



Order Decision

Site visit made on 18 July 2017

by Susan Doran BA Hons MIPROW

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

Decision date: 02 August 2017

Order Ref: ROW/3167988

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The East Riding of Yorkshire Council (Hotham Restricted Byway No.7) Definitive Map and Statement Modification Order 2016.
- The Order is dated 20 September 2016 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 one objection outstanding when the East Riding of Yorkshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Preliminary Matters

1. This case concerns the addition of a restricted byway between Padcroft Lane (point A on the plan attached to the Order) and Harrybeck Lane (point B), to the east of Hotham village. The Order route is known as Rowell Hill.

The Main Issues

2. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ('the 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 Definitive Map and Statement ('DMS') should be modified.
3. The evidence adduced is documentary. Section 32 of the Highways Act 1980 requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. I shall therefore consider whether the documentary evidence, when considered as a whole, shows that historic public vehicular rights subsist.
4. If so, then I shall need to consider the effect of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act') and its provisions. Section 67(1) of the 2006 Act extinguished any existing public rights of way for mechanically propelled vehicles ('MPVs') over ways which, immediately before commencement of the Act, were not shown in the DMS, or were shown as a footpath, bridleway or restricted byway. However, such rights will have been saved if any of the exceptions set out in Section 67 of the 2006 Act have been met, in which case the Order route should be recorded as a byway open to all

traffic ('byway'). If none of the exceptions apply, then it should be recorded as a restricted byway.

Reasons

Documentary evidence

5. The earliest document available to me is the 1771 Hotham Inclosure Award. The parties do not dispute that the Order route was thereby awarded and set out as a private road, at 40 feet wide, specifically for the use of the owners and occupiers of lands in Hotham¹. However, this would not preclude the subsequent acquisition of public rights over the way awarded, and it is necessary to consider the remaining documentary evidence to establish whether or not this has occurred.
6. A 1797 Estate Plan of Hotham Rectory annotates the Order route 'From Cave'; and an 1837 plan of the Hotham Hall Estate annotates it 'To Newbald'. Bryant's 1829 County Map of the East Riding of Yorkshire, a commercial map available to the public, depicts it as a 'Good Cross or Driving Road' connecting to the highway network. I agree with the Objector, Dr Gaskell, that none of these maps states unequivocally that the Order route is for public use, but I would not expect them to. Although the estate plans were private documents, they confirm the physical existence of the Order route subsequent to the Inclosure process, and by the annotations indicate it was regarded as a route connecting public destinations, thus more likely to be a public route of some sort. Similarly, whilst the county map on its own may not give rise to a conclusion that the Order route is a full public highway, it is necessary to weigh this evidence in the balance alongside all the other evidence available.
7. The Order route is shown connecting with other roads and as part of a longer route carrying the same name, Newbald Road, on the 1840 Tithe Map. No tithe rent was apportioned to the Order route. However, both public and private roads were capable of reducing the productiveness of land for the purposes of tithe assessment. Accordingly, this evidence is not conclusive as to a public status for the Order route.
8. Public highway maintenance responsibilities were transferred from the Parish Councils to Rural District Councils in 1895. Local government records in the form of Minutes from Hotham Parish Council and Howden Rural District Council refer to the Order route, which by then had become known as Rowell Hill and was described as a through road from Hotham to Newbald. In 1896, the Parish Council requested the Rural District Council take over its repair, previously the responsibility of the Surveyor of Highways out of the Parish Highway Rate further to the 1835 Highways Act. However, although noted by the Rural District Council and despite further requests from the Parish Council over the following years when the matter was escalated to the County Council, no further action was taken².
9. This suggests the Rural District Council did not regard the Order route as a publicly maintainable highway, although the Minutes demonstrate they were reluctant to take on any additional responsibilities notwithstanding evidence provided by the Parish Council. It is evident that the Parish Council did not

¹ Public roads were set out at 60 feet wide under the powers of the enabling Hotham Inclosure Act

² Two other named 'bye-roads' in the Parish were subsequently taken over and maintained by the Rural District Council

make a specific appeal concerning the Order route. Nevertheless, they made consistent efforts to have it included within the Rural District Council's responsibilities. This was on the clear basis that the Order route, a way connecting with public roads at either end, had been maintained by the Parish through the Surveyor of Highways in the past. This in my view adds weight to its reputation as a public road itself in the years leading up to 1895.

10. The 1910 Finance Act Map shows the Order route excluded from adjoining hereditaments and uncoloured, so not assessable for incremental valuation. This is a good indication of public status, in all probability of a public vehicular way as deductions are usually recorded for footpaths and bridleways in the accompanying documents. There could, however, be other reasons for the exclusion of a 'road', and as the East Riding of Yorkshire Council ('the Council') points out, it is not inconsistent with the 1771 Inclosure Award where ownership of the Order route was not assigned to any individual. Again that would not preclude the existence of, or subsequent acquisition of public rights.
11. Dr Gaskell believes the Order route has remained a private route since being set out under the Inclosure process, and does not accept that any subsequent evidence has demonstrated the existence of a public right of way over it. He does accept that as it is ungated at either end (and the documentary evidence shows this to be the case historically) the public may have accessed it from time to time by various means of transport.
12. I concur that the Order route was established as a private road in 1771. However, I find on the balance of probability that over time the public has acquired an historic right to the way, which connects two public roads, and this is more likely than not to have been a right for the public to use it with vehicles. I reach this conclusion primarily on the evidence of the Parish Council Minutes which demonstrate that the Order route had been repaired by the Parish in the manner of a public road prior to 1895, considered together with the Tithe Map, Finance Act records and the early maps (none of which are inconsistent with such status) showing it forming part of the local highway network. There is no evidence that any public rights acquired over the route on the basis of the documentary evidence have since been legally stopped up. Given this conclusion the Order route should be recorded as a byway, subject to the effect of the 2006 Act, which I consider next.

The 2006 Act

13. The Council considers that none of the exceptions set out in Section 67 of the 2006 Act applies. However, Dr Gaskell appears to suggest the Order route should be recorded as a byway further to subsection 67(2)(a) of the 2006 Act.
14. This subsection excepts ways whose main lawful use by the public during the 5 years preceding commencement of the 2006 Act (2 May 2006) was by motor vehicles rather than by other users, for example walkers, cyclists, horse riders or horse-drawn vehicles: the intention being to except highways that are part of the ordinary roads network. Accordingly, I need to consider evidence concerning use by the public between 2001 and 2006 to establish whether the exception is met and the Order route can be recorded as a byway.
15. Dr Gaskell has personally used the Order route with MPVs "on many occasions" in the 25 years that he has lived and farmed in the area. He believes there has been regular use by MPVs over a long period of time, including by commercial

and farm traffic. Photographs show the Order route (in particular the northern part which also provides access to an adjoining field) in regular use by vehicular traffic as evidenced by wear created by wheel tracks, and this was visible at my site visit. But, it is not possible to determine from the evidence if wear along the route as a whole results from public or private use; although Dr Gaskell states it is private use to access fields and travel from one end of the village to the other avoiding the narrow streets. Such private use would not, however, meet the requirements of subsection 67(2)(a).

16. No figures relating to public use for the required period are provided by either party³. Therefore I am unable to draw conclusions about the volume and/or frequency of use by the public with MPVs or to enable a comparison of the use by the public as pedestrians, horse riders, cyclists and so forth.
17. The Council points out that a byway is a carriageway and right of way for vehicular traffic, but one mainly used by walkers and horse riders, and the Order route, an unmade track, has a character more suited to use by walkers and horse riders, thus consistent with a byway⁴. It follows that a finding that the main lawful use was by MPVs would be inconsistent with byway status.
18. The lack of (recent) user evidence by the public (notwithstanding the evidence of private use by MPVs) does not mean that public rights, which I have concluded exist on the basis of the historical evidence, no longer exist over the Order route. However, I accept, as Dr Gaskell argues, that no substantial evidence of public use of the Order route has been provided, and none for the period to satisfy subsection 67(2)(a).
19. That aside, the existing private rights for MPVs are unaffected by this Order. Subsection 67(5) of the 2006 Act provides a private right of way for MPVs for those persons who have a reasonable need for access by MPVs to land in which they have an interest, in all cases where a public right of way for MPVs was extinguished by subsection 67(1).
20. It follows from the above that subsection 67(2)(a) does not apply, and there is nothing to suggest that any other exception that would save byway rights applies. I therefore find that public rights for MPVs have been extinguished, and the Order route should be recorded as a restricted byway.

Other matters

21. Dr Gaskell believes that a restricted byway would cause confusion and potential conflict between private users entitled to use it with MPVs and public users who were not. In addition, it would be difficult to enforce that status. To resolve this, recording it as a byway would enable equal access for all users. Whilst I understand this view, the management of the route is a matter for the highway authority. Furthermore, my decision must be based on the evidence and not on issues such as desirability.
22. The convenience or suitability of the Order route as an alternative for MPVs to the existing highway network is not a relevant consideration in my determination of the Order under the legislation. Neither am I able to attach weight to concerns that, as a restricted byway, the Order route would no longer

³ The Council says that none is available

⁴ *Masters v Secretary of State for the Environment, Transport and the Regions* [2000]

be available to the public with disabilities who may wish to access it by motor car. However, as stated above, existing private rights for MPVs remain extant.

Conclusions

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

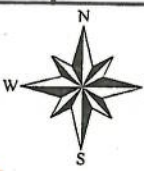
Formal Decision

24. I confirm the Order.

S Doran

Inspector

MAP NOT TO
ORIGINAL SCALE



EAST RIDING
OF YORKSHIRE COUNCIL

Location Plan

Scale 1:50,000



EAST RIDING
OF YORKSHIRE COUNCIL

Padcroft Lane

A

Rowell Hill

HOTHAM

Harrybeck Lane

B

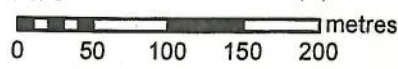


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PROPERTY LAW MANAGER

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DO NOT SCALE



Legend

— Restricted Byway to be added

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EAST RIDING
OF YORKSHIRE COUNCIL

Alan Menzies Planning and Economic Regeneration

TITLE The East Riding of Yorkshire Council
(Hotham Restricted Byway No. 7)
Definitive Map and Statement Modification Order 2016

ORIGINAL SCALE 1 : 3000	DATE Jun 2016	DRAWN MD	APPROVED DS	DRAWING NO. PER/DM/S14/50/HOTH/Drq02
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