falls into the category of highway that is proposed to be recorded on the definitive map and statement: a byway open to all traffic (BOAT).

Reasons

5. DCC received an application to record a public right of way along the Order route in November 2005. Following investigation, and after consideration of a
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report on the matter at its meeting on 27 July 2015, the Regulatory, Licensing and Appeals Committee of DCC resolved to make an order.

6. On the basis of the historical documents it discovered, the Council concluded that a public vehicular highway had been established along the Order route long ago, essentially relying on the legal maxim '*once a highway, always a highway*'. Further, it accepted that the way should be recorded as a BOAT.

Historical documentary evidence

7. DCC investigated a number of historical maps and documents, old highway records and local historical guidebooks. Whilst it does not rely on any one piece of evidence as conclusive, DCC submits that overall, on a balance of probability, it points towards the existence of historic public vehicular rights.
8. Early maps of the county, including those by Burdett (c1760), Greenwood (c1825) and Sanderson (1835 and 1836), show a road between Upper Town (south of Birchover) and Darley Bridge. Whilst none of these can be taken as unambiguously depicting a public carriageway, that is a clear possibility.
9. The Stanton in Peak Enclosure Award of 1819 does not set out this way but illustrates the Order route in the same manner as other roads, the annotation "*To Darley*" suggesting it was a public one. Similarly, the 1849 Tithe Plan for Wensley and Snitterton Township in Darley Parish marks this road "*From Birchover*", again alluding to a public highway.
10. Ordnance Survey (OS) Maps from 1840 through to 1962 are all supportive of a public road although not direct evidence that it did carry that status.
11. When a neighbouring property (Sabine Hay Farm) was sold at auction on 18 March 1890, the sales particulars stated: "*This farm adjoins the road from Birchover to Darley*", a clear reference to the Order route. Later, the records from the Finance Act 1910 are consistent with this being a public road and most probably a vehicular one.
12. Highway records from the 1929 Local Government Act (when responsibility for maintaining highways was transferred from the old rural district council to DCC) are available but only for the western end of the Order route. The plan 'handed over' by the former Bakewell RDC records 'Clough Road' as highway 149 continuing from Upper Town to the South Darley UDC boundary. Whilst this would appear to confirm that the road was then regarded as a highway in Birchover parish, DCC takes the view that this is not a safe deduction as other routes were included which do not carry public rights of way. Even with that caveat, given other evidence, this record is consistent with the Order route being a public road.
13. Indeed when preparations began for the first definitive map and statement following the National Parks and Access to the Countryside Act 1949, footpaths which connect with the Order route were surveyed and ultimately recorded as public paths whereas the road itself was not. Although the matter is not beyond doubt, evidence discovered by DCC suggests that minor roads were not included on the definitive map simply (and mistakenly) because they were already recorded on the highway authority's list of streets maintainable at the public expense. As an alternative explanation, it is suggested that roads such as the Order route were not included because they were not thought to qualify

for inclusion. Whatever the reason, the existence of connecting footpaths confirms, at the very least, a public right of way on foot along this road.

14. Until 1965, the eastern end of the Order route formed part of the main highway leading from Stanton Leys to Darley Bridge. By Order, the Quarter Sessions Court confirmed a diversion of this road onto the present carriageway known as Oldfield Lane leading northwest from point C; previously it had joined the Order route at a point between B and C. The 1965 diversion order stipulated that this part of the present Order route was to be retained. This evidence strongly suggests that a public carriageway was considered to continue through to Upper Town.
15. The picture emerging from the historical documentary evidence I have noted briefly above is supported by references in three local guidebooks, all of which are said to offer reliable interpretations of local historical artefacts, features and archived records.

Conclusions on the historical evidence

16. I agree with DCC that no one item of evidence conclusively confirms the status of the Order route but, when combined, it provides a strong case for the existence of a public carriageway of some antiquity. I have seen no evidence which challenges that interpretation.
17. Having examined all the available historical documents and mapping material, I draw the conclusion that the Order route has, since the 1760s at least, existed as an all-purpose public road. I therefore find, on a balance of probability, that the evidence is sufficient to show that it is a public carriageway that should be considered for addition to the definitive map and statement.

The definition of a BOAT

18. Having determined that the way is a public vehicular one, its inclusion in the highway authority's recent maintenance records provides exemption¹ from the effects of Section 67(1) of the Natural Environment and Rural Communities Act 2006 which would otherwise remove any public right of way for mechanically propelled vehicles (MPVs). A full public carriageway therefore continues to subsist along the Order route.
19. However it is still necessary to consider whether or not the route fits the statutory description of a BOAT insofar as it 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 If not, the route may be a vehicular highway but not one which should be recorded on the definitive map.
20. One of the objectors submits that the nature of the surface at the two ends of the Order route, and the vehicular traffic using these parts, demonstrate that these have the character of a way that is used more by motor vehicles than by horse riders and pedestrians. As a result, these sections should not be recorded as BOATs but should remain as NCHs on DCC's 'List of Streets'.

¹ Sub-section 67(2)(b) of the 2006 Act provides as follows: "(2) Sub-section (1) does not apply to an existing public right of way if ... (b) immediately before commencement [2 May 2006] 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)"

² Section 66 of the 1981 Act

21. He argues that, at the western end, the route provides access to Cowley Knoll Ffarm (a residential property and working farm) and to Ivy House (a private residence). There are regular visitors to both properties, with vehicles ranging from cars to 32 tonne lorries. The road here did once have a sealed surface but a lack of maintenance by the highway authority in recent years has led to its gradual disintegration. The same description applies to the easternmost section leading to Sabine Hay although this still retains its tarmac surface.
22. Commenting on these grounds for objection, the Green Lane Association (GLASS) submits that the route should be considered as one entity; either the whole should be recorded as a public NCH or as a BOAT. It argues that to differentiate between sections on the basis of local residents' traffic is irrelevant when the whole route has a varying character along its length and has been used by the public in MPVs as a through-route for as long as anyone can remember. From its observations elsewhere in the county, GLASS notes that DCC tends to use tarmac or tarmac planings when carrying out repairs to BOATs and to NCHs, implying that the Order route would be treated in a similar way whichever designation is decided.
23. DCC considers the character of this through-route is such that it is likely to be used more by non-vehicular traffic than by vehicles although it acknowledges that no survey has been undertaken. Nevertheless, it noted evidence which shows that the Order route was used 34 times since 1955 by one particular long-distance reliability trial for motor vehicles; other similar events have also been authorised over the years. Further, there is evidence from 12 individuals who have provided details of their own use on foot, horseback, bicycle and with a horse-drawn carriage as well as some use with motor vehicles. However, several commented that non-motorised use had declined in recent years as use by 4-wheel drive enthusiasts and motor cycles had increased.
24. In considering the submissions on this point, it is firstly important to recognise that the definitive map is a conclusive record of public rights of way, including footpaths, bridleways, restricted byways and BOATs, whereas the highway authority's 'List of Streets' is a classified record of highways maintainable at the public expense. The former is concerned with the legal status of ways open to the public whilst the focus for the latter is priority for maintenance and liability for known public highways.
25. Thus, it is entirely possible that a particular way might appear in both records. Defining the Order route as a BOAT would not result in it being removed from the List of Streets; it would remain a NCH in addition to its inclusion as a BOAT on the definitive map and responsibility for its maintenance would not alter.
26. In fact the essential question to be addressed here is whether all or part of the Order route satisfies the definition of a BOAT as set out in paragraph 19 above. There are two main sources of guidance on interpretation of this definition: Defra Circular 1/09 and the case of *Masters v the Secretary of State for the Environment, Transport and the Regions [2000]*³. These suggest that it is the 'concept', 'type' or 'character' of the way, and its 'suitability for use by pedestrians and horse riders' that denote a BOAT, rather than a direct assessment of its current (or recent) main use.

³ *Masters-v-the Secretary of State for the Environment, Transport and the Regions [on application of the Court of Appeal judgment] [2000] 4 All ER 458*

27. Nevertheless, use of the route may be relevant when considering the character of the way insofar as there can be a relationship between the type of surface provided by the highway authority, the suitability of the way for use by pedestrians and horse riders and the actual use that is made of the way. These factors are generally interlinked.
28. Here, I accept that there is additional vehicular use over sections at both ends of the Order route and that, at some stage in the past, this has been recognised by the highway authority in as much as the surface has been improved. However, I do not agree that this is sufficient to significantly alter the character of this old road such that it would fail to fit the overall concept of a BOAT as one more suited to non-vehicular traffic.
29. I am satisfied that, on a balance of probability, the evidence in this case shows there to be a public vehicular highway still in existence along the full length of the Order route and that overall this old road fits the description of a BOAT.

Other matters

30. Objectors highlight the effects of motor vehicles using (and mis-using) the Order route on residents and other users of this road. Serious concerns are raised over health and safety issues, the potential for accidents and the damage that has been done to the highway. Whilst I recognise these are all of the utmost concern to local people, they are not matters I have been able to take into account in determining the extent of the public rights that exist over the Order route.

Conclusion

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

Formal Decision

32. The Order is confirmed.

Sue Arnott

Inspector

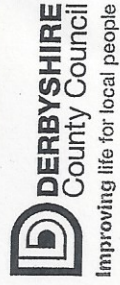


Wildlife & Countryside Act 1981
Section 53

The Derbyshire County Council
(Byway Open to All Traffic
along Clough Lane and
Oldfield Lane - Parishes of
Birchover and South Darley)
Modification Order 2016

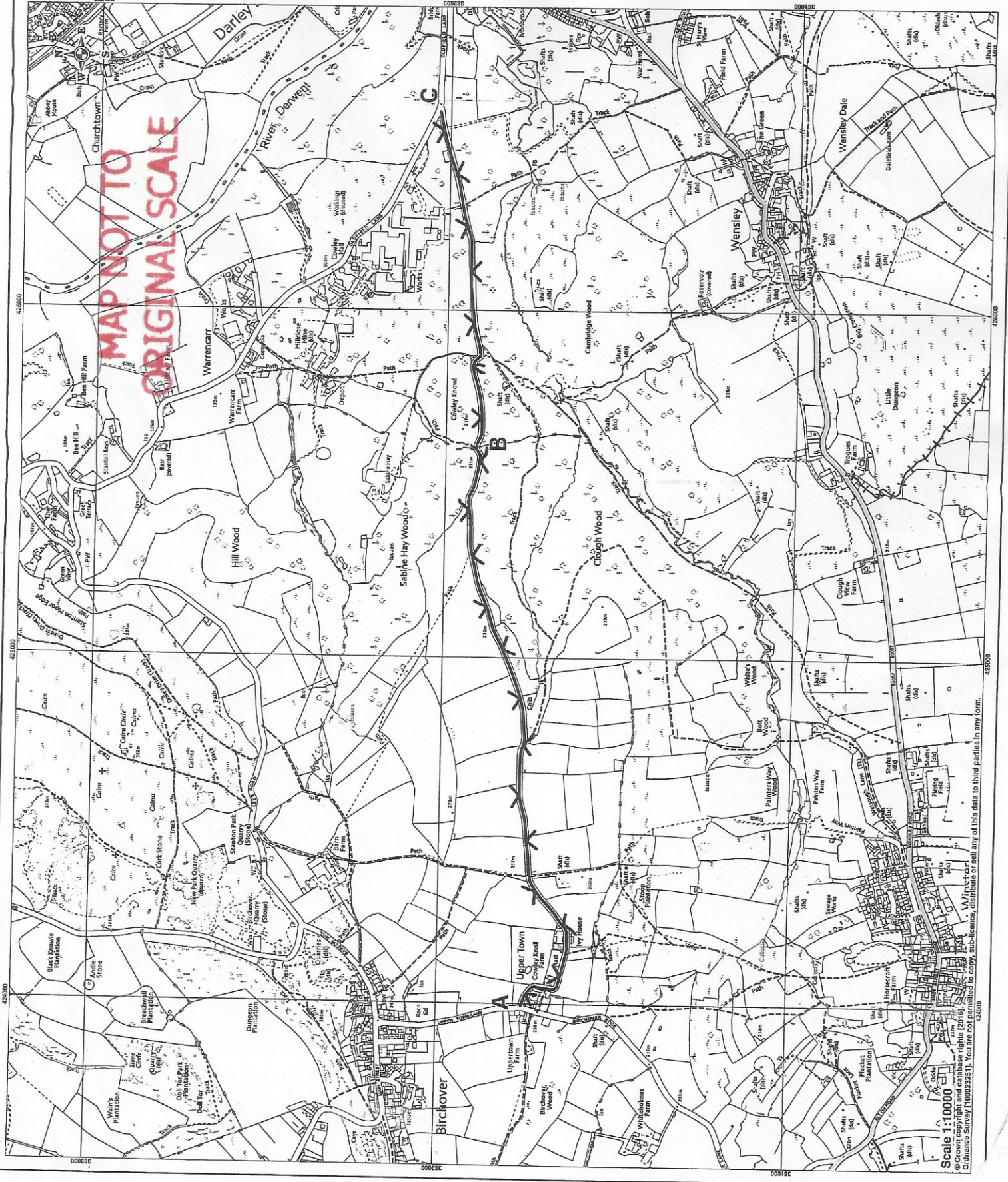
KEY

- Proposed byway
open to all traffic
- Existing
restricted byway
- Existing
public bridleway
- Existing
public footpath
- Parish
boundary



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MAP NOT TO ORIGINAL SCALE



Scale 1:10000
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