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| **Appeal Decision** |
| **by Gareth W Thomas BSc(Hons) MSc(Dist) DMS MRTPI** |
| **an Inspector appointed by the Secretary of State for Communities and Local Government** |
| **Decision date: 03 August 2022** |

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| **Appeal Ref: FPS/D3450/14A/9** |
| * This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Staffordshire County Council not to make an Order under section 53(2) of that Act. |
| * The Application dated 9 March 2017 was refused by Staffordshire County Council on 16 September 2011. |
| * The appellant claims that the Definitive Map and Statement should be amended for the area by upgrading Bridleway 29 Bradnop and Cawdry Parish (part) (OS map ref SK 0050 5459 to SK 0033 5418) to a Restricted Byway. |
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Summary of Decision: The appeal is allowed.

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Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act). I have not visited the site, but I am satisfied I can make my decision without the need to do so.
2. In this appeal, it is not the existence of a public right of way that is brought into question as the appeal route already has the status of a Public Bridleway; rather, the appeal claim is that it should enjoy the higher status of that of a Restricted Byway.
3. As set out in the case of R v Secretary of State ex parte Norton and Bagshaw[[1]](#footnote-1) the legal tests to satisfy before making a Definitive Map Modification Order are:

* Test A – whether a public right of way subsists. In order for Test A to be fulfilled, the standard of proof is to show that a right of way does exist on the balance of probabilities; or
* Test B – whether a public right of way has been reasonably alleged to subsist. In order for Test B to be fulfilled it must be shown that the reasonable person, considering all relevant evidence available could reasonably allege a public right way to subsist.

1. However, an upgrade of a public right of way under section 53 (3) c (ii) must meet the higher test of balance of probability (Test A).
2. A restricted byway includes rights on foot as well as the right to ride or lead a horse and to ride a bicycle (unless restricted) along with a right to use nonmechanically propelled vehicles e.g. a horse and carriage.

Main Issues

1. Whether an order should be made following the discovery of evidence which, when considered with all other relevant evidence available, shows that Bridleway 29 Bradnop and Cawdry Parish (part) in the definitive map and statement (DMS) ought to be recorded as a Restricted Byway.

Reasons

1. Section 53(3)(c) requires there to be a “discovery of evidence”, which is not restricted to new evidence or evidence not previously considered. The discovery of evidence has to provide direct and positive evidence of the existence of the appeal route and represent new information that was not available at the time the Definitive Map and Statement was prepared. The evidence adduced in this case consists of historic documents which I consider below.

*Inclosure Award 1769*

1. The appellant’s evidence relies heavily upon the Inclosure Transcript forming part of the Inclosure Award arising from the Inclosure Act.
2. The purpose of the Inclosure Act was to enclose the old commons, manorial waste and smaller holdings in order to increase agricultural productivity. This took place over several centuries and up to the Inclosure Consolidation Act of 1801, a local Inclosure Act empowered an Inclosure Commissioner to survey and divide the land, allotting it to named individuals, including the setting out of highways. An inclosure award would include a schedule of new roads and paths to be set out and importantly, often include provision that private roads were to include the status of a public bridleway or footpath. They are generally held to hold considerable weight particularly where they are supported by a Plan.
3. The principal piece of evidence that alludes to the route having a higher status, which is not a matter of dispute between the parties, is the 1769 Inclosure Award that created a “Public Horse Carriage and drift Road” to Ashenhurst. Ashenhurst at that time related to Ashenhurst Hall now demolished and which, by today, has been replaced by Ashenhurst Hall Farm. This award is described in the evidence as:

*“One other Publick Horse Carriage and drift Number 182 called Ashenhurst Road leading out of the beforementioned Turnpike Road between an ancient inclosure belonging to the said Lawrence Stanley called Jailors Meadow on the South East and the allotment number 181 hereinafter allotted to the said Thomas Mills on the North West from whence the said Road leads into and along the ancient Lane called Pinfold Lane to the allotment Number 180 hereinafter allotted to the said James Finney and by the East side of the allotment to the South corner thereof where the said Lane branches out into the two Roads one branch whereof lying between the last mentioned Allotment Number 180 and an ancient inclosure belonging to the said Elizabeth Higginbotham called the Fair Hayes from whence the said branch leads to a place in the Parish of Leek aforesaid called Middle Cliff and the other branch said allotment number 180 between the ancient inclosures to Ashenhurst aforesaid.”*

1. The Council acknowledges that despite the 1769 Act predating The Inclosure Consolidation Act 1801 and therefore would fall under the category of a Private Inclosure Act, this does not detract from its legal weight or probity.
2. Reference to the use of the terms ‘carriage’ and ‘drift road’ within the Transcript might reasonably suggest that the route had a higher status than that of a footpath or bridleway and this is further strengthened by the word “road”. I am though in agreement with the Council insofar as the word public as opposed to private when used in the context of an Inclosure Award is not necessarily indicative of its status.
3. That said, in the case of Dunlop v Secretary of State for the Environment and Cambridgeshire CC (1995) relating in that instance to the use of the term “private carriage road”, it was held that such term is deliberately used in the award as a term of art distinguishing the particular road according to the extent of the particular rights over it from public carriage roads on which all subjects enjoyed an equal right of vehicular passage. It would be unrealistic to suggest that the commissioners in the appeal case, in describing the route as a “public horse carriage…”, intended that it enjoyed only private rights.
4. The Inclosure Plan accompanying the Transcript of the Inclosure Award has only recently surfaced. The appellant concedes that the plan accompanying the 1769 Award shows the route only in part with an acknowledgment that this map may have been badly degraded. The Council recognises that a small part of the route shown despite its degradation does lead from the “*Turnpike Road”* and that this would indicate a higher status. The Council suggests that the alignment appears not to accurately reflect the claimed routing. For a claim to succeed, there has to be a degree of certainty that the Plan accompanying the Transcript are consistent. In this case, despite the degree of uncertainty that the whole section of the claimed route had at any time been drawn up, there is sufficient detail to suggest that the present claimed route is that shown in the appellant’s photographs.
5. Despite a level of uncertainty, the width is consistent with other roads in the area and appears to have some albeit limited evidence of a public road. The width at 30 feet would lend further merit to the claimed route having a higher status. I would also agree with the appellant that given the former status of the now demolished Ashenhurst Hall, it would have been a destination in its own right.

*Smiths Map 1801*

1. The Council accepts that the appeal route is depicted in the locality of the claim and appears to follow the line of Ashenhurst Lane to the south of Turnpike Road and forming a discernible crossroads with School Lane to the north. As the map predates 1835, it may provide supporting evidence for the existence of an ancient highway (having regard to the judgment of Ridley v Secretary of State Environment, Food & Rural Affairs [2009]). However, the clarity of this map is again suspect and without the certainty provided by a clear Inclosure Plan or other weighty evidence, it cannot prove conclusive evidence on its own. However, in combination with other evidence, there is a further good reason for the claimed route to have higher rights in previous centuries.

*Ordnance survey mapping*

1. The appellant submitted a copy of the 1837 (2” to 1 mile) OS map, which clearly depicts the route of Ashenhurst Road and then to Ashenhurst Hall which ties up with the claimed route as it is read today. Later OS editions show no change to the route from 1837 to today. This information has not been contested by the Council. The appellant’s argument that there would have been little prospect that the route would have changed between the Inclosure Award and the 1837 OS mapping information and beyond in later editions lends sufficient credibility and weight. This is also supported by the Yates Map of 1798 which also appears to show no change.

*Other evidence*

1. No more recent evidence of the existence of the appeal route has been discovered. The Parish Record card in denoting the route with the acronym CRF adds further weight to the outcome of this appeal. The Council concedes that The Commons, Open Spaces and Footpaths Preservation Society’s definition that CRFs are “highways which the public are entitled to use with vehicles but which, in practice, are mainly used by them as footpaths or bridleways” would lend support to the appeal route having the higher status as that of a Restricted Byway.
2. User Evidence do not alter my overall conclusions.

*Conclusions regarding the Documentary Evidence*

1. On balance, it is my view that it is most likely that the appeal route appears to have existed along the claimed route since the 1769 Inclosure Award with all subsequent maps reasonably and consistently showing the route. Invariably there will be discrepancies between historic maps and the accuracy of more modern maps; however, I am also satisfied as to its higher status. I am also conscious that, unlike the definitive map, the Inclosure Maps were not drawn for the specific purpose of identifying public rights of way.
2. It is to the evidence presented as a whole therefore that enables me to conclude that it is reasonable to allege that Bradnop and Cawdry 29 is a public carriageway and should be afforded the status as a Restricted Byway on the DM. The appeal in respect of the application should therefore be allowed.

**Overall Conclusion**

1. Having regard to the above and all other matters raised in the written representations, I conclude that there has been a discovery of evidence which (when considered with all other relevant evidence) is sufficient to show on the balance of probabilities that a Restricted Byway subsists along the appeal application route.

**Formal Decision**

1. The appeal in of the application is allowed and in accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Staffordshire County Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement to add a Restricted Byway, as proposed in the application dated 9 March 2017 not later than 6 months from the date of this decision. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Gareth W Thomas

INSPECTOR

1. [1994] 68 P & CR 402 [↑](#footnote-ref-1)