



Order Decision

Site visits made on 24 July 2017 and 3 July 2018

Hearing held 3 July 2018

by Helen Slade MA FIPROW

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

Decision date: 03 August 2018

Order Ref: FPS/Q1770/7/85M

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as The Hampshire (Winchester District No. 57)(City of Winchester) Definitive Map Modification Order 2015.
- The Order is dated 19 November 2015 and proposes to modify the Definitive Map and Statement for the area by adding a bridleway as shown in the Order plan and described in the Order Schedule.
- In accordance with Paragraph 8 (2) of Schedule 15 to the Wildlife and Countryside Act 1981 I have given notice of my proposal to confirm only part of the Order and to amend the description of the Order route accordingly.
- One objection was made with respect to my proposed modifications.

Summary of Decision: The Order is confirmed subject to the modifications that I formerly proposed, plus one minor additional modification, as set out in the Formal Decision.

Procedural Matters

1. My interim decision on this matter was issued on 4 August 2017 and should be read in conjunction with this, my final, decision.
2. Due to the complex legal issues involved in this case, which I felt would benefit from an oral discussion, a Hearing was arranged. It was held on Tuesday 3 July 2018 in the Mitchell Room at Elizabeth II Court, Winchester.
3. The objector at the Hearing was the original applicant, Ms Sue Coles on behalf of the Winchester CTC ('WCTC'), now part of Cycling UK. She was accompanied and assisted by Mr Andy Key, also a member of WCTC and a trustee of Cycling UK.

Main Issues

4. I established at the outset of the Hearing that there was some common ground between the parties present in that there is no dispute over the section of the Order route which I have proposed for confirmation as a bridleway (Points E to G on the Order plan).
5. The main issue which remains to be addressed is whether or not the remainder of the route is of a legal status which it is appropriate to record on the Definitive Map and Statement; and whether I should therefore make amendments to my proposal. The objector disagrees with my conclusion that the remainder of the route constitutes a 'footway' and in particular the

inference that the use of cycles over that part of the route is therefore unlawful. Objection is also made that my conclusion results in the non-recording of the part of the route between Points A and E on the Definitive Map and Statement.

6. I set out in my interim decision the legal basis on which the Order had been made, so I will not repeat it here. Suffice to say that the criteria which need to be satisfied remain the same as set out at paragraph 12 of that decision.
7. The test I must apply is the balance of probabilities.

Reasons

Documentary evidence of the status of the route

Section A-E

8. In my interim decision I focussed on the question of whether or not the route between these two points comprised a 'footway'. This was the position asserted by the Order Making Authority ('OMA') and also by Highways England ('HE'). All the land involved is owned by either Hampshire County Council (in its role as highway authority) or by Highways England. During the period prior to the application for the Definitive Map Modification Order ('DMMO') the HE land was owned by the Secretary of State for Transport, and managed on his behalf by the Highways Agency.
9. However, Ms Coles and Mr Key, on behalf of WCTC, argued strongly at the Hearing that the route had been set out from the start for cyclists in addition to pedestrians, and that therefore it could not be classed as a 'footway'. The OMA maintained its position that the route between Points A and E was a footway. and that therefore my interim decision should be confirmed since no amount of usage by cyclists could give rise to a dedication of public rights.¹
10. Ms Coles stated that, at the time of the construction of the interchange in the 1980s, the term 'cycleway' did not exist in legal terms and that this might explain the lack of any documentary evidence. However, I note that the Highways Act 1980 ('the 1980 Act'), as it was originally drafted and in force at the time, does contain specific provisions for the creation of a cycle track. Section 65 states as follows:

"... a highway authority may, in or by the side of a highway maintainable at the public expense by them which consists of or comprises a made-up carriageway, construct a cycle track as part of the highway; ...

... A highway authority may alter or remove a cycle track constructed by them under this section."
11. The applicant was also able to provide the guidance current at the time in respect of the design standard for combined pedestrian and cycle subways² and considered that this document supported her view that the route had always been set out for cyclists.
12. The guidance suggests that for subways up to 23 metres long (applicable to both the subways on the Order route) the height should be 2.4 metres for the

¹ Because it is not possible for rights to arise from an unlawful act

² Department of Transport Highways and Traffic Departmental Standard TD 3/79

- section used by cyclists and 2.3 metres for the part used by pedestrians. The width of such a subway should be 5.0 metres, where 2.0 metres was set aside for pedestrian use and 2.5 metres to accommodate two-way cycling. I note that this guidance is specifically aimed at combined subways where the pedestrian use and the cycle use are segregated.
13. The details submitted by the applicant of the subways on the Order route as built shows that they were both constructed to a height of 2.3 metres and a width of 3.00 metres. Thus they did not conform to the guidance for cycle subways in terms of height, but they were wider than the guidance suggests was required solely for pedestrian use; and the height was adequate for cycle use as demonstrated from examples elsewhere.
 14. Similarly Ms Coles stressed that the original layout of the route across the overbridge (between Points D and E on the Order route) was only marginally less than the guidance set out in the Design Manual for Roads and Bridges TA 90/05, and was within the tolerances allowable for short distances.
 15. It was also pointed out to me at the site visit following the Hearing that the overbridge parapet adjacent to the Order route was higher than the parapet on the opposite (vehicular) side of the road. The height of the parapet was that specified for use adjacent to routes used by cyclists, again reinforcing the applicant's view that the route had been set out as a cycling route. I place limited weight on this factor as I have no evidence as to whether or not the parapet is contemporaneous with the construction of the overbridge or not. However, I accept that it is higher which does lend support to the argument put forward on behalf of the WCTC.
 16. When taken together with the confusion of correspondence between the various agencies over the years, and the clear encouragement of cycling along the entire through route by several agencies, I can well understand the position adopted by the applicant and the organisation she represents. However, and notwithstanding the inevitable incongruity, I do not consider that the information submitted is helpful in persuading me to amend my decision and confirm the Order as a bridleway throughout.
 17. It was within the power of both the Department of Transport (as highway authority for the motorway and the trunk road) and Hampshire County Council (as highway authority for the remaining routes) to set out a route in accordance with the provisions of Section 65 of the 1980 Act and there was no need for a specific legal process to do that. I am persuaded by the evidence which has been submitted that the whole route was set out with cycling in mind at the time of the construction of the junction. No evidence has been submitted which clearly identifies any contemporaneous design guidance for combined pedestrian and cycle routes (which are 'shared use' in modern parlance) but in any case the guidance is not, as far as I can tell, mandatory. It is guidance - and there may be reasons why it might be necessary to depart from the ideal.
 18. For the sections of the Order route where the 'cycle track' lies '*in or by the side of*' the '*made-up carriageway*'³ I now adopt the view that part of the Order route between Points A and E is clearly a segregated part of the all-purpose highway and thus not a route which can be recorded on the Definitive Map and

³ The provisions set out in Section 65 of the 1980 Act

Statement as a bridleway. In order to accurately identify the relevant stretches of the Order route I have found it necessary to add a notation letter to the Order plan between Points A and B which I will call 'X'. The relevant stretches of the Order route are therefore A-X and D-E, Point X being the location at which the Order route diverges from running immediately alongside Easton Lane to the south west of the roundabout, and Point D being the location where it resumes immediate proximity to the trunk road.

19. Between Points X and D the Order route is grade separated from the carriageway but there is no evidence that there was any intention that this section should be dedicated as a bridleway⁴. Although it may superficially resemble the section of the Order route which I have proposed to confirm as a bridleway (Points E to G), I take the view that there are significant differences which do not permit me to draw the same inferences. Firstly, the route between Points X and D does not connect at either end with a route which is able to be defined as a bridleway and, secondly, the route diverges from the carriageway for the sole purpose of passing beneath it, rather than crossing it at grade. To all intents and purposes it therefore lies to the side of the carriageway and, in my view, remains a segregated part of it. I therefore conclude that the section between X and D must have been intended for the same use as the stretches on either side and have been constructed with cycling in mind.
20. If I am wrong, and the route cannot be considered to have been constructed as a route for cyclists, then I rely on the conclusions I reached in my interim decision that cycling on a footway is unlawful and cannot give rise to rights for cyclists. In either case the outcome is the same in terms of the Order.
21. I have given consideration as to whether or not I should revisit my decision on the section E to G, and treat it in the same way as the remainder of the route, thereby not confirming the Order at all. However, given that no-one has objected to my proposal, and based on the reasons that I set out in my interim decision, I am satisfied that, however anomalous it may seem, the extension to the bridleway can be deemed to have been dedicated at common law between those points.

Other matters

22. My attention was drawn by Ms Coles and Mr Keys to the thick white line which formerly denoted the edge of the carriageway on the motorway overbridge. In their view this meant that the Order route was separate from the highway, and could be recorded as a separate legal entity. I disagree with that view because the edge of the carriageway does not automatically equate to the edge of the highway. Furthermore, I have already concluded that the Order route in this location runs "*in or by the side of...a made-up carriageway*" and thus is part of the highway. The fact that the managing agent, on behalf of the Department of Transport, felt able to amend the layout of the carriageway by removing the white line and adding an additional traffic lane suggests that the existence of the demarcation was for traffic management purposes and not for defining the edge of the highway.

⁴ As required by common law, bearing in mind the land at the time was Crown Land

Conclusions

23. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with the modifications I formerly proposed, plus one minor administrative modification which does not require advertising.

Formal Decision

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

In Part I of the Schedule;

- in the first line of the description, delete the words 'grid reference' and the first grid reference, and substitute '*Point E*';
- In the first line of the description insert '*(Point G)*' after the word 'to' and put brackets round the reference to the second grid reference;
- In the first line of the body of the description delete the reference to the width being 2.5 metres and substitute '*3.0*';
- In the body of the description delete the description from and including the words at the end of the first line ('on the') up to and including the word 'footway' in the fifth line and substitute the words '*at Point E*';
- In the body of the description in the fifth line, after the words 'Junction 9' delete the words 'for 115 metres (C-D-E)';
- In the last line of the description delete the reference to '460' metres and substitute the figure '*160*';

In Part II of the Schedule;

- Insert at the beginning of the body of the description of the route the words '*A bridleway*' and substitute a lower case '*v*' at the beginning of the word 'Varying';
- In the first line of the body of the description amend the reference to the maximum width from '3.3' metres to '*3.0*' metres;
- In the first line of the body of the description delete the grid reference 'SU 4951 3032' and substitute the words '*Point E*';
- In the first line of the body of the description after the word 'and' insert the words '*Point G*' and insert brackets round the grid reference 'SU 4979 3056';
- Delete the body of the description from and including the words 'on footway' in the second line, to and including the word 'footway' in the fourth line, substituting the words '*at Point E*';
- Delete the whole of the first entry relating to the width of the path;
- In the second entry relating to the width of the path delete the first grid reference and substitute the words '*Point E*';

- In the second entry relating to the width of the path after the word 'and' insert the words '*Point F*' and insert brackets round the grid reference 'SU 4978 3054';
- In the last entry relating to the width of the path delete the words and figures 'SU 4962 3040 and SU 4963 4963(*sic*) 3042 and between';
- In the last entry relating to the width of the path after the remaining word 'between' insert '*Point F*' and put brackets round the ensuing grid reference;
- In the last entry relating to the width of the path after the word 'and' insert the '*Point G*' and put brackets round the ensuing grid reference;

On the Order plan:

- Delete the bridleway to be added between Point A and Point E.
- Add Point X as shown.

Helen Slade

Inspector

APPEARANCES

FOR THE ORDER MAKING AUTHORITY:

Mr Harry Goodchild	Hampshire County Council
Ms Caroline Perry	Hampshire County Council

FOR THE APPLICANT AND OBJECTOR:

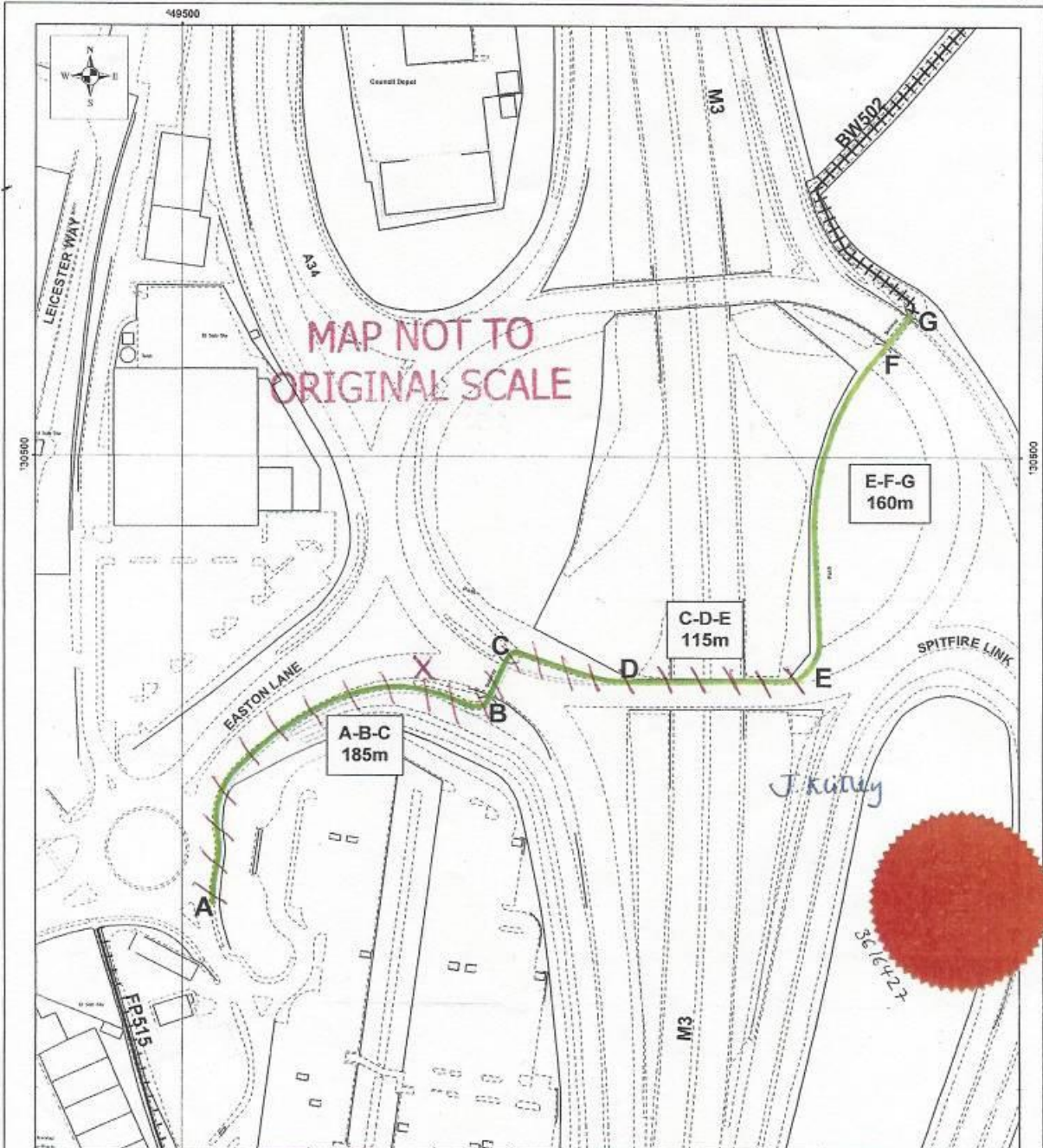
Ms Sue Coles	WCTC
Mr Andy Key	WCTC

INTERESTED PERSONS:

Mr Bob Damper	Chair of South Downs National Park Local Access Forum
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DOCUMENTS

- 1 Bundle of documents from WCTC including their original statement of case dated 28 April 2017 with all attachments; their supplementary statement dated 20 June 2017; and their statement of case dated 27 April 2018 with appendices
- 2 Bundle of documents from Hampshire County Council including their original statement of case dated 17 March 2017 with two lever arch files of appendices; their response to the original statements of case, dated 8 June 2017, with attachment; and their statement of case dated 1 May 2018
- 3 Statement of case from Highways England dated 27 April 2017 and attachments





MAP NOT TO ORIGINAL SCALE

SCALE 1:1500 449500

LEGEND

BRIDLEWAY TO BE ADDED TO THE MAP:- 

EXISTING FOOTPATH TO BE RETAINED:- 

EXISTING BRIDLEWAY TO BE RETAINED:- 

MAP No.454 PRODUCED FROM DIGITAL DATA SUPPLIED BY ORDNANCE SURVEY

THE COMMON SEAL OF HAMPSHIRE COUNTY COUNCIL WAS HEREUNTO AFFIXED IN THE PRESENCE OF:-

..... AUTHORISED SIGNATORY

DATE 19th November 2015

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KAREN MURRAY, DIRECTOR OF CULTURE, COMMUNITIES AND BUSINESS SERVICES, WINCHESTER