

BHS response to KCC statement

A. Introduction

A.1. This is the response of the British Horse Society to the statement submitted by the order-making authority, Kent County Council (KCC), on the Rose Lane, Lenham appeal.

A.2. We refer to the society's original appeal statement of case as BHS-SOC: for example, BHS-SOC/item III.K. We refer to the numbered paragraphs of KCC's statement, for example, para.10.

B. The reasonably-alleged test

B.1. We do not repeat here the grounds for appeal.

B.2. However, we wish to reiterate that, in order that the application be granted, the society is required only to reasonably allege that the appeal way subsists — a test which, in our view, KCC has not applied.

B.3. We address the reasonably-alleged test in the appeal statement of case (BHS-SOC/item I.H at paras.I.H.29–35). KCC has responded at paras.6–8 and 13–16, to which we reply here and also at *KCC reasons for rejecting the application* at item C below.

B.4. In relation to the reasonably-alleged test, we add that, in *R v Secretary of State for Wales ex parte Emery*,¹ the Court of Appeal (on appeal from the High Court) reviewed the decision of the Secretary of State to not allow an appeal against the surveying authority's refusal to make an order to record a public footpath, in circumstances where there was disputed user evidence.

B.5. Roch LJ (with whom the other lord justices of appeal agreed) said, approving the judgment of Owen J in the High Court in *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (cited in BHS-SOC/para.I.H.15 and copy included with the appeal):

But where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s 31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim either for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it by the public could not give rise at common law to any presumption of dedication.

¹ [1998] 4 All ER 367

B.6. While the present appeal relates to a claim made on the basis of historical evidence of reputation (and not user evidence), the explanation of the reasonably-alleged test in *Bagshaw* and in *Emery* applies equally: see the words of Lindblom LJ in *R (oao Roxlena Ltd) v Cumbria County Council*²:

The crucial question is whether the allegation is a “reasonable” one. This is not a high test, and deliberately so. The fact that the allegation is based on primary documents rather than user evidence as such does not bear on the principle. A reasonable allegation can properly be based on documentary material alone... .

B.7. Contrary documentary evidence, sufficient to displace a reasonable allegation, is sometimes referred to as a ‘knock-out blow’, and in his judgment in *Emery*, Roch LJ describes an, in effect, knock-out blow as where³:

...a reasonable person would say that the allegation that a right of way subsists was not reasonable because it would be bound to fail.

B.8. Examples of such a knock-out blow are given earlier in the judgment of Roch LJ — as, for example (in relation to user evidence), a deposit and declaration made under s.31(6) of the Highways Act 1980. A knock-out blow in relation to historical evidence of reputation might comprise, for example, a magistrates’ court stopping-up order, or irrefutable evidence of settlement of the estate at the alleged or probable date of dedication (where no earlier or later date of presumed dedication would be permissible in the particular circumstances). In *R (oao Monckton) v Staffordshire County Council*, the claimant referred to a declaration by Quarter Sessions that no public right of way subsisted over a way,⁴ presumably intending such a declaration to be recognised as a knock-out blow.⁵

B.9. We apply the case law in *Emery*, *Bagshaw*, *Roxlena* and *Monckton* in reaching our *Conclusion* at item G below.

C. KCC reasons for rejecting the application

C.1. KCC summarises its reasons for rejecting the society’s application in eight bullets at para.5. We respond as follows (those eight bullets are numbered below as b.1 to b.8).

C.2. b.1: *Lenham tithe map* (BHS-SOC/item III.F) — KCC asserts that the appeal way, ‘was more likely to have been a private occupation road’, because it is shown with gates across it. The Lenham tithe map/Poor Law survey shows the appeal way coloured in sienna. Our analysis shows that, on this map, this sienna colouring consistently is applied to known highways in the parish (see also the map at BHS-SOC/Annexe C), whereas obviously-private roads and drives remain uncoloured.

C.3. The appeal way is gated because it is a field or gated road — one which has long traversed ancient inclosures by means of gates at each field boundary (much as a footpath or field bridleway might do).

² www.bailii.org/ew/cases/EWCA/Civ/2019/1639.html, at [74]

³ At p.379

⁴ Under s.31(3)(a) of the National Parks and Access to the Countryside Act 1949 (now repealed).

⁵ www.bailii.org/ew/cases/EWHC/Admin/2022/3049.html, at [61–70]. The court preferred the defendant council’s analysis that the declaration was, in effect, spent.

C.4. b.2: Maidstone and Ashford Railway 1863–64 (BHS-SOC/item III.I) — the appeal way is recorded in the 1863–64 plans as in private ownership, because it was recognised as a field road not vested in the parish vestry, but only subject to a right of public passage. The appeal way is described in the book of reference as a ‘Road from Lenham Heath to Old Shelve Farm’, but not as an occupation road (an expression which is used of other ways). It therefore is not described as a private road, and it cannot be concluded from that description that it is not a public road. The 1863–64 plans must be viewed in the context of other evidence, including the plans for the *Great Kent Atmospheric Railway* (BHS-SOC/item III.H, dating from 1845–46) which describe the appeal way as a public highway; and the later plans for the *Maidstone and Ashford Railway* in 1874–75 which describe the appeal way as a public road. We stress that these plans are not inconsistent: they all correctly describe a public field road, which is not vested in the parish vestry.

C.5. b.3: Ordnance Survey County Series 25-inch maps (BHS-SOC/item III.K) — there is no evidential basis for inferring that the appeal way cannot be a public road because (within the unenclosed part of the way between Old Shelve and Shepherd’s Farm) it is not assigned a discrete parcel number. As we explain in the appeal statement, and as KCC expressly acknowledges in its determination,⁶ the Ordnance Survey did not generally concern itself with whether particular ways were public or private, and cannot therefore be said to have decided not to assign a discrete parcel number on the basis of the status of the appeal way, because that status was outside its competence. The depiction reflects the decision of an Ordnance Survey drawing clerk, having regard to the particular circumstances — that the appeal way lies across individual fields, and is gated and therefore closed off at each field boundary — that if discrete parcel numbers were assigned to the way, each section of the appeal way within each field would have required a separate number, which would be unduly exacting; or each section of the appeal way would need to be braced across each gateway. The area book does not refer to the way in relation to parcels crossed by the way, because ‘pasture’ is the predominant user of those parcels.

C.6. Gated public roads now are rare in Kent — most have either been fenced in, or are recognised today, if at all, only as footpaths or bridleways — but one example, Dane Hill Road, is known to the society leading north from Dane Farm at Covert Wood, Bladbean, near Barham (see BHS-SOC/illustration i). This is braced, on consecutive editions of the Ordnance Survey County Series twenty-five inch plans, to the fields on either side.⁷ Examples can also be found of the practice of assigning a single parcel number to the road, braced across the gateway.⁸

C.7. b.4: Designation of consolidated chapelry (BHS-SOC/item III.J) — the Schedule to the notice in the *London Gazette* describing the chapelry boundary contains three references to an ‘occupation road’ and one to a ‘bridle road or footpath’. It is suggested that, if the chapelry boundary was to be defined in relation to an occupation road, it was specified in those terms in the Schedule. Moreover, there is no suggestion that, if the appeal way

⁶ KCC report on application C449 dated 24 June 2024, Appendix B, para.32

⁷ Grid reference [TR177483](#). A parish boundary lies along the centre line of the road. See the National Library of Scotland (NLS) reference map [here](#), referring to the Ordnance Survey County Series twenty-five inch plan [second](#), [third](#) and [fourth](#) editions, which show each half of the road as braced to the adjoining land. (The first-edition plan shows the same treatment, but is not published online by the NLS.)

⁸ For example, at [Elkington](#), Leicestershire, the field road leading north-east from the village is shown with a discrete parcel number with a brace across the gateway, on Ordnance Survey County Series twenty-five inch second-edition [sheet XXII/16](#) revised in 1899 (the road is no longer unenclosed), whereas the road leading south from the village (now partly recorded as a BOAT), is shown braced to the field which it crosses, on [sheet XXIX/4](#) also revised in 1899.

were only a footpath, that it would be other than a public footpath (it is in any case unlikely that the chapelry boundary would be defined in relation to a private right of way which would be unknown to the wider public). As such, the evidence supports public rights over the appeal way — even if, as a minimum, only a footpath. But in our view, the reference to a ‘road or footpath’ is likely to mean a road which primarily was used as a footpath — much as the reference elsewhere in the Schedule to a ‘bridle road or footpath’ is likely to mean a bridleway which was primarily used as a footpath.

C.8. b.5: *Maidstone and Ashford Railway 1879–80* (BHS-SOC/item III.I) — see *British Transport Commission objection* at item D below.

C.9. b.6: *Finance (1909–1910) Act 1910* (BHS-SOC/item III.L) — the relevant field book expressly allows a deduction for a ‘public roadway’.⁹ The deduction also is classified on the fourth page of the field book entry as ‘deductions in respect of—...Public Rights of Way or User’. KCC does not explain its analysis that the deduction of £50 can be described as ‘relatively modest’. The deduction for a roadway is said by KCC to refer to ‘the old entrance to the farm’, but this entrance is described on the sketch in the field book as a ‘Public Right Way’ [sic], not as a public road, and there is no evidence that this entrance has ever had the reputation of a public road. Moreover, were this entrance a public road, it begs the question of where did it lead? It is vanishingly unlikely that this access way to Old Shelve, not now even recorded as a public footpath, was and remains a public road, leading only to Old Shelve itself, and that even in the early twentieth century, was declared and recorded as a public road. If it was a public road, it must have had a continuation along the line of the appeal way to B, and be the correct line of the appeal way between Old Shelve and the Ashford Road. Accordingly, we submit that the deduction refers to the appeal way, which is the obvious interpretation of the evidence. It may be that the Secretary of State concludes that the correct line of the appeal way lies along the line of the access between Old Shelve and the Ashford Road shown on the field book sketch (in place of that between Old Shelve and A) and directs accordingly — but we prefer our interpretation set out above.

C.10. b.7: *First definitive map and statement* (BHS-SOC/item III.O) — KCC describes ‘some confusion as to the status of the claimed route’ at the time of preparation of the first definitive map and statement, but the documentation is perfectly clear: the appeal way was recognised as a public road on both the *Highway inspectors’ map* (BHS-SOC/item III.N) and the *First definitive map and statement*, and Lenham parish council appeared to hold a consistent opinion. The parish council could hardly have thought otherwise — it recorded public footpath 66 on the parish map, terminating on the appeal way.

C.11. b.8: somewhat astonishingly, Network Rail has not objected to the application. KCC records that¹⁰:

Network Rail did not offer any opinion either way on the application but provided a factual response setting out that it owns and is liable to maintain the underpass through which the claimed route passes (towards its southern end) under section 68 of the Railway Clauses Consolidation Act 1845. The claimed route is therefore considered to be a private (occupation) road with no public rights.

⁹ The entry states ‘1 do roadway’, ‘do’ meaning ditto in reference in the previous line to ‘public’.

¹⁰ KCC report on application C449 dated 24 June 2024, Appendix B, para.106

C.12. It appears that the final sentence reproduced above is not part of Network Rail's opinion, but the inference of KCC. Accordingly, Network Rail cannot be said to have expressed an opinion on the merits of the application, still less to have objected to it. In the society's view, Network Rail's position is particularly striking in a context where it might be expected to have opposed the recording of a public way through the railway bridge, as the Commission is said to have done in 1952. We further consider the *British Transport Commission objection* in item D below, in the light of KCC's commentary on this aspect in its statement at [paras.5, b.7](#) and [12, b.5](#).

D. British Transport Commission objection

D.1. KCC's analysis appears to treat the British Transport Commission's objection to the inclusion of footpath 66 as outweighing the contemporary evidence of the *Highway inspectors' map* (BHS-SOC/item III.N) and the *First definitive map and statement* (BHS-SOC/item III.O). This is notwithstanding that the objection was not to the inclusion of the appeal way on the draft map, but to a connecting footpath; that the details of the objection itself, and the grounds on which it was made, are no longer available; and that the reasons for the deletion of footpath 66 from the draft map are no longer available.

D.2. We are willing to concede as probable that the Commission's objection to the inclusion of footpath 66 on the draft map was owing to its termination on the appeal way — it was, in effect, a surrogate objection to recognition of the appeal way as a public way. KCC states ([para.12, b.5](#)) that Network Rail's:

own records show... that the underpass through which the claimed route passes was considered by the statutory body responsible for railways as having been provided for "the accommodation of the owners and occupiers of lands adjoining the railway" under section 68 of the Railways Clauses Consolidation Act 1845.

It adds (also at [para.12, b.5](#)) that:

the reason that the Commission's perception is so relevant is that it was based upon an Act of Parliament (which resulted in the construction of the railway) identifying the way as a private occupation road.

D.3. Prior to the appeal, a request was submitted to Network Rail under the Environmental Information Regulations 2004 for¹¹:

...any information relating to the acquisition of land for [the appeal way railway bridge] or the construction of either of [that bridge], built under the Maidstone and Ashford Railway Act 1880, the line opening in 1884. For example, conveyances, contracts, agreements or plans relating to the acquisition of the land.

Also, any railway land plan or other information which purports to identify or relate to the extent or nature of private or public rights under the railway (i.e. through the bridge).

No information is sought which post-dates the Second World War... .

¹¹ Request logged by Network Rail as FOI202401091

D.4. We assume, as we are entitled to assume, that Network Rail disclosed all such information which it held.¹² The society's appeal statement of case includes such of the information which was disclosed as is relevant (see, in particular, extracts from the 1883 conveyance at BHS-SOC/illustrations xxii and xxiii). We submit that it is likely that the same information, and no more, was available to the Commission.

D.5. We therefore conclude that the Commission's objection was rooted in the same assessment as adopted by KCC: that the 1879–80 plans for the railway scheme, as built, identify the appeal way as an 'occupation road'. The Commission had no particular knowledge of the status of the way available only to itself — it relied on the same public data available to KCC and the society, together with the 1883 conveyance which adds nothing further to assist the Commission's case (but see below). Thus 'Network Rail's current records as to the status of the structure' (para.12, b.2) arise from the historical records already available and disclosed.

D.6. The society has set out its analysis of the railway data (at BHS-SOC/item III.I) and does not repeat it here. It submits that, taken in the context of the series of railway plans and the dimensions of the bridge as built, the Maidstone and Ashford Railway Company must have formed the view that the appeal way was a public road, and built the bridge to the minimum dimensions compatible with its statutory obligations.

D.7. KCC states (para.12, b.5) that: 'it is just as possible that the construction of the underpass to a larger standard than that required by law might have been attributable to agricultural access needs at the time, or local agreements with affected landowners.' It is possible. But one would expect a 'local agreement' to form part of the 1883 conveyance, and it does not. A landowner hardly would be advised to enter into a binding conveyance of the land without stipulating within it any conditions attaching to the sale, such as specification of a bridge built to larger-than-required dimensions.

D.8. As to 'agricultural access needs at the time', KCC has stated that¹³:

in the event of a successful appeal against refusal of the application, it is considered that a width of three metres would be appropriate, having regard to the fact that the claimed route comprises a largely unenclosed trackway crossing fields... .

KCC does not explain how a three-metre-wide¹⁴ track crossing fields, allegedly subject only to occupational use, and presumably seeing very little such use (the appeal way does not appear to have been used for many years, and perhaps decades¹⁵), could possibly cause the owner of the land to sacrifice financial reward for the sale of the land in return for a more generously-sized railway bridge (we suggest that the increase in width from 12 feet wide to 20 feet wide would increase costs today in the order of a six-figure sum). The Maidstone and Ashford Railway Company would not have agreed to shoulder substantial additional costs without reflecting the additional burden in reduced compensation for the sale of the land. Moreover, there is nothing in the 1883 conveyance to record any agreement for the construction of a bridge substantially in excess of the required dimensions. Indeed, there is nothing in the conveyance to record an agreement for the construction of

¹² Network Rail did not state that any information was withheld.

¹³ KCC report on application C449 dated 24 June 2024, Appendix B, para.143

¹⁴ *i.e.* 9 feet 10 inches.

¹⁵ On the [Ordnance Survey National Grid sheet TQ9250](#), revised 1969, the appeal way is labelled 'Path', suggesting a visual absence of vehicular use.

a bridge at all — which might be expected given that the obligation on the railway company to build an occupation bridge rests on proof of the existence of an ill-defined ‘private road’. But if the appeal way was recognised by both vendor-landowner and the railway company, at the time of the conveyance, to be a public road, then nothing need be said in the conveyance, because the railway company’s obligation to build a bridge, to the statutory dimensions, was indisputable.

D.9. If the entirely-private traffic using the appeal way had been of such size or volume as to justify building a 20-foot-wide bridge involving some financial loss to the vendor-landowner, one might expect it to have been recognised on the roughly contemporary *Ordnance Survey County Series 25-inch maps* (BHS-SOC/item III.K) first-edition plan (BHS-SOC/annexe D) by depicting a track with something more than the minimum width for a vehicular track.

D.10. On the other hand, KCC refers to the roughly contemporary *Highway inspectors’ map* and the *First definitive map and statement* as:

KCC’s records [which] on the other hand, were no more than internal documents that were not prepared pursuant to any statutory duty, and not subject (as it is understood) to any formal consultation process with landowners or other interested parties... .

D.11. We suggest that the *Highway inspectors’ map* was very likely an evolution of the handover maps prepared when statutory responsibility for minor roads was assigned from rural district to county councils under Part III of the Local Government Act 1929. If so, the information had been in use for over twenty years (leaving aside any previous records held by the originating Hollingbourn Rural District Council, which may have been consolidated into the *Highway inspectors’ map*).

D.12. KCC appears to dismiss the *Highway inspectors’ map* as an ‘internal document’ not subject to consultation. But the society’s perception from working with the map over many years is that it was an accurate record of publicly-maintainable roads in 1952.¹⁶ If KCC believes otherwise, we call upon it to submit evidence of proven errors. While the map was not (so far as we know) submitted to formal consultation, it is inevitable that the roads identified in it were subject to periodic inspection, and the clearance of obstructions such as fallen trees.¹⁷ Such activities would have been likely to attract attention and complaint from the owner of the land, if the status of the way were disputed.

D.13. Moreover, KCC’s then belief (evidenced by the *Highway inspectors’ map*) that the appeal way was a public road was reflected in it being identified in yellow, as an existing public road, on the *First definitive map and statement* draft map — as such, its belief was placed firmly in the public domain. Plainly, the parish council was of the same belief, because the parish council added footpath 66 to the parish map terminating on the appeal way (just to the north of the railway bridge) without any identified provision for a public continuation other than along the appeal way (whether south under the railway bridge or, improbably, north to Old Shelve). The draft map itself, with the appeal way coloured yellow, was subject to widespread local consultation: had the owner of the land success-

¹⁶ In common with the definitive map and statement, it is not comprehensive of the public road network at that time: but we do not know of any entries which can be shown to be erroneous.

¹⁷ The majority of the appeal way was identified as a non-maintained road, and therefore it is not suggested that KCC carried out regular maintenance.

fully challenged the colouring, no doubt it would have been deleted from the *Highway inspectors' map*.¹⁸

D.14. It may also be said that footpath 66 itself adds weight to the contemporary perceived status of the appeal way. Footpath 66 leads from just north of the railway bridge to the Ashford Road at a formerly-isolated location reasonably close to the junction with what is now restricted byway KH432 leading north-northeast from the Ashford Road to Cobham Farm. It is not obvious how such a footpath, shown on all three editions of the Ordnance Survey County Series twenty-five inch plans, could have been other than a public path — it does not serve any likely premises, such as a farm, which might have given rise to a private right of way, and it was included on the Lenham parish map, prepared under Part V of the National Parks and Access to the Countryside Act 1949, on the basis that there was a reasonable allegation of the existence of a public right of way. It appears to have been deleted from the draft map following the Commission's objection, but no reasons for its deletion are documented. That it was deleted does not amount to an admission that it was agreed not to exist (*i.e.* that the reasonable allegation was mistaken): only that, in common with many public rights of way eliminated at the draft map stage, no-one wished to argue for its retention by mounting a rebuttal to the Commission's objection. If there was a footpath along the line of footpath 66, plainly a public right of way (at least on foot) continued south along the line of the appeal way towards B.

D.15. In short, KCC has interpreted the objection of the Commission to the inclusion of footpath 66 on the draft map as evincing an informed understanding by the Commission of the true status of the appeal way, notwithstanding that the objection was based on the Commission's interpretation of the same evidence available to KCC. And it has dismissed its own contemporary evidence of the status of the appeal way, notwithstanding that it was contained in reliable records and represented the position also of the parish council.

D.16. We conclude that, far from the Commission's objection amounting to a 'knock-out blow' (if that is what KCC interpreted it to be), it is no more than a light brush with a feather.

E. KCC comments on the applicant's grounds of appeal

E.1. At paras.10–11, KCC dismisses the *Map of encampment on Lenham Heath* (BHS-SOC/item III.A), because: 'The 1781 map...says nothing of [the appeal way's] continuation north of the (now) railway.' As we explain in the appeal statement of case, the appeal way 'is shown projected about 260 metres beyond B, a point about 120 metres short of the centre line of the present railway bridge'. As Neither Shepherd's Farm nor Bolton Farm is shown, it may be inferred that the way projects north and is shown as a local road of significance leading towards Old Shelve.

E.2. At para.12, we respond to the bulleted points as follows (bullets are numbered b.1 to b.5).

E.3. b.1: it is incorrect that 'case law has firmly established that Tithe Maps cannot be relied upon to distinguish between public and private rights'. A number of cases in the superior courts have addressed tithe map and apportionment evidence in the context of rights of way, with differing and sometimes inconsistent conclusions. For example, in *Commission for New Towns v JJ Gallagher Ltd*, Neuberger J (as he then was) found (with

¹⁸ Instead, it appears to have been downgraded from a publicly-maintainable road (a continuous blue line) to a road which KCC purported to be non-maintained. See BHS-SOC/item III.N.

benefit from expert, including oral, evidence given by both parties) that an enclosed route on which no rent-charge was apportioned was ‘treated as having highway status’.¹⁹ However, the society submits that each tithe map and apportionment is unique, and must be considered on its own merits. The society relies on the particular analysis of the evidence of the Lenham tithe map in this case, which strongly suggests that the use of colouring was confined to, and intended for, public roads.

E.4. b.2: please see *British Transport Commission objection* at item D above.

E.5. b.3: please see para.C.9 above as regards the *Finance (1909–1910) Act 1910* (BHS-SOC/item III.L) evidence.

E.6. b.4: KCC states that ‘several early maps show the southern end as a cul-de-sac’. Those several maps show two enclosed roads, leading from A and B respectively, between which no connection is drawn. For the reasons explained (BHS-SOC/paras.I.H.12, I.H.21), we do not accept that these maps demonstrate that there was no connection, and we rely on the roughly contemporary *Greenwoods’ map of Kent* (BHS-SOC/item III.D) which shows that there was such a connection, that it was unenclosed, and that as an unfenced field road across farm land, this is likely to account for its exclusion from earlier maps.

E.7. KCC states that, ‘there are many routes on the List of Streets for the county that appear as cul-de-sac highways leading only to a small handful of properties’. We refer to our evidence at BHS-SOC/para.I.H.21 as to the paucity of cul-de-sac roads of historical origin which lack any public continuation whatsoever, and note that, while KCC says there may be many such cul-de-sac routes, we suggest that the overwhelming majority are modern cul de sacs which have been adopted for the benefit of residential frontagers. KCC offers no evidence of cul de sacs comparable to that which is asserted from B to Shepherd’s Farm.

E.8. In *Moser v Ambleside Urban District Council*,²⁰ the Court of Appeal considered a track in Ambleside leading from Gale Lane, through a gate at point A and across two fields to Stock Ghyll Lane at point B. The status of the roads at either end of the track also was uncertain. Atkin LJ said:

Gale Lane terminates at this gate, and it seems to me to be extraordinarily unlikely that if Gale Lane is a public highway, and there is some very strong evidence of that, it should have ended at that gate especially as there was this formed track in existence leading still further, and that leads me to suppose the learned judge was justified in drawing the inference that the public right of way continued beyond the present Gale Lane over this particular track and that that track did not end at the point “B”, but extended still further.

E.9. In the present case too, the way leading north from B is not a cul de sac: it continues north beyond Shepherd’s Farm to Old Shelve, and has done since at least 1820, the date of the *Greenwoods’ map of Kent* (BHS-SOC/item III.D), and in all likelihood, for very much longer. It is in those circumstances that KCC’s claim that Rose Lane between B and Shepherd’s Farm is a publicly-maintainable road with no continuation is particularly unlikely.

E.10. b.5: please see *British Transport Commission objection* at item D above.

¹⁹ At [98]. Copy included with appeal statement of case.

²⁰ (1925) 23 LGR 533, 89 JP 118

F. Procedural matters

F.1. KCC states, at para.8, that its duty²¹ was to “determine whether or not to make ‘the order to which the application relates’”. It explains that the application was for bridleway, and none of the evidence supports bridleway status.

F.2. The society agrees. With the benefit of research yielding further evidence, and further analysis of the evidence originally submitted in support of the application, the society concludes that the appeal way is a public road.²² The society notes with approval that KCC states (para.8) that, had it reached the same conclusion as the society, it would in any case have resolved to refuse the application for a bridleway, but to have exercised its stand-alone power to make an order for a higher status.

F.3. However, an appeal lies against the decision of the surveying authority: ‘Where the authority decide not to make an order’.²³ Thereupon the duty on the Secretary of State is that:²⁴

If on considering the appeal 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... .

Accordingly, the question for the Secretary of State is not necessarily whether an order should be made in the form applied for, but whether an order should be made arising from the appeal. If — as the society contends — the Secretary of State concludes that the reasonable allegation of a higher status is made out, then he may direct that an order be made accordingly.

F.4. KCC states (para.14) that, “The language of this section [presumably referring to para.4 of Sch.14] is termed such that ‘the order’ can only be one ‘to which the application relates’, and there is no express provision within the Act for the Secretary of State to ‘discover evidence’ that is over and above the status applied for (i.e. to which the application relates).”

F.5. The society disagrees. The language of para.4(2) uses the indefinite article — ‘If... the Secretary of State considers that an order should be made, ...’ [underline added]. This is intended to confer on the Secretary of State a wide-ranging power to make any appropriate order arising from the appeal. It may be compared with the language in para.3(1)(b), under which ‘the authority shall...decide whether to make or not to make the order to which the application relates.’ [underline added] As KCC accepts (para.8), the obligation on the surveying authority under para.3(1) is to decide whether to make the order applied for, and if a different order is called for, to refuse the application but for the authority to act on its own initiative to make the requisite order. The Secretary of State is in no such way constrained in making a direction under para.4(2).

21 Under the Wildlife and Countryside Act 1981, Sch.14, para.3(1)(b)

22 But, at least in relation to the way from A to Shepherd’s Farm, a road over which rights for mechanically-propelled vehicles have been extinguished under s.67 of the Natural Environment and Rural Communities Act 2006. That part between the terminus of the entry in the *List of streets* (BHS-SOC/item III.P) south towards B appears to be subject to the exception in s.67(2)(b).

23 Wildlife and Countryside Act 1981, Sch.14, para.4(1)

24 *Ibid*, para.4(2)

F.6. As to discovery of evidence by the Secretary of State (paras.14–15), the Planning Inspectorate has made clear that, on an appeal, any evidence submitted with the appeal will be considered.

F.7. At para.16, KCC observes that, ‘consideration will need to be afforded to the manner in which the southern section of the claimed route’ is represented in the order. The society notes that, as KCC accepts that the southern section of the appeal way is a publicly-maintainable highway, it is surprising that the application was not granted by making an order in respect of this part at least.

G. Conclusion

G.1. KCC states (para.7) that, ‘having considered all the relevant evidence available – tilts the balance of probabilities in favour of the claimed route having historically been a private occupation road.’

G.2. The society disagrees with that assessment. The evidence assembled in the society’s appeal statement of case is either complementary to the appeal, or neutral. Contrary to the interpretation placed by KCC on the material identified in the eight bullets at para.5, the only evidence adverse to the appeal is the *Maidstone and Ashford Railway* plans for 1879–80 (BHS-SOC/item III.I), which describe the appeal way as an occupation road — but which, the society maintains, are shown to be unreliable in the context of, first, the previous plans prepared for the same or similar railway project, and secondly, the execution of the plans in the form of a bridge built to public-road minimum dimensions.

G.3. Referring to the test in *Monckton* of contrary documentary evidence, sufficient to displace a reasonable allegation (see *The reasonably-alleged test* at item B above — what the society refers to as a ‘knock-out blow’), it is submitted that the reasonably-alleged test, which ‘is not a high test’,²⁵ is plainly met. There is credible historical evidence of reputation; there is — according to KCC, but not accepted by the society — some conflicting interpretation of that evidence as to reputation; and there is no documentary evidence which must inevitably defeat the claim. Indeed, the only adverse evidence, the *Maidstone and Ashford Railway* plans for 1879–80, is merely one item among several in the context of the railway evidence, which overall is supportive of the application. We therefore submit that the appeal should be granted.

G.4. In view of KCC’s acceptance that the appeal way between Shepherd’s Farm and B is a publicly-maintained road, it is suggested that the Secretary of State should direct KCC to make an order for a restricted byway between A and the northern terminus of the way identified in the *List of Streets* (BHS-SOC/item III.P), and for a byway open to all traffic from that point onwards to B.

Hugh Craddock for
British Horse Society

22 October 2024

²⁵ *Roxlena* in the Court of Appeal: see para.B.6 above.