

## Appeal Decisions

by **Martin Elliott BSc FIPROW**

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

Decision date: 14 November 2019

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### Appeal Ref: **FPS/G3300/14A/18**

### Appeal A

- 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 not to make an Order under section 53(2) of that Act.
- The Application dated 4 June 2009 was refused by Somerset County Council on 21 January 2019.
- The appellant, Sarah Bucks, on behalf of the South Somerset Bridleways Association, claims that the appeal route, Charmoor Drove, should be added to the definitive map and statement for the area as a restricted byway.

**Summary of Decision: The appeal is allowed.**

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### Appeal Ref: **FPS/G3300/14A/19**

### Appeal B

- 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 not to make an Order under section 53(2) of that Act.
- The Application dated 12 June 2009 was refused by Somerset County Council on 21 January 2019.
- The appellant, Sarah Bucks, on behalf of the South Somerset Bridleways Association claims that the appeal route, Hamway Lane, should be added to the definitive map and statement for the area as a restricted byway.

**Summary of Decision: The appeal is allowed in part.**

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### Appeal Ref: **FPS/G3300/14A/20**

### Appeal C

- 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 not to make an Order under section 53(2) of that Act.
- The Application dated 4 June 2009 was refused by Somerset County Council on 21 January 2019.
- The appellant, Sarah Bucks, on behalf of the South Somerset Bridleways Association, claims that the appeal route, Charmoor Lane, should be added to the definitive map and statement for the area as a restricted byway.

**Summary of Decision: The appeal is allowed.**

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### Preliminary matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine these appeals under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. I have not visited the sites but I am satisfied I can make my decisions without the need to do so. I have had regard to all the submissions made in respect of these appeals including those from a new interested party (interested party).

3. For convenience I have referred to the various points A to N marked on Appendix 1 of the Council's decision report dated 4 December 2018. Appeal route A (Route A) runs between points D through C, E, F, I, J, K, L, M to N, Appeal route B (Route B) between points A and C and Appeal route C (Route C) from point C through G to H.

### **Main issues**

4. Section 53(3)(c)(i) of the 1981 Act provides that an order should be made if the Authority discovers evidence which, when considered with all other relevant evidence available to them, shows that a right of way subsists or is reasonably alleged to subsist over land in the area to which the map relates. In considering the evidence under this section there are two tests which need to be applied, as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402*:

Test A: Does a right of way subsist on the balance of probabilities? This requires clear evidence in favour of public rights and no credible evidence to the contrary.

Test 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.

5. Section 53(3)(c)(ii) provides that an order should be made if the Authority discovers evidence which, when considered with all other relevant evidence available to them, 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. This section relates to the upgrading of a route shown on the definitive map and statement. The test to be applied to the evidence under this section is on the balance of probabilities.
6. The main issue is, in respect of the unrecorded sections of the appeal routes, whether the evidence shows that a public carriageway subsists, or is reasonably alleged to subsist. However, the section of Route B between points A and B is currently recorded as a public footpath. The application seeks to upgrade this path to a restricted byway. Consequently the main issue in respect of this section is whether, on the balance of probabilities, the appeal route is a public carriageway.
7. Section 67(1) of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) provides that an existing public right of way for mechanically propelled vehicles is extinguished if it is a way which, immediately before commencement was not shown on the definitive map and statement, or was shown in the definitive map and statement only as a footpath, bridleway or restricted byway. There is no suggestion that rights for mechanically propelled vehicles have been saved by any of the exceptions provided for by section 67 of the 2006 Act. Consequently if the appeals are successful, based on the relevant tests, then it would be appropriate to make Orders to add restricted byways to the definitive map and statement.

## **Reasons**

### ***Plan of the property of the Deanery of Wells 1813***

8. The plan shows all three appeal routes, with the exception of the section G to H (part of Route C) which falls outside the area of the plan, in the same way as other roads in the area. Whilst the appeal routes are so depicted it should be noted that the map was to show the property owned by the Deanery. There is no indication that in preparing the plan that any investigations were carried out in respect of the status of any routes passing through the land or that the routes shown on the plan were regarded as highways. Nevertheless the plan shows the routes in existence at the time of the survey.
9. I note issues in respect of the date of the plan. However, this has no bearing on my consideration of the evidence.

### ***Combe St. Nicholas Inclosure Act 1814 and 1818 Award***

10. The local Act incorporates the provisions of the 1801 Inclosure Consolidation Act.
11. Route A (D to Niii) is shown coloured brown. From Niii the route shown on the plan follows the line Niii to Ni through Nii. The route is made up of a number of routes identified in the award as private roads or droveways having widths varying between 16 and 30 feet. Route B (A to C) is also coloured brown and is made up of two routes also identified as private roads or droveways with a width of 16 feet. Route C is also coloured brown between points F and G and is described as a private road or droveway with a width of 24 feet.
12. The routes as set out are identified as being for the use of the owners and occupiers of the allotments of land in the '*Moors Commons and wastelands*'. Responsibility for maintenance rests with the owners and occupiers of the allotments.
13. I note the extensive submissions of the interested party in respect of the division of roads into public and private by inclosure awards. However, following *Dunlop*<sup>1</sup> the term private carriage road does not confer a public right of passage. Although this case has been criticised I am guided by the decision in *Dunlop* until a Court holds otherwise. In the context of the award the routes were private carriage roads for use by a limited number of individuals and not the public; maintenance being the responsibility of the various owners and occupiers. This does not support the existence of public carriageways. However, this does not preclude such rights from being established at a later date.

### ***Neroche Forest Inclosure Award 1833***

14. As with the Combe St Nicholas Award the Act incorporates the provisions of the 1801 Inclosure Consolidation Act. Route C (G to H) is shown as parallel dashed lines over a green tinted line. The route is described in the award as a private road through and over the allotment numbered 511 with a width of 18 feet. The award states that private roads are to be maintained at the expense of the

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<sup>1</sup> *Dunlop v SSE and Cambridgeshire County Council* [1995] 70 P & CR 307, 94 LGR 427

owners and occupiers of the allotments set out in the award. The award does not identify those who can use the way.

15. In respect of the interpretation of this evidence I revert to my comments at paragraph 13 in respect of the term private carriage road.

***Combe St Nicholas tithe map 1840***

16. The tithe map shows Routes A and B and the section of Route C (F to G) coloured sienna. The section of Route C (G to H) falls outside the map area. The routes are not subject to tithes. Whilst the routes are shown in the same way as other known public roads, tithe maps were prepared in connection with the assessment of land for tithes. The documents were not prepared with a view to establishing the status of any public highway and both public and private roads are capable of being free of tithes. The map shows the physical existence of the appeal routes but does not assist in establishing their status. Nevertheless the tithe map does not preclude the existence of public rights.
17. I note the recommended conventional signs for use on tithe maps<sup>2</sup> for the depiction of roads. However, it does not necessarily follow that routes depicted in accordance with the convention were considered to be public. I revert to my previous comments above (paragraph 16).

***Broadway (New Enclosures) tithe map 1840***

18. The section of Route C (G to H) which falls within the map area is coloured sienna and is not given an apportionment number. The other sections of the appeal routes fall outside the area of the tithe map. I revert to my previous comments in respect of the Combe St Nicholas tithe map which are applicable to the Broadway tithe.

***Map of Neroche Forest circa 1830***

19. The Council consider that this map arises in consequence of a survey prior to the Neroche Forest Inclosure Award of 1833. The map covers the area of Route C but no route is shown. The map is of little assistance but suggests that at the time of the survey Route C did not exist or was not a feature which was required to be surveyed.

***The Forest Lands situate in Combe St Nicholas 1848***

20. The map of lands held in trust for the 2<sup>nd</sup> poor of the parish shows Route A in its entirety. Route B is not shown with the exception of a short spur at point C. Route C is shown between points F and G although continues just to the other side of the River Ding. Whilst the map shows some or part of the appeal routes the map was not prepared to identify rights of way.

***Sales documents 1892***

21. The plan accompanying the sales documents shows the appeal routes in their entirety as uncoloured. Sales documents were produced to identify lands for sale and not with a view to providing information as to the status of any routes crossing the lands. The map provides no evidence as to the status of the

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<sup>2</sup> Commons Sessional Papers 1837(103) XLI 383

routes although it is noted that other uncoloured routes are now public vehicular roads.

### **Commercial maps**

22. Greenwood's map of 1822 shows the appeal routes, with the exception of Route C which is only shown extending just to the north of point G, as cross roads. It is noted that by this date the route Niii to Ni is no longer shown and the route passes directly between points Niii and N. Other known public roads are also shown as cross roads although roads with no known status are also shown. The Council also identify routes recorded as public bridleways or footpaths but this does not preclude the existence of higher rights.
23. It may be that the term cross road on Greenwood's map does not consistently equate to a public right of way. Nevertheless the recording of the appeal routes as cross roads does not preclude the existence of public carriageway rights and may offer some support as to public rights.
24. Bartholomew's half inch map for England and Wales dated 1911 shows the appeal routes as inferior roads '*not to be recommended to cyclists*'. The map carries the disclaimer that the representation of a road or footpath is no evidence of the existence of a right of way. The 1927 map shows the routes in a similar fashion and the map carries the same disclaimer. From the 1964 edition it is not clear whether the appeal routes are shown as '*Serviceable Roads*' or as '*Other Roads and Tracks*', the map carries the same disclaimer.
25. Bartholomew did not determine the status of routes shown on their maps or carry out any surveys on the ground to determine the nature or status of roads shown on their maps. It is therefore difficult to put much weight on these maps as depicting a vehicular highway.

### **Ordnance Survey**

26. The 1811 2 inch to 1 mile surveyors drawings show the pre inclosure layout of the area and sections of the appeal routes. The 1809-1811 Cassini reprint of the first series possibly shows a route corresponding with N to K and continuing northwards to Silver Street. Although it has been suggested that this continuation might be the route D to H I consider the route shown to be further east and not this route. The section A to B is also possibly shown on the map.
27. The 1886 1<sup>st</sup> edition 25 inch to 1 mile shows routes A and C with solid casing lines. Route B is shown with a shaded casing line and from point A northwards for approximately 92 metres is coloured sienna. It is noted that the route south of A is shown in a similar manner and whilst this section is recognised as a route with vehicular rights it does not follow that the route to the north of A should be the same status.
28. The 1898-1900 Cassini new revised edition shows the appeal routes as either third class metalled roads or unmetalled roads. The depiction on the map shows that the routes were suitable for wheeled traffic but provides no information as to whether the routes were considered public or private.
29. The 2<sup>nd</sup> Edition 25 inch to one mile map revised in 1901 shows the appeal routes as fenced tracks. Sections are identified with parcel numbers with the areas identified and are named Charmoor Drove, Hamway Lane and Charmoor Lane; this is not indicative of public rights.

30. The 1919 Cassini popular edition reprint shows Routes A and B and Route C between G and H as uncoloured roads with sections A to B and D to C being slightly wider. The wider sections are identified in the key as '*Roads under 14' wide*' with the narrower sections identified as minor roads. The section of Route C between F and G is shown by a dashed line, the key identifying this as depicting '*Bridle & Footpaths*'. The key states that private roads are uncoloured.
31. The 1940 War Revision shows the routes in a similar way to the 1919 Cassini map although the area of map covering Route B is damaged. The wider sections of the appeal routes are identified in the key as '*Other Motor Roads narrow Bad*' and the narrower sections as '*Minor Roads*'. The section of route F to G is shown as '*Bridle and Footpaths*'.
32. Ordnance Survey maps were produced to record topographical features and were not intended to provide evidence of status. Nevertheless the Ordnance Survey maps, from 1886, consistently show the physical existence of the routes and do not preclude the existence of public carriageway rights. Later editions suggest that the routes were suitable for motor traffic but there is no indication as to whether this was public or private traffic. I acknowledge that instructions for Field Officers suggest that notice was taken of the different classes of road and that '*a clearly marked track on the ground is not in itself sufficient to justify showing a path, unless it is in obvious use by the public*'. However, as noted above the Ordnance Survey maps were not produced to identify the status of routes and from 1888 such maps carried a disclaimer 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.
33. The 1884 Boundary Remark Book and the 1885 boundary sketch book map show a short section of appeal Route C at point G. These documents do not provide any further information and only serve to show the existence of this short section of Route C.

### **Ordnance Survey Object Name Books**

34. The Object Name Book of 1901 sheet LXXXVII N.W. identifies Charmoor Drove which is described as an occupation road. Hamway Lane is described as a road extending from the Honiton Ilminster main road to Charmoor Drove. Charmoor Lane is described as an occupation road extending from Charmoor Drove. The Object Name Book for LXXXVII N.E. identifies Charmoor Drove as an occupation lane and it is stated that the route is the property of various owners. Hamway Lane is described as an occupation road extending west from Charmoor Drove. Charmoor Lane is also described as an occupation road extending from Charmoor Drove.
35. A form headed '*E. C. Treppin Esq Estate Office Taunton*' for Plan 87/3 refers to Charmoor Drove from Ham Gate to Hamway Lane and under the column headed '*Parish and Owner's Name*' states '*Parish of Broadway. The Property of Lord Portman*'. The form headed '*E. J. Symes Esq. Somerset House Chard (asst. Overseer of Combe St. Nicholas)*' for plan 87/6 refers to Hamway Lane, sometimes called Hamley Lane, Charmoor Drove is also identified; no information is given in respect of either of the routes as to the '*Parish and Owner's Name*'. The form headed '*E. J. Symes Esq. Somerset House Chard (asst. Overseer of Combe St. Nicholas)*' for plan 87/7 refers to Hamway Lane and under the column '*Parish and Owner's Name*' states '*Combe St Nicholas*'

*Parish Extending west from Charmoor Drove*'. A further form headed '*R. J. Walters Esq. Solicitor Ilminster*' names Charmoor Lane and under the '*Parish and Owner's Name*' states '*From Charmoor Drove to the road between Broadway and Dommett*'. Under '*Remarks*' it is stated '*The property of J.H Walter*'. It appears that this remark relates to Dommett Moor Plantation and Charmoor Lane, possibly all three entries (to include Dommett Moor).

36. I note the suggestion of the appellant that if the appeal routes had been in private ownership that an owner would have been expected to have authorised the descriptions rather than the district overseer. However, whilst the district overseer would have been involved in the maintenance of public roads the routes were identified as occupation roads (noting that the Object Name Book for sheet LXXXVII N.W describes Hamway Lane as a road). The term occupation road is generally used as a term to describe a road laid out for the benefit of adjacent owners and occupiers and not a highway. The use of the term does not suggest that the routes were considered to be public carriageways.
37. As regards the Ordnance Survey '*Instructions for Field Examiners*' 1905, it is recognised that those asked to authorise the spellings were reputable people. included public officials and other respectable inhabitants who were likely to have knowledge of the roads. However, as noted above the Object Name Books are more indicative of the routes being occupation roads.
38. Overall the object name books do not provide positive information as to public rights but again do not preclude such rights.

### **1910 Finance Act**

39. The working plan shows all three routes as being excluded from the adjacent hereditaments. The Council make the point that approximately 58 metres north of point C the green line bounding one of the hereditaments is shown crossing the application route. Nevertheless they do not dispute that the appeal routes are excluded from the adjacent hereditaments.
40. The exclusion of the routes from the adjacent hereditaments is a strong indication that they were regarded as a highway although not necessarily a vehicular highway. However, there may be other reasons why the route might have been excluded for example where the route was set out as a private road in an inclosure award. The 1910 Finance Act evidence provides credible evidence that at that time the appeal routes could have been a vehicular highway. There is however a conflict of credible evidence in that the routes were awarded as a private roads. Further, the Ordnance Survey Object Name Books refer to the routes as occupation roads although the Ordnance Survey records are not determinative as to status.

### **Highway records**

41. The handover map of 1929 does not show any part of the appeal routes as being highways maintainable at public expense. The 1930s Road Records shows Route A from approximately 60 metres north of point C to N and Route C coloured with a purple broken line recording these sections as non-county roads. The first 50 metres north from point D on Route A is coloured yellow. It is suggested by the Council that in the 1930s this section was considered to be a public vehicular road but point out that neither the 1929 nor the 1950

records show this section as coloured. It is therefore contended that this short section from point D may have been a drafting error. The 1950 map shows Route A from approximately point E to N and Route C marked with a broken purple line.

42. The Council acknowledge that they have found no definition for the term '*certified non-county road*'. Correspondence in respect of a land search (paragraph 45) below might suggest that such routes were not highways maintainable at public expense but that does not prevent such routes from being highways. That such routes were included on the highway roads records could indicate that non-county roads were highways but not maintainable by the County. There is therefore a conflict of credible evidence.
43. In respect of the short section of Route A being coloured yellow, this might be a mistake. However, it is likely that the Council would not want to take on responsibility for roads which were not maintainable at public expense. Some care would have been exercised in recording maintenance liabilities. Consequently some weight should be given to the fact that this section of the route is shown as a highway maintainable at public expense.

### ***Ministry of Food National Farm Survey 1941***

44. Parts of Route A are excluded from the adjacent farm holdings, Route B is also excluded but none of Route C is excluded. Whilst parts of the routes are excluded from the adjacent farm holdings the primary purpose of the survey was not to record public rights of way. The exclusion of part of the routes may nevertheless indicate that the routes were considered to be vehicular highways. The weight to be given to this evidence is however very limited.

### ***Parish Files held by Somerset County Council***

45. Correspondence of 31 May 1956 from the Clerk to the County Council, in respect of a property search, states that Charmoor Drove and Charmoor Lane are not highways maintainable by the inhabitants at large. Reference is made to the 1818 inclosure award which identifies the routes as private roads and droeways. An undated note filed between 1962 and 1964 relating to the '*Road passing Ham Farm going N...*' indicates that the county road extended only to Ham Farm and that the route was shown on the 1840 tithe map and therefore probably part of the parish highway system.
46. An internal memorandum, 8 April 1974, between the County Planning Officer and the County Secretary is concerned with a route known as Sixteen Acre Lane. The letter goes on to state '*It is significant that many Parish Councils missed off their survey for the definitive map seemingly obvious lanes and droves that they assumed did not need to go on a "footpath map". Other seemingly obvious lanes not included on the definitive map in the area are Charmoor Lane and Charmoor Drove*'.
47. A letter from the Clerk to Combe St Nicholas Parish Council to the Clerk of the County Council dated 20 February 1981 indicates regret at not taking the opportunity to review footpaths and bridleways. It then refers to Charmoor Lane to the ford and Charmoor Drove as footpaths which have been for many years public rights of way. The view of the public rights of way officer was subsequently sought who, on 5 March 1981, stated that Charmoor Lane to the Ford and Charmoor Drove were shown on the County Surveyor's map with a



broken purple line. It suggests that the Parish Council submit evidence in support of footpath or bridleway rights.

### ***Definitive map records***

48. No part of the appeal routes were recorded on the parish survey or draft map prepared under the National Parks and Access to the Countryside Act 1949. An objection was made by the Ramblers' Association in respect of the south end of footpath 7/39 which was shown on the draft map as ending at point B. It was determined that the line of 7/39 be continued south between points A and B. The subsequent Draft Modification Map shows the continuation of 7/39 to the south of point A and this is reflected in the provisional and definitive maps.

### ***Parish Council Minutes***

49. The minutes from 1950 to 1956 suggest that the Parish Council was aware of and actively engaged in the process of creating the definitive map and statement. The minute of 16 September 1952 indicates that the Parish Council considered route A to be a private road and not a public highway. A minute from 1 April 1957 refers to the piece of road from '*Mr Edwards' Farm to the gate*' as being a public right of way. It is not clear from the evidence before me that the section referred to includes part of Route B (A to B) but in any event this view is entirely consistent with this section of the route being a public right of way.

### ***Evidence of use***

50. The appellant has submitted evidence of use forms from two individuals showing use of the routes on foot and horseback from 1977 to 2019 although no use is recorded between 1988 and 1995. The use appears to be as of right and without interruption. However, the evidence of use is insufficient to infer any presumption of dedication. Nevertheless it is not inconsistent with the routes being public rights of way.

### ***Landowner evidence***

51. A number of landowners have provided evidence as to their knowledge of the appeal routes. Reference is made to the existence of private rights along the routes. One landowner considers that the routes are restricted byways and who, along with their family, has used the routes on horseback. However, the use of the route A to H was said to be with the permission of the person they believed to be the landowner. Another landowner considers Charmoor Drove to be a drove/bridleway and that within living memory they recall being able to drive a horse and cart between points H and N. One landowner referred to the use of Charmoor Drove by local people and their visitors, another considered this and Charmoor Lane to be a public bridleway but that Hamway Lane was not a public right of way. However, one landowner is of the view that Routes A and C have not been used by the public.

### ***Aerial photographs***

52. The 1946 aerial photograph shows the physical existence of the appeal routes but does not provide any information in respect of the status of the route.

### **Overall conclusions on the evidence**

53. The documentary evidence adduced in these appeals shows that the appeal routes have been in existence since around 1814. Although set out in the relevant inclosure awards as private roads this does not preclude the routes from being public carriageways. The appeal routes are shown on commercial maps and Ordnance survey maps and their depiction again does not preclude the existence of public rights. The 1910 Finance Act evidence is suggestive that the appeal routes are public highways although their depiction is also consistent with the routes being awarded as private roads or the routes being occupation roads. There is therefore a conflict of credible evidence. The recording of Routes A and C as non-county roads suggests that these routes formed part of the highway network. The Ministry of Food National Farm Survey records of 1941 might be indicative that the routes were considered to be vehicular highways but as already noted this evidence is limited. Other documentary evidence does not support the existence of public carriageway rights but neither does it show that such rights cannot exist. Evidence of use is limited but not inconsistent with the routes being restricted byways. Evidence from the landowners does not support any particular status but again does not preclude public rights.
54. Having regard to all of the evidence it is just sufficient, in the absence of incontrovertible evidence to the contrary, to show that a restricted byway is reasonably alleged to subsist. However, in respect of Route B (A to B), bearing in mind my conclusions above and the relevant test set out at paragraph 5 above, I do not consider that the evidence is sufficient to show, on the balance of probabilities, that the section of public footpath ought to be shown as a restricted byway. I recognise the potentially anomalous situation that may arise if a definitive map modification order is made to record the remainder of the appeal routes but this is not a practicality I can take into account. However, in the determination of any order made as a result of these appeals, further evidence may be brought forward that may resolve the status of this section of Order route.

### **Conclusions**

55. Having regard to these and all other matters raised in the written representations I conclude that appeals A and C should be allowed and appeal B allowed in part.

### **Formal Decisions**

56. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Somerset County Council is directed to make an order (or orders) under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add Charmoor Drove (Appeal Route A), Hamway Lane (Appeal Route B between points B and C only) and Charmoor Lane (Appeal Route C) as restricted byways. These decisions are made without prejudice to any decisions that may be given by the Secretary of State in accordance with her powers under Schedule 15 of the 1981 Act.

*Martin Elliott*

Inspector