

Planning and Rights of Way Committee

5 September 2023

DMMO 2/21 – Definitive Map Modification Order to modify the definitive map and statement for Petworth to add a footpath between footpath 795 and footpath 797 in the parish of Loxwood

Report by Director of Law and Assurance

Electoral divisions: Petworth

Summary

The application seeks to modify the Definitive Map and Statement for Petworth by adding a footpath from public footpath 795 to footpath 797 in the parish of Loxwood. The application is supported by 116 public way evidence forms and documentary evidence.

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 to the definitive map and statement for Petworth from public footpath 795 to footpath 797 in the parish of Loxwood should be made.

1. Introduction

- 1.1 The application, made by Mr T J Bennett, was received on 31 January 2021 and seeks to add a footpath to the Definitive Map and Statement for Petworth in the parish of Loxwood. It is supported by 116 public way user evidence forms, testifying to the use of 118 users and by documentary evidence submitted by the applicant. The path claimed by the application is shown on the application plan.
- 1.2 The application is made under Section 53 (5) and is reliant on Section 53(3)(c)(i) Wildlife and Countryside Act 1980 (WCA), being the discovery, by the County Council of evidence which shows that a right of way which is not shown in the Definitive Map and Statement subsists or is reasonably alleged to subsist over land. The burden of proof rests with the applicant.
- 1.3 The requirements for the presumed dedication of a public right of way under statute are set out in Section 31 of the Highways Act 1980. This requires use of the claimed route by the public as of right and without interruption, over a period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route

had been dedicated. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public.

2. Characters and Features of the claimed route

- 2.1 The route which is being sought by the applicant begins at footpath 795 (grid reference 505607, 131934) and proceeds in a north-west direction across to footpath 797 (grid reference 504919, 132978). The surface of the claimed route consists of grass and dirt, which is enclosed by trees and vegetation on both sides. Throughout the route there are gates erected, which remained open during the officers site visit.

3. Land ownership

- 3.1 Land Registry documents show there are three landowners for the claimed route. The landowners are Nigel Ahmed Danhash, Ahmed Mansoor Danhash and Nadia Ahmed Danhash, who are joint owners of the land.
- 3.2 The applicant served notice of the application on each individual landowner on 31 January 2021.

4. Consultations

- 4.1 Standard consultations were sent to the amenity groups, the District Council and Parish Council.

- 4.2 The following comments were received:

- 4.3 Chichester District Council:

"We have no records that would support or dispute this claim. There is no planning history for the land, but a TPO was sought under reference 20/00275/TPO, this was not made. The site is within the Loxwood Neighbourhood Plan Area. The land is within the 6.5km Mens SAC buffer zone and 12km Ebernoe Common SAC buffer zone. There are also records of breeding birds, wolverine, bats and dormouse habitats and networks and records of designated statutory species including bluebell, Pearl-bordered Fritillary and White Admiral (butterflies) and the common lizard. The footpath also runs through ancient woodland."

- 4.4 The West Sussex Ramblers:

"There is significant evidence of use of the route by the public over a considerable period, also confirmed by our Local Footpath Warden for Loxwood parish. The additional historical mapping that has been submitted by the applicant also confirms the existence of the route through the woodland for well over a century. The future of public access to the route has been brought into question by the current landowner installing gates in January 2021 that could be used to obstruct the route, though left open at the moment, and by their clear desire to develop the site for commercial purposes. We therefore believe that the claimed route covered by the application should be recognised and protected by adding it to the Definitive Map as a footpath."

4.5 Loxwood Parish Council:

"The route has been used by walkers for over 40 years as evidenced by correspondence from the local community. The route connects existing PROWs and enables a circular walk in the Woods there is no doubt it is a very popular amenity."

4.6 Rudgwick Parish Council:

"The route connects existing PROWs and enables a circular walk in the Woods and has been used by walkers for over 40 years."

5. Evidence submitted in support of the application

5.1 The application was made following the installation of gates on parts of the claimed route in January 2021. This is taken as the event which brought the public's right to use the route into question.

5.2 The application is supported by 116 public way user evidence forms, testifying to use by 118 individuals from 73 postal addresses over the period 1950 to 2021. Additionally, there were 14 individual user statements in the form of written emails, testifying to the use of the path by 16 users.

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

5.1.1 all of the users claim to have used the route on foot,

5.1.2 twenty-nine of the users claim to have used the route on a bicycle,

5.1.3 three of the users claim to have used the route on a horse.

5.4 None of the claimed users report to having been turned away whilst using the route or claim to have seen any notices or otherwise preventing them from using the route, prior to 4 January 2021.

5.5 A number of users claim that gates were erected on the claimed route in January 2021. These gates were reported to be not locked and generally left open.

5.6 Five users claim to have been given permission to access the route.

5.7 Five users claim to have been told that the route was not public in 2020 during the Claypit webinar (planning application). Two users claim to have been told that the route was not public on 4 January 2021 when the gate were being erected.

5.8 All users report to have seen others using the route either on bicycles, horse and/or walking.

5.9 In addition to this, the Rudgwick Preservation Society provided a letter in support of the application. They referenced Diana Chatwin's book on Rudgwick (The Development of Timber-Framed Buildings in Sussex

Weald), which is said to have described the woodlands as similar to The Mens in the South Down National Park near Wisborough Green. Further, the letter stated the antiquity of some of the woodland surrounding the proposed path has been recognised by Natural England as Ancient Woodland. They noted that in between these tracks of woodland further planting was undertaken by the landowners before and after the death of the Lord Manor, Denzil Onslow, and the sale of the woodland in 1879. They claim that the land was then owned by two estates, in turn Loxwood Hall Estate and Pallinghurst Estate, which were finally broken up in 1958/9. They claim in the "Onslow years", the woodland became important for uses of commercial forestry and sporting pursuits, which continued into the 20th century.

Officer comments: This additional evidence submitted by Rudgwick Preservation Society, though interesting, does not have any relevance as to whether the claimed route has public status and to what extent.

5.10 The application is supported by archival evidence, submitted by the Rudgwick Preservation Society. They assert that the evidence submitted demonstrates that the claimed route was historically a route used by the public, as a footpath.

5.11 Second Edition Ordinance Survey Map 1876 and 1879:

The Rudgwick Preservation Society state that the 1876 map is the first to show a layout of multiple geometric rides and tracks criss-crossing the woodland. They assert that there has been straightening and realignment of the track. The applicant notes that the southern half of the track is depicted, which has a curve in Hurst Wood which has been straightened in the 20th century and that the track finished in a field (104) in the north-west. The applicant states that the northern half also finishes in field 104 and that the field was later planted with birch trees and the two tracks joined up.

Officer comments: Part of the claimed route is shown on the map denoted by double dashed lines. The start of the route commencing at FP795-3 is not depicted on this map but is later denoted by double dashed lines heading in a western direction. When the claimed route meets FP 792-1 it is not depicted at this point heading in a western direction. The route is then depicted again in double dashed lines heading in a northern direction.

5.12 Third Edition Ordinance Survey Map 1897:

The Rudgwick Preservation Society state that the map shows the track now all the way through the woodland in the north-west. This necessitates a right angle turn in the track.

Officer comments: Part of the claimed route is shown on the map denoted by double dashed lines. The start of the route commencing at FP795-3 is not depicted on this map but is later denoted by double dashed lines heading in a western direction. The remaining section of the claimed route is depicted in double dashed lines.

5.13 Ordinance Survey Map 1974:

The track has been straightened in the southeast and right-angle bend curved for lorry access. The short section across a field in the south-east is clearly shown. The applicant states that the track is clearly the main access route.

Officer comments: The claimed route is shown on the map denoted by double dashed lines.

6. Evidence submitted against the application

6.1 A joint objection was received from the following landowners: Ahmed Danhash, Nadia Danhash and Nigel Danhash. Mr Nigel Danhash provided the following comments on behalf of all the landowners:

- The woodland has been owned by my family for just under 30 years and we have used Tillhill Forestry to manage and maintain the woodland all the time we have owned the woodland.
- Both Tillhill Forestry personnel and ourselves have always advised any trespassers on the main track that they are trespassing and that they are endangering themselves if they are on the track. Members of the public are always asked to return to the several footpaths, that cross our woodland.
- The route is a service road for Forestry vehicles and machinery to use during necessary maintenance and woodland operations.
- The route was created in order to maintain the woodland and perform woodland operations without endangering the public or infringing on official public rights of way.
- The public have been noted using the service route irregularly on foot and are considered unauthorised users.
- 4m gates are located at the start and end of the service road and are kept locked when not in use. Additional gates and barriers are used at access points to PROW when the service road is in operational use.
- Gates were installed in the 1990's, as set out in correspondence from 1995 with Mr Peter Harrison. The letter dated 23 May 1995 references several gates in Songhurst and Bulhams Woods.
- Two recent photographs showing some gates and signs erected were provided. Nigel Danhash identified the first photograph as being located between the layby and the eastern woodland. The second photograph is located mid-way along the track in the western woodland.
- 'No unauthorised access' is clearly sign posted on gates during operational use, additional warning signage is used including 'machinery access route' and 'timber lorry access route' signage is regularly vandalised and removed by the public.

- The public is informed of the dangers present on the service road and to keep to official rights of way when encountered.
- Tilhill Forestry are instructed to ensure public safety by keeping the public away from work areas and service routes.
- A form CA16 was deposited with effect from 9 July 2020
- Tilhill management have stated no intentions to allow public use of the service road. There are already a number of public rights of way allowing public access through the woodland to and from the points proposed. There is no reason why an additional right of way should be necessary.

Officer comments: On a site inspection, it was noted that one of the gates shown in a photograph provided by the landowner is not situated at the location of the claimed route. It was noted that the gates along the claimed route appeared to be in a new condition, with product code labels still adhered to the gates. In addition, a sign stating "PRIVATE WOODLAND Please keep to public footpath", which appeared to be new, was found on the claimed route but had been removed from the gate. Signs stating, "Danger of Death Overhead Powerlines" and "Warning Timber Lorries in Operation" were also found on a gate and post. No other notices were found to be present on the claimed route, at the time of the site inspection. It is noted that only one of the gates referred to in the 1995 correspondence relates to the claimed route.

7. Archive evidence

- 7.1 The following Ordnance Survey maps were consulted at the West Sussex Record Office – OS 1876, OS 1897, OS 1898, OS 1912, OS 1973 and OS 1974. It is concluded that none of these maps show evidence of a historic right of way. OS maps can show the physical existence of a route on the ground but are not definitive in connection with the status of a route or whether it is public or private. From 1888, OS maps carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public rights of way and on late 20th Century OS maps which show those ways which are recorded in definitive maps and statements, the disclaimer is modified to acknowledge that some route shown are public rights of way.
- 7.2 The Tithe Maps for Wisborough Green, Adcock Map and the Quarter Sessions were consulted. It is concluded that neither the maps nor the Quarter Sessions show evidence of a historic right of way.
- 7.3 The Draft and Provisional Definitive Maps were consulted and it is concluded that neither map show evidence of a historic right of way for the claimed route.
- 7.2 The Loxwood Parish File revealed a map of the Pallinghurst Estate. This map did not indicate that the claimed route had the status of a right of way, however it did depict the route in solid black lines. This indicates the

physical existence of the track, but it is not definitive in relation to the status of the claimed route.

8. Consideration of claim

- 8.1 The application was submitted with user evidence and some archive evidence summarised in paragraph 5 and contained in the background papers of this report. Evidence against the application is summarised in paragraph 6 and contained in the background papers of this report. Archive evidence has been reviewed as summarised in paragraph 7 of this report. Section 53 WCA 1981 requires there to be a “discovery” of evidence and the applicant relied on user evidence.
- 8.2 In determining the application, there are two possible tests. The Committee must decide whether the evidence provided by the applicant, together with all other relevant evidence available, shows that on the balance of probability a right of way exists, or that it is reasonable to allege the existence of a public right of way. The burden of proving this falls to the applicant. Matters such as suitability of a way and possible nuisance or need, are irrelevant and cannot be taken into account when reaching a decision. In respect of the user evidence, the application has been considered under Section 31 of the Highways Act 1980, which requires consideration of whether there has been use of a way by the public ‘as of right’ and without interruption for a period of twenty years prior to its status being brought into question and if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

9. The 20-Year Period

- 9.1 Under Section 31 of the Highways Act 1980, a relevant date needs to be established for the 20-year period of use. The relevant date is determined as the period when the land has actually been enjoyed by the public ‘as of right’ and without interruption for a full period of 20 years taken back retrospectively from the first date of challenge.
- 9.2 In this instance, users claim that a gate and notice was erected on the land in January 2021. There is also the fact that a CA16 landowner deposit was submitted by the landowner in July 2020. Therefore, the relevant 20-year period for the purpose of determining this application is July 2000 – July 2020.
- 9.3 Whilst it is not necessary for all users to demonstrate continuous use throughout the 20-year period, they must demonstrate that the use has been made by the public continually during that period.
- 9.4 During the relevant 20-year period 118 users claim to have used the claimed route, 62 of which claim to have used it continually for the whole 20-year period.
- 9.5 The use of the application routes ranges between twice to 365 times a year.

10. As of right and without interruption

- 10.1 "As of right" means use without force, secrecy or permission. It is irrelevant whether the users actually knew they were not entitled to use the route or were indifferent as to whether they could use it. What is important is that looked at objectively they appeared to be using the paths as of right.
- 10.2 As detailed in paragraph 9.4 above, evidence submitted in support of the application has shown that the claimed route has been used by 118 users, 63 of which claim to have used the route continuously from July 2000 – July 2020. This is a significant number of users.
- 10.3 Three of the users which claim to have used the route continuously from July 2000 – July 2020 report to have been given permission to use the route during the 20-year period. As such, this evidence has been discounted from the number of users which claim to have used the route continuously for the 20 year period. It therefore appears that access to the claimed route within the application has been available throughout the relevant period until the gate and notice appeared in January 2021.
- 10.4 With regard to the issue of 'permission' a distinction needs to be drawn between toleration and permission. A landowner may be aware of the use of a path but chooses to do nothing to prevent that use. In those circumstances, even if they later make it clear they did not support the use of the path during the relevant period, their actions could be regarded as toleration of the use during that period. This means the use could still be regarded as being as of right.
- 10.5 However, the situation would be different if the landowner permitted the public to use the path but made clear (either expressly e.g. by a sign or through their conduct e.g. by closing the path occasionally) that their consent could be withdrawn in the future. In that case the use would be with permission and not as of right.
- 10.6 Ahmed Danhash, Nadia Danhash and Nigel Danhash assert that gates and notices were erected on their land which advised the public 'No unauthorised access' during operational use and additional warning signage is used including 'machinery access route' and 'timber lorry access route' signage. It could therefore be argued that the notices showed an interruption to use within the 20-year period.
- 10.7 However, it should be noted that none of the users claim to have seen any notices across the application land prior to January 2021. This is a substantial number of users claiming that no gates or notices were present on the claimed route prior to January 2021. However, the landowner state the gates were installed in the 1990's and is seeking to rely on correspondence from 1995 with Mr Peter Harrison. The letter dated 23 May 1995 references several gates in Songhurst and Bulhams Woods, which the landowners have identified on a plan showing the location of the gates referred to in the 1995 correspondence. It should be noted that only one of the gates referred to in the correspondence relates to the claimed route. The landowner did provide two recent photographs

showing some gates and signs erected. He identified the first photograph as being located between the layby and the eastern woodland. As such, this gate is not located on the claimed route. However, the second photograph is located mid-way along the track in the western woodland, which is located on the claimed route.

- 10.8 However, not one witness has testified to seeing any gates locked or unlocked prior to January 2021 and the evidence of the users suggests that the claimed route was used 'as of right'.

11. Evidence of no intention to dedicate

- 11.1 It is considered that the user evidence has met the statutory tests as set out in Section 31 Highways Act 1980 for the claimed route. User evidence submitted in support shows that the claimed route has been used 'as of right' and without interruption for a period of 20 years or more. It is therefore necessary to further consider whether there is sufficient evidence of no intention to dedicate by the landowner during the relevant 20-year period.
- 11.2 Evidence of a landowner's intention not to dedicate a public right of way must be overt and contemporaneous. The landowner cannot assert after the event that there was no intention to dedicate.
- 11.3 As set out in paragraph 6.1 above, a CA16 deposit was made on 9 July 2020 under S.31(6) Highways Act 1980 and S.15a(1) Commons Act 2006 which may show an intention that the landowners did not intend to dedicate the land to the public during the relevant period. This date has been taken as the date on which the public's use of the path was first challenged.
- 11.4 There is no other evidence of no intention to dedicate.

12. Common Law

- 12.1 At Common Law a right of way may be created through express or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to do so and that the public have accepted such dedication. Whilst there is no defined minimum period of continuous use to establish a right of way at Common Law, the use must be shown to have been 'as of right'.
- 12.2 As there is no defined length of time over which the use must occur, it simply must be long enough to justify an inference that there was an intention by the landowner to dedicate. A landowner needs to be legally capable of dedicating the way as public, therefore any periods in which the land was occupied by tenants could not be included in the period of use.
- 12.3 In this case there is a significant amount of evidence which spans a considerable period of time. It could therefore be concluded that a right of way have been created at common law.

13. Recommendation

- 13.1 The applicant has produced a substantial amount of credible evidence which demonstrates clear use of the claimed route during the relevant 20-year period. However, the landowners assert that gates are located at the start and end of the service road, which are kept locked when not in use. In addition, they state 'No unauthorised access' notices are sign posted on gates during operational use. As there is a conflict of evidence, the claimed route can only be reasonably alleged to subsist.
- 13.2 Archival research has indicated the existence of a route however has not indicated whether the route is public or private and/or its status.
- 13.3 It is therefore considered that as there is a conflict of apparently credible evidence from the applicant and the owners a public right of way has been reasonably alleged to subsist.
- 13.4 It is therefore recommended that an order should be made to add the claimed route to the definitive map.

14. Consultation, engagement and advice

- 14.1 See paragraph 3 above which details responses to statutory consultations as well as responses to additional consultations that were carried out as part of the investigation process.

15. Finance

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

16. Risk implications and mitigations

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

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

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

17. Policy alignment and compliance

Equality and Human Rights Assessment

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

Human Rights Act 1998 Implications

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

Crime and Disorder

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

Climate Change

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

Public Health

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

Tony Kershaw

Director of Law and Assurance

Case Officer: Gemma Penfold, Legal Assistant, 0330 22 27074

Appendices

- Appendix 1 – Site Plan 01826
- Appendix 2 – Location Plan 01826A
- Appendix 3 – Parish Location Plan 01826B

Background papers

- (1) Application and plan
- (2) Witness Table
- (3) Consultation responses
- (4) Evidence in support
- (5) Evidence in opposition
- (6) Archive Evidence