

# Winkland Oaks bridleway (PINS ref: ROW/3283869) BHS comment on objector's statement of case

## A. Introduction

A.1. These are the comments of the British Horse Society ('the applicant') on the statement of case submitted by Birketts LLP on behalf of its client, Mr William Hickson, of Winkland Oaks Farm. We refer below to the position represented by Birketts as the case made by 'the objector'. We refer to references in the BHS statement of case as 'SOC, X.Y', meaning item Y in part X of the statement of case (or SOC, X.Y.Z meaning para.Z in item Y in part X). We refer to numbered paragraphs in the objector's statement of case as 'WH, para.X'.

A.2. We note that the objector understandably refers to the notation C–D–E in identifying the course of the order way, this being the notation adopted in the applicant's application plan (which is reproduced at WH, para.3.2). The order plan however adopts the notation B–X–A, where C corresponds to B, E to A. But whereas D is where the order way crosses the parish boundary, X is at the southern entrance to the curtilage of Winkland Oaks Farm. As the letters in each notation are distinct, we shall refer to either notation where convenient.

A.3. We make the following observation in opening.

### Hangman's Lane

A.4. The objector states (WH, para.3.2) that,

| The Inspector is concern[ed] only with C to E on the map shown below.

In the sense that the inspector must decide whether to confirm the order, so that the order way (between C and E) is recorded as a bridleway, that must be correct.

A.5. Another order was referred to the Secretary of State for confirmation 'on the papers' to record Hangman's Lane, leading east from C (to the point A identified in the application plan), as a bridleway: this order now has been confirmed.<sup>1</sup>

A.6. But we do not agree that the inspector can have no regard to Hangman's Lane. The role of the order way as a continuation of Hangman's Lane for horse riders is addressed in the applicant's SOC, I.G (at para.I.G.3). The inspector for the appeal said (para.24 of the decision letter<sup>1</sup>) that:

| The evidence I have seen does not in my view *necessarily* indicate that the appeal route should be regarded as part of single route along with Hangman's Lane. [emphasis added]

The inspector will wish to consider the applicant's submissions on their merit and reach his or her own conclusion.

<sup>1</sup> Under reference ROW/3270493. Decision letter dated 9 September 2022.

A.7. The objector further states (WH, para.4.6) that:

Evidence relating only to Hangman's Lane (A to C on the Application Map) therefore cannot be considered.

We agree. The inspector does not need to have regard to such evidence, because Hangman's Lane is confirmed as a bridleway. But we suggest that the affirmation of Hangman's Lane as a bridleway is a material consideration in relation to the order way, as discussed above.

### Burden of proof and presumption against change

A.8. The objector correctly states (WH, para.4.8) that:

The burden of establishing that the route has been wrongly recorded, on a balance of probabilities, falls on the applicant for the order.

A.9. We agree. However, we do not agree that the cases cited by the objector (WH, para.4.8–4.10) add anything to the 'balance of probabilities' test.

A.10. *Trevelyan*, a decision of the Court of Appeal, was concerned with the deletion of a way from the definitive map and statement. In his judgment (with whom Simon Brown LJ and Longmore J agreed), Lord Phillip MR said:

At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists.

The Master of the Rolls was not concerned with the quite different position where a way was not only to be retained on the definitive map and statement, but to be 'upgraded' to record additional rights. Defra Circular 1/09 adopts the same position in relation to the *Deletion or downgrading of ways shown on the definitive map and statement*.<sup>2</sup>

A.11. *Leicestershire*<sup>3</sup> was a decision of the High Court concerned with an alleged correction of the route of a footpath (the existence of which overall was not in doubt) from the curtilage of one dwelling to that of an adjacent dwelling. The court expressly was concerned with the tests for confirmation of an order made under sub-para.(i) and (iii) of s.53(3)(c) of the 1981 Act (and therefore was not concerned with sub-para.(ii), under which the present order is made), and their juxtaposition where an order was made to delete one way and replace it with another (immediately adjacent). The hearing took place in January 2003, and did not have the benefit of the judgment of the court in *Todd*.<sup>4</sup> The court acknowledged that confirmation of an order made under sub-para.(i) required the decision-maker to be satisfied as to the reasonable allegation of the existence of the right of way (that finding was not followed in *Todd*). The court acknowledged that, in those circumstances, the inspector required to be satisfied that the tests in both sub-para.(i) and (iii)

<sup>2</sup> Paras.4.30–37, published at [www.gov.uk/government/publications/rights-of-way-circular-1-09](http://www.gov.uk/government/publications/rights-of-way-circular-1-09).

<sup>3</sup> The case does not appear to be reported. We have not received a copy of this (or any other) case with the objector's representations, but we trust that copies were supplied to the inspector.

<sup>4</sup> *Todd v The Secretary of State for Environment Food and Rural Affairs*.

were met, and it was insufficient if the inspector was satisfied only on the reasonable allegation test in sub-para.(i). Collins J said (para.21):

All [the test on the balance of probabilities] requires is that the inspector or the council is persuaded that it is more probable than not on the evidence — and on all the evidence — that the right of way exists.

A.12. At para.27, Collins J then said [emphasis added]:

As I say, where you have a situation such as you have here, it seems to me that the issue really is that in reality section 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong—which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right—that a change should take place. *The presumption is against change, rather than the other way around.*

This is the context for the words cited by the objector (WH, para.4.9). They cannot be applied to the general duty on a surveying authority to modify the definitive map and statement under s.53(2) of the 1981 Act.

A.13. In *Macintosh*, the High Court was concerned with the downgrading of a bridleway to footpath, and followed the ruling of the Court of Appeal in *Trevelyan*. The objector states (WH, para.4.10) that:

The Court held that there was a presumption that a right of way shown on a definitive map existed in the form shown on the map.

We have been unable to find any such words in the judgment of the court, other than (at para.5), the adoption of similar words from the judgment in *Trevelyan*. As stated (at para.A.10 above), this case and *Trevelyan* both were concerned with the weight of evidence necessary to downgrade or delete a path, and were not purporting to set standards for the weight of evidence needed to add, vary or upgrade a path.

### Downgrading on special review

A.14. The objector states (WH, para.4.11) that the decision to downgrade part of the order way (between the parish boundary and B) as part of the Special Review benefits from the ‘presumption of regularity’.

A.15. We address the effect of the Special Review at SOC, I.F, and we stand by what is said there. There is no place for the ‘presumption of regularity’ in this context of action by the authority which was subsequently shown to be unlawful.

### Conclusions in generality

A.16. Accordingly, we do not accept the objector’s conclusion (WH, para.4.12) that:

...the fact that the route is not currently recorded on the DMS as a bridleway carries weight and the presumption is that that is correct... .

We submit that the words supplied by the objector and quoted at para.A.8 above are a correct and sufficient summary of the law: the order is to be determined on the evidence available, on the balance of probabilities.

## B. The evidence

B.1. We have included in the annexe (p.20 *et seq* below) to these representations copies of the Sutton and Ripple tithe maps in full. These were included in the applicant's SOC, but only as extracts of the relevant area. In view of the objector's comments on the interpretation of the tithe maps, the applicant considers that the inspector and objector should have access to the entirety of the tithe maps. The apportionments can be found online.<sup>5</sup>

B.2. In general terms, the objector suggests (WH, para.5.1, referring to the applicant's para.3(2) appeal at para.I.F.1) that:

It appears to be at least tacitly acknowledged by the Applicant that the evidence for D to E is – on his own analysis – inadequate... .

B.3. This suggestion appears to be founded in the appellant's submission, in its para.3(2) appeal, that if the Secretary of State were minded not to grant the appeal in relation to the whole of the appeal way, he should alternatively consider whether to grant the appeal in relation to the way between C and D. This is because of the express description of the way between C and D (or at least between X and B) as a public road in the Ripple tithe map and apportionment. The appellant (*i.e.* now the applicant) was entitled to make submissions in that appeal as regards different possible outcomes to the appeal without prejudice to the determination of the appeal: such submissions do not suggest or imply that any part of the appeal evidence be 'inadequate'.

B.4. WH, para.5.2: The objector states that—

The physical appearance of the tracks is entirely consistent with their actual use as farm tracks with a footpath running along them.

The objector adds that the photographs (SOC, III) are illustrative. We agree. The photographs show a way which also is consistent with dedication as a bridleway. There is nothing about the tracks which rules out bridleway, or for that matter any other, rights.

### Ordnance Survey, Mudge-Faden one-inch map of Kent

B.5. WH, para.5.3.1: As the objector admits, 'OS maps...do not provide evidence as to the status of routes'. Accordingly, it cannot be inferred 'from the layout' that the way between C and D 'was private in 1801'. It can only be inferred that no continuation of the way (from D onwards to E or anywhere else) was marked on the map. As the map does not show field paths, this hardly is surprising. It therefore is impossible to draw any conclusion about the status of C–D, or indeed D–E. The express description of the way between C and D (or at least between X and B) as a public road in the Ripple tithe map and apportionment, about 40 years after the date of publication of the Mudge-Faden one-inch map, provides evidence that it was public.

### Greenwoods' map of Kent

B.6. WH, para.5.3.2: Again, the 'layout' cannot suggest a private farm track between X and B. The key to the Greenwoods' map describes the road between X and B as a 'cross road', suggestive of a minor highway.<sup>6</sup> The absence of any connection from A to X might in

<sup>5</sup> Via [www.kentarchaeology.org.uk/research/tithes](http://www.kentarchaeology.org.uk/research/tithes).

<sup>6</sup> See [Planning Inspectorate Consistency Guidelines](#), s.2.4, 'What is a Cross Road?'

other circumstances imply that the inclusion of the way between X and B showed that the way is other than a cross road. But the map does not mark field paths, and thus the road between X and B might well have been shown as part of a continuous public bridleway between A and B, of which only that part between X and B, and also the first part south-east from A, were of sufficient definition to merit being recorded on the map.

B.7. The objector states that:

There is a short track shown which may coincide with the last part of the claimed route leading to E, but it begins on a track which is still a private track today and leads to Forge Lane.

This 'short track' is the first 270 metres of the order way from A towards B. The inspector may note on his or her site visit that, while the first 60 metres or so of the way from A now forms a vehicular access to adjacent dwellings, the remaining 210 metres is a little-used (by farm traffic) now headland path. The applicant submits that, even at the time of the Greenwoods' survey in the second decade of the nineteenth century, this part of the way may have been a well-defined way, and merited recording as a road (in practice, a bridle-road), whereas the continuation to Winkland Oaks Farm, being a cross-field bridleway, did not merit being recorded.

#### Ordnance Survey, one-inch Old Series map of Kent

B.8. WH, para.5.3.3: Again, there is no basis on which an inference can be made that the part of the order way shown on the map (from X to B) was a 'private farm access', and the same considerations apply as in relation to the Mudge-Faden and Greenwoods' maps above.

B.9. It is not accepted that the omission of the first part of the order way, from A for a distance of 270 metres south-east towards B, which is nevertheless shown on the Greenwoods' map, suggests that this part of the order way 'existed only for a short period, perhaps for a specific and private purpose'. The inclusion of this part on the broadly contemporary Greenwoods' map, on the Sutton tithe map surveyed in the late 1830s (shown as a path) suggest a much older and continuous evolution.

#### Tithe Act 1836

B.10. WH, paras.5.3.4–5.3.7: We do not agree that what is shown on the Sutton tithe map, parallel to the pecked line showing the order way, is necessarily a 'boundary feature'. It certainly marks the bounds of each parcel identified in the apportionment, but whether the bounds were defined on the ground by physical features such as a fence, hedge, mere stones or a ditch and bank, cannot be established from the tithe map in isolation.

B.11. It is possible that, where on the tithe map (as here, save for the first 60m of the order way south from A) a boundary line is accentuated with an irregularly-shaped thickening, this may identify the presence of a hedge — but if it does, the boundary abutting the north-west side of the order way is not shown on the Ordnance Survey County Series twenty-five inch first edition map surveyed in 1871 (just thirty years later), which represents almost all the order way as unenclosed on both sides.

B.12. The objector states that:

On the National Archives copy [of the Sutton tithe map] a parallel pecked line is shown adjacent to the boundary feature, but there is nothing to indicate that it represents a public right of way.

We address this criticism at SOC, IV.D.14, where we observe that every way shown on the National Archives copy of the Sutton tithe map<sup>7</sup> in the same form as the order way (*i.e.* a single pecked line) is now recorded as a public path with one exception — a short footpath cutting off the corner of Church Hill at Upper Farm,<sup>8</sup> and this exception nevertheless is also recorded on the Ordnance Survey County Series twenty-five inch first edition map as a minor track or footpath.

B.13. However, we have now established that some paths appear only on the National Archives copy of the Sutton tithe map, and some only on the Kent County Archives copy — and some on both.<sup>9</sup> The following table classifies the paths.

### **Paths shown on Sutton tithe map**

<b>Path number</b>	<b>Status</b>	<b>Comments</b>
none	not recorded	Church Hill at Upper Farm
EE417	footpath	formerly RUPP
EE419	bridleway	
EE423A	footpath	
EE424	footpath	
EE425	footpath	only on KCC copy
EE426	footpath	only on KCC copy
EE427	footpath	the order way—only on NA copy
EE428, ER52A, ER52	bridleway/restricted byway	shown as road on KCC copy
EE429	footpath	only on NA copy

B.14. In the National Archives copy of the Sutton tithe map in the annexe (p.20 *et seq* below), we have highlighted in yellow those paths which are shown on that copy, and marked in green those paths which appear solely on the Kent County Archives copy, and we have annotated the paths with the path number on the definitive map and statement.

B.15. Accordingly, we submit that what is shown on the National Archives copy of the Sutton tithe map as coincident with the order way is highly likely to be a public path, but that the tithe map does not record whether it is a footpath or bridleway.<sup>10</sup> The Sutton tithe map is, however, good evidence that a path existed in 1839 (and in all probability, long before that date).

B.16. The objector notes that, on the Sutton tithe map, the order way crosses various boundaries drawn on the map. As noted above, these boundaries are not necessarily

<sup>7</sup> See annexe at p.20 *et seq* below for reproduction of entire Sutton tithe map.

<sup>8</sup> [TR33334949](#)

<sup>9</sup> This appears to be a matter of poor copying standards.

<sup>10</sup> *The Tithe Maps of England and Wales*, R J P Kain, R R Oliver, 1995 agrees: in the entry for the Sutton tithe map (p.253), it specifies 'foot/b'way' as one of the features shown.



indicative of physical boundary features — but if solid boundaries (such as a hedge or fence) were present, then no doubt a means of passage was provided for the use of the public. No adverse conclusion can be drawn from the order way crossing any physical boundaries which may have existed at this time — it is commonplace for a public right of way to traverse such boundaries, by means of gates or (in the case of footpaths) stiles.

B.17. The objector suggests that, in recording the use of parcel 194 (*i.e.* the parcel number for the order way shown on the Ripple tithe map) in the Ripple tithe apportionment as ‘Public Roads and Waste Lands’, the surveyor may have intended to denote its categorisation as ‘waste land’ (and not as a public road). But in the context of the tithe redemption process, and particularly at this time when common lands were still liable to inclosure, the term ‘waste’ has a single, universal meaning — that of manorial waste, which may or may not have been subject to rights of common. In the Oxford English Dictionary (OED), waste is defined as follows:

2. A piece of land not cultivated or used for any purpose, and producing little or no herbage or wood. In legal use spec. a piece of such land not in any man's occupation, but lying common.

B.18. Manorial waste is sparse in East Kent, and only one parcel, no.190, comprised in the range 179–197 (the parcels comprised in the class of ‘Public Roads and Waste Lands’) appears to be waste, as may be seen from the table below.

### **Ripple tithe apportionment: ‘Public Roads and Waste Lands’**

<b>Parcel number</b>	<b>Description or present-day road name or right of way</b>	<b>Present known status<sup>11</sup></b>
179	Dover to Deal turnpike	Public road
180	Ripple Road	Public road
181	Crooked S Road (from Church Lane to Ripple Road)	Public road/part extinguished
182	Church Lane	Public road/footpath EE433
183	Mantles Hill	Public road
184	Church Lane/EE433 to Cold-blow Farm	Unrecorded
185	Mongeham Road to Church Lane/EE433	Unrecorded
186	Mongeham Road/Pommeus Lane/Winkland Oaks Lane	Public road
187	Wingleton or Sutton Lane	Public road

<sup>11</sup> ‘Public road’ means recorded in the National Street Gazetteer as a publicly-maintainable road.

Parcel number	Description or present-day road name or right of way	Present known status
188	Crooked S Road (from Ripple Road to Wingleton or Sutton Lane)	Public road
189	Coldblow Road/Ringwould Road	Public road
190	Waste on north side of Ringwould Road (south of Ripple Cross)	Subsequently inclosed waste
191	Ripple Road to Ripple Cross	Restricted byway EE492
192	Ripple Road to Ripple Mill	Footpath EE455
193	Turnpike to Ripple Road	Unrecorded
194	Winkland Oaks Farm approach	Footpath EE427
195	Beacon Hill or Sutton Lane	Public road
196	Pixwell Point to Sutton	Footpath EE421
197	Turnpike to Knights Bottom	Footpath EE239/ER3

B.19. In the copy of the Ripple tithe map in the annexe (p.20 *et seq* below), we have highlighted (in red) those parcels included in the range 179–197, and selectively annotated the parcels with the relevant number to aid clarity.

B.20. The waste comprised in parcel 190 was a sliver of land on the west side of Ringwould Road<sup>12</sup> south of Ripple Cross, which by the time of survey for the Ordnance Survey County Series twenty-five inch first edition map in 1871 had already been inclosed. In this context, we suggest that the inclusion of parcel 190 in the class of ‘Public Roads and Waste Lands’ was predicated on its being highway waste (there being no common land in the parish).

B.21. It is not plausible to suggest that the order way, between X and B, was assigned to the category of ‘waste’ vice ‘public road’, firstly because a road (of whatever status) is not ‘waste’ (not being, per the OED, ‘not...used for any purpose’), but used for the purpose of passage and access to premises and fields.<sup>13</sup> And secondly because it did not need to be described as waste to avoid liability to rent charge. If the road were privately owned but unproductive, it could be described as such in the apportionment, and excluded from rent charge. The apportionment includes the following entries:

<sup>12</sup> [TR354484](#)

<sup>13</sup> The verges *etc.* of a public road may be highway waste, and therefore eligible for classification as ‘waste’ — this seems to have been the case in relation to parcel 190. But in such a case, plainly, the road itself is a public road.



## **Ripple tithe apportionment: selected entries**

<b>Parcel number<sup>14</sup></b>	<b>Description in tithe apportionment</b>	<b>Comments</b>
47a	Approach Road	Drive to Church Farm
82	Approach Road etc.	Now also part of footpath EE439 near Ripple Vale House

B.22. If the surveyor had wished to identify the order way between X and B as a private drive, he could and would have done so, as he did in relation to parcels 47a and 82. As it was, only one piece of land in the Ripple survey falls within the category of waste, and it is not the order way.

B.23. The objector suggests (WM, para.5.3.6) that the way cannot continue north-west out of the farm yard because it is 'clearly fenced', and continues that the farm yard would 'not be the sort of environment which would be attractive as a through route'. We agree that there appears to be one or two gates between the farm yard and the parish boundary, but as noted above, gates are commonly encountered on bridleways, and particularly cross-field bridleways such as this one. Traditionally, bridleways and other public paths also commonly navigate farm yards, and there is nothing objectionable or unusual about the alignment of the order way.

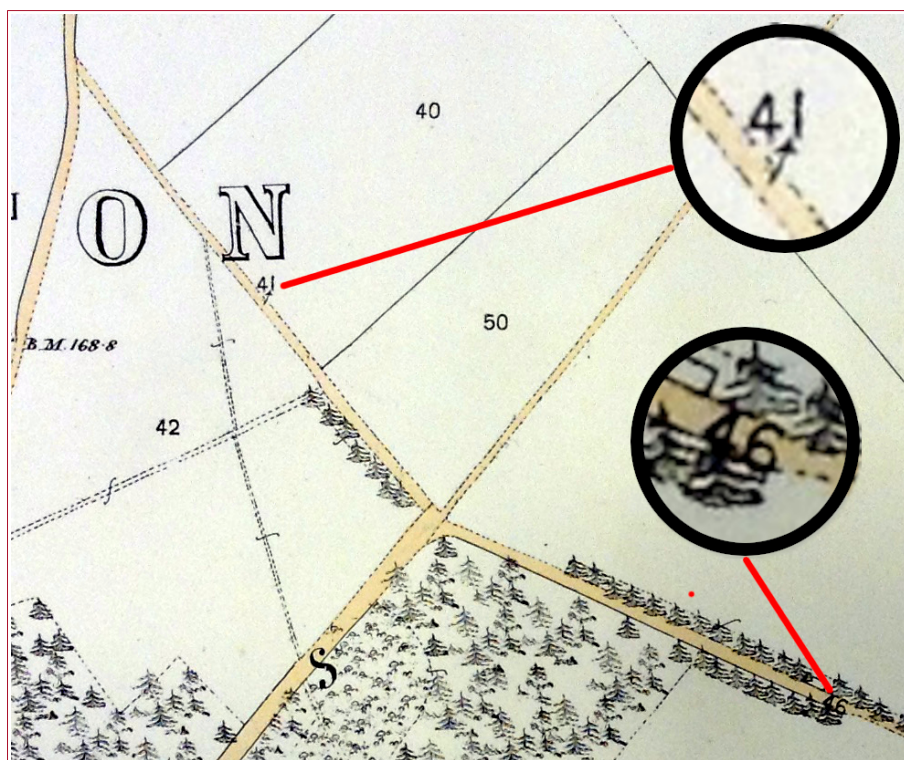
B.24. The objector also asserts that the tithe evidence is of little weight given its primary purpose (which was to assign rent charges in place of liability to tithes). We address this criticism in our SOC at IV.D.4–IV.D.6, IV.D.10–IV.D.12, IV.D.15, and particularly IV.D.19–IV.D.21.

### Ordnance Survey, County Series twenty-five inch first edition

B.25. WH, paras.5.3.8–5.3.10: We do not understand the objector's inability to place parcels 41 and 46 as forming part of the order way between D and E. In order to assist, we show below an extract of the plan with enlargements of the relevant parcel numbers.

<sup>14</sup> Entries in the Ripple apportionment are [transcribed on the website](#) of the Kent Archaeological Society.

## OS County Series twenty-five inch first edition plan extract



Both parcels 41 and 46 are described as 'Road' in the book of reference to the Ordnance Survey County Series twenty-five inch first edition plan.

B.26. The objector also states that:

The tie mark crossing the route C to D indicates that the land is in the same ownership as the land either side of the route or thought to be part of the same ownership.

This statement is incorrect. The purpose of the braces (three of which can be seen at SOC, IV.E, illustration xviii, drawn across the order way between the parish boundary and B) is to show that the land occupied by the track forms part of the adjacent parcel for the purposes of calculating the area.<sup>15</sup> The Ordnance Survey has in general never been concerned with the ownership of land.<sup>16</sup>

B.27. The objector further states (WH, para.5.3.9), in the context of the order way being shown as metalled on the first edition plan, that:

It is entirely reasonable that the track to a substantial farmstead would be metalled. That cannot reasonably be taken to indicate that it was public.

We agree that it is reasonable for the order way (in its entirety) to be metalled. We do not assert that metalling demonstrates that the order way is a public bridleway — only (SOC, IV.E.6) that metalling, 'is consistent with the status of the way as a public bridleway.' Simil-

<sup>15</sup> 'Although the general principle was that each 'field' or enclosure had its separate number and acreage, in practice small enclosures and features were 'braced' by an 'S' symbol to larger ones... .' *Ordnance Survey Maps—a concise guide for historians*, 3rd ed., Richard Oliver.

<sup>16</sup> There have long been exceptions in relation to, for example, land owned by the National Trust and open to the public.

arly, we suggest at the same reference that the description of the order way (between A and the parish boundary) as a 'Road' in the book of reference, also 'is consistent with the status of the way as a public bridleway.'

B.28. We do not agree with the objector (WH, para.5.3.10) that: 'The map clearly shows the route is enclosed'. The plan shows almost the entirety of the way to be bounded with a pecked casing, showing that it is unenclosed (there is an exception between A and the parish boundary on the south-west side of the order way, on the length between the intersecting metalled road, coloured sienna, and the position of parcel number reference 46, which may be enclosed on one side). We agree that there appear to be gates across the order way shown at the parish boundary<sup>17</sup> and at X,<sup>18</sup> but do not agree, for the reasons given at B.23 above, that such gates show, 'that it was not a through route open to the public.' There is no basis for such an inference.

### Ordnance Survey, County Series twenty-five inch second edition

B.29. WH, para.5.3.11: Again, we do not agree that the presence of gates at the parish boundary and X, shown on the second edition plan, indicate that the way 'is more likely to be private than public.'

B.30. We address at SOC, IV.F.5–IV.F.6 the objector's comment that, 'The absence of a BR marking is consistent with a private route.'

### Eastray Rural District Council highways report (1906)

B.31. WH, para.5.3.12: this item is no longer relied upon and does not appear in the SOC.

### Finance (1909–1910) Act 1910

B.32. WH, paras.5.3.13–5.3.14: We address the absence of any record of a deduction claimed for the order way in respect of hereditament 407 in the SOC, IV.H. Given the intentionally countervailing effect of different duties, a deduction for a right of way would not necessarily be beneficial to the landowner liable to duty.

B.33. We also observe, at SOC, IV.J.5, that the freehold title in Winkland Oaks Farm was disposed of in 1918 by Kent Coal Concessions and Allied Companies. Kent Coal Concessions, with and through its many subsidiary companies, was the lead player in developing the coalfields of East Kent during the early part of the twentieth century, and instrumental in establishing the East Kent Light Railway to service potential coal pits. Sites for pits were explored in the local area, including at Maydensole and at Sutton Hill. Doubtless, Kent Coal Concessions acquired Winkland Oaks Farm with a view to the exploitation of coal workings, and sold it in 1918 after local sites proved unviable (neither of the exploratory sites at Maydensole nor Sutton Hill was developed into functioning coal pits). As we note in footnote 37 to our SOC, IV.H.11, the 1910 Act also included provision for a mineral rights duty, and the likelihood that exploitation of the land for coal would give rise to such a

17 The parish boundary marking itself obscures any line drawn across the order way, but it seems likely that there is one.

18 Pecked lines are drawn across the order way at A, and either side of the intersecting metalled road coloured sienna: the function of these lines is to demarcate the extent of the road for the purposes of calculating its area. The order way at B is obscured by being contained in the binding of the copy filed at the British Library, but a copy available online via [webapps.kent.gov.uk/KCC.KLIS.Web.Sites.Public/ViewMap.aspx](http://webapps.kent.gov.uk/KCC.KLIS.Web.Sites.Public/ViewMap.aspx) confirms that there is no solid line across the order way at B, but only a pecked line to demarcate the boundaries of the adjacent parcels.

duty would further have complicated the calculations of the then owner of the land. We again aver that it is not possible to make any inferences about the existence of any right of way where the owner of the land declined to seek a deduction from site value for such rights of way — and as we note at SOC, IV.H.14, we can be confident that the order way subsisted as a right of way (whether footpath or bridleway) at the time of the 1910 Act valuation, because it was shown as such on the Sutton tithe map.

B.34. It is almost unknown for cross-field bridleways to be excluded from hereditaments (*i.e.* as a ‘white road’) for valuation purposes.

B.35. Accordingly, contrary to the objector’s assertion at WH, para.5.3.14, the evidence of the 1910 Act is neutral on the status of the order way at that time.

### Eastry Rural District Council surveyor’s report (1911)

B.36. WH, paras.5.3.15–5.3.17: The objector suggests that the 1911 report concerned another bridleway, ‘from Dover Hill past Winkland Farm to Sutton Hill.’

B.37. The surveyor’s report refers to:

the road leading from Dover Hill Sutton past Winkland Farm to the road leading from Ripple school to Martin.

The reference by the surveyor to ‘Winkland Farm’ intends, we submit, to refer to Winkland Oaks Farm, to which he refers in the previous line of his report. Winkland Farm was indeed another farm, about 1 km north of Winkland Oaks Farm.<sup>19</sup> But by the time of the Ordnance Survey County Series twenty-five inch third edition plan, revised in 1905,<sup>20</sup> Winkland Farm had been renamed Wingleton Farm (which name it retains to this day), presumably to avoid confusion with Winkland Oaks Farm. In Kelly’s Directory of Kent, 1903, an entry appears under Sutton-by-Dover for:

Bartlett George Stephen, farm bailiff to A.J. and W.P. Matthews esqs.  
Wingleton Farm<sup>21</sup>

Thus, if the surveyor had intended to refer to Wingleton Farm, he would have used that name.<sup>22</sup>

B.38. The objector also refers to a bridleway ‘to Sutton Hill’, but the report does not mention Sutton Hill.

B.39. Moreover, there is no conceivable line of bridleway from Dover Hill<sup>23</sup> ‘past Winkland [now Wingleton] Farm’ to the road from Ripple School<sup>24</sup> to Martin, or indeed to Sutton Hill. The nearest possible candidate is footpath EE426, which passes south of Wingleton Farm to the Ripple–Martin road, but this path does not begin on Dover Hill, nor even Forge

<sup>19</sup> [TR341493](#)

<sup>20</sup> [maps.nls.uk/view/103681943](https://maps.nls.uk/view/103681943)

<sup>21</sup> [specialcollections.le.ac.uk/digital/collection/p16445coll4/id/322435/rec/7](https://specialcollections.le.ac.uk/digital/collection/p16445coll4/id/322435/rec/7)

<sup>22</sup> The objector, at WH, para.5.3.15, includes an extract from the Ordnance Survey County Series six-inch first edition map to illustrate the location of Winkland Farm. This was surveyed 1871–72. The change of name is shown on the [third edition map](#), revised 1905.

<sup>23</sup> Dover Hill is the hill on Forge Lane leading south-west out of Sutton towards West Langdon and Dover.

<sup>24</sup> Ripple School, then and now, is at [TR346499](#). The road to Martin is the road due south from Ripple School, then south-west past B to the bottom of Waterworks Lane leading to Martin.

Lane, but on Vale Road, and there is no suggestion it ever has been other than a footpath. It is not shown on any map as a road, whether private or public.

B.40. Finally, there would be little purpose in the surveyor meeting the correspondent, Mr Qusted, at Winkland Oaks Farm, if the purpose of their meeting was to view a route which did not pass through the farm, but through neighbouring Wingleton Farm.

B.41. We do not know from the report whether the council ordered repairs to the order way, but it seems unlikely, because in 1913, it was recorded that 'no repairs has ever been done' to it. We explain at SOC, I.G.12, why the order way might have been considered by the council (wrongly) not to be publicly maintainable. But the key consideration is not whether the way was regarded as publicly maintainable, but its status. And as to that, the report is clear — the council, the surveyor and the tenant all considered the way to be (at least) a bridle road.

### Eastry Rural District Council surveyor's report (1913)

B.42. WH, paras.5.3.18–5.3.20: The SOC, IV.J.5 explains that the correspondence received by the council almost certainly originated from Messrs Worsfold & Hayward in its appointment as agent to the freehold owner of the land at Winkland Oaks Farm. It also explains (SOC, IV.J.4) the evolving names of the cottages near A and B. Plainly, therefore, the description of the way in the surveyor's report is that of the order way.

B.43. On this occasion, the council expressly declined to carry out repairs. However, the surveyor twice acknowledges the status of the order way as a bridle road, and there is no suggestion that it is anything other than a bridle road.

B.44. We do not agree with the objector's suggestions (WH, paras.5.3.19–5.3.20) that the enclosure of the order way in the vicinity of Winkland Oaks Farm 'tends to suggest that the route was not available for public use.' Both the Ordnance Survey County Series six inch third and fourth edition maps (which the objector includes in his submission) show the order way as almost entirely unenclosed, but we acknowledge that the order way is shown to pass through a larger field or enclosure in the vicinity of Winkland Oaks Farm. It is not clear why the objector suggests that this means that the route was not available for public use.

### Electricity (Supply) Acts 1882 to 1922

B.45. WH, paras.5.3.21–5.3.29: We rely on our analysis at SOC, IV.K, and in particular, to the submission in SOC, IV.K.12 *et seq* that it was not the intention of the Electricity Supply Acts 1882 to 1922 to confer powers on undertakers for the supply of electricity to use entirely private land (including land comprised in an entirely private road or track) for the accommodation of electricity supply lines without compensation to the owner of that land. Such powers, if they had been conferred, would have been contrary 'to the policy which the Legislature has certainly always pursued of not taking private rights without compensation' (*Tunbridge Wells v Baird*, SOC, IV.K.14). If the private land or way was to be used only by agreement between the undertaker and the landowner, no statutory power, and no notice, was needed.

B.46. What was intended was to enable lines to be laid in privately-maintainable public roads with the consent of the person liable to repair. This would overcome any difficulty which the undertaker might have in laying lines in a road where the person liable to repair might not have had power to enter into a private agreement, and where the cabling works



might otherwise have been an illegal interference with the public right of way. The order way was included in the 1923 notice because it was considered to be (consistent with the views of the local authority in 1911 and 1913) a privately-maintainable bridleway. We suggest that the undertaker signalled in advance its intention to use the order way, and Eastry Rural District Council advised the undertaker that the way was privately maintainable, and notice would need to be given of that intention.

B.47. The objector states that:

...there is no suggestion that the route was being broken up to facilitate lighting of the route; it is far more likely that it was to install a cable to supply electricity to homes and businesses locally. This may or may not have included Winkland Oaks Farm.

We agree. Had the undertaker wished to connect a supply to Winkland Oaks Farm (or any premises isolated from public roads), or indeed to lay cables on any private land, it would have relied on entirely private arrangements for that purpose, and no notice would have been required. But if the undertaker wished to use the order way to lay cables between, say, Ringwould and Sutton, it needed to give notice of that intention because the way was (perceived to be) a privately-maintainable bridleway, and the Electricity (Supply) Acts 1882 to 1922 conferred a power to use privately-maintainable bridle-roads and roads for that essentially public purpose. Our submission is that the Acts did not seek to enable the undertaker to adopt the use of an entirely private farm road or public footpath for that purpose merely by giving notice, and without agreement nor compensation.

#### Eastry Rural District Council, surveyor's report (1924)

B.48. WH, para.5.3.30: The surveyor's report refers to the order way as a 'Bridle Road'. The report was written by the same surveyor who reported in 1911 and 1913, and who by this time had been in service with the council for well over 19 years.

B.49. In his objection, the objector introduces a new element — that while the surveyor may have described the order way as a bridle road, it may have been a private bridle road. It is not clear whether the objector applies this analysis only to the 1924 report, or to all three (1911, 1913 and 1924).

B.50. In response, we firstly point out that, if the way were a private bridle road (but presumably a public footpath as it is now recorded), its status and use as a bridle road would be immaterial to the surveyor and the council, who were concerned only with public rights. In those circumstances, one might expect the surveyor to refer to the order way as a (public) footpath, but not as a (private) bridle road. The surveyor, and the council, were solely concerned with public ways.

B.51. Secondly, the surveyor referred to the order way as a bridle road in 1911 and 1913 as well as in 1924, and (in our analysis) the tenant farmer and the freeholder's agent thought it of at least that status, and plainly as a public highway. It hardly is credible that, on all of those occasions, the surveyor, the tenant farmer and the agent were engaging in the matter of a (private) bridle road in which the council, and the public, had no interest, but failed at any time to clarify in writing that their only real interest was in a public footpath along that route (it also is unlikely that the tenant farmer and freeholder's agent would be concerned about the maintenance of a public footpath). We note that the tenant farmer referred (SOC, IV.I.4) 'to the bad state of the road' which he plainly thought that the council



should maintain — hardly a position compatible with a way considered only to be a public footpath.

B.52. Thirdly, the suggestion that the order way was, at the time of the 1924 report, a private bridleway is implausible. A private road or path must be attributable to either:

- private ownership, such that the road is owned by a specific landowner who has exclusive control of the road, and who uses the road either for the private purposes of the landowner, or for the landowners' tenants, employees or others — an example is a carriage drive across a park, where both the drive and park are owned by the landowner, and the carriage drive provides a means of access to the principle house of the landowner; or
- a private right of way (or easement), such that the road is owned by J (J is the owner of the 'servient tenement', in this case the road and typically the neighbouring land), but K has a private right of way along the road to provide a means of access to K's own land (K is the owner of the 'dominant tenement') — an example is a track from a public road across a field to a cottage, where J owns the field and the track across it, but K has a right of way along the track as a necessary means of access to the cottage.

B.53. It is not obvious which origin is suggested here, but as the whole of the land crossed by the order way was at this time, and has remained, in unified ownership, and as no evidence has been submitted as to any rights which might arise under the second, we suggest it can only be the first — that the order way was (at least in part, presumably from A to Winkland Oaks Farm) a private bridle road for the use of the farm owner or tenant.

B.54. There is no evidence of private use being confined to equestrian use, and it is not obvious why it would have been. We know that in 1871 the order way between A and the parish boundary was metalled (SOC, IV.E.5) and was described as a 'Road' (SOC, IV.E.4). It was not annotated as a bridle road (*i.e.* 'B.R.') or footpath ('F.P.') on any of the Ordnance Survey County Series plans, suggesting that it was a way used by vehicular traffic (SOC, IV.F.5). It was described as an inferior road on the Bartholomew's maps (SOC, IV.G), referred to as a 'road' by the farm tenant in 1911 (SOC, IV.I), described as a road in the notice given in 1923 under the Electricity Supply Acts (SOC, IV.K), and referred to as a road in the particulars of sale in 1936 (SOC, IV.M). If this part of the order way were not a public bridleway in 1924, it does not seem to have been a private bridleway either, but a private farm road for vehicles.<sup>25</sup> Accordingly, the surveyor, in his 1924 report, cannot have had in mind that the order way was a private bridle road (rather than the more usual farm or occupation road).

B.55. Finally, the concept of a private bridleway is virtually unknown outside the statutory context of inclosure awards (and even here, they are unusual).<sup>26</sup> A search of the Lexis-Nexis<sup>27</sup> cases database for law reports referring to a 'private bridleway' or 'private bridle road' revealed only three hits, all referring to the statutory provision for the award of a private bridleway in s.10 of the Inclosure Consolidation Act 1801 cited in a single case.<sup>28</sup> A search for 'private footpath' revealed 42 hits.

<sup>25</sup> We accept that the order way very probably was, at this time, used by vehicles, although it is not entirely clear whether such use was private or public.

<sup>26</sup> There is no question of formal inclosure in relation to the order way. Statutory inclosure was rare in Kent (there being relatively little common land enduring into the eighteenth and nineteenth centuries).

<sup>27</sup> An online subscription legal service.

B.56. In summary, we submit that the highly experienced surveyor referred to the order way as a 'Bridle road' because he was long familiar with the way (not least from his site visit in 1911), and he knew it to have public bridleway status.

### Winkland Oaks Farm Sale (1936)

B.57. WH, paras.5.3.31–5.3.32: The objector suggests that—

...the fact that parcel 53 was identified for sale indicates that it was regarded as privately owned land.

We agree — but such status is compatible with the 'road' comprised in parcel 53 being a (purportedly privately-maintainable) public bridleway.

B.58. The way between the parish boundary and B is not separately identified as a road in the sale particulars because the way is comprised in, and braced with, other parcels (see para.B.26 above). It therefore is impossible to infer from the evidence, as the objector does, 'that the route was private and not public.'

### National Farm Survey

B.59. WH, para.5.3.33: We agree that there is some doubt whether the order way (between A and the parish boundary) is colour-washed blue, or whether it is merely excluded from the reddish colour-wash used for the holding generally.

B.60. Nevertheless if, as the objector suggests, private tracks were not colour-washed because they were unproductive land, then the practice does not seem to be implemented on any widespread basis known to the applicant, and it is not obvious why it would be thought necessary to adopt that practice.

B.61. We suggest that, on balance, the particular treatment of the order way (between A and the parish boundary) suggests that the draughtsperson perceived the way not to be part of the farm holding and likely to be a public road or bridleway.

### Parish survey

B.62. WH, para.5.3.34: We do not consider that the objection in relation to the parish survey needs further to be addressed and rely on the SOC, IV.O, and see also SOC, I.F and I.G.13.

## **C. Argument**

C.1. The objector asserts (WH, para.6.3):

There is ample evidence to suggest that C to D has, throughout the period in respect of which there is evidence, always been a private drive to a private farm, as it is today, subject only to footpath rights in more recent times.

We submit that, on the contrary, there is no evidence whatsoever which indicates that the way C–D (*i.e.* from the parish boundary to B) is a private drive, and cogent evidence in the Ripple tithe map and apportionment to the effect that it is a public road — leaving aside subsequent evidence in the Eastry Rural District Council reports relating to the order way

28 [\*R \(on the application of Andrews\) v Secretary of State for Environment, Food and Rural Affairs\*](#) [2014] EWHC 1435 (Admin)

as a whole. What the objector describes as ‘ample evidence’ is instead a series of unwarranted inferences, which we have addressed in this, the applicant’s response.

C.2. The objector continues (WH, para.6.3):

The historical evidence now referred to by the Applicant does not support the existence of even a public footpath, but, rather, suggests that there were historically no public rights on the Order Route at all. The first evidence of any public rights was in the Parish Survey in the 1950s.

Again, we disagree. There is evidence of a public right of way along the whole of the order way in the Ripple tithe map and apportionment and the Sutton tithe map (taken together), but with uncertainty as to the status of the way within the parish of Sutton. The objector appears to take the position that the present public footpath EE427 is incorrectly recorded, but we see no evidence to support that position (if taken), no application has been made to delete the footpath from the definitive map and statement, and it is not open to the inspector to amend the order before him or her to secure that outcome.

C.3. The objector adverts, in the part of his submission entitled ‘Argument’ and previously, to:

...the simple fact that [the order way] led to and from a private farm yard and was crossed by features indicating that it was enclosed by gates or other barriers.

The objector’s analysis is incorrect. There is no presumption that a public bridleway cannot pass through gates, or that it cannot pass through a farm yard, and many bridleways do just that — indeed, the inspector may well be familiar with some of the many orders made during the post-war period under s.119 of the Highways Act 1980<sup>29</sup> to divert footpaths, bridleways and restricted byways out of farm yards.

C.4. Insofar as the Ripple tithe map and apportionment shows the order way between the parish boundary (at its greatest extent) and B to be a public road, it is not unusual for roads to traverse farm yards, although in East Kent it is now unusual for such roads to remain gated, and one typically finds that farm business is carried on across the road but without interruption to traffic along the road. A gated example could still be seen until recently at Poulton Farm, Hougham Without,<sup>30</sup> where the byway open to all traffic through the farm yard was recently extinguished with reservation of bridleway rights,<sup>31</sup> and then subsequently diverted to a more northerly alignment.

C.5. Nor can it be said that, if it is correct that the true status of the order way is a bridleway from A to Winkland Oaks Farm, and a public road from there to B, that would be unusual, notwithstanding that the public road would have no outlet other than the farm itself and the farm lands. (We here leave to one side the possibility that the correct status is of a public road throughout.) Similar arrangements can be found throughout England, including in East Kent. What they have in common is that the public road is a no-through road for vehicles, but has some continuation as highway, even if of lower status — as a

<sup>29</sup> Originally, s.42 of the National Parks and Access to the Countryside Act 1949.

<sup>30</sup> [TR269412](#)

<sup>31</sup> [Notice in the London Gazette, 13 February 2019](#). The way subsequently was diverted to the north of the farmyard by order made under s.119 of the Highways Act 1980. An application has been made to record the continuation of the way to the east, including bridleway ER218A, as a restricted byway, signifying a continuous road between Capel and Dover.

footpath, bridleway or cart track. Examples can be seen as follows (grid references contain functioning hyperlinks to [www.streetmap.co.uk](http://www.streetmap.co.uk)):

### **Selected rural no-through roads in East Kent**

<b>Location</b>	<b>Grid reference</b>	<b>Comment</b>
Cooper Street Farm Road	<a href="#">TR304601</a>	Continues as footpaths in three directions (one of which may be an under-recorded carriageway)
Goldstone Drove	<a href="#">TR296610</a>	Continues as bridleway
Overland Lane to Overland Farm	<a href="#">TR275598</a>	Continues as bridleway leading to...
Little Knell Farm Road to Little Knell Farm	<a href="#">TR282596</a>	Continues as bridleway (leading to Overland Lane, <i>q.v.</i> )
Pedding Lane to Great Pedding Farm and Pedding Lane Cottages	<a href="#">TR270578</a>	Continues as several footpaths
Beaute Lane to Beaute Farm	<a href="#">TR260580</a>	No continuation (but evidence from Ordnance Survey County Series plans that formerly continued as footpath)
Bossington Road to Bossington Farm	<a href="#">TR235551</a>	Continues as two bridleways through Bossington Farm (one bridleway subsequently diverted)
Knowlton Lane to Knowlton Court and church	<a href="#">TR281533</a>	Continues as bridleway
Church Road to Bette-shanger (house) and church	<a href="#">TR313525</a>	Continues as bridleway

C.6. Some of these examples are very similar to the position at Winkland Oaks Farm: for example, on the Ordnance Survey County Series twenty-five inch second edition plan,<sup>32</sup> Bossington Road (near Adisham) enters from the south through a gate into a large enclosure (of area about 2½ ha) adjacent to Great Bossington house and farm, and a bridleway leaves the enclosure through a further gate on the north side.<sup>33</sup>

<sup>32</sup> [Kent 47/11](#)

<sup>33</sup> These arrangements have been more recently amended to divert the bridleway to a more easterly alignment.

C.7. The objector's rebuttal argument is founded in a misunderstanding: that rights of way are incompatible with gates, enclosures and farm yards, and that roads leading to farms must be private. The applicant submits, with local examples, that these arguments are false and should be disregarded.

Hugh Craddock, for the  
British Horse Society

27 September 2022

## Annexe

### Sutton tithe map (National Archives copy)

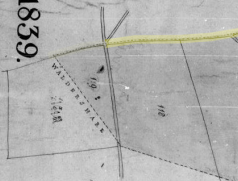
See paras.B.12–B.15 above. Showing:

- highlighted in *yellow*, paths shown on the National Archives copy of the tithe map;
- marked in *green*, the route of paths shown only on the Kent County Archives copy of the tithe map;
- labels in red, the path number as recorded on the definitive map and statement.



*The Underwriters' Survey of England was made first only by the Clerks of the Exchequer in the reign of Henry II. It was then made by the Surveyors of the Land in the reign of Henry III. It was then made by the Surveyors of the Land in the reign of Henry III. It was then made by the Surveyors of the Land in the reign of Henry III.*

A MAP of the PARISH of SUTTON, in the County of KENT. A R P Total Contents, 1055.1.36. Scale, 4Chains to the Inch. Corrected from a former Survey, Oct 1839. W HOLTUM, WALMER.



DETACHED LAND. Contents A R P 63-0-38



## Ripple tithe map

See paras.B.17–B.22 above. Showing:

- highlighted in *red*, annotations of parcel numbers 179–197 in the apportionment within the class of ‘Public Roads and Waste Lands’;
- printed in *red*, selected parcel numbers within that class (repeated only where clarity requires);
- highlighted in *green*, annotations of parcel numbers 47a and 82 in the apportionment described as ‘Approach Road’;
- printed in *green*, those parcel numbers.



