

Subject:	Application for a Definitive Map Modification Order, The Paddock, Roedean		
Date of Meeting:	14th March 2017		
Report of:	Executive Lead Strategy, Governance & Law		
Contact Officer:	Name:	Stephanie Stammers	Tel: 29-1523
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Ward(s) affected:	Rottingdean Coastal		

FOR GENERAL RELEASE**1. PURPOSE OF REPORT AND POLICY CONTEXT**

- 1.1 An application dated 11 March 2014 was submitted by the Roedean Residents Association, to Brighton & Hove City Council ("the Council") for an order modifying the Council's Definitive Map and Statement of Public Rights of Way by adding a public footpath at The Paddock, Roedean ("the Claimed Route").
- 1.2 The Council is the surveying authority for the purposes of section 53 of the Wildlife and Countryside Act 1981 ("the Act"). Section 53 (2)(b) of the Act requires the Council to keep the Definitive Map and Statement under continuous review and make such modification to the Map and Statement as required.

2. RECOMMENDATIONS:

- 2.1 That the Committee does not approve the application for a Definitive Map Modification Order on the basis that it has not been found that, on the balance of probabilities, a right of way over the Claimed Route subsists or can reasonably be alleged to subsist.

3. CONTEXT/ BACKGROUND INFORMATION

- 3.1 A copy of the application is included at Appendix 1. Drawing number A3/41483 showing the Claimed Route was also submitted with the application and is included at Appendix 2.
- 3.2 Eleven user evidence forms were submitted with the application, and copies of these are attached at Appendix 3.
- 3.3 The land known as The Paddock over which the Claimed Route runs has been owned by the Council since 1931. Copies of the Land Registry entries and title plan are at Appendix 4.
- 3.4 Jonathan Jose, of the Estates Team and Stephen White of CityParks Operations have completed the landowner's evidence on behalf of the Council and their statements are at Appendix 5 (Stephen White) and Appendix 6 (Jonathan Jose).

LEGAL POSITION

SECTION 53 WILDLIFE AND COUNTRYSIDE ACT 1981

- 3.5 Section 53(2)(b) of the Wildlife and Countryside Act 1981 imposes a duty on the Council to make any modifications to the Definitive Map & Statement that are necessary as a result of the occurrence of certain events. One such event is where use of a specific route raises a presumption that it has been dedicated as a public path (either a bridleway or a footpath). This is commonly demonstrated by user evidence.
- 3.6 Another such event is the discovery of evidence by the Council which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the Definitive Map and Statement subsists or is reasonably alleged to subsist over land in the area to which the map relates (Section 53(3)(c)(i)).
- 3.7 All the evidence must be evaluated and weighed and a conclusion reached whether, on the balance of probabilities, either the alleged rights subsist or are reasonably alleged to subsist. Any other issues, such as safety, security, suitability, desirability or the effects on property or the environment, are not relevant to the decision.

SECTION 31 HIGHWAYS ACT 1980

- 3.8 Where the evidence in support of the application is user evidence, section 31(1) of the Highways Act 1980 applies, which states;-

“Where a way.....has been actually enjoyed by the public as of right and without interruption for a full period of twenty 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.”

- 3.9 The public must have used the way without interruption and as of right; that is without force, secrecy or permission. Section 31(2) states that “the 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question”. Being “brought into question” would typically be an act by the landowner such as putting up a notice, erecting a gate or turning people away. Under section 31 the onus is on the landowner to show that they did not intend to dedicate the way as a public right of way.
- 3.10 In the case of The Paddock, Roedean, the placing of ‘Private Property’ signs by BHCC on The Paddock in April 2012 is the act which brought the right of the public into question. Therefore the period of use to be shown for the purposes of Section 31 Highways Act 1980 is the period of 1 April 1992 to 1 April 2012.

COMMON LAW POSITION

- 3.11 Additionally or alternatively, the requisite period of enjoyment may be demonstrated by satisfying the requirements of “common law” or law established through a series of

cases that have been decided by the courts. At common law there is no set period of use.

- 3.12 If reliance was being placed on some period of use less than 20 years duration, or if reliance was placed on a period of use expiring at some point before an identifiable act which brings into question the public's right to use the way, then resort to the common law rules of dedication may be necessary.
- 3.13 The case in this application is that the evidence available can be dealt with under the statutory test and in doing so will also satisfy the common law test. There is therefore, for the purposes of this report no need to distinguish between the two tests for the purposes of the conclusions drawn.

RIGHTS OF APPEAL

- 3.14 If the Council refuses the application, the applicants have a right of appeal to the Secretary of State. The applicants must serve notice of appeal within 28 days after service on them of the Council's decision.
- 3.15 If the Council grants the application and makes an Order, public notice of the Order is given. If any objections are received within a specified time the matter is referred to the Secretary of State for a decision.

DESCRIPTION OF CLAIMED ROUTE

- 3.16 A site inspection was undertaken by Ms Chantelle Hoppe, Ranger, Countryside Team, shortly after the application was made on 14 March 2014.
- 3.17 The Claimed Route is shown on Drawing no A3/41483 at Appendix 2 starting at the steps at the south east corner of the Paddock (point D) running to the north east corner of the Paddock (point C) and then along the northern boundary to the north west corner of the Paddock (point B).

APPLICANTS' EVIDENCE

- 3.18 The application was made on the basis of:
- a) Questionnaires from eleven people detailing their use of the Claimed Route (Appendix 3).
 - b) Drawing number A3/41483 dated 30 May 1989 issued by JE Bartlett, Borough Estates Surveyor for the Borough of Brighton (Appendix 2).

REASONS FOR USE

- 3.19 The evidence from the users is that the Claimed Route is used as a short cut to access Marine Drive and the seafront.
- 9 of the 11 users claim to have used the way for periods of 20 years or more.
 - 10 of the 11 users claim that the route was either blocked or partially blocked due to the Southern Water works which took place in 2010 and 2011.
 - All of the users say that there are no gates.

- 7 of the 11 users claim that there were notices placed on site in 2011 when the Southern Water works were being undertaken.
- No challenges to use have been recorded.

CONSULTATIONS

- 3.20 Ward councillors have been consulted. Councillor Mears has advised that in her capacity as ward councillor she has known of the existence of the Claimed Route since 1992 and has walked it herself on occasions. Councillor Mears supports the application.
- 3.21 Councillor Miller has advised that he supports the application. Councillor Miller has stated that the set of stairs would not have been put there for there then not to be a path.
- 3.22 Councillor Hyde has advised that she supports the application
- 3.23 Statutory consultations were carried out. One response was received from Peter Jarman, Local Footpath Secretary of the Ramblers Association, by letter dated 5 November 2014. The letter, included at Appendix 7, supports the application.

INVESTIGATION OF THE APPLICATION.

- 3.24 A detailed investigation of the evidence submitted with the application has been undertaken, together with additional research of the map evidence.

DOCUMENTARY EVIDENCE

- 3.25 A study has been made of the historical documents relating to the area of the Claimed Route held at East Sussex Records Office (ESRO), Brighton & Hove libraries and available online.

Ordnance Survey Maps

- 3.26 The Ordnance Survey County Series for Sussex from 1875 to 1938 and the Ordnance Survey plans from 1952 to 1995 (18 maps in total) have been looked at. The full results are at Appendix 8.
- 3.27 The only OS map to show a path running along the eastern and northern boundaries of The Paddock is the current OS MasterMap urban content for Brighton. A path is also shown along the western boundary, which continues in a northerly direction to meet up with Cliff Approach. The map, which is at Appendix 8, depicts OS progress as of 20 October 2016 and shows what is currently on the ground.

Rights of Way Survey

- 3.28 This was a survey carried out between 1951 and 1968 by Brighton Borough Council and predecessor authorities under the National Parks & Access to the Countryside Act 1949. The file, which was inspected at the ESRO, contains correspondence about obstructed footpaths, the status of rights of way and rights

of way sub-committee progress reports. The Survey does not include any reference to the Claimed Route.

Rights of Way file

- 3.29 This file, which was inspected at the ESRO, contains plans showing public rights of way in Brighton in 1989. The Claimed Route is not shown on them.

Tithe maps

- 3.30 The Rottingdean Tithe map dated 1839 prepared by Wm Leach includes the area of The Paddock. It does not record any paths in the area of The Paddock.

Finance Act 1910-11 maps

- 3.31 The extract of the Finance Act map of 1911 is at Appendix 9. This map shows parcel 272 which includes the whole of Black Rock and is the 1911 OS map. The Claimed Route is not shown although there is a diagonal path shown across what is now The Paddock.

Photographs

- 3.32 A number of photographs of The Paddock have been obtained and are at Appendix 10 (i) and (ii). The four aerial photographs from National Monuments Records dated: 8 April 1944, 19 April 1946, 7 April 1950 and 6 August 1950 (Appendix 10(i) clearly show the footpath on the western boundary. There is no sign of the Claimed Route on them.
- 3.33 The LocalView aerial photograph of 2000 (Appendix 10 (ii)) shows the footpath on the western boundary and a path running diagonally across The Paddock. There is no sign of the Claimed Route.
- 3.34 The LocalView aerial photograph of 2007 (Appendix 10 (ii)) shows the footpath on the Western boundary. There is no sign of the Claimed Route.

Earthship Biotecture Europe Ltd documents

- 3.35 In November 2006 Earthship Biotecture Europe Ltd (EBE Ltd) made a planning application to the Council for the development of 16 homes on the site of The Paddock. The hardworks plan for the development is attached at Appendix 11(i). This plan refers to an "Existing footpath" which runs along the eastern boundary to the point where the steps would be and approximately one-third of the way along the eastern section of the northern boundary. This matches the solid line shown on the 1980-1981 Ordnance Survey plan and on the Land Registry plan. The footpath on the western boundary is referred to as "Public foot/cycle path".
- 3.36 EBE Ltd's report dated November 2006 prepared as part of the planning application is also at Appendix 11(i). Paragraph 1.3 of the report states that "...access from Cliff Road to Marine Drive is via a side access route" which would be the footpath on the western boundary. A photograph at paragraph 1.6 of the report is an aerial view of The Paddock which shows the footpath along the western boundary and also a path running diagonally across The Paddock

but does not show the Claimed Route.

- 3.37 The eleven photographs taken by EBE Ltd in July 2006 as part of their planning application show the footpath along the western boundary but there is no sign of the Claimed Route. The photographs are at Appendix 11(ii)

Highways Records Card

- 3.38 A record in the Council's Highways Records Card states that the adoption of Footpath Brighton 89 along the western boundary was confirmed on 10 September 1991. The Highways Records Card details that the path runs across land that was intended to be laid out as a road in 1898. In addition that in 1989 the Borough Secretary confirmed that what is now Footpath Brighton 89 is a publicly maintainable highway. A copy of this Highways Records Card is at Appendix 12. There is no such record for the Claimed Route.

SUBMISSIONS FROM THE RAMBLERS

- 3.39 The Ramblers submission is contained in the letter of 5 November 2014 from Peter Jarman at Appendix 7. No documentary evidence has been produced with this letter.

RESPONSE OF LANDOWNERS TO APPLICATION

- 3.40 The Landowner states that:
- a. The Council has owned the land for 83 years.
 - b. The Council was unaware of members of the public using the Claimed Route prior to 2013.
 - c. Private Property signs were erected in April 2012,
 - d. If the Claimed Route had existed it would have been obstructed by major engineering works undertaken by Southern Water between 2010 and 2011. The licence of 10 May 2010 from the Council to Southern Water confirms the conditions on which Southern Water were granted access to The Paddock to carry out the works and is attached to Jonathan Jose's statement at Appendix 6

CONSIDERATION OF THE EVIDENCE

- 3.41 The Administrative Court confirmed in *Todd* (2004) that the test to be applied 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.

Is there evidence of an identifiable way capable of giving rise to a presumed dedication? (Highways Act)

- 3.42 A public right of way is a right to pass and repass along a defined route.

- 3.43 The Claimed Route crosses a grassed area. There is currently a defined route which on the evidence from Council officers is due to the Council's CityParks team having mown the defined route at the request of a local resident. The Landowner's position is that this defined route has only existed since 2013. It is a permissive path being used by the residents with the Landowner's permission and it has not been dedicated by the Landowner as a public right of way.
- 3.44 It is considered that the evidence is insufficient to support a conclusion that the Claimed Route subsisted as a defined route before 2013.

Has there been 20 years enjoyment by the public "as of right"? (s31 Highways Act 1980)

- 3.45 Use "as of right" means use without force, without secrecy and without permission. 10 of the users refer to obstructions and signs caused by the Southern Water works which took place between 2010 and 2011. 5 do not provide any dates, 5 say they were in 2012 and one as well as referring to 2012 also says there were was a private property notice on The Paddock in 2011. The licence of 10 May 2010 from the Council to Southern Water confirms the conditions on which Southern Water were granted access to The Paddock to carry out the works and is attached to Jonathan Jose's statement at Appendix 6.
- 3.46 It is therefore not considered that the evidence demonstrates 20 years uninterrupted use of the Claimed Route as of right.

Was there an intention to dedicate by the landowner during the claimed 20 year period? (s31 Highways Act 1980)

- 3.47 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.
- 3.48 The user evidence confirms that the Claimed Route was obstructed by major engineering works carried out by Southern Water . These works were carried out at The Paddock between 2010 and 2011 under a licence granted by the Council. This is evidence that there was no intention to dedicate on the part of the Landowner.
- 3.49 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 before the creation of the permissive paths in 2013 and the application cannot therefore succeed under either the Highways Act 1980 or at common law.

Whether the Claimed Route appears in the documentary evidence

- 3.50 There is no evidence of a footpath running along the line of the Claimed Route on any of the any of the photographs taken between 1944 and 2007.

- 3.51 The Ramblers Association state that the Claimed Route existed before 1898. However it is not shown on the 1875 OS map which does show a pecked line along the western boundary. The Claimed Route is also not shown on the 1880 or 1898 OS maps.
- 3.52 The current OS MasterMap urban content has a pecked wavy line running around the western, eastern and northern boundaries of The Paddock. This line represents what is now on the ground and matches the map annexed to Stephen White's statement. It does not match the line on drawing number A3/41483 which is entirely straight and marked as being 6 foot wide all the way around.
- 3.53 The Landowner's evidence is that a path along the eastern and northern boundaries now exists because the CityParks team have been mowing it since 2013.
- 3.54 There is no evidence of the meaning of the solid line shown on the Land Registry title plan, which is also shown on the 1980-81 OS map, although possibly this was intended to represent a hedge.

4. ANALYSIS & CONSIDERATION OF ANY ALTERNATIVE OPTIONS

- 4.1 The Council is under a legal duty to determine the application pursuant to s53 of the Wildlife and Countryside Act 1981.

5 COMMUNITY ENGAGEMENT & CONSULTATION

- 5.1 Consultation is set out at paragraphs 3.17 to 3.20 of the report.

6. CONCLUSION

- 6.1 The officer recommendation is that on the balance of probabilities it cannot reasonably be alleged that a right of way over the land has been enjoyed by the public as of right and without interruption for a full period of 20 years. The documentary evidence, particularly the photographs, does not support the existence of the Claimed Route. There is also no evidence that there was an intention to dedicate the Claimed Route within that period.
- 6.2 For the reasons set out in paragraph 6.1 above, the officer recommendation is that the test in section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 has not been satisfied. It has not been found that on the balance of probabilities a right of way subsists or can reasonably be alleged to subsist. It is therefore recommended that the Committee does not approve the application to modify the Definitive Map & Statement by adding the Claimed Route.

7. FINANCIAL & OTHER IMPLICATIONS:

Financial Implications:

- 7.1 The costs associated with determining the application have been met from existing revenue budgets.

- 7.2 If the report's recommendations lead to an appeal to the Secretary of State, there will be additional costs to fund the inquiry.

Finance Officer Consulted: Gemma Jackson

Date: 21/02/2017

Legal Implications:

- 7.3 The statutory background and the tests to be applied in determining the claim are set out in the body of the report.
- 7.4 It is not considered that any adverse human rights implications arise from the report's recommendation.

Lawyer Consulted: Hilary Woodward

Date: 21/2/17

Equalities Implications:

- 7.5 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:

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

Any Other Significant Implications:

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

SUPPORTING DOCUMENTATION

Appendices:

1. Application from the Roedean Residents Association
2. Borough of Brighton drawing number A3/41483
3. Eleven user evidence forms
4. Land Registry entries and title plan for title number ESX 188718
5. Statements from Stephen White on behalf the landowner
6. Statement from Jonatan Jose on behalf of the Landowner
7. Letter from the Rambler's Association dated 5 November 2014
8. Current OS MasterMap and results of OS map searches
9. Finance Act 1911 map

10. Copies of photographs –

- i) From National Monuments Records dated:
 - a. 8 April 1944
 - b. 19 April 1946
 - c. 7 April 1950
 - d. 6 August 1950

- ii) LocalView aerial photographs dated:
 - a. 2000
 - b. 2007

11 (i) Earthship Biotech Ltd's design statement dated November 2006

(ii) Eleven photographs taken by Earthship Biotech Ltd in November 2006

12. Highways records card dated 10 September 1991

13. Explanation of map evidence

Documents in Members' Rooms

1. None

Background Documents

1. None