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| **Order Decision** |
| Site visit made on 2 November 2021 |
| **by Gareth W Thomas BSc(Hons) MSc(Dist) DMS MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 13 December 2021** |

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| **Order Ref: ROW/3249177** |
| * This Order dated 13 June 2018 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 Restricted Byways WA99 Walford and GR42 (Part) Goodrich and Upgrade of Public Footpath GR19 (Part) to restricted Byway GR42 (Part) Goodrich) Modification Orde 2018. |
| * The Order is dated 13 June 2018 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway and upgrading part of a footpath to a Restricted Byway, as set out in the Order plan and described in the Order Schedule. |
| * There were two objections outstanding when Herefordshire Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs. |
| **Summary of Decision: The Order is confirmed** |
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Procedural Matters

1. No party requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations submitted to me. I made an accompanied site visit on 2 November 2021 in the company of a representative of the Council, representatives of the applicant for the Order (The Open Spaces Society) and a couple comprising one of the two statutory objectors who also own a dwelling house and garden land that is closest to and across which part of the Order route crosses, namely ‘Y Crwys’.

The Main Issues

1. The OMA rely on the evidence as a whole in relation to these routes, including documentary evidence, such as mapping, newspaper articles and correspondence as well as evidence from users.
2. If confirmed, the effect of the Order would be to add two sections of a Restricted Byway from A-B and D-E and upgrade part of an existing public footpath known as GR19 to a Restricted Byway between C-D to form a continuous Restricted Byway between points C-D-E.
3. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of the occurrence of events specified in section 53(3)(c)(i) and (ii). The main issue is therefore whether the discovery of evidence by the OMA when considered with all other relevant evidence available is sufficient to show, on the balance of probabilities, that a right of way which is not shown in the map and statement subsists on the route in question such that the definitive map and statement require modification and that the definitive map and statement require modification because there is no public right of way over land shown in the map and statement as a highway of any description.
4. From the submissions of the OMA, it is not intended to rely on the provisions of section 31 of the Highways Act 1980 (the 1980 Act) as to whether dedication of the way as a public highway has occurred through public use over a prolonged period.
5. Instead, the OMA relies on evidence to be considered under common law principles, whereby a right of way may be created through expressed or implied dedication and acceptance. The onus of proof lies with the claimant, in this instance the OMA, to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long as dedication could be inferred; or that the landowner was aware and acquiesced in public use. Use by the public must be as of right (without force, secrecy or permission). However, there is no fixed period of use which may range from a few years to a period of decades, according to the facts of the case. By the same token, there is no particular date from which the use as a public right of way must be calculated retrospectively.
6. The main issue therefore is whether the discovery by the OMA of evidence which, when considered with all other evidence available, is sufficient to show:

* In relation to A-B and D-E, that a right of way which is not shown in the Definitive Map and Statement (DMS) subsists over land in the area to which the map relates (section 53(3)(c)(i); and
* In relation to C-D, that a highway shown in the DMS as a highway of a particular description ought to be shown as a highway of a different description (section 53(3)(c)(ii).

1. The OMA is relying upon implied dedication under common law and the Order has been made mainly on the basis of documentary evidence together with some limited user evidence by the public. Section 32 of the 1980 Act requires me to take into account any map, plan or history of the locality or other relevant document giving it such weight as is appropriate and as is justified by the circumstances before determining whether or not a way has been dedicated as a highway.
2. I shall examine the evidence as a whole to establish whether a public right of way for vehicles exists along the Order route. However, the Natural Environment and Rural Communities Act 2006 (the 2006 Act) extinguished rights for mechanically propelled vehicles and, in this case, it is not argued they have been saved by any of the exceptions set out in Section 67 of that Act. Accordingly, should I find in favour of public vehicular rights existing, the way should be recorded as a Restricted Byway.

Reasons

***Background***

1. The Order route extends to a total of approximately 1671 metres on both sides of the River Wye from its starting point in Walford Parish at the junction of the C1274 Road between Ross on Wye and Walford on the northern side of the river and thence, from the opposite southern bank of the river, to a roadside location alongside Y Crwys and close to the junction of the C1260 in Goodrich. A section of the Order route is an existing footpath which follows the southern bank of the River Wye. The route is not continuous as the river is not bridged or forded at that location.
2. The application was made on the basis of historical documentary evidence and the submission of seven user evidence forms. The user evidence provided some evidence of use on foot, horse and a family photograph showing use by a car on one occasion at least. The OMA points out that this part of the evidence relates to the use of the northern section A-B only. One of the user evidence forms claim that they used this section of the path for a period of 32 years before being obstructed and prevented from doing so by a person, presumably the landowner.
3. There are a number of different landowners who are affected by the Order route. The historical existence of a track, either in whole or in part, which is on or is in proximity to the Order route does not appear to be of issue. Submissions from the landowner of the northern section and objections from two of the landowners of the southern section acknowledge that there was a historic line of a track that might add weight to it being a highway but that this depended on the crossing of the river by way of the Goodrich Ferry, which has long since ceased operating and that the Walford end would have been the subject of a fee to pass. The submissions also point to a significant number of inconsistencies, including the precise route of any historic highway, particularly between points D and E together with uncertainty whether the ferry was consistently used over time or whether the river was forded further downstream and well away from the Order route. Together, the landowners claim that the evidence undermines the case for a historic highway.
4. The OMA does not rely on user evidence for points D-E.
5. Substantial documentation was submitted in support of the application. Not all of those documents show the claimed route or its precise alignment. I shall not refer to each and every document presented in evidence; rather, for the purposes of this Decision, I shall focus on the core strands of the evidence relied upon by the OMA along with matters of dispute.
6. The OMA alleges that the route alignment on the northern section is not ambiguous and follows existing tarmac and unsurfaced farm tracks before leading across an arable field to point B. Similarly, a public footpath forms the section proposed to be upgraded between points C-D and is an obvious and well-used route. The public footpath is the only section of the claimed route that has recorded public status.
7. The objectors dispute the accuracy of the alignment of the claimed route between points D-E. The precise access to the Order route from the public road alongside Y Crwys is depicted at different positions either side of this property depending on which of the various maps in the evidence submissions are relied upon. The landowner and second objector also alleges that the Order route deviates from its original alignment alongside Tanners Close.

***Documentary evidence***

1. The OMA investigated a large number of historical maps and documents, old highway records and local historical books and guidebooks. Whilst it does not rely on any one piece of evidence as conclusive, the OMA submits that overall, on a balance of probability, it points towards the existence of historic public vehicular rights.

*Miscellaneous early mapping and records*

1. The Order route features on a number of commercially produced maps of the 18th and 19th centuries. The Isaac Taylor Map 1786 shows the claimed route in the same colouring and style as other recognisable primary roads, including the A40 and A49. The map also shows the ‘Goodrich Boat Ferry’ as being the clear crossing point over the River Wye. Similarly, the John Carey Map circa-1787, which may have formed part of Carey’s ‘New and Correct English Atlas 1787-9’ again shows the claimed route in the same manner as other primary roads. The Carey Map 1805 held in the County Record Office very clearly shows the claimed route in a similar manner to other primary roads.
2. A comparison between principal roads depicted on modern mapping of today and the Henry Price’s Map of 1817 indicates the claimed route as other roads in a solid line. The Bryant’s Map 1835, which was produced using surveyors and a triangulation system to enhance its accuracy very clearly shows the route passing alongside the property Y Crwys to a position near to the Boat Inn with the Goodrich Ferry labelled thereon with the northern section coloured red depicting its status as a Turnpike and Mail Road and the southern section coloured brown as a Good Cross and Driving Road. Toll Bars are also indicated on this map.
3. Later maps prepared during the mid to late nineteenth century, including Crutchley’s Map 1850 and Letts and Son’s Map 1893 continue to show the claimed route to a certain extent and in the same way as other primary routes. However, the route was less clear in other maps, notably The British Gazeteer circa-1852, Bacon’s Map 1878 and Letts and Son’s Map 1884.

*Tithe records*

1. Tithe maps were concerned with identifying land on which a tithe was due to the church and officially recorded the boundaries of all areas on which the tithe-charge was appointed. Their purpose was not to identify highways. However, as statutory documents involving the status of land ownership, they were required to have a high degree of accuracy.
2. Both the Walford and Goodrich Tithe Maps show the claimed route with solid lines to each side and coloured in the same way as other roads are shown. Moreover, the ‘Goodrich Boat’ is indicated. However, the Goodrich Tithe Map by contrast to other maps shows the Order route joining the highway to the north rather than the south of Y Crwys.
3. Tithe maps alone are rarely conclusive evidence of the status of a route. However, an un-tithed route containing solid lines and coloured, coupled with other evidence, can give a good indication that a route generally may be considered as a public highway.

*Highway records*

1. Acts of Parliament of 1749, 1769 and 1815 relating to the repair and widening of roads leading into and through Ross on Wye mention the need to undertake improvements to the road leading from Ross to ‘Goodrich Boat’, which relates to the section of the route to the north of the river. This particular section was turnpiked in the 1794 Act. An 1825 Act provided for the building of a bridge over the River Wye at Kerne, which resulted in the ultimate demise of the ferry and the abandonment by the public of the claimed route. The OMA point out however that no records exist confirming that the claimed route was formally stopped up. The 1862 Act of Parliament continued to set out provision for the continued maintenance of roads in the Ross area and the route from Ross to Goodrich Boat was listed therein.
2. Other highway documents of the 1820s set out various road improvement plans, including those of Thomas Telford that either showed the claimed route as other roads in the vicinity (of Ross) or included them for potential improvement. At one stage there was considerable debate as to whether the Goodrich Ferry or Kerne should be the favoured crossing point for a bridge with the latter chosen and built out in 1828.

*Finance Act 1910*

1. The Finance Act 1910 required all land to be valued. Sometimes, reference can be found to a possible public right of way in the documentation used as part of the valuation process. Otherwise, where a route is shown uncoloured and unnumbered on the map record so that it is outside of the hereditaments it is indicative of a public highway and usually one which is vehicular. In this case the claimed route to the south of the river is uncoloured and notably, the route where it meets the county road runs to the south of the property Y Crwys.
2. The area within Walford is not mapped for tax purposes and thus there is no indication from this source of public rights across the land in existence at that time. However, I note that the Finance Act’s primary purpose was not the identification of highways and there may be other reasons for the exclusion of the route.

*Ordnance Survey (OS) mapping*

1. Although the depiction of a way on an Ordnance Survey (OS) map is not, in isolation, evidence of the existence of a highway, the inclusion of a route on OS maps can provide useful evidence in helping to determine the status of a route when combined with other evidence. They are though surveys of land and are indicative as what is on the ground at the given time of the survey.
2. The OMA made reference to a series of OS maps dated between 1831 to the present time. I agree with the OMA that the earlier maps show the Order route in its entirety whilst the ‘Ferry’ crossing is notated thereon. The current series however depicts only part of the route to the north of the river, and this coincides with what was clearly apparent during my site visit where there remains a tarmac roadway for a good length of the route before changing to a typical unsurfaced farm track before merging into an arable field closer to the river. The southern section only shows a short section of the route adjoining Tanners Close and Y Crwys.

*Definitive Map records*

1. The requirement for County Councils to produce a Definitive Map & Statement (DMS) for its area was introduced by the National Parks and Access to the Countryside Act 1949. In the first instance a survey was undertaken of every public path at the parish level. Neither Walford nor Goodrich Parish Council claimed the full length of the Order route at the time the original DMS was being formulated in the 1950s.
2. In the case of Walford Parish, its survey map claimed the existence of a public footpath and described it as ‘Boat Lane’. Whilst the Goodrich Parish map claimed the route between Goodrich and the former ferry as a public footpath, this was not included in the DMS by the former County Council citing as its reason that the ferry was disused, although this would not have met any statutory basis for its demise as a public route.
3. Other than C-D, neither of the longer sections of the claimed route has ever been the subject of any previous scrutiny as far as the DMS is concerned. By cross-referencing with the early OS maps and other mapping, the OMA’s submission that the failure of the Parishes to question the existence of these routes was due to those councils accepting that they were already public roads has some credibility and is in my view a realistic proposition.

*Other historical evidence*

1. There are numerous references to the Order route and particularly the use of the Goodrich Ferry, including its use for freight and livestock in books, local newspaper reports and other journals whilst old paintings and other images reveal the nature of the crossing at Goodrich with its castle in the background. At one time, the Ferry operator appeared also to live on the Goodrich side of the river where an ale house was also in operation. The remains of the building are still evident on site close to point C on the Order Map. This suggests that trade between the riverbanks would have been buoyant at one time.
2. The demise of the route certainly arose as a result of the building of the Kerne Bridge. However, no party has provided any evidence that the Order route was in any way formally stopped up using statutory procedures, which suggests that the maxim of ‘once a highway, always a highway’ should prevail.

***User evidence***

1. The OMA explains that 7 user evidence forms were submitted purporting that the route to the north was used on a reasonably regular basis over periods of more than 30 years; one photograph dating from 1976 showed a typical family picnic beside a car next to the river. However, the user submissions refer only to the use of the northern section of the Order route.

***Conclusion on the documentary and user evidence***

1. Collectively, and on the balance of probability, the very substantial historical evidence points to the Order route being a public carriageway of some antiquity and, up to 1828 and for a number of years beyond, was used as an all-purpose public road. The limited user evidence reinforces the evidence in respect of the northern section.

***Other Matters***

1. It is clear that each of the objectors together with those who have made comments acknowledge the veracity of the historical evidence. However, there are understandable concerns particularly from landowners that there are impracticalities in having a route that cannot physically be continuous in the absence of a river crossing facility and which in part would traverse a private garden area causing potential disruption, privacy concerns and inconvenience. I fully recognise these concerns.
2. The process of examining evidence to determine the status of any route involves looking at records of what was in existence in the past, in some instances as is the case here, centuries ago. It is not a matter of taking what may be a more logical approach to the rights of way network and assessing the practicalities of opening up any lost rights. All those things may be relevant to the future management of the route in question, but they do not affect the impartial assessment of its legal status. Similarly, the downgrading of either part or the whole of the Order route to a lower path status is not open to me to consider notwithstanding recognition of the position being faced by the owner of Y Crwys, in particular. Neither is the potential for diversion of the route a consideration for me; it may be a matter to be pursued with the highway authority once the status of the route is confirmed but it does not affect my decision on this Order.
3. The Order route at its southernmost end at point E would appear consistent with historic and existing boundaries. However, it differs from some maps, including the Goodrich Tithe Map 1838, the OS Map 1831 among others, which show the route passing to the north of Y Crwys rather than to the south. The OMA has been unable to find any official record detailing the diversion of the route at this point. On the ground, I note that a northern point might have linked with other highways to form a crossroad at this location which would have given a more direct alignment to the historic route during the heyday of commercial traffic.
4. That said, the alignment indicated in the claimed route appears to follow natural contours and historic boundaries that continue to exist. For these reasons I agree with the Order route positioning for point E. I sympathise with the objector that the route would cause some inconvenience; however, I have no power to intervene further. I note that the OMA also recognises this and have separate powers to alleviate the problems that have been identified.
5. I am cognizant of the representations made in respect of the Order route as it passes Tanners Close. However, the various mapping that have been produced over time shows slight variations to the alignment as boundaries inevitably change through the passage of time. I am though satisfied that the Order route is representative of the evidence that has been relied upon.
6. I am satisfied that the widths of the way as indicated in the Order are consistent with the evidence that has been submitted and what I saw during my site visit.
7. In the light of the submissions of the parties, I am persuaded that the documentary evidence is on the balance of probabilities supportive of the claimed route being an ancient vehicular highway. By virtue of the Natural Environment and Rural Communities Act 2006, the public rights for mechanically propelled vehicles are extinguished and the appropriate status for the route is a restricted byway.

**Conclusion**

1. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed as indicated in the Order.

**Formal Decision**

1. I confirm the Order.

Gareth W Thomas

INSPECTOR

