

Rights of Way Committee

12 June 2018 – At a meeting of the Rights of Way Committee held at 2.15 pm at County Hall, Chichester.

Present: Mr Whittington (Chairman)

Mr Bradbury, Mr Acraman, Mr Baldwin, Mrs Duncton, Dr O'Kelly, Mrs Purnell, Mr Quinn and Mrs Russell

Part I

1. Declarations of Interest

1.1 In accordance with the County Council's code of the conduct, the following declarations of interest were made:

- Mr Whittington, Mr Bradbury, Mr Baldwin, Mrs Russell and Mr Acraman declared that they have made site visits for the following application, and that during visits if approached, none had engaged in any discussions regarding the 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.
- Dr O'Kelly declared a personal interest as local member for Midhurst, and as a member of a steering group working with South Downs National Park Authority and various cycling groups on plans for a future multi-use path along the old railway line from Petersfield to Pulborough, in relation to:
Elsted and Treyford, and Harting – Request for Diversion of Parts of Footpaths (fp) 871, 872 and 873; Creation of New Footpath on Disused Railway.
- Dr O'Kelly declared a personal interest as local member for Midhurst, which is also a prejudicial interest by virtue of the fact that she has knowledge of the matter and is known to some of the parties. Dr O'Kelly agreed to leave the meeting during the committee debate and vote on the item:
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.
- Mr Bradbury declared a personal interest as a member of Mid Sussex District Council in relation to:
Previous Rights of Way Decisions – Item 1. Haywards Heath FP 25 CU.

2. Minutes of the last meeting of the Committee

2.1 The Committee agreed the following corrections to the minutes of the previous meeting as follows.

- Previous Rights of Way Decisions' – incorrectly numbered, to become 23 (a)
- Outstanding Decisions – incorrectly numbered, to become 23 (b) and 23 (c) respectively.

- Noted that there is no minute 26.

2.2 Resolved – that the minutes of the meeting held on 20 February 2018, as amended by the Committee, be approved and signed by the Chairman as a correct record.

3. Previous Decisions Progress Report

3.1 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).

4. Outstanding Applications and Delegated Decisions

4.1 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).

5. Definitive Map Modification Order

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

5.1 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 bridleway 1163 to Fyning Lane in the Parish of Rogate (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; to make clear that this is the lower test only that the path can be reasonably alleged to subsist.

5.2 The Chairman drew the Committee's attention to hard copies of documents which were circulated in advance of the meeting (the last document listed was received too late to circulate in advance of the meeting, but was provided in hard copy to the Committee) as follows:

- Evidence including photograph provided by the Grey family.
- Evidence including photographs and a map provided by Mr and Mrs Noble.
- Evidence including maps, a photograph and a list of claimed inaccuracies in the evidence user forms provided by Mr Wakefield.
- Letter from Wilsons Solicitors, solicitor for Mrs Abramavich.
- Letter from Mr Howland.
- Information provided by Mrs Howland – email to Mr Howland from Mr Dean Hall of Fyning Hill Estate.

5.3 Mr Johnny Grey, owner of Fyning Copse spoke in objection to the application. The Grey family has lived in their property since 1990. The community does not want this path, as shown by the 30 objections. The path is narrow, dark and overgrown, has no views and leads nowhere, and does not

directly lead to the village or connect with other paths in the woods. Evidence of use between 1975 and 1995 is exceptionally light and lacks credibility. Doubt is cast on the credibility of evidence in support as follows: some witnesses claim to have walked the path between 1995 and 1997, when it was a trench nearly 3m deep; and there are claims the surface was grass, when grass could never grow in this heavily wooded area. There was a legal boundary dispute with the applicant and a witness from 2006 to 2011; it is felt witnesses are not impartial. This conflict of interest is acknowledged by Rogate Parish Council. There is overwhelming evidence that this path is not a right of way because there is no mention of it in planning application documents, objections to planning applications, title deeds, property searches or estate agent listings. The right of way does not exist. No member of the Grey family has ever seen anyone use this path.

5.4 Mrs Belinda Noble, owner of Fyning Twitten spoke in objection to the application. Route A to B is not what is shown on historic maps, but is a boundary ditch at the edge of Fyning Hill Estate. Fyning Twitten land overlaps part of the claimed path, proving it ceased to exist in 1964 when the property was built, and predating the 20 year period of claimed use. Historic maps suggest B to C and A to B are the same width, but this is not the case. Fyning Hill Estate has many signs asking walkers to stay on signed paths, but A to B has never been signposted. The path was not identified in legal searches during the purchase of Fyning Twitten in 2013. This was stated during a later application for planning permission and was not challenged – the applicant sat on the planning committee, and chaired one of the meetings. The County Council's report states there is inconclusive historic evidence. Eight statements in support of the path is a limited body of evidence, and covers a period 20-40 years ago. Witness statements are inconsistent. The claimed path is not a good route to the village, being indirect and narrow. An alternative, ancient, well-established and more direct route exists. Residents along the route have experienced criminal offences and the creation of a footpath would increase vulnerability. B to C is the only vehicular access to Fyning Twitten, and making it a footpath would be dangerous because there is no room to pass. The report incorrectly summarises Mrs Noble's evidence. Rogate Parish Council previously discussed and rejected an identical application in favour of a different path, and this application was made soon after, although support was not unanimous.

5.5 Mr Julian Wakeland resident of Foresters Cottage spoke in objection to the application. Historic maps show that if the path did exist it passed through what is now the extension at Fyning Copse, therefore, the claimed route of the 20 year period 1975 to 1995 no longer exists. In the last 14-years the Wakefield's have used the route over 38,000 times and never seen any of the 16 people who have claimed use, and all but one of those witnesses claim use during that period. Evidence of use during 1975 to 1995 is also questioned; there are inconsistencies, including that the route is a grassy track – it is not; one user was unable to put a value on how often he has walked the route; two others who have claimed to walk the route when told by Police not to enter Mr Grey's property; none were aware of closures from 1996 to 1997; and one relies on evidence of a 6-year old using the path in 1975. The claims of seven people using the path amounts to 81 uses per year. The Committee rejected an application at its last meeting based on use by eight people 1652 times per year. A Rogate Parish Council survey for the Neighbourhood Plan shows little interest

in additional public footpaths, but many asked for the current network to be better maintained. The intersection at point B would be a safety risk, as it is the only vehicular access to Fyning Twitten and Foresters Cottage.

5.6 Ms Ann Arnold, the applicant spoke in support of the application. Many villagers wish to protect the heritage of public rights of way. The path is clearly marked on maps dating back to 1873. Draft and definitive maps from 1950 identify the route and label it 'FP' at point B. Land registry documents show the gap between the boundary of Fyning Copse and fenced land to the north of the path belonging to Fyning Hill Estate; this part is passable. The claim that the route leads nowhere is contested as it joins another path which leads to the village. Five of the local residents who are in support have lived in Rogate all their lives. The path was and is used and, when partly blocked from time to time was still used, although with difficulty. No-one has been challenged. Evidence that the claimed route is in an 'entirely private garden' (report: 5.3) is contradicted by the words 'part of the claimed route that is adjacent to their property boundary' (report: 5.5). There have never been any private ownership signs. Of the 30 objectors some have relationships to the Grey family, some are new to the village and others live elsewhere. The path is on maps, sales details and a later planning application for Fyning Twitten, so the owners were aware of it. The path is not a private access to Foresters Cottage. Route B to C is 3m wide, wider than the 6ft 6" sections of Fyning Lane, and so is safer. The Fyning Hill Estate landowners deposit threatens use of permissive paths on the estate.

5.7 Dr Mairi Rennie, resident of Fyning Lane spoke in support of the application. The path has been in use since before the existence of cars. It is still in existence, unowned and unmaintained. The path has always been walked without privacy, force or permission. There has never been a 'private' notice. Neither landowner can dedicate the path as they do not own it; and proof was submitted but not recorded in the report. Closure for various building works is not proved, and it was unwise to build an extension virtually on a path open to the public. The reported gates are unlocked. Claims that no-one has been seen using the path are not proof it is not used. Objectors refer to more attractive permissive paths, but there are concerns that the Fyning Hill Estate landowners deposit could lead to closure of other paths at any time, meaning this path could end up being the only path between fp 1163 and fp 1162. Older, long-term residents are more likely to use the path; there is sufficient evidence of use back to 1975 but many witnesses are no longer here. Archival evidence is inconclusive without living witnesses, but the paths are shown on various maps from 1843 onwards. The report confirms the path is on the Draft and Provisional Definitive maps. The application is a way of asserting the rights of residents and future generations. It fulfils all the requirements to justify an Order being made.

5.8 Dr O'Kelly left the meeting for the duration of the debate and vote on the item.

5.9 The Committee sought clarification on the following points:

- Whether there has ever been a public footpath sign in place on the claimed route?

The claimed route is not on the Definitive Map and so there have never been any West Sussex County Council public footpath signs.

- Is the only access to Foresters Cottage to drive along the route C to B?
This is the correct interpretation.
- Is there a risk, as mentioned by speakers, that other permissive paths could disappear?

Reference to landowner deposits would refer to S.31 Highways Act 1980. Section 31 deposits made by landowners will defeat a claim of dedication of a way as a highway. As for other permissive footpaths on the Fyning Hill Estate, permission could be withdrawn at any time.

5.10 In reaching a decision the Committee made the following points:

Historic and Archive evidence:

- There is old archival evidence of a path. Point A shows as a rudimentary stretch of ground which could be a footpath but there is a question around whether the footpath ceased to exist when building work took place in the 1960s, across the line of the path.
- The conflicting evidence is difficult, because some evidence shows what may be a boundary ditch, but some shows the remnants of an old footpath, particularly the eastern end which goes no real distance and then narrows and there are blockages. The western end is similar.
- The letters 'FP' on an old map is some evidence, but not firm evidence of a public right of way.
- The maxim – 'Once a highway always a highway'. This raises the question about how far back we look for evidence on the basis that some highways have been in existence since Roman times.

Evidence of use:

- Committee members generally agreed that evidence of use is conflicting. Witness statements are questioned, but have to be taken at face value. There is little credible evidence of actual use.
- It is believed that the Grey and Noble families would not have bought their properties if they had known there was a right of way at the side of their houses.

Use of paths in the area:

- Travelling from points A to B to C, which is a dogleg around the village, would not be a normal route to take to the south of the village. There are other paths in the proximity of the area that can be used without needing to access this path and are easier to walk along - fp 1163 and Fyning Lane.
- The path is very narrow by Fyning Copse, through the gate. It is obstructed and it is hard to see how any could use it. It was questioned why anyone would want to use it, given that an easier footpath exists not far away.

Rogate Parish Council

- Minutes of the Rogate Parish Council meeting of 28 November 2016 were quoted, noting that this matter has divided the community. One

point highlights that Fyning Hill Estate offered an alternative east-west route, and offered to move the path south of Foresters Cottage and improve the surface and make it more passable in winter. The Parish Council voted on two resolutions; the first vote was to submit the application to West Sussex County Council which was defeated, although the applicant had voted in favour of this. The other vote, which was carried, was to accept the Fyning Hill Estate offer. It was noted that the applicant, a member of Rogate Parish Council, filed this application a week later.

- Rogate Parish Council's response dated 12 December 2017 to this application states that it is aware that there is body of evidence dating back to 1810 and confirms this is an ancient path, and in consequence it supports the application.

Other Matters

- A lot of rights of way were work paths in olden days, and it is important to recognise that there are paths that don't always fit with modern living. It is not certain that this path is worthy of protection.

5.11 The motion below was proposed by Mr Bradbury and seconded by Mr Baldwin, and was voted on by the Committee and approved by a majority. The result of the vote was 7 members in favour and 1 member, the Chairman, abstained. Due to her declared personal and prejudicial interest in the application Dr O'Kelly did not participate in the vote:

That the Rights of Way Committee refuses the application on the following grounds:

There is a conflict of evidence provided in support and against the application. Having heard the representations by all parties and understanding the evidence summarised in the report, it is concluded that the evidence in objection is considerable with little credible evidence of actual use in support and thus the claimed route cannot reasonably be alleged to subsist, and that an Order to add the path to the Definitive Map be not made.

5.12 Resolved – that an Order to add the path to the Definitive Map be not made.

5.13 The Committee recessed at 3.41 p.m. and reconvened at 3.46 p.m.

5.14 Dr O'Kelly re-joined the meeting.

6. Public Path Order Proposal

Lancing: Proposed Diversion of Part of Public Footpath 2048

6.1 The Committee considered a report by the Director of Highways and Transport concerning an application, upon which the County Council, as the highways authority, has been consulted by Adur & Worthing Councils. The Environment Agency proposes to divert part of a part of public footpath 2048 between Old Shoreham Road and a bridge carrying the south coast railway to the south. Given officers' concerns, 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. The following points, in addition to the report, were provided for the purposes of clarity:

- It is understood it is now intended that the drainage ditch adjacent to Cecil Pashley Way will be modified to a French drain (a sculptured ditch filled with porous materials) rather than as noted in the report.
- There are concerns regarding safety and potential conflicts between users, particularly the use by cyclists riding at speed.

6.2 Laura Floodgate, Solicitor clarified that an application for outline consent has been made but not yet granted for development at New Monks Farm. Mr Whittington clarified that this development is not specifically mentioned in the report but it lies to the north-west of the airfield. It will be a large residential and business development and includes plans for the realignment of roundabout junctions on the A27. The County Council's Walking and Cycling Strategy notes this will be a key route to the town centre and railway station, which will link with the national cycling network.

6.3 Mr Graeme McClure, Project Manager, Environment Agency spoke in support of the application to Adur & Worthing Councils. The Environment Agency intends to invest £40 million in this location to protect 2,300 houses and 390 businesses in Shoreham from the risk of tidal flooding. The intention is to replace the existing embankment, which is in poor condition and has a low residual life; seepage was noted this January. As recently as 2013, a flood event caused Shoreham airport to flood, temporarily closing it and the footpath. A higher embankment is intended to protect against a 1 in 300-year flood event. This new embankment will be further from the river and up against the ditch. This is to replace habitat which has been lost elsewhere by building the new flood defences. Requirement to provide habitat and the presence of the road and ditch are constraints. However, the footpath will be an improvement on what is currently there and provides sections of wider passing places. A section 73 amendment to the planning consent is being prepared in relation to the works on the ditch.

6.4 The Committee noted that Mrs Bridges, local member for Lancing advised she will not attend the meeting.

6.5 The Committee sought clarification on the following points:

- Could the width of the path be improved if the drain could be moved?

The Environment Agency does not propose to alter the alignment of the existing drain, which is close to the road, so this will remain a limitation for the future.

- Could more consideration be given to the widening the path?

The Environment Agency has conflicting duties which are limiting the proposal. Whilst the County Council has been in discussion with the Environment Agency for some years, this proposed route does not meet the minimum standard of the County Council.

- The duty of the Environment Agency to replace habitat lost was acknowledged, but it was questioned if this replacement habitat could be

provided elsewhere to allow this scheme to then meet the County Council's standards for footpath width and safety?

The Environment Agency can do this but it is understood that it has examined other options in Shoreham Harbour and has not found the size of area it needs to create replacement habitat. The Committee questioned if compensatory habitat needs to be in the area of Shoreham and were advised that if this is the wish of the Committee then it can be made clear to the Environment Agency this should be explored.

- Is the minimum path width of 2 metres a County Council requirement or a recommendation?

2 metres has been the County Council's standard for several decades. No recollection can be made of any path diversion less than this. Best practice aims to achieve more than this for popular paths.

- Could the Environment Agency proceed without the County Council's approval, given that it is only a statutory consultee on this application?

Planning consent and consent to divert a highway are separate matters. Planning consent means that the Agency could proceed, but without a Path Diversion Order the existing route cannot be stopped-up; so, on completion of the new embankment the old embankment must remain until the path is legally diverted. Adur & Worthing Council cannot confirm a diversion order with an unresolved objection in place, meaning the matter would be referred to the Planning Inspectorate for decision.

- Would a decision by the Committee to maintain an objection hold up the essential work on the new flood defences by the Environment Agency?

The work has started already.

- What would happen if the Committee were to object to the proposal?

There would be two likely options: 1) to ask the Environment Agency to revise its proposal; and, 2) that this Committee's objection is noted by Adur & Worthing Councils meaning it cannot confirm a diversion order and the matter would be referred to the Planning Inspectorate.

- Who is liable for any incidents if this scheme is approved, even by the Planning Inspectorate?

Liability is determined on a case by case basis but as a highway authority we have a considerable duty to ensure highways are fit for purpose. What is being proposed does not meet the standards of the County Council.

6.6 In reaching a decision the Committee made the following points:

- It is not for the Committee to provide solutions, which lie with the Environment Agency who is obliged to carry out the flood defence works and wants to provide a path which does not meet the County Council's standard. It is incumbent on the Committee to oppose a scheme which is not to this standard.
- The Committee stressed it was concerned not to put at risk the much needed investment by Environment Agency in the area.
- Increased use of the path is likely and this is a concern, especially with the proposed width. Some Committee members were very familiar with

the existing path and noted how narrow it is and the fact that the proposed path is not much wider.

- Recent seepage and likelihood of the failure of the embankment consideration needs to be given to a pragmatic decision.
- The proposal means that views from the new embankment will be a bit further from the river but are still nice, as are views from the other side. There will also be views of the new area of marshland.

6.7 The motion below was proposed by Mr Acraman and seconded by Mrs Duncton, and was voted on by the Committee and approved unanimously:

That Rights of Way Committee requires the County Council to maintain its objection to the Environment Agency's application to Adur & Worthing Councils on the following grounds:

That the proposed provision of the new alignment of Public Footpath 2048 (FP2048) between Old Shoreham Road and a bridge carrying the south coast railway to the south is not to the standard the County Council ordinarily requires to support a diversion, and it is counter to the County Council's 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).

6.8 Additionally, the Committee stated that it hoped for an ongoing dialogue between the County Council and the Environment Agency about this scheme.

6.9 Resolved – That Rights of Way Committee requires the County Council to maintain its objection to the Environment Agency's application to Adur & Worthing Councils for the reasons already stated:

7. Public Path Order Proposal

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

7.1 The Committee considered a report by the Director of Highways and Transport, concerning an application for diversion of parts of footpaths (fp) 871, 872 and 873 and creation of new footpath on disused railway at Elsted and Treyford, and Harting (copy appended to the signed version of the minutes). Judith Grimwood, Senior Rights of Way Officer introduced the report. Diversion Orders made following officer delegated decision attracted two objections which have been reviewed in the context of the legal tests. It is still considered that the legal tests for making the Order have been met and the Committee was specifically asked to note Appendix 1, Inspecting Officer's Report which explains the background and context to the original decision that the Orders be made. It is considered that the Orders should be submitted by the Director of Law and Assurance to the Secretary of State for confirmation.

7.2 In reaching a decision the Committee made the following points:

- In relation to distance and convenience, an additional 300m is not substantially inconvenient.

- There will be better walking conditions and the reduction in stiles is good.
- Views are acceptable throughout and although in the southern part this is limited by woods there are particularly good views from the top of the railway line and at point X. So, overall views are enhanced.
- Character is more subjective, but there will be more variation.
- It was agreed that as stated in paragraph 4.1 of the Committee report 'The new paths will provide some pleasant, easy to follow alternative routes with improved surface conditions and open access free from stiles'.

7.3 The officer recommendation was put to the Committee and approved unanimously.

7.4 Resolved – 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.

8. Secretary of State Decision

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

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

8.1 The Committee received and noted a report by the Director of Law and Assurance setting out the outcomes of recent decisions made by the Secretary of State (copy attached to the signed minutes).

8.2 The Committee wished it to be recorded that the outcome is noted with disappointment.

9. Date of Next Meeting

9.1. The Committee noted that its next scheduled meeting would be held at 2.15 p.m. on Tuesday 30 October 2018.

The meeting ended at 4.37 pm

Chairman