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## Order Decision

Site visit made on 4 August 2015

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 9 October 2015**

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### **Order Ref: FPS/Y2003/7/23**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Definitive Map Modification (Restricted Byway 21, Crowle) Order 2014 (1).
- The Order is dated 19 June 2014 and proposes to modify the Definitive Map and Statement for the area by adding to them a restricted byway as shown in the Order plan and described in the Order Schedule.
- There were 8 objections outstanding when North Lincolnshire 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 below in the Formal Decision**

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### **Procedural Matters**

1. I carried out an unaccompanied visit to the Order route.
2. One of the objections, made by Messrs Albone, was withdrawn by letter dated 1 July 2015.
3. Mr Seymour submitted a statement together with a copy of the *Andrews 2015*<sup>1</sup> judgement which, having only recently been handed down, were accepted by The Planning Inspectorate after the deadline for the receipt of statements of case. I agreed to accept a further late item of evidence from Mr Seymour. The documents were circulated to the parties for comment, and in reaching my decision I have taken them and the responses received into account in my determination of the Order.
4. The Order refers to the "County of Lincoln, Parts of Lindsey (Isle of Axholme), Definitive Map and Statement". However, North Lincolnshire Council ('the Council') says the correct reference is the "West Riding of Yorkshire (Thorne Rural District)", as the Order route used to lie in the neighbouring parish of Thorne. The Council states the two maps referred to are contiguous, and that the Order route is clearly identified from the description and map contained in the Order. I agree. There is nothing to suggest that anyone has been prejudiced by this error which can be corrected by modification if the Order is to be confirmed.
5. Mr Carney and Mr Seymour question whether the Council has discovered new evidence to trigger the making of a modification order. It is apparent that the

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<sup>1</sup> John Andrews v Secretary of State for Environment, Food and Rural Affairs [2015] EWCA Civ 669

documentary evidence on which the Council relies, its List of Streets ('LoS'), railway records and Finance Act 1910 records, has been known to it for some time. Nevertheless, becoming aware of it, or newly evaluating its significance can, I consider, amount to a discovery of evidence. Further, in this case, the Council says there has been no previous examination of evidence with regard to adding the Order route to the Definitive Map and Statement ('DMS').

### *Background*

6. The Order concerns the addition of a restricted byway in Crowle at an area known as Medge Hall, between its junction with Chapel Road and Jacques Bank (point A on the plan attached to the Order) and Byway Open to All Traffic ('BOAT') 21 Crowle (point B), which is known as Crook o' Moor Road. Between points A and B, the Order route crosses over the South Soak Drain, the Keadby and Stainforth Canal by way of a swing bridge, the Cleethorpes to Doncaster railway by way of a level crossing, then crosses over the North Soak Drain.
7. Crook o' Moor Road was added to the DMS as a BOAT in 2005/6. The Order route forms a continuation of this way.

### **The Main Issues**

8. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ('1981 Act'), which requires me to consider whether the evidence discovered (when considered with all other relevant evidence available) is sufficient to show, on a balance of probabilities, that a restricted byway subsists, and that the DMS should be modified. The evidence adduced is documentary.
9. It is not disputed that the Order route is a public vehicular highway. What is in dispute is its status, whether it is a BOAT, or a carriageway that should not be recorded in the DMS, or a restricted byway as described in the Order. In this respect and relevant to my decision is the effect of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act') and its provisions.
10. In reaching my decision I take into account relevant case law including, in addition to *Andrews 2015*, the Fortune cases in the High Court (Chancery Division) and Court of Appeal ('*Fortune 2010*' and '*Fortune 2012*')<sup>2</sup>.

### **Reasons**

#### ***Documentary evidence***

11. As mentioned above, the Council relies on its LoS (its record of highways maintainable at public expense); railway records concerning the South Yorkshire Railway and River Dun Company Book of Reference 1858-1859, which recognises the Order route as a public carriage road owned by the Surveyor of Highways; and Finance Act 1910 map, which shows it uncoloured.
12. In addition, Mr Carney has provided a photograph of Medge Hall Railway station, various records concerning the preparation of the DMS for the area under the National Parks and Access to the Countryside Act 1949 ('the 1949 Act'), highways records, and various other records including extracts from Acts, Awards and maps showing the locality, the route set out as Crook o' Moor Road

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<sup>2</sup> Vera Fortune, Rosemary Ayres and John Heselden v Wiltshire Council and Taylor Wimpey [2010] and Fortune & Ors v Wiltshire Council & Anr [2012] EWCA Civ 334

and the Order route. Mr Seymour has provided extracts from maps including Ordnance Survey maps, a range of plans and records dating back to 1772, including deposited canal and railway documents, similarly showing the locality, the route set out as Crook o' Moor Road and the Order route. In addition he has provided evidence that by 1858 the Order route was known by the Surveyor of Highways as 'Midge Hall Bridge Road'<sup>3</sup>: this is consistent with early Ordnance Survey maps which show the name changed from 'Midge Hall Bridge' to 'Crook o' Moor Bridge'.

13. Having considered all of the documents provided I am satisfied that the Order route forms part of an historic and longstanding continuous public highway, a through route that carried public vehicular rights prior to 2 May 2006<sup>4</sup>. I turn next to consider the likely status of the Order route and the effect of the 2006 Act.

### ***The 2006 Act***

14. I have concluded that a public right of way for vehicles exists over the Order route. However, Section 67(1) of the 2006 Act provides that, unless preserved by an exception set out in the Act, an existing public right of way for mechanically propelled vehicles ("MPVs") is extinguished if it is over a way which, immediately before commencement of the Act, was not shown in the DMS, or was shown as a footpath, bridleway or restricted byway.
15. Mr Seymour relies on three of the exceptions in the 2006 Act applying, these are subsections 67(2)(a), (2)(b) and (2)(c). Mr Carney argues that the Order route is a carriageway, so should not be recorded in the DMS. The Council says that were it not for the 2006 Act, the appropriate status for the Order route is a BOAT. However, it is their view that none of the exceptions that would preserve rights for MPVs applies in this case and therefore the Order route cannot be recorded as a BOAT.

### ***Subsection 67(2)(a)***

16. This subsection excepts ways whose main lawful use by the public during the 5 years preceding commencement of the 2006 Act was by motor vehicles rather than by other users, e.g. walkers, cyclists, horse riders or horse-drawn vehicles. The intention being to except highways that are part of the ordinary roads network.
17. Mr Leedale's objection refers to use of the Order route by motor vehicles for over 70 years. He also refers to the effect on local residents, landowners, fishermen etc., postal deliveries and deliveries in general, refuse collection and emergency vehicles, if the Order were to be confirmed. This implies a mix of public use of the Order route and use by invitation. Mr Carney states he has used it with a motor vehicle since 1975 between Crowle and the A18, and that another resident of Crowle has driven it for 70 years. There is also Mr Barker's petition that 14 people claim to have used the route to the south of a loading ramp (marked as a rectangle on the Order plan roughly half way between point A and the large building to the west).

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<sup>3</sup> 1858 Agreement between the South Yorkshire Railway and River Dun Company and the Surveyors of Highways of the Parish of Thorne

<sup>4</sup> The commencement date of the 2006 Act

18. Mr Seymour regards the Order route as part of the ordinary road network of the area, between Crowle and Medge Hall, used mainly and lawfully by vehicles in the period 2001 to 2006 by the public going about their daily business. Although his submissions also appear to accept that the Order route is a BOAT.
19. There is evidence that the Council maintained the Order route to accommodate MPVs during this period. In October 2005 it agreed 70 metres to South Soak Drain Bridge through the Crook o' Moor farmyard as maintainable to vehicular standard; and in February 2006, Crowle Town Council confirmed this section had been repaired to the residents' satisfaction. However, I consider this provides evidence only that it was maintained and suitable for vehicular use. Whilst there may well have been use by MPVs, it does not provide evidence that this was the main lawful use at the relevant time.
20. The Council has no evidence as to the main lawful use during the period 2001-2006 as no survey of use was undertaken by them; neither are they aware of any survey carried out by anyone else. Other than what is described above, no further evidence has been submitted. There is no evidence as to use by walkers, horse riders, cyclists or other users from which the relative volumes of use can be assessed against the very limited evidence available as regards use by MPVs. Mr Carney asserts that there are no private rights for residents to access their properties, but does not support this with evidence. For the exception to apply use must have been by the public: use by landowners or their visitors by licence or through an easement would not qualify.
21. Mr Carney argues that Crook o' Moor Road has always been an all-purpose highway, a thoroughfare, classified in 1921 as a "Class 3" road and later becoming an "unclassified road". By reference to the 1949 Act proceedings he argues that as the Order route was never claimed for inclusion in the DMS it was not a category of right of way suitable to be recorded in it. Rather, it was a road open to vehicular traffic that never received an asphalt topping.
22. Although Mr Carney and Mr Seymour maintain that the Order route is an "ordinary road", the Council argues that this subsection of the 2006 Act aims to distinguish between such roads that should not be recorded in the DMS, that is tarmacked carriageways, and those that should, the latter being BOATs and restricted byways, which are usually unsealed.
23. A BOAT is defined in Section 66(1) of the 1981 Act as a highway over which the public has a right of way for vehicular and all other kinds of traffic, but which is mainly used by the public as a footpath or bridleway. Having regard to the *Masters* case<sup>5</sup>, the test for a way to be included in the DMS relates to the character or type of route and whether it is more suitable for use by walkers and horse riders; although this case clarified that it is not necessary for there to be equestrian or pedestrian use for a way to be a BOAT, or that such use should be greater than vehicular use.
24. The Council describes the Order route as mostly an unmade rough track, having the appearance of such a highway (a BOAT), and the same character as Crook o' Moor Road which is recorded as a BOAT. I agree. As such, the Council argues, it would not be expected that its main lawful use would be with MPVs.

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<sup>5</sup> *Masters v Secretary of State for the Environment, Transport and the Regions* [2000]

25. Guidance produced by *defra*<sup>6</sup> states that if a highway satisfies the user test in subsection 67(2)(a), then it should not satisfy the 'BOAT test' in Section 66(1) of the 1981 Act. If, as a result of the 2006 Act, a BOAT cannot be recorded in the DMS, then the appropriate status is a restricted byway.
26. Having regard to the above, I find there is insufficient evidence that the main lawful use during the 5 years preceding commencement of the 2006 Act was by MPVs. Accordingly I conclude that subsection 67(2)(a) does not apply and that MPV rights have not been saved.

*Subsection 67(2)(b)*

27. This subsection excepts ways that, immediately before commencement of the 2006 Act are both recorded on the LoS as being maintainable at public expense and which are not recorded in the DMS as public rights of way. The intention here is to except highways that do not have clear motor vehicle rights by virtue of classification but are generally regarded as part of the 'ordinary roads network'.
28. The Order route is not recorded in the DMS. The Council states it was added to its LoS on 21 June 2010 further to its duty under Section 36(6) of the Highways Act 1980 ('the 1980 Act') to keep the list corrected up to date. An extract from the Council's current LoS records the Order route as Crook o' Moor Road. An accompanying map extract, showing highways maintainable at public expense shaded grey, includes the Order route<sup>7</sup>. An extract from the LoS provided by the Council dating to immediately before the commencement date is in the form of a map. It shows Crook o' Moor Road coloured, indicating it was a highway maintainable at public expense at the time, but only so far as a point to the north of the railway. However, the Order route is uncoloured unlike Jacques Bank and Chapel Lane to which it connects, which are shown coloured.
29. As previously mentioned (paragraph 20), the Council acknowledged the Order route (or at least part of it) was maintainable at public expense prior to commencement of the 2006 Act. In 2003, it had admitted it was a public carriage road north from the Canal bridge<sup>8</sup>. Furthermore, the Council had indicated in correspondence in 2005 that it was both "minded to" and "is to" add, at least part of it, to its LoS.
30. In summary, the detailed arguments put forward by Mr Seymour are that the Council's acceptance the Order route was a carriage road, and intention to add it to the LoS, triggered its duty to keep the List corrected up to date, and this should be taken as the date of entry to the List. Accordingly, before commencement of the 2006 Act, if the List did not contain the Order route, it could have done and should have done. Furthermore, there was a legitimate expectation that following the Council's acceptance, the route would have been added to the LoS at that time or as soon as reasonably possible thereafter. Were this exception not to apply, he argues, then it would result in the extinguishment of part of the ordinary road network, an outcome that Parliament did not intend when enacting the legislation.

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<sup>6</sup> Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways A guide for local authorities, enforcement agencies, rights of way users and practitioners, Version 5 – May 2008, at paragraph 26

<sup>7</sup> With the exception of that part of the route crossing the railway

<sup>8</sup> Further to Notices served on the Council under Section 56 of the Highways Act 1980

31. In this regard, Mr Seymour relies on the *Fortune* judgements and in particular paragraph 1073 of *Fortune 2010* where McCahill QC says, "*This analysis of the role and purpose of ss66 and 67 NERC leads me to conclude that s67(2) NERC should not be given a restrictive interpretation. On the contrary, Parliament having extinguished certain public vehicular rights of way merely because they were not shown on a Definitive Map, on which many of them simply could not have been recorded, a purposive interpretation should be given to the exceptions, especially when the burden of proof is cast upon the person seeking to establish that a particular unrecorded vehicular right of way has not been extinguished. Moreover, it seems to me appropriate that, if NERC starts from the premise of abolishing such a wide category of vehicular highways (and beyond the mischief at which the Act was directed, namely unrecorded BOATs), the exceptions to this extinguishment should not, in the absence of clear and compelling language to the contrary, be construed narrowly*", as endorsed in *Fortune 2012*.
32. Further in *Andrews 2015* at paragraph 33, "*Even in relation to modern statutes, which are drafted by skilled specialist draftsmen and are assumed to be drafted with precision and consistency, the courts adopt a purposive (in preference to a literal) interpretation so as to give effect to what is taken to have been intended by Parliament. We use the phrase "purposive interpretation" as shorthand for an interpretation which reflects the intention of Parliament. The court presumes that Parliament does not intend to legislate so as to produce a result which (i) is inconsistent with the statutory purpose or (ii) makes no sense or is anomalous or illogical. A purposive interpretation is all the more appropriate in a statute which is couched in language which is less consistent and more imprecise than that generally found in modern statutes.*"
33. In response, the Council says that to argue the LoS did not include the Order route immediately prior to commencement, but that it ought to have done is inconsistent with why the references to a "purposive interpretation" were made in the *Fortune* and *Andrews* judgements. The relevant wording in Section 67 of the 2006 Act (and subsections 67(1) and 67(2)(b)), they say, is wholly unambiguous. As a matter of fact the Order route was not shown in the map that constituted its LoS on 1 May 2006, and the wording of the 2006 Act is precise; and subsection 67(2)(b) is not qualified so as to allow evidence that the highway authority were giving consideration to inclusion at commencement. The purposive interpretation required in *Fortune* they say was to qualify what constituted a LoS within the context of Section 320 of the 1980 Act. Furthermore, the judgement is that if a list had some route missing elsewhere, this would not disqualify it as a list for the purposes of this exception, providing the way in question was included. In *Andrews 2015*, "purposive interpretation" is relevant to an understanding of the 1801 Act with which the judgement is concerned.
34. The *Fortune* cases concerned a route that was recorded in the highway authority's LoS, and much consideration was given to what constituted a LoS. In my view this differs to the present case where the route in question did not appear on the Council's LoS even though it is argued that it should have done, given that it had been maintained at public expense in the past. In *Fortune* the issue was whether what the Council regarded as its LoS was a valid list, and whilst it was determined it may contain errors or omissions<sup>9</sup> it nevertheless

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<sup>9</sup> My understanding is that it included some unadopted roads, and omitted minor highways

remained a valid list; in other words the inaccuracies in the list did not cause it not to have the essential character of a LoS<sup>10</sup>.

35. As regards *Andrews 2015*, I consider there is a distinction in that it was considering 19<sup>th</sup> century legislation and language compared to the recent legislation of the 2006 Act. The 2006 Act recognises that a public right of way for MPVs that existed before 2 May 2006 may since have been extinguished by the Act. The provisions of Section 67 are designed to reduce the scope for public rights of way for MPVs to be recorded. I agree with the Council that the wording is unambiguous. Section 67(1) explicitly extinguishes rights for MPVs over highways not shown in the DMS, or shown as a footpath, bridleway or restricted byway, subject to the clearly stated exceptions in Section 67(2). An ordinary meaning of the wording of subsection 67(2)(b) is that rights for MPVs are extinguished unless shown on the LoS at the appropriate date.
36. Mr Seymour also argues that there must have been some record in the Council's possession of their acceptance as regards maintenance prior to 2 May 2006 and that record, whatever, or wherever it was, comprised part of the LoS, so satisfies the exception. However, neither Mr Seymour nor the Council has produced a record to that effect.
37. I consider the LoS to be a maintenance record rather than a record of rights. It is a record required to be made kept corrected up to date by the Council further to the 1980 Act. Although Mr Seymour considers the Order route should have been recorded in the Council's LoS before May 2006, that it was an administrative error that could be corrected, it is not for me to determine whether or not it should have been so recorded. The inclusion of a route in the LoS is, in my view, a matter for the Council as highway authority, as is how best it should keep corrected its own LoS, as supported in *Fortune*.
38. Accordingly, I am not persuaded that the *Fortune* and *Andrews 2015* judgements enable me to conclude that the exception is engaged. I consider that the exemption applies only if the route appeared in the LoS immediately before 2 May 2006 Act. In this case the evidence is that it did not, and accordingly the Order route does not meet the test for exemption under subsection 67(2)(b).

#### *Subsection 67(2)(e)*

39. This subsection excepts from extinguishment ways that had been in long use by MPVs before 1930, when it first became an offence to drive "off-road". For this exception to apply, the rights for MPVs must have been created by inference of dedication at common law through use by MPVs before 1 December 1930. Mr Seymour asserts that the *Fortune* judgements mean that a purposive interpretation should be applied when considering this exception.
40. Given the location of the Order route, Mr Seymour argues it is more likely than not that it formed part of the ordinary road network and was used by MPVs. It was recorded as a public carriage road owned by the Surveyor of Highways in 1858 (paragraph 11). A letter from Crowle Town Council describes the passenger station and extensive sidings for the dispatch of produce, and Mr Seymour argues the presumption is these were accessed by the public in MPVs.

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<sup>10</sup> Paragraph 162 of *Fortune 2012*

41. No actual evidence that MPVs used the Order route before 1930 has been provided. However, evidence of long use by MPVs before 1930 would not of itself except rights of way from extinguishment. The evidence relating to the Order route shows that it has existed since at least 1772, well before the advent of MPVs and, as stated above, was recorded as a public carriageway in 1858. Accordingly, its origins as a vehicular highway appear longstanding. Where there has been an earlier creation of vehicular rights through use by non-MPVs, pre-1930 use by MPVs cannot be regarded as creating a right of way for MPVs. Nevertheless, Mr Seymour asserts that to accommodate MPVs the canal and railways companies would have been required to improve their crossings: by doing so and dedicating the way anew, the public accepted that dedication, and a new public right of way for MPVs was created over the canal and railway land before 1930.
42. I am not persuaded by Mr Seymour's argument. No evidence has been provided to substantiate the assertions as regards rededication and creation, and in any event they concern only part of the Order route.
43. Having regard to the above, there is insufficient evidence from which I can conclude that subsection 67(2)(e) engages.

### **Alignment**

44. Mr Barker submitted a petition signed by 14 local residents concerning the alignment of the Order route at Crook o' Moor Farm. It is their contention that the Order route should pass to the south of the loading ramp (paragraph 17) rather than to the north as shown on the Order plan. This being the route they have used, having lived in the area for many years. Mr Seymour agrees that the Order plan is incorrectly drawn, and comments that the 1910 Finance Act Map correctly shows the route.
45. By comparing the Order plan with the documents provided by the parties, and in particular the extract from the 1910 Finance Act Map, I consider that the historic route is depicted further to the south than is shown on the Order plan. Although the 14 signatories do not indicate whether their use is in a public or private capacity, their view as to the appropriate alignment of the Order route is consistent with that shown on the Finance Act record, as mapped by the Ordnance Survey.
46. Accordingly, I consider that the Order should be modified to reflect the historic alignment as depicted on the Finance Act Map. Such a modification would affect land not affected by the Order as made, and would therefore require advertisement.

### **Other matters**

47. Mr Ella, Mrs Mayfield-Ella, Mrs Jarosiewicz, and Mr Leedale are concerned about access to land and property in the event the Order is confirmed. In addition, concerns are raised by Mr Ella, Mrs Mayfield-Ella, Mr R Barker and Councillor T Barker, as regards the maintenance of the Order route.
48. My consideration of the evidence in determining if the Order route should be included in the DMS concerns whether or not public rights exist and, if they do, their status. However, any private rights of way that may exist are not affected by my decision. Where a public right of way for MPVs is extinguished under subsection 67(1) of the 2006 Act, subsection 67(5) provides a private



right of way for MPVs for those who have a reasonable need for access by MPVs to land in which they have an interest.

49. As regards the maintenance of highways, rather than being a matter for me, this is a matter for the Council, which is responsible for maintaining highways for their normal traffic.

### **Conclusions**

50. I conclude that further to the 2006 Act, rights for MPVs over the Order route have been extinguished. Accordingly, the Order route should be recorded in the DMS as a restricted byway.
51. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed with modifications.

### **Formal Decision**

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

- Delete the words "County of Lincoln, Parts of Lindsey (Isle of Axholme)" wherever they occur in the Order, and replace with the words "West Riding of Yorkshire (Thorne Rural District)"

In Part I of the Schedule to the Order, with regard to the width

- in the first line after the words "...on the map", insert "and on the Map prepared by the Valuation Office under the Finance Act 1910"
- in the second line after the word "as" insert "shown uncoloured on the Map prepared by the Valuation Office under the Finance Act 1910 and"
- at the end of the fourth line replace "north-east" with "south-east"

In Part II of the Schedule to the Order,

- in the fourth line replace "north-east" with "south-east"

On the Order plan,

- delete the route as shown between point A and where it turns to the north and replace it with a route from point A in a generally westerly direction to the south-east corner of Crook o' Moor Farm, then turning north to join the unaffected continuation of the Order route

53. Since the confirmed Order would affect land not affected by the Order as submitted, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*S Doran*

**Inspector**