
Order Decision

Site visit made on 19 March 2018

by Barney Grimshaw BA DPA MRTPI(Rtd)

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

Decision date: 28 March 2018

Order Ref: ROW/3180961

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Definitive Map Modification (Byway Open to All Traffic 1, South Ferriby and Horkstow) Order 2016(1).
- The Order is dated 17 May 2016 and proposes to modify the Definitive Map and Statement for the area by adding a Byway Open to All Traffic (BOAT) running between the A1077, South Ferriby along a road known as Middlegate Lane to Horkstow Road, as shown on the Order Map and described in the Order Schedule.
- There were 2 objections 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 subject to modifications that do not require advertising.

Procedural Matters

1. I made an unaccompanied site inspection on Monday 19 March 2018 when I was able to walk the whole of the Order route.
2. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

The Main Issues

3. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
4. As this Order is concerned with a possible unrecorded vehicular route, it is also necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) which extinguished rights of way for mechanically propelled vehicles (MPVs) subject to certain exceptions.

Reasons

5. All of the evidence in this case comprises historic documents; no evidence of recent use has been submitted.

Documentary Evidence

South Ferriby Inclosure Award 1804

6. In this Award a road, then named as Caistor Road, was awarded as a public carriage road. It is described as running from High Street in South Ferriby southward to a public road in the Lordship of Horkstow. The accompanying map makes clear that the road described is the Order route between Points A and B. The Award further specifies that the awarded public roads are 40' (12.2m) wide and that fences to adjoining allotments should be maintained for ever. These requirements are derived from the South Ferriby Inclosure Act 1801 which empowered the commissioners to make the Award. This Award is strong evidence that in 1804 the section of the Order route between points A-B was established as a public vehicular highway.
7. North Lincolnshire Council, the Order Making Authority (OMA), has discovered no evidence to indicate that any public rights over this route have since been extinguished or diverted and therefore the route is still a 40' (12.2m) wide public vehicular highway.
8. No Inclosure Act or Award was made for the parish of Horkstow. However, the OMA takes the view that the reference in the South Ferriby Award to the route joining a public road in Horkstow indicates its continuation as a route of similar status southwards from Point B. In addition, the naming of the route as Caistor Road is possibly indicative of the route having continued as far as Caistor, some 20 miles to the south.

Finance Act 1910 Records

9. The 1910 Finance Act imposed a tax on the incremental value of land which was payable each time it changed hands. In order to levy the tax a comprehensive survey of all land in the UK was undertaken between 1910 and 1920. This survey was carried out by the Board of Inland Revenue under statutory powers and it was a criminal offence for any false statement to be made for the purpose of reducing liability. The existence of public rights of way over land had the effect of reducing the value of the land and hence liability for the tax; they were therefore recorded in the survey.
10. In this case, much of the route within South Ferriby (Points A-B) is excluded from adjoining hereditaments which is consistent with it being regarded as a public vehicular route. Where hereditaments on either side of the route were in the same ownership, it is not in my view clear from the survey maps how it was regarded. Although the route is not clearly excluded the colouring of the boundaries of the hereditaments stops at each side of the route and the relevant Field Book entries make no mention of any deduction in value in respect of public rights of way.
11. Within Horkstow the route (Points B-C) is clearly shown as lying within hereditament 12. The relevant Field Book entry notes under the heading 'Charges, Easements and Restrictions affecting market value of Fee Simple' "Road (Public) £25" and a deduction of this amount is made in respect of 'Public Rights of Way or User'. However, as is pointed out on behalf of the objector, hereditament 12 also includes part of Horkstow Road and the Field Book entry might relate to this.

Ordnance Survey (OS) Maps

12. OS maps dated 1887, 1906 and 1945 referred to by the OMA show the Order route. These depict sections of the route differently. Section A-B is shown as a wide route between solid lines depicting hedges or fences on both sides whereas between Points B-C it is shown as a much narrower route with a solid boundary only on the western side. The OMA states that the Horkstow section of the route is in fact shown by means of a standard notation which does not necessarily reflect the actual width of the route on the ground.
13. An OS Boundary Remark Book Map and a Boundary Sketch Map, which are undated but said to arise from the Ordnance Survey Act 1841, show the Order route in Horkstow (Points B-C) as being roughly half the width of the route in South Ferriby (Points A-B). However, on behalf of an objector it is pointed out that in South Ferriby the route is shown as being wider in the north than the south. It is also argued that these documents were prepared to define boundaries rather than the width of routes.
14. These OS documents provide a reliable indication of the existence of the Order route at the time they were prepared and of the fact that its character and width was different to the north and south of the parish boundary. However, they do not in my view indicate the status of the route or its precise width at different points.

Highway Records

15. A Road Map prepared by the former Lindsey County Council in 1940 depicts the Order route as an 'Unclassified Road' with the northernmost section being metalled and the remainder unmetalled. A later Road Map (1960) again shows the Order route as an 'Unclassified Road' but additionally classifies the north section as 'Grade E' (or possibly 'Grade F') and the remainder as 'Grade G'. Minutes of the council dated 3 April 1944 give details of the classifications used. Grade E roads are described 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.*" Grade F roads are described as "*Disused roads which are recognised as public highways but which require nominal maintenance only.*" Grade G roads are described as "*Grass tracks, bridle roads, etc., which are recognised as public highways but which require nominal maintenance only.*"
16. Although Grade G roads could in theory not be open for vehicular traffic it is significant to note that this classification was used for part of the route within South Ferriby that was known to have been awarded as a public vehicular route and the records give no indication of a change of status in the route after it crosses the parish boundary into Horkstow. In addition it is suggested by the OMA that it had been the (incorrect) practice of the highway authority until relatively recently not to record bridleways and footpaths in the List of Streets even if they were maintainable at public expense.
17. Lindsey County Council was succeeded as highway authority by Humberside County Council from 1974 until 1996 when North Lincolnshire Council took over. A map which served as the List of Streets (maintainable at public expense) required to be kept in accordance with section 31(6) of the Highways Act 1980 until 2008 shows the Order route with the northernmost section coloured as an 'unclassified road' and the remainder as a 'green lane'.

18. The current List of Streets takes the form of an actual list rather than a map. It includes Middlegate Lane in both South Ferriby and Horkstow but provides no detail of the extent or nature of the route.
19. Overall, it would appear that successive highway authorities have regarded the whole of the Order route as a public vehicular route.

Other Documents

20. The Horkstow Tithe Map 1840 shows the southern part of the Order route (Points B-C) and a small part of the route north of B. The OA submitted a copy of the Tithe Map redrawn a long time after the original was made and objectors submitted a copy of the original. These both show the Order route in Horkstow as being considerably narrower than in South Ferriby (around 40% of the width on the original and 50% on the later version).
21. A Ministry of Agriculture Farm Survey Map of the early 1940s also shows the Order route. This map would have been prepared in connection with productivity for the war effort rather than the existence or status of highways. However, it is of interest in that it shows the Order route in South Ferriby to be largely excluded from adjoining land holdings, presumably because it was not productive land whereas in Horkstow the route is depicted as being narrower and included within a land holding.
22. One objector attributes considerable weight to a Map of the Manor of Horkstow prepared in 1761 by John Lund. This shows Middle Gate Road including the Order route between Points B and C as a Carriage Road which appears to continue to the north and south of the land of the manor. This map does not specify whether the route was public or private but it could be argued that, if it was a through route crossing the estate it would have been likely to have been used by the public. Another early map prepared by Captain Armstrong in around 1778 also shows Middlegate Lane as a through route described as a 'Country Road'.

Conclusions on Documentary Evidence

23. It would appear that the Order route has existed as part of a longer route since at least the second half of the 18th century.
24. The section of the Order route within South Ferriby (Points A-B) was awarded as a public carriage road in the Inclosure Award of 1804 and there is no evidence of public rights over the route having subsequently been extinguished or diverted. The route therefore is still a public vehicular route with a width of 12.2m (40').
25. With regard to the status of the section B-C, the evidence is less conclusive. However, it forms a short section of a longer through route the remainder of which is known to carry public vehicular rights. It was clearly considered to be a public road at the time of the inclosure and there would appear to have been no logical reason for awarding a public vehicular route which terminated as a cul de sac at the parish boundary. Successive highway authorities have also accepted it as being a public road of some sort. In my view, it is most likely that this section of the Order route also carries public vehicular rights.
26. With regard to the width of section B-C the position is even less clear cut. It seems to be common ground that this section is narrower than A-B and this is

consistently borne out by the map evidence. The OMA has taken the view that this section is 8.5m wide primarily on the basis of the OS Boundary Remark Book Map and Boundary Sketch Map which both show this section to be roughly half the width of Section A-B. However, objectors questioned the reliability of using these sources for the purpose of determining the width of the route.

27. The OMA also referred to trees having been planted within the highway area at one point by a predecessor authority and suggested that this indicated that the route should be 8.5m wide. However, although I accept that an authority would presumably not plant trees in such a way as to deliberately obstruct legitimate use of a highway, I cannot agree that the planting indicates any specific width of the route.
28. In my view there is no reliable evidence as to the correct width of the route between Points B and C. In such circumstances it is appropriate to specify a width that appears suitable having regard to relevant factors such as the type of user and the nature of the surface and is the minimum necessary for the reasonable exercise of the public right. This section of the Order route is an unsurfaced field edge track and a width of 5m as suggested on behalf of objectors would appear adequate to accommodate its likely use. I therefore propose to modify the Order to include this width.

The 2006 Act

29. As mentioned before, this act extinguished rights of way for MPVs subject to certain exceptions. In this case it would appear that one of the exceptions is applicable as immediately before the commencement (of the operation of the Act, 2 May 2006) the whole Order route was included in the list required to be kept under Section 36(6) of the Highways Act 1980 (the List of Streets). This means that any per-existing right of way along the route for MPVs has not been extinguished.

Other Matters

30. At present the Order route is included in the List of Streets as a highway maintainable at public expense. One objector argues that this is how the route should be recorded and it is unnecessary and undesirable for it to be recorded as a BOAT.
31. It is correctly pointed out on behalf of the OMA that if the Order is confirmed and the route is recorded as a BOAT this does not mean that it will be removed from the List of Street and it will remain a highway maintainable at public expense.
32. The 1981 Act defines a BOAT as "*...a highway over which the public have a right of way for vehicular and other kinds of traffic but which is used mainly for the purpose for which footpaths and bridleways are so used*".¹ The meaning of this definition was further clarified in the judgement of the Court of Appeal in the *Masters* case² in which it was stated that the test for a carriageway to be a BOAT also relates to its character and whether it is more suitable for use by walkers and horse riders.

¹ Section 66(1)

² *Masters-v-the Secretary of State for the Environment, Transport and the Regions* [Application of the Court of Appeal judgment] [2000] 4 All ER 458

33. I have seen no quantified evidence regarding the amount of use of the route by different types of traffic. The route forms part of the long-distance footpath, The Viking Way, which runs for 147 miles from the Humber Bridge to Rutland Water and is signposted as such at Points A and C. The route varies in character along its length; the northernmost part from Point A to the entrance to a large quarry has a tarmac surface in fairly poor condition. As this part of the route gives access to the quarry it is likely that it is used by some vehicles although material is taken out of the quarry by conveyor belt. South of the quarry the surface of the route is stone and then a natural surface. Between Points B and C the route takes the form of an unsurfaced field edge track. On my visit I saw no use of the route of any sort but I did see signs of recent use on foot and bicycle (tracks in mud and snow).
34. When the Order route is considered as a whole it seems unlikely that it attracts much vehicular traffic other than for access purposes as the parallel B1204 road provides a more convenient route for through traffic. Accordingly, it is likely that the route is used mainly for the purpose for which footpaths and bridleways are used. Also, the character of much of the route is such that it is more suitable for use by walkers and horse riders. I therefore conclude that it is appropriate for the route to be recorded as a BOAT.

Conclusions

35. Having regard to these and all other matters raised, I conclude that the Order should be confirmed subject to the modification of the width of section B-C previously referred to.

Formal Decision

36. I confirm the Order subject to the following modifications:

In the Schedule to the Order, Part 1, modify the width of B-C from 8.5 metres to 5.0 metres;

In the Schedule to the Order, Part 2, delete the words "*and 8.5 metres in Horkstow*" and substitute the words "*and 5.0 metres in Horkstow*".

Barney Grimshaw

Inspector

