

Planning and Rights of Way Committee

7 February 2023 – At a meeting of the Planning and Rights of Way Committee held at 10.30 am at County Hall, Chichester, PO19 1RQ.

Present: Cllr Burrett (Chairman)

Cllr Ali, Cllr Duncton, Cllr Gibson, Cllr Joy, Cllr Montyn, Cllr Oakley, Cllr Patel, Cllr Quinn and Cllr Wild

Apologies were received from Cllr Atkins and Cllr McDonald

Part I

25. Declarations of Interest

25.1 No declarations of interest were made.

26. Minutes of the last meeting of the Committee

26.1 In reference to part (a) of the planning permission for Planning Application WSCC/015/22, an update was requested regarding which authority has responsibility for heat dissipation as noted in Minute 23.8 of the minutes of the meeting of the Planning and Rights of Way Committee of 10 January 2023. The Committee was advised that enquiries are being undertaken by Planning Officers and the Committee will be provided with an update as soon as possible.

26.2 Resolved – That the minutes of the Planning and Rights of Way Committee held on 10 January 2023 be approved and that they be signed by the Chairman.

27. Urgent Matters

27.1 There were no urgent matters.

28. Definitive Map Modification Order

DMMO 10/20 – Definitive Map Modification Order application to add a restricted byway to the Definitive Map and Statement for Cuckfield Rural linking Birchgrove Lane and School Lane in the parish of Horsted Keynes

28.1 The Committee considered a report by the Director of Law and Assurance. The report was introduced by Georgia Hickland, Chartered Legal Executive, who outlined the application and the key points.

28.2 Mr Chris Smith, representing the Open Spaces Society, the applicant, spoke in support of the application. Historical evidence is important because common law provides that once a route is a public highway - including public footpaths and bridleways - it remains a highway forever, unless there is a Court or other Order stopping it up or diverting it, and no evidence has been found or provided that this has occurred for

this route. The historical evidence for this route is very strong. Land shown in white on the Inland Revenue Finance Act 1910 map was exempt from tax and was mainly owned by a rating authority. Where a white road joins others, which is the case with this route, it is almost certainly owned by a highway authority with public rights of access because otherwise there would be no reason for a local authority to own it. The 1930s Handover map shows the application route as a highway that was publicly maintainable. This map, which was provided by East Grinstead Rural District Council to the County Council, was used to identify the responsibility for maintained public highways; the application route is shown on the map. It would have been scrupulously checked at the time. No opposing historic evidence has been submitted. It is only necessary, at this stage, to show that someone could reasonably argue that the route is a right of way. *R v Secretary of State for the Environment ex parte Riley* [1989] stated that an Order must be made if a reasonable person, having considered all the relevant evidence, could reasonably allege a right of way subsisted.

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

State of the proposed route

Point raised – The proposed route is through woodland, leading to an old house that was once a school. Part of the route can be accessed, although with difficulty, and it is very muddy. In its current state it is not suitable for a byway. All it does is cut off a corner where two other paths join. It would require a certain amount of work to bring the route back into use.

Response – Concerns regarding the state of the path cannot be taken into account when determining the application. Should the application be approved and the Order confirmed the County Council would then be responsible for restoring the route to a passable condition and thence maintaining it.

Definition of a restricted byway

Points raised – Clarification was sought regarding the definition of a restricted byway and who can use such a route.

Response – A restricted byway is a highway over which the public have a right of way on foot, on horseback or leading a horse, with or without a right to drive animals and in a vehicle other than a mechanically propelled vehicle, thereby giving a right of way for pedal cyclists and drivers of horse drawn vehicles.

Historical evidence

Points raised – All the historical evidence is comprehensive and clear. Of particular note is the Handover map, which is interesting and significant. It was noted that no evidence of use had been submitted.

Response – The application is based on archive evidence only.

28.4 The substantive recommendation was proposed by Cllr Montyn and seconded by Cllr Ali, and voted on by the Committee and approved by a majority.

28.5 Resolved:-

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 restricted byway to the Definitive Map and Statement for Cuckfield Rural between School Lane and Birchgrove Lane be made.

28.6 The Committee recessed at 10.54 am to await the advertised start time of the Agenda Item 5.

28.7 The Committee reconvened at 11.48 am.

29. Definitive Map Modification Order

DMMO 4/20 – Definitive Map Modification Order application to modify the Definitive Map and Statement for Chanctonbury to add a footpath from Coombe Drove, Bramber to Bostal Road, Steyning in the parishes of Bramber and Steyning

29.1 The Committee considered a report by the Director of Law and Assurance. The report was introduced by Naomi Taite, Legal Assistant, who outlined the application and the key points.

29.2 A statement in objection to the application was read out by the Clerk to the Committee on behalf of Mr Thomas and Mrs Christine Harding, owners of Penland Cottage and, since 2008, landowners of approximately 8 yards of the proposed route. The other part of the route is unregistered. Good relations have been maintained with users of the cut-through running alongside the garden of Penland Cottage, but during 2020 the Hardings experienced problems with people lingering on the footpath. On the advice of the Police they erected a Permissive Footpath sign to deter loitering. Users felt that this might be an indication that the path would be closed, which has never been the case. It provides a safe, short route from Coombe Drove to Steyning and is well used by the elderly, young and families with prams. The Hardings would like the route to remain open and wish to work with West Sussex County Council to explore ways to keep the current line of the path either through a dedication or a diversion under the Highways Act 1980. The original line of the route as defined by the DMMO application evidence would not be acceptable under any circumstances because it would run through the garden of Penland Cottage and have a significant impact on the Hardings' security, young family and quality of life.

29.3 Mr Charles Ashby, representing members of the public and users of the proposed route, spoke in support of the application. Members of the Committee were referred to the plan on page 45, Appendix 2a, of the Committee report. The plan was made in 1963 at the time that

Chanctonbury Rural District Council approved the planning application for the Coombe Drove estate. It shows the original path, which was kept for residents' access. The County Council was asked to adopt the route but refused. However, it insisted the route should not be used for vehicular access and a brick barrier had to be erected at the Coombe Drove end, which got knocked over in the 1970s and was rebuilt using public donations. The original route was well used. A large amount of evidence, demonstrating regular, uninterrupted use during the period 1976 to 1996, has been provided including from people of standing within the community. Mr Ashby has used the path for over 47 years. The previous owners of Penland Cottage annexed most of the original route into their garden (which was stated as taking place in 1966), leaving the current narrow route. Bramber Parish Council laid the tarmac as a one-off gesture. Members were referred to page 46, Appendix 2b and it was pointed out that the current path is very narrow, has two blind bends and a high fence. It is very difficult for those with pushchairs or wheelchairs to pass, and many women do not feel safe using it at night, forcing the most vulnerable to use a more dangerous route. The original route was 10ft wide, lit at both ends and available for all to use. The legal tests have been satisfied.

29.4 Legal officers clarified that part of the original route was enclosed in the garden of Penland Cottage in 1996, not 1966 as stated by Mr Ashby.

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

Landowner Deposits

Point raised – A general explanation of Landowner Deposits was requested. It was noted that a 2009 Landowner Deposit was made, but it was not followed up with a Statutory Declaration. Would the earlier Landowner Deposit of 1996, which was extended by a Statutory Declaration, have had an expiry date in 2016?

Response – Section 31(6) of the Highways Act 1980 allows for landowners to deposit a map with the County Council showing the routes that they accept there is a right of way over and/or those that they do not. Whilst in place these Landowner Deposits prevent claims of rights of access, meaning that use cannot be shown to be "as of right". During the time period in question for this DMMO application, a Landowner Deposit lasted for 10 years (these now last for 20 years). If renewed within that period by way of Statutory Declaration, they could then last for a further 10 years. The previous owners' Landowner Deposit means the "use as of right and without interruption" effectively dates back to the 20 years preceding 1996. Landowner Deposits are personal and do not run with the land, meaning the Deposit made by the previous owners of Penland Cottage was not transferrable to Mr and Mrs Harding.

Legal Tests

Points raised – DMMO applications must be made on the legal tests. The evidence of use between 1976 and 1996 is quite clear. The principle of “once a highway always a highway” is met.

Response – None required.

Original route - width

Points raised – Noting that Appendix 2a of the Committee report shows the plan provided at the time that Chanctonbury Rural District Council considered the application for the Coombe Drove estate, how was the definitive line of the proposed route arrived at, and what evidence supports the basis for the route to be 10ft wide?

Response – Many members of the public who provided evidence of use claimed the width of the original route to be 10ft. Some also provided documents and plans including the plan at Appendix 2a, which was the most useful. A document, provided to the County Council by the previous owner at the time of the enclosure of the garden at Penland Cottage, shows the original route. Should the Order be approved a width would need to be specified in the Order and a width of 10ft is supported by the evidence.

Original route – prevention of vehicular access

Points raised – What were the implications of the brick wall in terms of prevention of access and the original route’s status? The existence of the brick wall appears to indicate the original route was for pedestrian use only. Should the application be approved with a route width of 10ft, then some form of obstruction may be required to prevent vehicular access including cyclists.

Response – There was no conclusive evidence as to when the brick barrier was removed but it is speculated that this occurred when the current path was put in place and because it is narrow it was not needed because the width does not support vehicular access. Should the Order be approved the County Council would not now require such a feature and would usually rely on signage.

Original route – line of the route, ownership of the land and practicalities going forward

Points raised – Confirmation was sought that the line of the original route now goes through a garden. If the original route were required to be reopened through the garden of Penland Cottage, would the owners lose part of their garden and what happens to the existing land of the current route?

Response – Part of the original route is now enclosed within the garden of Penland Cottage. The application was made for the line of the current footpath; however, the evidence, including the Section 31(6) Landowner Deposits, only supports the existence of the

original line of the route, not the current line. DMMO applications are a two-stage process. Where the County Council decides that an Order should "be made", objections may be received. Then, as an opposed Order, it must be submitted to the Planning Inspectorate for consideration as to whether it meets the legal tests for confirmation. The current path would remain at least until the Planning Inspectorate were to confirm the Order and only then would the County Council consider the practicalities for reinstating the original line of the route, as per the confirmed Order. If the Order were to be confirmed it would be shown on the Definitive Map as going through a garden. However, the Committee was advised that it cannot take the future of the route into account in determining whether or not the Order subsists, as per the legal tests.

Possible Diversion of the route

Points raised – Would any application for a Diversion by the owners of Penland Cottage need to wait until the Order is confirmed or not by the Planning Inspectorate? If an application were to be made to divert the route, then would any actions to reinstate the original line of the route be put on hold until such time as the Diversion Order is determined?

Response – An application for a Diversion Order under Section 119 of the Highways Act 1980 could only be made once the route is confirmed on the original line. Diversion applications to the County Council are currently closed but due to reopen very shortly. Any application would need to take its turn along with any other Diversion Order applications. It is not likely that there would be any enforcement action taken to open up the original route, particularly where an alternative is available and in use, whilst a Diversion Order application is waiting to be determined, but this would be an operational decision for the Public Rights of Way Team at the County Council.

29.6 The substantive recommendation was proposed by Cllr Oakley and seconded by Cllr Montyn, and voted on by the Committee and approved by a majority.

29.7 Resolved:-

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 to the Definitive Map and Statement for Chanctonbury from Coombe Drove, Bramber to Bostal Road, Steyning be made.

30. Date of Next Meeting

30.1 The next scheduled meeting of the Planning and Rights of Way Committee will be on Tuesday, 28 February 2023 at 10.30 am.

The meeting ended at 12.24 pm

Chairman