

|  |
| --- |
| **Interim Order Decision** |
| Site visit made on 14 December 2021 |
| **by Alan Beckett BA MSc MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 3 March 2022** |

|  |
| --- |
| **Order Ref: ROW/3253424** |
| * This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The West Sussex County Council (Chichester – No 1 (Walberton and Arundel: Addition of a Restricted Byway and Upgrade of Public Footpath 342 to a Public Bridleway) Definitive Map Modification Order 2019.
 |
| * The Order is dated 19 November 2019 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway and upgrading a footpath to bridleway as shown in the Order plan and described in the Order Schedule.
 |
| * There were 11 objections outstanding when West Sussex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.
 |
| **Summary of Decision: The Order is proposed for confirmation subject to the modifications set out in the Formal Decision.** |
|  |

Procedural Matters

1. None of the parties requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations forwarded to me. I made an unaccompanied inspection of the Order route on Tuesday 14 December 2021.

**Legal Framework**

1. The Order has been made under Section 53(2)(b) of the 1981 Act in consequence of the occurrence of events specified in Section 53(3)(c)(i) and (ii) of that Act.
2. Section 53 (3) (c) (i) provides that a modification order shall be made where evidence is discovered which (when considered with all other relevant evidence available) shows that a public right of way which is not shown in the definitive map and statement (DM&S) subsists over land in the area to which the map relates.
3. Section 53 (3) (c) (ii) provides that a modification order shall be made where evidence is discovered which (when considered with all other relevant available evidence) shows that a way shown in the DM&S as a highway of one description ought to be there shown as a highway of a different description.
4. Section 53 (3) (c) requires there to have been a ‘discovery’ of evidence for the provisions of the section to be engaged. That evidence has been discovered is not disputed in this case.
5. The evidence adduced in this case is documentary; no evidence of recent use of the Order route by the public on horseback or with vehicles had been submitted. Section 32 of the Highways Act 1980 (‘the 1980 Act’) requires a court or 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 appropriate, before determining whether or not a way has been dedicated as a highway.

The Main Issues

1. The main issues are therefore whether the evidence adduced is sufficient to show, on the balance of probabilities, that: (a) a restricted byway subsists between points A and B on the Order plan; and (b) public footpath 342 running between points B and G on the order plan ought to be shown as a public bridleway.

**Reasons**

1. The ways at issue form a continuous route which provides a means of travel between Binsted parish church in the west to the outskirts of Arundel in the east. As a single continuous route, it is appropriate to consider the documentary evidence in relation to the route as a whole, starting with the earliest records. Extensive research of the archives has clearly been undertaken on behalf of the applicant for the Order, and copious material arising from that research has been submitted, all of which has been taken into account; however, I do not make explicit reference to each, and every document supplied or to its content, but focus on those documents which are of particular relevance in the light of the matters set out in paragraphs 5 and 6 above.

**Documentary evidence**

*Glebe Terrier 1615*

1. A copy of the original document together with a typescript copy of the text has been submitted by the applicant. This document was produced to identify the property assigned to the incumbent of the church to support him and his family and provides a record of the extent of that property as of 28 December 1615. The terrier is signed by the incumbent of the day and countersigned by two of the Churchwardens.
2. The terrier describes one of the glebe fields by the name of Copthorne which was bounded on the south by “*the lane leading from Binsted Church to Arrundell”.* A further 4 acres of ground are “*bounded with the same lane on the north syde …which lane is parcel of the glebe land*” and a further acre of ground “*bounded with the same lane on the north syde & with the lane that goeth to Lower Binsted on the west side*”.
3. There is no plan attached to the terrier. However, the tithe commutation records of 1838 show the land which was then in the ownership of Rev. Maurice Smith as part of his glebe. The applicant submits that tithe parcel 71 (‘Church Croft’) is likely to be the field known as Copthorne in 1615 and that parcel 76 (‘Church Lane 4 Acres’) is the equivalent of the two separate parcels described in the terrier as being bounded on the north by the lane to Arundel and the lane to Lower Binsted.
4. Whilst it cannot be demonstrated conclusively that the applicant’s suggested comparisons between the glebe terrier and the tithe map are correct, I consider it highly likely that the glebe held in 1838 was one and the same as that set out in the terrier 200 years earlier.
5. The glebe terrier provides evidence of some weight that in 1615 there existed a through route which linked Binsted church with Arundel. The precise alignment of that route or its status cannot be established from the terrier as that was not the purpose of that document.

*County Maps*

1. The Yeakell & Gardner map of 1778 shows the A – B section of the Order route as an enclosed track running east from Binsted church which provides access to fields. From point B the continuation of the Order route is shown by means of a pecked line and whilst the applicant contends that the route is shown as continuing to point G, it is difficult to identify a marked route across Tortington Common due to the depiction of the common as woodland or wood pasture.
2. The Greenwood and Greenwood map of 1825 shows A – B as an enclosed track by means of double parallel lines but does not show any feature beyond point B. The key to the map shows that this route was considered to be a ‘cross road’ by the cartographer. It is generally accepted that the depiction of a route in this way on late eighteenth and nineteenth century commercial maps is indicative of a route over which the travelling public had a right of way on horseback or with vehicles. The map also depicts the Chichester Road / Torton Hill Road and Ford Road junction on the outskirts of Arundel. The Greenwood map is of little assistance with regard to the remainder of the Order route as it crosses Tortington Common.

*Parish and estate maps*

1. The map produced as part of a survey of the manor of Tortington in 1724 shows a route which approximates with C – F by means of double and single-peck lines. There is no key to the plan; consequently, it is not possible to determine what was being depicted by such annotation. The applicant notes that the only route marked ‘Road’ south of the Chichester Road is Binsted Lane, which was also depicted in part by a single peck line. The applicant contends that the route being depicted is likely to have been considered at that time to have had a higher status than footpath. Given the depiction of other known public roads in the same way, this is a possible explanation.

*Tithe maps and apportionments*

1. The Binsted tithe map shows A – B as an enclosed route between hedges or fences and is coloured ochre in the same way as other routes within the parish which were considered to be public roads. This section is numbered 75 and is described in the apportionment as Church Lane, listed amongst the three roads within the parish which were not subject to tithe and not listed as being in the ownership of any individual. The depiction of A – B in this manner provides supporting evidence of this part of the Order route being considered to be a public vehicular route at the time of the assessment.
2. The Binsted tithe map shows B – C by means of a dashed line running parallel to field boundaries and open ground to point C at the eastern arm of Binsted Lane. The 1840 Tortington tithe map shows the Order route between points C and F by means of double dashed lines in the same way that the eastern arm of Binsted Lane is depicted. A number of routes are shown to join this double peck line route. The applicant submits that depicting the order route in this manner is consistent with the route being an unenclosed bridle or drove road as it crossed Tortington Common. Section F – G of the order route is depicted by a series of dashes and dots, but there is no key to assist with the determination of what these markings sought to convey.
3. The tithe documents demonstrate the physical existence of a route between Binsted Church and point F which accords with the Order route. Whilst A – B was considered to be a public road not liable to tithe, the status of the remainder of the route is unclear from the tithe documents although the depiction of the route on the tithe maps is an indication of its prominence on the ground. The use of single- and double-peck lines may reflect the physical characteristics of the path present at the time and suggests that in the mid-nineteenth century, A – F would have been capable of supporting more than pedestrian traffic.

*Highways records*

1. A map was prepared in 1894 by the County Surveyor of the roads within Sussex which were maintainable at public expense. The copy extract submitted is of poor quality and the section A – B is partly obscured by the word ‘Binsted’. Whilst it is possible to make out the course of the route C – D, it is not possible to determine whether or not this route carries any colouring. The plan is of very limited assistance in determining the status of the Order route.
2. Also of limited assistance are the entries found in the Stock and Stores Account book for the parish of Tortington. Although this document provides information as to what materials were used in maintaining the parish highways, there is no specific detail as to where those materials were used.

*Ordnance Survey (‘OS’) maps*

1. The OS 1-inch to 1-mile map of 1895 depicts the Order route between A – D whereas the 1947 map of the same scale shows the whole of the order route. In both cases A – B is shown as an enclosed track running between fences or hedges with the respective keys to the maps classifying this section as a third class metalled road (1897) and an unmetalled road (1947). The 1897 map does not show D – G, and B – D is shown partly as a footpath and partly as an unmetalled road. On the 1947 map B – C and E – G are shown partly by a pecked line which denotes ‘footpaths and bridlepaths’, with C – E shown by double pecked lines denoting an unfenced road.
2. The first edition 1:2500 scale map of 1876 shows A – B as an enclosed track and is numbered ‘71’, and the book of reference describes this plot as a ‘road’. The remainder of the Order route is shown on the map but no part of it is annotated. The 1897 second edition map shows the order route in the same manner as the earlier map with sections B – C annotated ‘F.P.’. From point C the way over Tortington Common is shown by double peck lines indicating an unfenced track through the woods.
3. The applicant draws attention to the existence of ‘old gravel pits’ in both Binsted and Tortington adjacent to the order route which have access tracks leading from it. The applicant submits that the track near these workings is likely to have been suitable for wheeled access for the transportation of gravel. This may well be the case, but this does not mean that such use was by the public with vehicles, although it does suggest that C – D would have been capable of supporting more than pedestrian traffic.
4. The 1910 third edition 1:2500 map shows B – D annotated as ‘B.R.’; the crossing of a feeder stream north of the fish ponds west of point C is annotated ‘F.B.’. Whilst a footbridge may have been present on what was otherwise considered to be a route where equestrian traffic may be encountered, it may have been possible for such users to ride or lead a horse over the bridge or to wade through the feeder stream. Between F – G the Order route is shown by a double peck line annotated ‘F.P.’.
5. Although it is not possible to compare current ground conditions with those which were present over a hundred years ago, I saw from my site visit that the stream crossing at issue was wide enough for single file equestrian use (whether being led or ridden). The current stream crossing would be capable of supporting equestrian use; it is not improbable that the feature observed by OS in 1910 could have been similarly used.
6. The OS 1:2500 series maps were revised at various dates throughout the twentieth century. Of the map extracts submitted, there is little difference between the 1910 third edition and how the Order route is depicted on these revised maps. A – B is shown as an enclosed track; B – E is annotated ‘B.R.’, and E – G annotated ‘F.P.’. The applicant notes that none of the other routes and tracks through Tortington Common are marked ‘B.R.’ and considers that this indicated that the OS surveyor regarded the route as an undisputed public right of way.

*Bartholomew’s maps*

1. Extracts from two maps published in 1902 and 1922 were submitted. These maps were aimed primarily at motorists and cyclists and the applicant contends that such maps were unlikely to show routes which were unavailable for public use. However, Bartholomew’s maps all carried a disclaimer akin to that found on OS maps from 1888 that the depiction of a path or route was not an indication of a public right of way.
2. On the 1902 and 1922 maps only that part of the order route C – D is shown; the keys indicate that this section was considered an ‘*inferior road not to be recommended to cyclists’*. In *Commission for New Towns v J J Gallagher Ltd* [2002] EWHC 2668, 2 P & CR 24, the court observed that such a depiction was an indication of a route being one which cyclists could lawfully use, as at the time of the publication of these maps, cyclists could not lawfully use public bridleways. Whilst acknowledging the general disclaimer, the depiction of C – D in this way provides some support to the applicant’s claim that the Order route is of a higher status than a footpath.

*Finance Act 1910 records*

1. Section A – B is shown excluded from adjacent hereditaments in the same way that Binsted lane is excluded; the depiction of a route in this way for valuation purposes is usually indicative of the route being a public vehicular highway.
2. The Order route from B – G is shown to be within a number of other hereditaments for which deductions in land value were made due to the existence of footpaths. As regards the status of the Order route B – G, the Finance Act records are of limited assistance.

*Rights of Way Act 1932*

1. The map and schedule of paths compiled by Arundel Borough Council describes path 10 as running from “*the junction of Torton Hill Road and Green Lane bordering the Borough boundary, over ‘the Mountain’ and thence to Walberton*.” The plan shows the route F – G coloured green along with other routes considered to be public, but no key to the map has been provided.
2. The records for Binsted and Tortington show the order route A – F by means of a red line as are other routes considered to be public rights of way. The applicant notes that Old Scotland Lane is also shown in red on this map although it now appears on the DM&S as a public bridleway.
3. Whilst the 1932 Act plans demonstrate that the Order route was considered to be a public right of way at the time of the survey, they are of little assistance in determining what the status of the way was considered to be when the records were compiled.

**Conclusions on the documentary evidence**

1. That part of the Order route A – B has been consistently depicted on all maps as a hedged or fenced way separate from adjacent land and in a manner consistent with Binsted Lane to which it connects. Whilst the physical characteristics of the route are not indicative of its status, the depiction of the route on the tithe and Finance Act records is supportive of the route being a public vehicular way. I conclude that the evidence adduced in relation to A – B is sufficient to demonstrate, on the balance of probabilities, that a public vehicular way subsists over this section of the Order route.
2. The glebe terrier of 1615 does not assist with the alignment of the route beyond point B. In general, the documentary evidence demonstrates that various sections of the Order route have been depicted as observable features on the ground. The 1724 estate map shows C – F in the same manner as other known routes which are now recognised or recorded as having at least bridleway status. The depiction of part of the Order route in such a manner on these early maps gives an indication of the significance of the route as part of the highway network of the area at a time when travel on foot or by horseback was more prevalent than in the case today.
3. Whilst the route has been depicted by various means over time, OS mapping from 1910 indicates that A – E was considered to be a route on which equestrian traffic may be encountered. Whilst OS maps do not provide evidence of the status of the route, the depiction of this section of the Order route as ‘B.R.’ suggest that it was considered capable of carrying equestrian traffic. I do not place significant weight upon the OS annotating the stream crossing to the west of C as ‘F.B.’ within that section of the route annotated ‘B.R.’; it may have been possible for a horse to have been ridden or led over the crossing or for horseriders to have negotiated the stream itself.
4. Given the conclusion reached with regard to the status of A – B and the description of the order route as a lane between Binsted Church and Arundel from at least 1615, I consider it highly unlikely that anyone using A – B on horseback would have travelled to B and not continued eastwards towards Arundel at least as far as point E where the Order route intersects with Priory Lane.
5. Whilst there is no single piece of evidence which demonstrates conclusively that B – E is a public bridleway, and whilst some of the evidence is of little assistance in the determination of the historic status of the Order route, the evidence must be considered as a whole and in the round. I consider that when taken collectively, the evidence is sufficient to demonstrate that in the past, B – E would have been used by the public on horseback as well as on foot. It follows that I conclude that the evidence adduced is sufficient to demonstrate, on a balance of probabilities, that a public bridleway subsists over B – E and is more likely than not to have so subsisted since at least 1615.
6. The evidence for the continuation of a bridleway beyond Priory Lane towards Arundel (E – G) is less persuasive; this section of the Order route is either not shown in the documentary sources or is only shown as a footpath. Whilst the 1615 glebe terrier indicates that the existence of a route between Binsted and Arundel, such a journey would have been possible on horseback via Priory Lane. I am not persuaded that evidence of sufficient substance has been discovered to demonstrate that E – G subsists as a public bridleway.

**Natural Environment and Rural Communities Act 2006 (‘the 2006 Act’)**

1. Section 67 of the 2006 Act extinguished the rights of the public to use mechanically propelled vehicles on public highways unless the exceptions specified in section 67 (2) or 67 (3) were applicable. It has not been argued that any of the exceptions apply in this case.
2. Consequently, A – B cannot be recorded as a Byway Open to All Traffic as any mechanically propelled vehicular rights which were in existence over this section of the Order route were statutorily extinguished on commencement of Section 67 (1) of the 2006 Act. Accordingly, to record the public non-mechanically propelled vehicular rights which remain over A – B, I conclude that this section ought to be shown in the definitive map and statement as a Restricted Byway.

**Width**

1. Whilst a width has been specified in the Schedule for that part of the Order route to be added to the DM&S as a Restricted Byway, no widths have been specified for those parts of the Order route to be upgraded from footpath to bridleway. The published guidance is that where a width is absent, the Order should be modified to include details of the width of the Order route.
2. The Council submits that there are no widths currently recorded for footpath 342 within the definitive statement but has provided details of the widths which were recorded as part of a survey of the footpath undertaken in June 1984. The Council submits that the width of B – C varied between 1.8 and 3.0 metres; C – D varied between 3.0 and 3.6 metres but only 2.4 metres at the bridge over the stream; and was 4.5 metres in width between points D and E.

**Other matters**

1. None of the objections made to the order challenged the interpretation of the documentary evidence submitted by the applicant or the conclusions that could be reasonably drawn from that evidence regarding the status of the Order route. The objectors drew attention to the narrow and constrained width of the order route at F, to the condition of the surface of the path during the winter months when it becomes heavy and waterlogged, to the lack of use by horseriders, the potential impacts upon use of the land crossed by the Order route and the risk to the safety of other users posed by horseriders.
2. Whilst the concerns raised by the objectors are recognised and understood, they are not ones which can be taken into account in determining the historic status of the Order route. The process under section 53 of the 1981 Act is concerned with the determination of the existence of public rights; it is not a process whereby what is considered to be suitable or desirable by one party is recorded. Matters such as current or potential use of the land crossed by the Order route, the suitability of the route for public equestrian use or environmental impacts which might arise from such use are not matters which can be taken into account.

**Overall conclusion**

1. Having regard to these and all other matters raised in the written representations I conclude that the Order should be proposed for confirmation with modifications.

**Formal Decision**

1. I propose to confirm the Order subject to the following modifications:
2. in the Schedule, Part I, amend the description of the public right of way to be upgraded to read: “And the upgrade, to a bridleway, of that part of footpath 342 from its commencement (grid reference 498489, 106615) to where the path makes a junction with Priory Lane as shown on the order plan 10778 marked points B, C, D and E.”
3. in the Schedule, Part II, amend the description of the bridleway to read “A bridleway commencing at grid reference 498489 106615 and continuing in a generally easterly direction for a distance of approximately 1.8km to its junction with Priory Lane. Width: between 498489 106615 and 499349 106234 varying between 1.8 and 3.0 metres; between 499349 106234 and 500210 106317 varying between 3.0 and 3.6 metres narrowing to 2.4 metres at the stream crossing point; between 500210 106317 and 500311 106382 4.5 metres.”.
4. in the Order plan, delete E – F – G.
5. Since the Order as proposed to be confirmed would not show a way shown in the Order as submitted, I am required by virtue of Paragraph 8 (2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Alan Beckett

Inspector

