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# Order Decision

Inquiry held on 4 April 2017

**by Barney Grimshaw BA DPA MRTPI(Rtd)**

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

**Decision date: 21 April 2017**

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## Order Ref: FPS/P3800/7/74

- 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, 2014.
- The Order is dated 27 March 2014 and proposes to modify the Definitive Map and Statement for the area by adding a footpath running between Arundel Road and Cheviot Road, Worthing, as shown on the Order Map and described in the Order Schedule.
- There were 3 objections outstanding at the commencement of the inquiry.

## Summary of Decision: The Order is confirmed.

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### Procedural Matters

1. I held a public inquiry into this Order on Tuesday 4 April 2017 at County Hall, Chichester. I made an unaccompanied site inspection on 3 April when I was able to view the whole of the Order route. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary.
2. West Sussex County Council, the Order Making Authority (OMA), although supporting the confirmation of the Order, chose not to appear at the inquiry to provide oral evidence or to carry out any cross-examination. However, a representative of the OMA attended the inquiry to assist as necessary.
3. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.

### The Main Issues

4. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way that is not shown on the definitive map and statement subsists along the Order route.
5. Most of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the 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 was brought into question.

6. Common law also requires me to consider whether the use of the path and the actions of the landowners have been of such a nature that the dedication of the path by the landowners can be inferred.

### **Reasons**

7. The OMA examined various historic maps of the area but discovered no record of the Order route before the 1944 Ordnance Survey (OS) map. The route has subsequently been shown on more recent OS maps and is visible on aerial photographs taken since 2001. A 1932 map submitted at the inquiry shows a short section of the route at its northern end.
8. From evidence given at the inquiry it seems that the Order route probably came into existence as a through route in the 1930s when properties in Cheviot Road were being constructed although it is possible that part of the route existed earlier as an access to nurseries.
9. Although OS maps provide good evidence of the existence of physical features at the time they were surveyed, they do not indicate the existence of public rights. Accordingly, in the absence of other documentary evidence relating to the Order route, the question of whether the Order should be confirmed depends entirely on consideration of the available evidence of public use of the Order route in this case.

### **Statutory Dedication**

#### *Date when public use was brought into question*

10. There is evidence that public use of the Order route was brought into question in 1988 when a fence was erected across it close to Point B. This appears from a local newspaper report to have resulted in considerable protest from local people and the fence was removed after 6-10 weeks. Fifteen User Evidence Forms (UEFs) were submitted in 1988 in support of the claim that the route was a public right of way but, as the fence was removed, no formal application was pursued. The OMA has taken the view that because the fence was only in place for a limited period it was an insufficient challenge to bring public use of the route into question. However, at the inquiry it became clear that the view of users was that their use of the route had been brought into question in 1988 but that it had then been decided that it was a public right of way and therefore the fence was removed.
11. In my view, the 1988 fence did bring public use of the Order route into question. From the newspaper article and evidence given at the inquiry it appears to have caused considerable local outrage, the organisation of a petition and the collection of evidence to support a formal claim for the route to be added to the definitive map.
12. In 2010 another fence was erected across the route close to Point B and although this was soon broken it was replaced by a stronger fence that is still present. Public use of the Order route was therefore clearly also brought into question in 2010.

13. Landowners have submitted evidence of a fence or fences being erected across the route between 1988 and 2010 but users disputed whether these interfered with their use.
14. Overall, it is my view that public use of the Order route was brought into question in 1988 and again in 2010 and it is therefore appropriate to consider the 20 year periods from 1968 to 1988 and 1990 to 2010 with regard to the possibility that dedication of a public right of way might be presumed to have occurred in accordance with the provisions of the 1980 Act.

#### *User Evidence*

15. Eleven UEFs have been submitted in support of the current Order describing use of the Order route from the 1960s until 2010. Three forms were completed on behalf of 2 people each. Thirteen of the people completing UEFs claimed to have used the route throughout the period from 1990 to 2010 and one for part of that period. The frequency of use claimed varied from daily to once or twice per week. Most of the use claimed was on foot but some people also stated that they had used it on bicycles.
16. Five people stated that their property deeds indicated that they had a private right to use the route and their use might therefore be considered to have been in the exercise of their private right and should not be taken into account when considering the possibility of presumed dedication of the route under the 1980 Act. However, the OMA has stated that investigations at the Land Registry revealed that only one person had a private right to use the path throughout their period of use and one other for part of their period of use. I have seen neither property deeds nor Land Registry information and can conclude only that some of the use described in UEFs may have been in the exercise of private rights. People completing UEFs stated that they had not been obstructed or challenged and that they had not sought or received permission.
17. In 1988 15 UEFs on behalf of 18 people were submitted describing use of the Order route from the 1930s to 1988. Thirteen claimed to have used the route throughout the period from 1968 to 1988, four for part of that period and one had stopped using it before 1968. The frequency of use claimed varied but most people claimed to have used the route weekly or more often. Nearly all the use described was on foot. Again, users claimed not to have been obstructed or challenged or given permission.
18. In addition, 3 of the people providing evidence of use after 2010 also claimed to have used the route throughout the period 1968 to 1988 and a further 9 during some of that period. None of these people had also completed UEFs in 1988.

#### *Evidence of lack of intent*

19. Since 1975 most of the land crossed by the Order route has been owned by Mr GR Fluke who occupies property adjacent to it and a small section is now owned by Mr R Abbott, occupier of another adjacent property.
20. Mr Fluke has stated in written submissions that he was not approached and did not give permission for a fence to be erected across the route in 1988. He also stated that he has never personally challenged anyone using the route on foot. However, since 1990 he has given permission to the owners of various properties alongside the route to erect fences, locked gates and signs to stop

public access. His view is that public use of the route has always been subject to his permission which he has withdrawn on a number of occasions as a result of anti-social and criminal behaviour. No evidence has been submitted of any explicit permission being given and users of the route state that they did not receive such permission. In these circumstances it is possible that path users were unaware that the landowner regarded their use as permissive.

21. Mr Fulcher gave evidence that fences had been erected across the Order route on a number of occasions since 1990 although he admitted that these were often vandalised and there were long periods when public access would not have been significantly impeded. Aerial photographs said to be taken in around 2000-2002 and 2007 appear to show a fence across the route at Point B although it is not clear from the photos. whether a pedestrian would have been able get around the fence without undue difficulty. Mr McGuinness described this fence as a double fence forming a sort of 'chicane' which allowed walkers to pass but would have prevented use of the route by vehicles. Users who submitted UEFs had not referred to the fence although some reported that there had been bollards to prevent vehicular use. At the inquiry Mr McGuinness submitted evidence that he had subsequently contacted users and they corroborated his recollection of the fence. It was disputed by Mr Fulcher that there was ever a 'chicane' arrangement although he accepted that public access around the fence was often possible as a result of fence panels being broken down or removed.
22. It was also stated that Mr Abbott had erected a fence across the route although this had been of a somewhat flimsy nature and did not obstruct the route for long.

#### *Conclusions regarding Statutory Dedication*

23. Evidence of public use of the Order route in the period 1990 to 2000 is fairly limited and it is possible that some of the use described may have been in the exercise of private rights. Nevertheless, as the use described appears to have taken place on a relatively frequent basis, it is my view that it does raise a presumption that the route had been dedicated as a public footpath. However, there is also evidence that fences were erected across the route during this period with the authority of the landowners and this evidence is sufficient to rebut the presumption of dedication.
24. With regard to the period from 1968 to 1998, there is significantly more evidence of public use of the route and no substantive evidence of action by landowners to indicate their lack of intent to dedicate the route as a public right of way. It is therefore my view that the Order route was dedicated as a public footpath as a result of public use in the 20 year period from 1968 to 1988 in accordance with the provisions of the 1980 Act.

#### **Common Law**

25. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
26. In this case, there is evidence of public use of the Order route since the 1930s and no evidence of action by landowners to indicate a lack of intent to dedicate

it as a public right of way prior to 1988. In these circumstances it is arguable that it would be reasonable to infer that the route had been dedicated as a public footpath at common law before 1988. However, in the light of my conclusions regarding the statutory dedication of the route, it is not necessary to pursue this possibility further.

### **Other Matters**

27. Objectors referred to various problems they had experienced when the Order route had been open which included fly tipping, vandalism, dog fouling and other anti-social or criminal behaviour. They are concerned that problems will recur if the route is re-opened. I understand these concerns but, as they lie outside the criteria set out in the relevant legislation, I have given them no weight in reaching my decision.
28. One objector also suggested that, since most of the use of the route had been by people living in the immediate locality, it therefore was not use by the public at large as required by the 1980 Act. However, although there appears to be no legal interpretation of the term 'the public' as used in the 1980 Act, it has been accepted that use wholly or largely by local people may be taken as use by 'the public' in a number of cases, so long as use was not restricted to a particular class of user such as employees of particular firm or members of a single family.

### **Conclusions**

29. Having regard to these and all other matters raised, I conclude that the Order should be confirmed.

### **Formal Decision**

30. I confirm the Order.

*Barney Grimshaw*

**Inspector**

## **APPEARANCES**

### **OMA**

Ami Dye Legal Assistant, West Sussex CC

### **Supporters**

Joe McGuinness Applicant and path user

David Eames Path user

Daphne Eames Path user

### **Objectors**

Terry Fulcher Representing Mrs R Fulcher, occupier of adjacent property

### **Interested Parties**

Ann Norman Local resident and path user

Ron Sims Local resident and path user

## **DOCUMENTS**

1. Bundle of documents including Statement of Grounds, West Sussex CC.
2. Statement of Case and Proof of Evidence of Joe McGuinness, applicant.
3. Two Statements of Terry Fulcher.
4. Statement of GR Fluke (read by T Fulcher).
5. Further Statement with list of signatures and photo, J McGuinness.
6. Copies of 2 OS maps (1932 and 1944).

