



Order Decision

Inquiry opened on 4 December 2018

Site visit made on 3 December 2018

by Martin Elliott BSc FIPROW

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

Decision date: 22 January 2019

Order Ref: ROW/3194376

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Surrey County Council Restricted Byway No.41 (Walton and Weybridge) Definitive Map Modification Order 2016.
- The Order is dated 17 March 2016 and 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.
- There were two objections outstanding at the commencement of the inquiry.

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

Procedural Matters

1. I held a public local inquiry on 4 and 5 December 2018 in the Council Chamber at the Civic Offices of Woking Borough Council. I carried out an unaccompanied site inspection of the Order route on the afternoon of 3 December 2018. I did not carry out a further site visit following the close of the inquiry as there were no issues which required me to revisit the site. None of the parties required me to carry out any further site visit.
2. There were two duly made objections to the Order. However, shortly before the inquiry one of the objectors (Burhill Golf & Leisure Ltd, Burhill Developments Ltd and Burhill Estates Company Ltd (Burhill)) indicated that they would not be actively participating at the inquiry but would be represented by their Head of Property. The other statutory objector did not attend the inquiry. Although not making any objection in response to the notice of the making of the Order a Mr A Pidgley CBE raised objections to the Order and submitted a statement of case and proof of evidence in accordance with the Notice of Order. Mr Pidgley CBE was unable to attend the inquiry but was represented by Counsel. A number of representations of support were also submitted in response to the Notice of Order, some of these individuals gave evidence to the inquiry. In reaching my decision I have had regard to all documents and representations.
3. Part I of the Schedule to the Order refers to point 'C1' this is a typographical error and should read 'Ci'. The Council asked that the Order be modified to correct this error. Although the Schedule contains a minor typographical error the intentions of the Order are clear. The Order, if confirmed will be modified accordingly.

4. A number of additional documents were submitted at the inquiry. There is nothing to indicate any prejudice arising from the submission of these documents.

The Main Issue

5. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of an event specified in section 53(3)(c)(i) namely whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over the land in the area to which the map relates.
6. For the Order to be confirmed as made it is necessary to conclude that the right of way, in this case a restricted byway, subsists. The test to be applied to the evidence is on the balance of probabilities.
7. It is not disputed that the Order route was a public vehicular highway immediately before the commencement of section 67 of the Natural Environment and Rural Communities Act 2006 (NERC) on 2 May 2006. I have examined the documentary evidence and although the evidence is not substantial it is sufficient, in the absence of any contrary evidence, to enable me to reach a conclusion that, on the balance of probabilities, the Order route is a public vehicular highway which has been in existence prior to the inclosure of the area in the early 1800s. Although the Council have considered a statutory dedication under section 31 of the Highways Act 1980, given my conclusion, it is not necessary to consider this aspect further.
8. Section 67(1) of NERC provides that an existing public right of way for mechanically propelled vehicles (MPVs) is extinguished if it is a way which, immediately before commencement:
 - (a) was not shown on the definitive map and statement, or
 - (b) was shown in the definitive map and statement only as a footpath, bridleway or restricted byway.The Order route is not shown on the definitive map and statement and therefore rights for MPVs have been extinguished.
9. However, section 67(2) provides that subsection 1 does not apply if:
 - (a) it is over a way whose main lawful use by the public during the period of 5 years ending with the commencement was use for MPVs,
 - (e) it was a way created by virtue of use by such vehicles (MPVs) during a period ending before 1st December 1930.
10. The Council contend that rights for MPVs have not been preserved by any of the exceptions provided by section 67 of NERC. The Council therefore made an Order to add the route to the definitive map and statement for the area as a restricted byway. The objections to the Order are on the grounds that rights for mechanically propelled vehicles have been saved by the exceptions provided by sections 67(2)(a) and (e) of NERC and that consequently the Order should not be confirmed.

11. The main issue in this case is therefore whether any of the exceptions provided by section 67(2)(a) and (e) of NERC apply.
12. Section 67(5) of NERC provides that where immediately before commencement the exercise of an existing public right of way to which subsection (1) applies –
 - (a) was reasonably necessary to enable a person with an interest in the land to obtain access to the land, or
 - (b) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had an interest in that part only,the right becomes a private right of way for MPVs for the benefit of the land or (as the case may be) the part of the land.

Reasons

Whether the main lawful use by the public during the period of 5 years ending with the commencement (the relevant period) was use for mechanically propelled vehicles

13. The purpose of section 67(2)(a) of NERC is to except highways that are part of the ordinary roads network. The onus is on those asserting that the exception applies to prove that rights have not been extinguished where they disagree with the judgment of the local highway authority.
14. The Council are of a view that, having regard to Defra¹ guidance² at paragraph 28, for the purpose of this exception use by MPVs to gain access to properties adjacent to the Order route should be discounted. Such use is considered discounted on the basis of sections 67(5)(a) and 67(7). Although this is the view taken in Sauvain (extract included as part of inquiry document 9) the author does not appear certain. In my view the wording of the legislation is not clear but the sections relied upon by the Council are intended to preserve a right of access in the event of none of the exceptions under 67(2) being applicable. I do not consider it shows that previous lawful use of the way to access land should not be taken into in considering whether the exception applies. To discount such use would be contrary to the basic highway law principle that once a highway always a highway. It is not until the commencement of this section of NERC that rights for MPVs are extinguished. Returning to the Defra guidance this advises that use under any form of licence or easement by any means should be discounted. That suggests to me that use should be discounted where there is evidence that use was in consequence of a licence or easement. Use of a public vehicular highway would not be under a licence or easement but as a right to pass and repass.
15. The Council refer to a decision made by another Inspector (FPS/G1440/7/16). It is argued that the approach of the Inspector supports the Council's position that use must not be a limited class and that use to visit properties is not public use. However, in that case there appears to have been private rights of access which were relied upon to gain access to properties. Further, that at the time of granting such rights the status of the relevant part of the route was not clear-cut. In respect of the Order route it is acknowledged that public

¹ Department for Environment Food and Rural Affairs

² Part 6 of the Natural environment and Rural Communities Act 2006 and Restricted Byways – a guide for local authorities, enforcement agencies, rights of way users and practitioners, version 5 May 2008 published by Department for Environment Food and Rural Affairs (Defra)

- vehicular rights have existed since the early 1800s. I do not consider that the decision is of assistance and each case must be considered on its merits.
16. For section 67(2)(a) to apply the main lawful use must be by the public. The term main lawful use is not defined in the statute. I note that in opposition it is suggested that the test cannot simply be reduced to the question as to the majority of use but that it appears to be synonymous with 'first in importance'. That in my view introduces a qualitative assessment. The Defra guidance indicates that where the use has not been predominantly by MPVs then the exception cannot apply. The guidance also advocates a pragmatic approach (sensible and realistic rather than theoretical).
 17. As to what constitutes use by the public, given that the way is regarded as a public highway, use by MPVs to access land must be regarded as being public. It is however acknowledged that in using the route to access land it does not necessarily follow that that use will apply to the whole route. As suggested by the Council once each part of the route is reached then use of the remainder of the route falls away. It is noted, by a conveyance in 1919 to a Mr Chevau, that a right of access was granted to the land to the east of Turners Lane over the whole of Turners Lane. However, given that by this time the route was a public vehicular highway the grant of a right of way might have been included out of caution or in the absence of knowledge of highway rights. The granting of a right of way does not mean that any public rights used to gain access to property have been extinguished or that such rights can no longer be relied upon.
 18. Evidence contained in the statements from Burhill indicate use of Turners Lane, and, to a much lesser extent, the section of Burhill Road included in the Order (C to D³) by MPVs to gain access to the various properties adjacent to the route. The properties include a number of livery yards, greyhound kennels, T & J Autos (a vehicle repair business), other businesses and residential properties. The use was not only by the owners/tenants of the properties but also by those in MPVs delivering supplies and transporting goods to and from the properties. The point is made that in respect of the livery yards it was likely that these properties were visited twice a day to look after the considerable number of horses. Access to the golf course was also gained from Turners Lane. However, the statement of Suzie Hegarty indicates that from 2002 or 2003 access from the golf course along the western part of Burhill Road (not part of the Order route) became more overgrown and that by 2005 access could be gained 'on foot, motorbike or a horse but not really in a car'. The statement of T Cunnett of T & J Autos indicates that on an average day he would have between three and ten people driving to the business and this was mainly via Turners Lane from Burwood Road.
 19. The statements acknowledge use of Turners Lane and Burhill Road by dog walkers and horse riders. Volunteers would also visit the greyhound kennels in vehicles but take the dogs for walks along the Order route. It is suggested that the level of use by pedestrians during the relevant period was much the same as it is today and that you were more likely to come across a car than someone else on foot.
 20. Burhill also commissioned a traffic survey of Turners Lane which took place in November 2014. The survey indicates around 200 southbound and 200

³ Letters A to D used in this decision relate to points identified on the Order map.

northbound vehicle movements a day. The report author states that whilst it was not possible to comment directly on the use during the relevant period the characteristics of route are not likely to have changed in the last 10 to 15 years. No pedestrian count was taken.

21. The statement of Mr A Pidgley CBE indicates frequent use by commercial and private motor vehicles, for parking, walking greyhounds and by leisure walkers and joggers. The ratio of the various users to each other had not in his view changed. The majority of the traffic use is (and always has been) cars and commercial vehicles visiting businesses in Turners Lane. The statement provides a list of businesses which operate from Turners Lane.
22. A number of individuals gave evidence as to their knowledge of the way and its use. The evidence from these individuals is that vehicular use was not extensive although there was an acknowledgement of use by vehicles to access the various premises on the section of Turners Lane with a concrete surface A to B. However, on the route beyond point B, whilst there was acknowledgement of some use by MPVs, the evidence is that prior to 2013 this section was generally unsuitable for vehicles and not used with such intensity. With the improvements to the section B to C in 2013 vehicular traffic increased considerably. The evidence is that this section was used by pedestrians and equestrians and by families walking or cycling.
23. Statements of support indicate that the Order route prior to 2013 was little or rarely used by MPVs. Reference is made to the use of the route by pedestrians, equestrians and cyclists, the point being made that it was a safe place to walk and ride and to take children due to the absence of vehicular traffic. However, a number of statements acknowledge MPV use of the section A to B to access the greyhound kennels, the vehicle repair business and the Cemetery.
24. Having regard to all of the evidence, whilst some of the evidence was not tested at the inquiry some weight should be given thereto. The evidence indicates that the Order route has been used by MPVs and that such use was likely to have taken place in the relevant period. However, whilst, given the adjacent premises, it is more likely than not that use of the northern section of Turners Lane (A to B) was predominantly MPVs the evidence does not support this in respect of the remainder of the Order route. In respect of the remainder of the route access to the adjacent properties for MPVs was more limited and the evidence indicates that the route was used by pedestrians, equestrians and cyclists with vehicular use being rare. There is nothing to indicate that use was predominantly by MPVs.
25. As to the traffic survey commissioned by Burhill, given the evidence to the inquiry I do not consider it possible to conclude that the circumstances at the time of the survey were not likely to be different to those during the relevant period. Witnesses at the inquiry were clear that vehicular use of the lane increased following the improvements to the southern part of Turners Lane in around 2013. Statements also indicate that access from the golf course onto Turners Lane for cars was becoming more difficult from 2003 onwards. As such I give the survey little weight in respect of any use in the relevant period and in any event no data has been gathered as to use by others such as pedestrians and equestrians.

26. I note the suggestion that the presence of road name signs, highway signs and a post box are consistent with an impression of the route being a public road. However, the relevant test for the exception to apply is set out at paragraph 9 above.
27. I acknowledge the submissions that the documentary evidence does not distinguish between the different lengths of Turners Lane and as such it should be treated as one. It is also noted that section 67 of NERC refers to use being 'over a way' and that there is no reference to part of a way. However, the Council suggested that it was open to me to consider whether the Order should be modified if rights for MPVs are preserved. I accept that the documentary evidence extends to the whole route however, given the intentions of the exception, to save routes being part of the ordinary roads network, I do not consider that a saving exception on part of the route should apply to the remainder of any route where the exception cannot apply and where the route does not form part of the ordinary roads network.
28. Having regard to all of the above rights for MPVs will have been saved on the section of Order route A to B but not B to D in consequence of section 67(2)(a) of NERC.

Whether the way was created by virtue of use by mechanically propelled vehicles during a period ending before 1st December 1930

29. For this exception to apply it is necessary to show that the public vehicular highway was created by virtue of use by MPVs during a period ending before 1 December 1930. The term MPV is not defined in NERC or by any other statute. Wilkinson's Road Traffic Offences (included as part of inquiry document 9) identifies that the term '*mechanically propelled*' includes petrol and oil driven vehicles and also steam and electrically driven ones. In *R v Tahsin [1970] R.T.R. 88* the case of *Floyd v Bush [1953] 1 All E.R. 65* was applied and it was explained that the test as to whether a vehicle is mechanically propelled is whether the vehicle is constructed so that it can be mechanically propelled, not whether it had an engine in working order at the time. I agree with the point made by the Council that if a horse drawn vehicle or bicycle were an MPV then they could not be used on a restricted byway on which the public have a right on foot and with a horse and on or in vehicles other than MPVs.
30. I note the suggestion (by reference to paragraph 51 of the Defra guidance) that prior to 2 May 2006 no distinction between MPVs and non-MPVs existed. However, that relates to the absence of any distinction as far as rights of way classifications are concerned. I do not consider that the view of the Council that '*in all likelihood historic rights would have been created by virtue of use by non-mechanically propelled vehicle at an earlier date and so the exception would not apply*' is at odds with this advice. In my view the Council's approach is correct. For the exception to apply it is necessary to show that the right of way for MPVs must have been created by an inference of dedication at common law arising from use by such vehicles. It should be noted that the purpose of sections 66 and 67 of NERC is to curtail significantly the scope for recording rights of way for MPVs. If the use by other vehicles gave rise to a right of way for MPVs then the aspirations of NERC would not be achieved.
31. Mr Morgan asserted that the absence of any distinction between MPVs and non-MPVs was recognised in the case of *Slough BC v SoSEFRA [2018] EWHC 1963 (Admin)* paragraph 29. However, the issue was whether it was right for the

Inspector to modify the Order from bridleway to byway open to all traffic on the basis of the use of the way by bicycle. That approach was deemed to be incorrect (paragraph 34). I do not consider it supports a contention that there is no distinction between MPVs and non-MPVs. The issue was whether cycle use provided for the dedication of a way for vehicular use including motor vehicles.

32. Bearing in mind the above, the correct approach is whether the Order route was created by virtue of use by MPVs (engine driven) prior to 1 December 1930. The way was up to 2 May 2006 a public vehicular highway which was in existence in the early 1800s and would, more likely than not, precede any use by MPVs. As such the way could not have been created by virtue of use by MPVs and the exception does not apply. Notwithstanding the above there is, in any event, insufficient evidence before me of use by MPVs prior to 1 December 1930 from which an inference of dedication at common law can be drawn.

Overall conclusions

33. Given that rights for MPVs have been saved on the section A to B this part of the Order route must be considered as forming part of the ordinary roads network and consequently does not satisfy the definition of byway open to all traffic. Section 66 of the 1981 Act provides that a byway open to all traffic is a highway over which the public have a right of way for vehicular and all other kinds of traffic, but is used by the public mainly for the purpose for which footpaths and bridleways are so used. As noted in the Defra guidance if a highway satisfies the user test in section 67(2)(a) of NERC it should not satisfy the byway open to all traffic test.
34. I therefore conclude that the Order should be confirmed subject to a modification to delete the section A to B from the Order and a modification to correct a minor typographical error. Whilst the Order is confirmed in respect of the section B to D, section 67(5) of NERC provides a private right of way for MPVs for those persons who have a reasonable need for access by MPV to land in which they have an interest where a public right of way for MPVs is extinguished under section 67(1).

Other Matters

35. Concerns are raised in respect of the use of the Order route by vehicles, safety, the loss of amenity and the effect on wildlife. Whilst I note these concerns the 1981 Act does not enable such issues to be taken into account.

Conclusion

36. Having regard to these and all other matters raised at the public inquiry and in the written representations I conclude that the Order should be confirmed subject to modifications.

Formal Decision

37. The Order is proposed for confirmation subject to the following modifications.
- At Part I of the Schedule to the Order from line 2 delete 'A' (*Grid Ref. 510548 163701*) its junction with Burwood Road and proceeding along Turners Lane in a generally south easterly direction past point' and insert after '(Grid Ref. 510695 163376)' 'on Turners Lane 350 metres south-

south east of its junction with Burwood Road and proceeding along Turners Lane for 403 metres'.

- At Part I of the Schedule to the Order at line 5 delete 'C1' and insert 'Ci', at line 6 delete 'A' and insert 'B', delete '1491m' and insert '1141m' and at line 7 delete 'A' and 'B' of 5.0-14.4m, between'.
 - At Part II of the Schedule to the Order after 'FROM' insert 'a point on Turners Lane 350m south-south east of' and delete 'opposite no. 86 in a south easterly direction'. Further, delete from line 3 '5.0-14.4m, Occupation road, 5.0-14.4m, Concrete/Earth/Grass'.
 - Delete from the Order map references to point A, delete '753' and insert '403'. Delete the broken line and small arrowheads between points A and B.
38. Since the confirmed Order would not show a way in the Order as submitted I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 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.

Martin Elliott

Inspector

