
Order Decision

Site visit on 18 July 2019

by Mark Yates BA(Hons) MIPROW

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

Decision date: 23 September 2019

Order Ref: ROW/3208031

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Herefordshire Council Addition of Byway Open to All Traffic BZ77 Bosbury Modification Order 2017.
- The Order was made by the County of Herefordshire District Council ("the Council") on 6 September 2017 and proposes to add a byway open to all traffic ("BOAT") to the definitive map and statement, in the parish of Bosbury, as detailed in the Order Map and Schedule.
- There were ten¹ objections outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. All of the points referred to below correspond to those delineated on the Order Map. The dates of the relevant documents are shown in square brackets.
2. Following the site visit, a late submission was received from Mr and Mrs Jones on the ground that they purchased their property after the making of the Order and were only recently made aware the Order was now to be determined. However, as this submission does not provide any evidence material to my decision, there was no need for me to invite comments from the other parties.

Main Issues

3. The Order is made under Section 53(2)(b) of the 1981 Act and relies on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. Therefore, I need to determine whether the discovered evidence shows that a right of way which is not shown in the map and statement subsists. The test to be applied is the balance of probabilities.
4. The case in support relies upon various historical maps and documents rather than the user evidence forms ("UEFs") submitted in support of more recent public use on foot. In considering the above test, I shall first assess whether the documentary evidence is sufficient to infer the dedication of a public right of way over the route claimed ("the claimed route") at some point in the past. Should I find that this is not the case, I shall consider whether the user evidence is supportive of the dedication of a public footpath.
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. This requires consideration of whether there has been use of the way by the public, as of right 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. Alternatively, an implication of

¹ Two of these objections have subsequently been withdrawn

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.

6. It is not disputed that the exemption in Section 67(3)(a) of the Natural Environment and Rural Communities Act 2006 is engaged in this case. This specifies that any unrecorded public rights for mechanically propelled vehicles are not extinguished if before the relevant date² an application was made for an Order to modify the definitive map and statement to show a BOAT. Such an application was made by the late Mr Clutterbuck in September 1995 and notice of the application was served in November 1998.

Reasons

Consideration of the documentary evidence

7. It can only be said that the Taylor map [1754] and Cary map [1793] potentially show part of the claimed route. Due to the uncertainty regarding whether any part of the route is shown on these maps, I place no reliance on them.
8. The Price [1817] and Bryant [1835] maps of Herefordshire both generally show the claimed route leading from the present C1152 Road through to the B4214 Road. Nothing has been provided to indicate that these map makers made enquiries regarding the status of the roads that existed. From looking at the extracts provided it is apparent that not all of the roads shown are now viewed as having public status. Overall, I consider it likely that the surveyors were primarily concerned with representing the various topographical features present, including public and private roads. I find this to be the case irrespective of the fact that commercial maps were sold to the public.
9. The depiction of a road as a through route on the commercial maps may provide some support for public status. However, no distinction is drawn between the public and private roads on these maps. The evidential weight of the maps will accordingly be limited. Further, the information provided by the Council indicates that Price's map was derived from the Ordnance Survey ("OS") drawings of circa 1815. This means there is some doubt regarding the extent to which the land was surveyed on behalf of Price.
10. The OS Old Series map [1831] also shows the whole of the claimed route. Although OS maps assist in identifying the physical features present when the land was surveyed, they provide no confirmation regarding the status of the roads shown.
11. I accept on balance that a turnpike map [1832] shows the western end of the claimed route branching out of the turnpike road (now the B4214 Road). The Council believes the map is supportive of the existence of a through route at the time. Whilst only a short section is shown, the other available maps produced during the 1830s show the route continuing to the C1152 Road. However, there is no annotation on the turnpike map to indicate the status of the claimed route.
12. The fact that highways were incidental to the tithe process will usually serve to limit the evidential weight of tithe maps. In this case, the Bosbury tithe map [1841] shows the C-D section as an enclosed lane outside of the numbered

² 20 January 2005

- plots and leading out of the C1152 Road. One version of the tithe map shows this section coloured in the same way as the C1152 Road. There is no indication of a feature corresponding to the remainder of the claimed route.
13. A copy of the accompanying apportionment has not been provided. The Council says the C-D section appears to be included within this document under the category of "*Road and Common*". In response, the representation made on behalf of one of the objectors (Ms Leitz) outlines that a distinction is made between roads that were subject to the payment of tithes and others that were not. It is asserted that no reference is made to a road over the land crossed by the remainder of the route. The plot crossed by the A-B section is described in the apportionment as "*grass and orchard*".
 14. The failure of the tithe map to depict the A-B-C section does not preclude the existence of public rights, but it provides no support for there being a road that served as a through route at the time. Nor does there appear to be anything in the apportionment that points to a road crossing the land involved. In respect of the C-D section, the exclusion of a route from the tithed parcels of land could be indicative of a public or private road as both would have impacted upon the productivity of the land being assessed. There is no annotation on the map that provides any assistance regarding the status of the section shown.
 15. The Bosbury inclosure map [1854] shows the C-D section as an enclosed lane in a similar manner to the tithe map. The connecting C1152 Road is annotated as "*Old Public Highway*" and further eastwards it states "*To Bosbury*". To the west of point C, a section of the claimed route is shown by means of pecked and solid lines and annotated "*From Stanley Hill*".
 16. A copy of the inclosure award has not been provided, but none of the parties assert that the award made any provision for the claimed route. It is apparent from the map that a section of the route to the west of point C crossed parcel number 20. Nonetheless, the submissions of the parties do not point to there being any mention of a highway through this parcel in the award. The reference to the route continuing from Stanley Hill could provide some support for the existence of a highway, but not necessarily vehicular. However, the weight to be given to this annotation will be limited given that the award made no provision for the section of the claimed route that crossed land subject to inclosure. The remainder of the route was not shown as it was outside of the scope of the award.
 17. As outlined in paragraph 10 above, the OS mapping assists with identifying the presence of particular physical features when the land was surveyed. A number of OS maps, mainly at a large scale, have been provided from the latter part of the nineteenth century onwards. These consistently show the C-D section as an enclosed lane abutted by properties. It is apparent from the OS maps that at times there was a through route available. On some of the maps the western section is shown as a direct continuation of the track leading northwards to Hill Farm. There are also solid lines shown at points which would have been indicative of some sort of barrier such as a gate. This would not have prevented the route from being a highway, but the number of barriers may have impacted on the convenience of the route for vehicular traffic. The existence of other potential alternative routes in the locality has no bearing on the status of the claimed route.

18. Two sales plans [1882 and 1888] and a conveyancing plan [1898] depict the physical features evident at the time. However, these maps do not assist in determining the status of the claimed route.
19. A map coloured for the purpose of the 1910 Finance Act shows the C-D section excluded from the surrounding hereditaments. The remainder of the route passes through hereditament 173. The exclusion of a route from the surrounding hereditaments 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. There was a claimed deduction for footpaths through hereditament 173, but it is not possible to determine the location of these paths.
20. The Finance Act evidence is not supportive of the claimed route being a vehicular highway throughout the whole of its length. It only potentially provides support for the C-D section being a highway. The weight attached to the Finance Act evidence will accordingly be more limited than may ordinarily be the case.
21. The Council believes the submissions made by Bosbury Parish Council [1951] involving ways proposed for inclusion on the original definitive map are supportive of the claimed route being viewed as a public road. Attention is drawn to references to "*Stanley Hill to Village Rd*" "*Stanley Road*" and *Stanley Hill Road*" at points where three of the proposed paths linked with the claimed route.
22. The information supplied by the Council is that public roads were shaded green on this map and the alleged rights of way marked in red. The degree to which any part of the claimed route was originally shaded green is disputed. Although not clarified in this case, I have encountered instances where the public roads were marked by the surveying authority on maps supplied to the parish councils. Nonetheless, the purpose of this process was for the parish council to identify the ways believed to be public for inclusion on the definitive map rather than to represent public roads. In terms of any information held by the surveying authority at the time, the claimed route was not recorded as a highway maintainable at public expense.
23. The descriptions for the alleged linking paths could provide support for the parish council believing that public rights also existed over the claimed route. However, the relevant claimed paths were not subsequently taken forward by the surveying authority on the ground that they were only accommodation paths. Having regard to the matters outlined above, I do not consider that any significant reliance can be placed on the terminology used by the parish council.
24. I accept that the depiction of the claimed route linking with recognised public roads on two commercial maps could provide some support for this route being a highway. Although the weight to be attached to these maps will be limited. No reliance can be placed on the turnpike map save that it also indicates that the claimed route was a through route.
25. It can only be said that the tithe map could potentially provide support for the C-D section having public status. The inclosure map depicts the claimed route

leading out of a public road but the section of the route shown is not annotated as a highway. The annotation "*From Stanley Hill*" is indicative of the claimed route serving as a link between two public roads. However, no apparent provision was made for the section of the route that crossed land to be inclosed.

26. The fact that only a section of the claimed route was excluded from the surrounding hereditaments on the Finance Act map will serve to lessen the evidential weight of this document. I am also not satisfied that any significant reliance can be placed on the descriptive terms used by the parish council in connection with ways proposed for inclusion on the original definitive map.
27. There is clearly some evidence that could be supportive of the claimed route being an unrecorded historical highway. However, having regard to my conclusions in relation to the various pieces of evidence, I do not find on balance that when taken as a whole the documentary evidence is sufficient to show that a public right of way subsists.

The user evidence

28. The objectors do not seek to challenge the evidence of use on foot or object to the claimed route being recorded as a public footpath. No details have been provided of any challenge to use of the claimed route. Therefore, for the purpose of statutory dedication, I take the application of 1995 as being the event that brought the status of the route into question. This means the relevant twenty-year period would be 1975-1995.
29. Five UEFs were submitted in support of use by seven people, but the use by three of these people had ceased by 1971. The evidence forms comprise of two pages of standard questions and there is no map to confirm the route used. It is apparent that no follow up interviews were undertaken to provide further clarification on the alleged use. In my view the user evidence is not sufficient on balance to support dedication under statute, taking account of the relevant period above, or for any other period under common law.

Other Matters

30. The objectors have raised concerns about the impact of the claimed route being recorded as a BOAT in relation to issues such as safety, the environment and maintenance of the route. However, none of these matters are relevant to the test that I need to apply, as set out in paragraph 3 above.

Conclusion

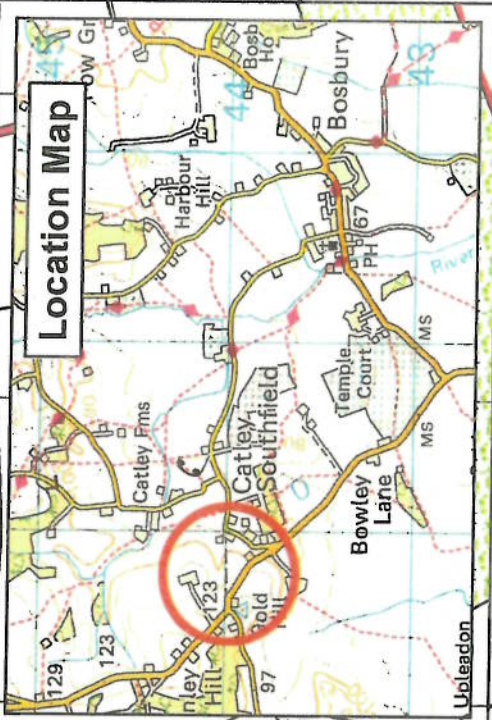
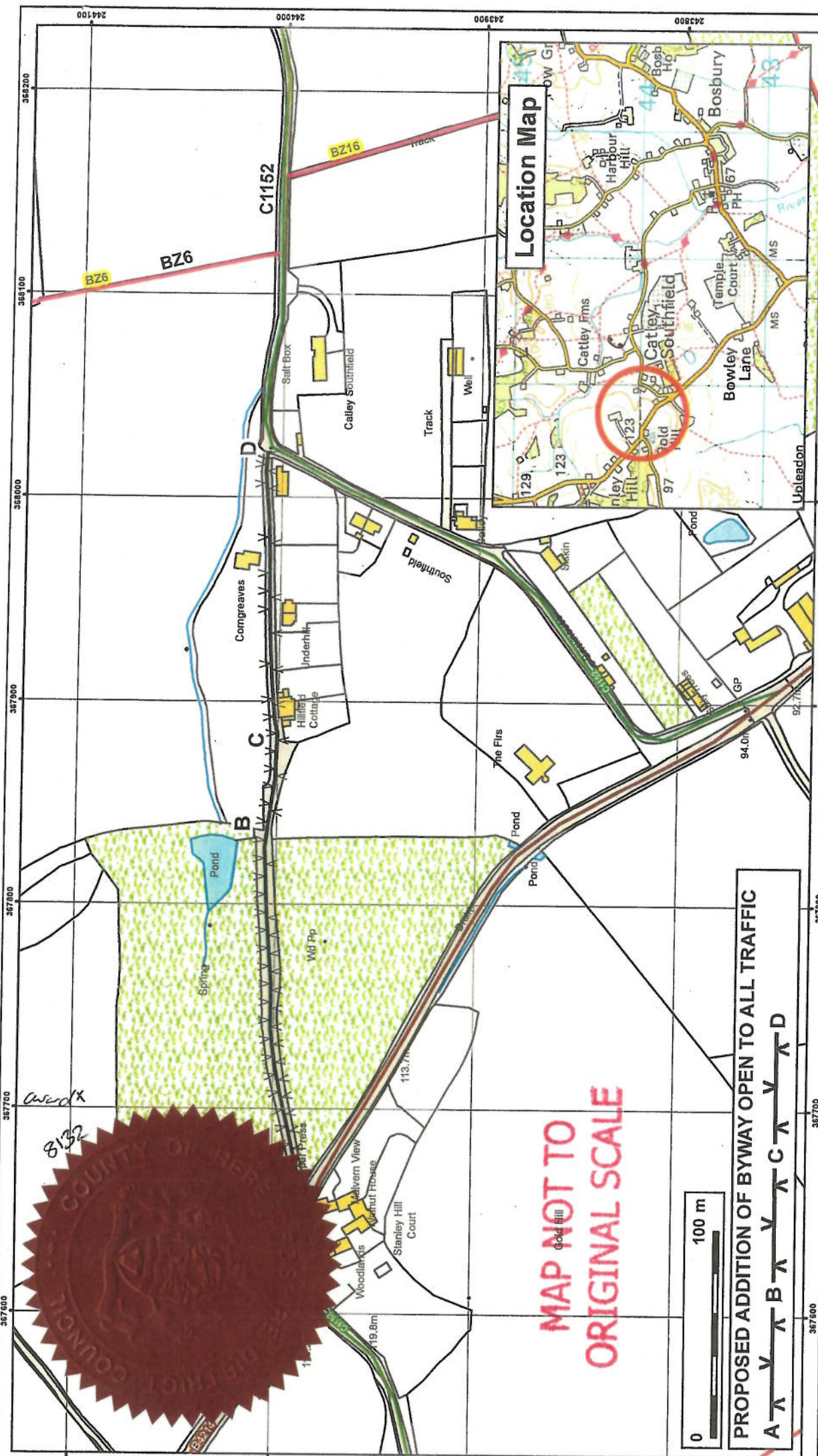
31. Having regard to these and all other matters raised in the written representations I conclude that the Order should not be confirmed.

Formal Decision

32. I do not confirm the Order.

Mark Yates

Inspector



MAP NOT TO ORIGINAL SCALE

100 m

PROPOSED ADDITION OF BYWAY OPEN TO ALL TRAFFIC

A $\overline{\text{V}}$ $\overline{\text{A}}$ $\overline{\text{B}}$ $\overline{\text{A}}$ $\overline{\text{V}}$ $\overline{\text{A}}$ $\overline{\text{C}}$ $\overline{\text{A}}$ $\overline{\text{V}}$ $\overline{\text{A}}$ $\overline{\text{D}}$



Wildlife and Countryside Act 1981, section 53
Herefordshire Council Addition of Byway Open to All Traffic BZ77 Parish of Bosbury
Definitive Map Modification Order 2017

SCALE 1:2500 @ A4

- PUBLIC FOOTPATH
- PUBLIC BRIDLEWAY
- RESTRICTED BYWAY
- BYWAY OPEN TO ALL TRAFFIC

Balfour Beatty Living Places
 Unit 3, Thorn Business Park
 Rotherwas
 Hereford
 HR2 6JT

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