Winkland Oaks bridleway (PINS ref: ROW/3283869) BHS comment on objector's representations

A. Introduction

A.1. These are the comments of the British Horse Society ('the applicant') on the representations dated September 2022 submitted by Birketts LLP on behalf of its client, Mr William Hickson, of Winkland Oaks Farm, in relation to the applicant's statement of case. As before, we refer below to the position represented by Birketts as the case made by 'the objector'.

A.2. We refer to paragraphs in the objector's statement of case as WH–SOC/*n*, and to paragraphs in the objector's representations as WH–R/*n*, where *n* is the relevant paragraph number. We refer to the applicant's statement of case as BHS–SOC/X.Y, meaning item Y in part X of the statement of case (or to X.Y.*n*, referring to the relevant paragraph in item Y in part X), and to paragraphs in the applicant's representations on the objector's statement of case as BHS–R/*n*.

A.3. Again, we refer to the notation used on the order plan (A–X–B) and in the application plan (C–D–E), as relevant, there being no conflict between them (but it should be noted that the notations run in opposite directions, so that A=E and B=C).

B. General comments

B.1. WH–R/2.1: The legal status of the order way is not necessarily that which is shown on the definitive map and statement, but the status which subsists in law. The showing of the way on the definitive map and statement at the relevant date is 'without prejudice to any question whether the public had at that date any right of way other than that right.'[1] The legal status is not affected by the order, but confirmation of the order will create a conclusive public record of the status.

B.2. WH–R/2.2–3.1: The objector misunderstands the applicant's position. We do not say that the decision of Kent County Council in the Special Review to downgrade the order way between the parish boundary and B from road used as a public path (RUPP) to footpath (BHS–SOC/I.F) remains open to challenge or can be disregarded. We do say that the decision was wrong, and incompatible with the subsequent judgment of the court in *Hood*.[2]

B.3. That part of the order way was recorded on the first definitive map and statement as a RUPP. A RUPP was defined as:

1 Wildlife and Countryside Act 1981, s.56(1)(a).

2 *R v Secretary of State for the Environment, ex parte Hood* [1975] QB 891 (as to which, see BHS–SOC/I.F).

> …a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used.[3]

B.4. The definition of a RUPP implies that the way is a public drove-way or a public carriageway (*i.e*. not being a public path, and therefore being neither footpath nor bridleway) and this is evidence that the way was considered, at the time of preparation of that map and statement, as having public either drove-way or carriageway rights consistent with the Ripple tithe apportionment. In the particular context, we do not think it likely that the way was a drove-way.

B.5. WH–R/3.2: We do not accept that:

> …the starting point is the presumption that the route exists in the form in which it is shown on the DMS.

Please see the BHS comment on the objector's statement of case, at BHS–R/A.8–A.16.

B.6. WH–R/3.4: The objector states that:

> …the Applicant's case is based substantially on conjecture and assumption.

The applicant's case comprises submissions based on facts, law and analysis. It is inevitable, in determining definitive map modification orders based on historical evidence, that the history of the claimed way is not fully documented. In such cases, it is reasonable to present the known facts, and to invite the decision maker to draw inferences supported by analysis. It is open to other parties to offer their own analysis in support of alternative inferences. The weight to be given to such inferences, if properly drawn, is a matter for the decision-maker. To characterise the applicant's case as 'based substantially on conjecture and assumption' is, we submit, incorrect.

B.7. WH–R/3.5: In this context, the objector suggests that evidence is lacking for the applicant's proposition that Hangman's Lane was a through route between Ringwould and Sutton for those on foot and on horseback. It is said (at WH–R/3.14) that this is because there is no evidence of a continuous route between A and B. We address that criticism in our evidence that the order way was recorded as a highway on the Sutton tithe map and Ripple tithe apportionment (BHS–SOC/IV.D; BHS–R/B.12–B.18). That allows a possibility, advanced by the applicant, that the way was indeed a continuation of Hangman's Lane, given that there is evidence since the first half of the nineteenth century that both Hangman's Lane and the order way have subsisted as public paths, have an end-on junction at B, and serve a useful purpose of communication between Ringwould and Sutton. But we accept that we cannot prove this submission to be correct, and we leave the inspector to allow it such weight as he or she thinks fit.

B.8. WH–R/3.6: The objector also suggests there is 'no evidential justification' for the applicant's assertion that the order way was (in part) omitted from early county maps because it was a cross-field bridleway. We disagree. There is no evidence that the order way between A and the parish boundary has ever been an inclosed lane, and all the Ordnance Survey County Series plans show that part of the way to be mainly or wholly unfenced. As such, it is by definition a cross-field path or track.

B.9. WH–R/3.10: The objector states that:

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

> It is not realistically possible to impugn, at the distance of so many years, the competence and draftsmanship skills of those who prepared [the parish map].

We disagree: Sutton parish council's deficit of competence is manifest in its parish map (BHS–SOC/IV.O, at illustration xxxiii), which drew footpaths 18 and 20 in quite the wrong locations, on unrealistic straight lines which did not exist.

B.10. The objector then states that:

> Speculation that the Parish of Ripple "perceived it to be a public road" is entirely without justification.

We have already noted (BHS–SOC/I.G.13) that the order way originally was omitted from the Ripple parish map, but it was included in the parish statement (BHS–SOC/IV.O, at illustration xxxv). The only plausible explanation for the (belated) classification by the parish council of the order way in Ripple as a 'CRF' (carriage road/footpath) — that is, a RUPP, which as explained at para.B.4 above, is by definition a public road used mainly as a public path — is that it was perceived to be not merely a footpath (which would have attracted a classification as footpath), but a public road used mainly as a footpath. As the objector states: 'The presumption of regularity…applies to the preparation of the Parish Map': we say it applies to the parish statement too.

C. The evidence

C.1. WH–R/3.14–3.15 Maps: The objector overlooks the applicant's presentation of evidence from the Sutton tithe map and the Ripple tithe apportionment which shows that the order way existed as a public way in the first half of the nineteenth century. Accordingly, it is suggested that, while possible that the order way sprang into life in the short interval between the Greenwoods' map dating from 1819–20 and the tithe surveys in 1839–40 — such that it became sufficiently established in that interval to be marked as a public path on the Sutton tithe map and recorded as a public road in the Ripple tithe apportionment — it is somewhat more likely that the order way as a whole was already well or long established by 1839–40, but partly overlooked by the surveyors of the county maps, for the reasons already addressed (BHS–SOC/I.G.3).

C.2. WH–R/3.16–3.18 Sutton tithe map: We have fully addressed what is signified by the pecked lines shown on one or other copy of the Sutton tithe map (BHS–R/B.12–B.15).

C.3. The objector states that:

> The Applicant's own analysis shows that the very highest interpretation of this dotted line is that the it might have indicated that the route was a public footpath (as it is today).

We disagree. Plainly, 'the very highest interpretation' of the pecked line is that the route could have been a public bridleway (as certain other such routes shown as pecked lines are now bridleways, and would have been then). There is no basis on which it can be concluded that the Sutton tithe map showed *only* footpaths. But we agree that it cannot be concluded from that evidence alone that what is shown on the tithe map is a bridleway and not a footpath. The value of what is shown is evidence that the order way existed in 1839 as an established public path.

C.4. WH–R/3.19 Ripple tithe map: We agree that the Ripple tithe map, in isolation, is of little probative value. The objector however has failed to take account of the record in the tithe apportionment of a public road (BHS–SOC/IV.D).

C.5. WH–R/3.21 Ordnance Survey County Series second edition twenty-five inch plan (1896): We address (BHS–SOC/IV.F.5–IV.F.6) the objector's argument that the absence of annotation of the order way as 'F.P.' or 'B.R.' (footpath or bridle-road) indicates that the surveyor did not see evidence of public use. The surveyor was indifferent to whether use were public. The surveyor could only record what was the 'highest' status of use, and if that status were vehicular, no marking ought to be made at all. The surveyor was no more likely to annotate the order way as a footpath or bridle-road merely because he saw evidence of use on foot and on horseback, than so to annotate any public road, because such use was (for the purposes of the survey) subsidiary to use by vehicles.

C.6. Put another way, a way was annotated 'F.P.' or 'B.R.' because it was solely or mainly used as footpath or bridleway. The order way, at this time, was doubtless also used by carts (which might explain why it was metalled).

C.7. WH–R/3.23–3.25 Bartholomew's maps: The objector states that:

> A map which did not show physical features, such as farm tracks (albeit over which there were no rights) would be of little help to navigation.

On the other hand, a map which was bought primarily by the cycling and motoring public and which showed a farm track as an 'indifferent' road (first two editions); and as a 'serviceable' road on the fourth edition, would invite use which was trespassory. It would be surprising if depiction as such was not corrected over a half-century of publication through four editions.

C.8. WH–R/3.26–3.27 Finance Act 1910: We agree that the map marked up with hereditaments prepared under the 1910 Act is accurate. What is in question is whether the absence from the valuation book of any claimed deduction for rights of way across the hereditament comprising Winkland Oaks Farm is of significance. We submit that it is not (BHS–SOC/IV.H).

C.9. WH–R/3.28–3.29 Eastry Rural District Council Surveyor's Report 1911: We note that the objector appears to accept that Mr Quested was the contemporary tenant of Winkland Oaks Farm. We consider this a valuable concession, as the objector, as present farm owner, is likely to have some awareness and historical records of previous farm owners or tenants.

C.10. We do not know what was written in Mr Quested's letter to the council surveyor: we only have the surveyor's note of the letter. We have shown that 'Winkland Farm' was a name no longer in use by 1911 (BHS–R/B.36–B.37). Thus the surveyor's note is unlikely to be a correct transcription of what was in the letter, for the reasons already given.

C.11. The marginal note is consistent with the surveyor's assessment of the order way as a non-maintained bridle road. If the council disputed that assessment, the marginal note would have said so.

C.12. WH–R/3.30–3.31 Eastry Rural District Council Surveyor's Report 1913: We do not consider it necessary to add to the submissions previously made (BHS–SOC/IV.J and BHS–R/B.42–B.43).

C.13. WH–R/3.32–3.42 Electricity (Supply) Acts 1882 to 1922: There is no uncertainty about the way referred to in the notice under the Acts, 'leading from Winkland Oaks Cottages Ripple to Dover Hill Sutton'. As we have explained (BHS–SOC/I.D.2), the dwellings at B originally were named Winkland Cottages and renamed Winklandoaks Cottages during the first half of the twentieth century. As, at the date of the notice, no other dwellings are known to have been given the same name, the notice therefore refers to the order way beginning at the cottages at B and continuing to Dover Hill at A.

C.14. We rely in general on our submissions previously made (BHS–SOC/IV.K and BHS–R/B.45–B.47).

C.15. At paras.3.40–3.41, the objector states:

> S17 of the 1882 Act does make provision for compensation for damage.
>
> 3.41 The inference drawn in [IV.K.15] is wrong and compensation was provided for, which strongly suggests that private land was in the contemplation of the draftsmen.

But s.17 of the 1882 Act does not require compensation to be paid for placing the undertaker's apparatus on private land (such as a private road) — it merely compels compensation to be paid to interested parties 'for all damage sustained by them'. As we have articulated in our previous submissions, nothing in the Electricity (Supply) Acts 1882 to 1922 confers a right to compensation to land owners and occupiers in consequence of the interference in their private property rights were undertakers' apparatus to be buried in or erected along their private farm track or road. In the absence of such provision, and consistent with the constitutional principles enunciated in *Mayor of Tunbridge Wells v Baird* 'of not taking private rights without compensation',[4] it may reasonably be concluded that the intention of the legislation was to enable the use of publicly and privately-maintainable highways for that purpose.

C.16. Little turns on it, but at para.3.42, the objector claims to have identified the 'road leading from Paramour Street to Downfield Farm', which we were unable to identify (BHS–SOC/IV.K.16, table, item x). However, footpath E68 leads from Knell Lane and not from Paramour Street. It may be the road listed in the notice — but it may not.

C.17. That a small number of the 32 streets not repairable by local authorities nor railways notified within the Eastry Rural District are now recorded as footpaths, or not at all, does not necessarily signify that they had that status, or no public status, in 1923 — and we submit that the order way is just such an example.

C.18. In our submission, it was not the intention of the Electricity (Supply) Acts 1882 to 1922 to enable electricity suppliers to lay cables underneath any field footpaths in the countryside, merely on the basis that the footpath was a public way and the landowner therefore was not entitled to compensation. The ways listed in the 1923 notice are consistent with this interpretation.

Hugh Craddock, for the
British Horse Society

2 October 2022

4 [1896] AC 434 at 439–40 (as to which, see BHS–SOC/IV.K.14).