



Order Decision

Site visit made on 26 May 2016

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 29 June 2016

Order Ref: FPS/G3300/7/94

- This Order is made under Section 53(2) of the Wildlife and Countryside Act 1981 and is known as The Somerset County Council (No. 1) Modification Order, 2014.
- The Order is dated 24 January 2014 and proposes to record a public footpath over the route known as Winterhay Lane, in the Parish of Ilminster. Full details of the route is given in the Order map and described in the Order Schedule.
- There were seven objections outstanding when Somerset County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Preliminary Matters

1. In the statement of case of South Somerset Bridleways Association ("SSBA") a request was made that at least section A – B¹ of the Order route, Winterhay Lane² ("the Lane"), be recorded with a higher status than footpath. This was so as not to compromise their application for the upgrading of Green Lane³, which is currently recorded as a public footpath, number CH 32/20 ("CH 32/20"), running west from the Lane.
2. Although I sympathise with the SSBA on this matter I can only record the Order route, or parts thereof, according to the weight of evidence on the balance of probabilities. Considerations of desirability and administrative ease are not matters that can weigh in the balance.
3. SSBA also requested that Green Lane be upgraded to restricted byway, as a contiguous route, forming a through-route with the Order route. I am able to propose modifications to an Order where I am satisfied that the evidence is sufficient to justify it. Such proposed modifications would need to be advertised. As the route is already recorded as a footpath, I would need to be satisfied on the evidence that the test under section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 ("the 1981 Act") had been met.

Procedural Matters

4. This case was originally scheduled to be dealt with by way of Public Inquiry as the objections from adjacent landowners ("the A/L") to the route challenged the evidence. As a result Somerset County Council, the order making authority ("the OMA"), wished to present oral evidence to an Inquiry.

¹ Points A – E are shown on the Order map

² Also known locally as Bumpy Lane and/or Allotment Lane

³ Also known locally as Grassy Lane

5. However, when the statement of case was presented by Mogers Drewett Solicitors, on behalf of the A/L it dealt only with the objection made by SSBA. The SSBA objection was made on the basis that the status should be recorded as restricted byway, rather than footpath. The OMA in discussion with the A/L clarified that the objections with regard to the Order as made were withdrawn and, therefore, there was no need for cross-examination of the oral evidence. In discussion with the statutory parties it was agreed that the Order could deal with by way of the written representations procedure.
6. The statements of case were already with the Planning Inspectorate and the proofs of evidence, which provide the last opportunity for parties to consolidate the case which is intended to be made at Inquiry, were due shortly afterwards. As a result, I was satisfied that there should not be any matters outstanding which would not have already been in writing to meet the original Inquiry timetable. Nonetheless, to ensure that all parties had fair opportunity to comment on the cases given the change in procedure, a revised timetable was drawn up. The unaccompanied site visit was carried out two weeks later than the originally proposed Inquiry date.

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 Definitive Map and Statement ("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 OMA were of the view that the documentary evidence demonstrated that the route was a public footpath and this was supported by the A/L, who conceded a 3 metre wide footpath over the full length of the Order route. SSBA argued that the documentary evidence showed that the rights to be recorded were higher than footpath. 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.
9. 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, or the date on which such dedication, if any took, place...". 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.

10. 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. 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.
11. The OMA indicated that there was sufficient evidence for rights on foot to have been acquired under the statute and additional rights can also subsequently arise. 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.
12. My decision will be whether or not the Order should be confirmed, or modified, on the balance of probabilities.

Reasons

Background

13. During an investigation in the early 1990s into Green Lane, the OMA discovered evidence to indicate that the Lane should be added to the DMS. In February 2010 the SSBA submitted an application to upgrade the status of Green Lane to restricted byway and in October 2013 made a similar application in relation to the Lane. I understand that neither application has been determined by the OMA at this stage.
14. Use of the Order route seems to have been challenged in 2012. This led to the Winterhay Action Group ("the WAG") submitting additional evidence to the OMA to support the recording of the route as a public footpath.

Physical characteristics

15. The southern-most section of the Lane is a publicly recorded and maintained highway providing access to properties and business and continuing east from point A, which is a crossroads with another route. The Order route continues on the north-south alignment from point A as roughly surfaced track. It is ungated at either end, although with a gate into the yard of Winterhay Farm, which lies a little to the north of point E. At point E the route joins footpath CH 14/11, which crosses the Lane. There are several properties and fields which require access over the Lane. FP CH 32/20, Green Lane, joins the Lane at point B. There are no gates or barriers on this route, which is an unsurfaced grass track, clearly used in part for agricultural access.
16. At the time of my site visit there were some signs on the Lane: at point A and a short distance south-west of D was "PRIVATE NO PUBLIC RIGHT OF WAY"; and at B, a little way north-east of B and south-east of D, were handmade

signs saying “*PRIVATE LANE PATRONS AND SERVICES ACCESS ONLY. THIS IS NOT A FOOTPATH. TRESPASSERS WILL BE PROSECUTED*”.

17. I understand that the Order route is unregistered and the OMA sought dispensation to give notice to unknown owners on site. There is no evidence before me of a claim of ownership of the sub-soil.

Documentary evidence

Pre-Inclosure evidence

18. SSBA referred to Map and survey of property of William Hanning, 1767, surveyed by Samuel Donne. It was argued that it showed the Lane as a route to Winterhay Green Common, noted to be “*where is Right of Common for an Unlimited Stock*” and, as it was important for public access to the common, must have had the status of at least bridleway. ‘*Smiths Tenement*’ which is shown on this map, can be identified as lying to the west of the Lane, on the 1768 Map of Ilminster. This map shows that only the southernmost section, south of point A, physically existed at that time.
19. Arguments that the reference in the 1780 plan of Ilminster “*To Winterhay*” were significant in showing that there must have been a carriageway are not supported by either the earlier mapping or the Ordnance Survey (“OS”) Surveyors drawing of 1802. These both show the section to approximately point A, beyond which lies the common land. I agree with the OMA that there also appears to be an entrance into Winterhay Green from the north-east.
20. The entire Lane is shown in the 1809 – 1813 OS map and it was suggested that this meant it came into existence before the Inclosure. Whilst this is possible, I understand that the map is a reprint, not necessarily derived from original, un-amended surveys. I agree with the OMA that reliance cannot be placed on it to show earlier existence of the Lane and, even if it did, any highway rights did not survive Inclosure, for the reasons set out below.
21. There is a little evidence regarding the existence of the route prior to the Inclosure process. However, the evidential weight can only really be placed on the southern section, which is currently recorded as a public vehicular highway.

Inclosure Act, 1815, Award and Map, 1820

22. Between 1545 and 1880 the system of farming scattered arable strips of land, and grazing animals on common pasture, was gradually replaced as landowners sought to improve productivity. The process of inclosure began by agreement but by the early eighteenth century, a process developed by which a Private Act of Parliament could be promoted to authorise inclosure where the consent of all those with an interest was not forthcoming. The Act set out the powers of the Inclosure Commissioners in the process and the Award then set out how the land was inclosed and awarded to the interested parties.
23. In 1801 Parliament simplified the process by standardising the most common clauses so that these would be automatically incorporated into Local Acts, allowing for more efficient passage through the Parliamentary process. Before making any allotments, the commissioner was to set out and appoint such public carriage roads and highways at least 30 feet wide over the land to be enclosed as he judged to be necessary. The Inclosure Commissioners were

empowered to stop up roads running through old inclosures but were required to obtain an order from the Justices to do so.

24. The "*Act for Inclosing Lands in the Parish of Ilminster, in the County of Somerset*" was given royal assent on 2 May 1815. The Act indicated that it was to "...[divide and allot] *the said Open and Commonable Pasture, called Winterhay Green...into several distinct Allotments... [to be] inclosed...*". I agree with the OMA that this Act was made under the 1801 and 1815 Acts.
25. There is agreement that the Award sets out both Green Lane and the Lane as private roads. SSBA argue that as Green Lane and the southern part of the Order route, between points A and B, provided access to a gravel allotment, this must have been a vehicular road. They argued that the requirement to set out public carriageways at 30 feet⁴ meant that making them private was advantageous in terms of maintenance.
26. I note that Winterhay, as an area, had no public roads set out and also that the SSBA do not suggest that it was awarded as a public carriage road. However, I consider that the failure to either set the route out as a public carriage road or to receive the consent of two Justices to stop up such an "...*old or accustomed public Road...*" indicates that the Commissioners did not believe this was a pre-existing public road, as was the case in *Hall v Howlett* (1976)⁵.
27. I agree with the OMA that the limiting of the access to "...*the proprietors of lands and estates of Ilminster...*" confirms that the private roads were for a limited section of society, not the general public. I am satisfied that the term 'private' as used in the 1815 Act relates to rights of use, rather than maintenance matters, in line with *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council* (1995)⁶, with the Commissioners powers confirmed by *R (oao John David Andrews) v Secretary of State for Environment, Food and Rural Affairs* (2015)⁷.
28. I note that other routes set out as 'private' in the Award are now recognised as public roads. However, this does not demonstrate that they were set out with public vehicular rights in the Award, as oppose to higher rights having been subsequently established.
29. The Award clearly sets out "*One public footpath...numbered 12 on the said Map of Winterhay Green commencing at an ancient stile on the North side of an Allotment numbered 20... [commencing to]...the North end of a private road numbered 2 on the same Map and thence upon and over the several private roads respectively numbered 2, 1 and 6...*". Under the heading *Private Roads* the award is made of "*One private road of a breadth of twenty feet numbered 1 on the said Map of Winterhay Green commencing at the South gate of Winterhay Green aforesaid and proceeding in a Northern direction to Richard Sharland's Barton Gate.*"
30. I agree with the A/L that gates are indicated on the 1802 OS surveyors drawing. Whilst there are no gates now, the Award was setting out the road by reference to what existed at the time. Given that this was common grazing

⁴ 9.1 meters

⁵ [1976] EGD 247

⁶ (QBD) [1995] CO/1560/94

⁷ [2015] EWCA Civ 669

land, it would be surprising if it was not gated. I also agree with the OMA that the reference to an '*ancient stile*' suggests that there was already a footpath over Winterhay Green prior to the Inclosure, rights over which were saved by the Commissioners setting out a public footpath over the Lane.

31. I agree with the OMA that the footpath and private road are coincident over the Order route section A – B – C – D and, in the absence of evidence of subsequent stopping up of the footpath, such rights exist today. The OMA rely on user evidence in relation to the section D – E, which I shall consider shortly. Whether the later evidence demonstrates that higher rights have subsequently arisen over all or part of the Order route also remains to be considered.

Post-Inclosure evidence

Map of Ilminster, 1821

32. This map shows the Order route and Green Lane as hedged routes, with Green Lane continuing past the gravel allotment to loop back to the road, now the B3168. The explanation shows the representation means that the routes are "Roads"; however, I agree with the OMA that this is not necessarily anything more than a description. These routes were set out as private roads only six years earlier and other routes, such as the drive to Manor Farm, for which no claim of public rights is made, are shown in the same way. Although there may be numerous parcels of land accessed from the Order route, the Inclosure awarded a private road to allow persons to access the lands allotted to them.
33. SSBA refer to the 1824 version of this map, suggesting it may have been drawn earlier than the 1821 map. I agree with them that there appear to have been subsequent annotations, with the map apparently used for various purposes. I do not consider that this adds weight to the depiction of the routes in suggesting that they are public roads as oppose to private.

Greenwoods Map, 1822

34. SSBA argue that the depiction on this 'commercial' map as a '*Cross Road*' indicates a public route, as otherwise those buying the map would not know which roads they could or could not use. Whilst the southern section of the Lane, along with Green Lane, would form a through-route, it is in fact only a circular route which the general public would not seem likely to use. The northern section is shown, as on the Parish map, with a circular route south of what is now Winterhay Farm but it is not clear why this would be used other than as private and invited access to the farm. The routes do not seem to be highways running between, and joining, other highways.
35. Commercial maps are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. Whilst, combined with evidence from other sources, they can tip the balance of probability in favour of such status, in this instance I am not satisfied that it can be given the weight argued.

Chard Canal Deposited Plan, 1833

36. Individual canal schemes were promoted by Special Acts, with the process codified in 1792 by a Parliamentary Standing Order. The canal deposited documents were in the public domain, even where schemes were not completed. Canal maps and their associated books of reference do not always

differentiate between public and private roads and do not normally record bridleways or footpaths.

37. SSBA indicate that an Act of Parliament passed in 1834 enabled the Chard Canal Company to compulsorily purchase land over which the canal route would pass. SSBA say that Green Lane is not numbered in the plan, being shown in the manner of public roads, such as the B3168. I consider that both these routes are numbered on the extract before me; Green Lane appears to be number 14 and the B3168 number 25. No copy of the relevant book of reference entries has been provided.
38. The plan which appears to be associated with the 1836 conveyance from Henry Down alters the numbering, such that what was 15 becomes 14 and Green Lane seems to be unnumbered. The land to be conveyed is referred to as being "*...bounded...on the southward part or side thereof by a roadway leading from the Ilminster and Honiton Turnpike Road to Winterhay...*". The copy of the deed exchange with Thomas Bower is too small for me to read whether there is anything relevant to Green Lane.
39. I consider the apparent lack of need for the Canal Company to compulsorily purchase the land crossed by Green Lane is suggestive of public rights. Although some of the documentation is not before me, on the balance of probabilities, the deposited plans provide a little evidence to support the claim that a highway existed over Green Lane at this time.

Ilminster Tithe Map and Apportionment, 1838

40. 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.
41. SSBA argue that the Lane and Green Lane are included in the apportionment number 1015, identified as '*Roads, Rivers and Waste*'. However, I agree with the OMA that the Lane is not specifically numbered nor referenced in the map or apportionment. I also note that it appears to be gated at either end, point A and the gate beyond point E.
42. Although SSBA indicate that other, now public, roads are shown in the same way, the OMA say that others, such as Rag Lane, are not so recorded. Furthermore, I agree with the OMA that roads, rivers and waste land can all be private as well as public. On the balance of probabilities, I do not find the tithe to be supportive of public rights, as a private road could also be found to be unproductive and, therefore, not subject to a tithe payment.

Railway documents, nineteenth century

43. As with the canals, railway schemes were promoted by Special Acts, with codification in 1810 and the requirements expanded in the Railways Clauses Consolidation Act 1845, with public rights of way which cross the route of a railway to be retained unless their closure had been duly authorised.

44. The deposited documents were in the public domain and the statutory process required for the authorisation of railway schemes was exacting; the book of reference and deposited plans needed to be of a high standard and were normally specifically surveyed for the scheme. Landowners would not have wished unnecessarily to cede ownership, Highway Authorities would not have wanted to take on unwarranted maintenance responsibilities, and Parish Councils would not have wished their parishioners to lose rights.
45. The line of deviation for the Bath, Wells, & Exeter Junction Railway, 1845, lies to the west of Green Lane but it does appear to be numbered as 27. This is identified as a 'Drove' in the ownership of '*Richard Sharland Surveyor of the Highways of the Tything of Winterhay*'. An entry in the book of reference that a way was in the ownership of the 'Surveyor of Highways' may be persuasive evidence of a public right of some description, although I understand that Richard Sharland was a major landowner in the area. I agree with the OMA that a 'drove' would only be suggestive of a route used to move livestock and this would not necessarily have required vehicular rights as suggested.
46. This plan was not implemented and I note that the Inspector dealing with the recording of Green Lane as a public footpath in the mid-1990s reported the case for the OMA that it was shown as an occupation road in the Chard and Taunton Railway Deposited Plan. None of the original documentation on this has been presented and neither do I have the 1995 Order decision⁸.
47. SSBA also referred to a Great Western Railway Chard Branch (B & E) Survey 1893 – 4, which shows the western end of Green Lane labelled "*From Ilminster*", with the B3168 annotated "*From Taunton*" and "*To Ilminster*". The book of reference is not before me and I am unclear on the reason for and status of this plan given the information apparently in the 1995 Order decision that the railway opened in 1866.
48. On the balance of the information I have, including the decision taken following a Public Inquiry held in the mid-1990s, I consider that the evidence is not supportive of vehicular rights existing over Green Lane, or by extension the Order route, in the mid-nineteenth century.

Ordnance Survey maps

49. The formation of OS was a 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.
50. The Order route and Green Lane are shown on OS maps from the 1882 – 1888 OS 1 mile to 1 inch map onwards generally in the same way that other roads are shown. However, there are differences, for example, the 1969 OS One Inch shows the Lane as a '*Minor Road in towns. Drive or Track (unmetalled)*' whilst Green Lane appears to be simply a '*Path*'. The disclaimer is clearly shown indicating that '*The representation on this map of any road, track or path is no evidence of the existence of a right of way*'.

⁸ Extracts from the Order Decision, Reference FPS/G3300/7/37, 25 August 1995 were provided by WAG

51. Both routes are named on many of the OS maps and the Object Names Book ("ONB"), which appears to date from 1902, with 1928 revisions, identifies the Lane as "*A public road extending from the West end of West Street to Winterhay Farm*". The authority for the name was given by Mr Poole, a solicitor from South Petherton whilst Mr Stephens, the Surveyor to the Chard Rural District gave authority to the name Green Lane, identified as "*A public road extending from Winterhay Lane in a westerly direction of for about ¼ of a mile to the railway.*".
52. Although OS maps are reliable in terms of physical characteristics their purpose was not to identify public and private access. The ONB was produced for the purpose of naming the route, rather than identifying highways. However, I give some weight to the fact that it was the Surveyor who identified Green Lane as a public road.
53. The inclusion of a route on a series of OS maps can be useful evidence in helping to determine the status, when used in conjunction with other evidence.

Conveyance of Winterhay Farm, 1902

54. I agree with SSBA that the documentation appears to identify the Lane as a single entity north to south, coloured in the same way as the public road, West Street, to the south. There is no indication of private rights being reserved to allow access, which may suggest that the access relies upon the route being part of the public road network. However, given that there is clear evidence of a private road having been set out, providing access, the probability is that there was no need for the right to be provided afresh.

Finance (1909 - 1910) Act

55. 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.
56. Each area of land, or hereditament, was identified on a map and information recorded in a Field Book. The Order route and at least part of Green Lane are excluded from the numbered hereditaments on either side. 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 forms and Field Books. However, as pointed out by the A/L, there may be other reasons to explain its exclusion. For example, there are some cases of a private road set out in an inclosure award for the use of a number of people but without its ownership being assigned to any individual, being shown excluded from hereditaments, although this has not been a consistent approach.
57. In connection with the other available evidence, I do not consider that the Finance Act information indicates a public vehicular right over the Lane.

Highway Board and Maintenance Records

58. The 1899 Parish boundary records result in the southern part of the Lane lying within Ilminster Parish, whilst the northern section, which is the Order route, is in Ilminster (Without). Although I agree with SSBA that the 1899 Highway Board Minutes have strong evidential weight I also note the, very fair, comment that it cannot be known whether the record of labour being used on the Lane relate to the whole of its length or only that within Ilminster parish, which is today recorded as a full public highway.
59. In the 1930s the Chard Rural District Highway Board Minutes show discussions regarding maintenance of the northern section of the Lane. Following a request for maintenance, due to works having been carried out in the urban district area, it was said that there had not been maintenance of it within the previous 25 years. However, *"Members stated that Winterhay Lane is much used by the general public, and after some discussion it was Resolved to recommend that the application be referred to the County Council with all available information as to Winterhay Lane and the use to which it is put."*
60. The subsequent entry referred to *"...Ilminster (Without) Parish Council...urging that this road, from the boundary of the Urban District to the farms occupied by Messrs. Oaten and Evans should be repaired by the Highway Authority...the County Surveyor...was unable to authorise any repairs, as there seemed to be considerable doubt as to whether Winterhay Lane is a Highway repairable by the inhabitants at large..."*.
61. I consider that SSBA make a reasonable argument that there was no discussion of this as a public footpath over a private road. However, I agree with the OMA that the actual type of use by the general public is not specified. The user evidence, discussed shortly, points to such use being on foot.
62. A couple of decades later the owner of Winterhay Farm again raised the matter of maintenance. A questionnaire, *"Liability for repair of footpaths and footbridges"* was completed, stating the route to be a footpath *"in constant use"*. Reference was made to the Inclosure Award and it was noted that repairs had been carried out from time to time by the owners and/or occupiers. The file document states that *"As it is the job of the respective owners occupiers etc. to keep the road maintained I presume this also covers the right of way which forms part of it."*
63. Despite the evidence of repair to the southern part of the Lane in the 1930s, neither the 1930s nor 1950s roads records maps show any part of it as a public road, repairable at public expense.
64. I agree with SSBA that the historic arguments about the route seem not to have been about public access, which has been accepted and acknowledged by previous landowners, but maintenance. However, overall, the evidence refers to the route as a public footpath over a private road, rather than a public road. Again the question in my mind is why the general public would wish to use this cul-de-sac, at least beyond Green Lane, other than as a footpath.

Aerial Photographs

65. Aerial photographs may confirm the existence of a feature at the time the photographs were taken but they cannot provide evidence of what rights might

exist over a route, only that it might be discernible on the ground on that date. The photographs from the 1940s and around 2000 show the route as a hedged feature within the landscape but provide not more evidence.

The Definitive Map and Statement

66. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS and set out a specific legal procedure to be followed in their production. In most areas the Parish Councils submitted a map and survey of the rights of way to be recorded for their parish. The survey maps for Ilminster and Ilminster (Without) showed the continuation of FP CH 14/11, which is recorded as FP CH 32/2 and the route to the south, FP CH 32/1 which runs off the section of the Lane running east from point A. Ilminster (Without) showed the route of FP CH 14/11, which crosses the Order route, but did not include either Green Lane or the Lane as public rights of way. The Urban District area showed the southern section of the Lane coloured as other roads.
67. There was no objection to the omission of these routes and, as a result they were not included in the DMS for the area. If the Lane was thought to be a highway, it might be expected that FP CH 14/11 would be shown as two separate routes either side of the Lane, rather than a single route crossing it.
68. In 1989 Ilminster Town Council ("the Town Council") applied for Green Lane to be added to the DMS as a public footpath. It seems that the Order was made to record Green Lane with the status of byway open to all traffic but, following a public Inquiry, the Inspector proposed a modification to footpath. It seems that there was a further Inquiry into this proposed modification with the final decision recording the route as a footpath.
69. I note the case for WAG that Green Lane was not being used as a cul-de-sac to point B, but in connection with the Lane. The Definitive Statement simply says that this footpath runs to the Lane and the Ramblers comment that FP CH 32/20 would not have been added to the DMS if it was a dead-end.

Ilminster Town Guides, 1954 onwards

70. SSBA indicate that these 'Official Guides' were produced by the Town Council and argue that they show the Order route and Green Lane as part of the network of streets. No key has been provided to show that the intention of the guides was to show only public routes. I notice that what appear to be the earliest maps show a route past Manor Farm to the north of and joining Green Lane. There is no evidence before me that this route was, or has been claimed to be, public. I do not consider that these documents provide evidence that the Lane was considered to be a public highway.

Walking route maps, 2005

71. I understand that these maps were available from the Tourist Information Centre from at least 2005 and showed the section A – B as part of a circular walk numbered 02. I agree with WAG that there is no indication of any question by the A/L regarding the showing of this part of the Lane as a route available for public use. The promoted use was on foot only.

Conclusions on the documentary evidence

72. I consider that the documentary evidence shows, on the balance of probabilities, that a route was physically and legally created as a private road, with a public footpath running between points A and D, by the process of Inclosure in the early nineteenth century. Although I agree with SSBA that there are some documents which are suggestive of higher rights, I consider that the OMA are correct in their view that these are the documents which should be given less weight. Overall, there is nothing of heavy weight in relation to rights greater than on foot over the Lane.

User evidence

73. User evidence forms ("UEFs") were submitted in support of the Order, with additional letters, maps, photographs and statements taken by WAG also providing information on use of the route from over seventy individuals. The OMA carried out interviews with some of those providing UEFs to clarify certain matters. Whilst I have not heard the evidence I am satisfied that a coherent picture of use of the Order route has been provided.
74. The vast majority of people used the route on foot and believed it to be a footpath. A few referred to seeing others on bicycles and one or two mentioned horses but I consider the direct evidence of such use too slight to support higher rights. Whilst the SSBA said that evidence of use by horse riders had not been submitted due to fears of reprisals, I can only give weight to the actual evidence before me. Although I consider some of the use is likely to be by private right, for example going to the allotments, which I understand to have been situated opposite point B, visiting friends or making deliveries to properties, the balance of the use is by the general public.
75. The earliest evidence of direct use dated from the 1930s, with reference also made to use by family members at the beginning of the twentieth century. There is some evidence of use of alternative routes, one continuing north through the yard of Winterhay Farm and the other being via a stile south-west of point D, which seems to have been removed about 10 years ago. Traversing around the edges of this field would be the route that was set out in the Inclosure Award, as shown on the Inclosure map.
76. I do not consider the user evidence sufficient to add any of the alternative routes identified by users. FP CH 14/11 has effectively replaced the Inclosure route within the field. It may be that legal changes were made of which I am unaware and, on the balance of probabilities, I consider that there is insufficient evidence overall to add this route at this time.
77. An Inquiry was originally to be called to test the apparent conflict in evidence between users and A/L. However, I consider the withdrawal of objection to footpath status indicates a fair acceptance by A/L that anything they may have done to prevent use could not demonstrate a lack of intention to dedicate a public right of way. The footpath has existed over section A – D from the early part of the nineteenth century, and so no-one was in a position to prevent use of it. Although not formally recognised in the mid-twentieth century, when the DMS was produced, I am satisfied that the ample evidence of use demonstrates acceptance of a footpath, arising either at common law or under the statute. The user evidence supports the documentary evidence.

The link between Green Lane and Winterhay Lane

78. SSBA argued that it was crucial for the evidence relating to the Order route to be looked at alongside their application to upgrade the status of Green Lane, which I have done so far as I am able. However, I bear in mind that the advertised Order was only for the Order route and there is likely to be other relevant information, both for and against Green Lane, which is not before me.
79. Whilst the section A – B in conjunction with Green Lane and beyond could be used as a through route by the wider public, it does not in my view form any shortcut in comparison to the section of the Lane south of point A and the B3168. Therefore, I find it difficult to see why 'the public' would make use of it apart from recreationally or on foot from the north or east.
80. Green Lane was recorded as a footpath following an Inquiry held almost twenty years ago. Bearing in mind that, by reference to family memory, there is evidence before me from the early twentieth century, it is likely that the Inspector would potentially have had the benefit of evidence dating from the end of the nineteenth century. On all the evidence then available the Inspector found that Green Lane should be a footpath. It was apparently noted in the decision dated 27 March 1997⁹ that, whilst it possibly occurred, there was no firm evidence to support use of the route in vehicles.
81. SSBA argue that Green Lane is described as a public road in 'many documents', however, I do not consider this to be the case. Some weight must be fairly given to the ONB and possibly the Canal documents. I have not found there to be such weight to the documents as a whole to demonstrate on the balance of probabilities that Green Lane should be upgraded by my powers of modification. That is not to say that with further investigation, including all the relevant evidence which may be available to the OMA, the case may not be made. I agree that if Green Lane were shown to be a public road this gives greater weight to at least the southern section of the Order route, A – B, having a higher status.

Conclusions at common law

82. SSBA have referred to case law in relation to the chain of evidence, saying that there are a number of cords of evidence which, taken together, are of sufficient weight to show that higher rights should be recorded. I agree that if there is synergy between relatively lightweight pieces of highway status evidence, then this would increase the collective impact of those documents. However, in this case the strongest cord is the setting out of a private road and public footpath in the early part of the nineteenth century.
83. Although SSBA suggest that this route was a public highway pre-dating the Inclosure processes, I do not consider that this is supported by the evidence. Following the setting out under the Inclosure the route has remained as a defined feature in the landscape, clearly used for access to land and property, as was the intention of the Inclosure Award, which set out a private road with a public footpath.
84. There is evidence of public use of the route on foot dating back to the early twentieth century, which is reasonably a continuation of the use of the awarded

⁹ Reference FPS/G3300/7/73M

rights. The strands of documentary evidence are suggestive of higher rights but, given the clear evidence arising from the Inclosure process, are insufficient, on the balance of probabilities, to demonstrate that a different status has subsequently arisen. Whilst there has been some discussion of maintenance and a few people believing the route may be a bridleway or a byway open to all traffic, there has not, in my view, been a local reputation of the route as a public highway over and above the known footpath rights.

85. I agree with the A/L that for dedication of higher rights to arise at common law there must have been dedication and acceptance since 1820. On the balance of probabilities, the evidence as a whole is insufficient to show either such dedication or public use higher than as footpath.
86. I consider, on the balance of probabilities, that the evidence as a whole supports the claim for public right of way on foot over the Order route A – E, section A – D having been awarded and the whole, A – E, having been used by the public on foot since at least the beginning of the twentieth century.

Section 31 of the Highways Act 1980

87. Being satisfied that the case has been established at common law in relation to the Order as made I do not need to consider the matter in relation to the tests under the statute. However, it would be possible for a higher right to be acquired over the pre-existing public footpath. In this case there is a little evidence of use of the Order route by horse-riders and cyclists. However, I am not satisfied that the evidence currently available in relation to the twenty-year period prior to use apparently being called into question is sufficient to give rise to a presumption of dedication of these higher rights either over the Lane as a whole or just the section A – B.

Other matters

88. The law does not allow me to consider such matters as the desirability or otherwise of the route in question. Concerns regarding the behaviour of individuals are not a matter for me. I would note also that the weight of numbers 'for' or 'against' the recording of the route is not relevant.

Conclusions

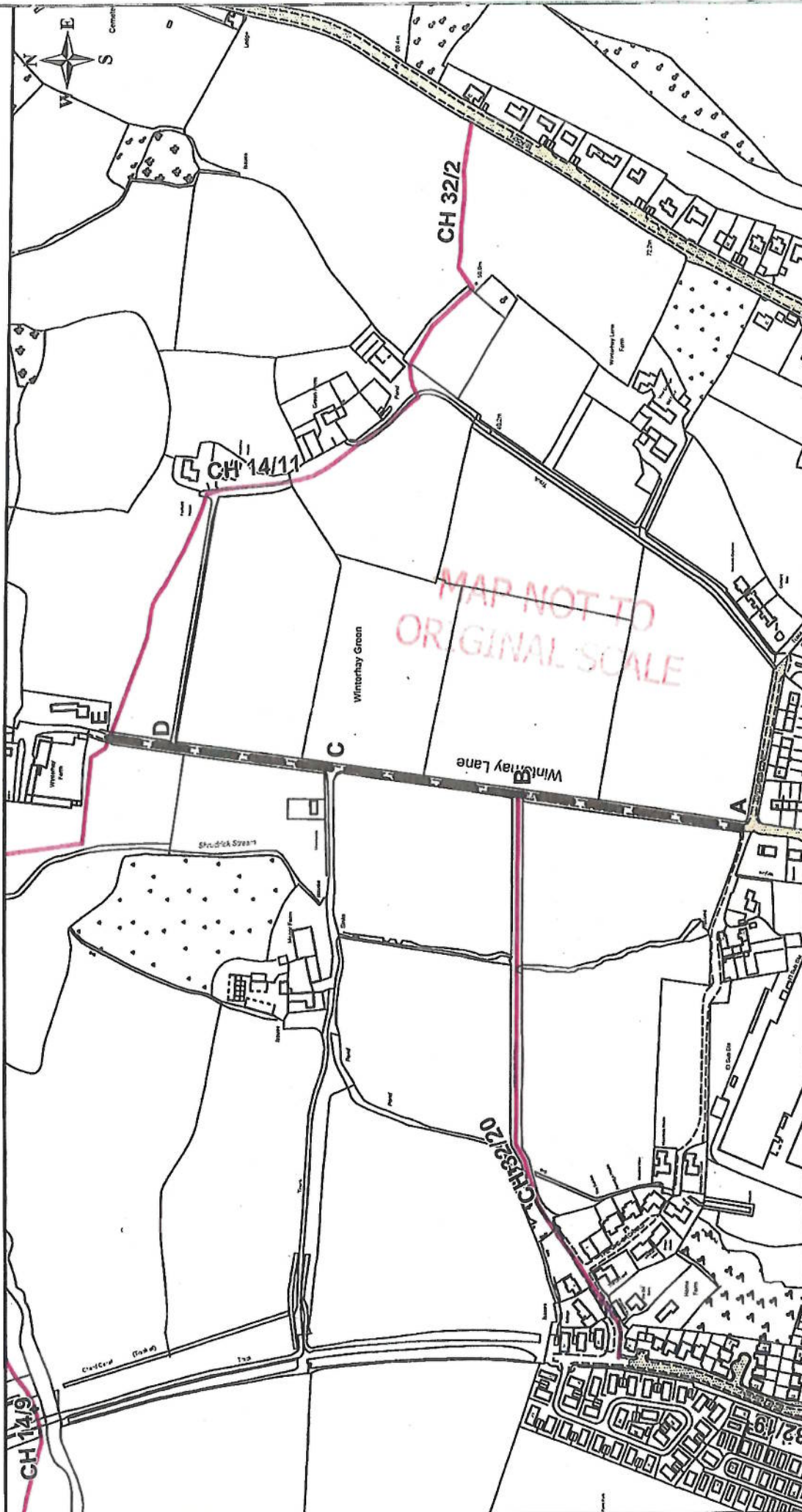
89. Considering the evidence as a whole I am satisfied, on the balance of probabilities, that the Order route should be recorded as a public footpath.
90. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.

Formal Decision

91. I confirm the Order.

Heidi Cruickshank

Inspector



APPENDIX 1

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The County Council can accept no responsibility for any error or inaccuracy which may arise from the transposition of the Rights of Way Definitive Map to a different scale.

Wildlife and Countryside Act 1981
The Somerset County Council
(No. 1) Modification Order, 2014
Parish of Ilminster

Parish: Ilminster
District: South Somerset
Date: 05/09/2012
Drawing No: H086-2012
Drawn By: M-Hardwill
Grid Ref: 335430 115450
Scale: 1:4000