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## Order Decision

Site visit made on 9 November 2020

by **K R Seward Solicitor, MIPROW**

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

Decision date: 19 November 2020

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### Order Ref: ROW/3234984

- 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 55) Definitive Map Modification Order 2019.
- The Order is dated 17 May 2019 and proposes to modify the Definitive Map and Statement ('DMS') for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There were 5 objections outstanding when East 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.**

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### Main Issue

1. The Order has been made under Section 53(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in Section 53(3)(c). Therefore, the main issue is whether the discovery by the authority of evidence which (when considered with all other evidence available) is sufficient to show under Section 53(3)(c)(i) that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.

### Reasons

#### Legal Framework

2. 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 Order to be confirmed. At this stage, evidence is required that a public right of way subsists. The test of the evidence is the balance of probabilities and the burden of proof lies with those who assert the existence of a public path.
3. As the evidence in this case concerns claimed use by the public, I must consider whether dedication of the way as a public footpath has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in Section 31 of the Highways Act 1980 ('the 1980 Act'), or by implied dedication at common law.
4. Under Section 31 of the 1980 Act, there must have been use of the claimed route by the public as a footpath 'as of right'<sup>1</sup> and without interruption, over a period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no

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<sup>1</sup> Meaning without secrecy, force or permission

intention on the part of the relevant landowner/s during the 20 year period to dedicate the way for use by the public.

5. Should the test for statutory dedication fail under Section 31, then it may be appropriate to consider the dedication of the way at common law. This requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the landowners and (iii) whether there is acceptance of the highway by the public. There is no fixed period of use at common law and depending on the facts of the case it may range from a few years to several decades. There is no particular date from which use must be calculated.
6. It is important to note that these provisions are concerned with whether public rights of way have already come into effect. A definitive map modification order does not create *new* rights but seeks to record those in existence. This differs from a Public Path Order made under other provisions within the 1980 Act to create or divert a public path where the effects on owners/occupiers are relevant.
7. Therefore, matters such as the possible negative impact of the public using the path on the living conditions of nearby residents or risks of its use for purposes of crime or anti-social behaviour cannot influence my decision. Similarly, the health and safety risks to walkers utilising the same space as vehicles (including large manoeuvring delivery trucks) can have no bearing on my decision.
8. Public and private rights can co-exist over the same land and public rights may be acquired over a private right of way. The effect of the Order, if confirmed, would not be to reduce the width of the existing private driveway over which part of the route runs or to diminish private rights in any way. Access for emergency services vehicles would be unaffected by the recording of public rights.
9. As a matter of law, access does not need to be gained to the countryside for a public right of way to exist. Public rights of way are capable of being acquired in an urban setting.
10. My decision must rest on the application of law to the facts and the weight of user evidence.

### **Background**

11. The route navigates through the residential retirement complex forming 'Clevedown' owned by Sussex Housing & Care Limited from an entry point along the A277 Brighton Road. Once down the steps near the entrance, the route passes around one block of flats following a laid path before crossing a parking area. It continues along the driveway (described by the owners as a service road) beside the communal gardens to exit on Barons Down Road.
12. There is an 'alternative' route through the same development that some users say they also used which exits at another point along Brighton Road. That route is not the one in the Order before me and I shall take no account of it.
13. The applicant maintains that the route has been a convenient shortcut ever since the 1970s when the complex at 'Clevedown' was built.

**Statutory dedication – Section 31 of the 1980 Act**

14. The first matter to be established in relation to Section 31 of the 1980 Act is when the right of the public to use the route was brought into question.

*Bringing into question*

15. Whether the right of the public to use the way has been brought into question is a question of fact and degree in every case. In this case, the application was prompted by the appearance of a sign erected by Sussex Housing in or around November 2016 affixed to the wall at the northern entrance off Brighton Road saying 'Private' and 'No Access' beneath. Entry point 'A' is quite narrow. Given the position of the sign at the top of the steps, it is clearly intended to refer to the path and not to some other land.
16. Other signage advertises the name of the complex and gives direction about use of the driveway by motorists and parking. None of these other signs have any bearing on the case.
17. In order for the public use to have been brought into question, it is necessary for the actions to clearly challenge the use. The applicant, who is the local Ramblers representative, clearly considered that the sign was intended to prevent public use. That is a reasonable conclusion to draw. The words make it plain that access is not permitted beyond that point from where the public would enter the route from Brighton Road.
18. I conclude that erection of the 'private – no access' sign suffices as an identifiable event which has brought into question the use of the claimed route under Section 31. Therefore, the relevant period for statutory dedication is the 20 years preceding the placing of the signage in late 2016.

*Evidence of use by the public*

19. It is suggested by a resident objector that the level of public use is low. There does not need to be a high level of public use in order for public rights to accrue provided there is sufficient quality and quantity of evidence of use. Use of the route as an urban shortcut does not diminish or negate the possible status of the route as a public right of way.
20. The original application was supported by 18 evidence user forms ('UEF') although one was discounted as incomplete. Further evidence, including the submission of some witness statements, has been produced during this process.
21. Evidence from around 28 users from 25 households has been provided<sup>2</sup>. All use was on foot. Only one user indicated that they used their bicycle also which would not suffice for any higher rights than a footpath. As is often the way, there is more evidence for the latter years than the earliest period. It is not necessary for all users to show a complete period of 20 years. It so happens that around 7 users claim use throughout the 20 year period. One indicates that they asked for permission but cannot recall from whom or when. As this use may have been authorised, I shall disregard it for the purposes of my considerations. The shortest period of use is around 18 months while others claim varying periods under 20 years. The level of use claimed ranges from daily by a small number of witnesses to occasional. Most say that their use was at

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<sup>2</sup> Excluding the evidence of one user whose use did not commence until 2018 i.e. after the relevant period, and so cannot be taken into account

least weekly. Upon analysis, the overall picture emerging is of a reasonable amount of frequent public use having taken place which was ongoing for at least 20 years prior to the date of calling into question.

22. One objector suggests that many people have confused a path up Barons Walk to the bus stop on Brighton Road which closed in 2009 when an electricity substation was built with the one through 'Clevedown'. However, most of the users have drawn the route that they used on their UEF. It is difficult to see in those circumstances how confusion could have arisen.

*As of right*

23. There are a large number of residents at 'Clevedown'. An objector suggests that the users were visitors rather than members of the public passing through the complex. If the users were all lawful visitors then their use would have been permissive and the claim would be defeated. However, the users who completed UEF's or provided evidence all refer to their use of the route as being between Brighton Road and Barons Down Road. None resided at 'Clevedown'. Most say that they used it as a shortcut to reach and return from the bus stop in Brighton Road which is close to the northern end of the route. Some describe the route as safer and more convenient than the alternatives to reach the main road. They include users who indicate they are unable to walk far with heavy shopping. The applicant acknowledges that there were times when he was a visitor to 'Clevedown' but says he has discounted those occasions and he also used the route for access to other locations.
24. In an email to the Council on 30 November 2017, the landowner stated that *"...we have no intention of stopping the general public walking through Clevedown. However, we occasionally get antisocial behaviour therefore we do not wish to publicise a formal right of way."*
25. However, the landowner provides no indication that permission has ever been given to general members of the public to use the route. Being aware and acquiescing in the public use does not amount to 'consent' which must have been communicated to the users. The route takes an alignment where walkers would easily be observed and there is no question of the use being anything other than open. From the amount of activity associated with the flats, it may have been difficult to distinguish between residents, their lawful visitors and others in order for unauthorised walkers to be challenged. Even so, unless there has been some form of challenge to the public use during the 20 year period then such use cannot be said to have taken place with 'force'.
26. An assistant warden at 'Clevedown' from approximately June 1993 to October 1997 suggests that it was well known that the public used the route mainly to reach the bus stop and she was never told to stop, or say anything, to users. Obviously, this evidence only covers the earliest months of the relevant period but it reinforces the user evidence from that time.
27. A former resident of a property adjacent to 'Clevedown' from 1998-2003 maintains that during this time all entrances to 'Clevedown' had 'private, no access' signs. This evidence is contradicted by numerous users who say that they never saw any such signs. Two witnesses say they saw signs along the route but without further elaboration. There are numerous signs at 'Clevedown' but it is only the sign which prompted the application that appears to be directed at pedestrians using the route. It is undisputed by the landowners that

such a sign first appeared towards the end of 2016. The landowners make no mention of other or previous signage before this time which might have been anticipated if any previous attempts had been made to deter public use. The former assistant warden has no recollection of any 'private' signs along the route up to her departure around October 1997.

28. This same former neighbour recalls her teenage sons being deterred by residents and challenged by staff when they tried to sneak through. However, no other users say they were ever challenged despite regular use over many years. Indeed, the landowners email response suggests that the public have not been stopped in the past and their concern is over anti-social behaviour. In a letter to the applicant of 8 February 2017 the landowner states that the main purpose of the new sign was to deter skateboarders who regularly use the area. It is not difficult to see how this could present a nuisance and potential hazard, but a public footpath is a right to pass on foot only and use for any other purposes would not be permitted.
29. There is some suggestion that a gate may have existed across the route. The only possible location would be at the northern end. There is no sign now of any gate or where one might have been. I saw a wooden gate beside the footway at the start of the 'alternative' route with a sign prohibiting public access, but this would not prevent use of the Order route. If there was a gate across the route, it was not locked as confirmed by the landowners who say: *'entranceways have never been locked, and we have no plans to do so in future'*.
30. Therefore, on the balance of evidence the use was 'as of right'.

*Whether any landowner demonstrated a lack of intention to dedicate*

31. A lack of intention to dedicate requires overt acts on the part of the landowner so as to show the public at large that there was no intention to dedicate the right. 'Intention' is an objective test of what a reasonable user would have understood the owner's intention to be rather than what the landowner subjectively intended, or the user subjectively assumed.
32. There is no evidence that the landowner had demonstrated a lack of intention to dedicate. If anything, the email from Sussex Housing to the Council stating there was *"no intention of stopping the general public walking through Clevedown"* indicates to the contrary and a tolerance of the public use.

*Conclusion on statutory dedication*

33. On balance and having regard to the totality of evidence, I consider that the use by the public has been enjoyed as of right and without interruption for the full 20 year period under consideration. There is insufficient evidence that any landowner demonstrated a lack of intention during this period to dedicate the route. Therefore, the tests in Section 31 of the 1980 Act are met and the way is deemed to have been dedicated as a public footpath.
34. Given my findings that statutory dedication has taken place it is unnecessary for me to go on to consider dedication at common law.

### **Other Matters**

35. Concerns are expressed over the loss of a right of way alongside Barons Down nursing home, but this has no bearing on whether public rights have been acquired over the Order route.
36. I recognise that residents are anxious and fear for their privacy by a public right of way being formalised, but the evidence in this case supports the existence of those rights and the Council has a statutory duty to keep the DMS up-to-date. The use is unlikely to differ as a result, being an urban cut-through.

### **Conclusion**

37. I am satisfied that, on the balance of probabilities, a public footpath subsists and the DMS should be modified accordingly.

### **Formal Decision**

38. I confirm the Order.

*KR Seward*

INSPECTOR