

Rights of Way Committee

5 March 2019

West Hoathly: Application for a Definitive Map Modification Order (Application No: 2/16) the addition of a bridleway at Top Road, Sharpthorne and to upgrade footpath 51FR to a bridleway.

Report by Director of Law and Assurance

Executive Summary

The application has been submitted by Mr P Brown and seeks to modify the Definitive Map and Statement for Cuckfield Rural by 1) adding a bridleway at Top Road in Sharpthorne to point B on the application plan and 2) to upgrade footpath 51FR from point B on the application plan to its termination at point C, Grinstead Lane, West Hoathly.

All evidence in respect of this claim is available for inspection in the Members' Room prior to the meeting.

1. The application is supported by documentary archival evidence only, which the applicant alleges demonstrates highway reputation over the claimed route.
2. The landowner's have submitted evidence which advises that the claimed route does not appear consistently on the maps provided by the applicant and that where the claimed route is visible on the maps there is nothing to differentiate it from private ways or otherwise to indicate its status.
3. Whilst the archive evidence submitted in support of this application appears to record all or part of the claimed route as a feature on a number of the maps consulted, they provide no indication of the status of the routes. Furthermore, the feature across the route at its junction with Top Road, and the lack of a consistent continuation on some of the OS mapping, is inconsistent with the route being a public highway.

Recommendation

That a Definitive Map Modification Order, under Section 53 (2) in consequence of an event specified in sub-section 53(3)(c)(i) and 53(3)(c)(ii) of the Wildlife and Countryside Act 1981, 1) to add a bridleway from point A, Top Road, Sharpthorne to point B and 2) to upgrade footpath 51FR to a bridleway from its commencement at point B to its termination at point C, Grinstead Lane, West Hoathly be not made.

1. Characters and features of the route

- 1.1 The claimed route is shown on the plan attached to this report, running between points A, B and C.
- 1.2 The claimed route begins at Top Road, Sharpthorne, identified as point A on the application plan. The route runs in a northern direction for approximately 1.28 kilometres where it meets footpath 51FR at point B. The route which is already recorded on the Definitive Map as a footpath then proceeds in an easterly direction until it joins with the highway at point C, Grinstead Lane, West Hoathly.
- 1.3 It is to be noted that following The East Sussex, West Sussex and Kent (County Boundaries) Order 1992, footpath 51FR, identified as points B to C on the application plan, was transferred to West Sussex County Council and renumbered footpath 51ESx following the West Sussex County Council (East Sussex-West Sussex (County Boundary No.1) Definitive Map Modification Order 2001.
- 1.4 This application is made in two parts:
 - 1.4.1 1) Point A – B on the application plan under Section 53(3)(c)(i) Wildlife and Countryside Act 1981, which requires the County Council to consider whether evidence submitted by the applicant shows that a right of way which is not shown in the Definitive Map and Statement subsists or is reasonably alleged to subsist over land; and
 - 1.4.2 2) Point B – C on the application plan under Section 53(3)(c)(ii) Wildlife and Countryside Act 1981 being the discovery of evidence which shows that a highway shown on the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
 - 1.4.3 The application is supported by documentary evidence only and is therefore considered with reference to Section 32 Highways Act 1980 which sets out that "A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, 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, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made and complied, and the custody in which has been kept and from which it is produced."
 - 1.4.4 The duty to make the Order for part 1) of the application is triggered if there is a reasonable allegation that the claimed rights subsist and for part 2) of the application if the County Council is satisfied that there has been the discovery of evidence, which, when considered with all other relevant evidence available shows that the alleged bridleway rights exist on the balance of probability.

2. Land ownership

- 2.1 Land Registry documents show there to be several different landowners for the claimed route, there is also some unregistered land.
- 2.2 The landowners consist of: Mr and Mrs Ashby, The Guide Association, Anthony Grubb and Ibstock Bricks Plc.

3. Consultations

- 3.1 Standard consultations were sent to the local member, County Council internal departments, amenity groups which included the Trail Riders Fellowship on a non-statutory basis, the District Council and the Parish Council.
- 3.2 The following comments were received.
 - i. **West Hoathly Parish Council:** "The Parish Council welcomed the application and, having seen the applicant's statement, was satisfied that there was archival evidence that there used to be a trackway along the route proposed"
 - ii. **The British Horse Society:** "The Society, therefore, supports the inclusion of this ancient way as a bridleway, in the restoration work planned for the clay quarry in 2028"

4. Evidence in support of the application

- 4.1 The application was supported by the following documentary archive evidence which, the applicant alleges, demonstrate highway reputation over the claimed route.
- 4.2 Sussex Maps by Richard Budgen 1724:

The applicant alleges that the map shows the claimed route, in its entirety, as the main road from West Hoathly towards East Grinstead by way of Willots Bridge. The applicant alleges that this map, showing the claimed route, is also included in "Sussex Tales of the Unexpected" by Kim Leslie published by West Sussex County Council chapter 3 page 15; 'The Appian Way for the high nobility'. This evidence supports the claimed route as a way in use by the public in 1724. The applicant believes that the claimed route is the same as shown on this map is supported by the boundary markings for Hundreds and Deaneries showing the ancient boundaries that subsequently became the defined parish boundaries.
- 4.3 Tithe Map of East Grinstead 1841:

The Tithe Communication Act 1836 enabled tithes to be converted to monetary payments. Maps were drawn to show titheable land. Non-titheable land, deemed to be unproductive was usually excluded on the maps, so that the landowner avoided tithe payments. It is usual for no tithe to be payable on roads. The applicant alleges that the map is consistent with the claimed route being a public highway at the time of the assessment. The road is coloured, indicating no apportionment. The

entire route is depicted in the same way as Grinstead Lane, which is now a public highway.

4.4 Tithe Map of West Hoathly 1841:

The claimed route is shown running along the parish boundary line with East Grinstead and also shown on the Tithe Map of West Hoathly Parish. It is concluded that there was no need to show any more detail on this map or in the apportionment as the road was in the ownership of landowners in East Grinstead Parish.

4.5 Ordnance Survey Old Series Map 1813:

It is alleged by the applicant that the route is clearly shown on the first edition OS map.

4.6 Ordnance Survey County Series Maps First Edition 1874:

The applicant reports that OS maps are not usually of use for rights of way purposes as they usually only show physical features and not legal rights. The maps show the claimed route as land parcel 2373. The applicant believes that if you cross reference the map with the Book of Reference that was published with the first edition OS map, it describes land parcel 2373 as a 'road'. Together, it is alleged by the applicant, this evidence shows that the road was in public use in 1874. The applicant believes that there can be confidence in this as the maps were executed by public surveyors.

4.7 Estate Maps and Records:

The applicant claims that the sale particulars estate map, produced in 1867 for the sale of Courtlands Estate, makes reference to the claimed route and names it 'Cookhams Lane'.

4.8 Ordnance Survey Boundary Records:

The Ordnance Survey was given the duty of ascertaining and recording all public boundaries by the Ordnance Survey Act 1841. Of particular value for determining highway status are the boundary sketch maps and boundary remarks book. It is alleged by the applicant that the claimed route, from points A to B and some of the claimed route from points B to C on the application plan, is shown on the boundary sketch maps to run alongside the East Grinstead and West Hoathly parish boundary. The applicant states that on page 26 the claimed route is described as an "Ancient Road".

4.9 Plaw Hatch Estate:

The applicant alleges that the claimed route is described in a paper "The Origins of Plaw Hatch Estate" and is described as an extension of the road included in the purchase of the manor of Mayes and Neylands Farm. The author states that the way, "carried on through a muddy track to Grinstead Lane and was discontinued by the turn of the [19th] century. The growth of residences in Sharpthorne around the [West Hoathly] railway station after 1882 would have favoured the alternative way to Grinstead Lane via New Coombe [Footpath 2WH]".

- 4.10 Planning Permission for Clay Quarry Works:
Planning permission was granted to Ibstock Building Products Ltd to extend the working of the clay quarry eastward in 1998. This included part of the claimed route being included in the extended quarry workings. A condition of the planning permission was the termination of the working in 2018. Prior to this, the extent of the clay workings was restricted to the west side of the claimed route. An "Archaeological Desk Based Assessment" Report No. 44144 was carried out by The Trust for Wessex Archaeology Ltd in November 1997 and refers to the claimed route as Cookhams Lane. Chapter 4.4 identifies the route as a "sunken or hollow way worn by pedestrian, animal or cart traffic". The report further states that "the possible significance of the lane lies in its use as a Parish and County boundary. In order to make such a territorial boundary easy to trace, they often follow easily recognisable pre-existing landscape features, such as barrows, roads, tracks, streams and rivers, and ditches and dykes". The applicant alleges that the report recognised and provided expert evidence of an ancient lane or track that existed on the ground prior to the clay quarry extension of 1998.
- 4.10 The applicant believes that with the exception of that part of the way now within the clay quarry, physical evidence of the claimed route as an ancient right of way remains visible on the ground throughout the route to this day. The applicant alleges that the evidence presented demonstrates the claimed route as a driving road for stock and pack animals as well for the public on foot and horseback. The applicant further alleges that all of the evidence suggests that bridleway rights existed at the time the various maps and pieces of evidence were created. The applicant notes that whilst no single piece of evidence is conclusive of highway status, every standard piece of evidence leans towards bridleway rights meaning that, it is argued, such rights exist on the balance of probability.
- 4.11 The applicant states that Point A of the claimed route is the junction of three parishes, East Grinstead, West Hoathly and Horsted Keynes. The applicant's belief is that a contention that exclusive private manorial rights applied to the claimed route can be rebutted on the basis that the iron working and smelting sites were distributed over three parishes and associated landownerships. A common factor is that the identified Bloomery sites in all three parishes are located so as to be able to take advantage of the application route.
- 4.12 The applicant believes that it is unlikely brickmaking in the 19th and 20th Century would have given rise to the use of the claimed route. Brickmaking was invariably carried out close to the building needing the bricks, as suitable brickmaking clay is plentiful. 'Brickmaking in Sussex' by M. Beswick published by the Sussex Archaeological Society in 1993 lists known brickmaking sites in Horsted Keynes, West Hoathly and East Grinstead. The applicant alleges that this evidence almost certainly eliminates the use of the claimed route by this industry.
- 4.13 The applicant alleges that the documentary evidence provided shows the complete route and on the balance of probability shows that a through route existed to and from the public highway at point A to the public

highway at point C when the various maps were issued. The applicant believes that out of preference a traveller on foot, horseback or driving livestock would always take the way offering the shortest distance and, where possible, gaining high ground for better surface drainage and personal safety. The applicant believes that the claimed route achieves that objective.

5. Evidence against the application

- 5.1 The Guide Association, Anthony Grubb and Ibstock Bricks Plc have submitted their objections to the application as a consortium. The consortium of landowner's state that there is no evidence to suggest that the claimed route is a public way. Mr and Mrs Ashby have also provided their comments to the application.
- 5.2 The consortium report that this area of land would have necessitated movements of estate workers and of animals across the estate. They further state that in this area, the origins of mineral working, commencing with the iron extraction from bell pits in the land adjacent to the claimed route, also required private ways to transport product to market. They note that tracks could come into existence that were of benefit to more than one individual property, but which would not be public.
- 5.3 It is noted that before the Railway and Brickworks were built, there was considerable activity in the parish in iron working as well as clay extraction. The consortium claims that it was known that many tracks were made to enable the businesses to export their wares, as well as drove roads to enable stock to be moved between fields. They state that none of the tracks or ways made for these purposes can be argued to have been recognisable as public rights of way, as they would have been protected by their owners and lessees against theft and rustling.
- 5.4 The claimed route does not appear consistently on the maps provided by the applicant. The landowners state that where the claimed route is visible on the maps there is nothing to differentiate it from private ways or otherwise to indicate its status.
- 5.5 The clay workings removed the old Cookham's Lane entirely, which was made possible by the shifting of the access to New Coombe Farm from the old private route, to a new route, which facilitated the fully consented clay working. It is argued that it is inconceivable that the consent for clay working would have been granted without reference to a public right of way if one existed, which the consortium contend is strong evidence that none did.
- 5.6 Prior to the removal of Cookham's Lane in 2003, Ibstock Brick commissioned independent archaeological assessment of the land structure as was required under Planning Conditions. The assessment did not draw any conclusions as to the legal status or users of the lane, rather the assessment examined the construction of the lane and suggested how this may have been related to the surrounding land use, referencing the iron workings mentioned above.

- 5.7 Cookham's Lane was a private right of access between Cookham's Farm and New Coombe Farm. The Tithe Map evidence has limitations, given the lack of clarity as to when ways should be excluded from hereditaments and given the claimed route cannot be pinpointed as the route to which a deduction was made. The exclusion of part of the claimed route from the tithed hereditament is unlikely to have been an acknowledgement of a public road.
- 5.8 It is argued that the claimed route was used to run cattle and sheep from New Coombe Farm to Blacklands Farm and it has never been used as a public way. The claimed route is a private way and it has never been a track which continues all the way through from Top Road to Grinstead Lane.

6. Archive and other evidence

- 6.1 The application and subsequent investigation by the County Council has brought forward large amounts of archival information on the claimed route. The relevance and usefulness varies greatly between each piece of documentary evidence, particularly, as the intention was to find evidence to prove the status of the route. The status of a route is difficult to determine from archive evidence as most historic maps do not provide information on status and/or are not seen as sufficient evidence to prove definitively the status or sometimes even the existence of a public right.
- 6.2 The following maps were examined as part of the investigation:
- 6.3 Ordnance Survey Mapping 1875 – 1969:
- 6.3.1 Points A to B:
Points A to B of the application route are not consistently shown on Ordnance Survey maps. Where the claimed route is marked on the maps it is identified as either a solid lined track or a faint pecked line. Whilst part of the claimed route is shown on most of the OS maps, they give us no indication of status of the routes. It merely shows that they were identified as features at the time of survey.
- 6.3.2 Points B to C:
Points B to C of the application route can be clearly identified on Ordnance Survey maps with some maps labelling the route as a footpath ('FP'). The majority of maps show the route as a double pecked track. Whilst it is shown that the route is marked on the maps, it must be noted that this does not indicate the status of the route.
- 6.4 East Grinstead Tithe Map 1840:
The map shows the full extent of the claimed route running south-west from Grinstead Lane to Top Road. The route openly joins onto the present day highway at both ends and is coloured the same as the other present day highways. By way of comparison, routes which appear to have no continuation and serving as access routes only, such as Neylands Farm to the north and Mays Farm to the east are also coloured in the same

manner. It is considered that the colouring of the claimed route has no bearing on its status.

6.5 West Hoathly Tithe Map 1841:

The route is shown from point A to B until it reaches the end of the map and crosses onto the East Grinstead Tithe Map. As with the East Grinstead Tithe Map and mentioned above, the route is shown as feature and coloured in the same way.

6.6 West Hoathly Estate Map 1865:

The claimed route is clearly identified on the map as both a double solid lined track from point A to B and a double pecked track from point B to C, however, there is nothing to indicate the status of the route

6.7 Summary of archive research:

6.7.1 The application route in its entirety, has been shown on various maps throughout time, however, none of the maps identified are produced for the purpose of confirming highway status.

7. Consideration of claim

7.1 The application was submitted with archive evidence summarised in Section 4 of this report. Evidence against the application has been submitted by a consortium and is summarised in Section 5 of this report. The investigating officer has conducted a thorough investigation into the County's archives at the WSCC Record Office and as summarised in Section 6 of this report.

7.2 In determining the application it is necessary to decide:

7.2.1 whether the evidence provided by the applicant for the addition of a bridleway between points A to B, together with all other relevant evidence available, shows that on the balance of probability a bridleway exists between points A and B, or in the alternative that a bridleway between points A and B is reasonably alleged to subsist, which is a lower test. This lower test requires that it is reasonable to allege a right of way subsists.

7.2.2 whether the evidence provided by the applicant for the upgrade of footpath 51FR to a bridleway, represents the discovery of new evidence, which, when considered with all other relevant evidence, shows that between points B and C, footpath 51FR ought to be shown as a bridleway, on the balance of probabilities.

The burden of proving this falls to the applicant.

7.3 Point A to B on the application plan has featured on a number of different maps throughout time, though not consistently.

7.4 The Budgen 1724 map relied upon by the applicant does show a route from East Grinstead to West Hoathly. However, due to the scaling of this map, it is not possible to conclude whether the route highlighted by the

applicant is the claimed route or the present day highway, Grinstead Lane, which is located to the east of the claimed route.

- 7.5 The Tithe mapping also depicts a route which is consistent with the claimed route, however, as mentioned above, the Tithe Maps also show the claimed route as a feature. However, tithe documents are concerned solely with identifying Titheable land. Tithe maps were not intended to record or establish public rights of way or highways. It is also noted that whilst the route is coloured on the Tithe mapping, many other routes which appear to serve as private access routes only, with no continuation past properties are also coloured in the same way. It is considered that the colouring of the claimed route provides no evidence of its status as a public highway.
- 7.6 The 1813 Old Edition Ordnance Survey Mapping produced by the applicant, shows part of the claimed route (A-B) as a feature. It clearly shows this part of the claimed route stopping at a point between the properties Old Coombe and New Coombe, with continuation past these properties following a similar line to that of the present day definitive footpath 51FR. Again, the depiction of the claimed route (A-B) as a feature on this map provides no indication of status. Further editions of the Ordnance Survey Mapping also record part of the claimed route (A-B) as a feature although the continuation of the whole of the claimed route, A, B and C, is not consistently mapped. The 1863, Sussex Series 1 OS mapping records a feature across the route at its junction with Top Road. A feature across the route is also shown on the 1874 1st Edition OS map (submitted by the applicant) and also the 1909 Sussex Series 2 OS mapping. The presence of a feature depicted across the route suggests that there was some kind of restriction or obstruction preventing public access. This is inconsistent with the route being a public highway.
- 7.7 The Courtlands estate map shows part of the claimed route (A-B) as a feature from its southern end. This map provides no evidence of the short section of this route's status, although the lack of continuation would more than likely suggest that it was an access route within the farm estate.

The naming of the route "Cookhams Lane" is not strong enough evidence in its own right to prove that the claimed route is a public highway.

- 7.8 Point B to C (definitive footpath 51FR) features on the majority of maps submitted in support of the application, however, it is considered that none of the evidence produced or considered as part of this application, is new evidence which would not have already been considered during the first recording of the route as a public footpath during the process of recording routes under the provisions of the National Parks and Access to the Countryside Act 1949.

8. Conclusion

- 8.1 Whilst the archive evidence submitted in support of this application appears to record all or part of the claimed route as a feature on a number of the maps consulted, they provide no indication of the status of

the routes. Furthermore, the feature across the route at its junction with Top Road, and the lack of a consistent continuation on some of the OS mapping, is inconsistent with the route being a public highway.

- 8.2 1) In consideration of all the evidence submitted in relation to this application and as set out above, it is recommended that an order under Section 53(2) in consequence of an event specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to add a bridleway from point A, Top Road, Sharpthorne to footpath 51FR at point B on the application plan, be not made.
- 8.3 2) In consideration of all the evidence submitted in relation to this application and as set out above, it is recommended that an order under Section 53(2) in consequence of an event specified in sub-section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to upgrade footpath 51FR to a bridleway from its commencement at point B on the application plan to its termination at point C, Grinstead Lane, West Hoathly be not 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:
- the application is not determined in accordance with the 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 appeal 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

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 An Equality Impact Report has been undertaken and is detailed below/ attached as an Appendix.
- 13.4 No relevant impact upon any of the protected characteristics in the Equality Act 2010 emerged during the consideration of this application.

Background Papers

- (a) Application (DMMO 2/16)
- (b) Evidence in support
- (c) Evidence in opposition
- (d) Archive Evidence

Appendices

- Appendix 1 Location Plan
- Appendix 2 Site Plan

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