



Order Decision

Site visit 13 August 2021

by Grahame Kean B.A. (Hons), Solicitor HCA

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

Decision date: 03 November 2022

Order Ref: ROW/3245816

- The Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Lincolnshire County Council – Ancaster Addition of Restricted Byway 1156 and Record Part of Restricted Byway 12 with a Width, Definitive Map Modification Order 2019.
- The Order is dated 20 May 2019 and proposes to modify the Definitive Map and Statement for the area by adding a restricted byway and amending an existing restricted byway to add a width (in part) as shown in the Order plans and described in the Order Schedule.
- There were 10 objections outstanding when Lincolnshire County Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Preliminary matters and history of the application

1. I made an unaccompanied site visit in clear weather and was able to view the Order route from public vantage points along RB12.
 2. The Council is the order making authority (OMA) and supports the Order. It seeks to add to the Definitive Map and Statement (DMS) the route "Pottergate" based on the Ancaster (Sudbrook) Inclosure Award 1770 (Award) as a byway (RB1156) with a width of 60 feet, and to add to the statement a width of 60 feet for a section of RB12.
 3. RB12 runs more or less parallel with the line of the ancient route known as Pottergate Road as shown on the Order map. However it takes a slightly different line, at times to the east and at others to the west of RB12 as it proceeds from Point A, at the junction with Water Lane, northward to Point I where it coincides with the claimed Pottergate Road. The section of RB12 from I to J is requested, based on the terms of the Award, to be recorded as 60 feet in width. Point J is at the end of the parish boundary and for the purposes of the Award is the extent of the road set out therein.
 4. The application which related to this matter, made in 1991, was given low priority and has a convoluted history. On 20 December 1994 the Council decided to make an order but not in respect of all sections of the claimed route. Moreover it upgraded the existing RUPP12 to a byway open to all traffic (BOAT) with a width of 60 feet, rather than responding to the applicant's case that a way be established on the line of the Award (albeit that such a line was never set out in a map in the application).
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5. The applicant appealed and the sole ground of appeal was that the missing section of RUPP12 should have been considered on the basis that the balance of user evidence was that this section should also have been reclassified as a BOAT. Thus the applicant appeared to have omitted a key part of his case, to amend the route to accord with the Award map. At any rate, on 24 October 1995 the regional government office allowed the appeal and directed the Council to make an order for the missing section, reclassifying it as a BOAT (approximately section C-F on the current Order map).
6. The Council never made the order. On 31 January 2002 the applicant (Lincolnshire Fieldpaths Association) raised with the Council the issue of the putative differences between the DMS route RUPP12, and the Award route, asking about an overlay of the two on one plan. It remarked that:

"The difference if it exists, was only of a few metres, and occurred where the surrounding land was one large unfenced arable field, so there would appear to be no practical difference between the two."
7. The letter was stamped as received by the Council on 5 February 2002. The Council says of this statement that it indicates the applicant did not supply the Award map at any time, which may be so but does not explain why the Council made no order in accordance with the government's ruling or alternatively did not challenge that ruling in the courts.
8. So, it appears no such order was made either in accordance with the Council's own decisions or the Government's directions. I note the Council subsequently deemed the application not to have complied with legislative requirements. It now seems the Council has taken matters into its own hands and promoted its own Order, now the subject of this decision.

Inspector Grimshaw's decision

9. This Order Decision of 18 April 2016¹ is potentially relevant as it acknowledged that the Award included a public horse carriage and drift road with a breadth of 60 feet named *Sudbrook Pottergate Road*. This was a different road in the general area, but not in the immediate vicinity of, the current Order route. Its effect was to record *Sudbrook Pottergate Road* in the DMS as a BOAT.

Other background

10. Ancaster became an important Roman military site due to its proximity to Ermine Street which was designated as the first turnpike road in Britain. Evidence as to the existence of Pottergate Road prior to 1769-70 is found in the Normanton Inclosure Award 1756, but the Order route is not shown.
11. The exact origin of the ancient way of Pottergate Road is unknown. It may have had Roman or mediaeval beginnings but at any rate there is no trace of the claimed route on the ground other than where it aligns with RB12.

Main issue and legal framework

12. The main issue is whether the available evidence shows that, on the balance of probabilities, the DMS requires modification.

¹ Ref Q2500/7/76.

13. Section 53(2) of the 1981 Act requires surveying authorities to modify its DMS on the occurrence of "events" set out in s53(3). The evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show on the balance of probability that a right of way subsists along the Order route (s53(3)(c)(i)), and the particulars in the DMS require modification as to the width of RB12 at section I to J (s53(3)(c)(iii)).
14. Section 32 of Highways Act 1980 requires any tribunal to which documentary evidence is adduced to take such evidence into consideration before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place. Such weight is to be given to the document as is "*justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it was produced.*"
15. The previous application suggested that the route proposed be recorded as a BOAT, however what is before me is the Order promoted by the Council who propose that the Order route should be recorded as a restricted byway. If reached, I will consider the relevance of s67 Natural Environment and Rural Communities Act 2006 (NERCA2006) as it extinguished unrecorded rights of way for mechanically propelled vehicles (MPVs) subject to exceptions.

Evidence

16. The evidence submitted in support of and against the Order comprises historical maps and other documents which require consideration.

Normanton Inclosure Award 1756

17. The map accompanying the award shows Pottergate running southward to the parish boundary and into Ancaster. The location of the way at this point is the continuation of RB12. The award pre-dated the Inclosure Consolidation Act 1801 (the 1801 Act), but in itself that does not invalidate the plan, as suggested by an objector.

Sudbrook with Ancaster Inclosure Award 1769 and Map 1770

18. The Award was made under a local Act of Parliament of 1769 entitled:

"An Act for dividing and inclosing the open fields, meadows and pastures and other commonable lands in the liberties of Sudbrook, within the parish of Ancaster 1769".

19. The 1769 Act authorised Commissioners to set out land and highways and provided that all public highways so laid out were to be a width of 60 feet between ditches or fences. The relevant parts read:

"it shall and may be lawful for any one or more of the said commissioners to administer and they are hereby impowered and required to administer the same accordingly And be it further enacted that the said commissioners or any two of them shall have full power and authority and they are hereby authorised and required as soon as conveniently may be after the passing of this act...

...in the first place, to assign and set out such public highways bridleways horse carriage and drift ways in over or through all or any part of the lands hereby intended to be divided and inclosed as in the judgment of the said

commissioners or any two of them are necessary and convenient provided that all such public highways (except bridleways private horse carriage and drift ways) shall be and remain sixty feet wide between the ditches or other fences and all such public highways and bridleways shall for ever hereafter be repaired and amended in the same manner as the public highways and bridleways within the said Liberties of Sudbrook now are or by law ought to be repaired and amended.” (Emphasis supplied).

20. The Award itself states:

“[the appointed persons] shall make a true and perfect plan of the whole of the said lands and grounds and which plan and admeasurement shall be reduced into writing ascertaining the contents of the whole and the contents of the lands belonging to each and every proprietor interested therein and shall be laid before the said commissioners or any two of them kept one of their meetings to be held in pursuance of this act and by them kept for the purposes of this act.” (Emphasis supplied).

21. The phrase “*shall be reduced into writing*” might suggest concern for accuracy in the form of a writing, rather than leaving it to what could be considered to be imperfections inherent in producing an accurate survey in 1770. In my view what was intended was that the plan should be translated into a writing so as to set out a description systematically as an aid to understanding. Whilst an intrinsic ambiguity in one document is potentially resolvable by recourse to the other, there is no authority of which I have been made aware that expressly determines which should prevail in the case of a conflict between the two. Thus practically speaking they might be examined together, however the writing, ie the Award itself is not discretionary as with the statement part of the DMS, so there is no basis for ascribing precedence to the map by analogy with the definitive map process.

22. I note also that the authority given in the 1769 Act is for a plan to be made generally in relation to “*the lands and grounds hereby intended to be divided and inclosed*”. The words stipulating a plan omit mention of highways, and insofar as the Award sets out highways, that does not appear to depend for its efficacy upon the allotment map per se, whose primary purpose would appear to be show the division and enclosure of the various land ownerships.

23. The Award referred to the way in which the commissioners “set out” land parcels for inclosure, and to the plan, as follows:

“We the said Daniel Douglas and Richard Metheringham do by this our Award or Instrument in writing under our hands and seals set out allot and assign to and for the said several owners and proprietors of land tythe and common right the several and respective parcels of land hereinafter mentioned and expressed with the buttals and boundaries thereof beginning with the Eastward boundary of each respective allotment and so on South West and North about in such order and manner as the said boundaries next adjoin to each other which may be more clearly understood by a plan of all the allotments herein made which plan is signed by the said Commissioners and annexed to this our Award.” (Emphasis supplied).

24. The phrase “*more clearly understood*” does not give dispositive effect over the wording of the Award to the plan, the latter being an aid to its comprehension no matter how true and perfect the surveyors may have striven to make it.

25. The Award "set out" highways to be 60 feet wide. It described Pottergate as running from Water Lane up to the Normanton parish boundary, describing it as follows:

"In the first place we have set out the following publick and private ways and roads over and through the said lands (that is to say:)...

one other publick horse carriage and drift road of the breadth of sixty feet beginning at the west end of a lane leading from the town of Ancaster called Water Lane and extending northward along the usual course of an ancient road called Pottergate Road over lands hereinafter allotted to the said William Roe nos. 19-9-16 and 17 to a gate in the Lordship of Normanton leading into a publick road in the said Lordship of Normanton called Pottergate Road which road we distinguish by the name Ancaster Pottergate Road." (Emphasis supplied).

26. The claimed route, ie Ancaster Pottergate Road lies across parcels of land owned by William Roe, Lord of the Manor. The land is described in the award with the words "including the land allowed for the said Ancaster Pottergate Road". The descriptions of parcels and acreage tally with those on the Award map. As an example, one parcel is described as follows:

"We have also set out and do hereby allot and assign to the said William Roe one other parcel of land No.9 in the middle field now field and heath containing three hundred and fifteen acres three roods and twelve perches including the land allowed for the said Ancaster Pottergate Road bounded by the allotments of the said William Roe Nos. 3 and 5."

27. Pottergate Road is shown on the Award map with broken parallel lines until the northern section meets Sudbrook Pottergate Road which is shown with unbroken lines. Most of the claimed route is therefore shown across fields with broken lines, suggesting the route was unfenced. Given that the award set out the "usual course of an ancient road called Pottergate Road" it must be a matter of doubt whether a new right of way was to be created.

Historical and railway mapping evidence

28. Maps considered are King 1806, the OS Old Series 1824 map, Bryant 1828 and Greenwood 1830. They are small in scale but show a route from Ancaster to Normanton and save for the King map, the route is mostly shown with broken lines. The Bryant map has the route as a "Lane and Bridle Way"; and the Greenwood map as a "Cross Road". The expression "cross road" did not then mean a point at which two roads cross, rather it included a highway running between, and joining other centres.
29. In comparing the Order route with these maps, a useful reference point is the bend in the line of the beck somewhat like a knobby knee in appearance, starting at Point B. There is insufficient detail on every map, but it is tolerably clear on the OS map and the Greenwood map, that the road next to it does not follow the claimed route but is detached from the line of the beck and proceeds in a more northerly direction.
30. *Newark and Sheffield Railway 1845*. The book of reference describes the route as "public highway called Pottergate Road" and the cross section of the proposed railway notes it as occupation road with the southern section of Pottergate shown on the same line as the definitive route.

31. *Great Northern Railway 1847*. The book of reference shows Pottergate as a "Public Highway" and the cross section describes the route as a Bridle Road.
32. *Boston and Midland Counties Railway 1852-3*. The map shows a notably similar position to the other two railway maps, in that the southern section of Pottergate is on the same line as the definitive route and not the claimed route. All three maps are drawn to a significantly larger scale than the commercial maps and 1824 OS map.

Ancaster Tithe Apportionment 1850

33. Only the southern section of Pottergate is shown which is similar (but not identical) to the Award map, in that the first section from Water Lane follows the field boundary by the beck. The scale of the tithe map indicates that a small section may be c30 feet wide but reduces to c15 feet as it leaves the boundary. It is the only map examined that bears marked similarities to the Award map. Existing maps could be used as a base, some many years prior to the tithe commutation process. It seems likely that the tithe map was based on the Award map but as public and private roads were not tithable, those shown in a tithe map cannot be determinative of public or private rights of way.

OS 6 inch and 25 inch 1891

34. Most of the route, marked Pottergate Road, is shown with broken lines indicating no fences or hedges. However from Water Lane to the railway (A-B-C) it departs from the claimed route, proceeding in a straight line rather than following the beck and turning along a field boundary, whence it essentially follows the line of RB12.

OS name book 1903

35. Sheet CV11 describes the route as a "road starting against the school in Ancaster and extends in a north-west direction through plan CV7 to Lincoln." This would indicate a route that avoided the field boundary or line of the beck along which the claimed route lies, as one leaves Ancaster.

Finance Act 1910 maps

36. The section of the route from Water Lane to the railway is uncoloured, possibly denoting public ownership, as is the railway line, whilst the rest of the route is contained in hereditaments.

Other maps and aerial images

37. The Bartholomew maps of 1904 and 1912, and the OS maps of 1912 and 1930 all show the route as it is now. The highways handover map of 1929 shows the line of Pottergate coloured brown from Water Lane to the end of the first field north of Sudbrook Road, suggesting designation as a minor road.
38. Aerial photographs of 1947 and 1971 reveal the line of Pottergate starting from Water Lane, and continues with what appears to be a metalled or hard core base, but north of Fir Tree Lane the line is unclear.

Parish survey 1952 and DMS

39. The survey map shows Pottergate marked in pencil. The survey card states that the route runs from Water Lane north of allotments over the railway to Fir

Tree Lane, over Harris' fields where there is an obstruction, continuing north-west to Heath Lane, Sudbrook. It also states that the road meets another road rather than the parish boundary. Heath Lane is an unaffected BOAT that proceeds north from Sudbury to meet RB12 at a point that does not coincide with the alleged Pottergate route until a few metres on at Point I. Summary sheets from the 1952 survey forms describe the route as a carriage road used as a bridleway and state the grounds for believing the path to be public are that it was "awarded", ie pursuant to the Award, being a metalled road blocked with post and barbed wire.

40. The Council suggests the award was cursorily inspected, otherwise the discrepancies with the line of Pottergate would have been noted. At this distance in time one cannot be certain what information the Council had before them when they compiled the sheets and the DMS was published. The presumption of regularity would suggest that proper account was taken of the award since it was specifically mentioned. What is also known is that the road known as Pottergate aligns with the line of what is now RB12. The statement in the DMS describes it as "*Pottergate Road – Normanton Parish Boundary*" and to my mind the discrepancies between the claimed route and RB12 across open fields are not that significant, other than the dog-leg section from Water Lane.
41. Subsequent to the publication of the DMS, the Council's Highways Committee records 1961-69 reveal that requests were made by transport bodies to stop up vehicular traffic on the section of Pottergate that crossed the railway line, with the parish council objecting and the British Transport Commission accepting that Pottergate was a highway. Aerial images of 1971 also show the route visible to a point north of Sudbrook Road, and a new development is apparent north of the railway with a connecting road, then uncompleted.

Other considerations

42. The Normanton Inclosure Award Map is indicative of a continuation route prior to the Award into the adjoining parish. The history of the previous application and decisions of the OMA show that the awarded route was not identified, yet the primary evidence in support of the Order is the Award.
43. There is no evidence of the position between the date of the Award map of 1770 and the earliest commercial map available to me, King in 1806. Yet from 1828 and consistently thenceforth it would appear that Pottergate has been shown on successive maps (with the sole exception of the tithe map) consistent with the road that has been made, named as such, and subject to long usage over several years, included in the DMS as RB12. The aerial photography supplied gives no indication of a different route to the definitive route.
44. The earlier maps are of a scale and accuracy that cannot conclusively determine the precise route of Pottergate. However I do think it significant that the little bump of the beck at it turns eastward is visible in these maps, close to where the claimed route is said to take off from the dog leg section at Point B. In the 1830 Greenwood map, also in the 1824 OS map, the route is well away from this point and takes off from a more southerly place more consistent with the current definitive route which strikes a more direct northerly passage.
45. There is only one route in the vicinity depicted in these maps (and indeed in other documentary evidence) so it is likely in my opinion that the mappers intended to reflect the road known as Pottergate. It is also noticeable that the

1824 map appears to show the route north of what would be Fir Tree Lane, in a slight zig zag configuration (and to a lesser extent in the Bryant map of 1828 but not the others), which has some resemblance to the line of RB12.

46. The OS First series map and particularly Greenwood's map support the existence of an established thoroughfare that proceeded from Water Lane at a tangent that avoided the field boundary but struck out in a more northerly direction across the fields. Greenwood was a well-known map-maker who produced maps of many counties, generally regarded as quite accurate and detailed for the time. All OS maps from 1891 show the route as it is now on the ground, consistent with RB12 on the definitive map, itself understood by those who completed the survey forms to reflect the line of the awarded route.
47. The awarded line was not acknowledged in the railway plans as far as the southern section is concerned. However it is on the tithe plan which is dated between the dates of the railway plans. What is notable about the railway plans on the one hand, which are made in or around 1845, 1847 and 1852, and on the other hand the Award map and the tithe apportionment map which have disparate dates of 1770 and 1850, is that the former group clearly delineate section A-B-C on the Order route as a straight line north from Water Lane, whereas the latter pair of maps show the dog-leg section on the field boundary.
48. The statutory process to authorise railway schemes was rigorous and deposited plans in the public domain were drawn to a high standard, usually specifically surveyed for the scheme and recorded topographical detail faithfully. Since 1845 public rights of way which crossed the route of a railway were to be retained unless closure was authorised. Although not aimed at recording rights of way, such plans can be good evidence of the matters they depict.
49. It is objected that neither the Award map nor the tithe map is new evidence in this case. In other words it is claimed that such evidence had already been "discovered" within the meaning of s53(3)(c)(i) of the 1981 Act and cannot be re-discovered. I accept that the Council as OMA has a continuing duty to review the DMS, however the objector also points out correctly that no evidence is offered of procedural error in the drawing up of the original DMS.
50. To the point that the 1891 OS maps showed no continuation of the route within the railway boundaries, the same is true of all other highway crossings in the vicinity. The railway plans taken together with the earlier mapping evidence, are indicative of the position on the ground throughout the period 1845 to 1852 on the southern section of the Order route. The tithe map alone reflects the Award map and there is no evidence that satisfies me that the land was independently surveyed afresh in 1850. Apart from the tithe and award maps the consistency in all the other maps, with their differing purposes, is striking.
51. When it came to setting out the line of Pottergate on its "usual course", all the maps' compilers (before and after the award) with the sole exception of the tithe map, followed what was understood to be the line of the only road that went through this vicinity, Pottergate. It is a strong possibility that the award dealt with a pre-existing road (the usual course of the ancient road known as Pottergate), and the award map erroneously showed a line around the edge of the field boundary before it struck northwards. The Award itself states that the road went northward directly from Water Lane which, allowing for the inevitable inaccuracies in earlier survey methods, would still be more consonant with the line in the railway and other maps than the tithe and Award maps.

52. There are clear references to other intermediate cardinal points in the award such as "south east" "south west" and "north westwards". It may be questioned whether there is an inherent ambiguity between the text in describing the road leading northward from Water Lane and the map on which the road is shown leading north-east before it leaves off the field boundary by the beck. This would tend to support the view that the dispositive effect of the Award was to set out the usual course of Pottergate as it is found in RB12.
53. For the route to be ascertainable under the award it would have been that most commonly used at the time (clearly not according to its usage at any given time in the future, for that would run counter to the aim of the legislation to create fixed and ascertainable ways). It is well established that a highway should have a defined route and it is remarkable that there is no hard evidence of clearly established usage over the line in the Award map.
54. Of course where a highway is created by statutory powers, no user by the public or any act of any party is necessary to complete the creation. As the court said in the case of *Buckland v SSE [2000] 1 WLR 1949* at p1960:
- "It is clear that a public highway may be created in a number of ways and once a highway it will remain a highway. It may be expressly so created by statute. An Act of Parliament may authorise the creation of a highway in some other way but any provisions and conditions of the Act will have to be satisfied before the purported creation of the highway becomes effective in law."*
55. *Micklethwaite v Vincent [1893] 69 LT 57* is an example of an award (made in 1808) where "even if the Commissioners in this case have acted *ultra vires*, it would be impossible to hold that the award at this distance of time could be impeached." The Award is long standing and has remained unchallenged. However given the above considerations, the accuracy of the map cannot be assumed.
56. RB12 may have formally come into being at a later date, but the evidence does not satisfy me on the balance of probability that it should displace the presumption that the DMS recorded the ancient road of Pottergate as what is now RB12 representing the "usual" route of the ancient way, notwithstanding the Award map, produced by what would have been fairly rudimentary surveying techniques in or before 1770.
57. The Council's argument that the awarded route was diverted to accommodate the rail crossing at a more convenient angle, is an unsubstantiated supposition that it was subsequently changed to fit in with the railway proposal of 1852.
58. It is undisputed that there has only ever been one used route in the location of the Order route and it is clear, on the ground, that the Order route has never been used and the current route of Pottergate has to all intents and purposes been its accepted usual route. The Council requires a plausible explanation why the Award cannot be relied on. RB12 has clearly been the subject of long usage by the public, and its inclusion on the first definitive map relied on the Award. There is a marked resemblance between the two routes apart from the dog-leg section from Water Lane to the railway line, and indeed a fairly high degree of correlation between the two routes. Essentially, having regard to and notwithstanding the primary importance of the Inclosure Act and Award, the preponderance of evidence is such that it is not only plausible but reasonable to infer that the Award map inaccurately depicts the usual course of the way.

59. On the information provided I am unable to conclude on the balance of probability that a public right of way exists as delineated on the Order map, but consider it more likely that the usual course of the ancient road, which was not a new road to be set out under the award, approximated to all intents and purposes to the route that had been used and was understood by the compilers of the DMS to represent the usual course of the Ancaster Pottergate Road.
60. The language of the 1770 Act and Award is not precise enough to satisfy me on the balance of probability that it was intended to create Pottergate as a new road in substitution for its usual course, rather than recognising the usual route for the purposes of excluding it from the allotted land. It already had its own name, and it led to a named destination.

Relevance of lack of evidence that the claimed road was ever completed

61. Specific events required by the award or the 1769 Act before the way became a highway are not at issue here, for example, a declaration by the Justices of the Peace that a carriageway had been "*fully and sufficiently formed, completed, and repaired*" as is required when an award stems from the 1801 Act. An award based on the 1801 Act and not ultra vires is strong evidence of the legal status of the highways described, although an inclosure award would be conclusive only as to matters within the Commissioners' jurisdiction.
62. If the usual course of the ancient road did go by the field boundary instead of along what is now RB12, it was not laid out as such and there is no evidence of user of that part of the claimed route (just as there is no evidence of user on any part of the Order route that differs from RB12).
63. In *The Personal Representatives of Mr Adrian Thomas Parker, Mrs Susan Parker v Nottinghamshire County Council, The Secretary of State for Environment, Food and Rural Affairs [2009] EWHC 229 (Admin)* it was argued that the public right of way alleged was never made up and never came into being. Although under the 1801 Act a surveyor was to be appointed who was to form and complete the road, where the statute merely authorised the setting out or making of a public road (which is the case here), then "*in the absence of user amounting to adoption by the public of the road in an unfinished condition, no highway comes into existence until the road has been set out and made in substantial conformity with the statutory requirements.*" (Paragraph 38, emphasis supplied). In *Parker* the evidence pointed to a pre-existing road which in the court's view made it unnecessary for there to have been further work to "make" the road.
64. The converse cannot sensibly be argued here, for the enabling Act preceded the specific requirements in the 1801 Act which were to apply only to future inclosure Acts. However the language used by the court in *Cubitt v Maxse (1872-73) L.R. 8 C.P. 704* illustrates the strictness with which the enabling statute creating a highway, is to be examined:

"It is contended on the part of the defendant, as matter of law, that the setting out by the commissioner on a map or plan annexed to his award of a road, and the staking out of the line of such intended road upon the land, without any other act done or any evidence of user by the public, makes it at once and for all time a public highway, even though it were not traversable at all. That proposition would require very strong words in an Act of Parliament to sustain it."

65. That said, whilst it is the consistent depiction of Pottergate in most of the other mapping evidence and the presumed basis of the DMS that raise doubts as to the integrity of the Award map, the absence of evidence that the Order route was ever physically set out or used, in places where it does not exactly align with RB12, although not a statutory requirement is consistent with finding that it was unlikely that the Award itself gave effect to the Order route as a public way.

The width of the claimed route on section I-J

66. In *Parker*, similar wording of "*shall and may*" was used, and reference was made to make ditches, fences and the like, "*so that such of the said publick Highways as shall be set out as Ways for Carriages shall be Sixty Feet broad at least between the Ditches and Fences.*" The wording of the particular Act and award gave commissioners a discretion in that the requirement for the width to be delineated only applied to carriageways considered convenient to ditch and fence and the stipulation as to width only applied, and could only have applied, to those highways which the commissioners newly set out.

67. It is likely that the 60 feet width provision was for newly made roads where ditches or fences were thought convenient. As far as the claimed route is concerned there is no credible evidence of fences or ditches that might have bounded it, whether at a 60 feet width or otherwise. The Council notes that absent ditches or fences, there would be no restriction on the width of 60 feet nominated in the Award. However this was a pre-existing way. If it were the intention of the statute or commissioners to set out an existing highway as an incumbrance to the enclosed lands of William Roe but with a newly created width of 60 feet, it seems to me that more explicit words would be required to make it a probability where, as here, no ditches or fences were to be erected.

Other matters

68. I recognise that the Council's intention with the Order is not to divert RB12 onto a new line but to record those rights prescribed in the award. Clearly RB12, to the extent that it runs from A to J, has been brought into existence and is predicated on the assumption that it follows to all intents and purposes the usual course of the ancient road known as Pottergate. By undisputed and long user it has become part of the definitive rights of way network in its own right.

69. With regard to the objectors' point that the application process is costing taxpayers money, and furthermore that everyone who has an interest in regularly using Pottergate is content with the current route, this is of course not a matter that I can consider.

Conclusion

70. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence does not show on the balance of probability that a right of way exists on the Order route from section A – I, or that the particulars in the map and statement require modification as to the width of RB12 at section I to J.

Formal Decision

71. The Order is not confirmed.

Grahame Kean

INSPECTOR

ORDER MAP – COPY – NOT TO SCALE

