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| **Order Decision** |
| Site visit made on 14 January 2025  **by David Wyborn BSc(Hons) MPhil MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 19 March 2025** |

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| **Order Ref: ROW/3327092** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Cornwall Council (Addition of a Restricted Byway at Crafthole in the Parish of Sheviock) Modification Order 2022. * The Order is dated 30 June 2022 and proposes to modify the definitive map and statement for the area by adding a restricted byway as shown in the Order plan and described in the Order schedule with consequential amendments to the definitive statement. * There was one objection outstanding at the commencement of the site visit.   **Summary of Decision: The Order is confirmed.** |

Procedural Matters

1. The Order seeks to amend the definitive map and statement (DMS) by the addition of a restricted byway, which would have a distance of about 32m. If confirmed, the route would pass between two public roads in a position to the broadly south east of the Finnygook Inn building (the Public House), within the village of Crafthole. It is shown on the attached Order plan as the route between points A and B. I conducted an accompanied site visit on 14 January 2025 to examine the Order route and surroundings.
2. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of an event specified in section 53(3)(c)(i), namely that a right of way which is not shown in the DMS subsists or is reasonably alleged to subsist over land in the area. The application has been made on the basis of both documentary evidence and user evidence.
3. Relevant to the considerations is that on 2 May 2006, section 67 of the Natural Environment and Rural Communities Act 2006 (NERC Act) came into effect. This provides that an existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which immediately before commencement of the NERC Act was not shown in the DMS, or was shown as either a footpath, bridleway or restricted byway. Neither Cornwall Council (the Council) or the applicant argue that any of the exceptions, that would allow rights for mechanically propelled vehicles to have been preserved, would apply in this case. As a consequence, based on the evidence and that any rights have not been preserved, the Order seeks a restricted byway. This would, if confirmed, allow public use of the route for walkers, horse-riders and carriage-drivers, and pedal cyclists.

**The Main Issue**

1. The main issue is whether or not the evidence as a whole suffices to show that, on the balance of probabilities, the claimed route exists and/or has been used in such a way and to such an extent that a restricted byway can be presumed to have been established and this should be recorded on the DMS.

Reasons

*Documentary evidence*

1. Section 32 of the Highway Act 1980 sets out that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.
2. The Council, which is the Order Making Authority (OMA), has set out in its evidence a series of maps and plans. The objector has commented on this and other submissions, and I have examined this information as part of my considerations.
3. The submissions from the Council include the Tithe Map of Sheviock (c1840) which shows the route A to B passing to the side of the now Public House. This building is coloured in red, indicating an inhabited building at that time, and the route is bounded by buildings on the other side. The Order route is coloured on this Map and depicted in the same way as other roads in the vicinity, which now form part of the public highway network. The land over which the Order route passes is identified without subdivision or separation from the other roads, and I consider, on the information available, is identified in the apportionment as roads and waste with no titheable value.
4. The purpose of a tithe map was to identify titheable land and not highways. Nevertheless, a tithe map can provide good evidence of the state of the land at that time. In terms of consistency of annotation on this Tithe Map as a whole, and with no tithe value, the inference is that the route A to B was a road that formed part of the wider network at that time.
5. The evidence from the Council also includes the maps in association with the Finance Act 1910. Both the working copy record sheets - District Valuation Map Cornwall XLV.14 Extract (c1911), held at the Kresen Kernow Record Office, and the Valuation Map (c1911) held at the National Archive, show the route A to B excluded from any hereditaments. This is important because the 1910 Act required all land to be valued, but routes shown on the base maps which correspond to known public highways, usually vehicular, are not normally shown as included in the hereditaments, i.e. they will be usually shown uncoloured and unnumbered.
6. Documents and plans produced under the Finance Act can provide good evidence regarding the status of the way, however, case law indicates that Finance Act records are not definitive and they are one part of the evidence to consider. Nevertheless, if a route in dispute is external to any numbered hereditament, which is the case with this Order route, there is a strong possibility that it was considered to be a highway at that time, normally, but not necessarily a vehicular public route.
7. There is a line across the centre of the route shown on both these Finance Act plans. However, I consider that this is a brace line depicting a link between the two adjoining sections of land for tax purposes, rather than a barrier feature. In conclusion, these Finance Act plans provide strong evidence of the Order route being a road, because the land that was annotated for tax purposes, excluded roads. Furthermore, these plans show consistency of the Order route with other, what are now, public roads in the vicinity and it is reasonable to consider them as all having similar rights.
8. In terms of other maps which are provided in the evidence, the Thomas Prides Map of the Manor of Sheviock 1775 (Carew Pole Archive) shows a clear link from A to B in the same way as other roads in the area. Spry’s Map of the Duchy of Cornwall holdings within the Borough of Crafthole 1792 (Carew Pole Archive) also shows the Order route and in the same way as other roads which now form part of the public network.
9. The Council also include in its statement a sketch plan of lands transferred to Reginald Pole Carew by Lord Clinton in 1825. The Council explain that while its provenance could not be verified and the image is of poor quality, the Order route can be identified bounded by solid black lines, connecting to and without a break in a manner no differently to nearby roads. I agree with this assessment of the Order route.
10. The submissions also include a series of Ordnance Survey Maps. I consider that the depiction of a way on an OS map is not, of itself, evidence of a highway, but that the inclusion of a route on a series of OS maps can be useful evidence in helping to determine the status of a route, particularly with other evidence.
11. In this case, extracts from OS maps from 1888, 1890, 1893, 1896, 1906 and 1964 have been submitted in evidence by the Council. While the 1890 map shows lines across the route and potentially a gate at Point A, these maps are generally consistent and clear in showing the Order route and that it links, and is depicted similarly, with other roads that are now part of the public road network.
12. Additionally, an aerial photograph of this section of Crafthole taken in 1963 shows the entrance to the Order route from the south with the adjoining Public House. This appears to show the entrance to the Order route at point B with a connection and similar treatment and surface as the nearby part of the main road.
13. The Council has also included other aerial photographs. These are a little blurry but the 1988 and 1995 photographs appear to show a link between A to B. Those aerial photographs from 2000, 2005 and 2016 (and the objector’s aerial photographs from 2001, 2005 and 2009) show most of the route but the route has what would seem to be the beer garden at the section closest to point B.
14. The objector makes the point that the route was not claimed to be a right of way in the parish survey of 1950, and it has not been on the list of streets to be publicly maintained.
15. At my site visit, I saw that the Order route is available, open and with a tarmacadam surface from the road at point A into the site and alongside part of the Finnygook Inn building. At the southern section, the surface is also tarmacadam but across this part of the Order route there are seating and tables in association with the beer garden and at the point B, joining with the main road, there is a fence with pedestrian gate.

*Conclusion on the documentary evidence*

1. In examining and considering the evidence I have had regard to the requirements of s32 of the Highways Act 1980. The mapping information generally provides reliable and detailed evidence which has been held in good custody. The Tithe Map and apportionment, the Finance Act maps, the landholding maps and the OS maps all provide consistently clear evidence of the Order route traversing from A to B and connecting with the roads at each end. With each piece of evidence, the Order route has a generally consistent appearance with other roads that now form part of the public road network, and the background information, such as with the Finance Act maps, which exclude the land from any hereditament, generally add to and support each other. This evidence leads to the conclusion that the rights over the Order route were at those times the same as on the adjoining public roads, and there does not appear to be any restriction or limitation on use or access. The earlier aerial photographs provide further collaboration of the mapping evidence of the existence of the route at those times.
2. Consequently, while acknowledging that the route does not appear on the 1950 parish survey, the documentary evidence when considered as a whole leads to the conclusion that the Order route was a public route with carriageway rights that would now include for the passage for mechanically propelled vehicles.
3. The evidence does not identify any legal or other event that has extinguished or altered those rights. Based on the legal presumption that once a highway, always a highway, it is concluded that the documentary evidence demonstrates that the Order route has historically been a public right of way with carriageway rights, including for mechanically propelled vehicles.
4. In coming to this conclusion, I have had regard to the submissions from and on behalf of the owner of the Public House, as well as his legal advisers at the application stage. I understand those points that are being made that each map or piece of evidence may have its particular issues or be open to some interpretation. However, when the documentary evidence is examined as a whole, it produces a clear and convincing pattern of information that leads to the conclusion on its historical status as a route with public vehicular rights, in the same way as the adjoining roads.
5. The Order route is not shown in the DMS. The NERC Act, because the exceptions do not apply in this case, does not preserve the higher rights for mechanically propelled vehicles along this route. Other rights are not affected. Consequently, the documentary evidence substantiates the case for the Order route to be recorded in the DMS as a restricted byway.

*User evidence*

1. The application was supported by 19 Public Rights of Way evidence forms. Additionally, in the course of its investigations, Cornwall Council discovered an additional 6 Public Rights of Way evidence forms submitted to Caradon District Council in 1981. One person submitted evidence on both occasions.
2. Given my conclusion on the documentary evidence above, I intend to also consider the user evidence on the basis of common law and not statute. I will therefore not need to examine, in this section, s31 of the Highways Act 1980 and the related considerations as to a 20 year period when the route was first brought into question or whether there was any intention to dedicate the route.
3. The user evidence indicates that bollards were erected in 1970 within the route in a location by the side of the building, and a fence and gate in 2010 along the side of the B3247 at point B. The bollards did not prevent pedestrian access and it was not until 2010 that access to walk through the site along the route appears to have been restricted.
4. The evidence from users is generally consistent and local residents confirm that they have used the route on a regular basis on many occasions over quite an extensive period. There is clear stated information from users that they have walked the route, in some cases since the 1930s to the time when the fence and gate was erected. These users say they were not challenged, and user evidence includes information from a lady who indicates that she walked the route from 1937-1981. This lady confirms that she was also the landlady of the Public House for 10 years and told not to obstruct the right of way at those times. Another witness is the owner of the adjoining Lynher House who had, by the 2010 application seeking to have the route recorded, lived in the house for the previous 50 years. This occupant has confirmed that she walked the route since 1960 and seen others walking the route, although this owner had some rights along the route to access Lynher House including for the delivery of coal. There are comments in the user evidence that the route is known locally as the Ope.
5. The evidence on vehicular use of the Order route is more limited, with a small number of local residents indicating that they had driven the route on some occasions from about the 1950s/1960s until 1970, when the bollards were erected. This user evidence is consistent with the mapping and other evidence detailed above, although there is only limited corroboration from other users on vehicular use.
6. It is argued that the beer garden has been in this position for over 50 years and caused an obstruction to the use of the route. However, this does not appear to have affected the public’s ability to walk through this area, including any gates, during the period up to 2010, as witnessed by the user evidence forms. Furthermore, the beer garden appears not to been in place to hinder the use for vehicular traffic prior to 1970.
7. Drawing these matters together, the user evidence indicates that the way had some vehicular use prior to the erection of the bollards in 1970 and pedestrian use continued until about 2010 when the fence and gate were erected. This evidence adds to the documentary evidence that the route was available and used by right by the public. Although the bollards prevented vehicular access after 1970, they could not prevent the existence of rights that were already in place and, therefore, I consider that the user evidence provides support to, and does not detract from, the conclusions already reached from the documentary evidence.

**Other Matters**

1. The owner of the Public House has submitted detailed written representations objecting to the Order being confirmed. As explained, the southern section of the Order route passes through land that has been used as a beer garden for some years. Consequently, the business concerns of the public house are understandable were the Order route to be recorded as passing through this area.
2. However, an application has been made by the Parish Council to the OMA and the Council has determined that application subject to the requirements of the law; and I am required to do the same. These requirements are based on, in this case, the historical evidence as to whether a route, with its status, existed in the past, and/or the user evidence.
3. Consequently, the issues raised by the owner of the public house, including in the business impact statement, and other matters such as highway safety issues at the access onto the main road, and the slope of the land and whether it is suitable for walkers, cyclists and/or horses, are not matters that influence the consideration of the key legal approaches as to whether the Order route should or should not be confirmed.
4. I have also noted the petition raising concerns that the recording of a restricted byway would adversely affect the beer garden. However, this petition does not include any convincing evidence to dispute the documentary position or alter the legal approach to determining the Order. Consequently, the petition is not a matter that can be given weight in the process.
5. Arguments regarding the notification procedures and whether the owner was correctly informed of the application have been addressed by the Council in its statement. This includes that it complied with the requirements of Schedule 15(3) of the Wildlife and Countryside Act 1981 and it received a dispensation from the Secretary of State to serve the notice impersonally because of the nature of the title on this strip of land. A copy of the notice, Order and Statement of Reasons was sent to the leaseholder of the Public House and other publicity, including in local newspapers, was undertaken. Consequently, it is considered that all parties, including the owner, have been able to engage in the modification order process.
6. I appreciate that the original application from the Parish Council sought to have recorded in the DMS the route as a public footpath. The owner of the Public House, through which the route A-B passes, while objecting, has indicated, without prejudice, that a footpath could potentially be accommodated through the site. Nevertheless, the Order needs to be determined in accordance with the statutory provisions and based on the evidence. Despite the application from the Parish Council making the case for a public footpath, the Council came to the view that the evidence indicated that a restricted byway should be recorded. For the reasons explained, I agree.
7. While it is not a matter for me to comment upon, I note that the Council in its statement has indicated, notwithstanding its approach to the consideration of this Order and were the Order to be confirmed, it would be an option for the landowner to apply to stop up part of the width.

**Width of route**

1. It is also argued by the objector, without prejudice to other objections, that the width of the route should be recorded as 2.5m throughout because this reflects what is available on the ground as a route. There is a section alongside part of the Public House where the width between the raised area around the building and the boundary with Lynher House is about 3.0m. However, the proposed 2.5m width is not supported by the historical evidence.
2. The Council has referred to advice which indicates that where the width of the new way may vary frequently along its length then a suitable form of wording may say varying between X metres and Y metres as shown on the Order plan. It is also explained, where appropriate, that when considering the width of a route, reference may be made to reliable sources of mapping that may be available, for instance the Ordnance Survey 25” County Series Maps.
3. This is the approach that the Council has taken, and I am satisfied that the width of the Order route, which is specified in Part I of the Schedule, which describes the width of the restricted byway as varying between 6 (six) metres and 8 (eight) metres, is appropriate based on the evidence when considered as a whole, despite the situation on the ground.

**Conclusion**

1. The mapping and related evidence strongly and consistently indicates that the Order route was available as a public highway with carriageway rights up to and including for mechanically propelled vehicles in the same way as the adjoining road network. On the balance of probabilities, the route was a public highway at these historical points in time and there is no evidence that these rights have been extinguished or the route officially diverted. Having regard to the provisions of the NERC Act, the route should be recorded in the DMS as a restricted byway.
2. The more recent user evidence provides support and complements the documentary evidence of the public use of the route, including up to 1970 for vehicular use and up to 2010 for access on foot.
3. As a consequence, I conclude that the evidence, on the balance of probabilities, demonstrates that the Order route should be recorded in the DMS as a restricted byway. I will confirm the Order accordingly.

**Formal Decision**

1. I confirm the Order.

David Wyborn

INSPECTOR

Copy of Order Map – Not to Scale

