



Order Decision

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

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

Decision date: 06 March 2018

Order Ref: ROW/3170102

Wardley, Rutland County

- This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is cited as the **Rutland County Council District Council (Wardley) Footpath B79 Modification Order (No.1) 2016**.
 - The Order is dated 6 October 2016 and proposes to modify the Definitive Map and Statement by adding a bridleway from Wood Lane, through Wardley Wood and then north easterly to Leicester Road by upgrading a footpath to a bridleway, as detailed in the Order map and schedule.
 - There were 3 objections outstanding when Rutland County Council (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
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Decision

1. I do not confirm the Order.

Preliminary Matters

2. None of the parties requested a public inquiry or hearing. I have therefore considered this case on the basis of the written objections and representations forwarded to me. I made an unaccompanied site visit on 30 November 2017.
3. In August 2010 the British Horse Society made an application to the Council to add a bridleway to the definitive map and statement of public rights of way. The Council refused the application in January 2016. The applicant appealed that decision to the Secretary of State who allowed the appeal in June 2016¹ and Rutland County Council was directed to make an Order. The Council has taken a neutral stance with respect to the confirmation of the Order.
4. The application included evidence of the Uppingham and Beamont Chase Enclosure Award and other documentary evidence. I am satisfied that such evidence was discovered in the sense of the Council considering evidence that was previously unknown them.

Main Issue

5. The Order has been made under section 53(2)(b) of the 1981 Act relying on the occurrence of events specified in section 53(3)(c)(i) and (ii). The main issue is therefore whether the evidence is sufficient to show, on the balance of probabilities, that a public bridleway which is not shown in the map and statement subsists on the route in question such that the definitive map and statement require modification (route A to B) and whether the footpath (route B to C) ought to be shown as a bridleway.

¹ Appeal Decision Ref: FPS/A2470/14A/1

6. In the context of section 53 of the 1981 Act the requirements of section 31 of the Highways Act 1980 (the 1980 Act) are namely;
 - a) whether the claimed bridleway was of such character that its use could not give rise at common law to any presumption of dedication;
 - b) the date on which the right of the public to use the claimed bridleway was brought into question; and
 - c) whether the claimed bridleway was actually enjoyed by the public 'as of right' (without force, secrecy or permission) and without interruption for a full period of 20 years ending on the date on which their right to do so was brought into question; and if so
 - d) whether there is sufficient evidence that there was, during this period, no intention to dedicate the claimed bridleway.
7. Whether, in the alternative or concomitantly, the evidence is such, again on the balance of probabilities, as to establish dedication at common law.
8. Section 32 of the 1980 Act, requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.

Reasons

9. I have considered whether the Order route could be considered in parts, in the event that public rights could not have been acquired along some part of the route. There is no rule of law that a cul-de-sac cannot become a highway by dedication at common law or under the provisions of section 31 of the 1980 Act. However, a cul-de-sac must have a defined end point, such as the seashore or a viewpoint. I am not satisfied that the public's use of any part of the Order route leads to the identification of a termination point between those shown in the Order and there is no identifiable feature, such as a view point, to indicate any alternative termination point. I therefore conclude that the Order route is a single way that cannot be divided into distinct parts. No party argued that the Order route should be considered in parts.

Presumed dedication of a bridleway under the Highways Act

Whether the claimed route was of such character that public use could not give rise at common law to any presumption of dedication

10. I am satisfied that the evidence of public user relates to a reasonably defined route. The claimed route starts and ends at another public highway and there is nothing about the character of the route that is inconsistent with the common law principles of implied dedication.

The date on which the right of the public to use the claimed bridleway was brought into question

Whether the claimed bridleway was actually enjoyed by the public 'as of right' (without secrecy, force or permission) and without interruption for a period of not less than 20 years, and if so

Whether there is sufficient evidence that there was during the 20 year period no intention to dedicate the claimed bridleway

11. Wardley Wood is owned by the Department of Environment, Food and Rural Affairs on behalf of the Forestry Commission. It was acquired on 7 October 1955 as freehold land together with an easement over the remainder of the Order route between Wardley Wood and Leicester Road (point C on the Order plan). The easement is for all purposes.
12. Section 327 of the 1980 Act indicates that the Act does not apply to land belonging to a government department unless there is an agreement between the highway authority and the government department that the Act shall apply. In any event, the Crown is not bound by any statute unless the statute expressly binds the Crown and that, for this purpose, Crown Land includes land owned by a government department.
13. It follows that for the purposes of the 1980 Act the date of bringing into question was 7 October 1955 and that after that date the application could only be considered on the basis of a claim at common law.
14. I have carefully considered the 11 user evidence forms submitted with the applicant's statement of case. Only two statements relate to the 20 year period before 1955 and in my view such evidence is of insufficient quality and quantity to form a reliable assessment of events over 60 years ago.
15. I therefore conclude that the claim on the basis of section 31 of the 1980 Act fails.

Common law

16. A highway may be created at common law by the dedication of the owner with the acceptance and use by the public. Dedication may be express or implied. Dedication is inferred where the acts of the owner point to an intention to dedicate. Use by the public of a way 'as of right' for a sufficient period could be evidence of an intention of the landowner to dedicate a public right of way. Whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must be assessed objectively. Unlike presumed dedication under the Highways Act, use by the public does not raise a presumption of an intention to dedicate. The burden of proof is on those asserting the public right to show, on the facts, that there was an intention to dedicate. The quality and quantity of public user must be sufficient to bring home to a landowner that a right is being asserted, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. User which is acquiesced in by the owner, is 'as of right'. However, user which is with the licence or permission of the owner, is not 'as of right'. Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence. Before there can be a dedication or implied dedication of a public right of way there must be an owner of the land legally capable of dedicating the way as public.
17. The earliest document submitted as part of the application is a map of the Manor of Wardley, dating from around 1630. It depicts part of the Order route through Wardley Wood and at the boundary with Beamont Chase indicates 'Aston Road'.

18. By an Act of 1799, *An Act for Dividing, Allotting, Inclosing, and Improving divers Open and Common fields, ... within the several Parishes of Lyddington with Caldecott and Uppingham, in the County of Rutland, ...* Commissioners were to set out and appoint both public highways and roads and private ways and following the enclosure and making of such new roads under the Award by the Commissioners, it would not be lawful for any person to use any of the former highways or private ways.
19. The subsequent Uppingham and Beaumont Chase Enclosure Award of 1804 awarded Wardley Wood and its Ridings to George Fludyer Esq. and set out:

From Ayston to Wardley through Beaumont Chase
And one private carriage and drift road of the breadth of thirty feet beginning at the boundary fence of the Parish of Ayston and proceeding in a south westward direction into through and over that part of Beaumont Chase which is first herein awarded to the said Gerard Noel Noel to the entrance into Wardley Wood which said last described road is by the said Commissioners set out and awarded as a private carriage and drift road for the use of the proprietors for the time being of that part of the said Chase and Wardley Woods ...
20. It is clear from the above, and maps signed by the Commissioners, that part of the Order route within Wardley Wood and across the former common lands of Beaumont Chase were clearly established as a private way. Other parts of the Award describe various other public carriage roads, bridle roads and private carriage roads that are also public bridle roads, such that I am in no doubt that the Commissioners were making a clear distinction between public and private ways. The effect of the award of 1804 was cogently to establish that there were no public rights along the Order route at that time and that any previous public rights that may have existed in Manorial times were extinguished.
21. In the light of the 1804 Award it is unsurprising that the Order route is shown on various 19C commercial maps, such as Greenwood's map of 1825 and upon Ordnance Survey maps. I attach no weight to the evidence from the various maps as positive evidence that any public right of way existed along the Order route.
22. The Wardley tithe apportionment of 1844 and the Ayston apportionment of 1849 are of no assistance in distinguishing any part of the Order route as being a public highway at any status. All that can be established is that parts were unproductive and not subject to tithe. Those parts of the Order route that are coloured sienna do not enable a distinction to be made between private and public ways.
23. Parts of the Order route are identified under the valuation records produced under the Finance Act 1910. No allowance is claimed for Wardley Wood. Other parcels are the subjects of a deduction for public rights of way but it is not clear if these relate to the Order route and, in any event, they do not distinguish between the established footpath or the claimed bridleway.
24. I have also considered the other documentary evidence from the applicant, estate sale catalogues and maps, and the survey produced by the Council but I find these documents are of very limited value with regard to the highway status of the Order route. The survey by the CPRE does not give any indication of the evidential basis of the supposed bridleway.

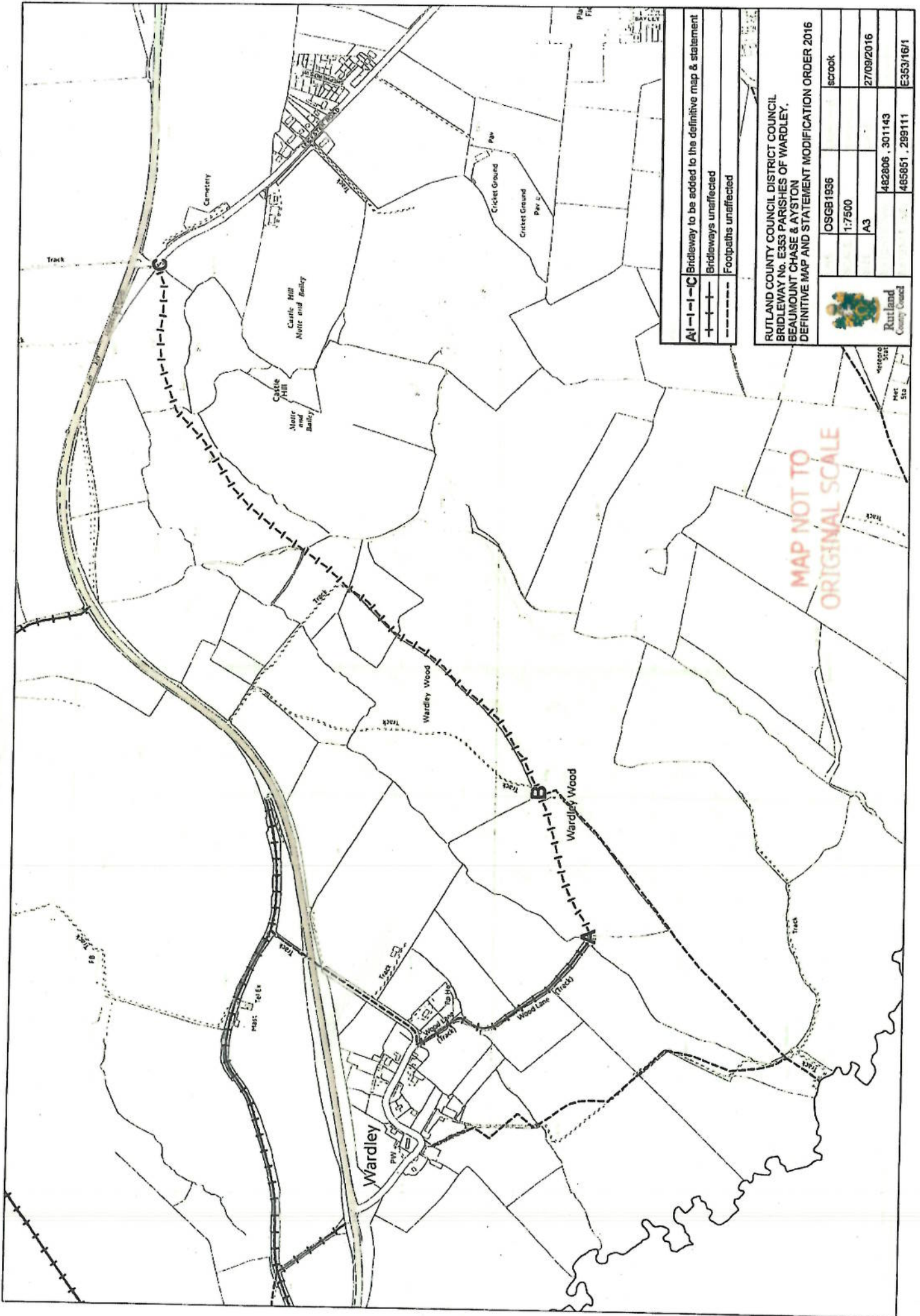
25. Section 46 of the Forestry Act 1967 allows the Forestry Commissioners to make byelaws: (a) for the preservation of any trees or timber on the land, or of any property of the Commissioners; and (b) for prohibiting or regulating any act or thing tending to injury or disfigurement of the land or its amenities; and (c) without prejudice to the generality of the foregoing, for regulating the reasonable use of the land by the public for the purposes of exercise and recreation. Such byelaws were made under SI 1982 No. 648. Byelaw 5 (xiii) prohibits the riding of horses except on bridleways. It follows that horse riding was unlawful on the claimed route after 1982.
26. At common law a public highway is inferred where the acts of the owner point conclusively to an intention to dedicate. The documentary evidence gives a clear explanation of the status of the Order route as a private way from the time of the 1804 Enclosure Award. It is clear that the route has physically existed at least since 1804. There is some evidence of public use on horseback from the 1920s and before 1982, after which date the use would have been unlawful. In my view such evidence is of insufficient quality and quantity to form a reliable assessment of events during this period. I am not satisfied that the user evidence combined with the documentary evidence provides a coherent basis to demonstrate any inference of an intention of the various owners to dedicate a public bridleway along the Order route.

Conclusion

27. The evidence is insufficient, on the balance of probabilities, to demonstrate that a public bridleway subsists along the Order route.
28. Having regard to these and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

Michael R Lowe

INSPECTOR



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| A1-I-I-C | Bridleway to be added to the definitive map & statement |
| - - - - - | Bridleways unaffected |
| - - - - - | Footpaths unaffected |

RUTLAND COUNTY COUNCIL DISTRICT COUNCIL
 BRIDLEWAY No. E353 PARISHES OF WARDLEY,
 BEAMOUNT CHASE & AYSTON
 DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2016

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| 1:7500 | |
| A3 | 27/09/2016 |
| 482806 , 301143 | |
| 485851 , 289111 | |
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**MAP NOT TO
 ORIGINAL SCALE**