



Order Decision

Inquiry opened on 12 January 2016

by Michael R Lowe BSc (Hons)

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

Decision date: 12 August 2016

Order Ref: FPS/Y3940/7/17

- This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Wiltshire Council Teffont Path No. 9 Rights of Way Modification Order 2015.
 - The Order is dated 13 January 2015 and proposes to modify the Definitive Map and Statement by upgrading Teffont bridleway No. 9 to restricted byway status with a width of 30 feet or 33 feet as detailed in the Order map and schedule.
 - There were 4 objections outstanding when Wiltshire Council (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
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Decision

1. I confirm the Order subject to the following modifications:

In part I of the Order delete the words 'Width A to B 33 feet' and insert 'Width A to B generally 10.06 metres (33 feet) and particularly as indicated by the First Edition Ordnance Survey map' and delete the words 'Width B to C 30 feet' and insert 'Width B to C 9.14 metres (30 feet)'.

In part II of the Order delete the words '33 feet' insert 'generally 10.06 metres (33 feet) and particularly as indicated by the First Edition Ordnance Survey map' and delete the words '30 feet' and insert 9.14 metres (30 feet).

Preliminary Matters

2. I held a public inquiry into the Order at Teffont Village Hall, Teffont Magna, Salisbury, Wilts. on 12 and 13 January 2016. I visited the site on the second day accompanied by the parties.
3. The Council made the Modification Order following applications made in March 2005 and August 2014. These applications included evidence of the Dinton Inclosure Award and other evidence of public user. I am satisfied that such evidence was discovered in the sense of the Council considering evidence that was previously unknown them.
4. Section 32 of the Highways Act 1980 requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.

Main Issue

5. The Order has been made under section 53(2)(b) of the 1981 Act relying on the occurrence of events specified in sections 53(3)(c)(ii) and (iii). The events are the discovery by the authority of evidence which (when considered with all
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other relevant evidence available to them) shows;
that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description (section 53(3)(c)(ii)), and
other particulars contained in the map and statement require modification (section 53(3)(c)(iii)).

Reasons

The Enclosure Award of 1837

6. A local Act of Parliament entitled 'An Act For dividing, allotting and inclosing Lands in the Parish of Dinton, in the County of Wilts.' received the Royal Assent on 24 June 1822. This local Act incorporated the provision of the General Act, the Inclosure Consolidation Act of 1801, and the first section of the 1822 Act required the appointment of two commissioners:

"for carrying this Act into execution, subject to such of the powers, authorities, directions, regulations, restrictions and provisions, contained in the said recited Acts as are not altered, varied or otherwise provided for by this Act."

7. Before making any allotments, the commissioners were required to set out and appoint such public carriage roads of at least 30 feet wide over the land to be enclosed as they judged to be necessary. The heading of section 8 of the 1801 Act read:

"Commissioners before making Allotments shall appoint publick Carriage Roads, and prepare a Map thereof to be deposited with their Clerk, and give Notice thereof, and appoint a Meeting, at which, if any Person shall object, the Commissioners, with a Justice of the Division, shall determine the matter. Where Commissioners may be empowered to stop up any old Road, it shall not be done without the Order of two Justices, subject to Appeal, to Quarter Sessions."

8. Section 8 provided:

"Be it further enacted, That such Commissioner or Commissioners shall, and he or they is and are hereby authorized and required, in the first Place, before he or they proceed to make any of the Divisions and Allotments directed in and by such Act, to set out and appoint the publick Carriage Roads and Highways, through and over the Lands and Grounds intended to be divided, allotted, and inclosed, and to divert, turn, and stop up, any of the Roads and Tracts, upon or over, all, or any Part of the said Lands and Grounds, as he or they shall judge necessary, so as such Roads and Highways shall be, and remain thirty Feet wide at the least, and so as the same shall be set out in such Directions as shall, upon the Whole, appear to him or them most commodious to the Publick, and he or they are hereby further required to ascertain the same by Marks and Bounds and to prepare a Map in which such intended roads shall be accurately laid down and described, and to cause the same, being signed by such Commissioner, if only one, or the major Part of such Commissioners, to be deposited with the Clerk of the said Commissioner or Commissioners, for the Inspection of all Persons concerned; and as soon as may be after such Carriage Roads shall have been so set out, and such Map so deposited, to give Notice in some Newspaper to be named in such Bill, and also by affixing the same upon the Church Door of the Parish, in which any of the Lands so to be inclosed shall lie, of his or their having set out such Roads and deposited such Map, and also of the general Lines of such intended Carriage Roads, and to appoint in and by the same Notice, a Meeting to be held by the said Commissioner or Commissioners, at some convenient Place, in or near to the Parish or Township within which the said Inclosure is to be made, and not sooner than three Weeks from the Date and Publication of such Notice, at which Meeting it shall and may be

lawful for any Person who may be injured or aggrieved by the setting out of such roads to attend; and if any such Person shall object to the setting out of the same, then such Commissioner or Commissioners, together with any Justice or Justices of the Peace, acting in and for the Division of the County in which such Inclosure shall be made, and not being interested in the same, who may attend such Meeting, shall hear and determine such Objection, and the Objections of any other such Person, to any Alteration that the said Commissioner or Commissioners, together with such Justice or Justices, may in Consequence propose to make, and shall, and he or they are hereby required, according to the best of their Judgement upon the Whole, to order and finally direct how such Carriage Roads shall be set out, and either to confirm the said Map, or make such Alterations therein as the Case make require: Provided always, That in Case such Commissioner or Commissioners shall by such Bill be empowered to stop up any old or accustomed Road, passing or leading through any Part of the old Inclosures in such Parish, Township, or Place, the same shall in no Case be done without the Concurrence and order of two Justices of the Peace, acting in and for such Division, and not interested in the Repair of such Roads, and which Order shall be subject to Appeal to the Quarter Sessions, in like Manner and under the same Forms and Restrictions as if the same had been originally made by such Justice as aforesaid."

9. Section 9 provided that roads and highways set out and appointed under section 8 were to be maintained in the same way as other public roads within the relevant parish.
10. Finally, section 35 of the 1801 Act whose heading read:

"After Allotment Commissioners shall draw up their Award, which shall be read and executed at a Meeting of the Proprietors, and proclaimed the next Sunday in the Church, and then considered as complete. Award shall be inrolled in one of the Courts at Westminster, or with the Clerk of the Peace, and may be inspected, and Copies obtained. Award and Copies shall be legal Evidence, and Award shall be binding on all Parties interested. Commissioners may annex Maps to the Award, which shall be deemed Part thereof."
11. Following the 1822 Act, two commissioners were duly appointed and began the process that led to the enrolment of the Dinton and Teffont Magna Enclosure Award in 1837. In July 1823 a notice was published in the Salsbury and Winchester Journal that various public and private roads had been 'set out and appointed' and a public meeting called to hear any objections.
12. The enclosure award set out 'several public carriage roads and highways and also several private roads and public footpaths in through and over land by the side of the several allotments'. One such way is described:

"No. III One Publick Carriage Road of the breadth of thirty feet called the Wylle Road branching out of the Old Turnpike Road from Salisbury to Hindon at Jackthorns in Teffont and proceeding Northwards in its ancient course through and over the common fields and Down of Teffont to the Oxdrove at the north west corner of Thickthorn ffield."
13. Two maps are deposited in local archives. The first is titled 'Map of the Manors of Dinton and Teffont 1827' and the second 'Map of the Manors of Dinton and Teffont 1828'. Both maps appear to relate to the enclosure process and show the order route marked as 'No. III Wyle Road 30 feet' and show the allotments as described in the award. The Council also identified a number of other documents concerning the award process, discovered in local archives.
14. The Ordnance Survey First Edition 1884/1886 was the first series of maps to appear after the 1837 Award. They are at a scale of 1:2500 and depict the

Order route in much the same manner as the 1827 and 1828 maps. Whilst the maps indicate a track, and verges braced within the same parcel, they also indicate that the northern part of the Order route was not enclosed on the eastern side at the time of survey.

Conclusion on the Award of 1837

15. I am satisfied that the 1837 Award set out the Order route as a public carriage road and that the 1822 Act gave the Commissioners the authority to do so. When a highway is set out in an inclosure award under statute, that is a legal event which declares that the right of way existed at that time. Distinct from common law dedication no public users is required. Save as provided by the Natural Environment and Rural Communities Act detailed below, there is no evidence to suggest that the carriageway has been subsequently extinguished and it therefore exists to the present day. It follows that the evidence of Tithe apportionments, Finance Act records, the survey for the original definitive map of public rights of way, and events after 1837 are of no further assistance in establishing the status of the Order route.
16. The case of Cubitt v Maxse [1873] LR 8 CP 704 concerned a case where an awarded road had not been set out and certified in accordance with its enabling Act. The court found the purported creation of the highway to be invalid. In my view this case has no application to the 1837 award as the Ordnance Survey maps clearly indicate that the carriageway was set out and the way exists to the present day. Section 9 of the 1801 Act required a declaration by the Justices at their special sessions before any road would become publicly maintainable. Although no copy of the declaration has been found there is no reason to believe that the declaration was not issued, in accordance with the presumption of regularity. In any event, a lack of such a declaration would only affect the maintenance liability and not the creation of the public carriageway.
17. The Ordnance Survey maps of 1884/1886 indicate that the northern part of the Order route was not fenced at that time. Whilst the Award set out the public road at 30 feet wide the responsibility of the commissioners was to mark the boundary, usually by stakes. The Award required the new owners and occupiers of the allotted enclosures to provide the fencing or hedges. Such enclosure boundaries would be the property and responsibility of the new owners. The apparent failure of some of the new owners to provide the boundary features is of no consequence to the creation of the public highway and I reject the submission that such failure in any way invalidates the Award after its enrolment.

Width and boundaries

18. As noted in the description of the public carriageway in the 1837 Award the route followed 'its ancient course'. Andrews and Dury's Map of Wiltshire was drawn at a scale of 2 inches to the mile and surveyed in 1773. It shows an unenclosed road from Teffont Magna village to join the Ox Drove. The northerly part of the route is more or less the same as the northerly part of the Order route as set out in the 1837 award.
19. An agreement between The Right Honorable George Earl of Pembroke and Montgomery, the President and fellows of Magdalen College, Oxford, and various other persons was reached in 1799 to divide Cow Down and Sheep

Down into enclosures and common tenantry. It was followed by an award dated September 1800 with a plan. Although it was the usual practice in the 18C for enclosures to be authorised by a Parliamentary Act it appears to have been lawful at the time for agreements between the parties for 'improvement' to enclose land surplus to the needs of the commoners and for regulation under the Inclosure Act 1773. The Commissioners for the award set out various roads called public roads at 33 feet wide and various private roads at 15 feet wide. The southern part of the Order route, shown A - B on the Order plan was described:

"And we do hereby further award order and direct a public road or driftway to and for each of them the said several owners and proprietors of the said several and respective allotments and pieces or parcels of land hereby before mentioned ... of the breadth of thirty ffeet leading from the Turnpike Road through an enclosure belonging to the Earl of Pembroke called Jack Thorns in the occupation of Oliver Smith and between the East ffield and Middle ffield to the Common Down as the same is already staked meted bounded and marked by us."

20. The Ordnance Survey Surveyor's Drawing No. 63, at a scale of 2 inches to 1 mile, indicates the physical establishment of the southern end of the Order route (A - B on the plan) by 1808. For the most part, the present day distance between the hedges of this length of the Order route is about 10 metres (33 feet) and consistent with the large scale Ordnance Survey maps of 1884/1886.
21. At common law a highway may be created by dedication by the owner and acceptance by the public through their use of the way. Whilst I am doubtful that the award of 1800, which did not have an enabling Act of Parliament, had the capacity to create a public highway, the award is nonetheless an effective dedication by the landowner. The route replaced an ancient route to Wylve and the nature of the route between the villages is a good indication that the public would have used the way at the time. Where a hedge or fence boundary of a highway was established by reference to the dedication of the highway, there is a presumption that the highway extends between the boundary features and is not confined to such parts as have been made up.
22. Despite the 1800 award having set out the southern end of the Order route at 33 feet in width, the Parliamentary award of 1837 then established the whole route at 30 feet wide. The 1822 Act required the Commissioners to set out public carriageways at '30 feet at the least'. A public notice under the 1837 Award process of August 1823 states that the Commissioners had set out Wylve Road ('Wily road') at that date and objections were invited. It is clear from the 1808 Ordnance Survey drawing that the southern part of the route, between A and B on the Order plan, was already full formed as a result of the 1800 enclosure at 33 feet in width. It seems to me implausible that the commissioners would have sought to amend the boundaries from 33 feet to 30 feet. A more likely explanation of events is that the commissioners simply deemed the existing features of the 1800 award to be sufficient setting out of the boundaries.
23. In my view the First Edition Ordnance Survey maps of 1884/1886 provide the best available documentation of the boundaries established by the 1837 award and are to be preferred as more accurate and reliable over the earlier maps. There are some minor discrepancies between the maps of 1827 and 1828 and the Ordnance Survey mapping. In my view this can be partly attributed to the

more stylised character of the older maps and partly to some minor deviation during the setting out process or in the planting of hedges.

24. I have noted that the maps of 1800, 1827 and, 1828 all show a wide funnel shaped configuration at the junction of Wylve Road and Dinton Road, the old Turnpike Road. This configuration 'cuts the corner' and makes for a more convenient junction alignment. An estate map dated 1843 and the map of the tithe apportionment dated 1840 indicate that by this time a small enclosure had been established within that land. By the time of the 1884/1886 Ordnance Survey mapping, and thereafter, the eastern part of the funnel shape appears to be enclosed and is now mature woodland.
25. In my view, if the Commissioners set out a highway on a slightly different alignment or width to that defined in the award as simply 30 feet and there is no challenge at the time, then such minor de facto variations in the highway boundary cannot be questioned decades later.
26. In summary, although the southern length of the Order route was generally set out at about 33 feet wide, it curves at the junction with Dinton Road and does not exactly follow the straight lines shown on the 1827 and 1828 maps attributed to the 1837 award. For these reasons, the First Edition Ordnance Survey maps provide the most reliable indication of the boundaries of the southern length of the Order route as established by the 1837 award. I have therefore amended the Order to define the width with respect to the First Edition Ordnance Survey maps.

Natural Environment and Rural Communities Act 2006

27. The Natural Environment and Rural Communities Act 2006 extinguished public rights of way for mechanically propelled vehicles on ways shown on a definitive map as a bridleway, with a number of exceptions. No evidence has been presented that any of these exceptions apply. The Order route was shown as a bridleway on the definitive map at the relevant date and therefore rights for mechanically propelled vehicles were extinguished and the way falls within the category of a restricted byway.

Other Matters

28. The Unit of Measurement Regulations 1995 (SI 1995 No. 1804) require the use metric units in legal documents, whilst permitting the use of imperial units as supplementary. I have amended the Order accordingly.

Conclusion

29. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be confirmed subject to modifications set out above.

Michael R Lowe

INSPECTOR

APPEARANCES

Wiltshire Council

represented by

Trevor Ward

of Counsel

who called

Sally Madgwick

Rights of Way Officer - Definitive Map Team

In support of the Order

Georgie Green

Robin Faulkner

Zillah Faulkner

Pamela Fisher

Myra Bennett

British Horse Society

Norman Beardsley

Wiltshire Bridleways Association (applicant)

The Objectors

Edward Waddington

Antonia Waddington

Peter Durtnall

DOCUMENTS (submitted at the inquiry)


- 1 Statement of Georgie Green
- 2 Statement of Zillah Faulkner
- 3 Statement of Robin Faulkner
- 4 Land Registry Plan at 5 March 2015
- 5 Notes on land at Hillcrest by Sally Madgwick

DOCUMENTS (submitted after the inquiry)

- 1 E-mail submission from Mr Durtnall dated 23 January 2016
- 2 Response by Wiltshire Council
- 3 Response by Norman Beardsley
- 4 Response by Pamela Fisher
- 5 Response by Bill Riley
- 6 Response by David Wood

TEFFONT PATH No. 9 - ORDER PLAN

Route to be upgraded to restricted byway 33 ft wide A  B

Route to be upgraded to restricted byway 30 ft wide B  C

Wiltshire Council

Where everybody matters

MAP NOT TO
ORIGINAL SCALE

1:10,000