

Kent County Council (Byway Open to All Traffic EE496 and Restricted Byway EE497 at Wingham and Goodnestone) Definitive Map Modification Order 2022

ROW/3311269

BHS statement of case on proposed modification

A. Introduction

A.1. This is the statement of case of the British Horse Society (the society) on the modifications proposed to 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').

A.2. The modifications were proposed in the inspector's interim decision dated 9 April 2024. The modifications would modify the order to show the order way throughout as a bridleway, and to record a width throughout of three metres.

A.3. As in the society's original statement of case in support of the order, the lettering A, B, C, D, E and F refers to the lettering adopted in the application plan reproduced on page 8 of the original statement of case. Where the letters differ from those used in the order, the order letters follow in italics in brackets — e.g. between D and E [*C and D*].

A.4. References to the society's original statement of case are in the form: [Part].[item].[paragraph]. For example, para.V.B.2 refers to paragraph B.2 in part V; item V.B refers to the entry labelled B in part V (which is *Early C18 St John's College terrier (II)*). Kent County Council is referred to as 'KCC'.

B. Grounds of objection

B.1. The society objected and continues to object to the proposed modification on the grounds that:

1. The modification affords excessive weight to early descriptions of the order way as a bridleway which can be taken to have been superseded by later evidence of vehicular status.
2. The modification also affords excessive weight to the assessment of the status of the order way as bridleway for the purposes of the East Kent Light Railway — an assessment which was and is known to lack rigour, so that it frequently under-recorded the status of public ways.
3. The modification fails to accord sufficient weight to the preponderance of eighteenth and nineteenth-century evidence which show that the way had the reputation of a public road.

4. The modification fails to take account of the society's submission (see society's original statement of case, part III) that the order way between A and B, which is tarred, and has the appearance of the ordinary road network, does not satisfy the statutory test to be recorded as a byway open to all traffic, and ought to be wholly deleted from the order (with consequential amendments to the order).

B.2. The society therefore submitted, and continues to maintain, that the proposed modification should be rescinded, and the order should be confirmed as made, with the exclusion of the way between A and B.

B.3. The grounds for objection are considered below in two items: in item D below, whether the order way between B and F [*B and E*] is a bridleway; and in item G below, whether the order way between A and B should be deleted from the order. Objection is also made to the proposed modified width of the order way, at item F below.

B.4. In addition, item C below refers to the upgrade to connecting *Public right of way EE269A*, and item E below recalls *The development of wheeled traffic* in connection with the identification of the order way as a 'shire way' or bridleway.

C. Public right of way EE269A

C.1. The interim decision refers in several places to bridleway EE269A (known as Woodshole Lane), which connects at F [*E*] with the order way and bridleway EE28.¹

C.2. On 22 July 2022 (the same date as the order was made), KCC made the Kent County Council (Restricted Byway EE269A at Goodnestone) Definitive Map Modification Order 2022 ('the EE269A order'). The effect of the EE269A order was to upgrade bridleway EE269A to restricted byway. The EE269A order was confirmed on behalf of the Secretary of State in a decision letter dated 11 January 2024.²

C.3. The continuation beyond the order way from point F [*E*] to the junction of Cave Lane with Goodnestone Hill and Goodnestone Road therefore is now recorded as a restricted byway. (The line of bridleway EE28 to Buckland Lane via Crixhall Court remains unchanged.)

D. Whether the order way is a bridleway

D.1. We consider here the proposed modification primarily in relation to the order way between B and F [*B and E*]. We address the status of the way between A and B in item G below.

D.2. The society's original statement of case at item I.I set out a table of the evidence contained in part V of that statement of case, together with an assessment of whether it contributed to reputation as bridleway or carriageway, and an assignment of points.³ This table is reproduced below for ease of reference.

1 Paras.2, 16, 22, 39, 40, 41, 45

2 ROW/3311754

3 For an explanation of the points, see paras.I.I.3–I.I.4 in the original statement of case.

Table of evidential items in Part V of the society's original statement of case

Item	Ref	Points	
		Bridleway	RB
Early C18 St John's College terrier (II)	V.B	0	0
C18 St John's College estate map	V.C	0	2
Survey of estate lands and roads Goodnestone	V.D	0	3
Late C18 St John's College terrier	V.E	0	0
Ordnance Survey surveyor's drawing, Canterbury (East)	V.EA	0	0
Barlow-Hasted map of Kent	V.F	1	0
Ordnance Survey, Mudge-Faden one-inch map of Kent	V.G	1	0
Early C19 St John's College Downe Court map (I)	V.H	0	0
Early C19 St John's College Downe Court map (II)	V.I	0	0
Greenwoods' map of Kent	V.J	0	1
Ordnance Survey, Old Series one-inch map	V.K	0	0
Tithe Commutation Act 1836	V.L	0	3
Mid-C19 St John's College estate map	V.M	0	0
Ordnance Survey boundary records	V.N	0	1
Inclosure Act 1845: order of exchange	V.O	0	0
Ordnance Survey large scale mapping	V.P	0	1
Eastry Rural District Council	V.Q	0	3
Bartholomew's map	V.R	0	1
East Kent mineral light railway	V.S	5	0
Finance (1909–1910) Act 1910	V.T	0	5
Electricity Supply Acts 1882 to 1922	V.U	2	0
Highway inspector's map	V.V	0	3
Draft definitive map	V.VA	0	2
Conveyance of 1982	V.W	0	3
Total points		9	28

D.3. One of the earliest available items of evidence is indeed consistent with bridleway status. The *Late C18 St John's College terrier*, item V.E, which dates from 1793, refers to the order way as 'a shireway leading to a farm called Twitham Farm' (as noted at para.V.E.5, a shireway is a public bridleway).⁴ This, however, is the only item of this era to refer to the order way as (in effect) a bridleway; other college estate documents refer to a lane (*Early C18 St John's College terrier (II)*, item V.B, which dates from 1704) or mark the order way on a map in the same way as other roads. We explain in item E (*The develop-*

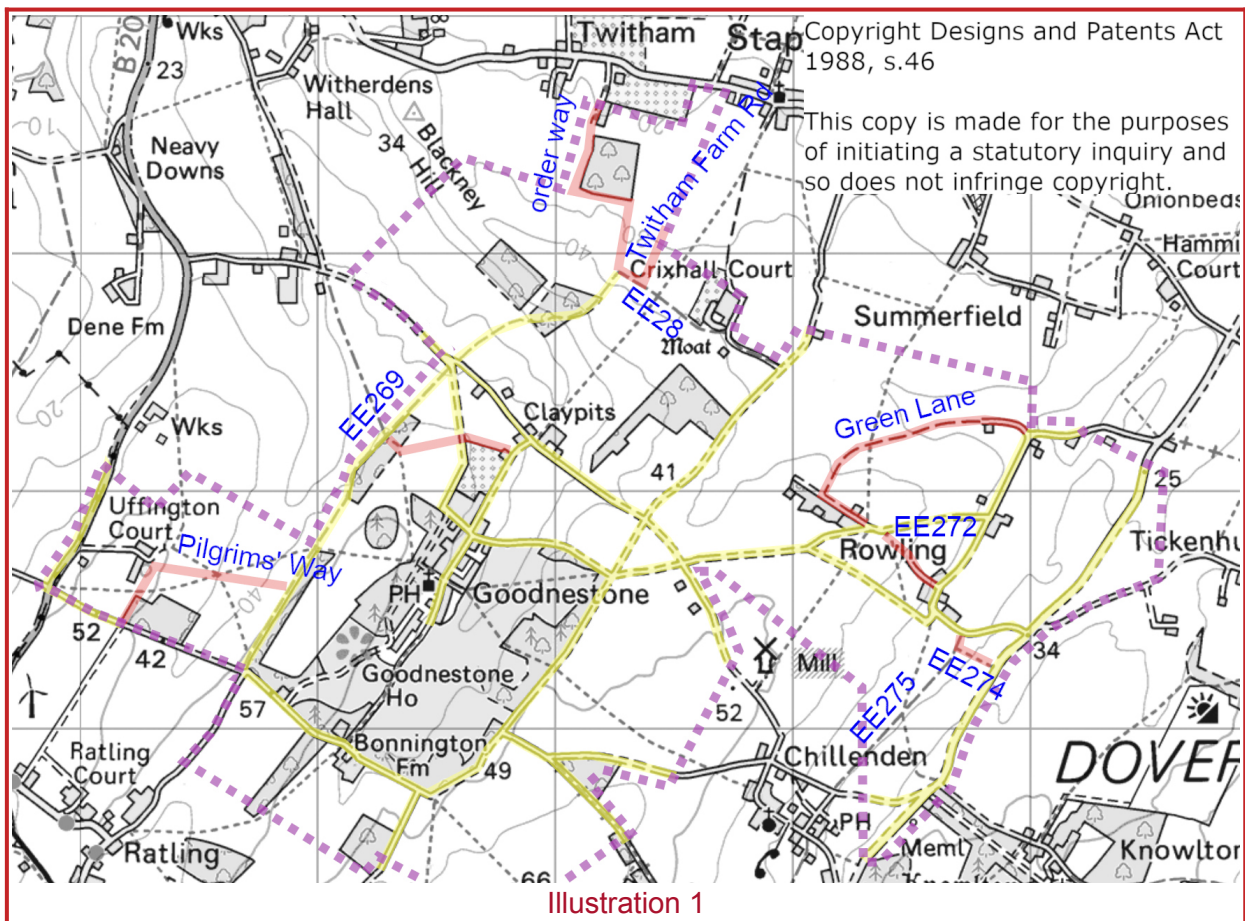
4 The evidence scores 0 points (neither as bridleway nor restricted byway) because no more than two documents are scored from similar historical sources: chronologically, this is the third such evidential source.

ment of wheeled traffic) below how ways which started out as bridleways became carriageways as vehicular traffic developed in the eighteenth century.

D.4. In the table, both the *Barlow-Hasted map of Kent*, item V.F, which dates from 1797–1801, and the *Ordnance Survey, Mudge-Faden one-inch map of Kent*, item V.G, which dates from 1801, are assigned points in favour of bridleway status, but only because neither map can be said with any certainty to distinguish bridleways and roads, and therefore the best inference that can be drawn from the items is that the order way must be at least a bridleway. The evidence cannot be said to favour bridleway status: only to lack probative value in distinguishing bridleway and road.


D.5. The *Survey of estate lands and roads Goodnestone*, item V.D, which dates from 1767, was commissioned by the owner of the lands, and refers only to 'roads' and to 'Twitham Lane'. The map within the survey (see the original statement of case at annex B, p.102) is a map of roads within the estate. Many of the roads identified in the map remain public roads or byways today, while others are no longer recorded.

Goodnestone Roads Map transposed to OS Landranger overlay



Key:

Public roads/byways⁵ shown as roads on Goodnestone Roads Map: yellow 

Other ways⁶ shown as roads on Goodnestone Roads Map: red 

Roads may be uncoloured where they straddle the parish boundary and were maintained by neighbouring parishes

Approximate line of Goodnestone parish boundary in C18: pink stipple 

Base map: Ordnance Survey 1:50,000 Landranger map

D.6. It may be seen that all of the roads and byways now recognised within the parish of Goodnestone (that is, the parish as defined in the eighteenth and nineteenth centuries),⁷ were identified as roads on the Goodnestone Roads Map. The Goodnestone Roads Map in addition identified several ways which are not now recognised as roads, viz:

- Green Lane, north of Rowling;
- Road at Rowling Court, part now footpath EE272;
- Road between Rowling and the Sandwich Road, now footpath EE274;
- Road from Claypits, across Saddlers Hill (also known as Goodnestone Hill), to Green Lane Road⁸;
- Pilgrims' Way at Uffington Court (part of a longer route across Goodnestone Park which, as regards the park, was stopped up in the eighteenth century)⁹;
- Twitham Farm Road (as far as the parish boundary);
- the order way (as far as the parish boundary).

All of these ways, save the Pilgrims' Way across Goodnestone Park, are considered to be candidates for recording as restricted byways on the definitive map and statement.

D.7. Whereas the road across Goodnestone Park (south-west from the church to Bonnington Farm), which was and remains a private drive (and public footpath), is not recorded as a road on the Goodnestone Roads Map.

D.8. It will be noted that neither bridleway EE275 (between Chillenden and Rowling), nor bridleway EE28 (between order way point F [E] and Crixhall Court) are identified on the Goodnestone Roads Map. Nor are several bridleways which are believed to have existed on Chillenden Downs (two of which can be seen marked 'B.R.' on the Ordnance Survey County Series 1:2,500 second-edition plan of 1898).¹⁰

D.9. Accordingly, it is submitted that the order way would not have been identified in the Goodnestone Roads Map if it were a bridleway.

D.10. Subsequently, the Wingham tithe map and apportionment (*Tithe Commutation Act 1836*, item V.L) show the order way between A and a point mid-way between C and D [A and a point between B and C] (*i.e.* including part of the order way south of the post-war threshold of acknowledged public maintainability at B), coloured sienna, and recorded in

5 As they are understood today: *i.e.* recorded in the list of publicly-maintained streets, or in the definitive map and statement as restricted byway or byway open to all traffic.

6 *I.e.* not recorded as public roads or byways today.

7 Goodnestone parish now includes the former parishes of Chillenden and Knowlton.

8 Green Lane road is now recorded as restricted byway EE269.

9 See writ of *ad quod damnum*, Kent County Archives EK/U373/O2 and Canterbury Cathedral Archives C-202/111/2

10 maps.nls.uk/view/101429646#zoom=4&lat=3256&lon=6967&layers=BT

the apportionment under the heading 'Roads, River and Waste Land'. As noted in the original statement of case at para.V.L.9: of the 28 roads identified under that heading, all but five today are recognised as roads or byways, and it is suggested that the tithe surveyor set out to identify only roads and not footpaths and bridleways.

D.11. In chronological progression, no other evidence identifies the order way as a bridleway until the plans for the *East Kent mineral light railway* (EKLR), item V.S, dating from 1910. These describe the order way as a 'Public bridle road' occupied by Eastry Rural District Council.

D.12. The society has, in relation to several applications for definitive map modification orders, concluded that the EKLR surveys consistently overlooked or under-recorded rights of way. In common with a number of other evidential sources, railway surveys (and particularly that for the EKLR) tend to false negatives, but not false positives — that is, the data are more likely to omit or under-record a right of way than to flag a non-existent one. This arises from the context of the evidence-gathering.

D.13. The surveyors and engineers employed to survey the proposed line might well overlook a minor right of way, and particularly a field path or field road, or take an enclosed or field way to have a lower status than public road (or merely to have the status of a private road). Such false negatives might arise from insufficient or poor data (e.g. an ill-informed or absent lay parish surveyor), negligence (failure to make due diligence inquiries), or deception (to lower the costs of construction¹¹), but would have a common outcome — the projected costs of construction would be less.

D.14. False positives, showing non-existent highways, or public paths as of incorrectly-higher status, cannot entirely be ruled out and again could arise from insufficient or poor data, but there was every incentive on the surveyors and engineers not to make mistakes which would appear to inflate projected costs unnecessarily.

D.15. In relation to the EKLR, the survey appears to have been done briskly and economically — that was the style of its engineer, and subsequently director and manager, Holman Fred Stephens. In relation to lines 1 and 2,¹² the crossing of Black Lane in Eastry (bridleway EE488) was recorded as a public footpath. The nearby crossing of BOAT EE109¹³ was recorded as a public bridleway. Great Selson Farm Road, for which an application has been made to record as a restricted byway,¹⁴ and Ringlemere bridleway, for which an application also has been made,¹⁵ were both recorded as occupation roads, as was Poulton Lane, bridleway EE193. Dambridge Farm Road, now part public road, part restricted byway EE165A, was recorded as a bridleway. These and other minor highway crossings are illustrated below.

11 Ss.46, 49 and 50 of the Railways Clauses Consolidation Act 1845, incorporated with almost every Act authorising construction of a railway after that date, required that public roads be taken over or under a railway by a bridge of specified dimensions, at considerable additional cost compared to a level crossing or lower specification bridge in relation to public paths and private roads. However, these provisions were excluded from application to the East Kent Mineral (Light) Railways Order 1911 in relation to the part of the network which was authorised and constructed, and presumably would have been excluded from any subsequent order, if one had been made. Thus it was the practice that the East Kent Light Railway crossed all roads on the level (save for one bridge adjacent to Eastry station).

12 Line 1: Shepherdswell to Eastry; Line 2: Eastry to Wingham.

13 Byway open to all traffic EE109 from Eastry Mills to Hammill.

14 PROW/DO/C415

15 From Fleming Road, Ringlemere, to Sandwich Road, Hammill: PROW/DO/C436

EKLR minor highway crossings (lines 1 and 2, vicinity of Eastry)

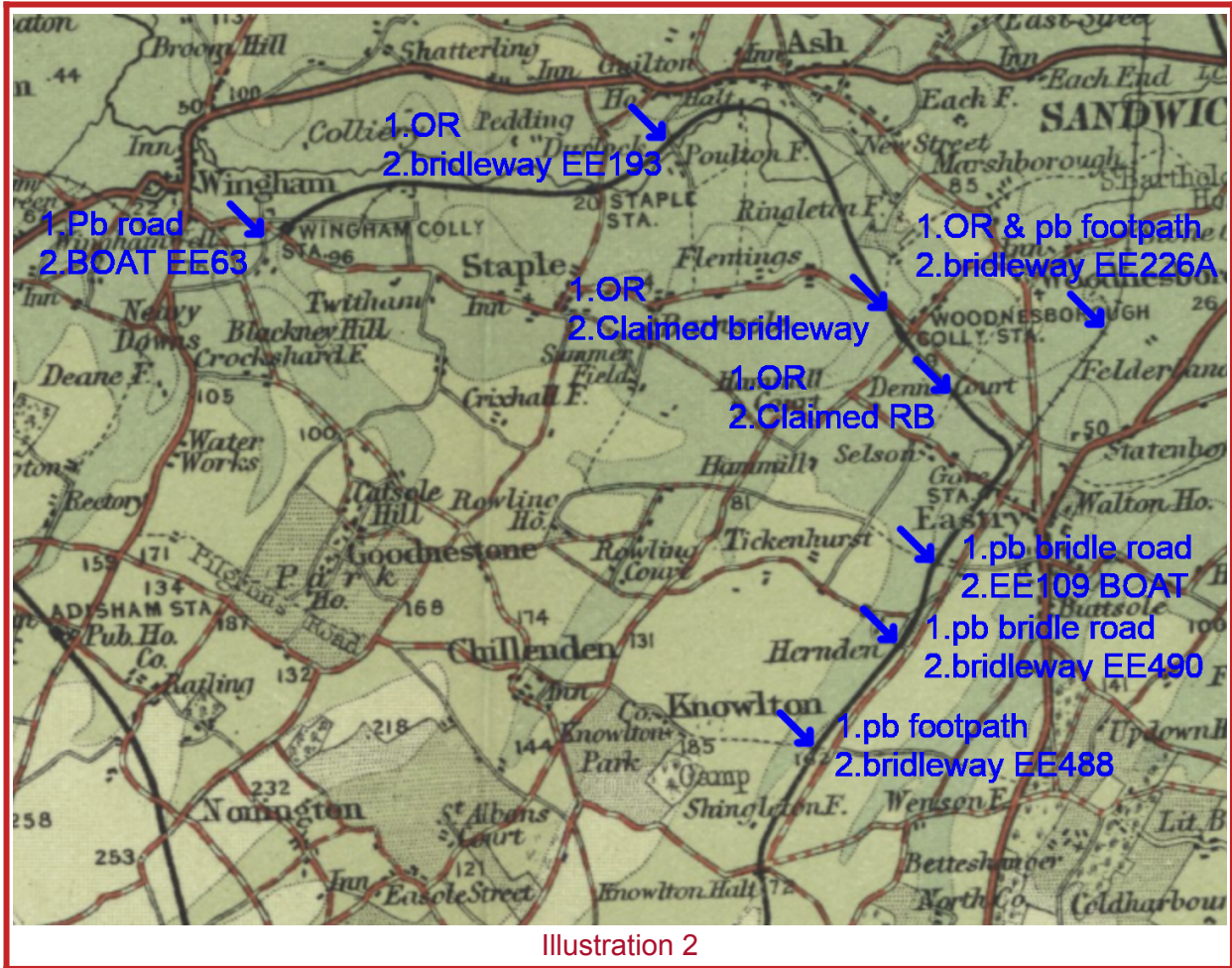


Illustration 2

Key:

1. = status shown in EKLR book of reference to line 1 or 2

2. = current status on definitive map and statement (or status claimed in application where not yet shown)

OR = occupation road

pb = public...

Base map: Bartholomew's 1;100,000 map (1922)¹⁶

D.16. It is likely that the EKLR survey was done without sufficient diligence, for only three years later the railway undertaker was challenged by the Eastry Rural District Council's surveyor as to the absence of provision for a bridleway at Black Lane (bridleway EE488) and elsewhere. The Surveyor's report to the council of 22 July 1913 records as follows¹⁷:

East Kent Light Railways. I met Mr A S Wilks one of the Kent Coal Concessions representatives yesterday in reference to the erection of Bridle gates & stiles, where the railways have crossed over the Bridle roads & footpaths. Mr Wilks has received instructions to get these erected without delay....

¹⁶ maps.nls.uk/view/75202935#zoom=6.3&lat=7023&lon=9342&layers=BT

¹⁷ Kent County Archives, RD/Ea/H6.

D.17. The history of the EKLR suggests that, if it erred, it always erred on the side of minimising costs, including by under-acknowledging public rights of way. That is what it is submitted happened here.

D.18. The only other evidential item to be scored as a bridleway in the table above is the notice of application for a special order for East Kent under the *Electricity Supply Acts 1882 to 1922*, item V.U, dating from 1923. Again, this evidence is scored as supporting bridleway status only because the evidence cannot be said with certainty to distinguish bridleways and roads (although the society believes that the entries in it solely relate to public roads). Therefore the best that can be said of this evidence is that the order way must be at least a bridleway. It cannot be said that the evidence points to bridleway status.

D.19. Even in the post-War period, the *Highway inspector's map*, item V.V, dating from 1952, records the order way as an E-class road (albeit subsequently crossed out in pencil). The society knows of no way marked on the Highway inspector's map in east Kent which is today a bridleway.¹⁸

D.20. The order way was recognised on the base map used to prepare the *Draft definitive map*, item V.VA, dating from 1952, as a publicly-maintainable road coloured yellow, consistent with the Highway inspector's map.

D.21. And as late as the 1980s, the *Conveyance of 1982*, item V.W, which conveyed Twitham Oast from trustees who had acquired the land 15 years earlier, recognised that the land was 'Subject to the rights of the public over the road or way known as Twitham Lane'.

D.22. It will be noted that the land transferred by the conveyance is that between B and C [*B and a point at the southern end of the Twitham Oast enclosure*]. For that land to be 'Subject to the rights of the public over the road or way', such rights must extend south from B, beyond the post-war threshold of acknowledged public maintainability at B, at least to, and inevitably beyond, Twitham Oast (such public rights could not terminate at Twitham Oast, which is not a place of popular resort). In the conveyance, the reference cannot be merely to the rights of the public over the public road from A to B — that would not be a case of the land being conveyed 'Subject to', but instead benefiting from, rights over A–B.

D.23. Finally, it will be noted that beyond the line of the order way, south-west from F [E] along the line of former bridleway EE269A was, by a definitive map modification order, on the basis of historical evidence, upgrade to restricted byway (see item C above) on 11 January 2024. The order way is the missing link: byway EE269A has at present no recorded continuation of the same status beyond F [E], and the only proper outlet is along the order way. There is no evidence that bridleway EE28 was ever a public road through to Buckland Lane via Crixhall Court.¹⁹

D.24. Accordingly, the society finds no substantive support in the evidence submitted to the Secretary of State that the order way has the status of a bridleway. It should (so far as the order relates to B to F [*B to E*]) be confirmed as submitted, as a restricted byway.

¹⁸ We refer only to East Kent because this is the extent of the area within the author's knowledge.

¹⁹ There is evidence, in the *Survey of estate lands and roads Goodnestone*, at item V.D, but see also the map at para.D.5 above, that Twitham Farm Road, shown in the survey, extended a short distance south-southeast along the line of bridleway EE28, before turning north-northeast towards Staple (now marked north-northeast from EE28 by a ditch). However, it appears to have fallen out of use by the late nineteenth century.

E. The development of wheeled traffic

E.1. It is submitted that what may have been a bridleway in earlier times became a carriageway owing to the development and prevalence of vehicular traffic in the eighteenth century.

E.2. In *The Story of the King's Highway*,²⁰ it is said:

We can hardly imagine to-day how rare, outside the Metropolis, was any sort of wheeled vehicle, even during the seventeenth century. Right down to the middle of the eighteenth century — in remote parts of these islands we may even say down to the middle of the nineteenth century — the passage of a wheeled vehicle of any kind remained, on all but the main roads, an exceptional event of the day. To an extent that we find it now difficult to realise, the seventeenth and eighteenth century roads were trodden by animal feet. ...throughout the whole of the fifteenth, sixteenth and seventeenth centuries, and, to a great though diminishing extent, throughout the eighteenth century, travellers went on horseback. ...Right down to the nineteenth century, indeed, every increase of travel meant, for the most part, an increase in the number of well-mounted horsemen, with their saddle-bags behind them, that were a constant feature of the roads.

The general means of conveyance of goods (apart from coastal and inland navigation) was by pack-horse, or in the case of animals destined for market or slaughter, on the hoof. *The Story of the King's Highway* illustrates the inadequacy of the contemporary road network for vehicles in the following reported episode:²¹

In 1750, as the modern historian of Surrey tells us, 'the people of Horsham petitioned Parliament for a passable carriage road to London, the road by Coldharbour and Dorking, which had superseded the excellent Roman road, being accessible only on horseback. If they wanted to drive to London, they gravely declared that they had to go down to the coast and round by Canterbury.'

E.3. No doubt farmers would have used carts to convey produce from the fields or to market, particularly when the roads were most passable in summer, but it was only the development of stage-coach routes operated by sprung coaches from the middle of the eighteenth century, and the construction or improvement facilitated by turnpikes, that promoted the widespread use of carriages for private and goods conveyance. *The Story of the King's Highway* states that the first sprung stage-coach, driven by a coachman, was advertised in 1754.²²

E.4. As the eighteenth century developed, there was increasing use of carriages for all purposes, and with it, an increasing use of any public right of way capable of accommodating vehicles — that is, having a suitable surface, width and gradient. It is suggested that rights of way generally became defined, not by any abstract status, but by how they were used. And if a way formerly used as a bridleway, or perhaps used by the farmer's own carts, could be used by the public in vehicles, it would be, unless steps were taken to prevent it.

²⁰ By Sidney and Beatrice Webb, 1913. Ch.V. Available at: catalog.hathitrust.org/Record/001348757

²¹ Attributed to *History of Surrey*, by H.E. Maiden, 1900, p.280

²² P.72. Before that time, services were provided by carriers in wagons.

E.5. We suggest that it is the evolution of England's road network in this period, between the sixteenth and eighteenth centuries, which explains the solitary reference, in the *Late C18 St John's College terrier*, item V.E, dating from 1793, to the order way as 'a shireway' (*i.e.* a bridleway). The order way, in common with many roads today, may well have originated as a bridleway. But it was capable of accommodating at least some kinds of wheeled vehicles, and it became so used. By the late eighteenth or early nineteenth century, it was being used by vehicles, and was or became recognised as a public road. This is the reputation of the order way apparent in almost all other contemporary and later evidence.

F. Width B–F [B–E]

F.1. It is proposed to modify the width of the order way to a width of three metres. The inspector stated that he was:

...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.

F.2. The inspector's analysis is not understood.

F.3. If, as the society seeks, the order is confirmed unmodified to record a restricted byway between B and F [*B and E*], it is proposed that the as-made order width of 3.5 metres should be retained unmodified.

F.4. Where historical evidence reveals the historical width of the order way — as it does here (see original statement of case, item I.J) — it should be applied to record the width in the order. In those circumstances, it is not correct to impose 'a reasonable width in the circumstances'. The historical evidence supports a width of at least 3.5 metres. Moreover, in relation to a restricted byway, 3.0 metres is insufficient to pass two carriages or carts of average width.

F.5. While it is likely that wheeled traffic seldom met and passed on the order way, at least between B and F [*B and E*], owing to the low volume of use, it is inevitable that on occasion, carriages, carts or horses would have passed each other: each pulling slightly off the centre of the track where it was unenclosed (which it almost entirely was, south of point B). If so, then the true width of the order way should incorporate whatever width was used and needed to pass users. Otherwise, the effect of the order would be to enable the landowner to fence in the way to the order width, so that two vehicles could not pass. The width of a highway is not necessarily confined to the beaten width, but extends to whatever width was, from time to time, used to enable traffic to get by.

F.6. The *Guidance on Procedures for Considering Objections to Definitive Map and Public Path Orders* published by the Planning Inspectorate,²³ advises that:

In the absence of evidence to the contrary, Inspectors should ensure that the width recorded is sufficient to enable two users to pass comfortably, occa-

23 At 24 Widths on Orders, para.24.4.2: www.gov.uk/government/publications/rights-of-way-guidance-booklet/guidance-on-procedures-for-considering-objections-to-definitive-map-and-public-path-orders-html#annex-l-widths-on-orders

sional pinch points excepted. This width may well be greater than the width of the 'trodden path'.

F.7. If, contrary to the society's submissions, the order is modified to record a bridleway between B and F [*B and E*], it is submitted that the width nevertheless should be retained as 3.5 metres, this width being supported by the evidence. There is no sound basis on which a lesser width may be substituted only because it is a 'reasonable width'.

G. Modification of order with respect to A–B

G.1. Item III.B of the society's original statement of case proposed that the order should be modified to exclude the part of the way A–B. The society's grounds for modification are therein set out.

G.2. This proposal has not been considered by the inspector in the interim decision. The society asks that it now be addressed.

G.3. It will be noted that, whether or not the inspector accedes to the society's proposed modification, the society submits that A–B cannot be a bridleway, for the reasons set out in item D above, but also because A–B plainly is part of the ordinary road network, identified in the council's list of publicly-maintainable streets, and maintained by the highway authority as such. This position is supported by the evidence of road maintenance summarised in the inspector's decision paragraphs 31–35, which must relate at least in part to the order way A–B. Prior to the National Parks and Access to the Countryside Act 1949, public bridleways were seldom maintained by local authorities, so that the evidence of maintenance by Eastry Rural Sanitary Authority (later, the Eastry Rural District Council) in the late nineteenth and early twentieth centuries is also supportive of public carriageway status.

G.4. In the society's present view, A–B ought not to be recorded as a byway open to all traffic (BOAT) because it is part of the ordinary road network. But the society is not opposed to it being recorded as a BOAT (as the order provides) if the inspector concludes that it should be. It does, however, say that it is not a bridleway, and should not be recorded as such.

Hugh Craddock
British Horse Society
29 November 2024