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| **Appeal Decision** |
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| **by Nigel Farthing LLB** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 12 May 2023** |

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| **Appeal Ref:** **FPS/P3800/14A/8** |
| * This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of West Sussex County Council not to make an order under Section 53(2) of that Act. |
| * By application dated 10 March 2018, The British Horse Society claimed that a route shown on the Definitive Map and Statement for Chichester, West Sussex as FP 155 should be shown thereon in part as a restricted byway and in part as a bridleway and further that a route leading west from FP 155 to Ordnance Survey grid reference SU 959 026 should be added to the definitive map and statement for the area as a restricted byway. |
| * The application was refused by West Sussex County Council on 1 March 2022 and the appellant was formally notified of the decision by letter dated 4 March 2022. * In writing this decision I have found it helpful to refer to points on the claimed routes marked on the application map. I therefore attach a copy. |
| **Summary of Decision: The appeal is dismissed** |
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Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of the papers submitted. In this case I am satisfied I can reach a reliable decision without visiting the site.
2. The Appellant, The British Horse Society, requests that the Secretary of State directs West Sussex County Council (WSCC) to make a definitive map modification order under Schedule 15 of the 1981 Act to record the routes which are the subject of this appeal in part as a restricted byway and in part as a bridleway (the appeal routes).
3. In addition to the submissions from the Appellant and WSCC, I have before me representations made on behalf of the landowners Mr D W Langmead and his Trustees, BL Solar 2 Limited and by Richard Hocking. I have considered all these documents in forming my conclusions.
4. The appeal concerns three distinct sections of the appeal routes. These are identified by reference to annotated points on the appeal map and are referred to as A to B, B to C and B to D. The route A to B to C is a continuous route on a broadly north / south alignment. The route B to D is a cul-de-sac spur west from point B. I will refer to these routes as indicated and collectively as the appeal routes.

Main issues

1. The main issue in this case is whether evidence has been discovered which is sufficient to show, on a balance of probabilities that;
2. route A to B, which is currently recorded on the definitive map and statement as a public footpath, has the status of a restricted byway,
3. route B to C, which is currently recorded on the definitive map and statement as a public footpath, has the status of a public bridleway and;
4. route B to D, which is currently not recorded on the definitive map and statement, has the status of a restricted byway, or that it is reasonable to so allege.

**Legal framework**

1. Section 53(2) of the 1981 Act requires the surveying authority (in this case WSCC) to make orders to modify its definitive map and statement in consequence of certain specified events as set out in Section 53(3).
2. Sub-section 53(3)(c)(i) describes one such event as “the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows … that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates …".
3. The statutory test to be applied to evidence under sub-section 53(3)(c)(i) therefore comprises two separate questions, one of which must be answered in the affirmative before an order is made: has a right of way been shown to subsist on the balance of probability or has a right of way been reasonably alleged to subsist? Both these tests are applicable when deciding whether or not an order should be made, but even if the evidence shows only the lesser test is satisfied, that is still sufficient to justify the making of the modification order requested by the appellant (notwithstanding that for the Order to be confirmed subsequently only the higher test will apply).
4. Accordingly for the purposes of this appeal in respect of route B to D, I need only be satisfied that the route is reasonably alleged to subsist.
5. Sub-section 53(3)(c)(ii) describes another event as: “the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows … that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description”.
6. Accordingly for the purpose of this appeal in respect of Routes A to B and B to C I must be satisfied that the right of way has been shown to subsist on the balance of probability.
7. The appeal seeks to record the routes A to B and B to D as restricted byways. For such a finding to be made it would be necessary to conclude that the routes have the historic status of public vehicular highways and that the right to use the routes with mechanically propelled vehicles has been extinguished by the effect of the Natural Environment and Rural Communities Act 2006 (NERC) s. 67.

**Reasons**

1. At a meeting of WSCC Planning and Rights of Way Committee held on 1 March 2022 the appellant’s application for a Definitive Map Modification Order was considered. A decision was taken to follow the officer recommendation that no Order be made.
2. The WSCC report to the committee addressed a number of sources of historical and documentary evidence, much of which is relied upon by the Appellant in this appeal, and all of which I have read and considered.
3. The Appellant’s basic premise is that the appeal routes are ancient drove ways used historically primarily for the seasonal movement of livestock between the Sussex coastal plain and the upland grazing of the Downs and Weald. The Appellant asserts that the historic use of these routes, perhaps from Bronze Age times, is sufficiently evidenced for a conclusion to be reached, on a balance of probabilities, that such use has given rise to dedication of public rights of way of at least the status claimed.
4. The evidence demonstrates clearly that the route A to B to D has existed as a significant physical feature for centuries. On various maps the route B to D is shown in the same manner as A to B, giving the appearance of a single continuous route (and on various of the maps both A to B and B to D are shown described together as ‘Drove Lane’). The evidence also demonstrates that the route B to C is of similar antiquity, but it has been represented as a different, and possibly lesser feature than A to B to D, and its alignment has not been consistent.
5. I have given careful consideration to the evidence submitted relating to the ancient habitation and farming practices for this area and to the origin and use of drove ways. In particular I have read the report of Veronica Cassin, the article ‘The agrarian origins of drift roads’ taken from the Rights of Way Law Review and the summary of a lecture given by Prof. Martin Bell. This material is useful in providing a general context to the origins of road patterns in Sussex. It is less useful in helping me to understand the origins and use of the specific appeal routes.
6. The only route specific evidence in this material is the statement by Veronica Cassin that ‘the significance of Drove Lane stems from its archaeological interest as a probable remnant of a very ancient drove route between Felpham and the Weald’. She does not explain the basis for her belief that Drove Lane is ‘a very ancient drove route’, nor does she identify what route she is referring to as Drove Lane. Other evidence suggests the way known as Drove Lane is the cul-de-sac route A to B to D, which is not consistent with an argument that the route is a drove way extending south to Felpham and beyond.
7. In making my decision I am required to rely upon evidence, and appropriate inferences from evidence, rather than supposition or conjecture. I note the frequent use by the Appellant of the words ‘could’ and ‘would’. These words indicate a degree of speculation and this is of limited assistance to me. I am required to be satisfied to the appropriate standard as to the existence, alignment and status of the specific appeal routes. For these reasons, in assessing the evidence on a balance of probability, I can attach only limited weight to the generic historical material. Consequently my conclusions as to the status of the appeal routes are based primarily on the route specific evidence from the mid-eighteenth century onwards.

A to B to D

1. The earliest evidence from an historic map enabling the route A to B to D to be identified is Yeakell and Gardner’s map published between 1778 and 1783. This shows the route A to B to D as a road or track enclosed by hedges. This map shows the route continuing west beyond point D, terminating at what appears to be a field boundary and not connecting to any other route. Accordingly the route is shown as a cul-de-sac.
2. Subsequent maps, including the Tithe and Finance Act maps, show the route A to B to D in the same manner as Yeakell and Gardner, with some variation in the termination point west of B, but in all cases showing this to be a cul-de-sac.
3. The parish and estate maps, whilst not necessarily showing all of the route A to B to D, support the evidence of the county and Ordnance Survey (OS) maps. The earliest of these maps is dated c. 1775. Earlier documentary evidence is produced containing references to a route which could be consistent with A to B to D, but without a plan there can be no certainty.
4. From this evidence I have no difficulty in concluding that the route A to B to D has existed as a significant feature since the mid to late eighteenth century, and probably well before that. The more challenging issue is to determine whether the route was private or public, and if public, at what status.
5. No evidence is available which might be conclusive of status. There is reference in a 1641 deed to a route described as “the king’s highway”, but there is no certainty that this is a reference to any part of the appeal routes and even if it were, it does not assist in determining the extent of any public right. Accordingly the exercise I must undertake is to balance all the available evidence, but the test that I must then apply for the route A to B is different to that for the route B to D.
6. For the appeal to be allowed in relation to the route A to B, which is currently recorded on the definitive map and statement as a public footpath, I must be satisfied, on a balance of probabilities, that the route subsists as a restricted byway. To reach this conclusion I would need to find that the route has the historic status of a public vehicular highway, but that the right to use the route with mechanically propelled vehicles has been extinguished by the operation of NERC.
7. For the appeal to be allowed in relation to the route B to D, which is not currently recorded on the definitive map and statement as a public right of way of any description, I will need to undertake the same analysis as for A to B, but the standard of proof can be either the balance of probability, or a reasonable allegation.
8. Because of the different tests that I must apply I shall deal separately with the routes A to B and B to D.
9. Dealing first with A to B, it is the Appellant’s case that this is part of an ancient drove way. It is said that such a drove way would have been used for the seasonal movement of livestock as well as a route to markets and possibly ports. It is suggested that such use would encompass driving livestock on foot and on horseback and that the route had the capacity to be used with a horse and cart. If it can be established to the required standard that the route has been used in this fashion, and that such use was by the public, I accept this would suggest that it had the status of a public vehicular highway.
10. I have commented earlier on the weight that I can attribute to the general evidence about the early habitation and use of land in Sussex and the origin of drift roads. I accept it is possible that the route A to B to C may have been part of such an ancient drove. However, the evidence from this early period, whilst interesting context, falls well short of establishing the existence of a public vehicular highway on the precise claimed alignment.
11. The evidence from the eighteenth century and subsequently shows that this section of the appeal route was by that time set out in a similar fashion to other local ways which are now accepted as public vehicular highways. The route was enclosed and named Drove Lane, or various corruptions thereof. It is reasonable to conclude that the route was used for the movement of livestock and that it had the capacity to be used by horse drawn carts. However, I must be satisfied that this was use by the public rather than use by the owners or occupiers of adjoining holdings to access their land in the nature of a private right of way. Such use would usually characterise an occupation road.
12. The representation of the route on the early county maps and on the OS is consistent with public vehicular status but is not determinative of it and is equally consistent with an occupation road serving a number of different landholdings.
13. I note that Greenwood’s map of 1825 shows only a section of the northern end of the route A to B which might suggest that he did not regard it to be a through route to Felpham.
14. The Appellant places significant reliance on John Cary’s map of 1794. I accept that this, in contrast to other contemporary maps, depicts a through route from Yapton to Felpham and the key suggests that this was a principal cross road.
15. My difficulty with Cary’s map is in accepting that the route it depicts is the appeal route. There are two principal reasons for this. First the map shows a single consistent route south from Yapton to Felpham. All other contemporary maps show a change in the nature of the appeal route at point B, with the enclosed route turning west at B to point D and a route of a different nature continuing to C. Second, I cannot reconcile the configuration of the route depicted at the northern end where it meets the Yapton to Barnham Road. The route is depicted (immediately above the ‘p’ of ‘Yapton’) as creating a cross-roads with the route continuing directly northwards past the church. In all other mapping Drove Lane is shown to join the Yapton to Barnham road as a T junction some distance to the west of the road leading to the church. I note that Greenwood’s map shows a cross-roads configuration with the road leading to the church, but the route heading south at this point is clearly not the appeal route. If this is a correct analysis the route shown on Cary’s map is not the appeal roue. For these reasons I am unable to place any significant weight on this evidence.
16. The parish and estate maps considered generally confirm the alignment and physical characteristics of the route A to B to D, but add little to an understanding of its status.
17. The evidence in relation to the creation of the Portsmouth and Arundel Canal (c.1821) shows the appeal route with no known owner. One explanation for this is that it was considered to carry public rights, but if that were the case it does not assist in understanding the extent of such rights. It is clear that the route A to B to C provided access to land in the ownership of a number of different individuals and it is possible that this is also an explanation for it not having a single recognised owner. The lack of an identified owner is not, of itself, a necessary indication of public status.
18. The representation of the appeal route A to B on the Yapton Tithe Map is consistent with other known public vehicular highways. However, the purpose of a tithe map was to identify tithable land, not to distinguish between public and private rights of way. A private road would be no more liable to tithe than a public road of the same physical characteristics.
19. The Appellant places reliance upon auction particulars relating to an estate sale in 1862, and upon a later Act of Exchange in 1867. In both cases the evidence relied upon is that access to the land in question could only be gained from the appeal route, but neither document refers to the existence of any easement for access. It is suggested that the proper inference from this is that the appeal route was regarded as a public right of way.
20. Use of a way to gain access to private land is not use in the nature of a public right of way. Continued use for such purposes could not be relied upon to support an inference of dedication of a public right. Instead it would potentially result in the acquisition of a prescriptive private right. The position would be different if it could be established that the route being used was a pre-existing public right of way, but this would necessitate the evidence being sufficient to demonstrate public vehicular highway status at an earlier date. The mere evidence, or inference of use of the appeal routes to access private land is not of itself supportive of the establishment of a public right of way.
21. The Finance Act map shows the majority of A to B as subject to duty and valued within hereditament 442. This suggests that the route was not at this time considered to be a public highway, and certainly not of vehicular status.
22. The OS Object Name Book provides conflicting evidence, with the original entry ‘public laneway’ giving some support to the appeal, but the subsequent amendment to ‘occupation road’ suggesting the opposite. The net effect of this evidence is neutral.
23. There is no individual piece of evidence in either direction that I can place sufficient weight upon to enable me to reach a conclusion. Taking all the evidence together it is clear that it is finely balanced. In such circumstances it is necessary to have regard to the standard and burden of proof. As explained, for this section of the route the test is whether, on a balance of probability, the route subsists. The reasonable allegation test does not apply. The burden of proof is on the Appellant to satisfy me that it is more likely than not that the route enjoys the status claimed. Having considered and weighed all the evidence and representations made to me, I am not satisfied that in respect of the route A to B the burden has been discharged.
24. Dealing next with the route B to D. The evidence relied upon is largely the same as that considered in relation to the route A to B, of which, as I have described, B to D is effectively a continuation of the same feature. There are however two important differences. First, in relation to B to D, for the appeal to be allowed I do not have to find that the route subsists; a reasonable allegation is sufficient. Second, this section of the route is a cul-de-sac and whilst there is no reason why such a route cannot be a public right of way, where, as here, the termination point of the route is not an obvious place of public resort, there should be some further evidence supporting positively the claimed public status.
25. I have concluded that the evidence for the route A to B is insufficient to satisfy the balance of probability test. In relation to this section, B to D, I must determine further whether public vehicular rights can be reasonably alleged to subsist. To do this it is necessary for me to consider whether there is sufficient evidence to explain the existence of the route as a cul-de-sac.
26. Point D is, or was, the entrance to a privately owned field. It does not serve any place of public resort. Accordingly if the route were a public vehicular highway, the right of the public would be confined to travelling to point D only to turn round and return the same way. Whilst such a public right of way can, as a matter of law exist, there would need to be compelling supporting evidence of that status.
27. Evidence of relevant use by the public might provide the bolstering evidence required. However, in this case there is no direct evidence of use and such inferences that can be drawn suggest the only logical use of the cul-de-sac route would have been by adjoining landowners for the purpose of accessing their landholdings. As I have described earlier, such use is indicative of the exercise of a private rather than a public right of way. For this reason I cannot rely upon such use as sufficient to explain the existence of the route as a public vehicular cul-de-sac.
28. In the absence of any other evidence to explain the existence of B to D as a public vehicular highway I conclude that it is not reasonable to allege that it enjoys that status.

B to C

1. The route B to C is currently recorded on the definitive map and statement as a public footpath (being part of FP155 Chichester), running east of the hedge / ditch for its full length. The appellant seeks to upgrade this route to a bridleway. For the appeal to be allowed in relation to this section of the route I must be satisfied by the evidence, on a balance of probability, that public bridleway rights subsist. A reasonable allegation is not sufficient.
2. The Appellant has specifically raised in the grounds for appeal a concern that WSCC failed to provide the committee with a full definition of a bridleway, specifically that it did not include reference to a right to drive animals. I accept that a bridleway can, but does not as a matter of course, include a right to drive animals. Where such a right is asserted, it must be proved to exist.
3. It is the Appellant’s case that the route A to C formed part of an ancient drove way passing through Felpham and Yapton. Reliance is placed upon the same evidence discussed earlier in relation to the historic habitation of land in the vicinity of the route. The suggestion is that the A to B to C was a single continuous route, with no differentiation between the manner in which A to B and B to C were used. Notwithstanding this the Appellant claims only bridleway status for B to C whilst claiming higher status for A to B.
4. The Appellant accepts that by the late nineteenth century B to C was used as a footpath and nothing more. Accordingly the evidence to be considered to determine whether higher status existed is that from before that period.
5. The route B to C is depicted on a number of the maps previously considered, but the depiction is universally different to that of A to B. Whilst A to B is shown as a significant feature enclosed by hedges on both sides, and named ‘Drove Lane’ or similar, B to C is depicted by a single dotted line passing through open fields. None of the evidence considered suggests that the route B to C has been known as part of Drove Lane, this name being used to describe only the route A to B to D.
6. Yeakell and Gardner’s map shows the route as a single dotted line running south from point B, initially to the west of the hedgerow but crossing to the east before reaching the Weststone Bridge (this is in contrast to the current definitive map which shows all of FP 155 to the east of the hedge).
7. In considering the value of Yeakell and Gardner’s map the Appellant highlights two instances where routes shown on that map with a dotted line were subsequently known as public roads. Having then considered the use of the land over which the appeal route passed, the Appellant asserts ‘It seems likely, therefore, that the dotted line represents an unmade road across country’. Whilst recognising this to be a possibility, I cannot accept the evidence makes such a conclusion ‘likely’.
8. The Appellant refers to the prospectus for Yeakell and Gardner’s map which claims that it shows ‘….every Bridle-way and Footpath’. Accordingly whilst the representation of the route on the map is indicative of the existence of a way, without a key status cannot be determined, and it is perfectly credible that what is represented is a footpath.
9. An indication of the route is given on the plan accompanying the Chichester Corporation Field Book of 1806, again represented as a single dotted line. The Appellant asserts that this represents a route ‘of at least bridleway status’. I can find no support for this assertion and it seems to me that it is equally indicative of a footpath.
10. The route B to C is not depicted on Greenwood’s Map, nor Gardner and Gream’s map, nor on the OS Old Series produced in 1805-6 and 1813. If the route were part of an ancient drove, with status higher than a footpath, it is perhaps surprising no sufficient evidence would remain at the time of these maps.
11. The Yapton Tithe Map 1841 depicts the route B to C with dot and dash lines representing a footpath or bridleway*.*
12. The OS Revised New Series, published in 1895, shows a route by a single dashed line representing a footpath. The route is drawn as a straight line. Field boundaries are not shown, making it impossible to determine the relationship of the route depicted to the field pattern. Bartholomew’s maps of 1902 and 1922 show B to C as a ‘footpath or bridleway’.
13. Footpath 155 continues south of the Weststone Bridge in the parish of Felpham. The current status of the route in Felpham derives from the Felpham Inclosure Award 1840 which set out the route as a ‘Private Road’ and ‘a public footpath’. In relation to this Inclosure Award, the Appellant says ‘The legal act that downgraded the route south of the Weststone Bridge specifically did not apply to Yapton’. I accept that the inclosure award for the parish of Felpham can have had no relevance to the appeal routes situated in Yapton. However I can place little. if any, weight on the appellant’s assertion that the route south of the bridge was ‘downgraded’ as a result of the award. For this to be the case there would need to be evidence showing this route had higher status before inclosure. Other than the general evidence about drove roads there is no evidence from which I can be satisfied that the route south of the bridge has enjoyed a status higher than footpath.
14. The Appellant also places reliance upon evidence about the physical characteristics of the Weststone Bridge to support an argument about the nature of traffic that might have used it. I accept the evidence supports the bridge being at one time a stone structure and thus that it was an important crossing. I do not however accept the appellant’s assertion that the bridge had a width of 38 ft. This claim is derived from scaling from the 1791 map by Thomas Gream. I do not consider that to be a credible approach when dealing with a feature of this small size and a map of this scale and antiquity.
15. In the absence of direct evidence of the historical manner in which the route was used, I must consider carefully what conclusions can be taken from the documentary evidence. I cannot ignore the manner in which B to C is represented on the various maps and documents considered. It is clearly shown as a different feature to the route A to B to D. On some maps it is not shown at all. It is not part of the route given the name Drove Lane.
16. In evaluating the documentary material it is difficult to find specific evidence of any significant weight supporting the route B to C having status higher than that of a footpath. For that reason I am unable to be satisfied on a balance of probability that the route B to C has the status of a bridleway. In reaching this conclusion I am mindful of the general evidence relating to the historical origin of drove roads, but I have explained why I cannot accept this evidence as sufficiently specific to the route in question.

*Summary and conclusions*

1. In relation to the routes A to B and B to C I find that the evidence is insufficient to satisfy me, on a balance of probability, that the routes enjoy the status claimed, or any status greater than that currently recorded on the definitive map and statement as public footpaths.
2. In relation to the route B to D I find the evidence is insufficient to raise a reasonable allegation that the route has the status of a public right of way of any description.

Conclusion

1. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

Formal Decision

1. I dismiss the appeal.

Nigel Farthing

**Inspector**

