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| **Appeal Decision** |
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| **by Helen Heward BSc (Hons) MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 08 June 2021** |

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| **Appeal Ref: FPS/Z1585/14A/18** |
| * 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 Essex County Council not to make an Order under Section 53(2) of that Act (the 1981 Act). |
| * The application dated 22 July 2015 was refused by way of a decision notice dated 13 February 2020. |
| * The appellant, Essex Bridleways Association, claims that a route should be upgraded and recorded as a restricted byway on the Definitive Map and Statement for the area. |
| **Summary of Decision: The appeal is allowed.** |
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**Preliminary Matters**

1. The application was made by Essex Bridleways Association. The Council’s decision notice is dated 13 February 2020. One objector received their copy on 14 February 2020, but the appellant advises they did not receive notice until 10 March. The appellant lodged the appeal with the Planning Inspectorate and served notice on Essex County Council on 30 March and submitted evidence of the date of delivery by the Royal Mail on 10 March.
2. Paragraph 4(1) of Schedule 14 to the Wildlife and Countryside Act 1981 states that where the authority decide not to make an order, the applicant may, at any time within 28 days after service on him of notice of the decision, serve notice of appeal against that decision on the Secretary of State and the authority.
3. My attention is drawn to *Godwin v Swindon*[[1]](#footnote-2) where it was held the deemed dates of service could not be displaced by evidence tending to prove some other date of actual receipt. The County Council and interested parties have had notification of the appeal. Submissions on the file indicate that all parties have been made aware of the submissions and arguments made by the appellant at appeal and allowed a full opportunity to comment and respond[[2]](#footnote-3).
4. I am satisfied that the appeal was lodged within 28 days of the 10 March 2020 and that no party has been prejudiced.
5. The application seeks to upgrade to a restricted byway footpaths recorded on the Definitive Map as follows: footpath 63 (part) and footpath 67 to a restricted byway in Shalford, Braintree.
6. The application form describes the claimed route as running “*from the commencement of footpath 63 (FP63) by Iron Bridge Farm north to the site of the Iron Bridge across the River Pant then continuing in an easterly and then southerly direction*” to “*meet the unclassified road Lones Hole Road to the south of Lones Hole*”.
7. FP67 crosses the River Pant by way of a footbridge which is roughly 1300mm wide. The application plan shows the claimed route consistent with the alignment of FP67 and FP63 as shown on the Definitive Map.
8. On several historical maps a ford is shown immediately north of, and generally parallel to, the footbridge with a dotted line and the “F.B” for footbridge appearing south of the word “*Ford*” on a number of the Ordnance Survey (OS) maps. The historical existence of this ford is not disputed. The parties do not dispute that an image of a photograph of two riders on horseback fording a river is of the ford on the north side of Ewen or Iron Bridge taken in the 1920’s.
9. The Council say that bridleway and vehicular use would have been via the road replacing the original ford. A more recently constructed culvert to the south of the footbridge can be seen on modern OS maps in a quite different alignment to the footbridge. An objector submits that this culvert was built privately on private land.
10. From the copy of the application plan submitted I can only make out a single red pen mark denoting the claimed route generally across the River Pant at the footbridge location and in an alignment consistent with that of FP67. At appeal the appellant argues that a footbridge is often provided for foot passengers within a carriageway highway[[3]](#footnote-4) and that bridleway and vehicular use would have been via the road and ford.
11. The obligation on the surveying authority is to make a judgment based on the best evidence it has. I have considered the appeal as a claim for a route via a river crossing immediately north of the footbridge along the alignment of the old ford crossing and in the same general alignment as FP67.
12. Whilst the accepted legal maxim ‘once a highway, always a highway’ will apply, sub-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 (MPVs) is extinguished unless there is evidence to show that one of the possible criteria for exemption listed in subsections 67(2) and 67(3) is satisfied.
13. In this case the appellant offered no comment on whether any of the exemptions listed in sub-section 67(2) and 67(3) of the 2006 Act would apply. The Council’s report and decision refer only to the application to upgrade to a restricted byway. Accordingly if the evidence shows that the route in question was historically a public right of way for vehicles I do not consider that I have evidence before me to determine if the possible criteria for exemption listed in subsections 67(2) and 67(3) would be satisfied in this case.
14. I have noted references to Lone’s Hole and Lones Hole and Ironbridge and Iron Bridge. I have used Lones Hole and Iron Bridge throughout.

**Main Issues**

1. In this case the claimed route is recognised as public highway by virtue of its inclusion on the Definitive Map and Statement for the area. It is recorded as a public footpath and the appellant claims it ought to be a restricted byway.
2. Section 53(3)(c)(ii) of the 1981 Act states that an Order should be made to modify the Definitive Map and Statement for an area 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 there shown as a highway of a different description*”.
3. The appellant’s case relies upon documentary evidence. Section 32 of the 1980 Highways Act provides that “*a court or other tribunal, before determining whether a way has, or has not been dedicated as a highway, or the date of such dedication, if any, took place, shall take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, and shall give such weight thereto as is justified by the circumstances, including the antiquity of the document, the status of the person by whom and for which purpose it was compiled, and the custody in which it has been kept and from which it is produced*.”
4. The process does not provide for the recording, or not, of what might be considered by the parties to be desirable or preferable. Consequently, some concerns of a number of objectors, such as lack of passing places, existence of gates, disturbance, loss of tranquillity, effects upon wildlife and the character and appearance of an Area of Outstanding Natural Beauty are not ones that I can take into account in reaching my decision. Nor would it be reasonable for me to undertake an accompanied site visit in order to consider the implications of allowing the appeal upon matters such as privacy, water pipes, land drains, and other property damage issues.

**Reasons**

1. A Chapman & Andre Map, 1777 shows the whole of the claimed route physically existing at that time and at a width that could have being capable of carrying vehicular traffic. The claimed route is seen running from “Nether Street” north, crossing east over Ewen or Iron bridge and then south parallel to the watercourse. One end of the route depicted appears to meet at a ‘crossroads’, the route appears as part of a network of routes and is similarly depicted and appears as wide as some routes that are now recorded as part of the public road network, but the map is not proof of status.
2. “Nether Street” could be interpreted as Lower Street but there is nothing to say that the name indicates any particular status or public rights of passage over the road, and Nether Street does not appear on later maps.
3. Although the appellant argued that comparison of this map with modern OS maps strongly suggest that the significant roads shown were part of the general purpose public road network, the Council drew attention to a foreword to the map held at Essex Records office by archivist F.G. Emmison that states it ”*is the first map of the whole county to show the course of minor roads, “green lanes” and even some of the track; milestones and turnpike gates on the arterial roads of the time are carefully drawn*”.
4. Two deeds dating from 1767 mention “*the highway leading from Ewen Bridge to Panfield*” (Essex Records Office (ERO): D/DU 293/323) and “*the lane leading to Ewen, alias Iron, Bridge*” (ERO: D/DU 293/321). The written description of the highway and lane in these deeds appears quite similar to the visual representation of a route from Panfield to Iron Bridge on the 1777 map. Although the deeds may relate to a piece of land bordered by what is now Ewen Bridge Lane I am not persuaded that this is evidence to say that the lane referred to did not extend further north or to the Ewen Bridge (along that section of the claimed route that is part of FP63 on the Definitive Map).
5. On a Cassini Series Map (168, Colchester), 1805, the route is shown in the same manner as other routes and known public roads. The route depicted on the OS 1stEdition Series Map, Sheet 47, 1856, is very similar to that on the 1805 Cassini Map.
6. An impression of some of the route around the same time can be found on the Shalford and Wethersfield Tithe Map, 1844. Tithe Commissioners were concerned solely with identifying tithable lands and not with roads or their status, so are not necessarily conclusive evidence about public roads but the maps can mark roads quite accurately and, with the schedules, can provide supporting evidence. However, there is a clear break or absence of route along a section that would be representative of the route near Iron Bridge Farm and no apportionment record has been supplied.
7. On an extract from an OS 1st Edition Map, 1876, 25” Sheet a route can be seen running north from Tanoffice, continuing past the eastern side of Iron Bridge Farm and northeast to Iron Bridge. The route continues to the river and the ford. On the east side of the river a route can be clearly seen running directly from the ford southeast to Lones Hole. Save for the area of the ford and an area adjacent to Iron Bridge Farm the claimed route is depicted by two solid lines. It appears wide enough for use on horseback or by vehicles throughout. The route south from Iron Bridge Farm, numbered 137, is noted as ‘*Road*’ with an acreage of 1.382. It is not clear if 137 includes the claimed route past Iron Bridge Farm. But such an impression would be consistent with the description of a “*highway from Ewen Bridge to Panfield*” in the 1767 deeds. On the east side of the river the route has the parcel number 643 and a measured acreage of 0.100 against it. The Book of Reference lists 643 as ‘*Road*’. The Council acknowledge that public roads depicted on 1:2500 maps invariably have a dedicated number and acreage.
8. On the OS 2nd Edition Map, 1896, 25” to the mile, the alignment of the route can be similarly made out depicted by two lines. It appears that the route from Iron Bridge Farm northeast toward Iron Bridge is narrower than that to the east of the river and the letters “F.P.” can be made out along the western edge of this section.
9. An enlarged extract from the OS First edition Map 1876, sheet 16/13 reveals a footpath can be seen parallel and to the west of the track running northeast from Iron Bridge Farm. On the 1896 OS Map extract the letters “F.P.” depicting footpath can also be seen alongside. This section of footpath is depicted on some later OS maps too. Whilst one argument for this arrangement could be that the adjacent track was not considered a public road, other explanations are possible. For example, it is not unknown for footpaths to be separate from the public road in situations subject to muddiness or water as might have been found close to a river. The double lined section also appears wide enough for use on horseback or by vehicle. At the river a ford wide enough for such use and a footbridge are both depicted.
10. Moreover, in this area FP63 is shown on the Definitive Map on the same alignment as the track; not to the west and separate from it. The Definitive Statement refers to FP63 north of Iron Bridge as running “*along the eastern boundary of OS Field No. 0006*”. But there is no field edge reference for the section between Iron Bridge and Iron Bridge Farm. A reference to “*unspecified width*” for this section of FP63 would appear more cognisant with an alignment along the track rather than the field edge.
11. The route of the claimed byway appears on 1898 and 1921/22 Cassini Maps where it is depicted narrower than other roads. In particular, the route running south from Iron Bridge Farm (which corresponds with the section where the number 137 appears alongside on the 1876 OS extract). Nonetheless the route can still be clearly made out and appears similar to other small roads and as part of a wider network.
12. From the key provided, it can be seen that a Bartholomew’s Half inch to the Mile Map 1919-1924 depicts the section of the claimed byway west of the river as “i*ndifferent*” “*passable for cyclists*”. There is a disclaimer that “*the representation of a road or footpath is no evidence of a right of way*”. The route east of the river is uncoloured and the appellant notes that the map key states that “*the uncoloured roads are inferior and not to be recommended*”.
13. On an extract from the OS Map New Series 1954 part of the route is annotated “*grass road*”. On an extract of a 1969 OS Map the appellant acknowledges that access to Iron Bridge Farm appears blocked with just the footpath continuing to Iron Bridge. The route is shown on County Roads and Bridges Maps 1906 and 1930 but it is not marked/coloured in any specific manner and there is insufficient evidence to say that the route appears as a publicly maintainable road on either.
14. There is no evidence to say whether two young riders on horseback at the ford depicted in a photograph said to date from the 1920’s are there by right or as of right, but they are seen side by side and it is evident that people on horseback could use the ford. It appears wide enough for crossing by vehicle. A later photograph of Iron Bridge in the 1960’s also appears to depict a channel that would have been wide enough for horses or vehicles.
15. Plans for the purposes of the 1910 Finance Act were produced as a baseline survey record from which present and future land values could be assessed for taxation. They were not intended as a record of public rights of way but as the presence of a public path or road could affect the value of land they were often recorded and the existence of uncoloured/excluded portions of a routeway on the recorded sheet plan can constitute good evidence of a public routeway. So too the absence of a hereditament number on the routeway.
16. In this case the claimed byway route can be seen in its entirety on a Record Plan and there is evidence from Valuation Reference Book A/R 2/2/21 of public right of way deductions in Shalford Parish for £20 against reference 167 Iron Bridge farm, £25 against reference 122 Tan Office Farm and £5 against reference 138 Lones Hole. Although there is no evidence from a Field Book to provide information on the status of the rights of way for which deductions were made, the route excluded on the plan appears to be wide enough for vehicles and similar to other known roads that can be seen.
17. On the west side of the river Unit 122 appears to be a relatively large unit of valuation, extending south toward ‘Tanoffice’ and ‘Malthouse’. Part of the adjacent excluded route, south of Iron Bridge Farm, is now an undisputed public road. On the east side of the river part of the excluded route south of Lones Hole is also now a public road and the route can be seen clearly excluded from adjacent Unit 138 Lones Hole and Unit 300 south of Unit 138. Not all roads excluded were public roadways and those sections of road beyond the claimed route on both sides of the river that have become undisputed public roads are not conclusive evidence that the claimed route has been dedicated.
18. There is a section of the claimed route east of the river crossing and northwest of Lones Hole where the Record Plan extract submitted is less clear. It is possible that land in this area could have been unproductive. The owner of Iron Bridge Farm claims that a gate can be seen across the road near Iron Bridge Farm in the same position as one that exists today. But many gated public roads exist.
19. The appellant draws attention to *Robinson Webster Holdings Ltd v. Agombar[[4]](#footnote-5)* where Etherton J found no reason why he should not take the plan and record of valuations prepared pursuant to the 1910 Finance Act at face value as very powerful evidence that the Blue Land was by 1875 a public highway maintainable at the public expense. At the Court of Appeal in *Fortune v. Wiltshire Council[[5]](#footnote-6)* Lewison J held that the consensus of opinion, therefore, is that the fact that a road is uncoloured on a Finance Act map raises a strong possibility or points strongly towards the conclusion that the road in question was viewed as a public highway.
20. I am mindful that in the same judgement Lewison J also concluded that the Finance Act records are not definitive, simply one part of the jigsaw puzzle to be considered when considering the status of a route. The ford would have given access to pastures and fields across the river. The characteristics of the route with a ford are such that that it is possible that a number of adjacent landowners might have needed to use the lane. But there is little evidence to say that Lones Lane Cottages were farm labourers’ cottages occupied in connection with Iron Bridge Farm. Whilst these matters could point to other reasons why the claimed byway route was excluded from adjacent units of valuation on the Record Plan they are more inference than fact.
21. The County Surveyor’s 1932 Book of Maps was prepared under the 1932 Rights of Way Act. This non mandatory work undertaken with the cooperation of the parishes, footpaths and bridleways thought to be public at this time were marked by short and long blue dashes respectively and the parties agree that the route from Iron Bridge Farm to the river crossing and then east of the river is marked by blue dashes denoting a public footpath along the claimed route.
22. In 1951/52 the parishes of Shalford and Wethersfield prepared Parish Survey Maps and cards under Section 28(4) of the National Parks and Access to the Countryside Act 1949. The Council state that returned Maps and Parish Cards were used by the County Council to draw up the 1953 Draft Map which recorded rights of way used on foot on horseback and roads used as public paths. On the Shalford Map extract supplied part of the claimed byway route is depicted as FP63 west of the river and then as FP67 east of the river. On the Wethersfield Map the route east of the river is recorded as FP31. A Note card for FP31 from Lones Hole to Iron Bridge records the path as fair and an “O” on the map indicates a narrow lane section between Lones Hole and open field marked with vegetation and impassable. An “R” indicates rails placed across the eastern end of the footbridge. The appellant draws particular attention to a note on a Wethersfield survey card that FP31 “*should be shown as BP but there are 2? obstructions*” and submits that “BP” refers to bridle path.
23. However, there were two parish councils and there is little evidence to demonstrate that this information would not have been before the County Council when they drew up the Draft Map and no evidence to say that Wethersfield Parish Council considered that the “BP” and/or “O” annotations were significant and/or of such weight that the route should have been identified as more than a footpath when the Draft Map was prepared. Moreover, I am not persuaded that this amounts to new evidence.
24. The claimed byway route is consistent with FP63 (part) and FP67 as seen on the Draft Map of Public Rights of Way published 1953 and described in the Statement. The Council advise that no objections were recorded to the routes when the Draft Map was published. The Definitive Map and Statement of Public Rights of Way was published in 1960. Routes FP63 and FP67 are shown in purple over dashed lines indicating it has the characteristics of a footpath. The route of FP63 from Iron Bridge Farm to Iron Bridge then east over Iron Bridge and continuing southeast as FP67 appears consistent with the claimed route. The depiction of the claimed byway route remains unchanged on the Definitive Map 2002. Some minor changes to the wording of the description of FP67 in the Definitive Statement have little material bearing on this case.
25. There is no key to a map attached to an extract from a conveyance of Iron Bridge Farm, 1895, (ERO:D/DU 947/5). The image submitted is not easy to read. Without the actual conveyance document the significance of colouring and uncoloured sections is not clear. The Council advise that the claimed byway route remains excluded from Title EX739340 and remains unregistered land. This could add weight to a view that this section is a private road with no owners but with private rights of use by a number of landowners. But equally it would be consistent with known public roads.
26. Quarter Session Records (ERO:Q/SR 90/35 & 95/76) provide conclusive evidence of the Court considering repairs required to be made to the Ewen Bridge between Wethersfield and Shalford by the inhabitants. The Council does not dispute that Ewen Bridge is identifiable in the judgement, and I agree that there is a clear inference of public rights, but the judgement is not conclusive as to whether the bridge was part of a footpath, bridleway, or restricted byway.
27. The ford to the north is not in existence today but that is not in itself conclusive evidence that the claimed byway does not subsist. A number of photographs have been submitted. Some in a document called “*The Iron Bridge Loop, Shalford and Wethersfield*” provide a photographic depiction of the route at or around 2012. The Council agrees that it shows a considerable part of the route as accessible. Objectors describe a footpath that runs beside properties at Lones Lane which is only wide enough for a footpath/stile width and that the width is restricted by a ditch, bank and trees. At the end of the public road at Lones Hole there is a gated driveway leading to the end cottage Lones Hole North leaving a restricted width footpath where trees would need to be cut back/felled. A number of other gates exist along the route including the gate to Iron Bridge Farm from Ewen Bridge Lane and at the footbridge. The width of the route along some sections is constrained with one photograph showing a width of 2.4m. But the evidence about these characteristics of the way is not conclusive that the route was private, and the width shown on the maps submitted provides a reasonably consistent picture of a route wide enough for use on horseback or by vehicle over time.

**Conclusions**

1. Overall, the evidence collectively and variously points to the existence of a way through on horseback or for vehicles, but the evidence is finely balanced as to whether it would have been any more than a private network.
2. Arguments on both sides rely upon a number of inferences. *Emery[[6]](#footnote-7)* indicates that where there is conflicting evidence, which could only be tested or evaluated by cross-examination, an Order would seem likely to be appropriate. The making of an Order leaves both the applicant and objectors with the ability to object under Schedule 15. At that stage the conflicting evidence can be heard, and those issues determined.
3. I did not have evidence before me to determine if any of the possible criteria for exemption listed in subsections 67(2) and 67(3) of the 2006 Act would be satisfied and I draw no conclusion on whether the way should be recorded as a Byway Open to all Traffic on the Definitive Map.

**Formal decision**

1. The appeal is allowed, and Essex County Council is directed to make an Order, to record on the Definitive Map and Statement to upgrade to a restricted byway footpaths recorded on the Definitive Map as follows: Footpath 63 (part) and Footpath 67 to a restricted byway in Shalford, Braintree, running from Iron Bridge Farm north to the site of the Iron Bridge across the River Pant on the north side of the footbridge then continuing in an easterly and then southerly direction to meet the unclassified road Lones Hall Road to the south of Lones Hole.

Helen Heward

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1. Godwin v Swindon Borough Council 2002 1 WLR997 and Anderton v Clwyd County Council (no 2) [2002] 1 WLR3174 [↑](#footnote-ref-2)
2. see Poole, R (on the application of) v SSCLG t & Anor [2008] EWHC 676 (Admin) (14 March 2008) [↑](#footnote-ref-3)
3. Email from Essex Bridleways Association 27 January 2021 [↑](#footnote-ref-4)
4. Robinson Webster (Holdings) Ltd v Agombar and another [2001] unreported (QBD)[2001] EWHC 510 (Ch), [2002] 1 P & CR 20 [↑](#footnote-ref-5)
5. Fortune and others v Wiltshire Council and Taylor Wimpey [2012] EWCA Civ334 [↑](#footnote-ref-6)
6. R v SSW ex parte Emery (1997) QBCOF 96/0872/D [↑](#footnote-ref-7)