

## Order Decision

Site visit made on 12 December 2023

**by Nigel Farthing LLB**

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

Decision date: 11 January 2024

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### Order Ref: ROW/3311019

- This Order is made under Section 53(3)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Kent County Council (Bridleway EE190 at Staple and Goodnestone) Definitive Map Modification Order 2022
- The Order is dated 1 June 2022 and proposes to modify the Definitive Map and Statement (DMS) for the area by upgrading a public footpath to a bridleway in the parishes of Staple and Goodnestone, as shown on the Order Map and described in the Order Schedule.
- There were 16 objections outstanding when Kent County 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.**

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### Procedural Matters

1. I made an accompanied site inspection on 12 December 2023 when I was able to walk the whole of the Order route and view the immediately surrounding area.
2. In writing this decision I have found it convenient to refer to points marked on the Order Map. The Order map is annotated with point A at the northern end of the route and point B at the southern end. The objectors have relied upon a map which is annotated with additional points, and it is convenient for the purposes of this decision to rely upon these annotations. I have therefore marked in blue on a copy of the Order map points A to D, X and 1 to 3. My annotation of point A corresponds with point A on the original Order map but point B does not. A copy of this map (which I shall refer to as the decision map) is appended to this decision. In this decision references to points on the decision map are references to the points that I have annotated in blue.
3. The Order was made by Kent County Council (KCC) under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(ii). It proposes to upgrade to a bridleway a route between points A and B on the Order map which is currently shown on the definitive map and statement as a footpath.

### The Main Issues

4. The requirement of Section 53(3)(c)(ii) of the 1981 Act is in two parts. The first is that there has been a discovery of evidence, being material that has not been considered previously in the context of the status of the Order route. The second element is that the 'discovered' evidence, when considered with all other relevant evidence available, should show that a highway shown in the map and statement
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as a highway of a particular description ought to be shown as a highway of a different description.

5. Section 32 of the Highways Act 1980 (the 1980 Act) requires me to take into consideration any map, plan or history of the locality or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway of the appropriate status.
6. The Order has been made solely on the basis of documentary evidence. There is no user evidence for me to consider.

## **Reasons**

### Discovery of evidence

7. The discovery of evidence is a prerequisite to the making of an order in reliance upon section 53(3)(c)(ii). In this case there is a wealth of documentary and physical evidence before me. No objection has been made questioning whether the requirement for new evidence has been fulfilled. I am satisfied that there is sufficient new evidence to meet this requirement.

### Physical and historical characteristics

8. The Order route can be divided into various sections by reference to its physical characteristics. Starting at the northern end of the route, the section of the route A to B begins as an enclosed lane, with a hedge on the east side and encroaching vegetation on the west. Because of the extent of encroachment, the available width for passage is relatively narrow. The western boundary of the lane appears to be marked by a post and wire fence which is reasonably obvious. The route is level, and the surface shows some evidence of having been improved.
9. Where the hedge to the east side ends the track ceases to be enclosed. It continues to point B as a grass field-side track alongside the continuing hedge to the west. The track is wide enough to accommodate agricultural vehicles.
10. At point B on the decision map the Order route diverts from the grass track, which continues in a straight line to Crixhall (formerly spelt Cricksall) Farm. At this point the Order route passes through a gap in the hedge and crosses an open field in arable cultivation in a straight line to point C on the decision map. The field is relatively level. The route is a trodden path, different in character to the section A to B. There was no evidence of the surface having been improved.
11. At point C the Order route passes through a hedge and crosses a public bridleway recorded as EE28. Within the hedge and alongside the Order route is a substantial old hard-wood post. The dimensions and condition of the post appear virtually identical to the posts at point 1 which are referred to later. From point C the Order route continues as a cross field path up a relatively steep slope to point 1.
12. Point 1 is the brow of the hill. At this point the Order route passes through another hedge within which there are two old hard-wood posts, one on either side of the path. The posts appear identical to the single post at C. The posts are set 52" (132cms) apart, a width suitable for a pedestrian to pass through, but inadequate for a horse. The post on the eastern side retains two substantial iron pins consistent with being part of a simple hinge mechanism. An elderly local resident recalls a wooden gate hung between these two posts with a metal weight used as a

self-closing mechanism. The gate is said to have been in place until at least the 1960s. An archaeologist dates the metalwork of the hinge pins as nineteenth century.

13. From point 1 the Order route descends quite steeply with a hedge on the eastern side. At point 2 the hedge comes to an end and the route continues towards point 3 as an open cross-field path. Before point 3 is reached the path levels out.
14. There is evidence that the land between points C and 3 was in earlier times used for the cultivation of hops. This is supported by the description of the route passing through a "Hop Garden" in the statement which accompanied the parish map for Staple. I am told hop production was a labour-intensive activity which, at certain times of the year, would have necessitated horse and vehicular access to carry hop sacks and equipment.
15. From point 3 the route is enclosed on both sides. On the west side there is a steep and substantial bank within which is a hedge. Behind this hedge is an area of land known as Claypits. On the east side the route is enclosed by post and wire fencing before passing between buildings and garden hedges and emerging onto Cave Lane. The buildings to the east of the Order route are known as Claypits Farm. There is evidence that this area of land was used for the extraction of clay for brick making.

#### Documentary evidence

##### *Faden's 1" map (1801)*

16. The earliest available representation of any part of the Order route is contained on Faden's map of 1801. This map was later published by the Ordnance Survey (OS). It depicts a track or road from point A to Crixhall. Point B on the decision map is part way along this track. The track is shown in the same manner as other routes which form part of the current network of local roads, but other routes are similarly shown which are not recorded as public rights of way.
17. The Ordnance survey, on which Faden's map is based, was principally for military purposes and was more concerned with function than status. The inclusion of the route A to B is good evidence of its physical existence as a route more substantial than a footpath but is of little assistance in understanding whether the route was public or private, or public for some purposes and private for others.
18. No route south of point B is shown on an alignment equivalent to the Order route. Two routes are shown branching off in the vicinity of point B but on an alignment further to the west, with one terminating on the bridleway EE28 at the point shown on the decision map as X, being to the west of point C.

##### *Greenwood's Map (1819-20)*

19. Greenwood's map shows A to B and the continuing route to Cricksall on a similar alignment to Faden's map. No route is shown south of point B equivalent to the Order route. A route is shown branching off at approximately point B on an alignment further to the west, and connecting to the EE28 at point X, consistent with the route shown on Faden's map.
20. The route A – B and on to Cricksall is shown as a cross road in the same manner as other local roads many, but not all of which are now vehicular highways. The

depiction of a route on a private map as a cross road can be some evidence that the mapmaker considered the route to be a public road.

*OS Old Series 1" map (1831)*

21. The route A – B and on to Cricksall is shown as on Faden's and Greenwood's maps. The Order route is not shown south of point B but a route branching off at point B and terminating at point X is shown, again consistent with Faden and Greenwood.

*Goodnestone and Wingham Tithe Maps (1841)*

22. The Wingham Tithe Map shows A – B as part of the access to Cricksall. It is depicted as an enclosed road coloured ochre. Various routes are listed in the apportionment as roads. The Order route cannot be identified with certainty as one of these roads, but it is possible that it is. The majority of routes coloured ochre and listed in the apportionment as roads are now public roads,
23. The Goodnestone Tithe Map shows an access from Cave Road at point D but no continuing route, and no route consistent with any part of the Order route within the parish. It is suggested that this may be because the land over which the Order route passes was held by the church but there is no evidence to support this hypothesis.
24. Tithe maps were concerned with identifying land subject to payment of tithe. Unproductive land, which often included roads, was not tithable. Private occupation roads could equally be unproductive and thus excluded from tithe. Accordingly, the depiction of a road on a tithe map can be consistent with public status but is not, on its own an indicator of it. At best it is supporting evidence to be considered with all other relevant material.

*OS Boundary Books (1867-69)*

25. The evidence from the Boundary Books is relevant only to the section A – B. The purpose of the exercise recorded in these books was to establish and record parish boundaries.
26. The books depict a route from Staple to Crixhall which includes the Order route A to B. A route is shown branching out to the west in the vicinity of point B but this route is not consistent with the Order route B – C and is likely to be the route to point X shown on earlier mapping.
27. The Wingham field sketch book records that the parish boundary between point A and part way to B was in the centre of the road and annotates the road as a 'private road'. The boundary sketch map shows the boundaries in the same position but omits the reference to the road being private.
28. The annotation of the route A to B as a private road is evidence of some substance as to how that part of the Order route was perceived in the mid-nineteenth century. The fact that the second entry refers to the route only as a road does not detract from the value of this evidence.

*Inclosure Acts (1845-82)*

29. Two Orders of Exchange were made under section 147 of the Inclosure Act 1845, one in 1872 and the other in 1878. One relates to land at the northern end of the

Order route and shows the route A to B and onwards to Cricksall. The southern end of the route shown is annotated "From Cricksall Court", which might suggest a route serving a private property. The route is however shaded ochre in the same manner as other routes now having the status of public roads. A route is shown branching out to the west in the vicinity of point B. This route is also shaded ochre, but the alignment is further to the west than the Order route and again is likely to be the track to point X..

30. The second Order concerns land in Cave Road in the parish of Goodnestone. The plan shows Cave Road in the vicinity of point D. At point D a short spur is shown in the same position as the southern tip of the Order route. The route is shown shaded ochre and open suggesting it continued, but there is no indication how far, or on what alignment.
31. The value of the evidence from the orders of exchange is mixed. The colouring of the route between A and B might suggest public status, but the annotation "From Cricksall Court" is at odds with this. The evidence relating to point D is insufficient to add anything of substance to an understanding of the route depicted.

*OS 1;1,250 County Series 1<sup>st</sup> Edition (1872), 2<sup>nd</sup> Edition (1898) and 3<sup>d</sup> Edition (1907)*

32. On the 1<sup>st</sup> Edition the Order route between A and B is shown as an enclosed road, described in the Book of Reference as "Road Etc". A short section of the Order route north from point D is also shown as an enclosed route between buildings and is described in the Book of Reference as "Road". The enclosed feature is co-extensive with the land described as "Claypits". Beyond this the Order route north to point B is depicted as a narrow feature between two pecked lines. The route is not annotated. This is the earliest depiction of a through route from B to D on an alignment consistent with the Order route.
33. The Second Edition depicts the Order route in the same manner as the First, but the section south from point B (in the parish of Wingham) bears the annotation "FP" and the section south of C (in the parish of Goodnestone) is annotated "BR".
34. On the Third Edition the annotation "FP" has been changed to "BR".
35. OS maps are good evidence of the existence of the physical features depicted but are not evidence of status. The series of maps demonstrate that a through route consistent with the Order route was available by 1872, although the physical characteristics of the section A to B, and possibly a short section north from point D, were of greater substance than for the remainder of the route. The annotations "FP" and "BR" are an indication of how the surveyor perceived the use of the route rather than an attribution of public status. The fact that the Second Edition map annotates one part of the route as "FP" and another as "BR" is confusing but might suggest that these sections of the route were at that time being used in different ways.

*Bartholomew's Map (1904)*

36. The Order route is not shown on any edition of Bartholomew's map.

*East Kent Light Railway Plan and Book of Reference (1910)*

37. The plan and book of reference were produced in support of a proposal to build a railway using statutory procedures. The proposal was dropped, and the line never

built. The illustration of the proposed railway line shows it crossing the Order route. In the Book of Reference, the Order route is described as a “Bridle road” in the “ownership or reputed ownership” of The Eastry Rural District Council. The same illustration, dealing with a different route being crossed by the proposed railway line, describes it as a “Public bridle road”.

38. The proposal to build this railway line was abandoned at an early stage. The Book of Reference for this line shows no amendments, whilst the entries for a different line within a similar scheme, which was progressed, show numerous amendments to the details, including ownership. This might suggest the proposal for this line did not receive the level of scrutiny applied to lines which were built, and that the details contained in the plan and book of reference may have contained errors.
39. The attribution of ownership, or reputed ownership of the Order route to Eastry Rural District Council is not corroborated by any other evidence and appears illogical. The evidence of the Finance Act map, which is contemporaneous with the Railway proposal, suggests that ownership of the Order route between points B and D was not distinguished from ownership of the adjoining land.
40. The description of the Order route as a “bridle road” might lend some support to confirmation of the Order, but two factors weigh against this. First the attribution of ownership to Eastry RDC casts doubt on the reliability of that evidence, second, the description of the Order route as a “bridle road” rather than a “public bridle road”. Given these factors I am unable to attach significant weight to this evidence.

#### *Finance Act (1910) and Valuer’s Field Book*

41. The section of the Order route between points A and B is shown on the Finance Act map as un-numbered and uncoloured and thus excluded from taxable hereditaments. There are various possible explanations for this treatment of the route. The most common reason is that the route was a public vehicular highway but a route in various or unknown ownership and used in common to access adjacent lands would often be treated in the same way.
42. The scheme of the Act was to exclude a vehicular highway from taxable hereditaments, but lesser public rights would be dealt with by deduction. The remainder of the Order route between points B and D is shown within coloured and numbered hereditaments, and thus taxable. Deductions are made for the hereditaments crossed by the Order route B to D, but as these include other known public rights of way it is not possible to distinguish what allowance was made for what route.
43. The evidence from the Finance Act map provides some evidence to support a status higher than footpath for the section A to B but is neutral in relation to the remainder of the Order route.

#### *Definitive Map process*

44. In the survey process for compilation of the First DMS, Staple Parish Council claimed the Order route south from B as “Footpath from Church Lane....”, Church Lane apparently being a reference to the track from Staple to Crixhall incorporating A to B. No claim was made for a route between A and B, nor indeed for the remainder of the track to Crixhall. There is no obvious means of access from Staple to point B without using the Order route from A. This could suggest the Parish

Council believed the public had a right to use that section and that such right was of a status not capable of being recorded on the DMS.

45. Goodnestone Parish Council claimed the Order route so far as it lay within their parish as a footpath, in part over a ploughed field and through a Hop Garden and with various gates, although with the comment that there was “no trace. Not used”.
46. The Draft DMS for the parish of Staple included the Order route A to B as “Cart Road Bridleway and Footpath” (CRB), The Order route south of point B, insofar as within the parish, was shown as a footpath.
47. The Draft DMS for Goodnestone showed the Order route within that parish as a footpath.
48. The First DMS recorded the Order route A to B as a CRB and the remainder as a footpath.
49. Following review, the section of the Order route A to B was reclassified as a footpath and the route in its entirety has retained this status.
50. Taken as a whole, the evidence of the DMS process gives no support to the Order route section B to D having any status higher than a footpath. The initial exclusion of the section A to B and subsequent recording as a CRB lends some weight to that section being thought to have a higher status, although on subsequent review no higher status than footpath was considered appropriate.

#### *Conclusions on documentary evidence*

51. No single piece of evidence is conclusive as to the status of the Order route. I am required to reach a conclusion on a balance of probabilities.
52. The northern section of the Order route, A to B is part of a longer route from the public road at Staple to Crixhall. The evidence shows the track from Staple to Crixhall to have been a distinct feature, of more ancient origin and independent of the remainder of the Order route B to D. I shall consider first the historic status of this section.

#### *A to B*

53. The documentary evidence demonstrates that a vehicular route from point A to Crixhall has existed from at least the late eighteenth century. Early maps show it as a through route, but later representations show the route from Staple (point A) leading to the complex of farm buildings at Crixhall, with no defined route through the farmyard. A separate route is shown emerging on the south side of the farmyard and leading to the highway. Whether a single route or two distinct routes, their purpose would appear to have been to provide access to Crixhall.
54. Much of the evidence is consistent with the track from A to Crixhall being either a public road or a vehicular occupation way providing access to the private land and buildings at Crixhall. None of the evidence prior to the emergence of the route B to D is suggestive of A to B being anything other than a vehicular route.
55. The factors that might point to public status include the depiction of the route as a cross road on early mapping, the description and shading of the route on the tithe map and the fact that it was uncoloured on the Finance Act map. None of these factors are individually of sufficient weight to demonstrate public status but

collectively amount to some evidence of substance that the track from A to Crixhall was a public right of way of a status greater than a footpath.

56. There are however factors which do not support this section of the Order route being a public road and are more suggestive of it being part of a private occupation road. These include the description of the road as private in the OS Wingham Field Sketch Book, the annotation on the Order of Exchange map of the route "From Cricksall Court" and the fact that no part of the route to Crixhall south of point B has been included on the DMS at any status.
57. I am required to determine whether, on a balance of probability the evidence demonstrates that the section A to B has the status of a bridleway, or possibly a higher status, and if so, what that status is. The burden of proof rests with the Applicant.
58. In assessing the evidence, I have regard to the fact that any conclusion in relation to A to B that relies upon the historical evidence prior 1872 must logically apply equally to the continuing route through to Crixhall.
59. The position is finely balanced, with evidence of substance on both sides of the argument. My conclusion as to the historic status of A to B comes down to reliance on the burden of proof. I am not persuaded that the evidence is sufficient to tip the balance in favour of the historic status of A to Crixhall being that of a public road. Accordingly, I will consider whether the evidence in relation to the section B to D is sufficient to demonstrate bridleway status, and if so, what the implications are for the section A to B.

#### *B to D*

60. The earliest representation of a route consistent with the Order route south of point B is on the 1872 First Edition OS. The fact that no map or other evidence has been produced showing the route at an earlier date does not preclude the possibility that the route was established before 1872, but there is no evidence to that effect. Indeed, the evidence demonstrates that there was an earlier route serving a similar purpose, but on a different alignment, to the west of the Order route. The impression given is that the earlier route from point B via point X was in common use to provide access from Staple to Goodnestone, but fell out of favour, perhaps as a result of Twitham Farm being destroyed by fire in 1875 and was replaced by the Order route from the later part of the nineteenth century, before itself falling into disuse by the mid-twentieth century.
61. There are three pieces of evidence principally relied upon in support of this section of the Order route having bridleway status; the annotation on the Second and Third Editions of the OS, the depiction of a spur of road at point D on the tithe and exchange maps and the description of the route on the East Kent Light Railway plan of 1910.
62. The OS records physical characteristics of features on the ground as they appear to a surveyor. It does not purport to distinguish between public and private rights of way.
63. On the 1872 OS First Edition the Order route B to D is shown as a narrow feature between double pecked lines but is not annotated. The annotation on subsequent editions is confusing, with the Second Edition annotating part of the route "FP" and part "BR" and the Third Edition showing the entire route annotated "BR". An



explanation for the different annotations on the Second Edition might be that the sections of the route had differing types of use at that time. The evidence shows that hops were grown on the fields to the north of the Order route. It is suggested that that these would have been taken from the hop garden to the oast houses at Cave Lane, in which case the Order route would have been an obvious route to use. The traffic associated with this activity could explain why this section of the route might have appeared to an OS surveyor as a bridle road whilst the section south from point B, which would not have been involved in hop cultivation, was used only on foot. On such a hypothesis the use of the route for the commercial purposes suggested would have been in the nature of use of a private occupation way.

64. Both the Goodnestone tithe map (1841) and the Goodnestone Order of Exchange plan (1872) depict a spur of an enclosed route at the junction of the Order route with Cave Lane. Neither plan shows anything more of the route than a representation of an entrance from the road. The representation is consistent with the OS First and subsequent editions which show a cul-de-sac section of enclosed track heading north from point D. This enclosed feature terminates after a short distance at a field boundary (point 3 on the decision map). Beyond the field boundary the Order route is shown continuing as a narrow feature between double pecked lines. The fact that the enclosed route does not continue may suggest that it served a particular purpose associated with the use of the adjoining land. To the extent that the route was used by the public, such use would have been limited to that accommodated by the track north of point 3.
65. I have concluded that the evidence of the Railway plan and book of reference is unreliable, and I have explained why I am unable to place significant weight on the description of the route as a bridle road as support for public bridleway status.
66. The evidence suggests that the Order route from B to D was used initially by the public for only a relatively short period. The first evidence of the route's existence is the 1872 OS and by the time of the parish survey in the 1950s it was said that there was 'no trace' of a route and that it was not used. More recently it would seem that the route has attracted pedestrian use following it being recorded on the DMS.
67. Had the route been a well-used public thoroughfare, whether as a footpath or a bridleway, I would have expected its reputation to persist into the mid-twentieth century when the parish survey was undertaken. The fact that it did not suggests perhaps that the use of the route in the late nineteenth and early twentieth was associated with a particular purpose which came to an end. The likely explanation is perhaps to be found in the growing of hops. Use of the route for that purpose would not be use by the public.
68. There is also physical evidence against the Order route having been anything more than a footpath. The evidence of the gate posts and self-closing pedestrian gate at point 1, possibly replicated at C, is persuasive.
69. The standard of proof that I am required to apply is the balance of probability. The burden of proof rests with the Applicant. Recognising that the evidence suggestive of the route having public bridleway status is limited and uncertain in both substance and duration, and that there is no convincing evidence to suggest that the route had a reputation locally as a bridleway, I find that overall, it is insufficient

to demonstrate on a balance of probabilities, that the Order route has acquired a status higher than that of a public footpath.

70. In the light of my findings in relation to the status of the route B to C it is not necessary for me to address further the status of the route A to B.

### **Other Matters**

71. Many people have, through objections, and by signing a petition expressed their opposition to the Order route being recorded as a bridleway. Many have expressed concerns about the suitability and safety of the route and environmental damage they believe will result from the Order being confirmed. I understand the reason for the concerns expressed but I have been unable to take account of such matters. My task is confined to determining whether the evidence shows that the route has the historical status claimed.

### **Overall Conclusion**

72. Having regard to these and all other matters raised I conclude that the Order should not be confirmed.

### **Formal Decision**

73. The Order is not confirmed.

*Nigel Farthing*

**Inspector**

**COPY OF ORDER MAP - NOT TO SCALE**

