
Order Decisions

Site visits made on 13 & 14 March 2017

by Susan Doran BA Hons MIPROW

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

Decision date: 12 April 2017

Order Ref: FPS/W1850/7/17

referred to as 'Order A'

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Herefordshire Council (Upgrade of Bridleway LN1 and Addition of Restricted Byways LN46 and LN47 Lingen) Modification Order 2015.
- The Order is dated 4 March 2015 and proposes to modify the Definitive Map and Statement for the area by adding two restricted byways and upgrading a bridleway to a restricted byway as shown in the Order plan and described in the Order Schedule.
- There were 8 objections outstanding when Herefordshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Order Ref: FPS/W1850/7/18

referred to as 'Order B'

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Herefordshire Council (Upgrade of Footpaths LN9, LN9A, LN5, LN8, LN12, LN17 (part) and LN10A, Upgrade of Bridleways LN11, LN10 and WE2 and Addition of Restricted Byways LN48, and LN49 Lingen and Willey) Modification Order 2015.
- The Order is dated 4 March 2015 and proposes to modify the Definitive Map and Statement for the area by adding two restricted byways and upgrading seven footpaths (one in part) and three bridleways to restricted byways as shown in the Order plan and described in the Order Schedule.
- There were 8 objections outstanding when Herefordshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Procedural Matters

1. Order A concerns a network of routes lying to the north-east and east of Lingen village, comprising routes A-B-D-E, B-C and F-G. Order B concerns a network of routes lying to the north and north-west of Lingen village, comprising routes H-I, J-I-K-L-M-N-O-P-Q-R, O-X-Y-S, P-S-T-U-V, and W-Z-K.
2. Both Orders rely on the same documentary evidence so I shall consider them together. In doing so I take into account all other relevant submissions.
3. In addition to the 8 objections submitted with regard to the Orders were 2 representations and 6 statements of support.
4. I made an unaccompanied visit to the area when I walked the Order routes and, or, viewed them from public vantage points where unavailable.

The Main Issues: Orders A and B

5. The Orders have been made by Herefordshire Council ('the Council') under Sections 53(3)(c)(i) and 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 ('the 1981 Act'). I must consider whether, on a balance of probability, the evidence discovered, when considered with all other relevant evidence available is, as regards Section 53(3)(c)(i), sufficient to show that restricted byways which are not shown in the Definitive Map and Statement ('DMS') subsist; and, as regards Section 53(3)(c)(ii), that the existing footpaths and bridleways described above ought to be shown as restricted byways, and that the DMS requires modification as a result.
6. In this case, the effect of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act') is relevant. The 2006 Act extinguished public rights for mechanically propelled vehicles ('MPVs'), unless preserved by one or more of the exceptions set out in Section 67 of the Act.

Reasons: Orders A and B

Documentary evidence

7. Two County maps pre-date the Inclosure process (which I refer to below). Taylor's 1786 map of Herefordshire shows the village of Lingen and the surrounding road network. Some parts of the Order routes may be depicted, but the limitations of the map mean that it is not possible to identify them with any certainty. Price's 1817 county map, on the other hand, shows routes broadly correlating with the positions of many of those shown on both Orders A and B.
8. By the early 19th century the land affected by most of the Order routes was subject to parliamentary inclosure whereby it was divided and allotted to individuals and, amongst other things, public highways were awarded. The Shobdon, Lingen and Aymestrey Inclosure Award of 1829 set out a number of Public Carriage and Drift Roads and Public Highways at 30 feet wide, including some of the Order routes. For Order A, these are routes A-B-D-E, which the Inclosure Award named as the Deerfold Road, and F-G, named as Limebrook Road. Route B-C did not form part of the awarded routes, apparently falling within the neighbouring parish and therefore outside the Inclosure Commissioners authority, although an indication of its existence is shown at points B and C.
9. For Order B, routes I-H, named as Boarsford Road; J-I-K-L-M, named as Harleys Mountain Road; M-N-O-P-Q, named as Knighton Road; O-X-Y-S, named as Briary Hill Road; P-S-T, named as Norman's Road; and W-Z-K, named as Lingen Road were also set out as public roads. As regards the latter route, the Award describes a connection between Lingen Road and Harley's Mountain Road, although the map only shows a route as far as point Z. The section T-U-V seems not to have formed part of the awarded route Norman's Road, although part from T-U is shown on the Inclosure map.
10. The Award was made under an Act for inclosing lands in the three parishes, and for extinguishing tithes in the same parishes, and was made by reference to the 1801 Inclosure Consolidation Act.

11. The Presteigne, Township of Willey, Inclosure Award of 1819 set out a Public Carriage Road, again with a width of 30 feet, over the length Q-R (with the exception of a short distance to R which fell outside the land to be inclosed by the Award). This comprised in part two named routes, Pedwardine Road and Mind (or Mynd) Road.
12. Similarly, this Award was made under a local Act to inclose lands within the township, and was subject to the 1801 Act. Both Inclosure Awards were enrolled with the Office of the Clerk of the Peace. The conclusions reached by the Council as regards the effect of the Inclosure Awards and Acts have not been challenged such that I should not accept them.
13. Several maps and plans which post-date the inclosure process are available, and these provide evidence that the Order routes were established on the ground, and therefore would have been available for public use. The Ordnance Survey ('OS') 1-inch map of 1831 depicts all of the routes set out under the inclosure process as well as the sections B-C, U-V and the remainder of Q-R (although on a slightly different alignment), which link the routes to the remainder of the highway network. Thus all of the routes shown in both Orders A and B were mapped.
14. Bryant's 1835 County map shows most of the Order routes as 'Lanes or Bridleways', although part of the Deerfold Road, and Boarsford Road, are missing. Nevertheless, their existence is confirmed in the earlier OS mapping.
15. Tithe records can provide evidence of the topography of routes, although not always their status. In this case, the Lingen Tithe Map of 1841 shows all the inclosure routes described above, as well as the sections B-C and U-V, and the link between Z and K, coloured in the same fashion as the remainder of the road network to and with which they connect, although this includes cul-de-sac roads. They are not numbered or described in the Tithe Apportionment. However, their depiction is good evidence that the Order routes remained in existence on the ground at the time.
16. The Presteigne Tithe Map of 1845 shows the section Q-R, the westernmost part of which follows a slightly different alignment to that shown on earlier mapping: this appears to have been connected with a formal diversion of Boarsford Road (paragraph 17). The Tithe Apportionment provides a figure for the total area of the 'Roads' depicted on the Tithe Map.
17. Boarsford Road was the subject of an 1831 Quarter Sessions order which diverted and widened sections of it passing through Boarsford village, and now forming the present county road. The western end of route Q-R did not form part of this alteration. However, the Presteigne Tithe Map and 1886 OS 25-inch map both indicate an alteration to it to accommodate the Quarter Sessions diversion of Boarsford Road, to which it connects.
18. Later OS mapping also reflects some alteration in the topography of the Order routes. The 1886 25-inch and 1903 25-inch OS maps indicate physical changes to some, subsequent to their depiction on the Tithe and earlier records. Some routes continue to be shown as enclosed 'roads', whereas others are no longer fully enclosed or are annotated as 'FP' or footpath on the maps, or are not shown at all. Thus the maps reflect a decline or change in the use of some of the Order routes over time.

19. Order A routes A-B-D-E, B-C and F-G are depicted as distinct bounded tracks, save only for a short section north of D where the route is bounded on one side only. Order B route H-I is depicted by double pecked lines or shown running between boundaries, and J-I-K and W-Z-K are shown bounded on both sides. Roughly mid-way between K and L the route enters a field and is marked as a footpath with no link to M. M-N is marked as a footpath. O-X-Y is marked as a track, bounded on one side, but its continuation to S is not mapped on the 1886 map, and by 1903 O-X is no longer shown, and the route shown south of Y-X (to which it connects) is marked as a footpath. N-O-P-Q-R is a bounded track apart from two lengths bounded on one side only, one shown by double pecked lines. Similarly, P-S-T-U-V is either a bounded track, bounded to one side, or represented by double pecked lines.
20. These maps are good evidence of the physical characteristics of the Order routes they portray at the time of the survey, depicting most of those set out at inclosure.
21. The 1910 Finance Act provided for the levying of a tax on the incremental value of land. In calculating the 'assessable site value' of land it allowed for deductions to cover such things as public rights of way and easements, should the land be sold. For Order A, routes A-B-C, D-E and F-G are excluded from the hereditaments (often an indication of a public highway, normally but not necessarily vehicular), but the section B-D is shown included within the land parcels. For Order B, J-I-K and part-way between K and L are excluded along with P-S-T-U-V, whereas H-I, W-Z-K, part-way between K and L and L-M-N-O-P (with the exception of two short sections east of P) are included within hereditaments, along with P-Q-R.
22. Accordingly the picture is a mixed one with parts of the same continuous route being both excluded from and included within hereditaments. The records detailing deductions for public rights of way or user have not been provided by the Council. However, they say none have been claimed in the Valuation Book for those sections of the Order routes that fall within landholdings. In addition, sections of modern day public roads are similarly shown with sections excluded and sections included within hereditaments, and no deductions recorded. In this case, therefore, the Finance Act evidence is of little help in determining the status of the Order routes.
23. There are some other relevant documents. A 1774 Estate Plan shows features, including 'roads' as they existed prior to the inclosure of the land, but is of limited evidential value. Sales Particulars dating to the early 1900s show parts of the Order routes both included and excluded from sale lots in similar fashion to their portrayal on the Finance Act maps. The Council indicates there is no reference to the routes in the sale details.
24. Most of the Order routes were recorded in Herefordshire's first DMS as Roads Used as Public Paths ('RUPPs') and subsequently reclassified further to the Countryside Act 1968, most as bridleways, the remainder as footpaths. This, the Council, says was on the basis of user at the time, notwithstanding the majority having been set out as public roads in the Inclosure Awards. Other sections that were awarded under the inclosure process were not recorded in the DMS at all.

Landowner evidence

25. Land Registry documents show that Mr Johnstone of New House Farm owns land adjoining Order route F-G (Order A), and this is consistent with, for example the Finance Act evidence described above, which excluded the route from valuation parcels. Mr Johnstone gated either end of the route, and has not known of its use by anyone as a public right of way.
26. Similarly, neither Mr Morris, who farms The Farlands and Court House Farm, or his father are aware of anything in their Deeds concerning the proposed modifications: their land is affected by Order A, route A-B-D-E, and Order B, routes J-I-K-L-M-N-O-P, O-X and W-Z-K.
27. Mr Price of Brick Kiln Farm states route J-I-K-L (Order B) has been known by his family as a "lane" since the 1950s. However, its width and topography are such that two vehicles are unable to pass. His family have maintained the 'lane' at their own expense for the private use of Brick Kiln Farm and Cwm Crave house. Mr Price considers that such routes came about in times gone by to serve the needs of the local and farming community.
28. Mr and Mrs Coleman of Bryfold Cottage are affected by route P-S-T-U. They say customary use is by walkers and equestrians, and the presence of mature trees indicates that parts could never have been used other than by those on foot.

Whether new evidence has been discovered

29. It is apparent that when many of the Order routes, or sections of them, were first added to the DMS in the early 1950s as RUPPs, and were subsequently reclassified as bridleways or footpaths on the 1989 DMS, at least some account was taken of the Inclosure Award evidence. However, I agree with the Council that there is documentary evidence now available that is 'new', in the sense it has not been considered previously, and this includes the County maps, tithe records, Finance Act records and OS mapping. It is therefore appropriate to consider all of the available evidence together.

Conclusions on the evidence

30. Early maps can be useful in supporting the longstanding existence of a way. Here, no keys have been provided for Taylor's and Price's maps to identify what they depict, so it is not possible to establish the status of the routes portrayed.
31. Inclosure documents can provide conclusive evidence of the legal status of the highways described. Here, the inclosure awards describe the awarding and setting out of the majority of the Order routes as public roads, 30 feet wide. That the routes were in fact established on the ground (further to the enrolment of the Awards) is evidenced in the subsequent documentary record, notwithstanding that over time use of some parts of the routes has declined and, or, changed as reflected by their depiction in particular from the late 19th century onwards. There is no evidence that the full public highway rights enjoyed by these routes have been altered (subject to the 1831 Quarter Sessions order described above) or stopped up.
32. OS maps provide a high degree of accuracy in recording the physical features in existence on the ground at the time. Later mapping includes a disclaimer as

regards the status of the routes portrayed. However, here the mapping which post-dates the Inclosure Awards provides good evidence that the public roads awarded were set out on the ground, thus supporting the existence of the routes in Orders A and B.

33. The Tithe maps provide good evidence of the existence of ways bounding titheable land to either side, and following the alignment of the Order routes. They are consistent with other contemporary documents, and provide further evidence in support of the existence of the routes set out by the inclosure process, and of the sections linking them to the remainder of the network.
34. These documents are helpful as regards the likely status and physical characteristics (including width) of those short sections of the Order routes not set out in the Inclosure Awards: B-C, U-V and the western part of Q-R. I concur with the Council and consider on the balance of probability these enjoyed the same status as the awarded routes to which they connected, that is, as public roads. Part of route U-V is described in the Lingen Inclosure Award as a public highway; the western end of Q-R is annotated "From Willey", and the eastern end "To Lingen", destinations suggestive of it being a public route. There would have been no purpose in setting out a public road to villages or places of public resort unless it provided a through route. In addition, all were shown on subsequent Tithe and OS mapping confirming their existence connecting to and with routes set out as public roads under the inclosure process.
35. From the above, I conclude on a balance of probability, that all of the routes (in Orders A and B) are public highways which carried public vehicular rights prior to 2 May 2006, the commencement date of the 2006 Act. However, it is necessary to consider their status in the light of the provisions of that Act.

The 2006 Act

36. Although the evidence of those objecting to the Orders is consistent in that public use of the Order routes has been unknown, this does not provide evidence that they carry no public rights. Unless legally stopped up (or diverted), then public rights that have been determined to subsist remain, even if they have ceased to be exercised.
37. I have concluded that a public right of way for vehicles exists over the Order routes (paragraph 35). However, Section 67(1) of the 2006 Act provides that, unless preserved by an exception set out in the Act, an existing public right of way for mechanically propelled vehicles ("MPVs") is extinguished if it is over a way which, immediately before commencement of the Act, was not shown in the DMS, or was shown as a footpath, bridleway or restricted byway.
38. It is not argued that any of the exceptions in the 2006 Act apply, neither is there any evidence available to me to indicate that any do. Further, although the original applications, made in 1998, were for Byways Open to All Traffic (BOATs), the applicant did not provide copies of all the documents to which he referred and on which he relied to establish BOAT status. The *Winchester*¹ case held that for the purposes of section 67(6) of the 2006 Act, an application must

¹ *R (oao the Warden and Fellows of Winchester College and Humphrey Feed Ltd.) v Hampshire County Council and the Secretary of State for the Environment, Food and Rural Affairs* [2008]

be accompanied by copies of all the documentary evidence that the applicant wished to adduce or rely upon together with a copy of a map drawn to the prescribed scale. Where this is not the case, as here, then public rights for MPVs will have been extinguished.

39. Order route B-C, however, was not the subject of an application under section 53 of the 1981 Act and therefore no exemption from the extinguishing effect of the 2006 Act could apply, accordingly MPV rights will have been extinguished over this section.
40. It follows that the Order routes should be recorded as Restricted Byways, that is, as ways over which the public has a right of way on foot, on horseback or leading a horse, and in or on vehicles other than MPVs (pedal cycle and horse-drawn vehicle).

Other matters

41. Some of the objections raise concerns about the width of the routes as stated in the Order at 30 feet wide, as this will be problematic both in practical terms and with regard to current farming practices and needs. I understand these concerns. However, this width is derived from the Inclosure Awards and is applicable to those routes set out therein, there being no evidence of any subsequent legal alteration to that width. Further, some of the Order routes (A-B-D-E, P-Q, P-S-T-U-V) are existing public rights of way with widths of 30 feet already recorded in the DMS. In some cases the used width or track on the ground is less than the full width stated between boundaries. The Council states the extent of works required to make the routes available to the public would be relatively modest as the majority are already in existence on the ground. In any event, matters concerning the maintenance of the Order routes fall outside the scope of the Orders before me. The stated widths for other (non-inclosure) routes have been calculated by the Council by reference to the 1903 OS mapping.
42. In addition, some objectors refer to the incompatibility of the Orders with the Entry Level Stewardship and Higher Level Scheme in place on some of the farms affected by the Orders. Again I understand the concerns. However, these are not matters that the legislation permits me to take into account. The issue before me is whether or not public rights of way subsist, and, if they do, their status.
43. Concerns are expressed that the routes may be used by MPVs, causing damage and disturbance. However, confirmation of the Orders as made would result in Restricted Byways, rights for MPVs having been extinguished.
44. Safety, suitability and environmental concerns are raised by some of those objecting to the Orders. Whilst I understand the importance of such concerns to those affected, they are not ones that I can take into account in my consideration of the Order under the 1981 Act. Again, my determination must be based on the existence or otherwise of public rights over the Order routes, and their status.
45. Suggestions are made to re-route some of the Order routes, however, this is a matter for alternative legislation.

Overall Conclusion

46. Having regard to these and all other matters raised in the written representations, I conclude that Orders A and B should be confirmed as made.

Formal Decisions

Order A

47. I confirm the Order.

Order B

48. I confirm the Order.

S Doran

Inspector



PROPOSED UPGRADE OF BRIDLEWAY TO RESTRICTED BYWAY
A-V-V-V-B B-V-V-V-D-V-V-V-E
PROPOSED ADDITION OF RESTRICTED BYWAY
B-V-V-V-C F-V-V-V-G

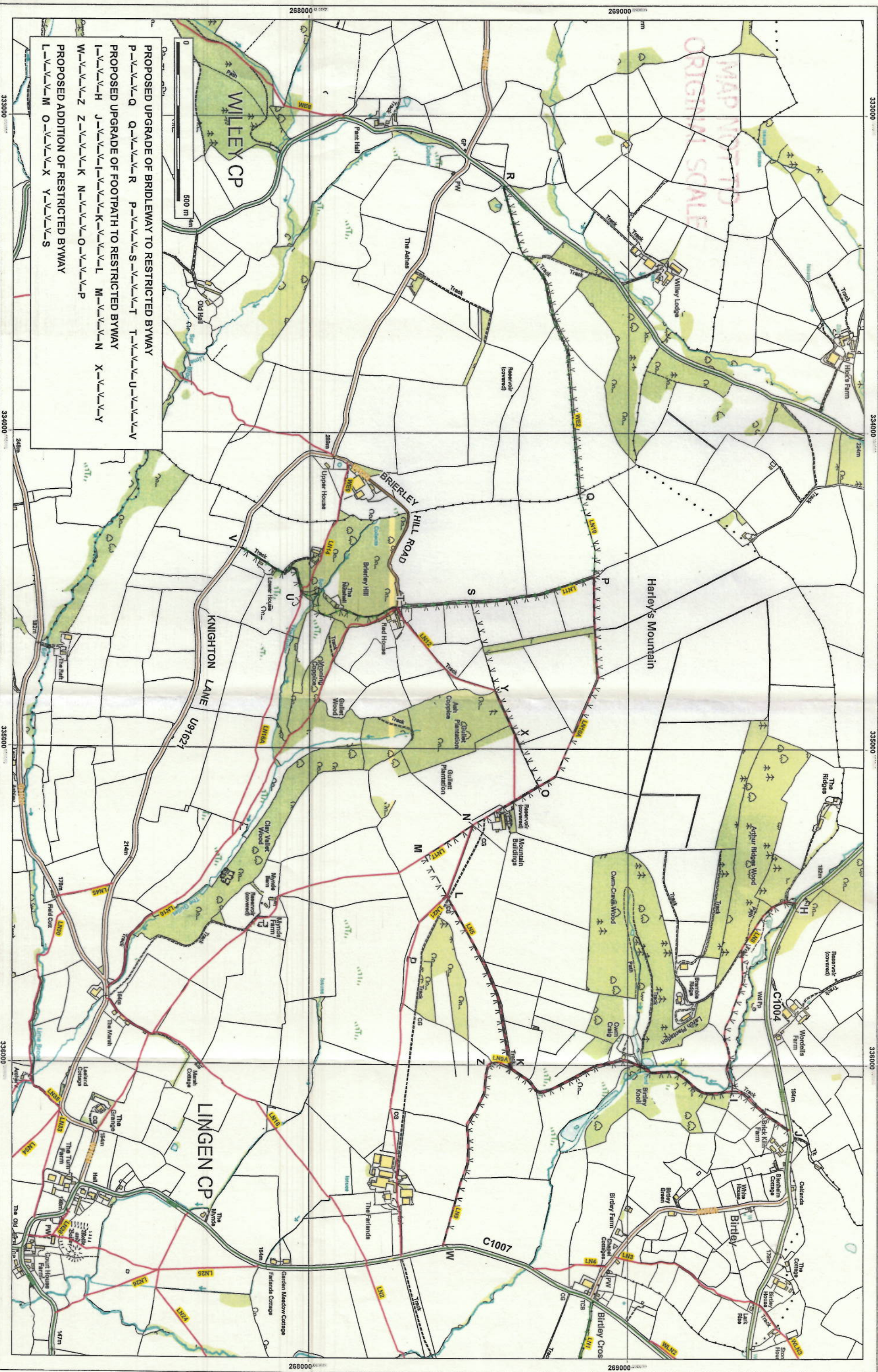
PUBLIC FOOTPATH
PUBLIC BRIDLEWAY
RESTRICTED BYWAY
BYWAY OPEN TO ALL TRAFFIC

WILDLIFE & COUNTRYSIDE ACT 1981
HEREFORDSHIRE COUNCIL (UPGRADE OF BRIDLEWAY LN1
AND ADDITION OF RESTRICTED BYWAYS LN46 AND LN47 LINGEN)
MODIFICATION ORDER 2015

DWG No.: M209, M210, M217/229-GEN
SCALE: 1:7500 @ A3

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PROPOSED UPGRADE OF BRIDLEWAY TO RESTRICTED BYWAY
P-V-V-V-Q Q-V-V-V-R P-V-V-V-S-V-V-V-T T-V-V-V-U-V-V-V-V
PROPOSED UPGRADE OF FOOTPATH TO RESTRICTED BYWAY
I-V-V-V-H J-V-V-V-I-V-V-V-K-V-V-V-L M-V-V-V-N X-V-V-V-Y
W-V-V-V-Z Z-V-V-V-K N-V-V-V-O-V-V-V-P
PROPOSED ADDITION OF RESTRICTED BYWAY
L-V-V-V-M O-V-V-V-X Y-V-V-V-S

