

|  |
| --- |
| **Order Decision** |
| Site visit made on 23 November 2021 |
| **by Martin Small BA (Hons) BPl DipCM MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 02 February 2022** |

|  |
| --- |
| **Order Ref: ROW/3264111** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Kent County Council (Bridleway EE490 at Eastry) Definitive Map Modification Order 2020.
 |
| * The Order is dated 20 July 2020 and proposes to modify the Definitive Map and Statement for the area by adding a path at Bridleway status, as shown in the Order plan and described in the Order Schedule.
 |
| * There was one objection outstanding when Kent County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
 |
| **Summary of Decision: The Order is confirmed.** |
|  |

Background

1. The case concerns the addition of a bridleway at a width of 3 metres which commences at a junction with Monkeys Hill at Heronden and runs in a generally south-easterly direction for approximately 190 metres to a junction with Thornton Lane, as shown between points A and B on the Inset Map of the Order Map.
2. The original application was for a longer route continuing to the east of Thornton Lane beyond point B. However, the continuation has been the subject of a separate Order; the Kent County Council (Bridleway EE491 at Eastry) Definitive Map Modification Order 2020. That Order was unopposed and has been confirmed.

The Main Issues

1. The criteria for the confirmation of the Order are set out in the 1981 Act, in this case subsection 53(3)(c)(i). This requires me to consider whether the evidence discovered shows that a bridleway should be recorded in the Definitive Map and Statement (‘DMS’) between points A and B. For this to be the case, the evidence must show that the Order route not currently recorded in the DMS subsists and should be recorded with bridleway status.
2. As regards the documentary evidence adduced, section 32 of the Highways Act 1980 (‘the 1980 Act’) requires that I take into consideration any map, plan or history of the locality, or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. Therefore, I must consider whether or not the documentary evidence available to me, when considered as a whole, shows that bridleway rights have existed historically over the Order route.
3. My decision is reached on the balance of probability.

Reasons

*County Maps*

1. The earliest map adduced is Andrew’s Topographical Map of Kent of 1769 which shows a way projecting east-south-east from a way at Harlden (now Heronden) to another way heading approximately south from Eastry to Thornton. Although not annotated, from their location and alignment, the ways at either end of the Order route are likely to be Monkeys Hill and Thornton Lane.
2. The connection of the Order route as shown on Andrew’s Map with Monkeys Hill is consistent with Point A on the Order map and the connection with Thornton Lane is broadly consistent with Point B. However, although Andrew’s Map is indicative of the existence of a way on the approximate alignment of the Order route, the Map is believed to have been produced to show potential clients’ country estates rather than give an accurate representation of the county. It is also not conclusive as to the way’s status and user rights.
3. William Boteler was born in Eastry and lived there nearly all his married life. Boteler’s *Collections for the Hundreds of Bewsborough, Cornilo and Eastry and part of Ringslow* contains a sketch map of 1790-92 which shows a way that corresponds with the Order route. This is shown in the same manner as ways that are recognisable as the acknowledged public highways of Monkeys Hill and Thornton Lane. Although the Order route is not annotated with a name or destinations neither Monkeys Hill nor Thornton Lane is named and, being within the frame of the map, it would not have been necessary to include destinations for the Order route.
4. The annotation of another route to the east of Thornton Lane as ‘Tenants Way’ suggests that Boteler differentiated between ways that were public highways and those that were not. This would indicate that the Order route was a public highway, although the user rights are not clear.
5. William Barlow’s map of the hundred of Eastry was incorporated within the first edition of Edward Hasted’s *History and Topographical Survey of the County of Kent*, dating from 1797-1801 and widely commercially published. This shows a way that corresponds with the Order route in the same manner as ways that correspond with Monkeys Hill and Thornton Lane.
6. The map does not show the continuation of the claimed route eastwards to the other side of Thornton Lane but this may be because the map did not set out to record most cross-field paths with no physical presence. The Barlow-Hasted map is therefore a firm indication of the existence of a physical way although is inconclusive as to its status and user rights.

*Local Maps*

1. The Contracted Map of Principal Roads in Eastry was produced in 1836 for the primary purpose of recording those principal roads which were maintainable by the inhabitants of the parish. The map shows the Order route but not as one of the maintainable roads. Whilst evidence of the existence of a way the map thus does not corroborate the claimed public bridleway status.
2. The 1841 tithe map for Eastry shows the Order route as an enclosed way between points A and B on the Inset Map of the Order Map open to and shown in the same manner as roads recognisable as Monkeys Hill and Thornton Lane. The way is excluded from the rateable parcels to the north-east and south-west and no tithe apportionment parcel number is allocated to the way. Given the public nature of the production of the tithe maps, it is unlikely that this absence of rating was an error.
3. The tithe maps were not intended to establish or record rights of way so should not be treated as conclusive evidence of the existence of a public right of way. The map is not conclusive that the Order route, Monkeys Hill and Thornton Lane were public highways of the same status at the time. No evidence is adduced of how the other ways came to be established as public highways.
4. However, the public road network as it exists today correlates well with the tithe map. The absence of any tithable rating is comparable to the representation of other routes that are now public highways, including Thornton Lane. The representation of the Order route on the tithe map therefore suggests a public way. The Objector’s suggestion that the Order route may have provided private access to the parcels of land fronting the way seems unlikely on a balance of probability as these parcels would have been accessible from either Monkeys Hill or Thornton Lane.
5. Furthermore, the Order route appears to be a continuation of Bridleway EE491 which runs across open ground south-east from Thornton Lane near the junction with the Order route towards Venson Bottom and Betteshanger, annotated on the tithe map as ‘Bridle Road’. Although the Order route is of a different character and notation, it is more likely than not that the Order route is of least the same status as this public bridleway.
6. The Canterbury Chapter Estates Map of Eastry, Tilmanstone and Worth, prepared in 1853 for the Ecclesiastical Commissioners in relation to the land holding of the Canterbury Chapter estates, shows a spur leading north-west of Thornton Lane at the approximate location of point B on the Inset Map. As with Thornton Lane, a known public way, this spur appears to be coloured sienna which differentiates it from the ‘Tenants Way’ to the east of Thornton Lane and suggests that the spur is also a public way.

*Ordnance Survey (‘OS’) records*

1. Four editions of the County series OS maps, dating between 1872 and 1938, and the Popular one-inch edition published in 1938, have been adduced. No keys have been provided for the County series maps but the applicant suggests that all four editions show the Order route as an unmetalled track between points A and B on the Inset Map. The 4th edition, however, shows only a route between the East Kent Mineral Light Railway, which crossed the Order route at that time, and point B, with no track shown between point A and the railway.
2. On the 1st Edition the Order route is not shaded as are Monkeys Hill and Thornton Lane but this does not disprove the claimed status of the Order route. Whilst the applicant contends otherwise, the inclusion of spot heights and / or bench marks are not indicative or proof of a public right of way. On the 2nd Edition map the Order route is annotated as ‘F.P.’ (footpath), which is confirmation of the physical existence of the route between points A and B and some evidence of its public status. The annotation as F.P. may indicate that the surveyor did not, at the time, see cause to record the Order route as a bridleway rather than denial of bridleway status. The route is not annotated on the 3rd and 4th Editions.
3. The Popular Edition shows the Order route as a pecked line between points A and B on the Inset Map, which the key identifies as ‘ Bridle and Footpaths’. However, since the late 19th century OS maps have carried a disclaimer that tracks and paths shown provide no evidence of the existence of a public right of way. The OS maps therefore provide evidence of the existence of a way on the Order route but is of limited weight as regards its status and user rights.

*East Kent Mineral (Light) Railway records*

1. The East Kent Mineral (Light) Railway (EKMLR) was authorised under the Light Railways Act 1896 which required the deposition of plans and books of reference in connection with a submission to the Board of Trade seeking authorisation under the Act. The plan for the EKMLR shows the Order route with a double pecked line between points A and B on the Inset Map. The Book of Reference records that the Order route is a ‘Public bridle road’ in the ownership and occupation of Eastry Rural District Council and as requiring a level crossing. This crossing is shown on an RAF aerial photograph of 1946.
2. In several applications for Definitive Map Modification Orders, the applicant has concluded that the East Kent Light Railway surveys consistently overlooked or under-recorded rights of way. These include the nearby crossings of Black Lane (bridleway EE488) and Byway Open to All Traffic EE109 which were recorded as a public footpath and as a public bridleway respectively. However, these examples suggest that the surveyor was more likely to omit or under-record a right of way rather than identify a non-existent right of way, which would have been consistent with the aim of keeping the costs of the railway to a minimum. I therefore give substantial weight to the EKMLR documentation.

*Finance Act records*

1. The 1910 Finance Act map appears to show the Order route colour-washed as part of hereditament 134 Middle and Lower Heronden Farm rather than uncoloured like Monkeys Hill and Thornton Lane. Discounts from the valuation could be claimed for land crossed by footpaths or bridleways but no deductions are recorded for rights of way in the field book for this hereditament.
2. Whilst a landowner might be expected to claim a deduction in value this was not an obligation and the OMA suggests reasons why a deduction for a right of way might not be claimed. Thus the absence of any deduction for hereditament 134 weighs against the Order in a balance of probability but is not conclusive evidence that the Order route is not a public right of way.

*Other records*

1. The 1904 Edition of Bartholomew’s map does not show the Order route, but it is shown on the 1922 and 1953 Editions. Whilst it is unlikely that an entirely private road would have been depicted on successive editions given the likely feedback from cyclists, the maps carry a disclaimer that the representation of a road or footpath is no evidence of the existence of a right of way. The maps are therefore of limited value in corroborating the Order route as a public bridleway. A composite HM Land Registry plan provided by the applicant shows the boundaries to two titles which abut the Order route. With the exception of that part comprised in the former course of the East Kent Mineral (Light) Railway the Order route is excluded from any registered title to the land.
2. It is unlikely that this narrow strip of land should be held in separate title yet remain unregistered given that first registration of title became compulsory in the area in January 1961. It is therefore more likely that the ‘*ad medium filum viae*’ rule applies; that the owner of land which abuts a public or private highway also owns the soil of the adjoining highway up to the centre line. The Land Registry evidence is thus indicative of a public way but is of limited weight.

*Consideration of the evidence*

1. The County Maps indicate that a way corresponding with the Order route had very probably come into existence by the late 18th century. The inclusion on these maps of a route is not in itself conclusive evidence of a public status as a bridleway. However, the fact that the way is shown on the County Maps in a similar manner to the acknowledged public highways of Monkeys Hill and Thornton Lane is indicative of the public status of the Order route. The County Maps therefore provide corroborative evidence of the existence of a public way between points A and B on the Inset Map. I find the same for the Land Registry evidence.
2. The Order route is not shown on the Contracted Map as a publicly maintainable highway. The purpose of Tithe Maps is not to record public rights of way and only a short section of the route is shown on the Canterbury Chapter Estates Map. The weight that can be attached to these records as unambiguous evidence of the existence of a public bridleway over the Order route is thus limited. Nevertheless, these local maps do provide further corroboration of the existence of a public right of way between points A and B on the Inset Map.
3. The OS maps record the physical features present at the time of the survey, including the Order route, but not its status. Similarly, the later editions of the Bartholomew maps are indicative of the physical existence of the Order route but are not conclusive of its status. The lack of a claimed deduction for the Order route under the Finance Act valuation weighs against the Order. However, the weight that can be given to these sources of evidence is limited.
4. Notwithstanding the suggestion of inconsistency raised by the Objector, I find the EKMLR documents to be good evidence of the Order route being a public bridleway.
5. In summary, none of the adduced evidence can be regarded as conclusive. However, considering the evidence as a whole I find, on the balance of probabilities, that the Order route not currently recorded in the DMS subsists and should be recorded with bridleway status.

Conclusions

1. Having regard to these matters raised in the written representations, I conclude that the Order should be confirmed.

**Formal Decision**

1. I confirm the Order.

Martin Small

INSPECTOR

