



Order Decisions

Site visit made on 7 August 2019

by K R Seward Solicitor

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

Decision date: 15 August 2019

Order A: ROW/3212978

- This Order is made under Section 26 of the Highways Act 1980 (the 1980 Act) and is known as the Hertfordshire County Council (Berkhamsted Footpath) Creation Order 2017.
- The Order is dated 11 August 2017 and proposes to create the public right of way shown on the Order plan and described in the Order Schedule.
- There were 2 objections outstanding when Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed subject to modification set out below in the Formal Decision.

Order B: ROW/3212979

- This Order is made under Section 118 of the 1980 Act and is known as the Hertfordshire County Council (Berkhamsted 27) Extinguishment Order 2017.
- The Order is dated 11 August 2017 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule.
- There were 2 objections outstanding when Hertfordshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. There is no applicant for the Orders. Instead, they are promoted and supported by Hertfordshire County Council, the Order Making Authority ('OMA').
2. Order B is for the extinguishment of the entire length of the public footpath known as Berkhamsted Footpath 27 ('FP27'). Order A adds a public footpath. The Orders were made on the same date. They are intended to be concurrent so that the existing path is replaced by another along a broadly similar alignment.
3. There is an error in the Schedule of Order A which the OMA has requested be corrected. At Part 1, the grid reference for point D on the Order Plan should have the prefix "SP" and not "TL" before the number 9893 0807. As point D is identified correctly on the Plan it is unlikely that anyone would be misled by the error. The Order can be modified without the need to re-advertise.
4. No-one requested to be heard with respect to the Orders and so I made an unaccompanied site inspection, taking account of the written representations.
5. I attach a copy of the existing and proposed routes as shown on the Order Maps for reference purposes.

Main Issues

Order A

6. Section 26 of the 1980 Act enables the local highway authority to compulsorily create a public right of way. Under section 26(1), the factors required to be considered with regard to the creation of a footpath are whether there is a need for a footpath along the line indicated on the plan attached to the order and whether it is expedient to create it having regard to:
 - (a) the extent to which the path or way would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area; and
 - (b) the effect which the creation of the path or way would have on the rights of persons with an interest in the land, account being taken of the provisions as to compensation.

Order B

7. By virtue of section 118 of the 1980 Act, for me to confirm the Order I must be satisfied that it is expedient to stop up the path having regard to:
 - (a) the extent (if any) to which it appears that the path would, apart from the Order, be likely to be used by the public; and
 - (b) the effect that the extinguishment of the right of way would have as respects land served by the path, account being taken of the provisions as to compensation.
8. Section 118(5) provides that where proceedings preliminary to the confirmation of a public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation order (as is the case here) then in considering to what extent (if any) that path would be likely to be used by the public, regard may be had to the extent to which the creation order would provide an alternative path.
9. In both cases I must also have regard to the material provisions of any public rights of way improvement plan ('ROWIP') prepared by any local highway authority whose area includes land over which the Orders relate.

Reasons

Order A

Whether there is a need for the footpath

10. The current alignment for FP27 as recorded in the Definitive Map and Statement ('DMS') is unusable in its entirety for several reasons. Not only is it obstructed by various forms of development, but it also goes into the river without means to pass on foot.
11. The new path is already in use. It is accessed off Lower Kings Road, a short distance south of the existing path which is the subject of Order B. It proceeds down the side of No 40 Lower Kings Road over the occupation road leading to Nos 36a and 36b. It continues around the back of these properties to then follow the river along an alignment broadly parallel with the existing path. Throughout this section, the path is hard surfaced and separated from the adjacent

supermarket and public car parks by hedging and/or railings. The path crosses the river via the existing footbridge and carries on between the river and towpath to connect with FP30 at a point north of No 4 St John's Well Lane.

12. Despite it not yet being recorded in the DMS, the new route is signed as a public footpath at the entry point along Lower Kings Road. During my mid-morning site visit I observed the new path to be in almost constant use south of the river. Some walkers were using it to reach the canal and beyond while others appeared to be shoppers or using it as a linkway. I saw fewer people along the section of new path running parallel with the towpath, but there is a wide well-trodden line indicating frequent use.
13. The objectors suggest that a better route would be either along the towpath or through the adjacent supermarket car park where a pedestrian route is marked out already. The OMA describes other solutions it considered including diverting the existing path along the canal towpath. This option was not pursued when agreement could not be secured from the Canal & River Trust for operational reasons. The OMA considers the Order route to be preferable to the busy car parks. Despite all of this, I must look at the Order as made.
14. Given the reasons why the existing path is unavailable, it appears unlikely to be brought into use. There would be a loss to the public footpath network if it were extinguished without a replacement.
15. In the circumstances, I am satisfied there is a need for the new path.

Whether it is expedient to create the footpath

(a) The extent to which the creation would add to convenience/enjoyment to the public or convenience to residents

16. There is no defined width for FP27 whereas the new path varies between 1.6m and 4m.
17. Part of the new route is along the occupation road leading to Nos 36a and 36b which is used by vehicles. A business operates from No 36a with some parking spaces. There is also a car park behind the offices at No 40. The occupation road is already shared with pedestrians accessing the properties and businesses. Clearly, pedestrian use of the road will increase if it is a public footpath, as is already evident. A double bend along the road (described as a "dog leg") reduces the visibility for motorists and other users. Safety concerns are raised in relation particularly to children, but there are risks too with FP27. The current definitive line goes through a public car park where vehicles are manoeuvring and out into the busy access road. The frequency and level of vehicular movements are likely to be lower than the car park given the limited properties served. There is no reason to suppose a problem will arise for those taking reasonable care of their own and others safety.
18. The western section of the new path runs between trees which many people will find a pleasurable walk. The path also facilitates access via the footbridge to recreational facilities to the north of the canal. Whether used for recreation or as a link between two points avoiding the busy High Street, the route can add notably to the convenience and enjoyment of a substantial section of the public and the convenience of residents. That is reinforced by the amount of use which is already apparent.

(b) The effect on the rights of persons interested in the land

19. Much of the land affected by the existing and proposed path is owned by Dacorum Borough Council who has raised no objection. The section of new path between the river and towpath from points E-F is unregistered land. The landowners are unknown. Two other landowners objected who own land along the eastern end of the route.
20. The proposed route would pass over the occupation road to the properties at Nos 36a & b Lower Kings Road. Once a public path creation order comes into operation, responsibility would rest with the OMA as local highway authority to maintain the width and length of the path to footpath standard. That duty remains irrespective of budget constraints. It would not be responsible for any damage or wear and tear caused by vehicular use, but that is no different from the position now.
21. The OMA acknowledges that the landowners could not maintain or upgrade the surface without its consent as local highway authority, but states that the process is not onerous, and permission would not be unreasonably withheld.
22. The OMA suggests that the public liability of the owners would reduce because the path is already in use. The objectors say it is only in use because the OMA erected signage. The owners must have acquiesced otherwise they could have prevented unauthorised public access. Nevertheless, I do not see how formalising the route as a public footpath places the landowners in a better position when it removes their ability to revoke consent to public use.
23. The OMA confirms that it does not intend to remove the hedge and tree between points B-C as feared by the objector. The path narrows between these points and by trimming the hedge the OMA says that the minimum width recorded in the Order (1.6m) can be achieved. From my own observations on site, this appears feasible.
24. I recognise that the objectors feel aggrieved that the use of their land is proposed in consequence of errors and obstructions which they believe were avoidable. That may be so, but the Order has been made and the proposal must be assessed in accordance with the statutory framework.
25. Concerns are expressed over the effect on the market value of property affected by the new path and future development potential. If the Order is confirmed, then the path would need to be accommodated within any proposals for development of the land affected unless it can be stopped up or diverted. Provisions relating to compensation for loss arising from depreciation in value of a person's interest in land or damage suffered from disturbance are found within section 28 of the 1980 Act. It is for those who claim their interest in land has been diminished to make out that case to the OMA.
26. I saw a car parked in the vicinity of the area identified as allocated parking for the tenants of No 36b. It did not appear to obstruct the path, but if there is conflict then it could be a matter raised under the compensation provisions.
27. I note that the objectors believe that development in the area has interfered with their right to use the occupation road all the way through to St John's Well Lane. Any unlawful interference with legal rights reserved in the title deeds will be a private law matter. It cannot affect my considerations under section 118.

The ROWIP

28. The OMA has drawn my attention to three points within the 'core actions' set out in its ROWIP. These are to (i) Development routes that cater for the needs of people with limited mobility and visual impairment (ii) Reduce the number of physical barriers on the network, e.g. improve surfacing, remove or improve structures, and (iii) Create off-road routes linking communities with places of work, schools and other local facilities.
29. I can see how the Order accords with the first two objectives by delivering a route of defined width without obstruction. However, I am not satisfied that the third is met when the route passes over the occupation road.
30. I note that in response to public consultation on Order A the OMA has since made provision within the ROWIP for the section of new path between B-D to be increased in width if opportunity arises in future.

Conclusion on Order A

31. There is a need for the new path. The new path is more convenient and enjoyable for the public than existing FP27. On the other hand, the affected landowners will have the burden of a public footpath across their land. There would not be the same freedom for the landowners to maintain or use the land in the manner of their choosing. Bearing in mind the compensation provisions available, I am satisfied that it is expedient for the new path to be created.

Order B

The extent to which the footpath would be likely to be used

32. There are several factors preventing public use of the existing definitive line of FP27 as recorded in the DMS. The alignment goes into the River Bulbourne where there is no means to cross or avoid the bank and water. It is obstructed by the substantial footbridge used for the new path. Part of the existing path passes within the grounds for the block of flats at Kings Court at the eastern end of the route. One corner of the block may be built over the path, but it is difficult to tell due to the thickness of the line on the map accompanying Order B. Unquestionably, FP27 passes through the communal garden for the flats.
33. At the western end, the path splays and passes through the row of cottages in St John's Well Lane, including their enclosed gardens and outbuildings. A public car park has also been built over part of the path which prevents use when the bays are occupied.
34. Whilst described by the OMA as 'anomalies', most of the issues are a symptom of development taking place or other forms of obstruction. A public right of way is not lost by disuse or obstruction. In accordance with section 118(6) any temporary circumstances preventing or diminishing the use of a path by the public shall be disregarded. Where the order route is impassable, I will need to consider the likely use if the obstructions are removed.
35. In making the Order the OMA must have considered the need for the path for public use. I must look at the likely future use of the path. They are not the same tests. Any circumstances preventing or diminishing the use of the path are to be disregarded and to be viewed as temporary when considering the Order. This can include obstructions in place for many years. At the confirmation stage,

I do not have to be satisfied that the path is not being used in order to conclude that it is not needed for public use.

36. FP27 provides a link between Lower Kings Road and St John's Well Lane running mostly beside the river. It is of undefined width. Even without the obstructions the public could not use the path in its entirety due to the river. At the time of my visit, the river was mostly dry, but it was still impassable due to the extremely muddy riverbed.
37. Where the definitive line goes into the river, the path is not obstructed but physically does not exist for it to be used by the public. This not a case of the river bank eroding. Rather, the footpath starts on one side of the river before crossing over it at an acute angle where there is no footbridge. From the Order Map, the definitive line appears to stray into the river at other points.
38. Nevertheless, the DMS is conclusive proof of the existence of the public footpath over the definitive line. There is no notion of an automatic or moving right of way onto adjacent land and so the public has no right to deviate onto other land. If a footbridge or suchlike could be built over the river in the places required, then it would make the path available for public use. Whether in reality the full length of the path would be used is uncertain as the route would still go through private gardens which is likely to deter some people.
39. The creation order would deliver a clear useable path of defined width. Whilst part of the new path is along an access road it otherwise offers a segregated route from the car parks travelling near to the river and through a tree sheltered passage instead of walking through a car park and private gardens. Given the choice most users are likely to find the new path far preferable.
40. It seems unlikely that both routes would be used especially as the termination points are so close. With a more accessible alternative route available by virtue of the Creation Order, it seems to me that the existing route is unlikely to be used to any material extent.

The effect which the extinguishment of the right of way would have as respects land served by the path

41. No adverse effects arising from the proposed closure on the land concerned have been drawn to my attention.

The ROWIP

42. No material provisions have been brought to my attention regarding Order B

Whether it is expedient to confirm the Order

43. The Order shall not be confirmed unless I am satisfied it is expedient to do so. The 'need' for the path is a matter for the OMA alone, but the use of the word 'expedient' in section 118 must mean that other considerations beyond the likely use of the path can be relevant in deciding whether to confirm the Order.
44. There is no path in physical existence capable of being used by the public where the defined route is in the river. This currently prevents use of the route as do the buildings and structures across the route. With the newly created route available, the existing path is unlikely to be used. There would be advantage to the landowners in not having a public footpath cross their land. That would be particularly so for those whose domestic properties are crossed by the route.

45. Taking all relevant factors into account, I am satisfied that it is expedient for the Order be confirmed. Nothing in the submissions or from my site visit leads me to conclude that it would not be expedient to confirm the Order.

Overall Conclusions

46. Having regard to the above, and all other matters raised in the written representations, I conclude that the Order A should be confirmed subject to the modification described in my procedural note. Order B should be confirmed.

Formal Decisions

Order A

47. I confirm the Order subject to the following modification:

- In Part 1 of the Schedule delete "TL" before the number 9893 0807 and substitute the letters "SP".

Order B

48. I confirm the Order

KR Seward

INSPECTOR

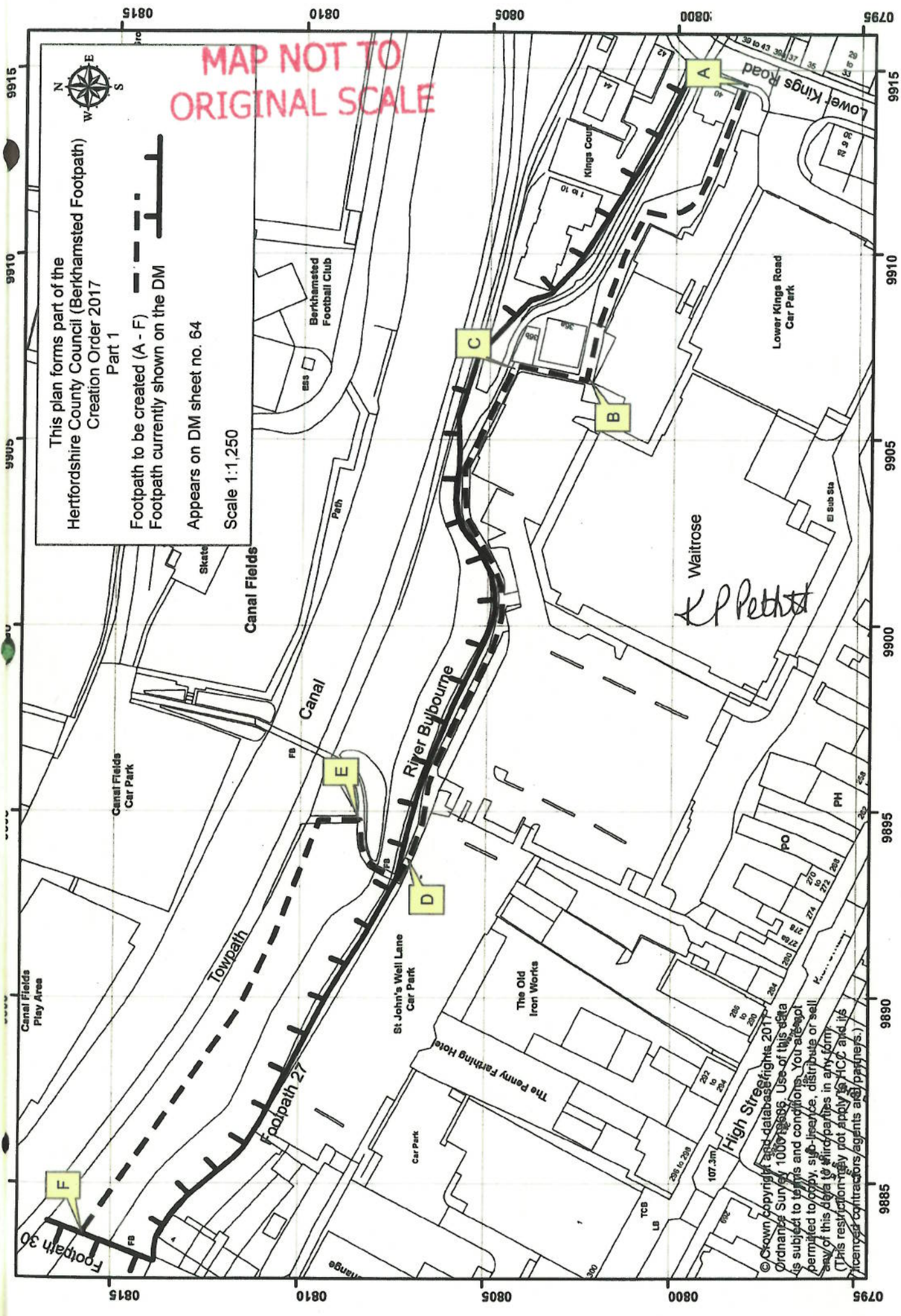
MAP NOT TO ORIGINAL SCALE

This plan forms part of the
Hertfordshire County Council (Berkhamsted Footpath)
Creation Order 2017
Part 1

Footpath to be created (A - F) - - - -
Footpath currently shown on the DM

Appears on DM sheet no. 64

Scale 1:1,250



K.P. Pettitt

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MAP NOT TO ORIGINAL SCALE

This plan forms part of the
Hertfordshire County Council (Berkhamsted Footpath)
Creation Order 2017
Part 2

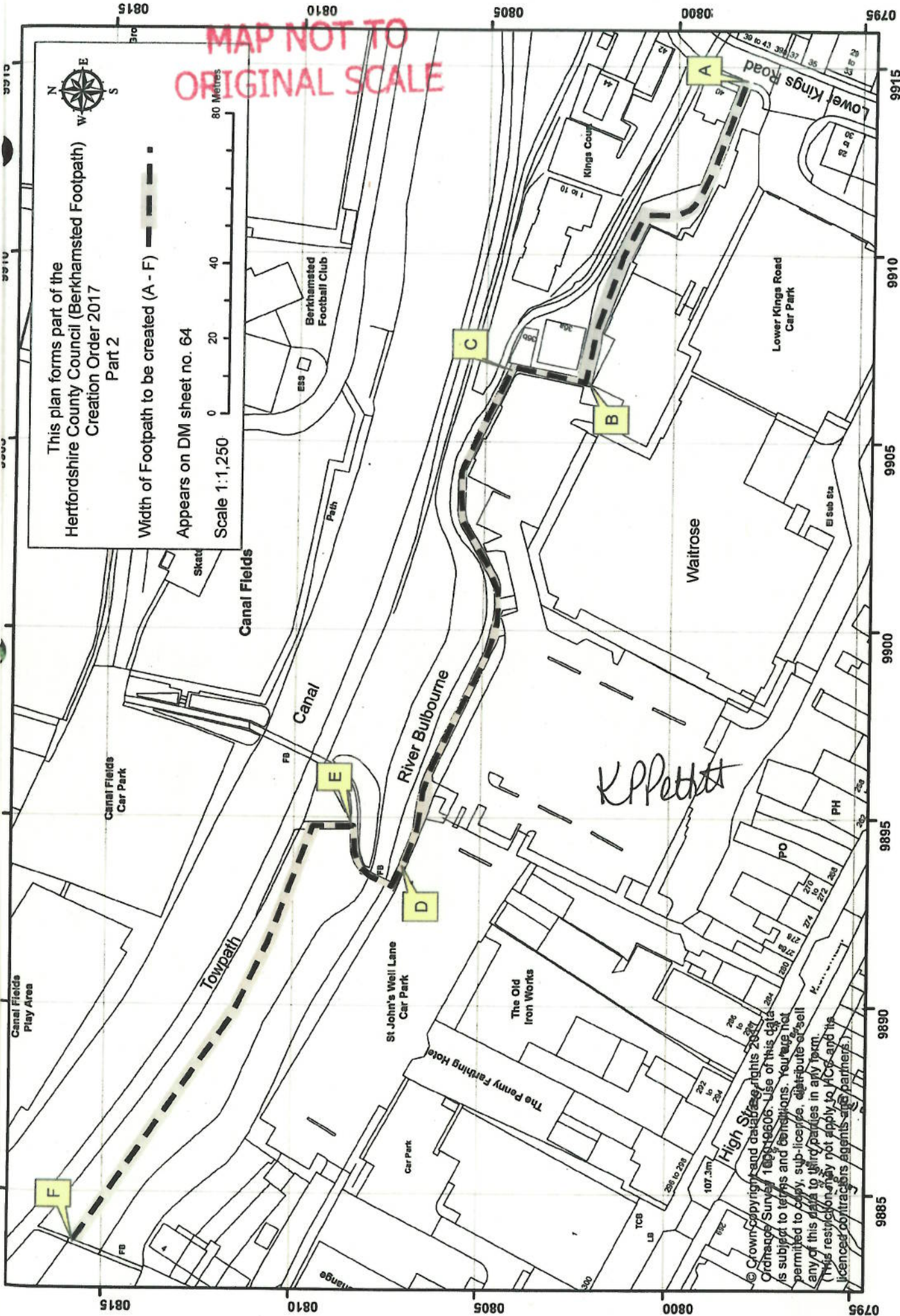
Width of Footpath to be created (A - F) ———
Appears on DM sheet no. 64
Scale 1:1,250



80 Metres

0 20 40

0 20 40



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