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## Order Decision

Site visit made on 20 February 2018

**by Helen Slade MA FIPROW**

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

**Decision date: 27 February 2018**

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### **Order Ref: ROW/3179946**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as The Kent County Council (Bridleways AW378 and AW379, Kingsnorth) Definitive Map Modification order 2016.
- The Order is dated 21 October 2016 and proposes to modify the Definitive Map and Statement for the area by adding two bridleways as shown in the Order plan and described in the Order Schedule.
- There were two objections outstanding when Kent County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

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### **Procedural Matters**

1. Kent County Council ('the County Council') submitted this Order to the Planning Inspectorate with a request not to confirm it, based on a review of the information and documentation which they had examined initially prior to the making of the Order. I must determine the Order based on the evidence available and, whilst I can take into account the County Council's request, I am required to make my decision on the basis of the facts of the case.
2. The statutory objections to the Order include representations that rights for certain vehicles still exist over the claimed route, and I have therefore had regard to the situation relating to those rights. I consider that this involves and examination of the effects of the Natural Environment and Communities Act 2006 – an issue which does not appear to have been addressed by the County Council.
3. Part of the route is currently inaccessible, but during my site visit I was able to walk the whole of the proposed route to the west of the A2070 Trunk Road, and to walk or view all but about 100 metres or so of the route to the east of the 2070.
4. The original applicant has moved away and the responsibility for it was assumed by Mrs Jenny Taylor. It was agreed by the parties to the Order that the matter should be determined using the written representation procedure.

### **The Main Issues**

5. The Order has been made in consequence of an event set out in Section 53(3)(c)(i) of the 1981 Act, which provides that the Definitive Map and Statement should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public

right of way which is not currently shown in it subsists, or is reasonably alleged to subsist, over the land in question. At the confirmation stage of the Order I must be satisfied that the right of way subsists. In this case the Order has been made to record a bridleway, but the objectors consider that rights exist for vehicles.

6. Although user evidence on foot, horseback and cycles was submitted to support the application, the County Council examined a number of documentary sources before making the Order. Section 32 of the Highways Act 1980 ('the 1980 Act') requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
7. Section 67(1) of the Natural Environment and Rural Communities Act 2006 ('the NERC Act') extinguished any existing public right of way for mechanically propelled vehicles on a way which, before 2 May 2006, was not shown in a Definitive Map or Statement. This provision is subject to a number of specific exemptions which, if any one of them is satisfied, have the effect of preserving those rights. I must therefore examine the provisions of the NERC Act to determine whether or not any public rights for mechanically propelled vehicles which might be found to subsist have been exempted from extinguishment by any of the stated provisions, or alternatively whether any rights for non-mechanically propelled vehicles subsist.
8. I have had regard to the guidance provided by the Department for Environment, Food and Rural Affairs ('Defra') in Circular 1/09 on Public Rights of Way, and to relevant legal judgements.
9. The test I must apply is the balance of probabilities.

## **Reasons**

### ***Background***

10. The application for the route to be added as a bridleway was made by a local resident, Mrs Gail Brace, in 2012 following the erection of gates across the route. The application was apparently accompanied by statements from a number of people who claimed to have used the route on foot, horseback and cycles, although I have seen only the copies of the interviews carried out by the County Council. The application route comprised the western part of the Order route, terminating at the junction with the A2070 Trunk Road. As a consequence of the informal consultation responses, the County Council made the Order for the whole of Steeds Lane including the eastern section linking to Brockmans Lane.
11. During the investigation of the application the County Council examined a number of old maps and other documents which supported the long-standing existence of the route which led them to consider that it might carry public vehicular rights. This was reinforced by the existence of a Side Roads Order ('SRO'), made in 1990, which stopped up that part of Steeds Lane where it crossed the newly constructed A2070; and a 1994 Prohibition of Driving Order made under the Road Traffic Act 1984 ('RTA 1984') which prevented motor vehicular use for 10 metres on either side of the A2070 and the adjacent and

parallel railway line. Nevertheless, the County Council made the Order to add the route as a bridleway.

12. No objections have been made challenging the existence of public rights on foot or on horseback. The statutory objectors claim that vehicular rights exist and that these should be preserved, either by recognising that the route is a full vehicular highway or by making provision in the Order for the continued use of the way by vehicles. Latterly, and as part of the written representation procedure, other parties have submitted statements supporting the confirmation of the Order as made, not wishing to see vehicular rights recorded over the route.

***Whether or not a public right of way subsists over the route in question***

13. No evidence has been submitted to challenge the existence of highway rights over the Order route, other than the 1990 SRO and the 1994 Order under the RTA 1984. These orders affect only the short length of the highway where the route crosses the A2070 and the adjoining railway line, and for 10 metres either side, effectively dividing the historical route of Steeds Lane into two halves. The effect of these orders in combination is to legally prevent the through use of the route in motorised vehicles, but not by any other means. The effect of the 1994 RTA Order is to suspend the motorised vehicular rights, but it does not extinguish them.
14. It should be noted that the SRO stopped up that part of Steed Lane which crossed the new trunk road, and this would have included all public rights, whether or not vehicular rights existed. It does not specify the nature of the rights stopped up; it merely refers to it as a highway. However the same SRO also stops up routes which it describes in more specific terms (e.g. Byway AE550 and several numbered public footpaths) so I am satisfied that by describing it as a 'highway' Steeds Lane was treated as a full vehicular highway.
15. It should also be noted that the copy of the Prohibition Order made under the RTA 1984 which has been submitted is actually headed 1993 and is not signed or sealed. The Notice from the London Gazette states that the order was made on 16 June 1994, coming into force the next day, and provides an opportunity to question the validity of the order. Bearing in mind that I have not seen a copy of the sealed order, I have no reason to believe that it did not come into effect as road traffic signs prohibiting motor vehicle access are present on both sides of the A2070 at this location. The order itself appears to be called 'The Kent County Council (Public Byway AE550 Ruckinge and Roads at Kingsnorth and Orlestone) (Prohibition of Driving and One-Way) Order 1994. This reinforces the fact that Steeds Lane was treated as a road, and not a lesser highway.
16. I agree with the County Council and the statutory objectors that the very existence of these two orders supports the historical existence of full highway rights over the whole of Steeds Lane, regardless of the evidence from current highway records which does not record the Order route as being a publicly maintainable highway.
17. The County Council also relies, latterly, on the evidence provided by the Deposited Railway Plans for the Ashford, Rye and Hastings Branch Railway Scheme dated 1844. In the statement provided by the County Council

explaining why it is considered that the Order should not be confirmed, their reasoning on this is contained in paragraph 15 and is based on the assertion that two main routes cross the railway line at the relevant location. These are listed as follows:

- a) *22 – Lane to Chart: Owned by the Surveyor of Highways*
- b) *55 – Lane from Chilmanton Green to Kingsnorth: Owned by the Surveyor of highways.*

The County Council considers it is the latter entry which is considered to refer to the Order route.

18. I have difficulty with this assertion for a number of reasons. Firstly the copies of the plans submitted to me are very hard to interpret as there is no indication of where north lies; but they appear to show a proposed railway corridor which follows a very different route from the line of the present railway. It passes close to the village of Shadoxhurst and to a location called Beaver Green, both of which are shown on the 1801 Mudges map as lying significantly to the west of the settlement of Kingsnorth. The present day railway line is to the east of Kingsnorth.
19. Furthermore, on present Ordnance Survey ('OS') maps, Great Chart (or Chart Magna on the 1801 Mudges map) and Chilmington Green also lie to the west of Kingsnorth. If a road was described as running from Kingsnorth to either of those places it would be to the west of the Order route by some margin. I am forced to the conclusion that the deposited railway plans submitted relate to a different scheme which does not seem to have been implemented. The line of the railway shown on the First Edition of the OS map submitted by the Council is on a significantly different route and is marked on the map as an 'Electric Telegraph'. The Second Edition of the OS map names it as the 'SER Ashford and Hastings Branch'. I place no weight on the evidence of the railway deposited plans as I believe they relate to different scheme which did not cross the line of the Order route.
20. The County Council has requested that the Order be not confirmed on the basis that the route carries rights as a full public vehicular highway. It is their view that Steeds Lane is consequently the responsibility of Kent Highways for management purposes and it is not appropriate for it to be recorded on the Definitive Map and Statement as a bridleway. Other parties consider that the route is not suitable for any form of vehicular transport and wish the Order to be confirmed to record a bridleway.
21. The existence or otherwise of vehicular rights is not dependent upon the current suitability of the route for that purpose. I am satisfied that, on the evidence available, Steeds Lane was historically a highway carrying full public rights, including rights for vehicles, and that this situation pertained until at least the 1990s, when the new road was built. I consider that it is necessary to examine the effect of the NERC Act to determine the current classification of the route, and thus identify the appropriate way of recording it. It is not my role to concern myself with who is responsible for managing the route as a consequence.

### **The effect of the NERC Act**

22. The intention of the NERC Act was to curtail the scope for establishing and recording public rights of way for mechanically propelled vehicles, particularly where those rights were established historically by means of use in non-mechanically propelled vehicles.<sup>1</sup> It achieved this by automatically extinguishing such rights except where those rights were saved by one of a number of exemptions.

23. Clause 67(1) reads as follows:

*"An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement<sup>2</sup> –*

*(a) was not shown in a definitive map and statement, or*

*(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.*

24. Clause 67(2)(b) reads as follows:

*"Subsection (1) does not apply to an existing public right of way if –*

*(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,*

*(b) 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 the public expense),*

*(c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,*

*(d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or*

*(e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.*

25. Clause 67(3) provides further exemptions as follows:

*"Subsection (1) does not apply to an existing public right of way over a way if –*

*(a) Before the relevant date<sup>3</sup>, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,*

*(b) Before commencement, the surveying authority has made a determination ... or*

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<sup>1</sup> 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)

<sup>2</sup> 2 May 2006

<sup>3</sup> 20 January 2005

*(c) Before commencement a person with an interest in the land has made such an application ...*

26. Clause 67(5) preserves a private right of access in mechanically propelled vehicles for persons with a need to access land in which they have a legal interest.
27. In this case the application was for a bridleway and not for a byway open to all traffic, but was in any case made after 20 January 2005 so the exemption in clause 67(3) does not and cannot apply.
28. The way was not shown on the Definitive Map and Statement before 2 May 2006, and neither was it shown (in respect of the actual Order route) on the relevant list of streets. Thus the exemption in clause 67(2)(b) does not apply either.
29. I have no evidence as to its main use during the five years prior to 2 May 2006, but the user evidence would suggest that its principle use was on foot or on horseback. The reported vehicle use relates to use by agricultural vehicles for access to adjacent land, or for access to residential property and on the evidence available I consider it unlikely that such use outweighed the use by the public by other means. In the absence of any evidence to show whether or not mechanically propelled vehicles used the way prior to 1 December 1930, or any evidence that the route was created by enactment, I conclude that none of the other exemptions apply.
30. I am therefore satisfied that the evidence shows that the rights for mechanically propelled vehicles which previously existed over the Order route were extinguished by the coming into effect of the NERC Act. Any access to land in mechanically propelled vehicles which was formerly exercised in pursuance of a public right of way is preserved as a private right of access by virtue of the provisions of Section 67(5) of the NERC Act.
31. The consequence of this is that I am satisfied that the appropriate status of the Order route is a Restricted Byway. This is a type route which ought to be recorded on the Definitive Map and Statement. It follows that I consider that the Order should be confirmed, but that the status of the route should be amended to show Restricted Byway. This modification will require advertising.

### ***The width of the route***

32. The Order states that the width of the Order route is 3.0 metres throughout, although it is of course divided into two separate numbered routes. However, as I have concluded that the route has an historical basis, the appropriate width is its historical width and not the width that was available for use more recently. At my site visit it was evident to me that the full width of the highway, as represented on the early editions of the OS maps submitted, is considerably wider than 3.0 metres. I also note that the original Parish Survey describes the route of an adjoining route (Footpath 30) as terminating at the junction with Steeds Lane 'adjoining Railway Bridge'.
33. The OS mapping submitted by the County Council suggests that Steeds Lane formerly passed beneath the railway line. I presume that the current level crossing was constructed much more recently, possibly in connection with the construction of the A2070 Trunk Road in the 1990s. At my site visit I was able

to see that the surface of the route to the east of the level crossing showed evidence of having been raised in height by a considerable amount.

34. The second and third editions of the OS maps submitted by the County Council show that by 1900 or so, the width of Steeds Lane to the immediate west of the railway line was measurably narrower than the width of the route to the east of the bridge. In addition, the length of the Order route where it passed alongside Ruffets Wood to meet Brockmans Lane was narrower still. During my site visit I was able to see that this situation still pertains. Despite parts of the route being very overgrown, the boundary hedges are still clear features which provide a measurable width.
35. I consider that the width of the section of the Order route to be known as AW378 should more correctly be recorded as being 8 metres in width, whilst the majority of the Order route to be known as AW379 would be more accurately described as being 10 metres wide, using in both cases the boundary hedges as the defining features. For the last part of the route near to Brockmans Lane, which currently runs through a corridor of scrub between two fields, I consider the width of 3.00 metres is appropriate.
36. I therefore intend to modify the Order accordingly in respect of the recorded width, adding an identifying letter 'X' to the Order schedules and plan to define the point at which the width of AW379 alters. Since the increased widths affect land not included in the Order as made, these changes will also require advertising.

### **Other matters**

37. Arguments relating to the suitability or otherwise of the route for vehicles, and opinions on the desirability of having a vehicle-free, recreational route are not relevant to the determination of this Order. I have not allowed these views, however sincerely held, to influence my decision. The County Council has powers under other legislation to deal with any management issues which may arise.
38. The speculation on future development in the area, and the possibilities that might arise in relation to the Order route, are not issues which affect my decision and I have not taken them into account.

### **Conclusions**

39. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with modifications to reflect its status as a Restricted Byway and to amend the width.

### **Formal Decision**

40. I propose to confirm the Order subject to the following modifications:
  - The title of the Order to be amended to refer to Restricted Byways rather than Bridleways;
  - All references to the Order route in the Order, the Schedule and on the Order Map to be amended to Restricted Byway rather than Bridleway;

- In Parts I and II of the Schedule in the descriptions relating to the route AW378, delete the references to the width being 3.0 metres and amend them to 8.0 metres;
  - In Part I of the Schedule in the description of the route AW379, delete the words 'with a width of 3.0 metres';
  - In the same paragraph, add the following additional text to the description 'Width between point C and point X – 10 metres; width between point X and point D – 3.0 metres.';
  - In Part II of the Schedule at the end of the description of AW379 delete the full stop and add the text 'from Brockmans Lane for a distance of 120 metres and then with a width of 10 metres to the A2070.';
  - On the Order Map insert point X as shown;
  - On the Order Map amend the title the symbol and the key to indicate the status of the route as a Restricted Byway.
41. Since the confirmed Order would show as a highway of one description a way which is shown as a highway of another description in the Order as submitted, and also affect land not affected by the Order as made, Paragraph 8 (2) of Schedule 15 to the Wildlife and Countryside Act 1981 requires that notice shall be given 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.

*Helen Slade*

**Inspector**

