



Appeal Decisions

by Sue M Arnott FIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 11 July 2016

Appeal Refs: FPS/G3300/14A/10, 11 & 12

- These appeals are made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Somerset County Council not to make orders under Section 53(2) of that Act.
- By applications dated 11 December 2008 the appellant claimed that three lanes which lie to the north of Pitney, known as Westerngate Road, Dyer's Piece Lane and Underwood Lane, should be added to the definitive map and statement for the area as restricted byways.
- The applications were refused by Somerset County Council on 5 November 2015 and the appellant was informed of the decision by notice(s) dated 9 November 2015.

Summary of Decision: The appeals are allowed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine these appeals under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of the papers submitted with each case. In this instance I am satisfied I can reach a sound conclusion on the evidence without visiting the appeal sites.
2. The appellant¹, acting on behalf of the South Somerset Bridleways Association (SSBA) requests that the Secretary of State directs Somerset County Council (SCC) to make definitive map modification orders under Schedule 15 of the 1981 Act to record as vehicular highways the routes which are the subject of these appeals; all three are presently recorded as public footpaths. However SSBA recognises that, as a consequence of the provisions of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) which came into effect on 2 May 2006, if a public vehicular right of way is shown to exist, the appropriate status for each route would now be 'restricted byway'.
3. The route I shall call Route X forms part of a lane known as "Westerngate Road" and is recorded on the definitive map and statement as Public Footpath L23/6 in the Parish of Pitney. I shall refer to "Dyers Piece Lane" as Route Y; this is recorded as Public Footpath L23/7. Route Z, which is shown on the definitive map as Public Footpath L23/12, is known as "Underwood Lane"².
4. All three routes were shown on a plan which accompanied a report to SCC's Regulation Committee dated 5 November 2015. It was at a meeting on this date that the Committee decided that no order(s) should be made although the report had recommended that it should in each case.

¹ On her death, the original applicant (Mrs S Wheeler) was succeeded as Chair of SSBA by Mrs S Bucks.

² For clarity, Route X carries Appeal reference FPS/G3300/14A/12, Route Y is FPS/G3300/14A/10 and Route Z is FPS/G3300/14A/11.

5. The sections of Routes X and Z that are at issue here do not comprise the whole lane. The claimed highways include only the northern portion of Westerngate Road (between the points labelled A and B on the plan) and the part of Underwood Lane (D-F) that excludes the easternmost length between Pitney Wood Farm and Touch Lane. The remainder of Westerngate Road south of A is recorded as a publicly maintainable highway on the County's Road map. So too are the continuations of Route Z, eastwards to Touch Lane in the north east and to the south and eastwards via Woodbirds Hill Lane. Route Y extends from point B (at its junction with Route X) to point C on that part of Stowey Hill that is now recorded as Restricted Byway L23/43.
6. Procedural points have been raised by SCC, by the appellant and by Mrs Masters, the agent acting for three of the land owning families affected by the three routes (although SSBA has confirmed that the Land Registry records show no known owner³ for any of the three lanes themselves).
7. The first point relates to the appellant's request that, if the evidence is judged to be insufficient to support a restricted byway, that the status 'bridleway' be considered in the alternative. SCC takes the view that since the applications were clearly for the recording of restricted byways, the right of appeal relates only to SCC's decision not to record routes of this status. It has nevertheless commented on the possible existence of bridleway rights.
8. The appellant argues that the applications for restricted byway status do not preclude the Council from concluding that a bridleway exists, even if the case for a restricted byway fails.
9. On this point she is quite right. However SCC is also correct in that an appeal can only relate to the rejection of the application, not to any other possible outcome. However it remains a possibility that, on looking at all the evidence presented in connection with an appeal, the Secretary of State or her Inspectors may conclude that it points to a public route of a different status than that claimed.
10. The agent for the landowners rightly points out that if there are no historical public vehicular rights shown to exist here, there is no default position; evidence to support public bridleway status would need to be 'discovered' to support the case for an order to record that status.
11. The second point concerns the validity of the application and thus the appeal. Mrs Masters challenges this on the basis that, in her submission, no relevant 'new' evidence was provided in support of the application. She highlights the omission of the Pitney Inclosure Award from the list of documents submitted with the original application to SCC, and identifies only three documents which would not have been amongst those that should have been checked during the preparation of the first definitive maps and statements in the 1950s under the National Parks and Access to the Countryside Act 1949. A Memorandum issued by the Open Spaces Society and Ramblers' Association in 1950 (and approved by the Ministry of Town and Country Planning) offered guidance on the types of historical documents that may be relevant to establishing the status of public rights of way.

³ SSBA also confirmed that it had erected notices at the ends of the three routes in accordance with instructions from SCC and Paragraph 2(2) of Schedule 14 to the 1981 Act.

12. The three records which the agent submits are the only “previously unavailable and unseen” documents include the 1885 Ordnance Survey (OS) Parish Boundary Remarks Book, the 1910 Finance Act Records and the 1941 Farm Survey map. She observes that none of these were prepared for the purpose of establishing public highways as required in Section 32 of the Highways Act 1932 and submits these are of little evidential value on their own. In her view it is disingenuous to rely on these as ‘new’ evidence when other supporting evidence is needed⁴.
13. On this point I must agree with SCC; it points out that having established that there is new evidence (which the agent has acknowledged), it then needs to be considered in the context of all the other evidence discovered including that which was available in the 1950s. The ‘new’ evidence need not be conclusive, only sufficient to trigger a reassessment of the evidence as a whole.
14. The last point concerns the evidence submitted by the appellant. Mrs Masters has questioned whether the inclosure evidence was submitted to SCC with the original application or brought forward by SCC itself. However, as it is clear that SCC took account of this evidence in reaching its decision not to make the requested orders, I consider it appropriate that it should be considered in this appeal.

Main issues

15. The main issue in this case is whether the evidence shows that a public right of way for vehicles was once established along each of the three appeal routes. If so, there is a second issue to be considered which is whether such rights still exist today.
16. Whilst the accepted legal maxim ‘*once a highway, always a highway*’ applies, the effects of the 2006 Act now need to be taken into account. In essence, sub-section 67(1) provides that an existing public right of way for mechanically propelled vehicles (MPVs) is extinguished unless, immediately before the commencement of the Act, it was recorded in the definitive map and statement as a byway open to all traffic. Whilst sub-sections 67(2) and (3) offer possible exemption from extinguishment, no claim has been made by the appellant that any of these apply here.
17. Section 53(2) of the 1981 Act requires a surveying authority to make an order to modify its definitive map and statement in consequence of certain specified events set out in Section 53(3).
18. Section 53(3)(c)(ii) requires that a definitive map modification order be made as soon as reasonably practicable following the discovery of evidence which (when considered with all 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*”.
19. In the case of an appeal route that already appears on the definitive map as a footpath, it is not sufficient to satisfy the lesser test by ‘reasonably alleging’ the existence of public vehicular rights. Whilst that could apply to the addition of a route with no definitive status at present, in this appeal the standard of proof required is the balance of probability.

⁴ A principle established in *Maltbridge Island Management Committee v SSE & Hertfordshire County Council* [1998] [1998] EWHC Admin 820, [1998] EGCS 134

20. As regards evidence of use by the public, Section 31 of the Highways Act 1980 sets out the requirements for presumed dedication under statute. In the alternative, implied dedication at common law may also be considered. However this is not the basis on which this case is argued.
21. The appellant's case relies primarily on documentary evidence in the form of historical maps, inclosure and tithe documents, 1910 Finance Act records and twentieth century sales particulars together with public highway records.
22. Section 32 of the Highways Act 1980 provides for "*any map, plan or history of the locality or other relevant document*" to be taken into consideration when deciding whether or not a way has been dedicated as a highway.

Reasons

23. A great deal of historical evidence has been gathered by the appellant in support of these applications and by SCC through its research. All this evidence was considered by SCC's Regulation Committee at its meeting on 5 November 2015. In summary the decision was to reject the officer's recommendation (to make orders in each case) on the basis that "*the evidence does not establish that on the balance of probabilities these footpaths had vehicular rights, and that as such the applications to upgrade L23/6, L23/7 and L23/12 ... be refused*".
24. Whilst the agent for the landowners supports that decision, the appellant contends that the report considered at this meeting gave more than sufficient evidence to support rights of way of a higher status than footpath and she challenges the decision not to make the orders requested.

1802 Pitney Inclosure Act and 1807 Pitney Inclosure Award⁵

25. The crux of this case centres on interpretation of the Inclosure Award for Pitney. The "*Act for Dividing, Exchanging, Allotting, and Inclosing the Open and Commonable Lands and Fields, within the Parish of Pitney, otherwise Pitney Lortie, in the County of Somerset*" in 1802 provided the basis for the Award which followed in 1807.
26. A full copy of the 1802 Act has not been submitted but, I agree with Mrs Masters, on balance it would be reasonable to assume that this Act operated together with the provisions of the Inclosure Consolidation Act of 1801.
27. The key point to note from the 1801 Act is that Section 8 and 9 required Inclosure Commissioners to set out public carriage roads at no less a width than 30 feet and to appoint a surveyor to oversee the making up of roads to a satisfactory standard followed by a declaration to that effect by the Justices.
28. In the Pitney Inclosure Award the Commissioner set out only two public carriageways, neither of which are now the subject of these appeals. However the Award also set out several private carriage roads. Whilst some of these were to be 30 feet wide (9.1m), others were 20 feet (6.1m) wide. In some cases these roads were also to carry driftways and in others also a public bridleway of a lesser width along the centre.
29. I do not have the text of each and every road or way set out by the Inclosure Commissioner but it seems to be agreed that in most cases, besides serving

⁵ There is one earlier document, a map produced by Day and Masters in 1782, but this commercial map offers no detail in relation to roads north of Pitney and I attach very little weight to it.

the owners and occupiers of the newly allotted lands and being maintained by them, these private carriage roads were also stated to be "*for the use benefit and enjoyment of all and every other person and persons whomsoever having any occasion whatsoever and howsoever to pass and repass thereon...*" .

30. One such 'private carriage road and drift way' set out was "Western Gate Road" (including Route X) which was described as leading northwards to a point where it entered "*a certain ancient lane called Dyers Lane*" (Route Y).
31. There are two main issues that arise from the inclosure award. The first is whether or not the award established a public right of way along Route X (Westerngate Road); the second is whether the references to Dyers (Piece) Lane as an ancient lane and depiction of Underwood Lane on the Award plan constitutes acknowledgement of pre-existing highways.
32. On the first point, it is clear that the Inclosure Commissioner did not expressly set out Western Gate Road as a public carriageway. However the appellant submits that this can be implied from three things: the description in the award of those who were to benefit from use of this private road, from an examination of all the routes set out within the parish and a comparison with other similar private roads, and from the colouring used on the inclosure plan.
33. I will deal with this latter point first as it seems to stem from a misreading of the plan. I agree with both SCC and Mrs Masters that the yellow colouring seems to be used to identify awarded allotments and where these lie at either side of Western Gate Road, the colouring has seeped into the road itself. Consequently I would attribute no significance to the yellow colouring of Route X on the Inclosure plan.
34. It is the appellant's case that, through his choice of words and the widespread setting out of private roads in the parish, the Commissioner intended that 'private roads' such as "Western Gate Road" should be public carriageways. Mrs Masters considers it scurrilous to advance an argument that the Commissioner made an error insofar as he intended to set out and appoint public roads but actually set out private ones.
35. Yet I must agree with the appellant that the extract quoted above (at paragraph 29) gives the clear message that all and sundry were to be at liberty to use these private roads by whatever means they wished in addition to occupational use by the adjacent new allotment owners and occupiers who were to be responsible for maintaining them.
36. However, SCC points out that in the description of those who are to benefit from use of "the said private carriage roads", the words "*and howsoever*" are omitted from the text which applies to the south, north and middle fields area to be inclosed although they are included in the Leazemoor and Pitney Seart sections.
37. As a consequence, SCC takes the view that the Commissioner was not providing for use by the public for all types of traffic over Western Gate Road but only lower public rights although these were not specified (and could therefore have been either on foot or with a horse)⁶.
38. On this point I find the logic of the appellant's argument more convincing. Indeed the Council's interpretation should lead to the same conclusion: the

⁶ Yet Mrs Masters notes certain routes where a public bridleway was set out in addition to a private carriage road.

- absence of any defined type of public user must surely mean that the mode of transport was not restricted.
39. Nevertheless, in accepting that the Inclosure Commissioner was intending the public to have free use (in whatever way) of the private carriage roads set out by him, that is not equivalent to the lawful establishment of a public carriageway under the terms of the enabling Act. None of these private roads were sufficiently wide to meet the minimum 30 foot public standard.
40. The appellant argues that the term 'private road' is used in the Award to mean a local road open to all but privately maintained by adjacent landowners as opposed to the parish. However both SCC and Mrs Masters point out that this interpretation was expressly rejected by Sedley J in the case *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council [1995]*⁷. He stated that differentiating between local and other roads would "have created a nominal distinction without a legal difference".
41. He noted that, certainly into the eighteenth century, there had been "a true distinction between private and common roads and public roads or highways." These differed by definition, being limited in the case of a private or common way to a specific class of user, whereas "all the King's subjects" were entitled to use public roads or highways. Sedley J further commented: "By the beginning of the nineteenth century however it appears that legal usage had changed so as to conflate common ways with highways and to distinguish these from private ways." He concluded that within the General Inclosure Act of 1801 public and private carriage roads were deliberately distinguished and that the distinction signified differential rights of user.
42. On the basis of the *Dunlop* case it is understandable that Mrs Masters argues that private clearly meant just that. Yet in that case the Commissioner had not clouded the water by added the wording that appears here in the Pitney Award, setting out a private carriageway that could be used by anyone.
43. Mrs Masters also refers to the more similar case of *Buckland and Capel v Secretary of State [2000]*⁸. In this instance a 1797 inclosure award set out a private road 20 foot wide but the wording made it clear that it was to be available for the wider public. The accompanying Act empowered the setting out of public roads but with a 40 foot minimum width.
44. Here Mr Justice Kay concluded: "*The Commissioners did not have power under the Act of 1797 to create a public highway otherwise than in accordance with the precise powers given under the statute. It was not open to them to circumvent the conditions necessary before a road would become a public highway by purporting to create a private way but to make it open to the public at large.*"
45. That conclusion must apply equally to the Commissioner in the present case. He had no authority to create a new 20 foot wide public carriageway along Western Gate Lane (including Route X).
46. The clear guidance provided by these two cases leads me to the conclusion that the appellant's argument cannot be sustained: whatever his intention, and despite his widespread use of this approach in Pitney, the Inclosure

⁷ *Dunlop v Secretary of State for the Environment & Cambridgeshire County Council [1995]* 70 P & CR 307, 94 LGR 427

⁸ *Buckland and Capel v Secretary of State [2000]* (QBD) EWHC Admin 279, [2000] 1 WLR 1949, [2000] 3 All ER 205

- Commissioner had no authority to create a public carriageway over the appeal route that forms part of the awarded private carriageway, Western Gate Road.
47. However, in the *Buckland* case, Kay J acknowledged that, notwithstanding the Commissioners' lack of power to create new highways, a private way could subsequently be dedicated as a public one. Indeed he also concluded that "*if there was evidence that the whole length of (the road) had been laid out in accordance with the award, that might provide very powerful evidence that a public highway had come into existence*". Although that had not occurred in the *Buckland* case, it is certainly a strong possibility here.
48. Consequently it is important to examine all the evidence which post-dates the inclosure award so as to determine whether or not a public carriageway was subsequently established along Western Gate Lane, despite the Commissioner's lack of authority to do what he did.
49. Turning to the implications of the Award for routes Y and Z, I have already noted that "Dyers Lane" is mentioned in the description of Western Gate Road and shown on the Award plan. Underwood Lane (including Route Z) is not named in the Inclosure Award although on the plan it is shown to exist as a continuation of Woodbirds Hill Lane and "Middle Hedge Lane"⁹ (the latter being set out as private road also). At its north eastern end, Underwood Lane is shown to link with Touch Lane and Dyers Piece Lane with Stowey Road.
50. The appellant highlights other 'ancient lanes' mentioned in the Award, the majority of which are today recognised public vehicular highways and, in her submission, appear to have always formed part of the local highway network.
51. Yet SCC assumes Underwood Lane to have carried the same status as its awarded continuation (a private carriageway) in the same way as Dyers Lane was a continuation of Western Gate Road. Were this not so, SCC argues that the Commissioner would have been setting out a series of cul-de-sac routes. However SCC acknowledges that in the case of Dyers Lane, this was the only means of access to a newly awarded allotment (No 322); in the absence of any expressly provided easement, it may be fair to assume that access along the lane was freely available.
52. Whilst I recognise there is often merit in looking at the totality of the Award and how other routes are treated besides the ones at issue, I prefer here to focus only on the three appeal routes. I can follow the logic of SCC's cul-de-sac argument insofar as the Commissioner formally set out Western Gate Road and Middle Hedge Lane as private carriageways, except for the fact that he went on to also provide for unlimited public use. I have accepted that this was wholly without the necessary legal authority but there would be absolutely no purpose at all in the Commissioner making this provision if the public had nowhere to go when they reached the end of the awarded lane.
53. However, reversing that argument, if the pre-existing (ancient) Dyers and Underwood Lanes were regarded as all-purpose highways, then both private and public traffic would (had the Commissioner's award been fully effective) have enjoyed a through-route in each case. That seems to me a more plausible explanation.

⁹ Now Middle Gate Road.

54. To conclude on Routes Y and Z, I accept the general point made by the appellant that the Pitney Inclosure Award offers good (but not conclusive) evidence of the pre-existence of public highways along Dyers Piece Lane and Underwood Lane and that the implication is these were available to all users.
55. Lastly, I note that no evidence has been highlighted, either in the Inclosure Award or otherwise, of ownership of the soil of any of the three appeal routes.

Other nineteenth century evidence

56. There are three types of nineteenth century records available which post-date the 1807 Inclosure Award: commercial mapping, tithe records and maps and other records compiled by the Ordnance Survey, each of which will attract a different degree of evidential weight.
57. The closest in time to the Award are an OS old series map of 1809-1811 and a surveyors' drawing of 1811, both of which are inconclusive and, being compiled whilst the new inclosure layout was still taking shape, may be unreliable.
58. In contrast, by 1822, the map-maker Greenwood showed all three routes as cross-roads and part of the post-inclosure network. Although this is not cast-iron evidence that they were regarded as public carriageways, it is nonetheless good evidence that by this date all three lanes were physically in existence.
59. By 1867 the Tithe Map for Pitney Lortie¹⁰ clearly depicted all three routes, coloured sienna in the same manner as other roads (whether public or private). Again, this does not confirm their status as highways but the nature of their depiction does identify them as being un-tithed and as tracks physically separated from adjacent fields. Given their nature as apparently unrestricted through-routes, their depiction on the tithe map is not conclusive but I would consider this marginally more supportive of public highways than of occupational roads viewed against the background of the inclosure award.
60. The OS Boundary Records include a Boundary Remark Book dated 1882 and a Boundary Sketch Map of 1885, both leading to the production of the OS First Edition 25" to 1 mile map in 1887. Although the boundary records add little other than to confirm the position of the eastern ends of Dyers' Piece Lane and Underwood Lane, the First Edition map shows with great clarity the full extent of these two roads together with Western Gate Road. All three routes are named. Even on the smaller scale 1" to 1 mile map produced between 1898 and 1900, all three are shown, Dyers Lane and Westerngate Road as 'unmetalled roads' but Underwood Lane as a 'third class metalled road'.
61. Mrs Masters highlights the lack of any 'Guide Posts'¹¹ which she argues might be expected if these routes were used by the travelling public, and she quite rightly points out that the OS had no remit to establish the legal status of any of the routes shown on its maps.
62. Yet in its Object Name Book compiled in 1901, the OS clearly did distinguish between different types of road. Although it had no jurisdiction in the matter, the OS chose to note 'public roads' as distinct from 'occupation roads', 'bridle roads', or simply 'roads'. This information was gathered through local enquiry and thus offers some evidence of the roads' reputation at the time of survey.

¹⁰ I note that the tithe map for the adjoining parish, Somerton, showed a part of Stowey Road and that the eastern tip of Dyers Piece Lane was included with the same sienna colouring.

¹¹ The OS recorded these on their maps as 'GP'.

63. In the case of each of the three appeal roads, the 1901 OS record notes the way as a "public road". However SCC points to the continuation of Underwood Lane which lies on an adjoining OS sheet where the nature of the lane was described instead as an occupation road. It points to this inconsistency as evidence that the conclusions as to status are unreliable.
64. I recognise there appears to be an inherent inconsistency in the way the OS recorded Underwood Lane and Woodbird Hill Lane. There may be an explanation or this may have been an error. Yet I see no reason to conclude that an error must have been made in all three cases such that the Appeal routes were all described as public roads when they were really private ones.
65. To summarise, having examined evidence from the nineteenth century which followed the inclosure award, I find this tilts the balance slightly more towards the existence of public roads than private ones.

Twentieth century evidence

66. Turning next to the twentieth century records discovered, these include those compiled under the 1910 Finance Act, estate sale documents, OS and other commercial maps and war time agricultural records in addition to the definitive map and other highway documents.
67. An examination of OS maps at various scales dating from 1904, 1919, 1929, 1930, 1937 and 1946 reveals that all show the three appeal roads clearly with only very minor differences.
68. None of these maps offer proof of the status of the roads shown but they do confirm that each continued to physically exist as enclosed lanes, largely unaltered, well into the twentieth century.
69. A commercial map produced in 1911 by Bartholomew likewise showed the three roads as did a subsequent edition in 1927. Initially these were classed as 'roads in poor condition' and later as 'inferior' roads not recommended for use by cyclists. The notation for footpaths or bridleways was not used.
70. Mrs Masters argues that, like OS maps, these do not record the legal status of the road shown; just because a route is shown as being passable, the public does not necessarily have a right to exercise vehicular or bridleway "passage".
71. In the 1910 Finance Act records, all three roads are shown as excluded from adjacent hereditaments for the purposes of tax assessment. This strongly suggests that, at the time of survey, the roads in question were considered to be public highways and most probably vehicular ones although other possible explanations need to be considered. For example, in some cases, a private road set out in an inclosure award for the use of a number of people but without its ownership being assigned to any individual is shown excluded from hereditaments; however there does not appear to be a consistent approach across all parts of the country such that one might confidently assume that to be applicable here at Pitney. In any event, a century earlier in Pitney, the Inclosure Commissioner invited use by the public along these routes.
72. Mrs Masters highlights the fact that, despite being described in the 1901 OS Object Book as an occupation road, Woodbird Hill Lane is also excluded on the 1910 plan. (Yet I note this same section of road is now recorded as a publicly maintainable highway and has been since 1929 at least.)

73. Details from the sales of the Duke of Devonshire's land in 1919, from the Earl of Ilchester's Somerton Estate in 1920 and of Glebe Lands at High Ham in 1934 all identify parcels of land served by the network of roads including the appeal routes. None of the documents specifically refer to the land being served by private rights of way, nor does any of the land sold include any part of these lanes.
74. Mrs Masters points out that these were clearly not produced for the purpose of establishing highways and carried a disclaimer against accuracy. On this, I tend to agree with her and with SCC that it is difficult to draw any firm conclusions one way or the other.
75. A 1941 Ministry of Agriculture survey sought to establish current agricultural use with a view to increasing food production. Whilst the appeal routes were excluded from adjacent land holdings, it seems clear that the primary purpose was not to establish the status of any lanes providing access to farm land. I therefore attribute very little weight to these records.
76. Turning lastly to the Council's own highway records, it is important to distinguish between those which were compiled to record liability for maintenance at the public expense (the County Road records) and those which provide a record of the public's rights (the definitive map and statement).
77. In 1929 when responsibility for maintenance of highways transferred to the County Councils, the 'handover map' recorded those highways where liability was to change. None of the three appeal routes were shown on the relevant handover map; neither is the remaining part of Western Gate Road which is now a publicly maintainable highway, yet the continuation of Underwood Lane (Woodbird Hill Lane) is recorded.
78. A schedule of roads in the Parish of Pitney (said to date also from 1929) includes those same sections which are currently recorded as publicly maintainable highways but are referred to as "Underwood Road" (Woodbirds Hill Lane), "Lower Underwood" (eastern end of Underwood Lane to Touch Lane) and "Dyers Piece Lane" (Western Gate Road south of Route X).
79. However none of the routes at issue in these appeals appear in either these records or subsequent County Roads records compiled in 1930 or 1950, nor in the current highway records.
80. This raises a question over how some parts of Underwood Lane and Westerngate Road came to be recorded as publicly maintainable in 1929. Over a century earlier the Inclosure Commissioner had set out Western Gate Road, placing burden of maintaining this "private carriage road" on the "owners and proprietors for the time being ...".
81. Mrs Masters helpfully points out that the 1835 Highways Act introduced the provision for "adopting" roads (which were not already publicly maintainable highways) through a legal process. Any highways existing in 1835 would automatically be maintained by the public purse and any previously private roads could be adopted. She argues that there is no evidence any of the three disputed ways have acquired public status (as a vehicular highway or bridleway) through long unchallenged use but recognises that these were all recorded on the definitive map and statement in the 1950s as footpaths.

82. In fact when initially surveyed in 1950 in preparation for the first definitive map, each of these routes was recorded by local surveyors as a "CRB" – a Carriage Road used mainly as a Bridleway. Throughout the subsequent statutory processes, each route came to be definitively recorded as a public footpath.
83. Mrs Masters argues that this is significant and that nothing has been produced to show that this process was in error or reached an incorrect conclusion. However, as I noted above in paragraphs 12 - 14, there are documents now submitted which would not have been available during the 1950s, most significantly the 1910 Finance records.
84. In conclusion, the picture which emerges from the early twentieth century records suggests three lanes with the reputation of being privately maintainable all-purpose public roads over which use had gradually declined to the point where only pedestrians, cattle and farm vehicles were regular users.

Summary

85. SCC contends that there may have been use of these routes for at least 200 years but that use was private not public. Mrs Masters argues that the cumulative effect of nothing is still nothing and that negative evidence cannot be gathered together to prove a positive result. In her view the Finance Act records have no supporting evidence. Yet the appellant submits there is ample evidence to support her three claims.
86. On balance, I consider the combination of the 1901 Object Book (indicating the appeal routes were believed to be public roads) and the 1910 Finance Act plans in particular lean towards a conclusion that the public had acquired a full right of way over each one over the intervening century since the Inclosure Award acknowledged (but did not create) the public's rights over all three.
87. To conclude, in my assessment, and within the limits of the information provided, I am satisfied that the evidence leaves the balance of probability quite finely balanced but just tipped in favour of all three routes being vehicular highways. The effect of the 2006 Act will therefore now result in the status of each way being recorded as 'restricted byway'.

Conclusion

88. Having regard to these and all other matters raised in the written representations I conclude that the three appeals should be allowed.

Formal Decisions

FPS/G3300/14A/10: Dyers Piece Lane (Route Y)

89. In accordance with Paragraph 4(2) of Schedule 14 to the 1981 Act, Somerset County Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area by upgrading to restricted byway the route of Footpath L23/7 as requested by the application dated 11 December 2008.

FPS/G3300/14A/11: Underwood Lane (Route Z)

90. In accordance with Paragraph 4(2) of Schedule 14 to the 1981 Act, Somerset County Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area by

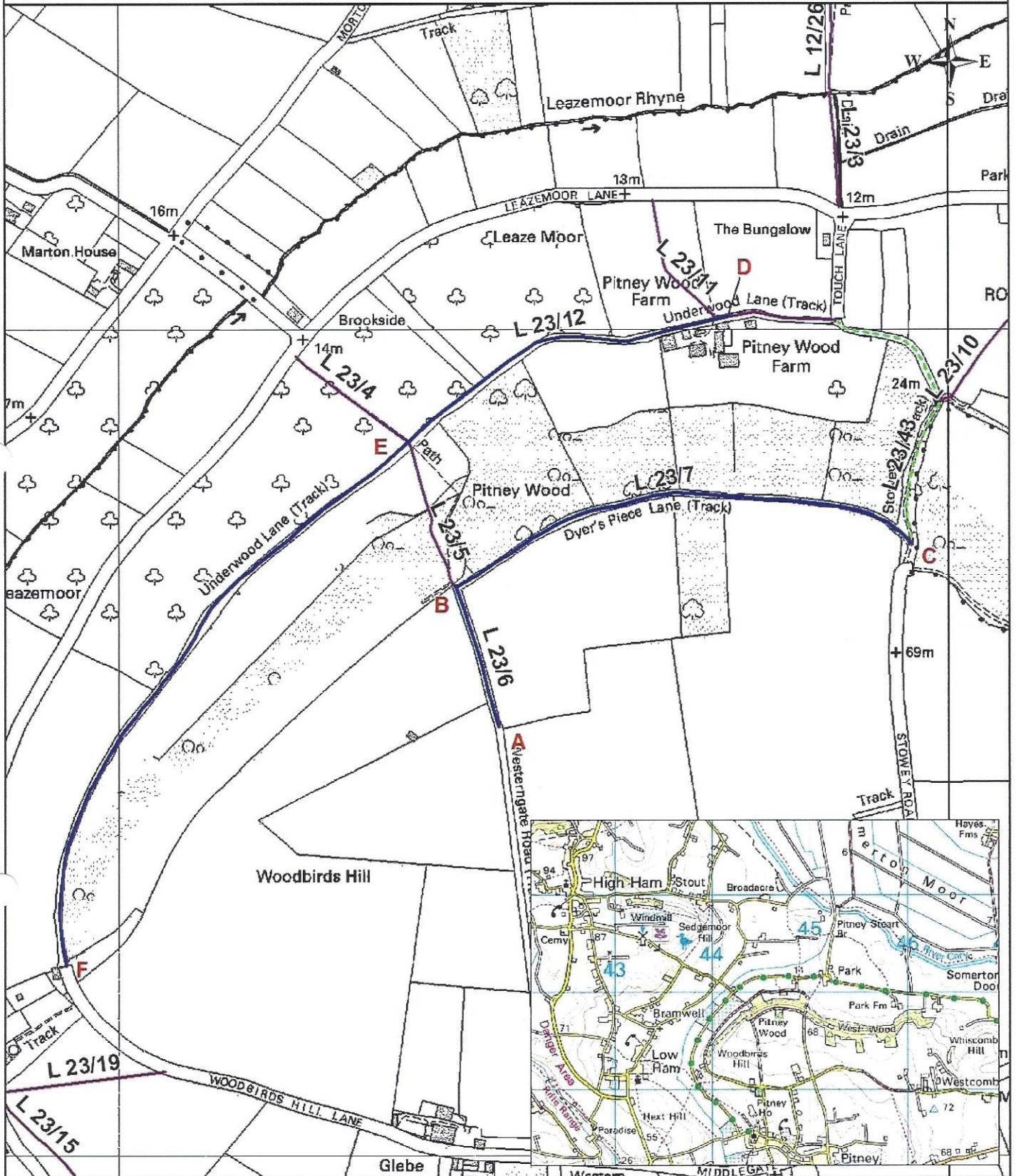
upgrading to restricted byway the route of Footpath L23/12 as requested by the application dated 11 December 2008.

FPS/G3300/14A/12: Westerngate Road (Route X)

91. In accordance with Paragraph 4(2) of Schedule 14 to the 1981 Act, Somerset County Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area by upgrading to restricted byway the route of Footpath L23/6 as requested by the application dated 11 December 2008.
92. These decisions are made without prejudice to any decisions that may be issued by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

Sue Arnott

Inspector



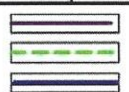
SOMERSET



County Council

Parishes: Pitney
 District: South Somerset
 Date: 02/02/2015
 Drawing No: H007-2015
 Drawn By: MHardwill
 Centre Grid Ref: 351885 132912
 Scale: 1:3000

Definitive Footpath
 Restricted Byway
 Alleged Restricted Byway



Wildlife & Countryside Act 1981 Section 53

ALLEGED RESTRICTED BYWAY OVER FOOTPATHS
 L 23/6, L 23/7 & L 23/12

The precise line of a Right of Way can only be determined by reference to the Definitive Map (1:10560 scale) and the attached plan has been produced by transposing the Rights of Way Definitive Map onto a larger scale. The County Council can accept no responsibility for any error or inaccuracy which may arise from the transposition of the Rights of Way Definitive Map to a different scale.