
Order Decision

Site visit made on 11 September 2023

by Nigel Farthing LLB

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

Decision date: 3 October 2023

Order Ref: ROW/3295978

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Warwickshire County Council Definitive Map Modification Order Parish of Wolfhampcote Sheet SP56NW Order No. 2 Path No. 352.
- The Order is dated 18 March 2020 and proposes to modify the Definitive Map and Statement for the area by adding a public Byway Open to All Traffic (BOAT) from its junction with the D2291 Nethercote Road to its junction with the D 2289 Wolfhampcote Lane as shown on the Order Map and described in the Order Schedule.
- There were 10 objections outstanding when Warwickshire County Council (the OMA) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation, one of which has been withdrawn.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held an inquiry at Flecknoe Village Hall on 12 September 2023. I made an unaccompanied site inspection on 11 September 2023 when I was able to view the whole of the Order route. At the conclusion of the Inquiry it was agreed that no further site visit was necessary.
2. The Order, if confirmed, will add to the definitive map and statement a byway open to all traffic from the D2289 at Wolfhampcote (point A on the Order map) to the eastern terminus of the D2291 Nethercote Road at Sawbridge (point H on the order map).
3. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

The Main Issues

4. The Order is made in consequence of the occurrence of an event specified in Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) which requires the discovery of evidence by the surveying authority which, when considered with all other relevant evidence available, shows that a right of way that is not shown on the definitive map and statement (DMS) subsists, or is reasonably alleged to subsist. At this confirmation stage the evidence must demonstrate, on a balance of probabilities, that the right of way subsists; a reasonable allegation is not sufficient.
 5. The first, and principal issue is to determine whether the Order route has the status of a vehicular highway. Although it is common ground between all the parties who
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attended the inquiry and the OMA that the Order route is such a highway, I am required to examine the evidence to reach my own conclusion.

6. The second issue is whether there has been a sufficient discovery of evidence to engage the substantive provisions of section 53(3)(c)(i).
7. Should the first and second issues be resolved affirmatively I am required to determine whether the Order route is a route which qualifies to be recorded on the DMS as a BOAT.
8. Finally, there are issues in relation to the width of the Order route and what, if any gates should be recorded as limitations.

Reasons

Documentary evidence

Commercial maps and Ordnance Survey (OS)

9. A range of commercial maps have been considered. Four maps dating from 1610 to 1788 do not show the Order route. All subsequent maps, the earliest being 1808, depict a route consistent with the Order route and running between Wolfhampcote and Sawbridge. None of these maps are conclusive evidence as to status but the route is generally shown in a manner consistent with other minor roads. On two of the maps (Smith 1808 and Dix 1820) the route is shown as a cross road which is suggestive of public vehicular status.
10. The Order route is depicted on the OS First Edition (1881 – 1890) with double pecked lines and no indication of status. Two routes are shown leading into the Order route, each annotated FP. There is no annotation to the Order route. The Order route is shown on all subsequent editions of the OS. The depiction of a route on OS mapping is not evidence of status but is evidence of the existence of the physical feature and its relation to the local highway network.

Wolfhampcote Inclosure Act and Award 1757

11. The Wolfhampcote Inclosure Award (the Award) divided land in the parish and set out public highways. There is no map to accompany the Award.
12. The Award describes an existing 'Publick' road and states that it should remain a public highway post-inclosure. The Award describes the route by reference to land holdings and allotments. The material descriptions are '...and out of the Allotment of the said Justinian Raynsford along the west side thereof into over and out of part of the said Robert clerke's allotment out of the south side thereof leading into a certain lane in wolfhampcote aforesaid called church lane shall remain from time to time and at all times for ever hereafter as a publick road and common highway to all intents and purposes for the passage and conveyance of persons horses beasts cattle and carriages and shall be deemed as part of the publick highway or road leading from Fflecknoe to Wolfhampcote aforesaid'

'and also that the ground now admeasured marked and set out being of the breadth of fforty feet leading from wolfhampcote Aforesaid into over thro' and out of the several allotments of the said Robert clerke and Thomas goode into over thro' and out of the lower end of the allotment of the Said elizabeth green Eleanor green and sarah green into over thro' and out of the bottom part of the allotment of the

said Elizabeth walker up to the town or Hamlet of sawbridge aforesaid shall be and remain from time to time and at all times for ever hereafter as a publick road and common highway to all intents And purposes for the passage and conveyance of persons horses beasts cattle and carriages and shall be deemed as part of the publick highway or road from Wolfhampcote to sawbridge’.

13. The OMA consider the passage quoted to be a reference to the Order route. This is consistent with the result of an interpretation and reconstruction exercise. The evidence and interpretation of the Award is not challenged by the objectors. I accept that the Award demonstrates that the Order route was in existence prior to inclosure and was preserved by it. The status and physical characteristics are set out unambiguously in the Award; it is a public highway with a width of 40 feet for use by carriages, horses, pedestrians and for the droving of livestock.

Finance Act 1910

14. The Order route is shown within various hereditaments with a rateable value. Although deductions are shown against these hereditaments for public rights of way, these may relate to public footpaths only. Other routes within the local road network, such as the D2289, are excluded from dutiable hereditaments.
15. Whilst public roads are usually shown excluded from rateable hereditaments, I agree with the position set out by one of the objectors; that whilst the exclusion of the route from the relevant hereditaments would be evidence supporting vehicular highway status, the failure to exclude the route does not preclude vehicular highway status. There is no means of knowing the reason why the surveyor preparing the Finance Act map chose not to exclude the route, but it is perhaps unlikely that he would have undertaken any significant investigation into its historic status.

Handover Map and Schedule

16. The Handover map and schedule record highways considered maintainable at public expense at the time maintenance responsibility for roads passed to the County Council under the Local Government Act 1929. The Order route is included in the schedule under the heading ‘other roads including bridle roads.’ It is annotated in pencil ‘40ft parish award’.

List of Streets

17. The Order route is recorded on the List of Streets as the E2289. This list has been kept since before the First DMS. Inclusion signifies only that the route is considered by the highway authority to be maintainable at public expense. It is not indicative of status and both vehicular and non-vehicular highways can be included. The designation of the Order route as E2289 may be suggestive that the route was considered a vehicular highway albeit a minor road.

The Definitive Map

18. The Rights of Way Act 1932 required a parish survey to be undertaken and for routes considered to be public rights of way to be recorded. The Order route is shown on the survey map as an ‘other road’.
19. The process leading to the compilation of the First DMS required a further parish survey in the 1950s. The Order route is shown on the survey map as an

'unclassified County Road'. On the accompanying statement the Order route was annotated 'BR' but this was crossed out and substituted with 'unclassified County Road'. On the map two footpaths are shown joining the Order route which is described as the 'Sawbridge to Wolfhampcote Road'.

20. On the Modified Draft (1959) and First DMS (1966) the Order route is shown but not marked as a public right of way. As with the parish statement two public footpaths are shown connecting with the Order route which is described in the Statement as the Sawbridge to Wolfhampcote Road. The current DMS does not record the Order route, but describes it as the E2289, in part known as Wolfhampcote Road and in part as Sawbridge Lane.
21. The treatment of the Order route on the DMS suggests that it was considered to have public rights of a higher status than appropriate to be recorded on the DMS.

Conclusions on documentary evidence

22. The Order route has existed since at least the mid-eighteenth century. The Award is compelling evidence that at that time it had the status of a vehicular highway available for use by all classes of traffic and for the droving of livestock. All subsequent evidence, save for the Finance Act map, is consistent with that status. It is difficult to reconcile the treatment of the Order route on the Finance Act map, but I am required to make a finding only on a balance of probability and, with the weight that attaches to the Award, coupled with the consistency of all other evidence, I am satisfied the documentary evidence proves sufficiently that the Order route has the status of a vehicular highway.

Physical Evidence

23. On my visit I was able to walk the full length of the Order route in both directions. The route is 1.75 miles in length and runs between the settlements of Wolfhampcote to the east (point A) and Sawbridge to the west (point H). Wolfhampcote is a very small settlement, but its population is enhanced by the community in permanent occupation of canal boats.
24. Throughout its length the Order route has a strip which is metalled, in the sense of being constructed of stone, but not sealed with tarmac. The width of the metalled strip varies but throughout it is wide enough for a motor vehicle but not always for vehicles to pass. The condition of the surfacing is generally good although there are wheel ruts and areas of unevenness which are deep in places and would make passage in an ordinary car uncomfortable.
25. For most of its length the Order route is now enclosed on both sides, generally with a post and wire fence to the south and frequently a hedge to the north. I was told in evidence that this was not always the case and the post and wire fence on the south side is of recent origin. The available width varies but in most places is somewhat less than 40 feet but before the construction of the post and wire fence the route was largely over open land.
26. The route passes over two bridges, the first between points A and B which crosses a cutting for a redundant railway line, and the second between points B and C where a bridge crosses a canal. In both cases the width of the bridge is significantly less than 40 feet.

27. There are a number of gates along the route. When I visited some of these gates were closed but a number were open and appeared not to have been closed for some time. The gates are at points C, 2, 3, 4, E and H.
28. At the Sawbridge end of the Order route there is a post bearing two Warwickshire County Council way markers. These refer to the route as 'Unclassified County Road'. At either side of the canal bridge (points B and C) there are rectangular highway signs, incorporating a red-rimmed circle. The signs read 'Weak Bridge 18t m.g.w.'
29. Public footpath R252 connects with the order route from the south-west at a point approximately mid-way between points D and 2. Footpath R251a joins, again from the south-west, at point E.
30. The character of the Order route is significantly defined by the metalled surface which has the appearance of having been constructed soundly and been well maintained in the past. The impression given is that the route was constructed to accommodate vehicular traffic. The point is emphasised by inspecting the junction of the Order route and the D2291 at Sawbridge. At this point the D2291 is a sealed road but the clear impression is that before the application of tarmac there would have been no obvious physical difference between the two routes.

User evidence

31. 52 user evidence forms were completed and considered by the OMA when making the Order. 32 people stated that they have used the Order route driving a car or motor vehicle. 38 people have used the route on foot, 28 on a bicycle and 14 on horseback.
32. At the inquiry 4 objectors who own land and property adjoining the Order route gave evidence that they use the Order route as the vehicular access to their property. They do not have the benefit of any private right of way over the route and consider their use is by virtue of the public vehicular status of the route. A further adjoining landowner had submitted a statement of case but did not attend the inquiry. They use the Order route in the same manner. One objector gave compelling evidence of her use of the Order route which she considers to be primarily a functional part of the network of local roads rather than a recreational route.

Discovery of evidence

33. The duty of the OMA to make a modification order under section 53(3)(c) of the 1981 Act is predicated upon 'the discovery of evidence'. Once such 'new' evidence has been discovered this has to be considered with 'all other relevant evidence available' to determine whether the route subsists. Accordingly, the discovery of evidence is a prerequisite to reliance upon this section for the making of an order.
34. One objector argues that where section 53(3)(c)(i) is relied upon, there must be a discovery of evidence before the OMA may undertake an investigation into the status of a route. Since in this case there was no application for a Modification Order, it is claimed that the process undertaken by the OMA is outwith the ambit of the section. I do not accept this proposition. The discovery of evidence is a prerequisite only for the making of an order. It matters not how, or by whom, the evidence is discovered. The OMA is under a statutory duty to keep the DMS up to

date. When new evidence is available to the OMA, wherever it has come from, it is under a duty to review all the evidence and to make an order if the evidential threshold is met.

35. There must however be new evidence. The OMA is not entitled merely to re-examine only material that has been considered previously. What amounts to 'new evidence' has been the subject of judicial consideration. The leading authority is the decision of the Court of Appeal in *R v SSE ex p. Burrows and Simms* [1991] 2QB 354. In that case emphasis was put on section 53(3)(c) being concerned primarily with the correction of mistakes which become apparent because new evidence, when taken together with previously considered evidence, suggests a different conclusion to that reached without the benefit of that new evidence.
36. In this case the 'mistake' the Order seeks to address is the decision not to include the Order route on the DMS. It can be said with some confidence that the OMA had previously considered the status of the Order route as the parish survey initially attributed bridleway status, but this was crossed out and substituted with 'unclassified County Road', indicating clearly that there had been consideration of the issue and a conclusion reached that the Order route did not meet the requirements for it to be recorded on the DMS.
37. In determining whether there is new evidence it is necessary to know what evidence was considered previously. In this case there is no record of what material the OMA had available when compiling the First DMS or at subsequent revisions. However, I can be confident that the most significant piece of evidence, the Wolfhampcote Inclosure Award, was known to the OMA for a considerable time, as indicated by the annotation '40' parish award' to the schedule to the 1929 Handover Map.
38. Without knowing what evidence has been considered previously it is not possible to identify evidence which is new. The OMA do not identify which, if any of the documents featured in their report have emerged only since the last revision of the DMS.
39. New evidence is only relevant if it suggests that an earlier decision was mistaken. Accordingly, I have considered whether any of the evidence available to me suggests that the decision not to include the Order route on the DMS was mistaken. I have already found the evidence demonstrates the Order route is a vehicular highway. The evidence is consistent, save for only the treatment of the route on the Finance Act map. I have no evidence whether the Finance Act was considered previously, and I have no evidence that it was not. However, it is generally accepted that the Finance Act map was not a source of evidence that was usually considered at the time of compilation of the First DMS. As the treatment of the Order route in the Finance Act map is at odds with other available evidence, I am satisfied that it is appropriate for me to consider the substantive issue of whether the Order route meets the requirements for recording on the DMS.

Does the Order route meet the requirements for a BOAT?

40. The statutory definition of a BOAT is set out in section 66(1) of the 1981 Act which reads; 'byway open to all traffic means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purposes for which footpaths and bridleways are so used'.

41. A literal approach to this definition would suggest that it requires first to establish that the route is a vehicular highway and second to undertake a numerical analysis of the current nature of use to determine whether vehicular use or pedestrian and bridleway use predominate. The courts have recognised that this approach can lead to uncertainty where patterns of use change over time. The preponderant use of the route may at a given time be as a footpath or bridleway, but at a later date vehicular use may dominate giving rise to the possibility of fluctuating status.
42. To avoid this undesirable situation the courts have adopted a purposeful approach to the definition. The Court of Appeal considered the matter in *Masters v Secretary of State for the Environment* [2001] QB 151 CA ('Masters') where Roch LJ, dealing with this point, said 'The purpose of the definition was to identify the way Parliament intended should be shown on the definitive map and statement by its type or character'. He explained this further, saying 'Consequently, in my judgement, it cannot be shown that evidence that the use of the way by the public does not satisfy the so-called user test, is an event the occurrence of which Parliament intended should lead a county council to make an order modifying the definitive map and statement.' And later 'This result also avoids the absurdity that the adoption of a literal interpretation of the statutory definition of a byway open to all traffic would produce; that county councils might have to review their maps and statements every few years as evidence was submitted to them that the patterns of use had altered.' He concluded by saying 'Parliament was setting out a description of ways which should be shown in the maps and statements as such byways. What was being defined was the concept or character of such a way'.
43. *Masters* concerned an application to delete a BOAT from the DMS, but the principles set out by the Court of Appeal apply equally to an application to record a BOAT. In either case whether or not a route is a BOAT is not to be determined by a quantitative analysis of the current pattern of use. The correct test is one of 'type or character' or 'concept', and once that is set it will not change regardless of a change to patterns of use. It seems to me this is consistent with the established common law principle, 'once a highway, always a highway'.
44. Unfortunately, the authorities do not give any significant guidance as to how type, character or concept are to be judged. I have approached the task by seeking to assess whether attributes of the Order route are more akin to a route which is part of the local highway network, or to a less functional and more recreational route.
45. The documentary evidence is helpful. The Inclosure Award describes the Order route as a 'publick highway or road' available for use by all classes of traffic. It is not distinguished from other routes which are now part of the local road network. Post-inclosure the Order route is depicted on various maps in the same manner as other local roads. Whilst some of these maps show bridle roads, other do not and all are concerned principally with showing the road network for the functional purpose of travelling from one place to another.
46. The evidence of formal classification of the Order route is largely consistent. It is shown on the Handover map and schedule where it is annotated '40' parish award'. It is, and has throughout been, on the List of Streets. The status of the Order route was considered at the time of compilation of the First DMS and it was determined that it is an unclassified county road which did not qualify to be recorded. This is consistent with how the Order route continues to be waymarked.

47. The physical characteristics of the Order route, which I have described, are, in my judgement, resonant of a road which has had greater prominence in the past, but which has declined in more recent times. I was struck by the similarities between the Order route and the D2291 at Sawbridge. At the point where one route runs into the other the only apparent difference is the application of tar sealant to the D2291.
48. The user evidence forms demonstrate that the Order route is currently used by a variety of different forms of traffic. Numerically pedestrian and bridleway use marginally exceeds vehicular use but that probably, to some extent at least, reflects the lack of maintenance of the surface and I think it likely that if the road were maintained to a better standard, it would have a greater level of vehicular use. This would also reflect the oral evidence of those who spoke at the inquiry and universally regard the Order route as a functional road which is part of the local network.
49. In my judgement the Order route has the character of a road rather than a recreational route of the nature appropriate to be recorded on the DMS as a BOAT. On that basis, and having considered all the available evidence, I find, on a balance of probabilities, that the Order route does not meet the definition of a BOAT.

Conclusions

50. The Order route is a vehicular highway.
51. I am satisfied, on a balance of probability, that there has been the discovery of evidence sufficient to engage the provisions of section 53(3)(c)(i) of the 1981.
52. The Order route does not meet the definition of a BOAT and accordingly does not qualify to be recorded on the DMS.
53. Having regard to these and all other matters raised, I conclude that the Order should not be confirmed.

Other matters

54. In view of my conclusions, it is not necessary for me to consider issues of width or limitations.

Formal Decision

55. I do not confirm the Order.

Nigel Farthing

Inspector

APPEARANCES

For the Applicant:

Gary Grant of Counsel

Who called:

Sonu Copson

Objectors

Richard Hawker

Robin Hickin

Graham Hards

Nigel Dorsett

Christine Sanderson

Interested Party

Diana Weaver

DOCUMENTS submitted at the Inquiry

1. Paginated bundle of Inquiry documents in two volumes
2. Warwickshire CC 'E' Road Policies
3. Copy Daily Telegraph article 07.02.2002.
4. Extract from 1996 wall map showing highways maintainable at public expense
5. Extract from Divisional Surveyor's working map 1970's or earlier
6. Extract OS 1907 Popular Edition
7. Richard Hawker public inquiry aide memoire
8. Copt Warwickshire CC Public Rights of Way Strategy 1993-1995
9. Copy correspondence with H. Clarke at Ministry of Transport – 1932
10. Extract Ministry of Transport Road Map 1925
11. Copy OS extracts

