



# Appeal Decision

by **Martin Elliott BSc FIPROW**

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

Decision date: 30 April 2018

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## Appeal Ref: FPS/G3300/14A/15

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Somerset County Council not to make an Order under section 53(2) of that Act.
- The application dated 4 June 2009 was refused by Somerset County Council on 2 November 2017.
- The appellant, Mrs S Bucks, Chair, South Somerset Bridleways Association, claims that the appeal route, Middle Hill Lane, Crewkerne (footpaths CH33/16 and CH33/17) should be upgraded to a restricted byway.

**Summary of Decision: The appeal is dismissed.**

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## 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.
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.

## Main issues

3. The application route is currently recorded on the definitive map and statement as two public footpaths. In terms of an application to upgrade the route to a restricted byway section 53(3)(c)(ii) of the 1981 Act is relevant. This provides that an order should be made if the Authority discovers evidence which, when considered with all other relevant evidence available to them, shows that a highway shown on the map and statement as a highway of a particular description ought to be shown as a highway of a different description. The test to be applied to the evidence is 'on the balance of probabilities'.
4. The appellant refers to a decision by another Inspector where the appeal was allowed on the basis that public vehicular rights were reasonably alleged to subsist. Reference is made to test A and test B as set out in the case of *R v Secretary of State ex parte Mrs J Norton and Mr R Bagshaw (1994) 68P & CR 402*. However, given that the appeal route is currently recorded on the definitive map as a public footpath the relevant test to be applied to the evidence is as set out at paragraph 3.
5. Section 32 of the Highways Act 1980 provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as

- the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.
6. The main issue is whether the evidence is sufficient to show, on the balance of probabilities, that the appeal route is a public carriageway.
  7. On 2 May 2006, section 67 of the Natural Environment and Rural Communities Act 2006 (NERC) came into effect. This provides that an existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement of the Act was not shown in the definitive map and statement, or was shown as either a footpath, bridleway or restricted byway. However, sub-sections 67(2) and (3) of NERC provide certain exceptions to the statutory extinguishment of rights for mechanically propelled vehicles.
  8. There is no suggestion that any of the exceptions provided for by NERC are applicable and therefore rights for mechanically propelled vehicles will have been extinguished. Should the evidence support the existence of a public carriageway then it would be appropriate to direct the Council to make an Order for a restricted byway. This accords with the application being for a restricted byway.
  9. The appellant refers to the case of *Fortune and Others v Wiltshire Council and Another* [2012] EWCA Civ 334 at paragraph 22 which is relevant to the consideration of the evidence.

## **Reasons**

### ***Tithe Map and Apportionment for the Parish of Crewkerne 1844***

10. It is agreed that the Tithe map is a second class map and is therefore only conclusive evidence in respect of the information relating to tithes. The map shows Middle Hill Lane which is not subject to tithes. The route is not referred to in the apportionment.
11. Whilst Middle Hill Lane is depicted in the same way as other known public roads it does not necessarily follow that the route is also a public carriageway, neither does it preclude such rights. It is also noted that other routes shown on the map in the same way as the appeal route are currently recorded as public footpaths or have no recorded public status. However, whilst this may be the case this does not mean that the routes are not public carriageways.
12. The tithe documents only show that the route was not subject to tithes and do not provide evidence as to a public carriageway. This evidence needs to be considered with all other relevant evidence.

### ***Exchanges after the General Inclosure Act 1845***

13. The appellant considers that an exchange which took place in 1858 sets out in the document what the landowners understood to be the network of roads at the time. Whilst the document was certified by the inclosure commissioners the document deals with the exchange of land and was not prepared with a purpose to identify the status of any routes shown on the accompanying plan. I note that the documents include no details of any easements for accessing the land. However, I have only been provided with an extract of the exchange

and the relevant map. It is therefore difficult to reach any conclusions in this respect. Whilst other similar agreements may include references to easements the absence of any such reference does not necessarily mean that the routes shown were public highways. In my view no conclusions can be reached from the documents as to the status of the appeal route.

### **Ordnance Survey maps**

14. The appeal route is shown on Ordnance Survey maps dating from 1809. The 1889 map names the route as Middle Hill Lane and Butts Quarry Lane. From 1903 the route, subject to the scale of the map, is identified as Middle Hill Lane. The 1898-1900 map shows the route as an unmetalled road. The 1919 map shows the route as a minor road although the key suggests that the route could either be a public or private route. The 1946 map identifies the route as a 'Minor Road in towns. Drives and Unmetalled Roads'.
15. The Council make the point that the 1903 map depicts several routes, but not the appeal route, with a shaded casing line. The Council acknowledge that such shading was not used exclusively for public roads but suggest that it was used to depict metalled public roads for wheeled traffic kept in good repair. Whilst the appeal route is not shaded this does not mean that it is not a public road.
16. The Council also note that the 1903 map annotates Bincombe Lane with the symbol 'F.P.' suggesting that the route was not suitable for equestrian and vehicular traffic. However, in respect of the appeal route this is not so annotated and the Council suggest that as the route is not marked then the route must have been considered as something other than a footpath although do not place any weight on such an inference. The map shows that Bincombe Lane was not suitable for equestrian or wheeled traffic but no conclusions can be reached in respect of the absence of any such similar annotation on the appeal route.
17. The appellant refers to the reliance of the Council on the disclaimer on Ordnance Survey maps that such maps only depict physical evidence and that the status of the roads shown have not been investigated. The appellant suggests that to take the disclaimer at face value ignores the fact that the Ordnance Survey maps were used by the public to access the countryside and the accepted wisdom was that a through route was available to the public.
18. The disclaimer, to the effect that the representation of any track or way on the map was not evidence of the existence of a public right of way, was introduced on Ordnance Survey maps from 1888. Ordnance Survey maps were produced to record topographical features and not to record the status of routes shown thereon. It may be the case that the maps were used by the public to access the countryside but the depiction of any route is not evidence as to status. It may also be the case that the route was shown as a through route which may be available to the public. Again the map provides no evidence as to status.
19. Ordnance Survey maps show the physical existence of the appeal route from 1809 onwards but do not assist in determining the status of the route.
20. The Object Name Book of 1901 describes Middle Hill Lane as a 'road' and the name was corroborated by the surveyor for Crewkerne Urban District Council. As noted by the applicant in their analysis of the book, other routes were

identified as public roads and one route is referred to as a 'private road'. It is also noted that of the 74 entries 48 are now recorded as having public vehicular rights. Whilst the book appears to distinguish between private and public roads the appeal route was not identified as a public road when others were identified as such. It is therefore difficult to conclude that the reference to the route as a road is indicative of a public road.

### ***Other mapping***

21. Greenwood's map of 1822 records the application route as a cross road. The use of this term might suggest that the route was regarded as a public road. However, there is nothing to indicate the basis of the inclusion of the route as a cross road. This evidence needs to be considered in the context of all other evidence.
22. Bartholomew's half inch map does not show the route but this does not mean that the route was not public.
23. The appeal route is shown on a 'Map of the Parish of Crewkerne 1819'. However, no details have been provided as to the purpose of the map. The map therefore does not assist in establishing the status. Similarly the 'Map of the Manor of Crewkerne 1835' shows the appeal route but provides no information as to status. As acknowledged by the appellant the map was not compiled to record public rights of way; the map was compiled to show the Manor.
24. The Donisthorpe Estate Map of 1846 identifies the appeal route as a 'road' but the map and key give no indication as to whether the route is public or private. The Donne Estate map, which the Council suggest is a tracing of the 1846 Estate Map, shows the appeal route which the applicant contends is shown in the same way as roads which are public today. The Donne Estate Sale Documents of 1919 also shows the appeal route. However, the maps provide no information as to status of the routes shown thereon.
25. A plan accompanying sale documents from 1924 appears to have been drawn on an Ordnance Survey map and shows the existence of Middle Hill Lane. The lane was not to be sold but an adjacent field (plot 30) was subject to the sale. The description of the plot describes it as 'situate just off the Yeovil Road, communicating with Butts Quarry Lane and extending to an area of 2r 38p'. Butts Quarry Lane is a name previously used for part of Middle Hill Lane. The appellant suggests that no reference is made to easements in the particulars. However, the particulars have been prepared for the sale of the plot and whilst no reference is made to easements it is not necessarily the case that access to the land is via a public carriageway. As pointed out by the Council the 'conditions of sale' state that the purchaser is 'deemed to have knowledge of the available means of access'. The method of access was therefore not an issue clarified or considered in the sale particulars.
26. A parish boundary map dated 1902 shows the parish boundary as running along the appeal route. The appellant submits that it is usual for parish boundaries to run along defined features and less common for them to follow footpaths which are typically less defined features. Whilst the parish boundary does follow the appeal route, which has been in existence since at least 1811, and therefore a prominent feature, it does not follow that the route is a public carriageway.

27. A map dated 1969 being a record of the Chard Urban District Council, whilst showing the administrative boundary, appears to be a copy of the 1929 Ordnance Survey map. The map provides no information as to status and I refer to my observations in respect of Ordnance Survey maps (paragraph 18)
28. Land registry records show that the appeal route is not registered to any owner. Whilst the land may not be registered it does not follow that the land is not in any particular ownership. The absence of any owner may be indicative that the route is public although there may be other reasons for the absence of any owner for example where the route provides access to a number of properties. The absence of any registration does not show the existence of a public vehicular highway.
29. Overall, whilst Greenwood's map is suggestive of a public vehicular route this has to be considered in the context of all other evidence. In respect of the estate maps these provide no information as to status and it should be noted that the primary purpose of estate maps was to record the land held by the estate and not to identify the status of routes crossing the land. Other maps provide no information as to status.

### **1910 Finance Act records**

30. The working plan does not offer any assistance as the map does not show any division of hereditaments. Although the Council say that the route appears uncoloured there is nothing to indicate that it was excluded from the adjacent hereditaments.
31. The record plan is incomplete but does show part of the route as being excluded from adjacent hereditaments. Additional plans which cover the area crossed by the appeal route show, to varying degrees, the route being excluded from adjacent hereditaments. One plan shows the whole of the route as being excluded from the adjacent hereditaments. However, the Council are uncertain as to the provenance of these additional plans.
32. The Council suggest that given footpath rights are known to exist on the route this offers a plausible explanation for the exclusion of the route. Whilst the route is currently recorded on the definitive map as a public footpath this does not preclude other rights from being shown to exist at a later date. It does not follow that the exclusion was therefore in consequence of public footpath rights. I also note the point made by the Council that other routes in the vicinity of Middle Hill Lane, marked 'F.P.' on the Ordnance Survey base map used for the 1910 Finance Act, are also excluded; these routes are now recorded on the definitive map as footpaths. The Council contend that it seems likely that, in the location of the appeal route, footpaths were on occasion excluded from valuation. However, as noted above Ordnance Survey maps do not provide information as to status and whilst some routes have been annotated 'F.P.' this only means that the route is not traversable by horses or wheeled traffic. It does not demonstrate that the routes were public footpaths and the inclusion on the definitive map does not preclude the existence of other rights. I do not therefore accept that the exclusion from the adjacent hereditaments was because the route was a footpath only.
33. The 1910 Finance Act plans suggest that the valuer was intending to exclude the route from the adjacent hereditaments. The exclusion of the route from the adjacent hereditaments raises a strong possibility that the way was

regarded as a highway although not necessarily vehicular. However, there may be other reasons why the route was excluded. The evidence needs to be considered with all other available evidence.

### ***Ministry of Agriculture Farm Survey 1942/43***

34. The map shows part of the appeal route as being excluded from the adjacent landholdings; this is with the exception of the section through the landholding identified as 5/80/4. The appellant concludes that the appeal route was used by various landholders and forms part of a network. The point is also made that other known public roads are excluded from adjoining landholdings. Whilst this is the case the purpose of the survey was to survey farms and not to record the status of any roads. The map provides no evidence as to the status of the roads passing through or adjacent to the landholdings.

### ***Highway Road Records***

35. The 1862 Map of Crewkerne Highway District, although not titled, is said to have been drafted as a record of roads maintainable by Crewkerne Highway Board. The map shows a number of roads coloured red or blue although the map does not indicate what these colours denote. Some roads are identified by letters at either end and are listed along with their lengths. The Council say that there is a strong correlation between the roads listed and those coloured blue. Middle Hill Lane is uncoloured and is not listed.
36. Although the Council are unsure of the provenance of the 1862 map 'Parish and other roads in the Town Tithing of Crewkerne' it is suggested that the map may have been produced by the newly formed Highway Board. The key indicates that parish roads were coloured pink, turnpike roads coloured orange and occupation roads shown green. The map shows Middle Hill Lane and surrounding tracks coloured green suggesting that the way was regarded as an occupation road.
37. The 1930 and 1950 road records do not highlight, nor annotate, Middle Hill Lane which suggests that the route was not regarded as a highway maintainable at public expense.
38. Modern road records do not show the appeal route as being a highway maintainable at public expense other than the first 33 metres from the western end of the route. The Council understood that this section carries public vehicular rights although the basis of that assertion is unclear.
39. Overall the highway records show that the appeal route was not regarded as a highway maintainable at public expense but this does not preclude the existence of public rights. The 1862 tithing map shows the route as being an occupation road which does not support the existence of public rights. I note the suggestion of the appellant that the fact that Middle Hill Lane was shown on the 1862 Crewkerne Highway District map is evidence that it was unlikely to have been a private road. However, it is not clear whether the map was based on a new survey or utilised a pre-existing map and the route is not coloured suggesting that the route was not maintainable at public expense. However, the depiction of the route is not evidence that the way is a public highway. Nevertheless it does not preclude the existence of public rights on the appeal route.

### ***Definitive map records***

40. The parish survey map and walking card for the survey carried out under the National Parks and Access to the Countryside Act 1949 record the route (CH33/16 and 17) as a footpath; the route is described as a green lane. The draft map shows the route coloured purple and also with green dashes. A purple line would denote a footpath and a green dashed line a road used as a public path. The draft modification map does not show the appeal route which suggests that no objections were made to the inclusion of the route on the draft map. The subsequent provisional and definitive maps show the route recorded as a public footpath. However, the definitive statement records the route as a carriage road mainly used as a public footpath. The statement was subsequently amended to record a public footpath on the route although it is not clear when the statement was amended. As the Council point out any amendment after the publication of the statement would have required an appropriate legal order.
41. The general County Council files contain a number of documents relating to the compilation of the definitive map. One such document 'Chard Rural District – CRFs now shown as FPs' shows that the appeal route was initially recorded as a CRF but subsequently amended to footpath.
42. The definitive map records show that the route was regarded as a public footpath although the reference to CRF may be indicative of a route carrying public vehicular rights but mainly used as a footpath. There is no indication as to how the term CRF came to be used but the route was subsequently recorded as a public footpath. Overall the records do not assist in determining whether the route is a public carriageway.

### ***Consultation responses***

43. The appellant makes the point that the authority's report sets out the replies to consultations. Respondents indicate that they had been told by a conveyancing solicitor that the route was a byway open to all traffic or possibly a bridleway and reference is made to seeing cyclists, horse riders and motorised vehicles on the route. One landowner confirms that they had not taken any steps to dissuade the public use of Middle Hill Lane although I have not been provided with any information as to the type of use by the public. This landowner had no objection to the route being upgraded subject to private rights to access adjacent land was maintained. This does not suggest that the owner considers the way to be a public carriageway otherwise they would not be raising concerns in respect of access to land. The responses of residents from adjacent houses is contradictory with one resident suggesting that the route had only been used by pedestrians whilst another had seen horse riders, cyclists, motorcyclists, 4x4 vehicles as well as agricultural vehicles.
44. Whilst there is reference to the use of the way by vehicles the context of this use is not identified. It is therefore difficult to give this any weight in support of public vehicular rights. It may also be the case that one of the landowners was informed that the route is a byway open to all traffic. However, there is no information as to the basis of this assertion and in any event the advice also indicates that the way may possibly be a bridleway. Overall the responses to the consultations do not assist in determining the appeal.

**Overall conclusions on the evidence**

45. Having regard to all of the above, the evidence shows the existence of the appeal route since 1809. The route is identified as a cross road on Greenwood's map of 1822 which might suggest that the way was considered to be a public carriageway. However, this evidence needs to be considered with all other evidence. Other map records show the physical existence of the appeal route but do not provide evidence as to status. The exclusion from the adjacent hereditaments on the 1910 Finance Act map is also supportive of the route being a highway but not necessarily vehicular. However, there may be other reasons for the exclusion of the route. It should be noted that the town tithing map of 1862 records the route as an occupation road. Although the provenance of this map is unclear it does suggest that the way was regarded as an occupation road rather than a public carriageway. This may provide a reason for the way being excluded from the adjacent hereditaments on the 1910 Finance Act map. The definitive map records provide some indication that the way might have been considered to be a public carriageway but the route was subsequently recorded as a public footpath.
46. When the evidence is considered as a whole it is in my view insufficient to show that, on the balance of probabilities, the route is a public carriageway. Whilst there is no evidence that public carriageway rights do not exist the test is whether such rights exist. I note the point that the appeal route forms part of a network of routes and the submissions thereon. However, for me to conclude that the appeal route is a public carriageway I would need evidence to support its existence. It does not necessarily follow that because the route forms part of a network that the route is a public carriageway. Given the evidence, the fact that the route forms part of a network does not tip the balance to enable me to conclude that the way is a public carriageway.
47. The appellant also suggests that the appeal route was the direct route from a quarry to some brick works. However, I have no evidence as to the materials quarried and whether these would have supplied the brickworks. The evidence also suggests that these two operations were not active at the same time. In any event, whilst it may be the case that the route provides a direct link between a quarry and brickworks, it does not follow that the use of the way was in consequence of public carriageway rights.
48. The appellant refers to the case of *R v Secretary of State for Wales ex parte Emery QBD (1996) All ER 1 (Emery)*. It is contended that the Council should be directed to make an order so that if necessary the credibility of the evidence can be tested at a public inquiry. *Emery* addresses the tests under section 53(3)(c)(i) and where there is a conflict of credible evidence then it should be found that a right of way is 'reasonably alleged to subsist'. However, in respect of the appeal route this is already recorded on the definitive map and the relevant test is that set out at paragraph 3 above. In respect of the appeal route there is no conflict of credible evidence, there is insufficient evidence to show, on the balance of probabilities, that the way should be recorded as a restricted byway.
49. The appellant makes the point that the average proportion of higher rights of way in Crewkerne is lower than would be expected and that logically many of the routes recorded as footpaths have under-recorded higher rights. Whilst

this may be the case my decision must be based on the evidence before me measured against the relevant test.

**Other Matters**

50. An interested third party raises concerns in respect of the cost of the upgrading and subsequent maintenance of the route as a restricted byway. Whilst I note these concerns they are not matters which can be taken into account. The issue is whether the route is a public carriageway to be shown on the definitive map and statement as a restricted byway.

**Conclusion**

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

**Formal Decision**

52. I dismiss the appeal

*Martin Elliott*  
Inspector