



Order Decision

Hearing Held on 15 August 2017

Site visits made on 24 July 2017 and 16 August 2017

by Helen Slade MA FIPROW

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

Decision date: 07 August 2018

Order Ref: ROW/3167600M1

- 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 (Basingstoke and Deane Borough No. 49)(Parish of St Mary Bourne) Definitive Map Modification Order 2016.
- The Order is dated 27 October 2016 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway 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 modify the Order to record a bridleway instead.
- There were four objections to my proposed modification.

Summary of Decision: I confirm the Order as originally made.

Procedural Matters

1. My interim decision on this matter was issued on 15th September 2017 and should be read in conjunction with this, my final decision.
2. Following receipt of four objections to my proposed modification, the parties have all agreed to the written representation procedure being used to determine the matter.

The Main Issues

3. Having been satisfied that the Order Route is a highway, the main issue I must now consider is whether I am correct in determining that it should be recorded as a public bridleway, or whether some other designation is more appropriate.
4. Hampshire County Council (as the Order Making Authority or 'OMA') maintain their view that the route carries vehicular rights as an all-purpose highway (subject to the provisions of the Natural Environment and Rural Communities Act 2006 ('the NERC Act')) and this view is supported by other parties, in particular Mr Peter Scrase. The original objector, Mr Sheerman, considers that the route is, at best, a public footpath.
5. As I set out in my interim decision, Section 67(1) of the NERC Act extinguished any existing public right of way for mechanically propelled vehicles on a way which, before 2 May 2006, was not shown in a Definitive Map or Statement, or was shown only as a footpath, bridleway or a Restricted Byway, subject to certain exemptions. If the OMA and Mr Scrase are correct in their analyses of the situation, I must examine the provisions of the NERC Act to determine

whether or not any public rights for mechanically propelled vehicles have been exempted from extinguishment by any of the stated provisions.

6. I continue to have regard to the guidance provided by the Department for Environment, Food and Rural Affairs ('Defra') in Circular 1/09 on Public Rights of Way, and to relevant legal judgements.
7. The test I must apply is the balance of probabilities.

Reasons

Examination of the Historical Documentary Evidence

8. In my interim decision I examined the historical documentary evidence in chronological order as far as possible as I believe this is the best way of achieving a synergistic picture of the question at issue. Mr Scrase has carried out a very detailed study of one of those historical documents, the outcome of which is supported by the OMA, the original applicant Mrs Woods, and Mr Anthony Prior. Mr Sheerman has not specifically commented on the findings of Mr Scrase, but continues to disagree with my interpretation of the historical documents and the inferences I drew from both that evidence and the evidence of the physical conditions of the Order route. I will deal firstly with the historical evidence.

Whitchurch Highway Board Schedule of Highways

9. Mr Scrase has undertaken an extensive and detailed examination of the information contained in the Schedule (which is dated 30 June 1863) and produced maps of the measured routes as he identifies them. He has also tabulated the lengths taken from the 1863 Schedule and compared them to his own measurements calculated digitally. His efforts have been meticulously set out, and his methodology and reasoning peer-reviewed by Mr Anthony Prior.¹ Both the OMA and the applicant rely on the work that Mr Scrase has done and I have no hesitation in agreeing that it is exemplary.
10. I also have no difficulty in agreeing with the OMA on the likely sequence of events resulting in the 1863 Schedule, and its relationship with the St Mary Bourne Vestry minutes. Whilst I did not make the connection obvious in my interim decision, it seems quite logical to me that the two processes were linked.
11. No-one has provided any evidence to challenge the conclusions reached by Mr Scrase in his identification of the relevant routes, and his evidence is of great value to my determination of the Order. I acknowledge that previous officer reports had given the 1863 Schedule considerable weight in support of other claims, but I must nevertheless bear in mind that each case is different and must be determined on the facts relevant to each situation. Notwithstanding, I can find no reason not to give Mr Scrase's work considerable weight in supporting that Rope Yarn Lane is, in fact, demonstrably part of the road described in the Schedule as '*Newbury Road by Doiley Wood*'.
12. I say this because the measurements given by Mr Scrase, and in particular the work done in identifying all the routes in the Schedule, convince me of the logic of the argument. Most telling was the information about the lack of a road

¹ Who gives his qualifications as a Fellow of the Royal Institution of Chartered Surveyors.

- down the valley immediately adjacent to the Bourne, and the consequence of that on the use of Windmill Hill as part of the route through the village. As Mr Scrase points out, in measuring all of the highways in the parish or tithing, one cannot count a route twice. In the absence of a through route down the valley in its present position, I accept that Windmill Hill must have been used for this purpose, whether by way of the ford or otherwise.
13. If Windmill Hill was measured as part of the route through the village of Stoke, it cannot also have been measured as part of the route to *Newbury Road via Doiley Wood*. An alternative route must have formed the basis for that particular measurement and I accept that the only logical contender is by way of Rope Yarn Lane. The measurement of that route made by Mr Scrase taken from Newbury Road itself (as it is described in the 1863 Schedule) has a close correlation to the distance in the 1863 Schedule, being only 7 metres less. I accept that this is a reasonable margin of error.
 14. This conclusion enables the measurements for the other adjoining routes to be explained and understood, further strengthening the case put together by Mr Scrase.
 15. I have studied the maps produced by Mr Scrase, together with his detailed explanation, and I am satisfied that it does indeed demonstrate that Rope Yarn Lane was included in the 1863 Schedule as forming part of the *Newbury Road by Doiley Wood* route. In my interim decision I was unable to place the weight on this evidence because it had not been demonstrated to my satisfaction that this was the case on the balance of probabilities. As a consequence I gave other evidence more or less weight than it was perhaps due. Mr Scrase has been able to explain and account for most of the measurement discrepancies and put them into a statistical context.
 16. Given the weight that I am now able to give the information in the 1863 Schedule, I can correspondingly place more weight on the fact that the route has been consistently shown on Ordnance Survey maps since 1808 in the context of the surrounding network, and on the picture resulting of its depiction on other maps over the years. Clearly it was not shown on all maps, even during the 19th century, but many of these were small scale, or were of less accuracy overall. I place more weight than I did previously on its depiction as a separate piece of land outwith the surrounding hereditaments on the map associated with the 1910 Finance Act documents, and its continued lack of any registered owner.
 17. I can now say with confidence that, on the balance of probabilities, the evidence supports that Rope Yarn Lane was part of the principal road network in the parish, and had been since long before 1863.
 18. I was satisfied previously, and remain satisfied, that the route has diminished in its importance as part of the overall local network, and this is reflected in its mixed and ambiguous representation in later local authority documentation (i.e. its slightly unclear status on the maps produced by the Joint Planning Committee in the mid-1930s, and its absence from the parish claim for the Definitive Map in the 1950s). I accept that this is not an uncommon scenario, and suggests that it may locally have been considered to be a road, but not understood as such by others. Nevertheless, by virtue of its previous existence and status it was, and remains, a vehicular highway maintainable at public expense, whether or not it has actually received any maintenance whatsoever.

The effect of the NERC Act

19. The intention of the NERC Act was to curtail the scope for establishing and recording public rights of way for mechanically propelled vehicles, particularly where those rights were established historically by means of use in non-mechanically propelled vehicles.² It achieved this by automatically extinguishing such rights except where those rights were saved by one of a number of exemptions.

20. Clause 67(1) reads as follows:

"An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement³ –

(a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway."

21. Clause 67(2)(b) reads as follows:

"Subsection (1) does not apply to an existing public right of way if –

(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66) (list of highways maintainable at the public expense),

(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,

(d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or

(e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930."

22. Clause 67(3) provides further exemptions as follows:

"Subsection (1) does not apply to an existing public right of way over a way if –

(a) Before the relevant date⁴, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,

² Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways – A guide for local authorities, enforcement agencies, rights of way users and practitioners (Version 5 May 2008)

³ 2 May 2006

⁴ 20 January 2005

(b) Before commencement, the surveying authority has made a determination ... or

(c) Before commencement a person with an interest in the land has made such an application ..."

23. Clause 67(5) preserves a private right of access in mechanically propelled vehicles for persons with a need to access land in which they have a legal interest.
24. In this case the application was made after 20 January 2005 so the exemption in clause 67(3) does not and cannot apply.
25. The way was not shown on the Definitive Map and Statement before 2 May 2006, and neither was it shown on the relevant list of streets. Thus the exemption in clause 67(2)(b) does not apply either.
26. There is no evidence to suggest that its main use during the five years prior to 2 May 2006 was in vehicles. The user evidence submitted would suggest that its principle public use was on foot or on horseback with occasional use in some sort of vehicle. Although this is disputed by Mr Sheerman, and the user evidence has not been tested, in the context of the consideration of exemptions this is not relevant. In the absence of any evidence to show whether or not mechanically propelled vehicles used the way prior to 1 December 1930, or any evidence that the route was created by enactment, I conclude that none of the other exemptions apply.
27. I am therefore satisfied that the evidence shows that any rights for mechanically propelled vehicles which previously existed over the Order route were extinguished by the coming into effect of the NERC Act. Any access to land in mechanically propelled vehicles which was formerly exercised in pursuance of a public right of way is preserved as a private right of access by virtue of the provisions of Section 67(5) of the NERC Act.
28. The consequence of this is that I am satisfied that the appropriate status of the Order route is a Restricted Byway. It follows that I consider that the Order should be confirmed as made, and that my proposed modification is no longer appropriate.

Use of the route

29. Although Mr Sheerman continues to dispute the evidence of use of the route, and seeks to explain its appearance by reference to more recent use by agricultural vehicles, the confirmation of this Order does not rely on user evidence, nor on the physical condition of the route.

Other Matters

30. In his objection to my modifications, Mr Sheerman draws my attention to three other routes featured on the Joint Planning Committee documents in the 1930s, and currently recorded as footpaths. He uses this information to suggest that the Order route I am considering should be treated likewise.
31. I have already indicated that each case must be determined on its own particular merits and, in any case, I have previously determined that the route carried more than pedestrian rights. I am unaware of all the circumstances affecting the three routes highlighted by Mr Sheerman and they are not

necessarily relevant to the route I am considering. I have made my decision based on the evidence relevant to this Order route.

Conclusions

32. Having regard to these and all other matters raised at the both the original hearing and in the written representations I conclude that the Order should be confirmed as made.

Formal Decision

33. I confirm the Order as originally made.

Helen Slade

Inspector

HAMPSHIRE COUNTY COUNCIL

WILDLIFE AND COUNTRYSIDE ACT 1981

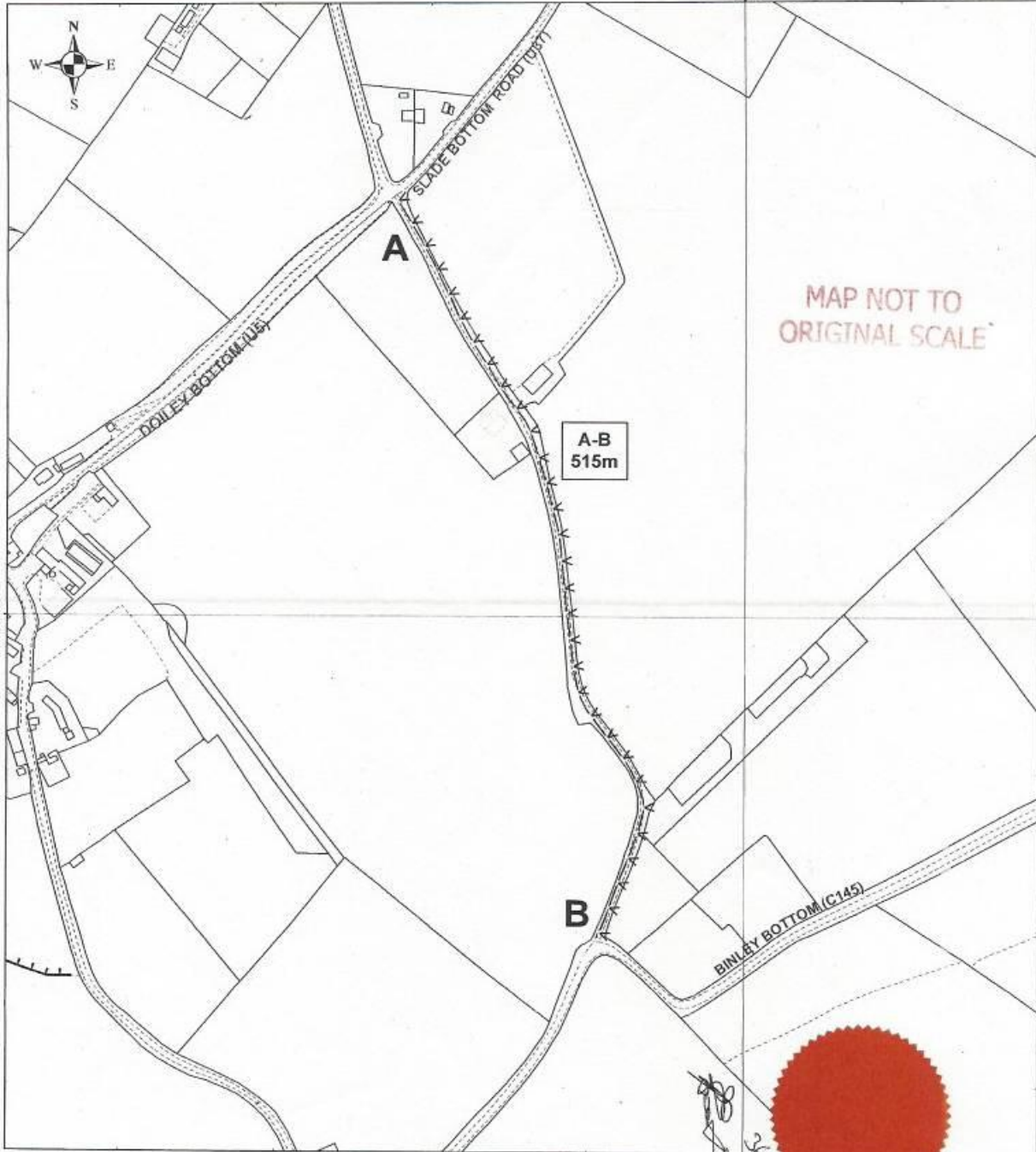
MAP REFERRED TO IN THE HAMPSHIRE

(BASINGSTOKE AND DEANE BOROUGH NO. 49)

(PARISH OF ST MARY BOURNE)

DEFINITIVE MAP MODIFICATION ORDER 2016

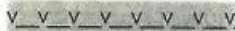
41000



SCALE 1:2,500

LEGEND

RESTRICTED BYWAY
OF VARIABLE WIDTH TO BE
ADDED TO THE MAP SHOWN:-



MAP No.463 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 27 October 2016

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