
Order Decisions

Site visit made on 4 July 2018

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 10 October 2018

Order Ref: ROW/3185313 (Order A)

- This Order is made under Section 257 of the Town and Country Planning Act 1990 and is known as the Parish of Felton (Public Footpath No 5) Diversion Order 2017.
- The Order is dated 11 January 2017 and proposes to divert the public right of way as shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Northumberland County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed

Order Ref: ROW/3190553 (Order B)

- This Order is made under Section 257 of the Town and Country Planning Act 1990 and is known as the Parish of Felton (Public Footpath No 5) Diversion Order 2017 (No 2).
- The Order is dated 31 July 2017 and proposes to divert the public right of way as shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Northumberland County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Preliminary matters common to both Orders

1. I made an accompanied site inspection, taking account of the written representations. The existing route is not available for use but its line was evident such that the existing and proposed routes could be compared.
 2. Both Orders propose the diversion of the same section of footpath which is closed by a temporary traffic regulation order (TRO), initially for health and safety reasons whilst the adjacent site was being re-developed. The TRO was extended and is due to expire on 12 November 2018. Meanwhile an alternative temporary route runs north along the verge of the adjacent Main Road and then east along the "Mouldshaugh" track, an access path of privately owned land some 8m wide, until it rejoins FP No 5 which continues northwards. The alternative route on the track is permissive and there appears to be some uncertainty as to public rights over it.
 3. An objection was made to the legality of submitting more than one order affecting the same route. The orders seek to achieve different outcomes in terms of the proposed diversion, and Northumberland County Council (the Council) as order making authority, suggests that I should decide whether to confirm one or the other Order but not both.
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4. Each Order must be considered principally on its own merits. Article 3 in each Order provides that the Order shall not come into effect until the Council has certified the creation of the alternative highway as provided for in Article 2. In principle therefore it seems that both Orders might be confirmed if they meet the necessary criteria discussed below, it being left to the Council's discretion as to which to implement. However the exercise of such a discretion, if it did exist, risks creating uncertainty for the future as regards the unimplemented Order.
5. To avoid that uncertainty the orders might have been worded to permanently negate the effect of one, should the other be confirmed, but this is not the case here. Given my decision to confirm one Order only it is unnecessary for me to consider whether it would be possible and if so, whether the Orders should be modified to that effect. That said, submission of the Orders, although not expressly prohibited in the legislation, would appear to be an undesirable precedent to follow. Of course in considering each order individually against the criteria, some account may inevitably be taken of the relative benefits and disbenefits of the other order, or indeed any aspirational alternative route.

The Main Issues

6. For either Order to be confirmed, by Section 257 of the 1990 Act I must be satisfied that it is necessary to divert the footpath to enable development to be carried out in accordance with the grant of planning permission.
7. The merits of the planning permission granted for the development are not relevant. If I were to find it necessary to stop up the path to allow the development to proceed, confirmation of the Orders is still discretionary. In exercising this discretion I must consider the disadvantages or loss likely to arise from the diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing public right of way, and weigh these against the advantages of each proposed Order in turn.¹
8. As development had commenced before the date of my site visit I must also be satisfied that it has not been substantially completed, since if it has, the powers of the 1990 Act would not be available to confirm the Orders. In essence some substantial part of the development permitted must remain to be carried out.
9. The issues I have described in the paragraph above require careful attention in this case because part of the existing route has been built over pursuant to the planning permission relied on by the applicant for the Orders.

Background to the Orders

10. The Council takes a neutral stance on the Orders as it sees no intrinsic public benefit in either proposed diversion of the existing route. The applicant, Bellway Homes has prepared its own case in support of both Orders. It relies on planning permission Ref 16/00138/FUL dated 6 September 2016, to erect 80 dwellings, associated access, infrastructure, open space and landscaping on land North Of Benlaw Grove, Main Street, Felton, Northumberland.
11. It is clear from the approved planning permission that the path would require to be diverted to enable the development to take place. The development permitted under Ref 16/00138/FUL is largely built out but has not been

¹ Paragraph 7.15 of Department for Environment, Food and Rural Affairs Circular 1/09

commenced in respect of two plots over which PF No 5 lies. However a third plot has been built upon and is now occupied, yet the footpath runs diagonally across its front garden area.

Reasons

Whether the diversion of part of footpath No 5 is necessary in order to allow development to take place

Orders A and B

12. Diversion of the path is necessary to allow the construction of two of the approved houses on their respective plots. Two houses may be a small proportion of the permitted 80 dwellings, but it is a substantial and by no means a minimal part of the permitted development to be carried out. This is so, notwithstanding that the Orders, if confirmed, would validate the unlawful development of the third plot over part of the existing footpath.
13. I use the word "unlawful" for two reasons. Firstly, and here I disagree with the Council, the development on the third plot clearly has an obstructive effect on the existing right of way, not least because of vehicles that may be stationed over it by the occupants. Secondly, a condition attached to the permission expressly forbids occupation of any dwelling until the construction of the diverted footpath has taken place in accordance with the approved details.
14. I queried this condition with the Council, without of course questioning the wisdom of its wording, but it is far from certain whether it was properly discharged and clearly no alternative footpath has yet been laid out. Nonetheless, the need for a diversion occasioned by a planning permission, is not made the less so because other parts of the footpath have been built over, provided that what remains to construct is a substantial part of the approved development.
15. Therefore I conclude in respect of both Orders that diversion of the footpath is necessary to allow development to be carried out in accordance with the planning permission Ref 16/00138/FUL.

The extent of disadvantage or loss likely to arise to the public, or to persons whose properties adjoin, or are near the existing public right of way as a result of the proposed diversion

Order A

Impact on members of the public generally

16. The approved residential development, now largely completed, is built on what was open arable agricultural land with FP No 5 crossing the site at its north-western corner. The development has thus clearly changed the character of the site. The existing route would be realigned so that it traverses the area of land west of the development site, identified on the approved site layout plan as a possible site for the erection of a doctor's surgery.
17. A key part of the objector's case was that the alternative route in Order A would compromise the ability to develop this adjacent land for the surgery. Neither the approved permission nor the associated section 106 planning obligation is effective to secure the provision of a surgery on this land, albeit

that the applicant is required to pay a sum of money to the Council as a contribution for the provision of such a facility in the area.

18. However it is understood that the existing surgery has worked with the Parish Council for several years to secure a new facility in the village, and after a thorough search for alternative sites the only suitable site identified is the land over which the diverted path in Order A would lie, if the Order were confirmed.
19. The issue of the surgery is only indirectly connected to the planning permission that would make it necessary to divert the footpath. However if the monies set aside for a surgery, most or all of which will by now have been paid to the Council, have not been applied for their intended purpose within three years, they are required to be diverted elsewhere and will no longer be available. In addition the applicant has made the land next to the development site available for this purpose.
20. The class of persons who would benefit from new surgery facilities, which are of an undoubted public benefit, appear to me to be significantly large, if not even coincidental with the inhabitants of the parish of Felton, as to constitute a section of the general public. Confirmation of the Order has the potential to cause substantial inconvenience to the public if their aspirations for a new surgery were to be frustrated by the existence of a footpath that could be better sited elsewhere. The disadvantage would be a loss of opportunity but in my view it would be a serious and significant loss of opportunity given the need to replace the existing facility and that despite an extensive search no alternative site can be identified.
21. Bellway has promoted Order B to avoid such disadvantages to the public. Confirmation of Order B would entail diversion of the existing route around the edge of the new development, thus avoiding having to cross the land to the west and, in overall terms for the reasons discussed below I agree that the Order could be confirmed.

Impact on persons whose properties adjoin or are near the footpath

22. The land crossed by the current and proposed footpath is in the ownership of the applicant or the Council; there are no other properties adjoining or near to the footpath which would be affected by the proposed diversion.

Conclusion as to whether Order A should be confirmed

23. The Order is necessary to enable the applicant to implement the planning permission already granted. However confirmation would mean that the resulting diversion of FP No 5 would traverse the land set aside for a replacement doctor's surgery. Although not part of the permission itself, it is clearly contemplated in the plans approved for the development of the adjoining housing development and the need for such a facility is not disputed.
24. The Council suggests that as and when the plans for development of the adjacent site for a surgery are firmed up, another diversion order could easily be made. That may be so but confirmation may not be guaranteed and even if this were possible, the wasted costs, which the objector rightly points to, are also a factor to consider. Further, and in any event as the Council itself suggests, the Order needs to be determined on the basis of what is known.

25. On the available information no other site can be identified for the surgery and the monies paid to the Council as a contribution towards its provision would be diverted to another purpose if the project fails. The loss of opportunity to develop the adjoining site for this public benefit is a disadvantage in itself that flows directly from the diversion Order. The disadvantage substantially affects members of this parish. When weighed with the factors that have led me to consider that another alternative in Order B would be more acceptable, I have come to the conclusion that I ought to refuse to confirm Order A.

Order B

Impact on members of the public generally

26. As I have described, if confirmed Order B would have the effect of diverting the existing footpath around the edge of the new housing development thus avoiding having to cross the land to the west. Footpath users would use connections within the site but on its periphery, separately from the housing itself. The overall length of the alternative route would be some 120m as compared to the existing section of 80m, and the new route would zig zag rather than maintain a straight line.

27. However the extra distance and deviation of the route are not in my view significant factors. The appearance of the immediate vicinity has changed due to new housing nearby, so this relatively short section of the footpath has in any case lost much of its character as a recreational route, which is not regained until the open fields are reached, north of the "Mouldshaugh" track.

28. Consequently I find that there are no significant impacts of the Order on members of the public.

Impact on persons whose properties adjoin or are near the footpath

29. The land traversed by the existing and new footpath is owned by the applicant or the Council. The properties adjoining or near to the footpath which would be affected by the proposed diversion are clearly separated from the line of the alternative route and would not be affected by confirmation of the Order.

Conclusion as to whether Order B should be confirmed

30. Order B if confirmed would result in a short section of the existing footpath being diverted around the edge of the new housing estate. Although not a benefit in itself, it would not be an unduly negative factor in light of the general change in character of the area at this point that has taken place. Nor would it be appreciably less beneficial than the alternative route in Order A since the latter is only a few metres away where there is a similar urban feel to the area.

31. I have considered as an aspirational route the temporary route that is currently provided. It is a longer route than that proposed in Order B, but does have a benefit in my view, in that it takes the footpath user away from the urbanising effects of the new development and along a wide and verdant verge adjacent to the carriageway of Main Road, before turning into the track that eventually joins to the unaffected section of FP No 5. However the present uncertainty over the public status of rights of way along the track prevents its consideration as a viable alternative even if, as may well be the case, some users might continue to use it for as long as they are permitted to do so.

32. Another variation to the eastward section of the temporary alternative route would be possible by use of land which runs parallel thereto and is within Bellway's ownership, a strip of land just outside the fence that currently marks the perimeter of the development which is still under construction. Although I saw on site how this might be created, its proximity to the new housing in this vicinity does not persuade me that it is a significantly more advantageous alternative to that proposed in Order B.
33. The Council states that the diversion proposed in Order A is "superior" to that in Order B, however it gives no cogent reasons in support of that view. Indeed its position is somewhat ambivalent, having professed to adopt a neutral stance on both Orders.
34. I find that the Order is necessary to be made to enable the applicant to implement the planning permission already granted. Moreover there would be, as a result of the Order being confirmed, no unacceptably adverse impacts on the public or on persons whose properties adjoin the footpath proposed to be diverted or which are nearby. Therefore I conclude that the Order should be confirmed.

Formal decisions

Order A

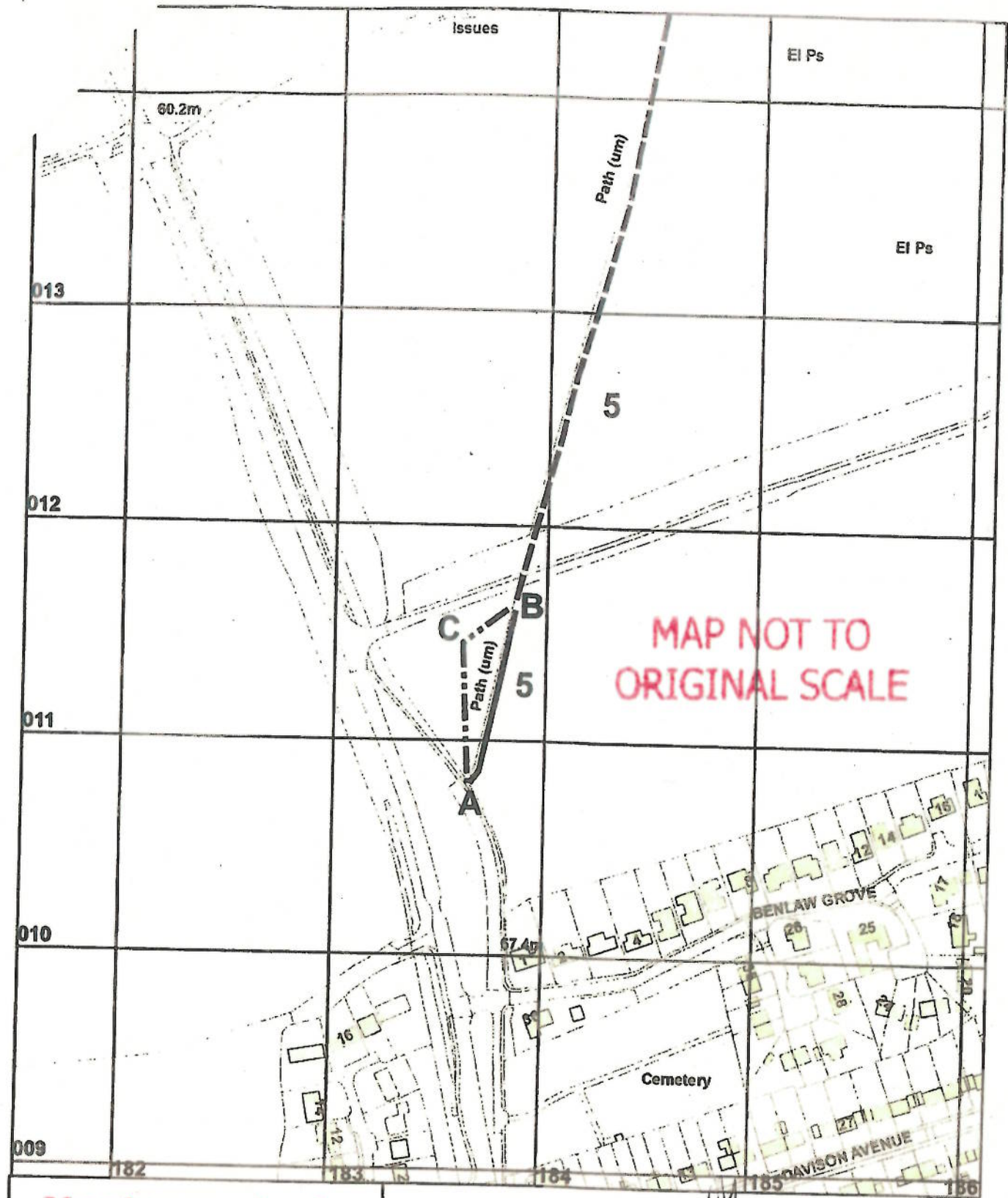
35. I do not confirm the Order.

Order B

36. I confirm the Order.

Grahame Kean

INSPECTOR



NORTHUMBERLAND

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Public Rights of Way

- Existing Public Footpath
- Public Footpath to be closed
- Public Footpath to be created

Former District(s)
Alnwick

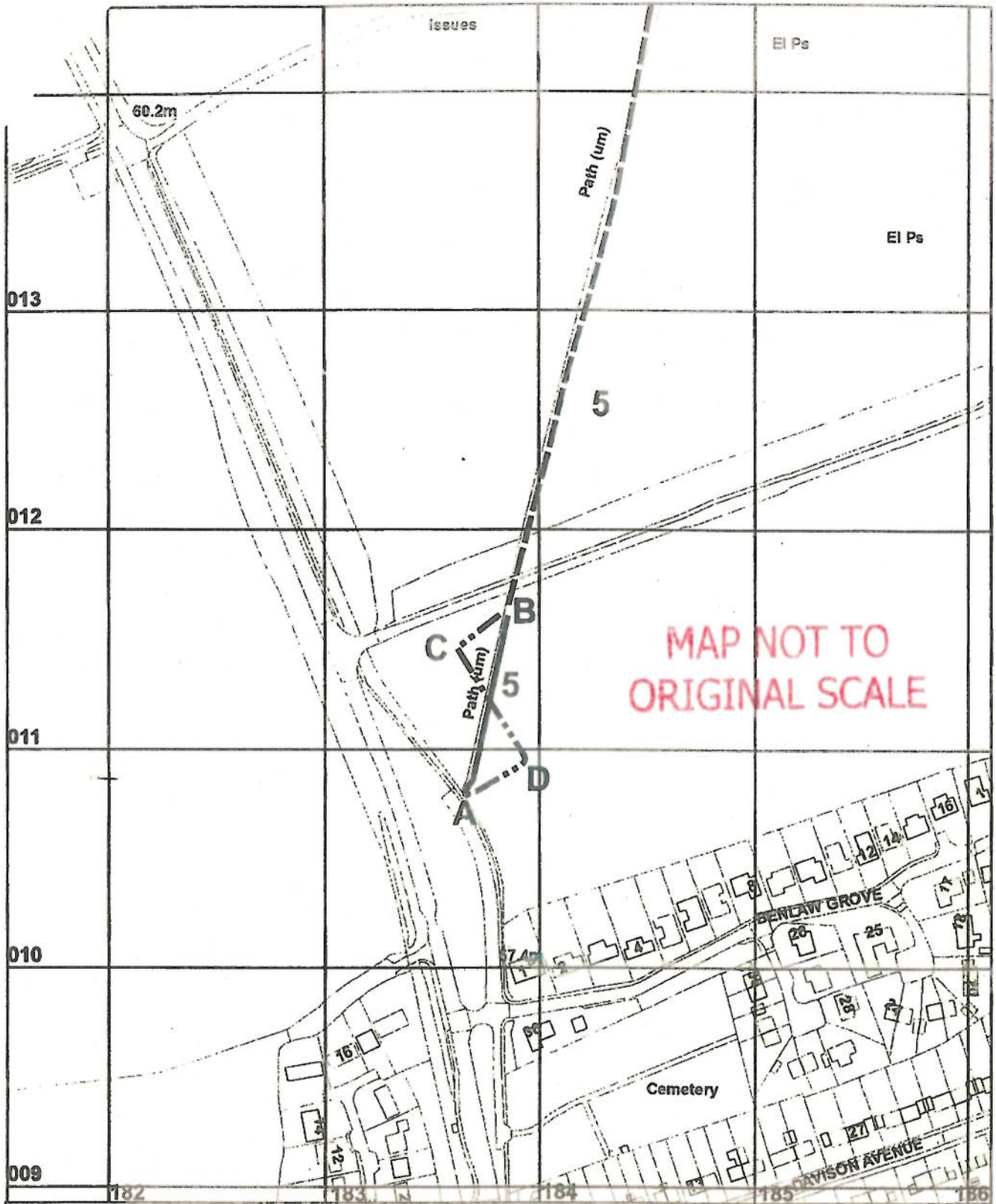
Parish(es)
Felton

Scale
1:2500

Def. Map No.
96

O.S. Map
NU 10 SE




Date
December 2016



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Public Rights of Way

-  Existing Public Footpath
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Johnson

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Former District(s) Alnwick	Parish(es) Felton	Scale 1:2500
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