



Order Decision

Inquiry held on 4 April 2018

by Mark Yates BA(Hons) MIPROW

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

Decision date: 29 May 2018

Order Ref: FPS/M1900/7/67R2

- 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 (Aldenham 83 and 9) Modification Order 2009.
- The Order was made by Hertfordshire County Council ("the Council") on 9 October 2009 and proposed to modify the definitive map and statement in respect of public rights of way in the parish of Aldenham, as originally detailed in the Order Map and Schedule.
- Part of the Order was confirmed on 6 December 2016.

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

Procedural Matters

1. I held a public inquiry into the part of the Order that remains to be determined on 4 April 2018 at the Radlett Centre, Radlett. I made an unaccompanied visit to the site on 3 April 2018 and I conducted a further visit accompanied by the interested parties following the close of the inquiry.
 2. This Order was initially considered by an Inspector following an exchange of written representations and a site visit in 2012. The Inspector's decision was quashed by consent of the Secretary of State following an appeal to the High Court and the Order fell to be determined by a second Inspector.
 3. The second Inspector held two public inquiries into the Order and reached her final decision on 6 December 2016. However, her decision was challenged and considered by the High Court in the case of *Trail Riders Fellowship v Secretary of State for the Environment, Food and Rural Affairs 2017*. The decision was quashed in relation to the part of the main route in the Order between points C and E on the Order Map ("the relevant section"). The successful ground of challenge related to the provisions of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"), in so far as the Inspector concluded that the relevant section should be recorded as a restricted byway rather than a byway open to all traffic ("BOAT").
 4. It is clear from the above judgment that the relevant section could be recorded as a BOAT. The public rights for mechanically propelled vehicles over it are preserved by virtue of the exemption in Section 67(2)(b) of the 2006 Act in that it is deemed to have been included in the list of streets immediately prior to 2 May 2006 and is not shown in the definitive map and statement.
 5. Most of the parties generally support the confirmation of the remainder of the Order subject to particular modifications. In contrast, Mr Kind has made submissions which, if accepted, would lead to the relevant section not being
-

- recorded in the definitive map and statement. He also questions the alignment of the relevant section.
6. Whilst Mr Kind has challenged the extent of the Council's statement of case, I find that no issue arises out of the Council summarising its position with reference to particular documents already provided given the long history of this matter. It follows that I do not accept that I should decline to confirm the relevant part of the Order in light of this matter.
 7. The applicant for the Order (Dr Wadey) has provided an additional document, namely a Finance Act map extract, which was referred to at the inquiry. This has been circulated to the other parties and there was no need to seek any further comments regarding this document. The same applies to the copies of the Supplementary Order Plans and the written transcript of the Council's closing statement, which have also been circulated.

Main Issues

8. I need to determine firstly whether the relevant section should be included in the definitive map and statement. If it is to be recorded in the map and statement, I will have to consider how its alignment is set out in the Order.

Reasons

Whether the relevant section should be recorded as a BOAT

9. The parties accept that the relevant section forms part of an ancient vehicular highway in conjunction with the remainder of the main route included in the Order. I have viewed the documentary evidence relied upon and I reach the same conclusion. Therefore, the issue to be determined is whether I should confirm the relevant part of the Order so as to add a BOAT to the definitive map and statement.
10. Mr Kind asserts that the first test to be applied relates to the definition of a BOAT in Section 66 (1) of the 1981 Act, namely "*a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used*". He submits that where there is an absence of evidence regarding the 'balance of user test' outlined above consideration should be given to the 'character test'. In respect of the latter, reference is made to the case of *Marlene Peggy Masters and Secretary of State for the Environment, Transport and the Regions 2000*.
11. The only reason to not confirm this part of the Order would be on the ground that the relevant section forms part of the ordinary road network. For this to be determined from the evidence, it will need to be shown that the predominant use of the route is by mechanically propelled vehicles when set against the other forms of public use. I note that this issue was addressed by the second Inspector in paragraphs 30-35 of her decision that followed the second inquiry. Whilst I do not necessarily accept the submission by Mr Kind that the legal position has changed since her decision, I must nonetheless consider this matter afresh in relation to the relevant section.
12. There is some written evidence of use by motor cyclists who wrote in opposition to the original decision to record the relevant section as a restricted byway and three user evidence forms ("UEFs") have been provided in support of such use. In particular, a letter of 26 January 2016 from Mr Mann of the

Hertfordshire Trail Riders Fellowship states that it has been used by members of this group for over forty years. In contrast, forty-four UEFs have been submitted from other users.

13. Dr Wadey confirmed at the inquiry that the route he and others had ridden encompassed the relevant section. There is also some additional evidence of observed use. Dr Wadey's view is that the use by pedestrians and horse riders was greater than the use by mechanically propelled vehicles irrespective of which period of time is considered. On this issue, Mr Kind submits that the user test has to be considered at a particular date, which should be no later than the date of the Order.
14. The user evidence provided cannot be relied upon to provide a definitive guide to the use of the relevant section. However, I agree with Dr Wadey that the evidence is not supportive of the relevant section being predominantly used by mechanically propelled vehicles. Nor indeed does it character suggest that it is part of the ordinary road network. It follows in my view that this section should be recorded in the definitive map and statement as a BOAT.

The alignment of the relevant section

15. The second Inspector concluded that two supplementary plans should be appended to the Order to provide greater clarity. She further took the view that the main route, including the relevant section, should be described in the Order by reference to features shown on the map produced in accordance with the 1910 Finance Act. It is acknowledged that a problem arises in accurately determining the position of particular features if reliance is placed on the current Ordnance Survey mapping.
16. It is generally accepted that the Finance Act map reliably shows the historical alignment of the highway. This map shows the relevant section partly within the brook and partly as an uncoloured feature separate from the adjoining hereditaments. In this respect, I see no material difference between the working map provided and the final record version held at the Public Records Office. An extract from the latter has been provided by Dr Wadey and a more extensive copy was previously submitted by Mr Beney.
17. Mr Kind suggests that the width of the relevant section is defined by reference to the 1897 Ordnance Survey map, which served as the base for the Finance Act map. In response, the Council states it has used the Finance Act map in other instances to define the extent of a public right of way. I consider that it would be appropriate to follow the convention used for the remainder of the BOAT in the Order by defining the relevant section by reference to the Finance Act map.
18. Two additional modifications to the Order have been proposed on behalf of the landowners (Drs Stearns). These are firstly that the Order Map contains a note to state that the Ordnance Survey base map does not show the course of the brook at the date of the making and confirmation of the Order. Secondly, it is suggested that reference is made in the Order Schedule to the relevant section leaving the brook at point H. On this issue, the Schedule already makes reference to the point where the way enters the brook. I accept that these modifications can be incorporated into the Order for greater clarity. In terms of identifying the grid reference for point H, it appears to me that this broadly corresponds to one of the points identified by Mr Kind.

Conclusion

19. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the remaining part of the Order should be confirmed with modifications. It follows that the modifications outlined below only relate to the relevant section.

Formal Decision

20. I propose to confirm the relevant part of the Order subject to the following modifications:








- For the description of the relevant section in Part I of the Order Schedule, in the first line replace "Restricted Byway" with "Byway Open to All Traffic" and amend the grid reference from "TL 1558 0103" to "TL 1557 0103"; in the second line replace "65" with "60"; in the third line amend the grid reference from "TL 1557 0097" to "TL 1555 0097"; in the fourth line replace "45" with "50" and amend the grid reference from "TL 1555 0093" to "TL 1554 0092". In the description of its width, in the first line replace "10" with "12", and amend the grid reference from "TL 1558 0103" to "TL 1557 0103"; in the second line amend the grid reference from "TL 1555 0093" to "TL 1554 0092"; and delete the remainder of the text and insert "as shown uncoloured [or blue] on the Inland Revenue Valuation Plan prepared under the Finance (1909-1910) Act 1910".
 - For the statement for Aldenham 83 in Part II of the Order Schedule, delete "RB" and in the fourth line amend the grid reference from "TL 1558 0103" to "TL1557 0103"; in the fifth line delete "as a Restricted Byway leaving The Brook on the east bank and running"; in the sixth line amend the grid reference from "TL 1557 0097" to "TL 1555 0097" and replace "crossing The Brook" with "leaving The Brook at TL 1555 0096"; and in the seventh line amend the grid reference from "TL 1555 0093" to "TL 1554 0092". In the description of its width, delete "as shown shaded grey on the plan forming part of the Hertfordshire County Council (Aldenham 83 and 9) Modification Order 2009" and insert "as shown uncoloured [or blue] on the Inland Revenue Valuation Plan prepared under the Finance (1909-1910) Act 1910".
 - Delineate the relevant section on the Order Map and supplementary plans by way of the notation for a BOAT.
 - Delete all references to the relevant section as a restricted byway on the Order Map and supplementary plans and amend the map keys accordingly.
 - Add to the Order Map, "The Ordnance Survey base mapping on this map does not show the course of The Brook at the date of the making and confirmation of the Order".
21. Since the confirmed Order would show as a highway of one description a way which is shown in the Order as a highway of way of a different description I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

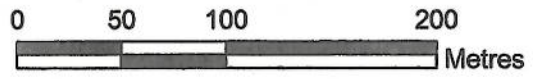
Mark Yates

Inspector

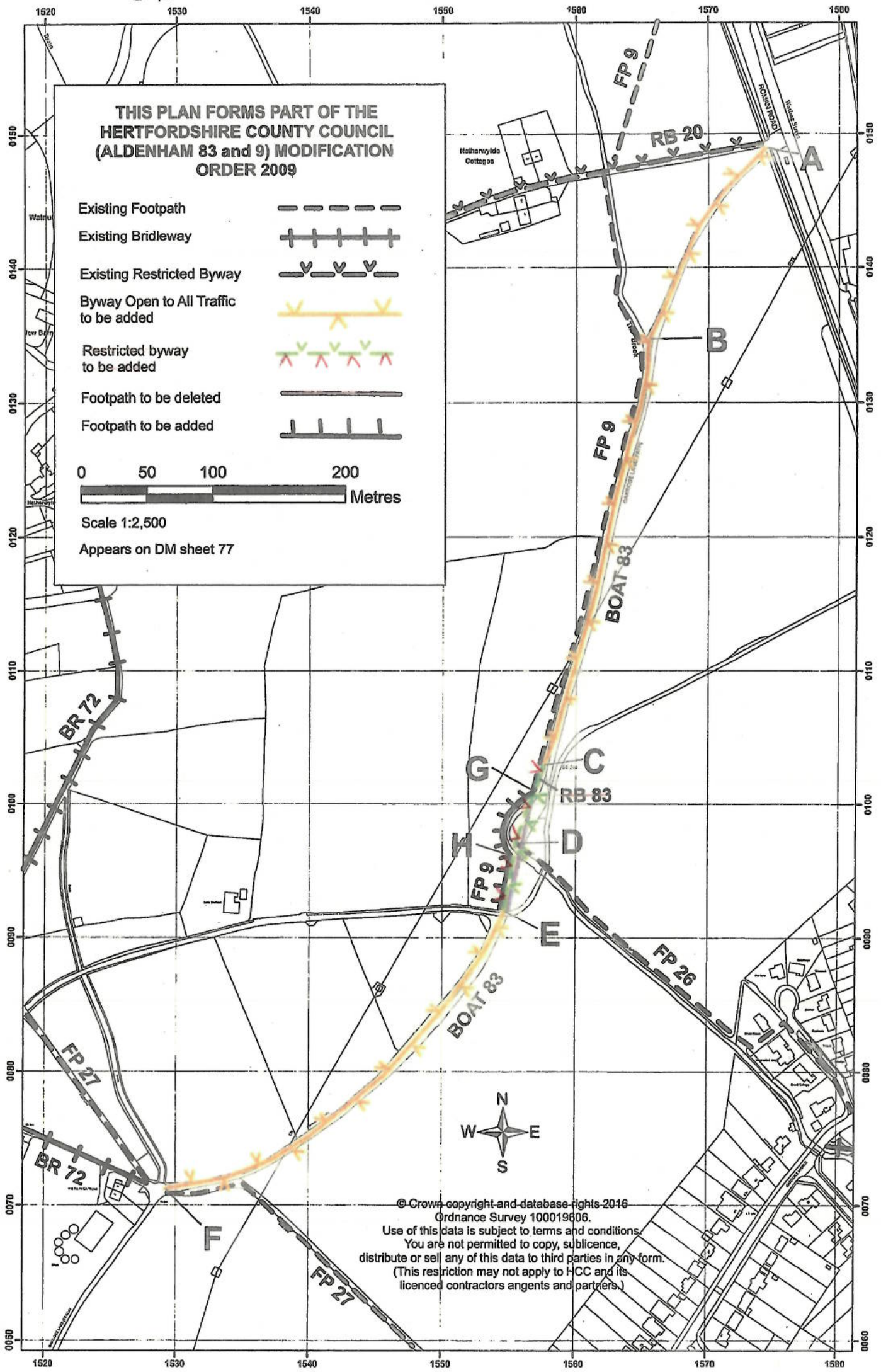
Supplement to Plan M

**THIS PLAN FORMS PART OF THE
HERTFORDSHIRE COUNTY COUNCIL
(ALDENHAM 83 and 9) MODIFICATION
ORDER 2009**

- Existing Footpath 
- Existing Bridleway 
- Existing Restricted Byway 
- Byway Open to All Traffic to be added 
- Restricted byway to be added 
- Footpath to be deleted 
- Footpath to be added 








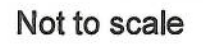
Scale 1:2,500
Appears on DM sheet 77

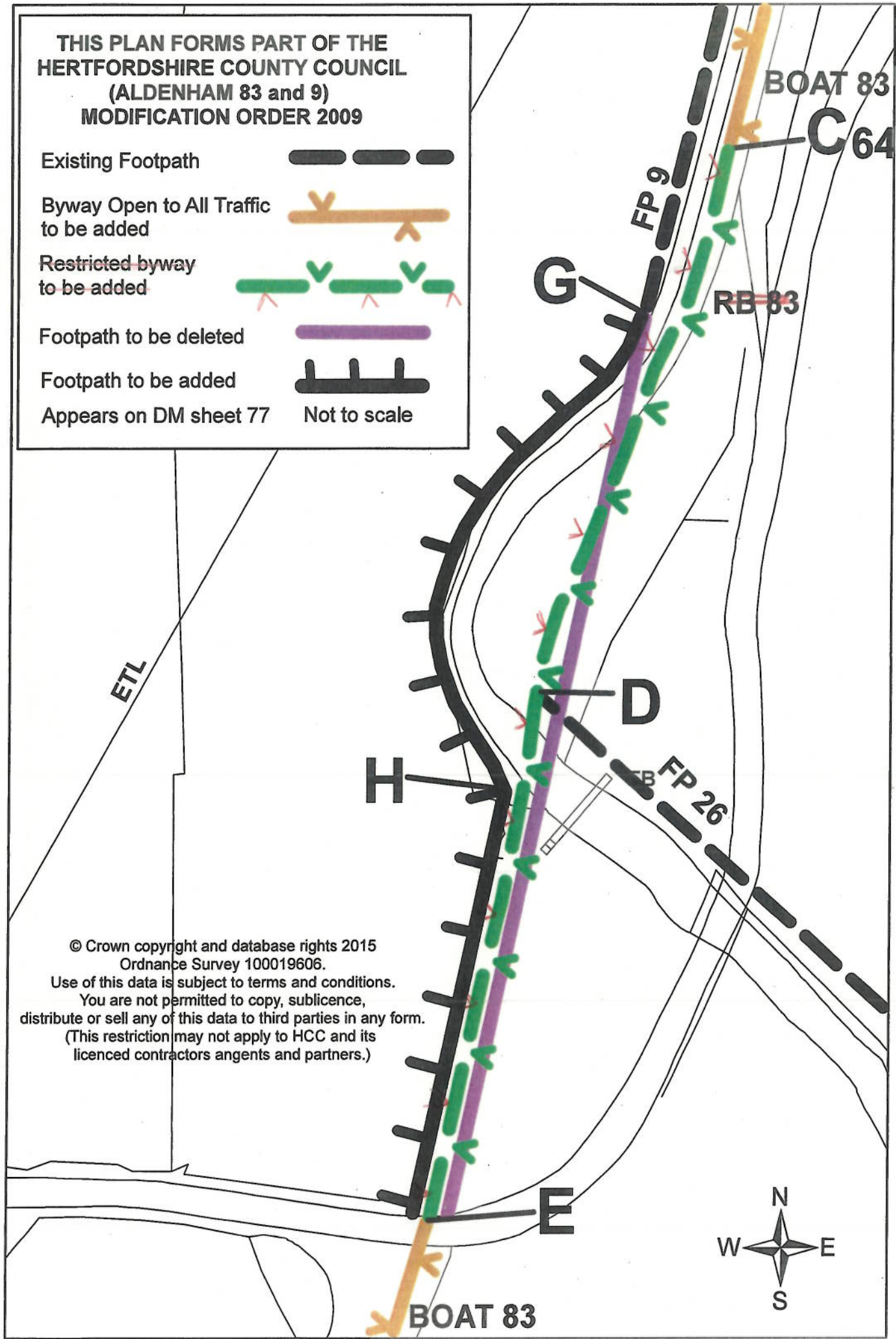


© Crown copyright and database rights 2016
Ordnance Survey 100019606.
Use of this data is subject to terms and conditions.
You are not permitted to copy, sublicense,
distribute or sell any of this data to third parties in any form.
(This restriction may not apply to HCC and its
licenced contractors agents and partners.)

Supplementary Plan B

**THIS PLAN FORMS PART OF THE
HERTFORDSHIRE COUNTY COUNCIL
(ALDENHAM 83 and 9)
MODIFICATION ORDER 2009**

- Existing Footpath 
- Byway Open to All Traffic to be added 
- Restricted byway to be added 
- Footpath to be deleted 
- Footpath to be added 
- Appears on DM sheet 77  Not to scale



© Crown copyright and database rights 2015
Ordnance Survey 100019606.
Use of this data is subject to terms and conditions.
You are not permitted to copy, sublicense,
distribute or sell any of this data to third parties in any form.
(This restriction may not apply to HCC and its
licenced contractors agents and partners.)