

North Somerset Council

REPORT TO THE PUBLIC RIGHTS OF WAY SUB COMMITTEE

DATE OF MEETING: 24 JANUARY 2018

SUBJECT OF REPORT: WILDLIFE AND ACOUNTRYSIDE ACT 1981
SECTION 53 AND SCHEDULE 14 SECRETARY
OF STATE DIRECTION ORDER AT
LOCKINGHEAD DROVE, LOCKING

TOWN OR PARISH: LOCKING

OFFICER/MEMBER PRESENTING: ELAINE BOWMAN

KEY DECISION: NO

RECOMMENDATIONS

That the Public Rights of Way Sub Committee note the following:

- 1) That North Somerset Council have been directed by the Secretary of State to make a Definitive Map Modification Order to record Locking Head Drove as a Public Bridleway.
- 2) That North Somerset Councils stance regarding the making of this Order will be in line with Legal Opinion which is currently being sought.

1. SUMMARY OF REPORT

This report is to advise the Committee that North Somerset Council ("the Council") has been directed to make an Order, the effect of which will be to add a Public Bridleway, running from the A371 Locking Moor Road along a route known as Locking head Drove to its junction with Somerset Avenue, on the Definitive Map and Statement. A small section of this route is recorded on the Definitive Map as Footpath AX20/8. The Committee is reminded that at its meeting on 28 March 2017 it determined that an Order should not be made on the grounds that there was insufficient evidence to support the making of an Order.

Usually the Committee would be asked to make a recommendation on the stance North Somerset Council would take if this matter was objected to resulting in a Public Inquiry.

We are currently facing an unprecedented high number of Definitive Map Modification Order determinations caused by Secretary of State Directions. We are therefore reviewing our future position to objected or directed Orders because of the unprecedented number of potential Public Inquiries. We are therefore seeking legal advice to determine the best course of action in responding to objected Orders.

Because of this it is not possible to recommend to the Committee a definitive stance but to seek delegation of the decision on what role to take based on the legal advice.

2. POLICY

The maintenance of the Definitive Map should be considered as part of the management of the public right of way network and so contributes to the corporate plan “Health and Wellbeing” and “Quality Places”.

3. DETAILS

Locking Head Drove was the subject of investigation following the submission of an application dated 22 March 1994. That application claimed that Locking Head Drove should be recorded as a Bridleway.

The current route of Locking Head Drove commences on the A371 Locking Moor Road and proceeds past Drove Farm, Locking Head Drove Farm over a short section of Footpath AX20/8 to its junction with the A379 Somerset Avenue as shown on the attached plan as C-A-B-I. A total distance of approximately 1568 metres.

North Somerset Council's Rights of Way Sub Committee considered this application on 28 March 2017 and formally resolved that **“the Public Rights of Way Sub Committee deny the making of a Definitive Map Modification Order because there is insufficient evidence to support it..**

The Council were advised verbally at its meeting on 27 July 2017 that the applicants Woodspring Bridleway Association had exercised their right of appeal against the Council's decision. An exchange of correspondence between the Council, the applicant and The Planning Inspectorate has taken place ensuring that all considered information was available to them.

An Inspector was appointed by the Secretary of State to determine the appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981. In this case due to one small section of the claimed route already illustrated on the Definitive Map it was necessary for two events detailed in the act to be taken into consideration.

One type of event is set out in sub-section 53(3)(c)(i) namely “the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates...”

Sub Section 53 (3)(c)(ii) sets out another type of event involving the discovery of evidence which shows “that a highway of a particular description ought to be there shown as a highway of a different description”.

The Inspector having considered all the evidence presented to her concluded that the appeal should be allowed and that an Order should be made.

A copy of the Secretary of State's decision and instructions to the Council are attached to this report, Appendix 2. The Order will be made once this report is considered by the Committee and existing workload allows.

If no objections to the Order are received the Council will itself confirm the Order. The Committee is being asked to give authority to confirm the Order, to avoid the need to return this matter back to Committee for authorisation.

If there is an objection to the Order, it will be forwarded to the Secretary of State and this will probably result in a Public Inquiry.

4. CONSULTATION

There is no requirement to consult at this stage as the statutory consultees, together with Parish Councils, Ward Members and affected landowners will be consulted when the Order is made and then given an opportunity to object or make representations. Informal consultations with statutory consultees and user groups were carried out prior to the Council's Committee Report of 28 March 2017.

5. FINANCIAL IMPLICATIONS

Having been directed to make this Order the Council will incur financial expenditure in line with the advertisement of the Order. Further cost will be incurred if this matter needs to be determined by a Public Inquiry. The Council is required to facilitate any public meeting that is held and meet its own costs if legal representation is required. These financial considerations must not form part of the Committee's decision.

Costs

Existing Revenue Budget

Funding

Existing revenue Budget

6. RISK MANAGEMENT

At this time the Committee has no alternative other than to follow the direction that has been issued. The Committee does however have the authority to decide what stance the Council takes in regard to the made Order.

7. EQUALITY IMPLICATIONS

All rights of way are available for the population as a whole to use and enjoy irrespective of gender, ethnic background or ability and are free at point of use.

8. CORPORATE IMPLICATIONS

Any changes to the network will be reflected on the GIS system which forms the basis of the relevant corporate records.

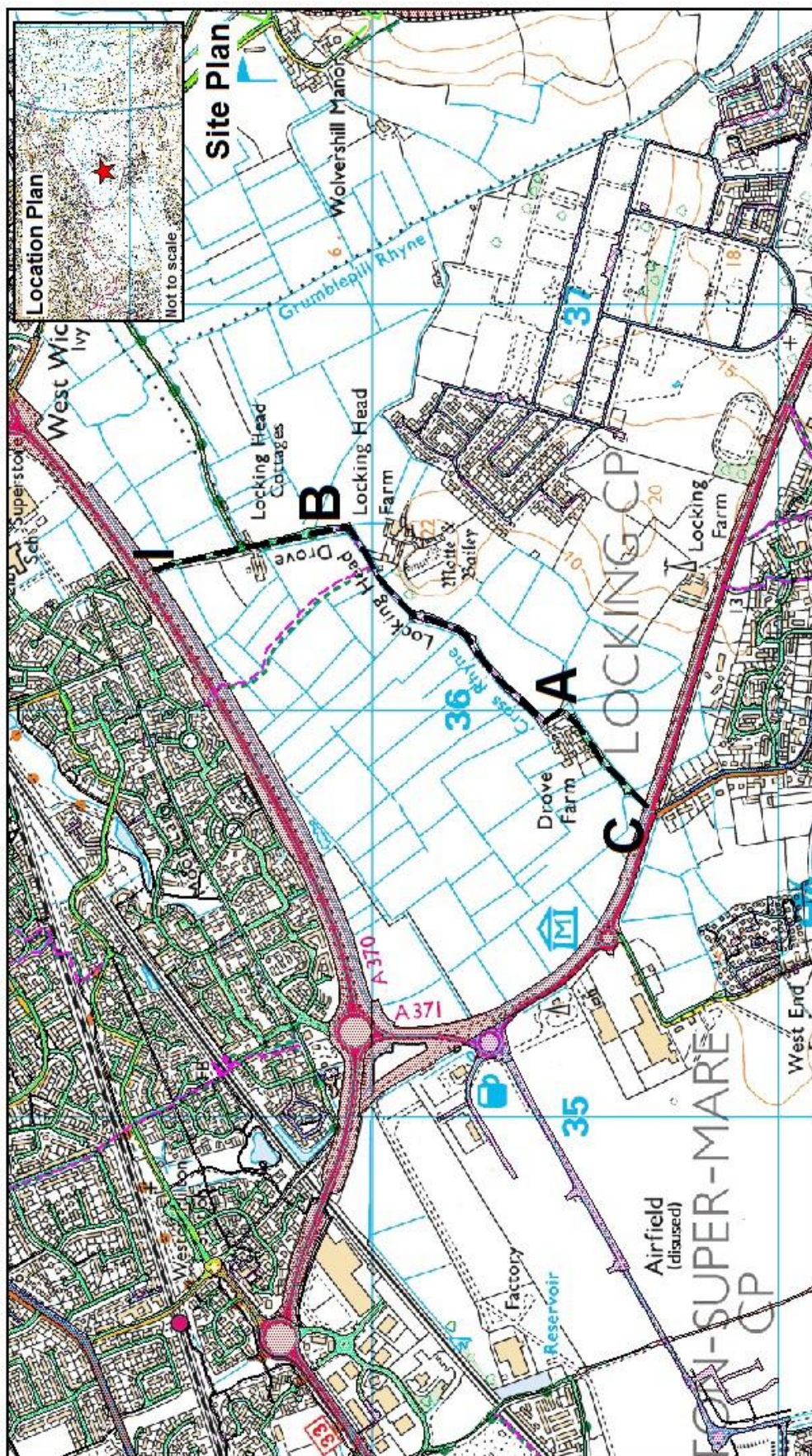
AUTHOR

Elaine Bowman
Senior Access Officer Modifications – Ext 7406

BACKGROUND PAPERS

File Ref Mod 19

APPENDIX 1 Location Plan



Map No. EB/Mod 19 Committee
Scale 1:12560
Date 28 February 2017
Grid Reference ST3660

Development & Environment
Public Rights of Way
Streets and Open Spaces
North Somerset Council
Town Hall
Walliscombe Grove Road
Weston-super-Mare
BS23 1UJ
Tel: 01934 888 802

Claimed route - C - A - B - I

Wildlife & Countryside Act 1981 - Sec 53 North Somerset District Council
Mod 19 Locking Head Drove
Definitive Map Modification Order Application
PROW Sub Committee 28 March 2017



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Appeal Decision

by Sue M Arnott FIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 14 November 2017

Appeal Ref: FPS/D0121/14A/3

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of North Somerset Council not to make an order under Section 53(2) of that Act.
- By application dated 28 January 1994 the Woodspring Bridleways Association claimed that Locking Head Drove near Weston-super-Mare should be added to the definitive map and statement for the area as public bridleway or byway open to all traffic.
- The application was refused by North Somerset Council on 28 March 2017 and the appellant was formally notified of the decision by letter on 2 May 2017.

Summary of Decision: The appeal is allowed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of the papers submitted with this case.
2. The appellant¹, the Woodspring Bridleways Association (WBA), now requests that the Secretary of State directs North Somerset Council (NSC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record the route which is the subject of this appeal either as a public bridleway, a restricted byway or a byway open to all traffic (BOAT).
3. When the application was made in 1994, WBA sought to have Locking Head Drove recorded as "A BRIDLEWAY/BYWAY²", the latter being the short form for a BOAT. Being determined now, over 20 years later, the effect of subsequent legislation needs to be taken into consideration, in particular the effect of Section 67 of the Natural Environment and Rural Communities Act 2006 (the 2006 Act).
4. Whilst the accepted legal maxim '*once a highway, always a highway*' will apply, sub-section 67(1) of the 2006 Act provides that an existing public right of way for mechanically propelled vehicles (MPVs) is extinguished unless there is evidence to show that one of the possible criteria for exemption listed in sub-sections 67(2) and 67(3) is satisfied. Applied now to this case, if the evidence shows that the route in question was historically a public right of way for vehicles, the public rights now in existence would be those associated with a restricted byway³ unless exemption from the extinguishing effects of the 2006

¹ The application was made by Mrs V Craggs on behalf of the WBA.

² A public right of way for vehicular and all other forms of traffic but which is used by the public mainly for the purposes for which a footpath or bridleway is so used

³ A highway over which the public has a right to walk, to ride or lead a horse or to drive a non-mechanically propelled vehicle

Act was shown to be applicable in which case BOAT may the appropriate status to be recorded on the definitive map.

5. In submitting this appeal, WBA now claims the route is a bridleway at least although it also submits there is a case for the existence of higher rights, summarising its position as seeking "a restricted byway unless a case can be made that it should be a BOAT". However it has offered no comment on whether any of the exemptions listed in sub-section 67(2) and 67(3) of the 2006 Act apply here.
6. The letter informing the applicant of the decision of NSC's Public Rights of Way Sub-Committee referred only to the rejection of an application for bridleway, although the Report submitted to the meeting on 28 March 2017 seems to have considered all options. It seems sensible that I do likewise.
7. The map submitted with the application identified the route at issue as starting at the A371 (opposite Elm Tree Road, Locking) and continuing past Drove Farm along Locking Head Drove to a point near Lipstone Farm which is now its junction with the A370 dual carriageway known as Somerset Avenue.
8. Sections at both ends of this route, labelled on the plan accompanying the NSC Committee Report as C-A and I-B respectively, are recorded on its list of streets as adopted highways. (To avoid any confusion in this Decision, I shall also refer to these same points as C, A, B and I.) A further section at Locking Head Farm (south of point B) is shown as a public footpath on the definitive map.

Main issues

9. The main issues in this case are whether the available evidence shows that, at some time in the past, a public right of way was once established along the full length of the appeal route, and if so, whether that was a right for people on foot, on horseback or leading a horse and/or with a vehicle. If vehicular rights are found to have been established, there will be a further issue to be considered which is whether such rights still exist today in full.
10. Section 53(2) of the 1981 Act requires the surveying authority (in this case NSC) to make orders to modify its definitive map and statement in consequence of certain specified events set out in Section 53(3).
11. One type of event is set out in sub-section 53(3)(c)(i): "*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows ... that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates ...*".
12. Sub-section 53(3)(c)(ii) sets out another type of event involving the discovery of evidence which shows: "*that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.*"
13. The majority of the applicant's claim relates to the addition of Locking Head Drove to the definitive map and statement so that the provisions of sub-section 53(3)(c)(i) apply, whereas that part over which the definitive Footpath AX20/8 passes would, if the evidence supports higher rights, need to be upgraded by relying on sub-section 53(3)(c)(ii).

14. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) is recognised as presenting two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability or has a right of way been reasonably alleged to subsist? Both these tests are applicable when deciding whether or not an order should be made, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify a modification order⁴ being made as requested by the appellant in relation to the claimed route (but in this case excluding the part of Footpath AX20/8 within Locking Head Drove).
15. The issue was addressed in the High Court case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1995]⁵ and later clarified in *R v Secretary of State for Wales ex parte Emery* [1998]⁶: when considering whether a right of way subsists (Test A) clear evidence in favour of the appellant is required and no credible evidence to the contrary. However when considering whether a right of way has been reasonably alleged to subsist (Test B), if there is a conflict of credible evidence but no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be a public right of way has been reasonably alleged.
16. For the purposes of this appeal, and in relation to the majority of the claimed route, I need only be satisfied that the evidence meets the lesser test (B) although even at this stage the higher test (A) is applicable where the matter falls under sub-section 53(3)(c)(ii).
17. The appellant's case relies primarily on documentary evidence in the form of historical maps, inclosure and tithe documents, 1910 Finance Act records and twentieth century sales particulars together with public highway records.
18. Section 32 of the Highways Act 1980 provides for "*any map, plan or history of the locality or other relevant document*" to be taken into consideration when deciding whether or not a way has been dedicated as a highway.
19. As regards evidence of use by the public, Section 31 of the Highways Act 1980 sets out the requirements for presumed dedication under statute, or, in the alternative, such evidence may be considered under the common law. However, given the very limited quantity of user evidence from individuals (one statement and one other person's recollections) it is unlikely that either approach will be sufficient to support the establishment of a public right of way within living memory.

Reasons

Background

20. After considering the evidence set out in the officer's Report on 28 March 2017, and hearing from the agent representing the owners of part of Locking Head Drove⁷, NSC's Public Rights of Way Sub-Committee decided not to make the order requested by the appellant.
21. When WBA was informed of NSC's decision by letter on 2 May 2017, the relevant Committee minute was quoted. This recorded that the officer had

⁴ The higher test would need to be satisfied to justify confirmation of an order.

⁵ *R v SSE ex parte Bagshaw and Norton* (QBD)[1994] 68 P & CR 402, [1995] JPL 1019

⁶ *R v SSW ex parte Emery* (QBD) [1996] 4 All ER 1, (CA)[1998] 4 All ER 367, [1998] 96 LGR 83

⁷ Through the public participation procedure

"reported that although this route is shown on historical maps the evidence produced by the owners of the land satisfied the test to show lack of dedication." A councillor "suggested that the officer's recommendation be supported" and it was resolved that the requested order be denied "because there is insufficient evidence to support it."

22. In lodging this appeal against the decision of NSC not to make an Order, the appellant's grounds cover three broad issues. Had these issues been adequately addressed, WBA submits that analysis of the evidence would have led to the conclusion that an order should be made.
23. Firstly it is argued that the Council's approach to evaluating the evidence was flawed insofar as it assessed each item of evidence in isolation without then considering it as a whole. NSC rejects this proposition, stating that its Report did consider each item separately (in Appendix 3) but later evaluated it all together (in Appendix 6). Whilst there are aspects of the Report on which I would draw different conclusions, I cannot agree with the appellant's criticism that a broad assessment of the evidence was not undertaken.
24. Secondly the appellant submits that NSC misinterpreted the Locking Inclosure Act 1800 and the subsequent Award, failing to appreciate the significance of the three common private ways and common bridges set out by the Inclosure Commissioners. I address this issue in some detail below.
25. Thirdly WBA has pointed to synergy between items of evidence in the depiction of the claimed route which was not identified by NSC in the analysis on which its decision was based. Again, after considering the inclosure records, I look at the significance of the other material below.
26. The original application made reference to (and attached copies of) only four items of documentary evidence⁸, these being maps by Day & Masters (1782), Greenwood (1822), David and Charles (1884) and Bartholomews (1941)⁹. However since then a great deal of historical evidence has been gathered by the appellant in support of its application and by NSC through its research, with contributions also from the landowners. It is my understanding that all the evidence has been circulated to all parties for comment and I have examined all of these documents in reaching my conclusions.
27. Although it was not one of the original documents submitted, I propose to start by considering the Locking Inclosure Act and Award since this appears now to be the foundation upon which the appellant's case rests.

Locking Inclosure Act (1800) and Award (1801)

28. It appears that the inclosure of Locking Moor was undertaken initially by agreement with the remainder being subject to the Locking Inclosure Act of 1800 and subsequent Award in 1801. Inclosure of the adjacent parish of Whorle took place around the same period through an Award in 1803.
29. Under the 1800 Act the Inclosure Commissioners were empowered to set out certain types of roads: public carriage roads (which were to be 40 feet in

⁸ In addition to the one user evidence form

⁹ Although in 1994 the failure to include ALL the evidence relied upon may not have been regarded as a significant omission, this may now be regarded as invalidating the application as a result of *R (oao Warden and fellows of Winchester College and Humphrey Feeds Ltd) v Hampshire County Council and SSEFRA (QBD)[2007] EWHC 2786 (Admin)*, CA [2008] EWCA Civ 431. That does not affect determination of this appeal except insofar as the question of possible exemption from the effects of sub-section 67(1) or the 2006 Act is concerned.

width) and "*other public Roads and Footways and private Roads and Footways*". All former roads and ways, public or private, that were not set out, or directed to continue, "*as Roads or Ways through the Commons and Waste lands ... intended to be divided and inclosed*" were effectively stopped up.

30. The appellant interprets the Act as providing for three classes of road or way: (1) public carriage roads; (2) other public roads and ways (of which there were two kinds (a) those that were to remain unchanged, and (b) those that were to be made as directed by the Commissioners, and (3) private roads and ways. That does not appear to be disputed in principle. What is at issue is which of these categories Locking Head Drove falls into.
31. The map accompanying the Award shows and labels Locking Head Drove bounded on both sides, numbered as parcel "47", with a bridge near to point C and a line across the drove near point B, most probably denoting a gate.
32. In the Award, after stating at the outset that "*no public carriage roads being by us thought necessary*", the Inclosure Commissioners deal initially with "*Private Roads and Drove Ways*". Three such ways are directed, awarded and appointed including Locking Head Drove, described as "*one other private Road or Drove way of the breadth of twenty five feet*". This extended from point C (at the junction with the firstly appointed road called Moor Drove) to a point I judge to be some 50 metres or so from here¹⁰.
33. The remainder of Locking Head Drove was identified also as parcel 47, awarded to the Society of Merchant Venturers¹¹ in the following terms: "*All that piece or parcel of ground in the said annexed plan numbered 47 and used as a private way or drove from (the end of the awarded private road or drove way to point B) the same nevertheless to continue open and used as a Road or Way*".
34. The Act made provision for the future maintenance of certain "Old Roads" that were to continue to exist (if "*set out or directed by the Commissioners to remain as Roads, Ways, Paths or Bridges*") where this had previously been "*at the expence of any Parish or Parishes, Place or Places*", in which case responsibility for maintenance and repairs was to continue as before.
35. Whilst it seems apparent that the majority of Locking Head Drove had, prior to 1801, been open and used as a road or way¹², and that, post-1801 it was to continue as before, it is not wholly clear from the Award whether previously it had been open for use by the public or been maintained at the expense of the parish.
36. The appellant's view seems to be that its status can be deduced from later evidence but in particular from examining the Award in context and the way the Commissioners dealt with three 'Private Roads or Drove Ways' as compared with the two other explicitly private roads.
37. The short section set out as a private road or drove way was appointed "*for the benefit use and enjoyment of all and every the owners Tenants and occupiers*

¹⁰ I note this does not correspond with the extent of the present highway maintainable at public expense which appears to continue to Drove Farm.

¹¹ As Lords of the Manor, the Act required the Society of Merchant Venturers to be awarded a proportion of the moor, commons and waste lands including parts that had already been inclosed and leased out by them during the previous twenty years.

¹² The irregular shape formed by the presence of pre-parliamentary inclosure encroachments at either side of Locking Head Drove also suggests it existed prior to the Award, rather than being set out anew by the Commissioners.

of the several and respective divisions and allotments plots and parcels of land hereinafter mentioned by us allotted inclosed and awarded with free liberty for them and every of them and all other person and persons who shall or may have occasion to travel there to go pass and repass in thro upon and over the same to and from their divisions and allotments pieces and parcels of land either on foot or horse back with horses cattle carts and carriages loaded or unloaded at their and every of their free will and pleasure or otherwise howsoever when and as often as they any or either of them shall think proper".

38. This appointment clause applied to *"the said Roads and Drove Ways hereinbefore particularly mentioned"* which included two other roads, these being Moor Drove and Laney's Drove. Both were similarly described as "private road and drove way" with breadths of "thirty feet" and "twenty five feet" respectively.
39. These three ostensibly "private roads", together with several bridges erected in them, were to be repaired at the joint expense of all the owners, tenants and occupiers to benefit under the award out of a rate levied in proportion to their allotment. This included Lockinghead Bridge located on Locking Head Drove near to its junction with Moor Drove.
40. In contrast, the two other roads set out in the Locking Inclosure Award (Pipes Way and Fishers Way) are each described as a "private road way or passage of fifteen feet wide" but the range of people able to use and benefit from the way is much more restricted and clearly omits the phrase *".. with free liberty for them and every of them and all other person and persons who shall or may have occasion to travel there ..."*.
41. The appellant draws attention to the significance of Moor Drove, it being shown in part on the Day and Masters Map of 1782¹³ in the general direction of Weston-super-Mare; its continuation was set out in the Worle Inclosure Award of 1803 with an identical appointment clause, and the two roads together follow close to the line of the present A371.
42. It is argued that, given the significance of the three common roads (the 30 feet wide Moor Drove in particular), and the complete absence of awarded public carriage roads, it would be wrong to conclude that in this context these 'private road and drove ways' were not intended to be used by the public. The people of Locking would otherwise have no legitimate means of travelling northwards unless by private right.
43. The schedule of rates in the Locking Inclosure Award records parcel 47 as owned by the Society of Merchant Venturers, the tenement being described as "The feed of Locking Head Drove" and extending to "4 acres 3 roods and 13 perches" for which a contribution of "2 shillings and 2 pence" was required.
44. The term "The Feed of Locking Head Drove" is not fully explained although here it is suggested that it referred to the drove being grazed. Commenting on the Council's Report, the agents for the landowners noted that *"a grazed and stocked way is most unlikely to be a public carriageway"*.

¹³ I agree with NSC that this pre-inclosure map does not show Locking Head Drove although a continuation of its north-eastern end does appear as a spur road south of Worle, as does Moor Drove, both seeming to end on the common that was subsequently divided in 1801 and 1802. I also accept the appellant's submission that it is "highly implausible that no-one went any further across Worle Common towards Locking until after the inclosure in 1800". However there is no evidence pre-dating the Award to show that the appeal route was the line then in use.

45. In my experience it is not unusual to find enclosed public highways that are grazed, in some cases where the herbage is let annually to the highest bidder. In the absence of any better explanation here, it seems entirely possible that Locking Head Drove was grazed and that the 'Feed' was effectively the benefit for which the owners were required to contribute to the collective fund to maintain the three identified roads. However I do not agree that this would necessarily rule out the co-existence of a public highway.
46. In its conclusions the NSC Report noted simply that Locking Head Drove was mentioned in the 1801 Award as a Private Road or Drove to be maintained by the owner of the land. It acknowledged that the route has continued to be shown on later documents as a route potentially capable of through-use by the public, but it concludes that at the time of the inclosure it was not considered to be for the use of the public.
47. In my view, examining the wording of the Award closely and looking at the references to both parts of Locking Head Drove, it is at least arguable that the longer, easternmost section fell into category 2(a) as described above in my paragraph 30, and the shorter westernmost part into category 2(b). Both *could* be interpreted as being appointed, set out or directed to continue as public roads or ways. The evidence provided by the Act, Award and accompanying map is far from conclusive but in terms of satisfying the lesser burden of proof (Test B), I consider it *could* form the basis of a reasonable allegation if supported by other relevant material.

Other nineteenth century evidence

48. In 1809 the Ordnance Survey (OS) published its first map of the area at a scale of 1": 1 mile (1:63 360). This depicted a network of roads between Locking in the south and Worle to the north, including Locking Head Drove, Moor Drove and Laney's Drove. The same network is shown on one of the maps supplied with the original application was that published by Greenwood in 1822, in this case in the category "cross roads".
49. NSC does not appear to have commented on the OS map but noted that the Greenwood map does not provide evidence of the status of Locking Head Drove, only of its physical existence. In contrast, the appellant points out that such county maps were produced for travellers and there would therefore be no value in showing through-routes that were not available to the public.
50. Commercial maps are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. However, combined with other evidence, they can tip the balance of probability in favour of such status. Whilst not strong evidence, here I regard both the OS and Greenwood maps as offering some support for the appellant's proposition that the three 'common' roads identified in the Locking Inclosure Award were open to the public in the early nineteenth century¹⁴.
51. The Locking Tithe Map and Apportionment of 1839 show that at that date Locking Head Drove was still owned by the Society of Merchant Venturers and contained an area of "4 acres 3 roods and 13 perches". Referred to as parcel 11a, it was occupied by a Mr Bishop and although its 'State of Cultivation' was listed as "Road etc", a tithe was nonetheless payable. Barriers (probably

¹⁴ The extract from the inclosure map supplied does not allow me to ascertain the position of the two 'private road way or passages' and therefore to make comparisons on other maps.

gates) are shown in three places along the length of the drove. Whereas Moor Drove was coloured ochre (the convention for surfaced roads and tracks), Locking Head Drove was uncoloured.

52. Whilst the agents for the land owners submitted, and NSC concluded, that this should lead to the conclusion that the route in question was a private road over land in private ownership, the appellant points out that the purpose of tithe awards was to identify productive land for which a tithe was payable, not to differentiate between public or private roads.
53. As regards interpretation of this piece of evidence I agree with the appellant. Given the nature of the drove as a strip of land capable of being grazed but carrying a (possibly unsurfaced) road or way along its length, there is nothing in the tithe documents that is incompatible with a public right of way although it is no proof of it.
54. Extracts from the (undated but post-1841) OS Object Name Book for the area show that the name "Locking Head Drove" was confirmed by the District Surveyor. This tends to suggest the highway authority of the time had an interest in the drove. In deciding the spelling of names to be included on its maps, the OS was guided primarily by local usage and custom and would make local enquiries and consult with such authorities as appeared appropriate in order to establish with as much authority as possible the most suitable name for a feature.
55. The descriptive remarks in the book note that the name "*applies to a road extending from junction of roads at Lipstock Farm to junction of roads south west of Drove Farm*". Although neither the appellant nor the Council consider this to be particularly significant evidence, I regard it as indicative of a public interest in the road, although neither the status nor full extent of that interest is revealed.
56. The purpose of a geological map of North Somerset dated 1862 was to map minerals in the area. NSC noted that this confirms the existence of the route (with no barriers shown) but not its status. I agree with that conclusion: it offers no evidence for or against the existence of a public right of way.
57. The OS First Edition 25" to 1 mile map of 1880 shows a gate at point C and one to the west of Locking Head Farm. A double pecked line depicts a track along the full length of the drove from C via A, B, I and continuing as far as Lipstone Farm where it connects with other droves set out in the Worle Inclosure Award.
58. Whilst the original application referred to an 1884 map by David & Charles, no copies appear to have been submitted and no comments on its contents have been made.
59. Looking at all the available evidence from the nineteenth century post-inclosure, I find that neither the commercial maps nor the tithe records are at odds with the type of road described in the Inclosure Award although neither offers substantive proof of a public highway. In my view this goes a little way towards endorsing the conclusion I reached on the 1801 documents but not sufficient to tip the balance in favour of a public road. However it is the interest of the District Surveyor noted in the OS Object Name Book to which I accord the most evidential weight as recognition of a public interest in Locking Head Drove. In my assessment, this supports my earlier conclusion that the evidence is such as to reasonably allege the existence of a public road or way.

Twentieth century evidence

60. Moving into the twentieth century, extracts have been provided from the records compiled under the 1910 Finance Act. However the quality of the copies makes their interpretation difficult. It appears that at that time the whole of Locking Head Drove lay within hereditament 1 (Drove Farm). The occupier was Mr Cook and the owner was listed as Mr King of the Trustees of Colston's Charity. A deduction for £100 was allowed for "Public Rights of Way or User" although the exact basis for this is uncertain. Hereditament 5 (Locking Head Farm) was occupied by Mr Criddle and also owned by the Colston Trustees. This too enjoyed a £100 deduction for "Public Rights of Way or User" which is equally unexplained. For both hereditaments 1 and 5, under the heading "Fixed charges, easements, common rights and restrictions" a deduction was recorded for "1 driving & 1 footpath".
61. The OS base map used for the 1910 record is dated 1903 and shows that from point C the defined track identified within the drove boundaries by a double pecked line leads to Drove Farm and no further. The drove itself continues until two (probably gated) boundaries cross it near to Locking Head Farm. From this farm onwards via B to point I the double-pecked line denoting a track reappears.
62. NSC concluded that there was insufficient clarity to deduce the significance of the £100 deduction for public rights of way and whether it related to Locking Head Drove. The agent for the landowners contends that the reference to "driveway" related to the nature of the way as a droveway for the driving of animals, not vehicles. In the absence of any evidence to the contrary, I consider that the most likely interpretation.
63. The exact date the information in the 1910 Act records was collected is not given. However in 1919 the land (including both farms) was sold. The "Special Conditions of Sale" explained that the land had been transferred to the Colston's Hospital Charity by indenture dated 26 October 1877. Both Mr Cook and Mr Criddle were listed as tenants in the sale particulars.
64. Thereafter, ownership of the drove was split between Drove Farm at the south western end and Locking Head Farm at the north eastern end with one, possibly two, gates between (one being shown on the 1880 OS map and two on the 1903 edition). Private rights for each farm were reserved over the corresponding other section of the drove. The agent for the landowners argued that there would have been no need to do so if the route had been a public carriageway. In response the appellant submits that this would have been a matter of good practice, enabling each individual to seek redress through the Courts in the case of obstruction of the way; such action would not have been available under the 1835 Highways Act.
65. I give little weight to this point either way since both arguments have merit. It is also possible that the lack of clarity as to the status of the drove in the Inclosure Award prompted the reservation of private rights in order to provide certainty for the purchasers.
66. NSC acknowledges in its Report that the highway records dating from 1930 (known as the handover maps, when responsibility was transferred from the districts to county councils) are the only evidence that maintenance of any part of Locking Head Drove falls upon the public purse. The sections from C to A and from I to a point south of B were, and still are, recorded as "adopted

highway" in the Council's records. However NSC does not offer any view on what rights that status may imply¹⁵. The agent for the landowners submits that these are cul-de-sac highways serving Drove and Locking Head Farms but do not form a public carriageway through-route.

67. The appellant submits that either (i) under the provisions of the Highways Act 1835¹⁶, being repairable by the inhabitants of Locking, maintenance of Locking Head Drove passed to the Surveyor of Highways, or (ii) at some point later, the Society of Merchant Venturers brought the two ends of Locking Head Drove up to standard so that these sections were "adopted".
68. There is no evidence of either, yet the handover map is clear. The two ends are maintainable at the public expense; therefore the public must enjoy rights of some description over them, even though they are recorded as cul-de-sac highways. It may seem an obvious assumption to make that, even if not responsible for its entire upkeep, the public must surely have a right along the whole length; however there is no evidence to confirm the section between has ever being been similarly recorded.
69. Subsequent OS maps¹⁷ in 1941, 1955, 1958 and 1967 all show that Locking Head Drove continued to exist as an enclosed strip of land, with gates, connecting with roads to the north and south (although affected by highway improvements and up-gradings at various times).
70. NSC reports that when the first definitive map and statement was prepared for North Somerset (with a relevant date of 26 November 1956) public rights of way in the parish were surveyed by members of Locking Parish Council. No survey details or copies of draft or provisional maps have been submitted but it appears this exercise resulted in the recording of Footpath AX20/8 partly across fields to the north of Locking Head Farm and, curiously, along the drove itself to link with the end of the adopted road.
71. The history of this definitive footpath is not explored¹⁸ but the appellant submits copies of correspondence showing the background to closure of connecting rights of way¹⁹ to the south of Locking Head Farm following on from wartime closures and the subsequent needs of the RAF Locking base.
72. The inclusion on the definitive map of the section of Footpath AX20/8 along the drove raises more questions than can be answered by the available evidence. However it is relevant to note that the definitive map is conclusive of the rights there shown but without prejudice to any others that may exist.
73. The agents for the landowners submitted statements from seven individuals, most of whom have family connections with properties close to Locking Head Drove, including Locking Head and Drove Farms, dating back to the 1920s. These people affirm that the gate separating the Drove Farm section of the drove from the Locking Head part was locked²⁰ from the late 1950s/early 1960s and possibly before that. Most are firmly of the view that it was always regarded as a private farm access track, not a public thoroughfare.

¹⁵ This is a record of maintenance liability, not public rights. (See the 'Carter letter' submitted by the agent.)

¹⁶ Which provided for highways in existence in 1835 to thereafter become maintainable at the public expense

¹⁷ A map by Bartholomew in 1941 was referred to in the original application but a copy has not been submitted.

¹⁸ However I note that on the 1880 OS map it is shown leading to a corn mill west of Lypstone Farm.

¹⁹ It is submitted that one of the routes closed may have been the cross-road shown by Greenwood in 1822 leading from Locking Head Farm southwards to a point east of the village, and that this may have been the basis for the 1910 Finance Act £100 deduction.

²⁰ By Mr Legg of Drove Farm

Summary and conclusions

74. In reaching its conclusion, NSC accepted these statements as evidence that the landowners had no intention to dedicate the drove as a public right of way of any description.
75. On the basis of the evidence before me, I would agree that is probably the case insofar as it related to the early twentieth century onwards, but it does not address the significance of the earlier (pre-1919/1920) evidence, nor does it explain how a public footpath over part of the drove came into existence or how both ends came to be publicly maintainable.
76. Ownership of Locking Head Drove changed in 1877 and 1919. Comparing the depiction of a defined track along the drove on OS maps of 1880 and 1903 suggests that during this period, use, be it public or private, declined during this period. That may be a coincidence or there might be a relevant explanation that is not apparent from the information presently available. Yet I find the evidence pre-dating the 1919 sale leaves open the possibility that it was used as a public way. On balance it is my view that the interpretation of the Inclosure Award offered by the appellant and the subsequent supporting evidence is sufficient to reasonably allege that a public right of way subsists along Locking Head Drove.
77. As regards the class of highway alleged, I noted earlier (at paragraph 5) that there is some confusion over which status is now sought by the appellant. The Inclosure Award did not set out Locking Head Drove as a public carriageway yet the wording that referred to the section set out in the award (at its western end) implied carts and carriages could be used as well as horses and cattle. The depiction of the way on subsequent maps such as Greenwood (as a cross road) might equally imply a reputation as bridle road yet the mention of carts and carriages tends towards a way of higher status. However in the light of the 1910 Act evidence noting it as a "driving road" I find the balance tips slightly more towards bridleway status, this be defined as a way over which the public has a right of way on foot, on horseback or leading a horse, and in some cases with a right to drive animals.
78. I noted in paragraph 16 above the test to be applied to the short length of the appeal route which is presently recorded as a footpath on the definitive map and statement requires that the evidence must show, on the balance of probability, that the higher rights claimed by the appellant subsist. Yet on the basis of the information provided in connection with this appeal, I hesitate to conclude that this higher level of proof is satisfied in relation to the entire route when there are many questions still to be answered.
79. Whilst the different standards of proof to be applied to different sections of the appeal route at this stage could potentially lead to an anomalous outcome, in the determination of any order made as a result of this appeal the same higher level of proof would be required to justify confirmation throughout the whole route, not just parts.
80. My finding that a bridleway has been reasonably alleged to subsist over the majority of the appeal route leads me to conclude an order should be made to add it to the definitive map. Whilst I do not find the available evidence sufficiently robust to conclude, on a balance of probability, that a bridleway subsists over the section presently recorded as a footpath, I nonetheless consider the same order should include a proposal to upgrade it for purely

pragmatic reasons since this would ensure that, if objections are raised, the evidence for the whole of the claimed bridleway may be more thoroughly tested.

Other matters

81. I noted above at paragraph 19 that the evidence of actual use by the public provided in this appeal was of such limited quantity that the requirements for presumed or implied dedication were unlikely to be satisfied. Taking into account also the material provided by the agent for the landowners to rebut any intention to dedicate the route for public use at any time from the mid-twentieth century onwards, I find no case for concluding that a right of way was established along Locking Head Drove during living memory.
82. However, that does not negate the earlier evidence from which I have concluded that a public bridleway has been reasonably alleged to subsist.

Conclusion

83. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed in respect of the route referred to here as C-A-B-I, now extending from the A371 via Locking Head Drove to a point now at its junction with the A370.

Formal Decision

84. In accordance with Paragraph 4(2) of Schedule 14 to the 1981 Act, North Somerset Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area by adding a public bridleway (and upgrading part of Footpath AX20/8 to bridleway status) between points C, A, B and I as requested by the application dated 28 January 1994.
85. This decision is made without prejudice to any decision that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Sue Arnott

Inspector