

# Order Decision

Site visit on 4 August 2016

**by Mark Yates BA(Hons) MIPROW**

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

**Decision date: 27 September 2017**

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## Order Ref: FPS/U1050/7/100M

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Derbyshire County Council (Byway Open to All Traffic along Derby Lane – Parish of Monyash) Modification Order 2015.
- The Order was made by Derbyshire County Council ("the Council") on 23 April 2015 and proposed to add a byway open to all traffic ("BOAT") to the definitive map and statement, as detailed in the Order Map and Schedule.
- The Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
- In accordance with Paragraph 8(2) of Schedule 15 to the 1981 Act I have given notice of my proposal to confirm the Order with modifications.

## Summary of Decision: The Order is confirmed.

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### Procedural Matters

1. This decision should be read in conjunction with my interim decision ("ID") of 9 November 2016, in respect of the Order, which outlined the main issues to be addressed, an assessment of the evidence and my conclusions.
2. I proposed to confirm the Order subject to modifications involving the status of a section of the route claimed ("the claimed route"). The modifications would lead to a proportion of the claimed route being recorded as a restricted byway rather than a BOAT. Two relevant objections were received to the proposed modifications from the Council and Mr Kind<sup>1</sup> on the ground that the whole route should be recorded as a BOAT. Mrs Mallinson opposed the recording of the claimed route as a BOAT and supports the modifications proposed in my ID.
3. It was originally proposed to hold a hearing into the objections made to the ID. However, I subsequently took the view that I did not consider this to be necessary. Following consultation with the relevant parties, it was decided that this matter could be determined by the written representations procedure.

### Main Issues

4. The issue to be determined is the extent to which the claimed route should be recorded as a BOAT in the definitive map and statement. This arises out of provisions contained in the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"). The 2006 Act has the effect of extinguishing unrecorded public rights of way for mechanically propelled vehicles unless one or more of the exemptions outlined in Section 67(2) or (3) of the Act is applicable.

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<sup>1</sup> On behalf of the Trail Riders Fellowship

## Reasons

5. The Council relies upon the exemption found in Section 67(2)(b) of the 2006 Act. This specifies that a public right of way for mechanically propelled vehicles is not extinguished if immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under Section 36(6) of the Highways Act 1980 ("the 1980 Act"). This list is commonly known as the list of streets.
6. The Council's list of streets is kept in map form. Whilst Mrs Mallinson draws attention to the comments made by a Council Officer (Mr White), the Council's position is that since the commencement of the 2006 Act this map has been held electronically rather than in paper form. In the absence of clear evidence to the contrary, I consider that I should accept the Council's position that only the electronically held version was relied upon for the purpose of Section 36(6) of the 1980 Act immediately prior to the commencement of the 2006 Act. It has not been shown that there was more than one map at any one time that officially served as the record of maintained highways.
7. There may well be minor variations between the alignments of ways transposed onto the different versions of the map of maintained highways that have been produced over the years, whether in paper or electronic format. Nonetheless, it is apparent that this way has been consistently recorded as being maintained at public expense. A pop up box within the electronic version identifies the claimed route by its historical name (Derby Lane).
8. It is not disputed that the electronic map provided shows the maintained highway varying from the route shown on the Order Map in places over the southern section of the claimed route. When magnified to a certain extent, the way is shown on the boundary or slightly into the adjoining field. It was this issue that led me to conclude that the exemption in Section 67(2)(b) of the 2006 Act is not applicable to the southern section of the claimed route.
9. The Council and Mr Kind have sought to persuade me that I was wrong to follow a literal interpretation of the 2006 Act with reference to certain legal judgments. In particular, Mr Kind has provided a copy of the recent judgment from the case of *Trail Riders Fellowship v Secretary of State for the Environment, Food and Rural Affairs 2017* ("TRF"). This case directly impacts upon the issue that I need to determine and involved a challenge to the decisions made by another Inspector, which Mrs Mallinson initially relied upon. The TRF case was circulated to the other parties and they have had the opportunity to comment on it.
10. It is apparent from reading the TRF judgment that the facts are materially the same as the matter I need to determine in relation to the map used to show highways maintained at public expense. Mr Justice Holman held in the TRF case that the purpose of the list of streets is to identify the ways maintained at public expense and not to precisely delineate them. The judge considered the Inspector's conclusion to be perverse and not one intended by Parliament. He quashed the Inspector's decision in light of this matter. I therefore consider that it would not be appropriate for me to confirm the Order with the modifications proposed in my ID.

11. I do not share Mrs Mallinson's interpretation that paragraph 30 of guidance issued by Defra<sup>2</sup> indicates that the exemption in Section 67(2)(b) of the 2006 Act is applicable to ordinary roads. Further, my observations of the site indicate that the character of the claimed route corresponds more to the definition of a BOAT in Section 66(1) of the 1981 Act, namely *a highway over which the public have a right of way for vehicular and all kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used*".
12. Nothing has been provided to suggest that I was wrong to conclude in the ID that the claimed route is a vehicular highway. However, in light of the *TRF* case, I consider that the exemption in Section 67(2)(b) of the 2006 Act is applicable to the whole of the route. In the circumstances, the Order should record the claimed route as a BOAT and there is no need for me to address the additional matters raised by the parties.

### **Conclusion**

13. I conclude that the Order should be confirmed as made rather than with the proposed modifications included in my ID.

### **Formal Decision**

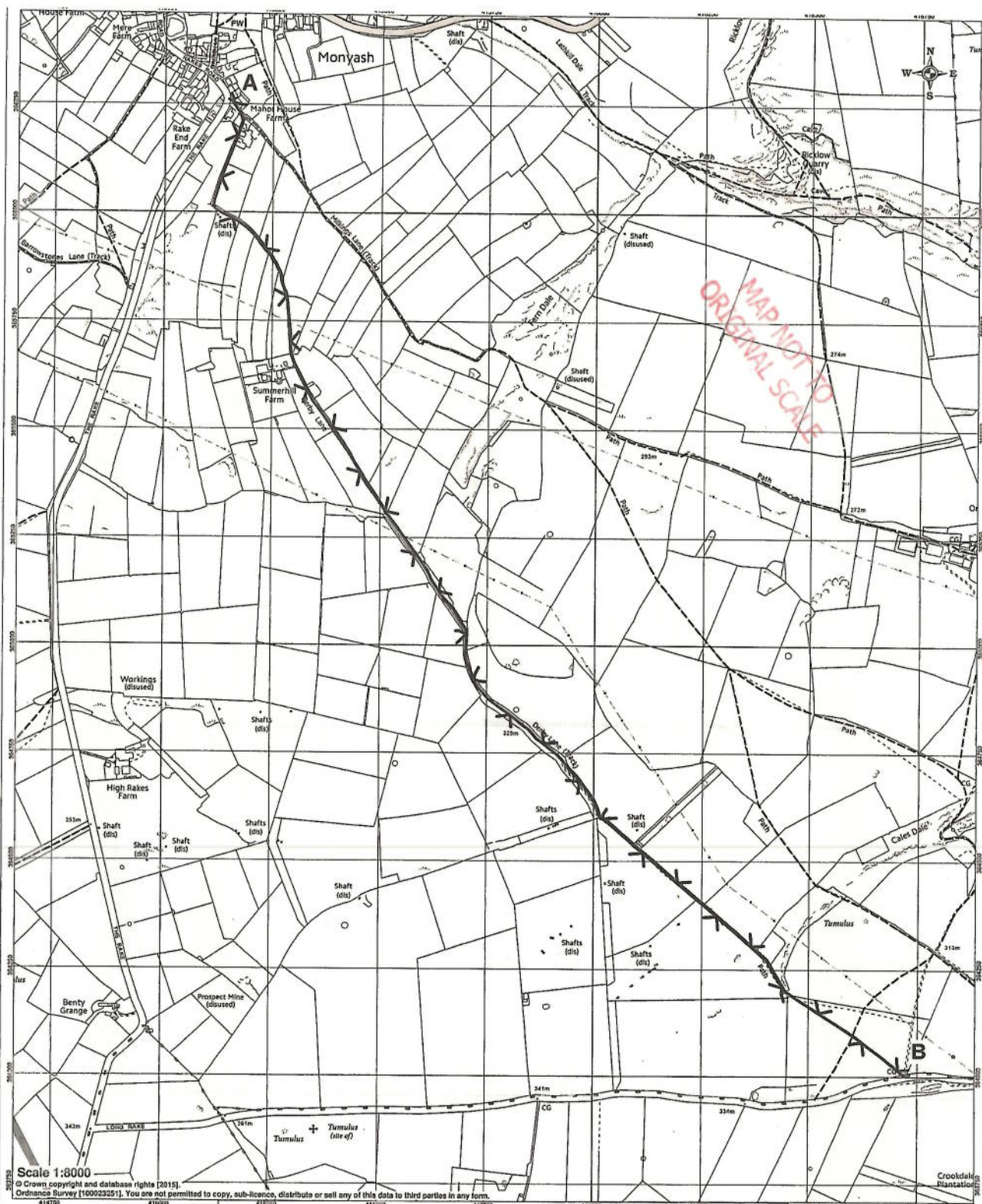
14. I confirm the Order.

*Mark Yates*

**Inspector**

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<sup>2</sup> Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways' – version 5 of May 2008



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Ref: ET/SR/X3303/Order/2015

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County Council  
Improving life for local people

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Produced by Public Rights of Way on 15 July 2014

### Wildlife and Countryside Act 1981 Section 53

**The Derbyshire County Council (Byway Open to All Traffic  
along Derby Lane - Parish of Monyash)  
Modification Order 2015**

key: Byway Open to All Traffic  
to be added  
Existing footpaths

