

Rights of Way Committee

Date: 3 November 2020

Recent Decision by the Secretary of State's Inspector- West Sussex County Council (Chichester- No.2 (Climping Parish and Town of Littlehampton: Upgrade of public footpath 174 to a restricted byway)) Definitive Map Modification Order 2020

Report by Tony Kershaw Director Law and Assurance

Electoral division/s: Middleton and Littlehampton Town Council

Recommendation

This is a report to be noted

1. Background

- 1.1 In April 2017 the County Council received an application, made by the British Horse Society, for the upgrade of footpath 829 to a restricted byway between the southern tip of Climping Street and continuing east and then north eastwards to Climping Mill and an addition of a restricted byway deviating from the footpath on a short loop by Climping Mill and then the upgrade of footpath 174 continuing in a rough north easterly direction to Rope Walk in the Parish of Climping near Littlehampton, West Sussex.
- 1.2 The application was supported by archive evidence only and was therefore considered with reference to section 32 of the Highways Act 1980.
- 1.3 The legal tests to satisfy before making a Definitive Map Modification Order are:
 - Test A – whether a public right of way subsists (in order for Test A to be fulfilled, the standard of proof is to show that a right of way does exist on the balance of probabilities); or
 - Test B – whether a public right of way has been reasonably alleged to subsist (in order for Test B to be fulfilled it must be shown that the reasonable person, considering all relevant evidence available could reasonably allege a public right way to subsist).
 - An upgrade of a public right of way under section 53 (3) c (ii) must meet the higher test of balance of probability (Test A). An addition of a

right of way can be considered on the lower reasonably alleged test (Test B).

- 1.4 The application route was divided into three parts as described below in reference to plan 01733a (appendix 1):
 - 1.4.1 DMMO 2/17 - The upgrade of public footpath 829 to restricted byway between points A and C/D pursuant to Section 53 (3) (c) (ii) Wildlife and Countryside Act 1981 (where a highway already exists but it should be shown on the definitive map as a different description).
 - 1.4.2 DMMO 3/17 - The addition of restricted byway between points D and E under Section 53 (3) (c) (i) Wildlife and Countryside Act 1981 (that a path subsists or is reasonably alleged to subsist)
 - 1.4.3 DMMO 4/17 - The upgrade of public footpath 174 to restricted byway between points E and F under Section 53 pursuant to Section 53 (3) (c) (ii) Wildlife and Countryside Act 1981 (where a highway already exists but it should be shown on the definitive map as a different description)
- 1.5 All three routes were considered at Rights of Way Committee on 22 October 2020.
- 1.6 Committee resolved DMMO 2/17 be made but DMMO 3 & 4/17 be not made.
- 1.7 The County Council made order DMMO 2/17 on the 7 April 2020 and it was advertised on 16 July 2020. Objections have been received so the matter will now be submitted to the Planning Inspectorate for determination.
- 1.8 The applicant appealed against the decision made by the County Council's Rights of Way Committee not to make DMMO 3 & 4/17 under section 53(5) and paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
- 1.9 The Planning Inspectorate has allowed the appeal and directed the County Council to make an order on the 23 July 2020, a summary of the inspectors report is provided below and the report attached.

2 The Inspector's decision

- 2.1 A full copy of the Inspectors decision report is attached, however, after reviewing the appeal documentation the Inspector concluded that;
 - i. Considering DMMO 3/17 the Inspector agrees with the approach taken by the County Council that in light of the Quarter Sessions Order 1936 the consideration of the claim should be to upgrade the existing footpath between points C-Y-Z (appendix 1) as the addition of a restricted byway along the route originally claimed from D- E would fail as all highway rights were stopped up along this route by the Quarter Session Order.
 - ii. Whether existing footpath 174 should be upgraded to a restricted byway between points C-Y-Z-F, taking the evidence collectively, although finely balanced, there is sufficient evidence to conclude the claimed route (diverted on its current alignment C-Y-Z) should be upgraded to a restricted byway. There is historic evidence describing the route as a road from 1400's to 1800's. There are also a series of maps such as the Tithe

Map, Yeakell and Gardner, Gardners Sussex, Gardner and Gream and Baliffs Court Farm that suggest a road existed carrying a higher status. Although the Inspector highlights these maps may not be conclusive as they do not have a key, taken collectively, it is reasonable to conclude the route had higher status. In addition, the Inspector goes on to say that bearing in mind practices of the time as well as the reasonable conclusion that Climping Mill was connected with Rope Walk by a road of some sort to provide access to the ferry until an alternative route was built, there is a credible case the route had higher status than a footpath.

- 2.2 Overall, the Inspector concluded that the evidence available shows that on the balance of probabilities a restricted byway subsists from C-Y-Z-F. The County Council were therefore directed to make an order under section 53(2) and schedule 15 of the Wildlife and Countryside Act 1981 on the 23 July 2020.
- 2.3 An Order to upgrade part of footpath 174 to a restricted byway from Climping Mill at the junction of FP174 and 829 in a north easterly direction to the Rope Walk was made by the County Council on 24 September 2020 and advertised on the 15 October 2020. The objection/representation period will end on the 26 November 2020. A copy of the order plan is attached at Appendix 2.

3. Finance

- 3.1 The County Council is under a duty to investigate Definitive Map Modification Order applications and all costs associated with the consideration of the application by officers' falls within existing budgets.
- 3.2 Cost implications arise:
- i. In the event of an order being made and objected to, the matter may fall to be considered at a public local inquiry or a public hearing. All fees incurred after submission of the order are borne by the County Council. This includes but is not limited to fees relating to the venue hire, fees relating to advert
 - ii. Should an order be made and confirmed; if any works are necessary to ensure the path is open for public use.
 - iii. Should the decision of the committee be challenged by way of Judicial Review.
- 3.3 The decision taken by the investigating officer and the Rights of Way Committee is a decision based on the application of strict legal tests and the above costs cannot be a consideration in the determination of the application.

4. Risk implications and mitigations

- 5.1 The decision is one that must be taken on strict legal tests:
- i. If the application is not determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.

- ii. In the event that an order is made the landowner could appeal to the Secretary of State and the matter be considered by way of written representations, hearing or public inquiry.
 - iii. In the event that an order is not made and the applicant disagrees with the decision then they have a right of appeal pursuant to Schedule 14 of the Wildlife and Countryside Act 1981 to the Secretary of State. The Secretary of State may direct the County Council to make an order, which if objected to could be considered by way of written representations, hearing or public inquiry.
- 4.3 In reaching a recommendation the investigating officer has considered the evidence in accordance with the law.

5. Policy alignment and compliance

Equality and Human Rights Assessment

- 5.1 The County Council has a duty to have regard to the impact of any proposal on those people with characteristics protected by the Equality Act. Officers considered the information provided by the applicant, together with the responses from consultees and other parties, and determined that the proposal would have no material impact on individuals or identifiable groups with protected characteristics.

Human Rights Act 1998 Implications

- 5.2 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.
- 5.3 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 right and freedom of others.
- 5.4 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's interest to do so 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.
- 5.5 The Committee should 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.

Crime and Disorder

- 5.6 The Definitive Map Modification Order process involves the application of legal tests, which mean that it is not possible to give weight to any effect on crime and disorder

Climate Change

- 5.7 Enhancement of the public rights of way network is a positive contribute towards the Council stated ambition of being carbon neutral by 2030, however such considerations are not matters that can be taken into account when consideration applications against the strict legal tests

Public Health

- 5.8 The addition of public rights of way through the definitive map modification order process could assist in enhancing the general health and wellbeing of the communities served by the Council. However, such considerations are not matters that can be taken into account when considering applications against the strict legal test.

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Appendices

- Appendix 1 – Plan 01733a
- Appendix 2 – Plan 01733b
- Appendix 3 – Plan 01732

Background papers

- a) Committee report October 2019 - <https://westsussex.moderngov.co.uk/mgChooseDocPack.aspx?ID=2112>
- b) [Inspectors full decision](#)