
Order Decision

Inquiry opened on 10 July 2019

by Barney Grimshaw BA DPA MRTPI(Rtd)

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

Decision date: 06 August 2019

Order Ref: ROW/3212412

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Cheshire West and Chester Borough Council (Addition of Public Footpaths No.12, No.13, No.14, No.15 and No.16 in the parish of Mollington) Modification Order 2017.
- The Order is dated 4 May 2017 and proposes to modify the Definitive Map and Statement for the area by adding five footpaths as shown on the Order Map and described in the Order Schedule.
- There were 6 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public inquiry into this Order on 10 and 11 July 2019 at the Town Hall, Chester. I made an unaccompanied site inspection on 9 July when I did not walk the Order routes but was able to view them from various points. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary
2. In writing this decision I have found it convenient to refer to points marked on the Order Map and on another map submitted with the application for the routes to be added to the definitive map. I therefore attach copies of these maps.
3. Cheshire West and Chester Borough Council, the Order Making Authority (OMA), had been directed to make an Order adding six routes to the definitive map by the Secretary of State. The Order as made included four of these routes (FPs 12, 13, 14 and 16) as directed but the remaining two routes were linked together by the addition of a further section not included in the direction (Points G to K) to form FP15. This completed a circular route and avoided the recording of cul de sac paths.
4. Some objections to the Order were made on the grounds that it did not include additional paths that had been applied for and it was argued that the Order could be modified to add these paths. The 1981 Act includes provision for modifications to be made to an Order by the Secretary of State subject to further advertisement if modifications would affect land not affected by the Order as made. However, the suggestion that this provision should be used in this case to add several additional paths raises significant issues. Most

importantly, people who might oppose the addition of these paths, including the owners of land crossed by some of them, would not necessarily have been aware that their addition was to be proposed and consequently did not have the opportunity to submit evidence to or attend the inquiry. This in my view would be seriously prejudicial to their interests.

5. In addition, as I have not had the opportunity to consider evidence against the addition of further paths, I have insufficient basis upon which to make a decision as to whether the criteria in the relevant Acts have been met with regard to these paths. Accordingly, whilst I heard evidence of use of these paths at the inquiry which was useful in building a picture of the patterns of use of all the paths in the area, I have taken the view that it would not be appropriate to consider adding additional paths to the Order at this stage.
6. The OMA chose to adopt a neutral stance regarding the confirmation of the Order and support for it at the inquiry was therefore led by the applicant, Mr Emery.

The Main Issues

7. The requirement of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act) is that the evidence discovered by the surveying authority, when considered with all other relevant evidence available, should show that rights of way that are not shown on the definitive map and statement subsist along the Order routes.
8. All of the evidence in this case relates to usage of the route. In respect of this, the requirements of Section 31 of the Highways Act 1980 (the 1980 Act) are relevant. This states that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question.
9. Common law also requires me to consider whether the use of the path and the actions of the landowners have been of such a nature that the dedication of the path by the landowners can be inferred.

Reasons

10. No documentary evidence supporting the confirmation of the Order was submitted.
11. Accordingly, the determination of this Order depends entirely on the evidence of public use of the claimed routes that is available and whether this indicates that public footpaths can be presumed to have been dedicated in accordance with the provisions of the 1980 Act (statutory dedication) or inferred to have been dedicated at common law.

Statutory Dedication

Date when public use was brought into question

12. It was common ground that public use of the Order routes was brought into question in 2013 when comprehensive repairs to fencing and signage were undertaken by the landowner.
13. There is evidence of obstructions to public access having been put in place at other times prior to 2013 which could also have brought public use of routes into question. However, other evidence suggests that public use continued without significant interruption despite these obstructions.
14. Accordingly, I have taken the relevant period of 20 years public use which would raise a presumption that these routes have been dedicated as a public footpaths in accordance with the provisions of the 1980 Act as running from 1993 to 2013 in this case.

Evidence of Users

15. Twenty-five User Evidence Forms (UEFs) were submitted on behalf of 17 people – several people submitted more than one UEF describing different routes used. Nine people who had completed UEFs also appeared at the inquiry to describe their use of routes along with another 4 people who had not previously submitted UEFs. I am therefore able to consider evidence of use submitted by a total of 21 people.
16. The use described covers a period from the late 50s to 2013 although most users did not claim to have used the routes before the mid-1980s. Eight people claimed to have used routes throughout the 20-year period 1993-2013 and twelve people for some of that period.
17. The routes people claimed to have used included not only the 5 Order Routes but also the other routes which had originally been applied for and some additional ones as well. Not all of those providing evidence had used all of the routes claimed and some sections appear to have only been used by a small number of people.
18. The frequency of use claimed varied considerably. It is difficult to quantify the frequency of use with accuracy because people typically used several routes but often with differing frequencies and also because frequency of use often varied at different times of the year and at different periods.
19. Users generally stated that their use had not been interrupted or challenged, that they had seen others using the routes and they had not received permission to use the paths.
20. It was argued on behalf of the landowner that use of the Order routes had not been 'as of right', as required in accordance with the provisions of the 1980 Act, but had been with force.
21. To the south-west of the land there is a high fence consisting of metal railings with spikes at the top erected by the former Chester City Council. Two access points are identified through this fence in the Order (Points E and H) and a further three on the application plan (Points B, D and J). Photographic and verbal evidence was provided to the effect that access had been forced at these points. Photos showed and users described the gaps in the fence as

being places where the railings had been prised apart to create openings large enough to permit access or sections of the fence had been broken down or removed. However, at Point H there was a gap in the fence prior to 2013 which appeared to have been created by design rather than by force. Evidence of both path users and a contractor to the landowner suggests that this gap was created at some time after 2001 by the council without the agreement of the landowner and was not at the same location as a previous forced gap in the fence which had apparently been some distance further to the north-west.

22. Evidence of the current landowner corroborated by that of others indicates that prior to 2001 the former landowner repeatedly pressed the City Council to repair their fence which from time to time they did. However, it was said that new gaps were soon re-created and it appears that the council became increasingly reluctant to spend money on repairs and, particularly after 2001, gaps were repaired less frequently by the council.
23. Evidence was given of an incident at Point E involving a child falling on to the railings from a tree at the point where a gap had been made in the fence. This necessitated a section of fence being removed by the fire service and the fence subsequently being repaired. However, a new gap was apparently created soon after.
24. Access at Point L was originally by way of a gate which afforded vehicular access to farm land. This was said to have sometimes been locked before the 1990s but after the land was occupied by travellers in the late 1990s it had been permanently locked. Users acknowledged that the gate had been locked but said it could easily be by-passed by way of a nearby gap. Use of this gap would have involved leaving the Order route (FP15) and passing through part of the car park of a neighbouring hotel.
25. Access at Point A2 was said to have been by way of a gap between a hedge and the end of the parapet of the bridge over the canal and then descent of a steep incline. However, an area of land in this area was sold in 1994 to Cheshire County Council to be used for the temporary storage of material dredged from the canal. The terms of the sale included the fencing of the land, removal of all dredged material, subsequent restoration of the land and an option for the original owner to buy it back. Evidence was given that dredging took place between 1994 and 1996 and that for a substantial part of this period access at A2 would have been impossible. This was disputed by some path users although there is documentary evidence of the sale of the land and the terms of it. The land was not formally transferred back to the owner until 2005 but it was accepted that work was completed well before then. At some time later a fence was erected in the area with a gap which permitted access although this was not in the same place as the previous access adjacent to the bridge parapet. The landowner stated that the fence had not been erected by her.
26. Overall, there is evidence to suggest that at each of the points where access was gained to the Order routes, this access may not have been 'as of right' as required by the provisions of the 1980 Act throughout the relevant 20 year period. Although there was no suggestion that any of the people providing user evidence had themselves damaged fencing to gain access, it would have

been apparent to them that the access they were using had been created by force rather than by the landowner wishing to establish a public route.

Actions of landowners

27. All the land crossed by the Order routes was owned by Mr R Cadwaladr from 1972 until 2001. The land was used for the grazing of dairy cattle from 1972 until 1988 and for bullocks from 1988 until 1994. Since then it has been let to tenants for arable farming.
28. A number of people provided written evidence and/or appeared at the inquiry to state that Mr Cadwaladr maintained fences and signs prohibiting access although these were repeatedly vandalised. He also repeatedly pressed the city council to repair their fence alongside the Blacon Estate. They also stated that he would consistently challenge trespassers on the land and ask them to leave.
29. Evidence was given that on one occasion the council installed a stile in the fence, possibly at Point D. Mr Cadwaladr was reportedly angered by this, challenged the council and the fence was quickly reinstated. No written record of this incident has been found and it probably took place before 1993. It is however perhaps indicative of the landowner's attitude to public access to his land.
30. After an incident in the early 1980s when hundreds of children were said to have entered the land, Mr Cadwaladr, acting on advice from the police, had metal signs made which were welded to gates and fencing to make them more difficult to remove.
31. There was also evidence that Mr Cadwaladr had agreed to a stile being located at Point B at one time. However, his daughter maintained that this had been specifically to allow people from Blacon Estate to gain access to the canal to fish and that it had been blocked up after the incident in the early 1980s referred to above.
32. When the land was leased it became the responsibility of the tenants to maintain the fences and prevent the establishment of any rights over the land. This they said they attempted to do but it became increasingly difficult and expensive as a result of vandalism.
33. Evidence was also given that the current landowner and her daughter challenged people they saw on the land on numerous occasions and this was to some extent corroborated by statements of others. However, none of the people who gave evidence of their use of the routes said that they had ever been challenged.
34. In 2011, a local paper published an article relating to a proposed development on the land crossed by the Order routes. This included a photograph showing protestors on the land. Mrs Samuel gave evidence that she had then contacted the editor of the paper stating that the protestors and the reporter and photographer had clearly been trespassing on the land and had received an apology and an assurance that no further trespass would take place by the paper's staff.
35. Attention was also drawn to the Mollington Parish Plan published in 2008 which referred to there being 10 public rights of way in the parish none of which were

the current Order routes. It was suggested that this indicated that even by 2008 the routes did not have the reputation of being public rights of way.

Conclusions regarding Statutory Dedication

36. The available evidence indicates that the Order routes were used by the public to a varying extent throughout the period 1993 to 2013. However, it is my view that some, if not all, of that use cannot reasonably be regarded as having been 'as of right' as required by the provisions of the 1980 Act. Much of the access to the land crossed by the claimed routes was by way of gaps in fencing that had clearly been forced rather than created by the landowner. In addition, there is evidence that landowners and tenants repeatedly took action to prevent public use. This included repairing fencing across access points, erecting signs, locking a gate and challenging users. Whilst it would seem that these actions did not succeed in preventing use or necessarily bringing public use into question, it seems clear to me that they did indicate their lack of intention to dedicate public rights of way.
37. On balance, it is my view that although the Order routes were used by the public during the period 1993 to 2013, much of that use cannot be regarded as having been 'as of right'. Also, during the same period landowners took action to try and prevent public access to the routes. This apparently met with limited success but could have brought public use into question and indicated a lack of intention to dedicate rights of way. Accordingly, it cannot be concluded that the routes have been dedicated as public footpaths under the provisions of the 1980 Act.

Common Law

38. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicate that they intended a way to be dedicated as a highway and where the public have accepted it.
39. In this case, there is some evidence of public use of the Order routes over a lengthy period but no substantive evidence that the landowners intended to dedicate them as public footpaths and in fact they took steps to try and prevent public access. It would therefore not be reasonable to infer the dedication of the routes at common law.

Conclusions

40. Having regard to these and all other matters raised, I conclude that the Order should not be confirmed.

Formal Decision

41. I do not confirm the Order.

Barney Grimshaw

Inspector

APPEARANCES

For the OMA

Sue Rumfitt	Rights of Way Consultant, representing Cheshire West & Chester Borough Council (CWCBC)
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Supporters

Gordon Emery	Applicant
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Who also called:

David Watson	Path user
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Brian Sullivan	Path user
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Jim Middleton	Path user
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Michael Price	Path user
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Andy Scargill	Path user
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Yvonne Jones-Lyon	Path user
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Linda Baker	Path user
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Noel Baker	Path user
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Jackie Gidman	Path user
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Brian Crowe	Former councillor and path user
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Michael Draper	Path user
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Paul Gidman	Path user
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Kim Draper	Path user
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Objectors

Mark Evans	Solicitor, representing S Cadwaladr
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Who called:

Norman Wyatt	Tenant of affected land
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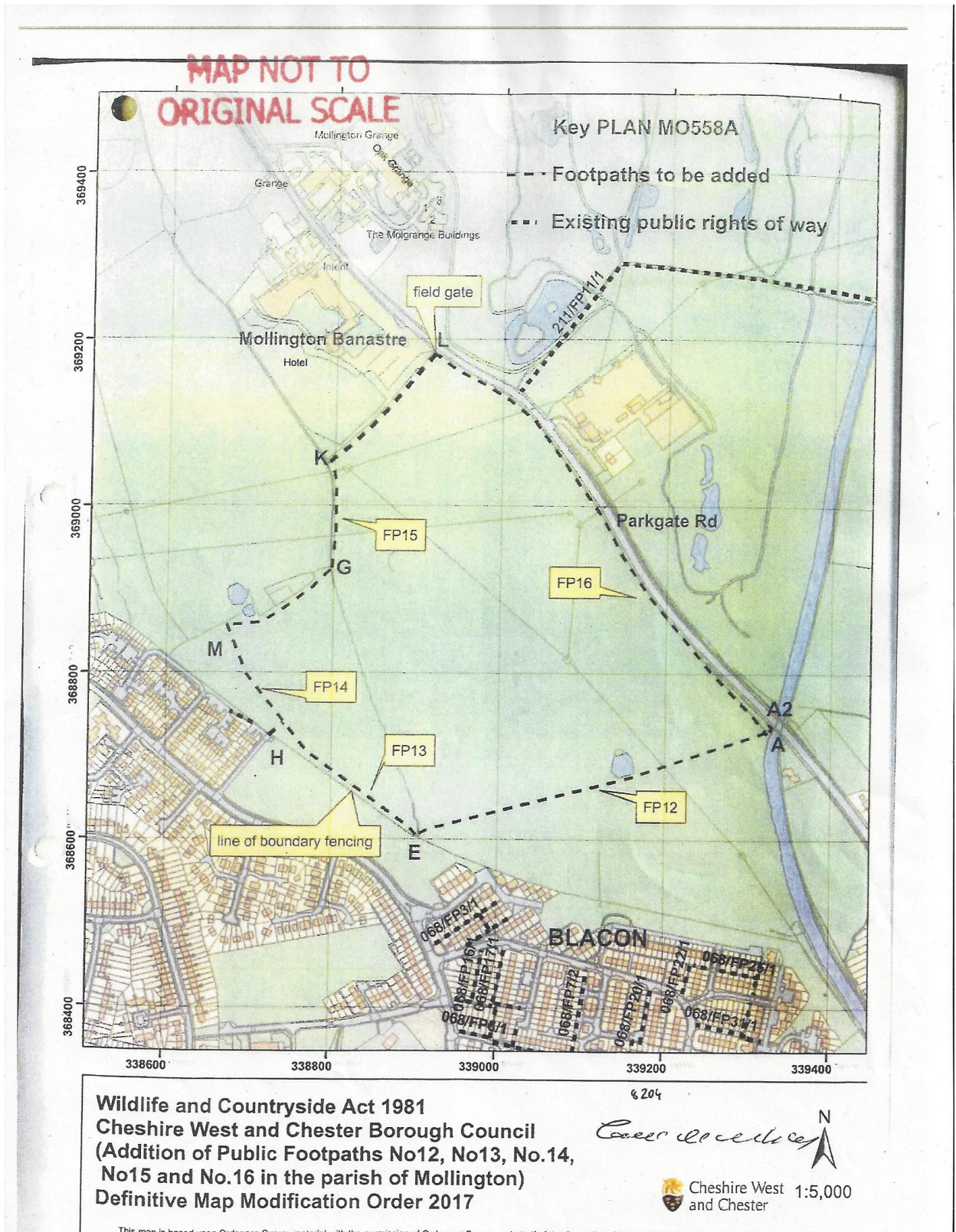
Robert Bradshaw	Agricultural contractor
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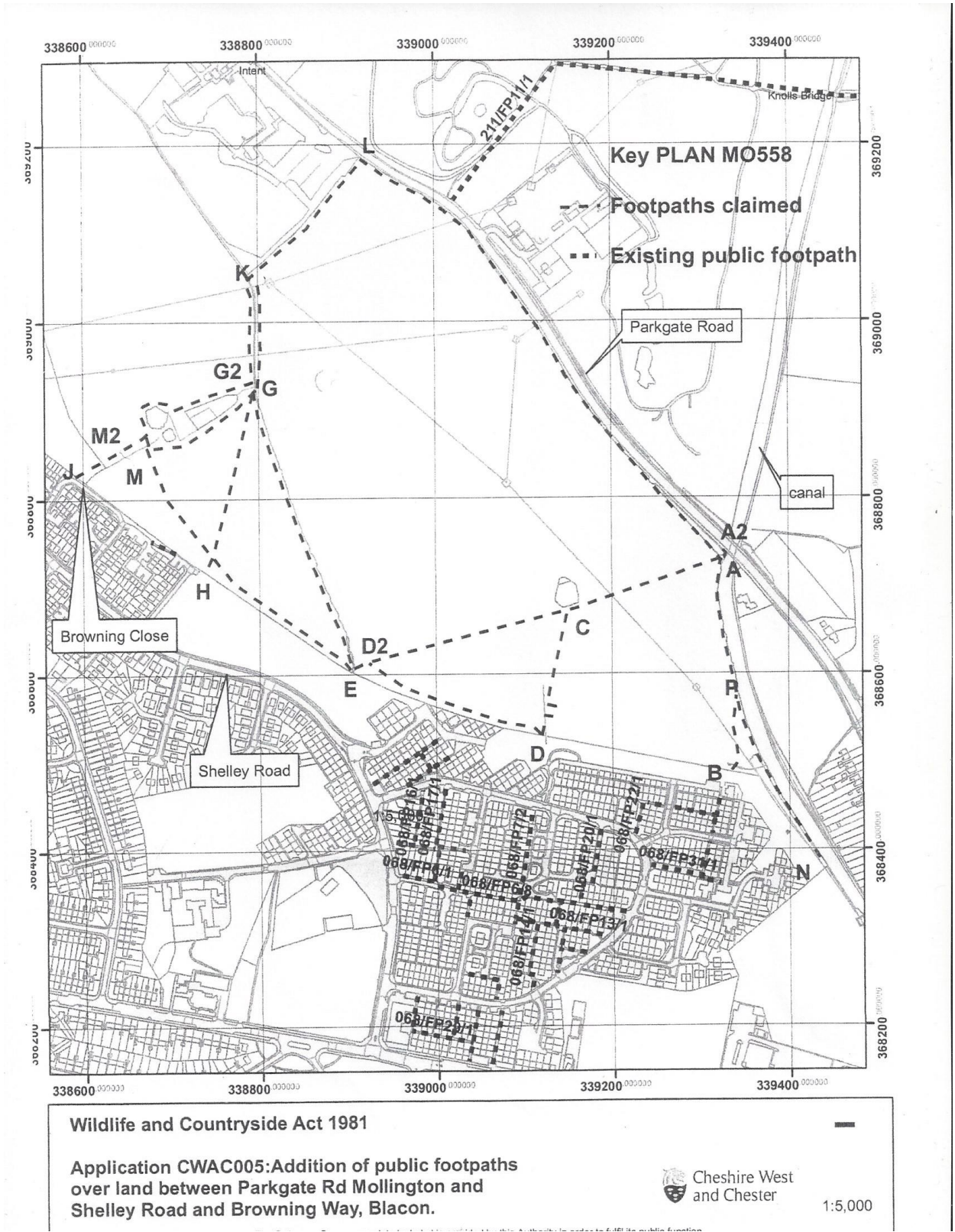
Susan Cadwaladr	Landowner
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Sophia Samuel	Daughter of landowner
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DOCUMENTS

1. Copies of Notices of the inquiry.
2. Statement of CWCBC with 2 files of documents.
3. Statement of Case for the Order, G Emery.
4. Statement of Case of Sophia Samuel with supporting documents.
5. Response to Statement of Case of Sophia Samuel, G Emery.
6. Letter from Lyn Rowlands (undated).
7. Letter from P Armstrong dated 4 July 2019.
8. Opening Statement CWCBC.
9. Opening Statement G Emery.
10. Additional statement and photographs, A Scargill.
11. Closing Statement, G Emery.
12. Closing Statement CWCBC,





MAP NOT TO ORIGINAL SCALE