



## Order Decision

**by Mark Yates BA(Hons) MIPROW**

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

Decision date: 03 August 2020

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### Order Ref: ROW/3221822

- This Order is made under Section 119 of the Highways Act 1980 ("the 1980 Act") and is known as The Havant Borough Council Footpaths Between Kingsclere Avenue & Dunsbury Way Havant Hampshire 2018.
- The Order was made by the Council of the Borough of Havant ("the Council") on 11 December 2018 and proposes to divert sections of footpath, as detailed in the relevant Order Map and Schedule.
- There was one objection outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

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### Decision

1. The Order is not confirmed.

### Procedural Matters

2. The existing paths included in the Order are the subject of an application to add them to the definitive map which is still to be determined. If this Order is confirmed, any public rights over the claimed paths will be stopped up.
3. The paths cross land for which planning permission was granted for a residential development. Previous Orders made in accordance with the Town and Country Planning Act 1990 were not progressed due to technical issues.
4. In response to correspondence from the Planning Inspectorate regarding the nature of the proposed diversion, the Council requests that this Order is confirmed with modifications. An opportunity was provided for interested parties to comment on the suggested modifications and nothing was raised to indicate that, if confirmed, the Order should not be modified in this manner.
5. Additionally, I wrote to the parties on 17 March 2020 outlining a preliminary view regarding the issue outlined in paragraph 8 below and seeking any comments in relation to this matter.
6. In light of the Covid-19 pandemic it was not possible for me to personally visit the site. Therefore, arrangements were put in place for another inspector to undertake a visit on my behalf. She undertook a visit to the site on 30 June 2020 and reported her findings in line with my specific instructions.

### Main Issues

7. Subject to the matter addressed below, the Order should be considered in accordance with the relevant tests set out in Section 119 of the 1980 Act.
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## Reasons

8. A Deed of Dedication of 14 August 2017, executed on behalf of the landowner (Portsmouth City Council), specifies that the "*Grantor hereby dedicates the Footpath to the intent that the same shall be and become part of the public highway as a footpath*". The route of this footpath corresponds with the proposed new paths included in the Order.
9. Reference is made to the highway authority (Hampshire County Council) being informed that the landowner no longer wishes to proceed with the dedication and therefore the county council has not acted on this deed. The intention being that the routes would be included in the Order to divert the paths.
10. It is apparent that the deed was originally drawn up in conjunction with a proposal to stop up the existing paths. However, this deed does not state that the dedication is conditional on the outcome of any Order or that it will come into effect at some later date. I interpret the deed to represent an express dedication of sections of public footpath.
11. The site visit revealed that surfaced paths have been created on site and are available for people to use. These works are wholly consistent with the dedication of a public right of way. The paths provide a link between Kingsclere Avenue and Dunsbury Way, but they also serve as a means of access for residents of the completed housing development. It is evident from the site visit that the new paths are being used by members of the public. This use most likely represents an acceptance of the dedication made by the landowner.
12. Paragraph 31 of the Planning Inspectorate's Rights of Way Advice Note 9 advises that a way created by a diversion may partly follow an existing path or road, but an Order under Section 119 of the 1980 Act should not be used to extinguish a footpath where the whole of the new path is already a public right of way. This advice follows on from the *Bernstein*<sup>1</sup> judgment.
13. In *Bernstein* it was held that a diversion involves the moving of the existing path onto a new alignment. The present Order would in effect be an extinguishment as the proposed paths have already been dedicated by the landowner.
14. For this reason, I do not find that the Order should be confirmed. This means that there is no need for me to address the specific tests set out in Section 119 of the 1980 Act. It will be for the Council to consider whether an Order should be made to extinguish the alleged public rights of way through the development.

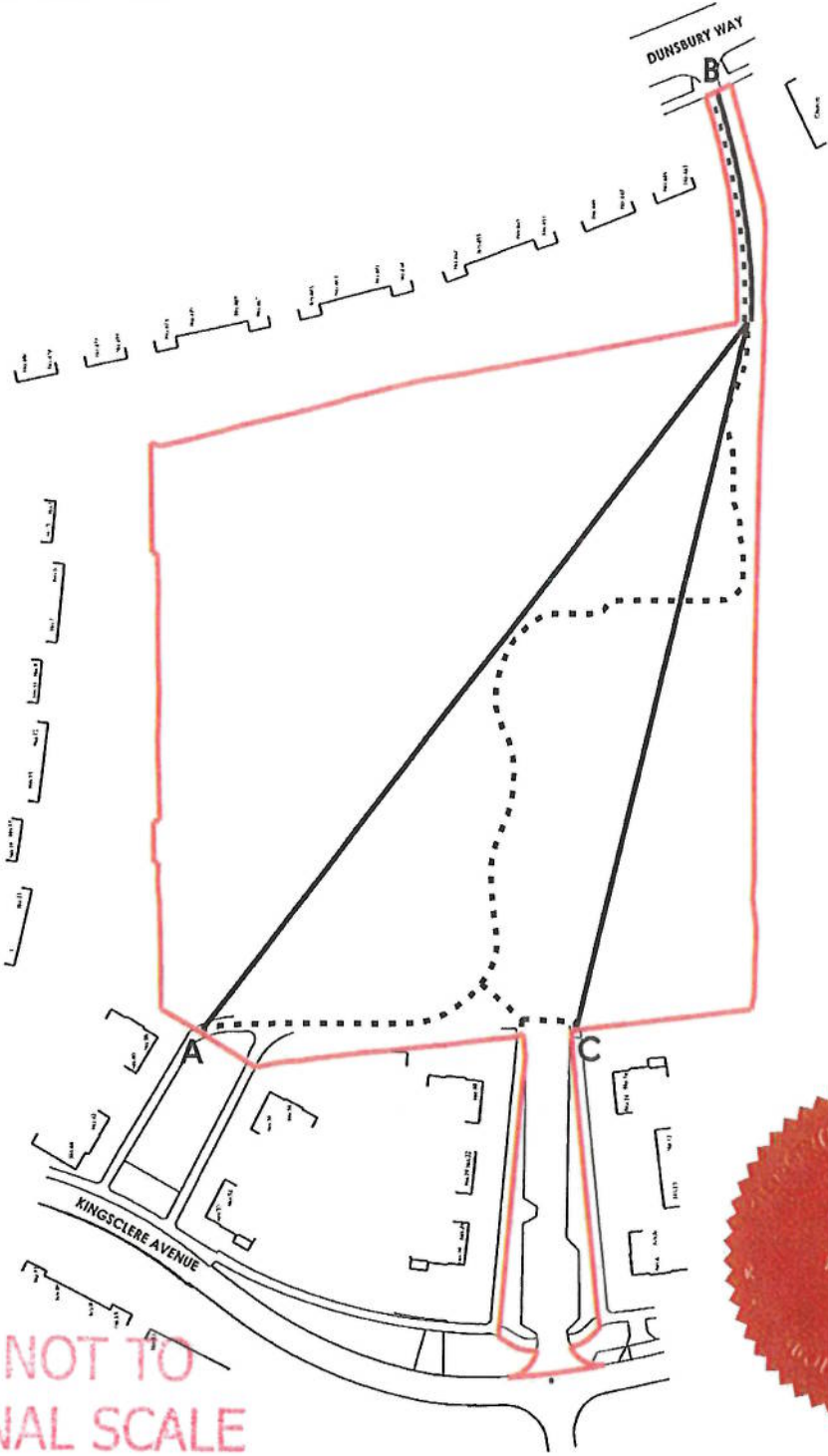
*Mark Yates*

**Inspector**

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<sup>1</sup> *R v Lake District Special Planning Board, ex parte Bernstein 1982*

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MAP NOT TO ORIGINAL SCALE



A4

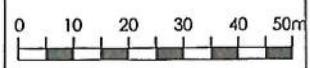
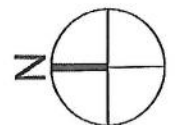
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PROPOSED HOUSING DEVELOPMENT  
 KINGSCLERE AVENUE  
 LEIGH PARK  
 HAVANT

RIGHTS OF WAY



SCALE BAR = 10mm INTERVALS AT TRUE SCALE

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