



Order Decision

Site visit made on 15 December 2020

by Alan Beckett BA MSc MIPROW

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

Decision date: 11 February 2021

Order Ref: ROW/3228703

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Oxfordshire County Council West Hanney Byway Open to All Traffic No.2 (Part) Modification Order 2019.
- The Order is dated 23 January 2019 and proposes to modify the Definitive Statement for the area by specifying the width of West Hanney BOAT 2 as described in the Order Schedule.
- There were 3 objections and 1 representation outstanding when Oxfordshire County Council ('the 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. This Order was scheduled to be determined by means of a public hearing that was due to be held on 27 October 2020. Unfortunately, the continued restrictions on public meetings of this nature in response to the Covid-19 pandemic meant that a public hearing could not be held as planned. In order to progress this matter without significant delay, all interested parties were invited to consider whether a change of procedure would be acceptable in these circumstances. As a result, it was agreed that the Order would be determined by means of written representations together with an unaccompanied visit to the site.
2. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the path at issue on Tuesday 15 December 2020.
3. West Hanney BOAT 2 runs in a generally north- south direction on both sides of School Road / The Causeway. For the purposes of this decision, a reference to BOAT 2 is a reference to the part of the byway which lies between School Road and East Hanney Restricted Byway 17.

The Main Issues

4. The only issue in this case is the lateral extent of BOAT 2. There is no dispute about the subsistence of a public right to pass and re-pass with mechanically propelled vehicles over BOAT 2. Although the Order route has been recorded since the first definitive map was published in 1956, the width of BOAT 2 was not recorded in the accompanying definitive statement, nor in any subsequent revised definitive statement. The Council seeks to record the width of BOAT 2 in the terms set out in the Schedule to the Order.

5. The Order was made under section 53 (2) (b) of the 1981 Act relying on the occurrence of events specified in Section 53 (3) (c) (iii). To satisfy the terms of that section requires evidence which shows on a balance of probability, that the particulars contained in the definitive statement concerning the width of that part of BOAT 2 at issue require modification.

Reasons

Background

6. I understand that the properties on The Causeway were constructed in or around 1939. The issue of the width of part of BOAT 2 has arisen following a claim made by one of the statutory objectors for possessory title of a parcel of land adjacent to No. 20 The Causeway. There is an ongoing dispute between the Council and the objector as to this parcel of land.
7. The Council contends that the land over which possessory title has been granted forms part of BOAT 2 and submits that the findings of the Court in *R (oao Wayne Smith) v The Land Registry (Peterborough Office)* [2010] EWCA Civ 200 demonstrates that title to land which forms part of the highway cannot be gained through adverse possession. The objector disputes that the land at issue forms part of the width of BOAT 2. I understand that the proceedings at the Land Registry Tribunal have been stayed pending the outcome of this decision.
8. As set out in paragraph 4 above, the issue between the parties is whether the evidence discovered demonstrates, on a balance of probability, that the width of BOAT 2 includes the disputed land. This is not a case based on evidence of use by the public, but on the interpretation to be placed upon historic documents and the conclusions which can be reasonably drawn from them. It is to the documentary evidence which has been submitted that I now turn.

Documentary evidence

9. West Hanney BOAT 2 runs on a generally north-south alignment and provides a link between the villages of East and West Hanney (the parish boundary runs down the centre of the part of the lane at issue) and the village of Grove. The earliest depiction of BOAT 2 is found in Roques map of 1761. The route is shown in the same way as other known highways (such as School Road and The Causeway); that is, by being coloured ochre, being bounded by hedges or fences and is distinct and separate from the adjacent fields. Whilst this map indicates that the route was considered to be part of the local road network, the map is at too small a scale to assist in the determination of the width of the lane.
10. Ordnance Surveyors Drawings of 1811-1812 are at a larger scale than Roques' earlier map which allows a greater amount of detail to be shown. On this map, BOAT 2 is shown as part of a route which links East and West Hanney to Grove and Wantage. The Drawing is of such a scale that the boundaries of BOAT 2 are clearly depicted; to the east, the route is separated from the adjacent field by a solid line indicating the presence of a fence or hedge, whereas to the west a broken line indicates the absence of any physical boundary. The Drawing shows that BOAT 2 was a feature in the landscape clearly identifiable as being separate from the fields either side of it. Although at a larger scale than Roques

map, the Drawing is at too small a scale to assist in the determination of the width of the lane.

11. BOAT 2 is shown on the East Hanney Inclosure Award Map of 1806 as a route which crosses the parish boundary. The route is not identified in the accompanying Award, as it lies outside the parish. The West Hanney Inclosure map of 1840 shows BOAT 2 coloured green as part of a through route and is described in the Award as "*a road leading from West Hanney to Wantage*" which formed the eastern boundary of lands awarded to John Aldworth. The Inclosure documents demonstrate the continued existence of BOAT 2 as a through route, but there is no indication in these documents of what the width of BOAT 2 was considered to be at the date of the Award.
12. The title commutation documents for West Hanney show BOAT 2 as part of a continuous through route. BOAT 2 is shown coloured blue whereas School Road – The Causeway is coloured ochre; no key has been supplied to indicate what was to be conveyed by the use of colour. The eastern boundary of BOAT 2 is shown by a continuous line indicating the existence of a hedge or fence, whereas the western boundary is shown by a broken line which indicates the absence of any physical boundary between the lane and the adjacent field. However, the use of colour demonstrates that the route was considered to be separate from the surrounding fields which are individually identified by number and are recorded within the apportionment.
13. Ordnance Survey ('OS') maps published at a scale of 1:2500 in 1878, 1899, 1912 and 1975 all show BOAT 2 on its current alignment. These maps consistently show the eastern boundary of BOAT 2 by means of a continuous line indicating the presence of a hedge or fence, with the western boundary being shown by a broken line. The parish boundary is recorded as running along the centre of the lane. The width of BOAT 2 on these maps is generally consistent and it is from the 1912 map that the Council has derived its assessment of the width of the route.
14. The 1975 map shows the existence of Nos. 1 – 20 The Causeway with the western boundary of No. 20 The Causeway being shown unchanged from that depicted on the 1912 edition of the map. The 1975 map also contains additional topographic detail not found in the earlier maps; within the confines of BOAT 2, a track or path is shown by means of parallel broken lines in the same way that the metalled surface of School Road is shown within the solid lines which denote the extent of that road. The parallel pecked lines within the confines of BOAT 2 show what appears to be the walked or used track which commences at School Road and runs closer to the western boundary of the lane for approximately 100 metres before continuing in the centre of the lane. The parallel broken lines within BOAT 2 on the 1975 map suggests that the route in use at that time was bounded by grass verges or other vegetation.
15. The change in vegetation within BOAT 2 shown in the 1975 map reflects what is shown in an aerial photograph taken in 1944. In addition to showing the boundary between BOAT 2 and No. 20 The Causeway as being that shown on the earlier 1912 map, the 1944 photograph shows a line of trees, shrubs or other vegetation growing within BOAT 2. The photograph shows a gap between that vegetation and the boundary of the lane with the garden of No. 20 The Causeway. The path in use at the time appears to be on the western side of

this vegetation, although it may have been possible to pass along BOAT 2 between the trees and the western boundary of No. 20 The Causeway.

16. The survey of public rights of way conducted by East and West Hanney Parish Councils under the provisions of the National Parks and Access to the Countryside Act 1949 ('the 1949 Act') both included BOAT 2 as it straddles the parish boundary. In 1951 East Hanney Parish Council described the route as "*a good grass unmetalled lane, the width varies from 10 to 16 feet*" and claimed that the route was public as it had been "*used by the public for 20 years also on Parish Award*".
17. West Hanney Parish Council described the route as crossing the main road from East Hanney to West Hanney near the school and claimed that it was a public route as it had been "*used by the public for 20 years*".
18. BOAT 2 was included in the definitive map and statement for Berkshire in 1956 as a Carriage road mainly used as a bridleway and has appeared in successive revisions of the definitive map. Although East Hanney Parish Council had described the width of the route as varying between 10 and 16 feet, the width of BOAT 2 has never been recorded within the definitive statement.

Other evidence

19. Correspondence has been submitted from residents of long standing with regard to their recollections of BOAT 2. Mr Green (writing in 2019) states that he has been resident in East Hanney for 65 years (that is since 1954) and that he attended Hanney School as a child and that the playing field was accessed from BOAT 2. Mr Green states that BOAT 2 provided vehicular access to the rear of the houses on The Causeway and that it had been wide enough for two cars to pass up to the point where the access track turned east, but then became six feet wide beyond the with a thick hedge and undergrowth on either side. To Mr Green's knowledge this had been the case until recent years when it had been widened to accommodate farm machinery.
20. The owners of the land on the western side of BOAT 2, Mr & Mrs Kauert (writing in 2017) state that they have been resident within the village for 53 years (that is since 1964) and have owned Weir farm since 1994. In correspondence with the Council, the Kauerts had stated that BOAT 2 had been '*double the current width*'. The Kauerts subsequently clarified this statement, and in common with Mr Green, their evidence is that BOAT 2 was at least 2 cars wide from the double telegraph pole at the School Road end to the rear of the houses on The Causeway. It is also submitted that the land on the western side of BOAT 2 was unfenced arable land until 2004 when use reverted to grassland and was fenced.

Discussion

21. The objectors submit that as the only evidence of the width of BOAT 2 is found in the East Hanney parish survey notes of 1951 that should be the basis of the width to be recorded. Measurements taken by East Hanney parish council in 2019 suggest that the available track remains within the range recorded in 1951, and the parish council submits that the depiction of the boundaries of the BOAT in the 1878, 1912 and 1975 editions of the OS maps demonstrates that the shape and width of the BOAT has remained broadly unchanged throughout that 100 year period.

22. It is also submitted that there is no evidence that either the eastern boundary of BOAT 2 extended as far into the current field as the Council suggest on the Order map or that the boundary on the western side of the lane has encroached into BOAT 2. The objectors do not accept the assertion of the Kauerts that the route had historically been twice the current width, with the owners of No. 20 directing my attention to the positioning of cobble setts at the head of BOAT 2 as being indicative of the width of the route as recorded in 1951.
23. It is the Council's case that the width described in the 1951 parish survey was not recorded in the definitive statement and therefore carries no legal weight, and that the width described as part of that survey does not reflect what is shown in any of the OS maps which have been considered. The Council notes that both East Hanney and West Hanney parish councils regarded BOAT 2 as a public right of way as a result of at least 20 years of undisputed use by the public. Consequently, the Council places reliance upon the 1912 OS map as evidence of the width of the route as this map was the most contemporaneous to the commencement of a 20-year period of use which would have expired in 1951.
24. I have considered the 1878, 1899, 1912 and 1975 OS maps, copies of which have been provided to me at a scale of 1:2500 and I have taken my own measurements from the maps to compare with the results arrived at by the Council. The copies provided by West Hanney Parish Council are described as being at a scale of 1:2500 when printed at A3, however the copies submitted were printed at A4 and are consequently not at a scale of 1:2500. The copies provided by the Council appear to be extracts of the original 1:2500 sheets; allowing for minor distortion from photocopying, I am satisfied that reasonably accurate measurements of the width of BOAT 2 as depicted by OS can be arrived at from these maps.
25. The four maps are consistent in that they depict the junction of BOAT 2 with School Road as being approximately 17 metres in width narrowing to around 10 metres at about its mid-point before widening again to around 14 metres at the junction with East Hanney RB17. I acknowledge that my own measurements may be slightly erroneous due to the possible distortion of scale arising from measuring from photocopies and not the originals. I agree with the objectors that the maps show the boundaries of BOAT 2 in a consistent manner and at a consistent width; however, the width depicted between the boundaries in these maps is commensurate with the width proposed in the Order and not the width recorded in the 1949 Act survey.
26. None of the maps considered suggest that the width of BOAT 2 historically was limited to between 3.04m and 4.87m as recorded in the parish survey. The 1975 map shows the position of the visible track within the wider boundaries of BOAT 2 with the worn track being shown as varying between 2 and 4 metres. Given the depiction of BOAT 2 on the 1944 aerial photograph, with trees, shrubs and other vegetation being prominent on the eastern side of the lane, I consider it highly likely that the width the parish council recorded in 1951 was the width of the used or usable track as it appeared on the ground and not the width between the boundaries of the lane.
27. Ordnance Survey maps can be relied upon as to the physical depiction of observable features in the landscape and provide good evidence as to the

matters shown in the maps; they can therefore be relied upon as evidence of the extent of the physical features shown. Although East Hanney parish council provided details of the width it considered BOAT 2 to have at the time of the survey, this is not reflected in any of the maps submitted by the parties. Consequently, I am not persuaded that the width recorded in the parish survey reflected the historic width of BOAT 2.

28. Although the objectors submit that the field boundaries have not changed since 1975, it is evident that what is physically present today is different to what was present in 1975 and to what is likely to have been present during much of the twentieth century. It is not known when the access track to the rear of The Causeway was created, but it is likely to post-date 1975 as it was not shown on that edition of the map. The creation of this access track would have required the re-ordering of the field boundary to the south of the properties on The Causeway. The creation of a suitable access splay may explain why the lane boundary immediately to the south of the rear access does not appear to be directly in line with the original garden boundary of No. 20 The Causeway. There may also have been some alteration to the western boundary following the fencing of the former arable field in 2004.
29. The recollections from residents of long standing do not shed any further light upon the historic width of BOAT 2. Both respondents describe a route over which two cars could pass at least as far as the rear of the properties on The Causeway. Given the available mapping and aerial photography, the recollections as to vehicular use to reach the rear of the properties on The Causeway could only refer to use after 1975. Neither resident can give direct evidence of the conditions of the lane during the 20-year period prior to the 1951 parish survey.
30. The boundaries shown by OS prior to the construction of the properties on The Causeway in 1939 are consistent. Given that BOAT 2 has been depicted as part of the local highway network since at least 1761 I consider it to be more likely than not that the boundaries shown by OS were laid out with reference to the lane and to separate the adjacent land over which the public had no right of access from that over which the public enjoyed such rights.
31. The large-scale maps considered above all show that the eastern boundary of BOAT 2 pre-dates the construction of the properties on The Causeway. Whilst all the land on the BOAT 2 side of that boundary may not have been habitually used by the public, and whilst the 1944 aerial photograph, the 1951 parish survey and the 1975 map all suggest that the observable use occurred on the western side of the lane, that in itself does not indicate that the land between the physical boundaries of BOAT 2 had not been dedicated to public use.
32. I have noted the position of the setts at the point where BOAT 2 makes a junction with School Road. Although the inner, narrower section of setts (approximately 6 metres from School Road) is only around 4 metres in width and aligns with the worn track, the outer line of setts at School Lane is approximately 16 metres and is commensurate with the width of the mouth of BOAT 2 recorded by OS.
33. Drawing all these matters together, I consider that the documentary evidence submitted demonstrates that BOAT 2 has been an observable feature in the local landscape since at least 1761. The status of BOAT 2 as a public carriageway is not in dispute; if the route not previously been dedicated as a

carriageway, it had become so through use by the public by the time of the parish survey in 1951. Given that the western boundary of No. 20 The Causeway is consistently shown to coincide with the eastern boundary of BOAT 2 on the 1944 aerial photograph and the 1975 OS map, I consider it highly likely that the lateral extent of the land dedicated to public use is between the boundaries of BOAT 2 as shown by OS on successive editions of the 1:2500 scale map.

34. I consider the use by the Council of the 1912 map to derive a measurement of the historic width of BOAT 2 to be appropriate in the circumstances as this map is the nearest in terms of publication date to the commencement of the 20-year period (1931-1951) which would have given rise to the dedication of the route to the public (if the route had not already been dedicated at some previous point in time). The 1912 OS map shows the lateral extent of the route which can be deemed to have been dedicated to public use.

Overall conclusion

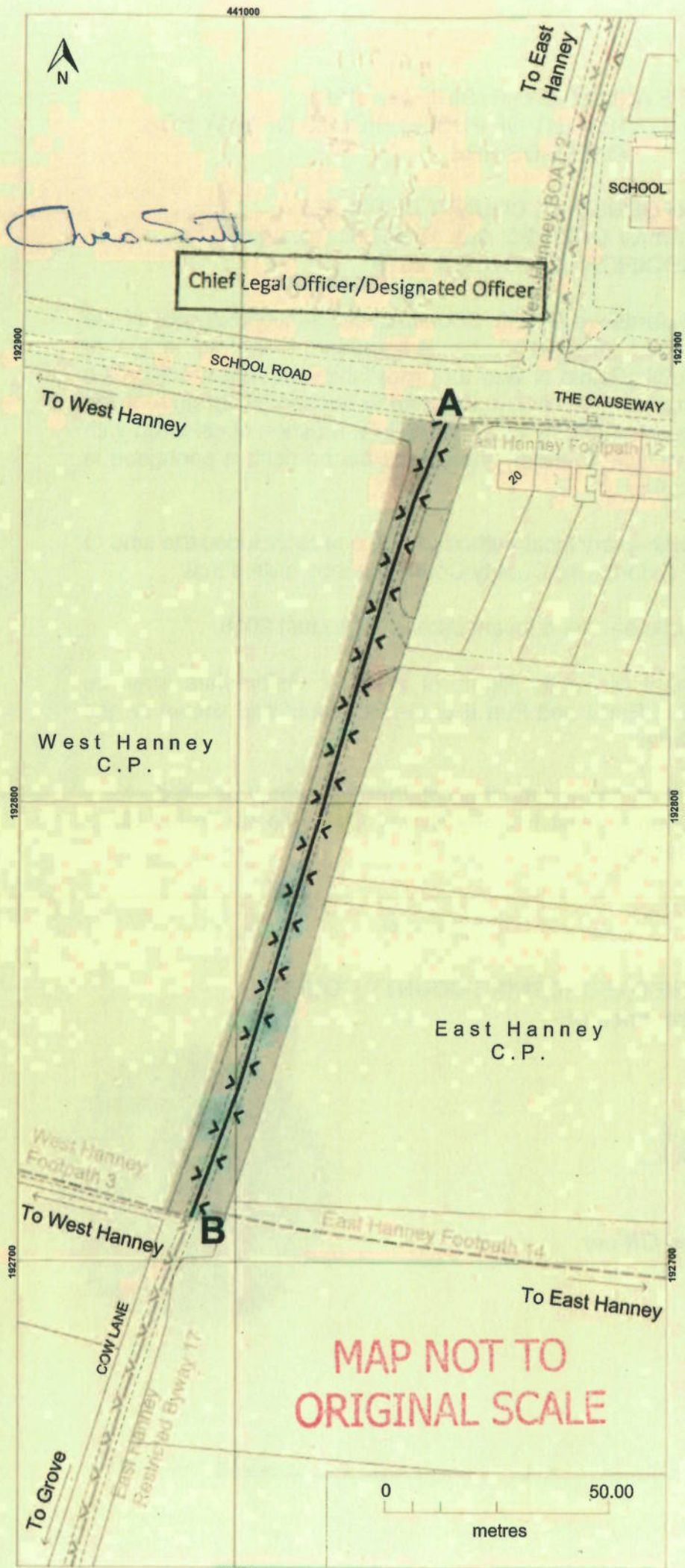
35. It follows that I conclude that the documentary evidence adduced demonstrates, on a balance of probabilities, that the historic width of BOAT 2 is that set out in the Schedule to the Order. It follows that I also conclude that the particulars contained in the definitive statement concerning the width of BOAT 2 require modification.
36. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.

Formal Decision

37. I confirm the Order.

Alan Beckett

Inspector

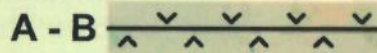


Wildlife and Countryside Act 1981 Sec 53

Definitive Map Modification Order

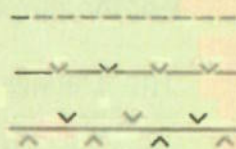
**The Oxfordshire County Council
West Hanney Byway Open
To All Traffic No.2 (Part)
Modification Order 2018**

Width of BOAT 2 to be recorded:



Length: 182 m approx.
Width: 10.8 m to 17 m, as shaded

Approximate route of other rights of way



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Scale 1:1250 @ A4

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OXFORDSHIRE COUNTY COUNCIL