



Order Decision

Site visit undertaken on 27 March 2023

by **A Behn Dip MS MIPROW**

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

Decision date: 18 May 2023

Order Ref: ROW/3296810

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Hertfordshire County Council (Ashwell 33 and Caldecote & Newnham 9) Modification Order 2018.
- The Order is dated 20 July 2018 and proposes to modify the Definitive Map and Statement for the area by adding a public bridleway as shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Preliminary Matters

1. In February 2004, an application to add a bridleway in the parish of Caldecote and Newnham to the Definitive Map and Statement for Hertfordshire was made by Mr M Westley (the applicant) of East Herts Footpath Society. In July 2018 after due investigation, Hertfordshire County Council (HCC) consented to make an Order which, following advertisement, received two objections and one expression of support. One objection was subsequently removed, with the remaining objector, an affected landowner AE & WA Farr, being represented by Birketts LLP (the objector).
2. I made an unaccompanied site visit on 27 March 2023 when I was able to view the entirety of the Order route and walk the major part, albeit there was no physical existence of it on the ground.
3. In writing this decision I have found it convenient to refer to points marked on the annotated Order Plan, and I therefore attach a copy of this plan.

The Main Issues

4. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the occurrence of an event specified in sub-section 53(3)(c)(i) of that Act. Accordingly, the main issue is whether the evidence discovered, when considered with all other evidence available, is sufficient to show that a public right of way not shown on the definitive map and statement, subsists over land to which the map relates.
5. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be reasonably alleged to subsist to make a Modification Order, the standard of proof is higher for it to be confirmed. At this stage, the evidence is required to show, on the balance of probabilities that a right of way subsists.

6. The evidence in support of this case relies on historical documents and maps. As regards the documentary evidence adduced, 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 provided as evidence, giving it such weight as is appropriate, before determining whether a way has been dedicated as a highway. There are several records before me and in making my decision I have considered them below.

Reasoning

Drury & Andrews' Map 1766

7. The Drury and Andrews' Map of 1766 was schematic by nature with a limited level of accuracy, but it can be of help in determining the location and status of a way, in conjunction with later maps.
8. The map shows a road (as indicated by the map legend) running between 'Newnham' and 'Bygrave,' which the applicant and HCC suggest may follow the alignment of points H-J of the Order route. The objector disagrees with this interpretation asserting that point J is further north.
9. As the map is schematic, it is difficult to ascertain whether the road shown does follow that part of the Order route indicated above. By itself, the map holds little evidential weight albeit it does illustrate a route existed, linking Newnham and Bygrave in 1766.

Papers relating to the sale of Manor of Newnham 1793-1808

10. The particulars of the sale of the land incorporate an estate plan of the Manor of Newnham. The map shows points H-J as part of a longer route linking Caldecott, Newnham, and Bygrave, illustrated by a double line, one solid and one pecked, with the eastern end of the route labelled 'to Bygrave' and the western end 'from Caldecott.' This would suggest that this part of the route was likely considered a road at this time.
11. The map also appears to depict points A-X in a similar fashion albeit very faintly. At point X this section connects to a separate route also depicted by a solid and pecked line leading east and labelled 'to Sandon,' and leading west then south to point Y. This adjoining route that cuts across point X was later denoted as a road to be stopped up, in the 1843 Quarter Sessions Notice of Stopping up (QSN).
12. HCC submit that this estate map shows the physical existence of a route between A-X and H-J, with H-J likely being highway, as it was part of a longer route labelled 'from Caldecott' and 'to Bygrave' and shows a similar alignment to the road depicted in the Drury and Andrew's Map.
13. It is common ground between the parties that the map does not show the physical existence of a route between points X-H, although this section of the Order route appears to follow the field boundaries that were in existence at this time.
14. It is agreed that the estate map is not evidence of highway rights being that it was compiled for the purpose of land sale, but it does illustrate the physical existence of sections A-X and H-J. The objector points out that the routes to the east of Newnham were depicted by line and pecks on this map rather than other routes which were depicted by double solid lines. As such they submit that this notation

was suggestive of less permanent substantial routes, likely created for farming rather than through routes. This is refuted by HCC and the applicant who submit that these notations were used to denote an unfenced route or boundary. With respect to the views expressed on the demarcation of the routes on this map it is of note that most of the routes illustrated this way on the map were later shown in the QSN to have highway status.

Bryant's Map 1822

15. Bryant's Map, drawn from an original survey, is considered more accurate than earlier commercial maps. It shows a route following points A-C, which then continues in a south westerly direction, west of points X to H, towards point Y. This appears to be one of the roads proposed for stopping up in the 1843 QSN. Just northeast of Y this route crosses another route that travels in a south easterly direction towards Bygrave incorporating points H-J. It is common ground that the map does not show a route between points C-X-H albeit the applicant submits that non-depiction does not imply non-existence and that, in 1822 perhaps, the route C-X-H was considered an inferior route to C-Y.
16. The applicant feels that the inclusion of sections of the Order route on commercial maps could indicate possible public rights, as those purchasing the maps would have the expectation that the routes shown on them were available to use. However, the objector asserts that if private routes were not shown on commercial maps, they would serve little utility for navigation. The objector also submits that Bryant's map holds no weight as it does not provide legal evidence of status. Later evidence, however, does indicate that the sections of the Order Route shown on this map were highway and consequently I consider it does offer some weight to the existence and possible status of sections A-C and H-J.

Ordnance Survey (OS) first edition map 1833, 1 inch to 1 mile

17. The earliest OS maps were produced for military transportation purposes and recorded physical features at the time of the survey but did not intend to identify public or private routes or their status. From 1888 OS maps carried a disclaimer to the effect that representation of a track or a way on the map was not evidence of a public right of way. The disclaimer was presumed to apply to earlier as well as later maps.
18. The 1833 map clearly depicts a route following points A-C-X-F and the route follows a similar line to point H, but does not show section H-J. The objector produced a map illustration overlaying the Order route in red with the route shown on an 1877 OS map and submitted that the Order route departs from that depicted on the OS map, from point F. However, I agree with HCC that the angle of the objector's red line depicting the Order route appears too sharp south of point F and that the Order route between F and H is more similar in its alignment to the route depicted on the OS map.
19. This OS map shows physical existence of the route from points A-H in 1833, although I do concur with the objector that, as supported by relevant case law, OS maps have the self-imposed limitation that the representation of a route is not evidence of public status.

Newnham Tithe Map and Apportionment 1842 (Apportionment) and 1847 Map (by HALS) & Newnham Tithe Map 1842 (by TNA)

20. Tithe records identified agricultural land that was capable of being tithed and recorded the resulting land apportionment on a map and in a schedule. They are considered statutory documents and although they were not produced to record public rights of way, they can sometimes be helpful in determining the existence and status of such routes.
21. The Order route is shown in its entirety on the 1842 map and coloured sienna. The route is labelled 'to Ashwell' at point A and labelled 'from Baldock' below the southernmost point of the route shown on the map, having headed south from point J along what is now known as Bridleway 13 (BR13) and then southwest along what is now known as Restricted Byway 14 (RB14). The apportionment does not detail individual roads but lists sixteen acres as the total amount of roads and wastes.
22. The colour sienna was often used to depict roads, however on its own the colouring is not in itself good evidence of public vehicular rights. The annotations 'to Ashwell' and 'from Baldock' however, show that the Order route had onward termini to named settlements. Although the objector suggests this labelling may have been done to help the reader orientate the map, it is suggestive when considered with the colouring of the route, of the possible existence of public rights.
23. The objector referred to the conclusion of *Merstham Manor Ltd v Coulsdon and Purley Urban District Council* [1937] 2 KB 77 along with its reference thereof in *Maltbridge Island Management Co v SE* (31/7/98), suggesting that tithe maps are not strong evidence of public status as their remit was not to identify whether routes were public or private, but just to show what was titheable. However, a tentative conclusion can be made from the examination of these statutory documents that the route physically existed at this time and may have held public rights.
24. The objector submitted that it is of significance that the Order route was depicted with dashed boundaries on the Tithe Map whereas the known public highways that survive today were depicted with solid lines. This is most certainly the case for vehicular highways, but it is also true that BR13 and RB14 which were depicted in the same manner as the Order route, also survive to this day.
25. The objector suggested that the Order route being depicted with double dashed lines was indicative that there were no hedges trees or fencing marking out the route and separating it from the surrounding land. They then further suggested that this lack of delineation to boundary features indicated the route was not laid out as a permanent physical feature and was more likely to be for private not public access.
26. However, upon close examination the Order route from points A-F seems to be demarcated by a solid and a dashed line seemingly following a boundary line. The same boundary lines appear also on Bryant's Map, the OS 1st Edition Map, and the sales documents. Points F-J are depicted as double dashed lines but the suggestion by the objector that this double dashing indicates private access rather than public is not borne out in later maps where section H-J is established as having highway rights in the QSN.
27. The objector referenced *Hollins V Oldham* [1995] pertaining to the accuracy of maps and their liability to human error. Drawing from this, the objector's

subsequent view was that this Tithe Map could not be relied upon due to its inconsistencies to the other maps submitted in evidence. However, the Judge in *Hollins V Oldham* reasoned that this applied to all maps, not just the Tithe Map and assuming that is the case, human error could apply to all the maps before me. Moreover the fact that maps were produced for different purposes would also form a reasonable explanation as to why routes are shown on some documents and not others.

Quarter Sessions Notice of Order 1843

28. The Quarter sessions were local courts where Justices of the Peace met quarterly to deal with county administration including the creation, diversion, or extinguishment of highways.
29. A Notice of Stopping up dated 12 August 1843 was submitted in evidence. It referred to a future meeting of 19 October 1843 by Justices of the Peace at St Albans, whereat application would be made to stop up various highways in the parish of Newnham.
30. On the accompanying plan the Order route is again shown in its entirety, illustrated by a solid line and pecks between points A-F and by double pecked lines from F-J. The route is coloured blue between points B-X and points H-J, with no colouring for the middle section X-H, or for A-B.
31. The notice reserved bridleway rights of eight feet wide on the two sections coloured blue on the accompanying map, which correlate to points B-X and H-J on the Order route. This would effectively have created two cul de sac bridleways.
32. It is notable that the road that ran northeast from point Y and then east to X and north to B was to be stopped up and diverted onto a highway to the west, which is in existence today known as Ashwell Road, but bridleway rights were to be reserved from points B -X.
33. It is notable also that the road running from point Y to point H was to be stopped as unnecessary, yet the section of the road from H-J was clearly still necessary as it was to be reserved with bridleway rights.
34. I acknowledge the objector's statement that the document is a Notice of Stopping up and not a 'made' order, and so must be limited in its evidential weight. However, as they reflect themselves, the fact that the roads to be stopped up were not shown in later maps, supports the premise that the order was in fact completed.
35. Nonetheless, whether it is a notice of Order or a completed Order the written and pictorial evidence of the intended reservation of bridleway routes over certain sections of the Order route is strong evidence as to the public status these parts of the route held and holds significant weight for these sections having held at least bridleway status in 1843.
36. The objector suggests that because the section of the Order route from X-H was not mentioned in the stopping up order, it might be reasonable to assume that this was because it was not a right of way. However, only the routes affected by the proposed changes appear coloured and are mentioned in the Notice of Order. Some of the other routes shown uncoloured but not referenced on the accompanying notice exist as some form of highway today.

37. It was noted by the objector that some other routes (not related to this Order) that were depicted on the QSN plan were not shown on the Tithe Map and vice versa and they suggested that this rendered the Tithe Map and QSN plan inconsistent and unreliable. However, the depiction of the local routes they specified were to be found on some of the other maps submitted in evidence and not in others. I refer back to paragraph 27.
38. The objector commented that there is no evidence that the bridleways mentioned in the notice were set out, used, and accepted by the public and suggest that the QSN should not be taken at face value. However, the QSN seems to indicate that the sections retained as bridleway were previously considered to be roads before the stopping up notice and if this were the case, it is unlikely that a lower status of way would require 'construction' of any sort.
39. The objector submitted that the QSN cannot provide evidence as to the status of X-H as it was not addressing or concerned with the legal status of this section. I agree to a point but consider it unlikely that these bridleways would be considered as necessary by the Justices of The Peace for no reason.
40. It is notable that this QSN affected routes that were coloured sienna on the Tithe Maps, adding credibility to the suggestion that the Order route was considered to have public rights in the 1840's, possibly at vehicular status.

OS Maps 1:2500, 1877 & 1898

41. Points A-C-X-F are visible as field boundaries, but no route is depicted. On the 1898 map the field boundary between A-C has disappeared.
42. It is agreed by all parties that at the time of the 1877 and 1898 surveys, the Order route did not appear to be a physical feature worthy of denoting on a map.
43. The objector notes that the only routes to physically survive from the Tithe Map onto these maps were those that had solid boundaries on both sides. However, conversely, I note that these OS maps do not show RB14 and BR13 which were depicted and coloured sienna on the Tithe Map and are in existence today. This is consistent to the reasoning that no one map shows everything, and that the evidence must be considered as a whole.

Finance Act 1910

44. The Finance Act 1910 (FA 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 between 1910 and 1920. It was a criminal offence to make false statements to reduce tax payments. The existence of public rights of way over land reduced its value and the liability for tax, so were recorded in the survey.
45. It is agreed by all parties that these documents provide no evidence of the Order route.
46. I concur with the objector that as per *Fortune v Wiltshire CC* [2012] EWCA Civ 334, inclusion in the FA 1910 is strong evidence that a route was public, however it does not necessarily follow as suggested, that if a route were not shown on the FA 1910 that it is strong evidence that a route did not exist.

Newnham Parish Survey 1951-1954

47. The National Parks and Access to the Countryside Act 1949 required County Councils to produce a survey of land in their area and produce a definitive map and statement showing all footpaths, bridleways and roads used as public paths.
48. An initial survey for this area appears to have been undertaken by Mr Page of the Ramblers' Association which resulted in four paths being included on the map, the Order route not being among them. The recorded notes of the survey of October 1951 did however mention that in a local establishment (which was south of the Order route) known as '*The Compasses P.H.*', '*a resident at Newnham and many old residents of Radwell and Baldock*' spoke of an old right of way with a description that resembled the line of the Order route. The residents remarked that it was unwalkable due to sections of it being ploughed up. The Ramblers advised on their notes that very old maps would need to be accessed to investigate further.
49. The objector states that this evidence amounts to statements made in a pub and can carry little or no weight, however I consider that the note from the survey affords some reputation to a similar route existing historically; albeit it is not evidence of public rights. I find it compelling that those local residents in the early 1950's with no immediate recourse to the maps that I have before me, (which are dated over a century earlier than the parish survey), should speak of an old right of way, mentioning specific features 'between Hullockpit Hill' and 'Bygrave Plantation' and connecting to 'Arbury Bank'.
50. Ashwell Restricted Byway No 2 (RB2), commences at point A of the Order route heading northwards to Arbury Bank. The parish survey also noted that RB2 should have continued further south to the parish boundary but had been ploughed up, adding credibility to the recollections of the local residents who talked of the Order route being ploughed up. It would also suggest the RB2 is likely the onward link of the route they spoke of leading to Arbury Bank.

Draft and First Definitive Map 1954-1955 and Special Review 1979-1984

51. The first Definitive Map shows RB2 terminating at point A of the Order route with no onward route into the Newnham Parish. The Special Review shows no evidence of the Order route albeit the Ramblers raised concerns at the time about why this route stopped abruptly at the parish boundary.

Conclusions on the documentary evidence

52. There is much debate about the consistencies or inconsistencies of maps, however it is generally accepted that maps had different objectives. Depiction on one map and not another is not necessarily inconsistency but perhaps relative to the purpose of the maps.

Sections A-X and H-J

53. I find sufficient evidence that sections A-X and H-J on the Order route held historical public rights of at least bridleway status. These sections are clearly described and illustrated by the 1843 QSN and supported by the earlier Tithe Map and Bryant's Map as well as the sales documents. Later maps indicate that the adjoining roads that were to be formally stopped up as part of the QSN were no longer in existence, suggesting the order was completed and there is no evidence

before me to show this was not the case. With this in mind, the fundamental principle of 'once a highway, always a highway' must prevail in the absence of any legal undertaking to amend or downgrade documented rights, even should the highway no longer physically exist or seem suitable.

Section X-H

54. The evidence for the mid-section of the Order route is less compelling than that for both end sections of the route. Although the objector submits that the Tithe Map is the only evidence relied upon for its existence, its physical presence is also illustrated on the 1833 OS 1st Edition map and the 1843 QSN, as well as being referenced by local residents in the 1950's parish surveys for the first Definitive Map and Statement.
55. If there was no purpose or onward journey, I can see no reason why the Justices of the Peace would order the roads intersecting the Order route to be formally stopped up in 1843 yet retain the end sections of the Order route as bridledways, both seemingly terminating in the middle of a field. As stated in *Bailey v Jamieson* [1875] *'to constitute a highway, there must be some notion of a passage which begins somewhere and ends somewhere, and along which the public have a right to drive or to walk from its beginning to its end'*. The objector suggested that these cul de sac bridledways could have had independent amenity, submitting that there was rumour of a well being in situ near point H. However, there is nothing before me that points to this being the case and nothing to suggest what independent utility may have been at point X.
56. With no proven independent amenity, I consider it more likely that the cul de sac ends of the Order route were downgraded from roads but retained as bridledways, to match the status and use of the mid-section X-H, correlating with the maps where the entire route is illustrated.
57. This likelihood is more compelling when the wider network is considered. The RB2 from Ashwell connects to section A-X, and BR13 and RB14 connect to section H-J. If Section X-H were a physical entity a much longer route linking the villages of Ashwell, Baldock and Bygrave, would have existed. This correlates with the recollections of the local people consulted in the parish survey.
58. I acknowledge the objector's comment that the Order route is not shown on any map since 1877 and that it is not credible that the physical existence of a route that held public status in the 1840's would have disappeared within that timescale. However, it is notable that the connecting bridledways and restricted byways that are shown on the Definitive Map today and were also shown as physical features in the 1840's and even in some of the earlier maps, were also not shown as physical entities on the 1877 map.
59. The objector submits that the evidence for the mid-section of the Order route is purely circumstantial and based mainly on the QSN proposal for the retention of bridledway rights for sections A-X and H-J. They also feel that it is inappropriate, 180 years later, to make assumptions as to why the bridledway rights were proposed to be retained. However, given the dependence of this case on historical evidence, I consider *Fortune & Ors v Wiltshire Council & Anr* [2012] applies. Lewison LJ commented that *where an inquiry goes back many years or in the case of disputed*

highways, centuries, direct evidence will often be impossible to find. The fact-finding tribunal must draw inferences from circumstantial evidence.

60. The evidence supplied in this case is very finely balanced and the views expressed are by nature subjective, raising inferences either way. I consider the evidence for Sections A-X and H-J substantial for confirming bridleway status. I do not consider that any piece of evidence individually points to section X-H as a bridleway but would refer to *R v Exall* 4 F & F 922, where Pollock CB suggested that circumstantial evidence *'is more like the case of a rope, composed of several cords. One strand might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.'* With this in mind, I do find when taken as a whole, on the balance of probabilities, the case tips just in favour of historic bridleway status having subsisted.

Other matters

61. I note the suggestion by the British Horse Society that should the section between X-H be found to have highway rights, it should be recorded as what the evidence suggests rather than treating it as an isolated highway. The reasoning for this was in case future and further investigation revealed a byway existed historically that connected to this section. However, I agree with the applicant and the objector that *Bailey v Jameson* applies in this instance. The evidence for higher status than a bridleway is not supported by the QSN as the roads leading to X-H were stopped up and only bridleway status was retained at each end of the Order route. Accordingly, it is reasonable to assume that the section X-H was also considered to be of no more than this status.

Conclusion

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

Formal Decision

63. I confirm the Order.

A Behn

INSPECTOR

