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| **Order Decision** |
| Site visit undertaken on 22 April 2025 |
| **by A Behn Dip MS MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 08 May 2025** |

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| **Order Ref: ROW/3337609** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the West Sussex County Council (Cuckfield Rural – No.2 (Ardingly Addition of a Footpath)) Definitive Map Modification Order 2023. |
| * The Order is dated 7 September 2023 and proposes to modify the Definitive Map and Statement (DMS) for the area by adding a public footpath as shown on the Order plan and described in the Order Schedule. |
| * There were three objections outstanding when West Sussex County Council (the 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. In October 2021, an application to add a footpath in the parish of Ardingly, to the Definitive Map and Statement (DMS) for the area, was made by the Open Spaces Society (OSS). The claimed footpath runs in a generally southerly direction, from the southern end of public footpath FP 11Ar, under the railway bridge, to a connecting public footpath FP 25 Ar, close to Stone Barn Cottages and Burstye Farm. In 2023, after due investigation, the Council resolved to make an Order. Following advertisement of the Order, three objections were received.
2. The Council noted that an error was made on the Order Schedule, wherein it refers to the modification of the Worthing DMS, rather than the Cuckfield Rural DMS. I do not consider there to be any likelihood of this causing the Order to be misinterpreted and should I be minded to confirm the Order, I will modify it accordingly.
3. I made an unaccompanied site visit on 22 April 2025 when I was able to walk and view the entirety of the Order route, albeit there was wire fencing at the railway bridge preventing access to that point.

The Main Issues

1. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the occurrence of an event specified in sub-section 53(3)(c)(i) of that Act. Accordingly, the main issue is whether the evidence discovered, when considered with all other evidence available, is sufficient to show that a public right of way not shown on the definitive map and statement, subsists over land to which the map relates.
2. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be reasonably alleged to subsist to make a Modification Order, the standard of proof is higher for it to be confirmed. At this stage, the evidence is required to show, on the balance of probabilities, that a right of way subsists.
3. The evidence in support of this case relies solely on historical research, documents and maps. As regards the documentary evidence adduced, 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 provided as evidence, giving it such weight as is appropriate, before determining whether a way has been dedicated as a highway.

Reasoning

*Tithe Map 1841*

1. A faint single dashed line can be seen on the map approximating to the claimed route. There are several such lines circuiting plots of land and without a key it is difficult to deduce their meaning. Whilst the map is good evidence of the existence of the claimed route at that time, it’s primary purpose was identifying titheable land, not ascertaining the public rights of any route.

*Ordnance Survey (OS) Mapping*

1. Various OS mapping was submitted dating from 1874 to 1963. The First Edition OS Map of 1874 depicts the claimed footpath with double dashed lines. Although the railway line has not been built at the time of this map, the northern continuation of the route in the form of FP11Ar is shown, as is a route branching to the west from the claimed route near to a stream. The claimed path is then shown on all future OS maps, for the most part depicted in a similar manner. On the 1956 OS map the claimed route is denoted ‘TK’ and the OS map published in 1959 depicts the Order route by a single dashed line, annotated ‘FP’. The single dashed line is repeated on the 1963 map, however this time the annotation has reverted to ‘TK’.
2. The OSS felt that inclusion on OS maps can be useful in determining the status of a route, and referred to the OS instructions to Field Examiners where they advised that a clearly marked track on the ground is not in itself sufficient to justify showing a path unless it is in obvious use by the public. Whilst I accept this reference, the Order route is depicted on the OS maps mostly as a track rather than a footpath and as pointed out by Burstye Farm, various tracks can be seen marked on the OS maps but such depiction does not mean that they necessarily hold public rights. I note that one OS map from the 1950’s notates the route as a footpath before reverting back to a notation for a track on a subsequent map. I consider that this ties in with the outcome of the Definitive Map process discussed later.
3. Whilst I agree with the OSS that OS maps can be useful when considered alongside other evidence, they hold little weight on their own. As pointed out by Bluebell Railway and Burstye Farm the OS maps are not evidence of the status of any road, track or path shown, with Burstye Farm drawing attention to various caselaw to support their interpretation.

*Railway records and Book of Reference 1877*

1. Railway records can be considered good evidence of what they portray as the documents would have been publicised, requiring the records to be accurate.
2. Dating back to 1877, the records relate to the main line from East Grinstead to its junction with the Lewes to Uckfield line. Branch line 3 turned off at Horsted Keynes to meet the London to Brighton main line and it is this branch that intersects the claimed route.
3. To the north of the railway line the continuation of the track that is currently recorded as FP 11Ar is depicted by double dashed lines. The dashed lines continue southwards across the proposed railway plan, forming the northern section of the Order route and pass through land parcels 44 and 45 on the plan. A route branching west from the Order route by a stream is depicted, similarly to the 1874 OS map. The Book of Reference describes parcel 44 as containing a field and a footpath and parcel 45 as containing a field, stream, occupation road and footpath.
4. The OSS were of the view that the footpath mentioned in the Book of Reference referred to the claimed route as only parcels 44 and 45 had footpaths referenced. They considered that the occupation road was a route further to the east as both parcels 45 and 49 referenced an occupation road.
5. It was the view of Burstye Farm and Bluebell Railway that the documents provided evidence that the route was an occupation road but did not indicate that the Order route was a footpath at the time of the railway construction. Both land parcels were shown as being in private ownership by the same person and that person would have needed access under the railway to reach their land on the northern side. Albeit the records showed that the Order route was under private ownership rather than the ownership of the Surveyor of Highways, I do accept the OSS contention that it would appear that very few public rights of way in the area were accorded to the Surveyor of Highways.
6. In consideration of these records, I concur with the Council that whilst it is possible that the footpath mentioned in the Book of Reference could be attributable to the Order route, this cannot be determined with any great degree of confidence as it is not notated on the map and there are other routes depicted on the railway map that could also represent the footpath.

*Conveyance of land from Lt. Col. Sampson to the Railway Company 1883*

1. The plan accompanying the conveyance documents shows the claimed route and the parcel of land is described as ‘Field, stream, Occupation road and footpath,’ corresponding with the earlier railway plans. An occupation bridge under the railway is referred to, with the plan notating its location at point C, which is where the claimed route passes under the railway.
2. While Bluebell Railway and Burstye Farm considered that ‘occupation bridge’ indicated its construction was for the benefit of the landowner only, the Council pointed out that the conveyance was dealing with the sale of private property and albeit a private right existed, this did not mean that there might not also have been public footpath rights across it, as a footpath was mentioned within the land parcel. Albeit I agree that this could be the case, only an occupation bridge is specifically recorded as being at that location, not a footpath. Whilst a footpath is mentioned on the land parcel, its location and whether it held any public status is unclear. Further, the purpose of the conveyance was for sale of land, not for ascertaining public rights and so holds very little weight.

*Finance Act 1910 Maps and Field Books*

1. The maps depict the Order route as falling within hereditament 36. The Field Book for hereditament 36 notates *‘Bridle way + 2 footpaths claimed by the public’,* with a deduction of £50 claimed under *‘Public Rights of Way or User’*.
2. Although the records did not specify where in the hereditament the bridleway and footpaths were situated, the OSS felt that the three rights of way claimed referred to two current public footpaths, FP 25 Ar, and FP 17Ar, with the third being the claimed route (and its northern extension FP 11Ar). It was the view of the OSS that after the arrival of the railway, which preceded these records, there was no further mapping evidence that would suggest that there were any other routes shown to which these records could be attributed.
3. Burstye Farm noted that the Field Book stated the Bridleway and Footpaths were ‘claimed by the public’ and also that the deduction appeared to be for ‘BR + path,’ not paths. It was the OSS view that ‘path’ was meant in plural terms for the deduction made, and there is an entry of £25 next to the £50 on the valuation which would suggest that this could be the case.
4. Whilst Bluebell Railway suggested that the rights recorded in the Field Book were rights of user, the OSS and the Council pointed out that public rights of user were rights to use land which was not a public right of way, such as allotments, and was generally applied to an area of land, rather than a route.
5. I concur with the view of the Council on the interpretation of these records. They agreed that the inference of the OSS as to where the referenced rights of way were located was a possibility, but felt that it was not certain that the claimed footpath was one of the routes deducted for, as the maps were not annotated.

*Council, Parish and Definitive Map Records*

1. A document by Ardingly Parish Council from 1929 was submitted as part of the evidence. The document appears to be in the format of a public notice, which stated *‘The following List of the Chief footpaths in Ardingly has been adopted by the Ardingly Parish Council as a record of Rights of Way for Foot Passengers.’* The list includes a footpath that the OSS suggest is the claimed route, as while there is no accompanying map, the footpath is listed as being crossed by other footpaths that have the same numbers as adopted during the Definitive Map process. The Council also believed this was the claimed route, which was numbered 11, and described as *Upper Lodge Carriageway. Turn into fields on the left …. ‘leads to Burstye crossed by numbers, 14,19, 22 and 23’.* It was noted by Burstye Farm that not all of the routes on this list made it onto the Definitive Map, however it is clear that the Parish Council considered this route was a public footpath at that time.
2. In addition to the 1929 document, other parish records between 1929-1942 appeared to reference the claimed path discussing maintenance for a footpath leading to Burstye, requiring a hedge to be trimmed and the installation of a finger post.
3. Minutes from 1954 relating to the creation of the first definitive map contained notes relating to the claimed route. The comments referred to the Draft Map showing a public footpath from Stone Barn Cottages, heading under the railway line to join another footpath. The minutes recorded that the landowner north of the railway bridge admitted to a public footpath, however the railway deposited plans from 1877 did not indicate the existence of any public right of way. The Railway Company had objected to the inclusion of the claimed footpath, contending that it would have been ultra vires for them to have dedicated a public footpath under the bridge, as doing so would have prevented them from infilling the bridge should the land either side of the bridge have become separately owned in the future.
4. Further comments stated that although the path was shown on the 1935 Draft Map, it was disputed. Mention was made of a gate across the route under the railway bridge, which was sometimes locked, and that the alleged route was obstructed by a pig run, fence and barbed wire. It was recommended that the path be deleted from the Draft Map and consideration was also given to deleting the northern extension FP 11Ar, however this could not be done due to the landowner north of the railway admitting a right of way across his land.
5. In 1955, the parish clerk objected to the deletion of the footpath from Upper Lodge to Burstye from the Draft Definitive Map and in 1956 there was an entry that described the outcome of an enquiry into the deletion of what seems to be the Order route.
6. The entry noted that evidence was given of the use of this footpath to and from Burstye Farm to Ardingly for many years. It then noted that the Railway Company had built the bridge for the convenience of the owner of the land whose land was severed by the railway and that the County Council had decided to delete the claimed footpath from the map.
7. A letter from 1957 from the Council to the rural district council explained that the reason the claimed footpath was deleted from the draft map was that they were not satisfied that there was sufficient evidence of use by the public as of right and without interruption. They quoted minimal use by the rambling clubs and a parish council survey report from 1951 stated the gate under the bridge was sometimes locked, the route was difficult to follow and there was barbed wire across the path south of the railway. The parish council and rural district council questioned the decision but ultimately decided to accept the County Council ruling at that time, albeit further correspondence in the 1980’s and 1990’s expressed a desire to reinstate the path.
8. The OSS pointed out that there was no objection to the claimed path from the landowners either side of the bridge during the definitive map process and suggested that the Council’s rights of way subcommittee who considered the claimed route just accepted the statement of the railway company. The OSS further suggested that the railway company suggesting it would have been ultra vires for them to dedicate a path through long use was stretching that concept too far and that there would be no public rights of way under or over railway bridges if this was the case. They drew attention to *British Transport v Worcestershire County Council [1958]* where it was decided that there was nothing to prevent dedication of a footpath provided that use of the public right of way was not incompatible with railway purposes.
9. I am not persuaded that the Council just accepted the statement of the Railway Company, as another nearby route that also crossed the railway was objected to by the Railway Company but was recorded on the Definitive Map. Despite the objection from the Railway Company, the County Council was satisfied, for that particular route, that there was sufficient evidence of use of the path by the public as of right and without interruption.
10. I accept the comment of the OSS that there appeared to be no objection to the claimed route during the definitive map process from the landowner south of the railway, however notations for the route indicate that there was a gate which was sometimes locked, barbed wire and obstructing pig pens. These obstructions do not infer an intention to dedicate a footpath at that time. Ultimately the records show a clear belief by the Parish Council that the claimed route was a public footpath, however following the objection from the Railway Company and the Council’s assessment of the evidence at that time, the Order route was not added to the Definitive Map.

*Other evidence*

1. The OSS drew comparisons between the vehicular highways to the east and west of the claimed route and a suggested shorter desire line for those on foot between Ardingly and Lindfield running parallel, but generally centrally, between the two highways. The route suggested was comprised of footpaths recognised today forming an almost continuous route between the two settlements, with the only gap being the claimed route. While I accept that a desire line may have existed, it is supposition, and there is a distinct dog leg bearing east, south of the Order route, which shows less resemblance to a desire line.

**Conclusions**

1. The Order route is clearly of some antiquity having been in existence since at least the 1800’s, with Burstye Farm suggesting that the existence of the claimed route and its northern extension stemmed from a need for the landowner to access his lower fields, as well as transport produce across these fields to a Tithe Barn that was located nearby.
2. Many maps, such as the OS maps are silent on any possible public status and albeit the Order route was notated FP in 1959, this postdates the deletion of the footpath from the draft map and is at odds with the evidence at that time which was that the footpath was obstructed under and south of the railway. Several documents refer to the route as an occupation road and albeit this is not mutually exclusive to public rights, as pointed out by the Council, it is also not evidence in its favour.
3. The railway plans and conveyance both mention footpaths within the parcels of land across which the Order route crosses, but again they cannot be directly related to the Order route as the accompanying maps do not notate the footpaths.
4. The Finance Act records of 1910 could be suggestive of the claimed route being considered to hold public rights, albeit without an annotated plan, it is again difficult to confidently accord the reference book deductions for the public bridleway and footpaths to specific routes.
5. The Definitive Map records and Parish Council records are ambiguous when considering public status of the Order route. While the Parish Council clearly considered the route public, the County Council confirmed its deletion from the Draft Map, based on lack of evidence of use at the time, obstructions along the route including a gate that was sometimes locked, alongside the objection of the railway company. While the landowner to the north of the railway line admitted to a public footpath across his land in the 1930’s, when the definitive map records were being prepared, there was no objection or admission from the landowner to the south in regard to the claimed route, but there were signs of a lack of intention to dedicate the route.
6. The suggestion put forward by the applicant wherein there seems to be a continuous route from Burstye to Ardingly, except for the gap forming the Order route is not an unreasonable one, albeit hypothetical, and when added to the other evidence, a reasonable allegation that the Order route may have held public rights is justified.
7. However at confirmation stage, the evidence for the existence of public rights has to reach the higher test of balance of probabilities. It is recognised that conclusive evidence of historic footpaths is often hard to find and that it is not one piece of evidence but the cumulative effect of several documents that tips the scales. I consider in this case that the evidence is very finely balanced, with well-reasoned arguments on both sides, however when weighing the evidence I find it is marginally insufficient to tip the balance of probabilities in favour of public footpath status existing along the Order route.

Formal Conclusion

1. 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.

A Behn

INSPECTOR

