

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