



Order Decision

Site visit made on 23 January 2018

by Martin Elliott BSc FIPROW

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

Decision date: 14 February 2018

Order Ref: ROW/3179816

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hertfordshire County Council (Barley 15 & 18) Modification Order 2017.
- The Order was sealed on 17 February 2017 and proposes to modify the Definitive Map and Statement for the area by adding a restricted byway (18), deleting a section of existing Barley footpath 15 and adding in its place a section of footpath as shown in the Order plan and described in the Order Schedule.
- There were three objections outstanding when Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is proposed for confirmation subject to modifications set out below in the formal decision.

Procedural Matters

1. I carried out an unaccompanied site visit on 23 January 2018 when I was able to view the Order routes.
2. One of the objectors raised concerns that the notices of the Order make no mention of the basis of the Order. It is suggested that the consultation procedure may be faulty and invalid. Whilst I note these concerns there is nothing to indicate that the Council has not complied with its statutory requirements in respect of giving notice of the Order. The notice also sets out the basis and the effect of the Order. The Council have confirmed that they have followed the requirements of the 1981 Act in respect of consultation and publication of notices.
3. Parts I and II of the Schedule to the Order do not provide a width for the section of footpath 15 B to Y¹ to be added. The Wildlife and Countryside (definitive maps and statements) Regulations 1993 SI 1993 No 12 (the Regulations) indicate that a width should be included in any Order. The Council have requested that the Order be modified to record a width of 2.5 metres. If the Order is confirmed in respect of footpath 15 I propose to modify the Order accordingly; the modification will require advertising which will invite further representations.
4. Schedule 4 of the Regulations also specifies that the seal and the date of making an Order should be inserted after the Order but before its Schedule. I note that the Order is sealed and dated after the Schedule to the Order. Whilst

¹ Points A to F and X to Y used in this decision relate to points shown on the Order map

the most appropriate place for the seal and date is after the Order and before the Schedule there is nothing to indicate that anyone has been misled or prejudiced by their positioning.

The Main Issues

5. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of events specified in sections 53(3)(c)(i) and (iii). The test to be considered is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show:
 - i) that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates (53(3)(c)(i), the addition of restricted byway 18 (A to F) and footpath 15 (B to Y));
 - ii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification (53(3)(c)(iii), the deletion of the section of footpath 15 (X to Y) and associated modifications to the definitive statement).
6. The test to be applied to the evidence is on the balance of probabilities.
7. The Council and the applicant for the Order, have referred to the case of *Fortune & Ors v Wiltshire County Council [2012] EWCA Civ 334* which is relevant to the analysis of the evidence.
8. On 2 May 2006, section 67 of the Natural Environment and Rural Communities Act 2006 (NERC) came into effect. This provides that an existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement of the Act was not shown in the definitive map and statement, or was shown as either a footpath, bridleway or restricted byway. However, sub-sections 67 (2) and (3) of the 2006 Act provide certain exceptions to the statutory extinguishment of rights for mechanically propelled vehicles.
9. No evidence has been put before me, in respect of restricted byway 18, that any rights for mechanically propelled vehicles will have been saved by any of the exceptions provided for by NERC. Should the evidence indicate that vehicular rights have been shown to subsist, on the balance of probabilities, then it would be appropriate to record the route as a restricted byway.
10. No objections have been raised in respect to the deletion/addition of footpath 15. I have considered the evidence and conclude that this part of the Order should be confirmed subject to modifications in relation to the addition of a width.

Reasons

Barley 18

Dury and Andrews' Map 1766

11. The map shows a road leading from Shaftenhoe End to Nuthampstead, the route passing to the west of 'Abbots Bury'. I note that the later inclosure award map shows 'Abbotsbury' in its current location which is to the west of

the Order route. Furthermore the current Bell Lane passes to the west of 'Abbotsbury' although this does not commence at Shaftenhoe End. The map is schematic and shows roads and other features but, given that the map was sold to the public, it is likely that the roads depicted on the map were considered to be public. However, it is not clear that the road shown is that of the Order route even though it clearly starts at Shaftenhoe End at point A on the Order map.

Barley Inclosure Records 1810-1819

12. The inclosure map of 1813 shows the Order route as passing through the old inclosures. The route is coloured sepia as with other public roads such as Bogmoor Road. The Order route is described as a 'lane' in the section of the award which describes the parish boundary with Barkway and is described in the description of 'Hither Lithams' as an 'ancient lane'. Whilst the route is not recorded in the section of the award describing public carriage roads this is not unsurprising given that the route is bounded in its entirety by old inclosures. It would not have been necessary to identify the route in the inclosure as a public carriageway as the award would have had no effect on the route and the pre-existing rights.
13. The inclosure records provide good evidence as to the existence of a highway predating the inclosure most likely a public carriageway.

Bryant's Map 1822

14. The Order route is shown on the map as a 'Lane & bridleway' as a main route between Shaftenhoe End and Mole Hill Green. Given that Bryant's map was sold to members of the travelling public it is likely that the route shown was considered to be a public route of at least bridleway status.

Barley tithe map and apportionment 1893-1843

15. The tithe map shows the Order route as the main route from Shaftenhoe End to Nuthampstead and is depicted in the same way as other known public roads such as Bogmoor Road. The route is not subject to tithes. The tithe map provides evidence of a significant route which corresponds with the Order route. However, although the route is coloured in the same way as other known public roads it does not necessarily follow that the route depicted is public. Nevertheless given the route goes to Nuthampstead, partly along a known public vehicular highway, it is more likely than not depicting a public road.

Ordnance Survey maps 1878-1921

16. The 1878 map depicts the Order route as a bounded road. The continuation of this route is identified in the Barley parish book of reference as a 'Road'. The book of reference also identifies the road known as Bell Lane passing by Abbotsbury as a road. The 1898 Ordnance Survey map depicts the Order route in a similar way to the 1878 map. The 1921 map again shows the route in a similar way to the earlier Ordnance Survey maps although the southern section appears to be covered with vegetation which might suggest that the route had become overgrown.

17. The Ordnance Survey maps show the physical existence of a road although given that such maps were not produced to record the status of any route the maps provide no evidence as to whether or not the route was public or private.

The Rural District of Ashwell (Main Roads) Order 1901

18. The Order declares that Bell Lane is a main road with the responsibility for maintenance being transferred to Hertfordshire County Council. The Order route is not mentioned but this does not preclude the route from being public.

1910 Finance Act records

19. The working and final copies of the Inland Revenue plans show the Order route as being excluded from the adjacent hereditaments. This provides a strong indication that the Order route was considered to be a public highway most likely vehicular. However, this is not conclusive and there may be other reasons for the exclusion of the route from the adjacent hereditaments.

Hertfordshire Map of Main and County Roads c.1927

20. The map was created by the County Council to index routes which had been taken over as main roads under the Highways and Locomotives (Amendment) Act 1878. The map shows the section of Order route A to B coloured red and numbered 723. The map indicates that this section was maintainable at public expense; it does not necessarily follow that the route is a vehicular highway. The accompanying book of reference suggests that the Parish made an application for the road to be maintained by the County but that this was not agreed to. The records do not provide any evidence as to whether the Parish were liable to maintain the remainder of the Order route but that does not preclude the existence of public rights.
21. The Council refer to the applicant making the point that the fact that the remainder of the route is depicted on the base map shows it must have been a prominent feature. It appears that the base map is an Ordnance Survey map and my comments above are equally applicable (paragraph 17). The base map therefore shows that at the time of the survey a route which corresponds with the Order route physically existed.

Definitive Map records

22. The Barley parish survey carried out under the National Parks and Access to the Countryside Act 1949 does not record the Order route as a public right of way. However, the survey does identify footpath 15 as commencing 'from lane approx. 50 yards SE of 'Three Crowns' P.H...'. The parish survey for footpath 16 which crosses the Order route at point E makes no reference to the Order route.
23. During the preparation of the draft map the Ramblers' Association suggested that the route 'Shaftenhoe End by junction of Willow Lane southwards towards Pondbottom Wood' should be included on the map. The matter was considered further by the Parish Council but it was not agreed that the route should be included as the landlord of the Three Crowns had stated that the path was little used. This does suggest that the route was used but there is no indication as to the type of user.

24. The subsequent definitive map does not record the Order route as a public right of way. The definitive statement describes footpath 15 in the same way as the parish survey.
25. The definitive map records do not provide any evidence as to the existence of vehicular rights. However, the description of footpath 15 in the parish survey and definitive statement suggests that the section of the Order route A to B was considered to be at least a public footpath. The absence of the route from the definitive map and statement does not preclude public rights from being shown to exist at a later date.

Aerial Photographs 1971, 2000 and 2010

26. The aerial photographs show, in part, the physical existence of the Order route however, they do not provide any evidence as to its status.

List of Streets 2006 and 2016

27. None of the Order route is identified on the 2006 list of streets as being a highway maintainable at public expense. The 2016 list of streets describes the section A to C as 'not maintainable but Highway rights may exist'. As above, whilst the route is not identified as a highway maintainable at public expense this does not preclude the existence of public rights.

Highways Act 1980 section 31(6) deposits

28. Deposits under section 31(6) have been made by the Cokenach Estate in 1988, 1997 and 2007. However, these deposits have no effect on pre-existing rights. The deposits do not acknowledge public rights on the Order route.

Conclusions on evidence

29. Having regard to all of the above, the earliest indication as to the existence of the Order route is the inclosure award which identifies the route as an ancient lane. The Bryant's map is suggestive of a public route of at least bridleway status and the physical existence of the route is shown on the Ordnance Survey mapping. The tithe map when considered with all the other evidence is also suggestive of a public route most likely vehicular as footpaths and bridleways are generally not identified on tithe maps. The 1910 Finance Act evidence also provides a strong indication of the route being a vehicular highway. There is nothing to indicate that the exclusion of the route from the adjacent hereditaments was as a consequence of some other reason. When the evidence is taken as a whole it is, on the balance of probabilities, just sufficient to show that the route is a vehicular highway. There is no evidence that the route has been stopped up and there is no evidence to suggest that the route is not public.
30. I note that one of the objectors claims that there is no evidence that the Order route was ever used by horses or horse drawn vehicles. However, as noted above the evidence is just sufficient to show that the route is a vehicular highway. It is also claimed that the section of the route D to E is wrongly described in the Order as a sunken lane and is in fact a ditch with undergrowth. In my view the section D to E described as a sunken lane clearly follows this feature and is entirely consistent with the Ordnance Survey mapping which shows the Order route as an enclosed road along this alignment. I do not

accept that the section D to E is a ditch, although I noted on my site visit that the route does take some drainage.

31. I conclude, mindful of my observations at paragraph 9 above, that the Order route should be recorded as a restricted byway.

Other Matters

32. The objectors raise concerns as to the effect confirmation of the Order would have on wildlife, the cost of necessary works to bring the condition of the route into a useable condition, the effect this will have on the rural nature of the area, the likelihood of misuse by motor vehicles, the potential for damage to a water pipe and road safety. The point is also made that the area is well provided with public access and the addition of the route is not supported by local residents who will be adversely affected.

33. Whilst I note and can appreciate these issues and concerns the 1981 Act does not enable matters such as suitability, desirability and need to be taken into account. The issue is whether or not public rights subsist on the Order route.

Conclusion

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

Formal Decision

35. The Order is proposed for confirmation subject to the following modifications:






- At Part I of the Schedule to the Order in respect of footpath 15 after 'Width:' insert '2.5m'.
- At Part II of the Schedule to the Order after the word 'Width' insert '2.5m between TL40843777 and TL40863776'.

36. Since the confirmed Order would affect land not affected by the Order as submitted I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Martin Elliott

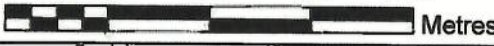
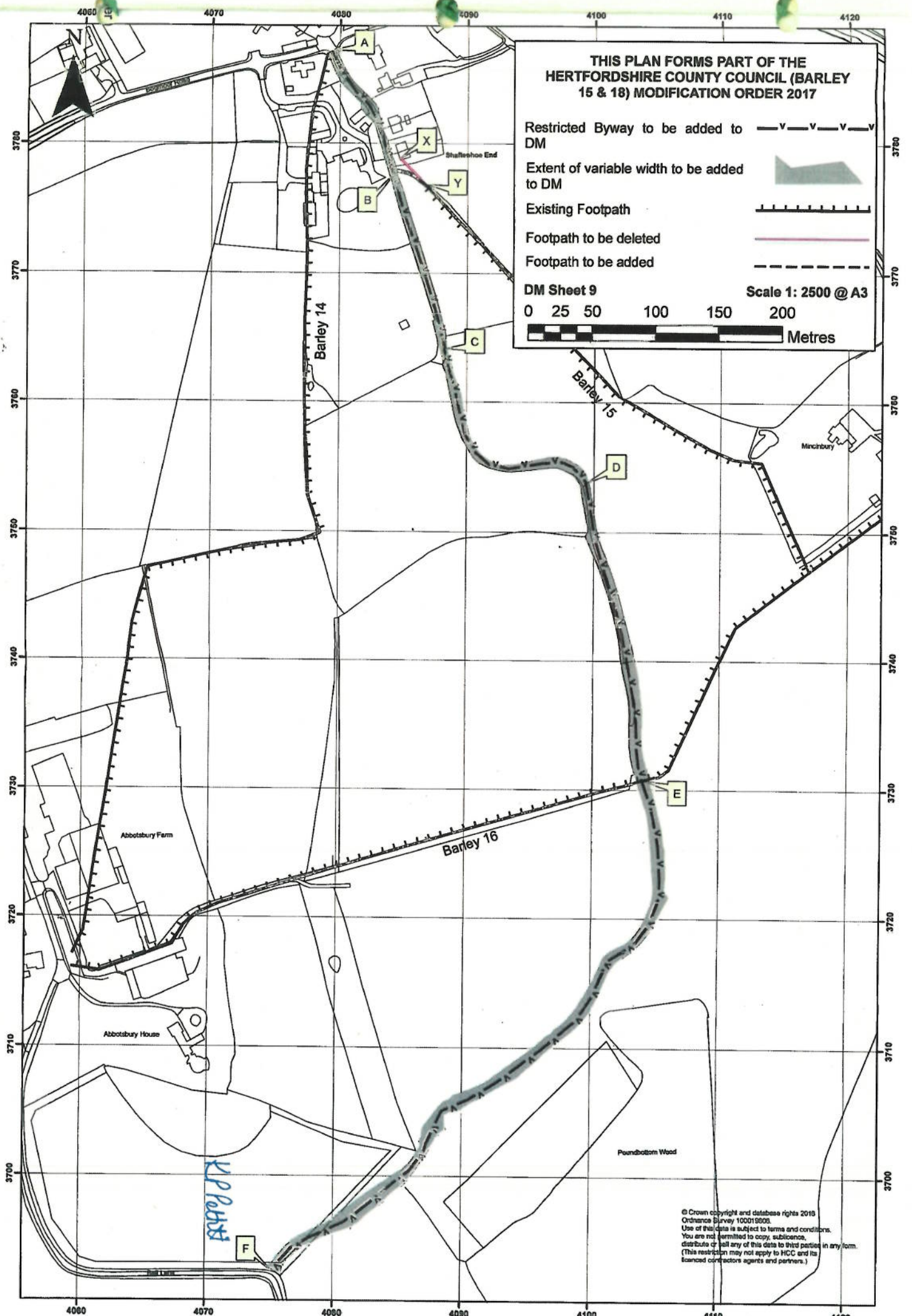
Inspector

**THIS PLAN FORMS PART OF THE
HERTFORDSHIRE COUNTY COUNCIL (BARLEY
15 & 18) MODIFICATION ORDER 2017**

- Restricted Byway to be added to DM 
- Extent of variable width to be added to DM 
- Existing Footpath 
- Footpath to be deleted 
- Footpath to be added 

DM Sheet 9 Scale 1: 2500 @ A3

0 25 50 100 150 200 Metres

VP Paths

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