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| **Order Decision** |
| Site visit made on 6 June 2023 |
| **by Nigel Farthing LLB** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 28 July 2023** |

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| **Order Ref: ROW/3289014** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hertfordshire County Council (Bushey 76) Modification Order 2019. |
| * The Order is dated 29 November 2019 and proposes to modify the Definitive Map and Statement for the area by adding a public Byway Open to All Traffic (BOAT) along Finch Lane from the junction with Aldenham Road to the junction with Homefield Road, as shown on the Order Map and described in the Order Schedule. |
| * There were 3 objections outstanding when Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation |
| **Summary of Decision: The Order is not confirmed.** |
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Procedural Matters

1. I made a site inspection on 6 June 2023, accompanied by an objector and a representative of Hertfordshire County Council, the Order Making Authority (OMA), when I was able to view the whole of the Order route.
2. The Order has been made in compliance with a direction to the OMA, by the Secretary of State in 2019 following a report made by another inspector. The OMA takes a neutral position in relation to confirmation of the Order.
3. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

The Main Issues

1. The Order is made in consequence of the occurrence of an event specified in Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) which requires the discovery of evidence by the surveying authority which, when considered with all other relevant evidence available, shows that a right of way that is not shown on the definitive map and statement subsists, or is reasonably alleged to subsist. At this confirmation stage the evidence must demonstrate, on a balance of probabilities, that the right of way subsists; a reasonable allegation is not sufficient.
2. It is common ground between the parties and the OMA that the Order route is a vehicular highway, and the single issue is whether it is a route which qualifies to be recorded on the Definitive Map and Statement as a BOAT.

Reasons

*Documentary evidence*

1. The historical documentary evidence adduced by the Applicants and the OMA demonstrates that the Order route has existed as a vehicular highway, and as part of a longer route all known as Finch Lane, since at least the early nineteenth century. No evidence has been produced to suggest any different or lesser status. The status of the Order route as a vehicular highway is accepted by the Objectors, and I agree with the parties’ conclusions on the evidence and I accept that this is sufficient to satisfy the requirement of section 53(3)(c)i of the 1981 Act for the discovery of evidence.
2. The Hertfordshire Highways (Main Roads) No. 4 Order 1898 declared Finch Lane to be a Main Road. It was shown in the Hertfordshire Map of Main and County Roads (c.1927) in the same style as other publicly maintainable roads. Finch Lane, including the section which comprises the Order route, was recorded in the list of highways maintainable at public expense prepared in accordance with the requirement of Section 36(6) of the Highways Act 1980 (the List of Streets) and remains on the current List of Streets.
3. The Bushey (Finch Lane) (Prohibition of Driving) Order 1973 (the 1973 Order) made it an offence for a motor vehicle to be driven along that section of Finch Lane which comprises the Order route. In consequence, since that time the lawful public use of the Order route has been on foot, cycle, or horseback. The effect of the 1973 Order however was not to remove the right for vehicles to use the Order route, but to impose a criminal sanction for such use and thus in effect to suspend that right unless or until the 1973 Order is revoked.

*The Definitive Map*

1. The Order route was not shown on the Draft, Provisional or First Definitive Map and Statement. No objection was made to the omission of the Order route. The First Definitive Map and Statement did record a public footpath (F/P 12) starting from Finch Lane (the current definitive map shows F/P 12 terminating before reaching Finch Lane although it would seem that this may be related to the development of Homefield Road which took place since the First Definitive Map and Statement were prepared). Until the applications which led to the Order under consideration being made, no claim had been made to add the Order route to the Definitive Map and Statement.
2. It is a reasonable conclusion that the reason the Order route was not included on the First or subsequent editions of the Definitive Map and Statement was that the route was considered to be a publicly maintainable vehicular road and thus did not qualify for inclusion.

*Physical Evidence*

1. On my visit I was able to walk the full length of the Order route in both directions. The route is 650 metres in length and runs between Aldenham Road to the north (point A) and the junction of Finch Lane and Homefield Road to the south (point B).
2. The route varies significantly in width. Throughout the full length there is a metalled carriageway which generally extends to the fence on the western side. Vegetation has encroached on both sides of the metalled surface such that it is difficult to identify its full extent. The OMA state that the metalled surface varies between 3 and 5 metres in width. It is generally in reasonable condition. There is some evidence that before the 1973 Order, when the route was regularly used by motor vehicles, it was possible for two cars to pass for the majority, if not all, of the route.
3. On the eastern side of the metalled carriageway there is a strip of land of varying width, with a fence along the eastern boundary, beyond which is a school playing field. The strip is largely overgrown, supporting a number of trees, some of which appeared reasonably mature. On the eastern margin of this strip, up against the fence, a worn path was evident, which I shall refer to as the footway. In places there was evidence that the footway had been metalled in the past. At some points the footway is at a higher level than the metalled carriageway, at others it is at a similar level.
4. Alongside the footway are a series of street lights, most of which appear to be of some long standing, but there was one, alongside an access to the school playing field, which appeared much more recent. It was difficult to understand whether the street lighting was to benefit the carriageway or the footway, as the columns were alongside the footway and thus in some places several metres from the carriageway, but the lamps were directed to the carriageway rather than the footway.
5. The OMA consider the highway to include the entirety of the land between the fences described, thus encompassing the metalled carriageway, the vegetated verge, and the footway.
6. At point A access to the Order route is restricted by wooden fencing to the east and a metal post in the centre of the carriageway. The post supports a sign indicating that the route is available to pedestrians and cyclists. There is also a blue circular sign to the same effect. A few metres into the lane there is a green metal rectangular structure which I understand to be gas governor station. It would appear that this is constructed in part on the metalled surface of the carriageway, and therefor restricts the available width for passage.
7. At point B there is a pair of rusty metal gates across the carriageway which appeared to be locked. Pedestrian access is available to the eastern side. There is an older circular sign with a red rim indicating that motor vehicles are prohibited from using the route.
8. While undertaking the site visit I witnessed a number of people using the Order route on foot and on bicycles. It has the impression of a route that is used regularly for these purposes. There was no evidence of use by motor vehicles, and this is unsurprising given the existence of the 1973 Order and the presence of the obstructions at points A and B.
9. Superficially the general character of the route is determined by the significant incursion of vegetation and trees which overhang and enclose much of it. In this setting the metalled carriageway and the presence of street lights appear incongruous. It takes little imagination however to envisage the vegetation and obstructions cleared away to leave a route which would have the same character, appearance and infrastructure as the rest of Finch Lane and the adjacent highway network.

Conclusions

1. There is no dispute as to the extent of the rights which exist over the Order route; it is a vehicular highway where the right to use with motor vehicles is effectively suspended. The only issue to be determined is whether the route qualifies to be recorded on the Definitive Map and Statement as a BOAT.
2. Section 66 of the 1981 Act defines a BOAT as ‘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 purposes for which footpaths and bridleways are so used’.
3. I have been referred to relevant case law culminating in the decision of the Court of Appeal in Masters v Secretary of State for the Environment [2001] QB 151, CA (Masters). The opening sentence of the leading judgment begins ‘The issue in this appeal is the meaning of the statutory definition of a byway open to all traffic’, essentially the same issue that I have to consider in this decision.
4. The Applicants argue that, applying a literal interpretation, the Order route fits squarely within the statutory definition of a BOAT and that is all that is required for the Order to be confirmed. It is common ground that the route is one over which the public have a right of way for vehicular traffic, but because that right is suspended, the main, or indeed only current use by the public is akin to a footpath or bridleway.
5. The OMA and the principal objector argue that the definition of a BOAT should be approached purposively rather than literally, and that the correct test is by reference to character or type rather than current use. It is argued that prior to the 1973 Order, the Order route was part of the ordinary road network, and its main use was by motor vehicles. Therefore, it did not meet the definition of a BOAT. The making of the 1973 Order could not change the underlying character of the route. Thus, if the Order route was not a BOAT before 1973, it cannot have become one since simply because the right to use it with motor vehicles has been suspended.
6. The principal objector places reliance upon the leading judgment in Masters given by Roch LJ, particularly his finding in relation to the definition of a BOAT that ‘The purpose of the definition was to identify the way Parliament intended should be shown on the definitive map and statement by its type or character’ and this was in contrast to ‘the literal interpretation of the definition in section 66(1)’. I note that in his conclusion Roch LJ also said ‘I consider that in defining a byway open to all traffic in the terms set out in section 66(1) of the Wildlife and Countryside Act 1981, Parliament was setting out a description of ways which should be shown in the maps and statements as such byways. What was being defined was the concept or character of such a way’.
7. Applying the principles set out in Maters, I am required to assess the eligibility of the Order route for recording as a BOAT by reference to its type or character rather than by reference to an assessment of the actual balance of use at any particular moment in time. If I were to apply the latter test, I accept that currently the Order route does fit the literal wording of section 66. However, the decision in Masters makes it clear that is not determinative, and that it is necessary to look beyond current use to assess the character or type of the route.
8. The judgment in Masters also establishes that the character of a route does not alter in consequence of periodic changes to the pattern or balance of use. It seems to me this is consistent with the established common law principle, ‘once a highway, always a highway’.
9. One of the applicants argues that the authorities ‘...allow us to distinguish ordinary roads (such as Aldenham Avenue or Homefield Road) from routes that are not ordinary like Finch Lane’ and adds ‘The order route is not an ‘ordinary road’ because it is subject to barriers to prevent its use by motor vehicles’. I do not accept this is the correct approach given the principles set out in Masters. Prior to the 1973 Order, Finch Lane was very much part of the ordinary road network, and indeed that part unaffected by the Order remains so. The character or type of the Order route prior to 1973 was manifestly that of a vehicular highway mainly used by motor vehicles. The fact that the Order route has not previously been considered for inclusion on the Definitive Map and Statement corroborates that. The 1973 Order has not changed the underlying character of the route, although it has altered the current balance and pattern of use. On that basis, and having considered all the available evidence, I find, on a balance of probabilities, that the Order route does not meet the definition of a BOAT.

Other matters

1. An objection was made on the grounds that the OMA had no power to make an order in respect of a footway, or in respect of a carriageway, or in respect of an urban road. Given my finding that the Order route does not meet the definition of a BOAT, it is not necessary for me to determine these further points of objection. However, my observations are that the objections in relation to the footway and carriageway are predicated upon these being separate rights of way. I accept the correct position is as set out by the OMA, namely that the Order route comprises a single highway within which there is set apart a carriageway and a footway. These are not separate rights of way to be individually recorded but are subsumed within the single vehicular highway.
2. The objection on the basis that the OMA had no power to record an urban highway as a BOAT, and that it should not have done so despite being directed to do so by the Secretary of State, is misconceived. I am aware of nothing to prevent the recording as a BOAT of any route which satisfies the statutory definition as elucidated by the Court of Appeal in Masters. Furthermore, the direction made by the Secretary of State was mandatory and it was not within the power of the OMA to ignore it
3. An objection was made on the grounds of safety and suitability. These are not relevant criteria.
4. Having regard to these and all other matters raised, I conclude that the Order should not be confirmed.

Formal Decision

1. I do not confirm the Order.

Nigel Farthing

Inspector

