

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

**1 March 2022**

**DMMO 5/18 Definitive Map Modification Order Application to modify the Definitive Map and Statement for Chichester to upgrade FP 155, Drove Lane to a restricted byway from Point A to B, upgrade to a bridleway from Point B to C and to add a restricted byway from Point B to D, in the parish of Yapton**

**Report by Director of Law and Assurance**

**Electoral division: Middleton**

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### **Summary**

This application concerns an application in three parts for an upgrade of part of footpath 155, Drove Lane, to a restricted byway from point A to B and an upgrade of part of footpath 155, Drove Lane, to a bridleway from point B to C and the addition of a restricted byway off Drove Lane from point B to D.

### **Recommendations**

- (1) 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 FP 155 to a restricted byway from point A to B (Path 1) 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 FP 155 to a bridleway from point B to C (Path 2) be not made
  - (3) 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 restricted byway from point B to D (Path 3) be not made.
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## **1. Introduction and description of the routes**

- 1.1 This report concerns an application made by the British Horse Society. The application submitted on 19 April 2018 seeks to modify the Definitive Map and Statement (DM&S) under the provisions of Section 53 of the Wildlife and Countryside Act 1981 (WCA1981).
- 1.2 This application seeks to make 3 changes to the DM&S as detailed on the plan at appendix 1;
  - i. The upgrade of footpath 155 to a restricted byway between points A-B on the application plan (path 1)
  - ii. The upgrade of footpath 155 to bridleway, as shown between points B-C on the application plan (path 2), and
  - iii. The addition of a new length of restricted byway as shown between points B-D (path 3)
- 1.3 In summary, the applicant alleges that the claimed route is a historic vehicular highway between points A, B and D (and as such should be a restricted byway) and between point B and C, although recorded as a public footpath, should be recorded as public bridleway. A bridleway is defined to include the rights of a footpath as well as the right to ride or lead a horse and to ride a bicycle. A restricted byway includes those rights along with a right to use non-mechanically propelled vehicles e.g., horse and carriage.
- 1.4 This report will refer to each of the paths as path 1, 2, and 3 as detailed above.

Path 1 begins at Point A which is the start of Footpath 155, accessed from Main Road in Yapton. It then heads south westwards for just under 1.5km to Point B.

Path 2 begins at Point B, which is on Footpath 155, and carries along in a south west direction for about 500m following footpath 155, crossing Weststone Bridge and ending at the Ryebank Rife. The footpath continues south westwards converging with Footpaths 153 and 154. Footpath 154 carries on, crossing Hoe Lane and ending in Shirley Drive.

Path 3 begins at Point B which is on Footpath 155 and heads west for just over 500m to point D.
- 1.5 This application is based solely upon archive evidence. A considerable amount of archival evidence was submitted in support of the application and a copy of the applicant's statement is attached as background paper 1. It is appreciated that points C and D are cul-de-sac highways, however it is not relevant to the determination of the application.
- 1.6 No user evidence has been submitted in support of this application, nor has any user evidence come forward throughout the consultation and investigation process.
- 1.7 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.

- 1.8 In considering the evidence, before making an order, it is necessary for the applicant to show that the following legal tests are satisfied.
- 1.9 Paths 1 and 2 relate to the upgrading of an existing right of way - Section 53(3)(c)(ii) of the WCA1981 states that an order should be made to modify the Definitive Map and Statement if evidence is discovered which, when considered with all other relevant evidence available shows that a highway shown on the map and statement as a highway of one description ought to be there shown as a highway of a different description. The test in these circumstances is the balance of probabilities.
- 1.10 Path 3 - Section 53(3)(c)(i) of the WCA 1981 provides that an order to modify the DMS should be made on the discovery by the authority of evidence which, when considered with all other relevant evidence available, shows that a right of way subsists or is reasonably alleged to subsist. There are therefore two tests that can be applied:
  - i. Test A: Does a right of way subsist on the balance of probabilities?
  - ii. Test B: Or, is it reasonable to allege that a right of way subsists?

## **2. Land Ownership**

- 2.1 Land Registry documents show the application route crosses land of several different owners, there is no unregistered land.
- 2.2 The landowners consist of; David Winston Langmead (WSX296970, WSX339962 and WSX347885 All freehold), Langmead Farms Limited (WSX365257 - Leasehold), BL Solar 2 Limited (WSX366333- Leasehold)
- 2.3 Notice was also served on R Hocking Esq - tenant of Drove Lane Farm; the occupier of 1 Drove Lane; Mr, and Mrs R Horan – tenants of 2 Drove Lane; the occupier, tenant of Frogs Lodge, Drove Lane; and D Dean Esq, 1<sup>st</sup> Yapton and Ford Scouts Group, tenants of The Scout Hut.

## **3. Consultations**

Standard consultations were sent to the local member, County Council internal departments, amenity groups, the Parish and Town Councils.

### **3.1 WSCC Prow Ranger, Darryl Hobden**

From a site visit with landowner R Hocking, he noted that he had no comments other than the lack of connecting routes in the area. He also mentioned that the path crossed arable land and whilst he did not think this would be affected, some of the proposed links would require bridges to be installed to accommodate RB/ BW users.

*Officer note: please see commentary below on connecting routes. The nature of the routes today or any works required so that users can be accommodated are not relevant in the consideration of this application.*

### **3.2 Local Member Jacky Pendleton**

Jacky Pendleton stated that she supported this application.

### **3.3 Trail Riders Fellowship (TRF)**

"With respect to the application, TRF is of the view that the evidence available supports the existence of carriageway status. The evidence presently available to TRF does not suggest that rights for mechanically propelled vehicles exist on the route. Based on evidence that TRF is currently aware of, the road appears to be a restricted byway."

### **3.4 British Horse Society**

They have no further archive or user evidence to support or negate this claim. The evidence provided has been reviewed by their head office and they are of the opinion that it provides strong support for the application. On the ground they believe this would be a very welcome additional off-road safe route for cyclists and horse riders on the Coastal Plain.

### **3.5 Yapton Parish Council**

- Objects to this application which they believe is entirely without merit
- Concerns about horses mixing with pedestrians, cyclists, dog walkers, etc.
- Drove Lane is a single lane road which is already heavily used by cars
- An upgrade to Restricted Byway, may actively encourage additional use in this way, given the limited space this would create a great deal of inconvenience for many residents as well as put vehicular and non-vehicular traffic at additional risk.
- Drove Lane is the only access to the Yapton Village Scout Hall, used evenings and weekends throughout the year by beavers, cubs, guides, scouts, and weekdays during term time by the Potter's House Pre-school which has space for 60 children, meaning up to 240 car movements through the Drove Lane junction every day just for the pre-school.
- The current usage of the Scout Hall combined with the limited space in Drove Lane means that there are few (perhaps no) times of day during the week or at the weekend where it would be sensible or safe to actively encourage more use by vulnerable people (on foot) or animals (such as horses).
- It is likely that the benefits to those who would like an Upgrade to Restricted Byway will be far outweighed by the inconvenience caused and the risk to all users of Drove Lane would be increased by this change too

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

- 4.1 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 27

August 2019. All of the evidence submitted can be found in the applicant's statement and addendums at background paper 1.

- 4.2 Details of the evidence submitted in support of the application is set out and analysed further in paragraph 6. In summary, the applicant submits that path 1 and path 3 had the reputation of public vehicular rights or is consistent with there being public vehicular rights and that Path 3 is on the balance of probabilities, historically part of a public drove route and key trade route which originated near Felpham and therefore would give rise to at least the status of bridleway.
- 4.3 The applicant identifies the following documents of particular importance:
  - 4.3.1 The deposited plan and book of reference for the Portsmouth and Arundel Canal
  - 4.3.2 The Yapton Tithe Map and Apportionments
  - 4.3.3 The Ordnance Survey Object Name Books
  - 4.3.4 No mention of easements to use for access to land parcels within Exchange Acts and Sales Particulars.

This evidence is supported by the portrayal in maps aimed at the public and smaller estate maps; other historic documents, information from the Victoria County History for Felpham and Yapton and archaeological evidence in the West Sussex historic environmental records (HER). The applicant has also scaled off a contemporary map, suggesting the Weststone Bridge was historically a stone bridge of some 38 feet width.

- 4.4 Within the applicant's amended addendum statement dated 27 August 2019, the applicant requests that in the event that it is decided the status of restricted byway is not sufficiently proven for points A to B, and/or B to D that consideration be given to whether bridleway status has been proven to the sufficient standard instead.

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

### **5.1 Landowner – Mr D W Langmead**

- 5.1.1 Mogers Drewett Solicitors, acting on behalf of Mr D W Langmead, Mr Langmead and his Trustees have submitted a considerable amount of evidence in rebuttal.
- 5.1.2 The entire route of Paths 1 and 2 is privately owned and is included within the tenancy of Drove Lane Farm.
- 5.1.3 They state that Path 1 to Path 3, being a cul-de-sac, means it cannot be said to have been dedicated to the public for use with vehicles. Path 3 has never been a public route of any kind, instead it was a private route serving the farmstead known as the Hams. The claimed route B to D is blocked off by locked gates and has been since the solar farm was established.
- 5.1.4 The submission claims there is no evidence that the public have used and accepted this route 'as of right' with vehicles, though have done so on foot,

which is why it is a footpath. There is no mention of Drove Lane in the Adcock classification of public highways, and the 1932 Act Survey recorded them as footpaths. It is argued that the five principal documentary sources used in public vehicular claims - Inclosure, Tithe, Finance Act 1910, Handover Map and List of Streets – are absent in this case and that this forms strong evidence against public vehicular status.

- 5.1.5 Drove Lane only ever went Path 1-3, what went on Path 2 was a separate matter, examples seen in Sales Particulars 1862 and Wyatt Map 1775 have an indeterminate way continuing southwards from point B. In the case of Path 2 no evidence of either creation or dedication of a bridleway, and no evidence of public bridleway use has been submitted. In the Object Names Book, Weststone Bridge was expressly described with the word 'foot' and said, "applies to a foot bridge crossing over the Rife."
- 5.1.6 It is the landowners view that the application relies solely on documentary evidence and there is not enough to support the application on the balance of probabilities; instead the balance of all the evidence shows that the correct status for this route, Path 1 and 2 remains a public footpath. In respect of path 3, there is no basis for arguing in favour of a public carriageway or a public bridleway and that no Order should be made in respect of any of this route.
- 5.1.7 The full submission of the landowners can be found at background paper 2.
- 5.2 **Tenant Farmer - R Hocking, Drove Lane Farm, Drove Lane, Main Road, Yapton, BN18 0EB.**
  - 5.2.1 Mr Hocking farms land over which points A to B of the application route pass.
  - 5.2.2 Mr Hocking stated that he has a lifetime tenancy under 1986 Agricultural Holding Act Tenancy from Mr David Langmead. He has held an interest in the land for 19 years and lived on the farm since 1972.
  - 5.2.3 His father was a tenant farmer since 1970. He currently considers the route as footpath as signposted and mapped. He uses the route daily to access his fields by foot or with farm vehicles and sees dog walkers daily on the route. He states that there is currently a kissing gate at the solar farm end of Drove Lane.
  - 5.2.4 Mr Hocking states that at the foot of Drove Lane Entrance is a sign saying, "Drove Lane farm, Private Road, max speed 15mph". He has only ever turned people back along the route who try to park cars along Drove Lane to go dog walking.
  - 5.2.5 In the past he has only given permission to Local Police Dog unit to access the route. Only residents of 3 other cottages and people using the farm livery have had private rights to use the route in the past.
  - 5.2.6 Mr Hocking states that it would not be practical for the route to be upgraded as it is a single farm track and therefore would not be safe. He also states that with the increased development in the area it would mean the route will be busier and likely to become more of a hindrance.

5.2.7 Footpath 155 passes right past the farm and last July they had their hay barn destroyed by fire and therefore do not want to encourage further public access. In addition, it is stated in Mr Hocking tenancy that the tenant is entitled to "quiet enjoyment" and with more kids and groups in the summer Mr Hocking states they are always on edge.

**5.3 Mr & Mrs Horan, 2 Drove Lane, Main Road, Yapton near Arundel, BN18 OEB. Mr & Mrs Horan are tenants of 2 Drove Lane and have an interest in land over which points A to B of the application route passes.**

5.3.1 They have held an interest in the land for 18 years, in addition Mr Horan lived at 1 Drove Lane from 1970-80.

5.3.2 They consider the route as a public footpath and private road.

5.3.3 They note that there is a public footpath sign and see people using the route daily on foot. They also use the route themselves daily.

5.3.4 They state that there is a kissing gate at the end of Drove Lane and at the end of the road as well as a notice off the main road stating "Private Road".

**5.4 Group Chair 1<sup>st</sup> Yapton & Ford Scout Group**

5.4.1 The Scout group objects to the application to upgrade Drove Lane to a restricted byway. The objection is based on the understanding that this would prohibit motorised vehicular access to their premises.

5.4.2 Officer comment - Yapton & Ford Scout Group have been advised that private access rights will continue regardless of what public rights are established.

## **6. Archive Research and consideration of the application documents**

The evidence is considered collectively for each of the claimed routes and is set out in chronological order. 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.

### **6.1 Early historic evidence.**

The annotated map showing historical environmental records (HER) does suggest the area surrounding Drove Lane has long been settled by people. In addition, the settlements from Yapton to Felpham appear to branch off from today's Footpath 155. The fact that people have been living in the vicinity of the path does suggest the route has existed and been used in this manner historically. As part of the claimed route on footpath 155 passes many of the historic sites of settlement, part of the route may have existed as far back as the Bronze Age and been used to transport livestock.

### **6.2 Grant (indented) by William Lenne of Bulsham and Nicholas Venables of Walberton 1560 (appendix 11 of applicant's statement)**

The deed describes land, which is stated to be former Tortington Priory lands, however, there is no plan to determine the exact land. Although the descriptions in this deed suggest there is some common land this simply

supports a position that some land near the route was used to keep stock and potentially Drove Lane was used to access these areas as it was known to exist in the 16th Century.

**6.3 Deed to lead the uses of a fine between John Boys of Wingham, William Baldwyn of Chichester and William Cutfold of Phelpham 1641 (appendix 12 of applicant's statement)**

The applicant infers that mention of the "kings highway from Yapton to Flannsham" is likely to refer to the claimed route C to A (path 2 and path 1). Although this cannot be certain from consideration of the maps referred to above. Drove Lane is one of the direct routes from Flansham towards Yapton in Yeakell and Gardners Map dated 1778. The deed also mentions common land in the Brooks once again. Both of which suggest that Drove Lane (claimed route point A to C (path 1 and path 2)) could have had higher status than a footpath, though this is not definitive.

**6.4 Information about Droving Characteristic coastal plain to Weald areas (Victoria County History and Wikipedia articles) (appendix 2 of applicant's statement)**

The applicant has put together information on Drove roads in Sussex and a history of the surrounding area to the claimed route from a range of sources such as historians and Wikipedia, therefore, some sources are more reliable than others. Drovers are described as a strong characteristic of the Weald which linked settlements in the South Downs coastal plains to their summer pastures in the Weald. As Drove Lane, (Path 1 and Path 2), goes in this direction it could mean the route was used in this way but this is speculative unless supported by further evidence.

The Victoria County History (VCH) describes several common pastures surrounding the claimed route in the 17th and 18th Century however, exact locations are not detailed. An extract from British History online does describe one farmer in Bilsham in 1671 having stock in the Weald at Kirdford. These descriptions of the area surrounding the claimed route support the fact that farmers in this area moved livestock using Drove Roads from pastures to the Weald. In addition, Drove Lane is one of the early roads mentioned in the area. The VCH of Yapton claims that Drove Lane was mentioned from 1542 but gives no further details on the route, so although it is not explicitly suggested the route was a Drove road it is reasonable to consider that it could have been used for this purpose historically. The publication is considered reliable as it is edited by academic historians but is by no means certain or definitive.

During the 17th century a new Bilsham road leading from Felpham to Middleton is mentioned and it is agreed that this could explain the declining importance of Drove Lane.

The applicant states that historic evidence shows that Weststone Bridge was originally a stone bridge. The parish and estate map of Richard Wyatt's land (WSRO Add Mss 2034) (appendix 9 of the applicant's statement) describe plot R as "Brook adjacent to stone bridge" and this bridge could be roughly in the right position to be what is later known as Weststone Bridge. A solid structure such as a stone bridge could suggest that the route was a higher

status than footpath, however, does not determine if it had private or public use. Wyatt's Map 1775 shows the land coming down to the corner and then turning westwards. Southwards from that corner, a way passes through a succession of gates and fields, shown by a single dotted line passing through field Q and into field R. The single dotted line does not connect with the bridge.

It is inferred by the applicant that the reason most paths in the coastal plain were recorded as footpaths is that the area was poor and when in the 19th Century land was enclosed, the population were not in a position to object. In comparison, more Bridleways are found in the areas near the South Downs where there were more merchants. Although there is mention of hard times in the VCH in the 19th Century, there is no direct proof of the applicant's assertion. It is however accepted that locally powerful landowners may have had significant influence on the outcome of inclosure in the early period (1500s) but this was less likely to occur after the 1800s.

**6.5 Parish and estate maps – plan of the lands in Yapton and Binsted belonging to Richard Wyatt 1775 (WSRO Add Mss 2034) (appendix 9 of the applicant's statement)**

This map shows Drove Lane marked as "Dro lane" and as the main road passing through the land parcels outlined on the parish estate map. In the table of reference Dro Lane is mentioned under parcel P, Q and U, which might imply the lane is under ownership of these landowners.

**6.6 Yeakell and Gardner Sussex 1778-1783 (appendix 4 of the applicant's statement)**

The claimed route from points A to B (path 1) and B to D (path 3) is depicted as a road enclosed by hedges or trees in the same fashion to other roads in the area, which were considered to be public vehicular highways. Point B to C (path 2) is shown as a dotted track following the line of a field boundary between vegetation. Weststone Bridge cannot be clearly seen if at all on the map, however a bridge of sorts is assumed to be present as the river is crossed and continues South. Some of the roads shown on the Yeakell and Gardner Map are today publicly maintainable highways, such as Priory Road. This does not mean however that all roads shown on the map were public roads. There is no key, therefore the status of the road cannot be determined conclusively. This map is of limited value in determining status as not only public routes were shown on it.

**6.7 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 (WSRO Add Mss 2068) (appendix 3 of the applicant's statement)**

This map shows a route from Barnham Brook through to Yapton Mead and shows Weststone Bridge showing the claimed route from points A to C (path 1 and path 2). There is no key provided but the fact that the route is shown indicates that it was an important route and potentially used with a higher status than footpath by the public, however there is no key to confirm this. The applicant claims that Weststone Bridge is shown as a substantial stone bridge suitable for horse and cart and that this provides further weight to the

claim that the route was used heavily by the public and by horse and cart. It is not possible to ascertain with certainty from this plan that Weststone Bridge was a stone bridge that was wide enough for horse and cart.

**6.8 Gardner and Gream 1795 (appendix 5 of the applicant's statement)**

The claimed route is only visible from points A to B (path 1) and is depicted in the same way as other roads. However, once again there is no key accompanying the map to determine public or private status of the roads. While the applicant states that the maps were produced for sale to the public and so routes are unlikely to be shown if not public, however, this assumption cannot be relied on.

**6.9 Ordnance Survey Draft Map 1805-6 (appendix 6 of the applicant's statement)**

This map shows the claimed route from A to B (path 1) and B to D (path 3) depicted as other roads on the map, however there is no key to determine the status of the route. Several Barns are drawn along the route and midway along point B to D (path 3) suggesting the area was actively farmed. The application route from point B to C (path 2) is not shown on the 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.

**6.10 Field Book of the Estates in the County belonging to the mayor, Aldermen, and citizens of the City of Chichester 1806 WSRO Add Mss 2067 (appendix 10 of applicant's statement)**

Whilst the plan "land in the Parish of Yapton" shows the route running alongside field boundaries and between hedges towards point C, the area around Weststone Bridge, there is nothing about the status or use of the claimed route noted (figure 17 on page 23 of the applicant's statement). The applicant highlights parcel 3 on this plan previously being common land and highlights a track to the east, however, there is no information provided on the map which confirms the status of the tracks shown as public or private.

The other relevant plan held in the field book labelled "Land in the Parish of Yapton and Barnham" shows Drove land roughly from point A to C (Path 1 and 2) of the claimed route as "Drove Lane". Unlike today's Drove Lane, the lane continues to the West at this point. The applicant believes this section to the west marked as Drove Lane is the claimed route from points B to D. It is however difficult to determine if the claimed route from point B to D (path 3) is shown on this map. The applicant believes the claimed route B to D (Path 3) is shown as a lane providing access to individuals land and therefore would have been used for higher purposes than a footpath and would have been public. While it is agreed that it was likely used for a higher purpose than footpath it does not mean the route was public and could have been for private use only. The plan itself provides no information on the status of Drove Lane as public or private.

**6.11 First Ordnance Survey Old Series 1813 (appendix 7 of applicant's statement)**

This map depicts the claimed route in the same way as above (A to B (path 1) and B to D (path 3)), however, less barns are shown on the map and are not labelled as such. There is still a Barn mid-way along point B to D (path 3).

**6.12 Portsmouth and Arundel Canal- constructed through Yapton opened 1823 QDP/W34 (appendix 13 and 14 of applicant's statement)**

The applicant highlights that Drove Lane labelled as "Drow Lane" in the canal plans has no named owner in the reference book so suggesting it was a public road. While it seems a possible assumption that the way was public it does not define the level of such use. It must also be noted that the route does have a line across it at the entrance to the main road, which could denote some form of barrier across the route.

**6.13 Greenwood and Greenwood Map of Sussex 1825 (appendix 8 of applicant's statement)**

Only a very short section of path 1 (A to B) is recorded on this map. The key refers to this short section being a Cross Road. The applicant considers that the depiction of this short length of path 1 as a "crossroad" is evidence in favour of Drove Lane being a public vehicular highway. The map does not, however, show the entire length of the claimed route, to include B to D (path 3) or indeed the additional length B to C (Path 2) as such. On older maps, a cross road typically means a public road. In the absence of the entirety of the claimed routes on this map and the way in which part of claimed path 1 is mapped as ending, it is considered of limited weight in determining the public status of the claimed routes.

**6.14 The Felpham (Flansham) Inclosure award 1826 (Appendix 19 of the applicant's statement)**

This affects the area to the south of the claimed route. The Award enclosed the former common brooklands south of the Ryebank Rife and under the heading "One Private Road marked D" in the margin, describes a "public footpath or way".... "towards Yapton and terminating at the main sewer separating the said parish of Felpham from the parish of Yapton". The applicant asserts that this is only for the route in the Parish of Felpham and states that it is normal for the status of routes to vary between parish boundaries, a claim which is supported with a quote from the book "Roads and tracks of Britain" by Christopher Taylor highlighting an example of this.

The Act which granted the powers available to the Inclosure Commissioners was obtained from the Parliamentary archives and reviewed. The Commissioner was "authorised and empowered to stop up and discontinue, or divert and turn and to set out and appoint any public road or roads, drift way, bridleway or footpath, public or private, leading between through or over any of the old inclosures in the said parish of Felpham and to make such order or orders, and to do and execute all such acts matters and things as shall be requisite or to him shall seem proper for that purpose; subject

nevertheless to the provisions of the said first recited Act with respect to the stopping up of any old or accustomed road or roads...".

The facts set out in an Inclosure award can carry significant evidential weight *Roberts v Webster (1967)*. However, there is often a problem with the exact meaning of the words used. The meaning of the word 'private' is much debated. The claimed route appears to be given the heading "One Private Road marked D" which then describes a public footpath or way. As Drove Lane is marked as a private road marked D, describing a public footpath or way, it is suggestive that it did not have carriageway status. It is concluded that this can carry evidential weight.

#### **6.15 Turnpike Plans**

There are no turnpike plans relevant to the claimed route the subject of the application.

#### **6.16 Tithe Map 1839 and Apportionment 1841 for Yapton (appendix 15 & 17 of applicant's statement)**

Drove Lane is shown crossing the canal just after point A of the claimed route down to point B (path 1) as other roads and is labelled as Drove Lane. At around point B the route shown as a road heads west and the rest of the application route point B to C (path 2) is shown as a faint dashed line along field boundaries until Weststone Bridge is reached on the edge of Felpham.

Appendix 17 of the applicant's statement provides a copy of the Parishes Tithe map which demonstrates that Drove Lane is the main access route to many of the parcels of land under different ownership.

The route A-B (path 1) is shown as a road, coloured sienna, outlined by the hedges of enclosures and with the apportionment number 421. It is also named on the plan, in the same way as other roads in the parish considered to be public. B-D (path 3) is also coloured sienna and given the number 325. Both are listed under the "Roads Wastes Water & C" section at the end with no amount payable.

It should also be noted that there is a black line marked on the plan, just south of point A, and north of the canal, with what could be a barrier to the route.

Tithe documents are solely concerned with identifying titheable land. Apportionments are statutory documents in the public domain. However, tithe maps were not intended to establish or record rights of way. There are a number of reasons why land might not have been subject to tithe in addition to the possibility of it being highway land. The land could be barren or land held by the church or land which had only recently been converted to productive land. Tithe maps and apportionments can generally 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. It follows therefore that the inclusion of a road under the heading 'roads and waste' is not, in itself, good evidence that it was public.

**6.17 Private Act of Exchange of Lands between R Redford and A.D Whit 1867 (Appendix 20 & 21 of applicant's statement)**

The applicant states that no records of the route in such a private exchange means that it was not considered necessary as they were public. However, it could equally be the case that omission was because no rights existed. Furthermore, public rights of way would not necessarily have been omitted from Acts as it would be in the landowners' interest to be aware of these rights.

**6.18 Quarter Session Records - Highway functions discharged by Justices of the Peace in quarter sessions**

There are no entries for the Parish of Yapton during this period.

**6.19 First edition of the ordnance survey county series 25 inch to the mile map Sussex 1876 (appendix 24 of applicant's statement)**

The claimed route from Point A to B (Path 1) is depicted by two solid black lines running parallel to each other as other public roads are shown on the map. The route near to point C is numbered 176. At point B the application route narrows and is shown by double dashed lines running parallel, which also appear to run through a hedge boundary until point C at Weststone bridge (path 2). The application route point B to D (path 3) is also shown as two solid black lines running parallel to each other, the initial length of the route from point B has double dashed lines running inside the solid parallel lines. The application route B to D (path 3) crosses parcel 188 and 185. While 188 is marked as "Arable &c" in the reference book, which the applicant states is significant it does not prove the status of the route at this point.

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

This Highways classification and report 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 on them and to report on their state of repair, having regard to the amount of traffic on them. The 1894 Map was produced to show maintainable roads within the county. Main roads and first to fifth class roads appear coloured on the 1894 map. Claimed route A to B, Path 1, is shown with black parallel lines and appears uncoloured. From point B to C, Path 2, there are black dashes to point C. Path 3, point B to D has black parallel lines for the start of the route and about a third of the way along when it changes to a single black line. Where roads are shown uncoloured it is not considered to be a fifth-class road.

**6.21 Object Names Books (ordnance survey record books) 1895 (Appendices 25 & 26)**

The object name book records the name of the claimed route A to B (path 1) and B to D (path 3) as Drove Lane. With a description as "public laneway commencing about 4 chains w of Bonhams going southwards to an end at the Hams", which is confirmed by several local landowners. The book is

marked as revised in 1938. The applicant states that this was changed to "an occupation road" around 1936.

There is no specific legal definition of the term "public laneway". The landowner submits that the circumstances and timing of the manuscript change made from public laneway to occupation road is not clear. The change was made in black ink and not blue/green ink, which denoted some of the changes /revisions made in January 1910, March 1910, June 1939, and July 1939. This change was initialled, with initials similar to the original Royal Engineer who first collected the names in 1896 (C Hammond Royal Engineers). The landowner submits the change must have been made contemporaneously with the original entry. It is not possible to know with certainty when the change was made, but the fact is a change was made from "public laneway" to "occupation road" at some point in time.

The applicant refers in the revised addendum to the applicant's statement (27.08.2019) to the definition of 'occupation road' contained in the Ordnance Survey Instructions to Field Examiners dated 1905 which the introduction makes clear was compiled from instructions to its surveyors dating back to 1881. In this it states at 92. "Occupation roads are shown, whether made or unmade. This term includes roads leading from a public road to a farm or inhabited house, and roads over which there is a private right of way from a public road, through one or more fields, to other fields which have a different owner or occupier. They are more or less of a permanent character". As is shown by this definition, the term 'occupation road' is and was normally used to describe a road laid out for the benefit of the occupiers of adjoining properties and not a public highway.

**6.22 Revised New Series map 1895 (Figure 7, page 13 of the applicant's statement)**

This map depicts the claimed route points A to B (path 1) and B to D (Path 3) in the same way as other roads. The Key from OS revised New Series denotes points A to B (path 1) as a second-class road and most of B to D (path 3).

In all the maps above the claimed route, particularly Path 1 and Path 3 are depicted in the same way as many of the public roads of today.

**6.23 Bartholomew's maps of Sussex 1902 and 1922 (figures 9 and 10, page 16 of the applicant's statement)**

The 1902 cycling map depicts point A to part way along A to B (path 1) as an inferior road (shown as two parallel solid lines and uncoloured) and from this point onwards as a dotted line marked as a Footpath and Bridleway.

The 1922 map shows the claimed route from A to B (path 1) as an inferior road and part way from B to D (path 3) also as an inferior road denoted by two parallel lines which are uncoloured. The applicant states that the CTC assessed the roads and revised these maps, but the fact that they were regarded as being not passable on a bike does not mean they did not have higher status as a bridleway. Bartholomew's 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 whether the route was public or private. It is therefore the case that limited weight can be given to these maps or indeed any map which does not have the positive function of identifying public carriageways.

**6.24 Inland Revenue Valuation - The Finance Act 1910 (appendices 29,30 and 31 of the applicant's statement)**

The 1910 Act provided for the levying of tax ('Increment Value Duty') on the increase in site value of land between its valuation on 30 April 1909 and, broadly speaking, its subsequent sale or other transfer. There was a complex system for calculating the 'assessable site value' of land, which allowed for deductions for, among other things, the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user and to the right of common and to any easements affecting the land (Section 25(3)).

Evidence of the possible existence of a public right of way in Finance Act documentation usually arises in one of two ways:

- reference to it in one or more of the various documents forming part of the valuation process, or
- exclusion of a route from the assessable parcels of land shown on the map record.

The 1910 Act required all land to be valued, but 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.

The extracts provided by the applicant are from the National Archives at Kew, given references IR124/9/483 and IR124.9.487. The field book reference is IR 58/22718 for hereditaments 442 and 437. The maps appear to show the entirety of Drove Lane included within hereditament 442 and 437, not as a white road, other than the bell-mouth access to Drove Lane on Yapton Road.

The applicant suggests that Drove Lane being shown only as a white road in the entrance off Yapton Road is inconsistent with the treatment of other similar roads nearby. It is suggested that the road may have been lightly used and the wide verges of it could have provided a grazing crop.

If a claimed route is external to any numbered hereditament, there is a possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books. However, there may 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.

The inclusion of the claimed route within hereditaments 442 and 437 suggests that it was not considered to be public highway. 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.

**6.25 Yapton Parish Highway Records – The Yapton Vestry Minutes (Appendix 27) PAR/225/12/2 and Parish Council minutes (appendix 28 of applicant’s statement)**

The applicant states that the Vestry Minute reveals the Parish was not in favour of its roads being adopted. The applicant highlights that the minutes 4/12/1931 reveal the County Council were proposing a bypass of Yapton utilising the extension of Drove Lane to Flansham and thereby reopening the former route via Weststones Bridge.

**6.26 Paths claimed under the Rights of Way Act 1932 (appendix 32 of the applicant’s statement)**

Chichester District Council requested Yapton Parish Council to record public paths in 1935. The routes A-B (Path 1) and B-C (Path 2) are recorded as FP 155.

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

This introduced procedures for recording the public’s rights on definitive maps, so called because they can be produced in court as conclusive evidence of those rights, and for creating, diverting, and extinguishing footpaths and bridleways by orders whose merits are argued at public inquiries rather than in the courts.

A-B (Path 1) and B-C (Path 2) were shown as footpath 155. C-D (Path 3) was not shown at all on this map.

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

The List of Streets is evidence of maintenance and not of status. Looking at the map, the maintainable section, which is highlighted in yellow, is Path 1 only, that of A - B. Paths 2 and 3 are not marked at all.

**6.29 Land registry title register extracts**

Title numbers WSX339962, WSX366333 and WSX365257 state that the owner has benefit of a right of way with or without vehicles and animals. The applicant asserts that this supports earlier claims that exchanges of land did not mention the right of way as it was public. Although it is acknowledged that this could be the case, practice in adding such rights of access may have changed over the years and so is not conclusive. In addition, it could mean that a public right of way at that time did not exist.

## **7. Consideration of application**

- 7.1 The application was submitted with archive evidence summarised in Section 4 and the background papers of this report. Comments against the application and other comments from landowners are summarised in Section 5. 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 that in rebuttal from the landowner, as set out in Section 6 of this report.
- 7.2 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.
- 7.3 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 Path 1 ought to be shown as a restricted byway.
  - ii. Whether the evidence provided by the applicant, when considered with all other relevant evidence, on the balance of probabilities, shows that Path 2 ought to be shown as a bridleway
  - iii. Whether the evidence provided by the applicant, together with all other relevant evidence available, shows that on the balance of probability a restricted byway subsists on Path 3, or in the alternative that a restricted bridleway on Path 3 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.
- 7.4 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.

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

The name of the route as Drove Lane on many of the maps is likely to indicate the nature of the use over the years. Droveing is the practice of walking livestock from one place to another, on foot and often with the aid of dogs. 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. It is accepted that the evidence does start to paint a picture of how Path 1 (along with Path 2 and Path 3) may have been used historically – the evidence does not however reach a conclusion in relation to whether any higher rights, other than rights on foot, were held by the public. It is not however necessary for conclusive evidence to be provided, it is necessary however to consider whether the tests set out at paragraphs 1.9 and 1.10 and also at para 7.3 i to iii above have been met.

## **7.6 Path 1 (A-B) Upgrade of part of FP 155 to Restricted Byway**

There is significant evidence of the existence of a route - most maps from as early as 1775 show a route between A and B. Most maps show the route as bounded by defined boundaries. Despite the clear existence of a route from A to B there is little historical evidence to conclusively determine whether the route is public or private and to indicate the likely status of the route. The route is denoted on most maps as being part of a Drove Road/Lane and this could mean that the path was used to drove animals most likely on foot but possibly also on horseback. The droveing does not seem to link significant marketplaces and it is likely that animals were being moved between pasture.

Despite clear evidence to suggest the existence of a route there is evidence shown on two maps, the Canal Map (para 6.12) and Tithe map (para 6.16), that the route is possibly different from other routes nearby. These two maps include a line across the entrance to the path, near the main road, which could suggest that either the route was not open to the public or that there was a barrier across the route which prevented certain use. The route was also noted as an 'occupation road' in the Object Names Book (para 6.21). An 'occupation road' is and was normally used to describe a road laid out for the benefit of the occupiers of adjoining properties and not a public highway. The route was not set out as a white road outside of hereditaments in the Finance Act maps, which suggests it was not considered to be a public carriageway. 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.

## **7.7 Path 2 (B-C) Upgrade of part of FP 155 to Bridleway**

Once again there is some historic evidence of the existence of a route - the earliest the route is shown is on the Yeakell and Gardner Map in 1778 (para 6.3). This map is of limited value in determining status as not only public routes were shown. The route is then shown on some later maps but is shown with less defined boundaries than Path 1. In the Bartholomew's Map of 1922 (para 6.23), path 1 is shown as an inferior road, with Path 2 being shown as a footpath or bridlepath. The route ends at a bridge which denotes the change in parish. The applicant believes that Weststone Bridge, was

originally a stone bridge, implying that this means the route was used with a higher status than a footpath. The landowner believes that the bridge has consistently been shown as a FP and is privately owned within WSX296970. Bartholomew's 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. Therefore, limited weight can be given to this map as it did not have the positive function of identifying public carriageways.

There is little historical evidence to conclusively determine whether the route is public or private and if it is public the status of the route. Despite evidence to suggest the existence of a route which runs from Path 1 southwards, there is evidence shown on two maps, the Canal Map (para 6.12) and Tithe Map (para 6.16), that the route is possibly different from others nearby. These two maps include a line across the entrance to the path near the main road at point A which could suggest that either the route is not open to the public or that there was a barrier across the route which prevented certain use. The route was also noted as an 'occupation road' in the Object Names Book (para 6.21). An 'occupation road' is and was normally used to describe a road laid out for the benefit of the occupiers of adjoining properties and not a public highway. The route was not set out as a white road outside of hereditaments in the Finance Act maps, which suggests it was not considered to be a public carriageway. Despite evidence of the existence of a route it has not been proven, on the balance of probabilities, that higher public rights other than use on foot exist on this path.

## **7.8 Path 3 (B-D) Addition of Restricted Byway**

Once again there is significant evidence of the existence of a route - most maps from as early as 1778 Yeakell and Gardner (para 6.6) show a clear route between B and D. Despite the clear existence of a route there is little evidence to determine whether the route is public or private and if it is public the status of the route. The route is denoted on most maps as being part of a Drove Road/Lane and this could mean that the path was used to drove animals most likely on foot but possibly also on horseback. The droving does not seem to link significant marketplaces and it is likely that animals were being moved between pasture - this is certainly more likely in this case as path B to D is a cul-de-sac.

Despite clear evidence to suggest the existence of a route there is evidence shown on two maps, the Canal Map (para 6.12) and Tithe Map (para 6.16), that the route is possibly different from others nearby. These two maps include 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 a barrier across the route which prevented certain use. The route was also noted as an 'occupation road' in the Object Names Book (para 6.21). An 'occupation road' is and was normally used to describe a road laid out for the benefit of the occupiers of adjoining properties and not a public highway. The route was not set out as a white road outside of hereditaments in the Finance Act maps, which suggests it was not considered to be public carriageway. Therefore, it is not possible to conclude from the evidence that historic public rights subsisted or are reasonably alleged to subsist on the claimed route B - D (path 3).

## **8. Conclusion**

8.1 It is therefore recommended that the Committee resolve as follows:

- i. In respect of Path 1 that an 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 155 to a restricted byway from point A to B be not made
- ii. In respect of Path 2 that an 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 155 to a bridleway from point B to C be not made
- iii. In respect of Path 3 that an order under Section 53 (2) in consequence of an event specified in sub-section (3)(c) (i) of the Wildlife and Countryside Act 1981, to add a restricted byway from point B to D be not made.

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

9.1 See paragraph 3 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**

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### **Appendices**

- Appendix A – Location Plan, No. 01802
- Appendix B – Site Plan, No. 01803

### **Background papers**

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