



Appeal Decision

by Mark Yates BA(Hons) MIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 22 April 2025

Appeal Ref: ROW/3348453

- 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 Kent County Council ('the Council') not to make an order under Section 53(2) of that Act.
- The application was dated 16 July 2020, and this appeal relates to the Council's decision of 26 June 2024 to not make an order.
- The application was made to add a bridleway to the definitive map and statement which runs between Rose Lane and the A20 Ashford Road, Lenham ('the appeal route').

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 the appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act. I note that one of the parties raised the potential for a site visit to be undertaken. However, I am not satisfied that it is necessary for me to visit the site for the purpose of reaching my decision. This is particularly relevant in relation to the issue involving the bridge which is addressed in paragraphs 26-27 below.
 2. The appellant requests that if the appeal is allowed the Council is directed to make an order within three months, and I consider this to be a reasonable timeframe.
 3. The application was made for an order to add a bridleway to the definitive map. Submissions have been made regarding whether this appeal could lead to an order being made for a restricted byway or byway open to all traffic, if the evidence is supportive of the route being a vehicular highway rather than a bridleway.
 4. Paragraph 3(1)(b) of Schedule 14 of the 1981 Act outlines that the Council is required to '*decide whether to make or not to make the order to which the application relates*'. The application in this case being for the addition of a bridleway. However, the Council could have made an order that varies from the application as part of its duty to modify the definitive map following the discovery of evidence of the occurrence of a particular event. It could have therefore made an order to record the appeal route with a different status, if satisfied that it was appropriate to do so.
 5. In terms of this appeal, paragraph 4(2) of Schedule 14 states that if the Secretary of State considers that '*an order should be made, he shall give to the authority such directions as appear to him necessary for the purpose*'. This seems to permit the
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Secretary of State to direct the Council to make an order that varies in some respects from the application.

6. There is the potential for the applicant to make a fresh application in such circumstances. However, in light of paragraph 4(2), I consider that if the evidence is sufficient to warrant the making of an order to record the appeal route with a different status than that originally claimed, it would be appropriate for the Council to be directed to make an order. To take a different approach could lead to a situation arising where it is found that the evidence is sufficient to justify a modification being made to the definitive map, but a conclusion is reached that no order should be made.

Main Issues

7. Section 53(3)(c)(i) 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 right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist...”*.
8. In considering the above there are two separate tests to be applied:
 - Test A: Does a right of way subsist on the balance of probabilities?
 - Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.

At this stage, I need only be satisfied that the evidence meets Test B, the lesser test.

9. Reliance is placed by the appellant on various historical documents and maps in support of the dedication of a public right of way at some unknown date in the past. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.
10. If I conclude that an order should be made to record public vehicular rights, consideration will need to be given to the Natural Environment and Rural Communities Act 2006 ('the 2006 Act'). Subject to certain exemptions found in Section 67(2) and (3) of this Act, any unrecorded public rights for mechanically propelled vehicles are extinguished.

Reasons

11. The appeal route is shown on a map prepared by the Council which is attached to this decision. It commences at its southern end at the junctions with existing public rights of way and continues through to the A20 Road. Where appropriate I shall refer to the route by reference to present day features. Travelling northwards, the appeal route is initially a continuation of Rose Lane and passes Bolton Farm, runs underneath a railway line and continues past Old Shelve Farm.

12. In term of the appellant's submissions on the topic of field roads, the issue to be determined is whether the route is a highway by reference to the documentary evidence. Highways can be enclosed or unenclosed and subject to limitations such as gates. There is also the potential for an unenclosed section of the route to not be shown on certain maps.

Map of the military encampment on Lenham Heath of 1781

13. This map shows a section of the appeal route from its southern end running towards where the railway bridge is now located. The appellant draws attention to the possibility that it projects beyond Bolton Farm, and it appears to be open-ended at the northern end of the section shown. However, the extent of the route cannot be determined from this map. Nor does it provide any indication regarding the status of the route.

Early mapping

14. The 1797 Ordnance Survey ('OS') surveyors drawings show a proportion of the appeal route southwards from Old Shelve Farm to the extent of the map sheet. I cannot determine on the copy provided whether the route is shown continuing through to the road at its northern end. However, only the southern portion of the route is clearly shown on the one-inch OS map initially published by Faden in 1801, which was derived from the OS drawings. Further, it is evident that the 1831 OS map only shows the southern section of the appeal route. I accept that the remainder may not have been shown due to its unenclosed nature. Nonetheless, the early OS mapping cannot be taken to provide evidence in support of the physical existence of the whole of the appeal route.
15. Although there appears to be some differences in the alignment of the appeal route depicted on the Greenwood map (published between 1821-1827), a road is shown in the locality of the route. There is a section that appears to be shown by single pecked lines, but the appeal route is for the most part depicted by way of double pecked or solid lines to indicate the absence or presence of boundary features. The map key indicates that this route fell broadly within the category known as a cross road. A cross road in this context meaning a road running between two other roads which is applicable in this case.
16. I have some reservations regarding the alignment of the route depicted on the Greenwood map, but I accept that a road is shown in the general location of the appeal route. Whilst the depiction of the route in this manner can provide some support for the existence of a public bridleway or road, the purpose of commercial maps was to show the physical features which existed when the land was surveyed, including all roads. This will invariably lessen the weight that can be attached to them.

Lenham tithe map (1842)

17. The whole of the appeal route is shown coloured on the tithe map. It is predominantly depicted by double pecked lines and shown through tithed parcels of land. The exception is the southern section which appears to be bounded on both sides and separate from the tithed parcels. There are solid boundaries in place which are more likely to be indicative of the presence of gates given that the route continued beyond these features.

18. In terms of the use of colouring to represent roads by reference to a standard key, I note that this key does not distinguish between public and private roads. The appellant has also provided details of research undertaken in connection with roads shown coloured on this tithe map. This could provide some support for a correlation between the use of colouring and highway status in respect of this particular map. The presence of gates along the appeal route may not have been convenient in terms of any use by equestrian or vehicular traffic. However, this does not demonstrate that no public rights existed over the route.
19. Attention is drawn to the later use of tithe records for the evaluation of the poor law rate. Nonetheless, this map was drawn up in relation to the assessment of the payment of tithes. Highways were incidental to this process and where for instance a route was excluded from the tithed parcels of land this could be indicative of a public or private road as both could have impacted on the productivity of the land being assessed. Further, no extracts have been provided from the tithe apportionment regarding the use of the land. Overall, the representation of the appeal route on the tithe map as a through route could provide support for highway status, potentially vehicular, but it does not by itself carry a significant amount of weight.

Railway documents

20. As part of the Parliamentary process for railway schemes a book of reference and plans were drawn up in relation to proposed railways. Various schemes were promoted which if built would have crossed the appeal route just to the north of where Bolton Farm is now located. However, it was not until an Act of 1880 that a railway was built in this locality. Whilst the other schemes were not ultimately taken forward, this does not necessarily undermine the value of the relevant documents produced for these proposals.
21. A plan for the proposed Northfleet to Dover Railway of 1835-36 does not show the appeal route and accordingly it is of no value.
22. A plan prepared for the proposed Great Kent Atmospheric Railway of 1845 records a section of the appeal route as plot 82a. The accompanying book of reference states that this was a '*Public highway*' in the ownership of the '*Surveyor of highways*'. These documents are clearly supportive of the route being considered to be a highway and this was more likely to be vehicular in nature. In contrast, the route is annotated on a section plan as an '*Occupation Road to Coats*'. An occupation road is a term generally applied to a private road. Although lower public rights could potentially also exist over an occupation road. Whilst there is clearly a conflict between the documents produced for this scheme, I consider that greater reliance should be placed on the book of reference. However, this discrepancy lessens a little the weight to be attached to these documents in support of the route being a highway.
23. Plans were prepared between 1864 and 1879 in relation to a proposed Maidstone to Ashford Railway. The 1864 plan shows that a section of the route fell within the plot numbered 10 and this plot is described in the book of reference as a '*road from Lenham Heath to Old Shelve Farm*' in the ownership and occupation of private individuals. The continuation of this road southwards is annotated '*from Lenham Heath*'. There will be some doubt regarding the meaning that can be attached to this evidence. The road is not defined as having public or private status and it

could potentially have been privately maintained. However, I find that it points more in favour of the route being viewed by the surveyor as a private road to the farm.

24. In contrast to the 1864 documents, those produced for the proposed Maidstone to Ashford Railway in 1874 show a section of the appeal route numbered 97a and this was stated in the book of reference to correspond to a '*public road*' in the ownership of the '*Bearsted District Highways Board*'. When taken in isolation these documents would provide good evidence of the route being viewed at the time as a vehicular highway. However, they need to be considered in conjunction with the earlier and later railway documents.
25. Plans were drawn up in 1979 in respect of the railway that was actually built under the Maidstone and Ashford Railway Act 1880. The route is shown crossing plots numbered 70, 71 and 67. In the schedule, plots 70 and 71 are described by reference to a field, occupation road and water features in the ownership and occupation of private individuals. Plot 67 is described as '*Field, occupation road, footpath and part of pond*'. Again this plot was stated to be in private ownership. The Council considers that the reference to a footpath relates to the proposed Footpath 66 (see paragraph 37 below) and that the occupation road corresponds to the appeal route. As outlined above, occupation road is a term that would generally be taken to relate to a private rather than a public road and it is distinguished from the other features mentioned.
26. The railway was subsequently built so that it crossed the appeal route by way of a railway bridge. The appellant has estimated the dimensions for the bridge that was built would meet the statutory requirements for a bridge where a railway crossed a public road. However, conflicting evidence has been provided from one of the landowners who states that the bridge has a lesser height which does not meet the statutory requirements. Further, submissions have been made by these parties regarding whether changes in the nature of the land have had an impact on the height of the arch of the bridge from the ground.
27. I note the conflicting evidence regarding this matter but place greater reliance at this stage on the information contained in the railway documents. The dimensions of the bridge are not therefore a determinative factor in relation to my decision.

Ecclesiastical notice in the London Gazette of 1874

28. The notice describes a boundary of the chapelry as being located '*... along the fence which divides the close numbered 1060 upon the last described maps from the close numbered 1062 upon the same maps to a boundary stone.... and placed at the north-western end of the last-described fence, on the eastern side of the road or footpath leading from Burnt House to Old Shelve*'. It appears to me that the reference in the notice to the appeal route as a footpath or road was used purely for the purpose of describing the position of the boundary by reference to particular features. I do not consider that it can be taken to provide a view on the status of the route.

Large scale OS maps

29. The appeal route is depicted on the 1871 OS map by a mixture of solid and dashed lines. In places a solid line is shown across the route which is likely to indicate the presence of a gate. The route is depicted in a similar manner on other large scale

OS maps. In terms of the colouring shown on the First Edition 1:2.500 map, this may represent some form of hard surface.

30. The Council has drawn attention to information contained in the book of reference to accompany the First Edition 25 inch map. It is stated that a section of the route to the south of the railway line is described in the book of reference as a '*Private road*'. The source of this reference is not known but it is evident that there was some information available to the surveyor to indicate the initial section was a private road. I consider that this document should be given a little weight in support of the route being considered at the time to be a private road. No mention is made of a road of any description in relation to other parcels crossed by the appeal route.

1910 Finance Act evidence

31. It appears to me that the section to the south of the railway line is shown excluded from the surrounding hereditaments in a manner that could provide support for highway status and more likely vehicular in nature. The remainder of the route is shown running through hereditaments 258 (under the railway) and 162 (Old Shelve Farm).
32. The field book in relation to hereditament 162 outlines under the heading '*Charges, Easements, and Restrictions affecting market value of Fee Simple*' that deductions were made for two public footpaths and a roadway. Another entry records a deduction of £50 for '*Public Rights of Way or User*'. A sketch plan in the book shows a route running through the yard of Old Shelve Farm which is annotated as '*Public Right Way*' [sic]. However, this route follows an alternative alignment to the appeal route and the route marked on the OS maps.
33. There is uncertainty regarding the location of the two footpaths. The section marked on the sketch refers to a public right of way and this could relate to one of the footpaths or higher rights in relation to a roadway. The exclusion of the section to the south of the railway is supportive of public vehicular rights. I consider that these pieces of evidence should be given a fair amount of weight at this stage albeit the weight will be limited by the issues outlined above.

Bartholomew's maps

34. The 1904 and 1922 editions show the appeal route as an uncoloured road which is described on the map key as being inferior and not to be recommended to cyclists. On the 1941 and 1953 editions it is shown as an '*other road*' and '*serviceable road*' respectively. There is a disclaimer on the map key stating that '*The representation of a road or footpath is no evidence of the existence of a right of way*'. Although these maps show the existence of a through road, the disclaimer will mean that limited weight can be attached to them.

Highways inspector's map and schedule

35. A Council highway inspector's map from 1953 shows the northern part of the appeal route by way of blue dashes and annotated '*E67*' with the remainder shown by way of a solid blue line and annotated '*D1036*'. The accompanying schedule is supportive of the D1036 being a maintained unclassified county road with the E67 not being publicly maintained. It appears that the northern section may have originally been viewed differently given the use of correction fluid. Although it is apparent that these were internal documents, they are supportive of the Council

viewing the appeal route during the 1950s as a highway and they should be ascribed a fair amount of weight.

Definitive map process

36. The parish map of 1950 on which the claimed public rights of way for inclusion on the draft definitive map were marked does not show the appeal route. One reason could be that it was considered to be part of the local road network, and this is supported by other contemporaneous documents.
37. The draft definitive map of 1952 shows the appeal route coloured yellow in the same manner as other local roads and distinguished from the alleged public rights of way. One of the alleged rights of way (Footpath 66) is shown on the map and is described in the accompanying statement as linking with the appeal route on the northern side of the railway line. The appeal route is referred to in the draft statement as an unclassified road.
38. Footpath 66 was subsequently removed from the draft map, and it is apparent that this resulted from an objection by the British Transport Commission. A number of points have been raised in submissions in relation to this matter, some of which appear to me to be based on supposition. However, the appeal route was never claimed or included as a public right of way on the parish or draft map for the purpose of the National Parks and Access to the Countryside Act 1949. It appears on the base used in relation to the draft map and it is mentioned in the description of one of the termination points for Footpath 66. However, the appeal route could not have been removed from the draft map as it was not claimed at the time to be a footpath, bridleway or road used as a public path.
39. It may well be the case that shortly after the removal of Footpath 66 from the draft map, a view was taken that the section of the appeal route to the north of the railway should not be recorded as an unclassified road, but that is a separate matter for which no records exist. The documents produced at the initial stages of the definitive map process provide some support for the appeal route being considered a vehicular highway.

List of streets

40. A proportion of the route to the south of the railway is recorded in the list of streets as a highway maintained at public expense. This is stated by the Council to relate to around the first 300 metres of the appeal route from its southern end. This suggests that public rights are considered to exist over at least a proportion of the route.

Other evidence

41. The case in support relies upon historical documentary evidence rather than recent use of the route. Therefore, a lack of current use or physical signs of a proportion of the route does not demonstrate that historical public rights do not exist. Nor would it necessarily be expected that public rights would be noted in property deeds.

Conclusions

42. I consider the documents that carry the most weight to be those produced for the purposes of the railway schemes and the 1910 Finance Act. These provide

conflicting evidence regarding whether the appeal route was considered a public or private road. In terms of the railway documents, greater reliance should be placed on those produced for the completed scheme, which notwithstanding the bridge point, are supportive of the route being a private road.

43. There are other lesser pieces of evidence that could provide support for the route being part of the local road network. In contrast, there is a reference to a section of the route as a private road in the OS book of reference. However, a fair amount of weight should be attached to the representation of the appeal route on the Highways Inspector's map and in the documents produced at the initial stage of the definitive map process.
44. In my view, the evidence when considered as a whole falls short of demonstrating on the balance of probabilities that a public right of way subsists. However, it is sufficient to find that a right of way is reasonably alleged to subsist in line with Test B. Having regard to the submissions of the appellant and the Council on the issue along with my assessment of the evidence, I conclude that an order should be made to record public vehicular rights over the appeal route.
45. It is apparent that the proportion of the appeal route shown in the list of streets meets the exemption found in Section 67(2)(b) of the 2006 Act and should be recorded in the order as a byway open to all traffic. There is nothing to suggest any exemption applies to the remainder of the route which should be recorded as a restricted byway.

Formal Decision

46. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act, Kent County Council is directed to make an order under section 53(2) and Schedule 15 of the Act within three months of the date of this decision to record the appeal route partly as a restricted byway and partly as a byway open to all traffic. 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.

Mark Yates

Inspector

