

Planning and Rights of Way Committee

18 July 2023

DMMO 3/19 - Definitive Map Modification Order Application to modify the definitive map and statement for Chichester by adding a bridleway from along the length of Sheepwash Lane, from the junction with the B2179 at Rookwood Lane, to its end on Redlands Lane, in the parish of West Wittering

Report by Director of Law and Assurance

Electoral division: The Witterings

Summary

The application seeks to add a bridleway along the length of Sheepwash Lane, starting from its junction with the B2179 at Rookwood Lane, to its end on Redlands Lane, West Wittering, and was submitted with 6 public way evidence forms testifying to use of the claimed route between 1965 – 2018.

The relevant 20-year period of continuous use for the purpose of the application is 1998 – 2018.

The claimed route is currently recorded as a G-class highway. G-class highways are a class of highway of a historic nature but over which the extent of the public right has not been investigated and established. Given the claimed route's antiquity it was necessary to investigate the historic archive, which included evidence from the County Council's Records Office and from third parties.

Additionally, the final 80 metres of Sheepwash Lane (from grid reference 479704, 099573 to its end on Redlands Lane at grid reference 479783, 099557) is already registered as D-class highway, so any addition to the definitive and statement of the route would need to end at that point.

It is concluded that the historical evidence meets the lower legal test and that the extent of public rights along Sheepwash Lane can be reasonably alleged to be a Byway Open to All Traffic (BOAT). Therefore, an order should be made to add a BOAT to the Chichester Definitive Map.

Recommendation

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 byway open to all traffic to the definitive map and statement for Chichester along the length of Sheepwash Lane, from its junction at Rookwood Lane with the B2179 to a point 80m west of its end at Redlands Lane, West Wittering, should be made.

1 Introduction

- 1.1 The application was made by the late Peter Dawson and was received in January 2019. Following Mr Dawson's passing in early 2023, his neighbour Liza Lingham has stated that she is willing to act as applicant in his place. The application seeks to add to the definitive map and statement a bridleway running along the length of Sheepwash Lane in West Wittering. The application was supported by 6 public way user evidence forms, testifying to the use of 6 users in total. The path claimed by the application is shown on the application plan.
- 1.2 The requirements for the presumed dedication of a public right of way for user evidence under statute are set out in Section 31 of the Highways Act 1980. This requires use of the claimed route by the public as of right and without interruption, over a period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public.
- 1.3 The application is made under Section 53(5) and is reliant on 53(3)(c)(i) Wildlife and Countryside Act 1980 (WCA), being the discovery by the County Council of evidence which shows that a right of way which is not shown on the definitive map and statement subsists or is reasonably alleged to subsist over land. The burden of proof rests with the applicant.
- 1.4 Sheepwash Lane is registered by WSCC as a G-class highway on the Council's List of Streets which lists highways maintainable at public expense. This means that the route has a status of antiquity and as such carries a certain class of public rights, although the extent of these rights has not been fully investigated and established. This investigation and report therefore focuses on both the user evidence provided by the applicant and any relevant historical evidence to help determine the extent of the public rights of way.

2. Character and features of the claimed route

- 2.1 The claimed route begins at the junction of Sheepwash Lane with Rookwood Lane and the B2179 (at grid reference 478634, 099213) and proceeds in an overall north-east direction for approximately 906 metres to grid reference 479280, 099775, where it turns generally south-east for another 568 metres to where it ends at Redlands Lane (at grid reference 479783, 099557). The final 80 metres, from grid reference 479704, 099573 to the junction with Redlands Lane, is already registered as D-class highway, so any route added to the map would end where it meets that highway. For the first 24 metres, the lane forms part of the junction between itself, the B2179 and Rookwood Lane. The surface is uneven tarmac until grid reference 478633, 099240, where Sheepwash Lane takes its own course. For the next 448 metres, the track is around 3 metres wide, with a gravel surface broken by many potholes, some of which are over 20cm deep. After Sheepwash House it narrows to around 2 metres in width and the surface improves to a smooth, smaller gravel and dirt surface. Where it is dirt, the surface shows regular use by horse riders and cyclists.

- 2.2 Footpaths 32, 2817, 2818 and 2819 all meet Sheepwash Lane at various points. There is clear use of farm vehicles crossing the path between fields at around grid reference 479439, 099746, though no obvious use of the Lane by those vehicles.
- 2.3 A significant portion of Sheepwash Lane (from its start to grid reference 479510, 099681; approximately 1.17 kilometres) forms part of the Salterns Way Cycle Route from Chichester to East Head, which was created and managed by the Chichester Harbour Conservancy.
- 2.4 The overall character of Sheepwash Lane is that of quiet country path, with an unmade surface and vegetation and/or ditches on either side. It shows the clear character of a track predominantly used by those on foot, bike and horseback, and whose suitability matches this use.

3. Land Ownership

- 3.1 Land Registry documents show the entire extent of the claimed route to be unregistered.
- 3.2 The applicant served notice of the application on any potential landowner by posting a notice at either end of the Lane on 26th February 2019. On the same day he served notice on adjacent landowners and occupiers.

4. Consultations

- 4.1 Standard consultations were sent to the local member, local access ranger, amenity groups, West Wittering Parish Council and Chichester District Council. Consultations were also sent to adjacent landowners.

- 4.2 The following comments were received:

- 4.3 From Sarah Rayfield, Access Field Officer, London & South East, The British Horse Society:

"It sounds as though historic evidence has not been submitted as part of the original application but it does appear to be an ancient highway. Much of [our] evidence indicates perhaps a status higher than bridleway."

Officer comment: The evidence produced by the BHS will be discussed in paragraph 7.

- 4.4 From the Clerk of West Wittering Parish Council:

"The Parish Council support [this] application and would have taken it on [after Mr Dawson's death] had Liza not wanted to."

- 4.5 Additionally, the following was received from Steve Pople, a local member of the Trail Riders Fellowship:

"I have responsibly ridden road legal motorcycles along the full length of this right of way continually since 1978 and wish to continue to do so. I have never encountered or observed any adverse interaction with other travellers or farmers etc. The road surface shows signs of agricultural vehicle usage in parts but is in good condition and was when I last rode Sheepwash Lane with

a companion on 3 May 2023. Therefore I wish to object to the unnecessary proposal to downgrade this sustainable right of way."

4.6 Richard Knight, local Ramblers' Association representative said:

"As ramblers rep for this area and resident for some 70yrs I can confirm without a shadow of doubt that this Lane has been an access for walkers farm usage for all this time. It always seemed that maintenance was carried by farm when they required access. However, it is a quite busy pathway for walkers and cyclists now."

4.7 Charles Osmond-Jones, an adjacent landowner said:

"There is an issue of holiday traffic using Sheepwash Lane as a rat-run or drivers having inadvertently accessed same. The nature of Salterns Way (Sheepwash Lane) is predominantly for leisure use by cyclists, walkers and wheelchair users which does not quite gel with excess use by vehicles."

5. Evidence submitted in support of the application

5.1 The application was made by Mr Dawson after he became frustrated by the number of motor vehicles using Sheepwash Lane, having been directed there by satellite navigation systems when the main road (the B2179) was blocked due to heavy traffic bound for the beach.

5.2 The application was supported by 6 public way user evidence forms, testifying to the use by 6 individuals from 6 unique postal addresses over the period of 1965 to 2018.

5.3 The 6 user evidence forms show the following type of use:

5.3.1 all users claim to have used the routes on foot;

5.3.2 all users claim to have used the routes either on a bicycle or on horseback;

5.3.3 one user claims to have used the route on foot, horseback and bicycle.

5.4 Between the 6 users, the claimed frequency of use ranges from 115 times per year to 600, with an average of 296.

5.5 None of the users report having been prevented from using the path, or having seen anyone else prevented.

5.6 All users report to have seen others using the route on foot, bicycles and horseback.

5.7 All users claim the path has remained the same in terms of its route and has not been ploughed or cultivated.

5.8 In addition to this, Mr Dawson submitted a number of other pieces of evidence:

5.8.1 A handwritten discourse into recent usage of motor vehicles on Sheepwash Lane, backed up by various documents including a 2017 Chairman's Report for the West Wittering Estate, some photographs of

his car at various points on the Lane, some 2011 statistics on national vehicle numbers retrieved from the Department for Transport website, and a printout of the results of a Google search for "how many vehicles on the road in the uk (sic) 2018";

- 5.8.2 A 2-page handwritten local history of Sheepwash Lane, ranging from Anglo-Saxon times to the present;

Officer Comment - This document does not give any indication as to the historic status of Sheepwash Lane.

- 5.8.3 An aerial photograph of Redlands Lanes, on which Mr Dawson has drawn the boundary of the Erstwhile West Wittering Common;

- 5.8.4 Letters received by Mr Dawson from JH & FW Green Ltd who own a significant proportion of the land around Sheepwash Lane, though not the Lane itself. These letters express support for the DMMO application and for limiting vehicular access to the Lane.

- 5.9 This additional evidence submitted by Mr Dawson, though interesting, does not have any relevance as to whether the claimed route has public status and to what extent.

6. Archive evidence

- 6.1 Owing to Sheepwash Lane being recorded on the List of Streets as a G-class highway, it was necessary to perform a thorough search of all available maps and records to establish what the historical evidence can reveal about the extent of the public rights of way along the Lane. The following documents were consulted at the West Sussex Record Office.

6.2 West Wittering Tithe Map and Apportionment, 1846:

- 6.2.1 The claimed route is depicted using solid lines. There are no apparent features suggesting that access along the route was restricted. There is no number on the Apportionment for the route, which is consistent with other roads known to be in use by the public at the time. For example, the Chichester Road, the B2179, is shown unrestricted as a throughfare and described by adjoining parcels 252 and 252a as a 'public road' with the road not given an Apportionment reference.

- 6.2.2 The absence of a restrictive feature across Sheepwash Lane stands in contrast to what is now Rookwood Lane, which has a solid line across its end at the junction between Rookwood Lane and Sheepwash Lane. Rookwood Lane is labelled 42 on the map, with the description "lane" and has an "outbound quantity" of "2a.4p". Its ownership is attributed to the Oliver Whitby Estate and its tenant is William Coombs.

- 6.2.3 However, it should be noted that Tithe maps were not intended to establish or record public rights of way. The maps are only conclusive of matters of relevance to the tithe commissioners and 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.

6.3 Ordnance Survey mapping:

6.3.1 The following Ordnance Survey Maps were consulted (all 1:2500 scale):

- OS Draft 1806
- OS First Edition 1875 (including the Area Book)
- OS Second Edition 1898
- OS 1911-12 Edition
- OS 1933 Edition
- OS 1966 Edition
- OS 1995 Edition

6.3.2 The Ordnance Survey maps all depict Sheepwash Lane in the same way, as departing from what is now the B2179 at Malthouse or Rookwood Corner, travelling north-west for around 906 metres, then turning south-west for around 560m, where it joins Redlands Lane. The route is depicted using solid lines on either side of the Lane. There are no visible features which would suggest that the claimed route was not freely accessible to the public. The 1875 First Edition has the route coloured orange, which is the same as other main routes in the area, such as the (now) B2179 and Itchenor Road. The area book for the First Edition labels the route as area 194 with the description "road".

6.3.3 Ordnance Survey Maps can provide an accurate picture of the landscape at the date of survey, and carry strong evidential weight, but it should be noted that the surveyors mapped physical features and not legal rights.

6.4 Adcock Report, 1890 and Map, 1894: The report makes no mention of Sheepwash Lane, but does mention Redlands Lane, and records it having a length of 1 mile, 150 yards, which is considerably longer than Redlands Lane is in reality. The map has a very clear notation of Redlands Farm, so it appears that Adcock subsumed Sheepwash Lane into Redlands Lane and measured them together, as their combined total is approximately that given. The claimed route and Redlands Lane is coloured dark green on the map and is depicted as being a fifth-class highway, in very poor condition.

6.5 Gardner and Gream Map, 1795: Sheepwash Lane is clearly shown on the map as a road. The route connects openly to the other roads in the vicinity. Redlands Lane, to which Sheepwash Lane connects at its eastern end, and which also connects Sheepwash Lane to the (now) B2179 is not shown on this map. The implication of this may be that Sheepwash Lane once formed part of the road network connecting West Wittering and Itchenor, and therefore may carry public vehicular rights.

6.6 Richard Budgen Map, 1724: This map does not show any roads or paths in the Witterings area beyond the main road leading on from Birdham to West Wittering village centre. The eastern section of this road is marked with dotted lines, in contrast to the solid lines around West Wittering. As such it is not of any use in determining this claim.

- 6.7 Rights of Way Act Maps, 1932: This map does not depict the claimed route as a public right of way such as a footpath or bridleway, though the fact that other footpaths connect with it implies the public must have had a right of access to it. The local map prepared for the Act was based on the 1933 edition OS map, which shows Sheepwash Lane as an open road much like the Chichester Road (now the B2179) as referred to above in paragraph 6.3.
- 6.8 Survey of Rights of Way under the National Parks and Access to the Countryside Act 1949: The Provisional Definitive Map (1958-59) was consulted. It shows Sheepwash Lane as depicted on the Ordnance Survey maps described above. It was not designated as a public right of way at the time the map was formulated. No features are present which would suggest that access was not freely available. The map depicts "County Roads" using orange shading; Sheepwash Lane is left uncoloured.
- 6.9 The West Wittering Inclosure Award, 1793: Only the very eastern end of Sheepwash Lane is visible on the Inclosure Award map, labelled as "Roberts Lane". Redlands Lane (labelled "to Roberts Lane") is also depicted and is shown from its junction with the (now) B2179, until it turns into Roberts Lane. Both junctions are open and show no sign of impediment to anyone wishing to use the roads. Redlands Lane is described in the text of the awards as being "...one other public Road or Way twenty feet broad clear of all ditches leading Northwards also from and out of the Road or Way first hereinbefore set out and described into a public road or way called or known by the Name of Robert's Lane". Both Redlands Lane and Roberts (now Sheepwash) Lane are here noted as "public road or way". Additionally, both Redlands and Sheepwash Lanes are coloured yellow on this map, and the map legend states "*the public roads are coloured yellow.*"
- 6.10 The Oliver Whitby Estate Map, 1828: This map is a plan of "Courts Farm ... belonging to the hospital founded by Oliver Whitby Esq ... in the year 1702." It shows a short section of Sheepwash Lane at its western end, where it was bounded by fields belonging to Courts Farm on its north side, and to a short extent on its south side. Although Sheepwash Lane is not labelled and has no direction listed on it (whereas other roads on the plan are listed as 'to Chichester' or 'to Itchenor') like in the Tithe Map (paragraph 6.2 above), its end is clearly shown as open, again in contrast to that of (now) Rookwood Lane, which is closed off and numbered on the plan.
- 6.11 Minutes of the West Wittering Parish Council meeting on 17 March 1919: A paragraph in these minutes states "*Complaint was also made as to the state of the road known as Sheepwash Lane, which has holes in it a foot deep. Mr Cate¹ proposed that the District Council be written and asked to repair same, seconded by Mr Chandler.*" This is an indication that in 1919 the Parish Council considered Sheepwash Lane to be a road, and maintainable at public expense. No record of any response by the District Council was minuted in later meetings.
- 6.12 Report on the survey of footpaths in the Parish of West Wittering carried out by E D Clements Esq, Surveyor and given to Mr J Hemmings, Footpath Secretary (Sussex), Ramblers Association, dated February 1951: This report was found on an old parish file in the County Council's archives. This report

¹ Or possibly Gate, Gale or Cale; the handwriting is unclear.

contains a list of recorded paths and describes their state of use and maintenance for the benefit of the Ramblers Association (Southern Area) and prepared by the County Council's County Surveyor of public rights of way. This report can be found in the background papers. Sheepwash Lane is included as an 'Unclaimed Path' and it is listed as 'A' meaning 'path little used' according to the key on the first page. The description of the path is 'a good track between hedges'. The report is typed throughout, however, next to the description is a handwritten note which says 'maintained carriageway'. It is not clear who wrote the side note given the report was prepared by the Surveyor and typed throughout.

7. Evidence provided by Sarah Rayfield on behalf of the British Horse Society

7.1 Ms Rayfield compiled a dossier of evidence to support the claim that Sheepwash Lane carries higher rights than those of a bridleway. In addition to the 1846 West Wittering Tithe Map (discussed in paragraph 6.2 above), Ms Rayfield provided evidence from the following sources:

1. 1805 Ordnance Survey "Arundel"
2. 1898 OS County Series 1:2500
3. 1910 Finance Act Map & Field Book
4. 1911 OS 1:2500 Sussex LXXII.8 and 1912 LXXII.4
5. 2015 West Sussex List of Streets
6. 2023 Geoplace FindMyStreet (National Street Gazetteer)
7. 2023 Land Registry

7.2 According to Ms Rayfield, numbers 1 to 3 and 7 on this list provide evidence in favour of the claimed route being public carriageway.

7.3 Number 4 is evidence, according to Ms Rayfield, that the public had at least rights on horseback along Sheepwash Lane, and numbers 5 and 6 demonstrate it should be marked on the definitive map as a restricted byway.

7.4 Ms Rayfield's overall conclusion is that, taken as a whole, *"the single explanation of the facts that a highway existed is compelling. As a result of the common law maxim 'Once a highway always a highway', in the absence of a stopping up order, it follows that a public carriageway existed immediately before the operation of the Natural Environment and Rural Communities Act 2006."* Ms Rayfield's conclusion will be discussed in conjunction with the Officer's conclusion in paragraph 16.

8. Evidence provided by Julie Robinson

8.1 Mrs Robinson, acting in an individual capacity, also submitted a portfolio of archival evidence to support the claim that the claimed route carries public rights of way higher than those of a bridleway. In addition to the Tithe Map, the Inclosure Award and Map, the Gardner and Gream Map, the Adcock Survey, the First Edition OS Map 1875, and the Rights of Way Act 1932 Maps (discussed in paragraph 7 above), Mrs Robinson includes evidence from the following sources:

1. John Cary's New Map of England, 1794

2. OS Old Series 1813 "Mudge Map" of Sussex
3. Greenwood and Greenwood Map of Sussex 1825
4. 1910 Finance Act Map & Field Book
5. Ordnance Survey Object Name Books
6. OS 1" to 1 Mile Maps 1895, 1947 and 1960
7. West Sussex Online Land Charges Map
8. HM Land Registry

8.2 The conclusion drawn by Mrs Robinson from all the above evidence is that the claimed route, Sheepwash Lane, is a public road which should carry vehicular rights: "*There would appear to be a greater body of evidence which indicates, on the balance of probabilities, that Sheepwash Lane has public vehicular rights originating from its use prior to the 1793 Inclosure Award, than there is to support a lesser status of bridleway.*" Mrs Robinson's conclusion will be discussed in conjunction with the Officer's conclusion in paragraph 16.

9. Evidence provided by the Trail Riders Fellowship

9.1 The Trail Riders Fellowship (the 'TRF') were consulted on an informal non-statutory basis as part of the investigation into this application. For consideration, they have submitted the following:

1. A covering letter dated 15 June 2023, with links to archive maps
2. A local newspaper article written by Charles Shippam dated 18 January 1979
3. Legal advice as to the recording of BOATs on the definitive map and statement dated 21 February 2022

9.2 Covering letter and links to archive maps:

9.2.1 In their covering letter, the TRF state they believe that the historic archive shows Sheepwash Lane in a manner that is consistent with carriageway status. They state that it is improbable that WSCC did not know the route as a carriageway prior to the recording of the first definitive map which was why it was not included as a right of way because it was beyond the scope of the legislation to do so.

9.2.2 They state that the onus is on the applicant to prove that there is no evidence of public vehicular rights and no such evidence has been produced.

9.2.3 They contend that WSCC does not have the power to record Sheepwash Lane on the definitive map and statement because it is a carriageway for vehicles and there has been 'no discovery of evidence' because WSCC has always known the Lane to be a carriageway rather than a public right of way.

9.2.4 The TRF's covering letter includes three hyperlinks to documentary evidence. The links connect to a number of Ordnance Survey maps which have been considered above including the draft Ordnance Survey map, some Scottish Ordnance Survey maps which are not relevant and some commercial maps. None of the links provide any maps which can be viewed at a readable scale and no printed copies

have been provided. No explanation of the significance of any of these maps has been provided either, other than to say that Sheepwash Lane is recorded *'in a manner that is consistent with carriageway status'*.

9.3 Local newspaper article dated 18 January 1979:

This article was written for the West Sussex Gazette by Charles Shippam in January 1979. Charles Shippam was a former chairman of the County Council's Rights of Way Committee. In this article he sets out, for the benefit of members of the West Sussex Harness Club and the Trail Riders Fellowship, a number of 'unmarked and unmapped unmetalled maintainable carriageways in West Sussex within its old borders'. Mr Shippam said that users may find the 'links and circuits' interesting in spite of WSCC 'persistently refusing to identify and often deter use with unlawful "no through road" signs.' He further says that 'many are unsuitable for three or four-wheeled traffic (motor) and may be a bit tight for a four in hand.' The TRF understand that Sheepwash Lane is listed as no. 34 in the article and described by Mr Shippam as 'a circuit north of A286 West Wittering by Redlands Farm,' however it is the investigating officer's opinion that this description is not conclusive in identifying Sheepwash Lane.

9.4 Legal advice dated 21 February 2022:

Counsel was asked to advise the TRF generally (the advice was not specific to this DMMO application) on the propriety of Order Making Authorities (OMAs) adding minor roads or unclassified roads to the definitive map and statement as BOATs. The full advice document can be read in the background papers and is summarised as follows: -

9.4.1 The advice discusses the various Acts that have supported and promoted the recording of public rights of way over time including the National Parks and Access to the Countryside Act 1949, the Countryside Act 1968, the Wildlife and Countryside Act 1981, the Countryside and Rights of Way Act 2000 and the Natural Environment and Rural Communities Act 2006. The advice clarifies that the purpose of rights of way legislation throughout time has always been to protect 'public paths' (defined as "a highway being either a footpath or a bridleway" under the 1949 Act) and described by Lord Fraser Tullybelton as ways for 'ramblers and riders' in *Suffolk CC v Mason (1979)*. BOATs were only able to be added to the definitive map and statement following the enactment of the 1968 Act under which a duty was placed on local authorities to conduct a 'special review' of all Roads Used as Public Paths ('RUPPs'). RUPPs were a third class of right of way (other than footpath and bridleway) and the review's purpose was to reclassify RUPPs, depending on the evidence available at that time, as a footpath, bridleway or BOAT. Similarly to the 1968 Act, a BOAT is defined under S66 of the 1981 Act as 'a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purposes for which footpaths and bridleways are used' which illustrates the point that the legislation was and is not concerned with recording ordinary roads to the definitive map.

- 9.4.2 The advice also discusses the legal requirement for the 'discovery of evidence' event under S53(3)(c)(i) of the 1981 Act and whether unclassified roads can meet this test when the existence of public vehicular rights (historic or otherwise) were already known to the OMA. A Section 53(3)(c)(i) event is 'the discovery by the authority of evidence which...shows...that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land...'. The advice quotes from the case *Mayhew v SSE (1993)* and Potts J: *"To discover," means to find out or become aware. "Discovery," means finding out or making known (Concise Oxford Dictionary). It connotes a mental process in the sense of the discoverer applying his mind to something previously unknown to him. In my judgment, the "event" in section 53(3)(c) is concerned with the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared. Were it otherwise, the surveying authority or a member of the public would be unable to take steps to correct a previously mistaken decision. Such a state of affairs would be at variance with the purpose and scheme of the legislation as well as good sense."*
- 9.4.3 The advice argues that if the unclassified road in question was maintained and appeared on the County Council's 'List of Streets' (the list of all maintainable highways (to whatever extent) as required to be kept by all highway authorities under S36(6) of the Highways Act 1980) then there will be no 'discovery of evidence' as the highway's status and its nature will have already been known to the OMA.
- 9.4.4 The TRF contends that this advice is relevant to the determination of this claim.

10. Consideration of claim

- 10.1 The application was submitted with user evidence summarised in paragraph 5 and contained in the background papers of this report. The additional evidence submitted by the BHS, Mrs Robinson and the TRF is summarised in paragraphs 7, 8 and 9 above and hard copies of these representations are contained in the background papers.
- 10.2 Section 53 Wildlife and Countryside Act 1981 requires there to be a "discovery" of evidence. The applicant here relies on user evidence, but as the claimed route is already registered as a G-class highway, the case officer has also conducted a thorough investigation of the County's archives and this evidence is set out in paragraph 6 of this report and will be discussed further in this section of the report. 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.

- 10.3 In determining the application, there are two tests to consider. The Committee has to decide whether the evidence provided by the applicant, together with all other relevant evidence available, shows that on the balance of probability a right of way subsists, or is reasonably alleged to subsist. In the majority of DMMO applications, the burden of proving this falls to the applicant. However the pre-existing status of the claimed route as a G-class highway has necessitated investigation and examination of all available historical evidence by WSCC legal officers.
- 10.4 DMMO applications have to be determined on the basis of the available evidence and the rule of law. Matters such as suitability of a way and possible nuisance or need, are irrelevant and cannot be taken into account when reaching a decision.
- 10.5 In respect of the user evidence, the application has been considered under Section 31 of the Highways Act 1980, deemed dedication of a way after uninterrupted use of 20 years.
- 10.6 Section 31 of the Highways Act 1980 requires consideration of whether there has been use of a way by the public as of right and without interruption for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

11. The 20-Year Period

- 11.1 A relevant date needs to be determined in order to establish the 20-year period. The relevant date is the period when the land has actually been enjoyed by the public as of right (without permission, without force and without secrecy) and without interruption for a full period of 20 years taken back retrospectively from the first date of challenge. In this instance, the applicant claims that increased use of Sheepwash Lane by motor vehicles in 2018 prompted him to apply for it to be added to the definitive map as a bridleway, to prevent such usage. He submitted six public way user evidence forms testifying to use of the route between 1965 and 2018. Therefore, the relevant 20-year period for the purpose of determining this application should be 1998-2018.
- 11.3 Whilst it is not necessary for all users to demonstrate continuous use throughout the 20-year period, they must demonstrate that the use has been made by the public continually during that period. The difficulty with the user evidence in this application is whether six people using the path regularly can be construed as usage by the general public.
- 11.4 As detailed in paragraph 5.4 above, evidence was provided testifying to the frequency of use of this path, with the number of times given ranging between 115 to 600 times a year.

12. As of right and without interruption?

- 12.1 "As of right" means use without force, secrecy or permission. It is irrelevant whether the users actually knew they were not entitled to use the route or were indifferent as to whether they could use it. What is important is that looked at objectively they appeared to be using the path as of right.

- 12.2 As detailed in paragraph 5 above, evidence submitted in all user evidence forms has shown that the route has been used by 6 users, of whom the one using it for the shortest duration still claims to have used it for the 29 years ending in 2018. The person using it for longest claims to have done so for 53 years, i.e. since 1965. Applying a cumulative frequency formula to the data (assuming the figures given are accurate) gives a figure of 66,655 individual uses over the entire claimed length of use, or 35,500 during the 20-year period.
- 12.3 Between 1998-2018, none of the users claim to have been stopped from using the route, or to have been given permission to do so. It therefore appears that access to the route has been available throughout the relevant period.
- 12.4 With regard to the issue of 'permission' a distinction needs to be drawn between toleration and permission. A landowner may be aware of the use of a path but chooses to do nothing to prevent that use. In those circumstances, even if they later make it clear they did not support the use of the path during the relevant period (i.e. by giving their permission), their actions could be regarded as toleration of the use during that period. This means the use could still be regarded as being as of right.
- 12.5 However, the situation would be different if the landowners permitted the public to use the path but made clear (either expressly e.g. by a sign or through their conduct e.g. by closing the path occasionally) that consent could be withdrawn in the future. In that case the use would be with permission and not as of right.
- 12.6 Between 1998-2018, no landowner appears to have prevented the use of the path by the public by way of signage or told anyone they may use it only with permission. In summary therefore, the use by members of the public of the route between 1998 and 2018 which any landowners did not prevent or explicitly permit, indicates that the use during the relevant period was as of right and without interruption.

13. Evidence of no intention to dedicate

- 13.1 It is considered that the user evidence has met the statutory tests as set out in Section 31 Highways Act 1980. User evidence submitted in support of the application shows that the original route had been used as of right and without interruption for a period of 20 years or more.
- 13.2 It is therefore necessary to further consider whether there is sufficient evidence of no intention during the relevant 20-year period to dedicate by the landowner.
- 13.3 Evidence of a landowner's intention not to dedicate a public right of way must be overt and contemporaneous. The landowner cannot assert after the event that there was no intention to dedicate.
- 13.4 No landowner for the application route has been identified or come forward willingly, neither has any indication that a landowner wishes to dedicate the path or prevent the path by means of a s31(6) Highways Act 1980

Landowner Deposit from being registered as a right of way. Should the latter have occurred, evidence would be held on file by WSCC.

- 13.5 The freely available use of the path without restriction speaks to, at very least, the tolerance of any landowners of its use by the public.

14. Common Law

- 14.1 At Common Law a right of way may be created through express or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to do so and that the public have accepted such dedication. Whilst there is no defined minimum period of continuous use to establish a right of way at Common Law, the use must be shown to have been as of right.
- 14.2 Dedication at common law is presumed if the way has been used by the public as of right. There is no defined length of time over which the use must occur and it simply must be long enough to justify an inference that there was an intention by the Landowner to dedicate. A Landowner needs to be legally capable of dedicating the way as public, therefore any periods in which the land was occupied by tenants could not be included in the period of user.
- 14.3 In this case there is evidence of use by members of the public, which spans a considerable period of time, and this use by the public demonstrates their acceptance of the dedication. It could therefore be concluded that rights of way have been created at common law.

15. G-class Highway

- 15.1 As a G-class highway, the claimed route has a status of antiquity and as such is acknowledged to have public rights, though the extent of these rights is not yet established. The evidence examined by the case officer needs to be assessed with the intent of discovering how far these rights extend. In making a recommendation, all the evidence has been considered in accordance with Section 32 of the Highways Act 1980, the relevant legal tests in Section 53 WCA 1981 and case law. In the case of claimed highways, direct evidence is often impossible to find and so it is necessary to draw inferences from circumstantial evidence.
- 15.2 The claimed route has been depicted on various maps over time. Many of the maps show the claimed route as freely linking Sheepwash Lane with the (now) B2179 at its western end and Redlands Lane to the east. There are no physical features shown on any of the maps which would suggest that access was restricted along the claimed route or that the claimed route was one which may be used as private access to land or a dwelling.
- 15.3 The Tithe Map and the OS First Edition map both seem to show Sheepwash Lane as having a status equivalent to other public carriageways in the area at the time. Subsequent OS maps appear to continue to support this level of public right. However, as previously stated, neither the Tithe Map nor the OS maps were created with any intention of or responsibility for showing or demonstrating public rights of way.

- 15.4 Both Ms Rayfield and Mrs Robinson provide details and analysis of the 1910 Finance Act Maps, which also shows the claimed route as commensurate with other main roads in the area. For the purposes of the revenue calculations required by the Finance Act, vehicular roads were usually excluded from landholdings as they brought no value to the land. Sheepwash Lane is depicted as a "white road" with no parcel number. Documents and plans produced under the Finance Act can provide good evidence on the status of a way, although the production of information on such ways was very much incidental to the main purpose of the legislation. A possible conclusion could be that Sheepwash Lane was considered a public carriageway. Both Ms Rayfield and Mrs Robinson draw this conclusion.
- 15.5 West Sussex Record Office copies of the 1910 Finance Act Maps for the western half of West Sussex, including the Chichester and West Wittering area were destroyed when the Chichester Valuation office was badly affected by bombing in the Second World War. These copies were provided by the National Archives in Kew. According to a letter in the Inland Revenue hard copy catalogue (now held by WSRO) the County Council received the maps and reference Books in 1979 from the National Archives. This information would therefore not have been available to the County Council during the time that the definitive map was being compiled.
- 15.6 The Adcock Map depicts Sheepwash Lane as a publicly maintainable highway, of the fifth class. As footpaths and bridleways were not included in Adcock's survey, a possible implication is again that the claimed route carries a higher right than bridleway.
- 15.7 The 1951 report to the Ramblers' Association could be considered evidence to support the argument that at the time the definitive map was compiled the County Council understood Sheepwash Lane to be a public carriageway rather than a public right of way. However, the surveyor had prepared the report and included Sheepwash Lane as an unclaimed path. However, without knowing for sure who wrote 'maintained carriageway' on the report by hand, it is not a conclusive piece of evidence on the status of the claimed route as public carriageway.
- 15.8 The consistency of the depiction of Sheepwash Lane as a public road across the majority of the sources examined (as detailed in paragraph 6) is potentially good evidence to support the claim that it carried vehicular rights. It is considered good practice when assessing rights of way cases to view each piece of evidence as a strand of a rope or piece of a jigsaw. Individually the pieces may not carry much weight or complete the picture, but when many different sources appear to agree, the indication that public rights subsist becomes stronger and more coherent.
- 15.9 The overall picture emerging in this case is that it is reasonable to conclude that Sheepwash Lane was considered in the past to be a public road, carrying vehicular rights. As a result, the provisions of the Natural Environment and Rural Communities Act (NERC) 2006 need to be taken into consideration.
- 15.10 One of the main principles of NERC 2006 was to "*curtail the future scope for establishing and recording public rights of way for mechanically propelled vehicles where these are based on either evidence of historic use, or*

dedication for use, by vehicles that were not mechanically propelled.”²

Section 67(1) of this Act extinguished public rights for mechanically propelled vehicles (subject to certain exemptions) at commencement on 2 May 2006, while S66 restricts the creation of new such rights. Unless any of the conditions for the exemptions set out in S67(2) or (3) were met, from this point, no further rights of way for mechanically propelled vehicles could be added to the definitive map. Instead, such rights would be added as restricted byways.

- 15.11 Under S67(2) it is necessary to show both that: (a) a public right of way for mechanically propelled vehicles existed at the commencement of section 67 (on 2 May 2006); and (b) that those rights had not been extinguished, because one of the exceptions in 67(2) or 67(3) applies.
- 15.12 In this case, there seems to be reasonable evidence that a right of way for mechanically propelled vehicles existed prior to May 2006. Subsection 67(2)(b) provides an exception for “ways that are both recorded on the “list of streets” as being maintainable at public expense and are not recorded on the definitive map and statement as rights of way.”³ It has been established that Sheepwash Lane is recorded on the List of Streets as a G-class highway maintainable at public expense. It is also clear that it is not listed on the definitive map, otherwise this application would not be before the Committee now. Therefore it seems reasonable to conclude that the exemption in subsection 67(2)(b) applies, and it would therefore be admissible to add the claimed route to the definitive map as a byway open to all traffic.
- 15.13 The TRF argue based on their evidence that Sheepwash Lane is a carriageway and therefore has a higher status than bridleway or BOAT, and that the legislation and relevant case law does not support it being added to the definitive map and statement as a public right of way at all.
- 15.14 When determining applications and considering evidence that may support the inclusion on the definitive map of a BOAT one has to decide whether vehicular rights have been found to exist. It is not right to simply rely on whether a way is included on the County Council’s ‘List of Streets’. The List of Streets is a list of all highways in the County and variable to the level of maintenance afforded. It does not give a legal status to the ways listed, as confirmed in DEFRA’s advice letter dated 28 November 2006; a copy of which is in the background papers. It is necessary to assess all the evidence together to gain an overall understanding of the status and nature of the way in question. The List of Streets only confirms that Sheepwash Lane is recorded as a G-class highway and that whilst it is a way of a certain historical antiquity the extent of public rights along it is unquantified without further investigation. The fact that S67(2)(b) of NERC 2006 exempts any ways subject to a DMMO application that are included in the List of Streets is to allow such an investigation to grapple with the evidence to uncover a way’s true status.
- 15.15 In the case of *Masters v SSETR (2001)* consideration of the nature of the way is key. To be added to the definitive map and statement there does not need

² [Defra guidance on Part 6 of the NERC Act 2006 \(whatdotheyknow.com\)](#), paragraph 3, page 3, accessed 12 June 2023

³ *Ibid*, para 22, page 8, accessed 12 June 2023

to be evidence of current vehicular use nor does non-vehicular use need to exceed vehicular use, instead it is necessary to consider the "concept or character of such a way" and whether the "character made them more likely to be used by walkers and horse-riders than vehicular traffic because they were more suitable for use by walkers and horse-riders than by vehicles." If the way does not have the character of a BOAT (definition can be read above in paragraph 9.4.1) then it cannot be added to the definitive map as a public right of way. The user evidence submitted in support of the application and comments from some of the consultees testify to the nature of the claimed route being a path that is used mostly by users on foot, bicycle and horseback. Additionally, the site visit made by the investigating officer produced further evidence to support this.

- 15.16 The TRF contend that because Sheepwash Lane was known to the County Council as a carriageway in the time before and during the drafting of the first definitive map and has since been listed on the List of Streets then there has been no discovery of evidence and does not meet the legal tests under S53(3)(c)(i) of the 1981 Act. It is accepted that if a way is considered to be, and maintained, as a carriageway then there would be no such discovery. However, as explained above, the existence of Sheepwash Lane on the List of Streets does not conclusively confirm the route's status; an investigation has been necessary. Equally, it could be argued that the general knowledge of the existence of the West Wittering Tithe Map and Inclosure Award (amongst other maps listed above) was known about but no investigation before now has taken place into the status of the route as shown on these maps.
- 15.17 The newspaper article submitted in support of the TRF's case confirms some confusion over Sheepwash Lane in 1979. The article comments that the ways listed are generally unmetalled, unmarked and not suitable in many cases for three- or four-wheeled traffic.
- 15.18 It is considered that, contrary to the case put forward by the TRF, there has been a 'discovery of evidence'. The user evidence submitted with the application has triggered the County Council's duty to investigate all available evidence as to Sheepwash Lane's status. This element of the evidence as well as uncovering, as a whole, what is in the archive not considered fully before, is a 'discovery of evidence', by finding out or becoming aware, by applying the mind to something previously unknown to the surveying authority when the earlier definitive map was prepared (*Mayhew v Secretary of State for the Environment [1992]*). Without the investigation having taken place the overall picture created by the archive would not have been discovered. The List of Streets forms just one piece of this 'jigsaw'. Regard must be given to the existence of evidence not considered at the time the definitive map and statement was compiled. All evidence that was considered during the mapping process and which in this case left Sheepwash Lane off the legal record of public rights of way would not alone be a 'discovery of evidence'. The user evidence, the newspaper extract from Charles Shippam and the Finance Act 1910 maps are examples of evidence that would not have been available to the authority at the time. It is correct for the County Council to process this DMMO application and to consider all available evidence as a whole and determine the legal status of Sheepwash Lane and whether an Order to modify the Definitive Map and Statement should be made.

16. Overall Conclusion and Recommendation

- 16.1 In terms of the application based on user evidence, the applicant has produced credible evidence which demonstrates clear use of the claimed route, as of right, during the 20-year period. It is not considered that there is credible evidence in conflict of this claimed use.
- 16.2 However, as the claimed route is registered as a G-class highway and there is also credible evidence of a higher public right of way, this higher right supersedes the application for bridleway status made by the applicant.
- 16.3 Evidence of a higher status than bridleway has been considered throughout this report. Some evidence points to BOAT status and some evidence purports to Sheepwash Lane being a fully-fledged publicly maintainable carriageway.
- 16.4 Although the evidence in favour of a public carriageway and a byway open to all traffic is credible, it is not the interpretation of the officer that it is entirely conclusive. All evidence implies there is a through unobstructed 'road'. Some evidence even references the claimed route as a 'Road' or 'Carriageway'. It is important to note that the production of the historic documents were not conceived to define the legal status of a right of way or highway; the delineation of such is incidental to the document's true purpose.
- 16.5 To be added to the definitive map as a BOAT the route needs to meet the exemptions of the Natural Environment and Rural Communities Act 2006 (refer to paragraphs 15.9 to 15.12) and it needs to meet the 'concept and character' test of a BOAT (*Masters v SSETR [2001]*) as discussed in paragraph 15.15 above. Sheepwash Lane does appear on the 'List of Streets' under the exemption in S67(2)(b) of the NERC Act. Given the evidence submitted by the applicant, the Ramblers' Association, the British Horse Society and other third parties summarised in paragraph 4 of this report and descriptions of the route in the 1951 report and the 1979 newspaper article the concept or character of the route is in line with a 'public path' a way used mostly for those on foot and horseback.
- 16.6 It could also be argued that Sheepwash Lane should not be added to the definitive map because it is a public maintainable carriageway. There is certainly evidence that could support that, however, it is not considered to be overall conclusive and given the path's nature and the evidence dating back to the 1950's of this path being typically used for those on foot and horseback rather than vehicles it is concluded that an order for BOAT status would be most appropriate. This recommendation is made on the basis only that the route can be reasonably alleged to subsist rather than the higher balance of probabilities test.
- 16.7 It is therefore concluded that the lower legal test has been met; that it is reasonable to allege that such a right of way subsists over the claimed route.
- 16.8 It is therefore recommended that an order should be made to add the claimed route to the definitive map and statement as a byway open to all traffic.

17. Consultation, engagement and advice

17.1 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.

18. Finance

18.1 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.

18.2 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.

18.3 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.

19. Risk implications and mitigations

19.1 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.

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

20. Policy alignment and compliance

Equality and Human Rights Assessment

- 20.1 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

- 20.2 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.
- 20.3 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.
- 20.4 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.
- 20.5 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

- 20.6 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

- 20.7 Enhancement of the public rights of way network is a positive contribution towards the Council's 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

- 20.8 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: Naomi Taite, Legal Assistant, 0330 222 5375

Appendices

- Appendix 1 – Site Plan 01823
- Appendix 2 - Location Plan 01823A
- Appendix 3 – Parish Location Plan 01823B

Background Papers

- (1) Application and plan
- (2) Witness Table
- (3) Consultation responses
- (4) Evidence in support
- (5) Evidence in opposition
- (6) Archive evidence
- (7) 1951 County Surveyor Report to the Ramblers' Association
- (8) DEFRA's advice letter dated 28 November 2006

**** Please contact the contact officer to request a copy of the background papers**