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| **Appeal Decision** |
| Papers on File |
| **by Claire Tregembo BA(Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 25 July 2025** |

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| **Appeal Ref: ROW/3347492** |
| * This Appeal is made under section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of West Berkshire Council not to make an Order under section 53 (2) of that Act.
* The application dated 5 December 2023 was refused by the Council on 30 May 2024.
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| * The appellant claims the extent of Cold Ash Byway 5 and 26 should be amended in the Definitive Map and Statement.

**Summary of Decision: The Appeal is dismissed.** |
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Procedural Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act).
2. The appeal has been determined on the papers submitted. I have not visited the site, but I am satisfied I can make my decision without the need to do so.

**Background**

1. In February 2023 West Berkshire Council (the Council) received an application for a Definitive Map Modification Order (DMMO) to record widths in the Definitive Map and Statement (DMS) for parts of Byways Open to All Traffic (Byway) 5 and 26 Cold Ash. This application appears to have been made following a dispute between residents regarding possible encroachment onto the byways by an abutting property.
2. The Council determined the application and made two Orders to record widths in the DMS for parts of Byways 5 and 26 on 19 September 2023. The West Berkshire District Council (Byway Open to All Traffic Cold Ash 5 (part) Width) Definitive Map Modification Order 2023 proposed to record a varying width between 5.6 and 7.1 metres as shown uncoloured on the Inland Revenue Plan prepared under the Finance Act 1910 in the Definitive Statement (DS) for Byway 5. The West Berkshire District Council (Byway Open to All Traffic Cold Ash 26 (part) Width) Definitive Map Modification Order 2023 proposed to record a varying width between 4.5 and 8.5 metres as shown uncoloured on the Inland Revenue Plan prepared under the Finance Act 1910 in the DS for Byway 26. The 2023 Orders were confirmed by an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs on 13 March 2025.
3. In December 2023, the appellant made an application for a DMMO to amend the DMS in relation to DMMO 291, The Byway 5 Cold Ash in the District of Newbury Modification Order 1995 (the 1995 Order). It states it is *‘in respect of frontagers hedgerow boundaries’*. The 1995 Order added part of Byway 5 to the DMS between the south end of the existing Byway 5, the west end of Byway 26, and the edge of the adopted highway of Bucklebury Alley. The Order map showed the extent of this area. The map submitted with the DMMO application indicates the appellant wants some of the area shown in the 1995 Order removed from the DMS.
4. I will refer to the letters shown on the 1995 Order in my decision. For ease of reference, I have appended a copy of this map to the end of my decision.

Main Issues

1. Section 53(2) of the 1981 Act requires surveying authorities to keep their DMS under continuous review and to modify them upon the occurrence of specific events set out in Section 53(3).
2. Section 53 (3)(c)(iii) of the 1981 Act provides that a DMMO should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification. This needs to be determined on the balance of probabilities.
3. The DMS is conclusive evidence as to the existence of a public right of way, unless and until it is modified by an Order.
4. In considering the evidence, I must have regard to the judgement in *Trevelyan v Secretary of State for the Environment, Transport, and the Regions* [2001] ECWA Civ 266. (*Trevelyan)* Lord Phillips states *‘where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a Definitive Map* (DM) *in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put into the balance, if it is to outweigh the initial presumption that the right of way exists’.*
5. Paragraph 4.33 of Defra’s Rights of Way Circular (1/09) Guidance for Local Authorities states *‘the evidence needed to remove what is shown as a public right of way from such an authoritative record as the DMS… will need to fulfil certain stringent requirements. These are that:*
* *The evidence must be new- an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the DM was surveyed and made.*
* *The evidence must be of sufficient substance to displace the presumption that the DM is correct.*
* *The evidence must be cogent.’*
1. Paragraph 4.34 states that where an application is made *‘it will be for those who contend that there is no right of way, or that a right of way is of a lower status than shown, to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be downgraded or deleted’*.
2. The case in support relies on documents and maps. I need to consider if the evidence provided is sufficient to infer the dedication of higher public rights over the claimed route at some point in the past. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.

Reasons

*Finance Act Map 1910*

1. The Finance Act map 1910 shows the appeal route excluded from the surrounding hereditaments in the same way as the rest of Byway 5, Byway 26, and Bucklebury Alley. The Ordnance Survey (OS) basemap shows the boundaries on the south and west side of The White House are similar to those on the 1995 Order and there are no verges indicated within Byway 5 or 26. The boundary to the west of Faraway appears to have been repositioned and straightened at some point between the two OS maps increasing the width of Byway 5 at the northwestern corner of Faraway but not alongside The White House.
2. The Finance Act 1910 imposed a tax on the increase in land value, which was payable when the land changed hands. Maps were produced to show taxable land following a survey by the Board of Inland Revenue. The exclusion of the appeal route from the adjoining hereditaments could indicate public rights which were more likely to be vehicular.

*Bucklebury Estate Plan*

1. An email from the Bucklebury Estate (the Estate) dated 7 October 2024 includes an extract of their historic estate plan. The land they previously owned is tinted pink on an OS basemap and includes the appeal route and surrounding properties. They state that, *‘although the surrounding land has been sold the byways are retained as part of the lands of the Manor’*. The property boundaries appear largely similar to the 1995 map, but the small scale of the map makes it difficult to make an accurate comparison.

*Definitive Map Records*

1. The original Royal County of Berkshire (RCB) DS, relevant date 3 May 1954, records the appeal route as C.R.B (Carriage Road used mainly as a Bridleway) 2 and 3 connecting at the junction with Alley Road (now Bucklebury Alley) which is at point A on the Order map. The DM shows the appeal route as a Road Used as a Public Path (RUPP) connecting at the corner of Bucklebury Alley. There is nothing to indicate its extent or width.
2. The RCB Draft Revised DM, relevant date 1 August 1976, shows the appeal route with a green line labelled 2 and 3 which connect at Bucklebury Alley. It is not clear if the green line is a broken line indicating byways or a solid line indicating bridleways and a copy of the DS to confirm the status has not been provided.
3. The RCB DMs, relevant dates 1 May 1991 and 1 May 1994 show Byways 5 and 26 unconnected with a gap between them where the appeal route is. Copies of the DSs have not been provided.
4. The Council’s DMs, relevant dates 1 January 2000 and 14 February 2019 show Byways 5 and 26 connecting at the corner of Bucklebury Alley. A copy of the DS is not provided but the Council advises that the notes section states *‘Previously RPP 25. MOD 229 refers. Part previously BW2 Bucklebury. Parts share width with bridleways 22 and 22A Hermitage (parish boundary changes April 1991). MOD 291 refers’*. MOD 291 is the 1995 Order.
5. A map showing Byways 5 and 26 dated 14 January 2016 appears to be a working copy of the DM. The centrelines of the byways are shown by a solid line with Vs on both sides. An extract of the Council’s Online map from 27 June 2024 shows the appeal route with a dotted green line. The working and online maps are not the Definitive Map and Statement so are not legal documents that can be used to determine the extent of public rights of way.

*Definitive Map Modification Orders*

1. The Roads Used as Public Paths (CRBs) 13 Basildon, 26 Chieveley/23 Hermitage, 25 Cold Ash/2 Bucklebury/22 Hermitage, 2 Frilsham/17 Bucklebury, 7, 8, and 9 Hermitage, 6a Bucklebury/10 Hermitage and 48 Lambourn in the District of Newbury Modification Order 1990 (the 1990 Order) reclassified routes recorded on the DMS as RUPPs to byways and renumbered RUPP Cold Ash 25 to Byway 5 Cold Ash. The Order map includes part of the appeal route south of point B on the 1995 Order map. The 1990 Order map shows the extent of Byway 5 coloured brown between property boundaries. The OS basemap does not have any dashed lines indicating verges between the property boundaries.
2. The 1995 Order made on 13 February 1995 added the appeal route to the DMS when it was confirmed by the RCB on 18 April 1995. The Order states *‘references to lettered points in the following descriptions are references to the letters on the attached map showing the way being* described’. The Description of the path to be added states *‘the section of way defined by boundaries A, B and C and the intervening property boundaries of “The White House”, “Wynd Wood” and “Ganfield”, covering a length of 14 metres between the western end of Byway 26 Cold Ash and the Southern end of Byway 5 Cold Ash.’* The Order map shows the extent to be added to the DMS coloured brown between points A, B, and C which includes area the appellant wants removed.
3. The OS basemap used in the 1995 Order shows the boundaries of the adjoining properties with solid lines. Between the property boundaries are dashed lines which indicate the extent of the carriageway and access into properties. The area between the carriageway and the property boundaries are likely to be verges. These verges are coloured brown indicating they are part of the highway to be recorded on the DMS.
4. Pre-Order consultation letters to the owners of The White House and Wynd Wood dated 26 May, and 8 June 1994 include a map showing the area they propose to include in a DMMO for Byway 5. This area is the same as in the 1995 Order. The response from the then owners of The White House states, *‘so far as we know we do not own any of the land in question. We await the speedy restoration of the* [Illegible] *sections as by-way with anticipation*.
5. A letter from the Technical Director at the RCB to Babtie Shaw & Morton (who appear to be the solicitors for the RCB) states the owners of The White House and Ganfield do not have any objection to the proposed Order. The owner of Ganfield considers the land to be part of the public right of way.
6. Other documents show that dispensation was requested and given by the Planning Inspectorate to post notices to unknown landowners on site and notices were then displayed.
7. The 2023 Orders referred to in paragraph 4 above were made on the basis of historic maps including commercial maps, OS maps, a Tithe map and the 1910 Finance Act map. In her decision letter dated 13 March 2025, the Inspector concluded that historic mapping, dating back to 1761, consistently shows Byways 5 and 26 running between boundary hedges and it was reasonable to assume that the hedge to hedge presumption applies.

*Sale and Land Registry Documents*

1. An undated Sale plan for the Estate includes the land where The White House is within plots 19 and 20. There are no verges shown alongside Byways 5 and 26 on the basemap. The boundaries of the plots are very similar to the property boundaries shown on the 1995 Order map.
2. A letter dated 29 April 1994 from Gardner Leader Solicitors to Babtie Shaw & Morton concerning the sale of The White House states *‘we have made a local search with Newbury District Council and enclose a copy of their plan showing the public highway coloured green. This leaves a gap between the public highway and the byway coloured on your plan’*. A pencil note on this letter states *‘ORDER Map error plus BW 28 numbering error!’* The plan attached to this letter shows the extent of the adopted highway along Bucklebury Alley ending at point A on the 1995 Order map.
3. The response dated 5 May 1994 confirms that Bucklebury Alley *‘does not connect with Byway 5 or 26 Cold Ash as they are shown on the Consolidated DM. You will note from my enclosed extract of the Consolidated DS that the byways are described as being joined. My extract of the original DM of 1954, and its accompanying statement, also show the byways as joining one another and the road’*. The letter went on to state that a DMMO would be needed to add the missing byway link. These letters appear to have instigated the 1995 Order.
4. A plan produced by the Council in response to the Land Charge Search for the sale of The White House in June 2014 shows Bucklebury Alley as an *‘adopted Highway’* and the appeal route as *‘unadopted/ private’*. Adopted highways are highways maintainable at public expense by the Highway Authority. Unadopted routes include public highways that are privately maintained.
5. The 2014 Land Charge Search response states there were no outstanding notices, orders, directions, or proceedings that subsist in relation to The White House.
6. Land Registry Title Plans for The White House from 1994 and 2023 show the extent of the property outlined in red. The Council states the same boundary is shown on all OS maps since 1982. The area shown coloured brown on the 1995 Order is outside of the redline boundary.

*The Resolution Agreement 2016*

1. The appellant refers to an email from the Council’s Senior Rights of Way Officer to residents as ‘the Resolution Agreement’. It concerns the Council’s decision not to take enforcement action for encroachment onto the verges and complaints to the Local Government Ombudsman. It also states the Council did not consider the verges alongside the surfaced track could be used by the public due to their physical condition and therefore did not form part of the highway.

*Photographs*

1. Various photographs of the appeal route have been provided dating between 1982 and 2023. The 1982 photographs show verges outside of The White House which sit above the surfaced track and outside the property boundaries. There are telegraph poles and a street name plate within the verges. Later photographs show a similar situation until 2015 when changes are made to the verges and the property boundaries. The photographs now show the telegraph poles and street name plate are now behind the property boundaries.

*Conclusions on the Documentary Evidence*

1. The DMS shows the appeal route was recorded on the original maps in 1954 and was still on the 1976 revised DMS. However, this section of Byway 5 is omitted from the 1991 and 1994 DM. When it was realised that this section was no longer shown on the RCB DM the 1995 Order was made to readd it.
2. No copies of the decision report for the making of the 1995 Order have been located. Therefore, there is nothing to indicate what evidence was considered when determining the extent of Byway 5 for the 1995 Order. However, as found in *Trevelyan* it must be assumed that proper procedures were followed, and evidence existed unless there is evidence to the contrary. The consultation letters, dispensation letter, and confirmation that notices were posted on site indicate the proper procedures were followed.
3. The 1995 Order clearly defines the full extent of the appeal route between the boundaries of the adjacent properties which coincide with the boundaries shown on the Land Registry Title Plan and the Estate Sale plan. The Order specifically refers to the property boundaries. The RBC clearly intended to show the area coloured brown on the Order plan as public highway and it must be assumed they had evidence to support this, even if it is not now clear what that evidence was. In *R v Environmental Secretary, ex parte Hood [1975] QB 891* Lord Denning considered that past evidence may well have been lost or forgotten with the passage of time and there must be evidence to justify any change to the DMS.
4. The appellant states the area shaded brown on the map does not reflect the description in the Order. I consider the brown shading accurately reflects the description of Byway 5 given in the Order. The appellant also claims the 1995 Order map is not part of the original Order and may have been repurposed or be a forgery. The Council dispute this claim. The Order map is labelled *‘Byway 5 Cold Ash’* and the letters shown on it correspond to those referred to in the 1995 Order. In the scanned copy the staple holes in the Order map line up with those on the Order indicating they have been stapled together and the staples and hole punches in a file copy also line up. Therefore, I consider the Order map is part of 1995 Order.
5. Anyone who wishes to challenge the validity of an Order, once it is confirmed, needs to make an application to the High Court within 42 days. There is no evidence that any challenge was made. Therefore, in accordance with paragraph 12(3) of Schedule 15 of the 1981 Act, the *‘validity of any Order shall not be questioned in legal proceedings whatsoever’*. Therefore, I consider the 1995 Order is conclusive evidence of the existence of public byway rights over the area shown coloured brown.
6. Because it is not known what evidence was considered before making the 1995 Order it is not possible to determine if any of the evidence put forward by the appellant is ‘new’ evidence. Any evidence that postdates the 1995 Order will not provide evidence about the extent of the highway when it was made.
7. The Council considers photographs from 1982 are likely to be new evidence. The 1982 photographs show the boundaries of The White House were behind the telegraph pole and street name plate, with verges between the property boundaries and the surfaced track. Photographs after 2015 show the property boundaries in front of the telegraph pole and street name plate. I consider the photographs do not support the view of the appellant that the 1995 Order widened the appeal route and took away hedgerows. Furthermore, the Inspector determining the 2023 Orders considered public rights over Byways 5 and 26 had existed, on the balance of probabilities, since at least the middle of the 19th Century. Therefore, the 1982 photographs provide limited evidence of the extent of public rights over the appeal route.
8. The Estate map and Sale plan are also likely to be new evidence. The appellant claims the banks and hedgerows are owned by the Estate as Manorial waste and are therefore not part of the byway. However, the email from the Estate states the byways were retained as land of the Manor but they do not indicate their extent. The Sale plan indicates the verges shown on the 1995 Order map were not part of the land sold. The Estate map also indicates the surfaced tracks are part of the land of the Manor and land being of a Manor does not preclude the existence of public rights.
9. The appellant considers the dashed lines shown on the OS basemaps indicates the property boundaries and the area between the dashed and solid lines indicates banks and hedges, which are part of their property boundary. I consider the dashed lines indicate the extent of the surfaced carriageway and the solid lines indicate property boundaries. The area between the solid and dashed lines are verges. They appellant also asserts that the area between the dashed lines is the extent of the byways, and the byways exist only in the surface of the track. The evidence before me does not support these assertions and the 1995 Order clearly shows the verges are part of Byway 5. Highways are not limited to made up surfaces and can also include verges between the carriageway and property boundaries.
10. The appellant asserts that ‘the Resolution Agreement’ is a legal agreement to protect the hedgerow banks alongside The White House and considers a DMMO should be made to reflect this agreement. However, I do not consider this to be a legal agreement. It is not signed by any of the parties involved and does not have the Council’s legal seal. It appears to be an email correspondence sent to the parties who complained about enforcement action not being taken, rather than being an agreement made with the owners of The White House.
11. ‘The Resolution Agreement’ indicates the views of Council Officers at this time, but it does not override the 1995 Order or the DMS. It also does not purport to delete any public rights over the appeal route. Public rights can only be removed from the DMS by due legal process. There is no evidence of any legal Orders to delete public rights over the area shown in the 1995 Order.
12. The appellant also considers the Land Charge Search response means that the 1995 Order has no legal bearing on The White House. As the 1995 Order was confirmed in 1995 it was not an outstanding. Once an Order is confirmed it is complete and the DMS is amended accordingly.
13. The Council states the evidence on the extent of Byways 5 and 26 in the 2023 Orders also provides evidence on the extent of the appeal route. However, I have not been provided with copies of some of the historic maps.
14. I do not consider there is any cogent evidence of sufficient substance to indicate that, on the balance of probabilities, the extent of the appeal route shown in the 1995 Order is incorrect. There is no evidence of legal events after 1995 to amend the appeal route. As there is insufficient new cogent evidence of sufficient substance to displace the presumption that the DMS is correct, there is nothing to justify the making of a DMMO to amend the DMS.

**Other Matters**

1. Many of the documents submitted concern claimed encroachment onto the adjoining byways, proposed enforcement action, damage to the verges, and the current extent of The White House boundaries. These actions appear to have occurred after the 1995 Order was made. Therefore, the documents do not provide any evidence in relation to the extent of the appeal route when the 1995 Order was made and I have not given any weight to these documents when making my decision. It is up to the Council to determine if encroachment has occurred and take any action they consider appropriate.
2. The protection of hedgerows or private property is not something that can legally be taken into consideration when determining the appeal before me.
3. Concerns were also raised about the Council referring to the application for the DMMO in their consultation letters and register of applications as a width modification. My decision concerns the description of the modification proposed in the application. The description in the Council’s consultation letters and register of applications does not provide evidence in relation to the appeal and I have not given any weight to this description when making my decision.

###### Overall Conclusions

1. Having regard to these and all other matters raised in the written representations, I conclude that the appeal should be dismissed.

###### Formal Decision

1. I dismiss the appeal.

Claire Tregembo

INSPECTOR

**1995 Order Map**

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