

Public Document Pack

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25 February 2019

Rights of Way Committee

A meeting of the committee will be held at **2.15 pm** on **Tuesday, 5 March 2019** at **County Hall, Chichester**.

Tony Kershaw
Director of Law and Assurance

Agenda

1. Declarations of Interest

Members and officers must declare any pecuniary or personal interest in any business on the agenda. They should also make declarations at any stage such as an interest becomes apparent during the meeting. Consideration should be given to leaving the meeting if the nature of the interest warrants it. If in doubt, contact Democratic Services before the meeting.

2. Minutes of the last meeting of the Committee (Pages 5 - 14)

The Committee is asked to confirm the minutes of the meeting held on 12 June 2018 (cream paper).

3. Urgent Matters

Items not on the agenda that the Chairman of the Committee is of the opinion should be considered as a matter of urgency by reason of special circumstances.

4. Previous Decisions Progress, Outstanding Applications and Delegated Decisions

(a) Previous Decisions Progress Report (Pages 15 - 16)

The Committee is asked to consider a progress report by the Director of Law and Assurance (on pink paper).

(b) Outstanding Applications and Delegated Decisions (Pages 17 - 20)

The Committee is asked to consider a progress report by the Director of Law and Assurance (on pink paper).

N.B. If members have any queries in connection with items 4(a) and 4(b) they are asked to raise them with officers before the meeting.

5. **Definitive Map Modification Order** (Pages 21 - 36)

Report by the Director of Law and Assurance.

To consider and determine the following application:

Sharpthorne: Application for a Definitive Map Modification Order (Application No: 2/16) the addition of a bridleway at Top Road, Sharpthorne and to upgrade footpath 51FR to a bridleway.

6. **Definitive Map Modification Order** (Pages 37 - 54)

Report by the Director of Law and Assurance.

To consider and determine the following application:

Henfield: Application for a Definitive Map Modification Order (Application No: 1/17) to add to the Definitive Map and Statement a public footpath along Dagbrook Lane

7. **Urgent Action** (Pages 55 - 76)

Report by the Director of Highways and Transport

To note the Urgent Action decision, published on 15 August 2018:

**Adur and Worthing Council's Public Path Diversion Order
Town and Country Planning Act 1990 S 257
Public Footpath 2048 (Shoreham Adur Tidal Walls Development)
Diversion Order 2018**

8. **Secretary of State Decision** (Pages 77 - 78)

Report by the Director of Law and Assurance.

The Committee is invited to note the following decision by the Secretary of State:

**West Sussex County Council (Warnham) Public Path (No. 1577)
Diversion Order 2013
West Sussex County Council (Warnham) Public Path (No. 1578)
Diversion Order 2013**

9. **Secretary of State Decision** (Pages 79 - 80)

Report by the Director of Law and Assurance.

The Committee is invited to note the following decision by the Secretary of State:

**West Sussex County Council (Petworth No.1 (Parish of Loxwood
addition of Footpath)) Definitive Map Modification Order 2014**

10. **Secretary of State Decision** (Pages 81 - 82)

Report by the Director of Law and Assurance.

The Committee is invited to note the following decision by the Secretary of State:

**West Sussex County Council (Southwater) Public Path (no. 2642)
Part Special Diversion Order 2016
West Sussex County Council (Southwater) Public Path (no. 1650)
Part Special Extinguishment Order**

11. **Secretary of State Decision** (Pages 83 - 84)

Report by the Director of Law and Assurance.

The Committee is invited to note the following decision by the Secretary of State:

Application for a Definitive Map Modification Order (Application No. 5/16) to add a public footpath from bridleway 1163 to Fyning Lane in the Parish of Rogate.

12. **Update on Delivery Works**

The Committee is asked to note a verbal update on delivery works in the last year, presented by Judith Grimwood, Senior Rights of Way Officer.

13. **Date of Next Meeting**

The next meeting of the Committee will be held at 2.15 p.m. on Tuesday, 25 June 2019.

To all members of the Rights of Way Committee

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Rights of Way Committee

12 June 2018 – At a meeting of the Rights of Way Committee held at 2.15 pm at County Hall, Chichester.

Present: Mr Whittington (Chairman)

Mr Bradbury, Mr Acraman, Mr Baldwin, Mrs Duncton, Dr O'Kelly, Mrs Purnell, Mr Quinn and Mrs Russell

Part I

1. Declarations of Interest

1.1 In accordance with the County Council's code of the conduct, the following declarations of interest were made:

- Mr Whittington, Mr Bradbury, Mr Baldwin, Mrs Russell and Mr Acraman declared that they have made site visits for the following application, and that during visits if approached, none had engaged in any discussions regarding the application:
Rogate: Application for a Definitive Map Modification Order (Application No: 5/16) to add a public footpath from bridleway 1163 to Fyning Lane in the Parish of Rogate.
- Dr O'Kelly declared a personal interest as local member for Midhurst, and as a member of a steering group working with South Downs National Park Authority and various cycling groups on plans for a future multi-use path along the old railway line from Petersfield to Pulborough, in relation to:
Elsted and Treyford, and Harting – Request for Diversion of Parts of Footpaths (fp) 871, 872 and 873; Creation of New Footpath on Disused Railway.
- Dr O'Kelly declared a personal interest as local member for Midhurst, which is also a prejudicial interest by virtue of the fact that she has knowledge of the matter and is known to some of the parties. Dr O'Kelly agreed to leave the meeting during the committee debate and vote on the item:
Rogate: Application for a Definitive Map Modification Order (Application No: 5/16) to add a public footpath from bridleway 1163 to Fyning Lane in the Parish of Rogate.
- Mr Bradbury declared a personal interest as a member of Mid Sussex District Council in relation to:
Previous Rights of Way Decisions – Item 1. Haywards Heath FP 25 CU.

2. Minutes of the last meeting of the Committee

2.1 The Committee agreed the following corrections to the minutes of the previous meeting as follows.

- Previous Rights of Way Decisions' – incorrectly numbered, to become 23 (a)
- Outstanding Decisions – incorrectly numbered, to become 23 (b) and 23 (c) respectively.

- Noted that there is no minute 26.

2.2 Resolved – that the minutes of the meeting held on 20 February 2018, as amended by the Committee, be approved and signed by the Chairman as a correct record.

3. Previous Decisions Progress Report

3.1 The Committee received and noted a report by the Director of Law and Assurance setting out the progress on previous delegated decisions and decisions made by the Committee (copy attached to the signed minutes).

4. Outstanding Applications and Delegated Decisions

4.1 The Committee received and noted a report from the Director of Highways and Transport and the Director of Law and Assurance outlining applications awaiting consideration (copy attached to the signed minutes).

5. Definitive Map Modification Order

Rogate: Application for a Definitive Map Modification Order (Application No: 5/16) to add a public footpath from bridleway 1163 to Fyning Lane in the Parish of Rogate

5.1 The Committee considered a report by the Director of Law and Assurance, concerning an application to add to the Definitive Map and Statement a public footpath from bridleway 1163 to Fyning Lane in the Parish of Rogate (copy appended to the signed version of the minutes). Laura Floodgate, Solicitor introduced the report. It is considered that the legal tests for making the Order have been met, but so as to provide additional clarity it is proposed that the recommendation be amended to include the words 'as set out in paragraph 8.1 of this report' at the end of the recommendation; to make clear that this is the lower test only that the path can be reasonably alleged to subsist.

5.2 The Chairman drew the Committee's attention to hard copies of documents which were circulated in advance of the meeting (the last document listed was received too late to circulate in advance of the meeting, but was provided in hard copy to the Committee) as follows:

- Evidence including photograph provided by the Grey family.
- Evidence including photographs and a map provided by Mr and Mrs Noble.
- Evidence including maps, a photograph and a list of claimed inaccuracies in the evidence user forms provided by Mr Wakefield.
- Letter from Wilsons Solicitors, solicitor for Mrs Abramavich.
- Letter from Mr Howland.
- Information provided by Mrs Howland – email to Mr Howland from Mr Dean Hall of Fyning Hill Estate.

5.3 Mr Johnny Grey, owner of Fyning Copse spoke in objection to the application. The Grey family has lived in their property since 1990. The community does not want this path, as shown by the 30 objections. The path is narrow, dark and overgrown, has no views and leads nowhere, and does not

directly lead to the village or connect with other paths in the woods. Evidence of use between 1975 and 1995 is exceptionally light and lacks credibility. Doubt is cast on the credibility of evidence in support as follows: some witnesses claim to have walked the path between 1995 and 1997, when it was a trench nearly 3m deep; and there are claims the surface was grass, when grass could never grow in this heavily wooded area. There was a legal boundary dispute with the applicant and a witness from 2006 to 2011; it is felt witnesses are not impartial. This conflict of interest is acknowledged by Rogate Parish Council. There is overwhelming evidence that this path is not a right of way because there is no mention of it in planning application documents, objections to planning applications, title deeds, property searches or estate agent listings. The right of way does not exist. No member of the Grey family has ever seen anyone use this path.

5.4 Mrs Belinda Noble, owner of Fyning Twitten spoke in objection to the application. Route A to B is not what is shown on historic maps, but is a boundary ditch at the edge of Fyning Hill Estate. Fyning Twitten land overlaps part of the claimed path, proving it ceased to exist in 1964 when the property was built, and predating the 20 year period of claimed use. Historic maps suggest B to C and A to B are the same width, but this is not the case. Fyning Hill Estate has many signs asking walkers to stay on signed paths, but A to B has never been signposted. The path was not identified in legal searches during the purchase of Fyning Twitten in 2013. This was stated during a later application for planning permission and was not challenged – the applicant sat on the planning committee, and chaired one of the meetings. The County Council's report states there is inconclusive historic evidence. Eight statements in support of the path is a limited body of evidence, and covers a period 20-40 years ago. Witness statements are inconsistent. The claimed path is not a good route to the village, being indirect and narrow. An alternative, ancient, well-established and more direct route exists. Residents along the route have experienced criminal offences and the creation of a footpath would increase vulnerability. B to C is the only vehicular access to Fyning Twitten, and making it a footpath would be dangerous because there is no room to pass. The report incorrectly summarises Mrs Noble's evidence. Rogate Parish Council previously discussed and rejected an identical application in favour of a different path, and this application was made soon after, although support was not unanimous.

5.5 Mr Julian Wakeland resident of Foresters Cottage spoke in objection to the application. Historic maps show that if the path did exist it passed through what is now the extension at Fyning Copse, therefore, the claimed route of the 20 year period 1975 to 1995 no longer exists. In the last 14-years the Wakefield's have used the route over 38,000 times and never seen any of the 16 people who have claimed use, and all but one of those witnesses claim use during that period. Evidence of use during 1975 to 1995 is also questioned; there are inconsistencies, including that the route is a grassy track – it is not; one user was unable to put a value on how often he has walked the route; two others who have claimed to walk the route when told by Police not to enter Mr Grey's property; none were aware of closures from 1996 to 1997; and one relies on evidence of a 6-year old using the path in 1975. The claims of seven people using the path amounts to 81 uses per year. The Committee rejected an application at its last meeting based on use by eight people 1652 times per year. A Rogate Parish Council survey for the Neighbourhood Plan shows little interest

in additional public footpaths, but many asked for the current network to be better maintained. The intersection at point B would be a safety risk, as it is the only vehicular access to Fyning Twitten and Foresters Cottage.

5.6 Ms Ann Arnold, the applicant spoke in support of the application. Many villagers wish to protect the heritage of public rights of way. The path is clearly marked on maps dating back to 1873. Draft and definitive maps from 1950 identify the route and label it 'FP' at point B. Land registry documents show the gap between the boundary of Fyning Copse and fenced land to the north of the path belonging to Fyning Hill Estate; this part is passable. The claim that the route leads nowhere is contested as it joins another path which leads to the village. Five of the local residents who are in support have lived in Rogate all their lives. The path was and is used and, when partly blocked from time to time was still used, although with difficulty. No-one has been challenged. Evidence that the claimed route is in an 'entirely private garden' (report: 5.3) is contradicted by the words 'part of the claimed route that is adjacent to their property boundary' (report: 5.5). There have never been any private ownership signs. Of the 30 objectors some have relationships to the Grey family, some are new to the village and others live elsewhere. The path is on maps, sales details and a later planning application for Fyning Twitten, so the owners were aware of it. The path is not a private access to Foresters Cottage. Route B to C is 3m wide, wider than the 6ft 6" sections of Fyning Lane, and so is safer. The Fyning Hill Estate landowners deposit threatens use of permissive paths on the estate.

5.7 Dr Mairi Rennie, resident of Fyning Lane spoke in support of the application. The path has been in use since before the existence of cars. It is still in existence, unowned and unmaintained. The path has always been walked without privacy, force or permission. There has never been a 'private' notice. Neither landowner can dedicate the path as they do not own it; and proof was submitted but not recorded in the report. Closure for various building works is not proved, and it was unwise to build an extension virtually on a path open to the public. The reported gates are unlocked. Claims that no-one has been seen using the path are not proof it is not used. Objectors refer to more attractive permissive paths, but there are concerns that the Fyning Hill Estate landowners deposit could lead to closure of other paths at any time, meaning this path could end up being the only path between fp 1163 and fp 1162. Older, long-term residents are more likely to use the path; there is sufficient evidence of use back to 1975 but many witnesses are no longer here. Archival evidence is inconclusive without living witnesses, but the paths are shown on various maps from 1843 onwards. The report confirms the path is on the Draft and Provisional Definitive maps. The application is a way of asserting the rights of residents and future generations. It fulfils all the requirements to justify an Order being made.

5.8 Dr O'Kelly left the meeting for the duration of the debate and vote on the item.

5.9 The Committee sought clarification on the following points:

- Whether there has ever been a public footpath sign in place on the claimed route?

The claimed route is not on the Definitive Map and so there have never been any West Sussex County Council public footpath signs.

- Is the only access to Foresters Cottage to drive along the route C to B?
This is the correct interpretation.
- Is there a risk, as mentioned by speakers, that other permissive paths could disappear?

Reference to landowner deposits would refer to S.31 Highways Act 1980. Section 31 deposits made by landowners will defeat a claim of dedication of a way as a highway. As for other permissive footpaths on the Fyning Hill Estate, permission could be withdrawn at any time.

5.10 In reaching a decision the Committee made the following points:

Historic and Archive evidence:

- There is old archival evidence of a path. Point A shows as a rudimentary stretch of ground which could be a footpath but there is a question around whether the footpath ceased to exist when building work took place in the 1960s, across the line of the path.
- The conflicting evidence is difficult, because some evidence shows what may be a boundary ditch, but some shows the remnants of an old footpath, particularly the eastern end which goes no real distance and then narrows and there are blockages. The western end is similar.
- The letters 'FP' on an old map is some evidence, but not firm evidence of a public right of way.
- The maxim – 'Once a highway always a highway'. This raises the question about how far back we look for evidence on the basis that some highways have been in existence since Roman times.

Evidence of use:

- Committee members generally agreed that evidence of use is conflicting. Witness statements are questioned, but have to be taken at face value. There is little credible evidence of actual use.
- It is believed that the Grey and Noble families would not have bought their properties if they had known there was a right of way at the side of their houses.

Use of paths in the area:

- Travelling from points A to B to C, which is a dogleg around the village, would not be a normal route to take to the south of the village. There are other paths in the proximity of the area that can be used without needing to access this path and are easier to walk along - fp 1163 and Fyning Lane.
- The path is very narrow by Fyning Copse, through the gate. It is obstructed and it is hard to see how any could use it. It was questioned why anyone would want to use it, given that an easier footpath exists not far away.

Rogate Parish Council

- Minutes of the Rogate Parish Council meeting of 28 November 2016 were quoted, noting that this matter has divided the community. One

point highlights that Fyning Hill Estate offered an alternative east-west route, and offered to move the path south of Foresters Cottage and improve the surface and make it more passable in winter. The Parish Council voted on two resolutions; the first vote was to submit the application to West Sussex County Council which was defeated, although the applicant had voted in favour of this. The other vote, which was carried, was to accept the Fyning Hill Estate offer. It was noted that the applicant, a member of Rogate Parish Council, filed this application a week later.

- Rogate Parish Council's response dated 12 December 2017 to this application states that it is aware that there is body of evidence dating back to 1810 and confirms this is an ancient path, and in consequence it supports the application.

Other Matters

- A lot of rights of way were work paths in olden days, and it is important to recognise that there are paths that don't always fit with modern living. It is not certain that this path is worthy of protection.

5.11 The motion below was proposed by Mr Bradbury and seconded by Mr Baldwin, and was voted on by the Committee and approved by a majority. The result of the vote was 7 members in favour and 1 member, the Chairman, abstained. Due to her declared personal and prejudicial interest in the application Dr O'Kelly did not participate in the vote:

That the Rights of Way Committee refuses the application on the following grounds:

There is a conflict of evidence provided in support and against the application. Having heard the representations by all parties and understanding the evidence summarised in the report, it is concluded that the evidence in objection is considerable with little credible evidence of actual use in support and thus the claimed route cannot reasonably be alleged to subsist, and that an Order to add the path to the Definitive Map be not made.

5.12 Resolved – that an Order to add the path to the Definitive Map be not made.

5.13 The Committee recessed at 3.41 p.m. and reconvened at 3.46 p.m.

5.14 Dr O'Kelly re-joined the meeting.

6. Public Path Order Proposal

Lancing: Proposed Diversion of Part of Public Footpath 2048

6.1 The Committee considered a report by the Director of Highways and Transport concerning an application, upon which the County Council, as the highways authority, has been consulted by Adur & Worthing Councils. The Environment Agency proposes to divert part of a part of public footpath 2048 between Old Shoreham Road and a bridge carrying the south coast railway to the south. Given officers' concerns, and that the scheme is clearly of

significance and with a high profile, the Committee is asked to decide whether the County Council should object or not to the Order. The following points, in addition to the report, were provided for the purposes of clarity:

- It is understood it is now intended that the drainage ditch adjacent to Cecil Pashley Way will be modified to a French drain (a sculptured ditch filled with porous materials) rather than as noted in the report.
- There are concerns regarding safety and potential conflicts between users, particularly the use by cyclists riding at speed.

6.2 Laura Floodgate, Solicitor clarified that an application for outline consent has been made but not yet granted for development at New Monks Farm. Mr Whittington clarified that this development is not specifically mentioned in the report but it lies to the north-west of the airfield. It will be a large residential and business development and includes plans for the realignment of roundabout junctions on the A27. The County Council's Walking and Cycling Strategy notes this will be a key route to the town centre and railway station, which will link with the national cycling network.

6.3 Mr Graeme McClure, Project Manager, Environment Agency spoke in support of the application to Adur & Worthing Councils. The Environment Agency intends to invest £40 million in this location to protect 2,300 houses and 390 businesses in Shoreham from the risk of tidal flooding. The intention is to replace the existing embankment, which is in poor condition and has a low residual life; seepage was noted this January. As recently as 2013, a flood event caused Shoreham airport to flood, temporarily closing it and the footpath. A higher embankment is intended to protect against a 1 in 300-year flood event. This new embankment will be further from the river and up against the ditch. This is to replace habitat which has been lost elsewhere by building the new flood defences. Requirement to provide habitat and the presence of the road and ditch are constraints. However, the footpath will be an improvement on what is currently there and provides sections of wider passing places. A section 73 amendment to the planning consent is being prepared in relation to the works on the ditch.

6.4 The Committee noted that Mrs Bridges, local member for Lancing advised she will not attend the meeting.

6.5 The Committee sought clarification on the following points:

- Could the width of the path be improved if the drain could be moved?

The Environment Agency does not propose to alter the alignment of the existing drain, which is close to the road, so this will remain a limitation for the future.

- Could more consideration be given to the widening the path?

The Environment Agency has conflicting duties which are limiting the proposal. Whilst the County Council has been in discussion with the Environment Agency for some years, this proposed route does not meet the minimum standard of the County Council.

- The duty of the Environment Agency to replace habitat lost was acknowledged, but it was questioned if this replacement habitat could be

provided elsewhere to allow this scheme to then meet the County Council's standards for footpath width and safety?

The Environment Agency can do this but it is understood that it has examined other options in Shoreham Harbour and has not found the size of area it needs to create replacement habitat. The Committee questioned if compensatory habitat needs to be in the area of Shoreham and were advised that if this is the wish of the Committee then it can be made clear to the Environment Agency this should be explored.

- Is the minimum path width of 2 metres a County Council requirement or a recommendation?

2 metres has been the County Council's standard for several decades. No recollection can be made of any path diversion less than this. Best practice aims to achieve more than this for popular paths.

- Could the Environment Agency proceed without the County Council's approval, given that it is only a statutory consultee on this application?

Planning consent and consent to divert a highway are separate matters. Planning consent means that the Agency could proceed, but without a Path Diversion Order the existing route cannot be stopped-up; so, on completion of the new embankment the old embankment must remain until the path is legally diverted. Adur & Worthing Council cannot confirm a diversion order with an unresolved objection in place, meaning the matter would be referred to the Planning Inspectorate for decision.

- Would a decision by the Committee to maintain an objection hold up the essential work on the new flood defences by the Environment Agency?

The work has started already.

- What would happen if the Committee were to object to the proposal?

There would be two likely options: 1) to ask the Environment Agency to revise its proposal; and, 2) that this Committee's objection is noted by Adur & Worthing Councils meaning it cannot confirm a diversion order and the matter would be referred to the Planning Inspectorate.

- Who is liable for any incidents if this scheme is approved, even by the Planning Inspectorate?

Liability is determined on a case by case basis but as a highway authority we have a considerable duty to ensure highways are fit for purpose. What is being proposed does not meet the standards of the County Council.

6.6 In reaching a decision the Committee made the following points:

- It is not for the Committee to provide solutions, which lie with the Environment Agency who is obliged to carry out the flood defence works and wants to provide a path which does not meet the County Council's standard. It is incumbent on the Committee to oppose a scheme which is not to this standard.
- The Committee stressed it was concerned not to put at risk the much needed investment by Environment Agency in the area.
- Increased use of the path is likely and this is a concern, especially with the proposed width. Some Committee members were very familiar with

the existing path and noted how narrow it is and the fact that the proposed path is not much wider.

- Recent seepage and likelihood of the failure of the embankment consideration needs to be given to a pragmatic decision.
- The proposal means that views from the new embankment will be a bit further from the river but are still nice, as are views from the other side. There will also be views of the new area of marshland.

6.7 The motion below was proposed by Mr Acraman and seconded by Mrs Dunton, and was voted on by the Committee and approved unanimously:

That Rights of Way Committee requires the County Council to maintain its objection to the Environment Agency's application to Adur & Worthing Councils on the following grounds:

That the proposed provision of the new alignment of Public Footpath 2048 (FP2048) between Old Shoreham Road and a bridge carrying the south coast railway to the south is not to the standard the County Council ordinarily requires to support a diversion, and it is counter to the County Council's on-going duty 'to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority' (Highways Act 1980 Section 130).

6.8 Additionally, the Committee stated that it hoped for an ongoing dialogue between the County Council and the Environment Agency about this scheme.

6.9 Resolved – That Rights of Way Committee requires the County Council to maintain its objection to the Environment Agency's application to Adur & Worthing Councils for the reasons already stated:

7. Public Path Order Proposal

Elsted and Treyford, and Harting – Request for Diversion of Parts of Footpaths (fp) 871, 872 and 873; Creation of New Footpath on Disused Railway

7.1 The Committee considered a report by the Director of Highways and Transport, concerning an application for diversion of parts of footpaths (fp) 871, 872 and 873 and creation of new footpath on disused railway at Elsted and Treyford, and Harting (copy appended to the signed version of the minutes). Judith Grimwood, Senior Rights of Way Officer introduced the report. Diversion Orders made following officer delegated decision attracted two objections which have been reviewed in the context of the legal tests. It is still considered that the legal tests for making the Order have been met and the Committee was specifically asked to note Appendix 1, Inspecting Officer's Report which explains the background and context to the original decision that the Orders be made. It is considered that the Orders should be submitted by the Director of Law and Assurance to the Secretary of State for confirmation.

7.2 In reaching a decision the Committee made the following points:

- In relation to distance and convenience, an additional 300m is not substantially inconvenient.

- There will be better walking conditions and the reduction in stiles is good.
- Views are acceptable throughout and although in the southern part this is limited by woods there are particularly good views from the top of the railway line and at point X. So, overall views are enhanced.
- Character is more subjective, but there will be more variation.
- It was agreed that as stated in paragraph 4.1 of the Committee report 'The new paths will provide some pleasant, easy to follow alternative routes with improved surface conditions and open access free from stiles'.

7.3 The officer recommendation was put to the Committee and approved unanimously.

7.4 Resolved – That the Public Path Diversion Orders made in respect of footpaths 871, 872 and 873 in the parishes of Elsted and Treyford, and Harting be submitted by the Director of Law and Assurance to the Secretary of State for confirmation.

8. Secretary of State Decision

**West Sussex County Council (Fittleworth) Public Path (No. 702)
Extinguishment Order 2016**

**West Sussex County Council (Fittleworth) Public Path (No. 2866)
Extinguishment Order 2016**

8.1 The Committee received and noted a report by the Director of Law and Assurance setting out the outcomes of recent decisions made by the Secretary of State (copy attached to the signed minutes).

8.2 The Committee wished it to be recorded that the outcome is noted with disappointment.

9. Date of Next Meeting

9.1. The Committee noted that its next scheduled meeting would be held at 2.15 p.m. on Tuesday 30 October 2018.

The meeting ended at 4.37 pm

Chairman

Rights Of Way Committee

5 March 2019

PREVIOUS DECISIONS PROGRESS REPORT

Key:	DMMO	-	Definitive Map Modification Order
	TRO	-	Traffic Regulation Order
	FP	-	Footpath
	BW	-	Bridleway
	RB	-	Restricted Byway
	BOAT	-	Byway Open to All Traffic
	TVG	-	Town or Village Green
	CL	-	Common Land
	TCPA	-	Town and Country Planning Act

* indicates a change in position since the last meeting

	Subject	Date Considered by Committee or Date of Delegation	Current Position
1	Haywards Heath: FP 25CU diversion	21.2.05	Diversion order and permissive path agreement not undertaken by Mid Sussex District Council. Whilst a safe and useable route is available, the landowner has been contacted regarding resolving the issues.
2*	Warnham: FPs 1578 and 1577, diversions and upgrade to BW	23.10.12	Orders confirmed by the Secretary of State. There is a separate report before this meeting
3*	Loxwood: DMMO 1/13 Nepp Lane – addition of FP	25.2.14	Orders confirmed by the secretary of state. There is a separate report before this meeting
4*	Southwater: BW 1642, FPs 1650 and 1651, diversion, extinguishment and creation	20.10.15	Inquiry held 24 th July 2018. Secretary of State has determined not to confirm the Orders. There is a separate report before this meeting.
5*	Bramber: DMMO 3/14 – addition of BW from RB 2059 to used route of BW 3183	7.6.16	Dedication specification agreed. Agreements to be circulated for signing.
6*	Graffham and Lodsworth: BW 1004 diversion, FP 2881 extinguishment	Delegated decision 26.1.17	Landowner not currently pursuing the diversion due to refusal of planning permission

7	Elsted: FPs 871 and 872, diversions	Delegated decision 1.12.16	Orders made and objections received. Orders have been submitted to the Secretary of State for determination.
8*	Slinfold: DMMO 1/15 Addition of FP from BW 3569 to FP 1467 on land east of Hayes Lane	Delegated decision 8.2.17	Order to be remade
9*	Steyping: FP 2732 diversion	Delegated decision 22.12.17	Order made confirmed
10*	Arundel: DMMO 1/16 Addition of a FP from Queens street to Fitzalan Road	20.2.2018	Order made and objections received submitted to the Secretary of State for determination
11*	Horsham: DMMO 4/16 Addition of a FP from Coney Croft cul-de-sac to FP 1586/2	20.2.2018	Order remade and currently on public deposit.
12*	Lancing FP 2048 Adur & Worthing S257 diversion consultation	12.06.18	Order made and confirmed by Adur and Worthing Councils. The certificate to bring the order into effect to be issued when the works are completed.
13	Haywards Heath FP28CU Mid Sx District S257 diversion consultation	Delegated decision 31.05.18	Order made by the District Council
14	Walberton and Arundel: DMMO 1/18 Addition of a restricted byway and upgrade of FP 342	Delegated decision 29.10.18	Decision not to make Orders. Applicant has appealed and currently with the Planning Inspectorate to determine.

Tony Kershaw

Director of Law and Assurance

Contacts:

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Rights of Way Committee

5 March 2019

Changes to the Network of Public Rights of Way, Common Land / Town or Village Greens

Key: DMMO - Definitive Map Modification Order
 FP - Footpath
 BW - Bridleway
 RB - Restricted Byway
 BOAT - Byway Open to All Traffic
 TVG - Town or Village Green
 CL - Common Land

1a. Applications for Definitive Map Modification Orders

	Parish	Application No.	Claim	Date application received
1	Binsted	1/18	Addition of RB and upgrade FP 342 to BW	08.02.18
2	Climping	2/17	Upgrade FP 174 to RB	11.04.17
3	Climping	3/17	Upgrade FP 829 to RB	11.04.17
4	Climping	4/17	Addition of RB	11.04.17
5	Henfield	1/17	Addition of FP Dagbrook Lane	15.02.17
6	Horsham	6/17	Addition of FP Dickens Way	26.07.17
7	Horsham	7-10/18	Addition of FP in Piries Place	05.02.18
8	Horsham	4/18	Addition of FP Mill Bay Lane	05.02.18
9	Pulborough	2/15	Addition of FP from FP 2337 to FP 2409	13.03.15
10	Rogate	5/16	Addition of FP at Fyning Twitten	06.12.16
11	Rogate	5/17	Addition of FP Fyning Lane	31.10.17
12	West Hoathly	2/16	Addition of BW between Top Road and Sharpthorne Road and upgrade of FP2WH to BW	13.05.16
13	West Hoathly	3/16	Addition of FP between Top Road and Station Road	17.08.16
14	Yapton	3/18	Addition of a FP West of Drove Ln	12.03.18
15	Yapton	5/18	Addition of a restricted Byway off drove lane and Upgrade of FP 155 to a restricted Byway, Yapton	19.04.18

16	Yapton	6/18	Upgrade of Fp 157 to restricted byway and addition of a Bridleway	19.04.18
17	Yapton and Climping	11/18	Upgrade of FP 166 and 165 to BW and the addition of a BW	19.10.18

1b. Applications to register land as Town or Village Green and applications to amend the Registers of Common Land / Town or Village Greens

Parish	Application No. / Reference	Proposal	Date application received
Horsham Town	TVG 30/47 - Land at 14A New Street, Horsham	Proposed registration Land at 14A New Street, Horsham	21.05.18
Bognor Regis Town	TVG 30/48 – The Sunken Gardens, Bognor Regis	Application to register the Sunken Garden, Bognor Regis as a TVG	04.09.18

2. Creations and permissive path proposals, diversion and extinguishment applications and District Council consultations received

- Key
- A - Awaiting investigation
 - B - Under investigation
 - C - Held in abeyance / additional information required
 - D - Withdrawn
 - E - Report before this meeting
 - G - Supported through officer delegation
 - H - Turned down at officer level

	Parish	Path No	Proposal	Date Received	Date of Decision	Category
1	Ansty & Staplefield	bw 40CR	Diversion	12.07.16		A
2	Ashurst	fp 2502	Diversion	21.01.16		A
3	Barlavington	New footpath	Permissive path proposal	01.05.18		B
4	Billingshurst	fp 1928	Diversion	19.04.16	25.10.18	G
5	Billingshurst	New link to fp 1321	Creation of footpath and bridleway dedication	09.10.17	23.10.18	G
6	Bosham	fp 238	Diversion	25.07.16		A

7	Chidham and Hambrook	fp 227	Diversion	19.12.14		C
8	Cowfold	fp 1773	Diversion	04.05.14		C
9	Cowfold	fp 1740	Diversion	04.11.15		H
10	Cowfold	fp 1742	Diversion	04.11.15		H
11	Duncton	New link to fp 724	Creation of footpath	05.07.18	18.10.18	G
12	Eastergate	fp 323	Diversion (Network Rail)	16.02.15		A
13	Fulking	fp 5_1	Diversion	28.06.16		A
14	Houghton	Permissive footpath	Permissive footpath	14.07.17		D
15	Kirdford	fp 614_1	Diversion	11.07.13		C
16	Pagham	fp 133	Diversion	01.08.16		B
17	Pulborough	fp 2312	Extinguish-ment (Network Rail)	17.01.13		A
18	Southbourne / Chidham / Hambrook	fp 258	Extinguish-ment (Network Rail)	11.11.12		B
19	Southwater	new footpaths	Permissive path proposals	01.04.13		C
20	Warnham	fp 1581	Diversion	01.06.09		C
21	Warningcamp	fp 2218	SDNPA S257 diversion consultation	13.09.18	14.11.18	G
22	Washington	New bridleway	Path creation	09.01.19	14.02.19	G
23	West Wittering	bw 20	Diversion	07.06.13		C
24	Worthing	new footpath	Path creation	12.10.12		C

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Director of Highways and Transport

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Outstanding applications 05.03.19

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Rights of Way Committee

5 March 2019

West Hoathly: Application for a Definitive Map Modification Order (Application No: 2/16) the addition of a bridleway at Top Road, Sharpthorne and to upgrade footpath 51FR to a bridleway.

Report by Director of Law and Assurance

Executive Summary

The application has been submitted by Mr P Brown and seeks to modify the Definitive Map and Statement for Cuckfield Rural by 1) adding a bridleway at Top Road in Sharpthorne to point B on the application plan and 2) to upgrade footpath 51FR from point B on the application plan to its termination at point C, Grinstead Lane, West Hoathly.

All evidence in respect of this claim is available for inspection in the Members' Room prior to the meeting.

1. The application is supported by documentary archival evidence only, which the applicant alleges demonstrates highway reputation over the claimed route.
2. The landowner's have submitted evidence which advises that the claimed route does not appear consistently on the maps provided by the applicant and that where the claimed route is visible on the maps there is nothing to differentiate it from private ways or otherwise to indicate its status.
3. Whilst the archive evidence submitted in support of this application appears to record all or part of the claimed route as a feature on a number of the maps consulted, they provide no indication of the status of the routes. Furthermore, the feature across the route at its junction with Top Road, and the lack of a consistent continuation on some of the OS mapping, is inconsistent with the route being a public highway.

Recommendation

That a Definitive Map Modification Order, under Section 53 (2) in consequence of an event specified in sub-section 53(3)(c)(i) and 53(3)(c)(ii) of the Wildlife and Countryside Act 1981, 1) to add a bridleway from point A, Top Road, Sharpthorne to point B and 2) to upgrade footpath 51FR to a bridleway from its commencement at point B to its termination at point C, Grinstead Lane, West Hoathly be not made.

1. Characters and features of the route

- 1.1 The claimed route is shown on the plan attached to this report, running between points A, B and C.
- 1.2 The claimed route begins at Top Road, Sharpthorne, identified as point A on the application plan. The route runs in a northern direction for approximately 1.28 kilometres where it meets footpath 51FR at point B. The route which is already recorded on the Definitive Map as a footpath then proceeds in an easterly direction until it joins with the highway at point C, Grinstead Lane, West Hoathly.
- 1.3 It is to be noted that following The East Sussex, West Sussex and Kent (County Boundaries) Order 1992, footpath 51FR, identified as points B to C on the application plan, was transferred to West Sussex County Council and renumbered footpath 51ESx following the West Sussex County Council (East Sussex-West Sussex (County Boundary No.1) Definitive Map Modification Order 2001.
- 1.4 This application is made in two parts:
 - 1.4.1 1) Point A – B on the application plan under Section 53(3)(c)(i) Wildlife and Countryside Act 1981, which requires the County Council to consider whether evidence submitted by the applicant shows that a right of way which is not shown in the Definitive Map and Statement subsists or is reasonably alleged to subsist over land; and
 - 1.4.2 2) Point B – C on the application plan under Section 53(3)(c)(ii) Wildlife and Countryside Act 1981 being the discovery of evidence which shows that a highway shown on the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
 - 1.4.3 The application is supported by documentary evidence only and is therefore considered with reference to Section 32 Highways Act 1980 which sets out that "A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made and compiled, and the custody in which has been kept and from which it is produced."
 - 1.4.4 The duty to make the Order for part 1) of the application is triggered if there is a reasonable allegation that the claimed rights subsist and for part 2) of the application if the County Council is satisfied that there has been the discovery of evidence, which, when considered with all other relevant evidence available shows that the alleged bridleway rights exist on the balance of probability.

2. Land ownership

- 2.1 Land Registry documents show there to be several different landowners for the claimed route, there is also some unregistered land.
- 2.2 The landowners consist of: Mr and Mrs Ashby, The Guide Association, Anthony Grubb and Ibstock Bricks Plc.

3. Consultations

- 3.1 Standard consultations were sent to the local member, County Council internal departments, amenity groups which included the Trail Riders Fellowship on a non-statutory basis, the District Council and the Parish Council.
- 3.2 The following comments were received.
 - i. **West Hoathly Parish Council:** "The Parish Council welcomed the application and, having seen the applicant's statement, was satisfied that there was archival evidence that there used to be a trackway along the route proposed"
 - ii. **The British Horse Society:** "The Society, therefore, supports the inclusion of this ancient way as a bridleway, in the restoration work planned for the clay quarry in 2028"

4. Evidence in support of the application

- 4.1 The application was supported by the following documentary archive evidence which, the applicant alleges, demonstrate highway reputation over the claimed route.
- 4.2 Sussex Maps by Richard Budgen 1724:
The applicant alleges that the map shows the claimed route, in its entirety, as the main road from West Hoathly towards East Grinstead by way of Willots Bridge. The applicant alleges that this map, showing the claimed route, is also included in "Sussex Tales of the Unexpected" by Kim Leslie published by West Sussex County Council chapter 3 page 15; 'The Appian Way for the high nobility'. This evidence supports the claimed route as a way in use by the public in 1724. The applicant believes that the claimed route is the same as shown on this map is supported by the boundary markings for Hundreds and Deaneries showing the ancient boundaries that subsequently became the defined parish boundaries.
- 4.3 Tithe Map of East Grinstead 1841:
The Tithe Communication Act 1836 enabled tithes to be converted to monetary payments. Maps were drawn to show titheable land. Non-titheable land, deemed to be unproductive was usually excluded on the maps, so that the landowner avoided tithe payments. It is usual for no tithe to be payable on roads. The applicant alleges that the map is consistent with the claimed route being a public highway at the time of the assessment. The road is coloured, indicating no apportionment. The

entire route is depicted in the same way as Grinstead Lane, which is now a public highway.

4.4 Tithe Map of West Hoathly 1841:

The claimed route is shown running along the parish boundary line with East Grinstead and also shown on the Tithe Map of West Hoathly Parish. It is concluded that there was no need to show any more detail on this map or in the apportionment as the road was in the ownership of landowners in East Grinstead Parish.

4.5 Ordnance Survey Old Series Map 1813:

It is alleged by the applicant that the route is clearly shown on the first edition OS map.

4.6 Ordnance Survey County Series Maps First Edition 1874:

The applicant reports that OS maps are not usually of use for rights of way purposes as they usually only show physical features and not legal rights. The maps show the claimed route as land parcel 2373. The applicant believes that if you cross reference the map with the Book of Reference that was published with the first edition OS map, it describes land parcel 2373 as a 'road'. Together, it is alleged by the applicant, this evidence shows that the road was in public use in 1874. The applicant believes that there can be confidence in this as the maps were executed by public surveyors.

4.7 Estate Maps and Records:

The applicant claims that the sale particulars estate map, produced in 1867 for the sale of Courtlands Estate, makes reference to the claimed route and names it 'Cookhams Lane'.

4.8 Ordnance Survey Boundary Records:

The Ordnance Survey was given the duty of ascertaining and recording all public boundaries by the Ordnance Survey Act 1841. Of particular value for determining highway status are the boundary sketch maps and boundary remarks book. It is alleged by the applicant that the claimed route, from points A to B and some of the claimed route from points B to C on the application plan, is shown on the boundary sketch maps to run alongside the East Grinstead and West Hoathly parish boundary. The applicant states that on page 26 the claimed route is described as an "Ancient Road".

4.9 Plaw Hatch Estate:

The applicant alleges that the claimed route is described in a paper "The Origins of Plaw Hatch Estate" and is described as an extension of the road included in the purchase of the manor of Mayes and Neylands Farm. The author states that the way, "carried on through a muddy track to Grinstead Lane and was discontinued by the turn of the [19th] century. The growth of residences in Sharpthorne around the [West Hoathly] railway station after 1882 would have favoured the alternative way to Grinstead Lane via New Coombe [Footpath 2WH]".

4.10 Planning Permission for Clay Quarry Works:

Planning permission was granted to Ibstock Building Products Ltd to extend the working of the clay quarry eastward in 1998. This included part of the claimed route being included in the extended quarry workings. A condition of the planning permission was the termination of the working in 2018. Prior to this, the extent of the clay workings was restricted to the west side of the claimed route. An "Archaeological Desk Based Assessment" Report No. 44144 was carried out by The Trust for Wessex Archaeology Ltd in November 1997 and refers to the claimed route as Cookhams Lane. Chapter 4.4 identifies the route as a "sunken or hollow way worn by pedestrian, animal or cart traffic". The report further states that "the possible significance of the lane lies in its use as a Parish and County boundary. In order to make such a territorial boundary easy to trace, they often follow easily recognisable pre-existing landscape features, such as barrows, roads, tracks, streams and rivers, and ditches and dykes". The applicant alleges that the report recognised and provided expert evidence of an ancient lane or track that existed on the ground prior to the clay quarry extension of 1998.

4.10 The applicant believes that with the exception of that part of the way now within the clay quarry, physical evidence of the claimed route as an ancient right of way remains visible on the ground throughout the route to this day. The applicant alleges that the evidence presented demonstrates the claimed route as a driving road for stock and pack animals as well for the public on foot and horseback. The applicant further alleges that all of the evidence suggests that bridleway rights existed at the time the various maps and pieces of evidence were created. The applicant notes that whilst no single piece of evidence is conclusive of highway status, every standard piece of evidence leans towards bridleway rights meaning that, it is argued, such rights exist on the balance of probability.

4.11 The applicant states that Point A of the claimed route is the junction of three parishes, East Grinstead, West Hoathly and Horsted Keynes. The applicant's belief is that a contention that exclusive private manorial rights applied to the claimed route can be rebutted on the basis that the iron working and smelting sites were distributed over three parishes and associated landownerships. A common factor is that the identified Bloomery sites in all three parishes are located so as to be able to take advantage of the application route.

4.12 The applicant believes that it is unlikely brickmaking in the 19th and 20th Century would have given rise to the use of the claimed route. Brickmaking was invariably carried out close to the building needing the bricks, as suitable brickmaking clay is plentiful. 'Brickmaking in Sussex' by M. Beswick published by the Sussex Archaeological Society in 1993 lists known brickmaking sites in Horsted Keynes, West Hoathly and East Grinstead. The applicant alleges that this evidence almost certainly eliminates the use of the claimed route by this industry.

4.13 The applicant alleges that the documentary evidence provided shows the complete route and on the balance of probability shows that a through route existed to and from the public highway at point A to the public

highway at point C when the various maps were issued. The applicant believes that out of preference a traveller on foot, horseback or driving livestock would always take the way offering the shortest distance and, where possible, gaining high ground for better surface drainage and personal safety. The applicant believes that the claimed route achieves that objective.

5. Evidence against the application

- 5.1 The Guide Association, Anthony Grubb and Ibstock Bricks Plc have submitted their objections to the application as a consortium. The consortium of landowner's state that there is no evidence to suggest that the claimed route is a public way. Mr and Mrs Ashby have also provided their comments to the application.
- 5.2 The consortium report that this area of land would have necessitated movements of estate workers and of animals across the estate. They further state that in this area, the origins of mineral working, commencing with the iron extraction from bell pits in the land adjacent to the claimed route, also required private ways to transport product to market. They note that tracks could come into existence that were of benefit to more than one individual property, but which would not be public.
- 5.3 It is noted that before the Railway and Brickworks were built, there was considerable activity in the parish in iron working as well as clay extraction. The consortium claims that it was known that many tracks were made to enable the businesses to export their wares, as well as drove roads to enable stock to be moved between fields. They state that none of the tracks or ways made for these purposes can be argued to have been recognisable as public rights of way, as they would have been protected by their owners and lessees against theft and rustling.
- 5.4 The claimed route does not appear consistently on the maps provided by the applicant. The landowners state that where the claimed route is visible on the maps there is nothing to differentiate it from private ways or otherwise to indicate its status.
- 5.5 The clay workings removed the old Cookham's Lane entirely, which was made possible by the shifting of the access to New Coombe Farm from the old private route, to a new route, which facilitated the fully consented clay working. It is argued that it is inconceivable that the consent for clay working would have been granted without reference to a public right of way if one existed, which the consortium contend is strong evidence that none did.
- 5.6 Prior to the removal of Cookham's Lane in 2003, Ibstock Brick commissioned independent archaeological assessment of the land structure as was required under Planning Conditions. The assessment did not draw any conclusions as to the legal status or users of the lane, rather the assessment examined the construction of the lane and suggested how this may have been related to the surrounding land use, referencing the iron workings mentioned above.

- 5.7 Cookham's Lane was a private right of access between Cookham's Farm and New Coombe Farm. The Tithe Map evidence has limitations, given the lack of clarity as to when ways should be excluded from hereditaments and given the claimed route cannot be pinpointed as the route to which a deduction was made. The exclusion of part of the claimed route from the tithed hereditament is unlikely to have been an acknowledgement of a public road.
- 5.8 It is argued that the claimed route was used to run cattle and sheep from New Coombe Farm to Blacklands Farm and it has never been used as a public way. The claimed route is a private way and it has never been a track which continues all the way through from Top Road to Grinstead Lane.

6. Archive and other evidence

- 6.1 The application and subsequent investigation by the County Council has brought forward large amounts of archival information on the claimed route. The relevance and usefulness varies greatly between each piece of documentary evidence, particularly, as the intention was to find evidence to prove the status of the route. The status of a route is difficult to determine from archive evidence as most historic maps do not provide information on status and/or are not seen as sufficient evidence to prove definitively the status or sometimes even the existence of a public right.
- 6.2 The following maps were examined as part of the investigation:
- 6.3 Ordnance Survey Mapping 1875 – 1969:
- 6.3.1 Points A to B:
Points A to B of the application route are not consistently shown on Ordnance Survey maps. Where the claimed route is marked on the maps it is identified as either a solid lined track or a faint pecked line. Whilst part of the claimed route is shown on most of the OS maps, they give us no indication of status of the routes. It merely shows that they were identified as features at the time of survey.
- 6.3.2 Points B to C:
Points B to C of the application route can be clearly identified on Ordnance Survey maps with some maps labelling the route as a footpath ('FP'). The majority of maps show the route as a double pecked track. Whilst it is shown that the route is marked on the maps, it must be noted that this does not indicate the status of the route.
- 6.4 East Grinstead Tithe Map 1840:
The map shows the full extent of the claimed route running south-west from Grinstead Lane to Top Road. The route openly joins onto the present day highway at both ends and is coloured the same as the other present day highways. By way of comparison, routes which appear to have no continuation and serving as access routes only, such as Neylands Farm to the north and Mays Farm to the east are also coloured in the same

manner. It is considered that the colouring of the claimed route has no bearing on its status.

6.5 West Hoathly Tithe Map 1841:

The route is shown from point A to B until it reaches the end of the map and crosses onto the East Grinstead Tithe Map. As with the East Grinstead Tithe Map and mentioned above, the route is shown as feature and coloured in the same way.

6.6 West Hoathly Estate Map 1865:

The claimed route is clearly identified on the map as both a double solid lined track from point A to B and a double pecked track from point B to C, however, there is nothing to indicate the status of the route

6.7 Summary of archive research:

- 6.7.1 The application route in its entirety, has been shown on various maps throughout time, however, none of the maps identified are produced for the purpose of confirming highway status.

7. Consideration of claim

- 7.1 The application was submitted with archive evidence summarised in Section 4 of this report. Evidence against the application has been submitted by a consortium and is summarised in Section 5 of this report. The investigating officer has conducted a thorough investigation into the County's archives at the WSCC Record Office and as summarised in Section 6 of this report.

- 7.2 In determining the application it is necessary to decide:

- 7.2.1 whether the evidence provided by the applicant for the addition of a bridleway between points A to B, together with all other relevant evidence available, shows that on the balance of probability a bridleway exists between points A and B, or in the alternative that a bridleway between points A and B is reasonably alleged to subsist, which is a lower test. This lower test requires that it is reasonable to allege a right of way subsists.
- 7.2.2 whether the evidence provided by the applicant for the upgrade of footpath 51FR to a bridleway, represents the discovery of new evidence, which, when considered with all other relevant evidence, shows that between points B and C, footpath 51FR ought to be shown as a bridleway, on the balance of probabilities.

The burden of proving this falls to the applicant.

- 7.3 Point A to B on the application plan has featured on a number of different maps throughout time, though not consistently.
- 7.4 The Budgen 1724 map relied upon by the applicant does show a route from East Grinstead to West Hoathly. However, due to the scaling of this map, it is not possible to conclude whether the route highlighted by the

applicant is the claimed route or the present day highway, Grinstead Lane, which is located to the east of the claimed route.

- 7.5 The Tithe mapping also depicts a route which is consistent with the claimed route, however, as mentioned above, the Tithe Maps also show the claimed route as a feature. However, tithe documents are concerned solely with identifying Titheable land. Tithe maps were not intended to record or establish public rights of way or highways. It is also noted that whilst the route is coloured on the Tithe mapping, many other routes which appear to serve as private access routes only, with no continuation past properties are also coloured in the same way. It is considered that the colouring of the claimed route provides no evidence of its status as a public highway.
- 7.6 The 1813 Old Edition Ordnance Survey Mapping produced by the applicant, shows part of the claimed route (A-B) as a feature. It clearly shows this part of the claimed route stopping at a point between the properties Old Coombe and New Coombe, with continuation past these properties following a similar line to that of the present day definitive footpath 51FR. Again, the depiction of the claimed route (A-B) as a feature on this map provides no indication of status. Further editions of the Ordnance Survey Mapping also record part of the claimed route (A-B) as a feature although the continuation of the whole of the claimed route, A, B and C, is not consistently mapped. The 1863, Sussex Series 1 OS mapping records a feature across the route at its junction with Top Road. A feature across the route is also shown on the 1874 1st Edition OS map (submitted by the applicant) and also the 1909 Sussex Series 2 OS mapping. The presence of a feature depicted across the route suggests that there was some kind of restriction or obstruction preventing public access. This is inconsistent with the route being a public highway.
- 7.7 The Courtlands estate map shows part of the claimed route (A-B) as a feature from its southern end. This map provides no evidence of the short section of this route's status, although the lack of continuation would more than likely suggest that it was an access route within the farm estate.

The naming of the route "Cookhams Lane" is not strong enough evidence in its own right to prove that the claimed route is a public highway.

- 7.8 Point B to C (definitive footpath 51FR) features on the majority of maps submitted in support of the application, however, it is considered that none of the evidence produced or considered as part of this application, is new evidence which would not have already been considered during the first recording of the route as a public footpath during the process of recording routes under the provisions of the National Parks and Access to the Countryside Act 1949.

8. Conclusion

- 8.1 Whilst the archive evidence submitted in support of this application appears to record all or part of the claimed route as a feature on a number of the maps consulted, they provide no indication of the status of

the routes. Furthermore, the feature across the route at its junction with Top Road, and the lack of a consistent continuation on some of the OS mapping, is inconsistent with the route being a public highway.

- 8.2 1) In consideration of all the evidence submitted in relation to this application and as set out above, it is recommended that an order under Section 53(2) in consequence of an event specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to add a bridleway from point A, Top Road, Sharpthorne to footpath 51FR at point B on the application plan, be not made.
- 8.3 2) In consideration of all the evidence submitted in relation to this application and as set out above, it is recommended that an order under Section 53(2) in consequence of an event specified in sub-section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to upgrade footpath 51FR to a bridleway from its commencement at point B on the application plan to its termination at point C, Grinstead Lane, West Hoathly be not made.

9. Resource Implications and Value for Money

- 9.1 The County Council is under a duty to investigate applications. The consideration of the application by officers falls within existing budgets.
- 9.2 Cost implications arise:
- 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.
 - Should an order be made and confirmed;
 - if any works are necessary to ensure the path is open for public use.
 - Should the decision of the committee be challenged by way of Judicial Review.
- 9.3 The decision taken by the investigating officer and the Rights of Way Committee is a decision based on legal tests and the above costs cannot be a consideration in the determination of the application.

10. Risk Management Implications

- 10.1 The decision is one that must be taken on strict legal tests:
- the application is not determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.
 - 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.
- 10.2 In reaching a recommendation the investigating officer has considered the evidence in accordance with the law.

11 Crime and Disorder Act Implications

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.

12. Human Rights Act 1998 Implications

- 12.1 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.
- 12.2 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 right and freedom of others.
- 12.3 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'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.
- 12.4 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.

13. Equality Act 2010 – Equality Impact Report

- 13.1 The Committee should be aware that the Equality Act 2010 bans unfair treatment, and seeks equal opportunities in the workplace and in wider society. It also introduced a Public Sector Equality Duty (PSED). The PSED requires us to have due regard in all decision making processes to the need to:
 - a) Eliminate discrimination, harassment, victimisation or other prohibited conduct;
 - b) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and
 - c) Foster good relations between those who share a relevant characteristic and those that do not share it.

- 13.2 The relevant protected characteristics are age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.
- 13.3 An Equality Impact Report has been undertaken and is detailed below/ attached as an Appendix.
- 13.4 No relevant impact upon any of the protected characteristics in the Equality Act 2010 emerged during the consideration of this application.

Background Papers

- (a) Application (DMMO 2/16)
- (b) Evidence in support
- (c) Evidence in opposition
- (d) Archive Evidence

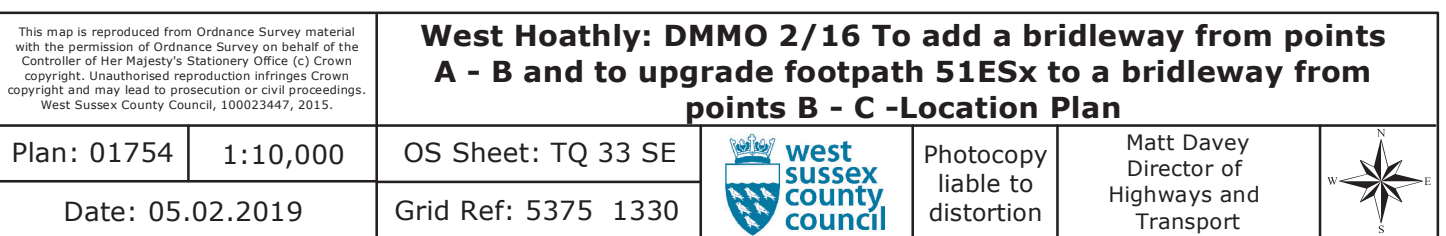
Appendices

- Appendix 1 Location Plan
- Appendix 2 Site Plan

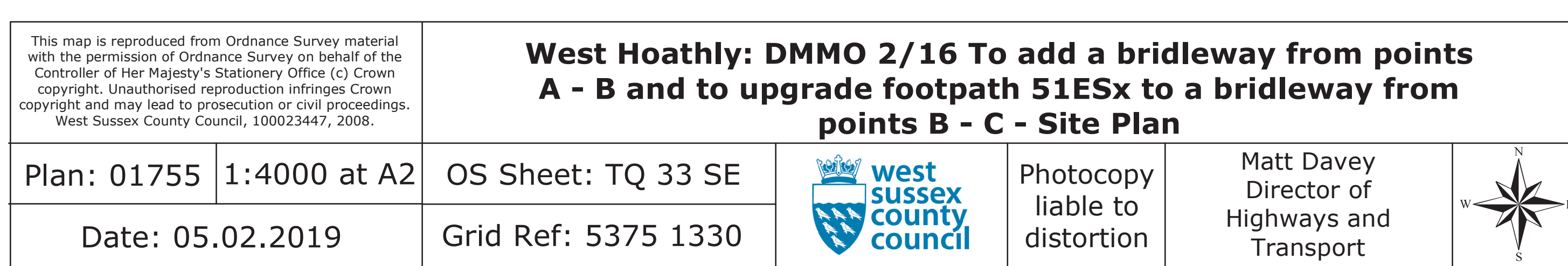
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Rights of Way Committee

5 March 2019

Henfield: Application for a Definitive Map Modification Order (Application No: 1/17) to add to the Definitive Map and Statement a public footpath along Dagbrook Lane

Report by Director of Law & Assurance

Executive Summary

The application has been submitted by Michael Wright and seeks to modify the Definitive Map and Statement for Henfield by adding a footpath from FP 2563 heading east along Dagbrook Lane to an unmarked track in the Parish of Henfield.

All evidence in respect of this claim is available for inspection in the Members' Room prior to the meeting.

1. The application was submitted with 34 user evidence forms, claiming use of the route from 1945-2017
2. Six objections were submitted by the landowners, tenant farmers and adjoining land owners.
3. Archive evidence is inconclusive on its own and so the application has been considered under S.31 HA 1980. The twenty year period for the purpose of determining this claim is 1995-2015.
4. The user evidence forms attest that the route has been continually used by members of the public from 1945-2017.
5. Evidence submitted by the landowners is in direct conflict with the use being "as of right" and without interruption.
6. The nature of the claimed route, being a cul-de-sac, with no continuation at one end to the public highway, is inconsistent with the characteristics of a public highway.

Recommendation

That a Definitive Map Modification Order, under Section 53 (2) in consequence of an event specified in sub-section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981, to add a footpath from FP 2563 and then east along Dagbrook Lane to an unmarked track in Henfield be not made.

1. Characters and features of the route

- 1.1 The claimed route is shown on the plan attached to this report (appendix 1), running between points A to C.
- 1.2 The claimed route begins at the western end of Dagbrook Lane (point A, appendix 1) which joins definitive footpath 2563 and continues in an easterly direction passing under the Downs Link footpath 3513 (point B appendix 1) along Dagbrook Lane ending at point C (appendix 1) where an unrecorded track heads north to join with definitive footpath 2567.
- 1.3 The route claimed is a cul-de-sac route, connecting only at its western end with a public highway, being definitive footpath 2563. At the eastern end of the claimed route there is no claimed continuation to the public highway.
- 1.4 The route follows a lightly wooded well-trodden track from point C (appendix 1) on the plan to where it passes through an old railway bridge passing under the Downs Link at point B (appendix 1). There is a gate under the railway bridge and a further metal gate about 50 yards further which opens up into fields and following along these towards footpath 2563.

2. Land ownership

- 2.1 Land registry searches confirm that all of the land crossed by the claimed route is unregistered; however, documentary evidence has been provided which is claimed to show that the land is owned by a Mr Elsam.
- 2.2 Due to the land being unregistered, notice of the application was erected on site in accordance with the Regulations. Should the County Council determine to make an order, dispensation for the serving of the required notices will need to be obtained from the Secretary of State.

3. Consultations

- 3.1 Before Making a Definitive Map Modification Order, the County Council is obliged to consult the relevant District or Borough and Parish Councils. Consultations have also been carried out with other interested bodies. Responses received to the consultations carried out can be found in the evidence file in the members' room.
- 3.2 In considering the result of the consultations, members of the Committee are requested to bear in mind that, when determining this application they can only take into account evidence which demonstrates whether or not the tests in Section 53 have been satisfied.
- 3.3 The following consultation responses were received.
 - 3.3.1 Henfield Parish Council
 - i. The Parish council stated that they have no conclusive evidence on this matter
 - ii. At least one Councillor stated that he has used the track in question well back into the last century.
 - iii. Another Councillor was told by the landowner that he and his family have frequently put up notices saying that the track is private.

- iv. The Parish Council also stated that it seemed to them that at least one other track would need to be similarly converted to secure access to both ends of the section in this application.

3.3.2 WSCC PROW Ranger

The only comment highlighted the fact that the claimed route does not connect to an existing public highway i.e. its cul-de-sac nature.

4. Evidence in support of the application

- 4.1 The application was submitted on 14 February 2017 by Michael Wright who since submitting the application gave consent for Ms Elizabeth Claxton to act on his behalf. The application is supported by 34 user evidence forms from 27 individual addresses, claiming use of the route from 1945-2017. The evidence provided by these "users" is summarised below;
- 4.2 All users claim to have used the route on foot, either walking or dog walking with their use ranging from two to 400 times plus a year. Four witnesses confirm using the route over 350 times a year. 21 of the witnesses claim to use the route 50 times or more a year and only three witnesses claim to use the route ten times a year or less.
- 4.3 All but one of the users claim to have seen others using the route on foot and one user, L Hornwell, states sighting of users on horseback.
- 4.4 Four witnesses claim to have sought and obtained permission from the occupier of "Dunstalls" to use their meadow. It is unclear from the user evidence forms the exact location of this meadow, however, Dunstalls is a property located to the north of point C. The unmarked track from point C runs through Dunstalls title and the application route does not pass into Dunstalls boundary and therefore it is considered these four users are making reference to having permission to use this unmarked track rather than the application route. In addition, the applicant later explained that some of the users have been granted permissive rights by the land owner of Dunstalls to use a track connecting the claimed route to the definitive footpath 2567.
- 4.5 Only one user, C Brown, commented on their public user evidence form that they were personally told the route was not public by the owner or occupier in 2016. However, M Wright stated on his public evidence form that although he has never been stopped from using the route or turned back he has heard of others being turned back by recent provisions of barbed wire blocking the Downs Link access.
- 4.6 Twenty users mention an obstruction on the route which varies from a gate, a gate and barbed wire, trees and barbed wire and a fence and hedge. Sixteen users mention a gate always being present, however, five state the gate being locked since 2016 or in recent years and only one user states the gate was locked prior to 2016. Mr and Mrs Lewis state the gate appeared in 2016. Two users report trees and barbed wire as an obstruction, again since 2016. One user mentions a fence and hedge to control stock and one mentions barbed wire on its own as an obstruction but does not provide details. Of these 20 users, pre-2016, only one user, A V Barwick, states that the gate under the railway bridge appeared roughly in 1986/7 and was kept locked. Only two other users mention another obstruction other than a gate but do not without specifying dates.

- 4.7 Twelve of the users report to have seen notices saying 'Private', 'No Public Access' or 'Right of Way' and 'Surveillance Area' all of which have been reported by users to have been put up since 2016, except for one user who does not specify a date the notices appeared.
- 4.8 Users M and P Cusack state this route is marked as a RUPP (Road used as a public path) on old maps. A letter was sent to Mr and Mrs Cusack for more details but no response was received. In addition, Mr Barwick describes the route being denoted as an occupation road in "Henfield tithe map 1845".
- 4.9 E Claxton provided pictures from a book "a tour of our commons by old and a young inhabitant the Henfield parish magazine February - August 1916" describing the routes use as a common.
- 4.10 One of the 34 users, A V Barwick, in a letter states the following;
- i. In the 1950s and early 60s when he used the route as a child there was no gate or fence.
 - ii. He believes in about 1986/7 a gate appeared at the railway arch to contain livestock, it was believed to be locked at this point and kept locked. Barbed wire was added at a later date. However, Mr A V Barwick does not state that this prevented him using the route.
 - iii. A wire fence is described to be put up across the lane towards point C of the application route again to control livestock grazing in adjacent fields in the 1990s. A V Barwick states there were never any notices and it was easy to duck under so believes it was not intended as a means of stopping people to use the lane.
 - iv. A V Barwick states that the lane was classed as an occupation road on the Tithe map. It is stated it was used as access to Pokerlee (demolished in the Edwardian period) farm and to the original site of Brookside Farm until the railway was constructed in 1861.
- 4.11 In summary, users claim to have used the route frequently on foot since 1945. It is clear from the user accounts the route was obstructed and notices put on site since 2016. A couple of users reported signs and obstructions along the route prior to 2016 but do not specify a date.

5. Evidence submitted by landowners and adjoining landowners / in opposition to the application

5.1 Mr Elsam

- 5.1.1 Mr Elsam states that his family have occupied and owned Brookside farm since the 1940s and that he "objects in the strongest possible terms". Mr Elsam's comments on the application and supporting evidence are summarised below:
- i. Mr Elsam highlights an inconsistency in accounts on the user evidence forms. Conversely, he also alludes to collusion by the users as the plan used is the same in nearly all user evidence forms submitted.
 - ii. The route is said to be regularly impassable due to flooding, which Mr Elsam states is supported by a nearby and necessary footbridge on FP 2563 which crosses Dagbrook Lane.
 - iii. The route is also stated to have, in the past, been overgrown to the point it was impassable which Mr Elsam states he can provide pictures

to demonstrate this was 1993 and also claims is supported by OS map First edition 1875 and the fact that sections were only cleared by his family after the great storm of 1987 (this further supported by Caroline McKenna's letter). The fact that it was so overgrown would have made it unlikely to have been used by so many people so frequently.

- iv. Mr Elsam also states the barrier described across Dagbrook Lane made reference to by A V Barwick in his public evidence form is supported by Map TQ2015 (1956) and TQ21NW (1963) (discussed in section 6.1.3 and 6.1.4).
- v. Mr Elsam states that in 2½ years of permanent occupation he has never seen anyone walking on the lane.
- vi. Mr Elsam claims that TDW157 Tithe Map recorded Dagbrook Lane as "Occupation Road" not a public highway which is supported by submission of the Tithe Map (see section 6.2.6), he has found no map to show the lane as a public right of way. In the past the occupation road was used to link parcels from Pokerlea, Brookside and Rye Farms all of which formed part of the Streatham Manor Estate.
- vii. Mr Elsam also highlights that the route is of great significance to wildlife and dogs walking through the area would disturb wildlife and habitat preservation.
- viii. Mr Elsam highlights the historic issue the family have had stopping people trespassing describing his father's, who moved to the farm as a young child, trouble with this. He claims that his family, since 1955, have been putting up signs and locking gates which were regularly broken or removed. Since Mr Elsam inherited the farm he reports of the gate being damaged.

5.5.2 Mr Elsam has submitted several photos of the site these include:

- i. Photos from 1993 showing the route looking quite overgrown. It is difficult to tell where on the claimed route these pictures are. The pictures include the gate under the railway bridge. Although the gate is closed you cannot clearly see from this whether or not the gate is locked.
- ii. A series of photos from January 2016 to October 2017 showing the gate under the railway bridge being locked and a series of photos in which Mr Elsam states shows the lock being forced open, cut open or removed altogether. From February 2017 the pictures show barbed wire along the gate and from January 2016 pictures show a notice on the gate stating "you're on cctv".
- iii. There is a picture of a sign just adjacent to the gate under the railway bridge in May 2016 stating Brookside Farm as a conservation area and not a public right of way.
- iv. There are two pictures which Mr Elsam claims to show was an old fence line (including concrete posts) running across the Lane near to the eastern end of the application route.
- v. There are numerous pictures from April 2015 to March 2016 showing notices stating "No Public Right of Way" at three points along the claimed route; where the Lane meets FP 2563, just after the Railway Bridge heading eastward and at the far east end of the claimed route. Some of the pictures show broken signs including bits of the signs in shrubbery.
- vi. Pictures from Jan 2016 to October 2016 show a gate at the far east end of the claimed route. The gate does not have a lock on it and has

been moved aside in some of the pictures. From one of the pictures (Jan 2016) you can see evidence of a track made from regular walking.

- 5.1.2 Mr Elsam has reported criminal damage and theft on his land on the claimed route in question but this cannot be considered as evidence.
- 5.1.3 Five police reports were submitted as evidence by Mr Elsam dated from the 17/08/2016 to the 20/10/2017 stating that the investigation was closed.
- 5.1.4 In addition to the above Mr Elsam also submitted the following historical maps of the area:
 - i. OS map 1st edition 1875 (XXXVIII/ 13)
 - ii. Early Ordnance Survey Sussex Map 1938 4th edition (XXXVIII.13)
 - iii. National Grid Arundel and Shoreham Map 1956 (TQ 2015)
 - iv. Arundel and Shoreham Map 1963 (TQ21 NW)
- 5.1.5 Mr Elsam claims that no historical maps of the area show the claimed route as a public right of way and that the presence of the feature across the route on the maps supports his assertion that the claimed route is private.
- 5.2 Alec Griffiths of Farmhouse, Tortington Drive, Small Dole, BN5 9XZ
 - i. Mr Griffiths describes keeping cattle in the section of Dagbrook Lane which includes the railway arch approximately 12 years ago and running them in the area for the previous 10 years (approximately 1994-2004).
 - ii. Mr Griffiths points out that the area was prone to flooding which made it impassable and also describes a metal gate under the old railway which was kept locked.
 - iii. Mr Griffiths lastly mentions that he also made hay in the adjoining fields and rarely saw anyone using the area but he does remember some people being told to keep to the footpaths if they strayed off the Footpath at Dunstalls (located to the north of Dagbrook Lane) by Mrs Sparks. He states that he has only ever known the area to be used for farming.
- 5.3 Mr P Turner of Brookside Cottage, Dagbrook Lane, Henfield, West Sussex, BN5 9SH.
 - i. Mr Turner and his family have lived at Brookside Cottage (a property on Brookside Farm) since 2001. Mr Mike Elsam was the owner of Brookside Farm at the time.
 - ii. Mr Elsam granted Mr Turner and his family permission to walk anywhere on the farm and so they state they knew the area well. He states that in all the years they lived there the area was not used as a footpath, mainly as there was livestock in the area. When the livestock were not there his children would play under the railway bridge and he does not recall anyone walking through when they were down there.
 - iii. Mr Turner also stated that the gate under the railway bridge was from time to time kept locked and there was a handwritten notice here saying not to walk there. As mentioned above his children often played in the area and Mr Turner has supplied pictures from 2010 and 2013 to show that the gate was closed. Mr Turner does not recall seeing anyone walk through.

- iv. Mr Turner claims that in the winter the area was prone to flooding making it impassable.

5.4 D Elsam, mother of Mark Elsam

- i. Mrs Elsam opposes the establishment of a footpath and states Brookside Farm has been under ownership of her late husband and now son since 1940.
- ii. Mrs Elsam has been a regular visitor to the farm from 1955 and states that over the years many signs have been put up, access has been barred and gates locked. Mrs Elsam states that she put a hand written notice stating it was private on the gate under the railway bridge thirty years ago along with other signs that were removed. On occasions it would not be locked as the lock was removed without their knowledge. Her husband did not farm on site but whenever present they would be shut and locked or secured and periodically signs were put up.
- iii. Mrs Elsam states that when her husband became ill her son took over the farm from 2012. They had a discussion at the time about people trespassing and her husband informed her son it was difficult to prevent despite physical barriers and signs being put in place. Since taking over the farm her son, Mark, has worked hard to continue to keep people on the rights of way.
- iv. Mrs Elsam states that since her son has lived on site the amount of trespassing has reduced and consequently the wildlife thrived. Lapwings have been seen on site for the first time and Mrs Elsam fears a footpath would prevent them becoming more established.

5.5 C McKenna, 75 Wannock Lane, Eastbourne BN20 9SG

- i. Brookside Farm was the home of her aunt Mary, and so she has visited the farm throughout her life, she was born in 1943.
- ii. Her Aunt Mary died in 1970 and then her cousin Michael inherited the farm and ran the farm as an absentee farmer.
- iii. Describes the farm being run down and neglected with Dagbrook Lane being particularly overgrown. She describes a gate adjacent to the old railway line often being left open as people ignored "PRIVATE- NO ACCESS" notices or similar. She mentions other similar signs on the farm being vandalised.
- iv. Describes staying on the farm in the 1990s for 3-4 weeks each spring to help with lambing and remembers unaccompanied dogs being a problem.
- v. Highlights that before the Hurricane of 1987, when Dagbrook Lane was cleared to rescue sheep trapped by floodwater, the lane would have been impassable.

5.6 S and P Haworth-Booth

- i. S and P Haworth-Booth lived and farmed Rye Farm for 34 years and took over grazing rights on Brookside in 1990 in order to manage Brookside, Pokerlea and Rye Farm as a whole under a Countryside and Stewardship scheme. They point out that the area is still under a countryside stewardship scheme and walkers not sticking to the footpath and dogs disturb ground nesting birds which the scheme is aimed at protecting.
- ii. They go on to highlight that dogs have been a continuous problem over the years causing injuries and losses to sheep and Neospora in

cattle caused by dogs. In addition people leaving gates open has caused problems in the past.

- iii. They state that Dagbrook Lane was the original access to Rye Farm as an occupation road but it was never cleared as they were aware people might use it and wanted to discourage this to prevent the possibility of livestock escaping onto the A2037.
- iv. Finally they state that the gate under the railway has over the years been wired up, chained and padlocked to keep cattle in and trespassers out.

6. Archive and other evidence

6.1 The following historical maps are further evidence examined as part of the research by WSCC.

6.1.1 Ordnance Survey Mapping Sussex Series 1 – 4 dating from 1863 – 1946

All of the Ordnance Survey maps mark Dagbrook Lane as such and the lane is shown enclosed with double black lines. The inclusion of a way on Ordnance Survey mapping gives no indication of its status.

6.1.2 Draft and Provisional Definitive Maps

The claimed route was not claimed as a public right of way during the process for recording public rights of way under the provisions of the National Parks and Access to the Countryside Act 1949.

6.1.3 Tithe Map Henfield 1845

This record was made before the old railway line was constructed. Dagbrook Lane can be seen depicted in the same way as today's maps, enclosed by solid black lines. An apportionment further along the lane from the application route is labelled as "Occupation Road" (Apportionment 485) supporting the private nature of the claimed route.

6.1.4 Deposited Plans Great Southern Railway 1834

As the above map did not show the old railway line the deposited plans were reviewed to ascertain if any information on Dagbrook Lane was given, however, there was no useful information provided by this plan.

6.1.5 Henfield parish magazine February -August 1916 provided by applicant

Describes Dagbrook Lane to the south of the Dag Brooks common, however does not specify the Lane's status as public or private.

7 Consideration of claim

7.1 Archive evidence

- 7.1.1 As part of the investigation, several pieces of archive information have been considered. It appears that the claimed route has been a feature on a number of maps, from as early as 1845. However, whilst the claimed route does appear as a feature on many of the maps and in some cases named as "Dagbrook Lane", none of them provide any details of status and whether or not the route is public or private. Many of the OS maps show a feature across the claimed route, which is considered to be a strong indication of the private nature of the claimed route and inconsistent with the route being a public right of way. On balance, it is considered that the archive evidence is not strong enough alone to recommend that an order be made, therefore it is

necessary to consider the evidence of use submitted under Section 31 Highways Act 1980.

- 7.1.2 Therefore, in determining the application the Committee has to decide whether the user evidence provided by the applicant, together with all other relevant evidence available shows that on the balance of probability a right of way exists, or that it is reasonable to allege the existence of a public right of way. The burden of proving this falls to the applicant.

7.2 User Evidence

- 7.2.1 Section 31 of the Highways Act 1980 requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

- 7.2.2 The application is supported by 34 user evidence forms which attest that the use of the claimed route spanned from 1945 to 2017

- 7.2.3 As mentioned above it has been highlighted that the route is a cul-de-sac ending at point C, appendix 1, and providing no continuation to a public highway. While the law does not state that the termini of a right of way has to end at another public right of way or highway, case law has established that the cul-de-sac should end at a place of special interest or have a purpose such as lead to a view point, park or other. The claimed route does not appear to meet this criteria, ending at a point to which only certain individuals have permissive rights to use (see section 4.4).

7.3 The 20 year period?

- 7.3.1 Under Section 31 of the Highways Act 1980, a relevant date needs to be established in order to establish the 20 year period. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, the first date of challenge.

- 7.3.2 As mentioned above in section 4, several users mention notices being put in place and the gate being locked in recent years or since 2016. However, Mr Elsam has provided photographic evidence of a notice from as early as April 2015. The photograph of the notice from April 2015 is considered to be the act that first brought the public right to use the route into question. The twenty year period for the purpose of determining this claim is therefore from 1995-2015.

- 7.3.3 All 34 users claimed to have used the route on foot during the relevant period, 1995 – 2015. 32 of the users report to have used the route prior to 1995. Therefore usage of the route by the public extends well beyond the 20 year period. Whilst it is not necessary for all users to demonstrate continuous use throughout the 20 year period, they must demonstrate that the use has been made by the public continually during that period. The user evidence forms attest that the route has been continually used by members of the public from 1945-2017.

7.3.4 There is, however, evidence submitted by the landowner, landowners relatives, previous farmers/ tenant farmers and neighbours which suggests the route was never intended to be dedicated as a right of way as gates were locked, notices put up, as well as other obstructions. Furthermore, at certain points in the past it is asserted that the claimed route was impassable due to flooding and overgrowth. This evidence is in direct conflict with most of the user evidence presented.

7.4 As of right and without interruption?

7.4.1 "As of right" means without force, secrecy or permission. The user evidence must show that the public have enjoyed use over the land "as of right" and without interruption for the full 20 year period.

7.4.2 As outlined in sections 7.3.3 all users claim to have used the route continuously throughout the relevant period 1995-2015. Only one user mentions an obstruction to the route during the twenty year period. Mr A V. Barwick believes the gate under the railway bridge was locked from 1986/7, he also mentions a wire fence near point C of the claimed route, which he believes was for control of livestock. Mr George Hunt also recalls a fence or hedge across the entrance to the old railway tunnel, but has not provided any evidence in relation to dates. In addition C Simmons mentions barbed wire but again does not specify a date. All other obstructions mentioned by users either mention an unlocked gate or have stated that obstructions have only been present since 2016 or in "recent years".

7.4.3 Evidence from Mr Elsam and his mother D Elsam state that the family have kept the gates locked but these have regularly been broken or removed, police incident reports throughout 2016-17 were submitted to support this. Mr Elsam has also produced photographic evidence of locks since 2016. Mr Griffiths, a tenant farmer, describes the gate under the Bridge being kept locked when he kept his cattle there from approximately 1994-2004. Mr Turner also states that from 2001 the gate was kept locked from time to time. S and P Haworth Booth state that the gate under the railway bridge has been wired up, chained and padlocked to keep cattle in and trespassers out.

7.4.6 Four users make reference to having permission from the occupier of "Dunstalls" (the property located to the north of Dagbrook Lane) who was reported to be "quite happy for walkers to use her meadow". However, as outlined in section 4.4, the occupier of Dunstalls is not the owner of the land on which the claimed route passes and the applicant has advised that the occupier of Dunstalls has provided permission for applicants to use the track which joins the claimed route at point C. It is concluded that this is what the users are referring to and therefore not relevant to the claimed route and so would not lead to a conclusion the claimed route was used with permission. Having said this, Mr P. Turner stated that his family were given permission to walk through Dagbrook Lane suggesting the claimed route was also not used "as of right".

7.4.7 One user reports knowledge of others being turned back or stopped from using the claimed route and only one user reported to have been personally turned back. Mr Griffiths, a tenant farmer, also reports remembering people being told to keep to the footpath by Mrs Sparks, the owner of Dunstalls.

- 7.4.7 Twelve users have reported signs/ notices being put up, of which 11 have been reported to be in place since 2016. Contrary to this, it has been asserted by the landowners that signs have continually been put up by the family since as early as 1955, photographic evidence of notices from April 2015 has been provided. During the site visit, evidence of the notice at point C was found, albeit the notices appear to have been torn/fallen down as they were on the ground.
- 7.4.9 It is clear that the evidence of use submitted in support of the claimed route directly conflicts with the evidence against use having been established 'as of right'. There is also inconsistency among accounts from users regarding notices and obstructions along the route.
- 7.4.10 Considering Mr Barwick's account of a locked gate since 1987 and occupiers accounts of locked gates and notices being on site, it seems reasonable to conclude that throughout time, including the relevant period, the land owners have attempted to prevent the public using the route and therefore the claimed route has not been used "as of right". In addition, Mr P Turner's account of obtaining permission to use Dagbrook Lane during the relevant period suggests the claimed route has been used with permission. Given the direct conflict of evidence it is concluded that use of the claimed route has not been "as of right" and without interruption.

7.5 Nature of the way

- 7.5.1 Notwithstanding the above and the conclusion that the legal tests for making an order have not been met, the cul-de-sac nature of the application must be addressed.
- 7.5.2 In certain circumstances cul-de-sac routes can be highways, however, this is usually in special circumstances. More often than not, this is the case where a cul-de-sac is the only way to and from a place of public interest or a special view point. It is not considered that the claimed route meets this requirement. The claimed route does not lead to a place of public interest or a special view point. It does lead to a connecting route, but this has no clear status as it is a permissive track used with permission and not 'as of right'.
- 7.5.3 Although in *Eyre v New forest Highway Board* 1892 it was determined that 2 cul-de-sacs were created as a linking section had questionable status, in this instance the connecting route has a clear status as a permissive track used with permission and not 'as of right'.
- 7.5.4 It is therefore considered, that this application does not have the characteristics of a public highway.

8 **Conclusion**

- 8.1 Evidence has shown that use of the claimed route throughout the relevant period has not been "as of right" therefore failing the relevant tests necessary for presumed dedication under Section 31 Highways Act 1980.
- 8.2 In addition to this, the nature of the way, being a cul-de-sac, is inconsistent with the route being a public highway.

8.3 In consideration of this and all of the evidence set out the in report, it is considered that the applicant has not shown that on the balance of probability a right of way exists, or that it is reasonable to allege the existence of a public right of way.

8.4 It is therefore recommended that an order to add a public footpath to the Definitive Map and Statement be not made.

9 Resource Implications and Value for Money

9.1 The County Council is under a duty to investigate applications. The consideration of the application by officers falls within existing budgets.

9.2 Cost implications arise:

- 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.
- Should an order be made and confirmed;
 - if any works are necessary to ensure the path is open for public use.
- Should the decision of the committee be challenged by way of Judicial Review.

9.3 The decision taken by the investigating officer and the Rights of Way Committee is a decision based on legal tests and the above costs cannot be a consideration in the determination of the application.

10. Risk Management Implications

10.1 The decision is one that must be taken on strict legal tests:

- the application is not determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.
- 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.

9.2 In reaching a recommendation the investigating officer has considered the evidence in accordance with the law.

10. Crime and Disorder Act Implications

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.

11. Human Rights Act 1998 Implications

11.1 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.

11.2 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 right and freedom of others.

- 11.3 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'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.
- 11.4 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.

12. Equality Act 2010 – Equality Impact Report

- 12.1 The Committee should be aware that the Equality Act 2010 bans unfair treatment, and seeks equal opportunities in the workplace and in wider society. It also introduced a Public Sector Equality Duty (PSED). The PSED requires us to have due regard in all decision making processes to the need to:
 - a) Eliminate discrimination, harassment, victimisation or other prohibited conduct;
 - b) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and
 - c) Foster good relations between those who share a relevant characteristic and those that do not share it.
- 12.2 The relevant protected characteristics are age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.
- 12.3 An Equality Impact Report has been undertaken and is detailed below/ attached as an Appendix.
- 12.4 No relevant impact upon any of the protected characteristics in the Equality Act 2010 emerged during the consideration of this application.

Background Papers

- (a) Application plan and map (DMMO 1/17)
- (b) Evidence submitted in support of the application
- (c) Evidence submitted against the application
- (d) Archive evidence

Appendices

Agenda Item 6

Appendix 1 Location Plan

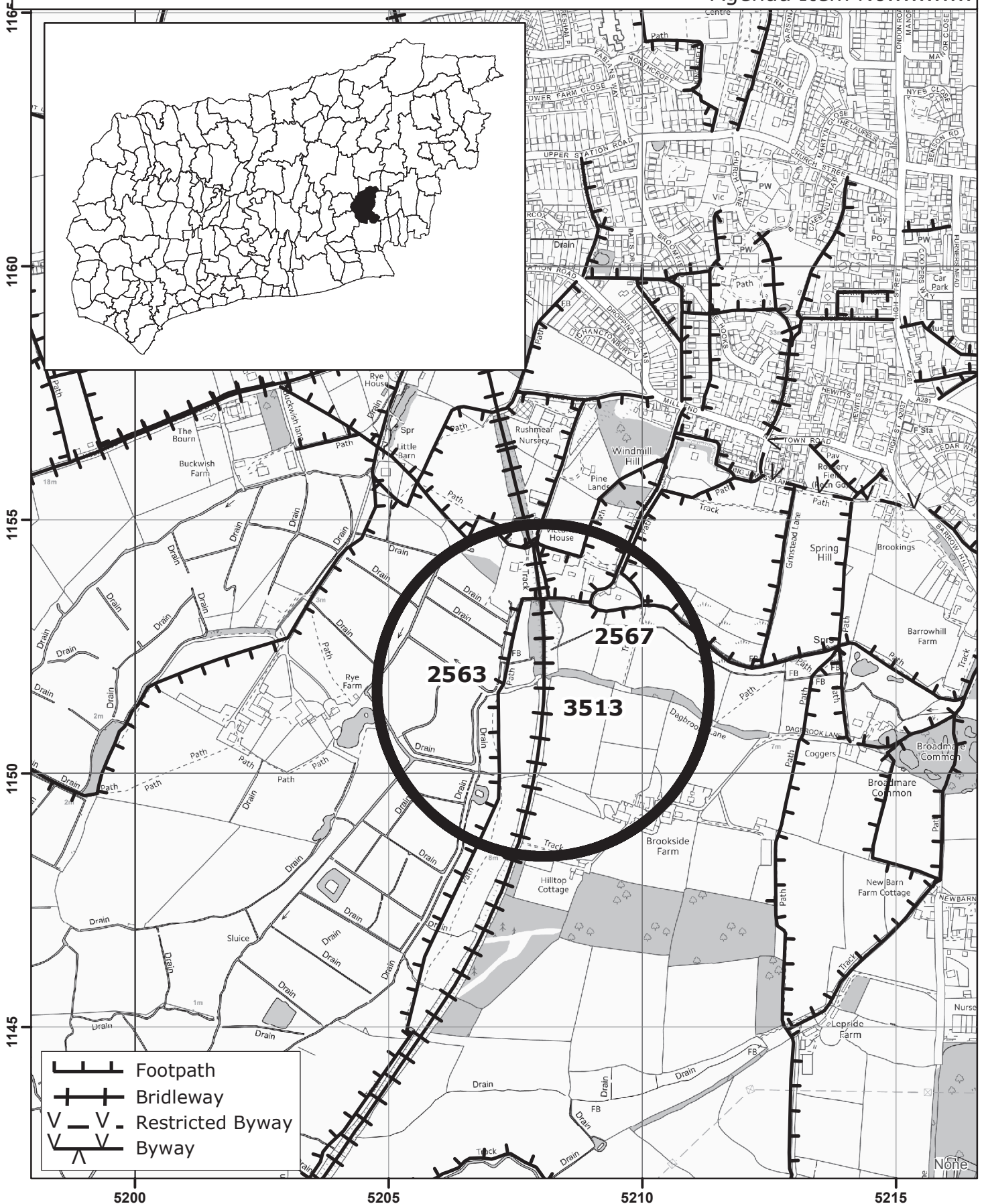
Appendix 2 Site Plan

Tony Kershaw

Head of Law Assurance and Strategy

Contact: Ami Dye ext. 22687

Parish: **Henfield**



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Henfield: Proposed addition of a FP along Dagbrook Lane - Location Plan

Plan: 01756 1:10,000

OS Sheet: TQ 21 NW



Photocopy
liable to
distortion

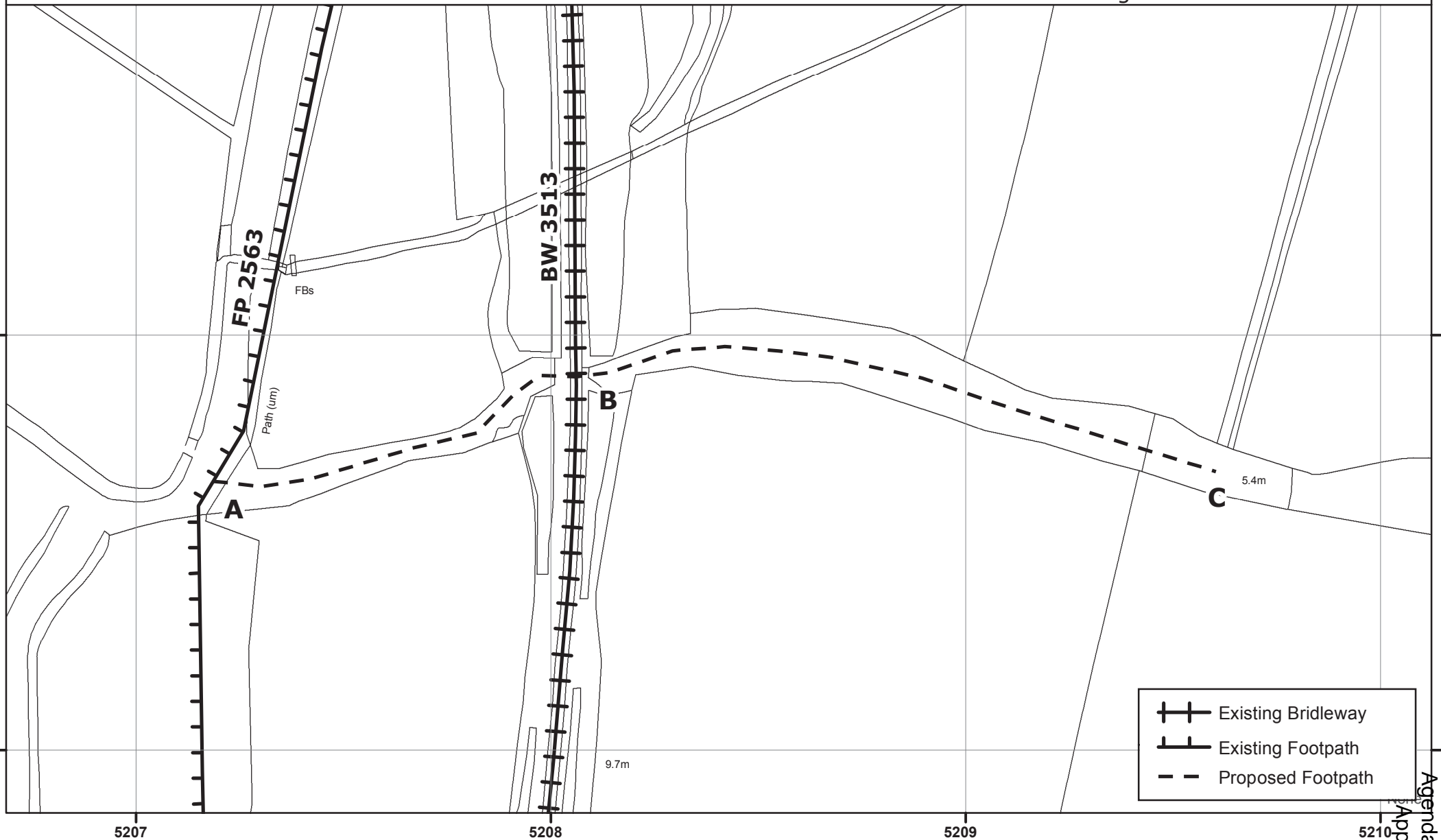
Matt Davey
Director of
Highways and
Transport


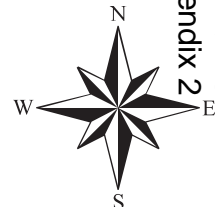


Date: 11.02.2019

Grid Ref: 5205 1150

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<p>This map is reproduced from Ordnance Survey material with the permission of Ordnance Survey on behalf of the Controller of Her Majesty's Stationery Office (c) Crown copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings. West Sussex County Council, 100023447, 2008.</p>		<h1>Henfield: Proposed addition of a FP along Dagbrook Lane - Site Plan</h1>					
Plan: 01757	1:1,250	OS Sheet: TQ 21 NW	Photocopy liable to distortion	Matt Davey Director of Highways and Transport			
Date: 11.02.2019		Grid Ref: 5205 1150					

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Tony Kershaw

Director of Law and Assurance

0330 22 28314

tony.kershaw@westsussex.gov.uk

www.westsussex.gov.uk

County Hall
West Street
Chichester
West Sussex
PO19 1RQ



8 August 2018

Mr Derek Whittington
Chairman,
Rights of Way Committee

Dear Mr Whittington,

Rights of Way Committee – Urgent Action Procedure: Adur and Worthing Council's Public Path Diversion Order Town and Country Planning Act 1990 S 257 - Public Footpath 2048 (Shoreham Adur Tidal Walls Development) Diversion Order 2018

I am writing to seek your agreement to an officer authorising the above matter that requires an urgent decision and I enclose a copy of a report prepared by the Director of Highways.

The report recommends West Sussex County Council's objection to the proposal (Order) to divert part of Shoreham Public Footpath 2048 is withdrawn.

The urgency of this matter is due to:

- (1) The proposal is needed because the County Council wishes to retain a useable path in a popular area and not to risk the Environment Agency's investment in flood defence for the benefit of the wider area. County Council officers have not identified further reasonable options to explore. It is considered Option 2 (Appendix 4) will ensure continued access for walkers and, with provision of various passing bays, will allow users to pass each other without undue inconvenience. This is at a risk to the County Council of exposure to potentially increased liability for accidents or injuries arising from a path below the Council's customary standard in width. Given the circumstances, it is considered this exposure is outweighed by the advantages to the wider community and that the County Council's formal objection to Adur and Worthing Council's Diversion Order be withdrawn.
- (2) The proposal cannot wait for the next Committee on 30 October 2018 because the Environment Agency has already begun works on site to create the new embankment and intends to complete this work in October 2018. It has made clear that for it to cease works temporarily will incur a significant cost.

Agenda Item 7

If you agree with an officer authorising the above recommendation, I should be grateful if you would kindly sign both the endorsed copy of this letter and the endorsement at the end of the report and return them to me.

This decision will be reported to the next meeting of the Committee and through the Members' Information Service in the usual way.

Yours sincerely

(BY EMAIL)

Tony Kershaw
Director of Law and Assurance

Enc. Report: Adur and Worthing Council's Public Path Diversion Order
Town and Country Planning Act 1990 S 257. Public Footpath 2048 (Shoreham Adur
Tidal Walls Development) Diversion Order 2018

Agreed

Approval provided by email

Katharine Eberhart

Director of Finance, Performance &
Procurement

Date: email dated 13.08.18

Derek Whittington

Chairman
Rights of Way Committee

Approval provided by email

Date: By email dated 10.08.18

Action Authorised

Approval provided by email

Tony Kershaw

Director of Law and Assurance

Date: email dated 13.08.18

Rights of Way Committee	
August 2018	Part I
URGENT ACTION Adur and Worthing Council's Public Path Diversion Order Town and Country Planning Act 1990 S 257 Public Footpath 2048 (Shoreham Adur Tidal Walls Development) Diversion Order 2018	
Report by Director of Highways and Transport Electoral Division: Lancing	

Recommendation

It is proposed that Adur and Worthing Councils be advised that West Sussex County Council's objection to the proposal to divert part of Shoreham Public Footpath 2048, as shown on the attached plan provided by the District Council, is withdrawn.

1. Background

- 1.1 On 30 May 2018 Adur and Worthing Council (AWC) made the above Order for diversion of part of footpath (FP) 2048. The length of path runs on the western embankment of the River Adur between Old Shoreham Tollbridge and the bridge carrying the south coast railway. Copy of the Order is attached (**Appendix 1**)
- 1.2 The proposal would enable the Environment Agency to install a new flood protection embankment west of an existing embankment. The current bank, which carries FP2048, is failing as flood protection and is not of sufficient height to protect Shoreham Airport and other land west of the river to the current 1 in 300-year standard. Establishing an embankment to the west would also allow the Agency to create enough mitigation habitat to satisfy a legal environmental requirement for its wider works within Shoreham Harbour.
- 1.3 The Agency proposed to provide a 1.5m surfaced footpath on a 2.0m wide bank crest with passing areas of 2.5m surfaced width (within a 3.0m crest) at various points along the length. Officers recognised this would be a slight improvement in terms of width than existing, also the surface would be consistent and level compared to the very uneven existing surface. However, officers were concerned that, as a popular route with walkers and frequent cyclists, although there is no public right to cycle, the path as proposed would not be appropriate for the expected increase in use, which could give rise to incidents of conflict between users. The County Council, as highway authority, could incur liability for future incidents arising from conflict; and that in recognising its duty to assert and protect the public right, the proposed provision would not meet the Council's customary minimum standard of provision.

- 1.4 On 12 June 2018, the West Sussex County Council Rights of Way Committee considered the proposal. A copy of the Committee report and meeting minute can be viewed here ([Appendix 2](#)). The Committee resolved to formally object to the Diversion Order. Adur and Worthing Council was advised of this on 26 June 2018.

2. Update

- 2.1 Following the Committee meeting, and in accordance with Members' wishes for a solution to be found that is pragmatic and not risk investment by the Agency to reduce the local flood risk, WSCC officers have explored various Options with the Agency. It has produced a report detailing these; copy attached (**Appendix 3**).

3. Consideration of Options

- 3.1 For reasons outlined in its report, the Agency has discounted all Options excepting that that had been proposed to the Rights of Way Committee, i.e. providing a 1.5m wide surfaced footpath with 0.25 grassed verges on top of a 2.0m bank crest, with 2.5m wide passing bays being provided at a number of points along the section. This is Option 2 in the Agency's report.
- 3.2 The County Council recognises the Agency has a difficult role balancing the requirements and needs of all stakeholders. It has legal obligations it must satisfy; for example, it must secure consent of the airport as statutory undertaker. There are also practical considerations, such as limited space for construction.
- 3.3 In the event there is no diversion, FP2048 will remain on the crest of the existing embankment; the Agency's Option 6. This bank is already in poor condition and, once the new embankment is in place, the Agency has confirmed it will no longer maintain the existing bank. The County Council's liability could, therefore, extend to undertaking repairs to the bank until such time as it is not reasonable to repair and to any incidents arising involving path users. At that point it would be faced with either extinguishing this section of FP2048, being a loss of access to the public; or seeking to divert it onto the new embankment, which would be the same as diverting the path as per Option 2.
- 3.4 In considering all Options proposed by the Agency, it is appreciated why the Agency has discounted all Options excepting Option 2. WSCC officers have not identified further reasonable options to explore.

4. Risk Management Implications

- 4.1 The County Council wishes to retain a useable path in a popular area and not to risk the Agency's investment in flood defence for the benefit of the wider area. It is noted, as was advised to the Rights of Way Committee, Option 2 would improve access for walkers and disabled users over the existing path – the surface would be wider and be consistent without trip hazards.
- 4.2 The County Council formally objected to the original proposal as it did not meet the Council's minimum standard of a consistent 2.0m minimum width and,

thereby, could expose the Council to potential future liability in the event of accident or injury of path users.

- 4.3 It is acknowledged the County Council may not be found liable in the event of future incidents – path users will have a duty of care to themselves and others. However, in the event the County Council is held liable and, given the consideration of the Options outlined in the Agency’s report, there would not be reasonable means for the County Council to adapt the path to mitigate arising incidents. The County Council, in the event of accepting a path below its minimum standard, must therefore accept the risk of increased and on-going liability.

5. The Equality Act 2010

- 5.1 As the report to Rights of Committee of 12 June 2018 noted, it is for AWC, as the Order Making Authority, to consider the Act in deciding whether or not to make an Order.
- 5.2 In considering future use of the path should Option 2 be provided for public use, it will have an improved and consistent surface, and a greater width compared to the existing path. For those with mobility impairment there will be good forward visibility and regular provision of passing bays, which will minimise any inconvenience arising from the path being less than the Council’s minimum width standard. It is considered the path will be as convenient as possible for all users, whether disabled or not.

6. Consultations

- 6.1 As the report to Rights of Committee of 12 June 2018 noted, it is for AWC, as the Order Making Authority, to carry out its own consultations in respect of the proposed diversion.

7. Resources

- 7.1 The implementation of Option 2 will be for the Environment Agency to finance and deliver in full. Any costs associated with the Order-making process are to be incurred by AWC as the Order Making Authority.

8. Need for a Urgent Action

- 8.1 Ordinarily it would be expected for a revised proposal to be considered by the Rights of Way Committee at its next meeting; this will be on 30 October 2018. The Agency has, however, already begun works on site to create the new embankment and intends to complete this work in October 2018. It has made clear that for it to cease works temporarily will incur a significant cost. For these reasons, officers are requesting this matter be considered by means of an Urgent Action rather than wait for the next meeting of the Public Rights of Way Committee.

9. Recommendation

- 9.1 Having considered the Options proposed by the Agency, it is considered Option 2 will ensure continued access for walkers and, with provision of various passing bays, will allow users to pass each other without undue inconvenience. This is at

a risk to the County Council of exposure to potentially increased liability for accidents or injuries arising from a path below the Council's customary standard in width. Given the circumstances, it is considered this exposure is outweighed by the advantages to the wider community of the flood defence and having a path available along the embankment crest. It is, therefore, recommended that the County Council's formal objection to Adur and Worthing Council's Diversion Order be withdrawn.

- 9.2 **Recommendation Of Director Of Highways And Transport:** It is proposed that Adur and Worthing Councils be advised that West Sussex County Council's objection to the proposal to divert part of Shoreham Public Footpath 2048 as shown on the attached plan provided by the District Council is withdrawn.

Jon Perks
Principal Rights of Way Officer
8 August 2018

Agreed

Approval provided by email

Katharine Eberhart

Director of Finance, Performance &
Procurement

Date: email dated 13.08.18

Derek Whittington

Chairman
Rights of Way Committee

Approval provided by email

Date: By email dated 10.08.18

Action Authorised

Approval provided by email

Tony Kershaw

Director of Law and Assurance

Date: email dated 13.08.18



ADUR DISTRICT COUNCIL

Jonathan Perks
West Sussex County Council
Public Rights Of Way Team
Rural Strategy, Environment And
Development
The Grange
Tower Street
Chichester
West Sussex PO19 1RH

Please ask for
Direct Line
Email
Date

James Appleton
01903 221333
Planning@adur-worthing.gov.uk
7th June 2018

IMPORTANT – THIS COMMUNICATION AFFECTS YOUR PROPERTY

Dear Sir/Madam,

**Section 257 of the Town and Country Planning Act 1990
Part 1 of Schedule 14 to the Town and Country Planning Act 1990
The Town and Country Planning (Public Path Orders) Regulations 1993**

We are writing to consult with you about the Public Footpath 2048 Diversion Order 2018 that was made by the District Council of Adur on 30th May 2018

Please find enclosed a copy of the Order and accompanying Plan. I also enclose a Notice which sets out the reasons for making the Order, where to view it and how to submit any representations.

Should you wish to make any representations about the Order, please ensure that these are received by us by Monday 9 July 2018 at the latest.

Yours faithfully

Gary Peck
Planning Services Manager

NOTICE OF PUBLIC PATH ORDER

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 257

THE DISTRICT COUNCIL OF ADUR

**(PUBLIC FOOTPATH 2048) (SHOREHAM ADUR TIDAL WALLS DEVELOPMENT)
DIVERSION ORDER 2018**

The District Council of Adur gives notice that on ^{30th} May 2018 it made an order under section 257 of the Town and Country and Planning Act 1990 because it is satisfied that it is necessary to divert the footpath to which the Order relates to enable the development described in Part 1 of the Schedule to be carried out in accordance with the planning permission granted under Part III of the Town and Country Planning Act 1990 to the Environment Agency of Guildbourne House, Chatsworth Road, Worthing BN11 1LD by the District Council of Adur on 1 June 2016 under reference AWDM/1614/15.

IF THIS ORDER IS CONFIRMED:

1. The highway over the land shown by a solid red line on the Order Plan 1 between points R and S and described in Part 2 of the Schedule to the Order shall be stopped up.
2. There shall be created to the reasonable satisfaction of the District Council of Adur an alternative highway for use as a replacement shown by a green dashed line on the Order Plan 1 between points R and S and described in Part 3 of the Schedule to the Order.
3. A copy of the Order and Plan may be inspected free of charge at the Council Offices at the Shoreham Centre, Pond Road, Shoreham-by-Sea between the hours of **09:00 and 17:00** Monday to Fridays (excluding bank holidays and public holidays) from **7 June 2018 to 9 July 2018**. A copy may also be viewed on the Council's website <https://www.adur-worthing.gov.uk/consultations/>
4. Any representations about or objections to the Order may be sent or delivered in writing to James Appleton, Head of Planning and Development, Adur & Worthing Councils, Portland House, 44 Richmond Road, Worthing, West Sussex BN11 1HS no later than **9 July 2018**.
5. If no such representations or objections are duly made, or if any so made are withdrawn, the District Council of Adur may confirm the order as an unopposed order. If the order is sent to the Secretary of State for the Environment, Food and Rural Affairs for confirmation any representations and objections which have not been withdrawn will be sent with the order.
6. The diversion of the footpath shall have effect on the date on which the District Council of Adur confirms the Order or certifies that the terms of Article 2 of this notice have been complied with, whichever is the later.

Dated: 30 May 2018

Signature of Council Solicitor: 

Name: Edwina Adefehinti

Adur & Worthing Councils
Worthing Town Hall
Chapel Road
Worthing
West Sussex
BN11 1HA

SCHEDULE

DESCRIPTION OF THE DEVELOPMENT UNDER PLANNING APPLICATION REFERENCE AWD/1614/15

Details of Development

Improvements to 1.8km of tidal defences on the East Bank between Coronation Green and the A27 Road Brighton and 5.4 km of defence on the West Bank between Shoreham Old Fort and Shoreham Toll Bridge. Proposed development (referred to as the Shoreham Adur Tidal Wall Scheme) consists of seven reaches on the West Bank (designated W1 to W7 inclusive) and three reaches on the East Bank (designated E1 to E3 inclusive). The proposed defences include steel sheet piling, concrete walls, flood glass and earth embankments, additional works to include a section of road raising, scour protection in the form of rock revetment, matting, planted terraces and gabions and the creation of 1.3 ha of intertidal salt marsh in Reach W7 and landscape improvements at Town Quay and the Shoreham Old Fort car park. The application is accompanied by an environmental impact assessment.

Location of development

Foreshore North of Adur Outdoor Activities Centre and East and West of River Adur Brighton Road, Shoreham-By-Sea, West Sussex.

PUBLIC PATH DIVERSION ORDER

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 257

THE DISTRICT COUNCIL OF ADUR

**(PUBLIC FOOTPATH 2048) (SHOREHAM ADUR TIDAL WALLS DEVELOPMENT)
DIVERSION ORDER 2018**

This Order is made by the District Council of Adur under section 257 of the Town and Country Planning Act 1990 ("TCPA 1990") because they are satisfied that it is necessary to divert the footpath to which this Order relates in order to enable the development described in Part 1 of the Schedule to this Order to be carried out in accordance with planning permission granted under Part III of the Town and Country Planning Act 1990 to the Environment Agency of Guildbourne House, Chatsworth Road, Worthing BN11 1LD by the District Council of Adur on 1 June 2016 under reference AWDM/1614/15.

BY THIS ORDER

1. The highway over the land shown by a solid red line on the attached Plan 1 between points R - S and described in Part 2 of the Schedule to this order shall be stopped up.
2. There shall be created to the reasonable satisfaction of the District Council of Adur an alternative highway for use as a replacement shown by a dashed green line on the attached Plan 1 between points R - S and described in Part 3 of the Schedule.
3. This Order shall come into force on the date on which notice that it has been confirmed is first published in accordance with Part II of Schedule 14 to the TCPA 1990 or the date on which the District Council of Adur certifies that the terms of Article 2 of this Order have been complied with, whichever is the later.
4. The Environment Agency is required to pay the cost of carrying out the necessary works. For the avoidance of doubt, the Environment Agency is the Applicant registered by the Local Planning Authority (the District Council of Adur) against Planning Application AWDM/1614/15.
5. Where immediately before the date on which the highway is diverted there is apparatus under, in, on, over, along or across it belonging to statutory undertakers for the purpose of carrying on their undertaking, the undertakers shall continue to have the same rights in respect of the apparatus as they then had.

SCHEDULE

PART 1

DESCRIPTION OF THE DEVELOPMENT UNDER PLANNING APPLICATION REFERENCE AWDM/1614/15

Details of Development

Improvements to 1.8km of tidal defences on the East Bank between Coronation Green and the A27 Road Brighton and 5.4 km of defence on the West Bank between Shoreham Old Fort and Shoreham Toll Bridge. Proposed development (referred to as the Shoreham Adur Tidal Wall Scheme) consists of seven reaches on the West Bank (designated W1 to W7 inclusive) and three reaches on the East Bank (designated E1 to E3 inclusive). The proposed defences include steel sheet piling, concrete walls, flood glass and earth embankments, additional works to include a section of road raising, scour protection in the form of rock revetment, matting, planted terraces and gabions and the creation of 1.3 ha of intertidal salt marsh in Reach W7 and landscape improvements at Town Quay and the Shoreham Old Fort car park. The application is accompanied by an environmental impact assessment.

Location of development

Foreshore North of Adur Outdoor Activities Centre and East and West of River Adur Brighton Road, Shoreham-By-Sea, West Sussex.

PART 2

DESCRIPTION OF SITES OF EXISTING PATHS

This description is directly in relation to the existing Public Footpath 2048 on the West Bank of the River Adur in Reach W7 of the Shoreham Flood Defence Scheme. All alphabetical point references and corresponding Ordnance Survey grid references are provided on Plan 1.

The relevant section of Public Footpath 2048 begins adjacent to the Shoreham-by-Sea Toll Bridge at point A, running south to the Network Rail bridge at Point U.

The section of the Public Footpath 2048 at points A – R spans a length of 118 metres in a south easterly direction towards point R and is adjacent to the existing ditch on its west. This section is approximately 1 metre wide.

The section of the footpath being stopped up is between points R – S, for approximately 770 metres at a width of approximately 1 metre following the river bank.

The section of the footpath at Points S – T forms a change in gradient ramping back down ending at the access steps to the car parks on the west. The footpath at points S - T is approximately 1 metre in width.

The section of the footpath at points T – U, spans from the car park access steps to the Network Rail bridge for a length of 29 metres. The footpath at points T – U is approximately 1.5m wide.

Section	Width (m)	Section	Width (m)
A-R	1	S-T	1
R-S	1	T-U	1.5

PART 3

DESCRIPTION OF SITES OF ALTERNATIVE HIGHWAYS

This description is directly in relation to the new construction works to Public Footpath 2048 on the West Bank of the River Adur in Reach W7 of the Shoreham Flood Defence Scheme. All alphabetical point references and corresponding Ordnance Survey grid references are provided on Plan 1.

The alternative footpath begins at point R, running immediately east before turning south towards the Network Rail bridge, ending 48m north of the Network Rail bridge at Point S, where the alternative footpath ties-in to the alignment of the original footpath.

The alternative footpath which begins at point R deviates at approximately 90 degrees to the west towards Brighton City Airport. The section of the alternative footpath at points R – B forms a gradient raising the level of the footpath for a length of 17 metres and is a width of 2 metres.

The section of the alternative footpath at points B – C forms the upper section of gradient transition and widens from 2 metres to 2.5 metres to provide a viewing area, before turning south, to run parallel to the alignment of the original footpath. The section of the alternative footpath at points B - C spans a length of 34 metres.

The section of the alternative footpath at points C – D heads in a southerly direction and crosses the line of the original Environment Agency sluice structure. The section of alternative footpath at points C – D spans a length of 202 metres and is a width of 1.5 metres.

The section of the alternative footpath at points D – E forms an 8 metre long pedestrian passing place with a width of 2.5 metres.

The section of the alternative footpath at points E – F sits on a bend in the new flood embankment at an approximate mid-point with the airfield to Brighton City Airport. The section of the alternative footpath at points E - F spans a length of 92 metres between the pedestrian passing places at D - E and F - G and is 1.5 metres in width. The section of the alternative footpath at points F – G forms another 8 metre long pedestrian passing place with a width of 2.5 metres.

The section of the alternative footpath at points G – H is 66 metres long with a width of 1.5 metres and to the southern point curves east to account for the existing buried pumping station adjacent to the access road on the west.

The section of the alternative footpath at points H – I forms another 8 metre long pedestrian passing place with a width of 2.5 metres and spans the new maintenance access steps for the buried pumping station.

The section of the alternative footpath at points I – J bends back to the west to the south of the pumping station before following the line of the river again for 88 metres at a width of 1.5 metres.

The section of the alternative footpath at points J – K is 11 metres long and forms a viewing platform within the passing place with a width of 2.5 metres. This section also forms a raised platform with 1:12 gradient either side.

The section of the alternative footpath at points K – L is 69 metres long opposite the southern end of the access track within the airport boundary and has a width of 1.5 metres.

The section of the alternative footpath at points L – M forms an 8 metre long, 2.5 metre wide pedestrian passing place.

The section of the alternative footpath at points M - N is 66 metres long with a width of 1.5 metres, ending at a new embankment arm out into the river providing access to a historic pill box. It also begins to widen at point N for the pedestrian passing place at points N - O adjacent which is 8 metres long and 2.5 metres wide.

The section of the alternative footpath at points O - P is 68 metres long with a width of 1.5 metres approaching the car parks on the western side by the Brighton City Airport buildings.

The section of the alternative footpath at points P - Q is another pedestrian passing place 8 metres long and 2.5 metres wide. The section of the alternative footpath at Points Q - S is 63 metres long and runs the length of the car park to the west to the tie-in point with the alignment of the original footpath at point S and is 1.5 metres wide.

Section	Width (m)	Section	Width (m)	Section	Width (m)
R-B	2	G-H	1.5	M-N	1.5
B-C	2.5	H-I	2.5	N-O	2.5
C-D	1.5	I-J	1.5	O-P	1.5
D-E	2.5	J-K	2.5	P-Q	2.5
E-F	1.5	K-L	1.5	Q-S	1.5
F-G	2.5	L-M	2.5		

This Order is made on

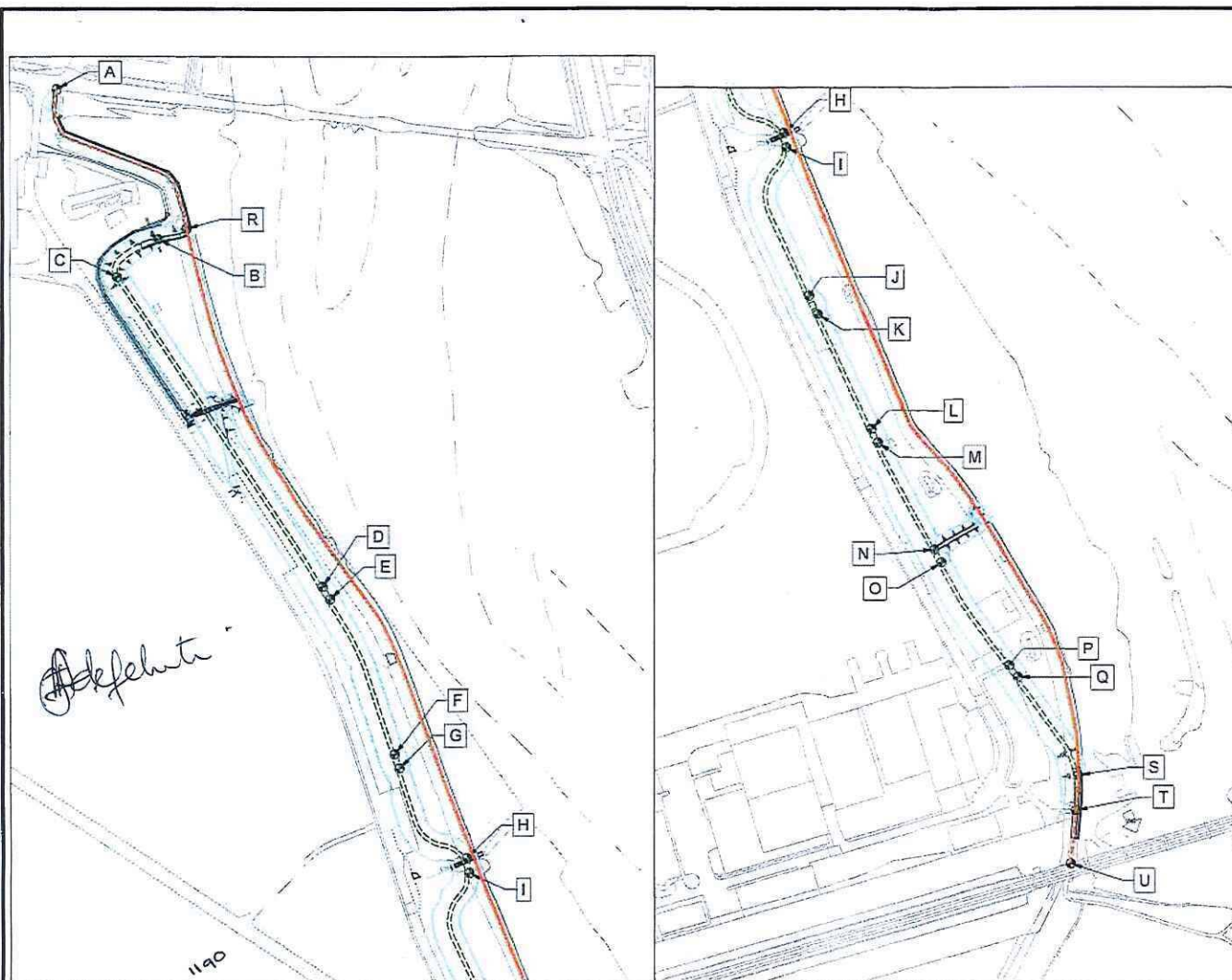
THE COMMON SEAL OF THE DISTRICT
COUNCIL OF ADUR was hereunto affixed
this 30th day of
2018 in the presence of:-

)
)
)
)

[Handwritten signature]



Authorised signatory



Notes:

1. All dimensions are in metres unless noted otherwise.
2. All levels are in metres relative to Ordnance Datum Newlyn (OD).
3. All positions are in metres relative to National Grid.
4. Location of Public Footpath based on drawings provided by West Sussex County Council extracted from 2008 Ordnance Survey Map.

Key to Symbols

- Extents of new flood embankment
- Reach extent
- Existing Public Right of Way - Footpath 2048 (to be diverted)
- Existing Public Right of Way - Footpath 2048 (unaffected)
- Proposed Public Right of Way

Footpath - Old

Ref	Ordnance Survey Grid ref
A	TQ 20432 05981
R	TQ 20502 05906
S	TQ 20815 05212
T	TQ 20814 05189
U	TQ 20811 05164

Footpath - Old

Ref	Distance (m)
A-R	118
R-S	770
S-T	19
T-U	29

Footpath - New

Ref	Ordnance Survey Grid ref
B	TQ 20487 05900
C	TQ 20465 05879
D	TQ 20576 05711
E	TQ 20580 05704
F	TQ 20616 05619
G	TQ 20618 05611
H	TQ 20655 05562
I	TQ 20656 05554
J	TQ 20669 05474
K	TQ 20674 05464
L	TQ 20703 05401
M	TQ 20706 05394
N	TQ 20737 05335
O	TQ 20741 05328
P	TQ 20778 05272
Q	TQ 20782 05265
R	TQ 20502 05906

Footpath - New

Ref	Distance (m)
R-B	17
B-C	34
C-D	202
D-E	8
E-F	92
F-G	8
G-H	66
H-I	8
I-J	88
J-K	11
K-L	69
L-M	8
M-N	66
N-O	8
O-P	68
P-Q	8
Q-S	63
S-T	19

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Mott MacDonald House

T
F
W



Environment
Agency

Client

Rev	Date	Drawn	Description	Ch'k'd	App'd
P01	25.04.18	IAS	Initial Issue	GW	NJC
P02	04.05.18	LB	Final Issue	GW	NJC

Title
Shoreham Adur Tidal Walls
Map referred to in the Adur District Public
Path Diversion Order 2018 for Public
Footpath 2048 (Plan 1) - Town & Country
Planning Act 1990 Section 257

Drawing Number
IMSO000648-MMC-01-W7-DR-C-2760

Drawn	I A Sussex	IAS
Checked	P M Starnes	GW
Approved	P J Phipps	PJP

Scale at A3
1:2500

Security	STD	Status	S0	Rev	P02
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Shoreham Adur Tidal Walls Reach W7 PRow Diversion

23 July 2018

Context and History

Although planning permission is in place for the Shoreham Adur Tidal Walls scheme, the project also requires consent to divert a Public Right of Way (PRoW) from the existing flood embankment in Reach W7 (Shoreham Airport) onto a new re-aligned flood defence.

The application for diversion is being made to Adur District Council (ADC) under Section 257 of the Town and Country Planning Act (1990). As part of the application, West Sussex County Council (WSCC) as the Rights of Way authority for the area are being consulted.

The existing embankment is in a poor condition, and is expected to fail within the next decade. The embankment breached in 2013, which required the Environment Agency to intervene to carry out emergency repair works.



The Agency's proposal is for a new flood defence embankment with a crest of 2.0m and a consistent surfaced width of 1.5m, below the County Council's standard minimum width of 2.0m.

The existing footpath is shown here in 2017. The width of the path varies from 1.1m to 1.7m throughout, and is of generally poor condition.



Application Status

The Agency's Project Manager (Graeme McClure) attended the West Sussex County Council Rights of Way Committee on Tuesday 12th June to make representation on behalf of the project. However, the committee unanimously voted to object to the footpath diversion. Concerns raised were largely based around the lack of adherence to the Council's minimum width for the footpath, in particular citing future developments in the planning pipeline as a factor that will increase usage of the footpath in the future.

Alternative Options Explored

This section outlines the range of options that have been explored to date, both during the design stage and in response to the objection raised at the Rights of Way Committee. For each option, a conclusion has been drawn on whether the option has been implemented, ruled out or remains open for further discussion and potential implementation.

1) Widen Embankment to Deliver Increased Footpath Width

The most obvious solution to meet the requirement of a 2.0m width footpath would be to construct a wider embankment, which would in turn facilitate a wider crest and footpath. However, it is not possible to widen the embankment on either side given constraints on the project.

- To the East, the project is creating saltmarsh habitat as a replacement for that lost elsewhere on the scheme. This is a critical element of the project, as replacement of the habitat forms part of the project's planning application and conditions. A number of alternative locations for creating this habitat in the local area were explored during the design stages, but there were no viable alternatives to the Airport location. Stakeholders including Natural England would be expected to object to any removal of the habitat creation from the scheme, as saltmarsh is deemed as a high priority form of habitat.
- To the West, the project is constrained by the Airport's main access road (Cecil Pashley Way). At the June Rights of Way committee, the small section between the road and the toe of the new embankment was suggested as a location for widening the embankment. However, in this location the project will be re-locating drainage assets in the form of a buried filter drain. Constructing the embankment over this filter drain is not possible, as not only would it lead to significant reinforcement being required for the drain to bear the load of the embankment, it would then be impractical to carry out any future inspection and maintenance.

As a result of these constraints upon the project, this option has been ruled out.

2) Incorporate Wider Passing Places

West Sussex County Council's PRow Officer was engaged during the design process, so was able to advise that the proposed 1.5m wide footpath did not meet the Council's minimum of 2.0m. In response, the project team has incorporated seven 'passing-places' where the width of the footpath could be increased to 2.0m without impacting upon the constraints outlined above.

This option has been implemented, and there are no further opportunities to add passing places without impacting upon the habitat creation.

Visualisation of the new embankment, with the existing alignment shown with a blue line.

An example of the passing places that have been incorporated is shown to the South.



3) Lower Embankment Height to Form Wider Crest

The project team have explored reducing the height of the new flood embankment by 0.2m, which would enable a wider crest and subsequently a wider footpath to meet the County Council's minimum standard. This is a simple and feasible technical solution, but would not deliver the flood defence capability that the Environment Agency has committed to the local community and third party funders.

Even if these challenge could be overcome, it is unlikely that the Environment Agency would receive consent from the landowner to implement a lower embankment height. As an Airport is a statutory undertaker, the Agency's typical 'Powers of Entry' to carry out works do not apply, and as such a legal agreement has been entered into between the Agency and the Airport to provide access. The terms of this agreement mean that any changes to the agreed design must receive consent. Reducing the height of the embankment would have a significant effect on the Airport landlord, as they are currently seeking planning permission for future development that relies on the new flood defence embankment being at its current design height.

As a result, this option is not feasible and has been ruled out.

4) Widen Footpath and Remove Verge

The proposed crest of the new flood embankment is 2.0m, with a paved footpath surface of 1.5m and grass verges of 0.25m to either side. Another technically feasible solution would be to remove the verges and pave the entirety of the crest, thus meeting the County Council's minimum standard.

However, the height of the new embankment and the steepness of the embankment sides mean that this would necessitate the introduction of a guardrail throughout the length of the embankment to prevent falls. The difficulty with this is that it is highly likely that it would be objected to at planning on aesthetic grounds. One of the key elements of the design in this location was to retain a semi-rural feel in a less urbanised part of the scheme, which was discussed and agreed with numerous stakeholders during the project's planning application.

As the Agency has little confidence that a guardrail solution would be approved by the planning authority due to stakeholder objections, this option has been ruled out.

5) Steepen Embankment Sides

Given the constraints to widening the embankment, the project team also examined steepening the sides of the structure to enable the design height to be retained whilst incorporating a wider crest and footpath. This has been ruled out as it would again require the incorporation of a guardrail to prevent falls which would be objected to at planning. In addition, it is likely to be rejected by the landlord as it would introduce safety concerns for future maintenance of the embankment (e.g. grass cutting).

As a result, this option has been ruled out.

6) Avoid PRow Diversion

The Environment Agency could seek to leave the existing footpath and embankment in place and complete the new flood defence only, negating the requirement for a diversion application. This option is technically challenging at the Northern interface between the old and new flood defences, and would likely require additional design and construction work being carried out by the Environment Agency to facilitate.

More importantly, this option would not offer any value to the community. With the introduction of the new flood embankment, the Environment Agency would withdraw all maintenance and monitoring of the old embankment. Given the poor condition, the embankment is likely to deteriorate further. Long-term, the footpath will likely require closure in the absence of active intervention by another party. For these reasons this option does not feel like the right outcome for any of the project stakeholders.

However, it is feasible therefore has the potential to be implemented.

7) Extinguish Public Right of Way

Under Section 257 of the Town and Country Planning Act (1990), the Environment Agency could seek consent to extinguish the Public Right of Way. However, given the usage of the footpath by the community it is not expected that the application would meet the required tests under the Act, and therefore has been ruled out.

8) Demobilise and Remove Flood Embankment

Other than the options highlighted within this report, the Environment Agency have no further options that can be explored in this location to provide the footpath width required. If the objection remains in place, the Agency will have to halt works and under the terms of the legal agreement with the landlord de-mobilise and reinstate the site to its previous condition. The diversion application will then be expected to be submitted to the Secretary of State for determination.

This option is the least favoured as it will not deliver the benefits of the flood defence project to a large section of the local community. Modelling carried out by the Environment Agency demonstrates that without the new embankment at Shoreham Airport, there will be little improvement in flood protection to South Lancing and large sections of Shoreham Beach. However, given the constraints from third parties, this option has the potential to be implemented.

Summary

It is hoped that this report adequately outlines the competing demands and constraints that the Environment Agency has to manage in this location, and the difficulties these have created with regard to the public right of way diversion. The approach throughout the design of the new embankment has been to seek to balance concerns from a wide range of stakeholders and deliver as much benefit as possible within the context of the constraints placed upon the project

It is acknowledged that a 1.5m wide footpath does not adhere to the County Council's minimum standards, but does offer a significant and long-term improvement on the existing situation. As a result, it is requested that the County Council's objection to the PRow Diversion application is removed to enable the completion of the flood defence to the current design.

Note on Cycling

The Environment Agency is conscious that when discussing Rights of Way, the topic of cycling is often raised.

The current embankment is not a cycle route, and the proposed new embankment will also not be suitable for cycling given the constraints on width, coupled with the limited clearance under the railway bridge to the South.

This is demonstrated here in a photograph taken prior to construction.



The project has however delivered improvements on the opposite bank of the River Adur that will benefit the cycling community.

Rights of Way Committee

5 March 2019

Recent Decision by the Secretary of State's Inspector:

**West Sussex County Council (Warnham) Public Path (No. 1577)
Diversion Order 2013**

**West Sussex County Council (Warnham) Public Path (No. 1578)
Diversion Order 2013**

Report by Director of Law and Assurance

Recommendation

That this report be noted.

1. Background

- 1.1 In October 2012 the Committee considered an application made by Mr J C Lucas to divert parts of footpaths 1577 and 1578 in the Parish of Warnham at Warnham Park on to a new route from bridleway 3647, running generally north westwards to Bell Road, under Section 119 of the Highways Act 1980.
- 1.2 The application was made in the interest of the landowner, who requested the diversion to enable him to extend his existing deer park to include land crossed by FP 1577 and for practical reasons associated with fencing and deer herd management. FP 1578 ran west from the A24 past Little Daux Cottage and the landowner believed that the privacy and security of the property would be improved if the path were to be diverted.
- 1.3 The Committee approved the officer recommendation that the legal tests for the making of a Diversion Order under Section 119 Highways Act 1980 had been met.
- 1.4 On 27 September 2019 the West Sussex County Council (Warnham) Public Path (No. 1578) Diversion Order 2013 and the West Sussex County Council (Warnham) Public Path (No. 1577) Diversion Order 2013 were made.
- 1.5 Six letters of objection were received during the statutory notice period; therefore the orders fell to be determined by the Secretary of State
- 1.6 On 8 September 2017, the opposed orders were submitted to the Secretary of State for the Environment, Food and Rural Affairs.

2. The Inspector's Decision

- 2.1 The Inspector concluded that in relation to the diversion of FP 1577, the order is expedient in the interest of the landowner. They found that whilst the diverted route of FP 1577 would be less convenient, as would the termination point, it would not be *substantially* less convenient. They considered that on balance greater weight should be given to the landowner in order to facilitate the expansion of the deer park.
- 2.2 With regards to the diversion of FP 1578, they were satisfied that the need for the diversion was expedient in the interest of the landowner to improve security. They further considered that the diverted route would offer better convenience and public enjoyment, and thus not substantially less convenient to the public.
- 2.3 The Inspector therefore concluded that the legal tests for confirmation of the orders had been met and confirmed the orders.

3. Resource Implications and Value for Money

- 3.1 The County Council has the power, but not the duty, to investigate applications for diversion and extinguishment applications made under the Highways Act 1980. Applicants are required to reimburse the County Council's costs up to the point where an opposed order is submitted to the Secretary of State for determination and while there is no obligation to submit such an opposed order, if the order is submitted, the County Council must bear the costs from that point.

Background Papers

- (a) Committee Report October 2012
<http://www2.westsussex.gov.uk/ds/cttee/row/row231012i6.pdf>
- (b) Inspectors full decision dated 4 October 2018
<http://www2.westsussex.gov.uk/ds/cttee/row/row050319warnham.pdf>

Tony Kershaw

Director of Law and Assurance

Contact: Georgia Hickland ext. 25360

Rights of Way Committee

5 March 2019

Recent Decision by the Secretary of State's Inspector:

West Sussex County Council (Petworth No.1 (Parish of Loxwood addition of Footpath)) Definitive Map Modification Order 2014

Report by Director of Law and Assurance

Recommendation

That this report be noted.

1. Background

- 1.1 In February 2014 the Committee considered an application, made by Mrs Wendy Andrews to add a footpath from Station Road to High Street in Loxwood, under Section 53 of the Wildlife and Countryside Act 1981.
- 1.2 The application to add a footpath from Station Road to the High Street in Loxwood was accompanied by seventeen public way evidence forms, which testified to the use of the route as of right on both foot and horseback between 1940 and 2013 and a number of historical maps of the area.
- 1.3 The adjoining landowners objected to the application. Their objections mainly focused on anti-social behaviour and were not considerations which could be taken into account when determining an application under the provisions of the Wildlife and Countryside Act 1981.
- 1.4 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 is 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).
- 1.5 The reporting officer concluded that the evidence of use asserts use throughout the relevant period “as of right” and without interruption, therefore recommended that, on the balance of probability and order be made.

- 1.6 Committee agreed with the Officer recommendation that the tests for the making of the order could be met and approved the officer recommendation.
- 1.7 On 28 March 2014 the West Sussex County Council (Petworth – No.1 (Parish of Loxwood: addition of a footpath)) Definitive Map Modification Order was made.
- 1.8 Three objections were received during the statutory notice period; therefore the orders fell to be determined by the Secretary of State.
- 1.9 On 12 October 2017, the opposed order was submitted to the Secretary of State for the Environment, Food and Rural Affairs who held a local public inquiry on 4 September 2018.

2. The Inspector's Decision

- 2.1 The Inspector concluded, after hearing evidence given during the inquiry, they concluded that the statutory tests for dedication of a path under Section 31 Highways Act 1980 could not be met. Therefore it was necessary for her to consider whether there had been dedication of the route at Common Law.
- 2.2 The Inspector was satisfied that there had been use of the Order route for a period in excess of 60 years by a group of people which constitute the public and that their use of the route had been "as of right".
- 2.3 The Inspector was satisfied that the use was sufficiently notorious that the Landowner must have been aware of it and has acquiesced in it. The Inspector was satisfied that dedication of the order route as a footpath can be inferred at Common Law, therefore confirmed the order.

3. Resource Implications and Value for Money

- 3.1 The County Council has the duty to investigate applications for Definitive Map Modification Orders made under the Wildlife and Countryside Act 1981. Applicants are not required to reimburse the County Council's costs for considering and determining these applications.

Background Papers

- (a) Committee Report October 2014
<http://www2.westsussex.gov.uk/ds/cttee/row/row250214i9a.pdf>
- (b) Inspectors full decision dated 23 October 2018
<http://www2.westsussex.gov.uk/ds/cttee/row/row050319loxwood.pdf>

Tony Kershaw

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Rights of Way Committee

5 March 2019

Recent Decision by the Secretary of State's Inspector:

**West Sussex County Council (Southwater) Public Path (no. 2642)
Part Special Diversion Order 2016**

**West Sussex County Council (Southwater) Public Path (no. 1650)
Part Special Extinguishment Order**

Report by Director of Law and Assurance

Recommendation

That this report be noted.

1. Background

- 1.1 In October 2015 the Committee considered an application, made by Christs Hospital School to divert part of public footpath 1642 and extinguish part of public footpath 1640 under Section 118B and 119B Highways Act 1980. Sections 118B and 119B relate to the special extinguishment and diversion of certain highways which cross land occupied for the purpose of a school.
- 1.2 The application to divert and extinguish the above paths was made due to the Schools concern that continued public use of the paths presented them with ongoing security and safety problems.
- 1.3 The school provided an incident log which recorded a number of incidents arising from what they considered to be use of the public paths and that had caused a danger or threat to pupils and staff.
- 1.4 The legal tests to satisfy before making a special extinguishment or diversion order are:
 - a. The order route is a relevant highway and that it crosses land occupied for the purpose of a school;
 - b. It is expedient, for the purpose of protecting pupils or staff from:
 - i. Violence or threat of violence
 - ii. Harassment
 - iii. Alarm or distress arising from unlawful activity, or
 - iv. Any other risk to their health and safety arising from such activity, that the line of the path or part of that path should be diverted.

- 1.5 The Committee agreed with the Officer recommendation that the tests for the making of the orders could be met and approved the officer recommendation.
- 1.6 The Orders were made and advertised, attracting a high number of objections; therefore fell to be determined by the Planning Inspectorate.
- 1.7 On 12 October 2017, the opposed orders were submitted to the Secretary of State for the Environment, Food and Rural Affairs who held a local public inquiry on 24 July 2018.

2 The Inspector's Decision

- 2.1 The Inspector concluded that overall there was limited evidence both of incidents associated with the Order routes and access to the School grounds as a result of using the order routes that has facilitated or contributed to violence or threat of violence, harassment, alarm or distress arising from unlawful activity or other risk to the health and safety of pupil and staff.
- 2.2 The inspector further considered that the Orders were unlikely to result in a substantial improvement in security and that the measures already put in place by the school have resulted in a decrease in the type and level of incidents with no, or no significant, issues reported to the inquiry subsequent to those provided by the incident log.
- 2.3 The inspector therefore concluded that the legal tests for confirmation of the order could not be met and did not confirm the orders.

3. Resource Implications and Value for Money

- 3.1 The County Council has the power, but not the duty, to investigate applications for diversion and extinguishment applications made under the Highways Act 1980. Applicants are required to reimburse the County Council's costs up to the point where an opposed order is submitted to the Secretary of State for determination and while there is no obligation to submit such an opposed order, if the order is submitted, the County Council must bear the costs from that point.

Background Papers

- (a) Committee Report October 2015
<http://www2.westsussex.gov.uk/ds/cttee/row/row201015i5.pdf>
- (b) Inspectors full decision dated 25th September 2018
<http://www2.westsussex.gov.uk/ds/cttee/row/row050319chosp.pdf>

Tony Kershaw

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Rights of Way Committee

5 March 2019

Recent Decision by the Secretary of State's Inspector:

Application for a Definitive Map Modification Order (Application No. 5/16) to add a public footpath from bridleway 1163 to Fyning Lane in the Parish of Rogate.

Report by Director of Law and Assurance

Recommendation

That this report be noted.

1. Background

- 1.1 In June 2018 the Committee considered an application, made by Ms Ann Arnold to add a footpath from bridleway 1163 to Fyning Lane in Rogate, under Section 53(2) of the Wildlife and Countryside Act 1981.
- 1.2 The application to add a footpath from bridleway 1163 to Fyning Lane in Rogate was accompanied by eighteen public way evidence forms, which testified to the use of the route between 1939 and 2016.
- 1.3 Each of the adjoining landowners submitted evidence against the application, including evidence that the claimed route has been blocked for various periods for building works from 1991. 30 local residents also submitted objections to the application.
- 1.4 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 is 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).
- 1.5 The reporting officer concluded that the evidence of use asserts use throughout the relevant period “as of right” and without interruption. However, as there was a direct conflict from those in objection to the claimed route, it was recommended that an order be made on the lower, reasonably alleged test.

- 1.6 After hearing evidence from a number of speakers during the Committee Meeting, a motion, proposed by Mr Bradbury and seconded by Mr Baldwin was voted on by Committee and approved by a majority. Committee resolved to refused the application on the following grounds:
 - 1.6.1 There is a conflict of evidence provided in support and against the application. Having heard the representations by all parties and understanding the evidence summarised in the report, it is concluded that the evidence in objection is considerable with little credible evidence of actual use in support and thus the claimed route cannot be alleged to subsist and that an order to add the path to the Definitive Map and Statement be not made.
- 1.7 On 5 July 2018, the applicant appealed this decision of the Committee to the Secretary of State for the Environment, Food and Rural Affairs.

2. The Inspector's Decision

- 2.1 The Inspector concluded that although there is a conflict between the evidence of the users and landowners, no evidence has been submitted which would establish incontrovertibly that the owners of the land during the relevant period has demonstrated a lack of intention to dedicate, or that the route was of such a character that use of it by the public could not give rise at common law to a presumption of dedication.
- 2.2 The inspector therefore concluded that the application succeeds against Test B as it is reasonable to allege the existence of a public right of way over the claimed path and directed the County Council to make the order.

3. Resource Implications and Value for Money

- 3.1 The County Council has the duty to investigate applications for Definitive Map Modification Orders made under the Wildlife and Countryside Act 1981. Applicants are not required to reimburse the County Council's costs for considering and determining these applications.

Background Papers

- (a) Committee Report dated 12 June 2018
<https://westsussex.moderngov.co.uk/ieListDocuments.aspx?CIId=167&MIId=564&Ver=4>
- (b) Inspectors full decision dated 25 January 2019
<http://www2.westsussex.gov.uk/ds/cttee/row/row050319rogate.pdf>

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