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# Appeal Decision

**by Mrs Helen Slade MA FIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 28 May 2019**

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## **Appeal Ref: FPS/D0121/14A/7**

- This Appeal, dated 2 November 2018, is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of North Somerset Council not to make an Order under section 53(2) of that Act.
- The Application dated 27 July 2004 was refused by the Council on 1 November 2018.
- The Appellant, Mrs Venetia Craggs, claims that an Order should be made to modify the Definitive Map and Statement by showing as a Byway Open to All Traffic ('BOAT') part of a route recorded as Public Footpath 29/76 in Sandford.

**Summary of Decision: The appeal is allowed in part.**

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## **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. This appeal has been determined on the basis of the papers submitted. I have received submissions from Ms J Roseff on behalf of the appellant; from the North Somerset Council ('the Council'); and from five interested parties. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. The application was originally made by Mrs Craggs on behalf of the Woodspring Bridleways Association. The appeal was made in her name, but the submissions have been made on her behalf by Ms J Roseff acting for the Axbridge Bridleways Association, which I understand to be the successor body to the Woodspring Bridleways Association.

## **The Appeal Route**

4. The application was originally made to upgrade to a BOAT a footpath described as running from "*Sandymead Lane/Sandymead Drove to Nye Road (Drove House)*". The application map identifies the locations of 'Nye Road', 'Sandmead Lane' (*stet*) and 'Sandmead Drove' (*stet*) whilst annotating the application route as merely 'Drove'.
5. The appeal identifies the route by reference to a Schedule 14 Direction decision reference (FPS/D0121/14D/12) and seems to apply the name "*Sandmeade Drove*" to the route in question. This name, in various spellings, has subsequently been applied to the appeal route throughout the submissions.

6. I consider that it is unhelpful and possibly confusing to refer to the appeal route using the same name as a route which is identified on many maps as relating to a different route running at right angles to it. I acknowledge that the two routes join each other but I can find nothing in the historical documentation submitted to show that the route which is the subject of the application and appeal has ever formally been named Sandmead Drove (or any other variation of spelling).
7. For clarity I therefore intend to refer to the appeal route simply as 'the appeal route' and by that I am referring to the section of Public Footpath 29/76 lying between Nye Road in the west and Sandmead Road<sup>1</sup> in the east and identified on numerous documents as running between annotated points A and B.
8. It has been suggested by Ms Roseff that the appeal ought to refer to the whole length of Footpath 29/76, some of which has been subject to diversion over the years. I must consider this appeal only in relation to the original application. For the avoidance of any doubt, this appeal decision relates only to the section of Footpath 29/76 described in the application.

### **Main Issues**

9. Section 53(3)(c)(ii) of the 1981 Act states that an order should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
10. This case relies on the interpretation of documentary evidence; no user evidence has been submitted. Section 32 of the Highways Act 1980 ('1980 Act') requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
11. The test to be met is the balance of probabilities.

### **Reasons**

12. The application was made in 2004 and although reference was made to the reliance on an 1822 map of Somerset by Greenwood, no copy of the document appears to have been enclosed.
13. The Council was subsequently directed by the Secretary of State to determine the Order and put the matter to their Public Rights of Way Sub-Committee on 26 September 2018. In conclusion they agreed that, although the route had been depicted on historical maps since 1811, there was no evidence to support its status other than that which was already recorded (i.e. public footpath). In particular, there was no documentary evidence to support the existence of public vehicular rights and no user evidence had been supplied to support the claim.
14. Subsequent evidence which has been submitted, by both the appellant, the Council and the Parish Council, shows that the appeal route has existed on the

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<sup>1</sup> As shown on Map No. EB/Mod 56/1 based on the Ordnance Survey 1:2500 map and prepared by North Somerset Council on 1 November 2005 which is attached to the copy of the application taken from the Register of Applications

ground since at least 1792<sup>2</sup>. A map submitted by the appellant and said to date from 1750<sup>3</sup> is of unknown provenance and ambiguous date and, in any case, I agree with the Council that it is far from clear that the appeal route is represented on it. Nevertheless, the 1811 Ordnance Survey surveyors plan clearly shows the route and I am satisfied that it had existed for several years before that date, and has physically existed ever since in one form or another.

***Evidence submitted by Winscombe and Sandford Parish Council ('the Parish Council')***

15. The Clerk to the Parish Council submitted information and extracts from two historical documents relating to the parish. In addition to the 1792 map referred to above, a copy of extracts from a Parliamentary Survey for the Parish of Winscombe from 1650 were submitted. These are difficult to read and the appellant has subsequently helpfully provided a partial transcription of the document. The Parish Council considers that the 1650 document serves to show that all the roads within the parish were part of the manorial commons, and that they belonged to the Lord of the Manor. As such, the Parish Council asserts that the rights to the common (and thus the rights to use the highways over them) belonged to the tenants of the Manor and to no other person. They were therefore not highways in the sense that we know them today, and were not roads for general public use.
16. The Parish Council further states that this Survey was accepted by another Inspector as demonstrating that the use of the routes was confined to certain people only, when making a decision on another route nearby. No copy of that decision has been submitted and I am therefore unable to see the context in which that argument was accepted.
17. The appellant points out that the document refers to the exercise of rights of common and not rights of access.
18. I am inclined to agree with the appellant's interpretation, and also to take account of the judgement in *R v Southampton (Inhabitants)* [1887]<sup>4</sup> where it was stated that '*user by the public must not be taken in its widest sense... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge.*'
19. Rights of common are restricted to certain people, usually by virtue of their tenancy or ownership of property, and it would be perfectly normal for such rights to be so described as in the 1650 document. If, however, the right of access to all routes in the parish had been similarly restricted, it would be difficult to see how anyone else would have been able to pass through or around the parish. Furthermore there are, of course, numerous other highways recognised today, including the appeal route, and thus I do not find that the argument put forward by the Parish Council is tenable in necessarily precluding the existence of public rights over and above those of its present recorded status as a footpath. Even if the route was only used by local people in practice, the judgement in *Southampton Inhabitants* suggests that this would be sufficient to demonstrate user by the public.

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<sup>2</sup> Estate Map by William White of the land owned by the Dean and Chapter of Wells Cathedral

<sup>3</sup> An Improved Map of Somerset

<sup>4</sup> *Southampton Inhabitants*

20. I am consequently satisfied that the appeal route can be shown to have physically existed in 1792 and that there is nothing in the early documentataion which would have prevented the use of the route by the public. However, this does not provide evidence that the public used the appeal route in vehicles at that time or since.

### **1797 Inclosure Act and 1799 Inclosure Award**

21. In 1797 a local act was passed authorizing the appointment of Commissioners to undertake the task of '*Dividing, Allotting and Inclosing the several Commons and Waste Lands*' lying within the parishes of Shipham, Winscombe in the County of Somerset. The Commissioners had powers to set out roads and appoint a surveyor to form them in the first instance. Public carriage roads were to be 40 feet wide, and sufficiently fenced on both sides. Existing public carriage roads deemed to be of adequate width notwithstanding, were also to be fenced in a similar manner, if not already defined in this way. They were also empowered to set out other routes, both public and private, and a variety of other features often covered by such awards. The Commissioners also had powers to stop up routes which they deemed to be useless and unnecessary, and any routes which formerly existed over or upon the common or waste lands (and not laid out as part of the Award<sup>5</sup>) were to be subsumed into the land to be allotted and divided. An example of this is illustrated by the treatment of the route now forming Nye Road, which at the time of the Award was called Neys Drove and was treated as part of the common or waste land to be sold off.

22. The Council states that the preamble to the Award indicates that the Commissioners did not consider that it had been necessary to set out or appoint any public carriage or bridle roads. The appellant and the Council differ as to the interpretation of the Act and its subsequent Award. Although appearing on the Award plan, the appeal route is not referred to in the Award itself and the Council considers that this indicates that the Commissioners did not consider any of the routes illustrated on the Enclosure Award to be public roads, and that this casts doubt on whether the appeal route has ever been more than a route used by the public on foot. The appellant considers that the road was pre-existing, and since it did not cross or lie upon any common or waste land that was subject to the Award, it was not affected by it. I note that in the report to the Committee, the Council does appear to recognise that this might be a reason why no public routes were set out in the Award.

23. I consider that the appellant is more likely to be correct, and I consider that the Council does acknowledge this potential scenario. Nevertheless, the 1797 Award does not actually provide evidence that the route was a highway of any sort, nor especially a public vehicular route. Nonetheless, given its position within the village and its similar appearance on the plan to other routes now recognised as part of the local vehicular highway network, I consider that it is more likely than not to have been one of the general-purpose highways in public use. That is not the same as saying that it was used by the public with vehicles.

24. Whilst I acknowledge the appellant's view that it is ridiculous to think of people carrying animals or crops around on their heads, it is clear from the evidence of Mr J Thatcher that driving animals along these routes was a regular activity,

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<sup>5</sup> Winscombe and Shipham Enclosure Award 1779

even into the 20<sup>th</sup> century. That is of course the derivation of the meaning of the word 'drove road'. Furthermore, the mapping evidence available suggests that it may not have been necessary to use the appeal route merely to access the adjoining land since all the fields or allotments might have been accessible from other adjacent routes. Those routes may or may not have been public routes, either at that time or now, but there is no evidence that it would have been necessary for the public to use vehicles (i.e. carts) on the appeal route. That is not to say that vehicles did not use it; the evidence is merely neutral on that issue.

25. Mrs Mallinson considers that the Inclosure Award plan shows other routes, which are footpaths, in the same way as it shows the appeal route and so does not provide evidence of higher rights. In particular she refers to the route annotated as 'Greenhill Foot Path'. However the appellant points out that the description on the actual text of the Inclosure Award the route concerned (i.e. Greenhill Foot Path) is described as being shown on the plan as a etched line, which is different from the way in which the appeal route is shown.
26. The 1799 Inclosure Award evidence is not persuasive of the existence of vehicular rights over the appeal route, but neither does it preclude them.

### ***Tithe Award 1843***

27. The Tithe Map shows the appeal route un-numbered and in the same fashion as other surrounding routes. Many of those routes are, today, recognised as part of the local vehicular road network. This evidence does not provide persuasive evidence of vehicular rights on its own, but it is consistent with the continued existence of a route of some significance in the local network.

### ***Other general mapping evidence***

28. Apart from the aforementioned map allegedly dating from 1750, the other mapping evidence provided by either the appellant or the Council (Greenwood 1822; Cary 1832; various maps on Ordnance Survey base maps) confirms the continued existence of the appeal route as a recognisable feature of the local network of routes, fenced or hedged against the adjoining fields.
29. The Council has submitted an extract from the Ordnance Survey Object Name Book which accompanied the 1904 revision to the Ordnance Survey maps. This contains an entry relating to Sandmead Drove, but the entry describes the route running north from the appeal route and to which I have referred in paragraph 6 above. As such it is not relevant to the appeal route except that it refers to its junction with "Ph Rd".<sup>6</sup> There is no explanation of what that means, but the point being so described is its junction with the appeal route. This is indicative that the appeal route had the appearance of a road at that time.

### ***Finance Act 1910***

30. The copy of the Finance Act 1910 map shows the appeal route clearly excluded from the surrounding taxable hereditaments. Mrs Mallinson is of the view that the most likely explanation for this is that it was a private route over which public footpath rights existed. I disagree with that view as it seems to me that that would apply in equal measure to all the other routes shown on the

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<sup>6</sup> As transcribed by the Council in its committee report

relevant map and also excluded from the taxable hereditaments. That is clearly not the case.

31. The exclusion of the appeal route from the surrounding hereditaments for taxable purposes is strong evidence that the route was considered to be a highway and that it was of a higher status than a footpath or bridleway. The Ordnance Survey base map onto which the Finance Act 1910 information is drawn shows the appeal route to be open at either end and an integral part of the local network which is also shown excluded from surrounding hereditaments, and many of which are currently part of the vehicular highway network.
32. The evidence supplied by the Council in the form of a statutory declaration made by a Mr Hancock in 1981 confirms that the land which formed part of the appeal route and which ran between fields that he owned had been appropriated by him but never conveyed to him. This supports the evidence that the appeal route did not form part of the surrounding land, but has always been considered separate from it, and increases the likelihood that it was a highway carrying higher rights than merely public footpath or bridleway rights.
33. I accept that in the early part of the 20<sup>th</sup> century, the normal mode of transport for the general public getting around the village would be likely to have been on foot, but in a rural agricultural setting it would seem more likely than not to have also included passage on horseback and traffic with a horse and cart. It will certainly have included the driving of animals; an activity still being carried on into the latter part of the 20<sup>th</sup> century as evidenced by Mr J Thatcher.

### **1930 Handover Map**

34. The evidence provided by this map seems to describe the Order route as a 'Certified Non-County Road'. The Council has provided no explanation of what this means but since the records were connected with the maintenance of roads and highways it suggests to me that it was not considered to be maintainable by the County Council at that time. That does not equate to it not being a highway, and its description as a 'road' implies that it had the appearance of a road at that time, regardless of the question of maintenance.
35. At that time a number of Rural District Councils still existed in many parts of the country and many of them had highway maintenance responsibilities. I note from the Walking Card for Footpath AX29/76<sup>7</sup> that there was provision for the card to be signed by the Rural District Council so I assume that one was in existence for the area concerned. I also note that the Council acknowledges that a number of other local routes not coloured as being highways at that time are now recognised to be minor highways. It may be that they were being maintained as highways by the relevant Rural District Council.
36. The evidence of the 1930 Handover Records weighs more in favour of rights higher than footpath or bridleway but is not conclusive of vehicular rights.

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<sup>7</sup> Submitted as part of the evidence regarding the Definitive Map Process by North Somerset Council

### ***The Definitive Map process***

37. The appeal route was claimed as part of the process of preparing the Definitive Map and does not appear to have been claimed as anything other than a public footpath, despite its slightly anomalous inclusion in a document identified as the Winscombe Parish Council Reclassification Document. That document appears to relate to a 1970 review of the Definitive Map and Statement, possibly relating to Roads Used as Public Paths ('RUPP'). There is no record of the appeal route ever having been recorded as a Carriage or Cart Road used as a Footpath or Bridleway, or as a RUPP. Nevertheless the 1970 review document appears to have confirmed its local reputation as a footpath rather than anything else.
38. There is some evidence that the routes listed in that review (which included the appeal route) may have been being used by children on horseback, an activity which was being discouraged by local landowners and farmers; but the evidence is very general and not specific to the appeal route. It is of little help in demonstrating actual use of the appeal route by equestrians, and of no help at all in showing public use in any sort of vehicle.
39. The Definitive Map process would seem to be consistent with the gradual decline in the importance of the appeal route in the local highway network, to the point at which its only, or main, use was on foot. This is not dissimilar to the situation found widely across the country and, although there was clearly no objection to its classification as a footpath at that time, that does not equate to the absence of higher rights. It merely reflects a more general situation pertaining nationally at that time.

### ***Other Matters***

40. Numerous references are made by the appellant to old legal cases regarding highway matters. These amply illustrate that the law of highways is complicated and the subject of much dispute over the centuries. It is interesting to note that, even in the decided cases, the opinions are frequently divided. Although interesting I have not found them particularly helpful in determining this matter, since they are not clearly related to the issue of status in circumstances similar to the one I am considering. The question of maintenance has always been a contentious subject where highways are concerned, but there is nothing of specific reference to the appeal route in this connection.
41. I note that there has been correspondence in the late 1980s and early 1990s in relation to the location of the route of the public footpath, and this may have a bearing on the line of the path in use on the ground. That is a separate matter from the one I am considering and one which the Highway Authority must resolve. This appeal and my decision relates to the historic line of the path which, unless formally diverted by Order, remains the same as when it was dedicated.

### **Conclusions on the Evidence**

42. The appellant has failed to provide conclusive evidence that there is a public right of way in vehicles of any sort over the route. Furthermore, I agree that the application was not compliant with the requirements of Schedule 14 to the extent required to preserve any vehicular rights for mechanically propelled

vehicles which may have been shown to exist. Consequently, I conclude that the appeal cannot succeed in relation to the application for a BOAT.

43. However, I am required to consider all the available evidence which has been submitted, and it seems to me that if my conclusion is that higher rights than footpath are likely to subsist, on the balance of probabilities, I should consider whether or not to allow the appeal and to direct the Council accordingly, even if the highway is not the same status as the one claimed. The objective of the legislation is to produce a Definitive Map and Statement of the highest possible accuracy, and it would not be effective use of public resources to reach a decision which would not assist in that task.
44. I consider that the evidence which has been submitted in relation to the appeal route is consistent with the long-standing existence of a route bounded by hedges or fences and which formed part of a continuous network of local routes serving the village of Sandford. Nothing in the evidence submitted suggests that the use of the routes was restricted to any particular class of persons, nor to any type of passage. This pattern of general use has declined over the years so that during the 20<sup>th</sup> century the only clear usage has been on foot. However, given the location of the route and its depiction on the available mapping evidence I am satisfied that it would historically have had the appearance of being an integral part of the local transport network. It would have been in use by at least the residents of the village in their daily life, and it is most likely to have been used in the way that any other general purpose route was used in the area: on foot, with a horse and cart, or on horseback, with or without driving animals.
45. In examining all the available evidence, I am satisfied that it is possible to conclude, on the balance of probabilities, that a highway for non-mechanically propelled vehicles subsists over the Order route and that an Order should be made to reflect that.

### **Conclusion**

46. Having regard to these, and to all other relevant matters raised in the written representations I conclude that the appeal should be allowed, but in respect of a different highway status.

### **Formal Decision**

47. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act North Somerset Council is directed to make an order under section 53(2) and Schedule 15 of the Act to modify the Definitive Map and Statement for the area to show the appeal route as a Restricted Byway.
48. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

*Helen Slade*

**Inspector**