



Order Decision

Site visit made on 11 August 2018

by **Jean Russell MA MRTPI**

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

Decision date: 23 October 2018

Order A: ROW/3187611

Cheshire East Borough Council (Public Footpath No. 14 (Part), Parish of Bunbury) Public Path Diversion Order 2017

- Order A was made under section 257 of the Town and Country Planning Act 1990 by Cheshire East Borough Council on 29 June 2017.
 - The Order proposes to divert the footpath to which the Order relates to enable development to be carried out in accordance with planning permission granted under Part III of the Town and Country Planning Act 1990.
 - There were seven objections outstanding when the Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
-

Order B: ROW/3187612

Cheshire East Borough Council (Unrecorded Footpath, Land off Oak Gardens, Parish of Bunbury) Public Path Extinguishment Order 2017

- Order B was made under section 257 of the Town and Country Planning Act 1990 by Cheshire East Borough Council on 29 June 2017.
 - The Order proposes to extinguish the footpath to which the Order relates to enable development to be carried out in accordance with planning permission granted under Part III of the Town and Country Planning Act 1990.
 - There were seven objections outstanding when the Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
-

FORMAL DECISIONS

Order A: ROW/3187611

1. It is proposed that Order A is confirmed subject to the following modifications:

- Within Part 2 of the Schedule, delete *'15 metres to O.S. grid reference SJ 5629 5754 (point D on TCPA/031A) and then running in a generally south south easterly direction for approximately 31 metres'* and substitute *'16 metres to point X on TCPA/031A and then running in a generally south south easterly direction for approximately 27 metres'*.
- Within Part 2 of the Schedule, delete the final three sentences and substitute: *'A total distance of approximately 120 metres in length. The footpath will be 2 metres wide between points A-X, 2.5 metres wide between points X-E-F and 4.5 metres wide between points F-C'*.
- On the Order map, delete point D and insert point X.

Order B: ROW/3187612

2. Order B is confirmed.

PRELIMINARY MATTERS

3. An application has been made to the Council under s53(2) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement of Public Rights of Way by adding the unrecorded footpath (UFP) that is subject to Order B as a public footpath.
4. The Council made Order B because evidence submitted with the application shows use of the UFP as a public footpath. The application is not determined or before me, but since the Council is the Highways Authority and has made Order B, it is reasonable for me to accept that the UFP is an unrecorded public footpath.
5. The Council received nine objections to Orders A and B; two had been withdrawn by the time that the Orders were submitted for confirmation.

The Permission Site and Surrounding Land

6. Orders A and B are both made pursuant to the outline planning permission granted on appeal (ref: APP/R0660/W/16/3165643) on 31 May 2017 for 'a residential development for 15 dwellings with associated works' on land at Oak Gardens. I shall refer to the 'outline permission' and the 'appeal decision' made by the 'previous Inspector'.
7. The 'permission site' is an irregularly-shaped area of overgrown pasture. It is enclosed by domestic gardens at Wakes Meadow to the north, a 'fenced plot' to the east, other residences at Oak Gardens and fields to the south, and woodland to the west. The site includes a veteran ash tree, while adjoining properties are typically bound by mature trees and hedgerows.
8. The road within Oak Gardens leads from Bunbury Lane and forks to the east of the permission site. The left spur leads south west to dwellinghouses; the right spur forms a turning head and also leads to the fenced plot. Between the two limbs of the road, there is a metal bar gate on the eastern boundary of the permission site.

The Footpaths

9. Public footpath No. 14 (FP14), which is subject to Order A, starts to the north east of the permission site on Bunbury Lane, and then runs past dwellinghouses. Point A on the Order A map is marked at the end of a garden, and FP14 runs from there for some 16m on a south western line through the 'fenced plot' to a small gate into the permission site.
10. FP14 continues south west through the permission site to a post at point B, and then leads south to a circular gate on the southern boundary of the permission site; point C. From there, FP14 leads over adjoining fields, while FP15 runs west through the site to a stile, FP18 and the woodland.
11. Order A would divert FP14 so that it leads west from point A to point D in the north east corner of the site; south down the eastern boundary of the site past the metal bar gate to point E; west along the southern boundary to point F; and then south west along the southern boundary to point C, FP15 and remainder of FP14.
12. The Order B map marks point A at the small gate; from there, the UFP leads south west direct to the stile at point B. Order B would extinguish rather than divert the UFP; users would walk to FP18 via the diverted FP14 and FP15. On the ground, FP14 and the UFP are not hard surfaced, but trodden through the pasture. It is anticipated that the diverted route would be formed of compacted stone, but that is not stated in Order A and is a matter for consideration.

MAIN ISSUES

13. S257(1)(a) of the Town and Country Planning Act 1990 (TCPA90) provides that a competent authority may by order authorise the stopping up or diversion of any footpath if they are satisfied that it is **necessary** to do so to enable development to be carried out in accordance with planning permission granted under Part III.
14. The 'necessity' test must be met for Orders A and B to be confirmed. In addressing this matter, *Rights of Way Circular (1/09): Guidance for Local Authorities (C1/09)* advises that the merits of the planning permission should not be questioned, but neither should an order be made purely on the grounds that permission is granted; the public right of way will not automatically be diverted or stopped up.
15. In the event that the necessity test is met, I have discretion as to whether or not to confirm the Orders. C1/09 expects that any **disadvantages or loss** likely to arise as a result of stopping up or diverting a way to members of the public generally, or to persons whose properties adjoin or are near the existing highway, should be weighed against the advantages of the proposed order.
16. The Council has requested that Order A is modified so as to widen the diverted path between points F and C; I shall also address this matter.

REASONS

Necessity

17. Objections have been made that the Orders are premature and it would be pre-emptive to alter the Order paths, because planning permission is granted only in outline. The Council rightly points out that an order can be made under s257(1A) even if planning permission is not granted at all – although it is equally true that a grant of even full permission does not automatically render an order necessary.
18. Applications for 'outline' planning permission are made to establish the principle of development; approval of prescribed details may be sought at outline stage and/or later 'reserved matters' application(s). The outline permission granted in this case is for 15 dwellinghouses; the quantum and type of development is specified. Scale, appearance, layout and landscaping are reserved matters, but the means of access to the development was approved at outline stage: the road at Oak Gardens would be extended through the metal bar gate into the site.
19. The previous Inspector saw 'site location', 'site access and visibility splay' and 'footpath' plans – plus an 'indicative layout' plan which incorporates FP14 as proposed to be diverted by Order A. The Council has provided me with the indicative layout plan, and another version of this drawing with added detail of FP14 as existing and the UFP. Since this is not actually entitled 'footpath plan', I shall refer to it as the 'plan of the paths'.
20. The indicative layout plan shows that the access from Oak Gardens would lead into the centre of the permission site. The approved houses would face onto the estate road, and be served by private back gardens extending towards or up to the site boundaries. The development would also include areas of open space.
21. The plan of the paths shows that, if the indicative layout was approved at reserved matters stage, and the permitted dwellings were constructed on that basis, but Orders A and B were not confirmed, FP14 and the UFP would each pass through several private properties. This means that the paths are incompatible with the indicative layout plan. If the permission had been granted in full, or if details of the layout had been approved at outline stage, it would have been plain that Orders A

and B are necessary to enable the development to be carried out. That layout is a reserved matter creates some uncertainty, but does not mean that the necessity test cannot be met. The outline permission needs to be considered in the round.

The Indicative Layout

22. The previous Inspector expressly determined the planning appeal on the basis that all matters except access were reserved for future consideration; she excluded the indicative layout from the list of plans that she required the development to be carried out in accordance with, under condition no. 4 imposed on the permission. However, as would be expected, the Inspector had regard to the indicative layout plan as part of the evidence on the likely impacts of the development.
23. The Inspector's observations and findings included:
- The veteran ash within, and some trees on the periphery of the permission site are subject to Tree Preservation Orders. The indicative layout plan adequately addressed 'tree constraints' with the ash to be retained as an 'amenity feature' within one of the proposed open spaces.
 - The proposed 15 dwellings could be orientated and sited in such a way to avoid an adverse impact on the living conditions of neighbouring occupiers.
 - The permission site falls within an 'indicative wildlife corridor' set out in the Bunbury Neighbourhood Plan (NP), but the proposed open spaces would include a 15m deep non-developable buffer zone to the adjacent woodland.
24. It must be construed that the interests of tree protection, living conditions and nature conservation are constraints to development – and I have already noted that the means of access will be from the metal bar gate. Thus, the permission site is not a 'blank sheet of paper'. With no evidence to the contrary, I find it unlikely that the indicative layout could be altered at reserved matters stage so that none of the permitted houses would be built over FP14 or the UFP on their existing lines.

The Proposed Diversion

25. The previous Inspector noted that the Council had given approval for Orders A and B to be made. She stated that, since a right of way 'would be diverted alongside the site, I am satisfied that walkers would retain an equally direct route'. She gave express support for the proposed diversion of FP14, consistent with other findings that the development would be acceptable in principle and could be laid out to avoid potential adverse impacts.
26. The Inspector imposed conditions on the outline permission including:
- 4) *The development hereby permitted shall be carried out in accordance with the following approved plans...Footpath Plan.*
 - 8) *No development shall commence until the public right of way through the site has been diverted as shown on the approved Footpath Plan.*
 - 9) *No dwelling shall be occupied until details of a public right of way management scheme have been submitted to and approved by the local planning authority. The public right of way shall be maintained in accordance with the approved scheme thereafter.*
27. The Inspector's reason for imposing conditions nos. 8 and 9 was 'to ensure that a public right of way remains in the vicinity of the site'. Planning conditions may only be imposed if necessary in planning policy terms, and while that might not amount

to 'necessary' for the purposes of s257, the previous Inspector's decision to permit the development subject to these conditions must carry significant weight. Indeed, condition no. 8 has the legal effect of preventing any part of the development permitted from being carried out until FP14 is diverted.

General Matters relating to the Outline Permission

28. Objectors have noted that other conditions imposed on the outline permission require the submission and approval of specified details before the development is commenced. Further conditions require the submission and approval of specified documents before the approval of the final reserved matters application.
29. Planning permission may be granted in full, as well as in outline, subject to pre-commencement conditions. The conditions described have the effect of staying the lawful start of development, but they are irrelevant to the question as to whether Orders A or B are necessary. The conditions which prevent occupation of the permitted houses until works are completed do not make the Orders premature.
30. Objectors have noted changes in planning policy since the appeal decision. The Council will doubtless have regard to the Cheshire East Local Plan Strategy, the NP and the National Planning Policy Framework (NPPF) when deciding any reserved matters application(s). However, the outline permission for 15 dwellings stands; it was granted, as it could only have been, on the basis of policy current at that time.
31. It has been suggested that modifying Order A so as to widen part of the diverted path would be incompatible with the outline permission, but the Council proposed the change with regard to the indicative layout plan.

Order A and the Fenced Plot

32. That part of the diverted FP14 marked as A-D on the Order A map crosses the fenced plot which is not within the permission site; this stretch would be some 15m long¹. The corresponding part of the existing FP14 is marked A-X by an objector, Mr Lomax, on his 'Plan B'.
33. Point D is approximately 3m north of point X, meaning that FP14 would be diverted so as to be closer to existing dwellings at Wakes Meadows. Indeed, the diversion is designed precisely so that the path would adjoin and follow property boundaries at Wakes Meadows, on the permission site and then at Oak Gardens.
34. Order A is not rendered unnecessary just because part of the order land is not within the permission site; it is not unusual for works to be required elsewhere to enable development. In this case, however, the reason given by the Council for diverting FP14 between points A and D is so that the footpath 'has less impact' on landowners – a reason related to the merits of the route.
35. The outline permission does not authorise or, to my knowledge, entail development on the fenced plot. The Council has not shown that it would matter if FP14 was to exit the fenced plot at D or X, when both points are on the proposed route. If the diversion started from X instead of A, there is no evidence that this would impede the construction of 15 houses on the site. It is unnecessary to divert FP14 between A and D, but it follows that Order A would be modified rather than not confirmed.

Conclusion

36. I have found that outline permission is granted for 15 dwellings with access from Oak Gardens; the plans of the paths and indicative layout indicate that private

¹ The UFP from A-B, as shown on the Order B map, is entirely within the permission site.

properties would be built over the existing FP14 and UFP; the appeal decision shows that the indicative layout takes on board site constraints; and the previous Inspector supported the diversion of FP14 and imposed a condition to prevent commencement of development until the public right of way is diverted.

37. Taking these considerations together, I conclude that it is necessary to divert FP14 and extinguish the UFP for the development permitted to be carried out. However, it is not necessary to divert FP14 outside of the permission site, and I propose to modify Order A so that the path is diverted from point X instead of A. It is not strictly necessary to advertise this modification under the TCPA90, but I shall do so because another modification, discussed below, will need to be advertised.

Disadvantages or Loss

Amenity Value

38. Local residents advise me that FP14 connects Lower Bunbury to Long Lane; the UFP is the historic link between Bunbury and Spurstow, and connects to the Sandstone Trail. Both paths afford pleasant walking over open land; they lead to or afford views of the woodland that is protected by the NP and Biodiversity Action Plan. The routes enhance the character of the village, and promote enjoyment of the countryside, meaning that they also contribute to the local tourism economy.
39. The paths undoubtedly have these and other attractive attributes. However, while the NPPF seeks to protect and enhance public rights of way, it does not resist their diversion to enable sustainable development – and the fact remains that outline permission is granted for housing on land crossed by the paths.
40. The Orders would result in walkers having a less direct as well as less historic route from the village to FP18, and reduced views of open countryside. From the appeal decision, however, I find that these disadvantages or losses would not negate or outweigh the benefits of the development which led to that being permitted.
41. In addition, the proposed diversion of FP14 has been designed so that there would be no loss of connectivity and little further to walk on the public paths around Bunbury. The Orders would enable – though not guarantee – construction of the development according to the indicative layout, meaning that walkers would pass proposed open space and have continued sight of the veteran ash tree.

Biodiversity and Nature Conservation

42. A number of local residents suggest that the proposed diversion of FP14 would cause a loss of biodiversity and be harmful to nature conservation, contrary to s40 of the Natural Environment and Rural Communities Act 2006, which requires public authorities, in exercising and so far as is consistent with the proper exercise of their functions, to have regard to the purpose of conserving biodiversity.
43. The previous Inspector noted that the permission site comprises 'semi-improved grassland'; it is also enclosed by mature trees and hedgerows and adjacent to wider countryside. It is identified in the NP as being within the 'indicative wildlife corridor' and of 'medium' distinctiveness in terms of conservation value. There is evidence that great crested newts, grass snakes, badgers and bats – if not also protected bird species – forage, roost or are otherwise active on or by the land.
44. The Inspector found that the proposed residential development would cause a loss of biodiversity, but there would be no unacceptable harm to protected species or loss of habitat, because the scheme would involve tree retention and the creation or enhancement of grassland. That conclusion is not binding on me, but it carries

- significant weight because it was made in respect of the whole development and so, by definition, covers the proposed diversion of FP14.
45. I also note that Council's Nature Conservation Officer (NCO) has no objections in principle to the loss of the UFP or diversion of FP14. He has raised concerns that the part of the diverted route, between points E-F-C, would run over the roots of adjacent mature hedgerow – but he also suggested that adverse impacts could be overcome by widening the path so as to create a 2m buffer and 'ensure that the hedgerow is not affected by the footpath construction'.
46. The Council accepts the NCO's recommendation, but asks that Order A is modified only to create a 2m buffer between points F-C, given lack of room between E-F on the indicative layout plan. Perhaps by way of compensation for that, the Council also suggests leaving the path grassed to avoid unacceptable harm to tree and shrub roots; the use of the word 'construction' by the NCO reflects that it had been proposed to surface the diverted path in compacted stone.
47. The Council can ensure that the diverted path is not paved; the appearance and landscaping of the development are reserved matters and so details of all planting and hardstanding on the permission site will need to be submitted to the Council for approval. Condition no. 9 on the outline permission requires the approval of a right of way management plan. I find that keeping the proposed route grassed would help to mitigate the impacts of the diversion, given that FP14 and the UFP already cross the semi-improved grassland on the site and walkers have not caused identified detriment to habitat or species.
48. I also propose to modify Order A so as to widen the path between points F-C as suggested by the Council; this modification will require advertisement. If the route is left grassed and no land is dug, it is not clear how walkers could be prevented from walking on the buffer zone. However, many public rights of way, including FP18, cross wooded land. I find that widening the path between points F-C, together with leaving the route grassed, would reduce the impact of footfall on tree and shrub roots so as to conserve biodiversity.
49. I note that modifying Order A so that FP14 is diverted from point X instead of A will mean that the path is further from a mature tree at Wakes Meadow. I conclude that Orders A and B would cause no unacceptable disadvantages or loss in respect of biodiversity or nature conservation.

Living Conditions and Safety

50. I have found it is unnecessary to divert FP14 outside of the permission site, such that I propose to modify Order A so that no part of this path will be any closer to properties at Wakes Meadow than it is now.
51. It is necessary to divert FP14 so that it would adjoin residential plots at Oak Gardens, but it is not unusual for public footpaths to follow property lines. Since FP14 would be diverted by just a few metres, and the adjoining gardens are largely enclosed by fencing and/or mature planting, local residents would be unlikely to suffer an unacceptable increase in noise or loss of privacy. There is no evidence that the proposed diversion would lead to any unacceptable increase in litter or other anti-social behaviour on the footpath, or loss of security at nearby dwellings.
52. Many public footpaths are overhung by trees that grow on private land. I am not persuaded that walkers using the diverted route would be at such increased risk of injury from falling branches that nearby occupiers could be duly concerned for liability. The proposed diversion would cause no unacceptable disadvantages or loss in respect of living conditions or safety.

Conclusion

53. I cannot speculate as to whether FP14 could be diverted to any alternative route. I conclude that the disadvantages or losses to the public arising from the diversion of FP14 and extinguishment of the UFP are not such as to outweigh the benefits of confirming Orders A and B.

CONCLUSIONS

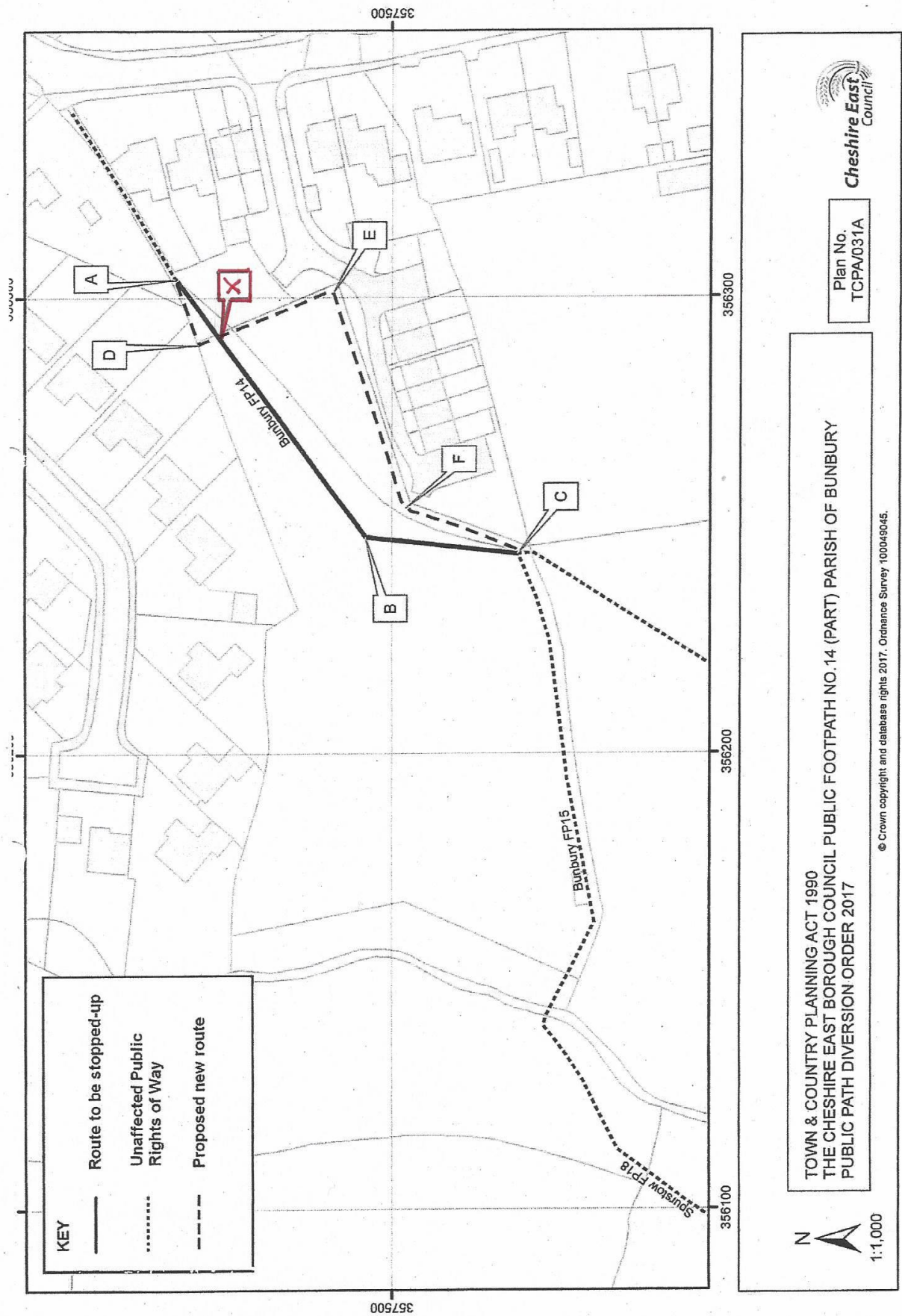
54. For the reasons given and with regard to all other matters raised, I conclude that Order A should be proposed to be confirmed with modifications, and that Order B should be confirmed as made.

55. Since Order A as modified would affect land not affected by the Order as made, Paragraph 3(6) of Schedule 14 to the TCPA90 requires that notice shall be given 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.

Jean Russell

INSPECTOR

ORDER A: ROW/3187611



ORDER B: ROW/3187612

