

BHS response to statement of Mr Andrew Fox-Pitt

A. Introduction

A.1. This is the response of the British Horse Society ('the society') to the comments submitted by Mr Andrew Fox-Pitt ('the objector'), on the Kelk Hill appeal.

A.2. We refer to the society's original appeal statement of case: for example, BHS-SOC/item III.K. And to the society's response to the order-making authority's statement in reply to the appeal¹: for example, BHS-RtoKCC/para.A.2. We refer to the numbered paragraphs of the objector's comments.

B. General comments in response to the objector's commentary

B.1. Para.2 (speculation): Our appeal does not rely on speculation. It relies almost entirely on evidence. But insofar as the society's appeal statement of case does engage in speculation (see, for example, BHS-SOC/para.I.I.5), it does so in order to inform the appeal.

B.2. As the objector will know, some aspects of an application or appeal in relation to historical ways cannot be resolved with evidence: for example, it seldom is possible to say when a highway first came into existence, or whether other parallel and potentially alternative routes came into existence sooner or later, and how (in mediæval times) alternative routes may have compared in terms of suitability for different types of traffic. In such circumstances, it is reasonable for a party to put forward submissions which rely on such evidence as is available and which may be speculative in part (provided that speculation is not presented as fact), if these may assist the decision-maker in reaching a conclusion. It then is open to other parties to make alternative submissions.

B.3. As to alternative submissions, the Knowlton estate (of which the lands farmed by the objector and crossed by the appeal way are part) was acquired from the D'Aeth family² in 1904 by Major Francis Elmer Speed,³ of whom Marietta Fox-Pitt (née Speed), the present owner of Knowlton Court, is a descendent. The objector, who farms the estate, is Mrs Fox-Pitt's son. Thus the Knowlton estate has been in the continuous possession of the present family for well over a century, and can be assumed to have acquired estate papers on the purchase of the estate in 1904, and to have accumulated papers subsequently.

1 Dated 11 October 2024

2 In the apportionment prepared under the *Tithe Act 1836* (BHS-SOC/item III.H), the entirety of the lands crossed by the appeal way are shown as owned by George William Hughes D'Aeth, the then owner of Knowlton Court (see the [transcript](#) of the tithe apportionment, where D'Aeth is misspelled as Deith).

3 Knowlton Court website: www.knowltoncourt.co.uk/Our-History.html. The D'Aeth family acquired the Knowlton estate in 1707.

B.4. The burden of proof (on the balance of probabilities) in applying for a definitive map modification order lies on the applicant. There is no obligation on an objector to produce any evidence to prove a contrary case. Nevertheless, it is submitted that, in relation to the appeal way, which undoubtedly has been in existence for centuries, which the objector appears to imply has always been a private road (presumably for the benefit of the estate and others), it is notable that not one single document has been submitted by the objector in his objection. It does not seem unreasonable in the circumstances to conclude that, notwithstanding the objector's association with the estate, and the long history of the estate, the objector does not possess a single piece of evidence which supports his contention that the appeal way is not a highway, or that it is a private road. That in itself is remarkable.

B.5. We also note that, although the objector denies that the appeal way is a public road (nor, presumably, even a bridleway), he does not say what it is. Plainly, it is a road capable of accommodating carts and horses, and has been since time immemorial. We refer in our appeal statement of case to the evidence of the hundredal boundary, which follows the centre line of the road (BHS-SOC/item I.H). The way traverses the Knowlton Estate, from A (which marks the eastern boundary of the estate) to D (which marks the western boundary, and the transition to the St Alban's estate). It joins, end on at D, and via a slight stagger at A, continuation routes heading approximately south-east/north-west across the East Kent downs. It does not pass or serve any house, cottage, farm or even barn, nor appears ever to have done so. The fields through which it passes are all accessible from neighbouring roads.⁴ It does not lead to or from Knowlton Court, but maintains a line to the south of the Court and park. It remained unfenced and ungated throughout until around the middle of the nineteenth century, crossing downland which traditionally was open and unenclosed.⁵

B.6. It is not clear what was the purpose of the appeal way, if it did not serve as a public road, nor how (if it was always a private road) the Knowlton estate succeeded in excluding public traffic from a way which was surely ungated and unenclosed from the earliest times until the 1850s. Even on the evidence submitted in the appeal, the appeal way subsisted as an ungated and unenclosed way for over two centuries.

B.7. Para.3 (balance): As we have explained in our appeal statement of case and in our response to the order-making authority's statement, we consider the authority's conclusion on the society's application to be predicated on a mistaken analysis of the evidence. Accordingly, we do not accept that the evidence 'is in the balance'. See, in particular, BHS-SOC/item I.G and BHS-RtoKCC/para.B.5.

B.8. Para.4 (dismissal of unsupportive evidence): The society deprecates (it is not a case of 'dismissing') evidence which does not support the appeal, either because in our submission, it does not have the significance contended by the order-making authority, or because it is unreliable. Only one piece of evidence falls into the latter class: the *Walmer, Deal and Adisham Railway* plans (BHS-SOC/item III.N). It is reasonable that those plans are treated as unreliable, because Parliament itself ruled the plans inadmissible as non-

4 We include here footpath EE264, which is the subject of an as-yet unconfirmed definitive map modification order to upgrade to restricted byway.

5 On the *Poor Law Commissioners' survey* (BHS-SOC/item III.J), the appeal way is shown for the first time as bounded on the north-eastern side. On the *Ordnance Survey County Series* first-edition large scale plan, surveyed in 1872 (BHS-SOC/item III.O), the appeal way between A and B is shown as bounded on the north-eastern side, and for part of the way between C and D on the northern side. It is otherwise unfenced and ungated.

compliant with Parliamentary standing orders. It is not clear why the order-making authority, and the objector, prefer the assessment of status given in plans expressly rejected by Parliament, over that in the *Ramsgate Sandwich Deal and Dover Railway* plans (BHS-SOC/item III.J) which were ruled to be compliant and underwent the usual process of Parliamentary scrutiny (even though the plans did not receive Royal Assent).

C. Objector's comments on evidence

C.1. Para.6 (*St Alban's map*): The objector appears to suggest that, although 'the map shows routes that are "all recognised as public roads today"', some of those routes may not have been public roads at the time the map was prepared. This is simply unlikely. The objector's proposition is that one or more of those routes existed, but were not public roads in 1629 — a time when the concept of entirely private roads of the character of the appeal way was barely recognised — but nevertheless became public roads subsequently. In our submission, roads which are shown on the St Alban's map and which are public roads today, were open to the public then.⁶

C.2. Para.7 (*OS Drawing*): The objector is tilting at windmills. We do not say that the *Ordnance Survey Drawing* (BHS-SOC/item III.B) is evidence of a public road, nor does the objector's quotation from that source suggest otherwise. We do not understand the objector's further comment about footpath status. We said that the Ordnance Survey Drawing does not (with possible rare exceptions) show footpaths, and therefore the depiction of the appeal way was not consistent with the existence of only a footpath. Plainly then, the Drawing is evidence that the appeal way either was a bridleway or public road, or that it was a private road.

C.3. Para.8 (*OS Old Series one-inch map*): We agree with the objector — not least, because that is what was said in the appeal statement of case (BHS-SOC/item III.E).

D. Order of exchange (1854)

D.1. Paras.9–10: Noted. But we reprise what we said in the appeal statement of case (BHS-SOC/para.III.I.8): '...it is not obvious how [the order] can fail to be evidence for the way beyond D at least as far as B (there being no suggestion that there is any other alignment to which it might relate).'

E. Poor Law Commissioners' Survey (1859)

E.1. Paras.11–12: The appeal way is marked with an intermittent coloured fill for the purposes of identification: the intermittency fill enables the underlying colouring to be recognised. Nevertheless, we attach in the annexe an unmarked copy, which shows that the appeal way is (in the original plan) coloured in the same way as other public roads (please see BHS-SOC/item III.J for further analysis).

E.2. The appeal way may be compared with the track shown in the bottom-right hand corner of the annexed extract (opposite the turning annotated 'to Singleton') which is not assigned an apportionment parcel number; is not coloured; and is braced to the parcel

⁶ Although we suggest that the vast majority of public roads in this area (which generally lacked any statutory inclosure process) are of ancient origin, we recognise one exception: the short arc between Grannies Lane and the Sandwich Road approximately 400 metres east-northeast of D. This appears to have been constructed in the early nineteenth century.

which it crosses. This track, it might be inferred, was not a public road, in contrast to the appeal way.

E.3. Of course, the map shows the effects of over 160 years of ageing — the colouring has faded to grey in parts. The objector has (below para.11) selectively reproduced, in isolation, that part of the plan showing the appeal way where the fill has entirely faded to grey, but without showing the neighbouring parts where the fade is less marked. This is unhelpful.

E.4. Paras.13–15: The objector suggests the survey was ‘was not prepared with the input of landowners’. The suggestion is mistaken: the survey was done at the initiative of the parish vestry (which obtained a direction of the Poor Law Commissioners for the purpose). The vestry was constituted by the landowners (and, at this period, only the landowners) of the parish. The survey would have been carried out under the supervision of the Poor Law guardians, who were themselves landowners elected to guardianship by the vestry. The entire process was supervised by the landowners of the parish.

E.5. As noted at BHS-SOC/fn.49, ‘S.6 [of the Parochial Assessment Act 1836] enables appeals to quarter sessions against the valuation.’ Thus, where there was disagreement about the valuation, there was also a right of appeal.

F. Ramsgate Sandwich Deal and Dover Railway (1861)

F.1. Para.16: We maintain our criticism of the guidance in the *Consistency Guidelines*⁷, which suggest that plans for railways which were not built may be less reliable. This guidance appears to rely on the finding of the High Court in *Trail Riders Fellowship v Secretary of State for the Environment, Food and Rural Affairs*⁸, in which Collins J briefly stated (in relation to railway plans showing the order way as a public road):

Nevertheless, the plans were never put before Parliament and so there was no detailed consideration of the issue.⁹

F.2. The finding was, however, mistaken, for the reasons set out at BHS-SOC/ paras.III.K.12–13. The success or failure of a particular railway proposal might depend on various factors, including whether the proposed line was considered viable (for example, in terms of proposed construction costs and potential traffic), whether there was local support for the proposal, and whether there were competing schemes. If the proposal was successful, it proceeded to Royal Assent; if it was not, it would be rejected or withdrawn. Even if the proposal received Royal Assent, it might not be built.¹⁰

F.3. None of this affected or was influenced by the accuracy of the plans — although the promoters of a Bill might be challenged on, for example, the expediency of a planned level crossing compared to a bridge. As we explain, the deposited plans for a proposal were subject to initial official scrutiny, and rejected if inadequate. This is what happened to the plans for the *Walmer, Deal and Adisham Railway* plans (BHS-SOC/item III.N). After that initial scrutiny, the plans were subject to the same Parliamentary process whether they were effectively approved, and the accompanying Bill received Royal Assent, or they were

⁷ *Consistency Guidelines*: para.10.2.4

⁸ [2015] EWHC 85 (Admin)

⁹ At [28]

¹⁰ An enabling Act might impose a requirement that the railway be built, with penalties for non-compliance. Even so, a further Act might be procured to relieve the railway company of the obligation.

rejected or withdrawn for whatever reason. It therefore is incorrect to find, as did Collins J, that, 'there was no detailed consideration of the issue.'

F.4. Proposals were also put forward in the same session of Parliament for the London Chatham and Dover Railway (Extensions to Walmer and Deal) Bill, which contemplated a line from Dover (Buckland) to Deal via Guston and Martin Mill (roughly along the alignment eventually authorised in 1874), and which received Royal Assent in the London, Chatham and Dover Railway (Deal Extension) Act 1862.¹¹ Accordingly, the proposals for the Ramsgate Sandwich Deal and Dover Railway were withdrawn, the alternative route via Guston and Martin Mill being preferred in Parliament. In the event, the 1862 Act was repealed three years later,¹² and the line was not built until 1881.¹³ But in the society's submission, the plans for the Chatham and Dover Railway (Extensions to Walmer and Deal) railway, although authorised by Act of Parliament, are no less or more authoritative than those for the Ramsgate Sandwich Deal and Dover Railway, or indeed, those for the line which was authorised in 1874 and which opened in 1881. All the plans were submitted to Parliament, were approved by the Examiners, and were subject to the Parliamentary process.

F.5. Para.17: We consider that the details contained in the book of reference are to be preferred, in the event of conflict, with those in the plan. The book of reference unequivocally identifies the appeal way as a 'Public Road', owned in Nonington by the then surveyor of the parish, John Spanton, and occupied by the same. The plan refers to the appeal way only in the sectional diagram as a 'Public Road or Occupation Road'. It is not uncommon in nineteenth and early twentieth-century documents for ways to be described in relation to two elements: for example, 'footpath or bridleway', or 'footpath or road'. We suggest that the higher rights should be favoured — particularly here where they are corroborated by the book of reference. It is the book of reference which would have attracted attention at the consultation stage mandated by Parliamentary standing orders,¹⁴ and it is suggested to be unlikely that the entries as given would have been misunderstood for anything other than a public road. It seems most probable that, after preparation of the plans, the railway surveyor established that the appeal way was a public road and entered the appropriate details in the book of reference, but failed to go back and amend the section.

F.6. The objector suggests that this evidence cannot 'discharge [the] burden' of proving 'that public vehicular highway rights exist'. However, each item of evidence should not be reviewed, and a conclusion reached, in isolation. While this evidence could, taken on its own, allow for at least some uncertainty whether the railway surveyor was satisfied that the appeal way was a public road, it is suggested that it corroborates, and is corroborated by, other complementary evidence (such as the *Poor Law Commissioners' Survey*, BHS-SOC/item III.J) which records the same public-road status.

F.7. Put another way: if several independent evidential sources described the appeal way as a public road or occupation road, that might give rise to real doubt whether it was a public road. Where several sources record that a way is a public road, and one source records it primarily to be a public road, but another part of the same source records it as a public road or occupation road, then it is suggested that the only reasonable inference is that the way is a public road.

11 c.clxiii

12 Deal and Dover Railway Act 1865 (c.ccxcvi), s.24

13 Dover and Deal Railway Act 1874 (c.lii)

14 BHS-SOC/fn.64

G. OS Boundary Records (1867–69)

G.1. Para.18: The objector criticises the society’s assessment of the *OS Boundary Records* (BHS-SOC/item III.L) that ‘the depiction [of the appeal way] is “suggestive of an ancient way which is likely to be a public road.”’ The objector says that the evidence ‘must be more than merely “suggestive”’.

G.2. However, the appeal statement of case refers to a detailed analysis of the significance of the appeal way following the line of the hundredal boundary, at BHS-SOC/item I.H.

G.3. And as we explain at para.F.6 above, a proper assessment of the appeal relies not on the appraisal of each individual evidential item to establish whether it surpasses an arbitrary evidential threshold, and the dismissal of those which fall short, but on the assessment of the evidence as a whole: see the appeal statement of case at paras.I.I.10–11.

H. Walmer, Deal and Adisham Railway (1871)

H.1. Paras.19–21: We have addressed this evidence at para.B.8 above.

I. Finance (1909–10) Act 1910

I.1. Paras.22–23: Again, the objector suggests that, ‘Evidence has to be more than “modestly supportive” which represents only a reasonable allegation.’ We refer to what we have said at para.G.3 above.

J. Other evidence

J.1. Para.24 (trees): The objector refers to ‘photographs of trees in [the society’s¹⁵] application, that look older than 150 years old’, and these are said to be incompatible with higher status.

J.2. We infer that the objector refers to the photographs at section II of the appeal statement of case, and particularly those at illustrations vii and x.¹⁶ If we are correct in suggesting that the original line of the appeal way follows the slight holloway now overgrown with trees between B and C (illustration vii: see BHS-SOC/para.I.H.13), the trees which have become established here appear to be of no particular age, and probably post-War in origin. Between C and D, there are indeed some vintage trees of considerable girth, but even now, they allow sufficient room to get by even within the limited space allowed between the fences. Nor can it be assumed that the fences have always been located in the same position.

J.3. As we note in our response to the order-making authority’s statement on the appeal (BHS-RtoKCC/para.B.9), it seems likely that there was a decline in vehicular traffic using the appeal way before the end of the nineteenth century, and probably a cessation in the early twentieth century. If so, that allows well over a century for uninterrupted tree growth to the present day.

J.4. It will be seen that, even on the *Ordnance Survey County Series* first-edition large scale plan (BHS-SOC/item III.O) surveyed in 1872 (illustration xxxi), the appeal way between C and D is shown as heavily treed in a landscape otherwise largely lacking trees.

¹⁵ The objector refers to ‘his application’: the application is that of the society, not the author.

¹⁶ The numbering of the illustrations in section II is not properly sequential.

Yet the plan records the hundredal boundary along the centre line of the 'road' between C and a little short of D, confirming that, at this time, the way continued to be regarded as a road, and not a path.

J.5. Para.25 (continuation beyond A): The objector asserts that there is no right of way beyond byway EE335 at A, and that this shows that the appeal way can be no more than a footpath.

J.6. Leaving aside that the appeal way at A joins with a byway, which provides a vehicular continuation to north-east and south-west, our appeal statement of case contends that the principal continuation of the appeal way lies along the line of bridleway EE335B (BHS-SOC/item I.I). This way, which is recorded as a bridleway, may be the subject of a future application to record as a restricted byway.

British Horse Society
4 November 2024

Annexe

Annexe: Poor Law Commissioners' survey

(see para.E.1 above)

Scale of Chains

