



Penderfyniad ar y Gorchymyn

Order Decision

Ymweliad a safle a wnaed ar
20 September 2010

Site visit made on 20 September 2010

gan/by Heidi Cruickshank BSc MSc MIPROW

Arolygydd a benodir gan
Weinidogion Cymru

An Inspector appointed by
the Welsh Ministers

Dyddiad/Date 25 October 2010

Order Ref: T6850/W/2010/515347

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 Powys County Council (Town of Builth Wells) (Restricted Byway 16(A)) Modification Order 2008.
- Powys County Council submitted the Order for confirmation to the Welsh Ministers.
- The Order is dated 6 May 2008 and there was one objection outstanding at the date of the site visit.
- 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 Schedules.

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

Preliminary Matters

1. The Order was advertised, apparently in May 2008, and attracted an objection as the Order Notice was incorrect, giving one status within the title and another in the body of the Notice. Powys County Council, the order-making authority ("the OMA"), accepted that there was an error and re-advertised the Order in September 2008, however, the objector said that whilst the English version had been corrected the Welsh text had not, and so was still in error.
2. The OMA said that they did not believe that anyone would have been prejudiced by this error. It is noted that the title of the Notice gave the correct status in both the Welsh and English versions on both occasions of advertisement. I consider that the point of the Notice is to make people aware of the Order and if anyone had been confused by the error they could have contacted the OMA to double-check the status. The Order itself gives the correct status and, taking account that the Notice was advertised twice with no queries other than from the objector I am satisfied, on the balance of probabilities, that there would be nothing to gain from requiring a third advertisement.

The Main Issues

3. The Order arose as a result of an application made to the OMA in July 2003 to record the Order route as a bridleway, under Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). The OMA decided that the historic documentary evidence strongly suggested that the route was an all-purpose ancient highway but that the vehicular rights had been extinguished as a result of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") and so the correct classification was Restricted Byway ("RB").
4. The objector believed that the route should be recorded as a Byway Open to All Traffic ("BOAT"), rather than RB. The main issues are, therefore, whether public rights have been shown over the Order route and whether or not any vehicular rights have been preserved or those rights extinguished under the 2006 Act.
5. I will consider whether a case is made for statutory deemed dedication under Section 31 of the Highways Act 1980 ("the 1980 Act") and, if necessary, whether a presumption of common law dedication arises, the intention of the landowner to dedicate a right of way, and the acceptance by the public of such a dedication, being implied from use of the way by the public and the documentary evidence.
6. The test I shall apply is whether or not the route subsists on the balance of probabilities.

Reasons

Documentary evidence

Maps and plans

7. The southern end of the continuation from the Order route, south of Erwhelm, was annotated as a "byway" on Ogilby's Britannia of 1675. Both the Walker map of 1835 and Becker, 1845, appeared to show the route as a continuation of the Bridleway (BR 27) which crosses the river Duhonwe. Small-scale maps such as this would be unlikely to show footpaths or bridleways due to limitations on scale and so are likely to indicate a route with higher rights.
8. The 1817 Ordnance Survey ("OS") drawing at 2 inches to 1 mile showed the route and seems to show the east-west road north of the river, which was not shown in the small-scale maps although they were published at a later date. This was shown more clearly on the 1833 1st edition OS map at 1 inch to 1 mile. The line now recorded as BR 27 was shown with Cnwc-y-llo and Erwhelm both named. The larger scale 1889 25 inch to 1 mile map indicated a through route from the road north of The Castle, now Hospital Road, to the junction of the roads, footpath and bridleway south of Erwhelm¹. The northern section was shown on the 1903 6" OS map, the southern section of which was not submitted.
9. I agree with the OMA that the OS mapping indicates the route as a long-standing enclosed physical feature in the landscape, open to the known public roads at either end and without any indication of gates across it. This is consistent with the depiction of a minor public road.

¹ Erw-helm on that map

10. Although without the benefit of other documents associated with the tithe surveys I accept the assessment of the OMA that the depiction of the northern section of the route, contained in the Builth Parish tithe map of 1842, is consistent with the status of a minor public road. I note that a gate was shown, which was not indicated on any other maps, however, this would not be inconsistent with a public route in a rural area, where stock control might be a relevant factor.
11. The Finance (1909 - 1910) Act 1910 maps showed the Order route uncoloured and separate from the adjacent hereditaments, which were braced across it where appropriate. I accept that this was the way in which other known roads were identified and consider that weight can be placed on this as indicative of public highway status over the Order route.
12. Taken as a whole I consider, on the balance of probabilities, that the historical mapping indicates that the Order route was treated in the same manner as other known public roads and was likely to have had the same status. I note that it has been referred to as Cnwc-y-llo road and the adopted section north-west of point A is signed as "Cnwch y llo Lane".

The Definitive Map and Statement

13. The route was not recorded on the Definitive Map and Statement for the area under the National Parks and Access to the Countryside Act 1949, however, the Definitive Statement for Footpath 3, just south of point A, describes it as leading to Cnwch-y-Llo Road. Footpath 4, which actually lies north of the section proposed to be added to the Definitive Map and Statement, is shown to cross Cnwch-y-Llo Road and Footpath 9, which joins the route from the east between points A and B is described as "...leading west to another County Road...".
14. I agree with the assessment of the OMA that it was assumed in the 1950s that this was a public road and so there was no need to record it on the Definitive Map and Statement.

Claimed use

15. Evidence of use of the route was submitted with the application by way of user evidence forms ("UEFs") and the Ramblers' Association representative also responded to the consultation letter that he had used the route once or twice and assumed it was a public road.
16. Section 69(1) of the 2006 Act amends section 31(2) of the 1980 Act to allow the date of application to record a route to be date from which the relevant twenty-year period is calculated. Although the application was submitted in 8 January 2003 the evidence was generally collected in 2002 and I agree with the OMA that the appropriate period is therefore 1982 - 2002; the earliest evidence of use dates back to 1943.
17. In the relevant twenty-year period there were between nine and twelve people using the route in any one year, the majority of that use being on foot. Three people used it with vehicles, including motor-bikes, and two also used it on bicycles. The majority of use was for pleasure and varied from twice daily to 2 - 3 times/year, the most common frequency being given as once a week. No-one indicated that they had been stopped in their use or given permission to use the route although one person indicated that he had done work for the adjacent

owners. Mr Chance, see below, indicated that he had accessed the road for maintenance purposes as well as pleasure.

18. I consider that the evidence is sufficient for a presumption of dedication under the statute, with evidence indicating use of the route as of right throughout the relevant twenty-year period. Although the OMA believed that it was necessary to identify a landowner who could have dedicated the rights I consider, in the absence of sufficient evidence of a lack of intention to dedicate a public right of way on the part of any landowner, that the presumption of dedication stands.

Status of the route

19. The application sought to record the route as a bridleway, however, the OMA were satisfied that the appropriate status was RB. I consider that the evidence as a whole supports the finding of that this is a route with public vehicular rights.

20. The OMA indicated that prior to the 2006 Act they would have sought to record the route as a BOAT. The definition in section 66(1) of the 1981 Act is:

"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."

21. I consider that the character of the majority of the route is of an old vehicular route which has fallen into general disrepair with the main evidence of public use being on foot, and a little by way of vehicles, including motor-bikes. In addition there was evidence on the ground of agricultural use and general access in association with the two farms. The majority of the surface is unsealed, and in some places down to bedrock, however from a point south of Cnwc-y-llo the route has a metalled and tar-sealed surface that is indistinguishable from the surface of the U0052 UCR at Erwhelm and appears to be publicly maintained.
22. I do not consider that the section south of Cnwc-y-llo has the character of a route any different from the general minor road network in this area. It seems to be part of the 'ordinary roads network', relied on for access to properties. As a consequence I consider that this section should not be recorded with the status of either BOAT or RB as it appears, on the balance of probabilities, that it is part of the minor highways network. Unfortunately, due to the lack of grid lines on the Order map I am not able to give the grid reference for this point in my proposed modifications.
23. In relation to the remaining section it was argued that the public vehicular rights were not extinguished by virtue of the 2006 Act due to the exception arising under section 67(2)(b). This arises if *"...immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense)"*.
24. Section 36(6) of the 1980 Act sets out that *"The council of every county, metropolitan district and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense."* Sub-section 7 sets out that the list shall be kept at the Council offices and may be inspected by any person.
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25. The commencement date is 15 November 2006 and the OMA have not commented directly with regard to what was shown on their List of Streets ("LoS") immediately before that date. I note that Mr Chance, who completed a UEF, wrote "*This is an unclassified county road open to all traffic and was when I was appointed Divisional County Highways Surveyor in 1966...see original county roads maps...*".
26. Within the Committee Report ("the Report") the OMA explained the arrangements for management of the road network before the establishment of Powys County Council in 1974: main roads and some minor ones were the responsibility of Brecknockshire County Council but the boundary with Builth Wells Urban District Council ("the UDC") runs through Erwhelm Farm, point B on the Order map, and north of there responsibility for minor roads lay with the UDC. The LoS held by the Highways, Transport and Property Department ("the HTP Department") in 2002 did not show the entire length of the route, only the section to point B as the highways maps were apparently marked up only from the former County Council maps, believed to date from the 1930s or 1950s.
27. The Report referred to a "*Schedule of publicly maintained roads*", which was thought to have been compiled at the time of transfer. This apparently described the U861 as "*Cnwc-y-llo Road. From: junction Hospital Road To: UDC Boundary. 2140 metres. Previous Authority: Builth Urban District.*" This schedule was held by Rights of Way staff and so unknown to the HTP Department.
28. It was stated that the HTP Department did not hold a list of the minor roads maintained by the former UDC; however, the objector submitted evidence that when he was researching routes in the period 1988 - 1995 he had identified the entire route as an unclassified road, albeit with the incorrect reference number. Additionally, a document submitted by the objector was discovered by the Highway Records Department within their written copies of the LoS during his visit in September 2008; the OMA said that the route had been added to the LoS following this visit.
29. The objector said that there appeared to be no guidance as to what constituted a LoS and he thought that the best were held as both a map and a written list. In this instance there is evidence that the entire route was publicly maintainable by the UDC prior to 1974 and the northern section of the U861 to point A and the southern section to Cnwc-y-llo farm have clearly been maintained in more recent years, apparently at public expense. It appears that at least two lists of such routes were held by the highway authority, one with the Rights of Way Department and one in the Highways Records. In the absence of submissions from the OMA as to what constituted their LoS, I consider, on the balance of probabilities, that the route as a whole was on the LoS, that is "*...a list of the streets within their area which are highways maintainable at the public expense...*" prior to the commencement of the 2006 Act. As a result I consider that the exception applies and the vehicular rights have not been extinguished. I believe that the appropriate status is BOAT for the section from point A to Cnwc-y-llo.

Conclusions

30. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed subject to modifications to remove

the section south of Cnwc-y-llo from the Order and to record the remaining section with the status Byway Open to All Traffic.

Formal Decision

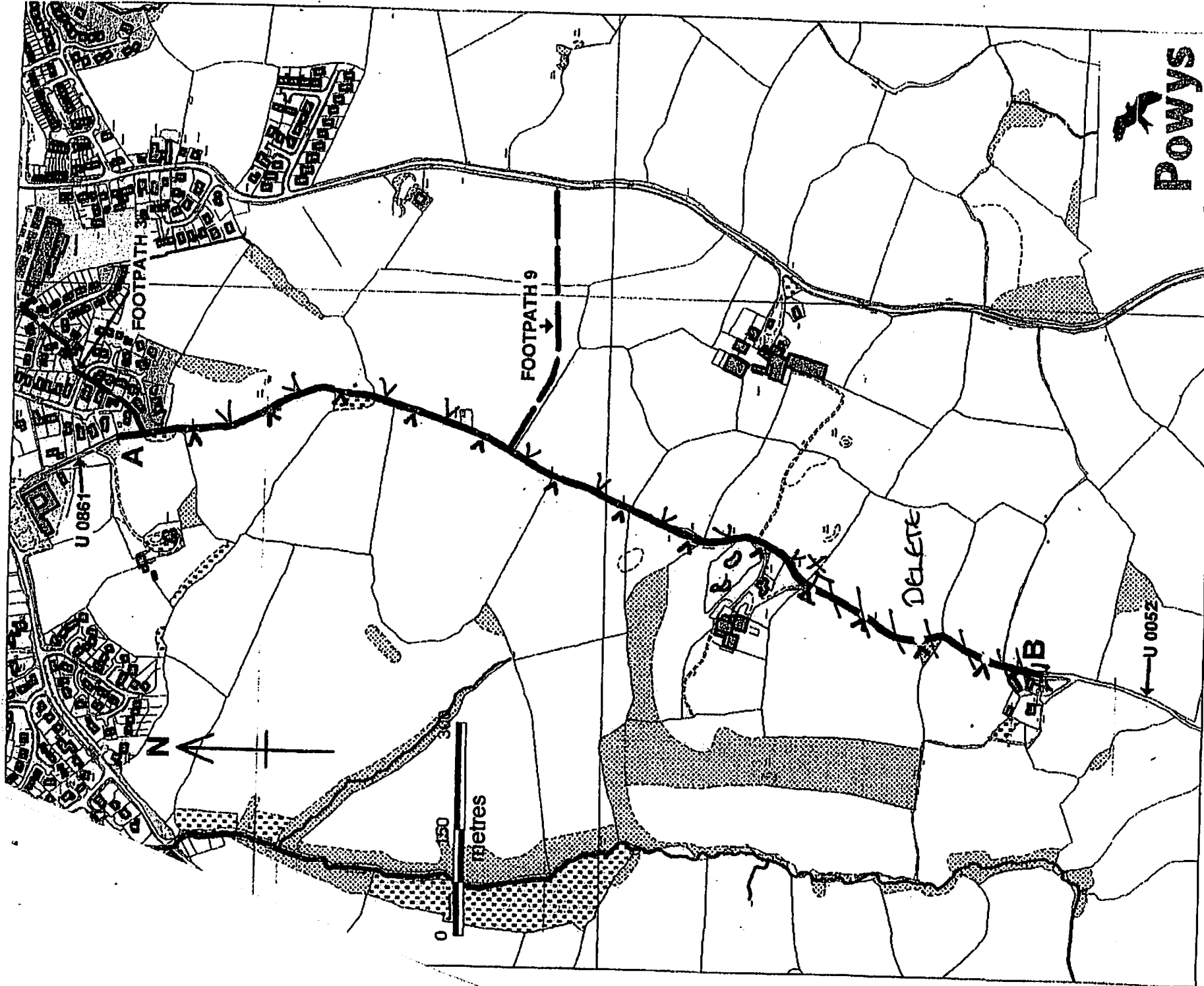
31. I propose to confirm the Order subject to the following modifications;

- Throughout the Order:
 - replace "...restricted byway..." with "...byway open to all traffic...";
- In Part I of the Schedule;
 - delete text between "... before passing Cnwc-y-llo farm..." and "...at Erwehelem farm [SO 0349.4939] point B...";
 - add text "... to the surfaced road, point X...";
 - replace "...1425..." with "...approximately 1,100...";
- In Part II of the Schedule:
 - delete text between "... before passing Cnwc-y-llo farm..." and "...at Erwehelem farm [SO 0349.4939]...";
 - add text "... to the surfaced road...";
 - replace "...1425..." with "...approximately 1,100...";
- On the Order map:
 - add point X;
 - delete section X - B;
 - for section A - X replace notation for restricted byway with that for byway open to all traffic.

32. Since the confirmed Order would not show a way shown in the Order and 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(1) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give the opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Heidi Cruickshank

Inspector



**Definitive Map Modification Order
 application at Cnwc-y-llo Road
 Builth Wells Community (A to B)**

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