



Order Decision

Inquiry held on 11 December 2018

by Sue M Arnott FIPROW

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

Decision date: 22 January 2019

Order Ref: ROW/3196939

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Cumbria County Council (Parish of Kendal: District of South Lakeland) Definitive Map Modification Order (No 3) 2017.
- The Order is dated 28 November 2017. It proposes to modify the definitive map and statement for the area by adding a footpath along Lumley Road, Kendal, from Milnthorpe Road to Stonecross Road, as shown on the Order map and described in the Order schedule.
- There were eight objections outstanding¹, together with 14 representations in support, when Cumbria County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: Confirmation of the Order is proposed, subject to the modifications set out in the Formal Decision below.

Procedural matters

1. On 11 December 2018 I held a public inquiry at South Lakeland House in Kendal, having visited the site of the claimed public footpath, unaccompanied, during the previous day. After the close of the event I make a further brief visit, again unaccompanied.

The Main Issues

2. The main issue here is whether the evidence is sufficient to show that, in the past, the Order route has been used in such a way that a public footpath can be presumed to have been established.
3. Cumbria County Council (CCC) made the Order under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of events specified in sub-section 53(3)(c)(i). Therefore if I am to confirm it I must be satisfied that, on a balance of probability, the evidence shows a public right of way subsists along the route described in the Order between the points labelled A, B, C, D and E.
4. The case in support of the Order is based on the presumed dedication of a public right of way under statute, the requirements for which are set out in Section 31 of the Highways Act 1980. For this to have occurred, there must have been use of the claimed route by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to its status being brought into question so as to raise a presumption that the route had

¹ One was subsequently withdrawn

been dedicated as a public footpath. This may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner(s) during this period to dedicate the way for use by the public; if not, a public footpath will be deemed to subsist.

Reasons

5. After receiving complaints that local residents were unable to walk between Lumley Road and Stonecross Road due to a blockage at the point marked 'E' on the Order plan, the (then) District Councillor Mrs Emmott was prompted to gather evidence from people who had previously used the route. She submitted an application for a definitive map modification order to CCC in June 2017 accompanied by 11 written statements from path users. This was subsequently reported to the Development Control and Regulation Committee on 1 November 2017, following which CCC concluded that a public right of way had been reasonably alleged to subsist and that an Order should be made.
6. The standard of proof required to justify confirmation of an Order is higher, it being judged on a balance of probability. At the inquiry CCC submitted that the available evidence is sufficient to meet the relevant test.

When was the status of the way brought into question?

7. When considering the evidence in relation to Section 31 of the 1980 Act, the first matter to be established is when the public's rights were brought into question.
8. There is little dispute that public use of the Order route was challenged when a neighbour erected 'Heras' fencing across both sides of a gap in the stone wall which separates the main part of Lumley Road from Stonecross Road and the estate roads linked to it. This is marked as Point E on the Order plan.
9. Some witnesses described warning tape being used initially, but it is clear that once the metal fencing was in place, passage through the gap was no longer possible. It was also reported that loose stone was piled in the gap to prevent access but this seems to have occurred after the fencing, not before.
10. At the inquiry Mrs Edmondson recalled that the initial blockage had been before Christmas in 2015 but that local people thought it was only temporary and for 'health and safety reasons'. Formal complaints were not made until a couple of months later when it was realised this was not the case.
11. Whilst CCC based its case on the status of the path being brought into question some time in 2016, I conclude it was more likely to have been in December 2015 when passage was first prevented. Accordingly I will examine the claimed use by the public during the preceding twenty years, December 1995-December 2015.

Evidence of use by the public 1995-2015

12. If a presumption of dedication is to be raised, qualifying use by the public during the relevant period must be shown to have been enjoyed 'as of right', without interruption, and to have continued throughout the full twenty years. Use 'as of right' is interpreted as being use by the public that does not take place in secret, is not by force and is not on the basis of permission.

13. In support of the claimed route is the written evidence of use from 11 people who completed standard forms. None of these claimants gave evidence at the inquiry although several were present.
14. In addition I heard oral evidence from five other people who had not previously completed forms but four of whom were nonetheless able to contribute their own long-standing use of the route by themselves and other family members, all having considerable knowledge of the locality dating back to the 1960s.
15. Whilst I accord greater weight to the evidence of those people who gave evidence in person and submitted to questioning, the written statements from the remaining claimants are largely consistent with the oral evidence.
16. I also have before me letters or emails from a further 10 people who support the recording of the Order route as a public right of way and who were referred to by witnesses at the inquiry as regular path users for many years. However their brief individual letters or emails did not give sufficient detail of their own use for me to give full weight to their evidence; however it clearly supports information given by others.
17. Nevertheless, in terms of the *quantity* of use, at this stage I have no difficulty in finding this sufficient to represent relevant use by the public.
18. However I need to consider whether this use was 'as of right'. There has been no suggestion that this use took place other than in a completely open fashion but one objection questions whether there has been an element of force implicit in the claimed use. There is also a likelihood that some path users may have done so in exercise of a private right attached to their residences.

Was the use 'by force'?

19. The possibility that the claimed use might be described as 'by force' (and therefore not 'as of right') arises from the initial beginnings of this route. The gap at point E lies in what was once a field boundary wall before development of Lumley Road in the 1960s. After the further development of properties in Stonecross Road² this stone wall separated two cul-de-sac carriageways with footways on both sides. For reasons which are not explained, on the Stonecross Road side, the tarmac road leads right up to the wall, but on the Lumley Road side, a wide grass verge approximately 10 metres in length was left unsurfaced. The evidence shows that this has been maintained as lawn and tended to by gardeners over the years.
20. It is suggested that the origin of the gap began with a resident from one side climbing the wall on a regular basis to visit his mother who lived on the other side. The date on which this began could not be established but this seems likely to have been long before the twenty year period that is relevant here. It seems that use by the gentleman concerned led to others doing likewise, to gradual damage to the wall, with stones falling or being moved aside, and to occasional repairs attempted by the gardeners.
21. However, one witness at the inquiry could recall that when his use began in 1987, the gap was easily negotiated without climbing, there being perhaps one stone to step over. Although that is some 8 years before the start of the relevant period, this tends to confirm the evidence from other claimants, that it

² Including those given an address in Lumley Road – numbers 23, 28, 30, 32 & 34

was easy to walk through the gap without any element of force throughout the period in question.

22. Although the initial use which led to the establishment of the Order route may not have been 'as of right' on account of being 'by force', I am satisfied that this is not the case for the use claimed between 1995 and 2015.

Was the use 'by permission'?

23. Whilst none of the claimants stated they had used any part of the Order route expressly 'with permission', it became clear at the inquiry that some of the use that has taken place was on a lawful basis as a result of pre-existing private rights attached to properties in Lumley Road.
24. Mrs Emmott submitted a copy a conveyance for the property now known as number 21 dated 23 July 1962 which reveals this plot includes land that extends to the middle of the carriageway. Land Registry searches carried out by CCC indicate that this is most probably the case for every property in the road. The conveyance provides for the owner to be responsible for maintaining the carriageway and verges "*forever or until Lumley Road is taken over by the Local Authority*". In fact Lumley Road has not been adopted by the highway authority and remains a privately maintained carriageway.
25. In addition to addressing maintenance responsibility, the conveyance also suggests that each property is entitled to enjoy the "*full and uninterrupted right ... to pass and repass at all times and for all purposes with or without vehicles horses and cattle over and along the land (which now forms the carriageway, verges and footways)*³".
26. It follows from this that those people who reside in Lumley Road, or visit residents in Lumley Road, may already do so by exercising a private right to use the full extent of the road. As a result, their use is not 'as of right' and therefore cannot contribute to the establishment of a public right since their use already has a lawful basis.
27. The consequence of this is that I must disregard much of the use claimed by at least 4 of the original 11 claimants, these being residents of Lumley Road south or east of point E. Further, I am in some difficulty in determining the weight I can attach to the remaining evidence forms since these do not differentiate between using the route to visit friends in Lumley Road or walking through for some other purpose. Likewise, the limited weight I can attach to the general letters of support in the absence of other details reduces further since I cannot differentiate between visits to friends in Lumley Road (which do not qualify) and journeys for other reasons (which do).
28. However the witnesses who gave evidence to the inquiry were able to clarify this point in response to questioning: in addition to visiting friends in Lumley Road, Mr Pimblett used the route to walk his dog 2-3 times a week; Mr Canaffin walked it perhaps once a month to walk down to the river or visit other friends, and Mrs Edmondson used it to catch a bus from the stop on Milnthorpe Road and sometimes to walk to the river.
29. Separating the private use from public use is not an easy task but the evidence submitted makes no attempt to distinguish between the two. For this I can only

³ This also includes the grassed area between numbers 21 and 26 Lumley Road.

rely on the evidence of witnesses who appeared at the inquiry who were not sufficient in number for me to regard as 'the public'. Although it seems to me entirely possible that others will have used Lumley Road on foot as a through-route unconnected with the private right, I do not have sufficient evidence before me from which to conclude that the Order route has been used in full *by the public* during the relevant twenty years.

30. However, the wall itself is owned in equal part by properties on the Stonecross Road side, namely 49 Stonecross Road and 28 Lumley Road. The trampled gap (which has been roughly surfaced with tarmac in part) lies in the section in the ownership of Mr Fielding⁴ at No 49. The private right of way enjoyed by properties in Lumley Road is unlikely to attach to his property. Consequently all the claimants (other than Mr Fielding himself) and other supporters who have used the path will have used the short length of the Order route which passes through the wall at point E 'as of right'.
31. Not all the claimants used the route throughout all 20 years but, aggregated, I judge there to be sufficient evidence presented in this case to represent qualifying use of the route through the gap at E *by the public 'as of right'*. However, due to the lack of clarity over the basis of the claimed use of Lumley Road, I cannot confidently find it to be use by the public and therefore capable of establishing a public right of way.

Was use continuous and without interruption?

32. In order to raise a presumption of dedication the claimed use must have continued throughout the twenty year period without interruption.
33. In his statement, a former owner of No 26 Lumley Road reported that some users were challenged when walking through the gap onto the grassed area and it is suggested that he put up notices to deter access. However none of the evidence from users corroborates this statement. In any event, this former owner confirmed he left the property in the mid-1990s and there is no evidence to suggest use was affected by his actions during the relevant twenty year period. Indeed there is no other evidence to indicate the claimed use was interrupted at any time until challenged by the barriers in December 2015.
34. I therefore conclude that the evidence before me is sufficient to raise a presumption of dedication in relation to the claimed public right of way through the gap at E but not for the full length of Lumley Road for the reasons given in paragraph 29 above.

The intentions of the relevant landowners

35. The owner of the part of the wall in which the gap at E is situated (Mr Fielding) has made clear in his representations that he does not oppose public access and has taken no steps to stop the public from using the gap that he says has been in place since he first moved to Stonecross Road in the early 1980s.
36. Aside from the wall, the length of Lumley Road, including its carriageway, verges and footways, is understood to be owned to the middle of the road by each respective frontager.

⁴ Mr Fielding was one of the original 11 claimants

37. Other than the reported actions of the owner of No 26 Lumley Road prior to the relevant period⁵, no other notices or challenges to pedestrians from individual frontagers in Lumley Road have been confirmed. Only the road sign at the Milnthorpe Road end near point A gives any indication of the landowners' collective intentions. This now states "LUMLEY ROAD: PRIVATE ROAD – NO CASUAL PARKING" (although it was suggested that this particular sign had not been in place throughout the whole 20 year period).
38. CCC submitted that the wording of this notice is ambiguous, tending to give the impression is that it applies to vehicular users rather than people on foot. I would agree and consider it falls a long way short of the clear statement of intention necessary to rebut a presumption of dedication. However, I have already concluded above that the evidence of use is not sufficient to raise a presumption that Lumley Road had been dedicated as a public path over, only through the gap at point E.
39. Since the owner of the wall at this point has not sought to rebut any presumption of dedication on his part, I find no evidence to suggest that between December 1995 and December 2015 he made clear to the public that he did not intend to dedicate passage through the wall at point E as a public path. Indeed the opposite appears to be the case.
40. I therefore conclude that the necessary tests are satisfied by the evidence but in relation to this part of the Order route only.

Other considerations

41. Reaching this conclusion leaves open the question of the status of Lumley Road in so far as a public right of way would usually connect with other highways or lead to a natural cul-de-sac such as a viewpoint or to some other place to which the public has access.
42. In the absence of sufficient evidence of use by the public to confirm the Order in full, the extent to which the public (as opposed to residents or their visitors) may use Lumley Road remains uncertain.
43. The conveyance submitted by Mrs Emmott gives the impression that the intention in the 1960s was to eventually see the road 'adopted'⁶ by the highway authority but, for whatever reason, this has never happened.
44. One objector submits that Lumley Road most probably constitutes a private street: it is laid out in the style of a street lined by residential properties, it enjoys street lighting⁷, there are standard highway road markings near point A at the junction with Milnthorpe Road and it otherwise has the appearance of a public highway including carriageway, verges and footways. He also draws attention to the ambiguous street sign which he argues, does not necessarily prevent use by public, 'private road' often being interpreted as 'privately maintained road'.
45. I have some sympathy with that view, but it is clear there is no formal record of the status of Lumley Road. CCC confirmed that it does not feature in its records of publicly maintainable highways (referred to as the 'list of streets'), nor does the county keep a list of privately-maintainable highways.

⁵ Noted in paragraph 33 above

⁶ The process of adoption of a road refers to future liability for maintenance.

⁷ Although no information was available to confirm whether this is provided at public or private expense.

46. Although the objector submits Lumley Road is a private street with public access, and I accept that is a strong possibility, no evidence has been submitted here to suggest the public has acquired a public right of way with vehicles and, other than one user who notes his use by bicycle, only evidence of pedestrian use has been put forward.
47. As explained above, I have found the available evidence insufficient to demonstrate use by the public since it has not proved possible, from the written material supplied, to identify whether or not the claimants were exercising a private right along Lumley Road. Although it would appear that there is nothing to prohibit people walking along the Order route between points A and E, it is beyond the scope of the evidence available to me to make any wider finding as to the status of the street.

Other matters

48. CCC suggested that I consider modifying the Order to reduce the width of the route from 15m (A-C) and 12m (C-E) to 1.8m, in effect restricting the public right of way to the footway along the east and northern side of the carriageway rather than encompassing the whole length (and width) of Lumley Road. I indicated that I could only do so if the evidence shows that is where the claimants actually walked.
49. From their explanations, it was clear that those people who spoke about their use at the inquiry generally walked along both footways and crossed from side to side at different points for different reasons. Since I have concluded that there is insufficient evidence to show use *by the public* of the Order route A-E, consideration of the proposed modification is no longer appropriate.
50. Many of the objections raised concerns over issues such as the effect of recording a public right of way on property values, dog fouling, litter problems and damage to the grass surface, suggesting that a public footpath is unnecessary and expressing concern over increased liability, maintenance responsibility and expense for landowners. None of these are matters which are relevant to my consideration of this Order which is based on the premise that long-standing use by the public has already established a public path. Nothing in this Order would affect liability for maintenance.

Summary

51. In conclusion, and on the basis of the information provided, I am satisfied that the relevant statutory test is met: that, on a balance of probability, a public right of way on foot has been shown to subsist but only in relation to the route through the gap at E. Consequently I conclude that the Order should be confirmed with a modification to the Order to remove the route shown between points A and E.

Conclusion

52. Having regard to the above and all other matters raised at the inquiry and in the written representations, I propose to confirm the Order with a modification to the Order route as referred to in the preceding paragraph.

Formal Decision

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

In the Order schedule

In **Part 1: Modification of the Definitive Map**

- Delete 'References on plan' "A-B-C-D-E" and substitute "E";
- Amend 'Description of length of right of way to be added' to: "A new 2m length of public footpath connecting Lumley Road Kendal with Stonecross Road at a gap in a wall at GR 350844 491186";
- Delete 'Width' as stated and substitute "1m";
- In **Part 3: Modification of Definitive Statement**
- Amend 'Width' to "1m"; amend 'Length' to "2 metres"; and amend 'Description' to read "From Lumley Road to Stonecross Road";

On the Order map

- Amend the line of "Footpath to be added" to remove section A-B-C-D-E as shown.

54. Since the confirmed Order would (if modified) not show a way as it is shown in the Order as made, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of my 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.

Sue Arnott

Inspector

APPEARANCES

In support of the Order

For the Order-Making Authority:

Ms P Christie Solicitor, Cumbria County Council

Who called:

Mr A Sims Countryside Access Officer; Cumbria County Council

Also supporting the Order:

Mrs S Emmott Applicant

Mr J Pimblett

Mr B Carnaffin

Mrs E Edmondson

Mr G Butler

Opposing the Order

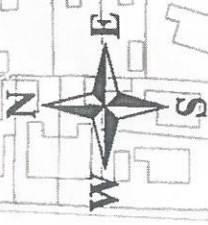
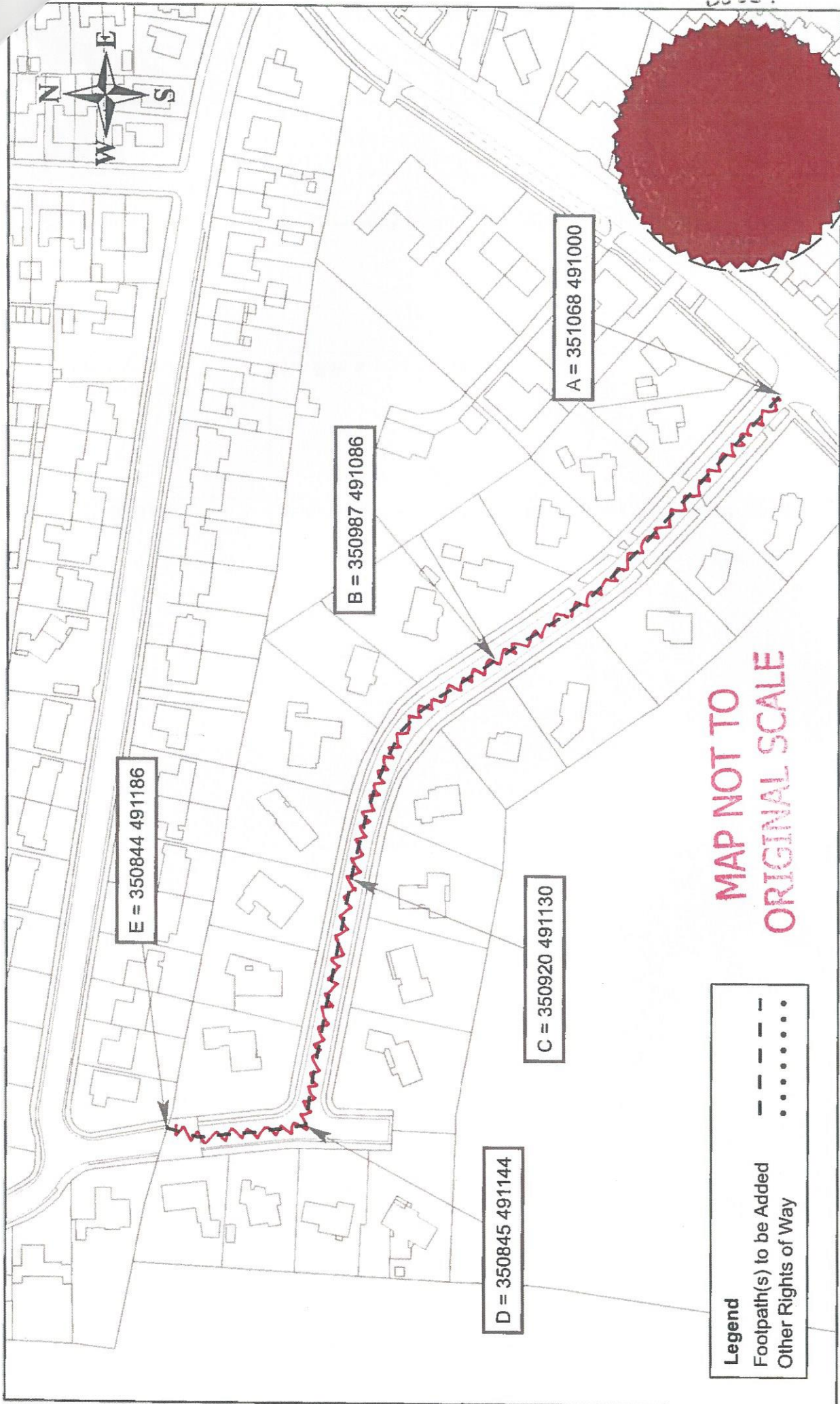
None present

DOCUMENTS

1. Copy of the statutory objections and representations
2. CCC's statement of grounds for seeking confirmation
3. CCC's statement of case submitted on 28 August 2018 and proof of evidence submitted on 13 November 2018
4. Mrs Emmott's statement of case submitted on 1 October 2018
5. Mr Kind's statement of case submitted on 19 September 2018
6. Email to the Planning Inspectorate from Mr & Mrs Edmondson sent 12 April 2018
7. Letter to the Planning Inspectorate from Mrs Powell dated 14 April 2018
8. Letter to the Planning Inspectorate from Mrs White dated 18 April 2018

Submitted at the inquiry

9. Witness statement of Mr A Sims of Cumbria County Council
10. Copy of conveyance of 21 Lumley Road Kendal dated 23 July 1962



E = 350844 491186

B = 350987 491086

A = 351068 491000

D = 350845 491144

C = 350920 491130

MAP NOT TO ORIGINAL SCALE

Legend

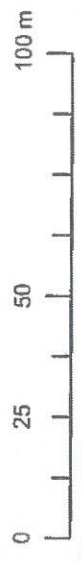
Footpath(s) to be Added - - - - -

Other Rights of Way · · · · ·

Wildlife and Countryside Act 1981 Section 53
 Definitive Map Modification Order
 Lumley Road, Kendal



Scale 1:1500 @ A4



Silby

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