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| **Order Decision** |
| On papers on file |
| **by A Behn Dip MS MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 16 August 2024** |

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| **Order Ref: ROW/3330170** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The East Sussex (Public Footpath Lewes 57), Number 2, Definitive Map Modification Order 2023. |
| * The Order is dated 28 July 2023 and proposes to modify the Definitive Map and Statement (DMS) for the area by adding a public footpath as shown on the Order map and described in the Order Schedule. |
| * There were two objections outstanding when East Sussex County Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is confirmed subject to the modifications set out in the Formal Decision that do not require advertising.** |
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Preliminary Matters

1. An application to add the Order route to the DMS was made by Mr C Smith, on behalf of the Ramblers in March 2018. The application was initially declined by the Council, however following a successful appeal in 2022, under Schedule 14 of the 1981 Act, the Council were directed to make an Order. A neutral stance has now been adopted by the Council in the matter of this Order.
2. I note that the Order contains a minor typographical error in Part 1 of the Schedule with regard to the spelling of De Montfort Rd. I do not consider there to be any likelihood of this causing the Order to be misinterpreted and should the Order be confirmed, I will modify it accordingly.
3. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

The Main Issues

1. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of the discovery of evidence as provided in section 53(3)(c)(i) of that Act.
2. According to sub-section 53(3)(c)(i) of that Act, the main issue is whether the evidence discovered, when considered with all other evidence available, is sufficient to show that a public right of way not shown on the Definitive Map and Statement, subsists over land to which the map relates.
3. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be reasonably alleged to subsist to make a Modification Order, the standard of proof is higher for it to be confirmed. At this stage, the evidence is required to show, on the balance of probabilities that a right of way subsists.
4. The evidence in support of this case is comprised of User Evidence Forms (UEF’s). As the UEF’s cover six years of use between 2012-2018 the case cannot be considered under statute, as this requires a twenty year uninterrupted period of use. It must instead be determined at common law.
5. At common law the issues to be addressed are whether, during any relevant period, the owners of the land in question had the capacity to dedicate a public right of way; whether there was express or implied dedication by the owners, and whether there is evidence of acceptance of the claimed right of way by the public.
6. Creative Developments Ltd (CDL), who owned land over which the claimed route crosses were dissolved shortly before the Order was made and the Council were unclear as to whether this would have a bearing on the case.
7. The land that belonged to CDL may be deemed subject to escheat to the Crown at common law, albeit Burgess Salmon LLP, who act for The Crown Estate were clear in their correspondence that The Crown should not be regarded as the current owner of the property in any conventionally understood sense. They also advised that they do not take any action which might be construed as an act of management, possession or ownership of the Property.
8. Albeit Crown land is not subject to statutory dedication under the Highways Act 1980, claimed dedication can still occur across such land at common law. This case is being determined at common law, although the period of use under consideration is 2012-2018 when CDL had ownership of the land. Consequently the possible escheat to The Crown, of any land over which the Order route crosses, would not have a bearing on this case.

***Common Law***

1. For clarity and context, it is noted that prior to the development of the land, there was a footpath in existence in the immediate locality for over 50 years, albeit on a slightly different line and appearing to be under the ownership of a now demolished public house. This footpath was closed once a year by the then landowner, indicating use was by permission. In 2010 planning permission was granted for the demolishment of the public house at this location and the development of 5 townhouses.

*User evidence*

1. Use of the Order route on its current alignment appeared to commence in 2012, once the development of the townhouses was completed, with the claim for a public right of way being made in 2018. The Order route appears to remain open and in use. Forty five UEF’s were submitted of which 3 possibly had private rights of access due to their gardens leading onto the claimed route. The UEF’s stated a frequency of use that varied from daily to weekly. The route is used predominantly as a shortcut for utility purposes such as going to school, work, the bus stop, shops, clubs, and visiting friends.
2. There was no suggestion from the UEF’s of signs or notices to the effect that the route might be private, nor a challenge to their use. Use of the path was therefore open and uninterrupted and of a frequency that would have been sufficient to raise the awareness of landowners that a right to use the Order route was being asserted. There appears to be no evidence of any steps being taken to prevent use, which may infer that the owners were content for public use of the path.

*Landowner evidence*

1. The Council report advised that the known owners of land across which the Order route runs were consulted as part of their investigation, with no landowner providing comments in the initial stages. Additionally, there is no evidence before me to suggest that any landowner at the time did not have the capacity to dedicate.
2. During the time period in question, the footpath appeared to be under the ownership of CDL. Following submission of the claim, in 2019, an SE George purchased 105 Western Road and appears to have some ownership for that part of the claimed path that borders 105 Western Road.
3. The Council noted that in September 2020 when chasing the landowners for a response to their consultation, the daughter-in law of SE George contacted the Council. She advised that they had been aware of the claim when purchasing the property, but could not offer information in support of, or against the application, albeit she confirmed that they had seen some people using the claimed route.

*Evidence of dedication*

1. With regard to evidence of dedication, there was information submitted relating to the planning application for the development of the townhouses by CDL. The subsequently approved planning application stated that a new public right of way would be provided on or adjacent to the site. An accompanying planning obligation, signed by CDL in 2010 related to the construction of the Order route and associated covenants. One of the covenants required that the footpath be open to the public for free and uninterrupted use every day in perpetuity, or until the footpath became a public highway maintainable at public expense. There is nothing before me that evidences any restrictions to this covenant. The Council commented that the landowner retained the control to close the path for maintenance and repair if agreed by Lewes District Council, however as the Inspector noted at Schedule 14 stage, this is entirely consistent with the requirements for a public right of way.
2. Following the making of the Order, a J George submitted an objection. She advised that there were covenants on 105 Western Road to maintain the paved section of pathway up to her boundary and provide lighting over that part of her property that overhangs the Order route. She stated that she had no intention of preventing members of the public enjoying the right of access through her property but considered that although the route was intended to ‘provide public benefit’ it was not intended to be a public right of way. However this is at odds with the planning obligation that stated that the footpath *‘shall be open to the public for free and uninterrupted public access on foot on every day throughout the year for twenty four hours a day forever thereafter or until the Footpath becomes a public highway maintainable at public expense.’*
3. Albeit the Council in their original report agreed that this planning obligation acknowledged provision for a footpath, they considered that use was permissive until such time as the owner took action to change this. However I concur with the Inspector at the Schedule 14 stage, who considered that the planning obligation and associated covenant showed both capacity and clear intent to dedicate a footpath for use by the public.
4. In conclusion I consider both capacity and intent to dedicate was shown by the landowner between 2012 and the submission of the application for a public right of way in 2018. Additionally I consider the user evidence is sufficient in both quantity and quality over that period to indicate acceptance by the public of the path and accordingly that dedication has occurred at common law.

**Other matters**

1. In her objection to the Order, the owner of 105 Western Road feared that the establishment of a permanent right of way would unduly affect the value of her property. She additionally felt that the rest of the footpath which had remained under the ownership of CDL, was in a poor state of repair.
2. Another objection was received to the Order from the owner of 103a Western Road, another property adjoining the route. This objector felt it was unnecessary for the path to become a public right of way as the owner of 105 Western Road had allowed enjoyment of that part of the route under her ownership for many years and had no intention of withdrawing the right. She also currently helped maintain the Order route along with the abovementioned landowner and was concerned that should the route become a public right of way, use would increase, making maintenance more taxing. Along with the owner of 105 Western Road, she was also concerned that the value of her property might be affected should the Order route be confirmed as a public right of way.
3. I recognise all of the above as genuine concerns, however, the legal tests on which this case must be determined do not allow for consideration of such matters as suitability and desirability. Any matters regarding current and future maintenance responsibilities should be directed to the Council for clarification.

Conclusion

1. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed with modifications that do not require advertising.

**Formal Decision**

1. I confirm the Order subject to the following modifications:

* On the Schedule, Part I - Description of the path to be added:

At lines 1, 3 and 5, **delete** *‘De Montford’* and **insert** *‘De Montfort’*

A Behn

INSPECTOR

