



Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 20 OCTOBER 2020

Appeal Ref: FPS/G1440/14A/9

- 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 East Sussex County Council (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 8 February 2017 was refused by the Council on 17 October 2019.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a Restricted Byway running from the Street, Piddinghoe (point A on the plan appended to this decision) to public footpath 9 Piddinghoe (point B on the appended plan).

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 1981 Act.
2. This appeal has been determined on the papers submitted.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties, the relevant part of the Wildlife and Countryside Act 1981 and the findings of the Courts in the *Bagshaw and Norton*¹ and *Emery*² cases.

Background

4. The appeal route commences on the Street, Piddinghoe and runs in a generally south-easterly then easterly direction to the footpath which runs along the western bank of the River Ouse. The track over which the claimed restricted byway runs currently provides access to adjacent properties and to the car park and pond of the Newhaven and Seaford Sailing Club (NSSC). The NSSC maintains a locked gate across the track to prevent access to its premises and the river by non-members vehicles.

Main issue

5. Whether the documentary discovered demonstrates that the appeal route is a public vehicular carriageway which should be recorded in the definitive map and statement as a Restricted Byway.

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402, [1995] JPL 1019

² *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367

Legislative Framework

6. The need for an Order to be considered when evidence is submitted in support of a claim that a public right of way which is not shown in the definitive map subsists is dealt with under section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all 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.

7. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

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

8. In relation to Test B, the Court of Appeal recognised in the *Emery* case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*, Roche LJ held that "*...The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.*"

9. The Appellant contends that the appeal route is a public vehicular highway. If that is the case, any right the public would have had to use the appeal route with mechanically propelled vehicles (MPVs) may have been extinguished on 2 May 2006 by virtue of the coming into operation of section 67 (1) of the Natural Environment and Rural Communities Act 2006, depending on whether any of the exceptions set out in section 67 (2 – 8) are applicable in this case. If public MPV rights have been extinguished, the route could not therefore be recorded as a Byway Open to All Traffic, however it could be recorded as a Restricted Byway.

Documentary evidence

10. A route running from the Street towards the River Ouse is shown in Budgen's map of 1724 although this route is shown running in a generally north-westerly direction whereas the appeal route runs in a south-easterly then easterly direction. Whilst the cartographer indicates the existence of a means of access to the river from the village it is not shown in its current position. No key to the map has been provided and it is not known what the cartographer considered the status of the route so shown to be; however, from the limited extract provided, only routes leading to or between settlements appear to be shown. Whilst this map does not demonstrate the status of the route shown, it appears to have been considered to be of sufficient importance to be included within the map.

11. The Overton and Bowles map of Sussex of 1740 shows a feature by means of solid lines which corresponds with the appeal route. The Appellant says that this is a representation of a road whereas the Council and the NSCC are of the view that what is shown by the solid lines are the ditches which bound an agricultural access track. No key was supplied with the map however the route is shown to run to the river from what appears to be a main road (thicker casing lines on one side of the road and distances between settlements recorded in miles). Even if the Council and the NSCC are correct in that the solid lines were to represent ditches, I would still accept the Appellant's submission that the route is shown in the manner of a road; it is the status of that road which is at issue.
12. In contrast to the previous maps, the Yeakell and Gardner map (1778-1783) only shows that part of the appeal route to the west of what is now the NSSC pond. This map shows a route which appears to serve as an access to adjacent fields and which does not provide a through route to the river. Although that part of the appeal route which is shown is depicted in the manner of a track or road, it may have been no more than an agricultural track giving access to cultivated fields.
13. The whole of the appeal route is shown on Mudge's map (surveyed 1813 but updated until 1873). The Appellant contends that as small-scale maps did not show footways or bridleways, the route is likely to have been considered to be a public vehicular way. The NSCC contend that it is much more likely to be the case that what was being recorded on the map was a droveway for the movement of cattle.
14. Greenwood's map of 1829 does not show the appeal route whereas the map shows the main road through Piddinghoe in the same way as the earlier Overton and Bowles map.
15. The first edition Ordnance Survey 1-inch to 1-mile map shows a track leading from the Street to the river; in common with the earlier maps, this early Ordnance Survey map shows the physical existence of the appeal route, but not its status. The first edition of the 25-inch to 1-mile map annotates the appeal route as land parcel 71 which extends towards the river a provides access to land parcel 68. The book of reference describes land parcel 71 as 'Road (rough pasture)' and parcel 68 as 'Pasture'. The Appellant concludes from this that the appeal route was a public road which carried full vehicular rights, whereas the NSCC's view is that the description is entirely consistent with an agricultural track which provides access to adjacent fields.
16. Subsequent Ordnance Survey maps published during the late nineteenth and early twentieth centuries show the changes in use of the land on the south side of the river. Whereas the maps of 1873 and 1899 show the land between the appeal route and the river as pasture separated by drainage ditches, by 1910 a clay pit has been developed to the north of the appeal route with a landing stage for the removal of excavated material. The 1930 edition of the map shows that the clay workings had been extended and were connected to the landing stage by means of a tramway; the flooded clay pit is now the pond of the NSSC.
17. Although other paths and tracks on the OS maps are annotated 'F.P.' or 'towing path', there is no such annotation shown on any part of the appeal route. A solid line is shown at the eastern end of the appeal route on all the large-scale

- OS maps, which may mark the end of the land parcel identified by the surveyor or may represent a physical barrier of some kind.
18. The appeal route is recorded as plot 79 in the Piddinghoe tithe records. This plot is described in the apportionment as being in the ownership and occupation of a William Waterman and is described as a 'droveway' cultivated as 'pasture'. With the exception of one small plot immediately to the north of the appeal route, all the adjacent plots were also recorded as being in the ownership of William Waterman. The Appellant submits that the tithe records suggest that the appeal route was used for the purposes of transportation. Whilst the tithe documents do not preclude the existence of public rights, the NSCC contends that any vehicular traffic at the time of the tithe survey is likely to have been of a private nature going to or from adjacent fields.
 19. An undated nineteenth century plan of the Lewes and Laughton levels shows the appeal route as a broad track running between fields. Adjacent fields are numbered on the plan whereas the appeal route is not. Whereas the Appellant says the appeal route is shown in the same manner as other roads and the towing path and is indicative of public status, the NSCC points out that the field boundaries are shown by thick lines whereas public roads are shown by faint solid or dashed lines and the towpath is coloured brown.
 20. The appeal route is not identified by a hereditament number in the records prepared under the Finance Act 1910 and is not included within adjacent hereditaments. The appeal route is coloured blue from its junction with the Street for the entirety of Ordnance Survey land parcel 79 which is identified by solid lines at either end of the parcel. Where adjacent hereditaments are located at either side of the appeal route, those hereditaments (such as 1431) are braced together with the brace passing under the appeal route to signify that the appeal route is not form part of the adjacent land.
 21. The Appellant submits that as the appeal route had no assessed value and was separated from other assessable hereditaments, the Finance Act records are indicative of the highway status of the route at the time of the survey. The NSCC submits that although there was no assessment of the appeal route it had been distinguished from the public road network by its colouration, whereas known public highways such as the Street remained uncoloured. The Council considers that the blue colouring could represent the waterways and ditches in the area. In both the Council's and the NSCC's view the Finance Act documents do not offer any proof of the existence of a public right of way over the appeal route.
 22. Conveyance documents from the 1930s regarding the sale of part of the appeal route refer to the retention of a vehicular right of access in favour of the vendor of the land together with the right of the purchasers to divert what was described as a 'farm road' (OS parcels 79 and 93) to another part of the property being conveyed. The NSCC submits that the retention of a private vehicular access or the ability to divert the route without reference to the highway authority is indicative of there being no public right of way in existence at the time of the conveyance.
 23. The appeal route is not given specific mention in the local history 'Portrait of Piddinghoe' although a description is given of the rise and expansion of the clay extraction works to the north of the appeal route. The Appellant submits that the appeal route may have been the most convenient place for the mooring

and loading boats. However, there is no evidence of a mooring or landing stage at the eastern end of the appeal route on any of the maps which have been consulted; the landing stage associated with the clay extraction works was to the north and some distance from the eastern end of the appeal route.

Conclusions

24. It is the Council's and the NSCC's case that the documentary evidence adduced in support of the application to add a restricted byway is weak and that the appeal should be rejected.
25. Whilst there is some degree of commonality with regard to the documentary evidence adduced by the parties, there are differences between them as to the inferences to be drawn from those documents. A particular point of contention relates to the interpretation to be put on the depiction of the appeal route in the Finance Act documents. Although the appeal route is shown excluded from adjacent hereditaments and was not assessed for the land value duty, the route was shown coloured and therefore treated in a way which was separate from the other public roads within the immediate area.
26. The Courts have in many cases considered the exclusion of a route from adjacent hereditaments as being supporting evidence of the route at issue being a public route. I have not come across a route which is both excluded from the assessment and at the same time coloured as if it was part of the assessment; further research into this apparent anomaly may shed light on what status the route was considered to have at the time of the survey. Given that the route was excluded from the assessment of land value duty, the conclusions drawn by the Appellant from the Finance Act documents are not unreasonable.
27. There is clearly disagreement between the parties as to the interpretation to be placed on the remaining evidence and the conclusions which can reliably drawn from those documents. Notwithstanding the conflict of interpretation, no incontrovertible evidence has been submitted which demonstrates that the claimed public vehicular rights do not exist or could not have existed at some point in the past.
28. In my view, the conflict in the interpretation of that evidence means that the appeal fails against test A above. However, in considering the evidence adduced as a whole, I consider that the Appellant could reasonably allege the subsistence of a public vehicular right of way. Accordingly, the appeal succeeds against test B.
29. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Exceptional circumstances

30. In ordinary circumstances, I would consider that the Council should be directed to make an order within three months of the decision on the appeal. However, I also consider that the impact of the current coronavirus outbreak on local authorities may limit the Council's ability to adhere to a three-month timescale.
31. Accordingly, and to give the parties some certainty that an order will be made in the near future, I consider it appropriate to allow the Council a period of 12 months for the order to be made.

Formal Decision

32. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the East Sussex County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act within twelve months of the date of this decision to add the restricted byway proposed in the application dated 8 February 2017 and shown as A – B on the plan appended to this decision.
33. This decision is without prejudice to any decision that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Alan Beckett

Inspector

APPENDIX

