



Order Decision

Hearing held on 6 February 2018

Site visit made on 6 February 2018

by Martin Elliott BSc FIPROW

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

Decision date: 09 March 2018

Order Ref: ROW/3172526

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Norfolk County Council (Martham Footpath No. 1(part)) Modification Order 2016.
- The Order is dated 8 August 2016 and proposes to modify the Definitive Map and Statement for the area by deleting a section of public footpath 1 Martham and adding in its place an alternative section as shown in the Order plan and described in the Order Schedule.
- There were three objections outstanding at the commencement of the hearing.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a hearing at Martham Village Hall on 6 February 2018. I carried out an unaccompanied site inspection of the Order routes, and the route subject of an application under section 53(5) of the 1981 Act (see paragraph 2 below), following the close of the hearing.
2. The Order arises from an application made by Mr P Curtis of Martham Boat Building and Development Company Limited (MBBDC) to alter the alignment of part of public footpath 1 Martham. Having considered the application the Council made an Order to delete the section of public footpath 1 subject of the application (A-B-C¹) but to add a different alternative section of public footpath 1 (A-D-E-C). The route sought to be added by the application of Mr P Curtis is from point A to point D then proceeding northwards to the boundary of Riverside Bungalow then west and south before running parallel and to the north of points E and C re-joining public footpath 1 to the north of point C. Mr P Curtis contended that the correct route to be added was that identified above which I will call the application route. The Council took a neutral stance at the hearing and whilst I note the concerns of Dr Bacon it is open to the Council to take this position. In reaching my decision I have had regard to all of the evidence before me including evidence from the Council which has also been included in the objector's bundles.
3. At the commencement of the hearing Mr P Curtis submitted a number of additional documents (hearing documents 1 - 8). A number of these documents had previously been submitted as part of the submissions accompanying the statement of case. Dr Bacon also submitted a list of staithe

¹ Letters A to E used in this decision relate to points identified on the Order plan

in the Broads. Whilst these documents should have been submitted in accordance with the timescales set out in the Notice of Order there is nothing to indicate that anyone has been prejudiced by the late submission of these documents.

4. In making his case Mr P Curtis referred to the leases for 28 and 30 Martham Bank. Copies of the leases had not been submitted previously but at the hearing I was provided with copies (hearing documents 10 - 12).
5. Mr P Curtis raised concerns as to the 10 metre width identified in the Order for part of public footpath 1 and the potential impact on properties to the west of point C. The Order provides, at Part I of the Schedule, for the route to increase to a width of 10 metres at point C. The Order has no effect on the width of public footpath 1 to the west of point C. However, I can appreciate that the variation to the definitive statement might be read so as suggest that the 10 metre width continues beyond point C. If the Order is confirmed I will modify it accordingly.
6. MBBDC refer to the fact that the Planning Inspectorate at one point dismissed the Council's 'application' on the basis that there was a fundamental error in the Order. However, I have considered the Order against the Wildlife and Countryside (definitive maps and statements) Regulations 1993 SI 1993 No 12 (the Regulations) and advice in Defra² circular at paragraph 4.17. There is nothing to indicate that the Order is fundamentally flawed. I also note that the Order is sealed and dated although this is at the end of the Order. Schedule 4 of the Regulations specifies that the seal and the date of making the Order should be inserted after the Order but before its Schedule. Whilst the most appropriate place for the seal and date is after the Order and before the Schedule there is nothing to indicate that anyone has been misled or prejudiced by their positioning.

The Main Issues

7. The Order has been made under section 53(2)(b) of the Wildlife and Countryside Act 1981 in consequence of events specified in section 53(3)(c)(i) and the first part of subsection (iii). The test to be considered is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show:
 - i) that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates (53(3)(c)(i), the addition of public footpath 1 A-D-E-C);
 - ii) that there is no public right of way over land shown in the map and statement as a highway of any description (53(3)(c)(iii), the deletion of the section of public footpath 1 A-B-C).
8. The test to be applied to the evidence is on the balance of probabilities.
9. In their Statement of Case the Council have identified the case of *R (oao) Leicestershire County Council v SSEFRA (QBD) [2003] EWHC 171 (Admin)(Leicestershire)*. This is a case similar to the circumstances before me and is relevant to my determination of the Order. Collins J held that "*the only issue which the Inspector had to determine was essentially which was the*

² Department for the Environment, Food and Rural Affairs

correct route to be shown on the map” requiring him to consider “both whether, in accordance with section 53(3)(c)(i), a right of way not shown subsisted, and also, in accordance with section 53(3)(c)(iii), whether there was no public right of way over land shown on the map”. “The presumption is against change rather than the other way around”. If there is insufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in everyone’s interest that the map is to be treated as definitive. ‘It would be difficult to imagine that a finding that is less than that the alternative exists on the balance of probabilities would be sufficiently cogent evidence to change what is on the map’.

10. I am also mindful of advice given in Defra³ Circular 1/09 in respect of deletions from the definitive map. This advises at paragraph 4.33 that the evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement will need to fulfil certain stringent requirements. These are that:
- i) the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made;
 - ii) the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;
 - iii) the evidence must be cogent.

Reasons

Background issue

11. It is the thrust of the case of MBBDC that the land over which the Order route A-D-E-C passes is a staithe and that there is no right or authority to compromise or prejudice the statutory Cess Staithe rights.
12. The Martham Inclosure Act of 1807 gives powers to the Commissioners to set out and allot land to be used as public staithe. The subsequent Martham Inclosure Award of 1812 set out Cess Staithe *‘for the use and convenience of the owners and occupiers of estates within the said parish of Martham for the time being for the laying and depositing thereon of the corn manure and other things which shall be conveyed or shall be intended to be conveyed by the said river or to and from the said river by means of the said boat dike...’* I agree with MBBDC that the right to deposit things on the Cess Staithe cannot be lost or defeated other than by an Act of Parliament (*Wyld and Others v Silver [1962] 3 All ER 309*) and in the absence of any Act of Parliament those rights remain. I also note that in accordance with paragraph 37(1) of Schedule 3 to the Norfolk and Suffolk Broads Act 1988 the Broads Authority have powers to prevent unlawful interference with any staithe or any exercisable rights.
13. In *Neaverson v Peterborough Rural District Council [1899 N. 1107]* it was held that a statutory right affecting the manner in which land may be used cannot be restricted or extended by prescription. However, I do not consider that this supports a proposition that precludes the dedication of a highway over a

³ Department for Environment, Food and Rural Affairs

staithe. I note that MBBDC only argue that this decision may⁴ mean that the Council will not be able to seek an Order extending or restricting rights granted in relation to Cess Staithe.

14. I acknowledge that a right of passage, in this case a public footpath, is protected by the imposition of a liability of an offence under section 149 of the Highways Act 1980 and it is also an offence under section 137 of the same Act to obstruct free passage on a public highway. The case of *Mr B Herrick and Mrs D Herrick v Kinder and Somerset County Council [2010] EWHC 269* which refers to *Seekings v Clarke 919610 59 LGR 268* makes it clear that the public have the right to use the full width of a highway.
15. In response to the submissions of MBBDC, David Harris acknowledged that a staithe is for use for loading to and from the river but took the view that the existence of a public footpath over a staithe was not inconsistent with the use of a staithe for these purposes. Dr Bacon could not see how the existence of a footpath could be prejudicial to the use of the staithe, making the point that Cess Staithe was little used. Dr Bacon provided a list (hearing document 9) of staithe with public access (either public paths or other public highways) or which were registered as commons and open access land.
16. Having regard to the above the recording of a public footpath over the staithe would not remove or destroy any rights attached to the staithe. Public rights are in essence public rights over private land and this does not prevent the use of that land. Nevertheless a public right of way, which would need to remain unobstructed, would have some impact on the way that the land could be used. However, there is nothing before me to suggest that the existence of a public footpath would be incompatible with the use of the land as a staithe such that a route should not be recorded. It is noted that in any event the application route as proposed by MBBDC crosses the staithe, although I accept that this route has been put forward in an attempt to resolve the longstanding issue in respect of public footpath 1. However, whilst Mr P Curtis maintained his position that it was not possible for a public footpath to cross the staithe, the route proposed by MBBDC does not support the contention that the recording of a public footpath would be incompatible with the use of the staithe for other purposes.
17. Notwithstanding my conclusions above, for me to confirm the Order, as made or with modifications, it is necessary to show that the route recorded on the definitive map A-B-C was recorded in error and that the route A-D-E-C or the application route is the correct alignment

Deletion of A-B-C

18. There is no evidence of this route being shown on historic maps. The consultation responses indicate that the route shown on the definitive map is incorrect. There is also no evidence that this route, which has at times been obstructed by a chimney, overgrowth, locked gates and fencing, has been used. The route is obstructed by a drainage dyke, which has been in existence since 1800, and there is no evidence of a means of crossing. The Council advise that the route is shown consistently on the provisional and definitive map although the draft map and survey forms have not been traced. The definitive statement describes the route as '*...round the drainage pump*' but

⁴ My emphasis

provides no information as to whether the route is to the north or south of the pump house.

19. The Council's Statement of Case refers to a route shown on the 2nd edition Ordnance Survey map of 1905 which shows a route to the north of the pump house and around the drainage arm (since infilled). The route is annotated 'f.p.' to the west. The map provides evidence of a route suitable for use on foot but Ordnance Survey maps were not produced to record public rights of way. The map does not evidence a public right of way.

Addition of A-D-E-C

20. The Council indicated that in making the Order they relied on evidence from aerial photographs and evidence of use provided by consultees.
21. There is no clear documentary evidence as to the existence of this route. The 1905 Ordnance Survey map shows a route to the north of the pump house but I refer to paragraph 19 above in respect of the evidential value of such maps. The 1910 Finance Act records identify a deduction of £60 for public rights of way or user in respect of hereditament 38 which includes the land crossed by the Order routes and the application route. However, the records do not provide any information as to the location of any public right of way for which a deduction may have been made.
22. The 1946 aerial photograph shows a worn route from point D across the staithe. It is noted that the drainage dyke across the land appears to have been filled in. Mr G Curtis indicated that he and his father filled in the ditch in 1962/63 although the evidence is that leading up to the filling of the dyke it was not a serviceable feature and more of a depression. Whilst the aerial photograph shows a worn route this does not necessarily mean that the route has been used as a public right of way. The 1988 photograph does not show a worn route between D and E. An aerial photograph from 1971 provided by the applicant shows the land between D and E being used for the parking of cars. The aerial photographs provide evidence as to the physical characteristics of the land on the day taken but provide no evidence as to public rights of way over the land.
23. The Council identifies a number of individuals who claim to have used the route for up to 60 years. Andrew Leask outlines his use over the staithe to the concrete path for 44 years but provides no details as to the route used. Alan and Sharon Wright refer to their use of the concrete riverside path and unrestricted use over the staithe but again no route is identified. Frances Butler indicates that she uses, and has used, a route from point D to the application route. Correspondence from Mr and Mrs Stamps shows that the route they used was from point D across the staithe although the map shows the route joining the application route north of point E. Professor Hampton indicates that the route varied but that most would regard the route as passing diagonally across the staithe. The accompanying map indicates a route broadly corresponding with the route D to E. David Sanford provides a plan showing the routes used by the public over decades. The plan shows a variety of routes over the staithe including a route which corresponds with D to E. In addition to the evidence from the Council at the hearing Margaret Mobbs indicated that she used a route over the staithe but this was not the Order route D to E.

24. Dr Bacon contended that the evidence of use was of good quality and sufficient to show more than 20 years use. However, on my analysis of the evidence of use it is not clear that all used the Order route. The plan provided by David Sanford shows a number of routes which might suggest that there was no particular route used over the staithe. Overall the evidence of use is insufficient to raise a presumption of dedication or an inference of dedication at common law.
25. Looking at the evidence as a whole I do not consider that it is sufficient to show, on the balance of probabilities, that a right of way on foot subsists over the Order route A-D-E-C.

Application Route

26. Mr P Curtis explained how he based the application route on information in the leases for 32 and 28 Martham Bank and detail from a Mr Moore and former employees of the company (long since deceased). In respect of the latter Mr P Curtis explained that this was what he had been told over the years. However, in the absence of direct evidence from any of these individuals it is difficult to give this any weight.
27. As regards the leases Mr P Curtis referred to clause 5 for number 28 Martham Bank which refers to the requirement *'to keep the whole of the land comprised in the demised premises (including the footpath at the rear thereof and the bank down to the soke dyke) in neat and tidy Order'*. In the first schedule reference is made to maintaining a right of way for all purposes connected with the use and enjoyment of the premises over the pathway coloured brown on the plan annexed to the headlease. This includes the part of the Order route A to near point D but the brown line on the plan does not extend to and around number 28 or around the mooring basin. The second schedule refers to a right of way in the same terms as in the first schedule in favour of the Lessor and its successors in title. The draft lease for number 32 Martham Bank makes reference to a right of way in similar terms.
28. Whilst the leases refer to a footpath and right of way they do not indicate a public footpath or public right of way and do not specify that access to the properties is from public footpath 1. It should be noted that the leases have been prepared in connection with the lease of the properties and have not been produced to record any public right of way.
29. Bearing in mind the above I do not consider that the evidence is sufficient to show that the application route is a public footpath. It may be the view of Mr P Curtis that public footpath 1 is incorrectly marked but that does not mean that the correct alignment is along the application route. It may also be the case that Mr Curtis sought to enlist the Council to try and improve and regularise what he perceived to be an unsatisfactory and imperfect arrangement. However, for me to conclude that the correct alignment is that of the application route I require evidence as to public rights.
30. I note the submissions that the tithe map⁵ shows the line of the public footpath along the river wall skirting closely both around the Internal Drainage Board outfall and mooring basin. I have examined the tithe map and it provides no

⁵ The document identified in paragraph 10 of the objector's statement of case as being the tithe map (page 019) is the 1910 Finance Act map record. A copy of the tithe map is found at tab 3 pages 37 and 38 of volume 1 of the objector's bundle

evidence as to the existence of a public footpath. It should be noted that the primary purpose of the tithe process was to record titheable land and not to record public footpaths.

Conclusions on the evidence

31. The evidence suggests that the existing route of footpath 1 has not been available since its recording on the definitive map and may have been recorded in error. However, for me to delete the route in accordance with *Leicestershire* it will be necessary to reach a finding that the correct route is A-D-E-C, the application route or indeed another route. As noted in *Leicestershire* it would be difficult to imagine that a finding that is less than that the alternative exists on the balance of probabilities would be sufficiently cogent evidence to change what is on the map. As noted above I consider the evidence in respect of the route A-D-E-C and the application route is insufficient to show that public rights subsist or that these were the routes which should have been recorded on the definitive map as the correct alignment of public footpath 1. As such the evidence is not sufficiently cogent and the Order should not be confirmed. There is no evidence before me of any other route which could be the correct alignment of public footpath 1.

Other Matters

32. The statement of case on behalf of the MBBDC makes the point that Mr P Curtis is left to champion the preservation and maintenance of staithes and raises concerns as to the attitude of the Broads Authority in regard to the preservation, maintenance and definition of staithes. Reference is made to support by the Broads Local Access Forum and the Parish Council, to establish public rights from Cess Road to connect with footpath 1; this is the route preferred by the Parish Council. Reference is also made to objections to a claim to the title of Cess Staithe, the entitlement to use Cess Staithe as a car park and the implications for properties beyond the staithe. Mr G Curtis raised concerns as to liabilities in the event that the Order is confirmed. Dr Bacon made the point that the application route was longer and less convenient and was more hazardous than the Order route. He also hoped that a pragmatic decision could be reached.
33. Whilst I note these matters I am unable to take them into account in reaching my decision. My decision must be made on the evidence before me measured against the relevant criteria. Issues relating to suitability, desirability and need cannot be taken into account under the 1981 Act.

Conclusions

34. 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

35. I do not confirm the Order

Martin Elliott

Inspector

APPEARANCES

For Norfolk County Council:

Mr I Sharman Case Officer

In support of the Order:

Dr K Bacon Broads Local Access Forum
Mr C Starkings Martham Parish Council

In opposition to the Order:

Mr P Curtis Martham Boatbuilding and Development
Company Limited
Mr G Curtis Martham Boatbuilding and Development
Company Limited
Mr I Curtis Martham Boatbuilding and Development
Company Limited

Interested persons:

Mr D Harris Solicitor, Broads Authority
Mr I Mitchell Ramblers' Association
Mr D Sanford Chairman and Managing Agent for Thurne
Bungalows Management Company Limited
Ms M Mobbs

DOCUMENTS

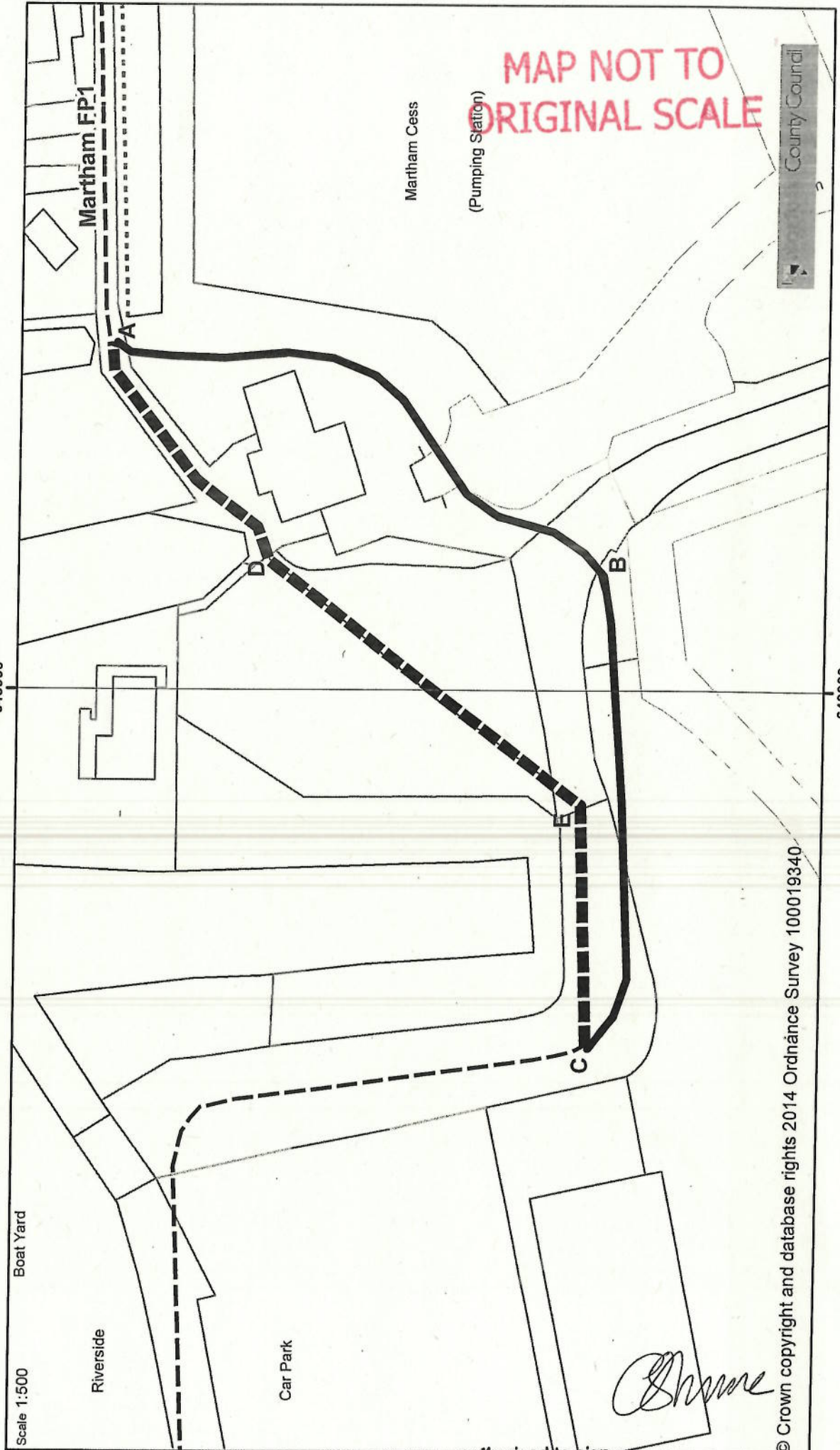
- 1 Legal argument of Martham Boat Building and Development Co. LTD.
- 2 1807 Inclosure Act for Inclosing and Draining certain Lands in the Parish of Martham
- 3 Extracts from the Martham Inclosure Award
- 4 Norfolk and Suffolk Broads Act 1988
- 5 Wyld and Others v Silver, Court of Appeal 1962
- 6 Neaverson v Peterborough Rural District Council [1899 N. 1107.]
- 7 Mr B Herrick and Mrs D Herrick v Peter Kinder and Somerset County Council [2010] EWHC 269 (Admin)
- 8 Highways Act 1980
- 9 Staithes in the Broads (rivers Thurne, Ant & Bure only)
- 10 Lease relating to Plot 28 Martham Bank
- 11 Draft lease relating to Plot 32 Martham Bank
- 12 Lease plan

Norfolk County Council (Martham FP1 (part)) Modification Order 2016

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- Route to be extinguished (A-B-C)
- Route to be added (A-D-E-C)
- Unaffected Route



MAP NOT TO ORIGINAL SCALE