



Order Decision

Site visit made on 19 April 2018

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 11 May 2018

Order Ref: ROW/3180704

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Norfolk County Council (Dereham) Modification Order, 2017.
- The Order is dated 3 May 2017 and proposes to record six routes to the east of Dereham as restricted byways. Full details of the routes are given in the Order map and described in the Order Schedule.
- There were three objections and representations outstanding when Norfolk County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Procedural Matters

1. No-one requested to be heard in relation to this Order. I made an unaccompanied site inspection and dealt with the matter by way of the written representations procedure.

Main issues

2. The Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the 1981 Act") by reference to section 53(3)(c)(i), which states that an Order should be made to modify the Definitive Map and Statement for an area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

"that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies."

3. Dereham Town Council ("the Town Council") applied to record the routes on the basis of use from time immemorial, taking account of more recent alterations arising from the construction of Dereham bypass in 1978. Norfolk County Council, the order-making authority ("the OMA") agreed that the evidence indicated that the routes had historically been public vehicular highways, with subsequent dedication of new sections once alterations occurred in relation to the A47. However, the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") meant that the routes should be recorded with the status restricted byway.
4. The objections and representations did not question the recording of the routes as public routes with the status of restricted byway. The matters raised related to the detail of the recording in relation to widths and limitations.

5. In relation to *Rights of way and mechanically propelled vehicles* section 67 of the 2006 Act sets out that:
- (1) *An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—*
 - (a) *was not shown in a definitive map and statement, or*
 - (b) *was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.*
6. This is subject to certain exceptions as set out in subsections (2) to (8). The relevant date for England is 20 January 2005 whilst the commencement date is 2 May 2006.
- (2) *Subsection (1) does not apply to an existing public right of way if—*
 - (a) *it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,*
 - (b) *immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),*
 - (c) *it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,*
 - (d) *it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or*
 - (e) *it was created by virtue of use by such vehicles during a period ending before 1st December 1930.*
 - (3) *Subsection (1) does not apply to an existing public right of way over a way if—*
 - (a) *before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic...*
 - (6) *For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act.*
7. My decision as to whether or not the Order should be confirmed, or proposed for confirmation, will be taken on the balance of probabilities.

Reasons

8. The routes lie to the east and south-east of the town of Dereham¹, on either side of the A47 Dereham bypass. Route A² is known locally as Cherry Lane and

¹ Also known as East Dereham

- named as such by a street sign at the north-western end. It starts from the junction of the C553 Norwich Road proceeding south-easterly for approximately 254 metres ("m") then easterly for approximately 93m and then in a generally south-easterly direction for approximately 343m to point A4/B1.
9. Route B starts from the eastern end of route A and proceeds in a generally south-westerly direction, adjacent to the northern side of the A47 for 949m. It then runs north-north-westerly for approximately 85m to meet with the U31481 Hall Lane within the Green's Road Industrial Estate.
 10. Route E runs from partway along route B in a southerly direction for 73m by way of a bridge over the A47 to join the track locally known as Hall Lane.
 11. Route C starts at the northern end of Restricted Byway Dereham 3 ("RB3") and proceeds in a generally westerly direction for 110m and then north-westerly for 377m and then west for 326m, north of Old Hall Farm. This section, C1 – C4, is known locally as Cherry Lane. The route then runs in a south-westerly direction for 479m and then westerly for 212m to the southern end of the bridge over the A47. This section, C4 – C6, is known locally as Hall Lane.
 12. Route D continues from the southern end of the A47 bridge, route E, in a westerly direction, as a continuation of Hall Lane. At the western end, D2, is an area of land, accessed from Hurn Road, with planning permission for development. The Breckland District Council permission³ specifies in the conditions that a pedestrian footpath to the eastern and southern perimeter of the site shall be permanently made available for all members of the public. Layn Properties confirmed that they are content to dedicate a public right of way over this land.
 13. Route F starts from the C211A Mattishall Road and proceeds in a generally southerly direction for 334m to join Hall Lane and Cherry Lane at points F2/C4.
 14. Routes B and E were created for private access as part of the construction of the A47 in the late 1970s. Routes A, C, D and F were the subject of previous applications under Section 53 of the 1981 Act.

Documentary evidence

15. I agree with the OMA that there is documentary evidence supporting the existence of routes A, C, and F since at least the late eighteenth century. They were identified on maps as early as Faden's Map of Norfolk in 1797 and described as ancient lanes on the Enclosure Award and Map of 1815 and 1812 respectively. The routes were depicted on the Tithe Map of 1839, coloured in the same way as other routes now known as public and are uncoloured on the map of the Finance Act of 1910. Taking all this evidence into account I consider, on the balance of probabilities, that they were identified as public vehicular highways.
16. Routes B, D and E were created as private access routes by the Side Roads Order of 25th July 1972 ("the SRO") and have been in existence since at least the completion of the bypass, the A47, in the late 1970s. The SRO interrupted the historic alignment of Cherry Lane, route A and the western end of route C.

² Points along the routes are identified as A1, A2, B1, B2, etc. as appropriate on the Order maps. The overall route identification as A, B, C, etc., is taken from this numbering system.

³ SPL/2013/1004/F

User evidence

17. There is ample evidence of use of the Order routes provided in 79 user evidence forms ("UEFs"), predominantly on foot, although a number indicate use on bicycle and some on horseback. There are also 21 users who claim use by motorised vehicles (MPV), cars, tractors and motorbike. The MPV use tends to be for access onto the allotments, visiting friends and relatives and for working for the farms and land around. The bicycle use supports the status restricted byway as such use falls under the definition of carriageway use.
18. The use is generally recreational for dog walking, circular walks and exercise, with some people visiting shops, allotments, the windmill and formerly fruit picking. The evidence of use arises from as early as the 1940s and varies from daily to monthly to occasionally. 62 users claim to have use of 20 years or more. During my site visit I noted evidence of use on all the routes.
19. There are no reports from users of having permission to use the routes or of anyone being challenged or stopped. There is no evidence to suggest that the use has not been 'as of right', as required.

Landowner evidence

20. A Landowner Evidence Form ("LOEF") and correspondence relating to the western end of route A indicated that it was not accepted that the route was public, although they had been seen using the route irregularly. Other LOEFs indicate acceptance of the route as a public carriageway, with members of the public regularly seen using the route, including pedestrians, cyclists and motor vehicles for leisure and farming activities. Others accept the western end as a public carriageway, used to access properties, garages, allotments and Dereham Windmill, with bridleway to the east.
21. In relation to route C and F LOEFs indicate that they are private routes, maintained by the properties alongside. Although acknowledging daily use for dog walking, which I observed during my site visit, the owners say that they have stopped motorcycle riders, kids on motor bikes and 4x4 users advised them it is private. Notices were put up in an attempt to stop 4x4s and motorcycle riders. These said 'Private Vehicle Access for Residents only', 'Private no unauthorised vehicles: No motor bikes' and/or 'private no unauthorised access, no motor bikes'.
22. The more recent signs and actions by local residents have been directed at vehicular traffic. There is no indication that they were intended to stop, or actually did stop, any other users.
23. Another LOEF relating to route C indicated acceptance of the route as a public footpath. It was noted to be an integral part of the farm used by farm machinery, which I also noted during the site visit.
24. The former owners of the land to the north of the A47, which has now been sold for housing development, indicated that prior to 1995 the public used Cherry Lane. The owners never gave the public permission to walk, ride or on the tracks and did not prevent them from doing so as they regarded the routes as public rights of way.

Summary

25. Taking account of the evidence as a whole, I am satisfied on the balance of probabilities, that routes A, C and F have historically been recognised as public vehicular highways. The user and landowner evidence generally supports continued understanding and use of the routes in this way, albeit that attempts have been made to resist vehicular use more recently on parts.
26. Routes B, D and E were created in the late 1970s when the A47 was built and were created by the Highways Agency ("the HA") as private access routes. There is no evidence that the public were prevented from using the routes, nor were there any signs or other actions taken by landowners advising users the routes were not public. On balance, the routes have therefore, been used by the public as of right for around forty years.
27. There is no evidence to suggest that any of the exceptions provided in Section 67 (2) of the 2006 Act apply. Therefore by virtue of section 67(1) the right of the public to use the routes with mechanically propelled vehicles was extinguished on 2 May 2006. Private rights are unaffected. The routes are to be recorded with the status of restricted byway.

Remaining Matters

Grid references

28. It was noted in objection, and agreed by the OMA, that the grid references in Parts I and II of the Order were incorrect as they should start TG not TF apart from two references in relation to route B, where TF 9985 1253 and TF 9981 1260 are correct.
29. I am satisfied all parties understand the land affected by the Order and so no prejudice has arisen from this typographical error. To avoid any potential confusion at a later date I agree that the grid references should be amended.

Limitations and Conditions

30. The OMA have decided that to add '*Limitations and Conditions: None*' to future Orders, if appropriate and that this should be added to the Order if there are no restrictions or conditions affecting the routes. As noted in objection there are two large industrial tyres situated to the east of point B2, which reduce the width in this area. It is unclear when these were put in place; however, they were not visible on the aerial photographs.
31. I am not satisfied that the route was dedicated to the public subject to the limitation in width introduced by these features and, therefore, I do not intend to record them within the Order. I shall make the requested modification to show no limitations or conditions.

Widths

32. The main disagreement related to the widths to be recorded on routes B and D. There was no disagreement over the widths to be recorded on the other routes and I have seen nothing to suggest that these widths were incorrect.
33. The determination of the width will, if not defined by an inclosure award, physical boundary or statute, be based on the evidence provided, or, where there is no such clear evidence, the type of user and what is reasonable. I

- agree with the OMA that in this case there is no express document which lays out the width for any of the routes.
34. The OMA indicated that the widths in the Order as made were taken from measurements of the used and available widths. However, objectors have also taken measurements and arrived at different widths for certain points. Orbit Homes (2020) Limited ("Orbit"), an interested party owning land to the north-west of the A47 including parts of the Order route between B1 and B2, supported confirmation of the Order without modification.
 35. By reference to case law, the Town Council suggested that a 'fence to fence' presumption should apply. The routes in question were created due to the changes arising from the construction of the A47. The 1988 aerial photograph submitted by the Town Council showed them as field-edge tracks. The 2001 and 2004/07 aerial photographs continue to clearly show these tracks.
 36. The Town Council said there was no recognition of public rights over the old routes of Hall Lane and Cherry Lane, as no public rights were recorded over them. I understand the routes, including the A47 overbridge, were provided by the HA under the SRO to allow continued private access to land. It is reasonable, from the evidence as a whole, to accept that the public resumed their use of the now altered routes as they became available.
 37. The HA fenced the south-eastern edge of route B. However, I agree with Orbit that the fence appears to have been erected in connection with the new highway constructed to the south-east, the A47, rather than by reference to the identified private rights to the north-west.
 38. In relation to the fencing on the northern side of the section B2 and to the end of the properties on Fern Close, as well as the section B2 – B3, I consider that the Town Council are correct that the fences appear to have been erected in order to separate land enjoyed by the landowner from other land over which rights of way were exercised. It should be remembered that only private rights were recognised and set out by the SRO and, therefore, it appears likely that the fences were erected in recognition of that right only.
 39. The fence line D1 – D2 appears to relate to the sale of land and provision of private rights in connection with the construction of the A47. The fences themselves may have been repaired and/or replaced in the last forty or so years but would be unlikely to have altered alignment.
 40. It is accepted that the fence erected by Orbit in 2015 was to delineate the land on which development is planned. The Town Council argued that the fence was moved following complaints and then erected by reference to what had been the boundaries, arising from the endpoint of former agricultural activities; as such, they said this also indicated the highway boundary.
 41. I am not satisfied that fencing was erected for the purpose of identifying the, then unacknowledged, public rights. Fences were erected in relation to the A47 in the first instance and secondly in relation to private rights.
 42. Orbit suggests that the UEFs are consistent in referring to a width of 10 – 12 feet, that is 3.0 – 3.7 metres. I do not agree that this is entirely consistent with the width to be recorded by the Order, which is 1.9 – 2.5 metres on route B. Analysis of the UEFs shows a variation from 1.5 – 7.6 metres, which relates

to a number of routes across a range of times of use, making it difficult to assess where users were thinking of when completing their UEF. The average narrowest width is 3.3 metres and the widest 3.9 metres. There are a number of comments referring to the width being suitable for agricultural use, which fits with the private rights known to have been provided for and the evidence of current and former affected landowners on routes B, D and E.

43. I consider that the evidence as a whole supports the existence of tracks on route B and D, set out for private use but subsequently taken to by the public in replacement for the unrecognised public rights severed by the construction of the A47. The track is seen on the aerial photographs as being of generally uniform width but the photographs are insufficient to scale that width. Although measurements were taken of the ramps to and from route E I do not consider that the aerial photographs support the argument that there was a change in width in this area.
44. I agree with Orbit that it is not appropriate to rely on the 'fence to fence' presumption as the boundaries referred to were not erected by reference to these routes as public highways. I also agree that it is not appropriate for me to take account of a potential future need for the public to have passing places in relation to private users; agricultural machinery today differs in scale from that used in the past but the dedication has already occurred according to the widths then available and used. However, I agree with the Town Council and the Ramblers that the widths proposed by the Order do not appear to reflect the widths available and used by the public on routes B and D.
45. Taking account of the evidence as a whole I consider that the width of the routes B and D should be recorded at a minimum of 3.6 metres, which is the average width overall from the UEFs. I do not propose to modify the maximum widths already identified by the Order, and to which no objection was raised.
46. I consider, on the balance of probabilities, that this reflects the width which would have been required for private agricultural use and reflects the likely width of the tracks as also used by the public. I also consider that this width appears appropriate having regard to all relevant factors, including the type of public use, the location and other physical features.

Order map

47. I noted a minor typographical error in the numbering of the western-most point of route C. This is shown as C6 on Annexed Map 3 but C1 on Annexed map 2. I am satisfied that this should be C6 on both maps and to avoid any potential confusion I propose to correct this.

Other matters

48. The law does not allow me to consider such matters as the suitability of the route. Neither does the Order, which seeks to record existing public rights of way, affect any private rights.

Conclusions

49. Considering the evidence as a whole I am satisfied, on the balance of probabilities, that the Order route should be recorded with the status of restricted byway. However, for the reasons set out above, I consider that

some of the widths to be recorded should be modified and that some other minor modifications should be made in relation to typographical errors.

50. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be proposed for confirmation subject to modifications.

Formal Decision

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

- Throughout the Order Schedules:
 - with the exception of the grid references TF 9985 1253 and TF9981 1260, replace text "...TF..." with "...TG...";
- Within Part I of the Schedule:
 - in relation to route B, replace text "...1.9..." with "...3.6...";
 - in relation to route D, replace text "...2.6..." with "...3.6...";
- Within Part II of the Schedule:
 - in relation to route B, replace text "...1.9..." with "...3.6...";
 - in relation to route D, replace text "...2.6..." with "...3.6...";
 - add text "*Limitations and Conditions: None*";
- On the Order plan:
 - annexed Map 1, in relation to route B, replace text "...2.5..." with "...3.6...";
 - annexed Map 2, in relation to route B, replace text "...1.9...2...2.1...2.2...2.5..." with "...3.6...";
 - annexed Map 2, in relation to route D, replace text "...2.6..." with "...3.6...";
 - annexed Map 2, in relation to route C, replace text "...C1..." with "...C6...";
 - annexed Map 3, in relation to route B, replace text "...2...2.2...2.5...2.6..." with "...3.6...".

52. 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 the opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Heidi Cruickshank

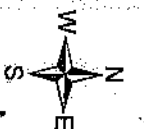
Inspector

Restricted Byway — V — V — V — V — V — V — V — V

Width (m) metres

Scale 1:2,000

Norfolk County Council
County Hall
Marshfield Lane
Norwich
NR1 2SG



600000 300000

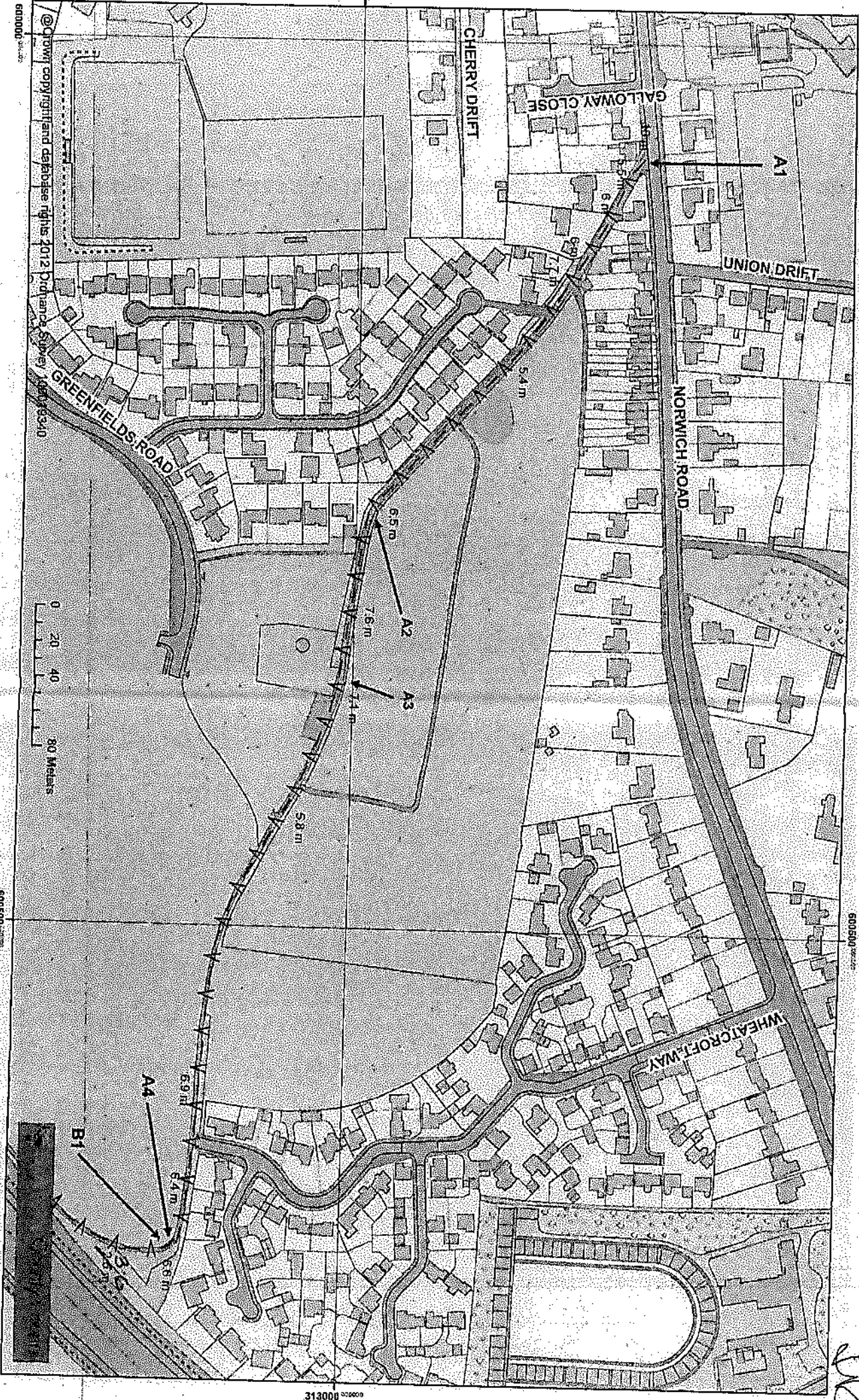
600500 300000

313000 800000

313000 800000

600000 300000

600500 300000



GREENFIELDS ROAD

CHERRY DRIFT

GALLOWAY CLOSE

UNION DRIFT

NORWICH ROAD

WHEATCROFT WAY

A1

A2

A3

A4

B1

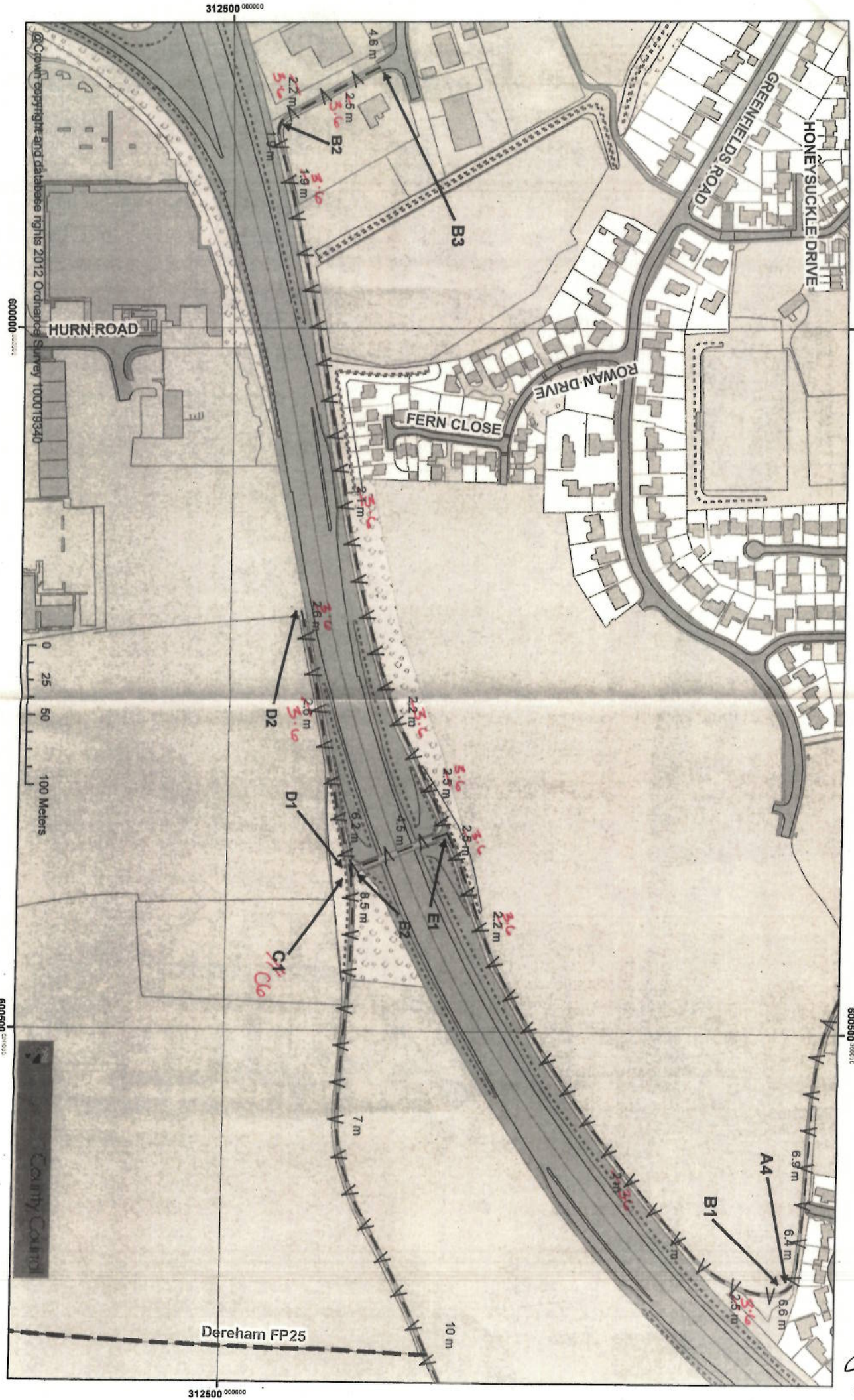
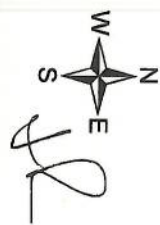
0 20 40 80 Metres

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Restricted Byway — V — V — V — V — V — V — V
Width (m) metres

Scale 1:2,500

Norfolk County Council
County Hall
Marineau Lane
Norwich
NR1 2SG



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600000

600000

600500

600500

312500

312500

Dereham FP25



ANNEXED MAP 3

NORFOLK COUNTY COUNCIL (DEREHAM) MODIFICATION ORDER 2017
Restricted Byway — V — V — V — V — V — V

Width (m) metres

Scale 1:4,025

Norfolk County Council
County Hall
Martineau Lane
Norwich
NR1 2SG

