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| **Appeal Decision** |
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| **by A Behn Dip MS MIPROW** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 16 August 2023** |

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| **Appeal Ref: ROW/3305267** |
| * 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 Somerset Council (the Council) not to make an Order under Section 53(2) of that Act.
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| * By application dated 1 March 2010, South Somerset Bridleways Association (SSBA) claimed that footpath Y 7/12 from the Old Rectory to Netherton Lane, should be upgraded on the Definitive Map and Statement for the area to bridleway status.
* The application was refused by the Council and the applicant was formally notified on 12 July 2022.
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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 on the basis of the papers submitted. I have not visited the site, but I am satisfied that I can make my decision without the need to do so.
2. In writing this decision I have found it convenient to refer to points marked on the Council’s plan, and I therefore attach a copy of this plan.

**Main Issues**

1. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority, (in this case Somerset Council) to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
2. Where it is proposed that an existing way should be upgraded from footpath to bridleway status, Section 53(3)(c)(ii) of the 1981 Act specifies that an Order should be made following the discovery of evidence which, when considered with all other relevant evidence, 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’*. The evidential test to be applied is the balance of probabilities.
3. The claim was based solely on historical documentary evidence. For documentary evidence, section 32 of the Highways Act 1980 (the 1980 Act) requires consideration of any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.

**Reasoning**

*Day and Masters Map 1782 and Greenwoods Map 1822*

1. A route is shown from point A to approximately point A2, on both maps, depicted in the manner of a cross road and ending in a cul de sac. Due to these maps being commercial, it is possible that this section of the route may have held higher rights than a footpath, however they are of limited value, as the recording of rights were not the purpose of these maps, and furthermore, not all of the route is shown.

*Closworth Tithe Map and Apportionment 1838*

1. The Tithe Map depicts the entire route, bounded by two solid lines and coloured sienna in the same manner as other roads that are now public highways. SSBA submitted that the colour sienna indicates a bye or cross road, and that if only footpath rights existed, the denotation would have been a dotted line, rather than the solid lines shown. The sienna colouring, although alluding to a vehicular highway is not conclusive evidence of that status. The Council pointed out several cul de sacs were shown in a similar manner on the Tithe map that were not deemed highways on later maps. However the application route is not a cul de sac route and is represented as a through route, joining highway to highway, rather than spurs leading to properties or farms, which is more likely to indicate highway in a similar manner as other routes on this map.
2. The route is not allocated an apportionment number and runs between separately apportioned lands, which SSBA pointed out was the same for now recorded public roads. Whilst the Council submitted that the route being unnumbered could indicate it was a private unproductive road, its depiction as a through route in the manner of a road or lane, along with the lack of an apportionment number raises an inference of higher rights than a footpath.
3. The apportionment refers to land in the area being exempt from the payment of tithes as ‘twenty-two acres, three roods and twenty-seven perches roads and waste unprofitable.’ SSBA had calculated the acreage to meet the total of ‘roads rivers and waste’ in the village and submitted that the acreage of the application route was needed, in order to reach the correct total in the apportionment. The Council are correct that it is not safe to conclude with any degree of confidence, the combination of routes which were involved in the figure roads and waste.

*Order of Exchange of Lands 1851-1852*

1. This map was produced as a legal record for the exchange of lands between Lord Portman and Reverend Bower, in the area of section A-B of the application route. Section A-B, which would likely have been used to access these land parcels, is again coloured sienna in the same manner as other nearby public roads.
2. The Council acknowledged that although it is plausible that the mapmakers considered this a public road, there is no explicit evidence of this and that the colouring of the route may have been used as a point of reference to draw attention to the relevant parcels of land.
3. SSBA pointed out that there was no mention of easements in the accompanying document, although I do not have the detailed document before me. They feel that because this was a legal document, easements would have needed to be in place if public rights were not in existence, in order to access the land plots being exchanged. The Council suggested that there was nothing in the extract from the document that suggested easements would or would not have been recorded.
4. The Order of Exchange of Lands is a legal document and I consider it unlikely that the route was coloured in the manner of a public carriageway solely to distinguish between the land parcels for exchange. I consider this document offers some reputation of a higher status than a footpath, at least between section A-B, albeit I do acknowledge that the document was not drawn up for the purpose of identifying public rights.

*Yeovil Highway Board records 1863*

1. This record depicts the entire route, bounded by two solid parallel lines. It is uncoloured, indicating it was not maintained by the highway board. This record shows good evidence of the physical existence of the route but it would appear that the Yeovil Highway Board did not recognise it as a highway.
2. The Council drew attention to the fact that many of the routes that were uncoloured on this map also no longer exist, however that does not necessarily mean that rights did not exist on this particular route. As the Council acknowledged, one uncoloured route is now recorded as bridleway Y7/11 and an Order has been made (albeit not yet confirmed) for a restricted byway on another.

*Ordnance Survey (OS) Maps from 1811 to 1946*

1. On the1811 map, section A-C of the route is illustrated in the same manner as other minor roads, several of which are now vehicular highways. Section C-D is not recorded on the map.
2. By 1886/87 the OS maps show the entire route, mostly uncoloured and denoted by parallel solid lines. On the 1899–1901 maps, the entire route is shown again as an unmetalled road. The 1919 and 1928 maps show section A-C as a minor road, whereas section C-D, denoted by a dashed line, is depicted as a footpath or bridleway.
3. On the 1946 OS map, taken from a survey in 1930, the route is on a more approximate line than previous maps, shown as an unfenced road between points C1-D, as an unmetalled road between points B1-C1 and as a footpath or bridlepath between points A-B1.
4. In their appeal SSBA pointed out that on the 1903 maps there were footpaths depicted adjacent to the application route, terminating where they joined it. They felt it unlikely that footpaths would end on a through route which had no public rights. SSBA acknowledged that if the through route only held footpath rights, this would be logical, however they suggested that if this were the case, the denotation of a footpath would have continued across the application route too.
5. The Council submitted that the footpaths shown on the OS maps were just a physical indication that those particular routes were not traversable by horses. They felt that the lack of the notation ‘F.P.’ on the application route would be entirely consistent with a private road over which footpath rights existed.
6. The OS maps present a consistent portrayal of the physical existence of the route, which up until the early 1900’s was shown on these maps as a minor unmetalled road. Later maps from the 1920’s depicted the northern section of the route as a bridlepath or footpath, and by 1946, most of the route appeared to be denoted as a footpath or bridleway.
7. As rightly pointed out by the Council, OS maps carry a disclaimer advising representation on the maps is not evidence of public rights, as supported by *Moser V Ambleside UDC [1925] KLGR, 537* which referred to OS maps, stating ‘they are only indicative of what are the physical qualities of the area which they delineate’.

*Finance Act records 1910*

1. On these records the majority of the application route is shown separately to the adjoining hereditaments and neither numbered nor coloured. Between points B-C the yellow line bordering hereditament 136 is not shown and although the Council felt it was unclear why this would be, it is possible that this was because hereditament 136 extended north, east, and west of the route. This same lack of shading was also shown on a section of carriageway which is now the A37, where it was bound either side by the same hereditament.
2. Notably the field book for hereditament 136 recorded a deduction of £150 for ‘public rights of way or user’ although it is unclear what this actually referred to and could have been for footpaths that were shown running through the hereditament.
3. The Council felt that uncertainty around the shading of the route between points B-C reduced the weight which could be given to this document, but in light of the fact that the A37 had a similar lack of shading on one section, but is a public carriageway, I am not inclined to agree.
4. The Council also considered that whilst the most likely reason for a route to have been excluded is because it was considered a highway, they felt that there were other potential reasons for the exclusion, which further limited the evidential value of this document.
5. The Finance Act records do indicate an intention to exclude the route from the valuation. As cited in *Fortune & ORS v Wiltshire Council & ANR [2012] EWCA CIV 334 [71]*, ‘the fact 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’.
6. I consider this document as significant evidence that the route was considered a highway and a through route at that time. In the absence of contrary evidence as to why the route was excluded, it is not an unreasonable assumption by SSBA, that a highway of higher status than a footpath may have existed.

*Bartholomew’s Maps 1902, 1911, 1923 and 1927*

1. All of these maps depicted the entire route as ‘an inferior road,’ not to be recommended to cyclists, and not as a footpath or bridleway. SSBA submitted that as cyclists could not travel on bridleways at that time, this was inference that the route held higher status. The Council pointed out the disclaimer on later versions of Bartholomew’s maps, that representation of a road on the map was not evidence of a public right of way. Albeit I agree with the Council, the consistency of depiction on these maps does afford some reputation that the route may have been public and therefore is of assistance when regarding the evidence as a whole.

*Manor Farm Plan 1924*

1. The 1924 Farm Plan incorporated land through which section A-C of the application route runs and the route was shown by solid parallel lines in a similar manner to other routes that are now public roads. The Council pointed out that the roads depicted on this Plan that are now public carriageways, were generally annotated with directional details. However, this is not the case for the road on the plan that ran east to west through Closworth at point A, which is a carriageway today. Furthermore, I would not expect this route to have been labelled with directional details as both termini of the route form a T junction with other roads.

*Handover Map 1929*

1. On this map the route was depicted by two solid parallel lines, uncoloured and unannotated. It is clear evidence that the route existed but was not considered as a highway maintainable at public expense.

*Ministry of Agriculture records 1941-1943*

1. The application route is recorded on this survey, albeit the maps before me do not seem to include the land encompassing the short section of C-C1. Sections B-C and C1-D fall between land holdings, whilst section A-B, denoted by two solid parallel lines, falls within holdings that encompass land on both sides of the route.
2. The Council felt that because section A-B fell within land holdings, it reduced the evidential weight of the document in showing vehicular rights, albeit they acknowledged that for those sections excluded from holdings, the survey could be evidence of public vehicular rights. Nevertheless public rights of way often travel across private land and it is of note that part of the current public carriageway running east to west through Closworth, that connects the A37 with Weston Lane is also shown as included in a holding in these records.

*County Road records 1930’s and 1950’s*

1. Both records record the route, which was marked in purple, designating a non-county road. It is unclear whether this designation referred to a private route, or a public route that was not maintained at public expense.

*Definitive Map and Statement (DMS) preparation records and Local Authority Records*

1. When preparation was underway for the compilation of the DMS it appeared that the Highway Authority undertook the survey for this area, rather than the Parish Council. Initially the route was omitted from the definitive mapping process but was then added after an objection was raised by the Ramblers.
2. The Particulars of Objection from the Ramblers dated 1959, described the exclusion of 2 routes running parallel to each other, (A) and (B). (B) is thought to be the route in question and was described as a ‘*Lane running parallel with (A) from east of Rectory, Closworth, generally northerly to Netherton Lane.’* The County Surveyor observed that as the 2 routes ‘*duplicated each other’*, only one should be registered, and directed that a footpath status be designated. This designation was made on the basis of the finding of a land search document in 1958, which had referred to the 1930’s road records and stated that the lane was not a public highway.
3. Of interest were the observations from the County Archivist on the Particulars of Objection. The Archivist stated that on the 1811 OS map, ‘*the southern half only shown as a road*’ and that on the Tithe Map of 1838 ‘ *the entire length is shown as a road - probably part of parish highway system*’. This document appears to indicate that the County Archivist, in 1958, interpreted the Tithe Map as showing that the route was part of the parish highway system, whereas the County Surveyor used the 1930’s road records and related land search to support his recommendation of footpath status.
4. Later Local Authority records show that the southern end of the application route between points A- A1 was diverted slightly to the east in 1990.

**Conclusions**

1. There is clear physical depiction of the route having been in situ since at least 1838, on most maps submitted in evidence. As time progressed it appears that the condition of the route may have declined, as supported by the later OS maps which depicted certain sections of the route as a footpath.
2. The Council consider that although the Finance Act 1910 records and some other earlier maps may suggest higher highway rights, they feel that these documents are of relatively low evidential weight, being that their primary purpose was not to record public rights. Whilst not inconsistent with the existence of higher rights than are currently recorded, they feel these maps are not conclusive evidence that the DMS should be amended.
3. By contrast, SSBA consider that the majority of evidence shows the route as a lane and that in the absence of evidence showing that only footpath rights existed over it, their claim should stand.
4. Albeit modern Council records do indicate that the route was considered a private road, several older records do infer that the route was a public highway of possibly higher status than a footpath. The Council acknowledge that the Finance Act 1910 record, which is a legal document of some weight, was not widely available when the DMS was drawn up. However they feel that a lack of direct affirmation of higher rights prior to this, suggests that the current designation of a footpath is more consistent with the overall evidence.
5. Albeit I agree that no single piece of evidence conclusively points to the footpath having a higher status than currently designated, there are several documents which, when considered together as a whole, have a synergy that does suggest that higher rights may exist. Given the dependence of this case on historical evidence, I consider that *Fortune & Ors V Wiltshire Council & Anr [2012]* applies. Lewison LJ commented that ‘*where an inquiry goes back many years or in the case of disputed highways, centuries, direct evidence will often be impossible to find. The fact-finding tribunal must draw inferences from circumstantial evidence.’*
6. I consider the evidence in this case to be finely balanced and the views expressed by each party, well-argued and by nature subjective, raising inferences either way. Overall, I do find that when the evidence is taken as a whole, on the balance of probabilities, the case tips just in favour of a possible higher historical status subsisting on Footpath Y 7/12. Correspondingly I will allow the appeal for an Order to be made to upgrade the footpath to a bridleway.

**Other Matters**

1. The Council have advised that an Order has been made to add a restricted byway known as Ridgeway Lane to the DMS, which terminates at point C of the application route. They acknowledge that the route, which consisted of similar evidence to this case, reached the lesser test of ‘reasonably alleged’ for the legal tests applied for the addition of a new public right of way, however as it is an opposed order, it remains to be seen whether the application satisfies the higher test.
2. SSBA commented that if the Ridgeway Lane Restricted Byway Order were successful in confirmation, it would leave a cul de sac route should Footpath Y 7/12 not be upgraded to a similar status. Therefore they now feel that the application route should be upgraded to a restricted byway rather than a bridleway.
3. The making of an Order in this particular case will afford an opportunity for further testing of the conflicting interpretations submitted, as well as consideration of whether the evidence is sufficiently persuasive for modification of the Order to a higher status than bridleway. It would also enable the confirmation of this route and the interlinked route of Ridgeway Lane to be considered in tandem.
4. Following submission of this appeal, 2 objections were made. The objectors in their submissions, felt that the topography of the ground did not lend itself to anything other than a footpath and submitted detailed accounts with photographs, illustrating how unsuitable the route currently is and would have been in the past, for use by equestrians or for herding purposes.
5. They also felt that the lack of physical evidence of a substantial bridge over the water course that is present now and would have been historically, did not support the existence of any highway other than a footpath. In support they commented that long-time residents and neighbours thought the application route had historically always been a footpath with a rickety footbridge, used by people at Netherton to attend church at Closworth. I accept that there is a lack of physical evidence of a historical bridge substantial enough to have supported equestrians, but that does not necessarily mean it did not exist.
6. The objectors also considered that the historical demographics of the area suggested that the village was never sufficiently prosperous to have possessed horses to use the route, but as the Council rightly point out, this does not necessarily mean bridleway rights did not exist.
7. I understand the viewpoints submitted by the objectors and agree that use of the application route, other than on foot over the past 100 years is most unlikely. However, the historical mapping does suggest that higher rights may have been in existence, extending back to 1838.
8. One objector felt that section A-A1 of the application route, which was subject to a diversion order in 1990 due to the old footpath being impassable, should not now be able to be upgraded retrospectively. He felt that although this section would be ‘feasible’ for use by equestrians, to upgrade it would be ultra vires. I acknowledge the point made and this is a matter that would require consideration should the Order be confirmed.
9. A number of other matters were raised by objectors, mostly relating to the suitability desirability, financial burden, and safety concerns likely to arise if the footpath were to be upgraded. Whilst I recognise all of the above as very real and genuine concerns, the legal criteria on which this case must be determined does not allow for consideration of such matters.

**Overall Conclusion**

1. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

**Formal Decision**

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Somerset Council is directed to make an Order under section 53(2) and Schedule 15 of the 1981 Act within three months of the date of this decision, to modify the definitive map and statement for the area by upgrading the existing footpath Y 7/12 to bridleway status.
2. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

A Behn

 **Inspector**

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