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| **Interim Order Decision** |
| Site visit made on 6 September 2022 |
| **by C Beeby BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 31 May 2023** |

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| **Order Ref: ROW/3272220** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Bedford Borough Council (Definitive Map and Statement for the former North Bedfordshire Borough) (Riseley: Byway Open to All Traffic No.71) Modification Order 2020. |
| * The Order is dated 7 October 2020 and proposes to modify the Definitive Map and Statement for the area by the addition of a Byway Open to All Traffic north from Dag Lane, Riseley as shown in the Order plan and described in the Order Schedule. |
| * There were six objections outstanding when Bedford Borough Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: Confirmation of the Order is proposed, subject to the modifications set out in the Formal Decision below.** |
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Procedural Matters

1. In writing this decision I have found it convenient to refer to points marked on the Order Plan. I therefore attach a copy of this plan.

The Main Issue

1. Bedford Borough Council made the Definitive Map Modification Order (DMMO) under Section 53(2)(b) of the 1981 Act on the basis of events specified in sub-section 53(3)(c)(i). As a result, the main issue is whether the discovery by the Council of evidence (when considered with all other evidence available) is sufficient to show that a byway open to all traffic which is not shown in the map and statement subsists over land in the area to which the map relates.
2. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be reasonably alleged to subsist in order to make a DMMO, the standard of proof is higher for it to be confirmed. At this stage, evidence is required on the balance of probabilities that a right of way subsists. Thus, it is not necessary to establish this “beyond reasonable doubt”.
3. User Evidence Forms (UEFs) were submitted in support of the DMMO application. As a result, the statutory requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This sets out that where a way has been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
4. If statutory dedication is not applicable I shall consider whether dedication has been shown at common law. Such a dedication requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was dedication by the landowner and whether there has been acceptance of the dedication by the public. Evidence of the use of a way by the public as of right may support an inference of dedication and may also show acceptance of the dedication by the public.

Reasons

***Background***

1. The Order route leaves Dag Lane following a track north between fields, crossing Footpath Riseley A9 before terminating at a point which does not connect with another highway. The route is consequently a cul-de-sac. Documentary and user evidence has been submitted in support of the Order.

***User evidence***

1. Five UEFs were supplied in support of the application. These record use on foot over the period approximately 1972-2003. The frequency of use ranged from once a week to 2-3 times per year. No maps were submitted with the UEFs and it is not possible to ascertain the physical extent of use from the descriptions provided.

***Documentary evidence***

*Riseley Inclosure Award 1796*

1. The inclosure award describes Dag Lane as an “ancient” lane. The Council submits that two awarded footpaths (Nos 9 and 10) are recorded to terminate at the boundary of enclosures or allotments lying adjacent to Dag Lane. A “private horse cart carriage and driftway or road” is recorded in the award to lead from the north east end of Dag Lane to surrounding enclosures.
2. Only a copy of the accompanying inclosure map is available. The Order route is shown between double solid lines and a yellow colouring is used for it. The same colouring is used for surrounding routes which are highways today. The route extends further than the northern termination of the Order route for some distance, leading to an area considered by the Council to be common pasture.

*Bryant’s Map of Bedfordshire 1826*

1. The Order route is shown between double solid lines, in the same way as the surrounding highway network. A building is recorded at its termination in the vicinity of Point B of the Order route. According to the key it is a lane or bridleway.

*Schmolinger’s Map 1837*

1. The map is at a small scale and features do not correspond to other mapping and the modern-day situation to a degree which is sufficient to identify whether the Order route is depicted.

*Ordnance Survey 25 Inch to a mile map 1901*

1. The Order route is shown between double solid lines and unshaded. Whilst the surrounding highway network is depicted between double solid lines, it is additionally shaded on one or both sides. From 1884 onwards, on the large scale plans, those metalled public roads for wheeled traffic which were kept in proper repair by the local highway authority were to be shown with shaded or thickened lines on the south and east sides of the road.

*Finance Act 1910*

1. The Order route is uncoloured and excluded from surrounding land parcels on the Finance Act map. It is not annotated with any numbering. Other routes in the vicinity which carry public carriageway rights today are also shown in this way. Dag Lane is recorded in the accompanying Field Book as the location of land parcels holding cottages and buildings.

*Handover document 1931*

1. This document is a list of roads for which Bedfordshire County Council took over maintenance responsibility in 1931. Streets recorded within the entry for Riseley include “Gold Street, Church Street, Rotten Row and short Length of Dog [*sic*] Lane”.

*Riseley Parish survey map c.1951*

1. This map, which was used in the drawing-up of the draft definitive map and statement, does not depict the existence of public rights along the Order route. Footpath 9 is bisected by the route, with a gap and a stile recorded where it meets it.

*Draft definitive map 1953, Modified Draft Map 1966, Provisional Map 1977 and Definitive Map 1982*

1. The draft definitive map does not depict the existence of public rights along the Order route. Footpath 9 is drawn in a continuous line crossing the way. No objections to the map were made concerning the absence of recorded public rights along the route.
2. Public rights were not recorded along the way in the subsequent documents of 1966, 1977 and 1982.

*Maintenance records (undated)*

1. Riseley Parish Council and Bedford Borough Council have no record of ever having carried out maintenance works on the Order route.

*Anglian Water records*

1. A water main is believed to have been laid along Dag Lane in the 1940s. The water company was consulted on the application and commented that it considered Dag Lane to be classified as public highway and that it had no record of a formal easement in respect of the pipe and considered that it is likely to have been laid under statutory powers available to the water undertaker at the time.

Reasoning

*User evidence*

1. The DMMO application was submitted in November 2003. In the absence of evidence of another qualifying event, this brought the right of the public to use the Order route into question, resulting in a relevant statutory twenty-year period of 1983-2003.
2. The UEFs show that one person used the route approximately 6 times per year on average over the relevant period, with use being much more often in some years, but absent for some years during the 1980s and early 1990s. This is minimal use which is insufficient to demonstrate that the way has been actually enjoyed by the public. As a result, it cannot have given rise to the dedication of a public right of way under Section 31 of the 1980 Act. As the evidence for a public right of way to have arisen through use fails according to the statutory requirements, it is necessary to consider the matter at common law.
3. The period over which the most intensive use of the Order route is shown in the user evidence was the 13 years 1990-2003. Three people used Dag Lane over the whole of this period, with their frequency of use being once a week, 2-3 times a year and approximately 6 times per year on average (but not for some years in the early 1990s). The use of one further person cannot be reliably gauged for this assessment because their frequency of use is unclear, as it is recorded only as “less than once a month”.
4. The level of use of a path may reflect its location within a sparsely populated area such as this. Nevertheless, use over the common law period was so infrequent by all but one person, and furthermore was made by such a limited number of people, that the overall use was insufficient to have been by the public.
5. The user evidence consequently does not demonstrate that either the statutory or common law dedication of a public right of way has occurred along the Order route.

*Documentary evidence*

1. Dag Lane is referred to in the inclosure award as an “ancient” pre-existing way. Nevertheless, there is minimal evidence before me to demonstrate whether it was also considered by the inclosure commissioners to carry any rights, whether private or public.
2. Whilst physical features on the inclosure map are identifiable on the later OS 1901 map, providing some support for the accuracy of the inclosure map, it is a copy map and its provenance is unclear. No key is available to explain the meaning of the colouring used. Furthermore, the same colouring is used to depict both the highway network within the village and the awarded “private horse cart carriage and driftway or road” which joins the north east end of Dag Lane, meaning it is unclear what, if any, rights the colouring of Dag Lane itself was intended to depict. For these reasons the inclosure map attracts limited evidential weight in this determination.
3. There is minimal evidence before me to confirm whether the awarded footpaths (9 and 10) met the Order route or not, as no relevant extract from the award is provided. Furthermore, whilst the copy inclosure map appears to depict the awarded footpaths, one does not meet the Order route and it is unclear whether the other is intended to or not. Moreover, that document attracts limited weight for the reasons set out above. It has consequently not been demonstrated that the inclosure documents were intended to show that the Order route bisected the awarded footpaths, and therefore no conclusions can be drawn in this regard.
4. Similarly, the evidence before me does not suggest that the Order route led to an area of common pasture land and hence I cannot concur with the submission that the “ancient” Dag Lane is likely to have been used by the public for access between that land and the village.
5. An awarded private driftway or road for use by horses, carts, carriages and as a driftway was set out to lead from the north east end of Dag Lane. As a section of Dag Lane north of the Order route was the only connecting route at that point, that section may additionally have been considered to be available for use by these means.
6. Thus, the inclosure documents provide limited evidence that access in some form, and potentially for vehicles, was considered to exist along the section of Dag Lane which lay north of the Order route.
7. Bryant’s Map was a well-made commercial map produced using surveys and a triangulation system. The map shows a route corresponding with the Order route in a manner described in the key as lanes and bridleways. The map was available for purchase by the public and hence the Order route’s depiction in the same way as the highway network in the village may suggest that it was considered to be available for use by the public. Nevertheless, the authority for any such assessment is unclear, and the key does not confirm its believed status. Therefore the map provides evidence of the physical existence of the route at the time, and some limited evidence that it may have been reputed to be a highway at the time.
8. Ordnance Survey maps were for sale to the public and carried a disclaimer from 1888 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. They generally provide a reliable indication of particular physical features when the land was surveyed. They do not set out to record the status of any paths or tracks shown. Thus, whilst Dag Lane has a similar width on the OS map to village streets, which may suggest its availability for use by carriages, the map does not shed light on whether any such rights were considered to be public or private.
9. Whilst the exclusion of the route from adjacent land parcels on the Finance Act map may be explained by the existence of public carriageway rights, there may be other reasons for this. Nevertheless, the whole of the Order route is uncoloured on the map, and is not shown to fall within the land parcel of any private individual. It is shown as part of the general road network, and this and previous evidence shows the route to have had a width which is likely to have been suitable for use by carriages. Taking all these matters together, there is consequently a strong possibility that the Finance Act map reflects the existence of carriageway rights for vehicular traffic along the Order route. Whilst the route shown on the Finance Act map and Order map is a cul-de-sac, it is not necessary for a public right of way to connect to another highway at both termination points.
10. The junctions of Footpath 9 with the Order route on the parish survey map suggest that some form of access was considered to exist along the Order route.
11. The Natural Environment and Rural Communities Act 2006 (the NERCA) extinguished unrecorded public rights of way for mechanically propelled vehicles (MPVs), subject to a number of exceptions, some of which are set out in section 67(3). One of these applies when, before 20 January 2005, an application was made for a DMMO, in accordance with Schedule 14 of the 1981 Act, to show the way as a Byway Open to All Traffic (BOAT).
12. An application must be made strictly in accordance with paragraph 1 of Schedule 14 to the 1981 Act, for the purposes of section 67(3). That paragraph states, amongst other things, that an application shall be accompanied by:
13. A map drawn to the prescribed scale and showing the way or ways to which the application relates; and
14. Copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.
15. The application to show Dag Lane as a BOAT was received by the Council in November 2003. Space for a list of accompanying documents is provided on the form, however no entries are made on it. The submitted UEFs were completed in May 2003, but are not referred to in the application. A document titled “documents to consult to establish the status of a claimed public footpath, bridleway or byway” includes copies of items of documentary evidence, but is unsigned and undated and does not refer to being part of the application.
16. Thus, whilst the application appears to have been accompanied by a map on which the route is indicated, there is insufficient evidence to demonstrate that it was accompanied by copies of any documentary evidence which the applicant wished to adduce even though the UEFs of May 2003 were completed in support. Therefore it has not been demonstrated that the application was made strictly in accordance with paragraph 1 of Schedule 14 to the 1981 Act. The identified carriageway rights are consequently not preserved by the exception within section 67(3)(a) of the NERCA.
17. Section 67(2)(b) of the NERCA excepts a MPV right from extinguishment if, immediately before commencement on 2 May 2006, it was not shown in a definitive map and statement but was shown in a list of highways maintainable at public expense.
18. The Council submits records from 1995 in support of its view that the application route is exempted from the extinguishment of MPV rights because the entire length of Dag Lane was shown in the list of streets. It additionally considers that MPV rights were preserved because documentary evidence such as the handover document shows the way in the same manner as other routes which are currently part of the ordinary road network.
19. Nevertheless, in pre-dating the commencement date by several years, the 1995 records do not confirm whether any part of the route was shown in a list of highways maintainable at public expense immediately before commencement. Furthermore, the NERCA does not provide for an exception from extinguishment based upon the depiction of a route in the same manner as roads within documentary evidence.
20. A further exception preserves MPV rights over a way if, before the commencement date on 2 May 2006, the surveying authority has made a determination in respect of a DMMO application. A committee report recommending the making of a DMMO was dated July 2005 but did not comprise a formal dated determination on the matter. The Council later took a decision on 14 November 2019, post-dating the commencement date by some years. Thus, neither document demonstrates that the exception applies.
21. Thus, there is insufficient evidence to demonstrate that MPV rights over the Order route were preserved by one of the above exceptions to extinguishment, or that any of the other exceptions within section 67 of the NERCA are applicable. The MPV rights over the Order route were consequently extinguished by the provisions of that section, leaving extant restricted byway rights. As a result, I propose to modify the Order to record a restricted byway over the Order route. The route’s width is that shown on the 1901 Ordnance Survey map and reflects the excluded area on the Finance Act map.
22. The principle “once a highway, always a highway” means that once a public right of way has come into existence it continues to exist indefinitely, unless brought to an end by the use of a statutory provision. Matters which have no effect on the pre-existence of a public right include the physical obstruction of a route, for example by the growth of trees and vegetation. Thus, even if the way had not been passable or used in living memory, this could nonetheless still be consistent with the pre-existence of the public rights identified above.

**Other Matters**

1. Conveyances dealing with land transactions in the vicinity essentially concerned private rights of property and were not prepared with a view to defining public rights. Therefore they do not provide any persuasive evidence on the extent of unrecorded public rights along Dag Lane.
2. An objection contends that notice of the making of the Order was not displayed in a prominent position at the ends of the Order route, contrary to Schedule 15(3) of the 1981 Act. However, there is minimal evidence before me to support the contention, or to suggest that anyone has, or is likely to have, suffered prejudice as a result of any failure to comply with this requirement. Thus, it has not been demonstrated that a failure to comply with procedures has occurred and should be remedied.
3. I acknowledge concerns raised regarding economic considerations, highway safety and congestion, fly tipping, environmental impact, crime and disturbance to occupiers. Nevertheless, the only issue here is what public rights of way exist: suitability and amenity must be disregarded in deciding whether to confirm an order. These matters consequently lie outside the criteria set out within the relevant legislation. As a result, I cannot give them weight in reaching my decision.

Conclusion

1. The evidence as a whole is sufficient to demonstrate the existence of a restricted byway over the Order route, for which minimal opposing evidence and no evidence of stopping up is before me. The obstruction of the route by trees and vegetation has had no effect on the existence of the unrecorded public rights. Thus, the balance of probabilities is tipped in favour of the modification of the Order as set out below.

**Formal Decision**

1. I propose to confirm the Order subject to the following modifications:

* In the Order title: amend “Byway Open to All Traffic No. 71” to “Restricted Byway No. 71”.
* In paragraph 3: amend “Byway Open to All Traffic No. 71” to “Restricted Byway No. 71”.
* In Part I of the Order Schedule (Modification of the Definitive Map): amend “Byway Open to All Traffic” to “Restricted Byway” throughout.
* In Part II of the Order Schedule (Modification of Definitive Statement: amend “Byway Open to All Traffic (BOAT)” to “Restricted Byway”. Amend “BOAT” to “RB”.
* On both the Order Map and the historic Ordnance Survey map: amend all references to “Byway Open to All Traffic” to “Restricted Byway”.
* On the Order Map: amend the notation used for the Order route on the map and within the key to a broken line and small arrowheads.

1. Since the confirmed Order would (if modified) show as a highway of one description a way which is shown in the order as a highway of another description, I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of my proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*C Beeby*

INSPECTOR



