



Order Decision

Inquiry opened on 27 June 2017

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 03 August 2017

Order Ref: FPS/D0840/7/24

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Cornwall Council (Addition of Footpath¹ from Road U6036 to Bridleway 62 Camborne) (Penponds) Modification Order 2016.
- The Order is dated 15 July 2016 and proposes to record a restricted byway running generally south-west from the road adjacent to Penponds Mill to the bridleway to Barripper. Full details of the route are given in the Order Map and Schedule.
- There were four objections and representations outstanding when Cornwall Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is proposed for confirmation subject to modifications set out in the Formal Decision.

Preliminary Matters

Status

1. Concern was raised as to why the Order was made to record the route with the status of restricted byway, when the original application was to record a footpath. Cornwall Council, the order-making authority ("the OMA") explained that the application was a trigger event, requiring them to investigate the relevant evidence. In this case they believed that the evidence as a whole showed that the route should be recorded at the higher status.

Order map

2. Concerns regarding the annotation on the Order map were discussed at the Inquiry and the OMA explained that these related to the OS map base. I am satisfied that the Order map is correctly drawn and that, reading the Order as a whole, no-one should have been misled as to the location of the Order route.

Procedural Matters

3. On 10 June 2004 an application was made to the OMA under Section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act") to add a footpath to the Definitive Map and Statement ("DMS") for the area.
4. On 14 December 2015 the OMA made an Order to record the route. As an objection was received to that Order it was submitted to the Secretary of State for Environment, Food and Rural Affairs for confirmation. That Order was rejected as invalid and returned to the OMA.
5. This Order was made and again attracted objections and representations, requiring that it be submitted to the Secretary of State.

¹ Subject to proposed modifications

6. I made an unaccompanied site visit on 26 June 2017 and held a Public Inquiry into the Order on 27 and 28 June at the Council Offices, Dolcoathe Avenue, Camborne. I made an accompanied site visit on the evening of 27 June.

Main issues

7. The Order is made under section 53(2) of the 1981 Act by reference to section 53(3)(c)(i), which states that an Order should be made to modify the DMS for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

"that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies."
8. The application was to record a footpath, however, on investigation of the evidence, the OMA were of the view that the route was a vehicular highway. Due to the introduction of the Natural Environment and Rural Communities Act, 2006, the OMA were content that the vehicular rights had been extinguished and, therefore, the correct status was that of restricted byway.
9. In objection it was argued that more weight had been given to the documentary evidence than was justified, with attention brought to apparent alterations to widths over time, which it was argued would not have occurred had the route been a public highway. It was argued that the documentary evidence could be indicative of private rights and was insufficient to show that there was a public highway. Challenges were also made to the reliability of the user evidence, particularly in recent years. It was said that the route had been overgrown, dangerous to use and impassable over many years, such that the claimed use could not have occurred.
10. Most public highways have been accepted by the public since beyond memory and the law presumes that, at some time in the past, the landowner dedicated the way to the public either expressly, with evidence of such dedication now being lost, or impliedly, by making no objection to use of the way by the public. The evidence to show that such dedication has occurred may arise from documentary and/or user evidence.
11. In relation to documentary evidence section 32 of the Highways Act 1980 ("the 1980 Act") requires that I take such evidence into consideration "...before determining whether a way has or has not been dedicated as a highway...". I am required to give such weight to the document as I consider is "...justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it was produced." Documentary evidence will often support other evidence and so should not be considered in isolation. At common law, the question of dedication is one of fact to be determined from the evidence as a whole.
12. If I am satisfied that a public highway exists at common law then, unless there is evidence of it having been subsequently stopped up, the route would still exist as a public highway, of the status identified, regardless of the actions or inactions of later landowners.

13. The OMA said that there was sufficient evidence in the period 1980 – 2000 for rights on foot to have been acquired under the statute, section 31 of the 1980 Act. Before a presumption of dedication can be inferred, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'called into question'. The use during that period must be shown to have been actually enjoyed by the public as of right and without interruption for a full period of twenty years, with consideration of whether there is evidence of a lack of intention to dedicate a public right of way in that period.
14. Where the evidence is sufficient to record a public right of way under common law then it need not be considered under section 31 of the 1980 Act, as subsequent use would be 'by right' and not 'as of right' as required under the statute. I will first consider whether the evidence as a whole shows there to be a public right of way over the route under common law, taking account of the documentary and user evidence.
15. In response to one objection the OMA requested a modification to better define the width of the route within the Order Schedules.
16. My decision as to whether or not the Order should be confirmed, or modified, will be taken on the balance of probabilities, which is the correct test under law in relation to these matters.

Reasons

Physical characteristics

17. The Order route runs from a public highway at Penponds Mill ("the mill"), the U6036 south-easterly between buildings, with houses/cottages on one side and the former mill building on the other. It runs alongside and above the mill leat – referred to by some objectors as the mill pond – to join a public bridleway, No. 62 ("BR62"), at point B². BR62 provides a link to Roskilly Lane to the west, which runs generally parallel to the claimed route, and a continuation along New Road to the south-east, which runs on to the village of Barripper. The village of Penponds lies to the north-east of the mill, with Camborne a little further north-east and Roseworthy to the north-west.
18. The Order route was very overgrown and impassable at the time of my site visits. To the south-east of point A there is a relatively new structure over the route just beyond which the ground levels alter substantially, with a ladder used during the site visit to gain access to the continuation of the route.
19. I understand the field to the east to be Council-owned. This slopes down towards the Order route and is bounded by a fence and overgrowth. The leat to the west sits below the Order route, and a wall, edging the leat, sits under the route supporting the western edge of the route.
20. The land crossed by the Order route is unregistered and the OMA sought dispensation to give notice to unknown owners on site. Although the owner of some of the land associated with the mill argued that he also owned the Order route, and other land, he agreed that he could not provide documentary evidence to assert that claim.

² Points A and B are shown in the Order map

Documentary evidence

Thomas Martyn Map, 1748/49 & Greenwoods Map, 1826/27

21. The earlier map does not show any routes running generally north – south in the vicinity of Barripper and the mill. The routes which are shown appear to now be recorded as public highways.
22. However, the early nineteenth century map indicates a route running from Barripper, east of the watercourse. It is shown with pecked lines, rather than solid lines as most other routes are shown, but no key was provided for the map to assist in identification.
23. Commercial maps are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. Combined with evidence from other sources, they can tip the balance of probabilities in favour of such status, but in this instance I place little weight on the potential depiction in one map, which may be either the Order route or Roskilly Lane.

Tithe Map and Apportionment, 1840

24. The Tithe Commutation Act 1836 (amended in 1837) converted tithes to a fixed money rent. Tithe documents are concerned with identifying titheable land and consist of the apportionment, the map and the file. Generally they can give no more than an indication as to whether any way is public or private, because a private right of way can also diminish the productiveness of the land for tithe assessment.
25. The Order route was included in the apportionment number 1359, identified as '*Road, Waste and Leat*', coloured sienna, which the OMA argued was how public roads were commonly shown on second class tithe maps. The adjacent '*House and Outhouse*' had a tithe payment of 11 pence but no tithe was charged on apportionment number 1359. Both plots were shown in the ownership of '*St Aubyn, Rev. John Molesworth*'.
26. In objection it was argued that the colouring did not necessarily indicate public vehicular rights and pointed out that there were no place names given as a destination for the route on the tithe map. It was said that this could indicate a private route connected with the mill, as both were in the same ownership.
27. I note that the now recorded parallel public road to the west, Roskilly Lane, is also numbered 1359 but the blue colouring suggests that it was leat or waste, rather than road. The link of the sienna coloured route south to Barripper and north-east towards Camborne suggests that the Order route was the main north – south route in this location at the time and, on the balance of probabilities, such a route would be open to the public.

Ordnance Survey maps

28. The formation of the Ordnance Survey ("OS") was in response to a military need for accurate maps. Over the years, OS developed a variety of maps to meet the growing need for accurate and up-to-date maps of the UK and the production of maps for sale to the public became an activity of increasing importance to OS from the early twentieth century. Since 1888 OS maps have carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way.

29. The Order route and the parallel Roskilly Lane are shown on OS map 1875 – 1901 and 1906 – 1908. Roskilly Lane has two fords shown on the earlier map, with a footbridge on the southern section at the beginning of the twentieth century.
30. One of the OS maps used as a base for the user evidence forms (“UEFs”), which were completed in 2004, showed the Order route with a pecked line annotated “*Path (um)*”. I consider that this shows that the surveyor identified an unmade³ path on the Order route, suggesting that there was sufficient use at this time for wear on the ground to be visible.
31. Although it was argued that the route had been narrowed, I am satisfied by comparison of the available maps that the western edge, against the mill leat, has not been altered. This sits on top of the leat wall boundary which appears likely to be a long-standing feature. The eastern side appears to have narrowed minimally from the 1906 – 1908 survey to that undertaken prior to the production of the OS map used as a base map for the Order. This may reflect movement of the fence on that side. I consider that the perception of the current narrowness arises primarily from the overgrowth.
32. There were some changes to the mill in the period between the 1875 – 1901 and 1906 – 1908 OS map surveys but I am satisfied that the wall and the area adjacent, crossed by the Order route, was unaltered. I do not consider that encroachment on this land has been shown from the evidence as a whole. The undated OS map attached to the UEFs shows some changes in the wall alignment to the south of point A but I consider that the width between the wall and number 13 Penponds Road remains unaltered. By the time of the survey for the Order map base there is a new building at the southern boundary of the curtilage, affecting the width more recently.
33. Although OS maps are reliable in terms of physical characteristics their purpose was not to identify whether routes were public or private. I am satisfied that the Order route was still shown as an available through route, at least on foot, up to the survey of the undated base map used in some of the 2004 UEFs.

Finance (1909 - 1910) Act

34. The Finance (1909 - 1910) Act provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and its subsequent sale or transfer. The ‘assessable site value’ of land allowed for deductions for, among other things, the amount by which the gross value would be diminished if the land were sold subject to any public rights of way or any public rights of user, to the right of common and to any easements.
35. Each area of land, or hereditament, was identified on a map and information recorded in a Field Book. The Order route was excluded from the numbered hereditaments on either side, as was the case with Roskilly Lane and the U6036. Where a route is so shown there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the Field Books.

³ That is not tarmac or some other type of surfacing

36. There was some discussion regarding bracing symbols, with the objectors arguing that the Order route was braced to the adjacent land, with no deductions for public rights of way in the Field Book. I am satisfied that bracing symbols indicate the understanding of the surveyor as to ownership of land parcels. However, the OS maps clearly show recorded public roads as shared with an adjoining land parcel; I agree with the OMA that it is generally the case that roads are presumed to be owned to the centre line by the adjacent landowner, unless there is evidence to the contrary. Ownership does not prevent the existence of public highway rights.
37. In this case I consider, on the balance of probabilities, that the Finance Act information provides some support for the existence of public vehicular rights over the Order route, in connection with the routes running north and south from points A and B.

Photographs

38. Photographs may confirm the existence of a feature at the time that they were taken but cannot provide evidence of the rights that might exist over a route, only that it might be seen on the ground on that date.
39. Photographs looking towards the mill from the direction of Roskilly Lane were said to date from pre- and post-1900. Both show water across the road on the corner north-west of the mill. The earlier photograph shows the old smaller mill building on the western side of the Order route and two cottages on the east. The later shows the new mill, which it was said had been built behind the old mill, to allow production to continue and to have affected the Order route.
40. I consider both photographs show a route continuing from Roskilly Lane around the mill wall and up an incline towards Barripper. Taking account of what is shown on the OS maps I am not satisfied that the montage of photographs is helpful or indicates that the location of the mill building affected the Order route. I would not expect it to as the Order route provides an access to and from the mill, whether in a public or private capacity.
41. I agree with the OMA that the 1946 aerial photograph shows the Order route as a wide through route from the southern junction, point B. The pale area does not show water in the mill leat, as suggested in objection, but rather a road or track, as a continuation of New Road, in the same way as Roskilly Lane can be seen. By the time of the 1988 and 1996 aerial photographs Roskilly Lane is clearly the surfaced road, in greater use, whilst the Order route can only be seen as a feature with vegetation. It is not possible to see whether there was, or was not, a through route beneath the tree canopy towards the end of the twentieth century.
42. Other photographs, which I understand to date from the time of purchase of the mill by the objectors in 1993/94, show scrap metal, cars and overgrowth, such as brambles, in and around the mill area immediately south of point A. I consider that they support the contention of the current mill owners that the route appeared impassable at that time. An oblique photograph, which I understand to date from the mid-1990s, shows the area cleared by that time.
43. I consider that the photographs show that there was a well-used through route until at least the middle of the twentieth century. It cannot be said whether such use was public or private.

The Definitive Map and Statement

44. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS, setting out the procedures to be followed in their production. In the early 1950s Town and Parish Councils in Cornwall were tasked with carrying out a survey of all the public rights of way in their area. The Camborne & Redruth Urban District Council Map, thought to have been produced in about 1953, did not identify any rights in this location. It showed the classified roads in green ink and the unclassified in blue. Although the objectors argued that the failure to show the Order route meant that it was not a public road, all that was being shown was that it was not at that time thought to be maintainable at public expense. BR62 is similarly not shown, but is now recorded as a public highway.
45. BR62 was recorded by an Order made on 10 December 1992, which upgraded some routes and added others, including this one. The Order was confirmed as an unopposed Order by Cornwall County Council on 12 February 1993. I note the view of the objectors that it was odd that BR62 should be recorded running generally north from New Road in Barripper but then turning west to Roskilly Lane, rather than continuing along the Order route. The OMA were unable to provide information on the process by which this route was recorded.
46. There have been earlier opportunities to record the Order route. However, the 1981 Act provides for the recording of routes which have not previously been recorded and these documents do not assist in showing that there were no public rights over the route, only that any which may exist have not previously been recognised and recorded.

Other information

47. The objectors argued that alterations to the route as the result of a sewer line being laid along it in the 1930s and the digging out of the mill leat, which was also referred to as a mill pond, meant that the route would have narrowed and been unusable. There was no documentary evidence to assist on the dates of this work but the claim is at odds with the OS mapping series and the 1946 aerial photograph, which show a wide through-route subsequently.
48. Again there is no documentary evidence to assist on dates but it was suggested that it was in the 1970s that South West Water put in a mains water line, which crossed the Order route, running generally north-east/south-west. One UEF refers to the route being barred in the 1970s and another refers to rubble at that time, which didn't prevent their use. This may relate to these works as they are likely to have prevented access for a period of time. However, OS mapping supports evidence of use of the route subsequently.
49. The objectors carried out a survey of trees along the route to try to give some idea of their age. It was argued that the trees would have blocked the route over a long period of time, such that the any users could not have been using the Order route. In relation to the trees in general there was a suggestion that use would have been difficult for years, particularly in the twenty-year period initially identified by the OMA, 1980 - 2000.
50. I note that a quote from 2006 indicated that the route was too overgrown to survey as requested. Although I understand the tendency to rely on current features as showing that a route could not be used in the past, vegetation can

grow very quickly. The quote arose some six years after the last possible date of use of the route as a through-route, due to blocking by fencing. Some users indicated the route could be overgrown at times but was no different to other, recorded, public rights of way. The early twenty-first century OS mapping suggests that a route on the ground was visible to that surveyor at that time. Whilst trees and overgrowth may have made use difficult, I am satisfied, on the balance of probabilities, that it was possible to use the route, at least on foot.

User evidence

51. UEFs were submitted in support of the Order, whilst the objectors provided additional information on use, or non-use, of the route. I heard from people on both sides at the Inquiry.
52. It was clear that the route had become overgrown to the extent that some people stopped using it prior to the erection of the fencing at the mill, which occurred in around 2000. The objectors suggest that there was no use from their ownership and occupancy in late 1993/early 1994, with the route being too overgrown from that time. However, it was also said that one young lady was told that the route was dangerous and not seen again – she must have been using the route in order to be told not to do so. Despite the suggestion that people must have been using a route either within the field to the east or along the leat edge to the west, those giving evidence under cross-examination were clear that they had walked on the ‘bank’, that is on the Order route.
53. Although there were concerns about the reliability of the evidence I found the information given under cross-examination to be reasonable on both sides, albeit that perceptions of events, dates, widths, etc., may have differed. Although there were some memories of use by horse and cart in the past the use was generally on foot, with more recent use either for pleasure or access to and from Camborne and Barripper. The former mill owners’ daughter indicated her understanding that use had generally reduced from the 1950s onwards, due to the building of bridges over the fords on Roskilly Lane and Mill Road. This was also indicated to be when the mill closed, so use to and from the mill would have been reduced. The objectors suggested that once the former owner of the mill stopped people using the route, which they said was from the 1960s, the route would have become disused and overgrown.
54. The evidence of the former mill owner turning people back is limited, with some users reporting that they met and spoke with him when using the route. His daughter recalled a specific incident with one gentleman but members of that family appeared unaware that their use was challenged. I understand that he would also snap fishing rods, when children were fishing the leat in the late 1970s. It was fairly accepted that the route may have been used without the former mill owner’s knowledge, as the family did not live at the mill full time.
55. I am satisfied, on the balance of probabilities, that the user evidence correlates with the documentary evidence, which shows that there was a through-route. The understanding by some that the route was not public, or even passable, does not in my view detract from the evidence of others that there was a route that they used. It appears that Roskilly Lane was formerly a less attractive walking route, due to the water and fords, which can be seen on the tithe and OS mapping, as well as in photographs. However, it seems likely that the

Order route would have become less used by the public once Roskilly Lane became the easier route. Any reduction in potentially private use to and from the mill would also have affected the ease of use of the Order route to the public. I consider, on the balance of probabilities, that use was at a low level by the end of the twentieth century.

Conclusions at common law

56. I am satisfied that the route has been a defined feature in the landscape from at least the middle of the nineteenth century when it was shown on the tithe map. Whilst I am satisfied that the mapping and earlier photography supports the existence of a route which could physically have been used by horse and cart, they do not show that such use was public as opposed to private access to and from the mill. The strands of documentary evidence are suggestive of higher rights but I consider them just insufficient, on the balance of probabilities, to support the existence of higher rights for the public, given the link to the mill, which could require private vehicular access.
57. However, taking the evidence as a whole I consider, on the balance of probabilities, that there has been historic public use of the route at least on foot, which has continued through the twentieth century, although no doubt reducing as surrounding roads have improved and the Order route has become overgrown and blocked to some extent by scrap vehicles and the like. On the balance of probabilities I consider that the public use on foot shows public use and acceptance supportive of common law dedication by the landowner in the past. Any actions by subsequent adjacent landowners could not prevent or remove the rights already dedicated. As a result, I consider that the Order should be modified to record the status of public footpath over the Order route A – B.

Section 31 of the Highways Act 1980

58. Not being satisfied that the case for higher rights has been established at common law I have considered whether they could have arisen under the statute. However, there is very little evidence of use of the Order route by horse-riders, cyclists or other vehicles. I agree with the OMA that it is insufficient to give rise to a presumption of dedication of any higher rights.

Width

59. I have given some consideration as to whether the entire width should be recorded, given my finding of footpath rights only. However, there is no reason why walkers would not have used the entire width available to them, even if sometimes only to provide passage for other users. On the balance of probabilities, I am satisfied that the Order should be modified as requested such that the two Schedules give the same information. I consider that this should include reference to the source document, the OS map, within both Schedules.

Other matters

60. The law does not allow me to consider such matters as the desirability or otherwise of the route in question or concerns regarding the actions of the Council during investigation of this case. The number of people providing evidence to one side or the other is not relevant to the decision.

61. I cannot take account of concerns relating to environmental matters; wildlife; potential for disturbance of badgers and the impact of tuberculosis; cost; maintenance of this and other routes; liability; health & safety; changes in status along the route; parking issues; or, the possibility of diversion of the route onto adjacent land. Although I am well aware that these are the important matters for people with an interest in this case, I have not been able to take account of these issues.

Conclusions

62. Considering the evidence as a whole I am satisfied, on the balance of probabilities, that the Order route should be recorded as a public footpath.

63. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be proposed for confirmation subject to modifications to status and width, as discussed.

Formal Decision

64. The Order is proposed for confirmation subject to the following modifications:

- Throughout the Order:
 - replace text "...restricted byway..." with text "...footpath...";
- Within Part II of the Schedule:
 - add box for 'Maximum width' at "5 metres" adding a note that this is "In accordance with the depiction of the way on map sheet Cornwall LXII.16 from the Ordnance Survey County Series Second Edition published at 1:2500 scale."
- On Order map:
 - alter the line to show the route as a footpath between points A and B, by a continuous line with short bars at intervals;
 - alter the key to show footpath.

65. Since the confirmed Order would affect land not affected by the Order as submitted and show as a highway of one description a way which is shown in the Order as a highway of another description, I am required by virtue of paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give the opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Heidi Cruickshank

Inspector

APPEARANCES

For the Order Making Authority:

Vanessa Davis	Legal Officer, Cornwall Council
<i>who called:</i>	
Mr S Dyer	Countryside Access Records Officer, Cornwall Council
Mrs P Hothersall	Applicant
Ms C Pernant	
Miss M Smith	
Mrs J Smith	

In Objection to the Order:

Mr D Watts
who called:
Mr N Watts

Mr D Curnow

Mr D Evans

Mrs M Hosking

INQUIRY DOCUMENTS

- 1 The Order
- 2 Closing Statement of Cornwall Council
- 3 Closing Statement of D Watts

Produced by Coutryside Access Team: 28 June 2016



THE CORNWALL COUNCIL
(ADDITION OF ~~RESTRICTED~~ BYWAY FROM ROAD U6036
TO BRIDLEWAY 62 CAMBORNE)(PENPONDS)
MODIFICATION ORDER 2016

