The Planning Inspectorate

Order Decision

Inquiry held on 7 November 2018

by Barney Grimshaw BA DPA MRTPI(Rtd)

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

Decision date: 7 January 2019

Order Ref: ROW/3189124

- 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 (Public Footpath Burwash 67) Definitive Map Modification Order 2017.
- The Order is dated 18 August 2017 and proposes to modify the Definitive Map and Statement for the area by adding a footpath running between the A265 Heathfield Road and the playing field, Burwash Common, as shown on the Order Map and described in the Order Schedule.
- There were 4 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a public inquiry into this Order on Wednesday 7 November 2018 at Burwash Common Pavilion. I made an unaccompanied site inspection on 6 November when I was able to walk the whole of the Order route. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary

2. 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

3. 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.

4. All 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.

5. 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

6. No documentary evidence indicating the status of the Order route has been discovered by East Sussex County Council, the Order Making Authority (OMA). Accordingly, the determination of this Order depends entirely on the evidence of public use of the claimed route that is available and whether this indicates that a public right of way can be presumed to have been dedicated in accordance with the provisions of the 1980 Act (statutory dedication) or inferred at common law.

Statutory Dedication

Date when public use was brought into question

7. Early in 2014 the Order route was obstructed by fencing apparently erected for health and safety reasons during the construction of new houses in Boundary Edge Close. Although this fencing was only temporary it appears to have brought public use of the route into question and soon after its erection an application was submitted to the OMA for the route to be added to the definitive map.

8. Since 2015, residents of Boundary Edge Close have challenged path users and obstructed the Order route with vehicles on occasion.

9. Evidence indicates that the route was partially obstructed by temporary fencing for several months in 2008 when works to clear the site of the former Conservative Club were being carried out. However, during this period it appears that a path was kept open which permitted continued use of the route.

10. No other evidence of action which might have brought public use of the route into question before 2014 was produced.

11. Accordingly, the relevant period of 20 years public use which would raise a presumption that this route has been dedicated as a public right of way in accordance with the provisions of the 1980 Act runs from 1994 to 2014.

Evidence of Users

12. User Evidence Forms (UEFs) on behalf of thirty-three people were submitted in support of the application for the route to be added to the definitive map. Ten people who had completed UEFs appeared at the inquiry to give evidence in person along with seven additional people who also described their use of the route. Accordingly, I have been able to consider evidence of use on behalf of forty people in total.

13. These people described their use of the route from the 1940s to the present day. The frequency of use claimed varied from daily to a few times per year but most people claimed to have used the route at least once per month and a large number more often than once per week.

14. Until 2005 the land crossed by the Order route was owned and occupied by the Conservative Club and some use was for the purpose of gaining access to the club and might therefore be regarded as having been by invitation rather than 'as of right' as required by the 1980 Act. However, all users claimed to have also used the route for other purposes as it provided a shorter and more attractive link between different parts of the village than walking along the roads.

15. Objectors pointed out that almost all of those claiming to have used the route were resident in the immediate locality and suggested that they should not be regarded as representative of the public (at large). However, it is quite common for some paths to be used almost exclusively by local residents and this does not prevent them from becoming public rights of way.

16. Overall, it is my view that the amount and type of public use of the Order route between 1994 and 2014 was such as to raise a presumption that it had been dedicated as a public footpath in accordance with the provisions of the 1980 Act. However, this presumption would be rebutted if there is sufficient evidence of action taken by owners of the land crossed by the route that indicated a lack of intention to dedicate a public right of way during the same period.

Action of Landowners

17. During the majority of the relevant 20 year period, the land crossed by the Order route was owned by the Conservative Club. There is no evidence to suggest that the club ever took any action to restrict public use of the route. On the contrary, witnesses who had been associated with the club said that care had been taken to close the car parking area once per year to prevent public rights being acquired over it but the Order route was always left open as it was believed to be a public right of way.

18. In 2005, the site of the Conservative Club was acquired by a group of local residents and was subsequently sold to a developer with the benefit of planning permission for four houses to be built but subject to a requirement that the footpath should remain open to the public. Before the houses were built the site changed hands again, possibly more than once. A further planning application was made by the eventual developer, Woldingham Homes, who agreed to dedicate the route as a public footpath. However, this dedication never took place and the land crossed by the route was sold along with the new houses.

19. In 2008 when the site was being cleared, temporary fencing obstructed part of the route for several months. However, path users stated that there was always a sufficient gap left to permit continued use. Some were also informed by the contractors that the fencing was necessary for health and safety reasons only and would be removed when clearance work was complete but that a pedestrian route would be maintained in the meantime.

20. In 1989, ornate memorial gates were erected at the point where the Order route enters the adjacent playing field (Point C). These gates are still in place and it seems highly unlikely that they would have been erected if it had not been believed that the public were entitled to use the route.

21. Overall, it is my view that landowners took no action to indicate a lack of intent to dedicate the Order route as a public footpath between 1994 and 2014.

Common Law

22. 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.

23. In this case, the available evidence indicates that the public have used the Order route for a lengthy period during which the landowners took no action to discourage such use and appear to have accepted it. In these circumstances, it may well be reasonable to infer that the route has been dedicated as a public footpath at common law. However, in the light of my conclusions regarding statutory dedication, it is not necessary to pursue this matter further.

Other Matters

24. Objectors to the Order raised a number of concerns including:

    - The lack of information given to them regarding the claimed right of way when they purchased their properties;
    - The danger inherent in pedestrians and vehicles using the same route;
    - The availability of an alternative route for pedestrians;

    I understand these concerns but, as they lie outside the criteria set out in the relevant legislation, I am unable to afford them any weight in making my decision.

25. The width of the route is stated to be 2 metres in the Order. This was questioned by objectors as the Order route now runs along a driveway and through a gap between fences where the available width is greater than 2 metres. However, the Boundary Edge development has taken place since 2014 and before then walkers used part of the access to the Conservative Club. Users' estimates of the width of the path vary from 1 metre to over 4 metres but, a width of around 2 metres was easily the most frequently mentioned. In addition, several witnesses specifically stated that this was the original width before redevelopment took place. In these circumstances, it seems reasonable to specify a width of 2 metres in the Order, this being the best available estimate of the used width during the relevant 20 year period.

Conclusions

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

Formal Decision

27. I confirm the Order.

Barney Grimshaw

Inspector

APPEARANCES

For the OMA

Gareth Jones	Solicitor, East Sussex County Council (ESCC)
Who called:	
Natalie Mclean	Legal Officer, ESCC
Celia Caulkin	Path user
Jeremy Richardson	Path user
Jane Lloyd	Path user
John Swift	Path user
Julie Beeney	Path user and former Treasurer Burwash Weald Conservative Club
John Beeston	Path user
Jacqueline Bird	Path user
Philip Brierley	Path user
Alan Fry	Path user
Michael Meeks	Path user
John Trigwell	Path user and former landowner
Irene Soullotis	Path user

Supporters

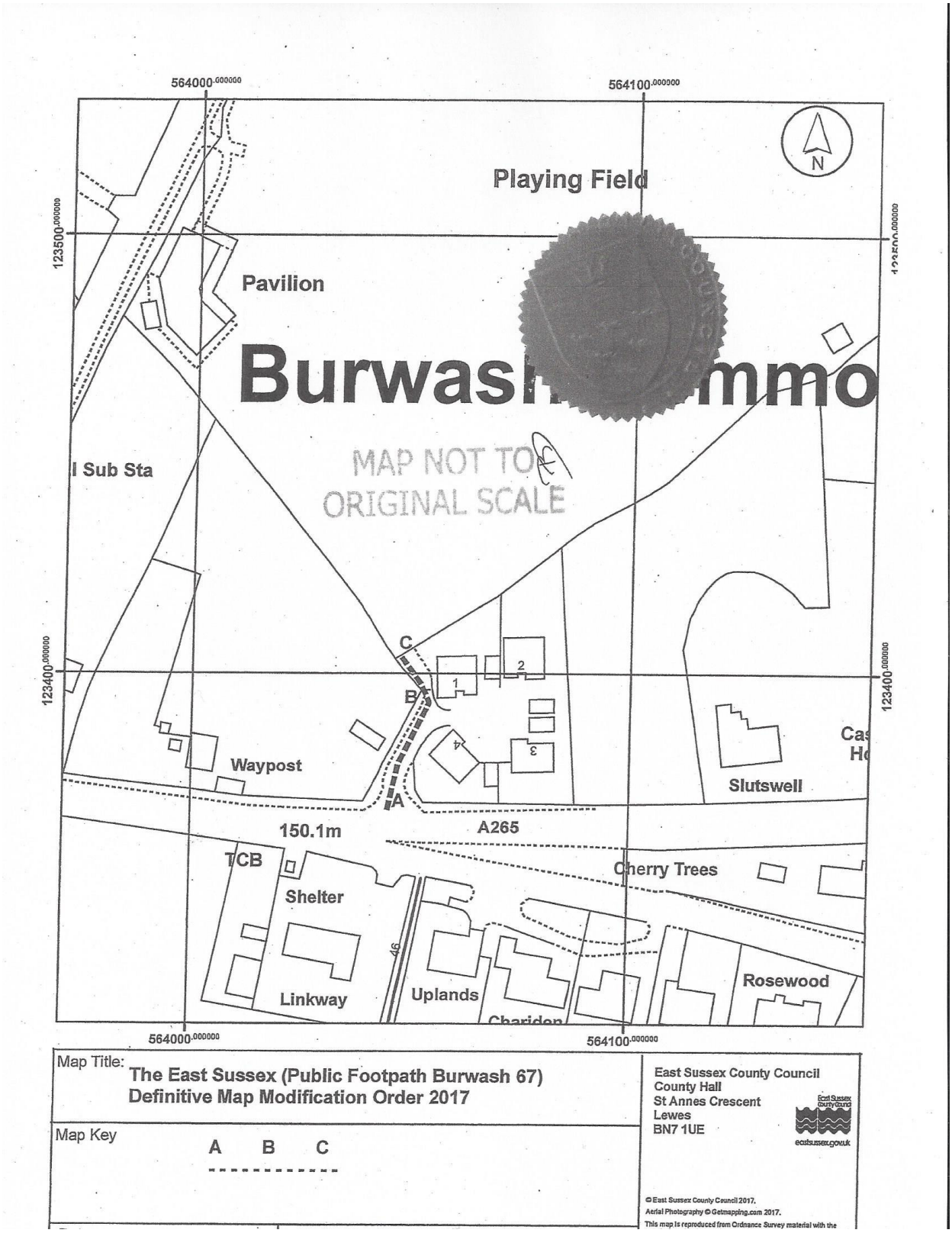
Diane Smith	Ramblers Association
Lesley Elmslie	Path user
Peter Shelton	Path user
Rosemary Ulas	Path user
John Barnes	County Councillor
Roger Newman	Path user

Objectors

Maya Polak	Landowner

DOCUMENTS

1. Statement of case of ESCC with bundle of supporting documents.
2. Statement of case of Natalie Mclean, ESCC.
3. Statement of Case of Burwash Common and Weald Residents' Association.
4. Proof of Evidence of Julie Beeney.
5. Proof of Evidence of John Beeston.
6. Proof of Evidence of Jacqueline Bird.
7. Proof of Evidence of Philip Brierley.
8. Proof of Evidence of Celia Caulkin.
9. Proof of Evidence of Jason Caulkin.
10. Proof of Evidence of Alan Fry.
11. Proof of Evidence of Jane and Keith Lloyd.
12. Proof of Evidence of Janet McCartney.
13. Proof of Evidence of John McCartney.
14. Proof of Evidence of Michael and Christine Meeks.
15. Proof of Evidence of Jeremy Richardson.
16. Proof of Evidence of Irene Soullotis.
17. Proof of Evidence of John Swift.
18. Proof of Evidence of John Trigwell.
19. Letter from Diane Smith, Ramblers Association, dated 26/07/2018.
20. Statement of Case of Maya Polak.
21. Excerpt from planning application, aerial perspective, parish council minute and excerpt from contract, I Soullotis.
22. Closing Submissions, ESCC.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N
Playing Field
Pavilion
Burwash Common
MAP NOT TO
ORIGINAL SCALE
Sub Sta
C
B
A
1
2
3
4
Waypost
Slutswell
150.1m
A265
TCB
Shelter
Cherry Trees
Linkway
Uplands
Rosewood
46
Map Title:
The East Sussex (Public Footpath Burwash 67)
Definitive Map Modification Order 2017
Map Key
A B C
East Sussex County Council
County Hall
St Annes Crescent
Lewes
BN7 1UE
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