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# Appeal Decision

**by Mrs Helen Slade MA FIPROW**

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

**Decision date: 31 October 2016**

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## **Appeal Ref: FPS/U1050/14A/8**

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of Derbyshire County Council not to make an Order under section 53(2) of that Act.
- The Application dated 14 June 2016 was refused by the Council on 23 May 2016.
- The Appellant, Marsh Green Estates Ltd, claims that an Order should be made to modify the Definitive Map and Statement by recording a reduced width for the appeal route and to add three limitations in the form of gates.

**Summary of Decision: The appeal is refused.**

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## **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. This appeal has been determined on the basis of the papers submitted. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. The appellant is represented by Birketts LLP who have submitted the appeal on behalf of Marsh Green Estates Ltd.

## **Description of the Appeal Route**

4. The length of Byway Open to All Traffic ('BOAT') affected by this appeal ('the appeal route') was added to the Definitive Map and Statement ('DMS') by a decision issued on 28 June 2010 ('the 2010 decision') by an Inspector appointed by the Secretary of State. The Inspector held three public inquiries into the matter, the second one being aborted for procedural reasons. His interim decision was published on 9 December 2008 ('the 2008 decision').
  5. The route added by the 2010 decision comprised the appeal route, and the two stretches of highway at either end ('the Order route'). This appeal relates only to part of the central section of the Order route.
  6. The appeal route is that part of the Order route commencing at Marsh Brook and running in a generally south east direction for approximately 350 metres to the junction with Footpath 50. The plan sent in with the appeal (Drawing Number MGE-1118-01-TS-001 – dated 13 March 2014) is not to scale at A4. I have therefore estimated the length by reference to a plan dated 17 February 2016 which appears to have been provided by Derbyshire County Council
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('DCC') and which is stated to be at a scale of 1:2500 and appears to be reasonably accurate ('the DCC Plan').

7. The appeal route is described in Column 3 of the statement in the DMS (headed Status and Description of Route) as follows:

*" ... Then opening out on the S side of Marsh Brook to a width of 7 metres, before continuing along walled track with a width varying between 5 and 7 metres, passing E of Marsh Green to junction with path No. 50."*

8. In Column 6 of the Statement the width for the whole central section of the Order route is described as varying between 4 and 7 metres, and contains the following additional information:

*"Ford with Stone gate posts set 1.4 metres apart"*

### **Grounds of Appeal**

9. The appeal has been couched in the following terms:

*"The application for a modification seeks to modify the description of BOAT 157 Ashover ("the route") in two respects; first by amending the recorded width of a section of the route, and second by recording certain gates as limitations on the right of way. In summary the grounds for this appeal are:-*

- 1. In relation to the width of the route, the highway authority ('DCC') has wrongly calculated that there is no evidence to rebut the "fence to fence" presumption which it has relied upon in rejecting the claim.*
- 2. In relation to the gates, DCC has wrongly concluded that the evidence shows that the historic gates post-date the dedication of the right of way."*

### **Main Issues**

10. With respect to the appeal, the criteria I need to apply are set out in Section 53(3)(c)(iii). In order to allow the appeal I need to be satisfied, on the balance of probabilities, that the evidence discovered by the authority<sup>1</sup> which, when considered with all other relevant evidence available to them, shows that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.
11. Although the appeal is presented as requesting modifications in relation to the particulars of the route contained in the DMS, this applies only to the application to add references to the gates. The application to record a reduced width is, in fact, an application to delete part of the highway, and I have considered that aspect of the appeal in this context.
12. In the case of *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001] ('*Trevelyan*'), Lord Phillips MR held that: *Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence*

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<sup>1</sup> Or supplied to it, as in this case

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*existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.*

13. In *Trevelyan* the Court also quoted with approval guidance which had been published in Department of the Environment Circular 18/90. The guidance stated that it was for those who contended that there was no right of way to prove that the definitive map was in error and that a mistake had been made when the right of way was first recorded; it also stated that the evidence needed to remove a right of way from the record would need to be cogent, and that it was not for the surveying authority to demonstrate that the map was correct.
  14. Circular 18/90 has been superseded by Defra Circular 01/09. Circular 01/09 states at paragraph 4.33: *The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with "higher" rights to a way with "lower" rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:*
    - *the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.*
    - *the evidence must be of sufficient substance to displace the presumption that the definitive map is correct.*
    - *the evidence must be cogent.*
  15. The principal issues therefore are whether any new evidence has been produced and, if so, whether, when considered with all other relevant evidence, it shows, on the balance of probabilities, that there is no public right of way along BOAT 157 over the width and length claimed and that an Order should be made to delete it from the Definitive Map and Statement.
  16. With respect to the issue of gates, I need to be satisfied, on the balance of probabilities, that the new evidence, taken with all the available relevant evidence, shows that gates existed at the locations claimed prior to the dedication of the route as a highway.
  17. This case relies on the interpretation of documentary evidence. Section 32 of the Highways Act 1980 ('1980 Act') requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
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## **Reasons**

### ***Whether any new evidence has been produced***

18. The evidence on which the decision was based to add the route to the DMS was initially considered by the inspector to be the evidence of use on horseback, except for those parts of the route covered by the 1779 Inclosure Act ('the 1779 Act') and the related 1783 Inclosure Award ('the 1783 Award'). He therefore proposed to modify the Order to record a bridleway for the majority of its length. At the third inquiry, he revisited all the evidence and heard further submissions on the documentary evidence and concluded that, in fact, the historical documentary could be relied upon to show that the route had been dedicated as a public highway with rights for carriages and that the dedication had taken place by at least 1751. The appellant appears to accept this.
  19. The appellant has submitted a comprehensive bundle of evidence which appears to contain most of the documentation which must have been considered by the previous inspector in reaching his decision, including both the 2008 decision and the 2010 decision. In the application the new evidence is listed as comprising:
    - The Finance Act Plan
    - Plan from Probate of Rev Joseph Bourne 1878
    - Report of 1891 Court Case
  20. In their response to the appeal, DCC has submitted a comprehensive collection of documents relating to the 1891 court case, and a selection of other maps and documents which were submitted to the earlier inquiries.
  21. It seems to me that the only new piece of evidence is the Plan from the Probate of Rev Joseph Bourne alleged to date from 1878 ('the Bourne map'), but which is submitted in isolation from any other documentation which might identify it. Although described as such in the appellants indexed bundle, there is nothing on the document itself to indicate what it is.
  22. From my reading of the 2008 decision and the 2010 decision, it seems to me that the 1910 Finance Act was thoroughly discussed at both inquiries, the inspector accepting at the second inquiry that his assessment of the value of that evidence had been incorrect. The 1891 court case was also examined in detail. I presume that the appellant wishes me to consider that these latter two pieces of evidence are 'new' because he wishes me to examine them with a different purpose in mind. His view is that the previous inspector looked at them with a view to the status of the route and not in relation to the width or the presence of gates.
  23. I think it is important to distinguish between new 'evidence' and new 'argument'; the 1981 Act requiring the former to enable a decision to be looked at afresh. However, given that the Bourne map does appear to be previously unseen and unconsidered, I will deal with the new 'arguments' in relation to the rest of the evidence as part of my overall examination of the issue.
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### ***The Width***

24. I disagree with the appellant that the width of the route was not fully addressed at the two inquiries, nor by the previous inspector. In his first decision the inspector dealt with the issue of encroachments and, despite his conclusion on the status of the route in the 2008 decision, quite clearly considered that a number of encroachments had occurred along the route over the years, and particularly in the 19<sup>th</sup> century. In order to have considered these issues as encroachments he must have had in his mind the width of the route overall. His modifications to the Order included modifications to the way in which the width of the route was expressed and, as the appellant acknowledges, no-one took issue with these at the time. Having reiterated these widths in the 2010 decision they therefore constitute, at this point in time, the definitive width of the highway.
  25. The issue I must address, then, is whether or not the new evidence is cogent and casts sufficient doubt on the evidence of the definitive map and statement to cause me to review the evidence as a whole.
  26. None of the new pieces of evidence submitted by the appellant actually provides any further detail with regard to the width. The 1910 Finance Act map was part of the evidence to the previous inquiries and shows the boundaries as they are now; the court case papers do not refer to the width specifically but do testify to the existence the field boundary walls; and the Bourne map clearly also shows the field boundary walls in the same way as all the other mapping. I agree with DCC that the mapping evidence shows the walls consistently which supports the view that they are more than likely to pre-date the earliest map evidence.
  27. The previous inspector concluded that the route had been dedicated as a public highway by 1751 at the least, and the appellant does not dispute this. He claims that if the walls existed at that time they were constructed for the purpose of containing stock and not for the purpose of defining the highway to the highway. He supports this claim by reference to the design and alignment of the gateways into the adjoining fields; a situation not uncommon along similar highways according to DCC.
  28. I have to agree with DCC that the alignment of gates into the fields does not have any bearing on the width of the highway. It is common along many public highways, nowadays viewed in common parlance as county roads or suchlike, to see gates offset in this fashion. The land between the gate and the road may or may not be part of the highway verge.
  29. Although I accept that the only reason for erecting the walls alongside the route, whenever that may have happened, was likely to be for the purpose of enclosing the land, the walls (and the gates in them) were clearly there to prevent the stock from wandering on the highway. In erecting boundaries to their fields, I cannot sensibly believe that any landowner would deliberately leave part of his allotted field on the highway side of the wall. I am sure, then as now, landowners were very protective and possessive about the land allotted to them (the parties to the inquiry accepted that this land appears to have been enclosed by some form of agreement which pre-dated the 1779 Act and consequent 1783 Award).
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30. In any case, even if the walls were erected prior to the dedication of the route as a highway, there is nothing in the new evidence which suggests otherwise than that the highway is defined by the walls alongside it. It is pure supposition to allege otherwise. The area between the walls is the area which has traditionally been available to the public, even if it was wider than that originally dedicated, although I have seen no evidence to support that premise. The walls have demonstrably not altered since 1818, the date of the Poor Law map. Even if the route has not been used to its full width for many years, because of the encroachments referred to by the previous inspector, I agree with the view expressed by DCC and the inspector that the maxim 'once a highway, always a highway' prevails, whether or not action was ever taken by the highway surveyor to prevent such obstructions.
31. I conclude on the balance of probabilities that the width of the highway is defined by the walls on either side, and that this has been the case since at least 1818, and almost certainly since at least 1751. Anything that has been erected within that area since that time is an obstruction.
32. I would add here that any gate which might have existed across the route (see below) and which allowed for the passage of farm carts would be unlikely to have been only 1.4 metres wide. The suggestion that the width of the BOAT should be governed by the width of the posts at the ford crossing (G3) is not sustainable, in my view.

### ***The Gates***

33. Turning to the evidence of gates, the appellant alleges that gates were erected prior to dedication of the route at three locations identified as G1, G2 and G3 on the DCC plan.
34. The point G1 is identified by the appellant as being adjacent to the junction with the route of the present Footpath 50. It is claimed by the appellant that the earliest map, the 1818 Poor Law map, shows a line across the route at this location. The new evidence of the Bourne map also shows a line across the route at this location.
35. I consider it requires a great deal of imagination to identify a line across the map at this point on the Poor Law map as it lies on a tear in the fold of the map. I most certainly would not rely on this as being evidence of a gate across the route. Subsequent mapping (Sanderson's 1835, Tithe 1852, Ordnance Survey 1879) does not indicate a gate at this point, and I conclude that it is more likely than not that there was no gate at the time of dedication in, or prior to, 1751. Even if the appellant is correct about there being a gate present by the date of the Bourne map, any gate which has been erected since the dedication of the route will constitute an obstruction to the highway. I note that DCC considers that this line is representative of a landownership demarcation but I do not need to reach a conclusion on that point.
36. Point G2 is identified as being due north of the buildings at Marsh Green Hall, about two-thirds of the way along the route towards Marsh Brook. Again, the appellant claims that there is a line across the route shown on the Poor Law map of 1818, and also on the Bourne Map of 1878. DCC considers that the fold in the 1878 map precludes them being able to say whether there is or is not a gate at that point.
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37. I consider that DCC are being generous. I have looked at the two plans and consider that neither one shows any sign of a gate at that location, fold or not. I acknowledge that the Tithe plan of 1852 appears to show a line across the route at that point, but it is not shown on the subsequent OS maps of 1879, nor on any later large scale OS maps. In any case it is largely academic because, as I have already stated, the evidence does not support a gate existing at this location prior to dedication. Any gate which may have appeared seems to have been short-lived and may have been treated as an obstruction, if it existed at all.
38. With regard to the alleged gate at Point G3, this is the point described in the DMS as being the posts at the ford. It is claimed by the appellant that there are signs on the posts that a gate was hung at this location.
39. It was agreed at the inquiry, according to the inspector's decision, that the posts in question were likely to have been erected in 1834, probably about the same time as trees were being planted alongside the highway. I acknowledge that the inspector retained this restriction in the width of the route in his final decision, and confess to being puzzled by it. In his 2008 decision it was clearly a reasonable restriction to have included, since he concluded that the route was a bridleway on the basis of common law usage. Such a restriction would not have been inconsistent with that.
40. However, having concluded in his 2010 decision that dedication took place as a carriageway many years prior to 1834, the width restriction at the ford assumes the character of an obstruction. This also seems to accord with the view of DCC in their response to the appeal. It is not for me to comment any further on this issue.
41. I agree with DCC that any line across the map which is visible on the 1818 Poor Law map at this point would be likely to represent the stream. But as I have already stated, and as I must conclude again, the evidence does not support, on the balance of probabilities, that there was any gate across the route at this point at the time of dedication. In fact, a gate would have been highly dangerous, I would suggest, since it would have hampered access across the ford by legitimate users on foot and on horseback, even if the intention was to (unlawfully) prevent carriages or carts. I consider that there was only ever likely to have been posts at this location and that any evidence of a gate is due to the re-use of an old gatepost from elsewhere.

### **Conclusion**

42. Having regard to these and all other matters raised in the written submissions, I conclude that the appeal should be refused.

### **Formal Decision**

43. I refuse the appeal.

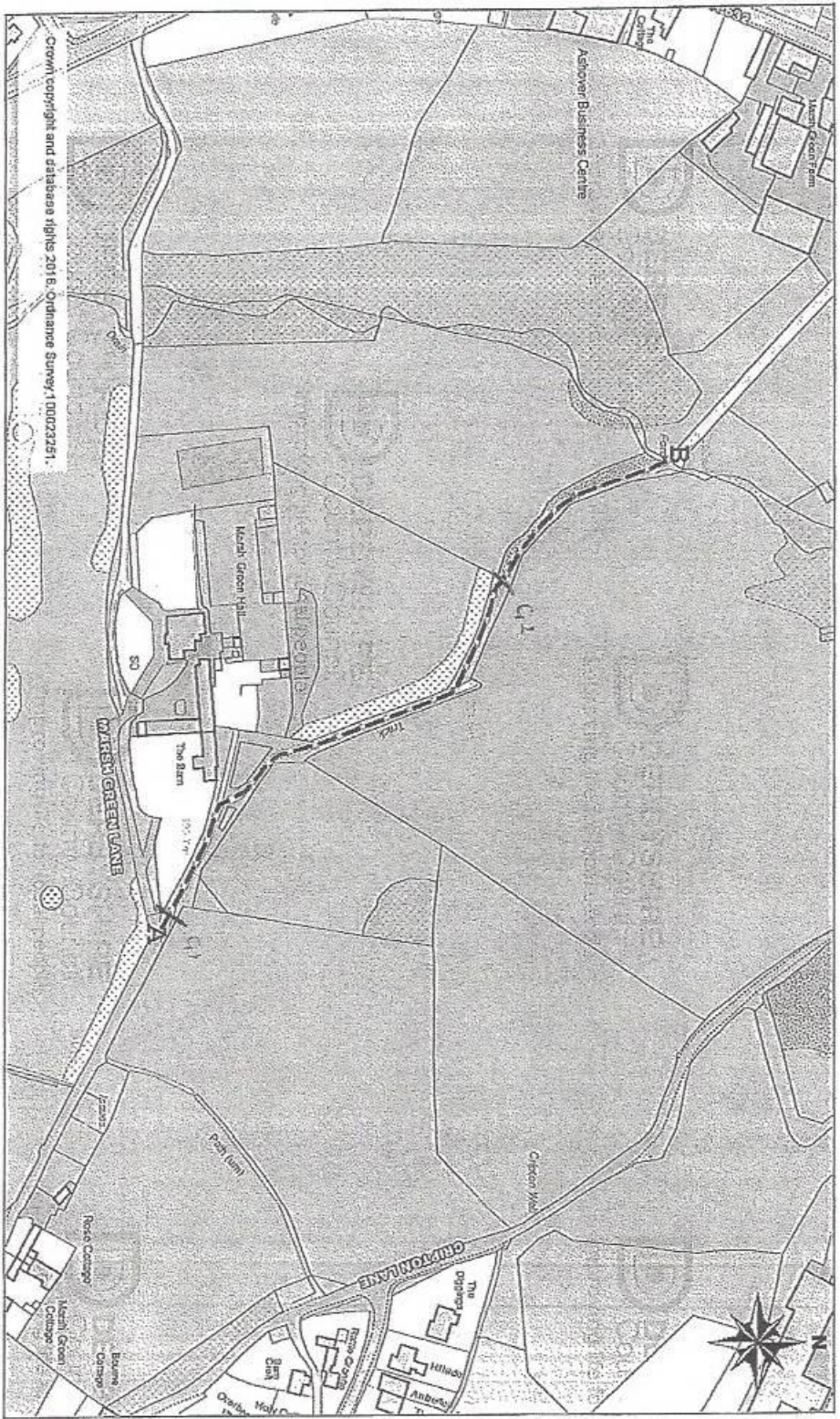
*Helen Slade*

**Inspector**

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**Wildlife and Countryside Act 1981 - Application under s53 to modify the description of Byway Open to All Traffic No. 157 between points A & B - Parish of Ashover**



Scale 1 : 2500

17-Feb-2016