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| **Order Decisions**  Site visits made on 21 November 2023 |
| **by C Beeby BA (Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 19 December 2023** |

**Order Ref: ROW/3302541 (referred to as “Order A”)**

* This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Essex County Council Definitive Map Modification No. 682 (Restricted Byways 42 Birch and 24 Copford, Colchester Borough) Order 2021.
* The Order is dated 14 October 2021 and proposes to modify the Definitive Map and Statement for the area by the addition of a restricted byway in Birch parish between the unclassified road by Hellens Farm and the parish boundary with Copford, and the upgrade of a public footpath in Copford parish between the parish boundary with Birch and Easthorpe Road to restricted byway, as shown in the Order plan and described in the Order Schedule.
* There were three objections outstanding when the 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 Order is confirmed.** | |

**Order Ref: ROW/3302542 (referred to as “Order B”)**

* This Order is made under Section 53(2)(b) of the 1981 Act and is known as the Essex County Council Definitive Map Modification No.683 (Restricted Byway 43 Birch, Colchester Borough) Order 2021.
* The Order is dated 14 October 2021 and proposes to modify the Definitive Map and Statement for the area by the upgrade of part of Footpath 5 Birch to restricted byway, and the addition of a restricted byway between Footpath 5 Birch and Maldon Road, as shown in the Order plan and described in the Order Schedule.
* There was one objection outstanding when the 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 Order is confirmed.** | |

**Preliminary Matters**

1. In writing this decision I have found it convenient to refer to points marked on the Order Plans. I therefore attach copies of these plans.
2. Both Orders were made following successful appeals under Schedule 14 of the 1981 Act against a decision by the Council not to make an Order. The Council was directed (Ref. FPS/Z1585/14A/19) to make an Order in 2021 for Order A and by an undated decision (Ref. ROW/Z1585/14A/20) for Order B. It is consequently taking a neutral stance on the Orders, with the applicant taking both forward.

**Main Issues**

1. The Orders have both been made under Sections 53(3)(c)(i) and (ii) of the 1981 Act, which require me to consider whether the evidence shows that restricted byways subsist over the Order routes, and whether the highways already shown in the definitive map and statement should be shown as highways of a different description. The test for confirmation of the Orders in respect of both the recorded and unrecorded sections is whether a right of way subsists on the balance of probabilities.
2. The submitted evidence is solely documentary. As a result, Section 32 of the Highways Act 1980 (“the 1980 Act”) is additionally relevant. This 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 the ways have been dedicated as restricted byways.
3. It is undisputed that the Natural Environment and Rural Communities Act 2006 has extinguished any unrecorded public right of way for mechanically propelled vehicles over the Order routes. This means that they cannot now be recorded as a byway open to all traffic.
4. For appeals under Schedule 14 of the 1981 Act, the relevant tests to be considered for applications to record a right of way under section 53(3)(c)(i) of the Act are whether a right of way subsists on the balance of probabilities (“the higher test”), or whether it is reasonably alleged to subsist (“the lower test”). Also at the Schedule 14 stage, only the higher test is applicable when considering applications to “upgrade” a right of way under section 53(3)(c)(ii). It is submitted in opposition to both Orders that both appeal decisions erroneously applied the lower test to the recorded sections of the application routes.
5. Both appeal decisions set out the differing tests applicable to the recorded and unrecorded sections of the application routes in determining whether an Order should be made. They note that potentially anomalous outcomes may consequently result from applications to record and to upgrade discrete sections of a single route. They conclude that, in the circumstances, it is reasonable to direct that an Order should be made for the whole application route even if the evidence in respect of recorded sections is considered to be insufficient to meet the higher test. They note that this would allow for the status of the routes to be fully explored if the Orders receive objections.
6. Whilst I note the reasoning of the appeal decisions, they were made without prejudice to any subsequent decision at the current (Schedule 15) stage. I have had the benefit of making a site visit to the Order routes and have been supplied with full statements of case and additional evidence, most notably the wills of William and Charles Round. Furthermore, publicity for the Orders has provided the opportunity for the submission of additional relevant evidence, either in support or opposition. All of these considerations have assisted me in reaching my decision. For these reasons, it is possible to reach differing conclusions in deciding whether an Order should be confirmed to initial views which may be expressed in deciding whether one should be made.
7. Furthermore, in deciding whether to confirm the Orders I am required to apply only the higher test in respect of each Order route as a whole. Thus, any recorded section meeting the higher test based on the totality of the evidence would implicitly additionally meet the lower test (although the lower test is not for me to consider here). The Orders have consequently allowed for the status of the routes as a whole to be fully explored and for a determination to then be made regarding whether the routes as a whole meet the higher test, as envisaged.

Reasons: Order A

***Documentary evidence***

1. *Draft map of Bockingham Hall Farm 1729*: The south part of the Order route between approximately points A and B is visible between double solid lines and is open at each end.
2. *Will of William Round, 1769*: This devises Mr Round’s worldly estate in the Manor of Birch Hall and refers to land which he has settled and conveyed upon the marriage of his eldest son. It is submitted that it shows an entailment of the estate for the heirs of William Round.
3. *Chapman and Andre Map 1777*: Whilst the start of a route is shown at Point F, the Order route does not appear on this document, although the surrounding highway network is shown.
4. *Ordnance Survey (“OS”) Drawing Witham 1799*: The full Order route is shown between two solid lines without obstruction and open to the highway at each end, in the same manner as the surrounding highway network.
5. *OS first series Sheet 1 1805:* The full Order route is shown between two solid lines without obstruction and open to the highway at each end, in the same manner as the surrounding highway network.
6. *Plan of the Manor of Great and Little Birch 1811*: The Order route is shown between solid lines and coloured brown in the same way as the surrounding highway network, much of which is still present today. No key to the document is available. Trees are drawn within the route between approximately points E and C. The modern-day western part of Bridleway 2 Birch is shown in the same way as the Order route and surrounding network.
7. *Administrative boundary dispute (Birch and Copford) documents, 1817:* The transcript of the 1817 parish boundary investigation records resolutions to hear evidence on and to set out the boundaries, for a third party to determine any dispute, and a subsequent agreement to refer a dispute and to be bound by the subsequent decision.
8. *Cary’s Map 1828*: The Order route is depicted between double solid lines in a similar way to surrounding lanes which are modern-day highways. The key depicts four types of roads: “Mail Roads, Turnpike Roads, Carriage Roads which are Parochial Roads, and Parochial Roads”. The route is shown as a Parochial Road which links with other highways.
9. *Will of Charles Round, 1831*: By this document land is given to Mr Round’s son. It is submitted that it shows the continuing entailment of the Round estate.
10. *Tithe Map Copford, 1839:* Section E-B only of the route is shown between double solid lines, and is excluded from the titheable parcels of land. Routes which correspond with the modern-day highway network in the vicinity are shown in the same way, as is the western part of Bridleway 2 Birch. The Order route is shown to run entirely outside Sellars Wood.
11. *Tithe Map Birch, 1839*: The whole route is shown between double solid lines and open to the highway at point A, and is excluded from the titheable parcels of land. It is not possible to ascertain, from the submitted copy, whether the route is open to the highway at point F, although no party has suggested that it is not. Routes which correspond with the modern-day highway network in the vicinity are shown in the same way.
12. *Tithe Map Great and Little Birch, undated*: This shows a solid line across the Order route at point F, with the four modern-day highways at the same location shown to be open where they meet the crossroads. The Order route is otherwise depicted in the same way as highways. It has no apportionment number, indicating that it was considered to be unproductive land.
13. *OS 1st Edition Map, 1875*: The whole route is shown between double solid lines and is open to the highway at each end. It is now shown to pass through Sellars Wood over the route E-D. The main network of roads in the area is coloured sepia but most of the Order route is uncoloured except section A-B, which is partially coloured sepia. Pecked lines are shown across its junction with Bridleway 2 Birch. The lane is annotated in Birch parish with the number 112, which is recorded in the accompanying Reference Book as a “road”.
14. *OS 2nd Edition Map, 1896*: The route is shown uncoloured between double solid lines and open to the highway at each end, in the same way as the surrounding highway network.
15. *Sale documents Boarded Barn Farm, 1905*: A short section only of the route is shown running south from Point F. It is coloured brown in the same way as the surrounding highway network, which corresponds with modern-day roads. It is marked “From Birch”, in the same way as other roads are labelled with their destination. It is shown as open to Easthorpe Road at Point F.
16. *ECC Main Roads and Bridges Map, 1906*: This map was intended to show major routes that were maintainable by the Council at that time. The entire route is shown on the OS base mapping as uncoloured between double solid lines, in the same manner as much of the surrounding highway network. It is submitted that the map’s keys denote that it is an “other road”. A limited number of main routes are coloured on the map, but the majority of the network is left uncoloured.
17. *Bartholomews Map, 1902-1906*: Whilst some roads forming part of the modern-day highway network are coloured, some are not. The Order route is uncoloured. It is shown between double solid lines in the same way as Bridleway 2 Birch. The key states that “the uncoloured roads are inferior and not to be recommended to cyclists”. It is not possible to ascertain from the submitted copy whether the route is open to the highway. Footpaths and Bridlepaths are denoted by a single dashed line, according to the key. It states that “the representation of a road or footpath is no evidence of the existence of a right of way”.
18. *Finance Act map, 1910*: The Order route is shown to be excluded from surrounding land parcels between points A and B. An orange marking denoting the apparent northern boundary of land parcel number 2 extends across the route at point C. The parcel boundary does not cross the route at point B. The orange marking of the boundaries of parcel 2 is generally relatively clear. However, the marking is not shown to follow the route’s boundaries between points B and C, so that, taken at face value, it is not clearly excluded from surrounding land between those points.
19. The accompanying Finance Act field book shows that deductions from the tax were made in the area where alleged public footpaths were identified across land. The book records two “alleged footpaths and rights of way” over land parcel number 2, with two dashed paths within the parcel which are not the Order route being marked “public” on the map. Deductions from the tax are recorded in respect of these paths.
20. The route is coloured yellow between approximately points B and E, however it is evident from the subsequent course of the yellow marking from both those points that it depicts the parish boundary which follows the central part of the Order route, rather than any land boundary. The route is excluded from surrounding land between points B and E.
21. The section of route E-F is partially obscured by smudging. Whilst the section is generally clearly excluded from the land parcel to the west, the orange marking for parcel 6 adjacent to its eastern boundary is not visible for approximately half of the section.
22. One deduction for a public footpath is recorded in the Book of Reference in respect of land parcel 6, however a track marked “F.P.” appears on the base map near the northern boundary of the parcel, and therefore it is likely that the deduction is for this.
23. *OS 6” Map, 1925*: The whole of the Order route is shown between double solid lines and is open to the highway at both ends, in the same way as the surrounding highway network.
24. *County Road Map, 1929/1930:* This document is based on maps provided to the County Council by Rural District Councils. It shows what were considered to be vehicular highways maintainable by the County Council. The majority of the surrounding highway network is coloured in some way. The Order route is shown to physically exist, but is not coloured and hence is not recorded as maintainable at public expense.
25. *County Surveyors Map, 1932:* This document was produced by the surveying authority and parish councils, and records footpaths and bridleways which were considered to be public at the time. The Order route appears uncoloured apart from a short section to the north of point A. Blue dashes denoting a footpath are shown running alongside the northern part of the route, so that at this time no footpath was considered to follow the route itself. The unclassified road which adjoins point A is coloured and annotated “NC road”, showing this section to be a non-classified road maintainable by the council.
26. *New Popular Edition Map, 1949*: The Order route is shown uncoloured between double solid lines and open to the highway. Part of the surrounding highway network is coloured orange. No key is available to assist with interpretation of the document.
27. *Parish Survey Map and Cards, 1951*: The parish survey card states “Footpath No 24 commences at Easthorpe Corner – runs SE across ploughed field – joins lane to Seller Wood. Condition of footpath being recommended to follow everyday use, i.e. to commence at and follow lane throughout to Seller Wood. No obstructions”. The map shows the southern section of Footpath 24 Copford to run adjacent to the Order route and its northern section to run within it. A fork of the footpath to the west is crossed through and marked “delete”, with “new course” apparently written adjacent to it where it follows the Order route.
28. *Draft Maps, Copford and Birch (dates not provided)*: These were produced in the drawing-up of the Definitive Map for the area, which was published in 1960 with a relevant date of 1953. The draft maps show Footpaths 24 Copford and 3 Birch to run adjacent to the Order route’s western boundary, rather than along the track which forms the route. The remainder of the Order route is not depicted on the draft maps as a public right of way. No objections were received to the draft maps and statements. Footpath 24 Copford is subsequently shown on the first definitive maps to follow the track, as it does today.
29. *Ordnance Survey Topographical Map, 1955*: Section E-F of the route and a small part of the south end are shown between double solid lines, however the remainder is not visible on the copy supplied.
30. *Aerial photographs, 1960, 1970, 1981, 1990, 2000, 2010:* At the scale provided it is generally possible only to discern that trees lined parts of the route in these photographs. The Order route additionally appears to be open to the highway at each end in the 2000 and 2010 photographs.
31. *Bartholomews Map, 1967*: Only approximately sections F-D of the route are shown, by double solid lines. It is uncoloured, with the surrounding highway network being coloured in an orange shade. According to the key it is either a “Serviceable Road” or an “Other Road & Track”. Footpaths and Bridleways are depicted by a single dashed line. The key continues to state that “the representation of a road or footpath is no evidence of right of way”. Bridleway 2 Birch is no longer shown.

***Conclusions on documentary evidence: Order A***

1. The 1729 Bockingham Hall map shows the existence of the southern end of the Order route, but does not provide information on its status, although it appears to be open to the highway and to continue north.
2. If a time when dedication of the Order route as a highway is presumed to have occurred were clear from the evidence, a proven contemporaneous lack of anyone with the capacity to dedicate the land as a highway may indicate that no effective dedication could have taken place at that point. In this case, it is undisputed that the will from 1769 shows that land was entailed, forming the earliest time when the title to that land is known. It is additionally undisputed that the entailment or settled land arrangement was ongoing over ensuing centuries, with a suggestion in opposition that there was a lack of capacity to dedicate between 1760 (the earliest possible date of the will, as the final figure is somewhat unclear) and 1910.
3. Nevertheless, the earliest evidence showing the existence of part of the route, which was open at each end (suggesting a through route), is from 1729. The available evidence consequently indicates that the route is likely to have already physically existed for many years by the time of the will written in the 1760s. Documentary evidence showing a precise date of suggested dedication is not before me; instead it is suggested that such a date cannot be ascertained and that the evidence as a whole suggests the existence of a historic vehicular highway.
4. Whilst I note later evidence of landownership in the area of the Order route by the Round estate, the will does not clearly show that the land crossed by the route was owned by Mr Round in the 1760s. Indeed, the 1811 plan of the manor shows land owned by “C Round” to be marked to the south east and away from the Order route, and does not indicate ownership of the Order route land by the Round estate.
5. Thus, the lane’s apparent existence for several decades prior to 1760, and the inability of the evidence in this case to support any precise date of dedication or ownership of the Order route land by the maker of the 1760s will, together mean that any lack of capacity to dedicate land in the area over the period 1760-1910 has not been demonstrated to have prevented the dedication of highway rights over the Order route.
6. Furthermore, the circumstances in the case of *Attorney General & Newton Abbot RDC v Dyer [1945] 1 Ch 67* are not so directly comparable to those under consideration here on the issue of capacity to dedicate that the judgment has any particular relevance to my decision.
7. The purpose of the 1811 plan of the manor is not stated, so that it is unclear whether it was made for the purpose of showing highways. Its compilers and hence their expertise are additionally unclear, although it identifies local landowners and landmarks, so that it may have been made to show ownership. Whilst it shows the Order route in the same way as some surrounding vehicular highways, part of the network shown corresponds today to a section of Bridleway 2 Birch. For these reasons it provides some minimal support for the existence of reputed public rights over the Order route, but it is equivocal as to their status.
8. The 1875 OS map is the first available document to depict the parish boundary between Copford and Birch. It is shown to follow the Order route between points B and E.
9. The transcript of the 1817 parish boundary investigation is limited in length, and is not accompanied by a map or any description of the location of the areas of parish boundary dispute. It is consequently not possible to determine whether any later investigation related to disputed boundaries along the Order route. Furthermore, a record of any such investigation and details of the nature of any public evidence sought on the matter are not submitted. Thus, it is unclear whether any investigation was carried out and, if it was, whether highways were to be considered. In any event, the process sought to identify parish boundaries, rather than to record highways, so that it may not have considered highway matters. For these reasons, the boundary transcript and the subsequent absence of the majority of the Order route from records of publicly maintainable highway attract only very minimal weight against the Order.
10. Case law (*Commission for New Towns & Worcestershire County Council v JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3*) has indicated that a parochial road in Cary’s Maps was a little more likely to be a public carriageway than a non-vehicular highway. This consideration attracts very limited weight in support of the Order.
11. Only a small extract of the Tithe Map of Great and Little Birch is provided, and no apportionment is submitted. It appears to be a different document from the 1839 Tithe Map of Birch. The small size of the extract limits the ability to compare the route with others in the vicinity. This, together with the minimal details provided of its date and provenance, limits the weight which can be attached to the document.
12. Nevertheless, it shows a solid line across the Order route at point F, with the four modern-day highways at the same location shown to be open where they meet the crossroads. It is uncontested that the line depicts a gate. It is submitted in support that gates to prevent stock from straying were and are not unknown on public and private roads. The Order route is otherwise shown in the same way as public roads.
13. It is undisputed that the 1839 Birch Tithe map shows the route to be open to the highway at each end. That document additionally shows that gates were marked where present on other routes. Nevertheless, the undated Great and Little Birch Tithe map indicates the presence of a gate at point F of the Order route. The document is likely to have been produced in response to the Tithe Commutation Act 1836, as the other Tithe documents were, and its authenticity is undisputed.
14. Thus, whilst the totality of the Tithe evidence indicates that the Order route was considered at the time to be unproductive land, there is some inconsistency in the recording of the Order route as open to the highway or not. The presence of a gate across the route could indicate that it was not considered to be a highway at that point, but is not conclusive, as a public road may be subject to a right to gate it to prevent stock from straying. However, no clear difference in the treatment of local public and private roads can be identified on individual Tithe documents. Considered in isolation, the Tithe documents consequently do not indicate whether the Order route was considered to be a private or public road at the time.
15. The 1875 OS map shows the Order route to be an enclosed track which is coloured in the same way as the surrounding highway network between approximately points A and B. The evidence does not indicate what the colouring was intended to depict. Whilst the Order route is described in the accompanying Book of Reference as a “Road” in the same way as surrounding highways, it is unclear whether the book distinguished between private and public roads. The map consequently shows the physical existence of the Order route at the time but does not, in itself, show its status.
16. The 1896 and 1925 OS Maps continue to show the enclosed Order route to be open to the highway at both ends and to form part of a network of routes. It is not marked “F.P.”, as paths in the area are. The maps consequently support the physical accessibility of the route at those times, and show that it was not considered to be a footpath, whether public or private. Only faint markings show the central section of the Order route on the OS 1955 map, so that it does not appear as part of a network of routes by that point. It is, however, still shown to be open to the highway at both ends.
17. The 1905 Boarded Barn Farm map was produced by a local surveyor on behalf of the executors of the owner of land elsewhere in the parish. The surveyor was based in a town some distance away, and no address is provided for the estate’s executors. There is consequently some doubt that the map’s makers had first-hand local knowledge of the type which could have provided a reliable view of the status of routes in the area. Furthermore, it is unlikely that they would have made extensive enquiries into the status of the Order route, as the estate for sale was located away from it and consequently did not rely on it for access.
18. The 1905 document is based on Ordnance Survey mapping, which in 1875 depicted the Order route as an apparent track in the direction of Birch. Its marking with a destination and its colouring, in the same way as the surrounding highway network, could consequently have been an assumption made by map makers who did not live locally, based on existing mapping, and there is nothing to suggest otherwise. In view of the above considerations, the document attracts only minimal weight in support of the Order.
19. The 1906 Main Roads and Bridges map shows the physical availability of the route on the underlying mapping, and that it was not considered to be maintainable by the County Council. It is unclear whether its depiction as an “Other Road” according to the key was intended to show a private or public route.
20. The route is shown as an uncoloured road which is part of a network of routes on the 1902-1906 Bartholomew’s Map. By the 1967 Bartholomew’s Map only the northern part of the route is shown. However, the documents add limited weight in support of the Order due to their disclaimer that the representation of such roads is no evidence of the existence of a right of way, suggesting that these matters were not investigated to any significant degree by the map’s makers.
21. Turning to the Finance Act 1910 documents, the orange boundary of parcel 2 across the route is relatively clear at point C, which could depict the Order route’s inclusion within the parcel at that point. However, the orange colouring is not visible across the route at point B.
22. In this respect and in terms of the absence of colouring along the route’s boundaries between B and C, that section of the Order route is generally shown in the same way as Birch Road passing north from Hardy’s Green. Birch Road was evidently a vehicular highway in 1910, and continues to be so in modern times. Nevertheless, it too is not clearly excluded from surrounding land in the usual way by the use of colour alongside the route, according to the Finance Act evidence both for Order A and, at a larger scale, for Order B. Similarly, colouring is absent along sections of the boundaries of the modern-day vehicular lane on the west side of the Finance Act map for Order A. The approach taken to the Order route’s depiction consequently has some consistency with that taken to vehicular highways elsewhere on the Finance Act maps. The orange colouring across the route at point C is anomalous in this regard. However, an explanation could be that, as the route was already coloured to indicate the parish boundary at that point, the orange colouring was not intended to be visible.
23. Deductions are recorded for the two footpaths within parcel 2 and they are clearly marked “public”, so that the Order route through the parcel was not considered to be a footpath.
24. The Order route is not clearly excluded from surrounding land for part of the section E-F. Nevertheless, it is most likely that the full section is intended to be excluded from the tax due to the course of the partial orange marking of adjacent land parcel 6, and as preceding and subsequent mapping shows a clear boundary between the Order route and the parcel.
25. The exclusion of a route from surrounding numbered land parcels on Finance Act 1910 documents may raise a strong possibility that it was considered to be a highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in field books; however, there may be other reasons to explain its exclusion.
26. In summary, it is most likely that section B-C was not intended to be shown as included within parcel 2 on the 1910 map, and there is some support for the depiction of that section being the same as vehicular highways in the vicinity. In view of the above considerations and the exclusion of the remainder of the route from surrounding parcels, the Finance Act documents attract moderate weight in support of the Order.
27. The remainder of the twentieth century documents generally show the physical existence of the route. The parish survey notes are somewhat equivocal, but in referring to “everyday use” of the Order route between points E and F they suggest that it may have been subject to a level of pre-existing use at the time, whether public or private. It is unclear why the Order route was not included in the survey as a potential public right of way. One explanation could be that the route fell into disuse during the twentieth century so that it was not identified as public by that point.
28. Whilst Footpath 3 Birch follows a field edge parallel to the Order route section E-D, it then takes a southerly course whilst the Order route turns in an easterly direction. There could be reasons for the brief co-existence of adjacent routes in this way, particularly where they have different statuses and destinations, so that this consideration does not reduce the weight attached to the evidence in support.
29. The Order route is shown largely consistently as part of a local network of routes on maps over a period of over two centuries. It appears as a useable through route connecting vehicular highways, and is generally consistently depicted to be physically capable of accommodating vehicles without obstruction. Successive commercial and local mapping generally shows that it was open to the highway at each end. It is shown as unproductive land in Tithe mapping and excluded from surrounding land parcels in Finance Act mapping. Mature trees and vegetation line significant sections of the route, giving the appearance of a historic lane of a width suitable for horsedrawn vehicles, albeit one which is now somewhat overgrown in parts. This supports the documentary evidence showing the route to be a landscape feature of some antiquity. Together, these considerations attract moderate weight in support of the Order.
30. The evidence as a whole shows that the route was generally consistently depicted in a more defined manner than surrounding footpaths and bridleways. Whilst I note the caution applied to the Finance Act evidence in the relevant Schedule 14 appeal decision, I have had the benefit of further analysis of that evidence, taking into account “Order B” documents photographed at a larger scale which were not available for consideration in the appeal decision for Order A. The evidence as a whole in this regard indicates that it is most likely that the whole of the Order A route was intended to be depicted as excluded from surrounding land parcels. Public footpaths were not excluded and were subject to deductions from the tax instead. The above considerations support the route’s reputation as a vehicular highway over centuries prior to a decline in use by the twentieth century.
31. Evidence which could potentially weigh against the Order is the route’s lack of depiction on the Chapman and Andre map of 1777, the potential gate across the route’s northern termination on the undated Tithe map, and the lack of recording of the route as maintainable on the County Road map of 1929/1930.
32. Nevertheless, the route is partially or wholly depicted as a through route on other eighteenth century documents, so that its absence from the 1777 map is somewhat inconsistent with relatively contemporaneous evidence and hence attracts only minimal weight. Any gates across the route are depicted over a limited period and, moreover, are not conclusive contrary evidence, as a public road may be gated to prevent stock from straying. The lack of identification of public maintenance responsibilities for the route by the 1930s is consistent with the hypothesis that the route fell into disuse during the twentieth century.
33. Documentary applications such as this may be based on evidence of reputation as a highway, so that direct evidence of use is not required for them to succeed. Similarly, records of public maintenance of a route may support the reputation of a way as public and its physical existence, but did not purport to be a record of rights. They form only one type of relevant evidence and their absence does not automatically indicate that a way was not accepted by the public; instead it is necessary to consider the evidence as a whole.
34. Overall, there is clear evidence in favour of the Order and no credible evidence to the contrary. Furthermore, there is no evidence to indicate that public rights over the Order route have ever been extinguished by legal mechanism. Thus, on the balance of probabilities, the evidence demonstrates the existence of a restricted byway over the full Order route.
35. The historic OS mapping used to depict the route’s widths on “Plan No.2” accompanying the Order reflects the widths shown on relevant evidence, where available, to a reasonably accurate degree. Thus, Plan No. 2 forms an acceptable record of the route’s widths.

Other Matters

1. I acknowledge concerns raised regarding the effect of the Order on biodiversity, privacy and property value, and the availability of other public routes in the area. Nevertheless, the only issue here is whether a public right of way exists: suitability and amenity must be disregarded in deciding whether to confirm an order. These concerns 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. Having regard to these and all other matters raised in the written representations I conclude that Order A should be confirmed.

**Formal Decision**

1. I confirm Order A.

Reasons: Order B

***Documentary evidence***

1. *Draft Map of Bockingham Hall Farm, 1729:* Approximately sections A-C of the Order route are shown between double solid lines and open at each end, including onto the highway.
2. *Will of William Round, 1769:* This devises Mr Round’s worldly estate in the Manor of Birch Hall and refers to land which he has settled and conveyed upon the marriage of his eldest son, James Round. It is submitted that it shows an entailment of the estate for the heirs of William Round.
3. *Chapman and Andre Map, 1777:* A route is shown along the approximate course of the Order route between sections A and C, and continues east to join Maldon Road but on an alignment not shown in the Order between points C and F. The route is depicted by double solid lines and open to the highway at each end, in the same way as the surrounding highway network.
4. *Plan of a Farm in Birch, 1790:* Approximately sections C-F of the Order route are shown between double dashed lines and apparently shaded, in the same way as Maldon Road. The map shows that land to the south of sections C-F was owned by James Round. The route is open to the highway at point F.
5. *OS Drawing Witham 1799:* The approximate Order route is shown between double dashed lines and open to the highway at each end, in the same way as surrounding highways.
6. *OS Map 1st Edition, 1805:* The approximate Order route is shown between double dashed lines and open to the highway at each end, in the same way as surrounding highways.
7. *Cary’s Map, 1828*: It is undisputed that the Order route is not shown on this document.
8. *Will of Charles Round, 1831*: By this document land is given to Mr Round’s son. It is submitted that it shows the continuing entailment of the Round estate.
9. *Tithe Map Copford, 1839:* Approximately sections A-C of the Order route are shown between double solid lines and open to the highway at point A, in the same way as surrounding highways.
10. *Tithe Map Birch, 1839:* Approximately sections B-F of the Order route are shown between double solid lines and open to the highway at point F, in the same way as surrounding highways.
11. *OS Map 1st Edition, 1875:* The two highways between which the Order route passes, Birch Road and Maldon Road, are coloured yellow and marked by double solid lines. The Order route is shown by double solid lines but is uncoloured. It is annotated with land parcel number 151 near point C, and with number 451 near point B. Parcel 151 is recorded in the accompanying Book of Reference as “Road”. No extract is available in respect of parcel 451. A solid line is marked across the junction with Maldon Road at point F. A dashed line is marked across the junction with Birch Road at point A. Trees are marked apparently along the boundaries of much of the route.
12. *Cruchley’s Road and Railway Map of Essex, c.1885:* A route is shown along the approximate course of the Order route between sections A and C, and continues east to join Maldon Road but on an alignment not shown in the Order between points C and F. The route is depicted by double solid lines and open to the highway at each end, in the same way as the surrounding highway network.
13. *OS Map 2nd Edition, 1896:* The Order route is marked between double solid lines and open to the highway at point A, with a line marked at the junction with Maldon Road at point F.
14. *ECC Main Roads and Bridges Map, 1906:* This map was intended to show the major routes that were maintainable by the County Council at the time. The Order route is not marked as such a route. The route’s alignment on the base mapping corresponds approximately to the Order route.
15. *Bartholomews map, 1902-6:* These maps were produced for commercial and travel use and were popular with tourists and cyclists. Part of the surrounding highway network is coloured orange, and part is not. The Order route is uncoloured and shown between double solid lines. It is not possible to ascertain from the submitted copy whether the route is open to the highway. According to the key it is an uncoloured road, and hence “inferior and not to be recommended to cyclists”.
16. *Finance Act Map, 1910:* The Order route is shown to be uncoloured and hence to be excluded from adjacent land parcels, in the same way as the surrounding highway network. A footpath to the south is annotated “Public”.
17. *OS Map New Series Edition, 1925:* The Order route is shown between double solid lines. It is open to the highway at point A but it is unclear whether this is the case at point F. Dashed markings appear on the eastern section of the route, which are shown as trees on larger scale editions according to the Council.
18. *County Road Map, 1930:* This map is based on maps sent to the County Council by Rural District Councils showing what they considered to be vehicular highways maintainable by the Council under the 1929 Act. No part of the Order route is shown to be maintainable at public expense.
19. *The County Surveyor’s Book of Maps, 1932:* Work to create a record of public rights of way was carried out in conjunction with parish councils. The information provided was used to draw up the plans sent to parish councils to assist in the drawing-up of parish survey maps. Blue dashes depict Footpath 5 but the remainder of the Order route is not marked as a public right of way.
20. *Evidence relating to 1932 Act Survey:* A letter of 1933 regarding signposting from the Round estate is held. It states that some of the paths where signs were erected were not considered by the landowner to be public rights of way. A list of paths was provided by the parish council and, whilst one path may relate to part of Footpath 5, there is no suggestion in the correspondence that public vehicular rights existed along the Order route, or that highway rights existed over section B-F.
21. *New Popular Map, 1949:* Only section A-B of the route, corresponding to part of the modern-day Footpath 5, is shown on the map uncoloured between double solid lines. The majority of the surrounding highway network is coloured orange.
22. *Parish Survey Map and Card, 1951/2:* Blue dashes depict Footpath 5 but the remainder of the Order route is not marked as a public right of way. The card describes Footpath 5 as follows: “commences at a gap North-West of the Angel Inn, runs South-West across field to gap in hedge through two further gaps then the footpath is overgrown and is impassable to the exit at a gap near Buckingham Hill”.
23. *Draft Map and Statement, 1953:* Footpath 5 is shown coloured in purple, to denote a public footpath, while the unrecorded section of the Order route is not coloured. No objections were received in respect of the depiction of the Order route in the document.
24. *Definitive Map, 1953:* Section A-B of the Order route was recorded as part of Footpath 5, whilst the remainder of the route was not recorded as a public right of way.
25. *OS Topographical Map, 1955:* Only part of the section of Order route at point A appears clearly on the map, shown to be uncoloured between double solid lines. The remainder appears to be present but is extremely faint.
26. *Aerial photographs, 1960, 1970, 1980, 1990, 2000, 2010:* These photographs show the Order route to be a field boundary with mature vegetation along its central section.
27. *First Review, 1963:* This map shows no change to the depiction of the Order route from the Definitive Map.
28. *Special Review, 1971:* There were no changes to the way that the Order route was shown on this record, so that it was not included on General Modification Orders of 1986 and 1989.
29. *Definitive Map and Statement, 2002:* There were no changes to the way that the Order route was shown on this record.
30. *Council photographs, 2012-2014:* These show land in the vicinity of the Order route.

***Conclusions on documentary evidence: Order B***

1. The evidence supporting Order B is largely similar to that for Order A, with the following main differences.
2. The route of Order A is not shown on the Chapman and Andre map 1777. The map shows a route which is similar to the route shown in Order B in the same way as the surrounding highway network.
3. The route of Order A is shown on Cary’s Map 1828, whereas the route of Order B is not shown.
4. The route of Order A is shown to be open to the highway at each end and is partially coloured sepia on the OS map 1875. However, lines are marked across the junctions of the route of Order B with other highways at each end on the same map, and none of the route is coloured.
5. Similarly, the route of Order A is shown to be open to the highway at each end on the OS map 1896. Whilst the route of Order B is shown on the map to be open to the highway at point A, a line is marked across its junction with Maldon Road at point F.
6. Whilst the whole of the route of Order A is shown on the 1949 Map, it shows only section A-B of the route of Order B.
7. Turning to the settled land issue, the 1790 plan of a farm in Birch shows land crossed by Order route B but is not submitted in support of Order route A. Whilst minimal evidence on the map’s provenance and purpose is available, it shows part of the route’s physical existence as an apparent through route at the time. It indicates that land to the south of the route was owned by James Round in 1790 so that, applying the presumption of ownership up to the centre of the road, Mr Round may be presumed to have owned part of the Order route at that point.
8. The 1790 plan consequently provides evidence of the ownership of affected land by the Round estate. When considered with the 1760s will, it forms evidence that at least part of the Order route crossed settled land by 1790. This provides closer evidence of settled land status to the earliest mapping of the Order route than any document considered in respect of Order A.
9. Nevertheless, the draft map of Bockingham Hall Farm of 1729 forms the earliest evidence of the route of Order B, showing it to be an apparent through route. This evidence predates the 1790 plan by more than 60 years. Given this significant timescale, it would be an assumption only for me to conclude that the will and plan evidence shows that the route crossed settled land in 1729, which is additionally the date only of the earliest mapping evidence and does not provide evidence of any date when dedication may have occurred. Thus, the 1790 plan and 1760s will evidence do not demonstrate that settled land status has prevented the dedication of highway rights over the Order route.
10. Cruchley’s Map shows part of the route’s physical existence in approximately 1885 but does not confirm whether it was considered to be public or private, or the status of any such rights.
11. In the same way as Order A, the Order B route is shown largely consistently as part of a local network of routes on maps over a period of over two centuries. It appears as a useable through route connecting vehicular highways until 1875, and is generally consistently depicted to be physically capable of accommodating vehicles without obstruction. It is shown as unproductive land in Tithe mapping, which is consistent with either a private or public route. Despite the apparent gates shown on the 1875 and 1896 maps, it is excluded from surrounding land parcels in Finance Act 1910 mapping, raising the strong possibility that it was considered to be a vehicular highway at that point. Mature trees and vegetation line significant sections of the route, giving the appearance of a historic lane of a width suitable for horsedrawn vehicles, albeit one which is now somewhat overgrown in parts. This supports the documentary evidence showing the route to be a landscape feature of some antiquity. Together, these considerations attract moderate weight in support of the Order.
12. The evidence as a whole shows that the route was generally consistently depicted in a more defined manner than surrounding footpaths and bridleways. The full Order route is clearly shown to be excluded from surrounding land on the Finance Act 1910 mapping. Public footpaths were not excluded and were subject to deductions from the tax instead. The above considerations support the route’s reputation as a vehicular highway over centuries prior to a decline in use by the twentieth century.
13. Evidence which could potentially weigh against the Order is the route’s lack of depiction on Cary’s Map of 1828, the potential gates shown across the route’s junctions with other highways in late nineteenth century mapping, and the lack of depiction of the unrecorded section in the 1945 map.
14. Nevertheless, the route is partially or wholly depicted as a through route on other nineteenth century documents and on the Finance Act 1910 mapping, so that its absence from the 1828 map is somewhat inconsistent with relatively contemporaneous evidence and hence is unexplained, but does not provide clear evidence against the Order. Any gates across the route are not conclusive contrary evidence, as a public road may be gated to prevent stock from straying. The lack of identification of part of the route by the 1940s mapping is consistent with the hypothesis that the route fell into disuse during the twentieth century.
15. Overall, there is clear evidence in favour of the Order and no credible evidence to the contrary. Furthermore, there is no evidence to indicate that public rights over the Order route have ever been extinguished by legal mechanism. Thus, on the balance of probabilities, the evidence demonstrates the existence of a restricted byway over the full Order route.
16. The historic OS mapping used to depict the route’s widths on “Plan No.2” accompanying the Order reflects the widths shown on relevant evidence, where available, to a reasonably accurate degree. Thus, Plan No. 2 forms an acceptable record of the route’s widths.

Conclusion

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

**Formal Decision**

1. I confirm Order B.

*C Beeby*

INSPECTOR



