

|  |
| --- |
| **Appeal Decision** |
|  |
| **by A Behn Dip MS MIPROW** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 13 December 2024** |

|  |
| --- |
| **Appeal Ref: ROW/3348866** |
| * 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.
 |
| * By application dated 16 October 2009, South Somerset Bridleways Association (the applicant) claimed that part of Footpath Y16/24A in the parish of Martock, should be upgraded on the Definitive Map and Statement (DMS) for the area to restricted byway status. The application also sought to add a continuation of that route (Broad Lane) to the DMS as a restricted byway.
* The application was refused by the Council in July 2024 and the applicant was formally notified on 10 July 2024.
 |
|  |
| **Summary of Decision: The appeal is allowed.** |
|  |

**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. Part of the route in the application that the applicant sought to be upgraded (points D-X-E-F-G) is not recorded on the DMS. Accordingly the Council investigated this part of the route under Section 53(3)(c)(i) of the 1981 Act as opposed to Section 53(3)(c)(ii).
3. A discrepancy was also noted by the Council wherein points A-A1 of the Order route were shown on the Definitive Statement as a footpath, but not shown as such on the Definitive Map. Albeit the Council have resolved to make an Order to rectify this anomaly, the inclusion of this section on the Definitive Statement but not on the Definitive Map means it cannot be considered as conclusive evidence of the existence of a public right of way for the purposes of this decision and must also therefore be assessed under Section 53 (3)(c)(i).

**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 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. Where no public right of way is presently recorded, Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that *“a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist…”.*
4. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) therefore comprises 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, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify the making of the modification order requested by the appellant (notwithstanding that for the Order to be confirmed subsequently only the higher test will apply).
5. Accordingly for the purposes of this appeal, points A1-D will need to be assessed on the balance of probability. In respect of points A-A1 and points D-X-E-F-G, I need only be satisfied that the route is reasonably alleged to subsist. It is apparent that an anomalous outcome could potentially arise from the different standards of proof to be applied to the different sections of the route at this stage. Should I find that only the lesser test is satisfied given that a proportion of this route is presently unrecorded, the reasonable approach would be for the whole of the route to be included in an Order. This will provide an opportunity for the status of the route ‘as a whole’ to be fully explored at the confirmation stage when the Order would be determined on the balance of probabilities.
6. 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.
7. 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*

1. This OS map depicts the appeal route between two solid parallel lines for its entire length, appearing similar to other roads, some of which are vehicular today. There are no lines or annotations across the route. 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 the route as far back as 1809, and of a width wide enough to allow vehicular use.

*Pre Tithe Records*

1. An 1823 map of the Parish and Hundred of Martock shows the route in its entirety, with a line across the route at Point A and an unidentified annotation at point E. The key identifies the route as ‘Routes & Lanes.’ A map of Lands in the Tithings of Bower Hinton and Martock from 1825 portrays the route in a similar style, albeit the unidentified annotation is replaced by a line across the route at point E. Like the 1823 map, an 1827 Map of Estates in the Parish of Martock also depicts the entire route between parallel lines. It is coloured sienna and the key again identifies the route as ‘Roads and Lanes.’
2. As with the earlier OS record, these maps are good evidence of the physical existence of the route which is likely to have carried vehicular traffic as it provided access to the adjacent plots of land. Depiction appears to be the same as other roads recognised as public highway today, albeit some routes not recognised as public highway are also shown in the same manner.
3. The applicant submitted a map from Victoria County History, however the Council commented that it was not a simple copy of the 1824 map due to typed annotations. Although it depicts the claimed route in its entirety I do agree with the Council that it does not add anything to the other contemporaneous maps already submitted.
4. Apart from the 1826 Turnpike Record showing the physical existence of a route, which appeared not to be considered part of the turnpiked road, the Turnpike Records of 1826 and 1830 are of little assistance.

*Martock Tithe Map and Apportionment 1840*

1. The Tithe Map shows the appeal route bounded by two solid lines, in a similar fashion to adjoining highways, which are acknowledged as vehicular highways today. The section between points B-C-D-X-E-F-G is not allocated an apportionment number and runs between separately apportioned lands. Between points A-B there is an annotation of 1445, which the accompanying apportionment describes as ‘arable land’ and at point A there is a line across the route.
2. Whilst the Council acknowledged that part of the route being tithable was not mutually exclusive to the existence of a highway, they felt it did not weigh in the favour of vehicular rights either. This was not the view of the applicant who considered that the description Broad Lane which appears on later maps, suggested that the route was broad in characteristic. They considered that this explained the ability for it being grazeable at its widest end between points A-B, and thus tithable at this section.
3. On the Tithe map provided by the Council the route appears uncoloured, however an inset map of the area shows points F-G coloured sienna, with the colour extending just north of point F, where the inset map then stops. The key to the Tithe Map depicts ‘Roads and Lanes’ as coloured sienna. A copy extract of an 1823 map held by National Archives was submitted by the applicant who felt that the Council were examining a faded copy held by Somerset Heritage Centre. The extract which the applicant felt was a copy of the map used for the Tithe Map, depicted the route coloured sienna.
4. A through route in the manner of a road or lane, accompanied by the lack of an apportionment number, would raise an inference of possible vehicular rights as no tithe would have been payable. Albeit a short section of the appeal route was titheable, the rest of the route was not and one reason could be that it was a public road, albeit as the Council submit, vehicular use may also have been by virtue of private rights. Although it is the case that the map was not drawn up with the purpose of identifying rights, it does add limited support in favour of possible vehicular rights across the majority of the appeal route.

*Highway Board Map 1863*

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. The claimed route appears as a through route to roads coloured red and yellow, albeit it is uncoloured itself. There is a line present across the route at point A. Albeit I accept that only coloured roads were strong evidence of a public vehicular highway, the map did not necessarily indicate that uncoloured routes were private, only that the authority was not responsible for maintenance of these routes.

*Sales Particulars 1883 &1895*

1. Both sales particulars show the existence of the entire route, with the 1895 map depicting points A-B by a pecked line on its western side and a solid line to the east. It is included in a sales lot which has a reduced yearly rent, although there is no information as to the reason why.
2. There is little help to be gleaned from these records other than the physical existence of the route, as the maps did not discern between the public and private roads. Although the route would have been needed to access adjoining plots, that does not necessarily infer public rights and I concur with the Council that the land between points A-B being marked as arable and with a pecked and solid line rather than double solid lines is less supportive of vehicular use for this section.

*OS Maps 1887 to 1945*

1. All of the maps submitted are consistent in their portrayal of the route, generally depicted between solid parallel lines in the manner of an unmetalled or minor road. On the 1887 map, there is a line at point A, points A-A1 are marked with a narrow double parallel line to the east, a single line to the west and a double pecked line in between. Between points A1-B is an annotation of F.P. Between points D-F, the route is annotated as Broad Lane. The Council considered that the annotation of F.P. was not necessarily a comment on the status of the route but was so that the public did not mistake those routes as being traversable by horses or wheeled traffic. They considered it was difficult to think of circumstances which would lead to this section of land incorporating two physical routes, one traversable by vehicles and another that was only suitable for pedestrians.
2. The 1903 map depicts the entire route, showing lines across the route at points A, B, E and F. The 1919 map shows the entire route as a minor road, as does the 1928 map. By 1937 the eastern boundary between points A-B is shown by a pecked line suggesting this boundary was unfenced at the time, a feature repeated in the 1945 map.
3. Ultimately the purpose of OS maps was not to record public rights of way, but rather what physical features existed on the ground. Subsequently these maps, although good evidence of the physical existence of the route, hold limited weight in demonstrating the status of any public rights.

*Deposited railway plans 1836 to1908*

1. Both the 1836 and 1845 plans show the southern section of the route, which is marked in the Book of Reference as an occupation road. The 1907 and 1908 records were concerned with an area to the north of the appeal route and describe the northern section of the route as an occupation road and footpath.
2. Albeit the railway plans never came to fruition, it is the case that the documents would have needed to be accurate, as they were subject to public consultation. With this in mind the plans are good evidence that areas of the Order route were considered to be an occupation road and that a footpath was in existence between points A-B.

*OS Object Name Book (ONB) 1901*

1. The ONB describes Broad Lane as ‘occupation road.’ The Council felt that this term was commonly used to describe private roads for the use of the occupier or owner. They drew attention to the description of Broad Lane in the ONB which *‘ends near the main road leading from South Petherton to Martock.’* The Council acknowledged that this description which suggests that Broad Lane did not terminate at the main road could be because the map finished at point A1 and that the rest of the route from A-A1 was in a different book. However they also considered that such a description was consistent with earlier mapping which they considered suggested a footpath, rather than a road was in existence between points A-B.
2. 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 northernmost part of points A-B is not visible due to a tear on the map, however the rest of the route is shown. The southern part of points A-B appears to have a pecked line close to its western boundary and the section is numbered 289, suggesting it is included in the hereditament of this number. The valuation documents for 289, reference a deduction for 2 public footpaths, however the documents do not identify where in the hereditament these paths were. The rest of the appeal route is shown uncoloured and excluded from hereditaments.
2. Where a route is uncoloured on a Finance Act map, this can raise a strong possibility that the road in question was viewed as a public vehicular highway, as routes with lower rights were typically dealt with by deductions recorded in the field books. This was acknowledged by the Council, however their view was that exclusion was not necessarily strong evidence of public rights and that roads which were not highways were sometimes excluded, such as a private road in multiple ownership. They also considered that if the route were excluded from B-C-D-X-E-F-G on the basis that it was a public vehicular highway, it would follow that points A-B should also have been excluded.
3. 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 appeal route at that time, albeit the status of the section of the route between points A-B is less clear.

*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 were solely concerned with public maintenance liability and although they show that the route existed, it is clear that the highway authority did not consider the route 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 the status of a road.

*National Farm Survey 1941-42*

1. The survey maps show the appeal route uncoloured and excluded from the adjoining land holdings. This may suggest that the route was a vehicular highway, however the purpose of the Farm Survey was to assess the agricultural value and potential of farms, not to ascertain status of adjoining roads and as such the map holds very limited weight.

*Definitive Map and Statement (DMS) Preparation Records*

1. The DMS records are of little help in assessing the claimed route. They highlight an anomaly on the Definitive Map for points A-A1 and show the existence of a definitive footpath Y16/24A between points A1-B, which then continues along the appeal route to point D, and then alongside, rather than over Broad Lane, to the east of point E. The records do not record a route along the section D-X-E-F-G.
2. Ultimately, the DMS is conclusive evidence of the status of a 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. In 1974 a letter from Martock Parish Council requested that Broad Lane should be classified as a bridleway. The Council replied that consideration would be given to this at the next review of the DMS, which ultimately did not take place. It is unclear from the Parish Council’s letter whether the route was already considered a bridleway or whether new or higher rights were being sought. The Council believe that the letters suggest the claimed route was a bridleway and had the reputation of such, but felt it afforded little weight.
2. Consultations carried out when assessing the original application for the appeal route show that three landowners believed the claimed route had recorded rights, with one landowner saying that the lane used to be trimmed every year and that it was used at that time by the general community. Another landowner stated that horse riders and motorbikes currently use the route.
3. The landowners comments are suggestive of some modern use of the appeal route and are consistent with aerial photography and photographs from a site visit by the Council which suggest some contemporary use may occur.

**Other Matters**

1. A letter was received from a local landowner who did not support the appeal and was concerned that private vehicular access would be removed should the route become a restricted byway and no vehicular access be allowed. For clarification, any private rights of vehicular access would be unaffected should the route be found to have public rights across it.
2. The letter also enquired as to whether all landowners had received notification of the application /appeal and whether a meeting had been held with the Parish Council to discuss the matter. Enquiries regarding the consultation processes undertaken are not matters for me to address and should be referred to the Council.

**Conclusions**

1. 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. Pre tithe records illustrate the entire appeal route in a manner similar to other vehicular roads. This trend continues for points B-C-D-X-E-F-G of the route with the 1840 Tithe Maps showing this part of the route running separately to apportioned lands and not allocated an apportionment number. Later OS maps give a similar depiction, albeit deposited draft railway plans describe the route as an occupation road, as does the ONB.
2. The Finance Act Records of 1910 depict points B-C-D-X-E-F-G of the route as uncoloured and excluded from hereditaments which is suggestive of this part of the route holding public rights, possibly vehicular, as lesser rights were generally dealt with by deductions. Between these points the appeal route also appears to be unregistered which can similarly be suggestive of public highway status. Later maps also show the existence of the route but are less helpful regarding evidence of status.
3. As outlined in the Main Issues, there are different tests to be applied to different sections of the appeal route and it is necessary to consider each of these in turn.

*Points D-X-E-F-G*

1. Overall, no single piece of evidence is conclusive as to the status of this section of the appeal route. Some evidence is suggestive of the appeal route being a public vehicular road, whilst other evidence is suggestive of it being an occupation road, possibly private in nature. Correspondence between the Parish Council and the Council in 1974 gives reputation of a bridleway existing along the appeal route. Much of the evidence before me is consistent with any of these propositions.
2. When considering the test to be applied, I am satisfied that the evidence before me is sufficient to raise a reasonable allegation of the existence of a restricted byway for this section of the appeal route.

*Points A-B*

1. The evidence for points A-B of the appeal route is more ambiguous. Whilst some of the mapping evidence depicts the entire route in the manner of a road or lane, both the Tithe records and the Finance records show this short section included in an apportionment and a hereditament. Whilst this does not necessarily exclude the existence of public vehicular rights, other evidence such as deposited railway plans and some OS maps are suggestive of lower public rights possibly existing at this location.
2. For the section of the appeal route between points A-A1 where no right of way is currently shown on the Definitive Map, the evidence is sufficient to satisfy the lower test of a reasonable allegation of a restricted byway, albeit at confirmation stage the higher test would apply.
3. The section of the appeal route between points A1-B currently has recorded rights as a public footpath. As a proportion of the evidence is supportive of the current designation of footpath, I am not convinced that, on the balance of probabilities, the evidence is sufficient to show that this section should be upgraded.

*Points B-C-D*

1. The part of the route between points B-C-D is also currently recorded as a footpath. The evidence for this section is similar to that for points D-X-E-F-G, and as such there is some supportive evidence that a higher right may exist than the footpath designation currently recorded. However the evidence is finely balanced in regards to its sufficiency to direct an upgrade from the status it currently enjoys.

**Overall Conclusion**

1. When looking at the appeal route as a whole, it is a through route between two public vehicular highways. A reasonable allegation for a restricted byway has been found for the two ends of the appeal route (points A-A1 and points D-X-E-F-G). However the finding for points A1-B of the appeal route and the finely balanced evidence for points B-C-D could leave an anomalous situation where there would be no onward southern destination for section A-A1 and no onward northern destination for section D-X-E-F-G.
2. As a result of the different findings for various sections of the route, I consider, that as outlined in the Main Issues earlier in this decision, the most reasonable approach in this particular case is to allow the appeal. This will give parties the opportunity to fully explore and argue the merits of the appeal route as a single entity, at confirmation stage.
3. Having regard to all matters raised in the written representations, I conclude that the appeal should be allowed.

**Formal Decision**

1. The appeal is allowed and in accordance with Paragraph 4(2) of Schedule 14 of the 1981 Act, Somerset 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 upgrading the existing footpath between points A1-B-C-D to restricted byway status and by adding a restricted byway between points A-A1 and D-X-E-F-G.
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**

****