

Unconfirmed minutes of Rights of Way Committee meeting of 20 February 2018 to be confirmed at the next Committee meeting

## **Rights of Way Committee**

20 February 2018 – at a meeting of the Committee held at County Hall, Chichester.

Present: Mr Whittington (Chairman), Mr Baldwin, Mr Bradbury, Mrs Duncton, Mrs Purnell and Mrs Russell.

Apologies: Mr Acraman, Dr O’Kelly and Mr Quinn.

19. The Committee resolved to write to Christine Luff, Team Leader, Rights of Way who is shortly due to retire to thank her for over 50 years of service to the County Council and for support to the Committee and its members. It was noted Mrs Luff is unable to attend this meeting due to a recent accident and the Committee wished her well for a speedy recovery.

20. The Committee noted that Mr Acraman is unwell and wished him a speedy recovery.

## **Declarations of Interest**

21. Mr Baldwin declared a personal interest as local member for Horsham East in agenda Item 6(b) - Horsham: Application for a Definitive Map Modification Order (Application No: 4/16) to add to the Definitive Map and Statement a footpath from Coney Croft cul-de-sac to public footpath 1586/2, in Horsham. Mr Baldwin elected not to speak as local member on the application.

## **Minutes**

22. Resolved – that the minutes of the meeting held on 11 July 2017 be approved and signed by the Chairman as a correct record.

23. The committee noted that in reference the minutes of Rights of Way Committee on 14 March 2017 an entry under minute 75, bullet 10 (second to last bullet point), which was recorded as *"one complaint was partially upheld from Selsey"*. This should have been should have been recorded as *'upheld'*.

## **Previous Rights of Way Decisions**

23. The Committee received and noted a report by the Director of Law and Assurance setting out the progress on previous delegated decisions and decisions made by the Committee (copy attached to the signed minutes).

## **Outstanding Applications**

22. The Committee received and noted a report from the Director of Highways and Transport and the Director of Law and Assurance outlining applications awaiting consideration (copy attached to the signed minutes).

24. The Committee noted regarding 'Haywards Heath FP 25 CU' that a response is still awaited from Sainsbury's.

## Update on Performance

25. The Committee noted a verbal report by Jonathan Perks, Principal Rights of Way Officer, who provided an update on performance during the 2017 calendar year.

- It was reported the County Council's performance as measured by the National Highways and Transport Annual Survey had reduced customer satisfaction scores.
- Volunteers continued to give valuable support to the service, including donating 3,500 hours of time on 56 task days.
- Over 4,000 problems and issues were logged in the last year; the County Council continues to prioritise health and safety issues over, for example, issues of minor maintenance.
- There were no formal customer complaints recorded in 2017 and three compliments were logged.

### **Arundel: Application for a Definitive Map Modification Order (Application No: 1/16) to add to the Definitive Map and Statement a public footpath from Queen's Street, Arundel to Fitzalan Road, Arundel, alongside the south of Caen Stone Court.**

27. The Committee considered a report by the Director of Law and Assurance, concerning an application to add to the Definitive Map and Statement a public footpath from Queen's Street, Arundel to Fitzalan Road, Arundel, alongside the south of Caen Stone Court (copy appended to the signed version of the minutes). Laura Floodgate, Solicitor introduced the report. It is considered that the legal tests for making the Order have been met, but so as to provide additional clarity it is proposed that the recommendation be amended to include the words 'as set out in paragraph 8.1 of this report' at the end of the recommendation which makes clear that on the balance of probabilities a path has been proved to subsist. The Chairman advised the Committee that the route of FP 3066-1 was incorrectly shown on the map provided with the report, and clarified that its route follows the zig-zag line of that footpath.

28. Mr Tom Alder of Lester Aldridge LLP, solicitors for McCarthy and Stone Retirement Lifestyles Limited, spoke in objection to the application. The statutory tests have not been met. McCarthy and Stone acquired the land in 2007 and granted a long lease in 2012. The 2005 DMMO application related to a different route, so it is correct to disregard this evidence. There is no documentary evidence of a path in existence in this period. During the 2007 planning appeal the Inspector expressly rejected a planning condition to provide a public right of way across the development. It is surprising this application has been accepted for a different route which covers the period 1985-2005, which was presumably the period covered by the 2005 application. The claimed route covers exactly the permissive path for residents' access which was built by McCarthy and Stone in 2009. On the basis that only 3 users evidence forms cover the 20-year period it is felt use by the public 'without interruption for a full period of 20 years' has not been sufficiently demonstrated. The likelihood of all

who submitted evidence forms making use of an identical route over what was then open land, and it matching the route of the current permissive path, is minimal. Lester Aldridge has been instructed that if an order is made to press for the Secretary of State to determine the application.

29. Mr Roger Edworthy, resident of Caen Stone Court, spoke in objection to the application. The making of the order will threaten rights to privacy and security. Prior to purchasing a property in Caen Stone Court, McCarthy and Stone staff confirmed a locked gate would be erected on the sale of all apartments because the pathway was for residents and visitors only. Prior to the gate, access was a free-for-all, including unaccompanied children, dog walkers who allowed their dogs to foul, cyclists, scooters and skate boarders. Access caused problems for residents manoeuvring and parking their cars. There is an adequate, safe alternative path 50m away. Caen Stone Court is not a short-cut and there is no compelling reason to walk through it. WSSC statistics show accidents have occurred in Queen Street, High Street, London Road and the A27, but not in Queens Lane. The issues with Queens Lane, caused by cars parking, will not be resolved by opening the route on Caen Stone Court.

30. Mr Gadsby, local resident, spoke in support of the application. Paragraph 6.1.1 (the Tythe Map 1841) of the Committee report states that 'the claimed route is not shown on the map'; this is misleading because the map shows a path between properties 701 and 702 and there could not have been access to 7 properties without it. This shows evidence of a path dating to 1841. Paragraph 6.1.1, states 'no walkways can be identified', but a photograph of Arun cinema shows a raised pavement next to it, which is now the site of Caen Stone Court. This is proof of a right of way from 1938 to 1959. An aerial photograph of Castle Service Station which traded on the site until 1992 shows an access. McCarthy and Stone's original plans did not include provision of any footpath across the site. Arun District Council planning officers' report (AB/187/06, dated 11/01.07) quotes the WSSC Rights of Way Officer 'there is a Public Footpath between Queen Street and Fitzalan Road that must be maintained'. Different plans submitted to the Planning Inspector in 2007 show a right of way added and right of way amended. Paragraph 38 of the Inspector's report stated that the plans 'indicates the possible, illustrative route for a footpath to cross the site'. The Right of Way shown on the plans was delivered as part of the development and is delineated in different colour bricks. Gates were not specified in the original design. It is difficult to see how residents of Caen Stone Court benefit from this private path because of where doors to the building are. McCarthy and Stone were aware of the 2005 DMMO application.

31. Mr Mark Philips, local historian and Chairman of Arundel Town Council Planning and Environment Committee, spoke in support of the application. Public access at the Queen Street side of this shortcut has been a passageway, pavement or wider access for many years. In the 1970s there was free and unhindered access from either end of the Castle Station garage forecourt through to Fitzalan Road. Testimonies submitted with the 2005 application refer to the same route and guidance to disregard them is incorrect because the then entrance to Queen Street was over 30m distant and not narrow as it is now. Maps referred to by Mr Gadsby show unhindered access across the land since at least 1841. Access continued until Caen Stone Court was built and residents

started informing pedestrians that the route was private. Arundel has lost a number of twittens and rights of way to development in the last 30 years. It is the castle, historic buildings, ancient street layouts and rights of way that make the town unique and a major tourist attraction.

32. Mr John Munro, local resident and user of the footpath, spoke in support of the application. Since the gate was erected he misses the ability to use the footpath which provided easy access to the local co-op. Parked cars, the lack of pavement and large vehicles coming along Queens Lane mean walking this route at the age of 89 is difficult. There are many other people who experience problems using Queens Lane including children and mothers with prams. It had been safer to use the path through Caen Stone Court and, although it is understood that McCarthy and Stone changed the line of the path, it was definitely a footpath because it was marked out clearly in red bricks. It is not understood why the gate was installed and he has never seen anyone using it. Many local residents feel strongly that the footpath should be opened.

33. The Committee noted that Mr Gary Markwell, local member for Arundel and Courtwick, has not requested to speak on the application.

34. The Committee sought clarification on the following points:

- Why is the relevant 20-year period of continuous use 1985 to 2005? Officers advised that the relevant 20-year period is determined from the date that the public's use of a path is first brought into question.
- What weight is given to evidence of use of the route during the relevant 20-year period and what, if any, case-law exists on the matter of weighting of such evidence? Officers advised that there is no statutory minimum number of users to show sufficient use to raise a presumption of dedication. The number of users must be sufficient to reasonably demonstrate to a landowner that the route is being used as a public highway. The recommendation has been made on the 'balance of probabilities' that it has been shown a right of way subsists. A lower test does exist, which is that a public right of way has been 'reasonably alleged to subsist'. The standard of proof is whether a reasonable person, considering all the relevant evidence available, could reasonably allege a public right of way to subsist.
- What case law exists around evidence of continuous use of a footpath? Officers advised that so long as there is any 20 year period of uninterrupted use ending in an act which has brought the right of the public into question the requirement of the section is satisfied. Case law has clarified that use must be by a sufficient number of people to show that it was use by the public, a number which may vary from case to case. Use over the twenty year period does not have to be by the same people. For the current application 3 users claim use for the full 20-years, 9 users between 1993 and 2005 and 12 users between 1998 and 2005.
- In reference to paragraph 6.2 of the report, what weight was given to the evidence of the 'gate, wall or sliding door...blocking access to

pedestrians and vehicles', as noted in relation to the 1986 photographic map (ACC 14261). Officers advised that close inspection of the archive evidence was undertaken but it was concluded that taken together the archive evidence was inconclusive. Many were so small they could not be determined clearly.

35. In reaching a decision the Committee made the following points:

- Some members felt that weight of evidence to support the relevant 20-year period of continuous use is very small and, therefore, evidence on the balance of probabilities was ambivalent. Some members noted that user evidence was sufficient to show the 20-year period of continuous use on the basis that a route was reasonably alleged to subsist.
- The lack of documentary evidence was acknowledged.
- Queens Lane is not a very safe alternative route for pedestrians.
- The Chairman acknowledged Mr Alder's comment that McCarthy and Stone would sustain an objection to the application.

36. The amended officer recommendation was proposed by Mrs Duncton and seconded by Mrs Purnell, and was put to the Committee and approved by a majority.

37. Resolved – That a Definitive Map Modification Order, under Section 53 (2) in consequence of an event specified in sub-section 53 (3)(c)(i) of the Wildlife and Countryside Act 1981, to add a footpath from Queen's Street to Fitzalan Road, in Arundel be made as set out in paragraph 8.1.

38. The Committee adjourned at 3.17 p.m. The Committee reconvened at 3.21 p.m.

**Horsham: Application for a Definitive Map Modification Order (Application No: 4/16) to add to the Definitive Map and Statement a footpath from Coney Croft cul-de-sac to public footpath 1586/2, in Horsham.**

39. The Committee considered a report by the Director of Law and Assurance, concerning an application to add to the Definitive Map and Statement a footpath from Coney Croft cul-de-sac to public footpath 1586/2, in Horsham (copy appended to the signed version of the minutes). Laura Floodgate, Solicitor introduced the report. It is considered that the legal tests for making the Order have been met.

40. Miss Claire Bowden, resident of Coney Croft, spoke in objection to the application. The cut through was never an official footpath or part of the design of the estate. Long standing residents say the gap was created by an act of vandalism approximately 12 years before the fence was erected 2 years ago. The gap has served to attract crime and Miss Bowden still feels the effects of a burglary that took place in January 2016, in which the burglar admitted coming

to the area through the gap; evidence from garage burglaries in the locality was also found. There had also been other offences, but not any since the gap was shut off 2-years ago. Like other physical defences, the fence is a deterrent to crime. The cut through (gap) leads from a driveway through a hedge to the garage area, as such is dangerous because of moving vehicles. Most people spoken to would be happy to have the gap closed and to walk around. Quality of life has improved for residents since the gap was shut-off, including reduced noise, anti-social behaviour, and less risk of damage to property caused by people on bikes.

41. The Chairman drew members' attention to written submissions in support of the application from Mr David Pillbeam, applicant and former resident of Coney Croft, and from Mrs Patricia Dennington, resident of Coney Croft.

42. In response to a point made by Miss Bowden, officers advised that if use is with force it does not satisfy the 'as of right' test. The formation of the gap by an act of vandalism has not previously been raised in the evidence submitted. Evidence against the application referenced a previous fence that was trampled down, however users referred to an unlocked gate. As outlined in paragraph 7.6.2 of the report, when Coney Croft was being developed, correspondence dating from November 1977 between the planning authority, Horsham District Council and the developer's agent stated that a "pedestrian gateway is being provided between the garages". Therefore, it was concluded that a gate was in position between the garages for a number of years; it was not locked and so the claimed use has been without force.

43. The Committee sought clarification on the following points:

- The fact that 'all the user evidence forms had been partially completed by the applicant' as noted in 7.7 of the Committee report was questioned. Officers responded that this has been considered, and the evidence treated with caution but that some evidence forms also contained individually written comments made by each witness.

44. In reaching a decision the Committee made the following points:

- Sympathy was expressed by Committee members for the concerns of residents about crime and anti-social behaviour. The Chairman noted that the legislation is no longer in tune with society as it is now. However, it was acknowledged that the strict legal tests under Section 31 of the Highways Act do not allow for weight to be given to crime and disorder implications, and the requirements of these tests had been met.
- The situation would be of more concern if the footpath was in front of houses.
- It was acknowledged that archive evidence is inconclusive.
- It was noted that the applicant has moved away from Coney Croft.

45. The officer recommendation was proposed by Mr Bradbury and seconded by Mrs Russell, and was put to the Committee and approved by a majority.

46. Resolved – That a Definitive Map Modification Order, under Section 53 (2) in consequence of an event specified in sub-section 53 (3)(c)(i) of the Wildlife and Countryside Act 1981, to add a footpath from Coney Croft to public footpath 1586/2 in Horsham be made.

**Slaugham: Application for a Definitive Map Modification Order (Application No: 5/15) to add a public footpath at Slaugham Mill Pond to the Definitive Map and Statement for Cuckfield Rural**

47. The Committee considered a report by the Director of Law and Assurance, concerning an application to add a public footpath at Slaugham Mill Pond to the Definitive Map and Statement for Cuckfield Rural (copy appended to the signed version of the minutes). Laura Floodgate, Solicitor introduced the report. It is considered that the legal tests for making the Order have not been met.

48. Mr Chris Hoskins, representative of Mr McArthur, the land owner, spoke in objection to the application. Mr Hoskins acted as the construction engineer for the raising of the top of the embankment and replacement of the controlling overflow arrangements, and as supervising engineer until 2017. Prior to the raising works, access problems were experienced because of narrow parts of the path, issues with the slopes, wave erosion, debris from vegetation and wet and muddy conditions in some areas. The scheme to increase the level and widen the top of the embankment did not directly affect the footpath along the former top, but resulted in new levels. There have been insurance concerns about unrestricted access to deep cold water following incidences of unauthorised swimming. Some users have continued to roam freely and slowed down the rate of vegetation development, resulting in abrasion, litter and dog fouling. Since erection of the boundary fence, wildlife is thriving and vegetation has improved which has reduced erosion and the effects of weather extremes and screens less pleasing features. Litter and damage has reduced, although there has been a recent incident of damage to the fence and interference with the overflow. The fence helps with public safety by limiting access to the water. Recent vegetation along the path has been cut back improving the width.

49. Mr John Welch, local resident, spoke in support of the application. Mr Welch declared that he is Chairman of Slaugham Parish Council, which supports the claim for continued use of the footpath. Mr and Mrs Castell, the applicant confirm they used the claimed footpath on top of the dam since 1993 and no gates, signs or notices restricted access. Mr Welch and other residents use the claimed route regularly. Section 6.1 of the Committee report mentions footpath passing through the reservoir's spillway, which was never the case, and it diverted west for a few metres to join the lower path. The claimed route gave walkers views of wildlife and the ability to enjoy the westerly view of the Mill Pond. Because the footpath was on top of the dam it was dry, whilst the lower path is boggy. Access was restricted during the works on the dam, but the majority of works were completed in a shorter time than noted in the report. Access continued unrestricted until early 2015, when barbed wire was installed. - Views have been lost. The claimed route was regularly used for 30years. Section 4.2.7 of the Guide to the Law for Rights of Way Committee Members

states that physical features and public enjoyment including views should be taken into consideration.

50. The Committee noted that Mr Acraman who is also local member for Worth Forest was unable to attend to speak on the application.

51. In response to the point made by Mr Welch, officers advised that Section 4.2.7 of the Guide to the Law for Rights of Way Committee Members refers to Section 119 of the Highways Act – Diversion of Footpaths, Bridleways or Restricted Byeways. The legal tests for Definitive Map Modification Orders do not include these considerations as these applications are made under Section 53 of the Wildlife and Countryside Act 1981.

52. The Committee sought clarification on the following points:

- The low number of user evidence forms was noted; what would be classed as sufficient evidence. Officers clarified that there is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. In this case the reason for the recommendation was threefold, the evidence of use was fairly light and did not cover the 20-years of continuous use. There was no access possible to the claimed route during the period of works to the dam, and additionally the plans provided with the user evidence forms did not show exactly the same route.

53. In reaching a decision the Committee made the following points:

- Safety should come before the desires for a view; concerns raised by the Environment Agency were highlighted, as noted in section 5.1.3 of the Committee report, 'that dam failure could result in an uncontrolled release of water from the reservoir and could endanger life'. It was noted that matters of safety cannot form the basis for a rejection of the claimed route.
- The works to the dam show that there has been interruption of use.
- Whilst some views will be lost, there are alternative views from other paths around parts of the Mill Pond.
- Sympathy was expressed with both sides in this case.
- The Committee encouraged Mr Hoskins to take back to the landowner concerns raised regarding the barb-wire.

54. The officer recommendation was proposed by Mr Bradbury and seconded by Mrs Duncton, and was put to the Committee and approved unanimously.

55. Resolved – That a Definitive Map Modification Order, under Section 53(2) in consequence of an event specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, to add a footpath at Mill Pond in the Parish of Slaugham be not made.

### **Date of Next Meeting**

56 The Committee noted that its next scheduled meeting would be held at 2.15 p.m. on Tuesday 12 June 2018.

The meeting ended at 3.58 p.m.

Chairman