

ROW/3254955

The Warwickshire County Council Definitive Map Modification Order

Parish of Aston Cantlow Sheets SP16SW, SP16SE, SP15NE Order No. 1 2019, Path No. AL223

Statement of case by Diana Mallinson, 29 October 2021

Introduction

1. This statement of case is in support of this definitive map modification order (DMMO), and is written by Diana Mallinson on behalf of the Green Lanes Environmental Action Movement, GLEAM (www.gleam-uk.org). GLEAM campaigns for the rights of walkers, horse riders, pedal cyclists, carriage drivers and the disabled to use green lanes (byways open to all traffic and other unsealed publicly maintainable highways) without danger, difficulty and inconvenience caused by recreational motor vehicle use.
2. I provide some additional evidence in support of the order route being a public bridleway as appendices to my statement of case, and discuss below this evidence and evidence provided by Warwickshire County Council, the order making authority (OMA), in its statement of case and appendices.

Historical evidence

Aston Cantlow inclosure award, 1744

3. The wording of the description of the order route in the inclosure award, "*in the way the same now is ?and ?antiently hath been used*" (OMA Appendix 10.23) indicates that the order route existed as a public bridleway before 1744, the date of the award.

Copy of Plan One Deed, 1858

4. As the OMA says in section 3.17 of its statement of case, this plan (OMA Appendix 28) shows that the western part (from A to between E and F) of the order route existed on its current line in 1858 and was considered to be a bridle road. The direction "*to Newnham*" at the eastern end indicates that the landowner (or other person) for whom this plan was drawn considered that the order route was a public bridleway.

Ordnance Survey 1:2,500 scale plan sheet 37.12, 1st edition, surveyed 1885, published 1887

5. I provide extracts from the version of this plan held by the National Library of Scotland (NLS) as GLEAM Appendix 1. This version differs from the version provided by the OMA as its Appendix 34 in that certain features are coloured. The road through the village of Aston Cantlow and the cul-de-sac road to and through the hamlet of Newnham are coloured brown, but the order route is not. GLEAM Appendix 2 is the NLS description of the content,

printing and colouring of this edition of the 1:2,500 plans. This description explains that the brown (“*burnt sienna*”) colouring was used for roads. The lack of colouring of the order route indicates that it was not considered to be a road by the Ordnance Survey in the 1880s.

Highway authority records

6. The OMA provides relevant minutes of Aston Cantlow Parish Council as its Appendix 38. The minute relating to the order route from the meeting held on 23 December 1895 (OMA Appendix 38.11) says:

“Proposed by Councillor Hancox that the Bridle Road, from the green gate to the Village of Newnham, be temporarily repaired by stocking ruts & breaking stones at the expense of the Highway Account. Seconded by Councillor Beesley, Carried Unanimously.”

7. This minute indicates that the order route was maintained at public expense by the parish of Aston Cantlow, which was the authority responsible for all highways (except main roads) in 1895.
8. In 1896, the responsibility for highways (except main roads) passed from Aston Cantlow parish to Alcester Rural District Council (RDC), under the Local Government Act 1894. At its meeting on 17 May 1911, Alcester RDC received a statement from Mr Gander of “*the footpaths repaired by him during his term of office as Highway Surveyor*” and titled “*Footpaths repairable by the District Council in different parishes*” (GLEAM Appendix 3.1). Mr Gander’s statement for Aston Cantlow gives “*Mill & thro’ Churchyard. Also part of Bridle Road, to Newnham.*” (GLEAM Appendix 3.1) He concluded his statement by saying “*The foregoing are the only footpaths I have had to repair and in 1896 I took over all the footpaths that had been previously repaired.*” (GLEAM Appendix 3.2) This statement indicates that in 1911 Alcester RDC considered the order route to be a public bridleway, which it had maintained (presumably this was in response to the request made by Aston Cantlow Parish Council in September 1900 cited at paragraph 3.25.1 of the OMA’s statement of case).
9. The information in the RDC statement of 1911 is consistent with the handover map and schedules of 1929, when Warwickshire County Council took over responsibility for the handed over highways. The order route is coloured on the handover map (OMA Appendix 43) and included in the “*Other Roads, including Bridle Roads*” column on the handover schedule (OMA Appendix 44), and the footpath described as “*Mill & thro’ Churchyard*” in 1911 is coloured on the handover map (OMA Appendix 43) and included as “*From Mill, thro’ Churchyard*” in the “*Public Footpaths maintained by R.D.C.*” column on the handover schedule (OMA Appendix 45).

Bartholomew's (half inch to 1 mile scale) maps, published in 1903, 1920 and 1941

10. Phil Hobson provides extracts from these maps in his objection on behalf of the Green Lane Association (GLASS) dated 4 September 2019 (OMA Appendix 79.59 to 79.92). He suggests in section 5 (OMA Appendix 79.65 to 79.66) of his objection that these maps show that the order route was “*considered to be an ‘inferior’ or ‘other’ road and that it was not considered to be either a Bridlepath or Footpath.*” He provides extracts from copies of these maps held by the National Library of Scotland as Appendices 4 (1903), 5 (1920) and 6 (1941) to his objection (OMA Appendix 79.90 to 79.92). The extract of the 1941 Bartholomew's map which he provides as Appendix 6 shows that the key to this map included the disclaimer “*N.B. The representation of a road or footpath is no evidence of right of way.*” I provide extracts from keys to Mr Hobson's 1903 and 1920 Bartholomew's maps as GLEAM Appendix 4. These show that these maps have a similar disclaimer: “*N.B. The representation of a road or footpath is no evidence of the existence of a right of way.*” for the 1903 map (GLEAM Appendix 4.1) and the 1920 map (GLEAM Appendix 4.2). These disclaimers indicate that the depiction of the order route as a road on Bartholomew's maps is not evidence that it was a right of way for the public with vehicles.

Ordnance Survey 1:50,000 scale map sheet 151, revised 1988, published 1990

11. I provide extracts from this map as GLEAM Appendix 5. Most of the order route, from A to its junction with AL88, is shown as a path on this Ordnance Survey map. But between this junction and the junction of the order route with AL81 at G, no path or other way is shown on this map. The final section (G-H) of the order route is shown as an other road, drive or track. This map shows that the section of the order route between AL88 and G was little used when the map was revised in 1988, insufficiently used to create a worn path or track on the ground.

Meaning of clap gate

12. On page 16 of his objection (OMA Appendix 79.75), Mr Hobson argues that motorcycles could have got through the clap gate which was on the order route until destroyed by recreational 4x4 users in the 1980s. I provide the Oxford English Dictionary definition and illustrative quotations for the meaning of clap gate as GLEAM Appendix 6. The definition of clap gate, as published in 1933, is “*a small door or gate which shuts when slammed, or which swings to of itself*” (hence the word “*clap*”) and the quotations are “*a small horse-gate*” (1847-78) and “*a kind of wicket, called in many parts a kissing-gate. Also a small hunting gate just wide enough for a horse to pass*” (1888). It seems unlikely that motorcycles could have been ridden or wheeled through a small hunting gate, which would have to be held open to allow a pedestrian or horse through.
13. In its letter of 17 December 1986 asking the OMA to classify the order route as a bridleway (OMA Appendix 63.1) the Stratford-upon-Avon Group of the National Farmers' Union

(NFU) said that the bridle gate, which had been sawn down by “intruders” a “couple of years ago [i.e. in 1984]” was 4 feet wide.

14. I suggest that this or a similar hunting gate existed on the order route in the late 19th and early 20th centuries, and that this was the reason the Ordnance Survey 1:2,500 plans (GLEAM Appendix 1, OMA Appendices 34 and 35) and 1:10,560 maps (OMA Appendices 36 and 37) show the order route as a bridle road (“B.R.”), i.e. the route was a through route for horses and walkers but not for vehicles.

DETR/Defra guidance

15. The OMA provides letters (24 August 1998 and 14 May 2001) from the Department of Environment, Transport and Regions (DETR) on the interpretation of the term “*unclassified county road*” as its Appendices 65 and 66. The most recent guidance, however, is that issued by Defra (DETR’s successor) in 2009 in its Rights of Way Circular 1/09. Paragraph 4.42 of this circular says:

“In relation to an application under the 1981 Act to add a route to a definitive map of rights of way, the inclusion of an unclassified road on the 1980 Act list of highways maintained at public expense may provide evidence of vehicular rights. However, this must be considered with all other relevant evidence in order to determine the nature and extent of those rights. It would be possible for a way described as an unclassified road on a list prepared under the 1980 Act, or elsewhere, to be added to a definitive map of public rights of way provided the route fulfils the criteria set out in Part III of the 1981 Act. However, authorities will need to examine the history of such routes and the rights that may exist over them on a case by case basis in order to determine their status.”

16. GLEAM’s experience is that some highways recorded on handover records and on the current list of streets, in other counties, have been found to have only public bridleway or footpath rights through the definitive map modification order process.

Discussion of evidence

17. The order route was recorded as a pre-existing public bridle road in the inclosure award of 1744, indicating that it had been dedicated as a public bridleway before that date. The identification of the 1744 public bridle road with the order route is confirmed by the 1858 plan and by the late 19th and early 20th century Ordnance Survey large scale plans and maps. The highway authorities responsible (Aston Cantlow Parish Council and Alcester RDC) considered that it was a publicly maintained bridleway in 1895 and 1911 respectively, and it was therefore included in the 1929 handover records. Aston Cantlow Parish Council claimed the sections from A to the junction with AL88 and from G to H as public bridleways in 1951 on the basis of use “*throughout living memory*”. If the parish council had considered these sections had public vehicular rights, as Mr Hobson argues in his objection, it would have claimed them as “C.R.B” i.e. “*Public or Private Carriage road and Public*

bridle road – C.R.B.” on the parish survey map (OMA Appendix 46) and parish survey schedules (OMA Appendix 47), not as “*Bridle road – B.R.*”. But Warwickshire County Council considered that the order route could not be included on the definitive map and statement because it was an “*unclassified county road*”, i.e. included as an unclassified road on the handover documents (OMA Appendices 52 and 53). The OMA provides other examples of public rights of way claimed by parishes in Warwickshire, which the County Council omitted from the definitive map and statement on the ground that they were unclassified county roads, in OMA Appendix 48. Since the DETR letters and Defra circular 1/09 were issued, the DMMO process has shown that the same omission happened in other counties (e.g. Derbyshire, Hertfordshire, Northumberland and the West Riding of Yorkshire) and these counties’ unsealed unclassified county roads are (belatedly) being added to the definitive map and statement as byways open to all traffic, bridleways and footpaths.

18. All the historical evidence, from 1744 to 1951, therefore indicates, or is consistent with, the order route having been dedicated as a public bridleway before 1744, and that higher (vehicular) public rights have not been dedicated subsequently.
19. In paragraphs 8.12 to 8.18 of its statement of case, the OMA considers whether higher public rights might have been dedicated on the basis of use by the public with motor vehicles after 1951, and rejects such a dedication on the grounds of use being by force (the destruction of the clap gate in 1984), landowner challenge i.e. lack of intention to dedicate, public nuisance and the effect of section 66 of the Natural Environment and Rural Communities Act 2006.
20. I agree with the OMA that the evidence does not support dedication of public vehicular rights on the basis of use after 1951. To the OMA’s comments on the dearth of evidence for use of the order route by the public with motor vehicles before the destruction of the clap gate in 1984, I add the point that the section between AL88 and G was little or not used by anyone in the 1980s, as this section was not recorded as a path or track by the Ordnance Survey in 1988. In OMA Appendix 73.6 a motorised user, Tom Archer, recalls a challenge to his use of the order route in 1992 by a local farmer blocking his exit at A. In OMA Appendix 81, a surveyor for GLASS, Hywel Tidley, reported that the landowner from Holmlea Farm had challenged his and other recreational motor vehicle drivers’ use in December 1998, telling the drivers that the order route was a bridleway.
21. In paragraph 8.15 of its statement of case, the OMA suggests that 2004, when the first user evidence was submitted, might be a date of bringing public vehicular rights into question. I wonder whether the submission of user evidence in 2004 was a bringing into question; this is because the recreational motor and horse-drawn vehicle-using public appear not to have been consulted, so they would not have been aware that public vehicular rights were being brought into question.
22. In paragraph 8.17 of its statement of case, the OMA cites case law about public nuisance precluding dedication and notes the evidence that recreational motor vehicle use of the order

route has caused public nuisance. In support of this argument, I provide a DMMO decision for two unclassified county roads in Derbyshire as GLEAM Appendix 7. In this decision, the inspector found that the routes were historically public bridleways, and that more recent use by the public with motor vehicles had not resulted in dedication of higher rights, because some of this use had caused public nuisance (GLEAM Appendix 7 paragraphs 14 to 24).

Conclusion

23. The historical evidence indicates that the order route is a public bridleway; the modern motorised user evidence does not meet the tests for dedication of higher rights. I therefore respectfully request that the order be confirmed as made.

Diana Mallinson, Honorary Secretary, GLEAM

29 October 2021

List of GLEAM appendices

Appendix number	Description	Date	Source
1	Ordnance Survey 1:2,500 plan, sheet 37.12, 1 st edition, extracts	Surveyed 1885, published 1887	https://maps.nls.uk/os/index.html
2	Ordnance Survey Maps – 25 inch 1 st edition, map content, printing and colouring		https://maps.nls.uk/os/index.html
3	Alcester Rural District Council minutes, extract	1911	Warwickshire County Record Office, CR 1547/6
4	Keys to Bartholomew map sheet 18	1903 and 1920	https://maps.nls.uk/series/
5	Ordnance Survey 1:50,000 map, sheet 151, extracts	Revised 1988, published 1990	
6	Definition of clap gate, Oxford English Dictionary	1933	https://archive.org/details/in.ernet.dli.2015.271839
7	Order Decisions FPS/U1050/7/40 and FPS/U1050/7/44	2009	Planning Inspectorate

List of appendices to the OMA's statement of case to which I refer

OMA Appendix and page number	Description
10.23	Aston Cantlow Inclosure Award 1744
28	Copy of Plan One Deed 1858
34	OS CS2500 1 st Ed
35	OS CS2500 2 nd Ed
36	OS CS 10560 1 st Ed
37	OS CS 10560 2 nd Ed
38.11	Parish Council minutes
43	Handover – map extract
44	Handover – Alcester Schedule
45	Handover – Alcester Schedule (footpaths)
46	Aston Cantlow 1950s Parish Survey - Map
47	Aston Cantlow 1950s Parish Survey – Schedule
48	Other parishes information
52	Draft Definitive Map Objection 2
53	Draft Definitive Map Objection 3
63.1	NFU Letter 2
65	DETR Letter
66	DETR Letter
73.6	2018 Informal Consultation Responses
79.59 to 79.92	Order Responses
81	GLASS form