
Order Decision

Site visit made on 29 June 2017

by Susan Doran BA Hons MIPROW

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

Decision date: 25 July 2017

Order Ref: FPS/Y2003/7/27

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Definitive Map Modification (Restricted Byway 30, Saxby All Saints) Order 2015(1).
- The Order is dated 12 November 2015 and proposes to modify the Definitive Map and Statement for the area by adding to them a restricted byway as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when North Lincolnshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Procedural Matters

1. The Order concerns the addition of a restricted byway between a bridge over a Land Drain (point A on the plan attached to the Order) and the eastern bank of the River Ancholme at Saxby Bridge (point B). The Order route forms the continuation of North Carr Lane which runs between the B1204 at Saxby All Saints village and point A.
2. Footpath 30 runs north-south along the eastern side of the River Ancholme. In addition, the western terminus of the Order route forms a junction with the route of an alleged footpath running along the eastern bank of the River Ancholme, for which North Lincolnshire Council ('the Council') has made two separate definitive map modification orders.
3. It is argued on behalf of the main objector, Mr Brown, that in the interests of justice, this Order should be considered alongside the two orders referred to above. The Council maintains they have no bearing on this Order and need not be considered concurrently with it. Whilst I appreciate the reasoning leading to Mr Brown's request, it is only this Order that has been submitted to the Secretary of State for determination, and as a consequence is before me for determination. The decision to submit one or all of the orders referred to is a matter for the Council. Although I understand that objections have been made to the other two orders (including by Mr Brown), the Council states that neither has proceeded through all the stages necessary for them to be submitted to the Secretary of State. In the circumstances I consider it is open to me to proceed to determine this Order.
4. In addition to the Objection are submissions from two interested parties opposed to the Order. Two further objections were submitted following re-advertising of the making of the Order by the Council.

5. I carried out an unaccompanied visit to the Order route.

The Main Issues

6. The Order has been made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ('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. The evidence adduced is primarily documentary. Some evidence of use has been submitted by the Council. The Council does not rely on this evidence indicating it has been provided only for completeness, preferring the documentary evidence. I shall though consider all of the evidence before me. I note that Mr Brown has commented on the user evidence.
7. 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 available to me, when considered as a whole, shows that historic vehicular rights exist over the Order route. It is the contention of the Council that it is more probable than not that this is the case.
8. 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 provides that, unless preserved by an exception set out in the Act, an existing public right of way for mechanically propelled vehicles ('MPVs') is extinguished if it is over a way which, immediately before commencement of the Act, was not shown in the DMS, or was shown as a footpath, bridleway or restricted byway.

Reasons

Documentary evidence

9. The earliest document provided is an Ordnance Survey ('OS') map of c1887. It, together with later maps dated 1907 and 1945, is consistent in depicting the Order route running towards Saxby Bridge initially as a bounded track then as pecked lines representing its continuation between wider boundaries representing the physical extent of the feature and thus its width. It is gated just before reaching Weir Dike to the east of the River where a wharf is depicted adjacent to Saxby Bridge, on its southern side. The later maps also show a gate at the eastern end of the Order route at the point where it widens.
10. An 1895 Table of Tolls, for sale to the public, indicates that the wharf was a stopping point along the River. It lists a wide variety of goods (not limited to agricultural cargoes) that were being transported at this time. The Council says a steam packet had been operating along the River since 1856, between Brigg to the south and Hull to the north, which is likely to have carried passengers and goods up and down the River.
11. However, the Finance Act Map 1910 records do not provide a clear picture that the Order route was a full public highway affording access to this wharf to and from Saxby All Saints. About 110 metres of the eastern end of the Order route, between the Land Drain (at A) and gate depicted on the later OS maps is shown uncoloured in the same manner as the remainder of North Carr Lane

extending from there east towards the village. Thus the excluded section it seems was regarded as a public highway, in all likelihood a public road.

12. The greater part of the Order route, however, falls within a hereditament or land holding, numbered 12 (cottage, garden and land at Saxby Bridge¹). The Field Book records a deduction here under "Fixed Charges, Easements, Common Rights and Restrictions" for a "Footpath Saxby to Winterton"; and under "Charges, Easements and restrictions affecting market value of Fee Simple", "Footpath and Road £50". This amount is then recorded under the section "Public Rights of Way or User". This suggests to me that further to the deduction claimed, the valuer did regard the remainder of the Order route as a public highway, certainly as a footpath, but I consider it is less clear that it was also regarded as a public road as the Council suggests. Had that been the case, then I would have expected the whole of the Order route to have been shown excluded from the adjacent landholdings. Further, I do not share Mr Brown's view that the deduction concerned grazing rights on the road and land across the river: it is clearly recorded against the category "public right of way or user" rather than to a private right.
13. Mr Brown's investigations reveal that land on both sides of the River was owned by the Hope-Barton Estate, and this included the Order route within hereditament 12. Hereditament 60 which concerns the wharf is identified as being occupied by the Co-op Stores. Other hereditaments which abut the Order route provide no further assistance as regards its status.
14. I have mentioned above the existence of at least one gate (or barrier) across the Order route at Weir Dike, and of gates present on Saxby Bridge (paragraph 9); and an undated photograph shows the Bridge gated on the western side. Mr Brown's evidence is that within living memory (as late as the early 1970s) tolls were collected at the cottage by the bridge, as referred to in user evidence forms discussed below. This is consistent, in my view, with the Finance Act evidence not recording the whole of the Order route as excluded, and suggestive that this part of it was regarded at that time to be a private road. I consider Saxby Bridge further below.
15. Accordingly, I find the Finance evidence demonstrates a short section of the Order route enjoying full highway rights, and the remainder public rights (at least) on foot providing access to the wharf and Saxby Bridge.
16. I do not find the extract from the National Farm Survey records 1941-3 of much assistance. The Council says carriageways, not being productive, were excluded from the colouring on the map unless the land either side had the same owner. Most of the Order route west of the Land Drain was included on the map, and they presume was in the same ownership. The remainder, a short section at Keepers Cottage east of B is uncoloured. The Council concluded that if it was uncoloured because it was carriageway, the remainder must have been a carriageway too. However, it was not the purpose of this Survey to establish or record the status of any excluded route: public and private rights could co-exist.
17. In the 1940s Mr Hope-Barton considered purchasing Saxby Bridge. The Bridge had been built further to an Act of 1767 which required bridges to be

¹ Now demolished, this cottage stood on land between Weir Dike and the River Ancholme. The entry does not refer to the present Keeper's Cottage which lies on the northern side of the Order route east of point B

constructed across the new River Ancholme and be “maintained for the convenient passage of the occupier or occupiers respectively to and fro the same”. A letter dated 17 July 1940 from the River Ancholme and Winterton Beck Catchment Board (‘the Board’) explains that its maintenance is a burden to the Board and its repair is done “for the sole benefit of Mr Hope-Barton”. However, if they sold it they would reserve a right of way over the bridge for the Board, their Officers and servants, and all other persons authorised by them or any of them. The Board applied to the Ministry of Agriculture and Fisheries to approve the proposed sale, considering that the bridge could be sold subject to the reservation of existing rights. However, the sale was never completed.

18. As the Council comments, the July 1940 letter refers to the bridge as a ‘suspension bridge’, which in fact it is not². However, all of the correspondence refers to ‘Saxby Bridge’ and a letter of 2 October 1940 includes a map showing the location of the bridge as Saxby Bridge.
19. Although Saxby Bridge does not form part of the Order route, this evidence shows that it was a private bridge with private rights, maintained by the Board for the use of the landowner whose land had been severed by the new River. No mention is made of public rights, although this is not evidence that public rights did not exist. Nevertheless, it suggests that the Bridge, effectively the continuation of the Order route, did not enjoy public rights.
20. Mr Ketley states his property deeds refer to a private right of access – Keeper’s Cottage was owned by the Hope-Barton Estate along with the surrounding land, and the ‘road’ privately owned and maintained by the landowner. A copy of the documentation referred to has not been provided. However, the existence of a private right of access is not unusual in conveyancing documents which deal essentially with private rights.
21. So far, it is not clear if the tolls (paragraph 14) were collected for the use of Saxby Bridge, or for the use of the Order route. If collected with regard to use of the Bridge, there are, the Council points out, other bridges crossing the River that are highways; and the existence of a toll is not incompatible with a highway, as exemplified by the Humber Bridge. On the other hand, if they were collected on behalf of the Hope-Barton Estate, as Mr Brown suggests, then they may have been with respect to the use of the Order route since the evidence is that the Bridge was privately owned and maintained by the Board.
22. However, highways records held by the Council point to the Order route having been maintained at public expense and, the Council argues as a full vehicular highway. The Lindsey County Council Northern Area Highways Committee Minutes of 7 November 1938 refer to reports from the Clerk and County Surveyor concerning the ‘roads and ways’ between the B1204 at Saxby All Saints over Saxby Bridge to the B1207. The Minutes state, *“The first section of the road leading westwards from Road B1204 to Saxby Bridge known as “North Carr Lane” had for some considerable time in the past been kept in repair by the highway authority, but it was possible that such section was an occupation lane only subject to a public right of way for pedestrians and cyclists, and had never become legally repairable by the inhabitants at large. Mr H J Hope Barton, the adjoining landowner, maintained a fence across North Carr Lane about 1,070 yards west of Road B1204 with a gate across the carriageway*

² The nearest suspension bridge over the River Ancholme is Horkstow Bridge further north

which was not locked. Further, the landowner maintained a gate at each end of Saxby Bridge and kept the eastern gate locked to enable him to collect tolls from drivers of vehicles. On the way on the west side of Saxby Bridge, the landowners had recently erected "Private Road" notices and had affixed posts to prevent the passage of vehicles to and from the direction of Appleby. It was understood that no complaints had been made as to the restriction of the user of the way by vehicular traffic, and that pedestrians and cyclists were permitted to use the way without restraint."

23. I consider 'the first section of road' refers to North Carr Lane and the Order route, the status of which was unclear, notwithstanding that repair had been carried out on it in the past. Such maintenance at public expense would not have been undertaken lightly. Furthermore, it was regarded as a public right of way for pedestrians and cyclists, not a permissive way for such use, tolls being collected only in respect of motor vehicles. The Committee resolved, *"That the question of the County Council continuing the repair of North Carr Lane be left in abeyance, and that any further repairs be carried out only on the instructions of the Committee, and that as to the way on the west side of the bridge to road B1207 appears on the evidence at present available to be a private one so far as vehicular traffic is concerned, no action seems to be necessary, respecting the erection of the notices and posts mentioned above"*.
24. Two years later, the Lindsey County Council Highways Department Road Map 1940 shows the whole of North Carr Lane including the Order route and Saxby Bridge as "Other Roads Metalled", indicating it was then considered to be a full highway maintainable at public expense.
25. In 1952, however, Lindsey County Council minutes (dated 31 March) regarding North Carr Lane, refer to requests to repair the route stating it was believed to be an occupation lane, but that there was clear evidence that between the B1204 and the east end of Saxby Bridge, it had been repaired by the highway authority in the past. It was resolved in accordance with County Council policy to repair it without formally admitting legal liability for the repair, and without improving the standard of repair provided in the past. In 1954 it was resolved that the section of North Carr Lane from the B1204³ to the Land Drain (the commencement of the Order route) be acknowledged as a highway repairable by the inhabitants at large.
26. A 1964 document, concerning the Liability of the County Council for the repair of by-roads, "Details of road maintained under the Highways Committee Minute dated 7 February 1949 and other roads of hitherto doubtful status, and details of roads not shown in Map A"⁴, records North Carr Lane as a Grade E road between the B1204 at Saxby and the River Ancholme. Class E roads were defined by Lindsey County Council in 1944 as "All other roads with metalled carriageways, including cul-de-sacs and accommodation roads to farms, etc., provided they are in daily use by wheeled traffic". The document records the route having been repaired at various dates between 1938 and 1954 and that in 1964 it was in 'excellent condition'. The type of traffic using the road is described as 'agricultural'. It also notes that the route was recorded on the (Glanford) Brigg Rural District Council Map of 1930, which I take to be the handover map when highways responsibilities were transferred to the County

³ The minute of 1 November refers to the B1206 but this appears to be an error given the context as Saxby All Saints

⁴ Map A the Council believes to be the precursor to its List of Streets

Council. A final handwritten note records, *"Resolved - having regard to the information now available North Carr Lane from its junction with the B1204 as far as the land drain about half a mile to the west be acknowledged as a public highway repairable by the inhabitants at large"*. This is consistent with the 1954 document referred to above.

27. Lindsey County Council also inspected the three bridges associated with the Order route for maintenance purposes in the 1970s - the Land Drain, Weir Dike and 'Saxby Toll Bridge' - describing the route as an unclassified road.
28. Official highway signage referred to by the Council in place on North Carr Lane includes one indicating 'Saxby Bridge' from the B1204 (in existence in 2009, but no longer present); a weight restriction sign at the east end of North Carr Lane warning of a weak bridge ahead (at the Land Drain); and a sign warning of a weight limit over Saxby Bridge. No evidence has been provided as to when they were installed.
29. Mr Brown recalls that the Order route was maintained as far as the River in the 1970s and 1980s, when the Council stopped maintenance beyond the Land Drain. At that time he regarded the Order route as a private road for agricultural use and private access to Keeper's Cottage.
30. Collectively, the highways records provide an indication of the Order route's status. They were principally concerned with maintenance. Some were produced for internal use and would not have been open to public scrutiny. Nevertheless, they indicate that part of North Carr Lane was regarded as publicly maintainable highway, and the Order route as a highway, at least in use by the public on foot and with bicycles: pedestrian use consistent with the deduction recorded in the Finance Act records (paragraph 12). This is not necessarily inconsistent with a belief it may have been an occupation road as this would not preclude the existence of public rights. The records show that public monies were expended over a considerable period in the upkeep of the road and it is unlikely that this would have been the case unless it enjoyed public rights. At times, these were considered to include vehicular rights which are consistent with public use to the toll gate at Saxby Bridge.
31. The Order route was not claimed by the Parish Council for inclusion in the DMS when it was being drawn up in the 1950s. It may be that they considered it carried no public rights, or that it enjoyed a higher status that was not appropriate to record in those documents: the latter consistent with some of the highways records.

User and landowner evidence

32. Correspondence dated 29 March 1971 from Glanford Brigg Rural District Council to Lindsey County Council states, *"Beyond living memory there has been a link between Appleby to the west of the River Ancholme and Saxby All Saints to the east of the river, and in modern times this link is in frequent use both by pedestrians and cyclists"*.
33. In 1979, Saxby All Saints Parish Council wrote to then then highway authority, Humberside County Council further to a review of the DMS requesting North Carr Lane be designated a Byway on the basis of current use *"...by pedestrians, horses and motor vehicles of all descriptions, and has been so used for many years"*. In the event, the review was not carried out. Accompanying their

letter were 6 user evidence forms claiming use of the route as far back as the early 1900s. None refers to the means by which they used it – on foot, horse and so forth – but none indicates their use was permissive. Two people refer to maintenance of the route as far as ‘the Cottage’, including tarmacking and filling in pot holes; and others to a (locked but attended) gate and tolls at the Bridge. One person states there was a toll bridge “*for pedestrians, horses and carts, bicycles, motor cars etc*”, but that residents of Saxby All Saints and Appleby were allowed access across the bridge free of charge.

34. The weight that can be attached to these evidence forms is limited given the limitations of the pro-forma itself and that inevitably more questions are raised than answered, for example whether one person referring to shepherding stock was a tenant of the land, or completely unconnected with it. Nevertheless, they give a flavour of use of the route and of its maintenance which is consistent with the evidence from the highways records considered above. The users confirm the collection of tolls, although suggest this extended beyond motor vehicular traffic.
35. A further 28 user evidence forms completed between 2011 and 2016⁵ are submitted by the Council. These claim use from 1940 to 2016 for varying lengths of time, predominantly on foot (21 people) and also with a bicycle (15 people), with a motor vehicle (4 people), and one on horseback. Claimed use is to get to work (mostly in Scunthorpe) and also for leisure purposes, including fishing and swimming at the River. Frequency of use varies from 3 to 100 or more times a year. Claimed use is as of right, that is without force, secrecy or permission and without interruption, until a barrier to prevent vehicular access and a notice were put up near the Land Drain in recent years and challenges made. One person who used the Order route from the 1950s to 1960s on a bicycle refers to gates over the River Ancholme and of being charged a penny by ‘Barton’s Estate’ to cross the river.
36. Mr Brown installed the barrier in 2009; had only allowed access with permission; and both he and Mr Ketley had re-directed walkers to the nearest footpath over the years. Mr Ketley queries the frequency of use claimed, and has told people the route is private since 1996, including some of those claiming use. Mr Twidle refers to fishing permits for the River in the 1970s and 1980s stating there was no right of way and access was by permission.
37. Although the weight that can be attached to this evidence is limited as it has not had the benefit of being tested, the user evidence forms attest to use consistent with the documentary evidence considered above. In particular use on foot is consistent with the Finance Act evidence whereby a deduction was claimed at least for a footpath and to the highways records which acknowledge use by the public on foot and with bicycles. Use with motor vehicles is consistent with the Lindsey County Council highways records roads map, and with the later highways maintenance records. Challenges to use appear to have been in recent years.

Conclusions on the evidence

38. The OS records confirm the physical existence of the Order route, but not its status. A wharf at the River is likely to have been accessed by the public with the 1910 Finance Act records confirming the existence of at least public

⁵ After the date the Order was made

footpath rights over the Order route. Lindsey County Council highways records expressed uncertainty as to whether it was an occupation road with a public right on foot and with a bicycle, the public road terminating at the Land Drain (although the Finance Act records indicate this was just to the west of the Drain). However, the highways records also provide evidence that maintenance at public expense was carried out over the entire length of the Order route for well over 30 years from the 1940s, and indeed prior to this, and that it was considered to be a lower classification of public road. The user evidence lends support to the Order route being regarded as a public road.

39. The evidence regarding tolls points to their collection for the use of Saxby Bridge rather than of the Order route, suggesting its use on the available evidence may have been permissive, and that use of the Order route was not on a permissive basis as has been suggested.
40. I find that, on balance, the evidence when considered as a whole tips in favour of the Order route enjoying public vehicular rights as a byway open to all traffic, the character or type of which is more likely to be used for the purposes that footpaths and bridleways are used. However, the 2006 Act provides that existing rights for MPVs have been extinguished (paragraph 8) unless preserved by an exception set out in Section 67(2) of that Act. The Council does not argue that any of the exceptions applies in this case. Mr Carney asserts that the Order route is a carriageway which should not be recorded in the DMS. However, as the Council points out, this argument does not take into account the effect of Section 67 of the 2006 Act which extinguishes unrecorded public rights of way for MPVs. For me to conclude otherwise, it would be necessary to demonstrate that the requirements of one of the exceptions have been met, and there is no such evidence before me. It follows that the Order route should be recorded as a restricted byway.

Other matters

41. Mr Brown maintains that the Order route is a cul-de-sac as there is no footpath link on the east side of the riverbank. I agree with the Council that there is nothing in law that prevents a highway from being a cul-de-sac. I note that point B is also the eastern end of Saxby Bridge and this is consistent with the collection of tolls here in the past, and of other historic features. In addition, the DMS records Footpath 30 running north and south such that the Order route is a cul-de-sac other than for pedestrians.
42. Concerns expressed about suitability of the Order route as a restricted byway, vandalism and anti-social behaviour, whilst genuinely held, are not matters that the legislation permits me to take into account.

Conclusions

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

Formal Decision

44. I confirm the Order.

S Doran

Inspector

MAP NOT TO
ORIGINAL SCALE

0m
250m

River Ancholme

Saxby All Saints Bridge

B

A

Land Drain

Saxby All Saints Canal

Wiley
Authorised
Signatory



Seal No 7987

Title: Restricted Byway 30 Saxby All saints

Drawing No

Version 1

Drawn by

Date 09/06/2015

Scale @A4 1:4530



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Director of Places
Peter Williams
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