

Subject:	Application for a Definitive Map Modification Order, Stanmer Park, Brighton		
Date of Meeting:	15 November 2011		
Report of:	Strategic Director Resources Strategic Director Place		
Contact Officer:	Name:	Carl Hearsom	Tel: 29-1523
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Ward(s) affected:	Hollingdean & Stanmer		

FOR GENERAL RELEASE**1. SUMMARY AND POLICY CONTEXT:**

- 1.1 An application has been made to Brighton & Hove City Council to make an Order modifying its Definitive Map and Statement of Public Rights of Way by adding a public footpath at Stanmer Park, Brighton.
- 1.2 The Council is the surveying authority for the purposes of section 53 of the Wildlife and Countryside Act 1981 and is required by law to keep the Definitive Map & Statement under review and make any changes necessary by Order.

2. RECOMMENDATIONS:

- 2.1 That the Committee declines to make an Order on the basis that the evidence referred to in this report does not demonstrate that the claimed right of way subsists or can reasonably be alleged to subsist.

3. RELEVANT BACKGROUND INFORMATION/CHRONOLOGY OF KEY EVENTS:**Introduction**

- 3.1 An application to modify the Definitive Map and Statement was received by the Council on 8 March 2011 (Appendix 1). The applicants are:

Jenny Lyon of High Street, Hurstpierpoint, West Sussex BN6 9TT;

Ann Markwick of Stanmer Village, Stanmer Park, Brighton BN1 9PZ; and

Alan White of the Open Spaces Society, 25A Bell Street, Henley-on-Thames.

A copy of the application is attached at appendix 1.

Description of the claimed route

- 3.2 A site inspection was undertaken by officers on 28 September 2011. A plan showing the application route is at Appendix 2, and an extract from the current version of the Definitive Map is at Appendix 3.
- 3.3 Travelling from east to west, the claimed route runs from existing bridleway 51B along the paved road that gives access to Stanmer House and Stanmer Nursery. That road is not at present subject to any public rights of way.
- 3.4 The route turns left at the gates giving access to the grassed area to the south-east of Stanmer House (“the Italian Gates”). The route then passes directly across the garden and up a very short flight of steps to the sloping grassy area to the south of the House (“the Cedar Lawn”). It passes south-west up and over the Cedar Lawn and joins the network of paths in the woods. These paths do not have public right of way status. The claimed route continues in the same approximate direction to join up with existing bridleway 53B that runs along the south-western edge of the Great Wood, and existing footpath 63 that runs over a footbridge crossing the A27.
- 3.5 The route along the access road to Stanmer House and Nursery is clearly a defined route delineated by the paved road.
- 3.6 Where the route crosses the garden of Stanmer House, there is a short flight of steps opposite the Italian Gates that are suggestive of a defined route. However, it should be noted that before the fence was erected along side of the garden facing the Italian Gates in April 2011, there was no physical barrier between the garden and the Cedar Lawn. This is clear from a photograph submitted by the applicants (appendix 4).
- 3.7 Where the claimed route crosses the Cedar Lawn there is no evidence on the ground of a defined path as such.
- 3.8 There are a number of paths visible through the woods, although it is difficult to match these up exactly with the application plan.
- 3.9 Photographs from the site inspection are at appendix 5.

Background to the application

- 3.10 In 2002 the council granted a lease for Stanmer House and a second lease for the adjacent stable block, both for 125 years, to Cherrywood Investments Limited.
- 3.11 Prior to the grant of that lease the Council complied with the requirements of section 123(2A) of the Local Government Act 1972, which requires the placement of two advertisements in a local newspaper where a local authority proposes to dispose of land that is “public open space”. No objections were received prior to the grant of the lease.
- 3.12 In April 2011 planning permission was granted to Cherrywood for the installation of fences to the garden area at the side of the building, replacement of fencing and walls to either side of gates with 1.8 metre high walls, and additional landscaping (BH2011/00286).

- 3.13 As a part of the planning consent granted it was agreed to vary a legal agreement put in place for an earlier planning consent (BH2004/03712) which required Cherrywood to provide public access through the garden during daylight hours. A copy of the section 106 Agreement and the later committee report recommending approval of the variation is at Appendix 6. On completion of the fencing works, which included the provision of an alternate access around the garden, the requirement to provide access across the gardens ended.
- 3.14 It is not a requirement of the lease for Cherrywood to provide public access across the garden.
- 3.15 The application for an Order was made following the erection of fencing around the garden and the locking of gates giving access to the garden of Stanmer House in pursuance of the above planning permission.

User evidence in support of the Application

- 3.16 318 people have completed questionnaires detailing their use of the route and their evidence is summarised in the table at Appendix 7. Copies of the completed questionnaires are available in Members' Rooms.

Reasons for use

- 3.17 Reasons given include walking, bird watching, recreation, picnics, and so on. Many of the forms mention that the area provides access to the woods behind Stanmer House.

Duration of use

- 3.18 144 of the users claim to have used the way for periods of 20 years or more.

Gates

- 3.19 26 users refer to gates on the claimed right of way having been locked as follows: user 68 (gates to the left of Stanmer House), 91 (gates at bottom of way, next to Stanmer House), 98, 111 (Italian Gates but access always possible), 112, 118 (gates locked when Cherrywood took over Stanmer House), 122 (gates to the gardens had been damaged), 135, 137 (when squatted all boarded up and locked), 155 (gate to path by Stanmer House), 169 (pre existing ornamental gate sometimes locked), 187, 189 (seen gates 30/5/11 erected illegally), 224, 268 (by house), 301 (temporary fence and gate in position at either end), 305 (since new ownership of Stanmer House), 306 (not usually in the past, although we have walked around the gates through the trees), 310 (metal railings blocking the way), 312 (occasionally), 313 (today).
- 3.20 User 48 states that there is an earth track to the side of the gates that most people use. User 243 states that it was not necessary to use the gate as there were other entrance points.

Signs and notices

3.21 Only one evidence form (112) refers to notices but gives no further details.

Verbal Challenges to Use

3.22 There is no evidence from users of the claimed path of their being told that the way was not public prior to the erection of the fencing in 2011.

Whether the way is a defined route

3.23 154 of the evidence forms refer to the way as being of various widths up to 3 metres wide, or equivalent (i.e. “enough for 4 people to walk abreast”; “footpath sized”). This would be consistent with a defined path.

3.24 However a substantial minority of the forms include comments suggesting that what is used is not a footpath as such but a more generally open area. Of particular note are forms 4, 11, 14, 19, 25, 26, 28, 30, 36, 39, 40, 70, 75, 89, 90, 109, 111, 126, 167, 171, 190, 193, 194, 198-200, 204, 303, 229, 243, 257, 259, and 286 .

3.25 For example, form 25 refers to the area as being “open access”; form 111 states that the user has “always used gardens”; form 167 says that the path is “unlimited”, “open access”; form 193 “gate to open land”; form 194 “lovely wide sweep of grass”; form 190 “varies: gate leads to a field, then woods”.

3.26 Some forms refer to the way as not being clearly defined at one side but the width of the gates at the other (see e.g. 204, 303).

3.27 Some forms refer to using the lawned area for picnics (e.g. forms 28, 39, 286)

3.28 As noted above, some forms mention that it was possible to follow a route around the gate rather than through it.

3.29 None of the forms refers to using the claimed right of way at night.

3.30 Photographs have been submitted by some applicants, but none showing a defined path.

Response of Landowners to application

3.31 Ownership of the land is as set out above. Cherrywood Investments has provided a detailed response supported by a number of witness statements which is reproduced at appendix 8.

3.32 A statement has been included from Mr David West, resident of the farmhouse at Home Farm. Mr West’s statement refers at paragraph 10 to the placement of a large stone block in front of the Italian Gates at the request of the council. A photograph of the stone block is attached to the statement.

3.33 A statement provided by Samantha Holland, director of Cherrywood Events Limited, also refers to the stone block and includes evidence in support of the claim that the photograph was taken in 2004.

- 3.34 A statement from Phil Purvis, architectural technician, attaches a photograph showing the garden area in 1999 and states that the gates were locked. It is not possible to conclude from the photograph alone that the gates were locked, although they are certainly closed.
- 3.35 This photograph also appears to show two straight tracks along the route of the claimed path. Officers have expressed the view that these may be tyre tracks. However it is more likely that they are traces of an original landscape feature in this location (for reasons set out below).
- 3.36 Also provided is a copy of a letter from the council dated 12 February 2007 from Debra May. This refers to the gates across the rights of way being gated in contravention of the section 106 Agreement relating to Stanmer House, and required the gates to be unlocked. The letter states that "... the right of way **remains** gated ..." (emphasis added).
- 3.37 Ms May's letter is referred to in the user evidence form completed by Mike Holland, director of Cherrywood Investments Limited which states that the Italian Gates were locked from 1999 until 2007.
- 3.38 A legal argument as to the effect of the basis on which the Council holds the land subject to the application is also put forward, which is considered below.

Response of Council as landowner

- 3.39 Council officers have given their views on behalf of the Council as the freehold owner of the land in question (Appendix 9). The Council's surveyor was not aware of indicated access to the garden having been restricted prior to the grant of the lease to Cherrywood in 2002.
- 3.40 The Council has not made any deposit under section 31(6) of the Highways Act admitting any rights of way over the area covered by the claimed route. In law this would be treated as evidence of a lack of intention to dedicate any other rights of way.
- 3.41 Officers are unaware of any Council employee having told members of the public that the way was not public.
- 3.42 Officers are unaware of any evidence held by the council that contradicts the evidence provided by the tenant of Stanmer House.

Historical Research and background

- 3.43 A study has been made of historical documents relating to the claimed footpath held at East Sussex Records Office (ESRO), Brighton & Hove libraries and by the council itself. Documents have also been provided by the applicants in support of the claim.
- 3.44 The history of Stanmer House and Stanmer Park is detailed in various publicly available sources. A useful summary is provided in the Summary of the Stanmer

Park Historic Landscape Survey & Restoration Management Plan produced in October 2003 (appendix 10).

- 3.45 Stanmer Park was bought by the then Brighton Borough Council in 1947. Prior to that date it had been in private ownership, most recently (from 1801 onwards) occupied by the Earls of Chichester.
- 3.46 The Stanmer Estate Committee of Brighton Borough Council resolved on 7 July 1953 to allocate an area of land for the use of public walks and pleasure grounds (appendix 11). This area was referred to as having an area of 269 acres or thereabout and being shown green on Drawing No 4345/TP.
- 3.47 The same Committee resolved on 15 September 1953 to rescind the resolution of 7 July and allocate for use of public walks and pleasure grounds an area of 205 acres or thereabouts and shown coloured green on Drawing No. 4345/TP.
- 3.48 Unfortunately it will be noted that the drawing number referred to in both sets of Committee minutes (7 July 1953 and 15 September 1953) is the same, but the first refers to an area of 269 acres and the second to 205 acres. A copy of the original drawing has been obtained from ESRO (appendix 12).
- 3.49 A further plan and memorandum dated 20 January 1984 and prepared for the Stanmer House Project Team shows land described as being held "under Public Walks and Pleasure Grounds Act" (appendix 13). There is no such Act, but this is consistent with the wording of the Public Health Act 1875 and the committee minutes.
- 3.50 Documentary evidence has been obtained showing that in the 1950s park police were challenging people using the wooded area behind the house (appendix 14). A copy of the original Ramblers' rights of way survey of 1951 has also been obtained, which does not mention the claimed footpath (appendix 15).
- 3.51 The applicants have provided a copy of a painting of a fete at Stanmer in around A.D. 1816. The house would at this time have been in private ownership. There is no suggestion that the people depicted were there otherwise than at the invitation of the landowner (appendix 16).

Maps

- 3.52 Ordnance Survey maps of 1876, 1911, 1930 and 1995 have been consulted (appendix 17). The 1876 and 1930 maps show a path around the garden that includes the claimed route, but the 1911 map does not. All three appear to show a route over the Cedar Lawn. However, the 1995 map does not show any path over the garden or the Cedar Lawn.
- 3.53 The tenants have supplied a copy of a map with handwritten annotations that appears to date from 1967 or before. A number of what appear to be paths are marked on this map (appendix 18).

Further comments from applicants

- 3.54 The applicants have submitted a response containing further comments on the evidence (Appendix 19). These are dealt with, where relevant, in the consideration of evidence below.

Legal Position

- 3.55 The application has been made under section 53 of the Wildlife and Countryside Act 1981 which requires the authority to keep the definitive map and statement of public rights of way up to date and amend it where necessary. If a way is shown on the definitive map then it is deemed by law to be conclusive evidence that the public had a right of way falling into that category at the relevant date.
- 3.56 The legal test to be applied is whether, on the balance of probabilities, the claimed right of way subsists or can reasonably be alleged to subsist. In reaching its decision the council must be guided by the appropriate legal principles.

Characteristics of a highway

- 3.57 In order for a right of way to subsist, it must have the essential characteristics of a highway. A highway is a right for the public to pass and repass along a defined route. Without a defined route there can be no right of way.

Dedication of a highway

- 3.58 In order for a right of way to arise across a piece of land there must be a dedication of that right of way by the landowner, and an acceptance of that dedication on the part of the public at large. Where the public have been using a way for a period of time “as of right” (meaning without force, without secrecy and without permission) the common law may imply such dedication and acceptance. This is a question of how the evidence would appear to a reasonable observer. This position is modified by statute where there has been at least 20 years’ use.
- 3.59 Section 31(1) of the Highways Act 1980 states that:
- “Where a way over any land ... has actually been enjoyed by the public as of right and without interruptions for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”.
- 3.60 The 20 year period is calculated retrospectively from the date at which the right of the public to use the way is brought into question (section 31(2)). There may be multiple dates on which the right to use a way is brought into question, and what must be established is at least 20 years’ uninterrupted use leading up to any such event. “Brought into question” means some act on the part of the landowner such as the erection of notices or gates or turning people away. The application for an Order is deemed by the Highways act to be an event bringing the right to use the way into question.
- 3.61 In the case of *Godmanchester* (2007) the House of Lords held that the word “intention” in section 31(1) means what the relevant audience, namely the users of the way, would reasonably have understood the landowner’s intention to be. The test is objective, and the reasonable user would have to understand that the

landowner was intending to disabuse him of the notion that the land was a public highway.

- 3.62 It must be emphasised that what is being considered in this report is how the actions of the freehold owner of the land (i.e. the council) would have appeared to an objective observer.

Allocation of land as “Public walks and Pleasure Grounds”

- 3.63 Under section 164 of the Public Health Act 1875, a local authority may purchase take on lease, lay out, plant, improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.
- 3.64 The tenant has put forward the legal argument that the alleged use of the footpath is referable to the public rights to use the land held under section 164 as public walks and pleasure grounds, by express permission of the landowner. The argument is essentially that such use cannot have been “as of right” because permission has been given by the Council when it allocated the land for public use
- 3.65 This argument is challenged by the applicants in their response of 1 November on the grounds that it is incompatible with section 31 of the Highways Act 1980.
- 3.66 This is an issue of law. The council has obtained independent counsel’s opinion. This has confirmed that the argument put forward by the tenant is correct. It is therefore necessary to determine how much of the land that is subject to the application falls within the area that was allocated as public walks and pleasure grounds in 1953.
- 3.67 Paragraphs 3.32 to 3.34 above summarise the evidence found in the council’s records. Both the 1953 plan and the 1984 plan are consistent with each other, and both include the entire route of the claimed right of way with the exception of the garden of Stanmer House and the Cedar Lawn.
- 3.68 No other drawing purporting to show the area allocated in 1953 is available. However, the 1984 plan is consistent with drawing 4345/TP . The most logical conclusion in the absence of any other evidence seems, on balance, to be that the area designated in 1953 is as shown shaded green on that drawing.
- 3.69 If it is accepted that the area shown coloured green on drawing 4345/TP accurately reflects the area designated as public walks and pleasure grounds, it must follow that no claim for a right of way can succeed in respect of those areas. It is not therefore necessary to examine in detail the evidence relating to those areas of the claim.
- 3.70 Cherrywood’s solicitor has requested that the following argument be placed before Members:

“The plan attached to the memorandum dated 20 January 1984 appears to designate the gardens of Stanmer House as land held under the Local Government Act 1972. I take it that means land held as public open space? The Council certainly told me at the time of Cherrywood entering into the Agreement for Lease of Stanmer House and its gardens that the gardens formed part of public open space and therefore that, for the lease to be granted free from any public open space designation, the Council had first to advertise publicly its intention to appropriate the gardens for private use, without any objectors coming forward. If the gardens were part of public open space at the time of the entering into of the Agreement for Lease on 21 March 2000, it seems to me that at that time the public had a general right to roam over the gardens of Stanmer House as part of the designated public open space (subject to any bye-laws or other restrictions that the Council may have imposed at the time and subject to the evidence in my submission to you that the Italian Gates were in fact locked by the Council at that time). If so, it seems to me that the alleged use of the footpath across the gardens of Stanmer House up to the time of the gardens ceasing to be designated as public open space in 2000 is referable to the public rights to use the land by virtue of it being designated public open space. Therefore I think it is certainly arguable that there was no user as of right (which is a pre-requisite of acquisition of rights of way by long use) prior to the gardens ceasing to be public open space. An analogous case, perhaps, is that of *The National Trust v Secretary of State for the Environment* [1998] WL 1044006, where it was held that there was no user as of right of an alleged footpath because the National Trust had made the land available to the public due to a "freedom to roam" policy”.

- 3.71 However in light of the findings below it is not necessary for this issue to be determined in order to arrive at a decision on this application.
- 3.72 The remainder of the report is therefore limited to consideration of whether a right of way exists over the garden and the Cedar Lawn. For completeness it should be noted that much of the user evidence submitted is in any case focussed on this area.

CONSIDERATION OF EVIDENCE

- 3.73 The applicants’ recent response questions the reliability of some of the evidence submitted in support of the application on the ground of links between the tenant of Stanmer House and the witnesses.
- 3.74 The solicitor for Cherrywood Investments has asked for it to be made clear that
- (a) Mr Purvis has never been an employee of Mr Holland or Cherrywood Investments Limited. He is an independent professional consultant to Cherrywood.
 - (b) Mr Garret of JP Garrett Electrical is an independent contractor and has not met Mr Holland.

- 3.75 Where there are conflicts between the evidence of different witnesses these are considered below. However for the avoidance of doubt there is nothing to suggest that any witness has been dishonest in their submissions.

Whether there is evidence of an identifiable way capable of giving rise to a presumed dedication

- 3.76 There are clearly a very large number of user evidence forms in support of the application, and as noted above many of them refer to a defined path. However, this evidence needs to be considered in the round with the historical evidence and the evidence provided by the tenant.
- 3.77 The tenant has made the point that the overwhelming majority of the application forms do not mention having seen any gates on the claimed right of way, and that this is inconsistent with the tenant's evidence showing that the gates were blocked by the stone block at some point in or before 2004, and were locked in 1999.
- 3.78 This seeming inconsistency may be explained by the fact that access to the garden was clearly possible via other routes in the past. The applicants' further response acknowledges this, stating that:

"Local residents ... as well as those regularly visiting the park at that time ... do recall the locking of the gates, and the positioning of a large stone to block them, for a short period following the occupation of the garden by travellers. The stone was clearly not to prevent walkers using the path, as it could not do so ..." (page 3).

"Walkers continued to use the footpath, as the garden was not enclosed until Spring 2011 and it was easy to enter and exit it from any direction. Notably, walkers from Hollingbury entered the park via a dedicated footpath (53B) ... walking through the woods and down the steps to the footpath in question. At the end of the path they exited through a well-used track between the bushes" (page 3).

"It is agreed that the public often entered and exited the gardens, and used the path, by other means than the open gates. This included children who enjoyed playing in this garden, and those entering the garden through gaps in the bushes and trees" (page 7).

- 3.79 The application plan shows a route that passes through the gates and across the garden. To the extent that access was obtained via other routes, it cannot be evidence in support of the claimed route.
- 3.80 It is also important to remember that access across the garden to the Cedar Lawn was not restricted by the fence now in place across the back and sides of the garden until April 2011. This is evident from the photograph at appendix 4 and acknowledged by the applicants as noted above. Walkers entering the garden by routes other than the gate would have had no reason to walk onto the route of the claimed path to get to either the steps or the gate. Even those entering by the gate would not have needed to proceed directly across the

garden to the steps. Whilst some of them may of course have done so the overall picture is not one of people using a defined path to travel from A to B.

- 3.81 When considered with the user evidence forms and the comments indicating use of an area for recreation, the evidence does not appear to demonstrate an identifiable path across the garden or the Cedar Lawn. It may show evidence that people were using the whole area of the Cedar Lawn and the garden for recreation, but that is not evidence of a highway.
- 3.82 The ordnance survey maps must be considered in their historical context. It will be seen from the maps from 1876, 1911 and 1930 that the layout of the paths and gardens around Stanmer House has changed over time. Throughout this period the house and garden were in private ownership.
- 3.83 The most recent ordnance survey map from 1995 does not show any path at all over the garden or Cedar Lawn.
- 3.84 The applicants' further response draws attention to the footpath marked on the 1876 Ordnance Survey map. They state:
- “As [Ordnance Survey] and Definitive Maps are usually in accord, it appears to be an oversight that the path in question was not entered onto the definitive map” (page 1).
- “... the path has existed since at least 1873, when it appeared on a first edition OS Map. This was accepted as evidence in the Colson Stone Report. ... The report also notes that there is clear evidence of the path though it is now grassed over”.
- 3.85 The straight tracks visible on the aerial photograph attached to the statement of Phil Purvis would be consistent with a grassed-over path.
- 3.86 It is established law that the representation of any road, track or path on a map published by the Ordnance Survey is no evidence of the existence of a right of way over it. In some instances, however, indirect support for a claim that a way carries public rights at the present time may be gained from the fact that the way is shown on an OS map published at an earlier date.
- 3.87 However, when considered in the round it is considered that none of the maps provide support to the claim. Relandscaping of the gardens took place whilst the House and Park were in private ownership, and it seems most likely that the paths shown reflect this. The copy painting from 1816 provided by the applicants also appears to show a fete taking place whilst the garden was in private ownership and does not provide evidence of a public right of way.
- 3.88 In relation to the Cedar Lawn, there is no evidence visible on the ground of a defined route. There is no obvious path over what is an open area of grassland. This is clear from all of the photographs of the area.
- 3.89 It has to be borne in mind that paths shown on the maps prior to 1945 are evidence only of physical features of the land. They do not provide any support

for the claim that the Council intended to dedicate paths over those routes at a later date when the paths had become overgrown.

- 3.90 When considered as a whole, it is considered that the evidence is insufficient to support a conclusion that an identifiable way subsists that passes over the garden of Stanmer House and the Cedar Lawn.
- 3.91 The application therefore cannot succeed. However for completeness the report goes on to consider the position if an identifiable route were found to exist.

Whether there has been 20 years' lawful use as of right.

- 3.92 It is clear that the application for an Order is an event bringing the right to use the way into question. It is also the case that the grant of planning permission allowing the way to be locked between dusk and dawn is such an event, as it involved locking the Italian Gates. The placement of the stone block in 2004 would also be such an event, as would the locking of the gates in 1999.
- 3.93 There is nothing in the evidence provided by the applicants that is inconsistent with the gates having been locked at night from 2007 onwards
- 3.94 The applicants have accepted that the Italian gates were locked and blocked by a stone block at some point, and in light of the photographic evidence it is accepted that this took place in or before 2004.
- 3.95 As pointed out by the applicants, the photographic evidence from 1999 submitted by the tenant does not clearly show that the gates were locked, although the accompanying statement of Phil Purvis says that this was the case. and the lo Given that the applicants have stated that access to the garden was possible via other routes, it is accepted that the gates were locked in 1999.
- 3.96 The fact that the Council felt it necessary to take action to enforce the covenants in the section 106 Agreement clearly indicates that the Italian Gates were locked in 2007.
- 3.97 When considered as a whole the evidence provided by the tenant of acts of interruption is convincing. It is therefore accepted that the right of the public was brought into question in 1999 by the locking of the gates., in 2004 by the placement of the stone block, and in 2007 by the locking of the gates again.
- 3.98 In order to succeed under the Highways Act the applicants would therefore have to show 20 uninterrupted years' use as of right up to 1999.
- 3.99 88 witnesses have said that they have only used the claimed right of way for 12 years or less. The evidence of these witnesses cannot therefore support a claim for 20 years' use culminating in 1999.
- 3.100 There is evidence that the Italian Gates were open for a period ending in 1999. However, the strength of the evidence submitted by the applicants must be considered. Because none of the user evidence forms mention obstruction of the

Italian Gates in 1999 or 2004 it is not possible to place much weight on them as evidence of earlier use of that route.

- 3.101 It is therefore not considered that the evidence demonstrates 20 years' uninterrupted use of the claimed route as of right.

Whether there is sufficient evidence that there was no intention to dedicate during the 20 year period

- 3.102 Legally, acts of a landowner that bring the right of the public to use a way into question may also provide evidence of a lack of intention to dedicate the way for public use.
- 3.103 The section 106 Agreement is cited by the applicants as evidence that a footpath existed and was used. However it is not evidence of an intention to dedicate a highway. If a public right existed over the claimed route there would have been no need to protect it by way of the section 106 agreement. The terms of the section 106 Agreement are also significant, as it specifically gave the council power to agree an alternative route for the right of way (clause 3.4). This is inconsistent with an intention to dedicate a defined route as highway.
- 3.104 There is sufficient evidence that was communicated to the public of a lack of intention on the part of the landowner to dedicate a right of way during the 20 year period ending in 2011. This includes the placing of stone blocks, the grant of planning permission and associated section 106 allowing the way to be locked between dawn and dusk, and the locking of the gates.
- 3.105 In light of the conclusions above it is not necessary to consider whether there was sufficient evidence of a lack of intention to dedicate in the period ending in 1999.

The position at common law

- 3.106 For the reasons given above it is not considered that the evidence provided shows that an identifiable way has been enjoyed by the public as of right for any period, and the application therefore cannot succeed at common law.

Conclusion

- 3.107 The Administrative Court confirmed in *Todd* (2004) that the test to be applied by the order making authority under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 is whether, on the balance of probabilities, the right of way subsists or can reasonably be alleged to subsist. If it can then the onus is on the authority to make an Order and the evidence is then tested as part of the confirmation process.
- 3.108 In summary:
- (1) In respect of those parts of the application route outside the Cedar Lawn and the garden of Stanmer House, the actions of the Council in allocating those areas for public walks and pleasure grounds means that any public use is

necessarily with permission and therefore cannot give rise to a public right of way;

(2) In respect of the Cedar Lawns, there is no evidence of a defined route leading from the steps to the Great Wood as claimed by the applicants. It is clear that the public freely roam over this area, but there is no defined highway.

(3) In respect of the garden of Stanmer House, there is insufficient evidence of a defined route.. Even if such a route could be demonstrated to exist, there is clear evidence on the part of the landowner of acts of interruption such that no 20 year period of enjoyment as of right has been made out.

3.109 It is the conclusion of this report that on the balance of probabilities no right of way subsists or can reasonably be alleged to subsist over the route claimed by the applicants. It is therefore recommended that the Committee decline to make an Order. .

4. COMMUNITY ENGAGEMENT AND CONSULTATION

4.1 The owners and occupiers of the affected property given the opportunity to comment on the application for an Order and the evidence submitted in support of it.

4.2 The Open Spaces Society and the Ramblers Association have also been given the opportunity to comment.

5. FINANCIAL & OTHER IMPLICATIONS:

Financial Implications:

5.1 The costs associated with the administration of this application has been met from existing budgets. There would be additional costs should there be a requirement for a public inquiry which would be reported back to the Committee.

Finance Officer Consulted: Anne Silley

Date: 24/10/11

Legal Implications:

5.2 The Council is under a duty to determine applications made under section 53 of the Wildlife and Countryside Act 1981. The appropriate tests to be applied and other relevant legislation are considered in the body of the report.

Lawyer Consulted: Elizabeth Culbert

Date: 03/11/11

Equalities Implications:

5.3 There are no equalities implications arising directly from this report. No new policy or amendments to existing policy are proposed. In any event, only the evidence relating to the claim can be considered.

Sustainability Implications:

- 5.4 These are not relevant issues. Only the evidence can be considered.

Crime & Disorder Implications:

- 5.5 These are not relevant issues. Only the evidence can be considered.

Risk and Opportunity Management Implications:

- 5.6 Risk in terms of health and safety of the public is not a factor taken into account with modification orders as they are purely evidence-based.

Public Health Implications:

- 5.7 These are not relevant issues as only the evidence can be considered.

Corporate / Citywide Implications:

- 5.8 These are not relevant issues as only the evidence can be considered.

6. EVALUATION OF ANY ALTERNATIVE OPTION(S):

- 6.1 There are no alternative options. The Council is under a legal duty to determine the application.

7. REASONS FOR REPORT RECOMMENDATIONS

- 7.1 These are set out in the body of the report.

SUPPORTING DOCUMENTATION

Appendices:

1. Application
2. Plan showing claimed route
3. Extract of current definitive map
4. Photograph submitted by applicants
5. Photographs from site visit
6. Section 106 Agreement and Committee report agreeing variation
7. Summary of user evidence
8. Response on behalf of Cherrywood Investments Limited
9. Response of Council as freeholder
10. Summary of the Stammer Park Historic Landscape Survey & Restoration Management Plan
11. 1953 Committee minutes
12. 1953 Memo and Plan
13. 1984 Memo and Plan
14. Park police reports
15. Ramblers' Association Rights of Way survey
16. Copy painting submitted by applicants
17. Ordnance Survey maps
18. Map submitted by applicants
19. Applicants' further comments

Documents in Members' Rooms

1. User evidence forms

Background Documents

None