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| **Appeal Decision** |
| by C Beeby BA (Hons) MIPROW |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 23 August 2024** |

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| **Appeal Ref: ROW/3325426** |
| * The appeal is made under Section 53 (5) and Paragraph 4(1) of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Somerset County Council (the Council) not to make a definitive map modification order (DMMO) under s53(2) of that Act.
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| * The Application dated 27 August 2008 was refused by the Council on 22 March 2023.
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| * The Appellant claims that the definitive map and statement (DM&S) of public rights of way should be modified by upgrading sections of public footpath in the parishes of Hinton St. George and Merriott to restricted byway.
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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 to the 1981 Act.
2. The appeal has been determined on the papers submitted. I have not visited the site, however I am satisfied that I can make my decision without such a visit.
3. I have found it convenient to refer to points on the Application Route plan (H03-2020) and therefore a copy of that plan is attached to this decision. There are some discrepancies in the stated numbering of the existing public footpaths along the application route within the submitted documents. Thus, for the avoidance of doubt, this decision refers to the public footpaths between points A-B-C-D on the plan, i.e. between the junction with Eggwood Lane and a point near the junction with Bull Bridge Lane.

**Main Issue**

1. The main issue 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.

**Background**

1. Documentary evidence has been submitted in respect of the application. It sought to record a restricted byway between highways, comprising a section of recorded public footpaths (A-D on the plan), and an unrecorded section (D-E). The recorded section comprises part of two public footpaths, and one full public footpath. The full length of the application route is known as Niddons Lane. Eggwood Lane adjoins the application route at A. After processing the application the Council decided to make a DMMO which sought to record only the unrecorded section of Niddons Lane as a restricted byway. The appeal consequently relates to the footpath section (A-D).

Legislative Framework

1. Section 53(2) of the 1981 Act requires the surveying authority to make orders to modify its DM&S in consequence of certain specified events, as set out in Section 53(3).
2. Sub-section 53(3)(c)(ii) sets out a 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”.
3. The appellant’s claim relies on sub-section 53(3)(c)(ii) in seeking to upgrade sections of recorded public footpath to restricted byway.
4. The relevant test to be applied to the evidence is: Does a right of way subsist on the balance of probabilities? For this possibility to exist, clear evidence in favour of the appellant and no credible evidence to the contrary is required.
5. 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 shows that the route was once a public carriageway, restricted byway would consequently be the appropriate status to be recorded.

Reasons

*Evidence*

1. A 1796 Plan of Hinton St George Manor was produced to show property. A-B is shown coloured in the same way as highways, whilst the remainder of the route is absent except for a “stub” at its western end. No key accompanies the map, so that no clarification of the colouring’s meaning is available. Furthermore, the map was not produced for the purpose of recording public rights of way. The document shows the physical existence of A-B at the time but does not suggest its status.
2. An Ordnance Survey (OS) Old Series Map of 1809 depicts the full application route A-E between double solid lines and open to modern-day highways at both ends. It is submitted that it is shown as an “other road”. Footpaths and bridleways, tracks and very minor roads may look much the same on such maps. The document shows the physical existence of the full route at the time but does not suggest its status.
3. The Greenwoods Map of 1822 shows A-B, which is open to the highway at its southern end, as a “cross road”. B-E is shown only by “spurs” of route at both ends.
4. The Hinton St George Tithe Map of 1838 shows most of A-B only. The Merriott Tithe Map of 1843 shows A-E. On both maps the route is shown between solid lines and is not numbered. It connects to current highways. The Merriott map shows a recorded public footpath to join the route at D, and markings along the route which correspond with modern-day field accesses.
5. An 1862 Crewkerne Highway Board Map shows the physical existence of the full application route. The lack of colouring of the application route suggests that the Highway Board did not consider itself to be responsible for its maintenance.
6. A Sale of Lands document of 1866 shows section A to approximately C of the application route forming apparent access to a parcel of land for sale. No easement over the lane is referred to in the submitted evidence.
7. An 1883 Boundary Remark Book shows A-B and a “stub” towards C. Eggwood Lane is depicted in the same way as the application route.
8. An 1885 OS Boundary Sketch Map shows the whole of the application route to be open to the highway at both ends. The parish boundary is marked along A-B.
9. An 1885 Poulet Estate map was produced for the landowner, in order to show shooting estates in the area. It shows A-B, and a “stub” towards C, to be coloured in the same way as highways in the area. No key accompanies the map, so that the meaning of the colouring of routes is unclear.
10. An OS Map of 1886 depicts the full application route between double solid lines and open to modern-day highways at both ends. Whilst some highways in the area are coloured yellow, the route is uncoloured. The route is named Niddon’s Lane.
11. An OS Map of 1887 shows the full application route between double solid lines and open to modern-day highways at both ends.
12. An OS Map of 1898-1900 depicts the full application route between double solid lines and open to modern-day highways at both ends. It is an unmetalled road according to the key.
13. An OS Map of 1901 depicts the full application route between double solid lines and open to modern-day highways at both ends. It is named Niddon’s Lane.
14. The OS Object Name Book of 1901 records the route as Niddon’s Lane and describes it as “a lane extending from the main road from Lopen to Merriott to the roadway from Stratton to Merriott”. Eggwood Lane, to the south, is described as starting at Niddon’s Lane. Niddons Lane was consequently considered by the document’s makers to pass between two vehicular highways.
15. An OS Map of 1903 appears to depict the termination of Niddons Lane at the main road, rather than at point A.
16. The majority of the application route appears from the available copy of the Finance Act 1910 map to be excluded from surrounding land parcels. The faint colouring along the boundaries of land parcel 94 appears to be partially absent in the vicinity of point C. Whilst it is difficult to be certain from the limited available extract, this may however be accounted for by parcel 94 apparently being the only land parcel to include land on both sides of the lane.
17. A map of 1918 produced to identify land for sale at the Lopen Estate depicts A-B and a short “spur” east of B only. The route is named but no key is available to assist in the map’s interpretation.
18. OS Maps of 1919 and 1940 depict the full application route as an uncoloured “minor road”, according to the key for the 1919 map. The key states that “Private Roads are uncoloured”. The 1940 map additionally shows all three recorded footpaths adjoining B-E. The map shows that the route physically existed at the time of the survey.
19. A Handover Map of 1929 recorded those highways considered to be maintainable at public expense, according to the Rural District Council. A-B is coloured red and appears to be annotated as the parish boundary. B-E has been coloured grey as part of a longer line in each direction. Surrounding highways are marked in various colours.
20. An OS Map of 1929 shows the full application route between double solid lines and open to the highway at both ends. It confirms that the route physically existed at the time of the survey.
21. Road Records of 1930 and 1950 show the physical existence of the full application route but do not show it to be highway maintainable at public expense.
22. An OS War Revision Map of 1940 shows the application route as an unmetalled road.
23. Ministry of Food National Farm maps were prepared in conjunction with individual farm records of the National Farm Survey. The maps show the extent of each farm. A survey extract of 1941-1943 is provided, on which the application route is shown to be excluded from the surrounding holdings except where land on either side is in the same ownership. The main road is shown in the same way. Whilst it is submitted that vehicular highways were excluded from the holdings, the authority for this conclusion is unclear. The primary purpose of the survey was, however, to classify farms by productivity, rather than to record rights of way.
24. In terms of records created in the production of the DM&S, the application route is shown on the base survey map but is not annotated, and is not mentioned in the survey cards. Most of the route is uncoloured on the Draft Map, however C-D forms part of a route coloured grey and connects the approximate routes of the recorded footpaths which adjoin these points.
25. Two objections to the Draft Map concerned the omission of one or more routes, including part of Niddons Lane, from the DM&S. Whilst copies of the objections are not held, a table summarising them was created. The clerk’s observations record that Niddons Lane was not considered to be a County road, and that the routes appeared to be public. Determinations were made to add one or more footpaths to the map. The Draft Modification and Definitive Maps subsequently showed A-D as a footpath forming part of a network of routes. D-E was not shown on the maps as a public right of way.
26. A “Victorian History of Somerset” publication appears to refer to A-B as a “road”. The basis for this description, and what is meant by the term, are unclear. In light of this uncertainty the document does not attract weight in favour of the appeal.
27. A Land Registry INSPIRE report of 2016 shows the application route to be separate from any registered landholding.

*Assessment*

1. The depiction of a cross road on a historic map does not automatically suggest the existence of public rights over it. The term’s meaning may vary depending on the road pattern or markings on each map, with potential meanings including a highway running between, and joining, other highways, a byway, and a road that joined regional centres.
2. In the submitted extract from Greenwoods Map several routes in the vicinity are shown in a similar way to the Order route, i.e. as “stubs” rather than through routes. The reasons for this are unclear. Furthermore, other local routes which are unlikely to have carried public vehicular rights are shown in the same way. As a result of these considerations, whilst the document shows the physical existence of A-B at the time, it does not lend weight in favour of the existence of vehicular or equestrian public rights over it.
3. The application route is shown not to be titheable on both Tithe Maps. This indicates a route which could be public or private. A dashed line on the Merriott map suggests the physical existence at that time of a recorded public footpath adjoining the route at D. The application route is shown to be of a greater width between double solid lines, and hence in a different way from the footpath. It is generally unlikely that a tithe map will show public footpaths and bridleways, as their effect on the tithe payable was likely to be negligible. The documents consequently suggest that the full Order route was considered by the document maker to be suitable for vehicular use. However, whilst the Tithe evidence shows that the application route physically existed at the time, they do not shed light on whether its status was considered to be public or private.
4. Records produced between 1862 and 1950 of highways considered to be maintainable at public expense do not indicate the application route as such, but show the physical existence of the route over that period. Other routes in the vicinity which are shown in the same way include both recorded public bridleways and routes with no recorded status. Thus, the documents do not shed light on the application route’s believed status. Nevertheless, the route’s omission from the highway records does not necessarily indicate that it was considered to be private, as other reasons may exist for this. These include the authority being unaware of highway rights along the route, the route being considered to be public but not maintainable, or the route being considered to be a public footpath or bridleway.
5. The estate and property-related documents of 1796, 1866, 1885 and 1918 show the physical existence of part or all of the route, but do not indicate its status. The sale map of 1866 shows a route which was likely to be available for use by vehicles to reach the land concerned, but does not indicate whether such use was considered to be public or private in nature.
6. The OS evidence generally shows the route’s physical existence and that it was considered to be a road rather than a footpath or bridleway. However, it does not indicate whether it was considered to be available for public or private use.
7. The Council states that a comparison with other vehicular highways shown on the document in a similar manner seems to suggest that the maker of the Finance Act map intended to show the full route of Niddons Lane to be excluded, including that part which runs through parcel 94. The parties agree that the most likely interpretation of the Finance Act document is that the full length of Niddons Lane was excluded from the valuation. If a route is external to any numbered hereditament, there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books; however, there may be other reasons to explain its exclusion.
8. The National Farm map of 1941-3 and Land Registry records show the physical existence of the route but do not indicate the nature of any rights considered to exist along it. The DM&S records do not add weight in favour of, or against, the appeal.
9. It is submitted that some of the OS evidence shows Niddons Lane to run from the vehicular highway and therefore to include the recorded bridleway CH 13/17. It is difficult to ascertain whether this is the case from the available extracts. Nevertheless, the submission is supported by the reference in the Object Name Book of 1901 to Niddons Lane starting at the main road, and to Eggwood Lane starting at Niddons Lane.
10. As set out above, as A-D is a recorded footpath, clear evidence in favour of the appellant and no credible evidence to the contrary is required for a right of way to be considered to exist along it on the balance of probabilities. The parties agree that the most likely interpretation of the Finance Act 1910 document is that the full length of Niddons Lane was excluded from the valuation, and I see no reason to reach an alternative view. In light of the Finance Act evidence and the submissions thereon, there is a strong possibility that the application route was considered at that time to be a public highway.
11. Furthermore, Niddons Lane as a whole has been consistently shown for over two hundred years to have a width which would accommodate vehicular use, and to form a through route between physical boundaries which was open to routes of a higher status, albeit with a modern-day vehicular highway at one end only. It is shown as unproductive land in Tithe mapping. No public attraction is identified at D which would explain the existence of any cul-de-sac restricted byway rights (which could be recorded on the DM&S if the appeal did not succeed) over the eastern end of Niddons Lane only. The evidence in respect of the footpath and unrecorded sections is generally the same, and does not suggest a change of status at D from footpath to restricted byway. There is nothing before me to suggest that the objections to the DMMO for D-E include any evidence indicating that restricted byway rights do not exist over the lane, which could be relevant to my assessment. Overall, there is minimal contradictory evidence against the appeal.
12. I acknowledge the differing tests which the Council was required to apply to the recorded and unrecorded sections of the application route, and that the DMMO seeking to record a restricted byway over D-E has been made but has not been confirmed because it received objections. Nevertheless, in view of the above considerations, it is improbable that a cul-de-sac restricted byway existed over either D-E or A-D.
13. Overall, there is clear evidence in favour of the appellant that an unrecorded vehicular public right of way is likely to exist over A-D, and there is no credible evidence to the contrary. 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.

**Other Matters**

1. I acknowledge concerns raised regarding maintenance and the suitability of the application route for other non-pedestrian use. Nevertheless, the only issues here are set out above: suitability and amenity must be disregarded in applying the relevant tests. The concerns consequently lie outside the criteria set out within the relevant legislation. As a result, I cannot give them weight in reaching my decision.

**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 County 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 upgrade sections of public footpath in the parishes of Hinton St. George and Merriott to restricted byway. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.

*C Beeby*

INSPECTOR

ROUTE PLAN

