



Order Decision

Inquiry Held on 12 November 2019

by K R Seward Solicitor

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

Decision date: 10 December 2019

Order Ref: ROW/3218180

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as The Surrey County Council Footpath No.602 (Busbridge) Definitive Map Modification Order 2018.
- The Order is dated 23 May 2018 and proposes to modify the Definitive Map and Statement ('DMS') for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Surrey County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. Originally, the Council considered three applications seeking the addition of a network of public footpaths to the DMS. They included an application made by Mr Graham Cornick for a path running along New Road from its junction with Salt Lane. The appeal is against the Order which followed that application.
2. The Order as made does not include the entire route claimed by Mr Cornick. New Road is a private road and it transpired that most users were exercising a private right of way over this part of the route as reserved in their title deeds. The Council considered there to be insufficient evidence of public rights being established over New Road. For that reason, the Order which followed excludes New Road. Instead, it is for a route commencing off New Road which proceeds through woodland to exit along the public highway in Clock Barn Lane.
3. In consequence, if the Order is confirmed then the public footpath will only be accessible to members of the public generally from the eastern end along Clock Barn Lane. It will terminate at the western edge of the woodland. Unless users can exercise a private right of way along New Road, they would need to turn back and retrace their steps. A cul-de-sac path would be created.
4. There is no rule of law that you cannot have a public right of way to a cul-de-sac as provided in *Attorney-General v Antrobus*¹ and other legal authorities. Therefore, the fact that the claimed route connects with an existing public highway at one end only does not impede confirmation of the Order.
5. I undertook an unaccompanied site visit the day before the Inquiry opened. Opportunity for an accompanied site visit was given at the end of the Inquiry but it was agreed to be unnecessary.
6. A copy of the Order Map is attached for reference purposes.

¹ [1905] 2 Ch 188

Main Issue

7. The Order has been made under Section 53(3)(2)(b) of the 1981 Act in consequence of the occurrence of an event specified in Section 53(3)(c)(i).
8. Therefore, the main issue is whether the discovery by the authority of evidence which (when considered with all other evidence available) is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.

Reasons

Legal Framework

9. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be *reasonably alleged* to subsist for an Order to be made, the standard of proof is higher for the Order to be confirmed. At this stage, evidence is required on the balance of probabilities that a right of way subsists. The burden of proof lies with those who assert the existence of a public path.
10. The evidence adduced is of claimed use by the public. Therefore, it is necessary for me to consider whether dedication of the way as a public footpath has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in Section 31 of the Highways Act 1980 ('the 1980 Act'), or by implied dedication at common law.
11. Under Section 31 of the 1980 Act, there must have been use of the claimed route by the public as a footpath 'as of right' and without interruption, over a 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 the 20-year period to dedicate the way for use by the public.
12. Should the test for statutory dedication fail under section 31, then it may be appropriate to consider the dedication of the way at common law. This requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the landowners and (iii) whether there is acceptance of the highway by the public. There is no fixed period of use at common law and depending on the facts of the case it may range from a few years to several decades. There is no particular date from which use must be calculated.

Statutory dedication – section 31 of the 1980 Act

Bringing into question

13. The first matter to be established in relation to Section 31 of the 1980 Act is when the public's rights were brought into question.
14. One objection is made by the joint owners of the land affected by the Order route who acquired the land on 14 June 2013 or thereabouts. A couple of weeks or so after their acquisition they erected clear signs saying: "Private Property, No Public Right of Way" at each end of the route. They also erected a lot of boundary fencing but chose not to fence off the path. They left a gap in the fencing at the eastern end and introduced a staggered wooden barrier at the western end. As the woodland was acquired for their own use, the new

landowners offered a licence to allow local residents to continue to use the path. The owner, Mr Favell, explained at the Inquiry how he had no objection to residents of New Road utilising the path as a private right, but did not want a public path across the land that would be available to everyone.

15. He suggested that the owner of New Road similarly did not want the general public using the road between point A and Salt Lane which Mr Favell warned would happen. As set out in my procedural note, the effect of the Order if confirmed will be to recognise public rights between points A-D only. It will not create any public right of way along New Road.
16. It was the offer of the licence that apparently prompted the application for a modification order. At the Inquiry I queried the sequence of events as the dates do not tally with the date of application preceding the current owners' acquisition of the land. It emerged from the emails read out by Mr Favell from his mobile phone that the offer of a private right of way was made to the applicant on 7 April 2013 i.e. at a time when the purchase was not complete.
17. As the claimed route has not been blocked to prevent public use, the date of challenge may be taken as the date of the application for a modification order being 5 June 2013. This date was accepted by the objectors. Therefore, the relevant period for statutory dedication is 5 June 1993 to 5 June 2013.

Evidence of use by the public

18. By the time of its determination, the application was supported by 18 user evidence forms ('UEFs'). Where users have submitted a second form claiming use until 2018, I have disregarded this evidence which goes beyond the relevant date of 2013. Of the 18 UEF's three were made on behalf of two people. Therefore, the UEFs provide evidence from 21 users. One of those UEF's was incomplete although the user subsequently wrote to clarify their use.
19. The objectors are critical that 6 UEF's have used a map provided for them by the applicant and not drawn the route themselves. Whilst not ideal, the forms are signed by the witnesses to confirm that to the best of their knowledge and belief the facts given are true. They are unlikely to have signed such a statement if the map appended did not reflect the route that they used. Some users are from the same families, but that is not unusual, and it does not diminish the quality of evidence they have given.
20. A separate and later application made by Mr Wilks on 31 March 2016 was supported by 15 UEF's claiming use of the Order route as part of a longer route. However, all the use post-dates 2013. It therefore falls outside the relevant period and cannot be taken into account.
21. The UEF's are consistent in referring to a well-trodden line. During my site visit I observed that the route follows a clear line that weaves through the woods.
22. There is no footway along Salt Lane so pedestrians must walk in the road. Users describe how the path through the woods became an established safe and pleasant alternative to contending with traffic in Salt Lane. I saw for myself how the winding narrow road with fast moving and frequent traffic is not very safe for pedestrians.
23. Users say that the route was also convenient as a shortcut for residents of New Road wishing to reach Clock Barn Lane, where there was (and still is) a post-

- box, or to travel onwards. By crossing Clock Barn Lane access may be gained to Busbridge Woods from exit point D. Many users say they used the route to reach the National Trust property at Hydon's Ball and Heath which is said to be popular with walkers and lies to the south. Some users claim to use the path to reach the care facility known as 'Cheshire Home' which adjoins the northern boundary of the woodland crossed by the claimed path. For others, it formed part of a longer circuit including to Juniper Valley to the north-east or to the 'Merry Harriers' pub.
24. All users claim use on foot. Five claim use throughout the relevant 20-year period, two of those users being from the same family including the applicant. Of the other users, the periods of use ranged from 3 years up to 18 years. A small number used the route daily and most used it at least fortnightly.
 25. Seven people claim use on bicycle, but such use was much less frequent than those walking the route and only three claimed use throughout the 20-year period. The cycle use is not of a level or frequency that can reasonably be regarded as giving rise to dedication as a highway for such use.
 26. Four of the users who completed UEF's gave evidence at the Inquiry. Two of those users have lived at the property immediately opposite entry point A since October 2000. They became aware of the path when viewing the property and the seller informed them that she walked her red setter dog along the path.
 27. Soon after their purchase they removed the tall boundary trees which then gave a clear view of the use of one end of the path. Both users described the path as being very well-used and following a clear, well-trodden line. Their observations even included horses and llamas from a nearby trekking facility being led out of the woods at point A. Of course, it cannot be certain that all the users they observed followed the same line through the woods, but as the path is the most direct route through the woods to reach Clock Barn Lane there appears to be a reasonable likelihood that many were following the same path. From the outset of their purchase these users say they used the path with their young children at weekends for walking or as a safe route to Hydon's Ball and Juniper Valley. They have both continued to use the route a couple of times per week for walking and running up to and beyond June 2013.
 28. The applicant's son claimed use from 1978-2018 but clarified afterwards that such use was daily until the late 1990's. In giving oral evidence, he described playing as a child in the woods with other children from the nearby local hospital and how he would often see them use A-D. On his almost daily errands to the post-box in Clock Barn Lane the witness explained how he always used the same path from A-D because it was safe, and his parents would know which route he had taken. This evidence pre-dates the relevant period for the purposes of section 31 starting in 1993. However, the witness went on to say that he used the same route daily from A-D until moving away in 1999. His use has continued thereafter when visiting the family home on a monthly basis or for frequent meetings and events for an animal welfare charity.
 29. Under cross-examination it was suggested that the witness and his family did not use the whole of the claimed route as they were more likely to have used an access gate from their home directly into the woods. In response, the witness insisted that he walked the same path from A-D on every occasion.
 30. Another witness who resides in New Road described using the route twice daily

from 2006 onwards to walk her dog. She explained that the path links up well with others in the area and can be used to reach Cheshire Home where her dog is used as a 'pet in therapy'.

31. A previous owner of the woods from 1990-1997 wrote to say that he lived opposite the woods in Salt Lane during this period and very regularly walked in the woods and drove past every day, but never encountered anyone or saw evidence of paths.
32. Given the size and density of the woods a walker would not, in all probability, be seen by a motorist unless they were at or near to an entry or exit point. Similarly, it is quite possible that users were not seen by the landowner as they passed through the woods. However, it would seem odd if a landowner visiting the woods on any degree of regularity did not spot the walked line if the same route was in frequent use and always a well-worn line as claimed.
33. This might suggest the path was not in regular use at that time or there could be other explanations. It was a long time ago and memories can fade. The landowner did not give evidence at the Inquiry for his version to be examined in detail. This limits the weight that can be attributed to what he has said. In contrast the evidence of some users was tested. Notably, the evidence of the former landowner is somewhat at odds with the oral testimony given by the applicant's son. He insisted he never saw anyone who he thought to be a landowner whilst using the path extensively over the same period.
34. None of the previous landowners attended the Inquiry to give evidence. As the objectors acknowledge, they have no first-hand knowledge themselves and rely upon what a previous landowner says whose evidence has not been elaborated upon or tested. The objectors further argue that it appears the claimed path confuses the alignment of three paths to make one. Most of the users UEF's showed other paths besides the Order route which reflects the original application being for more than one path. It does not mean that users were confused over the route used.

As of right

35. The road sign for New Road is marked as a 'private road'. This means that members of the public do not have a right to walk along the road to enter or exit the Order route at point A. The road sign does not defeat the claim for the Order route from A-D because it does not include land forming part of New Road. For dedication to occur the use must be without the consent of the landowner. Most of the users live in New Road and those users exercised a private right to pass along the road before entering the woods. That right does not extend past point A which is at the edge of the woods on neighbouring land. Public rights are capable of being acquired over the adjoining land not forming part of the road and the 'private road' sign will have no effect in relation to the claim.
36. The users were consistent in saying no-one ever challenged their use of the path. This is affirmed by others in written submissions. The case made by the objectors is that walkers used the path despite it being fenced. To support this stance reliance is placed in part on a letter from the previous landowners from whom the objectors acquired the woodland in 2013. It says the "woodland was fenced down the side of Clockbarn Lane and at the boundary of Cheshire

- Home". However, the letter does not comment on whether any gaps were left for pedestrian access at point D.
37. In this regard the objectors produced photographs of a coil of chain link fencing intertwined with barbed wire which they claim would have been stretched across point D to prevent public access to the woods. It is this fencing which the objectors contend was broken down and stood on by everyone walking the path. If users continued over fencing or trampled on fencing that had been broken down, then this would signify that use had taken place with 'force'.
 38. The local residents who gave evidence suggested that the fencing was most likely fly-tipped which has been a recurring problem in the woods. The position of the fencing away from the road does appear as though discarded. Upon closer inspection the chain link does appear to be attached to a fallen rotten wooden post once in the ground. However, the chain link is in good condition and is dissimilar to other fencing beside the road. Given all these factors there is no reliable indication that this piece of fencing or the barbed wire attached to the post went across the path during the 20-year period prior to June 2013.
 39. None of the witnesses recall seeing any fencing across the path. Indeed, those who attended the Inquiry to give evidence were adamant that there was never any form of fencing across exit point D. This is confirmed by other users who made written submissions. Where witnesses recalled the presence of a fence, they said it was attached to posts on either side of point D with a gap allowing free passage between the woods and lane.
 40. During my site visit I saw a timber post and barbed wire fence demarcating the boundary of the woodland where it extends alongside Clock Barn Lane. It stops at a post beside the path at point D where the path exits onto the lane. Remnants of a fence remain along the edge of the wood for a short distance to the south of point D.
 41. What is noticeable is that the fence to the north of point D is intact and in much better condition than the broken remains of a fence to the south. The rotten posts and rusted wire have clearly been there for some time.
 42. The local Ramblers representative argued that from the amount of rust it is likely that the barbed wire is at least 60 years old and probably dates from before World War II. The point was made that it is unlikely the woods were fully enclosed along this boundary since then because they offered a shortcut to various historical facilities in the vicinity.
 43. He produced a factsheet from the Ministry of Agriculture for British Columbia analysing when galvanised wire will start to rust. This depends on climatic conditions and the type of wire. That being so it is not possible to glean the likely age of the rusted barbed wire south of point D. Even if it could, none of this assists in establishing whether there was a fence actually across point D.
 44. Some evidence to support the users' is a screen shot from Google Street View of point D produced by the OMA which is said to be taken in 2009. It shows a clear track leading into the woods without any form of fencing across the entry point. Whilst I treat the image with some caution as the date has not been certified as accurate, it appears to contradict the objectors' argument.
 45. There is no suggestion that fencing was erected across the other end at point A which strikes me as odd if public access to the path was truly being prevented.

46. I conclude that there is nothing physically present now to indicate that a fence extended across the path to prevent public access prior to June 2013. Moreover, I find it improbable that so many different users would say point D was open and used by walkers to gain entry and egress unless that was the case. There is a lack of any clear evidence to the contrary. The balance of the evidence is that there was not fencing across point D to prevent public access.
47. From the evidence given at the Inquiry it appears that users assumed the path was available for public use. No-one appears to have acted with authorisation. Indeed, the written response from the landowner between 1990-1997 says "we never gave permission for anyone to walk there...". This covers the first 4 years of the relevant 20-year period. The subsequent landowners make no mention of giving anyone consent to walk in the woods.
48. Therefore, on the evidence before me the use was 'as of right'.

Conclusions regarding the evidence of use

49. Although not many users attended the Inquiry, the users who gave oral testimony were consistent and resolute in describing regular ongoing use of the same path from A-D. Collectively, their evidence spanned the 20-year period prior to the public use being called into question. In addition, the OMA produced signed and dated witness statements from three other users two of whom (from the same address) confirmed use along the well-worn path from 1984 onwards. The third statement confirms use from 1994 onwards. All refer to the path as being popular with dog walkers. When all the oral and written evidence is taken together there is enough to show continuous use of the path for a period of 20 years before the route was called into question.
50. It is a rebuttable presumption and so I must consider if there is evidence of a lack of intention to dedicate by any landowner over the 20-year period.

Whether any landowner demonstrated a lack of intention to dedicate

51. A lack of intention to dedicate requires overt acts on the part of the landowner so as to show the public at large that there was no intention to dedicate it. 'Intention' is an objective test of what a reasonable user would have understood the owner's intention to be rather than what the landowner subjectively intended, or the user subjectively assumed².
52. Posted to trees at each end of the route are signs saying: 'PRIVATE PROPERTY' with 'No Public Right of Way' beneath followed by the words 'No cutting or removal of wood and vegetation'. As these signs were only erected by the current owners after the application was made, they have no effect in preventing the acquisition of public rights if gained already.
53. The objectors argue that there has been systematic removal of signs designed to prevent entry to the woodland. A photograph of a Police witness appeal sign calls for information in relation to the theft of "two large advisory signs" between certain dates in 2011. It does not say what the signs said or give any other particulars. Without more information it is not possible to deduce from the description that the stolen signs were erected in or directed at the use of

² As per R(oao) Godmanchester Town Council and Drain v SSEFRA and Cambridgeshire City Council [2007] 3 WLR 85, [2007] 4 All ER 273

the woods. The Police sign could refer to any manner of signage and so it carries very little weight.

54. The objectors produce a photograph of a broken sign which they say was found in the woods. It can be gleaned that the sign reads: "Private Woods KEEP OUT" in white text against a green background. The users suggested that the sign came from Busbridge Woods which lie on the opposite side of Clock Barn Lane. None of the users could recall seeing the sign in the woods affected by the claimed path. Even if they had, they submitted that they would think it meant people should not stray off the path into the woods. Two of the users said that if they had seen signs to indicate entry was not allowed to the path then they would not have used it.
55. The landowners from 1997-2013 state in their letter to the objectors that "There was a wooden sign which read 'Private Woodland'". They do not say whereabouts the sign was located or identify it as the one photographed. The coloured broken sign is snapped with sharp edges. It does not appear to be wood and the text differs suggesting this is not the same sign described by the previous landowners.
56. In any event, a sign for 'Private Woodland' is ambiguous as to its meaning. As argued by the local Ramblers representative, there are many examples of public paths running through private woodland. Such wording alone is unlikely to be understood by the reasonable user as excluding public use of the path and it is more likely to be taken as simply banning people from roaming around the woods.
57. On the evidence before me I consider that a lack of intention to dedicate by any landowner has not been demonstrated.

Conclusion on statutory dedication

58. Having regard to the totality of evidence, I conclude on the balance of probabilities that the Order route has been used by the public as of right and without interruption for the full 20 years to raise the presumption that the way has been dedicated as a public footpath. That presumption is not rebutted by the landowner evidence.

Common law

59. Both the Parish Council and local Ramblers representative refer to historical use of the path which could date back to World War II. Around that time there were various institutions in the area including hospitals and an evacuation centre which could be accessed via the claimed path. My attention was specifically drawn to the location of a Social Club at the end of New Road used by hospital staff who walked through the woods from Cheshire Home particularly between 1968 to 1988. The historical uses that took place in the surroundings set the scene, but the information is of limited value in establishing public use of the path without further details in corroboration. For instance, it is possible that such historical use was with the permission of the owner of the time.
60. The OMA also took the view that the frequency of use indicated that a reasonable landowner would have been aware of the public use and that the facts as whole infer a way has been dedicated for public use at common law.

61. Given my findings that statutory dedication has taken place under section 31, it is unnecessary for me to explore these matters further.

Other Matters

62. In arriving at a decision, I am unable to take account of other matters outside the legal tests. This includes complaints by the statutory objectors that meetings took place between the Council and applicants in the woods without their permission and arguments that there is no need for a public right of way. It is also immaterial to my findings whether there are residents or landowners who do not want a public right of way which terminates next to New Road.

63. Similarly, submissions that more people will benefit from the route as housing numbers increase are also irrelevant to the issues before me.

64. I further note that the objectors are aggrieved by the time taken to process the application and that the original recommendation to the Council's Local Committee was to decline the application. They feel prejudiced by the deferrals after which the recommendation changed to one of approval over the Order route excluding New Road. The Council Officer explained that the change followed the consideration of legal advice submitted by the Ramblers to the effect that a cul-de-sac path could be created. The Committee was not bound to follow officer recommendation. Whilst I can understand the objectors' frustration, these are matters which cannot influence my decision. I have considered the matter afresh in light of all evidence before me.

Conclusion

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

Formal Decision

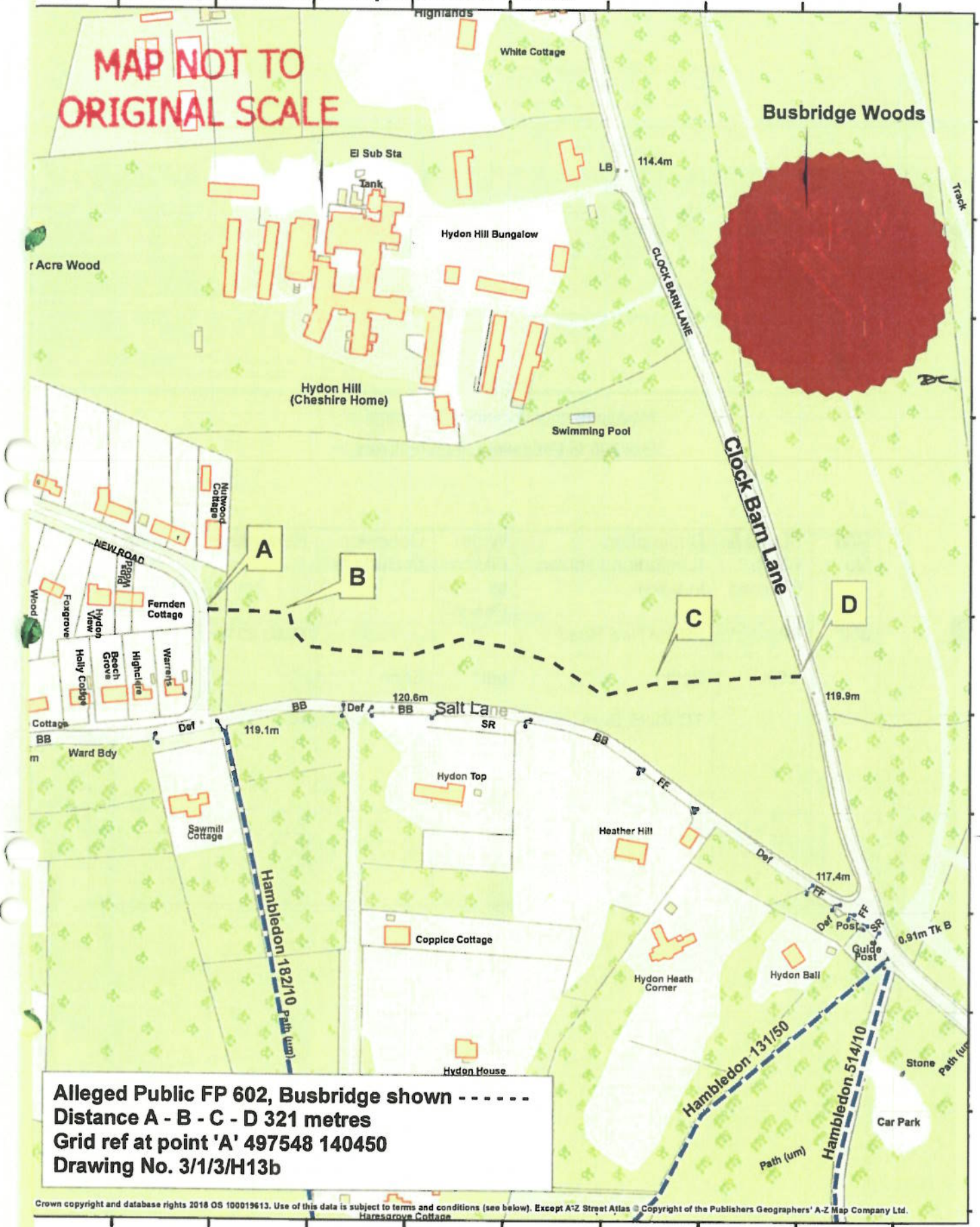
66. I confirm the Order.

KR Seward

INSPECTOR

Borough of Waverley
Wildlife & Countryside Act 1981 Map Modification Order

MAP NOT TO ORIGINAL SCALE



Alleged Public FP 602, Busbridge shown - - - - -
Distance A - B - C - D 321 metres
Grid ref at point 'A' 497548 140450
Drawing No. 3/1/3/H13b

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Rights of Way

- Footpath
- Restricted Byway
- Bridleway
- BOAT



Date: 27/04/2018