



Order Decision

Site visit on 18 October 2016

by Mark Yates BA(Hons) MIPROW

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

Decision date: 17 November 2016

Order Ref: FPS/Y3940/8/1

- This Order is made under Section 54(1) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) and is known as The Wiltshire County Council (Newton Tony 7) (Sheets SU 23 NW & SU 24 SW) Rights of Way Reclassification Order No.4 2005.
- The Order was made by Wiltshire County Council¹ (“the Council”) on 23 June 2005 and proposes to reclassify a road used as a public path (“RUPP”), numbered 7 in the parish of Newton Tony, as a byway open to all traffic (“BOAT”), as detailed in the Order Map and Schedule.
- There were four objections and two representations outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. This Order was originally scheduled to be determined by way of a public inquiry. However, in light of the circumstances outlined in paragraph 4 below, and following consultation with the parties, it was agreed that I should determine the case on the basis of the written representations provided. I therefore made an unaccompanied visit to the site on 18 October 2016.
2. The Council believes the Order can no longer be confirmed in light of the legislation set out in the main issues below. It therefore took a neutral stance following the referral of the Order to the Secretary of State. The case in support was taken forward by the Wiltshire Group of the Trail Riders Fellowship (“WGTRF”). Statements were submitted on behalf of WGTRF by Mr Kind. Additional submissions have been received from other supporters, including Mr Riley.
3. A number of submissions have been received from people opposed to the recording of public rights for mechanically propelled vehicles (“MPVs”) over Newton Tony 7. This includes statements from a local group (Newton Tony 7 Working Group²) and another organisation (the Green Lanes Protection Group³). A further objector is the Royal Society for the Protection of Birds, which owns land crossed by the way.
4. Mr Kind wrote to the Planning Inspectorate on 27 August 2016 outlining that, following the receipt of the statements of case, WGTRF and Mr Riley had reviewed their positions and did not intend to participate at the public inquiry. He refers to the placing of notices on site encouraging people to object to the recording of MPV rights. Mr Kind then questions the reliability of the evidence

¹ The relevant surveying authority is now the Wiltshire Council

² Principally the statements of Mr Rutter-Jerome and Mr Andrews

³ Statements from Mr Plumbe

- provided by the objectors. Nonetheless, he believes it would be futile to spend time at an inquiry challenging these witnesses.
5. I have considered the comments of Mr Kind and read the numerous letters and statements of the parties before reaching my conclusions. The public inquiry would have provided both sides with the opportunity to test the evidence by way of cross-examination. I find it regrettable that this position was adopted when the reliability of the objectors' evidence is plainly disputed. I note from the subsequent statements that some of the objectors have expressed disappointment at the cancellation of the inquiry.
 6. A further point arises out of a letter from Mr Plumbe regarding a potential application for costs. I see nothing wrong with a party giving advance notice of a possible costs application prior to an inquiry. However, this is no longer applicable now that the case is being determined by way of the written representations procedure.

Main Issues

7. The Order is made in accordance with Section 54 of the 1981 Act, in respect of the Council's duty to review all of its RUPPs shown in the definitive map and statement and reclassify them as follows:
 - (a) if a public right of way for vehicular traffic has been shown to exist, as a BOAT;
 - (b) if (a) does not apply and public bridleway rights have not been shown not to exist, as a bridleway; and
 - (c) if neither (a) nor (b) applies, as a footpath.
8. Section 47 of the Countryside and Rights of Way Act 2000 ("the 2000 Act") had the effect of repealing the duty to reclassify the remaining RUPPs in the manner detailed above. However, Section 48(9) of the 2000 Act makes it clear that Orders made prior to 2 May 2006 have to be processed to a final determination. Furthermore, any public vehicular rights that are found to exist are subject to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act").
9. Section 67(1) of the 2006 Act has the effect of extinguishing any unrecorded public rights for MPVs unless one or more of the exemptions outlined in 67 (2) or (3) of the Act is applicable. In this case, reliance is placed on the exemption contained in 67(2)(a) of the 2006 Act. This exemption applies where the main lawful public use of the way, during the period of 5 years prior to 2 May 2006, was by MPVs. No other exemption is apparent from the information supplied.
10. As Section 54 of the 1981 Act was not amended in light of the subsequent legislation, I am unable to modify the Order so as to reclassify a RUPP as a restricted byway.

Reasons

11. It is not suggested that the way should be reclassified as a bridleway or footpath. Nor is any issue taken with the Council's view that the historical documentary evidence is supportive of the existence of vehicular rights. This evidence is bolstered further by the research undertaken by Mr Riley. I accept that the documentary evidence provided is supportive of the dedication of a vehicular highway at some point in the past.

12. The issue to be determined from the additional submissions is whether the relevant exemption in the 2006 Act is applicable. I therefore need to consider the extent of the use over the five year period immediately prior to 2 May 2006 ("the relevant period"). Paragraph 28 of guidance issued by Defra⁴ makes it clear that the onus of proof in such cases rests with those who allege that this exemption applies.
13. Paragraph 21 of the above guidance indicates that this exemption is intended to apply where a way forms part of the ordinary road network. Whilst I note that Mr Kind questions the application of this paragraph to RUPPS, if the exemption applies, the way would not correspond to the definition of a BOAT in Section 66 of the 1981 Act, namely "*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*". Therefore, even if the exemption is applicable, the Order cannot be confirmed so as to record a BOAT. If I conclude that the main lawful use of the way during the relevant period was by MPVs, then I should find that the exemption applies irrespective of the character of the way.
14. Mr Plumbe makes a number of assertions regarding the potential for the MPV use to have constituted a criminal offence, including a public nuisance. However, it cannot be determined at the present time whether there is any substance in these allegations. In assessing the evidence, I shall start from the position that the use by MPVs during the relevant period has not been shown to be unlawful.
15. The number of people who state that they used the way on foot, horseback or pedal cycle far exceeds the number of MPV users. This is also applicable in terms of the extent of the claimed use. However, regard should be given to the quality of the evidence provided. In doing so, I have had regard to the issues raised by the parties in relation to the nature of the user evidence provided.
16. Both sides have made comments about the methods employed to encourage people to submit evidence and influence the responses. On this issue, Mr Andrews' statement that both sides "*seem to have gone to some lengths to raise awareness and encourage users to submit user evidence*" is supported by the details provided.
17. WGTRF raises the issue of the objectors' lack of previous knowledge regarding this matter despite notices being placed on site to advertise the making of the Order during the relevant period. Some of the objectors have subsequently given reasons why they may not have seen these notices. On this issue, I have had particular regard to the four objections made to the Order in 2005. I note that three of these⁵ are supportive of the main use at the time being by pedestrians, cyclists and horse riders. One of the objectors (Mr Coleman) does acknowledge some use by MPVs. This contemporaneous evidence should be given a fair amount of weight. In this respect, I note that a number of the evidence forms from people claiming MPV use of the way were submitted in 2007-08. The 2005 representation from Mr Collins also provides some evidence in support of use of the route by MPVs.

⁴ 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).

⁵ One of the objections was submitted on behalf of two people

18. In relation to the response by Newton Tony Parish Council to the Council's request for information regarding the use of the way, this was based upon information from the four Councillors who lived in the village during the relevant period. This indicates that the predominant use during this period was by walkers, cyclists and horse riders. Whilst this information was provided nearly 10 years after the end of the relevant period, the request itself was not phrased in a leading way.
19. The evidence is supportive of use of the way for a wide range of recreational pursuits by the different groups of users. I note in relation to the pedestrian use that this involved a large number of dog walkers and a fairly significant amount of use by joggers. The objectors have generally provided information regarding their personal use and the observed use by other people.
20. In terms of the descriptions of the routes used by the objectors, some of the use related to sections of the way and other use involved the whole way. I find it credible that joggers, cyclists and horse riders would have regularly used the whole way. I do not doubt that walkers did so on occasions. There is also evidence of people parking near to the way before embarking on a walk. In addition, I note that this use was not confined to residents of Newton Tony and included people from the surrounding parishes. Given the network of public rights of way in the locality, I would be surprised if people did not continue over Newton Tony 7.
21. The evidence of a lack of observed MPV use from a number of people does not necessarily mean that such use did not occur. There is clearly user evidence in support of such use. I also note that some of the objectors mention seeing such use albeit on an infrequent basis. The MPV use appears to have been often undertaken by small groups of motor cyclists. In relation to the responses in the evidence forms regarding the predominant type of use, I am not convinced that these serve as an accurate guide given the frequency of the stated MPV use.
22. The evidence provided in such cases often does not represent the sum total of the use. It is also possible for people to underestimate or overestimate their use. In this respect, there is some concern about the period of time that has elapsed since the end of the relevant period. Nonetheless, there is nothing to demonstrate that the user evidence has been deliberately fabricated.
23. Whilst there is evidence of use by all forms of traffic, the clear conclusion I reach from the evidence provided to me is that the MPV use was not the predominant form of use during the relevant period. Therefore, the relevant exemption in the 2006 Act is not applicable and the Order cannot be confirmed to record the way as a restricted byway.

Other Matters

24. A number of points have been raised regarding whether it is desirable for the way to be recorded as a highway for MPVs. However, this matter is not relevant to my decision. Nor indeed are issues relating to whether the way is suitable for use by MPVs.
25. In the circumstances, it is not necessary for me to give consideration to any suggested modifications to the Order.

Conclusion

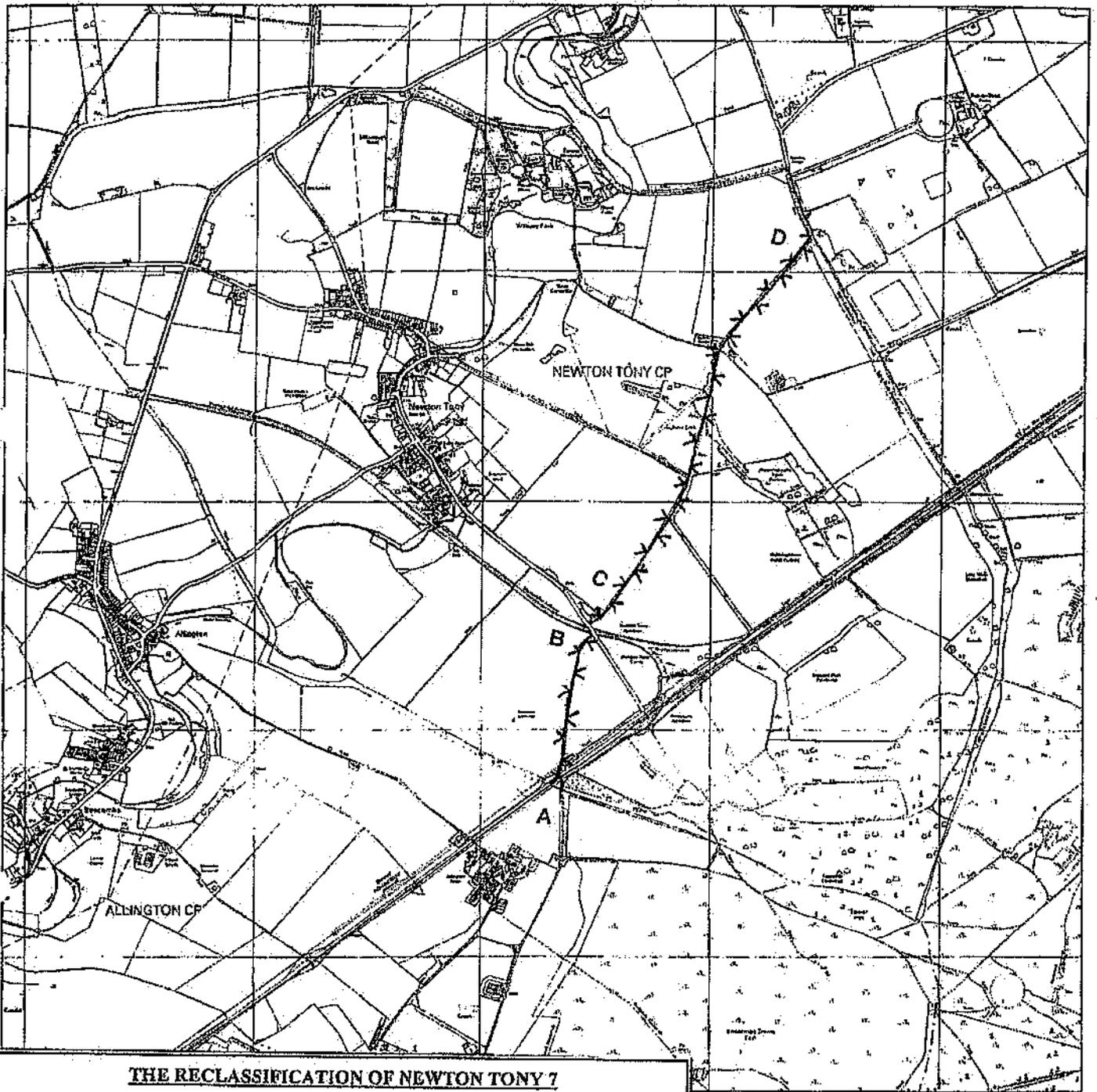
26. Having regard to these and all other matters raised in the written representations I conclude that the Order should not be confirmed.

Formal Decision

27. I do not confirm the Order.

Mark Yates

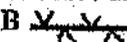
Inspector



THE RECLASSIFICATION OF NEWTON TONY 7

Key

Length of Road Used as a Public Path to be reclassified as Byway Open to all

Traffic: A  B  C  D 

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