



Order Decisions

Site visit made on 8 January 2018

by K R Saward Solicitor

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

Decision date: 19 February 2018

Order A: ROW/3180352

- This Order is made under Section 118 of the Highways Act 1980 (the 1980 Act) and is known as the West Sussex County Council (Fittleworth) Public Path (No.702) Extinguishment Order 2016.
- The Order is dated 22 April 2016 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule.
- There was 1 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 not confirmed.

Order B: ROW/3180353

- This Order is made under Section 118 of the Highways Act 1980 (the 1980 Act) and is known as the West Sussex County Council (Fittleworth) Public Path (No.2866) Extinguishment Order 2016.
- The Order is dated 22 April 2016 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule.
- There was 1 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 not confirmed.

Procedural Matters

1. The Orders were made on the same date. They follow an application by the owners of Warren Barn to extinguish sections of footpath which partially cross their land. Order B relates to a small section of FP2866 which links in to FP702, a substantial section of which would be extinguished under Order A. The statutory objector, the South Downs National Park Authority ('SDNPA'), has made a single submission in respect of the Orders. Given the commonality in issues, I deal with the Orders together except where the context dictates otherwise.
2. A letter objecting to both Orders was received from Jonathan Clark outside the objection period. I shall consider the objection having given the statutory parties opportunity to respond to the points raised.
3. No-one requested to be heard with respect to the Orders and so I made an unaccompanied site inspection, taking account of the written representations.
4. The Orders are for the extinguishment of the identified sections of footpaths 702 and 2866. References in the applicants' submissions to a diversion and alternative route are to an existing footpath rather than a diverted route. The

Order Maps are also annotated and marked up to show the proposed diversion of FP701 between points F-B and also a proposed footpath between J-H. They are outside the scope of these Orders and I have disregarded those references accordingly.

5. The SDNPA has contested the accuracy of the boundary line for the applicants' property indicated on a plan submitted by them. There is no suggestion that there is another landowner affected by the routes not already identified. Thus, this issue has no bearing on my consideration of the Orders. Similarly, whether or not there has been any change in the stance taken by the SDNPA does not influence my decision nor does its internal discussions on the matter as revealed in a Freedom of Information request.
6. I have found it convenient to refer to points along the existing and proposed routes as shown on the Order Maps which are the same for both Orders. Therefore, I attach a copy for reference purposes.

The Main Issues

7. By virtue of section 118 of the Highways Act 1980, for me to confirm the Orders I must be satisfied that it is expedient to stop up the paths having regard to:
 - (a) the extent (if any) to which it appears likely that the paths would, apart from the Order, be likely to be used by the public; and
 - (b) the effect that the extinguishment of the rights of way would have as respects land served by the path, account being taken of the provisions as to compensation.
8. The judgments in *R v SSE ex parte Stewart [1980] JPL 537* and *R v SSE (ex parte Cheshire County Council) [1991] JPL 537* clarified the relevant tests to be applied. Whilst the OMA must have considered the need for each path for public use when making the Orders, I must look at the likely future use of the paths. They are not the same tests. Any circumstances preventing or diminishing the use of the paths are to be disregarded and to be viewed as temporary when considering the Order.
9. I must also have regard to the material provisions of any public rights of way improvement plan ('ROWIP') prepared by any local highway authority whose area includes land over which the Order would extinguish a public right of way. As the footpaths lie within the South Downs National Park consideration must be given to the provisions of section 5 of The National Parks and Access to the Countryside Act 1949.

Reasons

Background

10. Point A is in the middle of open fields where FP702 meets FP2864. Fingerposts direct walkers to the north and south for FP702 and to the south-east for FP2864. FP702 proceeds downhill along an undefined route through open fields in a southerly direction to point E where there is a stile into Warren Barn Copse. The path leads through the trees before opening up on one side to paddocks at Warren Barn and continuing past its outbuildings and close by the main house to reach a pedestrian gate. The path leads into a further wooded

area and at point C there is a split in the route where FP2866 joins FP702. If confirmed, these routes would be extinguished up to points F and G where both paths link in with FP701 which runs from north-east to west. The paths to the south of Warren Barn cross Lithersgate Common, being Open Access Land.

The extent to which the footpaths would be likely to be used

11. My attention is drawn by the applicants to Advice Note 9. In particular to paragraph 18 which states: "At the confirmation stage, the decision-maker does not have to be satisfied that the way is not being used in order to conclude that it is not needed for public use. An Inspector could confirm an order even if he/she thought the way was likely to be used to a limited degree but was not actually needed."
12. The applicants say that they have monitored the use of the path that crosses their land over a considerable period and kept a log since May 2014. A copy is produced with entries up until September 2017. The applicants live and work at Warren Barn which has enabled completion of the log. Given that walkers must traverse between the house and outbuildings there is a high likelihood of them being seen by the occupiers particularly as the presence of geese and dogs will alert them to visitors. Inevitably there must be occasion when the path is used whilst the owners are out or otherwise engaged. They say that CCTV erected at their property allows them to monitor use at all times.
13. Until early 2015, the footpath across the applicants' garden had formed part of a route promoted by the SDNPA known as the "Serpent Trail". The reasons why its alignment was changed are not relevant to my decision. The point arising is that walkers wishing to follow the Serpent Trail will no longer utilise FP702. Thus, fewer people will have cause to use the path shown in Order A if following the Serpent Trail. The applicants say that the OMA's online map and editions of the Ordnance Survey have not yet been updated for the change to have full effect. Even so, I noted signs attached to trees for the Serpent Trail pointing walkers away from Warren Barn.
14. It seems unlikely that the owners will have under-stated the level of public use. During 2017, the figures suggest a decline in use from previous years with fewer groups, but there are still a small number of walkers recorded most weeks. In some weeks there may only be one or two people recorded, but it indicates consistent, if low, use over a sustained period of time. The applicants refer to the use in terms of the number of days in the month when walkers have been observed. This approach indicates that during 2017 there may only be up to 5 days per month when the path through Warren Barn has been used. By referring to the number of occasions rather than people, it does not reflect the level of use. Furthermore, these records do not show the amount of use of other parts of the route where people may have turned back without entering Warren Barn.
15. There is only one objection from a member of the public. No objections were raised by the Parish Council or user groups. This could indicate that there is little public interest in retaining the rights of way. On the other hand, the SDNPA suggests that the paths are likely to be reasonably well used to an extent commensurate with their rural location. Indeed, they describe the routes as being intrinsic to the local network of paths and suggest they afford a means for exploration and enjoyment of the National Park.

16. The SDNPA suggests there have been periods when there have been crops and other vegetation overgrowing parts of the route which will have affected the level of use and account for periods of no or low recorded use. In particular, they refer to crops between A-E on every occasion on site visits conducted between March-August 2017. That is plausible as the long stretch between A-E is across an open planted field. The route may still have been used, but I consider it likely that at least some people would be deterred either by fear of disturbing the crop or uncertainty over the existence of the route. I also noted that parts of the route in the vicinity of F-C-G were unclear through lack of signage and thick with vegetation making the way difficult to follow in places.
17. Those circumstances may have influenced the applicants' figures to some extent. Nevertheless, they must be set aside as temporary issues when considering the likely future use of the paths. That being so, it is likely that use would be higher but for obstacles deterring or diminishing the usability of the routes.
18. As a rural and relatively remote location it may never attract daily or a high numbers of walkers. In that context, the amount of use up until recent times has not in my view been insignificant and a clear, well signed route could attract more walkers.
19. Whilst the direction of the route is signed at point A, there is no worn route across the field. With point E also not visible from afar, it is difficult as a walker to gauge the correct alignment. When the field has been planted, it is perhaps unsurprising that there is no defined trodden path. Upon arriving at point E there is a stile of very basic construction. If travelling in the opposite direction the route is not signed from point E which is liable to cause confusion especially when there is crop in the field. All of these factors could deter use, but are capable of being remedied with increased likelihood of public use.
20. There is also no clearly defined track on the ground between points C-D where FP702 goes between the buildings at Warren Barn. Where the path crosses the lawn, there is no foot trail but this is not uncommon for a footpath across a domestic garden and does not signify a lack of use. There is a prominent finger post to aid walkers and a pedestrian gate provides a focal point, but it is not difficult to see how walkers might stray or get lost. With better waymarks walkers would be more likely to use and stick to the route. The applicants suggest that signs make no difference, but some people may be reluctant to use a route if it is unclear or they are fearful of trespassing.
21. An alternative route starts along FP2864 at point A and continues in a south-easterly direction through the fields along marked track lines. It is at a higher ground level than FP702 along easier terrain and offers expansive views of the surrounding landscape. In contrast, the views between A-E are largely restricted to the field on either side because of the topography which the non-statutory objector describes as a 'beautiful dry valley'. FP2864 continues over another rudimentary stile at the field edge into a copse before exiting along the lane near to FP701. From the conditions under foot it appears that FP2864 may currently be used in preference to FP702. Whatever the reason, the current condition of FP702 is to be disregarded in establishing its likely future use.
22. If the Order paths were extinguished, walkers would still be able to connect with FP702 further to the north by using FP2864. However, the availability of

an alternative route does not mean automatically that the public has no reason to use the Order paths. Each route offers different experiences. Some people may prefer the variance in views offered by FP702 and find the group of buildings at Warren Barn to be of interest. The dwelling at Warren Barn is expressed by the SDNPA to be a good example of the local built vernacular. From the path, the buildings and their setting can be appreciated even if the house itself is not a unique example. Although no users have come forward to say as such, both routes could be used as a circular route or to connect with FP701 further to the west if travelling in that direction.

23. The applicants suggest that it is illogical that dog walkers would use the path through their property when they could walk through the woods instead. That may be so, but not all walkers will have dogs. Being part of the National Park, it is very possible that walkers enjoying the countryside would utilise the route.
24. I note that in resolving to make the Orders, members of the Rights of Way Committee were influenced by FP2864 being an 'easier path'. I take this to be a reference to the gradients. Ease of use may cause some users to prefer that route, but it does not mean that the Order paths would not be used.
25. I find that there is regular albeit low use of the paths. Whilst no-one has expressly stated that they intend to use the routes in future, it seems to me that if the paths were better signed and maintained, it is likely they would be used to a reasonable extent by the public.

The effect which the extinguishment of the right of way would have as respects land served by the paths

26. No adverse effects arising from the proposed closures on the land concerned have been drawn to my attention. Compensation issues have not been raised.

Material provisions in the ROWIP for the area

27. The OMA has confirmed that it considers there to be no relevant provision within the ROWIP. The SDNPA on the other hand refers to a sentence within the ROWIP that says: "Only applications that do not result in a net loss of enjoyment and convenience for users are considered and opportunities are always taken to enhance the network wherever possible."
28. This sentence is included under the heading of "Changes to the network including diversions/upgrades/dedications/permissive agreements". The Orders are for none of those things. When read in context, I do not consider the provision to be of direct relevance. No other provision has been drawn to my attention.

Whether it is expedient to confirm the Order

29. The Order shall not be confirmed unless I am satisfied that it is expedient to do so. Whilst noting the content of the Order Decision for the extinguishment of part of footpath SM215 Priors Marston¹, each case must be considered on its individual merits. The 'need' for the paths is a matter for the OMA alone, but the use of the word 'expedient' in section 118 must mean that other considerations beyond the likely use of the paths can be relevant in

¹ Order Ref: FPS/H3700/3/19 dated 25 January 2012

determining whether to confirm the Orders. That stance is supported in the *Stewart* case.

30. There would be advantage to the landowners in not having a public footpath cross their land. That would be particularly so for the owners of Warren Barn whose private garden is crossed by the route passing close in front of windows. The applicants say they fear for their safety after incidents involving people using the path to enter their land. Both statutory parties provide lengthy details about confrontations and suchlike and I note that a member of the public was arrested in 2014. I attach some, albeit limited, weight to the desirability from the landowners' viewpoint of the paths being removed. However, there is no basis for me to believe that use of the path poses such a risk to person and/or property to outweigh the primary consideration concerning the extent of likely use of the paths.
31. These may also be historic paths dating back to at least the 1800's that linked farms and estates, but there is no substantive evidence to signify that they have particular historic value that should be preserved.
32. The extinguishments would result in the loss of the paths within the National Park. The document titled 'South Downs National Park - Special Qualities' describes how many people greatly value the sense of tranquillity and unspoilt places which give them a feeling of space and peace. Such value could be attributed to parts of these routes particularly from the sense of openness between points A-E along FP702. There would be loss to the public in consequence of its closure to which I attach limited weight.
33. The National Parks and Access to the Countryside Act 1949 requires any public body in exercising or performing any functions relating to land in a National Park to have regard to the purposes specified in section 5 of the Act. Those purposes are conserving and enhancing the natural beauty, wildlife and cultural heritage of the area and promoting opportunities for the understanding and enjoyment of the special qualities of those areas. In having regard to those purposes, it is still possible that the Orders could be confirmed as illustrated in the Order Decision brought to my attention for the extinguishment of part of FP3 in the Parish of Buriton². In that case the Inspector concluded that even if Network Rail had considered and fulfilled its duty under the 1949 Act, it would not have drawn any different conclusion.
34. It is the view of the SDNPA's Conservation Officer that the Warren Barn buildings make a contribution towards the cultural heritage of the locality and the broader National Park. In response, the applicants refer to the South Downs Society supporting the extinguishment and one of their core objectives is the preservation of cultural heritage.
35. On balance, I am unpersuaded on the information before me that the buildings have such significance that the removal of the routes in this instance would diminish opportunities for the enjoyment of the National Park contrary to the aims of section 5 of the 1949 Act.
36. First and foremost the test I must address is the likely use of the Order routes if they were to remain. From the information submitted it appears both paths are used and I have seen no persuasive evidence to suggest that would

² Order ref: FPS/Q1770/3/5 dated 4 January 2017

change. Indeed, without impediments and improved maintenance and signage the level of use could well increase. If the paths were to close then there would be an alternative route, but this is not such a significant factor in this case when it provides a different experience of the National Park. The Orders clearly benefit the landowners, but there would also be loss to the public from removal of the paths from the network. In the circumstances, I am not satisfied that it is expedient to stop up either path as shown in the Orders.

Other Matters

37. In its initial objection, the SDNPA suggested that an alternative less intrusive route to the occupiers of Warren Barn would be behind the outbuildings. Whether or not there are other alternatives does not influence my findings.

Conclusions

38. Having regard to the above and all other matters raised in the written representations, I conclude that the Orders should not be confirmed.

Formal Decisions

Order A

39. I do not confirm the Order.

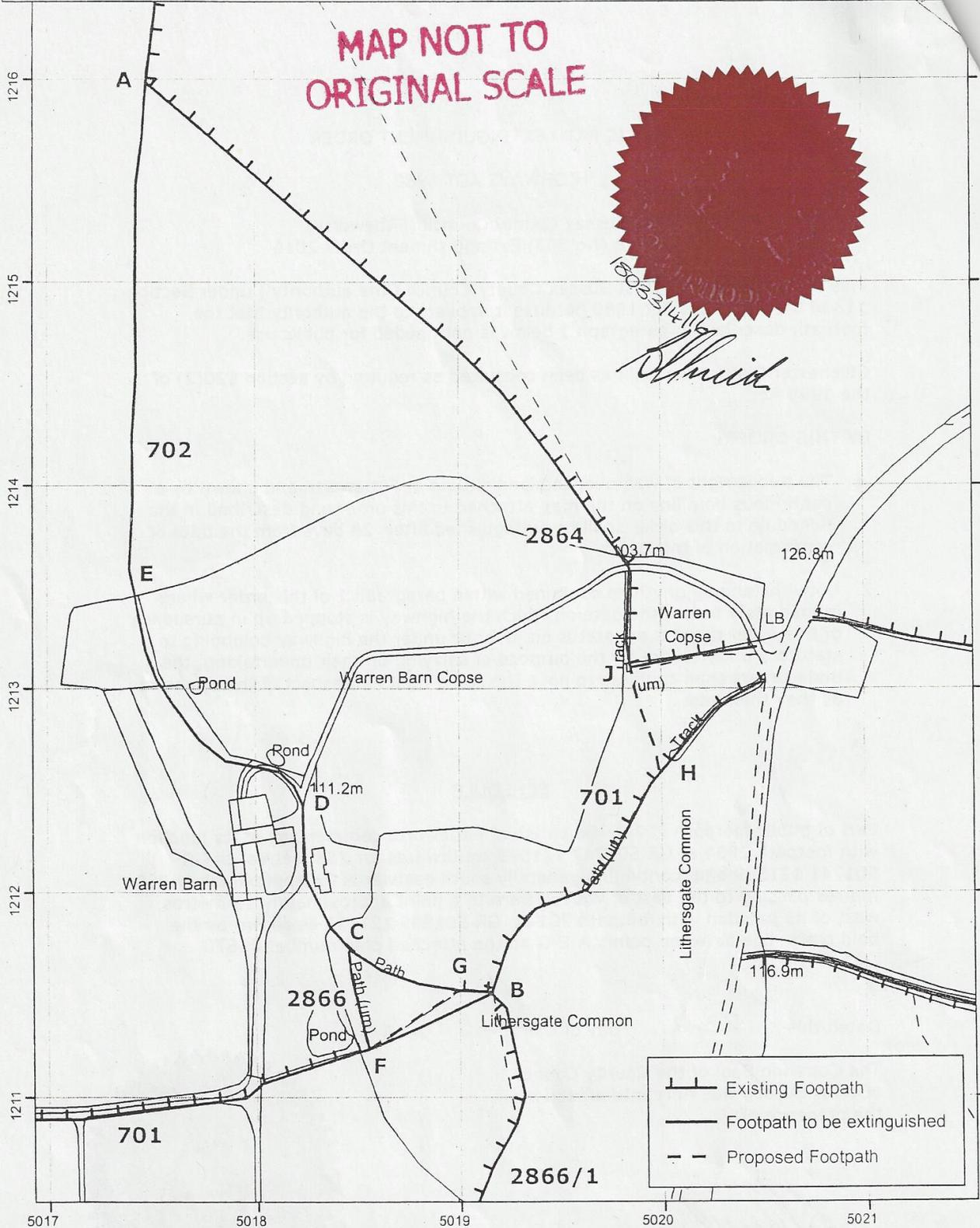
Order B

40. I do not confirm the Order.

KR Seward

INSPECTOR

MAP NOT TO ORIGINAL SCALE



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Fittleworth: Proposed extinguishment of part of Footpath 702, extinguishment of Footpath 2866, diversion of Footpath 701 and creation of a new Footpath - Site Plan

Plan: 01670 | 1:2,500
Date: 28.07.2015

OS Sheet: TQ 02 SW
Grid Ref: 5018 1211



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Nicola Debnam
Director of Highways and Transport

