



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 August 2019

Appeal Ref: FPS/D0121/14A/8

- 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 North Somerset Council not to make an Order under Section 53(2) of that Act.
- The Application dated 13 January 2005 was refused by North Somerset Council on 7 December 2018.
- The Appellant claims that the appeal route, a public Footpath and Restricted Byway, should be upgraded to a Byway Open to All Traffic.

Summary of Decision: The appeal is dismissed

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 Wildlife and Countryside Act 1981 ('the 1981 Act').
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. The appeal concerns an application made by Mrs V Craggs on behalf of the Sedgemoor Byways and Bridleways Association. Submissions have also been made on her behalf by Ms J Roseff of the Axbridge Bridleways Association. In reaching this decision, I take account of the submissions from and on behalf of the appellant, North Somerset Council ('the Council') and interested parties, where relevant.
4. The appeal describes upgrading a footpath to a byway open to all traffic ('BOAT'). However, the application was made to upgrade the 'Footpath and Road Used as a Public Path ('RUPP')¹ from the County Road, Rickford Lane, Burrington to Rickford Farm, Burrington and the County Road, to a BOAT. These are recorded in the Council's Definitive Map and Statement ('DMS') as Restricted Byway AX10/30, Footpath AX10/30, and Restricted Byway AX10/30, from Fry's Lane to Rickford Farm, Burrington (at the A368)². For the purposes of this decision I shall refer to them as the 'appeal route'.
5. Since the application was made, public rights to use mechanically propelled vehicles over a way shown in the DMS as a footpath, bridleway or restricted byway have been extinguished by the Natural Environment and Rural Communities Act 2006 ('the 2006 Act'), subject to certain exceptions. Where

¹ Now a Restricted Byway

² Also known as Rickford Lane and Burrington Lane

an application was made prior to 20 January 2005, as here, then those rights may be saved³. However, for this to be the case, the application must comply strictly with the requirements of paragraph 1 of Schedule 14 to the 1981 Act.

6. One of those requirements is that it must be accompanied by copies of any documentary evidence, including witness statements, which the applicant wished to adduce in support of their application. In this case, the applicant provided none but relied on the documentary evidence in the Council's own archives, although they did not identify what this was. It was not until 2018 that some documents were submitted by the appellant to the Council. Consequently, the application does not meet the requirement and this exception does not engage; and none of the other exceptions in Section 67 of the 2006 Act are claimed to apply. Therefore, the appeal route cannot be recorded as a BOAT in the event the available evidence demonstrates that public vehicular rights subsist over it. However, it could be recorded as a restricted byway, but only in so far as that part currently recorded as a footpath.

Main Issues

7. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
8. Section 53(3)(c)(ii) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description.
9. The appeal relies on documentary evidence. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
10. The test to be satisfied is on the balance of probability.

Reasons

Wrington Inclosure Award 1814

11. Although not set out under the Award, the eastern part of the appeal route⁴ is depicted on a plan showing land exchange, bounded on both sides and ungated, indicating this section at least existed at this date. But it does not assist in determining its status.

Burrington Tithe records 1840

12. Roughly half way along its length from Rickford Farm the Tithe Map shows the appeal route gated⁵ at a field. No continuation is shown across the field, but the appeal route is shown open-ended on the western side of the field where it

³ Section 67(3) of the 2006 Act

⁴ Approximately two thirds of the route

⁵ A solid line extending across the way

continues as an enclosed track west to Burrington. The field is numbered and recorded as 'arable' land with no reference to a 'road'. The remainder of the appeal route is un-numbered. It was not the purpose of the Tithe process to record public rights of way. However, the map shows that much of the route had the appearance of a road, the status of which cannot be determined, and that it accessed land.

Finance Act 1910 records

13. The Burrington end of the appeal route is excluded from adjacent land parcels which suggests this part was considered to be a public highway, possibly vehicular. However, the central and eastern sections form part of two separate land parcels which are braced across the appeal route. No deductions for public rights of way were claimed for either of these hereditaments.

Ordnance Survey ('OS') Mapping

14. The 1884 6-inch map names the route. It is open at Burrington where a short way along its length a 'Post Office' is marked. Roughly two thirds further along to the east and at its eastern end it appears to be gated⁶. The route is shown open along its length on the 1898 Map and appears as a 'third class' road. The 1904 6-inch map again names it and shows it as a through route. It appears in the same manner on the 1931 edition. It is uncoloured on the 1959 map (which colours known public highways) and annotated 'FP'. Unlike the usual abbreviation for a footpath, there is no full stop between the letters 'F' and 'P'. Whether this is an error on behalf of the OS is not clear, but no explanation of any alternative meaning for the lettering is given by or on behalf of the appellant.
15. The 1884, 1904, 1931 and 1959 maps show a double or single pecked line meeting the appeal route from the north roughly a third of the way along its length from its western end, which is annotated as a footpath.
16. These maps provide good evidence of the physical features in existence at the time of the surveys, and here suggest it had the characteristics at least of a footpath. But OS maps have long carried a disclaimer as regards status⁷. Accordingly, this evidence does not establish whether the route depicted was public or private.

Bartholomew's Maps

17. Similarly, the 1904 half-inch to the mile map shows it as a through route identified in the key as a 'Secondary Class Road (Good)'. Like the OS maps, this map carries a disclaimer as regards the status of roads and footpaths represented. However, there is no disclaimer on the 1922 version. Its key states that "Through Roads, First Class Roads, and Secondary Roads were motoring roads", the appeal route being an example of the third category.

Handover Map 1930

18. The Map showing routes maintainable at public expense colours the appeal route brown in like manner to other 'all-purpose roads' in the area. It is numbered 78 and recorded in the accompanying list as Burrington Lane, an

⁶ A solid line extending across the way

⁷ Since 1888 to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way

'Unclassified Road', although the Council says it is unclear what this term meant. They describe this now as a 'Class 4 Unclassified Road'. This adds some weight in favour of rights higher than those on foot existing over the appeal route but is not conclusive of vehicular rights.

19. Annotations alongside the appeal route split it into three parts with either end marked as 'CRF' and the central section as 'FP'. These are the terms used in connection with the Definitive Map process (see below), with 'CRF' first used at this time. It is not clear when these annotations were added to the Map, but it must have been around the period the DMS was being drawn up, or later.

Burrington Parish Council Minutes

20. An entry dated 26 February 1898 records an alteration to the 'turnstile' on the appeal route⁸ so that '*...horses cannot be taken by that way as is at present the custom*'. This implies it had been the practice for horses to use the route, though whether in a public or private capacity is not clear. Neither is it clear what status the route was considered to enjoy at the time.
21. A later entry of 15 October 1898 refers to '*...the difficulty arising from horses and machines being taken through...*' the appeal route, although it does not explain whether this was an issue of suitability, of public rights, or private rights in connection with accessing the land. Subsequent entries between 1898 and 1904 refer to the repair and maintenance of the stile⁹ erected to prevent the use described. Further entries concerning its maintenance are recorded in 1945 and 1946.
22. On 25th January 1949 the Parish Council agreed that Rickford Lane be subject to a County Council byelaw to prevent cycling on footpaths. The reasons for the byelaw were clarified in 1959, although they were not explained in the Minute reported. The Council has been unable to locate the byelaw but believes 'No Cycling' signs were in place on the appeal route until recently.
23. In 1952 the gate was removed for a trial period to make it easier for parents with small children to use the way. However, it was reinstated following use of the lane by motorcycles; although in 1955 the Minutes reported use by cycles and motorcycles, as well as cattle being driven through the lane.

Definitive Map 1956

24. The 'Walking Card' prepared by the Parish Council in 1951 records the appeal route as a metalled and hedged path, 9 feet wide, along which there was a kissing gate. It was claimed as a 'CRB'¹⁰ known as Burrington Lane. However, whilst the Parish Council regarded the route as one mainly used as a bridleway, this was amended to 'CRF'¹¹, presumably by the County Council some time later in the Definitive Map process.
25. An extract of the Parish Survey Plan provided is of poor quality. However, the Council says it shows only two thirds of the appeal route was claimed, the eastern end.

⁸ Referred to as the 'Dring', a description the Council understands is a local term to describe a narrow green lane

⁹ Also referred to as a gate, or 'Tram hatch'

¹⁰ Public Carriage or Cart Road or Green (unmetalled) Lane mainly used as a Bridleway

¹¹ Public Carriage or Cart Road or Green (unmetalled) Lane mainly used as a Footpath

26. When the Draft Map was prepared the whole of the appeal route was marked by a dashed green line numbered 10/30. However, what may be a later annotation beneath the central section reads, 'FP only No Cycling'. An objection concerning the route records the central section subject to a 'Cycling Order' and therefore a footpath. A modification to record this amendment to the Draft Map was advertised in July 1964 with this part of the appeal route represented by a purple line. The Provisional and Definitive Maps subsequently record the appeal route by a dashed green line, purple line, then dashed green line.

Council Adoption records

27. Around 2007 the western third of the appeal route (currently recorded in the DMS as a Restricted Byway) was adopted by the Council as having been maintained at public expense.

Conclusions on the evidence

28. Whilst there is evidence of the longstanding existence of a way at this location, the first indication of the appeal route as a continuous route is found in the 1884 OS map. Earlier documentary evidence shows only part of the route (1814), or that it met with or entered a field along its length (1840). It is possible it continued across the field, but there is no contemporary evidence to support this. Its status cannot be determined from these sources.
29. The Finance Act 1910 Map shows part of the appeal route, at the western end, was excluded from landownership, lending some support to the appellant's case. The 1922 Bartholomew Map provides further support for the existence of public vehicular rights over the whole route, as these maps were produced with the motorist and cyclist in mind. However, although highly regarded as map makers, Bartholomew did not employ independent surveyors to carry out on the ground surveys, or to determine the status of roads depicted on their maps. The appeal route's inclusion in the 1930 Handover Map is conclusive evidence that it was maintained at public expense, a commitment that would not have been undertaken lightly. It is suggestive of an inferior class of road, but not of what rights existed over it.
30. However, by 1910 the appeal route had been subject to a limitation in the form of a gate roughly mid-way along its length already in existence in 1898/9 when it was altered to prevent through-use by horses and 'machines'. There is no evidence of complaints when use was restricted in this way, despite the Minutes referring to use by 'custom', which implies an established use. The records do not clarify whether use was public or private and there is no evidence that any existing public rights were legally stopped up; although there would be none if higher public rights did not exist. Alleged vehicular use to access land either side of the appeal route would not necessarily be public use.
31. Nevertheless, the Parish claimed the appeal route as a CRB in the 1950s, a route used mainly as a bridleway, although this was later amended to a CRF (now restricted byway) with the central section limited to use on foot. This was presumably due to the existence of the gate and the 'No Cycling Order' established in the late 1940s.
32. The appellant refers to the case of *Eyre v New Forest Highways Board* [1892] in that where a short section of uncertain status exists between cul-de-sac ways, it can be presumed that its status is that of the two highways linked by

it. That case was based on user evidence over a long period and evidence of maintenance by the highway authority. In the present circumstances whilst some of the documentary evidence points to a way that was available for use, this is not evidence that the appeal route was used by the public in vehicles; although there is some evidence of its maintenance at public expense. However, the evidence strongly indicates that use as a through route was restricted to prevent horses, 'machines', and the driving of cattle in the late 19th Century, and cycles (through a byelaw) in the mid-20th Century.

33. For the appeal to succeed it is necessary to show that a highway of one description *ought* to be shown as a highway of another description. The evidence above when considered as a whole, and on the balance of probability, does not support a conclusion that the appeal route was used by the public with vehicles such that an order should be made to record higher rights than those presently recorded. Accordingly, and further to paragraph 6 above, the appeal as regards the application for BOAT status, and the upgrading of the section presently shown in the DMS as a footpath, fails.

Conclusion

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

Formal Decision

35. The appeal is dismissed.

S Doran

Inspector