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| **Order Decision** |
| Inquiry opened on 19 October 2021 |
| **by Heidi Cruickshank BSc (Hons), MSc, MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 2 December 2021** |

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| **Order Ref: ROW/3230685** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Cornwall Council (Addition of Restricted Byway from Road U6177 at Mawgan-in-Pydar School to Road U6177 at Lanvean in the Parish of St Mawgan-in-Pydar) Modification Order 2017. |
| * The Order is dated 21 November 2017 and proposes to record a restricted byway running generally north-east from the road adjacent to Mawgan-in-Pydar school to the road at Lanvean. Full details of the route are given in the Order Map and Schedule. |
| * There were four objections and representations outstanding when Cornwall Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is confirmed.** |
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Procedural Matters

1. On 15 August 2011 an application was made to Cornwall Council, the order-making authority (the OMA), by St Mawgan-in-Pydar Parish Council (the Parish Council) under Section 53(2) of the Wildlife and Countryside Act 1981 (the 1981 Act) to add a Byway Open to all Traffic (BOAT) to the Definitive Map and Statement (DMS) for the area.
2. The OMA determined that an Order should be made but to record the route with the status Restricted Byway. The Parish Council objected on the basis that their original application status of BOAT should be recorded or that the route should be recognised as a part of the normal vehicular highway network. Other objectors argued that there were issues relating to the determination to make the Order, which affected the reliability of the evidence as a whole. An Inquiry was held for the purpose of testing the evidence, as requested, however, only the OMA and Parish Council provided evidence to the Inquiry. All other matters are considered from the written submissions.
3. I made an unaccompanied site visit on 18 October 2021 and held a Public Inquiry into the Order on 19 and 20 October at Mawgan Porth Village Hall. There was no request for a further accompanied site visit following the close of the Inquiry.

Main issues

1. The Order is made under section 53(2) of the 1981 Act by reference to section 53(3)(c)(i), which states that an Order should be made to modify the DMS for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

*“that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies.”*

1. Whilst there was common ground between the OMA and the Parish Council that there were historically vehicular rights over the Order route, they diverged over the effect of the Natural Environment and Rural Communities Act, 2006 (the 2006 Act). Section 67(1) of the 2006 Act sets out that:

*An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement–*

*(a) was not shown in a definitive map and statement, or*

*(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.*

*But this is subject to subsections (2) to (8).*

1. The OMA were of the view that none of the exceptions set out in subsections (2) to (8) of the 2006 Act applied and, as a result, the vehicular rights had been extinguished. The Parish Council and a late representation from the Trail Riders Fellowship (TRF), argued that there were exceptions which may apply:

*67(2)(a), it is over a way whose main lawful use by the public during the period of 5 years ending with commencement* [2 May 2006] *was use for mechanically propelled vehicles;*

*67(2)(b), immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense);* or

*67(2)(e), it was created by virtue of use by such vehicles during a period ending before 1st December 1930.*

1. The other objections raised concerns with regard to the weight to be given to the evidence, both documentary and user, in part in relation to how it was gathered as well as the deliberation of the OMA. The effect of ownership of the land was raised as a matter of concern, as was the width of the route to be recorded.
2. In relation to documentary evidence, section 32 of the Highways Act 1980 (the 1980 Act) requires that I give such weight to the document as I consider is “…*justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it was produced*.”
3. A highway will be established at common law by dedication where the owner of the land has dedicated the way to the public and the public have accepted that dedication. The question of dedication is one of fact to be determined from the evidence as a whole. If satisfied that a highway exists at common law then, unless there is evidence of it having been subsequently stopped up, the route would still exist as a highway regardless of later actions or inactions. In such cases I do not consider it would be necessary or appropriate to also deal with the matter under section 31 of the 1980 Act, as use, once dedication and acceptance was established to have occurred, would be ‘by right’ and not ‘as of right’ as required under that statute. The decision as to whether or not public rights subsist will be made on the balance of probabilities.

Reasons

*Physical characteristics*

1. The Order route runs from a cul-de-sac highway, the U6177, which ends to the north of Mawgan-in-Pydar Community Primary School (the school) and north-east of the village shop and post office. Other facilities, such as the church and a public house are situated to the south-west of the Order route; a car park to the south; and a play area and recreation ground to the north of points A – B (points A – B – C are shown on the Order map), with access gained from the Order route. I consider that the south-western end of the route can be said to be situated within the village centre.
2. The Order route itself runs through a ford, with a footbridge alongside, running generally north-east and then north-north-east, with several properties gaining access from it. The route is surfaced, patched with tarmac, concrete and stone in places, with boundary hedges and fences. There are a couple of street lights at the southern end. It joins the road, also the U6177, to the north-east in an area referred to as Lanvean.

*Documentary evidence*

#### Thomas Martyn Map, 1748/49

1. Whilst I agree with the OMA there appears to be no route shown in the location of the Order route I do not consider that it can be said that the roads and tracks in the settlement of Mawgan are shown. They are not shown in their totality; the River Menalhyl (the river) is shown but not the routes over, through or alongside it in the village centre. Such routes must have existed.

#### Plan of Lanherne Mansion House, 1777

1. There were two plans associated with this Mansion House, which is now the Franciscan Sisters of the Immaculate Convent, and the plans are at a scale and accuracy in comparison with the current layout to be of assistance with regard to physical features. The road which runs out of the village to the east, towards Higher Winsor, appears to be a ford with a footbridge alongside. The road out of the village to the south is annotated ‘Coach Road to Lanherne from St Columb’. The southern end of the Order route is shown and, like the other road over the river, appears as a ford and a footbridge. The section A – B appears in the same way as other roads, uncoloured with a brown line, whilst the continuation towards point C appears to be coloured green and is annotated as ‘Part of the Gleeb’.
2. This is an estate plan, which would have been identifying land relevant to the Mansion House, not specifically identifying roads. It provides evidence of a route continuing beyond point B.

#### Greenwoods Map, 1826/27

1. The early nineteenth century map was said to be ‘from an Actual Survey’, however, the scale means that in the area of interest it is difficult to tell what is or is not shown. The line of the river is clear and a symbol indicates the location of the church. The Order route was not shown.
2. Commercial maps such as Greenwoods and the earlier Martyn’s map, are rarely sufficient to permit the inference to be drawn that a route is a highway. In taking account of the evidence from the intervening Mansion House plan and the limits of scale in relation to these maps there is a suggestion of a route at this early stage. I consider that other relevant evidence arises from the keystone of Lanvean Cottage, dating it to 1824. As access for this cottage arises from the Order route it is reasonable to assume, on the balance of probabilities, that the route existed at that time, regardless of the lack of completeness of these early maps in depiction of the route as a whole.

#### Tithe Maps and Apportionments, 1842

1. The Tithe Commutation Act 1836 (amended in 1837) converted tithes to a fixed money rent. Tithe documents are concerned with identifying titheable land. They can give no more than an indication as to whether any way is public or private because a private right of way can also diminish the productiveness of the land for tithe assessment. In this case we have the Parish copy, the Diocesan copy, which includes an inset map showing ‘Church Town’, and the Tithe Commissioners copies of the relevant documents. The landowner also submitted unidentified – that is in terms of their provenance - coloured copies.
2. I consider that all copies show the Order route as a whole on the current alignment. In crossing the river it is shown as a ford with a footbridge. The road to the north-west, noted on the Lanherne Mansion plan, is similarly indicated, although the bridge there was possibly a little more than a footbridge by that time, as it is now. The landowner suggested that the copies he submitted showed a building across the route. This building was shown on all the tithe map copies and I am satisfied that it did not interrupt use of a through route in this location, where it passes apparently unfenced, through the land with apportionment number 1326.
3. I agree with the OMA that the unbroken line at point B suggests a boundary treatment, through which I consider there must have been a gate allowing continued use of the ‘lane’ particularly obviously delineated on the Parish copy. Although the word ‘Church’ on the Diocesan copy covers the relevant area, I consider it clear that there was a barrier across the route between points B and C, following on from the northern boundary of apportionment number 1309. I am satisfied that this would be a gate, allowing continued access. There was no gate or barrier at Lanvean.
4. The route is shown coloured sienna as are other routes, some of which are now identified as highways. On balance, I consider the colouring shows where tithe would not be payable, due to the physical condition of the land in question, rather than identifying highways. Although tithe payment was made in relation to the identified plots 1306 and 1307 the payment calculation will have arisen from the entirety of the land within those apportionments, in the ownership of Thomas Thomas and the Reverend Philip Carlyon respectively.
5. The maps submitted by the landowner appear to use colour to identify the landownership, with green apparently showing the glebe land, that is the land owned by the church. Both copies leave the route as it runs south from Lanvean sienna as far as the gate identified on the other maps. He indicates that the property with apportionment number 1325, coloured blue on one of the maps, was owned by Thomas Thomas, who leased the glebe lands. This is Lanvean Cottage and it was said by an objector that this was a shop at one time, which I consider would be likely to require access from both north and south to be viable and available to villagers.
6. I consider that the tithe documents show that the Order route physically existed as a through route. It was in ownership and/or occupation of the Reverend at the southern end, north of the ford, with no indication of ownership or occupation of the remaining section beyond the second gate. Whilst I am satisfied that there were gates I do not consider that this indicates that there was not a through route. The purpose of the tithe maps mean that they do not assist in demonstrating whether that route was public or private.

#### Ordnance Survey maps

1. The formation of the Ordnance Survey (OS) was in response to a military need for accurate maps. Over the years, OS developed a variety of maps to meet the growing need for accurate and up-to-date maps of the UK and the production of maps for sale to the public became an activity of increasing importance to OS from the early twentieth century. Since 1888 OS maps have carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way.
2. The OS 25-inch coloured County series map, 1881 identifies and colours buildings, roads and rivers. The Order route is shown uncoloured, as is the southern section, which is now recorded as a highway. The area of the ford and footbridge was not identified in the way that it was in the earlier tithe mapping but I am satisfied that there was a through route in this locality. I disagree with the OMA that there was a line at point B on the map and consider that what is shown is the trees in this area. However, there was a line, showing a barrier, which on balance is a gate, at point C, the Lanvean end of the route.
3. The scale of the six-inch maps does not add any information in terms of the 1888 map but the 1908 map annotates the ‘Ford’ and footbridge, as ‘F.B.’. The gate at the northern end was still shown.
4. The OS map used as a base for the user evidence forms (UEFs), which were completed in 2011 and the Order itself, showed the Order route with no gates or barriers and the ford and footbridge annotated. The Rectory, now renamed Yongala, lies to the west of the Order route, partway along.
5. The OS maps are reliable in terms of physical characteristics but it was not their purpose to identify whether routes were public or private. I am satisfied that the Order route has remained as an available through route, although with gates at up to three points on the route at various times.

#### Bartholomew’s maps

1. These maps were reduced from OS maps and, as noted by the OMA, there is some evidence that the Cyclists Touring Club corresponded with Bartholomew regarding routes used by their members. However, the mapmakers do not appear to have determined the nature and status of the roads on their maps or to have examined the legal status of the routes before colouring them to indicate a particular status or use.
2. Both maps supplied, dating from 1901/2 – 1906 and 1919 – 1924, show the Order route coloured as a secondary road. I consider that this provides some evidence of reputation of the route.

#### Finance (1909 - 1910) Act

1. The Finance (1909 - 1910) Act provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and its subsequent sale or transfer. The ‘assessable site value’ of land allowed for deductions for, among other things, the amount by which the gross value would be diminished if the land were sold subject to any public rights of way or any public rights of user, to the right of common and to any easements.
2. Each area of land, or hereditament, was identified on an OS base map and information recorded in a Field Book. The valuations from the field books were transferred to what has been referred to as the Domesday book. I am satisfied that the Order route was excluded from the numbered hereditaments on either side, as was the case with now recorded roads in this area. The area around point B at the ford is coloured and associated with hereditament 128, which was part of the ‘Convent, Buildings and Land’, with no deductions for rights of way nor for ‘Appropriation of land for streets. Roads, open spaces, etc.’. It seems to be the footbridge that was left uncoloured.
3. I agree with the OMA that the exclusion of the route may indicate that it was a carriageway. Although there can be other reasons for exclusions there is no other obvious reason why that might be the case here. On the balance of probabilities, I consider that the Finance Act information provides some support for the existence of a carriageway over the Order route. That does not appear to be the case in relation to the ford, which could relate to the value of fishing.

#### Handover map, 1929

1. Under the Local Government Act 1929 County Councils across England and Wales gained increased powers as highway authorities, acquiring direct responsibility for roads in the Rural District Council (RDC) areas. This led to the production of what are referred to as handover maps, on which the RDC would mark the roads which they believed to be maintainable at public expense and were ‘handing over’ to the County Council for maintenance. The Order route was not shown on the Handover map and whilst that would not prevent it being a highway it shows that the RDC did not record it as maintainable by them.

#### List of Highways Maintainable at Public Expense (List of Streets)

1. We were fortuitously assisted by a Council Officer who was assisting with the Inquiry arrangements but had previously been responsible for maintaining the list of highways maintainable at public expense for the Cornwall County Council in 2006. This list, often referred to as the list of streets (LoS), arises from duties under section 36(6) of the 1980 Act and the Officer confirmed that he had overseen the migration of data from physical records, such as the Handover map, to the Council’s electronic database, which was the legal record so far as the Council, as the highway authority, were concerned.
2. The Parish Council relied on *Fortune v Wiltshire Council [2012] EWCA Civ 334* (*Fortune*), which they argued bears a number of similarities with the matter in this case. I agree with the OMA that *Fortune* related to a different issue, with the local authority there contending that a route was included on its LoS. The issue before the Court was whether the LoS was compliant with Section 36 of the 1980 Act. In this case, no argument is made that the LoS is not compliant with the requirements, although I understand that Parish Council would prefer to be able to add the Order route to the LoS at this time.
3. I note that the Parish Council felt that they had not been assisted with regard to accessing this information, which is unfortunate. Having had the benefit of seeing a live demonstration of the database layers in relation to the OS base data, I am satisfied that the Order route is physically shown and coloured light grey on the base mapping. However, it is not shown on the Council’s LoS as ‘unknown’, which is a darker grey colour in the key and which does relate to a small section of land near the ford but off the Order route.

#### Photographs

1. A photograph dated 1894 showed the ford and a wooden footbridge. A gate can be seen to the north-east of the ford, with no indication of signs. The wall to the south appears to be slightly lower between the gatepost and tree, suggesting a stile following on from the alignment of the footbridge.
2. It was suggested that the 1935 school photograph showed gates at the bottom of the lane, however, I have found it difficult to align the location of the photograph. It appears to have been taken within the school grounds and the gates and fences may relate to the boundaries of that property, giving access to and from the Order route rather than across the route itself. The small section of route visible appears open and used in that location.
3. Aerial photographs show the alignment of the route but with tree cover such that ground features are not easily discernible in more recent years. The 1946 aerial photograph shows the surface, suggestive of an open and used route, similar to other known roads in the area.
4. Photographs of a 1958 wedding party were said to have been taken at the Church Hall, which is now converted to the residential property Moorland House. The car would clearly access the Church Hall via the lane and others, including evidence given in person to the Inquiry, referred to access to and from the Church Hall for many village events. There were also photographs of a steam engine using the ford.
5. Photographs of signs were submitted such as ‘PRIVATE LANE RESIDENTS ONLY NO HORSES’, and ‘ NOTICE This Lane and Land beyond the footbridge is Private Property The public are permitted pedestrian access across the Lane on condition that ∙ Persons do so entirely at their own risk in the knowledge that the Lane surface is not maintained or made up for public use ∙ Dogs must be kept on leads at all times. ∙ Dog mess will be cleared up by the owner.’ One photograph shows a gate, which appears to be across the lane at a point north-east of point B, near the property Trevelyan, with a sign ‘NO THROUGH ROAD’. This photograph also shows a street lamp on the lane.
6. Photographs taken during the investigation of the route by the OMA show the surfacing and location of street lamps on the route. I agree that the existence of street lamps, which were erected and maintained by a public authority are indicative of an understanding of public rights.
7. I consider that the photographs show that there was a used through route, which has been subject to gates and signs more recently. Photographs may confirm the existence of a feature at the time that they were taken but it cannot be said whether that use was in a public or private capacity.

#### Parish Council Minutes

1. Photographs and transcripts of Parish Council minutes showed many referring to the Order route. From March 1907 these discussions indicate concerns regarding maintenance responsibility. I consider this would be unlikely if there was not public interest in the use of the route. It was referred to in that minute as the “*road from the school footbridge to Lanvean gate*” indicating that it was understood at that time as a ‘road’ and that there was a gate at Lanvean, which ties in with the early OS mapping. It seems that two former Rectors had borne the expense of repair of the route, the one who built the Rectory having apparently asked the Highway Board to hand the road over to him.
2. In 1908 the suggestion that repairs could be carried out by the Rector if the gates were locked to prevent use by heavy traffic indicates that any gates were unlocked and suggests there was already such use. This idea was rejected with the Chairman referring to the route as a public road. Repairs were again raised in 1932, this time with the County Council, with the handover of maintenance responsibility for roads having passed from the District Councils.
3. By 1947 the Rector was being asked to waive his rights over the road so that it could be taken over by the County Council. Continued discussions regarding ownership and maintenance led eventually to the meeting of the Rectory Road Improvement Committee on 9 March 1954. There was agreement to carry out voluntary and paid works on the road but it was not entirely clear whether this occurred at the time, with the final entry there being that further consideration be deferred until the Annual Parish Meeting. That may relate to the legal position or to the entirety of the works.
4. In September 1957 a letter was to be written to thank a parishioner, as I understand it then the owner and resident of the newly built Trevelyan, accessed off the Order route, for his work ‘cleaning up the Rectory Road’. In 1964 the Rector spoke suggesting adoption of the route. There were subsequent mentions of planning and maintenance matters.
5. In January 1964 there was a report of ‘Riverboard works…with…the ramp which it is proposed should be constructed in the roadway adjacent to the wall of the school playground will entail the raising the road level approximately 2 feet over a distance of 10 feet and then from gradual slopes to the ford on one side and the original road level on the other. The whole will be surfaced with tar macadam to the satisfaction of the County Council and the ramp will in no way interfere with either the free access of pedestrian traffic to the footbridge or to that of vehicular traffic to the ford.’ I consider this to be an important recognition of vehicular and pedestrian traffic in this area, with the works required to be done to the satisfaction of the highway authority.
6. January 1991 saw complaints about motor vehicles using the lane with a letter to the Highway Authority requesting an ‘Access Only’ sign. This was refused on the basis that it was a private road, on which local residents could act. It is not clear whether such notices were erected at this time. I understand that notices which stated ‘No horses’ were erected in the winter of 2002/03, leading to UEFs being submitted to the OMA.
7. The minutes suggest that the Parish Council have in general sought to have the route maintained. As is often the case the concern relates to maintenance, with ownership of the route a secondary matter where the highway authority does not agree they have responsibility for the route in question. There was an indication in 1954 that the Divisional Surveyor said that they had in the past repaired the road as far as Lanvean House, however, this was not recorded on the LoS. Whilst Lanvean House lies a little to the north, I note that this would tie in reasonably well with the difference in colour seen in the tithe map copies submitted by the landowner, where the northern section to the gate appears to have differed from the southern.
8. The Parish Council have acted following a change in ownership and the erection of gates in 2011 to take forward this application. However, there was a notable lapse in protecting public rights from the 1990s when vehicular access appears to have been discouraged. The matter was again left in abeyance in relation to subsequent verbal challenges and notices in around 2002/03. Nevertheless, the general picture arising is a concern to protect and maintain the route, which would relate to public use thereof.

#### The Definitive Map and Statement

1. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS. In the early 1950s Parish Councils were asked to carry out a survey of all the public rights of way in their Parish and mark these on a map. They were also asked to provide a descriptive statement of each way. The Parish Survey map for the parish of St Mawgan-in-Pydar dated 22 February 1951 does not include the Order route and therefore it was not included in the subsequent Draft Provisional Map for St Austell Rural District, 1951, First Definitive Map for St Austell Rural District, 1968 or Current Definitive Map, 2006. There is no indication of objection to the failure to include the route on the DMS at any point until the application was made for this Order.
2. It was suggested by the Parish Council that the reason it had not been included was because it was already recognised as a road at that time. However, the Parish Survey map does not identify roads as such and there is no indication that the relevant Parish minutes set this out as a reason why this route was not recorded by the survey process. As a result, I give no weight to this as supporting the claim for a public right of way of any description.

*User evidence*

1. 101 UEFs were submitted in support of the application, whilst objectors provided additional information on use, or non-use, of the route. I note that there were some concerns as to reliability of the user evidence and the point of the Inquiry, was to allow that to be tested. The OMA found that there were also 15 UEFs completed in 2003, 6 of whom also completed UEF’S in support of the 2011 application. The 2003 UEFs appear to have been submitted due to verbal challenges to users and notices erected by local people who lived along the lane. No application was made to the OMA for an Order at that time.
2. As noted by the OMA there was some discrepancy between the claimed use in the 2003 and 2011 evidence where users had provided information in both years. Whilst the evidence submitted in 2011 is more detailed I disagree that this means it is more accurate, despite the more structured set-up of the UEF. Without further information, through interview or cross-examination, I will only take the lowest reported level of use from these witnesses. However, even in doing so the number of UEFs and the agreement in the information provided is striking and provides a strong picture of consistent use of the route on foot, horse, bicycle and vehicle dating back to the 1940s.
3. The use has been part of everyday village life, accessing facilities such as the school, shop, post office, recreation ground and play area, attending whist drives, playschool and youth clubs in the church hall, as well as dances and other events, walking the dog, exercising horses and visiting friends and family. I understand that when there were roadworks in the village this route was used as an alternative access. There seems to have been a particular dislike of use of the route by horse-riders, with reports of verbal abuse from adjacent landowners in the early part of the twenty-first century. It seems that some people took note and stopped using the route whilst others were of the view that this was a public right of way and continued in their use.
4. A witness to the Inquiry clarified that despite claims she had permission to ride on the lane she had no cause to ask anyone for permission. In addition to the pony she rode she had also ridden with a pony trekking centre in the late 1960s, riding up and down twice a day escorting others. The person latterly trying to prevent horses on the route used to chat with riders in earlier years.
5. Whilst I agree with the objectors that there were gates across the route at various times there was no indication from the user evidence that these had been locked, until more recently in relation to the gate near Trevelyan. I do not find it unusual for there to be gates in a rural area and note that there was evidence from the tithe map that the route was unfenced to the apportionments which were subject to tithe. It would not be unlikely for a route in such circumstances to be subject to grazing, with gates required to prevent stock straying.
6. I am satisfied, on the balance of probabilities, that the user evidence correlates with the documentary evidence, which shows that this was a through-route. I agree with the OMA that the evidence supports the use of the route across all classes of users that might be expected on a road and demonstrates acceptance of the route by the public.

*Conclusions at common law*

1. I am satisfied that the route has been a defined feature in the landscape since at least the middle of the nineteenth century when it was shown on the tithe map. I consider it was probably there from an earlier time, with eighteenth century mapping showing the south-western end of the route and the topography of the other road out of the village making a difficult turn for horse and cart in either direction. The location of the route in relation to village facilities, both recent and from years past, mean that it appears to be an integral part of the village network. The strands of documentary evidence are supportive of higher rights.
2. The evidence shows use over such a long period and in such a way that the landowner, whoever that may have been, must have known of it. By the time of action taken in the latter part of the twentieth century use was already established. Whilst some apparently stopped their particular use of the route, others ignored challenges, indicating an understanding that the route was public and so they could not be prevented from use.
3. Considering the evidence as a whole I am satisfied on the balance of probabilities that the Order route was historically a highway, open to public use with all forms of transport. The ownership and maintenance issues may have muddled the matter at a local level, with newer landowners not having the advantage of long knowledge from which to take their information. Private ownership of land does not prevent the existence of public rights of way.

*Section 31 of the Highways Act 1980*

1. Being satisfied with regard to the case made at common law I do not find it necessary to consider matters further in relation to the statute. Such use as has occurred up to potential challenges in the latter part of the twentieth and early part of the twenty-first century cannot affect the rights which I consider were already established at an earlier date.

*Natural Environment and Rural Communities Act 2006*

1. Being satisfied that the Order route has been shown, on the balance of probabilities, to be subject to vehicular rights, the question arising is the effect of the 2006 Act on those rights. By reference to *Fortune* the Parish Council suggested that the 2006 Act was aimed primarily at countryside green lanes, which may be damaged due to vehicular use and that this route differed in terms of use, location and character such that the 2006 Act might not be applicable. I consider that the 2006 Act provides appropriate mechanism to avoid the extinguishment of rights over the ordinary road network such that there is no need to read the Act in a purposive manner as suggested.
2. Although the Parish Council suggested that the route could be recorded as an ordinary road, I am satisfied that the effect of the 2006 Act is to extinguish the mechanically propelled vehicle (MPV) rights subject to exemptions, which I shall deal with below. I agree with the OMA that it is beyond my powers to require the highway authority to add a route to the LoS or otherwise record it as a road in the same way as the adjoining U6177.
3. In the alternative the Parish Council suggested that the route should be recorded as a byway open to all traffic (BOAT). The definition for BOAT is set out by section 66(1) of the 1981 Act:

*“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*.”

1. With the Parish Council arguing that the vehicular use was so high that this was a ‘road’ I am not satisfied that the definition of BOAT would necessarily be met. I consider that the vehicular rights have been extinguished, unless one of the exceptions set out below is met.

*Section 67(2)(a)*

1. This section of the 2006 Act would prevent the extinguishment of the MPV rights if the use is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for MPVs. The date of commencement was 2 May 2006 and so the relevant period, 2001 – 2006 falls within a period covered by the UEFs.
2. I consider that the UEFs demonstrate use on foot, horse, bicycle and vehicle throughout the relevant period, despite there being some evidence of notices to dissuade use during this time. The Parish Council argued that the use by vehicles was higher than use on foot or horse, with no specific comment on bicycle use. Although suggesting that the number of people in a car may lead to more ‘users’ of vehicles, the information was not available to me in this way.
3. The TRF also suggested that the use prior to commencement was sufficient to save the MPV rights. The more recent UEFs are structured to try to gain information on both the type and quantity of use by individuals completing them. Reliance on the bar chart of MPV use alone does not provide the full picture of use in the UEFs as a whole. I am satisfied that the OMA are correct in their view that the UEFs record less use overall with vehicles than by any other means in the relevant five-year period to 2 May 2006. I also take note that there appears to have been action to prevent use within the five-year period to 2001. As a result, I am satisfied on the balance of probabilities that this exception to the extinguishment of MPV rights does not apply.

*Section 67(2)(b)*

1. This requires that immediately before commencement the route was not shown in a DMS but was shown in a list required to be kept under [section 36(6)](https://uk.westlaw.com/Document/IEFC40F00E44911DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=37be8300f64f4fe59793a7e394bce59b&contextData=(sc.DocLink)) of the 1980 Act - list of highways maintainable at public expense. As set out at paragraph 36, I am satisfied that the Order route is not shown on the LoS.
2. The important matter here is whether it was there shown immediately before commencement, 2 May 2006, but the OMA confirmed that they did not have a ‘frozen’ copy dating prior to that date. The LoS, as a ‘living document’, could be updated through appropriate procedures, however, it was confirmed that the data was taken from the handover map, which has been noted at paragraph 33 not to show the Order route.
3. The Parish Council suggested that there had been an error, with the route already a highway maintainable at public expense by 31 August 1835, when the Highways Act 1835 put highway maintenance in the hands of parish surveyors. It was suggested I should take the view that the route should have been recorded and treat it as if it had been. I am not satisfied that it is possible or appropriate to take this action. On the balance of probabilities, I am satisfied that the Order route was not shown on the LoS immediately before the commencement of the 2006 Act and, therefore, vehicular rights are not saved from extinguishment by virtue of this exception.

*Section 67(2)(e)*

1. This exemption to extinguishment of MPV rights arises where the evidence shows that the route was created by virtue of use by such vehicles during a period ending before 1st December 1930. This is the date at which the Road Traffic Act 1930 made the use of motor vehicles on bridleways and footpaths an offence without lawful authority.
2. The Parish Council submitted photographs and information suggesting use of the route, either directly or by inference, from the early part of twentieth century. I agree that the evidence suggests MPVs were in use in the area prior to the 1930 cut-off date and the 1908 Parish Council minute entries suggest there may have been use by heavy vehicles. However, the exemption relies on the route being created by such use and I am satisfied from the arguments made by the OMA and the Parish Council that the use was established long before the beginning of the twentieth century. I do not consider that the vehicular rights are saved from extinguishment through this section of the Act.

*Conclusions*

1. I do not consider that an exception to the extinguishment of vehicular rights arises from anything subsections of the 2006 Act, including ss 67(2)(c) and 67(2)(d). As a result, I am satisfied that the appropriate status for the Order route is restricted byway. This allows public use on foot, horse, bicycle and with a horse and cart, whilst retaining lawful private vehicular use for access to land and property.

*Width*

1. It was argued in objection that parts of the route were only 2.5 metres. I agree with the OMA that the lane is bounded and the width clear. I do not consider that the Order to be incorrect in setting out the minimum width of 5 metres and I do not propose to modify the Order on this point.
2. The TRF raised concerns about the lack of reference in Part II of the Schedule to the Order to the mapping as in Part I. The OMA explained that the reference to the width, based on the depiction of the way as shown on map sheet Cornwall XXXII.6 (1908) from the Ordnance Survey County Series Second Edition map series published at 1:2500 scale, was not carried over to Part II of the Schedule due to the format of the existing statement. I am satisfied that the Order provides sufficient information for users and landowners – and most importantly the highway authority - to understand the width of the route at any given point and that no amendment to the text of the Order is required.

**Other matters**

1. I note the suggestion of the TRF that the footbridge should not be recorded as part of the highway, as it would have been provided under general powers of improvement. I consider it helpful to have the footbridge recorded, providing acknowledgment and security for this feature, which appears to have been part of the route over the last two hundred years or so. The OMA do not request a modification to the Order, which refers to the footbridge within parenthesis. I am satisfied that Order is not defective due to this matter and do find it necessary to modify the Order in this respect.
2. The law does not allow me to consider such matters as the desirability or otherwise of the route in question or concerns regarding the actions of the Council during investigation of this case.

Conclusions

1. 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.

Formal Decision

1. I have confirmed the Order.

Heidi Cruickshank

**Inspector**

**APPEARANCES**

|  |  |  |
| --- | --- | --- |
| **For the Order Making Authority:** | | |
| Sancho Brett | | of Counsel, *on behalf of* Cornwall Council | |
| *who called:* |  | |
| Michael Eastwood | Countryside Access Team Leader, Cornwall Council | |
| Martin Wright | Commons Registration Officer, Cornwall Council | |

|  |  |
| --- | --- |
| **In Objection to the Order:** | |
| Mr Charlie Hopkins | *on behalf of* Mawgan in Pydar Parish Council | |
| *who called:* |  | |
| William Corbett |  | |
|  |  | |
| Clare Tyson |  | |

**INQUIRY DOCUMENTS**

|  |  |
| --- | --- |
| 1 | The Order |
|  |  |
| 2 | Opening Statement on behalf of the Cornwall Council |
|  |  |
| 3 | Greenwoods map photographs |
|  |  |
| 4 | Closing Submissions on behalf of the Cornwall Council |
|  |  |
| 5 | Opening Statement on behalf of Mawgan in Pydar Parish Council |
|  |  |
| 6 | Photographs, 1908, c 1930 |
|  |  |
| 7 | Closing Submission on behalf of Mawgan in Pydar Parish Council |

