

Subject:	Application for a Definitive Map Modification Order, Kingsway, Hove		
Date of Meeting:	15 November 2011		
Report of:	Strategic Director Resources and Strategic Director Place		
Contact Officer:	Name:	Carl Hearsom	Tel: 29-1523
	Email:	carl.hearsom@brighton-hove.gov.uk	
Ward(s) affected:	Wish		

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 between Kingsway and Wharf Road, 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 & Statement under review and make any changes necessary by Order.

2. RECOMMENDATIONS:

- 2.1 That the Committee approves the application for an Order on the basis that the evidence referred to in this report shows 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 Four applications were received in total. These were made by:
 - (a) Mrs Veronica J Cronin of Portland Road, Hove, received 14 Jan 2009;
 - (b) Ms Eileen E Odom of Carmel House, Westbourne St, Hove, received 13 Jan 2009;
 - (c) Mrs Brenda Wells of St Keyna Avenue, Hove, received 17 Dec 2008; and
 - (d) Mr Peter H Phillips of Edward House, 43 New Church Road, Hove, received 11 December 2008.

Copies of the applications are included at Appendix 1.

- 3.2 The applications were made following the erection of fencing and gates around the terrace in summer 2008. Planning permission was granted for this development under application number 2007/02948. This application also gave permission for the conversion of the bay window on the eastern elevation of the building into a doorway giving access to the terrace.
- 3.3 The freehold title to the land over which the claimed footpath runs is registered to Punch Taverns Limited. It is let to Mr Alan Kane on a lease that runs for 15 years from 1 January 1997. Mr and Mrs Kane are the current landlords of the public house. A copy of the title is at Appendix 2.

Legal position

- 3.4 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.
- 3.5 Section 31 of the Highways Act 1980 states that a highway can be created if there is 20 years uninterrupted use of it by the public. The onus then falls on the landowner to show that he or she did not intend to dedicate it as a public right of way. This can be by means of notices, verbal challenges, locked gates, barriers or depositions with the Highway Authority. A path may also be deemed to have become a public right of way under common law over a shorter period of time if the evidence shows that the landowner has acquiesced to the public use.
- 3.6 The 20 year period is measured retrospectively from the date at which the public's right to use the way is first "brought into question" (section 31(2)) by some act of the landowner such as the erection of notices or gates or turning people away.
- 3.6 A decision must be based on a consideration of all available evidence. It is a question of whether or not public rights exist or can be reasonably alleged to exist. It is not about the desirability or suitability of having a public right of way.

Rights of Appeal

- 3.7 If the council declines to grant the application, the applicants have a right of appeal to the Secretary of State., The applicant must serve notice of appeal within 28 days after tservice on him of the council's decision.
- 3.8 If the council grants the application and makes an Order, public notice of the Order is given. If any objections are freceived within a specified period of time the matter is referred to the Secretary of State for a decision.

Description of the Claimed Route

- 3.9 A site inspection was undertaken by Mr Hugo Blomfield, Countryside Manager, shortly after the applications were made, and by Carl Hearsom, Lawyer on Wednesday 22 June 2011.

- 3.10 This is an unusual application in that the claimed route is extremely short. There is an opening in the wall around that runs across the top of the garden of the public house, and two staircases run away to the left and right. These join again into a single short staircase of three steps. The application is made on the basis that a footpath runs over these steps and directly across the terrace of the public house to join the public highway in Wharf Road as shown on the plan at appendix 3. An extract from the current Definitive Map is at appendix 4.
- 3.11 There is a pedestrian barrier in Wharf Road immediately to the south of the end of the claimed right of way suggesting that at some point the council considered there to be a risk of pedestrians walking out in to the road (Wharf Road) from the area beside the pub.
- 3.12 The surface of the way is paved. The paving of the centre of the terraced area between the steps and the bottom gate is of a different colour to that either side.
- 3.13 A photograph of the view from the bottom of the claimed route is at Appendix 5.

Historical research

- 3.14 A study has been made of the historical documents relating to the area of the claimed footpath and held at East Sussex Records Office (ESRO) and Brighton & Hove libraries.
- 3.15 It is clear that there has been a flight of steps in this location for well over 100 years. At some point before the Second World War the steps were rebuilt in their current form. 1:2500 scale ordnance survey maps from 1898 and 1952 clearly show the steps in their original and rebuilt form.
- 3.16 A photograph dated 1927 held in the James Gray Collection (image reference JG_15_080.tif, available at www.regencysociety.org) shows the Adur Hotel and the top of the steps viewed from Kingsway.
- 3.17 An aerial photograph taken on 12 March 1948 (ESRO ref HMS 6699/37) shows the steps in the form in which they are currently constructed.
- 3.18 A copy of the O/S 25 inch series map for 1876 held at East Sussex Record Office has been annotated with a hand drawn dotted line which includes the route of the claimed right of way and is marked "towing path". However in the absence of any evidence as to why or when this annotation was made no weight can be attached to it.
- 3.19 It is clear from documents held on files at ESRO (C/C44/2 and C/C44/19a) dating back to the preparation of the Definitive Map in the 1950s that the issue of a right of way immediately to the East of the then Adur Public House was raised. At that time enquiries were made which concluded that no such right existed, but no evidence of what those enquiries entailed has been found.
- 3.20 The physical features of the site are shown at varying levels of detail on ordnance survey maps but the claimed public right of way is not marked as such on any map.

- 3.21 Copies of the documents referred to above (except for maps held at ESRO) are included at appendix 6.

Consultations

- 3.22 Ward councillors have been consulted. Councillor Peltzer Dunn has stated that the way is a public right of way established through uninterrupted public access over a large number of years. Mr Kemble, councillor at the time that the application was made, also expressed the view that the claimed route is a public right of way. Councillor Pissaridou has not expressed a formal view on the merits of the application.

User evidence in support of the Application

- 3.23 35 people have completed questionnaires detailing their use of the route and their evidence is summarised in the table at Appendix 7. For ease of reference, the comments of the landowner on each form are included in the same table. Copies of the questionnaires themselves are available in Members' rooms.

Reasons for use

- 3.24 It appears that the signatories used the claimed footpath as a short cut to access the Lagoon and the seafront area.
- 3.25 29 of the users claim to have used the way for periods of 20 years or more.

Gates

- 3.26 Users have referred to gates being placed across the way as follows: 1 (no time specified), 2 (only recently), 3 (not locked), 6 (in recent months), 7 (there are gates now), 8 (gates/fences erected approx 2 years ago), 9 (gates padlocked at entrance and exit (only within last year or so), 10 (recently the route has been gated and fenced, 12 (only recently), 13 (high wooden fence and gates appeared after smoking ban), 14 (recently erected), 15 (a year or so ago) 16 (in the last few years), 17 (no time specified), 18 (last 1-2 years), 20 (approx 18 months or so ago) 21 (last two years) 22 (2 years) 23 (2008) 24 (no time specified), 25 & 26 (new gate 2010), 27 (since pub changed owners), 28 (not locked) 29 (recently), 30 (no time specified), 31 (some time ago), 34 (this year).
- 3.27 Users 4, 5, 19, 32, 33 say that there are no gates.

Signs and notices

- 3.28 User 23 mentions a chalk sign in October 2008 saying "no thoroughfare". User 27 says that notices went up at the same time as the fencing. No other mention of notices is made.

Verbal Challenges to Use

- 3.29 User 13 states that their mother has been challenged but gives no further details. User 23 states that they were challenged by an employee of the Blue Lagoon in October 2008. No other challenges to use have been recorded.

Response of Landowners to application

3.30 Ownership of the land is as set out above. The landowner has responded to the application and the evidence by way of a letter which is reproduced as appendix 8. The letter comments on each of the evidence forms (see column 5, Appendix 7).

The freeholder also makes the following arguments in the letter:

- a. At the time the application was made, use had been restricted by the erection of the fence and gates in 2008. Prior to that date any use had been by tolerance of the freeholder, the previous owners and the lessees.
- b. The steps leading down to the lower ground level are clearly constructed in the same materials as the public house and form part of a single structure. The beer garden is also clearly part of a single physical planning unit, the curtilage of which is defined by the grass bank to the east.
- c. Use by members of the public walking across the beer garden has been tolerated as this would be a means of access for patrons and passing trade. The freeholder and current lessee are no longer willing to tolerate such use and took action in the summer of 2008 to prevent access by the erection of the fence and gates.
- d. Any tolerance of use does not indicate an intention to dedicate the route as a public right of way. Members of the public will have been fully aware that they were using the access to the public house's lower ground floor and will have been aware that they were crossing the beer garden. Objectively, any reasonable person would have been aware that they were entering on to the public house land and were within the curtilage of the public house. The subjective belief of the users is immaterial.
- e. The pavement to the south of the public house is part of the adopted highway. The lowered kerb is irrelevant to the issue of tolerance of use by the public.
- f. The beer garden has been closed to the patrons and the public on numerous occasions when private functions have been held in the beer garden. The gates are closed during closing hours and are left open solely for the use of patrons. Any person entering onto the land would know that they were entering onto private property.
- g. It cannot be inferred from the use of the land by the current freeholder, the lessee or previous owners that there has ever been an intention to dedicate. The tolerance of the use was nothing more than an act of charity and has been done for sound commercial reasons as this is the main access for patrons and it is difficult to distinguish between potential patrons and those who are taking advantage of the unusual physical layout of the site.
- h. Any use which may have been ongoing has been interrupted by the erection of the fence and gates. The applicant has provided no evidence that there was ever an intention to dedicate, and any statutory presumption has been

rebutted by the erection of the fence and gates and the use of the beer garden for private functions.

- i. The evidence of the applicants is often vague but acknowledges in most cases that use ceased in 2008 with the erection of the gates and fence. One user confirms that a member of staff informed them that the route was not a public right of way, another that a sign was put up stating that there was no access to the public. Most users did not assess the matter for themselves but based their view on anecdotal evidence from other members of the public.

Consideration of the evidence

3.31 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.

3.32 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”.

3.33 For the purposes of section 31 of the Highways Act, the right of the public to walk along the claimed footpath was brought into question in 2008 when the fence was erected around the terrace of the public house. Therefore the period of use to be considered under the Act is 1988 – 2008.

3.34 Alternatively, a public right of way may be established over a shorter period of time under the common law. An intention to dedicate on the part of a landowner may be implied where there is evidence of a period of use in which the landowner has acquiesced.

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

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

3.36 As the claimed route crosses an area that is paved, there is no physical evidence of a defined path.

3.37 However, the route of the claimed right of way is clear from the evidence forms submitted and the attached plans. It is clear that what is being claimed is an identifiable way from Kingsway down both flights of stairs and directly across the terrace to Wharf Road.

Whether there has been 20 years enjoyment by the public “as of right”

3.38 The right of the public to use the way was brought into question by the erection of gates in 2008. The calculation of the 20 year period must therefore run from 1988 to 2008.

- 3.39 Of the 35 users, 29 have used the claimed right of way for periods of 20 years or more, and 27 of those for periods in excess of 23 years (such that they must have been using the way for at least 20 years at the date that it was brought into question in 2008).
- 3.40 Use “as of right” means use without force, without secrecy, and without permission. There is no evidence of any obstruction of the way prior to 2008, nor any evidence of users attempting to conceal their use of the way from the landowner. The response submitted on behalf of the freeholder states that such use as occurred prior to the erection of the gates was “tolerated” as nothing more than an act of charity. However, no evidence has been submitted of any attempt to communicate this to users of the way (e.g. by way of a notice) during the 20 year period.
- 3.41 Some of the user evidence forms claim that there are no gates on the way. However, the great majority of them refer to gates being put in place at some time consistent with the erection of the gates and fencing in 2008 (see paragraph 3.24, above). Given that there is no claim on the part of the landowner that gates were erected prior to this gate, the evidence as a whole suggests that no gates were put in place until 2008.
- 3.42 The evidence therefore suggests that there has been 20 years use as of right of the claimed route.

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

- 3.43 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.
- 3.44 The freeholder makes the point that the steps and the terrace are part of a single physical planning unit with the Blue Lagoon public house, and that any reasonable person would have been aware that they were entering onto private property.
- 3.45 Paragraphs 3.26 and 3.27 above summarise the challenges to use referred to in the user evidence forms. These refer to challenges in 2008 when the use of the way was brought into question. No evidence of challenges to use prior to that date has been submitted.
- 3.46 It may have been apparent to users of the claimed path that they were entering the property of the freeholder of the Blue Lagoon. However, that is not strictly relevant to the question of whether highway rights exist. What must be considered is what the users of the path would have understood the intention of the landowner to be.

- 3.47 Applying the principles set out in *Godmanchester* there appears to be insufficient evidence that a lack of intention on the part of the landowner to dedicate a right of way was communicated to users of the way during the relevant 20 year period. A right of way would therefore be deemed to have been dedicated under section 31 of the Highways Act 1980.
- 3.48 It is therefore unnecessary to consider whether a highway has arisen by implied dedication under the common law.

Conclusion

- 3.49 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.
- 3.50 Officers are satisfied on the balance of probabilities that it can reasonably be alleged that a right of way over the land subsists or can reasonably be alleged to subsist. It is therefore recommended that the Committee approve the application for an Order.

4. COMMUNITY ENGAGEMENT AND CONSULTATION

- 4.1 Ward members' views have been sought, and 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.

5. FINANCIAL & OTHER IMPLICATIONS:

Financial Implications:

- 5.1 If the recommendation to the report is agreed the public footpath would need to be maintained within the current maintenance budget. The costs to date of processing the application can be met from existing budgets. Should there be an appeal against the recommendation further costs would be incurred in investigating the appeal.

Finance Officer Consulted: Name 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 It should be noted that Sussex Police were in favour of the planning application to enclose the beer garden, on the basis that it would prevent anti-social behaviour. However these are not relevant issues in determining the claim. 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.
- 5.7 Whatever decision is made may be challenged by way of the legal process available to both applicants and objectors. The claim has been investigated and the Committee's decision according to the law and evidence

Public Health Implications:

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

Corporate / Citywide Implications:

- 5.9 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:

- A. Maps & Historical Evidence
- B. Summary of User Evidence
- C. Landowner's Response
- D. User Evidence Forms

Documents in Members' Rooms

User Evidence Forms (Appendix D)

Background Documents

None