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## Interim Order Decision

Hearing held on 22 August 2022

Site visits made on 21 and 22 August 2023

**by Nigel Farthing LLB**

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

Decision date: 29 February 2024

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### Order Ref: ROW/3295334

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The East Sussex (Public Footpath Kingston near Lewes 21) Definitive Map Modification Order 2021.
- The Order is dated 24 September 2021 and proposes to modify the Definitive Map and Statement (DMS) for the area by adding a footpath between Ashcombe Lane to the south-western terminal point of public footpath Lewes 37, as shown on the Order Map and described in the Order Schedule.
- There were 4 objections outstanding when East Sussex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is proposed for confirmation subject to modifications which require advertising as set out below in the Formal Decision.**

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### Procedural Matters

1. I made an unaccompanied site inspection on 21 August 2023 and an accompanied site visit after closing the hearing on 22 August 2023.
  2. I held a hearing at the offices of East Sussex County Council on 22 August 2023.
  3. In writing this decision I have found it convenient to refer to points marked on the Order Map. I therefore attach a copy of this map.
  4. An application was made to East Sussex County Council (ESCC) to modify the DMS by recording a footpath on the route depicted on the Order map. Having investigated the application, ESCC decided not to make an Order. The Applicant appealed against this decision. The Secretary of State allowed the appeal and directed that an Order be made. In pursuance of this direction the Order was made by ESCC under the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of an event specified in sub-section 53(3)(c)(i).
  5. ESCC takes a neutral position at this confirmation stage of the process.
  6. The Order proposes to add to the DMS a footpath as shown between points A, B and C on the Order map. Point C is on the parish boundary and, when the Order was made, it was thought that this was the south-western terminal point of the cul-de-sac route recorded as footpath 37 in the adjoining parish of Lewes. On that basis the Order route would continue F/P 37 in a south-westerly direction providing a connection to the highway network at point A on Ashcombe Lane.
  7. Since the Order was made ESCC has reviewed the representation of F/P 37 on its digital map and concluded that this plots the south-western end of F/P 37 in the
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wrong position. The correct position, being that shown on the Definitive Map, remains on the parish boundary but approximately 10 metres north-west of point C.

8. Following the hearing I requested the OMA to produce a map showing F/P 37 in its correct position and once this had been provided, I invited comment from the parties. At the same time, I invited the parties to consider the relevance of the decision in *Perkins v Secretary of State for Environment, Food and Rural Affairs v Hertfordshire County Council [2009] EWHC 658 (Admin)* ('Perkins') and to make any submissions in respect thereof.

### **The Main Issues**

9. The requirement of Section 53(3)(c)(i) of the 1981 Act is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that a right of way which is not shown in the DMS subsists or is reasonably alleged to subsist.
10. The Objectors had, in their objection, disputed whether there had been a sufficient discovery of new evidence to engage the provisions of Section 53(3)(c)(i) of the 1981 Act. In their Statement of Case, and confirmed at the hearing, the Objectors withdrew that objection and conceded that the introduction of the Wiston Estate Terrier of Kingston constituted sufficient new evidence for this purpose.
11. At the stage of making the Order it is sufficient that the evidence raises a reasonable allegation that the route subsists but if I am to confirm the Order, I must be satisfied that the evidence shows that the public right of way described in the Order subsists on a balance of probability.
12. Section 32 of the Highways Act 1980 (the 1980 Act) requires me to take into consideration any map, plan or history of the locality or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
13. The Order has been made on the basis of documentary evidence alone, specifically the fact that a footpath was set out in The Kingston and Iford Inclosure Act of 1830. All parties acknowledge that the setting out of a public right of way in an Inclosure Act is usually conclusive evidence of the existence of a route of that status unless there is evidence of subsequent stopping up or diversion. There is no such evidence in this case, and it is therefore accepted that the footpath retains its legal status; the issue is whether the alignment of that footpath can be established with sufficient accuracy for the Order to be confirmed, with or without modification.
14. One of the slightly unusual features of this case is that there is today no evidence of any use of the route, nor of any physical features corresponding with the historical existence of a footpath on the Order route. Similarly, there are no extant features which assist in an understanding of where the route ran on the ground. Furthermore, the Order route is not depicted on any Ordnance Survey (OS) map, nor has any map been discovered, post-dating the Inclosure Act, which shows any representation of the Inclosure Act route.

### **Reasons**

15. In total three maps show, or potentially show, a representation of the Order route. These are the Wiston Terrier of Kingston, the 'Kingston Parish and Calculations'

and the Kingston and Iford Inclosure Act and Map 1830 ('the Kingston Inclosure Act'). I shall consider these in turn.

*The Wiston Terrier of Kingston*

16. This document is considered to be a record of the private land held within the Wiston Estate. It is not dated but refers to surveys undertaken on dates between 1750 and 1761. The Applicant suggests it is likely the terrier dates from shortly after this. I accept this is a reasonable supposition, and I accept the document pre-dates the inclosure process.
17. The Applicant suggests a route akin to the Order route is shown on three pages of the terrier, 18, 20 and 27. The Objectors dispute that page 20 is relevant but acknowledge that pages 18 and 27 show a route which could correspond broadly with the Inclosure award route and the continuing route which is now recorded as F/P Lewes 37.
18. Having examined the terrier I agree with the Objectors that page 20 does not show a route consistent with any part of the Order route. It is more likely that the route shown is part of the route recorded on the DMS as F/P 3.
19. I accept that the maps drawn on pages 18 and 27 depict a route which runs from Ashcombe Lane towards Lewes and is in the general vicinity of the Order route. The map on page 27 appears to be a continuation of the route shown on page 18 and together they may encompass all of the Order route and a section of F/P 37.
20. The Applicant acknowledges that these maps are at best indicative. They are not drawn to an ascertainable scale and do not contain measurements referable to any extant feature. Whilst the maps are annotated 'North' and 'East' they appear to be compressed on an east / west axis. In consequence the route shown has the appearance of running in a more northerly direction than the Order route and is not readily reconcilable with it. The maps do however depict the strip pattern of land occupation and the pattern shown on the map on page 18 can be correlated to the strip pattern shown on the map 'Kingston Parish and Calculations' considered below.

*'Kingston Parish and Calculations'*

21. The document entitled 'Kingston Parish and Calculations' is a large map of the parish of Kingston showing the strip pattern of cultivation. It is endorsed 'Produced and verified at a meeting under the Kingston and Iford Inclosure Act held the 17th day of May 1830'. It is therefore probable that the map was prepared as a preliminary stage of the inclosure process.
22. The map includes the area over which the Order route runs and shows numerous strips of land which would suggest a representation of the pre-inclosure pattern of land use and occupation. Within the area of land encompassing the section A to B of the Order route, the strip pattern depicted corresponds closely with that depicted on the Wiston terrier. A line is drawn on the map which appears to correspond substantially with the route set out as footpath 7 on the Inclosure Act map which is considered below. There is no annotation or key to the map meaning that it is not possible to determine definitively what the line represents.
23. The depiction of the line in the context of the pre-existing strips does permit some comparison with the Wiston terrier. Such a comparison shows some clear

similarities, but equally some differences. Both routes emanate from Ashcombe Lane and head in a north-easterly direction, crossing a narrow plot before passing through a larger, rectangular plot. The point of exit from this plot differs and the alignment of the route beyond the horizontal strips is markedly different. The terrier map shows a clear north-easterly (and in one part almost due north) direction whilst the 'Calculations' plan shows the route continuing south of east. In both cases the path is shown directly to the north of what appears to be a band of trees or scrub.

*The Kingston and Iford Inclosure Act and Map 1830*

24. The Kingston Inclosure Act was subject to the provisions of the Inclosure (Consolidation) Act 1801 ('the 1801 Act'). The 1801 Act gave the commissioners power to set out public and private rights of way and provided that any pre-existing rights of way which were not set out in accordance with the Act were 'for ever stopped up and extinguished'.
25. Whilst the previously considered terrier and the 'Calculations' map may suggest that a footpath akin to the Order route existed before the Kingston Inclosure Act, such a route would only survive the inclosure process if specifically set out in the Act.
26. The Kingston Inclosure Act sets out a public footpath in the following terms '*One other public footway six foot wide numbered 7 in the said plan extending from the said road number 1 south westward of Kingston Lane towards Kingston Church*'. Road No. 1 is the route today known as Juggs Road. The route depicted on the Inclosure map as No. 7 extends from Kingston church at its south-western terminus to road No. 1 (Juggs Road) at its north-eastern terminus. It is the middle section of this route that is claimed by the Applicant to be the Order route, the north-eastern section being already recorded as Lewes F/P 37 and the south-western section not being recorded on the DMS and not being part of the Order route.
27. The Inclosure Act map differs from the Terrier and 'Calculations' maps in that it does not show the strip pattern of cultivation. Whereas under these earlier maps the Order route is shown running through numerous strips, the Inclosure Act map shows the Order route within a single parcel of land. No other features are shown within this parcel. The absence of the strip pattern or any other features makes it difficult to reconcile accurately the Inclosure Act route with earlier maps. The shape of the route shown on the Inclosure Act map is very similar to that depicted on the 'Calculations' map but bears little resemblance to that shown on the Terrier map, although that map is clearly indicative.

*Other documentary sources*

28. Various historical sources, including County maps, the Tithe map and the OS series of maps have been consulted. No map post-dating the Inclosure Act map has been found which depicts the Order route. The Order route was included on the Draft First Definitive Map based on it having been set out in the Kingston Inclosure Act. An objection was made to its inclusion and, after discussion at a meeting of the Rights of Way sub-committee, it was deleted.

*Standard of accuracy*

29. Section 56 of the 1981 Act provides that the DMS shall be conclusive evidence as to the particulars contained therein and, in the case of a footpath, 'shall be conclusive evidence that there was at the relevant date a highway as shown on the

- map....’ and further that ‘any particulars contained in the statement as to the position or width thereof shall be conclusive evidence as to the position or width thereof at that date.’
30. This section was considered in *R v SSE, ex p Burrows and Sims* [1991] QB 394 where Purchas LJ stated that the 1981 Act recognises “*the importance of maintaining as an up-to-date document, an authoritative map and statement of the highest attainable accuracy.*”
  31. The issue was considered again in *Perkins* where Sir George Newman commented “*The structure of section 56(1) of the 1981 Act shows that, in broad terms, the purpose of the map is to confirm the existence of the route and the purpose of the statement is to provide greater detail as to the particulars of its position or width.*”
  32. In the case then under consideration the claimants argued that “*the Order should not have been made because, despite efforts to achieve the clarity required by law, the route of the footpath is not shown with sufficient accuracy, let alone the highest attainable accuracy.*”
  33. Sir George Newman considered the dictum of Purchas LJ and particularly the reference to “the highest attainable accuracy”. He concluded that Purchas LJ was “*referring to the general intention of the legislation, namely that the map and statement should be kept under review and modified in the light of the most up-to-date evidence as to what rights of way are in existence so as to show, as accurately as possible, those rights of way. I do not take him to have been purporting to lay down a general requirement that the map and statement should attain some particularly high level of precision in the sense of showing the detail of the route in terms of its precise location on the ground to a manifestly high degree of particularity.*”
  34. He continued “*I accept that if it is possible, it will generally be desirable to show an order route to a high level of precision, but that will be the position if there is evidence to support such precise delineation actually relating to the right of way in question. Where, as is often the case, the existence of the right of way is shown by historical maps of varying quality, vintage and produced for varying purposes, in my judgment, there is certainly no requirement in law to show the route with a greater degree of particularity than can be justified on the basis of the available evidence.*” This approach has been endorsed by the Court of Appeal in *Roxlena Ltd. R (on the Application Of) v Cumbria County Council* [2019] EWCA Civ 1639
  35. The judgment quoted in the preceding two paragraphs seems to me to be particularly apposite in the present case. Here the existence of a public footpath is accepted by all parties to have been confirmed by the Kingston Inclosure Act, but its location is difficult to establish with precision because it “is shown by historical maps of varying quality, vintage and produced for varying purposes.” Accordingly, the requirement is for the route to be ascertained with the “degree of particularity [that] can be justified on the basis of the available evidence.”

*Conclusions on documentary evidence.*

36. The 1801 Act set out a public footpath with a width of 6 feet. There is no evidence to suggest that route has been stopped up or diverted. Accordingly, that route, with the status of a public footpath, continues to exist.

37. The Terrier and the Calculations maps suggest this route, or one very similar to it, existed prior to the Inclosure Act, but those maps are of no assistance in establishing the precise alignment of the path since it owes its status to the Act.
38. The fact that the Order route is not shown on any map after 1830 suggests that it fell out of use soon after that date and no physical evidence of its existence remained. There is no suggestion of any use of the Order route within living memory. The current pattern of land ownership does not coincide with any element of the Order route. As a result, the alignment of the Order route can be established solely on the evidence of the Inclosure Act.

*Physical features*

39. Point A is located on the north-east side of Ashcombe Lane. The Order route crosses the corner of a plot of land currently being developed then crosses the garden of the adjoining property and the plot behind. The route then crosses the orchard located behind the property known as Appletrees before coming out onto open downland with no obvious features where it joins with F/P 37 Lewes at the parish boundary. There is no physical evidence on the ground of F/P 37 Lewes.
40. There are no physical features which correlate to any part of the Order route.

*Is the Order route capable of being reconciled sufficiently with the Inclosure Act route?*

41. In order to confirm or propose modifications to the Order I must be satisfied, on a balance of probabilities, that the route being confirmed, or proposed for modification, is the route set out in the Inclosure Act. I have set out above the standard of accuracy that I am required to apply.
42. The Applicant argues that the route he puts forward as the Order route is a reasonable 'best fit' having regard to the vagaries of mapping and levels of accuracy achievable in the early nineteenth century.
43. The Objectors assert that it is not possible to establish the correct line of the Inclosure Act route with the precision necessary for me to either confirm the Order or be sufficiently certain of an alternative alignment to propose a modification.
44. The Applicant and Objectors have attempted to identify the position of the footpath by overlaying the Inclosure Act map onto OS maps and the Order map. The only fixed point on the Order route available for this exercise is the south-western terminus of FP37 Lewes (point C on the Order map) although, for the reasons given, this is incorrectly located on the Order map. Other reference points not on the Order route, such as the neighbouring road network have been used.
45. The objectors commissioned a professional surveyor to undertake an overlay exercise using various different methodologies. The most comprehensive exercise was carried out using eight identifiable points of reference. The overlay map so produced is Appendix 4 to the Objectors' statement of case ('the Appendix 4 route'). This iteration of the exercise produces a reasonable correlation to the Order route but still with a number of discrepancies which impact on whether, and the extent to which properties in differing ownerships are affected.
46. Following the hearing ESCC have at my request, produced a version of the Order map which shows F/P 37 correctly located. This has resulted in the termination

- point of the recorded footpath being moved approximately 10 m along the parish boundary in a north-westerly direction.
47. None of the parties has, since the hearing, chosen to submit any further map overlays. The Applicant has made a further submission incorporating a copy of the Order map showing some suggested amendments to accommodate the revised point C and a 'rounding off' of the corner at point B to more resemble the shape of the Inclosure Act route.
  48. The Objectors have also made a further submission in which they have developed an argument they canvassed at the hearing. This seeks to establish point B by reference to the position of the windmill shown on the Inclosure Act map, and from this to extrapolate the position of point A by using the angle of the bend in the route shown on that map. The Inclosure Act map shows the bend in the footpath (point B) being almost due south of the windmill whereas point B on the Order map is some distance east of this.
  49. There is a logic to the Objectors' approach, but its merit is dependent upon the Inclosure Act map being drawn accurately and to scale, and the windmill in question being correctly located on the map. Pursuing this methodology, the result would be to locate point B somewhat to the west of where it is shown on the Order map. Using the angle of 147 degrees to establish point A would result in this being relocated, still on Ashcombe Lane, but some distance to the north-west of where it is shown on the Order map.
  50. The result of using the approach suggested by the Objectors is to produce a route between points A and B which is significantly shorter than on the Order map and on a noticeably more northerly alignment. The resultant shape of the route, and the proportion of the two elements, A to B and B to C, is not readily reconcilable with that depicted on the Inclosure Act map. The Appendix 4 route does however result in point B moving modestly to the west which accords broadly with the principle of the 'windmill approach'.
  51. A significant disparity apparent from all overlay exercises is in the configuration of the route in the vicinity of point B, where the Inclosure Act map shows the route bulging to the south before heading in a straight line on a broadly north-easterly direction. In contrast the Order map does not show the 'bulge', instead showing the route as a straight line from A to B and similarly from B to C.
  52. In my judgement, the Appendix 4 route provides the best interpretation of the Inclosure Act map because it gives the greatest "degree of particularity [that] can be justified on the basis of the available evidence." It is however not a perfect exercise and I acknowledge that the overlay bears a caveat that the level of accuracy could be as much as +/- 10m in either direction.
  53. I recognise that a margin of up to 20 metres could have real practical consequences, particularly between points A and B where the route passes through various parcels of land in different ownerships. I have considered whether this should be a factor in my assessment of whether the degree of particularity derived from the available evidence is sufficient for me to confirm the Order or propose confirmation of a modified route.

## Conclusions

54. Following the principles outlined in *Perkins* I have concluded that the evidence of the existence of a public footpath is sufficiently compelling to meet the balance of probabilities test. Acknowledging that the alignment of the route cannot be established with exactitude, for the reasons given I find the best that can be done on the basis of the available evidence is to adopt the Appendix 4 route. Accordingly, I propose to confirm the Order subject to a modification of the Order Map and Statement. I have, to the best of my ability, shown my interpretation of the Appendix 4 route in red on the attached copy of the Order map. In addition to showing the alterations to the route required by the Appendix 4 map I have also shown point C located correctly on the parish boundary.

## Other Matters

55. I recognise that the decision will have unwelcome implications for the affected landowners whose concerns are genuine and understandable. At this stage the process is to determine whether an unrecorded public right of way exists. The fact that there is no evidence of use of the Order route in living memory and no physical evidence of its existence cannot, as a matter of law result in the loss of status. The law does not recognise the concept of abandonment of public rights of way. Other procedures may however be available to mitigate the impact.

## Formal Decision

56. I propose to confirm the Order subject to the modification of the Order route as shown in red on the attached Order map and the description of the Order route as set out below and shown in red in Parts 1 and 2 of the Order Schedule.

### Schedule Part 1.

Delete from “A route comprising” to “...at the parish boundary TQ39600872” and replace with;

A route comprising a public footpath starting at the public highway known as Ashcombe Lane TQ 3923 0846. The route runs in a north-easterly direction across the properties of Meadow Way for 47 metres, then Audiburn for 60 metres, then Castelmer Fruit Farm for 125 metres to TQ 3938 0863 before turning in an easterly direction for 50 metres, then in an east north-easterly direction for 85 metres, then Audiburn again in an east north-easterly direction for 95 metres until it reaches public footpath Lewes 37 at the parish boundary TQ 3960 0872.

### Schedule Part 2

Delete “239230844” and replace with 3923 0846

Delete “0.463” and replace with 0.46

57. Since the confirmed Order would show as a highway of one description a way which is shown in the Order as a highway of another description as submitted I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the representation procedure.

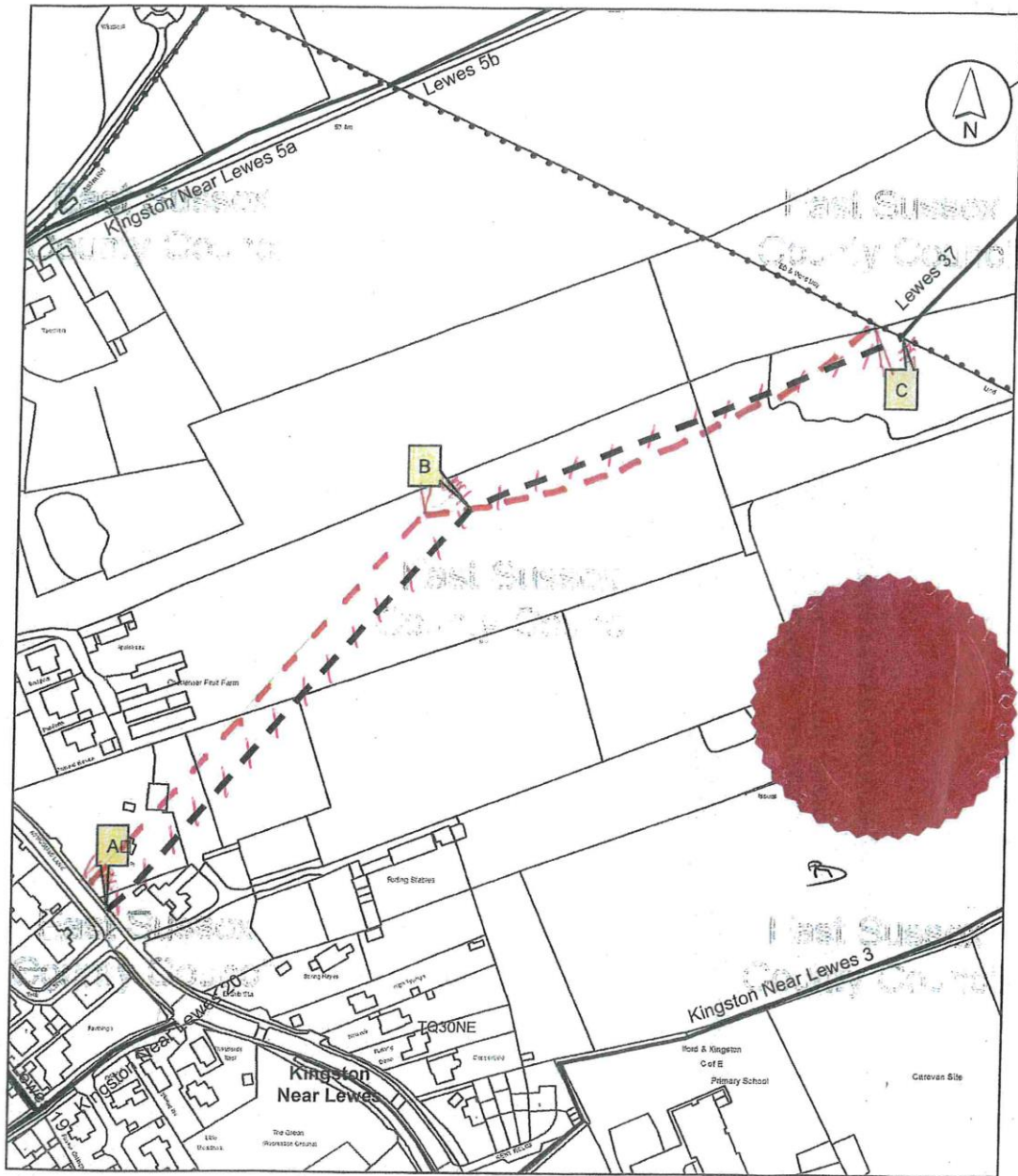



*Nigel Farthing*

**Inspector**



ORDER MAP - NOT TO SCALE - PROPOSED MODIFICATIONS



<b>Map Title:</b> THE EAST SUSSEX (PUBLIC FOOTPATH KINGSTON NEAR LEWES 21) DEFINITIVE MAP MODIFICATION ORDER 2021		 East Sussex County Council County Hall St Annes Crescent Lewes
<b>Key:</b> Existing Paths District Boundary	Footpath Creation A B C	
<b>Date:</b> 30/07/2021	<b>Map No:</b> CRE/KIN/FP/21/V1	<small>© East Sussex County Council 2021.                  Aerial Photography © Getmapping.com 2021.                  This map is reproduced from Ordnance Survey material with the permission of Ordnance Survey on behalf of the Controller of Her Majesty's Stationery Office © Crown copyright. Unauthorised reproduction infringes Crown copyright and may lead to prosecution or civil proceedings. 100019501, 2021.</small>
<b>Scale:</b> 1:2,500	<b>Author:</b> AT	