The Planning Inspectorate

Interim Order Decision

Inquiry opened on 2 June 2015

by Michael R Lowe **BSc (Hons)**

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

Decision date: 4 September 2015

Order Ref: FPS/G1440/7/33

East Sussex County Council

- This Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as **The East Sussex County Council (Public Footpaths Newhaven 16 (part) and 61A, B, C) Definitive Map Modification Order 2013**.
- The Order is dated 11 September 2013 and proposes to modify the Definitive Map and Statement by defining the width for Footpath 16 and adding an additional footpath from the promenade to the beach, as detailed in the Order map and schedule.
- There was one objection outstanding when East Sussex County Council (the Council) submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Interim Decision

1. I propose to confirm the Order subject to modifications which require advertisement:

   Delete the references to footpaths 61A, B, C and add a limitation of the parking of vehicles along the seaward and landward sides of the promenade:

   In the title of the Order delete the words 'and 61A, B, C'.

   In part I of the schedule under the sub-heading 'Description of path to be added' delete the second paragraph (A public footpath running from the promenade north of West Beach...).

   In part 2 of the schedule under the sub-heading '(ii) Addition of the following particulars to the East Sussex County Council (Lewes District) Definitive Statement' delete the reference and particulars relating to 61a, 61b and 61c.

   In part 3 of the schedule headed 'Limitations' add the words 'And a limitation and condition of the parking of vehicles on the landward and seaward sides of the promenade between A and C on the Order plan.'

   In the Order map delete the reference to 'and 61a, b, c' in the title and the key and delete the footpath between H-J and L-J-K (the steps).

Preliminary Matters

2. I opened the Public Inquiry into the Order at the Shakespeare Hall, Newhaven on 2 June 2015. On 3 June the venue was moved to the Meeching Hall, Newhaven and the Inquiry continued on 4 June before being adjourned to 6 July 2015 to hear the closing statements. I visited the site on 1 June 2015.

3. The objection is made by Newhaven Port and Properties Ltd (the Company).

Main Issues

4. The Order has been made under section 53(2)(b) of the 1981 Act relying on the occurrence of events specified in sections 53(3)(c)(i) and (iii). The events are-
   Re Footpath 16 - the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows other particulars contained in the map and statement require modification (section 53(3)(c)(iii)).
   Re Footpath 61a, b & c - the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path (section 53(3)(c)(i)).

5. The issues under section 31 of the Highways Act 1980 (the 1980 Act) are -
   a) whether the claimed route was of such character that its use could not give rise at common law to any presumption of dedication; and
   b) the date on which the right of the public to use the claimed footpath was brought into question;
   c) whether the claimed footpath was actually enjoyed by the public 'as of right' (without force, secrecy or permission) and without interruption for a full period of 20 years ending on the date on which their right to do so was brought into question; and if so
   d) whether there is sufficient evidence that there was, during this period, no intention to dedicate the claimed footpath.
   Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.

6. Section 32 of the 1980 Act requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances.

Background

7. The Council resolved to make the Order following an application by Newhaven Town Council in June 2011. The public rights of way application followed an application in 2008 to register the West Beach as a village green pursuant to the provisions of the Commons Act 2006. The village green application was considered by the Supreme Court in R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and Anor. [2015] UKSC7. The background in that case was set out as follows:

   > Newhaven is a port town on the mouth of the River Ouse in East Sussex, and its harbour ("the Harbour") has existed since the mid-sixteenth century, after a storm blocked the original mouth of the River Ouse, some three miles to the east. Since at least 1731, the operation of the Harbour has been subject to legislation. The Newhaven Harbour and Ouse Lower Navigation Act 1847 ("the 1847 Newhaven Act") repealed the earlier legislation, and established harbour trustees ("the trustees"), to whom it gave powers to maintain and support the harbour and associated works.
   >
   > Section 49 of the 1847 Newhaven Act is in these terms:
   >
   > > "[T]he Trustees shall maintain, and support the said harbour of Newhaven, and the piers, groynes, sluices, wharfs, mooring berths, and other works connected

> therewith, and also maintain and support the open navigation of the River Ouse between Newhaven Bridge and Lewes Bridge …"

The Newhaven Harbour and Ouse Lower Navigation Act 1863 ("the 1863 Newhaven Act") gave the trustees powers to construct and maintain and support the Harbour and associated works.

The Newhaven Harbour Improvement Act 1878 ("the 1878 Newhaven Act") established the Newhaven Harbour Company to which were transferred the rights, powers and duties of the trustees. Under section 57 of the 1878 Newhaven Act it is provided that:

> "the Company may hire or purchase and use any dredging machine for the purpose of deepening and cleansing the harbour …"

Section 2 of the 1878 Newhaven Act applied to the port section 33 of the Harbours, Docks and Piers Clauses Act 1847 ("the 1847 Clauses Act"), which provides that:

> "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

By virtue of the Southern Railway Act 1926, the Harbour Company was vested in the Southern Railway Company. Pursuant to the Transport Act 1947, the Southern Railway Company was nationalised, and the Harbour was vested in the British Transport Commission. As a result of subsequent statutory and contractual arrangements, the Harbour subsequently vested in British Railways Board (1962), Sealink (UK) Limited (1979), Sea Containers Limited (1984), and, most recently, in 1991, Newhaven Port and Properties Limited ("NPP"), pursuant to the Sealink (Transfer of Newhaven Harbour) Harbour Revision Order 1991 (SI 1991/1257) ("the 1991 Newhaven Order").

Paras 10 and 11 of the 1991 Newhaven Order provide:

> "10 (1) The Company, subject to obtaining the necessary rights in or over land, may execute, place, maintain and operate in and over the transferred harbour such works and equipments as are required for or in connection with the exercise by it of any of its functions and may alter, renew or extend any works so constructed or placed. …
>
> 11 (1) The Company may deepen, widen, dredge, scour and improve the bed and foreshore of the transferred harbour and may blast any rock within the transferred harbour or in such approaches. …"

The Beach is part of the operational land of the Harbour, which is currently owned and operated by NPP, and is subject to statutory provisions and byelaws. The extent of the Harbour area includes (i) a substantial breakwater and lighthouse, seawall and the Beach which form the west of the entry into the port, (ii) a pier, a much longer (and naturally created) shingle beach which form the east of that entry, (iii) the mouth of the River Ouse and the next thousand metres or so of the river, and (iv) land running either side of the river, which includes (v) a car park, marina and fishing berth to the west, and (vi) two quays, a ferry dock, a cool store, a harbour railway station, and harbour offices to the east. NPP's current strategic plan for development of the port is contained in its Masterplan (2012).

The Beach owes its origin to the fact that, in 1883, pursuant to the powers granted by the 1863 Newhaven Act, the substantial breakwater was constructed to form the western boundary of the Harbour. The breakwater extends just over 700 metres out to sea. After the construction of the breakwater, accretion of sand occurred along the eastern side of the breakwater, and that accretion has resulted in the Beach. To the north, the Beach is bounded by a harbour wall. On top of the harbour wall is an area of hard standing and a car park, which is now owned and operated by NPP. There are physically two means of access to the Beach: first, by steps leading down from the top of the wall, and, secondly, by another set of steps leading down from the top of the breakwater.

The Beach is substantially covered by the sea for periods of time either side of high tide. Inevitably, as the tide ebbs and flows, the amount of the land uncovered

varies, and the amount of the land uncovered at low tide and the period for which the whole of the Beach is covered with water varies between spring (high) and neap (low) tides. On average, the Beach is wholly covered by water for 42% of the time and for the remaining 58% of the time it is uncovered to some extent, but it is entirely uncovered by water only for a few minutes at a time.

The steps leading down to the Beach from the top of the harbour wall were accessible in practice by members of the public from shortly after the end of the Second World War (during which time it was closed) until it was fenced off by NPP in April 2006. Thereafter, access by the public was no longer possible, because access from the steps leading from the top of the breakwater had been closed off before 2006.

The making of byelaws relating to Newhaven Harbour

Section 58 of the 1878 Newhaven Act conferred on the Harbour Company the power to make byelaws which were to be approved and published in the manner prescribed by the 1847 Clauses Act. Section 83 of the 1847 Clauses Act gives to the "undertakers" in whom a harbour is vested the power to make byelaws "as they shall think fit" for various purposes, including "[f]or regulating the use of the harbour, dock, or pier". Section 84 provides for criminal sanctions at the suit of the undertaker for breach of such byelaws.

Section 85 of the 1847 Clauses Act states that the byelaws should not "come into operation until the same be confirmed" as required by that Act. Sections 86 and 87 of that Act are concerned with advertising and providing copies of the byelaws before confirmation.

Provisions relating to the publication and display of such byelaws were contained in sections 88 and 89 of the 1847 Clauses Act:

> "88. The said byelaws when confirmed shall be published in the prescribed manner, and when no manner of publication is prescribed they shall be printed; and the clerk to the undertakers shall deliver a printed copy thereof to every person applying for the same, without charge, and a copy thereof shall be painted or placed on boards, and put up in some conspicuous part of the office of the undertakers, and also on some conspicuous part of the harbour, dock, or pier, and such boards, with the byelaws thereon, shall be renewed from time to time, as occasion shall require, and shall be open to inspection without fee or reward …
>
> 89. All byelaws made and confirmed according to the provisions of this and the special Act, when so published and put up, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same."
>
> Section 89 was repealed by the Statute Law (Repeals) Act 1993. Section 90 of the 1847 Clauses Act provides that "[t]he Production of a written or printed Copy of the Bye laws" appropriately authenticated "shall be evidence of the Existence and due making of such Bye Laws", and "with respect to the Proof of the Publication of any such Bye Laws it shall be sufficient to prove that a Board containing a Copy thereof was put up and continued in manner by this Act directed …".

In February 1931, the Southern Railway Company made byelaws for the Regulation of Newhaven Harbour ("the Byelaws"), which were confirmed by the Minister of Transport the following month. The following Byelaws are germane to the present appeal:

> "51. No person shall enter or remain on the quays of the harbour unless he has lawful business thereon, or has received permission from the Harbour Master to do so; and every person entering or who shall have entered on such quays, shall, whenever required so to do by any duly authorised servant of the Company, truly inform him of the business in respect of which such person claims to be entitled to be thereon. Any person committing a breach of this byelaw may be forthwith removed from the quays and be excluded therefrom …

> 52. No person shall, without the consent of the Harbour Master, enter or remain within any part of the piers or quays which may, under a reasonable direction of the Harbour Master, be enclosed by chains, or by a barrier.
> 68. No person, without the permission of the Harbour Master, shall fish in the harbour; and no person shall bathe in that part of the harbour which lies between Horse Shoe Sluice and an imaginary line drawn from the East Pier Lighthouse and the Breakwater Lighthouse.
> 70. No person shall engage in or play any sport or game so as to obstruct or impede the use of the harbour, or any part thereof, or any person thereon; nor (except in case of necessity or emergency) shall any person, without the consent of the Harbour Master, wilfully do any act thereon, which may cause danger or risk of danger to any other person.
> 71. No person shall bring any dog within the harbour, or permit it to be within the harbour, unless it is securely fastened by a suitable chain or cord, or is otherwise under proper and sufficient control."

As regards publication and enforcement of the Byelaws, according to the Inspector who wrote the reports referred to in para 19 below, there were no byelaw signs in place during the relevant twenty year period that would have indicated to users of the Beach that their use was regulated by byelaws. She also concluded that there was no evidence of active enforcement of the Byelaws during that period; and that there was no other suggestion of any other overt act on the part of the landowner during that period to demonstrate that he was granting an implied permission for local inhabitants to use the Beach.

8. I appreciate that the Supreme Court was dealing with a village green case and that, whilst public rights of way cases apply the doctrine of dedication or presumed dedication, there is no such concept in a statutory 20 years user village green case. However, the concept of user 'as of right' or 'by right' i.e. by permission, is applicable to both types of cases and the issue of byelaws and their interpretation as giving an implied permission may be relevant, although in a different factual context. There are also some issues in common with regard to the statutory incompatibility.

Reasons

Discovery

9. A definitive map modification order based upon section 53(3)(c) of the 1981 Act is dependent upon the discovery of evidence (when considered with all other evidence available to the Council). In the case of Mayhew v Secretary of State for the Environment [1992] the meaning of 'to discover' is to find out or become aware. The phrase implies a mental process of the discoverer applying their mind to something previously unknown to them. More recently in the case of The Queen on the application of Dorset County Council v Defra [2005] EWCH 3405) it was stated:

> 5. The Secretary of State and the interested party submit that modification on the ground in question may indeed be made where there is the discovery by the authority of evidence; however, that the reinterpretation of evidence previously before the authority is not a ground for modification and that the claimant's case was based upon the interpretation of evidence previously before the authority which is not the discovery of evidence. The Secretary of State and the interested party further submit that this interpretation is consistent with authorities, including the decisions of the Court of Appeal in R v Secretary of State for the Environment ex parte Simms and Burrows [1991] 2 Queen's Bench 354, per Purchas LJ at 380, who refers to the discovery of new evidence, per Glidewell LJ at page 388, who refers to the finding of some information which was previously unknown, and per Russell LJ at 392; Fowler v Secretary of State for the Environment & Devon County Council

[1992] 64 Property and Compensation Reports 16 per Farquharson LJ at 22, who referred to fresh evidence; and Trenchard v the Secretary of State [1997] EWCA Civil 2670 per Pill LJ, referring to further evidence becoming available and approving a definition of discovery as connoting a mental process in the sense of the discoverer applying his mind to something previously unknown to him.

9. In my judgment, the Council has wholly failed to show that it has discovered any evidence. What it has done is to reinterpret the evidence that had been before it all along. I cannot see that that can arguably come within section 53(3)(c)(i). There must be a discovery, but there has been none. One does not discover a different interpretation and if one could do so, the process of mind changing could go on indefinitely. ....".

10. In the case of Kotarski & Anor v Secretary of State for Environment, Food and Rural Affairs [2010] EWHC 1036 (Admin) Simon J stated:

21. Mr Hodgkin's third point raises a question about the meaning of the expression 'discovery by the authority of evidence'. He referred to a decision of Mr Andrew Nicol QC (as he then was) sitting as Deputy High Court Judge in *Burrows v. Secretary of State for Environment Food and Rural Affairs* [2004] EWHC 132 (admin). In that case Mr Nicol QC set out what in his view was required before the powers in s.53(3)(c)(iii) could be invoked.

> [26] ... It is plain that the section intends that a definitive map can be corrected, but the correction ... is dependent on the 'discovery of evidence'. An Inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was drawn up. The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification.

22. Mr Hodgkin submitted that there had been no 'new evidence' in the present case, since the evidence had been available when the definitive map had been drawn up.

23. I do not understand the passage I have cited from the judgment of Mr Nicol QC to suggest a different test to that specified in s.53(3)(c).

24. The precondition for the exercise of the statutory power of review is the discovery of evidence which (when considered with all other relevant evidence) shows that particulars contained in the map and statement require modification. The discovery that there is a divergence between the two is plainly the discovery of such evidence, and it is unnecessary that it should be characterised as 'new evidence.' It is sufficient that there was the discovery of what the Inspector described as 'a drafting error', which was itself the result of what the Court of Appeal in *ex. p. Burrows and Simms* characterised as 'recent research.'

25. I note that this approach is consistent with (a) the general approach of the Court of Appeal in *ex. p. Burrows and Simms* referred to in paragraphs 13 above and 'the importance of maintaining an authoritative map and statement of the highest attainable accuracy'; (b) a generally beneficial purpose that there should be powers to make definitive maps and statements consistent when they are found to be inconsistent; and (c) the decision of Potts J in *Mayhew v. Secretary of State for the Environment* (1993) 65 P & CR 344 at 352-3, in which he specifically rejected the argument that the s.53(3)(c) modifications should be restricted to cases where 'new evidence' had been discovered.

26. In my view it is sufficient in the present case that the Council had recently discovered that there was a divergence between the definitive statement and the definitive map to bring the case within s.53(3)(c)(iii).

11. In Norfolk County Council, R (on the application of) v Secretary of State for Environment, Food & Rural Affairs [2005] EWHC 119 Pitchford J stated:

42. The measurement on the definitive map between points B and C is 1-2 millimetres, represented on the ground by a distance of 30 metres. It seems to me that this is within the tolerance permitting a conclusion that the statement was

> indeed providing particulars of the public right of way marked on the map. This is not, however, a judgment the inspector was called upon to make because the case was presented to her as one of conflict. As to the means of resolution of the issue what is the right of way in the absence of discovery of evidence, it is my view that the appropriate course would be an application for a declaration.

12. In Trenchard v Secretary of State for the Environment and Anor. [1997] EWCA Civil 2670 Pill LJ stated, after reviewing the Burrows and Mayhew cases:

> I would only add that, in my view, it follows that from the context of s.53, as now judicially explained, that 'discovery of evidence' should not be narrowly or technically construed. But it is not necessary in this case to consider what, if any, limit should be put upon the introduction of further evidence in relation to a proposed modification of the definitive map.

13. For the reasons given below I do not consider that the modifications proposed in the Order can be characterised as correcting an error or dealing with any conflict between the map and statement. With regard to the proposed addition to the map and statement of a footpath on the steps, this is a matter under section 53(3)(c)(i) of the 1981 Act which requires the discovery of evidence. There has not been any previous consideration of whether or not a public right of way subsists on this route and therefore there is no issue of reinterpreting evidence previously considered. With regard to specification of a width of Footpath 16 along the promenade I also consider that it is necessary to discover evidence for that claimed width. Section 53(4) clarifies that modifications under subsection (2) may be made, such as specified in subsection (3)(c)(iii), for the addition in the statement of a width. However, there is no indication that such modifications are exempt from the need for the discovery of evidence. I therefore agree with the submission by the Company that to add a width to a footpath already shown on the map but not detailed in the statement requires the discovery of evidence. The absence of a specified width in the definitive statement is not analogous to a conflict between the map and statement as considered in the Norfolk and Kotarski cases. In my view there is no case that the mere realization of an absence of a defined width on the statement could be considered to be a discovery of evidence. Also there is no issue of reinterpreting evidence previously considered as no consideration had been given to the width until the Town Council made its application.

14. Evidence has been presented that the public have acquired a public footpath on the steps and over an extensive width along Footpath 16. That evidence comprises witness statements and photographs of the locality, some of which pre-date the earliest definitive map and statement. That evidence when presented to the Council in the Town Council's application and following the Council's own research is, in my view, sufficient discovery for the purposes of section 53(3)(c) of the 1981 Act. The evidence need not be categorised as cogent, or otherwise, to be sufficient for the purposes of 'discovery of evidence', but it cannot be the reinterpretation of evidence previously considered. It is not a high hurdle. It is simply the trigger for the consideration of all the available evidence.

The Definitive Map and Statement

15. In Ernstbrunner v Manchester City Council & Anor [2009] EWHC 3293 (Admin) it was held that where a path is included in the definitive and statement for a particular area, and a dispute arises as to the line that this is intended to represent, the court has jurisdiction to determine, on the evidence, the true

line of the right of way. I have applied that principle to the question of what the definitive map and statement shows with regard to Footpath 16.

16. The current definitive map and statement for the District of Lewes is the consolidated map and statement published on 8 October 2003 and has a relevant date of 1 September 2003. It was produced under the provisions of section 57 of the 1981 Act. Section 56(1) of the 1981 Act provides in relevant part:

> (1) A definitive map and statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely—
>
> (a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot, so however that this paragraph shall be without prejudice to any question whether the public had at that date any right of way other than that right;
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> …
>
> (e) where by virtue of the foregoing paragraphs the map is conclusive evidence, as at any date, as to a highway shown thereon, any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at that date, and any particulars so contained as to limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions, but without prejudice to any question whether the right was subject to any other limitations or conditions at that date.".

17. This 2003 map is at a scale of 1:10,560. It shows Footpath 16 with the notation of a broken line with short intervals in accordance with the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993 No. 12). Schedule 1 of the regulations reads: Notation to be used on Definitive Maps (a) A footpath shall be shown by either a continuous purple line or by a continuous line with short bars at intervals, ... or by a broken line with short intervals. The 2003 statement records Footpath 16 as 'Newhaven No. 16, Type: F.P., From: 450003, Commencement: Fort Road, To: 447999, Termination: Beach, west of breakwater, Total length in miles: 0.35, Remarks: [none].

18. The 2003 map and statement consolidated the previous definitive map and statement published on 26 November 1963 with a 'relevant date' of 17 March 1960. The 1963 map and statement was the successor to the first definitive map and statement published on 29 May 1956 with a relevant date of 17 March 1953. The 1956 and 1963 definitive map and statements were produced under the National Parks and Access to the Countryside Act 1949. The 1949 Act includes the following provisions:

> 27(4) An authority by whom a draft map is prepared as aforesaid shall annex thereto a statement specifying the relevant date and containing, as respects any public path or other way shown thereon in accordance with the foregoing provisions of this section, such particulars appearing to the authority to be reasonably alleged as to the position and width thereof, or as to any limitations or conditions affecting the public right of way thereover, as in the opinion of the authority it is expedient to record in the statement.
>
> 32(4) A definitive map and statement prepared under subsection (1) of this section shall be conclusive as to the particulars contained therein in accordance with the foregoing provisions of this section to the following extent, that is to say -
>
> (a) where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date specified in the statement a footpath as shown on the map; ...

(c) where by virtue of the foregoing paragraphs of this subsection the map is conclusive evidence, as at any date, as to a public path, or road used as a public path, shown thereon, any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at the relevant date, and any particulars so contained as to limitations or conditions affecting the public right of way shall be conclusive evidence that at the said date the said right was subject to those limitations or conditions, but without prejudice to any question whether the right was subject to any other limitations or conditions at that date.

19. Regulations made under the 1949 Act included the National Parks and Access to the Countryside Regulations 1950 (SI 1950 No.1066). Regulation 5 reads: Rights of way or alleged rights of way shall be shown on a rights of way map in the following manner:- Footpath, by means of a purple line. ... .

20. The first draft map prepared under the 1949 Act was published in August 1953. It showed what later became Footpath 16 as Road Used as a Public Path (RUPP) No. 12, more or less in the centre of the promenade. A later draft indicated a red line for that RUPP to be deleted and a black line for a footpath to be added. The black line appeared adjacent and to the north of the red line. The provisional map published in October 1955 shows a purple line for a footpath more or less along the centre of the promenade. The first definitive map published in May 1956 shows a thickened purple line colouring in the width of the promenade. The draft, provisional and definitive maps of the first review dated September 1960, March 1963 and November 1963 all show Footpath 16 on the northern side of the promenade by a purple line. Throughout this process the statement attached to the various maps has remained unchanged and records the same details as the 2003 definitive statement.

21. With the exception of the 1956 definitive map all the various draft, provisional and definitive maps show Footpath 16 with same width as all other footpaths in the area. Throughout the process no change should occur unless objections have been made and determined in accordance with procedures of the 1949 Act. As no objections were made after the publication of the final version of the 1955 draft map no change should have occurred to the map and statement. It is a copying process and the 1955 draft should be identical to the present day 2003 version.

22. Only the 2003 definitive map and statement carries the conclusive provisions of section 56 of the 1981 Act. The earlier versions of the map and statement are, however, evidence of a possible error in the transcription process. All of the various maps need to be treated with a degree of tolerance due to the scale of the map and the level of attainable accuracy. The thickness of the line on the 2003 map is about 0.75mm. If it were to be treated as being to scale that would equate to a width of 7.92m (0.75 x 10,560 = 7920mm). The thickness of the lines on the earlier maps, save the 1956 definitive map, are quite fine, about 0.3mm.

23. In my view, the scale of the maps and the reasonable level of accuracy expected should not be interpreted as indicative of a precise location of the footpath within the promenade area. The apparent northerly bias of the first draft map is explicable by the showing of two lines, one of which will inevitably be above the other. The first provisional map and opportunity to show a position of the footpath within the promenade area indicated a central position.

The first definitive map appears to have deliberately thickened the line to show the whole width of the promenade. I do not consider that it is appropriate to attribute a level of accuracy to any of these 1:10,560 scale maps as to the precise location of the footpath within the promenade - that would be to consider that such maps were accurate to less than a millimetre. I therefore consider that all the various editions of the map are showing the same position for Footpath 16 as running along the promenade and that it is not possible, due to the scale of the map and level of accuracy attributable to the map, to determine that the footpath runs along any particular part of the promenade.

24. With regard to the width of Footpath 16 the 2003 definitive statement is silent as are all earlier versions of the statement. In my view is not the purpose of the definitive map to indicate the width of a public right of way shown thereon. The map is intended to indicate the alignment. The regulations require public rights of way shown on the map to be indicated by 'a line' and do not make any provision for the colouring or shading of an area. The statement may indicate the width but the 1949 and 1981 Acts left that as a matter of discretion to the surveying authorities and in this case that discretion was not exercised. I do not therefore consider that the thickening of the line on the 1956 definitive map is to be accorded any significance as to the width of Footpath 16. In any event, any attribution to width would be in error as no such indication was made at the draft and provisional stages, so as to allow for representations on the matter of width.

25. My conclusion as to what the definitive map and statement shows is that Footpath 16 runs along the promenade, is of no defined width and that no particular part of the promenade's width can be specifically identified as being the position of the footpath.

26. The interpretation of a definitive map and statement is a matter of fact and degree and there is no room for extrinsic evidence - the map shows what it shows and the statements says what it says. The correspondence between the Clerk to the County Council and the British Transport Commission, who were the owners of the port at the time of the preparation of the draft map and statement in 1954, is therefore not relevant to this issue. If it had been intended to indicate that Footpath 16 was a particular width or confined to a limited part of the promenade, then that should have been specified in the statement.

The width of Footpath 16

27. As noted above it is clear that the Council and the British Transport Commission were in correspondence and held meetings before the draft map was published in April 1955. In November 1954 the Commission's Estate and Rating Surveyor wrote to the Council and stated that 'I confirm that my Commission will not raise any objection to this route'. It referred to a plan sent by the Council, but there are no plans attached to the letters in the Council's files. There are three loose plans that show the whole of the width of the promenade coloured on a 1:2500 plan. It seems probable that one of these plans was attached to the correspondence. Nonetheless, I do not consider that the letter from the Commission amounts to express dedication of Footpath 16 let alone acceptance of a defined width. In my view all that can be said is that the Commission were content to let the registration proceed. There is nothing in the correspondence that indicates that the whole width of the promenade was intended to recorded as the footpath or that the footpath was to be

restricted to some part of the promenade. The issue of width was simply not addressed.

28. Halsbury's Laws of England Vol 21 (4th Ed) reads:

> 206. Where land adjoining a public footpath is laid out by the owner for vehicular traffic, even private vehicular traffic, a prima facie presumption arises that the owner has dedicated to public use as a footway the whole space which has in fact been devoted by him to traffic. This presumption, however, is rebuttable; for example where a public footpath of no prescribed width ran along an occupation cart road of irregular shape and varying width, the fact that at one spot the pubic was restricted to a hand gate, the private cart gate being kept locked, showed that the whole width of the road between the fences had not been dedicated to foot passengers. (see A-G v Esher Linoleum Co Ltd [1901] 2 Ch 647)

29. I have no reason to doubt that the Council had sufficient evidence in 1955 to show Footpath 16 on the draft map, indeed I must presume that they did. At the inquiry witnesses gave evidence of the extensive public use of the promenade on foot, some of which dated back to the 1940s. The promenade has existed since about 1883. It is clearly shown on the 1898 Ordnance Survey Map together with a bandstand near the lighthouse at the West Pier. A photograph c. 1950s indicates the promenade to have been a place of popular public resort with cars parked along both sides. Other than for parking of cars, it appears to me that the public had unrestricted access to the full width of the promenade. The promenade was, according to several witnesses, closed to the public around the time of both World Wars, but that still leaves time for public user to have given rise to presumed dedication either under the Rights of Way Act 1932 or by implied dedication at common law, before the relevant date of the first definitive map and statement.

30. I consider that the parking of cars is to be treated as a limitation upon the public's use of the promenade rather that an interruption of user. That would, in my view, be consistent with the use of highways as a market place or footpaths along canal tow paths in the cases of Gloucestershire CC v Farrow [1985] 1 WLR 741 (CA) and Grand Junction Canal Co v Petty (1888) 21 QBD 273 (CA) as examples of public highways subject to limitation upon their use.

31. There is no evidence that the public use of the promenade would have been incompatible with the operations of Newhaven Port in 1954 or earlier. Indeed the use of the promenade by the Company for port related purposes do not appear to have taken place until the 1990s.

32. I therefore conclude on the question of the width of Footpath 16 that the promenade is similar in nature to a footpath along a private road (see A-G v Esher Linoleum Co Ltd) where the presumption is that the whole width of the way has been dedicated and that there is no indication that the public have been restricted to any particular part of the promenade. I also conclude that the northern and southern edges of the promenade are subject to the limitation of parking by vehicles. It follows that that part of the Order concerning the width of Footpath 16 should be confirmed with the addition of a limitation or condition of parking along the edges.

The steps to the beach

33. The Council and the Town Council's claim to a footpath from the promenade to the beach raises the issue of the problems associated with a claim for a public footpath where there is also an issue of recreational use of the land, whether

as a potential village green or otherwise. However, I do not consider that there is any obstacle to a claim ending at the MHWM or indeed extending to MHLWM and being covered by the tide: Williams-Ellis v Cobb [1935] 1 KB Lord Wright "The right of way claimed in the present case is only over land of the respondent which ends at the sea, and I think, on the authorities cited, such a right of way may be good in law" and in A-G and Newton Abbot Rural District Council v Dyer [1946] Ch. Evershed J "It must now be taken as clearly settled not to be a requisite of a public right of way that it must lead from one highway to another. Thus there may be a public right of way to a view point or beauty spot. For some purpose - for example, the so-called public rights of navigation or fishing - the sea may be regarded as a highway, but apart from such consideration, the high water mark of the sea at ordinary tides may, I conceive, be a good terminus for public right of footway even though its proved use were confined to walking to the sea's margin and thence returning."

34. In the case of R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and anor. the Supreme Court considered the argument concerning public rights over the foreshore but did not decide the matter. I was invited to give my view on such rights. I decline that invitation on the basis that whether or not there are any public rights over the foreshore is not relevant to the claim for a footpath over the steps to the foreshore. In my view a footpath could exist to the foreshore whether or not there are any rights over the foreshore - the foreshore is a point to which a footpath could lead whether or not the public have rights to continue over the foreshore, use the foreshore by permission or simply return without entering the foreshore.

35. In the case of Oxfordshire County Council v Oxford City Council [2004] EWHC 12 Ch. Lightman J gave a ruling (ix) that was subsequently set aside by the House of Lords. However, it provides a convenient starting point:

> 101. The fourth relates to the meaning of the words "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". When agreeing to the insertion of these words in what became the 1932 Act, Lord Buckmaster explained that the words had the same legal effect as, and were equivalent to, the words "as a highway" (21st June 1932, House of Lords, columns 14-16). Lord Buckmaster's amendment would simply have read "where a way over any land has been actually enjoyed as a highway as of right …" It has been suggested that the formula is merely designed to exclude user which is permissive or tolerated, but such user is already excluded by the provision in the section that the user must be "as of right". The true meaning and effect of the words is that the user must be as a right of passage over a more or less defined route and not a mere indefinite passing over land. It is not possible to have a public right indefinitely to stray or meander over land or go where you like. If there is no made-up or definite enduring track but merely a temporary or transitory track, that is evidence against a public right of way: see Pratt & Mackenzie's Law of Highways 21st ed, pages 37-8 which cites the relevant authorities. Use for recreational walking is capable of founding a case of deemed dedication of a highway unless merely ancillary to recreational activities such as sunbathing, fishing or swimming: see Dyfed CC v. Secretary of State for Wales (CA) 30th November 1989 (reported in The Times 15th December 1989). Use of an esplanade for strolling up and down or for amusement is not inconsistent with it being a highway: and a cul-de-sac may be a public highway if there is some kind of attraction at the far end which might cause the public to wish to use the way: see Halsbury's Laws of England Fourth Edition Reissue Vol 21 paras 2-3. How far the public have rights of user over a public highway extending beyond that of passing and re-passing is as yet unclear. The House of Lords in DPP v. Jones [1999] 2 AC 240 held that the existence of a public right of way entitled the public not merely to pass and repass, but may include the

right of public assembly so long as such assembly does not unreasonably obstruct the highway. Lord Irvine LC expressed the view that the public might use and enjoy the highway for any reasonable purpose provided that the activity did not constitute a nuisance or obstruct the highway, but no-one else agreed with his view.

102. The issue raised is whether user of a track or tracks situated on or traversing the land claimed as a Green for pedestrian recreational purposes will qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a Green. If the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway, user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a Green. The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption. The answer must depend how the matter would have appeared to the owner of the land: see Lord Hoffmann in Sunningwell at pages 352H-353A and 354F-G, cited by Sullivan J in Laing at paras 78-81. Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential Green will ordinarily be referable only to exercise of a public right of way to the Green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential Green may be recreational use of land as a Green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a Green).

36. The first question is whether the steps are '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'. Before 2011, or the 1990s when the beach was used for the loading of bonios, it is not disputed that the beach area was frequented by many visitors who would use the beach for the usual recreational purposes - sunbathing, games, building sand castles etc., and who would gain access via the steps in question. Such use of the beach, to stray and meander over land and for recreational activities is clearly not capable of giving rise to a public right of way. However, use for recreational walking is capable of giving rise to a public right of way unless merely ancillary to such recreational use. It is therefore necessary to be able to determine if the public use of steps was sufficiently distinct from the recreational use, or ancillary to that use. The answer must depend on how the matter would have appeared to the owner of the land.

37. In my view, whilst I have no doubt about the evidence of the users of the claimed footpath over the steps, I do not consider that, objectively, a reasonable landowner could be expected to distinguish between the assertion of a public footpath and the recreational use of the beach. The claimed route is therefore of a character that public use could not give rise at common law to any presumption of dedication. In any event the Supreme Court has ruled that the public use of the beach was by permission as a result of Byelaws 68 and 70 which gave rise to an implied permission to use the beach freely for the purpose of bathing and recreation. On the basis that the use of the beach was by permission, the access to the beach from the promenade via the steps would, in my view, be purely ancillary to the use of the beach. The claim for a public right of way along the steps to the beach therefore fails.

Conclusion

38. Having regard to these and all other matters raised in the written representations, I provisionally conclude that the Order should be confirmed with modifications.

39. Since the Order as proposed to be modified would not show part of a way shown in the order as submitted, I am required by virtue of paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposals to modify the Order and to give an opportunity for objections and representations to be made to the proposed modification. A letter will be sent to interested persons about the advertisement procedure.

40. I appreciate that matters have been raised in this interim decision that have not been considered by the parties. The advertisement of the proposed modifications will allow the parties the opportunity to make further representations.

Michael R Lowe

INSPECTOR

APPEARANCES

East Sussex County Council
represented by
Trevor Ward — of Counsel
who called
Matthew Harper — Senior Rights of Way Officer

In support of the Order
Newhaven Town Council
represented by
Edwin Simpson — of Counsel
Instructed by Wellers Hedley
who called
Peter Samuel Bailey
Margaret Joan Rhodes MBE
Sheila Watts
Graham Roger Amy
Rosemary McIntosh
Michael Beach
Rod Main
Jacqueline Ann Cole

The Objector
Newhaven Port and Properties Ltd
represented by
Douglas Edwards QC
Philip Petchey — of Counsel
Instructed by DMH Stallard LLP
who called
Captain Francois Jean — Port Manager
David Collins-Williams — Harbour Master
Wayne Streeter

DOCUMENTS (submitted at the inquiry)

1 Summary of dates for definitive maps and statements
2 Copy of 2003 definitive statement
3 Bundle of photographs
4 Summary of user evidence
5 Aerial photographs 1931 onwards
6 Bundle of photographs of locality