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# Appeal Decision

**by Susan Doran BA Hons MIPROW**

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

**Decision date: 21 November 2019**

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## **Appeal Ref: FPS/G3300/14A/21**

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Somerset County Council not to make an Order under Section 53(2) of that Act.
  - The Application dated 1 October 2015 was refused by Somerset County Council on 31 January 2019.
  - The Appellant claims that the appeal route should be added to the definitive map and statement for the area as a bridleway/restricted byway/byway open to all traffic.
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## **Decision**

1. The appeal is dismissed.

## **Preliminary Matters**

2. 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 ('the 1981 Act').
3. I have not visited the site but I am satisfied I can make my decision without the need to do so.
4. The appeal concerns an application made by Venetia Craggs on behalf of the Sedgemoor Byways and Bridleways Association, with submissions also made by Joanna Roseff (together referred to below as 'the Appellant'). The application was made to add a bridleway/restricted byway/byway open to all traffic running from AX1/19 on the A38 Bridgwater Road to connect with AX29/37 and AX1/20 and connect with AX13/7 on the Shipham Road, known as Callow Drove ('the appeal route'). However, since public footpath rights already exist over the appeal route it is more appropriately an application to upgrade AX1/19 and AX1/20 (in the Parish of Axbridge) and AX13/7 (in the Parish of Cheddar) to bridleways, restricted byways, or byways open to all traffic ('BOATs'). Accordingly, I have approached the relevant tests on this basis.
5. In reaching this decision, I take account of the submissions from and on behalf of the Appellant, Somerset County Council ('the Council') and interested parties, where relevant. I have found it convenient to refer to the points marked on a plan of the appeal route prepared by the Council<sup>1</sup> (A-B-Bi-Bii-C and Di-D), which is attached to this decision.

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<sup>1</sup> Appendix 1 of the Council's investigation report dated 29 January 2019

6. As regards the possible recording of a BOAT, public rights to use mechanically propelled vehicles ('MPVs') over a way shown in the Definitive Map and Statement ('DMS') as a footpath, bridleway or restricted byway have been extinguished by the Natural Environment and Rural Communities Act 2006. This is subject to certain exceptions. However, none appear to apply in this case, in which case MPV rights (if found to exist) will have been extinguished.

### **Main Issues**

7. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their DMS under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
8. Section 53(3)(c)(ii) of the 1981 Act specifies that an Order should be made on the discovery 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 shown as a highway of a different description.
9. The appeal relies on documentary evidence. Section 32 of the Highways Act 1980 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.
10. The test to be satisfied is on the balance of probability.

### **Reasons**

#### ***Pre-Inclosure evidence***

11. Both the Council and Appellant agree the western end of the appeal route, A-B on Appendix 1, is depicted on Day and Masters' Map of 1782 where it is shown as 'open roads over commons and downs'. However, there is no consensus about the rest of the route depicted. If it is the appeal route, as contended by the Appellant, this would provide evidence it was wholly a pre-inclosure way.
12. Winscombe Drove lies north of the appeal route and the land slopes downhill between the two. Day and Masters' Map illustrates gradient by hatching and hatching is shown on the north side of the route it depicts. This in itself is more consistent with the appeal route than with Winscombe Drove and weighs in favour of the Appellant's case. However, a comparison with other maps - the 1792 Map of the Manor of Winscombe and Shipham<sup>2</sup>, the Shipham and Winscombe Inclosure Map 1799, Ordnance Survey ('OS') 1817 map<sup>3</sup>, and Greenwood's 1822 County Map - and the positions of other mapped features weighs in favour of the route shown being Winscombe Drove rather than the appeal route (other than A-B). For example, the 1817 and 1822 maps<sup>4</sup> show distinctive hatching between the two routes as well as to the north of Winscombe Drove and further to the south of the appeal route, more consistent in appearance with that shown on Day and Masters' Map. The relative positions of Shipham and Sidcot (Sydcot) and the connecting 'road' network appear more consistent with Winscombe Drove. So does the route's termination at a

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<sup>2</sup> Land belonging to the Dean and Chapter of Wells

<sup>3</sup> David and Charles reprint with railways inserted 1890

<sup>4</sup> Showing the situation post-inclosure

crossroads at its eastern end, and the continuation east (along Longbottom Lane), taking account of the parish boundary's position prior to inclosure, and other arguments put forward. There is no suggestion in any of these maps of an eastwards continuation of the appeal route, nor do I find support for a possible 'short cut' facilitated by the gradients from just west of C to a point partway up Longbottom Lane: this is speculation. Neither does the evidence adduced support Winscombe Drove being an unlikely permanent route in the 18<sup>th</sup> Century due to the underlying geology.

13. The 1782 Map was produced for use by the travelling public and it may be expected to illustrate public routes. Accordingly, and as part of a network of ways that lead to public destinations, it is likely that the route depicted was more significant than a footpath. However, the key to the map is not explicit as regards the status of the ways portrayed, public or private, or what rights they enjoyed. At best it provides some support for A-B being more than a footpath.
14. The 1792 Map shows the appeal route from the A38 to D-B and to a point just west of Bii<sup>5</sup> as a mapped feature, although Winscombe Drove is not shown. However, this estate map takes the matter of status no further.

### ***Inclosure evidence***

15. The Shipham and Winscombe Inclosure Award 1799 was enabled by a local Act of 1797. The Inclosure Commissioners were to set out public carriage roads (at least 40 feet wide), public bridleways and footways (amongst other things), and to stop up any pre-existing roads or ways, public and private, not set out in the Award. Thereafter, it was unlawful for anyone to use any roads or ways over the commons and waste lands other than those awarded and set out. The Inclosure Award Map shows the appeal route D-B-C<sup>6</sup> as Upper Callow Road (D-Bii) and Lion's Den Way (Bii-C) to the south of Lower Callow Road<sup>7</sup>. All three named routes are described in the Award as 'private roads', with the appeal route awarded widths of 24 and 10 feet respectively. The private roads were to be maintained at the expense of the owners and occupiers of the allotments set out. However, the description of those entitled to use these routes in addition to the owners, tenants and occupiers, included the public on foot, horseback and with carts or carriages, suggesting a public vehicular way.
16. The Cheddar Inclosure Award of 1801 enabled by a local Act of 1795, awarded ways in the same manner as the 1799 Award (above), the inclosed land seemingly abutting that of the earlier Award. The appeal route runs to a point some 300 metres west of C and is named 'Callow Way'. It is parallel with and south of Lion's Den Way, separated by a boundary feature, and set out as a private carriage road and driftway 20 feet wide for use by the owners and occupiers of allotments it served, indicating a private way.
17. The 1801 Axbridge Inclosure Award shows the central part of the appeal route, Bi to just east of Bii, named 'Upper Callow Road', although it was not set out under this Award. Two routes connect with it: 'Middle Callow Road', a private road, and 'Callow Path' described as both a private and a public footpath. The Council considers the Axbridge Commissioners believed the appeal route carried public rights by virtue of the Shipham and Winscombe Inclosure Award.

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<sup>5</sup> The section A-B falls outside the mapped area

<sup>6</sup> The section A-B falls outside the area subject to this inclosure award

<sup>7</sup> Now known as Winscombe Drove

18. The Appellant confirms that A-B lay within Compton Martin parish (now Axbridge) for which there is no inclosure award; and suggests the position of the routes set out in Shipham and Cheddar points to the parish boundary running between them.
19. Detailed submissions made by the Appellant concern interpretation of the Shipham and Winscombe Inclosure Award, and the case of *Buckland*<sup>8</sup> is relevant. It concerned another route, Barton Drove, set out in the same Award as a private road 20 feet wide, but again available for use by the wider public.
20. In *Buckland*, Kay J concluded "*It is clear that a public highway may be created in a number of ways and once a highway it will remain a highway. It may be expressly so created by statute. An Act of Parliament may authorise the creation of a highway in some other way but any provisions and conditions of the Act will have to be satisfied before the purported creation of the highway becomes effective in law. In either of these cases, the way becomes a public highway without any necessity for the public accepting it and using it unless that it is a condition imposed by the statute. If the way is not created as a highway in this way, it will only become a public highway if the evidence establishes either express dedication or user such as to give rise to the presumption of dedication*". And, "*...the Commissioners did not have power under the Act of 1797 to create a public highway otherwise than in accordance with the precise powers given under the statute. It was not open to them to circumvent the conditions necessary before a road would become a public highway by purporting to create a private way but to make it open to the public at large. Thus irrespective of the precise meaning of the user provision in the award, the Inclosure award cannot have created a public highway*". Accordingly, the Commissioners did not have the power to set out Barton Road as a public carriageway and its purported creation was ultra vires.
21. The Appellant considers *Buckland* was correctly decided but is misunderstood. I have read the arguments made which include the definition and characteristics of a highway, what was meant by the term 'private' in the context of the Act and at this period in time, and maintenance of the highway at public expense (or the 'public charge' using the terminology at the time of the Award). By reference to various documents it is argued that public vehicular ways could take several forms – public carriage roads between one market town and another, repairable by statute duty; lesser public roads from vill to vill (not being market towns), repairable by the inhabitants of the parish under common law rules; and *communis strata* or common ways, repairable by the inhabitants of a vill or by a private person. Reference is also made to the judgement in *Dunlop*<sup>9</sup> in which it is suggested that although the finding about public carriage roads in inclosure awards was probably correct, Sedley J reached the wrong conclusions as regards the common ways. In the *Dunlop* case, Sedley J determined that there was a distinction to be made between public and private roads in relation to the 1820 Award considered.
22. The Council takes the view that the Inclosure Commissioners in the Shipham and Winscombe Inclosure Award intended to award public vehicular rights over the appeal route, but because the award was ultra vires in this respect those rights were not legally established by the award.

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<sup>8</sup> *Buckland and Capel v Secretary of State for the Environment, Transport and the Regions* [2000] 3 All ER 205

<sup>9</sup> *Dunlop v Secretary of State for the Environment* [1995] 70 P & CR 307

23. In reaching a decision, I must follow the findings in the judgements. The relevant part of the appeal route was set out in the Shipham and Winscombe Inclosure Award in the same manner as Barton Drove in the *Buckland* case. Having regard to the findings of Kay J in that case, it follows that the Inclosure Commissioners were not empowered by the 1797 Inclosure Act to set out a carriage road for use by the public other than under the terms of that Act. The creation of a private way for use by the wider public, including with carriages, (at a lesser width or widths than the public carriage roads set out under the Award) was not within their powers and thus not an option available to them. Accordingly, I find the inclosure evidence (where relevant) supports the appeal route being set out as a private road, the maintenance of which fell on a limited group, the allotment owners and occupiers. I am not persuaded by the arguments it formed some category of a lesser public road or common way, or by the significance of its maintenance. Nevertheless, these findings would not prevent the appeal route from becoming a highway on foot, horseback or with a vehicle, subsequent to the Inclosure process, in which case it is necessary to consider the evidence post-dating the Award.

### **Post-Inclosure evidence**

24. Estate papers include a Map of the Axbridge Estate c.1811 showing the appeal route in some detail, but it did not form part of the land marked for sale, and no key accompanies the map. Another map dating to the same period shows the appeal route between Bi and C and is annotated 'To Bristol road and Nailsea 10m'. Again, there is no key. Both concern the sale and, or, management of land rather than with recording public rights of way, although the annotation to a destination suggests a public route. Neither were in the public domain until the mid-1950s, but they provide some evidence the appeal route, or parts of it, had come into existence soon after the inclosure process.
25. Greenwood's 1822 Map shows the parish or township boundary in the location of the appeal route. An 1826 Turnpike Plan (Shipham Road) shows Winscombe Drove meeting the turnpike road, but the appeal route appears as a single line. Of the four relevant Tithe maps (dating between 1839 and 1843) only one shows a section of the appeal route (Bi-Bii) within the parish of Axbridge. Again, this provides evidence of the existence of that section, though not of its status. The appeal route is depicted on OS maps from 1817, although at this date the eastern end (Bii-C) was not mapped. From 1883 when the OS began to use the notation 'FP' to indicate a way that was not traversable by horses or wheeled traffic, sections of the appeal route are annotated as a footpath and shown as a bounded or partially bounded track, gated in places (Bi and Bii).
26. Finance Act 1910 records do not assist, showing the appeal route within land parcels for which no deduction for public rights of way or user was made. It was not recorded in the 1930s or 1950s highways records as a highway maintained at public expense. Most of the appeal route is visible in a 1946 aerial photograph, confirming its physical existence but not its status.
27. When the DMS was compiled, Axbridge Parish Council claimed a bridleway (A-B), although the parish cards for the remainder of the appeal route record either no status, or a footpath. Use by tractors and other vehicles was noted, though this could have been private use. However, the maps subsequently prepared by the Council depicted the whole route as a footpath and this is how it appeared on the Draft, Provisional and Definitive Maps, without objection.

28. The Appellant maintains that many routes were recorded in the DMS at a lower status for reasons of desirability or to reduce maintenance liability, but there is no evidence this was the case here. Whilst it is not known why the appeal route came to be recorded as a footpath, there is nothing in the evidence to suggest the procedures set out in the 1949 legislation were not followed. There was an opportunity for objections to be made at the various stages, and none were.
29. The Appellant refers to a Winscombe Drove decision<sup>10</sup> in which it was concluded that bridleway rights subsist. However, that decision was reached on the basis of user rather than on documentary evidence. I understand that some user evidence was submitted with a previous claim for A-B but found insufficient to meet the tests, and no further evidence has been forthcoming in the present case beyond one account of use which was not further substantiated.

### **Summary of the evidence**

30. The pre-inclosure evidence shows parts of the appeal route existed as a physical feature, and it is possible, at least as regards A-B, that some form of public right existed over it. However, if this was the case, the status is unclear.
31. Having regard to the judgement in *Buckland*, the Inclosure Commissioners did not have the power to set out private roads as public carriage roads under the Shipham and Winscombe Inclosure Award. Whilst no public rights were legally set out over the appeal route, this would not preclude such rights having been acquired subsequently.
32. However, there is little evidence of dedication post-1840. OS maps are consistent in annotating the appeal route as a footpath, one that was not considered by the surveyors as suitable for use by horses. No public rights were acknowledged in the Finance Act records. In the 1950s when the DMS was prepared, the parish survey indicates vehicular access was possible from D-Bii, and A-B was described as a bridleway. Yet, the appeal route was subsequently recorded in the DMS as a footpath without challenge.
33. I find the evidence does not support the contention the appeal route should be upgraded to a higher status.

### **Other matters**

34. Whether or not any landowners wish to dedicate higher public rights over the appeal route is not a matter for this decision, neither are concerns about safety as they do not fall within the matters to be considered under the 1981 Act.

### **Conclusion**

35. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

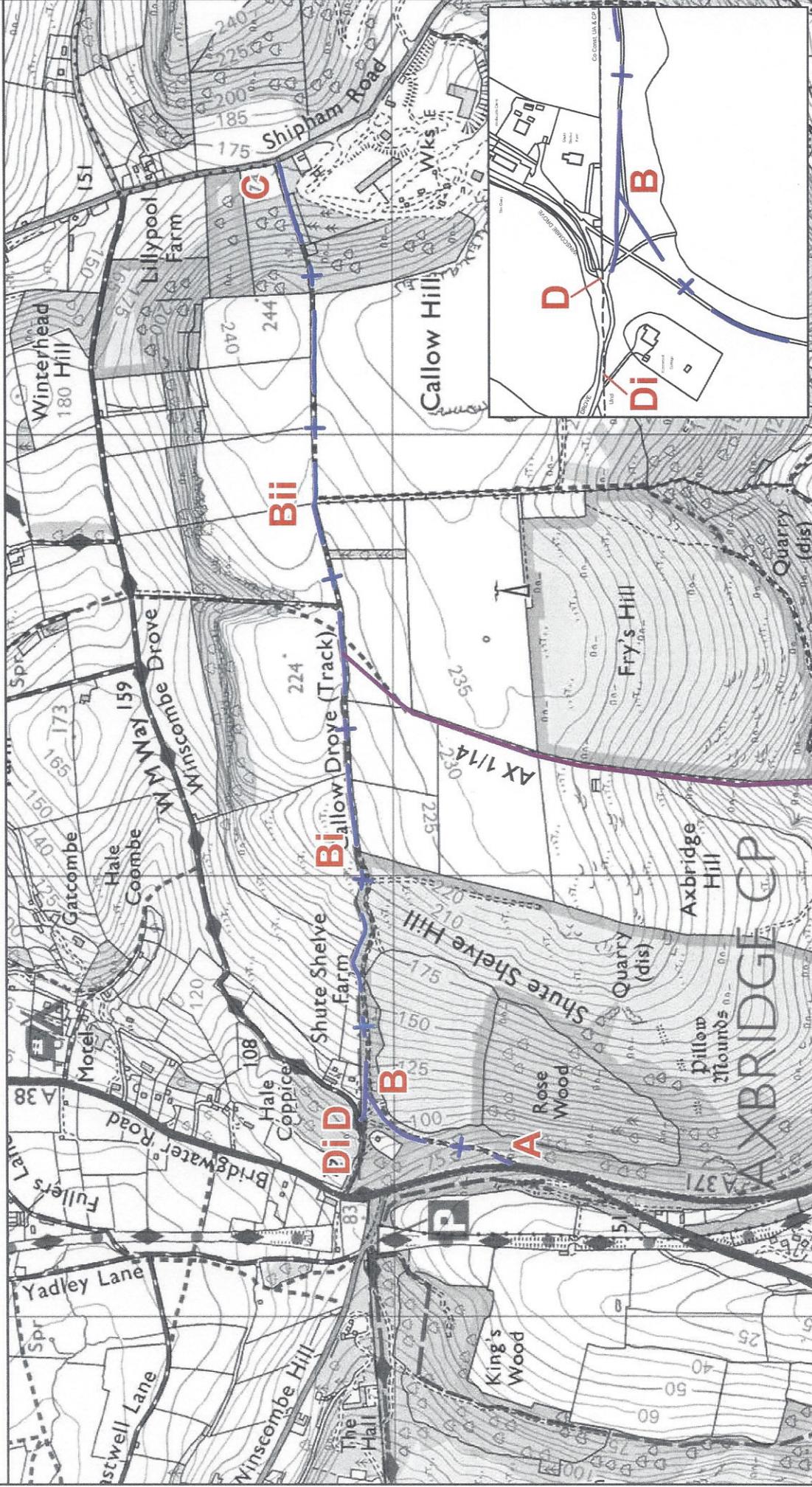
*S Doran*

**Inspector**

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<sup>10</sup> FPS/G3300/7/87 and FPS/D0121/7/15

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# Appendix 1

## Modification 820

Modification  
 +  
 Definitive Footpath

Parish: Axbridge, Shipham & Cheddar  
 District: Sedgemoor  
 Date: 19/11/2018  
 Drawing No: H24-2018\_2  
 Drawn By: MHardwill  
 Grid Ref: 343320, 156070  
 Scale: 1:12000



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