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| **Order Decision** |
| Site visit made on 17 October 2023 |
| **by J Ingram LLB (Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 6 February 2024** |

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| **Order Ref: ROW/3314087** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Devon County Council (Bridleway No. 28 Wembury) Definitive Map Modification Order 2022. |
| * The Order is dated 9 June 2022 and proposes to modify the Definitive Map and Statement for the area by upgrading a length of footpath to bridleway as shown in the Order plan and described in the Order Schedule. |
| * There was one objection outstanding when Devon County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is confirmed subject to the modification set out below in the Formal Decision.** |
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Preliminary Matters

1. This case concerns the proposed upgrading of footpath No. 28 Wembury to bridleway. The footpath runs between Warren Lane and Church Road along a lane known as Brownhill Lane. Devon County Council are the Order making authority (OMA) and are supporting the Order.
2. I made an unaccompanied site visit on 17 October 2023, when I was able to view the full length of the Order route. Following my site visit it came to light that the OMA had not submitted a statement of case, this was due to an administrative error at The Planning Inspectorate. Therefore, additional time was allowed for the OMA to submit their statement of case, which was then circulated to the other parties for any comments. I have not felt it necessary to revisit the site.
3. The objection only relates to part of the route, between points D and E on the Order plan. This section of Brownhill Lane runs between Mewstone Avenue and Church Road, it is used as private vehicular access to 14 properties.
4. The objection submitted does raise matters that I cannot consider in reaching my decision, I refer to them below.
5. There is a typographical error in part 1 of the Order, this will be modified if the Order is confirmed. This minor modification to the Order would not require advertising if the Order were confirmed. This is referred to at paragraph 34 below.

The Main Issues

1. The criteria for confirmation of the Order are contained in section 53(3)(c)(ii) of the 1981 Act. This requires me to consider whether the evidence discovered, when considered with all other relevant evidence available, is sufficient to show that footpath No. 28 should be upgraded to a bridleway, and that the Definitive Map and Statement (DMS) require modification.
2. The evidence is composed of claimed use by the public as a bridleway. Accordingly, I need to determine whether presumed dedication has arisen under the tests set out in section 31 of the Highways Act 1980 (The 1980 Act). Some documentary evidence is also available to me. My conclusion on the evidence as regards the existence or otherwise of the higher rights claimed is reached on the balance of probability.

Reasons

***Documentary evidence***

1. A series of Ordnance Survey map extracts dating between 1809 and 1975 have been provided. These show the physical existence of the Order route. It is shown as a defined through route with solid lines on both sides. The 1854-1863 25-inch edition shows the Order route coloured sienna, the same as other known public highways in the area.
2. The Wembury Tithe Map 1839 shows the full length of the Order route as a defined lane. There is no colouring on this map and the Order route is unnumbered, the same as the other lanes in the area.
3. Page two of the original parish survey dated 1953 notes the Order route as a ‘Public Footpath and Accommodation Road’, it makes clear that Brownhill Lane was not repairable by the County Council. The route was recorded on the final definitive map as a footpath in 1962. In 1969 Wembury parish council sent a report to the OMA containing additions and corrections to be made to the definitive map, footpath 28 was listed to be redesignated as a bridleway. However, in 1978 the parish council conceded that the use as a bridleway had been permissive, they did not think there was evidence of use on horseback by the public at large.
4. A booklet titled ‘Wembury Footpath and General Guide’ published in 1976 describes footpath 28 from Wembury House to Brownhill Lane and Church Road. At the end of the description, it states *‘The path gets very muddy in wet weather due to use by ponies*’. However, that statement does not clarify if the use was by adjacent landowners, users with permission or the general public.
5. In the aerial photographs from 1946, 1999 and 2015 the route of Brownhill Lane can be seen, however for the most part the surface is obscured by the vegetation.
6. The evidence from the Land Registry shows that the whole of the Order route is unregistered, although all the adjoining land is registered.
7. A representation made of behalf of the Byways and Bridleways Trust (BBT), in addition to the Ordnance Survey maps and Tithe Map evidence referred to above, also refers to the fact that the Order route is named. It is stated that such named lanes formed part of the public transport network. The representation also refers to ‘the thoroughfare principle’. It is stated that a way between two public ways is itself public and that Brownhill Lane, which forms a thoroughfare between Warren Lane and Church Road, is a highway and should be recorded as at least a bridleway.
8. Reference is also made to the instructions given to Ordnance Survey field examiners (surveyors) in 1905. Surveyors were instructed to show routes that were *‘of use or interest to the public’* and only to show a clearly marked track if *‘it is in obvious use by the public’.*  It is stated that the instruction as regards the ‘FP’ notation infers that all roads shown were public, since the letters ‘FP’ were used to distinguish those roads which were not suitable for horses and wheeled traffic.
9. A further document and two cases have also been submitted by the BBT. A British Horse Society paper titled “The use of Ordnance Survey Maps before the depiction of Rights of Way” which concludes that these maps were used by the public for navigational purposes from the first editions in the early 1800s. It is stated that the through roads and tracks shown on them were regarded as public.
10. The case of *The Attorney General v Council of the Metropolitan Borough of Woolwich* [1929] KBD 173 is submitted, several quotes from the judgement of Shearman J are highlighted. One states, *“Plum Lane” – a “lane” usually means a minor road leading between one main road and another main road”.*
11. The case of *The King v The Marquis of Downshire* [1836] 4 AD&E 697 is submitted. The BBT state the majority of the case is not relevant, however a quote from Patteson J is highlighted to show the judge’s view of legislation and the meaning of ‘roads’. *“Acts of Parliament are so loosely worded that an argument from the use of one word in one part of a clause, and another in another, has not much weight with me. I should take ‘road’ here, to mean anything over which the public has any right to go.”*
12. It is clear from the documentary evidence that the Order route has been in existence since at least 1809. I consider the Ordnance Survey maps, particularly the first series dated 1809, and the Wembury Tithe Map of 1839 are good evidence that public rights, higher than that of a public footpath, exist on the Order route.

***User evidence***

*Date of bringing into question*

1. There are two possible dates when use of the Order route was brought into question. The first is November 2018 when there was a public parish meeting to open the Definitive Map Review in Wembury. Following this meeting interest was shown by local horse riders in claiming footpath no. 28 Wembury as a public bridleway and some evidence was submitted at the time. The second date is 20 April 2021 when pre order consultation notices were placed on the route.
2. A bringing into question arises when at least some of the users are made aware that their right to use a way is being questioned. At the meeting the horse riders, if they were not already aware, would have realised that the route was recorded as a public footpath. I consider the ‘bringing into question’ to be the date of the meeting, as it was this that prompted the users to begin gathering evidence for the Order route to be recorded with the higher status they believed it enjoyed. It follows that I will examine use during the 20-year period prior to the parish meeting, that is November 1998 to November 2018.

*Whether use was as of right and without interruption*

1. Evidence is provided in 15 user evidence forms claiming use over a period from 1966 to 2020. All of the individuals claim use on horseback, some also used it on foot and two have also driven vehicles along the route. None of the individuals indicated they were challenged or interrupted in their use of the Order route. Only one individual states that their use was with permission, this was given by the owner of the yard where her horse was kept. She was told she was allowed to drive on the lane. Two further individuals, although they state they did not have permission, refer to their horses being kept somewhere on Brownhill Lane. They may therefore have used the route with implied permission or in a private capacity. However, the two individuals have only used the route more recently between 2019 and 2020.
2. Frequency of use on horseback varied from daily, weekly, to about 20 times a year. Use of the route was for pleasure. The OMA have stated that tracking data from the Strava application, when viewed in May 2021, does indicate that the footpath was being used by cyclists although not as frequently as the neighbouring county roads. I did see evidence of both horse and cycle use on my site visit. There are 4 individuals who have used the route on horseback for the full 20-year period. A further two individuals have used it for 18 years and 16 years of that period, and another for 7 years. The remainder of the use appears to be more recent, from 2016 onwards, however the use is frequent, daily or weekly.
3. The claimed use has not been disputed. In my view the evidence of use is sufficient to raise a presumption of dedication. However, this presumption can be rebutted if there is sufficient evidence on behalf of the landowners to demonstrate they had no intention to dedicate the way as a bridleway.

*Whether there is sufficient evidence of a lack of intention to dedicate by the landowners*

1. The whole of Brownhill Lane between points A-E on the Order plan is unregistered at HM Land Registry, although the adjoining land is all registered. The adjoining landowners may have some ownership rights to the middle of the lane.
2. There are 14 properties along the section D-E on the Order plan, it is likely that these properties have acquired private rights of access with vehicles.
3. No rebuttal evidence has been submitted demonstrating that adjacent landowners have made any overt actions at any time to deter or prevent the public from using the Order route as a public bridleway. The objector has referred to the section D-E on the Order plan and stated there have been a number of incidents or altercations where riders and drivers have needed to stop sharply. He comments that the lane is used by delivery vans and residents in vehicles and there is no room for horses to pass. I consider that this does not amount to a lack of intention to dedicate, there is no evidence of the horse riders use of the lane being challenged by any of the adjacent landowners.
4. I consider that the user evidence is sufficient to raise a presumption of dedication as a public bridleway. In my view the claimed use meets the tests set out in the 1980 Act. The evidence shows that the use of the lane on horseback has not been challenged.

*The character of the way*

1. The whole of the Order route was recorded as a public footpath on the Definitive Map with a relevant date of 11 October 1954. However, by 1969 the Parish Council sent a report indicating that Footpath no.28 should be upgraded to bridleway status. It is clear that the route has a long history, the full length appearing on the 1809 one-inch Ordnance Survey map. The Order route was in existence long before the properties were built that are now either side of the section D-E. The fact that this section is now used by vehicles with a private right of access does not affect the status of the public rights. Many privately owned or maintained lanes exist which also carry public rights of way. I conclude that in this case the Order route is a way the character and use of which can give rise to a presumption of dedication. It follows that the Order should be confirmed.

**Other Matters**

1. The objector raises a number of matters, these all relate to the section D-E on the Order plan, including safety, accessibility, unsuitability, and concerns regarding the width of the route. It is stated that when the lane is used by delivery vehicles and refuse collections, they take up the full width of the lane and there is no room for horses to pass. I consider that an obstruction of this nature would be temporary, users of the route would not be significantly affected by this. It is stated that this section of Brownhill Lane is a busy residential street and is not suitable for use as a bridleway due to the potential conflict with vehicles. There are concerns regarding the limited visibility for those residents exiting their driveways onto the lane. However, care and due diligence must be taken by all those using Brownhill Lane.
2. Whilst I understand and sympathise with the points raised by the objector, I am unable to take such matters into account under the 1981 Act. I must restrict my findings to whether the tests set out at paragraphs 6 and 7 have been met, such that an existing right of way should be shown in the DMS as a different status and the records amended as necessary.

Conclusions

1. I conclude that the combination of the documentary evidence and user evidence is sufficient to show, on the balance of probabilities, that footpath no. 28 Wembury should be upgraded to bridleway status.
2. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with modification.

Formal Decision

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

* On the third line of the third paragraph in Part 1 of the Schedule replace ‘Warren **Road**’ with ‘Warren **Lane**’.

J Ingram

INSPECTOR

