

Order Decision

Site visit on 4 January 2017

by Mark Yates BA(Hons) MIPROW

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

Decision date: 07 February 2017

Order Ref: FPS/J1155/7/113

- 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.99, Bere Ferrers) Definitive Map Modification Order 2015.
- The Order was made by Devon County Council ("the Council") on 9 December 2015 and proposes to add a restricted byway ("the claimed route") to the definitive map and statement, as detailed in the Order Map and Schedule.
- There were six objections¹ outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I undertook an unaccompanied visit to the site on 4 January 2017. Following my visit, an email was sent by one of the objectors (Mrs Dugmore). However, as the matters raised are not relevant to my decision, I have not invited comments from the other parties.
2. All of the points referred to below correspond to those delineated on the Order Map.

Main Issues

3. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows that a right of way, which is not shown in the map and statement, subsists. The burden of proof to be applied is the balance of probabilities.
4. I shall consider whether the historical documentary evidence provided is sufficient to infer the dedication of a highway corresponding to the claimed route at some point in the past. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.
5. The Council's view that none of the exemptions found in Section 67 of the Natural Environment and Rural Communities Act 2006 are applicable is not disputed. In the absence of anything to show that one or more of the exemptions apply, any unrecorded public rights for mechanically propelled vehicles are extinguished. Therefore, if public vehicular rights are shown to

¹ A statement of case has been submitted on behalf of five of the objectors.

subsist over the claimed route, the appropriate status would be a restricted byway.

Reasons

Background matters

6. An existing public right of way (Footpath 55) joins the claimed route at points V and U. The claimed route continues at its south western end through to point X. There is also a junction at point U with the Y1801 road² which continues to Hewton and North Hooe. Whilst the objectors allege that this section of Footpath 55 was recorded in the definitive map and statement in error, the Council considers the available evidence does not show that this was the case. This matter was addressed when the Council reached its decision to make the Order.
7. In light of the evidence presented to me, I shall only consider the issue of the status of the claimed route. This would not prevent an Order from being made to delete the relevant section of Footpath 55 from the definitive map and statement in the future. However, there would need to be the discovery of new and cogent evidence of such substance to demonstrate that an error occurred when this path was first recorded in the map and statement.

Consideration of the evidence

8. A plan of the manor of Beer Ferris from the late 1600s shows the peninsula within which North and South Hooe are located and this is annotated as "*The Waren*". The plan does not provide any evidence in relation to the existence or otherwise of highways in this locality. However, the annotation highlighted above may be of assistance when considering the later highway records.
9. The earliest plan to depict the claimed route is a 1737 plan of Beer Ferris Manor. It is shown in the same way as the connecting Y1801 road. This plan also shows the land attributed to North and South Hooe. Although the Council says that the plan only depicts roads, no key is provided to indicate that a distinction was drawn between public and private roads. It should be borne in mind that the purpose of this plan was to identify the relevant landholdings within the manor. The same applies to the depiction of the route on subsequent estate maps of 1843 (Tamar Silver Mines plan) and 1876 (Beer Ferris Manor map). However, I note that there appears to be an access road to the former South Hooe Mine shown leading out of the claimed route on the later estate maps.
10. A map produced by the Board of Ordnance in 1784 shows the claimed route in the same way as the public roads in the locality. The Council says the map was commissioned by the Government due to the perceived military threat from overseas. Whilst I do not doubt the accuracy of this map, it cannot be determined whether any consideration was given to the status of the roads shown.
11. Further support for the historical existence of the claimed route is found in a series of Ordnance Survey ("OS") maps, dating back to the small scale OS map of 1809. The 1809 map shows the claimed route by means of a pair of solid lines in the same way as the network of existing public roads in the area. It is

² Formerly known as UCR 175

shown on the subsequent OS maps of 1884, 1907 and 1953. There are solid lines shown on the 1884 and 1907 maps, just beyond the start of the claimed route at point U and at point X, which could denote the presence of gates. This would not preclude the existence of a highway and the potential structure at point U does not appear to be evident on the other maps provided. These OS maps do not provide any confirmation regarding the status of the routes shown. I also agree with the Council that the depiction of spot heights on OS maps does not assist on this issue. The access road to the former mine is clearly evident on the three later large scale OS maps.

12. The claimed route is shown within the "*cross road*" category on the Greenwood map of 1827 in the same way as the public roads in the area. This map again provides a good guide to the features present when the land was surveyed. When considered in conjunction with the OS maps outlined above, it could provide some support for the route being part of the local road network.
13. Reference is made in a grant for mining rights of 1836 to a carriage road or path from Hewton to South Hooe Farm House. It appears from the plan provided that this corresponds to the claimed route and the Y1801 road. This evidence is indicative of the route being capable of use by vehicular traffic.
14. The claimed route is shown excluded from the tithed parcels of land on the Beer Ferris tithe map of 1842 in the same manner as the public roads in the locality. However, highways were incidental to the tithe process and this will usually serve to limit the evidential weight of these maps. The exclusion of a route from the surrounding parcels of land could be indicative of a public or private route as both would have impacted upon the productivity of the land being assessed. In the absence of a map key, the tithe map by itself will carry limited weight and needs to be assessed in light of the other evidence provided. The Council also points to the parcel numbered 1329, which is located to the south of the claimed route, which is recorded in the tithe apportionment as Warren Hill.
15. It is apparent that the claimed route is shown within the taxable parcels of land on a map produced in relation to the 1910 Finance Act. There is also no deduction claimed for a public right of way that can be attributed to the route in the accompanying documents. The Council points to particular inconsistencies in the Finance Act documents in this area but it cannot be determined that the inclusion of the route within the taxable parcels of land was an error. This would not be supportive of the existence of a public road, which would usually be shown excluded from the surrounding parcels. Nonetheless, it needs to be borne in mind that the existence or otherwise of highways was very much incidental to this Act. Further, this map needs to be considered in relation to the highway records addressed below.
16. The claimed route was included in the 1921 catalogue for the sale of land belonging to the Mount Edgcumbe Estate and recorded in the documentation as a road. I take this reference to relate to the particular physical feature. A right of way was retained over this road for the benefit of the vender. This document is not supportive of public rights being recognised over the route. However, it was not concerned with the extent of the highways in the area but the proposed sale of land. Again this evidence needs to be considered in light of the highway records.

17. Bartholomew's maps of the 1920s were produced for the benefit of cyclists and tourists. This small scale mapping does not depict the claimed route. Although clearly the route continued to exist as a physical feature. The Council says the purpose of these maps was to guide the traveller along the most suitable route for their mode of transport. These maps do not serve as a definitive guide to highways and it is possible that the route was not shown as it was a cul de sac with no onward destination for cyclists and tourists.
18. Details have been provided of expenditure spent on road maintenance during the early part of the nineteenth century from the account books of the surveyors of the highways for the parish. The Council attributes the references to maintenance being undertaken on "*highways leading to the Warren*" and "*Warren Road and others*" in 1814 to relate to the claimed route. On this issue, reference is made to the 1600s plan and the tithe documents. An earlier entry from 1801 records the bringing of stone in relation to "*Werren*" Road. In respect of various references in the books from the 1830s and 1840s, predominantly in relation to a road or roads at "*Southern Hole*" and "*South Hooe*", or variants of these names, the Council believes that these relate to the claimed route as it served as a means of access to properties at South Hooe. There are also references to other ancillary works and the collection and preparation of mining rubble.
19. I cannot be certain that the references to roads at the Warren and South Hooe apply to the claimed route. The objectors believe that they relate to the Y1801 road as far as the branch of this road to North Hooe. Although there are separate references to the road leading to North Hooe in the account books. The extent of South Hooe is depicted on the 1737 estate map and there are no other apparent potential roads in this locality aside from the claimed route and the connecting Y1801 road. These features are consistently shown on maps produced during the nineteenth century. Overall, I find from looking at these entries that it is probable that maintenance was carried out on the claimed route at public expense during the nineteenth century. However, in reaching this conclusion, I do not say that all of the references supplied by the Council can necessarily be attributed to the claimed route.
20. A number of minutes have been provided in relation to meetings of Bere Ferrers Parish Council. These generally relate to the footpaths in the area rather than the claimed route. A minute from 1897 records an objection by the parish council to the proposal by the district council to discontinue maintenance on the road to North Hooe as it was considered unnecessary. There is no mention of a proposal to discontinue any part of the road to South Hooe and it was included in the subsequent highway records. Two minutes from meetings in September 1938 and December 1944 highlight the poor condition of roads around South Hooe. The latter mentions the roads to Birch Farm and South Hooe. A minute from September 1971 refers to Footpath 55 linking with the county road by South Hooe Farm.
21. The 1929 Local Government Act transferred responsibility for the maintenance of minor roads from the District Councils to the County Councils. However, it is apparent that in Devon this function was delegated to the Urban and Rural District Councils until 1947. The claimed route was recorded as an unclassified county road on the 'handover map' that the former Tavistock Rural District Council supplied to the Council in 1947 but it is stated to have been removed at a later date. It can be seen from looking at the map that traces of the blue

colouring to denote the unclassified road are still evident. This is also said to apply in relation to the register of unclassified roads which was kept during the 1950s-1970s. The Council cannot say when the route was removed from these records but believes that it was after 1958 in light of the reference to the claimed route being a county road in the definitive map records addressed below.

22. The handover map and subsequent highway records would usually provide conclusive evidence of the highway authority's acceptance of its maintenance responsibility. In this respect, they will be supportive of the claimed route being a highway but they would not ordinarily serve as a definitive record of the highway rights in connection with the ways shown. Whilst the objectors refer to the original inclusion of the route on the handover map as a clerical error, there is no evidence in support of such an error. It may have been an attempt to save the costs of maintaining the claimed route. However, there is no evidence of a formal decision being reached on this matter.
23. The claimed route is shown as a county road on the map showing the claimed public rights of way in the parish at the initial stage of the compilation of the original definitive map. It is apparent that the Council put this information onto the maps provided to the parish councils at the time. Footpath 55 is described in the documentation compiled during this process as joining the southern end of the road by the entrance to South Hooe Farm. It is worth noting that the highway documents and the definitive map are separate records.
24. It is apparent that the claimed route has been viewed in more recent years as a private road and not publicly maintained. Three of the statements provided by the objectors refer to the road being privately maintained in the 1960s. There is also evidence of action subsequently being taken in the form of verbal challenges and signage to indicate to the public that there was no intention to dedicate a public right of way or potentially a vehicular highway.

Conclusions

25. The claimed route is a feature of some antiquity. Its depiction on various estate, commercial and OS maps in the same manner as the public roads in the locality, including the Y1801 road, could be supportive of it being part of the local road network. However, the purpose of these maps was not to record highways and this will lessen their evidential weight. The tithe map could be indicative of the claimed route being a public or private road.
26. There is no reason why a cul de sac highway could not exist in this location in the same way as the present road to North Hooe. The claimed route appears to have historically served as a means of access to buildings at South Hooe. It is also apparent that there was an access road leading from the claimed route to the South Hooe Mine. The details provided by the Council indicate that the mine was a feature of some note before it closed. The highway minutes from the nineteenth century are supportive of public funds being spent on the maintenance of the road leading to South Hooe. I consider on balance that this would have encompassed the claimed route.
27. Some weight should be given to the lack of support in the Finance Act documents for the claimed route being a highway. However, I consider that only limited weight can be given to the 1921 sales catalogue and the

Bartholomew mapping. The ownership of the land crossed by the claimed route has no significant bearing on its status. There is evidence from the latter part of the twentieth century that points to the claimed route being viewed as a private road with attempts made to deter public access.

28. The handover map and the register of unclassified roads are supportive of the claimed route being an extension of the Y1801 road until it was removed from these records at a later date. These original documents should carry a significant amount of weight and follow on from the nineteenth century highway records. This evidence shows that the claimed route was considered by the relevant highway authorities to be a highway maintainable at public expense. Whilst a view was subsequently taken to remove the route from the maintenance records, this would not stop up any public rights which exist over the claimed route.
29. Having regard to my conclusions regarding the various pieces of documentary evidence, I find on balance that it is supportive of the claimed route being an ancient vehicular highway. In the absence of anything to show that these public rights have been stopped up, I conclude that a restricted byway subsists in line with the test outlined in paragraph 3 above.

Overall Conclusion

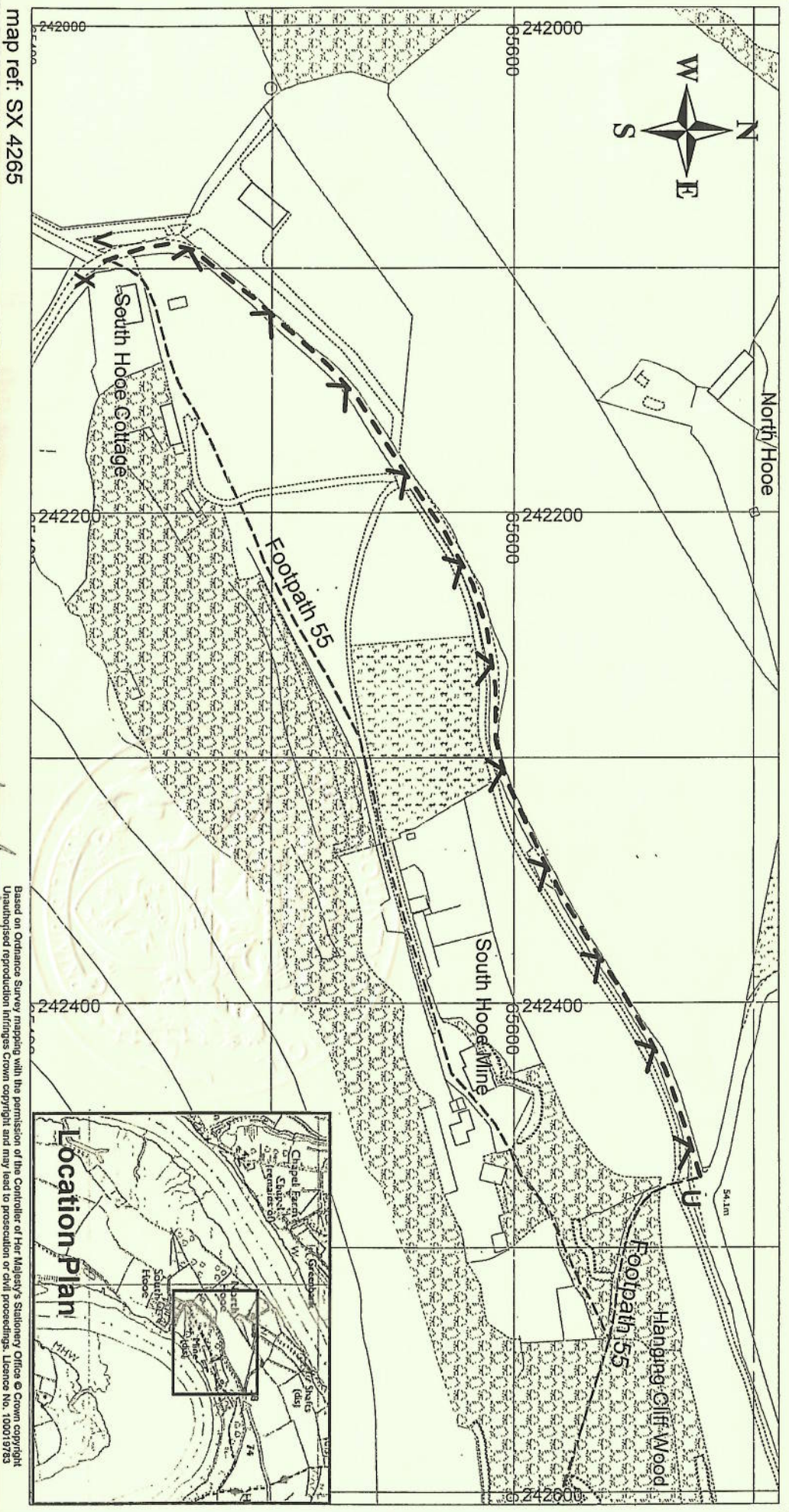
30. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed.

Formal Decision

31. I confirm the Order.

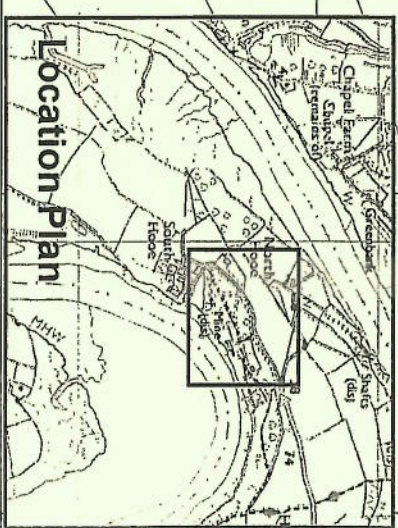
Mark Yates

Inspector



map ref: SX 4265

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Devon County Council
(Restricted Byway No. 99, Bere Ferrers) Definitive Map Modification Order 2015

Notation

Restricted Byway No. 99 U - V - X (approx 488 m) - V -
Existing footpath ---

drawing number **HCW/PROW/15/62**
date **December 2015**
scale **1:2,500**
drawn by **CLG**