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| **Appeal Decision** |
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| **by Susan Doran BA Hons MIPROW** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 20 December 2024** |

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| **Appeal Ref: ROW/3338772** |
| * 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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| * The Application dated 5 March 2019 was refused by West Sussex County Council on 17 January 2024.
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| * The Appellant claims that the appeal route Footpath 2540 (part) from its western extremity easterly along Furners Lane to where it leaves Furners Lane should be upgraded to a Restricted Byway, and from there along Furners Lane to its eastern extremity at Blackstone should be added to the definitive map and statement for the area as a Restricted Byway.
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| **Summary of Decision: The appeal is allowed insofar as the recording of a Bridleway** |
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Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under section 53(5) and Paragraph 4(1) of schedule 14 of the Wildlife and Countryside Act 1981 (‘the 1981 Act’).
2. I have not visited the site, but I am satisfied I can make my decision without the need to do so.
3. The appeal concerns an application made on behalf of the British Horse Society (‘the Appellant’). In reaching my decision I have taken account of submissions from the main parties, and from interested parties where relevant.

Main issues

1. The application was made under section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement (‘DMS’) under continuous review, and to modify them upon the occurrence of specific events cited in section 53(3).
2. Section 53(3)(c)(i) of the 1981 Act specifies that an order should be made on the discovery of evidence which, when considered with all other relevant evidence available, 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, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A a byway open to all traffic.
3. As made clear in the High Court in the case of *Norton and Bagshaw* (R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994]),this involves two tests:

 **Test A.** Does a right of way subsist on a balance of probabilities?

 **Test B.** Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

1. In relation to Test B, the Court of Appeal recognised in the Emery case (*R v Secretary of State for Wales ex parte Emery* [1998]) that there may be instances where conflicting evidence was presented at the schedule 14 stage. Roche LJ held that *"…The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry."*
2. As regards the appeal route, this section applies to the length between its eastern end at Blackstone then west towards the point where Footpath 2540 joins Furners Lane, which is not currently recorded in the DMS.
3. Section 53(3)(c)(ii) of the 1981 Act specifies that an order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description. As regards the appeal route, this applies to that length between its western end, where it leaves the adopted highway and heads east along Footpath 2540 to the point where the footpath leaves Furners Lane.
4. The evidence adduced is documentary. Section 32 of the Highways Act 1980 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 a way has been dedicated as a highway.
5. The grounds of appeal are as follows:
* West Sussex County Council (‘the Council’) attaches less weight to historic documents that were, or may have been, inspected for a previous application made in the 1980s. There is no legal basis for this approach.
* The Council defines ‘Occupation Road’ to mean a ‘private road’ throughout its assessment, it being a term normally used to describe a road laid out for the benefit of occupiers and adjoining properties, and not a public highway. No source for this definition has been given nor has it been substantiated. The Council’s decision hinges on the road being for private use only.
* The Council appears to have ignored evidence submitted in the application, specifically an analysis of the list of ‘Occupation Roads’ in the Henfield Tithe Apportionment Book. Many of those listed are more likely than not to have been public vehicular roads then, as they are today.
* The Council interprets guidance about annotations ‘from’ and ‘to’ a named settlement where an application route crosses a parish boundary as only applying when determining the status of a road labelled as such in the apportionments. This is questionable.
* A ‘negative slant’ has been placed on the interpretation of most of the evidence.
* Several pieces of evidence are dismissed as not being ‘conclusive’ of the lane being a byway. However, it is the combination of the evidence, as a whole, and on the balance of probability that is required (see *Todd & Bradley v SSEFRA* [2004] and *Fortune v Wiltshire Council* [2012]).
* The western end of Furners Lane has been treated as if it is a completely separate road rather than part of the same lane. The Council’s report does not explain how one end is a public vehicular road, but the remainder did not become dedicated to the public at a higher status than footpath when it led from the east to the market town of Henfield, and from both ends to the cattle market, a place of common resort in rural communities.

**Reasons**

1. The appeal route forms part of a longer route between Henfield and Blackstone. It commences from its western end at an adopted road, continues eastwards as Footpath 2540 crossing the parish boundary between Henfield and Woodmancote, to where the footpath leaves the lane, then continues along the lane to its termination at Blackstone Lane. From its western end to roughly midway along its length (where it is crossed by a north-south public right of way) it has a tarmacadam surface and from there to its easterly termination a grassed surface.
2. The Appellant seeks that it be recorded as a restricted byway. The Council acknowledges that in the event the evidence supports the existence of public vehicular rights, they will have been extinguished under the provisions of section 67 of the Natural Environment and Rural Communities Act 2006, since none of the exemptions therein apply.

***Documentary evidence***

1. A range of sources were examined. I refer below to those which show and or describe the appeal route.

*County Maps*

1. It is depicted as a physical feature in its entirety (together with the western section that is now adopted) in Yeakell and Gardner’s 1780 Map of Sussex, linking settlements, and with connections at either end to turnpike roads. There is no key to the map to indicate status.
2. It is similarly shown in Gardner and Gream’s 1785 Map in like manner with other known highways. Again, there is no key accompanying the map, though it is noted that some routes shown end at properties or fields suggesting these were private. It appears in like manner in Mudge’s 1793 Map of Sussex.
3. Greenwood and Greenwood’s Map of 1825 shows the appeal route as a ‘crossroad’ linking Henfield and Blackstone. The Appellant comments that such maps were sold to the travelling public so were likely to show routes the public could use, with many corresponding to main and minor roads in use today.

*Ordnance Survey Records*

1. The First Edition one-inch Ordnance Survey (‘OS’) map of 1813 depicts the appeal route consistently as a through route connecting Henfield and Blackstone having the appearance of a road, open at either end. The same is true for the 1895 one-inch map. The key indicates it is a ‘third class metalled road’, suggesting it was available for use by vehicles. Instructions to surveyors at the time indicated private roads were distinguished by a solid line where they met main roads. Since the appeal route is depicted open to the connecting roads, the Appellant contends this is indicative of it being a public road.
2. On the 1879, 1899, 1912 and 1952 OS six-inch maps the appeal route is depicted generally consistently. A footpath notation appears alongside much of it and a solid line at its eastern end suggests a gate or barrier.
3. Three First Edition 25-inch OS map extracts (1874) show the appeal route, all numbering the feature. The corresponding Books of Reference (1875) record these parcels as ‘Road’. It appears in the same manner as other roads depicted, although private and public ways are not distinguished. Some maps (for example the 1897 25-inch map) show the way diverging at its eastern end with tracks heading northwards before joining together. This, coupled with the solid line where the appeal route meets Blackstone Lane, is argued by an interested party as indicative of an occupation road. Whilst no legal order has been found that changes the alignment, later maps are consistent with earlier mapping showing the appeal route also or solely following a direct line at this point.
4. The 1871 OS Boundary Remark Book annotates the appeal route as ‘Furners Lane’ where it is crossed by the Parish boundary, which the Appellant says suggests it was more significant than a footpath. Conversely, it is suggested the name relates to Furners Farm, located midway along the appeal route and, together with the gate at its eastern end is consistent with an occupation road. Further, there is no shading on the southern boundary of the appeal route suggesting the OS surveyors did not consider it to be publicly maintainable.
5. The 1896 Object Names Book describes Furners Lane as an ‘occupation Lane’, indicating it ended (from the east) at a point where the appeal route is crossed today by a north-south footpath. It was not until 1905 that instructions to OS Field Examiners explain the term ‘Occupation Road’ as being a private right of way.

*Tithe records*

1. The Henfield Tithe Map (1845) records a parcel number for the appeal route which the Apportionment (1844) lists as part of ‘West end lane’ under the heading ‘Occupation Roads’. The Map annotates it ‘To Woodmancote’ at the Parish boundary. The Appellant considers the Occupation Roads listed describe roads that are not privately owned with many being public highways today. Accordingly, they are likely to have enjoyed public rights when the tithe records were drawn up, and by their depiction these were likely to have been vehicular. They regard the term ‘Occupation Road’ as ‘neutral’, there being no ‘proper and universal definition’ for the term. They calculate that 30% of the roads listed under that heading in the Apportionment are tarmacadamed public roads today and in all likelihood were public roads when the tithe records were compiled.
2. An interested party comments the term ‘occupation road’ is a long standing one pre-dating these records and normally used to describe a road laid out for the benefit of the occupiers of adjoining properties, not a public highway. They note the Apportionment lists two turnpike roads and six parish roads, so if the appeal route had been one of the latter it would have been listed under that heading.
3. The Woodmancote Tithe Map (1840) shows the continuation of the appeal route coloured with no apportionment number, the key to the map indicating ‘Roads’. Accordingly, no tithe was payable in relation to the appeal route in this parish. In addition, it is annotated ‘To Henfield’. An amendment to the Tithe Apportionment in 1922 shows part of the appeal route coloured yellow with annotations ‘To Henfield’ and ‘To Blackstone’.

*Finance Act records 1910*

1. The appeal route is uncoloured and excluded from land parcels or hereditaments throughout its length, suggesting it enjoyed public rights. It is generally accepted that these are likely to be vehicular rights. On the other hand, the Council considered it may represent private rights for the use of multiple owners where ownership was not assigned. None of the adjoining hereditaments refer to it.

*Rights of Way Survey and Definitive Map records*

1. A Rights of Way Survey map (1932) compiled by the parish councils represents the appeal route by a dotted line, annotated at either end with the letters ‘DR’ or ‘Drift Road’. This is understood to mean a way over which cattle can be driven, a right that can be encompassed within a bridleway, though the Council did not consider this meant the route was public.
2. The Map prepared under the 1932 Act shows sections of the appeal route coloured brown, with uncoloured sections having a thin brown line marked to its north, or simply uncoloured with no corresponding brown line. There is no key and all routes shown are coloured in the same manner, including those known to be bridleways or restricted byways today. The routes shown are numbered.
3. As regards the compilation of the DMS, records are limited. Parish Council minutes indicate maps on which to record “footpaths” were provided to the parishes by Chanctonbury Rural District Council. Henfield claimed the appeal route within their parish as a “Road Used as a Public Path” (a highway other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are used), whilst Woodmancote claimed it as a “Footpath”. Subsequently, the parishes agreed to proceed with a footpath, and this is how the First Definitive Map for Chanctonbury (1952) records the appeal route.

*Other Highway Authority Records*

1. A Highways Surveyor’s ‘Parish Highways Classification and Report’ (1890) lists Furners Lane in Henfield Parish, though not in Woodmancote, classifying it as a ‘Fifth Class Road’ in fair condition with 95 yards at its extreme western end maintained by the County. This, the Appellant maintains, indicates it was regarded as a public highway or road in Henfield, maintained by the Parish other than for a short length at its western end where maintenance fell to the Council. It is not clear whether the whole of Furners Lane in Henfield was under consideration, or just the western end which was maintained by the County Council. Given the explanation of how the classification was reached, including being based on the amount of through traffic, it would seem logical that it included the appeal route. However, the Council says the accompanying map does not show it as a road.
2. A 1915 Highway Surveyors Map depicts the appeal route by a black line, although there is no indication on the map what this represented. Nevertheless, it links to classified highways depicted on the map and, the Appellant argues, appears to form part of the highway network. Most of the black lines shown correspond with ways that are ‘lesser roads’ on OS maps today.
3. A letter written in 1962 from the Council’s Divisional Surveyor to the Brighton and District Motorcycle Club, states that “Furners Lane is a bridleway only, from a point 0.16 miles east of Henfield High Street”. The Council considers an error was made in describing it as a bridleway, whilst the Appellant considers it supports evidence from the 1932 records, and reflects the rights considered to exist.

*Other records*

1. The Appellant believes a road from Henfield to Hurstpierpoint described in a document dated 1469, followed the modern Furners Lane, suggesting the appeal route is an ancient highway. There is no plan to confirm its alignment.
2. Archaeological reports refer to ‘a medieval road’ which may have earlier origins and which the Appellant believes is Furners Lane. In addition, they consider the appeal route has the characteristics of a ‘hollow way’ for much of its length.
3. A range of documents dating between 1668 and 1922, including mortgages, indentures, conveyances, deeds, and agreements describe land that can be identified as abutting either side of the appeal route towards its western end. It is referred to as a ‘lane’ or ‘highway’. There are some references to maintenance and to the conveyance of access rights insofar as there are powers to grant them, which the Council considers suggest a private way.
4. Wantley Estate Map (1810) concerns land at the western end of the appeal route and abutting it to the north. The appeal route connects with the Henfield Turnpike Road at its western end, is annotated ‘to Blackstone’ at its eastern end and is uncoloured, as is the main road.
5. An Estate Plan of Bilsbury, Park and Woodhouse (1817) shows fields abutting part of the appeal route on its northern side. It is coloured brown and annotated ‘Blackstone Lane’ and ‘From Henfield’ to the west and ‘To Blackstone’ to the east, suggesting a through route.
6. Bartholomew’s 1902 map shows it as a ‘Good’ secondary road, represented by a broken orange line throughout. The map (based on OS mapping) carries a disclaimer that the representation of roads and footpaths is no evidence of a right of way. Later editions (1922 and 1944) depict it as a ‘Bridleway or Footpath’. These maps were produced for sale to tourists and cyclists. The Appellant comments that in 1902 cyclists had no right to use bridleways.
7. Sales particulars for Blackstone Farm (1919) show the eastern end of the appeal route coloured brown in the same manner as other routes shown on the map which are roads today, albeit the sale did not relate to land abutting it.
8. Sales particulars for Woodhouse Farm (1939) concern land abutting the appeal route. Reference is made to the farm being accessed over land belonging to adjoining landowners until such time as Furners Lane is *“made up and taken over by the local authority as a public highway for heavy traffic”*. The lane is excluded from the sale land.
9. Sales particulars for Blackstone Grange (1961) show land abutting, but the appeal route is excluded from the sale. The plan uses an OS base map which shows the eastern end of the appeal route has a gate or barrier across it.
10. An application based on user evidence to record Furners Lane as a bridleway was submitted by the Mid Sussex Bridleway Group in 1984 and determined by the Council in 1991. A subsequent appeal was dismissed by the Secretary of State in 1993. None of the documents sent with the application are available. However, a copy of the Committee Report records the recommendation not to make an order was upheld. An appeal against the decision failed, it being determined there was insufficient evidence for an order to be made. However, the Appellant comments that as no-one owned the lane (with one small exception) there was no-one with the capacity to dedicate or to demonstrate a lack of intention to dedicate it.
11. Modern land ownership records show most of the appeal route is unregistered apart from a small section to the east of Bilsborough Barn, approximately mid-way along it, and at Blackstone Farm at the eastern end. A 1949 conveyance concerns a plot of land in the ownership of Chanctonbury Rural District Council.
12. In the absence of other known landowners, it may be inferred that adjoining landowners own the appeal route to the centre line. It provides access to several residences, farm cottages and fields along its route. Currently several adjoining residents claim ownership, and some contribute to the private maintenance of the appeal route between its western end and Bilsborough Barn, at their own expense.

***Discovery of evidence***

1. The Council maintains some of the evidence adduced has been considered before, but acknowledges several County and other small-scale maps, some OS mapping, the Finance Act map, some Highways records, and sales, conveyance, mortgages, and estate plans, and archaeological surveys are new evidence. They also consulted additional OS mapping and the Finance Act 1910 Field Book.
2. Accordingly, I consider that there has been a ‘discovery of evidence’ sufficient to satisfy the requirement set out in section 53(3)(c) of the 1981 Act. I also note that the previous application was a user-based claim, for which the Council conducted limited additional research of the historical record.
3. However, I do not share the Council’s view that “slightly less weight” should be given to evidence previously considered when the earlier application concerning the appeal route was made to them. No indication of what the Council means by this is apparent in terms of the documentary sources examined. Whilst I take the view that it is not appropriate to just re-examine the same evidence that was previously available and considered when either the DMS was drawn up or when the earlier application was made, in this case new evidence has been discovered. It follows that the new evidence should be considered in the context of the previous evidence. However, there must be some new evidence which in combination with the previous evidence justifies a modification. It is the totality of the evidence, that newly discovered together with evidence previously known, that is to be weighed in the balance and I consider appropriate weight should be accorded to all the evidence.

***Analysis***

1. Few documents are conclusive or determinative as to the existence and status of public rights. The examination of each document together with the synergy between documents, even if individually of limited weight, adds to their collective weight. Once the evidence has been assessed, then a comparative assessment of the evidence can be made.
2. The appeal route’s origins may be medieval and therefore of some antiquity. Some early mortgages and conveyances (1689 -1747) describe land abutting the appeal route and describe it as a highway, which suggests a public route, although such documents were produced for private rather than public purposes.
3. The County maps (1780 onwards) are consistent in depicting it as a through route connecting two settlements, linking known public highways, appearing to be a significant route, as acknowledged by the Council, and suggestive of it too being a public highway of some sort. Only the Greenwood and Greenwood Map (1825) has a key which identifies the appeal route as a crossroad. In addition, these maps were produced for sale so it is arguable that purchasers would have expected to be able to travel along such routes shown.
4. The depiction of the appeal route is consistent in OS mapping, although some maps show a feature likely to be a gate at its eastern end and some potential variation in alignment where it meets the road there. In almost all instances though a direct alignment consistent with the appeal route is shown up to the road. The presence of a gate does not necessarily indicate the route was private. OS mapping latterly carried a disclaimer as regards public rights and this is presumed to apply also to earlier mapping, therefore this evidence is of greater assistance as regards the route’s features and alignment than of its status.
5. The Tithe records are inconsistent. For Woodmancote parish the appeal route is coloured in the same way as other known roads, which may indicate a public status. Yet for Henfield it is listed as an occupation road, a term which I agree with the Council and an interested party is usually indicative of a route for the use and benefit of owners and occupiers to access their land. Nevertheless, this would not rule out the possible existence of public footpath or bridleway rights. Both Tithe maps annotate the appeal route to and from destinations at either end, a practice commonly used where routes are public and therefore suggestive of public rights.
6. The 1890 Highways Survey records the western end of Furners Lane which is maintainable at public expense. On the submissions made, the circumstances of the remainder of the appeal route in Henfield are less clear.
7. Later OS mapping indicates a metalled or unmetalled road, and it is described in documentation as both a road (1874) and its western end an occupation road (1896). Bartholomew’s map (1902) indicates a good secondary road for cyclists. However, such maps carry a disclaimer as regards public rights.
8. The Finance Act records show the appeal route uncoloured and excluded from adjacent land which is suggestive of at least vehicular rights. It can be the case that use was private for those accessing the land where no owner was assigned. Mortgages, conveyances and indentures post-dating 1910 indicate the appeal route was private, although the inclusion of private rights could reflect caution on behalf of the conveyancer. In one instance some maintenance of part of the appeal route was made the responsibility of an adjoining landowner.
9. The 1932 survey recorded it as a Drift Road. It would have been unusual for this survey conducted under the Rights of Way Act to have shown the appeal route if it was not considered public. Claimed as a RUPP in one Parish and as a Footpath in the other it seems it was by agreement it be added to the DMS as a footpath. There is nothing to indicate this status was challenged. The 1962 correspondence from the County Surveyor refers to it as a ‘Bridleway’, which I consider reflects those rights officers considered it to have at the time, rather than an error.
10. The references to occupation road in some of the documentary sources is not inconsistent with the existence of public rights, neither is a drift road which, whilst primarily for the movement of animals, can be encompassed within a public bridleway right.
11. The sources are conflicting. I consider the available evidence is insufficient to allege the existence of public vehicular rights over the appeal route or that it ought to be upgraded to a restricted byway, albeit the western end connects with a short length of public road. However, I find there is sufficient evidence to reasonably allege public bridleway rights over the eastern section of the appeal route where no public rights are currently recorded. I also find the balance tips such that, together with my conclusions as regards the eastern part of the appeal route, the western section ought to be upgraded from a footpath to a bridleway.

**Other matters**

1. Submissions made by interested parties included the suitability and safety of the appeal route for use by horse riders, cyclists, and vehicles. These are not matters that can be taken into account in determining the appeal under the 1981 Act.

**Conclusion**

1. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed insofar as the recording of a bridleway over the appeal route.

Formal Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the West Sussex County Council is directed to make an order under Section 53(2) and Schedule 15 of the 1981 Act within 3 months of the date of this decision to modify the West Sussex County Council Definitive Map and Statement by adding a Bridleway as shown on the plan attached to the application dated 5 March 2019. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

S Doran

**Inspector**