



Appeal Decision

by Edward Cousins BA, BL, LL.M, Barrister

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

Decision date: 16 February 2021

Appeal Ref: FPS/U4610/14A/1

- This appeal is made under section 53(5) of, and paragraph 4(1) to, Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Coventry City Council not to make an Order under section 53(2) of that Act.
- The application made by the Ramblers Association as Applicants dated 24 September 2006 ('the Application') was refused by way of notice from Coventry City Council ('the City Council') dated 21st February 2020.
- The Appellants claim that a footpath should be recorded on the Definitive Map and Statement for the area.

SUMMARY OF DECISION: The Appeal is allowed

PRELIMINARY MATTERS

1. I have been directed by the Secretary of State for the Environment, Food and Rural Affairs to determine an appeal ('the Appeal') under Section 53(5) of, and Paragraph 4(1) to, Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act').
2. I have not visited the site. However, I am satisfied that I can make my decision without the need to do so. Also, in my judgment, there is no necessity to hold a Public Inquiry as the essence of the case rests on the interpretation of documentary evidence - not to resolve conflicting oral evidence.¹

The Appeal

3. The Appeal is made against the City Council's decision not to make an order in respect of the Application to add a public footpath to the definitive map and statement ('the DMS') between Westwood Heath Road and another application right of way upon which the City Council is yet to consult.² These form part of a series of identified pathways comprising a horseshoe pattern lying to the

¹ A reference has been made by one of the Objectors to the case of *R v Secretary of State for Wales, ex parte Emery* [1996] 4 All ER 1 as being relevant to this Decision. I do not agree with this representation on the basis that the Emery case involved a criticism of the Secretary of State made by the Deputy High Court Judge for not identifying that it was a case suitable for a public inquiry. Here I do not accept that there is any reason to hold a public inquiry for the reason stated.

² CAP 240. 'CAP' is an acronym for 'Coventry Ancient Paths' – a nomenclature devised by the Ramblers Association to describe identified ancient pathways in and around the City of Coventry.

north of Westwood Heath Road together with a northern spur to Charter Avenue.³

The Application Route

4. The application route ('the Application Route') is identified on the plans included within the Application and bears the reference 'CAP241'⁴. It is marked dashed red on the Screenshot (referred to in footnote 3) as lying between Westwood Heath Road marked at points A and E on the southern boundary of an area known as 'Park Wood'. At point E the Application Route meets CAP240. Once added to the Definitive Map and Statement both routes would provide a continuous public pathway from Westwood Heath Road, at points A and G, to Charter Avenue at point F. In its northerly trajectory the Application Route passes between the rear of Nos 31, 29, 27, and 25 Ten Shilling Drive ('the Objectors' Properties') to its west and the E.ON site to its east, and then curves generally in a north easterly and east north easterly direction beyond Guinea Crescent.
5. The plans attached to the Application date from the period prior to the development of the housing estate to the west of the Application Route ('the Estate Development'), to which further reference will be made, below.
6. It is apparent that when members of the Planning Committee of the City Council ('the Planning Committee') reached the decision not to authorise the making the order, concerns were expressed regarding crime and anti-social behaviour. These concerns I find are not relevant to the determination of this type of application. Additionally, it was felt that there was insufficient evidence in support of a public right of way due to the lack of current use. No apparent conclusion was reached on the weight of the documentary evidence included in the Officer's Report.
7. The City Council accepts that in fact only a small portion of the Application Route was considered by the Planning Committee on 19 December 2019 when it reached its decision. This is apparent from the Committee Report. However, seemingly the Planning Committee rejected the whole Application. It is uncertain why only a portion of the Application was put before the Planning Committee, and there is a lack of reasoning as to why they decided that the application for the Definitive Map Modification Order ('the DMMO') should be rejected.
6. Thus, there is considerable confusion and some ambiguity manifested between:-
 - (1) the precise extent of what was originally sought to be claimed as the Application Route;

³ Enclosed in the bundle of documentation prepared by the City Council ('the Bundle') is a screenshot - ('the Screenshot') dated February 2020 emanating from the City Council's on-line planning map indicating Application public rights of way annotated by the Appellants. This document is referred to in paragraph 2 of the Appellants' Grounds of Appeal dated 28 February 2020 challenging the decision of the Planning Committee. It is attached to this Decision as Annex 1. The identified reference points are inconsistent with those identified on other plans, see below.

⁴ This is at variance with other information contained in documentation which refers to CAP 141.

- (2) the identification on mapping by the City Council of the Application Route; and
 - (3) more particularly, the identification and precise extent of the Disputed Route.
8. In essence, I find that consideration was only given by the Planning Committee to that part of the Application Route situated at the rear of the Objectors' Properties in Ten Shilling Drive shown between points D and E on the Annex 2 Plan⁵. For the purposes of this Appeal Decision this will hereafter be referred to as the 'Disputed Route'. It is therefore apparent that the remainder of route identified as CAP241 in the Application still needs to be determined by the City Council i.e. as lying between points D and E on the Screenshot (Annex 1).
9. In this regard, I have sympathy for the Objectors who undoubtedly have had a sense of some bewilderment, as indeed have I, in trying to understand the extent of the decision made by the Planning Committee in its deliberations, and the interpretation placed on that decision by the Officers of the City Council and the Appellants.

MAIN ISSUES

Summary

10. This section contains a summary of the Main Issues. I also refer to a number of subsidiary issues in the Section entitled 'Discussion'. below.
11. Section 53(3)(c)(i) of 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that "*a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist...*".
12. In considering this issue there are two tests to be applied:
 - (1) Test A: Does a right of way subsist on the balance of probabilities?
 - (2) Test B: Is it reasonable to allege that a right of way subsists? For this possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist. If there is a conflict of credible evidence, but no incontrovertible evidence that a right of way could not be reasonably alleged to subsist, then it is reasonable to allege that one does.
13. Thus, for the purposes of this Appeal Decision, and having regard to the legal principles and evidential base, in my judgment, I need only be satisfied that the evidence meets Test B, the lesser test.
14. I also find that the limited user evidence provided is not sufficient in terms of the period of the stated use to support dedication in accordance with Section 31 of the 1980 Act. Therefore, there is a need to consider in this Appeal

⁵ Also recorded as lying between points A and B on the Annex 3 Plan.

Decision whether the documentary evidence is sufficient to support the dedication of a public right of way under common law.

15. A second point arises to be addressed which arises from the contention raised by one of the Objectors (Mr Johal) that notices were not correctly served in accordance with Schedule 2, paragraph 14 of the 1981 Act. I am satisfied that the City Council completed all the procedural steps at the Application stage.

DISCUSSION

The Common Law and Statutory Intervention

Common Law

16. The common law rule is "*Once a highway always a highway*". There is no extinctive presumption or prescription arising from the non-exercise of rights of passage, save only when this arises from natural causes such as inroads of the sea or landslips. In order to extinguish or even vary a right, intervention by statute has always been necessary.⁶ If it can be demonstrated that a way is an ancient highway the fact that it has fallen into disuse, for example because another more convenient highway has been dedicated, does not cause it to cease to be a highway.

*'Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used would preclude the public from ever resuming the exercise of the rights to use it if and when they think proper'*⁷

In *Dawes v Hawkins*⁸ Williams J stated that:

*'It is also an established maxim, once a highway always a highway: for, the public cannot release their rights, and there is no extinctive presumption or prescription'*⁹

Statutory Intervention

1980 Act, Section 31

17. For the reasons stated in paragraphs 12 to 14, above, there is no necessity to consider further the provisions of Section 31(1) of the 1980 Act.

The Definitive Map and Statement

18. Insofar as definitive maps and statements are concerned, local authorities are required to maintain definitive maps and statements, subject to the determination of objections, of public footpaths and bridleways in their areas. These maps are conclusive as to the rights shown. However, the local authority is under a duty to keep them under continuous review and to

⁶ See *Eyre v New Forest Highway Board* (1892) 56 JP 517.

⁷ See *Harvey v Truro Rural District Council* [1903] 2 CH 638, at 644, per Joyce J. (1860) 8CB (NS) 848.

⁹ See also *Robinson Webster (Holdings) Ltd v Agombar* (2002) 1 P & CR 20.

amend them accordingly. It therefore follows that the Definitive Map is always subject to modification under section 53 of the 1981 Act.¹⁰

THE EVIDENCE

Section 31 and user evidence

When the status of the Application way was brought into question

19. In paragraphs 3.6 to 3.8 of the Officer's Report the City Council contends that there are a number of events which could be regarded as appropriate for the 'calling into question', and sets out three possible dates for this purpose. It is concluded that the date should be 1986 being the date of the application for the DMMO.
20. However, this must be seen in the context of the actual alleged use made of the Disputed Route.

Evidence of User

21. The Application was accompanied by user evidence forms, and additional user evidence forms were submitted with the Appeal to the Planning Inspectorate.
22. Two aspects arise for consideration:
 - (1) The quality of the user evidence
 - (2) The frequency of such use.
23. In paragraph 4.2 of the Officer's Report the City Council refers to the user evidence. Only two responses were received. Following the consultation two user evidence forms were received claiming to have used the Disputed Route from 2010 to 2019, but the claimed user was less than on a monthly basis.¹¹
24. In paragraph 14 of the submissions ('the Submissions') lodged by Counsel on behalf of the Objectors it is contended that no material evidence of use was relied upon by the applicants. Further, no user evidence was submitted with the Application.
25. In my judgment the limited user evidence relied upon is not sufficient in terms of the period of the stated use to support dedication in accordance with Section 31 of the 1980 Act. Thus, having regard to this, and the other points made by Counsel in this regard, irrespective of the principle as to when and whether the public rights were called into question, any evidence relied upon as to user by the City Council I find to be wholly inadequate, if not non-existent. Thus, I agree with Counsel that the presumption of dedication cannot be relied upon for the purposes of this Appeal Decision in so far as Section 31 is concerned, and there is not applicable in the circumstances.
26. It is therefore necessary to consider whether the documentary evidence is sufficient to support the dedication of a public right of way under common law. This requires consideration of three main issues: whether the owner of the land had the capacity to dedicate a highway, whether there was express

¹⁰ See *R v Secretary of State for the Environment ex p. Burrows & Simms*, *ibid*.

¹¹ Only two UEFs have been provided from Mr and Mrs Moroney between 2010 and 2019.

or implied dedication by the landowner and whether there has been acceptance of the dedication by the public.¹²

At Common Law

Documentary Evidence – the City Council

Mapping

27. The establishment of the Ordnance Survey (“the OS”) was in response to a military need in the early part of the 19th century for accurate mapping arising from the threat of invasion. Over the decades the OS has developed a variety of maps to meet the growing need for accurate and up-to-date mapping of the United Kingdom. The production of maps for sale to the public became an activity of increasing importance from the early part of the 20th century. The more recent OS surveys and mapping provide an accurate representation of routes on the ground at the time of survey – historically by means of trigonometry and latterly by means of satellite.
28. However, it must be reiterated that the depiction of a way on an OS map is not, of itself, evidence of a highway. Similarly, the lack of depiction of a route on the OS mapping cannot necessarily be relied upon as an indication that there was not a used way on the ground.
29. The historical mapping evidence led by the City Council for the purposes of this Appeal Decision is as follows:
 - (1) OS mapping - the County Series - the Disputed Route forms part of a way recorded as follows:
 - (a) First Edition 1888 – the way is marked lying from south to north in field number 1037 parallel to the boundary with field number 874. At its southern end the way commences at what is now Westwood Heath Road at the junction of what is now Bockendon Road. On its western side the way is the marked by a single pecked line running in a northern direction together with an area brace. The way is then recorded as changing direction to the north east when entering field number 1238. It then changes direction to the east and is shown by parallel pecked lines with area braces before leading into an area marked as Park Wood;
 - (b) Second Edition 1903 - ditto;
 - (c) Third Edition 1925 – ditto;
 - (d) Fourth Edition 1936 – ditto;
 - (e) The Ramblers Association Map 1937. This is a map of some importance produced as part of the evidence before the City Council. This indicates the Application Route by means of a red pecked line. The City Council in paragraph 6.9 and 6.12

¹² See *The Secretary of State for the Environment, Transport, and the Regions v Baylis* [2000] EWCA Civ. 361 where there can be acceptance by the local authority on behalf of the public.

of the Officer's Report states that it considers that this is a highly significant document and highly persuasive evidence that the Application Route, and more particularly for these purposes – the Disputed Route, had public rights and that it was being used by the public when the map was drafted. It is also stated in paragraph 6.11 of the Officer's Report that the Application Route is within the former county borough area of Coventry which was exempt from producing a Definitive Map under the 1947 legislation. This may be a possible reason why the route was not recorded at an earlier stage. The Officer's Report in paragraph 6.10 also repeats the disclaimer that the Ramblers Association reproduces onto its maps, to the effect that although great care is taken, no guarantee is given that any indicated track is a public right of way.

Aerial Photographs

30. I have also seen 7 aerial photographs of part of the Application Route between Westwood Heath Road and the Unrecorded Public Footpath at point A as shown on the Annex 2 Plan. These aerial photographs were taken in 2005, 2007, 2010, 2013, 2015, 2017, and 2019. They were all produced by the City Council on the 30th November 2020.
31. The first aerial photograph taken in 2005 shows the Estate Development in the course of construction, but by that stage the various houses abutting the Application Route had been completed. It is also apparent that fences had been constructed to the east side of the individual houses lying between D and E on the Annex 2 Plan. Thus, Disputed Route is shown segregated from the adjacent properties by this fence. However, the area to the north i.e. part of the Unrecorded Public Footpath lying between points A and C appear to be open land. It is also apparent that a defined track lies between points A and E, including the Disputed Route between the fence line on the left-hand side and the tree line on the right-hand side leading to the Ten Shilling Drive spur towards the entrance to the E-On site.
32. A similar interpretation can be placed upon the aerial photographs taken in the subsequent years, although it must be stated that in one or two of these, such as the 2007 photograph, the line of the Disputed Route is in shadow. It is to be noted further that there is no evidence in any of these aerial photographs of obstructions to the Disputed Route, until the 2017 photograph which appears to indicate the hardstanding which had been constructed over part of the Disputed Route at No. 25 Ten Shilling Drive. This can be seen again in the aerial photograph taken in 2019.
33. In the 2010 photograph the City Council asserts that the tarmac of the Unrecorded Public Footpath is clearly visible up to where it meets point D. It is said that the photographs from 2010 to 2015 continue to demonstrate that there was a clear segregation from the adjacent gardens to its west side, although it does appear to be more overgrown.

The Unrecorded Footpath

34. As part of the City Council's evidential case, it is stated that part of the Application Route is recorded on the City Council's List of Streets as a highway maintainable at public expense between lines A-B-C-D on the Annex 2 Plan. This is shown as the Unrecorded Footpath. This was defined by virtue of an agreement dated 25 November 2009 made under section 38 of the 1980 Act, the effect of which was to create a section of public footpath ('the 2009 Agreement'). This route was adopted by the City Council on 13 June 2013.
35. It is therefore asserted that this demonstrates that the 2009 Agreement created a public footpath from Guinea Crescent to the rear of No.2 Guinea Crescent. This footpath then terminates at the boundary of No.31 Ten Shilling Drive. This pathway is shown coloured yellow on the plan attached to the 2009 Agreement as lines A-C and B-D.
36. As the City Council states in paragraph 5.34 of the Officer's Report, it is under a duty to ensure that this Application way (footpath) is added to the Definitive Map and Statement on the basis that this is a Legal Event¹³ for the purposes of the 1981 Act. It is also indicated by the City Council that the fact that the public rights were not recorded under the 2009 Agreement is not of itself a determining feature as to whether or not there were public rights in existence prior to the 2009 Agreement coming into effect. As stated, it is possible for pre-existing rights to be subsumed into a route subject to a section 38 Agreement.
37. For the purposes of this Appeal Decision I have found that the Unrecorded Footpath is not to be considered as part of this Appeal Decision as no findings adverse or otherwise were made by the Planning Committee in this regard and is therefore not relevant to this Appeal Decision.

Cul-de-Sac

38. One of the points taken by the objectors is that the Unrecorded Footpath to the north of the route line B-D on the Annex 2 Plan is currently a cul-de-sac. If the decision is favourable to the Appellants that section of the Application way will form part of the modification order to ensure that it is added to the Definitive Map. I have dealt with the position in relation to the Unrecorded Footpath, above.
39. However, and in any event, there is clear authority in support of the proposition that the fact that a cul-de-sac exists does not prevent a public right of way from existing in the absence of special circumstances.¹⁴ In my judgment there are no special circumstances upon which the Objectors can rely for the purposes of this Appeal.

¹³ In this regard I refer to an email dated 7 September 2020 where the City Council clarifies this point by stating that at this moment in time it does not intend to make a Legal Event Modification Order from Westward Heath Road to the Shillings Drive spur at the entrance of the E-ON site.

¹⁴ See e.g. *Robinson Webster (Holdings) Ltd v Agombar* [2002] 1 P&CR 20, where Etherton J stated "It is clear ... that public rights may be established over a cul-de-sac by actual use as of right by members of the public." See also *Norman & Bird v Secretary of State for Environment Food and Rural Affairs* [2006] EWHC 1881 (Admin) where Collins J stated "... there is no reason why a public footpath should not exist, albeit it is a cul-de-sac."

Extinguishment Order

40. To the south of the route being considered is a route now recorded on the working copy of the Definitive Map and Statement as Public Footpath No. 245. The original DMMO application included the route that is now Public Footpath No. 245. In the Officer's Report the City Council stated that it sought consideration of the evidence and determination by the Planning Committee in relation to this public footpath. The Officer's Report states as follows:- 'The route to the south was originally part of the route under consideration, it is separated only by adopted highway. It is asserted that if the adopted highway had not been built and accepted by the Council both routes would still be connected hence why the extinguishment Order is relevant.'
41. In 1996 an Extinguishment Order was made by the City Council to extinguish what is now Public Footpath No. 245 on the eastern boundary. It is said to be a relevant consideration for the purposes of this Appeal, For the City Council to make this Order the freehold owner would have had to accept expressly that the route subject to the extinguishment was a public highway. The point being made by the City Council is that it would not have been able to make the Order unless it had been accepted by all parties that the route was public highway.
42. However, the Extinguishment Order was not confirmed following an objection by the Ramblers Association to its being made. The City Council therefore considers that the making of the Order in itself is conclusive evidence that public highway rights subsisted over the way, a public footpath. I consider that this is a relevant consideration to this Appeal Decision

Planning History

43. A further plank in the City Council's evidence relates to the planning history of the Estate Development. The planning consent for the Estate Development was considered by the Planning Committee on 31 January 2001, and a report produced for that purpose. Reference is made to this and a number of other relevant documents. These are as follows:-
 - (1) In Appendix 4 of the Supplementary Planning Guidance to the City Council's Committee report dated 11th February 1999 under the heading "*The Site*" reference is made in paragraph 2.7 to the following:-

"A public footpath runs alongside the eastern boundary hedgerow. This is to be maintained within an adequate reservation and the layout and design of adjoining housing must be taken in account the requirements and natural surveillance. A new footpath link is to be provided alongside the central hedgerow."
 - (2) In Appendix 2 there are extracts taken from the Supplementary Planning Guidance Development Brief specific to plots 1 and 2 in the

Estate Development. In particular, there is reference in paragraph 5 to the following:-

"An existing field footpath runs along the eastern boundary of plots 1 and 2. This is to be retained in situ as a rural path within a 7-metre reservation. New housing plots adjoining this path must provide some degree of natural surveillance of this route. This will require some plots to orientate towards the footpaths."

- (3) On drawing No. 040566/38H dated June 2001 produced by Babbie on behalf of the City Council there is reference to the "Westwood Heath Housing Spin Road", and a hatched footpath reservation leading from Westwood Heath Road through to point D on the Annex 2 Plan.
- (4) In the sketch appraisal layout dated November 2001 produced by the developers of the Estate Development - Westbury Homes (Holdings) Limited ('Westbury Homes'), a "footpath link" is identified from Westwood Heath Road through to point D on the Annex 2 Plan. Public Footpath No. 245 also bears the wording "the existing footpath that runs along the eastern boundary is to be retained as a rural footpath within a 7-metre reservation ...", together with other relevant wording.
- (5) In the Design Statement received by the City Council on 7 December 2001 under the heading "Layout Design", paragraph 2 makes reference to the following:-

"... an existing field footpath runs along the eastern boundary, which is to be retained within a 7-metre-wide reservation. By utilising dual fronted houses with additional windows in gable walls together with plot orientation new dwellings will provide natural surveillance of this route."

- (6) In a letter dated 18 December 2001 from Mr Robert McCaig to the City Council a reference is made in paragraph 3 to the City Council's plans accompanying the planning application where it is stated:-

"... if I have understood the plans accompanying the application correctly, the hedgerow is not within the application site, presumably because the Council wishes to retain this strip of land containing the public footpath between Westwood Heath Road and Park Wood."

- (7) Under the heading "Description of Application Site" in the report to the City Council's Planning Committee dated 31 January 2002 it is stated at bullet point 5 that "a loose surfaced public footpath runs along the eastern boundary of the site".
- (8) There is a further reference under the heading "Proposal" in bullet point 7 to: - "The public footpath which runs along the eastern boundary of the site is indicated for attention within a 7-metre-wide landscaped reservation, which includes the existing mature boundary hedgerow which will be retained". In the following bullet point it is further stated "Boundary treatment proposed for dwellings which abut

this footpath is 1.8-metre-high hit and miss fencing with planting to either sides”.

- (9) In the report under the heading “*Relevant Planning History*” in the second sub-point of bullet point 3, it is further stated that “*a public footpath runs alongside the eastern boundary hedgerow. This is to be maintained within an adequate reservation and the layout and design of adjoining houses must make [take] into account the requirements of natural surveillance*”.

- (10) There is a further reference to “*Statutory Consultation Responses*” where in the first bullet point it is stated as follows:-

“The Ramblers Association have no objection in principle to the proposed development, however they are concerned that the 7-metre-wide footpath reservation indicated may be eroded or encroached upon by adjacent dwellings. It therefore requests that a condition is attached to any permission protecting the footpath.”

- (11) Again, under the heading “*Public Consultation Responses*” at bullet point 5 reference is made to one letter of comment which had been received from the occupier of 32 White Field Close expressing concern about:

“The potential loss of the public footpath and mature hedgerow along the eastern boundary of the site, and suggesting that conditions regarding their retention are attached to the permission.”

- (12) Under the heading “*Issues*”, there is a subsequent reference in bullet point 16 to:-

“the landscaped buffer to Westwood Heath Road and footpath reservation along the eastern boundary are indicated as stipulated within the development brief, and conditions are recommended to ensure these elements are retained as indicated.”

It is further indicated in bullet point 20 that:-

“the boundaries to the footpath will be 1.8-metre-high hit and miss fence with substantial landscaping. The dwellings adjacent to the footpath have been orientated to provide natural overlooking and surveillance.”

- (13) Contained in the schedule there are references to the footpath, and in particular in Planning Condition 13 to the planning consent granted on 28 March 2002 it is stated that:-

“The existing reservation located adjacent to the eastern boundary of the site shall be retained at a width of 7 metres in full in accordance with the detailed indicated on the approved plan no. SA-3B, and shall not be removed or altered in any way

without the prior written approval of the local planning authority."

- (14) In drawing no. SA-3B from Westbury Homes there is a City Council official stamp stating that the Estate Development was approved for planning purposes and despatched on the 28 March 2002. On this drawing the Application Route from Westwood Heath Road through to point D on the plan is identified as a "*footpath link*", and is identical to the sketch appraisal referred to in sub-paragraph (4), above, and contains the same wording "*... the existing footpath that runs along the eastern boundary is to be retained as a rural footpath within a 7 metre reservation...*"
- (15) There are further drawings contained within the planning file which all indicate the nature and extent of the footpath on the eastern boundary of the Estate Development.
44. Thus, in essence, the City Council asserts that the evidence upon which it relies relating to the planning history shows without any shadow of a doubt that there is, and always has been, a public footpath lying to the eastern side of the Estate Development part of which is established as Public Footpath No. 245 lying between Westwood Heath Road and Point E on the Annex 2 Plan, and thereafter lying between points E and D as the Disputed Route thereon. As paragraph 5.14 of the Officer's Report states, it seems that the Local Planning Authority intended for the relevant parts of the Application Route to provide for extra protection for the residents of the four houses bordering Ten Shilling Drive as a planning condition. The Officer's Report then goes on to state that "*it's not unusual for extra protection to be given to public rights of way via planning conditions, the condition demonstrate that the Application Route was regarded as a public right of way at the time of the condition being imposed.*"

The Sale of Land by Coventry City Council

45. The freehold of the land forming the Estate Development was owned by Coventry City Council. It was described in the documentation as 'prime land for residential development'. Following the grant of the planning consent, a sales tender document for Plot 5 was drafted by the Council and sent to interested parties. The closing date for tenders was 12 noon on the 19 November 2004.
46. There are a number of plans within the documentation that refer to an 'existing footpath' identified with hatching. This, as the City Council contends, lies along the line of the current route under consideration.
47. In the City Council tender description document of Plot 5, there appears a sub-plan dated 15 September 2004. There is reference to an "*existing footpath*" between points D and E on the Annex 2 Plan. The "*existing footpath*" is similarly identified on the plan annexed to the Agreement dated 28th March 2002 between the City Council and Westbury Homes and other plans produced during the early contractual stages. It is also identified as tinted yellow on the plan annexed to the section 38 Agreement dated 5th July 2005 tinted yellow lying between points D and E on the Annex 2 Plan.

48. I have already made reference to paragraph 2.7 of the Supplementary Planning Guidance, above, which formed part of the sales particulars. It is said that this document clearly shows that the City Council, as the freehold land owner, had accepted that there was a public footpath running across the site. The land owner also made this clear, and expressly stated, to anyone considering purchasing the land that a public footpath subsisted over the site.
49. It is also contended that the Sales Agreement between the City Council and Westbury Homes makes clear references to the footpath in the Sales Agreement. It defines the footpath as:-
- (1) 'Rural Footpath'- means the rural footpath running through the Footpath Reservation Strip
 - (2) 'Footpath Reservation Strip' means a seven-metre-wide forming a part of the Property shown hatched-black on the Plan
 - (3) 'Plan' means drawing number LPR-232-2001 attached

It is apparent that the plan attached to the Sales Agreement shows a hatched black line on the eastern edge of the site on the line of the Application route.

Restrictive Covenant

50. At the time when the City Council sold the Estate Development it ensured that a Restrictive Covenant would be included against the title in order to protect those parts of the Application Route so as to ensure that it would stay open and available for use.
51. Accordingly, those properties, namely Nos 25 to 31 Ten Shilling Drive, had noted in the Charges Register of each property registered at HM Land Registry the Restrictive Covenant. in the following terms:-

"Not to do or permit anything to be done on the Footpath Reservation Strip which will obstruct or in any way interfere with the use of the Rural Footpath and in particular not to erect or permit to be erected on any Footpath Reservation Strip whether temporary or permanently any building fence wall or other structure and not grow or permit to be grown on any part of the Footpath Reservation Strip any hedge or shrubbery".

52. This clearly demonstrates, so it is said by the City Council, that although the Disputed Route lies within the freehold of each of the properties, it is apparent that Ten Shilling Drive must be kept clear as it is considered to be a public footpath. Thus, it is asserted by the City Council that where the freehold owner has obstructed the route, as is the case in no.25 Ten Shilling Drive, such obstruction is unlawful, and the freehold owner is in breach of the obligation.
53. In this regard I note that one of the Objectors contends that the Application Route was to be private. However, according to the City Council this clearly

cannot be the case when regard is had to the mapping documentation, together with the terms of the Restrictive Covenant where in the latter it is expressly stated that it is a "*Rural Footpath*". The fact that there was no restriction mentioned in the Restrictive Covenant as to the class of person or persons who could be allowed to use the Disputed Route it is reasonable to imply that the public at large can use it for the purposes of passing and repassing.

54. Further, the solicitor acting on behalf of one objector submits that the actions of the City Council as landowner demonstrate that the route was not a highway at the time of sale. However, it is contended by the City Council that no evidence has ever been produced to support this assertion and none of the actions taken by the landowner can be interpreted as an intention not to dedicate. Indeed, there is no reference made by the Objectors to proceedings having ever been commenced in Lands Chamber by any of the Objectors seeking to modify or discharge the Restrictive Covenant.
55. In essence, it is contended by the City Council that the evidence is clear that it as landowner acted to protect the Application Route, and such actions cannot be interpreted as an intention not to dedicate the Disputed Route nor as a demonstration that the Disputed Route between D and E was not a highway at the time of the sale of the development land.
56. I shall address the substantive points on the documentary evidence raised by the City Council, below.

Width of the Disputed Route

57. A further point raised by the City Council in the Officer's Report is that in parts of the planning documentation relating to the Estate Development it is to be noted that a footpath reservation strip of seven metres from the eastern boundary of the Estate Development is identified. This continues to remain the width throughout the Disputed Route, and Public Footpath No. 245, except where it has been incorporated into the curtilage of one of the properties, such as in the case of No. 25 Ten Shilling Drive.
58. In this regard, there may be a misapprehension on the part of the owners of the four properties between points D and E on the Annex 2 Plan in that although it is recorded that the Disputed Route is contained within the freehold title to each of the properties, the fact that there is, so it is asserted, a public way in the form of a footpath running from north to south between points D and E, it is subject to the rights of the public to pass and repass. In other words, although the land may well be within the freehold title to these properties, it remains subject to public rights of way as overriding interests.
59. I consider that the evidence relating to the width of the footpath is a relevant consideration in support of this Appeal Decision.

Acquiescence

60. A final point raised by the City Council in the Officer's Report relates to the contention that it as landowner acted to protect the routes bordering the Estate Development and to ensure that they would be kept open and available for the public's use. It is said that that action could be regarded as

acquiescence by the landowner in the clear knowledge that each property owner knew the Disputed Route was being used by the public as a right of way, and did nothing to stop it.

61. Indeed, no legal action has ever been taken by the owners of the properties bordering the Disputed Route to prevent such use either by seeking to modify or discharge the Restrictive Covenant, to which mention has been made above, or to seek a declaration in the County Court or High Court as to challenging the legal status of the Disputed Route.
62. I consider that this aspect as to acquiescence is a further relevant consideration in support of this Appeal Decision.

The position of the Objectors

63. The City Council received a number of detailed and extensive objections to the Application prior to its consideration by the Planning Committee in December 2019. Those objections were broadly repeated in further wide-ranging correspondence to the Planning Inspectorate. It is to be noted that the City Council has subsequently failed to substantiate its decision during the exchange of written representations arising out of this Appeal. I do not propose to dwell on the detail of the historic objections. However, one of the principal objections was from Burges Salmon on behalf of the freehold owner of No. 25 Ten Shilling Drive (Mr Johal). Other objections were received from other property owners in the vicinity of the Disputed Route. Representations have also been made by the Open Spaces Society and the Appellants in support of the Appeal.
64. Submissions dated 3 August 2020 were then lodged by Counsel on behalf of four Objectors, namely the four freehold owners of Nos. 25 to 31 Ten Shilling Drive. The Submissions are divided into nine sections, including the Introduction and Conclusions. I do not propose to repeat the detail set out under headings entitled '*route subject to the appeal*', '*legal framework*', and '*user evidence*'.
65. Insofar as the '*historic map evidence*' is concerned Counsel has made a number of points in paragraphs 15 to 23 of the Submissions. Reference is also made to section 4 of the Historical Mapping Review contained in the Appeal Response lodged by the Objectors. Although it is acknowledged that the Application Route is identified in some of the earlier OS Maps as a physical feature, it is contended by Counsel that, the available map evidence is '*relatively limited*'. It is also said that the mapping evidence relied upon by the City Council fails to provide any material evidence in support of the Application route being a public footpath. I disagree with these assertions.
66. In section 4 of the Historical Mapping Review a distinction is also sought to be drawn between the letters '*CT*' and '*FP*', the former being an abbreviation for '*Cart Track*' in accordance with Ordnance Survey Mapping abbreviations and conventions, as identified in the First Edition 1955 OS. It is said that this demonstrates that the Application Route was located in an agricultural area and therefore appears to have been a private route for the purposes of accessing farmland belonging to Westwood Heath Farm. Accordingly, this point, and other points made in paragraph 16, support the proposition that

there is no evidence that the Application Route was a footpath with public rights of way over it.

67. I reject these points as having validity. I consider that the distinctions made between 'Cart Track' or 'Track' and 'Footpath' has no substance. These are mapping terms used by the Ordnance Survey for identification purposes. The fact that part of the Application Route may have been described as a 'Cart Track', in my judgment, is neither here nor there. There is no reason to suppose that because part of the Application Route may have been described as such, does not in itself mean that it could not also have been a public footpath. Nor does the apparent fact that historical mapping may indicate slight variations at different periods of the evolution of the Application Route mean that a continuous way did not exist between what is now Westwood Heath Road and Charter Avenue. All the mapping evidence relied upon by both the Appellants and the Objectors demonstrates that such a way may well have historically existed. Variations may have resulted from agricultural usage of the fields in question based upon the snapshots perceived by the surveyors at the time of each survey. Also, it must be remembered that until the mapping process was revolutionised by satellite technology, mapping was undertaken by physical surveys.
68. I have set out in some detail, above, the fact that there is a body of documentary evidence led by the Appellants (both mapping and photographic) that supports the evidential fact that the Disputed Route could reasonably be alleged to be a public footpath. In this regard it must be remembered that I am not to judge the strength of the evidence, as such, having regard to the express wording of section 53(3)(c) and in particular to the discovery by the local authority of evidence whereby it is reasonable to allege that a right of way subsists (Test B), no more, no less.¹⁵
69. Further, the documentation in relation to both the planning history and the sale of land by the City Council clearly makes reference to the preservation of the right of way to the east of the four houses in Ten Shilling Drive both prior to and subsequent to their construction. The fact that the line may in be a marginally different place from the original Application Route, as asserted by Counsel, cannot detract from the important point that the relevant documentary evidence provides the basis for the claim that it is reasonable to allege that such a right of way subsists. Also, there may be implications arising from the General Boundaries Rule.¹⁶
70. I also accept the points made by the City Council that the imposition of the restrictive covenant on the adjoining owners and the section 38 Agreement provides further evidence that it is reasonable to allege that a right of way subsists, by virtue of the desire to seek its protection from development.
71. Thus, in summary, I consider that there has been sufficient demonstration of the discovery of evidence whereby a "reasonable person having considered

¹⁵ See the Judgment of Owen J in *R v Secretary of State for the Environment, ex p Bagshaw & Norton*, to which reference has been made above.

¹⁶ i.e. There is no standard tolerance, measurement or ratio that can be attributed to the relationship between the position of the general boundary and the position of the legal boundary, See *Drake v Fripp* [2011] EWCA Civ 1279 where it was held that there is no limit to the quantity of land that can fall within the scope of the General Boundaries Rule.

all the relevant evidence available could reasonably allege a right of way to subsist”.

SUMMARY

72. Drawing together the various strands, in my judgment there is sufficient documentary evidence to be relied upon to support the proposition of the historical existence of a long-standing dedicated physical route on the ground along the line of the Disputed Route, as shown between points D and E on the Annex 2 Plan. I therefore find that in the circumstances there has been discovery of sufficient evidence upon which it is reasonable to allege that a right of way subsists in accordance with Test B. In other words, a reasonable person having considered all the relevant evidence available could reasonably allege a right of way to subsist.

CONCLUSION

73. Having regard to these and all other matters raised in the written representations I conclude that the Appeal should be allowed in so far it relates to the section of the application route between points D and E on the Annex 2 Plan.

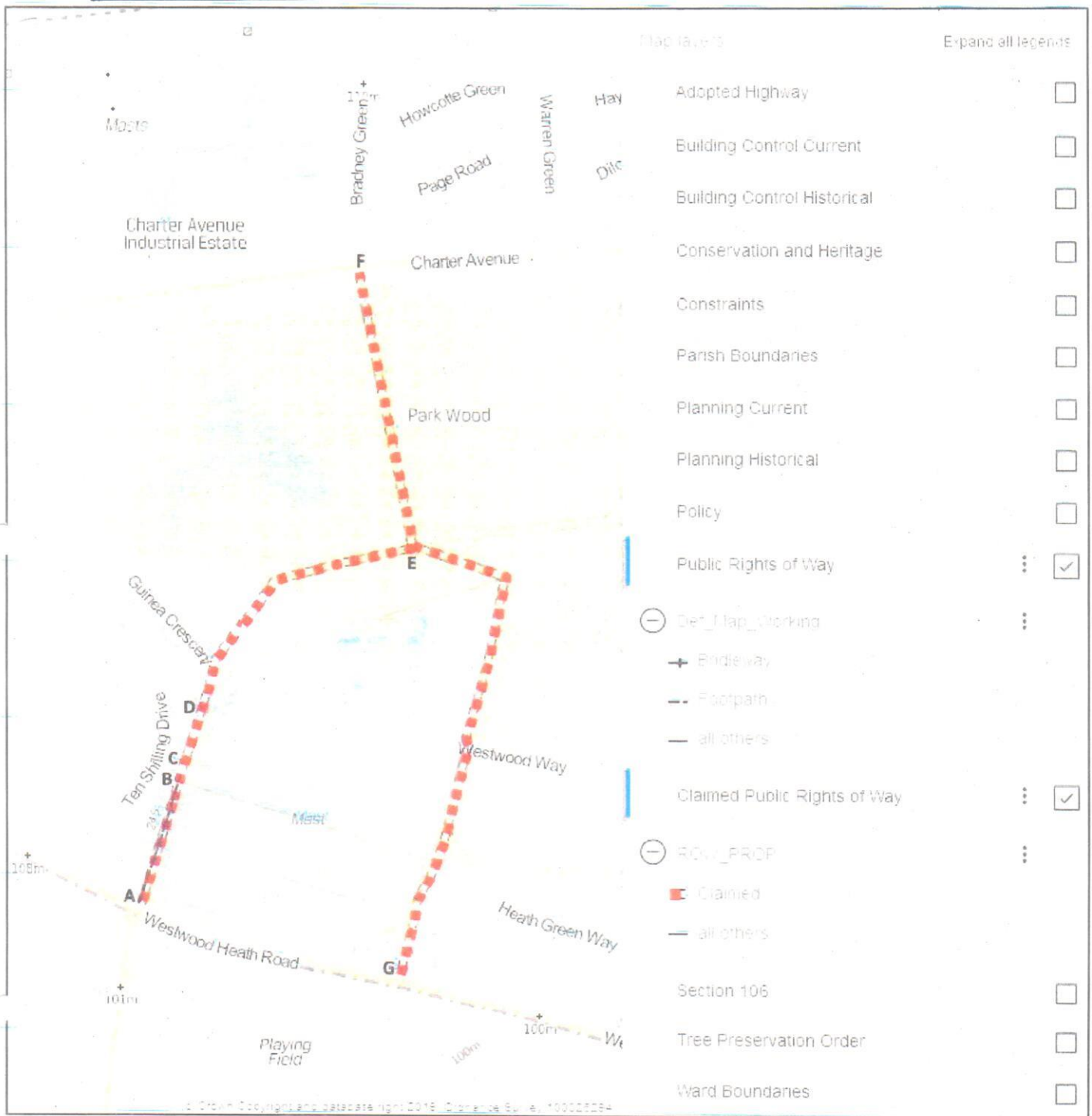
FORMAL DECISION

74. In accordance with paragraph 4(2) of Schedule 14 of the 1981 Act Coventry City Council is directed within 12 months of the date of issue of this Appeal Decision to make an order under Section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for the area to add a footpath over the section of the route between points D and E on the Annex 2 Plan identified as forming part of the Application dated 24 September 2006. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

Edward Cousins

Inspector

ANNEX 1



SCREEN-SHOT OF COVENTRY COUNCIL ON-LINE PLANNING MAP SHOWING CLAIMED PUBLIC RIGHTS OF WAY ANNOTATED A TO G BY RAMBLERS, WARWICKSHIRE AREA, FEBRUARY 2020.

A-B-C-D-E is the Ramblers claim *CAP241 cited in the Council's rejection letter. *CAP = Coventry Ancient Paths.

G-E-F is the Ramblers adjacent claim CAP240, on which the Council have yet to consult.

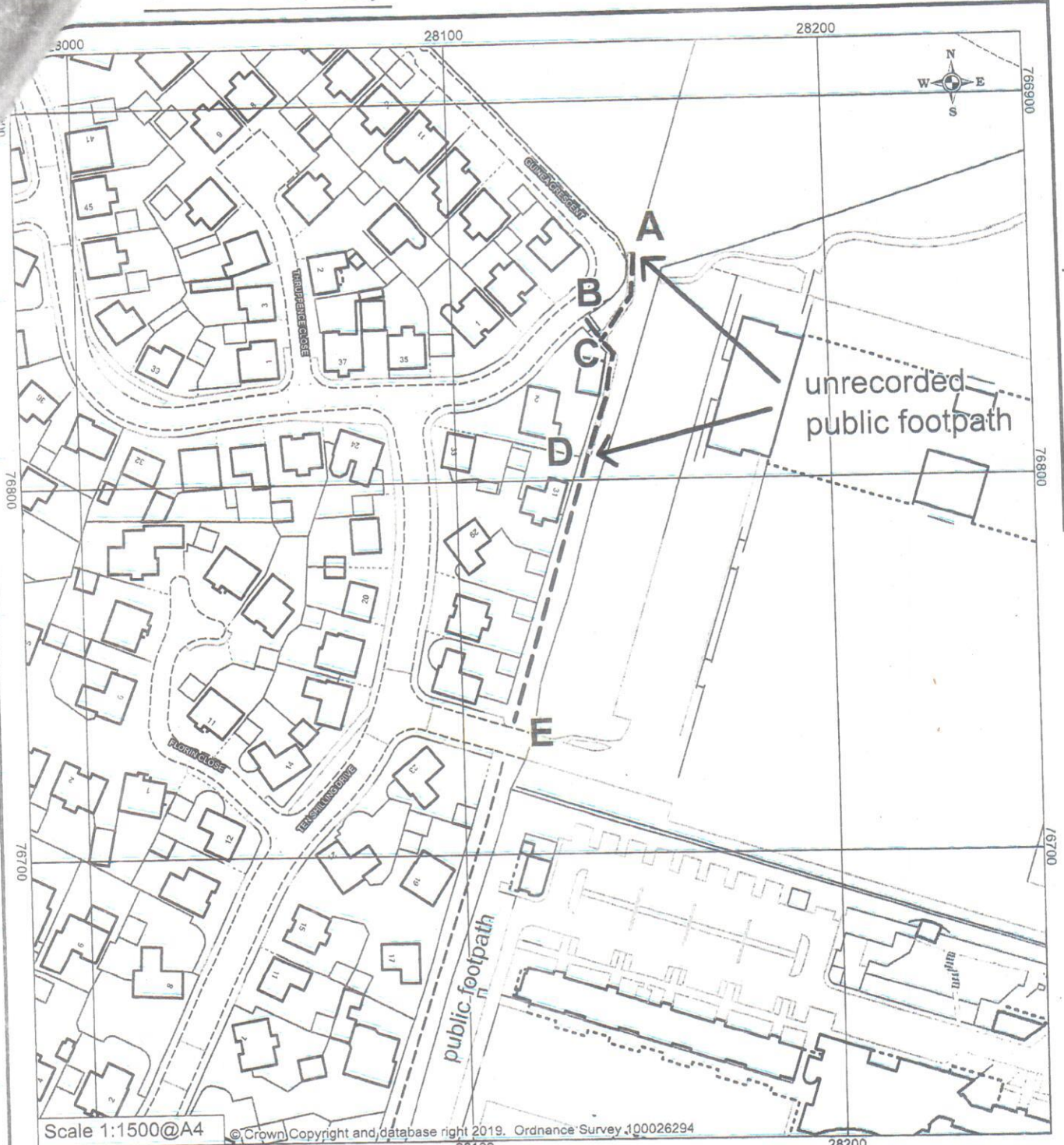
A-B is part of Ramblers claim CAP241 which has since been designated as public footpath 245.

C-D (Ten Shilling Drive to Guinea Close*) is the section of the Ramblers claim CAP241 rejected by the Council's planning committee – it is obstructed at C. *Should be Guinea Crescent.

A-B-C-D-E-F (Westwood Heath Road to Charter Avenue) is the heading of the Council's rejection letter, and includes a spur E-F which is not part of Ramblers claim CAP241 cited in the rejection letter.

Michael Bird, Footpath Secretary, Ramblers Warwickshire Area.

ANNEX 2

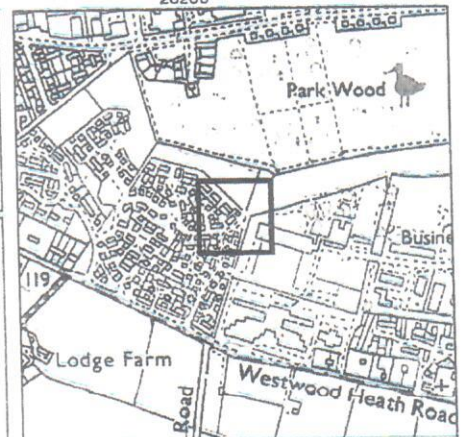


WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53

Application to Record a Public Footpath from
Ten Shilling Drive to Guinea Crescent
in the City of Coventry

Key

- Public Footpath to be Recorded
- Public Footpath



Ref: T&T/PROW/ALM/X0044/Cttm2019

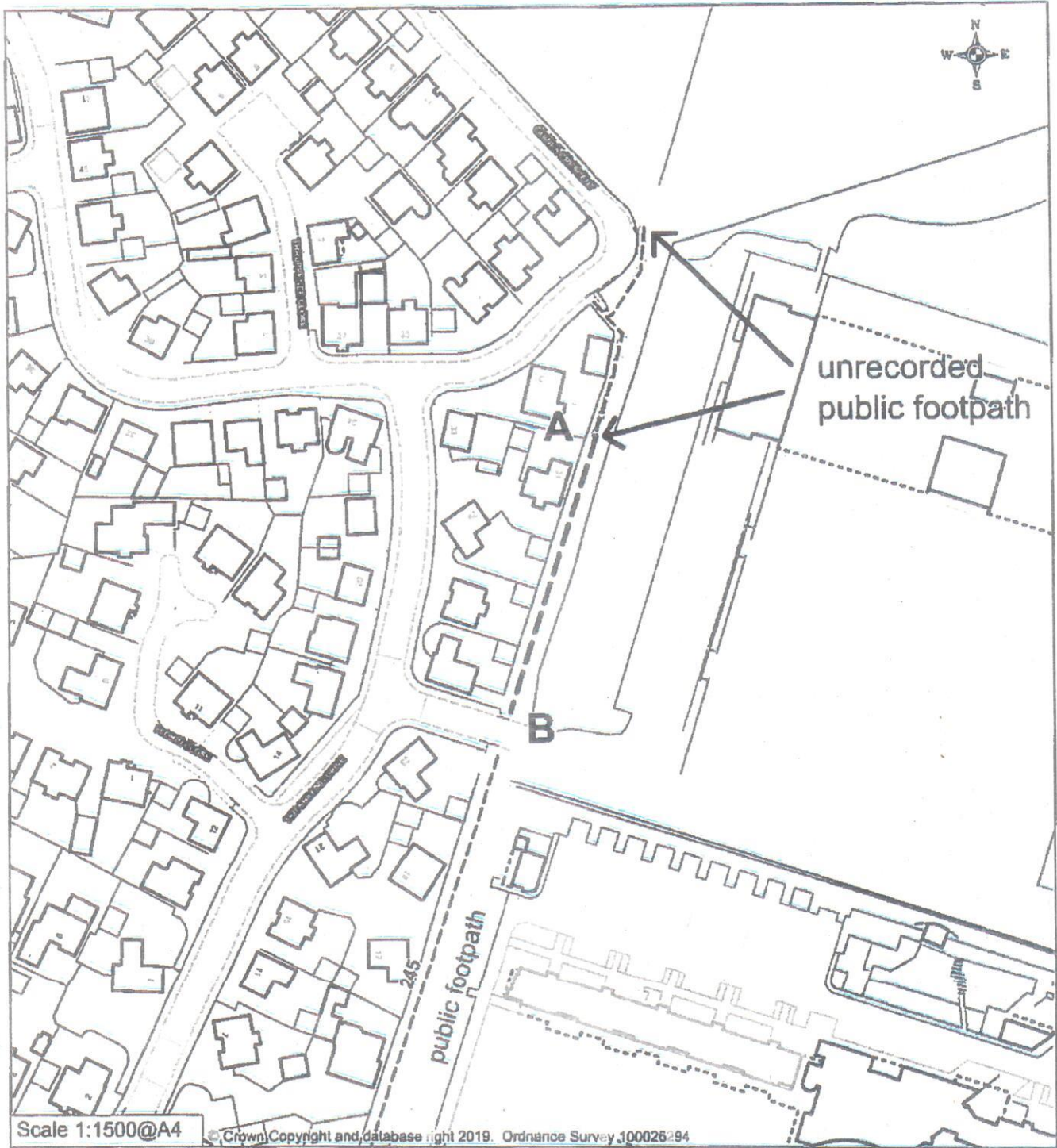


Produced By: ALM

Date: 23/10/2019

Public Rights of Way
Council House
Earl Street
Coventry
CV4 5RR

ANNEX 3



Scale 1:1500@A4

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Date: 04/05/2019

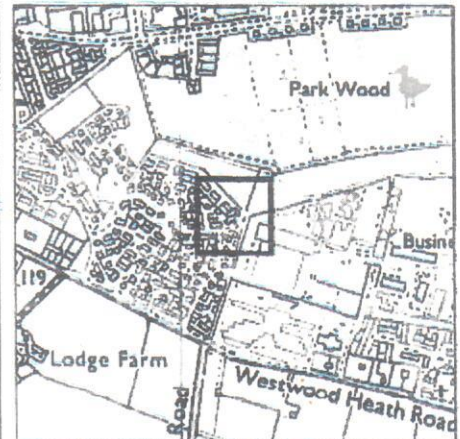
Public Rights of Way
Council House
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CV1 5RR

**WILDLIFE AND COUNTRYSIDE ACT 1981
SECTION 53**

Application to Record a Public Footpath from
Ten Shilling Drive to Guinea Crescent
in the City of Coventry

Key

- Claimed Public Footpath
- Public Footpath



Ref: T&T/PROW/ALM/X0044/Cons2019