



Order Decision

Site visit made on 8 November 2019

by K R Seward Solicitor

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

Decision date: 11 December 2019

Order Ref: ROW/3224174

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and is known as Public Path Diversion Order 2018 Footpath 23 Stock in the City of Chelmsford.
- The Order is dated 23 November 2018 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were 3 objections outstanding when Chelmsford City Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Preliminary Matters

1. None of the parties requested an inquiry or hearing into the Order. In arriving at my decision, I have taken all the written representations into account.
2. As I have found it convenient to refer to points along the existing and proposed routes as shown on the Order Map, a copy is attached for reference purposes.

Main Issues

3. The Order has been made in the interests of the owners whose land is crossed by Footpath 23 Stock ('FP23'). By virtue of section 119 of the 1980 Act, for me to confirm the Order I must be satisfied that:
 - (a) the diversion to be effected by the Order is expedient in those interests;
 - (b) any new termination point for the path is substantially as convenient to the public;
 - (c) the new path will not be substantially less convenient to the public in consequence of the diversion; and
 - (d) it is expedient to confirm the Order having regard to:
 - (i) the effect of the diversion on public enjoyment of the path as a whole, and
 - (ii) the effect the coming into operation of the Order would have with respect to other land served by the existing path and the land over which the new path would be created together with any land held with it.
4. I shall also have regard to any material provision contained in a rights of way improvement plan ('ROWIP') for the area when considering the Order.

Reasons

Whether it is expedient in the interests of the owner of the land that the path in question should be diverted

5. At present part of FP23 extends through the garden of Broadmore Cottage passing parallel to the front of the house within a metre or so of the front door and windows. The owner is the applicant who seeks diversion of the path.
6. Given the close proximity of the path to the front windows of the house there is undoubtedly an adverse effect on the privacy of the occupant/s from members of the public passing by. Its use will also invariably impede privacy for anyone using the wide areas of garden which are in full view from the path.
7. There is no suggestion that the presence of the path has given rise to any specific security issue. Nevertheless, it is understandable that occupiers could perceive their security is at risk when the path affords easy public access to the front and side of the house.
8. As the footpath bisects the garden it is claimed that this limits the private use of the eastern side. The footpath is said to be in regular use by dog walkers giving the owners concerns about allowing their own dogs into the area. Dogs being walked would need to be kept to the path. Whilst it is not difficult to see how problems could arise if the owner's dogs are loose in the garden, that could be the case wherever the path is positioned within the garden. Without further elaboration, I am not satisfied of the case being made over limitation on use of the garden from the alignment of the existing path.
9. Nonetheless, I am satisfied that it is expedient in the interests of the landowner, that this part of FP23 should be diverted to improve privacy and security to the house.

Whether any new termination point is substantially as convenient to the public

10. The northern termination point A would remain unchanged, but the southern termination point would be altered. Instead of terminating part way along Madles Lane, the new termination point would be located along the highway in Whites Hill which lies about 80m or so further to the north. New termination point C exits onto the road immediately opposite existing public footpath 'FP19'. By crossing the road walkers can proceed along FP19 on a similar north-eastern alignment.
11. For anyone looking to connect with FP19 the altered termination point will be shorter and more direct. Likewise, point C will be more convenient for walkers travelling along Whites Hill from the north-west or wishing to head that way into the village centre.
12. All the objectors argue that point C poses a road safety hazard as it is located on a bend where there is limited visibility for both walkers and other road users alike. Apparently, a road traffic incident has already occurred along this stretch of road, but no further particulars are given for me to gauge if it might be relevant.

13. In response, the owners explain that works will be carried out to cross a ditch at point C, create a visibility splay and provide a level area for walkers waiting to cross to FP19. The owners also point out that there is a 30mph speed limit along Whites Hill at proposed point C whereas it is a 60mph limit along Madles Lane at existing point B.
14. Both roads are narrow country lanes without a footway necessitating the use by walkers of the carriageway or the thin strip of verge. Clearly the speed of traffic influences road safety, but in this instance, it is the bend in the road limiting visibility which is the main factor raised in concern.
15. The parties disagree on the length of sightlines from point C. From my own observations, visibility is poor in each direction at the exit point. It only improves when looking north-west once stepping into the carriageway and it remains limited in the opposite direction. Even with visibility splays it seems to me that great care will be needed in crossing the lane at this point.
16. At present walkers must pass along Madles Lane from point B, through the junction and along Whites Hill to reach FP19. Therefore, walkers are exposed to traffic over a much longer distance than the 3m or so involved in crossing the road from the new termination point to FP19. The difference is that walkers at the moment can choose where to cross over Whites Hill and there are spots with better visibility. Whilst there is a higher speed limit in place along Madles Lane there are no specific safety implications raised with regard to existing exit point B. It is located along a straight section of the lane where visibility is good in each direction and there is a recess where walkers can wait.
17. Walkers also presently have the option of heading south-west along Madles Lane without entering Whites Hill at all. For those users, new termination point C would become less convenient. It would involve further distance to reach point B and Whites Hill could not be avoided as it can now.
18. Objectors claim there would be worse connectivity with FP25 and FP26, but they are not nearby and if there is any impact it would be marginal.
19. The altered termination point does provide better connectivity between FP23 and FP19 to the improvement of the footpath network generally. However, the legislation does not require there to be public benefits, only that a new termination point is substantially as convenient to the public.
20. To my mind, the new termination point cannot properly be regarded as substantially as convenient to the public if it introduces highway safety concerns which do not arise at the existing termination point. Those concerns do not appear to have been subject to assessment on the level of risk and sufficiency of the proposed mitigation measures.
21. I do not discount the possibility that the highway safety implications might upon analysis be considered satisfactory or in comparison to the current route and its connectivity to FP19 where walkers spend longer in the carriageway. However, there is no technical advice or assessment before me.
22. On the information before me I am not satisfied that the exit point on Whites Hill is acceptable in highway safety terms in the absence of further information.

Whether the new path will not be substantially less convenient to the public

23. The section of path to be diverted is about 67m in length whereas the diversion is approximately 80m. The increased length is not in itself significant. The difference lies in the change in alignment.
24. A-B follows a straight alignment in a south easterly direction exiting on Madles Lane. The proposal takes an easterly direction from point A changing to a north-easterly direction near the corner of the rear garden of the neighbouring property at 'Hunters Moon' before leading onto Whites Hill. The change in direction would have minimal impact on convenience.
25. For walkers heading north along Whites Hill or connecting with FP19 the diversion would be shorter and more convenient. This is reflected in a letter of support from a resident in Madles Lane who says the proposal offers a better and shorter route to FP19 reducing by a considerable amount the distance that walkers are exposed to walking along the carriageways of Madles Lane and Whites Hill.
26. The resident further submits that it also completely eliminates exposure to motor vehicles on Madles Lane. This is only the case if a walker is connecting between the two public paths. For those heading south along Madles Lane or approaching from that direction the route would be longer and road traffic in Madles Lane would not be avoided.
27. There are no other public footpaths in the immediate vicinity to the south of FP23. Therefore, anyone heading to or from Madles Lane will be undertaking road walking and the additional distance by road is unlikely to be significant.
28. On balance and taking into account the predominantly recreational nature of its use, I find that whilst there may be slight inconvenience to some users in terms of length, overall this is insufficient to conclude that the proposal is substantially less convenient to the public.

The effect of the diversion on public enjoyment of the path as a whole

29. Some people may feel uncomfortable entering a private garden space and walking so close to a house. If so, the diversion may be preferable as it is much further away from the house and passes through the large grassed garden. Where the diversion passes near to the neighbouring residential property at 'Hunters Moon', there is separation from the proposed path by boundary fencing and so there will not be the same sense of intrusion as currently exists.
30. For walkers connecting with FP19 enjoyment may be enhanced by providing a more direct link which also eliminates the road walking otherwise required between B-C. That said, the sense of enjoyment may be inhibited by the need to cross over Whites Hill to join FP19 at a point on a bend with limited visibility. By the same token the enjoyment for others heading south could be adversely affected because of the need to contend with that same section of additional road walking between C-B. Therefore, it will be more enjoyable for some and perhaps less so for others depending on the walker's destination.

31. From what is said in the letter of support from a local resident, FP23 is popular with ramblers following an historic trail called 'St Peter's Way' which continues along FP19 to the 7th century church at Bradwell-on-Sea.
32. Given the better connectivity achieved between the two public paths I consider overall that more people will enjoy the diversion.

The effect of the diversion on other land served by the existing paths and the land over which the new paths would be created

33. Both the land over which the existing route and proposed route pass belongs to the owner of Broadmore Cottage. No other land is served by the existing route. No adverse effects have been raised as regards the land served by the existing right of way or the land over which the proposed route will pass. The owner accepts that the effect of the Order would be to preclude the use of the land onto which the path is diverted for any purpose incompatible with the public's right of way. The issue of compensation does not arise.

The effect of the diversion on adjoining land

34. When considering expediency, it is open to me to consider other relevant factors in addition to those set out in the Section 119 tests considered above.
35. At present, where the existing path passes through the garden of Broadmore Cottage it is well away from other dwellings. By moving the path to the outer edges of the garden, it would pass close by the shared boundary with the neighbouring property at Hunters Moon. Objection has been raised by the owners of Hunters Moon to the proposed route although they emphasise that they do not object to the principle of the path being re-routed. It is their view that confirmation of the Order would impact negatively upon their privacy and security, whilst also diminishing the value and marketability of their property.
36. It is argued that the diversion would transfer the problems arising from the proximity of the public path to a private dwelling from one property to another.
37. There is no requirement under the 1980 Act for adjoining landowners even to be notified of a proposal to move a right of way adjacent to their land, although it is good practice to do so. The landowners cite the case of *Allen v Bagshot Rural District Council* [QBD 1970] which held that a path could be moved alongside adjoining land and the adjoining landowner had no say in the matter. As such, considerations of devaluation and disturbance are not relevant.
38. Nevertheless, the neighbours at Hunters Moon raise concerns over the effect on the privacy of their home and garden and they fear the diversion would make their property significantly more vulnerable to crime, heightened by a spate of recent break-ins in the locality. These are issues pertinent to their human rights which I must consider. Particularly relevant is the right to respect for their private and family life and home and the peaceful enjoyment of their possessions under Article 8 and Article 1 of the First Protocol to the European Convention on Human Rights, as incorporated into the Human Rights Act 1998 ('the 1998 Act').
39. The higher ground level along the existing route facilitates views towards the rear of the house at Hunters Moon, but they are not close range. The diversion

- would be considerably closer. There is a high timber boundary fence, but this does not effectively protect the privacy of the neighbouring occupiers due to the higher ground levels at Broadmore Cottage. Many of the large rear windows at Hunters Moon are exposed to view at points along the proposed path. During my site visit I was able to see a person quite clearly inside a rear ground floor room as I walked towards Hunters Moon from point A.
40. The proposed diversion would not cross the adjoining landowners' property and it would not be immediately alongside the boundary fence except where it would pass by one corner of Hunters Moon rear garden. It would run at an angle from the corner point towards Whites Hill providing a gradually widening 'buffer' strip separating the boundary from the path. Even so, the path is quite close to the side of the house. There are glimpses of one room closest to the boundary although the applicant's boundary fence shields most views of the side elevation of the property.
 41. Where a fence panel has been cut out to accommodate a tree trunk, there are only views into the garden of Hunters Moon if a walker were to stray from the path to peer through the gap created. The space is not large enough to afford a potential access point by intruders. The applicant has offered to improve boundary screening by undertaking works to the tree and replacing the section of fence panel. In addition, the fence height will be increased to 1.8m if required.
 42. These steps should go some way towards addressing the concerns of the adjacent landowners to help improve privacy. However, it will not prevent all overlooking and the large rear upper storey windows will remain in full view.
 43. There could still be additional noise generated by walkers and similarly conversations from within the garden may be heard from the path, but it will be fleeting as walkers pass-by.
 44. There is nothing to indicate that security to Hunters Moon would be adversely affected by the path running alongside the fence as there is no visible means by which the public could access the property from the proposed diverted path at this location.
 45. Drawing this all together, the proposed works would mitigate the effect of the diversion on the privacy of Hunters Moon, but it would not address it altogether. Even with those works there would be an adverse effect on the privacy of the neighbouring occupiers from public use of the diverted path in close proximity to the property with unobstructed views to some rear windows.
 46. Following receipt of the objections, the OMA says it suggested an alternative alignment, but it was rejected by the applicant. The applicant submits that there is no alternative available to him which would meet the requirements of Section 119 although no explanation is offered. A path running diagonally across the garden of Broadmore Cottage would restrict the use to which the land could be put, and it would also still impact upon privacy for garden users. However, a route much further away from the cottage would be a significant improvement to the privacy of occupiers and it should reduce concerns over security. Unless an alternative is subject to public consultation, it cannot be known with any certainty whether or not there is a suitable alternative option.

47. Rights under Article 8 are qualified such that in certain circumstances they may be interfered with. Notwithstanding this, any interference must be proportionate. Case law has established that the degree of seriousness required to trigger a lack of respect for the home will depend on the circumstances, but it must be substantial. When balances are struck, the competing interests of the individual, other individuals, and the community as a whole must be considered
48. In my view, whilst there would be an adverse effect with respect to the privacy of Hunters Moon, the interference would not be substantial for Article 8 to be engaged when having regard to the mitigation measures proposed. Even if it were engaged, once balanced against the competing interests and benefits to the other individual owners and to the public, any potential interference would be proportionate so as not to constitute a violation under the 1998 Act should the proposed diversion be found to accord with the 1980 Act.

ROWIP

49. None of the parties suggest that the Order is contrary to any material provision contained in a ROWIP.

Whether it is expedient to confirm the Order

50. I have concluded above that the Order is in the interests of the landowners under section 119(1) of the 1980 Act. However, section 119(1) is subject to section 119(2) which requires an altered point of termination to be substantially as convenient to the public. Given that I have not been satisfied that the altered termination point would be substantially as convenient, I do not consider it appropriate to confirm the Order. Although I do not consider the proposed route to be substantially less convenient to the public and there would be no adverse effect on public enjoyment overall, the failure to demonstrate that the new termination point would be substantially as convenient to the public means that confirmation of the Order is not expedient.

Conclusions

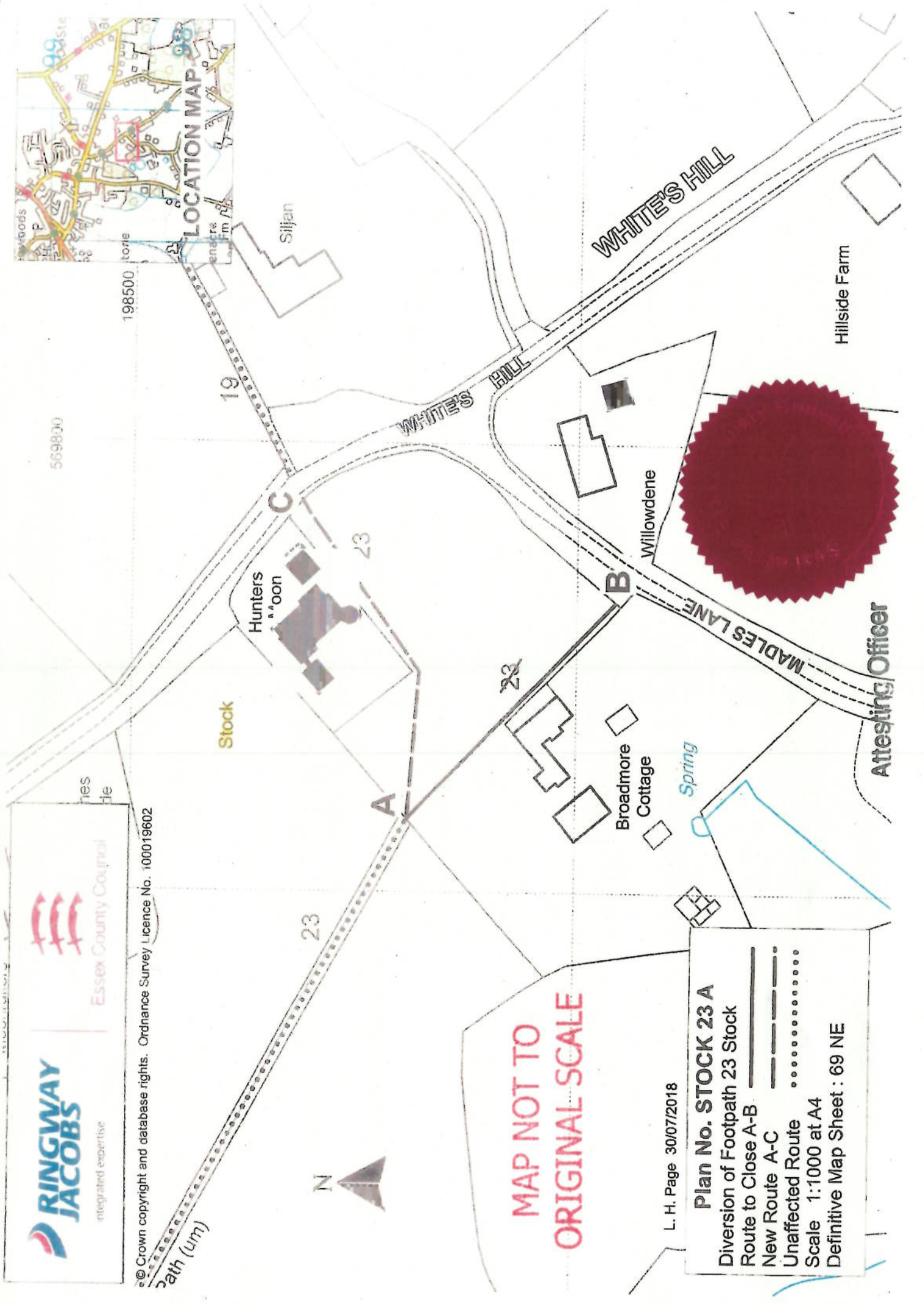
51. Having regard to the above, and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

Formal Decision

52. I do not confirm the Order.

KR Seward

INSPECTOR



MAP NOT TO ORIGINAL SCALE

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Plan No. STOCK 23 A
 Division of Footpath 23 Stock
 Route to Close A-B ———
 New Route A-C - - - - -
 Unaffected Route
 Scale 1:1000 at A4
 Definitive Map Sheet : 69 NE

Attesting Officer