
Order Decision

Hearing held on 26 April 2017

Site visit made on 25 April 2017

by Alan Beckett BA MSc MIPROW

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

Decision date: 12 May 2017

Order Ref: FPS/J1155/7/114

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Devon County Council (Restricted Byway No. 50, Sandford) Definitive Map Modification Order 2014.
- The Order is dated 20 August 2014 and proposes to modify the Definitive Map and Statement for the area by adding a restricted byway as shown in the Order plan and described in the Order Schedule.
- There was 1 objection outstanding at the commencement of the hearing.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a public local hearing into the Order at the Congregational Hall, Church Street, Sandford on Wednesday 26 April 2017 having made an unaccompanied inspection of the restricted byway the evening before. I was not required to conduct a further inspection of the Order route following the close of the hearing.
 2. In November 2005 the Devon Group of the Trail Riders Fellowship made an application to Devon County Council ('the Council') to record the Order route as a Byway Open to All Traffic ('BOAT'). The application did not comply with the provisions of paragraph 14 (1) of the 1981 Act as notice of the application was not served on the owners of the land crossed by the Order route. The application does not therefore provide an exception to the extinguishment (under section 67 (1) of the Natural Environment and Rural Communities Act 2006 ('NERCA') of any right the public had to use the Order route with mechanically propelled vehicles ('MPVs').
 3. In any event, even if the application had been fully compliant, the exception found in section 67 (3) (1) of NERCA would be inapplicable in this case as the application was made after the 20th January 2005 – the cut-off date beyond which applications for BOATs to be added to the definitive map and statement do not engage the section 67 (3) (1) exception.
 4. Nor does it appear to me that any of the exceptions described in Section 67 (2) of NERCA applies to the Order route. Consequently, if I were to conclude that the evidence shows, on a balance of probabilities, that public vehicular rights existed in the past, any right the public had to use MPVs on the Order route would have been extinguished on 2 May 2006 by virtue of Section 67 (1) of NERCA. However, on 2 May 2006 sections 47 to 50 of the Countryside and Rights of Way Act 2000 ('CROWA') came into force. The combined effect of
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these provisions is that if the Order route had been a public carriageway in the past, it would now carry Restricted Byway rights (by virtue of Section 48 of the 2000 Act); that is, a public right of way for vehicles other than mechanically propelled vehicles, and should be recorded as such on the definitive map and statement.

5. Rights of way, with some exceptions, come into existence because they have been dedicated to the public by the owners of the land over which they run. There is no evidence of express dedication in this case. An inference of dedication may be drawn at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. I shall therefore consider whether the evidence discovered enables an inference of the dedication of public vehicular rights to be drawn.

The Main Issues

6. The Order was made under Section 53 (2) (b) of the 1981 Act, relying on the occurrence of an event specified in Section 53 (3) (c) (i). The main issue is therefore whether the evidence discovered, when considered with all other relevant evidence is sufficient to show, on a balance of probabilities that a right of way not shown in the definitive map and statement (namely a Restricted Byway) subsists between Henstill Cross and the public road at Lower New Buildings.
7. The Council's case was that an inference of dedication of a public carriageway over the Order route could be drawn at common law and that the evidence of use adduced was evidence of the acceptance of that inferred dedication. In the alternative, the Council submitted that the evidence of use of the route prior to 2012 when Mr Hutchings acquired the land was sufficient to demonstrate deemed dedication of a public bridleway under the provisions of section 31 of the Highways Act 1980 ('the 1980 Act').
8. Section 31 of the 1980 Act provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise. The Council submitted that if I was not persuaded that the route had been dedicated at some indeterminate point in the past as a public carriageway then consideration should be given to modifying the Order to record the route as a public bridleway.
9. Section 32 of the 1980 Act provides that in determining whether a way has or has not been dedicated as a highway, consideration can be given to any map, plan or history of the locality or other relevant document which is tendered in evidence, and weight can be given to each document as is considered necessary in the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.
10. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.

Reasons

Documentary evidence

11. Ordnance Survey mapping from the beginning of the nineteenth century shows the Order route as being enclosed by hedges or fences throughout its length. The Order route is depicted as being a similar width as those routes to which it connects and which are currently recorded as public roads or restricted byways. The earliest Ordnance Survey map submitted by the Council is the Old Series edition of 1809 and it is more likely than not that the Order route was in existence prior to the survey for the 1809 map being undertaken.
12. Small-scale Ordnance Survey maps of the late nineteenth and early twentieth centuries (Revised New Series 1899-1900 and Popular Edition 1919) show the Order route by means of solid double lines which corresponds with unmetalled roads and minor roads in the relevant keys.
13. The first edition 25-inch to 1-mile Ordnance Survey map of 1880-1890 and the second edition map of 1919 both show the Order route bounded by hedges or fences throughout its length. Although the route is not named on the maps, two features are identified, one being Henstill Cross (at point C on the Order plan) and the other being Hawkins Pool (at point D).
14. Ordnance Survey mapping at both the 1-inch to 1-mile and 25-inches to 1-mile scales produced during the mid-twentieth century depict the Order route in much the same way as the late nineteenth and early-twentieth century maps. The Order route is shown as running between physical boundaries throughout its length and appears to be ungated. The keys to the small-scale maps describe the Order route as being among '*minor roads in towns, drives and unmetalled roads*'.
15. Although Ordnance Survey maps do not provide evidence of the status of any way shown on them, they provide good evidence of the physical existence of the way at the time of the survey. In the case of the Order route, the maps demonstrate the existence since at least 1809 of an ungated, defined route which would have been capable of supporting public traffic.
16. The Order route is part of a route described in an 1810 list of parish roads compiled by the Surveyor of Highways as running "*From Higher New Buildings to Pidsley Lane through Yarmley 1 mile 3 furlongs and 16 poles*"¹. This description corresponds to the route leading from the Morchard Bishop road at New Buildings to Lower New Buildings, then north-east via the Order route and restricted byway 48 to Pidsley Hill, a distance of 2290 metres. The 1810 survey provides evidence that the Order route was considered to be part of the ordinary road network of the parish.
17. In 1837 the Surveyor of Highways noted that the total length of roads in Sandford was 39 miles 5 furlongs and 12 poles of which 13 miles, 3 furlongs and 10 poles were maintainable by private individuals. The Finance Act documents considered below suggest that the Order route was one of the roads which was privately maintainable. The Surveyor of Highways records from the nineteenth century provide evidence in support of the Council's contention that the Order route is a public carriageway.

¹ 2293 metres

18. The Sandford Tithe Map and Apportionment of 1839 shows the Order route as a lane running between defined boundaries on the same alignment as today. The Order route is also coloured in the same way as the current public routes to which it connects. The depiction of the Order route in this manner is highly suggestive of a route of a status equal to those roads to which it connects. Although the tithe commutation process was not principally concerned with the recording of public rights, these documents provide evidence of some weight that the Order route was considered to be a public carriageway in 1839.
19. In 1843 John Quicke of Newton House made an application to the Quarter Sessions for the diversion of a footpath which ran between Middle Henstill Estate and Lower New Buildings. The plan attached to the application shows the lanes in the vicinity of the diverted footpath with the southern part of the Order route being annotated "to Yarmley" with part of Restricted Byway 49 being annotated "from Burrow". The depiction of the Order route as a through route to Yarmley supports and reflects the evidence found in the 1810 Surveyor's list of parish roads and demonstrates that in 1843 the Order route was considered to be part of the ordinary road network of the parish.
20. The 1903 Ordnance Survey Object Name Book gives the authority for the correct spelling and description of Henstill Cross and Hawkins Pool on the large-scale Ordnance Survey maps as being Mr S Prodham, the Surveyor of Highways. The name Hawkins Pool was described as applying to "a hollow in parish road about 12 chains SE of Enfield". Point D on the Order plan is approximately 240 metres south-east of Endfield Farm. This entry in the Object Name Book provides evidence that the Order route was considered by the Surveyor of Highways to be part of the public road network in 1903.
21. On the 1910 Finance Act plans the Order route is shown as passing through hereditament 115 with the coloured boundary line of the hereditament being broken where the Order route meets the public road at Lower New Buildings, at Yarmley Lane and at the lane leading to Borough. The valuation field book notes that the site value of hereditament 115 was reduced by £500 due to the existence of public rights of way or user.
22. The field book also records that the "*Upkeep of Road between Hawkins Pool & Yarmley is a tenant's liability. Upkeep of Road from Borough to West Henstill is a tenant's liability, as also the Road from West Henstill to the Nursery 456*". Under the heading 'Fixed charges, Easements, Common Rights and Restrictions' the surveyor noted "*Road Occupation Road 1 mile repairable ratione tenurae P R Way £20 x 25 = £500.*" This additional information clearly describes the Order route as being a public way which was repairable by the occupier of the land and that the site value of the land was reduced as a result of that maintenance liability.
23. The field book entries together with the break in the hereditament boundary line on the Finance Act plan provide good evidence that the Order route was considered to be a public road at the time of the Finance Act 1910 survey.
24. The Order route was not included in the survey of public rights of way conducted by the parish council in 1950 under the provisions of the National Parks and Access to the Countryside Act 1949. On the parish survey map there were no annotations made to any of the enclosed lanes which were not recorded as county roads and the parish survey appears to have focussed

- solely on cross-field footpaths as neither bridleways nor RUPPs were proposed for inclusion in the draft map.
25. I heard from a number of local residents as to their use of the Order route. None of those present at the hearing had used the route with a motorised vehicle although regular and extensive use had been made on foot and on horseback prior to Mr Hutchings' purchase of West Henstill Farm in 2012.
26. The Council had received a total of 26 user evidence forms in relation to the Order route. These forms demonstrated use of the Order route on foot and on horseback with the earliest use being in the 1940s. Only one form provided any evidence of use with a motorised vehicle with one respondent claiming to have ridden the Order route on his motorcycle between 1986 and 1997.
27. Taken singly, none of the pieces of documentary evidence adduced provides a conclusive indication of the existence of public vehicular rights over the Order route, but taken collectively, I consider that the documentary evidence provides a persuasive case that the dedication of public vehicular rights between Henstill Cross and Lower New Buildings had taken place at some indeterminate point in the past. The documentary evidence demonstrates that the Order route was considered to be a public road as early as 1810 and that in the early part of the twentieth century the liability for the maintenance of that part of the route between Hawkins Pool and Henstill Cross lay with the occupier of the adjacent land.
28. I consider that the evidence of use found in the user evidence forms, together with the oral evidence of use given at the hearing demonstrates the continuing reputation of the Order route as a public right of way and that the use made of the route by members of the public represents the acceptance of the dedication of the route as a public way which had occurred at some date prior to 1810.
29. The surface of the Order route is unsealed and between D – C has a grass and earth surface whereas between E – D the Order route is a sunken lane and the surface appears to be bed rock in places. The bulk of the oral evidence I heard at the hearing was of recent equestrian and pedestrian use. These factors make the Order route more likely to be used by the public on foot and on horseback than with vehicles. Bearing in mind these points, I conclude that the character of the route is such that it fulfils the definition of a BOAT.
30. By virtue of Section 67 (1) of NERCA any public right to use mechanically propelled vehicles along the Order route was extinguished on 2 May 2006. Consequently the Order route cannot be recorded as a BOAT. However by virtue of section 48 of CROWA, the Order route can be shown in the definitive map and statement as a restricted byway to record those public carriageway rights which, on a balance of probabilities, have been dedicated at some indeterminate point in the past.

Other matters

31. Concerns were expressed about the future management and maintenance of the route if it were recorded as a restricted byway and Mr Hutchings expressed his concerns regarding the failure of some users to clear up after their dogs had fouled his fields. The future management and maintenance of the Order route is a matter for the Council as the Highway Authority whereas dog fouling

is a matter for the District Council; neither issue is within my remit and I have not taken these matters into consideration in reaching my decision.

32. Mr Hutchings cleared the E – D section of the Order route in order to provide vehicular access to his fields from the south. It was suggested that if MPV rights had been extinguished then such access would not be possible in the future. I do not agree that this would be the case. If Mr Hutchings accesses his fields pursuant to a private vehicular right over E – D, the recording of the route as a restricted byway would have no impact upon that private right; public and private rights can readily co-exist over the same route.
33. If, on the other hand, Mr Hutchings was using E – D to access his fields because it was an old public road then his right to do so is preserved by Section 67 (5) of NERCA which provides for the creation of a statutory private right of access for mechanically propelled vehicles over those routes where the public MPV right has been extinguished under section 67 (1). By confirming the Order route as a restricted byway, Mr Hutchings' will have the benefit of a statutory private MPV right under the provisions of section 67 (5).

Conclusions

34. Having regard to these and all other matters raised at the hearing and in the written representations I conclude that the Order should be confirmed.

Formal Decision

35. I confirm the Order.

Alan Beckett

Inspector

APPEARANCES

For Devon County Council

Mrs T Weeks	Definitive Map Review Officer, Public Rights of Way, Lucombe House, County Hall, Topsham Road, Exeter, EX2 4QD.
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Interested parties in support of the Order:

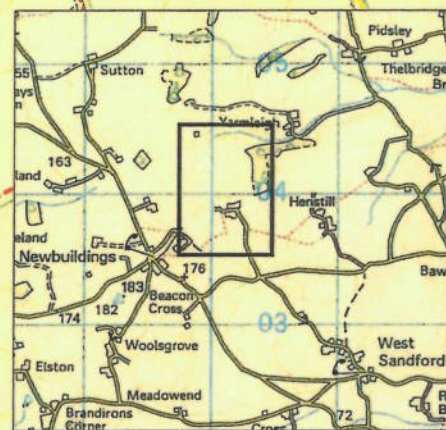
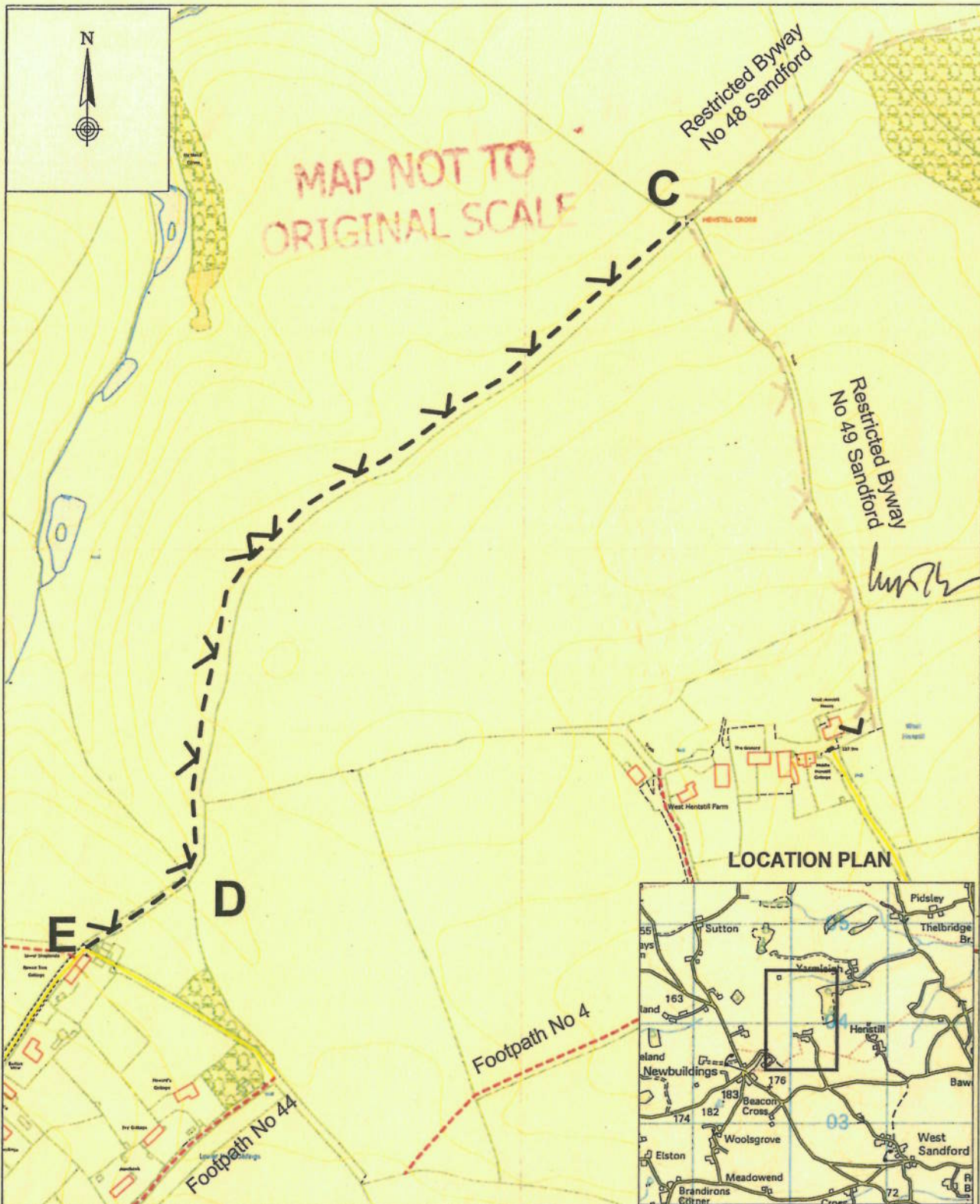
Councillor Mrs M Squires Mr C Jecks Mr A McCreadie Mr D Chudley Mrs M Bailey Mr N Unstead Mr G Lauder Mrs J Page Mr M J Davis Mrs P Clarke Mr S Shakespeare	Devon County Council
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The Objector:

Mr C W Hutchings

Documents presented at the hearing:

1. Statement prepared by Mrs M Bailey.
2. Statement of Mrs M Radford submitted by Mr C Jecks.



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DEVON COUNTY COUNCIL
DEFINITIVE MAP MODIFICATION ORDER 2014
RESTRICTED BYWAY NO. 50, SANDFORD

drawing number **HCW/PROW/14/47**
date **Jun 2014**
scale **1:4,000 at A4**
drawn by **TW**

Notation Restricted Byway No. 50
Sandford C - D - E (690 metres approx)
Existing Public Footpaths

David Whitton
HEAD OF HIGHWAYS, CAPITAL DEVELOPMENT & WASTE

