



Order Decision

Inquiry held on 29 January 2019

Site visit on 26 February 2020

by Sue M Arnott FIPROW

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

Decision date: 01 July 2020

Order Ref: ROW/3201752M

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Hertfordshire County Council (Graveley 15, 18 and 21 and Wymondley 24) Modification Order 2016.
- The Order is dated 19 February 2016. It proposes to modify the definitive map and statement for the area by adding a bridleway, upgrading a footpath to restricted byway status and upgrading a footpath to a bridleway along Green Lane, Turf Lane and Milksey Lane respectively, in the parishes of Graveley and Wymondley, as described in the Order. Only the status of Milksey Lane is at issue here.
- There was one objection outstanding when Hertfordshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.
- In accordance with Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 I have given notice of my proposal to confirm the Order with modifications. Three objections have been submitted in response.

Summary of Decision: Confirmation of the Order is proposed subject to further modifications, as set out in the Formal Decision below.

Preliminary matters

1. If confirmed with the modifications set out in paragraph 55 of my interim Order Decision issued on 20 February 2019, the Order would not record on the definitive map and statement a bridleway as originally proposed. Further, the existing public footpath would not be recorded over the full width of the lane as shown in the Order as made but would exclude a narrow strip along its southern side (in effect the raised roadside verge) and a small triangle of land near to its junction with Restricted Byway 15 in Graveley Parish (shown on the Order map as point B). In addition, a gate and stile would be recorded as limitations at the south eastern end of the Order route (at point C).
2. Whilst objections to my proposed modifications were lodged by three parties, all of whom had been present at the inquiry in 2019, submissions have also been made by four other parties raising objections to some (though not all) of my proposed changes.

The Main Issues

3. The main issue remains whether the evidence is sufficient to show, on a balance of probability, that a public right of way can be presumed to have been dedicated over and beyond the 6 feet (1.83m) wide footpath that is already recorded in the definitive map and statement, both in terms of the status of the way and its width.
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4. A second issue concerns my proposal to modify the Order by including two limitations, having previously reached the conclusion that the Order route was dedicated subject to the gate and stile in question.

Reasons

Legal context

5. As I previously noted, Hertfordshire County Council (HCC) made the Order on the basis of events specified in sub-section 53(3)(c)(i), (ii) and (iii) of the Wildlife and Countryside Act 1981 (the 1981 Act). Two of the three routes included in the Order had been confirmed unopposed, leaving only the present Order route (B-C) to be determined.
6. In her objection, Ms Emrys-Roberts challenged my statement¹ that "*only sub-section 53(3)(c)(i) is now relevant here*". I accept that is not entirely correct since it is (and was) clear that the matter before me not only concerns the addition of the claimed public right of way beyond the limits of the present definitive line (an event which is covered by sub-section 53(3)(c)(i)) but also the claimed upgrading of definitive Footpath No 18 (Graveley)(for which sub-section 53(3)(c)(ii) is engaged). However, I do not believe that my incorrect reference to the relevant legal event(s) led to any unreliable conclusions in the reasoning that followed.

The status of the Order route

7. I previously found insufficient evidence to demonstrate the existence of the public bridleway first proposed by the Order but accepted that the case for a public right of way on foot over a greater width (beyond 6 feet) could be supported on a balance of probability. This was based on use by the public during a 20-year period between July 1994 and July 2014.
8. In my interim Order Decision, I concluded that the gate at point C was locked at some point in 1994 and on a number of other occasions since then. Whilst pedestrians were able to by-pass the gate by using the adjacent stile, the blockage was sufficient to cause intermittent interruptions to regular use by horse riders.
9. With his recent submission, Dr Wadey for the British Horse Society (BHS) includes user evidence forms from four people² which were not before me previously. Whilst this adds to the body of evidence of horse riding along Milksey Lane, I still take the view that this is not sufficient to show uninterrupted public use with horses throughout the whole twenty year period; whilst there appears to have been a substantial amount of use in the latter years leading up to July 2014, there is a lack of evidence to show it was used to the same extent in the 1990s.
10. In fact Dr Wadey agrees the evidence is not sufficient to demonstrate the route has been dedicated as a bridleway under the statutory regime, but he explains that the application was made by the BHS because the route was actually in use by horse riders at the time.
11. Referring to the additional statements he provided, together with five others that I have previously considered, he submits that between 1999 and 2014

¹ In paragraph 5 of my interim Order Decision

² K Bennett, R Hughes, K Tuff and E Bracey; I have noted that none of these claimants recall a gate at C

- only one of these nine regular riders noted the presence of a gate (which did not prevent her use of the route), indicating that the others always found it to be open. He argues that this evidence casts doubt on whether the gate was locked as much as had been alleged at the inquiry.
12. He refers also to the case of *North London Railway Company v Vestry of St Mary, Islington [1872]*³ in which a way was held to have been dedicated after being 'thrown open to the public' and used as a highway for only eighteen months. He contends that by leaving the gate open in the knowledge that the public were using the route for at least 15 years is very similar.
 13. In short, Dr Wadey is suggesting that, by applying the common law, the use by the public was sufficient to establish a public right of way for horses over the full width of the former carriageway between 1999 and 2014.
 14. Ms Emrys-Roberts also submits that a bridleway exists. She asserts that the pre-1981 use of Milksey Lane would have continued after its formal closure to all but pedestrians until eventually prevented by the locked gate which she accepts was in place in 1994. However, no new additional evidence has been put forward to substantiate her claim.
 15. As I previously noted, any pre-existing rights for horse riders and cyclists were extinguished in law in 1981 even if their use did continue in practice. If that use (of which there is limited evidence) did continue from 1981 to 1994, it could not raise a presumption of dedication under the statutory approach and I am not wholly convinced that the frequency of such use during those 13 years would be sufficient to imply dedication at common law (although it is not entirely clear that this is the case she is making).
 16. Ms Emrys-Roberts questions whether the person who erected the gate (and eventually locked it) had the authority to do so, especially given that ownership of Milksey Lane has not been determined. It has still not been established that the gate was installed by the owner of land and I would not be prepared to accept it as a clear statement of a lack of intention to dedicate a right of way unless a connection with the owner were established.
 17. Ms Emrys-Roberts goes on to suggest that the gate was an illegal obstruction to the public's use of the lane. I cannot agree with that proposition. If the gate was first locked in 1994, then it seems unlikely (on the basis of the evidence before me) that a public right of way had been established during the period since 1981. The gate did not obstruct the 6 feet wide public footpath reserved by the 1981 stopping up order; therefore the gate itself could not constitute an unlawful obstruction in 1994 if no right of way had yet been established over the remaining width of the lane.
 18. Owners of the land on the north side of the lane, PCS Homebuild (PCS), oppose the Order route in its entirety. They dispute the existence of a public right of way over and above what is presently recorded on the definitive map.
 19. PCS took ownership of the land in September 2017; it had been previously held by Mr Smith, its sole director and shareholder who had owned the land since September 1998. Mr Smith says that at this time there was a locked gate and he was given the keys. Between 1998 and 2018 the only key holders were himself and his licensees who kept horses on the land. He asserts that the only

³ *North London Railway Company v Vestry of St Mary, Islington [1872]* 37 JP 341, 21 WR 226, 27 LT 672

- people who could have gained access were the key holders and that the use claimed by the BHS was not observed by or reported to him by his licensees.
20. Mr Smith's reported comments conflict with direct evidence I heard from witnesses at the inquiry in 2019. As I previously accepted, the evidence points to the gate being locked *on occasion* during the relevant twenty-year period but not consistently throughout that time.
 21. The claimed use may not have been observed by Mr Smith but that does not necessarily mean it did not take place. I did not hear direct evidence from him at the inquiry, nor did any horse riders appear as witnesses. I noted that both horses and cyclists were observed by at least one inquiry witness but this was not a frequent occurrence. Without the opportunity to test the evidence through cross-examination, it is difficult to reconcile the conflicts around the regularity of use by horse riders during the shorter periods suggested by both Dr Wadey and Ms Emrys-Roberts such as to establish the case for implied dedication at common law. Consequently I am still not convinced the weight I can place on the evidence of use by horse riders is sufficient to tip the scales.
 22. PCS also submits that the locked gate should be taken as demonstrating a lack of intention to dedicate the way as a public path. However, in the absence of any evidence as to ownership of the lane itself, I reject the assertion that either the erection of the gate, or its occasional locking, represented the intentions of the owner in this matter.
 23. I acknowledge that PCS claims ownership of the whole of Milksey Lane by virtue of adverse possession⁴, and that PCS argues it is not possible to take practical steps to demonstrate a lack of intention to dedicate a public right of way beyond the 6 feet wide footpath. This same point was raised at the inquiry and for the same reasons stated at paragraph 46 of my interim Decision, I reject it.
 24. In summary, having again examined the evidence to support the application for bridleway status, I am not satisfied the case is made out. However, I am unchanged in my conclusion that, on a balance of probability, the evidence shows a public right of way subsists on foot along the route B-C as described in the Order beyond the width presently recorded in the definitive statement.

The width of the Order route

25. On the basis of the evidence previously before me I concluded that the public right of way to be recorded on the definitive map should include the northern bank (broadly including the six-foot width reserved in 1981) plus the former road incorporating both the visibly metalled central section (surfaced with tarmac in part) and the mulchy parts on both the northern and southern sides (under which lie a hard surface). I accepted that no public right of way had been established through long usage over the southern bank/verge, nor over a triangle of land at point B at the junction of Milksey Lane with Turf Lane.
26. However I rejected the submission that an additional area (effectively the land behind the gate at point C) should be excluded from the width of the public footpath.

⁴ Mr Beney of the Open Spaces Society questions any claim of adverse possession of a highway (Footpath 18)

27. This latter point is again challenged by the owners of the land on the south side of Milksey Lane (Mr and Mrs Pickup). No new evidence has been submitted to support their further objection but they point to apparent inconsistencies in the reasoning in my interim Decision.
28. Mr and Mrs Pickup take issue with my conclusion at paragraph 37: "*Similarly at the gate, (there) were clearly times when pedestrians did find the gate closed and locked when the line they took would have veered towards the stile. Equally the gate was often found to be open in which case people walked directly through, the full width of the gateway being available to them.*" They argue that this is inconsistent with a finding of continuous and uninterrupted use of the area and that it conflicts with my conclusion that the gate was occasionally locked so that people veered towards the stile.
29. To consider this point fully, I have reviewed the evidence relating to the gate, when it was locked and the effect this had on users of the way. My main findings on this point were set out in my interim Decision from paragraph 25 onwards. Notwithstanding my revised conclusion (below) on the matter of the stile, my findings of fact remain largely unchanged in relation to the gate.
30. However I acknowledge the apparent conflict highlighted by Mr and Mrs Pickup and will therefore re-examine the interpretation I placed on those facts.
31. In doing so I will firstly reiterate my conclusion in paragraph 44 of the interim Decision that "*there is little, if any, evidence to show that the landowner during the relevant period made clear to the public in any way a lack of intention to dedicate any part of the lane as a public footpath*". Given that ownership of Milksey Lane is still to be determined, the erection of the gate at point C and its occasional locking cannot confidently be attributed to the owner of the soil on which it stands, nor has its original purpose been identified.
32. Having now re-considered my conclusions in the light of recent submissions, I think it would be helpful for me to clarify my reasoning in paragraph 43 where I stated "*There is nothing to indicate that the gate was intended to challenge use by the general public, either on foot or horseback (although the effect of the locked gate was to prohibit the free passage of horses).*"
33. I remain of the view that there is no evidence to show that pedestrians were intended to be excluded from the lane overall. The existence of the public footpath along the northern side of the lane is acknowledged although people were never restricted to this width other than on the occasions they found the gate locked when they resorted to the 6 feet wide path at point C.
34. I have less confidence in my previous conclusion (at paragraph 28 of my interim Decision) that "*pedestrian use was continuous and without interruption*" on the basis that "*none of the claimants who use the lane on foot have indicated that at any time their use was prevented*". When the claimed section of the lane is viewed as separate from the parallel definitive footpath, then it becomes clear that, as a matter of fact, use through the gate was interrupted on those occasions when the lock was in place. In effect, the barrier forced pedestrians back onto the definitive right of way in order to bypass the gate so that their journey could continue. This may not have been the situation throughout the whole of the relevant twenty years but, on the basis of the evidence before me, I must acknowledge that this happened on sufficient occasions to interrupt the otherwise continuous use through the gateway.

35. It follows from this that the claimed use by the public between the two gateposts at point C cannot raise a presumption of dedication as a public path since it cannot be described as 'without interruption'.
36. Mr and Mrs Pickup continue to assert that the public right of way should not be recorded over the first 10-15 metres west of the gate over the full width⁵ as they argue people would have veered toward the stile (which they submit was sited on land owned by the highway authority). In their view, pedestrians would have had no reason to go near the gate whichever their direction of travel. Accordingly, they seek a further modification to exclude all but a narrow and gradually widening strip from the stile for the first 10-15 metres of Milksey Lane.
37. It is hard to extract from the available evidence the precise actions of the claimants other than in broad terms. The general response from claimants who encountered the locked gate was that they diverted to the stile at the side to get around it.
38. This is a double gate and therefore the padlock and chain must have been located in the centre of the old road. It seems to me that most people would have needed to walk up to that point in order to establish whether or not it was locked or could be opened. If locked, then the obvious route from there would have been directly to the stile.
39. Whilst I accept the general thrust of the argument that the area around the southernmost gatepost is unlikely to have been walked on by people using the stile, with or without venturing to the centre to inspect the padlock first, the evidence remains somewhat equivocal.
40. The matter is not beyond doubt but, on balance, I am prepared to accept that qualifying use by pedestrians is unlikely to have made use of a relatively small area to the south west of the gate. Although it may appear to be of little significance, it is clearly a matter at issue here. Consequently, I shall need to propose a further modification so to omit an additional area from the extent of the public right of way as depicted on the Order map.

The proposed limitations

41. Having concluded that the gate and stile at point C were present at the start of the relevant period, I previously proposed that these should be recorded as limitations on the public's use in the definitive statement.
42. PCS endorses both limitations whilst Mrs Conchie for the Ramblers' Association (RA) opposes both. For the Open Spaces Society (OSS) Mr Beney challenges the stile but not the gate. HCC's primary case is that there should be no limitation recorded on the definitive statement for Footpath Graveley 18 at all, but, in the alternative, it opposes a stile as a limitation but not the gate.
43. For the BHS, Dr Wadey drew attention to a principle established in the case of *Robinson v Adair* [1995] *The Times*, 2 March 1995 to the effect that no public right of way can be established by actions which are prohibited or made criminal by statutory provision. He argues that it must follow that if a public right of way is established by lawful use, no limitation on that right can arise from actions which are prohibited or criminal by statutory provision.

⁵ I previously accepted the southern verge should be excluded from the Order route; that remains my view.

44. A similar argument is pursued by the RA and OSS which centres on the reservation of the 6 feet wide public footpath in the 1981 stopping up order. They point out that this made no provision for a stile at any point along its length. Neither has a stile been formally authorised by the highway authority, for example under Section 147 (or 66) of the Highways Act 1980. Referring to the case of *Herrick v Kidner [2010]*⁶, Mr Beney highlighted the public's right to use all parts of the Queen's highway unless lawful limitations exist; in his submission, the stile at point C is not lawful. HCC agrees that the stile is an unlawful obstruction of the highway so should not be recorded as a limitation.
45. Although there is no detailed survey to prove it, it would seem reasonable to suppose that the stile was positioned within the 6 feet width of the definitive footpath on the north side of the former vehicular highway along Milksey Lane. It was clearly within 6 feet of the present (northern-most) gatepost⁷. That being the case, and in the absence of evidence of formal authorisation, there is no doubt it was unlawful and, being installed after the re-establishment of the public right of way in 1981, cannot constitute a limitation on public use. Therefore, despite my previous conclusion, I now accept that it would not be appropriate to record this stile in the definitive statement as a limitation.
46. Further, I have concluded at paragraph 35 above that the claimed additional width used by the public did not extend between the two gateposts at point C so that the gate cannot amount to a limitation on public use and should not be recorded as such.

Other matters

47. In reaching these conclusions I have not considered the need for, or suitability of, either of the two limitations. Such an exercise is not relevant here since the Equalities Act 2010 does not apply in these circumstances. The question to be addressed is whether features which have existed as restrictions on public use of the way since dedication should be recorded as lawful limitations.

Summary

48. I remain of the view that, on a balance of probability, a public right of way on foot has been shown to subsist along Milksey Lane over a greater width than is recorded on the definitive map and statement but that the evidence is insufficient to demonstrate that a public bridleway has been established.
49. My previous conclusion as regards width still stands insofar as this right of way encompasses the six-foot width already recorded along its northern side plus the former road incorporating the visibly metalled central section and the mulchy parts on both the northern and southern sides but not the southern verge or triangle of land that I previously proposed for removal from the Order.
50. In addition, I have now concluded that, on balance, there are grounds for also excluding from the recorded width of this public right of way a further area on the south side of Milksey Lane immediately to the west of the gate at point C.
51. Finally, having taken on board submissions made in response to my proposed modifications, I accept that no limitations should be recorded in relation to Footpath 18 (Graveley) on the definitive statement.

⁶ *Herrick and Another v Kidner and Another [2010] EWHC 269 (Admin)*

⁷ It is possible that this gatepost also lies within the 6 feet wide footpath but that argument has not been pursued.

Conclusion

52. Having regard to the above and all other matters raised at the inquiry and in the subsequent written representations, I propose to confirm the Order with the previously proposed modifications, excluding those noted in the preceding paragraph (51) but with the addition of that referred to in paragraph 50 above.

Formal Decision

53. I propose to confirm the Order subject to the following modifications⁸:

In the Order schedule

- In **Part I: Modification of the Definitive Map - 'Description of public right of way to be upgraded'**: delete the entry for Milksey Lane;
- In **Part II: Modification of the Definitive Statement - 'Variation of particulars of path or way'**: amend 'Width' to read "Between 1.83m and 8m...";
- Change all references to 'Bridleway' (or 'BR') 18 to 'Footpath' (or 'FP') 18;

On the Order map

- Delete from the key "footpath to be upgraded to bridleway (B-C)" and amend "Existing footpath" to read "Existing footpath/footpath to be recorded with additional width (B-C);
- Amend the notation used on the map for B-C to that for the above and further reduce the area shaded grey.

54. Since the confirmed Order would (if modified as now proposed) not show a way as it is shown in the Order as made, I am required by virtue of Paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give further notice of my proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Sue Arnott

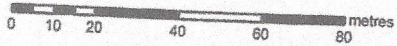
Inspector

⁸ For clarity, the text underlined indicates modifications which differ from those previously proposed.

The Hertfordshire County Council
 (Graveley 15, 18 and 21 and Wymondley 24)
 Modification Order 2016

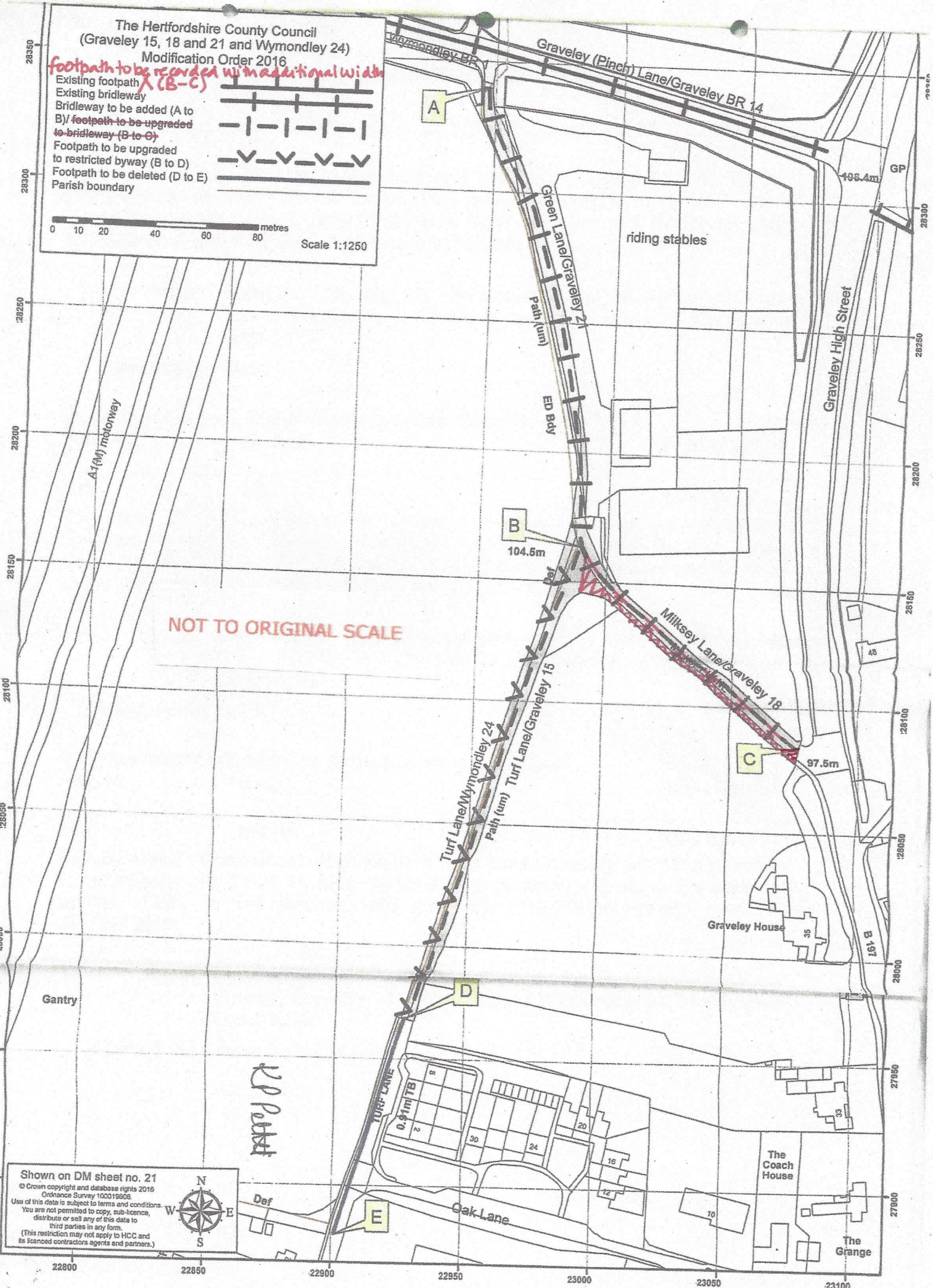
Footpath to be recorded with additional width
 X (B-C)

- Existing footpath
- Existing bridleway
- Bridleway to be added (A to B) / footpath to be upgraded to bridleway (B to C)
- Footpath to be upgraded to restricted byway (B to D)
- Footpath to be deleted (D to E)
- Parish boundary



Scale 1:1250

NOT TO ORIGINAL SCALE



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