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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: 04 June 2020**

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## Appeal Ref: **FPS/G1440/14A/8**

- 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 East Sussex County Council ('the Council') not to make an Order under Section 53 of that Act.
- The application dated 10 February 2017 was refused by the Council on 18 September 2019.
- The appellants claim that the definitive map and statement ('DMS') for the area should be modified by adding a footpath running from Ashcombe Lane at grid reference 539241 108452 (B) to a junction with the western end of Lewes Footpath 37 at the parish boundary at grid reference 539602 108721 (A).

**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 this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981. 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. The application was made for and on behalf of the Ramblers Association (now known as 'the Ramblers') for a footpath measuring six feet in width in the parish of Kingston. Objections have been raised by affected landowners.
3. A copy of a map prepared by the Council showing the claimed route is attached for reference purposes. In arriving at my decision, I have focussed on the route as plotted by the applicant.

## Legal Framework

4. For an addition to be made to the 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*<sup>1</sup> an Order to add a route should be made if either of two tests is met:

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

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

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<sup>1</sup> [1994] 68 P & CR 402

considered all the relevant evidence available, could reasonably allege that a right of way subsists.

## **Main Issue**

6. The main issue is whether there has been a discovery of evidence which (when considered with all other evidence available) is sufficient to show that a right of way which is not shown in the DMS subsists or is reasonably alleged to subsist over land in the area to which the map relates.

## **Reasons**

### ***Discovery of evidence***

7. Section 53(3)(c) requires there to be a "discovery of evidence". The primary documentary source upon which the applicant relies is the Kingston and Iford Inclosure Award c1830. The accompanying map shows a route along a broadly similar alignment to that claimed. It is described in the Award as "*one other footway six feet wide numbered 7 in the said plan extending from the said road number 1 south westwards of Kingston Lane towards Kingston Church*".
8. The Council refused to make an Order on the basis that the Inclosure Award was considered at the time of the first DMS process and so there has not been a "discovery of evidence". Objectors argue that no matter how many new documents are produced, if they do not provide direct and positive evidence of the existence of the application route then there is not a "discovery of evidence" as a matter of law.
9. The "discovery of evidence" is not restricted to new evidence or evidence not previously considered. The word 'evidence' is to be given its ordinary meaning. Case law makes clear that the term 'discovery' suggests the finding of some information which was previously unknown when the DMS was prepared, and which may result in a previously mistaken decision being corrected; i.e. the discoverer applying their mind to something previously unknown to them.
10. Various material from the production of the first DMS remains available. Even so, it cannot be known with any certainty that the investigative process was limited and rushed when the route in the Inclosure was first considered. Nevertheless, what matters is not how comprehensive the process was in the 1950's or if a site visit was conducted but whether material or information has now been uncovered which was not considered previously. Clearly, the Inclosure Award and Map cannot be regarded as discovered evidence when it formed the reason why the route was proposed for inclusion in the first DMS.
11. The applicant argues that the examination of historical records was limited at that time in the rush to complete the process and, in particular, it did not extend to tithe records. However, in the absence of evidence to the contrary it may be presumed that the Council considered the evidence available to it which included those records. In any event, it is undisputed that the application route is not shown on the Kingston Tithe Map 1842 nor does it appear on early commercial maps or Ordnance Survey maps.
12. Instead, the applicant relies upon the Tithe Map to demonstrate that there were no fences, hedges or walls along the application route. Having undertaken detailed analysis of the relevant parts of the Inclosure order the applicant submits that the map also does not show a route going through a flint wall but

down the side of the churchyard. That may be so, but the claims of obstruction (see below) concerned a linked path rather than the application route. The issue of obstruction had not led directly to the decision to omit the application route from the DMS. Consequently, I cannot be satisfied that the Tithe Map is discovered evidence.

13. While the applicant seeks to draw inferences from the absence of the application route from the Inland Revenue material, it does not provide any information one way or the other to amount to 'evidence'.
14. According to the applicant whether the route was laid out was critical to the decision to delete it from the DMS process. I do not read the material in quite the same way because the specific objection to the path was not that it had never been laid out, but that it did not exist (in 1953) and had not done so for the previous 30 years at least. In other words, there was no evidence of the path on the ground. Nonetheless, I address the point raised for completeness.
15. The applicant cites the Court of Appeal judgment in *R (Andrews) v SSEFRA* [2015] EWCA Civ 669 as authority that section 10 of the Inclosure (Consolidation) Act 1801 empowered commissioners to "set out and appoint" public footpaths. As there was no requirement for public footpaths to be 'ascertained' by 'marks and bounds' in the same way as public roads, it is submitted that the act of setting out is not to be understood as a physical laying down of a path surface. As such, the applicant concludes that there is no requirement to prove the application route was actually laid out on the ground and there is in any event no evidence that it was not. The point emerging is that a public path could have existed without being physically laid out.
16. The construction of the 1801 Act may have been clarified over time. However, the main thrust of the objection to the route was that there had been no path for at least 30 years. This was put to the Sub-Committee. It was open to the decision-maker to conclude that the path was not physically on the ground because it did not exist. There cannot now be a re-examination of that same evidence to fulfil the requirement for discovered evidence.
17. Having undertaken a site inspection, the applicant states that the route is the quickest way to walk between Ashcombe Lane and Juggs Lane avoiding a particularly steep slope. Research conducted by the applicant into the likely use and life of the path causes the applicant to infer that the route provided pedestrian access to two mills in the vicinity, the existence of which was revealed in a booklet published in 2013.
18. The main purpose of the path historically, and why it disappeared, are matters of speculation rather than the discovery of evidence. The applicant suggests that if the Sub-Committee had this information it would have been more likely to have concluded that the path existed before Inclosure. That simply cannot be known.
19. Through the use of software which was not available during the 1950's when the route was last considered, the applicant has plotted the path shown on the Inclosure Map onto a screenshot of the online Definitive Map. It is claimed that such use of technology amounts to the discovery of evidence. The difficulties in accurately plotting the Inclosure route illustrates how mapping has evolved. It does not reveal any information to support the existence of a public path.
20. However, after making the application, the applicant inspected and produced a

document titled "Kingston Parish and Calculation" thought to be a map of the parish showing strips of cultivated land prior to Inclosure. There is a broken line corresponding with the alignment of the path shown in the Inclosure Map. The catalogue and the document bear the words "Endorsed produced and verified at a meeting under the Kingston and Iford Inclosure Act held 17 May 1830".

21. Objectors claim that the additional map is not new evidence. They say it was produced as part of the Inclosure Award process and simply repeats the same information provided as part of the exact same process used in compilation of the first DMS.
22. The endorsement on the map makes clear that the map was considered during the Inclosure process and so it must pre-date the Inclosure Award. The purpose of the map is not altogether clear but that is not the point in issue. The question is whether the map amounts to information previously unknown to the authority when it decided not to add the path to the DMS.
23. The applicant suggests that the catalogue entry at the County Records Office indicates the map was held by a firm of architects and surveyors. As the firm was dissolved in 1990 the applicant considers it unlikely that the map came into the public realm before then. This is plausible especially as the Sub-Committee report from 1955 refers purely to the Inclosure Award. On the bare face of it, no other document was found to show the route. This is corroborated by correspondence from the time which records that "no other evidence is available". If the Kingston Parish and Calculation map had been available to the authority it might reasonably be anticipated that some mention of it would have appeared among the documentation.
24. On balance, it appears that the Kingston Parish and Calculation map was not held in the archival records before 1990 and it was unlikely to have been available during the 1950's when the status of the route was last considered. Therefore, the evidence indicates that the Sub-Committee, as decision maker, did not know of its existence to have had opportunity to consider it.
25. Consequently, it is reasonable to accept that the map is discovered evidence. The precondition for the exercise of the statutory power of review is fulfilled.

### ***Sufficiency of evidence***

26. Once there is a discovery of evidence, all available evidence falls to be considered afresh. It is not a question of assessing the strength of the additional map as evidence in isolation.
27. In objection some maps (which appear to have an OS base) and photographs owned by the Sharp family are produced in an attempt to show there is no evidence of a footpath through Castelmer Fruit Farm.
28. When the Draft DMS was prepared the route shown in the Inclosure Map was identified as Kingston 16b with a continuation to the west towards the church being 16a. A hearing was convened following objections by the then landowners. In a report to the Council's Rights of Way Sub-Committee in May 1955 the Council's Clerk recommended deletion of both 16a and 16b.
29. The report records that 16a is shown in the Inclosure Award. It proceeds to say that the owners of the land crossed by 16a point out that the route is not shown on the Tithe Map 1842. The route goes through two flint walls which the

objectors contend had existed since before 1830 and through a garage to a private house built in 1921. It is recorded that the Parish Council had not claimed 16a and had no evidence of its use. There was no evidence the path had been laid out under the making of the Award and there was no trace of it on the ground. Path 16b is described in the report as a continuation of 16a and part of the path in the Inclosure Award. The Clerk reports that the landowner disputes the existence of the path.

30. From the file it is apparent that the objection (raised in 1953) was based on the path not having existed for the past 30 years. The conclusion reached in the report is that if 16a is to be deleted as recommended, it follows that path 16b should also be deleted. This resulted in the removal of 16b from the Draft DMS to which no objections were made when the Provisional Map and Statement were subsequently advertised.
31. The report indicates that the deletion of 16b was tied to the objections which informed the recommendation and decision for 16a. The applicant examines each of the matters identified in the report for 16a. In essence, it is suggested that the decision to delete the path was based on erroneous information.
32. The only maps before me which show the path are the Inclosure Map and the additional Kingston Parish and Calculation map. The Inclosure Map and Award is a key document. There is no suggestion that the setting out of a footpath in the Award was beyond the Commissioners' powers. Whilst noting the reasons for the Sub-Committee's decision in the 1950's, the evidence is now supplemented, albeit to a limited extent, by the Calculation map which suggests that the route pre-existed the Inclosure. The Inclosure Award and Map show the route to have been recognised in that process. Nothing has been put before me to say that the path has subsequently been stopped up. In the circumstances, there appears to be strong evidence of the status of the route as a public path.

### ***Alignment of the application route***

33. Notwithstanding the above, the Council maintains that it is not possible to depict the claimed route within the Inclosure Award. Objectors agree and say that there is a route along a similar but not identical alignment to that claimed.
34. Clearly, my remit extends only to the consideration of the application route and not any other that might exist. The Council expresses concern that the application is flawed due to uncertainty the correct landowners have been notified in view of the issues in defining the alignment. However, if an Order is to be made it will be for the path as applied for and there is no indication that those affected landowners have not been informed.
35. The applicant believes that the Inclosure Map has compressed the distance between the east and west ends and argues that any differences are minor.
36. The objectors disagree and consider the overlaying exercise undertaken by the applicant is unreliable and point to disparity with the field boundaries and different shapes in the routes. Depending on which physical features are followed the objectors suggest that the path may shift by up to 100m onto neighbouring land at one end where the path meets the road. They maintain that the route shown on the Inclosure Award is not the one claimed.
37. There are notable differences between the Inclosure Map and the application route. The Inclosure route rises from the west to a peak and curves gently down

before rising gradually to continue east in a straight line. In contrast, the application route connects with an existing public path to the east but not in a straight line and without any curve in the alignment.

38. Invariably there will be discrepancies between historic maps, which may not be drawn totally to scale, and more precise modern day mapping. Unlike the Definitive Map, the Inclosure Map was not drawn for the specific purpose of identifying public rights of way. With that in mind, I consider that the route applied for corresponds sufficiently with the route depicted on the Inclosure Map to be regarded as one and the same for the purposes of this decision.

### **Other Matters**

39. I understand that part of the route is now built upon and may affect private gardens. These matters clearly have practical consequences if an Order is made, but they cannot influence a decision on whether an Order should be made. The need for a public path is also not something I can consider.

### **Overall Conclusion**

40. Having regard to the above and all other matters raised in the written representations, I conclude that there has been a discovery of evidence which (when considered with all other relevant evidence) is sufficient to show on the balance of probabilities that a public footpath subsists along the application route or is reasonably alleged to subsist.

### **Formal Decision**

41. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, East Sussex County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act not later than 12 months<sup>2</sup> from the date of this decision to modify the definitive map and statement to add a footpath as set out in the application dated 10 February 2017. 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.

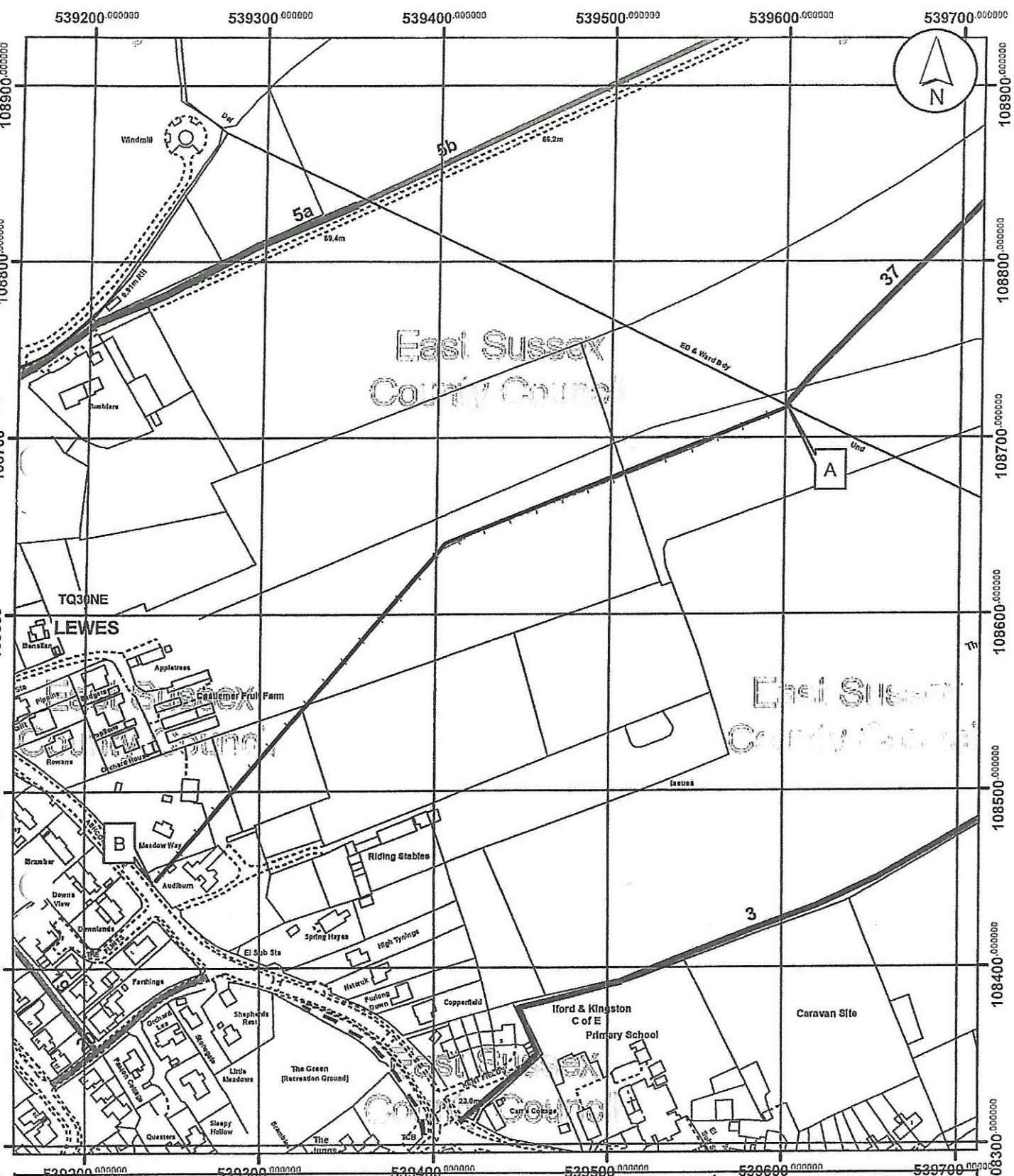
*KR Seward*

INSPECTOR

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<sup>2</sup> A longer period has been given than would otherwise have been afforded due to the exceptional circumstances arising from the ongoing global coronavirus pandemic.





Map Title:  
**Claimed route for Kingston near Lewes**

East Sussex County Council  
 County Hall  
 St Annes Crescent  
 Lewes



Map Key  
 A                      B  
 \_\_\_\_\_  
**Claimed Route**

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Date: 03/09/2019

Scale: 1:3,000

Author: NMC