



Order Decision

Inquiry Held on 30 January 2018

Site visit made on 30 January 2018

by Martin Elliott BSc FIPROW

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

Decision date: 22 March 2018

Order Ref: ROW/3170111

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Derbyshire County Council (Footpath from Public Footpath No. 7 to The Woodlands – Parish of Melbourne) Modification Order 2016.
- The Order is dated 10 March 2016 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 were six statutory objections outstanding at the commencement of the hearing.

Summary of Decision: The Order is confirmed subject to modification.

Procedural Matters

1. I held a public local inquiry at St Mary's Hall, Melbourne on 30 January 2018. I had previously opened and closed a public hearing on 4 July 2017. I did not consider it appropriate to continue with the hearing as it became apparent that the evidence of use, in respect of the route used, needed to be examined by way of a public inquiry. It also became apparent that since the making of the Order the ownership of land crossed by the Order route had changed and that these additional owners had not been served notice of the making of the Order. The Council subsequently served notice on the additional landowners resulting in a further nine objections and representations.
2. I carried out an unaccompanied site inspection of the Order route on the afternoon of 3 July 2017. I carried out an accompanied site inspection of the section of Order route C to D¹ following the close of the inquiry when I also observed the section C to B from point C. I am satisfied that I able to reach my decision based on my site visits having regard to the evidence before me.
3. At the opening of the inquiry Mrs Trevena advised that whilst parties had been informed of the date of the public inquiry they had not, until recently, been informed of the venue. The parties had also not been informed of the opportunity to submit statements of case or proofs of evidence in preparation for the inquiry. Whilst there appears to have been a lack of communication those making objections and representations were aware of the date and venue of the inquiry and it was open to them to make representations to the inquiry in respect of the lack of communication. However, other than the representations of Mrs Trevena no other representations were made and the objectors present at the inquiry, including Mrs Trevena, were happy for the

¹ The letters A to D used in this decision relate to points identified on the Order plan.

proceedings to continue. In reaching my decision I have had regard to all the submissions made including, where relevant (see paragraph 39 below), the additional objections. A number of additional documents were submitted to the inquiry. There is nothing before me to suggest that any of the parties have been prejudiced.

4. One of the additional objections makes the point that Cartwright Close is not included on the Order map. Further, that the modification to the statement describes the route in relation to Melton Avenue, Woodlands Close and The Woodlands with no reference to Marlpit Road and Cartwright Close. It is submitted that the Order provides insufficient information. Whilst the map does not show Cartwright Gardens, and there is no reference to this road or Marlpit Road, the intentions of the Order are clear. It is of note that a number of residents both on Cartwright Close and Marlpit Road have now lodged objections to the Order which suggests that residents understood the implications potentially arising from the Order. There is nothing to indicate that anyone will have been prejudiced.
5. A number of objectors make the point that the original application was for a route from footpath 7 to Woodland Close A to C but that the Order is for the route A to D and there have therefore been changes to the original claim. Whilst I note this issue I am required to consider the Order before me, the difference between the original application route and the Order route is not a matter for my consideration.

The Main Issue

6. The Order has been made under section 53(2)(b) of the 1981 Act in consequence of an event specified in section 53(3)(c)(i).
7. The main issue is whether the discovery by the authority of evidence, when considered with all other relevant evidence, is sufficient to show that a right of way which is not shown in the map and statement subsists over the land in the area to which the map relates. The test to be applied to the evidence is on the balance of probabilities.
8. The Council rely on the statutory dedication of the way under Section 31 of the Highways Act 1980 which provides that where a way, other than a way of such a character that use of it could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public, as of right and without interruption, for a period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that the landowner demonstrated a lack of any intention during this period to dedicate the route. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.
9. Issues have been raised in respect of the width of the route and I sought further information as to the route used.

Reasons

Background issues

10. A number of objectors make the point that during the search process when purchasing properties on Kings Croft there was no indication as to the existence of a public footpath on the Order route. Others state that the route

is not shown on any Ordnance Survey maps and that the Peak and Northern Footpaths Society have no record of a footpath in this location. Although the searches, Ordnance Survey maps and other records, including the definitive map, do not register or show the Order route this does not preclude the existence of public rights of way. In this case the Council submit that the route has come into existence in consequence of a statutory dedication.

Statutory dedication – Section 31 of the Highways Act 1980

When the right to use the way was brought into question

11. On 11 February 2014 an application under section 53(5) of the 1981 Act was received by the Council for the addition of a public footpath from public footpath 7 to Woodlands Close. The application route was subsequently obstructed by fencing later in 2014. The application would have brought the right to use the way into question and sets a relevant twenty year period of 1994 to 2014. It is not disputed that the right to use the way was brought into question in 2014 and there is no other evidence before me of an earlier bringing into question.

Evidence of use 1994 to 2014

12. The original application was accompanied by 22 evidence of use forms indicating use of a route which corresponds in part with the Order route, from footpath 7 to Woodlands Close. The forms show that sixteen individuals have used the route for the full twenty year period. My analysis includes the evidence of use form submitted by Mrs Shone who has now withdrawn her support for the Order. Nevertheless her form indicates use of the way for the full twenty year period. There are six others who have used the route for part of the period with four of these using the route for a significant part.
13. The evidence of use forms accompanying the application did not include a route over Woodlands Close (C to D). Mr Sturges indicated in cross-examination that he did not extend the route over Woodlands Close because the route led onto what he considered to be a road. On investigation the Council noted that Woodlands Close was not recorded as a public highway and sought information as to the use of a route over this part of the Order route. In the further consultation responses thirteen individuals explicitly confirmed use of Woodlands Close. Eleven of these have used the route for twenty years and the remaining two using the way for a substantial part of the twenty year period. A number of responses did not provide a clear indication as to whether or not they used Woodlands Close. However these individuals live on The Woodlands and it is therefore more likely than not that they would have accessed the remainder of the Order route via Woodlands Close.
14. An additional evidence of use form (inquiry document 2) shows use from 1998 to 2014. Although it is not clear from the accompanying map that this individual used Woodlands Close, observations made on the form would indicate the use of this route. The Council has also submitted a number of additional statements from individuals who have not previously completed evidence of use forms. The statements demonstrate use of the Order route during the 20 year period and add weight to the evidence of use.

15. There is no evidence that use was interrupted or that use was not 'as of right'². Use was on a regular basis and varied from daily to monthly although some used the way less than monthly.
16. A number of individuals gave evidence to the inquiry as to their use of the Order route. This was entirely consistent with the information contained in the evidence of use forms and additional statements and as such adds weight to those forms.
17. It is suggested in opposition that the claim for the footpath is without credible substance, is driven by opposition to the new development and that the Council has based its decision on emotional and exaggerated evidence. Although I note this point some weight should be given to signed evidence of use forms, additional statements and live evidence to the inquiry which was subject to cross-examination. There is nothing to suggest that the evidence of use is exaggerated or driven by opposition to the development. There remains support for the Order even though the development is largely completed.
18. In opposition Mrs Trevena did not contest that people had walked the Order route. However she contended that when the field was not cultivated people walked routes directly across the field; this was from 2014 and therefore outside the relevant twenty year period. Mrs Ireland asserted that the route was used around twice a day. She said that she would have noticed any use as she was a 'stay at home Mum' up to 2014. She said that her children would have also noticed fellow school pupils if, as suggested, it was used as a route to school. Ms Perrin outlined that she moved to the area in 1995 and did not know that the path existed. The objection made by Miss Day, who moved into the area in November 2013, indicates that she did not see anyone use the field verge to The Woodlands. Mrs Parker states that before she moved to her property on Marlpit Road she would visit the site during development. She did not observe a worn path along the boundary of her property. However, in 2014 the Order route was obstructed and the absence of a worn route is not unexpected. It may also be the case that since September 2015 Miss Betts has not seen any use of the Order route. The issue is whether the way has been used in the relevant twenty year period.
19. A number of objections include satellite imagery of the area of the Order route. It is submitted that there is no evidence of a visible path although Miss Day and Miss Betts suggest that the photograph shows that any footfall must have been on the perimeter verge of the field. Whilst the photographs do not appear to show a visible route, and given the definition this is not unsurprising, this does not mean that the Order route was not used. Other photographic evidence of the route clearly indicates a worn route on the ground and this is consistent with the evidence of use.
20. Having regard to the above and the evidence to the inquiry, whilst Mrs Ireland suggests that only two people a day used the path, and others were unaware of a route, there is evidence showing regular use of the way by the public as of right and without interruption. The use of the way is acknowledged by Mrs Trevena. Whilst the evidence of use is not substantial it is sufficient, on the balance of probabilities, to raise a presumption of dedication of a public footpath. If I were to exclude the evidence of use form of Mrs Shone my conclusion would be the same.

² Without force, secrecy or permission.

21. In view of my conclusion above it is necessary to consider whether any landowner demonstrated a lack of intention to dedicate the way as a public footpath. However, before considering that issue I will address the issue of the width of the claimed path and its location.
22. As regards the width, it was suggested by Mrs Ireland that the width of the route identified in respect of Woodlands Close was narrower towards point C than the 4.5 metres stated in the Order. Measurements taken on site indicate the narrowest part of Woodlands Close near to point C was 3.5 metres. In view of this the Order should be modified to identify the width of the section C to D as varying between 3.5 and 4.5 metres.
23. As regards the remainder of the route (A-C), the Council acknowledge that the description and width of the path information on the evidence of use forms had generally been completed in the same handwriting with only five completing this section themselves. Of these five two have indicated a width of 1 metre and another identifies the width as 3 feet (0.91 metres). The forms which have been pre-completed give a width of 1 metre.
24. The width of any route should be based on the evidence although where there is no clear evidence the width should be based on what is reasonable and sufficient to enable two users to pass; the width may be greater than the trodden path.
25. The Council have concluded, on the evidence, that a width of 1.5 metres is reasonable. Mark Hosker referred to the width of 1.5 metres for a field edge path identified in the Highways Act 1980 (as inserted by the Rights of Way Act 1990). However, this is the width specified for the reinstatement of a field edge path after disturbance. It does not provide a general proposition for the width of field edge paths. As noted above the width should be based on the evidence.
26. In terms of the evidence, Mr Smith indicated that the ploughing of the land left a strip of between one and two metres to walk on. Mr Budd stated that if someone was passing in the opposite direction he would step aside as the worn path was only wide enough for one person. He walked single file with his dog alongside. He estimated that there was always a distance of 2 metres from the fences at the back of Melton Avenue and the field. Ms Carroll also refers to the need to step to one side to allow someone to pass. However, Ms Slater indicated that she could walk two abreast most of the way. She believed the path to be around 1.5 metres wide.
27. Having regard to the evidence and what would be considered reasonable I conclude that the width identified in the Order of 1.5 metres is appropriate for the section of the Order route A to C.
28. As regards the location of the path Mr Tatam suggested that the walked line of the path would be the same as it is now but was probably slightly wider. Ms Slater said that she walked a comfortable distance from the boundary of the properties on Melton Avenue but couldn't touch the boundary. She also said that she could probably touch the wall of 3 Woodlands Close from the path although in cross-examination she accepted that she would probably have to step off the path to do this. Mr Smith said that the path was 1 to 2 metres from the boundary of the properties on Melton Avenue and acknowledged in cross-examination that he did not walk immediately adjacent to the wall of 3

Woodlands Close. He stated that he probably walked an arm's length from the wall and walked in the middle of a 1 to 2 metre strip. Ms Carroll said that the path was at least a metre from the boundary fences and maybe 1 metre from the field edge. Mr Budd said that between the boundary of the properties on Melton Avenue and the edge of the crop was about 2 metres in width. Mr Scanlon thought that the walked route was in the region of 1 to 1.5 metres from the boundary fences of Melton Avenue and that the current fenced route broadly follows the line of the original path with the exception of the section adjacent to 3 Woodlands Close. Mr Blatch, who accessed the path from his property on Melton Avenue, suggested that the path was 1 metre away from the boundary fence. The statement of Alison Henshaw outlines that the current fencing accurately reflects the route she used except to the side of 3 Woodlands Close where there is now insufficient room.

29. Mr Scanlon provided a photograph of the route adjacent to 3 Woodlands Close. He had estimated that the worn line of the path was around 2.6 metres from the extension of the property which Mrs Trevena said was built in 1982 or 1983. This photograph was put to a number of witnesses and it was accepted that the photograph showed the route of the path used adjacent to the property. Mrs Trevena accepted that the photograph was an accurate representation of the route which was used and was around 2 metres from the boundary of her property. She said that people did not walk right up against her boundary wall. Mrs Trevena's concern was that the fencing which had been erected was much closer to her property. However, the issue to be considered is not how the path has been fenced at present but the location of the path during the relevant twenty year period.
30. Having regard to the above the evidence suggests that the route walked was not directly against the boundaries of the adjacent properties on Melton Avenue but located in the region of 1 to 1.5 metres from the boundary lines and within an overall width of 2 metres. In respect of the route adjacent to 3 Woodlands Close the walked route was in the region of 2 metres from the boundary. Given the constraints of the scale of the Order map I conclude that the route shown on the Order plan reflects the route used.

Whether any landowner demonstrated a lack of intention to dedicate

31. As noted above it is necessary to consider whether any landowner, that is a person who is entitled to dispose the fee simple of the land, demonstrated a lack of intention to dedicate the way. For there to be sufficient evidence that there was no intention to dedicate the way there must be evidence of some overt acts on the part of the landowner, during the relevant period, such as to show the public at large, the public who used the path, that they had no intention to dedicate. The test is whether a reasonable user would have understood that the landowner, that is the owner of the land over which the route passes, was intending to disabuse the user of the notion that the way was public. This is the approach established in the case of *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28* paragraphs 32 and 33 as referred to by the Council.
32. The evidence of use from Maja Dawson, using the route between 1990 and 1996, indicates that she stopped or turned back when using the route 'once or twice, but not recently'. However, she has never been told that the route was not public. The Council have endeavoured to seek clarification but the user no

longer lives in the area. In the circumstances I do not consider that Maja Dawson was disabused of the notion that the Order route is public. As regards others who used the route, there is no evidence of any challenges to the use of the way during the relevant period.

33. The objection from Mr R Jackson, the owner of the adjacent land, suggests that on the completion of the Woodlands estate the tenant and members of the Jackson family challenged anyone on the route, stating that there was no public access. These challenges were said to have been met with strong verbal abuse and, whilst the tenant cultivated the land up to its edges, people still continued to walk and make a new path.
34. The evidence of Mr Smith is that he knew the previous owner of the field, Gerald Earp, and the tenant. He had spoken to Gerald Earp about the application and he agreed that the family were not bothered about people walking over the land. The statement from Gerald Messer understood the owner of the land to be the Earp family and was never challenged by the owner. Mr Tatam regularly met Mr J Jackson and was never challenged although acknowledged that he wasn't on land owned by the Jackson family.
35. Whilst Mr R Jackson asserts that challenges were made there is no evidence that these challenges took place during the relevant period. His evidence is inconsistent with the evidence of use which indicates that no challenges were made. It is of note that despite the alleged challenges use of the Order route continued and it would be reasonable to expect that if the landowner did not wish the land to be used then other actions would have been taken. There is no evidence that any landowner took any further action such as erecting a notice so as to demonstrate a lack of intention to dedicate.
36. In opposition the point is made that Woodlands Close is a private drive or a private road and does not form part of the public highway. It is suggested that it was common knowledge that Woodlands Close is a private road. Whilst the road may be private this does not in itself preclude the establishment of a public right of way and common knowledge that the road is a private road is therefore not sufficient to demonstrate a lack of intention to dedicate. It should be noted that public rights of way generally cross private land. Furthermore, as indicated above, for there to be sufficient evidence of a lack of intention to dedicate there must be actions which disabuse those using the way of the notion that the way is public. Mrs Ireland acknowledged that she was not in the position to challenge use of Woodlands Close as she did not own the land.
37. A Mr M Payne makes the point that there has never been an intention for Woodlands Close to be dedicated as a right of way and that ignorance of the law cannot be a justification to allow a public right of way. However, the evidence of use gives rise to a presumption of dedication and once that requirement has been satisfied then the burden shifts to the landowner to demonstrate a lack of intention to dedicate.
38. Bearing in mind the above there is insufficient evidence before me to demonstrate a lack of intention to dedicate and as such the dedication of a public footpath on the Order route is made out.

Other Matters

39. Issues are raised as to the effect the confirmation of the Order would have on property, the potential for anti-social behaviour, issues of safety and security, an increase in footfall along Woodland Close in the event of the diversion of the path and maintenance and other liabilities. Whilst I note, and can appreciate the genuine concerns, they are not matters which can be taken into consideration under the 1981 Act. It is also pointed out that the Persimmon development provides alternative routes, and that other alternative routes are available. Concerns are also expressed in respect of the development and the actions of the developer. Again these are not matters for my consideration.

Conclusion

40. 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

41. The Order is confirmed subject to the following modifications:

- At Part 1 of the Schedule to the Order at line 7 of the description of the path to be added after 'A-B-C and' insert 'varying between 3.5 and'.
- At Part II of the Schedule to the Order under width delete the words 'widening to' and insert 'varying between 3.5 and'.

Martin Elliott

Inspector

APPEARANCES

For Derbyshire County Council:

Lisa Edwards	Solicitor, Derbyshire County Council
who called	
Mark Hosker	Business Services Assistant, Derbyshire County Council
Cecilia Slater	
Colin Smith	
Jane Carroll	
Brian Budd	
Samuel John Tatam	
Tom Scanlon	

Also in support of the Order:

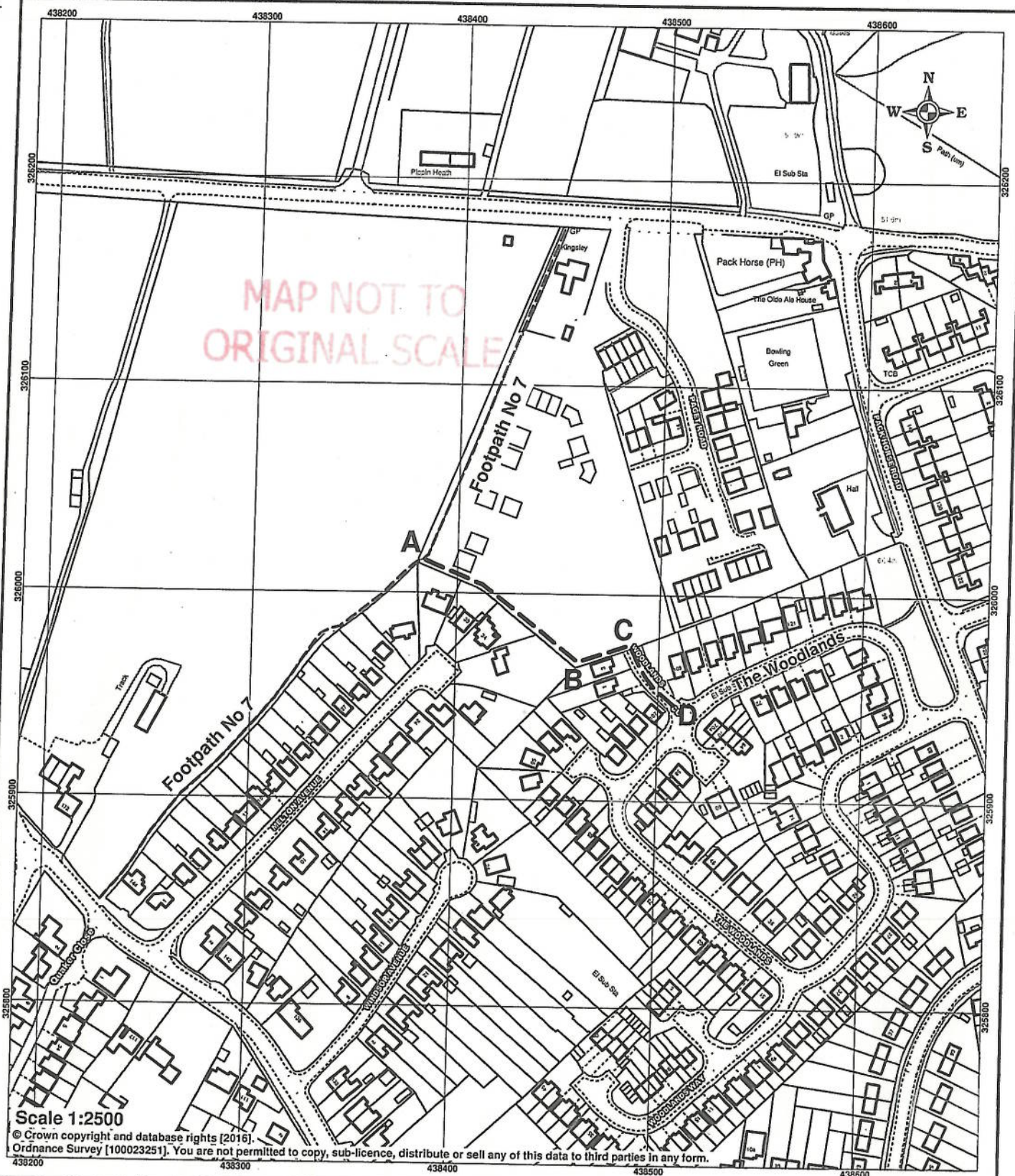
Paul Sturges	Applicant, Melbourne Footpaths Group
Michael Blatch	
Cllr Linda Chilton	County Councillor
Graham Truscott	

In opposition to the Order:

Victoria Perrin	Additional Objector
Mary Trevena	Objector
Alex Ireland	Objector

Documents handed in at the Inquiry


- 1 Correspondence from Mrs J Shone 30 January 2018
- 2 User evidence form of Terry Summerlin
- 3 Signed witness statement of Cecilia Slater
- 4 Access to Woodlands Close from Footpath 7 additional submissions of Alex Ireland
- 5 Closing Submissions on behalf of Derbyshire County Council.



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Produced by Public Rights of Way on 2nd March 2016

Wildlife & Countryside Act 1981 Section 53

The Derbyshire County Council
 (Footpath from Public Footpath No 7 to
 The Woodlands - Parish of Melbourne)
 Modification Order 2016

Key:

Footpath to be Added - - - - -

Existing Footpath - - - - -

