

Planning and Rights of Way Committee

7 February 2023

DMMO 10/20 – Definitive Map Modification Order application to add a restricted byway to the Definitive Map and Statement for Cuckfield Rural linking Birchgrove Lane and School Lane in the parish of Horsted Keynes

Report by Director of Law and Assurance

Electoral division: Lindfield & High Weald

Local Member: Garry Wall

Summary

The application seeks to add a restricted byway to the Definitive Map and Statement for Cuckfield Rural between School Lane and Birchgrove Lane in the parish of Horsted Keynes. The application is supported by documentary evidence only

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 restricted byway to the Definitive Map and Statement for Cuckfield Rural between School Lane and Birchgrove Lane be made.

1. Introduction

- 1.1 The application, made by the Open Spaces Society, was received on 9th December 2020 to add a restricted byway to the Definitive Map and Statement for Cuckfield Rural in the parish of Horsted Keynes. The application is supported by documentary evidence only.
- 1.2 The application is made under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (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.
- 1.3 The claimed route links Birchgrove Lane to School Lane between grid references 540186, 130205 and 540209, 130356 in the Parish of Horsted Keynes. The claimed route is approximately 156m in distance.

2. Land ownership

- 2.1 Land Registry documents confirm that the landowners for the claimed route are Timothy William Dalton and Judith May Badham.

3. Consultations

Standard consultations were sent to the amenity groups, the District and Parish Councils and local member. The following comments were received:

3.1 Horsted Parish Council

"Horsted Parish Council supports this application"

3.2 British Horse Society

"A primary objective of the British Horse Society is to promote and secure the provision, protection and preservation of rights of way and of access for ridden and driven horses over public roads, highways, footpaths, bridleways, carriageways, public paths and other land. As such, we would support an order which seeks to protect historic rights of way for both ridden horses and carriage driven horses."

4. Evidence submitted in support of the application

- 4.1 The application is supported by archival evidence only. The applicant asserts the evidence demonstrates that the claimed route was historically a route used by the public as a restricted byway.

4.2 Gardener and Gream Map 1795

The applicant advises that the claimed route is shown on the map as a road. The applicant states that few private roads were shown on the map and the existence of the claimed route means that it was more likely than not, a public route.

Officer comment: It is agreed that the claimed route is shown on the map as a road. The route connects openly to the other roads in the vicinity.

4.3 Greenwood and Greenwood Map of Sussex 1825

The applicant notes that the claimed route is depicted as a road. The applicant advises that the map key shows the route as a cross-road.

Officer comment: It is agreed that the route is depicted in the same way that a cross-road would be, as shown on the key.

4.4 Mudges Map 1873

The applicant notes that the claimed route is depicted as a road.

Officer comment: The claimed route seems to be depicted in the same way as a public road, however, it is noted that the photo provided with the applicant's evidence is blurry.

4.5 First Edition Ordnance Survey Map 1813-1819

The applicant states that the claimed route is shown as a road and that each end of the route is open. The applicant asserts that this depiction appears to show a public road.

Officer comment: The claimed route seems to be depicted as a public road. The claimed route openly connects either side to routes now recorded as public highways.

4.6 West Hoathly Tithe Map

The applicant advises that the claimed route is shown coloured sepia on the map and does not have an apportionment number. The applicant states that this is consistent with public status and further notes that other routes shown in this way in the vicinity are public routes today.

Officer comment: The Tithe Map is a second class map and is therefore only conclusive evidence in respect of the information relating to tithes, however, it is noted that the claimed route is depicted in the same way as other public roads in the vicinity.

4.7 First Edition Ordnance Survey 25" Map and Book of Reference

The applicant notes that whilst Ordnance Survey maps are not usually useful for determining public rights of way, the early maps in the first edition series contain valuable information when cross referenced with the books of reference that were published with them. The applicant states that the claimed route is shown as a road and that it is part of the road that runs to the south of the claimed route, numbered 849a. 849a is labelled as a road in the Book of Reference. The applicant suggests that as the claimed route has the same number as the road below it, it had the same status. The road to the south is today a county maintained road.

Officer comment: The OS Map and Book of Reference both depict and label the claimed route as a road. This is considered to be good evidence when considering whether the claimed route had public access rights at the time the maps were formulated, though not conclusive as to status.

4.8 Finance Act Map

The applicant states that the claimed route is shown as a "white road". The applicant asserts that where a route is shown as a white road the overwhelming likelihood is that it was a public road.

Officer comment: The Finance Act Map depicts the claimed route as a white road and this is considered to be good evidence on the status of the route at the time the maps were produced. 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.

4.9 Handover Map

The applicant notes that in 1930 the responsibility for minor roads passed from District Councils to County Councils and that the District Councils prepared handover maps showing the roads that they were responsible for and for which the County Council would take over responsibility for. The applicant advises that the claimed route is shown in yellow ochre. The applicant states that the road is numbered 58 and is described as running southwards and eastwards to road 13. The applicant asserts that this evidence shows that the claimed route was maintainable by the District Council at this time and that it would not be depicted in this way if it was a bridleway or footpath.

Officer comment: The claimed route is coloured yellow, in the same way as other public roads in the vicinity. This would indicate that the claimed route was maintained by the District Council when the maps were produced.

5. Evidence submitted against the application

5.1 Timothy Dalton, who is the landowner of The Key, Birchgrove affected by the application, has objected to the application. Mr Dalton provided the following comments:

- I do not believe and have never believed that the claimed route is a public right of way. The route is impassable for its entire length due to trees and dense vegetation in the woodland.
- I have never seen or been aware of members of the public using the claimed route on foot, horseback, bicycle or with any other non-motorised or motorised vehicles during my ownership.
- There are no notices or signs stating that the claimed route is not public as it is unnecessary due to the route being impassable.
- The previous owner of The Key and woodland have not notified me that they were aware of any public use of the claimed route during their ownership.
- If the claimed route was used historically, it is more likely that it would have been used as a private access for the purposes of accessing the woodland.
- The early map evidence submitted by the applicant is insufficiently precise. The evidence is circumstantial and not capable of being determinative as to the status of the route. Whilst the mapping evidence may indicate the existence of a route it does not determine the status or nature of the route.
- The fact that the claimed route may be shown as a road in some of the historic maps does not mean that it was a public road and it is more likely to have been a private route.
- Historic OS maps do not determine the status of routes shown and are not definitive. The First Edition OS map shows the claimed route as a road but

it does not provide any information about the status and you cannot determine whether it is a private or public road.

- Tithe maps were not intended to establish or record rights of way. Tithe maps are only conclusive of matters of relevance to the Tithe commissioners. The claimed route is shown in sepia and it does not have an apportionment number. The claimed route is not shown in yellow or sienna which may indicate public status.
- The applicant has not shown on the balance of probabilities that the claimed route was a public highway which should now be designated as a restricted byway.

6. Archive evidence

- 6.1 The application and subsequent investigation by the County Council has brought forward a variety of archival information on the claimed route. The relevance and usefulness differs 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 Ordnance Survey mapping:
- 6.2.1 The following Ordnance Survey maps were consulted at the West Sussex Record Office – OS XVI (16) 1879, OS 2nd Edition 1988, OS Edition of 1911 and OS 3rd Edition 1910/14.
- 6.2.2 The Ordnance Survey maps all depict the claimed route in the same way. The claimed route is shown as linking Birchgrove Lane to School Lane and is depicted using solid lines. There are no visible features which would suggest that the claimed route was not freely accessible.
- 6.2.3 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.
- 6.3 West Hoathly Tithe Map 1841: The claimed route is shown coloured sepia and is depicted using solid lines. The claimed route does not have an apportionment number. There are no visible features on the map to suggest that access along the claimed route was restricted. 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.
- 6.4 Survey of Rights of Way under the National Parks and Access to the Countryside Act 1949:

6.4.1 The following maps were consulted at the West Sussex Record Office – Draft Definitive Map 1953, Definitive Map 1957 and Draft Revised Definitive Map 1960.

6.4.2 The maps all depict the claimed route in the same way. The claimed route is shown as linking Birchgrove Lane to School Lane. It is not designated as a public right of way at the time the maps were formulated. No features are present which would suggest that access was not freely available. The maps depict 'County Roads' using orange shading. The claimed route is uncoloured.

7. Consideration of claim

- 7.1 The application was submitted with archive evidence summarised in Section 4 and contained in the background papers of this report. Evidence and comments submitted against the application are summarised in Section 5 and contained in the background papers. The case officer also conducted a thorough investigation of the County's archives and this evidence is set out in Section 6 of this report.
- 7.2 Section 53 requires there to be a "discovery" of evidence. The applicant relies on archive evidence. Section 32 Highways Act 1980 provides that a court or other tribunal, before determining whether a way has or has not been dedicated as a highway, shall take into consideration any map, plan or history of the locality or other relevant document, which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances. In doing so, account must be taken of the antiquity of the document, the status of the person by whom and the purpose for which it was made or compiled and the custody in which it has been kept.
- 7.3 The burden of proof rests with the applicant. In determining the application, it is necessary to decide whether the evidence provided by the applicant, together with all of the relevant evidence available, shows that on the balance of probability a restricted byway subsists, or in the alternative that a restricted byway is reasonably alleged to subsist, which is the lower test.
- 7.4 This application is concerned with whether the documentary evidence supports the route being a restricted byway, on the basis that it would have been an ancient vehicular highway, it is necessary to have regard to the provisions of S.67 of the Natural Environment and Rural Communities Act 2006 (NERC 2006), which extinguished public rights for mechanically propelled vehicles subject to certain exemptions. County Council records have been checked and there is no record of the route being recorded despite the route being marked on historic maps. It is therefore concluded that the S.67 NERC 2006 exemptions do not apply and if there were any rights for mechanically propelled vehicles then they would have been extinguished by NERC 2006.
- 7.5 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. The nature of the evidence that may

be considered in deciding whether or not to draw an inference is almost limitless.

- 7.6 The claimed route has been depicted on various maps over time. Many of the routes show the claimed route as freely linking Birchgrove Lane with School Lane. 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.
- 7.7 Both Mr Dalton and the applicant note that the First Edition Ordnance Survey 25" Map and Book of Reference label the claimed route as a road. Whilst Ordnance Survey maps can provide an accurate picture of the landscape at the date of survey, and carry strong evidential weight, it should be noted that the surveyors mapped physical features and not legal rights. However, when considering the evidence as a whole and the reference made in the First Edition OS Book of Reference, it could be interpreted that the claimed route was in fact a road when the maps were formulated and, without the existence of any restrictive features depicted, it could be argued that the claimed route was one which was open and available to the public.
- 7.8 The applicant also notes that the Finance Act Map shows the route as a "white road". It could be argued that this depiction might suggest that this section of the claimed route had public vehicular status at the time the maps were created.
- 7.9 Mr Dalton states in his evidence against the application that the route shown on the Tithe Map is not coloured "yellow or ochre" which would indicate that the route had public status. This is not entirely correct as some Tithe Maps also show public roads in either sepia/light brown as well as a light yellow colour. What is important to note here is that the claimed route is depicted in the same way as the other roads in the vicinity and which are now recorded as public highways. The claimed route connects to the roads freely and without restrictions.
- 7.10 Whilst no single piece of evidence is conclusive, on balance it could be argued that the claimed route did have historic public rights. Whilst it is noted that some of the maps were not produced for the sole purpose of establishing private or public rights of access, they do seem to depict the claimed route in a way that would be consistent with a public highway at that time.

8. Recommendation

- 8.1 In consideration of all the evidence submitted 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 restricted byway to the Definitive Map and Statement for Cuckfield Rural between Birchgrove Lane and School Lane, be made.

9. Consultation, engagement and advice

9.1 See paragraph 3 above which details responses to statutory consultations as well as responses to additional consultations that were carried out as part of the investigation process.

10. Finance

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

10.2 Cost implications arise:

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

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

11. Risk implications and mitigations

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

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

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

12. Policy alignment and compliance

Equality and Human Rights Assessment

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

Human Rights Act 1998 Implications

- 12.2 It is unlawful for a public authority to act in any way, which is incompatible with a convention right. The rights, which should be considered, are rights pursuant to Article 8, Article 1 and Protocol 1 and Article 6.
- 12.3 Article 8 protects the right to respect for private and family life including an individual's home. This is a qualified right and there may be interference by a public authority if that authority does so with an intention of protecting the right and freedom of others.
- 12.4 Article 1, Protocol 1 deals with the protection of property. Again, this is a qualified right and interference of it may take place where it is in the public's interest to do so subject to the conditions provided by law. Any interference, however, must be proportionate. The main body of the report identifies the extent to which there is an interference with these rights and whether the interference is proportionate.
- 12.5 The Committee should be aware of Article 6, the focus of which (for the purpose of this Committee) is the determination of an individual's civil rights, an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a great deal of case law. It has been decided that for rights of way matters, the decision-making process as a whole, which includes the right of review by the High Court, complied with Article 6.

Crime and Disorder

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

Climate Change

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

Public Health

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

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Appendices

- Appendix 1 – Location Plan 01816
- Appendix 2 – Site Plan 01817

Background papers

- (1) Application and plan
- (2) Consultation responses
- (3) Evidence in support
- (4) Evidence in opposition
- (5) Archive evidence

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