

ROW/3335673: Dane Hill appeal — appellant's response to statement of surveying authority

A. Introduction

A.1. This is the response of the appellant, the British Horse Society, to the submission of the surveying authority, Kent County Council (referred to below as 'KCC, para.n'), on the appellant's appeal in relation to its application for a definitive map modification order for a byway open to all traffic at Dane Hill, Palmstead, Kent.

A.2. The appeal is under Planning Inspectorate reference: ROW/3335673.

A.3. The appellant disagrees with the authority's submission, and primarily relies on its statement of appeal. However, it makes the following additional comments.

B. 'An existing full highway'

B.1. At KCC, para.4, the authority states:

Whilst the specific wording of that section of the 1981 Act was not used within the conclusion, the County Council is satisfied that a vehicular right of way subsists over the appeal route,

B.2. We therefore note confirmation from the authority that it did not apply the required statutory test to the application (*i.e.* whether the appeal way is a byway open to all traffic [BOAT]), and that the authority admits that the appeal way is a vehicular right of way. (It does not appear to be disputed that, as the appeal way is admitted to be a vehicular right of way, it is open to mechanically-propelled vehicles. For further discussion, see the statement of appeal at item I.K.)

B.3. Assuming that the Secretary of State accepts those concessions, the only outstanding matter in order that the statutory test is met therefore is whether the application way satisfies the so-called 'character test' test (see the statement of appeal, at para.I.J.10) to be recorded as a BOAT.

B.4. The authority refers (KCC, para.4) to the appeal way being:

...an existing full highway. And, being such a highway, it should not be recorded on the Definitive Map and Statement.

B.5. However, the character test does not directly exclude 'an existing full highway', whether it be the 'A2' (see KCC, para.4) or the appeal way (although we do not accept the implied characterisation of the appeal way as a full highway similar to the A2). The question for the Secretary of State is whether the character test does embrace the appeal way.

B.6. We are prepared to accept that the surveying authority, at the time of preparing the initial draft definitive map and statement, did exclude the appeal way from inclusion on that map, on the basis that it was part of the local road network. We note that, by doing so, the authority appears to have taken a county-wide decision to exclude from inclusion as a 'road used as public path' (RUPP) all those roads, whether sealed or unsealed, which were considered to be part of the local road network. We see no evidence that the authority applied its mind to whether the appeal way, or any other excluded local road, satisfied the test for a RUPP: we have seen nothing to suggest that individual such roads

were included on any draft map as a RUPP (or otherwise). Indeed, the authority admits as much at KCC, para.8. Therefore, we maintain that the authority has never applied its mind to the specific question of whether the appeal way ought to be included on the definitive map and statement as a RUPP, still less as a BOAT.

B.7. But leaving that question aside, plainly there is discovery of new, previously unconsidered, evidence that the appeal way subsists as a vehicular highway, and the authority must consider *de novo* whether the way is a highway eligible for inclusion on the map, per *Riley* (as to which, see the statement of appeal at para.I.J.18).

B.8. The authority's position appears to be that, every road which was excluded from inclusion on the draft map (arising from a county-wide decision to omit roads which were part of the local road network), acquired a permanent immunity from ever being considered for inclusion as a BOAT (even where new evidence of the existence of the way is adduced). This immunity, on the authority's analysis, would include any way which had long since ceased to bear any resemblance to part of the local road network — as indeed the appeal way has ceased to bear resemblance.

B.9. At KCC, para.9, the authority states:

Different teams within Kent Highways consider the status of the appeal route differently — Highways Enforcement considers it to be a 'restricted byway' as it has gates restricting use, whereas the Highways Definition Team considers it to be a vehicular highway based on the research they had undertaken. Unfortunately, when the Highways Enforcement Team were alerted to the gates some years ago, they decided not to take any action to open up the route.

B.10. The authority inadvertently identifies why the appeal way ought to be added to the definitive map and statement: not only because the authority itself is confused and uncertain about its true status, but because — arising from that confusion — it has failed to act to ensure the appeal way is available to the public. Presumably, the authority is less confused about the status of the A2, and would enforce against gates erected across the A2 preventing its use? As the authority itself concedes (KCC, para.10),

the List of Streets only provides a record of maintenance, and any *status* of a route recorded in it has no legal basis, as explained above.

C. Character test

C.1. Turning to the character test, we rely on the judgment of Roch LJ in *Masters* (see the statement of appeal, para.I.J.10), that (in effect) vehicular highways open to mechanically-propelled vehicles are eligible for inclusion as a BOAT on the definitive map and statement:

if their character made them more likely to be used by walkers and horseriders than vehicular traffic because they were more suitable for use by walkers and horseriders than by vehicles.

C.2. The authority at KCC, para.12, has no real answer to the appellant's contention, in the statement of appeal at paras.I.J.31–I.J.48, that the appeal way obviously satisfies the character test: it is the very epitome of a BOAT. The authority merely laments that, owing to a lack of maintenance, many roads genuinely once considered to be part of the local road network, might, through deterioration, become eligible to be recorded as BOATs. We

agree: they might. However, the authority is wrong to imply (KCC, para.12) that, by being so recorded, it would:

not b[e] a true representation of how those ways should be properly maintained and shown.

We know of no rule of law or statutory provision which requires BOATs to be maintained to a lesser standard than other roads merely because they are recorded as BOATs. Nor will the authority be prevented from carrying out whatever maintenance or improvement it thinks fit (including the provision of a sealed surface) merely because the appeal way is recorded as a BOAT.

C.3. In its concluding remarks (KCC, para.12), the authority states:

The appeal route connects only to other full vehicular highways. It is difficult to understand why this route may have been much used by pedestrians and equestrians... .

C.4. Many rights of way connect only to public roads. We do not accept that such a context necessarily affects the extent of use by the public (it might affect use, for example, if the right of way connected with a busy, major road with no pavement — that hardly is the case for the appeal way). But for the purposes of the character test, the absolute quantity of use of candidate ways by pedestrians and equestrians is immaterial: what matters is whether (per *Masters*):

their character made them more likely to be used by walkers and horseriders than vehicular traffic because they were more suitable for use by walkers and horseriders than by vehicles.

As to answering that question, we rely on the authority's own admission (KCC, para.13) that:

the appeal route currently appears to have the character of a byway.

C.5. If, as the authority appears to assert, the authority had removed the obstructions, renewed the metalling, tarred the surface, signposted it as open to all vehicles and with a local destination, and ensured it was shown on maps and satellite-navigation aids, it might have a good argument that the character test was not met. Those improvement options are open to the authority in respect of any unsealed road included on its list of streets. But it has done none of these things, and the character test is not to be applied on the basis of a what-if exercise, but on the basis of a what-is-found assessment.

C.6. And, as the authority acknowledges, what is found is a vehicular way with the character of a byway which satisfies the *Masters* test.

D. Width

D.1. In KCC, para.16, the authority turns to the question of width. It observes that the appellant has proposed various widths for the way based on evidence (see statement of appeal, item I.O). The authority, in purported rebuttal, states that:

It should be noted that Dane Hill Road is less than 3.5 metres for most of its length, as is Peafield Wood Road. It seems unlikely, and unreasonable, for the appeal route to be so much wider.

D.2. We disagree as to the true width of Dane Hill Road: it is a field road, formerly unfenced on both sides, and its true width is not easily gauged, nor recorded. But regardless, the width of neighbouring roads is not necessarily a good guide to the width of the appeal way, particularly where there is specific evidence of the width of that way.

D.3. We therefore ask the Secretary of State to direct that an order is made which reflects the widths set out in the statement of appeal (at item I.O).

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Hugh Craddock for the
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