
Order Decision

Inquiry held on 25 January 2017

Site visit made on 24 January 2017

by Alan Beckett BA MSc MIPROW

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

Decision date: 22 February 2017

Order Ref: FPS/F4410/7/33

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Doncaster Borough Council Public Footpath No 16 Doncaster Definitive Map Modification Order 2014.
- The Order is dated 17 December 2014 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 1 objection outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I held a public local inquiry into the Order on Wednesday 25 January 2017 at the Civic Offices, Waterdale, Doncaster having made an unaccompanied inspection of the Order route the evening before. The parties to the Order did not require me to undertake a second inspection of the route at issue following the close of the inquiry. At the inquiry, the case for the confirmation of the Order was made on behalf of Doncaster Borough Council (the Council) by Mr Streeten with the objector Mr Edis representing himself assisted by his daughter Mrs McDonnell. I am grateful to all parties for the helpful and courteous way in which they endeavoured to assist me in the course of the inquiry.

The Main Issues

2. The Order was made in consequence of an event specified in section 53 (3) (c) (i) of the 1981 Act which provides that the Definitive Map and Statement ('DM&S') should be modified where evidence has been discovered which shows, when considered with all other relevant available evidence, that a public right of way which is not currently shown in the DM&S subsists or is reasonably alleged to subsist over the land in question.
3. Whilst the evidence discovered by the Council need only be sufficient to *reasonably allege* the existence of a public right of way to justify an order being made, the standard of proof required to warrant confirmation of an Order is higher. For me to be able to confirm the Order, I must be satisfied that the evidence discovered demonstrates, on a *balance of probabilities*, that the claimed right of way subsists¹.

¹ *Todd & Bradley v the Secretary of State for Environment, Food and Rural Affairs* [2004] EWHC 1450 Admin

4. The case put forward by the Council in support of the confirmation of the Order is based on the dedication of a public right of way being deemed to have occurred under the provisions of section 31 of the Highways Act 1980 ('the 1980 Act'). Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that during that period the landowner had no intention to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise.
5. The evidential test to be applied, at common law or under the statutory provisions, is the civil standard of proof; that is, the balance of probabilities.

Reasons

The date on which the right of the public to use the way was brought into question

6. The path at issue runs over what is known locally as West Avenue. West Avenue is an unadopted street which has an uneven and potholed surface. The first 40 metres or so of the westernmost section of the road forms part of the objector's property although it lies outside the domestic garden boundary wall. The photographic evidence adduced shows that prior to 2013 the land outwith the garden boundary wall had the appearance of being part of the unadopted street in that it was of a similar width and had a similarly uneven and potholed surface.
7. Despite the physical appearance of the land, it is not disputed that the land immediately to the south-east of the bungalow is in Mr Edis' ownership and I understand that Mr Edis bought his property in late 1984 or early 1985.
8. In March 2013 the Planning Department of Doncaster Council received an application from Mr Edis for the erection of a pair of semi-detached houses to be built on the land to the south-east of his bungalow. Outline planning permission for the development was granted but the Council's Public Rights of Way section requested that an informative was included in the planning permission to the effect that a claim for a public right of way over the whole of West Avenue including Mr Edis' land may be submitted if the route was obstructed.
9. In or around July 2013 Mr Edis erected a fence at the eastern boundary of his property near to the passageway to the rear of the houses on Ronald Road together with notices which denied the existence of a public right of way over his land. The fence presented a physical barrier which effectively prevented free passage over Mr Edis' land and it was the erection of the fence and notices which prompted complaints being made to the Council and to Councillor Jones.
10. If public use of the claimed path had first been brought into question in July 2013 then the relevant retrospective 20-year period for the purposes of section 31 (2) of the 1980 Act would be July 1993 to July 2013. However, the Council argued that the public's right to pass and re-pass over Mr Edis' land had been brought into question in 2005 and referred to a letter dated 12 August 2005 which had been sent to Mr Edis following complaints having been made that Mr Edis had been preventing vehicles from using part of what the Council then

considered to be West Avenue. This document was submitted by Mr Edis to demonstrate that he had been in the habit of challenging public use of his land.

11. There does not appear to have been any further correspondence arising from the August 2005 letter, and if such correspondence exists it was not before the inquiry. Although the 2005 letter is silent as to whether Mr Edis had sought to prevent members of the public from walking over his land and refers exclusively to his challenge to those crossing his land in motor vehicles, the effect of the letter is to have called into question any right the public had to cross the land at issue.
12. It is clear from the terms of the letter that the Council considered (a) that Mr Edis' land formed part of West Avenue and (b) that the land had been open to public use for in excess of twenty years. The 2005 letter provides evidence that attempts had been made to prevent public access over Mr Edis' land which resulted in complaints being made to the Council as the body responsible for asserting and protecting the rights of the public. That the Council felt justified in writing to Mr Edis following complaints having been made is evidence that the Order route had a reputation as a public way.
13. Mr Edis did not dispute that the effect of the 2005 letter was to have brought public use of the claimed path into question. I conclude that for the purposes of section 31 (2) of the 1980 Act, public use of the claimed path was brought into question in August 2005 and the relevant 20-year period is August 1985 to August 2005.

Whether the claimed footpath was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the public's right to do so was brought into question

The public

14. There is no legal interpretation of the term "the public". A dictionary definition is "*the people as a whole, or the community in general*". Coleridge CJ (1887)² commented that use by 'the public' "*must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge*".
15. I acknowledge that of those who completed user evidence forms, or who were interviewed by the Council or who appeared at the inquiry, the overwhelming majority reside within the streets of Ronald Road and Furnivall Road. However, none of the supporters have any connection with the land crossed by the path, either in terms of ownership, tenancy or a business relationship with the owner of the land. Despite the close proximity of the residences of supporters to the claimed path, and the narrow geographic area from which the supporters are drawn, there is no reason, in my view, why those resident in the neighbourhood should be regarded as other than "the public".

Use by the public for not less than 20 years prior to the date use was brought into question

16. In total, 52 user evidence forms were submitted in support of the footpath being added to the DM&S. The majority of these individuals (35) reside in

² R. v. Inhabitants of Southampton (1887) 19 QBD 590; RWLR April 1998 S6.3 pp55

Furnivall Road, 8 reside in Ronald Road with the remaining 9 respondents living elsewhere within Doncaster. Of these users, 28 state that they have used the path throughout the relevant 20 year period and of this group, 2 people gave evidence of continuous use since the 1940s, 6 people gave evidence of continuous use since the 1950s, 5 people gave evidence of continuous use since the 1960s and 11 people gave evidence of continuous use since the 1970s.

17. I heard from 6 witnesses at the inquiry. Mrs Bebb had lived at her current address since 1957 but had used the claimed path as part of her journey to school in the late 1940s. Between 1953 and 1966 Mrs Bebb had worked in the Co-Op on Hall Flat Lane and had walked to and from work along West Avenue up to 4 times a day. Mrs Bebb had walked the path around 6 times per week to go to the shops on Warmsworth Road and for a walk on Hexthorpe Flatts; the only time she had been prevented from doing so was in 2013 when the fence had been erected. Mrs Bebb described the route along West Avenue as '*the back way*' and preferred to use the path to avoid the noise and fumes from vehicles on Balby Road.
18. Mrs Andrews has lived at her current address since 1966 and had first walked along West Avenue as a child as part of her journey to school. As an adult, she had used the claimed path two or three times per week to get to the post office, the butcher and other shops on Balby Road. Mrs Andrews recalled that lorries and vans had been parked up on Mr Edis' part of the route and that it had always been possible to walk past them; they had not been parked in such a way as to obstruct passage along the path.
19. Mr Yates had first walked along West Avenue in 1968 when courting his future wife; he had however driven a car or ridden a motor cycle over the route more frequently than he had walked it. His use of the claimed route during the 20-year period in question had however been infrequent; on an "*as and when required*" basis. Mr Yates recalled that when pushing his children along in a pram he would have to carefully pick his way along the uneven surface. Vehicles had been parked in an orderly fashion along the way and had not caused an obstruction. In Mr Yates view, no part of West Avenue appeared to be private land; it was open to the public and was used by the public.
20. Mrs Collett had moved to her current address in 1970 and had used the claimed route on a daily basis until 2000 when she passed her driving test. From 2000, Mrs Collett had driven her car along the full length of the Order route but had continued to walk along the path a couple of times a month. Mrs Collett had seen other people walking the Order route and had not been aware that the western end was owned by Mr Edis. Mrs Collett had seen the signs on Mr Edis' garden wall but thought that they referred to the land behind the wall; the previous owner of Mr Edis' bungalow had never challenged public use of the Order route.
21. Miss Shaw had been resident in Balby since 2002 and had walked the Order route two or three times per week until 2013. Miss Shaw produced an extract from a 1931 Ordnance Survey map which pre-dated the building of Mr Edis' bungalow; on that map no distinction was drawn between Mr Edis' land and the remainder of West Avenue. Miss Shaw had been unaware that the land was privately owned until it had been fenced off as it had been in frequent use by members of the public. Miss Shaw produced photographs taken before and

after the fence had been erected; prior to the fence the surface of the Order route had been uneven but clear of vegetation; following the erection of the fence, grass and weeds had taken hold. Miss Shaw ascribed this change to the cessation of use by the public; in her view, use had been sufficient to prevent weeds and grass from growing on the land.

22. Councillor Jones' earliest recollection of using the Order route was with his grandmother walking between her house and his parent's house in Hyde Park. Mr Jones had used the Order route on a regular basis throughout his life until 2013 particularly when delivering party political literature to constituent's homes during the year.
23. None of the witnesses I heard from recalled any obstruction of the path during their use of it; when Mr Edis' lorries were parked on the land it had always been possible to walk around them. None of the witnesses recalled being challenged by Mr Edis or his predecessors in title about their use of the route, although Miss Shaw recalled that her sister had been "*shouted at*" for driving her car along the route. Prior to 2013, there had been no obstruction or impediment which prevented use of the Order route as a link between Furnivall Road and Oswin Avenue.
24. The oral evidence given at the inquiry is of unchallenged use of the path since the late 1940s which continued until the erection of the fence in 2013 and reflects and supports the remaining written user evidence. I am satisfied that the user evidence when considered as a whole, demonstrates use of the claimed path by the public throughout the relevant 20-year period.

Without force

25. The Order route runs along West Avenue from its junction with Furnivall Road crossing Mr Edis' land and terminating on Oswin Avenue. The available evidence is that until 2013 there has never been a fence or other barrier to prevent access over Mr Edis' land. There is no evidence that the public has had to climb or cross any structure to use the footpath or had to break down a gate or fence in order to do so. I conclude that use of the path has been without force.

Without secrecy

26. It is not disputed that the claimed use took place at all times of the day and in full view of anyone who cared to look. I conclude that the claimed use was not secretive.

Without permission

27. There is no suggestion within the written evidence of use or in the oral testimony of those who appeared at the inquiry of permission to walk along the Order route being sought or obtained. Mr Edis submitted that a Mrs Culkin had been given permission although there was nothing in her written evidence which suggested that this was the case. Even taking Mr Edis' submission at face value, the fact that one person may have been given permission to cross his land does not negate the fact that the overwhelming majority of those who used the Order route did so without permission. I conclude that use of the claimed footpath by the public during the relevant 20-year period was without permission.

Without interruption

28. With regard to Section 31 of the 1980 Act an interruption in use must be some physical and actual interruption which prevents enjoyment of the path or way and not merely some action which challenges that use but allows it to continue. For any action taken to qualify as an interruption of use there must be some interference with the right of passage.
29. Whether any action can be regarded as an interruption is also dependent upon the circumstances of that action; temporary obstructions of a minor nature such as the parking of vehicles on a road³ or the storage of building materials on a path⁴ have been held not to amount to relevant interruptions.
30. In this case there is no evidence of the use of the footpath being interrupted in any way until the erection of Mr Edis' fence in 2013. The periodic parking of heavy good vehicles on Mr Edis' land between the mid-1980s and mid-1990s had no effect upon public use of the Order route; the witness evidence was that the vehicles were not parked in such a way which prevented use.
31. Mr Andrews' evidence was that when he was undertaking repairs to Mr Edis' vehicles any tape he put out to warn people of his work and to create a safe working space was broken down or cut through by those who used the path. Mr Andrew recalled that there had been a number of occasions where users strode over his outstretched legs when he was under the body of a vehicle.
32. Despite vehicles being either parked on the land or being repaired on the land, the evidence before me is that the presence of vehicles had no effect upon the ability of the public to walk along the full length of the Order route during the relevant 20-year period. I conclude that use of the route by the public between August 1985 and August 2005 was uninterrupted.

Summary

33. The user evidence before me demonstrates that the footpath at issue has been in continuous use by the public since at least the 1940s. There is a body of user evidence which is sufficient to demonstrate that use of the claimed footpath occurred throughout the 20-year period prior to August 2005 and that such use was as of right and without interruption. It follows therefore that the evidence adduced by the Council is sufficient to raise a presumption of dedication under Section 31 of the 1980 Act.

Lack of intention to dedicate

34. In order to take advantage of the proviso to section 31 (1) of the 1980 Act, the owner of the land has to provide evidence of overt and contemporaneous action having been taken against those using the claimed path.
35. In the case of *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, Hoffman LJ held that in terms of the intentions of the landowner, the *"intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is.... objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the*

³ Lewis v Thomas [1950] 1KB 438

⁴ Fernlee Estates Ltd v City & County of Swansea [2001] EWHC Admin 360

owner was intending to disabuse him of the notion that the way was a public highway". Furthermore the contemporaneous actions taken by the landowner must be "perceptible by the relevant audience" and be "objective acts perceptible outside the landowners' consciousness, rather than simply proof of a state of mind".

36. It was Mr Edis' case that he had taken a number of steps to make it clear that he contested use of his land by the public, the principal action being to personally challenge those he saw crossing his land. Mr Edis had run a transport and haulage business and had used the land adjacent to his bungalow to park, service and repair not only his own lorry but those of his friends who were also independent hauliers. It was Mr Edis' evidence, together with that of Mr Andrews, Mr Andrew, Mr Clarkson, Mr Barlow and Mr McDonnell that when the lorries were being repaired or serviced, Mr Edis would challenge anyone seen crossing his land, telling them that the land was private and that they should not be there.
37. Mr Edis was said to have issued challenges to pedestrians and others on such a regular basis and in such a forthright manner that it was "embarrassing" at times for members of his family. In addition to the oral evidence given, a number of written statements were also submitted from others who attested to Mr Edis' actions. I understand from the evidence of Mr Edis and his witnesses that when challenged, users of the claimed path responded with verbal abuse or simply ignored Mr Edis and carried on their way.
38. None of the witnesses who appeared at the inquiry in support of the Council's case recalled being challenged and Mr Edis and his witnesses were unable to identify any of the Council's witnesses as being someone to whom a challenge had been given. Furthermore, none of the respondents who completed a user evidence form recalled personal challenges to the use of the route before 2013.
39. The Order route lies in a built up suburb of Doncaster and the immediate surroundings are characterised by terraced housing; consequently there is a large local population living in the immediate vicinity of the Order route. Whilst I have no doubt that Mr Edis has issued challenges to some users, those challenges do not appear to have been made with sufficient frequency for it to have become common knowledge in the area that anyone found walking over the land would be subject to such a challenge.
40. It may be that those who had been challenged had not completed a user evidence form and were not present at the inquiry, but the preponderance of the user evidence submitted is that use had occurred without being challenged. There may well have been challenges made to some users when Mr Edis saw them, but such challenges do not appear to have brought home to a sufficiently wide cross section of the local population that use was being resisted or questioned such that users would have been made aware that there was no intention to dedicate.
41. A similar conclusion can be reached with regard to the parking of HGVs and other vehicles on the land. The photographic evidence submitted by Mr Edis shows his vehicles parked side by side at one or other sides of the land with more than sufficient space around them for members of the public to pass by on foot. The vehicles do not appear to have been parked in such a manner as to prevent access by the public and they were regarded by the user witnesses as being part of the ordinary street scene of West Avenue. The parking of

vehicles therefore could not be said to have conveyed to the public that there was no intention to dedicate a public right of way.

42. Similarly, the periodic servicing and repair of vehicles on the land had no effect upon use of the Order route by the public. Mr Andrew noted that if his legs were protruding from under a vehicle, members of the public would stride over him; Mr Andrews noted that the warning tape he set out to mark out his working area was ignored as people continued to walk past. If these activities were meant to convey to the public the landowner's lack of intention to dedicate, they appear to have been wholly unsuccessful.
43. Mr Edis points to a letter which he received from the Council dated 4 August 1986 as evidence that he had challenged use of the route and that such challenges had come to the attention of the highway authority. The letter from the Council was sent to Mr Edis' solicitor and appears to have been prompted following Mr Edis' refusal to allow the Council's highways maintenance staff to undertake repair works under section 230 of the 1980 Act to what was considered to be a private street. The letter also asked whether Mr Edis "*accepts that this part is subject to rights of way for the general public or anyone else*".
44. Although Mr Edis submits that this letter was further evidence that he had continually challenged public use of the Order route, the letter is concerned not with Mr Edis' approach to public use, but with his dispute about the Council's ability to undertake emergency repairs to a privately maintainable street. It would have been abundantly clear what Mr Edis' position was regarding public rights over his land had he responded in the negative to the Council's question. As it was, Mr Edis did not respond to that letter, and little weight can be attached to it as evidence of either his subjective or objective intention.
45. The most common way that the owner's intentions could have been brought to public attention would have been by the erection on the path of a suitably worded notice or notices denying the existence of a right of way. It is not disputed that Mr Edis had erected two notices on the ends of his garden wall which read "*Private land no trespassing*". Mr Edis provided photographic evidence of the existence of these signs and said they had been on site between the mid-1980s and the mid-1990s.
46. With regard to these signs, the critical question is not what message Mr Edis may have subjectively thought they conveyed, but what message the users of the path would objectively have understood from them; this is the point made by Hoffman LJ in the *Godmanchester* case. In this case, those users who recalled seeing the signs thought that they referred to the land behind the garden wall to which the notices were attached and not to the land over which they were walking; this was the point made by Mrs Bebb in her evidence. Mr Yates didn't know what land the signs referred to and the notices had no impact upon his use of the path.
47. A suitably worded notice of the kind erected by Mr Edis when he fenced the land off in 2013 would have readily conveyed to users his intention towards the land. Furthermore, the signs recently erected are in prominent positions at the centre of the boundary of the land where anyone attempting to walk this part of the Order route would have to pass them. The location of the signs erected by Mr Edis in 2013 and the message conveyed by them is unequivocal; as such they are in direct contrast to the signs said to have been present in the mid-

1980s. The existence of Mr Edis' earlier signs is not in dispute, but I do not consider that the wording and their positioning were sufficiently clear to disabuse users of the notion that the route across Mr Edis' land was not a public highway.

48. It follows that I conclude that there is insufficient evidence of a lack of intention to dedicate a public right of way for Mr Edis to be able to take advantage of the proviso to section 31 (1) of the 1980 Act.

Conclusions

49. I conclude that the user evidence adduced is sufficient to raise a presumption of dedication and there is insufficient evidence of a lack of intention to dedicate a public right of way over the Order route for that presumption to be rebutted.
50. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed.

Formal Decision

51. I confirm the Order.

Alan Beckett

Inspector

APPEARANCES

For Doncaster metropolitan Borough Council

Mr C Streeten	of Counsel instructed by Miss S Cutler on behalf of the Assistant Director of Legal and Democratic Services, Civic Offices, Waterdale, Doncaster DN1 3BU
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Who called:

Mrs L Godley	Public Rights of Way Officer, Doncaster Metropolitan Borough Council
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Mrs J Bebb

Mrs L Andrews

Mr A Yates

Mrs C Collett

Interested parties in support:

Miss R Shaw

Cllr G Jones	Member for Hexthorpe and Balby North
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Objectors

Mr A Edis

Mrs J McDonnell

Who called:

Mr A Edis

Mr M Barlow

Mr C Andrews

Mr P Andrew

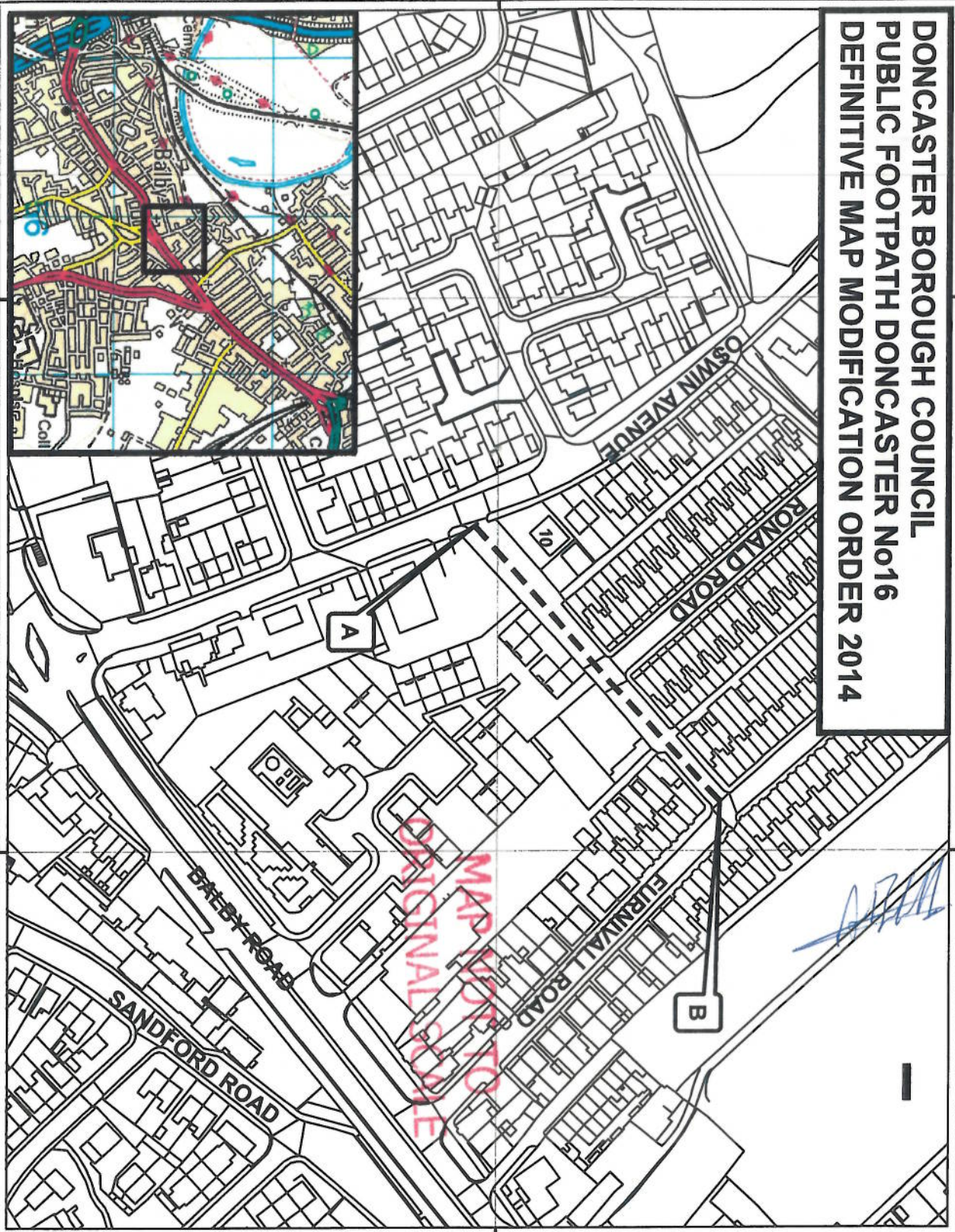
Mr D Clarkson

Mr J McDonnell

Inquiry documents

1. Bundle of maps and photographs submitted by Miss Shaw.
2. Closing submissions on behalf of Doncaster Metropolitan borough Council made by Mr Streeten.

DONCASTER BOROUGH COUNCIL **PUBLIC FOOTPATH DONCASTER No16** **DEFINITIVE MAP MODIFICATION ORDER 2014**



Key :

Legend

— Order route

GRID REFERENCES

A - SE 5608 0139
 B - SE 5618 0148

Notes :

Title :

Completed By :

Reference :
 West Avenue.mxd

Date :

26 June 2014

Scale :
 1:2,000