



Order Decision

Accompanied site visit undertaken on 23 January 2024

by Mark Yates BA(Hons) MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 09 April 2024

Order Ref: ROW/3311269

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as The Kent County Council (Byway Open to All Traffic EE496 and Restricted Byway EE497 at Wingham and Goodnestone) Definitive Map Modification Order 2022.
- The Order was made by Kent County Council ('the Council') on 22 July 2022 and proposes to add two rights of way to the definitive map and statement which form one continuous route in the parishes of Wingham and Goodnestone.
- There were six objections outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.

Procedural Matters

1. All of the points referred to below correspond to those delineated on the Order Map.
2. Following consideration of the application, the Council made an Order to add the route claimed ('claimed route') between Staple Road and the bridleways known as EE28 and EE269A. It is proposed to be recorded partly as a byway open to all traffic, commonly referred to as a 'BOAT' (points A-B), and partly as a restricted byway (points B-E). The difference in the status of the two sections arises out of the provisions of the Natural Environment and Rural Communities Act 2006 ('2006 Act').
3. The applicant requests that, if confirmed, the definitive statement contains a reference to no limitation being present on the way. However, I am not satisfied that such a modification is necessary. The absence of any limitations in the Order Schedule mean that none are presently deemed to exist.

Main Issues

4. The Order relies on the occurrence of an event specified in Section 53(3)(c)(i) of the 1981 Act. Therefore, I need to determine whether the discovered evidence shows that a right of way which is not shown in the map and statement subsists on the balance of probabilities.
 5. There is no evidence of recent public use and reliance is placed by the applicant on various historical maps and documents in support of the dedication of a highway at some point 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 tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.
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6. Subject to certain exemptions found in Section 67 (2) and (3) of the 2006 Act, unrecorded public rights for mechanically propelled vehicles over a way, which immediately prior to the commencement date (2 May 2006) was not shown in a definitive map and statement are extinguished. In terms of the recording of the A-B section as a BOAT, reliance is placed on the exemption in Section 67(2)(b) of the Act, namely where '*immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980*'. No exemption is considered to apply in relation to the remainder of the claimed route.

Reasons

Estate documents

7. Extracts have been provided of terriers which contain a written description of areas of land owned by St John's College, Cambridge. A 1701 terrier describes an area of arable land comprising of 18 acres by reference to landholdings and a '*shireway*'. The land described when considered in conjunction with the estate plan outlined below is supportive of the shireway corresponding to a proportion of the claimed route between points B-C. Additional reference material points to the word shireway historically being used locally to describe a bridleway.
8. Another terrier extract from 1704 describes two areas of land which total 17 acres. Reference is made to both pieces of land abutting a lane. Again, the evidence points to the lane corresponding to the proportion of the claimed route called a shireway in the 1701 terrier. I find '*lane*' to be a descriptive term and not necessarily indicative of a route having a particular status. It could equate to a bridleway or a road, but there is a positive reference in the 1701 terrier to the route being a bridleway.
9. A 1736 St John's College estate map shows by reference to the descriptions in the terriers that the shireway and lane corresponded to the northern part of the claimed route. The map shows the claimed route as an enclosed lane between points A and C. It is coloured in the same way as Staple Road and at point C the route is shown open ended with the annotation '*to Goodnestone*'. This is strongly supportive of the claimed route being a through route between Staple Road and Goodnestone to the south. The applicant draws attention to the route being coloured in the same way as other known highways on this map.
10. A 1767 survey of the estate lands and roads in the Goodnestone Estate includes a gazetteer of landholdings in the parish and a plan showing roads in the parish (including whether they were publicly maintained). The key confirms that roads are to be shown with a solid black line, but that '*where there are only dots... the road is not repaired*'. The plan shows the claimed route by a solid black line to indicate that it was maintained at public expense. It is annotated '*Twitham*' and is referred to as '*Twitham Lane*' in the accompanying description of the lands.
11. An extract from a St John's College terrier of 1793 refers to a proportion of the claimed route as a shireway leading to a farm known as Twitham Farm. Again, this provides positive evidence in support of bridleway status.
12. The St John's College Downe Court map of 1800-1820 again shows the northern section of the claimed route as an enclosed lane to around point C where it is annotated '*to Goodnestone*'. Another estate map of 1816 shows the northern

section of the route to be partly enclosed and partly unenclosed with the continuation at point C annotated '*from Goodnestone*'.

13. A St John's College estate map of 1843 shows a proportion of the claimed route from point A to a point between points C and D as an enclosed road. It appears to be coloured light grey in the same way as Staple Road.
14. It is evident from the estate documents that the claimed route was part of a through route which linked at each end with recognised highways. This provides some support for the route having public status. The references to a shireway point to a recognition by the estate that the route was used in the manner of a bridleway.

Halsted's History and Topographical Survey of Kent

15. The details provided reveal that Edward Halsted was a local historian, and his 1799 publication was followed by a revised and updated second edition in 1801 which included 34 folding maps. The relevant map shows an enclosed lane in the vicinity of the claimed route but with a more curved alignment which continues towards Goodnestone.

Greenwood map

16. The Greenwood map published between 1821-27 (surveyed 1819-20) shows the claimed route as a cross road between solid boundaries. It is shown as part of a through route in conjunction with the connecting Bridleway EE269A. An additional route is shown running to the south of point C.
17. The portrayal of the claimed route as a cross road between recognised highways can provide support for the route being a highway. Whilst this is more likely to have been indicative of a vehicular way, it could potentially have been a bridleway. However, the purpose of the map was to show the physical features which existed when the land was surveyed, including all roads. This will lessen the weight that can be attached to this commercial map.

Tithe maps

18. A proportion of the claimed route (approximately between points B and D) is shown on the 1841 Goodnestone tithe map. It is shown partly enclosed and unnumbered. The remainder of the land crossed by the route within the parish of Goodnestone appears to have not been subject to the tithe award.
19. The Wingham tithe map shows the northern section of the route linking with Staple Road and extending towards point C. It is shown as an enclosed road which was coloured ochre and not subjected to the payment of tithes.
20. Attention is drawn by the applicant to the Wingham tithe apportionment (under the heading '*Roads, River and Waste Land*') to various parcel numbers none of which appear on the map, including '*640-Twitham Road*'. Reference is made to all of the roads identified within the section '*Roads, River and Waste Land*' now being recognised as public roads or public rights of way, with the exception of two (including Twitham Road). Additionally, private roads appear to be separately identified.
21. The claimed route is shown excluded on the tithe maps in the same way as other roads in the locality. However, the exclusion of a route from the tithed parcels of land could be indicative of a public or private road as both would have impacted

upon the productivity of the land being assessed. This will generally impact on the weight that can be attached to the tithe maps. Nonetheless, the reference to Twitham Road in the apportionment would be suggestive of highway status. I note the applicant refers to roads listed under this section now being public roads or rights of way. Therefore, it may not necessarily be indicative of a vehicular highway.

Ordnance Survey (“OS”) documents

22. The OS drawings of 1797 and the subsequent 1801 OS map show the whole of the claimed route as an enclosed lane. It is shown continuing via Bridleway EE269A. The claimed route is depicted in the same way on the 1831 OS map. This map also shows the route continuing to the south of point C on the Greenwood map, but it is evident that the additional route was a cul de sac with no apparent continuation southwards.
23. The OS boundary sketch map with the records from 1869-71 shows the northern part of the claimed route as an enclosed lane with the parish boundary running down the centre of it for a short distance. At this point the map is annotated ‘*C. Rd*’ to indicate the centre of the road.
24. The First Edition OS map of 1872 shows the claimed route and the ‘*C. R.*’ annotation appears as the route passes along the parish boundary. Where the route passes through the yard of the former Twitham Farm there is a solid line across it and another as the route exits the farmyard to indicate some form of physical barrier such as a gate. The farmyard is numbered 7 in the OS book of reference which is described as ‘*sheds, yard, &c*’. In contrast, the remainder of the claimed route is described as a road with the route shown linking with the two present bridleways.
25. The colour copy of the above map shows the claimed route, aside from the farmyard, coloured ochre in the same manner as Staple Road. The two connecting bridleways are also coloured ochre and listed as roads. This colouring could indicate that some form of surfacing works had been undertaken on the route.
26. The 1898 Second Edition OS map shows the claimed route with the ‘*C.R.*’ initials where it follows the parish boundary. It is also evident that Twitham Farm had disappeared by this date and the applicant refers to the farm being destroyed by a fire in 1875. The 1907 Third Edition and 1946 Fourth Edition maps show no material changes had occurred in relation to the claimed route.
27. The evidential value of OS maps is that they provide a reliable indication of the presence of particular physical features on the date of the survey. They do not provide clarification regarding the status of the paths and roads shown. The OS documents indicate that the route had the appearance of a road, but no inference can be drawn as to its status. However, it continues to be shown as a though route and this may be suggestive of the route being a highway.

Order of Exchange (Inclosure Act 1845)

28. An Order of Exchange relating to the fields owned by St. John’s College to the west of the northern section of the claimed route is stated to have been made in 1872. The map with the Order generally shows a proportion of the claimed route as an enclosed lane with the initial section from the junction with Staple Road and Staple

Road itself both coloured yellow. It is unclear to me whether the route is depicted as far as point E.

29. The applicant draws attention to this plan and others prepared under the Act using a yellow or ochre wash to denote public roads or bridle roads. However, the colour wash does not appear to be shown as far as point C. This colouring could potentially reflect the surface of the route and there is no obvious reason for a road to terminate where the yellow wash ceases.
30. These documents relate to an exchange of land and the status of the claimed route had no apparent bearing on this matter. I do not find that anything can be gleaned from the colouring shown on this plan in terms of the status of the route.

Eastry Rural Sanitary Authority/ Rural District Council records (1886 – 1907)

31. The records between 1886 and 1894 contain reports of the surveyor of highways for the Eastry Rural Sanitary Authority. Highway functions were subsequently undertaken by the Eastry Rural District Council.
32. The surveyor's report of 2 March 1886 refers to a letter from an owner of land adjacent to the claimed route with reference made to Twitham Lane having been previously repaired by the highway authority. A note in the report book states that the road would be moderately repaired. Further information supplied by the applicant points to Twitham Lane corresponding at least to the northern part of the claimed route.
33. It was reported by the surveyor on 4 December 1894, under the heading '*Twitham Lane Wingham and Grove Road Staple*', that '*both of those roads require some materials... Twitham Lane would take 12 rods Beach, and Grove Road 8 rods*'. A note in the column states '*to be repaired*'.
34. A report of 16 July 1907 records that Mr Miles of Twitham Farm had requested that a length of road leading from Dambridge Road by Mr Pidduck's Farm to an Oast House be inspected. Mr Miles wanted the Council to undertake repairs as far as the Oast House. It is reported on 30 July 1907 that the road as far as the Cottage would be kept in necessary repair, but '*as there is no public traffic beyond that point the Council would not be justified in undertaking to repair the road as far as the Oast*'. In terms of the reference to Dambridge Road, the applicant believes this refers to Staple Road given that it serves as a link between the village of Staple and Dam Bridge. Additionally, a Mr. Pidduck is recorded in the title apportionment as the occupier of land to the east of the claimed route.
35. These minutes reveal that a section of the claimed route was publicly maintained which would be indicative of highway status, at least for the section concerned. It is also apparent that no expenditure was later considered necessary beyond the cottage as there was no use by traffic past this point. This suggests that if there had been evidence of use beyond the cottage the route would have been maintained accordingly.

1910 Finance Act map

36. The majority of the claimed route is shown excluded from the surrounding hereditaments on this map. The exclusion of a route in this way can provide a good indication of highway status, more likely vehicular in nature. In contrast, the D-E section is shown running through one of the numbered hereditaments. Whilst

this section is stated to have crossed land for which a deduction of £100 was claimed for paths in accordance with the Act, it is not possible to determine whether the deduction related in any part to the claimed route.

Bartholomew's maps

37. The 1904 edition shows the claimed route as a road marked with red dashed lines, indicating that it was considered to be a '*secondary road (good)*'. On the 1922 edition it is shown as an uncoloured road which is stated in the key to be '*inferior and not recommended to cyclists*'. The 1953 edition records the route as a serviceable road. However, a disclaimer appears on the maps which states, '*the representation of a road or footpath is no evidence of a right of way*'. This disclaimer will mean that no significant weight can be attached to these maps.

East Kent Light Railway

38. The railway was promoted under the Light Railways Act 1896. The 1896 Act required the deposit of plans and books of reference in connection with a submission seeking authorisation under the Act.
39. The 1910 deposited plan for line 6 shows a section of the claimed route in the locality of points B and C which is numbered 3. Parcel 3 is identified in the accompanying book of reference as a public bridle road owned and occupied by Eastry Rural District Council. Whilst a section of Bridleway EE269A is referred to in the book of reference as an occupation road, the documents provide support for the claimed route being viewed as a public bridleway.

Notice under the Electricity (Supply) Acts 1882 to 1922

40. A notice appeared in the London Gazette on 23 October 1923 regarding an application to lay apparatus under particular streets not repairable by the local authority for the purpose of the supply of electricity. One of the streets described corresponds with the claimed route and the continuation via the current Bridleway EE269A. Research undertaken by the applicant reveals that almost all of the streets included in the notice are today viewed as a highway with most of these corresponding with a category of public right of way that would be recorded on the definitive map.
41. The notice provides further evidence of the claimed route forming a through route in conjunction with Bridleway EE269A between Staple Road and Goodnestone. Whilst the claimed route was viewed as not being publicly maintained, the route may still be a highway. This is supported by the large proportion of the ways included in the notice now having highway status. However, the notice itself is not positive evidence of highway status. I also note the applicant believes the notice could be more supportive of bridleway status.

Council records

Highways Inspectors map (1952)

42. It is stated that these maps were produced by the Highway Inspectors in order to show the routes which fell within their jurisdiction with routes colour coded depending on the classification of the road. The initial section of the claimed route at its northern end is shown as an unclassified county road (maintained) and numbered D1842. The remainder of the route is recorded as an unclassified county road (non-maintained) and numbered 148.

43. It is apparent that this map was later amended with the majority of Road 148 being removed as it was not considered to form part of the publicly maintained highway. There is nothing to suggest that any public rights over the route have been legally stopped up.

Definitive map records

44. The draft map produced as part of the process to compile the original definitive map shows the section of the claimed route in Goodnestone parish coloured yellow which is stated to indicate that it was considered to be an unclassified county road at that time. The draft map for Wingham parish shows the northern end of the claimed route annotated '*unclassified county road*'. It is apparent that the claimed route was not included on the definitive map, presumably in light of it being viewed as an unclassified county road.
45. The Council undertook a review of the definitive map in 1970 and the draft revised map showed the claimed route as part of a BOAT which continued southwards along Bridleway EE269A. No records are available to indicate why the claimed route was proposed to be added as a BOAT. An objection was lodged on behalf of the Right Hon. Lord Fitzwalter which acknowledged that the northern section of the claimed route as far as the properties may be subject to vehicular rights. Additionally, the objection seems to acknowledge that the remainder of the route was a bridleway. However, the review was later abandoned on the direction of the Secretary of State for Environment in February 1983 without the status of the route being determined.
46. In terms of the reference by one of the objectors to a 1980 Diversion Order, no such document has been found by the Council. The Council suggest that it could relate to the above review.

Current highway records

47. The northern part of the claimed route between Staple Road and the entrance to Little Twitham Farm is recorded in the Council's list of streets. This comprises of a record of the highways maintained at public expense in accordance with Section 36(6) of the Highways Act 1980.
48. Guidance contained in paragraph 4.42 of Defra Circular 1/09 outlines the Secretary of State's current view in relation to unclassified county roads recorded in the list of streets. It is stated that this may provide evidence of vehicular rights. However, this must be considered in conjunction with all of the relevant evidence to determine the nature and extent of those rights.

Conveyance relating to Twitham Oast (1982)

49. A conveyance dated 24 February 1982 in relation to the sale of the property known as Twitham Oast contains the clause that the property is sold '*subject to the rights of the public over the road or way known as Twitham Lane Wingham aforesaid*'. This is indicative of a recognition of public rights at least over the northern section of the claimed route.

Conclusions

50. The evidence reveals that the claimed route was a through route of some antiquity which has been maintained on occasions at public expense. The evidence is supportive on balance of the route being an ancient highway which has for the

most part fallen into disuse. A lack of more recent use does not impact on these historical public rights.

51. However, I consider the evidence to be fairly evenly balanced in relation to the status of the claimed route. There is some evidence that points to either equestrian or vehicular rights and other evidence that is more neutral on this matter. The estate documents indicate that the route was initially viewed by the landowner as a bridleway. It is also evident from the deposited documents for the light railway that the route was considered to be a bridleway. Whilst documents such as the Finance Act map may point more to vehicular status, the exclusion of a route from the surrounding hereditaments would not be inconsistent with a bridleway. I also note that a proportion of the route continued through a numbered hereditament on this map.
52. Overall, I find on balance that the claimed route should be recorded as a public bridleway throughout the whole of its length.

Width

53. The applicant provided average widths in relation to the claimed route which were calculated from a few of the historical maps. It is apparent that the Council placed some reliance on these calculations and also had regard to the status of the two sections of the route when drawing up the Order.
54. However, I am not satisfied that significant reliance can be placed on the average widths taken from the historical maps. Where there is uncertainty in relation to the historical width of a way regard should be given to what would be a reasonable width in the circumstances. Bearing in mind my conclusion regarding the status of the route, I consider that 3 metres would be a reasonable width for a public bridleway in this location.

Other Matters

55. A number of matters are raised in the objections to the Order which sit outside of the relevant considerations (set out in the main issues above). These include the impact of use by off road vehicles, fly tipping, safety concerns, cost of maintaining the route, impact on privacy and security, environmental concerns and risk of flooding.
56. A deposit made under Section 31(6) of the Highways Act 1980 does not impact upon any historical public rights deemed to exist.

Overall Conclusion

57. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with modifications.

Formal Decision

58. I propose to confirm the Order subject to the following modifications:
- Delete all references to '*restricted byway*' and '*byway open to all traffic*' and insert '*bridleway*'.
 - Delete the references in the Order Schedule to '*3.5 metres*' and '*4 metres*' and insert '*3 metres*'.

- Add the notation for a bridleway to the Order Map and modify the map key accordingly.
59. Since the confirmed Order would show as a highway of one description a way which is shown in the Order as a highway of another description I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Mark Yates

Inspector

ORDER MAP - SHOWING PROPOSED MODIFICATIONS - NOT TO SCALE

