



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: 26 April 2021

Order Ref: ROW/3232146

- 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- (Slinfold: Addition of a Footpath) Definitive Map Modification 2019.
- The Order is dated 13 February 2019 and proposes to modify the Definitive Map and Statement for the area by recording a public footpath between Public Bridleway No. 3569 and Public Footpath No. 1467, as shown in the Order plan and described in the Order Schedule.
- There was one objection 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 18 August 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 DMMO 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 Issues

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 (when considered with all other evidence available) 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

Bringing into question

7. The objectors submit that a fence on the DMMO route was repaired on several occasions prior to 2014, and that these actions would comprise a bringing into question of the right of the public to use the route. However, the stated repairs lack substantive supporting evidence. Furthermore, the submitted user evidence does not record having encountered a fence on the DMMO route, therefore the public were not aware that their right to use the route was being challenged. Thus, the suggested fence repairs did not form a bringing into question.
8. A deposit by the owners of the land affected by the DMMO route under Section 31(6) of the 1980 Act was submitted to the highway authority on 19 August 2014. This formally acknowledged the rights of way across the land which existed at that point, and was intended to create a presumption that the owners had no intention to dedicate any further routes across their land. The deposit was required to be publicised on the authority's website and at an entrance to the land concerned. Thus, it was an action sufficient to bring the right of the public to use the DMMO route into question. As a result, I consider 1994-2014 to form the relevant twenty-year period.

Evidence of use

9. User evidence from eleven people is submitted in support of the DMMO, showing use between the years 1952-2015. The UEFs of nine people record use of the route on foot over the whole of the relevant twenty-year period. The average frequency of use recorded is between 12 and 300 times per year. Reasons given for use include walking, to access facilities and to visit a friend.
10. A statement by a tenant of the land over the relevant twenty-year period records that access from the land's northern boundary without permission was first observed in approximately 2001/2. The tenant believes that this use was linked to the occupation of the adjacent Six Acres residential development.
11. The objectors have submitted copies of various aerial photographs in the date range 1999-2015. No worn path is visible in the vicinity of the DMMO route on the 1999 photograph. A worn path following the approximate line of part of the DMMO route is discernible on a 2001 photograph, on which the Six Acres estate is under construction. Aerial photography between the years 2004-2012 shows worn tracks over the land, none of which relate with certainty to the

- DMMO route. The photograph of 2013 shows a similar route to the DMMO route worn to the south of the land.
12. Whilst a worn path corresponding approximately to the DMMO route is not visible on the aerial photography until 2015, the likelihood of use of a route resulting in a worn path may vary according to factors such as weather conditions, land use and the level of footfall. The time of day when a photograph was taken may additionally influence whether it is possible to discern a worn path or not.
 13. Furthermore, an aerial photograph cannot provide evidence of what rights may exist over a route and the user evidence before me shows consistent use of the DMMO route over the relevant twenty-year period.
 14. Taken as a whole, the combination of the user and aerial photography evidence suggests use by residents of Hayes Lane from the beginning of the relevant twenty-year period until the occupation of the Six Acres estate in 2002. Following this access to the land increased and continued to include use of the DMMO route by those who completed UEFs. This is corroborated by the tenant's recollections of first noticing access made from the land's northern boundary in approximately 2001/2.
 15. For these reasons, I attach only minimal weight to the submission that the aerial photography demonstrates a lack of public use of the DMMO route prior to 2005.
 16. One of the nine users over the relevant twenty-year period records use of the DMMO route since 1952. The route is accessed off the "Downs Link", a public bridleway and former railway line. The objectors submit that the use between 1952 and 1965 (when the railway was operational) would have been made with force and illegality, due to statutory provisions relating to fencing requirements and trespass on railways. They consider that this casts doubt on the accuracy of the user's recollections.
 17. I concur with the submission that the statutory provisions in question raise uncertainty regarding the accuracy of the user's recollections concerning their recorded use until 1965. Nevertheless, almost thirty years then passed until the commencement of the relevant twenty-year period in 1994, which is a comparatively more recent date from which memories are consequently more likely to be clear. The user's recollections of use of the DMMO route from that date are additionally corroborated by the evidence of eight others concerning the availability of the full DMMO route. Thus, I attach full weight to the user's evidence of use over the relevant twenty-year period.
 18. Turning to the question of whether use over the relevant twenty-year period was "as of right", objectors state that a fence was present along the Downs Link until at least 2001/2 and that access to the land was obtained when the fence was repeatedly damaged and then repaired using barbed wire. They contend that the fence was broken down and replaced by the landowner in 2012.
 19. Concrete fence posts and chain link fencing of some age were visible along the south side of the Downs Link on the day of my site visit. A fence post stood to one side of the northern termination of the DMMO route, however no chain link fencing was present across it. Modern palisade fencing is present across the

- route, however the evidence suggests that this was erected after the relevant twenty-year period. Substantive evidence is not provided in support of the stated fence repairs. The user evidence does not suggest that there has been any need to break down fencing, or that users met with any other obstruction on the route. Thus, on the balance of evidence, use has been “without force”.
20. There is no suggestion that any attempts were made to conceal public use of the route, and indeed the objectors’ evidence acknowledges that public use has occurred over the relevant twenty-year period. 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”.
21. There is no substantive evidence that members of the public sought or gained permission to use the route, or that use was interrupted with intent to prevent public use. As a result, use was “without permission and without interruption”.
22. Eight members of the public claim to have used the route frequently for the whole of the relevant twenty-year period. The frequency of use of a further person was twelve times per year on average, although not every year. The average frequencies of use recorded amount to over twelve times per week. Whilst this is not a significantly high frequency, it is regular use and its level reflects the route’s location at the edge of a relatively small village. Thus, use was sufficient to have been by the public.
23. On the balance of evidence, such use has been “as of right”, as required by the 1980 Act. Furthermore, the use was without interruption. As a result, the use raises a rebuttable 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 the route as a public right of way.

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

24. I have found above that there is insufficient evidence to support the alleged fencing of the DMMO route. Furthermore, had attempts to fence the route failed in this way, 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.
25. There is insufficient evidence indicating a lack of intention to dedicate the route as a public footpath over the period 1994–2014 to rebut the presumption that it has been so dedicated.

Conclusion regarding statutory dedication

26. 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 1994–2014.

Conclusion

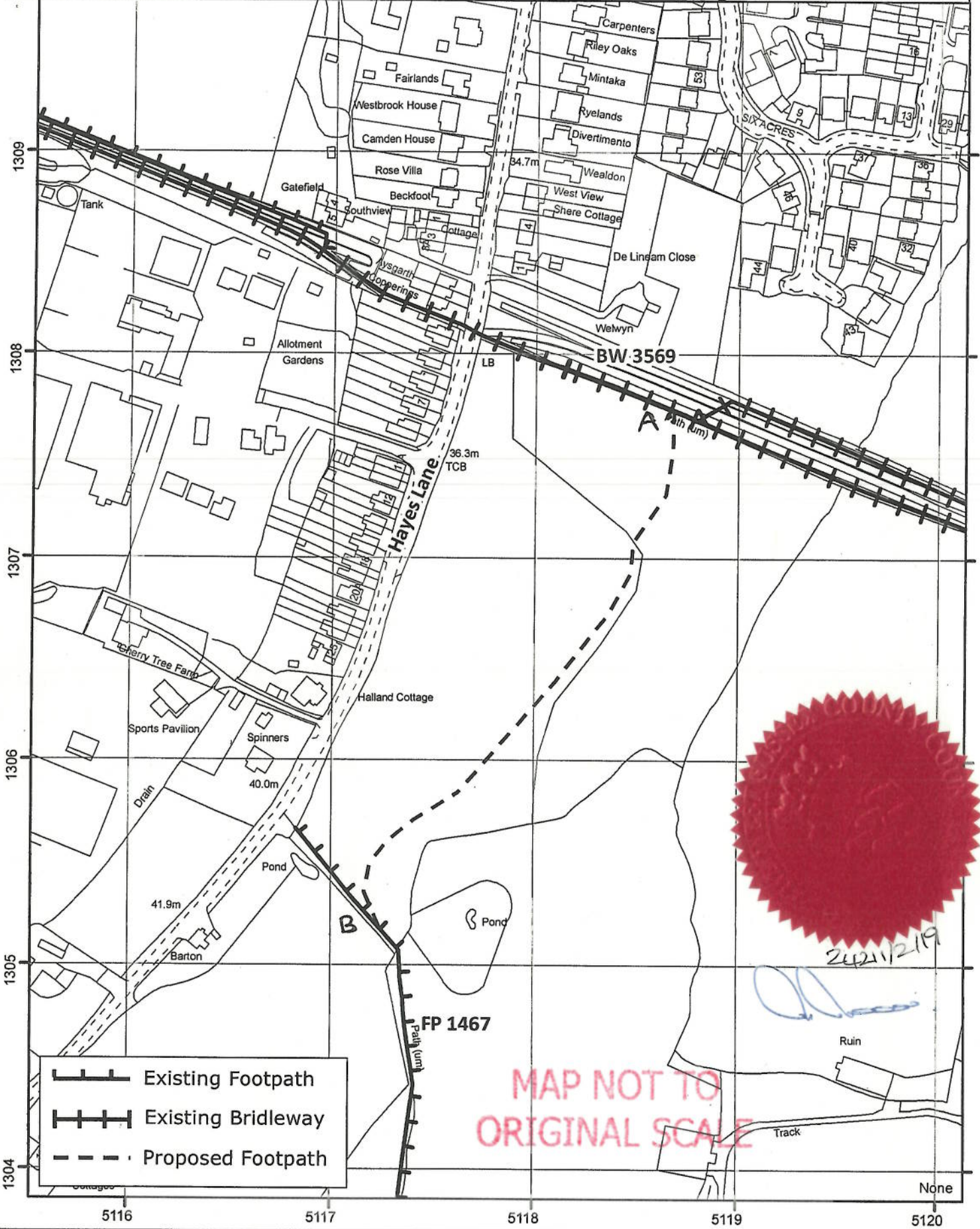
27. Having regard to all the evidence before me, I conclude that the DMMO should be confirmed.

Formal Decision

28. I confirm the DMMO.

C Beeby

INSPECTOR



	Existing Footpath
	Existing Bridleway
	Proposed Footpath

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Plan: 01719	1:2,500	OS Sheet: TQ 13 SW	<p>west sussex county council</p>
Date: 12.12.2017		Grid Ref: 5115 1305	