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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: 5 August 2024** |

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| **Appeal Ref: ROW/3326721** |
| * 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 26 November 2009, South Somerset Bridleways Association (the applicant) claimed that bridleway CH 19/36 Garstone Lane, in the parish of Merriott, should be upgraded on the Definitive Map and Statement for the area to restricted byway status.
* The application was refused by the Council in March 2023 and the applicant was formally notified in June 2023.
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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. 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.
2. When determining whether or not to make an Order upgrading CH 19/36 Garstone Lane (points G-K on the plan) from a bridleway to a restricted byway, the Council simultaneously considered another application for upgrading a connecting bridleway CH 19/25 Eggwood Lane (points A-F on the plan). This does not form part of the appeal before me.

**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 bridleway to restricted byway 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.
4. As this application is concerned with possible unrecorded vehicular rights, it is necessary to have regard to the provisions of Section 67 of the Natural Environment and Rural Communities Act 2006, which extinguished rights of way for mechanically propelled vehicles (MPV’s), subject to certain exceptions. The exceptions do not appear to apply in this case and therefore, should this appeal be allowed, no public rights for MPV’s would exist over the application route.

**Reasoning**

*Ordnance Survey (OS) Map 1809-1811 Old Series Map (Cassini Timeline reprint)*

1. This OS map depicts the route between two solid parallel lines for its entire length, appearing similar to other roads, many of which are vehicular today. The applicant considered that this map presented good evidence that the route carried vehicular rights as this map did not generally show footpaths or bridleways. Albeit this is true, the map was not created for the recording of public rights. However it is good evidence of the physical existence of Garstone Lane as far back as 1809, and of a width wide enough to allow vehicular use.

*Greenwood’s Map 1822*

1. Greenwood’s Map shows the entirety of Garstone Lane, in the manner of a ‘cross road.’ There was reference by the Council to *Hollins v Oldham [1995]* where Judge Howarth took the view that ‘cross roads’ meant a public road in respect of which no toll was payable. As the Council stated, the judge in question was considering a map produced 35 years earlier and by a different cartographer, and I agree that the precedent set should be considered, but in the context of any individual map.
2. Other routes were also shown on this map that have no public rights recorded across them today, albeit the majority are now public highways. The Council drew attention to *Merstham Manor Ltd v Coulsdon and Purley UDC [1937]* where the judge concluded there was nothing in the map to show whether the author intended to represent the road on the map as a public highway.
3. The map was produced for sale to the general public, and as acknowledged by the Council, it is likely that the surveyor would have focused on roads that were accessible or of some benefit to the public. As a result of caselaw, the map does hold some limited weight.

*Merriott Tithe Maps 1843*

1. The Tithe Maps depict Garstone Lane bounded by two solid lines, in the same way as the connected highways, which are acknowledged as vehicular highways today. The route is also not allocated an apportionment number and runs between separately apportioned lands. Its depiction as a through route in the manner of a road or lane with no indications of obstructions throughout its length, accompanied by the lack of an apportionment number, does raise an inference of possible higher rights than a bridleway.
2. It is the case that the map was not drawn up with the purpose of identifying rights. Nevertheless, the depiction of Garstone Lane on the Tithe Map as a through route and the fact that no tithe was payable could imply public vehicular rights, albeit as the Council submit, vehicular use may also have been by virtue of private rights.

*Crewkerne Highway Board Map 1862*

1. This map appears to have been devised to allocate roads that were considered to be maintainable by the Highway Board, with those that were maintainable, being coloured. Garstone Lane appears a through route to roads coloured red and yellow, albeit it is uncoloured itself.
2. The Council considered that this document was evidence against public vehicular rights, in that the Highway Board would have been unlikely to accept liability of a route lightly. In these circumstances the Council felt that the roads coloured were strong evidence of public highways, however those that are uncoloured were unlikely to be so. They further pointed out that most of the uncoloured roads do not carry public vehicular rights now and that many are cul de sacs.
3. Albeit I accept that coloured roads were strong evidence of a public vehicular highway, I do concur with the applicant that the map did not necessarily indicate that uncoloured routes were private, only that the authority was not responsible for maintenance of these routes.

*OS Maps (including Boundary Sketch Map 1885) from 1887 to 1940*

1. All of the maps submitted are consistent in their portrayal of Garstone Lane as a through route, generally depicted between solid parallel lines. In the 1898-1900 map the route is depicted as an unmetalled road, and in the 1919 map Garstone Lane is shown as a minor road.
2. It is noted by both parties that many of these maps depict features marked as ‘F.P’ crossing adjoining land and meeting up with Garstone Lane at various points. Some of these features are now recorded as public footpaths, others are not.
3. Ultimately the purpose of OS maps was not to record public rights of way, but rather what physical features existed on the ground. From 1888 OS maps carried a disclaimer to the effect that representation of a track or a way on the map was not evidence of a public right of way. The disclaimer was presumed to apply to earlier as well as later maps. Furthermore, in 1905 surveyors were instructed that ‘OS does not concern itself with rights of way and survey employees are not to inquire into them’. Subsequently these maps, although good evidence of the physical existence of the route, hold limited weight in demonstrating the status of any public rights.

*OS Object Name Book (ONB) 1901*

1. The ONB describes Garstone Lane as ‘occupation road.’ The Council considered that there must have been reason to describe the lane as an occupation road and felt that use of this term was commonly used to describe private roads for the use of the occupier or owner. They drew attention to other ‘lanes’ in the ONB which were also described as occupation roads, two of which were cul de sac routes. The Council therefore considered that the ONB was evidence in favour of a private vehicular road but was silent on the existence or otherwise of public rights.
2. By contrast, he applicant considered that Garstone Lane ‘would have been considered to have the same status as other routes described as *‘lane’* rather than bridleway.’ They submitted that the ONB did not specifically denote the route as a private road and concluded that the evidence supported the claim that the route carried vehicular rights.
3. There was a comprehensive submission referencing caselaw from the applicant on the interpretation of the word ‘lane’ and the implication that it meant a minor road leading between one main road and another. Although I acknowledge the viewpoint of the applicant in that the application route does run between two public roads, I do agree with the Council that when considering that some cul de sacs referenced in this case are also called ‘lane,’ the word could also have been used as a descriptive term for the character of a route.
4. Ultimately, the ONB was concerned with the correct spelling of places shown on the maps, not with their status, public or private. The book is of assistance in showing the physical existence of the route at this time and its character.

*Finance Act records 1910*

1. On these records the application route is shown separately to the adjoining hereditaments and is neither numbered nor coloured. 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’*.
2. The Council acknowledged that the application route shown in such a manner would be indicative of public vehicular rights, as routes with lower rights were typically dealt with by deductions recorded in the field books. However they did point out that there were other, albeit less common reasons, for the exclusion of a route, such as the existence of lower public rights or a private road in multiple ownership.
3. Aligning to this the Council pointed out that hereditament 17, east of point G on Garstone Lane did show a deduction for public rights of way, albeit they acknowledged that the deduction was not specific to a number or type of right of way and that given the size of the hereditament it could well have been in relation to other rights of way. As pointed out by the applicant, the map showing hereditament 17 does depict other routes across this hereditament that are recognised public footpaths today.
4. The Council then drew attention to the unusual depiction of hereditament 17, where the yellow shading depicting the hereditament neither crossed the route or continued along its boundary, making it unclear whether the valuer was intending to include or exclude this part of the Lane from the hereditament. However the Council went on to accept that a comparison of other local routes shown in this manner which are public highway today, were depicted in a similar fashion.
5. With regard to the inclusion or not, of part of the application route within hereditament 17, the applicant had analysed the OS field parcels belonging to that hereditament and calculated the field parcels to total 92.362 acres, which is similar to the 92 acres, I rood and 35 perches notated in the field book entry accompanying the 1910 Map. They submitted that this calculation did not include the application route (which was depicted as a separate land parcel of 2 acres) and was evidence that the route was not included as part of hereditament 17.
6. Albeit the Council accepted the records as evidence in favour of public vehicular rights, they felt the unusual depiction of hereditament 17 slightly reduced the weight that can be given to the document. I do not accept that this should be the case given that by the Council’s own admission, recognised local public vehicular highways such as Merriott Road and the A37 through Closworth were also depicted in the same manner.
7. While I accept the Council’s submission that exclusion of the route from the Finance Act Records could be due to other reasons, I do consider that the Finance Act records are supportive of possible public vehicular rights over the application route at that time.

*Bartholomew’s Map 1927*

1. The 1927 map denotes the application route uncoloured and between narrow parallel lines, which according to the key was an inferior road, not recommended to cyclists. *The* *Commission for New Towns v JJ Gallagher Ltd [2002] EWHC 2668 (Ch)* consideredBartholomew’s Map and the implication was that an uncoloured road was considered a public carriageway. As recognised by the judge in that case, the map itself does bear a disclaimer that representation of a road or footpath is not evidence of the existence of a right of way. Accordingly albeit this map is in favour of the existence of public vehicular rights, the weight it can be afforded is limited.

*Highway Road Records – Handover Map 1929, Road Records 1930 and 1950*

1. On these maps, the application route is shown in full, although it is uncoloured. These records do show the route existed, but were solely concerned with public maintenance liability and it is clear that the highway authority did not consider Garstone Lane as publicly maintainable. Overall these records do not weigh in favour of public vehicular rights at that time, however nor are they conclusive evidence of a status of a road.

*Definitive Map and Statement (DMS) Preparation Records*

1. When preparation was underway for the compilation of the Chard DMS, Garstone Lane was absent from the Parish Walking Survey Card. However at the time of the draft map an objection was received from the Ramblers due to its omission and it was added to the Draft Map. It is unclear from the papers before me how the bridleway designation was determined, but the observation by the clerk on the objection records was ‘appears to be public (Tithe Map, 1843)’.
2. The DMS provides conclusive evidence of the status of the right of way recorded at that time, but it is without prejudice to any question as to whether the public had at that date, higher rights than were recorded.

*Other sources*

1. The Ministry of Food National Farm Survey 1941-1943 shows the application route excluded from holdings, except where the land on either side is in the same ownership. I note that the County Road to the west of point G is shown in a similar manner. The applicant stated that they have found no instances where non-vehicular routes were depicted in this way, save for those which currently have applications for upgrading submitted.
2. In later correspondence the applicant also tendered the 1828 Dorset Road Map and the 1848 Map of Martock, both of which show the application route in the same way as other roads which are recognised as public vehicular highways today. The applicant felt that the 1828 Road Map was especially relevant as it was concerned with the introduction of road tax, implying roads would be shown, not bridlepaths or footpaths.
3. The Council acknowledged that the depiction of the application route was in the same manner as other known public roads today, but also pointed out that the same line style was used to depict some cul de sac routes such as the route to Waterloo Farm and Abbott Lane. Albeit the Council acknowledged that Garstone Lane was not a cul de sac, they considered that the same line style being used and the lack of a key meant that the maps were of little assistance beyond confirming the existence of the route at that time.

**Other Matters**

1. An objection was received to the appeal to upgrade Garstone Lane, wherein it was felt that to upgrade the bridleway to a restricted byway would be hazardous to horses, with the possibilities of bicycles approaching silently from behind. I understand this concern but as bicycles are able to use bridleways as well as restricted byways, this hazard is already in existence. Moreover, the legal basis on which I must determine this case, does not allow me to take factors such as safety and desirability into account.

**Conclusions**

1. As set out by the Council, the balance of probabilities test requires both sides of the evidence to be weighed against each other, with an Order being made if the scales tip in favour of a higher status having existed.
2. The Council considered that the DMS provided strong evidence of bridleway status and that this status was consistent with how the route was portrayed in the maps submitted in evidence. Accordingly they felt that as Garstone Lane was already acknowledged as a bridleway on the Definitive Map, any evidence that was indicative of public rights, but silent on status was consistent with the route as it is currently recorded.
3. It was their view that prior to the Finance Act 1910 there was minimal evidence which explicitly pointed toward public vehicular status, and they further felt that more contemporaneous evidence such as the ONB and the DMS gave reputation to their assertion that Garstone Lane was private.
4. Whilst I accept the viewpoint that the ONB describing the route as an ‘occupation road’ may give the reputation of a private road, the purpose of the ONB was ultimately to ensure the correct spelling of road names and is of little weight. The DMS is conclusive evidence of what was recorded at that date but is without prejudice to the question of whether higher rights may have existed.
5. When looked at as a whole, the evidence portrays a route of clear longevity, dating back at least as far as 1809 and of a character wide enough for vehicular use. Albeit it is the case that much of the evidence is silent with regard to the status of the route, all of the maps submitted, consistently present Garstone Lane in a similar fashion, as a through route running between two acknowledged public vehicular highways and without any obstruction across its length.
6. Greenwood’s Map of 1822 depicting a ‘cross roads’ gives some limited weight to the argument of a public vehicular highway, as does the Tithe Map of 1843 which shows the claimed route running separately to apportioned lands and without an apportionment number.
7. This representation of the application route is repeated 70 years later in the 1910 Finance Act, where such depiction is considered as strong evidence of public rights, most probably vehicular in nature. Although the Council make a reasonable assertion that, although less common, a private road in multiple ownership could be shown in this way, I consider that this assertion is less likely than the simpler possibility of the application route being considered a public vehicular highway. Bartholomew’s Map of 1927 also adds weight to the assertion of a public vehicular highway, albeit it very limited.
8. The views expressed by each party are well-argued and by nature subjective, raising reasonable inferences either way. Albeit no single piece of evidence conclusively points to the application route having a higher status than currently designated, there are several documents before me which, when considered together, have a synergy that suggests higher rights than a bridleway may exist along the application route.
9. Accordingly I find there is sufficient evidence to tip the balance of probability in favour of historic public vehicular rights subsisting on the application route. Correspondingly I will allow the appeal for an Order to be made to upgrade CH 19/36 Garstone Lane to a restricted byway.

**Overall Conclusion**

1. Having regard to all 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 bridleway CH 19/36 to restricted byway 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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