



Order Decision

Inquiry opened on 27 June 2017

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 10 July 2018

Order Ref: FPS/D0840/7/24M1

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Cornwall Council (Addition of Restricted Byway¹ from Road U6036 to Bridleway 62 Camborne) (Penponds) Modification Order 2016.
- The Order is dated 15 July 2016 and proposes to record a restricted byway running generally south-west from the road adjacent to Penponds Mill to the bridleway to Barripper. Full details of the route are given in the Order Map and Schedule.
- There were four objections and representations outstanding when Cornwall Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
- In accordance with Paragraph 8 of Schedule 15 to the Wildlife and Countryside Act 1981 I gave notice of my proposal to confirm the Order with modifications to alter the status of the Order route from restricted byway to footpath and to modify the width. Four objections were submitted in response to advertisement of the proposed modifications.

Summary of Decision: The Order is confirmed subject to the modification set out in the Formal Decision.

Preliminary Matters

1. If confirmed with the modifications proposed in paragraph 64 of my interim Order Decision ("the IOD"), issued on 3 August 2017, the Order would record the route on the Definitive Map and Statement as a footpath, rather than a restricted byway; and record the width of the route by reference to the second edition Ordnance Survey ("OS") map.
2. These modifications were duly advertised and four objections submitted. Whilst initially a supporter of the Order, Cornwall Council, the order making authority ("the OMA") took a neutral stance in relation to the proposed modifications.

Human Rights Act 1998

3. Reference was made to the Human Rights Act 1998 ("the 1998 Act"), which enshrines in UK law most of the fundamental rights and freedoms contained in the European Convention on Human Rights ("ECHR"). It was said that the route would affect private and family life, breaching Article 8 of the 1998 Act, which sets out that:

- i. Everyone has the right to respect for his private and family life, his home and his correspondence.*

¹ As the Order was originally made

- ii. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
4. Whilst it is unlawful for a public authority to act in a way which is incompatible with a ECHR right this does not apply if, as the result of one or more provisions of primary legislation, the authority could not have acted differently. Definitive Map Modification Orders are made under the primary legislation of the Wildlife and Countryside Act 1981 ("the 1981 Act"); the criteria of the 1981 Act are strictly limited and personal considerations are not relevant.
5. It is not considered possible to interpret the 1981 Act legislation in such a way that it is compatible with the ECHR rights. Consequently, whilst entirely understanding the concerns raised, I am satisfied that confirmation of the Order would not breach the requirements of Article 8 of the First Protocol to the ECHR, as incorporated by the 1998 Act.

Procedural Matters

6. The IOD was issued following a public inquiry into the Order in June 2017. The objections to the proposed modifications were dealt with through written representations.

Main issues

7. As referred to in the IOD the main issues arising were the status of the route as either public or private, with arguments as to the weight to be attached to the documentary evidence. There were also challenges to the reliability of the user evidence.
8. The OMA also requested a modification to better define the width of the route within the Order Schedules.
9. On the basis of the documentary and user evidence before me at that stage, I was satisfied, on the balance of probabilities, that a public highway existed at common law, but that the appropriate status was as public footpath.
10. Some new evidence has been presented by the British Horse Society ("the BHS") and the Ramblers' Association ("the RA"), who object to the recording of the route as a footpath, believing the status of restricted byway to be correct. No new evidence has been presented with regard to the proposed modification to the width but concerns have been raised by the affected landowners of Penponds Mill ("the mill").
11. The main issue is whether the newly submitted evidence, taken in conjunction with the evidence as a whole, indicates that the proposed modifications should be amended or removed, or additional modifications should be made or proposed, on the balance of probabilities.

Reasons

Documentary evidence

Greenwoods Map, 1826/27

12. Revisiting the Greenwoods map in light of the RA comments I agree it appears more likely that it was the Order route, rather than Roskilly Lane, that was shown on this early commercial map. Such a map would be likely to show public routes rather than private ones, which could not be used by those purchasing the map.

Tithe Map and Apportionment, 1840

13. It has been very helpful to see the extract covering the wider area on the Tithe mapping, as now submitted by the RA. I agree with them that this indicates that the apportionment number 1359, identified as '*Road, Waste and Leat*', coloured sienna, was seen on a wide number of routes. I understand that these are all now recorded on the list of streets as highways maintainable at public expense.
14. The common ownership by the Rev. John Molesworth St Aubyn is noted but I agree with the RA that it would be likely, if the access was purely associated with the mill, that the land would be let to the same tenant, Benjamin Treloar. That was not the case and the land crossed by the Order route remains outside identified recorded ownership.
15. It is acknowledged that tithe maps can only give an indication of whether a route is public or private, which led to the weight in the IOD tipping slightly towards private use by those higher rights than foot. However, the now available wider evidence of the historical treatment of all the routes identified by this apportionment number tips the balance back the other way. I am satisfied that tithe map suggests, on the balance of probabilities, that the Order route was the main public route in this location at this time. As such, I consider it would have been used by all classes of user.

Ordnance Survey maps

16. Both the BHS and the RA submitted additional OS maps to those already considered, dating from 1856 - 1975. These maps continue the story identified in the IOD of the growing importance of Roskilly Lane in comparison to the Order route over time. Whilst the owners of the mill argue that this indicates the Order route was private, and so could just be altered without the legal processes that might otherwise be required, I consider it simply shows that the public chose to use the new route more often, allowing changes to arise. The user evidence submitted to the Inquiry showed that the use did not stop, although it seems to have dwindled over time.
17. Copies of an OS Book of Reference were submitted, providing descriptions of what was seen on the mapping. Although there was disagreement as to the date of the document I am satisfied that it identifies the Order route as part of number 1937, described as Road, in the same way as Roskilly Lane, numbered 1930. It is the case that there were no gates across the Order route shown on any of the mapping; this would make it very difficult to prevent any use.
18. I agree with the RA that the bracing symbols arise from the OS mapping base and were not added by the District Valuer to the Finance Act 1910 mapping;

the matter was mentioned in that section of the IOD only as that was where discussion arose during the Inquiry. The terms of the Ordnance Survey Act 1841 suggest that it would be highly unlikely that the OS surveyor would have enquired into landownership.

19. The continued depiction of the Order route on the small-scale late nineteenth and early-mid twentieth century OS maps showed that it was an important enough route to be recognised by the surveyors for inclusion even at this scale. It was generally indicated in the same way as Roskilly Lane and I consider this further evidence adds weight to it having been of the same use and status.

Bartholomews maps

20. The RA submitted Bartholomew's ½ inch to the mile maps, 1903 and 1922. These show the Order route rather than Roskilly Lane, again suggesting the relative importance of it. I agree that it would not make sense for these maps, on sale to the public, to show a private road, rather than a nearby public road. These maps add further weight to the public status of the Order route.

Ownership

21. I note that the RA could not find public roads in the area registered in private ownership, although most footpaths and bridleways cross registered land. Public roads are rarely registered and I agree that the unregistered nature of the land crossed by the Order route adds a little more weight to the argument that this was a public road.

Other issues

22. Some further comments have been made regarding the evidence heard at the Inquiry but I am satisfied that I have dealt with that evidence within the IOD. There was concern about a petition but I have considered the user evidence on the basis of the submitted user evidence forms and the oral evidence given, and tested in cross-examination, at the Inquiry.

Width

23. The owners of the mill felt that there should be a survey of the current widths. The width to be recorded is based on the evidence of the route historically available to the public. More recent changes may have altered what is now physically available but there is no evidence of a legal change. I am satisfied that the identified modification to record the width by reference to the OS map should continue to be recorded in the Order Schedules as requested.

Summary

24. I initially found the evidence just insufficient to support the existence of higher rights for the public. Having the advantage of further evidence, I consider that this clarifies and confirms the likely balance of use as being on the Order route in the earlier years, with Roskilly Lane taking the main use later.
25. I am satisfied that the evidence tips the balance to public, rather than purely private, use and that the use would have been by all classes of user, as a public road. Taking account of the evidence as a whole I consider, on the balance of probabilities, that the route should be recorded at the status restricted byway, as originally set out in the Order.

Other matters

26. It is clear that this matter has arisen at a very difficult time for the owners of the mill and adjacent land and properties and I thank them for their continued assistance during this process. Although I extend my sympathy for the current personal circumstances, I am unable to allow such matters to alter the outcome.
27. In addition to the matters identified in the IOD that I am unable to take into account, I also note that whether the recording of the route would lead to loss in the value of the property and whether there is a need for the route are not issues I can consider.

Conclusions

28. Having regard to the above and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be confirmed as originally made in terms of status. The modification previously proposed in my IOD in relation to the recording of width should be confirmed.

Formal Decision

29. The Order confirmed subject to the following modifications:
- Within Part II of the Schedule:
 - add box for 'Maximum width' at "5 metres" adding a note that this is "*In accordance with the depiction of the way on map sheet Cornwall LXII.16 from the Ordnance Survey County Series Second Edition published at 1:2500 scale.*"

Heidi Cruickshank

Inspector

