

Planning and Rights of Way Committee

12 October 2021

Definitive Map Modification Order Application for DMMOs 4, 5, 6/19 in the parishes of Bognor Regis, Felpham and Bersted

- (1) Addition of a footpath from Brooks Lane to Downview School**
- (2) Addition of a footpath from the field adjacent to the rife to the Leisure Centre**
- (3) Addition of a footpath around the main field adjacent to the rife**

Report by Director of Law and Assurance

Electoral divisions: Bognor Regis East and Felpham

Summary

The application was submitted with 107 public way evidence forms testifying to use of three claimed routes between 1964 – 2021.

The relevant 20 year period of continuous use for the purpose of the application is 1998 – 2018.

It is concluded that the credible evidence from a significant number of users meets the legal tests and that orders should be made to add the paths to the definitive map.

Recommendations

- (1) Application Route 1 has, on the balance of probabilities, been proven to subsist and a definitive map modification order should be made.**
 - (2) Application Route 2 has, on the balance of probabilities, been proven to subsist and a definitive map modification order should be made.**
 - (3) Application Route 3 has, on the balance of probabilities, been proven to subsist and a definitive map modification order should be made.**
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1. Introduction

- 1.1 The application, made by David Meagher and Rachel Searle, was received on 23 May 2019 to add three new footpaths to the definitive map and statement in the parishes of Bersted, Bognor Regis and Felpham. It is supported by 107 public way user evidence forms, testifying to the use of 110 users. The paths are referred to as follows throughout this report and are shown on the plan at Appendix 2.
- 1.2 The application is made under Section 53 (5) and is reliant on 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 first route which is being sought by the applicants ("Application Route 1") begins at Brooks Lane (grid reference 494229, 100332) and proceeds in a north-east direction across the rife to Downview School (grid reference 494783, 100624).
- 2.2 The second route ("Application Route 2") begins at grid reference 494309, 100389 and proceeds in a south-east direction until it terminates at the Leisure Centre (grid reference 494603, 100259).
- 2.3 The third route ("Application Route 3") is a circular walk around the main field adjacent to the rife.

3 Land Ownership

- 3.1 Land Registry documents show there to be several different landowners for the land within the application, there is also some unregistered land. The landowners are B5 Limited, J Langmead, L MacKendrick, A Morgan, S Morgan, J Morgan, K Trenam, C Fuente, D Fuente and K Fuente, Downview Primary School, Sime Derby.
- 3.2 The applicant served notice of the application on each individual landowner on 13 July 2019. The applicant also displayed a copy of the notice on the claimed routes.

4 Consultations

- 4.1 Standard consultations were sent to the amenity groups, the District Council, Town Council and the South Downs National Park Authority.

4.2 The following comments were received:

4.3 Bognor Regis Town Council and Town Mayor Cllr Stephen Reynolds:

"Bognor Regis Town Council and I strongly supports this application for the following reasons:

1. Footpaths represent a suitable form of transport
2. It provides the healthy pursuit of walking and therefore reduces pollution
3. Serves as an amenity for residents of all ages to walk safely to Bognor Regis, Downview Junior School, Felpham College and Arun Leisure Centre
4. Provides a footpath link between the parishes
5. The footpath also is a "greenway" which encourages the movement of wildlife and migratory birds
6. The footpath is also a potential strategic link to the South Downs"

4.4 The South Downs National Park Authority:

"The proposed paths are located outside the National Park boundary and the SDNPA Access team has no evidence to support or refute the claim. However, we would like to make the following observations:

- The additional paths will add value to the network locally and open up new opportunities for self-guided walks into the National Park using a combination of rights of way and quiet lanes. For example, via Barnham and Walberton/Fontwell.
- The South Downs Partnership Management priority 5.2 identifies a need to improve accessibility through a network of high-quality routes connecting communities with the landscape, heritage, attractions and transport hubs and gateways. This application supports this priority and would enable communities outside the boundary to travel more sustainably to the National Park.
- The creation or confirmation of new rights of way locally will also enable more opportunities for people to improve their health and well-being."

4.5 The West Sussex Ramblers:

"We can see that it is obvious that the footpaths have provided useful links with current Rights of Way. The addition of the 3 footpaths outlined in the application would provide a significant enhancement to the Rights of Way network in the area and would retain the use of links that local residents have obviously benefitted from over many years. I confirm that Ramblers support this valid application."

4.6 Nick Gibb MP:

"I understand the applications have been submitted on behalf of the Save Aldingbourne Rife Paths Action Group as the footpaths represent an historical use of footpaths which have been used for over fifty years. The paths are an

important means of communication between the parishes Felpham, Bersted and Bognor Regis. The paths are also significant for school children and students who attend Downview Primary School and Felpham Community College. Several generations of families have used these routes which also represent an amenity for local people to enjoy the countryside.”

4.7 Felpham Community College:

“I am pleased to learn that there is an application underway to designate an existing path from Glenwood to Arun Leisure Centre / Felpham Community College as a Public Footpath and would like to give this application full support on behalf our school community. We hope that Public Footpath status will enable the future of the path to be safeguarded as a pedestrian route to college for current and future students and staff. We understand that the footpath from Brooks Lane across Aldingbourne Rife and across two fields to Arun Leisure Centre / Felpham Community College has been used by students from the Glenwood and Highfield Road areas of Bognor Regis since the college was opened in 1974.”

4.8 Local Member – Francis Oppler:

“In regards to the addition of the footpaths along the Rife, I would just like to add my support as one of the local members. I have spoken to many residents who have confirmed that the public use of these footpaths go back at least fifty years if not longer.”

5 Evidence submitted in support of the application

5.1 The application was made following the installation of temporary fencing to part of the claimed application routes in 2018.

5.2 The application is supported by 107 public way user evidence forms, testifying to the use by 110 individuals from 108 postal addresses over the period of 1964 to 2021.

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

5.3.1 all of the users claim to have used the routes on foot.

5.3.2 seventeen of the users claim to have used the routes on a bicycle.

5.4 None of the claimed users report to having been turned away whilst using the routes or claim to have seen any notices or otherwise preventing them from using the routes.

5.5 A number of users claim that access to the bridge and field was blocked briefly in 2018 when temporary fencing was erected. The fencing was removed a short time after it was erected and use of the routes resumed until 2021 when the application routes were blocked again by fencing.

5.6 Two users claim to have sought permission to access part of Application Route 1 on the Felpham side, e.g., the land registered under title number WSX156149.

5.7 All users report to have seen others using the routes either on bicycles and/or walking.

5.8 Breakdown of user evidence forms between the three routes

5.8.1 93 users claim the use of all three routes.

5.8.2 12 users claim the use of two routes.

5.8.3 5 users claim the use of only one route.

6 Evidence submitted against the application

6.1 A joint objection was received from the following landowners: J Langmead, L MacKendrick, A Morgan, S Morgan, J Morgan, K Trenam, C Fuente, D Fuente and K Fuente. The objection relates to land which is affected by the north eastern part of Application Route 1. The objection stated that permissive paths have been in existence across their parcel of land WSX156149 since 2017. The landowners have provided copies of notices dated May 2019 and have claimed that the notices are identical to notices which they state were placed on the land in 2017.

6.2 The above landowners have also confirmed that they deposited a section 31(6) Highways Act 1980 landowner statement with the County Council in May 2019.

Officer comment: The section 31(6) Highways Act 1980 landowner deposit falls outside of the relevant 20 year period and so this is not relevant when determining this application.

6.3 Mr Richard Brooks, who is the owner of the field registered under title number WSX165655 and which is affected by Application Route 1, Application Route 2 and Application Route 3, has submitted an objection to the application. Mr Brooks purchased the land in 2016. Mr Brooks states that each year the application routes which cross his land are muddy, rotted and covered in blackberry bushes. Mr Brooks advised that when he initially purchased the land, he tried to erect fencing panels which he claims were subsequently removed by the general public.

6.4 Mr Brooks stated that originally, he was happy to allow the public use of one path across the land but that he does not agree with the three routes that are now being claimed in the application.

6.5 Mr Callan Wood, who is purchasing the land currently owned by B5 Limited/Richard Brooks and registered under title number WSX165655, has submitted an objection to the application. Mr Wood states that he does not believe that private land should be allowed to be used by the public and has confirmed that he has erected fencing on the land to stop public use.

7 Archive evidence

7.1 The officer consulted the Sussex Series Ordnance Survey Maps dated 1863-1895, 1896-1899, 1909-1916 and 1930-1946 and concluded that none of these maps showed evidence of a historic right of way.

7.2 The officer consulted the Draft and Provisional Definitive Maps and concluded that neither map showed evidence of a historic right of way.

8 Consideration of claim

8.1 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 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.

9. The 20 Year Period

9.1 Under Section 31 of the Highways Act 1980, a relevant date needs to be established in order to establish the 20 year period. The 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 fencing was erected on the land which prevented public use of the routes first in 2018. Therefore, the relevant 20 year period for the purpose of determining this application is 1998 – 2018.

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 110 users claimed to have used all three of the claimed routes within the application, 50 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 1095 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 routes have been used by 110 users, 50 of which have used the routes continuously from 1998 – 2018. This is a significant number of users.

10.3 None of the users referenced in 10.2 above report to have been challenged whilst using the route or to have been given permission to use the route during the 20 year period. It therefore appears that access to the routes within the application has been available throughout the relevant period until the fencing and obstructions appeared in October/November 2018.

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 he later makes it clear he did not support the use of the path during the relevant period, his 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 One of the landowners, Mr Brooks, has confirmed that he was aware of the public use of the application routes across his land and acknowledged that he was agreeable to allowing the use of one of the paths. It can be concluded that he tolerated the use in this instance.
- 10.6 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 his conduct e.g. by closing the path occasionally) that his consent could be withdrawn in the future. In that case the use would be with permission and not as of right.
- 10.7 J Langmead, L MacKendrick, A Morgan, S Morgan, J Morgan, K Trenam, C Fuente, D Fuente and K Fuente claim that notices were erected on their land in 2017 which advised the public of the public rights of way over their land and also paths which they have given the public permission to use. The permissive paths are shown on the map provided in section 4 of the background papers. Whilst Application Route 1 does not appear to represent the permissive path shown on the notices, the notices do state that any other use of the land is not permitted. It could therefore be argued that the notices showed an interruption to use within the 20 year period.

However, it should be noted that none of the 110 users, a significant number, claim to have seen any notices across the application land in 2017. The landowners have also only provided copies of notices that are dated May 2019 and have not been able to provide copies of the notices which were placed on the land in 2017.

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 all three application routes. User evidence submitted in support of the application shows 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 further consider whether there is sufficient evidence of no intention during the relevant 20 year period to dedicate by the landowner.
- 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 10.7 above, it could be argued that the 'private land and permissive path' notices which affect part of Application Route 1, which the landowners say were erected in 2017, may show an intention that the landowners did not intend to dedicate the land to the public during the relevant period. However, as the landowners have not been able to provide evidence to support to this claim, and the fact that none of the 110 users, a

substantial number, claim to have seen any notices on the land, this claim has been given less weight.

- 11.4 There is no other evidence of no intention to dedicate in relation to all the claimed routes.

12. Common Law

- 12.1 At Common Law a right of way may be created through expressed 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 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, therefore any periods in which the land was occupied by tenants could not be included in the period of user.
- 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 rights of way have been created at common law.

13. Overall Conclusion and Recommendation

Application Route 1

- 13.1 The applicant has produced a substantial amount of credible evidence which demonstrates clear use of Application route 1, as of right, during the 20 year period. The landowner states that notices which were placed on the land for Application Route 1 could be argued to show that the owners did not intend to dedicate a public footpath across their land. The landowner states that these notices were erected in 2017, albeit they have not been able to support this assertion with documentary evidence. As such, it is not considered that there is a conflict of credible evidence of use and landowner submissions.
- 13.2 It is concluded that the legal tests have been met and that on the balance of probabilities Application Route 1 has been proven to subsist.
- 13.3 It is therefore recommended that an order should be made to add Application Route 1 to the definitive map.

Application Route 2 and Application Route 3

- 13.4 The applicant has produced a substantial amount of credible evidence which demonstrates clear use of Application Route 2 and Application Route 3 during the relevant 20 year period.

- 13.5 It is considered that the legal tests have been met and that on the balance of probabilities Application Route 2 and Application Route 3 have been proven to subsist.
- 13.6 It is therefore recommended that orders should be made to add Application Route 2 and Application Route 3 to the definitive map.

14. Consultation, engagement and advice

- 14.1 See paragraph 4 above which details responses to the 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 submission of the order are borne by the County Council. This includes but is not limited to fees relating to the venue hire, fees relating to advert.
 - ii. Should an order be made and confirmed; if any works are necessary to ensure the path is open for public use.
 - iii. Should the decision of the committee be challenged by way of Judicial Review.
- 15.3 The decision taken by the investigating officer and the Rights of Way Committee is a decision 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 investigating 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 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 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.

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 contribute towards the Council stated ambition of being carbon neutral by 2030, however such considerations are not matters that can be taken into account when consideration 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 test.

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Appendices

- Appendix 1 – Location plan
- Appendix 2 – Site plan

Background papers **

- (1) Application and plan
- (2) Witness list
- (3) Letters and emails of support
- (4) Landowner objections

**** Please contact the contact officer to request a copy of the background papers**