



Appeal Decision

by **K R Seward Solicitor**

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

Decision date: 01 August 2019

Appeal Ref: **FPS/B3600/14A/5**

- The appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Surrey County Council not to make an Order under Section 53 of that Act.
- The application dated 8 October 2013 was refused by the Council on 21 November 2018.
- The appellant claims that the definitive map and statement for the area should be modified by adding a route between Low Lane/Lower Farnham Road, Badshot Lea to 'The Moors' road, Tongham, as a bridleway.

Summary of Decision: The appeal is dismissed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine this appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981. I have not visited the site, but I am satisfied that I can make my decision without doing so.
2. A copy of the map accompanying the application showing the claimed route is attached for reference purposes. Surrey County Council ('the Council') submits that the application plan is not an accurate reflection of the routes which were or could have been used. It has produced another plan on which all routes claimed to be used are plotted and with notable points labelled. This plan is also attached for reference purposes. In places it is difficult to reconcile the two maps along the western half of the route. Where, as in this case, an alignment is hand drawn it is necessary to make allowances for possible discrepancies and I bear this in mind in my considerations. On the Council's map the claimed route appears to be A-B-C-D-E, D-J and H-F1.
3. The Council identified six possible landowners affected by the routes used, including itself and The Council of the Borough of Rushmoor. All landowners were notified of the application. One landowner objected to any route affecting their land. Based on the Title Plan this means X-B and U-B as shown on the Council's plan. Neither of these sections form part of the claimed route although most users say they used X-B rather than the one shown in the application. That being so, I have considered the possibility of an alternative alignment and taken into account the landowner's evidence raised in objection.
4. Of the landowners affected by the application route only Hanson Quarry Products Europe Ltd objected as the owner of Farnham Quarry.
5. I have utilised the description of the claimed route as it appears in the original application form whilst noting that different descriptions appear in the Council's

correspondence notifying the applicant of its decision and the Appeal Form.

Legal Framework

6. Section 53(3)(c)(i) provides that an order to modify the definitive map and statement shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.
7. As set out in the case of *R v Secretary of State ex parte Norton and Bagshaw*¹ an Order to add a route should be made if either of two tests is met:

A: does a right of way subsist on the balance of probabilities?

B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it is necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

Main Issue

8. Therefore, the main issue is whether on the balance of probabilities a public bridleway subsists along the claimed route or is reasonably alleged to subsist.

Reasons

Statutory dedication

9. Section 31 of the Highways Act 1980 ('the 1980 Act') provides that where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right² and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.
10. The applicant indicates that she seeks to rely upon dedication at common law rather than section 31 of the 1980 Act. Nevertheless, I shall consider the possibility of statutory dedication as I could arrive at a different conclusion from the Council.
11. The 20-year period is calculated retrospectively from the date when the right of the public to use the way was brought into question.
12. Most users identified a different access point from those shown by the applicant along the western end of the route. Instead they indicated a point at the junction of Low Lane with St Georges Road (point 'X') which leads in a north easterly direction across the field to pick up the claimed route. In her interview record the applicant acknowledges that most people came in via this diagonal route from the main horse livery in the area.
13. There is wide variance in the dates given in evidence over when the gates and fencing was erected across point X, but there is consensus between the

¹ [1994] 68 P & CR 402

² Meaning without secrecy, force or consent.

applicant and landowner that it occurred in 2009 after Gypsies had camped on the land. This prompted users to find other access points including those claimed along Low Lane and near to Pea Bridge. Before then it appears that very little use was made of these access points. Each access became blocked off in 2012 although a small number of people claim use after this date. I take 2012 as the most likely date that the public use of the route as applied for was called into question.

14. I note that prior to 2012, a locked gate was installed at point 'C'. Access from both point 'A' (as claimed by the applicant) and point 'X' would involve going via 'C'. Quite when the gate was erected is unclear. One user suggests it could have been as far back as the late 1980's. Others thought it was as late as 2008. The minutes of the Farnham Quarry Liaison Meeting held at Farnham Quarry on 11 October 2002 could shed some light. The meeting was attended by representatives of the landowner and reference is made to the problem of motorcycles accessing the site. The possibility is raised of installing kissing gates at the two NW corner public access points and a padlock with keys being available for the horse-riders. A key was given to the local riding school to gain access via the gate at point 'C'. It appears the gate was subsequently left unlocked, but it is unclear when.
15. It emerges from this that at least some of the horse riders who have supplied evidence and gained access via the locked gates did so with the consent of the landowner. That being so, they cannot have used the route 'as of right'.
16. The application was supported by 20 user evidence forms ('UEFs'). All claim use on horseback. Less than half also walked or cycled across the land. A short period by horse and carriage is recorded by the applicant only. Except for one, each UEF is accompanied by a map on which the user has marked the route taken. There is wide variance in the routes shown. It is from these maps that the Council has attempted to identify and plot the alignment of each route.
17. The application route is that claimed personally by the applicant. Three entry/exit points are shown. It is improbable that all three would be used on one occasion and so it appears to encompass different paths taken. That is borne out by witnesses who describe different routes and at different times, some of whom entered and left at a single point.
18. The access point is not the only difference between the users. A small number used an entirely different circular route. Others used parts only of the claimed route and some claimed an additional stretch to form a circular route around the lake annotated on the Council's map as 'Tongham Ponds'.
19. The Council interviewed several of the witnesses who completed UEFs and their signed statements are produced.
20. In her grounds of appeal, the applicant described the route as "*though variable was always available in some form for the whole of the claim period...*". She goes on to explain that "*Evidence forms submitted by users (horse riders) show variations in access points due to the need to deviate as a result of changing agricultural use by the land owners.*"
21. For the application to succeed under section 31 there needs to be sufficient evidence of use of the same defined path. As the access points have changed then it was not the same route used throughout the 20-year period. Some of

the users had landowner consent for at least part of the route. Moreover, very few users claim the same route for the requisite 20-year period prior to the public use being called into question whichever date is taken. Even for the alternative access from point 'X' (which has most support) there is still too much inconsistency over the route used to demonstrate a full 20-year period of use of a defined way by sufficient numbers before gates were erected in 2009.

22. Further doubt is cast upon the continuity of use of any route due to excavation works across large parts of the land in connection with nearby highways operations starting in 1991. Most notably between 1993-1999 a large pit was excavated which is now a lake. Once the works were complete, the whole site was landscaped. The Council suggests that it is unlikely public access was allowed or even possible during the period of works. The impact of these works upon use of the route has not been fully addressed by the applicant.
23. It has not been shown that a route subsists or can be reasonably alleged to subsist for statutory dedication based on the user evidence supplied.

Common law

24. An inference that a way has been dedicated for public use may be drawn at common law where the actions of landowners (or lack of action) indicates that they intended a way to be dedicated as highway and where the public have accepted that dedication.

Documentary evidence

25. The Inland Revenue Map (prepared under the Finance Act 1910) shows the route between A-B uncoloured as being excluded from the adjacent hereditaments and not liable for tax. This could be indicative of it being regarded at the time as a highway. It is usually the case that uncoloured routes are vehicular, but not necessarily so. It seems unlikely that a highway would have terminated as a cul-de-sac at point 'B'. The alternative explanation is that it was a shared access that none of the adjoining landowners claimed to own which may or may not have also carried public rights. I favour this interpretation as being the most plausible and which does not preclude the possibility of the route carrying public rights.
26. Hanson submits that whilst there has been permissive access on foot over some of the route within its ownership this has never amounted to permission for horses. All quarry managers responsible for the site over its operational lifetime since the late 1990's would have discouraged and prevented horse access. That might be expected in areas being actively worked, but the evidence suggests there was not a wholesale ban on equine use.
27. In particular, the minutes of the Farnham Quarry Liaison Meeting held on 11 October 2002 as referenced above record that the issue of "claimed paths" was discussed. Under the heading of "Access for the public" the minutes note:
- "It was suggested that 'kissing gates' could be installed at the two NW corner public access points (garage and Pea Bridge points on Badshot Lea Road), which may restrict some of the motorcycles accessing the site. However, there would have to be some access for the horse-riders, with the possibility of a padlock with keys available." [my emphasis].*
28. From these minutes, the quarry owner clearly realised that the public accessed

its land from two points. Kissing gates would allow pedestrian access, but not horse-riders. The minutes indicate a willingness though to facilitate at least some access for them. It implies that those to whom a key was provided would have consent rather than accommodating horse riders generally.

29. Aerial photographs from 1949-2012/13 reveal signs of worn lines consistent with the presence of paths. In 1999 the alternative line from X-B can be seen. It is only from the 2006 image that a network of paths can be seen clearly which seems to include the application route. Whilst the images indicate use of defined paths from at least this time, they do not demonstrate public use or the type of use.
30. Photographs within the Council's bundle show the gates and fencing at entry point 'A' with a notice affixed which says: 'Permissive Footpath' and 'Please keep to the permissive routes at all times'. A sign attached to a gate, possibly at point 'E', is headed 'Temporary Path Closure'. The signage does no more than confirm the existence of a path and demonstrates that from the time it was erected the landowners consented to pedestrian use.

User evidence

31. Common law requires consideration over whether the use of the route and the actions of the landowners have been of such a nature that the dedication of the route by the landowner as a public right of way can be inferred.
32. This requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the landowners and (iii) whether there is acceptance of the highway by the public.
33. There is no fixed period of use at common law and depending on the facts of the case it may range from a few years to several decades. There is no particular date from which use must be calculated.
34. The earliest claimed use is from the mid-1970s. Horse riders claim regular and continual use of the land throughout the following years until closure of the route. Only 4 or 5 riders say they used the same application route with access via point 'A' and in a couple of those cases the use was limited to about 4 years. In an unsigned statement from one witness whose use started in 1996 it says that the entrance now used from Low Lane (which I take to be access point 'A') was not used by horses as there was always a 'kissing gate'. Upon analysis there is very little support for the route as claimed.
35. There is more support for a route commencing at 'X' with around a dozen users identifying it as the entry point. The affected landowner disputes the evidence of users that this section was used by the public as the land was actively farmed between 1992 or early 1993 and August 1997. Copy correspondence from the time verifies that that there were 4 years or so when the land would have been cropped. Whether that in fact prevented access is unclear. Even if it did, the land could have been used afterwards.
36. One user who previously ran Badshot Lea equestrian centre used the land from 1986-2005. Along with others she used the diagonal access until it was fenced. When a gate and fencing was erected at point 'B' in the late 1980s/early 1990s she recalls a representative of Hanson coming to her home to apologise and

- providing a key for the gate. It was her understanding that the gates and fencing were intended to prevent scrambler bikes.
37. From this account Hanson gave her consent. At least three more users refer to group rides from the equestrian centre which went via point 'X', being nearest to the yard. By implication those users also appear to have had consent.
38. Another user commenced riding the land as a child in the 1970's. As the fields were not fenced it was possible to ride freely and during the 1990's she "used a lot of the fields" with her friends. Over time the landscape changed with bunds appearing. The user accepts it is possible that part of the route across 'Tices Meadow' has changed, but says the same route was followed "more or less". Whilst there were gates, the user cannot recall ever dismounting to open them.
39. Midway along where the two sections of path converge at point 'E', there was a gate. Horse riders say it was unlocked until recent years whereas visitors to the nature reserve maintain it was locked. A locked gate would prevent access to the eastern part of the route. As the dates are unclear over the period involved it is not enough in isolation to defeat a claim at this stage of the process.
40. However, there remains significant inconsistency in the route identified by the various users. With such a divergence in the routes drawn by users it appears that a variety were in use over the land. Roaming at will does not suffice. Even if users stuck to a defined path there is insufficient evidence of volume and intensity of continued use of the application route or the alternative access point to reasonably allege the existence of a bridleway. Moreover, it appears that some riders had landowner consent at least during certain periods to use part of the land and so did not use it 'as of right'.
41. The gates at point 'E' were of type that allowed access on foot. No evidence of pedestrian use has been supplied for me to consider whether there might be a case for lesser rights as a public footpath.
42. Overall, there is insufficient evidence of a public bridleway for a case to be reasonably alleged at common law.

Other Matters

43. Even if the holder of a caution over the land from A-B agrees to a bridleway, as suggested, that has no bearing on whether public rights exist already.

Conclusion

44. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does not show that a right of way subsists on the balance of probabilities or is reasonably alleged to subsist. The appeal should therefore be dismissed.

Formal Decision

45. I dismiss the appeal.

KR Seward

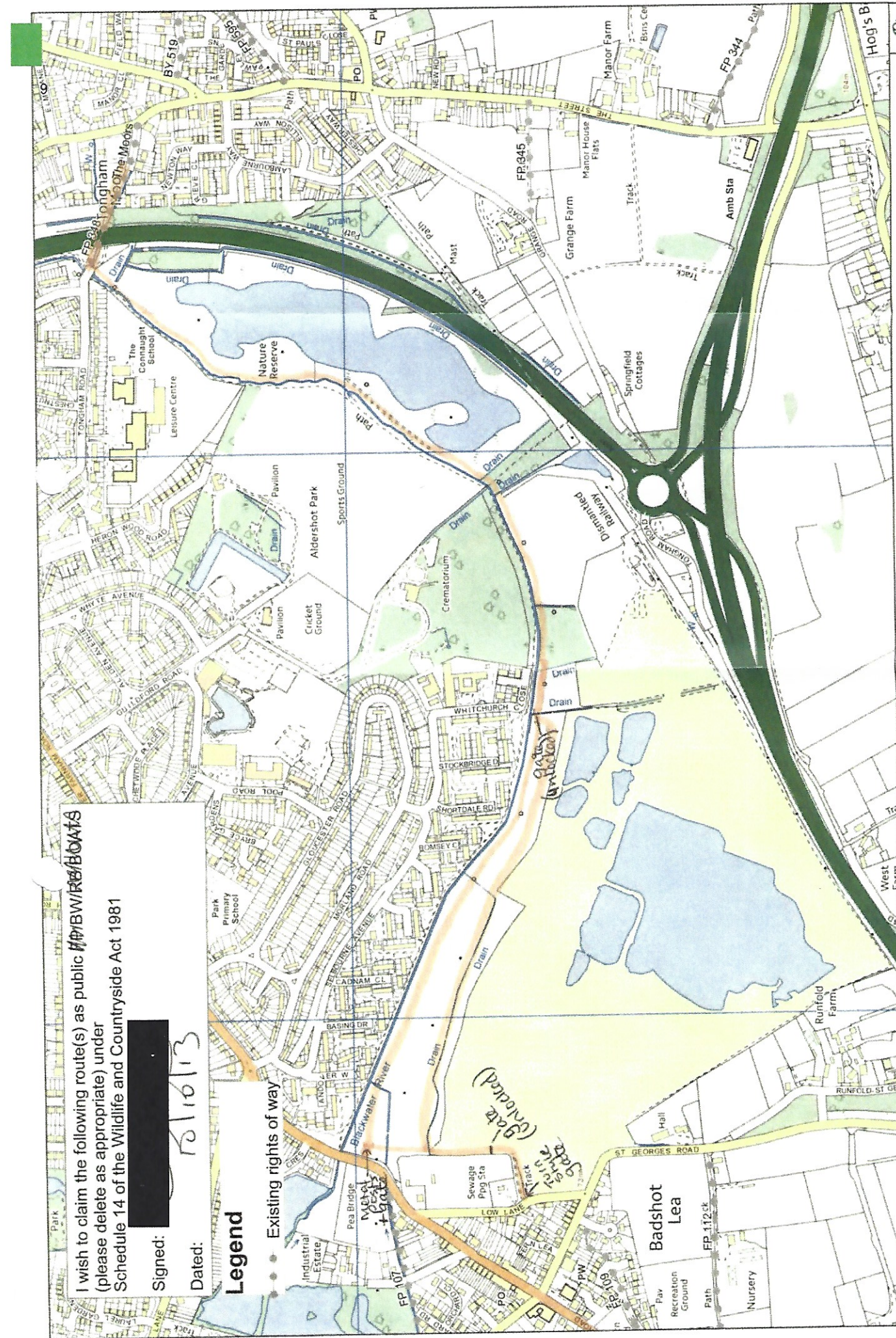
INSPECTOR

I wish to claim the following route(s) as public ~~FP/BW/RE/BOATS~~
 (please delete as appropriate) under
 Schedule 14 of the Wildlife and Countryside Act 1981

Signed: [Redacted]
 Dated: 21/10/13

Legend

Existing rights of way



Alleged public bridleway(s) between Low Lane, Badshot Lea, Farnham and FP 348 "The Moors", Tongham
 Please indicate route(s) used on this plan and any structures along it e.g. gates, bridges, obstructions, notices etc.

Printed By DW
 Printed On 17/09/13
 Scale 1:6,000

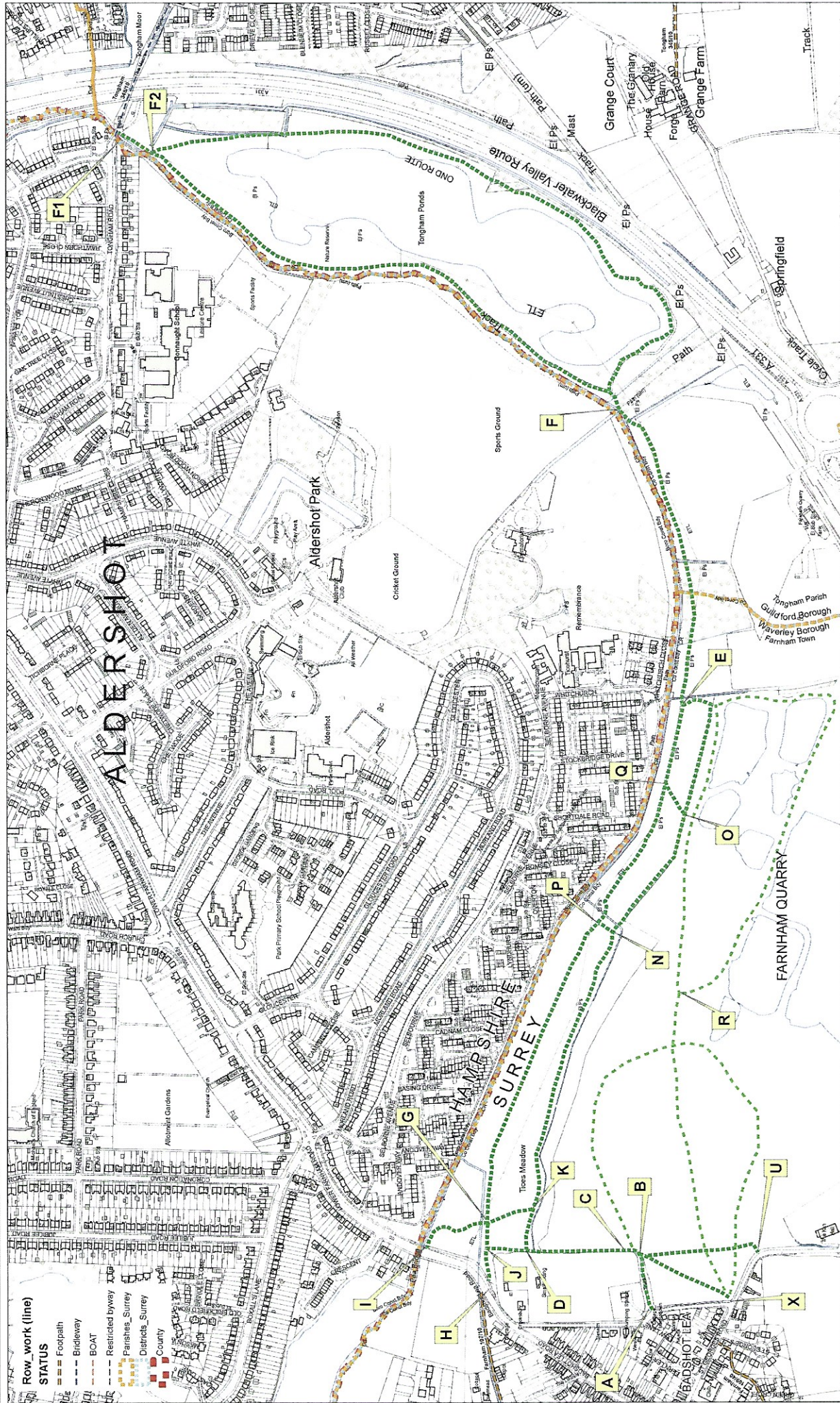
© Crown Copyright. All rights reserved.
 Surrey County Council. Licence No. 1000/863/2006
 PLEASE USE A DARK COLOURED
 PEN TO DRAW YOUR ROUTE

Original Size A4



H93a

Primary alleged public bridleways shown : Secondary alleged routes: - - - - -



Grid Ref. at A. 485463 148573
 O.S. Sheet SU 84 NE
 Drawn by Day
 Date 21/11/2017
 Drawing No. 3/1718/H93a

WILDLIFE AND COUNTRYSIDE ACT 1981
 MAP MODIFICATION ORDER
 BOROUGH OF WAVERLEY
 FARNHAM

1:2500 at A1L



Page 121

