



Order Decision

Inquiry opened on 22 February 2021

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 08 July 2021

Order Ref: ROW/3234285

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the West Sussex County Council (Midhurst No. 1: Rogate (Addition of Public Footpath)) Definitive Map Modification Order 2019.
- The Order is dated 12 February 2019 and proposes to record a public footpath lying generally to the north-west of the village of Terwick Common. Full details of the route are given in the Order Map and Schedule.
- There were nine objections outstanding when West Sussex Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Procedural Matters

The Application and Making of the Order

1. An application was made under Section 53 of the Wildlife and Countryside Act 1981 ("the 1981 Act") in December 2016 to add to the Definitive Map and Statement ("the DMS") a footpath at Fyning Lane in the Parish of Rogate.
2. Following investigation of the application the Officer reported to the order-making authority ("the OMA"), West Sussex County Council's Rights of Way Committee on the 12 June 2018. Although the Officer's recommendation was that a Definitive Map Modification Order ("DMMO") should be made, the Committee members resolved that it should not.
3. An appeal was made against this decision under Section 53(5) and paragraph 4(1) of Schedule 14 to the 1981 Act. The decision of 25 January 2019 directed that the Order be made, on the basis that it a right of way was reasonably alleged to subsist. The OMA made the Order as directed and, although taking a neutral stance with regard to confirmation, they assisted the Inquiry, in particular helpfully hosting the documents on their website.

The Inquiry

4. In light of the Government health restrictions in place to deal with the Covid-19 pandemic the Inquiry was held as a virtual event, that is online. A test event/pre-Inquiry meeting was held on 11 February 2021, with further opportunities for generic test event participation.
5. Holding the Inquiry virtually meant that instead of travelling in person to the event, participants were able to take part from their own home, office or other location that best suited them. This avoided concerns relating to any local, or national, restriction that could be put in place with little notice, as well as taking account of the potential vulnerability of witnesses. Such an event

makes use of Microsoft Teams allowing participants to take part, or watch/listen in, using computer, laptop, tablet, smart phone, or landline.

6. The purpose of the Inquiry remained the same – for me as the Inspector to see and hear the relevant evidence. The written submissions form part of the Inquiry evidence which I have also considered in writing my decision.
7. I opened the Inquiry on 22 February 2021 and adjourned on 24 February to resume on 22 April. The Inquiry was closed on 23 April 2021, having sat for five days in total.

Site visit

8. I made an unaccompanied site visit on 18 February 2021, for which the gate between points A and B¹ was left unlocked. No request was made at the close of the Inquiry for an accompanied site visit.

Main issues

9. The Order is made under section 53(2)(b) of the 1981 Act by reference to section 53(3)(c), which states that an Order should be made to modify the DMS on the discovery of evidence which, when considered with all other relevant evidence available, shows:

"(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies."

10. The supporter² to the Order relied primarily on the statute, section 31 of the Highways Act 1980 ("the 1980 Act"). The sub-sections of particular relevance are set out below:

(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes—

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway...

¹ Points A, B and C are shown in the Order map

² With the OMA taking a neutral stance the case in support of the Order was led by applicant, with particular assistance from two parties. I refer to these parties as the supporters in this decision

...

(7) For the purposes of the foregoing provisions of this section "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5), (6), (6C) and (13) "the appropriate council" means the council of the county, metropolitan district or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsections (6), (6C) and (13)) is situated or, where the way or land is situated in the City, the Common Council.

11. Before a presumption of dedication can be inferred under the statute, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'brought into question'. There was disagreement as to the appropriate date, with suggestion of changing evidence in order to meet challenges raised in proving the case for particular time periods. It is not unusual for the date of challenge to be revised due to additional information through the course of the process and I shall determine the relevant date and twenty-year period from the evidence.
12. To give rise to a presumption of dedication, it needs to be shown that there has been use as of right, that is without force, secrecy, or permission, and without interruption, throughout the relevant twenty-year period. The objectors³ were of the view that there had not been sufficient use to give rise to a presumption of dedication, with suggesting use by permission.
13. If the matter fails under the statute, then I will need to consider whether there was evidence of dedication at common law. Common law dedication may be shown by reference to documentary or user evidence, with the burden of proof lying on those making the claim for the existence of the rights.
14. Documentary evidence has been provided, such as maps and photographs. Section 32 of the 1980 Act sets out that "*A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.*"
15. I can only confirm the Order if I am satisfied, on the balance of probabilities, that a public right of way subsists.

Reasons

Background

16. The Order route has two sections, A – B⁴ running generally east - west to the south of an area of woodland identified on mapping as Fyning Common. This is not recorded as common land and there are public rights of way and other routes in existence on the land. The eastern end runs alongside the vehicular

³ When referring to objectors in this decision I am primarily referring to those who took an active role in the Inquiry. I shall also refer to the written objections as appropriate.

⁴ A – B – C are shown on the Order map.

access to the property Fyning Copse ("FC"), in part over unregistered land to the south of the property Heather Bank. There is a gate in a fence allowing access into the woodland, which I understand to be regularly used. The Order route continues to the north of the FC buildings, apparently within the garden, and north of Fyning Twitten ("FT"), outside the panelled garden fence. For the majority of its length it lies to the south of a bund, bank, or berm.

17. Section B – C runs generally north – south to the west of FT. It provides vehicular access to FT and Fyning Common, including the property Forrester's Cottage. This section of the route runs between hedge banks.
18. There was a great deal of concern regarding motives in this case. The supporters indicated it arose from worry on the potential loss of rights of way due to the legislative changes for recording of such routes, expected to take effect from 1 January 2026. The objectors suggested there was a personal animosity from the supporters, with other disputes raised within Rogate Parish Council ("RPC") by these parties and potential connection with a legal dispute.
19. Whilst there was some disquiet as to the matters being raised in a public forum, issues between parties can lead to a bias in the way in which evidence is presented and so can be relevant to the decision. This is not an unusual situation, although I found the level of hostility between the parties to be at the higher end of what is normally experienced. I bear in mind that arguments on both sides can be slanted towards a particular 'agenda'. I will take account of the evidence as a whole, with the 'neutral' documentary evidence helping me to understand and weigh any potentially 'non-neutral' evidence arising from the conflict of user and landowner testimony.

Documentary evidence

Tithe Map, 1843

20. Section B – C of the Order route was shown. Whilst it demonstrates the existence of a physical route at the time, it provides no evidence that the route was public, as a private right of way could also diminish the productivity of the land for the purpose of tithe assessment. The tithe documents arise from the Tithe Commutation Act 1836 (amended in 1837), which converted tithes to a fixed money rent and are concerned with identifying titheable land.

Rogate Inclosure Map, 1856

21. Whilst Inclosure Award maps and associated documents can provide relevant information in such matters the Order route lies outside the areas affected by the Inclosure. It is unclear from the documents provided, which with the exception of part of the map in the PowerPoint presentation were not good clean copies, whether there was more than one award in this area.
22. The southern boundary of the Rogate Inclosure awarded area seems to follow the northern boundary of section A - B of the Order route, with another map reflecting this. Part of an award was submitted, which refers to the setting out of a public driftway and a public footway, but there is no evidence to show that either of these relate to the Order route. The documents provide no information on the existence or status of the Order route.

Ordnance Survey maps

23. The formation of the Ordnance Survey ("OS") was in response to a military need for accurate maps. Over the years, OS developed a variety of maps to meet the growing need for accurate and up-to-date maps of the UK and the production of maps for sale to the public became an activity of increasing importance to OS from the early twentieth century. Since 1888 OS maps have 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 right of way.
24. The earliest OS map available was said to be surveyed in 1869 and published in 1870. It shows a route on the alignment B – C, with a solid black line to the west, suggesting a hedge, and a dashed line to the east, suggesting a defined route on the ground. A feature shown by double dashed lines follows the approximate route A – B although, particularly at the eastern end, this is noticeably south of the northern boundary line.
25. By the time of the 1913, revised 1920, map the land to the west had been separated by way of fences/hedges, with B – C enclosed on both sides, probably by hedges as is now the case. The western section of A – B was also shown between features, probably the bund on the Fyning Hill Estate ("FHE") land and a fence on the northern boundary of FT. The eastern end continued as a double-dashed line through the land as previously, with a further double-dashed feature heading north into the FHE land. The route was annotated 'F.P.' at the FT end.
26. What appears to be a sales map, apparently related to a sale of Rogate Estate in 1958, provides no additional information. It is based on an OS map and, as a result, shows the route in the same manner. Information on the plot identified as number 23 may have assisted but it is not before me.
27. The OS base map used by Land Registry ("LR") for Title WSX 194287, FT, Crown copyright 1991, shows the boundary to FT as a solid feature with northern edge a dashed line. A double-solid line to the east, north of FC, suggests hedges/fences on both sides. This is annotated "*Path (um)*"⁵ and the eastern alignment now runs to the north of the original alignment. The residential properties of FT and FC are shown on this mapping.
28. Although OS maps are reliable in terms of physical characteristics their purpose was not to identify whether routes were public or private. I am satisfied that a route has physically existed in the approximate alignment of the Order route from at least 1869. The western end, B – C has not significantly altered in alignment. The section east of point B, north of FT, has been a separate feature from the property for at least 100 years, whilst the eastern end, towards point A, altered in the mid-twentieth century.

Photographs

29. Photographs were submitted in objection to show the use of the garden area around FC over the years of the current ownership from 1990. These show the general use that might be expected in a family garden, alongside development and use of the land in connection with family and business. My attention was drawn to certain features, for example fallen trees and the location of the house extension, to support the argument that members of the public would

⁵ Unmade

have been seen had they been using the claimed route. Taking account of the purpose of these photographs, in line with section 32 of the 1980 Act, I give very little weight to them as assisting me in this decision. I also agree with the supporters that changes could have been made more recently to alter the appearance of the area in photographs or during my site visit.

30. Additional photographs showed the fencing and trees to the north of FT, with arguments as to whether people would have been able to walk through when they claimed they did. Other photographs on section B – C related to notices associated with forestry works, which were also shown. There was also photographs of notices associated with the FHE land.
31. Photographs may confirm the existence of a feature at the time that they were taken. However, they are always limited by viewpoint and cannot provide evidence of the status, or lack of status.

Planning information

32. In February 1956 an application was made for permission to develop the land, which relates to FT and other development in that area. The "*Existing access proposed to be used on the Western boundary of the property*" would relate to the Order route section B – C.
33. It seems that properties on both FT and FC were built in the early 1960s⁶, with the eastern end of the Order route altered to accommodate the driveway to FC from Sandy Lane, Bridleway 1163 ("BR1163"). The claimed route runs on the bank to the north of the driveway, in part on unregistered land.
34. There have been subsequent planning applications relating to FC. FT has also been subject to change, having been demolished for erection of the current residence, subject to planning applications in 2015. It was argued that the failure of some of those acting in support of the Order to comment on the claimed route in relation to more recent planning applications showed that they did not, at that time, believe there to be a footpath in this location; they were on the Parish Council and so could comment on planning applications. However, it is the case that the route was not a recorded right of way and I give little weight to this matter.
35. The plan of a proposed annexe to FC, dated 20/2/90, identifies a "*Footpath (unclaimed)*" by way of a double-line to the north of the property, with the "*Woodland*" identified to the north. This plan appears to have been drawn up for the former owners of FC, not long before the change in ownership. A plan associated with RG/70/90, 10/07/90, shows a 'Footpath'.
36. The location plan relating to the 1993 application RG/93/01771/DOM, identifies a 'footpath'. The related Case Officer's Sheet notes "*Neighbouring path is not a registered Footpath.*" The Case Officer's Sheet in relation to RG94/00996/DOM notes "*...distance of 3½ m to boundary (chicken wire fence) – woodland to N of this – small footpath (not public) is parallel to rear boundary. On house side of boundary several medium sized trees/shrubs...*". A plan relating to extension of the studio in 1996, RG/96/0211/DOM, shows a 'Footpath'.
37. In relation to a refused planning application No. RG/02/02613/DOM for an arts and crafts studio a 2002 letter from the Planning Officer for Sussex Downs

⁶ With the date of the planning permission FT may to have been in the late 1950s

Conservation Board, in relation to notes, "*I believe that the site might be visible from the path that runs along the northern boundary of the property, but this is not shown on the definitive map as a right of way.*" The Planning Comments indicate that "*The northern boundary off the site is contiguous with a 'permissive' footpath which gives way to a large area of mixed woodland to the north.*" The report of the Officer's site visit, of 9 October 2002, refers to "*...sporadic hedge/shrubs to northern boundary which is flanked by permissive path, countryside, company owned woodland.*" An associated plan shows a boundary for FC to the south of the claimed route, with 'Path (um)' indicated, whilst another shows the 'SITE BOUNDARY' and the 'footpath' to the north of it.

38. Planning permission documents and case officers have consistently identified a physical route on the ground in this location, which corresponds with the route identified in earlier mapping information.

Ownership matters

39. It is not my role to directly determine ownership, however, I was referred to *Lewis v Thomas (1950)*⁷ in relation to a quote from "*...Poole v. Huskinson that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment. If you bear quite clearly in mind what is meant by an act of interruption by the owner, if it is an effective act of interruption by the owner--I mean by the owner himself--and is effective in the sense that it is acquiesced in, then I agree that a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public...*" (my emphasis). Section 31(7) of the 1980 Act also assists as to identification of the 'owner' in these cases.
40. I am aware that LR Title Plans do not provide definitive evidence of boundaries. However, the matter of ownership is important in these cases, as only the freehold owner can show a lack of intention to dedicate a public right of way. Such determinations as I make are not binding in relation to any other relevant finding on this matter, only in relation to the claim for a public right of way over the land in question.
41. The owners of FT accept that their title, as shown in the LR Title plan for WSX194287, does not include the land crossed by the Order route and that this was shown as being part of the FHE land. Reliance was placed on a MapSearch Snapshot, which appeared to show the land boundary of FC (LR Title plan number WSX157349) to the north of the Order route, abutting the FHE land (LR Title plan number WSX95212). However, I consider the relevant LR Title plans, which are at larger scale particularly for FC, are clear in showing that the boundary between the properties lies to the south of the Order route.
42. I understand there to have been a boundary dispute in the period 2006 – 2011, relating to part of the southern boundary of FC. A site survey plan was drawn up by Sterling Surveys to assist, which clearly shows the boundary in line with the LR Title plan, that is with the 'Path (um)' as a physical feature adjacent to and outside the northern boundary of FC. Whilst the dispute related to land to the south it seems to me that a landowner would be especially careful in ensuring that all boundaries were correctly identified when this was the matter at stake in a legal case; this document was attached to a statutory declaration signed by the owner of FC in June 2008.

⁷ [1950] 1 KB 438

43. I note that the FHE Manager indicated in a 2016 email, relating to the erection of the fence now to the north of FC, that the boundary of FHE was '*easily identified by a raised mound*'. This would imply that the FHE land boundary ran alongside the northern edge of the Order route in this location at least, in line with the Snapshot map. This is a matter entirely between the relevant landowners/occupiers, with other evidence that may be relevant to such a decision and is not before this Inquiry.
44. On the basis of the evidence before me, and relevant to this decision only, I consider that the Order route section A - B runs over land owned by FHE, with the exception of the unregistered land section at the eastern end. I understand section B - C is on unregistered land.

The Definitive Map and Statement

45. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS, setting out the procedures to be followed in their production. In response to this it seems that early in the 1950s Parish Councils in Sussex were asked to survey the public rights of way in their area. The relevant Parish Council minutes 1949 - 1966 cover this period and show that the matter was discussed, and evidence sought. Within the minutes are discussions of the process and of particular routes but there is no indication of anything relating to the Order route.
46. A plan was submitted annotated as 'Parish Council Review 1974', with 'P - Proposed' highlighting what appears to be section A - B of the Order route, continuing on towards Footpath 1162 ("FP1162"). This appears to relate to a DMS review, however, it seems that annotation was made by the supporters to the Order. By reference to section 32 of the 1980 Act, see paragraph 14 above, this lessens the evidential value of the document. There was no further information on how this review arose, or what investigations may, or may not, have been made at the time.
47. A minute of 21/11/88 was suggested by the supporters to show consideration of the proposed route by the Parish Council. It records that "*A letter had been sent to County Hall requesting that two paths be included on the Definitive map one connection 1163 with 1162....*". BR1163 lies to the east of the Order route, where point A is situated. FP1162 lies to the west, branching off Footpath 1161, which runs alongside Home Farm. Whilst part of the Order route could potentially be part of a claimed route between the two recorded rights of way it would not form a direct link without recording additional lengths of path. I note that it would accord with the route apparently shown in the 1974 document. Although the supporters suggest it was not taken forward in 1988 as the route "*was not threatened and was maintained by volunteers*" there is no evidence as to why it was not followed up.
48. I consider there is limited evidence to suggest that section A - B of the Order route has been thought about in relation to recording rights in the latter part of twentieth century.

Other information

49. The granddaughter of the first owner of FC spent time there from the age of 5 onwards, most weekends and school holidays. She said, "*There was a footpath parallel to the drive that ran immediately behind the house and along the*

boundary of [the] garden. The Footpath was used by members of the family and visitors to [FC]...[and] to visit...neighbours...in [FT]. The footpath was fenced on one side...made of wooden posts and wire...[and] ran from the beginning of the drive...". She did not remember use of the path, except for family and visitors of FT and FC and did not think of it as a public footpath.

50. I heard information on the use and meaning of the term 'twitten', both generally and locally. An email from a former owner of FT shows his clear understanding that the name had arisen by reference to the access drive to the property, section B – C of the Order route, which he referred to as "The Twitten". Whilst some parties may understand section A – B to be the twitten referred to in the name, this is not borne out by the evidence.
51. A letter from the current owner of FC to RPC of 7 July 2016 indicates that "*The path through our garden is one of the least used in the neighbourhood, with just a handful of locals walking it each year.*" The RPC minutes of 28 November 2016 discussed the claim for the Order route. The owner of FC addressed the meeting and was recorded to say that "*Since he has owned the property there has been a status quo for 26 years with permissive use which should continue as he has never seen the need to formalise.*" A 2016 letter from a resident of 44 years similarly referred to retaining "*...the status quo, with this path available for use by local people...*"
52. On being asked about this letter and statement the owner of FC said he had indicated that there was some use in order to be polite to those claiming the route. I do not find it credible that, at the earliest formal opportunity to deny use of the Order route, which is what has been heavily pursued through the course of the Inquiry, this would not be done. I consider this statement supportive of the recognition of use, albeit at a low level. I note an early statement of objection refers to "*...verbal permissive agreements with the very small number of neighbours who ever expressed an interest in walking the path.*" This gives weight against later arguments that no-one at FC, whether living or working or visiting there, has ever seen anyone walking there; from the objectors' own information people were walking the route.
53. In 2013, the local magazine published 'Walks in and around Rogate – 10 short circular walks' which I understand was based on walks identified by a former Parish Councillor, first published in 1970. It was noted that although there were walks in the vicinity of the Order route it was not mentioned. However, I understand that all the walks follow designated public footpaths and bridleways and, therefore, I do not find it surprising that the Order route was not featured, either as part of the identified walks, or more generally.
54. The objectors referred me to trees on and alongside the Order route, arguing that they blocked, or would have made use difficult, over time. I understand the tendency to rely on current features as showing how a route may have been in the past. However, it remains possible to pass the trees now and so at earlier stages of growth it will have been easier, particularly when looking back to some 26 – 46 years ago.

Conclusions

55. I am satisfied from the documentary evidence that there has been a physical route on the ground in this location since at least the date of survey of the 1870 OS map, with the section B - C existing from at least 1843, by reference

to the title map. The eastern section of the Order route altered in the early 1960s, being moved further north with respect to the construction of FC in 1961. The Order route appears to have been on the current alignment for around sixty years.

56. There is consistent evidence showing the existence of a path on the Order route alignment in planning documentation relating to FC and information from former owners of FT and FC. The section B – C seems to have been a hedged 'lane' over a long period of time. It seems to be accepted that there has been a 'palisade' type fence bordering FT for the majority of the time, although it may have been a lower fence when the first property was built on that plot. Contrary to the Inquiry evidence of the owner of FC, I find the record of the visit of a planning Case Officer supports the evidence of the supporters that there was a chicken wire fence north of the original FC property. This was understood by him/her to mark the property boundary, with a footpath parallel to it and this boundary accords entirely with the LR Title plan for FC and the 'site boundary' as identified in planning documentation.
57. The LR title plans, alongside matters such as the boundary dispute and planning documents, show that FC did not recognise the Order route within their ownership at least into the early part of the twenty-first century. On the balance of probabilities, for the purposes of this decision, ownership of the land crossed by the Order route lies with FHE, with the exception of the small extent at the eastern end and section B - C.
58. There has been recognition of use of the Order route, albeit that it may be referred to as permissive or only by a small number of people. It is known that FHE allow permissive use of their land and the meaning of signs is an important matter in such considerations to which I shall return.
59. None of the documentation shows the status of this route to be public. The potential opportunities to claim in relation to the original drafting of the DMS and apparently in the 1970s and 1980s were not followed through. The change in alignment of the eastern end of the route in connection with the building of FC and the associated driveway indicate a landowner, or landowners, demonstrating use of the land without reference to a public right. Diversion of a public right of way, for example in connection with building works, would require a legal process to be undertaken, for which there is no evidence.
60. The more 'neutral' evidence considered assists me to build a picture of the situation on the ground, against which I can now consider the claimed use.

Section 31 of the Highways Act 1980

The relevant twenty-year period

61. The period of twenty years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question. I understand questions in relation to this route were raised in response to changes in fencing at FC in 2016. This would give rise to a relevant period 1996 – 2016.
62. The current owners of FC bought the property in 1990 and from that time several planning applications and developments were made, such as construction of a garden shed and workshop. It was suggested that some of the earlier works, such as for the studio, may have interrupted use at an earlier

date, perhaps due to storage of materials but there was insufficient evidence to support this argument.

63. There was evidence of works carried out at FC from 1995 relating to extension of the residential property. I heard from the builder for works at FC in the period 1992 – 2004 and the designer and builder involved with the extension in 1995 – 1998. The supporters pointed out that the extension appears to have been built out to the edge of the 'path', as noted on some of the planning drawings. It would therefore have been necessary to excavate in the area of the Order route to build the foundations, with the ground floor rooms below the ground-level to the north. The supporters pointed out that the extension appears to have been built out to the edge of the 'path'⁸, which is noted on some of the planning drawings. It would therefore have been necessary to excavate in the area of the Order route to build the foundations, with the ground floor rooms below the ground-level to the north. I am satisfied that the building works in the mid-1990s blocked the Order route for a time, on balance sufficient to interrupt the later potential period to 2016.
64. Whilst intent can be a consideration in these cases I think there is a synergy between interruption and the bringing of use into question; the interruption may itself bring use into question and does not have to be made by the landowner. I am satisfied that the extension works were sufficient to lead to the use being brought into question. Whilst it is possible that earlier works may have interrupted use leading to an earlier period, on the balance of probabilities, the relevant twenty-year period is 1975 – 1995.

Evidence of use

65. The evidence of use arises from the user evidence forms ("UEFs") submitted in connection with the application, statements, letters, and evidence given to the Inquiry. The amount and frequency of use is not the only issue to consider but also the quality of that evidence. It was suggested that the user evidence was unreliable, the supporters' case having altered over time in response to matters raised by the objectors. However, this is not unusual and I note that similar changes in case have arisen on both sides, for example, an owner of FT from 2013 indicated in a 2016 Landowners Evidence Form that they thought they owned land crossed by the Order route, part of section A – B. However, by 2018 it was indicated that "*In our dealings with the Vendor and their solicitors we made specific enquiries about the dotted line on the OS map (A/B) marked path (um) and were clearly told that this was private Fyning Hill Estate land.*"
66. I note that the applicant, who led the case in support of the Order at the Inquiry, did not initially put in user evidence herself. A statutory declaration of 2018 referred to use from 2002 – 2016. At the Inquiry it was then said that she had used the Order route from 1991, albeit infrequently as a weekend visitor. Another party had said in her UEF that she had used the route from 1973 to 2016, being away from 1992 to 2002 but later said she had used it occasionally from 1970 on. The changes over time, from two main supporting parties, fairly lead to a question as to reliability of their evidence of use and I treat it with some caution.
67. Nevertheless, in general, the claims of use dating back to earlier periods were within the original UEFs. It was not the case that only evidence relating to the

⁸ Whether that accords with the planning permission or not is not a matter relevant to this decision

- period to 2016 was first submitted, with a change to evidence back from 1995 then 'found'; that evidence has been before those investigating the matter at the various stages of this process, although some additional evidence for the earlier period was submitted.
68. Much was made of whether the route was 'grass', as it was suggested had been described on UEFs, suggesting people were confused as to the route they were using. Only one person referred only to a 'grassy track' whilst others referring to 'natural earth/grass' or 'grass & soil'. Other users referred to it differently, for example as a 'soil track' or 'rough earth'. I consider that the users made a distinction between a made route and an unmade route, as it has been recognised on some mapping. I do not consider that this shows that users were confused as to the route they meant; the route suggested to be the one they were thinking of, running north from the gate west of point A, is a woodland route of similar surface.
69. It was suggested that people had not understood the route being claimed, due to the way in which the supporters collected evidence. Two users withdrew their evidence, which is not therefore before me, however, their reasons for this were support for agreements reached by RPC, not that their evidence as submitted was incorrect. The RPC resolution related to an offer from FHE in relation to an alternative east-west path. One person fairly clarified that her frequency of use of the Order route section A – B was less than on her UEF, with most use of the track, section B – C; she did not withdraw her evidence of use of the route adjacent to FC, albeit infrequent. This does not support the contention that there has been a general misunderstanding of the claim.
70. I heard from seven people claiming use of the Order route in periods from 1959 – 2016, five of whom indicated use within the relevant twenty-year period. Although I have placed less weight on some of the evidence, for the reasons set out above, I am satisfied that those I heard from answered fairly and robustly to such cross-examination as was made. Three joined by telephone and the choice was made not to ask many questions of them, with the argument made that they could not be properly subjected to cross-examination. It was the objectors' own decision not to make use of the procedures that had been put in place to hold the Inquiry in the circumstances. I am satisfied that their availability and willingness to assist the Inquiry supports their submitted evidence.
71. Although there was much argument that people had not been seen, or heard, on the Order route, I agree with the supporters that use of a route such as this could easily be missed. It is a relatively short route, over which users would pass quickly. The owner of FT fairly said that around 3 people a week were seen on section B – C, although it would not be known whether such use related to the Order route or continuation into the woodland to the north. The former owner of FT, from 1997, referred to regular use behind that property in their early years by a particular neighbour. Although whether that use continued alongside FC is not stated that would be logical, rather than only walking behind FT and returning. He also referred to his use of a gate from his property to walk dogs.
72. Letters submitted during the course of the process refer to this as "*...an informal path used, fairly infrequently, by local residents...*" and indicate that "*...the footpath in question is very seldom used and then only very local residents. I*

occasionally use it to maintain its status...". Such use would not negate the understanding of the granddaughter of the former owner of FC, who was aware of use, even if she thought it to be only in relation to FT and FC.

73. As time goes by it becomes more difficult to rely on memory and those who might have been able to provide additional evidence are no longer able to do so. Taking account of all the user evidence, it would be fair to say that use in the relevant twenty-year period was infrequent, for example 3 or 4 times a year. Others referred to 'regular' use, but I find this evidentially insufficient to assist me. Some referred to daily when living at certain places but, again, not specifying when this was. Use when going to school appears to have been before the change in the eastern end of the route, therefore, not relevant to the Order route as a whole. Whilst it was said that those living at FC did not see strangers using the route, this is entirely understandable; the users were not strangers but local people, generally close neighbours.
74. I agree with the supporters that this is a sparsely populated rural area and, as such, the use would be low. Whilst I am satisfied from the evidence as a whole that there has been use of the Order route throughout the twenty-year period 1975 – 1995, I consider, on the balance of probabilities, that the level of use is insufficient to raise a presumption of dedication.

Use as of right

75. In order for any use to give rise to a presumption of dedication it is necessary to look at matters relating to whether or not that use was 'as of right'. To be as of right the use must be without force, without secrecy and without permission, either expressly or impliedly.

Force

76. There was some disagreement as to what happened when the Schedule 14 decision was issued, with a clear misunderstanding of what was meant by that finding. There was also disagreement as to what happened during the site visit associated with investigation of the case. These matters are not relevant to my decision, occurring after the relevant twenty-year period.

Secrecy

77. It was suggested that the claimed use from 1990, that is once FC was under the current ownership, could not have been at the quantity suggested unless carried out secretly, because such use was not seen. I have dealt with matters as to whether or not people may or may not have been seen earlier in this decision. I am satisfied that there was use of the route and that it was not deliberately secretive.

Permission

78. It was said for FC that certain neighbours walked "*along the northern boundary of our property*", with agreement. I have no further evidence from those neighbours regarding their understanding of the use, i.e., when it occurred, how often or whether they understood it to be permissive.
79. Additionally, it was said that the person delivering the Parish Magazine may have walked through, although no particular timeline was given for this. The same issue of detail also applies to deliveries, but no evidence was put to me of

a private right of access in relation to other properties over the relevant land. As a result, I consider that such use, delivering to adjacent properties, appears to have been use 'as of right' rather than 'by right'.

80. None of the UEFs refer to use by permission.

Interruption

81. I am not satisfied that it has been demonstrated that the compost heap, said to have been put in by the previous owner in the current location, impinging on the Order route or fallen trees, such as from the 1987 storm, have been shown to interrupt use. They could be stepped over or around and the size of the heap some 30+ years ago is not known. In relation to the Path Disruption Photographs and Plan, along with those submitted covering the period from 1992 to around 2000, I do not find that they assist to show, on balance, that use was not made of the route section A - B. There is recognition of use of the Order route arising from both the previous owners of FT and FC, as well as the current owners of FC, by reference to use by neighbours and those delivering the Parish Magazine who were not prevented in their use.

82. I consider that there is insufficient evidence of interruption within the relevant twenty-year period.

Summary

83. Taking amount of all the above matters I am satisfied that the use has been without force, secrecy, or permission. I am satisfied, on the balance of probabilities, that the use was as of right and uninterrupted. However, the level of use is insufficient to give rise to a presumption of dedication over the Order route.

Lack of Intention to Dedicate a Right of Way

84. Only the landowner can demonstrate a lack of intention to dedicate a public right of way. The eastern end of A - B and section B - C have no registered, or otherwise identified, landowner. Being satisfied, on the balance of probabilities, that FHE own the majority of the land crossed by section A - B of the Order route the matter of signage on FHE is relevant.

85. To the north-east of point B was a sign reading "FYNING HILL ESTATE PRIVATE PROPERTY . PLEASE KEEP TO SIGNPOSTED RIGHTS OF WAY . MOTOR VEHICLE ACCESS TO FORRESTERS COTTAGE ONLY." This sign has either been altered since photographs were submitted in 2018 or that sign was further north than point B; the sign I saw in this location on my site visit said, "FYNING HILL ESTATE PRIVATE PROPERTY Dog Walkers please keep your Dogs under control and pick up your animal litter. Please Keep to the Public Rights of Way". Within the woodland to the north of the gate west of point A I noted a sign "PRIVATE PROPERTY FYNING HILL ESTATE SECURITY ACCESS GATE ONLY". The 2018 Statutory Declaration of the FHE Manager sets out that similar signs were in place at various points from prior to the start of his employment in August 1991.

86. The current owners of FT argued that these signs indicated a lack of intention on the part of FHE to dedicate public rights of way on their land, i.e., the land adjacent to FT, over and above the existing recorded routes FP1162 and BR1163. I note that several of the statutory objectors also made this point.

87. FHE did not make a statutory objection to the Order, nor provide evidence directly to the Inquiry on the matter. A letter from their solicitors in 2018 refers to matters relating to signage on estate. It indicates that the boundaries of the estate have not been appreciated and, therefore “...*the relevance of the other signs on the Estate that relate to footpath use...Mr Hall's statutory declaration...states that the signs were already in position when he started his employment at the Estate in 1991...a small section of the claimed path is within the [FHE] and that the sign in question is located close to a gate where the claimed path enters the Estate. This wording is not ambiguous. It is clear that access to any path is restricted. This makes the use contentious...*”.
88. The question is whether these signs were sufficient to have indicated to the users that the landowner had no intention to dedicate a right of way in this location. I take account of *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs, 2007*⁹, which sets out that in “...*the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is...objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending...to "disabuse [him]" of the notion that the way was a public highway...section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate...In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind...the objective acts must be perceptible by the relevant audience.*”
89. I am satisfied that there was a general local understanding that use of the woods owned by FHE was permissive. The signage indicating users should use public rights of way may help to prevent strangers to the area wandering generally but, apparently, does not prevent wider use by locals. However, the issue of understanding that the land crossed by the Order route was owned by FHE, and, therefore, that any signage related to that route, is less clear cut.
90. The matter of ownership has come to the fore during the Inquiry, and the processes leading up to it, such that those with an interest have started to understand the situation. However, the owners of FC and FT and the FHE Manager have appeared uncertain of the ownership over time and so it is no surprise that users may not know that information.
91. I note that a couple of the UEFs, completed in 2016, had named the owners of FC and FT in the relevant section of the form and then this was crossed out. Another indicated they knew who owned the land but were unsure of the exact boundary. One of the users referred to there being “...*other paths nearby which are very pleasant but these belong to Fyning Hill Estate and since the time of Kerry Packer have had notices saying they were private. As I understand it this means the Estate can close them to the public...*”. I consider this makes a clear distinction in understanding the ownership and intention in relation to the routes on FHE land, as she understood it, and the Order route.
92. Section 31(3) of the 1980 Act refers to a situation where a landowner “...*has erected in such manner as to be visible to persons using the way a notice*

⁹ [2007] UKHL 28

inconsistent with the dedication of the way as a highway...". There were no notices visible to persons using the way. The lack of clear understanding shown by the users as to ownership, alongside that of the owners and adjacent owners, means that I do not consider that the signs could objectively be seen to relate to the Order route and so they are insufficient for a reasonable user to have understood what the owner was intending. I do not consider, on the balance of probabilities, that there is sufficient evidence of a lack of intention to dedicate a right of way over the land on the part of the relevant landowner and, therefore, the use has not been shown to be contentious, as suggested.

Conclusions

93. I am satisfied, on the balance of probabilities, that there is evidence of use by the public, as of right and without interruption within and throughout the relevant twenty-year period. Whilst I do not consider that there has been sufficient indication of a lack of intention to dedicate a public right of way on foot over this land on the part of the landowner within the relevant period, I find the level of use insufficient to raise a presumption that the way has been dedicated as a public footpath in the twenty-year period 1975 – 1995.

Common law

94. Turning to the common law position, I again find the low level of use insufficient to support a case of common law dedication. The documentary evidence does not record public status over the Order route, or any part thereof and the change to the route at the eastern end in connection with the building of properties, without any legal process, is a clear indication of lack of recognition of public rights. Taking account of the evidence as a whole I do not consider, on the balance of probabilities, that the burden of proof to show common law dedication has been met.

Other matters

95. The law does not allow me to consider such matters as the desirability or otherwise of the route in question, whether in relation to the Neighbourhood Plan or Parish Plan or the disquiet of affected landowners or local residents. I cannot consider privacy, security or health and safety matters. Concerns regarding land boundaries or compliance with planning permissions are not matters for me.

Conclusions

96. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should not be confirmed.

Formal Decision

97. I have not confirmed the Order.

Heidi Cruickshank

Inspector

APPEARANCES

For the Order Making Authority:

Miss G Hickland Trainee Legal Executive, West Sussex Council

In Support of the Order:

Miss A Arnold
who called:

Mrs V Hall

Mr M Harwood

Mr M Livett

Mrs C Livett

Ms O'Brien-Twohig

Dr M Rennie

In Objection to the Order:

Mr D Stedman-Jones *of Counsel instructed by Sue Rumfitt Associates on
behalf of Mr & Mrs J Grey and Mr & Mrs J Wakeland*

who called:

Mr J Grey

Mrs B Grey

Mr J Wakeland

Mr T Dowdell

Dr F Grey

Mr J Noble

Mrs B Noble

Mr M Rooke

Mr R White

Interested parties speaking in objection to the Order:

Mr S Sprackling

INQUIRY DOCUMENTS

- 1 The Order
- 2 Closing Statement of West Sussex Council
- 3 Closing Statement of

