

Brighton & Hove City Council

Environment, Transport & Sustainability Committee

Agenda Item 24

Subject: Application for a Definitive Map Modification Order, Benfield Valley, Hove

Date of meeting: 20 September 2022

Report of: Executive Director of Economy, Environment and Culture
Executive Director of Governance, People and Resources

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Ward affected: Hangleton & Knoll

For general release

1. Purpose of the report 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 (“the Definitive Map”) by adding two footpaths at Benfield Valley, Hove.
- 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 under review and to make any changes necessary by order.
- 1.3 The Committee is being asked to consider the evidence provided in support of, and in opposition to, the application and to determine whether an order modifying the Definitive Map should be made.

2. Recommendation

- 2.1 That Committee agrees to make an Order on the basis that the evidence referred to in this report shows that the Claimed Routes, as defined in the report, can at least be reasonably alleged to subsist in accordance with Section 53(3)(c) (i) of the Wildlife and Countryside Act 1981.

3. Context and background information

The Application

- 3.1 On 1 March 2019 an application was made to the Council by a local resident (“the Applicant”) for an order modifying the Definitive Map by adding two footpaths at Benfield Valley, Hove. The Applicant subsequently amended

the description of the footpaths (“the Claimed Routes”) in two further applications dated 1 September 2019, although the location of the footpaths remains as per the original application. The original application and the subsequent applications are referred to in this report as “the Application”. The Claimed Routes are shown by the thick black lines on the plan attached as Appendix 1. Footpath 1 (“Path 1”) runs from point A to point B on the plan, and Footpath 2 (“Path 2”) runs from point A to point C. As can be seen, Path 1 runs from Restricted Bridleway H 11b to the south side of the footbridge over the A27 and Path 2 runs from Restricted Byway H 11b to Footpath H 8a.

- 3.2 The land over which the Claimed Routes run is owned by the Council and leased to Benfield Investments Limited (“the Leaseholder”). The lease is for 225 years and the land is currently being used as a footgolf course. The Applicant has stated that they made the Application because the manager of the footgolf course had been refusing to allow members of the public to use the Claimed Routes.
- 3.3 The Application was supported by user evidence. A summary of this is found at Appendix 2 and further referenced below. The Application was also accompanied by a Submission Statement and a copy of this is found at Appendix 3. The personal details of a number of those submitting evidence have been redacted at their request. The Leaseholder has also requested that personal details are redacted from the representations they have provided.

Legal position

- 3.4 Section 53(2)(b) of the Wildlife and Countryside Act 1981 requires a surveying authority to keep its Definitive Map up to date and amend where any “event” detailed in s53(3) has occurred. 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. In reaching its decision the Council must be guided by the appropriate legal principles.
- 3.5 A successful application for a Definitive Map Modification Order is an event. Specifically, s53(3)(c) includes as an event:

“(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—

 - (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic”.
- 3.6 In the case of *R. v SoS for the Environment ex p. Bagshaw and Norton (1994)* the Administrative Court held that under s53(3)(c)(i) of the 1981 Act the test to be applied by a local authority in determining whether to make an order was whether all the evidence available either showed that a right of

way subsisted or, alternatively, showed that it was reasonable to allege that a right of way subsisted. In order to find that a right of way subsists it would be necessary for it to have been shown that, on the balance of probabilities, the right of way existed. In order to find that it was reasonable to allege that a right of way subsisted it would be necessary for it to have been shown that a reasonable person, having considered all the relevant available evidence, could reasonably allege a right of way existed: the evidence necessary to establish that a right of way was reasonably alleged to subsist was less than that required to establish that such a right did, in fact, subsist.

- 3.7 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.
- 3.8 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.
- 3.9 Section 31(1) of the Highways Act 1980 states that:
- “Where a way over any land ... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”.
- 3.10 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.
- 3.11 It was considered by the Divisional Court in the case of *Merstham Manor v Coulsdon and Purley UDC [1937]* that the word “interruption” in the Rights of Way Act 1932 was “properly to be construed as meaning actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenged the public right to that enjoyment.” In the case of *R.(on the application of Godmanchester v. SoSEFRA [2007]* the House of Lords held that the word “intention” 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.

Consultation following receipt of the Application

- 3.12 In June 2019 Councillor Barnett, Councillor Janio and Councillor Lewry were consulted on the Application as Ward Councillors. Responses were received from Councillor Barnett and Councillor Janio who advised that they supported the Application.
- 3.13 In August 2019 the Council notified the Leaseholder that the Application had been made and invited them to submit evidence regarding the same. A letter in response, objecting to the Application, was received from agents acting for the Leaseholder. Although the letter was dated 11 October 2019, it was sent to the Council, via email, on the evening of the 5 December 2019. A copy of this letter is found in Appendix 4.
- 3.14 The Council, as freeholder owner of the site, has been notified of the Application. The Council's Head of Estates, on behalf of the Council as freeholder, has advised that she has no evidence independent of that provided by the Applicant and on behalf of the Leaseholder of any public use of the Claimed Routes or of any action taken to prohibit use of those routes during the period of claimed use.
- 3.15 In October 2019 a number of local and national interest groups were notified of the Application, namely: Auto Cycle Union, British Driving Society, British Horse Society, Byways & Bridleways Trust, Cyclists Touring Club, Open Spaces Society and the Ramblers' Association. A response was received from the Ramblers who responded that they supported the Application.

Evidence

Documentary evidence

- 3.16 Historical research was carried out by the Council, as surveying authority, at the East Sussex Record Office situated at The Keep, and on-line, for the area of the Claimed Routes. The following documents were viewed:
- i. Ramblers Association report on the survey of footpaths in the Borough of Hove – 26 November 1950;
 - ii. Overton & Bowles survey of the County of Sussex 1740;
 - iii. Walkers County Map of Sussex 1861;
 - iv. Yeakall & Gardner Map of Sussex 1778-1783
 - v. Greenwood Map of Sussex 1824;
 - vi. Map of the County of Sussex as at April 1958;
 - vii. Ordnance Survey County Series for Sussex from 1875 to 1995;
 - viii. Ordnance Survey Maps: online mapping and walking, running and cycling routes;

- ix. Council's Definitive Map;
- x. Council's Highway Terrier

3.17 None of the documents referred to in the above paragraph indicate any routes and so there appears to be no documentary evidence of the Claimed Routes. Although the Submission Statement referred to in paragraph 3.3 above includes a copy of a 1951 map which is stated to show a path in the same position as Path 2, the historical evidence referenced above does not support this. It is therefore considered that accepting the Application for the Claimed Routes as public rights of way cannot be justified on the historical documentary evidence.

User evidence

3.18 Twenty people have completed user evidence forms detailing their use of the Claimed Routes, 19 people for Path 1 and 15 for Path 2, with 13 people completing forms for both Claimed Routes, as summarised in Appendix 2. Nineteen users have used the whole route on-foot and one has used Path 1 both on-foot and by bicycle. The status of a claimed right of way will depend on the nature of the use and the user evidence supports the use of the Claimed Routes as footpaths.

3.19 It appears that the users have used the Claimed Routes for walking to the Downs and for a circular walk from Meads Avenue and back. Fifteen users refer to the Claimed Routes being easier to use than the existing public right of way that runs between Meads Avenue and the A27, which is Restricted Byway H 11b. There has been uninterrupted use of both Claimed Routes between 1980 and 2018. Fifteen users refer to notices and fences appearing in summer 2018, when the footgolf course opened, on the land across which the Claimed Routes run.

3.20 According to 15 users, notices and fences appeared in mid- 2018 refusing access to the Claimed Routes and 8 users refer to verbal challenges. 2018 has therefore been taken as the date when uninterrupted use of the Claimed Routes ended.

Leaseholder's evidence

3.21 As noted in paragraph 3.13 above, a letter was received on behalf of the Leaseholder on 5 December 2019 objecting to the Application. The objection was on the grounds that the use of the Claimed Routes was not without interruption, was not as of right and that the use had been brought into question. The letter states that the Leaseholder had held an interest in the Claimed Routes and the wider Benfield Valley Golf Course since September 2004 and that since the land had been acquired there had been many instances when the Leaseholder's directors had challenged members of the public who had been trespassing, ie not adhering to the defined public rights of way which bordered the golf course. This included challenges over the use of the Claimed Routes. The letter states that members of the public

are directed to use the formal rights of way and that such verbal interactions occur daily. Moreover, obstacles have routinely been erected to discourage the public from entering the land, and signage displayed. It is stated that the signage is routinely removed and the obstructions vandalised and destroyed. It has been further stated that the existing course manager has been subjected to numerous verbal assaults by trespassers. A copy of the letter of objection and accompanying photographs and plan is found at Appendix 4.

- 3.22 Council officers were unaware that the Leaseholder was imminently to submit the letter referred to above and, by co-incidence, earlier in the day on which the letter was received, officers had made an order, under delegated authority, which, if confirmed, would modify the Definitive Map by adding the Claimed Routes. The order could be made under delegated authority as at the time of making the order no objections had been received.
- 3.23 As required by the legislation, the order was advertised and representations invited. Were any representations or objections to be received in response the order would need to be confirmed by the Secretary of State following a hearing or public inquiry. If no representations or objections were received the order could be confirmed by the Council.
- 3.24 A further objection was received on behalf of the Leaseholder on 29 January 2020 (found in Appendix 4) disputing that the use of the Claimed Routes was uninterrupted, or by the public, or as of right. It was also not agreed that 2018 was the year in which the use of the Claimed Routes by the public was first called into question or otherwise interrupted. The letter states that there is insufficient evidence to prove intention to dedicate by either the current or previous landowners whether by statutory presumption or under the common law.
- 3.25 A further letter (found in Appendix 4) was received on behalf of the Leaseholder on 19 March 2020 together with letters from the site operators and the Leaseholder's employees. As can be seen, the letters include the following: dog walkers and ramblers who had strayed from the public footpaths had been challenged on numerous occasions since 2005; they have been asked not to cross the golf course other than on the existing public footpaths and have been informed that they have no rights of access across the greens and fairways; works to expand the fairway, involving cutting back hedgerows, took place in 2005 and prior to this it would not have been possible to access and walk the Claimed Routes; fencing and signs were erected, to prevent walkers from crossing the golf course other than by the public footpaths but these were repeatedly defaced, destroyed or removed; shrubs planted to discourage public access have been trampled or cut through.
- 3.26 Further evidence was received from the Leaseholder on 29 July 2022, comprising a letter from the Leaseholder's agent and a further statement by one of its employees. These are found in Appendix 4. The letter makes the following representations: -

- The original golf course was severed by the construction of the A27 bypass in the early 1990s.
- The western part of the area between the public footpaths FP H8a and RB H 11b became the 8th hole.
- An access route for golfers already existed in a similar location to the southern part of Path 1 which linked to the fairway.
- A further route was added, following the construction of the footbridge, for golfers to access the 8th hole tees.
- This access route lead from the footbridge to the north of the 8th hole and is in the approximate location of the northern section of Path 1.
- It was never a public footpath or permitted route for walkers, and that the Claimed routes did not exist before the 1990s.
- That signs requesting that walkers remain on the public footpaths rather than the golf access paths, with arrows pointing out the directions of those footpaths, have been placed around Benfield Valley since the operation of the Benfield Valley Golf Course began in 1992.

The further representations provided by the Leaseholder's employee make the following representations:-

- That he was the golf course deputy head greenkeeper between 2005 and 2011 and continued to work regularly on the site between 2010 and 2021.
- He is currently employed full time at Brighton Footgolf.
- During the course of his employment, from 2005 to present, he has asked members of the public on hundreds of occasions to remain on the marked footpaths, where there is a right of way, and not to trespass on the course or the paths which exist to provide access for users of the course.
- He also refers to the signs on site requiring members of the public to remain on the marked footpaths, which he understands were erected by the owners of the land in the 1990s.
- One of those signs is on footpath H8a, outside Benfield Barn, one is on the same footpath at around the point where Path 2 goes from west to east, and the third sign is where footpath H8a and RB H11b meet, next to the footbridge.
- A photograph of one of the signs is provided.
- He states that the signs were positioned in locations where users of the lawful rights of way would clearly see them, and anyone using the Claimed Routes would be highly likely to see them.
- In addition, during the course of his employment he has erected numerous laminated signs at the entrances to the golf access routes, including points B and C on the plan (Appendix 1), advising the routes were for "Golfers Only".
- He, and others working on the site, have repeatedly made efforts to prevent members of the public using the Claimed Routes.
- Referring to the area on the plan (Appendix 1) between point A and where the Claimed Routes diverge, he says that members of the public would frequently attempt to cut through the site from RB H11b at this location, which involved a steep slope and walking through bushes and brambles, to walk to the footbridge.

- As well as challenging walkers in this location he has erected and repaired fences and re-planted bushes to act as a barrier to walkers. The wire of the fences has been repeatedly cut and the bushes trampled, cut through or pulled up.

Other representations

- 3.27 Representations in support of, and objection to, the order were received from members of the public and these are found at Appendix 5. As can be seen, the representations include statements that the former Golf Course owner, as well as the current leaseholder, have challenged use of the Claimed Routes and also that the paths have been used by the public for over 20 years.

Current position of the Application

- 3.28 As representations and objections had been received to the order made in December 2019 it would be for the Secretary of State to make the decision as to whether or not the order should be confirmed. The order and supporting documents were subsequently submitted to the Planning Inspectorate as the relevant body, but unfortunately it was determined that the order contained a fundamental error in that the Claimed Routes had been shown on the order plan by way of a red line, whereas the Claimed Routes should have been shown as a purple line, a continuous line with short bars at intervals, or by a broken black line. Accordingly, the order could not be accepted.
- 3.29 A further order was made on 10 March 2021 with the Claimed Routes shown in purple. This was advertised. A letter was received on behalf of the Leaseholder on 10 May 2021, found in Appendix 4, confirming that all previously submitted objection letters and supporting information should be considered in relation to the new order. Further correspondence in support of the Application was also received. This is found in Appendix 5.
- 3.30 The new order was submitted to the Planning Inspectorate and an inquiry date set for 18 October 2022. Counsel was instructed to appear on behalf of the Council but, having considered the case, he advised that the order made in March 2021 should have had a separate authority, and moreover that as objections had been received the decision whether to make the order should have been made by Committee.
- 3.31 It has therefore been agreed with the Planning Inspectorate that the inquiry will be put in abeyance and that the Application would be placed before the September Environment, Sustainability & Transport Committee for a decision as to whether an order should be made. The Applicant and the Leaseholder have been advised that the Application will be considered by this Committee in September. The Leaseholder's letter of 29 July last was sent in response to this.

Consideration of the Evidence

- 3.32 There is a clear conflict between the evidence presented by the Leaseholder and the user evidence and statements in support of the Application.
- 3.33 The Application is based on 20 years uninterrupted use of the Claimed Routes between 1998 and 2018. The letters and statements received on behalf of the Leaseholder assert that since 2005 members of the public have been told on many occasions not to use the Claimed Routes. Some of those completing the user evidence forms refer to either themselves or others being approached by persons on behalf of the Leaseholder asking them not to use those routes. However, no specific dates are given by the Leaseholder as to when the public using the Claimed Routes were approached. Similarly, there is no specific date of fencing being erected and shrubbery being planted to act as an obstruction.
- 3.34 The Leaseholder has provided photographic evidence of signage being erected. One such photograph is dated September 2017 and shows a notice erected outside Benfield Barn which states the land is private and asks that people keep to the public footpaths provided. However, this is to the south of the Claimed Routes. There is other signage located close to the Claimed Routes stating "Non golfers are advised to keep strictly to the marked footpaths and walkways and are expressly prohibited from going onto the tees, fairways and greens", but this wording could be considered to be ambiguous.
- 3.35 The statement received on the 29 July last advises that laminated signage stating "Golfers Only", or similar, has been erected on numerous occasions at the entrances to the golf routes, including at points B and C on the plan (Appendix 1). However, none of the evidence in support of the Application mentions this signage.
- 3.36 Another conflict in the evidence is the assertion in some of the user evidence forms that the Claimed Routes were used before the time, according to the Leaseholder, that the paths existed.
- 3.37 There is no specific evidence of an event which can be taken as an interruption to the 20 years use of the Claimed Routes.
- 3.38 Fourteen of the users who completed user evidence forms refer to notices and signs first appearing on the paths, and challenges first being made to them, in June, July and August 2018. Thus, the evidence from users is that interruptions to their use first occurred in June/July/August 2018 which period follows the date of opening of the footgolf course.
- 3.39 Eleven supporters who sent e-mails in support of the application refer to the footgolf business closing the paths. Two of these supporters refer to golfers and users respecting each other and co-existing without any problems when the land was used as a golf course prior to it being used for the footgolf business.
- 3.40 For the purposes of section 31 of the Highways Act 1980 the right of the public to walk along the Claimed Routes was brought into question in June

2018 when signs saying 'no access' and a fence appeared preventing access and verbal challenges to users were made. Therefore, the period of use to be considered under section 31 of the Highways Act is the 20 year period prior to that date.

- 3.41 Of the 19 users of Path 1, 14 have used it for at least twenty years, with the earliest use dating back to 1980. The user evidence is that there has been a continuous use of the path since 1980, although 5 users have used it for less than 20 years before 2018. Of the 15 users of Path 2, 9 have used it for at least twenty years with the earliest use dating back to 1980. The user evidence is that there has been a continuous use of the path since 1980, although 6 users have used it for less than 20 years before 2018. However, under section 31 Highways Act 1980 the twenty year period relates to the continuous public use not to the individual use. It is clear that there has been 20 years use of both Claimed Routes between 1980 and 2018.
- 3.42 Action to stop routes being recognised as public rights of way has to be obvious and overt so that actual users of the way are made aware that they should not be using a claimed route. There is evidence that challenges have been made. However, the evidence, as stated, is not without conflict or ambiguity.
- 3.43 The test to be applied to the Application is whether or not there has been evidence of use sufficient to raise a presumption of dedication. As noted above, in order for the Definitive Map to be modified the evidence must show that a right of way subsists or is reasonably alleged to subsist. The legal burden for the former is on the balance of probabilities; for the latter it needs to be shown that a reasonable person, having considered all the relevant available evidence, could reasonably allege a right of way existed.
- 3.44 It is considered that on the evidence supplied it can at least be reasonably alleged that the Claimed Routes are rights of way. If an order is made and the objections received are not withdrawn, and as noted in this report, the order would need to be confirmed by the Secretary of State, following a hearing or a public inquiry. It has been held (*Todd v. SoSEFRA (2004)*) that to confirm an order the Secretary of State would need to be satisfied on the balance of probabilities that the way existed. It would be insufficient at that stage to be satisfied only that the allegation of subsistence of the way was reasonable.

4. Analysis and consideration of alternative options

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

5. Community engagement and consultation

- 5.1 As set out in the body of the report.

6. Conclusion

- 6.1 If the evidence shows that a right of way can be reasonably alleged to subsist, or on the balance of probabilities subsists, then the onus is on the order-making authority to make the order. It is considered, on the evidence submitted, that the Claimed Routes can at least be reasonably alleged to subsist and that the requirements within section 31(1) Highways Act 1980 have been fulfilled.

7. Financial implications

- 7.1 The costs associated with determining the Application have been met from existing revenue budgets.
- 7.2 Should it be necessary to submit an order to the Secretary of State for confirmation there will be additional costs to fund the hearing or public inquiry.

Name of finance officer consulted: Jill Scarfield Date consulted: 23/08/22

8. Legal implications

- 8.1 The Council's Constitution provides that authority is delegated to officers to make orders under the Wildlife and Countryside Act 1981. The Constitution also provides that a function of Environment, Transport & Sustainability Committee is "To consider and make decisions on rights of way issues where objections have been received and not withdrawn or otherwise resolved". As objections have been received to the Application the determination of the same must be made by Committee.
- 8.2 The statutory background and the tests to be applied in determining the Application are set out in the body of the report.
- 8.3 If the Council declines to grant the Application the Applicant has a right of appeal to the Secretary of State. The applicant must serve notice of the appeal within 28 days after service on them of the Council's decision.
- 8.4 If the Council grants the Application and makes an order, public notice of the order will be given allowing for a period of at least 42 days for representations or objections with respect to the order to be made. If any objections or representations received within the publicity period are not withdrawn the Council must submit the order to the Secretary of State for confirmation. The legislation requires that the Secretary of State must hold a local inquiry or a hearing to consider the representations and objections made, following which the Secretary of State will decide whether or not to confirm the order.

Name of lawyer consulted: Hilary Woodward Date consulted: 17/8/22

9. Equalities implications

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

10. Sustainability implications

10.1 No sustainability implications identified.

Supporting Documentation

1. Appendices

Appendix 1 – Plan showing Claimed Routes

Appendix 2 – Summary of user evidence

Appendix 3 – Submission Statement

Appendix 4 – Leaseholder's representations

Appendix 5 – Public representations

2. Background documents

As referred to in this report.