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| **Order Decision** |
| Hearing held on 21 November 2023Site visit made on 20 November 2023 |
| **by Nigel Farthing LLB** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 5 March 2024** |

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| **Order Ref: ROW/3297877** |
| * This Order is made under Section 53(3)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Somerset County Council (No.5) Modification Order 2015.
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| * The Order is dated 18 December 2015 and proposes to modify the Definitive Map and Statement (DMS) for the area by upgrading a public footpath to a restricted byway in the parish of Chaffcombe, as shown on the Order Map and described in the Order Schedule.
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| * There were two objections outstanding when Somerset 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.** |
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Procedural Matters

1. I made an unaccompanied site inspection on 20 November 2023 when I was able to walk the whole of the Order route and view the immediately surrounding area.
2. I held a hearing at the Guildhall, Chard on 21 November 2023. At the close of the hearing, it was agreed that no further site visit was necessary.
3. In writing this decision I have found it convenient to refer to points A and B marked on the Order Map. I therefore attach a copy of this map.
4. The Order was made by Somerset County Council (SCC) under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(ii). It proposes to upgrade to a restricted byway a route between points A and B on the Order map which is currently shown on the definitive map and statement as a footpath.
5. An Inspector appointed under schedule 15 to WCA81 is not appointed to determine whether all or any of the statutory requirements set out in Schedule 14 have been complied with. He or she is appointed to determine only the merits the order itself. Any failure by the OMA to meet any requirement under schedule 14 is subject to judicial review at the time that the order is made.

**The Main Issues**

1. The requirement of Section 53(3)(c)(ii) of the 1981 Act is in two parts. The first is that there has been a discovery of evidence, being material that has not been considered previously in the context of the status of the Order route. The second element is that the ‘discovered’ evidence, when considered with all other relevant evidence available, should show that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description.
2. Section 32 of the Highways Act 1980 (the 1980 Act) requires me to take into consideration any map, plan or history of the locality or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway of the appropriate status.
3. For the Order route to be confirmed as a restricted byway I would need to be satisfied on the evidence that the route had the status of a byway but that the right to use it with mechanically propelled vehicles was extinguished by operation of the Natural Environment and Rural Communities Act 2006 (NERC) s. 67.

Reasons

Discovery of evidence

1. The discovery of evidence is a prerequisite to the making of an order in reliance upon section 53(3)(c)(ii). There must be something more than simply a redetermination of evidence considered previously. However, once there has been a discovery of evidence, this new material is to be considered together with all other evidence available.
2. The discovered evidence must be relevant to the status of the route under consideration, but it is not a requirement that it should, on its own, be determinative of that status.
3. SCC rely upon the map produced for the purposes of the Finance Act 1910 (‘the Finance Act map’) as the evidence which has been discovered. The objectors acknowledge that the Finance Act map was not publicly available at the time of the compilation of the First Definitive Map and Statement (DMS), and that it has not been considered previously in relation to the status of the Order route. Notwithstanding this they argue that the Finance Act map is not of sufficient weight or relevance to constitute new evidence.
4. Since they became available to the public Finance Act maps have become a standard evidential source in any consideration of claims concerning highway status. In Maltbridge Island Management Company v Secretary of State for Environment and Hertfordshire County Council [1998] EWHC Admin 820 Sullivan J acknowledged the corroborative role of material prepared under the Finance Act’. I have little difficulty in concluding that the Finance Act map does constitute relevant discovered evidence which satisfies the first limb of section 53(3)(c)(ii). The weight that is to be attached to that evidence is a matter which I will come on to consider.

Physical characteristics

1. The Order route has the appearance and characteristics of an old, unsealed rural lane. For much of its length it is enclosed by banks and hedging with numerous mature trees on either side. It has a length of approximately 638 metres and a width varying between 3 and ten metres. It connects at its northern end (point A on the Order map) with the terminus of a cul-de-sac unclassified county road, and at its southern end (point B on the Order map) with the terminus of the cul-de-sac unclassified county road known as Tolley’s Lane.
2. Heading south from point A the Order route climbs steeply before levelling out and then descending with a more gentle gradient to point B. The unclassified roads at either end of the Order route have a sealed tarmacadum surface whilst the Order route shows evidence of a hardened stone, or metalled surface which in parts is in poor condition, heavily rutted and was, on the day of my site visit, muddy with numerous puddles.
3. The road leading from Summer Lane to point A serves as an access to several properties including the substantial country house known as Avishays. The Order route itself provides access from point B to some residential properties. There are a number of field entrances leading off the Order route. When I visited there was evidence of vehicular use of the Order route but the condition of it was such that it is difficult to envisage it being used by a standard motor car.

Documentary evidence

*Ordnance Survey (OS) records*

1. The earliest available representation of the Order route is contained in the 1806 2”:1 mile OS surveyor’s drawings. The Order route is depicted as a through route, in part between two solid parallel lines and in part between two dashed parallel lines. It is shown in the same manner as the road network to which it connects and is annotated ‘Whitemoor Hill’.
2. The 1809 – 1811 OS Old Series map is available as a Cassini Timeline reprint. The Order route is shown in the same manner as on the 1806 drawings. Some routes which are now recorded as public footpaths, or some without any public status, are shown in the same manner.
3. An 1883 OS Boundary Remark Book contains a sketch which includes part of the Order route in the vicinity of point B. The Order route is annotated ‘Green Lane’.
4. The 1887 OS 25” map shows the road leading from Summer Lane to point A coloured sienna and with thickened casing indicating an improved surface. The Order route is not coloured and is shown without thickened casing, which could be consistent with the description of it as a ‘green lane’ in the Boundary Remark Book. The Order route is shown as open to the roads to which it connects, thus presenting as a through route.
5. The OS Revised New Series (1898 – 1900) depicts the Order route as a Third Class Road in the same manner as some other local roads. The key to this edition of the OS has provision for a road to be shown as ‘unmetalled’. The fact that the Order route is not so shown would suggest that it had a metalled surface, generally recognised as being unsealed hardened stone. Again, the Order route is shown as a through route, open at both ends to the roads to which it connects.
6. The OS Object Name Books (1901 and 1902) relate to the two sheets depicting the Order route. The entry for sheet 88.13 refers to ‘Whitemoor Hill’ and describes it as ‘a portion of the public road extending south from near Summer Lane’. The sheet in question included only a relatively small section of the Order route but does show a more extensive section of Whitemoor Hill which is not the Order route. There is thus some uncertainty whether the description of a “public road” can be attributed to the Order route. The Book relating to the second sheet, which depicts the greater length of the Order route, refers to the Order route as ‘Whitemoor Hill’ and describes it as ‘a steep portion of road situate on the N.E. edge of Castle Hill’.
7. The OS County Series 1” map (1926) shows the Order route as a minor road in bad condition, open at both ends to the recognised network of local roads. I note that the key to this map states that private roads are shown uncoloured, but I do not accept this could mean that all roads which are shown uncoloured were considered private.
8. OS maps do not purport to indicate the status of the routes shown. Taken together the OS maps referred to demonstrate that the Order route has existed as a physical feature since at least 1806. It has been of sufficient size to accommodate vehicular traffic and has had an improved surface, but has not been sealed, and on that basis is distinguishable from the roads to which it connects. It is shown throughout to have been open to the roads to which it connects and in the earlier maps is shown in exactly the same manner as other local roads now recognised as vehicular highways.
9. The description of the Order route as a ‘public road’ in the Object Name Book is some evidence of its reputation at that time.
10. The fact that the Order route was not sealed might suggest that by the end of the nineteenth century its significance was declining.

*County Maps*

1. The only County Map produced in evidence is Greenwood’s Map (1822) which depicts the Order route as a ‘cross road’ in the same manner as other roads which are now part of the local highway network, although roads not now regarded as public are also so shown.

*Tithe Records*

1. The Chaffcombe Tithe Map (1840) shows the Order route between solid parallel lines, tinted sienna and with no apportionment number in the same manner as other roads. The map depicts in the same fashion routes leading off the Order route which are not recognised as vehicular highways, and in some cases, these are not public rights of way of any description.
2. It was not the purpose of tithe maps to distinguish between public and private routes, but rather to distinguish between productive and unproductive land. Private occupation roads could be unproductive and thus excluded from tithe. The value of this evidence is accordingly limited. It does corroborate the existence of the Order route as a physical feature and one that was connected to routes now recognised as vehicular highway. Whilst this evidence cannot prove public status it does not suggest anything contrary to such status.

*Sales documents*

1. The Avishays Estate was sold in 1859. The sales particulars contain a plan which shows that the Order route was excluded from the sale. All the land to the west of the Order route was included in the sale, as was the majority of the land to the east, the only land not included in the sale being two small strips giving access to land further east shown to be in the ownership or occupation of Earl Poulett.
2. Particulars for sales in 1912, 1923 and 1977 show the Order route being excluded from land offered for sale. The Order route is depicted in the same manner as roads now recognised as vehicular highway. The particulars do however show in the same fashion other routes which have no recorded public vehicular rights.
3. The sales particulars can corroborate the existence of the Order route and its physical characteristics but offer no direct evidence as to status. The exclusion of the Order route from the land being sold is consistent with the Order route currently being unregistered at the Land Registry (and thus having no identifiable owner) whilst the adjoining land is registered.

*Exchange of land 1884*

1. A map prepared for the purposes of an exchange of land under the Enclosure Act 1845 shows the junction of Summer Lane and the unclassified road leading to point A. The small stub of road shown is annotated ‘To Crewkerne’. This might suggest that the Order route was available for use for passage to Crewkerne. The map was not prepared for the purpose of identifying public rights of way and the annotation does not indicate by what means the Order route could be used; the Order route is currently recognised as a public footpath and recorded as such on the DMS. For these reasons little weight can be attached to this evidence.

*Bartholomew’s Map 1901 and 1927*

1. Bartholomew’s Maps do not purport to identify public highways. It was however a map intended for practical purposes, and particularly for cyclists. The Order route is shown as an inferior road, not recommended for cyclists. This is consistent with the picture which emerges from the OS maps of a route that was capable of carrying vehicular traffic and was connected to the public highway network but the condition of which had deteriorated by the early twentieth century.

*The Finance Act 1910*

1. The Order route is shown on the Finance Act map as un-numbered and uncoloured and thus excluded from taxable hereditaments. There are various explanations for this treatment of the route. The most common reason is that the route was public vehicular highway but a route in various or unknown ownership and used in common to access adjacent lands would often be treated in the same way. The objectors claim that as the ownership of the Order route is unknown, and the evidence shows that it has been used to access land in more than one ownership, an argument that it was excluded on this basis is credible.
2. The scheme of the Act was to exclude a vehicular highway from taxable hereditaments, but lesser rights would be dealt with by deduction. Thus, if the Order route carries public rights, the fact that it is shown to be excluded is strongly suggestive that it was considered to be a vehicular way.

*Highway Records*

1. There is no evidence before me of public expenditure on maintenance of the Order route, nor is there any evidence of public complaint about the condition of the route.
2. The 1929 Handover Map and Schedule show the road from Summer Lane to point A coloured yellow, representing a category C road, being a ‘District Road of little importance, cul-de-sacs to single farms and the like’. The road south from point B (Tolley’s Lane) is similarly coloured yellow. The Order route is shown uncoloured and thus not considered to be maintainable at public expense. Vehicular highways existing prior to the Highways Act 1835 are maintainable at public expense.
3. Subsequent highway maintenance records are consistent with the Handover Map, indicating that the road from Summer Lane to point A is publicly maintainable, as is Tolley’s Lane to point B, but not any part of the Order route. This is consistent with what is apparent on the ground, where both maintainable sections of road have a sealed surface and are in reasonable condition, whereas the Order route shows no evidence of ever having been sealed and is in poor condition.
4. The Handover Map and maintenance records are for the purpose of recording maintenance responsibility and not status. Although, as a matter of law, a vehicular highway in existence in 1835 is publicly maintainable, the antiquity of the route would not necessarily have been known when the Handover Map was being compiled.
5. One objector refers to the apparent lack of signposts on the access roads to the Order route, and to the fact that the Order route is named Whitemoor Hill rather than by reference to a destination. I note that part of the route known as Whitemoor Hill is an established vehicular highway and I can attach no significant weight to this evidence.

*National Farm Survey 1941 - 42*

1. The survey was conducted to provide a comprehensive record of agricultural land. Maps were prepared of agricultural holdings and where these were separated by a vehicular route, that route would be shown excluded from the adjoining holdings. The Order route is shown excluded from adjoining holdings suggesting that it was considered to be a vehicular route, but this gives little assistance in determining whether it was regarded to be a public vehicular route or an occupation road.

*Definitive Map records*

1. The Order route was not claimed by the Parish for inclusion on the DMS. The survey card relating to the Order route was written in pencil and in a different hand to those routes claimed by the Parish. There are two possible explanations for the route not being claimed; either that the Parish believed it was not a public right of way, or that it was believed to be a public right of way of a status higher than appropriate for inclusion on the DMS.
2. At least one footpath claimed by the Parish for inclusion on the Draft map linked into the Order route. As the Parish did not claim the Order route, but claimed routes linking into it, a logical inference would be that the Parish considered it to be a public right of way of higher status, since otherwise the claimed routes would have been cul-de-sacs.
3. The pencil description of the Order route on the survey card is of a carriage road used mainly as a footpath (CRF) and it is shown as both a CRF and footpath on the Draft Map. The term CRF was used by some authorities to indicate a Road Used as a Public Path (RUPP) on definitive maps but had no legal significance. A RUPP was a route with the characteristics of a vehicular way but over which only public pedestrian rights had been established. The question of whether higher rights existed was left open until reclassification. Despite the reference to a CRF, the Provisional Map showed the route as a footpath only and this has remained its recorded status. There is no evidence to explain the reason for this change between Draft and Provisional stage. There is no record of any objection to the recording of the Order route on the DMS as a footpath.

*Capacity to dedicate*

1. The objectors presented an argument that the land over which the Order route runs was within a strict settlement for much of the nineteenth century and that this would have necessarily resulted in there being no individual with the capacity to dedicate the Order route as a public right of way.
2. I accept that when land is held under a strict settlement this may result in there being no individual with the capacity to dedicate. However, for such an argument to be credible there would need to be evidence that the land comprising the Order route was subject to such a settlement, that the terms of the settlement restricted capacity to dedicate and that the inference of dedication arose during the currency of the settlement.
3. In this case there is some evidence that a settlement was created for the Poulett Estate in 1813. Although there was some discussion about the provenance of this evidence, I accept that the extracts presented by the Objector derive from the deed held at the Somerset Heritage Centre.
4. There is no evidence of how or when the settlement came to an end. I have been provided with photographs of excerpts from the settlement trust deed which include the expression ‘in tail male’. I accept this is a phrase that might be used in a strict settlement however, I have not been provided with a complete copy of the deed nor any more comprehensive evidence about its nature and effect.
5. Whist there is evidence that the Poulett Estate encompassed land in the vicinity of the Order route, there is no evidence that the Order route was subject to the settlement. Indeed, the evidence shows the Order route being excluded from adjoining land ownerships. Furthermore, the evidence shows the Order route to have been in existence since at least 1806, several years before the settlement was created. For these reasons I am unable to find, on a balance of probabilities, that any inference of dedication is prevented by reason of lack of capacity to dedicate.

*Conclusions on documentary evidence*

1. There is no single piece of evidence which is conclusive as to the status of the Order route. Many of the documents considered are consistent with the Order route being either a public vehicular way or a private occupation road. Some of the documents are suggestive of public status, some of private status. My task is to assess the relevance and weight of each piece of evidence and to reach a conclusion on a balance of probability. I can only undertake this exercise on the basis of the evidence before me. One objector suggests that potentially relevant material has not been examined. If that is their view it was for them to research and produce any such documents.
2. The general impression I have gained from reading the evidence, and discussing it at the hearing, is that the Order route is an ancient lane which has probably been in existence since at least the eighteenth century. It would seem to have had a greater significance in the nineteenth century, but this has waned, and its condition deteriorated through the twentieth century. It may be that this is in some part due to the rise of the motor car.
3. The OS and all other mapping evidence prior to 1929 demonstrates that, from the earliest records, the Order route had the character and physical characteristics of a vehicular way. It has been depicted universally as open at both ends to routes which are recognised vehicular highways, and this is suggestive of the Order route being an integral part of the local highway network.
4. Prior to 1929 the only differentiation of the Order route from the roads joining to it is in the 1887 OS 25” map which depicts the joining roads coloured and with a thickened casing, indicating a second-class road, whereas the Order route is shown uncoloured between fine parallel lines, indicating a third-class road. This difference in standard is also suggested by the description of the Order route as a ‘green lane’ in the 1883 Boundary Remarks Book.
5. Whilst there is no direct evidence of status, the OS Object Name Books of 1901 and 1902 do refer to the Order route. It is uncertain whether the description of Whitemoor Hill as ‘a portion of the public road extending south from near Summer Lane’ relates to the Order route but the description of ‘a steep portion of road situate on the N.E. edge of Castle Hill’ does refer to it. Whilst recognising that it was not the purpose of the Object Name Book to determine the status of routes shown on the OS, the description does indicate that the Order route was considered to be a road.
6. The exclusion of the Order route from the Finance Act Map is consistent with it being a vehicular highway, although there are other credible explanations for this. Similarly, the fact that the Order route has no known owner (and remains unregistered) and was excluded from the sale of adjoining lands is consistent with public highway status, although again other explanations can be given.
7. The 1929 Handover Map is the earliest evidence which might suggest the Order route was not considered to be a vehicular highway. The map makes a clear distinction between the Order route, which is shown as not maintainable at public expense, and the roads continuing from it which are accepted as maintainable. vehicular highway. The Handover Map was concerned with recording responsibility for maintenance rather than status and for this reason the weight that I can attach to it is limited.
8. The evidence for the period post 1929 presents a consistent picture, with the Order route continuing to be excluded from every record of maintainable vehicular highways, and, as a result of the DMS process, being recorded as a public footpath.
9. Whilst the evidence since 1929 might cast some doubt on the status of the Order route, the principle ’once a highway, always a highway’ means that if there is sufficient evidence to give rise to an inference of dedication at an earlier date, the route will retain that status unless there is evidence of subsequent stopping up or diversion.
10. There are a number of strands to the relevant documentary evidence prior to 1929. No single piece of evidence is conclusive of public vehicular status but there is evidence suggestive of that status and no evidence to the contrary. There is a consistency to the various strands of evidence which, when all are taken together, is persuasive. The significant features are that the Order route links two cul-de-sac vehicular highways and is unfailingly depicted as open to these routes and is generally shown in the same manner as the local vehicular highway network. It is shown as a through route on maps, including Greenwoood’s and Bartholemew’s maps, which were intended to be used by the public. It was excluded from duty under the 1910 Finance Act and from the ownership of adjoining land.
11. The standard of proof that I am required to apply is the balance of probability. Whilst each individual piece of evidence can be explained in more than one way, I conclude that the cumulative weight of the evidence is sufficient to satisfy me that it is more probable than not that in the nineteenth and early twentieth centuries the Order route was considered to be, and was used as, a vehicular highway such that dedication at common law can be inferred.
12. Having concluded that the Order route was an historic vehicular highway the evidence that the Order route may have been viewed differently in the twentieth century cannot detract from that status.

**NERC**

1. The effect of NERC section 67, subject to certain exceptions, was to extinguish the right for mechanically propelled vehicles to use an existing public right of way which was not shown in a definitive map and statement, or was shown only as a footpath, bridleway or restricted byway.
2. The Order route is shown in a definitive map and statement, but only as a public footpath. In consequence the provisions of section 67 are engaged.
3. It would seem to be common ground that none of the exceptions set out in section 67(2) to (8) apply and in consequence the right to use the Order route with mechanically propelled vehicles has been extinguished and the correct status of the route is a restricted byway.

**Overall Conclusion**

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

**Formal Decision**

1. I confirm the Order.

Nigel Farthing

Inspector

**APPEARANCES**

**Order Making Authority**

Mr A Saint

**Supporters**

Mrs S Bucks Representing South Somerset Bridleways Association

Mr W Steel Representing The British Horse Society

(virtual attendance)

**Objectors**

Mrs M Masters

Mr A Dunlop

Mr M Hicks

**DOCUMENTS**

1. OMA Bundle of documents for the hearing
2. Mrs Masters Closing notes

