



Appeal Decision

by Susan Doran BA Hons MIPROW

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

Decision date: 27 November 2019

Appeal Ref: FPS/Q1770/14A/3

- 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 Hampshire County Council not to make an Order under Section 53(2) of that Act.
 - The Application dated 15 February 2016 was refused by Hampshire County Council on 17 April 2019.
 - The Appellant claims that the appeal route should be downgraded to a bridleway.
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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 Buriton Parish Council ('the Appellant') to downgrade to a bridleway Byway Open to All Traffic ('BOAT') 19, also known as 'the Milky Way' ('the appeal route'). In reaching my decision I take account of relevant submissions from the Appellant, Hampshire County Council ('the Council'), and the Trail Riders Fellowship¹.

Main Issues

5. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement ('DMS') under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
6. 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.

¹ An interested party

7. The DMS is conclusive evidence as to the existence of a public right of way, unless and until it is modified by such an order.
8. Guidance² provides that the evidence needed to downgrade a way recorded in the DMS with "higher" rights to one with "lower" rights will need to fulfil certain stringent requirements. These are that:
 - the evidence must be new – an order to downgrade a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made
 - the evidence must be of sufficient substance to displace the presumption that the definitive map is correct
 - the evidence must be cogent
9. In considering the evidence, I also have regard to the judgement in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] (*Trevelyan*) and in particular to the following statement by Lord Phillips M.R., "*Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put into the balance, if it is to outweigh the initial presumption that the right of way exists*".
10. In view of the above, my starting point is that the appeal route is presumed to exist, as a BOAT³. It is for those contending a mistake has been made to provide evidence which demonstrates that, on a balance of probability, the appeal route is of a lower status than that shown in the DMS. In reaching my decision I take into account the caselaw referred to by the parties⁴.

Reasons

Discovery of evidence

11. In reaching its decision not to make an order, the Council concluded there had been no discovery of evidence *sufficient*⁵ to overturn the initial decision that vehicular rights subsist over the appeal route. However, in addition to the evidence adduced by the parties during that process, the Appellant has discovered Minutes of the Petersfield Rural District Council ('the RDC') that have a bearing on the matter.

² Department for Environment, Food and Rural Affairs, Rights of Way Circular 1/09, Version 2 October 2009, paragraph 4.33

³ The appeal route was added to the DMS as a Road Used as a Public Path ('RUPP'), later reclassified to a BOAT

⁴ In addition to *Trevelyan*, this includes *Burrows v Secretary of State for Environment, Food and Rural Affairs* [2004]; *R v Secretary of State for the Environment ex parte Burrows and Simms* [1991]; *Mayhew v Secretary of State for the Environment* [1992]; *R v Secretary of State for the Environment ex parte Hood* [1975] 1 QB 891; *Fortune v Wiltshire Council* [2012] EWCA Civ 334

⁵ My emphasis

12. I note the Council's view that it is debatable whether the RDC Minutes constitute 'new' evidence as there was an on-going discourse between the various Councils (County, District and Parish) when the DMS was being drafted. It is not known whether these Minutes were made available to the Council at the time, notwithstanding the exchange of correspondence in the 1950s, the contents of which is known. However, in its original evaluation, the Council concluded the evidence available to it fell into one of two categories – evidence that was available during the preparation of the first definitive map in the 1950s, and documents that may not have been known to the decision makers at the time.
13. It follows that there has been a discovery of evidence, some of which is 'new'. I shall therefore consider all of the evidence together (the evidence evaluated in the Council's Committee Report⁶ and the evidence since adduced by the Appellant), in deciding whether or not the appeal should be granted, having regard to caselaw and the relevant tests set out above.

Consideration of the evidence

Map evidence from the 18th and 19th centuries

14. A route on Milne's 1791 County Map may represent the appeal route. However, it is shown on a 1793 Estate plan of the Manor of Buriton, although there is no key to this map so its status cannot be determined. The 1806 Ordnance Survey ('OS') drawing, confirms its physical existence as a mapped feature, but not its status. Greenwood's 1826 County Map shows it as a 'cross road'.
15. The appeal route is shown on the 1841 Tithe Map and Apportionment, recorded as privately owned and subject to a tithe charge. This evidence was considered in the 1930s when a map and schedule of rights of way in the parish was drawn up in response to the Rights of Way Act 1932, and available during the later preparation of the first DMS.
16. OS mapping dating from 1868-1939 annotates the appeal route as 'Milky Way', showing it as an unenclosed track running through woodland, at times gated. Again, these maps do not provide evidence as regards status.

Buriton Parish Minutes from the 19th century

17. Parish Vestry Minutes for 1856-1857 record a 'parish road' at the eastern end of the appeal route, but this does not assist as regards its status.
18. Parish Council Minutes for 1896-1908 include several references to the appeal route and its poor state of repair. One refers to it as the 'Milky Walk or Milky Way', all others as the Milky Way (in common with its description on earlier OS mapping). It is variously described as a 'Road', a 'High Road', and 'fourth class road' (by the late Surveyor to the Highway Board). Reference is also made to its would-be use by local people on foot if it were repaired.
19. The 1897 Minutes contain references to the RDC Minutes recently adduced by the Appellant (see below), including that the RDC agreed to repair the appeal route in 1898, having earlier declined to do so. It is also noted that the term 'road' was used in the RDC Minutes with regard to at least one footpath in another parish, suggesting the terms were considered interchangeable.

⁶ Report to Regulatory Committee, 17 April 2019

20. The Parish Minutes were inspected during the preparation of a schedule of rights of way in the 1930s and later preparation of the first DMS as evidenced in correspondence involving the Parish Council.

Petersfield Rural District Council Minute Book 1895-98

21. An entry dated 11 February 1897 referred to the "*bad state of the Road known as the Milky Way*" and described the maintenance to be undertaken. The matter was considered again on 11 March and then on 8 April when it was resolved a small committee view the road and report back. On 22 April, the members of that committee reported that they "*did not consider it came within the definition of a road, as it appeared to them nothing more than a footway which the Parish Council could repair...*". Maintenance of the way was again considered in November and December of that year when it was agreed to repair "*the pathway...*".
22. These Minutes, adduced by the Appellant after the Council's decision on the application, correspond to the events recorded in the Parish Minutes (above) concerning the appeal route. In them, the RDC's description of the appeal route is consistent with their later recording of it as a public footpath in the 1929 Handover Map.

Sales particulars

23. When Ditcham Park Estate was sold in 1921 the appeal route was shown coloured in the same way as other routes all of which are now public vehicular ways, and the Council believes it was considered to be a public road at the time. However, a later sale of Estate land in 1927 included the appeal route within the lot.

Buriton Parish Minutes and related evidence from the 20th century

24. Minutes for 1929 record events surrounding the obstruction of a number of routes in Buriton by the Forestry Commission, following which the Parish Council drew up a list of "Footpaths" and "Foot and Bridle Paths", the appeal route listed under the latter. In 1932 the Parish Council prepared a map and schedule of known rights of way further to the Rights of Way Act. This was approved by the Parish Council in September 1934 and put on deposit for public inspection and comment. As no objections or observations were received, the documents were approved in October 1934 and passed to the RDC so the routes could be recorded on their map, and this was completed by March 1935. The appeal route (No.19) was listed in the Parish Council Minutes as a 'Bridle Road and Public Carriageway', although the second part of the description is believed to have been a later addition.
25. A typed schedule of the reputed rights of way (dated 1934) records the appeal route as "*Route No.19 Bridle Road*" and remarks, "*Road unobstructed throughout and trimmed and repaired from time to time by Petersfield Rural District Council*". A copy of this document held by the Council includes later annotations – the addition of the words described above (paragraph 24). By whom and when these amendments were made is not known, although the Council believes it to have been between 1934, when the schedule was first drafted, and 1949, when the copy was submitted to the Council by the Parish Council.

26. It is apparent from the 1934 Schedule that Parish Minutes and an Inclosure Award were consulted, and that various routes were agreed by the Forestry Commission, suggesting some research was undertaken in its preparation.
27. Minutes for 1943 describe the appeal route as a bridleway. By July 1949, the preparation of the DMS was to commence and the Parish Council was asked by the Council to confirm their map showing rights of way in the Parish. In March 1950, the County Surveyor wrote to the Parish Council further to the survey already undertaken by them in 1934, indicating a further statement was unnecessary, but that the survey be formally submitted to the Annual Parish Meeting and any amendment be reported back. In addition, the appeal route was noted by the County Surveyor as incorrectly described as a public carriageway and this should be amended to bridle road. In April 1950 the status of the appeal route was further considered and reference made to the Parish Minutes of 1897-8, which were duly sent to the Council.

County Council records

28. The appeal route is represented on the 1929 Handover Map as a public footpath not repairable by the District Council⁷. This corresponds with the RDC's view in 1897/8 that it was a footpath, but contrasts with their acceptance then of maintenance responsibilities. These records were not in the public domain and were primarily concerned with maintenance.
29. A 1946 Highways Maintenance Map is marked by an orange dashed line and together with a network of routes, numbered 216. The colouring is identified in an internal memorandum as a highway representing "U 'unmetalled' roads" being representative of the status of the roads shown, rather than a legal interpretation.
30. The DMS was prepared further to the National Parks and Access to the Countryside Act 1949. The Parish map, dated 1 August 1949, showing the routes the Parish Council wished to be included, coloured the appeal route green, indicating a bridleway. However, the appeal route later came to be recorded in the first DMS as a RUPP.
31. On 28 March 1950, the Parish Council wrote to the County Surveyor agreeing the existing map and schedule was correct subject to two matters, one being the status of the appeal route. It further questioned what evidence the Council had to refute the Parish claim the appeal route was a highway (a reference to the Council's letter which stated the route had been incorrectly described as a public carriageway). The letter commented that the appeal route appeared to be a continuation of Mead Lane linking to an unmetalled highway and on to the Petersfield-Harting Road.
32. The County Surveyor replied on 18 April 1950 that the appeal route had always been recognised by the Council and RDC as a bridleway only. However, and seemingly in response to the comment from the Parish Council, from a site inspection the route did appear to be a continuation of Mead Lane linking up with U.216. Accordingly, the County Surveyor arranged for it to be recorded in future as an unmetalled public highway. An internal Council memorandum dated 20 April 1950 confirmed this had been done. Replying to the County Surveyor on 25 April 1950, the Parish Council acknowledged the appeal route's

⁷ The 'key' to the Map refers only to public carriageways and public footpaths

recording as an unmetalled public highway, submitting it had always been so, and the RDC's recognition of it as a bridleway was wrong. In support of this view, they enclosed copies of the 1897-8 Parish Minutes, commenting since that time the RDC had carried out work on the road not normally associated with a bridleway.

33. Although the Appellant now disputes the status of the appeal route, no objections to its recording as a RUPP in the first DMS were made.
34. An Order was made in 1988 reclassifying the appeal route (and others recorded as RUPPs) to a BOAT and confirmed as unopposed in April 1991. It is unclear as to what research into its status was undertaken at the time.

Whether the evidence is of sufficient substance to displace the presumption the Definitive Map is correct, and whether it is cogent

35. The 18th and 19th century map evidence confirms the longstanding existence of the appeal route but is of limited assistance regarding status. Neither Greenwood's map nor the Tithe records are inconsistent with the possible existence of public bridleway rights, and it is known the Tithe records were later consulted when rights of way were recorded in the Parish.
36. In the late 19th century, the Parish Council's view of the appeal route, as expressed in the Minutes, was of a road, high road, or lesser category of public road. There is a reference to use on foot, but this does not mean pedestrian rights were the only ones existing. These minutes also record that the RDC eventually agreed to carry out maintenance. The recently discovered contemporary RDC Minutes state they regarded the appeal route as a footpath. This view is then confirmed in the 1929 Handover Map, albeit the maintenance responsibility was not accepted, although this is not necessarily evidence that the appeal route's status was in question.
37. In 1929 the Parish Council listed the appeal route as a bridleway in a schedule of rights of way and passed this information on to the RDC in 1934, and later in 1949 to the Council. That the Parish Council regarded it as a bridleway was also stated in Minutes of 1943.
38. The Council later confirmed to the Parish Council, in 1950, its understanding (and that by now of the RDC) the appeal route was a bridleway, although by this time the parish schedule of rights of way had been amended with the words "and public carriageway" added, something they queried with the Parish Council. The Parish Council replied suggesting its appearance was as a continuation of another route linking with an unmetalled highway. In agreement, the Council records were changed, and the appeal route recorded as an unmetalled highway. This change was endorsed by the Parish Council in subsequent correspondence in which copies of the 1897-8 Minutes were provided in support.
39. The Appellant considers the decision to record the appeal route as an unmetalled highway was made on a perception or assumption it formed a vehicular connection with other routes. Further, that the actual evidence between 1897 and 1950 was disregarded, in particular the 1897-8 Minutes not having been considered as they were received after the Council's decision to record it in the DMS in this way. Moreover, that the Parish Council misunderstood and misdirected itself with regard to the appeal route's status.

40. However, it is clear that the 1950s correspondence concerned the Draft DMS, and that the Parish Council was advised by the Council of the RDC's view the appeal route was a bridleway. Further, it is clear that much of the evidence adduced was available to and considered by the Council when it prepared the DMS: this will have included the 1929 Handover Map (on which the appeal route was recorded as a footpath), parish minutes and correspondence; and again in 1986 when the appeal route was reclassified (although it is less clear what material was considered then).
41. The RDC Minutes produced by the Appellant clarify their position in 1897-8 as regards the status of the appeal route. However, by 1934 the RDC had been apprised by the Parish Council of their view at the time that the appeal route was a bridleway and had amended its records in 1935 – a status of which the Council was aware. It does not follow that had the Parish Council been aware of the RDC Minutes and considered them with their contemporary Minutes, that they may have re-evaluated the evidence and reconsidered their claim, as suggested by the Appellant. By 1929 the Parish Council was of the view the appeal route was a bridleway (having considered earlier evidence available to them). However, by 1950 as evidenced in correspondence with the Council, the Parish Council had clearly reviewed its position, relying on the 1897-8 Parish Council Minutes, on its appearance in the network, and on the type of maintenance carried out, and was of the opinion the appeal route was an unmetalled highway, a 'road'.
42. The various references in the Parish and RDC records appear contradictory. Nevertheless, it is apparent that a public consultation process was embarked upon not least during the preparation of the DMS. In this regard I note the statement of Lord Denning in *Hood*, "*The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975. So, it would be very unfair to reopen everything in 1975*".
43. On balance and having regard to the evidence I do not find it to be of sufficient substance to displace the presumption the definitive map is correct, neither do I find the evidence, including the recently discovered RDC Minutes, to be cogent in this regard.

Other matters

44. Reference is made to conflict between users of the appeal route, danger to users on foot and horseback, and environmental damage to the historic sunken lane. Whilst I appreciate these concerns, they are not relevant to the matters that can be considered under the 1981 Act.

Conclusion

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

S Doran

Inspector