



# Appeal Decision

by **Michael R Lowe** BSc (Hons)

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 31 January 2018

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## Appeal Ref: FPS/E2001/14A/5

### Appeal by Michael Trevor Jackson against a decision of the East Riding of Yorkshire Council

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of the East Riding of Yorkshire Council (the Council) not to make an Order under section 53(2) of that Act.
  - The Application by Michael Trevor Jackson, dated 10 August 2010, was refused by the East Riding of Yorkshire Council on 12 July 2017.
  - The Appellant claims that a short gap between Ivy Lane and Restricted byway No. 3 (West Lane) in Hedon should be added to the definitive map and statement for the area as a byway.
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### Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act the East Riding of Yorkshire Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area by adding a Restricted Byway between Ivy Lane and Restricted Byway No. 3 (West Lane) as set out in the application dated 10 August 2010.
2. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

### Preliminary Matters

3. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine the appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
4. The appeal has been decided on the basis of the papers submitted.

### Main issues

5. In considering the evidence and the submissions, I take account of the relevant parts of the 1981 Act and court judgments.
6. Section 53(3)(c)(i) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land to which the map relates. In considering this issue there are two tests to be applied, as identified in the case of R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994] 68 P & CR 402, and clarified in the case of R v Secretary of State for Wales ex parte Emery [1996] 4 All ER 1.

Test A: Does a right of way subsist? This requires clear evidence in favour of public rights and no credible evidence to the contrary.

Test B: Is it reasonable to allege that a right of way subsists? If there is a conflict of credible evidence but no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then a public right of way has been reasonably alleged.

For the purposes of this appeal, I need only be satisfied that the evidence meets test B.

## Reasons

7. Mr Jackson's application seeks to resolve an apparent anomaly between restricted byway No. 3 (West Lane) and Ivy Lane. Restricted byway No. 3 was added to the definitive map and statement following the confirmation of a modification order made in 2009 to upgrade a public bridleway to a restricted byway. The Council made the 2009 modification order following consideration of a number of historical documents including detailed records of the highway network in 1815. The Council say there is no doubt that West Lane and Ivy Lane historically joined and that matter is not in dispute.
8. There appear to be two distinct 'anomalies' with regard to the area between Ivy Lane and West Lane. Drawing PER/DM/S1471/HEDO/Drg02 in the Council's statement of case illustrates the issue. Ivy Lane was shown on the Council's list of streets prepared under section 36(6) of the Highways Act 1980 up to a certain point in 2010. The Council later realised an error in the extent of Ivy Lane that should be shown on those records. That length of Ivy Lane, about 15m, is the land over which Mr Jackson made his application and over which there is a physical barrier. There is a further extent of land, of about 7 or 8m, that is not shown on the Council's list of streets nor shown on the definitive map.
9. With regard to the land that is the subject of Mr Jackson's application, and this appeal, it is therefore apparent that there is no dispute that the land is now shown on the Council's list of highways maintainable at public expense. The question is whether or not the land qualifies as byway or restricted byway.
10. In the case of Masters v Secretary of State for the Environment, Transport and the Regions [2000] in the Court of Appeal Roch LJ said -

30. The intention of Parliament in passing the Acts of 1949, 1968 and 1981 is in my judgment clear. That purpose is that county councils should record in definitive maps and statements ways, including what Lord Diplock called "full ways or cartways" for the benefit of ramblers and horse riders so that such ways are not lost and ramblers and horse riders have a simple means of ascertaining the existence and location of such ways so that they may have access to the countryside. Parliament intended that "full highways or cartways" which might not be listed as highways maintainable at the public expense under the Highways Act 1980, should be included in the definitive map and statement so that rights of way over such highways should not be lost. Parliament's purpose was to record such ways not to delete them.

31. The definition in section 66(1) is the descendant of the definition of "road used as a public path" which is to be found in section 27(6) of the 1949 Act. That definition read "road used as a public path" means a highway other than a public path used by the public mainly for the purposes for which footpaths or bridleways are so used." "Public path" was defined as meaning a highway being either a

footpath or a bridleway. This definition was described by Sir John Pennycuick in Hood's case at p904G as a definition "of outstanding obscurity". Sir John Pennycuick continued "but it appears to denote a public way which is mainly used as a footpath or bridleway but is not exclusively so used, the implication being apparently that there is also occasional but subsidiary use for carts or other wheeled traffic.

41. I consider that in defining a byway open to all traffic in the terms set out in section 66(1) of the Wildlife and Countryside Act, 1981, Parliament was setting out a description of ways which should be shown in the maps and statements as such byways. What was being defined was the concept or character of such a way. Parliament did not intend that highways over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horseriders than vehicular traffic because they were more suitable for use by walkers and horseriders than by vehicles. Indeed, where such ways were previously shown in the maps and statements as roads used as public paths, Parliament made it obligatory that they continue to be shown on maps and statements when these were reviewed after 28 February 1983. For those reasons I would uphold the judgment of Hooper J. and dismiss this appeal.

11. It appears to me that, when considering the concept or character of a way as a byway, it is necessary to consider the point at which the byway character is lost and the character is more akin to the ordinary road network. Otherwise it may be difficult to resist a claim to register a byway on the definitive map for ordinary urban and rural roads where the traffic is mainly pedestrian or equestrian. Whilst the above case law has been concerned with ways that might be lost unless recorded, there is some indication that it was not the intention of Parliament to record such ways as described by Lord Denning MR as 'metalled roads used by motor cars' in the case of R v Secretary of State for the Environment, ex parte Hood [1975] QB 891. The finding by Roch LJ that "Parliament intended that "full highways or cartways" which might not be listed as highways maintainable at the public expense under the Highways Act 1980, should be included in the definitive map and statement" should not, in my view be read so as to imply that ways that are listed as highways maintainable at public expense should not be recorded as byways. The records of highways maintainable at public expense are not mutually exclusive to ways to be recorded on the definitive map and statement and, indeed, most public paths and ancient roads with an origin before 1835 are maintainable at public expense. In my view it is useful to ask if there is a benefit to ramblers and horse riders so that such ways are not lost and ramblers and horse riders have a simple means of ascertaining the existence and location of such ways so that they may have access to the countryside.
12. In my view the appeal land lacks clear evidence that its character is not of the nature of an ordinary public road. It therefore fails Test A above. However, there is some ambiguity as to the character of the land and it therefore passes Test B; it is therefore reasonable to allege that byway or restricted byway rights exist.

#### *The Natural Environment and Rural Communities Act 2006*

13. The Natural Environment and Rural Communities Act 2006 extinguished public rights of way for mechanically propelled vehicles with a number of exceptions:  
Subsection 67(2)(a) – excepts ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and

horse-drawn vehicles, in the five years preceding commencement. The intention here is to except highways that are part of the 'ordinary roads network'.

Subsection 67(2)(b) – excepts ways that are both recorded on the "list of streets" as being maintainable at public expense and are not recorded on the definitive map and statement as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the 'ordinary roads network'.

Subsection 67(2)(c) – excepts ways that have been expressly created for mechanically propelled vehicles.

Subsection 67(2)(d) – excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.

Subsection 67(2)(e) –excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive 'off-road'.

14. Mr Jackson made his application for a byway. However, it appears to me that as the way was not shown on the Council's list of streets on 1 May 2006 none of the exceptions apply. The 2006 Act extinguished public motor vehicular rights over every highway that was not shown on a definitive map and statement as a byway after 1 May 2006, unless the exceptions apply, as set out in the Defra Guidance at paragraph 17<sup>1</sup>. The land can therefore only be said to be reasonably alleged to be a Restricted byway as rights for public motor vehicles have been extinguished.

### **Other matters**

15. I have noted the concerns about the removal of a barrier within the land of the claimed way. That is a matter for the Council to address on the basis that the structure is on land that the Council recognises as public highway land. It is not relevant to this appeal.
16. Whilst I have directed the Council to make an Order for the appeal land, I have no powers to address the other land to close the gap between Ivy Lane and West Lane. I see no obstacle to the Council making a single Order to resolve that matter, at their discretion.

### **Conclusion**

17. In my view the evidence indicates that restricted byway rights are reasonably alleged to subsist over the land set out in the application by Mr Jackson.
18. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

*Michael R Lowe*

INSPECTOR

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<sup>1</sup> Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways. Version 5 May 2008.