
Order Decision

Inquiry held on 18 June 2019

Site visit made on 17 June 2019

by Martin Elliott BSc FIPROW

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

Decision date: 05 August 2019

Order Ref: ROW/3211411

- This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and Section 53A(2) of the Wildlife and Countryside Act 1981 and is known as The Kent County Council (Public Footpath MU65 (Part) & MT 41 (Part) Tonbridge and Hildenborough Public Path Diversion and Definitive Map and Statement Modification Order 2018.
- The Order was sealed on 19 April 2018 and proposes to divert the public rights of way shown on the Order plan and described in the Order Schedule. If confirmed, the Order will also modify the definitive map and statement for the area, in accordance with Section 53(3)(a)(i) of the Wildlife and Countryside Act 1981 Act, once the provisions relating to the diversion come into force.
- There were eleven objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed subject to modification.

The Main Issues

1. This Order has been made in the interests of the owner of the land crossed by the footpath. Section 119 of the Highways Act 1980 therefore requires that, before confirming the Order, I must be satisfied that:
 - (a) it is expedient in the interests of the owner of the land crossed by the section of footpath to be diverted that the line of the path or way, or part of that line should be diverted; and
 - (b) the path or way will not be substantially less convenient to the public; and
 - (c) that it is expedient to confirm the Order having regard to:
 - (i) the effect which the diversion would have on public enjoyment of the path or way as a whole; and
 - (ii) the effect which the coming into operation of the Order would have as respects other land served by the existing rights of way; and
 - (iii) the effect which any new public rights of way created by the Order would have as respects the land over which the right is so created and any land held with it, account being taken of the provisions as to compensation.
2. Section 119(6A) of the 1980 Act provides that I must have regard to any material provision contained in a Rights of Way Improvement Plan for the area covered by the Order.

3. I am mindful of the case of *R (on the application of Young) v the Secretary of State for Environment Food and Rural Affairs [2002] EWHC 844 (admin)(Young)*. This informs that where the proposed diversion is less enjoyable then the decision maker has to balance the interests of the landowner against those of the public. However, where the alternative route is substantially less convenient then the Order should not be confirmed.

Reasons

Whether it is expedient in the interests of the owner of the land crossed by the footpath that the way should be diverted

4. The Order has been made in the interests of the owner (the applicants) on the basis that the existing public footpath has an impact on the privacy and security of the applicants' residential property and its grounds. Concerns are also raised in respect of safety, hygiene issues relating to dog fouling, and the use of agricultural machinery on the footpath.
5. Before considering the interest of the owner I note the suggestion in opposition that the owner should not be able to apply for a diversion when the owner knew of the existence of the public footpath at the time of purchase. Whilst the owner may have been aware of the existence of the footpath this does not preclude an order being made by the Council where it is considered that such an order would be in the interest of the owner. The Council has made the Order on that basis.
6. It is also suggested that the applicants should have applied for the diversion at an earlier date and that the delay suggests that there was no long term issue. There is no requirement for an owner to apply for a diversion within a particular timescale and, as pointed out on behalf of the applicants, the applicants have had a reasonable period to consider whether an application for a diversion order in their interests should be made.
7. I note the submissions on behalf of the Ramblers which refer to similar situations to those in respect of the Order before me and a decision by another Inspector. Whilst I note these submissions my decision must be based on the merits of the Order measured against the relevant criteria set out at paragraphs 1 to 3 above.

Privacy and Security

8. The applicants contend that the property overlooks the existing right of way and that the footpath runs close to the property with the distance between the picket fence and the dwelling varying between 3 and 12 metres. It is stated that the existence of the path has an impact on the privacy of the dwelling as, depending on light conditions, it is possible to look into the ground floor rooms and directly into the house if the front door is open. The applicants also tends to avoid using the front garden and the front door for reasons of privacy. The applicants, fairly accepted that the children were of an age when they were less likely to use the front garden. However, the point was made that the location of the footpath meant that the family chose not to use the front garden. They did not allow their dog to use the front garden due to the disruption that might cause arising from the presence of walkers and in particular those with dogs.

9. In my view, whilst I would acknowledge that users do not deliberately peer into the dwelling, the inside of the dwelling is visible from the footpath and will, at certain times of the day, be more visible. Although at one point the footpath is as much as 12 metres from the dwelling the footpath does run closer and at the closest is only three metres away. I accept that path users are unlikely to walk close to the picket fence but nevertheless the footpath has an impact on the privacy of the dwelling. The footpath also has a significant impact on the privacy of the garden and the existence of the footpath restricts the applicants and their family in its use. It is noted that the footpath is also relatively well used and the extent of this use will further impact on the privacy of the property as a whole.
10. In terms of security the applicants recognise that to date they have not experienced any theft or serious criminal activity at the property. However, given the relatively isolated nature of the property (noting that there are nearby properties) and the ability of any member of the public to have close access to the property the footpath poses a security risk. I would acknowledge however that the presence of members of the public may also be of benefit to security. The public footpath also allows unrestricted vehicular access to the property; it is not possible to erect a gate to prevent such access as this would constitute, unless authorised, an unlawful obstruction. The diversion of the footpath would allow the applicants to secure the property and would enable them to challenge anyone on the property. The diversion would therefore be of benefit to the landowner in respect of security. I note the suggestion that other measures could have been taken by the applicants to improve security but it is not a requirement that other solutions to security should have been sought, and implemented, prior to an application being made.

Anti-social behaviour

11. The applicants outline that dogs have fouled the path and verge at a point where the applicants' family and visitors walk themselves. The applicants accepted that this was not a significant issue but advised that it was a regular occurrence. It is also stated that bicycles are often ridden in a dangerous manner and that challenging such use was often met with an aggressive response. Whilst I recognise that these issues will be alleviated in the event that the footpath is diverted I do not consider these benefits to be significant and there is nothing to indicate that these issues have anything but a minor adverse effect on the landowner.

Vehicular use

12. The land owned by the applicants includes the land crossed by the footpath and a paddock to the north which accommodates a pump house and chamber for drainage which has to be accessed on a regular basis. The entrance to the paddock between the metalled surface and the gate provides additional parking for the property. The applicant's cars are generally parked on an area of hardstanding to the east of the house and manoeuvres in and out of this area requires the use of the metalled driveway and footpath. The diversion will allow unfettered use of this land for vehicles, and for all other purposes, although I do not consider that the benefits are significant.

13. The route of the footpath is also used by farm machinery. Mr Griffin explained that he carried out work for the applicants and whilst he did not use the route with large vehicles he used the route on a regular basis to carry out work in the orchard and to maintain hedges. He acknowledged that there had not been any serious incidents involving pedestrians and farm vehicles but, particularly with the right angle bend on the existing route, there was an element of risk. In my view there is a risk of incidents between farm machinery but there is nothing to indicate that this risk is significant. Nevertheless the diversion would reduce any possibility of injury to the public by farm machinery on that section of path. There is consequently an indirect benefit to the applicants when work is being carried out on their land on their behalf.

Other factors

14. The Council referred to two other elements which were set out previously by the applicants but not pursued at the inquiry. These relate to an incident with a dog walker in his vehicle chasing his dog to the front of the applicants' house. This appears to be a one off incident but in any event the diversion will enable the applicants to restrict vehicular use to the front of their property. The other relates to a member of the public bearing a grudge against the previous owner of the applicants' property and standing on the path in front of the house. Whilst this is not an ongoing issue the diversion will enable the applicants to exclude people from the property.

Conclusions on interests of the landowner

15. Having regard to the above and all matters raised in the representations the diversion will have a significant benefit to the applicants in respect of privacy and security. The diversion will also enable unfettered use of the applicants' land. Whilst other benefits in respect of antisocial behaviour are not in my view significant they must weigh in favour of the applicants. I acknowledge that other property owners may have similar issues to the applicants with the public passing along a footway. However, it should be noted that in this case the footpath crosses through the applicants land rather than passing along a footway in front of the property. The issue to be considered in determining the Order is whether, in the first instance, the diversion is in the interests of the owner.

16. I conclude that the Order is in the interests of the landowner. As stated in *Weston*¹ 'The question that has to be asked under section 119(1) is whether the diversion is expedient in the interests of the landowner ... If it is more convenient, beneficial or advantageous to him, it is expedient in his interest'. If the applicants did not consider that the diversion was expedient in their interests they would not have made the application. However, having regard to *Young*, should I reach a conclusion that the diversion has an adverse effect on the enjoyment of the route as a whole then this must be balanced against the interests of the owner.

¹ *Ramblers Association v SSEFRA, Oxfordshire County Council and Weston* [2012] EWHC 3333 (Admin)

Whether the path or way will not be substantially less convenient to the public

17. The proposed alternative route is 22 metres shorter than the existing route. It cannot be said that such a decrease in length renders the alternative route to be substantially less convenient. There will be no significant difference in gradients between the existing and proposed alternative route.
18. Concerns are raised as to the condition of the surface and the difficulty of use of the alternative route in wet weather. The existing route is metalled to about point C and beyond is an established farm track. The applicants have agreed to provide a surfaced alternative path raised above the level of the surrounding area. The path will be 2.5 metres wide with edgings. A geotextile will be laid and will then have a surface of 75mm compacted type one stone topped with 25mm of compacted fines. The surface will be cambered and will be higher than the edging boards to enable water flow off the finished surface. The outside edging will have a top soil fill so that any vertical edge will be removed.
19. It is recognised that the existing path is physically wider although it has no recorded width and is partly surfaced. However, given the proposed works I do not consider that the surface of the alternative route, or the reduced width, will mean that it is substantially less convenient. The proposed surfacing will prevent the path from becoming muddy and difficult to use. It should be noted that the Order does not fully come into effect until the Council has certified that a route suitable for public use has been provided. The Council state that the alternative route will be surfaced in accordance with the above specification.
20. Representations have been made in respect of the structures on the alternative route. At the time of the inquiry a kissing gate remained at point D. However, the Council advised that the remaining kissing gate will be removed. The Order does not provide for any limitations on the route and will mean that the alternative route will be free of any structures.
21. The point is made that the existing route requires little or no maintenance and that by contrast the hedges on the alternative route will grow and reduce the width of the path. The applicants clearly acknowledge their responsibilities in respect of ensuring that the adjacent hedges do not encroach upon the width of the path. The Council outlined that they have a duty to maintain the surface of the path and that powers under section 154 of the Highways Act 1980 provide for the removal of overhanging vegetation; this would be equally applicable if the land were to change ownership. Whilst I acknowledge that the hedges adjacent to the alternative route will grow, given the duties and enforcement powers of the local highway authority I do not consider that any growth will mean that the alternative route will be substantially less convenient.
22. I note concerns in respect of the height of the hedge. However, an increase in height does not cause the path to be substantially less convenient. I consider this matter further in respect of the effect on public enjoyment.
23. I am also aware of concerns that other paths in the area are not well maintained. However, the correct basis for my decision is that the Council carries out its statutory duties in respect of the maintenance and enforcement of public rights of way. Those duties apply equally to the existing route.

24. I note the observations that in May 2018 the width of the alternative route had been reduced by vegetation and it is suggested that this undermines the assurances that the route will be maintained by the applicants. However, the proposed alternative route is currently not a public right of way and the applicants are not obliged to maintain the route as such. Furthermore, as it is not a public right of way, the Council has no statutory duties in respect of maintenance or enforcement. Should the Order be confirmed then the route will become a public right of way with its associated responsibilities.
25. Objections are made on the basis that the proposed alternative route will be subject to flooding. The Environment Agency river flooding risk map shows that the proposed alternative route, whilst at greater risk of flooding than the existing route, is at no greater risk of flooding than sections of Hawden Lane. The surface water flooding map shows that the alternative route is less prone to flooding than other sections of Hawden Lane and not significantly more prone to flooding than the section of Order route to be diverted.
26. Bearing in mind the above whilst the alternative route may be prone to flooding it is likely that on the occasions when flooded that access to the route will also be flooded. It is accepted that the alternative route may be more prone to flooding than the existing route but there is no evidence before me that flooding of the route occurs such that access will be prevented on a regular basis.
27. The applicants suggested that the works to the proposed alternative will raise the level of the path. Whilst this may be the case I have no evidence before me from which I can conclude that this has any effect on the flooding risk. Nevertheless the surface of the path will be raised above the adjacent land and this must have some bearing on flooding frequency.
28. Having regard to the above I do not consider that any flooding risk makes the alternative route substantially less convenient.
29. In conclusion the alternative route will not be substantially less convenient.

The effect which the diversion would have on public enjoyment of the path or way as a whole

30. Concerns are raised as to the loss of views, in particular of Hawden Farm, and the tunnel nature of the alternative route which would restrict views of the surrounding countryside.
31. The existing route passes the front elevation of Hawden Farm which is a grade II listed building. I would acknowledge that the views of the farmhouse add to the enjoyment of the route as a whole and some may enjoy reconnecting with the history of the area. The alternative route passes through a paddock along a hedged route.
32. Although at the time of the inquiry the hedges had been cut the views of the farmhouse were limited to views through a gateway from the paddock onto the existing footpath. I note the intention of the applicants to maintain the height of the hedge so as to maintain views. However, whilst the Council has enforcement powers in respect of vegetation encroaching onto the width of the alternative route, such powers do not extend to maintaining the height of the

- hedge. Whilst some weight should be given to the assertions of the applicants, if the hedge were allowed to grow then views of the farmhouse, and surrounding land, from the alternative route would be lost from this section of the path. Views of the farmhouse from other parts of the route are limited. As such the loss of views will have an impact on the enjoyment of the path as a whole.
33. In respect of the tunnel nature of the alternative route I revert to my previous comments in respect of the maintenance of the height of the hedge. The existing route is more open although, noting that the path is wider, the route is enclosed in part by high hedges which do not allow views of the adjacent land. I would acknowledge that some may not enjoy walking along a hedged path at 2.5 metres wide. However, the hedged section is relatively short and the remainder of the route as a whole is more open. I do not consider that the tunnel nature of the path has a significant impact on the enjoyment of the path as a whole.
34. I note the observation that the Ordnance Survey map of 1869 shows Hawden Farm and Hawden Lane and the paths associated with it. It may be the case that the Order route has been in existence for at least 150 years. However, there is no evidence before me that the public rights on the Order route are of an historic origin such that the diversion would prevent the enjoyment of the historic origins of the path. The section to be diverted is also relatively short in length compared to the route as a whole. Any loss should be seen in this context.
35. The Council contend that few people actually enjoy walking close to a domestic property. I would accept that some people may feel discomfort walking near to domestic properties; this may be greater in respect of an isolated property rather than, for example, walking close to properties in a residential street. However, not all will feel discomfort and in this case it is clear that some take enjoyment from viewing Hawden Farm from the adjacent footpath. Given the above I do not give this element any weight in considering the effect on the enjoyment of the way.
36. The Council referred to the survey carried out on behalf of the Ramblers and say that this demonstrates that the public consider the alternative route to be at least as enjoyable as the existing route. I do not think any conclusions can be reached from the survey as to the enjoyment of the way. However, the survey does show that whilst some objected to the diversion there was nearly an equal number who did not object (8 to 7); those who had no view either way did not complete the survey. It does not show an overwhelming opposition to the diversion.
37. Overall, there is some loss of enjoyment in respect of the path as a whole and this loss needs to be balanced against the interest of the landowner.

The effect which the coming into operation of the Order would have as respects other land served by the existing right of way

38. There is no evidence before me that the diversion would have any effect on land served by the existing way.

The effect which any new public right of way created by the Order would have as respects the land over which the right is so created and any land held with it, account being taken of the provisions as to compensation

39. The land over which the existing and alternative route passes is in the ownership of the applicants. The applicants clearly support the Order and there is no evidence before me of any adverse effect on the land over which the new route passes such that compensation issues are relevant.

Rights of Way Improvement Plan (ROWIP)

40. No material provisions have been put before me from any ROWIP which are relevant to the determination of the Order.

Whether it is expedient to confirm the Order

41. The use of the word expediency in section 119(6) means that other considerations may be taken into account in determining an order.
42. Representations are made that the alternative route will disadvantage those who are disabled, less mobile or using pushchairs. I have concluded that the alternative route will not be substantially less convenient. The alternative route will be provided with a compacted surface and will not be impeded by any path furniture. There is no significant difference in the gradient. There is nothing before me to indicate that those with protected characteristics in accordance with the Equality Act 2010 will be disadvantaged.
43. A concern was raised that access to the railway line in the event of an emergency would not be possible if the path were to be diverted. However, emergency services are not reliant on public rights of way in gaining access and access to the railway line can be gained from Powder Mill Lane at the other end of the route and via another route on land adjacent to the applicants. There is nothing to suggest that access to the railway line will be restricted if the Order is confirmed. As such this is not a consideration which weighs in the balance in determining the Order.
44. I have already considered the impact of flooding on the convenience of the route and bearing in mind my comments I do not consider that any flooding risk renders it inexpedient to confirm the Order. There is also no evidence that the alternative route will have any effect on local flooding.
45. Bearing in mind all of the above, the diversion is in the interests of the landowner as it will provide significant benefits in terms of privacy and security. Whilst there are other benefits I give these little weight to their being in the interest of the landowner. The proposed alternative route is not substantially less convenient. There is some adverse effect on the enjoyment of the route as a whole. However, whilst there is a loss I do not consider on balance that this outweighs the benefits to the landowner. Consequently taking all factors into account I consider that it is expedient to confirm the Order.

Other Matters

46. The Order is not intended to come into effect until the works to the alternative route (paragraph 18) have been carried out. The Council suggested three options by which this should be secured. I note those suggestions and take the

view that the Order should be modified. Irrespective of works to be carried out the Order should specify an actual date when the new route will come into effect. The certification of works relates only to the date on which the old route would be extinguished. If certification is never given then the old route and new route will continue to exist. Accordingly I consider that the Order should be modified at paragraph 3 so as to specify an actual date when the new route will come into effect.

Conclusion

47. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed subject to modification.

Formal Decision

48. I confirm the Order subject to the following modification.

- At paragraph 3 of the Order delete *'that it is certified by the County Council that an alternative route suitable for use by the public has been provided'* and insert in its place *'of confirmation of the Order'*.

Martin Elliott

Inspector

APPEARANCES

For Kent County Council:

Ms D Noble who called Mr C Wade	Of Counsel, instructed by Kent County Council Principal Case Officer, Definitive Map Team, Kent County Council
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In support of the Order:

Mr M Wood who called Mr D Batchelor	ET Landnet Limited, for the applicants Joint applicant
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Also in support of the Order:

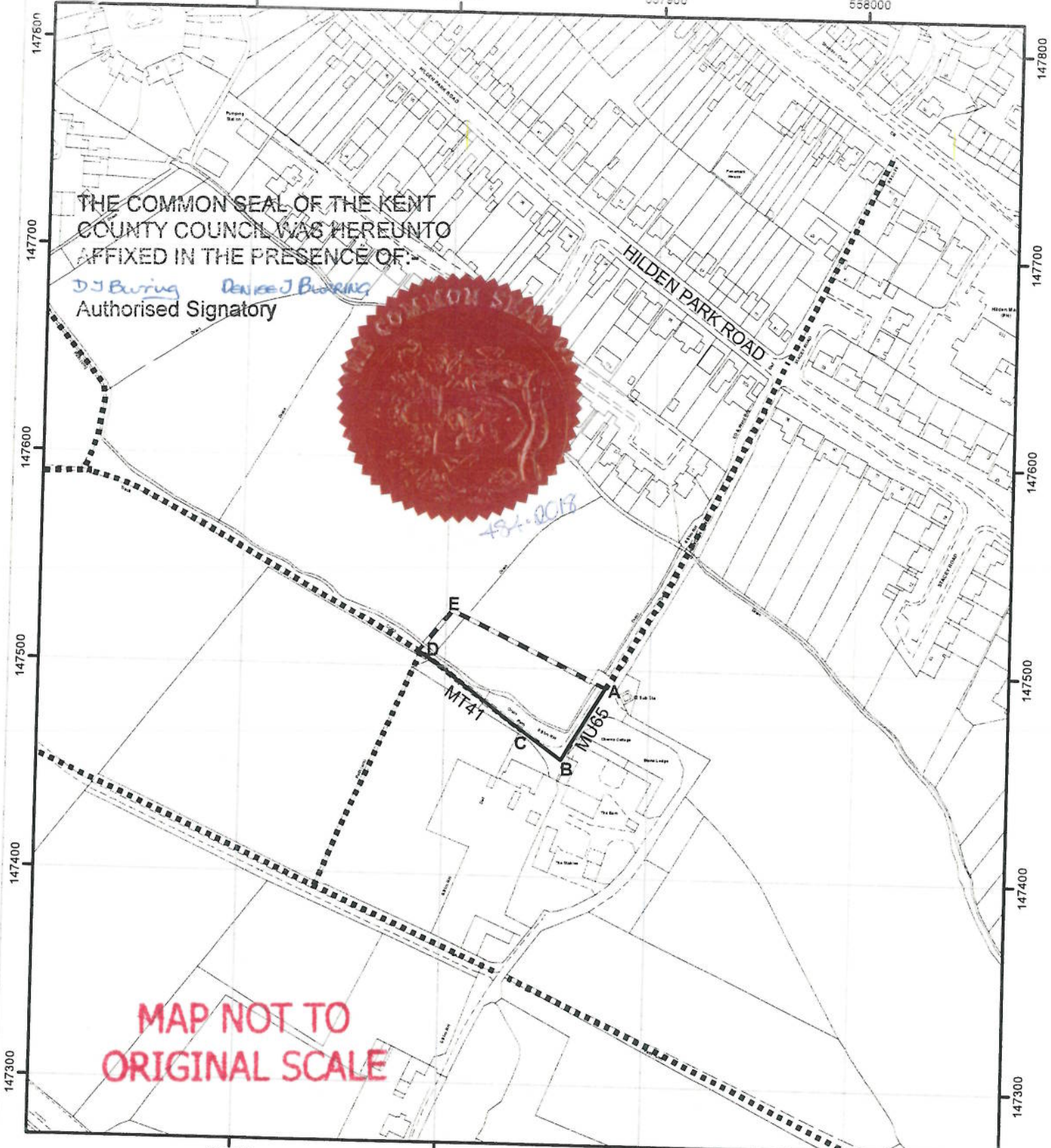
Mr J Griffin	Local landowner
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In opposition to the Order:

Mr D Wetton	Statutory objector, Ramblers', Local Footpath Officer for Tonbridge town and Hildenborough parish
Mr J Chillcott Mr N Simpkins	Statutory objector On behalf of Hildenborough Parish Council (statutory objector)
Mrs W Willis Mrs C Miller Mr Reed	

Documents handed in at the Inquiry

- 1 Extracts from Social Media
- 2 Grove Cottage (property prices) and Ordnance Survey map
extract showing Grove Cottage and Hawden Lane
- 3 Email correspondence between D Wetton and G Rusling of Kent
County Council
- 4 Appendix A and B of Ramblers' Statement of Case
- 5 Closing Submissions on behalf of the applicants
- 6 Closing submissions on behalf of Kent County Council



THE COMMON SEAL OF THE KENT COUNTY COUNCIL WAS HEREUNTO AFFIXED IN THE PRESENCE OF:-

DJ Buring Denise J Buring
 Authorised Signatory

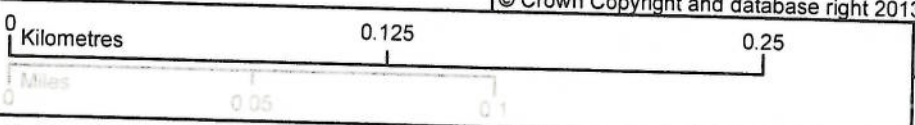
MAP NOT TO ORIGINAL SCALE

Key	— Route to be diverted
- - - - -	New Length of route
.....	Unaffected Routes

Highways Act 1980
Wildlife and Countyside Act 1981
Kent County Council
(Public Footpath MU65 (part) and MT41 (part),
Tonbridge and Hildenborough)
Public Path Diversion and Definitive Map and
Statement Modification Order 2018
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Reference: PROW/MU65MT41/1474



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