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| **Order Decision** |
| On papers on file |
| **by Susan Doran BA Hons MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 12 December 2022** |

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| **Order Ref: ROW/3281068** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Essex County Council Definitive Map Modification Order No.676 Restricted Byways 40 and 41 Birch, Colchester District Order 2020.
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| * The Order is dated 19 August 2020 and proposes to modify the Definitive Map and Statement for the area by upgrading to public bridleway two public footpaths as shown in the Order plan and described in the Order Schedule.
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| * There was one objection outstanding when Essex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The unconfirmed part of the Order is confirmed** |
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Procedural Matters

1. This case concerns the proposed upgrading to restricted byway of two public footpaths in the Parish of Birch. Following advertisement of the Order, an objection was received in relation to the proposed upgrading of one of the paths. Therefore, pursuant to paragraph 5(1) of Schedule 15 to the Wildlife and Countryside Act 1981 (the 1981 Act), Essex County Council (the Council) elected to severe the Order as made and, on 3 March 2021, confirmed the unopposed upgrading of part of Footpath 16 Birch to Restricted Byway 41.
2. As a result of severing the Order, the Council has created a digital document which it maintains should now be classed as the original. The Order before me appears to be as originally made but with an explanatory statement which is dated together with the Council’s seal, albeit sealed electronically. No objections have been made to the document being a digital one.
3. The Council has confirmed that all the necessary statutory requirements have been complied with in relation to the severed Order. The Planning Inspectorate guidance is for a hard copy of the signed and sealed order to be provided by an Order Making Authority. However, Schedule 4(3) of the Wildlife and Countryside Act Regulations 1993 requires only that when submitting an order to the Secretary of State for confirmation, it be accompanied by two copies of the order. As that has been done, I can find nothing in the legislation to suggest that I should not treat the Council’s digital Order as a valid one.
4. Accordingly, I shall proceed to determine the Order. This requires me to consider the unconfirmed part - the proposed upgrading of part of Footpath 13 Birch (Caper Lane) to Restricted Byway 40. If I conclude that public vehicular rights exist over the Order route, then I will need to consider the effect of the Natural Environment and Rural Communities Act 2006 (the 2006 Act).
5. Notwithstanding the objection made to the unconfirmed part of the Order, it did not contain any issue relevant to my determination of the case, and no amendments were subsequently made to it to include matters that I am able to consider. It follows that my decision is based on the papers provided by the Council.
6. Photocopies of several of the historical documents submitted are of poor quality. However, neither the documentary evidence nor the Council’s descriptions of what the records show has been challenged. I am therefore satisfied that I can reach conclusions on the submissions before me.

The Main Issues

1. The Order has been made by the Council under Section 53(3)(c)(ii) of the 1981 Act on the basis of historic documentary evidence. I must consider whether the evidence discovered, when considered with all other relevant evidence available, is sufficient to show that the existing public right of way (a footpath) ought to be shown as a highway of a different description, and that the Definitive Map and Statement (‘DMS’) require modification.
2. Section 32 of the 1980 Act requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it appropriate weight, before determining whether a way has been dedicated as a highway, in this case as a restricted byway.
3. My decision is reached on the balance of probability.

Reasons

*Early Maps*

1. The earliest document available, a 1688 Estate Map of Birch, is said to show the Order route connecting with a network of ‘roads’ that are recorded as publicly maintainable highways today. It confirms the physical existence of the way, though is not determinative of its status. Similarly, it is shown on an 1811 Plan of the Manor of Great and Little Birch.
2. Chapman and Andre’s County Map of 1777 again provides evidence of the physical existence of Caper Lane which is shown in the same manner as known public roads, although the map does not identify whether the routes depicted were public or private.

*Ordnance Survey (‘OS’) Maps*

1. The Order route is depicted on the 1799 OS Surveyor’s Drawing apparently gated, although this may relate to the need to prevent stock wandering from the common land (Layer Breton Heath) to the south-east, rather than to an obstruction to public use. The 1805 1st Edition Map shows the Order route. It is apparently coloured on the 1st Edition Map of 1875, in like manner to other routes, and recorded as a “road” in the OS Book of Reference. The 1898 2nd Edition Map shows it (as in earlier editions) bounded on both sides. This map also depicts and annotates footpaths, suggesting the Order route had a different appearance.
2. The 1925 Map appears consistent with earlier editions; and the 1955 OS Map (contemporary with the production of the Definitive Map and Statement) shows the Order route annotated as a footpath. This is the case on later maps dating to 1960 where it is recorded as “Footpaths and Tracks”.

*Tithe records*

1. I understand that the Order route is shown on the c1839 Tithe Map, again confirming its physical existence. It connects to what is now recorded as a restricted byway. There is no apportionment number indicating it was unproductive and no tithe was payable.

*Finance Act Records*

1. The Order route appears to be excluded from hereditaments as it is uncoloured on the working copy of the Map, and there are routes annotated by the valuers as public connecting with it. However, an extract from the Map held at the National Archive shows it uncoloured yet braced with adjoining land at its northern end.

*Highways Records*

1. Essex County Council’s 1906 Main Roads and Bridges Map appears to mark current trunk roads onto an OS base map, where the Order route is shown, although it has no key. The Order route is not marked.
2. The 1930 County Road (or Handover) Map does not show it (or connecting routes) as publicly maintainable highway. However, the County Surveyor’s 1932 Book of Maps, produced with the intention of recording public rights of way, records it as a footpath.

*Definitive Map records*

1. The Definitive Map and Statement (DMS) was drawn up over several phases in the 1950s. The Order route appears as a footpath on the Parish Claim Map, however the Parish Claim Card describing it is missing. It is coloured purple on the Draft Definitive Map and recorded as a footpath in the Statement. There was no challenge to its inclusion in the Map although a connecting footpath was subject to an objection. The connecting path was subsequently removed and did not appear on the Provisional Map. School Lane, which connects with the Order route and had been claimed as a bridleway, was also removed as it was considered to be an Unclassified County Road (now recorded as a Restricted Byway).
2. When the Definitive Map (relevant date 1 January 1953) was published, the Order route was marked as a footpath. This remained the case following the First Review of the DMS (relevant date 1 January 1963) and, in the absence of any challenge to its status, following the 1971 Special Review. The current DMS (relevant date 1 July 2002) again records it as a footpath.

*Other records*

1. Bartholomew’s 1902-6 Map produced for cyclists and tourists, shows the way as an uncoloured ‘lane’, described in the key as “inferior and not recommended to cyclists”. It is depicted in the same way on the 1967 Revised Map. Like OS maps, Bartholomew’s maps carried a disclaimer that the representation of a road or footpath was not evidence of a right of way.
2. A series of aerial photographs dating between 1960 and 2010 show the Order route as a defined feature, a track, connecting to other routes which are known highways.
3. Anglian Water has a recorded private right of access over part of the Order route which has been effective since the early 1960s.

*Consideration of the evidence*

1. The Order route has existed as a physical feature, part of a network of ways, since at least 1688. It is depicted throughout the historical record as a track bounded on both sides, in similar manner to connecting routes, and having the appearance of a road. It is shown consistently in documents whether drawn up for private purposes (estate records) or held in the public domain, including the OS maps and others produced for use by the public. Whilst none of the early records are determinative as to its status, none are inconsistent with it forming part of the wider highway network. Both the Tithe and Finance Act records suggest the Order route enjoys rights higher than those currently recorded on foot. The granting of private rights of access in the 1960s is consistent with its reputation and recording as a public footpath in the DMS in the 1950s but does not preclude the likelihood that higher rights exist over it.
2. Collectively, I find the documentary evidence tips the balance in favour of the Order route forming a long-standing vehicular highway, part of a network, with its use declining over time such that by the 1950s it had come to be regarded as a footpath. It follows that, on the balance of probability, public vehicular rights subsist over the Order route.

*The effect of the 2006 Act*

1. Section 67 of the 2006 Act provides that, unless already recorded in the DMS as a Byway Open to All Traffic (BOAT), public rights for mechanically propelled vehicles (MPVs) were extinguished as of 2 May 2006 unless certain exceptions apply. As there is no evidence before me that any apply in this case, it follows that rights for MPVs have ceased to exist and the way cannot be recorded as a BOAT but should be recorded rather as a Restricted Byway.

Other Matters

1. The submissions refer to a gate part way along the Order route. The Council does not seek a modification to the Order to include this as a limitation. It would appear that there has been a gate there for many years. The historical documentary record indicates the presence of a gate (or limitation) at a different location (in the late 18th century). However, there is nothing to indicate that either was present when the Order route was dedicated at some unknown point in the past.

Conclusion

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

**Formal Decision**

1. I confirm the Order.

S Doran

**Inspector**

