



Order Decision

Inquiry Held on 10 March 2020

by Helen Slade MA FIPROW

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

Decision date: 19 March 2020

Order Ref: ROW/3222427

- This Order is made under Section 257 of the Town and Country Planning Act 1990 and Section 53A(2) of the Wildlife and Countryside Act 1981 and is known as The Borough of Bournemouth Public Footpath U45 Stopping Up Order 2018.
- The Order is dated 22 November 2018 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule, and to modify the Definitive Map and Statement accordingly.
- There were seven objections outstanding at the commencement of the inquiry.

Summary of Decision: Order is confirmed with modifications.

Procedural Matters

1. I held an inquiry on Tuesday 10 March at the Civic Centre in Poole. I carried out two unaccompanied site visits to the area: one the day before the inquiry opened and one on the morning following the close of the inquiry. The second visit allowed me to view a slightly larger area in the vicinity of the footpath concerned, including Montgomery Avenue, Teddar Road, Cunningham Crescent and Verney Road. No-one requested an accompanied site visit and I am satisfied that I am sufficiently familiar with the area to enable me to determine the Order.
2. Since the Order was made there has been a re-organisation of local government in the area and Bournemouth Borough Council is now part of a combined authority known as Bournemouth Christchurch and Poole Council ('BCP'). For clarity I will refer to the combined Council in this decision, except where it is necessary for me to make a distinction for some reason.

The Order

3. When the Order was first submitted to the Planning Inspectorate a number of issues were identified: the Statutory Notice was inadequate as it did not describe the location of the route concerned with sufficient detail for it to be identified by a member of the public; and only one copy of the original Order was made by Bournemouth Borough Council ('BBC') contrary to the appropriate regulations¹. Furthermore, the Order did not comply with the regulations in that it did not fully reference the effect on the Definitive Map and Statement which would result from confirmation.

¹ The Public Rights of Way (Combined Orders) (England) (Amendment) Regulations 2010

4. The Planning Inspectorate agreed to accept a certified hard copy of the Order as being the second required Order, and requested BCP to re-advertise the Order with new, clearer wording in the statutory notice. The Planning Inspectorate also concluded that any necessary modifications to the Order could be made at the time of confirmation by the Inspector, if appropriate.
5. Two objections were made to the original statutory notice, and a further five were received during the second advertisement period. All seven objectors are statutory parties to this matter.

The status of the footpath

6. The footpath which is the subject of the Order was added to the Definitive Map and Statement following a decision made by an Inspector on an appeal under Section 53(5) of Schedule 14 to the Wildlife and Countryside Act 1981 ('the 1981 Act'). The appeal decision (Reference FPS/G1250/14A/1) was dated 29 November 2017 and BBC was directed to make an Order under Section 53(2) and Schedule 15 of the 1981 Act to modify the Definitive Map and Statement to include two of the three footpaths which were the subject of that appeal.
7. BBC made an Order on 4 January 2018 which purported to add the two footpaths to the Definitive Map and Statement by way of a 'Legal Event Modification Order' citing the above referenced decision of the Inspector as the qualifying event. This is a complete misunderstanding of the requirement to make an evidential Definitive Map Modification Order in accordance with Schedule 15 of the 1981 Act, and the effect of the order that was actually made is questionable.
8. Whilst the Order I am considering has been made under Section 257 of the Town and Country Planning Act 1990 ('the 1990 Act') the guidance given in the Rights of Way Circular (1/09) regarding Public Path Extinguishment Orders made under the Highways Act 1980 ('the 1980 Act') is equally pertinent. Paragraph 5.22 of the Circular states that:

"Ways need not be shown on the definitive map and statement before they can be extinguished but authorities must be satisfied as to the status of the ways before making an order..."
9. On the basis that the land over which the path runs was (at the time they made the legal event order) owned by BBC, and that BBC were the surveying authority for the Definitive Map and Statement at that time, I am prepared to accept that the Council has acknowledged the status of Footpath U45 as a highway and effectively dedicated it as such. Consequently, I am able to determine the present Stopping Up Order as applying to a highway, whether or not its appearance on the Definitive Map and Statement has been achieved using the correct lawful procedures.

The Main Issues

10. Section 257(1) of the 1990 Act provides for an Order to be made authorising the stopping up (or diversion) of a footpath if it is necessary to do so in order to enable development to be carried out in accordance with planning permission already granted under Part III of the same Act. In this case the Order is for the stopping up of Footpath U45.

11. In considering whether or not to confirm the Order, I am obliged to take into account:
- any significant disadvantages or losses the stopping up of the path would cause to the general public, or to other individuals whose actionable rights of access would be extinguished by the process;
 - any countervailing advantages to the public, or those individuals;
 - the planning benefits of, and the degree of importance attaching to, the development.
12. Mr Webster referred to the recent judgements in the High Court and the Court of Appeal in relation to a case involving Network Rail Infrastructure Ltd ('Network Rail').² I agree that these are relevant to this type of Order and that they set out the tests as being firstly, one of 'need' and secondly one of 'merit'.
13. I must also have regard to guidance on Rights of Way contained in DEFRA Circular 1/09, and other guidance submitted by the parties.

Reasons

The 'need' case

Whether it is necessary to stop up the footpath to enable development to take place in accordance with planning permission already granted.

14. Permission was granted by BCP on 16 April 2018 for a development of 14 dwelling houses, formation of new vehicular access and parking spaces, and the diversion of existing public right of way ((Planning Application Ref: 7-2016-26471). The permission states that at least 40% of the approved units shall be provided for affordable housing, but the evidence given by BCP, both written and oral, indicates that all the properties are intended for social housing.
15. The approved plan for the development (Site layout plan no. 2672-P-13U dated 11 August 2015) shows that the intention at that time was to divert the route of Footpath U45 (shown in red) onto a new route (shown in blue) which would effectively run along the footway of part of the new vehicular access. This route would have incorporated steps, whereas the present route is level. Informal consultation on this proposal was undertaken and objections were received on the basis that such a diversion would not accord with the Council's responsibilities under the Equality Act 2010, because the introduction of the steps would disadvantage people with mobility problems who might be prevented from using the route as a consequence of the diversion.
16. Having failed to find an acceptable diversion, BCP decided to make an Order extinguishing Footpath U45 instead of diverting it. The approved plan shows that the existing line of Footpath U45 would run over or through the gardens of 7 of the new dwellings, and through 4 (or possibly 6) of the sheds to be provided for bicycle storage at the bottom of the gardens.
17. Guidance from the Dorset Police, derived from the document 'Security by Design' suggests that retaining the footpath in this location, and separating it

² R(on the application of Network Rail Infrastructure Ltd) and SSEFRA and another [2017] EWHC 2259 (Admin) and 2018 EWCA Civ 2069

from the adjoining properties on both sides, would create an unlit corridor. Their advice is that development layouts should avoid the creation of too many, or unnecessary, segregated footpaths to the rear and side of property boundaries as these have been proven to generate criminal activity by providing legitimate access routes. Where it is necessary to retain a segregated path for some reason, it should be as straight as possible, wide, well lit and devoid of potential hiding places. It should also be overlooked by surrounding buildings and well maintained. They should ideally be at least 3 metres wide to allow easy passage and plenty of personal space. The guidance suggests that designers should consider making such a path a focus of the development.

18. The design of the approved development does not provide any of the suggested design parameters for the retention of Footpath U45, and indeed clearly envisaged that it would not remain in its current position. However in the absence of any consensus on a diversion route, the only option which appears to have been acceptable to BCP, based on the guidance from the police, was to remove it from the development altogether.
19. Mr Powis considered that the development could have been designed to incorporate the existing line of the footpath concerned, and that the path could have been improved with the provision of lighting and better maintenance to mitigate the risks highlighted by the police. This is undoubtedly a possibility, but the fact is that the approved design, as it stands, does compromise the line of the existing footpath. This does not mean that the path could not remain where it is, but it does mean that the planning permission could not be implemented in its approved form.
20. On behalf of BCP, Miss Shearer explained that the reduction in size of the gardens would be against local policy in terms of amenity space and garden dimensions, and would result in having to move the bicycle sheds. Both of these would require a new, or revised, planning application which would not be supported by either the police or the local planning authority. The alternative option of constructing only half of the development would not be viable as the site is going to be expensive to develop (due to geological and topographical constraints). Furthermore, there is a substantial need for 4-bedroom social housing properties of this type in the BCP area (over 800 people in the top ('gold') tier of the waiting list). It should be noted that I was not shown any evidence to support these latter statements, but they were not challenged by the objectors. The difficulties of developing the site are self-evident and not disputed by the objectors.
21. I place little weight on the arguments about the size of the amenity space as it was shown by reference to a document entitled 'Residential Development: a design guide' (now apparently incorporated into the Council's Core Strategy published in 2012) that there are no specified figures associated with garden sizes. However, on the bare facts, it is clearly necessary to divert or stop up the line of the existing Footpath U45 to enable the approved development to take place as it is currently not catered for in the design.
22. In my view confirmation of the Order depends on weighing the merits of the proposed development with the disadvantages or advantages to be gained from stopping up the path. The leading case in this respect is that of *Vasiliou v*

Secretary of State for Transport [1991] 61 P&CR 507 ('Vasiliou'), which was cited with approval in Network Rail.

The 'merits' case:

The effect on members of the public

23. The objectors claim that the loss of the path will result in significant disadvantages to the public, particularly those with mobility difficulties. They state that the present route is accessible in wheelchairs and mobility scooters and that it provides access to local bus stops and other facilities. Although the path is not being 'diverted' as such, the alternative route on the approved plans remains the route I have described above in paragraph 15 and is shown in blue on the approved plan. That route will incorporate steps.
24. Mr Webster considered that, given the layout of the surrounding streets and the addresses of some of the objectors, the number of people who would be inconvenienced or face difficulties of any sort would be restricted to about 8 properties (his estimate of half of the total number of properties) lying along the service road section of Moorside Road. This section of the road lies above the main carriageway and on a level with the present route of Footpath U45.
25. On my second site visit I was able to see that there are 24 semi-detached dwellings situated along the service road (numbers 102 – 148) so using Mr Webster's parameters would increase his estimate of the affected number of properties to 12.
26. I was also able to see the facilities referred to by the objectors (Bus Stops, Medical Centre, Library, Nursery School, playground, and shops) and that it was possible to get to these via Verney Road, Cunningham Crescent, Montgomery Avenue, and Teddar Road on the level from Moorside Road, albeit a slightly longer journey for some. I must also take into account that for those people with no mobility problems, the alternative route (the 'blue' route) will provide a way through to Teddar Walk and Teddar Road which is of an equivalent distance to the present route. Furthermore, two routes without steps will also be retained across or through the development (Footpaths U44 and U25), although I accept that these paths are on fairly steep gradients which would not necessarily be suitable for wheelchairs, or heavy buggies or pushchairs.
27. I note from the addresses of the objectors, and those who signed the petition that only three of them appear to live on the service road section of Moorside Road. I have no information on whether or not they would all have difficulties using the alternative route with the steps, although one of the residents does claim to have a medical condition which affects their ability to use slopes and steps.
28. I accept that there will be some members of the public, particularly those who either have mobility issues themselves, or who have young children with them, who will experience inconvenience as a consequence of the stopping up of Footpath U45. However, they will not be prevented from getting to their ultimate destination altogether, and there are likely to be many people who will be able to take advantage of the other routes which pass through the site. Mrs Lennon gave evidence at the inquiry and uses a wheelchair and a mobility scooter; but she acknowledged that she only used the Order route about once

a month, and it is clear from her address that other routes, on the level, are available to her. They may be less attractive to use, but they do not prevent her reaching the facilities to which I have referred above, including the bus stops, and nor do they prevent her from visiting friends in the vicinity.

29. I conclude that there will therefore be some disadvantage to the members of the public, but that it is limited in scope and significance. This nevertheless weighs in the balance against the stopping up of the path.

The effect on other individuals

30. In *Vasiliou*, access to business premises by the public and by the owner would have been prevented or curtailed by the closure of an adjacent highway. This was found to be sufficient reason not to confirm the closure order.
31. I have not been made aware of any similar circumstances in the Order I am considering. There is no evidence that Footpath U45 provides the sole means of access to any property, or that closure of it would prevent access to property. There is therefore no evidence of detrimental affect on individual rights of access.

Any countervailing advantages to the public

32. It was argued by the Council that there are significant advantages to the public arising from the proposed development in terms of the wider social benefit. The proposed development will provide much needed homes for some people who have been on the waiting list for many years. I accept that if the development goes ahead as planned this is likely to be a significant public benefit by providing much-needed housing. The associated loss of habitat, which concerns the objectors, is a matter which will have been taken into account during the planning process. It is not a matter for me to re-visit, although I accept it may be much-missed by some people.
33. I note from the parties' statements that there has been some misuse of the area (for fly-tipping and possibly for drug use) although no evidence of either problem was submitted to me. Nevertheless, the nature of the Order route is that it has a sharp dog-leg in it, and it is obscured from view for part of its length. Mrs Tucknott was honest enough to admit that she felt uncomfortable about not being able to see all of the footpath alongside her own property (Footpath U25), but said she would not want to see it closed as a consequence. I infer from her remarks that she has similar views about the Order route. Nevertheless, the police clearly consider such paths to provide opportunities for crime, and advise against creating such routes, but despite claims that there was a problem with burglaries in the area, no crime figures of any sort were presented to me by either party.
34. The Order route has been used for many years (as evidenced by the fact that the highway rights over it were deemed to subsist following the earlier appeal) and therefore the public must have accepted any risk that currently exists. The nature of the existing path is consistent with a path through an area of open space. However, the nature of the area will be changed by the development which will provide paths through it which are better maintained, well lit, and rather wider than the present Order route. This is likely to be seen, overall, as a public benefit and I accept that some advantages will arise from having more formally defined pedestrian routes in an area of housing. I also accept that the

design has been formulated to try to minimise the opportunity for crime, which would also provide a public benefit.

35. I was not provided with any examples of potential advantages to the pedestrian public from the stopping up of the footpath, other than that the routes through the development would be of a higher specification and would be less subject to criminal activity. Those people who use the current path and enjoy its ambience are unlikely to consider those issues to be of much benefit to them.

Balancing the advantages and disadvantages

36. The benefits of the development were clearly set out by BCP and were not seriously challenged by the objectors. Although it was postulated by Mr Powis that there was other land which could be developed for housing by BCP, that is not something that affects my decision on this particular matter.
37. There will be some disadvantage to the public from the stopping up of the path, but other paths exist, and will be created, to mitigate that to a large extent. It cannot be denied that there may be a few people, particularly those with mobility difficulties, who will suffer a disadvantage that is harder to mitigate, but there is insufficient evidence for me to conclude that the number of people affected will be significant and, in any case, other routes on the level are available to them.
38. Overall, the disadvantages that arise from this proposal are not sufficient to outweigh the advantages arising from the development, and they are not significant enough to prevent the confirmation of the Order.

Other Matters

39. Many of the objectors' arguments relate to their opposition to the development or their desire to retain the open space. Whilst I can appreciate their concerns, I must make my decision on the basis of the permission which has already been granted. Many of the issues they raise will have been considered by the local planning authority when deciding whether or not to grant permission, and it is not my role to re-examine that decision.
40. Concern was also expressed about the fact that the ground conditions were unstable and that the development may not take place as a consequence. I accept that this may be a possibility, but I must determine the Order on the basis of the criteria set out above in the Main Issues. In the absence of strong evidence to suggest that the development will not take place, I must proceed on the basis that it will. Should the development not take place, it will be open to BCP to take measures to retain the existing footpath if they wish, using appropriate legal procedures.

Conclusions

41. 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 with modifications. The modifications are administrative in nature and merely serve to clarify the impact of the Order. They do not require re-advertisement.

Formal Decision

42. I confirm the Order subject to the following modifications:

- In the heading to the Order in the first line after the words 'STOPPING UP' insert the words '*AND DEFINITIVE MAP AND STATEMENT MODIFICATION*';
- In Paragraph 1 of the Order after the words 'stopped up' insert the words '*and the definitive map and statement for the Borough of Bournemouth shall be modified*';
- In Paragraph 2 of the Order, delete the full stop after 'order' and add the words '*and thereupon the definitive map for the Borough of Bournemouth shall be modified by deleting from it that public right of way*'.

Helen Slade

Inspector

APPEARANCES

FOR THE ORDER MAKING AUTHORITY:

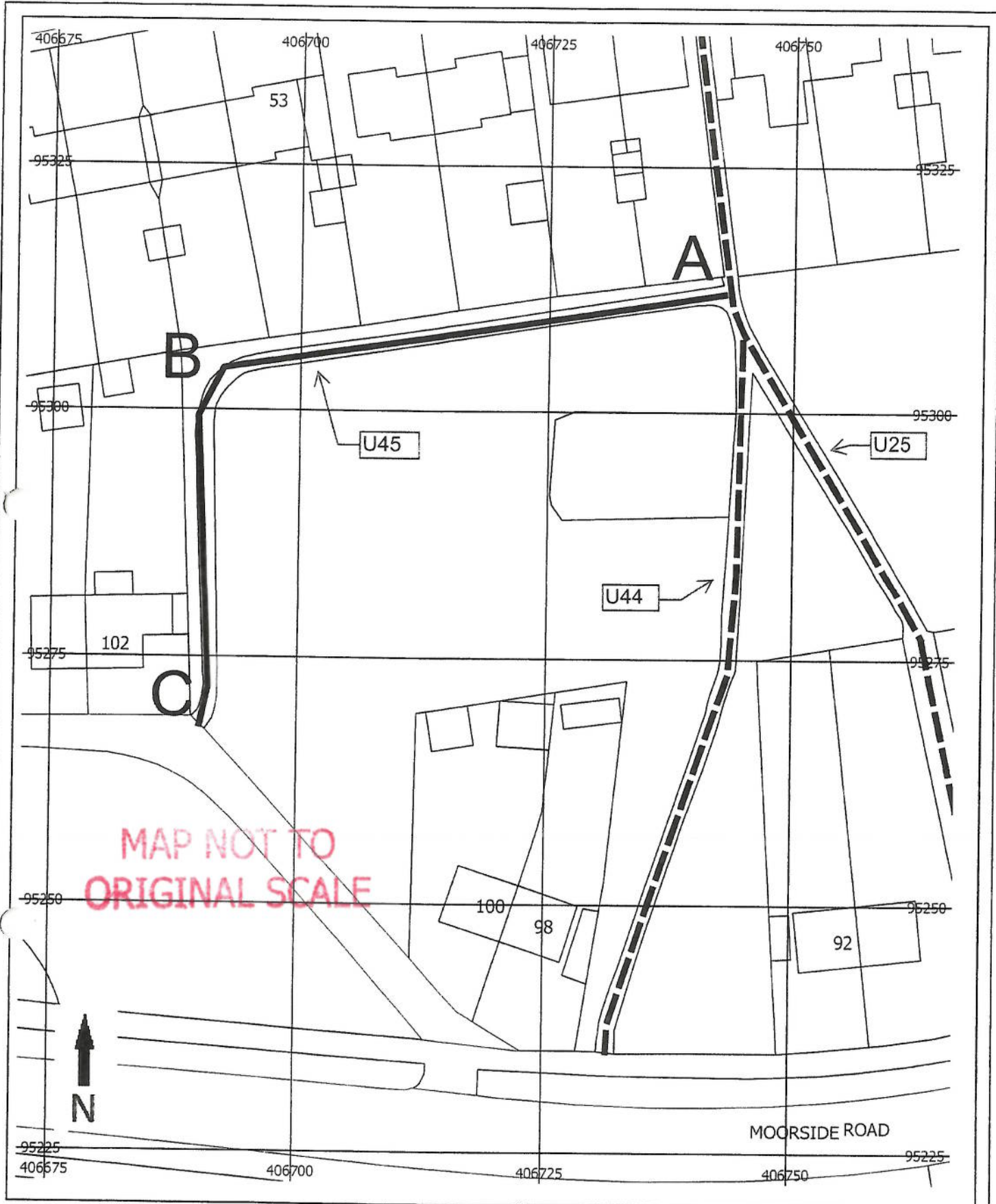
Mr W Webster	Of Counsel, instructed by the Order Making Authority
He called	
Miss L Shearer	Project Manager Housing, BCP

FOR THE OBJECTORS:



Mr D Powis	Retired Solicitor
He called	
Mrs S Lennon	Local resident
Mrs L Tucknott	Local resident
Mr A Watford	Local resident

DOCUMENTS

- 1 Statement of Case and associated bundle; and Proof of Evidence of Mr P Elias on behalf of BCP
- 2 Bundle of Photographs and Authorities submitted by Mr W Webster on behalf of BCP
- 3 Extract from 'Secured By Design' version 2, March 2019
- 4 Extract from Residential Development: A design guide submitted by Mr Webster on behalf of BCP
- 5 Copy of Legal Event Modification Order dated 4 January 2018 submitted by BCP
- 6 Petition and Statements submitted by Ms S Karol on behalf of objectors
- 7 Statement submitted by E G Turner
- 8 Statement submitted by Rachael Vye on behalf of Mrs Nicola Vye
- 9 Emails and document lists submitted by Mr D Powis
- 10 Bundle of documents submitted by Mr D Powis



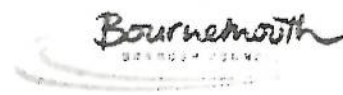
Legend

-  Unaffected Public Footpaths
-  Path to be Stopped Up

Public Footpath U45

Stopping Up Order Map

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