



Order Decision

Inquiry held on 20 February 2019

by Sue M Arnott FIPROW

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

Decision date: 17 April 2019

Order Ref: ROW/3194825

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the East Riding of Yorkshire Council (Howden Footpath Nos 15 and 16) Definitive Map and Statement Modification Order 2017.
- The Order is dated 1 November 2017. It proposes to modify the definitive map and statement for the area by adding two footpaths between Knedlington Road and Marsh Drain, Howden, as shown on the Order map and described in the Order schedule.
- There were two objections outstanding when East Riding of Yorkshire Council submitted the Order for confirmation to the Secretary of State for Environment, Food and 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 20 February 2019 I held a public inquiry at the Shire Hall in Howden, having viewed the claimed public footpaths from nearby public places, unaccompanied, during the previous afternoon. After the close of the event, I was able to make a full inspection of the claimed routes, on this occasion being accompanied by representatives of both supporters and objectors to the Order.
2. Two objections were submitted following publication of the statutory notice within the period specified. These were from Howden Town Council (HTC) and the Knedlington Estate. For ease of reference here I shall refer to the Knedlington Estate as 'the landowner' although a short stretch of the Order route at the point marked B on the Order map lies outside its tenure.
3. The existence of a further objection was raised at the inquiry when a copy was produced. This letter was not received within the statutory period and therefore was not accepted by the order-making authority as 'duly made'. Nevertheless, I have noted the nature of the objection and address below the points it raises.

Main Issues

4. The main issue here is whether the evidence is sufficient to show that, in the past, the Order route(s) have been used in such a way that public footpaths can be presumed to have been established.
 5. The East Riding of Yorkshire Council (ERYC) made the Order on the basis of events specified in sub-section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 (the 1981 Act). Therefore if I am to confirm it, I must be satisfied that, on
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a balance of probability, the evidence shows public rights of way subsist along the routes described in the Order between the points labelled A, C and B (proposed as Footpath 15) and between C, F, D and E (proposed as Footpath 16).

Reasons

6. The case in support of the Order is based on the presumed dedication of public rights 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, there must have been use of the claimed route(s) by the public on foot, as of right and without interruption, over the period of 20 years immediately prior to their status being brought into question so as to raise a presumption that they had been dedicated as public footpaths. 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 ways for use by the public; if not, public footpaths will be deemed to subsist.

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 so as to define the relevant retrospective twenty-year period.
8. In May 2011 one of the two claimed footpaths was blocked a short distance north of point A and a notice was erected which stated "KNEDLINGTON ESTATE – PRIVATE LAND – PLEASE KEEP OUT". A similar sign was erected at point B¹ and vegetation used in an attempt to block access at both A and B; this in turn prevented access to the linked route, C-F-D-E. Exclusion of the public prompted submission of an application to ERYC to record the two connected paths as public rights of way: A-C-B and C-F-D-E.
9. It is not disputed that this action brought into question the extent of the public's rights at that time.
10. Subsequently, in February 2012, the small weir that had (since the mid-1970s) enabled claimants to cross Marsh Drain at point B was removed by HTC, further challenging the existence of any public rights. This might also be regarded as bringing into question the status of the way but since use had ceased before the weir was removed, there is no prospect of demonstrating a period of twenty years' continuous use leading up to this point in time. Consequently, there is little value in considering this prospect further.
11. Evidence shows that the notice erected in 2011 near to point A was not the first in this location. A photograph² dated 2009 shows a sign attached to a short length of fence or gate but no wording is visible. This was clearly a different sign as the 2011 one was (and still is) positioned on two sturdy wooden posts.
12. Seven years earlier, evidence shows that the main advisor to the Estate (Mr Harrison) had been in touch with the local agent (Mr Screeton) to make arrangements to address trespass problems in various places. As a result, wooden signs were commissioned in late 2002 stating "KNEDLINGTON ESTATES –

¹ And on other boundaries of the Estate's property

² Taken from Google Streetview

- PRIVATE LAND – PLEASE KEEP OFF³". A quotation for the purchase of 10 such notices, a delivery note for the same and an invoice dated 12 April 2003 for their installation were produced by the landowner.
13. At the inquiry Mr Screeton stated that he himself checked that the signs had been erected by the contractor and could confirm one was placed near to point A (although this was not substantiated by any of the claimants). Nonetheless it seems reasonable to deduce that the sign visible in the 2009 photograph was quite probably the one erected in 2003 (although there is no evidence to indicate how long its wording continued to be visible).
 14. Some witnesses referred to there being an old gate at point A, describing it as being dilapidated and propped to one side. Mr Neal (previously game-keeper for the landowner) concurred, saying that it had sometimes been closed but never locked. Consequently, it would not have challenged public use.
 15. At the inquiry I heard that Mr Boulden, a previous tenant who had farmed the land at least back to the late 1980s, had occasionally put up home-made signs of his own to discourage people from walking in his fields. So too had Mr Neal in his role as game-keeper and as the manager of a shooting syndicate that made use of the land. However, it is difficult to be certain about the dates, positions and wording of such notices and I am inclined to conclude that these did not challenge users in such a way that their right to continue walking there was in question.
 16. There is also mention in one of the claimant's forms of an elderly lady being challenged by a man with a gun in 2007. No further information is available to substantiate this, or the particular circumstances.
 17. In summary I find that there are two occasions when the rights of the public have been brought into question and which require further consideration: April 2003⁴ and May 2011. Thus the two 20-year periods which require closer examination are 1983-2003 and 1991-2011.

Evidence of use by the public (1983-2003 and 1991-2011)

18. If a presumption of dedication is to be raised, qualifying use by the public during any 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.
19. In support of the claimed routes is the written evidence of use from a total of 17 people who completed standard forms claiming use of Footpath 15 but only 14 who used Footpath 16. Four of these claimants gave evidence at the inquiry and submitted to cross-examination. To investigate details of the weir across Marsh Drain at point B, ERYC wrote to all the claimants and replies were received from 7 people clarifying aspects of their use.
20. Whilst I accord greater weight to the evidence of the four people who gave evidence in person at the inquiry and submitted to questioning, the written

³ Photographs of notices erected elsewhere on the Estate suggest that this word was altered to 'out'.

⁴ Whilst ERYC submitted that 12 April 2003 should be taken as the date of 'bringing into question', I consider the date the signs were actually erected on site to be the relevant date of challenge. That is not necessarily the date of the invoice for the work but nothing appears to turn on this.

statements from the remaining claimants are largely consistent with the oral evidence. However I agree with Mr Wood (representing the landowner) that in one respect these forms cannot be regarded as wholly reliable.

21. Listening to the evidence given by the four supporting witnesses, it became apparent that not all had used the exact route of Footpath 16 in the vicinity of the unlabelled field corner to the west of point B. There is a spinney in this area and it seems some people walked in amongst the trees following the route shown on the Order map whereas others tended to stay at the field edge of the woodland⁵.
22. As Mr Wood emphasised, I cannot be certain whether the 14 claimants who used Footpath 16 followed this alternative or the Order route, other than for the four people who spoke at the inquiry. Insofar as Footpath 16 is concerned, that creates a significant degree of doubt over the weight I can attach to the forms in support of the Order route as drafted.
23. In fact the plans attached to the 17 forms claiming use of Footpath 15 are not beyond criticism since in some cases (though not all) these appear to have been pre-drawn so that the line claimed crosses Marsh Drain at a point slightly west of point B. However in this case, given the written descriptions on the forms which refer to using the path to access Howden Marsh, some mentioning the weir, and the lack of any other feasible crossing point, I am prepared to accept that the discrepancy has arisen from a lack of appreciation by the claimants that absolutely accuracy in marking up the map is critical.
24. The landowner challenges the extent of use claimed in several respects. It was Mr Screeton's evidence that the land had been tenanted both before and after 1998 when his firm took over management of the Knedlington Estate at Howden. He said the tenant, Mr Boulden, kept both cattle and sheep on the land at various times and took an annual hay crop from both fields, being required to keep the land 'in good heart'. He argued that this would not have been compatible with the public walking the claimed paths.
25. However Mr Neal, who had been involved with the land since the mid-1980s, said that whilst the present tenant had kept sheep there from spring through to autumn for the last 9 years or so, Mr Boulden did not keep his stock in these fields. To an extent, this accords with Ms Smith's evidence that from the date she first walked these routes in late 2002, she did not see livestock in the fields until after the obstructions in 2011. Yet Cllr Roberts recalled temporary fences being used to contain stock, these being positioned right up to the hedge line and as far back as 1992.
26. None of the claimants encountered any obstructions before 2011. In all probability, had they done so (given the strength of feeling that this was a well-used public path) this would have prompted an earlier claim that a public right of way existed. Although temporary fences may have been used at times in the past, with no certainty over their exact location and timing I conclude that prior to 2011 these did not prevent use of the routes now at issue.
27. In challenging the sufficiency of use I note the point made on behalf of the landowner that the claimed paths have never appeared on any published map. I have examined the maps provided and agree these offer no support for the

⁵ Following the close of the inquiry ERYC provided a plan showing the line of this alternative path.

- existence of a path over any part of the Order route⁶. However, that does not mean that the claimed use did not take place. On an aerial photograph (dated 2002) there is no sign of any worn path (although parts of Footpath 16 are detectable on a similar photo taken in 2008) but the majority of both routes is hidden by the tree canopy and neither photo offers reliable proof of a noticeable track on the ground⁷. However what this does show is that there was no worn line visible on a line directly between points A and B⁸.
28. Of the 17 claimants who say they walked Footpath 15, all did so during the period 1991-2011 but only 15 used the path between 1983 to 2003. There is no evidence to indicate that this use was at any time by force, in secret or with permission, therefore it was 'as of right'. I have noted the comment of Mr and Mrs Drinkwater (users from 1989 to 1999) who wrote on their form that "*We were told by locals that it was a public right of way to the marsh so had no reason to seek permission to use (it).*"
29. Seven of these claimants used the path throughout the whole period 1991-2011 whereas only 5 did so for all 20 years from 1983 to 2003. The landowner submits these numbers are low, given the population of Howden, but I have noted many comments on forms referring to the claimants frequently seeing other people similarly walking this path.
30. When aggregated with the use claimed for lesser periods, I judge there to be sufficient evidence to represent qualifying use of the route A-C-B during both 20-year periods so as to raise a presumption in both cases.
31. Turning to those people claiming use of Footpath 16, all 14 did so between 1991-2011 (7 for all 20 years) but only 12 walked it during the earlier period (5 for the whole period). Although these figures are not significantly less than for Footpath 15, I am unable to place as much weight on the evidence forms since there is insufficient detail available from each claimant (other than those who gave evidence at the inquiry) for me to be quite sure about the route they took. A difference has been highlighted in the north-east field corner between points E and F but there is also a question over D-E: was this in fact the point at which all users crossed from one side of the field to the other? This is an important issue as general wandering cannot establish a right of way.
32. It is because of that remaining doubt that I find the evidence is not sufficiently robust to raise a presumption that the Order route (or the amended line of Footpath 16 shown on the additional plan submitted by ERYC) has been dedicated as a public right of way.
33. 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 via A-C-B but not for circular route C-F-D-E-F for the reasons given in the preceding paragraph. In summary I find that the evidence of use before me is sufficient to raise a presumption of dedication in relation to Footpath 15 but, since doubts remain over Footpath 16, no such presumption is raised.

⁶ My attention was drawn to a footbridge over Marsh Drain on an Ordnance Survey map published in 1958 (although missing from later editions). However this was not at point B.

⁷ Nevertheless, I have noted that the applicant, Mr Milner, produced photographs showing his family walking the routes, for the most part following the worn lines of vehicular tyre tracks.

⁸ Mr Wood submitted that with nothing to prevent people walking directly from A to B, there would be no reason for people to have followed the Order route around the field edge via point C, other than in times of flood.

The intentions of the relevant landowner(s)

34. ERYC is itself one of the riparian owners of land alongside Marsh Drain, owning the Howden Marsh Nature Reserve which has been leased to HTC since 1976. In the lease renewed in 2006 (and eventually superceded in 2015) the landowner required HTC to maintain only three access points to the Reserve (which excluded point B), to "*remove all other unauthorised access points and to ensure no other access points are created without the consent in writing of the lessor*". It is not clear whether this same clause appeared in the lease which was current during the period 1983-2003.
35. Even if it did, the fact remains that there is no evidence that any overt action was taken at any time to deter pedestrians walking across the weir until its removal in 2012, after both relevant periods.
36. Land on the south side of Marsh Drain lies within the Knedlington Estate. Mr Screeton confirmed that there had been no notices erected at point B on behalf of the landowner until 2011. Various signs had been placed by Mr Boulden and by Mr Neal over the years but these had been on the initiative of both men, not on the instruction of the landowner; therefore such notices cannot be taken to represent the landowner's view.
37. On behalf of the landowner, in 2002 Mr Harrison had been alive to the problems of trespass and, through Mr Screeton, had put in place notices at various points on the Estate to deter unauthorised access. Point A had been judged to be one of those points. Although by 2009 the wording of the notice was not clearly visible (at least on the 'Streetview' photograph) I consider it reasonable to deduce that the wording in 2003 ("PRIVATE LAND – PLEASE KEEP OUT") was clear, overt and sufficient to make clear the landowner's position, even if claimants failed to notice it, chose to ignore it or simply believed it did not apply to them as they thought they were using an accepted public path.
38. Having agreed that a robust notice was erected in April 2003 on the authority of the landowner's agent and making clear the landowner's position, I find this to be sufficient to rebut any presumption that between 1991 and 2011 there was any intention to dedicate a public path leading from point A.
39. However there is no such statement during the 20 years preceding the 2003 notice and no other actions that can be dated, and attributable to the landowner, that might indicate the landowner's intentions. Neither have any statements or declarations been deposited under the provisions of Section 31(6) of the 1980 Act. It follows from this that insufficient steps were taken during the 20-year period 1983-2003 to rebut the presumption of dedication raised by public use of the path A-C-B.
40. I therefore conclude that the necessary tests are satisfied by the evidence but in relation to this part of the Order only.

Other matters

41. As I made clear at the inquiry, the merits of the Order routes are not at issue here. I have therefore given no weight to arguments from supporters that these routes provide a valuable link for pedestrians to reach Howden Marsh Nature Reserve from Knedlington Road and offer a useful circuit for dog-walkers; neither have I taken into consideration arguments from neighbours concerned about

privacy, security and public parking. 'Red Tractor Status' of the farm land is not a factor I can, nor have, taken into account.

42. I recognise that people may have difficulty crossing Marsh Drain now that the weir no longer exists. However, the Order is made (and now confirmed) on the basis that the route was walked (and was capable of being walked) during the relevant 20 years. Any replacement (in whatever form) would be a matter for the highway authority to pursue with the appropriate approvals (if required⁹).
43. I note here that ERYC was criticised by the landowner for altering its case in support of the Order before the inquiry. When it decided to make the Order, it did so on the basis that a period of 20 years had been established between 1989 and 2009, the way having been brought into question by the notice visible in the photograph from 2009. After evidence was provided to show that notices were erected in 2003, ERYC had shifted its stance.
44. On this point I see no difficulty with an order-making authority reacting to evidence it subsequently discovers once an order has been made, so long as its case is made known to other parties in advance of any inquiry. In fact ERYC made its revised submission clear in its statement of case; therefore all parties would have been aware of this and able to respond accordingly. I consider there to have been no prejudice in this respect.

Summary

45. 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 A-C-B. Consequently, I conclude that the Order should be confirmed with a modification to the Order to remove the route shown between points C, F, D and E.

Conclusion

46. 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 modifications to the Order as referred to in the preceding paragraph.

Formal Decision

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

In the Order schedule

In Part I: MODIFICATION OF DEFINITIVE MAP: Description of path or way to be added

- Delete item (b) (Footpath 16);

In Part II: MODIFICATION OF DEFINITIVE STATEMENT: Variation of particulars of path or way – additions:

- Delete entry for Footpath 16;

⁹ It was stated that the Ouse and Humber Drainage Board would have to give consent for a new footbridge but this was not explored at the inquiry.

On the Order map

- Amend the line of "Footpath to be added" to remove section between points C, D, E and F as shown.
 - In all other instances in the Order, delete references to Footpath 16;
48. 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

Ms D Wesselby Senior Legal Officer; East Riding of Yorkshire Council

Who called:

Mr M Milner Applicant

Mr D McLachlan

Mr R Morris

Ms C Smith

Opposing the Order

Mr M Wood Director, ET Landnet Ltd; on behalf of the Knedlington Estate

Who called:

Mr I Screeton Principal, Screetons Land Agency

Mr R Neal

Cllr H Roberts On behalf of Howden Town Council

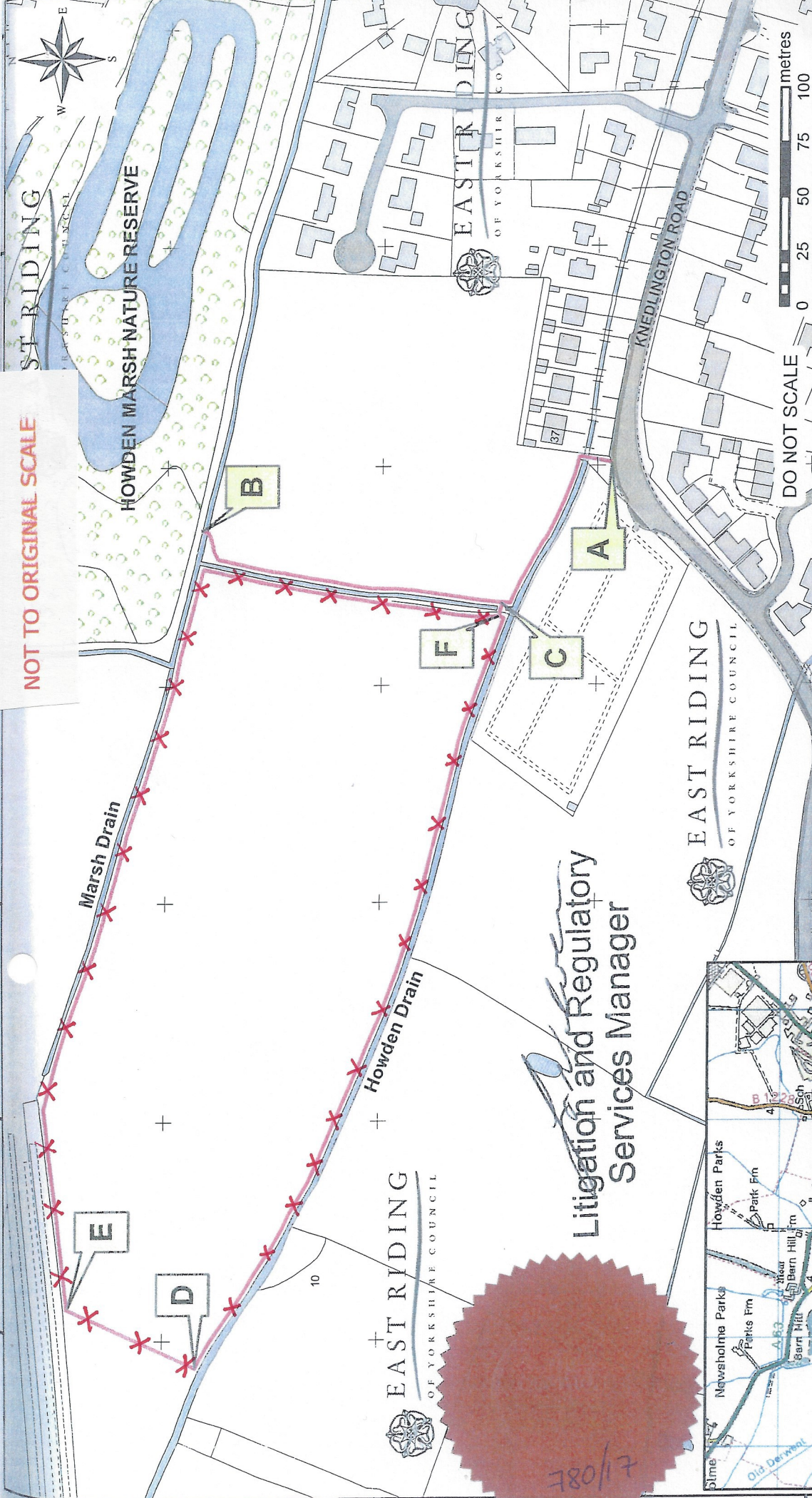
DOCUMENTS

1. Copy of the statutory objections
2. ERYC's statement of case together with associated documents
3. ERYC's proof of evidence and summary proof submitted on 4 October 2018
4. Statement of case of Mr M Milner submitted on 26 July 2018
5. Statement of case on behalf of the Knedlington Estate submitted on 3 August 2018
6. Proof of evidence of Mr I Screeton dated 27 September 2018
7. Proof of evidence of Mr R Neal dated 27 September 2018
8. Proof of evidence of Mr R Drury dated 27 September 2018

Submitted at the inquiry

9. Copy of letter dated 21 December 2017 from Mr & Mrs Jinks to East Riding of Yorkshire Council
10. Statement to the inquiry of Cllr Mr H Roberts
11. Additional photographs provided by Mr M Milner
12. Amended copy of the Order submitted by ERYC showing proposed amendment to line of Footpath 16

NOT TO ORIGINAL SCALE



Litigation and Regulatory Services Manager

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EAST RIDING OF YORKSHIRE COUNCIL
 Planning and Economic Regeneration

Alan Manzius

EAST RIDING OF YORKSHIRE COUNCIL
 Planning and Economic Regeneration

The East Riding of Yorkshire Council
 (Howden Footpath Nos. 15 and 16)
 Definitive Map and Statement Modification Order 2017

ORIGINAL SCALE	DATE	DRAWN	APPROVED	DRAWING NO.
1 : 1750	Oct 2017	MD	GG	PER/DM/S14/79/80/HOWD/DRG03

Legend

Footpath to be added (A-B) (G-F-D-E-F)

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