



Order Decision

Inquiry held on 21 August 2018

by Sue M Arnott FIPROW

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

Decision date: 31 August 2018

Order Ref: ROW/3188167

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Cumbria County Council (Parish of Broughton Moor: District of Allerdale) Definitive Map Modification Order (No 1) 2017.
- The Order is dated 3 August 2017. It proposes to modify the definitive map and statement for the area by adding a footpath in Broughton Moor between Chapel Terrace and Footpath 219014 as shown on the Order map and described in the Order schedule.
- There were two objections outstanding when Cumbria County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: Confirmation of the Order is proposed, subject to the modifications set out in the Formal Decision below.

Procedural matters

1. On 21 August 2018 I held a public inquiry at the Wave Centre in Maryport, having visited the site of the claimed public footpath, unaccompanied, during the previous afternoon. At the close of the event, none of the parties present requested that I make a further visit.

The Main Issues

2. The main issue here is whether the evidence is sufficient to show that, in the past, the Order route has been used in such a way that a public footpath can be presumed to have been established.
 3. Cumbria County Council (CCC) made the Order under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(i). Therefore if I am to confirm it I must be satisfied that, on a balance of probability, the evidence shows that a public right of way subsists along the route described in the Order between the points labelled A, B, C, D and E.
 4. The case in support of the Order was based on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980. For this to have occurred, there must have been use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.
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5. As I explained at the inquiry, in the alternative I may consider the common law approach. In addressing this possibility the issues I would need to examine are whether, during any relevant period, there was express or implied dedication by the owner(s) of the land in question (each having the capacity to dedicate a public right of way) and whether there is evidence of acceptance of the claimed right by the public. The burden of proof lies with those that assert the existence of a public path.

Reasons

Background

6. The origin of the Order route is linked to the connecting definitive footpath number 219014. At the inquiry this was said to have begun as a waggon-way between mines to the south and docks at Maryport to the north although it was not argued that this necessarily led to its eventual inclusion as a public footpath on the first definitive map prepared in the 1950s. However the route is clearly of some antiquity. Whilst its existence as a public path is not in doubt, its depiction on the definitive map (the legal record) is not without a degree of confusion since the scale of the map and quality of mapping means that it is difficult to judge, from this alone, its precise line on the ground.
7. Early Ordnance Survey (OS) maps often assist with interpretation of the definitive map in situations such as this and, although none have been submitted to me, I understand these are what led CCC to form its conclusion that the line of Footpath 219014 is as now depicted on the Order map as a series of black dots.
8. None of the evidence that is before me is in conflict with CCC's conclusion as to the position of the definitive footpath although that is not the central issue here. It is nonetheless important to make this clear since it seems that, in the past, incorrect information as to the line of this recorded public right of way has been given to various parties, no doubt leading to much of the frustration and anger that seems to have compounded problems at this site.
9. I am reassured that Footpath 219014 is drawn on the Order map with reasonable accuracy by a photograph produced at the inquiry by Mr Tuke whose family owned the site between 1967 and 1982; in the background a signpost can be seen, located on the opposite side of Seaton Road but pointing in the direction of the definitive footpath. This concurs with the line of dots on the Order map.
10. Along with his parents, Mr Tuke set up a garage and petrol station facing Seaton Road (known as Standingstones Garage) and built a new dwelling (Sunstones) to the south of the site. At the inquiry he was able to provide details of the relevant planning permissions granted in 1968/9 together with the approved plans. Further, he recalled a government inspector visiting the site at the time and advising that the development of the garage could only proceed if the footpath (291014) were to be diverted.
11. Mr Tuke stated that his father paid to have the footpath diverted. However no record of any formal diversion order to legally change the alignment of Footpath 219014 has been discovered. The line shown on the definitive map is therefore still the legally recorded route of this public footpath.

12. Meanwhile, and believing the formalities to have been taken care of, the Tukes proceeded to realign the public path on the ground. This involved building a brick wall 3 feet high between the forecourt and pavement and erecting a 4-foot high "wooden ranch-type" white-painted fence from the pavement, broadly parallel to A-B then across to the north eastern corner of new kiosk. This fence is shown on the plan dated 17 July 1967 attached to the planning application and is also visible on the second of Mr Tuke's photographs taken in 1971.
13. Thereafter members of the public were directed instead along the unofficial diversion which is now the route at issue here.
14. At some point in time which could not be established with any certainty, the signpost was moved to the end of the drive, confirmed by witnesses at the inquiry as having been in this position ever since they first lived in Broughton Moor in the mid-1970s.
15. I also note that Mr Tuke and others spoke of there being a private vehicular right of access along the Order route for particular owners and occupiers of land to the south and west¹.
16. In 1982, the Tukes sold the garage and (later) the house to Mr McDougall and his family who continued the business until the eventual closure of the garage and the deaths of Mr and Mrs McDougall. Thereafter the estate was managed by their son and daughters.
17. On 2 December 2014 planning permission was granted for the development of three dwellings on the former garage site. At that stage the planning authority was advised that the definitive route of Footpath 219014 lay along the present Order route. Since the public were walking this route at that time and it was signposted as a public footpath, the planning officer clearly had no reason to doubt this advice.
18. In June 2016 the house was sold to Mr and Mrs Crayston who now own the majority of the land over which Order route passes². Shortly afterwards, in August 2016 the site of the former garage was sold to Mr and Mrs Hogarth.
19. In July 2016 Mr Crayston began building a wall to separate his drive from the development site, leaving a gap where he accepted that the definitive line of Footpath 219014 crosses his land (as shown by the dots on the Order map). In addition on 6 September 2016 he installed a gate at point B and locked it.
20. Sometime after this, Mr and Mrs Hogarth blocked the gap left by Mr Crayston since it was their understanding, based on the erroneous advice given in response to the 2014 planning application, that the public right of way ran along the drive and not across their land.
21. With local people being unable to access either route, an application was made to CCC in November 2016 to record a public right of way along the drive on the basis of long-standing user, this being accompanied by statements from 15 users of the route. Following consideration of a report dated 18 July 2017, CCC concluded that a public right of way had been reasonably alleged to subsist and subsequently made the Order on 3 August 2017.

¹ Including Mrs Hetherington who owns the woodland south of D and who attended the inquiry out of concern that her access had been obstructed.

² A short section at the southern end lies in the ownership of Mrs Hetherington.

22. Whilst the standard of proof required to justify confirmation of an Order is higher, it being judged on balance of probability, at the inquiry CCC stated that it believed the available evidence to be sufficient to meet the relevant test.

The case for statutory dedication

23. When considering the evidence in relation to Section 31 of the 1980 Act, the first matter to be established is when the public's rights were brought into question.

Bringing into question

24. I agree with CCC's submission that the extent of the public's rights along the Order route was challenged on 6 September 2016 when passage was blocked by the locked gate installed by Mr Crayston. This establishes a twenty year period from September 1996 to September 2016 that requires closer scrutiny.
25. In addition I have also considered whether the status of the route was brought into question by two earlier events, namely (a) the installation of the signpost at point A and (b) the 2014 planning application.
26. As regards (a), it has proved impossible to identify either who installed the first such sign³ or exactly when this occurred. The evidence points to the early-mid 1970s. Given that the claimed route only appears to have come about as a result of changes made at the end of the 1960s, there is no reasonable prospect of any previous 20 year period of user being found, even if a precise date for installation could be established.
27. In relation to (b), it seems clear that the planning officer's report relayed misleading advice to the effect that the present Order route was in fact the recorded public right of way. That had the potential to bring forward a challenge but it seems there was none. That is perhaps unsurprising when the evidence before me indicates that the public had been using the drive for many years without challenge and that the owners of the land (the McDougall family) had been told by the Tukes that the public path had been diverted onto it around the time planning permission for the garage had been granted.
28. Although I suspect the outcome would be no different if the status of the way had been brought into question in 2014, I do not consider there to have been any challenge to the general (mis)understanding at that time that the Order route was Footpath 219014 and therefore already a recorded public path.
29. In summary, I am satisfied that the status of the Order route was brought into question on 6 September 2016. Accordingly I will examine the claimed use by the public during the twenty years preceding this date.

Evidence of use by the public

30. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been enjoyed 'as of right', without interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that is not by force, does not take place in secret and is not on the basis of permission.

³ I have noted that Mr Sims estimated the present wooden sign (which has since been moved from point A) is no more than 10 years old. However other witnesses at the inquiry confirmed that there had been a signpost at point A for many more years than that, the conclusion being that it had been replaced at some stage.

31. In support of the claimed route is the written evidence of use from 15 people who completed standard forms, although in this context I discount that of Mr Tuke as he did not use the claimed route as a member of the public (his family being owners of the land at the time). Of these 14 claimants, 4 gave evidence at the inquiry and answered all questions put to them by me.
32. In addition I heard oral evidence from two other people who had not previously completed forms but who nonetheless were able to contribute their own long-standing use of the route, both having considerable knowledge of the history of the village and well able to answer the questions put to them.
33. Whilst I accord greater weight to the evidence of those people who gave evidence in person and submitted to questioning, the written statements from the remaining claimants are consistent with the oral evidence.
34. However it became apparent from hearing evidence at the inquiry that the line used by the claimants is not accurately reflected on the Order map towards the southern end. All describe there being no limitation of any kind along the route from the road until a gap (located at a point I shall call X) beside the field gate which enters the access strip which lies to the east side of Sunstones. The gap leads into the woodland where it re-joins the definitive line at a point I shall call Y.
35. I have examined closely the regularity with which all the claimants used the route during the period between 1996 and 2016. Many reported seeing others similarly walking dogs, going for recreational walks and taking children to play on what was initially the Standingstones field but which subsequently became woodland. In terms of the quantity of use, I have no difficulty here in finding this sufficient to represent relevant use by the public.
36. It is clear that at no time was the claimants' use of the Order route with the express permission of the relevant landowner(s). Neither is there any suggestion that use took place other than in a completely open fashion.
37. Whilst there has been no physical force required in the manner in which the claimants have used the way, it is argued by one of the objectors that obstruction of the definitive route of Footpath 219014 has resulted in the public having no option but to find an alternative route, this being the present Order route along the drive.
38. Objector Mr Kind has referred to the case in 1860 of *Dawes v Hawkins*⁴ in support of his argument that use by the public of the claimed route was a consequence of being unable to use the lawful line which was obstructed; in the *Dawes v Hawkins* case, such use was not judged to show evidence of dedication of the alternative route. He highlights the headnote from the *Dawes* case: "...the public user thereof being referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stops a highway ..." such that it "affords no reasonable evidence of a dedication over that adjoining land".
39. CCC submits that the circumstances in the present case are sufficiently different to distinguish it from the scenario in *Dawes v Hawkins*. It argues that in the 1860 case the obstruction was temporary and the original way was eventually re-opened. Further, the landowner had not intended that a

⁴ *Dawes v Hawkins* [1860] 8CB (NS) 848, 141 ER 1399

- substitute way be dedicated in place of the original; the public had found their own way around the obstruction whereas here the landowner had positively encouraged people to use the 'new' route as an alternative.
40. The first photograph submitted by Mr Tuke (showing himself as a young man beside his father) shows that once the garage had been built the line of Footpath 219014 was blocked by the roadside wall. It remains so today.
 41. The second photograph shows the Tukes' forecourt with the white fence in situ, confirming that the fence illustrated on the 1967 plan of the proposed garage was subsequently erected and will also have prevented people from walking Footpath 219014 whilst it remained.
 42. Therefore, when the garage was first developed, the public would have had little choice but to follow the Tukes' diversion via the Order route. This would have been the nearest available alternative and at this stage I would agree that the circumstances show some similarity to those in *Dawes v Hawkins*.
 43. However, it seems that at some subsequent stage the white fence was removed as on an OS map dating from the 1980s no fence is shown. By 2008 another photograph shows the drive way to be open to the forecourt with a short length of brick wall separating the two areas part way along. Witnesses at the inquiry said that this had been the case for many years although they continued to use the Order route as signposted, not a diagonal line across the forecourt towards point C.
 44. The picture I draw from this is that for over 20 years members of the public have had the opportunity to choose which route to take so as to avoid the roadside wall which continues to obstruct Footpath 219014. The evidence shows that they did not switch to the closest line of deviation once a diagonal line became available with the removal of the white fence. Instead they positively opted to use the Order route. I accept these two possible options were close together, being at most around 2-3 metres apart, but that is sufficient to satisfy me that use during the period at issue was no longer referable to the obstructed definitive line.
 45. Whilst the matter is not beyond doubt, on balance I take the view that the Order route became established as a separate entity once the public had a choice. Consequently I decline to follow the rule set in *Dawes v Hawkins* and am satisfied that the claimed use during the relevant period was 'as of right'.
 46. To satisfy the relevant tests, the evidence must also show that the Order route was used continuously and without interruption throughout the twenty year period.
 47. Yet in their evidence, some claimants referred to the path being closed for a short period whilst open cast mining was carried out on a site to the south of the Order route. Planning permission was granted for these works in 1988. Mr Armstrong recalled clearly there being notices posted in the village on public paths indicating that these would be closed for seven years⁵. One such notice was said to have been attached to the signpost at point A.

⁵ No copy of any such notice was available but I note Mr Armstrong's very clear recollection that the closure period was 7 years.

48. However other witnesses said that they still used the Order route because it was possible to continue beyond it by walking below the baffle bank that had been constructed to screen the works, not on the public path.
49. In any event the temporary closure would have ceased in 1995 before the period at issue here. Indeed witnesses reported that the paths were quickly restored once mining came to an end. This being the only incident that caused some people to interrupt their use of the claimed footpath, I am satisfied that between 1996 and 2016 use by the public was continuous.
50. Consequently, I find the evidence before me to be sufficient to raise a presumption that the way had been dedicated as a public right of way.

The intentions of the relevant landowners

51. No evidence has been put forward to show that, at any time during the relevant period, the owners of the land took any steps to challenge the public's use of the Order route.
52. Indeed a letter written on 4 October 2016 by Mr McDougall's son who lived at Sunstones from 1982 to 2002 makes clear his family's belief that the public right of way ran along the drive as it did during the Tukes' ownership (albeit an unfounded belief since it appears that no formal order to divert the path was ever confirmed).
53. I therefore find no evidence to show that between 1996 and 2016 the landowners made clear to the public using the Order route that they did not intend to dedicate it as a public right of way. Indeed the opposite appears to be the case.
54. In conclusion, and on the basis of the information provided, I am satisfied that the relevant statutory test is met: that, on a balance of probability, a public right of way on foot has been shown to subsist and consequently that the Order should be confirmed with a modification to the Order route to reflect more accurately the line walked by the claimants, A-(B)-X-Y.

Other matters

55. At the inquiry CCC requested that I modify the Order to remove the gate at point B, listed as a limitation in the Order schedule, on the basis that this was installed at the end of the relevant period of use and therefore the presumed dedication was not subject to the gate. I agree with that analysis and propose to delete the gate from the Order schedule. In addition, I propose to remove the gap listed at point C and gate at point D since I have concluded this was not the route walked by the claimants; instead I shall propose the recording of a gap at point X.
56. Although objectors Mr and Mrs Crayston were not present at the inquiry, I have nonetheless taken on board points made in their objections but only where these have been relevant to the matters before me.

Conclusion

57. Having regard to the above and all other matters raised at the inquiry and in the written representations, I propose to confirm the Order with a modification to line of the Order route as referred to in paragraphs 34, 54 and 55 above.

Formal Decision

58. I propose to confirm the Order subject to the following modifications:

In the Order schedule

In **Part 1: Modification of the Definitive Map**

- Delete 'References on plan' "A-B-C-D-E" and substitute "A-X-Y";
- Amend 'Description of length of right of way to be added' to: "A new length of public footpath in Broughton Moor from Chapel Terrace at Point A (GR 305062 533323) south south eastwards for about 47 metres to a gap at Point X (GR 305088 533285) continuing south south eastwards for a further 16 metres to join Footpath 219014 at Point Y (GR 305094 533270)";
- Delete 'Width' as stated and substitute "A to Y = 3m"

In **Part 2: Limitations and Conditions**

- Delete two field gates listed and amend details for gap to "Grid reference: 305088 533285" and "Width 1.0m"

In **Part 3: Modification of Definitive Statement**

- Amend 'Width' to "3m"; amend 'Length' to 63 metres; amend 'Description' to read "From Chapel Terrace Broughton Moor south south eastwards to a gap at GR 305088 533285; then south south eastwards to join FP 219014";
- Delete 'Limitations & Conditions' as listed and substitute 1.0m gap at GR 305088 533285";

On the Order map

- Add point X at GR 305088 533285 and Point Y at GR 305094 533270;
- Amend the line of "Footpath to be added" via Points X and Y.

59. Since the confirmed Order would (if modified) (a) affect land not affected by the Order, and (b) not show a way as it is shown in the Order as made, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of my 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 advertisement procedure.

Sue Arnott

Inspector

APPEARANCES

In support of the Order

For the Order-Making Authority:

Ms P Christie Solicitor, Cumbria County Council

Who called:

Mr A Sims Countryside Access Officer; Cumbria County Council

Also supporting the Order:

Mr D Tuke

Mr T Armstrong

Mr K Herbert

Mr S Turnbull

Mr D Neale

Ms C Ferguson

Mr J Parker

Mrs E Hogarth

Mr P Hogarth

Opposing the Order

None present

Interested parties

Mrs S P Hetherington

DOCUMENTS

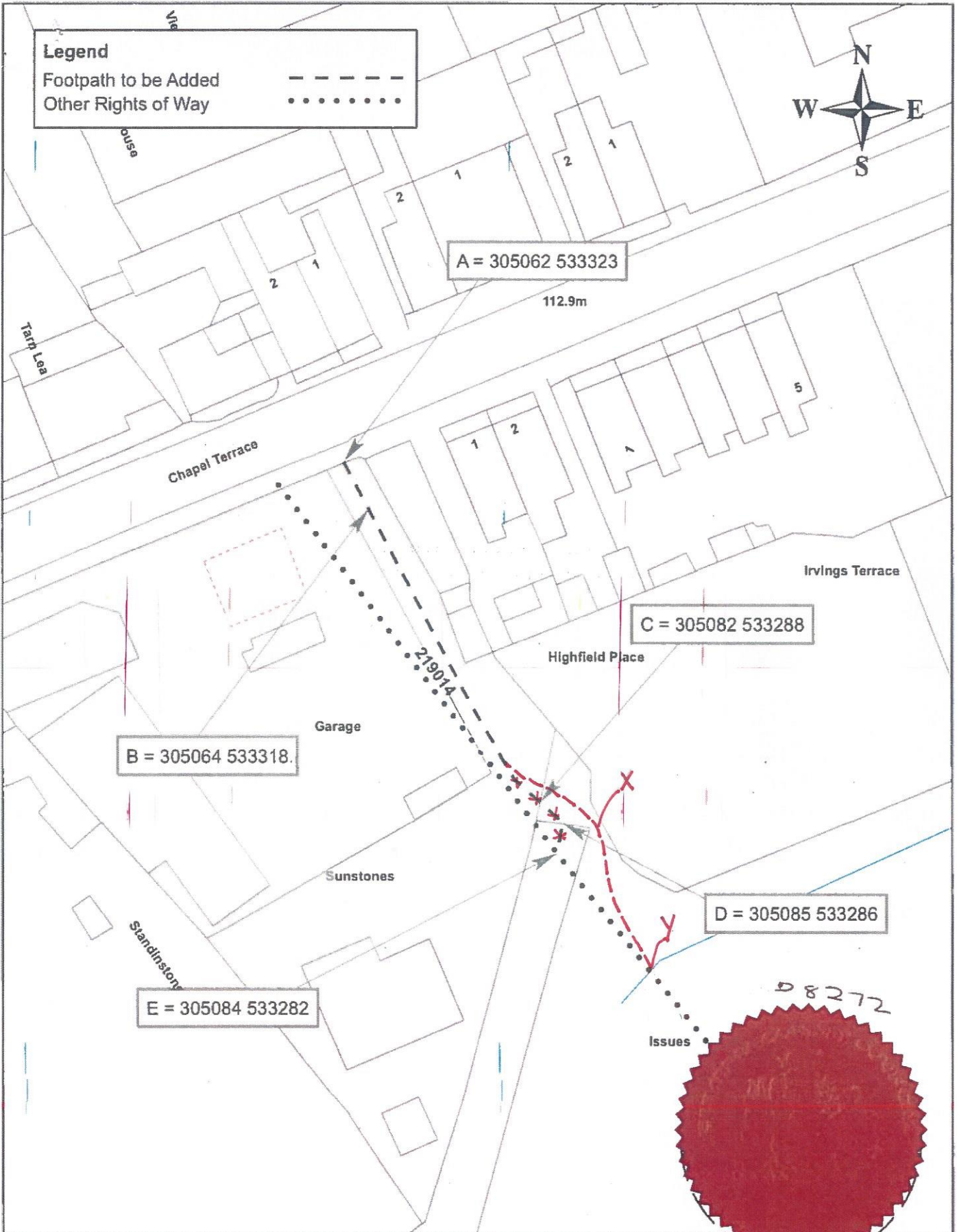
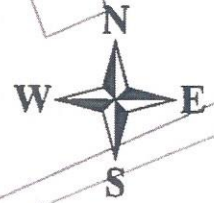
1. Copy of the statutory objections
2. CCC's statement of reasons for seeking confirmation with appendices
3. CCC's statement of case submitted on 8 May 2018 and proof of evidence submitted on 23 June 2018
4. Mr & Mrs Crayston's statement of case submitted on 19 June 2018 and further statement submitted on 24 July 2018
5. Mr Kind's statement of case submitted on 14 May 2018 and addendum submitted on 10 August 2018

Submitted at the inquiry

6. Proof of evidence of Andy Sims (Cumbria CC)
7. Copy of application form dated on 19 October 2016
8. Letter dated 10 August 2019 from Mrs E Strong
9. Copy of planning permissions CA2483 and CA 2567 dated 9 December 1968 and 23 June 1969 respectively relating to development of dwellinghouse and garage at Standingstones, Broughton Moor
10. Two photographs submitted by Mr Tuke
11. Letter from Cumbria CC to Mr Parker dated 23 October 2000 with accompanying Ordnance Survey maps
12. Various photographs submitted by Mr and Mrs Hogarth
13. Copies of correspondence between Mr & Mrs Hogarth and Cumbria County Council
14. Handwritten statement of Mr I McDougall dated 4 October 2016
15. Copy of the Order annotated with modifications requested by CCC

Legend

Footpath to be Added
Other Rights of Way



A = 305062 533323

112.9m

Chapel Terrace

Irvings Terrace

C = 305082 533288

Highfield Place

Garage

B = 305064 533318

Sunstones

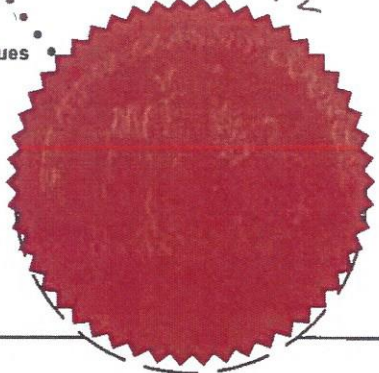
D = 305085 533286

Standinstone

E = 305084 533282

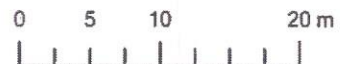
Issues

08272



Wildlife and Countryside Act 1981 Section 53
Definitive Map Modification Order
Sunstones Garage, Broughton Moor

Scale 1:500 @ A4



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S. Wainwright