Winkland Oaks bridleway
FPS/W2275/14A/23
BHS comments on surveying authority's statement

A. Introduction

A.1. This is the response of the appellant, Hugh Craddock on behalf of the British Horse Society, to the statement submitted by the surveying authority, Kent County Council, in reply to the appellant's statement of appeal against the authority's refusal to make an order upgrading footpath EE427 to bridleway at Winkland Oaks Farm, Sutton next Ripple, Kent. The refusal represented the determination of the appellant's original application to the authority for a definitive map modification order to upgrade footpath EE427 to bridleway.

A.2. Reference is made to the appeal map, at page 8 of the statement of appeal, and the points therein labelled C, D and E. The way C to D lies (and has always lain) in the parish of Ripple; the way D to E in the parish of Sutton.

A.3. The appellant relies on its statement of appeal, which includes the available evidence in connection with the appeal. These comments relate solely to points of contention between the authority's determination of the appellant's original application for a definitive map modification order, the appellant's statement of appeal, and the authority's statement in connection with that appeal. It does not purport to set out the appellant's full case.

A.4. The appellant refers below to the grounds of appeal referred to in its statement of appeal (item I.E) and in the authority's statement in reply.

B. Ground (a): the physical 'coming into existence' of EE427

B.1. The appellant stated in its grounds that:

> The authority was mistaken to conclude (decision report, annexe B, para.143) that: 'footpath EE427 does not appear to have existed as a physical entity in its entirety until some time later.' There is evidence of existence in the Sutton and Ripple tithe maps prepared under the Tithe Act 1836 (item IV.D [in the statement of appeal]). Prior to this date, no documents exist to prove the question either way.

B.2. The authority's comment supported an analysis that the appeal way is later in origin than footpath EE451, Hangman's Lane, 'which is consistently shown as a through-route on the earliest historic mapping' (and which is now the subject of a definitive map modification order to upgrade footpath EE451 to bridleway). Footpath EE451 from Ringwould terminates on the Ripple to Martin road opposite C.

B.3. Thus the authority was able to dismiss the appellant's submissions that the appeal way was a continuation, as a bridleway, of the probably ancient Hangman's Lane between Ringwould and C.

B.4. The National Archives copy of the tithe map for Sutton, taken with the tithe map for Ripple (statement of appeal, item IV.D), present the appeal way as a continuous route in existence at the time of the tithe commutation survey — around 1841.

B.5. The authority notes in its appeal statement (para.9) that the appeal way within Sutton parish (*i.e*. C to D) is not shown on early nineteenth century maps, and concludes:

> that the Sutton section of the claimed route is unlikely to have come into physical existence until at least 40 years later than the section of the claimed route south of Winklands Oaks Farm.

However, that conclusion relies on an assumption that a field bridleway — as the appeal bridleway was and remains, not enclosed from the fields through which it passes — would be marked on maps of this era. Certainly, Hangman's Lane is so marked — but other bridleways and restricted byways in the vicinity are not. Restricted byway and bridleway EE428, ER52A and ER52, which together connect Dover Hill to West Langdon, appears on none of the contemporary maps — Mudge-Faden one-inch map of Kent (item IV.A); Greenwood's map of Kent (item IV.B); Ordnance Survey, one-inch Old Series map of Kent (item IV.C) — while various other ways recorded as footpaths on the Sutton tithe map are also omitted. The Old Series map shows no paths (as opposed to roads or tracks) in this part of East Kent.[1] The Greenwood map does not include bridleways or footpaths in the key.

B.6. The appeal way was in existence at the time of the tithe survey. There is no reason why it should not have been in existence long before that time, and certainly during the early nineteenth century. Therefore, equally there is no reason to conclude that it is not coeval with Hangman's Lane, and part of a continuous route of the same status throughout. There is no evidence to argue (as the authority does, para.10):

> that the claimed route did not come into physical existence as a single entity until some time (arguably several decades) after Hangman's Lane (EE451).

It can be concluded only that there is no evidence either way as to provenance, and therefore it cannot be said with any assurance that the appeal route is later in origin, as a bridleway, than Hangman's Lane.

C. Ground (b): the Tithe Map designation of 'public roads and waste lands'

C.1. The tithe map and apportionment for Ripple classifies the appeal way between C and Winkland Oaks Farm as within a class of 'Public Roads and Waste Lands'.

C.2. The authority states (para.12) that:

> It is also well established that Tithe Maps cannot be relied upon to distinguish between public and private roads as this was not their primary purposes, such any reference to a public road (in the absence of any other sources supporting public status) is not to be taken as an authoritative assessment of it being a public road in the modern sense.

1 In *The First Ordnance Survey map*, Hellyer, R and Oliver, R, 2015, it is stated (p.95) that: 'Most Old Series sheets show some paths, by single fine dotted lines, although their density is far less than that indicated on later one-inch mapping. At present it is unclear whether such paths were foot paths or bridle paths.'

Reference is given to authority in *Maltbridge* (a copy of which is appended).[2]

C.3. First, *Maltbridge* is not authority for the submission made by the authority. Sullivan J (as he then was) said[3]:

> The Tithe map and apportionment evidence is undoubtedly relevant as to both the existence, and physical extent, of a way at the relevant time (see the Beynon and Loughlin cases and Sauvain). Because both public and private roads were not tithable, the mere fact that a road is shown on, or mentioned in, a Tithe Map or Apportionment, is no indication as to whether it is public or private.
>
> But if detailed analysis shows that even though he was not required to do so, the cartographer, or the compiler of this particular map and apportionment, did in fact treat public and private roads differently, whether by the use of different colours, the use or non-use of plot numbers, or other symbols, or in schedules or listings, I do not see why evidence based upon such analysis should not be admissible as to the existence, or non-existence of public rights of way. Whether the analysis does lead to such a conclusion, and if so, what weight should be attributed to the conclusion is a matter for the Inspector. Since it was not one of the purposes of the 1836 Act to distinguish between public and private roads, such information as can be derived from the Tithe Map and Apportionment cannot be conclusive, and must by its very nature be tentative, but the Inspector was not obliged, as a matter of law, to conclude that Mr Millman's analysis and conclusions on this issue were of no probative value whatsoever.

C.4. Thus, 'if detailed analysis shows that…the compiler…did in fact treat public and private roads differently…I do not see why evidence based upon such analysis should not be admissible as to the existence, or non-existence of public rights of way.'

C.5. In relation to the Ripple tithe map and apportionment, the appeal way between C and Winkland Oaks Farm expressly is classified as 'Public Roads and Waste Lands', and it is not suggested that (and there is no evidence to suggest) it was considered to be waste land — indeed, it obviously was and remains a road of some kind. Thus, *per* Sullivan J, such evidence is 'admissible as to the existence, or non-existence of public rights of way'.

C.6. Secondly, it is widely said (in, *inter alia*, Maltbridge*)* that the tithe commutation survey was not required to identify or distinguish public from private roads.[4] The task of those involved in implementing the 1836 Act was to ensure that the existing tithes were established, if necessary, on a monetary basis; and to calculate the amount of rent charge due on tithable land.[5] Land was exempt from liability if it was barren and unproductive. Both private and public roads might be classified as unproductive. Equally, both private and public roads might nevertheless yield useful grazing, and give rise to a liability to rent

2 *Maltbridge Island Management Company v Secretary of State for the Environment and Hertfordshire County Council* [1998] EWHC Admin 820, [1998] EGCS 134, [1998] Lexis Citation 5005.

3 P.11.

4 See, generally, Planning Inspectorate, *Consistency Guidelines*, para.8.2: '…tithe maps were not intended to establish or record rights of way. … It is dangerous to assume the maps to be proof of something that it was not the business of the Commissioners to ascertain…'.

5 *Tithe map case studies*, J Andrews, 1994, *Rights of Way Law Review*, s.9.3.67

charge. But the assessment was not indifferent to status. An enclosed public road, which was maintained by the parish, and on which the grazing (if taken) did not belong to any particular person but might be grazed in common as waste, would be excluded from assessment, whereas an unenclosed public field road, on which the grazing might be taken by the landowner while grazing the field as a whole, might well be liable to assessment in the usual way (as part of the field). On the other hand, an enclosed private road, with generous grazed shoulders or verges to any metalled road, ought to be liable to assessment.

C.7. Thus the status of a road, while not itself a specific requirement of the survey documents, was relevant to determining the output of the survey. Notably, an enclosed way with significant grazing capacity ought to have been classified differently depending on whether the grazing was vested in an individual landowner, or waste under the control of the parish or grazed in common by farmers and others with rights of common. Even then, status would not necessarily be determinative of the position — a privately-maintainable public road would be subject to public rights of way, but the land was held privately and could be grazed by the owner.

C.8. Where, therefore, a tithe survey expressly records that certain ways were 'public roads', the finding is not merely immaterial, or even incidental, but necessary to the conclusions of the survey. The surveyor allocated land to the class of 'public roads' because they were both public highways and that status was relevant to assessment to tithe rent charge (and invariably, the surveyor would have concluded that such public roads were excluded from liability). Private roads might also have been excluded from liability, but they would need to be assessed on their merits, *qua* private roads — and they would not have been classified as 'Public Roads and Waste Lands'.

C.9. It is therefore submitted that the classification in the Ripple tithe map and apportionment of the appeal way between C and Winkland Oaks Farm as a public road is not only admissible as to the existence of a public right of way, but of substantial weight. And, as the statement of appeal makes clear (para.IV.D.8), the tithe survey was conducted under rigorous local scrutiny. The owner and tenant of Winkland Oaks Farm cannot have been unaware of the findings.

C.10. The authority states (para.13) that:

> …this designation [as 'public road'] provides evidence of some form of public status, but it does not automatically follow that that status is anything higher than a right of way on foot.

The appellant disagrees. The term 'public road' is not a synonym for a public footpath: at its most extensive, it is a synonym for a public bridle road or carriage road. Nor is there any reason why the survey would have excluded this part of the appeal way from assessment if it were only a public footpath, for such status would make no difference to liability. There is no suggestion nor claim that any footpath has been included in those ways classified as 'Public Roads and Wastes'.

C.11. Finally, the authority states (para.14) that the way classified as a public road (*i.e.* parcel 194) terminates, at its northern end, at the entrance to parcel 173 (described in the apportionment as 'Barn Stables Shed & Yards'), and then resumes as an unnumbered (but apparently coloured faded sienna, in common with other public roads) enclosed way to

and slightly beyond the parish boundary with Sutton at D. The authority therefore concludes:

> …in so far as any public route might have existed, it did so, according to the Tithe Map, only as far as the entrance to the farmyard.

C.12. Again, the appellant disagrees. The farm yard (as a summary description of parcel 173) was also barren, and unlikely to be liable to rent charge. It comprised more than the public right of way through the farm yard, and therefore the road did not need to be, nor was, separately identified. That part of the appeal way north of the farmyard was coloured sienna (in common with parcel 174) and was about 60m in length (excluding that part shown outside the parish and north of D). It was not braced with any other parcel, and may have been included in the calculation of the area of parcel 194 (and of public roads and waste generally). It is reasonable to conclude that it was regarded as a continuation of the public road, but being *de minimis*, not expressly labelled as such.

C.13. The appellant notes also that the Ripple draft map identified the whole of the way between C and D as a 'Cart Road Footpath', and therefore as a public carriage road, and it remained so identified until the determination of the authority's Special Review in 1983 (see section H below).

C.14. There is a further difficulty with the authority's position as to the status of the appeal way between the farmyard and D. If correct, it posits a public road, or a public bridle road (see para.C.10 above for the appellant's position excluding the possibility of only a public footpath), which terminates in the farm yard with no public continuation (or at best, a continuation as a public footpath). That is inherently unlikely. There is no hamlet or place of public resort at Winkland Oaks Farm which would explain the establishment of a public road terminating at the farmyard. The only plausible explanation is that the public road does continue beyond the farmyard, and the supporting evidence is that it continues as a bridle road. The possibility is left open that it continues as a public road, but there is insufficient corroborating evidence.

D. Ground (c): the depiction of the claimed route on the First Edition OS Map

D.1. The appellant does not disagree with the authority's statement at paras.14–16, save as to the concluding remark at para.16:

> Indeed, the fact that this part the claimed route appears not to be as historic in nature as the remainder (as set out above) tilts the balance, in the County Council's view, in favour of the latter.

That remark is longer tenable in the light of the submission at section B above in relation to ground (a).

E. Ground (d): the Finance Act 1910 records

E.1. The authority concedes (para.17) that:

> …the Finance Act 1910 information neither supports the case for a Bridleway upgrade (on the one hand), nor confirms that no such right of way existed (on the other), and therefore does not assist in the determination of this matter.

E.2. However, the authority does not make its concession gracefully. The opening words of para.17 claim that:

> …it is slightly puzzling and surprising that no deduction was made for rights of way on the Finance Act 1910 records…

E.3. A full explanation is given by the appellant in its statement of appeal at IV.H.10–11 why the absence of any deduction for rights of way on the hereditament — even where the right of way was known to and accepted by the landowner — may be perfectly consistent with the landowner's best interests. There is nothing 'puzzling' nor 'surprising' about such circumstances if the operation of the legislation is properly understood, and they are commonplace.

F. Ground (e): the Electricity Supply Acts 1882 to 1922 notice

F.1. The authority questions whether the inclusion of the appeal way among the scheduled roads of which notice is given under the Electricity Supply Acts is any evidence of bridleway status: it notes that several of those ways are recorded as public footpaths today (including the appeal way).

F.2. The appellant explains (para.IV.K.18–20) that of the 32 scheduled roads, the three which are not today recorded as highways (of any status) are drove roads on Ash Level used to reach the marshes, the status of which is uncertain but which may well be public roads (item IV.K explains why all scheduled roads are highways of some kind).

F.3. It is then noted that, of the 8½ which today are recorded as footpaths, three (including the appeal way) are under application for upgrading, and the remainder are drove ways on Ash Level, where, again, the present recording as footpath is for want of investigation of higher rights for driving livestock, riding horses or vehicles.

F.4. The appellant therefore concludes that there is good evidence that the scheduled roads were regarded as either public bridle roads or carriage roads.

F.5. Moreover, this is consistent with expectation in the context of traditional respect for private property rights. The Electricity Supply Acts conferred powers on private electricity undertakers to lay their apparatus in certain streets and roads without compensation to the landowner. It was understandable that the undertaker might have rights to lay apparatus in public bridle roads and carriage roads (whether publicly or privately maintainable). It would have been considerably more intrusive to authorise apparatus to be laid in any footpath, whatever its character (whether agricultural or urban, cultivated or not, paved or not, well-used or abandoned, of uncertain width).

G. Ground (e): whether the claimed route formed a single entity with Hangman's Lane

G.1. The appellant addresses the question of whether the appeal way may be coeval with Hangman's Lane at section B (ground (a)) above.

G.2. While the provenance of the appeal way, and of Hangman's Lane, are a matter of some conjecture, it is submitted that it is a reasonable proposition that they together form a continuous through route, and there is no evidence to suggest that they are not of

consistent origin. As such, the proposition is a matter which can be taken into account by the decision-maker, and accorded such weight as thought fit.

H. Redesignation of Road Used as Public Path (RUPP)

Designation of appeal way C–D as RUPP

H.1. The authority observes that the appeal way, within Ripple (*i.e*. between C and D), did not appear on the parish map prepared by Ripple parish council. The appellant agrees — but it is not known whether the omission was because the way was considered not to be a right of way, or because it was considered to be a public road which was not eligible to be recorded on the definitive map and statement. It may be noted that a continuation of the right of way from D northwest to Dover Hill (albeit a footpath, numbered 20, and on an apparently incorrect alignment) was recorded on the parish map prepared by Sutton parish council.

H.2. The authority further observes that the appeal way between C and D was first included only on the subsequent draft map for Ripple, as a 'cart road footpath' (*i.e*. a RUPP). It states (para.29) that this:

> …is likely to have reflected a recognition of public rights of way on foot over a way which very clearly also served as access to Winkland Oaks Farm.

H.3. However, as the authority itself observes in following para.30, widely-circulated contemporary guidance correctly interpreted the legislation[6] to require that:

> …highways which the public are entitled to use with vehicles but which, in practice, are mainly used by them as footpaths and bridleways, should be marked on the map "C.R.F." and "C.R.B."

H.4. Thus, if the entry on the Ripple draft map correctly reflected statutory requirements, as interpreted in guidance, it was intended to identify a RUPP — that is,[7]

> "road used as a public path" means a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used.

A 'public path' being either a footpath or bridleway,[8] it follows that a RUPP must be a highway which is a carriageway.

H.5. The appellant concedes that the statutory requirements not always were correctly understood, and some RUPPs appear to have been identified where there was a public path subsisting over a private vehicular road. But that does not appear to be the case here, where — as the authority notes — the designation as Cart Road Footpath was added by the surveying authority at draft map stage, presumably on the initiative of the authority and not the parish council. It is reasonable to assume that the surveying authority was properly apprised as to the statutory requirements.

6 See National Parks and Access to the Countryside Act 1949, s.27(1) and (2), and the definition of RUPP in s.27(6).

7 National Parks and Access to the Countryside Act 1949, s.27(6).

8 *ibid*.

H.6. Thus the late designation of the appeal way between C and D as a RUPP supports the appellant's case that the way was believed, at the time, to be a public road — albeit one 'used by the public mainly for the purposes for which footpaths or bridleways are… used.'[9]

Redesignation of appeal way C–D as footpath

H.7. The appellant's statement of appeal (item I.H) refers to the downgrade in 1983 of the appeal way between C and D from RUPP to footpath following an abandoned Special Review.[10] The appellant submits (para.I.H.2) that the downgrade was unlawful in the light of the subsequent decision of the Court of Appeal in *Hood*.

H.8. The authority contends (para.33) that the reclassification was not unlawful,

> …because the 1970 Review Map was published prior to the judgement in the Hood case and, in the absence of any objection to the depiction of the claimed route as a Public Footpath during the relevant period…, the County Council had no power to refer its reclassification to the Ministry of Housing and Local Government.

H.9. However, as the authority itself summarises the judgment in *Hood* (para.32):

> …for the purposes of the Special Review and in the absence of any new evidence to the contrary, there was, by reference to section 32(4)(b) of the National Parks and Access to the Countryside Act [1949], a presumption that Bridleway rights were deemed to exist along routes previously shown on the Definitive Map at RUPP status.

H.10. The appellant accepts that, following the judgment in *Hood*, the authority had no power of referral of the downgrade to the Minister in cases (such as this one) where the draft revised map had been published following the Special Review, and there was no objection to the downgrade.[11] But the judgment of the court has the effect that the decision to downgrade the RUPP to footpath under the Special Review (irrespective of whether there was any subsequent objection) was incorrect and unlawful, notwithstanding that the unlawfulness was not fully recognised at the time, and no action was taken to quash it. In short, it should not have occurred. This appeal offers the opportunity to reverse that mistake.

H.11. The authority draws attention to the absence of any objection to the downgrade (para.31). In circumstances where the continuation of the RUPP from D to E was already shown as a footpath, that is hardly surprising — there was no reason to object unless the objector had knowledge of the evidence assembled in the appellant's statement of appeal, showing the continuation wrongly to be recorded as a footpath.

9 *ibid*.

10 Appendix C to the authority's statement of appeal includes, at page 9, a map dated 1970, which purports to be the 'definitive map'. This shows the appeal way between C and D now reclassified as 'footpath 427'. It is suggested that the map shown is the draft revised map published in 1970 following the Special Review (see paras.72–73 of appendix B, and para.34 of the authority's statement of appeal).

11 It is submitted, however, that in the light of that judgment, it could have sought an order of the court quashing the effect of the Special Review in relation to ways such as this one.

H.12. The authority states that 'the presumption relied upon in the Hood case…was repealed by the 1981 Act and an alternative provision…was introduced'. But the alternative provision, in s.54 of the 1981 Act, codified the decision in *Hood* by introducing a statutory presumption in favour of reclassification as a bridleway where vehicular rights had not been shown to exist.[12]

H.13. It is accepted that, on the basis of the current definitive map and statement, there is now no statutory presumption that bridle or vehicular rights exist over C–D. But the appellant submits that what was shown in the definitive map and statement as a RUPP, prior to the effect of the abandoned Special Review, is of some evidential weight in supporting the society's appeal.

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21 November 2020

12 See s.54(3)(b). The duty of reclassification of RUPPs contained in s.54 was repealed by s.47(1) of the Countryside and Rights of Way Act 2000.