
Order Decisions

Site visit carried out on 31 August 2016

by Peter Millman BA

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

Decision date: 19 September 2016

Order Ref: FPS/P3800/7/71 ("Order A")

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the West Sussex County Council (Chichester – No 1 (Stoughton: Path No. 3405)) Definitive Map Modification Order 2008.
- The Order is dated 7 January 2008 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There were seven statutory objections outstanding when West Sussex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: I have confirmed the Order with modifications.

Order Ref: FPS/P3800/7/72 ("Order B")

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the West Sussex County Council (Chichester – No 2 (Stoughton: Addition of a Byway Open to All Traffic)) Definitive Map Modification Order 2008.
- The Order is dated 7 January 2008 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There were thirteen statutory objections outstanding when West Sussex County Council ("WSCC") submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: I propose to confirm the Order with modifications that require advertisement.

Preliminary and legal matters

1. The two routes under consideration are linked. Order route A is a continuous route a little under two miles in length. It is named Park Lane from its junction with a road at Racton Common to the point where it meets Order route B, after which it becomes Monument Lane, passing Racton Monument before reaching the B4127 road near Lordington. I refer to this route in the rest of this Decision as Park Lane, Monument Lane or Park/Monument Lane as appropriate. Order route B, which is known as Park Slip, leaves Park/Monument Lane and leads northwards for a little more than half a mile until it reaches Woodlands Lane (now renamed Brooks Nap Road). Park/Monument Lane is shown on the first map appended at the end of this Decision. Park Slip is shown (at a different scale) on the second map.
 2. Park Lane/Monument Lane is shown on WSCC's Definitive Map as a bridleway. Park Slip is not shown on the Definitive Map as carrying any public right of way, although it is clearly in use by horse riders. Order A proposes to upgrade Park/Monument Lane to the status of Restricted Byway ("RB"), i.e. a route for pedestrians, cyclists, horse riders and drivers of non-mechanically propelled
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- vehicles ("non-MPVs") such as horse-drawn carts. Order B would add Park Slip to the Definitive Map as a Byway Open to All Traffic ("BOAT"), i.e. it would also be available for MPVs such as 4x4s, quad bikes and motor-cycles.
3. The application to show Park Slip as a BOAT was made in 1997. WSCC considered it, decided that the evidence showed that vehicular rights existed, and resolved in 2001 to make an Order to show the route as a BOAT. During its investigation of Park Slip, it discovered 'strong archive evidence' relating to Park/Monument Lane which suggested that it, too, might carry public vehicular rights. Realising this, and knowing that the consequence of a confirmed order to show Park Slip as a BOAT would be that it would end as a cul-de-sac for MPVs on Park/Monument Lane (then a bridleway), it decided formally to investigate the status of that route. It did this by making an application to itself in 2002 under section 53(5) of the Wildlife and Countryside Act 1981 ("the 1981 Act"), which states: *Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.*
 4. WSCC investigated its own application and concluded that vehicular rights existed on Park/Monument Lane. It resolved in September 2006 to make an Order to show it as a BOAT on its Definitive Map. Before it made an Order, however, the Stansted Park Foundation obtained counsel's opinion about its actions. Counsel's opinion was that WSCC did not have power to respond to the discovery of evidence for the existence of a public vehicular right of way over Park/Monument Lane by interposing a wholly unnecessary application to itself under section 53(5) when it could have proceeded directly to making an order under section 53(2) on the discovery of evidence, and that in any event the purported section 53(5) application was not a proper and valid application for the purposes of that subsection because it did not comply with the requirements of paragraph 1 of Schedule 14 to the 1981 Act in that no copies of the 'strong archive evidence' were attached to it. (see above at paragraph 3 and below at paragraphs 7 and 9).
 5. WSCC, having been invited to consider counsel's opinion, agreed with its conclusions and decided not to make a BOAT order for Park/Monument Lane. In the meantime, the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") had come into force in May of that year. This extinguished public rights of way for MPVs, subject to certain exceptions. If none of these applied to Park/Monument Lane, it would no longer be possible for WSCC to make an order to add it as a BOAT to its Definitive Map, since a BOAT includes a right of way for MPVs. WSCC therefore made an order – Order A – to show Park/Monument Lane as an RB, i.e. a public vehicular route, but not for the use of MPVs.
 6. Mr A Kind, for the Trail Riders Fellowship, objects to Order A on the grounds that the correct status of Park/Monument Lane is BOAT. He submits that the application by WSCC to itself under s53(5) of the 1981 Act was properly made. He states: *The application to record the Order route as a BOAT is a valid application and the TRF respectfully submits that the Order should be modified accordingly.* I do not accept that argument, for the reasons given below.

7. Section 67(1) of the 2006 Act extinguished public rights of way for MPVs subject to certain exceptions, which are set out in sections 67(2) and 67(3). Section 67(3)(a) and (b) state that extinguishment does not apply if *(a) before the relevant date [20 January 2005] an application was made under section 53(5) of the [1981 Act] for an order making modifications to the definitive map and statement so as to show the way as a [BOAT], (b) before commencement [2 May 2006], the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application...*
8. This is the only exception claimed to apply in this case. I accept that there was no valid application under section 53(5) for the reasons given by counsel (paragraph 4 above), and therefore no exception to the extinguishment of rights of way for MPVs with respect to Order A.
9. Even if the application had otherwise been valid, it contained no copies of any documentary evidence which the County Council wished to adduce in support of its application. Section 67(6) of the 2006 Act states that: *For the purposes of subsection 3, an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.* Paragraph 1 of Schedule 14 to the 1981 Act states: *An application shall be made in the prescribed form and shall be accompanied by- (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.*
10. Mr Kind argues that it is not illogical for WSCC not to have wished to adduce any documentary evidence: *given that it doubtless anticipated treating its own application as valid... Nor does the fact that the authority already had relevant evidence necessarily mean that it should be taken to have intended to adduce that evidence when making the application.* It seems to me, however, that had a third party submitted an application to WSCC without adducing any evidence it would have been rightly considered not to have met the requirements. There can be no exception simply because the applicant is the County Council.
11. There is another related matter, concerning Order B, that it will be convenient to deal with at this point.
12. The application for Order B was made under s53(5) of the 1981 Act in 1997, which was before the relevant date of the 2006 Act. It was an application to show a way as a BOAT, and the surveying authority, WSCC, determined to make an Order to show Park Slip as a BOAT before the commencement of Part 6 of the 2006 Act at the beginning of September 2006.
13. The 1997 application included a map drawn to the correct scale. It included copies of user evidence forms attesting to use of Park Slip on horseback. It listed, as documentary evidence in support of the application for BOAT status, only a tithe map which was said to show a 'Coach Road Field' and some correspondence with the Parish Council. Copies of some letters were included with the application but it did not include a copy of the tithe map or any other tithe documents. The application was therefore not properly made for the purposes of section 67(3) of the 2006 Act (paragraph 9 above). Any public rights for MPVs, therefore, which might have existed on Park Slip will not have been preserved, unless any other of the exceptions applies, and no party has argued that they do. I conclude that if vehicular rights once existed on Park Slip, they can only be recorded as RB rights.

14. It is the case therefore, that whether or not public vehicular rights for MPVs existed at some time in the past on the Order routes, neither can now carry them. In other words, neither route can be recorded as a BOAT, but only, subject to the conclusions I draw below, as RBs.

Main issue (both Orders)

15. The main issue is whether the evidence shows, on the balance of probabilities, that public vehicular rights exist on one or both of the Order routes. Public rights are dedicated or are deemed to have been dedicated by the owners of land crossed by a route. There is no evidence of an express dedication in either of these cases. An implication of dedication may be shown if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. The inference may arise from a consideration of historical documents. Section 32 of the Highways Act 1980 provides guidance. It states: *A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such a dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.*
16. It is accepted by all parties that public bridleway rights exist on both Order routes, so consideration of the evidence below concentrates on whether or not it shows that vehicular rights exist as well.
17. There have been very many objections to these Orders. The great majority have been concerned with the effect of their possible confirmation. Objectors are very concerned about the potential effects of vehicular use on wildlife, about anti-social behaviour and about motor vehicles damaging the lanes. Despite having been told very clearly by officers in the Planning Inspectorate and in WSCC that such matters, however important, are not allowed to be my concern, these objections have been maintained. I must therefore emphasise that all I am permitted by law to do is to ascertain what public rights exist over these routes. The consequences of my ascertainment are for others to deal with.

Reasons

Historical evidence

18. Much of the evidence is common to both Park/Monument Lane and Park Slip. I shall therefore consider them together, differentiating between them where necessary.

18th century maps

19. Commercial maps were made to be sold and were usually at quite a small scale, roughly comparable to current Ordnance Survey 1:50 000 maps, and covered part or the whole of a county. Some were carefully prepared from original surveys carried out on the ground. Others were simply copies – plagiarized from earlier maps. They would have been used as aids to

navigation. WSCC makes no mention in its evidence of which maps it considers original or more or less reliable.

20. Neither Order route was shown on Budgen's map of 1724. The earliest map on which both routes were shown was the rather larger scale one of Yeakell & Gardner, published in 1778. Park Slip is shown as it was before it was diverted in around 1869 (see below at paragraph 29). WSCC has not provided a key to any of these maps, so it is only possible to conclude that the routes existed on the ground from at least the latter half of the 18th century and were shown in the same manner as other roads.
21. Estate maps were usually commissioned by the owner of a substantial area of land, were at a larger scale than commercial maps, and would not normally aim to distinguish between public and private routes. WSCC found four 18th century estate maps which showed parts of one or both of the Order routes. No significant conclusions as to status may be drawn from these maps.

19th century commercial, estate and Ordnance Survey maps

22. The Greenwood brothers produced maps of many counties and are generally known as reputable map-makers. Their map of Sussex of 1825 differentiated between two classes of roads, turnpikes and cross-roads. Park/Monument Lane and Park Slip are shown on this map as cross-roads. WSCC cites the judgment in *Hollins v Oldham* (1995) as authority that a cross-road would have been considered a public road at the time the map was made. I accept that view, though it is not entirely inconsistent with both routes having been public bridle roads. Mr R Carr, for the Stansted Park Estate, asserts that Greenwood is known to have advertised his County Maps as showing private roads as well as public ones. In this case, however, the Order routes appear to form part of a highway network, rather than, for example, a drive leading to or through an estate. I conclude that this map is some evidence, though of no great weight, of the reputation of both routes as public vehicular highways in the early 19th century.
23. *A Survey of Lands the Property of Thos. Peckham Phipps Esqr. of Little Green Sussex* of 1818 comprises a map, on which fields and other features are numbered. The numbers are listed in an accompanying schedule, which gives the names of the numbered features. Two lanes are shown numbered, and both Order routes are shown but not numbered. In my view this suggests, but with no great weight, that neither route had a known owner and that both routes were considered public at the time.
24. The draft for the first edition Ordnance Survey map was produced from a survey made in 1805/6. This shows both Park Slip and Park/Monument Lane in the same manner as other roads. Both routes continued to be shown on later Ordnance Survey maps to the present day. The names Park Lane and Monument Lane first appear on a 6 inch to the mile map of about 1870. I conclude from the Ordnance Survey evidence that both Order routes existed as routes on the ground from at least the beginning of the 19th century.

Tithe documents

25. Payment of tithes in kind, by giving a tenth of the annual produce of land to the church, was commuted to a money payment by the Tithe Commutation Act of 1836. Commutation was carried out parish by parish. The maps which were

needed for this process were either drawn up from fresh surveys or based on existing parish maps. Titheable plots of land were shown numbered on the maps, these numbers corresponding to entries in the Apportionment or Award, which noted the name of each plot, its ownership, state of cultivation and titheable value. It was not part of the tithe process to ascertain whether or not the roads shown on tithe maps were public, but sometimes conclusions about public rights may be drawn from this material.

26. The Racton Tithe Map is dated 1839 and shows, in addition to the various numbered parcels of land, roads numbered, and coloured ochre. At the end of the Apportionment is a list of the roads. On the map, Park/Monument Lane is numbered 150 and Park Slip 151. The entries for those numbers in the list in the Apportionment are: *Public Bra[n]ch Road leading from Bayleys Barn [near the east end of Monument Lane] into the High from Westbourn to Forestside [the road which Park Lane joins at its western end], and Public Branch Road through Slip Copse* respectively. Other routes are shown in this list as 'public roads' or 'public bridle roads', while in the body of the Apportionment, under the names of individual owners, a 'road' and a 'private road' are listed.
27. Even though it was no purpose of the tithe process to determine the status of roads, a record such as this, which would have been in the public domain, does provide evidence of some weight that in 1839 the Order routes, because the description 'branch road' is differentiated from 'bridle road', had the reputation of being public vehicular roads.
28. The Tithe Map and Apportionment for Stoughton, dated 1840, are less informative. The Map shows a short part of the northern end of Park Slip, but the roads shown are not numbered, and there is no list of roads in the Apportionment. No significant conclusions may be drawn from this evidence.

Quarter sessions records

29. In 1869 an application was made to the court of Quarter Sessions to divert the northern end of Park Slip. Prior to 1869 Woodland Lane had ended by Woodland Cottages [shown to the east of the northern end of Park Slip on the map appended below]. It then ran in an arc of about a quarter of a circle to join what is now Park Slip some 140 yards or so south of the end of what is now Brooks Nap Road. The route proposed to be diverted was described as 'highway'. The fourth paragraph of the application stated: *That part of the highway which is proposed to be stopped up and which is coloured pink on the said plan is very dark and narrow and in several places a loaded waggon could not, with safety, pass through.* The 'said plan' is the only other related document produced by WSCC. The route coloured pink is annotated *Old road not wide enough in some places for a waggon to go along.*
30. There is no explicit record of the outcome of this application. All subsequent maps, from around 1870 onwards, however, show Park Slip as diverted according to the application and plan, and it is reasonable to conclude, in my view, that the 'highway' was properly diverted.
31. Mr Carr argues that these documents are ambiguous with regard to status because they only refer to the Park Slip route as being a 'highway'. It is argued further that reference to a waggon not being able to get through shows Park Slip was not being used by waggons at the time.

32. What the application states, as noted above, is that a 'loaded waggon' could not get through. I accept that the annotation on the map refers only to a 'waggon', but in my view it is the words in the application which are more significant. One could imagine, therefore, that a waggon loaded with straw for example, higher and wider than an unloaded waggon, would not have got through, but that an unloaded waggon might have had no difficulties.
33. Only a public road would have needed an order of Quarter Sessions to divert it, and in my view it is quite clear from this evidence that the documents are referring to a vehicular route, and that in 1869 Park Slip was considered to be, and was used as, a public vehicular road. If that was the case, then it follows that it was also likely that either Park Lane, or Monument Lane, or both, were public vehicular roads.

The map of maintainable roads

34. In 1894 the County Surveyor for West Sussex produced a map of publicly maintainable roads, together with a schedule. Roads were divided into six categories, main roads and then first, second, third, fourth and fifth class roads. Park Slip, Park Lane and Monument Lane were shown on the map as fifth class roads, and the schedule described their condition as green, bad and bad respectively. Other roads were recorded as very poor, poor, moderate or fair. There were no good roads in the schedules of the eleven parishes listed on the pages of the document produced by WSCC, although one road, the Chichester and Midhurst Road was described as 'very fair'.
35. This evidence, in my view, is strongly supportive of both Order routes being public at the time. Mr Carr argues that they could have been considered as bridle roads. I agree that that is possible. Without an analysis of the current status of all the roads listed in the 1894 schedule it is not possible to ascertain whether bridleways were intended to be included. It does seem to me, however, that the use of the word 'road' on its own is slightly more suggestive of vehicular routes rather than bridleways.
36. Of the individual pieces of 18th and 19th century evidence, the only ones which support with great weight the conclusion that the Order routes carried public vehicular rights are the two Quarter Sessions documents. Although the remaining evidence is at least compatible with the routes having only public bridleway status, the evidence considered so far as a whole presents a consistent narrative, which supports with considerable weight, in my view, a conclusion that at some time prior to the beginning of the 19th century, an owner or owners of the land over which both Order routes pass had dedicated public vehicular rights, that dedication having been accepted by the public.

The Definitive Map process

37. Sections 27 to 32 of the *National Parks and Access to the Countryside Act 1949* set out the process by which definitive maps were to be prepared. Information, in the form of a Map and Schedule of alleged public rights of way, was usually put together by parish councils and provided to the relevant 'surveying authority', normally a county council. Government advice on how to carry out the survey was sent to all parish councils. From information in this map and schedule a draft map was produced and publicised by the surveying authority. There was a statutory process for dealing with objections. Then a

provisional map was produced, to which objections could again be made, and finally a definitive map was published.

38. Stoughton Parish Council did not include either Park/Monument Lane or Park Slip in its map and schedule of alleged public rights of way. When the Draft map was published in 1953 the Society of Sussex Downsmen objected that Park/Monument Lane should have been shown as a bridleway. The Parish Council was asked to respond by the County Council, and its Clerk wrote: *My Council were under the impression they were County Roads & did not require marking on the Draft Map. If they are not, will you please mark them as bridleways.*
39. The County Surveyor wrote in a memorandum in May 1953 that the route had been used since pre-[2nd world]war days as a bridleway and that local information suggested that there had been an inn called The Packhorse on the southern side of Park Lane near its western end. In the end, for reasons which do not appear to have been recorded, the Highways Inquiry Committee decided that Park/Monument Lane should be shown on the Provisional map as a bridleway.
40. Mr Carr argued that this evidence clearly showed that the County Surveyor was of the opinion that the route only had the reputation of a bridleway. I do not accept that assertion. The Surveyor wrote nothing about the route's reputation, only its use.

Conclusions from the documentary evidence

41. Evidence of the definitive map process does not alter the conclusion drawn in paragraph 36 above. At some time in the past, almost certainly in the 18th century or earlier, public vehicular rights were dedicated by an unknown owner over Park/Monument Lane and Park Slip as it was before being partly diverted in 1869. The rights have now been legally diverted onto its current route. Prior to the 2006 Act those rights would have applied to vehicles of any description; now they apply only to non-MPVs.

Other matters

Width

42. Order A states, in parts I and II of the schedule, that the width of the way is 'its full historic width as shown on the 1874 edition Ordnance Survey Map' and that it has a 2.5 metre wide compacted surface. Mr Kind argues that this is unsatisfactory; the wording of the Order does not set out the true position, which is that the 2.5 metres is simply the width of the carriageway within the wider highway. In any event, the scale of the 1874 map is not given. It might be possible for someone to argue that the full width to which rights extended over Park/Monument Lane was only 2.5 metres. That seems to me unlikely, but I agree with Mr Kind that the wording could, and should, be made clearer, and I shall make an appropriate modification to Order A.

Conclusion

43. Having regard to these and all other matters raised in written representations I conclude that Order A should be confirmed with a modification to the Order schedules to clarify the description of the width of the Order route, and I

conclude that Order B should be confirmed with a modification so that the Order route is recorded as an RB rather than as a BOAT.

Formal Decision

44. I confirm Order A with the following modifications:

- In part I of the schedule to the Order, in the second line, delete 'for its full historic width as shown on the 1874 edition Ordnance Survey map,' and insert at the end of that part, 'The width across which public vehicular rights extend is the full historic width as shown on the 1874 1:2500 Ordnance Survey Plan.'
- In part II of the schedule to the Order, make the same deletion and insertion as for part I.

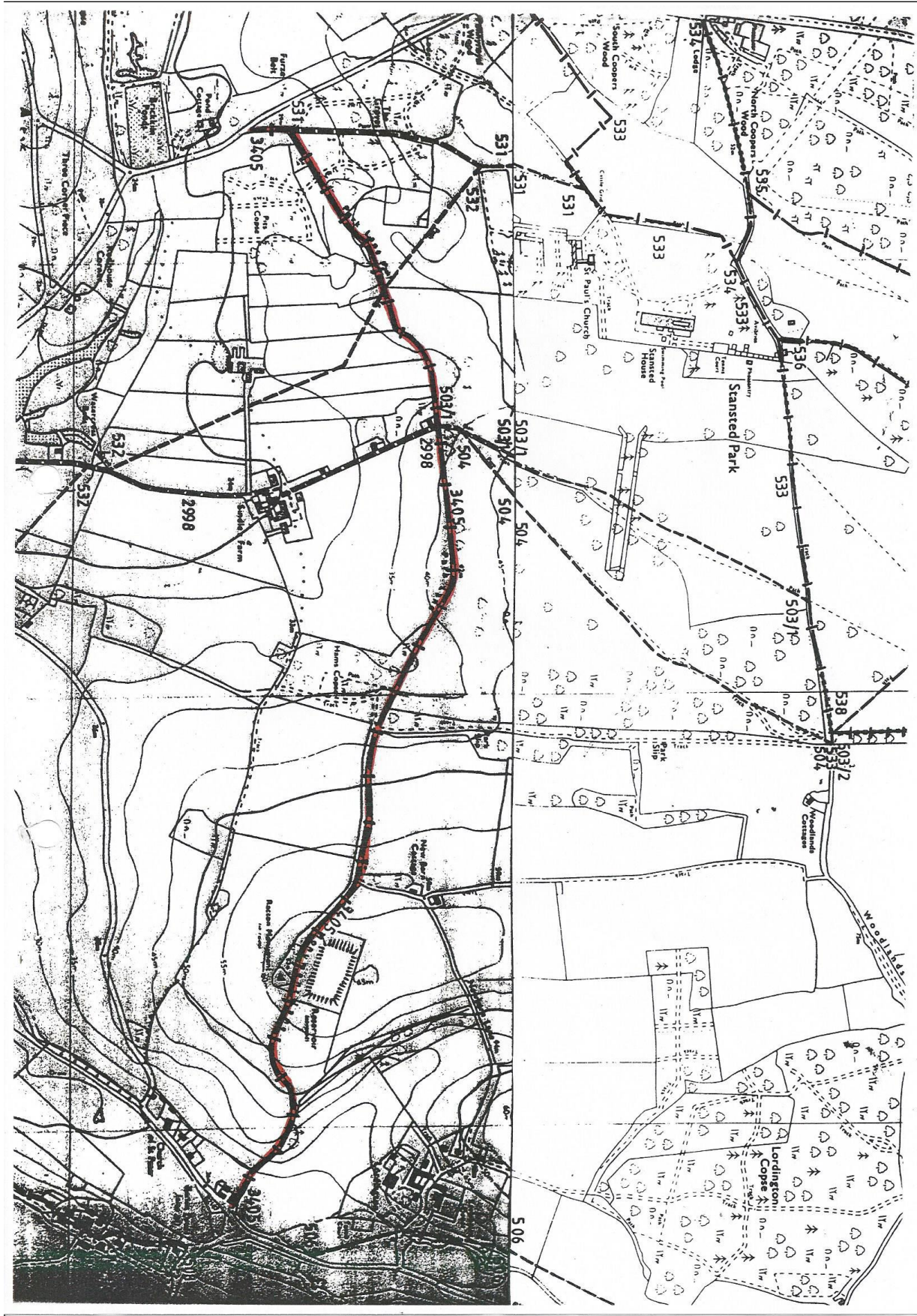
45. I propose to confirm Order B with the following modifications:

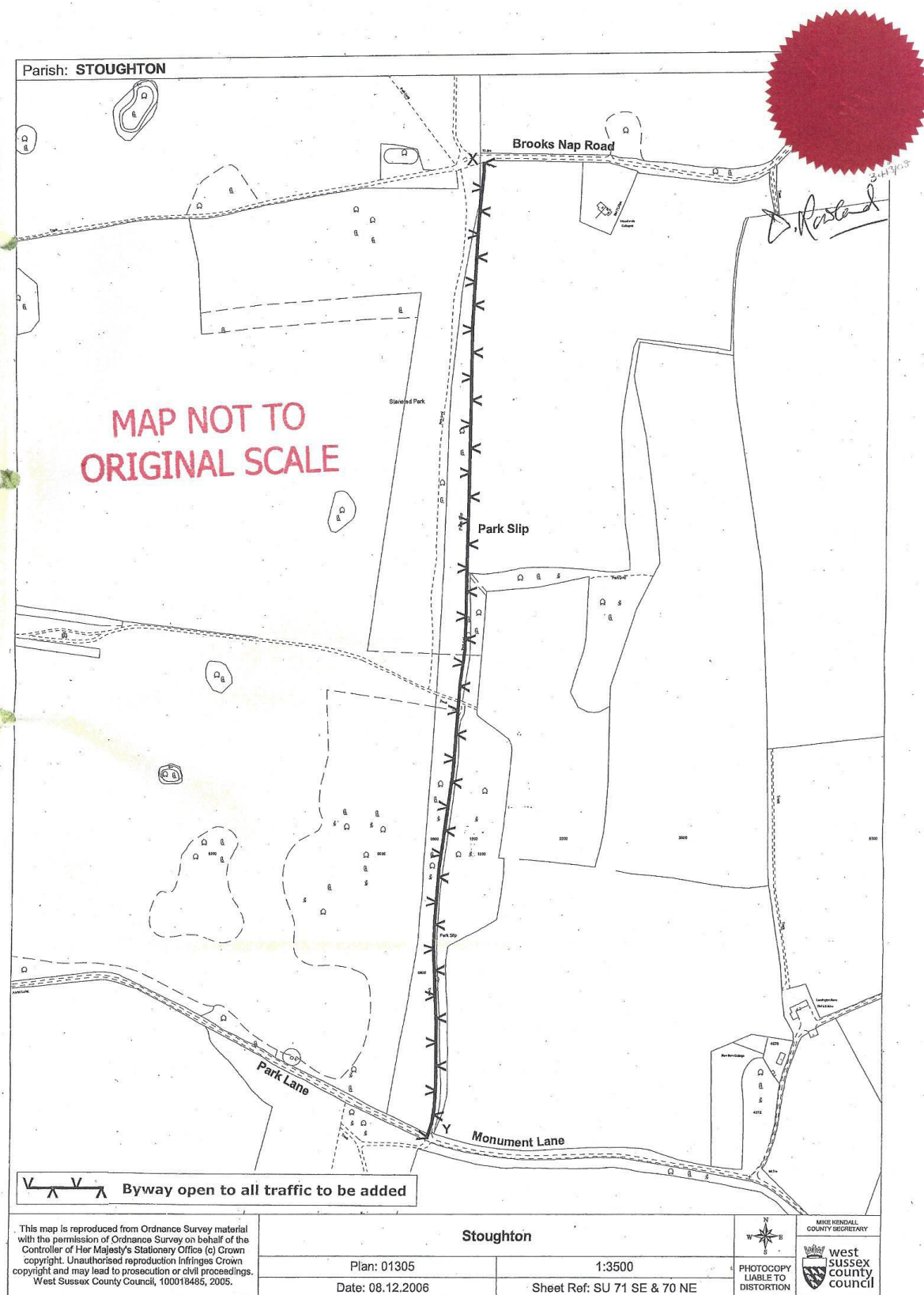
- In the title of the Order, paragraph 3 of the Order, parts I and II of the schedule to the Order, delete 'Byway Open to All Traffic' where it occurs and insert in its place 'Restricted Byway'.
- On the map attached to the Order, delete 'Byway Open to All Traffic' and insert in its place 'Restricted Byway'. Replace the symbol for Byway Open to All Traffic with the symbol for restricted byway.

46. Since Order B as proposed to be modified would show as a highway of one description [RB] a way which is shown in the Order as a highway of another description [BOAT] I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the 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.

Peter Millman

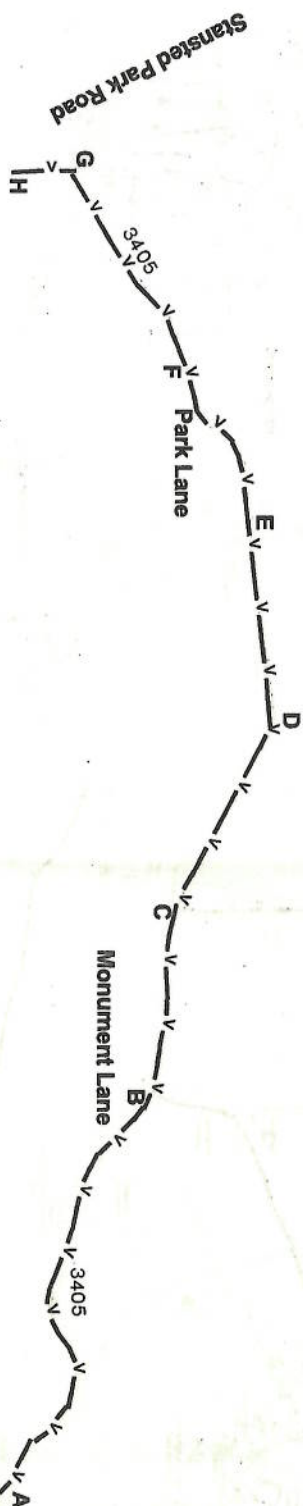
Inspector





MAP NOT TO
ORIGINAL SCALE

Park Slip



—V— Restricted Byway to be added

A. Fordland



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Parish: **STOUGHTON**

Brooks Nap Road

Starwood Park

Park Slip

Park Lane

Monument Lane

D. Parlane
34/4/05

Restricted byway



Byway open to all traffic to be added

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Stoughton

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MIKE KENDALL
COUNTY SECRETARY

