



Order Decision

Hearing held on 4 July 2017

by Mark Yates BA(Hons) MIPROW

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

Decision date: 15 September 2017

Order Ref: FPS/M1900/7/86

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Hertfordshire County Council (Great Gaddesden 35, 37, 39, 83 and 84) Modification Order 2016.
- The Order was made by Hertfordshire County Council ("the Council") on 4 March 2016 and proposes to modify the definitive map and statement in respect of public rights of way in the parish of Great Gaddesden, as detailed in the Order Map and Schedule.
- There were twenty objections and one representation outstanding at the commencement of the hearing.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a hearing into the Order on 4 July 2017 at Great Gaddesden Village Hall having visited the sites of the routes included in the Order the previous day. None of the parties present considered that there was a need to undertake a further visit to view any of these routes.
2. All of the points referred to below correspond to those delineated on the Order Map. It is proposed to add to the definitive map and statement a footpath (points A-B) and a byway open to all traffic ("BOAT") between points D-F-G. The latter has historically been known as Mill Hill Lane. The Order would also upgrade existing public rights of way, which are known as Rolph's Lane (points C-D-E) and Garner Lane (points H-I-G-J-K-L) to BOAT status. Further, the Order proposed to delete a section of Great Gaddesden Bridleway No. 39¹ (points L-M).
3. The case in support of the proposals to add the two new ways and upgrade the existing ways was principally made at the hearing by Ms Denton for the Council and the applicant (Mr Westley). A proportion of the land crossed by these routes is in the ownership of the Trustees of the Gaddesden Estate ("the Trustees"). The Trustees object to these proposals and were represented at the hearing by Mr Farthing. One of the Trustees (Mr Halsey) also provided some information in support of this objection. A few additional people spoke in support or opposition to the Order.
4. It is apparent that some of the land affected by the Order has been sold in the last year. I note that the Council notified a representative of the new landowner (the Crown Estate) of the position in relation to the Order prior to the hearing². The information supplied indicates that the Crown Estate had sufficient details to make a representation to the hearing if it wished to do so.

¹ Known as Cupid Green Lane

² The documentation supplied included a copy of the Order and the notice of the hearing

5. The Council has revised its view on the proposal to delete a section of Bridleway 39 in light of the written submission from Dr Wadey. It no longer considers that the Order should be confirmed in respect of this proposed modification to the definitive map and statement. I address this matter separately in paragraphs 60-64 below.
6. Towards the end of the hearing, Mr Westley outlined an issue arising out of his application which could potentially impact on the exemption relied upon for the matter outlined in paragraph 9 below. I agreed to the request for this issue to be addressed by written submissions following the close of the hearing. The subsequent submissions of the Council, the Trustees and Mr Westley have been circulated for information.

Main Issues

7. The Order is made under Section 53(2)(b) of the 1981 Act and relies on the occurrence of events specified in Section 53(3)(c)(i), (ii) and (iii) of the Act. Therefore, I need to determine whether there has been the discovery by the Council of evidence which (when considered with all other relevant evidence available to them) shows:
 - (i) that a right of way which is not shown in the map and statement subsists;
 - (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; and
 - (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.
8. In assessing the proposed additional ways and the upgrading of existing ways, I shall assess whether the documentary evidence is sufficient to infer the dedication of public rights of way of a particular status 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. The burden of proof to be applied is the balance of probabilities.
9. Should I find that any of the routes is a vehicular highway, consideration will need to be given to the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"). The 2006 Act has the effect of extinguishing unrecorded public rights of way for mechanically propelled vehicles unless one or more of the exemptions outlined in Section 67(2) or (3) of the Act is applicable.
10. Further, if I am minded to confirm the Order, consideration will need to be given to the historical alignment of a section of Rolph's Lane and the width of the routes.

Reasons

Discovery of evidence

11. Mr Westley's application followed on from the decision of an Inspector to not confirm an Order to upgrade Rolph's Lane to BOAT status after a public inquiry held in 1996.

12. Reference is made by the Trustees to the twofold requirement in Section 53(3)(c) of the 1981 Act; firstly that there is new evidence and secondly that the new evidence, when considered with all other relevant evidence, is sufficient to demonstrate that Rolph's Lane has a higher status than that recorded in the definitive map and statement. The issue for the Trustees is whether the new evidence adds anything to the evidence considered in 1996 to justify a different conclusion being reached.
13. The Trustees refer to the case of *Mervyn Darrell Burrows v Secretary of State for Environment, Food and Rural Affairs 2004* ("Burrows"). Paragraph 26 of the *Burrows* judgment states that:

"It is plain that the section intends that a definitive map can be corrected, but the correction... is dependent on the 'discovery of evidence'. An Inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was previously drawn up. The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification".
14. The Council draws attention to the case of *Kotarski and Secretary of State for Environment, Food and Rural Affairs and Dorset County Council 2010* ("Kotarski"). However, the issue in *Kotarski* was different to the present circumstances. The cases highlighted by the Council are supportive of the discovery of evidence encompassing situations where the surveying authority becomes aware of an error with the definitive map or statement.
15. It is not my role to re-determine the decision of the previous Inspector regarding Rolph's Lane. There has been the discovery of some new evidence, namely a parish map, Bartholomew's maps, London Gazette notice, Geographia map and an archaeological report. Further, Mr Westley considers that the case of (1) *The Commission for New Towns* (2) *Worcestershire County Council and J J Gallagher Ltd 2002* provides fresh judicial guidance on the interpretation of map evidence. He also makes the point that the absence of public rights over the claimed routes that connect with Rolph's Lane was a matter considered by the Inspector in 1996. His application seeks to address this point.
16. There appears to be no judicial guidance on the extent of the new evidence required to trigger the provision in Section 53(3)(c). It therefore seems appropriate to consider the new evidence provided in conjunction with the previously considered evidence. However, the new evidence when taken together with the other evidence would need to be sufficient to find on balance that higher public rights exist over Rolph's Lane. This issue is not alleged to arise in relation to the other claimed routes.

Consideration of the evidence

Estate documents

17. A 1657 map of the lands belonging to John Halsey shows the C-D section of Rolph's Lane by way of solid lines. It is shown open ended at point D which suggests that it continued beyond this point. This is also applicable to the spur shown which corresponds with the junction of the north western end of Mill Hill Lane.
18. The 1717 map of the lands belonging to Henshaw Halsey also shows the C-D section and the connecting Red Lion Lane by way of solid lines. Near to point C

is the annotation alongside Red Lion Lane which states "*Cross Lanes*". Further, it appears to depict the western section of Garner Lane. At the junction with Mill Hill Lane is the annotation "*Leading to The Row*" and towards the east is the annotation "*The Garner*". A 1756 plan of Hawbush Farm shows the eastern section of Rolph's Lane where it meets Gaddesden Row at point E.

19. The court roll admissions of Francis Wilkins at Hawbush Farm of 1748 related to the transfer of land. This document includes the reference to a certain lane, which it is accepted could relate to Rolph's Lane. The Council believes that the reference to a lane between Gaddesden Row and Water Lane is indicative of a through route to Red Lion Lane and beyond.
20. The estate documents indicate that particular sections of the claimed BOATs physically existed. Mr Westley points to the sections shown being separate to the numbered parcels and unobstructed. However, I am not satisfied that any conclusion can be reached on the ownership of the routes in question. The fact that a route connects at each end with a known highway may be supportive of the route being part of the local highway network but it could also be indicative of a private road for use by the estate. The maps were produced for the purpose of identifying particular landholding and not highways. As with many of the maps, the Trustees point to the depiction of other routes that are not recorded as highways. Whilst it is possible that unrecorded public rights exist over the routes highlighted by the Trustees, the conclusion I reach from the estate maps is that they are only indicative of the historical existence of particular physical features.

Parish map

21. A 1780 parish map of Great Gaddesden shows the claimed BOATs by means of solid lines in the same way as Red Lion Lane and Gaddesden Row. The Council considers it likely that this map was produced in order to show the division of land in the parish. There is nothing to suggest the map was concerned with the depiction of highways. Research undertaken by the Council indicates that a proportion of the routes shown are now recognised public roads. It is also apparent that a few of the routes shown are now footpaths or bridleways. Again, the Trustees point to routes shown that are not recorded highways.

Early commercial maps

22. The claimed BOATs are shown on the 1766 Dury and Andrews map of Hertfordshire as one of the "*Roads enclosed by Hedges*". This commercial map is schematic in nature but it is stated to have been based on an original survey. The Council considers that this map shows the majority of the known public routes.
23. Bryant's 1822 map of Hertfordshire shows the claimed BOATs within the category of "*Lanes & Bridleways*". Research undertaken by Mr Westley reveals that the husband of a local landowner (Rev J F Moore-Halsey) was a subscriber to the map. However, I am not satisfied that much can be gleaned from the subscription undertaken by Rev Moore-Halsey. The degree to which he agreed or disagreed with the features depicted on this map is unknown.
24. There is nothing to suggest that the surveyors of the commercial maps carried out any investigation regarding the status of the routes present on the ground. It may well be the case that a good proportion of the routes shown are now highways bearing in mind that these maps were produced for sale to the public

but there are examples where this is not the case. The descriptive terms used on the map keys do not provide any clarification on whether the routes were considered to have public or private status. The word "*Bridleway*" could suggest that some of the routes shown were not vehicular in nature. It also appears to be the case that there are instances where a route shown is now recorded as a non-vehicular public right of way.

Tithe documents

25. The claimed BOATS are coloured sienna and excluded from the tithed parcels of land on the Great Gaddesden tithe map of 1838-39. Reference is made by the Council to research which reveals that a number of the routes shown in this way are now recorded as highways. The Trustees also refer to instances where this is not the case. In particular, I note that some non-vehicular public rights of way are shown on the tithe map in this manner.
26. The accompanying award lists the claimed BOATs under the "*Roads, Commons and Waste*" category. There are twenty-one entries within this category of which sixteen are highways³ or claimed in the case of Mill Hill Lane. Three others are areas which are common or were provisionally registered as common. The Council also acknowledges that not all of the routes shown on the tithe map and now recorded as highways were included within this category in the award. However, I accept that it is possible that public rights were subsequently dedicated over these routes.
27. The fact that highways were incidental to the tithe process will usually serve to limit the evidential weight of tithe maps. The exclusion of a route from the surrounding parcels of land could be indicative of a public or private route as both would have impacted upon the productivity of the land being assessed. Mr Westley submits that the colouring could be indicative of a metalled surface and therefore more likely public status. Whilst I am familiar with colouring being used in this way on particular Ordnance Survey ("OS") maps, I am not aware of it being used in respect of tithe maps. Nonetheless, the depiction of private roads in the same way indicates that not all of the routes shown in this manner had public status. It is also apparent that some non-vehicular highways are shown in this way. The entries in the award are only supportive of the land not being subjected to the payment of tithes and provide no clarification regarding the status of the roads listed.

Highway maintenance records

28. There are two references to the repair of Garner Lane in the Great Gaddesden Surveyors of Highways account book from 1866. One of these also refers to Mill Hill. I consider there to be some doubt regarding whether the reference relates to Mill Hill Lane or Garner Lane in this locality. Although the Council points to the notation in the relevant entry which could indicate that it included Mill Hill Lane, this is not entirely clear. There is an additional reference to the repair of Garner Lane in the 1879 Surveyors of Highways minute book. The vestry minutes of 1884 state that "*it was resolved that the repair of Garner Lane be left to the overseer*".
29. The record of public maintenance being spent on Garner Lane provides good evidence of highway status. However, I find the position to be unclear in relation to the single entry to Mill Hill. Further, it should be borne in mind that

³ Including footpaths

the works could have been undertaken in respect of a public bridleway as well as a vehicular highway.

Historical OS maps

30. I note that the 1867-1894⁴ OS map shows the claimed footpath by means of pecked lines across parcel 333 and this route appears to continue north-eastwards over Rolph's Lane. No path is depicted across the small parcel numbered 336 to point A. Rolph's Lane appears to be generally shown as a field edge track as far as Elmtree Farm. At this point the track is shown turning south easterly to the farm. A short cul de sac section represented by double dashed lines is shown around point E. This suggests that there was no physical through route apparent on the ground on the date of the survey towards point E.
31. The C-D section is represented by double dashed lines which continue over the Mill Hill Lane route. The F-G section corresponds to a separate distinct enclosed lane which also continues to the east of point F. Garner Lane is generally depicted as a track alongside field boundaries.
32. The 1897-1901 OS map shows many of the features depicted on the earlier OS map but there are some differences. There appears to be a path shown across the small parcel near to point A. The claimed footpath is also annotated "FP". In terms of Rolph's Lane, there are two routes depicted over a short section. The northern route is shown continuing through to point E and is annotated "FP". A proportion of the Mill Hill Lane route is shown on an alternative alignment and corresponds to another route shown on the earlier OS map. This route is annotated "FP" and Garner Lane is annotated "BR".
33. OS maps are usually taken to be a reliable indication of the physical features present on the date of the survey and I have noted particular variations between the two editions of the maps above. However, OS maps cannot be relied upon to determine the status of the routes shown.

Finance Act evidence

34. Aside from a short section near to point C, the claimed BOATs are shown within the numbered hereditaments on the map produced in relation to the 1910 Finance Act. This is not supportive of the recognition of public vehicular rights over these routes. Nor can it be determined that any of the claimed deductions for "*public rights of way or user*" in respect of the hereditaments crossed by sections of the claimed BOATs related to these routes.
35. A claimed deduction of £20 is recorded in the supporting documentation for "*public rights of way or user*" within hereditament 106⁵ on the Finance Act map. Whilst no further clarification is provided regarding the alignment of the way in question, the only route depicted within hereditament 106 on the OS base map is the claimed footpath. Therefore, I consider it more likely that the reference relates to the relevant route in the Order. However, no evidence has been provided in relation to the remainder of this route through to point A, which passed to the front of a row of cottages⁶.

⁴ The date of the actual survey is unknown

⁵ This hereditament comprises of two relatively small parcels of land.

⁶ Mr Halsey believes that the cottages were demolished in the 1950s.

Later commercial maps

36. Two editions of Bartholomew's county map have been provided, which were produced in around 1902-1906 and 1907-1910. Rolph's Lane and Garner Lane are shown on both editions under the category of "*indifferent road (passable)*". The Council draws attention to this being consistent with other vehicular highways in the area. In terms of Rolph's Lane, it deviates to the south side of Elmtree Farm at its eastern end. The Trustees also point to an inconsistency in relation to the depiction of the western end of Garner Lane. A proportion of Mill Hill Lane is shown as an uncategorised track which continues eastwards through to Gaddesden Row.
37. These maps were aimed at cyclists and tourists and it is apparent that there was some input from the Cyclists Touring Club in terms of routes used by their members. However, this map maker did not employ independent surveyors to carry out the surveys on the ground. Nor did they verify the status of the routes shown. The Council also draws attention to the disclaimer which appears on these maps from 1904 onwards in terms of the routes shown.
38. The 1939 Geographia road map shows Rolph's Lane and Garner Lane under the "*other roads (subject to a right of way)*" category. Although there may be some inconsistency with the depiction of the latter. The Council points to this being comparable to other public roads. It also believes that this designation is indicative of a higher status than footpath. In contrast, the Trustees draw a comparison with the designation later employed in relation to ways categorised as footpaths used by cart road traffic. There is nothing to suggest that any investigation was carried out in relation to the status of the routes shown.
39. In my view, limited weight should be placed on the Bartholomew's maps in light of the factors highlighted above. I am also not satisfied that any significant reliance can be placed on the Geographia map. In terms of the "*other roads (subject to a right of way)*" category, the word "*road*" could merely reflect the existence of this physical feature irrespective of status.

London Gazette notice

40. A notice appeared in the London Gazette on 25 January 1927 in relation to the proposed extension of the supply of electricity in the area⁷. Paragraph 5 of the notice set out that the Order would authorise the relevant local authority to "*open, break up, and interfere with all streets, roads and public places, ways, footpaths, bridges...*".
41. There are a number of routes described in the notice under the heading "*Other roads*". The nature of the descriptions means that there may be a little uncertainty in identifying particular routes. There is a reference to a road "*from Red Lion Public House to Gaddesden Row*" which could possibly relate to Garner Lane. The description of a footpath "*from Crown and Sceptre Public House to the boundary of the borough of Hemel Hempstead via Mill Hill Farm*" probably relates to the C-D section and the route shown on the OS maps in the locality of Mill Hill Farm. Finally, the footpath "*from Briden's Camp to Gaddesden Row*" appears to encompass Rolph's Lane and possibly the claimed footpath.
42. I accept that the claimed routes are all potentially mentioned in the notice. However, it cannot be determined that the proposed Order impacted only on

⁷ The Watford Electricity (Extension) (Special Order).

highways. Therefore, I am not satisfied that the description of a route as a road is necessarily indicative of it being a public road. Further, the majority of the claimed routes were described as footpaths.

Rights of Way Act 1932

43. Some notes were produced for Great Gaddesden Parish Council in relation to the Rights of Way Act 1932. Mrs Hammond is quoted as saying that she had been told by residents at both ends of a route between Briden's Camp and Elmtree Farm that it was a bridleway. The agent is stated to be doubtful. Whilst I agree that this relates to Rolph's Lane, it could also potentially include the claimed footpath. There is another reference to a potential bridleway continuing in the locality of Mill Hill. A later letter of 1936 to the parish council refers to Garner Lane as a bridleway.
44. The absence of a map means that again there is a little uncertainty regarding the extent of the routes mentioned. In my view, the documents reveal little aside from the fact that the described routes were claimed to be rights of way of a particular status.

The definitive map process

45. The parish survey map, which was produced at the initial stage of the compilation of the original definitive map for the area, shows the routes that were claimed to be public rights of way. Garner Lane and the C-D section were included as proposed bridleways. The remainder of Rolph's Lane and a variation of the Mill Hill Lane route were shown as footpaths. Finally, the claimed footpath is depicted as a CRF⁸. However, the landowner subsequently objected to the inclusion of the claimed footpath and the Mill Hill Lane route on the ground that they were estate paths and Great Gaddesden Parish Council agreed that this was the case.
46. A hearing was held and the claimed footpath and the Mill Hill Lane route were omitted from the next stage of the process. The other routes were included on the original definitive map. A later review proposed to downgrade the C-D section but this was not taken forward as the review was abandoned.
47. This documentation shows that the contemporary evidence was not sufficient to support the inclusion of the two relevant routes. Further, the other routes were placed on the definitive map with the status originally claimed. However, this would not prevent the subsequent recording of any historical public rights that are found to exist over the claimed routes.

The user evidence

48. Six user evidence forms were submitted which generally provide support for equestrian use of Garner Lane and five forms were provided in relation to use of Rolph's Lane. The evidence of use by horse riders of Garner Lane and the C-D section corresponds to the bridleway status of these routes and provides no support for higher public rights.
49. It is not alleged that the user evidence is supportive of the dedication of additional public rights pursuant to Section 31 of the Highways Act 1980, or that this evidence can be relied upon in isolation to demonstrate dedication at

⁸ The initials CRF generally denoted a carriage road mainly used as a footpath

common law. The Council relies upon the historical documentary evidence outlined above.

50. Mr Worrell has provided some further information in support of the use of the routes by him and his late wife. Whilst this use is disputed to some extent in the written submission by Mr Dunbar, Mr Worrell clarified his evidence at the hearing. Mr Worrell outlines that they used Rolph's Lane on horseback and later as carriage drivers. However, the route used varied towards its north-eastern end. He also says that they used Garner Lane and the D-F section of the Mill Hill Lane route. Mr Worrell clarified that they only drove along a section of Garner Lane on a couple of occasions.
51. The Council points to a permit scheme in the area for horse riders, which appears to have operated since around 1980. Mr Worrell says that he and his wife later joined the scheme. It is also apparent that a general pass was given to the Gaddesden Place Riding School. Further a deposit was made in 2007 under Section 31(6) of the Highways Act 1980 whereby no additional public rights were acknowledged to exist over the land in question. These issues and the relatively sparse evidence of use mean that the user evidence provided cannot be relied upon to support an inference of dedication in respect of the claimed BOATs.

Archaeological report

52. The archaeological report written by Mr Hunn was commissioned by the Trustees. Mr Hunn did not attend the hearing which means that it was not possible to clarify any matters arising out of the report with him. The main issues in the report that are relevant to this Order are the potential variations between the ways on site and their historical routes and the widths of the ways. Mr Dunbar also refers to the present width of Garner Lane and the variation in its alignment. However, irrespective of their historical alignment, I do not find that this evidence demonstrates that the claimed BOATs were not used by vehicular traffic. Mr Hunn acknowledges that a farm cart could have negotiated these routes.

Conclusions for the claimed BOATs

53. The claimed BOATs appear to be features of some antiquity. Sections of Rolph's Lane are represented to varying degrees on the estate maps provided. These maps also provide some support for the existence of the other claimed BOATs. It is nonetheless generally accepted by the parties that the estate maps provide no indication of status. In terms of the early commercial maps, they could be supportive of the claimed BOATs forming parts of the local road network. However, the purpose of these maps was not to specifically record highways and they show other routes which are not known to be vehicular highways. These issues will considerably lessen the evidential weight of the early commercial maps.
54. A similar situation arises in respect of the tithe documents. The fact that a route was coloured sienna and shown outside of the tithed parcels of land could be indicative of a public or private route. It is also possible that a route shown in this way was a non-vehicular highway. The provenance of the parish map is uncertain and there is nothing to suggest that it was concerned with the depiction of highways. Although I accept that these maps could provide some support for the routes forming parts of the local highway network, it would be unsafe to place much reliance on them.

55. The highway records are supportive of public resources being spent on Garner Lane. This is indicative of the route being a highway but not necessarily a vehicular highway. I find the position to be unclear regarding the single reference in these records to Mill Hill and I therefore proceed with caution in relation to this entry. The Finance Act map is not supportive of the routes being recognised as vehicular highways. The London Gazette notice appears to refer to Garner Lane as a road, irrespective of whether it was for public or private use. It is apparent that Mill Hill Lane and Rolph's Lane were only described in this notice as footpaths. The Mill Hill Lane route was ultimately found not to be a public right of way following a hearing held into an objection to its proposed inclusion on the definitive map.
56. The historical OS maps indicate particular changes, including the variation to the Mill Hill Lane route, which are apparent from looking at some of the other maps. However, for the purpose of determining the status of these routes, I place little reliance on them. In light of my earlier conclusions, I place only slightly more weight on the later commercial maps.
57. A number of the documentary sources may provide support for the claimed BOATs being highways. However, I do not find the weight of the evidence when taken together is sufficient to infer the past dedication of public vehicular rights over these routes. Nor do I consider on balance that the evidence is sufficient to infer the dedication of a highway of a lesser status over a route in the locality of Mill Hill Lane or a bridleway over Rolph's Lane. It follows that I do not conclude on the balance of probabilities that the relevant tests outlined in paragraph 7 above are satisfied.

Conclusions for the claimed footpath

58. The 1867-1894 and 1897-1901 OS maps show a path across the field but only the latter indicates that it potentially continued through to point A. This evidence is only supportive of the existence of this physical feature. I find the deduction documented in the Finance Act records to most likely relate to a section of the claimed footpath. The London Gazette notice also potentially provides some support for this route being a footpath. However, the absence of evidence of the path continuing to the road lessens the weight of the Finance Act documents. Whilst originally claimed during the definitive map process, it was ultimately found to be only a private path.
59. I conclude on balance that the evidence is not sufficient to infer the past dedication of a historical public footpath over the route claimed. It follows that I do not find that a public footpath subsists on the balance of probabilities.

The proposed deletion

60. The Council no longer wishes to pursue the deletion of the L-M section in light of the judgment in the case of *Marlene Peggy Masters and Secretary of State for the Environment, Transport and the Regions 2000* ("*Masters*") and this is in line with the written submission made by Dr Wadey. Paragraph 37 of the *Masters* judgment makes it clear that the second limb in Section 53(3)(c)(iii) of the 1981 Act, namely that "*any other particulars contained in the map and statement require modification*", does not relate to the deletion of a right of way from the definitive map and statement.
61. For the first limb of Section 53(3)(c)(iii) to be engaged there would need to be the discovery of new evidence which shows on the balance of probabilities that

an error occurred when the way was first recorded in the definitive map and statement. Paragraph 4.33 of Defra Circular 1/09 further outlines that the evidence must be of sufficient substance to displace the presumption that the definitive map is correct and this evidence must be cogent. No case has been made to indicate that this is applicable to the L-M section.

62. Dr Wadey submits that the L-M section should be recorded as a BOAT. It is generally accepted that this part of Bridleway 39 now forms part of the ordinary road network and this was apparent from my visit to the site. A BOAT is defined in Section 66(1) of the 1981 Act as "*a highway over which the public have a right of way for vehicular and all kinds of traffic, but which is mainly used by the public for the purpose for which footpaths and bridleways are so used*". I agree with the Council that the character and use of this section is not indicative of a BOAT in line with the *Masters* judgment.
63. Dr Wadey also draws attention to the exemption contained in Section 67(2)(a) of the 2006 Act. This specifies that public rights for mechanically propelled vehicles are not extinguished if the main lawful use by the public during the five year period prior to the commencement of the Act was by mechanically propelled vehicles. However, as outlined in guidance issued by Defra⁹, this exemption is intended to apply to the ordinary road network and if it is applicable the way should not satisfy the BOAT test in Section 66(1) of the 1981 Act. In my view, the test in Section 66(1) applies where it is proposed to upgrade an existing way to BOAT status or if it is proposed add a BOAT to the definitive map and statement where no such way is presently recorded.
64. Having regard to the above, I do not consider on balance that the Order should be confirmed so as to delete the L-M section, or that I should propose to modify the status of this section.

Other Matters

65. Whilst I note the concerns raised regarding the potential problems associated with the routes being recorded as BOATs, such matters are not relevant to my decision. In light of my conclusions in paragraph 57 above, there is no need for me to address the widths or alignments of the claimed BOATs. Nor do I need to consider the submissions made in relation to the 2006 Act.

Overall Conclusion

66. Having regard to these and all other matters raised at the hearing and in the written representations I conclude that the Order should not be confirmed.

Formal Decision

67. I do not confirm the Order.

Mark Yates

Inspector

⁹ 'Paragraphs 21 and 26 of Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways. A guide for local authorities, enforcement agencies, rights of way users and practitioners (version 5 – May 2008)'.

APPEARANCES

For the Council:

Ms H. Denton	Definitive Map Officer
Mr D. Ogbonnaya	Solicitor employed by the Council

Other Supporters:

Mr M. Westley	Representing the East Herts Footpath Society
Mr B. Worrell	Rights of Way Officer for the local group of the British Driving Society

Objectors:

Mr N. Farthing	Solicitor representing the Trustees
Mr N. Halsey	Trustee
Mr P. Harris	Chairman of Great Gaddesden Parish Council
Mr T. Kirby	Secretary of the Water End and Upper Gade Valley Conservation Society

DOCUMENTS

1. Statement of Mr Brooks
2. Map of the area
3. Legal submission for the Council
4. Calculations for the dimensions of Rolph's Lane
5. Submissions by Mr Westley of 6 July 2017
6. Submissions on behalf of the Trustees of 7 July 2017
7. Submissions for the Council of 17 July 2017

This Plan forms part of the Hertfordshire
County Council (Great Gaddesden 35, 37,
39, 83 and 84) Modification Order 2016
Part 1

Existing footpath
Existing brideway
Footpath to be added
Footpath to be upgraded to
byway open to all traffic (D-E),
bridleway to be upgraded to
byway open to all traffic (C-D
and H-L) and byway open to
all traffic to be added (D-F-G)

Appears on DM sheet nos. 53 & 54
50 25 0 50 100 150 200 250
metres

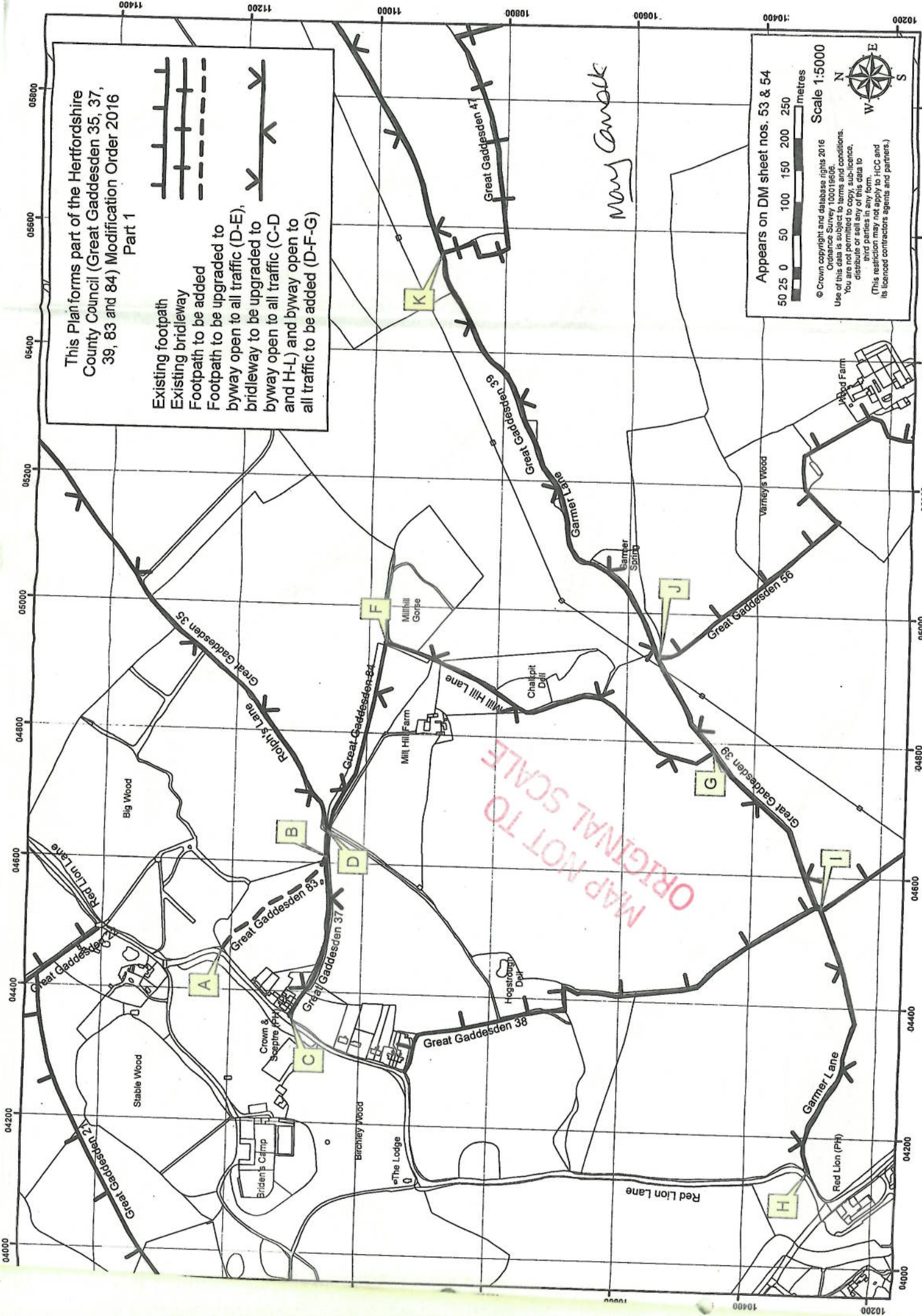
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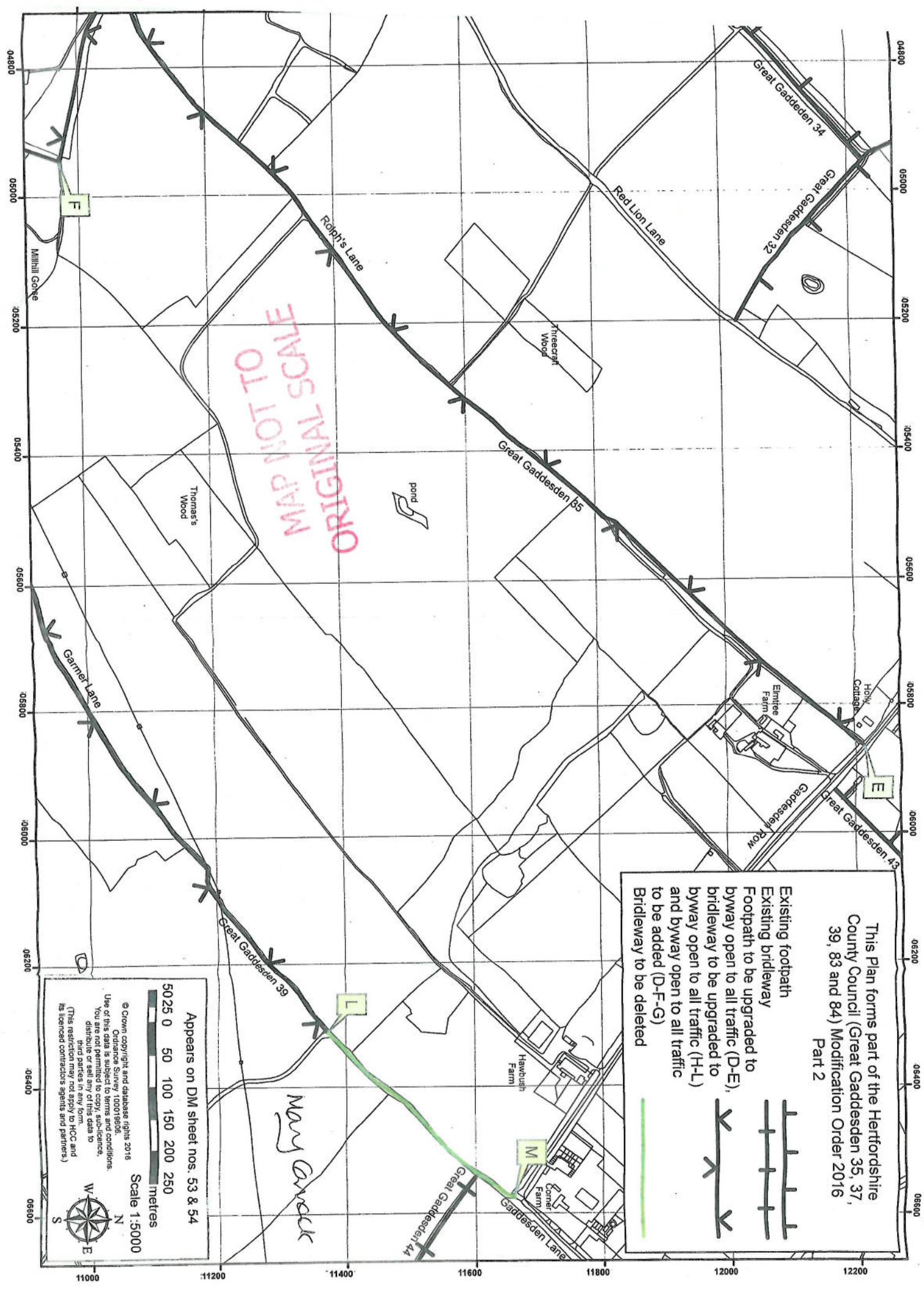
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May Canole

MAP NOT TO
ORIGINAL SCALE





This Plan forms part of the Hertfordshire
County Council (Great Gaddesden 35, 37,
39, 83 and 84) Modification Order 2016
Part 2

Existing footpath
Existing bridleway
Footpath to be upgraded to
byway open to all traffic (D-E),
bridleway to be upgraded to
byway open to all traffic (H-L)
and byway open to all traffic
to be added (D-F-G)
Bridleway to be deleted

Appears on DM sheet nos. 53 & 54

Scale 1:5000

metres

50 100 150 200 250

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