



Order Decision

Hearing held on 9 February 2021

Site visit made on 14 December 2020

by Alan Beckett BA MSc MIPROW

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

Decision date: 02 March 2021

Order Ref: ROW/3243062

- This Order is made under Section 257 of the Town and Country Planning Act 1990 and is known as the West Oxfordshire District Council Milton-under-Wychwood 301/13 (Whole) and Milton-under-Wychwood 301/5 (Part) Public Path Diversion Order 2019.
- The Order is dated 5 July 2019 and proposes to divert the public rights of way shown on the Order plan and described in the Order Schedule.
- There was 1 objection outstanding at the commencement of the hearing.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a virtual public local hearing into the Order on Tuesday 9 February 2021 having made an unaccompanied inspection of those parts of footpaths 301/5 and 301/13 at issue together with the proposed alternative routes on 14 December 2020 whilst undertaking site visits elsewhere in Oxfordshire.

Background

2. Footpath 301/5 commences at the southern end of Jubilee Lane and runs in a generally south-easterly direction to the parish boundary with Shipton-under-Wychwood. The section of footpath 301/5 at issue is that part which runs over a former parcel of meadow land and which now forms part of the housing development currently in progress.
3. Footpath 301/13 commences at a junction with footpath 301/5 a short distance to the south of Jubilee Lane and runs in a generally easterly direction across the meadow to its junction with footpath 301/14 at a point approximately 25 metres south-west of Frog Lane. That part of the meadow immediately to the south of The Sands and the properties known as Linden Lea and Harold's Gate is being developed for housing by the applicant for the diversion order, Spitfire Bespoke Homes ('Spitfire').
4. At the time of my site visit, the planned development of nine homes was proceeding with all nine houses built and with the necessary groundworks to provide vehicular access to the new properties underway. Site cabins were present on the western part of the development site and a number of tradesmen were on site engaged in various activities connected with the development.
5. In April 2017 Spitfire submitted a full planning application (17/01174/FUL) for residential development comprising the erection of nine dwellings with associated infrastructure and landscaping. This application was refused by West

Oxfordshire District Council ('the Council') in August 2017. Planning permission was granted on appeal (APP/D3125/W/17/3189184) in June 2018 subject to conditions. I understand that all conditions imposed as part of the permission have now been discharged.

6. It is proposed to realign part of footpath 301/5 to follow the footway of the access road which leads into the development, and to divert footpath 301/13 to a new alignment through that part of the site outside of the built development. At the time of my site visit, the proposed alternative routes had been created and were open, available and in use by the public.

The Main Issues

The statutory requirements

7. Section 257 of the 1990 Act requires that I must consider whether it is necessary to divert part of footpath 301/5 and the whole of footpath 301/13 to allow development to be carried out in accordance with the planning permission already given.

Effect of the proposal on other parties

8. Paragraph 7.15 of Defra Circular 1/09 (version 2 of October 2009) advises that in considering whether or not to confirm the Order, the disadvantages or loss likely to arise as a result of the diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing public right of way should be weighed against the advantages of the proposed order.

Reasons

Whether the diversion of the footpath is necessary in order to allow the development to be carried out

9. I saw that the access roads within the development have been constructed along with the footway on the western side of the access road onto which it is proposed to divert part of footpath 301/5. The diversion of part of footpath 301/5 is sought to prevent path users from having to walk within the vehicular part of the access road and also to remove the footpath from what would be the private amenity space of plots 3 and 4.
10. The properties being developed as plots 5, 6 and 7 have been built over the current definitive line of footpath 301/13. The approved development currently in progress would prevent path users from undertaking a journey between Jubilee Lane and Frog Lane via the footpath. The layout of the development means that footpath 301/13 would be obstructed by the three residential properties under construction and would pass through and over the private amenity areas of those plots.
11. I saw from my site visit that the houses on plots 5, 6 and 7 had been constructed and had the outward appearance of being completed. Spitfire submitted that whilst the external works to the houses had been completed, there were significant works which remained to be undertaken internally in order to make each of the three properties habitable, and for them to be able to function as the dwelling houses authorised by the planning permission.
12. Spitfire stated that the internal appointment of plots 5, 6 and 7 had been held at the 'second fix' stage; Mr Yeoman listed the 27 operations which remained

to be undertaken to each of the properties. Amongst these works were the installation and commissioning of plumbing and electrics, the installation of kitchen units and appliances, the installation of flooring and the hanging of internal doors and other internal carpentry. In addition, there were other works to be undertaken to the wider site to complete the development, including the top dressing of the road surface.

13. Section 257 of the 1990 Act provides for the diversion of a public right of way in order to enable development to be carried out for which planning permission has been granted. If the permitted development has progressed to the stage where it can be said to be substantially complete, then use of s257 to effect the diversion would be inappropriate as it is a mechanism to enable development, not to remedy the obstruction to a public right of way arising from development. In the cases of *Ashby*¹ and *Hall*², the Courts have given consideration to what is meant by 'substantially complete'. These cases provide guidance that a development can be considered to be 'substantially complete' when the works which remain to be carried out are minimal.
14. I concur with Spitfire that the works which remain to be undertaken to make plots 5, 6 and 7 into habitable dwellings cannot be described as 'minimal'. The works yet to be carried out involve a substantial degree of work to internally fit out each of the houses to a standard where the buildings could function as residential properties. I am satisfied that the approved development has not yet been completed and that the planning permission under which the development is taking place could not be fully implemented if the footpaths were to be retained on their existing lines.

The extent of loss and inconvenience likely to arise either to members of the public generally, or to persons whose properties adjoin, or are near the existing public right of way as a result of the diversion of the footpath

Impact upon members of the public generally

15. For those who use footpath 301/13 for utilitarian purposes as part of a walk between Jubilee Lane and Frog Lane, the proposed diversion would increase the journey distance by approximately 19 metres. This increase in distance and the accompanying increase in journey time is unlikely to inconvenience users of the footpaths.
16. Footpath 301/5 will run over the footway on the western side of the access road leading in to the development. Pedestrians will be required to cross that part of the access road which serves plots 1 to 4. The objector was concerned that the safety of path users would be compromised in having to cross the access road due to the number of vehicle movements likely to be generated from 9 new dwellings. In response, Spitfire submitted that the likely speed and number of vehicle movements which would be present would be low, and that the photographs of the site submitted in evidence demonstrated that sightlines for both pedestrians and drivers was very good.
17. I saw from my site visit that when approaching the crossing point on the proposed alignment of footpath 301/5 I had a clear view of the gap in the new dry-stone wall which provides access to footpath 301/13 and the land to the

¹ *Ashby & Dalby v Secretary of State for the Environment* [1980] 1 All ER 508

² *Hall v Secretary of State for the Environment* [1998] EWHC 330 (Admin)

- south of the development. There is also an unrestricted view of the driveway to plot 4 and path users would be able to observe any vehicle movement on the driveway. Although the roadside boundary wall of plot 4 prevents a direct view of traffic approaching from the west of the development, a judgement as to whether it is safe to cross the road does not have to be made until the path user is opposite the gap in the dry-stone wall. At that point, the user has a clear view along the access road towards plots 1-3 and will be able to determine whether it is safe to cross the road.
18. Concerns were also expressed for users approaching the crossing point from the south along footpath 301/5 or on the proposed route of footpath 301/13. It was submitted that users would be able to step straight out into the road from the footpath due to the gap in the dry-stone wall. The copy of the approved boundary treatments plan which I received is at such a scale which makes the annotation on the plan difficult to read, but it appears from the plan that it is proposed to erect a kissing gate within the current gap in the wall. Whilst a gate may be proposed, I will consider this issue on the basis of a gap in the wall being present as it was at the time of my site visit.
 19. The dry-stone wall marks the boundary between the built part of the development site north of the wall, and the landscaped open space to the south. The dry-stone wall thus provides an indication to path users of the change in environment; any reasonable user would therefore be aware of the possibility of vehicular movements near the houses, and that the gap in the wall should be approached with the required degree of caution. Furthermore, the dry-stone wall is only 1.2 metres in height; it is unlikely that a structure of such limited height would obscure vehicle movements within the development from the view of path users approaching the gap on either footpath.
 20. I am satisfied that the requirement to cross the access road to join either footpath 301/5 or footpath 301/13 would not expose users to such a degree of risk that would mean the proposed crossing point was unsafe or dangerous. It follows that I conclude that users of the footpaths are unlikely to be inconvenienced by having to cross the access road.
 21. The proposed alternative route for footpath 301/13 has been constructed and is open for use. The proposed footpath is made of crushed gravel between timber edgings and follows a sinuous course through the undeveloped open space to the south of the dry-stone wall. This land is partly improved and partly marshy grassland, with the wetter part of the site being to the south and west of Calais Cottage.
 22. The objector submitted that the development had necessitated building up the northern part of the site to provide sufficient level ground on which to build the houses. This had resulted in increased water run-off and had led to localised pooling of water on the new footpath which was at times covered in sandy mud. It was submitted that standing water on the surface of the path in winter would also present a slip hazard to users.
 23. The issue of the drainage of the development and the need for the attenuation of run-off from the site was considered as part of the planning process and the development was subject to a condition regarding surface water drainage. These matters have been addressed to the satisfaction of the Council and the condition has now been discharged. The issue of water on the proposed path is

- more likely than not to arise from the nature of the land crossed by the proposed footpath than from run-off from the new houses.
24. The existing line and the proposed line of footpath 301/13 cross an area of marshy grassland; it is naturally wet. The objector notes that prior to the development a number of routes existed across the site which meant that pedestrians could walk between Jubilee Lane and Frog Lane under all weather conditions.
 25. The aerial photograph of the site which was taken at some point before development commenced does not show significant wear along the line of footpath 301/13, which suggests that the definitive line of the path saw limited use which may have been due to it being wet underfoot. The proposed alternative route for footpath 301/13 runs through the same marshy grassland and consequently is likely to be damp or wet at times. Given the method by which the path has been constructed³ any water that collects on the surface should be able to percolate through the stone and geotextile membrane to reach the soil underneath.
 26. As noted above, I visited the site in mid-December. The day of my site visit was dry and sunny following at least two days of rain. There were areas of the proposed path which were soft underfoot and areas where some surface water was present. The path was, however, fully accessible and I observed a number of people making use of it as a means of passing between Jubilee Lane and Frog Lane. I consider that due to its construction, the proposed path is more likely to provide a year-round means of access through the open space than the current definitive line of footpath 301/13.
 27. The approved Landscape and Ecological Management Plan produced in response to condition 7 of the planning permission sets out the detail of the proposed alternative path including its dimensions and the materials from which it is to be constructed. The path is made from crushed Cotswold stone and runs through an area which is to be managed as public open space. I consider that the materials used for the alternative path are in keeping with the local landscape and are sympathetic to it; path users are unlikely to be inconvenienced or adversely affected by the materials from which the path has been constructed.
 28. Concerns were raised regarding the engineered nature of the path, the materials used in its construction and its effect of extending the 'urbanisation' of the village out into the wider countryside. Whilst the creation of a path through the meadow using crushed stone might be more visually intrusive than if the path were to have a grass surface (such as is present on footpath 301/14 which also crosses the site), the likely impact on the wider countryside and the Cotswolds AONB has already been considered as part of the planning process.
 29. The western end of footpath 301/13 would be moved southwards by not more than 40 metres; the junction of the eastern end of the path with footpath 301/14 would remain unchanged. I consider it highly unlikely that path users would be inconvenienced by the minor diversion to the south from the current line. The proposed alternative path retains the extensive open views of the countryside to the south which would have been available from the definitive

³ Appendix 6 of Spitfire's Statement of Case: Road and Footpath Construction Details

line of footpath 301/13; path users would not suffer any loss of views over the surrounding landscape.

30. The proposed diversion would maintain a link between Jubilee Lane and Frog Lane and Jubilee Lane. The diversions would not impact upon the public's ability to undertake a journey along footpath 301/5 and 301/13 to connect with other footpaths within the local rights of way network should they so wish. There is no disadvantage or loss to the public in this respect.
31. For the above reasons I conclude that the proposed diversions would not result in disadvantage or loss to members of the public who would seek to use footpaths 301/5 and 301/13.

Impact upon persons whose properties adjoin or are near the footpath

32. The land crossed by the footpaths at issue is owned by the owner of Calais Cottage who has consented to the diversion. There is no evidence before me from which I could conclude that persons whose properties adjoin the existing right of way would suffer loss or inconvenience as a result of the proposed diversion.

Other matters

33. The objector submitted that an alternative route to the proposed diversions could be considered. The objector's suggested alternative would follow a route which is the subject of an application made to Oxfordshire County Council to record a public footpath on the northern and eastern perimeter of the development site. The advantages of this route were claimed to be that it was not prone to flooding; that it was lit by the lights of adjacent houses and although enclosed for part of its length would be safe for users.
34. Although the attributes claimed by the objector may be present on the suggested alternative route, what I am required to consider is whether the diversion proposed by the Order satisfies the relevant tests under s257, not whether a diversion preferred by another party would satisfy those tests. I have not identified any disadvantage to the public or to adjacent landowners which suggests that the route proposed by the Order would fail to satisfy those tests.
35. As noted above, the internal fit of plots 5,6 and 7 has been held pending the determination of the Order. It is Spitfire's intention to proceed to completion of the houses and to sell them on confirmation of the Order. However, whilst the Order may be confirmed, it will not come into effect and plots 5, 6 and 7 will not be unencumbered by the public right of way until the Article 3 certificate has been issued by Oxfordshire County Council.

Whether the Order should be confirmed

36. The Order has been made to enable Spitfire to execute the planning permission applied for and subsequently granted. It is clear that the permitted development would obstruct part of footpaths 301/5 and 301/13 and I have concluded that the proposed diversion would not result in inconvenience or loss to the public in general or to those whose properties are adjacent to the footpath.

37. The advantage of the order is that the planning permission already granted can be carried out whilst retaining use of the footpaths at issue. I conclude that there would be no disadvantage or loss to the public or to other parties which would outweigh the advantages conferred by the Order.

Conclusion

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

Formal Decision

39. I confirm the Order.

Alan Beckett

Hearing documents

1. Itemised list of operations yet to be undertaken on plots 5, 6 and 7
2. Copy of Ashby & Dalby v SSE
3. Email from Mr Pratt to PINS dated 8 February 2021

Appearances

For West Oxfordshire District Council:

Ms Marie Barnes

Mr Chris Wood

For Spitfire Bespoke Homes:

Miss Rebecca Meager of Counsel

Mr James Yeoman, Savills

Objector:

Ms Carol Ayers

Interested party:

Mr John Pratt

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Town and Country Planning Act 1990
Section 257

Public Path Diversion Order

Milton-under-Wychwood Footpath No. 301/13 (Whole); and Milton-under-Wychwood Footpath No. 301/5 (Part)

Existing Footpath to be diverted.
A-B (301/13) Length= 160m
A-D(301/5) Length= 30m

Proposed Footpath diversion
A-D(301/5) Length=32m
C-B Length= 137m

Route of unaffected Footpaths
301/14 and 301/5(Part)

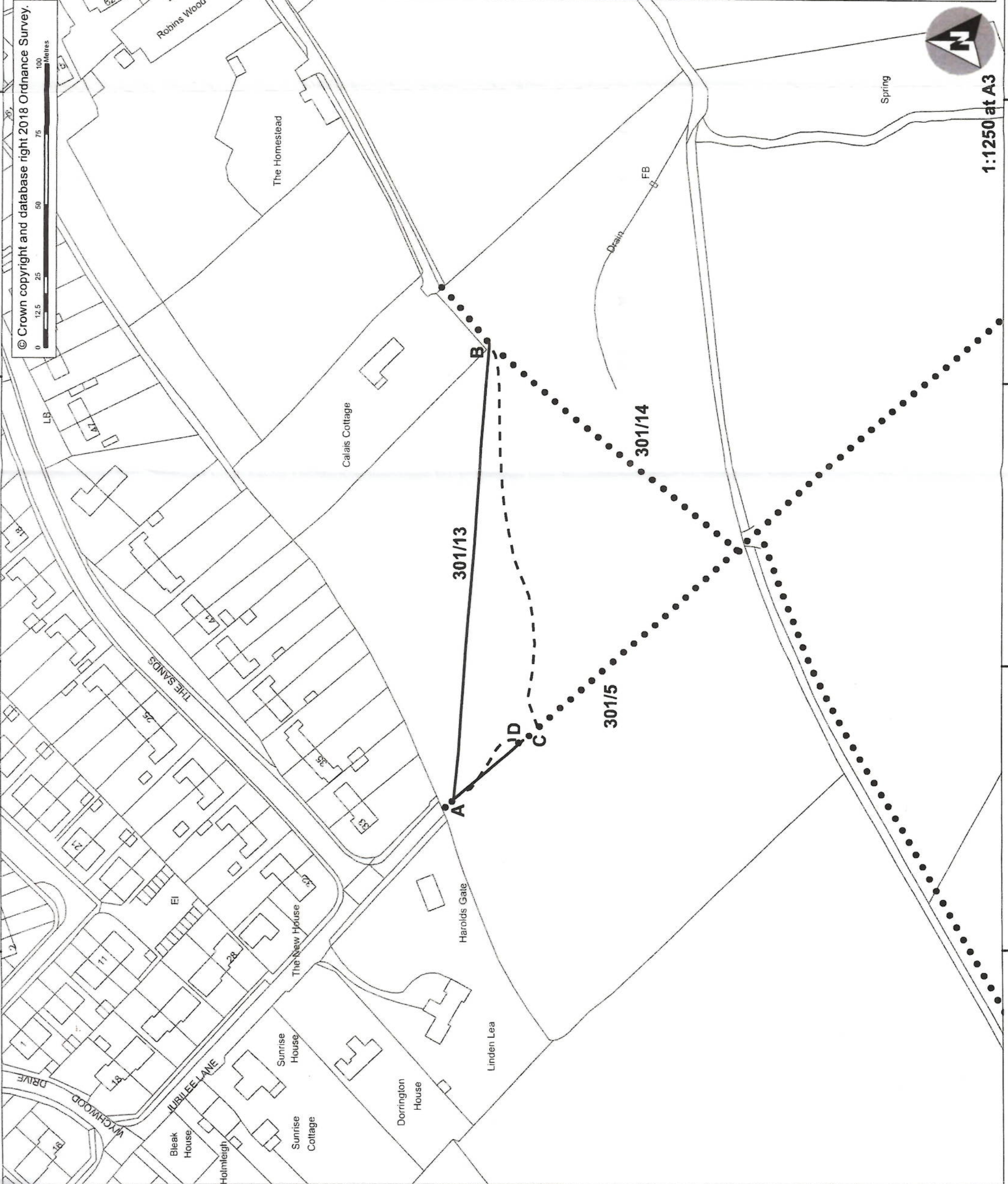
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