



Order Decision

Inquiry held on 29 January 2019

by Sue M Arnott FIPROW

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

Decision date: 20 February 2019

Order Ref: ROW/3201752

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Hertfordshire County Council (Graveley 15, 18 and 21 and Wymondley 24) Modification Order 2016.
- The Order is dated 19 February 2016. It proposes to modify the definitive map and statement for the area by adding a bridleway, upgrading a footpath to restricted byway status and upgrading a footpath to a bridleway along Green Lane, Turf Lane and Milksey Lane respectively, in the parishes of Graveley and Wymondley, as shown on the Order map and described in the Order schedule.
- There was one objection outstanding when Hertfordshire 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 29 January 2019 I held a public inquiry at The Hertfordshire Development Centre in Robertson House, Stevenage. During the previous afternoon I walked the Order route and connecting paths, unaccompanied, and did so again after the close of the event, on this occasion being accompanied by the objectors and a representative of Hertfordshire County Council (HCC).
2. As originally made, the Order proposes to record on the definitive map and statement a restricted byway along Green Lane and Turf Lane and a bridleway along Milksey Lane. However, part of the Order has since been severed¹ so that the recording of Restricted Byway 21 (in Graveley parish), Restricted Byway 15 (Graveley) and Restricted Byway 24 (Wymondley) was confirmed by HCC on 16 November 2017 unopposed; these routes are not at issue here. Only the proposed recording of Bridleway 18 (Graveley) (as shown on the Order map between points B and C) now falls to be considered.
3. As a result of receiving further evidence, HCC reconsidered its position. It now takes the view that the public has established a right of way on foot only along Milksey Lane but that this right extends across the full width of the way, rather than being limited to the 6 feet (1.83m) specified in the definitive statement². Consequently, HCC has requested I modify the Order to reflect this, offering two alternatives which I address below.

¹ Paragraph 5 of Schedule 15 to the Wildlife and Countryside Act 1981 allows for the severance of those parts of an order to which there are no objections.

² HCC provided an amended Order plan showing the route to be recorded as a public footpath, not a bridleway.

The Main Issues

4. 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 bridleway (or in the alternative, a footpath) can be presumed to have been established over and beyond the right of way already recorded in the definitive map and statement.
5. HCC 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), (ii) and (iii). Given the unopposed confirmation of two of the three Order routes, only sub-section 53(c)(i) is now relevant here. Therefore, if I am to confirm the remaining route, I must be satisfied that, on a balance of probability, the evidence shows a public right of way subsists along the route as described in the Order between the points labelled B and C and over the width stated in the Order Schedule.

Reasons

Background

6. Definitive Footpath No 18 (Graveley) is already recorded on the definitive map as along the length of Milksey Lane, but not over its full width. The definitive statement describes the route as "6 feet" (1.83 metres) wide "Commencing at junction of FP15, thence generally SE along the north-eastern side of Milksey Lane for a distance of 133 yds to join the county road".
7. This very specific description arises from an order³ made on 10 August 1981 by the Magistrates Court in Stevenage under Section 116 of the Highways Act 1980 which stopped up the previously existing historic vehicular highway whilst reserving a pedestrian right of way over a part of the lane.
8. Submissions at the inquiry as to the interpretation of the 1981 order and accompanying drawing lead me to conclude that, despite the impracticalities of walking such a route, the effect of this order was to retain a public footpath six feet wide running immediately adjacent to the northern boundary of the lane. The consequence of this is that for the most part this path supposedly follows the verge on the northern side of the former carriageway, this consisting of a bank with bushes and mature trees along its length.
9. The northern verge has been measured as varying from 3 feet to 6 feet (0.91m to 1.83m) in width so that it is only in a few places that the definitive public path actually follows the flatter surface of the old carriageway, the remainder lying on the steep bank to the side.
10. There is little doubt that all public rights other than the definitive footpath were extinguished in 1981. The question now is whether the public has established a right of way within the lane beyond the 6 foot width.

The case for dedication of a public right of way

11. 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 (the 1980 Act). For this to have occurred,

³ Information provided at the inquiry suggests that this stopping up order may have been prompted by concerns over travellers making use of the road. The continuation of Milksey Lane northwards from point B to Pinch Lane had been closed by a Special Roads (Improvements) Order in 1963.

there must have been use of the claimed route by the public, 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 been dedicated as a public path. 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 right of way will be deemed to subsist.

When was the status of the way brought into question?

12. 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.
13. Evidence provided by the objectors points to the existence of a gate at point C being locked in 1994 and on other occasions since then. Evidence from witnesses at the inquiry suggests this gate was installed in the early 1990s along with a wooden stile in the adjoining fence. Consequently, any passage by horse riders would have been prevented by this locked gate whereas pedestrian access could continue via this stile.
14. It seems to me that the extent of the public right of way was quite clearly challenged by this locked gate insofar as horse-riders and cyclists were concerned. However there could not be use 'as of right' throughout the preceding 20 year period since prior to 1981 any such use was in the exercise of rights which were subsequently stopped up by Court order. Therefore it would serve no purpose for me to consider this any further.
15. HCC accepted that an application dated 2 July 2014 made by the British Horse Society for a modification order to record Milksey Lane as a bridleway was the event that brought into question the status of the lane. The objectors do not dispute this, and I agree that, in the absence of any other earlier event⁴, the application should be regarded as the point at which the extent of the public's rights was challenged.
16. It follows from this that I need to examine the claimed use by the public during the preceding twenty years, July 1994-July 2014.

Evidence of use by the public 1994-2014

17. 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.
18. In support of the claimed route is the written evidence of use from 32 people; 29 people who completed standard forms and three who provided written witness statements. Four of these claimants gave evidence to the inquiry of their long-standing use on foot.
19. Whilst this body of evidence also refers to use on horseback and riding a bicycle, for the purposes of examining use capable of raising a presumption of dedication as a public right of way, I shall focus here only on pedestrian use.

⁴ An earlier application was made by the East Herts Footpath Society on 26 March 2013 but this related specifically to Green Lane, not to Milksey Lane.

20. Nineteen of the 32 claimants record their use on foot, seven of whom used the lane for the whole of the relevant period. Three others have used the route for over 10 of the 20 years.
21. Each of the four people from whom I heard oral evidence were able to contribute details of their own use of the route over many years, walking the lane both by themselves and with other family members and friends, all having considerable knowledge of the locality dating back before 1994.
22. Whilst I accord greater weight to the evidence of these four people, all of whom submitted to cross-examination, the written statements from the remaining claimants are largely consistent with this oral evidence.
23. 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. There is no suggestion that people walked the route in secret, that use was somehow by force or that it was on the basis of permission⁵. I am therefore satisfied that the claimed use by pedestrians was 'as of right'.
24. However in order to raise a presumption of dedication the claimed use must also have continued throughout the relevant period without interruption.

Was use continuous and without interruption?

25. I have noted above that the gate and stile at point C were probably installed in the early 1990s and were in place throughout the whole of the twenty-year period, save that the stile appears to have collapsed and become unusable by 2010. It follows from this that all use claimed during the years 2010 to 2014 will most probably have been through the open gate. Prior to this, the evidence indicates both were used.
26. In her written statement Ms MacDonald recounts her recollection that this gate was locked with a heavy chain and padlock, in particular on a memorable occasion in 1994 when an incident near to the gate confirmed it was locked. This is corroborated in the evidence of Ms Harling who recalls the gate being locked intermittently and Ms Nye who kept her horse at the livery yard in Milksey Lane for six months in 2002.
27. HCC accepted that this raises sufficient doubt over use by horse riders and cyclists during the relevant period to reject the original claim that use of that nature was continuous and without interruption. I agree with that analysis and therefore conclude that the case in support of a bridleway must fail.
28. In contrast, pedestrians who used the route were able to use the stile if ever the gate was locked or even out of preference if the gate was simply closed. Since none of the claimants who use the lane on foot have indicated that at any time their use was prevented, I conclude pedestrian use was continuous and without interruption.

Was the use over the full width of the lane?

29. The objectors submit that there is no evidence of use of two areas within the boundaries of the former road: one being referred to as 'the triangle of land near to point B at the junction of the Order route with Green Lane and Turf

⁵ I note that the objectors refer to use of the lane by horse riders from the nearby stables being with permission, but it has not been suggested that this applied to any of the claimed use by pedestrians.

- Lane, and the second being the sloping bank forming the southern verge of Milksey Lane.
30. Having examined the written evidence from the claimants and heard evidence from witnesses at the inquiry, I am inclined to agree, at least to the extent that these are omitted from DCC's further amended plan⁶.
 31. However the objectors contend that the area shown to no longer form part of the public right of way at the triangle should encompass the whole of the space between Turf Lane and Milksey Lane.
 32. What I would describe as the western side of the triangle in fact forms part of the restricted byway along Turf Lane, its width described in the Order Schedule as "between 5.5m and 12m" as shown on the Order Map. As I have noted above, this part of the Order has already been confirmed by HCC and I have no jurisdiction over it.
 33. Nevertheless, I am satisfied that the evidence before me does not support use by the public of the remainder of the triangle or of the southern verge of Milksey Lane.
 34. The objectors also challenge the claimed use of two other parts of the Order route: (a) the first 10-15 metres of Milksey Lane behind the gate at point C, their argument being that users of the stile would naturally bypass this lower part of the lane, and (b) what were referred to at the inquiry as "the mulchy parts" (these being the strips along the two edges of the visibly metalled road surface, each around a foot⁷ or so wide on which decaying vegetation has collected).
 35. It is the objectors' submission that the evidence points to use of the northern mulchy part together with a section of the metalled part no more than six-foot in width located along the northern side. They contend that the remaining four feet and the southern mulchy part should be excluded from the Order, as should the area behind the gate on the basis that these have not been used.
 36. Having examined the evidence from claimants and, in particular, listened to the witnesses at the inquiry, I find the point raised by objectors concerning a lack of use of these two areas is not substantiated.
 37. Seasonal changes in weather and vegetation may influence where within the flat plane of the former carriageway people have actually walked but overall over the year and throughout the relevant twenty years there has been no physical restriction (other than the raised banks) to prevent people using the full width of the lane. Similarly at the gate, they were clearly times when pedestrians did find the gate closed and locked when the line they took would have veered towards the stile. Equally the gate was often found to be open in which case people walked directly through, the full width of the gateway being available to them.
 38. In conclusion, I reject the objectors' submission that two additional areas (along the south side of the lane and behind the gate at point C) should be excluded from the width of the public footpath to be recorded.

⁶ This is the second amended plan which shows the Order route as a public footpath but also revises the extent of the highway shaded in grey. This is labelled "HCC amended order plan – January 2019".

⁷ 0.3m

39. In conclusion I find the evidence before me sufficient to raise a presumption of dedication in relation to the claimed public right of way but as a footpath only and over the width shown shaded on HCC's further amended plan.

The intentions of the relevant landowners

40. Ownership of the lane is not recorded by the Land Registry at present. The objectors believe that, historically, it ran with titles purchased from Mr MacDonald and now registered to them; registration with the Land Registry is said to be pending.
41. HCC submits that there is no proof that, during the relevant period, Mr MacDonald was the owner of the lane.
42. As I made clear at the inquiry, it is not my role to adjudicate on the matter of landownership, but even if Mr MacDonald was the owner of the entire lane, the only relevant action that might be attributable to him was the erection of the gate and stile at C⁸.
43. Evidence suggests that the purpose of this gate was partly to prevent dogs from Graveley House running out onto Graveley High Street, to prevent travellers gaining access to adjacent fields and/or to protect the security of the stables⁹ when unattended. There is nothing to indicate that the gate was intended to challenge use by the general public, either on foot or horseback (although the effect of the locked gate was to prohibit the free passage of horses).
44. I conclude from this that there is little, if any, evidence to show that the landowner during the relevant period made clear to the public in any way a lack of intention to dedicate any part of the lane as a public footpath.
45. On this point I acknowledge the submission made by the objectors to the effect that the landowner would not have felt capable of challenging public use of the lane given the existence of the definitive footpath. In effect it is argued that 'rights that cannot be prevented cannot be acquired'.
46. I reject this argument, not least because the objectors themselves have demonstrated very clearly that it is possible to challenge use over and above what is already recorded: after they acquired ownership in 2015 a notice was erected at point C which states "PRIVATE LANE : NO UNAUTHORISED USE : FOOTPATH WIDTH 6 FEET ALONG FENCE LINE".
47. In addition, section 31(6) of the 1980 Act provides a mechanism for landowners to declare the public rights of way they accept and, by implication, those they do not. HCC has confirmed that no such statements or declarations have been lodged at any time in relation to the Order route.
48. I therefore conclude that there is insufficient evidence before me to demonstrate that, during the period 1994-2014, the owner of Milksey Lane brought to the attention of the public a lack of intention to dedicate a public footpath over the full width of the lane (excluding the southern bank and part of 'the triangle').

⁸ Ms MacDonald thought the gate was either erected by him or on his instruction from farmer Mr Worboy.

⁹ Established on the site in 1999

Other matters

49. Having concluded that the gate and stile at point C were present at the start of the relevant period, it would appear that these features have existed as limitations on use by the public throughout the twenty years to a greater or lesser extent. It may therefore be appropriate to include these as limitations in the definitive statement.

Summary

50. In conclusion, and on the basis of the information provided, I am satisfied that the relevant statutory test is met insofar as, on a balance of probability, a public right of way on foot has been shown to subsist along Milksey Lane over a greater width than is recorded on the definitive map and statement.

51. I consider this right of way to include the northern bank (on the basis that this is included within the six-foot width already recorded) plus the former road incorporating both the visibly metalled central section (previously surfaced with tarmac in part) and the mulchy parts on both the northern and southern sides (under which lie a hard surface).

52. In addition, since the gate and stile have been in position since the beginning of the relevant period, this being the point in time when dedication is presumed to have occurred, I conclude it would be appropriate to consider recording both as lawful limitations on the definitive statement.

53. Consequently, I propose to confirm the Order with modifications (a) to remove references to the status of Graveley 18 being recorded as a bridleway, (b) to amend the width of Footpath Graveley 18 recorded on the definitive statement so as to reflect the area shaded grey on HCC's further amended order plan¹⁰, and (c) to record as limitations the gate and stile at point C.

Conclusion

54. 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 the modifications referred to in the preceding paragraph.

Formal Decision

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

In the Order schedule

- In **Part I: Modification of the Definitive Map - 'Description of public right of way to be upgraded'**: delete the entry for Milksey Lane;
- In **Part II: Modification of the Definitive Statement - 'Variation of particulars of path or way'**: amend 'Width' to read "Between 4m and 8m..." and amend 'Limitations' to read "Gate and stile at TL 2307 2808";
- Change all references to 'Bridleway' (or 'BR') 18 to 'Footpath' (or 'FP') 18;

¹⁰ A copy of this plan is attached to this Interim Order Decision for clarity.

On the Order map

- Delete from the key "footpath to be upgraded to bridleway (B-C)" and amend "Existing footpath" to read "Existing footpath/footpath to be recorded with additional width (B-C);
 - Amend the notation used on the map for B-C to that for the above and reduce the area shaded grey.
56. Since the confirmed Order would (if modified) not show a way as it is shown in the Order as made¹¹, 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

¹¹ In particular changes noted in paragraph 53 at (a) and (c).

APPEARANCES

In support of the Order

For the Order-Making Authority:

Ms R Scott Of Counsel; instructed by Hertfordshire County Council

Who called:

Ms A Simkins Definitive Map Officer; Hertfordshire County Council

Ms A Conchie Applicant (2013)

Mr H Bracey

Ms H Lumley

Mrs H Thompson

Opposing the Order

Mr C Bryden Of Counsel; instructed by Barnes & Partners, 90 Silver Street,
Enfield, Middlesex, EN1 3EP on behalf of Mr A & Mrs E Pickup

Who called:

Mr A P Pickup Objector

DOCUMENTS

1. Copy of the statutory objection and associated correspondence
2. HCC's statement of case dated October 2018 and appendices
3. Proof of evidence of Ms A Simpkin dated 2 January 2019
4. Statement of case submitted by Dr P D Wadey on behalf of the British Horse Society dated 30 November 2018
5. Statement of case submitted by Barnes & Partners on behalf of Mr & Mrs Pickup dated 29 November 2018
6. Proof of evidence of Mr A P Pickup dated 20 December 2018
7. Email to the Planning Inspectorate from Mr B Worrell sent 2 September 2018
8. Email to the Planning Inspectorate from Dr P Wadey sent 17 January 2019

Submitted at the inquiry

9. Updated appendices to HCC Statement of Case (user evidence chart and extract from current definitive map and statement)
10. Set of photographs of the Order route provided by HCC dated December 2018 & January 2019
11. Copy of email from HCC to Mr Pickup dated 22 June 2018
12. Extract from "the South of Graveley - North of Radwell (Baldock By-Pass) Special Roads (Improvements) Order 1963" relating to stopping up of Green Lane
13. HCC's (further) requested amendments to the Order

The Hertfordshire County Council
 (Graveley 15, 18 and 21 and Wymondley 24)
 Modification Order 2016

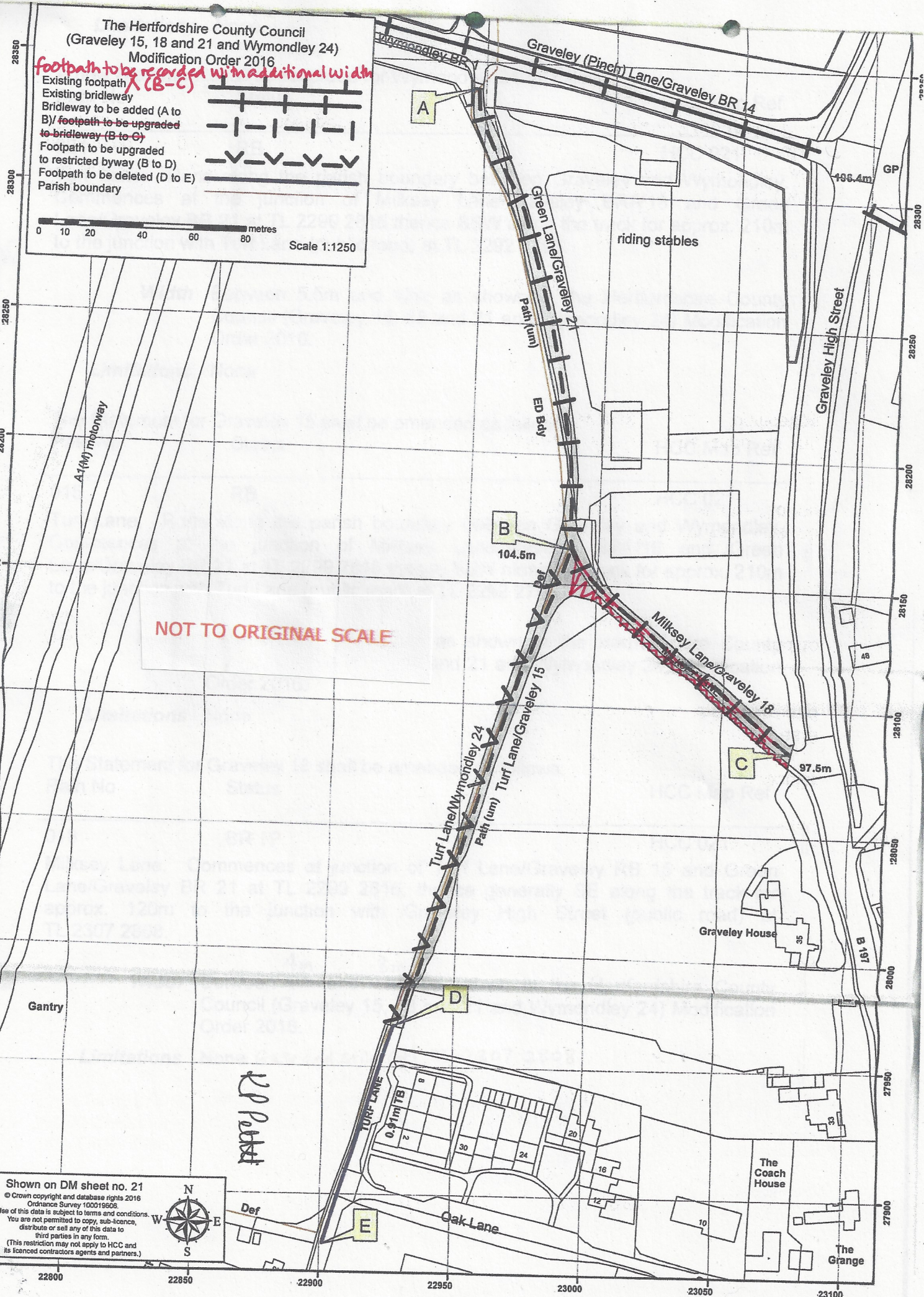
Footpath to be recorded with additional width (B-C)

- Existing footpath
- Existing bridleway
- Bridleway to be added (A to B) / *Footpath to be upgraded to bridleway (B to C)*
- Footpath to be upgraded to restricted byway (B to D)
- Footpath to be deleted (D to E)
- Parish boundary

0 10 20 40 60 80 metres

Scale 1:1250

NOT TO ORIGINAL SCALE



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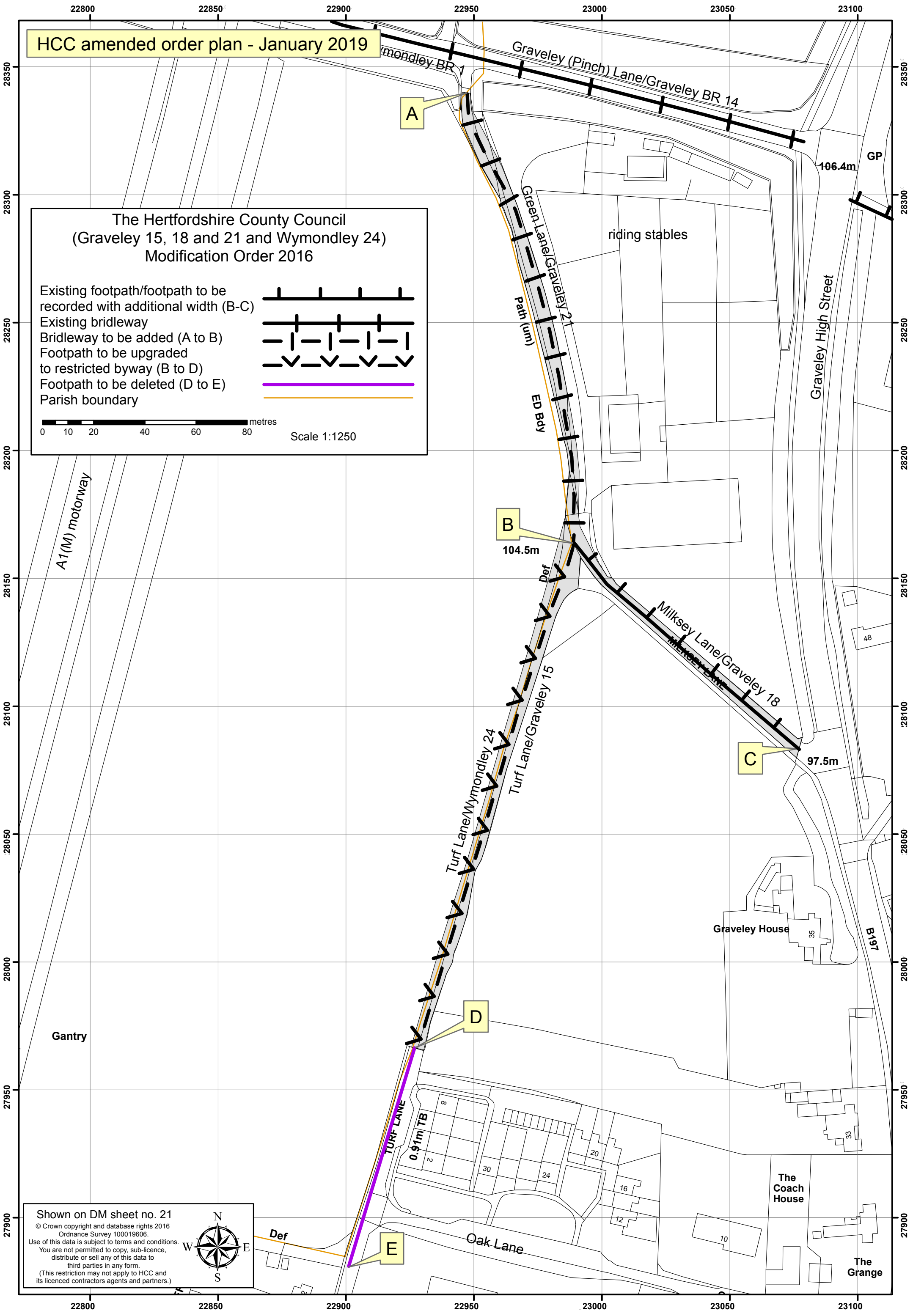
RP Path

HCC amended order plan - January 2019

The Hertfordshire County Council
 (Graveley 15, 18 and 21 and Wymondley 24)
 Modification Order 2016

Existing footpath/footpath to be recorded with additional width (B-C)
 Existing bridleway
 Bridleway to be added (A to B)
 Footpath to be upgraded to restricted byway (B to D)
 Footpath to be deleted (D to E)
 Parish boundary

0 10 20 40 60 80 metres
 Scale 1:1250



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