

2ND DECEMBER, 2003

COMPTON: APPLICATION FOR A DEFINITIVE MAP MODIFICATION ORDER (APPLICATION NO. DMMO6/00) TO UPGRADE PUBLIC FOOTPATH 3005/1 AT COMPTON TO BRIDLEWAY STATUS ON THE DEFINITIVE MAP AND STATEMENT FOR CHICHESTER

REPORT BY COUNTY SECRETARY

EXECUTIVE SUMMARY

1. The application, made under the provisions of Section 53 of the Wildlife and Countryside Act 1981, has been submitted by Mrs. S.H. Montilla on behalf of Hants. and West Sussex Borders Bridleways Group and seeks to modify the Definitive Map and Statement for Chichester by upgrading public footpath 3005/1 to bridleway status.
2. Members are requested to refer to paragraph 8 of the County Secretary's "Guide to the Law for the Rights of Way Committee". All evidence in respect of this claim is available for inspection in the Members' Room prior to the meeting.

CONCLUSION

1. The archive evidence in respect of the claimed route is, on balance, considered to be insufficiently strong to support the bridleway claim.
2. In the absence of conclusive archival evidence or of dedication at Common Law, the application has been considered under Section 31 of the Highways Act 1980. The erection of a gate with a padlock with adjacent stile at either end of the claimed route and the fixing of 'No Riding' signs to existing footpath signs challenged its use in 1981, establishing a relevant 20 year period of 1961-1981. Evidence forms have been submitted and balancing the evidence of use contained in these forms which cover this period against the evidence of challenge summarised in paragraph 8.7 of this report, it is considered that the tests under Section 31 have not been met.

RECOMMENDATION

That a Definitive Map Modification Order under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to upgrade footpath 3005/1 to a bridleway be not made.

1. BACKGROUND

- 1.1 This matter was previously considered by the Rights of Way Sub-Committee on 26th February 1991.
- 1.2 It was decided at that time that the archive evidence was insufficient and that on the balance of evidence available that the applicant had not been able to successfully

demonstrate 20 years usage of the route as a public bridleway “as of right” and “without interruption” and that it was resolved that a Definitive Map Modification Order be not made.

- 1.3 A new application for the same route was submitted on the 26th March, 2000 and it is supported by additional user evidence.

2. CHARACTER AND FEATURES OF THE ROUTE

- 2.1 A plan showing the location of the claimed route is annexed to this report. The claimed route runs between points A and H. The site was visited on the 13th September, 2002 and on the 11th February, 2003. Photographs of the route will be displayed at the Committee meeting.
- 2.2 The claim is for the upgrading of public footpath 3005/1 to bridleway. The footpath commences at its junction with bridleway 491 and continues for approximately 120 metres to a locked metal 5-bar gate with an adjacent stile. The footpath enters the woods (Grevitts Copse) and continues around the hillside then follows a field headland and then again enters woodland and continues up a steep incline to a 7-bar metal gate with an adjacent stile at its junction with FP 3006 the path continues eastwards to join the Walderton to Upmarden Road.

3. LAND OWNERSHIP

- 3.1 At the time that this matter was first considered in 1991 the southern half of the land was in the ownership of Lieutenant Commander Gordon-Smith R. N. (Retired) of Lower Farm, Up Marden, Chichester. The northern section of the route was in the ownership of the Watergate Park Estate.
- 3.2 The whole of the claimed bridleway is now owned by the Watergate Estate, Locksash Farmhouse, West Marden, Chichester, West Sussex.

4. CONSULTATIONS

- 4.1 Before making a Definitive Map Modification Order the County Council is obliged to consult the relevant District and Parish Councils. Consultations have also been carried out with other interested bodies. In considering the result of the consultations, Members of the Committee are requested to bear in mind, that in determining this application, they can only take into account evidence which demonstrates whether or not the test in Section 53 have been satisfied.
- 4.2 The following consultation replies have been received:-

Sussex Downs Harness Club and the British Driving Society

The Sussex Down Harness Club and the British Driving Society West Sussex, wish to support the applicants and believe that there is local archival evidence to support this claim and that the Tithes Map and Bartholomews Map 1959 seem to point to higher status than footpath.

Chichester District Council

The District Council confirms that it has no adverse comments to make to the proposal.

5. ARCHIVAL EVIDENCE

- 5.1 The archive evidence was examined at the time of the earlier application and the following was reported to the February 1991 Committee.
- 5.2 “Several maps were studied at the West Sussex Record Office including the Ordnance Survey and Estate maps and the Tithe Map and Award. The Ordnance Survey maps for 1872-73, 1899 and 1912 all show a distinct track along the route with a wide, open area alongside the buildings at Lye Common. A gate is shown at the entrance to the copse at point C on the plan.
- 5.3 Other old maps from “250 years of map making” also feature the route as a well-defined track. The 1778 Yeakell and Gardner (2” to 1 mile) and the 1795 Gardner and Gream (1” to 1 mile) both show a route along much the same line as the Ordnance Survey maps. Cartographically the route is depicted in the same way as are the present-day maintainable highways and bridleways. The route is also shown on the 1813 Ordnance Survey 1st Edition map.
- 5.4 There is no Enclosure Map and Award for the area. On the Tithe Map of 1841, however, points A-C and E-H are coloured brown, as are the present-day highways and bridleways, and are described in the Schedule as the total area of “Roads and Waste”. There is a gate at “C”, as on the 1872-73 Ordnance Survey map, and, at “E”, another gate and buildings, as shown on the 1st Edition Ordnance Survey map (1813).
- 5.5 The Estate maps are dated c. 1710, 1818 and 1841. The 1710 map of Upmarden Farm shows the route, from a point near D-E and from F-H on the plan, as a road; the survey made in 1818 for Sir Thomas Packham Phipps, Esq. shows the whole route, where it crosses Thorndell Farm, as a road. The 1841 Watergate Park Estate map, based largely on the Tithe Map, but of a slightly larger scale, shows the track with a gate at point C on the plan.
- 5.6 Other maps consulted as part of the research were the draft, provisional and definitive maps of public rights of way for Chichester District. All of these, plus an ownership map of Watergate Park Estate, for when Mr. Gomme was the landowner, show the route as a footpath.
- 5.7 No information was obtained from any of the other sources which were available for checking.”

6. EVIDENCE SUBMITTED IN SUPPORT OF THE APPLICATION

- 6.1 The earlier application considered in 1991 was accompanied by 13 evidence forms. The application dated the 26th March, 2000 is supported by an additional 7 evidence forms. The forms provide evidence showing use of the claimed route on horseback

between 1936-1983. The evidence is summarised in Table 1 of this report and the “Analysis of use Chart” accompanying this shows the periods of time each individual has used the claimed route.

- 6.2 One of the witnesses claims to have used the route on horseback from 1936 to 1983 (47 years), 2 of the witnesses claim to have used the route on horseback for 20 years or more and 8 of the witnesses claim to have used the route for 10 years or more.
- 6.3 None of the 20 witnesses report claiming to have a private right and have never sought permission to use the claimed route.
- 6.4 Mrs. R.E. Launder, one of the witnesses, submitted a statement to be included with her evidence stating that she rode the claimed route with friends believing it to be a bridleway and that when she organised a sponsored ride, as there were an unusually large number of horses involved, she informed the Farm Manager out of courtesy. She did not seek any permission.
- 6.4 The applicant referred in supporting evidence to certain documents held at the County Record Office, Chichester (paragraph 5 of this report refers).

7. EVIDENCE SUBMITTED BY LANDOWNERS AND OTHER INTERESTED PARTIES

- 7.1 Messrs. Thomas Eggar (TE) on behalf of their client Mr. Michael Steward of the Watergate Estate state that:-

7.1.1 OS Maps 1872-73, 1899 and 1912

The second edition 1899 Map shows a footpath marked on the track with no mention of a Bridlepath and the first edition surveyed in 1874 does not even show a footpath on the track. Some tracks on this map are shown in brown, but not the track in question. In the Historian’s Guide to OS Maps it states “nearly all first edition OS maps were published uncoloured but on demand hand coloured versions showed metalled roads in brown”. It is therefore suggested that this track was not a metalled road in 1874. TE state that their client holds a top copy of the 1914 OS map [6 inches:1 mile, surveyed in 1872-1873 and revised in 1910] showing this track as a footpath with no mention of a bridleway.

7.1.2 1874 Up Marden Parish Map 1778 Yeakell & Gardner and 1795 Gardner and Gream Maps plus 1813 OS first edition

TE states that the route is marked as a track but so are many other tracks in woodland and estate mapped areas (used as extraction routes, compartment breaks or just estate services to buildings etc.) and that their client considers that this is no proof that it is a footpath or a bridleway, although he accepts that the route is recorded on the Definitive Map of Public Rights of Way as a footpath.

7.1.3 The Tithe Map of 1841

TE states that this map shows a metalled track from the current Locksash Lane to the then substantial set of house and farm buildings at Lye Common and ceases at the entrance to the wood. Similarly, there is a metalled surface servicing the then farm buildings at bottom of Elmers [at E on WSCC Map] from the current Up Marden Road. They consider that it would have been sensible to have metalled tracks to service sets of farm buildings as they do today, however it does not make a right of way. It should also be noted that these two metalled tracks on the Tithe Map do not join up.

The fact that all roads are grouped together as “roads and ways” is only significant in terms of the Tithe map as these are areas on which no tithe was paid. Thus the recorder was not interested in categorising them in any other way. Likewise there was no need for an ownership declaration. Therefore, there is no proof that they were public rights of way, they consider.

7.1.4 The 1818 Map

TE states that the 1818 Map was produced by J Witcher, surveyor for the land owned by Thos Peckham Phipps. Thus it clearly is an estate terrier and should be read as such. The section that crosses Thorndell Farm is not the complete route. There is no legend to the terrier so it is wrong to assume it is a public track. Roads on other parts of this terrier are coloured brown, but not this one.

Their client states that a track may be shown but this is no proof that this was, or is, a bridleway.

7.1.5 TE have also been informed by Mr. Steward as a background to the period “it should be remembered that there were large numbers of people employed on the estate and farms in these times. The estates in this area were considered large. Therefore, there would have been considerable traffic of men, horses and their various wagons in an east/west (or vice versa) direction not only by the estate but by the tenant farmers as well. As was the custom in these times, there would have been consent by the various landlords for this to happen but it was not a consent granted for the general public”.

7.1.6 TE also enclose a statement of Mr. Ian Voak which states:-

“I have been employed on the estate as a farmworker/forester from 1967 when it was owned by Mr. D. Gomme. He instructed all his staff to ensure, when possible, that the public kept within the law so that the footpaths were use by walkers and the bridleways by horse riders. I can confirm that Mr. Gomme’s policy was continued by the subsequent owners namely Mr. M. Burgess, Mr. B. Baker and until the present day by the Watergate Estate. During by 35 years on the estate I have informed many a rider on a footpath or an estate track that he/she was in the wrong and directed them

back to the nearest road or bridleway in accordance with estate policy. This includes footpath 3005/1 from Lyecommon to Up Marden.

This particular footpath has always been marked as such at both ends and along its route by finger boards indicating it was only a footpath. In 1978 Mr. Burgess put gates at each end of this footpath but left gaps at the side for foot walkers to pass through. There are now stiles and the gates are kept locked except on shoot days and during harvest.”

The statement is signed, witnessed and dated 28th March, 2003.

7.1.7 It is further stated by their client that the claimed route has not been used by the public as a bridleway for a period of twenty years as required by the Wildlife and Countryside Act 1981.

7.2 Mr. Fred Francis of Keepers Cottage, 3 Lyecommon, Locksash Lane states that:- His cottage which he bought in 1980 is at the southern end of footpath 3005/1 and is adjacent to the path. Mr. Francis states that from 1980 he has informed riders that this route is of footpath status only. He says that he often chats to walkers who use the path and none have wished it to be changed to a bridleway.

8. CONSIDERATION OF THE CLAIM

8.1 In 1991 the Committee considered that there was insufficient archival evidence to support the upgrading of footpath 3005/1 to bridleway. No new archive evidence was uncovered during the course of investigating the current claim.

8.2 The archive is considered insufficiently strong to support the bridleway claim because:-

- (a) Other maps considered including the draft, provisional and definitive maps and an ownership map of Watergate Park Estate clearly record the claimed route as a footpath only.
- (b) While it is common for ordnance survey maps to show the physical presence of a track, no inference can be drawn as to the public status, if any, of such a track.
- (c) The maps from “250 years of map making” show the claimed route as a feature but also show other tracks (used as extraction routes, compartment breaks or estate services to buildings) so again it is considered that no particular inference can be drawn from the inclusion of the claimed route on these maps.
- (d) There is no Enclosure Map or Award for the area. The claimed route is shown on the Tithe Map of 1841 (para. 5.4 refers), in parts, but not as a continuous route and therefore the value of the Tithe Map in relation to the claimed route is questionable it is considered.

- (e) The claimed route is shown on Estate Maps, however the estate terrier carries no legend and the complete route is not shown and so the significance of the map in relation to establishing a public bridleway is again questionable it is considered.
- (f) The Bartholomews Map of 1959 shows the claimed route in the same way as other roads and tracks are shown. However the map carries a disclaimer that “the representation of a road or footpath is no evidence of a right of way.”

These uncertainties, when considered together, combine to the conclusion that the archive evidence is inadequate to prove the existence of a public bridleway over the claimed route.

- 8.3 Because the archive evidence is not considered to be sufficiently strong to support the application it is necessary to consider the user evidence in accordance with criteria in Section 31 of the Highways Act 1980. The user evidence must show that the public enjoyed the use over the land ‘as of right’ and without interruption for a full period of 20 years. ‘As of right’ means not by force, nor stealth, nor license of the landowner.

The case of **R v Oxfordshire County Council and others ex parte Sunningwell Parish Council** reviewed earlier cases and statute to determine what ‘as of right’ meant. It was decided that this phrase meant “not by force, stealth nor license of the owner, that is because the owner had in some way consented to the use of the land”. The principle has been further extended by the case of **R v Sunderland City Council (2001) 1 WLR**. This case was reported on the 6th July, 2001. It is confirmed that an ‘as of right’ claim could be defeated even by an implied license of the landowner. The question to consider is whether a reasonable person would have appreciated that the user was by permission or only with acquiescence. The Sunderland case approved a case decided in 1903, that of **Gardner-v-Hodgson’s Kingston Brewery**, which stated as follows:

“A title by prescription can be decided by long peaceable open enjoyment only; but in order that it may be so established, the enjoyment must be consistent with any other reasonable inference that it has been as of rightif the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established”.

- 8.4 According to Section 31 the relevant period of use is deemed as being the 20 years immediately preceding the date on which the use of the claimed route was first challenged. Referring to the public way evidence forms, the act of challenge was the erection of locked gates at Lye Common and the Up Marden road access and the fixing of “No Riding” signs to the existing footpath signs in 1981. The relevant dates are 1961-1981.
- 8.5 Only one of the witnesses claims to have used the route on horseback during the whole of relevant date.

- 8.6 3 more witnesses claim to have used the route on horseback for 20 years or more. Nevertheless although not completely within the relevant period there is a spread of use over this period which accumulates to use of the route for 20 years or more.
- 8.7 In reaching a decision regarding the claim it is necessary to balance the available evidence and it is considered that prior to the erection of the locked gates at each end of the claimed route in 1981 on the balance of probability users did not enjoy use over the claimed route "as of right". This is because there is evidence that during the relevant dates estate staff challenged horseriders, that gates were erected in 1978 to prevent use by equestrians, and that the route was clearly signposted as a public footpath. This, taken with the inconclusive archive evidence, leads to the recommendation that a Definitive Map Modification Order be not made.

9. CRIME AND DISORDER ACT IMPLICATIONS

The Definitive Map Modification Order process involves the application of legal tests which means that it is not possible to give substantial weight to any effect on crime and disorder in this area.

10. HUMAN RIGHTS ACT 1998 IMPLICATIONS.

- 10.1 It is unlawful for a public authority to act in any way which is incompatible with a convention right. The rights which should be considered are rights pursuant to Article 8, Article 1 and Protocol 1 and Article 6.
- 10.2 Article 8 protects the right to respect for private and family life including an individual's home. This is a qualified right and there may be interference by a public authority if that authority does so with an intention of protecting the rights and freedoms of others.
- 10.3 Article 1, Protocol 1 deals with the protection of property. Again, this is a qualified right and interference of it may take place where it is in the public interest to do subject to the conditions provided by law. Any interference, however, must be proportionate. The main body of the report identifies the extent to which there is interference with these rights and whether the interference is proportionate.
- 10.4 The Committee should also be aware of Article 6, the focus of which (for the purpose of this Committee) is the determination of an individual's civil rights and obligations. Article 6 provides that in the determination of these rights, an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a great deal of case law. It has been decided that for rights of way matters, the decision making process as a whole, which includes the right of review by the High Court, complied with Article 6.

MIKE KENDALL
County Secretary

BACKGROUND PAPERS

- (a) Report to Rights of Way Sub-Committee dated 26th February, 1991.
- (b) Application (DMMO6/00) from Mrs S H Montila on behalf of Hants. and West Sussex Borders Bridleways Group.
- (c) Public way evidence forms and letters.
- (d) Consultation replies.
- (e) Archival evidence.
- (f) Other information.

Contact: Mrs Glenys Frankland
(Ext. 77012)