



Order Decision

Inquiry held on 10 & 11 December 2019

by K R Saward Solicitor

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

Decision date: 24 December 2019

Order Ref: ROW/3221905

- This Order is made under Section 119 of the Highways Act 1980 ("the 1980 Act") and section 53A(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as The Kent County Council (Public Footpath SR22 (Part), Shoreham) Public Path Diversion and Definitive Map and Statement Order 2018.
- The Order is dated 6 September 2018 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were 5 objections outstanding when Kent County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Preliminary Matters

1. In arriving at my decision, I have taken into account all written representations and documentation as well as the oral submissions made at the Inquiry.
2. As I have referred to points along the existing and proposed routes as shown on the Order Map, I attach a copy of the map for reference purposes.
3. I undertook an unaccompanied site visit the day before the Inquiry opened and an accompanied site visit with representatives of the parties before proceedings began on day 2 of the Inquiry.
4. The application was made by the landowner of The Garden House. When the owner became aware of the existence of the public path across his land has no bearing on my decision. Similarly, how development and use of The Garden House evolved and the Council's response to obstruction of the existing path do not appertain to the legal tests that I must apply in deciding whether to confirm the Order.
5. In order to make an equitable comparison between the existing and proposed routes my decision shall be made on the basis that the existing path is open and available for public use along the correct alignment. For that reason, I shall disregard the presence of fencing across the legal line which currently prevents public access.
6. I note that a diversion has been in place for many years, but there is no suggestion that public rights have been acquired over it. It is signed as a temporary diversion. It does not completely correspond with the proposed diversion as shown in the Order which would necessitate the removal of a fence post and clearance of some vegetation.

7. At the commencement of the Inquiry the Council as Order Making Authority ('OMA') requested a modification to the Order. As made, the Order provides that the existing alignment of Footpath SR22 ('SR22') in Shoreham should not be stopped up until after 28 days of confirmation. Instead, a period of 18 months is suggested to allow biodiversity issues raised by objectors to be addressed. I return to this matter below.
8. The applicant opposed the late submission of documents on behalf of the neighbouring landowner, a statutory objector, a few days before the Inquiry. The applicant had opportunity to read those documents. During opening submissions Counsel for the objector asserted that the removal of a hedgerow adjacent to the proposed path was unlawful. Submissions were made on the implications flowing from those actions not expressly mooted before. Whilst the applicant was unrepresented at the Inquiry, Counsel for the OMA was able to respond to the points arising. In consequence, no prejudice arose to any party.

Main Issues

9. The Order has been made in the interests of the owner whose land is crossed by footpath SR22. By virtue of section 119 of the 1980 Act, for me to confirm the Order I must be satisfied that:-
 - (a) the diversion to be effected by the Order is expedient in those interests;
 - (b) the new path will not be substantially less convenient to the public in consequence of the diversion;
 - (c) it is expedient to confirm the Order having regard to:
 - (i) the effect of the diversion on public enjoyment of the paths as a whole, and
 - (ii) the effect the coming into operation of the Order would have with respect to other land served by the existing paths and the land over which the new path would be created together with any land held with it.
10. I shall also have regard to any material provision contained in a rights of way improvement plan ("ROWIP") for the area when considering the Order.

Reasons

Whether it is expedient in the interests of the owners of the land that the footpath in question should be diverted

11. The Order aims to divert the section of SR22 which runs through the grounds of the residential property known as The Garden House. The owner disagrees with comments from objectors that the land crossed by the path comprises an uncultivated meadow/field rather than part of the domestic garden.
12. I heard and can see from photographs supplied how the land was once long grasses. How it is defined does not particularly matter, but I must assess the position as the land is used now rather than in the past. It is now short grass planted with some trees. The perimeter of the grassed area is enclosed with post and rail fencing so that it is contained with the house. It appears as though part of the grounds. It is evident that it is privately owned land associated with

the dwelling. Indeed, throughout the Inquiry various parties from both sides referred to the land as 'garden' and I shall do likewise.

13. At its closest point the path is approximately 24m away from the house.
14. It was put to the OMA's witness under cross examination that most properties have a highway much closer to their home and having a large property does not entitle a landowner to favourable treatment. There is a clear distinction. Where a property is close to a public road or footway, there is no formal mechanism for an adjacent landowner to apply for it to be moved. They have no choice but to tolerate the possible impacts on privacy and security that flow from its use. In contrast, there is statutory provision to enable a landowner affected by a public path to apply for its diversion under section 119. That provision is not available for other types of highway.
15. I appreciate that there are many examples of public footpaths closer to all manner of dwellings, but I must concentrate on this particular property. Whatever my decision it does not set a precedent as each and every case must be determined on its individual merits.
16. Due to the topography, the house is at an elevated level when viewed from the path. The path crosses centrally through the landholding in a location where walkers will clearly see anyone using the areas located at the front and side of the house. French style doors open onto a patio laid with table and chairs. The owner explained how the patio captures the late evening sun making it suitable for entertaining. He suggested that his ability to use the area for socialising was compromised by the possible and sudden emergence of members of the public along the path. How often this might occur is uncertain as the existing route has not been in active use for some years.
17. People using the patio will be in full view of walkers along the path. It may not take long for a walker to pass, but even a brief interruption is liable to disrupt the privacy of those on the patio to some extent.
18. The landowner described the need for extra vigilance when his child is playing, or his dogs are in the garden as members of the public could appear a few metres away at any moment. The owner stated that the area to the front and side of the house is more level than other parts of the garden which is why it is suitable for play. I saw that the area comprises a hard-surfaced area to the front of the house where cars are parked. Next to the patio the land drops away at the side to front. This gives a natural differentiation between the area immediately around the dwelling and the lower area of grass where the path is located. The path then crosses over the drive and passes near to the garage which is set away from the house. The landowner referred to the grass crossed by the path as the 'lower' garden which reinforces that this is a distinct area.
19. Clearly, the welfare of children is paramount, but it seems to me that the area where a child might play away from parked cars is not that close to the path. There is a large enclosed rear garden and it might reasonably be expected that this would be the main focal point for the family wishing to enjoy privacy. This limits the degree of interference with use and enjoyment, but it does not negate it altogether. I can see that the owner may not want a child using the section of garden where the public pass or for his dogs to be loose in this area. The

occupiers may also wish to enjoy the view for themselves albeit the undulating topography is likely to limit the active use of the land as garden.

20. Walkers utilising the definitive line cannot be challenged which has prompted the landowner's concerns over security. Although the path affords accessibility to the grounds, it appears that such concerns arise from fear as to what might potentially occur rather than any actual incident. It might be argued with any public path near to buildings that a security risk is posed. It does not automatically mean that there is a justified concern over security due to the location of the public footpath.
21. I note the owner's argument that a diversion would allow the boundary to be secured to improve security. For anyone intent on gaining entry it could still be gained easily via the proposed route which crosses the driveway. As the objectors pointed out, if the owner has concerns then they could be addressed by other measures such as the erection of fencing between the path and garden or installation of security cameras.
22. What the diversion would achieve is greater separation between the house and public with opportunity to challenge anyone in the garden area. There may be a greater sense of security in consequence even if not in reality.
23. The position of the path will inhibit the family use and enjoyment of their property to at least some extent. For that reason, I am satisfied that it is in the interests of the landowner for that part of SR22 to be diverted and to improve privacy and the sense of security in the garden.

Whether the new footpath will not be substantially less convenient to the public

24. The proposal is to divert SR22 along an established path close to the perimeter of the landholding segregated from the garden area by fencing and hedging. As already noted, the route is already in use subject to some re-configuring.
25. Instead of a virtually straight line across the grass between points A-B in a north easterly direction, the diverted path would veer north at point A before changing direction again at point D to head east and loop round to join point B.
26. In doing so it would cross over the driveway to the house. A prominent sign is affixed to a wooden post beside the landowner's driveway stating: 'PRIVATE LAND – NO PUBLIC RIGHT OF WAY'. This makes clear the diversion is not in that direction. It is difficult to miss. Despite this and other 'temporary diversion' signs, the owner of the neighbouring property described seeing around twelve groups of people a year proceed down the driveway past his house towards the main road instead of following the diversion. This is not cited as the reason for his objection but is raised as matter of inconvenience for the public generally.
27. The argument made was that it is inconvenient for walkers who find themselves needing to backtrack. I heard how the area was once overgrown and this may have meant the route was not obvious. I daresay walkers may also not have expected the route to run behind a small timber shed particularly given the confined amount of space. This may explain why some walkers got lost. Once the route is fully laid out and waymarked the prospect of walkers becoming confused and straying off the path onto the busy A225 road appears unlikely.

28. The additional length is approximately 37m. The advocates disagreed on whether account may be taken of the whole of SR22 in determining the effect on convenience. Section 119(6) provides that "the path or way will not be substantially less convenient to the public in consequence of the diversion...".
29. No mention is made of the 'path as a whole' in the same way as the test of public enjoyment under section 119(6)(a), but that provision concerns the effect of the *diversion*. In contrast, the test for convenience relates to '*the path*'. This indicates that comparisons are to be made between the path i.e. SR22 as recorded and as proposed rather than being confined to the section of subject to the diversion. Bearing in mind also that matters of convenience include factors such as length and accessibility, those factors could not be properly assessed if not in the context of the entire path.
30. The additional length represents an increase of about 2% over the entire length of SR22 which measures around 1766m. There was consensus that the vast majority of walkers use SR22 for recreation. Even so, one objector submitted that people still prefer to take the shortest route. That may be so, but the test is one of convenience and an extra 37m will not take very long to walk having negligible impact upon convenience whether considered in relation to the diverted section only or the entire length of SR22.
31. The existing route has the convenience of being virtually a straight line across the garden. The proposed circuitous route may be out of character with the remainder of SR22 but that does not make it any less convenient. It is the changes in direction which would be less convenient. On the ground they do not appear particularly acute to cause any significant impact on convenience.
32. Apart from a short stretch past point A, there is currently no trodden line for the existing route making the alignment through The Garden House unclear. It would be improved by signage.
33. There is no defined width recorded for the recorded path whereas the diversion would be 2m wide except for a short section between C-D where it would narrow to 1.2m as it passes behind the timber shed.
34. Concerns are expressed over the gradient of the proposed path. Supporters on the other hand say that the existing path is uneven and with the steep bank they find the new route more convenient with its gentle incline. They say it is better suited for children and walkers with dogs.
35. Both routes start and finish in the same place necessitating a climb to the same point. The proposed route is on an incline involving a similar if not slightly lesser gradient than the existing path. In places it is on the level and where the path climbs it does so reasonably steadily. The conditions under foot would be improved by surfacing works between points A-E where there are currently exposed tree roots and masonry. It is not presently in its final condition.
36. The existing route involves contending with a steep bank near to point A prior to crossing the garden. According to the those in support of the diversion the bank is liable to become muddy and slippery. I saw for myself that part of the bank is very steep and had started to become muddy after recent rainfall. It is

likely to be treacherous as conditions worsen over winter months. For some users it would make use of the path too difficult. However, this indicates there is a maintenance issue. Whilst there is trampled passage from point A to the garden edge this area has suffered from overgrowth which would need to be cleared to bring the path back into use.

37. The open area of grass along the proposed route undulates but the conditions are good under foot.
38. In summary, there is negligible inconvenience from the increased length. Walking conditions would become fit for public use once surfacing works are undertaken. There is some inconvenience from the changes in direction, but they are not significant. Consequently, the new path will be less convenient to the public but not *substantially* so which is the test I must apply.

The effect of the diversion on public enjoyment of the path as a whole

Historical background

39. SR22 is annotated on the extract of the Ordnance Survey map of 1894. The route has not entirely followed the same alignment ever since with records showing a diversion in the 1970's. The existing alignment starts from what is now the A225 road running across a cultivated field and through woodland before entering the grounds of The Garden House. It continues along an arduous uphill route through woodland and beyond. It is a considerably lengthy path. Although also long established in time, the route has no particular historical significance.
40. The main point of contention is the comparison in views between the existing and proposed routes. In particular, the extent to which it is possible to see the Shoreham Cross, the village of Shoreham and the valley below.
41. Shoreham is made up of two conservation areas. The Shoreham Conservation Area Appraisals document prepared by Sevenoaks District Council is in draft form only, but it contains some useful descriptive material which aids in understanding the area. It explains that the village lies in the valley of the River Darent, giving it a sense of remoteness. It adds that the "presence of the river and the views across the valley are crucial to Shoreham's sense of place and its special character." One of the main features of the conservation areas is identified as "a strong visual connection with the enfolding landscape of the Darent Valley, made possible by its topographical position and the loose texture of its built form."
42. The draft Appraisal confirms that "In 1920 the War Memorial cross was cut into the hillside above the High Street by the villagers themselves." According to The Shoreham Society it measures about 100ft high and 55ft across. The Society describes it as the iconic symbol of the village.
43. The draft document also identifies the enclosure provided by the sides of the valley as an important aspect of the character of the conservation areas. It explains how scenic views from outside the conservation areas which take in the village as a whole together with its surrounding landscape help to appreciate its rural setting and well-defined boundary.

44. My attention was drawn to the heritage provisions within the National Planning Policy Framework. This document provides a framework for the preparation of local plans for housing and other development and it is a material consideration in planning decisions. As none of those things apply, I do not regard it relevant.

Hedgerows

45. There was dense undergrowth where the proposed route passes around the perimeter of The Garden House. The works undertaken included a reduction in the height of a hedgerow along the owner's western boundary. Objectors argue that the diversion is a product of unlawful activity from removal of part of the hedgerow. Regulation 7 of The Hedgerow Regulations 1997 makes it an offence for a person to intentionally or recklessly remove a protected hedgerow without written permission of the local planning authority. As such, they say the position should be taken as though the hedgerow remains intact and obscures views from any point along the proposed route between A-C. That is uncontested by the OMA as a point of principle if indeed the Regulations apply.
46. The landowner contests that it is a 'hedgerow' as it comprises mainly bramble. The DEFRA guidance¹ advises that the term is not defined in either section 97 of the Environment Act 1997 or the Regulations, but is likely to be given its ordinary, natural meaning as found in a good dictionary. As a guide, it may be 'a row of bushes forming a hedge, with the trees etc growing in it; a line of hedge.' It does not need to contain trees. Certainly, on a visual inspection it has the appearance of what would ordinarily be regarded as hedgerow.
47. The OMA does not dispute that it is hedgerow but claims it is not a *protected* hedgerow. Case law² and commentary³ was produced to support the view that the hedgerow is within or along the curtilage of the dwellinghouse and thus falls outside the Regulations.
48. Whether unlawful works have been undertaken to a protected hedgerow is a matter for the relevant authority. Even if this is an important hedgerow that is protected, there is no evidence before me that any part has been removed within the meaning of section 97(8) of the Environment Act 1995 which defines 'remove' as 'uproot or otherwise destroy'. The hedge has been cut and photographs supplied of its previous state, but they do not demonstrate that the hedge has been uprooted or destroyed. In the circumstances, I shall consider the position now that the works have been done.
49. As it happens, the issue of whether a protected hedgerow has been unlawfully removed is not that significant in the context of this case as shall become apparent in the reasons below.

Views

50. The landowner contends that the proposed diversion would offer enhanced views of the Shoreham Cross, the Darent Valley and the village of Shoreham. Objectors on the other hand maintain that those views are limited and only came about once the hedgerow was cut extensively in the summer of 2018.

¹ Titled "The Hedgerow Regulations 1997 – A Guide to the Law and Good Practice"

² *Burford v SSCLG & Test Valley BC* [2017] EWHC 1493 (Admin)

³ Extract from "The Law of Trees, Forests and Hedges", Second Edition, by Charles Mynors

51. There is a general duty under section 11 of the Countryside Act 1968 to have regard to the desirability of conserving the natural beauty and amenity of the countryside when exercising functions relating to land. That includes the conservation of its flora, fauna and geological and physiographical features as provided by section 49(4) of that Act.
52. As the land forms part of the Kent Downs Area of Outstanding Natural Beauty ('AONB'), section 85 of the Countryside and Rights of Way Act 2000 (CROWA00) imposes a duty on me to: "have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty". This also includes, by section 92, the conservation of its flora, fauna or geological or physiographical features.
53. The 'Duty of Regard' is reiterated in The Kent Downs Area of Outstanding Natural Beauty Management Plan 2014-2019⁴. Policy MPP2 says that individual local authorities will give high priority to the AONB Management Plan vision, policies and actions in carrying out 'other relevant functions' besides those planning related. One of its aims is for 'the principal special characteristics and qualities of the historic character of the Kent Downs landscape, the sites and features, field and settlement patterns, villages, hedgerows, routeways, woodlands and parklands are recognised, valued, conserved and enhanced'. Another aim is for 'the landscape context and setting of all historic buildings, features and settlements is protected, conserved and enhanced'.
54. Policy AEU2 is specific to public rights of way and provides that 'diversions and stopping up of PRoWs will be resisted unless it can be demonstrated that they will not have a detrimental impact on opportunities for access and quiet enjoyment of the AONB landscape and historic character'.
55. The proposed route has been in use for some time as a permissive path. Movement of the path from one location to another would not in itself give rise to adverse impact upon the AONB. The diversion would remain within the boundaries of land associated with a residential dwelling. However, the issue raised by objectors is the effect of the diversion on enjoyment of the AONB, among other matters.
56. Where the hedgerow has been cut in height there is a stretch along the proposed path where views over the surrounding countryside can be enjoyed. They include views of the village, Cross and valley. Those views are from a lower elevation than the existing route and so they are not as far reaching. Nor do they offer the same appreciation of countryside all about.
57. Objectors fear that after another growing season the views will be obscured once more. That may not happen so soon, but it is not an irrational fear given the density of the hedgerow which already shows signs of upward growth and how it obscured views in the past. Indeed, it was the lack of views which had prompted the case officer originally to recommend that an Order not be made.
58. Therefore, the views facilitated by removal of hedgerow are not as good as those from the existing route. Moreover, the availability of views from this section of the proposed route depends entirely upon the goodwill of the landowner in preserving them. As acknowledged by the OMA, it has no control

⁴ Second revision April 2014

over those matters as local highway authority. These factors limit the reliance that I can place on the views along this stretch as currently available.

59. There is another place along the proposed route where the Cross can be viewed in the context of the village and valley when walking downhill midway from point F-E. It is limited to certain spots and so could be missed. The view is interrupted by a large tree and it is at a lower level than the existing route.
60. This is less of a problem along the existing route as it passes across the open grass at an elevated level giving mostly unobstructed and far reaching views over the landscape encompassing all three features. Those views are not continuous, and when the trees are in leaf they may become more restricted. Nonetheless, it was evident from my site visits that there are times of year when the views are expansive and more so than the proposed diversion.
61. It seems improbable that the landowners would undertake further planting or erect fencing to obscure views from the existing route when it would also be liable to affect their own views.
62. The character of SR22 is predominantly woodland and that would remain so. Objectors claim the existing route is the only section of SR22 across open land. In response the OMA highlights that another section of SR22 lying between The Garden House and the A225 crosses an open field. I saw that the views from the field are expansive but the land levels are much lower than those through The Garden House and so they do not readily compare. Whilst the Cross can be seen along with some rooftops, the valley is not visible, and the view does not benefit from the same elevated position as the open garden area.
63. There are supporters who say they prefer the proposed route as it follows a clearly defined path with a gentle incline that offers as good if not better views of the surrounding landscape. There is currently no trodden line to follow along the existing route as it is not in public use. The current lack of signage is liable to cause confusion for walkers with risk of people straying off the defined route. That is far less likely to happen once the route is re-opened and signed so walkers may well feel more at ease in entering the garden. The incline is comparable on each and it is only one steep section along the existing route which presents an issue.
64. The Rights of Way Officer considered the Cross to be the main point of interest. I accept that it is a striking feature in the hillside which can be appreciated in isolation. However, most people would prefer a wider view to one offering fragmented snapshots. No doubt there will be walkers who understand the significance of the Cross in the context of the village and seeing the two together will have meaning whereas for others it will not. What came out of evidence is that SR22 is one of the very few places on this side of the valley where the Cross, village and valley can be viewed together in context from a public path. That scenic view plays an important part in the ability to appreciate the conservation areas in their valley setting and the AONB.
65. The landowner provides extracts of draft DEFRA guidance on diversion or extinguishment of rights of way passing through gardens, farmyards and commercial premises. The document is in draft form only and so it is not official guidance. It describes how members of the public may not be comfortable

following a path through a contained space such as private gardens because doing so feels like infringing on the privacy of a house owner. However, it also explains that the less contained the space is, the fewer the public's concerns tend to be. The degree of proximity can make a big difference. Few people are troubled by using public paths across privately owned land around a house so long as they feel they can keep a reasonable distance from it.

66. The Rights of Way Officer gave evidence in support of the Order albeit contrary to his initial recommendation based upon an adverse effect on enjoyment. He explained that at the time of his report he was relatively new in post and had not appreciated the need to balance the landowner's interests with the effect on public enjoyment. Since then, he has gained more experience and come to realise how people repeatedly say they do not like crossing gardens.
67. There is support for that view among the representations. Some users describe feeling more comfortable walking around the perimeter of the property rather than going straight through a private garden with the need to contend with a steep bank. One user refers to the fear of encountering loose dogs in the garden.
68. The existing route is not especially close to the house itself. There is a reasonable separation distance and the path crosses land lower down than the areas closest to the house. It is not like walking through a domestic garden close to the house and it is not within a contained space. I appreciate that some walkers may still feel self-conscious or that they are intruding especially if they can see occupiers outside. It may make them more reluctant to use the path for fear of trespassing or to pass through quickly without taking in the view. For many others, none of this will be an issue at all. Much depends on the individual concerned. I note that the Parish Council unanimously decided to oppose the diversion indicating that those members did not consider the garden location to be inhibitive.
69. Various references were made at the Inquiry of people feeling uncomfortable standing in the garden area to admire the view or to take photographs. The right of the public is to pass and repass and not to stop and use the path as a viewing platform. By walking at a steady pace the view can be appreciated.
70. Where the proposed route suffers is that a part passes tightly behind a shed in one corner of the garden where the path then narrows to 1.2m. It is this section of route that the Rights of Way Officer originally described as "unpleasant". The route proceeds from D towards A between hedgerow and vegetation on both sides creating an enclosed space. This is at risk of becoming rather oppressive if the hedgerow is not kept down in height. It does not compare favourably with the openness of the route across the garden. Indeed, the narrow passage behind the shed gives the impression of being pushed to the outer edges of the grounds with little regard to users.
71. In the past the path may have offered a pleasant walk through a field with a track cut into the long grass. Such pleasure may have been spoiled by the planting and landscaping that has been undertaken since, but that is the right of the landowner. There is nothing to compel the landowner to maintain the land as it once was provided the path is kept clear.

72. Whilst the proposed route may have suffered from overgrowth of vegetation in the past, the route would need to be brought into a fit condition for public use.
73. I note that The Ramblers raised no objection to the Order, and I am satisfied there is no evidence the organisation was misled as suggested. It might be anticipated that The Ramblers would have objected if they had significant concerns, but that does not diminish the concerns of those who have aired their views in opposition.
74. It is evident from the written submissions that there is a sharp contrast in the views of the public and this was reinforced from the evidence given orally at the Inquiry. Enjoyment is of course subjective and may depend on a walker's preferences. Those who are uninhibited by its garden location are likely to prefer the existing route with opportunity to enjoy more extensive and far reaching views. For dog walkers, the enclosed sections of proposed path may be better for off lead walking.
75. The diversion may also better suit those who dislike entering the garden or are unable to contend with the existing bank. However, it seems to me that those factors could be addressed at least to some extent by surface improvements to make the path fit for public use and waymarking.
76. I consider that there are important views of significance available from the existing route which cannot be seen from the proposed diversion. When considering the public use generally, most people would get greater pleasure from the views available from an open setting experienced from the existing route rather than the limited and more fleeting views from the proposed route, part of which is channelled behind a shed and enclosed by vegetation.
77. Bearing in mind that a large part of SR22 is through woodland, the views of the countryside which can be gained from this section of path as it opens up will be a highlight for many. Whilst there are some views available from the proposed route, they are not the same and the diversion will result in a loss of enjoyment of SR22 for many people in their appreciation of the AONB.
78. Therefore, I consider that there would be a diminution in the public enjoyment of the path as a whole.

The effect of the diversion on other land served by the existing path and the land over which the new path would be created

79. The owners of the neighbouring property known as The Summer House maintain that part of the route infringes the boundary line. To illustrate this, an aerial image has been plotted with the registered and conveyed titles. With any mapping there can be discrepancies, but the OMA confirmed that to the best of its knowledge the entire diversion falls within the title of The Garden House. The Order map was apparently drawn with reference to the Land Registry plans to ensure that was the case. In evidence it was explained by the Public Rights of Way Officer how the Order route has been drawn to allow a 1m gap between the path and edge of the applicant's registered title.
80. The OMA acknowledged that some realignment would be required of the path laid out to correspond with the proposed route shown on the Order map. If there is any dispute over boundaries, it is a matter outside the scope of this

decision. I am satisfied with the explanation provided by the OMA and note the compensation provisions available should it transpire the boundary is infringed.

81. There is no substantive evidence that the proposed diversion would have any adverse effect on land served by the existing route or on the land over which the alternative route will be created.

Biodiversity

82. Potential implications arise from removal of hedgerow/undergrowth required to accommodate the new path in terms of biodiversity. By virtue of section 40 of the Natural Environment and Rural Communities Act 2006 ('NERC') a public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity. That duty extends to my role in determining this appeal.
83. In order to facilitate the proposed diversion a further section of vegetation would need to be cleared between points C-D to achieve the intended 1.2m width. Measurements taken on site at the narrowest point by the corner of the shed established that there is currently a 1.0m margin. Therefore, 0.2m of hedgerow would need to be cleared to achieve the intended width. This does not appear to include any roots and so it would be the outer face of the hedge that would need to be cut back.
84. In objection, it is maintained that the hedgerow is home to many rare species including a colony of Roman Snails which are listed as protected within the 1981 Act. This raises the duty to have regard to The Habitats Directive.
85. The OMA accepts it is possible that the hedgerow is home to protected species. Its Senior Biodiversity Officer, a County ecologist, explained that Roman Snails, common dormice⁵ and other protected species such as invertebrates are recorded⁶ as present within the area. As such, their presence at this site cannot be ruled out. No survey or assessment has been carried out and the witness had not visited the site but from information provided by the Public Rights of Way Officer she considered a survey to be unnecessary due to the small area of habitat affected. She pointed out that just because a survey does not find evidence of species it does not mean none are present. The Officer thought it very unlikely that mitigation cannot be undertaken because of the amount of habitat that would remain.
86. In her professional view, the best approach would be a pre-commencement survey conducted prior to any works undertaken during the summer months as the optimum period. Should any protected species be detected then a licence would be sought from Natural England for permission to move them. From experience, the witness thought it unlikely that a licence would be declined as she had never known it to occur. Subject to any licensing requirement, the vegetation would then be cleared in a phased approach involving two stages.
87. In taking this precautionary approach the OMA emphasised that it is assuming protected species are present. The landowner submits that the quality of the flora and fauna adjacent to the proposed route is such that there would be no

⁵ Protected by European legislation

⁶ by the Kent and Medway Biological Centre which collates survey data for Kent

impact on conservation from clearance of the way. Nevertheless, the landowner agrees to such mitigation measures as suggested by the OMA. He is also willing to commission an ecological survey.

88. Of course, there can be no certainty on what species might be found or guarantee that a licence for mitigation measures would be forthcoming if required. The objectors further argue that in considering the grant of a licence Natural England must be satisfied that there is no satisfactory alternative⁷ and a satisfactory solution would be to maintain the existing route. This pre-supposes that a licence would be required which is not yet known.
89. The uncertainty presents an issue with the way that the Order is currently framed with the existing path being extinguished and the new path being created 28 days after the date of confirmation. Clearly the Order could not be made conditional upon the outcome of biodiversity measures.
90. I accept that the wording of section 119(1)(a) requires a specified date to be inserted in the Order for the new path to be created. As such, it cannot be tied to the date of certification of works to be undertaken to bring the new path into a fit condition for public use within section 119(3)(b) of the 1980 Act. However, there is nothing to prevent the existing route being extinguished on either the specified date that the new path is created or the date that works to it are certified by the local highway authority, whichever is later.
91. Thus, if the OMA's requested modification was accepted, the Order would give a period of 18 months before the new path comes into effect. This should allow enough time for the steps required to address biodiversity matters, whatever they might be. That does not mean the existing path can remain blocked throughout the 18-month period as it will continue to be the legal line unless and until extinguished. If for any reason, the biodiversity issues prevent the necessary works being undertaken to the new path and certification is never given then both the old and new routes would continue to exist although in practical terms the whole width of the new path could not be used.
92. At the Inquiry the OMA flagged up the possibility of both routes existing but advocated this approach as a solution if necessary. In my view, there may only be minor works required to a short section of hedgerow, but a certification process before the existing route is extinguished would safeguard any protected species along the new route. If the landowner is prepared to accept the risk of a licence from Natural England not being obtained, then it ensures biodiversity measures are addressed. On this basis, I am satisfied that a mechanism can be put in place through modification of the Order to ensure there is no breach of the Habitats Directive.
93. Under cross-examination the Biodiversity Officer acknowledged that some species, including Roman Snails and dormice can be affected by recreational disturbance from footfall beside a hedgerow. That is not the same as active works to the hedgerow which might disturb part of a habitat. In theory, it might be a factor for consideration in the balance, but on such sparse information I do not consider it would weigh very heavily. Indeed, the Officer added that there

⁷ Under section 16 of the 1981 Act the appropriate authority shall not grant a licence for any purpose mentioned in subsection (1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution.

could be benefits for some species from additional light filtration due to the hedgerow being cut which could weigh in the other direction.

94. Supporters argue that if the Order is not confirmed then biodiversity issues could arise from bringing the existing path back into use from clearance of vegetation near to point B and where the path is blocked by a fallen tree. The objectors say it is immaterial as the route must be treated as though open and available for public use. That is the position when drawing comparisons between the paths, but it does not mean such factors are irrelevant when considering matters of expediency.
95. As it is, the legal line runs through the overgrowth and so the path is already there. Having possibly created a habitat for wildlife by allowing the path to become overgrown and remain obstructed is not a reason to divert it. It may now be more difficult to clear the route, but there is no reason to suppose it cannot be achieved whilst following all proper measures to ensure protection of biodiversity even if that means the path cannot be re-opened immediately. In either scenario measures may need to be taken to address wildlife.

ROWIP

96. By the time of the Inquiry the OMA had adopted a new ROWIP 2018-2028. Various provisions were brought to my attention by the representatives for and against the Order. Both sides highlight the objective in paragraph 3.8 of theme KT03 to develop access which does not conflict with nature conservation interests and support mitigation measures which may require recreational pressure to be diverted from sensitive sites. These matters are addressed more fully above.
97. A key theme is for a well-maintained network to improve and increase the current maintenance of the network through further targeted vegetation clearance, signage and surfacing to encourage and increase use. A similar point is found in EN02 where maintenance and improvements will be designed to be in keeping with surrounding environment. The OMA considers these objectives are met by the clearance and type of surfacing proposed along the new route.
98. An action point under paragraph 5.6 of RR01 is to 'Advise on, and where appropriate, progress orders to amend the PROW network in the interest of the public and or [*sic*] the landowner'.
99. Subject to modification of the Order to address the works required, I find no conflict with a material provision within the ROWIP.

Whether it is expedient to confirm the Order

100. The meaning of 'expedient' in the context of section 119(6) was considered by the High Court in *Ashbrook v East Sussex County Council*⁸. With reference to the Concise Oxford Dictionary Mr Justice Grigson considered it safe to assume that Parliament had in mind it meant "suitable and appropriate".
101. Case law has further confirmed that the issue of expediency under section 119(6) is not confined to the specific factors in sub-paragraphs (a)-(c) of that

⁸ [2002] EWHC 481 (Admin)

section, namely those concerning public enjoyment, the effect on the land and other land, plus the compensation provisions. It can encompass other factors. Potentially, that could include matters pertaining to biodiversity.

102. The judgment in *R (oao) Young v SSEFRA*⁹ is authority that in deciding whether to confirm an order, the criteria in s119(6) should be considered as three separate tests, two of which may be the subject of a balancing exercise. Where, as in this case, the proposed diversion is considered expedient in terms of test (i), is not substantially less convenient in terms of (ii), but would not be as enjoyable to the public, I must balance the interests raised in the two expediency tests i.e. the interests of the owner in (i), and the criteria set out in s119(6)(a) (b) and (c) under (iii) to determine whether it would be expedient to confirm the order.
103. In terms of the landowner's interests I consider it relevant that the existing path crosses an undulating piece of land in the lower garden area situated well away from the house. There is reasonable separation distance. I have found that there are adverse effects on privacy, most notably from use of the patio at the side of the house. However, the property benefits from a large enclosed garden at the rear which is totally unaffected by the path. Had the path been closer to the house or affected the back garden then the effects would have been more serious. Security concerns could be allayed in other ways.
104. Matters of biodiversity are capable of being addressed through modifications to the Order for the new path or taking appropriate steps when considering clearance works to the existing path.
105. There would be a diminution in public enjoyment from loss of the same open, elevated and far reaching views across the landscape including Shoreham Cross, village and valley as a collective which are of local significance. I consider that they are important features to the character of the AONB. This would be significant in terms of the effect on the use of the path as a whole. Moreover, the diversion is compromised by a section of path extending behind a shed and enclosed by vegetation.
106. On balance, I consider that the effect of the diversion on public enjoyment outweighs the more limited effects on the landowner's interests. This leads me to conclude that it would not be expedient to confirm the Order.

Conclusions

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

Formal Decision

108. I do not confirm the Order

KR Seward

INSPECTOR

⁹ (QBD)[2002] EWHC 844 (Admin)

APPEARANCES

For the Council:

Ms Merrow Golden She called:	Of Counsel
William Barfoot	Public Rights of Way Officer
Helen Forster	Senior Biodiversity Officer, Kent County Council

Also in Support:

Jeremy Aslan	Applicant
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In Objection:

Ms Victoria Hutton She called:	Of Counsel
Mr Powell	Statutory objector

Also in Objection:

Sarah Parkes Shoreham Parish Council	Statutory objector
John Saynor The Shoreham Society	Statutory objector
Sheila Birkin	Statutory objector

DOCUMENTS submitted at the Inquiry

1. The Hedgerows Regulations 1997: A Guide to the Law and Good Practice published by DEFRA
2. Extract from 'The Law of Trees, Forest and Hedges' by Charles Mynors
3. Opening statement on behalf of Kent County Council
4. Kent County Council's Right of Way Improvement Plan 2018-2028
5. Email from Helen Forster with list of species within the 'designated species layer' and 'other designated species layer'.
6. Copy of Mr Aslan's submission given as evidence in chief

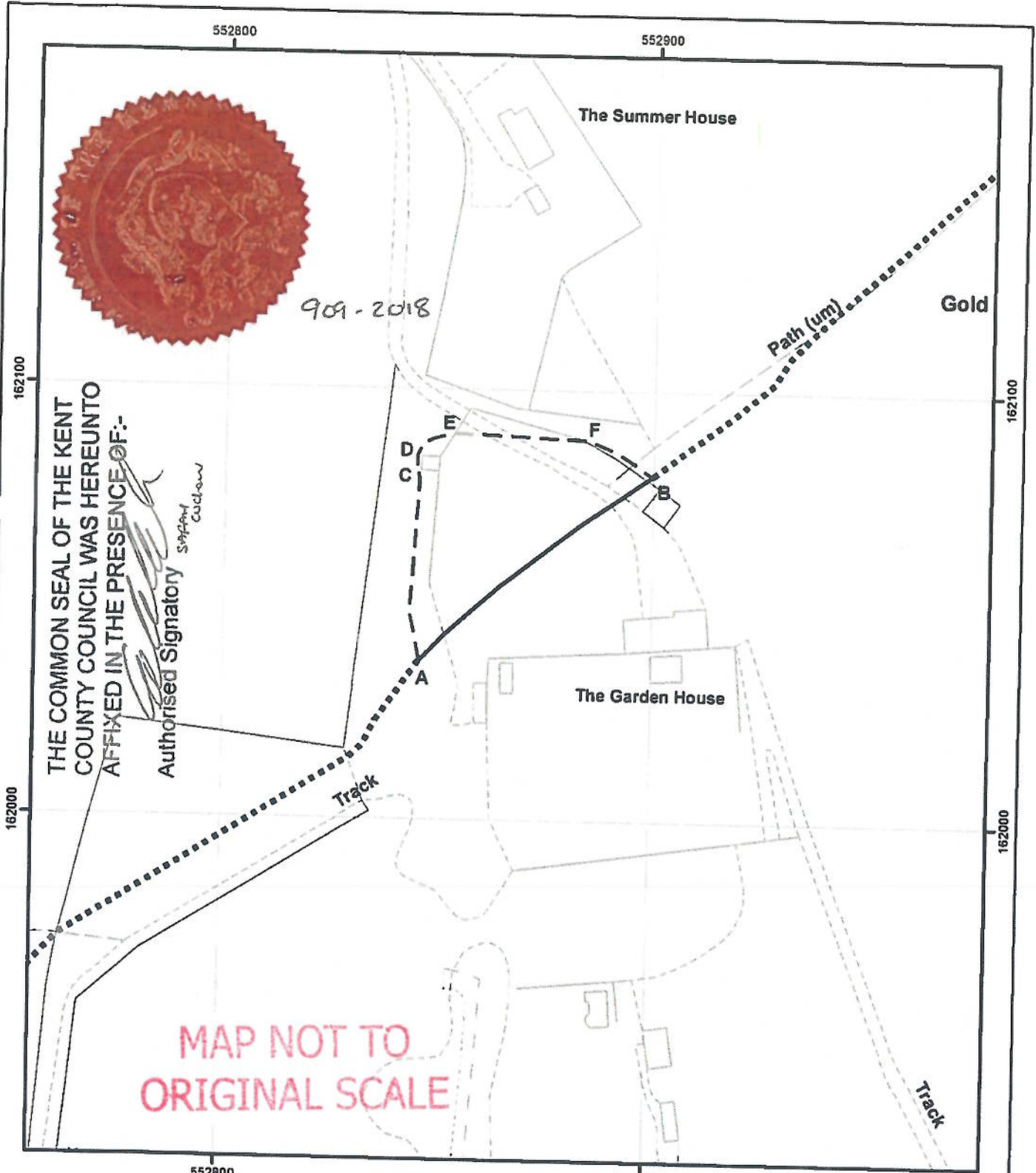
7. Copy of *Burford v SSCLG & Test Valley BC*

8. Written copy of the closing submission for Mr & Mrs Powell

DOCUMENTS submitted after close of the Inquiry

9. Written copy of the closing submission for Kent County Council

10. Written copy of the closing submission by Mr Aslan



THE COMMON SEAL OF THE KENT COUNTY COUNCIL WAS HEREUNTO AFFIXED IN THE PRESENCE OF:-
 Authorised Signatory
Suzanne Cuckow

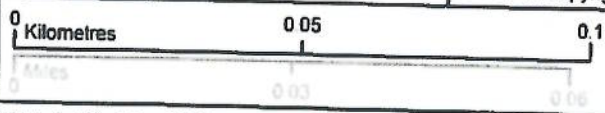
MAP NOT TO ORIGINAL SCALE

Key
 ——— Route to be diverted
 - - - - - New Length of route
 Unaffected Routes

Highways Act 1980
Wildlife and Countryside Act 1981
Kent County Council
(Public Footpath SR22 (Part), Shoreham)
Public Path Diversion and Definitive Map and
Statement Modification Order 2018
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