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| **Order Decision** |
| Site visit made on 11 March 2025 |
| **by Mrs A Behn Dip MS MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 4 April 2025** |

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| **Order Ref: ROW/3333716** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as Hertfordshire County Council (Hitchin 42) Modification Order 2022. |
| * The Order is dated 10 March 2022 and proposes to modify the Definitive Map and Statement for the area by upgrading part of Hitchin Footpath 42 to a restricted byway, as shown on the Order Map and described in the Order Schedule, along with the recording of a width for the Order route. |
| * There were 2 objections outstanding when Hertfordshire County Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is confirmed** |
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Preliminary Matters

1. In August 2017, an application to upgrade part of Footpath 42 (FP42), to a restricted byway was made to the Council by Philip and Helen Jarvis (the applicants). This application was then subject to a Direction on 3 July 2019. In 2021, after due investigation, the Council consented to make an Order upgrading the northern section of FP42 to a restricted byway. Following the making of the Order, objections were received from the landowner and family members, and a letter of support was received from the British Horse Society.
2. The objectors stated that they are the owners of the land and the application is not in the interest of the landowners or the public. The legislation applicable in this case is not merit based, but evidential only and seeks to record what public rights may have existed historically on the Order route. Land ownership is not altered should the Order be confirmed and ownership of land has no bearing on the public rights that are found to exist over it.
3. Some evidence presented by the applicants relates to the possible responsibility or ownership of the Order route, being that it remained unregistered until 2015, when it was then registered to Mill Farm. They raise questions about the validity of the land registration / title of the Order route and the fact that the title does not acknowledge highway rights across it.
4. Aligning to this they drew attention to *R.(on the application of Smith) v The Land Registry (Peterborough Office) v Cambridgeshire County Council [2010]* highlighting the principle that it is not possible to adversely possess an existing highway. Whilst I recognise the direction that the applicants take in this regard, a First Registration would not override the Definitive Map, which is conclusive evidence of the existence of FP42. Nevertheless, it is not within my power to address any issues relating to Land Registry, only to consider whether higher rights than a footpath exist across the Order route. As the applicants acknowledge in their statement of case, *‘ownership has no relevance to the public highway status of the Order route in relation to recording the correct status of it.’*
5. I made an unaccompanied site visit on 11 March 2025 when I was able to view and walk the Order route. 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.

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. The Order has also been made in consequence of the discovery of evidence as provided in section 53(3)(c)(iii), in that other particulars contained in the Definitive Map and Statement require modification, namely defining the width of the Order route and recording that there are no limitations.
3. The DMS currently shows no recorded width for the route and as such it is also necessary for me to consider the width of the section in question, in relation to the documentary evidence adduced. The burden of proof to be applied is the balance of probabilities.
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 as a restricted byway. There are several records before me, as evidence discovered, and in making my decision I have considered them below.
5. Should the evidence be supportive of possible unrecorded vehicular rights, 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**

*Ippollitts Inclosure Map and Award 1818*

1. Inclosure documents can provide very good evidence of public rights of way, including public roads. The Inclosure map shows the Order route coloured sienna in the same manner as other roads and bound by solid lines. It is depicted as a wide and short cul de sac off the main road, and appears to provide access to the mill pond, a building and an adjoining mead. While it is not labelled like other roads in the Award, neither is it mentioned as forming part of the surrounding hereditaments.

*Hitchin Tithe Map and Apportionment 1844*

1. The Tithe Map, whilst showing other surrounding roads, does not show the Order route.

*Ordnance Survey (OS) Mapping 1851 -1981*

1. Produced at a scale of 1:2640, the 1851 Hitchin Town Plan shows the Order route, coloured sienna, as part of an onward route southwards. Depicted with a solid line to the east and dots to the west, the route tapers from the end of the Order route at point B, into a narrower onward route, which is shown between dotted lines. Two buildings appear to be adjacent to the Order route. Other rights of way shown on the Definitive Map today are also depicted in the same way on this map, albeit there are also some routes shown that are not recognised as public rights of way and form parts of private gardens.
2. The OS maps of 1878 and 1897 both show the Order route as bound by solid lines with an onward route southwards from point B, depicted by a single dotted line. The maps show the Order route as part of plots 786 and 815, along with Road off Charlton Road which is recognised as public vehicular highway today. The parish boundary is depicted running down the centre of Road off Charlton Road as well as the Order route, and is marked on the map as *‘C.R’* (centre of road). The applicants felt that the original parish boundary running along the centre of the Order route, may have been the reason that it was not explicitly defined or mentioned in the Ippollitts Inclosure Award.
3. In the 1922 OS map, the Order route appears to be braced to plot 305, suggesting it is part of that plot. There is a pecked line at point A of the Order route possibly denoting a change in surface. By 1982, the Order route is notated as a track and appears to be braced to the field to the south of point B and regarded as an occupation road.
4. The OS maps show the Order route in a generally consistent manner. The Council considered that the depiction of the Order route as part of Road off Charlton Road on the 1878 and 1897 maps suggested it held the same status. They drew attention to *A Descriptive Manual of OS maps* by Harley in which the author states that some features are always separately numbered and measured irrespective of their size and that this included public roads. The Council also pointed out that none of the earlier OS maps denoted a physical barrier at point A, where the Order route met Road off Charlton Road, although the maps consistently showed a physical barrier, such as a gate, at point B.
5. 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. As such, albeit I accept the Council’s comment regarding the depiction of the Order route on the 19th Century OS maps, these maps hold limited weight in demonstrating the status of rights of way. They are useful however, in showing what physical characteristics existed at the time.

*Historical photographs 1880 and pre-1880*

1. The photographs show point A of the Order route, with the Council suggesting that there seemed to be no notable difference from the rest of Road off Charlton Road. I do agree with this, albeit the photos show only part of the Order route.

*Highways Maintenance Records*

1. The schedule for an 1899 Main Road Order describes part of Brick Kiln Lane and part of Road off Charlton Road notating *‘including the short branch road leading towards Charlton Mill’*. It is unclear as to whether that branch refers to, or included the Order route.

*Finance Act Documents 1910*

1. The Finance Act 1910 maps show the Order route uncoloured and falling outside of land holdings. The existence of public rights of way effectively reduced the value of the land and liability for taxation and they were therefore included in this statutory survey. These records do raise a strong possibility of the existence of a public highway, possibly vehicular, along the Order route, although it cannot be assumed that the existence of carriage rights is the only possibility for the exclusion of the route.

*Definitive Map Records*

1. In the Hilton Parish Survey of 1950-53, the purple line denoting FP42 stops short of point A of the Order route. The descriptions in the survey and the draft statement notate that FP42 starts from Mill Farm Charlton. The Council considered that although these records do not indicate clearly where FP42 started, it would suggest that at least the northern part of the Order route was considered a public road, otherwise there would be no access to the footpath. While I agree, the survey map is not clear enough in the vicinity of point A to deduce a conclusion.
2. The First Definitive Map of 1953 shows FP42 commencing approximately midway between points A and B, again indicating that at least the northern section of the Order route was considered a public road. As in the parish survey, the Definitive Statement notates that the footpath commences at Mill Farm.
3. By the 1978 Special Review Draft Map, FP42 is clearly shown starting at point B with the accompanying statement again stating that the footpath commenced from Mill Farm. This suggests that in 1978 the Council considered that the Order route was public vehicular highway. The same depiction was repeated on the consolidated maps until the year 2000, when FP42 was then shown as starting from point A of the Order route, rather than point B.
4. The Council stated that there were no legal changes to the Definitive Statement during this time and suggested that the mapped differences in the northern termination of FP42 related to the accuracy of the lines drawn.

*Aerial Photograph 1962*

1. The aerial photograph shows the Order route, similar in appearance to Road off Charlton Road, and as pointed out by the Council, not separated from the main road by any barriers and appearing to provide access to 24 Charlton Road and the field beyond. Whilst I accept the Order route looks similar in depiction and surfacing as the main road, the private driveway of the property to the left of the photograph also looks the same.

*Deeds / conveyancing records*

1. Whilst the purpose of conveyancing documents was not to record the status of a highway, they can provide useful context and information.
2. The map that forms part of the 1864 deeds for Charlton Mill does not show the Order route with any clarity. Where the Order route would run, seems to be part of the western field of Lot 412 next to the mill pond. Lot 412 is described as *‘Bushleys and Meadow’*. There appears to be a small gap, near point A, which the Council considered notated the boundary of the private land at point A.
3. The conveyance for Mill Farm in 1975 shows the Order route included in the red line boundary of the sale. Current land registry documents show that the Order route was registered to Mill Farm in 2015.
4. Various conveyancing documents were submitted in evidence for the former 20-23 Mill Lane, that abuts Road off Charlton Road (formerly Mill Lane) adjacent to the Order route. The conveyancing plans of 1881 and 1921 show a line and gate across the Order route near point B, but do not distinguish between the Road off Charlton Road and the Order route.
5. The 1966 conveyancing plans for 24 Charlton Road show the property abutting the southern end of the Order route. There are no mentions of easements to the property along the Order route and the Council considered that this suggested that public vehicular rights must have extended along the Order route in order to gain access to the property.

*Correspondence relating to access to the pumping station at Well Meadow*

1. In 1967 a solicitor for the tenant of Mill Farm wrote to the local water company, advising that a no parking notice was going to be erected on the Order route as vehicles were parking on *‘a private roadway’* that also had a right of access for the water company to reach the pumping station at Well Meadow.
2. Whilst the solicitor’s letter suggests the roadway, which seems to pertain to the Order route was private, the Council were unable to find any access rights or easements in the 1960 deed that transferred the water undertaking to Lee Valley Water Company.
3. An adjoining resident, of 22 Charlton Road, who was copied into the letter, replied, saying he was in doubt about the responsibility of the access way and that when cottages (now demolished) were present on his property the council repaired the frontage of that part of the Order route. In his letter, he also stated that ‘*the access for a long time has been available for watering horses and was the way to four houses and a smithy.’*
4. A 1973 letter to the resident of 22 Charlton Road, from the Engineer and Surveyor for the district Council, in response to the occupants query about the status of the Order route, noted that FP42 terminated midway between points A- B of the Order route according to the Definitive Map. In his interpretation and that of a colleague, he considered that the rest of the route was likely *‘public highway’* and that the *‘Highway Authority would be in a position to prevent its obstruction and take action against those who might wish to prevent vehicular movement along it.’*

**User evidence**

1. Various letters and statements of truth were also submitted in evidence concerning use of the Order route by vehicles. Contemporarily, it would appear that the route was predominantly used by visitors to, or sometimes residents of, the properties in the immediate locality, to park their cars, or by 24 Charlton Road to access their property. It was also mentioned that some dog walkers parked their cars on the spur at point B. The Council considered such use would be consistent with the Order route being a public vehicular highway, or there being private easements over it.
2. Being that the use of a right of way is primarily to pass and repass, I am not persuaded that use of the Order route to park cars is necessarily vehicular use by the general public, and it is at odds with other user evidence which states that only farm vehicles used the track. Margaret Waldock, whose aunt previously owned 24 Charlton Road, and had been coming to the area since 1949, also commented that her aunt only owned a bicycle and access to No.24 was only by a ‘3 foot wide wrought iron gate’.

**Conclusions**

1. It is recognised that cul de sacs in rural areas can be highways, especially where they lead to a place of public interest or were, what was a through road, that then became a cul de sac as a result of changes to the highway.
2. In this case the historical evidence consistently presents the Order route as a short stub of highway. In existence for over 200 years, the Order route is shown on the Inclosure Award map of 1818 in the manner of a public vehicular highway, giving access to a millpond, adjacent buildings and then the fields beyond. This map is clearly supportive of the local reputation that the route was used for watering horses and access to a smithy.
3. OS mapping consistently portrays the route in the same manner, as part of the main road it adjoins, with no gates or limitations being shown at point A until 1922. The representation of the Order route uncoloured and between hereditaments on the Finance Act records of 1910 is also supportive of the suggested existence of a vehicular highway, and the 19th Century photographs show houses lining part of the Order route, with that section being maintained to the same degree as the adjoining recognised public highway.
4. Contemporarily, it would seem that use of the Order route changes and the Definitive Map Process provides a good reflection of the cloudy nature of the highway status of the Order route at that time. Although it is not known what sources were researched during this process, there were clearly different perceptions of where the Order route commenced and terminated and what status it might have held in the past. Certainly the Definitive Map records and the 1973 correspondence from the Council do indicate that, at the time, they believed public vehicular rights may have existed over at least part of the Order route.
5. The conveyancing records and land registry documents mirror the ambiguity of the status of the route and whom it may have been owned by. Ultimately the land remained unregistered until 2015. It was remarked upon that the route being unregistered and the lack of recorded easements detailed over the route were also supportive of a public vehicular highway.
6. I consider that caution should be exercised when proportioning weight to a lack of evidence of private easements and a route being unregistered land. However in this particular case, when added to the strength of the historical mapping evidence, the Definitive Map records, aerial photographs and the local reputation of the route being a historic watering hole, which appears to be supported by the representation of the Order Route on the Inclosure Map, a strong and cohesive argument is made in favour of the Order route having historically held public vehicular status.
7. With this in mind, the fundamental principle of ‘once a highway, always a highway’ must prevail in the absence of any legal undertaking to amend or downgrade documented rights, even should the highway no longer seem suitable. 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 a different status for the Order route.

**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 concur with the Council in that none of the exemptions apply to the Order route. As a recorded footpath on the Definitive Map, the main use by the public, prior to 2006, was on foot, and it was not shown on the list of streets prior to commencement. As such public rights on the Order route would be on foot, horseback, bicycle and by horse drawn carriage. Any private vehicular rights are not affected.

**Width**

1. There appears to be no objection to the width of the Order route, which is already assertable as the full width of the track, as was available on the route as a footpath. The Order route is shown of a consistent width on most of the historical documents submitted. I am therefore satisfied that the Council’s decision that the widths be based on what is shown excluded on the 1910 Finance Act records, as set out in the Order, are representative of what would have been available for public use.

**Other Matters**

1. The landowners expressed concern that the Order route was needed to enter their farm fields and park their cars, as there was no parking directly outside their dwellings. In a similar vein, the applicants considered that the present status of footpath on the Order route did not grant the owner of the subsoil the right to access land with a vehicle or to obstruct the right of way.
2. Whilst no public right of way should be obstructed, the confirming of an Order will have no effect upon the right of the owner of the sub soil of the Order route, to access their land or drive over the Order route. I see no reason that the confirming of the Order would cause disruption to farming activities, as a public right is only to pass and repass on the route.

**Conclusion**

1. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed and that the Definitive Map and Statement should be amended to record the Order route as a restricted byway.

Formal Decision

1. I confirm the Order.

Mrs A Behn

Inspector

