

# Order Decision

Inquiry opened on 22 February 2017

**by Mark Yates BA(Hons) MIPROW**

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

**Decision date: 11 April 2017**

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## **Order Ref: FPS/Q2500/7/84**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Lincolnshire County Council (Woodhall Spa) Definitive Map Modification Order 2015.
- The Order was made by Lincolnshire County Council ("the Council") on 9 December 2015 and proposes to add a restricted byway ("the claimed route") to the definitive map and statement, as detailed in the Order Map and Schedule.
- There were four objections and one representation outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is proposed for confirmation subject to the modifications set out below in the Formal Decision.**

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## **Procedural Matters**

1. I held a public inquiry into the Order on 22-23 February 2017 at the Coronation Hall, Woodhall Spa. I visited the site alone prior to the inquiry and I undertook a further visit accompanied by the interested parties following the close of the inquiry.
2. All of the points referred to below correspond to those delineated on the Order Map.

## **Main Issues**

3. The Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of an event specified in Section 53(3)(c)(i) of the Act. Therefore, if I am to confirm the Order, I must be satisfied that the evidence discovered shows that a right of way, which is not shown in the map and statement, subsists. The burden of proof to be applied is the balance of probabilities.
4. I shall assess whether the evidence is sufficient to infer the dedication of a public right of way at some point in the past. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.

## **Reasons**

### ***Background matters***

5. The test that I need to apply is set out in paragraph 3 above. Whether it is desirable for a particular route to be recorded as a public right of way is not relevant to my decision. As outlined below, there are some additional matters that are also not relevant to my determination of this Order.

6. An application was made on 12 May 1998 for the addition of a public footpath to the definitive map and statement, in accordance with Schedule 14 to the 1981 Act, which was supported by user evidence. The route claimed generally ran between points A-B-C. However, near to point D, it continued to Mill Lane via the track that bisects Nos. 59 and 61 Mill Lane.
7. An appeal was made against the Council's decision to not make an Order for the above route. It was at this stage that some further evidence was discovered. Following consideration of the evidence and submissions of the parties, the Secretary of State directed the Council to make an Order for a byway open to all traffic ("BOAT") over a proportion of the route claimed at the time. It is apparent that the omitted section encompassed the track between the two properties.
8. An Order was made on 18 December 2002 in accordance with Schedule 15 to the 1981 Act. The Council was unable to confirm the Order due to the objections sustained to it. However, in light of an error with the Order Map, the Council made a second Order in 2015. The Secretary of State subsequently refused to confirm the 2002 Order because of the defect with the Order Map.
9. The 2015 Order now falls to me to determine in accordance with Schedule 15 to the 1981 Act. Any issues in relation to the process at the Schedule 14 stage are not matters for me to now determine. The information supplied by the Council is supportive of the statutory requirements being undertaken in relation to the making of the Order. Whilst the claimed route in the Order continues through to Mill Lane, I am not aware of anything that prevents the Council from making an Order for a route that goes beyond what was directed by the Secretary of State in 2001. Irrespective of whether an application is made, the Council has a duty to modify the definitive map and statement following the occurrence of an event specified in Section 53(3) of the 1981 Act.
10. The Natural Environment and Rural Communities Act 2006 has the effect of stopping up unrecorded public rights for mechanically propelled vehicles unless one or more of the exemptions found in Section 67 of the Act is applicable. The Council's view that none of the exemptions are applicable in relation to this Order is not disputed. Therefore, if public vehicular rights are shown to subsist over the claimed route, the appropriate status would be a restricted byway rather than a BOAT.
11. The claimed route proceeds through a bungalow (59 Mill Lane) and its garden. I sympathise with the present owners of the property (Mr Woods and Ms Chamberlain) on this matter. However, this issue cannot have any bearing on my decision. This applies irrespective of any alleged breach of the human rights of the owners of the property as it is not possible to interpret the 1981 Act in a way that it is compatible with the Convention rights. The Council has indicated that if the Order is confirmed consideration will be given to the diversion of the way where it passes through the bungalow and its garden. There would be an opportunity for people to object or make a representation in response to any Order made to divert the route.
12. The Council does not rely to any significant extent on the user evidence and no members of the public came forward to speak at the inquiry in support of the use documented in the evidence forms. The case in support therefore relies upon the interpretation of various historical maps and documents. Some of the objectors are concerned about the erection of a kissing gate and placing of a

waymark on the track between Nos. 59 and 61 Mill Lane, which could have served to encourage people to use this route and prejudice any future consideration of the route between the two properties. Whilst I appreciate the concerns expressed, this is a matter that an aggrieved party should pursue with the Council as the highway authority for the area. The kissing gate and waymark are not located on the route included in the Order and no case was made at the inquiry in support of the recording of public rights over this section.

13. The length of time taken for the case to be submitted to the Secretary of State for a final determination is regrettable but it is outside of my control. People have had the opportunity to object or make a representation and they have done so. There is no apparent disadvantage to the parties arising out of this delay in terms of the consideration of the historical documentary evidence.
14. Some comments have been made about the involvement of a supporter of the Order (Mr Padley) and his role within the Local Access Forum. However, I do not see that any issue arises out of Mr Padley taking an active role at the inquiry. Clearly both he and the Council take the view that the Order should be confirmed.

### ***Consideration of the evidence***

15. A 1762 plan of the River Witham by Grundy provides no indication of any routes within the area shown. A wharf (Kirkstead Wharf) is generally annotated on the plan to the north of the site of Kirkstead Abbey but there is no indication of any other wharf in this locality.
16. The Council has provided transcripts from the 1769 Langton, Horncastle and Woodhall Enclosure Award in relation to two public roads included in the award. These were described as the "*Road to Kirkstead South Wharff*" and the "*South Road to Kirkstead Wharffs*". No locally held enclosure plan was available at the inquiry. One of the objectors (Mr McNeil) says that such a plan could exist in the National Archives. However, there is nothing to show that this is the case and the onus rests with the parties to provide any evidence in support of their respective positions. Regard should also be given to the points outlined in paragraph 22 below.
17. The objectors expressed concerns about the Council's late disclosure<sup>1</sup> of the discovery of an error in the last line of the transcript for one of the named roads. However, it is apparent that the Council did not consider that anything turned on this issue. The objectors were also concerned about Mr Padley's statement that this issue changes his view on the location of these awarded roads. Having listened to the views of the parties, I concluded that I would not hear any further submissions on this matter. I did nonetheless reserve the right to seek the views of the parties following the close of the inquiry if I considered it necessary to do so for the purpose of reaching my decision but I have not felt the need to do so.
18. The Council's witness (Ms Beeby) does not allege that either public road corresponds to the claimed route, which she believes was most likely located beyond the scope of the award. In terms of the reference to an ancient gate in the description of the '*South Road to Kirkstead Wharffs*', Ms Beeby considers that it was either a pre-existing feature or was located outside of the scope of

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<sup>1</sup> After the evidence of the parties had been heard

- the award. She nonetheless accepts that this feature could have been sited at points A or E. Mr Padley takes the view that it is possible to place these roads elsewhere.
19. The later map evidence is supportive of Mr McNeil's view that the south wharf related to a wharf in the locality of the present Kirkstead Bridge and a second northern wharf was located near to the claimed route. From reading the descriptions of the two roads highlighted by the Council, I accept that there is nothing to indicate that they corresponded to the claimed route. It is possible that the roads related to sections of the present B1191 Road with the *South Road to Kirkstead Wharffs* continuing over a proportion of Mill Lane. However, even if this were the case, it provides no direct information in relation to the claimed route.
  20. Two additional objectors (Mr and Mrs Wild) have provided further transcripts from the award. They were unable to attend the inquiry but it appears that their views on the enclosure award correspond to some extent with those of Mr McNeil. There is a reference in the award to a 60 feet wide carriage road between Lincoln and Boston. Mr McNeil believes this road connected the two wharfs and proceeded over the same route as the later railway. However, the '*South Road to Kirkstead Wharffs*' is described as proceeding initially in a westerly direction from the south end of the Lincoln to Boston road. This does not point to the Lincoln to Boston road following the former railway line. Nor indeed is any road acknowledged over this alignment in the railway documents addressed later in this decision.
  21. Mr McNeil submits that a private road in the award corresponded to the claimed route. The highlighted road is described as leading out of Blows lane, which he believes related to where the road that presently comprises of Green Lane and Mill Lane is located. I take the relevant description to commence from the wording "*AND the said commissioners have set and appointed a Bridle Road...*". The side annotation highlighted only serves to identify the general location of the various provisions in the award. In terms of the preceding public road described in the award, it cannot be determined that this related to the claimed route.
  22. In the absence of an enclosure award plan, it is difficult to identify to any reasonable degree the routes of the described roads. Nor is it possible to determine the extent of the lands that were enclosed. In the absence of a plan, I do not dismiss entirely the assertions made regarding the awarded bridle road. However, it is described as proceeding eastwards from the southern end of Blows Lane and continuing towards Thornton, which does not point to the claimed route. In particular, even if the claimed route was awarded as a private bridle road, there would be nothing to prevent the route from subsequently being dedicated to the public. Both the Council and Mr Padley rely on the later evidence in support of the assertion that the claimed route has public status.
  23. A 1792 plan of the River Witham by Green shows a route leading out of the "*Old Warth*" which could correspond to the claimed route. Another wharf (annotated as "*Kirkstead Warth*") is shown to the south of the old wharf. These features are shown on a second plan of the river from 1792.
  24. The claimed route is generally depicted by means of a pair of solid lines between the river and Mill Lane on the 1824 Ordnance Survey ("OS") map. I am not necessarily convinced that there is any significant break in the solid

- lines shown. Nonetheless, I concur with the Council that a boundary would not be shown where a route proceeded across open ground. There is the annotation "*Kirkstead Wharf*" in this locality. A windmill is shown at the corner of the present junction of Mill Lane and Green Lane. Further to the south and near to the current road bridge is the annotation "*Kirkstead Ferry*".
25. The claimed route is generally shown on the Bryant map of 1828. Whilst it is unclear whether the route falls within the "*Good Cross or Driving Roads*" or "*Lanes & Bridle Ways*" categories, there are routes alongside the river elsewhere annotated as a bridle road and a footpath. At the point the claimed route meets the riverside is the annotation "*Kirkstead Wharf & Ferry*". The former Swan and Grid Iron Public House is also shown in this locality. Only the eastern part of the claimed route is depicted on Greenwoods map of 1830. On this issue, the Council points to other routes that are not shown where they approach the river.
  26. Although there may be some minor differences in the way particular sections are shown on the above maps, it is apparent that the claimed route historically existed as a physical feature broadly on the alignment included in the Order. The claimed route is shown in a similar way as other public roads in the area and served as a means of access between Mill Lane and the wharf. Further, the Bryant map provides some support for a ferry in this location. However, the early maps provide no confirmation regarding the status of the routes shown. It is possible that the route only served as a private means of access.
  27. A proportion of the claimed route from its western end is shown numbered 18 on a plan of 1844 in relation to the proposed London & York Railway. The route is shown continuing beyond the limits of deviation for the proposed railway, where it is depicted as open-ended. This suggests that the route continued eastwards towards Mill Lane. There is annotation which points to the existence of a ferry in this locality (Kirkstead ferry). Reference is also made to the route located near to the present Kirkstead Bridge, which is shown numbered 8.
  28. Routes 18 and 8 are recorded in the accompanying book of reference as "*highway*" and "*public highway*" respectively. The parcels that form part of the riverbank and are adjacent to these routes are recorded in the book of reference as "*North Bank of Witham and Wharf (extra parochial)*" and "*Wharf and Ferry*" respectively. Parcel 8 is recorded within the ownership column as being under the control of the named surveyor of the highway. In respect of parcel 18, this is recorded in the relevant column as "*The Surveyors, as aforesaid*". From looking at the various entries in the book of reference it is clear that this reference relates to the surveyors of the highways.
  29. The railway documents are supportive of the two routes being highways that provided a means of access to the wharfs and to some extent ferries. Some of the objectors seek to draw an inference from the absence of the word "*public*" in the entry for the claimed route. However, the important word is "*highway*", which is a way over which the public have a right to pass and repass. Whilst this is distinct from a private right of way, the two may co-exist. The reference to the surveyors of the highways in the ownership column for the claimed route is also supportive of the route having public status. As Mr Padley points out this relates to the surface of the highway.
  30. There is no evidence to support Mr and Mrs Wild's assertion that any public rights were likely to have been stopped up. Further, the 1847 Great Northern

Railway Act made provision for the railway to cross roads 8 and 18 on the level. This is supportive of the retention of these public rights. Mr Padley and Mr McNeil agree that the gate posts in place where the claimed route meets the former railway line correspond to the original posts at this point. The difference in the widths of the entry points for the crossings in relation to roads 8 and 18 could reflect the different nature of the two roads. Reference is also made by the Council to the distinction between the description of the claimed route and the entries in the book of reference for the occupation roads. I note that the occupation roads are stated to be in the ownership of named parties.

31. It is apparent from the maps outlined above that the claimed route continued through to Mill Lane and this is further supported by the estate map addressed below. The route provided a means of access between Mill Lane and a historical wharf and a ferry is recorded on the map. Reference is also made by the Council to the former public house (parcel 23). These locations could be places of public resort and a cul de sac highway can exist in such circumstances. I consider that significant weight should be attached to the railway documents. The railway was built and the documents would have been subjected to local and Parliamentary scrutiny. It is not alleged that the documentary evidence is supportive of the route being a public bridleway or footpath. Given the existence of the wharf, I consider that the railway documents are supportive of the route being a public carriage road.
32. The claimed route is shown coloured in the same way as Mill Lane and numbered 5 on a plan in relation to the Disney Charity of 1858. Whilst the depiction of the claimed route in this manner could be supportive of the route having public status, the purpose of the plan appears to have been to identify land within the ownership of the Disney Charity. The absence of any explanation for the number given to the route will further limit the weight of this plan. However, it is supportive of the section of the claimed route shown on the railway plan continuing to Mill Lane. The pecked line at the junction with Mill Lane would not be supportive of a gate at this point. The Council says that it represents the parish boundary and a solid line is depicted for the first time on the 1890 OS map. It is accepted that there was a gate at the point the route met the railway.
33. Mr and Mrs Wild refer to features shown on an OS map they have provided, which is stated to span the period of 1842-1952. It was not possible to ascertain from them the provenance of this map. It could be a map which incorporated later revisions. Nonetheless, in determining the existence or otherwise of particular features, I give greater weight to the OS maps that cover a more limited period of time. In terms of the southern ferry, this was to be extinguished once a swing bridge in this location was open to the public<sup>2</sup>. There is no evidence of a ferry at the western end of the claimed route after the 1844 railway plan.
34. The claimed route is shown on the OS maps of 1890 and 1905. These maps could suggest that there were gates at the points the route met Mill Lane and the railway. The existence of gates would not have prevented the route from being a highway. It is not possible at this point in time to determine whether any such gates were locked. The later map indicates that part of the boundary of the route was no longer in place. It also shows that the wharf continued to exist as a physical feature. In terms of the numbers given to the parcels on

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<sup>2</sup> By Section 29 of the Great Northern Railway Act 1889

- the OS maps, in the absence of a book of reference, these provide no indication of status.
35. I consider that little weight should be attached to the failure of the 1947 OS map to depict the claimed route given the scale of this map. It is evident from the 1971 aerial photograph that the route continued to exist as a physical feature.
36. The claimed route is shown within the taxable parcels of land on a map produced in relation to the 1910 Finance Act. This would not be supportive of the existence of a vehicular highway, which would usually be shown excluded from the surrounding parcels. There is also no deduction claimed for a public right of way that can be attributed to the route in the accompanying documents. Nonetheless, it needs to be borne in mind that the existence or otherwise of highways was very much incidental to this Act. It could be that by this time the route had fallen out of use, for instance in relation to public vehicular traffic. Mr and Mrs Wild draw attention to the route being shown gated on the OS base map used in relation to the Finance Act map, which is consistent with the 1905 OS map detailed above.
37. A 1936 map of the parish shows the claimed route to be one of the numbered routes. This map appears to depict the footpaths and other claimed rights of way in the parish at the time but its provenance is unknown. It is apparent that the route was not claimed as a public right of way as part of the process undertaken to compile the definitive map and statement for the area under the National Parks and Access to the Countryside Act 1949. I do not find Mr and Mrs Wild's point regarding the absence of a level crossing from the base map used for the definitive map to be significant. As outlined in paragraph 30 above, provision was originally made for the railway to cross the claimed route on the level.
38. Part of the land owned at the time by the Disney Charity was sold in 1975 and nine Properties, including No. 59 Mill Lane, were subsequently built on the site. The objectors refer to a covenant in the 1975 conveyance for the maintenance of a stock proof fence along the western boundary of the land sold. There is nothing to suggest that there was a covenant in place when the land was within the same ownership. It appears that it was put into the conveyance to ensure that the remainder of the land was securely fenced. This issue would not prevent the recording of any pre-existing highway rights over the claimed route.
39. The development involving these properties led to the original route being physically diverted at its eastern end so that it now proceeds between Nos 59 and 61 Mill Lane. There is nothing to suggest that any public rights were acknowledged to exist at the time and a private right of way was retained over the route in the conveyance. The fact that no diversion was sought for a public right of way following the grant of planning permission reflects the position that no such way was recorded.
40. Mr McNeil says the Council should have investigated the title to the land and he refers to the issue of it being held in trust. He also refers to the land being ecclesiastical land. Nonetheless, it is open to anyone to provide evidence relevant to the issue of whether an implication of dedication can be inferred at common law. No evidence has been provided to show that the owner of the land crossed by the claimed route did not have the capacity to dedicate a public right of way at some point in the past, for instance prior to the production of

the railway documents. It is apparent from looking at the railway book of reference that the land to the south of the claimed route was in the ownership of the trustees of the Disney Charity in 1844. However, In respect of this issue, I note that the enclosure award refers to land awarded to John Disney.

41. The user evidence forms provide some support of more recent use by members of the public mainly on foot. However, it is not asserted that the user evidence can be relied upon to demonstrate the dedication of a public right of way. Further, Mr McNeil points to action that could have constituted use by force rather than as of right. In the circumstances, I consider that very limited weight should be attached to the untested user evidence.

### ***Conclusions***

42. The absence of an enclosure award plan means that it is not possible to determine to any reasonable extent where particular named routes were located. Nonetheless, it is not asserted that public rights were awarded over the claimed route. Even if private rights were awarded over this route, this would not prevent a highway from subsequently being dedicated over the claimed route.
43. It is apparent that the claimed route is a feature of some antiquity. The depiction of the route on particular maps in the same manner as Mill Lane could be supportive of it forming part of the highway network. Whilst these maps were not concerned with recording the status of the routes shown, when considered in conjunction with the later railway documents, they could support an inference of the dedication of a highway. The map evidence is also supportive of the existence of a wharf at the western end of the claimed route. This feature is represented on the 1905 OS map but it is not possible to determine when it ceased to operate.
44. I consider that significant weight should be attached to the railway documents. These passed through the full Parliamentary process and are clearly supportive of the claimed route being a highway which linked with the wharf. There were other potential destinations in the area, including a public house and for a period of time a ferry. In my view, the railway documents are supportive of the existence of a vehicular highway.
45. Some weight should be given to the Finance Act evidence which is not supportive of the claimed route having public status. However, the issue of whether a route had public status was incidental to this Act. There is generally a lack of support for the route being a highway in the other twentieth century documents, which may have been as a consequence of the wharf ceasing to operate. The evidence of public use in recent years is mainly on foot and was not tested at the inquiry.
46. I do not find the evidence in support to be compelling. However, having regard to my conclusions regarding the various pieces of evidence, I conclude on balance that the evidence points to the route being a historical public road that had fallen into disuse by the early part of the twentieth century. I therefore find on the balance of probabilities that a restricted byway subsists.

### ***The width of the claimed route***

47. The Council says the 9 metres width specified in the Order for the claimed route is derived from the 1905 OS map. It is apparent from looking at the historical maps that the route was largely enclosed by physical boundaries and



these are shown by way of solid and pecked lines on the 1905 OS map. These boundaries correspond with the proportion of the route shown as parcel 18 on the railway plan. However, it is apparent from looking at the 1905 map that the width between these features is not consistent and there are points where the route is less than 9 metres wide and points where it is potentially slightly greater than 9 metres.

48. In the circumstances, I consider that it is appropriate to modify the Order to state that the width of the claimed route is shown hatched on a copy of the 1905 OS map which will be appended to the Order. As it is possible that part of the width of the route will extend slightly beyond 9 metres I take the view that the proposed modifications should be advertised, as outlined in paragraph 51 below.

### **Overall Conclusion**

49. 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 with modifications.

### **Formal Decision**

50. I propose to confirm the Order subject to the following modifications:

- Delete the final line in Part II of the Order Schedule and insert "*width of the way is shown by red hatching on the 1905 25 inch Ordnance Survey map which is appended to this Order*".
- Attach the map outlined above to the Order.

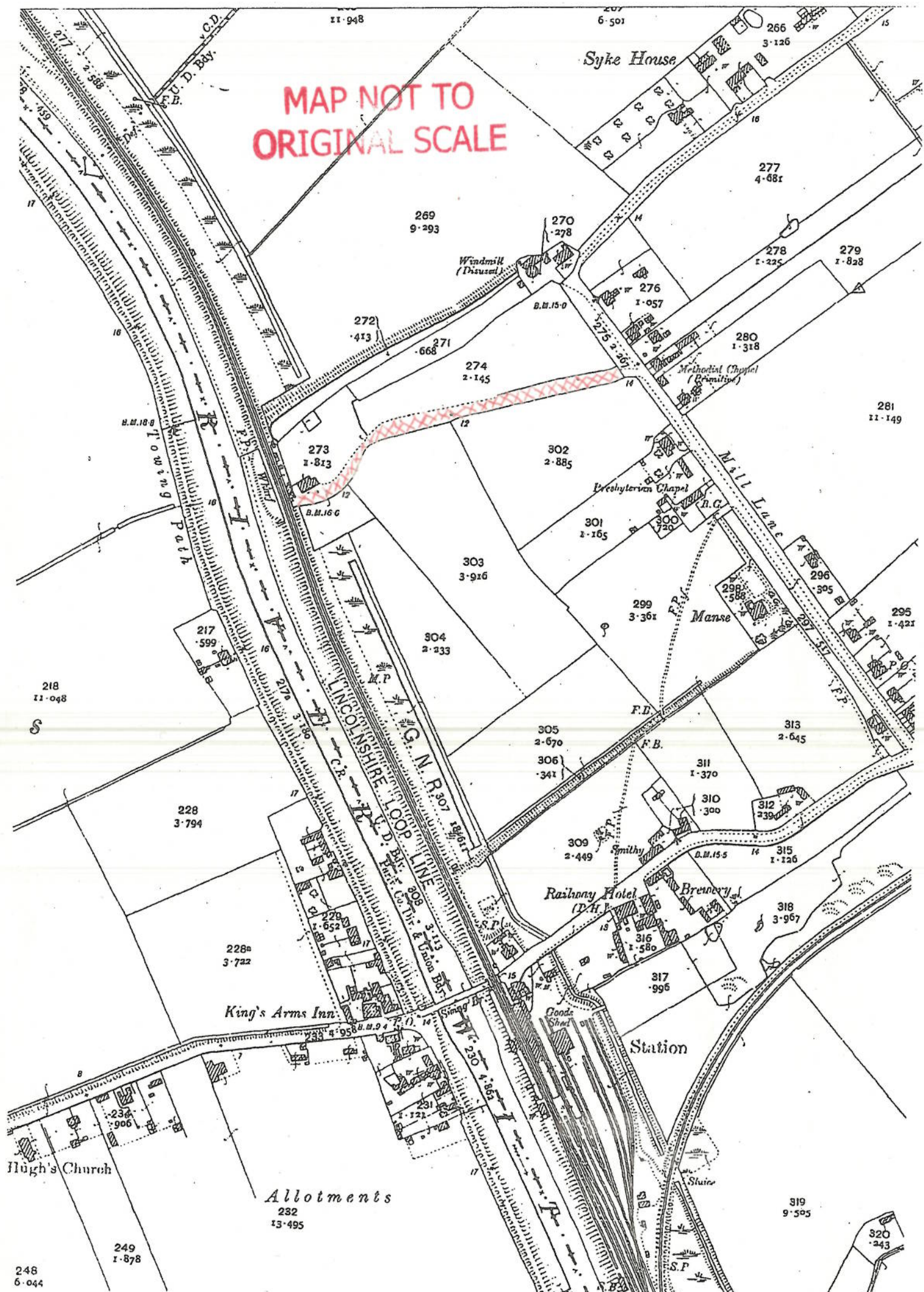
51. Since the confirmed Order would affect land not affected by the Order as submitted I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

*Mark Yates*

**Inspector**



MAP NOT TO  
ORIGINAL SCALE





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MAP NOT TO  
ORIGINAL SCALE



No. in Set  
FO8961  
Book

THE COMMON SEAL of LINCOLNSHIRE  
COUNTY COUNCIL was hereunto  
affixed in the presence of

Authorised Officer  
LEIGH MIDDLETON

**Key:** Restricted Byway 1125  
Unaffected Public Footpath 149

**Lincolnshire**  
COUNTY COUNCIL

Date 09.10.2015

**Definitive Map Modification Order Application:**  
Woodhall Spa  
Restricted Byway 1125 between Mill Lane and  
river Witham bank

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R A Willis  
Executive Director for Environment & Economy  
County Offices, Newland, Lincoln, LN1 1YL

Scale: 1:2300

Plan Ref: 2015/011/DMMO193/RB1125/A4