



## Order Decision

Inquiry held on 7 August 2019

**by Heidi Cruickshank BSc (Hons), MSc, MIPROW**

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

**Decision date: 18 September 2019**

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### **Order Ref: ROW/3214078**

- The Order is made under Section 119 of the Highways Act 1980 and is known as The Isle of Wight Council, Public Footpath BB40 (Part) Forelands Bembridge Isle of Wight Diversion Order No. 1 2018.
- The Order is dated 2 February 2018 and proposes to divert part of a footpath running over land on the south-eastern side of Bembridge onto an alternative alignment, as shown in the Order map and described in the Order Schedule.
- There were 46 objections and representations outstanding when the Isle of Wight Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is not confirmed.**

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### **Preliminary Matters**

#### ***The Definitive alignment***

1. This Order was made by the Isle of Wight Council, the order-making authority ("the OMA"), following the investigation of a claim under section 53 of the Wildlife and Countryside Act 1981 in November 2016. The application related to a claimed alternative alignment of the Order route between points X and B<sup>1</sup>.
2. The OMA did not find that the Definitive Map and Statement ("the DMS") required modification as a result of that application and no appeal on the matter was made to the Secretary of State. I am satisfied that the route shown on the Order map, to reflect the route as recorded on the DMS, is the route which is under consideration in relation to this Order. The OMA also accepts and agrees with objectors that the obstructed alignment A – X – B is the legal alignment<sup>2</sup>. Section A – X would divert onto the line A – E and X – B onto alignment D – E – X – Y – Z – B.
3. It is not for me to decide whether or not the making of a diversion Order was appropriate; my only role is to determine whether the statutory tests relating to the Order before me are satisfied.

#### ***The status of the proposed routes***

4. The OMA statement of case indicated their view that since construction of the seawall in 1984 the majority of the general public had used the path proposed to become public footpath BB40. This was supported by some of the statutory representations and objections. All parties agreed that the northern-most

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<sup>1</sup> The Order map shows points A – E. I have added points X, Y and Z to the copy of the Order map attached to this decision for ease of reference.

<sup>2</sup> It has not therefore been necessary to deal with the legal cases referred to in objection in relation to potential reinstatement of the existing route.

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routes, A – E and D – E – X, had been used over many years, rather than the route A – X running through what was referred to by some as a ‘rockery’.

5. Taking account of *R v Lake District Special Planning Board ex parte Bernstein [1982]*<sup>3</sup> I asked for comments on the possibility that the proposed route may already be an unrecorded public right of way. The OMA said that whilst they believed the public had used the proposed routes they had insufficient evidence to meet the tests for presumed dedication. I note that in relation to section X – B the claimed alignment, referred to in paragraph 1, was not the route proposed by this Order but an alternative to the north-west of X – B.
6. Taking account of the evidence of obstruction to the routes on both sections A – X and X – B *Dawes v Hawkins [1860]*<sup>4</sup> provides authority that such public use as has been made of the proposed routes would not support dedication at common law. The use is referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stops a highway. I am satisfied from the evidence available at this time that the proposed routes are not already public rights of way and it is appropriate to consider whether the legally recorded route should be diverted onto the alternative alignments.

### **Requested modifications**

7. The OMA requested a modification to the Order in relation to the timing of the works, allowing for a lead-in time. In discussion of the parties in whose interests the Order has been made it was confirmed that the lessee and occupier of the café, situated to the north of the route X – B, was one of the parties who would find the diversion in their interests. I am satisfied that it would be appropriate to consider those interests. However, as I am not confirming the Order I have not dealt further with modifying it.

### **Procedural Matters**

8. I made an unaccompanied site visit on 6 August and held a Public Inquiry into the Order on 7 August 2019. Following a request to do so I made a further visit accompanied by representatives from all sides at the close of the Inquiry.

### **Legal Framework**

9. The Order is made under section 119 of the Highways Act 1980 (“the 1980 Act”) in the interests of the owner of the land and the public. As noted above I am also considering the interests of the lessee/occupier of the land.
10. Sub-section (6) of the 1980 Act sets out that “*The Secretary of State shall not confirm a public path diversion order...unless [she is]...satisfied that the diversion to be effected by it is expedient...in the interests of the owner, lessee or occupier of land crossed by the path...or of the public, it is expedient that the line of the path...or part of that line, should be diverted...and further that the path...will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the effect which—*
  - (a) *the diversion would have on public enjoyment of the path or way as a whole,*

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<sup>3</sup> [1982] Lexus Citation 81 (The Times, 3 February 1982)

<sup>4</sup> 8 CB (NS) 848, 141 ER 1399

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- (b) *the coming into operation of the order would have as respects other land served by the existing public right of way, and*
- (c) *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,*
- so, however, that for the purposes of paragraphs (b) and (c) above the Secretary of State or, as the case may be, the council shall take into account the provisions as to compensation referred to in subsection (5)(a)..."*
11. Sub-section 2 sets out that a "...diversion order shall not alter a point of termination of the path or way...(where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public."
12. Sub-section (5) sets out that "...the council may require [the owners] to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,—
- (a) *any compensation which may become payable under section 28 above as applied by section 121(2) below, or*
- (b) *where the council are the highway authority for the path or way in question, any expenses which they may incur in bringing the new site of the path or way into fit condition for use for the public..."*
13. I must have regard to the material provision of a rights of way improvement plan ("ROWIP") prepared by any local highway authority whose area includes land over which an Order would create or extinguish a public right of way.

### **Main Issues**

14. There were no objections to the diversion of section A – X onto alignment A – E but I still need to be satisfied that the proposal is appropriate. Section A – X could only be diverted if section D – E – X – Y – Z – B was recorded as a public right of way; if this was not the case point E would not terminate on a highway and so the diversion would not satisfy section 119(2) of the 1980 Act.
15. Objectors raised particular concerns about public safety in relation to use of the seawall, section Y – Z, which was related to matters of convenience and enjoyment of the route. There were questions as to the weight that should be given to the parts of the ROWIP submitted by the OMA.
16. It is noted that the Collins English Dictionary defines 'expedient' as "*suitable to the circumstances; appropriate; inclined towards methods that are advantageous rather than fair or just...*".

### **Reasons**

#### **Section X - B**

*Whether it is expedient, in the interests of the owner, lessee, occupier of the land and the public, that the right of way in question should be diverted*

17. Two owners would be affected by this section of the route: the Forelands Drive Association ("the FDA") who own the majority of the land crossed by the existing route as well as all that crossed by the proposed route; and, the owner of the beach hut and enclosed land situated to the south-west of point X.

18. The recorded route of section X – B runs alongside, and probably partly through, the beach hut within the enclosed associated garden area; through part of the land enclosed with and occupied by the Beach Hut Café (“the café”); and then across an open area to the beach. Due to erosion the route west of point B is inaccessible for general walking, with a drop to the foreshore from the bank. Those accessing the beach from the existing route appear to divert to the steps between Z and B, which are part of the proposed route.
19. I understand that the land around the beach hut has been enclosed since before the current owner bought it in 2003. It would be in the interests of that owner to enjoy the use of the property without the need to reinstate the definitive route, which may require relocation of the beach hut itself.
20. With regard to the café there would be less disruption in reinstating the definitive line, which runs along a plateau of land. However, I accept that in a commercial environment it may be in the interests of the lessee and occupier not to have to take account of the route when placing tables and chairs. The general public making use of the café would also be likely to appreciate being able to use the slight plateau, rather than the more sloping and uneven land in the grassed café area.
21. Although providing more land in respect of the proposed route than the existing, the FDA were content with the diversion. It would resolve long-standing issues and simplify matters for their lessee, which would be a sensible outcome from their perspective.
22. The proposed route would provide a surfaced path, with appropriate steps and handrails as required, with clear evidence of public use of this route. Although I find the diversion to be less in the interest of the public than of the owners and occupiers, I consider it does meet this test.
23. Taking all the relevant points into account I consider the proposed diversion to be suitable to the circumstances arising in this case and, therefore, appropriate and expedient in the interests of the owners, lessees, occupiers and the public.

*Whether the new route will be substantially less convenient to the public*

24. The existing route follows a plateau and I understand formerly a slope to the foreshore. Whilst I have considered the route as if it were open and available I take some account that the former coastal slope could not be reinstated without significant coastal protection works in this area.
25. The proposed route would be longer but not significantly so; even taking account of the additional distance added by the diversion A – E there is only an additional 23 metres overall. There is no width recorded for the legal alignment in the DMS whilst the proposed route would vary from a minimum of 1.5m to 4.35 – 4.85 metres on the seawall, Y – Z. Whilst the steps to the beach, Z – B, are a pinch-point at 1 metre width I observed use of the proposed route by people with a child’s pushchair, carrying a surf/body board, with dogs and carrying bags of provisions to the beach huts to the west. There was no indication that the proposed route made such use inconvenient in comparison to the use that would have been available on the existing route.
26. In this location climate change is an important issue for consideration. The sea level is predicted to rise, leading to increased erosion and I agree with

- objectors that it would not be sensible to move the route to a location where it may then be lost. However, the Isle of Wight Shoreline Management Plan 2, December 2010, indicates an intention to 'Hold the Line' of the sea defences in this area in the periods to 2025 and 2055. Beyond that period it would be subject to 'Managed Realignment', with the aim to increase the time before property was affected or lost and to maintain local use of the frontage. I agree with the OMA that if the seawall coastal defence was not held then the land behind it, crossed by the existing route, would also soon be lost to the actions of the sea. I am satisfied that there would be no more likelihood of loss of the proposed route through coastal erosion than the existing.
27. A main concern raised was the proximity of the section Y – Z to the sea and whether this would be dangerous, potentially leading to people being swept off the seawall, slipping on seaweed or getting wet due to wave splash. The seawall lies approximately ten metres closer to the sea than the existing route and is lower down the coastal slope from the plateau.
28. A photograph showing seaweed on this area was submitted; whilst I noted a little seaweed on the seawall during my site visits I accept the evidence from the FDA that the amount seen in the photograph was an unusual situation. I do not consider the presence of seaweed on a route by the sea would be anything unusual. It seems unlikely that the existing route would be subject to seaweed but it would be subject to the potential issues arising from sharing space with private and commercial premises. There was no evidence of recorded incidents or complaints arising from use of either route<sup>5</sup>.
29. Concerns that seaweed would become caught, leading to smells, if a guardrail was put on the seawall are in my view overstated. It would be no more or less likely to be caught, and remain, on a rail than on the seawall itself and, as noted by the OMA, there was no evidence of seaweed caught on the existing guardrails associated with the steps south-west of point Y.
30. The OMA said that the inclusion of the guardrail was only to address public concern and they did not think it necessary due to the extreme unlikelihood of conditions capable of sweeping a person from the seawall. The FDA raise concerns that it may provide a false sense of security, encouraging use at times when the area generally should not be used. As the guardrail is set out in the Order as works to be carried out in implementation I have considered the matter as if it would be present.
31. Photographs of waves overtopping the seawall were submitted by objectors. In relation to the photographs from 10 August 2014 I do not accept the argument that this reflects 'normal summer weather'. Although the calculations undertaken suggested gusts of 26.5 knots the Met Office data clearly indicates a gust speed of 47 knots at or near this location for the period 10 – 11 August 2014. The Met Office data referred to the effect of Hurricane Bertha on the UK as a whole with unseasonably windy and very wet weather, stating "*Many coastal locations recorded gusts of 40 – 50 Kt (unseasonably strong for the time of year) including along the south coast of England on 10 August*"; indeed it seems odd to take such a photograph unless it was showing something unusual in this location at this time.

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<sup>5</sup> It seems that some members of the public have used routes though the café area, although not following the definitive line X – B in recent years due to longstanding obstructions.

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32. The right of way would be used throughout the year, particularly by local dog walkers, whilst the café is only open April – October. Other photographs showing overtopping of the seawall generally dated from winter periods although one dated August 2013, in addition to that of August 2014, clearly showed the proposed route to be wet underfoot and waves, which would wet users, at point Y. The steps providing beach access at low tide appear to lead to increased wave splash in this area.
33. The proposed route would be surfaced against the picket fence which denotes the café boundary, which may be an improvement over the unsurfaced footing of the existing route. This is likely to assist with use when wet underfoot but would not prevent people becoming wet from the wave splash. However, I agree with the beach hut owner that leaving an unsurfaced area between the seawall edge and the proposed surfacing may in itself lead to difficulties in use, with different surfacing in the same area.
34. I do not find the evidence to suggest that people would be unable to use the proposed route for extended periods due to weather or tide at present; the OMA suggest a maximum of two hours around high tide. However, the OMA's own climate change information indicates that *"Extreme weather events are predicted to become more frequent and severe, leading to damage to buildings and infrastructure, and risks to our personal safety."*
35. In the context of the proposed route representing a reduction in public safety, the OMA's Health and Safety Advisor said that in his professional judgement the route would be safe for public use, bearing in mind that it is not possible to remove all hazards and risk. He had not carried out a direct comparison of the existing and proposed routes but did not find any reason for the public to be stopped from using the section Y – Z.
36. The law does not require the removal of all risk but does require it be reduced so far as reasonably practicable. Taking account of the professional advice offered I am satisfied that the proposed route would not present a public safety risk. There is some evidence that people may occasionally be prevented from using the proposed route, or at least might have to accept that they would become very wet in so doing and so, at some times, the proposed route would be less convenient for the public to use than the existing. However, the information that extreme weather events will become more frequent and severe indicates that in the long-term there would be more occasions when users would find the proposed route difficult or impossible to use.
37. Overall, the proposed route may not be substantially less convenient to the public in the short-term, although there would be times when this would be the case. Taking the long view in relation to a public right of way in this location I consider that the proposed route, in terms of section Y – Z, would be substantially less convenient to the public than the existing route X – B. I do not consider this to have relevance to the use of seawalls elsewhere, or to the potential introduction of the England Coast Path in this area; it relates only to the tests which I must apply under the 1980 Act comparing the existing and proposed routes.

*The effect of the diversion on public enjoyment of the route as a whole*

38. The footpath A – X – B – C provides access generally north-east to south-west, giving access to the foreshore in this area. The proposed routes would provide the same access opportunities as well as legal access to the steps to the beach situated south-east of point Y.
39. Use of the existing route would involve passing through three areas of residential type property and a public café. The proposed route provides a clear and separate route from these facilities and I agree with the OMA that some people would enjoy this more than feeling they may be in private space.
40. Part of the point of using a route to the beach would be to see, hear and smell the sea and I consider that some people would prefer a route closer to the sea. However, the matters of potential long-term effects on public use – and indeed occasional disruption in the short-term – due to extreme weather conditions would affect enjoyment.
41. I consider that there are positives and negatives in relation to public enjoyment of the use of the route as a whole. However, I consider that use, particularly of section Y – Z, would be less enjoyable than the existing route with changing weather patterns leading to greater likelihood of people being unable to use the route for periods of time, or unable to do so without getting wet.

*The effect the coming into operation of the Order would have with respect to the land served by the existing route and the land over which the new route is created together with any land held with it, account being taken of the provisions as to compensation*

42. The majority of the land crossed by the existing and proposed routes are within one ownership. I am satisfied those interests would not be negatively affected.
43. It appears that the café may have relied on the footpath for customer access. If the Order were confirmed the access currently available between points E and X would be legally recorded; however, as all the land is in the same ownership, the business interest should not be affected. Access at the western end, from the beach, does not now follow either the legal line or the proposed route of the footpath. Legally recording the steps B – Z may provide some benefits in terms of ensuring access to the open area of land, which then gives access into the café area.
44. The beach hut would also have relied on access from the footpath and the proposal would allow continued access from the section D – X.
45. The beach huts situated to the west of the footpath appear to rely on the right of way for access. Although it was suggested that the owners/occupants may be unhappy with the proposed route, no beach hut owners/occupiers provided such evidence to the Inquiry, either in writing or in person. One couple, identifying themselves as owners of a beach hut, indicated that they had used the route on an almost daily basis for many years walking their dog and accessing their hut. They supported the proposed diversion which I am satisfied would provide access to the beach and the beach huts as required.

46. The Order sets out that any compensation which becomes payable in consequence of the coming into force of this Order would be defrayed by the landowners/lessees/occupiers of the land.

*Whether the point of termination of the new right of way will be on the same highway or highway connected with it, and will be substantially as convenient to the public*

47. Point B remains unaltered, giving a connection to the continuation of the public right of way to the mean high water mark, point C. Point X moves a short distance to point D, with access to Footpath BB10. I agree with the FDA that the section D – X is more convenient for members of the public approaching from the carpark to the north and so I am satisfied that the diversion is appropriate in relation to the matter of termination points.

#### *Conclusions*

48. I consider that it is expedient to confirm this part of the Order in the interests of the owners and/or occupiers or lessees of the land, as well as the public in some respects. However, in terms of public use I consider that the proposal overall would be substantially less convenient to the public. I also consider that it would not be expedient to confirm the Order in respect of the matters relating to public enjoyment of the route as a whole, although satisfied as to the effect on associated land and the termination points.

#### **Section A - X**

*Whether it is expedient, in the interests of the owner, lessee, occupier of the land and the public, that the right of way in question should be diverted*

49. Two owners would be affected by this section of the route: the FDA who own the 'rockery' area and the land crossed by the proposed route; and, the owner of Seabarn, a derelict property situated just north-east of point X.
50. I am satisfied that it would be in the interests of the landowners, and any occupiers, for the route to be diverted, removing the need to reinstate a public footpath through the enclosed land. I also consider that it would be in the interests of the public to preserve the alternative route, which is already provided with handrails and steps in this location.

*Whether the new route will be substantially less convenient to the public*

51. Although I was unable to walk the existing alignment, it is a relatively short section such that the general direction and topography was clear from viewing it at either end. I understand that the area has been subject to land slips but this was not directly visible due to the extensive overgrowth. Taking account of the short diversion and the facilities of the proposed route, I am satisfied that the route would not be substantially less convenient to the public.

*The effect of the diversion on public enjoyment of the route as a whole*

52. There were no objections to the diversion of this section, which I take to indicate that the public were content with the effect of the proposal on their use. I am satisfied that there would be no negative effect upon public enjoyment of the route as a whole.



*The effect the coming into operation of the Order would have with respect to the land served by the existing route and the land over which the new route is created together with any land held with it, account being taken of the provisions as to compensation*

53. The majority of the land crossed by the existing and proposed routes are within one ownership and so I am satisfied that their interests would not be negatively affected.
54. The property Seabarn is in separate ownership and would have relied on access from the footpath, although it does not seem to have been available on this alignment for some time. Taking account of my decision with regard to the diversion of X – B I am not satisfied that this property would be served by the proposed route and so diversion would not be appropriate in this respect.

*Whether the point of termination of the new right of way will be on the same highway or highway connected with it, and will be substantially as convenient to the public*

55. Point A continues to provide access to Footpaths BB10 and BB13. Point X would move to point E, which would have been part of the proposed new route of the existing footpath BB40. However, given my decision in relation to the diversion of the section X – B, there would be no recorded highway in this location. As a result, the points of termination would not be substantially as convenient to the public, with no legal right of use beyond point E.

#### *Conclusions*

56. I conclude that it is expedient to confirm this part of the Order in the interests of the owners and/or occupiers or lessees of the land, as well as the public. In terms of the effect on public use I am satisfied that the changes would not be substantially less convenient or have a negative effect upon the enjoyment in using the footpath. However, I do not consider that it would be expedient to confirm this part of the Order with regard to the public termination point or the effect on land served by the existing route.

#### ***Rights of way improvement plan***

57. The OMA referred to the possibility for improvements in mobility access linking the proposed route Y – Z with the continuation of the seawall to the east. I understand this part of the seawall is currently planned as part of the England Coast Path. I agree with objectors that whether improvements may be made on the eastern section is not clear, with issues around funding and topography seeming a potential barrier to implementation. In relation to this Order the funding would be provided from obligations under section 106 of the Town and Country Planning Act 1990.
58. In terms of the surfacing on section Y – Z this may assist those users who would already have been able to negotiate the steps and slope of section D – Y. I do not consider that the ROWIP specifically supports the diversion, however, it also does not weigh against confirmation of the Order.

#### ***Statutory designations***

59. Section Y – Z – B lies within the Site of Special Scientific Interest ("SSSI") and the entirety of the route within an Area of Outstanding Natural Beauty

("AONB"). The existing route is within the AONB and the south-western end within the SSSI. The proposed route is already in use, with evidence to support that having been the case over at least the last 15 – 20 years, if not longer. I am satisfied that there would be no conflict between the designations and the recording of the proposed route in this location.

### **Overall Conclusions**

60. I consider that it is expedient to confirm the Order in the interests of the owners and/or occupiers or lessees of the land, as well as the public. In terms of the effect on public use I consider that the proposed route would be substantially less convenient to the public than the existing. I consider it would also have a negative effect upon public enjoyment in using the footpath such that it would not be expedient to confirm the Order. Due to the relationship of the sections of the route proposed for diversion I have not been able to consider diverting only section A – X.
61. I understand the desire put forward by one party for a finite end decision, with apparent social media comment and general behaviour over the matter in the local area put to a stop. However, I am not satisfied that this proposal can be said to be expedient overall.
62. Having regard to these, and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should not be confirmed.

### **Other matters**

63. Whilst a number of the representations in support of the diversion used a particular form of words, a number of objectors referred to the use of the 'current' footpath, which cannot be the legal alignment I needed to consider, as it has not been available to the public for at least sixteen years. I have taken account of all the pertinent matters raised and would note that the number of parties on either side of a case is not a relevant matter in reaching a decision.
64. I have dealt with the Order as made. Without a request on the part of the OMA to modify the route it is not open to me to consider alternatives which may have been discussed as different stages and may have provided a solution.

### **Formal Decision**

65. I have not confirmed the Order.

*Heidi Cruickshank*

**Inspector**

## **APPEARANCES**

### **For the Order Making Authority:**

Mr B Gard                      Principal Lawyer for Litigation & Property for Isle of Wight Council

*who called:*

Mr R Burroughs              Health and Safety Advisor for Isle of Wight

Mr D Clarke                    Rights of Way Manager for Isle of Wight

### **In Support of the Order:**

Ms E Clarke

Mr P Richardson              *on behalf of* Forelands Drive Association

### **In Objection to the Order:**

Mr D Betteridge

Mr G Ferris

Mrs M Gare

Mr J Roberts

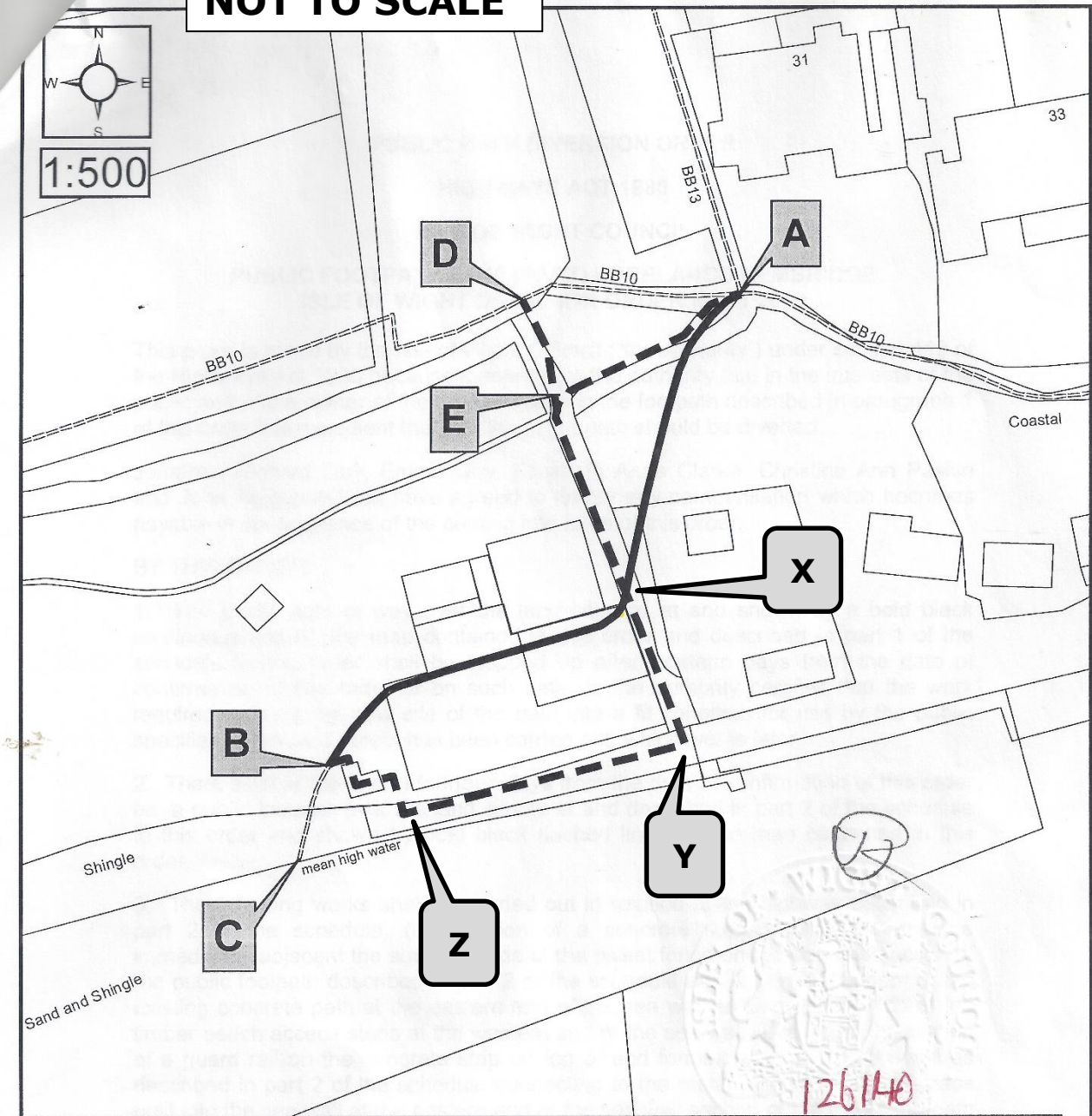
Mrs M Sullivan

Miss M Wills

## **INQUIRY DOCUMENTS**

- 1     The Order
- 2     Opening Statement on behalf of the Isle of Wight
- 3     Isle of Wight Council List of appearances
- 4     Closing Statement on behalf of the Isle of Wight
- 5     Calculations from Mr G Ferris

**NOT TO SCALE**



Section of Public Footpath BB40 to be deleted = bold black continuous line A-B  
Sections of Public Footpath BB40 to be created = bold black dashed lines D-E-B and A-E  
Section of Public Footpath BB40 to remain = double dashed line B-C

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ISLE OF WIGHT COUNCIL  
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HIGHWAYS ACT 1980 s119  
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