



## Order Decision

Inquiry opened on 18 June 2019

**by Sue Arnott FIPROW**

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

**Decision date: 26 July 2019**

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### **Order Ref: FPS/H0928/5/1R**

- This Order is made under Section 257 of the Town and Country Planning Act 1990. It is known as the Eden District Council Public Path Stopping Up Order (No 1) 2015 Cross Croft, Appleby (footpath 303028).
- The Order is dated 22 April 2015. It proposes to stop up a section of public footpath that crosses (at grade) the Settle-Carlisle Railway Line at Appleby, as shown on the Order map and described in the Order schedule.
- There were 10 objections and representations<sup>1</sup> outstanding when Eden District Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

**Summary of Decision: The Order is confirmed with modifications as set out in the 'Formal Decision' below.**

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### **Procedural Matters**

1. In November 2016 a public local inquiry was held into this Order. The Inspector's decision, issued on 4 January the following year, was quashed by order of the High Court<sup>2</sup>, a decision subsequently challenged but upheld by the Court of Appeal<sup>3</sup>. I have been appointed to re-determine the Order and accordingly held a second public local inquiry into the Order at the Town Hall in Penrith on 18, 19, 20 and 21 June 2019.
2. Although the timetable set for the submission of documents prior to this inquiry was governed by the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007, related legal proceedings taken (and due to be taken) through the Courts in the months leading up to the event created a level of uncertainty that was not helpful to the process of preparing for submission inquiry documents by the parties concerned with this case. As a result, I amended the deadlines to accommodate the obvious need to take account of the fluctuating position as regards the planning situation, this having a direct impact on my consideration of this Order. Whilst serious concerns had been expressed in writing before the inquiry, no representations were made at the start of the event to the effect that any party had been unable to submit their case because of the changing circumstances.
3. Whilst I visited the site, unaccompanied, during the afternoon of 17 June before opening the inquiry, I made a further inspection at the end of the

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<sup>1</sup> The previous Inspector noted 9 objections extant at the start of his inquiry, all of which remain.

<sup>2</sup> *R (on the application of Network Rail Infrastructure Ltd) v the Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 2259 (Admin) (the High Court case)

<sup>3</sup> *R (on the application of Network Rail Infrastructure Ltd) v the Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 2259, [2018] EWHC Civ 2069

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proceedings on 20 June, on that occasion with representatives of the order-making authority (Eden District Council (EDC)), the applicant (Story Homes Ltd (SH)), supporters Network Rail Infrastructure Ltd (NR) and objector to the Order the Ramblers' Association (RA).

### **The Main Issues**

4. Since the Order is made under Section 257 of the Town and Country Planning Act 1990 (the 1990 Act), if I am to confirm it I must be satisfied that it is necessary to permanently stop up the way in question (shown as A-B-C-D-E on the Order map) to enable development to be carried out in accordance with a valid planning permission.
5. Whilst not expressly stated in the relevant statute, both the Courts and Government Circular 1/09 version 2 (Defra) make clear that, in determining an order of this kind, the decision-maker has a discretion as to whether to confirm it, even if the stopping up is shown to be necessary. Thus, it is widely accepted that any disadvantages or losses likely to arise as a result of the path closure to members of the public or to persons whose properties adjoin or are near to the existing highway, may be weighed against the advantages to be conferred by the proposal when determining the Order.
6. In short, these legal tests have been described by the Courts as 'the necessity test' and 'the merits test'. Confirmation requires both to be satisfied<sup>4</sup>.
7. Whilst I must also have regard to any material provisions in any rights of way improvement plan for the area when determining this Order, no issues have been raised in this respect. In addition, in reaching my conclusions I have considered the requirements of the Equality Act 2010 where appropriate.

### **Reasoning**

8. The rationale for this stopping-up order, and in particular NR's support for its confirmation, is that residential development adjacent to the Carlisle-Settle Line will unacceptably increase the level and frequency of public pedestrian crossings of the railway, especially by vulnerable and encumbered people and for a multitude of user groups.
9. Although it had made the Order having been satisfied that stopping up was justified, EDC adopted a neutral stance as regards confirmation and took a relatively passive role at the inquiry. On its behalf, Mr Owen outlined a number of factual matters including a chronology of events relating to the issue of the various planning permissions affecting the site.

### **Background**

10. It is not necessary for me to set out in full the planning history of this development but certain events leading to the making of the Order are relevant to some of the arguments made by objectors. I will therefore note the key points here.
11. In short, planning permission was granted for a major housing scheme in Appleby in July 2013 (reference 11/0989). This included the construction of 142 dwellings including 26 units of affordable housing, open spaces and

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<sup>4</sup> A point articulated by Lindblom LJ at paragraph 51 of his judgement in the Court of Appeal case (see footnote 3 above).

associated infrastructure on a site that sits between Cross Croft to the south, Back Lane to the west, Drawbriggs Lane to the north and the Carlisle to Settle railway to the east.

12. A variation of the scheme was then sought, leading to the issue of a further permission in March 2014 (reference 13/0969). Both permissions contained the same condition (no. 14) which restricted the development to 32 houses (on plots located furthest from the railway line) until "*a footpath diversion order has been made and confirmed...*". The condition stated that this order was to "*incorporate the diversion of the (existing) footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle-Settle public railway crossing from the site ... and re-routing of the footpath to the north east of the site that can in principle afford connectivity to Drawbriggs Lane...*".
13. In response to applications from the developer (SH), the planning authority EDC then made two public path orders, both dated 22 April 2015. The second of these<sup>5</sup> (No.2) dealt with the requirements of the first part of the condition, this being a minor diversion of Footpath 303028 adjacent to the cemetery to accommodate a section of the development that would otherwise have obstructed the path. This order was not opposed and was subsequently confirmed by the authority on 12 December 2018.
14. The first order (No1), addressing the second and third parts of the condition, is the one now before me for determination. This proposes closure of the part of Footpath 303028 from a point on the eastern boundary of the development site, over the railway (A-B-C) and through a wooded area to a point on Drawbriggs Lane (C-D-E). The Order also proposes the creation of an alternative footpath leading generally northwards within the development site<sup>6</sup> to the west of the railway boundary to a different point on Drawbriggs Lane (A-F-G-H).<sup>7</sup>
15. Shortly after these orders were made, approval for further variations to the development was granted with the issue of planning permission reference 14/0594 in May 2015. Development was subject to the same condition, albeit renumbered as Condition 13.
16. At this point, the procedures for determination of the opposed Order (No 1) began, leading to its submission to the Secretary of State on 2 March 2016. Days later, on 9 March full planning permission was granted by EDC (15/1097) for variation of Condition 13 following an application by SH under Section 73 of the 1990 Act.
17. The new Condition 13 read:

*"No development hereby approved shall take place beyond plots ... (64 units total) unless any of the following exceptions occur: (i) A footpath diversion and stopping up order that incorporates the diversion of the existing footpath adjacent to the cemetery, the stopping up of it to prevent any access to the*

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<sup>5</sup> The Eden District Council Public Path Stopping Up Order (No 2) 2015 Cross Croft, Appleby (footpath 303028)

<sup>6</sup> I understand that part of the land was previously within the ownership of NR but was sold to SH to facilitate provision of the alternative link path.

<sup>7</sup> Although it is now accepted by all parties that the proposals in the Order should have stopped there, it went on to include the creation of the connecting section H-I-E which is already a recognised highway (Drawbriggs Lane). Whilst the intention is that pedestrians should follow the footway between these points depending on their direction of travel, the Order cannot create a new public right of way where one already exists. Consequently, I was asked by EDC to modify the Order so as to remove H-I-E from Part 2 of the Order Schedule and the Order plan if minded to confirm it.

*Carlisle-Settle public railway crossing from (the) site ...<sup>8</sup> and re-routing of the footpath to the north east of the site that can in principle afford connectivity to Drawbriggs Lane, (has) been made and confirmed by the LPA or the Secretary of State, or (ii) the Secretary of State, upon consideration of a lawfully made stopping up order as aforementioned in point i) does not confirm the order ...”*

18. It was interpretation of this condition that was the focus of debate at the first inquiry held in November 2016. Subsequently the Inspector’s decision to not confirm the Order was issued and this was later successfully challenged through the Courts (as noted in paragraph 1 above).
19. Although it is not directly relevant, I record also that a further permission was issued by EDC in November 2018 (18/0531) in which Condition 13 was removed. Following a legal challenge by NR, this decision was quashed by the Courts in April 2019 so that the condition was once again fully engaged. This is of note solely because for the period between November 2018 and April 2019 there was no restriction on SH’s progress towards completing the development.
20. This may explain why development on the site has continued beyond the 64 houses to which SH were restricted under the terms of the revised Condition 13. At the time of the second inquiry it was confirmed to me that 117 dwellings have been built, sold and occupied leaving 25 still to be fully completed; of these 25, 4 are due for occupation very soon, and a further 18 properties are in the final stages of construction. An injunction granted to NR against SH on 8 May 2019 prevented any further work on the final 3 dwellings until 1 July. On the day of my last visit, these properties had no roofs.
21. However, at a meeting on 16 November 2017 the planning authority decided it would postpone any enforcement action pending the determination by the Secretary of State of this Order.

### **Legal submissions**

22. As a result of the decisions of the Courts, useful guidance is provided on several aspects of this case. Nevertheless, objectors have made a number of submissions on matters concerning interpretation of the law and the approach to be followed in this particular case.
23. Before addressing those submissions, I firstly acknowledge a point made by Mr Lopez for NR: the issues leading to the successful challenge of the previous Inspector’s decision were confined to procedural matters and related solely to ‘the necessity test’; the merits of the Order were not addressed at the 2016 inquiry or in the ensuing Court cases. Consequently, as Mr Lopez put it, I begin “*from a blank canvass in exercising discretion on the ‘merits’ issue*”.
24. In fact both Mr Kind and Mr Duval (objectors) made submissions to endorse the existence of this discretion at the confirmation stage of an order of this kind. In addition to the case of *Vasilou v Secretary of State for Transport [1990]* that was discussed in both of the recent NR Court judgements, extracts from *K C Holdings (Rhyl) v Secretary of State for Wales and Colwyn Borough Council 91989*) and *R (oao Batchelor Enterprises Ltd) v Secretary of State for the Environment [2001]* have been referred to by objectors.

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<sup>8</sup> (including the erection of signage and fencing prohibiting such access)

25. In essence the argument put forward is that Parliament attached considerable importance to the extinguishment of public rights of way, Keene LJ (in the KC Holdings case) suggesting there exists "*a degree of presumption*" against extinguishing or diverting public rights of way. He emphasised that "*the Secretary of State must be sure that it is necessary to confirm an order*" and "*must consider the merits of the right of way proposed to be altered*". That is not in dispute here.
26. However a further point is made by objectors: Keene LJ goes on to state that "*road safety is a matter of central importance to the exercise of [the Secretary of State's] functions under section 247<sup>9</sup> and he must, in my judgement, be able to take it into account when considering such an application, irrespective of the views taken by the local highway authority or the local planning authority*".
27. This issue is highlighted particularly since the argument is made that there is a clear and essential 'merits' case to be made as regards the comparative safety of the railway crossing and the road alternative. Again, as a principle that is not challenged by the supporting parties and it is an essential element in my determination of this Order.
28. It is also clear to me that the 'merits test' requires a comparison between the route that would be stopped up by the Order and the alternative route that is proposed for the public. However, the aspects of each route that may be considered are not limited. I have already noted that safety is an important factor here, and the relative convenience and attractiveness of both are also relevant.
29. To summarise the relationship between the two tests, the guidance offered by the most recent judgement shows that the Court of Appeal was satisfied that the Order is, and remains, 'necessary' for so long as the 'merits' issue is either outstanding and yet to be concluded or is concluded in favour of confirmation of the Order.

#### *Validity of the Order*

30. Mr Kind submits that if the development authorised under planning permission 15/1097 is completed, or substantially completed, and only if 15/1097 is the 'parent' of this Order, then the Secretary of State no longer has jurisdiction to confirm the Order, regardless of any made-out case on necessity.
31. Taking Mr Kind's second point first, the order states that it was made in relation to planning permissions 11/0989 and 14/0594. However, it was agreed by all parties present at the (second) inquiry that in fact it is 15/1097<sup>10</sup> that is being implemented by SH, and that it is this permission that now falls to be considered here<sup>11</sup>. This was also the finding of the previous Inspector who further concluded that the Order is not invalidated by the change, a view that was subsequently endorsed by the Courts<sup>12</sup>, even though permission 15/1097 was issued after the Order was made<sup>13</sup>.
32. Arguments made by objectors Mr Kind and Mr Wilson in relation to this point take the issue no further and I rely on the findings of Holgate J in the High

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<sup>9</sup> And by analogy Section 257

<sup>10</sup> And plan revision "V"

<sup>11</sup> Although it is accepted that planning permission 14/0594 is also still extant.

<sup>12</sup> The judgement of Holgate J at paragraph 64

<sup>13</sup> Mr Wilson requested that I modify the Order to make clear that 15/1097 is the relevant planning permission.

Court case (at paragraph 76) in accepting that, despite references in the Order having been superceded, it is still valid and remains capable of confirmation (after consideration of the relevant tests judged in relation to the planning permission actually being implemented rather than those explicitly stated).

*Whether the development is substantially complete*

33. Mr Kind's first point is one also made by Mr Wilson and Mr Duval. All base their submissions on the issue in the case of *Ashby & Dalby v SSE & Kirklees MDC [1978]* & *CR 362 (CA) [1980]*. In that instance, as Mr Wilson described it, the developer had 'jumped the gun' by seeking to complete the development before a decision was reached on the diversion of a public right of way.
34. In brief, the *Ashby* case established that orders can still be made under the 1990 Act so long as some of the authorised development remains to be completed. However, where development, in so far as it affects a right of way, is substantially complete, the power to make such orders is no longer available as it cannot be argued that the diversion is necessary to enable the development to proceed.
35. Conveying this principle, Defra Circular 1/09 v2 advises, at paragraph 7.11, that development "*in so far as it affects a right of way, should not be started and the right of way should be kept open for public use, unless or until the necessary order has come into effect.*"
36. Whilst NR points to the building work in Appleby yet to be completed (including the three dwellings with no roofs), Mr Duval submits that the development is 98% complete. In his submission, that qualifies as 'substantially complete' since 'substantially' means 'largely or mostly' and the development is the actual construction work (not the condition), even if in breach of the planning condition. He argues that "*the permission for the houses already completed has been spent, and it is only the effect of the completion of the remaining houses that should be considered*". Since the planning permission allowed for 64 houses to be finished and occupied, only the remaining 78 houses fall to be considered. In his view, the degree of completion should be judged on the date the decision is taken.
37. Mr Wilson considers that NR has artificially prevented the full completion of the whole development by injunction but in his view this does not override the fact that the development is now substantially completed.
38. For SH, Mr McNally argued that is not the case, highlighting other infrastructure works yet to be finished in addition to the three dwellings which are the subject of the injunction.
39. NR supports that position, but Mr Lopez submitted that, even if all the construction work was completed, in this case that would not cause the stopping up of Footpath 303028 to cease to be 'necessary' to enable the development to be carried out in accordance with planning permission 15/1097.
40. He argues that both the *Ashby* point and paragraph 7.11 of Circular 1/09 apply to cases where a right of way would be physically obstructed by development. In this case, no part of Footpath 303028 would be blocked by development<sup>14</sup>;

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<sup>14</sup> Aside from that part recently diverted by Order (no.1); see paragraph 13 above.

rather, it is Condition 13 with its 'Grampian'<sup>15</sup> effect that creates a legal obstacle which falls to be addressed by the Order.

41. On this point, I am guided by the judgement of Lindblom LJ in his Court of Appeal judgement at paragraph 13. Here he accepted that "*the requirement of "necessity" for the making and confirmation of an order under sections 257 and 259 may be satisfied by the existence of either a physical or a legal obstacle<sup>16</sup> to the development proceeding.*"
42. It seems to me that where one is dealing purely with a legal obstacle, which Lindblom LJ noted might take the form of a condition restricting the scope of the development, then the principle established in the *Ashby* case has little relevance. Although as a matter of fact there is still building work to be done by SH on the site, the question of whether or not the development is *substantially* complete does not materially affect consideration of the necessity test since this is acknowledged to hinge on the interpretation and application of Condition 13. Footpath 303028 remains open for use by the public.
43. The progress of the construction works beyond the 64 unit limit set by the condition was (and is) clearly a matter for the planning authority and I offer no view on EDC's decision to hold back any enforcement action until the Order has been determined (as noted above at paragraph 21).

***Whether the stopping up of Footpath 303028 is necessary to allow development to be carried out in accordance with a valid planning permission***

44. As I have noted above, in physical terms there is no need to make any change to the route of Footpath 303028 to enable any part of the development to take place (other than as has already been provided by Order No. 2). However, for the development to proceed in accordance with the relevant planning permission (which has been established to be 15/1097), it must comply with the conditions placed on it. It is therefore necessary that the requirements of Condition 13 (noted above at paragraph 17) are met if the development is to be carried out in accordance with planning permission 15/1097.
45. At the inquiry Mr Wilson submitted that the order cannot be treated independently of the planning condition which prompted it, and that the justification for the 'Grampian' condition must be considered when assessing the necessity for the order; in his view these matters are inseparable.
46. I agree, although in this case the construction of the condition itself has led to complications in its interpretation. That aside, it is not solely the fact that a condition exists requiring the stopping up of a footpath that makes an order necessary; the reason for the condition is arguably where the substance of the justification lies.
47. Interpretation of Condition 13 was fully explored by Holgate J in the High Court and later by Lindblom LJ in the Court of Appeal, and I am bound by the decisions of both Courts.
48. Lindblom LJ commented (at paragraph 42) that Condition 13 "*is in typical "Grampian" form. Its point and purpose are evident both in its own terms and in the "Reason" for its imposition. It partly restricts the progress – both construction and occupation – of the development permitted by making it*

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<sup>15</sup> A reference to the case of *Grampian Regional Council v City of Aberdeen District Council* [1984] 47 P & C R 633

<sup>16</sup> My emphasis

- depend on events yet to occur through a further statutory process – the process for the making and confirmation of a "footpath diversion and stopping up order", and on a decision being made one way or the other, in the course of that process. And the "Reason" for the condition explains why: "[to] overcome adjacent public highway conflict", and to support the policies of the Local Transport Plan and of the Development Plan to which it refers."*
49. As further guidance, the judgement continues (at paragraph 44): *"Essential to understanding how condition 13 regulates the carrying out of the development is to recognise that it contains not merely one "Grampian" restriction, but two. These two controls operate together, in sequence."* It was accepted that the second 'exception' does not come into play unless the first exception fails.
50. Therefore, insofar as Condition 13 represents a 'legal obstacle' preventing the full completion of the development, I shall initially focus on the first 'exception', turning to the second only if this does not lead to confirmation.
51. The reasons given in Decision Notice 15/1097 for imposing Condition 13 are stated to be: *"To overcome adjacent public highway safety conflict. To support Local Transport Plan Policy LD5 LD7 and LD8, Structure Plan Policies T25, T27 and L53 and Eden Core Strategy Policies CS5 and CS18 and the NPPF<sup>17</sup>."*
52. Although not explicit in the reasoning, the "adjacent highway safety conflict" is most likely a reference to the requirement in the condition to stopping up the public right of way to prevent access to the railway crossing.
53. In her evidence for NR, Ms Stephenson explained each of the policy references which support Condition 13, all aimed at promoting public safety on highways and at points at which members of the public may come into contact with hazards arising from various means of transport including trains.
54. At a local level, many of the original policy reasons given by EDC for imposing the condition have been replaced by newly adopted plan policies. The current Eden Local Plan (2014-32)<sup>18</sup> and the Cumbria Local Transport Plans 2 and 3 each provide support for the approach taken to the development of this site and the proposals for Footpath 303028.
55. In particular, EDC's adopted Local Plan and Policy DEV3 discourages the removal of a public path unless an acceptable alternative can be provided and a legal order obtained. Further, it does not support development that *"would lead to a material increase or significant change in the character of traffic (vehicles, pedestrians, cyclists, horse riders and animals) using a rail crossing, unless it can be demonstrated that safety will not be compromised, in consultation with Network Rail"* or where there would be *"a severe, unmitigated impact on the surrounding highway network"*.
56. At the national level, a revised version of the NPPF was released in July 2018, further strengthening the policy basis for the imposition of Condition 13. A key paragraph is 108: *"In assessing ... specific applications for development, it should be ensured that: ... (b) safe and secure access to the site can be achieved for all users; and (c) any significant impacts from the development on the transport network ... or on highway safety can be cost effectively mitigated to an acceptable degree."*

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<sup>17</sup> National Planning Policy Framework

<sup>18</sup> Adopted October 2018

57. Whilst Mr Wilson voiced criticism of EDC's handling of the decision to grant planning permission, the relevance of these policies to the Order was not challenged and I accept these underpin the reasoning for Condition 13, even more so in their revised and updated form.
58. It became apparent at the inquiry that when EDC first imposed condition 13 (initially as 14) in response to NR's concerns following consultation on the various planning applications made by SH, the full extent of the risks foreseen by NR were not articulated to the planning authority.
59. Mr Duval reasoned that the wording of the revised condition implies that the completion of 64 houses cannot present a safety problem, otherwise NR would have objected to the rise from 32 to 64. He questioned the point at which the level of risk became unacceptable. Now these houses exist and are occupied, he argues that it is only the effect of the remaining properties that should be taken into consideration in addressing the necessity test. NR challenged his analysis, saying it did not judge the increased risk arising from 32 houses to be acceptable, nor later 64 houses; that was a judgement made by EDC for reasons that have not been explained.
60. Nevertheless, NR made the case that, in setting the condition, EDC had recognised there would be a material change of character and use of what is referred to here as the 'Dairy House crossing', thereby importing an unacceptably high level of risk to the existing footpath.
61. I received forceful evidence from NR's witnesses, Mr Hume and Mr Greenwood, in respect of the dangers identified here. Mr Hume offered detailed assessments that had been carried out using two different methods; the All Level Crossing Risk Model (ALCRM) which seeks to quantify the comparative risks of crossings to aid the decision-making process for identifying and mitigating the risks identified, and the Narrative Risk Assessment (NRA), designed to introduce a more qualitative measure.
62. Assessments were undertaken on the basis of pedestrian counts undertaken in October 2014 and more recently in December 2018/January 2019 (including photographic evidence gathered by CCTV) together with a further data gathering site visit in April 2019. The resulting forecasts for increases in usage (up to 80 people per day) were challenged by objectors who pointed to the already high levels of occupation within the new development at the time of the 2019 survey.
63. Although objectors were reluctant to agree that the crossing is inherently unsafe or dangerous for most users, I recognise that its position immediately adjacent to a new family-focused housing estate, with access limited only by a small kissing gate, brings forth a new potential for misuse, especially by young people and unsupervised children. Even if the number of regular path users does not rise to the extent forecast by NR, there is still a need to address the demonstrably real problems of mis-use, distracted use and use by vulnerable people of this crossing, all of which is exacerbated by the geographic constraints of the line curvature at this point which restrict visibility.
64. Already CCTV has shown all these types of activity taking place at the Dairy House crossing, including night-time loitering by youths, dog-walkers and people using mobile phones who are easily distracted, and the ease of access onto the track by un-supervised children.

65. Mr Hume outlined the range of options normally available to NR in mitigation of these types of risks but the physical constraints of this site prevent consideration of a bridge or underpass. In addition, its location near to Appleby station restricts the technical solutions available, in particular the use of miniature stop light (MSL) systems. All these and others had been evaluated, with only the possibility of an integrated MSL system at a cost of around £1.5m or an order to close the footpath remaining as options.
66. Mr Greenwood gave evidence to support NR's submission that the cost of an integrated MSL system could not be justified given the level of usage of this path and the unacceptably high level of risk that would remain from mis-use even if it was installed. Moreover, there would be no funding for such a system available within current budgets and spending timescales.
67. A study of the permeability and accessibility of the development site had been commissioned by SH in relation to the removal of the former condition 14. This was carried out by Vectos in 2014 and also examined safety of the crossing (although not the relative safety of both routes at issue). This study has been overshadowed by the detail of NR's research and the evidence presented to the inquiry. Consequently I place little or no reliance on this.
68. In summary, I accept there are serious concerns for the overall safety of the public at this crossing, these presenting risks that cannot reasonably be mitigated by any means other than the closure of the public right of way.
69. I find there to be clear and documented policy reasons for the imposition of Condition 13 in the circumstances of the development here. Planning permission for the development has been granted, remains valid and is subject to Condition 13 requiring consideration of a stopping up order for Footpath 303028. This Order is therefore necessary to enable the first 'exception' referred to in the condition to be satisfied.

***'The merits test': Disadvantages v advantages of the proposal***

70. Having accepted that closure of a section of Footpath 303028 is necessary to allow the authorised development to proceed to a conclusion, I turn next to consider the overall public interest and in particular the effects of the proposal on path users. As I noted earlier, any disadvantages or loss likely to arise as a result of the diversion to members of the public may be weighed against the advantages to be conferred by the diversion when determining the Order. In addressing 'the merits test', various issues have been raised, broadly under three main headings: convenience; attractiveness, character and enjoyment, and safety, all of which are inter-related to a degree.
71. Before I examine these issues, I note here that at the inquiry Mr Wilson expressed concern that the 'Grampian' condition had been said to 'negate the necessity test' and possibly overrides any future 'merits test'. That is not my interpretation of the Court judgements. Whilst I consider the necessity test to be satisfied for the reasons given above, I intend to examine the merits of the Order in full.
72. It is important to note that whilst stopping up the section of Footpath 303028 between points A and E, the Order also proposes to create a new 2 metre wide public footpath as an alternative. Since this new route (A-F-G-H) has already been constructed, a direct comparison between the two is readily available.

73. There is no doubt at all that if simply walking between points A and E, the alternative via A-H and the Drawbriggs Lane footway is longer. On my accompanied site visit, the difference was timed at an additional 2 to 3 minutes, depending on the speed of walking.
74. However, this increase must be considered in context. As Mr Duval submits, there will be longer-distance walkers using the full length of Footpath 303028, from Back Lane up to Roman Road, as part of a circuit and for whom the alternative via A-H-E would clearly be necessary. Yet for this group of users, the additional time and distance would represent only a proportionally small increase in their journey overall.
75. It is possible that residents of the new development will find work on the industrial estates to the south east of the site. Walking to work would also entail following the alternative route in full but, depending on the location of 'home', it may be more direct to use estate roads and walk via Cross Croft.
76. However, most other popular destinations lie in the opposite direction. It is highly likely that, as a result of the development, the majority of use of this path by residents will be to afford access to the local primary school, the secondary school, Appleby railway station, and parts of the town centre. An examination of each of those possible journeys shows that walking via the alternative route A-H would be shorter than using the existing A-E.
77. Moreover, using the smooth-surfaced and gently sloping new path down to a chicane-style safety barrier at H avoids two kissing gates (one with 5 steps), a narrow stony walkway with encroaching vegetation, a railway crossing with its wooden boardwalk, an unsurfaced path through a wooded area and finally a steep decent involving 4 steps down to the road at point E. In terms of gradients and limiting conditions, the alternative A-H-E clearly has many advantages over A-E for people with mobility restrictions.
78. Whilst the woodland to the east of the railway line currently has the attraction of a chicken coop near the footpath (though not all users will welcome that), the new route A-F-G-H is not an unattractive walk, G-H passing beside trees on the railway embankment. Inevitably this option involves walking along the Drawbriggs Lane pavement, although fortunately for some users, point H is almost opposite the footpath to the station.
79. As far as enjoyment is concerned, a traffic-free route is always to be preferred over one beside a road. Yet, whilst I have no firm details of vehicular usage, Drawbriggs Lane is not a busy main highway, nor is it an unattractive walk, with woodland between the road and the railway. Although this roadside section is of a wholly different character to the path to be stopped up, for most destinations to the north of the development site, pedestrians following the present Footpath 303028 from A to E will need to use the same 100-metre length of Drawbriggs Lane from E before crossing the road near point I. In short, whilst such people would save this roadside walking by using the alternative A-H, others may find it added to their journey.
80. The point of greatest contention between the parties here concerns the relative safety of the two routes. Users of the present footpath must contend with the railway crossing (B-C) whereas users of the alternative must walk alongside vehicular traffic on Drawbriggs Lane.

81. Both Mr Duval and Mr Wilson submitted that footpath users do not perceive the railway crossing to be dangerous; most people will observe the procedure advised by the notices at either site and cross the line safely.
82. I have no doubt that the majority of people using the crossing will do so with the intention of keeping themselves and others safe. But as evidence collected by NR shows, people are easily distracted, especially those crossing with a dog or with children. In fact Mr Greenwood provided clear photographic evidence showing that at this particular crossing a group of youths had recently congregated here at night, placing themselves and other rail users in danger.
83. I have no difficulty in accepting that the rigorous risk assessment systems employed by NR show there to be serious potential for harm at this crossing although I am not convinced that the numbers of people expected to be using it once the development is fully occupied will rise to the extent forecast. Whilst Mr Wilson observed that with most of the homes on the development already occupied we *"are able to know the actual impact on use of the crossing as things stand today"*, I recognise that not *all* the properties are complete and that establishing new patterns of use can take some time to settle in.
84. However, there is no denying the proximity of the 142 new family-type houses to this potentially fatal hazard and the ease of access to it that will continue if the public right of way is to remain.
85. In comparison with the inherent dangers of the rail crossing which have been thoroughly assessed by NR, objectors Messrs Kind, Wilson and Duval point to the lack of any comparative exercise to establish the safety of the proposed alternative route. Accidents do occur involving pedestrians on roads, even roads with pavements.
86. With no such audit before me, Mr Duval argues that it is not possible for me to come to a sound conclusion. The order should not be confirmed unless the alternative route is shown to be "significantly safer". Similarly, Mr Wilson submits that the absence of a local highway authority safety assessment in this case is sufficient reason for the order to not be confirmed, and Mr Kind contends that with insufficient evidence on road safety, I cannot make a rational decision on the merits of changing the highway network.
87. Mr Kind refers to a Memorandum of Understanding between Network Rail, the Institute of Public Rights of Way and Access Management and the Association of Directors of Environment, Economy, Planning and Transport which deals with public rights of way and rail crossings. At paragraph 4.3, this states that where the public are displaced on to the local highway network, there should be a full road safety audit carried out at the expense of NR. That has clearly not happened in this case.
88. In response, Mr Greenwood pointed out that this document had been signed on 29 March 2019, some considerable time after the Order was made and after preparations began for this inquiry. He acknowledged that it represented good practice but in this case the Order had not been requested by NR (although its confirmation was fully supported) and EDC had been satisfied with the response from the highway authority following consultation on the proposal.
89. I recognise the value of the Memorandum of Understanding in setting down what should be regarded as standard practice. Had this been in existence when the decision was taken to make this Order, I would have expected this

procedure to have been respected, even though NR were not the applicants. However, it is a fact that a full road safety audit was not commissioned at the time and has not been produced since. Whilst that falls short of the standard now adopted in the Memorandum, it is not inevitably fatal to my determination of this Order.

90. It is not disputed that there is a footway alongside the carriageway for the full length of Drawbriggs Lane between points H, I and E. It is true there is a short section where the pavement narrows to a pinch-point measured at 1m but for the majority of its length it averages 1.2-1.5m in width. There is a possibility that a pedestrian may have to wait to allow another to pass at the pinch-point but otherwise there is sufficient width to allow two people to pass without stepping into the road or to walk two abreast.
91. There is no record of road traffic accidents occurring at this location and neither are there any particular conditions which might indicate a cause for concern from a safety standpoint. Further, Cumbria County Council's Highways Department, its Safer by Design Team and its Public Rights of Way Section were all invited to comment on the proposed order and expressed no concerns over the safety of pedestrians using the roadside footway.
92. I acknowledge the comment made by Mr Kind that "*Safety is not absolute. Safety is always comparative.*" Although I do not have before me a quantified assessment of the risks involved in using the footway between points H, I and E as I do for the railway crossing, I am nonetheless satisfied that the route proposed as the alternative to the section of Footpath 303028 A-E would present a much lesser safety risk to the public in general terms than that inherent in the existing route A-B-C-D-E.
93. To summarise my conclusions as regards the effects on the public, I find that the proposed route would be longer for those people walking to or from Roman Road via Footpath 303028, or the industrial area to the south of Drawbriggs Lane, but not substantially so. For all other path users, walking to most other destinations via the newly provided footpath A-H would entail a shorter overall journey than by crossing the railway between B and C. Whether longer or shorter, the alternative route has other advantages in terms of its convenience, especially for people with mobility problems. Whilst both present and proposed routes have attractive features, only the existing footpath is wholly off-road in nature but that comes at the expense of convenience insofar as the terrain, gates and steps represent limitations for some walkers. It is the inclusion of a section of roadside walking that weighs against the proposed alternative but, when balanced against the safety risks associated with the at-grade rail crossing on Footpath 303028 I consider this option to present a lesser degree of danger.

***Whether the Order should be confirmed***

94. In reaching a final conclusion on confirmation of this stopping up, a final balancing exercise is required. I must weigh the need for the path closure alongside the advantages of the proposal (and in particular those that would accrue to SH as the applicant for the Order) against any disadvantages that may result, especially for members of the public who use this path.
95. In the first instance into the balance goes the essential reason for the Order: the need to satisfy the condition which requires that at-grade access across the

railway ceases before SH's development of all 142 new dwellings can be completed. As I have noted, there are sound local and national policy planning reasons for this restriction.

96. Sitting behind this are the serious concerns of NR with its statutory duties and fundamental responsibilities for public safety and operational efficiency of the rail network as set out in its Operating Network Licence. In the public interest, this seeks to safeguard against all unnecessary disruption to line traffic and any impediment to trains travelling at line speed.
97. As Mr Greenwood explained, criminal prosecutions (both for NR and the user) will follow in the event of passive level crossing misuse or trespass<sup>19</sup>. From photographic evidence presented at the inquiry it appears that such incidents have already begun to occur at the Dairy House crossing. Whilst ensuring the safety of the public is the priority for NR, the operational delays resulting from the temporary closure, line speed reduction or reduced train use that would inevitably result from a fatality, a 'near-miss' report or a trespass incident would have a significant impact on operational efficiency.
98. As I have already noted above, quantitative measurement of the risks at the crossing through the ALCRM scoring system were explained by Mr Hume showing this to rate as an unacceptable C5 rating at present without any future increase in use. Further qualitative data provided through the NRA method shows an alarming change in the character of the crossing, in particular an increase in vulnerable as well as 'encumbered' users. NR submits that there is highly evidenced scope for the SH development to introduce and exacerbate use by vulnerable groups such as unaccompanied children, distracted youths, dog walkers and groups of people who tend to 'back-up' at the crossing.
99. Taken to task over possible mitigation solutions, Mr Hume made clear that the circumstances at the Dairy House crossing, with its relative proximity to Appleby Station, effectively rules out the installation of a warning light system and the physical constraints of the site preclude a footbridge or underpass. A system of integrated MSLs might be technically possible but the prohibitive cost could not be justified in this location.
100. Having examined his findings, I have a high regard for the expert evidence given by Mr Hume and place significant weight on his professional assessment of the risks involved and mitigation options.
101. Mr Lopez submitted there would be further advantages to the public if the Order were to be confirmed, deriving from the provision of a new public right of way A-F-G-H.
102. SH submitted that, having worked with EDC and NR to successfully introduce the new path into the development, essentially as an alternative to the existing crossing, it has been well received by the residents and, in contrast to the existing footpath, offers a practical, safe and attractive route that all users can enjoy. SH confirmed that it would remain in place even if the Order is not confirmed.
103. On that basis Mr Duval argued that walkers will not actually gain from the Order as the alternative would be available anyway, whilst Mr Wilson submitted

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<sup>19</sup> Under the Health and Safety at Work Act 1974 and/or the British Transport Commission Act 1949

that the circumstances might suggest that the way was being dedicated at common law.

104. Although it is a small point, I agree with Mr Lopez that there would be some advantage to the public to see the status of the new link confirmed as being a public right of way from the outset.
105. Whilst I consider there to be advantages in terms of overall convenience for some types of path users and for some people with destinations to the north of the development, I recognise there is some substance to the objectors' argument that this link is intended to be made available to the public whether or not the crossing is closed. Nevertheless, it would form an alternative to the Order route A-E and offer some benefits to some users.
106. On the other side of the scales, the only substantive disadvantage to have emerged from my examination of the evidence would be to those people intending to walk from A to E in order to progress further along Footpath 303028 or to turn south eastwards along Drawbriggs Lane. For these people the diversionary route via A-F-G-H-I-E would be longer than A-E although it would be more accessible and arguably safer.
107. I understand there may be a degree of resentment felt by leisure walkers who have enjoyed the use of Footpath 303028 for many years without incident to see it re-routed, essentially due to the impact of the development. The Ramblers' Association, through Mr Duval, has represented the interests of such people at this inquiry. However, I have noted that only two of the original objections were from Appleby residents who expressed any concern over the proposed changes to this path.
108. I am curious that Mr Wilson advocates the application of "the flexible principle of expediency", then argues that confirmation of the Order is not expedient in the public interest, given its uncertain and discredited background. Further, he referred to the views of the dissenting judge in the Court of Appeal judgement, suggesting that no true merits test has been shown to have been satisfied and consequently the order is not confirmable. As I have noted above at paragraph 47, I am bound by the (majority) decisions of the Courts.
109. In conclusion, taking into account all the matters before me, I find that the weight of the evidence tips the balance firmly in favour of confirming the Order.

*Modifications requested*

110. EDC recognised that it should not have included within the Order the apparent creation of a new alternative route (H-I-E) where this is already a highway. Consequently, the authority requested that I modify the Order to remove references to this section of Drawbriggs Lane. No representations were made to the contrary and I agree that such a modification would clarify the true extent of the Order.
111. In addition, I have noted above (at Footnote 13) the submission from Mr Wilson that the Order should refer to the planning permission on which the Order does in fact rely. For the sake of clarity, I will make the change requested.

112. Schedule 14 to the 1990 Act provides that where confirmation is proposed subject to modifications to the Order, notice must be given (by further advertisement) in cases where the modification affects land not affected by the Order as made. However, that does not apply here, and I therefore intend to modify the Order as requested without giving further notice.

**Whether EDC used the most appropriate statutory procedure**

113. In his objection, Mr Wilson submitted that the use of an order under section 257 of the 1990 Act by EDC was misconceived. Nothing in the Notice of Planning Decision (for 15/1097 or others) required the use of this legislation to achieve the desired footpath closure. Given the nature of NR's concerns over the safety of the Dairy House crossing, albeit in relation to the increased risks posed by the development, the use of powers under the Highways Act 1980 should have been considered more appropriate. He argues that Section 118A deals specifically with the closure of rail crossings and involves a more rigorous evidential test than that which applies under the 1990 Act.

114. At the inquiry, on behalf of EDC, Mr Owen refuted Mr Wilson's criticism of the Council's handling of this case, highlighting the observation of Holgate J (at paragraph 64 of his judgement and later upheld in the Court of Appeal), that "condition 13 in permission 15/1097 is only satisfied if a stopping up order is first made "by the LPA<sup>20</sup>" and then confirmed or not confirmed." EDC is the LPA, not the highway authority and thus has no powers to make orders under the 1980 Act.

115. Further, at paragraph 59 of his judgement, Lindblom LJ states that whilst it may have been the case that, in these circumstances, a more appropriate means of achieving diversion of the footpath would have been the procedure for a rail crossing order under the Highways Act 1980, "*this does not mean that the council was wrong to provide as it did in condition 13 for the process under sections 257 and 259 of the 1990 Act*".

116. In my final analysis, having taken on board all the various submissions made in this case, I am satisfied that in reaching my conclusion that the tests to be applied in respect of this Order have been met, there has been a thorough examination of all the wide ranging issues that might conceivably affect the decision as to whether or not the Dairy House crossing should continue to be open to the public.

**Conclusion**

117. Having regard to the above and all other matters raised at the inquiry and in the written representations, I conclude that the Order should be confirmed with the modification noted above in paragraphs 110 to 112.

**Formal Decision**

118. I confirm the Order with the following modification:

- In line 6, amend "Planning permission numbers" by deleting "11/0989" and adding "15/1097"

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<sup>20</sup> Local Planning Authority

- In the Order Schedule Part 2: in line 6 delete “and then in an east north easterly direction for approximately 61 metres to point I (at grid reference 369045, 520340) and then in a south easterly direction for approximately 123 metres to return to point E (at grid reference 369143, 520270);
- On the Order map: delete “Alternative Route to be provided” between points H, I and E.

*Sue Arnott*

**Inspector**

## **APPEARANCES**

### **In support of the Order**

Mr J Lopez                      Of Counsel; instructed by Womble Bond Dickenson (UK) LLP  
for Network Rail Infrastructure Ltd

#### *Who called*

Mr J Hume                      Level Crossing Manager, Network Rail Infrastructure Ltd

Ms J Stephenson              Town Planning Manager (London North Western Route),  
Network Rail Infrastructure Ltd

Mr J P Greenwood          Head of Liability Negotiation, Network Rail Infrastructure Ltd

### **Also in support**

Mr D Hayward                Each appearing for Story Homes Ltd individually on 18  
June 2019, 19 June 2019 and 20 & 21 June 2019  
Mr P Fenton                      respectively  
Mr A McNally

### **Objecting to the Order**

Mr G Wilson                Statutory objector

Mr A Duval                    Statutory objector; Footpath Secretary, The Ramblers (Penrith  
Group)

### **Appearing in a neutral capacity**

Mr E Owen                    Of Counsel; instructed by Eden District Council

## **DOCUMENTS**

1. All papers submitted to the previous Inquiry
2. Re-submission of Eden District Council's Statement of Reasons (2/3/16)
3. Statement of case submitted by Mr A Duval for the Ramblers' Association (16/4/19)
4. Statement of case submitted by Mr G Wilson (23/4/19)
5. Statement of case submitted by Womble Bond Dickinson for Network Rail Infrastructure Ltd (23/4/19)
6. Statement of case submitted by Mr A Kind ((9/5/19)
7. Statement of case submitted by Story Homes Ltd (9/5/19)
8. Addendum to submission from Mr A Kind (25/5/19) with enclosure

9. Proof of evidence and summary proof of Mr A Duval for the RA (30/5/19)
10. Proof of evidence and summary proof of Mr J Hume & appendices (31/5/19)
11. Proof of evidence and summary proof of Ms J Stephenson & appendices (31/5/19)
12. Proof of evidence and summary proof of Mr J P Greenwood & appendices (31/5/19)
13. Extract from the definitive map for the area
14. Cumbria County Council (Footpath No 303028 Parish of Appleby) Public Path Diversion Order 1994
15. Note to Inspector submitted to the inquiry (in his absence) by Mr A Kind
16. Email from Cumbria County Council dated 19 June 2019 clarifying retention of LTP policies
17. Details of requested modifications to the Order
18. Additional note submitted to the inquiry by Mr A Duval concerning recent site visits and census figures
19. Additional documents supplied by Network Rail:
  - NR1: Note on Network Rail's Network Licence on Operational Efficiency & Safety
  - NR2: BBC News Reports 9 & 12 May 2019
  - NR3: Miniature Stop Lights – Costings
  - NR4: Detailed plans of Appleby
  - NR5: Aerial photographs of Appleby
  - NR6: Extract from Eden Local Plan 2014-32 Inset Map 3
  - NR7: Plan showing local amenities in Appleby
  - NR8: Plan identifying alternative routes
  - NR9: Extract from 'Crashmap' for Appleby area
  - NR10: Additional note on NRA of Mr J Hume
  - NR11: Photographs showing footway width
  - NR12: Memorandum of Understanding between Network Rail, ADEPT, LGA & IPROW (dated 29 March 2019)
  - NR13: Note of Ms Stephenson on the Cumbria Development Design Guide (2017)
  - NR14: Eden District Council Delegated Report in relation to Application for Footpath Stopping Up Order at Cross Croft, Appleby (decision dated 17 April 2015)
  - NR15: Planning Inspectorate Order Decision FPS/J1155/4/59 issued on 24 August 2016
  - NR16: Section 257 & 259 of the Town and Country Planning Act 1990
  - NR17: Schedule 14 of the Town and Country Planning Act 1990
  - NR18: The Ramblers Association v Secretary of State for Environment, Food and Rural Affairs (and Others) [2017] EWHC 716 (Admin)
  - NR19: Department of Transport Local Transport Note 2/08 "Cycle Infrastructure Design" (issued October 2008)

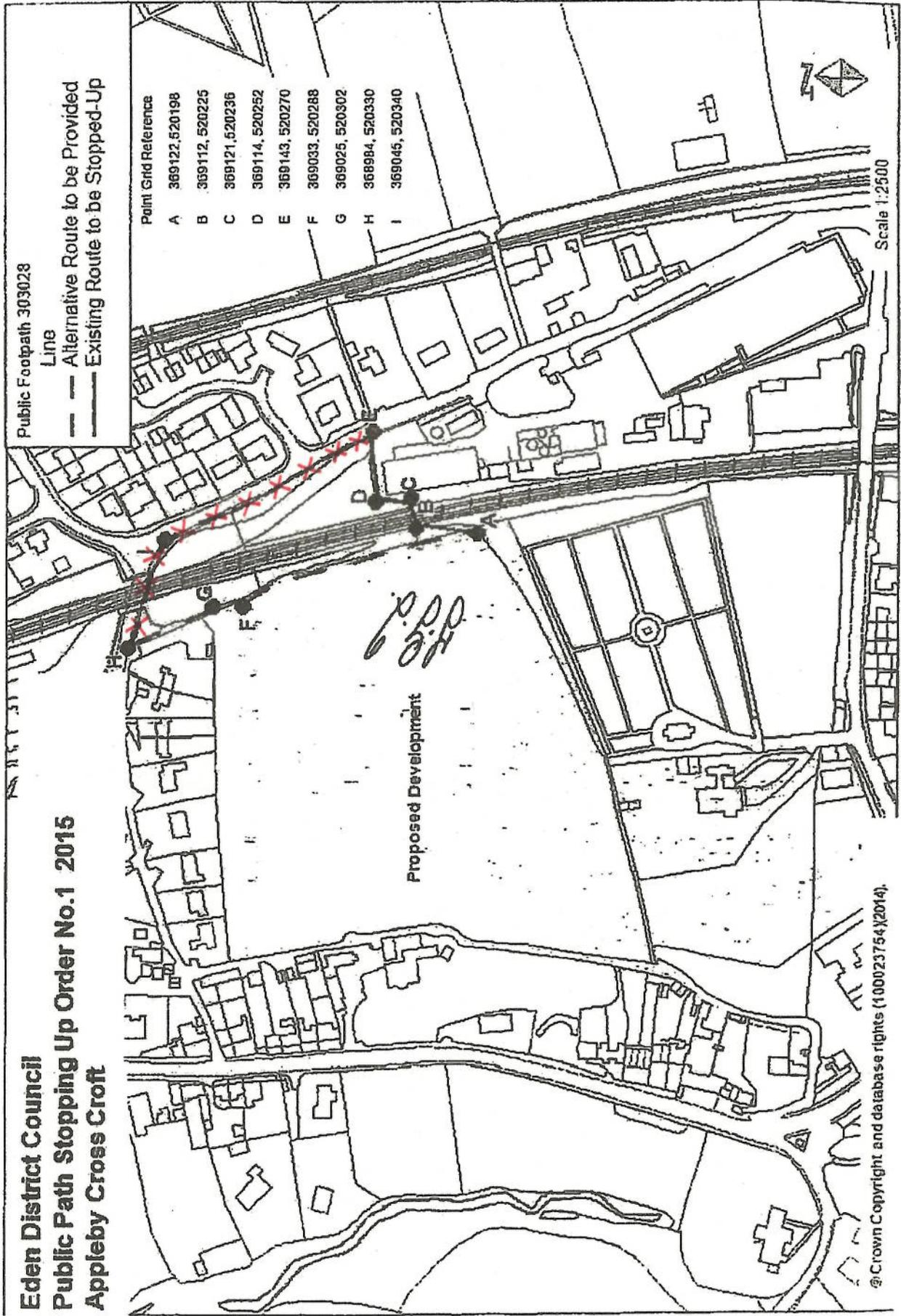
**Eden District Council  
Public Path Stopping Up Order No.1 2015  
Appleby Cross Croft**

Public Footpath 303028

Line

- Alternative Route to be Provided
- Existing Route to be Stopped-Up

Point Grid Reference	
A	369122, 520198
B	369112, 520225
C	369121, 520236
D	369114, 520252
E	369143, 520270
F	369033, 520288
G	369025, 520302
H	368984, 520330
I	369045, 520340



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