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| **Appeal Decision** |
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| **by Sue M Arnott FIPROW**  |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 3 September 2021** |

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| **Appeal Ref: ROW/Z1585/14A/20** |
| * 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.
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| * By application dated 29 October 2018 Essex Bridleways Association claimed that a route leading from the B1022 Maldon Road, Birch, westwards towards Bockingham Hall Farm’ should be added to the definitive map and statement for the area as a restricted byway.
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| * The application was refused by Essex County Council under its delegated procedures and the appellant was formally notified of the decision by letter dated 31 July 2020.
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| **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 (the 1981 Act) on the basis of the papers submitted with this case.
2. The appellant, Essex Bridleways Association (EBA), requests that the Secretary of State directs Essex County Council (ECC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record the route which is the subject of this appeal as a restricted byway.
3. In addition to the submissions from the appellant and ECC, I have before me representations made on behalf of the landowners directly affected by the claimed route, the Birch Estate. I have considered all these documents in forming my conclusions. In this case, I am satisfied I can reach a reliable decision without visiting the site.

Main issues

1. The main issue in this case is whether the available evidence shows that, at some time in the past, a public right of way for vehicles was established along the full length of the appeal route which, in the absence of evidence of legal closure, still exists today and should be recorded as a restricted byway.

**Legal framework**

1. Section 53(2) of the 1981 Act requires the surveying authority (in this case ECC) to make orders to modify its definitive map and statement in consequence of certain specified events as set out in Section 53(3).
2. One type of event is described in sub-section 53(3)(c)(i): “*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) 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 …"*.
3. Sub-section 53(3)(c)(ii) sets out another type of event involving the discovery of evidence which 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*.”
4. The majority of the appellant’s claim seeks addition to the definitive map and statement of a once well-defined but unrecorded lane (leading generally westwards and north from Maldon Road) to which the provisions of sub-section 53(3)(c)(i) would apply. That part of the claimed route following the line of definitive Footpath 5 in Birch parish (leading eastwards from Bockingham Hall Farm) would, if the evidence supports higher rights, be upgraded by relying on sub-section 53(3)(c)(ii).
5. For convenience I shall refer to the southern and easternmost part of the claimed route as “the unrecorded section” and to the westernmost part as “the footpath section”.
6. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) is recognised as presenting two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability or has a right of way been reasonably alleged to subsist? Both these tests are applicable when deciding whether or not an order should be made. However, even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify a modification order being made [[1]](#footnote-1).
7. The issue was addressed in the High Court case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1995][[2]](#footnote-2)* and later clarified in *R v Secretary of State for Wales ex parte Emery [1998][[3]](#footnote-3)*: when considering whether a right of way subsists (Test A) clear evidence in favour of the appellant is required and no credible evidence to the contrary. When considering whether a right of way has been reasonably alleged to subsist (Test B), if there is a conflict of credible evidence but no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be a public right of way has been reasonably alleged.
8. For the purposes of this appeal, and in relation to the unrecorded section of the claimed route, I need only be satisfied that the evidence meets the lesser test (B) although even at this stage the higher test (A) is applicable to the footpath section where the matter falls under sub-section 53(3)(c)(ii).
9. The appellant claims the route is a restricted byway. The case put forward in support of this status relies on a range of historical evidence that has been submitted to demonstrate, on a balance of probability, that long ago the Order route was regarded as a vehicular highway. Following the legal maxim ‘*once a highway, always a highway[[4]](#footnote-4)*’, if such a carriageway is shown to subsist, it will still exist today unless formally closed by legal order.
10. In this case, following enactment of the Natural Environment and Rural Communities Act 2006, any public rights that may once have existed for motorised vehicles will now have been extinguished. If the evidence does show that the claimed route was once a public carriageway, then ‘restricted byway’ is now the appropriate status to be recorded
11. Section 32 of the Highways Act 1980 provides for *“any map, plan or history of the locality or other relevant document”* to be taken into consideration when deciding whether or not a way has been dedicated as a highway. In effect, this is declaratory of the common law. Documentary evidence may not on its own be conclusive of the existence of a way but in assessing the value of a document, account should be taken of the facts surrounding its creation and its provenance, and any relevant evidence should be weighed accordingly.
12. When determining the application, ECC took the view that the absence of any evidence of use by the public[[5]](#footnote-5) capable of demonstrating acceptance of the claimed carriageway as a highway is fatal to the case, whether or not the historical evidence is sufficient to imply dedication. It has subsequently clarified its position, accepting that evidence of public use in living memory is not necessarily essential; what is required is evidence to demonstrate dedication of the route by the landowner together with acceptance of that dedication by the public. ECC submits that could be either through use of the route or by reason of the route being maintained at public expense or otherwise for the benefit of the public.
13. In response, EBA argues this approach is “*simply wrong*”. It submits that evidence of reputation, as provided by the many historical documents, goes to “*the ‘whole package’ of dedication (time out of mind) and acceptance (time out of mind*.” That concurs with my understanding of the basis on which potential ‘old highways’ that have fallen out of use should be considered.

Reasons

1. In its report dated 29 July 2020, and after assessing the evidence in this case, ECC concluded that there is insufficient evidence to show that the claimed route had been dedicated and accepted as a highway for public vehicular use. Nevertheless, it agreed that the evidence supports the claimed route having physically existed “*as a road of some antiquity*”.
2. Indeed, the draft plan of Bockingham Hall Farm dated 1729 shows the footpath section and a short stretch of the unrecorded section as a lane bounded on both sides, leading off what is now known as Birch Road. The lane was clearly in existence in the early eighteenth century.
3. Although this plan gives little indication of the legal status of the road at that time, the fact that it was subsequently shown as a way through to the Maldon Road on the map of the county prepared by Chapman and Andre map in 1777 does weigh against it being a purely private or occupational lane.
4. Little further weight is added by the plan of a farm owned by James Round in 1790 other than to confirm that the southern end of the unrecorded section was shown as a lane in a similar manner to Maldon Road although narrower.
5. Around the turn of the nineteenth century early Ordnance Survey records began. In this area, that included early drawings (by Witham) in 1799 leading to the First Series map at 1 inch to one mile (by Mudge) in 1805. There is no doubt that the claimed route was noted by both surveyors. It is evident that many roads were included which lead only to an individual property where the status of the way might be considered private, but that is not the case with the claimed route. Thus one might reasonably deduce that these OS drawings, together with the Chapman and Andre map, are more likely to be depicting a public highway than a private road.
6. Tithe maps were prepared in 1839 for the parishes of Copford and Birch with the claimed route being show partly on each. In each case the lane was shown as separated from the adjacent (titheable) fields. Both EBA and ECC note that no tithe was payable for the lane and that these maps give no indication of its status. I do not disagree but would further add that the depiction of the lane would be equally consistent with a finding that the claimed route was a public one or private.
7. By the late nineteenth century, and almost a hundred years after its first representation on the 1777 county map, the OS 1st edition 25” more clearly defined the claimed route as an enclosed lane with many trees apparently within the boundaries along its length. That does not seem unusual when compared with the Maldon Road which is likewise shown to be tree-lined.
8. The accompanying OS Book of Reference identified the part of the unrecorded road in Birch parish simply as “road”, giving no indication as to whether this was public, private, occupational or bridle. Although the extract submitted with this appeal notes several other ‘roads’, there is insufficient mapping available to enable me to identify which roads these refer to or to make any judgement as to the implications for the status of the way.
9. ECC observes that, at the point the claimed route meets the Maldon Road, the 1875 OS map shows a single line across the entrance to the lane which it believes represents a gate. The presence of such a gate, unless locked, is not necessarily inconsistent with the existence of a vehicular highway. It may simply be a means of restraining cattle or horses.[[6]](#footnote-6) Nevertheless it does raise a question over the public’s rights along the lane (if any).
10. That said, the lane continued to be shown in the same way on the OS 6” to one mile revision in 1896 (albeit without trees) and later on the OS 25” edition which was used as a base for the 1910 Finance Act records[[7]](#footnote-7).
11. In that same period the lane appeared on a map of Essex by Cruchley in 1885 showing roads and railways, a publication where it would be unusual to see private roads included. In the early 1900s, it is shown on Bartholomew’s half inch to one mile map as a road, albeit in the category “inferior and not to be recommended to cyclists”.
12. In 1906 ECC prepared a map showing its “Main Roads and Bridges” which did not record the claimed route as the responsibility of the Council. Neither was it included on the map prepared in 1930 showing roads maintainable at the public expense which incorporated those roads ‘handed over’ by the former district council, nor was it on the County Surveyors’ Map of 1932.
13. Turning back to the 1910 Finance Act mapping records, both the footpath and unrecorded sections are clearly shown as excluded from all adjacent hereditaments along its length. As ECC and the Birch Estate point out, there can be several explanations for this; even so, there is a strong possibility that it was considered a public highway, normally but not necessarily a vehicular one.
14. It is the appellants’ case that the 1910 Act evidence adds further weight towards public road status. It submits that, when assessed alongside the totality of the evidence here, this points towards the most likely interpretation of the exclusion of the lane – that it was reputed to be a public vehicular road.
15. The OS revised its maps of the area in 1920. On the 6 inch to one mile map published in 1925, it depicted the lane with trees at regular intervals within the lane itself but still bounded on both sides throughout its length. On the 25” edition of the same date, the lane may have been gated near the former parish boundary. In fact, on a 1” to one mile road map published by the OS in 1949, the condition of the route appears to have deteriorated such that only the footpath section eastwards from Birch Road was included, and in 1955 an OS 1:25000 map showed only a faint hint of the road beyond the footpath section.
16. ECC’s research has shown that, throughout the process of preparing and publishing the definitive map and statement under the National Parks and Access to the Countryside Act 1949, the status of the claimed way was never in question, other than the recording of what is now Footpath 5. Neither was it raised during subsequent reviews.
17. In 1951 the footpath section was noted as obstructed, overgrown and impassable although it was nonetheless recorded as part of the public path leading eastwards to Fountain Lane. Its physical description is not easy to verify from the early aerial photographs available, starting in 1960, but the series of photos give the impression (from above) of the former lane having become one thick line of vegetation.

**Summary and conclusions**

1. From the evidence presented in this case it is clear that a well-defined lane following the line of the claimed route was in existence as early as 1725 and continued to be bounded on both sides throughout its length for around two centuries before the northern (footpath) section was dismantled. There is evidence that towards the end of this period it had become overgrown, and by the mid-twentieth century it was undoubtedly unusable as a through-route, probably for all types of traffic, whether public or private.
2. There is no one piece of evidence that unambiguously confirms its status either as a public highway or as a private, occupational road although arguments are made for both possibilities. The lane was shown on an early commercial county map in 1777 in the same manner as other local vehicular highways, and thereafter continued to exist as a physical entity for well over a century. It was similarly included in two other commercial maps in 1885 and the early 1900s although its deteriorating condition was evident from the latter.
3. That in itself is not sufficient to confirm the existence of a public carriageway but other reliable records that also carry weight, such as the tithe records from 1839 and the 1910 Finance Act maps, are either consistent with a road of that status or carry a strong possibility of a road with that reputation. Of particular significance, there is no evidence that positively indicates the route was *not* a vehicular highway, and there is no evidence of formal extinguishment of any public thoroughfare. In my view that must lead to a conclusion that a public carriageway has been reasonably alleged to subsist along the claimed route and that such a way would now be classed as a ‘restricted byway’.
4. I noted in paragraph 12 above the test to be applied to the length of the appeal route which is presently recorded as a footpath on the definitive map and statement requires that the evidence must show, on the balance of probability, that the higher rights claimed by the appellant subsist. Yet on the basis of the information provided in connection with this appeal, I hesitate to conclude that this higher level of proof is reached in relation to the entire route when there are questions still to be answered and (possibly) other evidence to be considered.
5. Whilst the different standards of proof to be applied to different sections of the appeal route at this stage could potentially lead to an anomalous outcome, in the determination of any order made as a result of this appeal the same higher level of proof would be required to justify confirmation throughout the whole route, not just parts.
6. My finding that a restricted byway has been reasonably alleged to subsist over the appeal route leads me to conclude an order should be made to add it to the definitive map. Whilst I do not find the evidence before me in this appeal sufficiently robust to confidently conclude, on a balance of probability, that a restricted byway subsists over the section presently recorded as a footpath, I nonetheless consider the same order should include a proposal to upgrade it for purely pragmatic reasons since this would ensure that, if objections are raised, the evidence for the whole of the claimed restricted byway may be more thoroughly tested.

Conclusion

1. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed in respect of the claimed route, including both sections referred to here as the footpath section and the unrecorded section.

Formal Decision

1. In accordance with Paragraph 4(2) of Schedule 14 to the 1981 Act, Essex County Council is directed to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area by adding a restricted byway (and upgrading part of Footpath 5 Birch to restricted byway status) as requested by the application dated 29 October 2018.
2. This decision is made 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.

Sue Arnott

**Inspector**

1. The higher test would need to be satisfied to justify confirmation of an order. [↑](#footnote-ref-1)
2. R v SSE ex parte Bagshaw and Norton (QBD)[1994] 68 P & CR 402, [1995] JPL 1019 [↑](#footnote-ref-2)
3. R v SSW ex parte Emery (QBD) [1996] 4 All ER 1, (CA)[1998] 4 All ER 367, [1998] 96 LGR 83 [↑](#footnote-ref-3)
4. Dawes v Hawkins [1860] [↑](#footnote-ref-4)
5. Aside from pedestrian use of Footpath 5 [↑](#footnote-ref-5)
6. An observation noted in *Brand & Brand v Philip Lund (Consultants) Ltd Chancery 18 July 1989* [↑](#footnote-ref-6)
7. No date is available for this OS edition but the absence of any roadside trees clearly distinguished it from the 1875 issue. [↑](#footnote-ref-7)