



Order Decision

Inquiry Held on 9 July 2019

by Alan Beckett BA MSc MIPROW

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

Decision date: 29 August 2019

Order Ref: ROW/3184705M

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as the Hertfordshire County Council (Little Gaddesden 2, 3 and 27) Modification Order 2014.
- Hertfordshire County Council submitted the order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
- The Order is dated 11 April 2014. The Order was the subject of an interim decision dated 25 July 2018 in which I proposed to confirm the Order subject to modifications which required advertisement.
- There was 1 objection and 1 representation outstanding at the commencement of the inquiry.

Summary of decision: The order is confirmed subject to the modifications set out in the Formal Decision.

Procedural Matters

1. The inquiry into the proposed modifications was held pursuant to the provisions of paragraph 8 of schedule 15 to the 1981 Act. The only objection which had been received following the advertisement of the proposed modifications was that made by Mr Maclaren about the non-deletion of footpath 3. A representation was also received from the Council regarding the terminal point of footpath 3 with footpath 2. No objections or representations were made in relation to the unmodified part of the Order.
2. Mr Maclaren submitted his statement of case and proof of evidence in accordance with the timetable set out in the notice of order. The date for the submission of statements of case was by 7 May 2019 with proofs of evidence due for submission by 11 June.
3. Mr Thiebaud, acting for the Art and Architectural Trust ('the AAT') the owner of the field crossed by footpath 27 submitted a proof of evidence which was received on 4 June. This proof of evidence related to the unmodified part of the Order and rehearsed the points initially made in objection to the Order and which were before the first inquiry. The matters which the AAT wished to raise did not relate to the proposed modifications which were the subject of the paragraph 8 inquiry being held.
4. As noted in paragraph 2 of the interim decision, having made a statutory objection to the Order setting out its case, the AAT did not appear at the June 2018 inquiry nor was it represented. The issues raised in the AAT's letter of objection and subsequent correspondence with the Council were considered in determining whether the evidence demonstrated, on a balance of probabilities,

- that a public footpath subsisted on the route shown in the Order as footpath 27.
5. The matters which the AAT wished to raise at the paragraph 8 inquiry were those which it had sought to raise at the first inquiry. It is to be noted that in its June 2019 proof the AAT states "*We have, in this submission, repeated our proof of evidence to rescind this interim decision....*".
 6. No material which had not been previously considered was put forward in the AAT's June 2019 submission. As all the matters which the AAT sought to advance had already been considered at the first inquiry (which the AAT did not attend), it was not considered necessary to re-open the paragraph 7 inquiry. Such matters could and should have been put forward in person at the first inquiry.
 7. The AAT had not made an objection to the interim decision, nor had it sought to engage with the process by submitting a statement of case in accordance with the published timetable. All other parties were therefore unaware that the AAT sought an opportunity to re-run the paragraph 7 inquiry. In view of the objections and representations which had been duly made in response to the publication of the interim decision, the second inquiry had been arranged to hear the objections into the proposed modifications.
 8. As the matters sought to be raised by the AAT had already been considered by the first inquiry, it was not necessary to re-open that inquiry under paragraph 7. Consequently, I did not hear submissions from the AAT regarding footpath 27.

The Main Issues

9. In the interim decision, I concluded that the available documentary evidence did not show that an error had been made in recording footpath 3 on its current alignment. That alignment shows the footpath to run through the grounds of properties known as Windrush and Blue Cottage in addition to a parcel of woodland to the north of Blue Cottage. This route is shown as D – X on the modified Order plan. It is Mr Maclaren's case that the definitive map is in error and that the correct line of footpath 3 should be D – E – B as originally contended for by the Council.
10. The Council raised no objection to the interim decision with regard to footpath 3 but suggested that if the footpath was to be retained on the definitive map, then a further modification should be considered to show footpath 3 on the alignment shown in the first definitive map (D – G) and not for it to be retained on the alignment shown in the current definitive map (D – X). The Council submit that the alignment D – X was the result of errors which had occurred since the production of the first definitive map (see paragraph 32 of the interim decision).
11. In relation to footpath 3, section 53 (3) (c) (iii) of the 1981 Act provides that an order to modify the definitive map and statement should be made following the discovery of evidence which (when considered with all other relevant evidence available) shows that there is no public right of way over land shown in the map and statement as a highway of any description. Section 32 of the Highways Act 1980 (the 1980 Act) requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant

document which is tendered in evidence, giving it such weight as is appropriate, before determining whether a way has been dedicated as a highway.

12. The main issue in relation to footpath 3 is whether the evidence discovered when taken with all other evidence available demonstrates, on a balance of probabilities, that the initial recording of footpath 3 was erroneous and that there is no right of way over D – X and that a public right of way subsists over D – B.
13. A second issue arises if it is determined that footpath 3 was not incorrectly shown on the draft definitive map; whether the proposed alignment D – X requires further amendment to show footpath 3 as running D – G.

Footpath 3 – documentary evidence submitted by Mr Maclaren.

14. Mr Maclaren submitted several documents relating to the deeds of his house which had been constructed in or around 1938, the architect's drawings being dated July of that year. The documents submitted by Mr Maclaren had not been produced at the first inquiry. I am satisfied that new evidence has been discovered which needs to be considered with the evidence already submitted.
15. Whilst the architect's drawing only shows the elevations of the house and does not provide any indication of what the conditions of the site in which it was built were at the time of construction, the land registry title plans shed light on this issue.
16. In 1928 a Yorkshire timber merchant named Thomas Place purchased part of the Ashridge Estate and subsequently sub-divided the land and offered plots of land for sale for development. Two of those plots of land were purchased by the Wynne-Morgan family who had Blue Cottage built in 1938.
17. The deed plan for Mr Place's building estate shows that the boundaries of the plots offered for sale had been delineated by a 'line of posts'. Running parallel to the line of posts and between the land offered for sale to the east and west of them is a strip of land on the alignment D – E – B which is coloured brown. Mr Maclaren's deeds show that this strip of land was subject to rights of way in common with the other parts of Mr Place's building estate which were coloured brown on the deed plan. The title plan also shows by means of a double peck line a path or track running through the building estate on the alignment D – X.
18. Mr Maclaren also provided copies of correspondence with the descendants of Mr & Mrs Wynne-Jones and their successors in title. This correspondence is to the effect that from the time of the construction of Blue Cottage, there was no footpath running through the property and that there had always been a path between fences along the strip of land which separated between Blue Cottage from Priory Cottage and Priory End.
19. Mr Maclaren submitted that the title deed evidence demonstrates that by 1938 at the latest, the boundaries of the properties on Mr Place's building estate had been established and that the footpath had been located between the fences which marked the boundaries of neighbouring properties. A further plan in Mr Maclaren's bundle which shows the boundaries of the additional plot of land purchased by Mr and Mrs Wynne-Jones in 1938 did not show the peck line footpath as continuing through the plot of land on which Blue Cottage had been built.

20. It is Mr Maclaren's case that the boundaries of Blue Cottage had been established by at least 1938 and that the footpath 3 had probably followed the line D – B since at least that date; the public had not been inconvenienced by the currently available footpath. Given the history of the land as demonstrated by the deeds to Blue Cottage it is submitted that it would be irrational to consider the reinstatement of a footpath which has probably not been in use since 1928 and which had been redirected to its current location in 1938. It was believed there was enough evidence to show that the draft map had incorrectly shown the position of footpath 3.
21. At the first inquiry, Mr Westley's case had been that the documentary evidence adduced did not demonstrate that the route of footpath 3 shown in the draft map had been added in error. The additional documentary evidence did not alter that view and Mr Maclaren agreed that although the line of the footpath had been physically altered, no diversion order had been found to authorise that change. Mr Westley's case remains that the maxim 'once a highway, always a highway' led to the conclusion that the draft map was correct in showing the historic line of footpath 3 which had not been formally diverted.
22. The evidence adduced from Mr Maclaren's deeds assists with that part of the history of the site which was hinted at but missing from the evidence which was before the first inquiry. The deed evidence is consistent with the 1956 sketch plan attached to Mr Haydon's letter¹ which noted that footpath 3 had been "*diverted when Blue Cottage was built*".
23. The deed evidence is also not inconsistent with Mr Nightall's recollections from 1978² that Blue Cottage had been fenced since 1926 and that the footpath had since at least 1955 run between fences. Although Blue Cottage was not built until 1938 and Mr Place bought the land in 1928, not 1926, Mr Nightall's recollections regarding the fencing of the plots are reflected by the deed plans.
24. In paragraph 35 of the interim decision I concluded that the boundary of Blue Cottage had moved to the east given that the draft map showed the footpath following the peck line on the base map but also running at the eastern boundary of Blue Cottage. It is evident from the deeds that the boundaries of Blue Cottage were established by at least 1932 and that my conclusion as to the movement of the boundary was incorrect.
25. The route shown in the draft map is reflected in both the marked-up plan produced by the Council in 1956 in its response to Mr Nightall and in the 1928 deed plan of the land purchased and subsequently sub-divided by Mr Place. The 1928 deed plan shows that as part of the onward sale of plots of building land, Mr Place sought to provide a new alignment for footpath 3 as it ran through his land. The description of this new route as being subject to rights of way, suggests that it was accepted by Mr Place that a right of way ran over the plots of land he sought to sell on and that the right of way was being accommodated on a new alignment within his retained land.
26. There is however, no evidence of a diversion order having been sought from the Quarter Sessions to give legal effect to the physical movement of the path to the route between Mr Place's building plots; Mr Maclaren had not located such a document in his deeds and no evidence has been provided to either

¹ Paragraph 26 of the interim decision

² Paragraph 29 of the interim decision

- inquiry that such an order was made. This is in direct contrast to the action taken over footpath 2 after Mr Nightall had altered the alignment of that path.
27. The documentary evidence, when taken as a whole, shows that from the late nineteenth century a route capable of carrying pedestrian traffic had existed over part of the Ashridge Estate and was one which Mr Place sought to accommodate between his building plots. It was this route which was marked on the draft map and it is likely that it was this historic route which the parish council sought to record as a public right of way.
28. It may have been Mr Place's intention that the footpath over the land he was subdividing should have been formally diverted but this does not appear to have been done. The absence of any formal action having been taken to stop up and divert the pre-existing right of way shows, on a balance of probabilities, that the route recorded in the draft map was an accurate representation of where the historic public right of way ran at the time the draft map was produced.
29. It follows that I consider that footpath 3 was not erroneously shown in the draft and definitive maps and that the interim decision regarding the deletion of D – X does not need revisiting.

Position of footpath 3

30. The Council submitted that if it was concluded that footpath 3 was not shown in the draft and first definitive maps in error, then consideration should be given to amending the position of footpath 3 as the route shown in the Order was that shown in the current definitive map which the Council says shows a different alignment to that shown in the original draft map.
31. Mr Westley's view was that given the difference in scale of the Order and draft maps, the difference between the two would be *de minimis* and no further modification was required.
32. The copy of the draft map provided in the Council's bundle (HCC03) does not show footpath 3 connecting directly to Ringshall Road. Instead footpath 3 is depicted as making a junction with footpath 2 at a point east of Ringshall Road with footpath 2 then running a short distance to the road. Footpath 3 is therefore not shown on the alignment D – G. The copy I have is not at a true scale of 1:10,560 due to it being a photocopy of the original map, however, scaling the distance between Ringshall Road and the commencement of footpath 3 shows that point to be between 10 and 15 metres from the road. Point X on the modified Order map is approximately 18 metres south-east of Ringshall Road.
33. It is difficult to determine from the copy of the draft map the exact position of the northern end of footpath 3. However, I consider point X on the 1:1250 modified Order plan to be a sufficiently accurate representation of the northern end of footpath 3 as shown on the draft map at a scale of 1:10,560. Consequently, I do not consider that the Order plan requires further revision as to the position of footpath 3.

E - B

34. Mr Maclaren took issue with the interim decision to remove E - B from the Order. Although the oral evidence I heard at the first inquiry was that E - B had not been used due to overgrowth, that had not been his experience. Mr Thiebaud said that E - B had been in use during the 35 years the AAT had owned its land. In Mr Maclaren's view if the interim decision led to the Council not maintaining E - B, this would be a greater inconvenience to the public.
35. It was evident from my site visits that there was a prominent wear line in the ground along E - B although the path was somewhat overhung by bracken fronds. The route E - B is also the alignment of the route shown in the 1928 deed plan coloured brown which was identified as being subject to a right of way.
36. Whereas I had concluded in the interim decision that an inference of dedication at common law could not be drawn on the evidence then available, the setting out of E - B by the then landowner as a route subject to a right of way, the depiction on conveyance plans and deeds of the route in such a way to make it clear to would be purchasers of the building plots that there was a right of way over that route, and the subsequent use of that route by the public is evidence from which dedication and acceptance of a public right of way at common law can be inferred.
37. In the light of the new documentary evidence submitted, I conclude that E - B should not be removed from the Order.

Other matters

38. At the inquiry it was contended that the correction of the definitive map by removing D - X was a matter of common sense; as footpath 3 had not been used for at least 35 years (according to Mr Thiebaud) and may not have been available since at least 1938, its removal from the map would be no loss.
39. I acknowledge that to conclude that footpath 3 is not shown in error on the map may appear perverse given that it is likely to have physically disappeared from the ground between 80 and 90 years ago. However, section 53 of the 1981 Act is not concerned with what might be desirable or preferable and conclusions must be arrived at following an examination of the available evidence, irrespective of what those conclusions might be.
40. In this case, the evidence submitted shows that a public right of way subsisted over the land that eventually became part of Windrush, Blue Cottage and the woodland to the north which has not been formally diverted.
41. My decision will no doubt come as a disappointment to Mr Maclaren who is the recent and current owner of Blue Cottage and who has been left with a problem that has been a live issue for many years. It may be that some other administrative solution can be found to address the issue of footpath 3 either by means of extinguishment under s118 of the Highways Act 1980 or by means of a diversion under s119. These are matters for the landowners and the Council to explore and are not matters for my consideration under this Order.

Conclusions

42. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that as the evidence demonstrates, on a balance of probabilities that there is no right of way of any description over A – C – B and C – X, these ways should be deleted from the definitive map and statement. I also conclude that as the evidence demonstrates that a public right of way on foot subsists over G – B and F – E – D and E – B, these routes should be added to the definitive map.

Formal Decision

43. The Order is confirmed subject to the following modifications:

In the Schedule Part I:

Under the sub-heading 'Description of path or way to be deleted':

amend paragraph 2 to read: That part of Little Gaddesden Footpath 3 commencing at a junction with Little Gaddesden Footpath 2 at SP 9848 1421 (point C on the Order plan) and running generally south for approximately 25 metres to SP 9848 1419 (point X on the Order plan).

under the sub-heading 'Description of path or way to be added':

amend paragraph 1 to read: A public footpath commencing at SP 9850 1390 (point D on the Order Plan) and running generally north for approximately 130 metres to SP 9850 1403 (point E on the Order Plan) then running generally north east for approximately 150 metres to a junction with Little Gaddesden Footpath 2 at SP 9861 1414 (point F on the Order plan). Width: varying from 1 metre to 1.45 metres between SP 9850 1390 (point D on the Order Plan) and SP 9850 1403 (point E on the Order Plan) as shown shaded on part 2 of the Order Plan, 2 metres between SP 9850 1403 (point E on the Order Plan) and SP 9861 1414 (point F on the Order Plan). Limitations: None.

Amend paragraph 3 to read:

A public footpath commencing at a junction with Little Gaddesden Footpath 2 at SP 9851 1417 (Point B on the Order plan) and running generally south for approximately 130 metres to a junction with Little Gaddesden Footpath 27 at SP 9850 1403 (Point E on the Order plan). Width: 3 metres Limitations: None.

In the Schedule Part II:

Amend the statement for Little Gaddesden 027 to read:

Commencing at a junction with Little Gaddesden FP3 at SP 9850 1390 and running generally N then NE for approximately 280m to a junction with Little Gaddesden FP2 at SP 9861 1414. Width: varying from 1 metre to 1.45 metres between SP 9850 1390 and SP 9850 1403; 2 metres between SP 9850 1403 and SP 9861 1414. Limitations: None.

Amend the statement for Little Gaddesden 002 to read:

Commences at junction with Ringshall Road at SP 9846 1420 and runs generally SE for approximately 20 metres to a junction with Little Gaddesden FP3 at SP 9848 1419 then continues generally SE for approximately 35 metres to a junction with a public footpath at SP 9851 1417 and then E to a junction

with Little Gaddesden FP27 at SP 9861 1414. Continues SE through Ashridge Park across FP5 at Witchcraft Bottom thence SE and then NE to junction with county road opposite Memorial Lodge at Little Gaddesden.

Width 4.21m between SP 9846 1420 and SP 9851 1417

Limitations gate at SP 9846 1420

Amend the statement for Little Gaddesden 003 to read:

Commences at junction with Little Gaddesden FP2 at SP 9848 1419 thence generally SE through Ashridge Park to junction with FP5. Recommences from FP5 approximately 170m SW of previous junction thence SE then S to west end of Ashridge House thence SW and SE along eastern boundary of Hardings Rookery to join Park Road at Berkhamsted Lodge. Width: Limitations:

Add the following as a statement for a footpath running from SP 9851 1471 to SP 9850 1403

Commencing at a junction with Little Gaddesden FP2 at SP 9851 1471 and running in a generally southerly direction for approximately 130 metres to a junction with Little Gaddesden FP 27 at SP 9850 1403. Width: 3 metres
Limitations: None.

In the Order Plan Part 1:

insert point X;

delete the footpath between points X and D.

annotate D – E as being part of Little Gaddesden FP27

In the order Plan part 2:

annotate D – E as being part of Little Gaddesden FP27

Alan Beckett

Inspector

THIS PLAN FORMS PART OF THE
 HERTFORDSHIRE COUNTY COUNCIL
 (LITTLE GADDESSEN 2, 3 & 27)
 MODIFICATION ORDER 2014

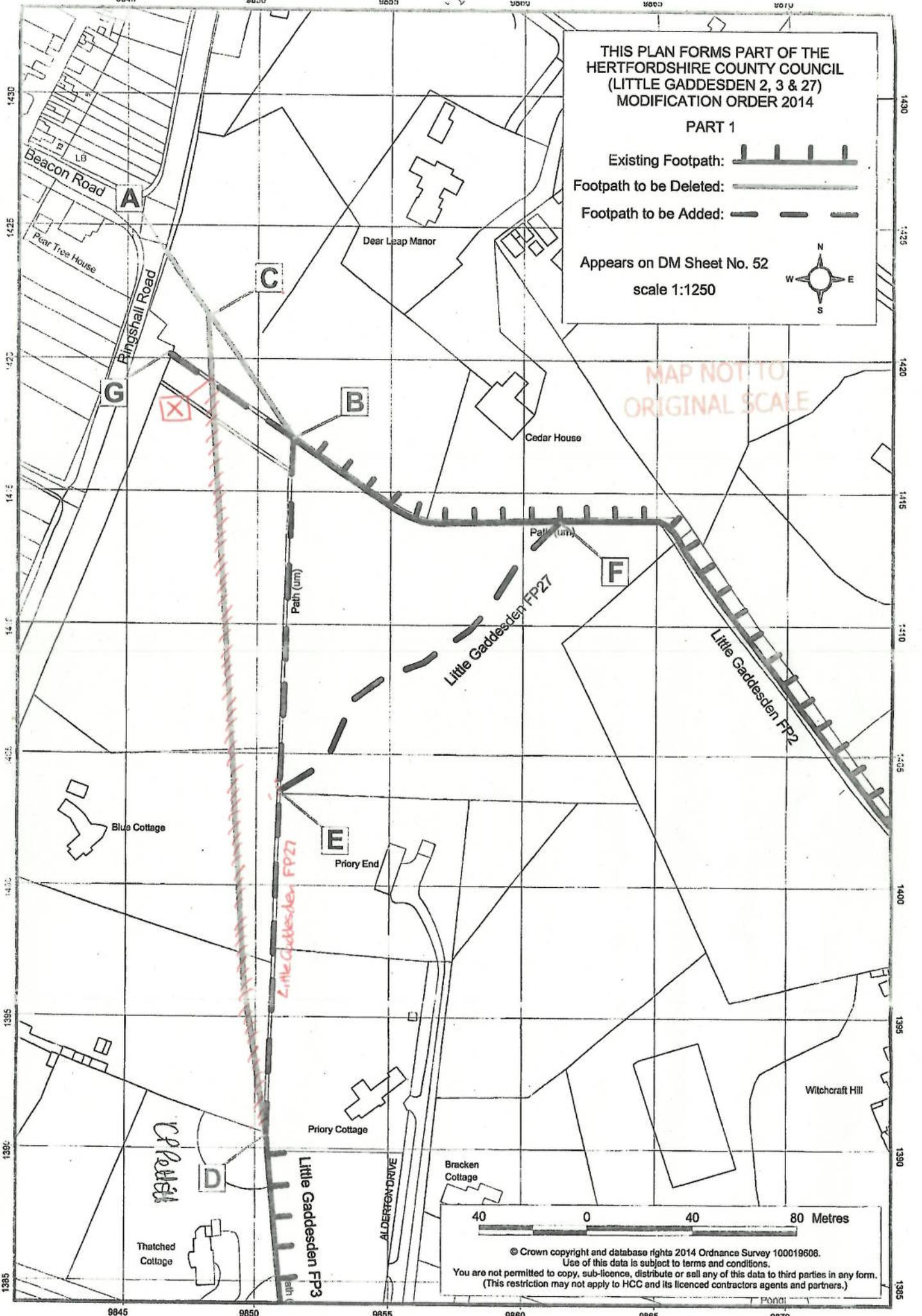
PART 1

- Existing Footpath:
- Footpath to be Deleted:
- Footpath to be Added:

Appears on DM Sheet No. 52
 scale 1:1250



MAP NOT TO
 ORIGINAL SCALE



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MODIFICATION ORDER 2014

PART 2

Depiction of variable width:

Appears on DM Sheet No. 52

Not to scale



MAP NOT TO
ORIGINAL SCALE

Priory End

Little Gaddesden FP3 FP27

Priory Cottage

CP 100019606

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