

Penderfyniad ar y Gorchymyn

Ymchwiliad a gynhaliwyd ar 07/02/17
Ymweliad â safle a wnaed ar 08/02/17

gan Susan Doran BA Hons MIPROW
Arolygydd a benodir gan Weinidogion Cymru
Dyddiad: 13/06/17

Order Decision

Inquiry held on 07/02/17
Site visit made on 08/02/17

by Susan Doran BA Hons MIPROW
an Inspector appointed by the Welsh Ministers
Date: 13/06/17

Order Ref: K6920/W/2016/516208

The Welsh Ministers have transferred the authority to decide this Order to me as the appointed Inspector.

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Caerphilly County Borough Council (Restricted Byway No. 367 in the Community of Abercarn) Definitive Map & Statement Modification Order No. 2 2014.
- Caerphilly County Borough Council submitted the Order for confirmation to the Welsh Ministers.
- The Order is dated 25 November 2014 and there were 3 objections outstanding at the commencement of the local inquiry.
- The Order proposes to modify the Definitive Map and Statement for the area by downgrading a Restricted Byway to a Footpath as shown in the Order plan and described in the Order Schedules.

Summary of Decision: The Order is not confirmed

Procedural Matters

1. I made an accompanied site visit following the close of the Inquiry with representatives of Caerphilly County Borough Council ("the Council"), Dr McGregor, and Mr Bland and Mrs Thomas of the Open Spaces Society ("OSS"). Mr Roberts and Mr Evans were present for part of this visit.

Legal Submission

2. At the commencement of the Inquiry, Mr Bland, representing the OSS, submitted that the Order could not be confirmed.
3. The Order route, Restricted Byway 367, was formerly recorded on the Council's Definitive Map and Statement ("DMS") as a Road Used as a Public Path ("RUPP")¹. Further to the Countryside and Rights of Way Act 2000 ("the 2000 Act"), all RUPPs were automatically reclassified as restricted byways under the provisions of Sections 47 and 48 of that Act with effect from 11 May 2006, this being the commencement date in Wales. Therefore it was submitted that the Order route could not be downgraded since the 2000 Act provided conclusive evidence of restricted byway rights over the way.

¹ The DMS originally compiled by Monmouthshire County Council recorded RUPPs as 'Cartroad Footpaths' ("CRF") and 'Cartroad Bridleways' ("CRB"). However, the terms CRF and CRB have no legal status, the correct legal designation being RUPP.

4. In support of this argument, the OSS cited Defra guidance², to which the Council responded, also referring to the same guidance. Having considered the submissions from the parties, I determined to proceed with the Inquiry without prejudice to what I may decide having given further consideration to the matter.
5. Section 47 of the 2000 Act provides that all ways shown in a DMS as RUPPs immediately prior to commencement shall be treated instead as shown as restricted byways. The 2000 Act enables restricted byways to be upgraded (Section 48(6)), and provides that a restricted byway that was formerly a RUPP may be deleted if it can be shown that no right of way existed and it was wrongly included in the DMS (Section 48(3)). However, neither is argued here. The Council's case is that the Order route was incorrectly recorded as a CRF (or RUPP) and should have been recorded as a footpath: if so, it would not have been reclassified as a restricted byway in 2006.
6. The Defra guidance does not apply in Wales. Welsh Government Guidance for Local Authorities on Public Rights of Way, October 2016, concerning restricted byways that were formerly RUPPs provides at Paragraph 5.17, *"Where, with regard to former roads used as public paths, a way is shown in the Map with the restricted byway notation, but is described in the Statement as a highway of another description, authorities should establish the correct status of the way and, in accordance with their duty under s.53 of the WCA 1981, modify the Map and Statement appropriately. Any applications for Orders to modify the status of a road used as a public path which were made before November 2006 are to be determined under the WCA 1981, subject to s.67 of the NERC 2006."* The Order route is described as a 'footpath', 'cartroad' and a 'CRF' in the Definitive Statement and is currently classified as a restricted byway.
7. Having regard to the above, I shall determine the Order and consider the evidence adduced in the light of the appropriate criteria described above, and further as set out below.

The Main Issues

8. The Order has been made in consequence of an event specified in Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), the discovery of evidence which, when considered with all other relevant evidence available, is sufficient to show that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description and that the DMS require modification. In this case, the highway in question is recorded in the DMS as a restricted byway and the Order seeks to downgrade it to a footpath.
9. In reaching my decision I also have regard to the Welsh Government Guidance which sets out at paragraphs 5.49 to 5.54 the relevant issues when downgrading ways which are shown in the DMS. Paragraph 5.50 states, *"Notwithstanding the clear starting point in relation to the possible deletion or downgrading of a right of way, the powers in s.53(3) of the WCA 1981 include the making of orders to delete or downgrade rights of way shown on the Definitive Map and Statement in cases where the evidence shows that rights did not exist at the time they were first shown on the map..."*. Paragraph 5.51 continues, *"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*

² Department for Environment, Food and Rural Affairs, Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways, Version 5, May 2008, at paragraph 99

equally apply to the downgrading of a way with "greater" rights to a way with "lesser" rights – 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 or considered in a previous application*
- the evidence must be of sufficient substance to displace the presumption the Definitive Map is correct*
- the evidence must be cogent*
- there must be positive evidence of any erroneous recording*

10. I also take into account the Trevelyan judgement³ and the following statement by Lord Phillips M.R., *"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 such evidence 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 into the balance, if it is to outweigh the initial presumption that the right of way exists"*.

11. The evidence adduced in this case is documentary and witness evidence. As regards the documentary evidence, Section 32 of the Highways Act 1980 ("the 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.

Reasons

Whether there is new evidence

12. The Council relies on evidence provided by the current landowners, and by local residents, that they were not aware of any public rights of way crossing Cefn Pennar Farm. Dr McGregor has owned Cefn Pennar Farm since the 1990s and Mr and Mrs Roberts farm some of the adjoining land. The Council contends that the evidence of local witnesses who knew and worked at the Farm in the 1950s is 'new'.

13. Knowledge and evidence about the period post-dating the drawing up of the DMS in the early 1950s is not relevant to my determination of the Order, but that concerning the period prior to the relevant date of the DMS, 1 July 1952, is relevant.

14. I shall consider the 'new' evidence adduced along with all of the evidence available to me against the tests set out above.

Assessment of the evidence:

The documentary evidence

³ Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001]

15. The Order route is shown on the 1846 **Tithe Map** for the Parish of Mynyddislwyn. A bounded track of irregular width runs between the Ty-Coedcae Road and Cefn Pennar Farm, and to the south of the Farm a double pecked line runs to Pant-y-resk Road. It is gated at either end, and ungated along its length. The Apportionment describes the northern section as a 'Road' and the southern section as 'Arable'.
16. The Council considers that no positive inference as to its status can be deduced from the records and the Order route could be a private or occupation road, leading solely to the Farm. I note, however, that the Apportionment distinguishes 'roads' from 'occupation roads', although both public and private roads were capable of reducing the productiveness of land for the purposes of tithe assessment. Land holdings to the north of the Farm were in different ownerships. The southern part of the Order route passing through a field was considered capable of producing a crop.
17. The **Ordnance Survey** ("OS") Drawing of 1813 shows the northern section of the Order route as a bounded track continuing east from the Farm as a double pecked line which the OSS suggests was the precursor to the present Pant-y-resk Road. The latter first appears on the OS 1833 1-inch map.
18. OS maps for 1873-1888, 1900-1904 and 1919-1920, like the Tithe Map and early OS maps show the route between the Ty-Coedcae Road and Cefn Pennar Farm. South of the Farm the path is narrower than the section to the north of the Farm, but this is consistent on all the mapping. The 1873-1888 map shows the southern section initially bounded then as parallel pecked lines to the Pant-y-resk Road in similar fashion to other tracks shown on the map in and around the Farm: comparable in terms of physical appearance and width. By 1919-1920, the OS mapping shows a new access track has been created to the Farm from the Pant-y-resk Road which is depicted in the same manner as the Order route between that road and the Farm. Accordingly, both appear from their depiction by the OS Surveyor as capable of accommodating the same type of traffic or use. It is not until after the base map used for the 1951 Parish Survey (paragraph 22) that OS map extracts provided (the earliest dated 1958-1973) show the southern section of the Order route narrower and annotated by the OS surveyor 'FP' denoting a footpath. All of the pre-1952 OS maps indicate the existence of gates at various points along the Order route.
19. The Area Book accompanying the 1880 OS map records the section north of the Farm as a 'road'. However, neither this designation nor the OS maps themselves are of assistance in establishing the Order route's status, but they do provide evidence as to its physical characteristics.
20. An **aerial photograph** dated 1940 shows the track to the Farm from the north, but the detail around the Farm itself is unclear. A lighter line is evident at and consistent with the location of both the Order route from the Pant-y-resk Road and of the 'new' access track to the Farm. Photographs from 1945 and 1951 clearly show the southern section as well as a 'short cut' from the northern section crossing a field to the Farm. None of these photographs appears to show any impediment to the Order route.
21. The **Survey** to record paths for inclusion in the DMS was undertaken by Abercarn Urban District Council ("UDC"). An officer, Mr J Games, surveyed the Order route on 6 June 1951. It is described in the Schedule as a 'CRF', *"From the junction with the Pant-y-resk Road this path goes N. along a footpath and passes the farm the road is then a cartroad up the junction with the road leading to Ty-Coedcae"*. The reason for claiming it was given as "Usage". The Parish Map shows both the Order route and the 'new' Farm access track were marked for inclusion, however, the latter is crossed out

and the former ticked together with a reference number. No path furniture is recorded along its length although OS mapping indicates it was gated at either end. Presently there are gate posts in place at both ends of the Order route which appear to be of some age, but this does not necessarily mean these have always been in situ.

22. The term CRF was used to denote a public carriage or cart road or green (unmetalled) lane mainly used as a footpath. The Council contends that in recording it as a CRF, the surveyor believed it was used as a footpath rather than as a bridleway, or CRB. However, the term referred to the 'main' use, thus use other than by the public on foot cannot, in my view, be ruled out.
23. The **DMS** proceeded through Draft and Provisional stages before it was finalised, with opportunities for objections to be made by the public (at the Draft Map stage) and by landowners. An extract from the Provisional Map, the Council contended, shows the Order route north of Cefn Pennar Farm marked with a green dashed line and to the south of the Farm with a black dashed line, which they say indicates a difference in status was recognised at the time. Consequently, they said, an error was made as the way should have been registered as two separate paths: to the north of the Farm as a CRF and to the south as a footpath; or alternatively as a footpath throughout.
24. The 1950 Regulations⁴ provide that "*Rights of way, or alleged rights of way shall be shown on a rights of way map in the following manner – Footpath, by means of a purple line. Bridleway, by means of a green line. Road used as a public path, by means of a broken green line.*"⁵ The Provisional Map shows the appropriately coloured symbol was used for footpaths and RUPPs (there being no bridleways depicted on the extract provided). Accordingly, it is unclear what, if anything the black marking (which seems to continue as a 'smudge') was intended to represent. In any event, if those drawing up the Provisional Map believed there was an error which they were highlighting, and I can see no evidence to demonstrate this (for example there is none that any objections were made by the landowners to the status), the route appeared and was annotated on the Definitive Map as a RUPP throughout its length.
25. In addition, evidence adduced by the OSS points to a thorough and detailed procedure undertaken by the UDC and Monmouthshire County Council in preparing, producing and advertising the DMS, and a lack of any evidence of a procedural error.

The witness evidence

26. Mr Kendall gave evidence to the Inquiry that as a child aged 10 or 11 in 1954/5 he had worked for Mr Birtles at Cefn Pennar Farm during the summer holidays and at other times, and had not known of the right of way as he had not seen anyone use it. Both he and Mr Roberts, who had also known Mr Birtles from around the same time, recalled that members of the Birtles family used the southern section of the Order route to get to Pant-y-resk Road; the children to go to school. The Council's Committee Report indicates that Mr Kendall believed use of the northern section of the Order route was private in connection with the Farm.

⁴ The National Parks and Access to the Countryside Regulations 1950 SI 1950 No 1066, at paragraph 5

⁵ These were later amended in 1963, SI 1963 No 968 to include footpaths to be shown by a broken black line with short intervals

27. Mr Roberts recalled at the Inquiry that in the 1950s Mr Birtles had a van to take milk churns to the Pant-y-resk Road, and that the track was used to access the fields for hay.
28. The Council's Committee Report refers to a further witness, Mr Baker, who worked in the area "many years ago" and had not seen horses on the southern section of the route, and only those kept by Mr Birtles on the northern section.
29. Dr McGregor had been told about the property when it was a working dairy farm by Mr Birtles' daughter. Features such as underground wooden water pipes and two large Victorian water tanks, in Dr McGregor's view, made it unlikely that vehicles would have crossed over them. The public are said to have followed the Order route from the Pant-y-resk Road to Cefn Pennar Farm on foot to collect milk.
30. Mr Evans spoke at the Inquiry of his father's use of the Order route. A signed written statement from Mr Evans senior referred to his having taken horses along it prior to Mr Birtles' occupation of the Farm.

Topography

31. The Council considered the width of the route south of the Farm suitable only for use on foot and insufficient for horse riders or a horse and cart; furthermore that the land rose steeply up from the Pant-y-resk Road to Cefn Pennar Farm. In addition, the route is uneven and the angle north of the Farm too awkward for use with a horse and cart; and the definitive alignment was impeded by a rocky outcrop.
32. South of the Farm the route is overgrown, making it difficult to discern features associated with it. However, no width is defined for any part of the Order route in the Survey Schedule or DMS, and the OS maps considered above (for example the 1919-1920 edition) show a feature of similar width to the Farm's 'new' vehicular access. Several other routes in the area available for equestrian and/or restricted byway use were calculated by the OSS to be of a similar gradient, and in one case steeper than the southern section of the Order route.
33. There has been some renovation work at the Farm and it is possible that the features on the ground today do not reflect those in place in the early 1950s. No evidence has been adduced to support the contention regarding the angle of the track north of the Farm. The OS map evidence shows a 'short cut' to reach it from the track, which could for example reflect convenience for the landowner, or the use of vehicles such as tractors referred to by some of the witnesses.
34. I do not find that the evidence adduced demonstrates the route was too narrow for use other than on foot (indeed Mr Evans senior's written evidence (paragraph 30) suggests otherwise), or that use by other categories of user was impeded elsewhere when the DMS was compiled. Moreover, the topography of the Order route was known when it was added to the DMS with no impediments to use recorded in 1951.

Whether the evidence (when considered with all other relevant evidence available) is of sufficient substance to displace the presumption that the definitive map is correct, whether it is cogent, and whether there is positive evidence of an erroneous recording

35. Evidence heard at the Inquiry from those who had worked at Cefn Pennar Farm post-dates 1952, and therefore sheds no light on the circumstances at the relevant date of the DMS. However, even if it related to 1951/2 (as suggested in the Council's

Committee Report), that witnesses were unaware of the existence of a public right of way or did not see anyone use it, other than the landowners, is not evidence that no public right of way existed, or that use by the public was only on foot. The basis for the UDC claiming the public right of way in 1951 was 'usage'. Accordingly, there must have been appropriate investigations and/or evidence available to them at the time to support the addition. With the passage of time, this is no longer known or available.

36. I find nothing in the documentary evidence to support the view that the southern section of the Order route could only have been a footpath. In particular, the purpose of the black line on the Provisional Map is, in my view, inconclusive, such that it cannot be determined that a mistake had been made on this basis. Neither is there any evidence that the Order route was erroneously recorded as a result of the definitive map process. The evidence adduced by the OSS demonstrates the proper procedures were followed throughout. The only possible error put forward by the Council is that the route was recorded as a 'CRF' rather than as a 'RUPP'. This was not unique to the Order route as the terms CRF/CRB were widely adopted across its DMS. As indicated above, these terms have no legal basis, the correct legal term being 'RUPP'.
37. Having regard to the tests set out above, I conclude that the evidence adduced is insufficient to displace the presumption that the DMS is correct. I do not find the evidence to be cogent, nor do I conclude there is evidence of an erroneous recording.
38. In considering specifically the Order route's description as part 'footpath' part 'cartroad' and subsequent recording as a CRF/RUPP, now a restricted byway, having regard to the documentary and witness evidence, I reach the view that whilst the description appears inconsistent, the evidence adduced and considered above (for the reasons given) is insufficient for me to conclude that the southern section (or the whole) of the Order route should be recorded only as a footpath.

Other matters

39. I understand that when the Council's Rights of Way Cabinet supported the making of the Order that is before me for determination, at the same time they approved the making of a diversion order under Section 119 of the 1980 Act. The diversion of the Order route is not before me and I have attached no weight to it in my decision.
40. Neither have I taken into account submissions concerning the desirability, suitability or need for the route for particular types of use, including horse riding; recent events relating to the accessibility or otherwise of the Order route to the public; or matters concerning a permissive alternative route, as none are relevant to my determination of the Order under the relevant tests.

Conclusion

41. Having regard to these and all other matters raised at the Inquiry and in the written representations I conclude that the Order should not be confirmed.

Formal Decision

42. I do not confirm the Order.

S Doran

Inspector

APPEARANCES

For the Order Making Authority :

Mr J Williams	Solicitor, Caerphilly County Borough Council
who called	
Mrs J Piper	Countryside and Rights of Way Support Officer

Supporters :

Dr A McGregor	Landowner
Mr G Roberts	Landowner
Mr B Kendall	

Objectors :

Mr P Bland	<i>representing</i> The Open Spaces Society
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who called	
Mrs M Thomas	
Mr J Derrick	
who called	
Mr M Evans	

DOCUMENTS

1. Legal submission concerning the Reclassification of Roads Used as Public Paths, together with extracts from 'Rights of Way A Guide to Law and Practice' 4th edn, Riddall and Trevelyan, and Defra guidance, Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways, Version 5, May 2008, submitted by the Open Spaces Society
2. Supplementary documents OSS 29-32, submitted by the Open Spaces Society
3. National Parks and Access to the Countryside Regulations 1950 SI 1950 No 1066, submitted by the Open Spaces Society
4. Aerial photographs dated 12 May 1951, 1 June 1962 and 22 June 1974, submitted by Caerphilly County Borough Council