



Order Decision

Site visit on 29 August 2018

by Paul Freer BA(Hons) LLM PhD MRTPI

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

Decision date: 28 December 2018

Order Ref: ROW/3196026

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Herefordshire Council (Addition of Byway Open to All Traffic BKR14 Brockhampton) Modification Order 2017.
- The Order is dated 7 April 2017. It proposes to modify the definitive map and statement for the area by the addition of Byway Open to All Traffic (BOAT) from the C2272 County Road to the B4224 County Road in the Parish of Brockhampton, as shown on the Order map and described in the Order schedule.
- There were six objections outstanding when Herefordshire Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is confirmed.

Main Issues

1. The main issue here is whether the evidence is sufficient to show a BOAT can be presumed to have been established.
2. The Order was made under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-sections 53(3)(c)(i) and 53(3)(c)(iii). If I am to confirm it, I must be satisfied that, on a balance of probability, the evidence shows a BOAT subsists along the route described in the Order and that other particulars contained in the map and statement require modification.

Reasons

3. Herefordshire Council (HC) made this Order in response to an application from Mr Owen Morgan on behalf of the Open Spaces Society. The case in support is based largely on documentary evidence. It is convenient to set out first that documentary evidence. I shall then turn to the one user evidence form that was submitted with the application, the comments made by affected landowners and the objection to the Order. I will then conclude by assessing all the evidence looked at in the round.

The documentary evidence

4. The documentary evidence is derived from numerous sources, including historical maps and a signed statement. I shall consider these in turn, where appropriate grouping documents from the same source or of similar description together.
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5. Between 1817 and 1901, a number of commercial maps were produced for the County of Herefordshire. On all of these maps, the route is clearly recognisable. This includes the map produced by Andrew Bryant in 1835, who is recognised as producing well-made maps using surveyors and a triangulation system. On his map, Bryant depicts the route as bounded on both sides by solid black lines, which the key indicates as 'Good Cross & Driving Roads'. Other routes that are presently in use as public roads are also clearly recognisable on this map and are similarly depicted.
6. The objectors to the Order point to inconsistencies in terms of what these maps record, and in particular point to the 1817 map produced by Henry Price as being based on working drawings produced by Ordnance Survey. This is acknowledged by HC although, as pointed out, it was also based on actual surveys that he undertook. I accept without hesitation the general point made by objectors that OS maps are concerned with physical features and not rights of use, but this does not negate consideration of these maps alongside other evidence.
7. Contemporaneous with the production of the County Maps, and beyond, Ordnance Survey produced a series of maps of the area. On all of these maps, the Order route is clearly recognisable. In particular, the Ordnance Survey map of 1887 shows the route in some detail and essentially as existing at the present time. Similarly, the Ordnance Survey maps of 1904, 1905, 1927, 1929, 1931 and 1952 also show the route in some detail. On all these maps, the Order route is shown as enclosed by solid lines in a similar way to other roads that are recognisable as existing at present. I also note that in these later maps a footpath is shown in the same position as footpath W015B on the present Definitive Map. That footpath is depicted differently on the Ordnance Survey maps than the Order route and, unlike the Order route, is also specifically annotated as "F.P.". I comment on the significance of this below.
8. Although now wholly within the parish of Brockhampton, as a result of the Hereford and Worcester (Areas) Orders (SI 1985 No56) coming into force, the Order route originally passed through the parishes of both Brockhampton and Woolhope. The Brockhampton Tithe Map of 1840 shows the section of the Order route from point A to point B albeit, as noted on the Tithe Map itself, this part of the route fell within the parish of Woolhope at that time. A small part of the route from point B to point C is also shown on the Tithe Map. The Order route is depicted on the Tithe Map as solid lines, as is a section of another route that now form part of a public road (C2272).
9. The extract of the Brockhampton Tithe Map provided to me includes part of some wording within the confines of the Order route as depicted that, whilst not shown in its entirety, appears to read "To Hereford". The objectors to the Order question the inferences that may be drawn from Tithe Maps and challenge some of the points relied upon by HC in this respect as being mere assertion. Nonetheless, the annotation of a road 'to' or 'from' a named settlement on a Tithe Map is suggestive of public rights. It therefore seems to me that, whilst clearly not conclusive in its own right, the annotation of "To Hereford" on the Brockhampton Tithe Map should be considered alongside other documentary evidence.
10. I have also been provided with an extract from the Woolthorpe Tithe Map of 1845. This map shows the entirety of the Order route as solid lines infilled with

- a pale, but nonetheless discernible, sienna colour wash shading. Other routes that may be recognised as forming part of the existing road network are similarly depicted on the map.
11. In June 1869, the whole of the Brockhampton Estate was offered for sale at auction. The plan accompanying the sales catalogue shows the Order route in full. Other routes that are presently in use as public roads are also clearly recognisable on this map and are similarly depicted.
 12. The sales catalogue itself is wholly silent on access to the Estate. One possible explanation for the omission of the Order route from the sales catalogue, together with similarly depicted routes, is that these routes were recognised as being open to public use. Notwithstanding, I acknowledge that there is nothing in the catalogue for the 1869 sale of the Brockhampton Estate that expressly supports or negates that possibility.
 13. The Brockhampton Estate was offered for sale again in 1890. The full length of the Order route is shown on the Auction Sale Plan, and is depicted the same as other routes that are presently in use as public roads.
 14. In addition to the maps relating to the sale of the Brockhampton Estate in 1869 and in 1890, I have been provided with a number of other maps relating to the title of this land. However, there is limited supporting information in relation to these maps and, in some cases, only part of the route is shown. For that reason, whilst the route (or parts of it) is typically depicted on these maps in the same way as other routes now recognisable as being public roads, I can only attach limited weight to them.
 15. The Finance Act Map of 1910 shows the entirety of the Order Route, with the majority of the route being excluded from the hereditaments identified on the adjoining plots. The majority of the route is depicted on the Finance Act Map as uncoloured and not numbered, and as such can be distinguished from the coloured and numbered hereditaments. There is one a portion of the Order Route, equating approximately to the section between points F and G, which appears to be shown as forming part of the hereditament of a property identified as Buckenhill Farm. The Field Book records a deduction for 'Public Rights of Way or User' and I cannot discount the possibility that this deduction relates to section F to G of the Order route. The Finance Act Map also shows a number of footpaths now recorded on the Definitive Map as crossing the hereditament of Buckenhill Farm. It is therefore equally plausible that the entry in the Field Book relates to those footpaths.
 16. Setting aside the question over that one, relatively short, section of the route, it is reasonable to conclude from the above that the majority of the Order route is excluded from hereditaments associated with adjoining land. Whilst not in itself conclusive, one possible explanation for the exclusion of the Order route from the hereditaments is that it was considered public highway at that time, and as such was not taxable. It is also in my view significant that the Order route is depicted differently on the Finance Act Map than footpaths, suggesting that the route may have been used by vehicles or at least differently from the footpaths. It is also significant that the Order route is shown on the Finance Act Map in the same way as roads that now form part of the public road network.

17. I fully acknowledge that it is possible that the Order route was excluded from the Finance Act Map because it was a private road. The objectors consider that this is a credible scenario here, given that several properties that adjoin the route are said to have expressly granted rights of way over it. I will return to the question of ownership of the route below but it seems to me that, if the road had been private, the absence of colouring would place it at odds with other roads shown on the map that are similarly uncoloured and now recognised as being public roads.
18. As mentioned above, although now wholly within the parish of Brockhampton, part of the route was previously within the parish of Woolhope. I have been provided with extracts from the Woolhope Parish Council Minute Book dating from the period from April 1946 to January 1966 that record approaches to Herefordshire County Council seeking to have the Order route maintained at public expense¹. These Minutes also record that, in September 1965, the Parish Council resolved to support an application to have "the road at Upper Buckenhill" classified.
19. It is by no means certain from the description of "the road at Upper Buckenhill" that the Woolhope Parish Council Minute Book is referring there to the Order route. Nonetheless, it is apparent that the action was initiated following an approach to the Parish Council by a Mr Moffat, one-time occupier of Sloe Cottage and which is located at Point D on the Order route. Mr Moffat has, over time, consistently sought to have the Order route adopted as public highway: indeed, his commitment to that cause is termed by HC as "waging a campaign". The objectors to the Order question Mr Moffat's motivation, suggesting that he was seeking to have access to his property maintained at public expense. Nevertheless, on the basis of Mr Moffat's action in initiating the action to have the route classified, I am satisfied that this reference in the Council Minutes to "the road at Upper Buckenhill" does, more likely than not, relate to the Order route.
20. It is evident that no action was taken by Herefordshire County Council as a result of the approaches made by Woolhope Parish Council. The difficulty that I have with this evidence is that there is no explanation in the Woolhope Parish Council Minute Book or elsewhere as to why Herefordshire County Council took that stance. One interpretation is that Herefordshire County Council did not consider the route to be a public one at the time. The possible explanation put forward by HC, that the County Council did not have the route recorded and thus did not feel compelled to act, must be treated as being purely speculative. Nevertheless, the Minutes and the actions that the Parish Council took are in my view a clear indication that Woolhope Parish Council considered that the Order route was public vehicular highway.
21. The claimed route is not shown as being publicly maintainable on the Highway Handover Map of 1929 or the Publicly Maintained Highways Map of 1972. Given that the specific purpose of these maps was to identify routes maintainable at public expense, the omission of the claimed route from these maps is a matter to which I must attach appropriate weight. However, the omission of the route from the latter must be considered in the context of the sequence of events that occurred in years immediately before and after that map was produced. It is to that sequence of events that I now turn.

¹ The Order route is generally referred to in these Minutes as 'Cophthorne Lane'.

22. As part of the preparation of the First Definitive Maps, the National Parks and Access to the Countryside Act 1949 required Parish Council's to produce a map showing all the ways they regarded as public and wished to claim. Brockhampton Parish Councils submitted a claim for part of the Order route but this was not accepted for inclusion on the Draft Map. Woolhope Parish Council excluded the Order route from their submission map but did include the footpath that is now footpath W015B.
23. The Order route was not included on the First Definitive Map published in 1952 but is referred to in the Statement as part of the description for the footpath that is now Footpath W015B, where it is referred to as a "U.Rd" (unclassified road). The background to this is explained by HC, and derives from the decision made at that time that routes used by vehicles, whether public or private, were rejected for inclusion on the Definitive Map on the basis that only footpaths and bridleways should be included. This position is supported by the fact that the footpath that is now footpath W015B was shown on that First Definitive Map.
24. The situation was reviewed as a result of the Countryside Act 1968 (the 1968 Act) coming into force. The 1968 Act introduced the provision of a Special Review of the Definitive Map and Statement. As part of that Special Review for Herefordshire, the Order route was shown on the draft map and statement as a proposed modification to the First Definitive Map. The Order route was claimed as Byway Open to All Traffic W053 and, I understand, shown as such on the draft map and statement. No objections were received to the inclusion of this route on the Definitive Map and Statement.
25. As it transpired, the Special Review for Herefordshire was overtaken by events, specifically the coming into force of the 1981 Act. As a consequence of provisions within the 1981 Act, those claimed routes that were not subject to objection should have automatically been included on the Definitive Map and Statement. Because no objections had been received in relation to what is now the Order route, this should have applied to that route.
26. However, whilst the Order route was included in the Definitive Statement, where it was recorded as 'By-way', it was not shown on the Definitive Map itself. Moreover, whilst the Order route had originally been included in the Statement, the entry has subsequently been scribbled out in pencil. No explanation is given on the Statement itself for this handwritten modification.
27. The position adopted by HC is that the 1972 Special Review map is a legal event but that an omission occurred in the transfer of data from the draft map to the Definitive Map. This is supported by a detailed explanation of the methodology for producing maps at that time and citing the scale of the task as a factor, all corroborated by an experienced mapping officer. In my view, the explanation offered by HC is an entirely credible one, especially having regard to the initial inclusion of the route on the Statement to the Definitive Map.
28. In relation to the handwritten modification of the Statement, HC concede that this was an "incorrect action" and surmise that at some point an officer, realising that the route was not shown on the Definitive Map, took it upon themselves to remove the entry in the Statement. I also take the point made by HC that the Special Review process was a legal event to produce the Statement to the Definitive Map and that there was no subsequent legal event to change it.

29. The objectors point to the absence of the Order route on the List of Streets and accompanying map produced by Herefordshire Council as evidence that the route is not a public right of way. However, HC explain that the List of Streets was compiled pursuant to the New Roads and Streetworks Act 1992 and that, prior to that Act coming into force, it was normal practice for public rights of way to be recorded on Lists of Streets. Given that Herefordshire Council would have relied upon the Definitive Map when compiling the List of Streets, it is unsurprising that the Order route does not appear on that list.
30. The application was supported by a signed statement from a Mr Howard White, a long-time resident of Brockhampton and occupier of a property close to Point B of the Order route. In his statement, made in 1976, Mr White indicates that he had known the way all his life and that it had always been considered by local inhabitants as a public right of way used for all types of traffic. Mr White also provides details of several individuals who regularly used the complete way, albeit I note that these individuals appear to be tradespeople. It would therefore appear likely that these individuals were using the Order route for the specific purpose of delivering goods to properties along the route, and as such may have been than using the route through implied licence rather than as a public route in its own right.

User Evidence Form

31. The application was supported by a one User Evidence Form, this from the aforementioned Mr Moffat. Attached to that User Evidence Form are a number of detailed comments. As part of his evidence, Mr Moffat claims uninterrupted use of the Order route from 1964 to 1985, every day, both on foot and by motor vehicle. Nonetheless, as resident of Sloe Cottage, I cannot discount the possibility that Mr Moffat had a private right to use the Order route to gain access to his property. It follows that Mr Moffat's evidence cannot be considered as being made by a member of the public and accordingly I attach only limited weight to this evidence.

Land owners comments

32. The responses to the questionnaires sent to affected landowners revealed a divergence of opinion as to whether the Order route is public. A number of objections were raised in these responses, with the main grounds including highway safety, security, disturbance of wildlife (including protected species) and absence of need for the route. However, whilst these are clearly matters of importance to the owners of affected properties, they are not relevant to my consideration of this Order.

Objections

33. There are a total of six objections to the Order, all represented in submissions made on their behalf by a solicitor. Where appropriate, I have already addressed these objections above in relation to the relevant documentary evidence. I shall focus here on the objections made in relation to the ownership of and rights over the Order route.
34. The whole of the route is said by the objectors to be within the title held by the Clay family and forms part of the Brockhampton Estate. The copy of the conveyance provided by the objectors is of poor quality, but the land subject to the title appears to be that edged in red on the plan attached to the conveyance. The whole of the Order route falls within that area edged in red

albeit, for reasons that cannot be discerned from the document, part of the Order Route appears to be coloured in green. The poor quality of the reproduction is such that the date of the conveyance cannot be discerned, although comparison of the main text reveals it to be the same document referred to by the Council (see below), and therefore dating to 1965.

35. A number of residential properties that abut the route are in separate ownership and copies of the Title Deeds for these properties have also been provided. Although expressed in somewhat different terms, the Title Deeds to each of these properties state that the owner enjoys rights of access over a specified part of the Order route. It is also clear from these Title Deeds that the occupiers each pay a contribution to the maintenance of the route. The objectors consider that these private rights of way are evidence that the vehicular access enjoyed over the route by the owners of and visitors to these properties is evidence that it is by way of express permission. The underlying point being made is that, had the Order route been a public right of way, there would be no need for the occupiers of those properties to enter into agreements granting them access over the land.
36. It is, on my reading, clear that the Title Deeds held by the objectors do indeed provide for rights over parts of the route. The legal standing of those rights is, however, far from clear. As indicated above, the copy of the conveyance provided by the objectors is of poor quality. The copy of the conveyance provided by the Council is little better, although it is possible to discern that the date of the conveyance as April 1965. Even so, the quality of the reproduction is not of sufficient quality to enable all of the clauses within the document to be read. Consequently, whilst there is reference in the document to rights and easements, it is not possible to ascertain whether these relate to the Order route. In addition, there is the uncertainty around the significance or otherwise of the land coloured in green on the conveyance plan and which only applies to the Order route.
37. Against this, the land registry documents provided by the Council clearly show that none of the land crossed by the Order route falls within those titles. Those land registry documents do record rights being recorded over the Order route but, in view of the uncertainty over the conveyance in April 1965 and the clarity of land registry documents provided by the Council, I am not on the balance of probability persuaded that those rights are to the exclusion of any public rights that may subsist.

Assessment of the documentary evidence

38. In assessing the documentary evidence, I am immediately struck by the consistency with which the Order route is indistinguishable from other routes that are today recognisable as public roads. This is true of the County Maps, some of which were produced to a high quality by well-respected map makers. It is also true of the Ordnance Survey maps and the Tithe Maps. Furthermore, it is in my view significant that the Brockhampton Tithe Map of 1840 includes the annotation "To Hereford".
39. Similarly, the plan accompanying the sales catalogue for the Brockhampton Estate in June 1869 shows the Order route in the same way as other routes that are presently in use as public roads. The same applies to the Finance Act Map of 1910, which is consistent with the associated Field Book recording a deduction for "Public Rights of Way or User".

40. The role played by Woolhope Parish Council in the preparation of the Definitive Map for of the area is of particular importance. It is evident that even before the publication of the First Definitive Map the Parish Council considered the Order route to be public highway. There are understandable reasons why the Order route was only referred to in the Statement to the First Definitive Map as a County Unclassified Road. It is however instructive that the Order route was claimed as a Byway Open to All Traffic W053 at the first opportunity when the 1968 Act came into force. It is particularly significant that the Order route was captured as 'By way' on the Statement to the 1972 Special Review map. The fact that the Order route was omitted in error from the Definitive Map does not alter the importance of that legal event.
41. The probability that the Order route has been used as a public way is supported by the fact that Footpath W015B was shown on that First Definitive Map. That footpath can only be accessed from the Order route. It is therefore logical that the Order route must have been considered to be public way. Otherwise, including footpath W015B the First Definitive Map would have no meaning or value. This is consistent with the Order route being referred to in the Statement to the First Definitive Map as a County Unclassified Road.
42. Taken individually, none of the above considerations are in themselves conclusive. However, when looked at together and taken in the round, the documentary evidence builds a picture of the Order route consistently being shown in the same way as other routes that are presently in use as public roads and as being widely perceived as being public. I find this evidence to be compelling.
43. There is nothing in the evidence submitted by the objectors and affected landowners that casts significant doubt on the documentary evidence provided by the Council or which leads me to a different view. I am therefore satisfied that, on the balance of probability, the evidence shows a public vehicular right of way of the category byway open to all traffic subsists along the route described in the Order.

The effect of the Natural Environment and Rural Communities Act 2006

44. If confirmed, the Order would record the route in question as a byway open to all traffic. The definition of a byway open to all traffic is "*a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used*".² On the basis of the evidence presented in this case I am satisfied that the Order route meets this criteria.
45. Section 67(1) of the Natural Environment and Rural Communities Act 2006 (2006 Act) provides that an existing public right of way for mechanically propelled vehicles is extinguished, subject to subsections (2) to (8). However, Section 67(3)(a) indicates that Subsection 1 does not apply to an existing public right of way over a way if, before the relevant date, an application was made under section 53(5) of the 1981 Act for an order making modifications to the definitive map and statement so as to show a byway open to all traffic. The relevant date is stated at Section 67(4) of the 2006 Act as being 20 January 2005, and Section 67(6) indicates that the application must be in accordance with paragraph 1of Schedule 14 of the 1981 Act.

² Section 66 of the 1981 Act

46. The application was made on 21 May 2003, and therefore before the relevant date for the purposes of Section 67(4) of the 2006 Act. The application was made in accordance with paragraph 1 of Schedule 14 of the 1981 Act, including the submission of documentary evidence. Accordingly, I am satisfied that the exemption at Section 67(3)(a) of the 2006 Act applies in this case.

Conclusion

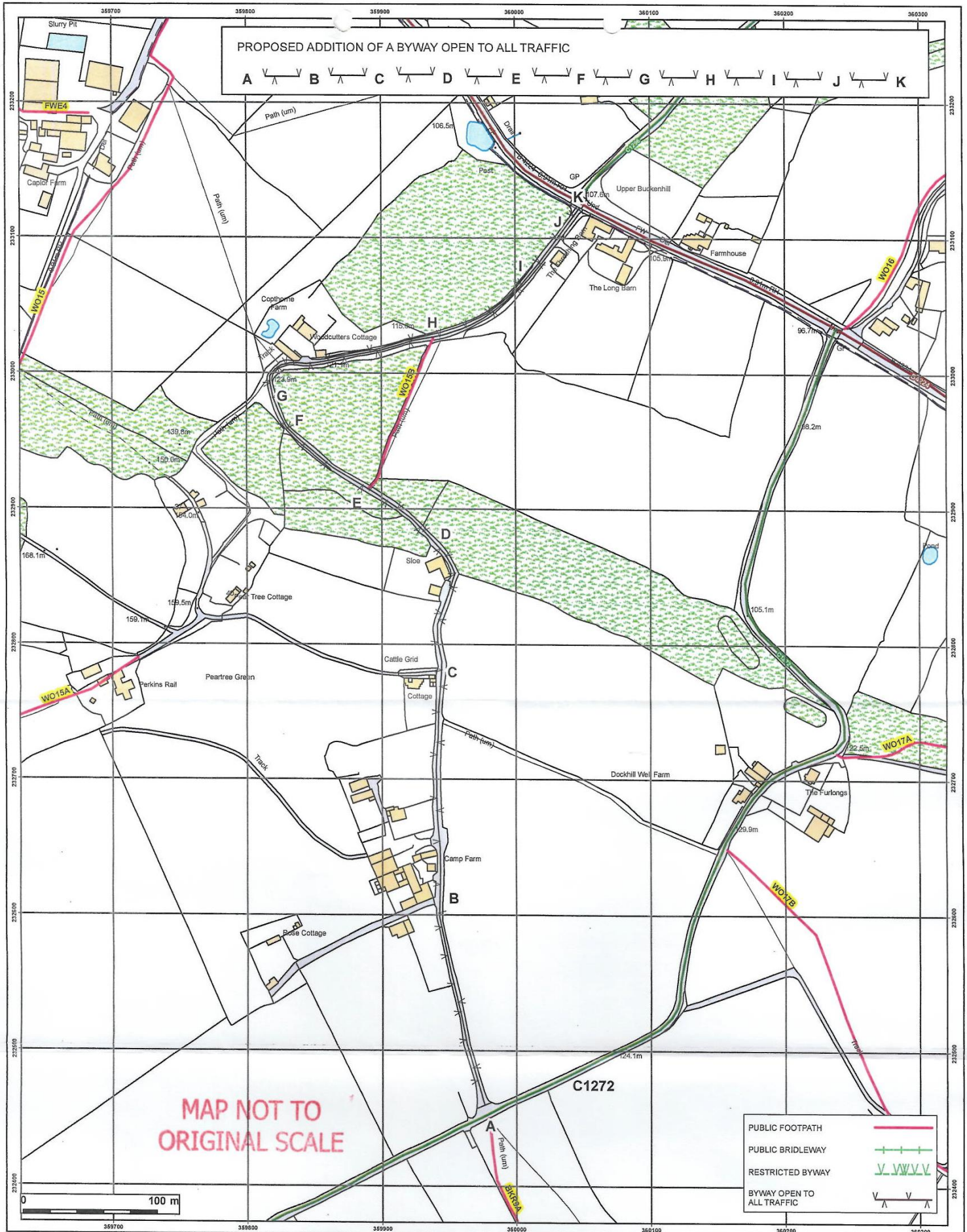
47. Having regard to the above and all other matters raised in the written representations, I confirm the Order.

Formal Decision

48. The Order is confirmed.

Paul Freer

INSPECTOR



MAP NOT TO ORIGINAL SCALE

PUBLIC FOOTPATH	
PUBLIC BRIDLEWAY	
RESTRICTED BYWAY	
BYWAY OPEN TO ALL TRAFFIC	



ORDER PLAN - COUNTY OF HEREFORDSHIRE DISTRICT COUNCIL
 WILDLIFE & COUNTRYSIDE ACT 1981
 ADDITION OF BYWAY OPEN TO ALL TRAFFIC BKR14
 IN THE PARISH OF BROCKHAMPTON
 MODIFICATION ORDER 2017
 DWG No.: M264 A3 (1)/425-GEN SCALE 1:2500 @ A3

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