



Order Decision

Hearing Held on 6 August 2019

Site visit made on 6 August 2019

by Susan Doran BA Hons MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 17 September 2019

Order Ref: ROW/3214747

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Devon County Council (Restricted Byway No.50, East Down) Definitive Map Modification Order 2018.
- The Order is dated 16 February 2018 and proposes to modify the Definitive Map and Statement for the area by upgrading part of a Footpath to Restricted Byway and adding a Restricted Byway as shown in the Order plan and described in the Order Schedule.
- There were 4 objections outstanding at the commencement of the hearing.

Summary of Decision: The Order is confirmed

Procedural Matters

1. This case concerns the proposed addition of a Restricted Byway (points E-F-G-X-H-I-J on the Order plan) along a generally defined lane between the County road near Prince's Gate Bridge and the north-east side of Shortacombe Gate, and the upgrading to Restricted Byway of part of Footpath No.20 (points J-K) continuing from the north-east side of Shortacombe Gate to the County road, Dudmoor Lane, at Shortacombe Corner, together forming a continuous link.

The Main Issues

2. The Order has been made under Sections 53(3)(c)(i) and (ii) of the Wildlife and Countryside Act 1981 (the 1981 Act), which requires me to consider whether, on a balance of probability, a Restricted Byway subsists between points E and J, and the existing public footpath between points J and K ought to be shown as a Restricted Byway respectively, and if so that the Definitive Map and Statement ('DMS') requires modification.
3. The Order has been made mainly on the basis of documentary evidence, and limited use by the public. Section 32 of the Highways Act 1980 (the 1980 Act) requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
4. I shall examine the evidence as a whole to establish whether a public right of way for vehicles exists along the Order route. However, the Natural Environment and Rural Communities Act 2006 (the 2006 Act) extinguished rights for mechanically propelled vehicles and, in this case, it is not argued they have been saved by any of the exceptions set out in Section 67 of that Act. Accordingly, should I find in favour of public vehicular rights existing, the way should be recorded as a Restricted Byway.

Reasons

Conveyancing and related evidence

5. Detailed searches¹ carried out by North Devon Council revealed no public right of way passing through or abutting the property. The DMS would have been consulted as part of this process, but as the Order route is not currently recorded its absence from these records is to be expected². Further, the DMS is a minimum record of public rights and does not preclude the existence of as yet unrecorded rights.
6. Neither are there references about ownership or rights of way over the Order route in conveyances dating between 1934 and 1977, as confirmed in a statutory declaration made by a former owner of Shortacombe Farm in 1978. This states that the only rights enjoyed over the way were private rights relating to the owners, and to others for agricultural purposes only. Again, the absence of any reference is not surprising since conveyances essentially deal with private rather than public rights. References to private rights do not provide conclusive evidence that no public right exists.
7. A 2016 deposit under section 31(6) of the 1980 Act does not acknowledge the existence of any public right of way over this land but, whilst sufficient to rebut an intention on behalf of the owner or his successors in title to dedicate a highway during the associated relevant period, it has no effect retrospectively.

Historical documentary evidence

8. Although not directly affecting the Order route, the East Down Inclosure Award (1823), following an Act of 1811, set out a public carriage road which included the section from Ashelford Corner to Prince's Gate "*leading to the village of Shortacombe*". This is the present County Road connecting to the Order route at E. I consider this to be strong evidence that the continuation of the route awarded enjoyed the same status, at least as far as the named destination of Shortacombe. There would have been little point in the Inclosure Commissioners appointing and setting out a public vehicular route leading to the village if such rights terminated at the edge of the lands to be enclosed.
9. The East Down Tithe Map shows E-G and J-K as parcel 920, recorded in the Apportionment as 'Roads'. Its continuation west, the Inclosure awarded route, is also included under this category. From G-I, the alignment differs to the Order route, enclosed or gated at either end, passing closer to Shortacombe House and between buildings, and numbered 400 which is recorded as 'homestead'. As a 'first-class' Map it attracts some weight for its accuracy, although it was not the purpose of tithe documents to record public rights of way. Nevertheless, I consider it good evidence that the route either side of Shortacombe, at least, was regarded as part of the parish road network.
10. A series of newspaper reports on proceedings at the County Magistrates Petty Sessions, Ilfracombe District Highway Board, Barnstaple Rural District Council and East Down Vestry between 1845 and 1905 refer to the route passing through Shortacombe Estate needing maintenance. The early reports show its

¹ In relation to the purchase of Lower Court Barn

² The Order was made further to Devon County Council's Parish Review, and the route's status followed from their analysis of the evidence adduced

maintenance responsibilities lay with the adjoining landowners³. In addition are references to the owner of Shortacombe attempting to prevent use by the public (in 1855), by installing a gate when it was being used to avoid the turnpike road toll. However, it was found that the "*road was a public highway*".

11. These reports also refer (in 1856) to a diversion of the Order route at Shortacombe established by the landowner, which was found to be a public highway through its use by the public without interruption or permission over a number of years. Whilst this had not been an official diversion by order of the Quarter Sessions, it was determined a public highway, and one with which the parish concurred and were found ought to repair⁴. The public status of the Order route was reaffirmed at Petty Sessions in 1868, although by whom it should be maintained remained in discussion until 1869 when the Highway Board agreed to take on the repair of the road. There is a reference to gates across it in 1882 and again in 1899, and the question whether the occupier had the right to retain them since it was a parish road.
12. Minutes of the East Down Vestry between 1868 and 1869 provide further detail about various indictments for repair; and the 1881 County Magistrates Petty Sessions noted the Order route was a "*public highway repairable by the parish*". East Down Parish Council Minutes from 1894 to 1975 refer to the road, noting in 1935 that it was "*unfit for motor traffic*".
13. There is no evidence of maintenance at public expense in recent times. Current landowners have undertaken maintenance works at their own expense, requiring occasional closure of the way to facilitate this; and the 1978 statutory declaration (paragraph 6) confirms this was the case in the past.
14. Ordnance Survey maps from 1889 to 1961 show the Order route following the 'diversion' and linking with the highway network. They provide no evidence of status but are helpful in showing the physical existence and features of the routes they depict. The Order route was excluded from adjoining land parcels on the Finance Act Map 1910, a likely indication that it was considered to be a public highway. It was not claimed for inclusion when the DMS was prepared in the 1950s, the Parish Council regarding it as a public road with (what is now) Footpath 20 terminating at J, although this was subsequently extended to meet Shortacombe Corner (K) by Devon County Council (the Council).

User evidence

15. Four users provided evidence, 3 claiming use on horseback and one on foot over periods from 1963, 1981, 1993 and 2014, until challenged in 2016. Some previous and current landowners had challenged public use over a number of years and did not consider the route to be a public right of way. The claimed use is insufficient in itself to raise a presumption of dedication, but it lends limited support to the historical evidence of a way available for public use.

Conclusions on the evidence

16. Forming the continuation of a public road, described as continuing to Shortacombe, which was set out and awarded under the Inclosure process, it is more likely than not that the Order route enjoyed the same status, at least as

³ Ratione tenurae

⁴ Although reports clarify that the owner of the estate was required to pay an annual sum to the highway authority towards its upkeep

far as Shortacombe. Tithe records lend support to it being a parish road, with the possible exception of the section passing through Shortacombe itself.

17. There was a long running dispute as to maintenance responsibility. However, its status as a public highway was held in 1855, 1856 and 1868 by the County Magistrates and confirmed in 1898 by Barnstaple Rural District Council, albeit from 1856 on the amended (Order route) alignment at Shortacombe.
18. Collectively the evidence points to the Order route as a historic public vehicular road, repairable initially by adjoining landowners and subsequently at public expense, rather than an occupation track to access fields along its length⁵ or the river. It is not clear why it was omitted from the Council's list of streets, although the Parish Council regarded it as a public highway in the 1950s when they claimed Footpath 20 terminating on it. Notwithstanding the views of previous and current landowners, there is no evidence that any existing public rights have been stopped up by due legal process.
19. Although the alignment at Shortacombe has altered following planning permission⁶ and the historic route is no longer available on the ground, the establishment of the new driveway does not remove or stop up any public rights already acquired on the historic alignment.
20. Having found that public vehicular rights subsist and further to paragraph 4 above, it follows the Order route should be recorded as a Restricted Byway.

Other matters

21. I note concerns about alleged procedural irregularities during the Schedule 14 stage of the process, but I have been appointed to determine the Order under paragraph 10(1) of Schedule 15 to the 1981 Act, and not whether the procedural requirements at the previous stage were properly met.
22. The Order route passes directly in front of private property with issues raised about the safety of the owners' children, and the effect on existing landscaping and other features. Whilst important matters, I cannot consider the suitability or desirability of the route for public use under the legislation. Neither can I consider the effect on land use or liability. My decision must be based on the evidence for the existence or otherwise of public rights. Nor is the apparent lack of public interest in the Order relevant - the Council has a statutory duty to keep the DMS under continuous review. The Council expressed its intention to seek a diversion at G-X-H to the new driveway if the Order is confirmed.

Conclusions

23. Having regard to these and all other matters raised at the Hearing and in the written representations, I conclude that the Order should be confirmed.

Formal Decision

24. I confirm the Order.

S Doran

Inspector

⁵ Field gates accessing other land were evident at the site visit

⁶ In 1986 on the evidence of Mr and Mrs Hardman, and 1996 on the evidence of Devon County Council

APPEARANCES

Order Making Authority:

Caroline Gatrell

Definitive Map Review Officer, Devon County Council

Objectors:

Nicola Hardman

Michael Hardman

DOCUMENTS

1. Copy of the Order plan annotated with grid references, submitted by Devon County Council