
Order Decision

Inquiry held on 31 January 2017

by Helen Slade MA FIPROW

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

Decision date: 10 February 2017

Order Ref: FPS/P3800/7/73

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as The West Sussex County Council (Worthing – No.1 (Worthing: Addition of a Footpath)) Definitive Map Modification Order 2012.
- The Order is dated 12 April 2012 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There were 14 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I undertook an unaccompanied site visit to the area the day before the inquiry opened when I was able to walk along the claimed route and to familiarise myself with the general area.
2. None of the objectors took advantage of the inquiry procedure to submit statements or proofs of evidence, and none of them attended the inquiry itself. West Sussex County Council ('the Order Making Authority' or 'OMA') had a presence at the event, and the applicant, Mr Ray George, took the principle role in support of the Order. Three other people also attended the event: two in support of Mr George and another interested party. The inquiry was consequently curtailed, and most of the evidence was taken as read, there being no opportunity for cross-examination. Apart from the necessary formalities, issues relating to land ownership and private rights were discussed, and I heard supporting user evidence from Mr Derek Leathers.

The Main Issues

3. The Order has been made in consequence of an event set out in Section 53(3)(c)(i) which provides that the Definitive Map and Statement should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public right of way which is not currently shown in the map and statement subsists or is reasonably alleged to subsist over the land in question. In this case the Order relates to an alleged public footpath. At the confirmation stage of the Order I must be satisfied that the right of way subsists.
4. With respect to evidence of use, Section 31 of the Highways Act 1980 ('1980 Act') states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been enjoyed by the public as of right and without interruption for a full period of 20 years, that way is

deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, either by a notice or otherwise.

5. It is also open to me to consider whether dedication of the way has taken place at common law. This requires me to examine whether the use of the path by the public and the actions of the landowners or previous landowners (whoever they may have been) were of such a nature that dedication of a right of way can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common law; the length of time required to allow such an inference to be drawn will depend on all the circumstances. The onus of proving the dedication rests with the person claiming the public rights exist.
6. 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.
7. I have had regard to the guidance provided by the Department for Environment, Food and Rural Affairs ('Defra') and relevant legal judgements, and the test I must apply is the balance of probabilities.

Reasons

Background

8. The application was made by Mr R George in November 2010. It was accompanied by a number of user evidence forms. The path concerned is a narrow access way, or twitten, running from King Edward Avenue to Sackville Road, lying between properties 91 and 93 King Edward Avenue, and numbers 24 and 26 Sackville Road. There is a short 'dog-leg' half way along as the gaps between the properties are not quite in line with each other. The dog-leg utilises a short section of a longer central path running between the rear gardens of the properties in the two roads concerned.
9. The Estate was built in the second half of the 1930s by a developer called Wilmore Phillips Limited, a company which no longer exists. The houses were generally built in terraces of four houses, and access to the rear gardens was via the central passage running between the rear garden fences, and from side passages at the ends of each terrace of four. Two of the side passages connected the central passage to Sackville Road, and two other side passages (and the eastern end of the central passage) connected the central passage to King Edward Avenue.
10. The Land Registry documents relating to some of the properties have been submitted by both the applicant and by the OMA, and these indicate that the owners of the relevant properties benefitted from a private right of access over various parts of the communal passages, depending on the location of their houses. In all cases, the right extended to part of the central passage, and along one of the side passages leading to the road onto which their own property fronted.

Land ownership

11. There appears to have been some confusion, during the time that this matter has been under investigation, over the exact nature of the ownership of the land concerned and I will therefore deal with this at the outset.
12. In response to inquiries made by the OMA, the owners of numbers 91 and 93 King Edward Avenue, Mrs G Weller and Mr and Mrs Warrington respectively, completed land owner evidence forms which indicated that they each owned part of the route concerned, and each paid a peppercorn rent to the other. Correspondence from Mr C Wozencroft appears to contradict this, indicating that he and his sister are now the owners of the passageway between the two properties concerned. Nevertheless it would appear that part of the relevant passageway has been widened in the past to facilitate access to a garage in the rear garden of number 91, and the peppercorn rent may apply to this land.
13. The owners of numbers 24 and 26 Sackville Road have not acknowledged ownership of any part of the Order route.
14. However, using the documentation provided by the applicant and the OMA, which includes the title documents for a number of properties and a filed plan of the estate as it was first developed, and with reference to the comments in the written representations, I am satisfied that the situation is likely to be as follows:
 - The side passage way between points C and D on the Order Plan is owned to the centre line by the properties abutting it on either side, despite the comments of the current owners: i.e. numbers 24 and 26 Sackville Road;
 - The section of the Order route between points B and C (part of the central passage) is owned to the centre line by the properties abutting it on either side: i.e. probably 26 Sackville Road and 91 King Edward Avenue, due to the slight off-setting of the side passages;
 - The side passageway between points A and B on the Order plan largely remains in the ownership of the descendants of the developer, currently identified as Mr C Wozencroft and his sister.
 - A previous owner of 91 King Edward Avenue widened the side passage for part of the length between points A and B, to facilitate access to a garage in their rear garden. Part of the Order route therefore appears to belong to the current owners of that property.

Statutory Dedication under Section 31 of the 1980 Act

The 'Public'

15. A total of 28 people now have supplied evidence of their use of the alleged path, covering a period of time extending from 1936 to the present day; all of whom either live, or have lived, in King Edward Avenue. Some of the witnesses who have connections with properties on the north side of King Edward Avenue may have benefitted from a private right to use part of the order route, but those witnesses whose addresses related to the even-numbered properties on the south side of King Edward Avenue will not have had private rights over passages on the opposite side of the road.

16. The witnesses whose usage covers the earliest part of the period recall using the route to access the nurseries on the north side of Sackville Road, and other local facilities. Latterly, and since the 1950s in particular, the witnesses indicate that they were going to schools, sports facilities, cub and scout venues, shops and to visit friends and relatives to the north of the estate or in Sackville Road itself. Those visiting properties on the south side of Sackville Road may be considered to have been using part of the Order route by invitation, or implied permission, since the people they were visiting may have enjoyed private rights over the northern section of the Order route.
17. As the applicant acknowledges, the catchment area for the users of the route was quite small, being of particular benefit to the residents of a relatively defined stretch of King Edward Avenue and their friends, relatives and visitors. In terms of the definition of 'the public' for the purposes of the 1980 Act, it is recognised that this should not be interpreted too narrowly, and may be taken as meaning a group of people that can collectively be taken as representing the local community. It is often the case that a particular highway will only ever be used by local residents.¹ A public footpath is a type of highway.
18. There is nothing in this case to suggest that there was any formal restriction confining the use of the way to a defined and limited section of the public. The fact that some residents were given private rights to use the path does not inherently preclude the use of the path by other people, and there is no evidence to suggest that the path could not be used by anyone who chose to walk along it. I am satisfied that the user evidence demonstrates that the claimed route has been used by the public.

User as of right

19. Use that is capable of demonstrating that a way has been dedicated as a public highway must have been exercised 'as of right'. This means that it must have been enjoyed by the public without permission, without secrecy and without force.
20. In this regard, it is necessary to treat with some caution the evidence of use provided by some of the witnesses who are likely to have, or have had, at least a partial right of access. About two thirds of the user witnesses lived in, or have associations with, properties on the south side of King Edward Avenue and thus have no private rights over the claimed route. There is no evidence that any of those users sought or were given any form of permission.
21. Some use by the remaining one third of the witnesses is likely to have involved use of part of the claimed route over which they had no private rights, and that use, equally, does not appear to have been exercised with any form of permission.
22. There is no evidence that anyone used the way secretly; indeed use of the way is acknowledged by adjoining residents, and some users who were misbehaving have reportedly been apprehended. Antisocial behaviour is not acceptable anywhere, including on a highway, and such action by adjoining residents is therefore understandable. There is no evidence that anyone using the way in a responsible manner appears ever to have been prevented from doing so.

¹ *R v Southampton (Inhabitants) 1887*

23. Equally there are no gates across the route and, apart from the possible need to push through undergrowth on occasion, there is no evidence that force was used to gain access to it. The property details supplied to me show that the adjoining owners should have been maintaining the passageways and keeping them clear of undergrowth. There should therefore never have been the need to force a way through.
24. I am therefore satisfied that it has been demonstrated that there has been use of the way by the public which has been exercised as of right, allowing for the fact that the use of some of the route by some people will have been in a private capacity.

Period of use

25. The OMA made the Order on the basis of the statutory criteria in Section 31 of the 1980 Act which I have set out above. In order to identify the relevant period of 20 years' use, the date of the application was taken to be the date on which the use of the route was brought into question. Thus the 20 year period for statutory purposes runs from 1990 to 2010.
26. The OMA concluded that of the 19 witnesses whose evidence they examined, 12 people claimed to have used the Order route during that 20 year period, of whom seven used it for the entire time. Four of the 12 users were exercising private rights during some or all of the period of their usage, and so their evidence in relation to that half of the claimed route had to be discarded.
27. I have the benefit of some extra user evidence, which shows that during the relevant 20 year period, at least 17 people used the claimed route, of whom five lived on the north side of King Edward Avenue and were likely therefore to be exercising private rights, at least in part. Four of those witnesses were the ones identified by the OMA and one is an additional witness who supplied evidence in October 2016. Five people whose use I can rely on as being user as of right claim use of the route throughout the 20 year period, whilst several people claim to have used the route for overlapping periods of the relevant 20 years, resulting in usage figures each year of at least 12 to 14 people.
28. I am therefore satisfied that there is evidence of use by the public as of right for a period of 20 years dating back from 2010.
29. Mr and Mrs Warrington, who own 93 King Edward Avenue, claim that the route was obstructed in early 2005 due to building works, allowing no access at all; and that it is blocked regularly once a year for fence maintenance and weed killing. This, they argue, demonstrates that the path has not been available for the required uninterrupted period of 20 years, and renders the user evidence unreliable as none of the witnesses mention these stoppages.
30. I agree with the analysis of the OMA, supported by that of the applicant, that even if I accepted that these stoppages were total, they were not effected for the purpose of preventing use, but for the purpose of carrying out works of one sort or another. In any case, the adjoining owners are under an obligation to maintain access for those people who have private rights. Whilst I accept that passage may have incidentally been difficult or even impossible at times, I do not accept that it was done with the intention of obstructing a right of way.
31. I am satisfied that overall there has been use of the way by the public for an uninterrupted period of 20 years.

Whether there is sufficient evidence of a lack of intention to dedicate during the relevant period

32. Dedication of a public right of way can only be effected by a landowner, and so it follows that only a landowner can demonstrate a lack of intention to make such a dedication.
33. Section 31 of the 1980 Act sets out a number of ways in which a landowner might demonstrate a lack of intention to dedicate a public right of way: by erecting suitably worded notices; by lodging a notice with the appropriate council, or by making a formal deposit and declaration under Section 31(6) of that Act. There is no evidence that any of these methods, or any other, has been employed by the relevant landowners.
34. Actions taken by the abutting owners of 91 and 93 King Edward Avenue (allegedly stopping people who were behaving badly etc.) are of no effect in this regard because they are not the landowners of the relevant length of the claimed route, apart from a short section in the ownership of number 91. Nevertheless it appears that general use of the path was tolerated, and the only action taken was the apprehending of people behaving badly, which is understandable and reasonable.
35. The alleged obstruction of the route in 2004/5 for the building works, and other temporary blockages, cannot provide evidence of the landowner's intentions, since Mr and Mrs Warrington do not actually own the relevant piece of land.
36. There is no evidence that action has been taken by the other adjoining landowners, who, in any case, do not appear to be aware that they may own the relevant stretch of the claimed route. Neither is there any evidence that the actual owners of the majority of the land between points A and B on the Order plan took any interest in the land whatsoever during the relevant period.
37. I am therefore satisfied that there is insufficient evidence of a lack of intention to dedicate the route as a public right of way during the relevant 20 year period, and that a public right of way can therefore be deemed to have been dedicated by virtue of the statutory provisions.
38. That is not to say that I have no sympathy with some of the concerns expressed by the adjoining owners about antisocial behaviour, but problems which may arise from the use of the path are matters which can be dealt with by the local authority using their powers under other legislation.

Dedication at common law

39. Notwithstanding my conclusions on the statutory provisions, Mr George considers that there is sufficient use of the way for such a long period of time that dedication at common law can be inferred. I acknowledge that the user evidence shows that since at least 1954 the number of people claiming to have used the path in any one year is in double figures and remains reasonably consistent up to the present time. User prior to that date is not so high, but that is likely to be because there are fewer witnesses still available to provide the necessary evidence.
40. However, for a common law dedication to be successful, it is necessary for any actions by the landowner to be consistent with dedication. In this case, it is clearly documented that the original landowners gave private rights to certain

people; an action which would not have been necessary had it been the intention to dedicate public rights of way.

41. Furthermore, they did not treat the whole length of the Order route in the same way when they laid out the land. It seems that although the land over which the central passageway and the path to Sackville Road runs was actually conveyed to the abutting property owners, the path to King Edward Avenue was retained by the developer. No reason has been suggested for this course of action, and it is one which has left rather an annoying anomaly for the present landowner, but it suggests that there was a desire to retain a degree of control for some reason.
42. Thus, although the dedication of private rights does not preclude the dedication of public rights over the same routes, it is not an action which is consistent with the dedication of public rights. Neither is the retention of ownership of a short spur of land which is, in effect, a cul-de-sac. Thus I conclude that, when the estate was built, it was not the intention of the landowner that the Order route should be a public right of way.
43. The question remains, therefore, can that dedication be deemed to have occurred after that time and, if so, when? I conclude that the use of the route has been consistent for many years, and that the use has clearly been tolerated by successive landowners over a long period. Such extended toleration amounts to acquiescence and I am therefore satisfied that, in addition to my conclusion on a statutory dedication, a right of way can also be presumed to have been dedicated at common law.

Other Matters

44. Many of the objectors' comments relate to the undesirability of having a public footpath over the claimed route. Whilst acknowledging their concerns, this is not a matter which I can take into account. My decision must be based on the criteria as set out in the relevant legislation.

Conclusions

45. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed.

Formal Decision

46. I confirm the Order.

Helen Slade

Inspector

APPEARANCES

FOR THE ORDER MAKING AUTHORITY:

Ms Ami Dye

Legal Assistant, West Sussex County
Council

IN SUPPORT OF THE ORDER:

Mr Ray George

Applicant

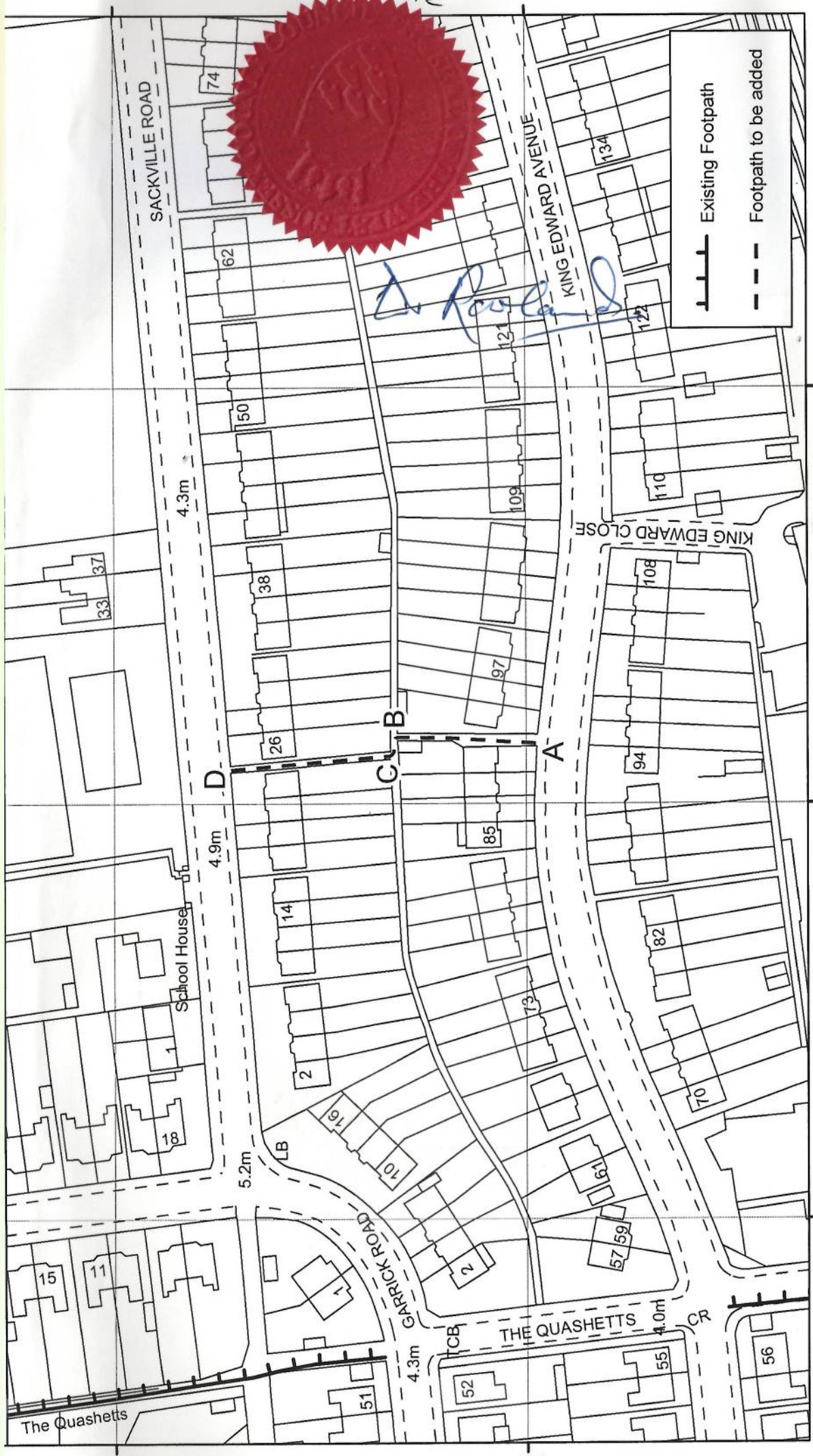
Who called:

Mr Derek Leathers

User Witness

DOCUMENTS

- 1 Statement and appendices submitted by West Sussex County Council
- 2 Statement and appendices submitted by Mr R George
- 3 Proof of evidence and attachments submitted by Mr R George
- 4 Copy of Notices relating to Local Inquiry submitted by West Sussex County Council



west sussex county council

Worthing: DMMO 1/11

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Tony Kershaw
Head of Legal and
Democratic Services

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Date: 10.04.2012

OS Sheet: TQ 10 SE

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West Sussex County Council, 100023447, 2008.

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