



Order Decision

Site visit made on 5 September 2023

by Nigel Farthing LLB

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

Decision date: 8 November 2023

Order Ref: ROW/3308921

- This Order is made under Section 53(3)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Dorset Council (A Byway Open to All Traffic, Batcombe and Leigh at Bailey Drove) Modification Order 2021.
- The Order is dated 12 March 2021 and proposes to modify the Definitive Map and Statement ('DMS') for the area by adding a byway open to all traffic (BOAT) between the County Road D20570 to Wriggle Lane (D20555), as shown on the Order Map and described in the Order Schedule.
- There were 2 objections outstanding when Dorset Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I made an accompanied site inspection on 5 September 2023 when I was able to view the Order route.
2. 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.
3. The Order was made by Dorset Council (DC) under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-sections 53(3)(c)(i), (ii) and (iii). It proposes to add to the DMS a byway open to all traffic as shown A - E on the Order map. Between points A and B a public footpath (part of FP 11, Batcombe) is currently recorded, between points B and D no public right of way is currently recorded and between points D and E Bridleway 59, Leigh is currently recorded.

The Main Issues

4. The requirement of section 53(3)(c)(i) of the 1981 Act is the discovery of evidence by the surveying authority which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the DMS subsists, or is reasonably alleged to subsist.
 5. The requirement of section 53(3)(c)(ii) is that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description.
 6. At the stage of making the Order it is sufficient under section 53(3)(c)(i) that the evidence raises a reasonable allegation that the route subsists but if I am to confirm
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the Order, I must be satisfied that the evidence shows, on a balance of probability, that the public right of way described in the Order subsists.

7. For the Order to be confirmed I will need to be satisfied on the evidence that the route has public vehicular status and that the right to use it with mechanically propelled vehicles (MPVs) was not extinguished by operation of the Natural Environment and Rural Communities Act 2006 (NERC) section 67.

Reasons

The Leigh Inclosure Award 1804 and Map (undated)

8. The Leigh Inclosure Award 1804 (the Award) was made under the authority of the Leigh Inclosure Act 1799 (the Act). The Act authorised the Commissioners, inter alia, 'to set out and appoint such public Highways and Carriage Roads to be made in, over upon and through said Tract or Piece of Commonable Land'.
9. The Award set out 'One other Public Carriage Road of the breadth of forty feet as the same is staked out and called Maiden Newton Drove branching out of the Main Drove aforesaid..... and extending Westward until the same enters an old Drove leading out of the said Common towards Maiden Newton.....'.
10. The Award Map (the Map) is undated. It depicts Maiden Newton Drove in a position which corresponds with points C – D – E of the Order route as shown on the Order map. Point C is on the boundary between the parishes of Leigh and Batcombe.
11. The Award and Map are compelling evidence that the section of the Order route C – D – E was set out as a public carriage road and in the absence of any evidence of subsequent stopping up or diversion it continues to enjoy that status.
12. The Award does not give direct evidence of the status of the remaining section of the Order route, A – C, which lies in the adjoining parish of Batcombe. The Award does however refer to the route continuing west from point C as 'an old Drove' towards Maiden Newton and the Map at point C is annotated 'To Maiden Newton'. The evidence suggests strongly that the 'old Drove' route from point C west towards Maiden Newton was the Order route A – C and that this would have the same status as C to E.

Tithe Maps

13. The Batcombe Tithe Map 1838 and the Tithe Map for the Chapelry of Leigh in the Parish of Yetminster 1840 each depict the section of the Order route within the respective parishes in a manner consistent with other roads in the locality. In neither case is the Order route given an apportionment number. The Batcombe Tithe Map shows the section C - D annotated Bailey Drove. The feature is shown as a continuous route A – E and it would seem that the annotation is applied to the whole of the route, suggesting that it was considered a single road of consistent status. The section B – C is depicted significantly narrower than the remainder of the route.

Commercial and other private maps

14. Various commercial and other maps have been examined. Taylor's maps of 1765 and 1796 do not show the Order route but predate the Inclosure Award. All subsequent maps depict the Order route in a manner consistent with it being a public vehicular road.

Ordnance Survey (OS)

15. The Order route is shown on all OS maps from the 1811 First Edition. The nineteenth century maps show the whole of the Order route in a manner consistent with other public roads, although the OS is not direct evidence of status. The twentieth century maps suggest that the central section of the Order route, between points B and D, which includes the crossing of the stream, had changed and that use of this section by vehicles may by then have ceased.

Finance Act 1910

16. The Finance Act map shows the Order route, annotated 'Bailey Drove', as a single continuous feature excluded from adjoining parcels, uncoloured and unnumbered in the same manner as other public vehicular highways. This strongly suggests that the surveyor who prepared the map considered the Order route to be a public vehicular highway.

Definitive Map process

17. The parish surveys did not claim any part of the Order route for inclusion on the Draft DMS. Batcombe parish claimed FP11, which emanates from the Order route, suggesting the parish considered the section A – B to have a status higher than that which would be recorded on the DMS.
18. The First DMS recorded FP 11 between points A and B although the statement described the route as 'Bailey Drove through gateway to the Parish of Leigh'. No other part of the Order route was recorded.
19. As a result of the 1973 Special Review a bridleway was recorded between points C and E.

Land Registry

20. No part of the Order route is registered at the Land Registry. Adjoining land is registered. The exclusion of the Order route from adjoining registered titles is consistent with it having highway status.

Conclusions on documentary evidence

21. The Leigh Inclosure Award 1804 and Map are compelling direct evidence of the vehicular status of that part of the Order route within the parish of Leigh and strong supporting evidence in respect of the section within the parish of Batcombe. The Finance Act maps provide strong corroboration and all other evidence considered in consistent with that status. There is no evidence to the contrary. Accordingly, I am satisfied, on a balance of probabilities, that the Order route has the status of a vehicular highway.

Physical Evidence

22. On my visit, I was able to walk the sections A – B and E – D, but the central section B - D was overgrown and impassable.
23. The section A – B has the appearance of a sunken lane bounded on both sides by substantial hedges. The entrance at point A was gated, but the gate was not locked. The surface was deeply rutted and wet and difficult to traverse. The grass

and other vegetation growing within the lane was quite high and showed no sign of recent use of any description. At point B there is no feature continuing to the north-east which is recognisable as a road. There is what appears to be a wide, dense and impenetrable hedge. I assumed that this encompasses the Order route running north-east from this point.

24. The section E – D gives the impression of a wide, open strip bounded by hedges on both sides. The entrance at point E was gated, but the gate was not locked. The surface vegetation was lush and even, suggesting that it had been relatively recently cut or grazed. There was no evidence of any recent use. At point D the terrain drops to the stream and the route is blocked by brambles and other vegetation.
25. The visible physical features that I could see are consistent with the Order route having the historical status of a vehicular highway.

Natural Environment and Rural Communities Act 2006 (NERC)

26. If confirmed, the Order would record the route in question as a BOAT. The definition of a BOAT is “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 purpose for which footpaths and bridleways are so used”.
27. I have concluded that the documentary evidence demonstrates, on a balance of probability, that the Order route is a vehicular highway. I have been provided with no evidence of use of the Order route; however, one section is currently recorded on the definitive map and statement as a footpath, and a second section as a bridleway. The central section has no recorded public status but is impassable. On this basis it is reasonable to conclude that the Order route is, or would be, mainly used for the purposes for which footpaths and bridleways are so used. Accordingly, I accept that the Order route meets the definition of a BOAT.
28. Section 67(1) of NERC provides for the extinguishment of rights for mechanically propelled vehicles (MPVs) over unrecorded public rights of way, subject to the exceptions set out in sub-sections (2) and (3).
29. None of the exceptions contained in section 67(2) apply in this case.
30. Section 67(3) prevents the extinguishment of MPV rights where ‘before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic’. The relevant date was 20 January 2005.
31. Section 53(5) of the 1981 Act provides that an application for a modification order must be made in accordance with the provisions of Schedule 14 of that Act.
32. Schedule 14 paragraph 1 provides:-
 - ‘An application shall be made in the prescribed form and shall be accompanied by-
 - (a) A map drawn to the prescribed scale and showing the way or ways to which the application relates; and
 - (b) Copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.’

33. In consequence the exception contained in section 67(3) will only be engaged where a compliant application was made before 20 January 2005. In the absence of a compliant application MPV rights will have been extinguished.
34. The issue of what constitutes a compliant application has been the source of significant litigation. The courts have adopted a requirement for strict compliance with the statutory requirements.
35. In this case the application was made by Mr J Stuart on behalf of the Friends of Dorset Rights of Way on 14 July 2004. In the summer of 2005 DC embarked upon a full consultation process resulting in a report to the Roads and Rights of Way Committee. The Committee initially resolved to make an Order, but before it could do so an objection was received from High Stoy Parish Council and Leigh Parish Council raising as an issue whether the application was duly made in accordance with paragraph 1 of Schedule 14 and within the required time limit.
36. The committee subsequently refused to make an Order on the grounds that the application was supported by 'computer generated enlarged versions of Ordnance Survey maps' which it concluded were not in strict compliance with paragraph 1 of Schedule 14.
37. An application was made by the Trail Riders Federation (TRF) to the High Court to judicially review DC's decision to reject the application in this and four other cases. The High Court judge refused to interfere with DC's decision but the Court of Appeal, and subsequently the Supreme Court concluded that the map accompanying the application did comply with the requirements of paragraph 1. An Order was made by the Supreme Court which included the following declaration 'The five applications dated 14 July 2004 [.....] made to the Appellant under section 53(5) of the Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act'.
38. DC subsequently sought to amend the Order to limit the declaration to compliance with para.1(a) of Schedule 14, so as to leave scope for consideration of whether the application was compliant with para.1(b) in relation to the supporting evidence which accompanied it. The Supreme Court refused to amend the Order and in responding Carnwath LJ said 'The court sees no reason to vary the terms of the order which was agreed between the parties and reflected the relief sought in the original claim. Had the council wished to challenge the validity of these applications on other grounds within schedule 14 para.1, they should have done so expressly in these proceedings or reserved their position. That not having been done, it is too late to raise these issues at this stage'.
39. Notwithstanding the unambiguous Order of the Supreme Court, I am invited by objectors to ignore the plain effect of the Order and to consider arguments that the application was not made in strict compliance with para.1(b) of Schedule 14. The basis for this submission is that the Supreme Court, and the lower courts, heard argument about only the adequacy of the map which accompanied the application, being the requirement of para.1(a) and, it is suggested, there are reasons to challenge whether para.1(b) was strictly complied with.
40. I agree with the objectors that the proceedings focussed solely on para.1(a) issues however, it is important to have regard to the terms of the relief sought by the TRF in their initial claim for judicial review. The relief sought included a claim for a declaration that the five applications were made in accordance with 'paragraph 1

Schedule 14 Wildlife and Countryside Act 1981'. It was apparent from the outset that the issue before the court was not confined to para.1(a) but also extended to para.1(b). It was thus open to DC and the Interested Party, Mr Plumbe, to raise as an issue any perceived lack of compliance with para.1(b). No such issues were raised until after the conclusion of the proceedings and the clear consequence of this was that the opportunity to do so had been lost once the Order had been made.

41. In the circumstances I have described I take the view that it is not open to me to go behind the terms of an Order made by the Supreme Court. The effect of the declaration is to establish conclusively that the application in this case made on 14 July 2004 was compliant with paragraph 1 of Schedule 14 of the 1981 Act and in consequence pre-existing unrecorded rights for MPVs to use the Order route were not extinguished.

Other Matters

42. References have been made to the suitability and desirability of MPVs using the Order route. I understand the points made but, as they concern matters which lie outside the criteria set out in the relevant legislation, I have not given them any weight in reaching my decision.

Conclusions

43. Accordingly, it is my view that, on the balance of probabilities, the available evidence is sufficient to demonstrate that the Order route meets the definition of a BOAT and qualifies to be recorded on the definitive map and statement as such. Further, and for the reasons given, I am satisfied that the right for MPVs to use the Order route were not extinguished by reason of section 67(1) of NERC.
44. Having regard to these and all other matters raised, I conclude that the Order should be confirmed.

Formal Decision

45. I confirm the Order.

Nigel Farthing

Inspector

