



Order Decision

Hearing held on 25 November 2008

by **Mark Yates BA(Hons) MIPROW**

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

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Decision date:
23 December 2008

Order Ref: FPS/E0535/7/26

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Cambridgeshire County Council (Restricted Byway No 14 Easton) Definitive Map Modification Order 2008.
- The Order was sealed by Cambridgeshire County Council ("the Council") on 10 January 2008 and proposes to add a restricted byway to the definitive map and statement, as detailed in the Order Map and Schedule.
- There was one objection outstanding at the commencement of the Hearing.

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

Preliminary Matters

1. I held a Hearing into the Order on 25 November 2008 at the Spaldwick Community Primary School, Spaldwick. I made a visit to the site accompanied by the parties or their representatives immediately following the close of the Hearing.
2. For clarity, all of the points referred to in this decision relate to those annotated on the modified Order Map, which is attached to the decision.
3. I address the issue of the width that is specified in the Order Schedule for the claimed route in paragraph 33 below.

Main Issues

4. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. Accordingly, I need to be satisfied that the evidence, when considered with all other relevant evidence, is sufficient to show that, on the balance of probabilities, a restricted byway which is not shown in the definitive map and statement subsists.
5. Rights of way, with some exceptions, come into existence because they have been dedicated to the public by the owners of the land over which they run. 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. I shall consider whether the evidence enables an inference of the dedication and acceptance of a right of way to be drawn.

6. The parties do not believe that any of the exemptions contained in the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") are applicable in this case. Therefore, any public rights for mechanically propelled vehicles are extinguished by virtue of the 2006 Act.

Reasons

The User Evidence

7. Seven statements were submitted in support of use of the claimed route and three people provided some additional details on this issue at the Hearing. These statements indicate that there has been use of the claimed route during parts of the twentieth century. Whilst the statements are supportive of a belief that the claimed route is a highway, I do not consider that they are sufficient to demonstrate consistent use of the route during the twentieth century. Further, these statements are only indicative of use, at times, by pedestrians.
8. In my opinion, the Order needs to be considered primarily in light of the historical documentary evidence which is detailed below.

The Historical Documentary Evidence

9. The main piece of evidence that the Council relies upon in support of the Order is the 1774 Easton Inclosure Award and its accompanying map. The powers of the Inclosure Commissioners were set out in the relevant local Act. Whilst this Act is difficult to read in places, it states that the Commissioners were authorised to:

"set out and appoint such and so many public and private roads and ways in and through the new inclosures to be made by virtue of this act in such directions and situations as the commissioners so setting out and appointing the same shall think proper provided such public roads shall be sixty feet broad at least which said public roads shall at all times forever hereafter be repaired ... by and at the expense of the inhabitants and occupiers of lands in the said parish of Easton in like manner as the public roads in the said parish are or ought by law to be repaired..." [sic].

10. It is not disputed that a section of the claimed route was set out in the inclosure award. This is described in the award as *"one other public road as now set out from the west end of an ancient lane leading from Easton towards Spaldwick to the east end of another ancient lane leading from Easton to Spaldwick aforesaid by the south end of the allotments to Thomas Sutton and Mary Mackennys"*. The public roads set out in the inclosure award were to have a breadth of 60 feet.
11. The Council says that the inclosure map shows this awarded road and the remainder of the claimed route by way of a dark coloured line. However, other routes, both public and private, are shown in the same manner on this map. It appears to me that the awarded road is shown with a greater width than the sections described as parts of an ancient lane; however, it is not possible to be certain on this issue. It also appears that the route is shown proceeding for a short distance into the neighbouring parish of Spaldwick.
12. In my view, the Commissioners clearly awarded a public road over a section of the claimed route as distinct from a bridleway or a footpath. Mrs Hanney, on

behalf of the objector, questions the meaning of the word "*public*" in the inclosure award, with reference to the case of *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council [1995]*. However, there is nothing to suggest that the Commissioners intended that the route should only be used by a limited section of the public. I consider that the inclosure award provides strong evidence to show that a section of the route was set out as a vehicular highway.

13. The majority of the claimed route consisted of two sections of an ancient lane that passed through land that comprised of old enclosures, which were outside of the Commissioners jurisdiction. I accept that the inclosure award provides no express details regarding the status of this lane. In relation to the land included in the inclosure award, the local Act specifies that any roads or ways not set out in the award were to be stopped up. It appears to me that the Commissioners took action to prevent the stopping up of a section of the claimed route. I consider it likely that, having taken the trouble to ensure that a section of the claimed route was set out as a public road, the Commissioners were acting in the belief that the remainder of the route had the same status.
14. There are also clear references in the description of the relevant awarded road to it connecting with two sections of an ancient lane leading from Easton to Spaldwick. In addition, the descriptions of the adjoining parcels of land, belonging to Thomas Sutton and Mary Mackennys, state that these parcels were bounded to the south by the public road leading from Easton to Spaldwick. Further, there is nothing to suggest that the Commissioners would have set out a short section of public road which connected at each end with a private way or a highway of a different status. Overall, I consider that the inclosure award points to a belief by the Commissioners that the ancient lane had the same status as the awarded public road and that together they formed part of a route between Easton and Spaldwick.
15. The parties agree that a highway was not awarded in the Spaldwick Inclosure Award of 1777 to connect with the claimed route. However, a copy of this inclosure award and the relevant local Act were not available at the Hearing. The Council's report of 11 October 2007, regarding the application for a Modification Order, provides some background details in relation to the Spaldwick Inclosure Award. It is apparent that the relevant local Act contained similar provisions to those contained in the Act for Easton in relation to the setting out of highways and private roads. It also specifies that any roads that were not included in the inclosure award were to be stopped up.
16. The evidence indicates that different approaches were taken in respect of the two inclosure awards. Whilst the Spaldwick Inclosure Award provides no evidence in support of the claimed route, it does not diminish the evidence contained in the Easton Inclosure Award. The Easton Inclosure Award clearly set out a section of public road over part of the claimed route. It is also supportive of the existence of a highway over the remainder of the claimed route. I consider that, in such circumstances, a cul de sac highway could exist.
17. Mrs Hanney suggests that the awarded road may not have been physically made up on the ground or that there was an error in relation to the Easton Inclosure Award and its map. I address these issues in paragraphs 30 and 31 below, following consideration of the remainder of the documentary evidence.

18. The earliest available plan of the area is a map of 1768 which was produced by Jefferies. The Council says that this map shows the claimed route as an enclosed road, which continues in the parish of Spaldwick as an unenclosed road. It is not possible to determine the status of any of the routes that are depicted on this map or the actual survey upon which it was based. However, I consider that this map shows the existence of a physical feature that broadly corresponds with the claimed route. It further indicates that the claimed route formed part of a through route between Easton and Spaldwick. Whilst it may not be possible to establish precisely when the land was surveyed, the survey would have pre-dated the Easton Inclosure Award.
19. The 1801 Cary map also shows the route that is detailed in paragraph 18 above albeit at an even smaller scale. Again, it is not possible to determine the status of any of the routes that are shown. The Council and Mrs Hanney dispute whether the Cary map was based upon an original survey. I concur with Mrs Hanney's view that it is not possible to be certain that Cary surveyed this particular locality. However, I consider it likely that the relevant survey was undertaken after the completion of the Easton Inclosure Award.
20. Whilst the Jefferies and Cary maps provide evidence in support of the physical existence of the whole of the claimed route, a pre-1817 draft Ordnance Survey ("OS") map only shows the A-B section of the route. This is also the case with an 1835 OS map. However, the Council confirms that the 1835 OS map was based upon the pre-1817 draft map. In addition, there is no indication of the claimed route on a plan of the estates of Lady Olivia Sparrow of 1813; although, a present byway open to all traffic to the south is shown.
21. A map produced in connection with the 1842 Easton Tithe Award shows the claimed route between two solid lines, coloured sepia and not annotated. It is also unnumbered and excluded from the taxable parcels of land. In addition, there is no apparent information regarding the claimed route in the accompanying tithe apportionment. The parties agree that this map provides no confirmation regarding the status of the routes that are shown on it.
22. Although the tithe map may not provide confirmation regarding the status of the claimed route, it indicates that the route existed as a physical feature. I also note that the tithe map appears to show the section that was set out in the inclosure award as a public road with a greater width than the remainder of the route. The claimed route is not annotated in the same way as the road to the north but I do not find this to have any significant bearing on the status of the route. However, the claimed route appears to be shown proceeding slightly into the parish of Spaldwick and open ended at this point, which could suggest that the route continued beyond the parish boundary.
23. The claimed route is depicted on a plan produced in connection with the estates of the Duke of Manchester of 1847, which the parties suggest was closely based on the tithe map. I accept that this plan provides no clarification regarding the status of the routes shown on it. However, it is supportive of the existence of the claimed route as a physical feature.
24. The claimed route is shown in greater detail on the 1885 OS map. I do not consider that the earlier 1884 OS boundary sketch map provides sufficient detail to enable me to reach any meaningful conclusions in relation to the

- features that are depicted on it. None of the parties believe that the OS maps provide any firm indication regarding the status of the routes that are shown. However, reference is made to the depiction of certain features in connection with the route, notably a well and a possible gate. These details are replicated on the 1901 OS map. In my view, the 1885 and 1901 OS maps depict the physical existence of the majority of the claimed route. It is apparent that the section between the awarded road and the parish boundary was no longer visible as a distinct feature by 1885. I do not consider that the existence of certain features such as a gate and a well across or within the boundary of the claimed route provides any clear indication of the route's historical status. One of the supporters, Mr Jolly mentions a row of trees that are located within parcel 87 on the 1885 OS map, which could be indicative of part of a track or lane beyond the parish boundary. Mr Jolly also brought an aerial photograph to the Hearing which shows a row of trees in this locality.
25. A map produced in relation to the 1910 Finance Act shows the majority of the claimed route excluded from the surrounding taxable parcels of land. The section between the awarded road and the parish boundary is shown within the taxable parcels of land (points E-C). To some extent, I concur with Mrs Hanney's submission regarding the value of this map. In relation to the proportion of the route that is excluded from the surrounding taxable parcels of land, this could be indicative of the existence of a highway. However, in some cases, the exclusion of a route may be due to other reasons such as the existence of a private road. I also note that the copy provided is the working map and not the final record plan. In relation to the western end of the claimed route it is not possible to reach any conclusions regarding its status from this document as it falls within the taxable parcels of land.
26. A map in connection with the National Farm Survey of 1943 shows the majority of the claimed route excluded from the surrounding fields in the same way as the Finance Act map. However, the Council confirms that this document was not concerned with identifying the status of any of the routes that are shown on it.
27. There is no reference to the claimed route in a letting agreement of 1891 in relation to parcels 147 and 170 on the 1901 OS map. However, the absence of any reference to a private or public right of way in this document provides no clarification regarding the status of the claimed route. A section of the claimed route is mentioned in an abstract of title of 1970. This refers to a conveyance of 1918 in relation to plots 165 and 168 on the 1901 OS map. These are described as being bounded to the north and east by the occupation road known as Cherry Orchard Lane. This indicates that a view was taken, at the time, on behalf of the owner of the relevant plots, that the claimed route was a private right of way.
28. Mrs Hanney states that most of the land in the area was in the ownership of two estates before being incorporated into one landholding in 1863. She considers it likely that the land crossed by the claimed route would have been in the ownership of one of these estates. Mrs Hanney also says that both of the estates were in settlement from the mid 1600s until some time after the completion of the inclosure process in the area, which would have impacted upon the capacity of a person to dedicate a highway over the claimed route. However, there is no evidence to show that the land crossed by the claimed

route has historically been in a settlement. I also note that ownership of the land in question has not been established. In relation to the D-E section of the route, this was set out in accordance with a statutory process. Overall, I do not conclude from the details provided that the land crossed by the claimed route was included in a settlement.

29. The route was not claimed or recorded at any stage of the process in relation to the original definitive map for the area. Mrs Hanney believes that this provides strong evidence of its status. However, as the Council submits, the Order is seeking to record unregistered public rights. Therefore, I do not consider that any failure to claim or record the route in the past has a significant bearing on its status.
30. In relation to the making up of the claimed route on the ground, the Easton Inclosure Award refers to a route that already existed between Easton and Spaldwick. There is supporting evidence regarding the existence of this route on the 1768 Jefferies map. The maps produced after the Easton Inclosure Award do not all show the full extent of the claimed route. However, the 1801 Cary map and the 1842 tithe map show the whole of the claimed route as a physical feature. These maps are supported by the 1847 plan of the estates of the Duke of Manchester. In addition, the tithe map indicates that a section of the claimed route had a greater width than the remainder of the route. The available published maps from the latter part of the nineteenth century and the twentieth century show all but the western end of the route as a physical feature. In my view, these maps point to the existence of a greater width in connection with the section encompassing the awarded public road.
31. I find that the claimed route was considered to be part of a highway leading to Spaldwick at the time of the Easton Inclosure Award. In addition, the Inclosure Commissioners set out a section of this route as a public road with a width of 60 feet. I consider it likely that this was done in order to prevent a section of the route from being stopped up. It is also my view that, on balance, the middle section of the claimed route was set out as a public road in the inclosure award in light of the status of the remainder of the route within Easton. Whilst the map evidence is not conclusive, it indicates that this road was subsequently available on the ground. In relation to the possibility that an error occurred in respect of the Easton Inclosure Award, there is a lack of significant evidence to indicate that such an error occurred.
32. Having regard to the above, I conclude that the historical documentary evidence shows that, on the balance of probabilities, the claimed route is a vehicular highway. However, in light of the 2006 Act, I accept that the route should be recorded in the definitive map and statement as a restricted byway. Whilst some of the documents suggest that the route continues beyond the parish boundary, in my view, the evidence is not sufficient to demonstrate the existence of a highway that continues within the parish of Spaldwick.

The Width of the Claimed Route

33. The Council confirms that the width that is specified in the Order was calculated from the OS County Series map. I accept that the width of the sections of the claimed route that were not expressly set out in the Easton Inclosure Award could be calculated from this OS map. However, I consider that the width of

the remainder of the route should reflect the width of 60 feet (18 metres) that was included in the inclosure award in relation to the public roads. Therefore, I propose to modify the Order so that it records a width of 8 metres for the A-B-D and E-C sections of the claimed route and a width of 18 metres for the D-E section of the route.

Other Matters

34. Some issues have been raised regarding the suitability or desirability of the claimed route. However, these matters are not relevant considerations in connection with Orders made in accordance with the 1981 Act.

Conclusion

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

Formal Decision

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

Delete all of the text under the column headed "Width" in Part I of the Order Schedule and insert "8 metres (points A-B-D and E-C) and 18 metres (points D-E)".

Delete on the fourth, fifth and sixth lines of the description contained in Part II of the Order Schedule "Width varies between 8m and 38m at its widest point, more particularly as shown on the map attached to The Cambridgeshire County Council (Restricted Byway No 14 Easton) Definitive Map Modification Order 2008" and insert "The width is 8 metres (points A-B-D and E-C) and 18 metres (points D-E)".

Insert the letters "D" and "E" on the Order Map where the eastern and western ends of the awarded public road are located and amend the map and its key to show a width of 18 metres between these points.

37. Since the confirmed Order would not show a section of the way in the Order as submitted 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.

Mark Yates

Inspector

APPEARANCES

For the Council:

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DOCUMENTS

- 1 Table of evidence prepared by the Council
- 2 Addendum to the statement of case on behalf of Mr Purser
- 3 Closing statement on behalf of Mr Purser