



Appeal Decision

by **K R Saward Solicitor**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 23 July 2020

Appeal Ref: **FPS/P3800/14A/7**

- The 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 of that Act.
- The application dated 6 April 2017 was refused by the Council on 22 October 2019.
- The appellant claims that the definitive map and statement for the area should be modified by adding a restricted byway and upgrading Footpath 174 to a restricted byway from Climping Mill north east to Rope Walk, Littlehampton.

Summary of Decision: The appeal is allowed.

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'). I have not visited the site, but I am satisfied in the circumstances of this case that I can make my decision without doing so.
2. A copy of a map prepared by the Council showing the claimed route is attached for reference purposes.
3. The application is made by the British Horse Society ('BHS'). Originally, the BHS applied for a definitive map modification order ('DMMO') to upgrade parts of Footpaths 829 and 174 to restricted byways and to add a section of restricted byway, from Climping Street, Climping via Climping Mill to Rope Walk, Littlehampton. The Council treated this as three separate applications. Its Rights of Committee resolved to make a DMMO for the upgrade of FP829 (Council ref: DMMO 2/17) to a restricted byway between points A-C/D on the basis that it provided access to the Mill. The Mill was located at point C/D where FP829 also meets FP174. It resolved not to make a DMMO for the continuation of the claimed route by the addition of a restricted byway between points D-E (Council ref: DMMO 3/17) or the upgrade of part of FP174 between E-F (Council ref: DMMO 4/17). The appeal concerns DMMO 3/17 and 4/17 only. For that reason, I have taken the description of the claimed route from the Appeal Form.
4. In the course of this appeal, representations have been made by the affected landowner regarding the Committee decision to upgrade FP829 between points X-D. However, this appeal concerns only the claimed restricted byway between D-F which was rejected by the Committee.
5. A restricted byway includes rights on foot as well as the right to ride or lead a horse and to ride a bicycle (unless restricted) along with a right to use non-mechanically propelled vehicles e.g. a horse and carriage.
6. The Council relies upon its Committee report and flags up a couple of errors

therein where its references to the application and upgrade were transposed.

7. Factors such as the proximity of the claimed route to the golf course and works required to facilitate an upgrade of its condition cannot influence my decision.

Background

8. Following the decision of the Rights of Way Committee, a DMMO will be made to upgrade the existing public footpath A-C/D to a restricted byway. The DMMO will take effect if it is confirmed. Should the remainder of the application succeed then there would be a continuous route as a restricted byway between Climping Street, Climping to Rope Walk, Littlehampton (i.e. A-F).
9. Application was originally made to add a restricted byway within Littlehampton golf course from points D-E along a different alignment to the short section of FP174 lying between those points. Following an objection by Littlehampton Golf Club it emerged that the unaffected part of FP174 was diverted onto the current definitive line in pursuance of an Order made by the Court of Quarter Sessions on 31 December 1936. The path was diverted from the line now sought to be added as a restricted byway between D-E. The 1936 Order had stopped-up the "public footpath or highway" along its previous alignment. For that reason, the Council concluded that "all highway rights along the claimed route D to E" were stopped-up. Instead, it considered whether the archive evidence supports the existence of higher rights than a footpath before 1936 along D-E which were diverted onto the existing alignment of the public path C-Y-Z. I agree that the Quarter Sessions Order diverted all highway rights. The question is whether those rights were on foot only as per the Council's finding.
10. The BHS was unaware of the Quarter Sessions Order at the time of the application and does not dispute that "the line represented by DMMO 3/17 was diverted onto the current line of the path, with the old section being stopped up". The section from D-E forming part of the golf course is not currently used by the public. The appellant clarifies that the application between those points was made simply to correspond with other historical records being relied upon.
11. The BHS seems to accept that the correct approach is to establish if higher rights than a footpath subsist along the definitive line from C-Y-Z. They dispute the Council's conclusion that only a footpath was diverted. The Council does not discount the possibility that higher rights might have existed. The Quarter Sessions Order describes a "portion of a public footpath or highway" to be diverted with a "new footpath or highway" provided in lieu of and in substitution for "the said old highway". Inclusion of the words "or highway" distinguishes between a footpath and other form of highway. The appellant acknowledges that the Order shows that by 1936 the route was probably more used as a footpath. The wording does not mean that higher rights must have existed or, conversely, that it can only have been a footpath. Howsoever interpreted, the Order was drafted widely enough to stop up all highway rights.
12. Given the Quarter Sessions Order, the addition of a restricted byway along the route originally claimed from D-E is bound to fail. In view of the change in facts, I shall consider the application as though made for an upgrade of the existing footpath between those points, marked as C-Y-Z. This reflects the approach taken by the Council. The Council's report recognises that there is a lower test for an addition to be made to the DMS than applies for an upgrade.

Legal Framework

13. In order for a footpath to be 'upgraded', section 53(3)(c)(ii) provides that an order to modify the DMS shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a highway shown in the map and statement subsists as a highway of a particular description ought to be there shown as a highway of a different description.

Main Issues

14. In light of the background, the main issue is whether the evidence is sufficient to show, on the balance of probabilities, that the existing public footpath (FP174) between points C-Y-Z-F should be recorded as a restricted byway.

Reasons

15. The application relies upon archival evidence only. Section 32 of the Highways Act 1980 requires a court or other tribunal to take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, giving it such weight as is justified by the circumstances.

Estate maps and information

16. Littlehampton and Atherington Estate Map, 1606, produced by John Norden shows a route passing through common land starting just before the Mill around point D to point F to connect with a road coloured sepia. The Council accepts this route may have been used by horse and cart which would have been necessary to transport heavy grain to the Mill. The appellant argues that the existence of a mill indicates public access to it.
17. In the transcript of an 'Assignment Deed' from 1660, reference is made to a 'windmill on the Common Lane between Millfield common field and East Cudlow' with the mill forming part of the lands for Atherington manor. The Council says it is reasonable to infer that the Common Lane is D to F. Without a plan it is not certain, but the description appears to fit.
18. The tracing of Bailiff's Court Farm Map, 1772 produced by Thomas Gream identifies a route by solid parallel lines passing by Climping Mill to point F. As no other means of travel on horseback or with horse and carriage are shown, it is deduced by the Council that the route formed the only means of access between the Mill and Littlehampton. If so, it is unlikely to have been limited to use on foot. Without a key, the status of the route cannot be certain.
19. A transcript of a Mortgage Deed dated 1 April 1780 mentions Climping Windmill and its location with "Climping Common Field on N" and "a lane called Mill Lane leading to the coast on S". It is insufficiently clear whether Mill Lane is the claimed route or if the lane had public or private status.

Publications

20. Much of the evidence relied upon originates from 'A History of the County of Sussex' first published in 1997 by Victoria County History ('VCH'). The Council acknowledges that the books can be considered reliable as all editors of the publications are academic historians. The text describes how the ferry at Littlehampton was reached by a road that ran north-east from Climping Mill by 1606. The Council accepts that it could be inferred the route was likely to be public and used by horse and cart being one of the only access routes to the

ferry at Littlehampton until the new road was built in 1824. The description appears consistent with the route from D-F.

21. By way of additional evidence not previously submitted to the Council, the BHS produces an extract of a map of Climping c1875 which is said to have accompanied the History. The map identifies the windmill and shows a road along the un-diverted alignment with the ferry to the north of point F. This would appear to be the road referenced above.
22. In other extracts from VCH reference is made to ferries from 'Hamptone' (it later became Littlehampton) as early as the 13th century and the erection of a bridge across the river between Littlehampton and Atherington during the 15th century. Whilst these and other reference material on historical means of transport and coastal changes are informative, they do not add much to establishing the likely type of use of this particular recorded path. The BHS acknowledges that the ferry was only for foot passengers in the early 19th century but suggests the existence of a lane near to the ferry in 1606 (as per the estate map) indicates passage for carts and packhorses via the ferry or bridge prior to that time.
23. The BHS disputes the Council's conclusion that use of the route may have ended in 1824 when Ferry Road was built and the Mill was no longer in use having been converted to two cottages. According to the appellant the Mill did not close until late in the 19th century. The text from "Sussex Notes and Queries" (Vol 17 1968-1971) produced by the British Archaeological Society describes wagons going to Climping Mill across the sand and shingle and how "this dangerous passage became disused when the Horse Ferry was opened in 1824". The section of route from A-X for which an Order is already to be made runs along the foreshore which appears most likely to be the route described. The Mill may still have been accessible from the opposite direction along the claimed route from point F-D. In any event, whether or not the claimed route fell into disuse by horse drawn wagons would not affect its legal status.
24. I gather that E-F follows a high embankment and the Rights of Way Committee were dubious over its suitability for transportation. The issue is not its condition now. By definition, an embankment is a raised bank to carry a road or suchlike. Extracts from the Historic England 2018 publication on 'Mills: Introduction to Heritage Assets' are produced to explain that windmills needed good road access. They had to be set on high ground to maximise their ability to catch the wind while at the same time remaining accessible to carts and packhorses bringing grain for milling or collecting flour. It seems plausible that Climping Mill was served by a road, but whether that was between points D-F along a route available to the public remains to be established from other documents.
25. The 'Rights of Way Law Review' article on 'The agrarian origins of drift roads' from 1998 provides an overview of the origins of 'drift roads' and how they evolved but does not assist specifically with this particular claimed route.

Commercial maps

26. Yeakell and Gardner's Sussex (1778) depicts the Mill and a wide route between solid parallel lines leading from it towards Littlehampton and point F. The route is depicted as other roads on the map although its status is unclear. It is similarly shown in the same way as other known public roads on Gardner &

Greem's Map of Sussex 1795¹. As the route is still shown despite being less detailed than Yeakell's map, the appellant believes it is reflective of a route of some prominence. That is possible, but not necessarily so.

27. Climping Mill is marked on Greenwood's Map of Sussex, 1825. In the approach from point A, a route is shown as double dashed lines changing to double solid lines at point D as it passes the Mill on the un-diverted alignment of FP174 to point E or thereabouts but not beyond. From the key, the Council identifies these solid parallel lines as "Turnpike Roads & Toll Bars" whereas the appellant believes the route from Climping Street going past the Mill is a 'crossroad'. The Council refers to legal authorities that a turnpike road only remained as a highway once the powers of the Turnpike Act expired if it had been a highway beforehand. From the quality of print it is not easy to tell, but the dashed lines leading into solid lines appears more reflective of a crossroad. In support of such interpretation it appears that the route was not included on Sussex Turnpikes Map and the VCH refers only to a tollgate at the ferry when Ferry Road was built c1824.

Tithe map

28. It is not entirely clear from the copies supplied with the appeal, but the parties agree that a road is shown passing the Mill to join Rope Walk (point F) on the Climping Tithe Map, 1843 which is coloured sienna from around point E. The Council acknowledges that the route is shown in similar manner to other roads indicating a status higher than a footpath but considers it does not carry great weight without a key. The route does not appear as wide as some other roads, but it is without an apportionment number indicating it was not titheable. It appears to be some albeit limited evidence of a public road.

Ordnance survey mapping

29. The route from D towards F is shown as a road by two solid parallel lines on the Old Series Ordnance Survey Map (scale 1" to 1 mile) published by Lt Col Mudge in 1873 (surveyed 1813). There is no key on the map to indicate if it was available to the public. The appellant argues that the map was made for sale to the public and so would be unlikely to show a route the public could not use. There may be some merit in that argument as the early edition maps were very expensive, but it is by no means certain.
30. The OS Local View Sussex Series 1 (1863-95) shows the route by double dashed lines from D-F as originally claimed. The Council says that double dashed lines can represent a bridle road or open road using conventional signs but this is not reliable for interpreting OS maps.
31. A footpath is annotated just before point D with the path continuing past the Mill where there is a further F.P. annotation between points E-F on the OS Local View Series 2 (1896-99). The Series 3 Map (1909-16) similarly shows a route but the footpath annotation is along the stretch E-F only. By the time of the Series 4 Map (1930-46) a footpath is shown along the diverted alignment. I gather that the route follows the diverted line on the current OS map for which no date is given and no copy is supplied. When the draft and provisional Definitive Maps were prepared (dates not given) the claimed route was shown as a footpath.

¹ The Council describes this as 'Gardner & Green Map'

32. As additional evidence, the BHS produces an extract of the OS Boundary Sketch Map, 1873 to show that historically Atherington and the southern end of Climping Street were detached parts of the parish of Littlehampton until amalgamation. The BHS suggests that the information is a further good reason for the claimed route to have higher rights in previous centuries between Littlehampton and the detached portion on the western side of the river. As this is speculative it carries little weight as evidence.

Other sources

33. The Plan for the Grand Imperial Ship Canal 1827 included an intended branch from Arundel to the sea near Littlehampton. The BHS contends that part of the plan shows the claimed route from halfway between points D-E and continuing past point F as though one with the road known today as Rope Walk. There is a route shown which could be a road but it is not easy to reconcile with the claimed route. There is no entry in the Book of Reference to assist.
34. The Stocks and Shares Account Book, 1879 forms part of the audited accounts for the Climping Highway Parish from the years 1880-1889. The appellant deduces that the entries made by the Parish Surveyor mean the Parish regarded the claimed route as a parish highway at the time. However, they list costs for "Street and Millborough", "Millborough Hill" and Millborough Hill Road" being names which do not appear elsewhere to ascertain if any entry relates to the claimed route. Even if they do, it does not establish that the route was maintained as more than a footpath.
35. The appellant downloaded a copy of the County Council's Land Charges on-line Map with a blue line along the claimed route which the appellant believes indicates a route maintainable at public expense and unusual if it is a footpath only. The Council confirms that there is in fact no such line on the actual map. Moreover, Land Charges records dating from Adcock's County Survey Map of 1894 show at no point has the route been maintained other than as a footpath.
36. Picture postcards of the disused Climping Mill said to date from circa 1910 and 1939 show a section of road going past the windmill at the start of the claimed route. They illustrate that the road would have been wide enough along this stretch to accommodate vehicular traffic with a gap in the flint wall at point D.

Conclusions on the documentary evidence

37. In its Committee report, the Council accepted that from the 1400's to the late 1800's a road is described from the Mill to the River Arun to access either a ferry or bridge across to Littlehampton which suggests the road was used by horse and cart which could have been public. In recommending that the route is no more than a footpath, the Council considered that only Greenwoods Map of 1825 (for D-E) and the Atherington Estate Map indicated any higher rights.
38. However, there are a series of other maps such as the Tithe Map, Yeakell and Gardner's Sussex, Gardner & Gream's Map of Sussex and Bailiff's Court Farm Map which are supportive of the presence of a road carrying higher rights than those currently recorded. None of the maps are conclusive and without a key it cannot be certain they show the claimed route, but the likelihood is that they do. Taken together they form a reasonable body of evidence in favour of the application which needs to be considered in the context of the times.

39. There is cause to conclude that Climping Mill was connected with Rope Walk, Littlehampton by a road of some description. Historically it appears that this would have provided a route to the ferry to the north until an alternative route was built. The precise alignment is unclear but given that a road corresponding with that claimed appears on early maps, it seems most likely to be the route described. No other possible route has been identified to fit the description.
40. Bearing in mind practices of the time it appears likely that members of the public would have utilised the route with horse and cart to reach the Mill. Once the Mill closed at some point during the 1800's, the need for use by horse and cart would have declined with the route no longer serving the same public purpose. This might explain why the OS Sussex Series 2 from 1863-95 recorded only a footpath. Although this and later OS maps weigh against the application, they may reflect known use at that time as circumstances changed. The purpose of these maps was not to identify public rights of way.
41. When the evidence is considered collectively there is a credible case that the entirety of the route would have been used with horse and cart, on horseback as well as on foot. It is quite finely balanced but overall, I am satisfied that there is sufficient evidence of higher public rights along the claimed route, including D-E. All such rights between points D-E were diverted onto the current alignment C-Y-Z by Quarter Sessions in 1936.

The 2006 Act

42. This appeal concerns a possible unrecorded vehicular route. Therefore, it is also necessary to have regard to the provisions of section 67 of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act') which extinguished public rights of way for mechanically propelled vehicles, subject to certain exceptions.
43. None of those exceptions apply here. Therefore, if any rights for mechanically propelled vehicles had been established along the claimed route then they would have been extinguished as a result of the 2006 Act.

Conclusion

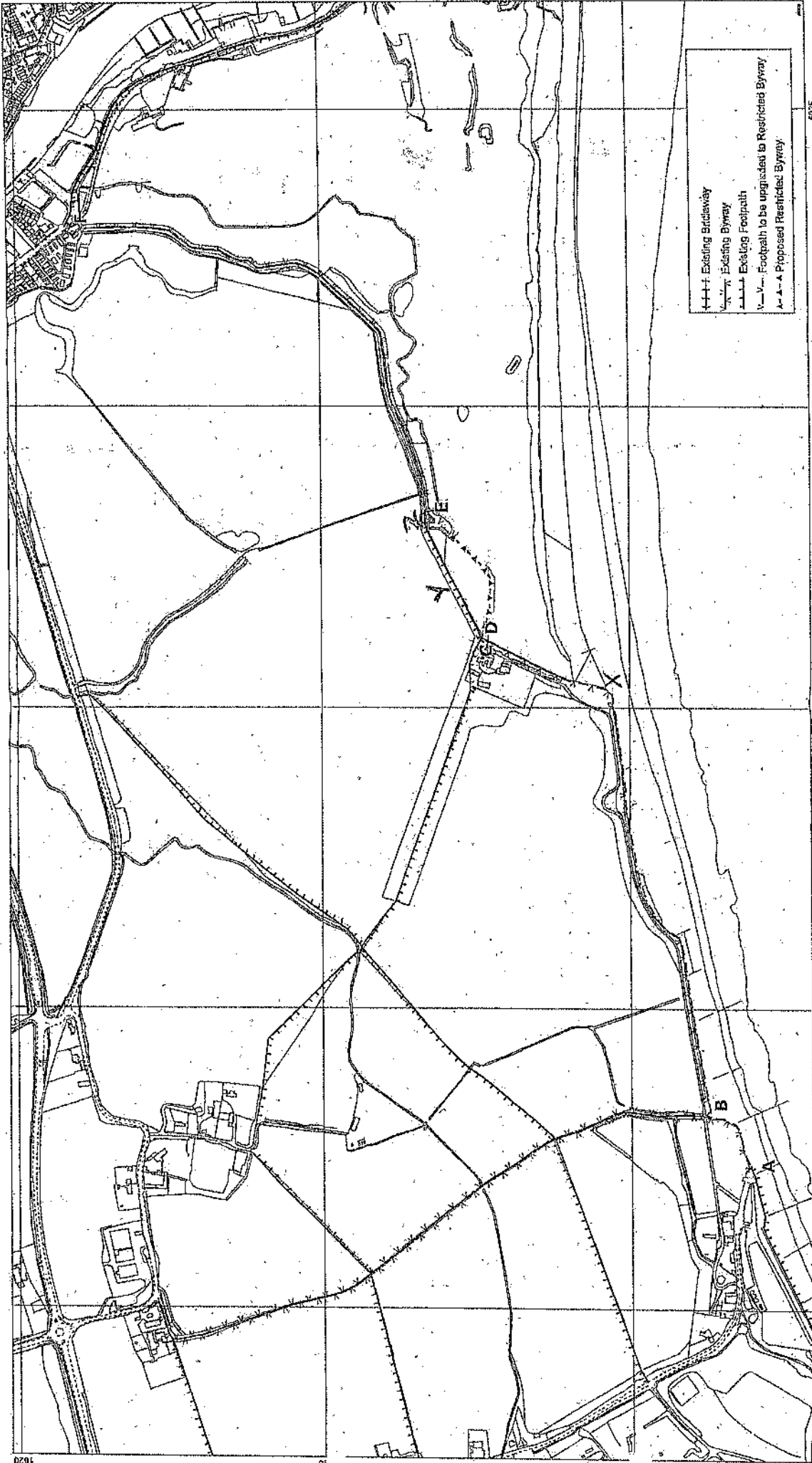
44. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does show that on the balance of probabilities a restricted byway subsists from C-Y-Z-F.

Formal Decision

45. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, West Sussex County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act not later than 12 months² from the date of this decision to upgrade the existing public footpath between points C-Y-Z-F. This decision is made without prejudice to any decision that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.



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² A longer period has been given than would otherwise have been afforded due to the exceptional circumstances arising from the ongoing global coronavirus pandemic.



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Climping and Littlehampton - Upgrade of FP 829 and FP 174 to Restricted Byway status - Site Plan

Plan: 01733a	1:3000 at A1	OS Sheet: TQ 00 SW	Photocopy: liable to distortion	 west.sussex.county.council	Matt Davey Director of Highways, Transport and Planning	
Date: 02.07.2019		Grid Ref: 5015 1010				