



Appeal Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 08 April 2021

Appeal Ref: FPS/G1440/14A/12

- This Appeal is made under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act') against the decision of East Sussex County Council ('the Council') not to make an Order under section 53 (2) of that Act.
- The application dated 14 September 2017 was refused by the Council on 2 October 2020.
- The Appellant claims that the definitive map and statement of public rights of way should be modified by adding a public footpath between the northern end of Cissbury Avenue, Peacehaven and public footpath 8 Peacehaven (as shown on the plan appended to this decision).

Summary of Decision: The Appeal is dismissed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the 1981 Act.
2. This appeal has been determined on the papers submitted.
3. In arriving at my conclusions, I have taken account of the evidence submitted by the parties, the relevant part of the Wildlife and Countryside Act 1981 and the findings of the Courts in the *Bagshaw & Norton*¹ and *Emery*² cases.

Background

4. The claimed route runs over land which formed part of an inter-war 'plotland' development. Such developments were characterised by the landowner of the time pegging his land out on a grid pattern and offering individual plots for sale for housebuilding with access roads running between block of building plots. The Peacehaven development commenced in 1917; however, the named roads which were to serve the building plots offered for sale were not made up or provided with any mains services.
5. The claimed footpath runs between Cissbury Avenue and footpath 8 over land which was intended by the initial developer to form part of a residential road known as Balcombe Road. This section of Balcombe Road to the north of

¹ *R v Secretary of State for the Environment ex parte Bagshaw and Norton* (QBD) [1994] 68 P & CR 402, [1995] JPL 1019

² *R v Secretary of State for Wales ex parte Emery* [1996] 4 All ER 367

Cissbury Avenue does not appear to have ever been formed or completed. The land to the west of footpath 8 crossed by the westward continuation of the projected road was compulsorily purchased by the Ministry of Agriculture during World War Two and subsequently ploughed and used for agricultural purposes.

6. Although many of the roads around the Peacehaven development were eventually made up at the frontagers expense and then adopted by the local authority, many roads failed to materialise, Balcombe Road and Friars Avenue being two such intended roads which although shown on various development plans did not exist on the ground. The land crossed by the claimed footpath is unregistered, although the owner of No 62 Cissbury Avenue claims ownership.
7. No. 62 Cissbury Avenue was purchased by a Mr Stimpson in 1967; access to this plot of land was originally intended to be from Friars Avenue. This much is evident from a 1952 deed whereby the then owner of the property (then known as 'Strathmore') obtained a right of access over that part of Balcombe Road at issue which was then in the ownership of the Saltdean Estate Company. This private right of access was sought and granted as the part of Friars Avenue which was to have provided access to Strathmore had not been formed.
8. From the 1952 grant, it is known that at that date the land crossed by the claimed footpath was in the ownership of the Saltdean Estate Company. It is to be noted that the part of Balcombe Road owned by the Saltdean Estate Company and over which a private right of access way granted does not appear to have been set out as a road although it is evident that it was possible to access No. 62 from it.
9. As noted above, Mr Stimpson purchased No. 62 Cissbury Avenue in or around 1967. In or around 1973, Mr Stimson sought to buy out his wife's interest in the property and, according to the Statutory Declaration made by his great nephew at the time of winding up Mr Stimson's affairs in 2006, purchased that part of Balcombe Road adjacent to his house and securely fenced the western boundary of his property. Other than the Statutory Declaration, there is no other evidence of that purchase, although it is evident that since 1973 Mr Stimpson treated the land as part of his property, operating a vehicle repair business from there.
10. Given that the Saltdean Estate Company had been in possession of the land crossed by the claimed right of way in 1952, it remains possible that Mr Stimpson did in fact purchase the land from the company or from its successors in 1973. Although there is only the Statutory Declaration of Mr Stimpson's great nephew which provides evidence of that purchase, CLC Properties (who purchased the property from Mr Stimpson's Estate) had conducted its own searches which had not led to any other party indicating that it had an interest in the land. On the evidence before me, I have no reason to doubt that part of the land crossed by the claimed footpath had been purchased by Mr Stimpson in 1973.
11. Two previous applications had been made to the Council to record a public footpath between Cissbury Avenue and footpath 8. These applications had been made in 2008 and 2015 but neither application was compliant with the requirements of Schedule 14 to the 1981 Act and were not progressed.

12. In 2009, discussions were held between the Council and the then landowner for the dedication of a public right of way, but these discussions did not lead to the making of a public path creation agreement. The then landowner set up a permissive route between Cissbury Avenue and footpath 8 on an alignment adjacent to the northern boundary of No 60a Cissbury Avenue; permission was revoked in 2015. The current application was made after the Appellant had approached the Council for an update on the progress of the 2015 application.
13. The Appellant contends that the claimed footpath is the full width of the projected Balcombe Road and that the public would have habitually used the width of the route which had been pegged out as part of the initial inter-war development.

Main issue

14. Whether the evidence discovered demonstrates that the appeal route is a public footpath which should be recorded in the definitive map and statement.

Legislative Framework

15. The need for an Order to be considered when evidence is submitted in support of a claim that a public right of way which is not shown in the definitive map subsists is dealt with under section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that a modification order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
16. As made clear by the High Court in *Bagshaw and Norton*, this involves two tests:

Test A - Does a right of way subsist on the balance of probabilities?

Test B. Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

17. In relation to Test B, the Court of Appeal recognised in the *Emery* case that there may be instances where conflicting evidence was presented at the schedule 14 stage. In *Emery*, Roche LJ held that "*...The problem arises where there is conflicting evidence...In approaching such cases, the authority and the Secretary of State must bear in mind that an order...made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry.*"

User evidence

18. For a claim for a right of way based on user evidence to succeed, the evidence adduced has to demonstrate that use has occurred over a defined route for at least twenty years prior to the date at which the public's right to do so was brought into question. Whilst not all witnesses are required to be able to demonstrate personal use of the appeal route for the whole of the twenty-year period, the evidence should be able to collectively demonstrate that use had

- occurred throughout that period. If the user evidence is sufficient to raise a presumption that the route has been dedicated to the public, that presumption is rebuttable if the landowner is able to demonstrate that during that 20-year period his intention not to dedicate had been communicated to the public.
19. The land crossed by the claimed footpath was purchased in or around 2008 by CLC Properties from the estate of Mr Stimpson. CLC Properties installed Heras security fencing at the property around the date of its purchase as the bungalow on site was unoccupied, Mr Stimpson having died in 2004. The available evidence is that CLC also deposited building materials of various kinds on or in the vicinity of the claimed footpath as obstructions to anyone who chose to breach the security fencing. Those who provided evidence of use of the Appeal route refer to the line of the path being obstructed by building materials, glass and so forth.
 20. Whilst those who completed user evidence forms do not provide dates at which they encountered the obstructions caused by the building materials, it is more likely than not that these incidents occurred in connection with the acquisition of the site by CLC Properties and the erection of the Heras fencing. It is also more likely than not that a combination of these events led to the 2008 application being made to the Council to record the route as a public right of way. Accordingly, the date at which use of the claimed footpath was brought into question was 2008, and the relevant 20-year period for the purposes of section 31 (2) of the 1980 Act is 1988 – 2008.
 21. The application was supported by 14 user evidence forms ('UEFs') representing use by 16 individuals. The earliest use of the route is said to have been in 1947, although this early use has to be discounted as (a) the respondent acknowledged that he used the claimed route at that date as one of his childhood friends lived at No. 62, and (b) the claimed use ended in 1980. Similarly, the evidence of one other user has to be discounted as their use ended in 1971.
 22. Although submitted in support of the 2017 application, with one exception the user evidence forms had been completed in 2008 and had formed part of the evidence of the incomplete application made that year. As such when the respondents speak of use continuing 'to the present day', this is a reference to use continuing up to the date that the forms were completed; for the bulk of the respondents that end date is 2008, the one exception being that of the use who completed a form in 2015.
 23. The Appellant did not complete a user evidence form but stated in correspondence that his knowledge of the path dates from 2005, although he did not recall having used it until October 2008 when the Heras fencing was brought to his attention. One respondent does not provide the dates during which use of the path is claimed although use was said to be on a daily basis. Of the remaining respondents, 8 claimed to have commenced their use during the 1960s, 3 commenced use in the 1980s and 1 commenced use in 2007.
 24. The frequency of claimed use is said to vary from daily to weekly to monthly. One respondent used the route 'frequently' but did not provide any clarification as to what was meant by that. The Appellant only appears to have used the route once. Those users whose evidence is not discounted claim to have used the route at issue throughout the 20-year period which ended in 2008.

25. However, two respondents provide evidence that during the 20-year period they were aware that the route had been obstructed by Mr Stimpson. In their joint UEF, Mr & Mrs Caffrey state that the footpath had been '*blocked by Mr Stimpson for 4.5 years before he died*'. Given that Mr Stimpson died in 2004, this would put mean that the route had been 'blocked' from 1999 to 2004. Mr Ward also reported that '*The footpath was shut for a few years when I think the elderly gentleman felt a bit vulnerable. He repaired cars at home and drove one up against the entrance*'.
26. Whilst the majority of the users claim to have used the path throughout the 20-year period prior to 2008, this does not appear to have been possible on the evidence of some of those users. Whilst there is nothing in the UEFs of Mr & Mrs Caffrey or Mr Ward which describes the means by which Mr Stimpson 'blocked' or 'shut' the footpath (it is not known whether the car Mr Ward refers to was driven up against the eastern or western end of the path for example), but it would appear that Mr Stimpson took action to prevent people walking through his property.
27. The blocking of the path for a period of 4.5 years prior to Mr Stimpson dying is a not inconsiderable period of time (one fifth of the relevant 20-year period) and one which on the face of it represents an interruption to the use of the path at issue and which would prevent a full period of 20-years use being achieved. Other users make no reference to this event in their UEFs, which suggests that their recollection is inaccurate or mistaken. Nor is any mention made by those users who claim to have walked the route since the 1970s of the fence along the western boundary of his property which Mr Stimpson is said to have erected in 1973.
28. A number of references are made to a stile or gate having been erected on the boundary leading to footpath 8, but there is no consistency within the user evidence of who erected the stile or gate, when it was erected or how long it may have been present. Photographs taken of the remnants of the Heras fencing and building materials on the line of the claimed footpath in 2008 show a gap in a post and rail fence on the western boundary of No. 62 but do not provide evidence to corroborate the claim of a formal means of access through Mr Stimpson's property having been present.
29. The user evidence submitted is therefore contradictory and inconsistent as regards the availability of the claimed route during the 20-year period which ended in 2008. Whilst most users do not recall any impediment to their use of the claimed route, it is significant that three of those users noted that the route had been 'blocked' or 'shut' during the latter years of Mr Stimpson's period of ownership.
30. For a claim of long use to satisfy the provisions of section 31 (1) of the 1980 Act, that use has to be as of right and uninterrupted. On the users' own evidence, it can be concluded that use of the path was interrupted during the final years of Mr Stimpson's ownership, irrespective of use prior to 1999 and irrespective of whether use became possible once more after Mr Stimpson had died.
31. It follows that as the user evidence is insufficient to raise a presumption of dedication, the appeal cannot succeed against Test A identified in paragraph 16

above, nor would it be possible to reasonably allege the existence of a public footpath on that evidence.

Common Law

32. The Appellant submits that Balcombe Road had been dedicated at common law in 1917 when the then landowner began the process of selling off building plots on land while granting purchasers a right of way over the roads he had pegged out in order to reach the South Coast Road (the modern A529). However, the sale terms provided that purchasers would have a right of access over the developers retained land in order for purchasers to be able to reach their personal property; the granting of a private right of access does not indicate the dedication of those unformed roads to the public. Accordingly, I am not persuaded that the unformed section of Balcombe Road had been dedicated to the public in 1917.
33. On his purchase of the additional land to the south of his house in 1973, Mr Stimpson had fenced the western boundary of the property which would have prevented access between Cissbury Avenue and footpath 8. The erection of a fence is inconsistent with the intention to dedicate a public right of way, as is the action reportedly taken by Mr Stimpson in his latter years to 'shut' or 'block' the claimed footpath.
34. I conclude that at common law it would not be possible to reasonably allege that a public right of way subsists over the appeal route.

Conclusions

35. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

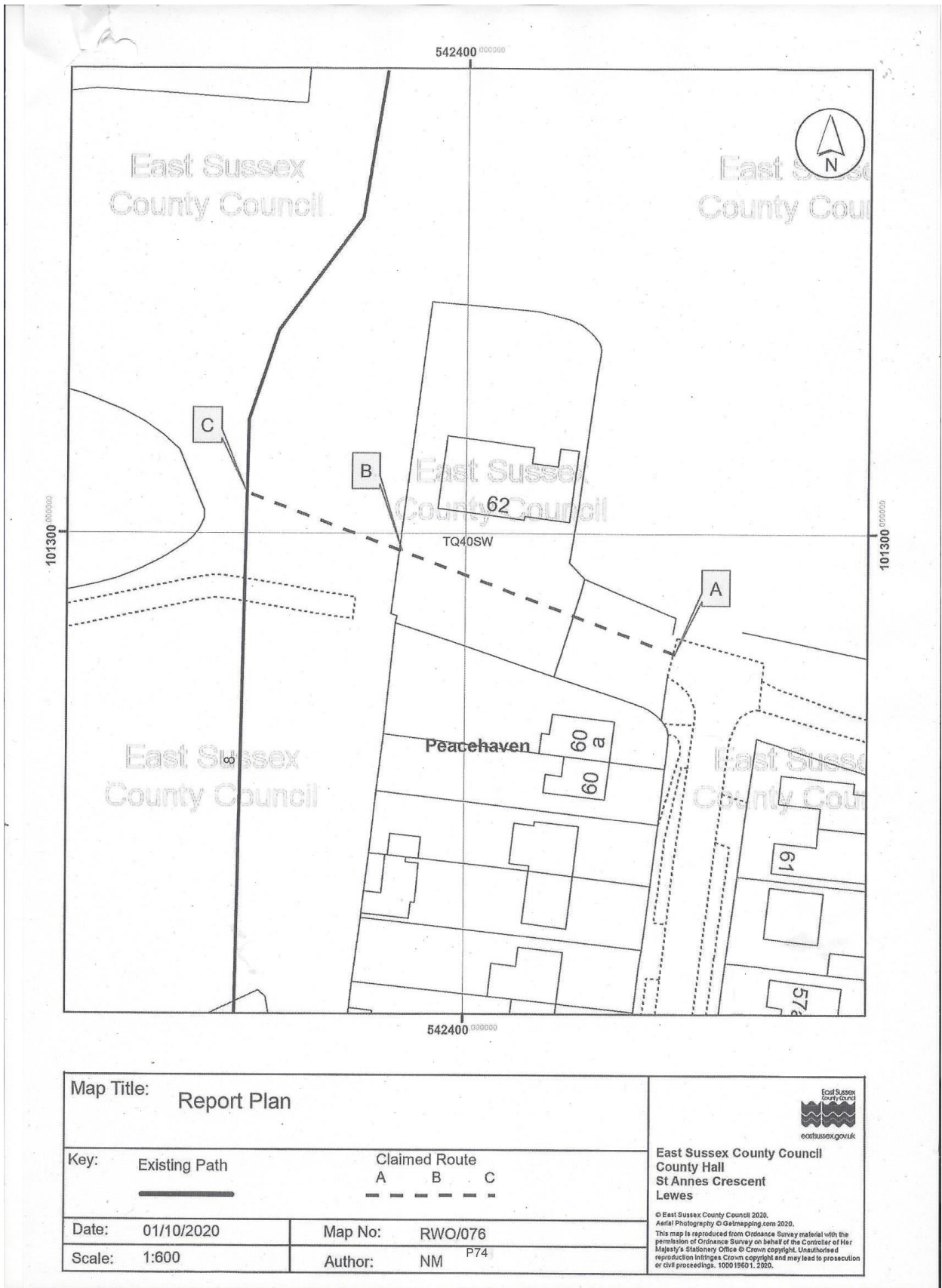
Formal Decision




36. I dismiss the appeal.

Alan Beckett

Inspector

APPENDIX



Map Title: Report Plan		 East Sussex County Council County Hall St Annes Crescent Lewes
Key:	Existing Path 	
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Scale: 1:600	Author: NM P74	