
Appeal Decision

by Susan Doran BA Hons MIPROW

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

Decision date: 14 June 2021

Appeal Ref: FPS/G1440/14A/10

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of East Sussex County Council not to make an Order under Section 53(2) of that Act.
- The Application dated 9 March 2017 was refused by East Sussex County Council on 27 February 2020.
- The Appellant claims that the appeal route from the Beddingham to Newhaven Road to the South Downs Way should be added to the definitive map and statement for the area as a restricted byway.

Summary of Decision: The appeal is allowed

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act').
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. The appeal concerns an application made by Christopher Smith on behalf of The Ramblers' ('the Appellant').
4. Comments and submissions have been made by the Appellant, East Sussex County Council ('the Council'), and on behalf of the Firle Estate ('the landowner') I have taken into account all the evidence available to me in this decision.

Main issues

5. The application was made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
6. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.

As made clear in the High Court in the case of *Norton and Bagshaw*¹, this involves two tests:

Test A. Does a right of way subsist on a balance of probabilities?

Test B. Is it reasonable to allege on the balance of probabilities that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

7. In relation to Test B, the Court of Appeal recognised in the *Emery*² case that there may be instances where conflicting evidence was presented at the schedule 14 stage. Roche LJ held that "*...The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.*"
8. The evidence adduced is documentary. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway. Therefore, the main issue before me is whether the documentary evidence discovered demonstrates that the appeal route is a public vehicular carriageway which should be recorded in the definitive map and statement as a Restricted Byway.
9. The test to be satisfied is on the balance of probability.

Reasons

10. The appeal route commences at the Beddingham to Newhaven Road (A26) and runs in a generally southerly direction to the South Downs Way, passing to the west of The Lay, Coombe Barn and Red Lion Pond ('the pond').
11. The Application was supported by a range of sources including County Maps, Ordnance Survey, Tithe, Finance Act and Definitive Map records³. The Council investigated a further range of documentary sources including estate maps, touring maps, surveys undertaken by the Parish and by the Ramblers', and other Council records. Following its consideration and rejection by the Council, the Appellant takes issue with a number of the findings made in the Council's Report, and which I refer to below.
12. The Appellant raises an issue regarding the extent of the public highway at the northern end of the appeal route. However, in considering the appeal I have taken the appeal route as commencing from the A26 Beddingham to Newhaven Road as shown in the application plan submitted by the Appellant, and as considered by the Council in its Committee Report⁴ and shown on the plan contained in that report.

¹ R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994]

² R v Secretary of State for Wales ex parte Emery [1998]

³ Other sources were investigated by the Appellant including turnpike, inclosure, rail and canal records and highway authority minutes but no relevant evidence located

⁴ Dated 18 February 2020

Variations in the alignment of the appeal route at its southern end

13. From an examination of the documents adduced it is apparent that the southernmost end of the appeal route has not always followed the same alignment. Old maps up to and including the First Edition Ordnance Survey ('OS') one-inch map show the route splitting into two with a fork heading in a south-westerly direction and a fork heading in a south-easterly direction, the latter broadly consistent with the appeal route. The southernmost end does not appear on the tithe map. Later OS mapping shows the south-easterly fork taking a slightly different alignment where the pond is now mapped, running to the north and then east of this feature. More recent OS mapping is more consistent with the route shown on the old maps and with the application/appeal route.
14. Both the Council and landowner consider this is more likely to indicate the appeal route is a private rather than public one, especially given the lack of any evidence of a formal stopping up or diversion. Further, the landowner argues the divergence is not *de minimus*, or slight, and cannot be attributed to tolerance.
15. It is possible that the apparent inconsistencies relate to the surveying techniques used by the early map makers and/or that the southern end of the appeal route enters open downland where, as the Appellant suggests, it is not uncommon for routes to vary over time. However, there is some consistency in that the alignment appears unchanged during the period a windmill ('the mill') is mapped as a feature (further to the east), then changes slightly after it is believed to have been dismantled, and when the pond is mapped as a feature. The alignment then appears (latterly) to return to one broadly consistent with the original route, now shown to run slightly west of the pond (as claimed).

Old maps as evidence of status

16. Early historic maps submitted in support of the existence of the appeal route include Yeakell and Gardner (1778), Gardner and Gream (1795), Greenwood and Greenwood (1825), and Mudge (surveyed 1813, updated 1873) showing it in similar manner to other routes they depict. Together with the First Edition OS one-inch map, they are all consistent in showing the appeal route splitting into two at its southern end with a south-easterly and a south-westerly fork as described above. All but Yeakell and Gardner's map show the mill further to the east of the pond, the latter not being shown on any of these maps.
17. The Council concluded these old maps show part of the appeal route, but neither they nor the landowner consider they provide evidence of its status. Conversely, the Appellant considers it more likely than not that the appeal route as shown is a public road. No keys to the maps have been provided, nor information about whether the maps resulted from original surveys, or for whom they were produced. Arguably, such maps were produced for the travelling public who might have had an expectation that they could use the routes shown. Reference is made to Greenwood's map distinguishing between 'cross-roads' (the manner in which the appeal route is depicted) and turnpike roads. However, the term cross-road is not defined and it is not clear that all routes depicted on these old maps were public highways. Nevertheless, although the Council and landowner suggest the appeal route could have been

a private road, the Appellant points out that no examples of private roads on the maps have been identified by them.

18. Accepting the limitations of the accuracy in particular of the earliest examples, these maps provide good evidence of the physical existence of the appeal route from at least 1778, with the alignment which follows the easterly fork broadly consistent with it.
19. The First Edition 25-inch OS map showing the appeal route is accompanied by a Book of Reference which identifies it as a 'Road'. This and later OS maps (to the 1950s) show the southernmost end of the appeal route taking an alignment just to the north and then east of the pond rather than to the west as claimed. The Appellant found no Quarter Sessions or related records concerning any stopping up or diversions affecting the appeal route and, as stated above, the Council concluded the change in alignment indicated a private rather than a public route. The Appellant argues that where there are no defined boundaries, as here on the open downland, routes can and do move over time.
20. OS maps have long carried a disclaimer as regards the routes they show, so do not provide evidence of status but are useful evidence of the physical existence and alignment of the routes recorded at the time. Nevertheless, the inclusion of route on a series of OS maps, as here, can be useful evidence in helping to determine status when considered together with other evidence. The same is the case for the old maps considered above, which are rarely sufficient on their own to reach the conclusion that a route shown is a public highway.

The tithe map and apportionment as evidence solely of alignment or also of status

21. The Council and landowner concluded the tithe records (1840) are evidence of the alignment and existence of the route but not of its status or rights. On the other hand, the Appellant considers inferences can be drawn from tithe documents regarding the existence of public rights, in particular public vehicular rights, where highways are tinted yellow or sienna to indicate a public status. In support he cites *Dunlop*⁵ which stated, amongst other things, that all roads coloured brown (or sienna), or otherwise excluded from tithe, must be public rights of way.
22. Here, the appeal route is coloured in like manner to the routes with which it connects at its northern end (the current A26 and a public bridleway), and initially of a similar width (as far as Coombe Barn) before continuing as a narrower feature. The Council says there is a 'bar', or solid line, crossing the route at this point which they interpret as a gate. The photocopies provided are insufficiently clear for me to make this out. Nevertheless, this is not an unreasonable conclusion to draw if the feature is present, though its presence would not in my view exclude the possibility of the route enjoying public rights. As regards colouring, both the Council and the landowner disagree with the Appellant, the latter referring to the caselaw cited as authority with regard to inclosure award evidence.
23. Towards its southern end the route depicted takes the south-westerly fork (the south-easterly fork being absent) and stops after crossing a boundary. From

⁵ *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council* [1995]

most of the extracts available to me it is unclear if this marks the extent of the area forming part of this tithe map. However, the landowner indicates that this is a numbered apportionment, thereby suggesting the route stops at an arbitrary point, appearing to be a cul-de-sac, although as the Appellant points out, the lower part of the route enters and crosses open downland.

24. At the northern end is the number 277 which the tithe apportionment lists as roads with a total value, but no ownership is given. This indicates the appeal route (where shown) is untithed. The Appellant asserts that all the routes numbered 277 are now public roads or byways open to all traffic, having examined the tithe map as a whole, and where they are coloured routes accessing a farmhouse for example, they are 'blocked off' from the main roads. There is no such blocking off where the appeal route meets what is now the A26. The Appellant acknowledges this is not conclusive as to status but is suggestive the appeal route was a public road. Although the Council considers the top part of the route may be public and the lower, section private due to its narrowness and the feature interpreted as a gate, the latter could be associated with the nature of the land and its use as open downland, for example to graze sheep, rather than with rights, public or private. It was not the purpose of the tithe process to record public rights of way, but rather to identify productive land for which a tithe was payable. Both private and public roads could affect the productiveness of the land and thereby whether a tithe was due. Nevertheless, that the south-westerly fork terminates without meeting another route, and that the south-easterly fork (following the alignment of the appeal route) is absent, (suggesting, the landowner argues, that the southern end diverges considerably and is inconsistent with the appeal route), does not necessarily mean that no way, or highway, existed. It may be that there was no effect here on the titheable value of the land.
25. The depiction of a south-westerly fork at the lower end of the appeal route is consistent with the early maps considered above which all show the appeal route splitting into two branches; and with an 1816 estate map produced by W Figg, also responsible for producing the tithe map, in which it is annotated 'Road from Seaford'. Seaford lies on the coast to the south of the appeal route.

The depiction/portrayal of the appeal route in the Finance Act survey as evidence of its status as a public road

26. The appeal route falls within a numbered hereditament (18) on the Finance Act plan, with the possible exception of a short length at the northernmost end where it connects with the current A26 which is excluded, although the Council disagrees with this interpretation. The accompanying Field Book records a deduction of £100 for public rights of way in this hereditament, a substantial sum which the Appellant suggests may indicate more than one public right of way crossing this land parcel.
27. The Council considers its depiction (not as an uncoloured route excluded from hereditaments) indicates the landowner did not consider it was a public highway but was subject to taxation as private land. Further, there being no description of it in the accompanying field book, there is nothing to suggest the deduction applied to the appeal route. Accordingly, this evidence does not support the appeal, and contradicts the tithe evidence. The Appellant, however, suggests the route's importance had declined, perhaps following the

demise of the mill located to the east which he argues was accessed via the appeal route, or was due to changes in technology around this early part of the 20th century. Conversely, the Council argues reduced use may have resulted from the permissive nature of its use as a private road having changed or, as a farm track, it was less important.

28. The deduction does appear high, although the extent of the hereditament to which it applies is not clear to me from the extracts provided. It is possible that it applied to one or more routes: a section of the route currently recorded as part of the South Downs Way passes through the hereditament. There is nothing to suggest the deduction applied to any route not marked on the OS base map. That it was not excluded and identified as a public road may have been because it was private or, if the deduction applied to the appeal route, enjoyed public rights of a lower status as a bridleway or footpath.

Whether the first Definitive Map process was flawed

29. Records include a reference to the appeal route having been accepted as a bridleway in 1936, but this status was subsequently repudiated as it only accessed a mill, now demolished. The Appellant therefore believes the appeal route was omitted from the DMS as a result of confusion rather than deliberately, and no proper consideration was given to the evidence, including that the route was originally admitted by the landowner in the 1930s.
30. The Council has not seen any evidence that the surveys and processes used to prepare the original DMS in the 1950s were flawed, and accordingly accepts the records as accurate: the appeal route not having been included.
31. There appears to be some uncertainty about whether the tithe records were consulted when the DMS was being prepared. The Appellant has knowledge of the records relating to this which he says suggest that tithe documents were only examined if a route was disputed, and one or both parties raised the matter of the maps. However, whilst the Council believes tithe records were consulted at the time, they say the appeal route was not disputed and was considered private – its use as a route to the mill having been rejected by the landowner, so it was not considered to be a public right of way then, nor in the 1950s. Further, if the tithe records were considered, the evidence would not have been strong enough for the appeal route to have been considered public. Given the 1930s evidence, the current landowner believes it more likely that the matter of the appeal route was considered when the DMS was drawn up.
32. Notwithstanding whether or not tithe records were consulted when the DMS was being prepared, or indeed whether the appeal route was considered for inclusion, the Finance Act records would not have been available at that time, so constitute new evidence.
33. It is further argued by the Appellant that, in addition, recent evidence adduced concerning the mill is new, and would not have been taken into account in the 1950s.

Evidence about the mill

34. The Appellant asserts the mill shown on the old maps and located east of the appeal route was Beddingham Mill and, whilst it had probably disappeared by 1813 or 1825 when it appears the effects of the mill were sold, was accessed via the appeal route. It is likely, given the map evidence described above, that

other routes also accessed the mill, as the Council points out. Nevertheless, that does not mean that the appeal route was not a means of access to it, and the 1936 evidence albeit subsequently denied by the landowner as regards a public right of way, suggests this. Indeed, the Council accepts it would have been unusual to keep a route open for access to a mill that had long since disappeared, whilst acknowledging that the former presence of a mill was known to those drawing up the DMS and who chose not to include it.

35. Apart from the old maps, the evidence relied on by the Appellant about the mill is supplied by the Sussex Mill Group by way of social media. This the Council places little weight on in part due to the way it has been provided, arguing that such a medium is not necessarily a trustworthy source. Similarly, the landowner affords it no weight. Although the Appellant has not provided copies, there is nothing to suggest that the original documents described do not exist or are not available for scrutiny, nor that the research is unreliable.
36. The documents are newspaper articles referring to the mill in the 18th and 19th centuries, and include references describing its location, sale, and to sales advertised to the public. The issue turns on interpretation of this evidence. The Appellant argues the mill did not belong to the Firle Estate and, in the absence of evidence of a grant or permissive right, access to it via the appeal route, the most direct route from Beddingham village, would have been by a public right of way. He points out that it was common practice for the public to visit mills as a place of public resort, to purchase flour and so forth. The Council maintains that none of the press reports refers to public access, and access to an auction for example would have been by permission or invitation. There is no evidence, they say, the public visited the mill, or if they did by what route: it is located some 750 metres from the southern end of the appeal route, and there is an alternative route that is closer⁶. Furthermore, the mill is not shown on the tithe records or OS maps. The landowner comments there is nothing to indicate the mill was not part of the farming enterprise of the land on which it was situated, or that the miller was not an owner of the land or had an interest on the land. And, as a business premises, people would have accessed it on business in the same way customers might access a commercial property by licence or permission, which is not necessarily public access.

Other evidence

37. The appeal route, or one approximating to it, appears on early 20th century touring maps, with one not recommending its use by cyclists, although I would regard this as a reflection of its suitability. In any event, many of these maps were based on OS mapping and therefore are of limited value in terms of indicating its status. A Rural District Council Map is ambiguous marking a black dashed line along it, but uncoloured: such an annotation combined with red or blue colouring is said in the key to represent bridleways and footpaths respectively, but ones not admitted by the owner. The 1816 estate map would have been drawn up for private use, but maps of this type where drawn up by professional surveyors are often reasonably accurate. It is interesting to note the annotation relating to the route between the current South Downs Way and A26 from a destination some distance away. Such annotations are often suggestive of a public way.

⁶ Beddingham Bridleway 4b

Conclusions on the evidence

38. The Appellant acknowledges that no single piece of evidence is conclusive but taken as a whole considers it demonstrates the appeal route's reputation as a highway over many years, and full vehicular rights up to the passing of the NERC Act⁷.
39. I consider the old map evidence confirms the longstanding existence of the appeal route, or one broadly consistent with it. Neither these nor the tithe records are inconsistent with the possible existence of public rights, perhaps vehicular, which favours the Appellant's case. Later mapping evidence shows a slight change in alignment at the southernmost end of the appeal route around the now mapped feature of the pond, meaning that for this small section there is no settled route throughout its documented history. Latterly the appeal route is shown apparently reverting to the original alignment or one broadly consistent with it. Alone, the OS maps are of limited value as regards status but show a route capable of use on horseback or with a vehicle.
40. The presence of a mill to the east, at least until the early 19th century may have provided a purpose for the appeal route. There is no evidence to say it was accessible to the public, and equally none that it was not. The old and other map evidence also confirms the appeal route connected with a route now recorded as part of the South Downs Way to the south, and the A26 to the north, both public routes, and thereby to and from onward links.
41. The Finance Act does not support the existence of the appeal route as a vehicular highway excluded from hereditaments. However, this may be because by then the nature of the use of the route had changed following the demise of the mill. There was still a belief held in the 1930s that the route provided public access on horseback to the former mill, albeit the landowner appears to have changed his mind on this point. The deduction claimed for public rights of way for the land valuation parcel through which it passes cannot be directly attributed to the appeal route from the available information. Given the figure claimed and that only a short section of what is now part of the South Downs Way runs through it (from the information provided) may point to the appeal route as a public right of way and weigh in the Appellant's favour.
42. The evidence in my view is finely balanced. There is a conflict of evidence but no incontrovertible evidence which demonstrates that public rights do not exist or could not have existed at some point in the past. It follows in my view that Test A has not been met but that the balance just tips in favour of Test B and a reasonable allegation that a right of way subsists.

Conclusion

43. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Exceptional circumstances

44. Given the exceptional circumstances currently being experienced as a result of the coronavirus (Covid-19) outbreak, and to give the parties some certainty

⁷ Hence the application being made for a restricted byway

that an order will be made in the near future, I consider it appropriate to allow the Council a period of 12 months for the Order to be made.

Formal Decision

45. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the East Sussex County Council is directed to make an order under Section 53(2) and Schedule 15 of the 1981 Act within 12 months of the date of this decision to modify the East Sussex County Council Definitive Map and Statement by adding a restricted byway as shown between points A and B on the plan attached the application dated 9 March 2017. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

S Doran

Inspector