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# Appeal Decision

**by Susan Doran BA Hons MIPROW**

**an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 25 May 2016**

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## **Appeal Ref: FPS/Z1775/14A/1**

- This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Portsmouth City Council not to make an Order under section 53(2) of that Act.
- The Application dated 27 November 2014 was refused by Portsmouth City Council on 24 November 2015.
- The Appellants claim that the appeal route at Town Quay, The Camber, Old Portsmouth from Trimmers Court junction with East Street along the quayside edge to Bridge Tavern and along Inner Camber Basin quayside edge to Trimmers Court, in both directions, should be added to the definitive map and statement for the area as a Byway Open to All Traffic.

## **Summary of Decision: The appeal is dismissed**

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### **Preliminary Matters**

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act.
2. I have not visited the site but I am satisfied I can make my decision without the need to do so.
3. New evidence and argument has been provided in the submissions further to that submitted with the Application and considered by Portsmouth City Council (PCC) in reaching its decision not to make an Order. The parties have had an opportunity to comment on the additional submissions and I have taken into account all the evidence available to me in this decision.

### **Main issues**

4. The Application was made under Section 53(2) of the 1981 Act which requires surveying authorities (such as PCC) to keep their Definitive Map and Statement (DMS) under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
  5. Although PCC did not address the relevant events in its determination, it is necessary that I do so in reaching my decision on this Appeal. The relevant events in this case are Section 53(3)(b) of the 1981 Act which states that an order should be made to modify the DMS where it can be shown that a period of time has expired such that the enjoyment by the public of a path during that time raises the presumption that the way has been dedicated as a public path; and Section 53(3)(c)(i) of the 1981 Act which specifies that an Order should be made following the discovery of evidence which, when considered with all other
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relevant evidence available to them, shows *"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..."*.

6. The case of *R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw* [1994] held that this involves two tests:

Test A. Does a right of way subsist on a balance of probabilities? This requires clear evidence in favour of the Appellants and no credible evidence to the contrary.

Test B. Is it reasonable to allege on the balance of probabilities that a right of way subsists? If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that one does subsist.

The case of *Todd and Bradley v Secretary of State for Environment, Food and Rural Affairs* [2004] clarified that, at the Schedule 14 stage and in reaching my decision, I need only be satisfied that the evidence meets test B. Therefore, if evidence has been discovered which shows that it is reasonable to make an allegation that a public right of way as claimed exists over the Appeal route, then an Order should be made.

7. In this case there is both evidence of claimed use of the Appeal route by the public, and documentary evidence to consider. The user evidence is considered against the requirements of Section 31(1) of the Highways Act 1980 (the 1980 Act) which provides that *"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"* and Section 31(2), that *"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 ... or otherwise"*.
8. Section 31(8) of the 1980 Act provides that *"Nothing in this section affects any incapacity of a corporation or other body in possession of land for public and statutory purposes to dedicate a way over land as a highway if the existence of a highway would be incompatible with those purposes"*. Principally, it was for this reason that PCC refused to make an Order, in that the recording of the Appeal route as a public right of way was considered to be incompatible with the statutory purpose for which the Camber Quay undertaking was created and maintained.
9. If Section 31 of the 1980 Act is inapplicable, then the question of dedication must also be examined in the context of common law. At common law a right of way may be created through expressed or implied dedication and acceptance. The onus of proof is on the claimant to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long that it could be inferred; or that the landowner was aware of and acquiesced in public use. Use of the claimed way by the public must be as of right (without force, stealth or permission) however, there is no fixed period of use, and depending on the facts of the case, may range from a few years to several decades. There is no particular date from which use must be calculated retrospectively.

10. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
11. The Application and Appeal concern the claimed addition to the DMS of a Byway Open to All Traffic (BOAT)<sup>1</sup>, and thus the basis on which my determination is made. A BOAT is a carriageway and a right of way for mechanically propelled vehicles (MPV), but which is mainly used for the purposes for which footpaths and bridleways are used. It is therefore necessary in this Appeal to consider the effect of the Natural Environment and Rural Communities Act 2006 (the 2006 Act) which curtailed the future scope for establishing and recording public rights of way for MPV based on evidence of historic use, or dedication for use, by vehicles that were not mechanically propelled.
12. Section 66 of the 2006 Act is concerned with the creation of rights of way for MPV after the commencement date of the Act<sup>2</sup>. It prevents use by non-MPV (such as a bicycle) giving rise to a public right of way for MPV, provides that no public rights of way for MPV can be created in the future<sup>3</sup>, and that use of a way by MPV cannot give rise to a public right of way of any kind<sup>4</sup>. PCC approached the Application on the basis that use by MPV could not give rise to a public right of way, relying principally on Section 66, and accordingly disregarded vehicular use in reaching its decision not to make an order.
13. However, the provisions of Section 67 of the 2006 Act are relevant as regards public rights of way for MPV that existed before commencement of the Act. It extinguished unrecorded rights of way for MPV subject to certain exceptions<sup>5</sup>. Thus, if a public right of way for MPV existed at commencement of Section 67 of the 2006 Act and one or more of the exceptions applies then MPV rights will not have been extinguished. If rights for MPV have been saved then it would be appropriate for an Order to be made to add the way to the DMS as a BOAT. In the alternative, should rights for MPV have been extinguished such an order would not be appropriate and the Appeal should be dismissed.
14. In all cases the test to be satisfied is the balance of probability.

## Reasons

15. The Camber is a harbour situated in Old Portsmouth, with water on its north, south and east sides. An adopted highway, East Street, runs on an east-west axis through The Camber, and connects with Trimmers Court which in turn connects with Seager's Court (towards its western end) and Broad Street. The Appeal route follows the perimeter of The Camber, marked on many of the maps and plans adduced as 'Town Quay'. At the eastern end of Bridge Street and The Camber is The Bridge Tavern.

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<sup>1</sup> The Appellants state that they do not seek to prove that a BOAT is justified, but to demonstrate that the evidence supports further investigation as regards the category of route prior to an order being raised

<sup>2</sup> 2 May 2006

<sup>3</sup> Subsection 66(1)

<sup>4</sup> Subsection 66(2)

<sup>5</sup> Contained in subsection 67(2) and subsection 67(3), although in this case there is no suggestion that the exceptions contained in subsection 67(3) apply

### **Documentary evidence**

16. The documentary sources available date back to the mid-18<sup>th</sup> Century. Numerous maps, plans, aerial and other photographic evidence has been provided, and several Acts and Orders concerning The Camber covering both the 19<sup>th</sup> and 20<sup>th</sup> centuries, are cited (the empowering legislation). These include the 1839 Act for Enlarging the Town Quay of the Borough of Portsmouth and for improving the Portion of the Harbour of Portsmouth called The Camber (the 1839 Act); the 1847 Harbour Docks and Piers Clauses Act (the 1847 Act) of which section 33 is relevant<sup>6</sup>; the Portsmouth Camber Quays Act 1868 (which extended the wharf, including part of the Appeal route); the Landport Wharf Act 1883; the Portsmouth Camber Quays Order 1898; the Portsmouth Camber Dock and Flathouse Wharf Order 1911; the Portsmouth Corporation Act 1959 (the 1959 Act); the Harbours Act 1964; the Portsmouth (Camber Dock and Flathouse Wharf) Harbour Revision Order 1990 (the 1990 Order); and the Portsmouth (Camber Dock) Harbour Revision Order 1995. As a whole, the documentary record reveals that over the centuries domestic and commercial buildings have come and gone and the dock itself has been subject to enlargement and to different uses. It is possible, therefore, that the width of the Appeal route has altered over time and thus the area in claimed use by the public has altered over time, but it has not been possible to establish this from the evidence provided.
17. The Appellants refer to the 1839 Act whereby the Mayor and Burgesses were empowered to regulate people working on the quays "for the convenience of persons walking upon"<sup>7</sup>. This points to use by pedestrians, although whether public, permissive, or both, is unclear. A swing bridge was built at this time to connect East Street with Gunwharf Road opposite, subsequently demolished in the mid-1920s. A survey carried out over a six day period in December 1921, and reported in the Camber Dock Committee Minutes of 1922, recorded 17,777 pedestrian and 3,414 vehicular movements across the Camber Bridge. However, this provides no direct evidence as to usage of the Appeal route itself, although it remains possible that some of these users continued onto the Appeal route or parts of it.
18. Both the 1847 and 1959 Acts enabled PCC to make byelaws concerning The Camber. However, the Appellants say the most recent byelaws (for 1936 - 1939) make no reference one way or the other as regards public access to the quayside. The byelaws referred to by PCC are concerned with regulating the behaviour of the public (regarding the lighting of lamps, not committing a nuisance and not bathing between certain hours) implying public access over The Camber, but that certain activities needed to be controlled.
19. PCC's Camber Investigation Report (the Report) concluded that notwithstanding land use changes at The Camber between 1850 and 1950, the quayside itself had remained open and accessible. Mapping shows that a route equivalent to the Appeal route was physically available by 1933. Prior to this, buildings and alleyways were present at various times at the western end of the Appeal route. There is evidence of activities taking place along the quay including the unloading and storage of coal on the south side of The Camber from the 1930s to 1970s. Later, a car park was established here, although

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<sup>6</sup> It states, "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"

<sup>7</sup> Clause LXI

- survey information and user evidence suggests it was not heavily used. Warehousing remained in place on the north side.
20. Subsequent research of Council records of the Camber and Dock, and Roads and Works Committees for the period 1895-1915 by the Appellants reveals over 50 entries relating to the Town Quay. These indicate it was considered to be a public highway by both the Highways and Port Authorities, but what rights it enjoyed is not stated. Minutes from these meetings concern such matters as the equal sharing of costs for paving, repairing/maintaining and lighting the quayside highways. Examples only of minutes between 1905 and 1913 have been provided – minutes from 1909 refer to the question of the Quay being a public highway being referred to the Town Clerk, although minutes concerning the outcome of this enquiry are not provided. Minutes for 1912 refer to the state of the roads at the Outer and Inner Camber.
  21. There are also references from later minutes. The 1927 Roads and Works Committee considered proposals to close a road from East Street to the Inner Camber Quay; and minutes for 1928 note an obstruction to the east end of the Inner Camber Quay preventing the public and vehicular traffic passing round by the Bridge Tavern. A 1935 newspaper report refers to closure of a highway, Cromwell Court, between East Street and the northern Quay, although it does not say what status it or the Quay enjoyed. Copies of Quarter sessions records have not been provided.
  22. Numerous photographs, mostly undated but broadly identifiable to periods such as the 1930s, 1950s and 1960s<sup>8</sup> support the evidence of claimed use by the public (considered below) for leisure and recreation dating back to the 1950s and beyond. These show pedestrians, including family groups, at various locations on The Camber. Some show people walking where vessels are being unloaded; others show vehicles, for example parked outside The Bridge Tavern, or travelling along the quay.
  23. A 1959 Book of Reference deposited with the 1959 Act lists the Town Quay as a public highway. It is described as owned by the Lord Mayor, Aldermen and Citizens of the City of Portsmouth, in like manner to the other public highways affected by the Act, these being listed as Broad Street, East Street, Seager's Court, and from East Street to Seager's Court. The associated plan marks 'Town Quay', which is equivalent to the Appeal route. Concern was expressed by the Minister of Transport and Civil Aviation during the passage of the Portsmouth Corporation Bill as to its effect on the public right of passage over these highways, included in the land to be acquired. Assurances were given (in May 1959) that due to the nature of the proposed works public rights would not be prejudiced. This evidence supports the Appeal route being considered a public highway in 1959.
  24. A guided walk leaflet produced in 1978 by Portsmouth City Museums & Southern Tourist Board for Portsmouth Point includes the Appeal route, suggesting that it was regarded as enjoying public access, at least on foot.
  25. From the 1980s onwards, warehousing on the north side of The Camber was demolished and various initiatives, consultations and local plans from this period proposed or recommended that public access be retained around the edge of The Camber. Some though (such as the 1981 Report of the Camber Area Local Plan) referred to maintaining access to boats moored there, and this

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<sup>8</sup> By reference to the type of dress and make of vehicles portrayed

may be interpreted as private rather than public access. By the early 1990s there were proposals to pedestrianize an area at The Bridge Tavern. In August 1990 a section of the Appeal route outside The Bridge Tavern was closed to traffic, initially for a 3 month period, vehicles diverting around the west side of the building. Such a closure is unlikely to have been made on a route unless it carried or was thought to carry public vehicular rights. At this time, East Street operated as a one-way highway for vehicles, meaning that other parts of The Camber are likely to have been in use by vehicles. An application was made to place tables and chairs outside the Tavern, to which the City Planning Officer agreed subject to an adequate thoroughfare being retained for pedestrians. In 1991, part of the quay was temporarily closed due to the stability of the quay wall which the Appellants consider demonstrates the quay was considered to be public highway, but which PCC considers was an informal arrangement.

26. The 2014 Ben Ainslie Racing Limited (BAR) development which triggered the Application (see below), it is said, envisaged the retention of a pedestrian route around the perimeter of The Camber.

*Conclusions on the documentary evidence*

27. Of the evidence reviewed above, the references concerning the 1959 Act, the various minutes referring to the maintenance of a public highway and the traffic regulation order lend support to an inference of dedication of the Appeal route as a public right of way. There is further supporting evidence that the Appeal route was regarded as enjoying public rights in the promoted walk leaflet and the many photographs demonstrating use by the public. It seems to me from the documentary evidence as a whole that it is at least reasonable to allege that public rights exist, and that such rights may well be vehicular.

***Claimed use by the public***

28. PCC's investigation focussed on claimed use by the public (principally on foot) for a 20 year period. Thus the tests in Section 31 of the 1980 Act are applicable. The 20 year period for consideration is not identified, other than being described by PCC as the "the last 20 years". However, the Application indicates that the Appeal route was obstructed in May 2014 further to the BAR development on the north side of The Camber. This would give a 20 year period of May 1994 to May 2014.
29. No earlier bringing into question of the public's right to use the Appeal route with MPV, or by any other means is identified by the parties. Nevertheless, evidence of claimed use by the public on foot and with a bicycle, as well as with MPV, dating from the 1950s has been adduced.
30. As well as the user evidence forms submitted with the Application, PCC invited evidence from and interviewed local residents about their use of the Appeal route, summarising the evidence in the Report. Further clarification of use by the public has been undertaken by the Appellants. In all, some 100 or so individuals claim use of the Appeal route. It is not always clear however, how much of their use (individually) was on foot, compared to on a bicycle or with MPV, nor for what period(s) of time, or how frequent the different types of use were. Whilst PCC acknowledged there was evidence of use of the Appeal route with vehicles from time to time, no detailed analysis of this or of use with bicycles was undertaken.

31. Although none of the claimants indicate they had expressly sought or been given permission to use the Appeal route, for some individuals, use claimed was to access facilities and businesses on The Camber, or to access moored boats, for example. This is unlikely to constitute use 'as of right'. Some though, also claimed use for leisure purposes, but it is not clear how much of their use may have been with, or may be regarded as by, permission, and how much without, that is 'as of right'. Notwithstanding these uncertainties, there is a large body of claimed use by individuals walking, cycling, running or driving along the Appeal route for leisure and recreational purposes, and of their having witnessed others doing the same.
32. Evidence provided as part of the Appeal by Mr Pounds and Mr and Mrs Attwood is of use from the 1960s on foot, whilst observing use by vehicles and other pedestrians, taking account of the working dock. The evidence of Mr Hicks was of unobstructed use.
33. In addition, there is evidence of use that points to the full width claimed having been used by the public although PCC regarded the width of the Appeal route so used to be 2-3 metres. This was based on photographic evidence of pedestrians close to the quay edge and witness testimony that people walked there, as there was more to see.
34. Those claiming use stated they had neither been prevented nor restricted by any means or by anyone in their use of the Appeal route; and no prohibitory signs had been encountered. PCC says public use was regularly interrupted by barriers, gates and/or signage to warn of heavy plant and machinery. However, this is in conflict with the evidence of the users, some of whom acknowledged that for short periods of time and only on occasion, had their use been interrupted, either by temporary fencing, employees or both, whilst cranes or other equipment were in operation along the quayside.
35. The evidence of KB Boat Park<sup>9</sup> which operates a working crane on The Camber<sup>10</sup> was that the restriction of use by the public at such times was for health and safety reasons, whilst confirming it was for short periods. Photographic evidence shows examples of a temporary closure in 2011 with barriers in place when the crane was operating. This suggests that such interruptions were not carried out with the intention of preventing the acquisition of a public right of way through claimed use of the Appeal route by the public, but rather for operational safety reasons. PCC, however, maintains it was to prevent public access, especially so for vehicles.
36. KB Boat Park says the crane bay has been marked by yellow hatching for some 20 years, a requirement of the Harbour Master being that such working areas are able to be closed off for safety reasons, with temporary barriers and the like, when port operations require it. Similarly, Baker Trayte Marine Ltd has temporarily closed off the Quay edge for safety reasons to both cars and pedestrians, whilst retaining pedestrian access behind their compound.
37. Other features along the quays are referred to in the submissions such as a length of chain and posts on the section beside the former pay and display car park (on the south side of The Camber) between 1999 and 2014. However, users did not find this interrupted their use of the Appeal route and its width as

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<sup>9</sup> Agents for the Harbour Master

<sup>10</sup> As well as operating forklift and boat lift trucks in the affected area

claimed, although the fencing was described by PCC as demarcating a route for walkers to follow.

38. Asserting control by managing zones used for parking, marshalling the area passable by pedestrians, and that the appeal route falls within the operational port land are argued by PCC as evidence on behalf of the landowner of a lack of intention to dedicate a public right of way of any kind, whether under Section 31 of the 1980 Act or at common law. However, it is also stated that both the landowner and agent acknowledged use by public. Although some users recalled barriers they did not encounter them in operation, found their use was not prevented, or were prevented from use only for short periods when equipment was operating. Photographic evidence supports vehicular and pedestrian use of these areas, although particularly for the former it is difficult to establish in most cases whether this was permissive or public use. In common with PCC, BAR say since 2014 they have not restricted pedestrian or cycle access other than for safety reasons when launching and recovering boats.
39. There is photographic evidence of signage directed at the public including a sign which reads, *"Members of the Public are respectfully reminded that this an Operational Dock and as such certain hazards exist which you will not normally meet on open public highway. At any time of the day or night operations involving the loading and unloading of ships or the lifting and cradling of craft and associated work may take place....Portsmouth commercial port can accept no responsibility for damage or injury howsoever caused to visitors to this dock. The Harbour Master"*. This is consistent with PCCs references to the Appeal route being managed for purposes associated with the working port. It may also indicate that the Appeal route was regarded as a highway subject to a limitation in, or condition of, its use. It is not clear how long the sign has been in place.

#### *Conclusions on the user evidence*

40. There is conflicting evidence, especially as regards whether use was as of right or by right, whether interruptions were intended to prevent use by the public, and whether the actions of the landowner amounted to a lack of intention to dedicate, but there is no incontrovertible evidence that a way cannot be reasonably alleged to subsist over the Appeal route on the basis of 20 years use. However, this conclusion is subject to the fact that, having regard to paragraph 12 above, a 20 year period ending in May 2014 (when the obstruction brought public rights into question) could not give rise to the recording of a BOAT through use by MPV over the Appeal route since it in part relates to a period after commencement of the 2006 Act.
41. However, having regard to the conclusions I have reached above regarding the documentary evidence, the evidence of use by the public adds support to the reasonable allegation of a pre-existing public right.

#### **The 2006 Act**

42. If a BOAT is reasonably alleged to subsist over the Appeal route, then it is necessary to consider the effect of Section 67 of the 2006 Act. The Appellants refer to three of the exceptions, subsection 67(2)(a), (c) and (d).
43. Subsection 67(2)(a) excepts ways that have been lawfully used more by MPV than (in this case) walkers and cyclists, in the 5 years prior to commencement



of the Act, and is intended to except highways that are part of the ordinary road network. PCC acknowledges a level of MPV use, but considers there to have been more use by pedestrians and vehicles accessing private facilities, in other words permissive use. Use of the southern side of The Camber to access the car park was regulated by a Traffic Regulation order, although this suggests at least part of the route had been used by MPV to some degree. The Appellants argue that a roadway was marked out along part of the Appeal route forming the entrance to the former car park; between 1971 and 2015 East Street was designated as 'one way' for vehicular traffic; and some 35% or 36% of users described passage by MPV around the quays. However, on the available evidence, and noting the limitations referred to above in not being able to determine the relative levels and types of use and whether it was by right (permissive) or as of right, 35% or 36% of claimed use with MPV does not amount to the main lawful use in the 5 years leading up to commencement of the 2006 Act. Accordingly there is insufficient evidence to enable a conclusion to be reached that this exception applies. Furthermore, if a highway satisfies the user test in this subsection of the 2006 Act, it should not satisfy the 'BOAT test' in Section 66(1) of the 1981 Act (paragraph 11).

44. The evidence adduced and reviewed above does not, in my view, tend towards the conclusion that the exceptions in 67(2)(c) (which excepts ways that have been expressly created or constructed for MPV by primary or secondary legislation), or 67(2)(d) (which excepts ways that have been created by the construction of a road intended to be used by MPV, rather than ways that have subsequently been maintained to enable use by MPV), apply.
45. Subsection 67(2)(b) excepts ways that are both recorded on the list of streets as being maintainable at public expense and are not recorded on the definitive map. No evidence has been provided in this regard, however, the Appellants say the Appeal route is *presently* recorded on the Surveying Authority's list of streets as an unadopted highway. However, for the subsection to engage, the Appeal route would have to have been recorded on the list immediately before 2 May 2006. There is no evidence available from which I can reach such a conclusion.
46. For the exception in 67(2)(e) to apply the right of way for MPV must have been created by inference of dedication at common law through use by MPV before 1 December 1930. There is evidence relating to vehicular use of East Street and the swing bridge in 1922, though not directly of the Appeal route at this time; and there are minutes relating to the maintenance of The Camber prior to 1930 and to closure of highways connecting with the appeal route which may be relevant in this context. However, evidence of long use by MPV before 1930 would not of itself except rights of way from extinguishment. Where pre-1930 use relies upon an earlier creation of vehicular rights (through use by non-MPV, by express dedication or by some other means) then pre-1930 use by MPV cannot be regarded as having created the right of way for MPV and the exception will not be engaged. Given the longstanding existence of The Camber, the historical evidence suggests it is more likely than not that any possible vehicular rights will have arisen through use by non-MPV.
47. As the Application was made after the 2006 Act came into force, and I find there is insufficient evidence available at this time from which to conclude that any of the exceptions apply, I am unable to conclude that it is appropriate that an order for a BOAT should be made.

48. It may be that other rights subsist over the Appeal route and I note that PCC reached the conclusion that, were it not for their view it would be incompatible with the statutory purpose of the undertaking, an application to record a public footpath would be accepted.

### **Statutory Conflict**

49. PCC states the existence of a public right of way would be incompatible with the empowering legislation, in particular the 1847 Act and the 1990 Order, and their ability as landowner and Port Authority to manage The Camber as an operational port now and in the future as it would impact on their ability to set apart and appropriate any part of the undertakings for the exclusive or preferential use and accommodation of any particular trade, activity, person, vessel or class of vessels, and their ability to construct warehouses, storehouses, sheds or other buildings, or gates, fences and entrances within the harbour, dock or pier; their power to allocate for parking; and their power to alter the quay wall. The Camber's relevance to wider strategic objectives which may in time rely on the empowering legislation is also referred to.

50. The Appellants dispute this and refer to highways existing at other ports, as indeed does East Street at The Camber, and that traditional port activities here are in decline. They say from the 1960s a more residential and amenity role has been envisaged; future proposals support The Camber's diminishing role as a working port; use of the Appeal route has been continuous throughout the port's recent history and beyond; and current use is not incompatible with a public right of way. Although no copy of the DMS was provided by either party, the Appellants point out it records a public right of way (number 10) lying partly within the statutory undertakings of The Camber port.

51. The cases of *Newhaven Port and Properties Ltd v East Sussex County Council* [2015] (*Newhaven*) and *British Transport Commission v Westmorland County Council* [1959] are relevant. The first held that a presumption of dedication would not arise if the right of way would be incompatible with the statutory purposes of the landowner. The second held there is nothing to prevent dedication provided use of the right of way by the public was not incompatible with the purpose of the undertaking; and, incompatibility is a matter of fact.

52. I note that there is a conflict of evidence and argument regarding this matter. Notwithstanding this, as I have concluded no Order for a BOAT should be made it is not necessary for me to reach a finding in this regard.

### **Conclusion**

53. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

### **Formal Decision**

54. The appeal is dismissed.

*S Doran*

**Inspector**