
Order Decision

Site visit made on 4 January 2017

by Alan Beckett BA MSc MIPROW

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

Decision date: 27 January 2017

Order Ref: FPS/U1050/7/107

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Derbyshire County Council (Byway Open to All Traffic from Duffield Bank, Makeney to far side of River Derwent – Belper and Parish of Duffield) Modification Order 2014.
- The Order is dated 14 August 2014 and proposes to modify the Definitive Map and Statement for the area by adding a Byway Open to All Traffic ('BOAT') as shown in the Order plan and described in the Order Schedule.
- There were 3 objections outstanding when Derbyshire County Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me and the observations made during a site visit on 4 January 2017 in the company of Mrs Phillips and Mrs Gale of the Council, the landowners Mr Ward and Mr Goodwin, and Mr Turton of the Derbyshire Footpaths Preservation Society.
 2. The objection made by Mr A D Kind related to the use of the term 'approximate width' in Part II of the Schedule to describe the width of the BOAT. Guidance on the width to be recorded in the definitive statement is found in Advice Note No. 16 published by the Planning Inspectorate. In relation to definitive map modification orders, paragraph 10 states: "*A minimum or approximate width may be used in an order where the evidence indicates a minimum or approximate width. Historic documents tendered in evidence may use terms such as "at the least" or "thereabouts" to qualify the stated width and thus it may be appropriate for the order to be drafted in similar terms.*"
 3. In this case, the documentary evidence does not provide any indication of the width of the route at issue, whether approximate or otherwise. The width to be recorded is derived from the depiction of the route found in the second edition 25-inch to 1-mile Ordnance Survey map of 1898 as suggested by paragraph 11 of Advice Note No. 16. In responding to Mr Kind's objection, the Council requested that the term "*Approx*" be removed from Part II of the Schedule. If the Order is confirmed, I will modify it in the manner requested by the Council.
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The Main Issues

4. The Order has been made under section 53 (2) (b) of the 1981 Act in consequence of an event specified in section 53 (3) (c) (i) of that Act.
5. Section 53 (3) (c) (i) states that a modification order should be made by the surveying authority following the discovery of evidence which (when considered with all other relevant evidence available) shows that a way which is not shown in the map and statement subsists¹ as a public right of way.
6. The Council's case is based upon an analysis of the documentary evidence adduced by the Derbyshire Footpaths Preservation Society in support of its application to record the route as a BOAT and upon other documentary evidence discovered by the Council as part of its own research. The conclusions reached by the Council arising from its consideration of the documentary evidence have not been challenged by the objectors.
7. The evidential test to be applied is the civil standard of proof; that is, the balance of probabilities.

Background and the impact of section 67 of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act')

8. On 31 January 1997, the Council received an application from the Derbyshire Footpaths Preservation Society for a modification order to add a BOAT between Duffield Road, Makeney to Station Approach, Duffield. The application was accompanied by a map showing the claimed route, and by copies of the documentary and photographic evidence on which the applicant sought to rely. The application was therefore fully compliant with the requirements of paragraph 1 to schedule 14 of the 1981 Act.
9. The Council considered the application and the available evidence and concluded that although public vehicular rights subsisted on the eastern side of the River Derwent, the public rights on the application route to the west of the river had been extinguished under the Inclosure Award of 1791. On 16 January 2006 the Council's Regulatory – Licensing and Appeals Committee resolved that an Order be made to add a BOAT to the definitive map and statement for that part of the claimed route east of the River Derwent including the ford crossing of the river.
10. Section 67 (1) of the 2006 Act extinguished, as of 2 May 2006, any right the public had to use mechanically propelled vehicles ('MPVs') over a route that was not shown in the definitive map and statement or over a route that was shown in the map and statement but only as a footpath, bridleway or restricted byway.
11. The general provision of section 67 (1) is however subject to a number of exceptions which are set out in sections 67 (2) to (8). Subsections 3 (a) and (b) provides for the preservation of public MPV rights where an application had been made prior to the relevant date (20 January 2005) and where the application had been determined by the Council prior to the commencement of the Act (2 May 2006).

¹ *Todd & Bradley v Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 1450 Admin

12. In this case an application which strictly complied with the requirements of paragraph 1 to Schedule 14 of the 1981 Act was made and was determined by the Council prior to the two key dates set out in sections 67 (3) (a) and (b) of the 2006 Act. Consequently the exceptions found in section 67 (3) (a) and (b) are engaged and any public MPV rights in existence over the Order route were not extinguished on 2 May 2006. It follows that if the documentary evidence demonstrates, on a balance of probabilities, that a public vehicular right of way subsists over Save Penny Lane, such rights can be recorded in the Definitive Map and Statement as a BOAT.

Reasons

Documentary evidence

References to quarter sessions 1658 and 1714

13. The applicant submitted an extract from *Three Centuries of Derbyshire Annals* (1890) by Revd. J C Cox in which reference is made to the inhabitants of the Parish of Duffield being presented to the Quarter Sessions of 1658 for failing to maintain and repair "*a Foarde in ye River of Derwent called Duffield Foarde used for all carts & Carriages being in ye said Parish in great decay, & ought by them to be repayred*". In 1714 the Quarter Sessions awarded £30 of public funds for the repair of the ford as the existence of the ford reduced the wear and tear on Duffield Bridge.
14. The references within the extracts from the Rev. Cox's book suggest that in the mid-seventeenth and early eighteenth centuries the ford through the Derwent which forms part of the order route was considered to be maintainable at public expense and that it carried public vehicular rights. If the ford was a public carriageway at that time then the approaches to it from the east and west were also likely to be of the same status.

Eighteenth and nineteenth century small scale maps

15. Fox's map of Derbyshire (1760) shows by means of a double peck line a route running from Makeney to Duffield which fords the River Derwent north of Duffield Bridge. The same feature is shown by Cary (1789), Burdett (1791), Tuke (1798), Smith (1801), Cary (1805), Pigot (1806), Smith (1808), Cary (1811) and Teesdale (1829). The route depicted on all these maps is consistent with the current line of Save Penny Lane.
16. Very few of the small scale maps considered contain a key to what the cartographer was depicting. Of those maps that do carry a key (Smith 1801, Pigot 1806, Smith 1808, Teesdale 1829) the route shown is described as either a '*cross road*' or a '*bye road*' indicating that the map maker considered Save Penny Lane to be part of the public road network and available for the public to use on horseback or with vehicles.
17. It is not known which (if any) of the maps were prepared following a survey of the area and given that the inclosure award (considered below) stopped up the route to the west of the ford, it is likely that maps produced by Cary after 1791 are copies of his earlier map and that the remaining maps published after 1791 which show the existence of a through route are likely also to be copies of other works as opposed to having been produced as a result of a fresh survey. Whilst some weight can be attached to the post-1791 maps as evidence of the

continuation through time of the Order route to the ford from the east, they are of limited value with regard to the route to the west of the ford.

Duffield Inclosure Award 1791

18. The Duffield, Belper, Hazelwood and Makeney Inclosure Award of 1791 was made under the provisions of an enabling Act of 1786 and allotted to Thomas Porter Bonell and John Broadhurst two parcels of land "*situate lying and being in a certain ancient lane called Ford Lane in the said liberty of Duffield*". The two parcels (numbered 3 and 4) are clearly shown in the award plan to be the continuation of Save Penny Lane on the western side of the river. The Council submits that the effect of the inclosure award was to extinguish any public right of way which was in existence over "Ford Lane" although the inclosure process had no effect upon Save Penny Lane on the eastern side of the river or on the ford itself.
19. The applicant considered that the inclosure commissioners had not acted in accordance with the enabling Act by not first stopped up roads which were to be extinguished and divided; consequently public rights still existed over the route of "Ford Lane". However, the Commissioners were empowered by the Inclosure Act to "*set out and appoint such public carriage roads in over and upon the lands and grounds hereby intended to be inclosed as they shall think necessary and proper*". On considering the terms of the Act and the Award together, it would appear that the Commissioners considered that the retention of Ford Lane was unnecessary and therefore directed that the land it comprised should be divided and allotted by the Award. On a balance of probability, the inclosure evidence demonstrates that any public rights that had subsisted over "Ford Lane" were extinguished in 1791.
20. An 1801 plan of a parcel of land known as Green Pleck shows the property being bounded on the south-west side by a road identified as '*Makeney Ford Road*'. The alignment of this road is identical to the Order route. There is no indication from this plan that the road was considered to be privately owned and its description as '*Makeney Ford Road*' reflects the Quarter Sessions evidence from 1658 of the ford and the road leading to it being a public carriageway.
21. A later survey of Green Pleck dated 1824 shows the western end of Save Penny Lane where it meets the Derwent with "the Ford" annotated at the river. There is no indication from this plan that the Order route was considered to be in private ownership. This plan also supports the earlier evidence of the Order route being a public carriageway.
22. Sanderson's 1835 map of twenty miles around Mansfield shows Save Penny Lane running to the river but does not show any continuation of the route to the west of the Derwent. Sanderson's map is drawn to a scale of 2.5 inches to the mile and is considered to be a highly accurate and detailed map for its time. Unlike some of the small scale commercial maps produced after 1791, Sanderson's map accurately reflects the post-inclosure landscape with "Ford Lane" no longer being visible on the ground.

Duffield Tithe map

23. The tithe map shows Save Penny Lane running from Duffield Bank to the river as a separate feature outwith the other numbered parcels and appears to not

have been considered titheable. No apportionment details have been submitted, but the tithe map demonstrates the continued existence of Save Penny Lane as an identifiable feature in the landscape. The tithe plan also shows that the continuation of the road on the western side of the river had been incorporated into the adjacent fields in accordance with the inclosure award.

Ordnance Survey maps 1836 – 1972

24. The Ordnance Survey first edition one-inch map of 1836 shows Save Penny Lane as a road or way bounded by hedges or fences which separate the road from the surrounding fields. In this respect the map depicts the order route in the same way that the private estate surveys of 1801 and 1824 had done.
25. The first edition 25-inch to 1-mile map of 1879 shows the majority of Save Penny Lane as being bounded by hedges or fences although the boundary on the northern side of the road as it approaches the river was becoming discontinuous. Save Penny Lane has its own Ordnance Survey parcel number and is annotated "849" on the plan; it is not known how Ordnance Survey described this road as the relevant extract from the book of reference has not been submitted.
26. The Order route is annotated 'Save Penny Lane' on the 1913 edition of the 25-inch to 1-mile map and although most of the route is shown bounded by hedges or fences, the western end of the lane is not separated from the adjacent field. The Order route is depicted in much the same way on the 1972 1:2500 scale map; the route is still labelled 'Save Penny Lane' and its western end is shown as not having a physical boundary on its northern side.
27. None of the Ordnance Survey maps considered show the route to the west of the river. Although Ordnance Survey maps do not provide evidence of the status of Save Penny Lane, they demonstrate the continued existence through time of the route recorded in the Quarter Sessions of 1658 as being a public carriageway. In this respect, the maps are supportive of the physical existence of a route which would have been capable of carrying public vehicular traffic.

Other evidence

28. In *"Records and Traces of Old Roads Near Derby"* published in the Derbyshire Archaeological Journal of 1913, W Smitherd noted that the route east of the Derwent was called Save Penny Lane and described it as *"an old road to a ford across the Derwent near Duffield railway station"* and that Save Penny Lane used to be called Ford Mouth Lane.
29. Two other local histories provide an insight into the origin of the name of the Order route. In his book *"Old Duffield"* (1922) J Bland wrote *"Other fords, as we have mentioned, crossed the river in the village. The old lane leading down to these fords can still be seen at the Makeney end; it is called 'Save Penny Lane' because people who used it, and crossed the ford, saved the penny toll which Messrs. Strutt charged for crossing the bridge they had built"*. An extract from the *Illustrated History of Duffield* (1986) by W R Watson provides the same information and may have used Bland's book as a source.
30. The local histories provide a plausible explanation of the origin of the name of the Order route and that it was one used by the public to avoid paying tolls on

other available routes. The histories also show that the reputation of the Order route as a public right of way continued into the twentieth century. Although Watson's reference to pedestrians using the Order route to avoid being charged a penny toll for the use of the Strutt bridge shows that the Order route was used by foot traffic, this does not detract from the Quarter Sessions records of 1658 which demonstrate that Save Penny Lane was a public carriageway.

Other matters

31. Objections were received from Mr Goodwin and from Mr Ward who own the land crossed by the Order route. Concerns were expressed regarding the purpose of recording the route as a BOAT as the ford had been destroyed many years ago and Save Penny Lane was a cul-de-sac at the eastern river bank. Mr Goodwin also had concerns regarding the impact use of the BOAT would have on growing crops, upon the security of equipment and machinery being used on the farm and how and where vehicular users would turn round once they had reached the river.
32. Whilst I acknowledge these concerns, the definitive map process under section 53 of the 1981 Act is concerned with recording those public rights which are shown to subsist, not about recording those rights which may be desirable or preferable. The future management of the BOAT is a matter for the Council as the highway authority and it may be that Mr Goodwin's concerns can be addressed as part of that future management. The matters raised by Mr Goodwin are not ones which I can take into account in reaching my decision.
33. Mr Ward's objections were that the route had never been a public right of way and that use by the public with vehicles might cause damage to the earth banks of the drainage ditches at the side of the lane or to the culverts built by the Strutts in previous centuries.
34. Although Mr Ward asserts that the Order route was not a public right of way, he provided no evidence to substantiate that assertion, nor had he submitted any documentary evidence to counter the conclusions which the Council and the applicant had reached. Although I acknowledge that there is a potential for drains and culverts to be damaged by modern vehicles these are not matters which I can take into account as my remit extends only to a determination of what public rights subsist over the Order route. As noted above, the future management of Save Penny Lane is a matter for the Council who will be aware of the concerns raised by Mr Ward.

Conclusions

35. The documentary evidence adduced provides a persuasive case for the existence of public vehicular rights over Save Penny Lane. The origins of the Order route are uncertain, but the Quarter Sessions records demonstrate that by the middle of the seventeenth century, the ford in the Derwent and the roads that led to it were publicly maintainable carriageways. Although the road on the western side of the Derwent was stopped up in 1791 by the inclosure process, the road on the eastern side of the river remained a public highway although it has subsequently fallen into disuse.
36. In the absence of any evidence to show that the public carriageway rights over Save Penny Lane have been formally stopped up in the intervening period, the

rights demonstrated to exist by the Quarter Sessions records of 1658 remain in existence and should be recorded in the definitive map and statement.

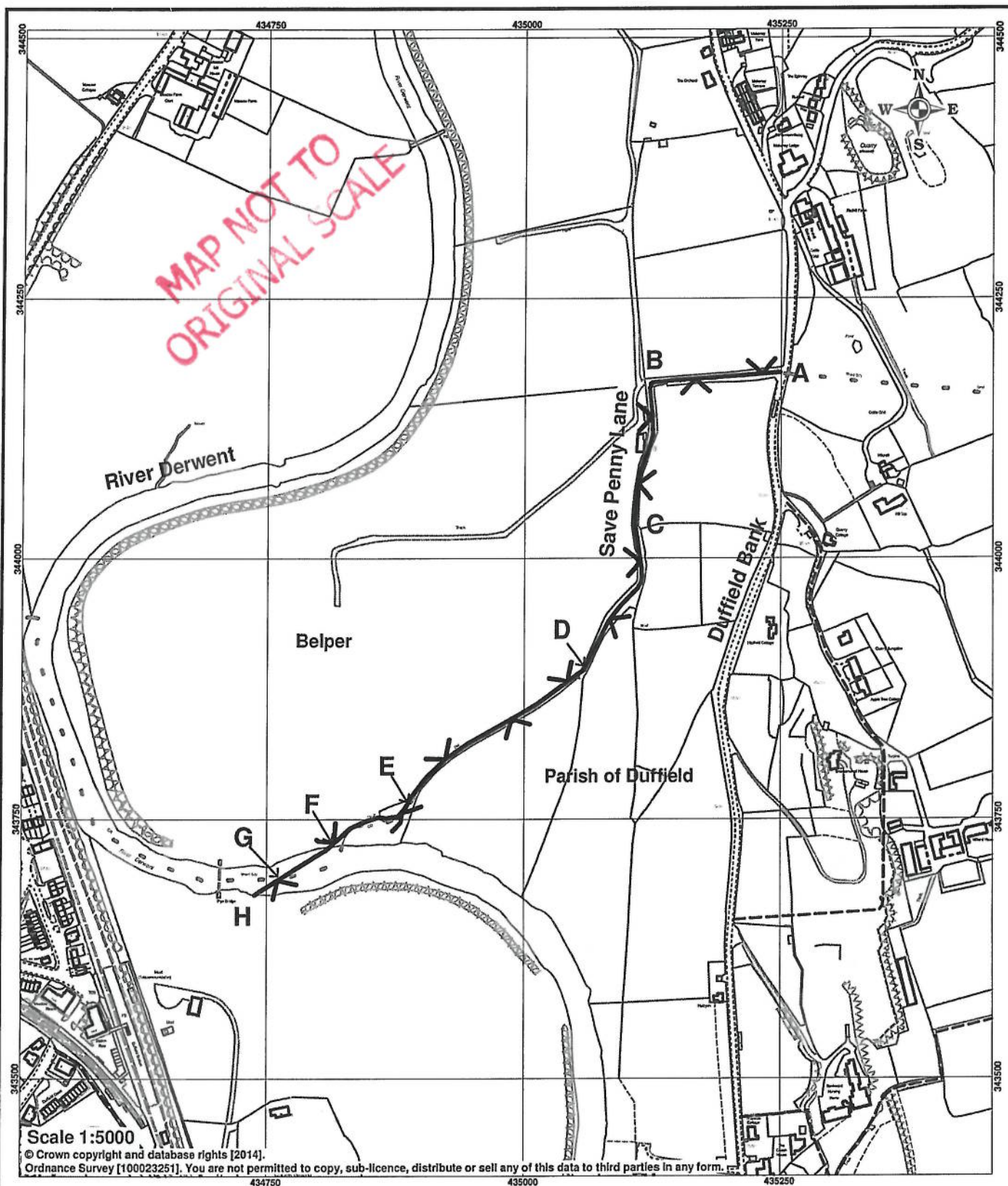
37. I conclude that the documentary evidence adduced in this case is sufficient, on a balance of probabilities, to show that a public carriageway subsists over Save Penny Lane.
38. Having had regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed with modifications.

Formal Decision

39. I confirm the Order subject to the following modification: in the Schedule, Part II, delete the word "Approx" from the column heading "Approx Width".

Alan Beckett

Inspector



Ref: PE/JV/X2921/Order/2014

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County Council
Improving life for local people

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Produced by Public Rights of Way on 29 July 2014

Wildlife & Countryside Act 1981 Section 53

The Derbyshire County Council (Byway Open to All Traffic from Duffield Bank, Makeney to far side of River Derwent - Belper and the Parish of Duffield) Modification Order 2014

Key:

Claimed Byway
Open to All Traffic
Existing Footpaths
Parish Boundary

