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| **Appeal Decisions** |
| On the papers on file |
| **by Martin Small BA (Hons) BPl DipCM MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 17 June 2022** |

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| **Appeal A Ref: FPS/W2275/14A/24** |
| * 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 Kent County Council not to make an Order under section 53(2) of that Act.
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| * The application dated 14 January 2019 was refused by notice dated 19 July 2021.
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| * The appellants, Mr and Mrs Wilkins, claim that the particulars in relation to the recording of historic limitations (gates) on Restricted Byway AB27 at Tenterden should be amended.
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| **Summary of Decision: The appeal is dismissed.** |
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| **Appeal B Ref: FPS/W2275/14A/24** |
| * 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 Kent County Council not to make an Order under section 53(2) of that Act.
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| * The application dated 8 April 2019 was refused by notice dated 19 July 2021.
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| * The appellants, Mr and Mrs Wilkins, claim that Restricted Byways AB27 and AB28 at Tenterden should be downgraded to Public Footpath status.
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| **Summary of Decision: The appeal is dismissed.** |
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Preliminary Matters

1. I am appointed 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 (“the 1981 Act”). I have not visited the site but I am satisfied that I can make my decision without the need to do so.
2. In June 2020 Kent County Council, the Order Making Authority (OMA), was directed by another Inspector to determine an application by Robin Carr Associates on behalf of the appellants to amend the particulars in relation to the recording of historic limitations on use (gates) on Restricted Byway AB27 not later than 12 months from the decision date of 19 June 2020.
3. As the investigation of that case involved substantially the same evidence as other applications to downgrade to Public Footpath status of Restricted Byways AB27 and AB28 and to record a width along Restricted Byway AB27, the OMA considered it appropriate to deal with those at the same time. The OMA declined to make an Order to modify the Definitive Map and Statement (“the DMS”) in respect of amending the particulars and downgrading the status. The appeals are made against these decisions. The OMA objects to both.
4. For ease and the avoidance of doubt I have attached to this decision a copy of the map provided by the appellants identifying the points of reference within the submitted evidence.

The Main Issues

1. In considering the evidence, I take account of the relevant part of the 1981 Act and relevant court judgements. Section 53(3)(c) of the 1981 Act states that an Order should be made to modify the DMS for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows;

“*(ii) that a highway shown on the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or*

*(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any particulars contained in the map and statement require modification.*”

1. In respect of Appeal B I also take note of the advice in Defra Circular 1/09 which sets out that the evidence needed to downgrade a way with “higher” rights to a way with “lower” rights will need to fulfil certain stringent requirements:
* *the evidence must be new;*
* *the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;*
* *the evidence must be cogent.*
1. In these appeals, the documents arising from the 1910 Finance Act are considered to be new evidence as they were not released into the public domain until the 1960’s. Consequently, they would not have been available during the preparation of the DMS.

**Reasons**

Appeal A - Limitations

1. There is no dispute that Restricted Byway AB27 is a public highway but for the application to succeed it is firstly necessary to demonstrate, on the balance of probability, that the gates in question existed on or before the date that public rights were dedicated over the driveways concerned.
2. The appellants contend that there is an absence of any 19th Century documentary evidence that positively points to the existence of public rights over the route of Restricted Byway AB27. Nevertheless, the OMA considers that public rights were dedicated at the time of the Tithe Map 1843 and possibly earlier. Part of the route is shown on the Mudge-Faden Map of Kent 1801 and in full on the Tithe Map. However, the former does not differentiate between public and private ways. The clear depiction of the routes in the same manner as other highways on the Tithe Map provides evidence of some weight that the routes were public, but in the absence of other supporting evidence Tithe Maps cannot be relied upon to make a distinction between public and private roads.
3. The 1st – 3rd editions of the Ordnance Survey (OS) Map consistently show AB27 in the same manner. The Area Book of Reference for the 1st Edition identifies AB27 as a ‘Road’, but not whether it was public or private. On the 1908 OS Map the route Q-X is annotated as “F.P.”, but from 1888 OS maps have 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. Consequently, although later added to the DMS as Public Footpath AB35, the annotation is of limited value as evidence that this route, or route AB27, were subject to public rights by that time.
4. The majority of Restricted Byway AB27 crossed land that was subject to claims in respect of the existence of public rights or user under the 1910 Finance Act, although no claim was made for the section D-C of AB27. The lack of claim for this section may be because the claimant chose not seek tax relief or it may be because public rights did not subsist over this area. The fact that the landowner did actively claim relief for public rights of way or user elsewhere suggests the latter. The appellants suggest that it would thus be reasonable to conclude that public rights on the remainder of route AB27 came into being during the period immediately preceding the production of the Definitive Map (1929-1949) based on evidence available at that time.
5. Although a specific date when public rights were dedicated cannot be proven, I find, on the balance of probability in the absence of cogent evidence to the contrary, that public rights for the majority of the route AB27 did not exist prior to 1910 and for the section D-C prior to 1929.
6. The appellants seek the recording of gates at points A, B, C and D on the map attached to these decisions. They contend that the 1843 Tithe Map and the 1876, 1908 and 1947 editions of the Ordnance Survey indicate gates at points A, C and D on the map. However, although the appellants believe that a gate has been at Point B for some considerable time, there is little documentary evidence for this.
7. The OMA accepts that the Tithe Map shows images of gates drawn on the map at points D and S and a linear feature across AB27 at point A2 possibly denoting a gate. The 1st Edition of the OS Map shows a linear feature which may be a gate at points D and A2. The 2nd Edition OS Map shows linear features at point C and possibly point D, although the mapping is insufficiently clear to see any marked features at points A, A1 and A2. A linear feature is shown across the route at points D, C and A1 on the 3rd Edition OS Map. The 1961 OS Map shows a linear feature across the route at points D and A1 and later OS mapping shows a linear feature across the route at points A and B.
8. User evidence is limited but three Statutory Declarations have been submitted supporting the existence of gates at points A and B and an old gate at point C in the late 1960’s/early 1970’s and at points A and B in 1978/79. One of the Declarations confirms that the old gate at point A was removed in 1978/79.
9. A Statutory Declaration by the objector to the claim states that there were no gates at points A, C or D and only the rotting remains of a gate at point B in 2000. The objection is supported by an expert analysis of aerial photographs from 1946 – 2013 which concludes that these show a possible gate at point A or A1 in 1946, 1958 and possibly 1959, a gate at point B in 2018 and possibly in 2003 and no gates at points C or D. The objector has also included Statutory Declarations by two users who state that they did not encounter any gates during the time they used Restricted Byway AB27 between the 1930s and the 1960s.
10. However, it is possible that gates were open at the time the aerial photographs were taken and, if so, they would be difficult to see on the photographs. The gates being open might be the reason the submitted older Declarations do not accord with the aerial photographs and not noticing a gate does not necessarily mean that one was not present. Thus neither the aerial photographs nor the older user evidence is conclusive as to the non-existence of gates on the route.
11. On the basis of the map and user evidence I accept on the balance of probabilities that there have been gates on Restricted Byway AB27 in the past, but it would appear that the location of those gates has varied over the years. The first record of a gate at point B is in the late 1960’s/early 1970’s, which post-dates the dedication of public rights.
12. The last record of any gates at points A and C was in the late 1960’s/early 1970’s and at point D in 1961, until the appellants erected gates at points A and B in 2014. The objector indicates this as the date the lawful use of Restricted Byway AB27 was brought into question for the purposes of section 31 of the Highways Act 1980 (“the 1980 Act”). No evidence of gates at points A, C or D within the 20 years prior to the date of challenge has been adduced, which accords with the objector’s evidence, nor of there being no intention during that period to dedicate a highway.
13. It was held in *Gloucestershire County Council v Farrow & Others* [1985] 1 WLR 741 that if a right of way originally dedicated subject to a limitation or condition is subsequently used for a 20-year period during which time it is free from that limitation or condition, the highway is presumed to have been rededicated free from the limitation or condition under the terms of section 31(1) of the 1980 Act.

Conclusion on Appeal A

1. For the reasons given above, it is reasonable to conclude that, having regard to the totality of the evidence and on the balance of probabilities, no gates should be recorded as limitations on Restricted Byway AB27 at points A, B, C or D.

 Appeal B - downgrading

1. The leading judgement regarding the deletion of rights from the DMS, and by analogy downgrading, is that of *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] *(“Trevelyan*”). This sets out that the standard of proof required to justify the removal of rights from the DMS is no more than the balance of probabilities, and this is the basis on which my decision will be taken.
2. However, evidence of some substance must be put in that balance if it is to outweigh the initial presumption that the higher rights exist. It is for those who contend that a right of way is of a lower status than that shown on the DMS to prove that the DMS requires amendment due to the discovery of evidence, which when considered with all other relevant evidence, clearly shows that the right of way should be downgraded.
3. The appellants contend that Restricted Byways AB27 and AB28 were mistakenly recorded as RUPPs on the 1952 DMS. The evidence discovered is that the public rights established at the time of the Finance Act were of no higher status than public footpath. There is an absence of any documentary evidence to support the subsequent inclusion of the whole of either routes AB27 or AB28 on the DMS as a Road Used as Public Path (RUPP).
4. However, as it was out in *Trevelyan*, “*It was of the nature of things that such evidence might be lost with the passage of time, in which event an assumption should be made that such evidence had nonetheless existed.*” *Trevelyan* also set out “*In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed*”. With the distance in time from the production of the DMS, it is unlikely that anyone could show, with any degree of certainty, the evidence that was considered at the time of producing the DMS which led to the decision to record the routes as RUPPs.
5. The appellants suggest that this evidence may have been knowledge of actual use by the public on horses and vehicles during the period immediately preceding the production of the DMS (1929-1949). Even so, the appellants contend that public use could only have been on foot; any other use would have led nowhere as the routes only connect with footpaths. However, the OMA suggests that S-T-U on the map may have been a public highway providing a connection for the routes. Even if not, the OMA contend that there are many examples of cul-de-sac restricted byways in Kent, including in the Tenterden area, so that being a cul-de-sac would not necessarily be evidence of a lower status.
6. The appellants also contend that when AB27 was categorised as a RUPP it was described as a Carriage Road Footpath. It is suggested that this is indicative of either footpath or bridleway being the historic status of the route. The objector to the claim though draws my attention to *Regina v Secretary of State for the Environment ex parte Hood*, in which ‘CRF’ is taken to denote a “cartroad footpath”. This is one of the two non-statutory subdivisions of “road used as a public path” used by local authorities in preparing the DMS. In the judgement Lord Denning opined that a “road used as a public path” came within the category of a cartway over which the public have a right. The label “CRF” does not therefore support the recording of AB27 and AB28 other than as RUPPs.
7. The appellants also suggest the bypass gates for cattle grids along the route being only wide enough for pedestrians or horses is indicative of no higher than bridleway status. However, I do not find the width of the bypass gates to be sufficient to displace the presumption that the routes were correctly recorded as RUPPs on the DMS.
8. The burden of proof lies with the appellants to demonstrate that RUPP status was incorrect and that lower rights should be recorded. The appellants have not discharged that burden by demonstrating that the evidence that led to the decision to record the routes as RUPPs, which I should assume to have existed, was flawed. Nor have they provided evidence that the correct procedures were not followed in the recording of routes AB27 and AB28 as RUPPs on the 1952 DMS.
9. There were no objections to the inclusion of these routes as RUPPs at that time. Objections were made, however, to the proposed reclassification of the routes as footpaths as part of the review commenced under the Countryside Act 1968. That review was subsequently abandoned and the routes remained as RUPPs until reclassified as Restricted Byways under the Countryside and Rights of Way Act 2000.
10. The Countryside and Rights of Way Act 2000 (“the 2000 Act”) allows a Restricted Byway to be deleted if there was no public right of way over the route shown as a RUPP immediately before the commencement of section 47 of the 2000 Act, that being 2 May 2006. The 2000 Act also allows the reclassification of a route to a lower status where there was an outstanding application or Order made before the commencement of section 47. Neither are the case with this appeal.
11. Moreover, the Defra publication *Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways A guide for local authorities, enforcement agencies, rights of way users and practitioners* (Version 5 May 2008) provides guidance on modifying the DMS. Paragraph 99 of the publication sets out that; “*As restricted byways that were formerly RUPPs were statutorily reclassified as restricted byways (by sections 47-51 of the CROW Act), they cannot be downgraded through the definitive map modification process.*”
12. I accept that the Defra publication includes a disclaimer that the contents merely represent Defra’s view of the law and does not take the place of the law. Senior Counsel has advised the appellants that the Defra guidance is incorrect and that it remains possible to amend the status of former RUPPs now recorded as Restricted Byways, although this opinion is not adduced. I also acknowledge that section 53(3)(c)(ii) of the 1981 Act is not expressly modified to not apply to restricted byways. However, I do not lightly dismiss the Defra guidance and do not find this sufficiently persuasive that the guidance is wrong in law.

Conclusion on Appeal B

1. For the reasons given above, it is reasonable to conclude that, having regard to the totality of the evidence and on the balance of probabilities, that Restricted Byways AB27 and AB28 should not be downgraded to Public Footpath status.

Conclusion

1. Having regard to these and all other matters raised in the written representations I conclude that both Appeal A and Appeal B should be dismissed.

**Formal Decision**

1. Both Appeal A and Appeal B are dismissed.

Martin Small

INSPECTOR