



Order Decision

Inquiry held on 31 July 2019

Site visit undertaken on 30 July 2019

by Mark Yates BA(Hons) MIPROW

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

Decision date: 16 September 2019

Order Ref: ROW/3213248

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as The Cornwall Council (Upgrade of Footpath to Restricted Byway together with the Addition of Restricted Byways at Zelah in the Parish of St Allen) Modification Order 2017.
- The Order was made by The Cornwall Council ("the Council") on 28 March 2017 and proposes to record the route ("the claimed route") as a restricted byway in the definitive map and statement, as detailed in the Order Map and Schedule.
- There were two objections and one representation outstanding at the commencement of the inquiry.

Summary of Decision: The Order is proposed for confirmation subject to modifications set out below in the Formal Decision.

Procedural Matter

1. All of the points referred to below correspond to those delineated on the Order Map.

Main Issues

2. The Order relies upon the occurrence of events specified in Section 53(3)(c)(i) and (ii) of the 1981 Act. Therefore, consideration needs to be given to whether the discovered evidence shows on the balance of probabilities that the definitive map and statement should be modified on the grounds that:
 - a) a right of way which is not shown in the map and statement subsists, and
 - b) a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
 3. The Council's primary position is that the documentary evidence is supportive of the claimed route being an unrecorded vehicular highway. This would involve the upgrading of the existing footpath (points A-B) and the addition of new sections of public right of way (points B-C and D-E). As no exemption in Section 67 of the Natural Environment and Rural Communities Act 2006 is deemed to apply, any unrecorded public rights for mechanically propelled vehicles are extinguished and it is appropriate in such circumstances for the way to be recorded as a restricted byway.
 4. I shall first assess whether the documentary evidence is sufficient to infer the dedication of a highway at some point in the past. Should I find that this is not the case, I will consider the Council's alternative position, which is that the user evidence forms ("UEFs") provided are supportive of the more recent dedication of a footpath between points B-C and D-E. Despite the D-E section comprising
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of a short link between the C364 Road and a bridleway, no public rights are recorded over this section.

5. When considering the user evidence, the relevant statutory provision for the dedication of a public right of way is found in Section 31 of the Highways Act 1980 ("statutory dedication"). This requires consideration of whether there has been use of the way by the public, as of right¹ and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
6. Alternatively, an implication of dedication can arise at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication.

Reasons

Consideration of the documentary evidence

7. Tithe map extracts, dating from around 1840, show the claimed route as an enclosed lane. It is listed within the accompanying apportionment under the heading "*Waste and Road*". The depiction of the route in this way could provide some support for it having highway status. However, highways were incidental to the tithe process and no distinction appears to be drawn in the documents between public and private roads. These matters will serve to limit the evidential weight of the tithe documents.
8. The documents provided in relation to the 1910 Finance Act indicate that the claimed route was excluded from the surrounding hereditaments. The representation of a route in this manner can provide a good indication of highway status, probably vehicular as footpaths and bridleways were usually dealt with by way of deductions in the accompanying field books. However, there may be other reasons for its exclusion. It also needs to be borne in mind that the existence of highways was incidental to the Finance Act.
9. Although the claimed route is shown as a physical feature on various Ordnance Survey maps, these maps do not provide any clarification regarding the status of the route. The same applies to the aerial photographs provided. Further, the existence of private rights over the claimed route does not rule out the potential for unrecorded public rights to exist over the route or for public rights to have been subsequently dedicated.
10. The A-B section was claimed as a CRF (cart road footpath²) by Perranzabuloe Parish Council as part of the process to produce the original definitive map for the area. It was described at the time as continuing through to the "*Zelah Trunk Road*". However, the B-C section was not claimed at the time by St Allen Parish Council. The A-B section was added to the definitive map as a RUPP before being reclassified as a footpath. Whilst the documentation indicates that Perranzabuloe Parish Council took the view that a through route existed as far as point C, it does not necessarily point to this route being a recognised vehicular highway.
11. The exclusion of the claimed route from the surrounding hereditaments on the Finance Act map would generally be supportive of the route being a vehicular

¹ Without force, secrecy or permission

² This would fall within the category of public right of way formerly known as a road used as a public path ("RUPP")

highway. However, I am not satisfied on balance that this document along with the other limited pieces of evidence is of such weight to conclude that the claimed route was dedicated as a vehicular highway at some point in the past. I therefore consider below the user evidence that has been provided. Subsequent references to the claimed route should be taken to encompass the B-C and D-E sections.

Consideration of the user evidence - statutory dedication

When the status of the claimed route was first brought into question

12. The evidence is supportive of an earth bank initially being placed across the claimed route in around September 2013. This action triggered the application for an Order to modify the definitive map and statement. The bank clearly served to bring the status of the route into question. This means the relevant twenty-year period to be considered for the purpose of statutory dedication should be taken to be 1993-2013 ("the relevant period").

Evidence of use by the public

13. Thirty-one UEFs have been completed in support of use of the claimed route and four people gave evidence at the inquiry in relation to their use of the route. Although two people did not mark the claimed route on the map attached to their UEF, they clearly describe the route they used. The use by three people did not encompass the relevant period and their evidence should therefore be discounted in terms of statutory dedication. Overall, there is evidence of use during the relevant period from twenty-four people on foot, four of whom also used the route on horseback. Additionally, four people only used the claimed route on horseback.
14. The Hick family rented fields adjacent to the claimed route from around 1989/1990 before they purchased the fields in 1997. It is apparent that they have a private right of way by virtue of a deed of 1904 and this is stated to be the sole right of access over the route. However, the Land Registry plan provided does not indicate that their ownership extends over the claimed route.
15. Reference is made to the claimed route previously being overgrown with gates across the route in two locations. The overgrown vegetation was acknowledged by the user witnesses at the inquiry, although they state it was always possible to use the route. The evidence regarding the gates is supportive of these being opened so that they were across the route at times to facilitate the movement of cattle.
16. There is conflicting evidence regarding whether vegetation and gates served to interrupt access on occasions. However, I am not satisfied it has been shown that use was interrupted during the relevant period. I find it noteworthy that improvement works commenced on the claimed route after the Hick family started to rent the adjacent fields. Mr J. Hicks says it took around two years to clear the route to facilitate use for vehicular traffic. It is therefore apparent that by the onset of the relevant period these works would have facilitated access for pedestrians.
17. There is no evidence to suggest that the use was conducted in secret or by force. Whilst Mr J. Hicks asserts that particular people had permission to be on the claimed route, he conceded in cross-examination that, in light of the Land Registry title document, he was probably not in a position to grant or deny permission for people to use the route. Further, there is a lack of evidence to

show that permission was given for people to walk or ride along the route. An inference is drawn between other activities that may have led to some people coming onto their land rather than for people to use the claimed route. This was most evident from the testimony of Mrs Poland at the inquiry. There will nonetheless be some doubt regarding the evidence of Mr Rowe as he states in his UEF that his use related to the movement of cattle. I consider it appropriate to err on the side of caution and discount this form. Having regard to the above, I conclude that the remainder of the evidence of use was as of right.

18. An extract has been provided from a publication involving a long-distance walk known as the 'Celtic Way'. The claimed route is included in the publication and this could have served to have encouraged some people to use it.
19. There is written evidence in support of use of the claimed route dating back over a number of years. This evidence was endorsed by the users who spoke at the inquiry. I have looked at the user evidence provided in terms of the numbers using the route during the relevant period and the frequency of this use in reaching my conclusions. In respect of the extent of this use, it should be borne in mind that the claimed route is located within a rural setting and it was mainly used for recreational purposes. Some people used the route on a regular basis, but others did so on isolated occasions. There is consistent use by pedestrians of the B-C section with less use of the continuation between points D-E. Some people chose to continue along the footway of the C364 Road rather than use the bridleway that continues from point E.
20. I find from my assessment of the UEFs and the evidence of the users at the inquiry that the user evidence is sufficient on balance to raise a presumption of the dedication of a public footpath between points B-C and D-E. However, the evidence of use by horse riders falls way short of being supportive of the dedication of a bridleway over any part of the claimed route. It would also not be sufficient to infer the dedication of a bridleway at common law.

Whether any landowner demonstrated a lack of intention to dedicate the sections of footpath

21. As outlined in paragraph 14 above, the claimed route falls outside of the registered title of the Hick family. Further, Mr J. Hicks acknowledges that people were not challenged as he was unaware that the public used the route. Nor did he point to any other action been undertaken to deter use of the claimed route. It is nonetheless apparent that on one occasion Mrs Wilson was informed by his son (Mr O. Hicks) that the claimed route was not a public right of way. This occurred after she challenged his use of the route on a motor cycle. Another challenge to the same user appears to have occurred in 2013. Even if these challenges had been made on behalf of the landowner, they would not in my view be sufficient in isolation to demonstrate to the public that there was a lack of intention to dedicate a footpath.
22. Overall, I conclude on balance that the evidence is not supportive of any landowner taking sufficient action to communicate to the public that there was a lack of intention to dedicate a footpath over the claimed route during the relevant period.

Conclusions

23. I have concluded above that the evidence of use raises a presumption that the B-C and D-E sections of the claimed route have been dedicated as sections of footpath. In addition, I found on balance that no landowner took sufficient action to demonstrate to the public that there was a lack of intention to dedicate these sections during the relevant period. Therefore, I conclude on the balance of probabilities that two sections of public footpath subsist.

Other Matters

24. The objectors raise concerns in relation to issues such as privacy, security, the environment, wildlife habitats and farming activities. Whilst I appreciate these concerns, such matters have no bearing on whether a public right of way has been dedicated.

25. I recognise that for some people the recording of the D-E section as a public footpath will lead to the unsatisfactory situation of the connecting route continuing to be a cul de sac bridleway. However, there are alternative powers available to deal with such anomalies.

Overall Conclusion

26. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed with modifications.

Formal Decision

27. I propose to confirm the Order subject to the following modifications:

- Delete all references to the title of the Order and insert "*The Cornwall Council (Addition of Footpaths at Zelah in the Parish of St Allen) Modification Order 2017*".
- Delete the text in the preamble to the Order relating to Section 53(3)(c)(ii) of the 1981 Act.
- Delete the sub-heading "*Description of Path or Way to be Upgraded*" in Part I of the Order Schedule.
- Delete the first two paragraphs in Part I of the Order Schedule.
- Delete all references to "*Restricted Byway*" or "*RB*" and insert "*Footpath*" or "*FP*".
- Delete from the second line of the third paragraph in Part I of the Order Schedule "*to be upgraded to Restricted Byway by this order*".
- Delete the text within the first and third boxes underneath the headings "*Location*" in Part II of the Order Schedule and the associated numbers.
- Delete "*at Parish Boundary*" from the fourth box underneath the heading "*Location*" in Part II of the Order Schedule.
- Remove the arrowhead notation from the Order Map and amend the map key accordingly.
- Remove point "*A*" from the Order Map.

28. Since the confirmed Order would show as a highway of one description a way which is shown in the Order as a highway of another description I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Mark Yates

Inspector

APPEARANCES

For the Council:

Ms V. Davis

Lawyer employed by the Council

She called:

Mr J. Rowell

Senior Countryside Access Records
Officer

Mr R. Fraser

Joint Applicant

Mrs J. Poland

Mrs C. Wilson

Mr D. Smith

Objectors:

Mr J. Hicks

Mr O. Hicks

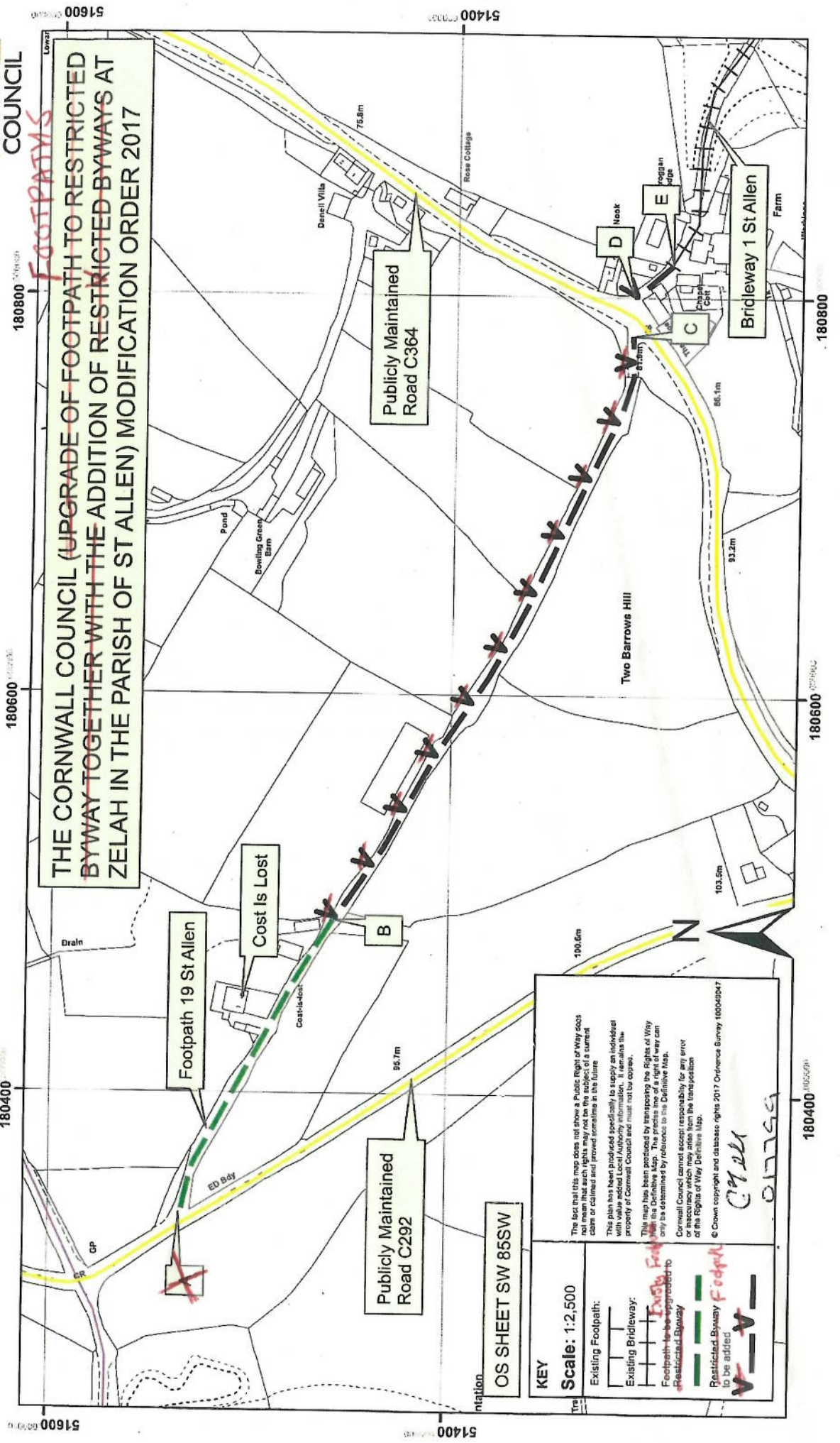
DOCUMENTS

1. Extract from Celtic Way publication
2. Land Registry Office Copy document
3. Closing submission on behalf of the Council
4. Potential modifications to Part II of the Order Schedule

Wildlife & Countryside Act 1980 Section 53
 Order Map: WCA 586
 Parish: ST ALLEN CIVIL PARISH
 Produced by Countryside Access Team: 21 March 2017



THE CORNWALL COUNCIL (UPGRADE OF FOOTPATH TO RESTRICTED BYWAY TOGETHER WITH THE ADDITION OF RESTRICTED BYWAYS AT ZELAH IN THE PARISH OF ST ALLEN) MODIFICATION ORDER 2017



OS SHEET SW 85SW

KEY

Scale: 1:2,500

- Existing Footpath: [Symbol]
- Existing Bridleway: [Symbol]
- Footpaths to be upgraded to Restricted Byways: [Symbol]
- Restricted Byways to be added: [Symbol]

The fact that this map does not show a Public Right of Way does not mean that such rights do not exist or that they are currently claimed or claimed and proved sometime in the future.

This plan has been produced specifically to supply an individual with details of the public rights of way which remain the property of Cornwall Council and must not be copied.

This map has been produced by transposing the Rights of Way which are shown on the Ordnance Survey maps of the area. The accuracy of the Rights of Way shown on this map may differ from the transposition of the Rights of Way on the Ordnance Survey maps.

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