WCA/573 – CORNWALL COUNCIL
ORDER TITLE: THE CORNWALL COUNCIL (ADDITION OF RESTRICTED BYWAY FROM ROAD U6177 at MAWGAN-IN-PYDAR SCHOOL TO ROAD U6177 AT LANVEAN IN THE PARISH OF ST MAWGAN-IN-PYDAR) MODIFICATION ORDER 2017

OBJECTIONS OF ST MAWGAN-IN-PYDAR PARISH COUNCIL

OVERVIEW

St Mawgan Parish Council (the PC) resolved to object to this proposed Modification Order at a meeting which took place on 13th December 2017. Whilst the PC welcomes formal recognition of Church Lane's (the Lane) long-standing use both as a footpath and as a bridleway, the Order proposed, that Church Lane henceforward become a 'restricted byway', would remove the ability of parishioners and others lawfully to continue to use Church Lane with motor vehicles. It is the view of the PC that this is a right that has been exercised by the public for as long as motor vehicles have been driven in the parish and pre-dates the 1930 cut-off contemplated by section 67 (2) (e) of the Natural Environment & Rural Communities Act 2006 (NERCA).

In the alternative, or additionally, the decision of Cornwall Council not to recognize Church Lane as a 'by way open to all traffic' (BOAT) implies that it believes that Church Lane's main use during the five years leading to NERCA's commencement was not as 'a highway over which the public have a right of way for vehicular and all other kinds of traffic but which is used by the public mainly for the purpose for which footpaths and bridleways are so used' (the statutory definition of a BOAT under section 66 (1) of the Wildlife and Countryside Act 1981). If that is the case then it follows that Cornwall Council accepts that Church Lane's main use in the five years leading up to NERCA's commencement was the only other possible alternative, namely main use by 'mechanically propelled vehicles' (MPVs) rather than by pedestrians and riders. It further follows, therefore, that the exception listed in section 67 (2) (a) of NERCA would apply to Church Lane and that MPV rights are not extinguished by NERCA section 67 (1) (a).

THE EVIDENCE

Cornwall Council's detailed report on Church Lane appears to confirm the following facts.

(1) Church Lane has been in existence in substantially its present form since at least the time of the 1881 Ordnance Survey. However the Lane is also shown on earlier tithe maps and so is likely to date from an even earlier time.

(2) The Lane appears 'uncoloured' on the district valuation map relating to the 1910 Finance Act implying that the Lane was at that time a recognized 'highway'. There is a clear logic to this as the Lane connects the area known as Lanvean to the centre of the village and would have been used by horse-drawn traffic as a matter of course since it first came into being.

(3) The ownership of the Lane became somewhat clouded over time. The PC's minutes of 1907 reveal that a former rector of the parish had approached the PC in the middle of the nineteenth century requesting to be allowed to take on the up-keep of the Lane (at this time the original Rectory was situated on the western side of the Lane). This implies that, at that time, the Church did not own Church Lane since, had it done so, permission to maintain the Lane would presumably not have been required.

The PC's more recent researches indicate that, up until a date around 1973, the 'living' of St Mawgan parish had been in the gift of the Carnanton Estate which had built the 'new' rectory (by) around 1870 following the destruction by fire of the original rectory (on the site of what is now s property 'Yongala'). It is the PC's understanding from Carnanton's current owners that, when he inherited the estate around 1970, assumed responsibility for the 'living' but did not wish to continue with this duty. Accordingly the 'new' rectory and its land (which the Estate believes to have included the Lane) were divested by Carnanton to the Diocese. Given the extent of Carnanton's property ownership within the village (eg the present playing field, the Falcon Inn, the Primary School together with its car-park and a significant number of cottages) it seems inherently plausible that, if the Lane belonged to anyone prior to Carnanton's relinquishment

of the St Mawgan 'living', then it belonged to the Estate. Further evidence of this is suggested by the Francis Frith photograph of a gate at the southern end of the Lane which appears to have been constructed to the pattern of Carnanton Estate gates of the period. The broad point to be made, however, is that all vehicular use of the Lane had been dedicated by the Carnanton Estate generations before ownership passed to the church. Prior to the advent of MPVs this would have been use by horse-drawn traffic or on foot. But when MPVs first arrived they would have assumed the same rights and this would have taken place before 1930.

THE STATUTORY FRAMEWORK 1949-1981

The statutory framework for the establishment of rights of way post-1945 is set out in a number of different Government Guidance and Advice notes and referred to in case law, see eg *Masters v SSETR [EWCA] 31 July 2000*. There the Court of Appeal traced the progression of the formal registration of rights of way from the National Parks and Access to the Countryside Act 1949 (NPACA), via the Countryside Act 1968, to the Wildlife and Countryside Act 1981. More recently there have been the Countryside and Rights of Way Act 2000 (CROW) and NERCA in 2006.

Of the 1949 Act Lord Denning stated in 1975 (when giving judgment in R v SSE, exp Hood [1975] QB 891) : "The object of the statute is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835. They were created in the days when people went on foot or on horseback or in carts. They went to the fields to work, or to the village, or to church. They grew up time out of mind. The law of England was: once a highway always a highway. But nowadays, with the bicycle, the motor car and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should be preserved and known so that those who love the countryside can enjoy it and take their walks and rides there. That was the object of the NPACA 1949 and the Countryside Act 1968. In 1949 the local authorities were required to make inquiries and map out our countryside. First a draft map; next a provisional map; and finally, a definitive map. There were opportunities both for landowners and the public to make their representations as and when the map passed through each stage. In 1968 there was to be a review and re-classification."

The first Definitive Map under NPACA allowed for three different categories of highway: footpaths, bridleways and 'roads used as public paths' (RUPPs). However this requirement was amended under the 1968 Act which required all RUPPs to be re-classified either as footpaths, bridleways or 'byways open to all traffic' (BOATs).

In 1981, and before this re-classification of RUPPs was complete, a further change to classification procedure was made by the Wildlife and Countryside Act. Section 54 of the Act required surveying authorities, as soon as reasonably practicable, to review all RUPPs remaining on the Definitive Maps and to make modification orders reclassifying each as either (a) a BOAT, if a public right of way for vehicular traffic had been shown to exist; or (b) a bridleway, if (a) did not apply and bridleway rights had not been shown not to exist; or (c) a footpath, if neither (a) nor (b) applied.

A 'Byway open to all traffic' is defined in section 66 of the 1981 Act as 'a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used'.

Section 53 of the 1981 Act imposed an ongoing statutory duty on all surveying authorities, following the commencement date of 28th February 1983, to 'keep the definitive map and statement under continuous review' so that, should an 'event' occur such as to suggest that further modification of the definitive map was necessary, such modification might be made as soon as was 'reasonably practicable'. Such 'events' were categorized under section 53 (3) of the 1981 Act.

At this stage, and before consideration is given to the CROW Act 2000 or to NERCA 2006, it is perhaps helpful to examine the extent to which these statutory duties have been complied with in regard to Church Lane. There still exist (referred to in the CC Report) all the pro-forma surveys of footpaths and bridleways undertaken by the PC as a result of the 1949 Act, and the results of these surveys in due course found their way onto the Definitive Map. However Church Lane itself was not included on the Definitive Map at this time and the only reason for this, as it appears to the PC, is because the PC at that time considered Church Lane to have full 'highway rights'. The Lane was not, to quote Lord Denning, 'an ancient highway that had fallen into disuse', rather it was a clearly delineated route which connected Lanvean

to the centre of the village. Moreover by 1949 the Lane had clearly been used by all types of transport (including MPVs) for a considerable period of time.

A RUPP was defined , under the 1949 Act, as ‘a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used’ and logic suggests that the Lane was purposefully omitted by the PC from their survey return to the then highway authority because it was simply not felt that its primary use was as a footpath **or** a bridleway (it should be noted in this regard that, although they appear similar, there is a difference between the definition of a RUPP under the 1949 Act and a BOAT under the 1981 Act). Accordingly the Lane escaped being classified as a RUPP on the first Definitive Map.

It should also be noted, at this stage, that despite a statutory duty being imposed by the 1981 Act upon the ‘surveying authority’ to keep the rights of way network under continuous review no attempt appears ever to have been made properly to classify Church Lane. It is common ground that, in the early 1960s, a concrete base was put in the ford beside the primary school and the ramp built and thus firm evidence existed at that time of a right of way which was not on the List of Streets. There appears also to have been numerous occasions over the years when the responsibility for the Lane’s maintenance was taken up by the PC with the Highways Authority. It can hardly be argued, therefore, that the Lane constituted an ‘undiscovered’ right of way. The reality is that the ‘surveying authority’ neglected its statutory duty properly to classify the Lane over an inordinate length of time and this is at the root of the present problems as to the Lane’s correct classification.

COUNTRYSIDE AND RIGHTS OF WAY ACT 2000

The CROW Act 2000 was enacted when the re-classification of RUPPs was still far from complete. Section 47 (2) of the Act provided that every way which, before the commencement of the Act was shown on a definitive map as a RUPP should be treated instead as a ‘restricted byway’ over which the public would have all rights bar MPV rights. The Act also made provision for the extinguishment in 2026 of any unrecorded rights of way with MPVs and inserted into the 1981 Act a requirement that every surveying authority should keep a register of applications. It might be thought that the application made in 2003 to establish the status of the Lane would have alerted the surveying authority to the need to pursue this of its own volition.

THE NATURAL ENVIRONMENT AND RURAL COMMUNITIES 2006

DEFRA's 'Guide to Part 6 of NERCA' (for local authorities, enforcement agencies, rights of way users and practitioners) states at the beginning that 'in December 2003 the Government carried out a review of its policy on the use of motor vehicles on rights of way and published a consultation paper entitled: Use of mechanically propelled vehicles on rights of way. The main proposal in the consultation was to limit the basis on which rights of way for mechanically propelled vehicles may be acquired and end the situation where historic use by non-mechanically propelled vehicles, such as horse-drawn vehicles, can give rise to a right of use by modern mechanically propelled vehicles. The consultation document sets out the rationale for this.'

In a foreword to the consultation document the Rural Affairs Minister, Alun Michael, said: 'As Rural Affairs Minister I have been approached by many individuals and organizations who are deeply concerned about problems caused by the use of mechanically propelled vehicles on rights of way and in the wider countryside. I share these concerns having seen for myself examples of damage to fragile tracks and other aspects of our natural and cultural heritage in various areas of the country. There is considerable concern about behaviour that causes distress to others seeking quiet enjoyment of the countryside……I do not think it makes sense that historic evidence of use by horse-drawn vehicles or dedications for vehicular use at a time before the internal combustion engine existed can give rise to rights to use modern mechanically propelled vehicles. Those who suffer from vehicle misuse find this incomprehensible and in this paper we offer new proposals that are intended to address what many have come to view as the inappropriate and unsustainable way in which vehicular rights are acquired and claimed on rights of way'.

It seems to the PC to be clear from this, and also from other contemporaneous comment, that Part 6 of NERCA was specifically designed to deal with a particular mischief, namely the damage that was being caused to ancient ways such as the Ridgeway or the South Downs Way, or unclassified ways on Dartmoor or other national parks, by the inconsiderate use of 4x4 vehicles or 'trail bikes'. This is what Alun Michael meant when he referred to damage to 'fragile tracks' and causing distress to persons 'seeking quiet enjoyment of the countryside'. However, whilst these concerns are perfectly understandable in a general sense, the situation envisaged by Alun Michael does not appear to the PC to reflect the historic situation with

Church Lane. Here we have a short lane (239 metres) connecting two other lanes or parts of the village which has been used by MPVs since they first took over from horses and carts. That use by MPVs has never been questioned by the owners of the Lane (the relevant persons for presumed dedication) and has now been in existence for many generations. It seems hardly likely, therefore, that NERCA was ever intended by Parliament to remove rights of such long-standing particularly where no particular nuisance has been identified over the best part of a century.

SECTION 67 (2) EXCEPTIONS

Section 67 (1) (a) of NERCA extinguishes any existing right of way by MPVs if it is over a way which, immediately before commencement, was not shown in a definitive map and statement, but this is subject to 5 exceptions listed in section 67 (2) between (a) and (e). As stated at the outset, one of these exceptions, s67 (2) (e), arises if the existing right of way 'was created by virtue of use by such vehicles during a period ending before 1st December 1930.

That date is now some 87 years distant and therefore conclusive evidence of MPV use of the Lane prior to 1930 has been hard to come by. However, the PC is able to point to evidence from a former Chairman of Cornwall Council to the effect that her father used to drive the owners of Tolcarne House to church in the 1920s using the Lane. It is also the case that the former Church Hall (now Moreland House), which has been described by parishioners as a 'hub' of social activity, is situated on the eastern side of the Lane and would have been accessed by those with cars from the time cars first arrived in the village.

A third factor which needs to be appreciated is that the road from Carnanton's East Lodge to Newquay Airport and beyond was only built in the 1960s. What this means is that all traffic to St Mawgan from St Columb would have had to approach the village via the lane which leads from St Columb to Mawgan Porth. This traffic would have included the earliest deliveries by light lorry as well as car traffic.

From Trevenna Cross the most direct route into the village would have been via Lanvean and Church Lane; this would also have avoided the steep hair-pin bend above Penpont. Therefore

it is the PC's submission that, on the balance of probabilities, the earliest MPV traffic delivering goods to the village would on occasions have used Church Lane.

The second relevant exception to Section 67 (1) is where 'the public right of way is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles'.

The difficulties of establishing the facts of this, not least some twelve years after the commencement date of 2nd May 2006, are again obvious. No traffic surveys were ever undertaken and, even if they had been, they were liable to have been distorted by the difficulty in distinguishing between a private or a public use of the Lane, or even a factor as mundane as the time of year the survey was undertaken. If, for example, the survey were undertaken during inclement winter weather then there would likely have been less recreational use of the lane by walkers or riders.

Nevertheless, if one has to discount 'private' use of the lane by residents (as DEFRA's Guidance suggests), or those visiting properties along the Lane such as the postman, it is a perfectly reasonable stance to take that, on the balance of probabilities, the public's main use of the Lane between May 2001 and May 2006 is likely to have been with cars. This also appears to accord with Cornwall Council's decision not to propose designation of the Lane as a BOAT. As stated above, in order to be classified as a BOAT the Lane would have had to be used predominantly by walkers and riders rather than by MPVs. Therefore if the Lane is not deemed to be a BOAT by the Council then implicit in that decision is the recognition that MPV use of the Lane outweighed defined BOAT use of the Lane during the material period.

CONCLUSION

The PC's stance in this matter is really very simple; it is that it is inherently wrong if a long-established right to use the Lane with MPVs should now be extinguished because of what amount to a series of lacunas in the law or surveying authority process. First the Lane was never designated as a RUPP following the 1949 Act because its main use at that time was not and equine or pedestrian use, and as a result it was never 'flagged up' for consideration following the 1968 or 1981 Acts. Secondly, the Lane was never included on the List of Streets as its ownership was private. Thirdly, the Lane's proper status as a right of way was

never ascertained by the surveying authority at the appropriate time in dereliction of the statutory duty imposed upon it. And fourthly, the proposition now appears to be that NERCA, which was clearly enacted to deal with a very specific problem, should be held to remove long-established user rights in a totally different factual situation.

It is not as if Church Lane has ever been or is likely in the future to be used in the kind of anti-social way that prompted NERCA, and it is interesting to note that the main objection of certain residents along the Lane has seemingly been towards its use as a bridleway rather than with MPVs. Nor will the majority of MPV use of the lane ever be curtailed because of the exemption under the Act in respect of MPV use to access property along the Lane. However, the ability by non-residents lawfully to use the Lane to get into or out of the village remains a useful right as was recently demonstrated when the road into the village from the northern side (Ox Lane) was temporarily closed for tree-felling.

For at least these reasons the PC believes that NERCA should not be held to have extinguished the right to use Church Lane with MPVs and that the balance of probabilities in regard to sections 67 (2) (a) and (e) should be construed benevolently.

Finally, the PC would make the point that, if the use of the Lane by MPVs were ever deemed to have inconvenienced ramblers or riders then that situation could be addressed by means of a Road Traffic Regulation Order. The removal of the MPV right where such inconsiderate use has not hitherto been found to exist is unnecessary.

8 January 2018

Natural Environment

10 JAN 2018

Countryside Access Team Leader,
Cornwall Council
Floor 4A, Pydar House
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Truro TR1 1XU

Ref WCA-573

OBJECTION TO DMMO WCA-573

Dear Sir/Madam,

We write as the Landowners of the affected land to which the above Modification Order refers in response to your advice dated 29 November 2017.

We are aware that the Applicant has already resolved to object to this Application.

As a consequence the Landowners now submit their objection to the Order on the grounds that the interpretation of the evidence so far as presented in the Case Officer's report is not the only arguable assessment to be made of the information documents he has collated and does not include all contradictory evidence available.

In particular the Landowners are unhappy with the conduct of the Authority leading up to and during the period of investigation, that no reference was made to them during this time and important information has been withheld from them directly and in the published information despite specific information requests. The Landowners are not satisfied that the principles of natural justice have been applied in the handling of the Application and the manner in which conclusions have been drawn, specifically but not limited to the non-disclosure of critical evidence that appears key in the opinions formed by the Case Officer.

The heavy redaction of documents and withholding of information are cause alone to request that an enquiry be held to reach a final determination of this Application.

Inconsistencies and errors are apparent in the detail of the Case Officer's report. For example; it is claimed, without disclosure of the underlying evidence, that six witnesses submit a gate was locked across the lane in the winter of 2002/2003 (section 6:31). There is no other evidence presented that supports a claim that any gate existed along with the lane at this time. Contradictory evidence suggests there has never been a gate that could be locked across the lane since at least the 1960s up to the time when the landowners closed a gate across the lane in 2011. This calls into question the evidence used to determine the 20 year period assessment.

As the relevant officers of Cornwall Council are aware the matters underlying this Application have become extremely controversial in the local community. It is evident to the Landowners that this controversy was a deliberate part of a coordinated **campaign** by a number of individuals to enlist as many members of the public to submit the highest number of User Evidence Forms possible. The sheer weight of numbers does not in itself give credence to the claims being made however the Case Officer's report appears to take the view that it does, even to the point of dismissing inconsistencies in multiple reports/forms provided by single individuals. The Landowner believes a proper examination of that evidence is now warranted.

The landowners also point to factual errors in the Schedule, Part II of the Order. It is widely accepted the access lane, being the Investigation Route, is as wide as it has ever been in its history. The stated minimum width in the Schedule is given as 5 metres. No average width is given. The factual truth is the minimum width of the investigation route is only 2.5 metres along a significant proportion of its length, such that the average width across the whole length could not be said to be more than 3 metres.

It is with regret that the Landowners feel the investigation and subsequent conclusions drawn by the Authority have not been conducted in a manner which imparts confidence in the accuracy, openness and impartiality of the process. We therefore object to the Order being confirmed by Cornwall Council and insist that the opportunity be provided that all evidence be fully disclosed and the opportunity for cross examination afforded by way of a public enquiry. Only with such examination can the matter be settled to the satisfaction of all concerned

Yours faithfully,

as Landowners.

Natural Environment

10 JAN 2018

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Reference - WCA573 8-1-2018

Submission of objection

Dear Sir / Madam,

As Residents living beside Church Lane we wish to lodge an objection to the order made by Cornwall Council Being elderly our ability to write by hand in detail is limited but nevertheless we make the following points as the reasons for this objection.

In reading the claims made in many of the documents submitted it is our view that much of what is being claimed regarding historical use of the access lane is false

only by examination through an enquiry would we be satisfied that the truth on these claims be determined

We have been residents alongside the lane for over 60 years, and prior to that land adjacent to the lane was in ownership of our family since 1920.

Particularly we note a claim that a gate was locked on the lane in 1983. No such gate has ever existed.

Use of the lane by the public has been challenged in all the time we have lived here, although such regular

public use was not really evident until the 1980s.

We also point out the error on your order where it states the minimum width of the lane is 5 metres this is nonsense as the width over much of the lane is little more than 8 - 10 feet.

In conclusion we say this order cannot be confirmed by Cornwall council and should be directed to the Secretary of State for final examination

Yours Sincerely