



---

## Order Decision

Site visit made on 10 September 2020

**by D M Young JP BSc (Hons) MA MRTPI MIHE**

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

**Decision date: 20 October 2020**

---

### **Order Ref: ROW/3237064**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Derbyshire County Council (Restricted Byway from Sheffield Road to Hazelmere Road – Parish of Elmton with Creswell) Modification Order 2018.
- The Order is dated 22 February 2018 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.
- There was one objection outstanding when Derbyshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

### **Summary of Decision: The Order is Confirmed**

---

#### **Procedural Matters**

1. None of the parties requested to be heard, I have therefore considered the case on the basis of the written representations received.
2. The proposed Order seeks to formally record the Order route as a Restricted Byway. It arises from an application from the Clowne Countryside Access Group dated 8 December 2012 to add a footpath to the Definitive Map and Statement (DMS) from Sheffield Road (Point A) to Footpath No 4 at Markland Gripps (Point B).
3. For ease of reference, I shall refer to the various points labelled on the Order plan a copy of which is attached to this decision. I carried out an unaccompanied site inspection of the Order route on the morning of 10 September 2020.
4. The Order is supported by Derbyshire County Council (the "Order Making Authority" (OMA)). The objector is Ebony Prior, the occupier of The Stone Barn, Uppermill Farm which is located adjacent to the Order route.

#### **The Main Issues**

5. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) and (ii) of the 1981 Act. This section requires me to consider whether the evidence discovered by the OMA, when considered with all other relevant evidence, is sufficient to show, that the rights of way described in the Order subsist and that the DMS therefore require modification.
6. The case in support of the Order relies upon historical documentary evidence namely the Enclosure Award for Whitwell, the Elmton Tithe Plan and the Elmton

Common Enclosure Award. The OMA argue that these demonstrate that the Order route was dedicated as a highway of public carriage road status maintainable at the public expense at some point in the past. The main issue is therefore whether the new evidence is sufficient to infer that the dedication of a public right of way occurred at some point in the past. The burden of proof to be applied is the balance of probabilities.

7. The fact that there has been no public use of the routes in recent times does not preclude the possibility of a right of way being added to the Definitive Map bearing in mind the long established legal principle "*once a highway, always a highway*".

### **Reasons**

8. The Order route is a narrow, metalled lane to the north of Creswell. Both the Sheffield Road and Hazelmere Road ends of the route are gated with. The route passes through a working farm known as Upper Mill Farm. The southern section of the route between points B to C already forms part of Public Footpath Number 4.
9. The Whitwell Enclosure Plan of 1823 depicts the northern section of the Order route between Upper Mill Farm and Sheffield Road as part of the road network. It is annotated "Mill Road" and shaded yellow between Sheffield Road to a point just west of Point B. It is listed in the accompanying Award as a "*Public Carriage Roads*" with the description "*one other public carriage road called Mill Road from Creswell Turnpike Road in a southerly and easterly direction over Hollin Hill Common to Creswell Upper Mill*".
10. The Elmton Tithe Map of 1850 shows the southern section of the Order route between point C and just to the west of point B as part of the road network. The Elmton Common Enclosure Plan of 1851 shows the whole of the southern section of the route from Hazelmere Road past Upper Mill Farm as far as Mill Dam. It is labelled "*Mill Road 30 feet*" and shown in the same way as other public roads in the area.
11. As Enclosure Awards were created by an Act of Parliament, they offer compelling evidence as to the status of a route. The documentary evidence in this case has not been challenged by the objector. Accordingly, I am satisfied that on the balance of probabilities that vehicular rights subsisted along the Order route at the time of the Enclosure Awards.
12. Unless one of the saving provisions under section 67 applies, the Natural Environment and Rural Communities Act 2006 extinguished vehicular rights over all highways. The OMA argues that the Order route is not subject to any of the exceptions and so the vehicular rights are deemed to have been extinguished. I see no reason to take a contrary view and so the route should be recorded on the DMS as a Restricted Byway.

### **Other Matters**

13. The Order route runs adjacent to the objector's property who claims she was not made aware of the Order. The Council acknowledge that the objector moved into her property after the original consultation exercise (December 2014 – January 2015). However, all the affected landowners including the objector were consulted when the Order was made in February 2018. From the

evidence before me I am satisfied that the correct publication procedures were followed.

14. I can understand concerns regarding privacy and security. However, and notwithstanding that these concerns have not been substantiated in any meaningful way, a Definitive Map Modification Order seeks to record a public right of way which already exists under the law. As a consequence, there is no consideration of the effect of the public right of way on individuals and no determination of any private, human or civil rights.

### **Conclusions**

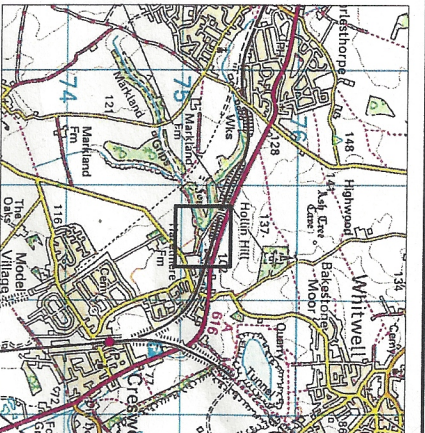
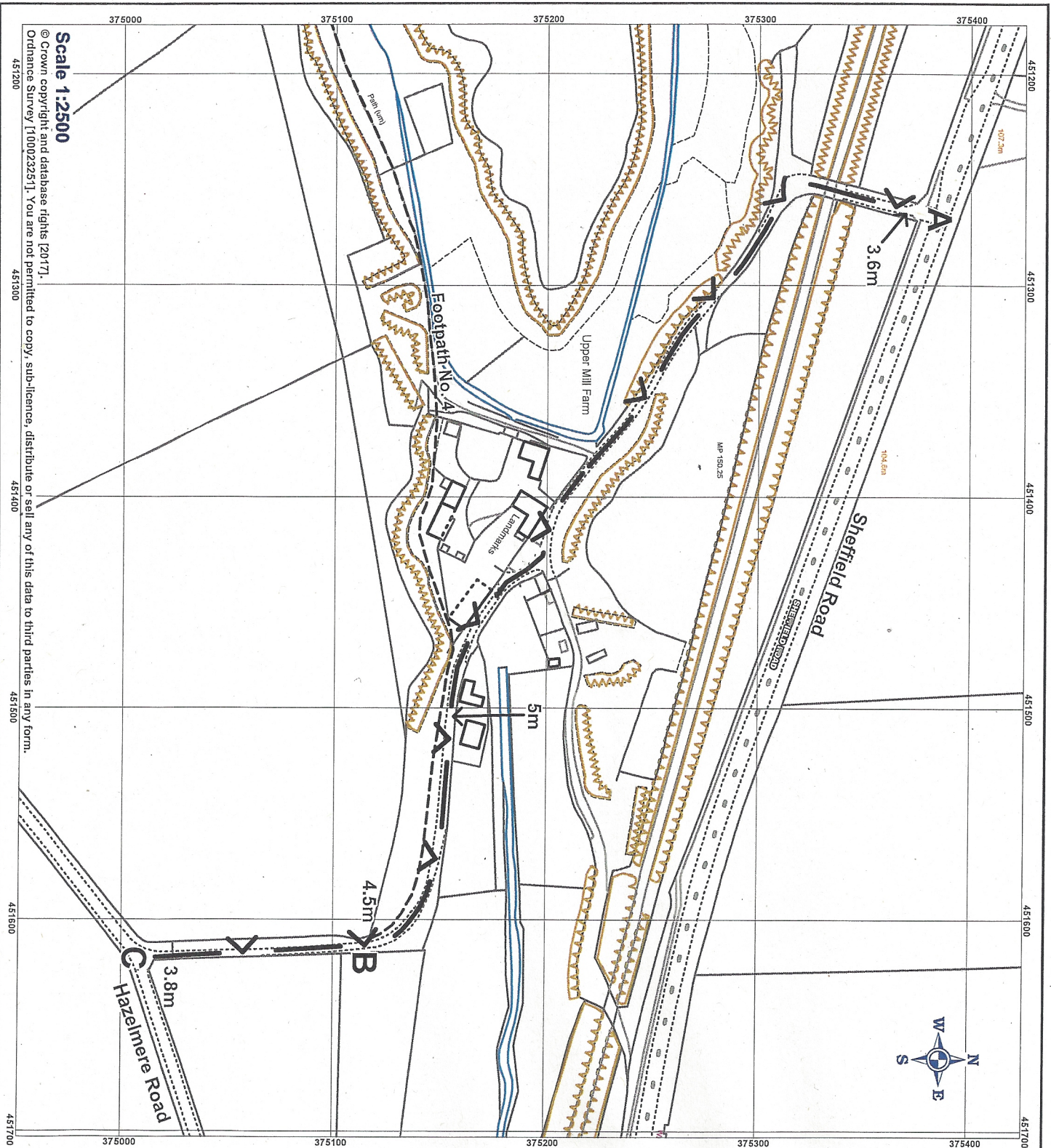
15. On the balance of probabilities, and considering the evidence as a whole, I am satisfied, that the Order route should be recorded on the DMS as a Restricted Byway. Having regard to these and all other matters raised I conclude that the Order should be confirmed.

### **Formal Decision**

16. The Order is confirmed.

*D. M. Young*

**Inspector**



**Wildlife & Countryside Act 1981 S. 53**

The Derbyshire County Council  
 (Restricted Byway from Sheffield  
 Road to Hazelmere Road  
 - Parish of Elmlton with Creswell)  
 Modification Order 2018

**KEY**

Restricted Byway to be added (A-B)	———>
Path to be upgraded to Restricted Byway (B-C)	———>>
Existing Footpath	———
Parish Boundary	- - - - -



**Mike Ashworth**  
 Strategic Director  
 Economy, Transport & Environment  
 Derbyshire County Council  
 Data Release  
 Mainook  
 DE4 3RY

Date: 25 January 2018  
 Ref: TE/CH/X3941/Order/2018

**Scale 1:2500**

© Crown copyright and database rights [2017].  
 Ordnance Survey [100023251]. You are not permitted to copy, sub-licence, distribute or sell any of this data to third parties in any form.