



Order Decision

Inquiry held on 10 April 2018

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 03 May 2018

Order Ref: ROW/3181626

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Cornwall Council (Upgrade of part of Footpath 2 Tregony to Restricted Byway and Addition of Restricted Byways in the parishes of Tregony and Cuby) Modification Order 2016.
- The Order is dated 14 December 2016 and proposes to upgrade a footpath to restricted byway and record restricted byways on the Definitive Map and Statement in the Parishes of Tregony and Cuby. Full details of the routes are set out in the Order Map and Schedule.
- There were seven objections and representations outstanding when Cornwall Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed subject to modifications set out in the Formal Decision.

Preliminary Matters

1. The Ramblers made a representation to the Order regarding a number of typographical errors and Cornwall Council, the order-making authority ("the OMA"), requested modifications as a consequence.
2. I have given careful consideration to the requested modifications and am satisfied that they have not resulted in prejudice to any party, such that the Order should be rejected as fatally flawed. It is clear that the objectors have understood the purpose of the Order. I am also satisfied that the requested modifications do not require further advertisement by virtue of paragraph 8 of Schedule 15 to the Wildlife and Countryside Act 1981 ("the 1981 Act").
3. In confirming the Order I shall make the modifications as requested.

Procedural Matters

4. I made an unaccompanied site inspection on 9 April 2018, walking Footpath 2 ("FP2"), C – F¹. As the land crossed by the Order route was unregistered I was unable to gain landowner permission to walk some sections. Therefore, I viewed the remaining sections from the public highways at points A, B and G.
5. I held an Inquiry into the Order on 10 April and no-one requested a further site visit following the close of the Inquiry.

¹ Points A – G are used to identify points on the Order map as modified

Background

6. In June 2003 an application was made to the OMA under Section 53(2) of the 1981 Act. The application sought to add the northern-most section, A – B/F, to the Definitive Map and Statement (“DMS”) as a public footpath.
7. As a result of the discovery of evidence during the preparation of the Council Report into the application² the OMA identified the sections running west, F – C, and south, F – G, as potentially needing to be recorded and/or upgraded. The Order proposes to record all sections with the status restricted byway.

Main issues

8. The Order is made under section 53(2) of the 1981 Act by reference to: section 53(3)(c)(i) which refers to whether a right of way which is not shown in the Map and Statement subsists over land in the area to which the map relates; and, 53(3)(c)(ii) which relates to whether there has been a discovery of evidence which, when considered with all the other relevant evidence, shows that a highway shown in the DMS as a highway of a particular description ought to be there shown as a highway of a different description.
9. The OMA relied on the common law, with the user and documentary evidence in combination said to show that dedication had taken place. The burden of proof at common law lies in this case with the OMA. The evidence as a whole needs to show that dedication of public rights on the part of the landowner has occurred, along with acceptance of those rights by the public.
10. In objection it was argued that the documentary evidence did not show that higher rights had existed and the use had only been as a footpath. Most public highways have been accepted by the public since beyond memory. The law presumes that, at some time in the past, the landowner dedicated the way to the public either expressly, with evidence of such dedication now being lost, or impliedly, by making no objection to use of the way by the public. The evidence to show that such dedication has occurred may arise from documentary and/or user evidence.
11. In considering such matters I shall bear in mind the requirements of section 32 of the Highways Act, 1980 (“the 1980 Act”), which sets out in relation to *Evidence of dedication of way as highway* that:

“A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”
12. Matters were raised regarding the possible effect on walkers if the routes were recorded at a higher status.

² 7 October 2016

13. I will confirm the Order if satisfied, on the balance of probabilities, that it meets the test that the route – and all sections thereof - subsists as restricted byway. In determining this I shall take account of all the submitted documentary and user evidence.

Reasons

Documentary evidence

Small-scale mapping

14. I agree with the OMA that the 1748/49 Thomas Martyn map indicates roads or tracks linking Tregony³ with Reskivers.⁴ I consider that the Ramblers are correct to say that, taking account of the date of compilation and relatively small scale, the Martyn map strongly supports the existence of all sections of the Order route.
15. The Greenwood 1826/27 map similarly indicates the Order route, albeit less clearly aligned to the north. I consider it unclear whether section A – B is indicated or the 'road' to the west of that, seen on the relevant tithe map.
16. These maps support the existence of physical routes, Greenwoods perhaps only relating to part. Given that they were prepared to assist travellers the routes appear to be related to public access. In objection it is argued that use would have been on foot to access Cuby church, situated to the north-west of point A. However, there is no evidence that such access would have only been on foot; given the small scale of these maps, it does not appear that footpaths would be likely to be depicted.
17. I agree with the Ramblers that weight should be placed on the depiction on the Martyn map in particular as supporting higher rights over the Order route.

Tithe Maps, 1841

18. The Tithe Commutation Act 1836 (amended in 1837) converted tithes to a fixed money rent. Tithe documents are concerned with identifying titheable land and consist of the apportionment, the map and the file. Three maps were produced and there can be variations between them. Tithe maps are generally good evidence of the topography of the area but can give no more than an indication as to whether a route is public or private, as a private right of way can also diminish the productiveness of the land for tithe assessment, which was the reason for which the documentation was drawn up.
19. In this area three parishes converged and so there are three separate tithe maps: Cuby Parish; Veryan Parish; and, The Borough or Township of Tregony.
20. The southern section F – G is shown in its entirety on the Map of Veryan Parish. It is shaded sienna in the same manner as other public highways, such as the A3078 at point G. However, I note that other routes, recorded as public bridleways to the north and south, are shown in the same way, as is the route through Reskivers to the north-west. I note the submission from the Ramblers that "*Roads and Wastes*" are unnumbered in this apportionment and the Order routes would have been numbered and recorded if they were private roads.

³ Sometimes referred to as Tregoney

⁴ Shown on the map as Reskevaas

21. The section C – F, currently recorded as FP2, is clearly identified in the Map of the Borough or Township of Tregony, with the sections leading generally north and south from point F also seen. I note that it may be included the apportionment number 126, identified as "*Waste Streets and Roads.*"
22. Section A – B is clearly seen in the Cuby tithe map, shaded as the U6098, Cuby Road to the north. Again I note another route coloured in this way, which appears to be a cul-de-sac route providing field access only, to the south-west. The continuations into the neighbouring parishes are clear. I agree with the Ramblers that "*Public Roads*" recorded in the apportionment are unnumbered.
23. There are no indications of gates or barriers of any type across any section of the Order routes or their junctions with public roads.
24. Taking account of the indication of the Order routes on three separate tithe maps in the same manner as public highways I consider that some weight can be placed on the depiction of the routes supporting higher public status.

Ordnance Survey maps

25. The formation of Ordnance Survey ("OS") was a response to a military need for accurate maps. Over the years, OS developed a variety of maps to meet the growing need for accurate and up-to-date maps of the UK and the production of maps for sale to the public became an activity of increasing importance to OS from the early twentieth century. Since the late nineteenth century OS maps have carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way. OS surveys and maps, especially the larger scale plans, provide an accurate representation of routes on the ground at the time of the survey.
26. The 1875 – 1901 and 1906 – 08 OS maps clearly show the Order routes without barriers or gates to prevent use. It was suggested in objection that the northern section of 'the footpath' formerly ran through the field now belonging to him, lying to the west of point A, directly adjacent to the Order route. The 1906 – 08 OS map shows a pecked-line on the western edge of what were then four separate fields, running to join the track claimed under the Order. This pecked-line feature is marked 'FP', suggesting it was used on foot but differs from the alignment indicated by the objector, see Inquiry Document 7.
27. The Order route remains shown as a separate feature from the adjoining fields. I do not consider that the existence of another route in the vicinity, whether public or private, negates the evidence relating to the Order route.
28. I consider that the OS mapping demonstrates that the Order route sections were open and available for use at end of the nineteenth and beginning of the twentieth century. The OS maps do not show whether they were public or private but may assist in conjunction with other information.

Bartholomew's maps

29. Bartholomew's maps were reduced from OS maps, including layer relief colouring. I understand Bartholomew did not employ independent surveyors to carry out surveys or to determine the nature and status of the routes on their maps. As such I do not agree with the Ramblers that the depiction of route A – G assists in determining the status.

Finance (1909 - 1910) Act

30. The Finance (1909 - 1910) Act ("the Finance Act") provided for the levying of tax on the increase in site value of land between its valuation as at 30 April 1909 and its subsequent sale or transfer. Each area of land, or hereditament, was identified on a map and information recorded in a Field Book.
31. I agree with the OMA that the Order route sections were excluded from the numbered hereditaments on either side, as were other public roads. Where a route is so shown there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the Field Books. I give some weight to this document as indicating that the Order route was seen and treated as part of the ordinary road network in this locality.

The Definitive Map and Statement

32. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS and set out the legal procedure to be followed in their production. In this county, as in many, the Parish Councils were asked to identify the public rights of way in their area.
33. FP2 was claimed at this time and subsequently recorded on the DMS. The reason for recording the route was "*Uninterrupted user by public for years.*" There was no continuation from the eastern end, approximately point D, and I understand that the continuation in Veryan Parish was recorded by a Modification Order made in 2007.
34. The Ramblers suggest that the continuations may not have been recorded as the relevant Parish Councils thought that they were public roads. This is a possibility but there is no further evidence, such as Parish Council minutes, to assist with this matter. I am satisfied that the evidence shows the existence of public rights on foot at that time over FP2 but it does not assist with regard to the claimed higher rights.

Aerial Photographs

35. Aerial photographs dating from 1946, 1988 and 1996 show the continued existence of the Order route sections on the ground. They cannot assist in showing status but suggest continued use.

Land Registry

36. I note that the land crossed by the Order routes is unregistered. The route exists as a separate banked and hedged area outside the registered land on either side. I agree with the Ramblers that this is suggestive of an ancient public highway.

User evidence

37. The application sought to record the northern-most section, A – B, as a footpath. Unsurprisingly the user evidence forms ("UEFs") submitted at that time showed only use of that section and only on foot. It was suggested in objection that the application was made in response to Cuby Parish Council closing the route in the fields to the west, see paragraph 26 above. However, the application and associated UEFs clearly relate to the Order route within the

- banked and hedged lane, with no mention of any difficulties using that route. Any actions taken by Cuby Parish Council appear unrelated to the Order route.
38. During investigation of the application the OMA identified the other sections of Order route. The additional UEFs submitted in 2014 show use of all sections on foot and horse. Whilst the objector⁵ suggested that the UEFs should not be relied upon, it was accepted that those giving evidence to the Inquiry had used the Order route. It was also said that the route was a footpath and that the Order should be confirmed to show that status.
39. I note that one of those giving evidence of use with horses owns land adjacent to the northern-most sections of the Order route and it was suggested in objection that she may have private rights here. Given the possibility of private rights I have given less weight to this evidence. I note that this landowner freely accepts the use of the Order route by others and has undertaken works to assist in keeping the route open for public use, including by horse and pony riders.
40. The objectors indicated use of the Order route on foot by themselves and family members. This was particularly to and from the hamlet of Reskivers and Tregony, for access to school and other facilities, avoiding the use of Reskivers Hill. There was some indication of awareness of existing use by horse-riders, with concerns related to increased use.
41. The paper "*A WALK round the Ancient and Beautiful Village of Tregony*" was recorded to have taken place in 1972 and appears to include all the Order route sections. FP2 is known as Lady Lane and the generally north/south route, A – G is named here as Church Lane.
42. I note that the southern section appears to have been blocked at some point and cleared prior to this walk. However, it is unclear where this was or for how long use may have been difficult. The UEFs showing use with horses on this section post-dates the reported clearance works.
43. Although unable to walk the entirety of the Order route sections, there was visible evidence of use of all sections by walkers, dogs, horses and ponies.
44. Taking account of the evidence as a whole I am satisfied that I am able to place reliance on the use as reported in the UEFs, as well as that documented above. The majority of the use is on foot but I received direct evidence of use on horses and ponies as well as anecdotal evidence of use with bicycles. It was indicated in objection that cyclists had been prevented from using the routes by one of the Parish Councils. There is no further evidence in relation to this matter and neither Parish Council has objected to the recording of the Order routes with the status restricted byway.

Conclusion

45. The documentary evidence shows that there has been a physical feature in the landscape from at least the mid-eighteenth century. The suggestion of higher public rights arises from a number of strands of evidence, in particular the Martyn map, the tithe records and the Finance Act records. The land is not registered to any adjacent owner. The majority of recent use has been on foot

⁵ In this case I refer to the objector who attended the Inquiry

but there is consistent evidence of use by horse-riders from the early 1970s, over almost fifty years.

46. The evidence as a whole supports the dedication of the route in the past by an unknown landowner with acceptance by the public demonstrated through use, for which the evidence currently before me dates back to the early – mid twentieth century. Looking at the combination of documentary and user evidence submitted I am satisfied that public rights subsist on the Order route.
47. Taking account of the evidence as a whole I consider, on the balance of probabilities, it is sufficient to show that a public right of way subsists over the Order route. Given the effect of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"), I agree with the OMA that the vehicular rights have not been exempted, so saving the carriageway rights. The appropriate status is therefore restricted byway. The 2006 Act does not affect vehicular rights relating to private access to land and property.

Other matters

48. Concerns were raised regarding environmental matters; the possibility of greater use than at present by riding stables or the hunt; maintenance and suitability; and health & safety. Whilst I understand that these concerns are the matters of most importance to people living and working here, they are not relevant to the issues I need to consider under the 1981 Act.
49. I note the suggestion that other objectors may not have attended as they felt that the decision had been made. I have taken appropriate account of all the matters raised in writing and would have heard evidence from any statutory or interested party at the Inquiry had they wished to provide it.
50. I agree with the Ramblers that the Order does not seek to change the status of the routes, only to record the rights that already exist over the routes on the basis of the evidence presented. My decision has been taken on the evidence available to me.

Conclusion

51. Having regard to these and all other matters raised at the Inquiry, and in the written representations, I conclude that the Order should be confirmed subject to the modifications as set out in the Formal Decision below.

Formal Decision

52. I confirm the Order subject to the following modifications:

- In the preamble to the Order:
 - in line 3 replace text "...yay..." with text "...way...";
- In Part I of the Schedule to the Order, 'Description of Path or Way to be Upgraded':
 - after text "...Parish of Tregony..." add text "...to be upgraded to Restricted Byway...";
 - after text "...to this order..." add text "...shall be upgraded to Restricted Byway...";

- after text “...*Cornwall LXIII.12*,...” add text “...*LIX.9*...”;
- In Part I of the Schedule to the Order, ‘Description of Paths or Ways to be Added’:
 - in paragraphs 1 and 2, after text “...*to be upgraded to*...” replace text “...*Byway Open to All Traffic*...” with text “...*Restricted Byway*...”;
- In Part II of the Schedule to the Order, ‘In the Definitive Statement for the Parish of Tregony’:
 - remove reference to ‘Average Widths’ of 4’0” and 8’0”;
 - for route numbers 2 and 4 add ‘Minimum Width’ “3 metres” and ‘Maximum Width’ “6 metres”;
- In the Order map:
 - modify southern-most point ‘F’, on the A3078, to point ‘G’.

Heidi Cruickshank

Inspector

APPEARANCES

For the Order Making Authority:

Vanessa Davis Legal Officer, Cornwall Council

who called:

Mr S Dyer Countryside Access Records Officer, Cornwall Council

Ms A Bishop

Ms T Southworth

In Support of the Order:

Mr R Fraser *on behalf of* The Ramblers

In Objection to the Order:

Mr G Blackler

INQUIRY DOCUMENTS

- 1 The Order
- 2 Cornwall Council, Bundle of Documents
- 3 Documentary Evidence, marked with reference points
- 4 Requested modifications to Order
- 5 Map showing land owned by user witness
- 6 Closing submissions on behalf of Cornwall Council
- 7 Map showing route of believed former field footpath

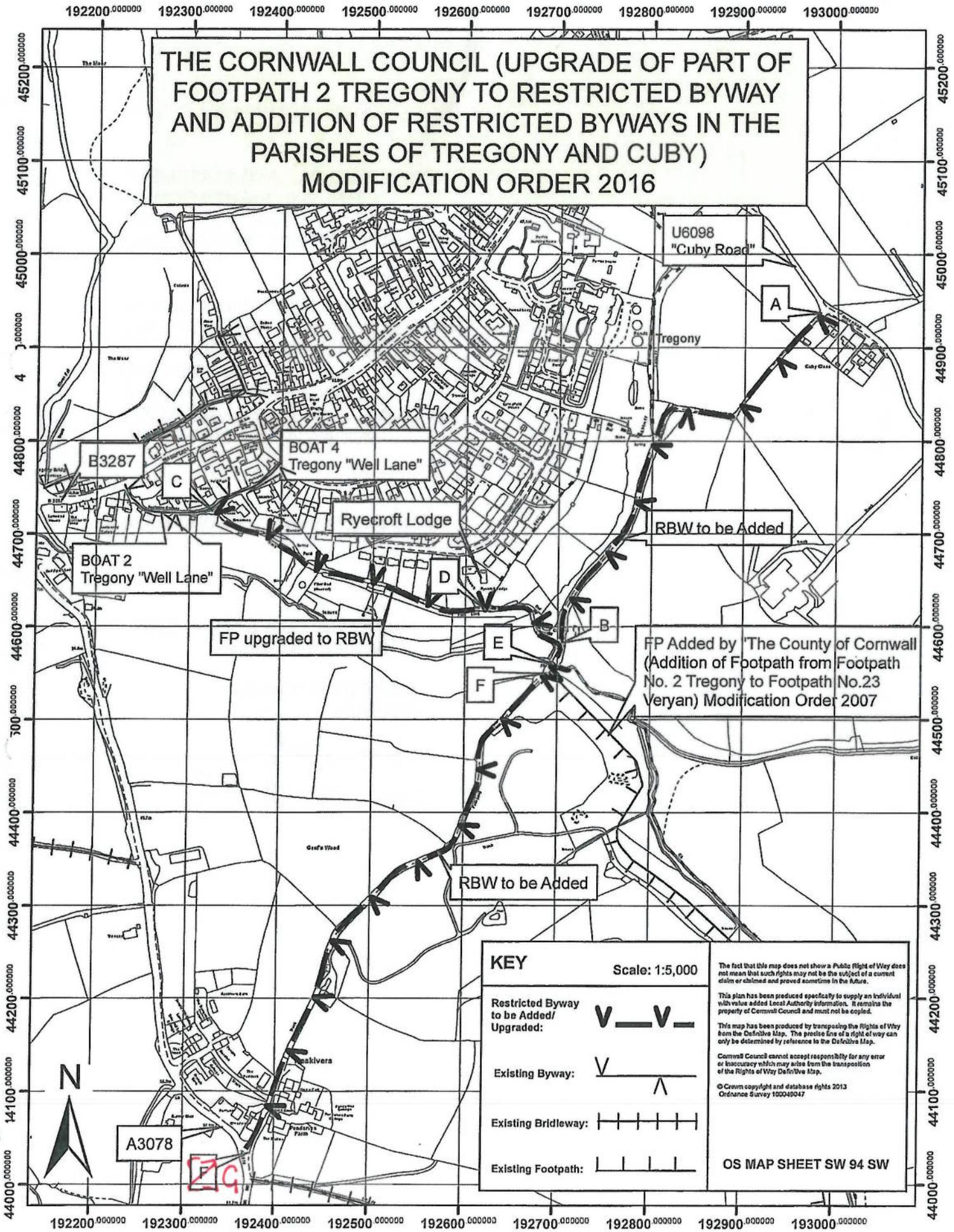
Wildlife and Countryside Act 1981 Order Plan: WCA 485

Parish:TREGONY & CUBY Path Number:FP/325/2

Produced by Countryside Access Team: 9 December 2016



THE CORNWALL COUNCIL (UPGRADE OF PART OF FOOTPATH 2 TREGONY TO RESTRICTED BYWAY AND ADDITION OF RESTRICTED BYWAYS IN THE PARISHES OF TREGONY AND CUBY) MODIFICATION ORDER 2016



U6098 "Cuby Road"

Tregony

E3287

BOAT 4 Tregony "Well Lane"

Ryecroft Lodge

BOAT 2 Tregony "Well Lane"

FP upgraded to RBW

FP Added by 'The County of Cornwall (Addition of Footpath from Footpath No. 2 Tregony to Footpath No.23 Verman) Modification Order 2007

RBW to be Added

KEY

Scale: 1:5,000

Restricted Byway to be Added/Upgraded:

Existing Byway:

Existing Bridleway:

Existing Footpath:

The fact that this map does not show a Public Right of Way does not mean that such rights may not be the subject of a current claim or claimed and proved sometime in the future.

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OS MAP SHEET SW 94 SW

