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# Appeal Decision

by **Susan Doran BA Hons MIPROW**

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

Decision date: 09 December 2024

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## Appeal Ref: ROW/3335673

- 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 Kent County Council not to make an Order under Section 53(2) of that Act.
- The Application dated 8 December 2018 was refused by Kent County Council on 30 November 2023.
- The Appellant claims that the appeal route from Peafield Wood Road to Dane Hill Road, Barham, Canterbury should be added to the definitive map and statement for the area as a Byway Open to All Traffic.

**Summary of Decision: The appeal is allowed**

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## Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act').
2. I have not visited the site, but I am satisfied I can make my decision without the need to do so.
3. The appeal concerns an application made by Hugh Craddock on behalf of the British Horse Society ('the Appellant').

## Main issues

4. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
5. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, 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, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic ('Byway').
6. As made clear in the High Court in the case of *Norton and Bagshaw* (R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994]), this involves two tests:

**Test A.** Does a right of way subsist on a balance of probabilities?

**Test B.** Is it reasonable to allege on the balance of probabilities that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

7. In relation to Test B, the Court of Appeal recognised in the Emery case (*R v Secretary of State for Wales ex parte Emery* [1998]) that there may be instances where conflicting evidence was presented at the schedule 14 stage. Roche LJ held that "...*The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.*"
8. The evidence adduced is documentary. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether a way has been dedicated as a highway.
9. However, there is no dispute between the Appellant and Kent County Council ('the Council') that the appeal route carries public vehicular rights. In its determination of the application, the Council concluded the appeal route is a full vehicular highway or carriageway maintainable at public expense, recorded in their List of Streets ('LoS'), and therefore should not be recorded in the DMS as a Byway. Disputing this, the Appellant's grounds of appeal are that the Council was incorrect to determine there had been no discovery of evidence in relation to the application; and incorrect to determine that the appeal route does not satisfy the definition and character of a Byway test.
10. Therefore, the main issue before me is whether there has been a discovery of evidence and whether the appeal route satisfies the relevant tests such that it should be recorded in the DMS as a Byway and, if so, the Council be directed to make an Order accordingly.
11. The test to be satisfied is on the balance of probability.

### **Reasons**

12. The appeal route commences at Dane Farm, Dane Hill Road and runs in a north-westerly direction along a defined way between the Farm buildings to a track along the eastern boundary of Peafield Wood, then turns south-west along the track to the junction with Peafield Wood Road, in the Parish of Barham.

### **Documentary evidence**

13. The appeal route is depicted in the historical record as a physical feature as early as 1769 (Andrew's County Map) and appears consistently on County and other commercially produced maps, and on Ordnance Survey ('OS') mapping through to 1945. On one OS map, for example, it is identified as an 'unmetalled road'. However, none of these sources provide a status for the appeal route. The Tithe map (1842) depicts it unnumbered and separate from adjoining land parcels. A Sale Plan (1868) annotates it with a destination ('To Wigmore Court'). The OS

Book of Reference (1860) describes it as a 'Road' and it is coloured on the First Edition OS map in like manner to Dane Hill Road and Peafield Wood Road. Like other known highways in the area, it is not excluded from land holdings in the Finance Act records (1910). However, in relation to Dane Farm the Valuer's Field Book records, "*The land lies on either side of road which is in very bad order and practically impassable in the winter*".

14. When the DMS was drawn up in the 1950s, the appeal route was not claimed by the Parish Council. The Draft Map (1952) shows it coloured yellow in like manner to publicly maintained roads. A note states, "*This section is non-maintained unclassified county road, and will probably be indicated at Provisional Stage by a broken yellow line*". Yet, it is not marked on the Provisional Map, and does not appear as a public right of way on the DMS (1952), Draft Revised Map (1970), Definitive Map (1987), or current Definitive Map (2013).
15. Rural District Council Minutes (1899) refer to the "*bad state of road leading from Dane Farm towards Covet Wood*" and in relation to 'Dane Road', "*this road appeared to be a public highway and now requires repair*". These references may relate to the appeal route. Its use by vehicles (and its physical appearance at Dane Farm) is evidenced in two photographs of a classic car trial (1937). An aerial photograph (1946) shows it as a defined way.
16. Council records include a Highways Inspectors Map (1953) showing it marked with a solid blue line representing 'unclassified county roads (maintained)' and numbered 'E123', an annotation in ink "*Schedule C*" and in pencil "*Include Shown as C.R. on F.P. map*". The Council's LoS maintainable at public expense identifies the appeal route as 'Dane Hill Path'; and the Canterbury Local Street Gazetteer (2003) records it as an 'adopted path'.
17. The landowner believes the appeal route is a private farm track added to the LoS by error. They have never witnessed its use by the public and refer to the presence of (locked) gates, which it seems have been in situ for many decades.
18. On balance, the consistent depiction of the appeal route, particularly in the early mapping, is suggestive of a way seemingly forming part of the local road network, and likely to have been regarded as a public highway of some description. When the DMS was drawn up, it was not claimed and was considered to enjoy full highway rights, as indicated by its yellow colouring on the Draft Map. This is also reflected in the appeal route being recorded in the Council's LoS. There is no evidence of any legal event affecting its status. It follows it is more likely than not that the appeal route enjoys public vehicular rights.

### ***Discovery of Evidence***

19. For an order to be made, there must be a 'discovery of evidence' (paragraph 5). Further, the surveying authority has a duty to make an order where the discovery of evidence supports a reasonable allegation that a right of way subsists, or that it does subsist.
20. Amongst the submissions available to me is a legal opinion provided to the Trail Riders Fellowship concerning the recording of Byways in the DMS. A summary of this opinion is as follows, "*There is a duty on OMAs to record BOATs in the DMS but only in circumstances where such a route was wrongly omitted from the DMS – i.e. following the "discovery ... of evidence" that it should be so recorded. BOATs*

*are therefore a residual category that is not the focus of the legislation. Generally, where a right of way is an ordinary unclassified road recorded in the authority's list of streets of highways maintainable at public expense, there will be no scope for the "discovery ... of evidence" that would justify an amendment to the DMS under WCA 1981 s.53(3)(c)(i)".*

21. It is the Council's position that there has been no such "discovery of evidence" since the appeal route is a full vehicular highway, not required to be recorded in the DMS. Accordingly, no specific determination was required in this case as the evidence has always indicated the appeal route is a full vehicular highway.
22. When the DMS was being drawn up under the National Parks and Access to the Countryside Act 1949, three categories of way were recorded – footpaths, bridleways and Roads Used as Public Paths ("RUPPs"). This latter category was defined as a "*highway other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used*". This implied a route over which there was a vehicular right but in practice was used mainly by walkers and equestrians. Since the existence or otherwise of public vehicular rights was not conclusive, subsequent legislation required RUPPs to be reclassified and routes carrying vehicular rights, but which were mainly used on foot or horseback, were to be recorded as Byways or restricted byways.
23. As stated above, the appeal route was not claimed for inclusion in the Parish Survey when the DMS was being prepared. Indeed, the base map was pre-populated with known 'maintainable highways', the appeal route being coloured yellow (indicating an unclassified road). This suggests it was considered to form part of the ordinary road network at the time, so was effectively excluded from the Draft Map. However, a contemporary note indicates it was regarded as an unclassified road that was *not* maintained (paragraph 14). A 1953 record, on the other hand, colours it blue denoting a maintained unclassified road (paragraph 16). How the status of the appeal route is described currently by different teams within the surveying authority suggests some uncertainty about it. This varies from a restricted byway due to the presence of gates, to a vehicular highway based on research carried out, and to a 'Path' in the LoS. A LoS is a record of highways maintainable at public expense, rather than necessarily evidence as to their legal status. Furthermore, no enforcement action has been undertaken to remove the gates that have obstructed the way for many years.
24. Section 53(3)(c)(i) of the 1981 Act is triggered upon the discovery of evidence previously unknown to the surveying authority. It is not known what evidence was considered in 1952 as regards the appeal route. The application included a wide range of documentary sources, some of which the Appellant maintains would not have been considered before, when, or if, the status of the appeal route was previously determined. In terms of the evidence adduced, some of it will undoubtedly be new, not least the Finance Act records which were not available in 1952. The test is whether evidence has been discovered which when considered with the evidence as a whole, is sufficient for an order to be made. If met and it can be demonstrated that a way not recorded in the DMS subsists or is reasonably alleged to subsist, with the evidence adduced examined against each category of way and/or the status of way claimed. As described above, it is accepted that the documentary sources here indicate the existence of public vehicular rights.

25. The Appellant maintains there is no evidence that the Council applied its mind to whether the appeal route satisfied the RUPP test in the 1950s and should have been recorded in the DMS then. Neither have they done so as regards whether it should be recorded in the DMS now as a Byway.
26. As stated above, the legislation provides for a vehicular highway to be recorded in the DMS, with both a restricted byway or a Byway arguably distinct from an 'ordinary road' or carriageway which may be more appropriately recorded in a LoS. There is evidence to be weighed in the balance that the appeal route was not maintained as an 'ordinary road' or carriageway, with evidence in the Finance Act records, 1937 photographs, the 1952 Draft Map annotation and lack of removal of more recent obstructions relevant. To decide if the appeal route is eligible to be added to the DMS I consider the evidence should be examined afresh and evaluated against the definition of a Byway (paragraph 28). The 'Masters' case (*Masters v Secretary of State for the Environment, Transport and the Regions and Somerset County Council [2000] EWCA Civ 249*) (paragraph 32 below) is also relevant.
27. The Council as the surveying authority has a duty to keep the DMS under continuous review (paragraph 4). Having regard to the above, I consider there has been a "discovery of evidence" under the 1981 Act. It follows that consideration should be given as to whether the appeal route is eligible to be included in the DMS as a Byway. I turn next to consider the definition and character of a Byway.

#### **Definition and character of a Byway**

28. Section 66(1) of the 1981 Act defines a Byway 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 purposes for which footpaths and bridleways are so used*".
29. Defra Circular 1/09 (at paragraph 4.42) as regards unclassified roads on the LoS states that "*In relation to an application under the 1981 Act to add a route to a definitive map of rights of way, the inclusion of an unclassified road on the 1980 Act list of highways maintained at public expense may provide evidence of vehicular rights. However, this must be considered with all other relevant evidence in order to determine the nature and extent of those rights. It would be possible for a way described as an unclassified road on a list prepared under the 1980 Act, or elsewhere, to be added to a definitive map of public rights of way provided the route fulfils the criteria set out in Part III of the 1981 Act. However, authorities will need to examine the history of such routes and the rights that may exist over them on a case by case basis in order to determine their status*".
30. In addition, section 67(2) of the Natural Environment and Rural Communities Act 2006 excludes the extinguishment of public rights for mechanically propelled vehicles by virtue of a route's inclusion on a LoS.
31. The Council maintains that as a full publicly maintainable vehicular carriageway, it cannot be assumed that vehicular use would not be predominant if the appeal route was open, available, and properly maintained to a suitable level, like any other minor road. The Appellant believes there is little likelihood of this. However, the Council is concerned there is a risk that more country lanes and tracks that should be maintained by them will not be, resulting in the character of those routes changing out of neglect (rather than disuse) and many such routes falling to be



added to the DMS by default rather than by an accurate representation of how they should be properly maintained and recorded. Accordingly, for the appeal route to be suitable for full motor vehicular use (as part of the ordinary road network) would require the Council to remove the obstructions, and maintain it to a suitable standard, at which point, were vehicular use to be predominant, it would no longer satisfy the character test. Further, if the appeal were to be granted the Council says it would need to engage in a wholesale re-examination of routes that had fallen into disuse.

32. In *Masters*, Roch LJ commented that, *“Parliament did not intend that highways over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than vehicular traffic because they were more suitable for use by walkers and horse riders than by vehicles”*. Accordingly, a public road which otherwise may not be eligible to be recorded in the DMS, may be recorded therein if it satisfies the definition of a Byway, which in turn depends on the ‘character test’.
33. As previously stated, the inclusion of a route in a LoS is not in itself conclusive as to it being a carriageway, although it may provide some evidence of the existence of vehicular rights when considered together with all other relevant evidence. Given the above, I see no impediment to such a way being recorded in both the DMS and LoS, so long as it fulfils the relevant criteria set out in the 1981 Act. Each situation should be considered on its own merits to determine the nature and status of the existing rights. The historical evidence adduced in this case indicates the appeal route was once metalled, though records and photographs over many decades evidence its poor state of repair. Accordingly, I consider the appeal route is capable of being recorded in the DMS as a Byway, notwithstanding it currently being recorded in the Council’s LoS.
34. A copy of an Order decision (Planning Inspectorate reference ROW/3289014) has been provided in which it was determined not to confirm an order to add a Byway to the DMS, whereby if cleared of obstructions (and notwithstanding a Prohibition of Driving Order in place) it would have the character, appearance and infrastructure of the lane which forms its continuation and which is part of the ordinary road network. In the present case, however, the appeal route currently does not have the same character as the roads to which it connects, whether the obstructions are removed or not.
35. The character test in *Masters* provides that where a way had fallen into disuse, it satisfies the definition of a Byway if its character makes it more likely to be used by walkers and horse riders than by vehicular traffic because it is more suitable for such use than use by vehicles. Whilst the appeal route has been obstructed and unavailable for use for some time, its character on the available evidence is more akin to that of a Byway, an unsurfaced track.
36. Having regard to the above, I consider the appeal route is not precluded from being considered for addition to the DMS taking into account in particular the *Masters* character test for a Byway which is applicable in this case, the existence of public vehicular rights over the appeal route as agreed by both parties, and the advice contained in Circular 1/09.

### **Width**

37. The Appellant submits if it is directed that an Order be made, the appeal route's width should be scaled off from the Second Edition OS County Series map of 1896 (published 1898). This would provide a 6 metres width for a length of 60 metres from the commencement of the appeal route at Dane Hill Road, extending between buildings abutting it, reducing to 4.7 metres through its central section, then 3.5 metres to its termination at Peafield Wood Road. Conversely, the Council considers a reasonable width of 3 metres throughout should be applied, it being unlikely and unreasonable for the appeal route to be wider, especially given that Dane Hill Road is less than 3.5 metres for most of its length as is Peafield Road.
38. I consider that determination of the width should be based on the evidence provided, in this case the historical record. Only where there is no such clear evidence should the width be based on what is reasonable, the type of use being taken into account. The issue of width is determinable at the confirmation stage.

### **Modifications**

39. It is suggested by the Appellant that the plan accompanying the application for a definitive map modification order may not show the route connecting with Dane Hill Road as it should. I consider that any order made should correspond with the description and plan provided at the time the Application was made. It is open for any possible discrepancies to be rectified at the confirmation stage.
40. In addition, it is suggested that any order resulting from the appeal should expressly record that the route is not subject to any limitations, such as gates. In my view, the recording of limitations should reflect the circumstances at the time the route was dedicated for use by the public.

### **Conclusion**

41. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

### **Formal Decision**

42. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the Kent County Council is directed to make an order under Section 53(2) and Schedule 15 of the 1981 Act within 3 months of the date of this decision to modify the Kent County Council Definitive Map and Statement by adding a Byway as shown on the plan attached the application dated 8 December 2018. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

*S Doran*

**Inspector**