

Penderfyniad ar y Gorchymyn

Ymweliad â safle a wnaed ar 27/05/20

**gan Joanne Burston BSc MA MRTPI
AIPROW**

Arolygydd a benodir gan Weinidogion Cymru

Dyddiad: 18/06/2020

Order Decision

Site visit made on 27/05/20

**by Joanne Burston BSc MA MRTPI
AIPROW**

an Inspector appointed by the Welsh Ministers

Date: 18/06/2020

Order Ref: ROW/3228802 referred to as 'Order A'

The Welsh Ministers have transferred the authority to decide this Order to me as the appointed Inspector.

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Monmouthshire County Council restricted byways 53-16 and 117B Community of Devauden Definitive Map Modification Order 2018.
- Monmouthshire County Council 'the Council' submitted the Order to the Welsh Ministers for determination.
- The Order is dated 22 January 2018 and there were two objections outstanding when the Council submitted the Order to the Welsh Ministers for determination.
- The Order proposes to modify the Definitive Map and Statement for the area by adding restricted byways as shown in the Order plan and described in the Order Schedule.

Summary of Decision: The Order is not confirmed.

Order Ref: ROW/3230570 referred to as 'Order B'

The Welsh Ministers have transferred the authority to decide this Order to me as the appointed Inspector.

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Monmouthshire County Council restricted byway 53-16 Devauden Definitive Map Modification Order 2018.
- Monmouthshire County Council 'the Council' submitted the Order to the Welsh Ministers for determination.
- The Order is dated 26 November 2018 and there were four objections outstanding when the Council submitted the Order to the Welsh Ministers for determination.
- The Order proposes to modify the Definitive Map and Statement for the area by adding a restricted byway as shown in the Order plan and described in the Order Schedule.

Summary of Decision: The Order is proposed for confirmation subject to modifications set out below in the Formal Decision.

Procedural Matters

The two Orders

1. The Council, as the order-making authority ("the OMA"), submitted these Orders to The Planning Inspectorate, requesting confirmation of Order B and that Order A not be confirmed. They indicated that Order A had a number of technical errors and

anomalies¹ and therefore it was necessary to remake the Order. There is also agreement to this approach from those objecting to the Order.

2. The making of a new Order is an uncommon course of action, as there is no opportunity for Orders made under the 1981 Act to be abandoned. Opposed Orders must be submitted to the Welsh Ministers for determination.
3. Given the errors and anomalies identified by the OMA I consider that any person viewing the Order would have been misled as a result and would be likely to misunderstand its intention or effect. Accordingly, Order A should not be confirmed.

Procedural Matters – Order B

4. This case concerns the addition of a restricted byway between points A – G on the plan attached to the Order and is based on documentary evidence. I made an unaccompanied visit to the Order route. In reaching my decision I have considered all the documentary evidence and submissions made by the parties.
5. Mindful of historic spellings of place names, throughout this decision I have used these spelling of the geographical locations 'Panta' and 'Trelleck Grange'.

The Main Issues

6. Section 53(3)(c)(i) of the 1981 Act requires me to consider whether, on a balance of probability, a Restricted Byway subsists and that the Definitive Map and Statement ('DMS') requires modification as a result.
7. Section 32 of the Highways Act 1980 requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it appropriate weight, before determining whether (in this case) a restricted byway has been dedicated as a highway.
8. The OMA's position is that the documentary evidence is supportive of the claimed route being an unrecorded vehicular highway. As no exemption in Section 67 of the Natural Environment and Rural Communities Act 2006 is deemed to apply, any unrecorded public rights for mechanically propelled vehicles are extinguished and it is appropriate in such circumstances for the way to be recorded as a restricted byway.

Reasons

Consideration of the documentary evidence

Commercial Mapping

9. The earliest evidence of the Order Route appears on early nineteenth century mapping. The Price's Map 1823 and David and Charles Map 1830 clearly show the Order route as a twin 'solid black line', travelling from Porchas to the south, up to Trelleck Grange. The Greenwood's Map 1830 broadly depicts a route from Order points 'C' to 'G'.
10. Whilst, there is no key to these maps to inform the reader of the route status, such maps were expensive to purchase and were sold to the travelling public in order to get around. It would seem pointless to show a route that a traveller could not use either by foot, horse or carriage.
11. The Hall's Map 1831 and the Gary and Son Map 1840 show a twin 'black line' broadly along the Order route from Trelleck Grange in the north to point 'E', where the track

¹ As set out on the OMA's Statement of Case.

then goes east towards Tintern. These 'roads' are in a finer pen than the more major direct 'roads' between Chepstow and Devauden.

12. The Cary's Map of 1805, the Teedale's Map 1829 and the Thomas Moule's Map 1848 do not depict the Order route but do show other surrounding roads that directly linked larger settlements such as Chepstow to Devauden. This may be due to their smaller scale and therefore of a less detailed quality than some of the other maps provided.
13. The majority of the historic maps show the physical existence of a route capable of carrying traffic, similar to other nearby routes which are now public highways. Furthermore, several of these historic routes are shown on the Definitive Map as footpaths which adds weight to the Order route having at least a similar status.

Tithe Map

14. Tithe apportionment and maps were produced to agree the commutation of tithe payments. Land which was not subject to tithes included public highways and sometimes such highways were sienna coloured, given apportionment numbers and recorded in the ownership of the surveyor of highways. Nonetheless, the evidence of a tithe payment does not negate public rights.
15. The Tithe Map before me is dated 1839 and it would appear that only buildings are shown in a different colour. It shows the physical existence of the Order route, shown by a solid black line on either side of the track. The track is not shaded in any colour, nor are any other tracks or roads. Whilst there are appointment numbers on the map, I do not have the apportionment book to show whether the route was exempt from tithe or if there was any explanation of what the land was e.g. roadway, brake or drove. In any event the Tithe Map does not show whether the route depicted was public or private but may assist in conjunction with other information.

Ordnance Survey (OS) Mapping

16. A number of OS maps have been brought to my attention dating from 1833 to 1920. The 1833 OS 1-inch map shows a track from Trelleck Grange, through Order points 'A' to 'G'. The 1881, 1901 and 1920 OS 25-inch maps and 1886 OS 6-inch map also show a very similar track alignment. This track seems to link up a number of farm buildings. The track has a narrower width than some of the others on the maps, perhaps showing a lesser status, which would be supported by such tracks being now designated as footpaths on the DM. Moreover the 1920 map has the annotation of *fp* alongside a dotted line adjacent to the track between Order points 'B' – 'C' which would indicate a separate user to the adjoining track.
17. These OS maps were printed for the travelling public and show physical features on the ground and therefore over a period of time these could change. The OS maps over the period 1833 – 1920 continue to show the track, however I have no key to inform me whether this track is, for example, an unmetalled road and OS maps have, in the main, carried the disclaimer 'The representation on this map of a Road, Track or Footpath is no evidence of a right of way'.

Ministry of Transport (MoT) Mapping

18. This series of maps were issued with the object of publishing for general information the results of the 'Classification of Roads in Great Britain' carried out by the MoT under Section 17(2) of the Ministry of Transport Act, 1919. These maps continued to be produced until circa 1936 -37. Class I roads were coloured red and prefixed by the

letter 'A'. Class II roads were coloured green and prefixed by the letter 'B'. Other roads were not numbered. An OS map base was usually used.

19. The 1923 MoT Map² does not show the Order route and only the A446 is shown shaded red. The 1926-1928 MoT Map³ shows the Order route as a solid pair of black lines, it is not coloured or numbered. However, this feature would not be unusual given that an OS base layer was used and therefore the disclaimer would apply.

Finance Act 1910

20. The 1910 Act provided for the levying of tax ('Increment Value Duty') on the increase in site value of land between its valuation as at 30 April 1909 and, broadly speaking, its subsequent sale or other transfer. There was a complex system for calculating the 'assessable site value' of land, which allowed for deductions for, among other things, public rights of way or user. Vehicular roads were usually excluded from adjoining landholdings as these were held on behalf of a ratings authority – a highway authority was a ratings authority.
21. These records are in three parts, including a map, field book and valuation book. Each landholding is coloured or has its boundary coloured, but the roads will be left white and there will be a handwritten number for each landholding. The field book is essential for showing where deductions have taken place to indicate highway status. However, applying for a deduction was entirely voluntary.
22. The Finance Act extracts before me clearly show a 'white road' between Order points 'E' and 'G'. The track between Order points 'A' and 'E' (through hereditament 225) is shown but it is coloured in the same shade as the landholding, but I note that there are 'fp' symbols along some sections of the track, many of which match existing rights of way on the Definitive Map (DM). The Field Book for hereditament 225 also shows that a deduction of £20 has been made for '*Public Rights of Way or User*'⁴.
23. Overall, all there is good evidence that a vehicular road existed between Order points 'E' and 'G'.

Highway Authority Records

24. The 1949, 1955 and *circa* 1974 Highway Record Maps show the Order route referenced '53 – 16' and shaded as an unclassified county road (UCR). Following the Local Government Act 1972 'UCR' is a now obsolete term. Whilst many Highway Authorities still use the term, the most that can be deduced from it, post 1972, is that the route is a highway, maintainable at public expense. It is no indication that it carries vehicular rights.
25. However, on all these maps the route seems to have been scribbled out by pencil at an unknown later date. A similar approach was taken to unclassified road reference "53 -18" and "53 – 11" which are shown as 'county unclassified roads' on the Order Plan. The Highway Record map compiled *circa* 2008 shows the Order route shaded magenta and referenced 53 – 16. There is no key for this map. The 1952 Highway Record map (updated to 1987) does not show the Order route, however certain sections of the Order route are marked as footpaths.

² OMA Buddle A Appendix 26.49

³ OMA Buddle A Appendix 26.49

⁴ I acknowledge the objectors comments that the valuation also included 2 other hereditaments.

26. A supporting handwritten undated schedule states that for the Order route, reference section 53 – 16, that "*Great Panta Road, not maintained at all, see schedule of amendments, Div 2*". In this respect I acknowledge that a public highway cannot be removed just because the route has not been maintained. Furthermore, I have no evidence before me that the Order route was removed from the highway records by a legal process or that the route was recorded in error.
27. The 1970 List of Unclassified County Roads does not contain the Order Route, although if the numerical order is followed the route 53 – 16 has been crossed off the list. Road reference 53 – 18 is included. The 1988 'List of Streets' does not include the Order route but does include 53 – 18. Whereas the 2008 'List of Streets' includes the Order route 53 – 16 as a 'green lane' and the 2012 'List of Streets' includes the Order route 53 – 16 as a 'restricted byway'. This later addition of the Order route to the List of Streets is probably as a result of the ongoing dispute as to the status of the Order Route.
28. The evidence from highway records is therefore mixed. It is understandable, from the evidence before me, that the route seemed to flit in and out of highway authority lists and maps. This perhaps results from the confusion about how to correctly record routes of differing user. Nevertheless, there is strong evidence that the Order route was a publicly maintainable highway, but not necessarily indicating a vehicular highway.

The Definitive Map

29. The DMS defines the legal status and alignment of public rights of way. The Draft DMS states that footpath FP177 (as shown on the Order Plan) commences from the "*end of County road near Panta north to Parish Boundary.*" And similarly, FP 182 and 183 the draft Statement states "*Parallel to County road for 350 yds. North of Great Panta.*" These routes and descriptions were then also included in the County of Monmouth DM of Public Rights of Way and Written Statement. The fact that the footpaths (mentioned above) were linked to a County Road (as interpreted from the 1949 highway record document), which is the Order Route in question, goes some way to explain why the total length of the Order route is not included in the DM and Statement.
30. The 1972 'Special Review of the Definitive Map' and associated correspondence highlights that the Council were considering downgrading certain County Roads / green lanes to footpath, bridleway or byway status. The Review Map shows the Order route from points 'A' to 'E' as a solid magenta coloured line. Whilst I do not have a key to this map, other similarly coloured lines have been added to the DMS as footpaths. Order route 'E' to 'G' is not coloured on this map.

Sales Particulars

31. Sales particulars are particularly useful as public roads will often be excluded from them. Moreover, the description of sale lots can often include access and easement arrangements.
32. The Trelleck Grange Estate was put up for sale on 20 July 1920. The sale included, amongst other farmsteads, Great Panta Farm⁵, where the remarks state that "*the lots have good frontages to parish roads*". The individual description for Great Panta

⁵ This landholding includes the majority of the Order route.

Farm itemises a number of roads and lanes and includes their acreage but does not refer to any specific roadside frontage.

33. 1959 deed of conveyance includes a right of access for forestry purposes to the benefit of the Minister of Agriculture and Fisheries. It is considered by the objectors that such a deed would be unnecessary if a vehicular right of way already existed.
34. The Conveyance plan from the 1977 sale of Panta Farm excludes the 53 – 18 and 53 – 11 unclassified roads, but not the Order route. The schedule attached to the conveyance itemises a number of tracks and includes their acreage⁶. I note that the vendor retained a right to pass and repass along the access way OS No. 3193. This would appear to relate to Order points 'E'⁷ through to 'G'⁸. If this route were an unclassified road then such a right would be unnecessary. A similar situation exists from the point FP180 joins the Order route through to Order point 'E', in that Natural Recourses Wales has stated that the Welsh Ministers have an unrestricted private right of way for vehicle access along this section of the Order route.
35. There is no conclusive evidence from the sales particulars that the Order route was a public highway. Nonetheless, a landowner would be free to sell the subsoil of a public highway, but this would be subject to the public rights that lay over it.

Conclusions on the documentary evidence

36. The majority of the documentary evidence presented shows the physical existence of the Order route on the ground. The commercial maps, that show the route, would support its use as a public highway, but given that the route is not shown on the smaller scale commercial maps, more likely as a footpath or bridleway. The Finance Act Map offers a firmer conclusion that the route between Order points 'E' to 'G' was an unclassified road. Whereas the route to the north had a lower status, for which a deduction was claimed. This conclusion is also supported by the various sales particulars and necessary easements to provide a third-party vehicular access.
37. The highway records are an interesting quandary. To my mind the inclusion of the Order route on the 1949 records and the supporting text in the 1952 DM Statement would point to it being a highway maintainable at public expense. The subsequent deterioration in its physical quality on the ground may have led to its removal in subsequent iterations of the highway records but there is no evidence to suggest that any public highway rights were extinguished. Moreover, increased use of the access to the east of Great Panta towards Pontysaison, may have reduced the significance of the Order route (points 'C' to 'E') to gain access to properties in and around the farmstead. The MoT 1926 map would seem to support the use of the route as an access to properties. Indeed, this would add weight to the argument that only private vehicular access was permitted along the Order route, such as access to properties and the use of the track for farm and forestry operations.
38. With this in mind I find insufficient evidence to swing in favour of a restricted byway through Order points 'A' - 'E'. However, on the balance of probabilities, I conclude that a public footpath did and still does exist between Order points 'A' – E and that a restricted byway does exist between Order points 'E' and 'G'.

⁶ A number of other conveyances for the land surrounding Great Panta Farm similarly itemises tracks.

⁷ The easement commences between Order points 'E' and 'F'.

⁸ As marked X and Y on 1977 Conveyance Plan (1 – South Section)

39. It follows from this that I should propose to modify the Order so as to show A-E as a footpath rather than a restricted byway.

Other Matters

40. In response to a consultation undertaken in the year 2014/15 into the status of routes: 53 – 11; 53 – 18; and 53 – 16, a number of responses were received. The majority of these letters relate to the use of 53 – 11 and 53 – 18. One person stated that they have walked the Order route and another states that they would walk it, but it is overgrown. Two people state that the Order route has never had a public right of way, but the landowners would use the route to gain access to fields and buildings.
41. The objectors raise concerns in relation to issues such as blockages on the route, privacy, security, the environment, wildlife habitats and farming activities. Whilst I appreciate these concerns, such matters have no bearing on whether a public right of way has been dedicated.
42. Respondents also raised the issue of other paths in the local area that should be recorded on the DMS. The status of such paths have not been addressed in my consideration of the Order route before me. Such rights would fall to be considered under a further application, should one be made.

Overall Conclusions

43. Having regard to these and all other matters raised in the written representations I conclude that Order A should not be confirmed, and Order B confirmed subject to modifications.

Formal Decisions

Order A

44. I have not confirmed the Order.

Order B

45. I propose to confirm the Order subject to the following modifications:

Schedule: Part 1, paragraph 1

- Delete all references to "Restricted Byway" and insert "Footpath".

Schedule: Part 1, paragraph 2

- line 8 after 'the Plan' insert the following paragraph:
"Restricted Byway 53 – 16 commencing at its junction with Unclassified County Roads 53 – 11 and 53 – 18 at Grid Reference ST 49219915 (Point E on the plan) and running in a generally south south-easterly direction for a distance of approximately 226 metres to Grid Reference ST 49309894 (Point F on the Plan) then again in a southerly direction for a distance of approximately 67 metres to its junction with County Road 53-3 at Grid Reference ST49299888 (Point G on the Plan)"

Schedule: Part 2, Paragraph 1

- Delete all references to 'Restricted Byway' and insert 'Footpath';

Schedule: Part 2, Paragraph 2

- after line 9 ending in "ST49219915" insert the following paragraph:
"Restricted Byway 53 – 16 commencing at its junction with Unclassified County Roads 53 – 11 and 53 – 18 at Grid Reference ST 49219915 and running in a generally south south-easterly direction for a distance of approximately 226 metres to Grid Reference ST 49309894 then again in a southerly direction for a distance of approximately 67 metres to its junction with County Road 53-3 at Grid Reference ST49299888."

46. Since the confirmed Order would show as a highway of one description a way which is shown in the Order as a highway of another description I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Joanne Burston

INSPECTOR