

Public Document Pack

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1 October 2021

Planning and Rights of Way Committee

A meeting of the Committee will be held at **10.30 am** on **Tuesday, 12 October 2021** at **County Hall, Chichester, PO19 1RQ**.

Note: In response to the continuing public health measures, there will be limited public access to the meeting. Admission is by ticket only, bookable in advance via: democratic.services@westsussex.gov.uk

The meeting will be available to watch live via the Internet at this address:

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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 3 - 10)

The Committee is asked to confirm the minutes of the meeting held on 7 September 2021 (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. **Definitive Map Modification Order** (Pages 11 - 26)

Report by the Director of Law and Assurance.

The Committee is asked to consider and determine the following application:

Definitive Map Modification Order Application for DMMOs 4, 5, 6/19 in the parishes of Bognor Regis, Felpham and Bersted:

- (1) Addition of a footpath from Brooks Lane to Downview School**
- (2) Addition of a footpath from the field adjacent to the rife to the Leisure Centre**
- (3) Addition of a footpath around the main field adjacent to the rife**

5. Secretary of State Decision (Pages 27 - 52)

Report by the Director of Law and Assurance.

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

Recent Decision by the Secretary of State's Inspector: DMMO 5/16 – To add a footpath at Fyning Lane, Rogate

6. Date of Next Meeting

The next meeting of the Committee will be held at 10.30 am on Tuesday, 9 November 2021.

To all members of the Planning and Rights of Way Committee

Webcasting

Please note: this meeting is being filmed for live and subsequent broadcast via the County Council's website on the internet. The images and sound recording may be used for training purposes by the Council.

Generally the public gallery is not filmed. However, by entering the meeting room and using the public seating area you are consenting to being filmed and to the possible use of those images and sound recordings for webcasting and/or training purposes.

Planning and Rights of Way Committee

7 September 2021 – At a meeting of the Committee held at County Hall, Chichester, PO19 1RQ.

Present: Cllr Burrett (Chairman)

Cllr Atkins, Cllr Gibson, Cllr Hall, Cllr Joy, Cllr Patel, Cllr Quinn, Cllr Sharp, Cllr Forbes and Cllr Kenyon

Apologies were received from: Cllr Ali, Cllr Duncton, Cllr McDonald, Cllr Montyn and Cllr Oakley

Substitutes: Cllr Forbes and Cllr Kenyon

Also in attendance: Cllr Russell

Part I

8. Declarations of Interest

8.1 In accordance with the County Council's Constitution: Code of Practice on Probity and Protocol on Public Participation in Planning and Rights of Way Committees, the following Members declared that they had been lobbied in relation to Agenda Item 4, planning application WSCC/004/20: Cllr Burrett (Chairman), Cllr Gibson and Cllr Sharp.

8.2 In accordance with the County Council's Code of Conduct, the following Members declared a personal interest in Item 4, planning application WSCC/004/20 because they are members of the National Trust: Cllr Burrett (Chairman) and Cllr Sharp.

9. Minutes of the last meeting of the Committee

9.1 Resolved – That the minutes of the Planning and Rights of Way Committee held on 29 June 2021 be approved and that they be signed by the Chairman.

10. Urgent Matters

10.1 There were no urgent matters.

11. Planning Application: Waste

WSCC/004/20 – Restoration of the former Standen Landfill site with a woodland and pasture landfill cap system. Evergreen Farm, West Hoathly Road, East Grinstead, RH19 4NE.

11.1 The Committee considered a report by the Head of Planning Services (copy appended to the signed copy of the minutes). The report was introduced by Chris Bartlett, Principal Planner, who gave a presentation on the proposals, details of the consultation and key issues in respect of the application including changes to the proposal since the

application was last considered by the Committee at its meeting of 29 June 2021, as follows:

- The importation of inert waste material would be over a period of 104 weeks rather than the previously proposed 80 weeks, thereby reducing average vehicle movements per day to 25 daily deliveries (50 HGV movements) and extending the length of completion of the project to two and a half years.
- There would be no working on Saturdays.
- A community liaison programme, including with the National Trust, would be required by condition.

11.2 It was confirmed that photographs and information, submitted by Zara Luxford on behalf of the National Trust prior to the Committee meeting, had been circulated to Committee members. Mr Bartlett advised that the HGVs to be used would not be 4m in height, as per the one shown in the photographs, but would be 2.89m in height.

11.3 Zara Luxford, General Manager, Standen House (National Trust), spoke in objection to the application. The motion agreed by the Committee on 29 June 2021 has not been fully addressed. The minor variations regarding HGV movements do not constitute any significant amendments. There would still be one HGV movement every 7 minutes, which continues to be unacceptable. The transport statement has still not been reviewed; it is out of date and assesses HGV movements over a 10 hour window and fails to take account of return movements. Whilst reduced from a 60% increase in HGV traffic, this 51% increase on West Hoathly Road is still neither negligible nor easily accommodated. There would be significant disruption to visitors to Standen House and residents, who would have to negotiate large vehicles on the narrow lanes for at least two years. West Hoathly Road and Saint Hill Green are not wide enough to accommodate the type of traffic proposed. The road widening does not make it clear whether there would be damage to the sandstone rock outcrops adjacent to the site entrance; at a site meeting in June 2021 the applicant said that they would be affected. The Committee report does not consider this in relation to impacts on the landscape character or the AONB and under the High Weald AONB Management Plan any harm to sandstone outcrops is considered to be a major impact on natural beauty.

11.4 The Committee noted a written statement in objection to the application from Ashley Jinks, Infrastructure Officer, Metrobus Ltd. Metrobus objects to the application and strongly opposes the scheme. Their position on this has not changed since the previous proposal. The proposal would bring HGVs into direct conflict with Metrobus services on the very narrow roads in the locality. Concern was raised at the manner in which some of the dump trucks are driven. The potential for conflict is extremely high and could have fatal consequences. The roads in the area are simply not suitable for the amount of vehicle movements being suggested. The scheme should be rejected.

11.5 The Committee noted a written statement in support of the application from Jane Warrener, co-owner of Evergreen Farm. The property was purchased in 2004 for the purposes of keeping horses, to run a livery and keep a range of farm rescue animals. It became clear the land was not fit for purpose and the quality of grass was poor with next to

no nutrients. The land is excessively muddy leading to numerous incidents and injuries, which along with illness has led to two horses having to be put to sleep. Mrs Warrener suffers from a rare condition, which she believes is caused by the effects of landfilling. The land is in urgent need of restoration to return it to a workable and safe condition.

11.6 Laurence Stringer of GTS Civils spoke in support of the application. The original [withdrawn] application suggested a route through East Grinstead town centre that would have led to safety issues. The currently proposed route is more appropriate. It has been demonstrated that two HGVs can pass at all points along the route. There would be around 4 lorry movements to the site per hour. Site access onto West Hoathly Road would be improved including widening to provide a 12m bell-mouthed access. There would be an improved, wider access road through the site. A safety audit from the A22 along Imberhorne Lane, Saint Hill Road and West Hoathly Road was carried out in accordance with Government guidance, GG119. Mitigations agreed would include the narrow sections being widened by 0.5m, vegetation would be cut back to improve visibility, lorries would use the northern arm of the Saint Hill Road/West Hoathly Road junction to access the site and the southern arm to egress and warning signs would be erected at Saint Hill Road. As requested by the Highway Authority, a Section 59 Agreement would require a photographic survey of the entire route to be undertaken before operations commence and any damage caused by operations would be repaired. There would be a lorry routing agreement in place. A construction management plan would be submitted for approval. There would be no severe or unacceptable impacts. The proposal is in accordance with current WSCC policies. There is no objection from WSCC Highways.

11.7 Cllr Jacquie Russell, local County Councillor for East Grinstead South and Ashurst Wood spoke on the application. Since the Committee deferred the matter in June, very little has changed. The current proposal has only removed Saturday working and reduced HGV movements from 62 to 50 per day, which means one every 7 minutes rather than one every 6 minutes. However, this extends the development timescale to 2 years instead of 18 months. These minor mitigations will not overcome the concerns regarding the route, which is extremely tight with poor visibility. The view of WSCC Highways, that this proposal is acceptable and that this route is the most appropriate, is not one that can be supported. There is no appropriate route at all. East Grinstead has 30,000 residents and the roads are heavily congested and used by unprecedented levels of HGVs. It is questioned whether all HGVs adhere to their routing agreements. It seems that this route is seen as appropriate because it is the quickest route. This is irrespective of any impacts on amenity and the environment, which have not been fully understood. The current proposal has shifted away from the public health concern and focuses on policies regarding recovery. The Environment Agency does not state that the proposed works need to be undertaken and states that the only public health issues would arise from disturbance of the hazardous contaminants already present. Is this a genuine recovery operation? It was questioned whether the real benefit was actually about resetting the landform for some future use. A social media post, dated 6 August 2021, was quoted; it states that that Evergreen Farm is being recommended as good for

camping, dog walking and fire pits. This promotion of the site by the owners as a campsite does not accord with the claims of risks to public health from leachate and gases including methane.

11.8 During the debate the Committee raised the points below and a response or clarification was provided by the Planning, Highways and Legal Officers, where applicable, as follows:

HGV delivery times and number of HGV movements

Points raised – The issues of Saturday working were discussed; on one hand, it was suggested that this should be reinstated so as to spread-out the HGV movements across the week; on the other hand, it was stated that removal of Saturday working was positive because it addresses the concerns about the safety of users of the recreation ground, which had previously been raised by the Committee. Various suggestions regarding HGV movements were made, these were that they cease at 14.30 or alternatively 15.00 or be spread across the whole day. Different hours for HGV movements, dependent on term-time and outside term-time, were also suggested. Clarification was given regarding the hours that Imberhorne School is open.

Response – Any work undertaken on a Saturday would likely have more impact on Standen House which receives more visitors at weekends and the removal of Saturday working was in-line with a request from the National Trust. However, should the Committee wish to reinstate Saturday working then it would not be likely that the applicant would object. Imberhorne School, which is on the route and caters for pupils at Key Stages 4 and 5, holds registration at 08.40 and the last lesson starts at 14.00. The proposed timings for HGV movements are aimed at preventing an impact on peak traffic times at either end of the day. If HGV movement hours were to be condensed further this would mean more movements per hour or would cause the development to take place over a longer period. The final HGV of the day would require approximately half an hour on site in order to offload and leave the site, so if the end of the period were to be 15.00 then in winter the final HGV would have left the site by the time it gets dark.

Highway capacity, road safety and routing

Points raised – Clarification was sought regarding the ownership of the land proposed for widening and whether the applicants have the right to widen it and also whether the sandstone outcrops would be affected by widening works. One Member experienced an occasion recently of having to reverse blindly around the corner into West Hoathly Road from the Saint Hill Road junction because a bus was stuck at the junction due to oncoming traffic; this was dangerous and highlights the issues with the proposed route that would not be mitigated by HGVs using the other arm of the junction at Saint Hill Road and West Hoathly Road. The Committee asked whether traffic lights or a roundabout at the Saint Hill Road and West Hoathly Road junction could be considered. Clarification was sought on the length

of time that temporary traffic lights might be installed for. One Member noted that it may have to be accepted that there is no satisfactory route.

Response – The land where proposed widening works would take place is on adopted highway. WSCC Highways has received and assessed an indicative plan, which shows that there is sufficient space for the proposed widening. A detailed scheme would need to be submitted, which would be subject to a Section 278 Agreement. The proposed widening by 0.5m should not affect the sandstone outcrops; it would take place at either end of where the rock outcrop is. In relation to impacts on the highways, no proposals for either traffic lights or a roundabout have been put forward. The applicant has set out how they intend to mitigate the impacts of the proposal and these mitigations are seen as appropriate. The constraints along the route are acknowledged; however, the issues at the Saint Hill Road and West Hoathly Road junction are long-standing and do not arise from the planning application. Therefore, it would not be appropriate to use the planning process to require the installation of either traffic lights or a roundabout. It should also be noted that the route has no weight limit along it and is currently used as a bus route. There is no standard limit on the length of time that temporary traffic lights may be installed for, but it should be noted that temporary traffic lights are not optimised for the flow of traffic at any particular location and because of this they can cause traffic to back-up.

Acceptability in terms of Waste Planning policy

Points raised – In relation to the matter of the volume of inert material to be imported, it was queried whether the calculations of proposed material were accurate because this did not appear to add up when calculating the amount of 126,677m³ inert material to be used across 4,400m² of land, based on the depths proposed and likely density of material per cubic metre. It had been expected that new calculations would be supplied. It was queried whether this volume of material is truly “no more than is necessary to deliver the benefits identified” as per policy W8 (e) of the Waste Local Plan.

Response – No new calculations were submitted; however, there would be no reason to suppose that the calculations are incorrect. The volume to weight ratio of inert material to be imported would appear to be about the right amount, based on the proposed one and a half tonnes per cubic metre when considered against an average of one to two tonnes per cubic metre. There is a requirement, by condition, for a verification plan (Condition 8) for completion of the restoration strategy and, if required, officers would ensure that a check is carried out on the amount of material brought in.

Public Health, gases and leachate

Points raised – The concerns about public health versus the impacts caused by the proposal were discussed. It was noted that

Environmental Health officers have not said that the work must be done, so clarification was sought regarding the urgency of the work. Some Members felt that the issues regarding the potential harm to public health were clear and that the proposal would see long-term benefits. It was queried whether the presence of contaminants has been properly verified. One Member cited a Canadian study of landfill sites which has stated that after a period of 20 years the impacts on groundwater can't be detected (Standen landfill site has been closed for nearly 30 years). The concerns raised by Cllr Russell regarding camping at Evergreen Farm were discussed and it was noted at the Planning Committee site visit that one tent had been seen on site plus a sign about camping. The personal concerns, as raised in the statement by Jane Warrener, one of the owners of Evergreen Farm, about the site in relation to the welfare of their animals and her own personal health, were noted. Clarification was sought regarding the permits for camping.

Response – Section 9.3 of the Committee report addresses the risks posed, including to controlled water sources and the presence of methane and CO₂ in certain areas. The site is a former landfill site and reports submitted state that the land contains contaminants; there is debris near the surface and the potential for leaching from the site. The reports advising of the presence of contaminants have been provided by a qualified person. The proposal would remediate historic activity and provide a clay capping system with different levels of topsoil restoring areas of grassland and woodland. The proposal would also protect the site from leachate into nearby water sources by preventing surface water penetrating the cap. It is difficult to say what urgency there is, but this type of application is not unusual with legacy landfill sites; the closure and restoration of older landfill sites was not always undertaken with the rigour that would be expected today. In relation to the quoted camping at Evergreen Farm, the extent of this is not known. This does not mean it has not occurred, but that the application has been assessed without information on this. The Committee must look at the application as it is presented. There are certain permitted development rights relating to camping (so that there is 'deemed planning permission' for the activity in question, subject to certain restrictions and qualifications). No permits are required for camping for up to a period of 28 days. However, camping would be an issue for the District Council, not the County Council, and the existence of any camping on site could not form a proper part of the formal reasons for granting or refusing the application for landfill restoration.

Community Liaison

Points raised – The requirement to have a community liaison programme, which includes the National Trust, was welcomed. Clarification was sought on how this would be managed.

Response – The community liaison programme would be a requirement and is included as part of Condition 4 'Construction Management Plan'.

Landscaping – trees and hedgerows

Points raised – It was noted during the site visit that it is proposed to remove some trees, but that these would be replaced. The loss of the hedgerow in the centre of the site, and the attendant impact on wildlife, would be contrary to Mid Sussex District Plan policy 37 'Trees, Woodlands and Hedgerows'. Clarification was sought regarding the replacement of the hedgerow because there is no mention of this in the Committee report. Clarification was also sought regarding the paragraph starting "In this location..." mentioned in section 4.8 of the Committee report.

Response – Condition 9 'Soft Landscaping Scheme' secures details of landscaping to be provided. Should the Committee wish to include a reference to hedges this can be incorporated into the condition. Section 4.8 of the Committee report refers to removal of trees and vegetation. The location referred to is the slope on the western boundary, where grassland is proposed, which is because the steepness of the slope would not allow for sufficient soil to accommodate the depth required for tree roots on top of the clay cap, meaning only grass is suitable in this location.

Site topography

Points raised – Section 4.7 of the Committee report mentioned use of a digger on site. Clarification was sought regarding the use of plant on site because of the steep slopes.

Response – The operation of plant on site is a matter for the site owners and operators.

Lighting

Points raised – Due to the absence of permission for external lighting, as per Condition 19 'Lighting', clarification was sought regarding what happens during permitted operating hours when it is dark.

Response – No external lighting would be permitted. The proposed hours of operation would be 08.00 to 18.00 hours Monday to Friday, but during winter the loss of daylight would naturally limit the times that plant can operate.

Expiration of Planning Permission

Points raised – The period of operations would be two and half years and planning permission is granted for only three years, so it is noted that there is no real allowance for slippage time on the development.

Response – It is not recommended that the period of planning permission be extended.

11.9 The Committee agreed to informally delegate to the Head of Planning Services the requirement to include specific references to hedges in the soft landscaping scheme to be submitted to the Council as part of Condition 9 'Soft Landscaping Scheme'.

11.10 The following amendment to Condition 15 'HGV Deliveries' was proposed by Cllr Gibson:

No HGV vehicles associated with the installation and construction of the development hereby permitted shall be received by or despatched from the site except between the hours of 09.30 and ~~15:30~~ **14.30** on weekdays only.

Reason: In the interests of highway safety and of the amenities of the locality.

The proposal was not seconded and so fell.

11.11 The following amendment to Condition 15 'HGV Deliveries' was proposed by Cllr Kenyon and seconded by Cllr Gibson:

No HGV vehicles associated with the installation and construction of the development hereby permitted shall be received by or despatched from the site except between the hours of 09.30 and ~~15:30~~ **14.30** on weekdays only **during school term time** and 09.30 **and 15:30 weekdays only outside school term time**.

Reason: In the interests of highway safety and of the amenities of the locality.

The Committee voted on the amendment, which was approved by a majority on the Chairman's casting vote.

11.12 The substantive recommendation, including amendments to the Conditions and Informatives set out in Appendix 1, as approved by the Committee and noted in minute 11.11 above, was proposed by Cllr Forbes and seconded by Cllr Atkins and approved by a majority.

11.13 Resolved – That planning permission be granted for planning application WSCC/004/20, subject to the Conditions and Informatives as set out in Appendix 1 of the report and amended as agreed by the Committee.

12. Date of Next Meeting

12.1 The next scheduled meeting of the Planning and Rights of Way Committee will be on Tuesday, 12 October 2021 at 10.30 a.m.

The meeting ended at 12.32 pm

Chairman

**Key decision: Not applicable
Unrestricted**

Planning and Rights of Way Committee

12 October 2021

Definitive Map Modification Order Application for DMMOs 4, 5, 6/19 in the parishes of Bognor Regis, Felpham and Bersted

- (1) Addition of a footpath from Brooks Lane to Downview School**
- (2) Addition of a footpath from the field adjacent to the rife to the Leisure Centre**
- (3) Addition of a footpath around the main field adjacent to the rife**

Report by Director of Law and Assurance

Electoral divisions: Bognor Regis East and Felpham

Summary

The application was submitted with 107 public way evidence forms testifying to use of three claimed routes between 1964 – 2021.

The relevant 20 year period of continuous use for the purpose of the application is 1998 – 2018.

It is concluded that the credible evidence from a significant number of users meets the legal tests and that orders should be made to add the paths to the definitive map.

Recommendations

- (1) Application Route 1 has, on the balance of probabilities, been proven to subsist and a definitive map modification order should be made.**
 - (2) Application Route 2 has, on the balance of probabilities, been proven to subsist and a definitive map modification order should be made.**
 - (3) Application Route 3 has, on the balance of probabilities, been proven to subsist and a definitive map modification order should be made.**
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1. Introduction

- 1.1 The application, made by David Meagher and Rachel Searle, was received on 23 May 2019 to add three new footpaths to the definitive map and statement in the parishes of Bersted, Bognor Regis and Felpham. It is supported by 107 public way user evidence forms, testifying to the use of 110 users. The paths are referred to as follows throughout this report and are shown on the plan at Appendix 2.
- 1.2 The application is made under Section 53 (5) and is reliant on 53(3)(c)(i) Wildlife and Countryside Act 1980 (WCA), being the discovery, by the County Council of evidence which 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. The burden of proof rests with the applicant.
- 1.3 The requirements for the presumed dedication of a public right of way under statute are set out in Section 31 of the Highways Act 1980. This requires use of the claimed route by the public as of right and without interruption, over a period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public.

2 Characters and Features of the claimed route

- 2.1 The first route which is being sought by the applicants ("Application Route 1") begins at Brooks Lane (grid reference 494229, 100332) and proceeds in a north-east direction across the rife to Downview School (grid reference 494783, 100624).
- 2.2 The second route ("Application Route 2") begins at grid reference 494309, 100389 and proceeds in a south-east direction until it terminates at the Leisure Centre (grid reference 494603, 100259).
- 2.3 The third route ("Application Route 3") is a circular walk around the main field adjacent to the rife.

3 Land Ownership

- 3.1 Land Registry documents show there to be several different landowners for the land within the application, there is also some unregistered land. The landowners are B5 Limited, J Langmead, L MacKendrick, A Morgan, S Morgan, J Morgan, K Trenam, C Fuente, D Fuente and K Fuente, Downview Primary School, Sime Derby.
- 3.2 The applicant served notice of the application on each individual landowner on 13 July 2019. The applicant also displayed a copy of the notice on the claimed routes.

4 Consultations

- 4.1 Standard consultations were sent to the amenity groups, the District Council, Town Council and the South Downs National Park Authority.

4.2 The following comments were received:

4.3 Bognor Regis Town Council and Town Mayor Cllr Stephen Reynolds:

"Bognor Regis Town Council and I strongly supports this application for the following reasons:

1. Footpaths represent a suitable form of transport
2. It provides the healthy pursuit of walking and therefore reduces pollution
3. Serves as an amenity for residents of all ages to walk safely to Bognor Regis, Downview Junior School, Felpham College and Arun Leisure Centre
4. Provides a footpath link between the parishes
5. The footpath also is a "greenway" which encourages the movement of wildlife and migratory birds
6. The footpath is also a potential strategic link to the South Downs"

4.4 The South Downs National Park Authority:

"The proposed paths are located outside the National Park boundary and the SDNPA Access team has no evidence to support or refute the claim. However, we would like to make the following observations:

- The additional paths will add value to the network locally and open up new opportunities for self-guided walks into the National Park using a combination of rights of way and quiet lanes. For example, via Barnham and Walberton/Fontwell.
- The South Downs Partnership Management priority 5.2 identifies a need to improve accessibility through a network of high-quality routes connecting communities with the landscape, heritage, attractions and transport hubs and gateways. This application supports this priority and would enable communities outside the boundary to travel more sustainably to the National Park.
- The creation or confirmation of new rights of way locally will also enable more opportunities for people to improve their health and well-being."

4.5 The West Sussex Ramblers:

"We can see that it is obvious that the footpaths have provided useful links with current Rights of Way. The addition of the 3 footpaths outlined in the application would provide a significant enhancement to the Rights of Way network in the area and would retain the use of links that local residents have obviously benefitted from over many years. I confirm that Ramblers support this valid application."

4.6 Nick Gibb MP:

"I understand the applications have been submitted on behalf of the Save Aldingbourne Rife Paths Action Group as the footpaths represent an historical use of footpaths which have been used for over fifty years. The paths are an

important means of communication between the parishes Felpham, Bersted and Bognor Regis. The paths are also significant for school children and students who attend Downview Primary School and Felpham Community College. Several generations of families have used these routes which also represent an amenity for local people to enjoy the countryside.”

4.7 Felpham Community College:

“I am pleased to learn that there is an application underway to designate an existing path from Glenwood to Arun Leisure Centre / Felpham Community College as a Public Footpath and would like to give this application full support on behalf our school community. We hope that Public Footpath status will enable the future of the path to be safeguarded as a pedestrian route to college for current and future students and staff. We understand that the footpath from Brooks Lane across Aldingbourne Rife and across two fields to Arun Leisure Centre / Felpham Community College has been used by students from the Glenwood and Highfield Road areas of Bognor Regis since the college was opened in 1974.”

4.8 Local Member – Francis Oppler:

“In regards to the addition of the footpaths along the Rife, I would just like to add my support as one of the local members. I have spoken to many residents who have confirmed that the public use of these footpaths go back at least fifty years if not longer.”

5 Evidence submitted in support of the application

5.1 The application was made following the installation of temporary fencing to part of the claimed application routes in 2018.

5.2 The application is supported by 107 public way user evidence forms, testifying to the use by 110 individuals from 108 postal addresses over the period of 1964 to 2021.

5.3 The user evidence submitted with the application shows the following type of use:

5.3.1 all of the users claim to have used the routes on foot.

5.3.2 seventeen of the users claim to have used the routes on a bicycle.

5.4 None of the claimed users report to having been turned away whilst using the routes or claim to have seen any notices or otherwise preventing them from using the routes.

5.5 A number of users claim that access to the bridge and field was blocked briefly in 2018 when temporary fencing was erected. The fencing was removed a short time after it was erected and use of the routes resumed until 2021 when the application routes were blocked again by fencing.

5.6 Two users claim to have sought permission to access part of Application Route 1 on the Felpham side, e.g., the land registered under title number WSX156149.

5.7 All users report to have seen others using the routes either on bicycles and/or walking.

5.8 Breakdown of user evidence forms between the three routes

5.8.1 93 users claim the use of all three routes.

5.8.2 12 users claim the use of two routes.

5.8.3 5 users claim the use of only one route.

6 Evidence submitted against the application

6.1 A joint objection was received from the following landowners: J Langmead, L MacKendrick, A Morgan, S Morgan, J Morgan, K Trenam, C Fuente, D Fuente and K Fuente. The objection relates to land which is affected by the north eastern part of Application Route 1. The objection stated that permissive paths have been in existence across their parcel of land WSX156149 since 2017. The landowners have provided copies of notices dated May 2019 and have claimed that the notices are identical to notices which they state were placed on the land in 2017.

6.2 The above landowners have also confirmed that they deposited a section 31(6) Highways Act 1980 landowner statement with the County Council in May 2019.

Officer comment: The section 31(6) Highways Act 1980 landowner deposit falls outside of the relevant 20 year period and so this is not relevant when determining this application.

6.3 Mr Richard Brooks, who is the owner of the field registered under title number WSX165655 and which is affected by Application Route 1, Application Route 2 and Application Route 3, has submitted an objection to the application. Mr Brooks purchased the land in 2016. Mr Brooks states that each year the application routes which cross his land are muddy, rotted and covered in blackberry bushes. Mr Brooks advised that when he initially purchased the land, he tried to erect fencing panels which he claims were subsequently removed by the general public.

6.4 Mr Brooks stated that originally, he was happy to allow the public use of one path across the land but that he does not agree with the three routes that are now being claimed in the application.

6.5 Mr Callan Wood, who is purchasing the land currently owned by B5 Limited/Richard Brooks and registered under title number WSX165655, has submitted an objection to the application. Mr Wood states that he does not believe that private land should be allowed to be used by the public and has confirmed that he has erected fencing on the land to stop public use.

7 Archive evidence

7.1 The officer consulted the Sussex Series Ordnance Survey Maps dated 1863-1895, 1896-1899, 1909-1916 and 1930-1946 and concluded that none of these maps showed evidence of a historic right of way.

- 7.2 The officer consulted the Draft and Provisional Definitive Maps and concluded that neither map showed evidence of a historic right of way.

8 Consideration of claim

- 8.1 In determining the application, the Committee has to decide whether the 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. Matters such as suitability of a way and possible nuisance or need, are irrelevant and cannot be taken into account when reaching a decision.

9. The 20 Year Period

- 9.1 Under Section 31 of the Highways Act 1980, a relevant date needs to be established in order to establish the 20 year period. The relevant date is determined as the period when the land has actually been enjoyed by the public as of right and without interruption for a full period of 20 years taken back retrospectively from the first date of challenge.
- 9.2 In this instance, users claim that fencing was erected on the land which prevented public use of the routes first in 2018. Therefore, the relevant 20 year period for the purpose of determining this application is 1998 – 2018.
- 9.3 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.
- 9.4 During the relevant 20 year period 110 users claimed to have used all three of the claimed routes within the application, 50 of which claim to have used it continually for the whole 20 year period.
- 9.5 The use of the application routes ranges between twice to 1095 times a year.

10. As of right and without interruption?

- 10.1 "As of right" means use without force, secrecy or permission. It is irrelevant whether the users actually knew they were not entitled to use the route or were indifferent as to whether they could use it. What is important is that looked at objectively they appeared to be using the paths as of right.
- 10.2 As detailed in paragraph 9.4 above, evidence submitted in support of the application has shown that the claimed routes have been used by 110 users, 50 of which have used the routes continuously from 1998 – 2018. This is a significant number of users.
- 10.3 None of the users referenced in 10.2 above report to have been challenged whilst using the route or to have been given permission to use the route during the 20 year period. It therefore appears that access to the routes within the application has been available throughout the relevant period until the fencing and obstructions appeared in October/November 2018.
- 10.4 With regard to the issue of 'permission' a distinction needs to be drawn between toleration and permission. A landowner may be aware of the use of

a path but chooses to do nothing to prevent that use. In those circumstances, even if he later makes it clear he did not support the use of the path during the relevant period, his actions could be regarded as toleration of the use during that period. This means the use could still be regarded as being as of right.

- 10.5 One of the landowners, Mr Brooks, has confirmed that he was aware of the public use of the application routes across his land and acknowledged that he was agreeable to allowing the use of one of the paths. It can be concluded that he tolerated the use in this instance.
- 10.6 However, the situation would be different if the landowner permitted the public to use the path but made clear (either expressly e.g. by a sign or through his conduct e.g. by closing the path occasionally) that his consent could be withdrawn in the future. In that case the use would be with permission and not as of right.
- 10.7 J Langmead, L MacKendrick, A Morgan, S Morgan, J Morgan, K Trenam, C Fuente, D Fuente and K Fuente claim that notices were erected on their land in 2017 which advised the public of the public rights of way over their land and also paths which they have given the public permission to use. The permissive paths are shown on the map provided in section 4 of the background papers. Whilst Application Route 1 does not appear to represent the permissive path shown on the notices, the notices do state that any other use of the land is not permitted. It could therefore be argued that the notices showed an interruption to use within the 20 year period.

However, it should be noted that none of the 110 users, a significant number, claim to have seen any notices across the application land in 2017. The landowners have also only provided copies of notices that are dated May 2019 and have not been able to provide copies of the notices which were placed on the land in 2017.

11. Evidence of no intention to dedicate

- 11.1 It is considered that the user evidence has met the statutory tests as set out in Section 31 Highways Act 1980 for all three application routes. User evidence submitted in support of the application shows that the route has been used as of right and without interruption for a period of 20 years or more. It is therefore necessary to further consider whether there is sufficient evidence of no intention during the relevant 20 year period to dedicate by the landowner.
- 11.2 Evidence of a landowner's intention not to dedicate a public right of way must be overt and contemporaneous. The landowner cannot assert after the event that there was no intention to dedicate.
- 11.3 As set out in paragraph 10.7 above, it could be argued that the 'private land and permissive path' notices which affect part of Application Route 1, which the landowners say were erected in 2017, may show an intention that the landowners did not intend to dedicate the land to the public during the relevant period. However, as the landowners have not been able to provide evidence to support to this claim, and the fact that none of the 110 users, a

substantial number, claim to have seen any notices on the land, this claim has been given less weight.

- 11.4 There is no other evidence of no intention to dedicate in relation to all the claimed routes.

12. Common Law

12.1 At Common Law a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to do so and that the public have accepted such dedication. Whilst there is no defined minimum period of continuous use to establish a right of way at Common Law, the use must be shown to have been as of right.

12.2 Dedication at common law is presumed if the way has been used by the public as of right. There is no defined length of time over which the use must occur and it simply must be long enough to justify an inference that there was an intention by the Landowner to dedicate. A Landowner needs to be legally capable of dedicating the way as public, therefore any periods in which the land was occupied by tenants could not be included in the period of user.

12.3 In this case there is a significant amount of evidence which spans a considerable period of time. It could therefore be concluded that rights of way have been created at common law.

13. Overall Conclusion and Recommendation

Application Route 1

13.1 The applicant has produced a substantial amount of credible evidence which demonstrates clear use of Application route 1, as of right, during the 20 year period. The landowner states that notices which were placed on the land for Application Route 1 could be argued to show that the owners did not intend to dedicate a public footpath across their land. The landowner states that these notices were erected in 2017, albeit they have not been able to support this assertion with documentary evidence. As such, it is not considered that there is a conflict of credible evidence of use and landowner submissions.

13.2 It is concluded that the legal tests have been met and that on the balance of probabilities Application Route 1 has been proven to subsist.

13.3 It is therefore recommended that an order should be made to add Application Route 1 to the definitive map.

Application Route 2 and Application Route 3

13.4 The applicant has produced a substantial amount of credible evidence which demonstrates clear use of Application Route 2 and Application Route 3 during the relevant 20 year period.

- 13.5 It is considered that the legal tests have been met and that on the balance of probabilities Application Route 2 and Application Route 3 have been proven to subsist.
- 13.6 It is therefore recommended that orders should be made to add Application Route 2 and Application Route 3 to the definitive map.

14. Consultation, engagement and advice

- 14.1 See paragraph 4 above which details responses to the statutory consultations as well as responses to additional consultations that were carried out as part of the investigation process.

15. Finance

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

16. Risk implications and mitigations

- 16.1 The decision is one that must be taken on strict legal tests:
- i. If the application is not determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.
 - ii. In the event that an order is made the landowner could appeal to the Secretary of State and the matter be considered by way of written representations, hearing or public inquiry.
 - iii. In the event that an order is not made and the applicant disagrees with the decision then they have a right of appeal pursuant to Schedule 14 of the Wildlife and Countryside Act 1981 to the Secretary of State. The Secretary of State may direct the County Council to make an order, which if objected to could be considered by way of written representations, hearing or public inquiry.

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

17. Policy alignment and compliance

Equality and Human Rights Assessment

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

Human Rights Act 1998 Implications

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

Crime and Disorder

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

Climate Change

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

Public Health

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

Tony Kershaw

Director of Law and Assurance

Contact Officer: Georgia Hickland, Trainee Legal Executive, 0330 222 5360

Appendices

- Appendix 1 – Location plan
- Appendix 2 – Site plan

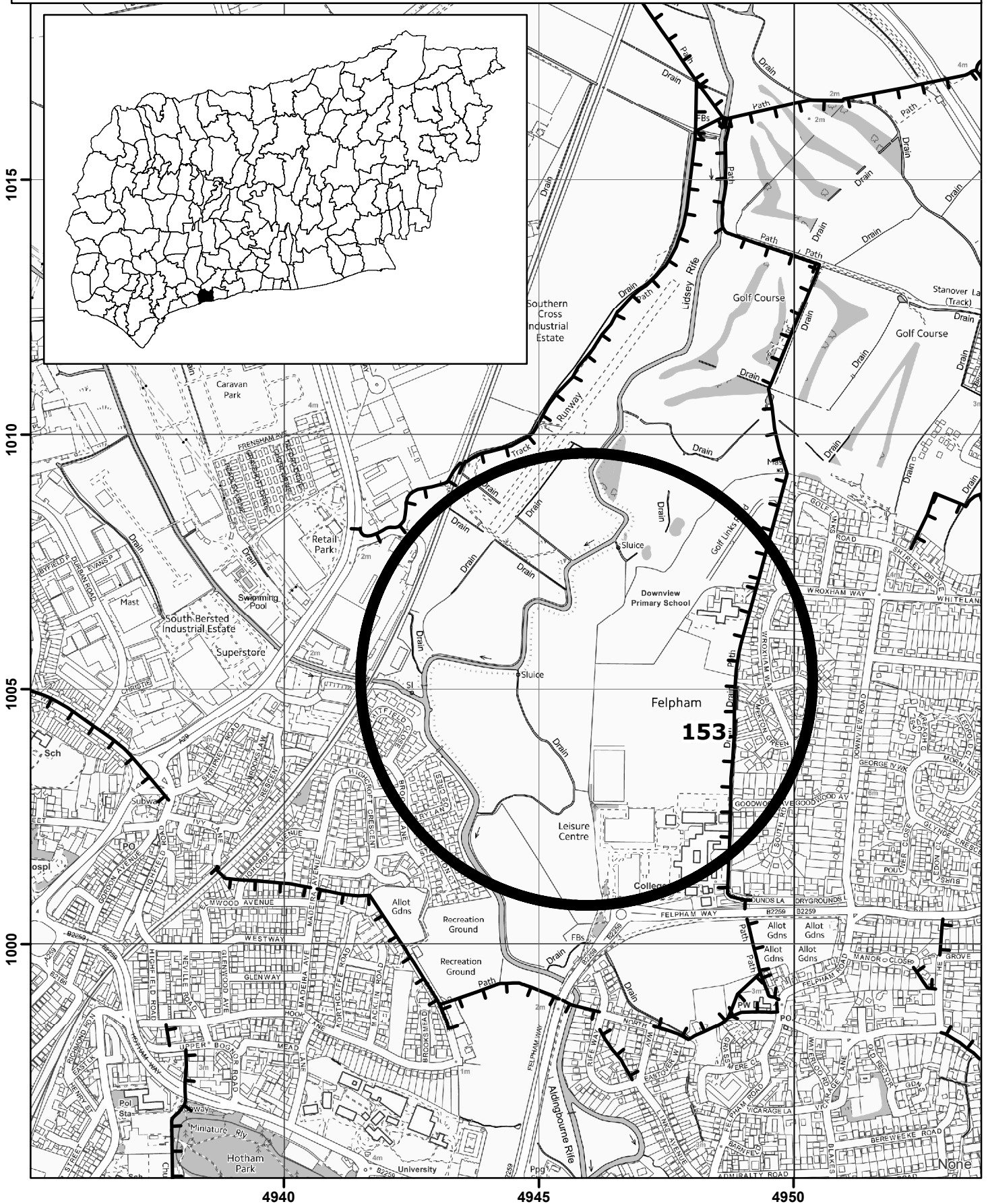
Background papers **

- (1) Application and plan
- (2) Witness list
- (3) Letters and emails of support
- (4) Landowner objections

**** Please contact the contact officer to request a copy of the background papers**


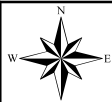
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Parish: **Felpham**

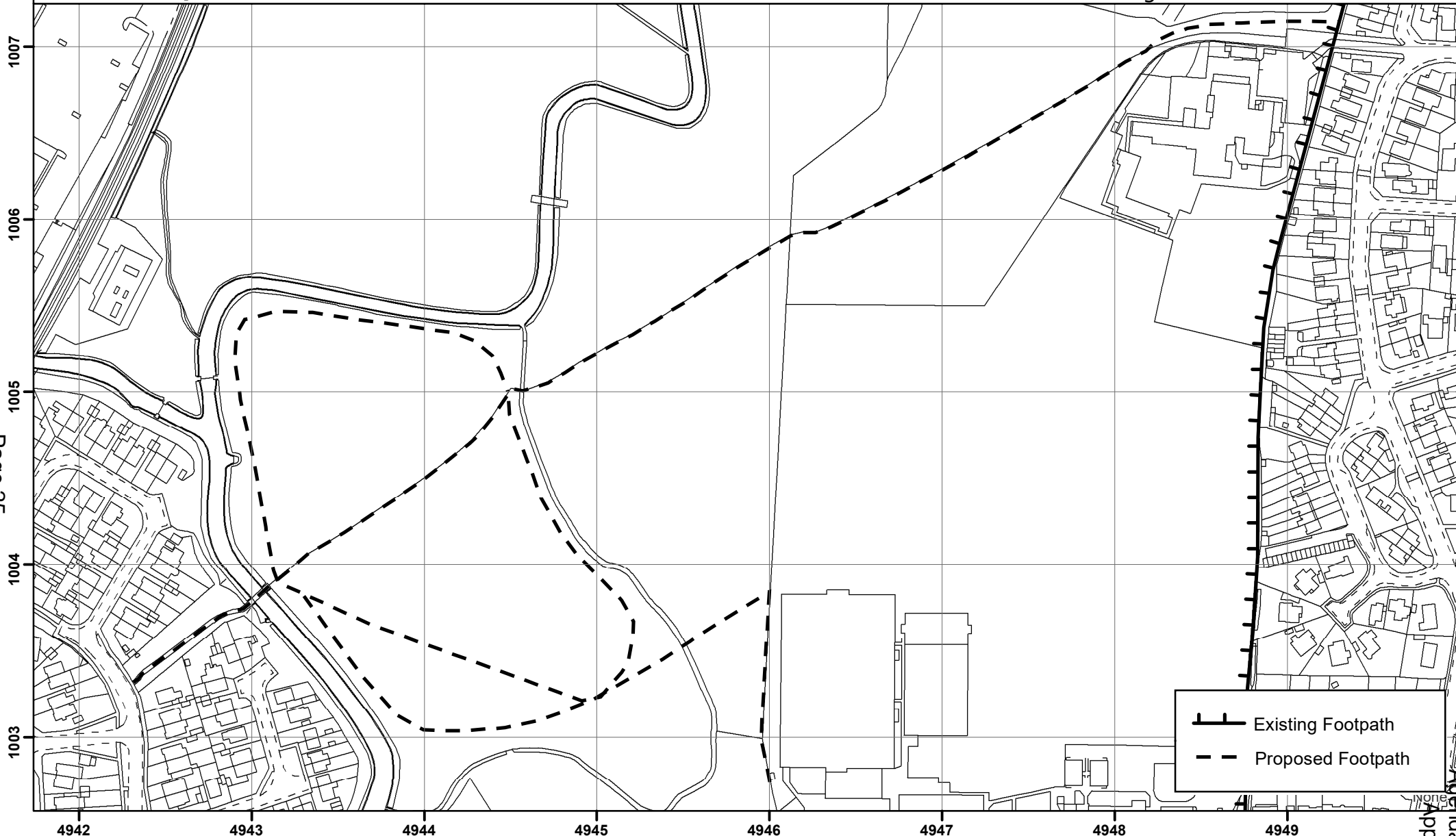




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Felpham: Proposed addition of Footpath - Location Plan

Plan: 01801	1:10,000	OS Sheet: SU 90 SW		Photocopy liable to distortion	Matt Davey Director of Highways, Transport and Planning	
Date: 22.09.2021		Grid Ref: 4940 1000				

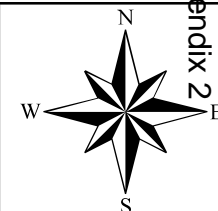
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	Existing Footpath
	Proposed Footpath

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Felpham: Proposed addition of Footpaths - Site Plan



Plan: 01800

1:3,000

OS Sheet: SU 90 SW

Photocopy
liable to
distortion

Matt Davey
Director of Highways,
Transport and Planning

Date: 22.09.2021

Grid Ref: 4943 1003

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**Key decision: Not applicable
Unrestricted**

Rights of Way Committee

12 October 2021

Recent Decision by the Secretary of State's Inspector:

DMMO 5/16 – To add a footpath at Fyning Lane, Rogate

Report by Director Law and Assurance

Recommendation

That this is a report to be noted

1. Background

- 1.1 In June 2018 the Committee considered a DMMO application, made by Ms Ann Arnold, to add a footpath at Fyning Lane in the Parish of Rogate.
- 1.2 The legal tests to satisfy before making a Definitive Map Modification Order are:
 - i. Test A – whether a public right of way subsists (in order for Test A to be fulfilled, the standard of proof is to show that a right of way does exist on the balance of probabilities); or
 - ii. 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 a1.4 The application route was divided into three parts as described below in reference to plan 01733a (appendix 1):
- 1.3 The application was supported by user evidence only.
- 1.4 The affected landowners Mr and Mrs Grey and Mrs Abramovich and adjoining landowners Mr and Mrs Noble, Mr Pope and Mr and Mrs Wakeland all objected to the application.
- 1.5 The reporting officer concluded that the applicant had produced credible evidence of enjoyment of the way as a public right of way over a full period of 20 years, but there was a conflict of apparently credible evidence from the owner in relation to one or more other issues arising under Section 31 of the Highways Act 1980, therefore the test 'reasonably alleged to subsist' was recommended.

- 1.6 The Committee refused the application, and it was resolved that an order be not made.
- 1.7 On the 25th March 2019 the applicant appealed the County Council's decision to the Planning Inspectorate. The case was considered by an Inspector by way of public inquiry.

2. The Inspector's decision

- 2.1 A full copy of the Inspectors decision report is attached, however, after reviewing the appeal documentation the Inspector concluded that;
 - It was not considered that there was a sufficient indication of a lack of intention to dedicate a public right of way on foot over this land on the part of the landowner within the relevant period.
 - The level of use was insufficient to raise a presumption that the way has been dedicated as a public footpath in the twenty-year period 1975 – 1995.
- 2.2 In conclusion, the Inspector directed that an order for the whole route should not be made.

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.

Tony Kershaw

Director of Law and Assurance

Contact Officer: Georgia Hickland ext. 25360

Appendices

- Appendix 1 – Committee report, dated 12 June 2018
- Appendix 2 – Location plan
- Appendix 3 – Site plan
- Appendix 4 – Inspector's full decision report, dated 8 July 2021

Rights of Way Committee

12 June 2018

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.

Report by the Director of Law and Assurance

Executive Summary

The application, submitted by Ann M Arnold, is made under the provisions of Section 53 of the Wildlife and Countryside Act 1981 and seeks to modify the Definitive Map and Statement for Rogate by adding a public footpath from bridleway 1163 to Fyning Lane in the Parish of Rogate.

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 18 public way evidence forms supporting use of the claimed route between 1939 and 2016.
2. Each of the landowners has submitted evidence against the application including evidence that the claimed route has been blocked for various periods during buildings works from 1991. 30 local residents have also submitted objections to the application, most of which never understood the claimed route to be a public right of way, as it was not an accessible route, there being other more attractive and convenient routes available.
3. The first of act of challenge is taken to be when the claimed route was closed for 31 months between February 1995 and August 1997 whilst an extension was built directly adjacent the claimed route. The claimed route was completely blocked, having been dug with 2.9 metre foundations, leaving users with no alternative route. The relevant 20 year period of continuous use for the purpose of this application is therefore 1975 – 1995.
4. The archive evidence is inconclusive as to the existence of a public right of way over the claimed route.
5. The evidence of use asserts use of the claimed route for the relevant period 'as of right' and without interruption. However, there is a direct conflict of evidence from those in objection to the claimed route, which asserts that the claimed route was not an accessible route and was not used by the public. The landowner of part of the route also asserts that for periods from 1991 the claimed route was temporarily blocked during various building projects. In the absence of incontrovertible evidence that the claimed route cannot be reasonably alleged to subsist, on balance, it is concluded a path can be reasonably alleged to subsist.

6. On the basis of all the evidence available, it can reasonably be alleged that the owners of the land over which the claimed route runs dedicated public rights on foot and that the public has accepted that dedication.
7. It is recommended that an order to add the path to the Definitive Map be made on this basis.

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 bridleway 1163 to Fyning Lane in Rogate be 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 on point A bridleway 1163 and runs west to point B. From point B the track then runs south to point C to where it opens up on to Fyning Lane. Fyning Lane is an adopted highway.
- 1.3 A site visit of the claimed route was carried out starting at point C on the application plan. The path at point C has a width of 3 metres and is a loose gravel surface. The path runs north 178 metres from point C to B on the application plan. At point B, the claimed route proceeds east with a width of 1 metre and is of an earth surface. The site visit proceeded for approximately 50 metres where a fence belonging to Fyning Twitten was blown down obstructing the route. The site visit restarted at point A on the application plan.
- 1.4 Point A has a width of 8 metres and is a loose gravel surface. The path proceeds at a small incline where the surface changes to earth and runs for approximately 80 metres where the route was obstructed, making the route impassable and so had to continue through the property boundary.
- 1.5 Approximately 82 metres along, the path has a width of 1.5 metres with an earth surface. After a further 20 metres a gate has been installed by the landowners making the route impassable. Through the gate for a distance of approximately 65 metres, the claimed route has been obstructed by various trees and branches, leading to divert approximately 2 metres around the claimed route. After a further 10 metres, the claimed route runs behind Fyning Twitten.
- 1.6 At approximately 170 metres from point A to point B, the path is very difficult to pass due to obstruction by the fence of Fyning Twitten in several places. The claimed route is narrow in some places with a width of 0.5 metres although, in other parts the route has a width of 1 metre.

The claimed route has an earth surface for the majority of its length from A – B.

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 of the claimed route are Mr and Mrs Noble, Mrs Abramovich, Mr and Mrs Grey and Mr Pope.
- 2.3 The applicant served notice of the application on each individual landowner on 5 December 2016. The applicant also displayed a copy of the notice on the claimed route.

3. Consultations

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 to the consultations can be found in the evidence file in the members' room.

In considering the result of 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. The following consultation responses were received:

3.1 Rogate Parish Council

Rogate Parish Council is aware of a body of evidence that confirms this is an ancient path that dates back to 1810 and as a consequence, the parish council supports the DMMO application.

3.2 No consultation responses were received from the following bodies:

Auto-Cycle Union, British Driving Society, British Horse Society, Byways and Bridleways Trust, Open Spaces Society, Cycling UK, Ramblers Association.

4. Evidence in support of the application

- 4.1 The application was submitted on 5 December 2016 by Ms Ann Arnold and is supported by 18 user evidence forms; however, since the application was submitted 2 witnesses have withdrawn their evidence, leaving 16 user evidence forms spanning the period 1939 to 2016. The burden of proof rests with the applicant.
- 4.2 Most of the witnesses report to have seen no notices during their use of the claimed route. Although, 4 users claim to have seen a "private" sign

since June 2016. 12 of the users also note that two unlocked gates were erected in January 2016.

- 4.3 All users claim to have used the route on foot and the frequency of use varies between 3 times per year to weekly, with some users not stating how often they have used the route. Most users claim to have seen others using the claimed route. One user, Ellen Patricia Bateman states that she worked for Fyning Twitten during 1980 to 1986 for the period of her use. This user's evidence has been disregarded as despite the fact it is stated she was not given permission to use the route by the Owner, it is concluded that her use of the claimed route was likely in the exercise of a private right.
- 4.4 All users claim that they have never been told by an owner or occupier that the route was not public and that they have never sought or received permission to use the route. No users reference the presence of any signs other than that erected in 2016. No users report any stiles, gates or obstructions of the claimed route other than two unlocked gates since January 2016.
- 4.5 The applicant has submitted Ordnance Survey maps with the application with the earliest map showing the application route dating back to 1879. The applicant states that these maps are evidence that a path has existed since this date. One of the maps submitted by the applicant is dated 1913 – 1914 and shows the application route labelled "FP".

5. Evidence against the application

5.1 The Grey family

- 5.2 Mr and Mrs Grey are the owners of Fyning Copse which they have owned since 1990. The claimed route affects the majority of Fyning Copse's property boundary from point A to B.
- 5.3 They contest that the claimed route is a public right of way and state local people do not wish to walk it as it leads nowhere. They consider the claimed route should be described as an entirely private garden path.
- 5.4 They state that the claimed route was closed for 31 months between February 1995 and August 1997, whilst they were constructing an extension directly adjacent to the claimed route and assert that the right of the public to use the claimed route was therefore first called into question in February 1995.
- 5.5 The part of the claimed route that is adjacent to their property boundary has been seriously blocked many times over the past 27 years. This includes the building of a studio around 1991 for a period of nine months when the claimed route was covered by scaffolding. In 2010 a large oak tree fell from Fyning Estate across the claimed route onto the studio roof. The roof had to be rebuilt and for a period of approximately 3 months, the claimed route was blocked with scaffolding and building materials. Building materials for a copper roofed low building were stored on the

claimed route in around 1992. The building of a bicycle shed in 1994 involved the blocking of the claimed route for a period. An open log store extension to the bicycle shed building was made in 2005 resulting in the claimed route being used as a construction area for a couple of months. The back of this building has been continually used to store large items which have regularly blocked the claimed route. It is argued that these interruptions are strong evidence that they have never intended to dedicate the way to the public. They also assert that this is evidence that the claimed route was not heavily used by the public as they claim to have never received a single complaint in relation to these closures of the route. Evidence of the above is provided within section D of the background papers.

- 5.6 Mr and Mrs Grey have also provided witness statements from their four grown up children; 5 past employees of Johnny Grey Studios; 5 current employees of Johnny Grey Studios; 3 past builders or other contractors at Fyning Copse; their daughter's partner Dr Henry Bowyer and their lodger Korel Walley in objection to the claimed route. All of these people have been in very close proximity to the claimed route at various points. With the exception of Mrs Grey, none of these people has seen a single user of the claimed route up until 2016. Mrs Grey refers to two people she has seen using the path between 5 and 8 times and to whom she has given permission to use the claimed route over the period she has lived at Fyning Copse.
- 5.6 Mr and Mrs Grey have questioned the validity of the user evidence forms stating that there is a serious conflict of interest at the heart of the DMMO application, which they state arises from a boundary dispute dating back to 2006. They note that two of the users asked for their evidence to be discounted as they believed the claimed route was a different path in the woods to the north. Mrs and Mrs Grey also question the stated route of 11 witnesses who state they were walking the claimed route as a means of going from Fyning to Rogate Village. In order to do so people would walk through the Fyning Hill Estate woods to the north and west of the claimed route. It is concluded therefore that the witnesses were confused about which path they were giving evidence about.
- 5.7 Mr and Mrs Noble
- 5.8 Mr and Mrs Noble occupy Fyning Twitten which is situated at point B on the application plan and have occupied this property for 5 years. Prior to their occupation they were long standing residents of the village and have lived within ½ mile of the claimed route for over 20 years.
- 5.9 Mr and Mrs Noble do not consider the route to be a public right of way stating that when they purchased the property legal searches confirmed this to be the case. They advise that they have never seen any walkers using the route A to B, that they were never told of it by others and that there is nothing to indicate there was a path there. Mr and Mrs Noble have only ever seen the owner of Fyning Copse use the claimed route A to B. There are large signs all over Fyning Hill Estate declaring it to be

Private Property and for anyone entering to keep on the clearly signed rights of way.

- 5.10 During 2014 when the eastern boundary of the property was cleared no users were visible and in 2015 when 2 garden sheds were relocated bordering the claimed route A to B, the work took several months and during that time no-one was seen using it. The claimed route has been overgrown with bracken which has not been trodden down, a good indicator of use.
- 5.11 One side of the claimed route A to B is bordered by an old boundary fence. When the property was purchased in 2013 the fence was braced against trees on the opposite side of the claimed route by well-aged wooden braces, which effectively blocked the claimed route. Mr and Mrs Noble note that the fence has collapsed into the claimed route at the present time. They have not received any complaints about this.
- 5.12 Mr and Mrs Noble advise that the claimed route identified as point B to C on the application plan is very narrow with insufficient room for cars and pedestrians to pass each other. This part of the claimed route is used by vehicles as a private right of access to properties, meaning the route would be unsafe if it were to be made a public right of way. On a number of occasions they have had cause to block the claimed route B to C for maintenance of overhead branches and tree cutting, and over the last 18 months a building project. On several occasions the claimed route has been completely blocked by large vehicles bringing materials to and from the site and to work on site. There have been no complaints during this time about rights being denied.
- 5.13 Mr and Mrs Noble note that the user evidence forms are not consistent with their descriptions of the track and so have questioned the validity of the user evidence forms. It is surmised that there is confusion over the route being claimed. Many users refer to the track being predominantly grass/turf/sandy which mis-describes the surface. The claimed route A to B is not grass but leaf litter. The claimed route B to C is a hard surface along its full length.
- 5.14 Mr and Mrs Wakeland
- 5.15 Mr and Mrs Wakeland occupy Foresters Cottage which is situated just north of the claimed route, identified as point B and have done so for over 14 years. The claimed route from point B to C is their private access route to the property, which they travel over frequently (approx. 750 times per year in the case of Mr Wakeland and approx. 2000 times per year for Mrs Wakeland). During that time they have never seen any of the users who assert to have used the claimed route.
- 5.16 Mr and Mrs Wakeland state that the claimed route from point B to C was closed for a period from February 2008 to March 2008 for forestry work. Mrs Wakeland also advises that since moving into the property she has maintained the hedges, at least four times a year, at which times access to the claimed route has been blocked. There has never been any

challenge from members of the public. Evidence of the path's closure is provided in section D of the background papers.

- 5.17 Mr and Mrs Wakeland claim that the track from point B to C is very narrow and difficult to pass pedestrians safely. If the claimed route were to become a public right of way there would be an increased safety risk for pedestrians and restrict access to their property.
- 5.18 Mr and Mrs Wakeland also question the validity of the user evidence forms, which were originally canvassed by Rogate Parish Council. The Parish Council sought to make the application for route A-B-C on the application plan but subsequently voted against pursuing the application in November 2016.
- 5.19 Mr Hall
- 5.20 Mr Hall is the Estate Manager of Fyning Hill Estate. Part of the claimed route from point A to B is within the Estate. Mr Hall has acted as agent for the owners of Fyning Hill Estate since August 1991.
- 5.21 Mr Hall advises that there is a "private land" sign erected along the claimed route A to Band states that it is sited near a security access gate and adjoins the claimed path, making it clear that the land is private property. Mr Hall's evidence is provided in section D of the background papers.
- 5.22 Mr Hall refers to new fencing erected opposite the claimed route between A to B approximately 10 to 15 years ago. It is stated that the fencing was erected across the claimed route and was cut by members of the public over a period of 6 to 8 weeks and each time replaced by Fyning Hill Estate. This became such a repeated problem that a gate was installed.
- 5.23 Mr Hall advises that the claimed route has always been very narrow and overgrown with holly and brambles and is obstructed at several points by large trees. Mr Hall claims that the wooden fence forming the boundary with Fyning Twitten has not been maintained by the owners of Fyning Twitten and it has been falling across the path making it virtually impassable. Mr Hall further notes that from time to time the owners have supported this fence with props which has further obstructed the path at head height and lower.
- 5.24 Objections from local residents
- 5.25 The County Council has also received 30 letters and emails from local residents opposing the application.
- 5.26 The majority of objections are from residents or former residents of Fyning Lane or Rogate who know the area well and regularly walk the area. In summary most argue that they never understood the claimed route to be a public right of way as it was not an accessible route and that there are other more attractive, convenient and available routes. One objector (Bev Albery) states that she has only ever seen one person walk

along the claimed route, which was the Estate Manager for Fyning Hill Estate. Another objector (Harriet Heslop) has lived in Rogate for over 30 years and has never been told that there was a public right of way along the northern boundaries of Fyning Copse and Fyning Twitten. The understanding has always been that this was an informal path used, fairly infrequently by local residents. Another objector (D J Leonard) has been walking in the woods for over 30 years and states that the claimed route A to B has been very overgrown and towards the western end barely visible and they cannot remember ever seeing anyone try to use the claimed route.

6. Archive and other evidence

- 6.1 The following historical maps of the area have been examined as part of the research into this claim.
- 6.2 Ordnance Survey Mapping 1st Edition 1875
The claimed route begins from the southern end of Upper Fynings Lane and runs west as a double pecked path through a field where it joins a few different tracks. The claimed route then runs south as a pecked and solid lined track until it adjoins Fyning Lane.
- 6.3 Ordnance Survey Mapping 2nd Edition 1897
The claimed route runs the same path as its earlier edition map; however, it has now been identified as a footpath by the depiction 'FP'.
- 6.4 Ordnance Survey Mapping 3rd Edition 1912
This edition of the map has now identified two property boundaries through which the claimed route runs. The route begins from the southern end of Upper Fynings Lane and is now identified as running through parcel number 295a as a double pecked path. As the route links with the north east corner of parcel number 295 the route runs as a double solid lined track until the north western boundary where it then runs as a double solid lined track south and joins onto Fyning Lane.
- 6.5 Tithe Map dated 1843
The track from A – B specified on the application plan is not shown on the Tithe Map. B – C is shown as an open track that stops at point B on the map. This route could be identified as an access track as opposed to a public way.
- 6.6 Draft and Provisional Definitive Maps
The draft and Provisional Definitive Maps are very similar in how they are set out. They identify the route as beginning from Bridleway 1163 and running north-west as a pecked track which is labelled as "FP" at point B of the route. From point B the route opens up into a double solid lined track where it runs south and joins onto Fyning Lane. The tracks are not coloured.
- 6.7 Analysis of the Archive

The archive evidence taken together is inconclusive as to the existence of a public right of way over the claimed route. While the claimed route B – C can be identified on the Tithe Map, there is no evidence of a public right.

7. Consideration of claim

7.1 In determining the application the Committee has to decide whether the evidence provided by the applicant, together with all other relevant evidence available, shows that on the balance of probabilities 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 The application is supported by 16 user evidence forms which attest to use of the claimed route that spans the period 1939 to 2016. As stated in paragraph 6.7 above, the archive evidence is inconclusive as to a right of way along the claimed route. In the absence of any conclusive documentary evidence it is necessary to consider the user evidence provided by the applicant. In accordance with Section 31 of the Highways Act 1980, the user evidence must show that the public have enjoyed use of the claimed route 'as of right' and without interruption for a full period of 20 years.

7.1 The 20 year period?

7.1.1 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 referred to is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, whether by a notice or otherwise.

7.1.2 As mentioned in paragraph 4.3 above, 4 users make reference to "private" signs and unlocked gates present in January and June of 2016. Mr Hall has also provided evidence that a "private" sign was installed and maintained since 1991. However, the evidence submitted by Mr Hall details that a sign was sited near a security access gate adjoining the claimed route. A photograph has been provided, showing that the sign reads "PRIVATE PROPERTY FYNING HILL ESTATE SECURITY ACCESS GATE ONLY". This has been in place and maintained since 1991 to present. However, it is concluded that this does not represent an act of challenge to use of the claimed route, given that a true reading of the sign, taken with its location adjoining the claimed route suggests that access to Fyning Hill Estate is restricted. The evidence in support states that there were no notices on the claimed route other than the notice erected in 2016 and so the evidence this notice was ambiguous and so would not render use contentious.

7.1.3 Mr and Mrs Grey provide evidence that the claimed route was closed for 31 months between February 1995 and August 1997, whilst they were constructing an extension directly adjacent to the claimed route. This is corroborated by Tony Dowdell (building contractor); Mike Rooke (Design and Build Consultant) and Felix Grey all of whom confirm the claimed route was completely blocked, being dug with 2.9 metre foundations,

leaving a user of the claimed route with no alternative route. It is concluded that the right of the public to use the claimed route was therefore first called into question by the digging of foundations in February 1995. The relevant 20 year period is therefore 1975 to 1995.

7.1.3 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.

7.1.4 During the relevant 20 year period 8 users claim to have used the claimed route, 2 of which, Simon Wright and Roger Eade, claim to have used it continually for the whole 20 year period. One of the 8 users is Jennifer Ramsey who provided clarification of her evidence of use of the claimed route 30 times per year for which she had thought she was referring to the track from Foresters Cottage to Fyning Lane. Jennifer Ramsay says she has walked the claimed route since 1981 but fewer times. The frequency of use is not specified. The volume of use in this period for the other 7 users ranges from 4 times per year to 20-30 times per year.

7.1.5 There is considerable evidence from those in objection to the application that the claimed route has not been used as a public right of way as it has not been an accessible route and because there are other more attractive and convenient routes available. Evidence submitted by Mr and Mrs Grey also refers to various obstructions of the route for building projects from 1991. This evidence is in direct conflict with the evidence of use in support of the claimed route during the relevant period.

7.2 **As of right and without interruption?**

7.2.1 The user evidence must show that the public have enjoyed use over the land 'as of right' and without interruption for the full period of 20 years. Use of the land "as of right" means without force, without secrecy and without permission.

7.2.2 As detailed above in paragraph 7.1.4, evidence submitted in support of the application has shown that the claimed route has been used by 8 users throughout the relevant period. None of the users report to have been challenged whilst using the route or to have been given permission to use the route or report to having seen any signs other than those erected in 2016

7.2.3 All users of the claimed route for the relevant period claim that they have never been told by an owner or occupier that the route was not public and that they have never sought or received permission to use the claimed route. No users report any stiles, gates or obstructions of the claimed route throughout the relevant period.

7.3 **Evidence of no intention to dedicate**

7.3.1 User evidence submitted in support of the application appears to show that the route has been used 'as of right' and without interruption for a

period of 20 years or more. It is therefore necessary to consider whether there is evidence of no intention to dedicate by the landowner.

- 7.3.2 Evidence of a landowner's intention not to dedicate a public right of way must be overt and contemporaneous. The landowner cannot assert after the event that there was no intention to dedicate.
- 7.3.3 Evidence submitted by The Grey family details the temporary closure and blockage of the route on many different occasions throughout the period between 1991 and 2018. This is in direct conflict with the evidence submitted in support of the claimed route, which does not reference any closures or blockages of the route throughout the relevant period.
- 7.3.4 Evidence submitted by Mr Hall details that a sign was sited near a security access gate adjoining the claimed route and maintained since 1991 to present. However, it is considered that this does not represent evidence of no intention to dedicate as it relates to access to Fyning Hill Estate and does not refer to use of the claimed route.
- 7.3.5. It is concluded that there is no incontrovertible evidence which shows a lack of intention to dedicate the claimed route.

7.4 **Conclusion:**

- 7.4.1 Where an applicant for a DMMO produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, but there is a conflict of apparently credible evidence from the owner in relation to one or other issues arising under Section 31 of the 1980 Act; then the allegation that the right of way has been 'reasonably alleged to subsist' is used. That is unless there is documentary evidence produced which must inevitably defeat the claim. Either, for example, by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such character that the use of it by the public could not give rise at common law to any presumption of dedication.
- 7.4.2 The evidence of use asserts use of the claimed route for the relevant period 'as of right' and without interruption. However, there is a direct conflict of evidence from those in objection, which asserts that the claimed route was not an accessible route and was not used by the public. The landowner of part of the route also asserts that for periods from 1991 the claimed route was temporarily blocked for various building projects. In the absence of incontrovertible evidence that the claimed route cannot be reasonably alleged to subsist, on balance, it is concluded that a path can be reasonably alleged to subsist. Therefore, it is recommended that an order to add the path to the Definitive Map should be made on this basis.

7.4.3 Common Law

Dedication at common law is presumed if the way has been used by the public as of right. There is no defined length of time over which the use

must occur and it simply must be long enough to justify an inference that there was an intention by the Landowner to dedicate. A Landowner needs to be legally capable of dedicating the way as public.

For public use of a route to raise an inference of dedication it must be sufficient to carry to the mind of a reasonable landowner the fact that a continuous right of enjoyment is being asserted and ought to be resisted. In this case, the asserted use of the claimed route spans a considerable period of time (1939 to 2016), demonstrating a frequency of use ranging from 3 times a year to weekly. The erection of signs by the Fyning Hill Estate adjacent the claimed route between A and B was not effective to demonstrate a lack of intention to dedicate the claimed route on the part of the landowner. On the basis of all the evidence available, it can reasonably be alleged that the owners of the land over which the claimed route runs dedicated public rights on foot and that the public has accepted that dedication.

8. Resource Implications and Value For Money

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

8.2 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.

8.3 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.

9. Risk Management Implications

9.1 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.

Agenda Item 5
Appendix 1

- 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.

Tony Kershaw
Director of Law and Assurance

Background Papers

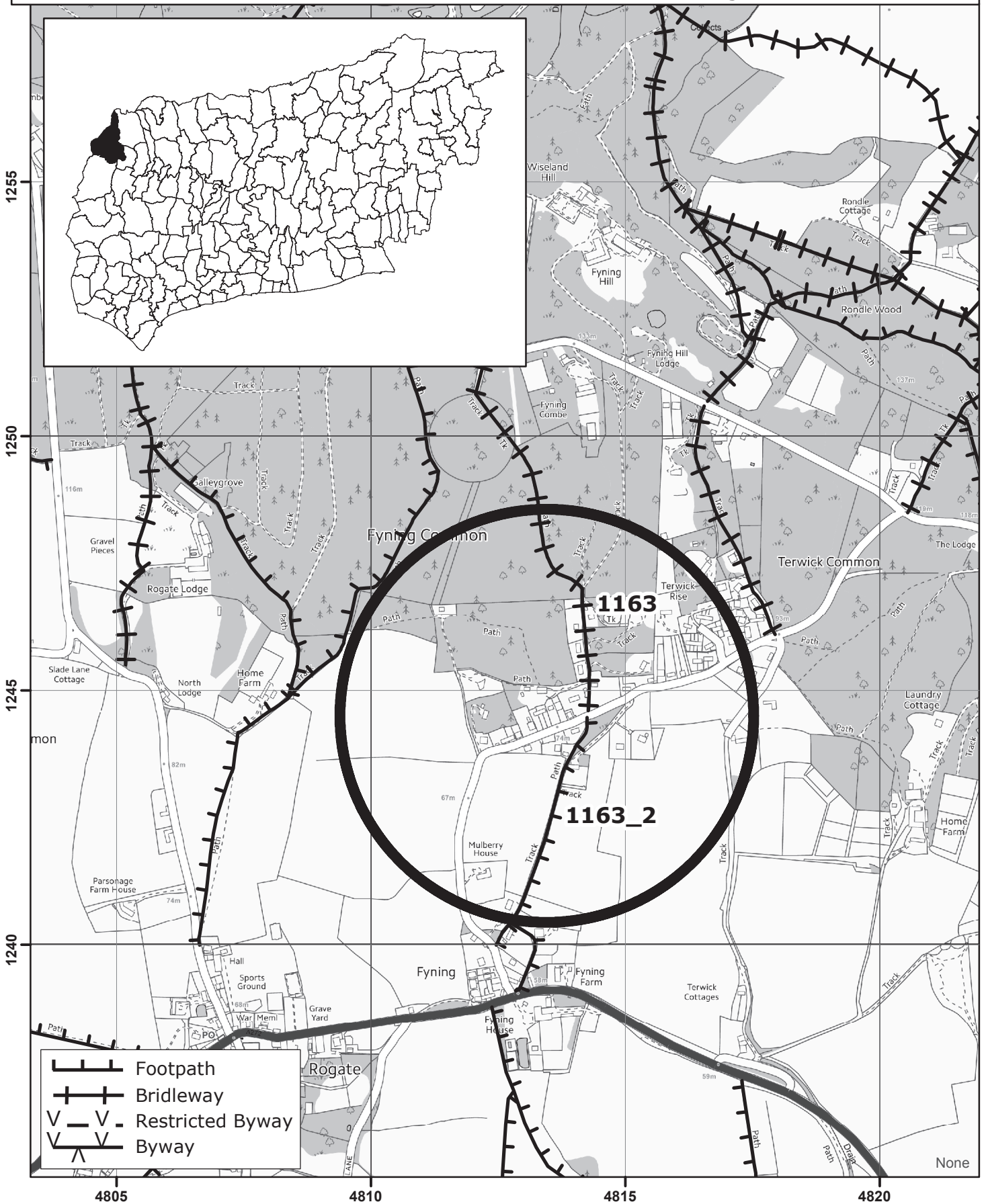
- (a) Application (DMMO 5/16)
- (b) Consultations
- (c) Evidence in support
- (d) Evidence against
- (e) Archive, mapping and photographic evidence

Appendices

- Appendix 1 Location Plan
- Appendix 2 Site Plan

Contact: Georgia Hickland
Ext: 25360

Parish: **Rogate**

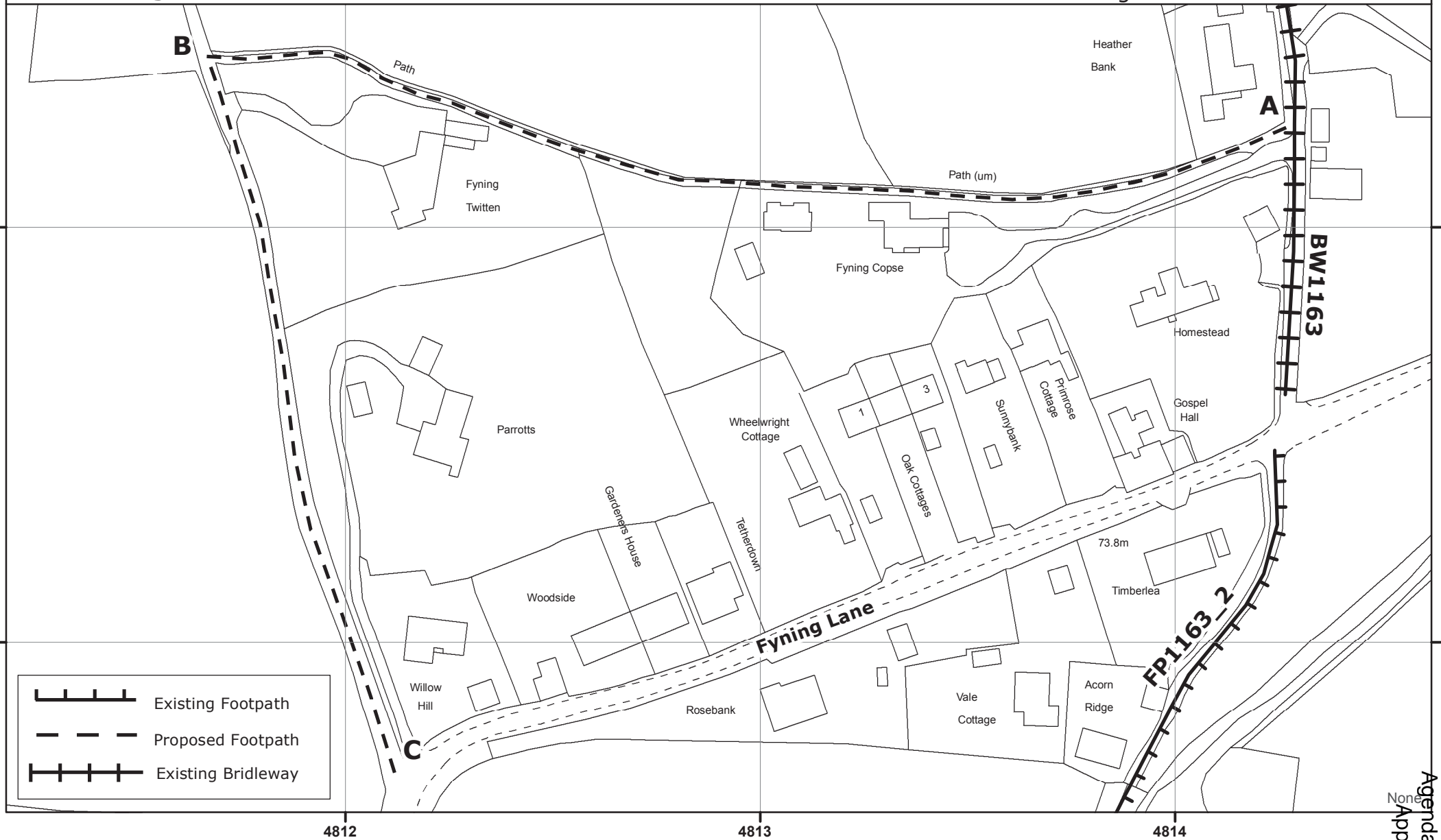


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Rogate: Addition of FP from BW1163 to Fyning Lane - Location Plan

Plan: 01734	1:10,000	OS Sheet: SU 82 SW		Photocopy liable to distortion	Matt Davey Director of Highways and Transport	
Date: 15.05.2018		Grid Ref: 4810 1245				

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	Existing Footpath
	Proposed Footpath
	Existing Bridleway

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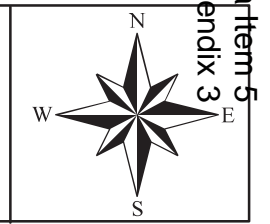
Rogate: Addition of FP from BW1163 to Fyning Lane - Site Plan

Plan: 01735	1:1,250
Date: 15.05.2018	

OS Sheet: SU 82 SW
Grid Ref: 4810 1245

Photocopy liable to distortion

Matt Davey
Director of Highways and Transport



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Appeal Decision

by Alan Beckett BA MSc MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 25 JAN 2019

Appeal Ref: FPS/P3800/14A/3

- This Appeal is made under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of West Sussex County Council (the Council) not to make an Order under section 53 (2) of that Act.
- The application dated 5 December 2016 was refused by the Council on 15 June 2018.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a public footpath from a point on public bridleway 1163 and running in a generally westerly then southerly direction to a point on Fyning Lane (as shown between red lines and points A – B – C on the plan attached to this decision).

Summary of Decision: The Appeal is allowed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the 1981 Act.
2. This appeal has been determined on the basis of the papers submitted.
3. In arriving at my conclusions I have taken account of the evidence submitted by the parties, the relevant part of the Wildlife and Countryside Act 1981 and the findings of the Courts in the *Bagshaw and Norton*¹ and *Emery*² cases.

Main issues

4. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
5. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

Test A - Does a right of way subsist on the balance of probabilities?

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

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402, [1995] JPL 1019

² *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367

6. In relation to Test B, the Court of Appeal recognised in the *Emery* case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*, Roche LJ held that "*...The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.*"
7. Roche LJ also held that "*Where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years, and there is a conflict of apparently credible evidence in relation to one of the other issues which arises under s31, then the allegation that the right of way subsists is reasonable and the Secretary of State should so find, unless there is documentary evidence which must inevitably defeat the claim for example by establishing incontrovertibly that the landowner had no intention to dedicate or that the way was of such a character that use of it could not give rise at common law to any presumption of dedication.*"

Reasons

The path at issue

8. The claimed path commences on public bridleway 1163 opposite a property known as Bennetts House (at point A on the plan appended to this decision) and runs in a generally westerly direction to the north of two properties known as Fyning Copse and Fyning Twitten. Where the claimed path meets the access track to the property known as Foresters (at point B on the appended plan), the claimed path turns to the south and runs over that access track to connect with Fyning Lane (at point C).
9. The evidence adduced by the parties is unclear as to whether the path between points A and B crosses land in the ownership of the Fyning Estate (to the north of A – B) or whether the land crossed by the path is part of Fyning Copse and Fyning Twitten. It is noted that the applicant served notice of the application on the land in addition to serving notice on the owners of the land adjacent to the claimed path. For the purposes of this decision it is not necessary for the owner of the land crossed by the claimed path to be identified.

Documentary evidence

10. In support of the application, extracts from Ordnance Survey ('OS') maps were submitted. The OS maps of 1873, 1897 and 2008 show the existence of a route on a similar alignment to the claimed path, with that route annotated 'F.P.' on the 1897 map and as 'path (um)' on the 2008 map. The OS maps submitted demonstrate the existence through time of a route on the alignment of the claimed path but do not provide evidence of the status of the route.
11. Similarly, the extracts from a number of planning applications made in relation to Fyning Copse provide evidence of the existence of the claimed path but not of its status. The plans which form part of the correspondence around a planning application made in 2002 show the existence of a footpath on the northern boundary of Fyning Copse. The reference to the path in the response

from the Sussex Downs Conservation Board ("*I note from my site visit.....that the site might be visible from the path that runs along the northern boundary of the property...*") demonstrates that in October 2002 a route on the same alignment as the claimed path was visible on the ground.

12. None of this evidence demonstrates that the claimed path is a public right of way but it provides evidence that a feature capable of accommodating pedestrian traffic had been present in the landscape since at least 1873 and remained visible into the early years of the current century.

User evidence

13. In this case, it is common ground that public use of the claimed path was brought into question in February 1995 when excavation works associated with the construction of an extension to Fyning Copse were undertaken. The available evidence suggests that the ground crossed by the claimed path was excavated up to a depth of 2.9 metres and completely blocked to use by members of the public. The excavation works remained until around August 1997 when the extension to the house was completed.
14. The works undertaken in February 1995 on the line of the claimed footpath which prevented access along it can be considered to be the event which brought public use of the path into question. The relevant 20-year period of use is therefore February 1975 to February 1995.
15. Eighteen user evidence forms (UEFs) were submitted in support of the application. However, since the application was submitted to the Council two witnesses have withdrawn their evidence leaving 16 UEFs which collectively claim use of the path at issue between 1939 and 2016.
16. Of the 16 UEFs submitted, three respondents claim use of the path throughout the 20-year period which ended in February 1995 and six others claim use of the path for part of that period ranging from 6 years to 19 years. Of the remaining 7 UEFs, three respondents claimed use of the path for varying periods which ended prior to 1995 whereas use by four respondents did not commence until after 1995. Frequency of claimed use ranged from 3 times per year to weekly. Most users claim to have seen other pedestrians using the claimed path.
17. The majority of respondents claim not to have seen any prohibitory notices along the path during their use, although four respondents note that a 'private' sign has been present since 2016. Twelve users note that in January 2016 gates had been erected at two points along the claimed path; there is no indication that these gates had been locked. None of the respondents have been told by an owner or occupier that the claimed route was not public nor have they sought or been given permission to use the claimed path.

Landowner evidence

18. The owners of Fyning Copse have been resident since 1990 and contest the claimed use of the path by the public. In addition to use of the path being brought into question in 1995 by the excavation works they contend that use of the path would not have been possible on a number of occasions over the 28 years which they had owned the property. It is stated that whilst undertaking building works at the property during 1991 and at subsequent dates, the claimed route has been used to store materials or has been obstructed by

scaffolding. The owners contend that these actions are evidence of a lack of intention to dedicate a public right of way. Furthermore, they say the absence of complaints during the various building works demonstrates that the use of the path is not as extensive as has been claimed.

19. The owners of Fyning Copse provided a number of statements from current and former employees who worked at the property together with statements from others who had day-to-day knowledge of the property. None of the people had observed anyone using the path prior to 2016. The validity of the user evidence forms is questioned as the claimed route does not form part of a route from Fyning to Rogate village as stated in some of the forms; such a journey would require a walk through the Fyning Hill Estate woods to the north and west of the claimed path.
20. The owners of Fyning Twitten have been resident for 5 years although they have lived in Fyning since 1997. Searches conducted as part of their purchase of the property did not suggest the existence of a public right of way and no-one has been observed using the claimed path other than the owners of Fyning Copse. They note that there are large signs on the Fyning Hill Estate which require pedestrians to keep to the clearly signed public rights of way. The fact that the claimed path is overgrown with bracken which has not been trodden down is considered to demonstrate the lack of use of the claimed footpath.
21. The owners of Forester's Cottage (to the north of point B) state that B – C forms part of their private access to the house and that in 14 years they have not seen anyone walking along the claimed route. The owners contend that use of B – C would not have been possible between February and March 2008 due to forestry operations and that maintenance of the hedges adjacent to B – C requires the blocking of the access track; no complaints have been made about the unavailability of the claimed route during such works.
22. The Agent for the Fyning Hill Estate has been in post since 1991 and states that a "*private land*" sign has been present along the claimed route A – B located near the security access gate into the estate. Fencing erected around 15 years ago across the claimed route was repeatedly cut by the public such that the Estate erected a gate in the fence line. The claimed route has always been narrow and overgrown and is obstructed at various points by mature trees. It is contended that the boundary fence of Fyning Twitten has not been maintained and has fallen over the path making it impassable.
23. Thirty letters and emails of objection were received by the Council from local residents who oppose the application. The gist of these objections is that it has not been understood locally that the claimed route is a public right of way as it is not an attractive route and that there are other more attractive, convenient and available routes.

Consideration of the evidence

24. For a claim for a right of way to succeed, the tests set out in section 31 of the Highways Act 1980 (the 1980 Act) have to be satisfied. The evidence has to demonstrate uninterrupted use by the public as of right (that is, without force, secrecy or permission) for at least twenty years prior to the date at which the public's right to do so was brought into question. Whilst not all witnesses are required to be able to demonstrate personal use of the claimed path for the

whole of the twenty-year period, collectively, the evidence should demonstrate use throughout that period.

25. Evidence has been given by 3 individuals as to their use of the claimed route throughout the relevant 20-year period, with evidence from 5 other individuals regarding their use for periods ranging between 6 and 19 years during that period. None of these persons had been challenged or given permission to use the path and there is no evidence that use required the breaking or scaling of fences or was contrary to prohibitive notices. Taken at face value, the evidence would seem to satisfy the tests set out in section 31 of the 1980 Act.
26. In direct conflict with the evidence of claimed use is the evidence provided by the landowners of the path being blocked for periods of time from 1991 onwards and the consequent interruption of any claimed use.
27. Applying the tests at the schedule 14 stage as clarified by the Court in *Bagshaw and Norton* and in *Emery*, I find that there is credible evidence of use by the public of the claimed route and that there is a conflict between that claimed use and the evidence of the landowners of obstruction and interruption of use during the relevant period.
28. 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 had 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. It follows that I conclude that that the application succeeds against Test B as set out in paragraphs 5 to 7 above as it is reasonable for the appellant to allege at this stage the existence of a public right of way over the claimed path.

Conclusion

29. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

30. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act West Sussex County Council is directed to make an order under section 53 (2) and Schedule 15 of the 1981 Act to modify the definitive map and statement to add the public footpath proposed in the application dated 5 December 2016. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Alan Beckett

Inspector

APPENDIX – plan of the claimed footpath

