



Order Decision

Site visit made on 26 February 2018

by **Martin Elliott BSc FIPROW**

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

Decision date: 28 March 2018

Order Ref: ROW/3175914

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Nottinghamshire County Council (East Markham Byway Nos. 27, 28, 29, 30, 31, & 32) Modification Order 2005.
- The Order is dated 29 July 2005 and proposes to modify the Definitive Map and Statement for the area by adding three byways open to all traffic and upgrading three public bridleways to byways open to all traffic as shown in the Order plan and described in the Order Schedule.
- There were ten objections and one representation outstanding when Nottinghamshire 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 the modifications set out below in the Formal Decision.

Procedural Matters

1. The Order arises from an application under section 53(5) and Schedule 14 of the 1981 Act made on behalf of the Trail Riders Fellowship. However, the Trail Riders Fellowship no longer supports the confirmation of the Order. The Council also requests that the Order is not confirmed. Whilst there is now no support for the confirmation of the Order I am still required to determine the Order based on the evidence before me measured against the relevant criteria.
2. Representations have been made on the basis that the notice of the Order was factually incorrect and is unlawful. The point is made that there are three references to the A57 (T) road and that the A57 was 'de-trunked' in early 2005. Secondly byways 30 and 31 are more commonly known as Back Lane which became a County road in the mid-1980s and that this road has, since that time, been open to all traffic.
3. Whilst the notice refers to the A57 as a trunk road, and this may be in error, the notice is clear as to the effect of the Order. In respect of Back Lane whilst this may be a County road the Order proposes to add the route to the definitive map, again the notice is clear as to the intentions of the Order. The fact that the route is regarded as a county road open to all traffic does not preclude its recording on the definitive map. There is nothing to indicate that the notice or Order are misleading or that anyone will have been prejudiced.
4. Schedule 4 of The Wildlife and Countryside (definitive maps and statements) Regulations 1993 SI 1993 No 12 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 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 section 53(3)(c)(i) and (ii). The main issues are:
 - i) Whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show 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 byways open to all traffic (BOAT) 30, 31 and 32).
 - ii) Whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description. (53(3)(c)(ii) the upgrading of bridleways 1, 2 and 5 to BOAT).
6. The test to be applied to the evidence is on the balance of probabilities.
7. 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 NERC provide certain exceptions to the statutory extinguishment of rights for mechanically propelled vehicles.
8. Section 67(3)(a) NERC provides that where a valid application, in accordance with section 53(5) and Schedule 14, has been made before 20 January 2005 then rights for mechanically propelled vehicles will be saved. However, the Council state that the application to add the routes to the definitive map as BOATs did not contain copies of all the documentary evidence being relied upon. As such the application was not valid and the exception does not apply. Consequently should the evidence show that, on the balance of probabilities, vehicular rights exist then rights for mechanically propelled vehicles will not have been saved by section 67(3)(a) and the routes should be recorded as restricted byways.
9. Notwithstanding the above, section 67(2)(b) NERC saves rights for mechanically propelled vehicles that are both recorded on the list of streets at the relevant date of 2 May 2006 and where such rights are not recorded on the definitive map as a footpath, bridleway or restricted byway.
10. Relevant case law suggests that, for a carriageway to be a BOAT, it is not a necessary precondition for there to be equestrian or pedestrian use or that such use is greater than vehicular use. The test also relates to its character or type and whether it is more suitable for use by walkers and horse riders than vehicles.

Reasons

Byway 27

11. The majority of the route was a pre-inclosure way (Nether Cart Gaps) and not subject to the award. No information is before me as to the status of the route pre-inclosure. A short section of the route where it now crosses the railway was awarded as a private carriage road called Hollow Gate Road.
12. Between 1819 and 1858 Nether Cart Gaps and Old Moor Gate (also known as Holdmoor Gate and Hollow Gate Road) was let for grazing. However, the letting of lanes included routes awarded as private carriage roads¹ and the evidence does not therefore necessarily support the existence of a public carriage road.
13. The 1846 deposited plans for the Great Northern Railway shows that the railway line was constructed across the route. The route is identified as parcel number 45 which is described in the book of reference as a public highway in the ownership of the Surveyors of the Highways for the Parish of Markham. This provides evidence that the way was regarded as a public highway but this evidence needs to be considered with all other evidence. It should be noted that the section of the route identified in the deposited documents was awarded at inclosure as a private carriage road and not a public way.
14. The 1910 Finance Act shows the route as being excluded from the adjacent hereditaments. This provides a strong possibility that the route was considered a public highway and is consistent with the deposited railway documents. However, the exclusion may have been for other reasons and this evidence needs to be considered in the context of all other evidence.
15. The route is not recorded on the 1929 Handover Plan as a highway maintainable at public expense although that does not preclude the existence of public rights.
16. The evidence is conflicting and whilst the route was identified as a public highway in the deposited railway documents the relevant section of the route was awarded at inclosure as a private carriage road. There is nothing from the inclosure award evidence which indicates that the route was public and the exclusion of the route on the 1910 Finance Act may be attributable to the route having the status of private carriage road. It is noted that the route was not identified as a highway maintainable at public expense on the 1929 map and, although this does not preclude the existence of public rights, this is consistent with the status of private carriage road. I therefore consider that there is insufficient evidence to show that the route is a public carriageway.

Byway 28

17. The inclosure award shows the route as pre-inclosure leading to, and including part of an awarded private carriage road. No evidence is before me as to the status of the route pre-inclosure. The lane was let for grazing but as noted above this does not necessarily evidence public highway rights. The deposited railway documents (paragraph 13 above) identify the route as an occupation road in the ownership of six named landowners. The route is excluded from

¹ The inclosure award provides that the grass and herbage of public and private ways shall remain for the benefit as directed by the commissioner.

the adjacent hereditaments on the 1910 Finance Act. Whilst this provides a strong possibility that the way was a public highway it is more likely than not excluded in consequence of the fact that the way was an occupation road and this status is consistent with the status of private carriage road. The route is not recorded on the Handover Maps of 1929 as a highway maintainable at public expense.

18. One of the objectors makes the point that the route provides access to property and is a no through road. It is also said that since 1982 there has been a notice stating 'No Vehicles Except For Access'. Whilst the route is a no through road only providing access to property, and there has been a restrictive notice, this does not preclude the existence of a public carriage road. However, having regard to all the evidence I do not find it sufficient to show the existence of a public vehicular highway.

Byway 29

19. The inclosure award map shows the whole route as a pre-inclosure route known as Finny Lane. Finny Lane leads to a private carriage road passing over lands called Crook'd Dole Road. As above, there is no evidence before me as to the pre-inclosure status. The lane was let for grazing and the route is excluded from the adjacent hereditaments on the 1910 Finance Act. The route is not shown on the 1929 Handover Plan as a highway maintainable at public expense. Looking at the evidence as a whole, having regard to my previous observations in respect of the various items of evidence, whilst the route is excluded on the 1910 Finance Act map there is no other evidence which is suggestive of public rights. In the absence of other evidence this is not sufficient to demonstrate the existence of public vehicular rights.

Byway 30

20. The route is shown on the inclosure award map as being pre-inclosure. The lane was let for grazing, is excluded from the adjacent hereditaments on the 1910 Finance Act and is not identified as a highway maintainable at public expense on the 1929 Handover Map. I revert to previous comments on these documents. However, the Council state that the route *'is currently recorded on the Council's List of Streets which suggests that as a vehicular highway, it is not used in a manner of a byway open to all traffic... Accordingly, the evidence is not sufficient to show...that the route should be recorded on the DMS as a byway'*. The representation to the Order indicates that Back Lane (which includes Byway 30 and 31) became a County road in the mid 1980s following research which showed that the route is a public road. It is stated that the road has been open to all traffic since that time.
21. Bearing in mind the above the Council appears to accept that this route is a public vehicular highway and the evidence when taken as a whole, including the recording of the route on the list of streets, and in the absence of evidence to the contrary, is just sufficient to show that the way is a vehicular highway. However, it does not necessarily follow, as suggested by the Council, that because the route is recorded on the list of streets it should not be recorded on the definitive map and statement. The test is as set out above at paragraph 10 above.
22. On my site visit I noted that the route was used by vehicular and pedestrian traffic but in the absence of evidence of levels of use it is not possible to

conclude that the evidence of vehicular use exceeds that of pedestrian and equestrian use. In the absence of evidence of levels of use it is necessary to consider the character of the way. The route is unsurfaced and has the appearance of a green lane rather than a made up carriageway which would be used by general motor traffic. As such, and bearing in mind that rights for mechanically propelled vehicles will have been saved as the route is shown on the list of streets but not on the definitive map (paragraph 9), it is appropriate for the route to be recorded as a BOAT.

Byway 31

23. The route is depicted as a pre-inclosure way on the award map. The route was let for grazing and the route is excluded from the adjacent hereditaments on the 1910 Finance Act records. The route was not shown on the 1929 Handover Plan but is shown on the List of Streets. The route forms part of Back Lane which, as noted above (paragraph 20), is considered to be a public road. I revert to the observations of the Council and my comments made thereon in respect of byway 30 and the status of the route which are equally applicable to Byway 31 (paragraphs 20 and 21). Rights for mechanically propelled vehicles will also have been saved by virtue of the route being shown on the list of streets but not being recorded on the definitive map and statement.
24. Notwithstanding the above, the most northerly and southerly sections of the route have a tarmac surface and are used to gain vehicular access to and from the parish recreation ground. Although I have no evidence as to the balance of user these sections are not of a character more suitable for use by pedestrians and equestrians rather than vehicles. These sections of the route should be deleted from the Order as it is not appropriate to record them on the definitive map as a BOAT.

Byway 32

25. The route is depicted on the inclosure award as being pre-inclosure and the route is excluded from the adjacent hereditaments on the 1910 Finance Act plans. The route is not shown as a highway maintainable at public expense on the 1929 Handover Plans. I revert to previous comments in relation to this evidence and conclude that there is insufficient evidence to show that the route is a public vehicular highway.

Overall conclusions

26. Other than byways 30 and 31 there is insufficient evidence before me from which I can conclude that the routes (27, 28, 29 and 32) are public carriageways and the Order in respect of these routes should not be confirmed. In respect of byways 30 and 31 the evidence is just sufficient to show public vehicular rights and byway 30 should be recorded as a BOAT. In respect of byway 31, whilst rights for mechanically propelled vehicles have been saved, the most northerly and southerly sections are not of a character of a BOAT and these sections should be deleted from the Order. Given that the routes to be upgraded to byway are being deleted from the Order it is no longer necessary to include reference to section 53(3)(c)(ii) of the 1981 Act in the preamble to the Order.

Other matters

27. The Parish Council suggests that when the survey of parish paths was carried out under the National Parks and Access to the Countryside Act 1949 that no further changes can be made. However, the 1981 Act provides for modifications to the definitive map and statement and therefore allows for changes to be made. The objections raise issues in respect of safety, security. Whilst I note these concerns the 1981 Act does not permit issues of suitability, desirability and need to be taken into account.

Conclusion

28. 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

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

- From the preamble to the Order delete `, and in Section 53(3)(c)(ii) of the Act, namely the discovery of evidence that parts of the highways shown as bridleways over land situated at East Markham ought to be shown as Byways`.
- From the title of the Order and the numbered paragraph 3 of the Order delete `Byway Nos. 27, 28, 29, 30, 31 & 32` and insert `Byways 30 & 31`.
- In Part I of the Schedule to the Order in respect of Byway 31 delete `SK 74527293, at` and insert `SK 74527292 approximately 18 metres south of`, delete `220` and insert `157`, delete `SK 74547270, at` and insert `SK 74547277, approximately 50 metres north of`. Further, delete the section relating to Byway 32 and the section relating to the description of paths to be upgraded.
- In Part II of the Schedule delete the descriptions of the paths to be added numbered 27, 28, 29 and 32. In respect of the description of East Markham Byway 31 delete `SK 74527293, at` and insert `SK 74527292 approximately 18 metres south of`, delete `220` and insert `157`, delete `SK 74547270, at` and insert `SK 74547277 approximately 50 metres north of`.
- From the Order map delete Byways 27, 28, 29, 32, the northern 18 metres and southern 50 metres of Byway 31 and associated grid references and insert the grid reference `SK 74547277` for the southern end of this route. Delete the title `Byway Nos. 27, 28, 29, 30, 31 & 32` and insert `Byways 30 & 31`.

30. Since the confirmed Order would not show ways in 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

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Scale 1:7000
Sheet No.: SK77SW
Grid ref: See Plan

Proposed Modification Order

Parish and Path No.'s affected: **BYWAYS 30 & 31**
EAST MAALHAM BYWAY NOS. 27, 28, 29, 30, 31 & 32

Key:

Proposed Byway

N



Nottinghamshire County Council Environment
Countryside Access,
Trent Bridge House, Fox Road,
West Bridgford, Nottingham,
NG2 6BJ

MAP NOT TO ORIGINAL SCALE

