



Appeal Decision

by Mark Yates BA(Hons) MIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 11 June 2019

Appeal Ref: FPS/G3300/14A/17

- This appeal 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 Somerset County Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application dated 27 August 2008 was refused by the Council on 15 May 2018.
- The appellant (Ms S. Bucks of the South Somerset Bridleways Association) claims that sections of Footpaths L17/3 and L17/15, in the parish of Kingsbury Episcopi, should be upgraded to bridleway status. This route ("the claimed route") is shown between points A-B-C on the attached map.

Summary of Decision: The appeal is allowed.

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 1981 Act. I am satisfied I can make my decision without the need to visit the site.
2. The Council reached its decision after considering various pieces of documentary evidence. Following the submission of the appeal, the appellant submitted user evidence forms ("UEFs") in support of recent public use. The submissions of the parties have focussed on the documentary evidence rather than the alleged recent use of the claimed route. However, it is the Secretary of State's published policy that when determining this type of appeal the Inspector should have regard to all the evidence provided and not just the evidence submitted with the application.

Main Issues

3. Section 53(3)(c)(ii) of the 1981 Act specifies that an order should be made where the evidence discovered 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. The evidential test to be applied is the balance of probabilities.
 4. When assessing the documentary evidence, I need to consider whether it is sufficient to infer the dedication of higher public rights over the claimed route at some point in the past. 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 appropriate.

5. In terms of the user evidence, the relevant statutory provision for the dedication of a public right of way is found in Section 31 of the Highways Act 1980. This requires consideration of whether there has been use of a way by the public, as of right¹ and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way. If statutory dedication is not applicable, I shall consider whether the user evidence supports an implication of dedication at common law.

Reasons

Documentary evidence

6. A map of circa 1830 of Kingsbury Episcopi shows the claimed route in the same manner as other roads in the parish. It is a through route that links with other highways. Whilst the depiction of the route in this way may provide some support for it being a highway, no information has been provided regarding the provenance of this map. It can only be said that it was possibly produced as part of the initial stage of the inclosure process. Nor does the map contain a key or any annotation to indicate whether the route was considered to have public or private status. The map provides evidence of the physical existence of the claimed route prior to the inclosure of land in the area but it is of limited value in terms of the status of the route.
7. A local Act was passed in 1830 for the inclosure of land in Kingsbury Episcopi. For the most part it incorporated the standard provisions contained in the Inclosure Consolidation Act 1801 ("the 1801 Act"). It is apparent that the provisions of Sections 8-10 of the 1801 Act were applicable to the public and private roads included in the inclosure award.
8. The Kingsbury Episcopi Inclosure Award of 1835 set out the claimed route as two private carriage roads (Nos 12 and 13) with a width of 20 feet in each case. It specifies that the owners and occupiers of land served by the private roads were responsible for the maintenance of the roads. In respect of the lack of evidence that the route was extinguished by the Commissioners, the 1830 map is the only piece of evidence that pre-dates the inclosure of the land. Although this shows the claimed route, it cannot be said that the route was a pre-existing highway.
9. Submissions have been made regarding the interpretation of the inclosure award, including from an interested party (Ms Roseff). These relate to a large extent to the case of *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council 1995* ("*Dunlop*"). Whilst Ms Roseff makes criticisms of the findings of Sedley J in *Dunlop*, where applicable, I must follow the judgment.
10. Sedley J found in *Dunlop* that by the nineteenth century there was a distinction between public and private roads. Section 8 of the 1801 Act required Commissioners to set out the public carriage roads with a minimum width of 30 feet and these were to be the most commodious for the public. This is distinct

¹ Without force, secrecy or permission

from Section 10 which empowered Commissioners to amongst other things award private roads. It is apparent that the inclosure award made different provision for the public and private roads in line with the 1801 Act. It is also the case that the relevant private roads were set out with a width of 20 feet, which was less than the required width for a public road.

11. The Council draws attention to some of the private roads in the award also being set out as public footpaths or bridleways. Reference is made to the setting out of the B-C section of the claimed route separately in the award as a 3 feet wide public footpath. It was therefore the case that provision was made for the public pedestrian rights to exist within a private road. Such an arrangement would not have been necessary if the route was considered a public road. This reveals that the Commissioners made clear provision for the public and private rights. I also note that the continuation of Private Road No. 12, to the west of point B, provided a means of access to various plots of land and it was not a through route.
12. The inclosure evidence is supportive of the claimed route being awarded as sections of private roads, with B-C also including a public footpath. This provides strong evidence that at the time of the award no additional public rights existed over the route. It follows that I do not accept Ms Roseff's submissions that the claimed route was at the time a public road for local traffic. Nor do I find there to be merit in the argument that the word 'private' related to maintenance. The question of whether 'higher' public rights were dedicated after the inclosure award needs to be determined from the other pieces of documentary evidence.
13. An 1844 tithe map for the parish shows the route coloured in the same manner as other roads in the locality. However, the fact that highways were incidental to the tithe process will usually serve to limit the evidential weight of tithe maps. For instance, as applies in this case, the exclusion of a route from the tithed parcels of land could be indicative of a public or private road as both would have impacted upon the productivity of the land being assessed. Although the appellant refers to the suggestion by Lt Dawson of the Ordnance Survey ("OS") for colouring to be used on tithe maps, it is my understanding that no standardised practice was employed to distinguish between public and private roads. The tithe map could therefore merely have represented the existence of the awarded private road.
14. The claimed route is shown on OS maps published in 1887, 1898-1900, 1903 and 1919. I take these maps to provide a good indication of the physical features present when the land was surveyed. They can provide supporting evidence when considered in conjunction with other pieces of documentary evidence. However, OS maps are silent on the status of the paths or tracks shown. The fact that the route is shown as a distinct track rather than a pecked line in the manner of a path is not indicative of the existence of higher public rights.
15. The claimed route is shown excluded from the surrounding numbered hereditaments on a map produced in relation to the 1910 Finance Act. On this issue, provision was made in Section 35(1) of the Act for no duty to be applied to land, or an interest in land, held by a rating authority. This could potentially relate to highway land. Overall, where land is shown in this way, there is a strong possibility that it was considered a highway, most likely vehicular in

nature. However, there are potentially other reasons for the exclusion of a route from the surrounding hereditaments.

16. A Council farm valuation of 1912 shows a proportion of the claimed route in the same manner as other routes that are now public roads. However, its depiction as a road reflects the consistent way this feature has been shown on various maps. There is nothing to suggest that the surveyor considered it to have public status. This would also apply to a 1915 map in relation to the sale of smallholdings. The Council says the 1915 map was based on the 1903 OS map.
17. The 1924 sales particulars for the Kingsbury Estate state that access to the land was from either end of the route. This reference only says that access to the land was available from the claimed route. It contains no reference to the route being public. No evidence has been provided to clarify whether the landowner had a private right of access. In terms of the current unregistered ownership of the land crossed by the claimed route, no conclusion can be drawn from this matter.
18. A map in relation to the national farm survey of 1941-42 shows the route excluded from the surrounding parcels. The purpose of the survey was to ascertain information relating to farms and not highways. It cannot be determined that the exclusion of the route from the surrounding agricultural land points to it having public or private status.
19. No part of the claimed route has been recorded as a highway maintainable at public expense in records dating back to the 'handover map' produced in relation to the Local Government Act 1929. A section of the awarded Private Road No. 13 in the inclosure award, to the south of point A, has been viewed by the highway authority as a public road. There is no evidence to explain why the connecting route became a section of public road. However, I note that there are properties that now abut this road.
20. The claimed route was originally put forward by the parish council for inclusion on the definitive map as a road used as a public path, but it was subsequently recorded in the draft, provisional and definitive maps as a footpath. This indicates that the evidence available to the Council at the time was only supportive of footpath status. Nonetheless, this does not rule out the possibility that unrecorded higher public rights exist over the route.
21. I do not find the 1830 map is sufficient to show that the claimed route was viewed as a pre-inclosure highway. The inclosure award is strong evidence of the route being set out as a private road. Most of the other evidence is supportive of the existence of the claimed route but is silent in terms of its status. I accept that the exclusion of the route from the surrounding hereditaments on the Finance Act map could be supportive of the claimed route being a public road. However, when considered in conjunction with the other pieces of documentary evidence, I am not satisfied that the evidence is of such weight to find on balance that an order should be made to record higher public rights over the claimed route.

The user evidence

Statutory dedication

22. The Council says there has been no opportunity to interview witnesses or seek comments from the landowners regarding the UEFs. It therefore declined to comment on the user evidence. No request was made for an extension of time to enable further investigations to be undertaken by the Council. As outlined in paragraph 2 above, I am required to have regard to all the evidence provided when reaching my decision. This means I must reach a view on the evidence contained in the UEFs.
23. There is no mention in the UEFs of any challenges to the use of the claimed route by horse riders or cyclists that could have served to bring the status of the route into question. In such circumstances, the event should be taken to be the application for a modification order of 27 August 2008. This means that the relevant twenty-year period to be considered is 1988-2008 ("the relevant period").
24. Twenty-five UEFs have been provided in support of use of the claimed route. However, it is apparent that the use by eight of these people occurred after the end of the relevant period and should therefore be discounted. Eight people state that they had started to use the route by the onset of the relevant period and the number of users increased during this period. The use documented in the forms largely occurred on a regular basis. Three people mention a stile but there is no suggestion that it served to interrupt use of the route. Nor is there anything in the forms to suggest that the use was not as of right.
25. When taken at face value the UEFs provide evidence of use throughout the relevant period that is sufficient on balance to raise a presumption of the dedication of a public bridleway. Bearing in mind the fact that the claimed route comprises of sections of public footpaths, in reaching this conclusion, I have discounted the evidence of use on foot. There is nothing to suggest that any action was taken during the relevant period to indicate that there was a lack of intention to dedicate higher public rights over the claimed route. I note that there was an enquiry from a landowner in 1995 regarding the potential dedication of a bridleway over the claimed route. However, as ownership of the land was unclear, it was not possible to proceed.
26. The written material provided is supportive of the dedication of a public bridleway over the claimed route in accordance with Section 31 of the Highways Act 1980. I therefore conclude on the balance of probabilities that an order should be made in accordance with Section 53(3)(c)(ii) of the 1981 Act. Clearly the making of the order may well lead to further evidence being provided both in support or opposition to the claimed route being recorded as a bridleway.
27. In light of the above conclusion, there is no need for me to address the user evidence in the context of common law dedication.

Conclusion

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

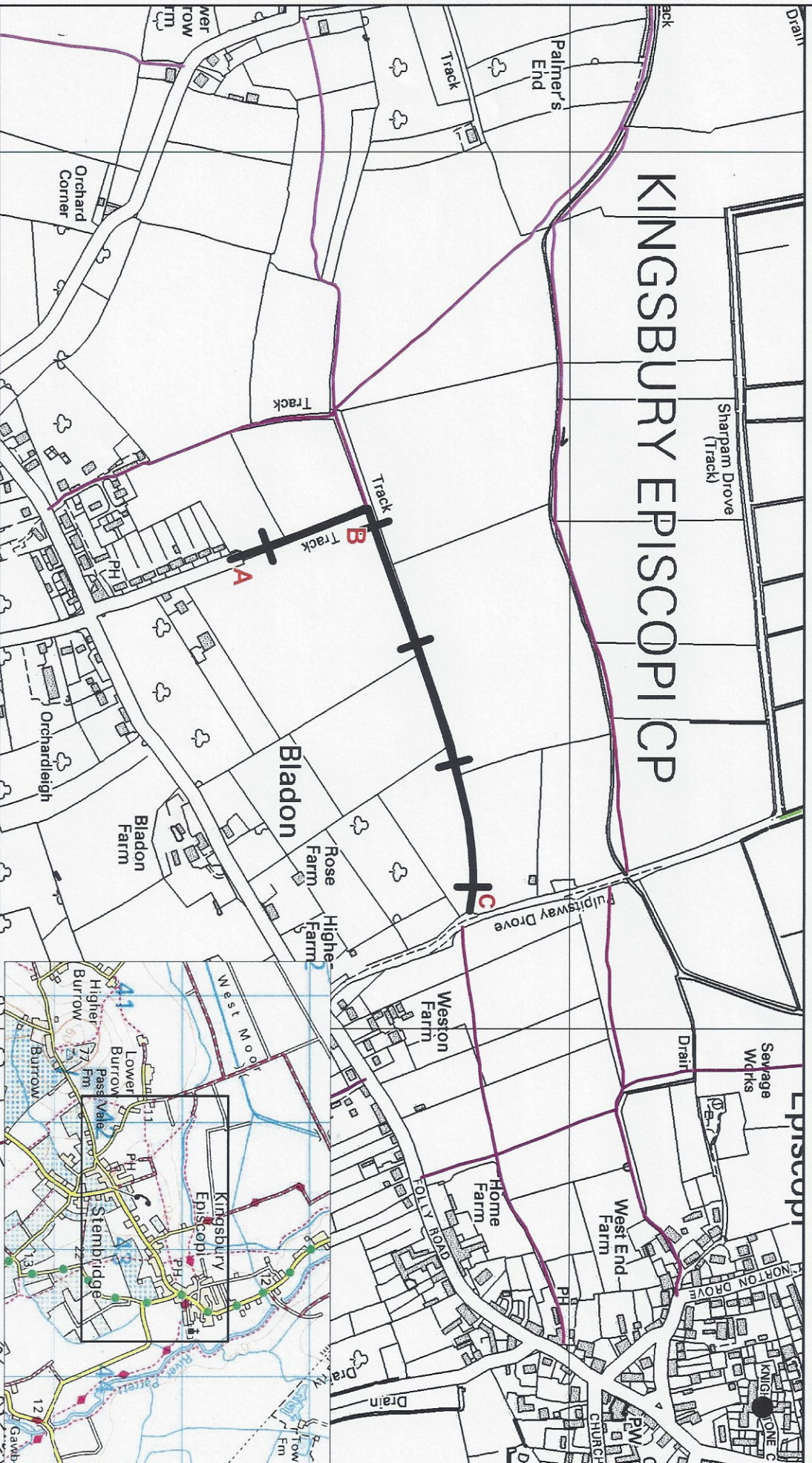
Formal Decision

29. In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act Somerset County 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 add a bridleway over the route as proposed in the application dated 27 August 2008. 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 to the 1981 Act.

Mark Yates

Inspector

(C) Crown copyright. All rights reserved (Somerset County Council) (100038382) (2017)



Parish: Kingsbury Episcopi
 District: South Somerset
 Date: 05/01/2017
 Drawing No: H004-2017/544m
 Drawn By: MHardwill
 Grid Ref: 342710 120920
 Scale: 1:5000

Definitive Footpath
 Claimed Bridleway
 (shown A-B-C)



Section 63 Wildlife and Countryside Act 1981.
 Claimed Bridleway over Footpaths L 1713 & L 1715, Kingsbury Episcopi

(c) Crown copyright. All rights reserved (Somerset County Council) (100038382) (2017)
 The County Council can accept no responsibility for any error or inaccuracy which may arise from the transposition of the Rights of Way Definitive Map to a different scale.

