



Order Decision

Site visit on 10 November 2020

by Sue Arnott FIPROW

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

Decision date: 13 January 2021

Order Ref: ROW/3237069

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Derbyshire County Council (Footpath from Station Road to Public Footpath No. 2 via Calico Lane – Whaley Bridge) Modification Order 2018.
- The Order is dated 8 February 2018. It proposes to modify the definitive map and statement for the area by recording a public footpath between Station Road, Furness Vale, and Footpath No. 2 (Whaley Bridge) beside the Peak Forest Canal, as shown on the Order map and described in the Order schedule.
- There was one objection outstanding when Derbyshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

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

Procedural matters

1. This Order was scheduled to be determined by means of a public inquiry that was due to be held on 10 November 2020. Unfortunately, the introduction of restrictions as a result of the Covid-19 pandemic has meant that a public meeting of this nature could not be held as planned. In order to progress this matter without delay, all interested parties were invited to consider whether a change of procedure would be acceptable in these circumstances. As a result, it was agreed that the Order would be determined following further written exchanges together with an accompanied visit to the site.
2. I am grateful to all concerned for their assistance in making this alternative arrangement during difficult times. For my inspection of the claimed footpath on 10 November 2020, I was joined by Mr Hosker and Ms Zasada on behalf of Derbyshire County Council, Mr Cheshire (claimant) and Mr Paxton (objector).
3. Whilst there has been no formal inquiry, I have nonetheless taken account of all the evidence submitted in reaching my decision.

The Main Issues

4. The main issue here is whether the evidence before me is sufficient to show that, in the past, the Order route has been used in such a way and to such an extent that a public footpath can be presumed to have been established.
 5. Derbyshire County Council (DCC) made the Order under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(i). If I am to confirm it, I must be satisfied that, on a balance of probability, the evidence shows a public right of way on
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foot subsists along the claimed route, described in the Order and labelled A-B-C-D-E.

Reasons

6. Firstly, I have examined the several old Ordnance Survey maps submitted by DCC, all of which show Calico Lane and the cottages at Lake View (previously known as Furness Row). Whilst the Order route has been shown consistently since the 1880s onwards, it cannot be deduced from these records that it was open to the public. Nevertheless, these maps confirm that there has been a lane physically in place on the line now claimed and shown on the Order map as A-B-C-D-E since the late-nineteenth century at least.
7. The same caveat applies to the aerial photograph¹ dated 1999; whilst it shows a worn route between points B, C, D and E, it cannot be assumed from the photograph alone that this was the result of use by the public². This enlarged photo is not sufficiently clear to confidently state that a gate was in existence at point D at that time but on balance I would say that it does since the worn path appears to narrow slightly here.
8. I note that the route C-D-E is not shown on a map held at Whalley Bridge Library and submitted by Mr Paxton. This is a map produced by the Local Authority Publishing Company Ltd although it is not clear what involvement either the district or county council may have had in its compilation. The map shows Calico Lane continuing along the Order route from A via B (with a spur to Lake View House) to C, continuing on the north east side of the cottages at Lake View and connecting with the canal towpath at the southern end of the terrace. There is no key to indicate the status of the way shown and it is therefore difficult to allocate any evidential weight, either in favour of a public right of way or otherwise. However, it does shed some light on the changing pattern of access as noted in my paragraph 14 below.
9. The main case in support of the Order is based on the presumed dedication of a public footpath under statute, the requirements for which are set out in Section 31 of the Highways Act 1980 (the 1980 Act). For this to have occurred, there must have been use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question. Such use would raise a presumption that the route had been dedicated as a public footpath. This may be rebutted if there is sufficient evidence to show that during this period there was no intention on the part of the relevant landowner to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.

When was the status of the way brought into question?

10. When considering evidence in relation to Section 31 of the 1980 Act, the first matter to be established is when the public's rights were brought into question.
11. DCC concluded this occurred in the summer of 2010 when a notice first appeared on the gate at point D indicating the way was private. Around this same time, two users of the route acknowledge being told by the owner of 1 Lake View that the way was not a public path.

¹ The Google Earth Satellite Image

² Especially since I understand that residents of Lake View enjoy certain private rights of access although no documentary evidence has been provided to support this.

12. These actions prompted the Whaley Bridge Amenity Society to submit an application to DCC in March 2011, co-ordinated by local councillor Mrs Winters, seeking a definitive map modification order to record a public right of way on foot along the length of Calico Lane and passing on the north side of No 1 Lake View to join the towpath beside the Peak Forest Canal.
13. According to the various recollections of the claimants, this gate was installed in the late 1980s/early 1990s. In his evidence, adjacent resident Mr Kelsey explained how he himself cleared overgrown vegetation and a derelict boundary wall to build the present wall and gate (but does not give a precise date for this)³. He said it was essentially done for safety reasons to prevent his and his neighbours' children (and dogs) gaining easy access to the canal side.
14. Prior to 2007, it appears that many members of the public used a link between the towpath and Calico Lane via a path at the southern end of the Lake View terrace. When this southern path was blocked off to all but residents by the owner of No 14 during the period 2007-2009⁴ it seems all use by the public transferred to the Order route between C and E⁵. The (then) owner of No 1 (Mr Rothwell) states that he wrote to the owner of No 14 to complain that this action would have a significant impact on access through the gate at his end, but that "*as part of the village community we would not be restricting access for local people to access the houses and industrial estate from the canal at our end*".
15. However, in July 2010, following a series of incidents involving abuse from non-local members of the public and theft from his garage, Mr Rothwell attached a printed notice to the gate stating: "*Please beware: This is not a public right of way. It is private land. We allow access on to & from the canal to residents of Lakeview & Bankview only. We also agree access to anyone who works on the industrial estate.*" This was superseded by another notice⁶ stating "*NOTICE – This gate will be locked closed on Saturday 1st January 2011. This is not a Public Right of Way. It is Private Land.*" In January 2011 this was replaced by a more permanent sign which simply stated "PRIVATE". There seems little doubt that these actions challenged the right of public to use the Order route.
16. At point A there is another notice at the entrance to the business park which lists the companies operating there. This reads: "CALICO LANE (PRIVATE) NO THROUGH ROAD". The date this notice was first erected is not known but it has been in place since at least August 2009.
17. Whilst it is entirely possible that this sign *could* have brought the status of the way into question at that time, it appears that the claimants largely ignored it. Indeed, the wording can easily be interpreted as applying to vehicular access rather than people on foot.
18. In any event, without a date on which it was first displayed, I am unable to consider this as a possible challenge that might bring into question the public's rights for the purpose of Section 31 of the 1980 Act.
19. I shall therefore examine the claimed use by the public during the twenty-year period July 1990 to July 2010.

³ Claimant Mrs Spencer recalls the gate was not there in 1981 when she moved to her present home.

⁴ It appears that no claim was made at that time to register a public right of way along that line.

⁵ One claimant comments that "no one really bothered at the time because we could still use the Order route".

⁶ Photographed in December 2010 and provided by claimant Mrs Cheshire

Evidence of use by the public

20. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been enjoyed 'as of right', without interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that does not take place in secret, is not by force and is not on the basis of permission.
21. In support of the claimed route I have before me the written evidence of 21 individuals. Each person completed a standard user evidence form giving details of their own use of the claimed route.
22. It has been drawn to my attention that the description of the route has been completed in the same hand on each form. Whilst objectors argue this shows the evidence is therefore pre-formed and incorrect, DCC submits that it does not detract from the reliability of the evidence contained in each statement. Each user has signed the declaration to confirm that the information given is true and accurate to the best of their knowledge. The Council also points out that there is no evidence to the contrary or to suggest the evidence is otherwise unreliable or untrue.
23. It seems to me that most if not all the claimants have answered the majority of the questions in their own hand and, given their signature at the end of each form, I am satisfied that the evidence is valid.
24. In addition, I recognise that all the claimants marked up a map indicating the route(s) they used and many have also included detailed descriptions of the paths they took. With the exception of three claimants⁷, I am in no doubt that this evidence relates to the Order route.
25. Of the 18 people who have made clear they used the Order route, 15 did so regularly throughout the whole of the relevant twenty year period, from 1990 through to 2010 when the notices first appeared. In fact the claimed use dates back several decades, for six people beginning in the 1950s and one in 1942.
26. The claimants describe walking routes including Calico Lane to and from the towpath sometimes to visit residents of Lake View, Lodge Farm and other properties nearby, but also as part of a circuit for daily dog-walking or simply for leisurely walks or runs. Some mention using this route to reach community bonfire parties held near the mill pond although the exact dates for this are not given.
27. In terms of quantity, I find the numbers of people using the route, and seeing others do so, sufficient to raise a presumption of dedication as a public path.
28. Turning to whether this use was 'as of right', there is no suggestion that the claimed use took place in secret; it appears to have been open and readily observable. Neither is it contended that it was in any respect 'by force'.
29. DCC acknowledges that some of the claimed use would have been in the exercise of a private right of way or license, for example to visit people living at Lake View. To clarify the issue, the Council carried out further investigations to try to distinguish between qualifying use that was 'as of right' and other

⁷ I have needed to discount the evidence of Mr Easton and Mr and Mrs Townend since they have not marked the Order route on their maps.

- (private) use which cannot contribute to the establishment of a public right of way. From the responses to DCC's request for additional information, it appears that many people did both but nonetheless believed the Order route to be a right of way open to the public on foot.
30. However objectors submit that such use as there was (which is not denied) was entirely with permission and therefore not 'as of right'.
31. Whilst most claimants say that they never felt they needed permission to use the route, two of the 18 claimants report having been given permission to use the claimed route. One was given permission⁸ by a previous owner of 1 Lake View whilst one was told (somewhat ambiguously) by a previous property owner that it was "OK to use the route".
32. I appreciate the point made by Mr Paxton that it is difficult to state with any accuracy the occasions on which he has spoken to people passing his house, politely challenging their right but giving them permission to continue. No doubt the same is true of his predecessor at No 1. However the incidents he himself reports are unlikely to have been during the period that is relevant here since he did not move to the property until after 2010.
33. Although Mr Rothwell made representations before the Order was made, disputing the establishment of a public right of way, he states that since he moved to the property (c2000) he "*always allowed local people to use the route for access*" but adds that "*the gate has been locked 1 day every year since moving to the property some 14 years ago, usually on Christmas Day*".
34. This raises two issues. Firstly, it is not clear how he differentiated between 'local people' and other members of the public and thus permitted the former but not the latter. His first notice in 2010 advised people of this policy but, prior to this, there is only limited evidence to support Mr Rothwell's conversations with people walking past his house. As I have noted above, two of the claimants acknowledge being given verbal permission in the past but there is no evidence of anyone being turned away.
35. Secondly Mr Rothwell states that he locked the gate once a year. However none of the claimants report being prevented from passing through the gate prior to 2010, either physically or by notice. Further, none of these people knew it was ever locked.
36. I will refer to this submission again below but insofar as the annual closure may have affected use by the public, I conclude there was no interruption in fact prior to Mr Rothwell's notices in 2010 followed by the locked gate on 1 January 2011.
37. Overall I am satisfied that a sufficient number of people used the claimed route regularly, without interruption and throughout the relevant period. I find their use to have been without force and without secrecy. Whilst there are two claimants who acknowledge the verbal permission granted by a previous landowner, I am not satisfied that the permission said to have been extended to specific local users was made clear to all until the notices in July 2010 which brought the status of the way into question. It is therefore my conclusion that the use by the remaining claimants was not 'with permission'.

⁸ H. Spencer

38. Amongst the user evidence presented I have noted references by some claimants to seeing other path users on bicycles or on horseback; some have themselves cycled along the route. However the total numbers of both groups are limited and not sufficient to demonstrate use by the public.
39. I also note that Mr Paxton questioned the lack of any reference by claimants to vehicular use of the claimed route⁹ when there is clearly private use by traffic gaining access to the various residences along the lane and the commercial premises at the old mill. In response to a request for further information some claimants acknowledge use by vehicles but commented that these were not able to connect with the canal towpath (and therefore not seen as relevant to the claim). Consequently there is no likelihood of use of the way by motor vehicles being of a nature that might contribute to the establishment of a public way.
40. From my examination of the evidence before me, I conclude, on a balance of probability, that the claimed use between July 1990 and July 2010 was not only without force, secrecy or permission, that it was continuous and without interruption throughout the whole 20-year period, but that it was also clearly used by the public on foot in sufficient numbers and with sufficient regularity to raise a presumption that the Order route was regarded a public right of way.

The intentions of the relevant landowners

41. Having reached that conclusion, I turn next to consider whether the actions of the landowners during the relevant period was sufficient to rebut that presumption.
42. I will first acknowledge that the pattern of land ownership is complex, as illustrated by the relevant Land Registry plan. Since it is only the owner of the fee simple that has the capacity to dedicate a public right of way, it is the actions of that same landowner that must be examined where the rebuttal of any presumed dedication is being considered.
43. The majority of Calico Lane (A-B-C) lies with the ownership of the old mill buildings now used as a small business centre. Although no objection to the Order has been submitted by this owner, the sign that stands at point A requires consideration. As I have noted above this states: "CALICO LANE (PRIVATE) NO THROUGH ROAD". The claimants ignored it, judging that it did not apply to pedestrians. There is a strong argument for interpreting its meaning as directed to vehicular traffic since people knew that the route on foot led to the canal towpath and therefore was a 'through road'.
44. DCC submits that the wording of this sign is not sufficient to notify users that the route is not a public footpath. I tend to agree with that analysis, but at the very least the sign might be said to be ambiguous. The weight that I allocate to this sign insofar as it (possibly) indicates a lack of intention to dedicate a public path is very limited.
45. The majority of the land crossed by the Order route between points C, D and E lies with ownership of No 1 Lake View although this narrows towards point D, leaving a sliver of land unregistered. It is possible (but by no means certain) that the gate at point D lies on this unregistered land.

⁹ It is my view that most claimants were likely to have been concentrating on the section in dispute, that is C-D-E.

46. The gate itself was installed before the relevant period by the owner of No 2 Lake View but it is clear that the notices were attached to it in 2010 by the then owner of No 1. Since these notices brought into question the status of the way, they lie at the very end of the twenty-year period and are not evidence of the landowner's intentions during it.
47. The actions that have most relevance are those of the previous owners of No 1, most notably Mr Rothwell who has written of his experience of people using the route during his tenure. In his evidence he stated "*Since we moved in to Number 1 Lakeview we have always allowed local people to use the route for access.*" He continues: "*We erected the 'Private' sign on the gate in 2010 following a series of incidents with members of the public, not local people, coming through the gate. These were walking groups, mountain bikers and horse riders and others.*"
48. He then describes several incidents that might be considered abusive behaviour and theft from his property but sates "*We have always welcomed access to local people to use the route for genuine reasons including leisure activities*".
49. The message I deduce from Mr Rothwell's statements is that he was content to let local people use C-D-E with respect but that his intention that this should be on the basis of 'permission' was not widely communicated. Aside from the incidents in 2010 where some users clearly took unreasonable advantage of Mr Rothwell's tacit acquiescence, and conversations with a few individuals, there is no evidence of anyone being turned away prior to 2010, nor any notices to make his position plain.
50. Mr Rothwell also stated that since he moved to the property the gate had been locked one day every year, usually on Christmas Day. However that is not corroborated by any other evidence.
51. In response DCC draw attention to the decision of the High Court in the case *Ali v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 893 in which it was held that closing a path on Christmas Day was insufficient to make clear to the public that there was no intention to dedicate a public right of way. This was a time that users were unlikely to be walking the route and more overt action was needed to communicate the owner's intention.
52. In this case, it is possible that local people did try to walk the route on the day the gate was locked but there is no evidence before me to support that. I can therefore give Mr Rothwell's actions only limited weight in terms of making clear to the public a lack of intention to dedicate the path as a right of way.
53. I further note that in the case of *Poole v Hutchinson*¹⁰ in 1843 it was held that "*there may be a dedication to the public for a limited purpose ... but there cannot be a dedication to a limited part of the public.*" Despite Mr Rothwell's aspirations, a path cannot be dedicated solely for use of local people.
54. Overall, I find the evidence to demonstrate a lack of intention to dedicate a public right of way for pedestrians along the length of the Order route is quite limited and, on balance, insufficient to rebut the presumption of dedication. It follows from this that a public right of way is deemed to have been established along the Order route.

¹⁰ *Poole v Huskinson* (1843) 11 M & W 827

55. In conclusion, and on the basis of the information provided, I am satisfied that the relevant statutory test is met: that, on a balance of probability, a public right of way for pedestrians has been shown to subsist over the Order route A-B-C-D-E. Consequently, I conclude that the Order should be confirmed.

Other matters

56. In his objection, Mr Paxton has challenged the width of the route that would be recorded in the Order for the section between C and D. The Order schedule states this to be 2.9 metres, that being the full width of the drive between those two points. The user evidence forms all state the width as "At least 2'6" – wider in part" but this was pre-completed in the same hand in each case and not the evidence of each individual claimant. When DCC recorded the width of C-D, it measured the full extent of the driveway on the basis that this was the width available for use. However Mr Paxton argues that cars have regularly been parked on the drive and therefore people must have walked to the side. Subsequent information suggests to me that people will have tended to take a reasonably direct line (but around the cars) between point C and the gate at D. In my judgement, 1.5 metres is a more reasonable estimation of the width necessary to enable two people to pass comfortably and more appropriate given the evidence. I therefore propose to modify the Order accordingly.

57. Mr Paxton criticised DCC for its delay in processing the application made in 2011 and also questioned whether he should have been advised of the application when he purchased his property. These are both matters that should be addressed to the relevant council but do not affect the pre-2010 evidence on which this case is based.

58. Concerns have been expressed over the impact of public access via the claimed footpath alongside No 1 Lake View, particularly regarding privacy and security. However these are not matters that are relevant to my consideration of this Order which is based on the premise that long-standing use by the public has already established a public footpath.

Conclusion

59. Having regard to the above and all other matters raised in the written representations, I propose to confirm the Order with the modifications referred to in paragraph 56 above.

Formal Decision

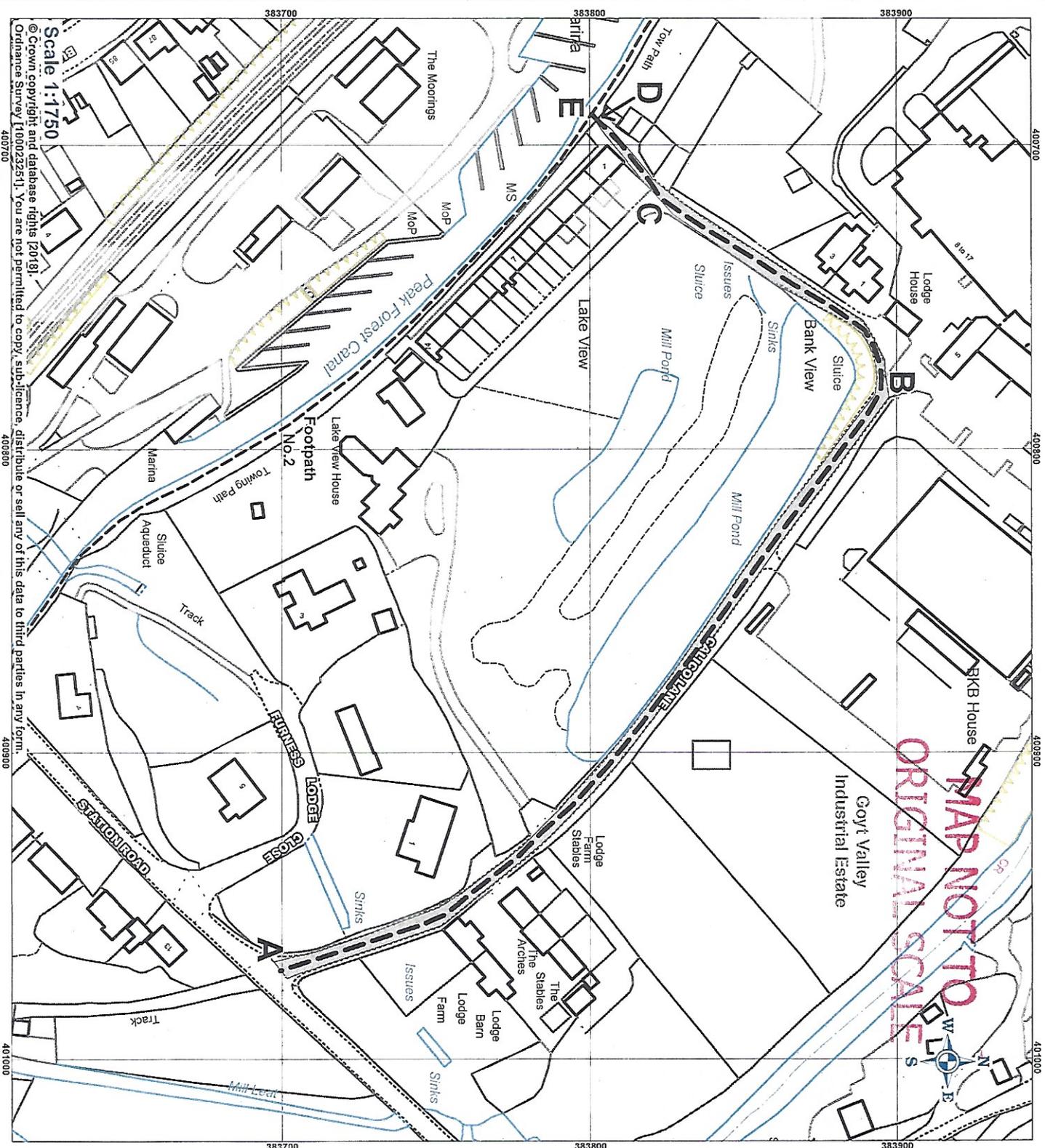
60. I propose to confirm the Order subject to the following modification:

In Part II of the Order schedule - Modification of the Definitive Statement:
amend width of "Point C to D" so as to read "1.5 metres".

61. Since the confirmed Order would (if modified) not show a way as it is shown in the Order as made, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of my proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

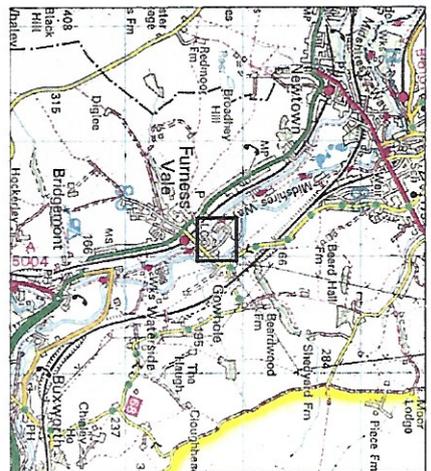
Sue Arnott

Inspector



MAP NOT TO ORIGINAL SCALE

Scale 1:1750
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Wildlife & Countryside Act 1981 Section 53
The Derbyshire County Council
(Footpath from Station Road to
Public Footpath No.2 via Calico
Lane - Whaley Bridge)
Modification Order 2018

Key:
 Footpath to be added

Ref: TE/CHX3735/Order/2018
Date: 19 January 2018



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