
Order Decisions

Inquiry opened on 15 November 2016

Site visit made on 16 November 2016

by Martin Elliott BSc FIPROW

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

Decision date: 20 December 2016

Order Ref: FPS/B2002/7/2

Order A

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The North East Lincolnshire Council Public Footpath, Cleethorpes No 5 Definitive Map Modification Order 2012.
- The Order is dated 21 September 2012 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There were eight objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Order Ref: FPS/B2002/7/1

Order B

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The North East Lincolnshire Council Public Footpath, Cleethorpes No 5 Definitive Map Modification Order 2015.
- The Order is dated 6 November 2015 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public local inquiry at Grimsby Town Hall on 15 and 16 November 2016. I carried out an unaccompanied inspection of the Order routes and surrounding area on the afternoon of 14 November 2016. I was provided access to the land by a representative of Associated British Ports (ABP) but, as outlined at the inquiry, I did not discuss the merits of the case with them. I carried out a further unaccompanied site visit on 16 November which was limited to observing a fencing post on the boundary between the land owned by ABP and North East Lincolnshire Council (the Council) adjacent to the railway line fencing.
2. The Orders arise from an application made by a Mr R Palmer for the addition of a number of public footpaths and a restricted byway from the Fuller Street footbridge to Salvesen Road. The Council refused the application but, following an appeal to the Secretary of State, were directed to make an Order for a route identified in the decision of Inspector Yates as the 'northern route'.

3. On 21 September 2012 the Council made Order A which attracted eight objections including one from the applicant for the Order. On considering the objections, specifically the objection from Network Rail, the Council took the view that the Order was fundamentally flawed in that it showed a route from Harrington Street using a footbridge (known as Fuller Street footbridge) over which there were no public rights. The Order was also considered flawed because the route shown was outside the direction given by Inspector Yates. Consequently the Council did not support the confirmation of Order A, and no one has offered any support for its confirmation.
4. Notwithstanding the view of the Council that Order A is fundamentally flawed I note that the Order has been made under the first part of section 53(3)(c)(iii) of the 1981 Act which provides for the deletion of a public right of way from the definitive map and statement where no right exists. The Order has also been made under section 53(3)(b) of the 1981 Act providing for the recording of a public right of way arising from the dedication of a way in consequence of the expiration of a period of use.
5. The Order was made with the intention of adding a public footpath to the definitive map and statement. However, the sections cited in the preamble to the Order are contradictory in that the first section cited refers to the deletion of a public right of way and the second section relates to the addition of a right of way. Further, Part 1 of the Schedule provides no indication that the route identified is to be added to the definitive map and therefore does not conform to the Regulations¹. Additionally whilst the Order route is shown on the Order map there is nothing to indicate that the route shown is to be added to the definitive map. Taking all factors into consideration I take the view that Order A is misleading in its intentions and not capable of confirmation. The errors and omissions are of such significance that modification of the order would not be appropriate. In view of this, and the absence of any support for confirmation of Order A, I have not considered this Order further. Any further references to the Order in this decision relate to Order B unless clearly specified.
6. In respect of Order B the Council took a neutral stance at the inquiry having been directed to make the Order. It was understood that the case in support of Order B was to be made by the applicant. However, having concerns over an award of costs², the applicant, Mr Palmer, indicated that he was only prepared to act as a witness. Nevertheless, Mr Palmer had produced a case in support of the confirmation of the Order and in effect was the supporter of the Order. No application for an award of costs was made at the inquiry. A number of other individuals gave evidence in support of the Order.
7. The statement of case submitted by ABP did not include any supporting documents. However, the subsequent proofs of evidence included a number of items of documentary evidence. The Rights of Way (Hearings and Inquiries Procedure (England) Rules 2007 indicates that a statement of case should contain full particulars of the case including any supporting documents which are being relied upon, a proof of evidence being a written statement of evidence. Mr Palmer raised concerns as to the late submission of documents.

¹ Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993

² An award of costs can be made on the basis of unreasonable behaviour of a party leading to unnecessary or wasted expense of the party seeking costs.

8. Whilst ABP should have included the documentary evidence with their statement of case the documents were available prior to the inquiry and there is nothing to indicate that anyone will have been prejudiced by the late submission of documents.
9. At the commencement of the inquiry ABP submitted additional documentary evidence which it considered to be of fundamental importance in the determination of the Order. Personal circumstances had prevented Mr Findlay from producing a comprehensive proof of evidence. Given its relevance the additional evidence was accepted. An adjournment was taken for consideration of the additional evidence. In the interests of fairness ABP suggested that it was appropriate for them to give their evidence first. Whilst it is normal for the case in support of an Order to be heard first it appeared to me sensible to hear the case for ABP in order that supporters of the Order could fully understand the case being presented by ABP and enable supporters to make a response. Whilst the additional evidence should have been submitted in the time period specified in the Notice of Order there is nothing to indicate that anyone will have been prejudiced by its late submission.
10. As noted above the Order arises from a direction from the Secretary of State. Whilst a decision has been made in respect of the evidence before Inspector Yates any decision made at the Schedule 14³ stage is without prejudice to any decision at the Schedule 15 stage. Furthermore, I have been appointed by the Secretary of State to determine the Order before me. My decision must be based on the evidence before me measured against the relevant criteria which are set out below.

The Main Issues

11. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of events specified in sections 53(3)(c)(i) and 53(3)(b). The main issues are whether the discovery by the authority of evidence, when considered with all other relevant evidence, 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. Further, whether the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during the period raises a presumption that the way has been dedicated as a public path.
12. The test to be applied to the evidence is on the balance of probabilities.
13. Section 31 of the Highways Act 1980 provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
14. Should the case for a statutory dedication fail then it may be appropriate to consider dedication at common law. This requires consideration of three

³ Schedules 14 and 15 to the 1981 Act

issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. There is no evidence of any express dedication. Evidence of the use of a path by the public as of right may support an inference of dedication and may also show acceptance by the public. In a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant.

Reasons

15. The Order route crosses an area of land known by various names, New Clee Waterfront, New Clee Wasteland and New Clee Sidings. I shall refer to the land crossed by the Order route as New Clee Sidings. ABP identified the land crossed by the section of the Order route D to E⁴ in their ownership as the 'port land'.

Statutory dedication – Section 31 Highways Act 1980

When the right to use the way was brought into question

16. For the purposes of a statutory dedication the relevant twenty year period applies retrospectively from the date when the right to use the way was brought into question.
17. Mr Palmer outlined that in 1999, due to the partial erection of a fence at New Clee Sidings, residents approached the Council requesting that a right of way be recorded over the land. Mr Palmer confirmed that the palisade fence which crossed the Order route on the boundary between the land owned by ABP and the Council was erected in 1997. He said it was still possible to access the land by going around the seaward end of the fence. A number of those who have completed evidence of use forms (UEF's) indicate that the fence was erected in 1997. ABP contended, by reference to the asset register (inquiry document 11) that the fence was present in January 1997 and that the erection of the fence would have taken place towards the end of 1996.
18. The evidence indicates that a fence was erected in January 1997 and possibly earlier in 1996. Whilst, before the completion of the fence, which Mr Palmer said was in March 2016, it was possible to access the land owned by ABP by going around the fence, the fence would have prevented access along the Order route. It was the erection of the fencing which prompted Mr Palmer to make the application under the 1981 Act to the Council. In my view the erection of the fence in 1997 would have brought the right to use the way into question. This sets a relevant twenty year period of January 1977 to January 1997.
19. ABP argued that the right to use the route was brought into question earlier in 1977 when a fence was erected on the boundary between the port land and the land owned by the Council.
20. In 1974 the then owner of New Clee Sidings, British Transport Docks Board (the Board), sold the eastern part of the land to Cleethorpes District Council. The conveyance (inquiry document 5) at paragraph 2(b) stipulates that the

⁴ Letters A to E used in this decision relate to points identified on the Order map and in the Schedules

purchaser erects a fence of a type to be approved by the vendor on the boundary between the landownerships within one month of the completion of the sale, the conveyance being dated 8 July 1974.

21. A memorandum dated 8 October 1976 (Inquiry document 6) reports the fact that there was still no fence erected on the boundary of the Board's land as called for in the terms of the sale of the land. Correspondence to Cleethorpes Borough Council from the Board, 20 October 1976, asks when the matter of the fence will be attended to. On 24 January 1977 the Council informs the Board that quotations for the fence are being obtained. After protracted correspondence regarding the pegging out of the line of the fence the Council advised the Board on 3 May 1977 that the fence was being erected. A file note dated 5 May 1977 states that the fence was erected on 4 May 1977. However, a handwritten note indicates that on 13 May 1977 the fence had been broken down. A memorandum from the Estate Surveyor, 18 May 1977, suggests that the fence wires had been cut and outlines the need to prevent trespass onto the land as there is no public right of way. Further correspondence between the Board and the Council, 16 June 1977, refers to a suggestion by the Docks Manager to insert more concrete posts in the fence which, although may not prevent pedestrian access, would stop vehicles. The correspondence informs that the British Transport Police had been requested to take action to prevent further trespass and states that there is no public right of way between the two lands.
22. Mr Palmer submitted that it is not clear from the correspondence whether the fence was a boundary line simply indicating a change of ownership or whether it was intended to prevent access.
23. In my view the correspondence provides compelling evidence as to the erection of a fence in May 1977. Although taken in 1989 the feature shown on the aerial photograph (inquiry document 7) along the boundary line is consistent with the existence of a fence albeit that by that date there were gaps. I also note a concrete straining post (inquiry document 4) remains on the boundary line which is also consistent with the fact that the fence erected in 1977 was concrete post and wire. The fence was erected as a condition of the 1974 conveyance and marked the boundary between the landholdings.
24. I do not propose at this stage to consider the ongoing presence of the fence after 1977 which, if appropriate, will be considered in the context of an interruption in any subsequent twenty year period and whether the landowner demonstrated a lack of intention to dedicate. The issue to be considered is firstly whether the erection of the fence would have brought the right of way into question.
25. It is clear that the fence was vandalised soon after its erection in May 1977 and I am aware of the additional statements assembled by Mr Palmer to the effect that prior to the erection of the palisade fencing in 1997 there was no fence restricting access. However, the fence, which was erected to prevent trespass onto the port land, was nevertheless erected and would, for a brief period, have prevented access. The erection of the fence prompted its vandalism by persons unknown. In my view it is more likely than not, bearing in mind its vandalism, that at least some of those using the Order route would have viewed the erection of the fence as an action to prevent access such as to

challenge the right to use the way. This would set a relevant twenty year period of May 1957 to May 1977.

26. Given that the palisade fencing was erected by January 1997 and that the wire fence erected in May 1977 brought the right to use the way into question there is no clear period of twenty years prior to January 1997 to enable the consideration of a statutory dedication. In view of this I have not considered further the statutory dedication of the Order route arising from use in a twenty year period prior to 1997.

Whether there is a way of such a character that use of it could give rise at common law to a presumption of dedication

27. For a statutory dedication to occur it is necessary that the way is of a character that use is capable of giving rise to a presumption of dedication at common law. A way which could not give rise to a dedication at common law is, for example, one over which there is a statutory exclusion which prevents a right of way from being established by use.
28. ABP contends that section 57 of the British Transport Commission Act 1949 (the 1949 Act) provides a statutory bar to any statutory dedication, and dedication at common law, of a public right of way over port land.
29. Section 57 of the 199 Act provides that *'As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road path thoroughfare now or hereafter the property of the commission and forming an access or approach to any station goods yard wharf garage or depot or any dock or harbour premises of the Commission'*. The protective provisions of section 57 were preserved by Schedule 2, Part 3 of the Transport Act 1962 and transferred to the British Transport Docks Board.
30. New Clee Sidings were first conveyed to the Great Western Railway Company by way of three conveyances in 1888, 1890 and 1915. On 1 January 1923 that company became part of the London and North Eastern Railway (LNER) and on 1 May 1929 the LNER agreed to sell the New Clee Sidings to the Grimsby Corporation and entered into a 30 year lease with buy back provisions in favour of LNER. In 1949 legal ownership of LNER passed to the British Transport Commission which was subsequently dissolved and the British Transport Docks Board assumed ownership. On 22 June 1966 the Grimsby Corporation conveyed Number 3 Fish Dock and New Clee Sidings to the British Transport Docks Board.
31. Section 5 of the Transport Act 1981 reconstituted the British Transport Docks Board which became known as ABP.
32. From around 1934 the New Clee Sidings formed an integral part of the port land which comprised railway sidings and in 1949 was in active use as port premises and continued to be used until the late 1960s. Mr Jaynes explained that following the decline of the fishing industry in Grimsby in the early 1970s the nature of the port's business has changed. However, the New Clee Sidings have been used for various purposes such as port plant laydown, stockpiling of building materials for the development of other parts of the port, temporary storage and as a construction site for the Environment Agency for the new sea

- wall defence. In recent years a series of new-build fish processing units have been constructed.
33. Mr Jeynes said that it was not uncommon to see areas of the port apparently unused and that it was essential to hold areas of land in reserve to meet future development needs. Mr Jeynes identified a number of future potential business development options for New Clee Sidings including storage, new riverside berths, offshore wind generation, project cargoes, fuels, fish processing and decommissioning.
34. Mr Palmer referred to the decision of Inspector Yates, following the appeal under Schedule 14 of the 1981 Act, that the land having not been used for the purposes cited in Section 57 of the 1949 Act for a period of twenty years or more could not rely on the protection of the Act. Mr Palmer also gained confidence from a further decision of Inspector Norman in relation to an appeal against a decision of Doncaster Metropolitan Council (referred to by Mr Palmer as the Doncaster Ruling). This again was a decision following an appeal under Schedule 14 of the 1981 Act.
35. As noted above at paragraph 10 any decision at the Schedule 14 stage is without prejudice to any subsequent decision at the Schedule 15 stage. Any decision at the Schedule 15 stage will be based on the evidence before the Inspector which may or may not have been before the original Inspector at the Schedule 14 stage. Further, it should be noted that a decision of an Inspector does not set any legal precedent and each case should be decided on its merits; this is equally applicable to the decision of Inspector Arnott and the Dibden Bay case referred to by ABP.
36. In respect of the decision of Inspector Yates he concluded that the land fell into the definition of the 1949 Act but was not convinced that where land ceased to be used in accordance with Section 57 of the 1949 Act that it remained protected from subsequent dedication. However, he had been provided with nothing to confirm that the land was being used in a manner consistent with the 1949 Act during the relevant twenty year period he was considering. It was on this basis and other matters before him that he made his direction. There is nothing to indicate that he considered any evidence in respect of the applicability of the 1949 Act. Given the circumstances I do not think that the decision of Inspector Yates supports any proposition that the 1949 Act could not apply to the port land. As noted above any decision must be decided on its merits and I must have regard to the evidence now provided by ABP and all other relevant evidence.
37. As regards the Doncaster Ruling Inspector Norman states that *'There is very little to suggest that any part of the bank which forms part of the claimed route was ever a wharf, depot or dock [18], and no evidence that this was so during the relevant twenty year period'*. It was on the basis of an absence of evidence that he concluded that section 57 of the 1949 Act did not apply. ABP submitted a copy of the decision following the making of the Order as directed by Inspector Norman (inquiry document 10). Inspector Arnott also concludes that there is little evidence of the canal bank ever forming land to which section 57 of the 1949 Act would apply. It was on the basis that Inspector Arnott concluded that section 57 did not apply. Again my decision must be based on the merits of the cases and I must therefore have regard to the evidence submitted by ABP and all other relevant evidence.

38. ABP submitted extracts of a report into an inquiry relating to Dibden Bay and a report to the Hampshire County Council rights of way panel in relation to claimed rights of way at Dibden Bay (inquiry documents 1 and 3). I note that the Inspector for the Dibden Bay inquiry concluded that despite the fact the relevant land had never been used for port related activities the land was operational by virtue of its inclusion in the port estate and the role it played in the planned expansion of Southampton docks. Hampshire County Council also concluded that overriding considerations applied to the land owned by ABP, those considerations being that section 57 of the 1949 Act prevented the acquisition of any right by virtue of user at common law and under section 31 of the 1980 Act.
39. Having regard to the above, in 1949 New Clee Sidings were clearly an integral part of the dock in that the sidings provided essential facilities for the operation of the port. The land was property forming the harbour premises of the Commission. Although the sidings fell out of use by the late 1960s the land, with the exception of the land which was sold to the Council in 1974, has been used for operational activities associated with the port. Whilst parts of the land do not now appear to be actively used by ABP the land is essential for future development needs of the port and is used for a variety of purposes, albeit in my view fairly low key, and remains part of the dock and harbour premises.
40. As submitted by ABP section 57 of the 1949 Act is clear that rights cannot be acquired over any property now or hereafter forming any dock or harbour premises of the Commission. ABP is the successor body to the British Transport Commission. The protection of the port against the creation of a public right of way continues from the passing of the Act and cannot be lost. The 1949 Act does not require that the land is operational, only that the land forms a dock or harbour premises of the Commission. As noted above the land forms part of the docks and harbour premises and section 57 provides a statutory bar to the dedication of public rights by user. The way is therefore not of a character that use could give rise to dedication at common law.
41. I note that the North East Lincolnshire Employment Land Review states the land should be excluded from supply and identifies that the majority of the site is located within ecological designation. The Draft North East Lincolnshire Local Plan Sustainability Appraisal Report also refers to the nature conservation designation limiting opportunity for development. However, this does preclude the land from being a dock or harbour premises. The land may also be listed by the Council as a Local Wildlife Site but this is not a statutory designation and again does not preclude the premises from being a dock or harbour premises. Further, the land may be identified on 'magic.gov' as grassland but this has no bearing on the status of the land as a dock or harbour premises.
42. Bearing in mind all the above, no statutory dedication can arise from use between 1957 to 1977. I have therefore not considered the other elements required in respect of a statutory dedication. Given my conclusions there can also be no inference of dedication at common law over land owned by ABP as the 1949 Act establishes a statutory bar to the dedication of public rights by user. For completeness should there have been a clear twenty year period prior to January 1977 my conclusion would have been the same. The land was and continues to be land to which section 57 of the 1949 Act applies.

Dedication at common law

43. In view of my findings it is appropriate to consider the dedication at common law of a footpath over the land now in the ownership of the Council. It should be noted that prior to the ownership by the Council section 57 of the 1949 Act was applicable to the land and provided a statutory bar to dedication by prescription or user. The relevant period for consideration is therefore from 1974.
44. The original evidence of use forms provide limited evidence as to use of a way from Suggitt's Lane to point D. I was provided with some evidence of use by those giving evidence to the inquiry. Mr Palmer submitted a photograph showing current use of part of the Order route and I noted use of part of the Order route on my site visits. However, there is nothing to indicate that this use extends to point D. Mr Palmer also contended that the route between Suggitt's Lane and the Fuller Street footbridge had taken place since the 1930s although in my view the evidence from this time is very limited. Mr Palmer provided three photographs, dated around 1939 and 1955, two of which he contended showed use of the Order route, and a photograph taken on 18 January 1976, the morning after a flooding incident, showing what he believes to be people walking the Order route. I have examined these photographs closely and I do not consider that they show individuals using the Order route. In my view the route being used is to the north of the Order route and the photographs do not support the use of the Order route.
45. It is noted that the Council in drafting the Order identified the line of the Order route from Suggitt's Lane to the Fuller Street footbridge. The decision to show this route was not however prompted by historical evidence but prompted from a practical perspective. I do not consider that this decision can be taken as inferring any dedication of a route over the land, noting that the Council have maintained a neutral stance in respect of confirmation of the Order.
46. As noted above, the burden of proving the landowners intentions in asserting any dedication at common law rests with the claimant. This is a heavy burden and, in practice, even quite a formidable body of evidence may not suffice. Looking at the evidence as a whole it is in my view insufficient to raise an inference of dedication at common law. In any event the route would terminate at point D on the boundary of the land owned by ABP. This land has continued to form land to which section 57 of the 1949 Act is applicable. Whilst cul-de- sac highways do exist there is nothing before me to indicate that point D is a place of public interest or resort such as to provide special circumstances that could provide an appropriate point of termination to justify the existence of a right of way.

Other Matters

47. A number of issues were raised in respect of the suitability and need for the Order route. Concerns were also raised in respect of the abundance of wildlife and its dependence on the land and the visual impact of the 'cold store'. Mr Palmer also referred to an urban 'right to roam'. Whilst I note these matters the 1981 Act does not allow such considerations to be taken into account. The relevant criteria are those set out at paragraphs 11 to 14 above.

48. Mr Palmer also provided background information in respect of the determination of the application to add the route to the definitive map. Whilst I note this information the determination of the application is not a matter before me. I have been appointed to determine the two Orders.

Conclusions

49. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that Orders A and B should not be confirmed.

Formal Decisions

Order A

50. Order A is not confirmed

Order B

51. Order B is not confirmed.

Martin Elliott

Inspector

APPEARANCES

For North East Lincolnshire Council:

Mr A Gill	Of Counsel
Ms N Hardy	Public rights of way mapping officer, North East Lincolnshire Council

In support of the Order:

Mr R Palmer	Applicant, on behalf of local residents
Mrs J Edwards	Local resident
Mr D Linford	Local resident
Mr A Clarke	Local resident
Mr A Johnson	Local resident

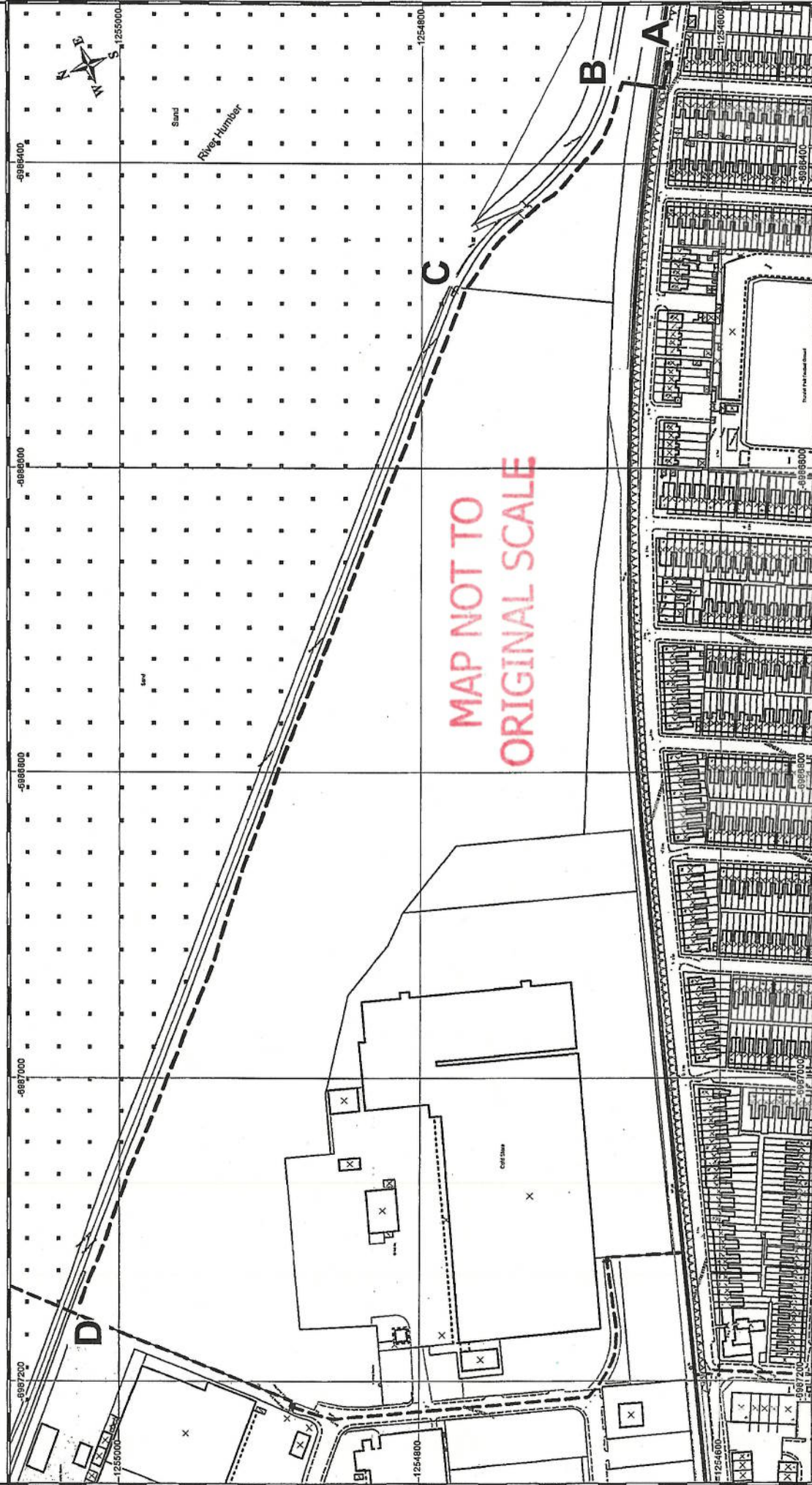
For the Objector:

Mr A Fraser-Urquhart QC	Of Counsel
who called	
Mr T Jeynes	
Mr A Findlay	
Mr S Blissett	

Documents handed in at the inquiry

- 1 Extracts from Inspector's Report relating to Dibden Bay Inquiry September 2003
- 2 Photograph of Southampton harbour/Dibden Bay
- 3 Report to Rights of Way Panel of Hampshire County Council 29 May 1997
- 4 Photograph of palisade fencing 29 June 2015
- 5 Conveyance between British Transport Docks Board and Cleethorpes District Council
- 6 Correspondence relating to land near Suggitt's Lane, Cleethorpes
- 7 Aerial photograph 21 September 1989
- 8 Opening Statement for ABP
- 9 Statement of Nicola Hardy, Public Rights of Way Mapping Officer
- 10 Order Decision FPS/F4410/7/25 footpath along north and eastern bank of Stainforth and Keadby Canal, Thorne
- 11 Extract from Asset Register held by ABP
- 12 Statement of Mrs J Edwards
- 13 Google maps aerial photograph submitted by Mr A Johnson
- 14 Closing statement on behalf of ABP
- 15 Closing statement of Mr R Palmer

Claimed Route of Cleethorpes FP5



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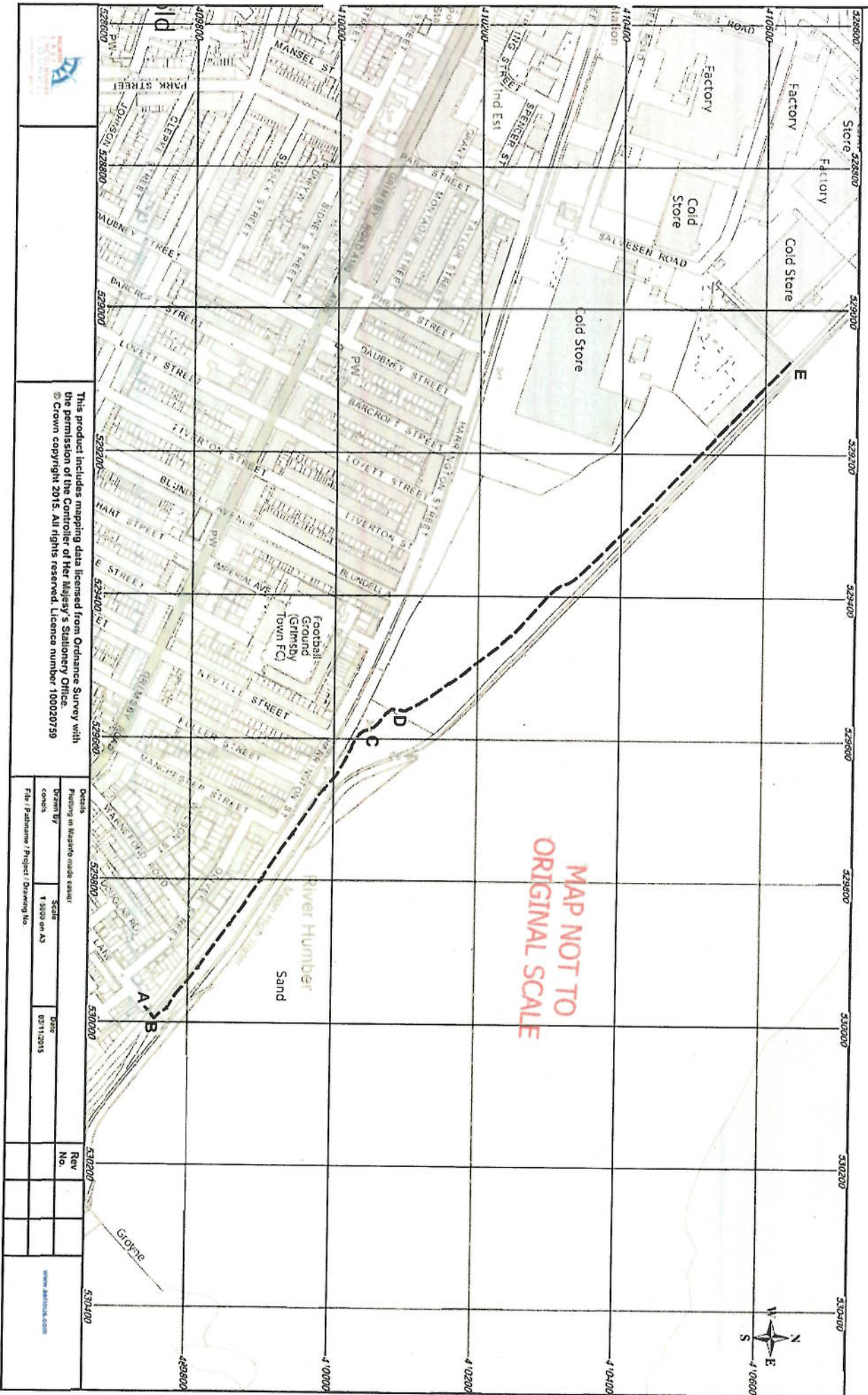
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Cleethorpes No 5 Definitive map Modification Order 2015



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