

Order Decision

Site visit made on 30 June 2016

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 19 July 2016

Order Ref: FPS/W1850/7/15

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The County of Herefordshire District Council (Addition of Restricted Byway LQ85 Longtown and Llanveynoe) Modification Order 2010¹.
- The Order is dated 14 April 2010 and proposes to record a route in the Parishes of Longtown and Llanveynoe as restricted byway. Full details of the route is given in the Order plan and described in the Order Schedule.
- There were five objections and representations outstanding when Herefordshire County 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.

Procedural Matters

1. No-one requested to be heard with respect to the Order and so I made an unaccompanied site inspection, taking account of the written representations.

Main issues

2. The Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("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."
3. Herefordshire Council, the order-making authority ("the OMA"), argued that the evidence showed that the Order route was an ancient route and that public vehicular rights had existed since at least the eighteenth century. These rights were affected by the the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"), referred to below.
4. An objection was made on behalf of the Trail Riders Fellowship ("the TRF") on the basis that the section A – B² was already recorded as a Byway Open to all Traffic ("BOAT") and section B – C part of the width of the unclassified road U75000. The OMA indicate that section B – C is part of the road included within

¹ Subject to proposed modifications the Order will be known as The County of Herefordshire District Council (Addition of Public Footpath LQ85 Longtown and Llanveynoe) Modification Order 2010

² Points A – B – C are shown on the Order map

- the width shown on the list of streets, which records maintenance responsibilities, and have asked for a modification to the Order in this respect.
5. The current owner of adjacent land, and some of the Order route, argued that the documentary evidence was insufficient to show that it should be recorded as a restricted byway.
 6. Most public highways have been accepted by the public since beyond memory. 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. In relation to documentary evidence section 32 of the Highways Act 1980 requires that I take such evidence into consideration "*...before determining whether a way has or has not been dedicated as a highway...*".
 7. 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.
 8. Section 67 of the 2006 Act in relation to *Rights of way and mechanically propelled vehicles* sets out that:
 - (1) *An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—*
 - (a) *was not shown in a definitive map and statement, or*
 - (b) *was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.*
 9. This is subject to certain exceptions as set out in subsections (2) to (8). The OMA were satisfied that none of the exceptions arose and that the appropriate status was that of restricted byway, rather than byway open to all traffic.
 10. My decision will be whether or not the Order should be confirmed, or proposed for confirmation, on the balance of probabilities.

Reasons

Background

11. On 4 March 1998 an application was made by Longtown Group Parish Council ("the Parish Council") to Hereford and Worcester County Council ("the County Council") to add a bridleway to the DMS over the Order route. Due to local government reorganisation in 1998 the matter became the responsibility of the OMA. As a result of the report to Committee in December 2008, the OMA decided that this Order should be made. Following the submission of the Order to the Secretary of State the Parish Council indicated that they were against the proposal to record the route as a restricted byway.

The Definitive Map and Statement

12. The TRF raised concerns about discrepancies seen in copies of the DMS held in the Hereford Public Library in the 1990s in comparison to copies held by the County Council.

The First Definitive Map and Statement

13. The National Parks and Access to the Countryside Act 1949 ("the 1949 Act") introduced the concept of the DMS and set out the procedures to be followed in their production, with associated guidance available at the time. The OMA indicate that the Parish Council did not claim the Order route. The eastern section was marked in green showing that it was, as now, part of the road network. The Draft map and Statement was published in 1952, the Provisional in 1958 and the First DMS in 1961. The route was not shown on this DMS.

Countryside Act 1968

14. The production of the DMS under the 1949 Act was always intended to be subject to periodic review. However, before the County Council could carry out such a general review the introduction of the Countryside Act 1968 ("the 1968 Act") required a special review to be carried out. Proposals for routes to be included in the DMS were submitted to the County Council with the British Motorcycle Federation writing on 15 May 1970 regarding this matter and suggesting a number of routes for inclusion with the status of BOAT. Number 53 referred to *"Longtown Please retain this old county road on [Parish Boundary] via Penrhewy³ to the Turnant/Oldcastle route. Or make BYWAY."*
15. The County Council responded that the intention of the 1968 Act was to deal with 'roads used as public paths' ("RUPPs"). Nevertheless, it was their intention to carry out a review to include routes not already on the DMS, which appeared to justify inclusion. In relation to number 53 the County Council indicated that *"Unclassified county road 909 starts to the south of Penyrhiwiau and runs to the north-east to join third class county road 203, 130 yards north-west of the Crown Inn at Longtown. The western section from Penyrhiwiau to join unclassified county road 907 will be included as a byway."*
16. The Draft Review Map published in 1972 showed the Order route as BOAT no. LQ83. The 1968 Act led to objections being made to the Department of the Environment ("the DoE"). Two objections to the inclusion of LQ83 were made. The County planner said that the route *"...is physically impassable and I feel it should not be designated. LQ 83 is the line of an old Rue which used to link Longtown Village to Llanthony Abbey. It would be economically impracticable to open up this route and at the moment the farmer, Mr Powell, whose land it crosses has complained to me because people trespass on his land, because they cannot walk along the line of LQ 83...I think that LQ 83 should not be designated unless the County Council is prepared to make it passable and thereby eliminating the nuisance of trespass that Mr Powell has complained about."*
17. The other objection, from the then landowner, said that he objected as *"...the Rue in its present state is impassable and designation would no doubt increase the number of people attempting to use the bye-way, who finding it impassable would trespass onto my land to gain access to the top of the mountain."*

³ Also spelt Penyrhiwiau or Pen-y-rhiwian

18. The County Council responded to the objections and in April 1977 the landowner was informed that they had accepted the objection. The comment was that *"If this were an old 'rue' it would not have been 'open to all traffic'. Actually the Welsh word rhiw (pl rhiwiau) means a hill, apparently a hill with a wrinkle (lat ruga) or sighting notch for a ley. The U/C County road for Longtown ends where the real hills start (which the name of the farm implies)...It is agreed that it is economically impracticable to open up the route, and that it is of no public use. Pedestrians are catered for by footpaths LV10 and LV4, and horses and vehicles by the Turnant road."*
19. The 1968 Act allowed 'suitability' as a test in relation to the reclassification of RUPPs. I do not understand this to have been a relevant test in relation to other routes, although it appears it may have played a part here in the County Council acceptance of the objection.
20. The DoE decided to hold an inquiry into the objections raised regarding objections to the (former) rural district of Dore and Bredwardine, which included Longtown. However, the introduction of the 1981 Act amended the procedure and the OMA indicate that in 1983 the Secretary of State for the Environment directed that the First and Special Review be abandoned. Routes to which there had been objection, such as the Order route, were not to be included in the new DMS, relevant date 1 April 1989. I understand this to be the current DMS.
21. The TRF indicate that LQ83 was included in the DMS viewed and copied from the library and queried whether the review was properly abandoned. The OMA note that the Definitive Statement has a typed entry referring to byway no. 83, which has been scribbled out in pencil. It does not seem to me that simply scribbling out an entry carries the required legal force in modification of the DMS. However, given that the 1981 Act required routes to which objection had been made in the earlier review, but not determined, be not shown, I am satisfied that the Order route should not have been shown in the DMS at that time. I shall consider the evidence to see whether it should now be included.

Documentary evidence

Small-scale maps

22. The OMA say that the majority of lanes and roads on the 1817 map of Price correspond to those shown on modern mapping. This is the case but I note the point made by an objector that there are other routes shown on the same way on this map which have different status, e.g., footpaths or farm roads. I give little weight to the argument that the failure to show the spring means that he did not appreciate that this was a dry stream bed.
23. Bryant's 1835 map shows the Order route as a through-road continuing from the maintained highway to the east. Again the argument is raised that the failure to show the spring to the west of Penrhewy is significant, with a suggestion that the map may have been copied. However, I consider that the Bryant map is more detailed, showing enclosures at the western end of the route and so I place some reliance on it. I am satisfied that the mapping shows the route as a *'Good Cross & Driving Road'*. It may have been fenced from the surrounding land but I do not consider that this would imply that there was no route to the west of Penrhewy. I note the comment in the Rights of Way Law Review article that Bryant also annotated routes as *'Private'*, which is not shown on this route, therefore suggesting it was understood to be public.

24. I am satisfied that these small-scale maps show a through-route as a continuation of the eastern road from Longtown joining to a route, which is now recorded on the list of streets at the western end. Although such maps are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway, in this case, on the balance of probabilities, the route has the same status throughout and this is at least suggestive of vehicular rights.

Tithe maps, 1840 & 1844

25. The Tithe Commutation Act 1836 converted tithes into a fixed money rent. The documents consist of the apportionment, the map and the file, and are concerned with identifying titheable land. Whilst tithe maps may not necessarily provide evidence of public rights of way, they are generally good evidence of the topography of the roads they portray, especially those which form boundaries of titheable land. As statutory documents, where they do provide evidence they should be given the appropriate weight bearing in mind the original purpose of the documents concerned.
26. The objector indicates that these are second class maps and suggests that, as a result, there may be uncertainty about their accuracy. It is not my understanding that a second class map is necessarily cartographically inaccurate. They will still have been subject to public inspection but may have arisen due to adoption of an existing survey of the area, rather than being a new survey.
27. The tithe maps of Longtown, 1840, and Llanveynoe, 1844, show the Order route, coloured sienna and apparently not subject to tithe payment. The Order route appears to be a continued through route from the eastern end, with no indication of a difference in surfacing or boundaries. The Longtown map shows a line, suggesting a gate across the route near point B.
28. Both public and private roads had the capacity to diminish the productiveness of land for the assessment of tithe and so the apparent lack of tithe payment required does not show that the route was public. The tithe maps indicate that a route physically existed on the ground in the mid-nineteenth century, providing support to the depiction on the earlier small-scale maps.

Ordnance Survey maps

29. The Ordnance Survey ("OS") was formed in 1791 in response to a military need for accurate maps and over the years has developed a variety of products to meet the need for accurate and up-to-date mapping. Instructions for surveyors laid down that their task was to show what was on the ground at the time of the inspection and the depiction of a way on an OS map is not, of itself, evidence of a highway. Nevertheless, the inclusion of a route on a series of OS maps can provide useful evidence.
30. The OS maps of 1888, 1904, 1905 and 1952 show the Order route as an enclosed track open to the highway at the eastern, with the western end gated. A track can be seen continuing from the gate over the section B – C indicating access from the track. A pecked-line route is shown on the northern side annotated "F.P." or "Foot Path". The eastern end of this footpath route joins the now recorded public footpath LV10, which runs to the north from Penrhewy. The current landowner and the OMA seem to agree that this footpath, running alongside the Order route was likely to have provided an alternative 'winter path' used when the original route was too muddy to be convenient on foot.

31. In relation to the 1904 OS map the OMA say that the annotation 'C.R.', which can be seen to the south of the route, almost directly north of Coldbrook Farm, refers to a 'carriageway'. It is my understanding that an abbreviation in such an instance would refer to the location of the Parish boundary, being in the 'Centre of Road'. I do not think that it provides information as to status. The large scale OS map base used for the Order route annotates the route as a 'Track'.
32. The OMA mention that there are bench marks on the Order route on the OS maps. I do not believe that these are indicative of a public right of way.

Finance (1909 - 1910) Act

33. The Finance (1909 - 1910) Act ("the 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. Each area of land, or hereditament, was identified on a map and information recorded in a Field Book. Routes shown on the base plans which correspond to known public highways, usually vehicular, are not normally shown as included in the hereditaments, i.e. they will be shown uncoloured and unnumbered.
34. Although the objector suggests that the map numbers sections along the route A – B, the only numbers I am able to discern are those on the OS base mapping. This would have been used to identify land areas but does not assist with regard to the 1910 Act information. The 1910 Act used the base mapping to record their own numbers for tax purposes and these can be seen as 17 and 18 to the south and 292 to the north of the route.
35. The Order route itself is excluded from the adjacent hereditaments. This means that 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. There may be other reasons to explain its exclusion. The route is a continuation of what is now recognised and recorded as a public vehicular highway, which is treated in the same way.

Other evidence

36. The former and current owners of Penrhewy seem to indicate that people have tried to use the route on foot over the years. When finding it impassable, for whatever reason, the public apparently try to follow the alignment within the field in order to access the mountain. The current owner indicates that he directs people found here to follow the recorded route LV10.
37. The OMA refer to eight user evidence forms submitted with the application. These were not submitted but I understand them to show some use on foot on either side of the Order route, due to the lane becoming obstructed/overgrown. Two people referred to permission.
38. The OMA report that a local Councillor referred to the route as having been a byway at one stage, although not used for a long time. The former owner also referred to the route as a 'bye-way' in his objection to the Review map. This provides a little evidence of the reputation of the route.

Physical characteristics

39. Objectors referred to the route as a stream bed, indicating that in wet periods water runs down through it, from the mountain and the spring situated to the north-east of point B. I also noted a land drain emptying into the route to the north-west of point A. The water was indicated to wash out the surface and bring down debris, blocking the route itself, as well as drains and gutters lower down the road to the east. There are points on the route where the bedrock is exposed to some depth, such that it is hard to imagine access other than on foot, and even that with some difficulty. In places there appears to have been some cutting out of the rock by hand, altering the profile of the base.
40. However, it should be remembered that the physical evidence on the ground now may bear no resemblance to the physical conditions in years gone by. Assumptions made on the basis of current physical characteristics should be treated with caution. I agree with the assessment of the OMA that the route is a sunken lane, as supported by the documentary evidence.

Conclusions

41. It is the evidence as a whole that needs to be taken into account. I do not consider that the DMS processes assist in showing that the route either should, or should not, be recorded with any public status; the claim was made but never tested, due to procedural matters. There is some evidence of an awareness of the former landowner of use on foot in his fields, which he was concerned might increase if people found the designated route to be impassable, suggesting knowledge that people were attempting to walk the claimed route.
42. The mapping evidence demonstrates that a physical route existed and, on the balance of probabilities, was a recognised track to the mountain, as a continuation of the maintained road from Longtown to the east. However, the weight of evidence of these mapping is slight, with the greatest support for public vehicular rights arising from the 1910 Act mapping. Although finely balanced, I do not consider that the evidence is quite sufficient to demonstrate the public rights claimed.
43. Taking account of the mapping and the evidence of use, or rather attempted use, on foot, I consider, on the balance of probabilities, that public rights do exist over the route, as a continuation from the village, but the Order route has not been shown to have rights higher than on foot. For that reason I propose to modify the Order to record a public footpath, rather than a restricted byway.

Other matters

44. The law does not allow me to consider such matters as the desirability or otherwise of the route in question; concerns about potential misuse by off-road vehicles; potential cost of maintenance; the availability of other routes; or, safety issues. I have not taken account of these concerns.

Conclusions

45. 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. The section B – C should be removed from the Order, as requested, as it is part of the existing highway to the west.

46. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be proposed for confirmation subject to modifications.

Formal Decision

47. I propose to confirm the Order subject to the following modifications:

- Throughout the Order:
 - replace text “*...restricted byway...*” with text “*...public footpath...*”;
- Within Part I of the Schedule:
 - remove reference “*...- C...*” throughout;
 - after text “*...632 metres to...*” add text “*...the County Road U75000...*”;
 - remove text “. *The restricted byway continues in a westerly direction for approximately 23 metres to Ordnance Survey grid reference SO 3096 2773 (point C on the Order plan). The length of the way between points B to C is in the parish of Longtown.*”;
 - after text “*...length of approximately...*” replace text “*...655...*” with text “*...632...*”;
- Within Part II of the Schedule:
 - remove text “*The restricted byway continues in a westerly direction for approximately 23 metres to Ordnance Survey grid reference SO 3096 2773...*”;
 - after text “*...length approximately...*” replace text “*...655...*” with text “*...632...*”;
- On the Order plan:
 - alter the title to refer to a public footpath;
 - delete section B - C;
 - modify the Order line to this point to a broken black line with short intervals;
 - alter the key to show the footpath between points A and B and to remove B – C.

48. Since the confirmed Order would not show part of a way shown in the Order 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 1981 Act 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

