



Order Decision

Hearing held on 23 January 2018

Site visit made on 22 January 2018

by Alan Beckett BA MSc MIPROW

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

Decision date: 27 February 2018

Order Ref: ROW/3177581

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and is known as the Cumbria County Council (Footpath no 554012 Parish of Mansriggs & Osmotherley) Public Path Diversion and Definitive Map and Statement Modification Order 2016.
- The Order is dated 17 November 2016 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were 2 objections outstanding at the commencement of the hearing.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a public local hearing into the Order at the Coronation Hall, County Square, Ulverston on Tuesday 23 January 2018 having made an accompanied inspection of that part of footpath 554012 at issue together with the proposed alternative route the afternoon before.
2. One of the grounds of objection to the proposed diversion was that Mrs Muncaster had known of the existence of the footpath when the property was purchased and that the subsequent use made of the land by her did not provide a reason to seek the diversion of the footpath. However, this argument does not take account of the provisions of section 119 (1) of the 1980 Act or the finding of the Court in the case of *Ramblers Association v Secretary of State for Environment, Food and Rural Affairs* [2012] EWHC 3333 (Admin) ('the *Ramblers' case*'). In the *Ramblers' case*, Ouseley J confirmed that there was no statutory bar to a person making an application in circumstances where they have acquired property with the knowledge that a public right of way subsisted over it. Mrs Muncaster's awareness of the existence of the footpath at the time she purchased her property is irrelevant to the question of whether it would be in her interests for the footpath to be diverted.

The Main Issues

3. The Order is made in the interests of the owners of the land crossed by the current line of footpath 554012. Section 119 of the 1980 Act requires that, before confirming the Order, I should be satisfied that:
 - (a) it is expedient, in the interests of the owners of the land, that the footpath in question should be diverted;
 - (b) the terminal points of the proposed footpath are on the same highway as the path to be diverted or on a highway connected with it and are substantially as convenient to the public;

- (c) the new footpath will not be substantially less convenient to the public;
 - (d) it is expedient to confirm the Order having regard to its effect;
 - i) on public enjoyment of the path as a whole; and
 - ii) the effect the coming into operation of the order would have with respect to the land served by the existing path and the land over which the new path is created together with any land held with it, having regard to the provisions as to compensation.
4. In addition, in determining whether or not to confirm the Order, Section 119 (6A) of the 1980 Act requires that I should give consideration to any material provision of a rights of way improvement plan ('ROWIP') prepared by any local highway authority whose area includes land over which the Order would create or extinguish a public right of way.
5. Furthermore, I need to give consideration to what impact (if any) the proposed diversion would have upon the biodiversity and natural beauty of the area.

Reasons

Whether it is expedient, in the interests of the owner of the land, that the footpath in question should be diverted

6. Footpath 554012 forms part of the Cumbrian Way, a 72 mile recreational route between Ulverston and Carlisle. The Cumbrian Way was devised by the Ramblers' Association in the 1970s and is one of the few long distance routes within Cumbria which is officially recognised and supported by Cumbria County Council ('the Council'). I understand that this long-distance footpath is well used and that the majority of those who seek to undertake this walk do so from south to north; that is, to commence at Ulverston and walk to Carlisle.
7. Footpath 554012 commences on Higher Lath Road (at point B on the Order plan) near Windy Ash and runs in a generally northerly direction towards the collection of houses in the vicinity of Newbiggin Hall. The used path runs directly outside the applicant's property at The Old Rookery passing five ground floor windows and two doors into the house along a stone flagged path which separates the living accommodation from the area of lawn and garden immediately to the east. From The Old Rookery the path follows a shared track which provides vehicular access to the houses at Newbiggin. From Newbiggin Farm the footpath runs over pasture and arable fields to point A.
8. The route shown on the Order plan represents the line of footpath 554012 as shown on the Council's Definitive Map of public rights of way. The path in use departs from the line shown on the Order plan at a point approximately 30 metres from Higher Lath Road and runs adjacent to the applicant's house as described above in paragraph 7. The used route re-joins the definitive line at a point just to the north of Newbiggin Hall; in total, the length of the route in use which is not on the definitive line is approximately 72 metres. The problems which Mrs Muncaster has experienced with the used path have led to the application to divert that part of footpath 445012 at issue.
9. Mr McCracken submitted that if the path were to be diverted, public use of the used route is likely to have been sufficient for a public right of way to be deemed to have been dedicated on that alignment. It was argued that even if the definitive line of footpath 554012 were to be diverted, it was likely that a public right of way over the walked line would remain.

10. I understand the point being advanced by Mr McCracken but I consider this to be misconceived. Although it might be possible for a claim to be made that the section of used path which is not co-incident with the definitive line has become a public right of way through a period of long use¹, such a claim could only apply to that section. It would not be possible for a claim to be advanced that a public right of way had been acquired over the definitive line, as any use of the definitive route by the public will have been 'of right' by virtue of the route being recorded as a public right of way in the definitive map.
11. If the Order is confirmed then any subsequent application under schedule 14 of the Wildlife and Countryside Act 1981 could only relate to that 72 metre section of the used path which diverges from the existing definitive line. It is well established that a route which is a cul-de-sac at both ends cannot subsist as a public right of way.
12. Mrs Muncaster submitted that she had happily lived alongside the Cumbria Way for approximately 20 years, firstly at Windy Ash and latterly at The Old Rookery into which she moved in 2002. Although Mrs Muncaster has no issue with members of the public exercising their right to walk along the footpath, it is her case that the rise in the numbers of people following the Cumbria Way in recent years has ruined outdoor leisure time for her and her family, has severely compromised her ability to enjoy the amenity space of her garden and has on occasion, also given rise to trespass into her house.
13. Mrs Muncaster stated that outdoor leisure time for her and her family is ruined by the regular stream of walkers who pass along the path between the house and the garden. The number of people walking the Cumbria Way had 'exploded' in recent years and it was the sheer number of users passing through and the problems associated with those numbers which had prompted the application to divert the path. Mrs Muncaster estimated that the number of users of the Cumbria Way when she first moved to Windy Ash was in the order of dozens per year whereas on August Bank Holiday Monday of last year 103 people walked past her house and there were regularly 30 to 40 walkers passing through on an ordinary weekend. Mrs Muncaster's contention that the number of users had risen substantially in recent years was not disputed by any party, nor was her account of the number of walkers currently using the path.
14. I heard that Mrs Muncaster's children and grandchildren could not play in the garden without adult supervision due to the number of strangers walking the footpath. In addition there had been a number of incidents where walkers had entered her house and made use of her lavatory or had been searching for the kitchen in order to top up their water bottles. Furthermore, despite signage being erected to indicate the route of the path, some walkers sought a way around the garden and left gates open which resulted in the garden being damaged by livestock. The diversion had been sought to prevent a recurrence of the incidents described and to improve the safety and security of her family and the security of the property.
15. I saw from my site visit the proximity of the footpath to the ground floor windows of Mrs Muncaster's house, and that following the line of the path meant travelling between the house and the adjacent garden. I consider that the safety and security of the property would be enhanced if the footpath were

¹ Section 31 of the 1980 Act

diverted as the diversion would prevent any further incidents of trespass into her home of the type that Mrs Muncaster described.

16. I consider that the proposed diversion would be in the interests of Mrs Muncaster; the path would no longer run within a few metres of the windows of her house and would enhance the ability of her and her family to enjoy the amenity value of her garden area.
17. Mrs Muncaster does not own the first two fields to the north of Newbiggin Farm and the owner of those fields was not present at the hearing. Mrs Sweeting is the owner of the arable field in which point A is located and the land over which the proposed route would run. Mrs Sweeting has given her consent to the diversion. I consider that the diversion would be in the interests of the owners of the fields to the north of Newbiggin Farm as it would remove or reduce the burden of public rights over the land. I conclude that the proposed diversion would not have an adverse impact upon the interests of the owners of the fields to the north of Newbiggin Farm.
18. For these reasons, I am satisfied that it is expedient in the interests of the landowners that the footpath should be diverted.
19. The objectors suggested an alternative diversion around Mrs Muncaster's garden which could, it was suggested, be screened from the house and garden by hedging; this would retain the majority of the original route of the footpath. Whilst the objectors may have favoured this route, it was not supported by Mrs Muncaster as being in her interests as such a diversion would not address the problem of the path being in close proximity to the house and would simply throw the problems associated with the path onto Mrs Sweeting.
20. Given that the alternative diversion proposed by the objectors fails the statutory test in section 119 (1) of the 1980 Act, I will not give further consideration to this suggestion even if the diversion proposed by the Order does not satisfy the remainder of the statutory tests.

Whether the terminal points of the proposed highway are on the same highway as the path to be diverted or on a highway connected with it and are substantially as convenient to the public

21. The northern terminal point of the proposed footpath would be the same as the existing terminal point of that part of the path to be diverted.
22. The diversion would result in the southern terminal point of footpath 554012 being approximately 200 metres west of the current terminal point. The Cumbria Way also utilises footpath 554005 opposite Higher Lath Farm; the proposed diversion would almost halve the amount of roadside walking required for pedestrians to walk between these two paths. For anyone undertaking a journey along 554012 and 554005, whether or not as part of a walk along the Cumbria Way, the proposed terminal point at F would be substantially as convenient as the existing terminal point at B.
23. For these reasons, I am satisfied that the proposed route would be substantially as convenient to the public as the existing route.

Whether the new footpath will not be substantially less convenient to the public

24. There would be a reduction in the length of footpath 554012 of 44 metres as a result of the proposed diversion; it is unlikely that this minor reduction in length would inconvenience most users of the footpath.
25. For those wishing to travel west along Higher Lath Road or to walk footpath 554005, the proposed route would be as convenient as the existing route as it would involve approximately 200 metres less roadside walking. Conversely, for those wishing to travel east along Higher Lath Road to 554009 the proposed diversion would result in 200 metres of additional roadside walking. Whilst this proposal would result in inconvenience to some users, I do not consider it to be substantially so, as reaching footpath 554009 from the east already involves considerable roadside walking, there being no other routes which connect to that footpath.
26. I consider that the proposed route will be more convenient for some walkers as there would be no stiles on the route for pedestrians to negotiate. At points C, D, E and F the proposed path will cross field boundaries by means of gates. Although gates are not the least restrictive means of crossing a field boundary, they are more readily negotiable by users than stiles. At the field boundary immediately south of point A on the current footpath is a step stile built into the boundary wall; whilst this stile was relatively straightforward to negotiate, the absence of stiles on the proposed path would be more convenient for some users.
27. The proposed path will have a uniform width of 3 metres. The increased width of the path available to users is unlikely to inconvenience those who seek to use it. Sight lines along Higher Lath Road in either direction at point F are comparable to those available at point B and the presence of a grass verge at the side of Higher Lath Road would provide an alternative to walking in the road for pedestrians travelling between 554012 and 554005.
28. For the above reasons. I conclude that the proposed diversion would not be substantially less convenient to the public.

Whether it is expedient to confirm the Order having regard to:

The effect the diversion would have on public enjoyment of the path as a whole

29. The objectors submit that the proposed route would not be easy to follow as the gate at point E is not visible from point F. Similarly, at point D it was not possible to see the gate at point C due to the topography of the fields although a gate immediately north of point D was visible; it was submitted that the presence (and visibility) of this gate may confuse pedestrians and lead them off the proposed route. In comparison, the existing route was, for the most part, bounded on the east side by a dry stone wall which helped to guide walkers along the correct path.
30. Although it was not possible to see the gate at point C when standing at point D, the wall end at point A was visible; pedestrians following the proposed route would therefore be able to navigate from point D by reference to visible features on the ground which can be identified on a map. Although it is not possible to see the gate at point E from point F due to the southerly slope of the field towards the road, the wall in which the gate is located is shown on

maps and point E is almost directly north of point F. Those users walking the Cumbria Way equipped with map and compass are unlikely to be confused by the new alignment of the footpath. For those who are not so equipped, the erection of marker posts and appropriate signage of the type found on the existing route to assist walkers would address any confusion about the alignment of the proposed route.

31. The proposed diversion would remove the requirement for pedestrians to walk in close proximity to Mrs Muncaster's ground floor windows and the doors which lead into her house. For the Ramblers' Association, Mr Walker acknowledged that many walkers were uncomfortable with walking through domestic curtilages; it is likely that for such users, the enjoyment to be derived from walking the path would be enhanced by the proposed diversion.
32. The objectors contended that the proposed diversion would remove the views to be had of Windy Ash and to the south when approaching point B from Higher Lath Road and of the hamlet of Newbiggin with its mixture of traditional farm buildings; these features added diversity and interest to a walk along the footpath. In contrast, the fields through which the proposed route would run did not hold any feature of interest.
33. Although the farm buildings at Newbiggin have been sympathetically converted to provide family dwellings, there is no evidence that those buildings are of any specific architectural merit which would provide additional interest to the passing walker. With regard to the views of Windy Ash and the valley through which Higher Lath Road passes, these views would remain for anyone who wished to undertake a walk along Higher Lath Road or was travelling between 554012 and 554009. The proposed diversion is therefore unlikely to adversely affect the enjoyment of a walk along footpath 554012 in these respects.
34. The proposed route follows a more elevated position in comparison to the existing path and the views available towards Coniston Old Man to the north and to the Barrow Monument outside Ulverston to the south are consequently more extensive than those available on the current route which are in part curtailed by the lower altitude and by the buildings at Newbiggin. Although the views towards the Coniston fells may be available from other parts of the Cumbrian Way, what I have to compare is the impact upon public enjoyment between the existing and proposed routes and not the proposed route with some other public right of way in the immediate vicinity. The proposed diversion is therefore unlikely to adversely affect the enjoyment of a walk along footpath 554012 in this respect.
35. The objectors also submitted that the historic route of the footpath would be lost as a result of the diversion. Although the route currently in use has been depicted by Ordnance Survey since 1861 as a recognisable feature in the landscape, no evidence has been provided which demonstrates that this path has any historical significance or interest in the local area or within Cumbria; the proposed diversion is unlikely to adversely affect the enjoyment of a walk along footpath 554012 in this respect.
36. The objectors contended that confirmation of the Order would set an unwelcome precedent for other parts of the footpath network where (as a result of barn conversions) a path ran through what are now domestic curtilages. The objectors gave a number of examples of properties on the route of the Cumbria Way where public footpaths ran through collections of buildings

- which if subject to the creation of domestic gardens such as that created by Mrs Muncaster, might lead to a rise in similar applications to divert footpaths being made. It was submitted that the cumulative effect of such diversions would be detrimental to the public's enjoyment of the Cumbria Way on those rights of way affected. In support of their contention, the objectors relied upon the findings of the court in *Collis Radio Ltd v Secretary of State for the Environment* [1975] 29 P & C R 390 ('Collis Radio').
37. For the Council, Mr Sims submitted that when a diversion proposal was being considered, it was considered on its own merits with the circumstances of each case being weighed against the statutory tests found in section 119. In the current case, the driving force behind the application was the impact upon the applicant of a substantial increase in the numbers of users of the Cumbria Way who passed through her property; the use of the land to the east of Mrs Muncaster's house as domestic amenity space was not the principal factor in this case. As each diversion was considered on its merits, confirmation of the Order would not set any precedent.
38. The *Ramblers* case is accepted as authority that the question of precedent is a matter that could be considered under the expediency test found in section 119 (6). In that case, Ouseley J held that such an argument had to be based on evidence for any concern about precedence to be justified. Mrs Muncaster submitted that the objector's claims were not supported by any evidence other than the naming of a number of properties through which the Cumbria Way ran.
39. The concerns raised by the objectors regarding the creation of gardens over land crossed by public rights of way or other difficulties being placed in the way of users was considered by Ouseley J in the *Ramblers'* case who held that such matters were capable of being relevant under section 119 (6). In this respect, the decision in the *Ramblers'* case is on all fours with the decision regarding precedence being a material consideration as set out in *Collis Radio*.
40. Although both cases demonstrate that a concern regarding the setting of precedent is a material consideration, there are to my mind significant differences between the two cases. *Collis Radio* is a planning case and as Widgery CJ held "*Planning is something that deals with localities and not individual parcels of land and individuals sites. In all planning cases it must be of the greatest importance when considering a single planning application to ask oneself what the consequences in the locality will be – what are the side effects which will flow if such a permission is granted*". *Collis Radio* was concerned with what the consequences might be for a locality which was designated for industrial use if planning permission was granted for use of a warehouse as a cash and carry retail facility.
41. The proposal to divert a public right of way is markedly different to planning cases such as that in *Collis Radio* in that a section 119 diversion order deals solely with individual sites and individual parcels of land. On the question of the setting of precedence, I consider that the *Ramblers'* case is a more appropriate authority in the consideration of this issue in relation to a section 119 diversion order than *Collis Radio*.
42. Having accepted that precedent was a relevant matter for consideration, Ouseley J said: "*There was no evidence, and none has been suggested to have existed, to justify any concern about precedence. The issue appears to have*

been presented in as general terms to the Inspector as those in which he dealt with the issue in paragraph 70. It would have been irrational on the basis of that generalised comment for an Inspector to have concluded that an order which was otherwise justified on a careful examination of the facts should be rejected. But I recognise that there may be circumstances in which a case is so identical to another that it would raise issues of consistency in the application of policy for different conclusions to be reached, and that an accumulation of such decisions could be seen to be harmful. But such an argument requires to be backed by evidence which could permit an Inspector to conclude that the point was a good one. Here there was no evidence which could have permitted a reasonable Inspector so to conclude."

43. In the *Ramblers'* case, the footpath at issue ran through Bodicote Mill and it had been submitted that if the diversion was allowed it might set a precedent for the diversion of other paths which pass close to nearby mills. The submissions made to the Inspector in that case were made in general terms as noted by Ouseley J. In the current case, the objectors' submissions are made in similarly general terms. Whereas the Cumbria Way may pass through hamlets of a similar type to that found at Newbiggin, the objectors produced no evidence to demonstrate what, if any, concerns the occupiers of those properties had regarding the Cumbria Way, or their intentions, if any, regarding the footpath. Mr Sims was unaware of any enquiries to divert footpaths which had been made as a result of the current Order being under consideration.
44. The case put forward by the objectors regarding precedence appears to me to be of the same general nature to that which had been advanced to the Inspector in the *Ramblers'* case; whilst I acknowledge that the Cumbria Way runs through similar hamlets to that at Newbiggin, that mere fact does not indicate that the circumstances pertaining in Mrs Muncaster's case are or would be replicated in other cases which are to be considered on their own merits. I conclude that there is no evidence before me that the diversion of part of footpath 554012 would set a precedent for the diversion of other footpaths.
45. The objectors also asserted that the diversion of the footpath would have adverse impacts upon the economic life of the area through which the Cumbria Way passes, that the diversion would have adverse impacts upon sustainable modes of transport and was not consistent with the Cumbria Local Transport Plan 2011-2026.
46. With regard to the former point although Mrs Sweeting runs a bed and breakfast facility as part of Newbiggin Hall, the objectors produced no evidence to demonstrate that the diversion would have an adverse effect upon Mrs Sweeting's occupancy rates. Similarly, no evidence was submitted to give credence to the claim that the diversion would adversely affect the use of the X11 – 12 rural bus service. Given that the diversion would retain footpath 554012 as part of the Cumbria Way (albeit on a different alignment), it is difficult to comprehend how the diversion would impact upon a rural bus service, even if that service was supported by local walking groups. Nor is it apparent how the diversion would be contrary to the provisions of the Local Transport Plan; the diversion would retain a means of pedestrian access between Higher Lath Road and Elleriggs Brow. If the existing route is considered to be compatible with the Local Transport Plan, it is difficult to

comprehend how the proposed alternative route would be incompatible with that Plan.

47. On balance, I feel the enjoyment of those who seek pleasure from informal recreation on footpaths such as 554012 would not be diminished as a result of the diversion.

The effect the coming into operation of the Order would have with respect to the land served by the existing path

48. There is no evidence before me that the Order would have, in this respect, any effect separately identifiable from those considered above in relation to the other requirements of Section 119 of the 1980 Act.

The effect any new right of way created by the Order would have as respects land over which the new right is created together with any land held with it, account being taken of the provisions as to compensation

49. The proposed footpath would run over land in the ownership of Mrs Sweeting who has given her consent to the diversion. There is no evidence before me to suggest that the new right of way would have any adverse effect upon the land over which it would run. Mrs Sweeting has confirmed in writing that a claim for compensation under section 28 of the 1980 Act would not be made.

Summary

50. I conclude that it is expedient to confirm the Order having taking into account the effect the diversion would have on public enjoyment of the path as a whole, on the land served by the existing and proposed paths and on any land held with it.

Consideration given to the Rights of Way Improvement Plan ('ROWIP')

51. The Council has prepared a ROWIP; I understand that there are no provisions within that plan of particular relevance to this case.

Consideration given to the conservation of biodiversity² and natural beauty³

Biodiversity

52. The land crossed by the proposed route is not classified as a Site of Special Scientific Interest and is not covered by any other local designations aimed at conserving habitat types or species diversity. Consequently, there is no evidence before me that the proposed diversion would have any impact upon biological diversity.

Natural beauty

53. Footpath 554012 is not located within any area which is designated as being of special importance in a national context (such as an Area of Outstanding Natural Beauty) although the path is set in attractive countryside near to

² Section 40 of the Natural Environment and Rural Communities Act 2006 - duty to have regard to the purpose of conserving biodiversity.

³ Section 11 of the Countryside Act 1968 - duty to have regard to the desirability of conserving natural beauty and amenity of the countryside.

Ulverston. The diversion of the footpath is unlikely to have any adverse impact upon the conservation of the natural beauty of the area.

Whether it is expedient to confirm the Order

54. I have concluded that it is expedient in the interests of the landowner that the path be diverted and that although there may be some inconvenience to some users arising from the diversion, these will not be substantial. I have concluded that the proposed terminal point of the diverted footpath will be as convenient as the terminal point of the current path. I have concluded that it is expedient to confirm the Order as the diversion would have no adverse impact upon public enjoyment of the path as a whole, and no adverse impact upon the land served by the existing path to the land over which the new path would be created.

55. It follows that it is expedient to confirm the Order.

Conclusion

56. Having regard to these and all other matters raised at the hearing and in the written representations, I conclude that the Order should be confirmed.

Formal Decision

57. I confirm the Order.

Alan Beckett

Inspector

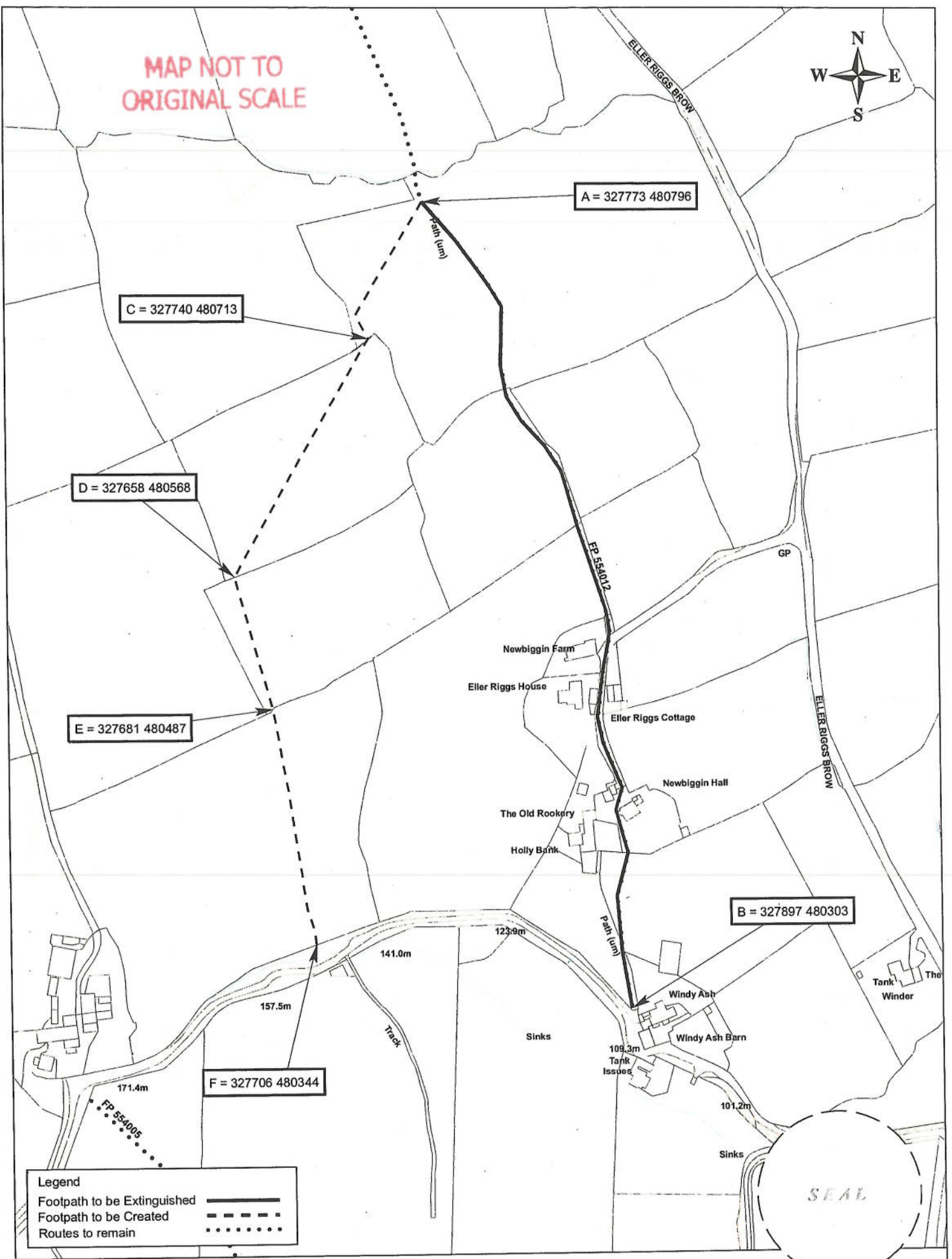
APPEARANCES

Cumbria County Council:	Mr Sims
Applicant:	Mrs Muncaster
Interested parties in support:	Mrs Medhurst Mr Hones
Ramblers' Association:	Mr Walker
Objectors:	Mr McCracken QC Mr Coe
Other Interested Parties	Mr Ulloch Mr Buxton

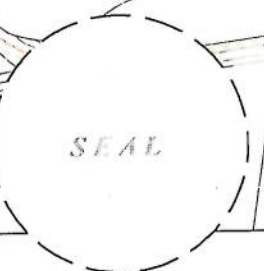
Documents introduced at the hearing:

1. Opening remarks by Mrs Muncaster; response the objection by Mr Coe; response to the objection by Mr McCracken.
2. Speaking note from Mr McCracken.
3. Speaking note from Mr Coe.
4. Copy of the application made to divert footpath 554012 dated 8 February 2016.
5. Copy of letter from Mrs A V Sweeting dated 23 January 2018.

MAP NOT TO ORIGINAL SCALE

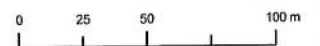


Legend	
Footpath to be Extinguished	
Footpath to be Created	
Routes to remain	



Highways Act 1980 Section 119 and Wildlife and Countryside Act 1981 Section 53
 Public Footpath 554012 Diversion and Public Path Modification Order
 Cumbria Way, Newbiggin Hall, Eller Riggs Brow, Ulverston

Scale 1:2000 @ A3



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