



Order Decision

Site visit made 15 June 2020

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 23 July 2020

Order Ref: ROW/3220614

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The West Sussex County Council (Chichester No. 1 – Arundel (addition of a Footpath) Definitive Map Modification Order 2018.
- The Order is dated 14 November 2018 and proposes to add a footpath running between Queen Street and Fitzalan Road via Caen Stone Court to the Definitive Map and Statement. Full details are set out in the Order Map and Schedule.
- There were two objections outstanding when West Sussex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is proposed for confirmation subject to modifications set out in the Formal Decision.

Procedural Matters

Original Order

1. West Sussex County Council, the order-making authority ("the OMA") made an Order to record this route on 16 March 2018. For reasons set out in the letter from the Planning Inspectorate this Order was found to be fatally flawed¹. The current Order was a replacement for the original.

Site visit

2. An accompanied site visit was arranged to take place on 11 March 2020. Unfortunately, public transport problems prevented that visit taking place. Subsequent Covid-19 lockdown restrictions on 23 March 2020 meant that an accompanied site visit would not have been appropriate. To progress the matter the parties were asked for agreement to an unaccompanied site visit. Further opportunity was given for additional submissions, for example maps or photographs, to assist with the site visit.
3. I would like to thank the parties for their assistance in making alternative arrangements during this difficult time. I made an unaccompanied site visit on 15 June, with access provided through the locked gate within Caen Stone Court ("CSC") without discussion. In addition to walking the route shown on the Order map, I took the opportunity to walk the 'block' of Queens Lane, Fitzalan Road, the access adjacent to Martlets Court² and Queen Street. I noted the locations of Westbury Lodge and the Co-op supermarket, as well as the general

¹ ROW/3207863

² Concerns that Footpath 3066-1 may be incorrectly recorded and/or obstructed are not matters relevant to this decision.

relationship to the town centre and Arundel Castle, which were matters relevant to the submissions on the Order.

4. One of the objections to the Order was withdrawn following submission of the Order to the Planning Inspectorate. The remaining objection was made on behalf of the Caen Stone Court Home Owners ("CSCHO").

Main issues

5. The OMA relied on the evidence of use to demonstrate that there had been deemed dedication of the Order route under the statute of section 31 of the Highways Act 1980 ("the 1980 Act"). CSCHO disputed whether the use had been possible through a full twenty-year period due to the development of the properties which they own and occupy.

6. The relevant sub-sections of section 31 of the 1980 Act are set out below:

(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, 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, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes—

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway...

7. The 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'brought into question'. To give rise to a presumption of dedication, it needs to be shown that there has been use, without interruption, as of right, that is without force, secrecy or permission, throughout the relevant twenty-year period.
8. I will consider whether the evidence as a whole is sufficient to show that there is a public right of way that should be recorded on the Definitive Map and Statement. My decision will be made on the balance of probabilities.

Reasons

Background

9. This Order arises as the result of an application made by Arundel Town Council on 20 November 2015. That application was accompanied by a number of user evidence forms ("UEFs"). The application was made following the erection of the electric gate to the west of point B³.
10. An application was made by another party in 2005 to record a footpath in the same area but on a different alignment through the land that has now been developed as part of the properties of CSC. This application arose following the erection of a barrier across the route. McCarthy & Stone Retirement Lifestyles (McS) indicated an understanding that this application had failed but there is no evidence before me that the application was determined by the OMA.
11. The OMA indicate that it was withdrawn following the agreement of the then landowner to enter into a dedication agreement under section 25 of the 1980 Act. The land changed hands before the agreement was completed and so this creation was not implemented. The OMA say that the 2005 application is not relevant to the current application, however, among the UEFs submitted in support of the 2015 application were those that had originally been submitted with the 2005 application.
12. I understand the current owners of the land crossed by the Order route to be Aviva Investors Ground Rent GP Limited and Aviva Investors Ground Rent Holdco Limited with a long-term lease to McS. McS appear to have been the developers of the current 24 apartments in CSC, at least some, if not all, of which are now in separate private ownership by way of long leasehold⁴. CSCHO says that the CSC development commenced in 2007 and was completed in July 2009. The Order route follows a red brick path laid within a darker red brick, vehicle turning and parking area for residents only.
13. Evidence has been provided of the former land uses, such as a brewery, cinema and garage, along with earlier mapping and photographs. Section 32 of the 1980 Act sets out that "*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 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 routes in use over time

14. With the challenge as to whether routes were available for use as claimed by the UEFs, due to changes from development of the land over time, I need to understand which route or routes were available when. This will help in

³ Points A and B are shown on the Order map

⁴ CSC indicate that all the plots were sold by 2013 and the OMA indicate that this is by leasehold

- understanding the use or potential use in relation to any relevant twenty-year period and assist with regard to the reliability of the evidence as a whole.
15. The earliest mapping provided is the tithe map, 1841⁵. The apportionment number 702, which is situated in part of the footprint of CSC, is said to be Swallow Brewery with cottages to the south. There appear to be 8 cottages facing the brewery and 6 on Queen Street. No copy of the apportionment entries has been provided.
 16. There is a clear and open route between what are now Fitzalan Road and Queen Street, which appears to run from approximately point A to a point a little further north than point B. The entrance is visible in the submitted drawing of the brewery.
 17. Reference is made to a 1912 tithe map, but I cannot identify a copy in the papers. Similarly, no copies appear to have been provided of the Ordnance Survey ("OS") mapping 1863 – 1946. Four of the five aerial photographs referred to in the report appear to have been provided although only one is identifiable by its date, 1968. All are of such poor quality that it is not possible to identify the features mentioned in the report.
 18. An undated oblique photograph submitted by a supporter to the Order is said to show the former Arun Cinema, which I understand was in place from about 1938 – 1959. This is situated on the northernmost part of the area now occupied by CSC, on a smaller footprint than the former brewery. The six cottages fronting Queen Street on the tithe map are identifiable but, apart from the Fitzalan Road end, several of those running at right angles to Queen Street have been removed.
 19. Directly to the south of the cinema is a pavement with a parking area south of that. Bollards on Fitzalan Road would prevent vehicles accessing from that side, but pedestrians appear to have had open access through the site. This would have encompassed a wider area than seen on the tithe map, although the pavement would have been likely to encourage use of the northern-most part. Two separate UEFs referred to a plaque on the cinema, one specifically saying it said it was a footpath. There are no photographs of such a plaque.
 20. The undated later photograph submitted in support shows part of the cinema removed on the Queen Street side and the removal of 3 of the 6 cottages on Queen Street. This provides a larger area which I understand to have been in use as a petrol station and forecourt, referred to as Castle Garage. There is no indication of any barriers to use, although it is difficult to see the Fitzalan Road end clearly.
 21. I understand the land to have been used as a garage from the late 1950's or early 1960s until around 1992. What appears to be the referenced 1973 OS map shows the later garage, which I believe was a Texaco garage. The supplied mapping does not cover the eastern-most section of the Order route, which would have been on a separate OS sheet. However, a physical through route was not identified on this map. The OS map attached to the 2005 application shows a gate at or near point A, to the west of 4, Queens Lane.

⁵ Two versions were available to me, one attached to the OMA's 2018 Committee Report and a larger scale extract attached to a statement of case in support of the Order

There is a garage building and the canopy of the forecourt with a line identifying the boundary to the pavement on Queen Street.

22. Photographs of the garage area in the committee report are undated but appear to relate to the 2005 application, with a barrier being referenced at that time. The garage is closed, with the pumps removed and heras-style fencing preventing access to the forecourt and canopy area. A low wall was present between the Queen Street pavement and the forecourt with vehicular access formerly crossing the pavement, most likely on a one-way system south to north. To the west of 4 Queens Lane was a gate blocking access onto the forecourt. The supporter indicates that the area was used as a second-hand car dealership following the closure of the garage. There is mention of a sliding door or gate in relation to the garage.
23. It appears that an understanding was reached for execution of an agreement under section 25 of the 1980 Act. The Ground Floor Plan associated with the planning for CSC, 10/1489/105, A, 1/12/06, shows a 'Right of way' between Queen Street and Fitzalan Road, following approximately the line of the Order route. The appeal decision⁶ sets out that there was a separate statutory process underway, which is presumed to relate to the s25 agreement. This was not relevant in terms of the appeal decision relating to planning merits. The planning decision does not provide evidence that there was no public right of way, as that was not the purpose of that decision. However, the planning documents also do not demonstrate that there was a public right of way.
24. This route identified by the planning document approximates the physical route visible on the ground, delineated by lighter colour red brick within the darker red brick paving. From 2015 the use of this route was prevented by way of notices and the electronic gate, leading to the 2015 application.

Summary

25. From the documentary evidence it seems that there has been a physical route available between Fitzalan Road and Queen Street for a number of years. This route has not always run on the same alignment, with building works, buildings and barriers sometimes interrupting possible alignments. The UEFs need to be considered with this background in mind.
26. Whilst it was argued in objection that none of the documentary evidence showed a public right of way over the route in question the point of this process is to determine whether or not one subsists, on the balance of probabilities.

The relevant twenty-year period

27. Section 31(2) of the 1980 Act sets out that the period of twenty years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question. Whatever occurs, and whoever causes the question to arise, the action must be sufficient to bring it to the attention of the users of the route that their right to use it has been challenged.

⁶ APP/C3810/A/07/2041196

28. Whilst events in 2015 – notices, turning back, a locked gate and an application to record the route – were sufficient to call use into question, the period 1995 – 2015 would be interrupted by the application of 2005. The OMA determined that events in 2005 brought the use of a route into question, giving rise to the relevant twenty-year period 1985 - 2005. There appears to have been a physical barrier in place at this time, possibly in relation to the planned development of CSC, which gave rise to the 2005 application.

User Evidence

29. The OMA did not take account of the UEFs submitted with the 2005 application; however, these documents are important to the question of use in the relevant twenty-year period. I note that both the supporter and an objector have referred to them and it is appropriate that I consider the evidence as a whole.
30. Looking at the 2015 UEFs ten people indicated that they were using the Order route in the twenty-year period from 1985 but there were only two or three reporting such use in the first five years of that period 1985 - 1990. I am not satisfied that such a circuitous route was likely to have been used without a physical delineation on the ground to guide users, although it is possible that it could have been accessed around the features on the ground at the time.
31. The claim of presumed dedication over the Order route in this time fails as I am not satisfied that there is sufficient evidence of use of this route throughout the twenty-year period 1985 - 2005 as required.
32. The UEFs submitted with the 2005 application do not show the Order route and this is understandable; as submitted in objection there is no indication that it was physically indicated on the ground until such time as CSC was built. The 2005 UEFs refer in general to a route traversing the garage forecourt, via the canopied area, to Queen Street via the northern vehicular access/egress. A couple of people indicated use of a route to the south of the canopy, which would have taken them to the southern vehicular access/egress.
33. Twelve people indicate use of this route in the relevant twenty-year period. Although numbers are lower in the very earliest part of the period, on balance, I am satisfied that the use is sufficient to give rise to a presumption of dedication in this twenty-year period. However, this presumption cannot relate to the Order route, as that was not what was shown by the users themselves in the UEFs. It can only relate to the route shown diagonally across the former forecourt area. There was a small amount of evidence relating to use on bicycle, however, I do not consider this sufficient to suggest that higher rights should be recorded on any route in question.
34. In addition, some of those who completed later UEFs noted that the route had changed. Clearly during the earlier period they were not using the Order route and may well have used the route identified by the 2005 application. However, without confirmation of the previous route which they had personally used, I have not placed weight on these UEFs in relation to this likelihood.
35. Although there were concerns in objection that only three of those completing the earlier UEFs were shown on the electoral register this is hardly surprising given that it is now fifteen years since the completion of those UEFs. People

will have moved away, or sadly passed away, but this does not detract from the written evidence submitted. This applies equally to the 2015/16 UEFs.

36. I agree that without further information there is some difficulty in reconciling the use of the route by someone living in Fitzalan Road when there would have been access to and from Queen Street further north. The UEF clearly states that the use was from "*Queen's Lane to Queen's Street to reach town*". The user may have had friends or family in Queens Lane with whom they walked but, as this cannot be known from the information given, I have given lesser weight to this UEF. I have not given weight to the use by anyone living in CSC, who would be presumed to have private rights over the route in question. I am satisfied that the UEFs, predominantly from those living in and/or visiting Queens Lane properties, are representative of 'the public' as required.
37. The objection queries the reasons for use of the claimed route when other accesses are available to Queen Street, via Queens Lane, the alleyway and/or FP 3066-1. However, people will tend to take short-cuts if available to them. For those living in Queens Lane the claimed route forms an obvious desire line to and from town; one user says that a "*Resident moaned that I was being lazy*", suggesting an understanding that this was a shorter route for some.

Landowner/occupier Evidence

38. There is evidence from those objecting to use of the route that such use occurred, on foot, bicycle, scooters, skateboards and dog walking. Whilst those living at CSC would prefer that there not be such use, with the associated issues that may arise, they were aware of such use. This does not relate to the 2005 application route, but it supports the generality of evidence in the UEFs that there was a used route in this location, providing links to and from Queen Street.
39. One or two of the CSC occupiers indicate their understanding that the red-brick pathway was marked to show an emergency fire exit. Others referred to it as originally providing access to the former show home.

Lack of intention to dedicate a right of way

40. In objection it was argued that users would not have been able to use the garage forecourt due to health and safety concerns. It is difficult to remember that health and safety may not have been such a concern in years gone by. The use of the garage area as a service station appears to have been only up to around 1992, after which it was a car dealership. The users indicate that this was the route used and I see no reason to doubt their evidence, which led directly to an agreement to record a public right of way over the land, even if ultimately not implemented. I do not consider there to be sufficient evidence of either interruption to use or a lack of intention to dedicate a public right of way over the land in question within the relevant twenty-year period.

Summary

41. I am not satisfied, on the balance of probabilities, that it has been shown that there has been a full uninterrupted period of twenty years use by the public over the land crossed by the Order route. There is insufficient user evidence in relation to use of that route is to support the presumption of dedication.

42. Taking account of the evidence as a whole I consider, on the balance of probabilities, that there is sufficient evidence to support a presumption of dedication in relation to the route for which the claim was initially made in 2005.
43. This finding is not made lightly as I fully recognise the potential difficulties that could arise as a result. However, I am satisfied that the evidence supports the claim of a pre-existing public right of way on foot over this alignment; a right of way is not stopped up simply by the fact that it is built over.

Outstanding matters

44. Orders are required to record a width but here is no width given for the route in this Order. Unfortunately, the UEFs do not ask about the width of the route and the earlier mapping shows an open area with no apparent width limitation. In the circumstances I shall record a width of 2 metres throughout, which I consider appropriate for use by walkers in an urban area.

Other matters

45. Considerations relating to the Human Rights Act 1998 ("the 1998 Act") are not engaged in relation to an Order of this type. This is not the addition of a new route but a determination as to whether such public rights already subsist over the land in question. The criteria which may be considered under the Wildlife and Countryside Act 1981 are strictly limited; it is not possible to interpret the legislation in such a way that it is compatible with the European Convention rights incorporated into the UK legislation by the 1998 Act.
46. Concerns regarding a petition and the response of the OMA; or the way in which the decision was taken to make the Order, are not relevant to this decision. I can only determine the Order before me on the evidence that has been submitted. I have not relied on the petition as providing evidence as it lacks detail of any individuals use of a route for this purpose.
47. The law does not allow me to consider such matters as the desirability or otherwise of the route; alternative routes; privacy; potential effects on property values; security or health and safety. It is clear there has been much concern for both those who would wish to see a right of way recorded and those who would not, which has also involved the Office of the Local Government Ombudsman. Whilst I have sympathy for each side of the argument, I have not taken account of such issues in reaching my decision.

Conclusion

48. Having regard to these, and all other matters raised in the written representations, I conclude that the Order should be proposed for confirmation, subject to modifications to the alignment of the route to reflect the route claimed in 2005 as set out below in the Formal Decision.

Formal Decision

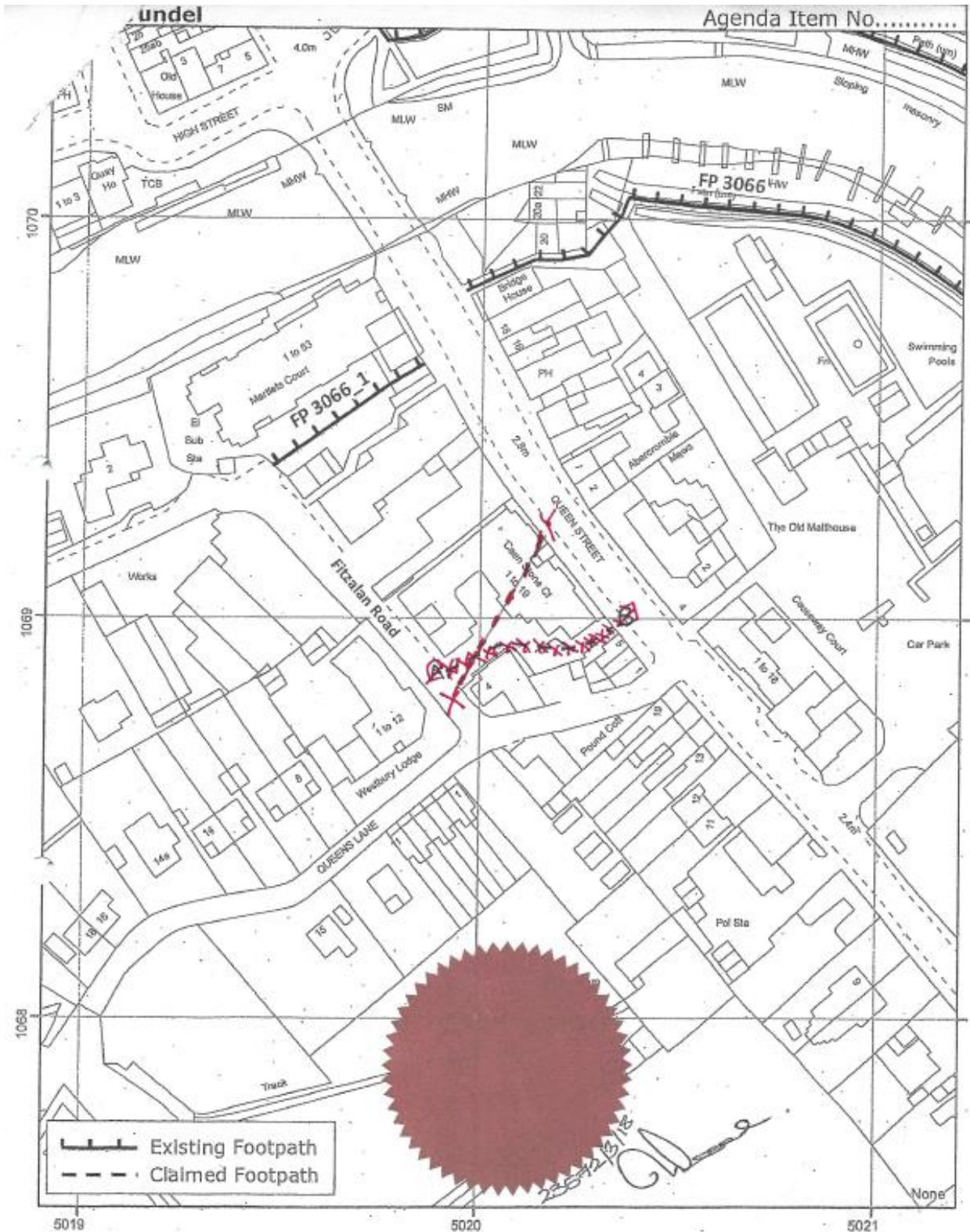
49. I propose to confirm the Order subject to the following modifications:

- Within Part I of the Schedule:
 - replace text "...501991, 106886..." with text "...501996, 106882...";
 - add text "...north-..." to text "...north-easterly...";
 - replace text "...32 metres then continuing along the south eastern side of Caen Stone Court for approximately 10..." with text "...46...";
 - replace text "...502033, 106899..." with text "...502014, 106921...";
 - replace text "...A and B..." with text "...X and Y...";
 - add text "Width 2 metres";
- Within Part II of the Schedule:
 - replace text "...501991, 106886..." with text "...501996, 106882...";
 - add text "...north-..." to text "...north-easterly...";
 - replace text "...32 metres then continuing along the south eastern side of Caen Stone Court for approximately 10..." with text "...46...";
 - replace text "...502033, 106899..." with text "...502014, 106921...";
 - add text "Width 2 metres";
- On the Order map:
 - delete route shown A - B;
 - delete text "A" and "B";
 - add route X - Y;
 - add text "X" and "Y".

50. Since the confirmed Order would affect land not affected by the Order; not show a way shown in the Order; and, show a way not so shown, I am required by virtue of paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order. This gives the opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Heidi Cruickshank

Inspector



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Arundel: DMMO 1/16 - Addition of footpath from Queen Street to Fitzalan Road - Site Plan

Plan: 01727 1:1,250
Date: 08.02.2018

OS Sheet: TQ 00 NW
Grid Ref: 5020 1065



Photocopy liable to distortion

Matt Davey
Director of Highways and Transport

