

**Your Ref:** 3235980M  
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**Date:**

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Dear Sirs

**Wildlife & Countryside Act 1981**  
**The Monmouthshire County Council Restricted Byway 53-16**  
**Devauden Definitive Map Modification Order 2018**  
**Order Making Authority's Submissions in Respect of Proposed**  
**Modifications to the Order**  
**PINS Ref: 3235980M**

1. The following submissions are made on behalf of Monmouthshire County Council in their role as both Surveying Authority and Order Making Authority in respect of The Monmouthshire County Council Restricted Byway 53-16 Devauden Definitive Map Modification Order 2018 (the Order).

**Preliminary Matter**

2. In her Order Decision dated 27<sup>th</sup> May 2020 Inspector Joanne Burston considered two Definitive Map Modification Orders. The first of those Orders was made on 22<sup>nd</sup> January 2018 and was known as "*The Monmouthshire County Council Restricted Byway 53-16 and 117B Community of Devauden Definitive Map Modification Order 2018*". It is referred to in the Order Decision as "Order A".
3. This Order [Order A] was submitted to the Planning Inspectorate by the Order Making Authority with a request that it was not confirmed due to a number of technical errors. Inspector Burston agreed with the Order Making Authority's request and subsequently resolved not to confirm Order A. For the avoidance of doubt the Order Making Authority agrees with that decision and Order A does not form any part of these subsequent proceedings.

**Background**

4. The second Order considered within the Order Decision of 27<sup>th</sup> May 2020 was The Monmouthshire County Council Restricted Byway 53-16 Devauden Definitive Map Modification Order 2018. It is referred to within the Order Decision as "Order B" but is hereafter referred to simply as "the Order".

5. Having considered all of the available and relevant evidence the Inspector proposes to modify the Order by recording the section of the Order Route shown A-B-C-D-E on the Order Plan as a Public Footpath, but to confirm the section of the Order Route shown E-F-G, as made, as a Restricted Byway.
6. This proposed modification attracted two objections, the first from Mrs Ann Underwood, Access and Bridleways Officer for the British Horse Society (Newport and Monmouthshire area), who believes that the section of the Order Route A-B-C-D-E is subject to at least public bridleway rights. The second objection was lodged by Mr and Mrs Brooke who own the land crossed by the Order Route (A-B-C-D-E) and who assert that no public rights of way exist at all over that section of the Order Route.
7. It is noted that neither party is disputing the Inspector's decision to confirm the southern section of the Order Route (E-F-G) as a Restricted Byway. These proceedings are therefore restricted to the existence and status of the norther section of the Order Route (A-B-C-D-E) only.

#### **Order Making Authority's Position**

8. The Order Making Authority did not submit any objections or representations in respect of the proposed modifications, and indeed confirms here that it has no objection to the modifications should the Inspector so wish to proceed. The Order Making Authority maintains the same stance as it always has throughout these proceedings, namely one of impartial objectivity with a view to ascertaining the true status of the Order Route. In doing so the Order Making Authority agrees with the Inspector's findings that the Order Route is a public highway of some description, but that evidence points to the status of the way being higher than public footpath.
9. Notwithstanding the above, as a matter of due diligence, and in Order to assist the Inspector in her deliberations, the Order Making Authority does consider it appropriate to offer comments on:
  - a) The legal tests and approach to consideration of evidence
  - b) the physical existence of the Order Route
  - c) the Order Decision
  - d) the submissions made by the British Horse Society
  - e) the submission made on behalf of Mr and Mrs Brooke

#### **Legal Tests & Approach to the Consideration of Evidence**

10. This case does not rely upon evidence of modern use, nor is there any evidence of express dedication. In this case the inference of dedication has been drawn from evidence that the way was already recognised as being a highway by the start of the period covered by living memory, coupled with the absence of anything to show that the public recognition was misplaced. In this class of case the common law approach simply recognises that the facts all point one way, and that it is immaterial that the claimant cannot identify the early owners or show the actual date when dedication was likely to have occurred<sup>1</sup>.
11. The standard of proof is the civil test of the balance of probability. This essentially means that if the Inspector considers the evidence to be 51% in favour of public rights the burden of proof has been met.

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<sup>1</sup> See e.g. *Williams Ellis v Cobb* [1935] 1 KB 310 (CA), 318-9, 325, 327-8, 331

12. The consideration of evidence may be considered analogous to piecing together a jigsaw where each document is an individual piece of the jigsaw. It is only when the pieces are put together that the true picture can be seen, albeit it does not necessarily require every piece to be in place.
13. The approach to evidence was also considered in *R v Exall and Others* (1866) 4 F & F 922: *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then if any one link broke the chain would fall. It is more like the case of a rope composed of several cords. One strand of a cord might be insufficient to sustain the weight, but three stranded together may be of quite sufficient strength."*
14. Although *R v Exall* is a criminal law case, it is respectfully submitted that the approach outlined is the correct approach to the strands of evidence in this case.

#### **The Physical Existence of the Order Route**

15. The physical characteristics of the Order Route are also a material consideration, perhaps more so than usual. Whilst currently very overgrown and impassable for much of its length, the route forms a quite significant landscape feature being, at least in part, a sunken lane of quite substantial proportions. Whilst it is accepted that the physical existence of a way is not, on its own, evidence of public rights, it must be considered alongside all of the other available and relevant evidence. When this approach is adopted, the physical characteristics of the Order Route suggest a status higher than public footpath.

#### **Comments on the Order Decision**

##### Commercial Maps

16. The Order Making Authority agrees with the Inspector's conclusions that these documents are generally supportive of public highway status.
17. Early commercial maps can provide good evidence of the physical existence of a route, as of the date of survey, especially if it is shown to exist on later more reliable documents. In this case a number of maps show the Order Route as part of a longer through route running to the settlement of Trelleck Grange and beyond. The depiction of a road or way in this manner is more in keeping with a public highway, than it is a private way.
18. Maps within this category generally did not show footpaths, and only very occasionally do they show bridleways (annotated to differentiate between bridleways and carriageways). The depiction of the Order Route is therefore more in keeping with it being a public carriageway than any other status of public highway.
19. The fact that other routes in the area, that are shown on the early commercial maps, are now shown on the Definitive Map as footpaths, may add weight to the proposition that the way is a highway of some description, but this must be considered in the context that the conclusive status of the Definitive Map is without prejudice to the existence of higher (unrecorded rights). In other words, the other routes may actually be under recorded.

##### Tithe Map

20. Tithe Maps were produced for the purposes of commutation of tithes from payment in goods to a monetary amount. It is often mistakenly interpreted that the use of sienna colourwash on a route is indicative of public highway status this is incorrect. It simply means that the land was non-productive and therefore not subject to tithe payments. A highway would only be

excluded from tithe if it was non-productive (for instance a highway with wide verges that could be grazed by cattle, might still be subject to tithe and therefore would be allocated a hereditament number and included for assessment in the tithe apportionment.

21. Notwithstanding the above, tithe maps do provide some of the most accurate large scale mapping of their time, and as such they can provide excellent evidence of the physical features (as of their date of survey) that they depict.
22. In this case the Order Route is not allocated any hereditament numbers which would suggest that it was considered to be non-productive land. The map does however confirm the physical existence and characteristics of the Order Route, and that it is entirely consistent with the early commercial maps which depict the Order Route.

#### Ordnance Survey Maps

23. Ordnance Survey maps provide excellent evidence of the existence of physical features that existed at the time of their survey. It is not however possible to ascertain the status of way by reference to the width of track that is depicted on the mapping. Furthermore since 1880 they have carried a disclaimer to the effect that the depiction of any path track or way is not evidence of public highway status.
24. It is important to note that in this case, the Ordnance Survey mapping is entirely consistent with the Tithe map and the early commercial mapping. No part of the Order Route is defined or categorised with the letters "F.P." or "B.W" which would suggest that it was passable with carriages ("F.P." indicated a way was not suitable for horses or carriages; "B.W." was indicated a way was not passable with carriages. Neither annotation was indicative of public status).
25. It is not unusual in hilly/mountainous areas for pedestrian routes (footpaths) to exist alongside sunken lanes. These are sometimes referred to as "snowpaths" because they would be used when the sunken lanes became blocked by snow drifts. Such a path (whether a snowpath or not) is depicted on the 1920 OS map.
26. The larger scale maps and plans would not usually carry a key. It is however clear that the Order Route is mapped as road or track of carriageway proportions. This is entirely consistent with the early commercial maps and tithe map.

#### Ministry of Transport Maps

27. There is no suggestion that the Order Route has ever been a "classified road", or indeed a classification of road that would specifically feature on these small-scale maps. The fact that the 1926-8 map shows the Order Route again confirms its continued physical existence but to no greater extent than other Ordnance Survey based materials.
28. The Inspectors conclusion [para 37] that the depiction of the Order Route on the 1926 MOT map is supportive of the existence of private rights is unreasonable and without foundation.

#### Finance Act 1910

29. The exclusion from valuation of Section E-G of the Order Route is consistent with that section being acknowledged as a public highway of some status or other, but this is not in contention.
30. The remainder of the Order Route (A-E) is shown within the adjoining land holdings. Whilst deduction have been claimed in respect of public rights of way or user, it is not possible to

attribute this deduction to the Order Route. It may apply to other public rights of way within the land holding.

31. It should, of course be noted that not all road/carriageways were necessarily excluded from valuation. If a route was not bounded by physical boundaries it may have been included in the adjoining land holdings. Furthermore, any claim for public rights of way or user was discretionary on the part of the landowner. It was only an offence to falsely claim for something that did not exist.
32. It is perhaps also worthy of note that no claims were made in respect of easements, therefore there can be no suggestion that the Order Route was included due to it being private. In fact these documents (so far as A-E is concerned) are effectively neutral.
33. It is not possible to reach the conclusion that the Inspector expresses at para 36 of the Order decision, namely that the A-E “had a lower status for which a deduction was claimed”. Such a conclusion has no basis in fact or evidence.

#### Highway Authority Records

34. The Order Making Authority agrees with the Inspector’s conclusion that these records provide “strong evidence that the Order Route was [is] a publicly maintainable highway”. The Authority would however disagree that these records don’t provide evidence of historic public vehicular rights.
35. These documents are significant in the determination of this case. It is important to note that there is no evidence, which pre-dates the first set of record maps, which suggests that the inclusion of the route as an unclassified county road is incorrect. Furthermore, the Inspector correctly concludes that she has no evidence before her to suggest that the Order Route was removed from the highway records by way of any due legal process (i.e. a highways stopping up order or a court order removing the public maintenance liability).
36. It is the Order Making Authority’s view that the later removal of the Order Route from these records was undertaken without lawful authority. The rationale behind these actions is unclear, but it may have been as a result of no maintenance works being undertaken on the route for a period outside the direct knowledge of those maintaining the records. This is not a legitimate ground for the amendment of the record.
37. The Inspector’s approach to the interpretation of the records, i.e. that they are evidence that the Order Route is a Highway Maintainable at Public Expense, but not of its actual status (beyond highway of some description) is in line with various pieces of government advice that has been issued on the understanding that these records are correctly maintained. In common with the majority of Highway Authorities in England and Wales, the List of Streets is not maintained correctly and as such further interpretation is required.
38. For such records to be maintained correctly all highways maintainable at public expense would have to be included in the records. This would include, amongst other things, the vast majority of public footpaths and bridleways that are shown on the Definitive Map. This is not however the case. An artificial administrative spit within the Authority means that only those routes maintained by the Highways Department are on the list of streets/highway records, and routes shown on the Definitive Map are not included because they are the responsibility of the Public Rights of Way Team. The net result of this, especially in rural areas is that the

inclusion of a route on the list of streets/highway records is actually indicative of the Order Route being historically considered to be a public carriageway (now restricted byway).

#### Definitive Map

39. The Order Route was not added to the Definitive Map as part of the original Definitive Map preparation process because it was considered by the Highway Authority to be a County Road, and public carriageway. If it had been considered to be a highway of any status lower than Public Carriageway the County Council would have been duty bound to record it on the Definitive Map as a Footpath, Bridleway or Road Used as a Public Path.
40. The preparation of the Definitive Map was not, of course, a process undertaken internally within the County Council. There was consultation, including a requirement for a Parish/Community Council meeting, maps placed on deposit on a number of occasions etc. There was therefore ample opportunity for challenge/queries if anyone considered the route to be of a different status.
41. The 1972 Review did not include any provision which allowed for the public rights to be extinguished or created. The process was concerned with ascertaining the existing status of public rights of way. There were no requirements to consider the status of routes that were already considered to be County Roads, and certainly no provisions to allow for any “downgrading” of status. This would have required separate legal order processes (e.g. stopping up order). Perhaps of greatest significance is the fact that the Order Route was not added to the Definitive Map as part of the Review Process.
42. The correspondence at Appendix 17 of the original decision report relates to the special review and review of “Green Lanes” and gives a useful insight into the issues being considered. In particular it is noted that, in considering status the question is asked whether a route is a Footpath, Bridleway, RUPP or County Road. This clearly indicates that County Roads were considered to be of a higher status, than RUPP, namely a public vehicular highway. The legality of the inclusion of these County Roads in the review is also questioned.

#### Sales Particulars

43. The public highway right is a right to pass and repass over (usually) private land. Furthermore, the *ad medium felum* principle provides the rebuttable principle that the adjoining landowner owns the subsoil of the highway to its centre. Whilst public roads might be excluded from sales particulars and conveyancing documents, the inclusion of such a road in these documents cannot be taken as evidence that public rights do not subsist.
44. The fact that private rights are reserved over the Order Route is not evidence that public vehicular rights do not subsist. It is quite common for conveyancers to reserve rights over routes which are already public highways/carriageways, especially when they have been subject to a lack of maintenance.
45. With regard to this particular case, consideration should also be given to the dates of the deeds and how the Order Route was depicted on the Highway Records at the time.

#### **Comments on the submissions made by the British Horse Society**

46. The Order Making Authority is broadly supportive of the comments submitted by the British Horse Society, and would agree that the evidence tends to be supportive of public highway rights of bridleway or higher.

47. The map produced by J & C Walker (1836) shows the route as part of a longer through route running between highways and settlements etc. In other words, it shows the route in a manner that is entirely consistent with it being a public highway, and given the nature of the routes depicted on such maps, the status of the route is more probably than not, at least a public bridleway.

**Comments on the submission made on behalf of Mr and Mrs Brooke**

48. For the avoidance of doubt the Order Making Authority does not agree with the proposition that the Order Route (A-E) is not subject to any form of public rights at all. Such a proposition is wholly unsustainable, not least because of the number of public rights of way which link/terminate on the Order Route. There is no suggestion that any of those routes are, or have ever been, cul-de-sac highways. Furthermore, the Objectors have not provided any evidence to support their contention that these linking footpaths are cul-de-sacs, the burden being upon them to overturn the initial presumption against cul-de-sac highways in rural locations.
49. The Inspectors proposed modifications are probably the very best outcome that the Objectors could realistically hope to achieve. The Inspector has concluded (quite correctly) that there is strong evidence that the Order Route (A-E) is a highway maintainable at public expense. By then proposing the lowest of highway status (footpath) the Inspector has reduced any burden which may be placed on the Objectors to the lowest it can be.

Paragraphs 2-14 of the Objection: Commercial Maps

50. The Objectors appear to place undue weight on the early commercial maps in this case.
51. It is noted that the Objectors suggest that no weight can be attributed to these documents due to a lack of mapping keys being provided. Such an approach would not only be incorrect, it would also be unlawful. The Inspector does not have the authority to completely disregard relevant evidence. It is however accepted that where a map key has not been provided, this will have an impact on the evidential value of the document.
52. The references to the text found within Riddall and Trevelyan (the Blue Book) are misplaced, and of little assistance in this case. Whilst this generic advice is, of course, broadly of assistance, in this case the Order Route has not only been mapped for approximately 200 years, it still physically exists on the ground today, as a sunken lane, albeit in a rather overgrown state of disrepair. This is confirmed across the majority of the evidence in this case.
53. The early commercial maps (produced for whatever reason) confirm that the Order Route physically existed in the early Nineteenth Century. They also confirm that it physically existed as part of a longer through route or a character that can only be defined as being of public highway status (i.e. it is a longer, through route, rather than being the driveway to a larger country property). There is certainly no evidence (the objectors have provided no such evidence or expert opinion) to support the proposition that the Order Route was depicted on these maps for any purpose other than it being part of the local public highway network.
54. Furthermore, maps of this nature generally do not depict public footpath, and also rarely depict public bridleways. In the absence of any evidence to the contrary, and more specifically in this case, they point towards public carriageway status.

Paragraphs 15-16 of the Objection: Ordnance Survey Mapping

55. Whilst the Ordnance Survey Mapping might not show the physical existence of the old road leading to Trelleck Grange and beyond (probably due to it falling into disuse) they do show the entire Order Route A-E on an alignment that is entirely consistent with the routes mapped on the early commercial mapping. This is not surprising given its physical presence as a landscape feature (sunken lane).
56. The Order Making Authority would agree with the Objectors assertion that the larger Ordnance Survey Maps were not produced for use by the travelling public (their scale is just too large for such use). It is however incorrect for the Objectors to suggest that these maps are not supportive of the proposition that the Order Route is a public highway. They are part of the overall body of evidence, and that evidence is generally consistent with the Order Route being an historic public carriageway which had fallen into disuse over the past 150 years or so.

Paragraphs 17-22 of the Objection: 1910 Finance Act

57. The Order Making Authority takes the view that, in respect of section A-E of the Order Route, these documents are of no assistance at all. They are essentially neutral on the issue of the existence or otherwise of public highway rights,

58. Paragraphs 23-26 of the Objection: Highway Records

59. The Order Making Authority's position is that:
- i. the Order Route is recorded as an Unclassified County Road on the earliest available set of highway record maps;
  - ii. the correct interpretation of these records is that the Order Route is recorded as a public vehicular highway;
  - iii. there is no evidence, which pre-dates these records, to suggest that this status is incorrect;
  - iv. there is no evidence to suggest that the later removal of the Order Route from these records was subject to due legal process.
60. The interpretation of these records is subject to the requirements of Section 32 of the Highways Act 1980. Regardless of the statutory provisions under which they were, or were not produced, or whether they are, or were, in the public domain, these records were produced by the Highway Authority for the purposes of carrying out their statutory duties as Highway Authority. As a result, the inclusion of the Order Route on these records cannot be disregarded lightly.
61. The Inspector is correct to conclude that these records provide strong evidence that the Order Route is a Highway Maintainable at Public Expense. The Authority would go one step further to say that when they are considered in the correct context, they also provide evidence which favours public carriageway status.
62. The Objectors appear to place undue weight on references to the Order Route being "scribbled out" and it seeming to "flit in and out of the highway lists and maps", instead attributing what they suggest are more considered terms. It is somewhat pedantic to take issue at the terms of phrase being used, and is indicative of the weakness of the Objectors case regarding this evidence. Furthermore, their submission that "no legal process was ever in place to record or remove a route from this record" is incorrect.

63. Whilst it is agreed that there is no process that is analogous to the Definitive Map Modification Order Process, a route can only be lawfully added to the (now) List of Streets if it is subject to some form of statutory “adoption” process (e.g. a Highways Act 1980, Section 38 agreement or a Public Path Diversion Order). Similarly, a route can only be removed if it is subject to due legal process (e.g. A magistrate Court Order under Section 116 of the Highways Act 1980, or a Public Path Diversion or Extinguishment Order). The addition or removal of a way from the records without following due legal process would essentially be unlawful.

*Paragraph 27 of the Objection: Definitive Map Review*

64. The extract of the Special Review Map shows part of the Order Route (C-E) coloured purple in the same manner as public footpaths already recorded on the Definitive Map. Section C-B is not shown on the Special Review Map although the parallel Footpath 183 is shown.
65. No reliance can be placed upon the depiction of the Order Route (C-E) in purple on this map because it is nothing more than a proposed addition to the map, probably based upon the RUPP Review criteria of the Countryside Act 1968, which were later ruled by the Courts to be unlawful. (This was because the reclassification criteria included suitability considerations).
66. At the end of the day this proposed status was never implemented and therefore it would be unsafe to place any great value on this document.

*Paragraph 28 of the Objection: Property Deeds*

67. The Objectors offer no relevant points of evidence on these documents, other than clarifying a place name.

*Paragraph 29-32 of the Objection: Conclusions*

68. The points raised by the Objectors in this part of their submission have, by and large been covered elsewhere in the response to their objection and need not be duplicated here.

**Concluding Comment on behalf of the Order Making Authority**

69. When determining this Order the Inspector is duty bound to take into account all available and relevant evidence. The evidence of the early commercial maps, Tithe Map and Ordnance Survey Maps are consistent with the Order Route being part of a longer through route, which would be rightly defined as being of the character of a public highway of public carriageway status. Over time the route has fallen into disuse which has resulted in section s of it being recorded on the Definitive Map (perhaps incorrectly) as a footpath.
70. The Order Route was however, by the mid-20th Century, still considered to have the reputation of being an Unclassified County Road and was recorded as such on Highway Authority record maps. These maps did not include footpaths or bridleways in rural locations and as a result it would be reasonable to conclude that they only showed the publicly maintainable vehicular highways.
71. During the second half of the 20<sup>th</sup> Century efforts were made (albeit without lawful authority) to remove the Order Route from these records on the ground that it had never (within the memory of those undertaking the task) been maintained. There is however a significant difference between something that is “maintained” and “maintainable”.
72. At the end of the day, the vast majority of the evidence points towards the Order Route being a public carriageway, and as such it would be appropriate to conclude that Restricted Byway status is appropriate.

73. In contrast the Objectors have not provided any cogent evidence or sustainable arguments which prove a contrary position.

74. I trust that the above is of assistance. If you have any queries, please do not hesitate to contact me

Yours faithfully

Robin Carr FIPROW  
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