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Mr A Kind
45 The Fairway
Newcastle upon Tyne
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Your Ref:

Our Ref: FPS/U1050/7/46

Date: 28 JUN 2010

Dear Sir

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53
Derbyshire County Council
(Byway Open To All Traffic from A632 via Marsh Green to Moor Road - Parish of Ashover) Modification Order 2007

I enclose for your information a copy of the Inspector's final decision on this Order, following his letter dated 09 December 2008.

Also enclosed are two leaflets entitled *Our Complaints Procedure* and *Challenging the Decision in the High Court*.

If you have any queries about the enclosed decision, please contact the Quality Assurance Unit at the following address:

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An electronic version of the decision will shortly appear on the Inspectorate's website.

Yours faithfully

Clive Richards
(Rights of Way Section)

Despatch 2

Order Decision

Inquiry held on 15 December 2009 and 27, 28, 29 and 30 April 2010

Site visit made on 29 April 2010

by Adrian I'Anson Solicitor

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

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Decision date:
28 JUN 2010

Order Ref: FPS/U1050/7/46/M

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Derbyshire County Council (Byway Open To All Traffic via Marsh Green to Moor Road – Parish of Ashover) Modification Order 2007.
- The Order is dated 12 July 2007 and proposes to modify the Definitive Map and Statement for the area by adding to it a Byway Open To All Traffic ("BOAT") as shown in the Order plan and described in the Order Schedules.
- There were objections outstanding when Derbyshire County Council ("the Council") submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
- In accordance with paragraph 8(2) of schedule 15 to the 1981 Act I gave notice of my proposal to confirm the Order with modifications the details of which are set out below.
- Objections were lodged to the modifications.

Summary of Decision: I confirm the Order subject to some of the modifications originally proposed and additional minor modifications.

Application for costs

1. At the Inquiry an application for costs was made by Mr Petrie against the Council. This application is the subject of a separate Decision.

Preliminary Matters

2. Following a public inquiry held on 7, 8 and 9 October 2008, I proposed that the Order be confirmed subject to modifications. The effect of these was to
   i) confirm as a BOAT the 60 metre length of the Order route from Matlock Road (A362) and the 70 metre length of the Order route from Moor Road
   ii) modify the intervening section as a bridleway and
   iii) amend the widths specified in the Order.

3. On 15 December 2009, I held an inquiry into the proposed modifications. This inquiry was held under paragraph 8 of schedule 15 to the 1981 Act. It was submitted to me that, for reasons I do not need to detail, it would be more appropriate for the inquiry to be held under paragraph 7 of schedule 15. An inquiry held under paragraph 7 would entitle parties to produce evidence other than that which related only to the proposed modifications. I accepted the submissions. The inquiry was adjourned on the basis that it would be reconvened on the basis of paragraph 7. The inquiry was re-advertised as a re-opening of the original inquiry to hear new evidence into the unmodified

part of the Order and concurrently to continue the inquiry (adjourned from 15 December 2009) into my proposed modifications.

4. Submissions were made to me to the effect that the application to record the route made by Mr Hiley was invalid. None of these submissions raised issues that I did not consider when reaching my decision on the same matter at paragraph 2 of my Interim Decision.

The Main Issues

5. This is set out in section 53(c)(i) of the 1981 Act. It is whether or not I can be satisfied, on a balance of probabilities, that the evidence discovered by the Council is sufficient to show that the right of way which is not shown on the Definitive Map and Statement, namely the claimed BOAT, subsists over the land in question and that the Map and Statement therefore require modification.

6. Section 66 of the 1981 Act defines a BOAT as *"a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used".* This definition was interpreted in the case of *Masters v Secretary of State for the Environment and Somerset CC 2000.* In that case, the judge stated that *"What was being defined was the concept or character of such a way. Parliament did not intend that highways over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horseriders than by vehicles".*

7. Although the majority of the evidence in this case is documentary, some of the evidence relates to usage of the route. In respect of this, the requirements of section 31 of the Highways Act 1980 ("the 1980 Act") are relevant. This states that where it can be shown the that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, 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 to be calculated retrospectively from the date when the rights of the public to use the way were brought into question.

8. If I decide that the statutory test fails, I shall consider the test for dedication at common law; that is, whether the available evidence shows that the owners of the land over which the Order route passes have dedicated a highway to the public. In 2007, owners of the land crossed by that part of the Order Route lying between the ford and point B on the Order Map, dedicated it as a public bridleway. However, I will consider implied dedication of other rights of passage over this and the remaining parts of the route. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. Such acceptance is usually shown by use of the route by the public.

9. There is a secondary issue which relates to the effect, if any, on the Order of the Natural Environment and Rural Communities Act 2006 ("NERC") and I deal with this later in my Decision.

Reasons

Documentary evidence

Ashover Enclosure Award and Map of 1783

10. In this respect, my Interim Decision took account of the evidence of Professor Turner on behalf of the Council. His evidence was to the effect that the formal setting out and appointment in the Award of two ends of the Marsh Green Road as a public carriage and drift road afforded strong evidence that the intervening length was a public carriage road. I weighed against this the two possibilities raised by Mr Petrie.

11. These were that
    (a) the two ends of Marsh Green Road were set out as cul de sac public carriage roads in order to facilitate cart and carriage road access to land that would otherwise have become landlocked by the enclosure of the commons and waste grounds and/or
    (b) the two ends of Marsh Green Road were set out as cul de sac public carriage roads to avoid the Commissioners having to research (and, if necessary, arbitrate on) disputes as to the rights that existed over the intervening length of road

12. In my Interim Decision, I noted Professor Turner's concession that Mr Petrie's suppositions were possible explanations for the restricted award. I went on to conclude that the evidence of Professor Turner was weakened by that concession and that there was no clear evidence that the Enclosure Award established a public carriage road over the intervening length.

13. The Council have challenged, in several ways, both my conclusion on this issue and also my approach to the matter. They contend that my conclusion is wrong for the following reason. They state that the setting out of the route as a new road under the Award could not have applied to this intervening section because it was no part of the Commissioners' functions under the Act to establish new lengths of road outside the areas to be subject to the enclosure. The Council refer to page 30 of the Award which states that the Commissioners' powers as to roads beyond the waste lands and commons subject to the Award were limited to the making of adjustments. They state that the Commissioners do not appear to have made any such adjustments.

14. The 1779 Ashover Enclosure Act is authority for the Award and requires the Commissioners *to set out and appoint such...proper highways and roads for public and private use...in, over, or upon the said commons or waste lands intended to be divided and inclosed by virtue of this Act, as they in their direction shall think requisite...*" Accordingly, I accept that the issue before me, in this respect, is whether or not the Award is consistent with the prior existence of the intervening length as a public carriage road. It follows that the conclusion I reached in the final sentence of paragraph 10 of my Interim Decision, as quoted in paragraph 12 of this Decision, was misconceived.

15. The Council challenged my approach to consideration of the two possibilities raised by Mr Petrie. In their Statement of Case they contend that it is self evident that whenever a probability, short of an absolute certainty, is

established for the occurrence of a particular event or outcome, there will remain a possibility (however remote) of non-occurrence. I accept this proposition. In so doing, it is appropriate that I re-consider my approach in balancing the opposing evidence of Professor Turner and that of Mr Petrie.

16. At paragraph 10 in my Interim Decision I stated that Professor Turner's position on the setting out and appointment of the two ends of the public carriage road and drift road afforded strong evidence of there being a public carriage road for its entire length.

17. The Council submitted a letter of clarification from Professor Turner dated 26 February 2009. He states there that if the Order route was only necessary to serve properties at either end, the Commissioners would have stopped it up and awarded private carriage roads. These would have been constructed (but not maintained thereafter) at public expense. However, the Commissioners would have had to make it clear that they were changing the pre-existing carriage road and there is nothing in the Award to suggest that they did this. On the contrary, the wording *"branching out of the said Chesterfield Road and extending in a Westerly Direction to the said Matlock Turnpike Road"* suggests that there was a pre-existing carriage road through route which they intended to preserve.

18. At this inquiry, Mr Petrie produced evidence to further his contention that access to Henstone Cottage was from the north west section of Marsh Green Lane (Ralph Lane) and not from Cripton Lane, as asserted by the Council. I accept, from the evidence of local people, that in the previous century, access to Cawood Cottage and Henstone Cottage may have been via Ralph Lane. I also attach some significance to the size of the stone structure lying between Henstone Cottage and Cawood Cottage. From my view of it, I consider that it possibly acted as a dam as well as a bridge. It clearly served to connect the two properties. However, there is no evidence, either documentary or on the ground, of a route leading west from Cawood Cottage to Ralph Lane. I have looked carefully at the extract from the 1816 Poor Rate Map and can see no evidence of a route between Cawood Cottage and Ralph Lane.

19. On the other hand, the Ordnance Survey 25" 1964 map shows a route, albeit marked as a footpath, leading from Henstone Cottage to Cripton Lane. On the whole, I consider it more likely that the access to these two cottages was, at least in the 19th and 18th centuries, via Cripton Lane. However, even if Mr Petrie's assertions are correct, they do not overcome the basic contrary point as set out in Professor Turner's letter of 26 February 2009. In that letter, he stated that *"if the Order route was only necessary to serve properties at either end the Commissioners would have stopped it up and awarded private carriage roads, sometimes called occupation roads".* There was no effective challenge to his view and I give it significant weight.

20. Mr Petrie refers to a section cut through Ralph Lane on 14 March 2007. I accept that this reveals a narrow paved section which might be more appropriate for walkers or pack horses. However, this is an isolated section and I can give it little weight.

21. Mr Petrie contended that ends of Marsh Green Lane (as shown on the Award Map) were never *"made and formed"* as required by the Enclosure Act and

hence never became public highways. He relies on *Cubitt v Lady Caroline Maxse 1873 [L.R.] 8* in which Keating J stated that there was no intention on the part of the legislature that the road set out should become a public highway until it was completely formed in accordance with the Act.

22. Mr Kind, representing, Mr Hiley, the applicant for the Order, made two points to counter Mr Petrie's assertion on this point. First of all, he contends that *Cubitt v Maxse* relates to acts and awards made under the provisions of the General Inclosure Act 1801 – and hence does not relate to this Award of 1783. Pre-1801 inclosure awards, matters as to width and making and forming are merely directory. He cited *AG and Rural District Council of Settle v Rural District Council of Lunesdale 1902 Law Times 16 August 1902 ("Settle")* for this proposition.

23. Mr Kind also asserted that the Award sets out a sequence of events that may or must be done. These start with a survey which is followed by the setting out, dividing and allotting of the lands to be inclosed. At page 11, the Award states *"the said public and private roads shall be made and formed, and for ever maintained, in such manner as the public and private roads in the said manor have heretofore been formed and made"*. Mr Kind interprets that wording to indicate that the requirement to make and form the roads lies with the public – as it did in the past. This assertion accords with the judgment of Farwell J in *Settle* in which he said *"I think the setting out of the various highways is a duty to the public"*.

24. Having read *Settle*, I accept Mr Kind's assertions. Accordingly, I conclude that even if the ends of Marsh Green Lane (as shown on the Award Map) were never *"made and formed"* as required by the Enclosure Act, that would not prevent these lengths becoming public highways.

25. Taking into account the issues I have considered in paragraphs 17 to 24, I can give little weight to the possibility raised by Mr Petrie and set out in paragraph 11a.

26. I now turn to consider the possibility raised by Mr Petrie and paraphrased by me at paragraph 11(b). Mr Petrie asserted that the Commissioners set out Marsh Green Road as a public carriage road in order to avoid researching or arbitrating on disputes. In his closing, he stated that at the heart of the enclosure issue was the ability of the Commissioners to establish historical rights over ancient enclosures. He said that the position of the Council and Mr Kind was based on a claim that the Commissioners would have been able to establish without doubt the nature and extent of those rights. His position was based on the premise that such clarity would not have been possible and that the Award should take account of that uncertainty.

27. I am aware that the Commissioners were under a clear duty to survey the land and a consequence of their award of a road as bearing public status would be to impose the burden of maintaining such road on the public. In view of the scrutiny that that burden would impose on the Commissioners, I consider that they would have taken particular care. Furthermore, Mr Petrie has been unable to support his proposition with any firm evidence that the Commissioners were uncertain or confused as to any of the decisions they made. Accordingly, I give this possibility little weight.

28. In interpreting the Award, and in particular the wording set out in paragraph 17, I have paid attention to the case of *River Wear Commissioners v Adamson 91877) 2. App. Cas. 743*. This authority has been relied upon both by the Council and Mr Petrie. The latter asserts that the word *"extending"* as used in the Award and interpreted by the Council, is not what Lord Blackburn describes as the *"ordinary signification"* of the word and cannot therefore be relied upon. The Council also rely on this case as authority for the principle that words should be accorded their ordinary meaning. I have little difficulty in accepting that the word *"extending"* in the context of the Award is a clear indication that the wording *"public carriage road and drift road"* applies as much to the intervening length of Marsh Green Road as to the two lengths of the road shown on the map.

29. I return to my consideration of matters in paragraph 10 of my Interim Decision. I now view the "concession" by Professor Turner in the light of his clarifying letter of 26 February 2009 and my review, as set out above, of the two possibilities raised by Mr Petrie. I conclude by giving much greater weight to the evidence of Professor Turner than to that of Mr Petrie. This leads me to the finding that the wording of the Enclosure Award, when given a proper construction, shows, on a balance of probability, that the whole through route of Marsh Green Lane was a public carriage road.

Uniformity of approach by the Commissioners

30. Mr Petrie contended that almost without exception the roads awarded in the 1783 Award are described in the same way. He described this as a sort of "one solution fits all" structure. He considered that this left the Commissioners with no flexibility to cover different levels of historic rights over the ancient enclosures. The Council conceded that it was an accident of history that the Award provided no public bridleways or private carriage roads with public bridleways. However, they referred to thirty seven public carriage roads in the Award. All bar one of these are described in the same way as the Order route: namely *"branching out of"* a particular road and *"extending to"* another road or locale. The exception is a cul de sac route to a public stone quarry. In addition, the Award sets out a total of eighteen private roads. Some of these are described as through routes connecting with public carriage roads at either end. However, the majority are cul de sac routes leading to particular buildings or houses. I consider that the Council has demonstrated that the variety of highways established by the Award are sufficient to indicate that the Commissioners took appropriate care in reaching their decisions and that their decision in this case was not arbitrary or based on a uniform approach.

The issue of culs de sac

31. The Council referred to the Planning Inspectorate's Consistency Guidelines which at 2.48 state that in certain circumstances, culs de sac in rural areas can be highways. The cases of *Eyre v New Forest Highways Board 1892, Moser v Ambleside 1925, A-G and Newton Abbott v Dyer 1947 and Roberts v Webster 1967* are cited in the Guidelines. Examples of such circumstances are where a cul de sac is the only access to a place of public interest or where changes to the highway network have created the cul de sac.

32. The Council also submitted a paper presented by David Braham QC to a Rights of Way Law Review course. In this paper Mr Braham states that "*awarded highways tend to stop short where they reach old inclosures or common land which was to be retained as common land, or reach the parish boundary. However, even if your claimed route is not expressly awarded because it was outside the relevant area, the Award may still give a clear indication of its status. The point here is that where an awarded highway runs up to the edge of the area to be inclosed it is more likely than not that the Commissioners considered that it linked up with or continued as a pre-existing highway beyond that point.*"

33. Section 3.4 of the Guidelines advise that a past decision is binding on a present case only to the extent that the facts are comparable. Mr Petrie drew distinctions between the present case and the cases of *Eyre v New Forest Highways Board 1892, Moser v Ambleside 1925, A-G and Godstone RDC.* I accept that there are differences between the facts of these cases and that before me. On the other hand, whilst the Council accepted the same, they responded that the principle behind the cases was "on all fours" with their interpretation in this case. I would add that Mr Braham when referring to the outcome of the *Eyre* case stated that it did not turn on the implications of any Inclosure Award, but the facts raised a similar point. I have no doubt that the principle set out in the Guidelines and supported by the case-law makes it clear that I would have to identify special circumstances to justify the creation of culs de sac. Mr Dunlop sought to argue that access to the coal yard at Nethermore could have justified the existence of a cul de sac. I would not consider a coal yard to be a place of public resort. The owners of the coal yard would, by implication, grant their customers a private right of way specific to each visit. No special circumstances, such as a place of interest or beauty spot, other than the situation put to me by Mr Dunlop, have been suggested to me. This enhances the case for the intervening section of Marsh Green Road together with the two ends formally set out as a public carriage road under the Award being a continuous public carriageway.

1891 County Court case

34. There was no significant evidence at the second inquiry which caused me to doubt my finding on this issue as set out at the end of paragraph 14 of my Interim Decision. There I found that neither the report nor the judgment helped me as to the status of the route.

35. The Council sought to rely on a passage in the newspaper report of the case which quoted Mr Nodder as saying that the highway was not metalled for "heavy conveyances". The Council claimed that this was an indication that the route could have taken light carriages at the time. Mr Petrie challenged this as a supposition and referred to Mr Nodder's qualification of the metalling as being "for a path". I agree with Mr Petrie's view that the Council's claim is supposition.

36. I find that the value of the evidence of this case is to indicate the probability of the existence of the intervening length of the Order route being in existence by 1751 as a public highway of some kind.

Encroachments

37. Additional significant evidence on this issue was submitted by Mr Petrie. This related to the fact that the buildings at Nethermore, which he claimed were an encroachment, were subjected to parish council rates. I accept that this fact strengthens the argument that at that time, the highway authority did not treat that part of the Order route as a public carriage road.

38. However, this fact and that of all the other encroachments must be viewed in the context of a public highway acknowledged to have been in existence in 1751 and, on the evidence of the Award, accepted as a public carriage road in 1783. The first evidence of the encroaching buildings was on the 1818 Poor Rate Map – over 60 years after 1751 when Marsh Green Lane was considered to be open and over 20 years after its status as a public carriage road was acknowledged by the Award.

39. The Council also made the point that improvements to Butts Road from 1765 onwards would inevitably have meant that in terms of access to and from Ashover via the Matlock turnpike, this road would have been preferred to Marsh Green Road. As a consequence, the latter would have declined in use and importance. This decline would have been accelerated in the early 1800s, by the land-owner opening a new south drive to Marsh Green House in the position now followed by footpath 50.

40. Having reviewed my consideration of this issue, I am led to the conclusion that the encroachments (coupled with the lack of regular maintenance) should be viewed in the light of the circumstances I refer to above and the fact that rights had probably been acquired prior to 1751 and acknowledged by the Award in 1783. In view of that, I consider that the fact of the encroachments and lack of maintenance do not detract to any significant extent from the conclusion that the Award has led me to.

Maps

41. I acknowledge that the maps that I listed in paragraph 22 of my Interim Decision indicate the existence of the Order route as a through route. However, my finding was addressed to whether or not this evidence helped me decide whether or not the route carries public vehicular rights. The comments of the Council do not affect that finding.

42. I accept that Inland Revenue officials carrying out the survey for the purposes of the Finance Act 1910 were working to national guidelines. However, I do not concede that Mr Petrie's comparison with their findings as to other neighbouring highways was irrelevant.

43. The Council's main criticism of this section of my Interim Decision relates to a comparison between the "cumulative" and "synergistic" approach to the weighing of evidence. I am mindful of the related advice in the Consistency Guidelines which favour the latter approach. My conclusion at paragraph 27 of the Interim Decision refers to all the maps although I make no reference as to whether my approach was "cumulative" or "synergistic".

44. The synergistic approach required me to take into account the action of the individual items of evidence working together. I believe that I took that

approach. Having reviewed that evidence in the light of the Council's comments, I have reached the same conclusion. The evidence taken together confirms my view that there was a highway of some kind passing along the entire length of the Order route. However, even when approaching this evidence on a synergistic basis I find no significant map evidence to the effect that the Order route is a BOAT.

Evidence of a lost highway

45. Mr Clarke submitted at the inquiry that the configuration of the western end of Ralph Lane might have been affected by a lost highway stopped up during enclosure. From his cross-examination by Mr Petrie, I conclude that there is no certainty that this route had any connection with Ralph Lane. Hence, this evidence did not help me reach any conclusion as to the status of the Order route.

The Causey[1] and the Bench Mark

46. Mr Kind made submissions at the inquiry and supported them by pointing out features on the site visit relating to a claim that at some time there had been a raised footway to the west of the steeply sloped section of Order route to the north of the ford. This he termed a causey. The word is derived from the French *causie* and ultimately from the Latin for "trodden".

47. A causey could provide extra width of passage for either a horse or walkers or an alternative way where the existing way was worn, sunken or waterlogged. Having raised this issue on the penultimate day of the inquiry, it is unfortunate that Mr Kind was absent on the last day to provide more evidence on this issue and to give other parties an opportunity to test the extent to which it might have existed and, if so, its relevance to the Order before me.

48. I have read the written evidence which Mr Kind submitted to support his claim with some interest. However, the site inspection failed to convince me as to any probability of the existence of this feature. Although I accept that a causey may have existed in the position claimed, that possibility does nothing to add weight to the conclusion I reach below.

49. Towards the end of the inquiry, Mr Kind referred to a bench mark on the north-eastern pillar at the ford. There was considerable debate as to when the pillar with that mark may have been erected. I was unable to fix on a date when it was probably erected but am content to rely on the conclusion at paragraph 19 of my Interim Decision that the work at the ford was carried out around the year 1834.

Conclusion regarding documentary evidence

50. In reaching my conclusion I have taken into account my Interim Decision and all objections and representations made to it either in writing or at the second inquiry. The conclusion I reached in my Interim Decision was set out at paragraph 31.

51. For the reasons set out above, I am now satisfied that the evidence of the Award is sufficient, on a balance of probabilities, to convince me that the Order

[1] Old English for causeway

route as a whole has been a public carriage road from at least as far back as 1783. None of the other documentary evidence which I have considered and reviewed significantly detracts from this conclusion.

52. In considering whether the Order route has the character of a BOAT, I have taken into account its entire length. Due to the physical constraints of Ralph Lane, I have no doubt that the character of the Order route makes it more likely to be used by walkers and riders than by motor vehicles.

User evidence

53. I heard additional evidence at the inquiry from individuals who claimed use of the Order route on motor bikes. These included Mr Hammond who rode the route between 1969 and 2008, latterly once every month to six weeks. Mr Chapman claimed use on his motor bike from about 1973 to "last year or so". Frequency of use amounted to a few times a week in the summer to every now and then. Mr Ellison used the route on his motor bike three to four times per year from 2003 to now. Mr Marshall used the route by motor bike twice a year on average between 1973 and 2000.

54. I have taken account of Mr Petrie's argument that the date of calling into question of the status of the Order route which I established in paragraph 33 of my Interim Decision as 2007 was wrong. In fact the Council share his view that a more appropriate date for the calling into question would be the date of Mr Hiley's application – 6 July 2004. I accept their view.

55. I also accept the unchallenged evidence of Mr Petrie that due to the strict settlement binding the Marsh Green Estate between 1971 and 1985, the owners lacked capacity to dedicate rights of way over that part of the order route crossing their land. Having said that, given the fact that the Estate was managed professionally, the location of the trustees outside Derbyshire is of no relevance to the acquisition of rights.

56. The consequence of these findings, as to the date of bringing into question and capacity, is that the applicant would fail to achieve the twenty year period required to found a statutory claim as referred to in paragraph 7. As a consequence, I turn to consideration of the claim on a common law basis. Accordingly, I would consider use prior to 1971 and use since 1985. It is clear from the evidence I heard at this and the previous inquiry, that the use prior to 1971 use was minimal. Furthermore, the use which I considered at the inquiry of use since 2005 was not sufficient, as assessed at common law, to result in implied dedication of the Order route as a BOAT. The additional evidence as to use of the Order route, referred to in paragraph 53, was not so significant as to change my finding on this issue.

57. Mr Dunlop sought to challenge the evidence of five of those who had claimed in writing use of the Order route on motor bikes. However, the extent to which that challenge was successful was balanced by the additional oral evidence referred to in paragraph 53.

58. Mr Dunlop and Mr Petrie both made submissions to the effect that use of the route by motor bikes amounted to a public nuisance and accordingly could not lead to a grant of rights by implied dedication. However, in view of the finding

that I have made in the previous paragraphs, I do not need to determine this particular issue.

59. The user evidence alone does not demonstrate dedication either at statute or common law. However, it does give a small amount of added weight to the position that the Order route is a longstanding vehicular route.

The impact of section 67 of NERC

60. Section 67(1) of NERC extinguished, from 2 May 2006, any right that the public had to use mechanically propelled vehicles over a route that was not shown on the definitive map and statement.

61. However, the general provision of section 67 (1) is subject to a number of exceptions. These include an exception, at section 67(2)(b) which preserves mechanically propelled vehicular rights over a route which immediately before 2 May 2006 was not shown in a definitive map and statement but was shown in the list required to be kept under section 36(6) of the 1980 Act.

62. In my Interim Decision, at paragraph 26, I found that the list kept by the Council complies with section 36(6) of the 1980 Act. Not surprisingly, the Council considered this aspect of my Decision to be correct. However, Mr Dunlop made significant submissions on this point and I need to review this part of my Interim Decision on this issue in the light of these.

63. Mr Dunlop quoted a fellow Inspector in a Decision of 28 September 2009[2] as stating *"As the 1980 Act does not specify the form the List of Streets should take and the question to my knowledge has not been determined subsequently by a court, then the list can take whatever form the authority chooses so long as it fulfils the purpose for which it is intended which is to enable those routes for which the public is responsible for maintenance to be identified."* Although the list in that case comprised a series of maps, not in electronic format, the Decision supports my view. However, Mr Dunlop continues by arguing that words should be given their literal meaning and that a "map" is not a "list". He supports that argument by referring to section 14C(4) of the 1980 Act which, in a different context, distinguishes between a list and a map. However, I give considerable weight to two factors. The first is that the Council's list is interactive and has a search facility. To my mind, this facility imports a characteristic of a list – the ability to check the inclusion or otherwise of an element. The second factor is that the Council considered the specific issue of whether their list qualified as a list under the relevant legislation at a public meeting. In doing so, the Council might have had in mind the words of Humpty Dumpty: *"When I use a word, it means just what I choose it to mean -- neither more nor less.'* The Council's decision, unlike that of Humpty Dumpty, was prefaced by a report which was open to public scrutiny, considered at an open meeting and was then subject to challenge.

64. The second ground of Mr Dunlop's challenge is that the list fails to comply with the statutory requirement as it is not a *"list of the streets within their area which are highways maintainable at the public expense."* The Council accepted the advice of Counsel (given at a Rights of Way Law Review lecture on 16 September 2009) that the statutory provision requires those footpaths and

[2] FPS/J1155/7/76

bridleways which are, in fact, also publicly maintainable highways to be included within such a record. However, they contended that it does not follow that a list produced in partial compliance with the statutory requirement, but which excludes such footpaths and bridleways, is not capable of comprising a statutory list of streets. The Council asserted that there had not been any blanket exclusion of footpaths and bridleways from their list of streets nor had there been, on their part, any deliberate attempt at action to amend the list to achieve this. Mr Dunlop accepts the difficulty of keeping a list up to date and concedes that it does not have to be perfect. However, he contends that an authority which keeps a list which omits footpaths and bridleways cannot claim to keep a list of streets as defined by the statute. I do not accept that the Council's failure to keep a list which fully complies with the legislative requirement is a matter of principle. Hence, I do not accept that it fails the test which Mr Dunlop seeks to apply in this context.

65. Mr Dunlop's final argument is that for an exemption to apply, it must comply with all of the tests set out at (a) to (e) in subsection 2 of section 67 of NERC. The latest version (5) of the guidance on the Act prepared by DEFRA states that (a) to (e) are alternatives and that for an exemption to apply, it needs to fulfil only one of the five criteria. He considers that the DEFRA advice is wrong and refers to section 6 of the Road Traffic Act 1988 which uses the word *"or"* between sub subsections to make it clear that it is referring to alternatives. I do not find the reference to another statute helpful and, in any event, I am obliged to follow current advice. This argument of Mr Dunlop's does not persuade me to depart from the advice.

66. Accordingly, I maintain my view that the list kept by the Council complies with section 36(6) of the 1980 Act. I, therefore, conclude that, by virtue of the exception set out above, the right of the public to use the Order Route, which I have held to have BOAT status, with mechanically propelled vehicles has not been extinguished.

Width

67. The modifications I proposed in my Interim Decision to the widths specified in the Order drew no objections and I set them out again. Because of the differing widths of the Order route, I have retained the division of the route in three sections even though the status of the three are the same. At the final line of Part II of the Schedule I should have modified the wording from *"The width of the path varies between 4 metres and 12 metres"* to *"The width of the path varies between 4 metres and 7 metres"* and I now make the necessary amendment. I have also amended the reference in the second column third row of the table from a width of 12 metres to a width of 7 metres. These modifications accord with the original amendments.

Modifications

68. Apart from the modifications as to width referred to in the preceding paragraph, I have corrected my error in referring on several occasions to "Andover" instead of "Ashover". I have retained the amendment of the plan to show the positions of A^1 and B^1 respectively. As the Order route is now confirmed as a BOAT throughout its length, I have deleted the reference to

path no. 158 and repeated the reference to path no. 157 in the second and third sections. None of the modifications require advertising.

Overall Conclusion

69. Having regard to these and all other matters raised both at the inquiry and in written representations, I conclude that the Order should be confirmed with modifications.

Formal Decision

70. I confirm the Order subject to the following modifications:
    - in Part I of the Schedule to the Order delete the existing text and substitute the following:

      A - A¹ Byway Open to All Traffic No. 157 in the Parish of Ashover from Point A (GR SK 3406 6410) on Matlock Road (A362) proceeding in a south-easterly direction to point A¹, a distance of 60 metres or thereabouts.
      The width of the path varies between 6 metres and 7 metres.

      B¹ - C Byway Open to All Traffic No. 158 in the Parish of Ashover from Point B¹ proceeding in a south-easterly then north-easterly direction to point C (GR SK 3468 6367) on Moor Road, a distance of 70 metres or thereabouts.
      The width of the path varies between 4.8 metres and 6 metres.

      A¹ - B¹ Byway Open to All Traffic in the Parish of Ashover from Point A¹ proceeding in a south-easterly direction to point B¹, a distance of 690 metres or thereabouts.
      The width of the path varies between 4 metres and 7 metres.
    - in Part II of the Schedule to the Order delete the existing text and substitute under the following headings:

Path No	1/10,000 OS Sheet Ref No	Status and Description of Route	Nature of Surface	Length	Width	Remarks
157	SK36/SW	Byway Open to All Traffic from E side of Matlock Road (A362) (3406 6410) N of Bungalow Farm, in a SE direction along enclosed grass and stone surfaced track with a width varying between 6 and 7 metres	Grass Stone	60 metres	Varies between 6 and 7 metres	Modification Order 2007 DCC Ref: X3151.
157	SK36/SW	Byway Open to All Traffic from the north-eastern edge of Bungalow Farm in a generally SE	Grass Stone Tarmac	690 metres	Varies between 4 and 7 metres.	

		direction along enclosed grass and stone surfaced track with a width varying between 4.8 and 7 metres to ford crossing of Marsh Brook. Then opening out on S side of brook to a width of 7 metres, before continuing along walled track, with a width varying between 5 and 7 metres, passing E of Marsh Green to junction with path No. 50. Then ESE along surfaced access road which forms part of Marsh Green Lane, with a width varying between 4 and 6 metres to Nethermore.			Ford with stone gate posts set 1.4 metres apart.	

157	SK36/SW	Byway Open to All Traffic from Nethermore, in a ESE and ENE direction along surfaced access road which forms part of Marsh Green Lane, with a width varying between 4 and 6 metres to W side of Moor Road (3468 6367) opposite Chapel Hill.	Tarmac	70 metres	Varies between 4 and 6 metres.	

- on the Order Plan add "A¹" at a point on the Order route 60 metres or thereabouts from point A and "B¹" at a point on the Order route 70 metres or thereabouts from point C.

A F I'Anson

INSPECTOR

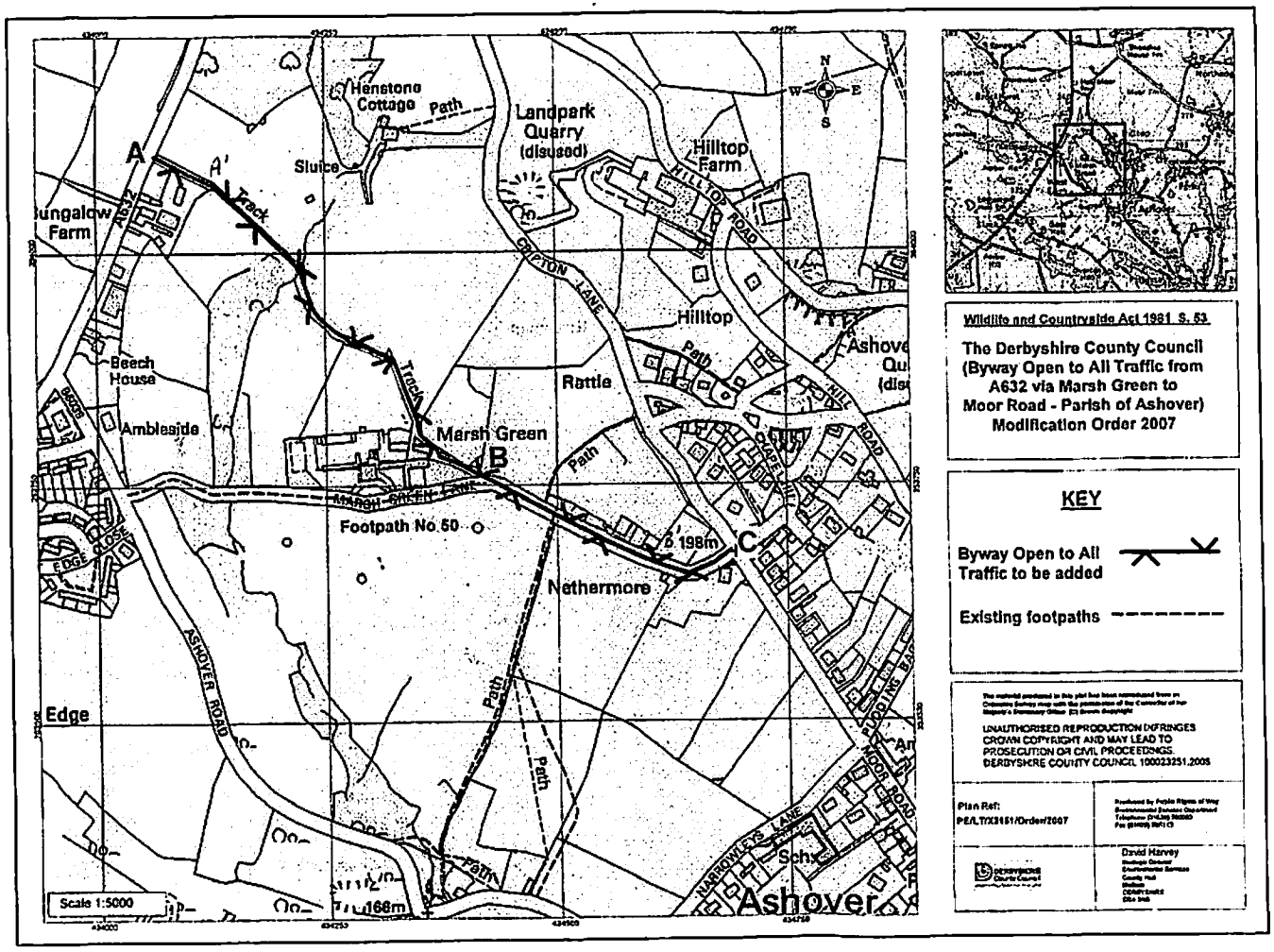
APPEARANCES

For the Council	
Mr S Brent who called:	Solicitor with the Council.
Mr P Jackson	Senior Legal Assistant with the Council
The Applicant	
Mr Hiley represented by	
Mr A Kind.	Representing the Trail Riders' Federation
Supporters of the Order	
Mr I Chapman	
Mr J Clarke	
Mr I Hammond	
Mr R Marshall	
Objectors	
Mr A Dunlop	Representing Ashover Parish Council and Ashover Parish Countryside Protection Organisation
Mr A Petrie who called:	
Mr J Brailsford	
Cllr Mrs C Brocksopp	
Mrs J Butler	
Ms L Mannifield	
Mr D Parker	Formerly of W T Parker – agents for the Marsh Green Estate
Mrs S Petrie	
Mr C Pratt	
Mrs M Pratt	
Mr J Wardle	
Mr J Watts	

DOCUMENTS SUBMIITED DURING THE INQUIRY

1 & 2	RC1 & 2	Letters from Mr R Coxhead dated 7 December 2009 and 29 April 2010
3	DCC1	Supplementary Proof of Evidence of Mr P Jackson ("PJ")
4	DCC2	"Inclosure Awards: law and practice" David Braham QC – Rights of Way Law Review 9.3 139 – 145
5	DCC3	List of publicly repairable roads in Upperend Quarter 1760 - 1761
6	DCC4	1879 1st edition 1:2500 Ordnance Survey Plan
7	DCC5	Closing summary and rider of S Brent
8	JC1	Extract from Poor Law Rate Map of 1818
9	JC2	Map showing turnpike system in area of Ashover
10	JC3	Extract from Burdett's Map
11	JC4	Extracts from Sanderson's map
12	JD1	Letter from Mr J Dicks dated 28 April 2010
13	AD1	"Ordnance Survey Maps: a descriptive manual" by J B Harley pp 35 & 38
14	AD2	Closing summary by Mr A Dunlop
15	LM1	Report by Ashover Riding Association on bridleways and unclassified roads and tracks used by horse riders in the Ashover District
16	AK1	Late matters submission
17	AK2	Legal submission
18	AK3	"Parliamentary inclosure and pre-existing highways" – Alan Kind and Robert Halstead Byway and Bridleway 2004/2/16-20
19	AK4	1st edition OS map indicating width of Order route
20	AK5	AG and Rural District Council of Settle v Rural District Council of Lunesdale 1902 Law Times 16 August 1902
21	AK6	"Ordnance Survey Maps: a concise guide for historians" – Richard Oliver 2005 p 75
22	AK7	"Packmen, Carriers and Packhorse Road" – David Hey 1980 pp 65-71
23	AK8	"Horse Causeys and halter paths" – Byway and Bridleway 2005/7/66
24	AK9	"Horse causeys in context?" - Byway and Bridleway 2000/4/28

25	AK10	Act of 1696 "for the better amending and repairing the highways and explanation of the laws relating thereunto"
26	AK11	Highways Act 1833 section 21
27	AK12	Herrick & Herrick v Kidner & Somerset County Council HC 2010
28	AK13	Maroudas v SoS for DEFRA CA 2010
29	AP1	Opening Statement
30	AP2	Letter to Planning Inspectorate dated 21 November 2009
31	AP3	User evidence form and letter dated 30 November 2009 from Karl Hayes
32	AP4	Questions for John Clarke
33	AP5	Public roads between Matlock and Chesterfield shown on Burdett's Survey from 1763
34	AP6	Overlays of Burdett's Map with Ordnance Survey maps
35	AP7	Questions for David Parker
36	AP8	Questions for Mr Hiley
37	AP9	Questions for the Council
38	AP10	Witness statement of Sara Atkinson, Clerk to Ashover Parish Council, read at the inquiry by Cllr Mrs C Brocksopp
40	AP11	Extract from Ordnance Survey 25" map 1964 edition showing bench mark
41	AP11	Closing statement of Mr A Petrie
42	AP12	Costs Application by Mr A Petrie
43	JW1	Summary of Statement in support of D.C.C's and objection to modifications from Mr J Watts



Wildlife and Countryside Act 1981 S. 53

The Derbyshire County Council (Byway Open to All Traffic from A632 via Marsh Green to Moor Road - Parish of Ashover) Modification Order 2007

KEY

Byway Open to All Traffic to be added

Existing footpaths

Plan Ref:
PE/L/T/23151/Order/2007

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