



Order Decision

Site visit made on 4 February 2021

by C Beeby BA (Hons) MIPROW

an Inspector appointed by the Secretary of State

Decision date: 15 March 2021

Order Ref: ROW/3226577

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the West Sussex County Council (Horsham No.1 (Addition of Public Footpath) Definitive Map Modification Order 2019.
- The Order is dated 22 January 2019 and proposes to modify the Definitive Map and Statement for the area by recording a public footpath between Coney Croft, Horsham and Public Footpath No. 1586/2 in Horsham, as shown in the Order plan and described in the Order Schedule.
- There were ten objections and one representation 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 confirmed.

Procedural Matters

1. The Definitive Map Modification Order (DMMO) was scheduled to be determined by means of a public inquiry that was due to be held on 24 March 2020. However, the introduction of restrictions due to the Covid-19 pandemic meant that a physical event of this nature could not be held as planned. Thus, in view of ongoing pandemic-related restrictions, the written representations procedure (including an unaccompanied site visit by the Inspector) was selected as the most appropriate means to progress the matter without delay.
2. The parties were consequently invited to submit any further written representations concerning relevant physical features of the Order route. Representations, which I kept in mind when undertaking my site visit, were subsequently received.
3. I am satisfied that I am properly able to make a determination on the evidence before me. I have taken into account all of the submissions in reaching my decision.

The Main Issue

4. West Sussex County Council made the DMMO under Section 53(2)(b) of the 1981 Act on the basis of events specified in sub-section 53(3)(c)(i). As a result, the main issue is whether the discovery by the Council of evidence is sufficient to show that a public right of way on foot which is not shown in the map and statement subsists over land in the area to which the map relates.
5. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be *reasonably alleged* to subsist, the standard of proof is higher for the DMMO to be confirmed. At this stage, evidence is required on the balance of

probabilities that a right of way subsists. The burden of proof lies with those who assert the existence of a public footpath.

6. The majority of the evidence in support of this case comprises User Evidence Forms (UEFs). As a result, the statutory requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This sets out that where a way has been enjoyed by the public as of right and without interruption for a full period of twenty 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. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.

Reasons

When the right of the public was brought into question

7. The evidence as a whole indicates that in January 2016 the alleged route was fenced on the Coney Croft side of the hedgerow through which it passes. This action was taken by the occupier of a property on Coney Croft, in response to alleged antisocial or criminal behaviour. The fence was sufficient to physically prevent the public from proceeding along the route and therefore its construction brought the right of the public to use the way into question. There does not appear to be any earlier date of challenge to public use and so I consider 1996–2016 to form the relevant twenty-year period.

Evidence of use

8. A proportion of responses to the questions on almost all of the UEFs has been pre-filled by the applicant, prior to the UEFs' completion by respondents. However, it is apparent from later annotations that respondents saw the parts of the UEFs which were pre-filled, and that some chose to amend or add to this information. As a result, it is evident that they had the opportunity to assess whether the pre-filled information correctly represented their recollections. Thus, I am satisfied that the UEFs accurately record the evidence of those users.
9. Twenty-two UEFs are submitted in support of the DMMO, showing use between the years 1976-2016. The UEFs of sixteen people record use of the route on foot over the whole of the relevant twenty-year period. The frequency of use recorded is between 30 and 300 times per year. Reasons given for use include exercise, to visit others and to visit local services and facilities. Thus, use of the route was by the public. For use by the public to have been "as of right", it must have been without force, without secrecy and without permission.
10. A number of objectors to the DMMO state that a fence was present across the route, and that this was partly trodden down to facilitate public use. A low fence of metal wire and wooden posts is present within the hedgerow through which the route passes. A gap in the centre of the fence corresponds with the route shown in the UEFs.
11. Whilst no gate in the fence is now visible, several of the users of the route over the relevant twenty-year period record the presence of a gate which was latched but not locked. This is marked on UEFs at the point where the route meets the recorded Public Footpath No. 1586/2. The user evidence suggests that the gate was removed a number of years ago because it fell into disrepair.

12. Given the consistency of the user evidence on the matter of the gate, the acknowledgement of the existence of the gate by two objectors and the presence of the gap in the wire fence, it is most likely that the gate was present where the gap now exists. The user evidence records that the gate was unlocked when present and does not suggest that there has been any need to tread down fencing, or that users met with any other obstruction on the route. Thus, on balance, the evidence does not indicate that force was employed to make use of the route.
13. There is no suggestion that any attempts were made to conceal public use of the route, and indeed a number of objectors to the DMMO acknowledge that public use has occurred. It has consequently been open use of a type that was capable of being challenged had anyone chosen to do so, and hence was use "without secrecy".
14. Both sides indicate that members of the public did not seek or gain permission to use the route, and therefore use was "without permission".
15. Turning to the issue of whether use was without interruption, an objector states that bushes and shrubs flourished since the gate was removed and formed a natural obstruction, so that the route was not in unobstructed use for the relevant twenty-year period. There is no other evidence to suggest that natural obstructions made the route impassable on foot at any point over the relevant period. Moreover, an interruption must be with intent to prevent public use if it is to prevent the dedication of a public right of way¹. Thus, if vegetation had occasionally impeded use of the route, this would not have formed an interruption for statutory purposes.
16. A significant number of members of the public claim to have used the route frequently for the whole of the relevant twenty-year period. On the balance of evidence, such use has been "as of right", as required by the 1980 Act. Furthermore, the use was without interruption.
17. As a result, the use raises a presumption that the DMMO route has been dedicated as a public footpath. It is a rebuttable presumption and so I must consider if there is sufficient evidence that there was no intention during the relevant period to dedicate it as a public right of way.

Evidence of lack of intention to dedicate a public right of way

18. Objectors state that a notice on the garages which reads "Private Property Residents Parking Nos 23-31 only", and which was present at my site visit, has been there for several years. It is submitted that the notice has been there since at least 2013.
19. The notice's wording appears to be directed to those seeking to park vehicles in the area. This is consistent with evidence that parking availability in the garage area has given rise to concerns. Thus, the notice does not clearly seek to deter use of the route on foot. The notice is positioned on a block of garages to the side of the route rather than on it. Furthermore, users do not report having seen a notice until the fencing of the route in January 2016. The evidence as a whole consequently indicates that the notice's wording and position did not clearly communicate to users that there was no intention to dedicate the route as a right of way for use by walkers.

¹ Lewis v Thomas [1950] 1 KB 438

20. An objector states that she arranged for a "Private Property" notice to be attached to the new fence, and that the notice was subsequently removed by an unknown party. However, she states that the notice was erected in January 2018 and consequently this occurred after the relevant twenty-year period. As a result, it would not form potential evidence of a lack of intention to dedicate a public right of way over the period over which statutory dedication occurred.
21. I acknowledge the submission that an individual who wishes to turn people back from using a route may not do so due to concerns about potential retaliation. Nevertheless, there are a number of other means by which a lack of intention to dedicate a public right of way may be communicated. The evidence before me does not indicate that any such measures were taken over the relevant twenty-year period.
22. There is insufficient evidence indicating a lack of intention to dedicate the route as a public footpath over the period 1996–2016 to rebut the presumption that it has been so dedicated.

Conclusion regarding statutory dedication

23. The evidence of public use considered above is sufficient to raise the presumption that the route has been dedicated as a public right of way. That presumption is not rebutted by the opposing evidence. Accordingly, I conclude that on the balance of probabilities the DMMO route has been dedicated as a public footpath as a result of use by the public over the period 1996–2016.

Other Matters

24. Objectors to the DMMO raise concerns regarding its effect (if confirmed) on their rights under the Human Rights Act 1998 (the 1998 Act). Whilst I sympathise with these concerns, a DMMO seeks to record a public right of way which already exists under the law; there is no provision for consideration of its effect on individuals and their human rights. A decision to confirm or not confirm a DMMO is lawful under Section 6(2) of the 1998 Act. A highway authority may take account of such issues by, for example, diverting a newly recorded route, however this is not a matter for this Decision.
25. Objectors additionally raise a number of concerns relating to the possibility of antisocial and criminal behaviour, effects on the natural environment, noise and dog fouling, the potential cost of maintenance, and danger to the public from vehicles if a public right of way were recorded over the route. I understand these concerns, however, as they lie outside the criteria set out within the relevant legislation, I cannot give them weight in reaching my decision.
26. Similarly, support for the route remaining closed and the availability of potential alternative routes are matters which lie outside the statutory criteria which I must consider.
27. A public right of way can co-exist with a private right of way over land and therefore I have not considered further the submission that confirmation of the DMMO would adversely affect any private right of way.
28. An objector raises concern about the route measurements in the Council's report on the matter. Notwithstanding this, the measurements differ from those subsequently recorded in the DMMO, which forms part of the legal record

of a public right of way upon its confirmation. I consider that the DMMO measurements correspond acceptably with my site visit observations and therefore I do not share the concerns regarding the accuracy of measurements.

29. An objector submits that a gap in the hedgerow where the route passes through it is not shown in property deeds. Whilst this document is not before me, the identification of highways was not its primary purpose. There may be other reasons for any exclusion of the route, and consequently I attach only minimal weight to the submission.

Conclusion

30. Having regard to all the evidence before me, I conclude that the DMMO should be confirmed.

Formal Decision

31. I confirm the DMMO.

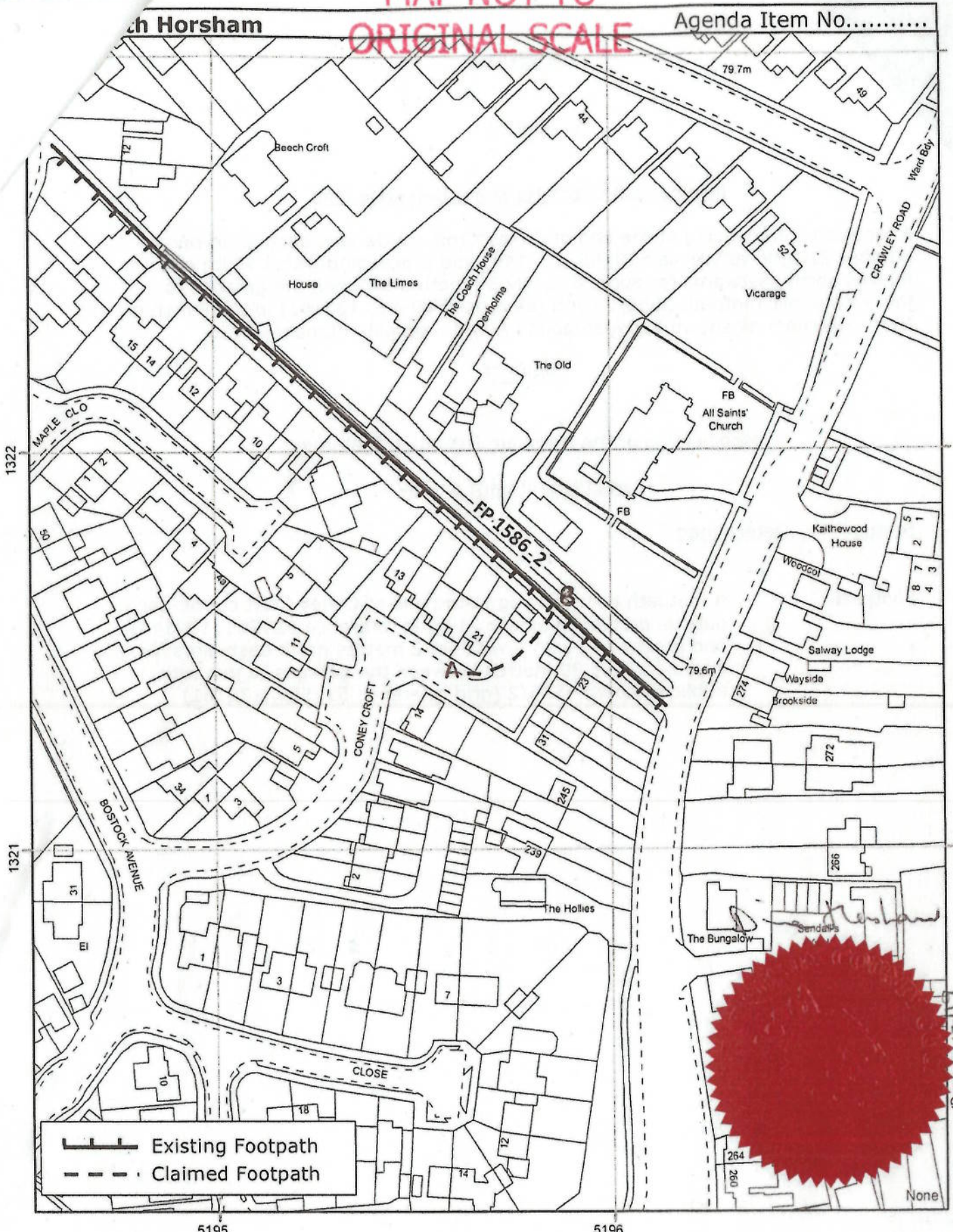
C Beeby



INSPECTOR

MAP NOT TO ORIGINAL SCALE

North Horsham

Agenda Item No.....



 Existing Footpath
 Claimed Footpath

5195

5196

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North Horsham: DMMO 1/15 to add footpath from Coney Croft to FP 1586_2 - Site Plan

Plan: 01725 1:1,250
Date: 08.02.2018

OS Sheet: TQ 13 SE
Grid Ref: 5195 1320



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Matt Davey
Director of Highways and Transport



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