
Order Decision

Hearing held on 22 August 2017

Site visit made on 22 August 2017

by Susan Doran BA Hons MIPROW

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

Decision date: 25 September 2017

Order Ref: ROW/3170176

- This Order is made under Section 119 of the Highways Act 1980 and is known as the Kent County Council (Public Footpath SD271 (Part) West Kingsdown) Public Path Diversion and Definitive Map and Statement Modification Order 2016.
- The Order is dated 5 December 2016 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule. If confirmed, the Order will also modify the Definitive Map and Statement, in accordance with Section 53(3)(a)(i) of the Wildlife and Countryside Act 1981, once the provisions relating to the diversion come into force.
- There were 7 objections outstanding at the commencement of the hearing.

Summary of Decision: The Order is confirmed subject to modifications set out below in the Formal Decision

Procedural Matters

1. The Order route passes through the middle of the garden at Woodside¹ and then through the south-western end of Kaysland Park where its definitive alignment is obstructed. Section 119 of the Highways Act 1980 ('the 1980 Act') provides no guidance when considering the proposed diversion of a route which is obstructed. I consider, however, that the obstructions here at Kaysland Park are temporary ones, and in reaching my decision I have ignored them, comparing the routes as if there were no obstruction on the existing path.
2. Kent County Council ('the Council') requested two modifications to the Order. Firstly, in line with recently issued Defra² advice, to insert a date when works to bring the new footpath into a condition suitable for use by the public have been completed; and secondly, to amend a typographical error regarding the date of the Order as referred to on the Order plan. I am satisfied that both requests are within my powers of modification and that neither requires advertising. Therefore, if I decide to confirm the Order I shall modify it accordingly.

The Main Issues

3. The Order was made in the interests of the landowners. Section 119 of the 1980 Act requires that before confirming the Order, I must first be satisfied it is expedient in the interests of the landowners that the footpath in question

¹ Also referred to as 'Wood Side'

² Department for Environment, Food and Rural Affairs

should be diverted; and that the new footpath will not be substantially less convenient to the public.

4. I must also consider whether it is expedient to confirm the Order firstly having regard to the effect which the diversion would have on public enjoyment of the path as a whole; and then on its effect as respects other land served by the existing path, and the effect which any new path created by the Order would have as respects the land over which it is created and any land held with it, having regard to the provisions for compensation.
5. I am also required to have regard to any material provision of a Rights of Way Improvement Plan. However, in this case, the Council has confirmed that there are no relevant provisions in its 'Countryside Access Improvement Plan' which I need to consider.

Reasons

Whether it is expedient in the interests of the owners of the land that the footpath in question should be diverted

6. The Order has been made on grounds of security, privacy and anti-social behaviour. The Applicant, owners of Woodside who have a young family, described various incidents which had occurred over the last 4 or 5 years since moving into their property. These included dog fouling, apparently unaccompanied dogs, dogs not under close control, verbal abuse directed at family members, and misuse of their children's playhouse. Email correspondence with the Council dating to 2013, provided by Simon Moriarty, recorded that incidents had been reported to the Police. However, as no crime had been committed, no further action had been taken. In addition, Simon Moriarty had contacted Sevenoaks District Council and the local Animal Control Officer regarding his concerns about dogs on the public right of way.
7. Residents of Kaysland Park, contacted by Roy Barry, reported they had encountered no, or only occasional incidents of anti-social behaviour or problems with walkers and children passing through; although one couple had planted bushes to prevent youths from accessing their property. Similarly, Objectors, some of whom were frequent users of the path through Woodside and Kaysland Park, had themselves encountered no significant problems. However, Martin Stoneham reported that three Kaysland Park residents had indicated to him in the last year that they would prefer the footpath to be moved away from existing homes.
8. There is no requirement for dogs to be kept on a lead on a right of way, although I understand the concerns expressed by the Moriarty's about their children's safety playing in the garden when dogs may pass through off the lead, accompanied or otherwise. Although the incidents of anti-social behaviour may not be occurring every day, the indications are they have had a detrimental effect on the family's enjoyment of their garden. Furthermore, the lack of problems observed by some of the Objectors may not reflect the actual situation, as they are not there as often as the residents themselves. I recognise too that the family's privacy is affected by the position of the path within the property. Whilst some of the Objectors suggested the Applicant fence off the path through the garden, as had been the case in the past, this would not allow unhindered use of the land by the family. As regards the residents of Kaysland Park affected by the footpath, diverting it would increase

their privacy and be beneficial as regards the, albeit, limited incidents of anti-social behaviour experienced there.

9. Having carefully considered the evidence, I am satisfied that diverting the path from the middle of the garden at Woodside is expedient in the interests of the owners there, and I am further satisfied that it is expedient in the interests of the Kaysland Park landowners that it is diverted.

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

10. The proposed path would run from point A on the Order plan alongside the boundary of Woodside and Crete Lodge, where it would be 2.5 metres wide with an aggregate surface, to enter Sidehilly Wood at point C. It would then continue along the edge of the Wood at a width of 2 metres with a soft surface to D, and then to B. The existing route crosses an area of hardstanding near A before proceeding across a level lawned area to enter the edge of the woodland at the boundary between Woodside and Kaysland Park. Here the definitive line passes mainly through garden areas: the path used in practice runs between the boundaries of gardens and the Wood.
11. The proposed route would slope down from A to C then follow a broadly level 'terrace' for most of its length, although some levelling work would be required including at point D where the land slopes away. The path would then rise up to B. There are several 'informal' paths further into the Wood running broadly parallel with the proposed route and it is the case that these and the land to the south west slope away, in part quite steeply. It was the steepness of the slope that gave rise to concern for several of the Objectors, including Robin Vining. However, having seen the alignment of the proposed route on the ground I do not share the concerns of Robin Vining and others as regards steepness, or the extent of works necessary to provide a path certified as suitable by the Council for use by the public. Neither did it appear that erosion would be a significant issue as the land over which the proposed route would pass appeared broadly level; although I note Josie Watchorn's experience elsewhere in the locality where wood chippings as a surface material had not lasted. Any future maintenance of the proposed path, if the Order is confirmed, would fall to the Council.
12. The existing path has an open aspect where it passes through the garden at Woodside. The proposed path would pass through the edge of the Wood for most of its length and by its very nature would not have the same open feel. Nevertheless, it is proposed to cut back overhanging vegetation to a height of approximately 2.5 metres (7 feet), the material then being used as chippings (along with other existing cuttings alongside Woodside) to provide the soft surfacing for the path. No existing mature trees would be removed in order to provide the proposed path (which may need to deviate from a straight line slightly as a result), and indeed only one 'pinch point' was pointed out to me at the accompanied site visit where it was possible that a young tree may need to be removed, and another location where a holly may need to be taken out. Concerns were raised, including by Margaret Richards, that the proposed path would be more enclosed and darker than the existing path and that this might dissuade some people, especially the elderly, from using it. However, given the proposed works, it did not seem to me that its character would be

significantly different to other parts of the existing path as a whole which pass through or on the edge of the Wood.

13. The change in direction at points A and C was another concern, in particular as regards the safety of users. Both points would create a 90 degree turn in the path's alignment, and at C an existing shed was considered by Josie Watchorn to compromise safety. I agree that a direct route is more convenient than one where changes in alignment are introduced, although I note that the footpath as a whole is already subject to such changes in direction. As regards the shed, users would be at this location for a short period of time: the path would remain visible from Woodside and its garden at least whilst passing that property. No safety issues concerning existing changes in direction elsewhere on the path were brought to my attention such that I could conclude the route proposed was not appropriate.
14. The existing path between A and B is 145 metres long and the proposed path 182 metres in length, creating an additional distance of 37 metres. Although Roy Barry used the path for utilitarian purposes as well as for recreation, the path is essentially a recreational route, enabling users to avoid London Road. I consider the additional distance to be insignificant in terms of length and time taken to walk it. I accept that it will be a little longer for the elderly and less able users, but I do not consider any inconvenience that may arise as a result of the extra distance to be substantial. Indeed, Martin Stoneham pointed out that walkers are currently following a longer route than the definitive one so as to avoid the obstructions at Kaysland Park.
15. On balance whilst there may be some inconvenience for some users as a result of the proposal, overall I do not conclude that the new footpath would be substantially less convenient to the public: that is the test I must apply.

Whether it is expedient to confirm the Order having regard to:

(a) the effect the diversion would have on public enjoyment of the path as a whole

16. Alan Porter commented on the history of the Order route which he said had been shown on Ordnance Survey maps dating back to 1840. A map from a history of the Parish showed a path passing through the north-western edge of Sidehilly Wood at this date. He believed it was important to retain paths on their original alignment, and others agreed that people liked to walk historic routes. Whilst the path has existed on its definitive alignment for many years, I am not aware of anything of particular historical importance associated with it or its enjoyment by the public that would lead me to conclude I should place significant weight on this argument. Nevertheless, I accept that some people would be disappointed by the loss of part of a longstanding path which is considered to be part of the local heritage, if the Order were confirmed. However, the 1980 Act provides a mechanism by which applications may be made to move paths, subject to the appropriate tests being met. If the Order is confirmed, the footpath would still provide access between Botsom Lane and Kingsingfield Road and pass through the edge of part of Sidehilly Wood.
17. Roy Barry submitted that few paths in the area pass through gardens whereas several pass through woodlands, so confirmation of the Order would result in a loss of enjoyment. I accept that may be the case for some users. Yet, as the Council commented, and I agree, the vast majority of users prefer not to walk

through private gardens as they feel uncomfortable doing so on privacy grounds. This was a view echoed by Lynda Harrison from personal experience of the path through Woodside.

18. Robin Vining did not consider confirmation of the Order would substantially increase the public's enjoyment or result in an improvement through the repositioning of the path. However, the tests do not require there to be a substantial improvement in this regard for an order to be confirmed.
19. As regards safety, it was suggested that a combination of the change in direction, the likelihood of dogs off the lead in the Wood, dumping of garden rubbish and other anti-social behaviour would have a negative effect on public enjoyment. I have already considered above the change in direction at points A and C and acknowledge that some users would find this to be less enjoyable than a direct route. Though as previously noted, the path as a whole is subject to similar changes in direction at other points along its length, and there is no evidence before me that this has had a negative impact on the enjoyment of users or of their safety. As stated above, there is no requirement for dogs to be on a lead, and users may encounter them anywhere along the path as a whole. There is no evidence to suggest that anti-social behaviour would increase as a result of the proposed diversion. The dumping of garden rubbish is a matter for other authorities to address.
20. On balance, whilst I accept there would be some negative effects on public enjoyment, these are not sufficient in my view to warrant not confirming the Order.

(b) the effect which the coming into operation of the Order would have with respect to the land served by the existing right of way, and

(c) the effect which any new public right of way created by the Order would have with respect to the land over which the right is so created and any land held with it, having regard to the provisions for compensation

21. No additional issues arise with regard to the land served by the existing right of way which requires my consideration.
22. I understand that the owner of Sidehilly Wood over which the greater part of the Order route would pass (C-D-B) has no objection to the proposal. Land at A-C is in the ownership of the Applicant. However, the Council sought dispensation from the Secretary of State³ regarding land crossed by the proposed route towards point C, the ownership of which they had not been able to establish: no-one came forward to say it was their land. Robin Vining suggested this may be Crown land, or in the alternative in the ownership of Margaret Martin of Crete Lodge, who objects to the Order. Indeed, the latter was her stance at the Hearing, and further that she would not give consent to the diversion as proposed.
23. I agree with the Council that an order can be made in the interests of the owner(s) of the land crossed by the existing path or way, its confirmation subject to that order meeting the necessary criteria, and that Section 119 (1) of the 1980 Act allows for this and for a diversion to be on land of the same or of another landowner (or lessee or occupier). Furthermore, Section 28 of the

³ In accordance with paragraph 1(3C) of Schedule 6 Part 1 to the 1980 Act

1980 Act, as applied by Section 121(2), provides for compensation in respect of land affected by the coming into operation of such a diversion, where it is shown that the value of an interest of a person in land is depreciated, or that that person has suffered damage by being disturbed in their enjoyment of that land.

24. Issues of compensation have not been raised by any of the affected parties. However, the Applicant has agreed to defray any compensation which becomes payable in consequence of the coming into operation of the Order, as well as the costs of bringing the site of the proposed path into a fit condition for use by the public⁴. It seems to me that if an issue of compensation under Section 28 of the 1980 Act were to arise, then it would be open to the owner of the unregistered land to submit a claim to the Council⁵.
25. Several Objectors, including David Diboll, raised concerns about the effect of the proposal on the flora and fauna of the woodland citing several protected species as resident or likely to be resident there. Sidehilly Wood is ancient woodland or a plantation on an ancient woodland site, and I understand falls within the boundary of an Area of Outstanding Natural Beauty. Similarly, concerns were expressed about the potential loss of mature trees, although the Council has given assurances that this will not be the case and, as stated above (paragraph 12) there was little indication at the accompanied site visit that the removal of trees would be required. In addition, the effect of the new path on tree roots was highlighted.
26. In this regard it will be necessary for the Applicant to consult with and take appropriate advice from the local authority and Natural England prior to commencing any works if the Order is confirmed, so as to ensure they are carried out sensitively to the woodland environment, to obtain any necessary licences and comply with legislation. Simon Moriarty gave assurances at the Hearing that, if required, this would be done.
27. On balance I find that any adverse effects on the land over which the new right of way and any land held with it can be addressed through consultation with the appropriate authorities/wildlife bodies before work commences to ensure any necessary safeguards are put in place; and in the case of the unregistered land, under the provisions for compensation contained within the 1980 Act.

The effect of the Order on Crete Lodge

28. It is open to me to consider other relevant factors in addition to those set out in the Section 119 tests considered above with regard to expediency, and in this case Margaret Martin, Andrea Lawrence, Robin Vining, Roy Barry and Margaret Richards in particular drew my attention to the effect of the proposal on Margaret Martin's home, Crete Lodge. In summary, their concerns were that the problems experienced by the Moriarty's would be transferred to Margaret Martin, that there would be a negative effect on her safety and security, an increase in noise and a drop in the value of her property.

⁴ Paragraph three of the preamble to the Order

⁵ Any such application for compensation must be made to the order making authority within 6 months of the coming into operation of an order (Section 28(2) of the 1980 Act and Regulation 5 of the Public Path Orders Regulations 1993), and any dispute as regards the level of compensation payable is determined by the Lands Tribunal

29. Footpath SD271 presently passes alongside the north-eastern boundary of Crete Lodge. The Order proposes the path should then continue along the south eastern boundary of Crete Lodge. Margaret Martin is concerned that users will be able to look into her kitchen window where she spends a lot of time. However, the boundary between the two properties is screened by a high fence and vegetation, such that at the time of my site visit I was unable to see through to any window. Furthermore, Simon Moriarty has offered to replace the fence at his own expense, should the current boundary be considered inadequate by his neighbour, so as to prevent people looking into her property.
30. There is nothing to indicate to me that Margaret Martin's safety and security would be adversely affected by the path running alongside the fence as there is no visible means by which the public could access her property from the proposed diverted path at this location. It was suggested that very tall people or children carried on their parents shoulders would be able to see over the fence, but this seems unlikely to be a regular occurrence, and walkers would pass by relatively quickly. Some additional noise may result as users would pass closer to this side of the property than is the case presently, but there is nothing to suggest this would be significant.
31. 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 (as here) to do so. The Council referred to 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. No details were submitted in writing or to the Hearing as regards the claimed devaluation of Crete Lodge as a result of the Order, if confirmed.
32. However, I am entitled to consider Margaret Martin's rights under the Human Rights Act 1998 ('the 1998 Act'), both in terms of the effect on Crete Lodge and as regards the unregistered land which she claims to own. The Council had given consideration to her concerns in that the present Order results from amendments to the original application in order to accommodate issues she had raised. I have concluded above that there is no indication of any significant interference to Crete Lodge and the rooms on its south eastern side due to the existing fence and vegetation between the properties, nor would be the case if new fencing resulted, as proposed by Simon Moriarty, although some additional noise may occur.
33. The 1980 Act envisages and provides for situations where a way is diverted onto land of the same or another landowner (paragraph 23) and contains provisions for compensation as described above.
34. On the evidence available to me I consider that any likely harm or interference to Margaret Martin and her property is proportionate when balanced against the benefits to the applicant and their young family and to the public interest. Furthermore, I consider it is proportionate when taking into account the statutory compensation afforded by the 1980 Act. Thus, in my view, any potential interference is in accordance with the provisions of the 1980 Act and does not constitute a violation under the 1998 Act.

Whether it is expedient to confirm the Order

35. I have given careful consideration to the tests and to the objections raised. I have concluded that it is expedient in the interests of the landowners that the footpath be diverted. I have found that, on balance, the new footpath will not be substantially less convenient to the public, and that overall public enjoyment will not be affected detrimentally. I am satisfied that necessary measures will be implemented to address any potential adverse effect on wildlife and the woodland as a result of the proposal. I have considered the effect of the proposal on the land that is unregistered and note the provisions of Section 28 of the 1980 Act should any landowner seek compensation as a result of the Order coming into effect. I have considered the objections raised by Margaret Martin of Crete Lodge and whilst I understand her concerns, I agree with the Council that there will be no significant detrimental effect on her home as a result of the proposal. Overall, I am satisfied that it is expedient to confirm the Order.

Other matters

36. One of the objectors referred to a planning permission in relation to Woodside. This is not a matter before me and not one that has a bearing on my decision as to whether or not this Order made under the 1980 Act should be confirmed. It follows that I have not taken it into account in reaching my decision.

Conclusions

37. Having regard to these and all other matters raised at the Hearing and in the written representations I conclude that the Order should be confirmed with modifications, as described in paragraph 2 above, which do not require advertising.

Formal Decision

38. The Order is confirmed subject to the following modifications:

- One page one of the Order, in paragraph numbered '1', line 3, after 'from' insert " 1st May 2018", and in paragraph numbered '3', line 1, after 'from' insert "1st May 2018"
- On the plan attached to the Order, replace '2015' in the Order title with "2016"

S Doran

Inspector

APPEARANCES

For the Order Making Authority:

Chris Wade	Principal Case Officer, Public Rights of Way and Access Service, Kent County Council
Nicky Biddall	Public Rights of Way Officer

Applicants:

Simon and Nicola Moriarty

Objectors:

Roy Barry
David Diboll
Andrea Lawrence
Margaret Martin
Margaret Richards
Robin Vining
Josie Watchorn

Others who spoke in support of the Order

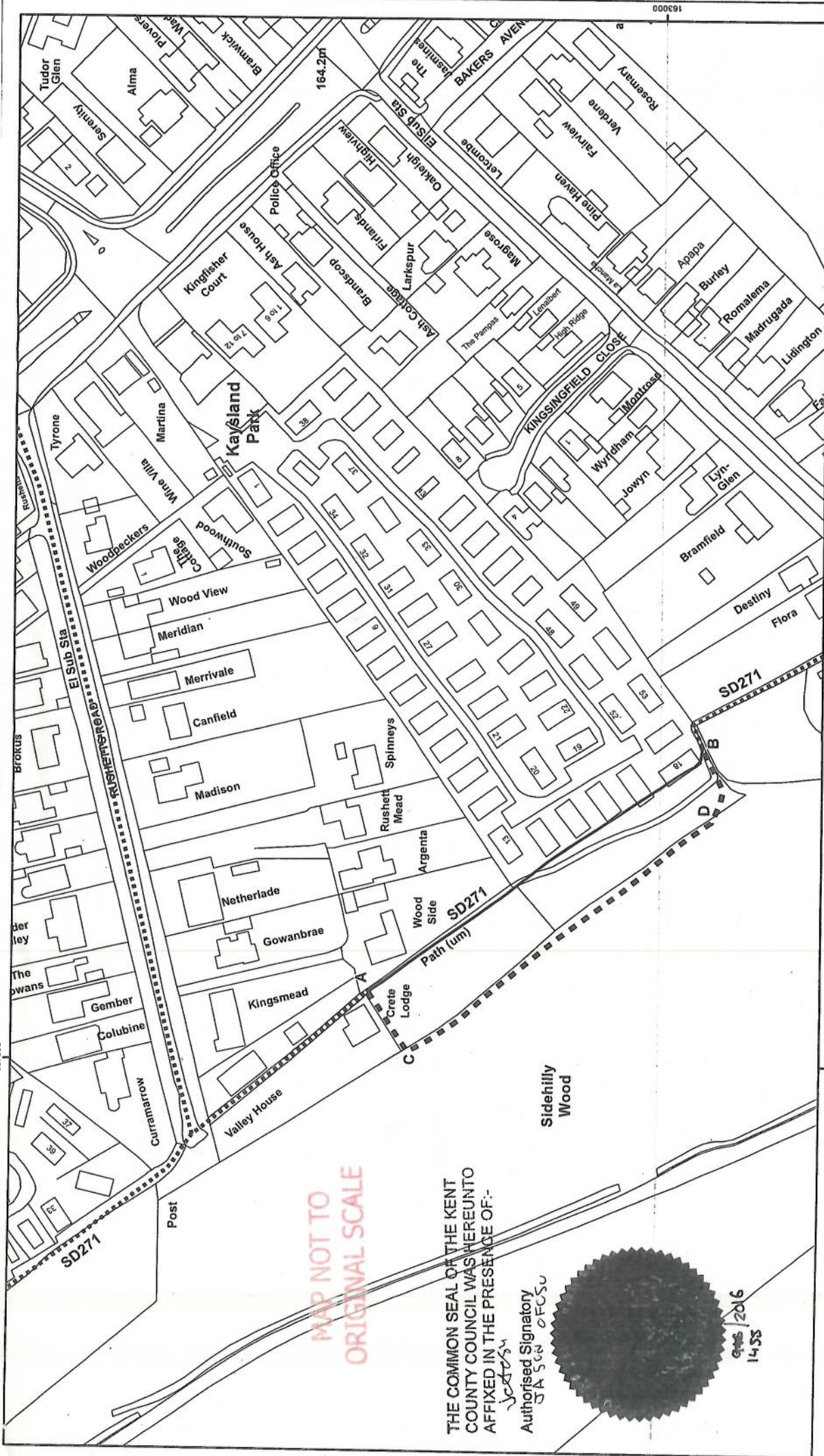
Lynda Harrison
Martin Stoneham

Others who spoke against the Order

Joyce Barnes
Chris Benson
Alan Porter
Mr Till
Yvonne Vining
Marie Watts
Mr Weatherly

DOCUMENTS

1. Copies of correspondence, Appendices B-I, submitted by Roy Barry
2. Plan of the Parish of Kingsdown 1840, submitted by Alan Porter
3. Map showing Revised Ancient Woodland Inventory for Sevenoaks District – North Sheet, submitted by Kent County Council
4. Correspondence dated 28 June 2017, submitted by Kent County Council
5. Copies of emails to Kent County Council, Dartford and Sevenoaks Environmental Health Partnership and Sevenoaks District Council, submitted by Simon Moriarty



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0 0.03 0.06 Miles

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Kent County Council

Kent County Council
Highways Act 1980
Wildlife & Countryside Act 1981
The Kent County Council (Public footpath SD271 (part) West
Kingsdown) Public Path diversion and Definitive Map &
Statement Modification Order ~~2015~~ 2016

Public Rights of Way and Access Service

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THE COMMON SEAL OF THE KENT COUNTY COUNCIL WAS HEREUNTO AFFIXED IN THE PRESENCE OF:-

Authorised Signatory
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