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Your Ref: JB/NY 125  
Our Ref: FPS/M1900/7/81  
Date: **01 SEP 2015**

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Dear Madam

## WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53

Hertfordshire County Council  
(Ardeley 3, 52 and 53, Great Munden 65, 66 and 67 and Walkern 43) Modification Order 2012

I enclose herewith a copy of the Inspector's interim decision with regard to the above-named Order.

The Inspector has proposed a modification to the order and I will shortly be contacting you to make the arrangements for the modification notice. As you know, the authority is entitled to comment on the Inspector's proposals and I will send you more details about how this can be done in due course. In the meantime, you will find information about the modification process at section 7 of our booklet *Definitive Maps and Public Path Orders*. Please let me know if you require a copy of this booklet.

If you have any complaints or questions about the way we have handled the Order to date, or about the conduct of the Inspector, please write to me at the above address. We will investigate your complaint and you can expect a full reply within three weeks.

An electronic version of the decision will shortly appear on the Inspectorate's website.

Yours faithfully

*Jean McEntee*  
(Rights of Way Section)

Despatch 1 oma

## **Modifications**

1. The Secretary of State or Inspector may decide that an order should be confirmed with modifications. The modifications may be quite small, like correcting a spelling error or adding a grid reference or they may be major. The Inspector will explain the exact modifications in the order decision.
2. Some modifications must be advertised so that people are given the opportunity to object or submit representation to them. The following types of modification need to be advertised:
  - moving the line of a path;
  - increasing the width of a path;
  - adding a width to a path (definitive map modification orders and some public path orders);
  - showing a new path on the order;
  - deleting all or part of a path shown in the order (definitive map modification orders only); or
  - changing the type of path shown in the order (definitive map modification orders only).

Decisions, which propose modifications needing advertisement, are known as 'interim' or 'proposed' decisions.

3. Where a modification needs to be advertised, we will arrange for a notice to be published in a newspaper circulating in the local area, outlining how and when objections or representations can be made. A copy of the notice will be copied to the authority, the objectors (including anyone who has made a statutory representation), the applicant, other people who were given permission by the Inspector to speak at the inquiry (if one was held) and any other people who have asked for a copy of the decision.
4. For your objection/representation to be 'duly made' it has to be made within the time and manner specified in the notice and be with respect to the proposal. Your objection/representation would not be 'duly made' if made before or after the notice period and you would not have the right to be heard.

### ***No objections/representations to proposed modifications***

5. If no objections/representations are received to the proposed modifications, the Secretary of State or Inspector will make a final decision, in which he or she will confirm the order with the modifications they previously proposed. The final order decision will be sent to all the people who received a copy of the interim decision.

### ***Objections/Representations to proposed modifications***

6. Objections/representations to the modifications will be considered by the Secretary of State or an Inspector (usually the same Inspector who proposed them).

Dependant on the number and content of objections/representations received, there may need to be an inquiry to consider the evidence they contain.

7. If there are only a few objections/representations and/or the issues they raise could be dealt with by written representations, we will write to the authority and relevant parties to ask if they would be happy for a final decision to be made on this basis instead of an inquiry. We will hold an inquiry if anyone asks to be heard by an Inspector.
8. If an inquiry is held into the proposed modifications, the Inspector will not be able to consider any representations into the unmodified part of the order. If anybody asks to give evidence relating to the unmodified part, the Inspector will ask them to submit it in writing to the Planning Inspectorate (within a specified period) and continue to hear the evidence relevant to the modifications. If the submitted representation raises questions likely to effect the Secretary of State or Inspector's decision, it may be necessary to re-open the original inquiry (if one was held). However, if all the parties agree, the new evidence could be dealt with on the basis of written representations (this is the most likely action if the interim decision was made following an exchange of written representations).
9. Having considered the objections/representations, the Secretary of State or Inspector may decide that they do not raise any questions likely to affect their decision. If this is the case no further action on the objections/representations will be taken and the Secretary of State or Inspector will proceed to write a final decision.

***What happens if objections/representations are received to the unmodified part of the order?***

10. If the only objections/representations received within the objection/representation period relate to those parts of the order the Secretary of State or Inspector does not propose to modify, it may be necessary to re-open the original inquiry or offer the written representations procedure if more appropriate.
11. If the original inquiry is re-opened, the Inspector would not be able to hear evidence relating to his or her proposed modification(s). If anybody asks to give evidence on the modified part, they will be asked to submit it in writing to the Planning Inspectorate within a given period. Again, if the submitted representation raises questions likely to effect the Secretary of State or Inspector's decision, it may be necessary to hold an inquiry so that it can be discussed. However, if all the parties agree, the evidence could be dealt with on the basis of written representations.

***Objections/Representations received to the proposed modifications and the unmodified part of the order***

12. Where both types of objection/representation are received within the objection/representation period, it may be necessary to hold a 'joint' inquiry. A joint inquiry effectively re-opens the original inquiry whilst allowing the Inspector to hear evidence against the proposed modification(s).

***Hearings***

13. A hearing may be held instead of an inquiry with the agreement of the authority and the relevant parties.



## Interim Order Decision

Site Visit made on 7 July 2015

by **Michael R Lowe** BSc (Hons)

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

Decision date: **01 SEP 2015**

**Order Ref: FPS/M1900/7/81**

**Hertfordshire County Council**

- This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the **Hertfordshire County Council (Ardeley 3, 52 and 53, Great Munden 65, 66 and 67 and Walkern 43) Modification Order 2012**.
- The Order is dated 20 January 2012 and proposes to modify the Definitive Map and Statement by the addition of a length of restricted byway along part of The Old Bourne and upgrading a length of bridleway to the status of restricted byway in the Parishes of Ardeley, Great Munden and Walkern as detailed in the Order map and schedule.
- There were 5 objections outstanding when Hertfordshire County Council (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

### Interim Decision

1. I propose to confirm the Order subject to modifications which require advertisement:

In part I of the schedule within the section headed 'Description of Path to be added' delete the words 'restricted byway' and substitute the word 'bridleway' wherever it occurs.

In part I of the schedule delete the section headed 'Description of Path to be upgraded'.

In part II of the schedule delete the abbreviation 'RB' (restricted byway) and insert 'BR' (bridleway) wherever it occurs.

In parts 1 and 2 of the Order map delete the restricted byway notation shown A-B, C-D-E-F-G and F-H-I-J-K-L and substitute a bridleway notation as a route to be added.

In parts I and 2 of the Order map delete the restricted byway notation between B and C (the grey shading to remain unchanged in the part 2 map).

### Preliminary Matter

2. None of the parties requested a public inquiry or hearing. I have therefore considered this case on the basis of the written objections and representations forwarded to me.

### Main Issue

3. The Order has been made under section 53(2) of the 1981 Act relying on the occurrence of events specified in section 53(3)(c)(i) and (ii). The main issue is therefore whether the evidence is sufficient to show, on the balance of

probabilities, that a restricted byway which is not shown in the map and statement subsists on the routes in question such that the definitive map and statement require modification and whether a bridleway shown in the map and statement should be shown as a restricted byway.

4. Section 32 of the 1980 Act requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.

### **Background and Reasons**

5. The Council resolved to make the Order in January 2012 following an application made by Mark Westley of the East Herts. Footpath Society in July 2003. Mr Westley's application sought to record a bridleway from Wood End to Sander's Green, only part of which was already recorded on the definitive map and statement as a bridleway. This part of the application I shall call Lye Lane, as depicted in part on the Ordnance Survey maps. The second part of the application sought to record a byway open to all traffic both north and south of Sander's Green along The Old Bourne which, the Council say, is a seasonal chalk bed watercourse that is dry in summer but can be filled with fairly deep water in the winter.
6. The Council assessed the evidence submitted in the application, their own research and the responses to consultations. The Council concluded that the evidence indicated that the whole of Lye Lane and The Old Bourne, between Haultwick Road and Rush Green Road, was an ancient public highway with vehicular rights. However, in accordance with the Natural Environment and Rural Communities Act 2006, the rights for mechanically propelled vehicles (motor traffic) have been extinguished. The Council therefore made the Order to record Lye Lane and The Old Bourne as a restricted byway.
7. The Council relies upon documentary evidence and there is no evidence of recent public user, indeed much of the route is overgrown and impassable. Nonetheless, evidence of past events and documentary sources may establish past dedication. A highway may be created at common law by the dedication of the owner with the acceptance and use by the public. Dedication may be express or implied. The evidence would need to be cogent to discharge the burden of proof that rests upon those seeking to establish the rights. Although there is no evidence of current or recent use, the legal maxim *once a highway, always a highway* applies for the public cannot release their rights through lack of use. In this decision I have used the word *highway* in the sense used after the Highways Act 1835 to refer to all classes of ways; carriageways, bridleways and footpaths.
8. In summary, the Council and Mr Westley's submission is that the totality of the historical documentary evidence suggests that the Order route is a highway with vehicular rights; whilst the objectors' case is that either no highway exists or that the Order route should be a bridleway. It is common ground that the Order route is cartographically represented on various maps and plans, but the significance of the maps and plans and the inferences to be drawn from the documents is in dispute. Various objections have been made concerning the suitability of the Order route for any public use and environmental issues. Whilst I understand these concerns I am unable to have regard to such matters, as the sole issue before me is the existence or otherwise of a public right of way.

#### *Survey of the Parish of Yardley 1744*

9. The Order route is depicted on this map as a way enclosed by hedges in a similar manner to ways that are now public vehicular roads. However, as Dr Hodson has pointed out after considering the whole map, some routes are similarly shown but only lead to fields, with the inference that such ways were accommodation roads and private. The map annotates the Order route with names *Lye Lane, The Bourn, Hollow Way Lane* and *Road to Munden*. I agree with Dr Hodson's conclusion that the map is not direct evidence that the Order route was a public highway and that the term 'road', as used in the early 18C and 19C, could be used to describe bridleways and footpaths e.g. foot roads. I also agree that there is, nonetheless, a reasonable inference that as through routes the ways were public.

#### *Dury and Andrews Map 1766*

10. This schematic map shows that the Order route matches the key for 'roads enclosed by hedges'. Again, I agree with Dr Hodson's assessment that the use of the term 'road' is not incompatible with bridleway status and that all the map indicates is the physical feature.

#### *Bryant's Map 1822*

11. This is a map of high quality and at a small scale. It shows the Order route keyed as 'Lanes and bridleways', distinct from 'Turnpike and Mail Roads' and 'Good Cross or Driving Roads'. It appears to me that, as the surveyor is indicating that the Order route does not fall in the category of a 'good cross road or driving road', it did not appear to be in a good or fit condition for vehicular traffic. I agree with Dr Hodson's conclusion, based upon an analysis of how Bryant's map compares to contemporary enclosure awards, that 'lanes and bridleways' are not necessarily public ways.

#### *Tithe Map and Tithe Apportionment 1839-1841*

12. The Order route appears to be coloured sepia on the tithe maps, in common with public roads. However, as indicated by Dr Hodson's research, some private roads in the locality were also similarly coloured. Part of Lye Lane is noted as being in the ownership of the 'Parishioners of Yardley'. This would be consistent with being a public highway, although commons, greens and wastes are also listed as being in the ownership of the Parishioners.

#### *Finance Act 1909-1910*

13. The Finance Act records treat the Order route in various ways. The northern part of Lye Lane, which is recorded on the definitive map as a bridleway, is included within the adjoining land parcels and no deduction is claimed for a right of way. The southern part of The Old Bourne is excluded from the survey whilst the northern part is either included within the adjoining land or is difficult to distinguish from the watercourse which is coloured blue. In my view the absence of colouring on the Finance Act plans, whilst compatible with a public carriageway, does not exclude the possibility that a parcel of land is a public bridleway, a private road or land in unknown ownership.

*Definitive Map - Parish Survey 1952*

14. The Ardeley Parish Council survey indicates that Lye Lane was considered to be a little used historic driftway and no other parts of the first surveys for the definitive map appear to have considered the Order route to be of any public highway status.

*Ordnance Survey Map 1878 and onwards*

15. The northern part of Lye Lane is recorded in the first edition name book as a road, as is the northern part of The Old Bourne from Watering Place Green. The remaining portions appear to have been treated by the Ordnance Survey as a watercourse. It is noticeable that Victoria Bridge, at point H on the Order map, appears to have existed from before the 1878 map and that the bridge was built without any obvious access to The Old Bourne and with no headroom for even pedestrians to pass underneath. Whilst the Ordnance Survey maps are good evidence of the physical features shown, it was not their function to determine the legal status of roads, tracks or paths.

*Assessment of the evidence*

16. In my view the 18C and 19C maps are clear indications that Lye Lane and The Old Bourne were part of a road network, road in the sense of being neutral as to public or private or the nature of traffic. Evidence from the late 19C and 20C all points to most of the Order route having been abandoned. On the balance of probabilities I consider that the character of the way, its origins and destinations, 'to Munden' and 'from Munden', are indicative of public ways greater than a footpath, but I am not satisfied that there is sufficient inference that such ways carried vehicular traffic and I agree with Dr Hodson, and others, that the nature of the ways would have precluded the easy use by vehicles. It follows that the Order route should be recorded as being of bridleway status. I agree with the Council's assessment of the width as following the hedge to hedge principle.

**Conclusion**

17. Having regard to these and all other matters raised in the written representations, I provisionally conclude that the Order should be confirmed with modifications.
18. Since the Order as proposed to be modified would show a highway of one description a way which is shown in the Order as a highway of another description, I am required by virtue of paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposals to modify the Order and to give an opportunity for objections and representations to be made to the proposed modification. A letter will be sent to interested persons about the advertisement procedure.

*Michael R. Lowe*

INSPECTOR