



Appeal Decision

by **K R Saward Solicitor**

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

Decision date: 12 July 2019

Appeal Ref: FPS/P3800/14A/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 West Sussex County Council ('the Council') not to make an Order under Section 53 of that Act.
- The application dated 22 January 2018 was refused by the Council on 30 October 2018.
- The appellant claims that the definitive map and statement for the area should be modified by (1) adding a restricted byway from east of Binsted Church at SU 983 061 to SU 985 063, & (2) upgrading the footpath known as FP 342 to a bridleway from its commencement in Binsted to its termination near Canada Road in Arundel at TQ 010 069.

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 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 that I can make my decision without doing so.
2. The application is made by The British Horse Society ('BHS') in respect of two linked routes as set out in the heading above. A copy of a map accompanying the application showing the entirety of the claimed route is attached for reference purposes. The route claimed as a restricted byway is a short section between points A-B. It joins to the existing public footpath shown on the Definitive Map for Chichester known as FP 342 which is claimed as a bridleway between points B-G. The section between B-D only falls within the South Downs National Park.
3. A bridleway is defined to include the rights of a footpath as well as the right to ride or lead a horse and to ride a bicycle. A restricted byway includes those same rights along with a right to use non-mechanically propelled vehicles e.g. a horse and carriage.

Legal Framework

4. For an addition to be made to the definitive map and statement ('DMS'), section 53(3)(c)(i) provides that a modification order shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.

5. As set out in the case of *R v Secretary of State ex parte Norton and Bagshaw*¹ an Order to add a route should be made if either of two tests is met:

A: does a right of way subsist on the balance of probabilities?

B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

6. In order for a footpath to be 'upgraded', section 53(3)(c)(ii) provides that an order to modify the definitive map and statement shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a highway shown in the map and statement subsists as a highway of a particular description ought to be there shown as a highway of a different description.
7. Section 53(3)(c) requires there to be a "discovery" of evidence. This is not disputed in this case.
8. The application relies 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.

Main Issues

9. Therefore, the main issues are whether the evidence is sufficient to show, on the balance of probabilities, that:
- a restricted byway subsists or is reasonably alleged to subsist between points A-B; and
 - the existing public footpath between points B-G should be recorded as a public bridleway.

Reasons

10. As both claimed routes form one continuous line, I will consider the historical evidence collectively starting with the earliest records. Copious material has been provided and whilst I have taken this all into account, I do not make explicit mention of each and every document supplied or its content.
11. The application routes lie within the parishes of Walberton (which includes Binsted) and Arundel. Prior to boundary changes the application route historically crossed the parishes of Binsted and Tortington.

Glebe Terrier 1615

12. The text is illegible in the photographic copies of the original document, but a typed transcript has been provided by a qualified archivist. The glebe terrier is said to describe property assigned to the incumbent of the church.
13. The copy is signed by the vicar and two churchwardens. It refers to "the lane leading from Binsted Church to Arrundell". It goes on to describe "one acre

¹ [1994] 68 P & CR 402

more bounded with the same lane on the north syde & with the lane that goeth to lower Binsted on the west side.”

14. Binsted Church is located close to point A and the BHS believes that the separate references to the same lane is the application route. The Council acknowledges that the details “appear to match today’s path” from A-B, but say it is difficult to tell without a map.
15. The BHS suggests that if the route was a footpath it would not have been called a lane and quotes from various books to suggest that this may be a mediaeval road. These include ‘The Victoria County History’² for Binsted which in an extract refers to text dating from 1615 describing an “east-west road crossing the centre of the parish.... between Binsted and Arundel” which survived in 1992 “as a fairly wide footpath”. The publication is deemed to be reliable as it is edited by academic historians.
16. The descriptions in the 1615 record seem to be consistent with the location of the route, but the status of the road described is unclear. The BHS regards it highly unlikely that ‘an ancient through route between parishes not in the same ownership would be private’. There may be some credence in that, but it is by no means certain.

Tithe maps and apportionment

17. The Tithe Map and Apportionment for Binsted 1838 is identified by the BHS as a first class map with the Commissioners’ seal affixed meaning that it is reliable as a true record for the purposes for which the map was drawn.
18. The route between A-B is coloured in the same way as roads in the parish known to be public. It is annotated with the number 75 which is identified in the Apportionment as ‘Church Lane’. There is a line shown across the lane just past point A. The Council says it could mean that there was no public access whereas the BHS says it could denote different apportionments. On the face of it, it is unclear what the line signifies.
19. The lane stops at point B. From B-C there is a dashed line beside the field boundary indicating a much narrower physical feature. From the photocopies it is not easy to follow the route thereafter. The BHS takes issue with the Council identifying a mark on the map as a footbridge rather than another type of bridge or feature.
20. The small scale and quality of print makes it somewhat difficult to read the Tithe Map and Apportionment for Tortington 1940. It appears to show the route as double dashed lines between C-F which the BHS suggests is being portrayed as an open bridle or drove road in the area of Tortington Common. There is a change to a single dashed line beside a field boundary from F-G.
21. The BHS notes that F-G appears in similar manner to B-C on the Binsted Tithe Map, but argues it is unlikely to be a footpath because other roads shown as open roads lead off it. The BHS rejects the Council’s suggestion that the changes in demarcation could denote different status of parts of the route. Instead, it is suggested that they simply reflect how the way appears on the ground. There is no key on the map to provide clarification.

² The Victoria History of Sussex forms part of a national series on English local history.

22. As the route led off a vehicular highway the BHS believes it was a lane leading from Binsted Church to Arundel.
23. The now recorded bridleway along Old Scotland Lane is not shown on the map and the Council accepts that the inclusion of the application route on the map signifies its prominence, but not that it necessarily had bridleway status.

Parish and estate maps

24. The survey and map of the manor of Tortington 1724 was commissioned by the landowner. It appears to show the route within Tortington (D-G) as a double dotted line and a single dotted line. The BHS acknowledges that it is not possible to say with certainty what this represents without a key.
25. The BHS highlights that the only route marked "Road" is the road now known as Binsted Lane and that too is partially represented on the map by a single dotted line track. It is further submitted that the road known today as Priory Lane is via single and double dotted line tracks. Another old road known to have existed from Arundel to Tortington is similarly depicted on the 1724 map as a single dotted track. The BHS has annotated copies to illustrate its case.
26. The BHS draws the inference that the routes shown by single and dotted lines must represent routes of higher status than footpaths. I regard it as a possible interpretation but not necessarily so.
27. The Council refers to the Estate Map of Binsted Ball Farm from the early 19c as only showing the route from C-D. From the extract provided by the BHS, Binsted Church is depicted with a road opposite consistent with points A-B.

County maps

28. Adcock's Survey 1894 of the County's Roads is a survey prepared by the County Surveyor which aimed to inspect all parish roads. The route A-B may be coloured green to denote a maintainable 5th class road but it is not wholly clear from the copy because it is obscured by the word 'Binsted'. C-F is shown as a black line similar to Bridleway 338 (Old Scotland Lane), but there is no key to assist in determining its status. B-C is not shown and there is possibly a dashed line from F-G. Unless there is a clearer copy, the map is of very limited value.

Commercial maps

29. Yeakell and Gardner's Sussex (1778) is identified as an unfinished map of the whole of Sussex. The Council accepts that it shows a route from Binsted to Arundel matching A-G. The route between A-B appears to be depicted as a road enclosed by hedgerow as it is shown in the same way as other roads. From B onwards it appears to be a dotted line beside hedgerow and woods heading towards point G although shading on the map affects the clarity.
30. The present day photographs supplied for comparison purposes show the application route enclosed between A-B and extending beside hedgerow past point B.
31. Instead of denoting a footpath, the BHS believes that dotted tracks can mean mediaeval roads as outlined by an author of a book on mediaeval roads and tracks. Comparisons are drawn with other former roads shown in this way. It is a possible interpretation, but there is no level of certainty this is a mediaeval

road especially without a key on the map. What it does support is the physical presence of a road from A-B.

32. Greenwood and Greenwood Map of Sussex 1825 shows the route A-B by solid parallel lines which the 'Explanation' for the map defines as 'cross roads'. There is similarly a cross road shown near to F-G which is thought to be Priory Road rather than part of the application route. On older maps a 'cross road' typically means a public road, but it is not conclusive.
33. These maps were expensive to purchase and the BHS quotes Judge Howarth in *Hollins v Oldham* [1995] that there was "no point, it seems to me, in showing a road to such a purchaser which he did not have the right to use."
34. The mapmaker may not necessarily have been right to depict it as a cross road, but it is some evidence to be considered alongside other findings.
35. Bartholomew's Maps were produced for sale to the public. They were highly regarded map producers, but independent surveys were not undertaken on the ground or to determine the nature and status of the roads on their maps.
36. The quality of the printed copies makes it difficult to tell, but the Council advises that A-B is shown as a single dotted line to point C which is identified as a "Footpath & Bridleway" on the key. From C-D the route is shown on both the 1902 and 1922 editions as an uncoloured road. The key says "the uncoloured roads are inferior and not to be recommended to cyclists". The rest of the route is shown as a black line which the Council considers may represent smaller "other roads".
37. Bartholomew's Maps (1901 and 1911 editions) were considered in *Commission for New Towns v J J Gallagher Ltd*³. The Court observed that the implication of a demarcation as an uncoloured inferior road on these maps appears to be that they are public carriageways. The first reason being that each of the other four categories are public highway. Secondly, the indication in the description of the uncoloured roads is that they can lawfully be used by cyclists which, at that time, would have meant they are public carriageways.
38. However, the Court noted the disclaimer (which also appears in these cases) that "The representation of a road or footpath is no evidence of the existence of a right of way". The Court concluded that the disclaimer underlines the fact that one cannot place much weight on Bartholomew's Maps, or indeed any map which does not have the positive function of identifying public carriageways.
39. Whilst I would not disregard the information on the map altogether, I treat it with some caution. I note that the Council agrees with the BHS that C-D is shown the same as some of today's public roads in the area as well as Bridleway 338 (Old Scotland Lane).

Finance Act 1910 maps

40. The 1910 Act required all land to be valued. Where a route is shown uncoloured and unnumbered so that it is outside of the hereditaments it is indicative of a public highway and usually one which is vehicular.

³ [2002] EWHC 2668, 2 P & CR 24

41. The application routes from A-G crossed several hereditaments. Some of the field books are missing and from those that are available deductions are made for footpaths only.
42. In its original submission the BHS omitted to mention that A-B is shown as a white road outside of any hereditament. This supports the claimed route being a restricted byway.
43. The BHS highlights that part of Old Scotland Lane which is now a public bridleway was included in the same hereditament as the application route where the deduction was for a footpath. As that Lane was not shown as a white road, but still has bridleway status, the BHS considers that comparisons can be drawn. The suggestion is made that it is not uncommon to find that landowners claimed for footpaths rather than bridle roads. Even if that is so, just because one bridleway was identified as a path does not mean that other recorded footpaths are bridleways also.
44. Finance Act records are not definitive, but it supports a restricted byway between A-B. It does not support a bridleway over the remainder of the route.

Ordnance Survey ('OS') mapping

45. From the Council's research it says that the route between A-B appears to 'stand-alone' in the draft maps from 1789-1840 without any continuation towards Arundel. It is depicted in the same way as roads, but there is no key.
46. In 1813 the route is shown as an enclosed road between A-B where it stops abruptly. The BHS notes that the map does not appear to show routes such as bridleways. This is supported by the Council which says it only appears to show what are now public roads. From B onwards the route is shown by double dashed lines which are narrower in width in places. Where the route narrows 'F.P.' is seen on the map.
47. The parties disagree on whether the routes are shown on the 1872 and 1873 versions. I cannot be sure from the copies. A-B appears in 1876 as an enclosed road and is annotated with the number 71. The Book of Reference for parcel 71 in the parish of Binsted reads "Road". From point B towards C the route continues by double dashed lines.
48. From the key to the 1895 OS map, A-B and C-D was a fenced unmetalled road with a footpath in between from B-C. From D onwards the route is not shown. As the map would have been made for sale to the public the BHS considers it unlikely to show routes the public could not use. In my view that does not automatically follow. Attention is drawn to Old Scotland Lane which is on the DMS as a bridleway, two-thirds of which is shown in the same way as C-D, the inference being that C-D is also a bridleway.
49. In 1897 a gravel pit is shown in the vicinity of C-D which was accessed off the application route. The BHS argues that there are no other roads nearby and so the route must have been used to extract gravel. Despite the route from C-D being annotated 'F.P.' the BHS submits that it must have been more than a footpath as gravel extraction would have been done by cart. However, it does not mean that the public had more than rights on foot. The Council suggests that other routes not shown on the map could have been available particularly as access to gravel pits would at that time have been private.

50. The Council inspected software copies of the 1863-95 OS maps. It reports that A-B is shown in the same way as other public roads. That remains the case on 1896-1899 editions. At that time the route from B is marked by single or double dashed lines. It is annotated 'F.P.' between B-C and F-G only.
51. In 1910 A-B is shown as an enclosed road. The sections between B-C and C-D are depicted by double dotted lines and annotated along each stretch with 'B.R.' to indicate a bridle road. F-G is denoted by a dotted line annotated 'F.P.' for footpath. The BHS believes this confirms the claim that the surveyor saw evidence of a bridle road along most of the route except for the part nearest to Arundel.
52. The Council reports that on the 1909-19 series and also the 1930-46 series A-B is again shown as other roads. On both series there are 'B.R.' annotations to indicate that the route from B onwards is a bridleway until the route narrows around F-G where it is marked 'F.P.'. Around point C, 'F.B.' for 'footbridge' is marked above the fish ponds. The 1912 and 1914 editions produced by the BHS are similarly marked except the 1912 extract which does not cover D-G.
53. The BHS emphasises the change from around 1912 when the route then becomes annotated as a bridleway up to point F. The Council states that the presence of the footbridge is inconsistent with bridleway status. The BHS produces photographs of the point where the route crosses the stream which is marked as a footbridge on the OS maps. The existing bridge appears wide enough for a horse to cross, but its suitability for bridleway traffic does not shed light either way.

Rights of Way Act 1932

54. At the time of the Council's assessment, the Record Office was unable to locate the records of submissions made by Arundel Borough under the Rights of Way Act 1932 as referenced by the BHS. They have now been located and examined by the Council.
55. On the maps for Binsted and Tortington the route between A-B is marked in red ink and annotated no 8. The red line continues past point B along the application route onto the next sheet. The maps record the routes considered by the parishes to be public. They provide supporting evidence that the route had public status, but for no more than a path. Existing bridleways are also shown on these maps as paths, but it cannot be inferred from this that the claimed route must have higher status.

Other sources

56. A painting by a local resident artist said to be circa 1950 depicts a figure on horseback riding past woodland. It is featured on the Binsted Arts website and the accompanying article interprets the painting as a rider travelling along the edge of Tortington Common from Arundel, being the application route in the vicinity of point C. The BHS suggests that the painting confirms use of the route as a bridle road. As it is a creative work, its accuracy and reliability as an historical record is unpersuasive. Moreover, it does not demonstrate public use.
57. The Arundel Neighbourhood Plan was adopted in 2014. It includes a site called 'Horses Field' roughly halfway between F-G and the application route runs inside the north-eastern boundary where there is a line of trees. The supporting text says "...Some of its trees are of historic importance in identifying the line of an

old route to Arundel Castle from the west....". As the application route is the only public right of way through the field the BHS believes this demonstrates that it must be the "old route to Arundel Castle." That may be so, but it does not establish that the old route was anything other than a footpath.

58. The record entries from the late eighteenth century for materials used on parish roads make no reference to the application routes. They are too vague to provide any illumination over the status of any part of the route. Even if there is evidence on the ground of surface improvement by flint and gravel that does not demonstrate any higher rights.
59. There are no records of Inclosure. The BHS quotes from the 'Victoria County' history of both Binsted and Tortington which refer to informal enclosure taking place. I do not find the details to be of particular evidential value in this case.

Conclusions on the documentary evidence - Points A-B

60. The Council acknowledges that the application route between A-B appears to be consistently marked and described as a road or lane. In the absence of clear evidence defining the status of this section of route the Council questions whether it was a route for public use or a private road to access the rectory and surrounding fields.
61. Various dictionary definitions of "lane" are supplied by the BHS with variants on it meaning a narrow road, especially in the countryside. The term does not in itself assist, but there is supporting evidence that this was a road/lane used by the public in the Tithe Map and Apportionment for Binsted and Finance Act map. The Greenwood and Greenwood Map of Sussex may reinforce that view.
62. The Council says that there is not "conclusive" evidence of the status of the route, but there does not need to be. The lesser test need only be fulfilled i.e. that a public right of way is reasonably alleged to subsist. There is multitude of evidence of A-B being shown in the same manner as existing public roads. Bearing in mind also the other available sources there is sufficient information to reasonably allege that a restricted byway subsists.

Conclusions on the documentary evidence - Points B-G

63. It is accepted by the Council that if A-B was shown to historically be a public right of way of higher status than a footpath it would lend support to an upgrade for the remainder of the route.
64. The earliest evidence of the route as a whole is the 1615 terrier map which refers to a road running east to west. The BHS believes that to be the application route which was a lane leading from Binsted Church to Arundel. The Council accepts that it is plausible the application route was a mediaeval road but refutes there is enough evidence in support.
65. The BHS emphasises that both the 1724 estate map and 1778 county map depict the route as a single dotted line track in the same fashion as a known public road of at least bridleway status.
66. The OS maps from 1912 indicate that most of the route was a bridleway. The Council refers to the Planning Inspectorate guidance that from 1888 onwards OS maps had a disclaimer that the representation of a track or way on the map was not evidence of a public right of way. However, that does not mean the

annotation must be wrong. In response, the BHS draws support from the consistency derived from the Tithe Maps, but they really establish only that a route existed, not its status.

67. Nevertheless, there was a notable and consistent change in how the route became annotated on the OS maps. I do not find it a fatal flaw in the BHS' case that a footbridge was annotated as well as a bridleway. It may simply have facilitated access on foot which was not needed on horseback because a horse could cross through the water. Alternatively, it may have been the practice of the time to annotate in that way. Ultimately, there is nothing to show that the maps must be wrong to identify a bridleway.
68. Given my conclusion that there is a reasonable case that a public road existed from A-B, it seems unlikely that it would have been used on horseback up to point B only. In all probability such use would have continued past that point.
69. Extracts of reference material in books on historical roads and tracks are supplied by the BHS to assist in the understanding of the proper context of the times when travel by foot and on horseback was the norm.
70. Bearing in mind the practices at the time, it is consistent that users would have travelled by horse from the church all the way along the route towards Arundel.
71. There is no one individual strand of evidence that makes a compelling case for a bridleway, but the pieces of evidence must be drawn together. When looking at the picture as a whole there is a credible case that the entirety of the route would have been used on horseback as well as on foot. It is finely balanced but overall, I am satisfied that the case has been made that a bridleway subsists.

The 2006 Act

72. As part of this appeal is concerned with a possible unrecorded vehicular route between A-B, it is necessary to have regard to the provisions of section 67 of the Natural Environment and Rural Communities Act 2006 which extinguished public rights of way for mechanically propelled vehicles, subject to certain exceptions.
73. None of those exceptions apply here. Therefore, if any rights for mechanically propelled vehicles had been established along the claimed route between A-B route then they would have been extinguished as a result of the 2006 Act.

Other Matters

74. Landowners affected by the routes object and express various concerns. The application involves analysis of documentary material to ascertain if there is historical evidence to support the claimed routes. That process does not allow consideration of the current suitability of ground conditions for bridleway use or restricted byway traffic. Nor can my decision be influenced by safety concerns from possible conflict with farm traffic. Similarly, the disturbance to horses in adjacent fields from bridleway use cannot be taken into account.

Overall Conclusion

75. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does show that on the balance of probabilities a restricted byway which is not shown in the DMS is

reasonably alleged to subsist between points A-B. I am also satisfied that on the balance of probabilities a bridleway subsists between points B-G.

Formal Decision

76. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, West Sussex County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify the definitive map and statement to add a restricted byway and upgrade a footpath to a bridleway as set out in the application dated 22 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 Seward

INSPECTOR

