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# Appeal Decision

by **K R Saward Solicitor**

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

Decision date: 23 March 2020

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## Appeal Ref: FPS/Q1770/14A/4

- The 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 of that Act.
- The application dated 3 January 2018 was refused by Hampshire County Council on 24 October 2019 and the decision was communicated to the applicant by letter dated 28 November 2019.
- The appellant claims that the definitive map and statement for the area should be modified by (i) upgrading to a byway open to all traffic the footpath (Tangley 12 FP) from public road C168 to public road C33; and (ii) adding to the particulars relating to the footpath/byway open to all traffic from C168 to C33 by providing the width is that shown from the hereditaments on the Finance Act 1910 Valuation Plan and that there are no limitations or conditions on the use of the route by the public.

**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 this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act'). I have not visited the site, but I am satisfied in the circumstances of this case that I can make my decision without doing so.
2. A copy of a map prepared by the Council showing the claimed route is attached for reference purposes.
3. With the appeal, additional documentary evidence and correspondence has been produced from that originally considered by the Council. In arriving at my decision, I have taken into account all the submissions made both for and against the route.

## Legal Framework

4. There are two elements to the application. Firstly, the application seeks to upgrade the existing recorded footpath FP 12 in the parish of Tangley ('FP12') as shown on the Definitive Map and Statement ('DMS') to a byway open to all traffic ('BOAT'). Secondly, modifications are sought to the DMS to add the width to correspond with the Finance Act 1910 valuation map and to record that there are no limitations or conditions on the use by the public.
5. A duty is placed on the Council under section 53(2) to keep the DMS up-to-date and to make such modifications to the DMS as appear to them to be requisite in consequence of any of the events identified within section 53(3).

6. In order for a footpath to be 'upgraded', section 53(3)(c)(ii) provides that an order to modify the DMS shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a highway shown in the DMS subsists as a highway of a particular description ought to be there shown as a highway of a different description.
7. The landowners dispute that there has been a "discovery" of evidence as required by section 53(3)(c). It is not possible to re-examine the same evidence considered when the DMS was first drawn up. There must be some new evidence, or discovery of an error might suffice. One of the documents relied upon by the applicant is the valuation map produced under the Finance Act 1910. This map clearly existed when the DMS was first prepared in 1954. That does not mean it was examined. The applicant and supporters say the map cannot have been considered at that time because the Inland Revenue did not make the maps available for public inspection until some years later.
8. As there is no substantive evidence that the Finance Act map was previously considered, I take the view that it does amount to the "discovery" of evidence for the purposes of section 53. There is also other evidence which has emerged in the form of highways correspondence indicating vehicular use which could similarly fulfil that requirement.
9. By virtue of section 53(4), the modifications which may be made by an order under section 53(2) include the addition to the Definitive Statement of the width of any public path or BOAT which is or is to be shown on the map and any limitations or conditions affecting the right of way thereover.
10. Section 53(3)(c)(iii) applies where there is no public right of way over land shown in the DMS as a highway of any description, *or any other particulars contained in the map and statement require modification*. This section is applicable to the extent that the Definitive Statement would require alteration with the deletion of the existing recorded widths in the description should the second limb of the application succeed.

### **Main Issues**

11. As an application has been made for a BOAT, I must consider the appeal on that basis. However, there are implications arising from the Natural Environment and Rural Communities Act 2006 ('the 2006 Act') which require consideration. Notably, whether the path could be upgraded to a restricted by way if it cannot be a BOAT.
12. The main issues are:
  - whether the evidence is sufficient to show, on the balance of probabilities, that the existing public footpath (FP12) should be upgraded to a BOAT; and
  - whether the width should be modified in the DMS and whether it should record that there are no conditions or limitations on the public use.

### **Reasons**

#### ***The 2006 Act***

13. A BOAT is defined within section 66 of the 1981 Act to mean "a highway over which the public have a right of way for vehicular and all other kinds of traffic,

but which is used by the public mainly for the purpose for which footpaths and bridleways are so used”.

14. The provisions of section 67(1) of the 2006 Act extinguished public rights of way for mechanically propelled vehicles, subject to certain exceptions. It essentially prevents the addition of more BOAT's after the cut-off date prescribed in the Act unless an exception applies.
15. The route is already recorded in the DMS as a public footpath and no possible exception within section 67(2) has been drawn to my attention. By operation of the 2006 Act, if any public vehicular rights had been established and extinguished then an Order could still potentially be made for a restricted byway rather than a BOAT.
16. A restricted byway allows the public a right of way on foot, on horseback (or leading a horse) and in/on vehicles other than mechanically propelled vehicles. This includes cycles and horse-drawn vehicles, but not motorised vehicles.

### ***Documentary evidence***

17. The application relies primarily on archive evidence. Section 32 of the Highways Act 1980 ('the 1980 Act') requires a court or other 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 justified by the circumstances.
18. Objection is raised by the landowners who are not happy about the use of the route by the public with vehicles. They maintain that it was a farm road which may or may not have been used by the public on foot. Clearly, the status of the route as a public footpath as recorded on the DMS is deemed conclusive<sup>1</sup>. That is not in issue.

### *Tithe records*

19. Tithe maps officially recorded the boundaries of all tithe areas on which tithe rent-charge was apportioned.
20. The claimed route is shown uncoloured on the Tangley Tithe Map (1838) and is given two parcel numbers. Those numbers do not appear in the accompanying apportionment. It appears on the map by wide solid double lines in the same way as other known roads. A figure is given at the end of the apportionment of the total area within the parish for 'waste/roads'. While not certain, it appears most likely that the route falls within this category.
21. As both public and private roads were not tithable, the mere fact that a road is shown on a tithe map is no indication as to whether it is public or private. However, I note from what the applicant says that other public roads also do not appear in the apportionment.
22. These factors give credence to it being a road carrying public rights although in isolation it is not enough to show the existence of vehicular highway rights.

### *Finance Act 1910 records*

23. The Inland Revenue map for Tangley uses the second edition Ordnance Survey

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<sup>1</sup> Thus, rights on foot exist already, but it is possible for a public footpath to be upgraded if evidence suffices.

county series map as a base. This shows the claimed route as an uncoloured road. Most of the surrounding parcels of land are outlined in different colours to denote ownership and exclude the road. Roads, including the claimed route, are omitted from the valuation.

24. The landowners describe the process under the Act as "hit-and-miss" with frequent inconsistencies and failure to complete the mapping process. They say that the map is incomplete and because the land was bounded by separate hereditaments neither claimed it. They suggest that it is uncoloured as neither surveyor was sure of the ownership.
25. However, it was nationwide convention to leave public highways uncoloured. Moreover, the 1910 Act required *all* land to be valued, unless exempted, for the purposes of recording the apportionment of duty. Routes shown on the base plans which corresponded with known public highways were not normally included within the hereditaments and so this may be the most likely explanation.
26. The applicant examines the causes of non-valuation and identifies the only potentially applicable provision under section 35 being the one which exempted duty in respect of land held by a rating authority. As the rating authority was also the local highway authority the applicant suggests that it supports highway status. The objectors cite the definition of 'rating authority' in the 1910 Act which referred to a body with power to raise rates and say it had nothing to do with public highway being vested in a highway authority. The point is arguable either way.
27. Whatever the reason, the fact remains that the route is shown as excluded from the taxable land of the adjoining hereditaments. It is uncoloured which may be some evidence of public status. Such routes are normally vehicular because footpaths and bridleways were usually dealt with separately.
28. The survey lends corroborative support for a vehicular highway albeit not conclusive. It is one piece of evidence to be considered amongst all others.

#### *Commercial maps*

29. Bartholomew's half inch map of England and Wales, 1902, shows the route as a 'white road' being 'an inferior road, not recommended for bicycles'. However, the map carries a disclaimer that "The representation of a road or footpath is no evidence of the existence of a right of way". It is also believed that independent surveyors were not employed to carry out surveys on the ground.
30. Greenwood's map of Hampshire, 1826, shows turnpike roads and crossroads. It does not show public footpaths. The claimed route is shown as a 'crossroad'. On older maps a 'crossroad' typically means a public road. Sometimes bridle roads and private roads are shown, but more often than not, a crossroad will be public.
31. These maps were expensive to purchase, and it could be said that there was no point in showing a road to a purchaser if he did not have the right to use it. It cannot be known for certain either way, but they provide limited evidence to be considered alongside other findings.

### *Ordnance Survey ('OS') mapping*

32. The four County Series OS maps (scale 25" to 1 mile) dating from 1870-1931 show the claimed route by solid parallel lines. The objectors agree that this is good evidence of its existence, but not its status. On the second and third editions a footpath to the south of Whistler's Farm is annotated and shown much narrower in width. It could be deduced that if the route was a footpath only it would be similarly annotated.
33. In support of the application the British Horse Society flag up that the claimed route along with other current public roads in the area, including the C168 road, Cow Down Lane and Holt Lane, are all identically described as a 'road' in the Book of Reference for the 1<sup>st</sup> edition OS map, 1874. This could suggest that the route appeared to have the same public status.

### *Sales particulars*

34. A plan for the sale of the Tangle Estate produced in 1876 depicts the claimed route as white rather than sepia like other roads shown. While the objectors maintain that this shows that the route was private, that cannot be gleaned either way especially without a key to the map.
35. When the Upton Estate and Bourne Farm were marketed for sale in 1898 the claimed route was shown as a sepia coloured line. Apart from showing that a route existed, it does not assist in establishing if there were public vehicular rights. More information is available in the sales brochure and map for the Estate and Farm which was marketed in 1917. The claimed route is shown and described as an 'occupation road'. This could indicate that the route was thought to be a private road.

### *Andover Highways Book*

36. The Council explains that the Andover Rural District Council Highway Handover Map, 1929, was prepared when responsibility for highways transferred from the rural district council to the county council under the Local Government Act 1929. The purpose of the map was to identify highways maintainable by the Council. The claimed route was not shown meaning that it was not regarded as publicly maintainable highway. The position remained the same when the Highways Maintenance map for the Andover Division was produced in 1946.

### *Ministry of Agriculture, Fisheries and Food Farm Survey*

37. The Survey of 1941 for Whistler's Farm would have included most of the claimed route. On the survey form, the surveyors indicated the condition of the roads to be 'bad' and the farm roads 'fair'. A distinction was being made between the two types of road, but without further information to identify how any part of the claimed route was classified, it is of little evidential value.

### *List of streets*

38. The route is currently recorded in the list of streets maintainable by the Council at public expense known as 'Whistler's Down Road'. The Council notes with interest that the authority appears to have carried out maintenance to the surface of the claimed route and indicates it was unaware of this when the Officer's report was written.

39. The landowners maintain that the Council's decision to add the route to the list of streets was flawed. However, the absence of the route from highway maintenance records from the 19<sup>th</sup> to early 20<sup>th</sup> century, but it is not conclusive evidence of a private road. It might indicate the route was privately maintained, but that is something different.
40. Correspondence has been produced with the Council during the 1980's which resulted in it taking responsibility for the maintenance of the route as a road. A letter from the Assistant County Surveyor in March 1982 explains that investigations were conducted into the Tithe Award and other old maps at the Record Office. Consideration was given to OS records, Greenwood's map and also the Tangley Tithe map which the Council considered to be particularly significant. It was assumed that the parcels of land forming the route were not tithable. By implication it was concluded that "these parcels form part of the public road". The writer goes on to note that other nearby parcels of land now forming part of the maintained road system, either metalled or unmetalled, are not listed in the schedule of lands.
41. In consequence it was concluded that the "access road" should be recorded on the County Surveyors Road Map as an unmetalled road. Prior to this time and from the 1940's/1950's, the Parish files confirm that the route was not regarded as maintainable as a road.
42. The Assistant County Surveyor clarified on 3 December 1982 that the "*track appears to be an unclassified road and what is known as an ancient highway, i.e. publicly maintainable because it was in existence as a public road on the 20<sup>th</sup> March 1836.*"
43. There followed a letter from the County Divisional Surveyor on 3 March 1983 to advise that approval had been secured to improve the surface including "coated macadam" over the whole length from the Class III road south of Whistlers Farm up to the farm drive. The remaining length to the north of the farmhouse was to be dealt with "in a piecemeal fashion" over the next few months.
44. By 1986 the Council described the route as "now a metalled road" and confirmed that rights of way still existed along FP12. That was, of course, the recorded status of the route at that time.
45. When an occupier of Whistler's Farm made a claim against the Council in 2002 for damage to his car due to the condition of the claimed route, liability was initially denied. Then in September 2002 the Council's Head of Legal Practice wrote that it "*has now established that ALL of Whistlers Farm Road is highway rather than just the metalled section. It was originally thought that the unmetalled section was a Byway Open To All Traffic, and as such not subject to the maintenance inspection regime enjoyed by the classified highway network. It has been established that the section of highway was wrongly defined, as it was an ancient highway pre-dating 1835.*" It goes on to say that "*This section has now been correctly defined and will henceforth be maintained as an unclassified road, together with the rest of Whistlers Farm Road, and maintained to a safe and serviceable condition.*" On that basis liability was accepted for the damaged car and the claim was met in full.
46. Although the letter confirms that the Council did not consider any part of the route to be a BOAT, what emerges is that the Council concluded it to be an

ancient road, presumably because of the evidence in Greenwoods map which pre-dated the Highways Act 1835.

47. Further correspondence demonstrates that the local highway authority surfaced a section of the route to Whistlers Farm in 2004.
48. When the local highway authority added the route to its list of streets it clearly considered a range of documents. Whilst a public footpath could be added to the list of streets, that is not what happened. It was added as an unclassified road and this may provide evidence of vehicular rights. There is no reason to suppose the route would have been recorded as a highway maintainable at public expense with the resultant responsibilities and costs implications that entailed unless the Council was satisfied the evidence sufficed. Moreover, it is clear from the correspondence that the route was subsequently maintained to a standard to accommodate vehicular traffic. The Council would not have done so had it been a private road.

#### *Definitive mapping*

49. The claimed route appeared as a public footpath when the Tangley Parish Map was prepared under the National Parks and Access to the Countryside Act 1949 to identify public rights of way in the area. This led to the production of the draft Definitive Map to which three objections were made for Tangley, but none concerned the claimed route.
50. The claimed route was recorded as a footpath on the first DMS in 1954 and in subsequent versions.

#### *Land title*

51. The proprietors of Whistler's Farm have a registered "right of way on foot and by motorised transport" over the claimed route from the Farm to the western point of the route at its junction with the U56. It is contended by the objectors that no such right would be needed if the route were a public carriageway. However, public and private rights can co-exist as is evident from the fact that the entire route is already a public footpath.
52. Most of the land affected by the claimed route is unregistered. Unless all the surrounding land except for the route is registered no inferences can be drawn.

#### *Modifications*

53. The Definitive Statement records the existing footpath at varying widths between specified points. Having compared the widths taken from the OS County Series, the Council does not consider that the differences warrant varying the particulars.
54. The applicant considers the recorded widths to be very approximate and the width of the 'white road' on the Finance Act map to be very specific. By utilising this map, the applicant believes it would avoid potential disputes in future.
55. The DMS should be as accurate as it can be, but there is a lack of information before me on the extent of any discrepancies and where they arise. Without more information I cannot be satisfied that there is cause to modify the DMS.
56. As there are no limitations along the route such as gates or stiles, the applicant would like it recorded that there are 'no limitations' in the same way that some

other Councils adopt this practice. In my view, this is unnecessary. If there were limitations/conditions they should be included, not the other way around.

### **Evidence of use**

57. The previous owners of Whistler's Farm who were responsible for getting the route added to the list of streets say that they used the entire route in all types of vehicles, on horseback and with horse and carriage throughout their 44 years of ownership until 2014 and continued thereafter. They no longer have an interest in the land and yet still maintain the route was used by the public as a road with vehicles.
58. Three members of the family who previously resided at Whistler's Farm have completed user evidence forms of their use spanning from 1968 to the current day. Two other forms have also been submitted for three people. Two users claim 11 years use from 1968-1979 whereas the other four all claim in excess of 20 years continuous use on foot, bicycle, on horseback and in vehicles.
59. Section 31 of the 1980 Act provides that where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is calculated retrospectively from the date when the right of the public to use the way was brought into question.
60. The Council say they cannot be sure users were not exercising private rights. That is possible, but the former occupiers of Whistler's Farm say they used the entire route and not just the section over which rights are reserved. That said, the volume of evidence is low and comes from three families only. It does not suffice to demonstrate statutory dedication of rights for more than a footpath.
61. That is not to say it is irrelevant because the use provides some support for the historic evidence of a highway used by different types of traffic.
62. The objectors produce a statement<sup>2</sup> from a former local resident who spent time at Whistler's Farm during childhood when his family lived locally between 1947-1962. He recalls an access track, hard surfaced with flints and chalk, which was suitable for cycling and access vehicles, such as the post and milk lorry, which went to the farm only. He does not recall ever meeting a member of the public on the farm either walking, cycling, riding or driving. The witness says part of the route did not exist and he *"cannot conceive that it was ever considered as a through route as it was virtually impassable beyond Whistler's Farm and it was so much quicker to use the roads to get from Tanglely to Upton"*.
63. These recollections are difficult to reconcile with the parish council claiming the entire route as a public footpath during that period. There was also a letter in December 1963 sent on behalf of the owner of Whistlers Farm to the Council enquiring if the Council would be prepared to resurface the "road running past my farmhouse" which "is a public right of way". This confirms that there was a road which did not stop at the farmhouse but went past it.

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<sup>2</sup> The statement is not 'sworn' as the Council describes but it contains a statement of truth and is signed/dated.



### **Conclusions on the evidence**

64. The weight attaching to the evidence as a whole must be assessed. The BHS draws my attention to the Court of Appeal decision in *Fortune & others v Wiltshire Council and Taylor Wimpey*<sup>3</sup> that direct evidence will often be impossible to find over the passage of time and inferences must be drawn from the circumstantial evidence.
65. Historical evidence does not need to be supported by public user evidence in order to demonstrate higher public rights, but in this case there is some, albeit limited, corroborating evidence.
66. The objector's suggestion that the route was a private road only cannot be right as the public use of the route was recognised when it was added to the DMS as a footpath. This provides conclusive evidence of public rights on foot as per section 56(1)(a) of the 1981 Act. The point in issue is whether the road had any greater public status.
67. The route was numbered on the Tithe Map without a corresponding entry in the apportionment and it was uncoloured on the Finance Act Map. The judgment in *Maltbridge Island Management Company v SSE & Hertfordshire County Council*<sup>4</sup> addressed the weight to be given to Tithe map and Finance Act evidence. The Court held that the tithe map and apportionment evidence is undoubtedly relevant as to both the existence, and physical extent, of a way at the relevant time. However, because both public and private roads were not tithable, the mere fact that a road is shown on, or mentioned in, a tithe map or apportionment, is no indication as to whether it is public or private.
68. Nonetheless, more often than not a road shown on these documents will be a public carriageway rather than a footpath. The omission of the claimed route from the tithable and taxable holdings in the same way as other known highways lends some support for its public status.
69. A limited degree of supporting weight is found in Greenwood's, Bartholomew's maps and OS records. None of the documents are conclusive but taken together they provide sufficient evidence of vehicular carriage rights up to the point it was decided to add the route to the County Road map in the 1980's.
70. At that time the Council recognised the claimed route as being publicly maintainable highway as an unclassified road. This did not necessarily acknowledge vehicular status, but County Surveyors tended to think of roads being vehicular when recording a publicly maintainable road. That is reinforced by the subsequent actions of the Council in the re-surfacing works undertaken. A route can be on the list of streets without being a public right of way. For instance, it could be part of the ordinary road network instead. What emerges is that the Council maintained the route as a road at public expense giving a firm indication that this is not a private road. With classified roads at each end of the claimed route it is entirely plausible this was a through route and not just used to exercise private rights.
71. Prior to the 1980's the records establish that the route was regarded as a public footpath only. The parish council in the 1950's considered the route had no

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<sup>3</sup> [2012] EWCA Civ334

<sup>4</sup> [1998] EWHC Admin 820, [1998] EGCS 134

higher status than a public footpath. However, the evidence also indicates that the route was in a poor state of repair around that time and had become badly overgrown by 1983. This may well have influenced the type of use. As set out in *Harvey v Truro Rural District Council*<sup>5</sup> the mere disuse of a highway cannot deprive the public of their rights. Furthermore, there is no indication in the material provided that the parish council researched any historic evidence.

72. As the route was not identified as maintainable at public expense in earlier highways records the objectors argue the 'presumption of regularity'. The presumption operates where the validity of an act done by a public authority depends on the existence of a state of facts which cannot, with the passage of time, be proved. It presumes the authority acted lawfully and in accordance with its duty in omitting the route from its records of maintainable highways.
73. Even so, nothing prevented the Council from updating its records for the future upon discovering evidence to indicate its previous position was wrong. In changing its position, the Council not only accepted the route was publicly maintainable as a road but proceeded to undertake maintenance works and improvements to accommodate vehicular use which had in fact been sought by the former owners of the Farm.
74. No one piece of evidence is compelling but when taken collectively (including the actual use to which the route has been put) it seems to me more probable than not that the claimed route is a public carriageway.
75. Rights to use the route by mechanically propelled vehicles would have been extinguished as a result of the 2006 Act as no exceptions have been identified. The claimed route cannot be recorded as a BOAT in consequence, but the rights that would remain enable it to be recorded as a restricted byway.

### **Conclusion**

76. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence now available does show that on the balance of probabilities that the claimed route subsists as a public carriageway and should be recorded as a restricted byway.
77. I am not satisfied that there is sufficient evidence for the width of the road to be changed from that currently recorded or that there is reason to specify that there are no limitations or conditions on public use.

### **Formal Decision**

78. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Hampshire County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act, not later than 9<sup>6</sup> months from the date of this decision, to modify the definitive map and statement to add a restricted byway, rather than a byway open to all traffic as applied for on 3 January 2018. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.

*KR Saward* INSPECTOR

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<sup>5</sup> [1903] 2 Ch 638

<sup>6</sup> I would have directed 3 months, but a longer period has been given due to the exceptional circumstances arising from the ongoing public health emergency