

Interim Order Decision

Site visit made on 30 October 2023

by Mrs A Behn Dip MS MIPROW

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

Decision date: 8 February 2024

Order Ref: ROW/3289783

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Dorset County Council (Upgrading of Bridleway 9, Winfrith Newburgh and part of Bridleway 5, Coombe Keynes (Claypits Lane) to Restricted Byways) Definitive Map and Statement Modification Order 2011.
- The Order is dated 3 June 2011 and proposes to modify the Definitive Map and Statement for the area by upgrading Bridleway 9 and part of Bridleway 5 to Restricted Byways as shown on the Order Map and described in the Order Schedule.
- There was 1 objection and 2 representations outstanding when Dorset County Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is partly confirmed, subject to the modifications set out in the Formal Decision, which require advertising.

Preliminary Matters

1. In June 2005, an application to upgrade a route between Winfrith Newburgh and Coombe Keynes, from a bridleway to a byway open to all traffic, was made by Mr Diamond on behalf of The Trail Riders Fellowship. In June 2011, after due investigation, the Council refused the application as submitted, but consented to make an Order to upgrade that part of the route from Claypits Farm to the western edge of Coombe Wood, incorporating Bridleway 9 and part of Bridleway 5, to a restricted byway.
2. Following the making of the Order, an objection was received from the landowner, Lulworth Estate Trustees Ltd & Weld Estate Trustees Ltd (the objector). Two representations were also received wherein the correspondents stated they had no objection to the Order.
3. I made an unaccompanied site visit on 30 October 2023 when I walked the current diverted route of the bridleways, as well as the majority of the Order route on its original line, being able to observe those parts that I did not walk from other vantage points. In writing this decision I have found it convenient to refer to points marked on the Order Map and therefore attach a copy of this map.

The Main Issues

4. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of the discovery of evidence as provided in section 53(3)(c)(ii) of that Act. The

requirement of the legislation and what I must consider on the balance of probabilities, is whether the evidence discovered by the surveying authority, when considered with all other relevant evidence available, shows that a right of way that is shown on the Definitive Map and Statement as a highway of a particular description, ought to be there shown as a highway of a different description.

5. For the user evidence submitted, section 31 of the Highways Act 1980 Act (the 1980 Act) is relevant. This requires consideration as to whether a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years. If this is the case the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is calculated retrospectively from the date when the right of the public to use the way with motorised vehicles was brought into question.
6. If statutory dedication is not applicable, I shall consider whether an implication of dedication for use by motorised vehicles has been shown at common law. Common law requires me to consider whether the use of the way and the actions of the landowner have been of such a nature that the dedication of the way for vehicular use by the landowner can be inferred.
7. As regards the documentary evidence adduced, section 32 of the 1980 Act requires that I 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 for motorised use. There are several records before me, as evidence discovered, and in making my decision I have considered them below.
8. Should the evidence be supportive of possible unrecorded vehicular rights, it will be necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006 (NERC), which extinguished rights of way for mechanically propelled vehicles, subject to certain exceptions.

Reasoning

User evidence

Statutory Dedication

9. The application to upgrade the Order route was made in June 2005, which the Council submits is the date the status of the right of way was brought into question. Albeit the objector deposited a Statement and Plan under Section 31(6) of the 1980 Act in 1990 and again in 2005, both showing the Order route as a bridleway, neither were followed up by a declaration. Correspondingly I find that as the process was not completed, these deposits are likely not sufficient to bring the status of public rights into question. Accordingly when considering statutory dedication, the relevant period will be considered as 1985-2005. The user evidence before me is insufficient to fulfil the requirements of statutory dedication as the earliest use by motorcyclists commenced in 1986, fulfilling only 19 of the 20 years use required. I will therefore consider the matter under common law.

Common law

10. At common law there is no requirement that 20 years use be shown. An inference that a way has been dedicated for public use under common law may be drawn where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
11. With respect to use by motorised vehicles, the objector raised the point that when the dairy was constructed 40 years previously, it appeared to have been built over the line of the Order route. They considered that this would have been inconceivable should there have been motorised use of the bridleway and further added that no interference had been experienced with the dairy by virtue of motorised use, suggesting there had been little or any use of the Order route in this manner.
12. Six User Evidence Forms were submitted stating use of the Order route by motorcycle. Use was open and for pleasure with no users being challenged. All users mentioned gates along the route that were unlocked (or often unlocked as stated by one user) and all recalled a wide route that narrowed significantly at Coombe Wood. They stated that others used the route, on foot, horseback, and motorcycle and that they saw no signs or notices advising they should not be using the route.
13. Albeit use appeared to be open, as Lord Blackburn summarised in *Mann v Brodie [1885] 10 App. Cas. 378*, it is necessary for such use to be '*so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated.*' Until 1990, there were only 2 users of the route by motorcycle, following that the average was 4, and for two brief periods between 1996-97 and 2003 -2006 there were 5 users by motorcycle. Use averaged between 3-4 times per year, with one person stating use of the route 6 times per year and two further users stating use only 1-2 times per year.
14. Although two users submitted that they were seen by farmworkers and another two state they left visible tyre tracks on the route, I am not persuaded that the level of usage was sufficiently notorious to alert the landowner that a continuous right to enjoyment of the use by motorcycle was being asserted.

Documentary Evidence

Thomas Sparrow Estate Plan 1768 and John Sparrow Lulworth Castle Estate Map 1771

15. The 1768 Winfrith map appears to show the Order route as far as approximately Point E, by parallel dotted lines, which the map explanation indicates are 'retained roads'. The same denotation is used in the 1771 map, although much clearer, with the route shown running along the hedge lines, except between points C-D where it runs across an open field. At point E, the route is labelled 'To Coombe.'
16. Conversely the corresponding Coombe Keynes map which includes the area of the route from points E-F does not show the Order route at all, yet does show an unrelated accommodation track between two fields.

The Winfrith Newburgh Inclosure Act 1768 and Award 1771, The Coombe Keynes Inclosure Act and Award 1761

17. In the Inclosure documents for Winfrith Newburgh, under the heading '*Publick Roads,*' 5 roads are shown, the final one being described as '*The road leading from the Parish to Coombe Wood from the Crown Inn thro' Clay Street.*' I concur with the Council's view that this description likely relates to the Order route, inasmuch that the Crown Inn was apparently located in School Lane according to the 1841 Census, and that 'Clay Street' may have been Claypits Lane.
18. Albeit the objector also agreed that the road described corresponded with the Order route, their assertion was that although the road went in the direction of Coombe Wood it did not actually reach the wood, but terminated at the claypits which were marked on old maps as being located between points A-B. The objector considered that the claypits would have been a place of public resort, but that the onward route would have been at most, a bridleway.
19. In support of this reasoning, attention was drawn to the width of the roads set out in the Winfrith Newburgh Award, which were stated to be set out as '*60 feet broad at the least, between the ditches or fences (except bridleways and footways)*'. The objector asserted that the Order route was demonstrably narrower than the width set out by the Commissioners, but that Claypits Lane prior to point A was much wider and thus likely the extent of the road described in the Winfrith Newburgh award.
20. The objector also pointed out that although the Award had set out public roads as 60 feet in width, it was also set out that this did not need to be the case for bridleways and footpaths. Aligning to this, the view of the objector was that the public roads set out did not necessarily have to be vehicular, and that a bridleway could have been a public road for the purposes of the document. The council did not agree with this interpretation, and considered that the route being awarded under the public road section clearly demonstrated the intention of the Commissioners to record the route as a vehicular highway.
21. It was submitted by the objector that the Coombe Keynes Inclosure Act and Award of 1761 had not been considered by the Council and that it was significant within these documents, that the Order route was not shown for that part of the Order route comprising points E-F, which fell inside the parish boundary for Coombe Keynes. They also felt it was notable that under the heading of public roads in the Coombe Keynes Award, there was no reference to any road leading to Winfrith Newburgh from Coombe Keynes.
22. Inclosure documents can provide very good evidence of public rights of way, including public roads, however, there was sometimes a lack of consistency between different maps and awards and this can be seen clearly in this particular case. The Coombe Keynes award did not set out any public road on the line of the Order route heading from their parish to Winfrith Newburgh, albeit the Winfrith Newburgh documents did recognise a public road from that parish to Coombe Wood.
23. I consider the Winfrith Newburgh Award offers very strong evidence of a possible vehicular carriageway for part of the Order route, albeit the powers of the Commissioners would not have enabled them to award roads in another parish. As such, the Inclosure records as a whole do not support a vehicular carriageway to

Coombe Wood itself, as that is outside of the parish, but only as far as point E of the Order route.

Cary's Map 1787, 1st Edition Ordnance Survey (OS) Map 1811, C&J Greenwood Map of Dorset 1826

24. Cary's is a small-scale map which shows a route in a similar location to the Order route, leading to Coombe Keynes, although the line of the route is straighter than that of the Order route. On the OS map, a route is shown from Winfrith Newburgh to Coombe Keynes on the same alignment to the Order route, corresponding with the Greenwood map, although the excerpt from this map shows the first part of Claypit Lane between two solid lines and the rest of the Order route as a double pecked line.

Winfrith Newburgh and West Lulworth Tithe Map 1839 and Coombe Keys Tithe Map 1840

25. The 1839 Winfrith Newburgh Tithe map shows the Order route from point B to just past point E, leading into Coombe Keynes parish and labelled '*to Coombe Keynes*'. The Coombe Keynes tithe map also shows a route, coloured sepia, from point E leading to Coombe Keynes, labelled '*from Winfrith Newburgh*.' The route is marked with the number 32 along its length, which in the apportionment is described as '*The Drove*' with its state of cultivation marked as '*rough pasture*' and measuring 4 acres and 15 perches. A number of lines are shown across the route which could indicate gates.

26. Ultimately the Tithe Maps did not differentiate between public and private roads, as the Tithe Commissioners were only concerned with the productiveness of the land. Roads marked upon them could have been private or public as both lessened the productivity of the land. It can be observed from the colouring of other routes on the two maps, that some are recognised as highway today and others are not, for instance the farm track heading north to Newburgh Farm.

Plan of Newburgh Farm 1876 and Osmington to Lulworth Light Railway feasibility survey 1898

27. The Farm Plan only shows the part of the route from point D, labelled '*from Winfrith*' at this point and '*to Coombe Keynes*' at point F. The Osmington to Lulworth Light Railway feasibility survey 1898 depicts the Order route as an unmetalled road. Although these documents afford reputation of the existence of the route, they are of little help when ascertaining status.

Wareham Highway Board Minutes April and June 1896

28. In the minutes of the Wareham Highway Board a surveyor was instructed to inspect the '*Coombe Wood Road*' with regard to drains and ditches. The surveyor reported back that a drain should be re-laid and the side ditches taken out. This was '*ordered to be done*.'

29. There is no reference as to where on the Order route this drainage problem occurred, but I do concur with the objector that the most logical area would have possibly been between points A-B, which is lower lying topographically, with some ditches present and quite boggy in nature. However it may also have been on the section of Claypits Lane west of point A which is recognised as a vehicular highway today.

OS Maps 1886, 1888, 1898, 1902, 1906, 1928

30. All of the OS maps show the Order route in a consistent manner, depicted by double parallel lines along Claypit Lane to approximately mid-way between points A and B, and thereafter by double pecked lines, or one pecked line and one solid line. On some of the maps there are lines across the route suggesting possible gates existed along the Order route. The 1888 6 inch to 1 mile map, placed the name Claypit Lane equidistant between point A, to just before point B on the map, rather than half way along the Order route, which the objector considered to be significant to the apportionment of what was viewed as public highway on this map.
31. Ultimately, the purpose of OS maps was not to record public rights of way, but rather what features existed on the ground. 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. Furthermore, in 1905 surveyors were instructed that '*OS does not concern itself with rights of way and survey employees are not to inquire into them*'. As such, these maps hold limited weight in demonstrating the status of rights of way but are useful in showing what physical characteristics existed at the time.

Finance Act 1910

32. The Finance Act 1910 maps show part of the route uncoloured and falling outside of land holdings for the short section from point A to just before point B. Along with the depiction of double parallel lines and the existence of buildings along this short section of the route, the documents do suggest that section A to just before B was possibly a vehicular highway.
33. Thereafter the rest of the Order route falls into the unbroken colour washed hereditaments numbered 93 and 199, with the accompanying valuation reference books indicating deductions of £50 and £100 for rights of way within the hereditaments. The existence of public rights of way effectively reduced the value of the land and liability for taxation and they were therefore included in this statutory survey. Although there are other rights of way within the hereditaments, there is potential that a proportion of the deductions were for the remainder of the Order route. However, whether the status of this section was also a vehicular right of way is more unclear, being that it falls within other land holdings and that deductions for public rights of way were more likely to be footpaths or bridleways rather than vehicular carriageways.

Bartholomew's Touring and Cycling Maps 1911 and 1920

34. Both maps depict the Order route as an uncoloured road '*inferior and not recommended to cyclists*.' Albeit Bartholomew's map was sold commercially, it did not address the public status of any routes shown and bore a disclaimer to that effect. Accordingly these maps are good evidence of the existence of the route, but not evidence of the level of any public rights.

Bacons Map of Dorsetshire 1920's and Ministry of Transport Road Map of Weymouth, Yeovil, and Taunton 1923 and Geographia map of Dorsetshire 1920's

35. All maps depict the Order route as 'other road.' These maps are helpful in that they add to the consistency of portrayal of a route on the line of that of the Order route, albeit they are not evidence of the status of that route.
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Definitive Map Process records

36. The Order route features from the very first parish surveys when it was labelled by both parishes as a public carriage or cart road mainly used as a bridleway (CRB). There is much conversation about the term CRB and whether the term was engaged to describe a public carriage road used as a bridleway, or a cart road used by farm traffic whose main use was as a bridleway. Ultimately the context used here is not known, although some of the documents are helpful in showing how the Order route received its current designation.
37. The 1954 survey notes and letters for Winfrith Newburgh stated that the condition of the Order route was *'fit for vehicular traffic'* and that it had been added *'for the purpose of continuity,'* albeit the route was added by the County Council, rather than the Parish Council. The officer further stated that *'This CRB is known as Claypit Lane and was erroneously assumed to be a county road.'* The survey notes for Coombe Keynes stated that the route was *'poor through Coombe wood,'* which is west of the Order route and that the western section of the Order route (points E-F) *'was ploughed.'*
38. The draft map of 1955 suggested the Order route should be classified as a Road Used as a Public Path, although the 1964 provisional map showed the Order route as a bridleway, depicting a line across the route at point A, with the annotation of C/R, seemingly indicating that was where the County Road terminated and the bridleway began. Ultimately the first Definitive Map in 1967 showed the Order route as a bridleway.
39. Further consideration was given to the status of the route in the 1973 Special Review with suggestion that it was an old road connecting villages in the area, but also saying only farm traffic could negotiate the route directly east of the County Road, or through Coombe Wood. Notated also was the fact that the first field east of Claypits Lane was now pasture, albeit in dry weather the section could be passable in an ordinary motor vehicle. However, just as happened in the earlier definitive map processes, the final decision was to *'retain as bridleway – public vehicular rights not shown to exist over this way and furthermore the path is unsuitable for public vehicular use.'* There were objections received to this classification, generally based either on the OS Map of 1811 showing the Order route as a road or because *'it was liable to be ploughed'*. The Special Review was ultimately abandoned before its completion in this area.
40. The Definitive Map Process records provide a comprehensive history of how the designation of the Order route on the Definitive Map and Statement was ultimately decided. It is clear that throughout the process consideration was given as to whether the status of the Order route should be higher than that of a bridleway, with the written evidence suggesting differences of opinion in this regard.

Other Matters

41. A letter was submitted by the objector from Dorset Police, who were concerned about upgrading the Order route in light of rural crime, commenting that it would facilitate offenders to access the rural estates more easily. Although I sympathise with their concern, the legislation I must adhere to, does not allow me to take such matters into consideration.

Conclusions

42. When considering the user evidence, it is clear that the user evidence forms portray use of the Order route by motorcycle for a period of 19 years. Such use did not fulfil the 20-year requirement of statutory dedication and so consideration was given at common law. Although use by motorcycles was evidenced over a long period of time, I do not consider the use to be of a frequency, so notorious that it would have come to the attention of the landowner. The existence of any tyre tracks on the route after use would have been temporary by nature and as use was less than monthly by any user, I am not persuaded this would have brought such use to the attention of the landowner. Albeit two users stated they were seen by farmworkers, again the frequency of their use would have unlikely been sufficient for the landowner to have become aware that a right to use the route by motorcycle was being asserted. Subsequently, I do not find dedication of this route as a vehicular highway under common law in light of the evidence of more recent use.
43. The Winfrith Newburgh Inclosure documents do offer very good evidence of a route between points A-E that may have been considered vehicular at the time, albeit the adjoining parish did not show a connecting route from point E and did not state any public roads leading in the direction of Winfrith Newburgh in the vicinity of the Order route. I concur with the Council that the Winfrith Newburgh Inclosure award clearly shows that the Commissioners intended to set out a vehicular road along the Order route, albeit their powers would not necessarily have allowed them to award highways outside of the parish.
44. The fact that there was no onward vehicular route past point E that was recognised by the Coombe Keynes Inclosure document does add some weight to the argument of the objector that maybe the vehicular rights did not extend across the whole route. The Council in their original Order decision considered there was insufficient evidence to show a vehicular route beyond the western fringe of Coombe Wood (point F on the Order Map) and it is not an unreasonable suggestion from the objector that there would seem to be little purpose for the public to drive carts or carriages along the route if there was no rights for vehicular traffic acknowledged past the parish boundary, which terminates a short distance before Coombe Wood. There is also nothing before me that would indicate the woods were a destination point, as they appeared to be in private ownership. However cul de sac rights of way do exist and the Winfrith Newburgh Award is clear in its setting out of a public road along the Order route.
45. The Tithe Maps quite clearly depicted the route, coloured, and labelled with onward destinations in both parishes. However upon close examination of the records it can be seen that some private roads were also coloured.
46. Depiction of a route shown clearly excluded from land holdings on the Finance Act 1910 records raises a strong possibility that the route in question was a public highway, possibly of vehicular status. These records only show the short section from point A to just before point B of the Order route in this manner, with the rest of the route being shown included in hereditaments. Although there were deductions for rights of way within the hereditaments through which the Order route crossed, it is not necessarily evidence that the route held vehicular status.
47. The many commercial and small-scale maps submitted offer good reputation of the existence of the Order route and are supportive of showing it as part of a local highway network. Being that most maps were not concerned with public rights, and

- often showed private routes as well as public routes, their weight in helping determine status is less.
48. My view is that the Definitive Map Process provides a good reflection of the cloudy and sometimes ambiguous nature of the evidence before me. Although it is not known what sources were researched, there were clearly different perceptions of the Order route and what status it might have held in the past.
 49. For a right of way to be upgraded, the supporting evidence needs to present a strong and cohesive argument to tip the balance of probabilities in favour of the higher status. When considering the evidence in this case, it is very finely balanced with both sides relying on a number of credible interpretations.
 50. From the evidence before me, it is clear that the Order route has existed for centuries, and the documents strongly indicate a level of public access over it historically. I consider that the evidence from the Inclosure Award, as a legal document setting out public roads, strongly supports the existence of historical vehicular rights to point E of the Order route, and tips the balance in favour of confirmation of the Order, however the evidence regarding vehicular status beyond that point is far more equivocal.
 51. 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 seem suitable.
 52. In conclusion, it is my view that on the balance of probabilities, the available evidence is sufficient to show that the Definitive Map and Statement should be amended to show restricted byway status for Bridleway 9 only.
 53. With regard to the width of the Order route, the Sparrow maps are contemporary with the Inclosure records for Winfrith Newburgh and clearly show the Order route as far as Point E as a 'retained road.' This is suggestive that the route was a pre-existing highway prior to the Inclosure Award. There is no evidence before me that supports the width as being 60 feet in width. Indeed on my site visit I noted that there were sections of the Order route that were unlikely to ever have been the said width for setting out, and later maps post dedication, are suggestive of the same. With this in mind, and alongside there being no argument made for a wider width, I am satisfied that the widths set out in the Order are correct.
 54. The objector requested that should the Order be confirmed, modifications be made to reflect the gates shown on the historic mapping. They considered this crucial to farm security and refer to a police report submitted in evidence. In terms of my decision, I can only have regard to any limitations that were in place when a right of way was dedicated. At the time of the Inclosure Award there appears to be no indication that there were limitations on the Order route, albeit I do accept that gates certainly appear to be shown on later maps. Ultimately it would be the decision of the Council as to whether structures can lawfully be erected on the route, for that part that is confirmed.

Natural Environment and Rural Communities Act 2006 (NERC)

55. Section 67 of the NERC Act had the effect of extinguishing all unrecorded public rights for motorised vehicles from May 2006, with certain exemptions. I do not consider that any of the exemptions apply to the Order route and as such public

rights on the route between points A-E would be on foot, horseback, bicycle and by horse drawn carriage. Any private vehicular rights are not affected.

Formal Decision

56. I propose to partly confirm the Order with the modifications detailed below. These modifications would have the effect of showing in part, as a highway of one description, a way which is shown on the Order as a highway of another description. It is therefore required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act that notice of the proposal to modify the Order be given and an opportunity for objections and representations to be made regarding the proposed modifications.

- On the Order title, **delete** 'and Part of Bridleway 5, Coombe Keynes'.
- On the Order title, **delete** Restricted Byways and **insert** Restricted Byway.
- On the Order at section 3, **delete** 'and Part of Bridleway 5, Coombe Keynes'.
- On the Order at section 3, **delete** Restricted Byways and **insert** Restricted Byway.
- On the Schedule, PART I, Description of ways to be upgraded, on line 1, **delete** 'and Part of Bridleway 5, Coombe Keynes'.
- On the Schedule, PART I, Description of ways to be upgraded, **delete** paragraphs 4 and 5 that relate to Bridleway 5.
- On the Schedule, PART II, Variations of particulars of ways, **delete** paragraphs 5, 6, 7, and 8, that relate to Bridleway 5 and Restricted Byway 6.
- On the Order Map Title, **delete** 'and Part of Bridleway 5, Coombe Keynes'.
- On the Order Map Key, under Proposed Restrictive Byway, **delete** the letter 'F'
- On the Order Map Grid References, **delete** 'F' and its grid reference.
- On the Order map, **delete** the restricted byway notation from point E to point F and **insert** the notation for definitive bridleways, (as set out in the key).
- Then, on the Order Map, **delete** point F.

Mrs A Behn

Inspector

