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| **Order Decision** |
| Site visit made on 20 June 2023 |
| **by C Beeby BA (BA Hons) MIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 20 July 2023** |

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| **Order Ref: ROW/3295505** |
| * The Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the East Sussex (Public Footpaths South Heighton 22a and South Heighton 22b) Definitive Map Modification Order 2021. |
| * The Order is dated 10 December 2021 and proposes to modify the Definitive Map and Statement for the area by the recording of two public footpaths as shown in the Order plan and described in the Order Schedule. |
| * There was one objection outstanding when the East Sussex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is not confirmed.** |
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**Preliminary Matters**

1. The applicant for the Order submitted documents with their statement of case. These were extracts from the plans and book of reference for the Newhaven and Seaford Water Board Lower Ouse Valley and Glynde Sewer. It is suggested on behalf of Network Rail, who submitted a written representation on the Order, that the sewerage documents should not be taken into account in this decision because it had not seen these documents and because it had not had a sufficient opportunity to examine the case in opposition due to the written representations procedure which was chosen to determine the Order.
2. Whilst I note these submissions, the sewerage documents comprised appendices to the applicant’s statement of case. The initial Notice of Order following submission of the Order to the Secretary of State set out that copies of any documents supporting statements of case could be viewed at the Council’s offices. This notice, and the subsequent statement which referred to and extracted the sewerage documents, were sent to parties including Network Rail within the standard timescales which would allow for review of the documents. Thus, there was a sufficient opportunity to view the appendices to the applicant’s statement of case so that I do not identify any prejudice to Network Rail’s position in this regard.
3. Submitted documents show points along the Order routes by different annotations from those used in the Order plan. For the avoidance of doubt, this decision refers solely to points shown on the Order plan, which depicts the northern termination of the routes (at Tarring Neville Footpath 1) as Point A, and their southern termination (at South Heighton Footpath 17a) as Point E. I therefore attach a copy of the Order plan.
4. Whilst the Order routes were not accessible at the time of my site visit, I was able to view the surrounding land from public vantage points, and I am satisfied that I can make my decision on this basis.

The Main Issue

1. The East Sussex County Council made the Definitive Map Modification Order (DMMO) under Section 53(2)(b) of the 1981 Act on the basis of events specified in sub-section 53(3)(c)(i) and 53(3)(c)(iii). As a result, the main issues are:

* Whether the discovery by the Council of evidence (when considered with all other evidence available) is sufficient to show that public footpaths which are not shown in the map and statement subsist over land in the area to which the map relates; and
* Whether any other particulars contained in the map and statement require modification.

1. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be reasonably alleged to subsist in order to make a DMMO, the standard of proof is higher for it to be confirmed. At this stage, evidence is required on the balance of probabilities that a claimed right of way subsists.

Reasons

***Background***

1. The Order seeks to record public footpaths across land adjacent to the railway, and over a level crossing across it, in the parish of South Heighton. A tramway formerly met the railway close to the crossing. This served the Heighton Cement Works. Documentary evidence is submitted in support of the Order.

***Documentary evidence***

*Brighton, Lewes and Hastings Act (1845)*

1. This Act authorised the creation of a railway between Southerham and Newhaven. Its deposited plan and book of reference did not record a public right of way over any part of the Order routes. The land parcels on both sides of the proposed railway were described as “pasture” with private owners and occupiers.

*Ordnance Survey (OS) 25 inch to the mile map, First Edition (undated)*

1. A path is marked by double dashed lines along the approximate Order routes.

*OS 6 inch to the mile map, First Edition (undated)*

1. A path is marked by double dashes along the approximate Order routes and is annotated “F.P.”.

*OS Map Sussex LXVII 6 inch to 1 mile (1879)*

1. A line appears along part of the Order routes, however it is not identifiable as a path on the copy available.

*OS Map Sussex LXXVIII 6 inch to 1 mile (1879)*

1. Any path is not identifiable on the copy available.

*Newhaven and Seaford Water Board Lower Ouse Valley and Glynde Sewer plans and book of reference (1898)*

1. These show a track along the full route of the approximate Order routes. Where it crosses the line of the proposed pipes the track may be annotated with the number 3. Land parcel number three is described in the book of reference as a public footpath, which is owned by a private individual. Other types of route recorded in the book of reference are public road, occupation road and private road.

*OS Map Sussex LXVII.15 25 inch to 1 mile (1899)*

1. A line appears along part of the Order routes, however it is not identifiable as a path on the copy available.

*OS Map Sussex LXXVII.3 25 inch to 1 mile (1899)*

1. The southernmost end of the Order routes appears between double lines and is annotated “F.P.”.

*Conveyance (1900)*

1. This concerns private rights of way and includes plans showing a track over part of section E-C of the Order route.

*OS 1:2500 Third Edition Map (1908)*

1. A path is marked by double dashes along the approximate Order routes and is annotated “F.P.”.

*Finance Act maps and field books (1910)*

1. Whilst a line corresponding approximately to part of the Order routes and marked “F.P.” is visible on the base mapping, the field books contain no deduction for rights of way for the land parcels crossed by the Order routes.

*OS Map Sussex LXVII.SE 6 inch to 1 mile (1911)*

1. A line annotated “F.P.” is visible along the centre of the Order routes.

*OS Map Sussex LXXVII.NE 6 inch to 1 mile (1911)*

1. The southernmost end of the Order routes appears between double dashed lines and is annotated “F.P.”.

*The London Brighton and South Coast Railway Act (1914) (the 1914 Act)*

1. The Act was promoted in order to carry out minor work to the railway which required legislation. It included provisions for the stopping up and diversion of public footpaths in the parishes of Newhaven, Piddinghoe and South Heighton. Separate provisions applied to private rights of way in the area. The powers in respect of public footpaths in the relevant area were not exercised. The plan shows the proposed stopping up of a section of footpath between approximately Points C and E of the Order route and of a nearby footpath along the riverbank. The creation of a new footpath including section C-B of the Order route over the crossing was proposed.
2. The railway line is marked with a number 6 close to section C-B of the Order route and is described in the book of reference as “railway and works, telegraph and telephone posts and wires and occupation crossing”.
3. The description of the land parcel crossed by the footpath between Order route points C and E is “rough pasture, footpath, stream, pond, riverbank and towpath (River Ouse)”. The owners or reputed owners of the land parcel include the parish council of South Heighton. Whilst the rural district council was the highway authority at that point, the applicant submits that it did not deal with footpaths, considering them to be the responsibility of parish councils.

*Letter from land agent to Mr Brown, District Engineer, Brighton Station (June 1921)*

1. This requests the keys to “the crossing by the cement works” so that cattle may be herded over it.

*Letter from railway company to Mr Brown (June 1921)*

1. This requests the removal of padlocks on the gates at “the crossing just north of the tramway to the Heighton Cement Works”. It states that “the arrangement is only to exist for a time, to enable the tenants of the land to cart hay across the railway”.

*OS Map Sussex LXVII.SE 6 inch to 1 mile (1933)*

1. A line along the central section of the Order routes is annotated “F.P.”.

*OS Map Sussex LXXVII.NE 6 inch to 1 mile (1933)*

1. The southernmost end of the Order routes appears between double dashed lines and is annotated “F.P.”.

*OS Third Edition Map (1939)*

1. A path is marked by double dashes along the approximate Order routes and annotated “F.P.”. Lines are present across the route on both sides of the crossing, potentially depicting the presence of gates.

*OS Map Sussex LXXVIII.3 25 inch to 1 mile (1940)*

1. The southernmost end of the Order routes appears between double dashed lines and is annotated “F.P.”.

*OS Map Sussex LXVII.15 25 inch to 1 mile (1943)*

1. A line appears along part of the Order routes, however it is not identifiable as a path on the copy available. It is submitted that it is annotated “F.P”.

*OS Map One inch map (1945-47)*

1. A route corresponding approximately to the Order routes is shown by single dashes.

*Parish survey map*

1. A route corresponding approximately to the Order routes is marked and annotated with the number one. Field gates are marked on both sides of its railway crossing.

*Parish survey notes (October 1951)*

1. This survey was carried out by the Ramblers’ Association and the resulting notes were endorsed by Mr Eldridge, who is recorded in the later 1956 hearing minutes as a member of the parish council. The notes for the path show that it ran between a boat house and the riverbank, that field gates existed at both sides of the railway crossing and that the landowners did not dispute the path’s existence. They record that the path had been used by the public for many years.

*Report on survey of footpaths (October 1951)*

1. These notes from a survey of the route appear to have been made on the same day as the parish survey. They state that the path is clearly defined to the railway crossing, and that it is well used. They do not record having encountered any obstructions at the railway line.

*Notes on Survey of Rights of Way, Tarring Neville parish, by land agent (1952)*

1. These generally concern paths in the adjacent parish and comment on routes shown in the survey as rights of way.

*Handwritten note (1953)*

1. This states “F2001/South Heighton: No reference to path No 1 in deposited railways maps Southerham Junc. To Newhaven. Archives ref. QDP/E2. 15/4/53”.

*Draft Definitive Map and Statement (1954)*

1. The Order routes were shown as a public footpath in the draft map and statement.

*Rights of Way sub-committee minutes (1955)*

1. An objection to the inclusion of the Order routes in the draft map was received from the British Railway Board. The relevant minutes record that the commission had stated at a subsequent hearing that gates on both sides of the railway crossing had been locked since before 1935. The minutes state that since the hearing it had been ascertained that the South Heighton Parish Council had claimed the path for inclusion in the draft map in error. It was recommended that the Order routes (“path South Heighton 1”) should be deleted from the draft map. The minutes later show that the recommendation was approved.

*Rights of Way sub-committee minutes (1956)*

1. An objection to the previous decision of the sub-committee to delete path South Heighton 1 from the draft map was subsequently received from South Heighton Parish Council. A further hearing was held in 1956 where the British Transport Commission stated that the crossing was constructed as an accommodation crossing only, and was provided because the new railway line severed lands in private ownership. It was additionally stated that, had there been a public footpath over the line, the company would have been obliged to provide stiles or small gates at each side of the crossing, however that none had been provided.
2. A representative of the South Heighton Parish Council and four other witnesses testified to the use of the alleged path for over 50 years at the hearing. However, all five people stated that throughout that period one or both of the railway crossing gates had always been locked. One of the witnesses thought that there must have been small swing gates beside each of the two railway field gates. Another user, who had used the path once or twice a week between 1912 and 1914 and again between the end of the First World War and 1925, stated that there had been no small gates but that battens had been fixed to each of the railway crossing gates and that these had enabled people to climb over the gate as if it were a stile. The parish council’s representative corroborated the presence of the battens and said that since he had become a member of the council in 1922 it had not received any complaints regarding the locking of the railway gates or the non-repair of the battens. Another witness with use over the periods 1896-1914 and 1920-1939 considered that battens may have been used.
3. A witness who was formerly employed on a local farm and used the path regularly between 1896-1916 was unable to recall any gates beside the crossing gates, or the presence of any battens. He recalled that his employer had had a key to open the railway gates when they wished to drive cattle through. A further witness stated that he had used the path three or four times a year since 1923 and had never seen any battens on the railway gates, which he had climbed over.
4. It was decided to maintain the previous determination that path South Heighton 1 should be deleted from the draft map. It was resolved that the recommendations in the report would be approved and adopted.

*Provisional Definitive Map (1957)*

1. The Order routes were not depicted as a public right of way.

*Definitive Map (1957)*

1. The Order routes were not depicted as a public right of way.

Reasoning

1. No public right of way was acknowledged over the Order routes in the 1845 plan and book of reference for the creation of the railway.
2. OS maps between at least 1899-1940 depict a path along the Order routes, which is annotated “F.P.”. By then such maps carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way. Whilst the routes are annotated “F.P.” on OS maps, apparently conflicting instructions issued by the OS at that time on the annotation of paths present a somewhat ambiguous picture of the approach taken in this regard. Thus, whilst the OS maps suggest the existence of a physical track along the approximate course of the Order routes, I attach only minimal weight to their annotation as “F.P.” favouring the existence of public rights. The route shown on the OS maps connects with a highway at both ends. Nevertheless, this does not automatically indicate the existence of public rights along it, and it is necessary to consider the evidence as a whole.
3. It is submitted in opposition that the 1914 Act documents formed part of the “deposited railway maps” referred to in the handwritten Council note of April 1953, and hence that the 1914 documents were examined as part of the process of producing the definitive map and statement. It is suggested that the use of the 1914 Act documents to support an order under section 53(3)(c) of the 1981 Act consequently does not amount to the discovery of new evidence in accordance with that section, and hence that the 1914 Act evidence is not admissible for consideration as part of this decision.
4. It is not possible, from the evidence before me, to establish which document is referred to in the 1953 note of a document checked during the drawing-up of the draft map. Nevertheless, the status of the Order routes was examined in the 1950s in the process of drawing up the definitive map and statement. The sub-committee minutes of 1955 refer to the 1845 railway documents, but not to the 1914 Act evidence. The matter came before the committee twice and was considered in some detail, with documentary evidence evidently having been relied on. However, the 1914 Act evidence is not referred to, although it is relevant to a consideration of the status of the routes and was relatively recent evidence which would have merited consideration during the 1950s process. On balance, therefore, it is most likely that the 1914 Act documents were not considered during the drawing-up of the definitive map and statement. Thus, they form evidence which has been discovered in accordance with section 53(3)(c) of the 1981 Act and which consequently falls for consideration in this decision.
5. The 1914 Act book of reference and deposited plans record three railway crossings in the parishes of Newhaven, Piddinghoe and South Heighton. The Newhaven crossing forms part of the riverbank public footpath proposed in the Act for diversion. The crossing was described in the book of reference as “footpath”, which was owned by the railway company or the urban district council. No occupiers were recorded.
6. The crossing in Piddinghoe parish was described in the book of reference as an “occupation crossing” and was annotated “to be stopped up” on the plan. Its owners were recorded in the book of reference as the railway company or His Majesty’s Postmaster General. Its occupiers were “Liquidators of Parsons Brothers, Limited, viz.:- Francis Octavius Grant, Thomas Parsons, John Charles Webber”.
7. The crossing in South Heighton parish, which carries the Order route, was described in the book of reference as an “occupation crossing”. Its owners were recorded as the railway company or His Majesty’s Postmaster General. Its occupiers were a cement company, George Benton and His Majesty’s Postmaster General.
8. The entry for the Newhaven crossing, carrying a public footpath, consequently differed from the entries for the other two crossings in three main ways. It was described as “footpath”, whereas the other two crossings were described as “occupation crossing”. The Newhaven crossing was considered to be owned by the urban district council, however the other two crossings were considered to be owned by the postal authority. Whilst the Newhaven crossing had no recorded occupiers, the other two crossings were occupied by a company, the postal authority and individuals.
9. A distinction in the 1914 Act documents between the recording of the Newhaven crossing and the crossings in Piddinghoe and South Heighton parishes is consequently evident. As it carried a public footpath, the Newhaven crossing was considered to be owned by the district council, whereas the two stated occupation crossings were considered to be owned by the postal authority, perhaps suggesting necessary access across the railway for it. No occupiers of the Newhaven crossing were recorded, presumably due to its status as public. However, occupiers of the two occupation crossings were a company, an organisation and individuals. Those two crossings consequently appear to have been subject to private rights of way whose holders were identified in the “occupiers” column.
10. The two occupation crossings (including the Order route crossing) are therefore less likely to have been considered to be available for public use, when compared to the representation of the public crossing in the book of reference. This accords with the 1956 objection of the railway company that the Order route crossing was constructed as an accommodation crossing only. Furthermore, as the implementation of the Act in this area would have resulted in the provision of one public crossing in the area of land to be acquired, in place of the existing public crossing and two occupation crossings, it is possible to understand why the scheme was pursued by the railway authority.
11. The 1914 Act sets out that public footpaths will be both stopped up and diverted, and that private rights of way will be stopped up only. The key to the 1914 Act plan shows section E-C of the Order route “to be stopped up” only, whereas the riverbank public footpath is “to be stopped up and diverted”. The key is therefore consistent with the existence of private rights over the Order route section and public rights over the riverbank footpath, according to the Act’s provisions.
12. Furthermore, the reference to parish council ownership in the book of reference entry for land parcel number three, which includes both of these routes, could refer to the riverbank footpath only. The plan depicts the proposed public level crossing between points C-B as “new footpath”, which would have been superfluous had public rights already existed over it. These considerations are also consistent with the existence of public rights over the section of riverbank public footpath, and private rights over section E-B of the Order route.
13. Conversely, the 1914 Act gave the railway company the power to divert, stop up and “cause to be discontinued” public footpaths over the land to be acquired. It did not confer the power to create new public rights on land which it already owned, which would have been necessary had the crossing been an occupation crossing only. It is submitted that the Act’s lack of provision in this regard weighs in favour of the pre-existence of public rights over the crossing, despite its apparent inconsistency with the plan showing a new public footpath across the railway.
14. Nevertheless, the crossing cannot have been subject to public rights in the absence of any public access to either side of it. I have identified above that the 1914 Act documents are consistent with the existence of private rights only over section E-C of the Order route, which adjoins the west side of the railway crossing. Furthermore, these documents record no public footpath through land parcel number five, to the east of the line. This parcel lies within the area proposed for acquisition and therefore it would have been necessary to deal with any public rights which existed through it. Nevertheless, it is described as “allotment gardens and railway siding” which are owned by two private individuals and occupied by the cement company. Whilst the approximate route of part of Section B-A of the Order route is shown as a physical track through parcel five, no public rights are recorded along it and consequently no existing public access is shown to the east side of the crossing. This further reduces the likelihood that the crossing was subject to public rights at the time.
15. It is submitted that it would not have been necessary for the 1914 Act to provide for the stopping up of any private rights over section E-C because any such rights would automatically accrue to the railway operator, who was buying the land. Nevertheless, the Act provides for “all private rights of way over any lands which shall under the powers of the Act be acquired compulsorily and over any footpaths authorised to be stopped up shall as from the date of such acquisition or stopping up be extinguished”. It therefore envisaged the need to stop up private rights of way over the land to be acquired, as indicated on the plan.
16. The 1914 Act documents would have been subject to public scrutiny and consultation. Precision would have been necessary in their preparation, as the land to be acquired would be compulsorily purchased and any compensations due as a result needed to be accurate. There is nothing before me to suggest that they were incorrect. Thus, in view of the above considerations, the 1914 Act evidence indicates the existence of private rights only over section B-E of the Order routes, and neither public nor private rights between section B-A. There may have been many reasons for the existence of a private right of way over the routes including, for example, access for land management purposes by adjacent owners and use by the postal service, as set out in the book of reference.
17. The annotation of the Order routes on the sewerage scheme documents is unclear and may or may not show the number three, described in the book of reference as a public footpath. There is no record before me of an objection to the scheme by the railway operator, apparently conflicting with its view of the Order routes and crossing as private within its own 1914 Act documents.
18. Nevertheless, even if land parcel three does relate to the section of Order route crossed by the proposed pipes, the documents do not acknowledge the existence of any public rights over the riverbank public footpath, which is marked on the plan to lie within the scheme’s limits of deviation and would consequently be affected by it. Public rights were acknowledged over the riverbank footpath in the 1914 Act evidence and, as the sewerage scheme was proposed in 1898 only a few years prior to that, were likely to have existed over it by 1898. A riverbank path also appears to be marked on the 1845 railway plan. However, no explanation for the lack of identification of the riverbank rights is before me.
19. Furthermore, the evidence of a number of people at the 1956 hearing was that locked gates had existed at the crossing over a period which coincided with the date of the sewerage documents. These would have been inconsistent with the existence of a public right of way. Finally, whilst the sewerage documents are relatively contemporaneous with the 1914 Act evidence, a conflict arises in the depiction of the Order routes as public in the former and private in the latter. Thus, the sewerage documents conflict with other evidence which attracts full weight as it underwent public scrutiny and consultation. This introduces doubt over their accuracy and, as a result, the sewerage documents provide only limited evidence in support of the existence of public rights over the section E-C.
20. The railway commission’s objection to the draft map stated that locked gates had existed on both sides of the crossing since “well before 1935”. This is supported by the evidence of five people, including a representative of the parish council, who stated at the 1956 hearing that “one or both of the railway crossing gates had always been locked” since the early years of the twentieth century. The consensus of those users was that it had been necessary to climb over the gates in order to cross the railway on foot, with one person who used the route for the twenty years prior to 1916 stating that their employer had had a key to open the gates when they wished to take cattle through. The 1921 letters requesting keys to the crossing and for the padlocks to be removed provide evidence that the gates were still locked at that point. The presence of locked gates is inconsistent with the existence of a public right of way over the crossing because it would physically prevent the use of the route as a footpath. The hearing evidence of some people that “battens” had facilitated the climbing of the gates at some points was contested by others, so that it is equivocal.
21. The 1956 hearing evidence and 1921 letters span the period prior and subsequent to the 1914 Act, and indicate that the railway crossing on the Order route had locked gates on both sides over several years during the early part of the twentieth century. Furthermore, the presence of field gates on both sides of the crossing is shown on the parish survey map and gates appear to be shown on the 1939 OS map. Whilst these two documents do not confirm whether the gates were locked, they support the witnesses’ recollection of their presence at the crossing.
22. The 1951 parish survey did not record the presence of locked gates at the crossing. Nevertheless, as the evidence of the British Transport Commission to the 1956 hearing was that “one or both of [the field gates at each side of the crossing] have been padlocked as long as can be remembered, a key being in the possession of the owner of the severed lands”, and users at the hearing recalled the presence of locked gates over a substantial period, the parish survey may have been carried out at a time when the gates were temporarily left open by the keyholder. This theory is made more likely in view of the fact that the parish survey and the separate Ramblers’ survey, which similarly did not record any locked gates at the crossing, appear to have been carried out on the same day, significantly limiting their extent.
23. Whilst the Ramblers’ survey of 1951 additionally states that the owner agreed that the path was public and that the path had been used by the public for many years, the source of this information is unclear and hence it is difficult to assess its likely accuracy. Furthermore, conflicting evidence to the hearings only a relatively short time later was that whilst some use of the route had been made, this was by climbing locked crossing gates during the first half of the twentieth century, and that the railway operator which owned the crossing objected to the depiction of the path as public. As a result, the 1951 surveys provide only limited evidence in support of the existence of public rights over the routes.
24. The land agent notes of 1952 concern paths in Tarring Neville parish rather than South Heighton and therefore their lack of objection to the inclusion of the Order routes in the draft map attracts no particular weight in support of the Order. Furthermore, whilst the removal of South Heighton Path No 1 from the provisional and then definitive map and statement left Tarring Neville Path No 1 as a cul-de-sac route, this may be explained by its termination on the survey map at a boat house, forming a potential point of interest.

**Conclusion**

1. The sewerage documents and the 1951 surveys provide limited evidence in support of the existence of a public footpath over the Order routes. However, those documents conflict with the 1914 Act evidence, which indicates the existence of private rights only between points E and B, and with the testimony heard at the rights of way sub-committee hearings and the 1921 letters indicating the presence of locked gates at the crossing between the early and middle years of the twentieth century. Whilst most of the OS maps show the existence on the ground of a route between highways, the OS evidence is relatively contemporaneous with the 1914 Act documents, the 1921 letters and the rights of way sub-committee minutes, which do not support the existence of public rights over the routes and which attract full weight. Furthermore, for the reasons set out above, I attach only minimal weight to the suggestion that the annotation “F.P.” on OS maps favours the existence of public rights over the Order routes in this case.
2. Thus, taken together, the limited evidence in support does not tip the balance of probabilities in favour of the confirmation of the Order. The discovery of evidence (when considered with all other evidence available) is consequently insufficient to show that public footpaths which are not shown in the map and statement subsist over land in the area to which the map relates, or that any other particulars contained in the map and statement require modification.
3. Having regard to these and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order.

*C Beeby*

INSPECTOR

ORDER MAP - NOT TO SCALE

