

## **Rights of Way Committee:**

**25 June 2019**

**Yapton: Application for a Definitive Map Modification Order (Application No: 3/18) to add to the Definitive Map and Statement for Chichester a footpath from West of Drove Lane off FP200-1 at Point A (SU972034), to point B (SU971034) and terminating at point C (SU907031), in the Parish of Yapton.**

### **Report by Director of Law and Assurance**

#### **Executive Summary**

The application, submitted by Mr Chris Smith and received on 12 March 2018 seeks to modify the Definitive Map and Statement for Chichester by adding a footpath from West of Drove Lane off FP200-1 at Point A (SU972034), to point B (SU971034) and terminating at point C (SU907031), in the Parish of Yapton.

All evidence in respect of this claim is available from Officers.

1. The application is made under Sections 53 (3)(c)(i) of the Wildlife and Countryside Act 1981.
2. The application is supported by documentary evidence only and is considered with reference to Section 32 Highways Act 1980.
3. The claimed route from points B to C is shown as a footpath on early Ordnance Survey maps pre 1909 and also on other archival evidence; the Boundary Remark Sketch map and remark books 1872 show the claimed route from points B to C annotated as a footpath; Yeakell and Gardner's Sussex also show a similar route to the claimed route.
4. It is considered that the claimed route from points A to B being shown as a route in Yeakell and Gardner 1778, depicted as a road in the Inclosure awards 1867 and the fact that it was the only access to the clearly marked footpath in the Boundary Remark Book 1872 and Boundary Sketch Map 1873 it can be concluded that historically a right of way can be reasonably alleged to have subsisted from points A to B.
5. On balance, it is concluded that on the basis of the documentary evidence produced the claimed route can be reasonably alleged to subsist as a footpath from points A to C.

#### **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 footpath to the Chichester Definitive Map and Statement for points A to C *be made*.

## **1. Characters and features of the route**

- 1.1 The claimed route starts approximately 100 metres west of Drove Lane along the Chichester to Arundel canal shown as point A on the plan. The route continues heading west a few metres to the south and running parallel to the canal path. At point B, the route heads in a south westerly direction initially following the line of a drain/ditch and then diverting towards Frogs Lodge, where the claimed route meets Footpath 158 at point C and terminates. The application is supported by archive evidence alone. There is no user evidence supporting the application.

## **2. Land ownership**

- 2.1 Land registry searches show there is one landowner for the claimed route and several tenants.
- 2.2 The landowner is Mr David Winston Langmead.
- 2.3 Adjoining land owners/tenants served notice of the application for an order include; Mr R Hocking of Drove Lane Farm, Drove Lane, Yapton BN18 OEB; D.Dean of 1<sup>st</sup> Yapton and Ford Scout Group, c/o 25 Tacklee road, Yapton BN18 OEB; the Occupiers of Frogs Lodge, Drove Lane, Main Road, Yapton, BN18 OEB; The Occupiers of 1 Drove lane, Main Road, Yapton BN18 OEB; The Occupiers of 2 Drove Lane, Main Road, Yapton BN18 OEB.

## **3. Consultations**

- 3.1 Standard consultations were sent to the amenity groups, County Council internal departments, the District Council and the local member. The following comments were received:
- 3.2 Local Member, Jacky Pendleton, supports this application as a multi-user footpath for the use of walking, cycling & horse-riding.
- 3.3 The British Horse Society stated that they had no archival or user evidence to provide. They did however state that if the application was successful they would ask for consideration given to a possible upgrade of the route for the benefit of all including the land owner.
- 3.4 In considering the result of the consultations, members of the Committee are requested to bear in mind that, when determining this application they can only take into account evidence which demonstrates whether or not the tests in Section 53 have been satisfied.

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

- 4.1 The application is supported by the following documentary archive evidence submitted with the application including a supplementary statement which was submitted on the 26 April 2018. The evidence is presented in order of consideration in the applicant's statement.

- 4.2 History of the application route  
The applicant states that prior to construction of the Portsmouth and Arundel Canal, land to the west of Drove Lane was accessed off the main Yapton road by Rush Piece Lane which is shown in the deposited plan for the Portsmouth and Arundel Canal 1815. The applicant infers that a decision was taken not to put a bridge to serve Rush Piece Lane and instead this was put over Drove Lane. The claimed route along A to B is claimed to have been a cart track which ran south of today's footpath 200-1, the canal towpath. The applicant states that this cart track would have been required (being separate to the towpath) to avoid the steep incline down the embankment in order to reach Denges Barn. An extract from PAL Vines London's Lost Route to sea describes the difficulty of crossing such bridges at this time in history.
- 4.3 Yeakell and Gardner's Sussex 1778 and 1783 (Appendix 1 of applicant's statement)  
The map was produced before the section of the canal was constructed. The applicant claims it is relevant to the application as it shows a route from Drove Lane via Denges barn through to Barnham was in existence before construction of the canal, although, it does not follow the exact line of the claimed route.
- 4.4 First Edition of the Ordnance survey County Series 25 inch to the mile map Sussex 1876. (Figure 6-8 of the applicant's statement)  
The applicant states that the claimed route is clearly shown as a feature on the ground on this map although the status is not given. The accompanying book of reference marks the land which A to B passes over as "Towing path, &c."
- 4.5 Second Edition of the Ordnance Survey County Series 25 inch to the mile map Sussex 1897 (Appendix 2 of the applicant's statement)  
The applicant states that the claimed route is shown in the same way as the earlier Ordnance Survey maps but is now annotated as F.P. (footpath).
- 4.6 Ordnance Survey 25" to the mile county series map Sussex 62-11- Revised 1910, published 1912 (fig 9 of the applicant's statement)  
The applicant states that the claimed route does not appear on this map or later maps.
- 4.7 Tithe map and apportionment for Barnham Parish (Appendix 3 of the applicant's statement)  
The applicant states that the Tithe map shows a clear distinction between the towpath, canal and area of land immediately south; all of which is labelled as "Road and Water" on the Tithe map where application route A to B runs. The applicant highlights that there is a distinction from how the canal is depicted to the towpath alongside the canal.
- 4.8 Inclosure awards – order of exchange – R. Redford and A. D white 1867 (Appendix 4 of the applicant's statement)  
The applicant states that the claimed route point A to B is shown on the plan attached to the order coloured sepia which is the same depiction as

Drove Lane and the main road. Points B to C are not shown, and the applicant points out that other footpaths known today are also not shown. The applicant asserts the claimed route may have come into being later than this document but concludes that the absence of other routes known to have existed means the accuracy of this as a record of rights of way cannot be relied upon.

- 4.9 Boundary Remark Book 1872 (Appendix 5 of the applicant's statement)  
The applicant claims that the claimed route runs along or very close to the boundary being surveyed and appears on several pages of the boundary remark book. It is suggested this is strong evidence for the existence of the claimed route citing acceptance by both Parishes of the existence of the path, given the records were signed by the Meresmen of the parishes and nearly the entire claimed route is drawn over various pages in the book. The applicant also notes that all those footpaths which were so recorded in these books with no additional word "public" are today on the Definitive Map and are shown as "Footpath".
- 4.10 Boundary Sketch Map 1873 signed by Col. Bayly of the Royal Engineers (Appendix 6 of the applicant's statement)  
The applicant states that the claimed route is clearly seen and annotated as "F.Path". The applicant states that these maps were advertised for public inspection and so provide good evidence for the existence of the path. They were also signed and approved by Meresmen of both Yapton and Barnham Parish.
- 4.11 Quarter Sessions  
The applicant states that the claimed route does not appear to have been stopped up by an application to quarter sessions as there are no entries in this period.
- 4.12 Inland revenue Act 1910  
The applicant states that the footpath was not on the ordnance survey edition 1:25000 base map used for these valuations so no conclusions can be drawn.
- 4.13 The Rights of Way Act 1932 (AM/796/13/5) Appendix 7  
The applicant states that the claimed route was identified and numbered by Yapton Parish but was never claimed. The applicant also asserts that the claimed route was referred to in the Minutes between 1894 and 1954, which is the period when paths were recorded by the Parish under the 1932 Rights of Way Act and the 1949 National Parks and Access to the Countryside Act. Further, the applicant presents the map in figure 17 of their statement showing that the claimed route was identified and numbered on Yapton Parish maps but never adopted.
- 4.14 Supplementary applicant's statement
- 4.14.1 Ordnance Survey Instructions to Field examiners  
The applicant submitted an additional statement on 26 April 2018. The additional statement drew reference from the Ordnance Survey Instructions to Field examiners by C Duncan *et al.*, 1905 accessed on the

Ordnance Survey Website. The applicant takes from this guide that although Ordnance survey maps are not considered evidence of public rights of way if footpaths can be seen going between well-defined objects of interest they are likely to be in use by the public. The applicant therefore suggests that the claimed route connects FP200-1 and 158. The applicant states that the fact the footpath was not shown from 1899 was likely to be because it was no longer apparent as the public ceased to use it in favour of an alternative route or because it became unusable as it was blocked. Ordnance survey maps only surveyed and marked visible tracks or routes. The applicant also makes reference to the fact that the evidence presented meets the test of reasonably alleged to subsist.

#### 4.13.2 Boundary Remark Book 1872 (supplementary applicant's statement)

This was accessed by the applicant from the National Archives, Kew. The Boundary Remark Book page presented shows a Footbridge crossing the Boundaries between Yapton and Felpham which is marked as private. The applicant infers that the application route would have therefore been marked as private if it was considered so.

### **5. Evidence submitted in opposition /from the landowners/tenants**

#### 5.1 Richard N Hocking of Drove Lane Farm, Yapton, Arundel, West Sussex BN18 OEB

5.1.1 Richard Hocking has been a tenant farmer of the land in question for 48 years. He occupies the land in which the entire claimed route passes through.

5.1.2 He does not consider the claimed route to be a public right of way and states that 100+ years ago the route joined Frog Lodge to the canal.

5.1.3 Richard Hocking states that he has never seen the public use the route and it is visible from his residence.

5.1.4 Richard Hocking states that there is a post and wire fence which obstructs the claimed route just above point C which divides a paddock and arable field

5.1.5 Mr Hocking believes that the claimed route "serves no benefit to the public and crosses arable land and horse paddocks" He also states that the claimed route would be "an extreme inconvenience" to himself and it is "totally unnecessary".

### **6. Investigation by the County Council**

The Archive evidence presented by the applicant as well as further archive evidence considered by the County Council is considered below in Chronological order and not in the same order as the applicant's statement and supplementary statement

6.1 Yeakel and Gardner's Sussex 1778 and 1783 (appendix 1 of applicant's statement)

There is a dotted line on this map indicating a route which appears to match the claimed route from A to B and then continues in a similar direction from points B to C, suggesting there may have been a route as a means of accessing Barnham, the status of the route cannot be determined from this map as there is no key.

6.2 Tithe Map Yapton Parish 1839 WSRO TD/W153 (appendix 1) and Tithe map Yapton national Archives IR30/35/306 (appendix 3 of the applicants statement)

The Tithe map obtained by the applicant (see section 4.6 and appendix 3 of the applicant's statement) is determined as being first class by the applicant. However, the National Archives have confirmed there is no evidence of the map being first class. The Tithe map held by West Sussex records office is a second class map, although second class maps were not sealed as they often had a minor flaw they were not necessarily inferior from a cartographer point of view (Planning Inspectorate DMMO guidance).

Considering the Tithe map in appendix 3 of the applicant's statement, a route is shown enclosed by two solid black lines along the application route A to C, towards point C the area opens up into a larger parcel labelled as 9a. The applicant states that the apportionment from A to B, 12a, is described as "road and water" there is a line separating the section corresponding to B to C labelled as apportionment 9a. Unfortunately it has not been possible to access the apportionments in the National Archives.

Considering the second class Tithe map obtained at West Sussex records office, no clear route is shown for point B to C. However, the area where a drain/ditch is shown in today's map running alongside the claimed route point B to C is shown as an enclosed strip of field leading into a larger section of field which is labelled "3.2.29". There is also a section with a small amount of water shown towards point C. This enclosed area could be interpreted as a path, however, there is no apportionment to confirm this. For points A to B of the claimed route, there is a single dashed line running along the canal and an apportionment 313, which is labelled as "Path waste land and Road".

Although both maps distinguish points A to B as a path and road, it is not possible to distinguish this section of the route from the present day's definitive footpath 200-1 which runs along the tow-path of the canal. Therefore, the Tithe maps do not determine whether or not a footpath was in existence at this time for points B to C or that a separate route exists alongside today's footpath 200-1 for points A to B.

6.3 Inclosure Awards – Order of Exchange 1867 WSCC Records Office reference Add Mss 28,658 (appendix 4 of applicants statement)

The plan does show a route from points A to B depicted by two solid parallel lines, however there is a line across the route at point B and although it is not clear it is considered the route is coloured sepia. A route is shown in a similar way from B to half way to point C, this section is not coloured.

The route is not mentioned in any of the plots described in the Order, Drove Lane is the only route/lane/road mentioned in the Order, this does not mean the right of way did not exist as it may simply not have been the purpose of the map to indicate public rights of way.

The applicant purports that the application footpath may have come into existence at a later date and that is why it is not shown, however, contradictorily the applicant also states that the footpath from A to B is shown on the earlier map Yeakell and Gardner 1778.

Despite this and the fact there is no key to the Inclosure award, it is considered that the depiction of the route A to B is an indication of the existence of a Highway as the plan depicts other highways (such as towards Climping and Drove lane) in the same way as point A to B.

6.4 Boundary Remark Book 1872 (applicants statement appendix 5 and supplementary applicant's statement)

The claimed route from C to B is clearly shown and marked as footpath with Frogs Lodge as a reference point. The applicant claims that Figure 12 shows a cart road which would be the claimed route from A to B. It is considered more likely that this cart road is beyond point B of the claimed route forming the route shown also on Ordnance Survey maps heading towards Denges Barn. Along A to B a single dashed line shows a route along the canal until it merges into a double dashed line marked as "cart road" (figure 12). In addition, thick dashed lines are shown marked as "Def" (meaning defaced) this is considered to show a parish boundary. There are no other images from the boundary remark book which show the claimed route A to B.

The map shown in the supplementary applicant's statement does not show the claimed route but shows another area where a Foot Bridge on the boundary is marked as private. The applicant concludes from this that the footpath on the boundary remark books showing the claimed route (section 6.4) would have been marked private if it was. This seems a logical conclusion and supports the claim that the claimed route had public status as a footpath as it is not annotated as private on the boundary remark book and clearly marked as a "Footpath" from points B to C.

The Boundary remark book 1872 provides fairly strong evidence that the claimed route B to C was public as it is labelled as footpath. The Boundary remark books were prepared by Ordnance Survey and the applicant states that they were checked by the Mersemen of each parish which is confirmed to be correct according to the National Archives. This

means these documents can be taken as good evidence a footpath was in existence from points B to C.

This record could also suggest the existence of a footpath along points A to B as although "Footpath" is not written along this section of the route it appears to be the only access to the clearly marked footpath along points B to C. In addition the fact that it merges into a cart road heading slightly southwards away from the canal indicates it did not follow the line of today's footpath 200-1 along the canal towpath and was in fact a separate route.

6.5 Boundary Sketch Map 1873 signed by Col. Bayly of the Royal Engineers (appendix 6 of applicants statement)

The claimed route is shown as a double dashed line from Frogs Lodge (roughly point C), following the "defaced" boundary in a northerly direction and is annotated with "FP". As the applicant states, this document would have been signed by both Parishes. Therefore the Boundary Sketch map clearly shows a footpath along the claimed route points B to C. Along point A to B a route seems to be shown as other roads depicted by two solid black lines running parallel to each other, however, there is no indication of the status of this route. The route does not appear to continue on beyond point B of the claimed route and again appears to be the only access point to the clearly marked footpath along points B to C.

6.6 Sussex Series 1 (1863-95) Local View (appendix 6)

Running immediately along the canal (A to B of the claimed route) is a single dashed line running within two parallel black lines. The single dashed line at point B continues westwards, now as a double dashed line, running parallel but south of the canal towards Denges Barn. There are also larger dashed markings with the wording "Def" (meaning defaced) running parallel to the canal but just inside the field boundary to the south, considering later maps (see paragraph 6.12) this marking is likely to be the parish boundary.

A route is marked by double dashed lines running along the drain/ditch to about 1/3 of the way towards definitive Footpath 158, where the route diverges from the drain/ditch (labelled 3ft R.H on this map), continues down to a tree and road and definitive footpath 158, which matches the line of the claimed route C to B. There is also a dotted line running in a similar direction to the claimed route from point B to C, which is also marked by "Def" which is most likely the parish boundary according to the Ordnance Survey maps general key held at the records office and comparing to other boundaries on the map.

Although a route does seem to be marked from B to C the nature and status of the route is not defined. The single dashed line also running from point A to B demonstrates the existence of a route. While it is difficult to separate footpath 200-1 to the claimed route, considering the continuation of the route to Denges Barn, it is thought likely that an additional route to the towpath would have been in existence from just after point A to allow access to Denges barn avoiding the steep bank of

the canal at point B. This is also indicated by the fact that the single dashed line merges into the double dashed line leading to Denges barn. Despite this inference the nature or status of the route as public or private is not confirmed and it could be the case that it was used as a private access to Denges Barn.

6.7 First Edition Ordnance Survey Sussex 1875 25 inch to the mile (Fig 6 and 7 of applicants statement and appendix 2)

The same route is shown as described in Sussex Series 1, except the dotted lines described along point B to C above are shown as thick single dashed lines. In addition, as stated by the applicant in paragraph 4.3 the parcel along the claimed route A to B just before point A is labelled 3 which is described as "Towing path &c" in the OS Book of reference.

6.8 Sussex Series 2 (1896-99) Local View (appendix 7)

The same route is shown as in the Sussex Series 1 map above, except in this map the route is annotated as FP (Footpath) along point B to C and becomes a single dashed line where the route meets the line of the drain/ditch heading north towards the canal between point B and C. In addition, no defaced path is shown along the canal. Although the status of the route is defined in this map from points B to C as footpath, Ordnance Survey maps cannot be relied on in determining whether a route is public or private as they came with a disclaimer to state that the representation of a track or way on a map was not evidence of the existence of a public right of way (See Planning Inspectorate consistency guidelines).

6.9 Second edition Ordnance Survey County Series 25 inch to the mile map 1897(Fig 9 of the applicants statement and appendix 3)

The same route is shown as in Sussex Series 2.

6.10 Sussex Series 3 (1909-16) and Sussex Series 4 (1930-46) Local View (appendix 8 and 9)

In both of these maps the route is no longer shown from points B to C. A route is still shown along the canal and the defaced dotted line is shown, both as described in Series 1 (section 6.6).

6.11 Ordnance Survey map 25 inch to the mile County Series Map Sussex 1912

The claimed route B to C is not marked. Where a drain/ditch is marked today is denoted by two solid black lines running parallel to each other. As in earlier Ordnance Survey maps there is a single dashed line running parallel and south to the canal which merges into a double dashed line at point B and then continues as a double dashed line to Denges Barn indicating the continuation of the way was used as access to Denges Barn and was perhaps private, although the status is not indicated on the map.

As also mentioned above in Paragraph 6.6, the continuation of the route from A to B onwards to Denges Barn suggests that this was not today's FP 200-1, which continues onwards along the towpath indicating there was likely a separate route to today's FP 200-1.

6.12 West Sussex Records Office National Parks and Access to the Countryside Act 1949 (AM/796/13/5) - Map Ordnance Survey map 1913 (appendix 4)

The claimed route from points C to B is not marked on the map, however, the route depicted as thick single dashed lines in the 1897 Ordnance Survey map and the dots in 1912 Ordnance Survey map are highlighted in green. The key states that the path marked in green is the correct path. However, looking at the Ordnance Survey key the marking of this route is similar to those of Parish boundary (dots) and the parliamentary division boundary (thick dashed lines). Other boundaries are shown in the same way on the map. It is therefore concluded that these markings are in fact the Parish Boundary and not the claimed route. This evidence is presented by the applicant under the Rights of Way Act 1932. Along Points A to B a route is depicted by a red line, however, this continues onwards along the canal towpath and therefore it is considered to show footpath 200-1 and not the claimed route.

6.13 Map from Yapton Parish council believed to be held as part of the Rights of Way Act 1932 (figure 17 of applicants statement)

The applicant also submitted a document held at Yapton Parish Council Office and although this was not looked at directly, the picture provided by the applicant (Fig 17 of the applicant's statement) has been reviewed. The claimed route from points B to C is marked on the map as FP and is marked with the number 16 in pencil. It is unclear if the FP line is scribbled out or ticked. The applicant also states that although it is assumed the map was used by the Parish to record paths it is not annotated as such and so this is a presumption but provides evidence that the existence of a route was perhaps debated at this time.

Points A to B of the claimed route is numbered 22. However, it is not clear this section joins the route B to C and it is difficult to separate from FP 200-1, although there does seem to be divergence at about point A into two routes; the towpath (fp 200-1) and a route that continues onwards past point B.

6.14 Ordnance Survey Sussex 1938, 25 inch to the mile fourth edition (appendix 11)

This map is the same as the 1912 edition.

6.15 Inland Revenue Act 1910

The book was held but no maps accompanied it so it did not provide any useful information.

6.16 Draft and provisional Definitive Map

Neither of these maps show the claimed route from point A to C. However, along section B to C a yellow line with black dots is shown and seems to meet Footpath 200-1 at point B. This dotted line is also shown on all four of the Sussex Series maps (see descriptions below sections 6.6, 6.8 & 6.10) as well as the 1897 Ordnance Survey map and Ordnance Survey Map 1913. The dots run on a similar path to the claimed route, however, the markings do resemble that marking Parish Boundaries (as defined by an Ordnance Survey general key) and the

Parish Boundary for Yapton/Barnham today is located to the west of the claimed route at the far end of the field where the route is located.

6.17 Adcock's survey (1974)

The route is not recorded on this map.

6.18 Definitive Map

There is currently no Right of Way marked on the definitive map from points A to C. Although along point A to B footpath 200-1 runs along the canal.

6.19 Supplementary applicant's statement - Ordnance Survey Instructions to Field examiners

Although the claimed route does connect two points of interest as the applicant states (section 4.13.1) this does not alter the fact that Ordnance Surveys carry a disclaimer stating that the representation of a track or way on a map was not evidence of the existence of a public right of way and the courts have treated Ordnance Survey maps as not being evidence of the status of a way (Planning Inspectorate consistency guidelines) on their own. The applicant also states that the route was likely no longer shown after 1899 because it was no longer in use and Ordnance survey maps only marked visible tracks and routes on the ground. While this is a reasonable suggestion as Ordnance Survey maps show features on the ground, it is an assumption only. However, as the applicant highlights, the evidence is enough to reasonably allege existence of a right of way prior to 1899 particularly considering all other evidence as well as the Ordnance Survey maps.

## **7 Consideration of claim**

7.1 The application was submitted with archive evidence summarised in section 4 of this report. The investigating officer conducted a thorough investigation into the evidence submitted and the County Council's archives at the WSCC record Office as summarised in section 6 of this report. Evidence against the claimed route is summarised in section 5 of this report. The Rights of Way Ranger for Yapton conducted a site visit and took photographs of the northern section of the route.

7.2 In determining the application it is necessary to decide whether the evidence provided by the applicant, together with all other relevant evidence available, shows that on the balance of probability a footpath exists between points A and C, or in the alternative that a footpath between points A and C is reasonably alleged to subsist, which is a lower test. This lower test requires that a reasonable person, considering all relevant evidence available could reasonably allege a public right of way subsists. The burden of proving this falls to the applicant.

7.3 Matters relating to suitability and condition of a way and possible nuisance or need are irrelevant and cannot be taken into account when reaching a decision

## 7.4 **Archive Evidence**

7.4.1 The applicant and County Council's investigation has brought forward considerable archival information on the claimed route. The earliest historic evidence considered is Yeakel and Gardner's Sussex 1778 and 1783 and the latest being the Adcock's Survey 1974. The claimed route has been considered in two sections A to B and B to C.

7.4.2 **The claimed route from A to B.** This section of the route is difficult to determine as on some of the historic maps it is difficult to decide if the route shown along the canal is the claimed route or definitive footpath 200-1 already in existence. In addition its status is not clearly defined in any of the maps considered.

Despite this, it is considered that although no single piece of evidence confirms the claimed route points A to B as a footpath, taking the following evidence together the claimed route can be reasonably alleged to be a footpath; Yeakell and Gardner 1778 in which it is depicted as a single dashed line, the Boundary Remark Book 1872 depicted as a single dashed line providing access to the footpath between B to C, the Boundary Sketch Map 1873 depicted as other roads and again providing the only access to the marked footpath points B to C and the Order of Exchange 1867 depicted as other roads, suggesting status as a highway.

In relation to distinguishing the claimed route from footpath 200-1, it is concluded that it can be reasonably alleged that in the OS maps the clear continuation from point B to Denges Barn suggests that this was not today's FP 200-1 which continues along the towpath and not to Denges Barn. Thereby indicating it was likely there was a separate route to today's FP 200-1. In addition, although this continuation to Denges Barn could indicate private access, the change in depiction from a single dashed line (points A to B) to a double dashed line (points B onwards parallel to the canal) in the OS maps could also indicate a change in status in the route from point B onwards.

Lastly, the route A to B seems to be the only access to the claimed route along B to C, which is clearly marked as a footpath in the Boundary Remark Book 1872 and Boundary Sketch Map 1973; therefore suggesting the claimed route along A to B could be reasonably alleged to subsist as a public right of way.

7.4.4 **The claimed route from B to C.** A route heading in a similar direction to the claimed route is shown in Yeakell and Gardner's Sussex 1778. Part of the claimed route is first shown, following the same line as the claimed route from point C to B in the early Ordnance Survey maps series 1 and the 1875 Ordnance Survey map as a double dashed line. The path is then annotated as "FP" (footpath) in later versions, Ordnance Survey Series 2 and the Ordnance Survey map 1897. Part B to C of the claimed route is shown on the "Boundary Sketch Map" in 1873 and annotated as "FP". The Boundary remark book 1872 also shows the route from points B to C annotated as "footpath". From 1909 onwards, the route from point B to C is not shown on the Ordnance Survey maps. It

could be alleged that the claimed route is shown on maps from the 1932 Rights of Way Act, although it is unclear if the annotation of this footpath labelled as number 16 is ticked or crossed out.

- 7.4.5 It should be noted that the practice of annotating footpaths on Ordnance Survey maps on a large scale began in 1893 and from 1888 Ordnance survey maps carried a disclaimer that evidence of a track or way on the map is not evidence of the existence of a public right of way.

## **8 Conclusion**

- 8.1 The application route from points B to C is shown as a footpath on early Ordnance Survey maps pre 1909 and also on other archival evidence; the Boundary Remark Sketch map and remark books 1872 shows the claimed route from points B to C annotated as a footpath, Yeakell and Gardner's Sussex also show a similar route to the claimed route and it is therefore be concluded that historically a right of way can be reasonably alleged to have subsisted from points B to C.
- 8.2 On balance, it is considered that the claimed route from points A to B being shown as a route in Yeakell and Gardner 1778, depicted as a road in the Inclosure awards 1867 and the fact that it was the only access to the clearly marked footpath in the Boundary Remark Book 1872 and Boundary Sketch Map 1873 it can be concluded that historically a right of way can be reasonably alleged to have subsisted from points A to B.
- 8.3 Therefore, on balance, it is concluded that on the basis of the documentary evidence produced that the claimed route can be reasonably alleged to subsist as a footpath from points A to C.
- 8.4 It is therefore recommended:  
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 footpath to the Definitive Map and Statement or points A to C be made.

## **9. Resource Implications and Value for Money**

- 9.1 The County Council is under a duty to investigate applications. The consideration of the application by officers falls within existing budgets.
- 9.2 Cost implications arise:
- 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.
  - Should an order be made and confirmed;
    - if any works are necessary to ensure the path is open for public use.
  - Should the decision of the committee be challenged by way of Judicial Review.

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

## **10. Risk Management Implications**

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

- If the application is not determined in accordance with the relevant legal tests this could lead to a successful legal challenge by way of Judicial Review.
- In the event that an order is made the landowner could object to the making of an order to the Secretary of State and the matter be considered by way of written representations, hearing or public inquiry.

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

## **11. Crime and Disorder Act Implications**

11.1 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.

## **12. Human Rights Act 1998 Implications**

12.1 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.

12.2 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.

12.3 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.

12.4 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.

### **13. Equality Act 2010 – Equality Impact Report**

13.1 The Committee should be aware that the Equality Act 2010 bans unfair treatment, and seeks equal opportunities in the workplace and in wider society. It also introduced a Public Sector Equality Duty (PSED). The PSED requires us to have due regard in all decision making processes to the need to:

- a) Eliminate discrimination, harassment, victimisation or other prohibited conduct;
- b) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and
- c) Foster good relations between those who share a relevant characteristic and those that do not share it.

13.2 The relevant protected characteristics are age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

13.3 No relevant impact upon any of the protected characteristics in the Equality Act 2010 emerged during the consideration of this application.

#### **Tony Kershaw**

Director of Law and Assurance

#### Background Papers

- (a) Application plan and map (DMMO3/18)
- (b) Evidence submitted in support of the application (archive evidence)
- (c) Evidence submitted against the application
- (d) Archive evidence
- (e) Equality Impact Report

#### Appendices

Appendix 1 - Location Plan 01771

Appendix 2 - Proposal Plan 01772

**Contact:** Charlotte Nash

Ext: 03302226934