

## **Planning and Rights of Way Committee**

**1 March 2022**

**DMMO 6/18 Definitive Map Modification Order Application to modify the Definitive Map and Statement for Chichester to upgrade FP 157 to a restricted byway from Point A to B and to add a bridleway from Point B to C, in the Parish of Yapton**

**Report by Director of Law and Assurance**

**Electoral division: Middleton**

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### **Summary**

The application is to upgrade FP 157 to a restricted byway from point A to B and to add a bridleway from point B to C and is supported by documentary archival evidence only.

### **Recommendations**

- (1) That a Definitive Map Modification Order, under Section 53(2) in consequence of an event specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to add a bridleway from points B to C on the application plan be not made
  - (2) That a Definitive Map Modification Order, under Section 53(2) in consequence of an event specified in sub-section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to upgrade footpath 157 to a restricted byway from points A – B on the application plan be not made
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### **1. Introduction**

- 1.1 This report concerns an application made by the British Horse Society submitted on 19 April 2018 which seeks to modify the Definitive Map and Statement (DM&S) for Chichester to add a new bridleway and to upgrade FP 157 to a restricted byway in the parish of Yapton. The application is based solely on archival evidence and is not supported by any user evidence.
- 1.2 It is made under Sections 53(3)(c)(i) and 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 (WCA), being the discovery, by the County Council of evidence which shows (i) that a right of way which is not shown in the DM&S subsists or is reasonably alleged to subsist over land and that (ii) a highway shown in the DM&S as a highway of a particular description ought to be there shown as a highway of a different description.

## **2. Characters and Features of the claimed route**

- 2.1 Section A to B of the claimed route is public footpath 157. The route starts at point A (GR 497673, 103295) on the application plan at Main Road, Yapton and proceeds southwards along Tack Lee Lane for approximately 0.55km until it reaches point B (GR 497390, 102968). From point B the route proceeds in a southwest direction for approximately 1.2km until it terminates at Drove Lane, point C (GR 496398, 102399) on the application plan.

## **3. Land Ownership**

- 3.1 The land over which the claimed route crosses is owned by Mr David Langmead and BDW Trading Limited. There is also some unregistered land.
- 3.2 The applicant served notice of the application on the landowner and adjoining landowners on 23 April 2018. The applicant also displayed a copy of the notice on the unregistered land.

## **4. Consultations**

- 4.1 Standard consultations were sent to the local member, County Council internal departments, amenity groups which included the Trail Riders Fellowship on a non-statutory basis, the District Council, and the Parish Council.

### **4.2 Local Member Jacky Pendleton**

Jacky Pendleton stated that she supported the application.

### **4.3 Yapton Parish Council**

The Parish Council advised that they were "pleased to see work being done to reinstate the route" and confirmed that they "fully supported" the application.

## **5. Evidence submitted in support of the application**

### **5.1 Evidence submitted by the applicant**

- 5.2 The application is supported by archival evidence only. The applicant has submitted a large volume of archive evidence in support of the claim including an applicant statement containing interpretation of the evidence and addendum to applicant's statement with revisions dated 26 August 2019. The applicant claims the evidence demonstrates that the claimed route was historically a route used by the public as both a restricted byway and bridleway. Copious material has been provided and whilst this has all been taken into account, explicit mention is not made of each and every document supplied, its alleged meaning or its content.

### **5.3 The claimed route from A to B**

- 5.3.1 In summary, the applicant claims that the Yeakell and Gardner's Sussex Map, the OS Draft Map, First OS Old Series Map, and the Greenwood and Greenwood Map depictions are consistent with the proposition that the claimed route A-B was considered to be a public vehicular highway.

- 5.3.2 The applicant also relies on the plan of the lands in Yapton and Binsted belonging to Richard Wyatt and the Yapton Tithe Map which show the route A to B, also known as Tack Lee Lane, coloured Sepia and named Tack Lee Lane. The applicant further notes that the Tithe apportionment lists Tack Lee Lane under 'Roads, Wastes, Water & C.'
- 5.3.3 The applicant argues that the Sales Particulars 1862 is strong evidence that route A to B was a public vehicular highway.
- 5.3.4 The applicant states that the Inclosure Record Order of Exchange is good evidence that Tack Lee Lane was considered a public vehicular highway and notes that the route is drawn and coloured in the same way as Drove Lane. The applicant claims that the First Edition OS County Series Map shows and names claimed route A-B as Tack Lee Lane. The applicant notes that this parcel number is described as 'Road' and suggests that this is good evidence that Tack Lee Lane was considered to be a public vehicular highway.
- 5.3.5 The Portsmouth and Arundel Canal Plan and Book of Reference shows the claimed route from A to B enclosed by two straight lines and labelled as 'Tack Lee Lane'. The book of reference shows that this route does not have an owner. The applicant claims that this is good evidence of its public status and notes that other routes shown on the map are labelled as private occupation roads.
- 5.3.6 The Inland Revenue Valuation also shows the route enclosed by two straight lines and coloured white. The applicant states that this suggests the route belonged to a rating authority.
- 5.3.7 Within the revised addendum the applicant refers to the name of the claimed route, which is referred to both as South Street and Tack Lea. Evidence is provided from Historic England publication 'Pre-Industrial Roads Trackways and Canals' (2011) and online from Wikipedia suggesting the name South Street tends to the conclusion that the claimed route was originally a paved road, probably Roman, going south. In relation to the alternative name Tack Lee, it is suggested by the applicant that, Tack has a meaning in Sussex of 'path or causeway' and Lea or Lee most likely originates from 'Leah' meaning pasture, meadow, fields, or a clearing in woodland. The applicant concludes that the claimed route originated as a Roman road, which crossed the rife at what was then an important crossing point but in its history was also used as a drift road linking the common open arable fields with the common pasture.

#### **5.4 The claimed route from B to C**

- 5.4.1 The applicant notes that the Yeakell and Gardner map, Yapton Tithe Map and Sales Particulars map all depict the claimed route B to C in full.
- 5.4.2 The applicant notes that the Sales Particulars map does not label the route B to C as 'footpath' like other routes shown on the map and alleges that this shows that the route had a status higher than a footpath.
- 5.4.3 The applicant claims that the route B to C is shown to be a footpath and/or a bridleway on the Yapton Tithe map.

#### **5.5 Letters and emails of support**

5.5.1 Adjacent property owners Mr and Mrs Holmes of 45 The Pines, support the application and advise that they would actively encourage use of the route by horses.

## **6. Evidence submitted against the application**

### **6.1 Landowner - David Langmead**

6.1.1 The landowner asserts that the route claimed by the applicant is not justified on the balance of evidence submitted by the applicant.

6.1.2 The landowner acknowledges part of the claimed route labelled as Tack Lee Lane and argues that this lane was an accommodation lane, used for access purposes and serving the two adjacent arable fields. That the lane was not shown as owned by anyone in the 18<sup>th</sup> Century is normal in circumstances when occupiers or graziers of those fields used the land for access. The landowner claims that Tack Lee Lane is a private right of way, exercisable by those seeking agricultural access to the fields and that whilst farm carts may have traversed it, this would have been for purely private use, not public.

6.1.3 It is claimed that the lane was a cul-de-sac, stopping at the barn, which lay at the end of the spur eastwards from the dogleg and therefore could not have been a through route used by the general public.

6.1.4 The landowner asserts that for the claim to succeed, it will need to be shown that the lane from A-B was historically used by the general public by "all the King's subjects", with wheeled vehicles, as of right. The landowner argues that cannot have been so as it is very unlikely that the general public would have driven up the lane only to have turned back. The landowner agrees that the general public may have walked the lane and confirms the route to be a public footpath to this day.

6.1.5 The applicant states that the early map evidence submitted by the applicant is insufficiently precise and claims that in any case it is not capable of being determinative as to status, and at most determinative of existence.

6.1.6 The landowner advises that the Yeakell & Gardner 1783 map extract corroborates the lane being a cul-de-sac. The landowner acknowledges that there is a faint line emanating from the 'dog-leg' and leading south westwards but it is advised that it is not possible to determine the nature or status of the route. The landowner states that the explanation of the status of the lane and of the subordinate route lies in the extract from the Prospectus, namely that the Yeakell & Gardner map showed "every road, public and private, every bridleway and footpath...". The landowner asserts that it cannot be claimed that the map represents a public carriageway and a bridleway.

### **6.2 Tenant Farmer - Richard Hocking**

6.2.1 Richard Hocking is the tenant of Drove Farm. David Langmead is the freehold owner of this section of land. Mr Hocking has been the tenant of the land since 1999, in succession to his father who was tenant from 1970.

- 6.2.2 Mr Hocking confirms that the route from points A to B is a public footpath only and claims that any vehicular access along this route is to access the adjacent houses and farm along the route point A to B.
- 6.2.3 Mr Hocking notes that since 1999 there have been five or six occasions where the use of the route from A to B has been by way of horseback. Richard states that he challenged the users and informed them that the route was not a public bridleway and that they have no right to use the route whilst on horseback.
- 6.2.4 Mr Hocking asserts that the route from points B to C does not exist and there is no indication on the ground that it has ever existed. Mr Hocking further claims that he has not seen any use of this route.
- 6.3 *Adjoining Property Owner* - Graham M White, Dyers Croft, Main Road, Yapton, Arundel, BN18 0EB
- 6.3.1 Mr White is an adjoining property owner near point A of the claimed route and has owned the property for 20 years. Mr White considers the route to be a footpath from the sign at point A and uses the route himself to visit friends at "The Pine".
- 6.3.2 He sees people using the route daily on foot and it is the main route for children from the estate to school. A to B is a very busy footpath and there would be a danger to pedestrians from horses and vehicular traffic. There is also a listed old canal bridge, which is not suitable as a byway.
- 6.4 **Adjoining landowner - R W & S Westron of North Choller Farm, Walberton**
- 6.4.1 Mr and Mrs Westron have owned Blackman's Field since 1982, which is to the east of the claimed route and adjoins the last quarter section of A to B. A grass crop has continuously been grown on it, to provide silage for the dairy herd on their farm 3 to 4 km away.
- 6.4.2 When the field was purchased their solicitor carried out the necessary checks to ensure they had access to Tack Lee Road, which leads to their field. They were assured by previous owners that they had used the track for access during their ownership and that they were always able to use the track for farm vehicles. They have trimmed hedges and trees along the track and undertaken maintenance to ensure unobstructed access.
- 6.4.3 Mr and Mrs Westron do not want an upgrade to change their access or disrupt their ability to farm the field in an efficient or timely manner. Footpath 157 does not and never has entered or crossed their field.
- 6.4.4 They have suffered from fly tipping and anti-social behaviour involving motorcycles and cars accessing the area and state there is a need to bear in mind the effect of opening up further access to the area. Officer comment: issues surrounding suitability of a route are not relevant to the legal tests to be applied to this archive claim. They have never seen horse riders on the existing footpath, only walkers.

## **6.5 Mr and Mrs Crowley, of Wivenhoe House on Main Road, Yapton,**

- 6.5.1 Mr and Mrs Crowley have voiced concerns over the number of vehicle movements in the area, which will only increase as more houses are being built. The footpath is sixty yards away from a busy junction and the high level of traffic on the main road is a cause for concern. The footpath is used by children going to and from the local schools, as well as dog walkers. They are worried that if this upgrade is sanctioned it will only be a matter of time before there is an accident and severe injury to pedestrians, drivers, or animals.

## **7. Archive research and consideration of the application documents**

### **7.1 Richard Wyatt Map 1775 (Appendix 9)**

This map shows Tack Lee Lane coloured sepia and named, which is consistent with the claimed route A to B being considered a vehicular road at the time of production. As with other maps the lane ends after a short eastward extension. The assumption could be that this lane is a private route serving the Tack Lee fields.

The claimed route B to C is shown as a faint dotted track, so a very different depiction from that of claimed route A to B, implying these routes have different status at this time. However, there is no key. Given the map was not produced with the purpose of recording public rights of way it is considered of limited weight in terms of status, though shows the existence of the claimed route.

### **7.2 Yeakell and Gardner Sussex 1778 – 1783 (Appendix 4)**

The claimed route A-B is depicted as a road which seems to be enclosed by hedges or trees. From point B there is a faint dotted track cutting through several fields to point C on Drove Lane.

As there is no key, the status of every path and road shown cannot be determined whether public or private. The landowner submits that an explanation of the status of the lane lies in an extract from the Prospectus, namely that the map showed "every road, public and private, every bridleway and footpath" so private rights were shown as well as public rights and footpaths as well as bridleways. This map is therefore not determinative as to status.

### **7.3 Plan showing situation and extent of those lands in the Chichester levels charged with payment to the support of Ellmore Sluice by Thomas Gream 1791 (Appendix 11)**

This plan shows the Brooklands and coastal area together with all the associated bridges in the vicinity. According to the scale on the map, Weststone Bridge could be wide enough to take horse drawn carts. However, just because it was allegedly wide enough for horse drawn cart does not mean it was used for this purpose.

It is also worth noting that this bridge is not part of the claimed route and that the depiction of the bridge is unclear on this evidence and can be seen in later maps marked only as a footbridge.

#### 7.4 **Gardner and Gream 1795 (Appendix 5)**

The entrance of Tack Lee Lane from the main road is shown as an opening to the fields only. Further to the west, Drove Lane is shown with parallel lines leading from the main road to Point C of the claimed route, depicted similar to that of other roads in the area. The applicant asserts that the entire route can be made out via the edge of field boundaries but there is no key and footpaths are not marked so limited weight can be given to this map.

#### 7.5 **Draft OS Map 1805-13 (Appendix 6 & 7)**

This map shows claimed route A to B with parallel lines, heading south eastwards at point B a short distance to a barn, where it ends. It is depicted as a road distinguishable from nearby lands and in the same fashion as other roads nearby. It is possible that this is private road for access to the barn.

There is nothing shown for claimed route B to C on this map.

As with all OS maps, most are helpful evidence of the physical existence of routes, especially if consistently shown. However, they are less helpful in terms of determining the status of the routes shown and are not definitive.

#### 7.6 **Field Book of the Estates in the County belonging to the Mayor, Alderman and Citizens of the City of Chichester 1806 (Appendix 10)**

The only section of the claimed route depicted on this map is the very end of B- to C where it meets Drove Lane. Drove Lane from the main road to Point C and further south is shown. With so little of the claimed route visible on this map, it is not helpful in determining the existence of the claimed route at this time and does not indicate the historical status of the claimed route. It could be argued that this small section of the route is purely to access the nearby fields as it appears to go no further north.

#### 7.7 **Railway, Canal and River Records 1815 (Appendix 13)**

Tack Lee Lane was crossed by the canal at a point numbered 10 on the Plan. Tack Lee Lane is shown with no owner in the Book of Reference but this does not prove definitively that it had public vehicular status. The lane is shown stopping at the fields.

There is also a depiction of a black mark on the A to B route, south of point A but north of the bridge which could be a barrier to the route. A similar marking can be seen on Drove Lane to the west of Tack Lee Lane just south of the canal.

#### 7.8 **Greenwood and Greenwood Map of Sussex 1825 (Appendix 8)**

The claimed route A to B is shown as a 'cross road' according to the Explanation. On older maps a 'cross road' typically means a public road. However, there were only two options, a turnpike or a cross road, meaning that everything that was not a turnpike was a cross road.

This map, like Gardner and Gream has the claimed route turning eastwards toward a barn. There are again no markings for B to C. The applicant asserts that in *Hollins and Oldham (1995)* Judge Howard examined various

maps from 1777 to 1830 including Greenwoods, Bryants and Burdetts. Maps of this type, which showed cross roads and turnpikes, were maps for the benefit of wealthy people and were very expensive to purchase. There was 'no point showing a road to a purchaser if he did not have the right to use it'. This map is however, not definitive as to the status of a route. In the absence of the entirety of the claimed route on this map, it is considered of limited weight in determining the public status of the claimed route.

#### **7.9 Tithe Map 1839 and Apportionment 1841 for Yapton (Appendix 15)**

The second-class map shows the claimed route from A to B coloured sienna, the same way as other public roads and it is annotated Tack Lee Lane on the plan. The apportionment lists it under 'Roads, Wastes, Water & C' as Tack Lee Lane. in the same way as other public roads and no tithe was assessed. However, as both public and private roads were not tithable this is inconclusive.

The route B to C is shown with dots and dashes at the beginning and end but merges with boundaries for the middle section.

There does appear to be a black line just south of point A across the route which could be a form of barrier restricting access. There is a similar mark on Drove Lane which is to the west of Point A. The mark is not visible on other roads on the map.

Tithe maps were not intended to establish or record rights of way. As this is a second class map it is only conclusive of matters of relevance to the tithe commissioners. Generally, it can give no more than an indication as to whether any way is public or private because a private right of way can also diminish the productivity of the land for tithe assessment. The inclusion of a road under the heading 'Roads, Wastes, Water & C' therefore is not, in itself, good evidence that it was public.

#### **7.10 Sales Particulars 1862 (Appendix 17)**

The claimed route A to B is shown coloured sepia as other roads, including that of Drove Lane. Claimed route B to C is marked by a dashed line going through Lot 6, along the eastern side of Lot 9 before ending at Drove Lane, between Lots 10 and 11. What is interesting to note is there is a dashed lined route going through Lot 3, a plot to the east, which is marked 'Foot path'. There is no such annotation on the B to C route which could imply it was not a public footpath and was for access only.

#### **7.11 Inclosure Records 1867 (Appendix 19)**

Tack Lee Lane is drawn and coloured in the same way as the main road through the village and Drove Lane. However, from looking at Figure 26 on page 34 of the applicant's statement (extract from WRSO Add Mss 28658), Tack Lee Lane ends before reaching the end of parcel 360, whereas Drove Lane (running parallel) extends further so it could be argued that it was a route serving only those parcels of land.

The Felpham/Flansham Inclosure Award 1826 had the route at Weststone Bridge marked as a footpath. The facts set out in inclosure records can carry

significant evidential weight (*Roberts v Webster (1967)*). However, there is no description of the claimed route and so limited weight can be given to it.

**7.12 First Edition of the Ordnance Survey County Series 1876 (25 inch to the mile) (Appendix 20)**

The map shows Tack Lee Lane with a parcel number that in the Book of Reference reads "road". In this edition there was no distinguishment between any type of route, calling them all 'road' whether public or private, and of whatever status. So, this map is of limited weight and cannot be used for confirmation of status.

The claimed route from B to C is not shown on the map.

**7.13 County of West Sussex Parish Highways Classification and Report 1890 – Charles Adcock County Surveyor and Adcock Map 1894**

This was prepared pursuant to the resolution of the Main Roads and Bridges Committee to inspect all parish roads, divide them into classes according to the amount of traffic upon them and to report on their state of repair, having regard to the amount of such traffic. Tack Lee Lane is not listed in the list of highways in the Yapton parish.

In the Adcock Map of 1894 showing maintainable roads within the county, Point A to B Tack Lee Lane is uncoloured, meaning it is not even a fifth-class road. Main roads and first to fifth class roads appear coloured on this map.

**7.14 Revised New Series map 1895**

This map can be found online: <https://maps.nls.uk/os/one-inch-rev-new-series/#sheet> on the Bognor Outline Sheet number 332.

The route A-B is marked with parallel lines and is shown as an unmetalled road. From point B there is a footpath marked going to Drove Lane however it is in a much more western direction so hits Drove Lane a lot further north than Point C. There is nothing shown on the B-C route.

**7.15 Second Edition OS 1897/8 (Figure 28 & 29 on page 37 of applicant's statement)**

This map can be found online: <https://maps.nls.uk/os/25inch-england-and-wales/sussex.html>

Sheet number Sussex LX11.11 – 1897 - shows the northern end of the route and Sheet number Sussex LX11.15 – 1898 - shows the southern end.

The route is shown similar to that of 1895. However, the eastern dog leg at Point B is shown, as seen on other maps. There is a footpath from Point B going in a western direction to Drove Lane. There is nothing marked on the route B-C.

**7.16 Bartholomew's maps of Sussex 1902 and 1922**

These maps were popular with tourists and cyclists and revisions were suggested by the Cyclists Touring Club and acknowledged on the maps. It has been suggested that as these maps were made for sale to the public,

mainly tourists and cyclists, if a route was not shown, the implication was they were not public routes.

Neither of the routes, A to B and B to C are shown on either of these maps. Drove Lane to the west of Point A is shown.

These maps can be seen online at: <https://maps.nls.uk/view/97131107>

These maps were produced for sale to the public and were highly regarded. However, independent surveys were not undertaken on the ground to determine the nature and status of the roads on their maps. As with OS maps, Bartholomew's maps come with a disclaimer that they do not provide proof of the existence of a right of way and therefore the map is not conclusive in determining status. Limited weight is given to this map or indeed any map which does not have the positive function of identifying public carriageways.

#### **7.17 Inland Revenue Valuation – Finance Act 1910 (Appendix 21 & 22)**

Tack Lee Lane, from Point A to B with a small eastwards section, as shown on other maps, is uncoloured, meaning it is unvalued. Evidence of the possible existence of a public right of way in Finance Act documentation usually arises either by reference to it in one or more of the documents forming part of the valuation process or by exclusion of a route from the assessable parcels of land shown on the map record. Routes shown on the base plans which correspond to known public highways, usually vehicular, were not normally shown as included in the hereditaments i.e. they were shown uncoloured and unnumbered.

If a claimed route is external to a numbered hereditament there is a possibility it was considered a public highway, normally, but not necessarily vehicular, since footpath and bridleways were usually dealt with by deductions recorded in the forms and Field Books. There could be other reasons to explain its exclusion. There are some cases of a private road set out in an inclosure award for the use of a number of people but without ownership being assigned to any individual, being shown excluded from hereditaments, however, this is not consistent.

Therefore, being shown as uncoloured does not prove public vehicular status definitively. Documents and plans produced under the Finance Act can provide good evidence on the status of a way. However, the production of information on such ways was very much incidental to the main purpose of the legislation.

The claimed route B to C is not shown on the map.

#### **7.18 Third Edition OS 1912**

This map shows A-B with the dog leg going east. The footpath from Point B is shown as going westwards and not following the B-C route, where once again there is nothing marked.

#### **7.19 Paths claimed under the Rights of Way Act 1932 (Appendix 28)**

A path is recorded from the canal to Point B, missing out a section from A, the main road, to the canal. This is unlike Drove Lane which is marked from the main road. This could just be a mistake, as in later maps it is worth noting that the entire route of A to B is marked as a footpath. There is a footpath marked from Point B but it goes westwards and hits Drove Lane at Drove Lane farm, a considerable distance north of Point C.

#### **7.20 E.N Mason & Sons Ltd, Road Classification 1946**

This has the claimed route A to B marked by black parallel lines, like that of Drove Lane, ending at point B where it turns into a dashed line south westward to Drove Lane, south of Drove Lane Farm, different from B to C on the application plan. The key shows trunk, A and B class roads and the route is none of these. This is of limited weight in determining the status of the claimed route.

#### **7.21 Recording of paths under the National Parks and Access to the Countryside Act 1949**

The path (157) is recorded from A to B, where it has been diverted from joining Drove Lane south of Drove Lane Farm going in a westward direction at Point B, to going in a northwest direction hitting Drove Lane a considerable distance further north. There is no path marked going from B to C.

#### **7.22 West Sussex Public Path Orders**

On 15 June 1972, two Extinguishments Orders were made concerning different portions of footpath 157, one in the parish of Barnham and the other in the parish of Yapton. The portion in Barnham does not concern the claimed route, as it covers an area to the west of Drove Lane adjoining Church Lane. This Order was confirmed on 16 May 1980, as referenced in the applicant's statement on page 47.

The applicant could not find confirmation of the Extinguishment Order concerning Footpath 157 in the Yapton parish. This order refers to the part from Drove Lane, where path 148 starts, going eastwards to Point B of the claimed route. This Order was never confirmed. At a Rights of Way Sub Committee meeting on 21 June 1976, the committee determined to revoke this Extinguishment Order.

On 25 January 1991, two Public Path Diversion Orders were made for portions of footpath 157, one titled northwest and the other southeast. The northwest order does not concern the claimed route, as it heads northwest from Drove Lane. The other order diverted the path from Point B of the claimed route, to head north westwards to Drove Lane, north of Drove Lane Farm. The original route from Point B headed west to Drove Lane, meeting it at the same point as footpath 148 and south of Drove Lane Farm. This is the route shown on the Second Edition of the OS map as referenced in the Landowner's submission. This original path is not the claimed route B to C; Point C is a lot further south on Drove Lane. The diverted route from Point B is the route currently shown on the Definitive Map.

The applicant could not find Notice of diversion of this path to its present course on the Definitive Map. Notice of these Public Path Orders was

advertised in the Littlehampton Gazette on 1 February 1991. Both Diversion orders were confirmed on 21 June 1991, as mentioned in the Landowner's submission, and confirmation was advertised in the Littlehampton Gazette on 5 July 1991. As regards the claim for the route B to C therefore, a bridleway can only be added on the claimed route B to C if the balance of the evidence provided shows this.

### **7.23 Land Registry Maps**

The Land Registry map shows that three quarters of the route A to B is shown as white and separate from adjoining lands coloured pink, down to where it meets Footpath 156-2 going in a south-east direction. This makes it difficult to come to the conclusion that this is a public vehicular road as it does not relate to the whole claimed route A to B. The remainder of claimed route A-B is within the titles WSX410820 'Land lying to the south-west of Tack Lee Lane' and WSX421223 'Land on the south-west side of Main Road.'

### **7.24 West Sussex County Council List of Streets maintainable at public expense**

If a route is shown on this list, it is evidence of maintainability and not of status. Looking at the map, the maintainable section, which is highlighted in yellow, ends at the most southerly house on claimed route A to B, which is just over a third of the way to Point B, so it would appear the maintainable element of this route is linked to the housing development.

## **8. Consideration of claim**

- 8.1 The application was submitted with archive evidence summarised in Section 5 and contained in the background papers of this report. Comments against the application and other comments from landowners are summarised in Section 6 and contained in the background papers. The investigating officer also conducted a thorough investigation of the County's archives as well as undertaking a detailed consideration of the archive evidence submitted by the applicant and evidence submitted in objection as set out in Section 7 of this report.
- 8.2 Section 53 requires there to be a "discovery" of evidence. This is not disputed. The application relies on archive evidence. Section 32 Highways Act 1980 provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, 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. In doing so, account must be taken of the antiquity of the 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.
- 8.3 The burden of proof rests with the applicant. In this case there are different standards of proof to be applied when considering each claimed route.

In determining the application, it is necessary to decide:

- i. Whether the evidence provided by the applicant, when considered with all other relevant evidence, on the balance of probabilities, shows that Point A to B ought to be shown as a restricted byway.
- ii. Whether the evidence provided by the applicant, together with all other relevant evidence available, shows that on the balance of probability a bridleway subsists from point B to C, or in the alternative that a bridleway is reasonably alleged to subsist, which is the lower test. This lower test requires that it is reasonable to allege a right of way subsists.

8.4 As part of this application is concerned with whether the documentary evidence supports the route being an ancient vehicular highway, it is necessary to have regard to the provisions of S.67 of the Natural Environment and Rural Communities Act 2006 (NERC 2006), which extinguished public rights for mechanically propelled vehicles subject to certain exemptions. County Council records were checked and there is no record of the route being recorded as anything other than a footpath, despite the route being marked on historic maps. It is therefore concluded that the S.67 NERC 2006 exemptions do not apply and if there were any rights for mechanically propelled vehicles then they would have been extinguished by NERC 2006.

#### 8.5 **An overview of the route as a whole**

The applicant has suggested that the area surrounding Drove Lane has long been settled by people and the interpretation of this is that the route was used to transport livestock and goods to local markets – droving is the practice of walking livestock from one place to another, on foot and often with the aid of dogs. It is accepted that the evidence does paint a picture of how A to B may have been used historically, however, the evidence does not reach a conclusion in relation to whether any higher rights, other than rights on foot, were held by the public. It is not necessary for conclusive evidence to be provided, it is necessary to consider whether the tests set out at paragraph 8.3 above have been met.

Whilst the route A to B is shown consistently on several maps, the route B to C is far more varied and these will be looked at and considered separately below.

#### 8.6 **In relation to route A to B Upgrade to Restricted Byway**

8.6.1 There is significant evidence of the existence of a route, with most maps from as early as 1775, showing a route between A and B. Despite the clear evidence of a route from A to B there is little evidence to conclusively determine whether the route is public or private and to indicate the status of the route definitively. The implied droving does not seem to link significant marketplaces and it is likely that animals were being moved between pasture.

8.6.2 Despite clear evidence to support the existence of a route there is evidence shown on the tithe map, that the route is possibly different from other routes nearby. This map includes a line across the entrance to the claimed route which could suggest that either the route was not open to the public or that

there was some form of barrier across the route which prevented certain use. Despite evidence of the existence of the route, it is not possible to conclude from the evidence, on the balance of probabilities, that higher public rights, other than use on foot exist on this path.

## **8.7 In relation to route B to – C Addition of Bridleway**

8.7.1 The claimed route from B to C is displayed differently on most of the maps from that of A to B. On the earliest map, that of Richard Wyatt, B to C is depicted as a dotted track. On other maps it is not depicted at all, e.g. the OS Maps from 1805- 13 and the Greenwood map of 1825. On the First Edition OS Map in 1876 the path follows a different route and hits Drove Lane further north than point C. There is little evidence to determine whether the route is public or private and if it is public the status of the route.

There is evidence shown on the tithe map, that the route is possibly different from others nearby. This map includes a line across the entrance to the path from the public road which could suggest that either the route is not open to the public or that there was some form of barrier across the route which prevents certain use. It is not possible to conclude from the evidence that a historical public right subsisted or is reasonably alleged to subsist on the claimed route B to C.

## **9. Consultation, engagement and advice**

9.1 See paragraph 4 above which details responses to the statutory consultations as well as responses to additional consultations that were carried out as part of the investigation process.

## **10. Finance**

10.1 The County Council is under a duty to investigate Definitive Map Modification Order applications and all costs associated with the consideration of the application by officers' falls within existing budgets.

10.2 Cost implications arise:

- i. In the event of an order being made and objected to, the matter may fall to be considered at a public local inquiry or a public hearing. All fees incurred after submission of the order are borne by the County Council. This includes but is not limited to fees relating to the venue hire, fees relating to advert
- ii. Should an order be made and confirmed; if any works are necessary to ensure the path is open for public use.
- iii. Should the decision of the committee be challenged by way of Judicial Review.

10.3 The decision taken by the investigating officer and the Rights of Way Committee is a decision based on the application of strict legal tests and the above costs cannot be a consideration in the determination of the application.

## **11. Risk implications and mitigations**

11.1 The decision is one that must be taken on strict legal tests:

- i. If the application is not determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.
- ii. In the event that an order is made the landowner could appeal to the Secretary of State and the matter be considered by way of written representations, hearing, or public inquiry.
- iii. In the event that an order is not made and the applicant disagrees with the decision then they have a right of appeal pursuant to Schedule 14 of the Wildlife and Countryside Act 1981 to the Secretary of State. The Secretary of State may direct the County Council to make an order, which if objected to could be considered by way of written representations, hearing, or public inquiry.

11.2 In reaching a recommendation the investigating officer has considered the evidence in accordance with the law.

## **12. Policy alignment and compliance**

### **Equality and Human Rights Assessment**

12.1 The County Council has a duty to have regard to the impact of any proposal on those people with characteristics protected by the Equality Act. Officers considered the information provided by the applicant, together with the responses from consultees and other parties, and determined that the proposal would have no material impact on individuals or identifiable groups with protected characteristics.

### **Human Rights Act 1998 Implications**

12.2 It is unlawful for a public authority to act in any way, which is incompatible with a convention right. The rights, which should be considered, are rights pursuant to Article 8, Article 1 and Protocol 1 and Article 6.

12.3 Article 8 protects the right to respect for private and family life including an individual's home. This is a qualified right and there may be interference by a public authority if that authority does so with an intention of protecting the right and freedom of others.

12.4 Article 1, Protocol 1 deals with the protection of property. Again, this is a qualified right and interference of it may take place where it is in the public's interest to do so subject to the conditions provided by law. Any interference, however, must be proportionate. The main body of the report identifies the extent to which there is interference with these rights and whether the interference is proportionate.

12.5 The Committee should be aware of Article 6, the focus of which (for the purpose of this Committee) is the determination of an individual's civil rights and obligations. Article 6 provides that in the determination of these rights, an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a

great deal of case law. It has been decided that for rights of way matters, the decision-making process as a whole, which includes the right of review by the High Court, complied with Article 6.

### **Crime and Disorder**

- 12.6 The Definitive Map Modification Order process involves the application of legal tests, which mean that it is not possible to give weight to any effect on crime and disorder

### **Climate Change**

- 12.7 Enhancement of the public rights of way network is a positive contribute towards the Council stated ambition of being carbon neutral by 2030, however such considerations are not matters that can be taken into account when consideration applications against the strict legal tests

### **Public Health**

- 12.8 The addition of public rights of way through the definitive map modification order process could assist in enhancing the general health and wellbeing of the communities served by the Council. However, such considerations are not matters that can be taken into account when considering applications against the strict legal test.

### **Tony Kershaw**

Director of Law and Assurance

**Contact Officer:** Georgia Hickland, Trainee Legal Executive, Legal Services: 0330 222 7763

### **Appendices**

- Appendix A – Location Plan, No. 01804
- Appendix B – Site Plan, No. 01805

### **Background papers**

1. Application and plan
2. Consultation responses
3. Evidence submitted by the applicant
4. Evidence submitted by the landowners
5. Archive evidence