



Order Decision

Inquiry held on 17 April 2018

by **Alan Beckett BA MSc MIPROW**

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

Decision date: 05 June 2018

Order Ref: ROW/3181095

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Metropolitan Borough of Barnsley (West Riding of Yorkshire County Council Definitive Map and Statement) (Hoyland Nether) Modification Order (No. 16) 2017.
- The Order is dated 22 May 2017 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were 2 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a public local inquiry into the Order at the Milton Hall, Elsecar on Tuesday 17 April 2018 having made an unaccompanied inspection of the claimed footpath the evening before. Following the close of the inquiry, I undertook a further inspection of the claimed footpath in the company of the parties.

The Main Issues

2. There were two objectors to the Order. Mr Howard contended that the user evidence was insufficient for the order to be confirmed, whereas Mr & Mrs Hibberd acknowledged that use had been made of the claimed path over a considerable period; their objection was the proposed recording of a width of 3.5 metres.
3. The main issues in this case are; first, whether the evidence discovered by the Council is sufficient to demonstrate, on a balance of probabilities that a public right of way on foot subsists over the Order route; and secondly, the width of the route to be recorded in the definitive statement.
4. In a case where it is claimed that a public right of way has come into existence through long use the provisions of section 31 of the Highways Act 1980 ('the 1980 Act') require me to be satisfied that the public had used the claimed path as of right¹ and without interruption for at least 20 years prior to the right to do so being brought into question. Use by the public in such a way is sufficient to raise a statutory presumption that the owner or owners (whoever he, she or they may be) of the land crossed by the path had dedicated such a right to the public. This presumption is however rebuttable if there is sufficient evidence to demonstrate that during the 20-year period under consideration the public

¹ Without force, without secrecy and without permission

were made aware that there had been no intention on the part of the landowner to dedicate a public right of way.

5. If the statutory scheme set out under section 31 of the 1980 is not satisfied, I am also required to consider whether a dedication of the claimed route can be inferred at common law. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.

Reasons

When the right of the public to use the claimed footpath was brought into question

6. The application to add the claimed footpath to the Definitive Map and Statement ('DM&S') was prompted by the actions of the new owners of the land crossed by the path. In the summer of 2016, Mr & Mrs Hibberd erected a fence along the length of the path to provide a driveway to the rear of their property. A width of approximately 1 metre was left between the new fence and the hedge opposite to provide a means of continued access between Strafford Avenue and Lifford Place.
7. At some point shortly afterwards, Mr Howard obstructed the gap which had been left which prevented the use of the path as a through route. The obstruction was first reported to the Council on 24 September 2016 and it was this latter action that prompted the application to add the path to the definitive map and statement.
8. Ordinarily, the actions described above are likely to provide evidence of a date on which public use of the claimed footpath had been brought into question. However, in this case, the Council's records show that the previous landowner, Fitzwilliam (Wentworth) Estates² had included the land in various deposits and statutory declarations which had been made under section 31 (6) of the 1980 Act. The Council's records show that the land had been included in statutory declarations made on 12 December 1994, 17 January 2001 and 14 January 2011. The 1994 declaration referred to an earlier deposit made on 8 September 1998.
9. The Council had no copy of the 1988 deposit in its records, nor had Fitzwilliam (Wentworth) Estates. It was the Council's case that as it had no reason to doubt that the 1988 deposit had been made, 8 September 1988 could be taken as the earliest date at which public use of the claimed route had been brought into question. Although the question was posed by one of the objectors as to whether deposits and declarations prior to 1988 had been made by the landowner, no evidence was submitted by any party that such deposits had been made.
10. I am satisfied that a deposit under section 31 (6) of the 1980 Act had been made by Fitzwilliam (Wentworth) Estates on 8 September 1988 with regard to those public rights of way which it recognised as existing over its property. As the path at issue was not recognised at that time as being subject to public rights, the deposit brought into question the use of the path by the public.

² Fitzwilliam (Wentworth) Estates sold the land crossed by the claimed path as part of 9A Lifford Place with that part of the path between 24 and 26 Strafford Avenue being subsequently sold to Mr & Mrs Hibberd

Accordingly, I conclude that the relevant 20-year period of use for the purposes of section 31 (2) of the 1980 Act is 9 September 1968 to 8 September 1988.

Whether the public have used the Order route as of right and without interruption for a period of not less than 20 years prior to their right to do so being brought into question

The public

11. There is no legal interpretation of the term 'the public'. A dictionary definition is "*the people as a whole, or the community in general*". Coleridge CJ (1887)³ commented that use by 'the public' "*must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge*".
12. I acknowledge that of those who completed user evidence forms, or who appeared at the inquiry, the overwhelming majority reside within the streets of Strafford Avenue, Lifford Place and Cobcar Lane. However, none of the supporters have any connection with the land crossed by the path, either in terms of ownership, tenancy or a business relationship with the owners of the land. Despite the close proximity of the residences of supporters to the claimed path, and the narrow geographic area from which the supporters are drawn, there is no reason, in my view, why those resident in the neighbourhood should be regarded as other than 'the public'.

Use by the public for not less than 20 years prior to the date use was brought into question

13. In total, 38 user evidence forms were submitted from 37 individuals⁴ in support of the footpath being added to the DM&S. The majority of these individuals (25) reside in Strafford Avenue, 6 reside in Cobcar Lane, 4 reside in Lifford Place with the remaining 2 respondents living elsewhere within Elsecar. Of these users, 11 state that they have used the path throughout the relevant 20-year period and with the exception of one individual whose use commenced in 1958, these respondents commenced use at various dates during the early 1960s.
14. Six other respondents had used the path prior to 1988 for periods of between 2 and 12 years. Nineteen other respondents had commenced use after 1988 and had used the path for various periods prior to the path being obstructed in 2016. One other respondent described use between 1954 and 1969 and then again between 1977 and 2016.
15. I heard from 7 witnesses at the inquiry. Mr John Cutts had first used the path in 1973 when being walked to school by his parents and had continued to use the path as part of his route to both junior and senior schools he attended. The path was also used for visiting friends who lived on Lifford Place and to play football on Lifford Field. The path had also been used a part of Mr Cutts' route to work until he moved to Cobcar Lane in 1987. From that date, Mr Cutts had used the path to visit his grandmother who lived on Strafford Avenue.

³ R. v. Inhabitants of Southampton (1887) 19 QBD 590; RWLR April 1998 S6.3 pp55

⁴ Mr M Taylor completed 2 forms; the first is dated 6 June 2014, the second is dated 14 October 2016.

16. Mr Eric Cutts had first used the path in 1966 when walking his future wife back to her parent's house and then from 1967 as a resident on Strafford Avenue as a short cut to reach the shops and bus stop located on Cobcar Lane. Mr Cutts recalled that coal was delivered to the houses in the area with the coal wagon driving along the path from Strafford Avenue and exiting onto Lifford Place.
17. Mrs Lindley had been resident on Strafford Avenue since 1979 and had first used the path as part of a circular walk with her dog and to visit family and friends in Church Street. For a period of around two years in the mid-1980s, Mrs Lindley had been without a car and had used the path as a short cut to the bus stop on Cobcar Lane in order to go to work. Mrs Lindley's use of the path was mainly in the evenings and at weekends for walking the dog or going to the local shop. Mrs Lindley recalled that she would often pass others on the path and that although cars were sometimes parked along the path, they had not prevented use.
18. Mrs Willingham had first used the path in the late 1960s when visiting her grandparent's house on Strafford Avenue and had used the path on a daily basis to go to the shop on Cobcar Lane, or to the bus stop. The path had been wide enough for a lorry to drive along. Mrs Willingham recalled the bollards being erected but was unsure of the date and that after the bollards had been installed there had been no further restriction on use of the path.
19. Mrs Utley said that she was part of a big family in Elsecar and had used the path from around 1958 to visit relatives in Strafford Avenue from her home in Church Street. The path had been in regular use by residents for access to and from the facilities in the village; until 2016 there had been no constriction of the width of the path other than the bollards and users were free to walk over whichever part of the path they chose.
20. Mr Franklin had first used the path in 1963 when he was 11 years old. Like other witnesses, he had used the path as part of a short cut to his grandparents who ran the local post office. Mr Franklin had used the path on a daily basis on foot as a child and as part of his work had driven cars belonging to the customers of his garage along the path when going to or from customer's houses on Strafford Avenue. It had been possible to drive a car along the path until the late 1970s when the bollards had been erected.
21. Mrs Walton appeared on behalf of Mr & Mrs Hibberd. Her evidence was that she had walked that path since 1986 for access to the bus stop and local shops and that she considered a width of 1 metre was sufficient to provide adequate access for pedestrians.
22. None of the witnesses I heard from recalled any obstruction of the path during their use of it; when cars had been parked along the path it had always been possible to walk around them. None of the witnesses recalled being challenged by anyone about their use of the route. Prior to 2016, there had been no obstruction or impediment which prevented use of the path as a link between Strafford Avenue and Lifford Place.
23. Neither Mr Hibberd nor Mr Howard were resident in the area during the relevant 20-year period under consideration and were unable to provide any evidence contrary to that given by the users who appeared at the inquiry. Mr Howard considered that the evidence of use submitted in support of the Order

was low in terms of absolute numbers and was insufficient to give rise to a public right of way.

24. The further back in time the relevant 20-year period is, the more difficult it is likely to be for a claimant to be able to provide evidence of use of the path, particularly where the beginning of the 20-year period is (as in this case) 50 years ago. However, in this respect, Elsecar appears to have a stable population with successive generations of some families continuing to live in the village. In this case, despite the 20-year period commencing 50 years ago, evidence of use of the path throughout the 20-year period has been provided by 11 individuals with a further 7 others providing evidence of use for part of that period. I am satisfied that the user evidence adduced is sufficient for the purposes of section 31 of the 1980 Act.
25. The oral evidence given at the inquiry is of unchallenged use of the path since the late 1950s which continued until the blocking of the path in 2016; the oral evidence given is reflected and supported by the remaining untested written user evidence. I am satisfied that the user evidence when considered as a whole, demonstrates use of the claimed path by the public throughout the relevant 20-year period.

Without force

26. The Order route runs between Strafford Avenue and Lifford Place. The available evidence is that until 2016 there had never been a fence or barrier to prevent access other than the bollards found around half way along the path. There is no evidence that the public has had to climb or cross any structure to use the footpath or had to break down a gate or fence in order to do so or that use has been contrary to a prohibitory notice. I conclude that use of the path has been without force.

Without secrecy

27. It is not disputed that the claimed use took place at all times of the day and in full view of anyone who cared to look. I conclude that the claimed use was not secretive.

Without permission

28. There is no suggestion within the written evidence of use or in the oral testimony of those who appeared at the inquiry of permission to walk along the Order route being sought or obtained. I conclude that use of the claimed footpath by the public during the relevant 20-year period was without permission.

Without interruption

29. With regard to Section 31 of the 1980 Act an interruption in use must be some physical and actual interruption which prevents enjoyment of the path or way and not merely some action which challenges that use but allows it to continue. For any action taken to qualify as an interruption of use there must be some interference with the right of passage.
30. Whether any action can be regarded as an interruption is also dependent upon the circumstances of that action; temporary obstructions of a minor nature

such as the parking of vehicles on a road⁵ or the storage of building materials on a path⁶ have been held not to amount to relevant interruptions.

31. In this case there is no evidence of the use of the footpath being interrupted in any way until the blocking of the path in 2016. The periodic parking of motor cars along the route had no effect upon public use of the path; the witness evidence was that the vehicles were not parked in such a way which prevented use.
32. Despite vehicles being periodically parked on the land, the evidence before me is that the presence of vehicles had no effect upon the ability of the public to walk along the full length of the path during the relevant 20-year period. I conclude that use of the route by the public between 1968 and 1988 was uninterrupted.

Summary

33. The user evidence before me demonstrates that the path at issue has been in continuous use by the public since at least the late 1950s. There is a body of user evidence which is sufficient to demonstrate that use of the path occurred throughout the 20-year period prior to September 1988 and that such use was as of right and without interruption. It follows therefore that the evidence adduced by the Council is sufficient to raise a presumption of dedication under Section 31 of the 1980 Act.

Whether there is sufficient evidence during the relevant 20-year period of a lack of intention to dedicate

34. In order to take advantage of the proviso to section 31 (1) of the 1980 Act, the owner of the land has to provide evidence of overt and contemporaneous action having been taken against those using the claimed path during the relevant 20-year period which has brought to the attention of users that there was no intention to dedicate a public right of way.
35. In the case of *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, Hoffman LJ held that in terms of the intentions of the landowner, the "*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: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending to disabuse him of the notion that the way was a public highway". Furthermore the contemporaneous actions taken by the landowner must be "*perceptible by the relevant audience*" and be "*objective acts perceptible outside the landowners' consciousness, rather than simply proof of a state of mind*".
36. During the relevant 20-year period of use considered above, the land crossed by the claimed footpath was in the ownership of Fitzwilliam (Wentworth) Estates. No evidence was submitted by the former landowner with regard to its approach to use of the land by the public during that period. There is therefore no evidence before me from which it could be concluded that Fitzwilliam (Wentworth) Estates had conveyed to the public a lack of intention to dedicate

⁵ Lewis v Thomas [1950] 1KB 438

⁶ Fernlee Estates Ltd v City & County of Swansea [2001] EWHC Admin 360

a public right of way such that the presumption raised by the evidence of use would be rebutted.

37. It follows that I conclude that there is insufficient evidence of a lack of intention to dedicate a public right of way for the current owners of the land to be able to take advantage of the proviso to section 31 (1) of the 1980 Act.

Common law

38. Given that I have concluded that the evidence adduced is sufficient to satisfy the statutory scheme set out in section 31 of the 1980 Act, I am not required to assess the evidence at common law.

Width

39. The Order stipulates that the footpath has a width of 3.5 metres. This is the width which the Council contends was available to the public to use until the path was blocked in the summer of 2016. The Council determined the width from an assessment of the responses given in the user evidence forms and from measurements from Ordnance Survey maps which showed the route in its pre-2016 unobstructed form. The Council say that those who completed a UEF estimated the width to have been between 3 and 5 metres, and that Ordnance Survey maps showed that the path had been 3.5 metres wide where it ran between 24 and 26 Strafford Avenue.
40. Two concrete bollards had been erected on the claimed path in line with the rear boundary fences of the houses on Strafford Avenue. Whilst Mr & Mrs Hibberd did not dispute use of the claimed path by the public, it was their case that the bollards had restricted the width of the footpath to no more than 950mm. This figure was arrived at as that was the width of the central gap between the two bollards. In their submission, the metre width gap which they had left between the fence and the boundary of 24 Strafford Avenue reflected the width between the bollards which had been available for the public to use. It was submitted that the width of the footpath should therefore be recorded as not more than 1 metre.
41. Although the bollards would have restricted the width of the path, that restriction was not limited to 950mm as the measurements taken on site demonstrated that a gap of 900mm had existed between the boundary of 26 Strafford Avenue and the westernmost bollard with a further gap of 1 metre between the easternmost bollard and 24 Strafford Avenue.
42. I accept that the bollards restricted the available width of the footpath, but only to the extent of the of the land which was physically occupied by them, which amounted to 500mm as each bollard was 250mm wide. Therefore, at the point where the bollards were located, the available width was at least 2.85 metres.
43. The witnesses who appeared in support of the Order gave evidence as to how they had used the path; other than the bollards there was no restriction upon the width or any constraint which required use of one side or other of the path; the evidence I heard was that the full width between the houses had been used and that users were free to walk between any or all of the gaps between the bollards.
44. It is not known when the bollards were erected or who erected them. Mr Hoyland speculated that as the Council had no records of the erection of the

bollards they may have been erected by the former UDC prior to local government re-organisation in 1974. No evidence was submitted by Mr Hoyland to give substance to that claim and I consequently do not attach significant weight to it.

45. The oral evidence I heard was that the bollards were present in the late 1970s, but as Mr Franklin had been able to drive along the path to the rear of his customers' houses until the late 1970s, it seems unlikely that the bollards had been present throughout the 20-year period of use considered above. As the bollards were not present at the start of the 20-year period the path has not been dedicated to public use subject to a constriction on width at its half way point.
46. Other measurements of the width of the tarmac which had been laid on the path were taken which showed that a width of between 2.95 and 3.5 metres had been available. However, the recent changes to the boundaries of the properties means that it is by no means certain that what was visible at the time of my visits accurately reflected what was present on site during the 20-year period which ended in September 1988. Accordingly, I consider that to base the width to be recorded as that derived from Ordnance Survey mapping is not unreasonable and reflects the width which is more likely than not to have been available for the public to use.
47. I conclude that the Order does not require modification in regard to the width of the path to be recorded in the definitive statement.

Other matter

48. Mr Hoyland submitted that I should give consideration to the impact a 3.5 metre wide footpath would have in relation to Mr & Mrs Hibberd's use of the land as a driveway to their house, and that I should strike a balance between the needs of the public and his clients; in his view, the 1 metre width path which had been left was sufficient for public use. However, the current use of the land and the impact the footpath may have on that use are not matters which I can take into account in reaching my decision. The question regarding the width of the route is to be answered in relation to the physical characteristics of the footpath during the relevant 20-year period of use; that period of use ended almost 30 years before Mr and Mrs Hibberd purchased the land crossed by the footpath.

Conclusions

49. I conclude that the user evidence adduced is sufficient to raise a presumption of dedication and there is insufficient evidence of a lack of intention to dedicate a public right of way over the Order route for that presumption to be rebutted. It follows that I conclude that that the evidence adduced is sufficient to demonstrate on a balance of probabilities that a public right of way on foot subsists over the route described in the Order.
50. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude and that that the Order should be confirmed.

Formal Decision

51. I confirm the Order.

Alan Beckett

Inspector

APPEARANCES

For Barnsley Metropolitan Borough Council:

Mrs C Radford	Solicitor instructed by Mr A C Frosdick, Executive Director of Core Services & Solicitor to the Council
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who called:

Mr R Catling	Definitive Map Officer
Mr J Cutts	Local resident
Mr E Cutts	Local resident
Mrs C Willingham	Local resident
Mrs A Utley	Local resident
Mrs B Lindley	Local resident

Interested party in support of the Order:

Mr Franklin	Local resident
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In objection to the Order:

Mr M Howard	Landowner
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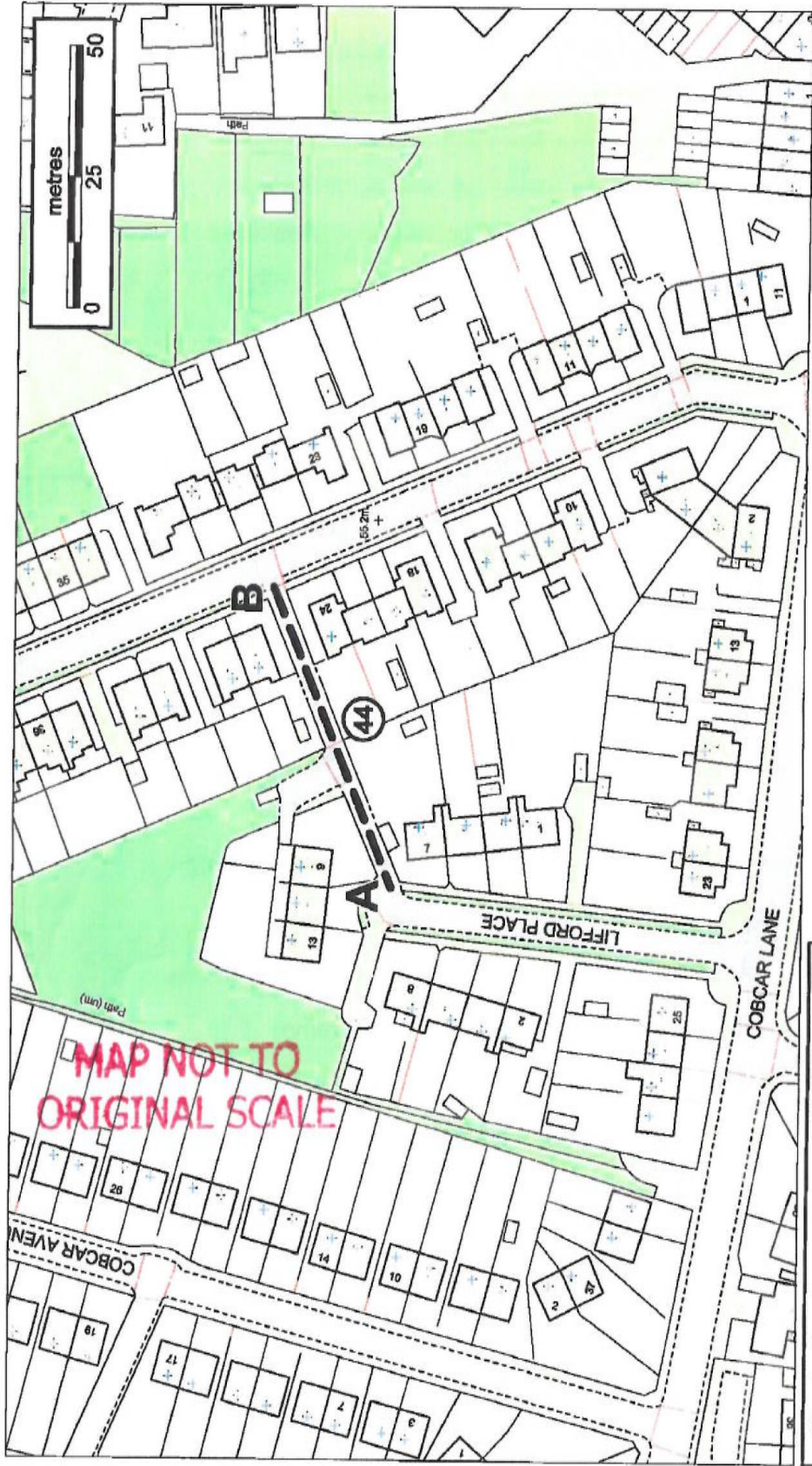
Mr W H M Hoyland	Solicitor, Pennine Law Solicitors, Riversdale, 37 Market Street, Hoyland Nether, Barnsley, S79 9QR
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who called:

Mr J Hibberd	Landowner
Mrs A Hibberd	Landowner
Mrs E Walton	Local resident

Inquiry documents

1. Six interview forms submitted on behalf of Mr & Mrs Hibberd.



Footpath to be added to the
Definitive Map & Statement

Map 1 referred to in The Metropolitan Borough of Bamsley (West Riding of Yorkshire County Council Definitive Map and Statement) (Hoyland Nether) Modification Order (No. 16) 2017	
Drawn by BMBC	Scale 1 : 1000
Map 1	-