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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/9** |
| * 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.
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| * By application dated 19 April 2018, The British Horse Society claimed that a route shown on the Definitive Map and Statement for Chichester, West Sussex as part of FP 157 should be shown thereon in part as a restricted byway and further that a route leading west from FP 157 to Ordnance Survey grid reference GR 496398, 102399 should be added to the definitive map and statement for the area as a bridleway.
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| * 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 appeal map. I therefore attach a copy.
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| **Summary of Decision: The appeal is allowed in part.** |
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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 and by Richard Hocking. I have considered all these documents in forming my conclusions.
4. The appeal concerns two 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 and B to C. The route A to B is an enclosed track on a broadly north / south alignment. The route B to C crosses open fields and is not represented by any feature on the ground today. I will refer to these routes as indicated and collectively as the appeal routes.

Main issues

1. The main issues in this case are 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 not recorded on the definitive map and statement, has the status of a public bridleway, 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 C, 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 the route A to B 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 route A to B as restricted byway. For such a finding to be made it would be necessary to conclude that the route has the historic status of a public vehicular highway and that the right to use the route with mechanically propelled vehicles has been extinguished by the effect of the Natural Environment and Rural Communities Act 2006 (NERC) s. 67.

**Reasons**

1. WSCC 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.
2. The Appellant’s basic premise is that the appeal routes provide a link to 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.
3. The Appellant has provided copious evidence to demonstrate that this area was inhabited from a very early age. I accept the evidence of the historic pattern of agrarian practices and the use of drove roads. This is helpful context, but I must be satisfied by the evidence as to the status and use of the Order routes on the specific alignment claimed and for purposes consistent with the status claimed. I am unable to accept the Appellants assertion that the evidence provided can properly be regarded as evidence of actual use of the Order route or use for particular purposes.
4. The evidence demonstrates clearly that the route A to B has existed as a significant physical feature since at least the late eighteenth century. It is universally represented as an enclosed track running south from point A on Main Road for approximately 550 metres to point B. The historical maps show that at point B the track turned a right-angle to the east continuing a short distance before terminating at a barn. This spur (which I shall refer to as ‘the spur’) is not part of the appeal route.
5. The route B to C is represented on some of the maps produced in evidence. Where it is shown it is depicted as a very different feature to A to B. It is usually shown as a single pecked or dotted line, suggestive of a footpath or possibly a bridleway, passing through a series of fields. At point C the route connects to Footpath 155.
6. The Order routes form a continuous way from point A to point C, but with a change in status at point B. For the Order to be confirmed the evidence must provide an explanation for this change in status, since otherwise the effect is to record A to B as a cul-de-sac for any right of way higher than recorded for B to C.
7. Although I am required to apply different tests to each section, I shall consider together the evidence for both routes and address subsequently the conclusions it is appropriate to take from the evidence.

*Historic maps*

1. The earliest of the historic maps produced in evidence is Yeakell and Gardner’s Map published between 1778 and 1783. The prospectus for this map claimed that it shows “every road, public and private, every bridleway and footpath…..’. The map shows the route A to B as a road or track enclosed by hedges. The spur is shown continuing east. The route A to B and the spur are shown in identical fashion and as a single continuous feature, giving the appearance of an occupation way providing access to adjoining land. No track or other routes are shown to connect to either A to B or the spur. Accordingly the route is shown as a cul-de-sac. A route resembling B to C is depicted as a feint dashed or dotted line. This route is not shown to connect to the appeal route at point B; instead it is shown running parallel and to the west of A to B terminating at Main Road just west of point A. It is interesting to note that the map shows a network of dotted lines which, in at least two other cases, are shown alongside and parallel to more significant routes. The reason for this is not apparent.
2. John Cary’s Map of 1794 depicts a continuous road running from Yapton to Felpham. The northern point of the depicted route would seem to be consistent with point A as it is directly opposite the road leading north past the church. The representation of a through route to Felpham commencing at point A is at odds with all other contemporary mapping such that it is difficult to reconcile what is shown and therefore to accord it any significant weight.
3. Gardner and Gream’s Map of Sussex was produced in 1795. It is of small scale (1” to 1 mile). It shows an opening from Main Road consistent with point A but there is no further representation of either A to B or B to C.
4. Greenwood’s Map of 1825 shows the route A to B in the same manner as Yeakell and Gardner as a cul-de-sac terminating at the barn. No connecting route is shown and there is no representation of a route consistent with B to C.
5. In discussing the private county maps the Appellant refers to judicial comment concerning the cost of these maps and that ‘there was no point in showing a road to a purchaser if he did not have the right to use it’. It is difficult to reconcile that comment with the plethora of cul-de-sac routes shown even on the small extract from Greenwood’s Map provided by the Appellant.

*Tithe map and apportionment for Yapton 1841*

1. The Yapton Tithe Map shows the route A to B and the spur as an enclosed road coloured sienna. It is named Tack Lee Lane and is listed in the apportionment under the heading ‘Roads Waste Water &C’. The inclusion of the route under this heading is not necessarily an indication of public vehicular status since the purpose of the process was to allocate tithe duty to qualifying parcels of land. A road, whether public or private, would not be subject to tithe unless it could support a crop.
2. The appeal route B to C is represented on the tithe map by a line drawn using double dots and a dash. The Appellant asserts that this notation represents a footpath or bridleway. I accept this is a possibility, but without a key it is not possible to place significant reliance on this, particularly as it was not the purpose of the map to identify public rights of way.

*Inclosure*

1. No inclosure award has been found for the parish of Yapton. The Appellant relies upon the plan attached to an 1867 Order of Exchange. On the plan the route A to B is shown coloured in the same manner as the main road through the village. The appeal route was not part of the exchange, and it was not the purpose of the deed to identify public rights of way. Whilst the representation of the route is consistent with other public roads, little weight can be attributed to this in assessing the status of the appeal routes.

*The Portsmouth and Arundel Canal Plan and Book of Reference 1815 - 17*

1. The evidence in relation to the creation of the Portsmouth and Arundel Canal (c.1815) 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 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.

*Inland Revenue – Finance Act 1910*

1. The Finance Act map shows all of Tack Lee Lane as a ‘white road’ being uncoloured and thus not subject to duty. The fact that the spur is included as part of the white road suggests that the lane was considered as a single cul-de-sac feature and not as part of a through route. A white road is consistent with public vehicular status but can also suggest a route used by a number of landowners to access adjoining lands.
2. B to C is not shown on the Finance Act map and I am not told that any deduction was made for a public right of way passing through the relevant hereditaments.

*Ordnance Survey (OS)*

1. The OS Draft (1805-06) and Old Series (1813) maps of Sussex show the Order route A to B and the spur, but do not show B to C. It is evidence of the existence of the physical features of the route A to B but cannot be relied upon to determine status.
2. The OS First Edition of the County Series (1876) is a very detailed map drawn to a scale of 25” to the mile. It depicts the Order route A to B and the spur as a single continuous feature described as a ‘road’ but without specifying whether public or private. B to C is not shown, although a route from B is shown on a different alignment and is annotated ‘FP’.
3. The Second Edition dated 1897 shows A to B and the spur, but also shows an extension of the route leading south from the eastern end of the spur. This extension terminates at a field entrance and the route has the appearance of an occupation road providing access to adjoining land.

*Parish and Estate Maps and other documentary evidence*

1. A map drawn by Wyatt shows A to B and the spur named as Tack Lee Lane (with the name extending into the spur). It possibly depicts a gate at B with a single dotted line shown broadly following the course of B to C to the extent of the map extract provided. The Appellant suggests that the fact that B to C passes through various landholdings ‘indicates that what is being portrayed is an unmade road rather than a footpath’. I do not agree that this is a reasonable interpretation of what the map shows or that any such inference can be drawn. The notation used to show the section of B to C is consistent with the standard representation of a footpath or possibly a bridleway, but not a vehicular route.
2. A map drawn by Thomas Gream (1791) does not show any part of the Order route. It is relied upon by the Appellant to demonstrate the capacity of the Weststone bridge, but that is not material since, if established, the Order route would feed into another route, Drove Lane (FP155), which led to the bridge. It is the status of Drove Lane rather than the order route which might be relevant to the capacity of the bridge.
3. Other documentary evidence is adduced by the Appellant concerning the nature of the land in the vicinity of Weststone bridge and mentioning Tacklea or South Street. I can attach very limited weight to this evidence as it is at best reputational and does not assist in understanding the nature and use of the Order route.
4. A plan from auction sales particulars of 1862 show Tack Lee Lane and the spur coloured sepia, apparently in the same manner as the main road through the village. I note however that the plan shows a track running south from the eastern end of the spur consistent with the route shown on the OS Second Edition of 1897. No other evidence has been produced to suggest this extension of Tack Lee Lane is a public right of way of any description and this must influence the weight that I can attach to the evidence. The fact that the particulars make no reference to the existence of an easement benefitting the land being sold is of little weight.

*1932 Rights of Way Act and Definitive Map records*

1. Under both the 1932 Act and the National Parks and Access to the Countryside Act 1949 A to B was claimed as a footpath. B to C was not claimed.
2. The inclusion of a short section of the Order route south from point A in the List of Streets as a Class E route, meaning a ‘link footway’, does not support the Appellant’s assertion that this is ‘good evidence that carriageway rights exist on the application route’.

Conclusions on historical and documentary evidence

1. The evidence establishes unequivocally that the feature known as Tack Lee Lane, comprising the track A to B and the spur, has existed since at least the late eighteenth century. A to B and the spur are consistently represented as a single continuous route.
2. The representation of a route between B and C is less consistent, but is sufficient to demonstrate, on a balance of probability, that a route of some description existed on this alignment from the late eighteenth century until the mid to late nineteenth century from which time a route on a different alignment has been shown.
3. 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.
4. For the appeal to be allowed in relation to the route B to C, which is not currently recorded on the definitive map and statement as a public right of way of any description, I must be satisfied that a public bridleway subsists, but the standard of proof can be either the balance of probability, or a reasonable allegation. The test for a reasonable allegation to arise is that there is some credible evidence in support and no conclusive evidence against the existence of the claimed right.
5. Because of the different tests that I must apply, and the differing status alleged, I shall deal separately with the routes A to B and B to C.

A to B

1. There is no single piece of evidence that is determinative of status of A to B. 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 Tack Lee Lane, or various corruptions thereof, and possibly as South Street.
2. As A to B and the spur were the only apparent means of access to the adjoining lands, 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.
3. On all the historic maps A to B and the spur are shown as a cul-de-sac route terminating at a barn or field entrance. The depiction of the route is generally consistent with the representation of other routes which are now regarded as public vehicular highways. There are however examples of other routes depicted in the same fashion, but which are not now regarded as having that status. It was not the function of any of these maps to differentiate between public and private ways.
4. The fact that the Portsmouth and Arundel Canal Book of Reference specifically described other routes as occupation roads, whilst not so describing A to B, does lend some weight to the Appellant’s assertion that the author considered the route a public road, but we cannot know on what basis that conclusion was reached.
5. I can place little reliance on the auction particulars of 1862, or upon a later Act of Exchange in 1867. In both cases the evidence relied upon is the absence of any formal 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. At the very highest this is only supportive evidence.
6. 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.
7. The Finance Act map shows A to B uncoloured and therefore not subject to duty. One explanation for this is that the route was considered to be a public highway, and possibly of vehicular status. An alternative explanation is that the route was used by the various owners of adjoining lands as a private access to their land but with no known owner of the track.
8. There is no individual piece of evidence in either direction upon which I can place sufficient weight to enable me to reach a conclusion on a balance of probability. 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. 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. One of the factors that I cannot ignore is that if A to B were to be confirmed as a restricted byway it would be a cul-de-sac for any permitted public use other than on foot. It is necessary for me to consider whether there is any evidence to provide a reason for the route to exist as a cul-de-sac.
9. Point B is, or was, the entrance to a privately owned field, possibly with a public footpath continuing from point B. It does not serve any place of public resort. The evidence shows that from point B Tack Lee Lane continued east along the spur only to terminate at another field opening. Accordingly if the route were a restricted byway from A to B, the right of the public, other than on foot, would be confined to travelling to point B, 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, such as evidence of public expenditure on maintenance.
10. 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, other than on foot, would have been by adjoining landowners for the purpose of accessing their landholdings. As 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.
11. In the absence of any other evidence to explain the existence of A to B as an historical cul-de-sac public vehicular highway, I conclude that the evidence is insufficient, on a balance of probabilities to establish that this section of the appeal route enjoys any higher status than that currently recorded as a footpath.

B to C

1. The route B to C is currently not recorded on the definitive map and statement as a public right of way of any description. A public footpath is recorded emanating from point B, but taking a different course to join Drove Lane (FP155) to the north of point C.
2. For this appeal to succeed the evidence must, as a minimum, give rise to a reasonable allegation that a public right of way subsists on the claimed alignment between points B and C. The test will be met if there is some credible evidence supporting the appeal, and no conclusive evidence to the contrary.
3. I accept that the representation of a route consistent with B to C on Yeakell and Gardner’s Map, the Wyatt map and on the Yapton Tithe Map represents some credible evidence to support the existence of a public right of way. There is no conclusive evidence to the contrary. On this basis I find that the reasonable allegation test is met. I have considered whether the route shown on these two maps is consistent with a bridleway, as the Appellant claims, or whether it is more likely to be a footpath. In the absence of a key to any of the relevant maps it is not possible to be certain what is represented. However, having regard to the conclusion that I have reached in relation to the status of A to B, and applying the same logic in relation to the creation of a cul-de-sac route, I conclude that it is reasonable to allege that it is a public footpath and not a bridleway.

*Summary and conclusions*

1. In relation to the route A to B I find that the evidence is insufficient to satisfy me, on a balance of probability, that it enjoys the status claimed, or any status greater than that currently recorded on the definitive map and statement as a public footpath.
2. In relation to the route B to C I find the evidence is sufficient to raise a reasonable allegation that the route subsists as a public footpath.

Conclusion

1. Having regard to these and all other matters raised in the written representations I conclude that in relation to the route A to B the appeal should be dismissed, but allowed in relation to the route B to C at the status of a public footpath.

**Formal Decision**

1. 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 Act to modify the definitive map and statement for the area by adding a Footpath between points B and C.
2. This decision is made without prejudice to any decision that may be issued by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.
3. The appeal in relation to the route A to B is dismissed.

Nigel Farthing

 **Inspector**