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## Order Decisions

Site visit carried out on 1 May 2017

**by Peter Millman BA**

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

**Decision date: 09 May 2017**

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### **Order Ref: FPS/G1440/7/34 (Order A)**

- 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 Footpath Hastings 421) Definitive Map Modification Order 2016.
- The Order is dated 10 June 2016 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There were 7 statutory objections outstanding when East Sussex County Council ("the County Council") submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.

**Summary of Decision: I have not confirmed the Order.**

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### **Order Ref: FPS/G1440/7/35 (Order B)**

- This Order is made under Section 53(2)(b) of the 1981 Act and is known as The East Sussex County Council (Public Footpath Hastings 421) Definitive Map Modification Order 2016.
- The Order is dated 14 July 2016 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There were 7 statutory objections outstanding when the County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for determination.

**Summary of Decision: I have not confirmed the Order.**

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### **Preliminary matters**

1. After the County Council published Order A it realised that it contained typographical errors. It therefore made Order B in the same terms (apart from the errors) and asks that Order A is formally 'not confirmed'. I shall accede to that request. The remainder of this decision therefore concerns only Order B, which I shall refer to as 'the Order'.
  2. Mr P Cole applied for a modification order to add the Order route (see plan at the end of this decision) to the County Council's Definitive Map in April 2011. The County Council considered his application in November 2015 and concluded that there was insufficient evidence to show that it could reasonably be alleged that public footpath rights existed over the route claimed. It therefore refused to make an order.
  3. Mr Cole appealed to the Secretary of State against that refusal and was successful. The inspector who considered the appeal on behalf of the Secretary of State concluded that there was just sufficient evidence to found a reasonable
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allegation (see paragraph 5 below) of the existence of public rights. The County Council was directed to make the Order. It did so, but decided to take a neutral stance with regard to its determination.

4. Of the seven objections to the Order, one is from Mr Cole, the applicant. The others are from residents or owners of properties near the Order route.

### **Main issue**

5. To make an order, it is necessary for the evidence to found a reasonable allegation of the existence of public rights. To confirm an order, the more onerous test of whether the evidence shows, on the balance of probabilities, that public rights actually exist must be satisfied. The main issue therefore, is whether the evidence shows that a public right of way on foot exists on the route shown on the Order plan between A and B.
6. There are two alternative tests which may be applied to the evidence to determine whether public rights exist. There is the statutory test for confirmation of modification orders set out in section 31 of the 1980 Highways Act ("the 1980 Act"), which reads as follows: *(1) Where a way over any land... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question...*
7. There is also a common law test, which is based on the fact that public rights of way are, generally speaking, dedicated by the owners of the land across which they run. There is very rarely evidence of an express dedication. There is none in this case. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. The inference may arise from a consideration of historical documents instead of, or as well as, evidence of use of a route by members of the public. Section 32 of the 1980 Act provides guidance. It states: *A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such a dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.* The standard of proof for both tests is the balance of probabilities.

### **Reasons**

#### ***The statutory test***

8. The application for a modification order was accompanied by three completed user evidence forms. None of the forms claimed use of the Order route for a period in excess of 20 years. This is insufficient to demonstrate use of the Order route by 'the public' rather than by a very few individuals. The statutory test is clearly failed and I shall not consider it further.

### ***The common law test***

9. Anchor Passage, as the Order route is known, has existed since the first half of the 19<sup>th</sup> century. It is a narrow passage, locally known as a 'twitten', starting from a road called East Ascent, and running between houses, up some steps, to end in a car parking area called Sadler's Court. This perhaps took its name from the fact that the area was, in the 19<sup>th</sup> and early 20<sup>th</sup> centuries, a mews where horses were stabled, associated with the nearby Royal Victoria Hotel. Anchor Passage passed a once-existing public house, the Anchor Inn, closed in 1904 and now a private dwelling. Currently there are doors opening from the Passage to private dwellings either side. Sadler's Court is not adopted or publicly maintained highway, and it is unclear whether the Order, if confirmed, would result in a cul-de-sac public right of way being added to the Definitive Map.
10. There seems to be little doubt that Anchor Passage was used (whether or not as a public highway) from the time of its construction until around the beginning of the 21<sup>st</sup> century, after which gates were erected and locked across it at three points, but very little documentary evidence which has a bearing on whether or not public rights were ever dedicated over Anchor Passage has been discovered.
11. A report in the 1850s by the Surveyor to the St Leonards Improvement Commissioners (the highway authority of the time) stated that: *in consequence of a complaint from Mr Ballard of the Anchor Inn informing me that the steps from East Ascent to the Anchor Inn were in a dangerous state I have inspected them and find that the treads are very much worn away and should recommend that they be taken up and relaid...*
12. It seems to me that this is consistent with Anchor Passage having the reputation at the time of carrying public rights. However, in the absence of any evidence that the Improvement Commissioners were not responsible for other matters than public highways, it is difficult to give this evidence great weight in supporting a conclusion that public highway rights had been dedicated.
13. Another report (the extract is undated although clearly from the late 19<sup>th</sup> century) states: *Gentlemen, On inspecting the state of the Town, I find there is very little to report. The stone pavement to Footpath leading to the Anchor Inn requires repair under a part of which Mr Beck, Baker, has long had a right of an Oven and to properly protect it will cause additional expense in repairing the Pavement.*
14. Although this report mentions the Order route, it is not at all certain that the pavement referred to is part of Anchor Passage rather than a pavement leading to it. It can therefore not be given significant weight.
15. In August 1947 someone wrote to the Borough Engineer on behalf of the resident of 5a East Ascent (adjacent to the Order route) calling his attention to: *the sweeping and lighting on steps which lead off East Ascent to No. 1 Maze Hill... and 5a East Ascent known as Anchor Passage...* At the bottom of the page is a footnote, in a different hand to that of the letter writer, stating: *Notice at these steps warns users No Thoroughfare, to Victoria Hotel garage only, Do not deface walls. Victoria Hotel Co.* Beneath that is further stated: *There is an E.L. Lamp at top of steps. They are not swept by this dept.* It

seems likely that this would have been added by someone in the Borough Engineer's office. The reply from the Borough Engineer to this letter, also in 1947, states: *the footpath referred to... is a private passage over which the public have a right of way. The Corporation are not responsible for maintaining this passage.*

16. Although a copy of the letter was not produced, it is not disputed that it exists and is kept in the East Sussex Record Office. It is clear, therefore, that in 1947 the Borough Engineer considered that Anchor Passage was a public right of way, and this evidence supports the view that at some time prior to 1947 it had been dedicated as a public footpath. On the other hand, the document refers to a notice, perhaps erected on behalf of the Victoria Hotel, fairly clearly indicating a belief that the Passage was not a public through route.
17. There was, the 1947 correspondence confirms, a lamp-post at the top of the steps, probably at the point where the Passage turns through a right angle. Although lamp-posts are usually erected at public expense, only on public thoroughfares, the evidence about who erected this one and what happened to it ultimately is scant, and nothing of significance about the existence of public rights of way on Anchor Passage can be concluded from it.
18. In 1987 Hastings Borough Council was party to a deed of grant which gave a private right of way over, *inter alia*, Anchor Passage. I conclude from this that at that time the Borough Council did not consider that public rights existed; if they had, there would have been no need to grant rights. Ownership of Anchor Passage is not registered with the Land Registry. A neighbouring resident currently claims ownership, but historically the situation is not clear.
19. The evidence of use, briefly noted at paragraph 8 above, adds very little in support of the view that the Order route carries public rights.
20. In conclusion, some evidence has been provided which supports the view that public rights exist on Anchor Passage, but apart from comparatively recent evidence of the existence of gates locked across it, and the granting of private rights, nothing of substance pointing to the existence only of private rights. The test, however, (paragraph 7 above) is whether it may be inferred from all the evidence an intention on the part of a landowner or landowners to dedicate public footpath rights, and in my view the currently available evidence is too slight to enable that inference to be made. If such evidence comes to light in the future, a further application may be made.

### **Conclusion**

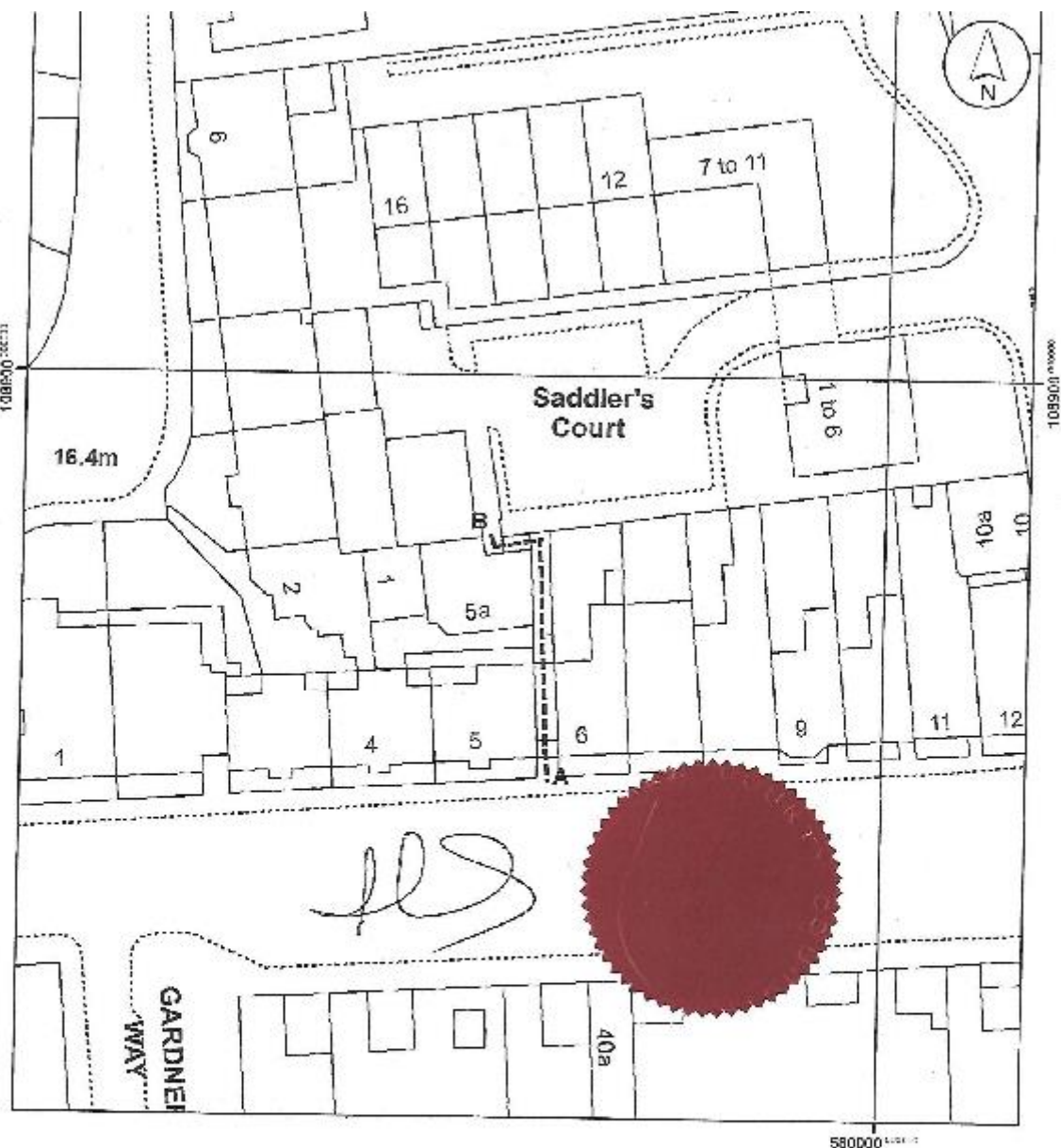
21. Having regard to these and all other matters raised in written representations I conclude that the Order should not be confirmed.


### **Formal Decision**

22. I do not confirm Order A.
23. I do not confirm Order B.

*Peter Millman*

**Inspector**



Map Title:		The East Sussex County Council (Public Footpath Hastings 421) Definitive Map Modification Order 2016		East Sussex County Council County Hall St Anne's Crescent Lewes	
Key:		Public footpath			
Date:		06/07/2016		Map No: HAS/FP/21/DM/MO/2016/V2	
Scale:		1:500		Author: NMC	

Map not to original scale