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| **Order Decision** |
| On papers on file |
| **by Mrs A Behn Dip MS MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 05 January 2024** |

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| **Order Ref: ROW/3318163** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Definitive Map and Statement of Public Rights of Way for Gloucestershire, upgrading part of Public Footpath DLH9 to Restricted Byway & part to Public Bridleway: Parish of Longhope Modification Order 2016. |
| * The Order is dated 10 March 2016 and proposes to modify the Definitive Map and Statement for the area by upgrading part of public footpath DLH9 to Bridleway and part to Restricted Byway, as shown on the Order Map and described in the Order Schedule. |
| * There were 2 objections outstanding when Gloucestershire County Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation, one of which was subsequently withdrawn. |
| **Summary of Decision: The Order is confirmed.** |
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Preliminary Matters

1. I have been appointed by the Secretary of State for Environment Food and Rural Affairs to determine whether this Order should be confirmed on the basis of the papers submitted. I have not visited site but I am satisfied that I can make my decision without the need to do so. In writing this decision I have found it convenient to refer to points marked on the Order Map and therefore attach a copy of this map.
2. In June 2006, an application to upgrade part of public footpath DLH/9 to a bridleway (points A-B on the Order Map), was made by Jan James and Helen Hail. A further revised application was made in March 2007 to show the whole route (points A-D). After due investigation, the Council determined to make an Order to upgrade that part of the route from points A-C to a bridleway, and that part of the route from points C-D to a restricted byway. Following the making of the Order, two objections were received, one of which, remains outstanding.

The Main Issues

1. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of the discovery of evidence as provided in section 53(3)(c)(ii) of that Act. The requirement of the legislation and what I must consider on the balance of probabilities, is whether the evidence discovered by the surveying authority, when considered with all other relevant evidence available, shows that a right of way that is shown on the Definitive Map and Statement as a highway of a particular description, ought to be there shown as a highway of a different description.
2. For the user evidence submitted, section 31 of the Highways Act 1980 Act (the 1980 Act) is relevant. This requires consideration as to whether a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years. If this is the case, the way is 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 20 years is calculated retrospectively from the date when the right of the public to use the way was brought into question.
3. If statutory dedication is not applicable, I shall consider whether an implication of dedication has been shown at common law. Common law requires me to consider whether the use of the way and the actions of the landowner have been of such a nature that the dedication of the way by the landowner can be inferred.
4. As regards the documentary evidence adduced, section 32 of the 1980 Act requires that I take into consideration any map, plan or history of the locality, or other relevant document provided as evidence, giving it such weight as is appropriate, before determining whether a way has been dedicated a highway. There are several records before me, as evidence discovered, and in making my decision I have considered them below.
5. As this Order is concerned with possible unrecorded vehicular rights, should part of the route be confirmed as a restricted byway, it will be necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006 (NERC), which extinguished rights of way for mechanically propelled vehicles, subject to certain exceptions.

Reasoning

**Documentary Evidence**

*Ordnance Survey Surveyor’s Drawing 1811*

1. A route is shown on a similar line to the Order route, uncoloured and depicted by double pecked lines. The purpose of OS maps was not to record public rights of way, but rather what features existed on the ground. From 1888 OS maps carried a disclaimer to the effect that representation of a track or a way on the map was not evidence of a public right of way. The disclaimer was presumed to apply to earlier as well as later maps. Furthermore, in 1905 surveyors were instructed that *‘OS does not concern itself with rights of way and survey employees are not to inquire into them’*. As such, these maps hold limited weight in demonstrating the status of rights of way, but are useful in showing what physical characteristics existed at the time.

*Bryant’s Map of Gloucestershire 1824*

1. Bryant’s Map, drawn from an original survey is considered fairly accurate when compared to earlier commercial maps. There was an expectation that the routes shown on this map were available to use, being that they were commercially sold, however the map was not concerned with the legal status of the routes it depicted. The northern section of the Order route between points D-C is clearly shown, however the southern section is less clear, although a route can be seen from just north of point B heading southwards.

*Tithe Map and Apportionments Longhope 1841, Aston Ingham 1839/1841*

1. The Tithe Maps were of little help as they did not show the route. On the Aston Ingham map the area of May Hill Common was stated to be *‘waste’* and was not titheable. The purpose of tithe maps was to ascertain the productiveness of land not public rights, however I note the Council’s submission as held in *Stoney v Eastbourne RDC[1927] Ch.367*, that just because a public highway was not shown on a tithe map, did not mean it did not exist.

*Longhope Inclosure Award and Map 1874*

1. The Longhope Inclosure Award and Map were far more helpful in ascertaining any public rights that may have existed historically, with the northern section of the route from points D-C being set out in these documents as a public carriage road. At point C which comprises the summit of the hill, the area was described as *‘Recreation Ground,’* and between points C-A the Order route was set out as a private carriageway and occupation road. Inclosure Awards, being legal documents, can provide good evidence of public rights of way, including public roads and I consider the Longhope Award offers good evidence of a vehicular carriageway for points C-D, but does not appear to ascribe public rights to the section of Order route south of point C.

*Ordnance Survey Maps published 1888 and 1924*

1. Both maps clearly show the Order route and the 1888 map is consistent with the Inclosure documents in portraying a wide route depicted by double solid black lines. By 1924, the route is depicted by double dashed lines, appearing narrower in width between points C-D.

*Conclusions on documentary evidence*

1. The documentary evidence before me suggests that a route was in existence from at least the early 1800’s. Albeit the Inclosure documents provide strong evidence of a public carriageway between points C-D, there is insufficient documentary evidence to ascertain any public rights of a historical nature for the rest of the route.

**User evidence**

***Statutory Dedication***

*When the status of the claimed route was brought into question*

1. The application to upgrade the Order route was brought about by the Council erecting barriers at point B and between points A and B in early 2006, to prevent vehicles accessing May Hill Common. This also had the effect of preventing access to the route by equestrians. At the same time a notice was erected close to point A which stated *‘No Horses or Motor Vehicles. Public Footpath only.’* The new barriers replaced an old barrier that had been erected circa 1986 to deter vehicles, but which allowed access for horses. The Council thereby submits that 2006 is the date that the status of the right of way was brought into question and I concur with this submission. In view of this, when assessing statutory dedication, the relevant period will be considered as 1986-2006.

*Evidence of use by the public*

1. Forty User Evidence Forms (UEF’s) were provided in support of use of the claimed route on horseback, with earliest use purporting to be from 1926. Two further forms stated use from 1929/1930 and one form stated use from 1935, albeit this user was a tenant who leased grazing rights and so I consider this use was by permission. Twenty-four UEF’s evidenced use for the entire relevant period, with a further three stating use for nineteen years.
2. Equestrian use appeared to be mostly recreational, with the majority stating weekly use. Except for the one person who had permission from the Huntley Estate, none of the users sought or were given permission to ride the route, and use appeared to be open and persistent. One UEF attested to using a horse and cart on the route and a photograph from the 1930’s was also submitted, showing a horse and cart on the route.
3. Most remembered gates on the route but stated they were open or unlocked, and always passable with a horse, until they were replaced in 2006 with the new barriers. No notices were recalled other than the one that was erected at the same time as the new barriers.
4. Having regard to the evidence submitted, I find that there is sufficient user evidence to raise a presumption of the dedication of a public bridleway over the Order route. Therefore, the first part of the statutory test is satisfied.

*Evidence of the landowner and whether the landowner demonstrated a lack of intention to dedicate a public bridleway*

1. The land across which the majority of the route runs, is unregistered, although Longhope Parish Council own a circular piece of land on the summit of the hill, at point C on the Order map. The National Trust own the land either side of the route, but the Order route itself is excluded from the land registration.
2. The Council advised that there is a National Trust sign at point B, albeit I have no information before me as to when it was erected. The National Trust Byelaws are written on the back and state that no unauthorised persons should ride on any part of Trust property where horse riding is prohibited, or to the danger or annoyance, or without consideration to others. I agree with the Council that the sign does not specifically prohibit horse riding along the Order route and in any case, The National Trust do not own the track over which the Order route runs. Accordingly I do not consider this notice presents a lack of intention to dedicate.
3. The land at the summit of the hill (point C of the Order route) is owned by the Parish Council and is registered as a village green. The Council gave consideration as to whether early use by equestrians over this section could be considered ‘by right,’ given that local inhabitants were indulging in ‘lawful sports and pastimes.’ However the UEF’s did not specify the village green as their destination, but rather described their use as riding over May Hill, with many quoting onward destinations.
4. With this in mind, I concur with the Council that *R v SoS for Environment ex parte Billson [1998] EWHC Admin 189* applies, wherein a track across a common that was used as a route between destinations rather than as a destination itself, was capable of having a public right of way established over it, under Section 31 of the 1980 Act.
5. In any case, this consideration is immaterial for any evidence of use during the relevant period, as that part of the Order route that crosses the village green was excluded from the final village green registration in 1973. Any use on horseback from that date would have then been considered ‘as of right.’
6. Ultimately, I find that no action was taken by any landowner during the relevant period that was sufficient to demonstrate that there was a lack of intention to dedicate a bridleway.

*Conclusions on statutory dedication*

1. I have concluded that the user evidence is sufficient to raise a presumption that the claimed route has been dedicated as a public bridleway. In addition, there is no evidence that any landowner demonstrated to the public, a lack of intention to dedicate a bridleway during the relevant period. There is some evidence of use by horse and cart, however taking into account *Whitworth v SSEFRA [2010] WWCA Civ 1486*, I consider that this evidence is insufficient on its own, to raise a presumption of dedication of a restricted byway. Overall the user evidence points towards a public bridleway subsisting across the route in question. In light of this conclusion, there is no need for me to address the evidence in the context of common law dedication.

Other Matters

1. I note that there was one objection outstanding in regard of this Order. The objector was in agreement that the evidence indicated higher rights existed on the Order route, but was concerned that the confirming of the Order would result in a dead-end bridleway at point D of the route, which forms the county boundary with Herefordshire. He stated that this dead end would be due to the neighbouring authority, Herefordshire Council, having not yet determined a separate application for the upgrading of what would form a continuation of the Order route past the county boundary. This he felt was unacceptable, as there were already a number of other dead-end rights of way in existence.
2. I can appreciate the frustration caused by the situation wherein one authority has determined their section of a through route but a neighbouring authority has yet to process the onward route. However the legal basis on which this case must be determined does not allow for consideration of such factors, and consequently is not a matter that I can take into account.
3. The second objection which was ultimately withdrawn, expressed concern about possible conflicts arising by equestrians and other users having to share the same route, and that there were other routes available for use by equestrians. Albeit I understand these concerns, the legislation I must use when making my decision does not allow for the desirability, safety, or suitability of the route to be taken into account.

**Conclusions**

1. For a right of way to be upgraded, the supporting evidence needs to present a strong and cohesive argument to tip the balance of probabilities in favour of the higher status. When considering documentary evidence, albeit evidence suggests a route was in existence in the early 1800’s there is no clear evidence of any status of that route until the Longhope Inclosure Award in 1874. This legal document then clearly sets out that part of the Order route between points C-D, as a public carriageway. In the absence of contemporary evidence suggesting otherwise, I concur with the Council that this section of the Order Route should be recorded as a restricted byway.
2. Turning to the user evidence, it is clear that the user evidence forms portray long use of the entire Order route on horseback, from as far back as 1926 and certainly there is sufficient use shown to fulfil statutory dedication between 1986-2006. There is also no evidence that any landowners took any action that could show a lack of intention to dedicate the route as a bridleway. Therefore I am satisfied that the user evidence supports the upgrade of the Order route between points A-C to a bridleway.
3. In conclusion it is my view that on the balance of probabilities, the available evidence is sufficient to show that the Definitive Map and Statement should be amended, to show bridleway status between points A-C of the Order route and restricted byway status between Points C-D.

**Natural Environment and Rural Communities Act 2006 (NERC)**

1. Section 67 of the NERC Act had the effect of extinguishing all unrecorded public rights for motorised vehicles from May 2006, with certain exemptions. I do not consider that any of the exemptions apply to the Order route and as such public rights on the route between points C-D would be on foot, horseback, bicycle and by horse drawn carriage. Any private vehicular rights are not affected.

Formal Decision

1. I confirm the Order.

Mrs A Behn

Inspector

