

Public Document Pack

Tony Kershaw
Director of Law and Assurance

If calling please ask for:

Tracey Guinea on 033022 28679
Email: tracey.guinea@westsussex.gov.uk

www.westsussex.gov.uk

County Hall
Chichester
West Sussex
PO19 1RQ
Switchboard
Tel no (01243) 777100



1 June 2018

Rights of Way Committee

A meeting of the committee will be held at **2.15 pm** on **Tuesday, 12 June 2018** at **County Hall, Chichester**.

Tony Kershaw
Director of Law and Assurance

Agenda

1. Declarations of Interest

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

2. Minutes of the last meeting of the Committee (Pages 3 - 12)

The Committee is asked to confirm the minutes of the meeting held on 20 February 2018 (cream paper).

3. Urgent Matters

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

4. Previous Decisions Progress Report (Pages 13 - 14)

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

5. Outstanding Applications and Delegated Decisions (Pages 15 - 18)

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

N.B. If members have any queries in connection with items 4. and 5. they are asked to raise them with officers before the meeting.

6. **Public Path Order Proposal** (Pages 19 - 28)

Report by the Director of Highways and Transport.

The Committee is asked to consider a consultation by Adur & Worthing Councils in respect of the following Environment Agency proposal:

Lancing: Proposed Diversion of Part of Public Footpath 2048.

7. **Public Path Order Proposal** (Pages 29 - 52)

Report by the Director of Highways and Transport.

The Committee is asked to consider and determine whether the following Orders should be submitted to the Secretary of State for confirmation:

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

8. **Definitive Map Modification Order** (Pages 53 - 70)

Report by the Director of Law and Assurance.

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

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

9. **Secretary of State Decision** (Pages 71 - 108)

Report by the Director of Law and Assurance.

The Committee is invited to note the Secretary of State's decision on the following:

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

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

10. **Date of Next Meeting**

The next meeting of the Committee will be held at 2.15 p.m. on Tuesday 30 October 2018.

To all members of the Rights of Way Committee

Rights of Way Committee

20 February 2018 – at a meeting of the Committee held at County Hall, Chichester.

Present: Mr Whittington (Chairman), Mr Baldwin, Mr Bradbury, Mrs Duncton, Mrs Purnell and Mrs Russell.

Apologies: Mr Acraman, Dr O’Kelly and Mr Quinn.

19. The Committee resolved to write to Christine Luff, Team Leader, Rights of Way who is shortly due to retire to thank her for over 50 years of service to the County Council and for support to the Committee and its members. It was noted Mrs Luff is unable to attend this meeting due to a recent accident and the Committee wished her well for a speedy recovery.

20. The Committee noted that Mr Acraman is unwell and wished him a speedy recovery.

Declarations of Interest

21. Mr Baldwin declared a personal interest as local member for Horsham East in agenda Item 6(b) - Horsham: Application for a Definitive Map Modification Order (Application No: 4/16) to add to the Definitive Map and Statement a footpath from Coney Croft cul-de-sac to public footpath 1586/2, in Horsham. Mr Baldwin elected not to speak as local member on the application.

Minutes

22. Resolved – that the minutes of the meeting held on 11 July 2017 be approved and signed by the Chairman as a correct record.

23. The committee noted that in reference the minutes of Rights of Way Committee on 14 March 2017 an entry under minute 75, bullet 10 (second to last bullet point), which was recorded as *"one complaint was partially upheld from Selsey"*. This should have been should have been recorded as *'upheld'*.

Previous Rights of Way Decisions

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

Outstanding Applications

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

24. The Committee noted regarding 'Haywards Heath FP 25 CU' that a response is still awaited from Sainsbury's.

Update on Performance

25. The Committee noted a verbal report by Jonathan Perks, Principal Rights of Way Officer, who provided an update on performance during the 2017 calendar year.

- It was reported the County Council's performance as measured by the National Highways and Transport Annual Survey had reduced customer satisfaction scores.
- Volunteers continued to give valuable support to the service, including donating 3,500 hours of time on 56 task days.
- Over 4,000 problems and issues were logged in the last year; the County Council continues to prioritise health and safety issues over, for example, issues of minor maintenance.
- There were no formal customer complaints recorded in 2017 and three compliments were logged.

Arundel: Application for a Definitive Map Modification Order (Application No: 1/16) to add to the Definitive Map and Statement a public footpath from Queen's Street, Arundel to Fitzalan Road, Arundel, alongside the south of Caen Stone Court.

27. The Committee considered a report by the Director of Law and Assurance, concerning an application to add to the Definitive Map and Statement a public footpath from Queen's Street, Arundel to Fitzalan Road, Arundel, alongside the south of Caen Stone Court (copy appended to the signed version of the minutes). Laura Floodgate, Solicitor introduced the report. It is considered that the legal tests for making the Order have been met, but so as to provide additional clarity it is proposed that the recommendation be amended to include the words 'as set out in paragraph 8.1 of this report' at the end of the recommendation which makes clear that on the balance of probabilities a path has been proved to subsist. The Chairman advised the Committee that the route of FP 3066-1 was incorrectly shown on the map provided with the report, and clarified that its route follows the zig-zag line of that footpath.

28. Mr Tom Alder of Lester Aldridge LLP, solicitors for McCarthy and Stone Retirement Lifestyles Limited, spoke in objection to the application. The statutory tests have not been met. McCarthy and Stone acquired the land in 2007 and granted a long lease in 2012. The 2005 DMMO application related to a different route, so it is correct to disregard this evidence. There is no documentary evidence of a path in existence in this period. During the 2007 planning appeal the Inspector expressly rejected a planning condition to provide a public right of way across the development. It is surprising this application has been accepted for a different route which covers the period 1985-2005, which was presumably the period covered by the 2005 application. The claimed route covers exactly the permissive path for residents' access which was built by McCarthy and Stone in 2009. On the basis that only 3 users evidence forms cover the 20-year period it is felt use by the public 'without interruption for a full period of 20 years' has not been sufficiently demonstrated. The likelihood of all

who submitted evidence forms making use of an identical route over what was then open land, and it matching the route of the current permissive path, is minimal. Lester Aldridge has been instructed that if an order is made to press for the Secretary of State to determine the application.

29. Mr Roger Edworthy, resident of Caen Stone Court, spoke in objection to the application. The making of the order will threaten rights to privacy and security. Prior to purchasing a property in Caen Stone Court, McCarthy and Stone staff confirmed a locked gate would be erected on the sale of all apartments because the pathway was for residents and visitors only. Prior to the gate, access was a free-for-all, including unaccompanied children, dog walkers who allowed their dogs to foul, cyclists, scooters and skate boarders. Access caused problems for residents manoeuvring and parking their cars. There is an adequate, safe alternative path 50m away. Caen Stone Court is not a short-cut and there is no compelling reason to walk through it. WSCC statistics show accidents have occurred in Queen Street, High Street, London Road and the A27, but not in Queens Lane. The issues with Queens Lane, caused by cars parking, will not be resolved by opening the route on Caen Stone Court.

30. Mr Gadsby, local resident, spoke in support of the application. Paragraph 6.1.1 (the Tythe Map 1841) of the Committee report states that 'the claimed route is not shown on the map'; this is misleading because the map shows a path between properties 701 and 702 and there could not have been access to 7 properties without it. This shows evidence of a path dating to 1841. Paragraph 6.1.1, states 'no walkways can be identified', but a photograph of Arun cinema shows a raised pavement next to it, which is now the site of Caen Stone Court. This is proof of a right of way from 1938 to 1959. An aerial photograph of Castle Service Station which traded on the site until 1992 shows an access. McCarthy and Stone's original plans did not include provision of any footpath across the site. Arun District Council planning officers' report (AB/187/06, dated 11/01.07) quotes the WSSC Rights of Way Officer 'there is a Public Footpath between Queen Street and Fitzalan Road that must be maintained'. Different plans submitted to the Planning Inspector in 2007 show a right of way added and right of way amended. Paragraph 38 of the Inspector's report stated that the plans 'indicates the possible, illustrative route for a footpath to cross the site'. The Right of Way shown on the plans was delivered as part of the development and is delineated in different colour bricks. Gates were not specified in the original design. It is difficult to see how residents of Caen Stone Court benefit from this private path because of where doors to the building are. McCarthy and Stone were aware of the 2005 DMMO application.

31. Mr Mark Philips, local historian and Chairman of Arundel Town Council Planning and Environment Committee, spoke in support of the application. Public access at the Queen Street side of this shortcut has been a passageway, pavement or wider access for many years. In the 1970s there was free and unhindered access from either end of the Castle Station garage forecourt through to Fitzalan Road. Testimonies submitted with the 2005 application refer to the same route and guidance to disregard them is incorrect because the then entrance to Queen Street was over 30m distant and not narrow as it is now. Maps referred to by Mr Gadsby show unhindered access across the land since at least 1841. Access continued until Caen Stone Court was built and residents

started informing pedestrians that the route was private. Arundel has lost a number of twittens and rights of way to development in the last 30 years. It is the castle, historic buildings, ancient street layouts and rights of way that make the town unique and a major tourist attraction.

32. Mr John Munro, local resident and user of the footpath, spoke in support of the application. Since the gate was erected he misses the ability to use the footpath which provided easy access to the local co-op. Parked cars, the lack of pavement and large vehicles coming along Queens Lane mean walking this route at the age of 89 is difficult. There are many other people who experience problems using Queens Lane including children and mothers with prams. It had been safer to use the path through Caen Stone Court and, although it is understood that McCarthy and Stone changed the line of the path, it was definitely a footpath because it was marked out clearly in red bricks. It is not understood why the gate was installed and he has never seen anyone using it. Many local residents feel strongly that the footpath should be opened.

33. The Committee noted that Mr Gary Markwell, local member for Arundel and Courtwick, has not requested to speak on the application.

34. The Committee sought clarification on the following points:

- Why is the relevant 20-year period of continuous use 1985 to 2005? Officers advised that the relevant 20-year period is determined from the date that the public's use of a path is first brought into question.
- What weight is given to evidence of use of the route during the relevant 20-year period and what, if any, case-law exists on the matter of weighting of such evidence? Officers advised that there is no statutory minimum number of users to show sufficient use to raise a presumption of dedication. The number of users must be sufficient to reasonably demonstrate to a landowner that the route is being used as a public highway. The recommendation has been made on the 'balance of probabilities' that it has been shown a right of way subsists. A lower test does exist, which is that a public right of way has been 'reasonably alleged to subsist'. The standard of proof is whether a reasonable person, considering all the relevant evidence available, could reasonably allege a public right of way to subsist.
- What case law exists around evidence of continuous use of a footpath? Officers advised that so long as there is any 20 year period of uninterrupted use ending in an act which has brought the right of the public into question the requirement of the section is satisfied. Case law has clarified that use must be by a sufficient number of people to show that it was use by the public, a number which may vary from case to case. Use over the twenty year period does not have to be by the same people. For the current application 3 users claim use for the full 20-years, 9 users between 1993 and 2005 and 12 users between 1998 and 2005.
- In reference to paragraph 6.2 of the report, what weight was given to the evidence of the 'gate, wall or sliding door...blocking access to

pedestrians and vehicles', as noted in relation to the 1986 photographic map (ACC 14261). Officers advised that close inspection of the archive evidence was undertaken but it was concluded that taken together the archive evidence was inconclusive. Many were so small they could not be determined clearly.

35. In reaching a decision the Committee made the following points:

- Some members felt that weight of evidence to support the relevant 20-year period of continuous use is very small and, therefore, evidence on the balance of probabilities was ambivalent. Some members noted that user evidence was sufficient to show the 20-year period of continuous use on the basis that a route was reasonably alleged to subsist.
- The lack of documentary evidence was acknowledged.
- Queens Lane is not a very safe alternative route for pedestrians.
- The Chairman acknowledged Mr Alder's comment that McCarthy and Stone would sustain an objection to the application.

36. The amended officer recommendation was proposed by Mrs Duncton and seconded by Mrs Purnell, and was put to the Committee and approved by a majority.

37. 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 from Queen's Street to Fitzalan Road, in Arundel be made as set out in paragraph 8.1.

38. The Committee adjourned at 3.17 p.m. The Committee reconvened at 3.21 p.m.

Horsham: Application for a Definitive Map Modification Order (Application No: 4/16) to add to the Definitive Map and Statement a footpath from Coney Croft cul-de-sac to public footpath 1586/2, in Horsham.

39. The Committee considered a report by the Director of Law and Assurance, concerning an application to add to the Definitive Map and Statement a footpath from Coney Croft cul-de-sac to public footpath 1586/2, in Horsham (copy appended to the signed version of the minutes). Laura Floodgate, Solicitor introduced the report. It is considered that the legal tests for making the Order have been met.

40. Miss Claire Bowden, resident of Coney Croft, spoke in objection to the application. The cut through was never an official footpath or part of the design of the estate. Long standing residents say the gap was created by an act of vandalism approximately 12 years before the fence was erected 2 years ago. The gap has served to attract crime and Miss Bowden still feels the effects of a burglary that took place in January 2016, in which the burglar admitted coming

to the area through the gap; evidence from garage burglaries in the locality was also found. There had also been other offences, but not any since the gap was shut off 2-years ago. Like other physical defences, the fence is a deterrent to crime. The cut through (gap) leads from a driveway through a hedge to the garage area, as such is dangerous because of moving vehicles. Most people spoken to would be happy to have the gap closed and to walk around. Quality of life has improved for residents since the gap was shut-off, including reduced noise, anti-social behaviour, and less risk of damage to property caused by people on bikes.

41. The Chairman drew members' attention to written submissions in support of the application from Mr David Pillbeam, applicant and former resident of Coney Croft, and from Mrs Patricia Dennington, resident of Coney Croft.

42. In response to a point made by Miss Bowden, officers advised that if use is with force it does not satisfy the 'as of right' test. The formation of the gap by an act of vandalism has not previously been raised in the evidence submitted. Evidence against the application referenced a previous fence that was trampled down, however users referred to an unlocked gate. As outlined in paragraph 7.6.2 of the report, when Coney Croft was being developed, correspondence dating from November 1977 between the planning authority, Horsham District Council and the developer's agent stated that a "pedestrian gateway is being provided between the garages". Therefore, it was concluded that a gate was in position between the garages for a number of years; it was not locked and so the claimed use has been without force.

43. The Committee sought clarification on the following points:

- The fact that 'all the user evidence forms had been partially completed by the applicant' as noted in 7.7 of the Committee report was questioned. Officers responded that this has been considered, and the evidence treated with caution but that some evidence forms also contained individually written comments made by each witness.

44. In reaching a decision the Committee made the following points:

- Sympathy was expressed by Committee members for the concerns of residents about crime and anti-social behaviour. The Chairman noted that the legislation is no longer in tune with society as it is now. However, it was acknowledged that the strict legal tests under Section 31 of the Highways Act do not allow for weight to be given to crime and disorder implications, and the requirements of these tests had been met.
- The situation would be of more concern if the footpath was in front of houses.
- It was acknowledged that archive evidence is inconclusive.
- It was noted that the applicant has moved away from Coney Croft.

45. The officer recommendation was proposed by Mr Bradbury and seconded by Mrs Russell, and was put to the Committee and approved by a majority.

46. 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 from Coney Croft to public footpath 1586/2 in Horsham be made.

Slaugham: Application for a Definitive Map Modification Order (Application No: 5/15) to add a public footpath at Slaugham Mill Pond to the Definitive Map and Statement for Cuckfield Rural

47. The Committee considered a report by the Director of Law and Assurance, concerning an application to add a public footpath at Slaugham Mill Pond to the Definitive Map and Statement for Cuckfield Rural (copy appended to the signed version of the minutes). Laura Floodgate, Solicitor introduced the report. It is considered that the legal tests for making the Order have not been met.

48. Mr Chris Hoskins, representative of Mr McArthur, the land owner, spoke in objection to the application. Mr Hoskins acted as the construction engineer for the raising of the top of the embankment and replacement of the controlling overflow arrangements, and as supervising engineer until 2017. Prior to the raising works, access problems were experienced because of narrow parts of the path, issues with the slopes, wave erosion, debris from vegetation and wet and muddy conditions in some areas. The scheme to increase the level and widen the top of the embankment did not directly affect the footpath along the former top, but resulted in new levels. There have been insurance concerns about unrestricted access to deep cold water following incidences of unauthorised swimming. Some users have continued to roam freely and slowed down the rate of vegetation development, resulting in abrasion, litter and dog fouling. Since erection of the boundary fence, wildlife is thriving and vegetation has improved which has reduced erosion and the effects of weather extremes and screens less pleasing features. Litter and damage has reduced, although there has been a recent incident of damage to the fence and interference with the overflow. The fence helps with public safety by limiting access to the water. Recent vegetation along the path has been cut back improving the width.

49. Mr John Welch, local resident, spoke in support of the application. Mr Welch declared that he is Chairman of Slaugham Parish Council, which supports the claim for continued use of the footpath. Mr and Mrs Castell, the applicant confirm they used the claimed footpath on top of the dam since 1993 and no gates, signs or notices restricted access. Mr Welch and other residents use the claimed route regularly. Section 6.1 of the Committee report mentions footpath passing through the reservoir's spillway, which was never the case, and it diverted west for a few metres to join the lower path. The claimed route gave walkers views of wildlife and the ability to enjoy the westerly view of the Mill Pond. Because the footpath was on top of the dam it was dry, whilst the lower path is boggy. Access was restricted during the works on the dam, but the majority of works were completed in a shorter time than noted in the report. Access continued unrestricted until early 2015, when barbed wire was installed.- Views have been lost. The claimed route was regularly used for 30years. Section 4.2.7 of the Guide to the Law for Rights of Way Committee Members

states that physical features and public enjoyment including views should be taken into consideration.

50. The Committee noted that Mr Acraman who is also local member for Worth Forest was unable to attend to speak on the application.

51. In response to the point made by Mr Welch, officers advised that Section 4.2.7 of the Guide to the Law for Rights of Way Committee Members refers to Section 119 of the Highways Act – Diversion of Footpaths, Bridleways or Restricted Byeways. The legal tests for Definitive Map Modification Orders do not include these considerations as these applications are made under Section 53 of the Wildlife and Countryside Act 1981.

52. The Committee sought clarification on the following points:

- The low number of user evidence forms was noted; what would be classed as sufficient evidence. Officers clarified that there is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. In this case the reason for the recommendation was threefold, the evidence of use was fairly light and did not cover the 20-years of continuous use. There was no access possible to the claimed route during the period of works to the dam, and additionally the plans provided with the user evidence forms did not show exactly the same route.

53. In reaching a decision the Committee made the following points:

- Safety should come before the desires for a view; concerns raised by the Environment Agency were highlighted, as noted in section 5.1.3 of the Committee report, 'that dam failure could result in an uncontrolled release of water from the reservoir and could endanger life'. It was noted that matters of safety cannot form the basis for a rejection of the claimed route.
- The works to the dam show that there has been interruption of use.
- Whilst some views will be lost, there are alternative views from other paths around parts of the Mill Pond.
- Sympathy was expressed with both sides in this case.
- The Committee encouraged Mr Hoskins to take back to the landowner concerns raised regarding the barb-wire.

54. The officer recommendation was proposed by Mr Bradbury and seconded by Mrs Duncton, and was put to the Committee and approved unanimously.

55. 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 at Mill Pond in the Parish of Slaugham be not made.

Date of Next Meeting

56 The Committee noted that its next scheduled meeting would be held at 2.15 p.m. on Tuesday 12 June 2018.

The meeting ended at 3.58 p.m.

Chairman

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RIGHTS OF WAY COMMITTEE
12 June 2018

PREVIOUS DECISIONS PROGRESS REPORT

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

* indicates a change in position since the last meeting

Subject	Date Considered by Committee or Date of Delegation	Current Position
1. Haywards Heath FP 25CU	21.2.05	Diversion order and permissive path agreement not undertaken by Mid Sussex District Council. Whilst a safe and useable route is available, the landowner has been contacted regarding resolving the issues.
2. Warnham FPs 1578 and 1577 and upgrade to BW	23.10.12	Diversion orders have been submitted to the Secretary of State for determination.
3. Loxwood: DMMO 1/13 Nepp Lane addition of FP	25.2.14	Order made and objections received. Order submitted to Secretary of State for determination. Public Inquiry to be held 4 th September 2018.
4. Southwater: BW 1642, FPs 1650, 1651 diversion, extinguishment and creation	20.10.15	School security orders made, objections received, Orders submitted to the Secretary of State for determination. Public Inquiry to be held 24 th July 2018.
*5. Fittleworth: Footpath 701 diversion and path creation	Delegated decision 23.2.16	Order confirmed and creation agreed
6. Bramber: DMMO 3/14 addition of BW from RB 2059 to used route of BW 3183	7.6.16	Following an appeal by the applicant, the Secretary of State directed that an order be made. This course will no longer be necessary as the landowner has agreed to dedicate.
7. Upper Beeding: DMMO 3/15 addition of BW Smugglers Lane to A2037	Delegated decision 3.8.16	Order quashed, application to be reconsidered.

Agenda Item 4

8. Graffham and Lodsworth: BW 1004, FP 2881 extinguishment	Delegated decision 26.1.17	Orders made and to be confirmed when applicant completes works
*9. Fittleworth: FPs 702 and 2866 extinguishment	14.3.17	Orders not confirmed by the Secretary of State
*12. Elsted: FPs 871, 872 diversion	Delegated decision 1.12.16	Orders made objections received. To be considered by Rights of Way Committee
13. Slinfold DMMO 1/15 Addition of FP from BW 3569 to FP 1467 on land east of Hayes Lane	Delegated decision 8.2.17	Order made and objections received. To be submitted to the Secretary of State for determination.
*14. Ashurst and Wiston FP 2511 diversion	Delegated decision 10.11.17	Order made and to be confirmed when applicant completes works.
*15. Steyning FP 2732 diversion	Delegated decision 22.12.17	Order made and to be confirmed when applicant completes works.
*16. Lindfield Rural FP 36LR & 13LR diversion	Delegated decision 3.1.18	Order made and confirmed

TONY KERSHAW
Director of Law and Assurance

Contact: Georgia Hickland ext 25360 and Charlotte Nash ext 26934
Previous decisions 16.05.18

Rights of Way Committee 12 June 2018

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

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

1a. Applications for Definitive Map Modification Orders

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

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

Parish	Application No. / Reference	Proposal	Date application received
Midhurst	CA10/02	Removal of part of CL169 Midhurst Common from the CL/TVG Register	25.05.17

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

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

	Parish	Path No	Proposal	Date Received	Date of Decision	Category
1	Ansty & Staplefield	bw 40CR	Diversion	12.7.16		A
2	Ashurst	fp 2502	Diversion	21.01.16		A
3	Barlavington	New footpath	Permissive path proposal	01.05.18		B
4	Billingshurst	fp 1928	Diversion	19.04.16		A
5	Bosham	fp 238	Diversion	25.07.16		A
6	Chidham and Hambrook	fp 227	Diversion	19.12.14		C
7	Cowfold	fp 1773	Diversion	04.05.14		C
8	Cowfold	fp 1740	Diversion	04.11.15		A
9	Cowfold	fp 1742	Diversion	04.11.15		A
10	Eastergate	fp 323	Diversion (Network Rail)	16.02.15		A
11	Fulking	fp 5-1	Diversion	28.06.16		A
12	Haywards Heath	fp 28CU	Mid Sx DC S257 Diversion	17.08.17	31.05.18	G
13	Kirdford	fp 614/1	Diversion	11.07.13		C
14	Lancing	fp 2048	Adur & Worthing S257 diversion consultation			E
15	North Horsham	fp 1586-3	Extinguish-ment (Part)	27.02.18	09.05.18	G

16	Pagham	fp 133	Diversion	01.08.16		A
17	Pulborough	fp 2312	Extinguish- ment (Network Rail)	17.01.13		A
18	Southbourne/ Chidham/ Hambrook	fp 258	Extinguish- ment (Network Rail)	11.11.12		A
19	Southwater	new footpaths	Permissive path proposals	01.04.13		C
20	Southwater	fp 1656	Horsham DC S257 diversion and dedication consultation	30.10.17	16.02.18	G
21	Upper Beeding/ Henfield	new cycle link	Bridleway creation: Small Dole to Downs Link	07.09.14		A
22	Warnham	fp 1581	Diversion	01.06.09		C
23	West Grinstead	fp1825, 1827	Diversions	28.02.11		C
24	West Wittering	bw 20	Diversion	07.06.13		B
25	Worthing	new path	Path creation	12.10.12		C

Matt Davey
Director of Highways and Transport

Tony Kershaw
Director of Law and Assurance

Contacts:

Georgia Hickland ext 25360 and Charlotte Nash ext 26934 - definitive map modification order applications and common land/town or village green applications.

Judith Grimwood ext 26705 - creations and permissive path proposals, diversion and extinguishment applications and District Council consultations.

Outstanding applications 16.05.18

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Rights Of Way Committee

12 June 2018

Town and Country Planning Act 1990 Section 257

Lancing: Proposed Diversion of Part of Public Footpath 2048

Report by Director for Highways and Transport

Executive Summary

The County Council has been consulted by Adur & Worthing Councils (AWC) in respect of an Environment Agency proposal to divert part of Public Footpath 2048 (FP2048) between Old Shoreham Road and a bridge carrying the south coast railway to the south. The proposal is made as part of the Agency's works to implement a flood alleviation scheme for Shoreham, within which it is required to provide compensatory environmental habitat. The Agency has identified this can be created by realigning the river's flood embankment west towards the airport and removing the current defence carrying this length of FP2048. Paragraph 2 of this report refers.

An application has been made to AWC, as the local planning authority, as is customary when path Orders are sought to enable development to take place. In such cases the County Council is consulted as highway authority. Members are requested to refer to paragraph 4.10 of the "Guide to the Law for the Rights of Way Committee".

Officers are satisfied diversion is necessary to enable consented development to take place. It is, however, that officers are concerned that the proposed provision of the new alignment is not to the standard the County Council ordinarily requires to support a diversion. The proposal is to provide generally a 1.5m surfaced footpath on a 2.0m wide bank crest with passing areas of 2.5m surfaced width at various points along the length. This is a popular route with walkers and frequent cyclists, although there is no public right to cycle, and officers are concerned that the path as proposed will not be appropriate for the expected increase in use, which will give rise to incidents of conflict between users. As highway authority, the County Council has an on-going duty 'to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority' (Highways Act 1980 Section 130) and could incur liability from future incidents.

Conclusion

Given this concern, and that the scheme is clearly of significance and with a high profile, the Committee is asked to decide whether the County Council should object or not to the Order.

1. Background

- 1.1 Adur & Worthing Councils (AWC) is to make an Order under the Town and Country Planning Act 1990 Section 257 to divert a length of public footpath 2048 (FP2048) alongside Shoreham Airport, Lancing. An application has been made to it by the Environment Agency in order that the Agency can implement planning permission granted to deliver a flood alleviation scheme for the local area, consented under planning application AWDM/1614/15.
- 1.2 When initially approached by the Agency in 2011, it was suggested an embankment crest up to 4.0m would be created. County Council officers suggested the scheme presented an opportunity to enhance local off-road access demand. Up-grading the route to bridleway status would formalise the path's regular cycle use and provide a convenient route for horse riders to access the beach. The Council's standard minimum width for a bridleway is 3.0m, which is encouraged to be greater if a route is known to be popular and used regularly by different modes.
- 1.3 The Agency advised, in 2015, it would be unable to provide a 4.0m width and bridleway and, due to the legal requirement to provide compensatory habitat for other parts of Shoreham Harbour and the river channel it needed to work in, that the footpath provision would be 1.5m along this length. Officers discussed the proposal with the Agency, which offered to create a series of passing bays to enable walkers to pass each other conveniently. It accepted this would compromise some of the area of habitat mitigation it is required to provide but still leave it satisfying that legal duty.
- 1.3 WSCC has lodged a holding objection to the diversion proposal pending comments from County Councillors.

2. The Proposal (see AWC Plan 1)

- 2.1 It is proposed that a length of approximately 770m of FP2048 is diverted (shown as R – S on the plan) to be replaced with a length of 824m between R – S via points C – Q.
- 2.2 The present route of FP2048 (shown R – S on the plan) is 1.4m to 1.7m in width between sloping concrete slabs set in the embankment. Much of the path surface is of 1.22m-wide concrete slabs, which are uneven due to settlement over time and vegetation growth, with narrow grassed verge to both sides. There are no gates or other furniture limiting users' enjoyment of the route. Presently this length is currently closed to the public to enable the Agency to begin its construction of the new embankment proposed to carry the diverted length of FP2048.
- 2.3 The diversion route is proposed to have a surfaced width of 1.5m with 0.25m grassed verges on both sides, thereby using the full width of the bank crest of 2.0m. There will be a series of passing bays, providing a width of 2.5m, for path users to pass each other more conveniently.

- 2.4 The length to be diverted will be open, without fencing or other barrier, and the land will fall away at 1:2.5 gradients (22 degrees) in both directions. To the east, this will fall to land intended to become new saltmarsh habitat; the slope will be allowed to vegetate naturally. To the west the slope will be top-soiled and seeded, and fall to a drainage ditch adjacent to Cecil Pashley Way, the airport approach road. The Agency advises it is to make a further planning application to remove this ditch and to create a level grassed verge varying between 2m and 4m between the embankment toe and the road. There will be no gates, bollards or other structure along the proposed new route. The Agency proposes to provide signage off Old Shoreham Road and close to the railway bridge to deter cycling on the new route.

3. The Legal Tests for Diversion

- 3.1 The test to be satisfied under the Town and Country Planning Act 1990 Section 257, for both the making and confirmation stages, is that diversion is necessary to enable development to take place. Members are requested to refer to paragraph 4.10.7 of the "Guide to the Law for the Rights of Way Committee". It is for AWC, as the Order Making Authority, to be satisfied that the test is met.
- 3.2 Members will also note paragraph 4.10.8 of the "Guide to the Law for the Rights of Way Committee". Together these two paragraphs make clear that consideration is also to be given to the disadvantage or loss to path users as a result of any diversion compared with any benefits to be gained.
- 3.3 County Council officers consider it will be an advantage to walkers that a consistent and level surface will be provided – the present surface of concrete slabs is uneven. However, officers have concerns for the future enjoyment of the path. These were detailed by the Principal Rights of Way Officer in responding to a planning application consultation in December 2015, which is copied below:

The County Council's standard is for a minimum width of 2.0m where footpath diversions are sought, and a greater width where popular and possibly conflicting use could be reasonably expected. I do not consider that the provision of small verges as proposed make the effective usable proposed width 2.0m given there are immediate and steep drop-offs, which would be hazardous to path users. Use of this route is already significant given the open character of the path in the local landscape and the extensive and enjoyable views along the river, to Lancing College and to the Downs; and with likely development in and around Shoreham, the number of users can only increase. In addition to walkers, who have a legal right of use, it is known that cyclists currently use the footpath for convenience and enjoyment given the lack of alternative local facilities; this use too can only reasonably be expected to increase upon completion of works. I am concerned that the width as proposed, limited between [...] steep slopes, which themselves could be hazardous to unwitting people, will give rise to conflict between users and, unless a 3.0m wide path can be consistently created, or without more regular passing places

provided (i.e. increased number of 'build-outs', say every 100 metres), I must raise objection to the design as submitted.

- 3.4 As highway authority, the County Council has an on-going duty 'to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority' (Highways Act 1980 Section 130). In considering whether the proposal can be supported the County Council needs to consider this in the context of its standards and the expectation of applicants to provide a minimum path width of 2.0m.
- 3.5 The Agency has acknowledged officers' concerns and incorporated seven passing bays along the length, mostly of 8m length and increasing the path width to 2.5m. These bays are generally spaced between 66m and 92m apart excepting one length of 202m. For the latter, a maintenance crossing point will act as a *de facto* passing bay.
- 3.6 For reasons outlined above, the proposal does not meet the County Council's standard. It is reasonable to envisage, should incidents of conflict arise, the County Council will be the organisation expected to devise and implement measures to resolve conflict(s), which could be a considerable liability given the length of the path and the sensitive local environment.

4. Rights of Way Improvement Plan considerations

- 4.1 The proposal has been examined in the context of the Rights of Way Improvement Plan. In creating a new path that is a lesser width than would be expected for convenient use by walkers, and is potentially unsafe due to the hazards of conflict with other path users and sloped to both sides, the proposal is not considered to meet the objectives of the Plan.

5. The Equality Act 2010

- 5.1 In considering this application the County Council's responsibilities under the provisions of the Equality Act 2010 have been taken into account. It is for AWC, as the Order Making Authority, to consider the Act in deciding whether or not to make an Order.

6. Consultations

- 6.1 AWC, as the Order Making Authority, is required to carry out its own consultations in respect of the proposed diversion.
- 6.2 In line with agreed delegated decision procedures Members have been notified of this proposal by way of the Members Information Service in May 2018.

7. Costs

- 7.1 The County Council is not expected to bear any costs associated with the diversion of this path, with works being undertaken by the Environment Agency at its cost.

Matt Davey
Director of Highways and Transport

Background Papers

- (a) Email dated 24 December 2015 from Jon Perks, WSCC Principal Rights of Way Officer, to Gary Peck, Planning Services Manager, Adur & Worthing Councils
- (b) Email dated 16 May 2018 from Jon Perks, WSCC Principal Rights of Way Officer, to Gary Peck, Planning Services Manager, Adur & Worthing Councils

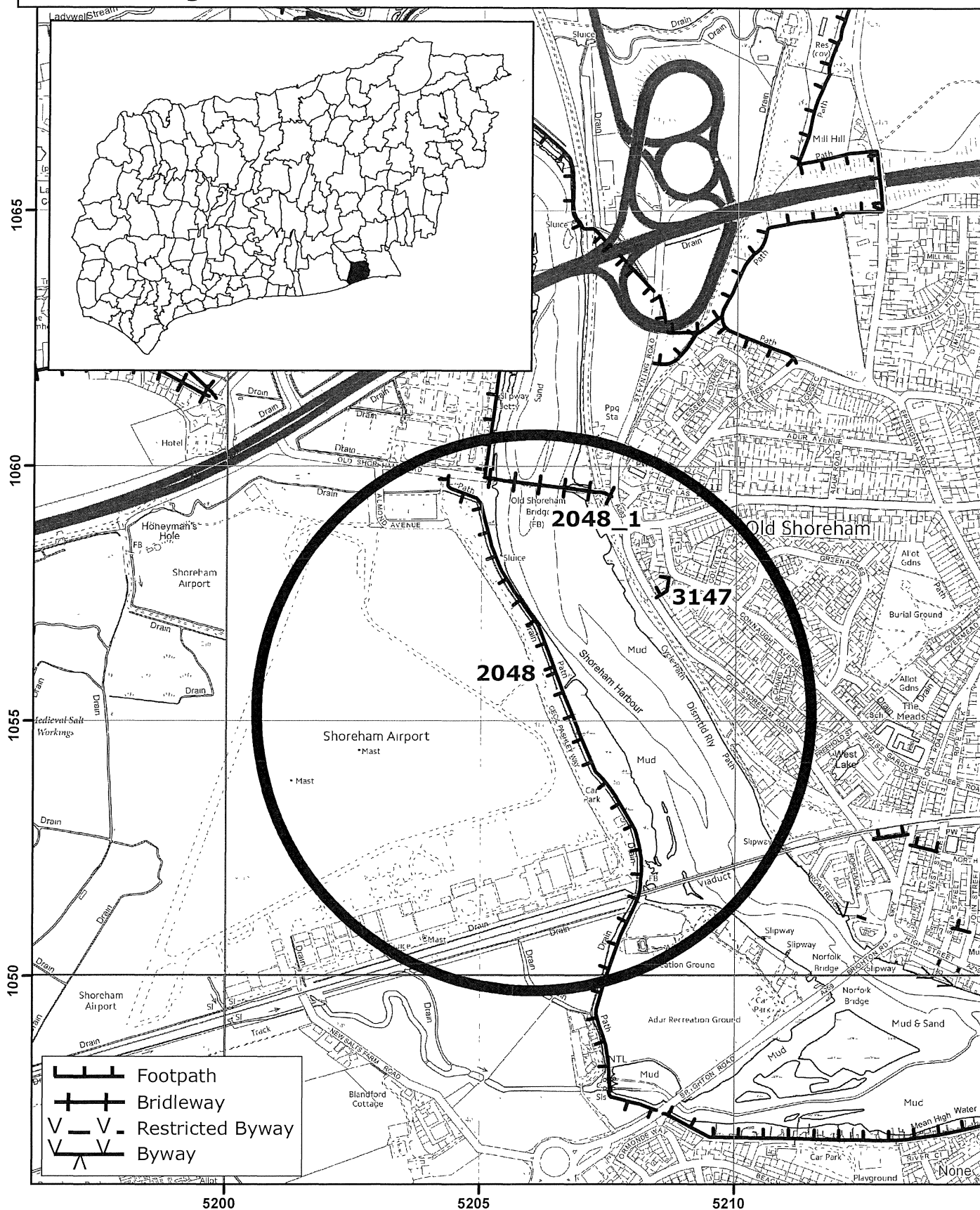
Appendices



Appendix 1 Location Plan
Appendix 2 Proposal Plan

Contact: Jon Perks
Tel: 03302 226 703

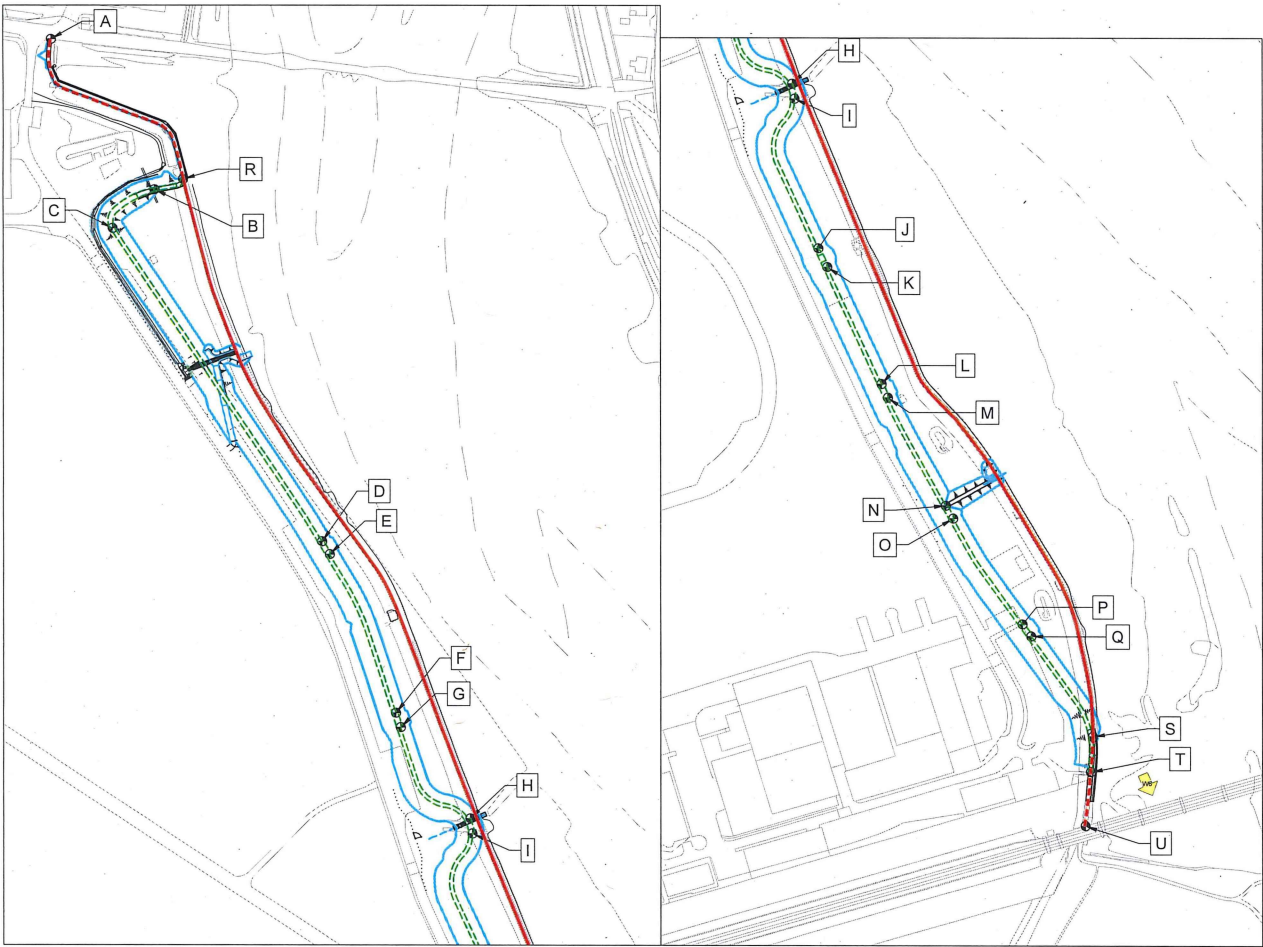
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Parish: **Lancing**



This map is reproduced from Ordnance Survey material with the permission of Ordnance Survey on behalf of the Controller of Her Majesty's Stationery Office (c) Crown copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings. West Sussex County Council, 100023447, 2015		Lancing: Proposed diversion of FP 2048 - Location Plan				
Plan: 01736	1:10,000	OS Sheet: TQ 20 NW		Photocopy liable to distortion	Matt Davey Director of Highways and Transport	
Date: 21.05.2018		Grid Ref: 5205 1050				

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

Key to Symbols

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



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

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

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

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

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 Mott MacDonald Mott MacDonald House <div>T F W</div>	 Environment Agency	Rev	Date	Drawn	Description	Ch'k'd	App'd	Title	Drawn	I A Sussex	IAS
		P01	25.04.18	IAS	Initial Issue	GW	NJC	Shoreham Adur Tidal Walls Map referred to in the Adur District Public Path Diversion Order 2018 for Public Footpath 2048 (Plan 1) - Town & Country Planning Act 1990 Section 257	Checked	P M Starnes	GW
		P02	04.05.18	LB	Final Issue	GW	NJC		Approved	P J Phipps	PJP
									Scale at A3 1:2500		
Drawing Number IMSO000648-MMC-01-W7-DR-C-2760									Security STD	Status S0	Rev P02

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Rights Of Way Committee

12 June 2018

Highways Act 1980 Sections 119 and 25

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

Report by Director for Highways and Transport

Executive Summary

In December 2017 Orders were made to divert three public footpaths, together with the dedication of two additional paths, at Woodhouse Farm near Elsted following an officer delegated decision by the Principal Rights of Way Officer. A copy of the Decision Report is attached for information (Appendix 1).

The Orders attracted two objections and so, in line with the agreed practice when an Order made following officer delegated decision is opposed, the Committee is asked to decide whether the Orders should be submitted for confirmation. This report summarises the points raised by objectors and considers their significance in the context of the legal tests for Public Path Diversion Orders.

Conclusion

Having reviewed the objections with the applicants' agent, the officers' view remains that the legal tests for making and confirmation are met. To enable the Diversion Orders to be progressed they will need to be submitted to the Secretary of State (The Planning Inspectorate) for determination and the Committee's authority to make the submission is now sought.

Recommendation

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

Background

An application, made on behalf of the owner Woodhouse Farm, just north of Elsted and East Harting, to divert three public footpaths at the farm, together with the dedication of two additional paths, was determined under officer delegation in December 2016 as no adverse comments to the proposal had been received at consultation. The decision of the Principal Rights of Way Officer was that Public Path Orders be made. A copy of the Decision Report is attached for information (Appendix 1).

Orders were made and published on 10 March 2017. Two individual objections were received and so, in line with the agreed practice when an Order made following officer delegated decision is opposed, the Committee is asked to decide whether the Orders should be submitted for confirmation. This report summarises the points raised by objectors under five headings and considers their significance in the context of the legal tests for Public Path Diversion Orders.

1 Objection 1 - Distance and Convenience (Objector 2)

- 1.1 The proposed paths are less direct and will take longer to access. For example, fp 872 from F to E is approximately 50% longer and fp 871 from Q to S is 18% longer (fp 873 is 3% longer).
- 1.2 **WSCC Comment** – *The test for confirmation requires that the proposed route of a diversion not be substantially less convenient to the public, and distance /direction are clearly relevant issues (see Decision Report, paras 4.2, 4.4, 4.6). Two of the three diversions are lengthier than the existing routes and, in the case of fp 872, the increase in distance to be walked between F and E is some 300 metres and approximately 50% more than the present path. However, in the context of a rural walk and as it can be reasonably envisaged users will have already come far and/or have some way to travel, this distance is not considered substantially less convenient. Also, in considering users' convenience it is noted there are 4 stiles to be negotiated on the present route of fp 871 and 2 stiles on each of the other two paths; together with the marshy wetland and lengthy stretches across heavy, rather poorly drained arable land, both are known to present some quite difficult walking conditions during much of the year. In contrast, the proposed routes have open access throughout and follow wide permanent grass headlands skirting around the arable and marsh areas, which will offer much easier walking conditions.*
- 1.3 *A further point to consider is that although the diverted routes of individual paths are longer, the overall effect of the proposals is that they make more direct connections between the 3 paths. For example, walkers wishing to go north from Elsted via fp 872 or fp 873 and then travel west towards Nyewood via fp 871, would at present walk away from their direction of travel across the arable field and then turn back, i.e. for fp 872 E-C-B and for fp 873 H-D-*

C-B. The diversions offer direct, easy to walk connection via the proposed headland route of fp 871. Also, the two additional paths offer some more direct connections; for example, between fp 872 and fp 873 via R-S.

- 1.4 *On balance, the overall effect of the proposals, together with the two additional paths, offers new alternative routes for walkers with the option of shorter routes or 'figure eights', and although some directions of travel will be longer than at present others will be more direct with new routes providing easier walking conditions and without the need to negotiate stiles. In the context of their recreational use and in view of the open access, improved conditions and the opportunity of alternative routes, the diversions are not considered to be substantially less convenient to walkers.*

2 Objection 2. Enjoyment, path character and views (Objectors 1 and 2)

- 2.1 The present paths are across open fields with uninterrupted views of the South Downs and surrounding countryside, which is enjoyable; whereas the proposed routes are on muddy field edges, are shady with overhanging trees obstructing the views.

The proposed route H-J-I-E would have an unattractive narrow corridor effect as compared to the existing path.

All landowners would like to move cross field paths to the edges and if this happened the path network would be worse and less varied.

- 2.2 **WSCC Comment** – *Regard must be given to the effect the diversions would have on public enjoyment of the way as a whole as part of the test for confirmation (Decision Report, paras 4.2a, 4.4a, 4.6a). Considering first the objectors' concern about an unattractive corridor effect it should be noted that only the lengths of diversion adjoining the marshland D-H, J-I and M-L, will be on 5 metre wide headland tracks fenced on both sides in order to protect the conservation area. The rest of the proposed routes of fp 871 and fp 872, and the additional route L-X, are open on one side. Views from the existing routes are open and in all directions but over much of their lengths are limited by the wooded field boundary – more distant views to the South Downs are really only available from limited parts of fp 872 north of point C. The most extensive lengths with views to the Downs are the proposed route of fp 872, section M-L, and the northern half of I-L, much of the additional path L-X and through the trees from the railway route R-S. The proposed diversion of fp 871 along P-Q also offers very long distance views over countryside to the north.*
- 2.3 *The character of the proposed routes will be different but will still provide a network of very pleasant farmland walks with some attractive views over the surrounding countryside. There will be more opportunity to choose different routes and the new railway track route will provide an interesting contrast.*

- 2.4 *When considering enjoyment of the paths and the walking conditions they offer it should be noted that substantial lengths of the present paths are subject to ploughing and cropping. Present legislation allows cross-field paths to be ploughed provided they are reinstated to a width of 1 metre within 14 days of ploughing. It is, therefore, inevitable that the quite heavy, poorly draining clay soil will create difficult walking conditions at times. The lengths of all 3 existing paths that cross the wet marshland area are quite difficult to walk – the vegetation consists of dense tussocks of rushes and wetland vegetation with varying amounts of standing water at different times of the year.*
- 2.5 *It should be further noted that the landowner would be entitled to fence each side of the present paths if he wishes.*
- 2.6 *Legislation provides for landowners to apply for individual paths to be diverted and each case is considered on its own merits, so there should be no concern that this diversion might be a precedent for the diversion of other cross field paths.*
- 2.7 *The enjoyment of any route will always be a matter of individual preference, but it is considered that the proposed diversions will not make fp 871, fp 872 or fp 873 less enjoyable to walkers than the present routes.*

3 Objection 3. Wildlife conservation (Objector 2)

- 3.1 The diverted paths, alongside hedges and woodland, conflict with a greater range of wildlife habitats whereas the existing paths, mainly in open grassland, are away from field edges and woodland.

The proposed path link interferes with feeding, breeding and nesting grounds of rare wading birds, such as Snipe and Redshank, that can be found in the flat wetland fields situated immediately north and south of the old railway line. Habitats for rare reptiles and amphibians would also be disturbed.

The existing paths do not create any additional pressure on the local wildlife. The proposed paths interfere with a greater number and range of habitats and various species, such as bats found near hedgerow trees and barn owls hunting near field edges.

- 3.2 **WSCC Comment** – *The objector's view about the possible adverse impact of the path proposals on wildlife is at odds with the expert advice provided to the applicant by Natural England, the Game and Wildlife Conservation Trust and the South Downs National Park Authority. The applicant has forwarded 2 letters dated 12 January 2017 and 27 April 2017 (for clarification Woodhouse Farm is part of Hill Ash Estate) from Dr Andrew Hoodless, head of Wetland Research for the Game and Wildlife Conservancy Trust. He confirms that the marshland area crossed by the existing paths (defined as Grid Refs. SU 817 208 & SU 815 209 in his letter and marked on the*

attached plan) is important habitat for Snipe and Lapwing (ground nesting birds on the UK list of Birds of Conservation Concern) and that the existing paths across their nesting grounds are not helpful. He goes on to advise that "the re-routing of paths to the field edge seems an appropriate measure to minimise disturbance, in particular by dog walkers." He also gives the view that any detriment to other species at the field edge would be outweighed by the benefit to the breeding waders and Snipe.

4 Objection 4. Additional path is not necessary (Objector 2)

4.1 The proposed new additional path link on the old railway is additional to two new further links, which are much shorter between fp 871 and fp 872, and the additional route is thus not necessary.

4.2 **WSCC Comment** – *The new paths will provide some pleasant, easy to follow alternative routes with improved surface conditions and open access free from stiles. The 2 extra paths to be provided as part of the package of proposals, especially the new route on the old railway track with its typical old rail bed surface and some attractive views south to the Downs, will be welcomed additions to the network and will increase the opportunity for local walkers to vary their routes with different options for circular walks within the new network. In response to consultation the two local parish councils confirmed their support for the new route on the old railway as did the South Downs National Park Authority.*

5 Objection 5. Impact on neighbouring land (Objector 2)

5.1 The proposed diversions and new path on the railway will increase the risk of livestock worrying by dogs, especially on the neighbouring grazing land to the north. Contamination of the neighbouring land by dog faeces and Neosporin parasite is a concern. The livelihood of the neighbour to the north of the railway is dependent on the grazing of cattle and sheep and minimum public access is preferred whereas the applicant does not depend on grazing livestock.

The public would have further additional risk of dogs being shot if they are found let loose or not under control and worrying livestock.

5.2 **WSCC Comment** – *The diversions are confined to land owned by the applicant. The proposed new route R to S on the old railway track is a direct and very clearly defined route separated from the land to the north by fencing, although it is noted that the old railway style fencing is in poor condition. For much of its length the new path is on a slight embankment and so the difference in levels adds to the separation. The County Council is committed to improving access for public path users and to provide link paths and increased opportunities for walkers to enjoy the countryside wherever it is possible and appropriate, as is considered to be the case here.*

6 Conclusion

- 6.1 For the reasons detailed above and contained in the Decision Report, the tests for the making and confirmation of these diversions are considered to have been met. It is recommended that the Orders be submitted to the Secretary of State for determination.

7 Resource Implications and Value for Money

- 7.1 It is the County Council's practise to exercise its power to consider applications for diversions from landowners. The applicant for this diversion has undertaken to pay the cost of making and advertising the Order and for works necessary to implement it as referred to in paras 10 and 11 of the Decision Report. The County Council has the power, but not the duty, to submit opposed Public Path Orders to the Secretary of State for confirmation. The applicant will bear the cost of any submission and the matter may be determined by way of written representations. However, should the Secretary of State decide to hold a public inquiry or hearing, the County Council bears this cost.
- 7.2 Cost/resource implications could also arise if the decision of the Committee should be challenged by way of Judicial Review.

8 Risk Management Implications

- 8.1 The decision to make a Public Path Order is one that must be taken on strict legal tests. Officers believe that the tests have been satisfied in this case. If the application has not been determined in accordance with the tests, this could lead to a successful legal challenge by way of Judicial Review.

9 Crime and Disorder Act Implications

- 9.1 This is addressed in the attached Decision Report.

10 Human Rights Act 1998 Implications

- 10.1 This is addressed in the attached Decision Report.

11 Equality Act 2010 – Equality Impact Report

- 11.1 This is addressed in the attached Decision Report.

12 Public Rights of Way Management Plan Considerations

- 12.1 This is addressed in the attached Decision Report.

Matt Davey
Director of Highways and Transport

Background Papers

- a) PUBLIC PATH DIVERSION ORDERS Highways Act 1980 West Sussex County Council (Elsted & Treyford and Harting)Public Paths 871, 872,873 Diversion Orders 2017
- b) Email from Objector 1 dated 13 April 2017 to the Director of Law and Assurance.
- c) Email from Objector 2 dated 20 April 2017 to the Director of Law and Assurance.
- d) Email from applicant's agent dated 9 March 2018 to Director of Law and Assurance.
- e) Letter from Director of Law and Assurance dated 27 April 2018 to objectors 1 and 2.
- f) Letters dated 12 January and 27 April 2017 from Dr Andrew Hoodless, Head of Wetland Research for the Game and Wildlife Conservancy Trust.

Appendices

Appendix 1 – Highways Act 1980 S119 and S118 Elsted and Treyford, and Harting:
Request for Diversion of Part of Footpath (fp) 871, 872 and 873;
Creation of new Footpath on Disused Railway – Decision Report dated
1 December 2017

Appendix 2 – Location Plan

Appendix 3 – Site Plan

Contact: Judith Grimwood
Tel: 03302 226 705

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Highways Act 1980 S119 and S118
Elsted and Treyford, and Harting – Request for Diversion of Part of
Footpath(fp) 871, 872 and 873; Creation of new Footpath on Disused
Railway

Inspecting Officer's Report

1 Location and Background – Location plan 01692

A request has been received from Mr Giles Wheeler-Bennett on behalf of the landowner, Mr Nigel Hanbury, for the diversion of parts of fps 871, 872 and 873 at Woodhouse Farm just north of Elsted and East Harting. The site was inspected by the Rights of Way Officer on 10 February and 13 April 2016.

Access to the farm is from East Harting via a narrow lane with D classification public highway status. The northern end of the lane meets fp 871 at **A** near the entrance to the farmyard. Westwards fp 871 runs through Loaders Copse and then north-west across farmland towards Nyewood. To the east it runs through the farmyard on the main accessway and close to the farmhouse before passing through a game bird rearing area to the east of the buildings. It turns north east over a stile at **B** to cross large open arable field to intersect with fp 872 at **C** in the approximate centre of the field. Further north fp 871 crosses a stile to enter an uncultivated area of marshy grassland before meeting with fp 873 at a further stile at **D** just before crossing the disused railway line which forms the northern boundary of the applicant's land.

Footpath 872 bisects the farm on a north-south line from **E** to **R** forming a crossroads with fp 871 in the centre of the arable field at **C** before crossing the southwest corner of the marshy grassland and entering a tree lined headland known as Summer Row via a stile at **F**. The path runs northwards through trees to meet the disused railway line at **R** before continuing northwards across neighbouring farmland towards Dumpford Lane.

The applicant describes Woodhouse Farm as a mixed arable and livestock holding with conservation being an integral part of its management. The rearing of gamebirds for recreational pursuits is an additional activity on the farm. He further advises that Woodhouse Farm forms part of a conservation Entry Level Stewardship Scheme(ELS) administered by Natural England which promotes the conservation of flora and fauna through the introduction of a restrictive farming regime with annual management payments and grants for improvements. The scheme started in 2012 and runs for 5 years - he intends to enter the Countryside Stewardship Scheme (CSS) as and when his existing Entry Level Scheme (ELS) expires next year.

The applicant has sought advice from Natural England, the Game and Wildlife Conservation Trust and the South Downs National Park Authority as to enhancing the wildlife on the farm, in particular the populations of snipe and lapwing - ground nesting birds on the UK list of Birds of Conservation Concern. As part of the conservation programme for the farm some areas have been sown with wild grass/wildflower mix and wide grass margins have been established around the perimeter of the majority of the arable fields. A new woodland area has been planted and the marshy grassland between the old railway and the boundary line **I-L** which has a high flora and fauna value is managed by grazing to create

different habitats, including wet areas with rushes and tufted vegetation particularly suited to ground nesting birds.

The applicant's original proposal met with some adverse comment at the initial consultation stage owing to concerns about the circuitous nature of the diversion proposed for one of the paths. Following discussion between the case officer and the applicant's agent a less extensive route was agreed and it is this amended route that is now the subject of the report.

2. Reasons for the Request for the Diversions

The applicant's agent reports that, on their present routes, fp 871, 872 and 873 have a considerable impact on the management of the farmland and his conservation aims and on the privacy and security of the farm.

East of point **A** fp 871 passes through the farmyard and where livestock are housed at times, materials and equipment are stored and machinery is in constant use. The buildings, and also the farmhouse are within a few metres of the path. The applicant expresses concern that this has an adverse impact on the security of the farm and on the privacy and security of the nearby farmhouse. He would like to improve security at the property by locking gates etc. but the obligation to allow access through the farmyard via the paths makes it difficult to do this.

A further concern is that at times there is considerable movement of large agricultural vehicles around the farmyard and so the need to ensure the safety of walkers who may enter the working area at any time can hinder efficient farm operations. The applicant believes he would be able to reduce these safety concerns and also improve the privacy and security of the property if public access to the area directly surrounding the house and farmyard were to be removed and the path diverted onto an alternative route further away from the buildings.

Beyond the farmyard fp 871 crosses a paddock which is used for the grazing of sheep and rearing of game birds and the present route of the path can cause disturbance especially when walkers are accompanied by loose dogs. The applicant would like to remove this problem by diverting the path away from this area.

The path northeast of **B** bisects a large arable field on an undefined line forming a cross roads with fp 872 near the centre and so their reinstatement and clearance of growing crops requires the applicant to give a considerable amount of attention at the various stages of cultivation. The applicant would like to place these paths on headland routes where they would not be subject to cultivation.

Further north, where fp 871, 872 and 873 enter an area of wet marshy grassland, the vegetation consists largely of dense tussocks of rushes and wetland vegetation with varying amounts of standing water at different times of the year. The applicant would like to protect and encourage this habitat as it suits snipe, lapwing and other ground nesting birds. These routes are already quite difficult to negotiate due to the ground conditions at most times of the year and this could worsen as the wet marshy grassland develops. Furthermore, loose dogs are an obvious hazard to nesting birds and could undermine the conservation efforts. The applicant would like to remove this problem by diverting the paths onto routes skirting around the marshland area.

3. The Proposals – Plan 01693/1

3.1 The Proposed Diversion of part of fp 871 (to Q-P-X-B-E-I-J-H)

Beginning in the west the proposed route runs north from **Q** to run along the western side of a series of small ponds and then turns east via an existing field access at **P**. Turning south eastwards the route crosses an arable field to **X** on a line to be established as a 3m wide grass surface southern headland adjoining a new fence and hedgeline to be planted as part of the works to install the diversion. At **X** suitable culverts/footbridges will be provided to take the new path over the double ditch feature on the field boundary.

Turning south on the western field headland there is a 3m grass field edge route to **B** where the path turns east on a southern headland route which widens to 6m and follows the adjoining woodland eastwards to meet fp 872 at **E** and then continues east north east to **I**. Continuing north east a small watercourse that crosses the route at **J** will be provided with a small bridge or culvert to serve the new path. At **H** the proposed path meets fp 873 where it will terminate. The diverted route of fp 873 will provide a connection to the present northern end of the length of fp 871 at **D** just to the south of the disused railway.

3.2 The Proposed Diversion of part of fp 872 (to I-L-M-G)

It is proposed that from point **E** walkers using fp 872 will travel east via the new route of fp 871 for approximately 310 m to **I**. From here a new route will run north west on a 3m wide grass surfaced fenced headland route to **L** and then turn north east on a western headland route to **M** where it enters Summer Row and rejoins the length to be retained at **G**. The existing metal gate at **M** will be removed to allow open access for the path.

3.3 The Proposed Diversion of fp 873 (H-D)

Footpath 873 presently crosses 2 stiles to enter and exit the marshland area at **H** and **D**. It is proposed that the new path will run on an almost parallel route following the fenced field edge route just to the south of the existing route. It will serve as a connection for the diverted route of fp 871.

3.4 Additional Paths

In addition to the diversions of fp 871,872 and 873, the landowner has agreed that, once the Orders are ready to be confirmed, he will dedicate a footpath on the old railway between **R** and **S**. The old track bed runs between trees on a slightly raised embankment over much of this length and provides very good walking conditions with some attractive long distance views southwards towards the South Downs and north over Dumpford Park Farm. It offers an interesting contrast as part of a longer distance farmland walk. An additional length of new path to connect fp 871 and 872 between **X** and **L** will provide a useful link in the network and allow the option of figure of eight alternatives for local walkers.

4. The Tests

4.1 Making Test for the Diversion of part of fp 871-A,B,C,D(to Q-P-X-B-E-I-J-H)

i The grounds:

An authority may make an order to divert a public path if it is satisfied that it is expedient that the line of the path or way, or part of it, should be diverted in the interests of the owner, lessee or occupier of land crossed by the way; or in the interests of the public; or both.

The application to divert the footpath is made in the interests of the landowner. The reason given is that on its present route the path has an adverse impact on the security of the property and the privacy of the farmhouse, the effective management of the farm both in terms of agricultural efficiency and the furtherance of the landowner's conservation aims. A diversion of the path onto a route avoiding the main farmyard area and removing the length which bisects arable land will enable privacy, security and agricultural efficiency to be improved. The diversion will also allow the conservation value of the marshland to be developed with less likelihood of disturbance.

ii The point of termination and convenience:

The authority must also be satisfied that the diversion order does not alter any point of termination of the path, other than to another point on the same path, or another highway connected with it, and which is substantially as convenient to the public.

The western point of termination of the path will not be changed but its eastern end will be foreshortened to **H** where it meets fp 873. The diverted route of fp 873 provides a connection to the western termination of the existing route of fp 871 at **D** and is considered substantially as convenient to users as the path to be stopped up.

Conclusion on the Making Test

The applicant has demonstrated that it would be in his interests for the path to be diverted as proposed and the altered point of termination of the northern end of the path will not be substantially less convenient to the public. Therefore the part of the test concerning the grounds for the diversion is satisfactorily met.

4.2 The Confirmation Test for the Diversion of part of fp 871

Is the proposed route substantially less convenient to the public?

The present path to be diverted is some 1320 metres (m) in length and the proposed path is approximately 1380m, plus a further 194m via the diverted route of fp 873, which is a slight overall increase in distance. However, there are 4 stiles to be negotiated on the present route together with the marshy wetland and a lengthy stretch of path across an area of heavy, rather poorly drained arable land - both known to present some quite difficult walking conditions during much of the year. In contrast the proposed route has open access throughout its length and follows wide permanent grass headlands skirting around the arable and marsh areas which will offer much easier walking conditions. The effect of the proposals as a whole offers new alternative routes for walkers wishing to travel between points **A** and **D** - although a little more lengthy than the present route of fp 871 these routes provide easier walking conditions without the need to negotiate stiles.

In the context of a recreational walk and in view of the open access, improved conditions and the opportunity of alternative routes the diversion is not considered to be substantially less convenient to users.

Is it expedient having regard to:-

- a) the effect on public enjoyment of the way as a whole?*
- b) the effect on other land served by the existing way?*
- c) the effect on land over which the way is created?*

- a)** The present path takes walkers through the busiest and most intensively used part of the farm. There are some attractive views from the existing path over the surrounding farmland and towards the Downs and these will still be available from the proposed path, together with some new views over a series of small ponds that will be available from the new length **Q** to **P**. Many walkers will find the improved walking conditions easier to negotiate than the present paths which may increase their enjoyment of the path as a whole.
- b)** It is not anticipated that other land will be directly affected by the diversion.
- c)** It is understood that the applicant owns all the land over which the path is proposed to run.

Conclusion on the Confirmation Test

The proposed route is lengthier than the present path but any inconvenience caused by increased distance is offset by the improved walking conditions and accessibility of the proposed route. In conjunction with the other diversions proposed the diverted route offers the walkers new alternative routes within the local network. Views from the proposed path are much the same as those presently available.

It is concluded that users' enjoyment of the path as a whole is not diminished by this diversion and the legal test for confirmation as set out in Section 119 of the Highways Act 1980 has been satisfactorily met.

4.3 The Making Test for the Diversion of part of fp 872- E,C,F,G (to I-L-M-G)

i The grounds:

An authority may make an order to divert a public path if it is satisfied that it is expedient that the line of the path or way, or part of it, should be diverted in the interests of the owner, lessee or occupier of land crossed by the way; or in the interests of the public; or both.

The application to divert fp 872 is made in the interests of the landowner. The reason given is that on its present route the path has an adverse impact on the effective management of the farm both in terms of agricultural efficiency and the furtherance of the landowner's conservation aims. A diversion of the path onto a route not bisecting arable land will enable agricultural efficiency to be improved. The diversion will also allow the conservation value of the marshland to be developed with less likelihood of disturbance.

ii The point of termination and convenience:

The authority must also be satisfied that the diversion order does not alter any point of termination of the path, other than to another point on the same path, or another highway connected with it, and which is substantially as convenient to the public.

The points of termination of the path would not be changed and in this respect the proposed route is considered substantially as convenient to path users.

Conclusion on the Making Test

The applicant has demonstrated that it would be in his interests for the path to be diverted as proposed. In terms of the point of termination and convenience of the diversion the proposed path is considered to be as convenient to the public.

Therefore the part of the tests concerning the making of the diversion Order is satisfactorily met.

4.4 The Confirmation Test for the Diversion of part of fp 872

Is the proposed route substantially less convenient to the public?

The present path to be diverted is some 595 metres (m) in length and the proposed path is approximately 613m, plus a further 310m via the diverted route of fp 871 which, overall, is a considerable increase in distance. However, there are 2 stiles to be negotiated on the present route together with the marshy wetland and a lengthy stretch of path across an area of heavy, rather poorly drained arable land, both known to present some quite difficult walking conditions during much of the year. In contrast the proposed route has open access throughout its length and follows permanent grass headlands skirting around the arable and marsh areas which will offer much easier walking conditions. The effect of the proposals as a whole offers new alternative routes for walkers wishing to travel between points **E** and **G** - although more lengthy than the present route of fp 872 these routes provide easier walking conditions without the need to negotiate stiles.

In the context of a recreational walk and in view of the open access, improved conditions and the opportunity of alternative routes the diversion is not considered to be substantially less convenient to users.

Is it expedient having regard to:-

- a)** *the effect on public enjoyment of the way as a whole?*
- b)** *the effect on other land served by the existing way?*
- c)** *the effect on land over which the way is created?*

- a)** The present path bisects arable land and crosses wet marshland. There are some attractive views from the existing path over the surrounding farmland and towards the Downs and these will still be available from the proposed path. Many walkers will find the improved walking conditions easier to negotiate than the present paths which may increase their enjoyment of the path as a whole.
- b)** It is not anticipated that other land will be directly affected by the diversion.
- c)** It is understood that the applicant owns all the land over which the path is proposed to run.

Conclusion on the Confirmation Test

The proposed route is lengthier than the present path but any inconvenience caused by increased distance is offset by the improved walking conditions and accessibility of the proposed route. In conjunction with the other diversions proposed the diverted route offers the walkers new alternative routes within the local network. Views from the proposed path are much the same as those presently available.

It is concluded that users' enjoyment of the path as a whole is not diminished by this diversion and the legal test for confirmation as set out in Section 119 of the Highways Act 1980 has been satisfactorily met.

4.5 The Making Test for the Diversion of part of fp 873- H to D

i The grounds:

An authority may make an order to divert a public path if it is satisfied that it is expedient that the line of the path or way, or part of it, should be diverted in the interests of the owner, lessee or occupier of land crossed by the way; or in the interests of the public; or both.

The application to divert fp 873 is made in the interests of the landowner. The reason given is that on its present route the path has an adverse impact on the landowner's conservation aims. A diversion of the path onto the nearby field edge will allow the conservation value of the marshland to be developed with less likelihood of disturbance.

ii The point of termination and convenience:

The authority must also be satisfied that the diversion order does not alter any point of termination of the path, other than to another point on the same path, or another highway connected with it, and which is substantially as convenient to the public.

The points of termination of the path will not be changed. The diverted path will avoid 2 existing stiles.

Conclusion on the Making Test

The applicant has demonstrated that it would be in his interests for the path to be diverted as proposed. In terms of the point of termination and convenience of the diversion the proposed path is considered to be as convenient to the public. Therefore the part of the tests concerning the making of the diversion Order is satisfactorily met.

4.6 The Confirmation Test for the Diversion of part of fp 873

Is the proposed route substantially less convenient to the public?

The present path to be diverted is only slightly longer than the proposed path. There are 2 stiles to be negotiated on the present route together with the marshy wetland which presents quite difficult walking conditions during much of the year. In contrast the proposed route has open access throughout its length and follows a permanent 3m wide grass headland skirting around the field edge and offers much easier walking conditions.

The diversion is not considered to be substantially less convenient to users.

Is it expedient having regard to:-

- a) the effect on public enjoyment of the way as a whole?*
- b) the effect on other land served by the existing way?*
- c) the effect on land over which the way is created?*

- a)** The present path crosses wet marshland. There are some attractive views from the existing path over the surrounding farmland and towards the Downs and these will still be available from the proposed path. Many walkers will find the improved walking conditions easier to negotiate than the present paths which may increase their enjoyment of the path as a whole.
- b)** It is not anticipated that other land will be directly affected by the diversion.
- c)** It is understood that the applicant owns all the land over which the path is proposed to run.

Conclusion on the Confirmation Test

The proposed route offers a very obvious and convenient alternative to the present path. It avoids 2 stiles and will not reduce users' enjoyment of the path as a whole. It is concluded that the legal test for confirmation as set out in Section 119 of the Highways Act 1980 has been satisfactorily met.

5. Consultations

On 7 July 2016 letters of consultation in respect of the applicant's original proposal were sent to the relevant user groups and other interested parties, including the Members Information Sheet, with the request that any comments be submitted by 18 August 2016. The responses received were accepting of the proposals in general and the additional path links were welcomed. However a concern about part of the diversion of fp 871 was raised by the following consultees: Harting and Elsted/Treyford Parish Councils, Chichester District Ward member Mr A Shaxson, South Downs National Parks Authority (SDNPA), South Downs Society, the Ramblers and a local walker. They were consistent in their acceptance of the reasons for the length **A** to **B** of fp 871 to be diverted away from the yard and rearing pens but considered the diversion route proposed, which was routed further north along the edge of a new plantation under the earlier proposal, to be unnecessarily lengthy and circuitous.

Following discussion between the case officer and the applicant's agent a less extensive route via a proposed new southern headland **P** to **X** was agreed and on 21 September 2016 the consultees who expressed concerns were asked to comment on the amended route. Replies were received from all except the SDNPA and were all either in support of the amended proposal or registered no objection.

6. Rights of Way Improvement Plan Considerations

The proposal has been examined in the context of the Rights of Way Improvement Plan and is considered to be in accordance with relevant provisions of the Plan. One of the key aims of providing additional link paths where possible is met by the provision of the path on the old railway **R** to **S**.

7. The Equality Act 2010

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 the County Council to have due regard in all decision making processes to the need to:

Eliminate discrimination, harassment, victimisation or other prohibited conduct;

Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and

Foster good relations between those who share a relevant characteristic and those that do not share it.

The relevant protected characteristics are age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

In considering this application the County Council's responsibilities under the provisions of the Equality Act 2010 have been taken into account.

8. Crime and Disorder Act 1998 Implications

The Sussex Police Crime Prevention Design Advisor supports the proposal.

9. Human Rights Act 1998 Implications

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.

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.

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.

The County Council should be aware of Article 6, the focus of which 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.

10. Works to be undertaken by the applicant:

1. A width of 3 metres for the new paths to be provided, except for the length **M** to **G** which is restricted to 2m by existing trees.

2. The existing metal gate at **M** will be removed to allow open access for the path.
3. An opening to be formed in the boundary at **X** to accommodate walkers - minimum width 1.2m - or application to be made for installation of a gate to an approved standard. Culvert/footbridge to an approved standard to be installed.
4. A new fence/hedge to be provided **P** to **X** and the surfaced seeded and rolled to create a 3 m wide headland route.
5. A culvert or footbridge to an approved standard to be installed at **J**.
6. The length **B** to **E** is rutted and subject to waterlogging. Improvement works are required to provide a generally level surface suitable for convenient use by walkers, in keeping with its farmland location and commensurate with local/seasonal conditions. The confirmation of the diversion order will be conditional on this standard of path being provided. The applicant has been asked to consider what works - which may include drainage and surface materials as determined by his own investigations - he may need to undertake to achieve this. The specification for these works is to be approved by the Rights of Way officer.
7. Waymarking will be adjusted and new waymarkers installed by the County Council as necessary- the cost of the work to be charged to the applicant.
8. Fallen trees to be cleared from the route **R-S**.

11. Costs

As regards the costs associated with the diversion/extinguishment order process, the usual administrative fees plus advertising charges will be borne by the applicant together with the cost of adjusting the waymarking and other works.

12. Overall Conclusion on the Proposals

This is a reasonable proposal that will allow the landowner to improve the security of the property and the privacy of the farmhouse, the effective management of the farm both in terms of agricultural efficiency and the furtherance of the conservation aims allowing the marshland to be developed with less likelihood of disturbance. The new paths will provide some pleasant, easy to follow alternative routes with improved surface conditions and open access free from stiles. The 2 extra paths to be provided as part of the package of proposals, especially the new route on the old railway track, will be welcomed additions to the network and will increase the opportunity for local walkers to vary their routes with different options for circular walks within the new network.

It is considered that the legal tests for diversion of fps 871,872 and 873 can be met.

Judith Grimwood
Public Rights of Way Officer

10 November 2016

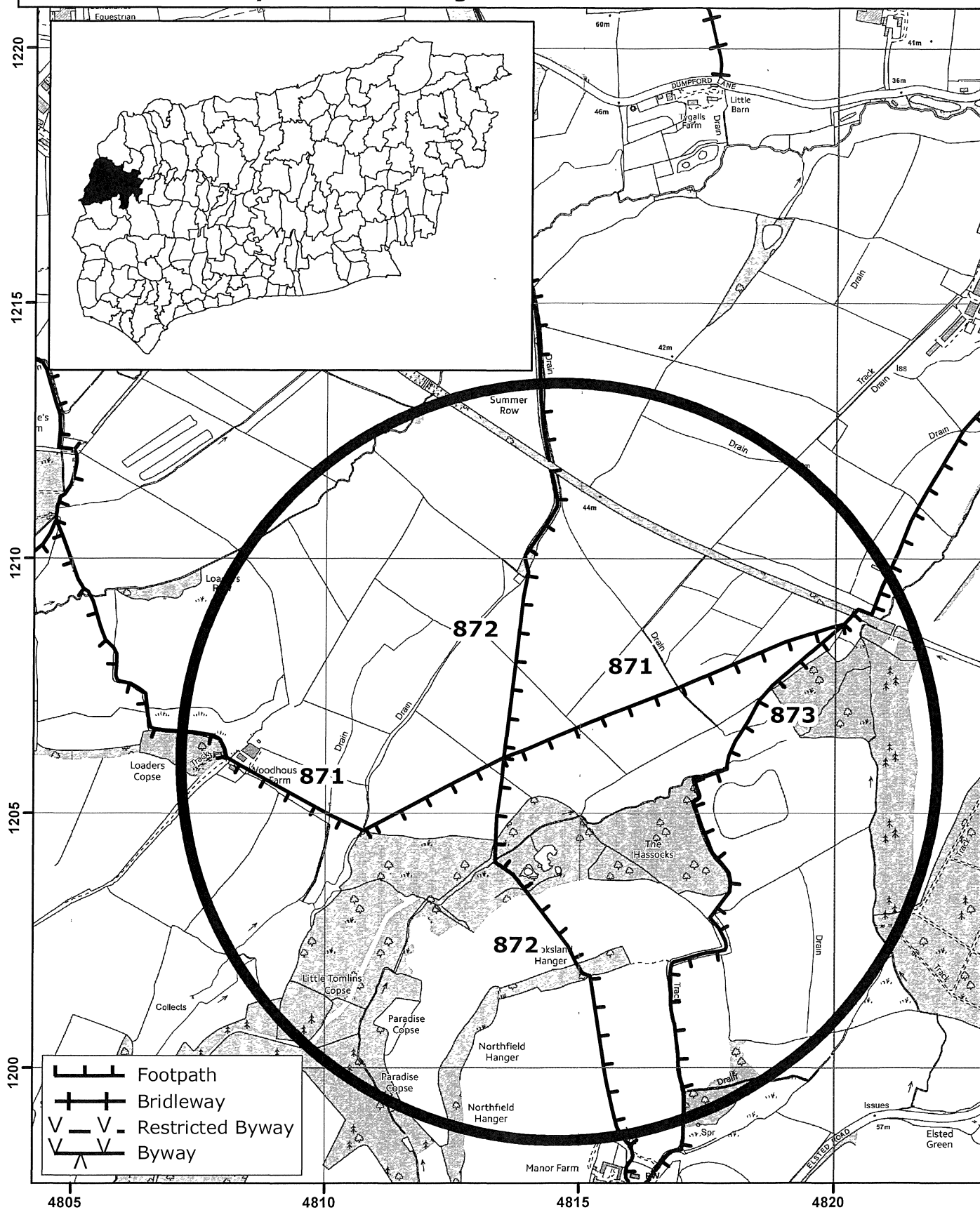
DECISION of PRINCIPAL RIGHTS of WAY OFFICER:

It is proposed that Orders be made under Section 119 of the Highways Act 1980 for the diversion of parts of footpaths 871, 872 and 873 as shown on attached plan 01693/1. Upon confirmation the County Council

will enter into an agreement with the landowner to dedicate new footpaths from points X to L and R to S.

PROPOSAL APPROVED.....Jon Perks ...01.12.2016.....date

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Parish: **Elsted & Treyford and Harting**

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West Sussex County Council, 100023447, 2016

Elsted & Treyford and Harting: Proposed Diversion of part of Footpaths 871, 872 and 873; Creation of new Footpath on disused Railway - Location Plan

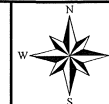
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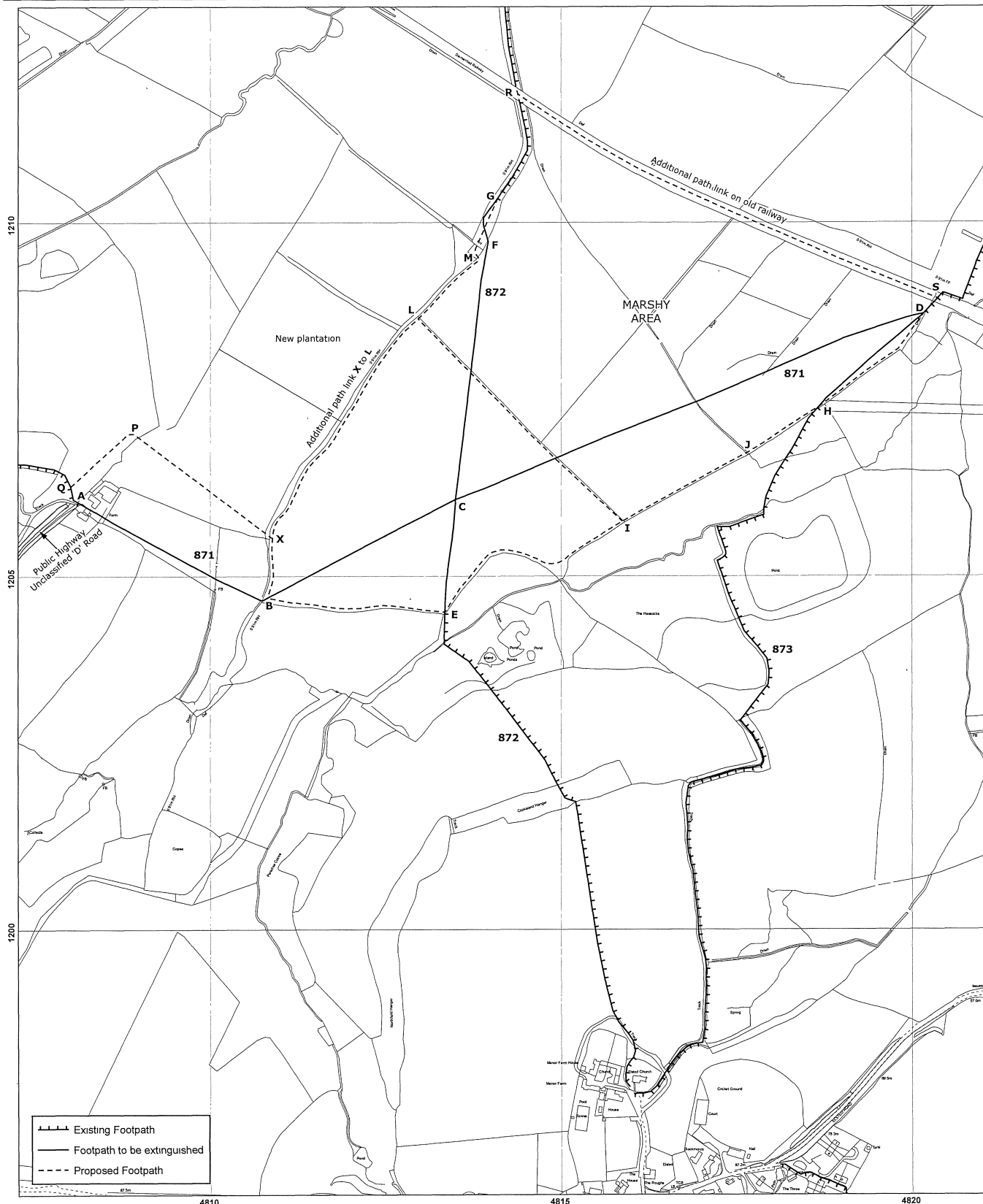
OS Sheet: SU 82 SW

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Lucy Monie
Interim Director of
Highways and
Transport



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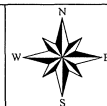
Elsted & Treyford and Harting: Proposed Diversion of part of Footpaths 871, 872 and 873; Creation of new Footpath on disused Railway - Site Plan

Plan: 01693/1 | 1:2,500 at A1

OS Sheet: SU 82 SW

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Matt Davey
Director of
Highways and
Transport



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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.

- 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

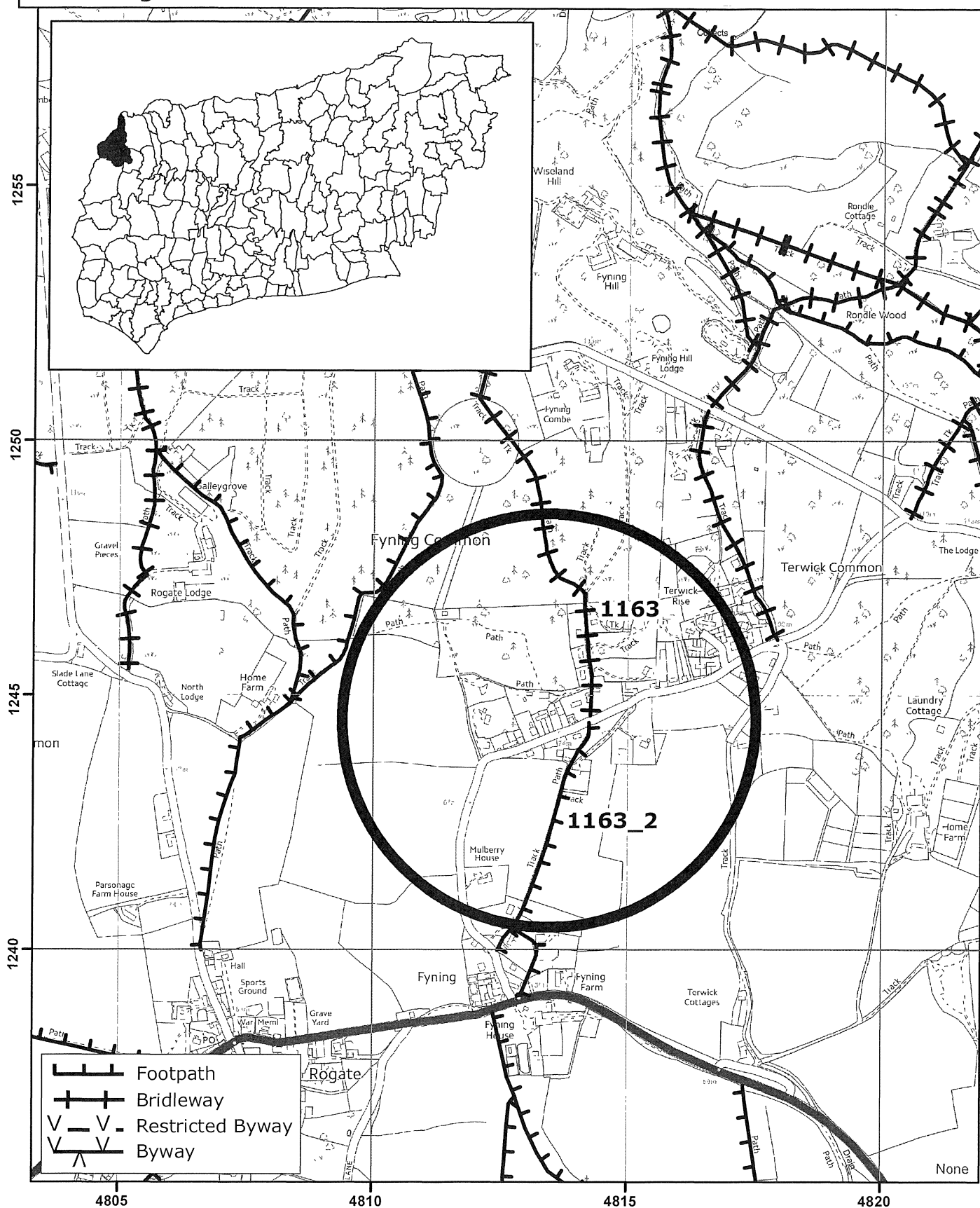
- (a) Application (DMMO 5/16)
- (b) Consultations
- (c) Evidence in support
- (d) Evidence against
- (e) Archive, mapping and photographic evidence



Appendices

Appendix 1 Location Plan
Appendix 2 Site Plan

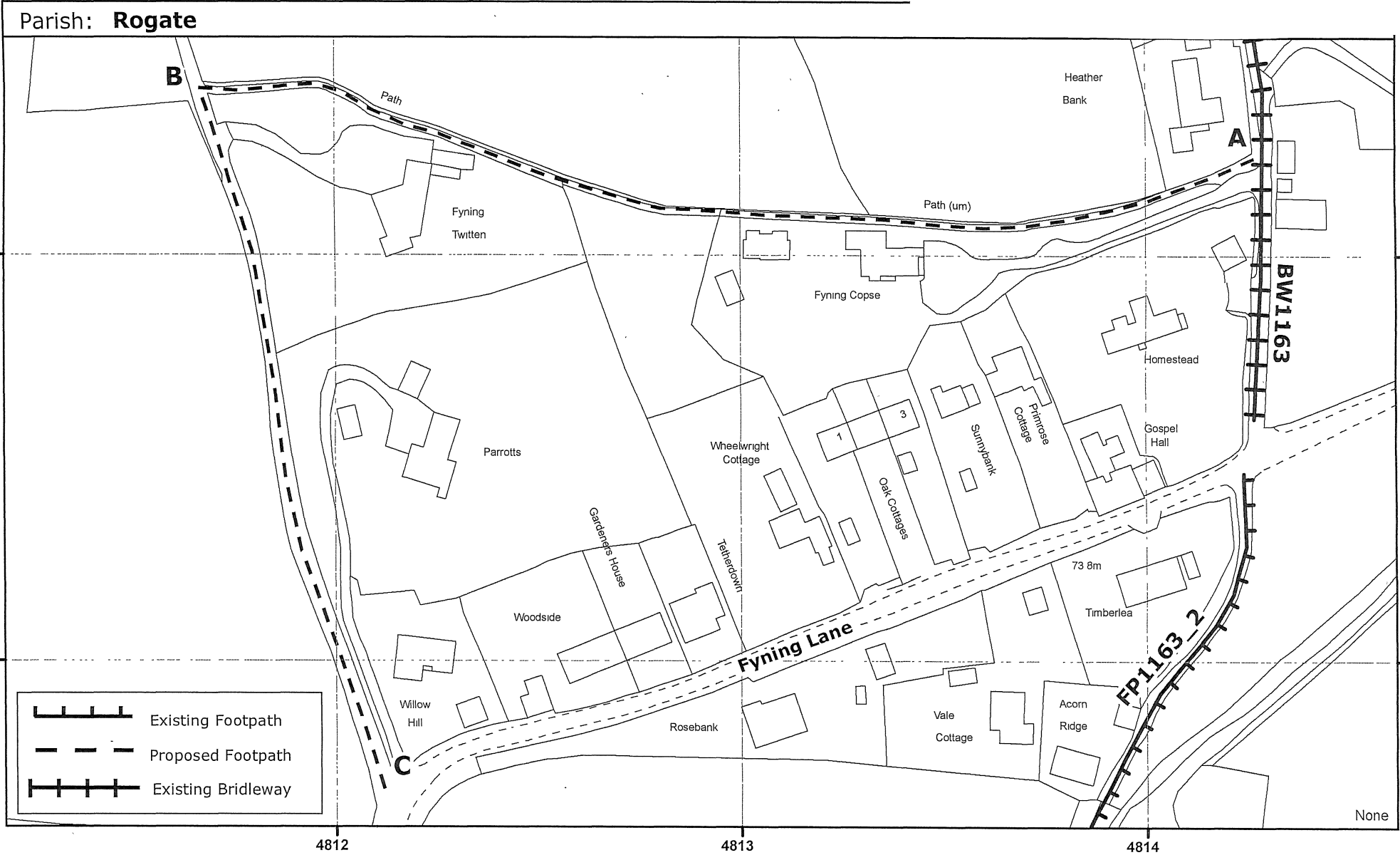
Contact: Georgia Hickland
Ext: 25360


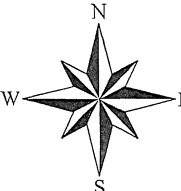
Parish: **Rogate**



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

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Plan: 01735	1:1,250	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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Rights of Way Committee

12 June 2018

Recent Decision by the Secretary of State's Inspector:

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

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

Report by Director of Law and Assurance

Recommendation

That this report be noted.

1 Background

- 1.1 In February 2016 the County Council received an application by the owners of Warren Barn in Fittleworth to extinguish and divert public footpaths in the vicinity of their property and their application was determined under officer delegation in February 2016. The decision of the Principal Rights of Way Officer was that Public Path Orders be made.
- 1.2 When the Orders were made and published, an objection was received from the South Downs National Park Authority to the Extinguishment Orders. No objections were made to the associated diversion Order for part of Footpath 702 and that Order was confirmed on 21 March 2018.
- 1.3 Principal Rights of Way Officer, having considered the objection from the South Downs National Park, remained of the view that the legal tests for the making and confirmation of the Orders under Section 118 of the Highways Act 1980 were capable of being met and following a report to the Rights of Way Committee on 14 March 2017 it was resolved that the Extinguishment Orders should be submitted to the Secretary of State for determination with the recommendation that the Orders be confirmed.

2 The Inspector's Decision

- 2.1 The Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs, in his decision letter, set out the tests for confirmation:-

'By virtue of Section 118 of the Highways Act 1980, for me to confirm the Orders I must be satisfied that it is expedient to stop up the paths having regard to:

(a) the extent (if any) to which it appears likely that the paths would, apart from the Order, be likely to be used by the public; and

(b) the effect that the extinguishment of the rights of way would have as respects land served by the path, account being taken of the provisions as to compensation'

The Inspector further sited the need to have regard to the material provisions of any public rights of way improvement plan (ROWIP).

- 2.2 With regards to sub-paragraph (a) above, the Inspector considered representations from the applicants and the South Downs National Park and conducted an independent site visit. The inspector concluded that there was regular, albeit low, use of the paths and that should the existing paths be better signposted and maintained that said use by the public could increase.
- 2.3 With regards to sub-paragraph (b) above, the Inspector considered that there were no adverse effects arising from the proposed closures on the land concerned and compensation issues have not been raised. The inspector further considered that there were no implications to the ROWIP with regards to these Orders.
- 2.4 The Inspector considered that there would be an advantage to the landowners in not having a public footpath cross their land but did not however believe that the use of the path posed a risk to person and/ or property that would outweigh the extent of likely use of the path.
- 2.5 The Inspector did attach weight to the argument put forward by the South Downs National Park that confirmation of the Extinguishment Orders would create a loss of tranquillity and peace to the public that parts of the paths afford.
- 2.6 In summary the Inspector concluded: *'The Orders clearly benefit the landowners, but there would also be a loss to the public from removal of the paths from the network. In the circumstance, I am not satisfied that it is expedient to stop up either path as shown in the Orders.'*
- 2.7 The Inspector's decision was received from the Secretary of State for the Environment, Food and Rural Affairs was dated 19 February 2018 not to confirm the Orders.

3 Resource Implications and Value for Money

- 3.1 Expenditure incurred by the County Council in processing the Public Path Orders were offset to a degree by the standard fees charged to the applicants. The costs included officer time and advertising in the local press.

Tony Kershaw
Director of Law and Assurance

Appendices

- 1) Delegated Officers Report dated 23 February 2016
- 2) Rights of Way Committee Report and Minutes dated 14 March 2017
- 3) Inspector's Decision (ref: ROW/3180352) dated 19 February 2018

Contact: Tanneth Melhuish
ext. 56731

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Highways Act 1980 S118, 119 and S25
Fittleworth – Request for Extinguishment of Part of Footpath 702
and Footpath 2866; Diversion of Part of Footpath 701 and
Creation of Additional Footpath at Warren Barn

Inspecting Officer's Summary Report (to be read with Mike Walker's Consultation Report)

1 The background to the proposal- location plan 01669 and proposal plan 01670

An application for the above path changes has been received from Mike Walker – Public Rights of Way and Countryside Access Professional, on behalf of the owners of Warren Barn, Bedham Lane, Fittleworth. The site was inspected by the Rights of Way Officer on 21 November 2014 and, together with Mike Walker, on 18 June 2015 .

The owners of Warren Barn would like part of footpath 702, which passes close to their house, to be removed. They are unable to offer an acceptable diversion route and so request consideration is given to extinguishment of the path on the grounds it is not needed owing to a nearby alternative route via the existing path network. As a consequence of the extinguishment proposal some smaller changes to adjoining paths are also proposed. The proposal the applicants have put forward as shown on plan 01670 follows discussion with the Rights of Way Officer and Mike Walker.

Mr Walker has examined the proposal in detail and has considered the issues involved for each element in the context of the relevant legal tests. His statement, which is titled 'Consultation Report. Highways Act 1980 S119, S118 and s25', is to be read in conjunction with this report. It concludes that the necessary legal tests for each element of the extinguishment and diversion proposals are met.

Although the statement considers some issues which may extend beyond the scope of the legal tests for extinguishment, it is accepted that a reasonable case for the legal tests having been met appears to have been demonstrated. However, in order that a neutral position be retained until the results of consultation became known, letters of consultation were sent out using Mike Walker's Statement to provide the information about the proposal, accompanied by the usual WSCC plan, together with a covering letter requesting comments as usual but not making a recommendation of support or not. The responses received are summarised as follows.

2. Consultations

On 20 November 2015 letters of consultation were sent to the relevant user groups and other interested parties with the request that any comments be submitted by 8 January 2016. Notice of the consultation was included in the Members Information Sheet.

Some of those who replied raised a number of minor points and queries which were later resolved following discussion with the Rights of Way Officer as follows. The Parish Council sought reassurance about the measurements of the lengths of path affected and required clarification that the diversion of the route F to G simply formalised the existing situation on the ground.

The South Downs National Park Authority's Rights of Way and Access Officer raised some doubts about the strength of the grounds for extinguishment and made suggestions about further monitoring of the present level of use. However, in view of the general acceptance of the proposal by other consultees he concluded his response by advising he does not wish to object to the proposal but may review his position if there is strong user objection at the Order making stage.

The Ramblers advised that they have no objections and Horsham District Council replied to consultation but had no comments. Both the South Downs Society and the Sussex Police advised that they fully support the proposal.

In conclusion, there are no adverse comments about the proposal in response to the consultation.

3. Landownership

The owner of the land crossed by the length of existing footpath 702, points A to E, at Fitzleroi Farm, has confirmed his support for the proposal. The Stopham Estate, who own land to the south and east of the applicant and are affected by the proposed new link path J to H and also the formalisation of the used route G to F, has indicated consent which is yet to be confirmed.

The rest of the land affected by the proposals is owned by the applicants.

4. Rights of Way Improvement Plan Considerations

The proposal has been examined in the context of the Rights of Way Improvement Plan and is considered to be in accordance with relevant provisions of the Plan.

5. The Equality Act 2010

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 the County Council to have due regard in all decision making processes to the need to:

Eliminate discrimination, harassment, victimisation or other prohibited conduct;

Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and

Foster good relations between those who share a relevant characteristic and those that do not share it.

The relevant protected characteristics are age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

In considering this application the County Council's responsibilities under the provisions of the Equality Act 2010 have been taken into account.

6. Crime and Disorder Act 1998 Implications

The Sussex Police Crime Prevention Design Advisor supports the proposal.

7. Human Rights Act 1998 Implications

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.

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.

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.

The County Council should be aware of Article 6, the focus of which 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.

8. Overall Conclusion

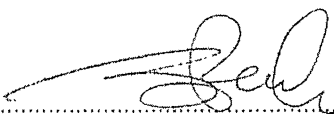
This application includes some fairly small changes to adjoining paths but the main focus of the proposal is the extinguishment of a substantial length of footpath 702. From the applicants' point of view there are a great many issues and points of concern behind the request but largely these are not relevant to the legal tests for extinguishment. The main question of whether the path is not needed for public use, having regard to the extent it is likely to be used and the effect on land crossed by the path is set out in detail in paragraphs 7i and 8 of Mike Walker's report. The report concludes that the legal tests have been met.

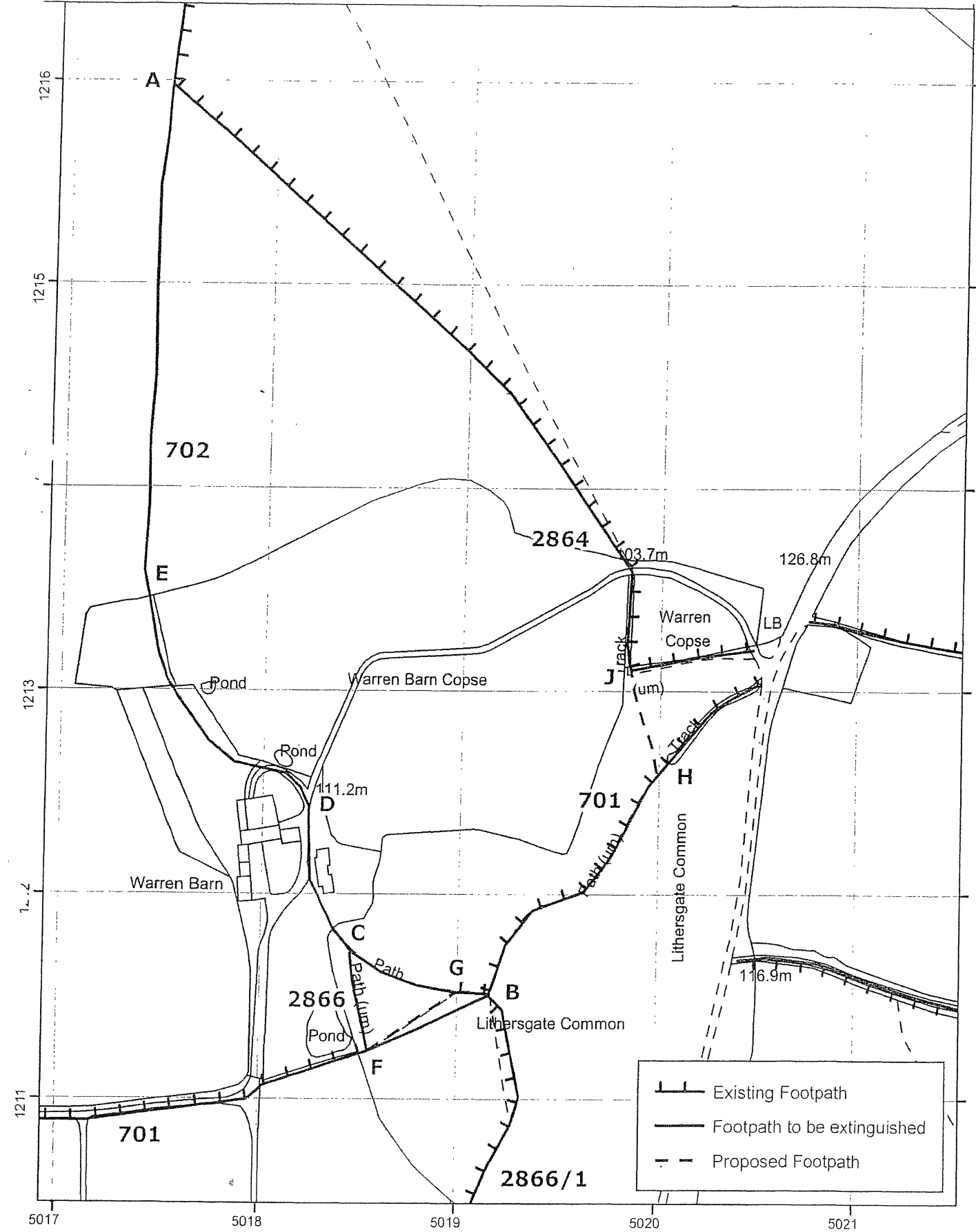
Whilst it could be argued that the public's need for the path will only be clearly determined by the publication of the Extinguishment Order, on the basis of the information presently available it is fair to accept that a reasonable case has been demonstrated for the legal tests having been met. It is therefore recommended that the necessary Public Path Orders be made.



Judith Grimwood
Public Rights of Way Officer
February 2016

DECISION of PRINCIPAL RIGHTS of WAY OFFICER:

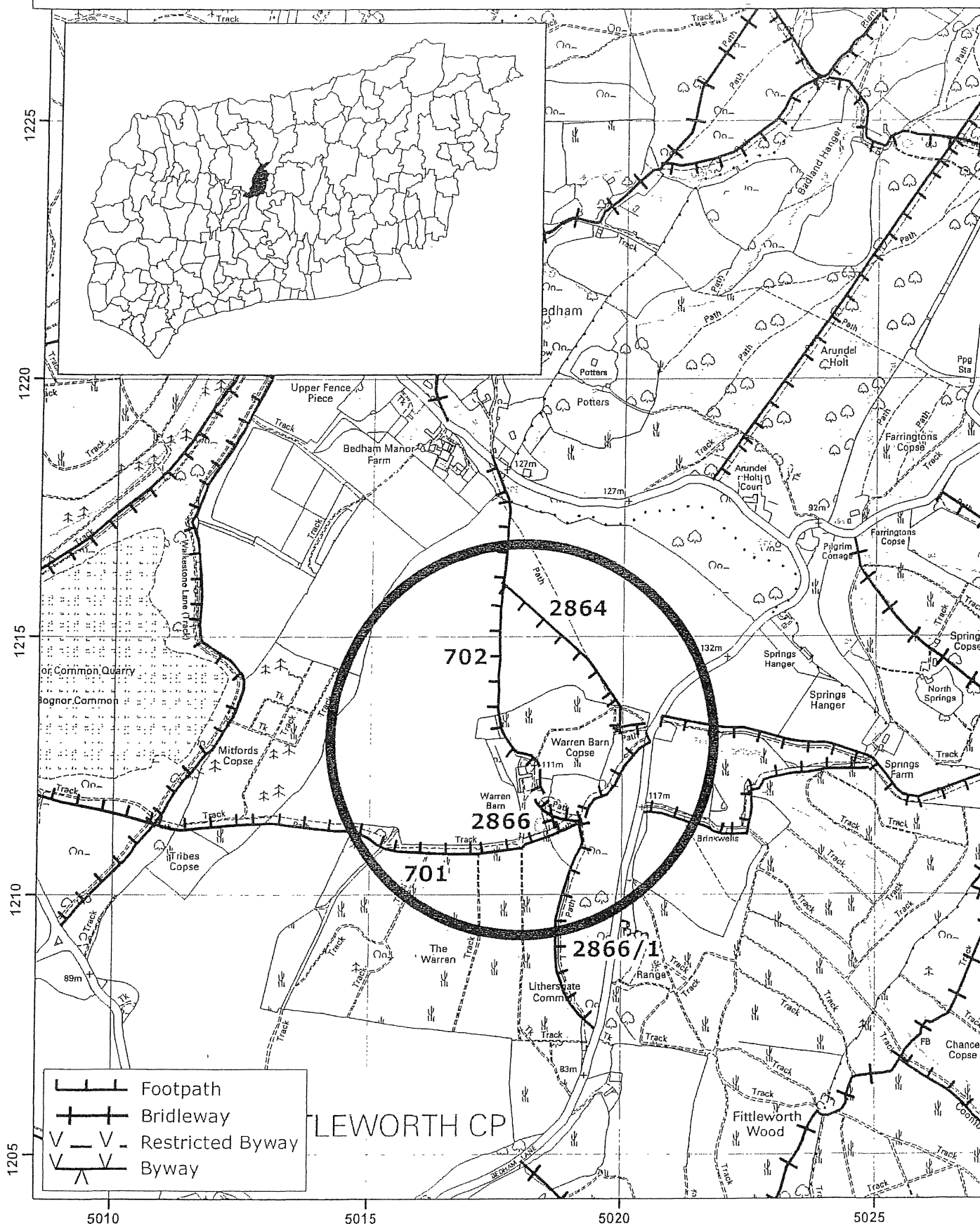
It is proposed that Orders be made under Section 118 and 119 of the Highways Act 1980 for the Extinguishment of Part of Footpath 702 and Footpath 2866 and Diversion of Part of Footpath 701; and Creation of an Additional Footpath under the provisions of Section 25 of the Highways Act as shown on attached plan 01670.

PROPOSAL APPROVED  Jon Perks 23/2/16 date



<small>This map is reproduced from Ordnance Survey material with the permission of Ordnance Survey on behalf of the Controller of Her Majesty's Stationery Office (c) Crown copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings. West Sussex County Council, 100023447, 2015</small>		Fittleworth: Proposed extinguishment of part of Footpath 702, extinguishment of Footpath 2866, diversion of Footpath 701 and creation of a new Footpath - Site Plan				
Plan: 01670	1:2,500	OS Sheet: TQ 02 SW		Photocopy liable to distortion	Nicola Debnam Director of Highways and Transport	
Date: 28.07.2015		Grid Ref: 5018 1211				

Parish: **Fittleworth**



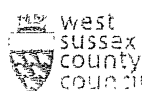
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Fittleworth: Proposed extinguishment of part of Footpath 702, extinguishment of Footpath 2866, diversion of Footpath 701 and creation of a new Footpath - Location Plan

Plan: 01669

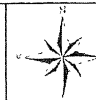
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Nicola Debnam
Director of
Highways
and Transport



Date: 27.07.2015

Grid Ref: 5018 1211

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Mike Walker

Public Rights of Way and Countryside Access Professional

Consultation Report

Highways Act 1980 S119, S118 and s25

Application for: -

- The Extinguishment of Part of Footpath No 702
- The Extinguishment of Footpath No 2866
- The Diversion of Part of Footpath No 701
- The Creation of a Footpath between Footpaths Nos 2864 and 701

At Warren Barn, Bedham Lane, Fittleworth

1. Background

An application is made by the owners of Warren Barn for the extinguishment of part of Footpath No 702 together with the consequential extinguishment of Footpath No 2866, as well as the creation of a new path linking Footpaths Nos 2864 and 701 and a minor diversion of a section of Footpath No 701 to reflect its use on the ground.

Footpath No 702 runs north from Footpath No 701, through the Warren Barn property and then into a large arable field where it forms a junction in the middle of that field with Footpath No 2864. In passing through Warren Barn it runs adjacent to the front of the house and between an area forming the house, garden and outbuildings which are used as a studio by the owners.

Footpath No 2866 forms a short link between Footpath Nos 701 and 702.

The section of Footpath No 701 to be diverted would reflect how the path is marked on Ordnance Survey maps and is the route in current use on the ground.

A new public Footpath will be created to link Footpaths Nos 701 and 2864 which will allow for these routes to be joined without the need to use a short section of Bedham Lane in order to do so.

2. Reasons for the Request for Diversion and Extinguishment

Warren Barn is a family home and Footpath No 702 as described above, impacts on it considerably, being a cause of regular concern to the owners. Between points C and D on the plan, the route passes immediately in front of the house which lies on the east of the path. To the west of the path is a courtyard area, adjacent to which are the buildings on the west of the path which are used by the owners as a studio from which they work. The applicants state that any use of the path can have a considerable impact on family life, privacy and security of

themselves, their home and their family. The very rural, and relatively isolated location only adds to the overall intrusiveness of the path which the owners feel makes living at the property a constant source of worry.

There have been several incidents of intrusion into the family life at Warren Barn and these have been documented. CCTV evidence is also available.

The owners have suffered a number of thefts and attempted thefts from outbuildings, along with other instances of anti-social and aggressive behaviour towards the landowners exhibited by persons using the path.

Walkers also sometimes stray from the path or will stop to observe members of the landowners' family when they are trying to enjoy the garden. On occasions members of the public have been found wandering in the garden close to the house and within the vicinity of the other buildings although the owners cannot always challenge them due to the close proximity of the path.

As a consequence, the owners feel that the path unnecessarily exposes their home and place of work to intrusion and, potentially to those with ill intent, who they are unable to challenge. As a result, the owners have been compelled to seek ways to improve security at the property including the installation of CCTV. The continued obligation to allow access makes it impossible for security to be improved by the locking of gates etc.

There is also some history to this path in terms of its potential closure / diversion but these have never been concluded. Furthermore, whilst the owners were willing to look at potential alternative routes so the path might be diverted, there are no obvious possibilities and the topography of the area does not lend itself to this as it consists of undulating land where it would be difficult to set out any new routes. Even if it were possible, to some extent any diversion would only make a new path even more duplicitous of No 2864.

By extinguishing Footpath No 702, the short, linking Footpath – No 2866 – becomes irrelevant and needs to be extinguished as a consequence.

The opportunity can be taken to undertake the minor diversion of a small section of Footpath No 701 for the reasons explained above.

Also, the creation of a new section of public footpath linking Footpaths Nos 701 and 2864 would be a useful addition for the reason set out above.

3. The Proposed Extinguishment of Part of Footpath No 702

From its southern end at **Point G** the existing path runs generally northwards passing adjacent to the house and immediately between the buildings of Warren Barn, partly co-existing with the driveway to the property and then passes into small paddocks, entering a large arable field at **Point E**, and continuing to a junction with Footpath No 2864 at **Point A**.

4. The Proposed Extinguishment of Footpath No 2866

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From its southern end at **Point F**, generally northwards, to its northern termination at **Point C**.

5. The Proposed Diversion of Footpath No 701

From its junction with Footpath No 2866 at **Point F**, east-north easterly to **Point B** at its junction with Footpath No 702, will be diverted to a slightly more north-easterly direction from **Point F** at its junction with Footpath No 2866 to its junction with Footpath No 702 at **Point G**.

6. The Proposed Creation of New Footpath

A new path will be created from its junction with Footpath No 701 at **Point H**, running north to a junction with Footpath No 2864 at **Point J**.

7. The Legal Tests

i. The Legal Test under the Highways Act 1980 for the Extinguishment of Part of Footpath No 702

An extinguishment Order may be made if the Authority is satisfied that the path is not needed for public use.

In this case it is not necessary that Footpath No 702 be used by the public in order to fulfil any particular walk in the area. By utilising the other existing public footpaths – Nos 701 and 2864 – the same outcome is achieved when walking from West to North and vice-versa, or from South to North and Vice-versa.

The rural, very secluded nature of the area, its proximity to any developed area and the undulating topography mitigate against any question of ‘need’ due to convenience, distance, etc

Similarly there is no ‘need’ for the viewing of Warren Barn itself, which is not listed and nor does it have specific architectural merit in that the public would be deprived of such a view.

The Serpent Trail formerly included Footpath No 702 through Warren Barn but was re-routed onto a more westerly route – with less road walking – in April this year and is, therefore, not affected by this proposal.

ii. The Legal Test under the Highways Act 1980 for the Extinguishment of Footpath No 2866

The legal test is as above. In this case, however, the path becomes unnecessary as a consequence of extinguishing Footpath No 702.

iii. The Legal Test under the Highways Act 1980 for the Diversion of Part of Footpath No 701

The Authority can make an Order to divert a public footpath if it is satisfied that it is expedient to do so either in the interests of the owners or occupiers, or of the public, or both.

In this case, the diversion is considered to be little more than a tidying up exercise. It is possible that the route has never been recorded correctly on the Definitive Map but, in any event, the route used by the public on the ground is that shown on Ordnance Survey maps and is in a natural gully that provides an obvious, already well used route in contrast to the definitive line which crosses difficult terrain much less suitable and convenient for walkers.

A diversion must not alter a point of termination of the path if that point is not on a highway, or otherwise than to another point which is on the same highway, or a highway connected to it, and which is substantially as convenient to the public.

The termination points of the proposed alternative path are on the same paths as at present and are not altered in that sense. This is a relatively minor change and a diversion of the path and is simply to rectify an anomaly in the most straightforward way, whilst complying fully with the legal tests.

iv. The Creation of a New Public Footpath between Footpaths Nos 701 and 2864

A new path would be created by the owner under a separate Public Path Creation Agreement in accordance with section 25 of the Highways Act 1980. The Agreement can be prepared and signed ready to be brought into effect on confirmation of the Extinguishment and Diversion Order.

8. The Confirmation Test for the Extinguishment of Part of Footpath No 702

Two additional tests apply when considering if an Order should be confirmed or not.

These are: -

- a) That it is expedient to do so having regard to the extent to which it appears that the path would, apart from the Order, be likely to be used by the public and***
- b) Having regard to the effect which the extinguishment would have on the land crossed by the path***

With regard to (a), the path is open and available for the public to use. It is used although not heavily. The question of expediency in this case gives some allowance for other factors to be taken into account. In this case, these are best considered within test (b) in that the effect of the extinguishment would have on the land crossed by the path.

For reasons set out above, the effect of the use of the path on those who live on the land crossed by the path is exponentially greater than the effect on any single individual or on the

Mike Walker

Public Rights of Way and Countryside Access Professional

public as a whole in accessing the countryside in the area. There is almost nothing else that the owners of the land can do that preserves their enjoyment, security and privacy of the immediate surroundings of their home without obstructing the path. For example, fencing of the path is no answer in that it passes immediately past their front door, along their access and bisecting the buildings that are in constant use, making this an impossibility. Set against this, the infrequent enjoyment of the path by the public is not adversely affected by using the alternative paths that are available.

The route is used for passive recreational purposes where speed of connection between two fixed points is not a paramount consideration for most users. This situation might be different were this a path in a more urban or suburban setting where the proximity of services to individuals may be a factor. In this case, anyone walking to this area has already covered some distance in order to do so and the overall additional walking distance utilising Footpath Nos 701, the newly created route and Footpath No 2864 negligible. The additional distance for a walker at point F wishing to proceed to point A is 125 metres via points H and J. The additional distance for a walker at point B wishing to access point A is 32 metres via points H and J. This is not considered to be a substantial inconvenience to public use, set against the impact on the land of the present path and its location, remoteness and topography.

There are no views that are special to this path that cannot be obtained on the alternative paths in the area.

There are no properties or other discrete areas of land in different land ownership which require the retention of the paths proposed for extinguishment in order to gain access. The adjacent owners support the intention of the Order, and the extinguishment of the path would have no adverse effect upon the land served by them.

Neither can it be said that these are, in any way, temporary circumstances where the permanent closure of the path might be seen as an unnecessarily drastic. The potential for the house to be anything other than a family home being unlikely.

Some recent monitoring of the use of Footpath No 702 has been undertaken. Following completion of works requiring the temporary closure of the path it was reopened towards the end of July. Since that time not one person has walked through on Footpath 702. In comparison, in monitoring the use of the alternative path - No 701 – up to 45 persons in a day have been noted to use that route.

9. The Confirmation Test for the Extinguishment of Footpath No 2866

The confirmation tests apply equally here but, given that those in respect of Footpath No 702 can be met, Footpath No 2866 would be a cul-de-sac. As a path in its own right, it has very little use other than to cut a corner between two other paths.

10. The Confirmation Test under the Highways Act 1980 for the Diversion of Part of Footpath No 701

The confirmation tests for a diversion Order are: -

- a) That the new path should not be substantially less convenient to the public***
- b) That it is expedient having regard to the effect of public enjoyment of the path as a whole***
- c) The effect on other land served by the existing way***
- d) The effect on land over which the way is created?***

It is felt that this is such a minor change that the question of it being substantially less convenient or have any effect on public enjoyment of the route as a whole does not arise. Indeed it is subject to use whereby no such questions have been raised or even realised.

There are no material effects in respect of (c) and (d).

11. Rights of Way Improvement Plan Considerations

The proposal has been examined in the context of the Rights of Way Improvement Plan and is considered not to counter the relevant, overall provisions of the Plan.

12. The Equality Act 2010

In considering this application the County Council's responsibilities under the provisions of the Equality Act 2010 have been taken into account. There are no impacts on those with disabilities with conditions on the ground being the same for other paths in the immediate area.

13. Crime and Disorder Act 1998 Implications

Sussex Police Crime Prevention Design Advisor has been asked for his views on the proposal from the crime prevention viewpoint.

14. Human Rights Act 1998 Implications

In considering this application the County Council's responsibilities under the provisions of the Human Rights Act 1998 have been taken into account.

15. Other factors

Although not yet in place, the Government has taken account of concerns and has drafted guidance, the effect of which would be that local authorities should be mindful to divert paths if there is a reasonable alternative route to be provided or extinguish paths where there is a reasonable alternative available, where existing routes pass through gardens, working farmyards and commercial premises. This is one such route that the proposed guidance is intended to cover and one where there exists a satisfactory, safe and suitable alternative route for public use.

Mike Walker

Public Rights of Way and Countryside Access Professional

16. Works

There are no works needed in order to bring these matters into effect.

17. Costs

The administrative fees and advertising charges associated with this process will be borne by the applicant.

Overall Conclusion

Whilst it is relatively rare that the Council makes Orders to extinguish paths, this one would seem to meet the relevant legal tests. It is also the case that this matter is one which has a long history and continues to present real concerns to the owners of the property whereby it is having effect on their daily lives and to their health.

Whilst the path is in use to some extent, it is not greatly used and other paths in the area are relatively well-used and the more popular promoted walk is a short distance away. On balance it is considered that the overall impact on the closure of Footpath No 702 will have no detrimental impact on the local rights of way network.

Mike Walker
Director

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Rights of Way Committee

14 March 2017

Highways Act 1980 Section 118

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

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

Report by Director of Law and Assurance

Executive Summary

An application made by the owners of Warren Barn, Fittleworth to extinguish and divert public footpaths in the vicinity of their property, was determined under officer delegation in February 2016 as no adverse comments to the proposal had been received at consultation. The decision of the principal rights of way officer was that Public Path Orders be made.

When the Orders were made and published, an objection was received from the South Downs National Park Authority (SDNPA) to the Extinguishment Orders. No objection was made to an associated Order to divert a length of footpath 701 and that Order is capable of confirmation. The Authority had not objected to any of the proposals at the consultation stage. A second objection was made by a local person, who subsequently withdrew when the applicants' agent had explained the proposals to him in more detail. He now actively supports the proposals. The SDNPA however maintained its objection, and the view that the legal tests for the making and confirmation of Orders under Section 118 of the Highways Act 1980 had not been met. This report summarises the points raised and considers their significance in the context of the legal tests for confirmation of Public Path Extinguishment Orders.

Conclusion

Having reviewed the objection of the SDNPA and the comments on the objection with the applicants' agent, the officers' view remains that the legal tests for making and confirmation are met. As the objection still stands, if the Extinguishment Orders are to be progressed they will need to be submitted to the Secretary of State (The Planning Inspectorate) for confirmation and, in the circumstances, authority to make the submission is sought.

Recommendation

That the Public Path Extinguishment Orders made in respect of footpaths 702 and 2866 in the Parish of Fittleworth be submitted to the Secretary of State for confirmation.

1. The making test under S118 Highways Act 1980

- 1.1 The order making authority must be satisfied that the path is not needed for public use

2. The SDNPA's objection to the making of Extinguishment Orders in respect of footpaths 702 and 2866 under S118

- 2.1 The existing legal lines (702/2866 proposed to be extinguished) form the shortest and most convenient route for walkers through Bedham heading south or southwest, or towards Bedham from south or southwest and therefore are needed. The alternative, ie via FPs 701 and 2864 is longer and less direct.
- 2.2 Warren Barn, adjacent to FP702 proposed to be extinguished, is a typical example of a traditional small farmstead in the Western Weald of the National Park and has an intrinsic and cultural heritage interest. It cannot be seen from the alternative route (701/2864) and so that it can continue to be seen FPs702/2866, proposed for extinguishment, are needed.
- 2.3 These comments demonstrate that the paths are needed for public use; therefore, the making test is not met.

3. The applicants' comments

- 3.1 FPs 702/2866 are not needed for public use in terms of convenience, distance or viewing Warren Barn. It is not necessary for these footpaths to be used by the public to fulfil any particular walk in the area. The same outcome is achieved using nearby FPs 701/2864 and the increase in distance from whatever direction of travel along these alternative paths is small in percentage terms.
- 3.2 Warren Barn does not have special merits e.g. it is not listed nor has architectural merit. It is recognised by the SDNPA as typical. It is a family home and when development which has planning consent is completed the site will have no traditional features. In any event, Warren Barn can be seen from other parts of the rights of way network further away from the property and the longer view can be considered to provide a better appreciation of the building without the feeling of intrusion.
- 3.3 No individual member of the public has made/maintained an objection to the orders and the SDNPA is the sole objector. This lack of objection indicates that the walking public do not feel a need for the shorter route.
- 3.4 The paths are not needed for public use for the reasons above, and the making test is therefore met.

4. The officers' comments

- 4.1 The alternative via FPs 701/2864 increases distance by only an insignificant amount and provides a no less convenient route.

- 4.2 The applicants' view that the building, Warren Barn, is not unique or particularly special or unique in character, is accepted, and as it can still be viewed from FP 701, albeit at a greater distance and from a different perspective, FPs 702/2866 are not needed to enable the property to continue to be seen.
- 4.3 The conclusion is that the making test is satisfied. The lack of objection by the consultees including The Ramblers' and the Parish Council, both of which are considered to be the most genuine representatives of the actual path users; and the lack of public objection indicate a lack of public need or interest in retaining the paths proposed for extinguishment.

5. The confirmation tests under S118 Highways Act 1980

- 5.1 The order making authority must be satisfied that it is expedient to confirm having, regard to:
- (a) the extent (if any) that the path would, apart from the order, be likely to be used by the public; and
 - (b) the effect which the extinguishment of the right of way would have as respects land served by the path.

6. The SDNPA's objection to the confirmation of Extinguishment Orders in respect of footpaths 702 and 2866 under S118

- 6.1 FPs 702 and 2866 provide the most convenient route and a visual experience not offered by the alternative. Therefore, the footpaths are likely to be well used by the public. Lack of use appears to be connected with the condition of the paths which were obstructed by overgrowth in the summer. Following a site visit after clearance, a walker was encountered and she is reported to have said she would be likely to use the paths proposed for extinguishment in the future. If the footpaths are clearly waymarked and kept vegetation free, then they will be well used.
- 6.2 A purpose of a National Park is to promote opportunities for the public to enjoy its special qualities. FP702 in particular provides a unique opportunity to enjoy this part of the South Downs National Park. Extinguishment would be contrary to a National Park purpose and all relevant authorities have a duty to have regard to such purpose.
- 6.3 For the reasons above, the paths would be likely, apart from the Orders, to be used by the public and their extinguishment would have an adverse effect on the land over which they pass; therefore, the tests for confirmation have not been met.

7. The applicants' comments

- 7.1 Actual use is a factor when considering likely future use. The public who actually use and enjoy the network of paths in the area have expressed no desire to retain the paths proposed for extinguishment even though new way marking on FP 702 has made the route clear and helped prevent

people wandering off the path, as acknowledged by the SDNPA in January 2016.

- 7.2 The applicants' CCTV shows users favour the nearby alternative FPs 2864/701 which have better gradients and less structures, rather than FPs 702/2866 which are proposed to be extinguished. There is no indication that the paths proposed for extinguishment would be likely to be used to any extent in the future.
- 7.3 When considering the effect extinguishment would have as respects land served by the path, the adverse effect of FPs 702/2866 on the landowner is, it is considered, greater than the adverse effect extinguishment would have on individual walkers.
- 7.4 For these reasons, the confirmation tests have been met.

8. The officers' comments

- 8.1 There is evidence to show that the paths proposed for extinguishment have been maintained including being waymarked. Therefore, the lack of objection to their proposed extinguishment is considered to be because people do not particularly value these paths, rather than because, as suggested by the SDNPA, people did not know of the paths or could not use them.
- 8.2 Therefore, on the main question of whether the paths are needed for public use having regard to the extent they are likely to be used, it is considered that these paths are not likely to be well used in the future.
- 8.3 On the effect which the extinguishment would have as respects land served by the paths, the land crossed by FP 2866 and the southern length of FP 702 from C to G on the report plan (Appendix C) is registered as Open Access Land meaning that the public have a right on foot and so the land will continue to be enjoyed in the event that the public paths are extinguished.
- 8.4 While relevant authorities have a duty to have regard to a National Park's purpose, such regard is not part of the strict legal test for extinguishment nor carry more weight.

9. Conclusion

- 9.1 The tests for the making and confirmation are considered to have been met and it is recommended that the Orders be submitted for determination.

10. Resource Implications and Value for Money

- 10.1 The County Council has the power, but not the duty, to submit opposed Public Path Orders to the Secretary of State for confirmation. The applicants will bear the cost of any submission and the matter may be determined by way of written representations. However, should the

Secretary of State decide to hold a public inquiry or hearing, the County Council bears this cost.

11. Risk Management Implications

- 11.1 The decision to make a public Path Order is one that must be taken on strict legal tests. Officers believe that the tests have been satisfied in this case. If the application has not been determined in accordance with the tests this could lead to a successful legal challenge by way of Judicial Review.

13. Crime and Disorder Act Implications

This is addressed in the attached delegation report.

14. Human Rights Act 1998 Implications

This is addressed in the attached delegation report.

15. Equality Act 2010 – Equality Impact Report

This is addressed in the attached delegation report.

16. Rights Of Way Improvement Plan Considerations

This is addressed in the attached delegation report.

Tony Kershaw
Director of Law and Assurance

Background Papers

None

Appendices

Inspecting Officer's Summary Report - Appendix A
Report by Mike Walker, Consultation Report - Appendix b
Site Plan 1 - Appendix C
Site Plan 2 - Appendix D

Contact: Christine Luff
Ext: 22691

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**Extract from the minutes of Rights of Way Committee meeting of
14 March 2017:**

**West Sussex County Council (Fittleworth) Public Path (No. 702)
West Sussex County Council (Fittleworth) Public Path (No. 2866)**

44. The Committee considered a report by the Director of Law and Assurance, concerning an application to extinguish lengths of public footpaths 702 and 2866 (copy appended to the signed version of the minutes). Christine Luff, Team leader – Rights of Way introduced the report. Having reviewed the objection of the South Downs National Park Authority (SDNPA) and the comments on the objection from the applicant's agent, it is considered that the legal tests for making and confirmation of the Orders have been met. As the objection still stands, to progress to confirmation, the Orders will need to be submitted to the Secretary of State for determination and, therefore, authority to make the submission is sought.

45. Ms Sarah Manchester, consultant to SDNPA, spoke in objection to the application. The Orders do not meet the legal criteria for confirmation. The primary consideration is the extent to which the footpaths would be likely to be used by the public if not extinguished. Footpath 702 is a direct continuation of the local path, providing the most direct north-south route and the one most likely to be used by the public; only walkers coming to or from the east are likely to choose footpath 2864. Footpath 702 was seen to be overgrown in July 2016 and has been removed from the clearance programme; part of footpath 702 has not been reinstated through growing crops. Lack of use of an overgrown path can't be used as evidence that a path is unlikely to be used. The Committee report acknowledges the paths are used to some extent. Lack of objections does not prove the paths are not likely to be used. The footpaths offer good views of attractive historic buildings that will be lost to the public, if closed. Ms Manchester's understanding is that Case Law has shown that legislation referred to in paragraph 5.1 of the Committee report only applies to adjacent landowners regarding access to their property. The extinguishments will result in a net loss of enjoyment and the Rights of Way Improvement Plan states that only applications that don't result in such a loss of enjoyment should be considered. The County Council will bear the cost of a public inquiry and should only pursue the Orders if the legal tests are met.

46. Mr Nigel James, SDNPA, spoke in objection to the application. One of the statutory purposes of the National Park is to promote opportunities for the public's enjoyment of the Park's Special Qualities, including views of diverse landscapes and buildings. Warren Barn's footpaths are part of a historic network and are characteristic of the Western Weald, and provide walkers with unique views different to the alternative routes. Views of the Barn from footpath 2864 are hidden by a fold of in the land particularly when trees are in leaf. The SDNPA Conservation Officer's assessment is that Warren Barn forms an attractive group of buildings, contributing to the cultural heritage of the locality; planning documents support this. SDNPA would not like to see the contribution that these footpaths make to the enjoyment of the South Downs lost. The duty to have regard to National Park purposes does have to be given due weight. A more comprehensive consultation on the extinguishments is called for. The paths should not be permanently lost to current or future generations. The

paths need to maintained, as well as not extinguished, for the public to use them, and are likely to be used by the public if they were to remain open. If the public rights of way are removed, this will set a precedent.

47. Mr Michael Wood, ET Landnet Ltd, agent for the applicant, spoke in support of the application. A statement from Mike Walker, consultant, addresses the following. The application hinges on a single objection from SDNPA, who had not previously objected at consultation on the making stage. Nothing has changed since. The footpaths do impact on the owners of Warren Barn because they pass through their garden, close to their front door. The legal tests have been satisfied. The routes are not everyday routes. During consultation there was no suggestion of a need to retain the footpaths nor that they are or will be needed. SDNPA had agreed that the footpaths do impact on the owners, having previously agreed to realign the Serpent Trail. There has been no objection from Open Spaces Society, Ramblers or local people. DEFRA's Stakeholder Working Group issues guidance that supports the extinguishment of footpaths that pass through farmyards or private gardens, where alternatives are available. Mr Wood acknowledged that there is some limited use of the footpaths. Only public need is relevant. If the public wished to see the views then there would be greater use of the paths. Superior views are enjoyed from the alternative route. The South Downs Society supports the extinguishments. Warren Barn is attractive but it is not a listed building. The legal tests have been met.

48. Mrs Ruth Huddleston, the applicant and owner of Warren Barn, spoke in support of the application. The SDNPA has been erratic in its views; first saying it would object only if others did; it now mention the setting of Warren Barn but told the Local Access Forum that their objection was because the route was an important, well-used link. When the property was purchased, searches did not mention the Serpent Trail. This was subsequently promoted but the leaflet did not state that the path passed through a private garden. The current paths are intrusive: some walkers have invaded the family's privacy, making personal and inappropriate comments, peering in through the windows, taking photos, allowing dogs to kill a chicken and made unfounded claims of path-blocking; the police asked one person to stop walking through the garden. Walkers cannot be unaware of the notices around the area. The claimed overgrown path was strimmed three times in the last 12 months. Neither the OS map nor the Serpent Trail guide have been updated to advise of the new route, which means walkers continue to walk through the thinking they are on the Serpent Trail. SDNPA has commented inappropriately on the value of Warren Barn and has, generally, shown a lack of respect to the family and have not sought to engage with them.

49. The Committee sought clarification on the following point:

- Who bears the cost of a submission? Officers advised that the cost is shared. The applicant will pay an increased administration cost. The County Council generally provides a room for the hearing or hires one at cost, there is then the cost of preparation for an inquiry including officer time and the cost of notices in the press and around the site are relevant. The Planning Inspectorate do not charge for their time.

50. In reaching a decision the Committee made the following points:

- The property was previously derelict.
- Fittleworth Parish Council is in support of the extinguishments.
- The reason why SDNPA has only chosen to object at the confirmation stage is questioned.
- There will be different views from the alternative route, but nothing is being lost to walkers or the community. Different views are part of all routes.
- The lengths of the footpaths proposed for extinguishment, particularly 702, are very close to Warren Barn, which is a private home.
- Measured online, using a satellite mapping tool, there is only a minor difference in distance between the lengths to be extinguished and the alternative route.
- SDNPA's comments regarding the County Council bearing the cost of inquiry are not material to the consideration of the application.
- The alternative route provides an easier path.
- The proposed extinguishment orders are reasonable.

51. The amended officer recommendation, proposed by Mr R. Rogers and seconded by Mrs Duncton, was approved unanimously by the Committee.

52. Resolved – That the Public Path Extinguishment Orders made in respect of footpaths 702 and 2866 in the Parish of Fittleworth be submitted to the Secretary of State for determination.

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Order Decisions

Site visit made on 8 January 2018

by **K R Saward Solicitor**

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

Decision date: 19 February 2018

Order A: ROW/3180352

- This Order is made under Section 118 of the Highways Act 1980 (the 1980 Act) and is known as the West Sussex County Council (Fittleworth) Public Path (No.702) Extinguishment Order 2016.
- The Order is dated 22 April 2016 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when West Sussex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Order B: ROW/3180353

- This Order is made under Section 118 of the Highways Act 1980 (the 1980 Act) and is known as the West Sussex County Council (Fittleworth) Public Path (No.2866) Extinguishment Order 2016.
- The Order is dated 22 April 2016 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when West Sussex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. The Orders were made on the same date. They follow an application by the owners of Warren Barn to extinguish sections of footpath which partially cross their land. Order B relates to a small section of FP2866 which links in to FP702, a substantial section of which would be extinguished under Order A. The statutory objector, the South Downs National Park Authority ('SDNPA'), has made a single submission in respect of the Orders. Given the commonality in issues, I deal with the Orders together except where the context dictates otherwise.
2. A letter objecting to both Orders was received from Jonathan Clark outside the objection period. I shall consider the objection having given the statutory parties opportunity to respond to the points raised.
3. No-one requested to be heard with respect to the Orders and so I made an unaccompanied site inspection, taking account of the written representations.
4. The Orders are for the extinguishment of the identified sections of footpaths 702 and 2866. References in the applicants' submissions to a diversion and alternative route are to an existing footpath rather than a diverted route. The

Order Maps are also annotated and marked up to show the proposed diversion of FP701 between points F-B and also a proposed footpath between J-H. They are outside the scope of these Orders and I have disregarded those references accordingly.

5. The SDNPA has contested the accuracy of the boundary line for the applicants' property indicated on a plan submitted by them. There is no suggestion that there is another landowner affected by the routes not already identified. Thus, this issue has no bearing on my consideration of the Orders. Similarly, whether or not there has been any change in the stance taken by the SDNPA does not influence my decision nor does its internal discussions on the matter as revealed in a Freedom of Information request.
6. I have found it convenient to refer to points along the existing and proposed routes as shown on the Order Maps which are the same for both Orders. Therefore, I attach a copy for reference purposes.

The Main Issues

7. By virtue of section 118 of the Highways Act 1980, for me to confirm the Orders I must be satisfied that it is expedient to stop up the paths having regard to:
 - (a) the extent (if any) to which it appears likely that the paths would, apart from the Order, be likely to be used by the public; and
 - (b) the effect that the extinguishment of the rights of way would have as respects land served by the path, account being taken of the provisions as to compensation.
8. The judgments in *R v SSE ex parte Stewart* [1980] JPL 537 and *R v SSE (ex parte Cheshire County Council)* [1991] JPL 537 clarified the relevant tests to be applied. Whilst the OMA must have considered the need for each path for public use when making the Orders, I must look at the likely future use of the paths. They are not the same tests. Any circumstances preventing or diminishing the use of the paths are to be disregarded and to be viewed as temporary when considering the Order.
9. I must also have regard to the material provisions of any public rights of way improvement plan ('ROWIP') prepared by any local highway authority whose area includes land over which the Order would extinguish a public right of way. As the footpaths lie within the South Downs National Park consideration must be given to the provisions of section 5 of The National Parks and Access to the Countryside Act 1949.

Reasons

Background

10. Point A is in the middle of open fields where FP702 meets FP2864. Fingerposts direct walkers to the north and south for FP702 and to the south-east for FP2864. FP702 proceeds downhill along an undefined route through open fields in a southerly direction to point E where there is a stile into Warren Barn Copse. The path leads through the trees before opening up on one side to paddocks at Warren Barn and continuing past its outbuildings and close by the main house to reach a pedestrian gate. The path leads into a further wooded

area and at point C there is a split in the route where FP2866 joins FP702. If confirmed, these routes would be extinguished up to points F and G where both paths link in with FP701 which runs from north-east to west. The paths to the south of Warren Barn cross Lithersgate Common, being Open Access Land.

The extent to which the footpaths would be likely to be used

11. My attention is drawn by the applicants to Advice Note 9. In particular to paragraph 18 which states: "At the confirmation stage, the decision-maker does not have to be satisfied that the way is not being used in order to conclude that it is not needed for public use. An Inspector could confirm an order even if he/she thought the way was likely to be used to a limited degree but was not actually needed."
12. The applicants say that they have monitored the use of the path that crosses their land over a considerable period and kept a log since May 2014. A copy is produced with entries up until September 2017. The applicants live and work at Warren Barn which has enabled completion of the log. Given that walkers must traverse between the house and outbuildings there is a high likelihood of them being seen by the occupiers particularly as the presence of geese and dogs will alert them to visitors. Inevitably there must be occasion when the path is used whilst the owners are out or otherwise engaged. They say that CCTV erected at their property allows them to monitor use at all times.
13. Until early 2015, the footpath across the applicants' garden had formed part of a route promoted by the SDNPA known as the "Serpent Trail". The reasons why its alignment was changed are not relevant to my decision. The point arising is that walkers wishing to follow the Serpent Trail will no longer utilise FP702. Thus, fewer people will have cause to use the path shown in Order A if following the Serpent Trail. The applicants say that the OMA's online map and editions of the Ordnance Survey have not yet been updated for the change to have full effect. Even so, I noted signs attached to trees for the Serpent Trail pointing walkers away from Warren Barn.
14. It seems unlikely that the owners will have under-stated the level of public use. During 2017, the figures suggest a decline in use from previous years with fewer groups, but there are still a small number of walkers recorded most weeks. In some weeks there may only be one or two people recorded, but it indicates consistent, if low, use over a sustained period of time. The applicants refer to the use in terms of the number of days in the month when walkers have been observed. This approach indicates that during 2017 there may only be up to 5 days per month when the path through Warren Barn has been used. By referring to the number of occasions rather than people, it does not reflect the level of use. Furthermore, these records do not show the amount of use of other parts of the route where people may have turned back without entering Warren Barn.
15. There is only one objection from a member of the public. No objections were raised by the Parish Council or user groups. This could indicate that there is little public interest in retaining the rights of way. On the other hand, the SDNPA suggests that the paths are likely to be reasonably well used to an extent commensurate with their rural location. Indeed, they describe the routes as being intrinsic to the local network of paths and suggest they afford a means for exploration and enjoyment of the National Park.

16. The SDNPA suggests there have been periods when there have been crops and other vegetation overgrowing parts of the route which will have affected the level of use and account for periods of no or low recorded use. In particular, they refer to crops between A-E on every occasion on site visits conducted between March-August 2017. That is plausible as the long stretch between A-E is across an open planted field. The route may still have been used, but I consider it likely that at least some people would be deterred either by fear of disturbing the crop or uncertainty over the existence of the route. I also noted that parts of the route in the vicinity of F-C-G were unclear through lack of signage and thick with vegetation making the way difficult to follow in places.
17. Those circumstances may have influenced the applicants' figures to some extent. Nevertheless, they must be set aside as temporary issues when considering the likely future use of the paths. That being so, it is likely that use would be higher but for obstacles deterring or diminishing the usability of the routes.
18. As a rural and relatively remote location it may never attract daily or a high numbers of walkers. In that context, the amount of use up until recent times has not in my view been insignificant and a clear, well signed route could attract more walkers.
19. Whilst the direction of the route is signed at point A, there is no worn route across the field. With point E also not visible from afar, it is difficult as a walker to gauge the correct alignment. When the field has been planted, it is perhaps unsurprising that there is no defined trodden path. Upon arriving at point E there is a stile of very basic construction. If travelling in the opposite direction the route is not signed from point E which is liable to cause confusion especially when there is crop in the field. All of these factors could deter use, but are capable of being remedied with increased likelihood of public use.
20. There is also no clearly defined track on the ground between points C-D where FP702 goes between the buildings at Warren Barn. Where the path crosses the lawn, there is no foot trail but this is not uncommon for a footpath across a domestic garden and does not signify a lack of use. There is a prominent finger post to aid walkers and a pedestrian gate provides a focal point, but it is not difficult to see how walkers might stray or get lost. With better waymarks walkers would be more likely to use and stick to the route. The applicants suggest that signs make no difference, but some people may be reluctant to use a route if it is unclear or they are fearful of trespassing.
21. An alternative route starts along FP2864 at point A and continues in a south-easterly direction through the fields along marked track lines. It is at a higher ground level than FP702 along easier terrain and offers expansive views of the surrounding landscape. In contrast, the views between A-E are largely restricted to the field on either side because of the topography which the non-statutory objector describes as a 'beautiful dry valley'. FP2864 continues over another rudimentary stile at the field edge into a copse before exiting along the lane near to FP701. From the conditions under foot it appears that FP2864 may currently be used in preference to FP702. Whatever the reason, the current condition of FP702 is to be disregarded in establishing its likely future use.
22. If the Order paths were extinguished, walkers would still be able to connect with FP702 further to the north by using FP2864. However, the availability of

an alternative route does not mean automatically that the public has no reason to use the Order paths. Each route offers different experiences. Some people may prefer the variance in views offered by FP702 and find the group of buildings at Warren Barn to be of interest. The dwelling at Warren Barn is expressed by the SDNPA to be a good example of the local built vernacular. From the path, the buildings and their setting can be appreciated even if the house itself is not a unique example. Although no users have come forward to say as such, both routes could be used as a circular route or to connect with FP701 further to the west if travelling in that direction.

23. The applicants suggest that it is illogical that dog walkers would use the path through their property when they could walk through the woods instead. That may be so, but not all walkers will have dogs. Being part of the National Park, it is very possible that walkers enjoying the countryside would utilise the route.
24. I note that in resolving to make the Orders, members of the Rights of Way Committee were influenced by FP2864 being an 'easier path'. I take this to be a reference to the gradients. Ease of use may cause some users to prefer that route, but it does not mean that the Order paths would not be used.
25. I find that there is regular albeit low use of the paths. Whilst no-one has expressly stated that they intend to use the routes in future, it seems to me that if the paths were better signed and maintained, it is likely they would be used to a reasonable extent by the public.

The effect which the extinguishment of the right of way would have as respects land served by the paths

26. No adverse effects arising from the proposed closures on the land concerned have been drawn to my attention. Compensation issues have not been raised.

Material provisions in the ROWIP for the area

27. The OMA has confirmed that it considers there to be no relevant provision within the ROWIP. The SDNPA on the other hand refers to a sentence within the ROWIP that says: "Only applications that do not result in a net loss of enjoyment and convenience for users are considered and opportunities are always taken to enhance the network wherever possible."
28. This sentence is included under the heading of "Changes to the network including diversions/upgrades/dedications/permissive agreements". The Orders are for none of those things. When read in context, I do not consider the provision to be of direct relevance. No other provision has been drawn to my attention.

Whether it is expedient to confirm the Order

29. The Order shall not be confirmed unless I am satisfied that it is expedient to do so. Whilst noting the content of the Order Decision for the extinguishment of part of footpath SM215 Priors Marston¹, each case must be considered on its individual merits. The 'need' for the paths is a matter for the OMA alone, but the use of the word 'expedient' in section 118 must mean that other considerations beyond the likely use of the paths can be relevant in

¹ Order Ref: FPS/H3700/3/19 dated 25 January 2012

determining whether to confirm the Orders. That stance is supported in the *Stewart* case.

30. There would be advantage to the landowners in not having a public footpath cross their land. That would be particularly so for the owners of Warren Barn whose private garden is crossed by the route passing close in front of windows. The applicants say they fear for their safety after incidents involving people using the path to enter their land. Both statutory parties provide lengthy details about confrontations and suchlike and I note that a member of the public was arrested in 2014. I attach some, albeit limited, weight to the desirability from the landowners' viewpoint of the paths being removed. However, there is no basis for me to believe that use of the path poses such a risk to person and/or property to outweigh the primary consideration concerning the extent of likely use of the paths.
31. These may also be historic paths dating back to at least the 1800's that linked farms and estates, but there is no substantive evidence to signify that they have particular historic value that should be preserved.
32. The extinguishments would result in the loss of the paths within the National Park. The document titled 'South Downs National Park - Special Qualities' describes how many people greatly value the sense of tranquillity and unspoilt places which give them a feeling of space and peace. Such value could be attributed to parts of these routes particularly from the sense of openness between points A-E along FP702. There would be loss to the public in consequence of its closure to which I attach limited weight.
33. The National Parks and Access to the Countryside Act 1949 requires any public body in exercising or performing any functions relating to land in a National Park to have regard to the purposes specified in section 5 of the Act. Those purposes are conserving and enhancing the natural beauty, wildlife and cultural heritage of the area and promoting opportunities for the understanding and enjoyment of the special qualities of those areas. In having regard to those purposes, it is still possible that the Orders could be confirmed as illustrated in the Order Decision brought to my attention for the extinguishment of part of FP3 in the Parish of Buriton². In that case the Inspector concluded that even if Network Rail had considered and fulfilled its duty under the 1949 Act, it would not have drawn any different conclusion.
34. It is the view of the SDNPA's Conservation Officer that the Warren Barn buildings make a contribution towards the cultural heritage of the locality and the broader National Park. In response, the applicants refer to the South Downs Society supporting the extinguishment and one of their core objectives is the preservation of cultural heritage.
35. On balance, I am unpersuaded on the information before me that the buildings have such significance that the removal of the routes in this instance would diminish opportunities for the enjoyment of the National Park contrary to the aims of section 5 of the 1949 Act.
36. First and foremost the test I must address is the likely use of the Order routes if they were to remain. From the information submitted it appears both paths are used and I have seen no persuasive evidence to suggest that would

² Order ref: FPS/Q1770/3/5 dated 4 January 2017

change. Indeed, without impediments and improved maintenance and signage the level of use could well increase. If the paths were to close then there would be an alternative route, but this is not such a significant factor in this case when it provides a different experience of the National Park. The Orders clearly benefit the landowners, but there would also be loss to the public from removal of the paths from the network. In the circumstances, I am not satisfied that it is expedient to stop up either path as shown in the Orders.

Other Matters

37. In its initial objection, the SDNPA suggested that an alternative less intrusive route to the occupiers of Warren Barn would be behind the outbuildings. Whether or not there are other alternatives does not influence my findings.

Conclusions

38. Having regard to the above and all other matters raised in the written representations, I conclude that the Orders should not be confirmed.

Formal Decisions

Order A

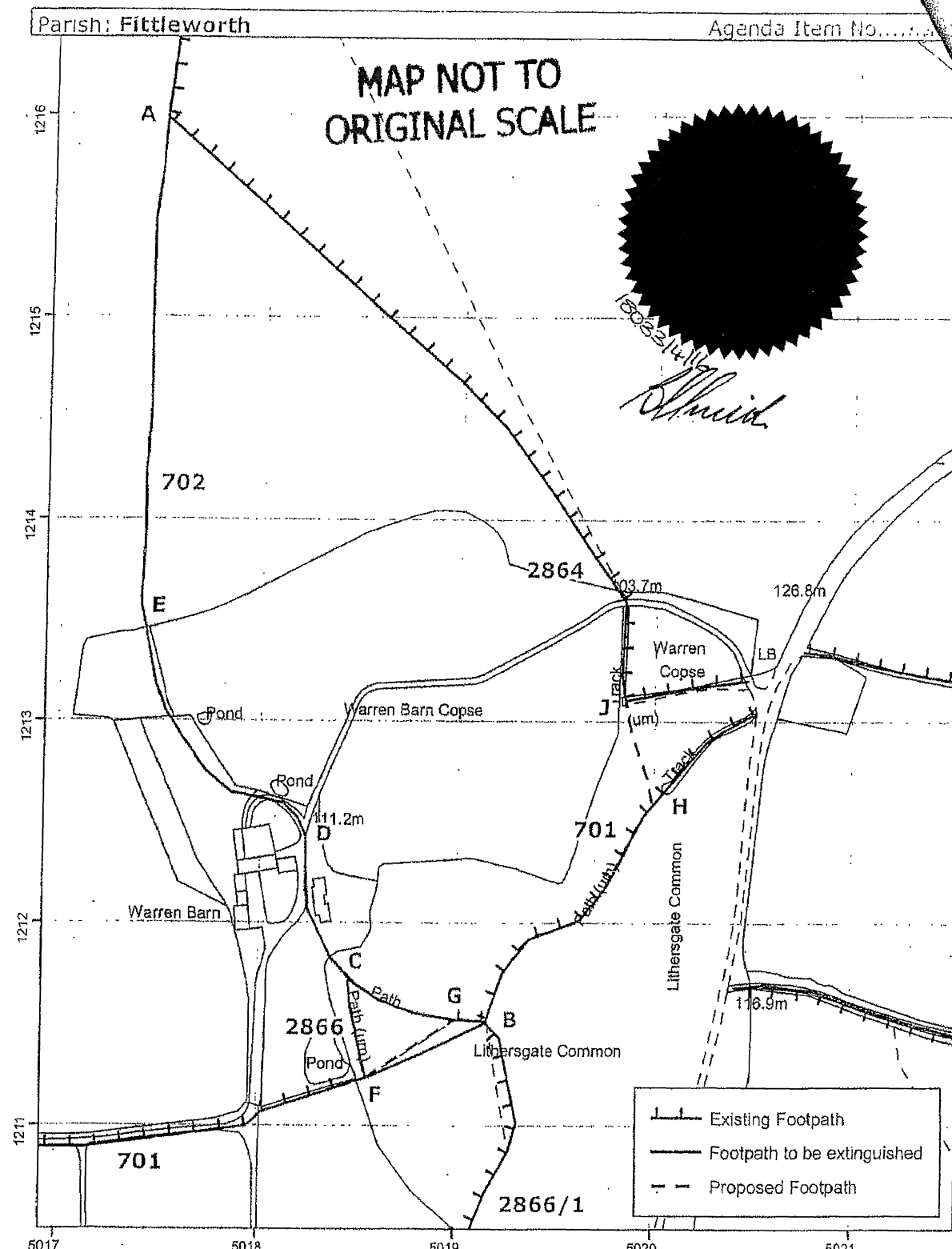
39. I do not confirm the Order.

Order B

40. I do not confirm the Order.

KR Seward

INSPECTOR



This map is reproduced from Ordnance Survey material with the permission of Ordnance Survey on behalf of the Controller of Her Majesty's Stationary Office (c) Crown copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings. West Sussex County Council, 100023447, 2015		Fittleworth: Proposed extinguishment of part of Footpath 702, extinguishment of Footpath 2866, diversion of Footpath 701 and creation of a new Footpath - Site Plan			
Plan: 01670	1:2,500	OS Sheet: TQ 02 SW		Photocopy liable to distortion	Nicola Debnam Director of Highways and Transport
Date: 28.07.2015		Grid Ref: 5018 1211			

