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| **Order Decision** |
| Site visit made on 29 January 2025 |
| **by A Behn Dip MS MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 13 March 2025** |

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| **Order Ref: ROW/3334428** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the West Berkshire District Council (Byway Open to All Traffic Cold Ash 5 (part) Width) Definitive Map Modification Order 2023. |
| * The Order is dated 19 September 2023 and proposes to modify the Definitive Map and Statement (DMS) for the area by amending the description of the restricted byway so as to clarify its width, as shown on the Order Plan and described in the Order Schedule. |
| There were 3 objections and 1 representation outstanding when West Berkshire District Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. Further representations were later received from the Green Lane Association and Bucklebury Estate.  **Summary of Decision: The Order is confirmed.** |
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| **Order Ref: ROW/3334432** | |
| |  | | --- | | * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the West Berkshire District Council (Byway Open to All Traffic Cold Ash 26 (part) Width) Definitive Map Modification Order 2023. | | * The Order is dated 19 September 2023 and proposes to modify the Definitive Map and Statement (DMS) for the area by amending the description of the restricted byway so as to clarify its width, as shown on the Order Plan and described in the Order Schedule. | | * There were 3 objections and 1 representation outstanding when West Berkshire District Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. Further representations were later received from the Green Lane Association and Bucklebury Estate.   **Summary of Decision: The Order is confirmed.** | | |
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**Background**

1. In February 2023 the Council received an application requesting that the DMS be modified to record widths on the sections of the two byways in question. The application appears to have arisen as a result of a local dispute between residents, about possible encroachment by a fronting property, onto the public highway.
2. From the submissions before me and the user evidence forms submitted, it would appear that the alleged encroachment spanned a number of years and was set before the local Ombudsman in 2016, who considered that civil litigation and / or the courts should decide the matter. The Council advised aggrieved parties that they could seek a court order or apply for a Definitive Map Modification Order (DMMO), to formally record a width of the routes in question. Mr Bailey then applied for a DMMO to be made, which the Council duly investigated, resulting in the Orders before me.

**Procedural Matters**

1. Mr Fenner drew attention to a Resolution Agreement between himself and the Council in 2016 concerning likely ownership of, protection of, and the line of the hedgerow banks by his property. The agreement appears to have been as a result of local requests for enforcement action taken further to works to the verges undertaken by Mr Fenner. At that time the Council took the view that the verges were too high to belong to the byway and enforcement action was agreed not to be taken. Mr Fenner states that the Council is legally estopped from reneging on this agreement and believes its contents are sufficient to negate the Orders under consideration today.
2. The Council have a statutory duty to investigate the application made by Mr Bailey in 2023 to modify the DMS to record a width on the byways in question, and the Orders were made based on extensive research undertaken some years after the date of the Resolution Agreement. As commented on by the Council, any view taken by them prior to the application by Mr Bailey, has no bearing on the legal width that is shown to exist on the byways based on the historical evidence before me.
3. In his submissions, Mr Fenner made reference to a related Schedule 14 appeal that he has made, which seeks to modify a DMMO (MOD291) made by the Council in 1995. This Modification Order was made to include the junction where the two byways in question meet, having previously been erroneously omitted from the DMS. The Order recorded a width for that segment of byway, which included some of the land / verge in front of Mr Fenner’s property, ‘The White House.’ The previous owners of The White House had considered that the land outside of their fence line, did not belong to them and that it should be recorded as part of the byway.
4. Mr Fenner suggested that this Order should be quashed, in light of his evidence that has been submitted for the Orders before me. However, the related appeal for MOD291 is not before me for consideration today and is therefore outside of the scope of this decision.
5. In his submissions Mr Fenner frequently stated that *‘a byway exists only in the surface of the lane.’* To clarify, this adage refers to ownership of the subsoil of a byway and does not mean that the right of way is necessarily limited to a made up surface, such as a gravel track. It can also include verges.
6. The Green Lane Association (GLASS) considered that the width of the full length of both Byways, as can be determined by the evidence, should be reflected within the Modification Orders before me. Whilst I agree with the merits of this, the Order Maps do not show the full extent of the byways for me to modify, should the evidence reflect the widths are consistent for the entirety of the byways. In a similar vein, Cold Ash Parish Council felt that other similar verges in the Parish should receive the same attention to ensure transparency and fairness. In both cases, it is open to the Council to investigate as needed and make further Orders where necessary.

*Land Ownership matters*

1. There were substantial early submissions from Mr Fenner asserting possible land ownership of parts of the byways and verges, along with discussion on aligning boundary and property rights that might extend onto the routes.
2. Later submissions from Mr Fenner appear to no longer assert ownership but instead refer to correspondence from the Bucklebury Estate in late 2024, wherein it is stated that the byways form part of their manorial waste. Mr Fenner considered that the verges being manorial waste, meant that they could not form part of the byways. However the byways themselves also form part of the manorial waste and land being manorial waste does not preclude public rights existing across them.
3. In more recent submissions Mr Fenner stated that the Finance Act 1910 maps identified Mereings to the boundaries for Bucklebury Parish and the Property Rights of the landowners of the Parish. He attested that the Mereings show that landowners have the *‘right to claim four feet beyond root of hedge in making their boundary and may use the land for whatever purpose they choose.’*
4. The parish boundary is depicted as four feet from the root of a hedge on the OS maps, however it does not necessarily follow that the ownership of any property that is bounded by a hedge in the parish, extends four feet from the root of a hedge. Nevertheless, even should that attestation be proven to be correct in this instance, it is the case that land being privately owned does not prevent public rights being acquired across it, indeed many public rights of way run across land in private ownership.
5. It was suggested by Mr Fenner in his evidence that a fundamental breach of process had occurred, wherein the Council had not consulted with the landowner of the byways prior to the making of the Orders. This allegation appears to have arisen as a result of the correspondence from Bucklebury Estate in late 2024, stating that they were owners of the land over which the byways cross. The correspondence advised that the Estate were in the process of preparing an application to register the land, as the byways formed part of the estate’s manorial waste.
6. The Council in response to this allegation, advised that they had noted during their investigations in 2023 that adjacent land was previously owned by Bucklebury Estate and had contacted them for comment. The Estate had acknowledged the Council’s email in 2023, however made no further comment until the correspondence received in late 2024.
7. I consider that the Council followed due process with regard to the legal consultation process and correctly obtained dispensation to erect notices to the owner / occupier of the land across which the byways run, which was at that time, and currently remains, unregistered. It appears from the papers before me that Bucklebury Estate did not raise an objection to the Orders in their 2024 correspondence, but requested that their ownership of the land was noted.

**Legislation**

1. The Orders have been made under section 53(2)(b) of the 1981 Act on the occurrence of an event specified in sub-section 53(3)(c)(iii) of that Act, namely the discovery of evidence by the authority which, (when considered with all other relevant evidence available), shows that the particulars contained in the Definitive Statement require modification.
2. The DMS currently shows no recorded width for the routes and as such it is necessary for me to consider the width of the byways in relation to the documentary evidence adduced. The burden of proof to be applied is the balance of probabilities.
3. I undertook a site visit on 29 January 2025, accompanied by Mr Bailey (the applicant), Mr Fenner (the principal objector), and Mr Higgins (the Council).

**Reasoning**

***Evidence***

1. The routes came into existence historically, they have been depicted in historic records for centuries and their existence is based on historic evidence. As such, any width recorded should also be based on historical evidence. I have been presented with a number of documents, photography and user evidence forms, all of which have been considered in relation to the width of the Order routes.
2. The origins of the byways start appearing in early mapping evidence, dating back to Rocque’s Map of 1761, with the Ordnance Survey (OS) drawing of 1808 clearly showing both routes, bound by solid lines. From that point onwards the routes are depicted in a similar manner on every OS map. The Tithe Map of 1842 and the Finance Act records from 1910 also show the Order routes bound by solid lines, and excluded from surrounding land parcels.
3. As such, it is clear from the historical mapping that the byways have been in existence since the 18th Century. Although a specific date of when public rights were dedicated cannot be proven, the evidence would suggest that, on the balance of probabilities, the routes held public rights from at least the middle of the 19th Century.
4. When considering the widths, whilst early maps such as those of John Rocque 1761 and John Willis of 1768 show the Order routes, the depiction of the byways are far more defined in the 1808 OS surveyor drawing. Looking at the 1842 Tithe Map, this shows Byway 26 as narrowing, past its junction with Byway 5. Byway 5 is depicted as more uniform in width.
5. Turning to the OS Maps, the 1880 1:25000 County Series Map and the 1883 map of scale 6 inches to 1 mile, both clearly depict both routes enclosed between solid black lines, again showing Byway 26 narrowing, with Byway 5 being a uniform width for that part which is affected by the Order. East of plot 107 is the notation *‘4ft R.H’.* This denotes that the administrative boundary ran 4 feet from the root of the hedge on the boundary of plot 109, which is adjacent to plot 107, now The White House, whose boundaries the byways are located next to. This denotation is suggestive of hedge boundaries being in existence at that time and the same notation is evident on other later OS maps.
6. The 1898 OS map, similarly of 6 inches to 1 mile scale, consistently repeats the denotation of the two byways in question, with the eastern line denoting Byway 5 having a thickened casing line, suggesting a publicly maintained road for use by wheeled traffic at that time. This is supported by the 1898 Object Name Book which describes an *‘unmade public road extending from the Firs Tree Public House to The Alley’*. Byway 26 does not have a thickened casing line indicating it was unmetalled. By this point the northern end of Byway 5, which is outside of the Orders before me today, narrows. The 1912 OS map, of scale 1:2500, shows a similar picture, albeit the casing can no longer be seen on the eastern side of Byway 5.
7. The Finance Act 1910 map was also submitted in evidence. This legal document uses the 1912 OS base map and shows both byways uncoloured and excluded from the surrounded hereditaments. Whilst Mr Fenner suggests in his evidence that the representation of a route in the Finance Act records is not evidence of a right of way, the status of the byways are not in question here, it is the recording of a width.
8. The next large scale OS map submitted is dated 1960, at a scale of 1:10000, and shows the byways with the same shape and width as the 1912 map. For the first time a house is shown on the plot, whereas previous references to the plot describe a pasture and later a garden.
9. A 1968 land registry map shows a more curved south west corner for The White House, suggesting a driveway has been constructed and by 1982, the OS map at a scale of 1:2500 shows verges to both byways around the edges of The White House property. The eastern verge for Byway 5 terminates where it meets the neighbouring property to the north. The solid boundary line for The White House runs inside of the verges, matching the red line boundary on the submitted Land Registry documents for the house, which depicts the verges outside of the property boundary. The current Ordnance Survey Master map also shows the verges.
10. Verges were not depicted on earlier OS maps. OS mapping instructions in 1905 stated no verges were to be shown unless they were approximately 3 metres in width. After 1956 no minimum width was required and verges, which were defined as the area between the edge of the roadway and the adjoining property boundary, were depicted. On my site visit I noted that verges do appear to form part of the character of the immediate locality.
11. Bernard Clark commented on the 1982 OS map and the current OS Master Map, the fact that they show verges and a useable byway width that is less than what is on the ground today and questioned why any changes needed to be made. However where, there is no legal width recorded for a right of way, the determining of any such width should be based upon what was available to the public at the time it was dedicated. As such, the useable width today, does not necessarily reflect the highway width historically available for use.
12. Turning to the Definitive Map records, the 1950 Definitive Map Survey notated the section of Byway 5 in question as between 9-14 feet and noted that it had been well used by the public throughout living memory, supporting public use back to the 19th century. The same records described a width of 10-16 feet for Byway 26, again noting that it had been used throughout living memory.
13. Albeit these widths were on the survey sheet, they were not then recorded on the Definitive Statement. The Council considered that these widths were likely what was a useable width on the ground at the time and suggested that the significant difference between these widths and those calculated from the OS maps / Finance Act Map from 40 years previously, was that the verges between the used surface and property boundary lines were not included in the parish survey but were included in the earlier mapping.
14. I concur with the Council that the parish survey likely measured the useable widths as they were in 1950. However it has been found, on the balance of probabilities, that dedication occurred in the previous century and so the useable widths of the byways in 1950 does not assist in determining the widths that would have been available for public use 100 years earlier.
15. Mr Fenner commented that the Order routes were only ‘properly designated’ as byways in the 1990’s and that the steepness of the current banks verging the byways have seen no significant change since then. Aligning to this Mr Fenner considered that the Definitive Map records should be used to define the widths, rather than ‘fossil records.’
16. However, the date that the byways were ‘properly designated’ is not the date they came into being, but rather the date that they were recorded on the DMS. As such, the recorded date is irrelevant to the legal widths that the public would have been able to use historically.
17. Several photographs, aerial photography, google street view images and user evidence forms were also submitted. The photographs show how the verges have altered since the 1980’s, and more specifically from 2015 onwards. The user evidence forms submitted support the long use of the byways, and in some evidence, use of the raised verges next to them. They indicate that cars and other users while once able to pass each other with ease, are no longer able to do so, due to the lanes having been *‘substantially reduced in width.’* This information is helpful in building a picture of how the byways have physically altered in contemporary times, but given the ancient nature of these highways, is less helpful in ascertaining historical widths, as it is clear that the highways predate the photographs by at least one hundred and fifty years. With that in mind, the widths cannot be defined by modern day hedge lines, but must be ascertained using historical documentation.

**Conclusions on the evidence**

1. The evidence shows, that on the balance of probabilities, the byways are ancient highways, with notations from the 1898 Object Name Book referencing what forms Byway 5 as a ‘*public road’* and the parish survey in 1950 supporting this, indicating that the routes had been used *‘throughout living memory’.* The historical mapping shows the existence of the byways extending back to the 1800’s and there is clear consistency on the mapping regarding their position, width and layout. Whilst the date of dedication is presumed to be out of living memory based on historical mapping, public rights were likely dedicated in the 19th Century. Correspondingly the maxim *‘once a highway, always a highway’* applies.
2. Turning to the question of widths, the OS mapping from 1880 onwards notate the existence of hedges forming the administrative boundaries on adjacent plots. I concur with the Council that it is reasonable to assume, without cogent evidence to the contrary, that the hedging would have continued onto the plot of land next to the byways, especially as the Tithe Apportionment for 1842 lists the plot as house, garden and orchard and the OS Book of Reference for the 1880 map notates the plot as pasture.
3. Mr Fenner in his objections, considered that as the hedgerows were not physically depicted on the Finance Act Map, the map therefore did not show the true contours of the lane. He suggested that the width of the byways surveyed at the time would have included the hedges, meaning that the useable width was less than the solid lines indicated. Mr Fenner maintained his view that the Mereings indicated his landownership extended four feet from the boundary hedge, suggesting this meant that any hedge to hedge boundary presumption would be invalid.
4. The root of a hedge commonly sat on the boundary of a property, which is why the administrative boundary for the parish was described on OS mapping as four feet from the root of the hedge. Therefore, whilst the physical depiction of hedges is not shown on the mapping of the time, it is reasonable to assume, in the lack of any persuasive evidence before me of an alternative, that the solid lines depicted on the OS maps form the centre of the hedge. It would seem illogical for the surveyor to calculate a parish boundary from the root of a hedge but not use the same method for property boundaries in the locality. Hedgerows are common boundary features, however they are living features which grow. As the hedge grows outwards, this does not reduce the legal width of the highway it grows out onto, and as highlighted earlier in this decision, any ownership of land across the highway, does not preclude public rights crossing it.
5. Given the consistent mapping of the routes for over 200 years and given that the highways predate the Finance Act 1910 records by some considerable time, it is reasonable to assume that the boundary hedges were ‘fencing against the highway’ and that the hedge to hedge presumption applies.
6. As the depiction of the byways has been congruous with other mapping throughout the historic record, and including the Finance Act 1910 map, I concur with the Council that it was appropriate to use the Finance Act records, which used the 1912 OS map as a base, to define a width for the routes in question. I am satisfied that, on the balance of probabilities, the widths depicted on the Finance Act 1910 map are representative of what was considered the legal highway and available for public use, both at that time and in the preceding century, when dedication would have taken place.
7. The Council determined the widths of the Order routes by scaling off measurements taken from the Finance Act 1910 map and used the hedge to hedge principle, which applies where the boundary features were laid out with reference to the highway. The widths ascertained using this method were, for Byway 5, between points A-B, varying between 5.6 and 7.1 metres as shown uncoloured on the Inland Revenue Valuation Plan prepared under the Finance Act 1910 and for Byway 26, a width varying between 4.5 and 8 metres between points X-Y as shown uncoloured on the Inland Revenue Plan prepared under the Finance Act 1910.
8. The objector commented that the OS map used for the Finance Valuation was on a scale of 25 inches to the mile and that it was accurate at best to plus or minus 12 feet in any direction, giving it no meaningful value in determining the widths of the byways. Whilst I accept that there may be positional discrepancies on a two dimensional map, this will have little effect on the relative position of one feature to another on the ground, such as boundary hedging. As such it does not detract from the usefulness of the OS maps to define the width between two features.
9. I consider the methodology used by the Council both reasonable and logical and whilst the mapping does not and cannot provide an exact width, it does assist in ascertaining the likely widths that were available at the time the routes were dedicated as highway.
10. In the absence of any records of a legal reduction in width, or evidence that there were any physical features preventing use of any part of the highways, I conclude that the solid line boundaries used on the Inland Revenue Valuation Plan for the Finance Act 1910, which excluded the byways from taxation, are representative of the widths available for public use at the time of dedication, and that the Orders should be confirmed.

**Other Matters**

1. An objection was received from Susan Shakespeare who was concerned that confirmation of the Orders would result in the removal of hedgerows and vegetation. This concern was also echoed by Bernard Clark and Mr Fenner.
2. My role is solely to determine a legal width on the sections of byways in question, which, as remarked upon by both the applicant and GLASS, does not, on its own, facilitate the removal of hedges and trees. I fully appreciate that any future actions which objectors perceive might or might not be undertaken by the Council are of genuine concern to them, however these hypotheses are outside of the scope of what I may consider under the legislation to be applied.

**Formal Conclusion**

1. Having regard to the above, and all other matters raised in the written representations, I conclude that the Orders should be confirmed.

**Formal Decision**

1. I confirm the Orders.

*Mrs A Behn*

**INSPECTOR**



