

Planning and Rights of Way Committee

9 January 2024 – At a meeting of the Planning and Rights of Way Committee held at 10.30 am at County Hall, Chichester, PO19 1RQ.

Present: Cllr Burrett (Chairman)

Cllr Atkins, Cllr Duncton, Cllr N Jupp, Cllr McDonald, Cllr Montyn, Cllr Oakley, Cllr Quinn and Cllr Wild

Apologies were received from Cllr Gibson, Cllr Mercer and Cllr Patel

Absent: Vac - Labour

Also in attendance: Cllr Linehan and Cllr Payne

Part I

28. Declarations of Interest

28.1 In accordance the County Council's Constitution, including the Code of Conduct as well as the Code of Practice on Probity and Protocol on Public Participation in Planning and Rights of Way Committees, the following declaration was made in relation to the lobbying of members regarding Item 4 DMMO 2/19:- the Chairman confirmed that all Committee members had received a submission from Woodmancote Parish Council that was an objection to the application.

28.2 No other declarations of interest were made.

29. Minutes of the last meeting of the Committee

29.1 The Chairman confirmed that the minutes of the previous meeting on 5 December 2023 were still in preparation and would be submitted for confirmation to the next meeting of the Committee.

30. Urgent Matters

30.1 There were no urgent matters.

31. Definitive Map Modification Order

DMMO 2/19 - Definitive Map Modification Order to modify the definitive map and statement for Chanctonbury to upgrade footpath number 2540 from its western extremity at point A along Furners Lane to point B to a Restricted Byway and to add a Restricted Byway from point B to Blackstone Lane at point C
[additional information and clarification of the details of the proposed route - To upgrade part of footpath 2540 to a Restricted Byway and add a Restricted Byway along Furners Lane from the commencement of footpath 2540 at its western end to where the route meets Blackstone Lane, in the parishes of Henfield and Woodmancote].

31.1 The Committee considered a report by the Director of Law and Assurance (copy appended to the signed minutes).

31.2 The report was introduced by Charlotte Nash, Trainee Legal Executive, who outlined the application and the key points. A presentation was shown which provided updated versions of Appendix A and Appendix B to clarify the area (copy appended to the signed minutes).

31.3 An Agenda Update Sheet was also circulated to provide amendments to paragraph 7.4 in the report (copy appended to the signed minutes).

31.4 Michael Wood spoke on behalf of the Executors of the D. C. Allen Will Trust, who have the legal freehold interest in Blackstone Farm, in objection to the application. The application needed to be considered in its entirety and no elements should be considered in isolation. Paragraph 8.29 of the Committee report outlined that the evidence for the route from points B to C was not sufficient to support a reasonable allegation of public rights; for which the client agreed with. The footpath had been considered in the 1950s, where the residents would have likely had a better understanding of the route. The evidence in support of the claimed route did not meet the required legal tests for an Order to be made. The officer's recommendation to not make an Order for the claimed route was supported.

31.5 The applicant Hilary Pierce, on behalf of the British Horse Society, spoke in support of the application. It is felt that some pieces of evidence supporting the application had been overlooked by the case officer. There were areas with no clear ownership in the Tithe records, the Woodmancote Tithe map had no apportionment numbers and the Henfield Tithe map marks the route as a road. Both Tithe maps show the route as 'to and from' two places which would suggest public rights were in place. It was inconceivable that all inter-connecting roads as shown on Tithe maps would be private use. The Finance Act 1910 map shows Furners Lane as a "white road" excluded from the hereditaments, which would indicate it was a vehicular public road. Legal documents dealing with the transfer of land either side of Furners Lane refer to the claimed route as a highway or lane. If there was no ownership then the landlord had no authority to make the usage private. In 1949 Chanctonbury Rural District Council (RDC) conveyed part of the land indicating it was public if owned by the RDC. Horsham District Council had not supplied further information which would be required for a proper analysis. Gallagher 2002 and Fortune 2012 state there should be a proper analysis of the lane's appearance and width on old maps, considering what the lane connects to and its desirability for public use; such objective analysis is absent from the officer's report. Considering if the path was a footpath, the term highway pre-1835 was used for public vehicular roads. Old maps also show Furners Lane in the same manner as other roads in the area. It is more likely than not that the public used it both on horseback and with vehicles. Evidence demonstrates, on the balance of probability, that the proposed route along Furners Lane has restricted byway rights or at least bridleway status.

31.6 Alison Short spoke in support of the application as an interested party. The maps showed a clear route was in place, which was supported by Hilary Pierce's evidence. The track had been previously used and marked as a bridleway, with a bridleway stone engraved at the left side

of the eastern Blackstone end. At the Blackstone end the footpath had originally run to the right side, outside of the hedge when heading west and had been moved to the centre by a farmer. Gates had been installed to prevent access and cars had also been parked to restrict access. Historic evidence references a historic route from Henfield to Hurstpierpoint. The application required fresh consideration in order to support communities and also promote healthy lifestyles.

31.7 Cllr Sarah Payne, as the local member for Henfield, thanked officers for their comprehensive research of the area. Cllr Payne had walked the route and noted that areas of the path had a chalk base, which supported the route being a footpath. Blocked ditches had been observed and reference had been made to a local resident's mother historically walking the route. In considering the application, Cllr Payne noted the legal tests required to support the application and felt that there had not been sufficient new evidence to support the application and, therefore, supported the officer's recommendation to decline the application.

31.8 Cllr Paul Linehan, as the local member for Bramber Castle, commended the officer's report and felt that there had not been any new evidence supplied in support of the application. Cllr Linehan confirmed that he had considered the historical maps and felt that the status of the route was not clear. The colouring on the Tithe Map did not indicate public status for the route and other mapping proposed private status. Mortgage paperwork suggested private access had been granted. Property owners along the route had permitted access across their land, but these routes were not appropriate for horses or disabled access. Other landowners had also not allowed horse riders on their land. The new evidence only referred to historical maps that officers had advised were not strong enough to support an Order being made for the claimed route. A query was raised as to how much weight should be given to Article 8 of the Human Rights Act that gives the right to live a life privately without government interference. Cllr Linehan supported the officer recommendation to decline the application.

31.9 Officers confirmed that between points A to B the claimed route was an existing public footpath and so the application for this part was to upgrade the footpath to a restricted byway. Points B to C was an unrecorded path so the application for this part was for an addition of a restricted byway. At point B the existing footpath leaves the track and runs north of the track and north of points B to C to meet Blackstone Lane.

31.10 The Committee made comments including those that follow and responses were provided by the Legal Officers, as relevant:

- Clarity was sought regarding the higher and lower legal tests. The report confirmed that the route from points B to C had not met the lower test, but the lower test consideration of points A to B was not set out within the report. Officers confirmed that the claimed route between points A to B was for an upgrade of a footpath to a restricted byway and could only be considered under the higher test of balance of probability as set out under Section 53(3)(c)(ii) of the Wildlife and Countryside Act. With regards to the route between points B to C the application was for an addition of a restricted

byway and should be considered under Section 53(3)(c)(i) of the Act and could therefore be considered under both the higher and lower tests of whether a right of way subsists or is reasonably alleged to subsist. However the whole route needed to be considered in its entirety and so the officer recommendation was that the entire route failed on the balance of probability test and also on the reasonable allegation test.

- Some Committee Members confirmed they had walked the route and noted that the footpath sign at the Blackstone Farm end had fallen down. The footpath had areas of flooding and single file widths. The addition of horse riders could make the track unpassable. Overhanging trees were also observed that would need to be cut or felled to allow horse riders to traverse the route. - Officers confirmed that issues of suitability could not be considered under the legal tests.
- It was commented that the maps proposed a historical route between settlements and queried which evidence was considered new for the purposes of this application, and queried if it was possible to revisit the 1991 application papers. The premise of 'once a highway, always a highway' was queried and it was asked whether in this case the claimed route was a highway. Officers confirmed that paragraph 8.7 of the report listed all new evidence submitted in support for the current application. It was unclear if the Greenwood and Greenwood map was considered as part of the previous application but it would have been available to view at the time. It could therefore be considered as potential new evidence; however, it was not considered that the Greenwood and Greenwood map tipped the balance of the weight of the evidence in favour of the application. With regard to the point raised about 'once a highway, always a highway' it was confirmed this legal maxim was correct and would be relevant in this case if it had been established that the claimed route was once a highway, however the evidence in this case was not conclusive.
- The Committee referred to the evidence from the speakers which listed the route as a highway, bridleway, drove or drift way and asked what weight was given to these terms. Officers noted the references appearing in the historic evidence but explained that they could also relate to private access. The evidence was conflicting however taken as a whole, it was considered the evidence does not tip the balance.
- The legal implications if the route was adopted was queried. - Officers explained the implications of the Committee's decision. If the application was declined, the applicants would be able to appeal to the Planning Inspectorate. If the application was approved, the landowners would be able to object. There would be further opportunities for the application to be debated.
- Clarity was sought regarding consideration of the Human Rights Act. Officers explained that the legal tests under the Wildlife and Countryside Act were separate from the Human Rights Act. Officers needed to be mindful of the Act but it was not relevant for the application's consideration and the legal tests.
- It was queried if case law where Article 8 of the Human Rights Act had been considered as part of a Right of Way application. Officers could not refer to a specific case but confirmed there would be

relevant case law. For the consideration of the application it was necessary to adhere to the legal tests set out in the Wildlife and Countryside Act.

31.11 Cllr Atkins commented that consideration should only be given on the outlined legal tests and, therefore, proposed the substantive recommendation that the Definitive Map Modification Order should not be made. The proposal was seconded by Cllr Montyn. The Committee voted on the proposal and agreed by majority vote not to support the application.

31.12 Resolved:-

That a Definitive Map Modification Order under Section 53 (2) in consequence of an event specified in sub-section 53 (3)(c)(i) and (ii) of the Wildlife and Countryside Act 1981 to upgrade footpath 2540 to a restricted byway between points A and B and to add a restricted byway between points B and C, as per the amended plan 01824, to the definitive map and statement for Chanctonbury be not made.

31.13 The Chairman thanked officers for the detailed report.

32. Date of Next Meeting

32.1 The Committee noted that its next scheduled meeting would be held at 10.30 am on 6 February 2024 at County Hall, Chichester.

32.2 Officers confirmed that DMMO 8/19 and TVG 31/52 were likely to be on the February agenda. There would also likely be an update on TVG 30/53 at the March Committee meeting.

32.3 The Chairman queried the process for Public Path Orders (PPOs). – Officers confirmed that the Public Rights of Way Team had reopened their books for PPOs. The process had been streamlined following the Deregulation Act. An update would be sent to the Committee on the new process.

The meeting ended at 11.40 am

Chairman