

To *Legal Services*
From Highway Land Information Team

Theobalds Road Burgess Hill

Background Information:

As part of planning proposals in the vicinity of this road we were contacted by a resident of the road asking for confirmation regarding the considered status. They were informed that the way was shown on the Highway Terrier as an unadopted public highway and also recorded on the Definitive Map of Rights of Way as a bridleway. The resident didn't agree with the unadopted public highway status and supplied information regarding the use of the road. We have also been contacted by users groups and have been supplied with information from West Sussex County Council as part of the road is in West Sussex.

The Highway Land Information Team holds the County Council's Highway Terrier, which shows public highway rights up to the full vehicular standard. Highways shown on the Highway Terrier are either adopted, unadopted (also known as Private Streets) or ancient highways. Adopted public highways are ways over which the public at large may pass and repass as of right – i.e. without force, secrecy, or permission, and without hindrance – by foot, by horse and by vehicle; and they are maintainable at the public expense by the County Council as Highways Authority. Unadopted highways have full public highway rights as above, but are not maintainable at the public expense.

According to the Highway Terrier records, Theobalds Road (as shown in blue on the attached plan) is considered to be an unadopted public highway, i.e. it has public rights of passage up to a vehicular level. (Document 1)

We have found no formal agreements referring to public rights of way being granted over this road. It is therefore believed that the reason for showing the road as an unadopted public highway is because it was considered at the time to have acquired highway rights under section 31 of the Highways Act 1980.

Parts of Section 31 are summarised as shown in italics below:-

Where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question. This could be by a notice which has been erected in such manner as to be visible to persons using the way being a notice inconsistent with the dedication of the way as a highway and which has been maintained after the 1st January 1934 or any later date on which it was erected.

The Notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

In the late 1970's and early 1980's, the Private Street Works team at East Sussex County Council compiled a list of Private Streets within the county. (A Private Street can include a road, highway, lane, footway, alley, passage, square or court not maintainable at public expense) This was to enable a prioritised list of streets to be established for consideration for improvement works under the Private Street Works process leading to their eventual adoption as highway maintainable at public expense. All the roads on the list were visited by a surveyor and a record made concerning their length, width, general condition etc. and photographs taken. All the roads included on this list are now shown on the Highway Terrier as unadopted public highways, unless they have subsequently been adopted, formally stopped up or been removed following a review of evidence.

I have visited the site to assess the general character of the road and the possibility of public use. I note that there was a sign stating that the way is a private road. The road provides access to several residential properties and farmland. There appears to be no reason for the public to use the road by vehicle. The only exception is where a vehicular gate has been installed as an emergency access for an adjoining residential development. The gate is closed with an open access for pedestrians.

Rights of Way

The Definitive Map and associated Statement are documents held by our Rights of Way Group which record Public Rights of Way (Public Footpath, Bridleways, etc.).

- Theobalds Road is shown on the Definitive Map of Rights of Way as a bridleway
- According to information supplied by West Sussex County Council the section of Theobalds Road within their control has been consistently recorded as a public bridleway since the first definitive Map in the 1950's and is recorded as bridleway 47BH.
- Survey of Rights of Way 1953. The final statement dated 19 May 1953 refers to Wivelsfield 1a as a bridleway from the parish boundary to Right of Way 9 Antye Farm. Then bridleway 3d from Right of Way 2 to Antye Farm. There is a separate memo dated 11 February 1953 from the County Surveyor confirming that the Tithe Map and evidence supplied by the surveyor to the Burgess Hill Urban District Council shows that Path 1, where it enters the parish near Theobalds Farm, is a bridleway.
- 1963 and 1971 revised maps also show 1b and 3 a-c as bridleway (as on current map)

The Ramblers Association report on footpaths in the parish of Wivelsfield from June 1951 refers to 'Path No 1 Valebridge Road to St John The Baptist Church as a made road to Antye Farm then well used path to Lunces Hall. Path No 3 Theobalds Farm to Cuckfield UD Boundary is described as along roadway Via Antye Farm, Continues as farm road'

Where the Unadopted highway is shown on the terrier heading north east just North of Antye Farm; there are no Rights of way currently shown over this section and none referred to in the rights of way surveys.

Notes and maps regarding rights of way (Document 2)

Historical Maps

Tithe Map – The road is shown as a track but has no number assigned to it, it is referred to as a Bridle Road and there appears to be a feature across the road at the western end near Theobalds farm. (See Document 2)

Epoch 1 – 1863 to 1894 There is still a feature across the road near Theobalds Farm. Only Theobalds Farm, Antye farm, woodlands and fields (Document 3)

Epoch 2 – 1897 to 1899 – Very little change from Epoch 1 (Document 4)

Epoch 3 - 1909 to 1912 – Very little change from Epochs 1 and 2 (Document 5)

Epoch 4 – 1925-1939 shows that the first part of the road is along the route of the access to the original Farm. The solid feature across the road near Theobalds Farm is no longer shown (Document 6)

Roman Terrier – This is a terrier showing highway records in use pre 1970's. Any adopted roads would be shaded grey. The Terrier would also indicate whether there were any acquisitions or other documents relating to a road. The Ordnance Survey (OS) base data for this terrier was last revised in 1909. This shows that there was a solid feature across the road probably a gate in the vicinity of Theobalds Farm (Document 7)

Jones Terrier -This Terrier was used for searches pre 1970's. The Ordnance Survey base data was last revised in 1937. Where properties have been constructed after the survey the approximate boundaries of new properties are shown on the terrier. There are a number of properties drawn on at the western end of the road indicating that the majority of the residential development in this road took place sometime after 1937. The solid feature across the road near Theobalds Farm is also still shown. (Document 8)

1979-1981 Private Street Surveys

Theobalds road was included on this list but although it is shown in the accompanying map book we have been unable to find the survey report and photographs

Development Control Book

Theobalds Road is shown in the unadopted highways book given to the then named 'Land Section' in April 1998 by Development Control, located on Map Tile page TQ 3220. This is a book of OS Survey map tiles apparently showing what was considered as the extent of unadopted highway. Copy enclosed labelled Development Control Map Tile Book.(Document 9)

National Street Gazetteer

Theobalds Road has a NSG (National Street Gazetteer) Number of:P5633 numbers indicate that a road is considered a Private Road or a Private Street and therefore not maintainable at the public expense, but does not indicate highway rights. It is described as Theobalds Road and is shown as having a length of 1,164.25 metres.(Document 10)

Street Lights

There are 9 street lights shown on ESCC records. According to the residents there are 3 street lights which are maintained by the parish council. There are lots of similar situations in East Sussex where street lights are maintained at public expense but the road is not. In this case as it is an established bridleway this could justify public street lighting.

Ownership

The road is shown as unregistered but the Theobalds Road Residents maintain the road. I have looked at the registered Titles for some of the residential properties at the western end of the road and out of the 5 titles selected only one refers to rights of way over Theobalds Road. ESX249717 Stamford Theobalds Road – The register refers to a conveyance dated 21 September 1955 and

states “together also with the full benefit of the right of way (in common with the owners and occupiers of adjoining lands) through over and along Theobalds Road to Valebridge Road”

If the road was considered to have acquired highway rights by 1955 it would not have been necessary to grant this right. (Document 11)

Local Councils

Lewes District Council planning – Application for development of 72 dwellings on land adjoining Theobalds Road from 2011 refers to a gated entry onto Theobalds Road in the north east corner of the site. As part of the application it was agreed that none of the dwellings would have direct vehicular access onto Theobalds Road. Access was permitted for cyclists & pedestrians via a link that doubles as an alternative access for emergency vehicles.

Natural Environment and Rural Communities Act 2006

Section 67(1) extinguished, on commencement, public motor vehicular rights over every highway that is not already shown on the Definitive Map and statement, or is shown as a footpath, bridleway, or restricted byway. In effect this means that public rights of way for mechanically propelled vehicles have been extinguished over every highway not already shown on the Definitive Map and statement as a byway open to all traffic.

In the absence of further qualification this provision would extinguish public rights of way for mechanically propelled vehicles over virtually the whole of the existing highway network. But section 67(2) introduces a series of exceptions to protect certain highways from such extinguishment under section 67(1). Any way that qualifies under any one, or more, of these exceptions would not have its public rights of way for mechanically propelled vehicles extinguished.

67(2)(a) – excepts ways that have been lawfully used more by motor vehicles than by other users, e.g. walkers, cyclists, horse riders and horse-drawn vehicles, in the five years preceding commencement i.e. over the period 2001 to 2006. The intention here is to except highways that are part of the ‘ordinary roads network’.

67(2)(b) – excepts ways that are both recorded on the “list of streets” as being maintainable at public expense and are not recorded on the definitive map and statement as rights of way. This is to exempt roads that do not have clear motor vehicular rights by virtue of official classification but are generally regarded as being part of the ‘ordinary roads network’.

67(2)(c) – excepts ways that have been expressly created or constructed for motor vehicles

67(2)(d) – excepts ways that have been created by the construction of a road intended to be used by mechanically propelled vehicles.

67(2)(e) –excepts from extinguishment ways that had been in long use by mechanically propelled vehicles before 1930, when it first became an offence to drive ‘off-road’.

The guidance notes to the Act clarify that the burden of proving mechanically propelled vehicular rights have not been extinguished is on the user. The user would have to establish both that the way carried vehicular rights as of 2nd May 2006 and secondly that those rights had not been extinguished because one of the exceptions listed at section 67(2) applies.

As the way is shown on the Definitive map as a bridleway, any vehicular rights that had been acquired have been extinguished by NERC unless one of the exceptions applies:-

67(2)(a) – According to information submitted by users the way is likely to have been used more by other users than vehicles so this exception would not apply.

67 (2)(b) The way is not recorded on the list of streets so this would not apply.

67 (2)(c and d) The way was originally a track leading to woodlands and farms, the road has been improved over the years particularly since residential properties were built at the western end, The way existed before mechanically propelled vehicles and therefore I do not consider it has been expressly constructed for motor vehicles.

67(2) (e) Before 1930 the way was a just a track providing access to farms and the use of the road would have been farm vehicles.

Summary of relevant information received

It is not a destination road to a public location for example a public house or church	Theobalds Road Residents Association in letter to Nicholas Soames 17 th October 2018
No Residential Properties have been built with access via the bridleway since 1996	Theobalds Road Residents Association in letter to Nicholas Soames 17 th October 2018
The Road has always been very obviously signposted with private Road/Cul de sac signs	Theobalds Road Residents Association in letter to Nicholas Soames 17 th October 2018
Theobalds Road bridleway has not been used more by the public in motor vehicles than by other users e.g. walkers, cyclists, horse riders and horse drawn vehicles	Theobalds Road Residents Association in letter to Nicholas Soames 17 th October 2018
Implied that last two purchases of properties in Theobalds Road required indemnity insurance and statutory declarations from previous owners detailing their access rights by way of prescriptive rights	Theobalds Road Residents Association in letter to Nicholas Soames 17 th October 2018
Historic Maps from Napoleonic times (1815 and 1836) refer to Theobalds Road as a bridle road.	Mid Sussex Area bridleways Group in letter dated 31 October 2018
Theobalds Road is actually used by more public on foot and horseback than in motor vehicles	Mid Sussex Area bridleways Group in letter dated 31 October 2018
The road is a bridleway and private unadopted road of 39 houses, a working farm, kennels and riding stables.	Mid Sussex Area bridleways Group in letter dated 31 October 2018
The road is signposted at the entrance as a public bridleway, double signposted as a private road, cul de sac and no through road.	Mid Sussex Area bridleways Group in letter dated 31 October 2018
The surface is privately maintained by the residents to bridleway standards only. There are only 3 streetlights along the entire length paid for by the Parish Council.	Mid Sussex Area bridleways Group in letter dated 31 October 2018
Only the residents and a tenant farmer who access the bridleway by motorised vehicle	Mid Sussex Area bridleways Group in letter dated 31 October 2018
The current legal Definitive Maps held by ESCC and WSCC indicate that Theobalds Road continues to be dedicated as a bridleway by both Authorities. The bridleway has been in existence pre 1949 and shown on the Definitive Map at registration in 1952. It is not a BOAT (Byway Open to all Traffic) and the public do not have right or reason to cross the bridleway by car	Mid Sussex Area bridleways Group in letter dated 31 October 2018

Theobalds Road residents have never purchased property on the bridleway under the misapprehension that full public vehicle rights exist	Sarah Roberts email to Rupert Clubb 11 December 2018
Theobalds Road is recorded as public maintainable highway, however limited to the status of a bridleway numbered 47BH. The status has been consistently recorded since maps of public rights, known as Definitive Maps were first compiled in the 1950's.	Matt Davey Director of Highways and Transport WSCC. Email to Nicholas Soames dated 16 November 2018
WSCC can confirm that it presently is unaware of any application seeking rights above the existing bridleway status	Matt Davey Director of Highways and Transport WSCC. Email to Nicholas Soames dated 16 November 2018

Conclusion

The inclusion of the road in the private streets survey coupled with the fact that since then our records have indicated the way to be an unadopted highway supports the current view that Theobalds Road is an unadopted public highway.

However the map evidence indicates that there was possibly a gate at the western end of the road and the road was just a farm track until residential development at the western end took place sometime after 1937 but probably in the 1950's. The Rights of Way survey information from the 1950's, classified the road as a bridleway. The revised Definitive Maps from 1963 and 1971 also classified the road as a bridleway. The section in West Sussex has also been classed as a bridleway since the 1950's. West Sussex County Council has also confirmed that they have not received any claim of higher rights over their section of the road.

If vehicular highway rights have been acquired it would have been sometime between the road first being opened up i.e. when the residential development took place at the western end and the date when the right of the public to use the way is brought into question such as the erection of the private road sign. I have been unable to confirm the date that the private road sign was first erected but the residents state that there has always been a sign. In any case there is currently appears to be no reason why the public would use this road by vehicle and looking at the map evidence there appears to be no reason historically for the public to have used this road by vehicles and therefore it is unlikely that public vehicular rights have been acquired.

The section in West Sussex has been classified as a bridleway and is not considered to have public vehicular rights and as there is no way that a vehicle could access the section of Theobalds Road in East Sussex without crossing the section in West Sussex it is not possible for vehicular rights to have been acquired over the section in East Sussex.

In addition even if public vehicular rights have been acquired it is likely that they have been extinguished by NERC. It would be up to users of the road to prove that any vehicular rights that had been acquired have not been extinguished by NERC.

Accordingly, on the balance of probabilities, I take the view that there appears to be no reason for the road to be shown as an unadopted highway and recommend that it should be removed from our records and treated as a private road with bridleway rights over part of it.