

LANDMARK CHAMBERS

PUBLIC RIGHTS OF WAY SEMINAR

PART X OF THE TOWN AND COUNTRY PLANNING ACT 1990:

SUPPORTING PAPER SUMMARISING THE

POWERS AND PROCEDURE

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## INTRODUCTION

1. Planning and delivering development can be influenced and complicated by public rights of way (“PROW”). Indeed, such rights can prevent development in some situations.
2. The grant of planning permission does not extinguish or divert any existing public rights of way. Nor does it preclude a modification order being made under the Wildlife and Countryside Act 1981 to add additional PROW. So, care is required to ascertain what PROW apply to a site.

3. The Rights of Way Circular 1-09 (V2, Oct 2009) issued by Defra states:

*7.1 Proposals for the development of land affecting public rights of way give rise to two matters of particular concern: the need for adequate consideration of the rights of way before the decision on the planning application is taken and the need, once planning permission has been granted, for the right of way to be kept open and unobstructed until the statutory procedures authorising closure or diversion have been completed.*

*7.2 The effect of development on a public right of way is a material consideration in the determination of applications for planning permission and local planning authorities should ensure that the potential consequences are taken into account whenever such applications are considered.*

.....

*7.15 The local planning authority should not question the merits of planning permission when considering whether to make or confirm an order, but nor should they make an order purely on the grounds that planning permission has been granted. That planning permission has been granted does not mean that the public right of way will therefore automatically be diverted or stopped up. Having granted planning permission for a development affecting a right of way however, an authority must have good reasons to justify a decision either not to make or not to confirm an order. The disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the advantages of the proposed order.*

4. In addition, article 15 of The Town and Country Planning (Development Management Procedure) (England) Order 2015 requires that a development affecting a PROW must be advertised in a local newspaper and by positing a site notice.
5. The powers for extinguishing or diverting a PROW to enable development to be carried out are found in Part X of the Town and Country Planning Act 1990. These cover:
  - (1) Orders that may be made by the Secretary of State and London boroughs (ss.247-256).
  - (2) Orders made by local planning authorities (ss.257-261)
6. This paper focuses on how to deal with PROW, the diversion or extinguishment of which are required in order for development to take place by:
  - Summarising the statutory basis for each such order;
  - Summarising the relevant procedure for each; and
  - Considering some of the substantive issues that can arise.

## THE STATUTORY BASIS

### Section 247

#### Scope

7. Section 247 of the TCPA 1990 provides:
  - (1) **The Secretary of State may by order authorise the stopping up or diversion of any highway outside Greater London if he is satisfied that it is necessary to do so in order to enable development to be carried out—**
    - (a) **in accordance with planning permission granted under Part III or section 293A, or (b) by a government department.**
  - (2) **Such an order may make such provision as appears to the Secretary of State to be necessary or expedient for the provision or improvement of any other highway outside Greater London.**
  - (2A) **The council of a London borough may by order authorise the stopping up or diversion of any highway within the borough, or within another London borough if the council of that borough consents, if it is satisfied that it is necessary to do so in order to enable development to be carried out—**
    - (a) **in accordance with planning permission granted under Part III or section 293A, or (b) by a government department.**

**(2B) Such an order may make such provision as appears to the council to be necessary or expedient for the provision or improvement of any other highway within the borough.....**

8. Thus, this empowers the SoS to authorise by order the stopping up or diversion of any highway outside Greater London, if he is satisfied that it is necessary so to do in order to enable development to be carried out in accordance with certain planning permissions or by a government department.
9. Within Greater London, the LBCs have a similar power in relation to highways within their area, or by agreement, within the area of another London borough.
10. The power to make an order under this section includes the power to provide for the improvement of any other highway as appears to the SoS, or London borough, to be expedient or necessary (s.247).
11. The order may provide that any such highway created or improved by virtue of this order becomes a highway maintainable at public expense (s.247(3)(a)).
12. S.247 allows an order to be made in respect of all kinds of highway and is, therefore, one of the few statutory provisions authorising interference with a public vehicular right of way.
13. The SoS has indicated in Circular 1/09 that the policy is, other than in exceptional circumstances, to make orders stopping up or diverting footpaths and bridleways under s.247 only in cases envisaged in the use of the concurrent procedure in s.253, that is in anticipation of planning permission.
14. Section 253(1) provides:

**253.— Procedure in anticipation of planning permission.**

**(1) Where—**

**(a) the Secretary of State or the council of a London borough would, if permission for any development had been granted under Part III, have power to make an order under section 247 or 248 authorising the stopping up or diversion of a highway in order to enable that development to be carried out,**

**(b) [repealed]**

**then, notwithstanding that such permission has not been granted, the Secretary of State or, as the case may be, the council of the London borough may publish notice of the draft of such an order in accordance with section 252.**

Preconditions

15. The essential precondition to the making of an order under section 247 is a conflict, or potential conflict, between a planning permission and a continued existence along within its present line of a PROW.
16. The other pre-conditions are:
  - (1) The existence of a planning permission
  - (2) The extinguishment or diversion is necessary (“the necessity test”) to enable the development permitted by that planning permission to be carried out. The development need not involve the construction of any physical object over the highway. A change of use may be sufficient, if that change requires closure of the highway. As to the meaning of “necessary”, this was considered in *Network Rail Infrastructure Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 2259 (Admin) as addressed below. This held that an order may be necessary even where there would be no physical conflict between the development and a PROW to meet a *Grampian* condition imposed on the permission (see *Network Rail Infrastructure Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 2259 (Admin) – dealt with below – but note this is being appealed).
  - (3) It is essential that the development for which planning permission has been granted should not have been substantially completed before the order is made (or, in the case of s.257, confirmed) - see *Ashby v SSE* [1980] 1 W.L.R. 673.

#### The Balancing Exercise

17. The power is a discretionary one that allows the SoS to balance the overall public interest in interfering with an established PROW (“the merits stage”).
18. However, that discretion has to be exercised on the basis that planning permission has been granted: see paras. 40-2 of PINS Rights of Way Section Advice Note No 9, January 2018 (Appendix 1)–

“40. However, the Inspector does have latitude to consider wider issues. He should consider the overall public interest in diverting or stopping up a right of way and how it will affect those concerned. Considerations could include, for example, matters such as how the confirmation of the order would result in the loss of passing trade (which might be particularly relevant in view of the

*fact that there is no provision for compensation in relation to this type of order). Such issues may not be a material consideration at the planning stage. Furthermore, there are bound to be some matters which are overlapping – i.e. relevant to both the planning merits and the merit of whether or not an order should be confirmed.*

*41. The Inspector is not obliged to confirm an order, even if it appears necessary to enable the development to take place. There is discretion. Non-confirmation of the order might be justified where the way proposed to be stopped up could be diverted instead, or the proposed diversion would not be the most suitable and the order could not be modified.*

*42. When Inspectors consider an order made under section 257, they should be mindful that the planning merits of the development itself are not at issue in the RoW case and Inspectors should not allow that matter to be re-opened. The weighing up of the planning merits and demerits will have been determined in favour of the development (where planning permission has already been granted).”*

This approach was adopted by Nicholls LJ in *Vasiliou v SST* [1991] 2 All ER 77.

19. Nonetheless, the existence of planning permission does not guarantee that the highways order will be confirmed and does not permit any abrogation of PROW. As advised in Circular 1/09 (with my emphasis):

*7.11 The grant of planning permission does not entitle developers to obstruct a public right of way. It cannot be assumed that because planning permission has been granted that an order under section 247 or 257 of the 1990 Act, for the diversion or extinguishment of the right of way, will invariably be made or confirmed. Development, in so far as it affects a right of way, should not be started and the right of way should be kept open for public use, unless or until the necessary order has come into effect. The requirement to keep a public right of way open for public use will preclude the developer from using the existing footpath, bridleway or restricted byway as a vehicular access to the site unless there are existing additional private rights. Planning authorities must ensure that applicants whose proposals may affect public rights of way are made aware of the limitations to their entitlement to start work at the time planning permission is granted. Authorities have on occasion granted planning permission on the condition that an order to stop-up or divert a right of way is obtained before the development commences. The view is taken that such a*

*condition is unnecessary in that it duplicates the separate statutory procedure that exists for diverting or stopping-up the right of way and would require the developer to do something outside his or her control.*

20. *Vasiliou* concerned a decision of the SoS to make an order under s.247 contrary to the Inspector's recommendation:
- (i) The Inspector had been influenced by evidence that the reduction of passing trade consequent upon the making of an order would have severe economic effects on a local restaurant, for which there is no provision in the legislation for compensation. The passing trade made up some 60-70% of the restaurant's trade.
  - (ii) The SoS concluded that the economic effects of making the order were not a relevant consideration and made the order.
  - (iii) The CA quashed the order on the basis that the SoS was entitled to and should take into account the adverse effects his order would have on the trade of an owner of a business being carried on on land adjoining the highway and that such a consideration would not subvert the planning procedures already followed as an individual financial loss was not a matter to be considered at the planning stage (relying on *Great Portland Estates Plc v Westminster City Council* [1984] 3 All E.R. 744).
  - (iv) In giving judgment, Nicholls LJ accepted that there was inherently an element of overlap. He held that even if Mr Vasiliou's financial loss was a material planning consideration, the "subversion" of the planning system argument would still be unsound as there is overlap between consideration at the planning and highways stages.

#### Procedure

21. The procedure before the making of an order under s.247 by the Secretary of State or a London borough council is set out in s.252. This covers the publication and serving of the notice of stating the general effect of the Order and how a person may make presentations or objections in relation to it, the time limit for which must be at least 28 days from the date of publication of the notice. There is, unlike for a section 257 Order, no requirement for confirmation of the Order. However, where there are objections from any local authority, National Park authority or undertakers or gas transporter on whom the notice has been served, a public inquiry must be held. In the case of other

objectors, the SoS or (in the case of Orders made by a London borough) the Mayor may be decide that an inquiry is unnecessary (s.252(4)-(5A)).

## Section 257

### Scope and relationship with section 247

22. S.257 is limited to footpaths, bridleways and restricted byways. Other than that difference, this section mirrors the powers of the SoS under s.247. The preconditions and approach to the balancing exercise apply as for section 247.

23. Section 257(1) provides:

### **257.— Footpaths, bridleways and restricted byways affected by development: orders by other authorities.**

(1) Subject to section 259 , a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway if they are satisfied that it is necessary to do so in order to enable development to be carried out—

- (a) in accordance with planning permission granted under Part III or section 293A, or
- (b) by a government department.

(1A) Subject to section 259, a competent authority may by order authorise the stopping up or diversion [... of any footpath, bridleway or restricted byway if they are satisfied that—

- (a) an application for planning permission in respect of development has been made under Part 3, and
- (b) if the application were granted it would be necessary to authorise the stopping up or diversion in order to enable the development to be carried out.

(2) An order under this section may, if the competent authority is satisfied that it should do so, provide—

- (a) for the creation of an alternative highway for use as a replacement for the one authorised by the order to be stopped up or diverted, or for the improvement of an existing highway for such use;
- (b) for authorising or requiring works to be carried out in relation to any footpath, bridle way or restricted byway for whose stopping up or diversion, creation or improvement provision is made by the order;
- (c) for the preservation of any rights of statutory undertakers in respect of any apparatus of theirs which immediately before the date of the order is under, in, on, over, along or across any such footpath, bridleway or restricted byway;

- (d) **for requiring any person named in the order to pay, or make contributions in respect of, the cost of carrying out any such works.**

#### Procedure

24. S.257 Orders can be made in advance of the grant of planning permission (under s.257(1A) inserted by the Growth and Infrastructure Act 2013). They have no effect until confirmed (s.259(1)). However, an order cannot be confirmed until permission is granted.
25. The form for orders made under sections 257 and 258 of the TTCPA 1990 is prescribed in the Town and Country Planning (Public Path Orders) Regulations 1993 (SI 1993 No 10 amended by SI 1995/451).
26. The procedure for Confirmation of the Order is found in Schedule 14 to the T CPA 1990: this requires the giving of notice in the prescribed form which must specify the time (at least 28 days from the date of first publication of the notice) within which, and the manner in which, representations or objections may be made
27. RoW Booklet (2018 Revision at para. 1.4) sets out the documents that are required to be sent to the SoS with the draft Order. This includes a 'statement of reasons'. In this the local authority must explain why it considers that the order should be confirmed and how the order meets all the relevant criteria that will need to be considered by the Inspector, even if these have not been disputed by the objector(s). The local authority must also provide its comments on the representations and objections made to the order.
28. As noted above, before it can be effective the order must be confirmed:
- (1) By the lpa where there is no objection; or
  - (2) Where there are unresolved objections, by the SoS who must be satisfied of all matters which the order-making authority is required to be satisfied.
29. If there are no objections, the draft Order may be confirmed without modification.
30. If an objection is made by a local authority or National Park authority, a local inquiry must be held (see the RoW Booklet at paras. 1.7-1.14)

31. If an objection is duly made by another party and they wish to be heard, either an inquiry or a hearing is held by an Inspector, or the objections can be dealt with by way of written representations.
32. Statements of Case and, for Inquiries, proofs of evidence are required.
33. The Rights of Way (Hearing and Inquiry Procedure) (England) Rules 2007 (Annex A to the RoW Booklet) sets out the procedure for hearing and inquiries.

### **SUBSTANTIVE ISSUES**

34. As indicated above, the relationship between the planning regime can in practice be less straightforward and there is often an overlap between of the relevant considerations applicable to each.
35. In principle, the functions involved at the planning application and stopping up/diversion stages are different. For example, the effect of a stopping up order is to take away the right of an individual to recover for particular damage suffered by that individual beyond the inconvenience that might be suffered by that individual in common with the public at large. Thus, it is necessary for the SoS to take into account, when exercising the discretionary balancing power, the effect that would have directly on those concerned, as held in *Vasiliou v SST* referred to above.
36. In *Network Rail Infrastructure Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 2259 (Admin) the claimant applied for judicial review of a decision of the SoS, by his planning inspector, not to confirm a stopping up order where:
  - (i) The order was made by the local planning authority under s.257 to enable development to be carried out under two planning permissions granted for the construction of up to 142 houses.
  - (ii) The permissions were granted subject to a negative "Grampian" condition, further to *Grampian RC v City of Aberdeen DC* 1984 S.C. (H.L.) 58, which prevented more than 32 houses being built until a footpath diversion order had been made and confirmed.
  - (iii) The footpath ran close to the development site and crossed railway tracks. The condition stated that the order should provide for (a) the stopping up of the footpath to prevent access from the development

site to the railway crossing; (b) the stopping up of a section of the existing footpath; and (c) the provision of an alternative route.

- (iv) Following objections to the order, the SoS held a public inquiry. Prior to the inquiry, the developer applied under s.73 for the grant of a fresh planning permission with amendments to the condition. The revised condition proposed a housing restriction increase to 64 houses, and the lifting of the restriction if either of two exceptions were satisfied, namely (i) that the stopping up order was made and confirmed; or (ii) the secretary of state decided that the order should not be confirmed. The local authority granted permission for the development of 142 houses subject to the revised condition.
- (v) Two objectors contended that the order was no longer necessary and was therefore ultra vires the SoS's powers. The inspector decided that that issue should be determined at the outset of the inquiry. Following submissions, he concluded that the revised condition permitted the whole development, irrespective of whether the order was confirmed, and was therefore ineffective. He rejected the suggestion that he should consider all the evidence before making such a decision.

37. Holgate J. held that:

- (i) In concluding that a revised condition for the grant of planning permission for housing development was ineffective, thereby making a stopping up order under s.257 ineffective, the planning inspector had erred in his application of the merits and necessity tests in *Vasiliou v Secretary of State for Transport* [1991] 2 All E.R. 77.
- (ii) The language of the condition did not purport to render the order incapable of confirmation. The inspector erred in concluding that the necessity test could not be satisfied. As that was the sole basis for his refusal to confirm the order, that was sufficient to require the decision to be quashed and reconsidered.
- (iii) However, one of the flaws in his interpretation was that it involved reading exception (ii) in isolation from exception (i), when it was plain that they were to be considered together. Both exceptions envisaged that the embargo on carrying out the residual part of the development necessitated the making and consideration of a s.257 order to divert the footpath as described.

- (iv) The necessity test was therefore satisfied in both cases. Both exceptions then dealt with the effect of the decision as to whether the order should be confirmed, which involved the application of the merits test. They differed in that exception (i) dealt with the situation where the merits test was satisfied and the order was confirmed, whereas exception (ii) dealt with the situation where the merits test was not satisfied and the order was not confirmed. A key difference was that where the order was confirmed, exception (i) also prohibited occupation of the residual 78 houses until the order came into force and the diverted footpath was made available for use.
- (v) There were therefore three fatal flaws in the decision (see para. 69 of the Judgment). First, the inspector's interpretation failed to give any effect to exception (i). He failed to recognise that it was a restriction which not only satisfied the necessity test under s.257, but also engaged the merits test. Second, reading the condition as a whole, the restraint on carrying out the residual development continued to make the order necessary until at least the outcome of the merits test was known, and either exception (i) or (ii) could be applied. Third, the condition could not sensibly be interpreted as meaning that the stopping up order was not necessary at all or under any circumstances, or that the development could be carried out irrespective of whether the order was confirmed, *Vasiliou* and *Grampian* followed (paras 60-73).
- (vi) With regard to where the Order was necessary the Judge held (with my emphasis):

*52. Returning to the language of section 257(1), a local planning authority has a discretionary power to authorise by order the stopping up of a public right of way where it is necessary to do so to enable development to be carried out in accordance with a planning permission. Thus, the necessity test is concerned with whether such an order is necessary for that purpose. Furthermore, the terms of the planning permission, including its conditions and the drawings determining how the development authorised is allowed to be carried out are relevant to the application of the necessity test. Mr Buley's submissions effectively disregarded the words "in accordance with a planning permission" and treated the question posed by the necessity test as simply being whether the*

*order is necessary to enable the “relevant development” (as he put it) to go ahead. But effect must be given to the words I have emphasised in section 257(1). They are not surplusage and cannot be ignored.*

*53. The language used by Parliament in section 257(1) for the purpose of enabling, or facilitating, the carrying out of development, strongly suggests that the word “necessary” does not mean “essential” or “indispensable”, but instead means “required in the circumstances of the case.” Those circumstances must include the relevant terms of the planning permission (see by analogy the power of compulsory purchase in section 226 and the case law referred to in paragraph 36 above).*

38. The Judge’s comments on the fact that the Inspector dealt with this issue as a preliminary issue are also important. He held (at paras. 34-39) that:
- (i) It was necessary to consider precisely what the preliminary issue should be and to draft it in advance of the hearing. The parties' written arguments could focus on that issue and the need for an agreed statement of facts could be addressed.
  - (ii) Nothing resembling that approach had occurred in the instant case. Good practice was not followed.
  - (iii) It would be advisable for the Inspectorate to consider giving or reviewing the guidance to inspectors on (a) the circumstances in which it was appropriate for a preliminary issue to be determined; (b) the procedure to be followed, notwithstanding the fact that the procedure might only be appropriate in a limited range of cases (See paras 34-39 of judgment).
40. This case is subject to an appeal to the Court of Appeal, which is due to be heard in June 2018.

## **CONCLUSIONS**

41. A planning permission does not override PROW. Those rights have to be diverted or extinguished. The powers specifically relevant to enable development to be carried out are found within Part X of the TCPA 1990 and in particular sections 247 and 257 (and see PINS Advice Note No. 9 at paras. 39-45).

42. Sections 247 and 257 of the 1990 Act allow the making of an order authorising the stopping up or diversion of a highway if the relevant authority is satisfied that it is '*necessary to do so in order to enable development to be carried out in accordance with planning permission*' granted under Part 3 or section 293A of the 1990 (or by a government department).
43. A section 247 order applies to all types of highways. The relevant authority is either the London borough councils (within Greater London) or the Secretary of State (outside Greater London). There is no separate confirmation stage, with the order taking effect from the date such authority make the order.
43. A section 257 order applies specifically to public footpaths, bridleways and restricted byways. The district or county council are the relevant authority empowered to make such orders. However, the made order can only be confirmed (i.e. take legal effect) by such local authority if it is unopposed following statutory notifications. If the made order is opposed then it is referred to the Secretary of State to decide whether to confirm the order. An inspector will be appointed by the Secretary of State who will either hold a local inquiry or receive written representations.
44. It is essential that the development for which planning permission has been granted should not have been substantially completed before the order is made (or, in the case of s.257, confirmed) - see *Ashby v SSE* [1980] 1 W.L.R. 673.
45. There are essentially two stages to consideration of an order:
  - (1) The necessity test: whether it is necessary to enable that it is necessary to enable development to be carried out in accordance with planning permission relied upon; and
  - (2) The merits test: in exercising the discretion whether to confirm an order the SoS is obliged to take into account any significant disadvantages or losses flowing directly from the order which have been raised. The SoS must also take into account any countervailing advantages, along with the planning benefits of, and the degree of importance attaching to, the development. He must then decide whether any such disadvantage or losses are of such significance or seriousness that he should refuse to make the order.

46. Examples of the application of the application of the necessity and merits test are found in the Interim and Final decisions in respect of The London Borough of Havering (Public Footpath 198) Stopping Up and Diversion Order 2015 (see Appendix 2) and considered in the associated seminar presentation.

STEPHEN MORGAN

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February 2018

## REFERENCES

### **Legislation**

Part X and Schedule 14 of the Town and Country Planning Act 1990

The Town and Country Planning (Development Management Procedure) (England) Order 2015, article 15/595

Town and Country Planning (Public Path Orders) Regulations 1993 (SI 1993 No 10 amended by SI 1995/451).

### **Advice**

Defra Rights of Way Circular 1-09 (V2, Oct 2009)

PINS Rights of Way Section Advice Note No 9, January 2018 (RoW Booklet)  
Guidance on procedures for considering objections to Definitive Map and  
Public Path Orders in England, January 2018

### Cases

*Ashby v SSE* [1980] 1 W.L.R. 673

*Vasiliou v SST* [1991] 2 All ER 77

*Network Rail Infrastructure Ltd v Secretary of State for the Environment, Food  
and Rural Affairs* [2017] EWHC 2259 (Admin)

### Texts

Highway Law by Stephen Sauvain, 5<sup>th</sup> edition 2013 - Chapter 9, Extinguishment  
and Diversion of Highways

## APPENDIX 1



### **RIGHTS OF WAY SECTION ADVICE NOTE No 9** (Extracts)

First issued March 2001

The Planning Inspectorate 9th Revision January 2018

### **GENERAL GUIDANCE ON PUBLIC RIGHTS OF WAY MATTERS**

## **Introduction**

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### **Town and Country Planning Act 1990 Cases**

#### **Stopping up or diversion of FP or BW to enable development to be carried out**

39. Following a grant of planning permission, the local planning authority (LPA) may make an order to stop up or divert a FP, BW or RB if they are satisfied that it is necessary to enable that development to be carried out (TCPA 90, section 257). Similar powers are available to the SoS/WM (TCPA 90, section 247).
40. Before an order can be confirmed, or indeed made, it must be apparent that there is a conflict between the development and the right of way, such as an obstruction. An outline permission might not give the degree of certainty necessary to evaluate the impact that the development will have upon the way. However, the development does not need to be in the form of a physical interference such as a building on the right of way. For example, a change of use may be sufficient.
41. Alternatively, following the amendments of section 257 by the Growth and Infrastructure Act 2013, an order may be made in anticipation of planning permission. However, an order made in advance of planning permission cannot be confirmed by either the authority or the SoS/WMs until that permission has been granted.
42. When Inspectors consider an order made under section 257, they should be mindful that the planning merits of the development itself are not at issue in the RoW case and Inspectors should not allow that matter to be re-opened. The weighing up of the planning merits and demerits will have been determined in favour of the development<sup>12</sup> (where planning permission has already been granted).
43. However, the Inspector does have latitude to consider wider issues. He should consider the overall public interest in diverting or stopping up a right of way and how it will affect those concerned. Considerations could include, for example, matters such as how the confirmation of the order would result in the loss of passing trade (which might be particularly

relevant in view of the fact that there is no provision for compensation in relation to this type of order). Such issues may not be a material consideration at the planning stage. Furthermore, there are bound to be some matters which are overlapping – i.e. relevant to both the planning merits and the merit of whether or not an order should be confirmed.

44. The Inspector is not obliged to confirm an order, even if it appears necessary to enable the development to take place. There is discretion<sup>13</sup>. Non-confirmation of the order might be justified where the way proposed to be stopped up could be diverted instead, or the proposed diversion would not be the most suitable and the order could not be modified.
45. The power contained in section 257 is only available if the development, insofar as it affects the path or way, is not yet substantially completed<sup>14</sup>. If the development has been substantially completed another type of order would have to be made (e.g. under sections 116, 118 or 119 of the HA 1980).

### **Land held for a planning purpose**

46. Section 258 of the TCPA 90 gives power to local authorities to make an order extinguishing footpaths, bridleways or restricted byways over land which they hold for planning purposes. An order may not be made unless the authority is satisfied either that an alternative is not required or that an alternative has been or will be provided.

<sup>12</sup> Vasiliou v Secretary of State for Transport [1991] 2 All ER 77.

<sup>13</sup> K C Holdings Ltd v Secretary of State for Wales (DC) [1990] JPL 353

<sup>14</sup> See Ashby and Dalby v Secretary of State for the Environment [1980] 1 WLR 673 and Hall v Secretary of State for the Environment [1998] JPL 1055

## Surface mineral workings

47. Section 261 of the TCPA 90 allows for orders to be made under section 247 or section 257 to temporarily stop up or divert a highway (in the case of section 257 orders, for footpaths, bridleways and restricted byways) for the purpose of enabling surface minerals to be worked. This is provided so that the highway can be restored to a condition not substantially less convenient to the public, after the minerals have been worked.

## APPENDIX 2



## Order Decision

Site visit carried out on 13 July 2016

by Peter Millman BA

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs Decision date: 25 July 2016

**Order Ref: FPS/B5480/5/2**

- This Order is made under Section 257 of the Town and Country Planning Act 1990 ("the 1990 Act") and is known as The London Borough of Havering (Public Footpath 198) Stopping Up and Diversion Order 2015.

- □The Order is dated 8 December 2015 and proposes to stop up a footpath and provide an alternative as shown on the Order Map and described in the Order Schedule.
- □There were two objections outstanding when the London Borough of Havering (“the Council”) submitted the Order to the Secretary of State for confirmation.

**Summary of Decision:** I propose to confirm the Order with a modification which requires advertisement.

### **Procedural matters**

1. I carried out a site visit unaccompanied by anyone. I subsequently noted that one of the objectors, in a letter dated 20 April 2016, accompanying his Statement of Case, had asked to be present when I carried out the visit. An officer from the Planning Inspectorate contacted him, offering a second, accompanied visit, but he replied that he was content for me not to make a second visit.
2. I stated above that there were two objections outstanding when the Council submitted the Order to the Secretary of State. After that submission, a number of other people sent letters to the Planning Inspectorate objecting to the Order. I have had regard to these letters in coming to my decision.

### **Main issues**

3. The Order states that it was made because the Council was satisfied that it was necessary that part of footpath 198 (between A and C on the copy of the Order map appended below) be stopped up in order to allow development, for which it had granted planning permission under part III of the 1990 Act, to be carried out. Before confirming the Order, I am required by Section 257 of the 1990 Act to be satisfied that there is a valid planning permission, and that it could not be implemented without stopping up the footpath.
4. Even if I am satisfied on those issues, my confirmation of the Order is discretionary. In exercising this discretion I must consider the merits and demerits of the proposed stopping up (including the provision of an alternative route) in relation to the particular facts of the case, and in particular the effect the confirmed Order would have on those entitled to the rights that would be extinguished by the Order. I must also approach the exercise of my discretion on the assumption that the issue has been resolved in favour of the development being allowed to proceed, and consider whether the disadvantages and losses flowing from the proposed stopping up would be of such significance that I should refuse to confirm the Order.

### **Reasons**

#### **The planning permission**

5. The Planning Consent referred to by the Order, reference P1220.14, is for development at the former Old Windmill Hall site, St Mary’s Lane,

- Upminster, for the erection of a 3 storey building comprising 22 retirement living apartments with communal facilities and landscaping.
6. I have seen copies of the relevant consent and the associated approved plans. These show that the development would not be possible unless part of footpath 198 was stopped up.

### **The merits and demerits of the proposed diversion**

7. Footpath 198 leaves St Mary's Lane just to the east of the site of Old Windmill Hall (point C on the plan below). It is not signed or marked at this junction. It crosses a tarmac area, the site of the development for which planning consent has been given, and enters Upminster Park. The Park has a surface of short mown grass. The right of way continues in a south-south-easterly direction across the grass, although there is no sign at all of a trodden path on the ground, until it reaches a tarmac path (point A on the plan).
8. The proposed diversion also starts from St Mary's Lane and joins the existing path at A. It runs along a tarmac path which is designated, by signs, as National Cycle Network route 136. From A northwards, the tarmac is 2 metres wide, not including the narrow edging strip, which is level with the tarmac. Where the path starts to run through an area where there are some bushes on both sides of it, the tarmac surface widens to 2.6 metres, and then the path splays out further in the last couple of metres or so before it reaches the pavement of St Mary's Lane. There are two benches and four lamp posts adjacent to the path between A and B.
9. I visited the site on a sunny July morning, and stayed for 50 minutes, observing the use of the paths. During that time I saw one person walking a route approximating to C-A. Another person with a child started from C, but diverged from the right of way on entering the Park. Seventeen pedestrians and two cyclists used the full length of the proposed diversion, B-A, while two more cyclists and twenty or so pedestrians used short parts of the route, most of these starting from B and then spreading out across the Park when they were able. I am aware that typical use in the earlier morning and later afternoon may well be significantly different from what I observed, especially since there are schools in the vicinity.
10. Most objections are concerned principally with the safety of pedestrians on a route shared with cyclists. Cycling is prohibited in the Park, apart from on the designated Cycle Route, and objectors feel that accidents will be the inevitable result of confirming the Order. The Council's response is that there is already shared use of the Cycle Route and that there have been no reports of incidents. One objector states that he has witnessed 'a number of incidents' at the junction of the cycle route and St Mary's Lane, but it is not clear what these were and whether they occurred on the alternative route or the footway of St Mary's Lane.
11. One of the objectors included with his Statement of Case a risk assessment, carried out by the Council in 2012, examining the safety implications of allowing cycles on shared paths within Upminster Park. At that time bye-laws prohibited cycling within the Park. This assessment acknowledged that although accidents involving cyclists and pedestrians are uncommon, and that fewer than 3 pedestrians, on average, are killed by cyclists each year in the UK, most of these being hit when stepping

into a road, there is a perception that sharing a pathway with cyclists can be dangerous. The assessment considered a number of factors specific to Upminster Park, such as the volume and speed of cycle traffic and visibility, and concluded that the likelihood of pedestrians being injured by being struck by a cyclist was 'unlikely', the likely consequences if that happened to be 'minor' and that therefore the risk level was 'acceptable'. According to the Council's 'risk matrix' no further action is needed where a risk is calculated to be acceptable.

12. This objector states that he would prefer a 'no cycles, no risk' policy, rather than a very low risk, but he does not challenge the Council's conclusion as to the risk level.
13. The applicant for the Order, McCarthy & Stone, included with its Statement of Case a copy of chapter 8 of the Sustrans National Cycle Network guidelines. This chapter deals with paths and areas free of motor traffic. There is a section concerning paths with shared use where there is no segregation of cyclists from pedestrians. The guidelines state that the preferred width of such paths is 3 metres with an 'absolute minimum' of 2 metres.
14. The Order states that the diverted right of way will be 1.8 metres wide. The applicant, commenting on the Order and the Sustrans guidance, states, 'upon measure McCarthy & Stone find the width of the alternative route to be 2.02m extending to 2.95m, with space for passing. Therefore this is considered to be an adequate width for a non-segregated route...' I concur. The McCarthy & Stone measurements agree with those I took; I did not include the narrow strip of edging in my measurement (paragraph 8 above) and I accept 2.95 metres as the width of the path where it splays out to join the footway at St Mary's Lane. I do not understand why the Council specified a lesser width in the Order, and one that does not meet the Sustrans guidance, when it could easily have specified a width of 2 metres.
15. I conclude, from the matters discussed in the previous five paragraphs, that if the width over which pedestrian rights extended between A and B was extended to 2 metres, and more where the tarmac path is wider, that would not pose an unacceptable risk to pedestrians.
16. On St Mary's Lane, roughly half way between C and B, there is a Toucan crossing, which caters not only for pedestrians, but also cyclists continuing along route 136, who are permitted to use the pavements at that point. Objectors were also concerned about the safety of the crossing, but that cannot be my concern – it is not on the route of footpath 198 or its proposed replacement.
17. The Council notes that the route between A and B is a much better path than that between A and C because it is surfaced and lit, rather than predominantly grassed and unlit. I consider that it would be much easier to use than footpath 198 at night and for those in wheelchairs and those with pushchairs.
18. Two objectors wrote that the entrance to the Cycle Route at B was between bushes and very intimidating at night. I do not doubt that some people might feel intimidated, but, as I have already noted, C-A is not lit at all, whereas there are four lamp posts between A and B and it is a straight, surfaced path. I do not accept that the proposed diversion would be less safe at night.

## **The development and disadvantages and losses**

19. McCarthy & Stone, the applicant for the Order and a provider of retirement homes, included in its Statement of Case a detailed argument supporting the view that the planned development would help to meet the London Plan, which seeks to ensure that account is taken of the needs of older residents. If the development went ahead there would be significant contributions towards infrastructure costs and the provision of affordable housing in the borough as well as a payment to the Mayor's Community Infrastructure Levy. No objector questioned the importance of the development or disputed the figures and submissions provided by McCarthy & Stone.

## **Conclusions from the evidence**

20. I conclude from the matters discussed in the preceding thirteen paragraphs that the proposed diversion of A-C onto A-B would provide a reasonably safe and easier to use alternative if it met Sustrans' minimum width standards. Any disadvantages caused by sharing the route with cyclists would not be such that I should refuse to confirm the Order (paragraph 4 above).

## **Other matters**

20. A fault, perhaps minor, in the description of the alternative highway in part 2 of the Schedule to the Order is that it does not mention connections with public highways at each end of the path. That fault is easily remedied (see below at paragraph 23)

## **Conclusion**

22. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed with a modification to the description of the diverted footpath to show its connections at either end, and a modification to increase its width.

## **Formal Decision**

23. I propose to confirm the Order with the following modifications:
- □ In part 2 of the Schedule to the Order, add, after 'Commencing at' 'the existing footpath 198 at', and add, after 'approximately 87 meters to' 'a junction with St Mary's Lane at'
  - □ Also in part 2 of the Schedule, delete '1.8 meters' and add '2 metres or the width of the tarmac surface, whichever is greater, to a maximum of 2.95 metres.'

24. Since the confirmed Order would affect land not affected by the Order as submitted, I am required by virtue of Paragraph 3(6) of Schedule 14 to the 1990 Act to give notice of the 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.

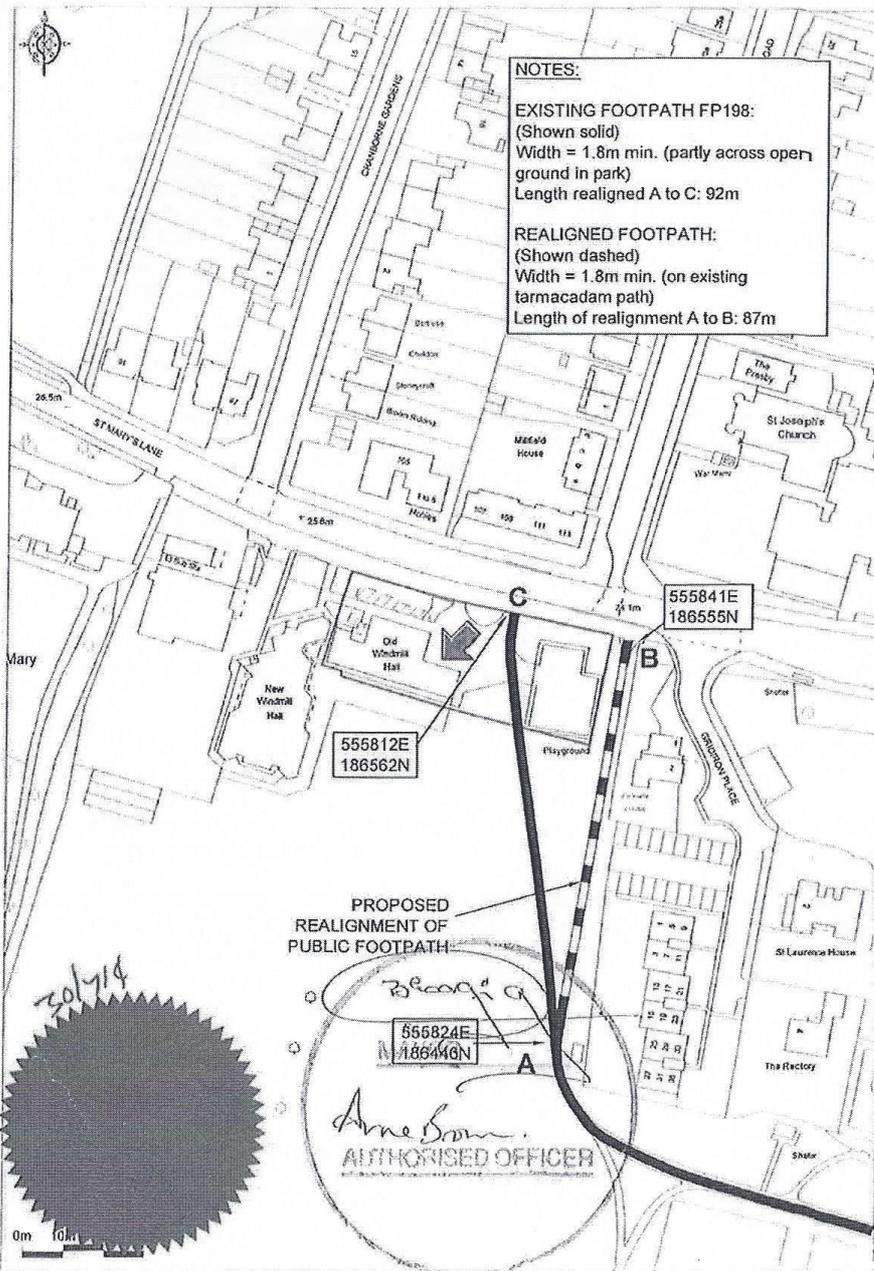
Order Decision FPS/B5480/5/2 *Peter Millman*

Inspector

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Order Decision FPS/B5480/5/2

The Former Old Windmill Hall St Mary's Lane, Upminster, RM14 2QH  
 1987 Footpath Realignment April 2015



## Order Decision

Inquiry held on 4 July 2017

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs Decision date: 03 August 2017

Order Ref: FPS/B5480/5/2M

- □ This Order is made under Section 257 of the Town and Country Planning Act 1990. It is known as London Borough of Havering (Footpath 198) Stopping Up and Diversion Order 2015.
- □ The Order is dated 8 December 2015 and proposes to stop up footpath 198 and provide an alternative route, as shown in the Order map and described in the Order Schedule.
- □ In accordance with Paragraph 3(6) of Schedule 14 to the Town and Country Planning Act 1990 notice has been given of the proposal to confirm the Order subject to modification. Eight objections were submitted in response.

Summary of Decision: The Order is confirmed subject to modifications set out in the Formal Decision.

### **Preliminary Matters**

#### ***Dealing with the Proposed Modifications***

1. This Order was initially dealt with by way of the written representations procedure. As a result of the matters raised, and following a site visit on 13 July 2016, modifications were proposed to the Order to record a width of 2 – 2.95 metres on the proposed alternative route, A – B<sup>1</sup>; and, make minor modifications to the description of the alternative highway to identify the connections to existing public highways.
2. The Interim Order Decision (“the IOD”), issued on 25 July, proposing these modifications led to further objections and representations. Additional objections and representations were received in the lead up to the Inquiry.
3. It is usually the case that the Inspector who proposes modifications would deal with the Order through to its conclusion. However, in this case the Inspector was due to retire before the matter could be completed and so I have taken over the determination of this Order. It is fair to say that, as a result, greater leniency has been given to both sides in presenting ‘new’ evidence in relation to the Order as a whole, rather than concentration on the proposed modifications as would normally be expected at this stage.

#### ***The Order map***

4. Concerns were raised that the Order map was incorrect by reference to either historical changes or the continuation of the National Cycle Network (“NCN”) on the Route 136 (“NCR136”). I am satisfied by reference to the Definitive Map

<sup>1</sup> Points A, B and C are shown on the Order map

and Statement that the Order map is correct. The continuation of the NCN beyond point A is a not part of this Order.

### **Procedural Matters**

5. I made an unaccompanied site visit, observing the general use of the existing and proposed routes, between 3 and 4pm on Monday 3 July 2017. I held a public Inquiry into the Order on 4 July. Following discussion with the parties at the close of the Inquiry it was agreed that there was no need for a further accompanied site inspection.

### **Main Issues**

6. The Order was made because it appeared to the London Borough of Havering, the order making authority ("the OMA") that it was necessary to stop up and divert the relevant part of the footpath to enable development to be carried out in accordance with planning permission granted under Part III of the Town and Country Planning Act 1990 ("the 1990 Act").
7. Section 257 of the 1990 Act requires that, before confirming the Order, I must be satisfied that that it is necessary to stop up and divert the footpath in question to allow development to be carried out in accordance with the planning permission already given but not substantially complete.
8. Even if I were to find it necessary to stop up or divert the path to allow implementation of the permission my confirmation of the Order is discretionary. In exercising this discretion I must consider the merits or disadvantages of the proposed diversion and stopping up in relation to the particular facts of the case, and in particular the effect the confirmed Order would have on those entitled to the rights that would be altered by it.

### **Reasons**

Whether it is necessary to stop up and divert the footpath to enable development to be carried out

9. Planning permission was granted on 2 April 2015 under reference P1220.14 for development at the former Old Windmill Hall Site, St Mary's Lane, Upminster for the erection of a three storey building comprising 22 retirement living apartments with communal facilities and landscaping ("the development").
10. As found in the IOD, I am satisfied the approved plans show that the development could not go ahead unless the relevant part of Footpath 198 ("FP198"), passing over the site, was stopped up.

### **Whether the development is substantially complete**

11. The development has not been started and, therefore, this matter is satisfied.

## **The effect of the Order on those whose rights would be extinguished by it**

12. The representative of the Friends of Upminster Park ("FOUP") fairly indicated that FOUP had objected at every stage to the proposed changes to the land crossed by FP198, as they were against the principle of the development. Whilst I recognise that this may colour the evidence, the same may be true of those who would wish to see the Order succeed so that the development could go ahead. I approach the evidence as a whole aware of such potential bias and giving appropriate weight to the matters raised on both sides.

13. The main matters of concern raised in objection related to the shared use of the alternative route, A – B, NCR136. This matter was considered in the IOD and led directly to the proposed modification to the width. This was to record the minimum 2 metres identified in the "Sustrans NCN guidelines: traffic-free paths." Although argued that this was only guidance, not standards, I am satisfied that I should take some account of this.
14. Despite the comment that 2 metres related only to canal paths I am satisfied that Figure 8.1 "Shared Cycle Tracks/Footpaths/Bridleways" is relevant to the Order. The guidance shows 3.0m as preferable with 2.0m an absolute minimum; the proposed modification records the tarmac route on the ground, meeting this minimum requirement.
15. The guidance indicates that "In general cycle routes through such public spaces (for example part of an existing path through a park) are likely to be shared with pedestrians. They should be well defined with pedestrians having the remainder of the area for their continued exclusive use." Despite concerns that cyclists, particularly children, might cycle on the grass I consider that NCR136 in this location follows the guidance, being a defined tarmac route on the edge of Upminster Park ("the Park"), which is otherwise left for pedestrians.
16. Concerns were raised that the desirable minimum clearance of 0.5m to objects on the edge of a shared cycle track might not be met in relation to features such as park benches, lighting columns and litter bins alongside the route. I note that this is 'desirable' and, therefore, may not be met in some cases. Having observed the use of the route I am satisfied that the adjacent features do not cause an unacceptable risk to users.
17. The desirable 0.75m minimum to boundary walls and frontages is met, which I consider relevant to the discussion about the width that would be left near point B once the proposed development was in place, with concerns that an alleyway would arise. The supporters provided copies of the footprint of the planning permission, which indicates that the building does not abut directly onto the edge of the development site, alongside NCR136.
18. In relation to the concern of increased use of NCR136, due to people being diverted from FP198, I note the measurements made for McCarthy & Stone on Thursday 25, Saturday 27 and Sunday 28 May 2017. Although suggested that the weekend chosen might not have shown 'typical' use, the general findings, that most use is already taking place on NCR136 rather than FP198, accord with the observations in the IOD, of a supporter to the Order and my own site observations made on the day before the Inquiry.

19. It is clear that some people use FP198, at least in part, as an access to and from the Park; however, the numbers are low in comparison to the use of NCR136. I accept the evidence of the supporters to the Order that even if all those using FP198 were to move onto NCR136 there would only be a small increase in use. The greatest change would occur on a weekend, when more people as a percentage of the total use FP198, however, the overall use is lower at the weekend in comparison to the weekdays and so the effect would not be significant. I also agree that not everyone will necessarily divert onto NCR136 anyway, given the other existing alternative through the New Windmill Hall carpark, situated to the west along St Marys Lane.
20. The current cycle use is low, around 4 per hour over a 12 hour period. I note the argument that the failure to advertise the current byelaws, allowing cycling on the designated route within the Park, may lead to an increase in cycling, once updated. However, I consider that the NCR136 is signed to show cycling and I understand that NCR136 is shown on the Sustrans website. The cycle use may increase but I agree with the supporters that a very significant increase would need to arise before any likely conflict might arise.
21. The OMA indicate that that NCR136 has been part of the NCN for several years<sup>2</sup> and there have been no reported accidents. It was claimed in objection that people would not know how to report such incidents and fairly agreed by the OMA that there may have been incidents of which they were unaware. It was said that an accident had been reported to the OMA the previous week but no details were forthcoming from either side.
22. The risk assessment for NCR136 identified a 'low risk' and it was argued that only 'no risk' would be acceptable. I consider that the OMA are correct in their assessment that a 'low risk' is something we all accept as part of everyday life, whether crossing the road or walking down stairs. There was some indication of people taking evasive action when using NCR136 and I do understand that some may perceive a level of risk in relation to other users which is not reflected in either the local or national statistics of actual conflict. The OMA rightly indicate that the principle points of conflict are likely to be at the Park entrances but that reasonable users should generally be aware of one another. On the basis of all the evidence I am satisfied that the risks which may arise as a result of increased use of NCR136 if FP198 is stopped up are not such that they should override the other factors relevant to confirmation of this Order.
23. Although there was some reference to the value of the historic route of FP198, the legislation allows such changes to be made where necessary, taking account of the circumstances of the case. It seems that the route now used as NCR136 has existed since at least 1990, with a tarmac path, following approximately the line of FP198, having been removed at around this time. There is no evidence of any legal change to the recorded public rights but the observed use shows the preferred route to be NCR136. I am satisfied that the indication in some aerial photographs of a route on the ground near the alignment of FP198 arises from the changes in the subsoil due to the former tarmac surface rather than indicating current use of this route.
24. I note that FOUP believe people may have been discouraged from using FP198 by the closure of it for some time and the concrete now across the

carpark entrance. However, I agree with the OMA that the route of NCR136 is preferable to FP198 due to it being surfaced, which will provide an improved access for school during wet weather. I also consider the provision of lighting on this route to be advantageous.

25. There is an additional distance to be walked from point A to the Toucan crossing giving access to Champions Road, which appears to be a popular access to and from the Park. It is 1.5 metres overall, as identified by the

<sup>2</sup> The FOUP website post, dated 10 November 2012, refers to the provision of a cycle and pedestrian link and widening of the original path.

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supporters, or 6.5 metres comparing the distance from point B to the Toucan with that from point C, as identified by FOUP. I do not consider any reasonable user would find such small increases in distance to be inconvenient.

26. A matter was raised regarding the potential safety aspects of removing an access to and from the Park, so that emergency services would be directed over NCR136 or the New Windmill Hall access, as would people needing to leave the Park in an emergency. This was also referred to in relation to expected increased use of the Park in conjunction with New Windmill Hall.

27. I understand that there are two emergency vehicle access points elsewhere in the Park. FP198 does not provide vehicular access any further than the edge of the former carpark due to ground-posts preventing such access. There are six other access points to and from each side of the Park including the remaining two access points from the north, off St Marys Lane. There has been no objection to the Order from any of the emergency services.

28. Whilst I recognise the disquiet of some people at the proposed changes, I am satisfied that the disadvantage or loss as a result of the diversion and closure of the footpath would be minimal.

### **The advantages conferred by the Order**

29. In considering the overall effect of the Order I take account that confirmation would allow the development to go ahead. The supporters provided additional evidence supporting the need for such development in the country, in line with one of the core planning objectives of the National Planning Policy Framework, and specifically the need and desire in this area, as evidenced by expressions of interest. The development would include financial contributions towards infrastructure costs and to the Mayor's Community Infrastructure Levy. The planning report shows that the existence of FP198 across the site was taken into account as a material consideration during the planning process.

30. I am satisfied that the advantages in confirming the Order, and therefore allowing the development to proceed, outweigh the potential concerns to the loss of FP198 raised in objection.

### **Other matters**

31. A number of matters were raised which were not relevant to my decision, several of them having already been determined through the planning process, or being relevant to that process, or other procedures, rather than this Order. These included whether a precedent for changes to open space would arise; whether other sites could deliver the development aims; whether, given the high level of requirement for such properties, it was worth proceeding for 22 units; other local planning decisions; whether the byelaws allowing cycling on the Park had or had not been properly advertised; whether the access near Brookdale Close is suitable for shared use; whether there would be a view to or from the Park once the development was complete; whether there was a requirement for parking in the area to support local businesses, provide access to the Park or assist during school run periods; whether the OMA had been entitled to use the area as a public carpark; concerns regarding signage on the route; and, whether the OMA acted lawfully with regard to the sale, or potential sale, of the land in question, including areas of green space.

32. I do, of course, understand that these issues are of particular importance and interest to those living locally and making use of the Park. However, I have been unable to give them weight in this matter.

### **Conclusion**

33. 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 subject to the modifications previously proposed by the IOD, paragraph 23.

### **Formal Decision**

34. In exercise of the powers transferred to me, the Order is confirmed subject to the modifications previously proposed:

- In part 2 of the Schedule to the Order:
  - □ after text "Commencing at..." add text "...the existing footpath 198 at ...";
  - □ after text "...approximately 87 meters to..." add text "...a junction with St Mary's Lane at...";
  - □ replace text "1.8 meters" with text "2 metres or the width of the tarmac surface, whichever is greater, to a maximum of 2.95 metres."

*Heidi Cruickshank*

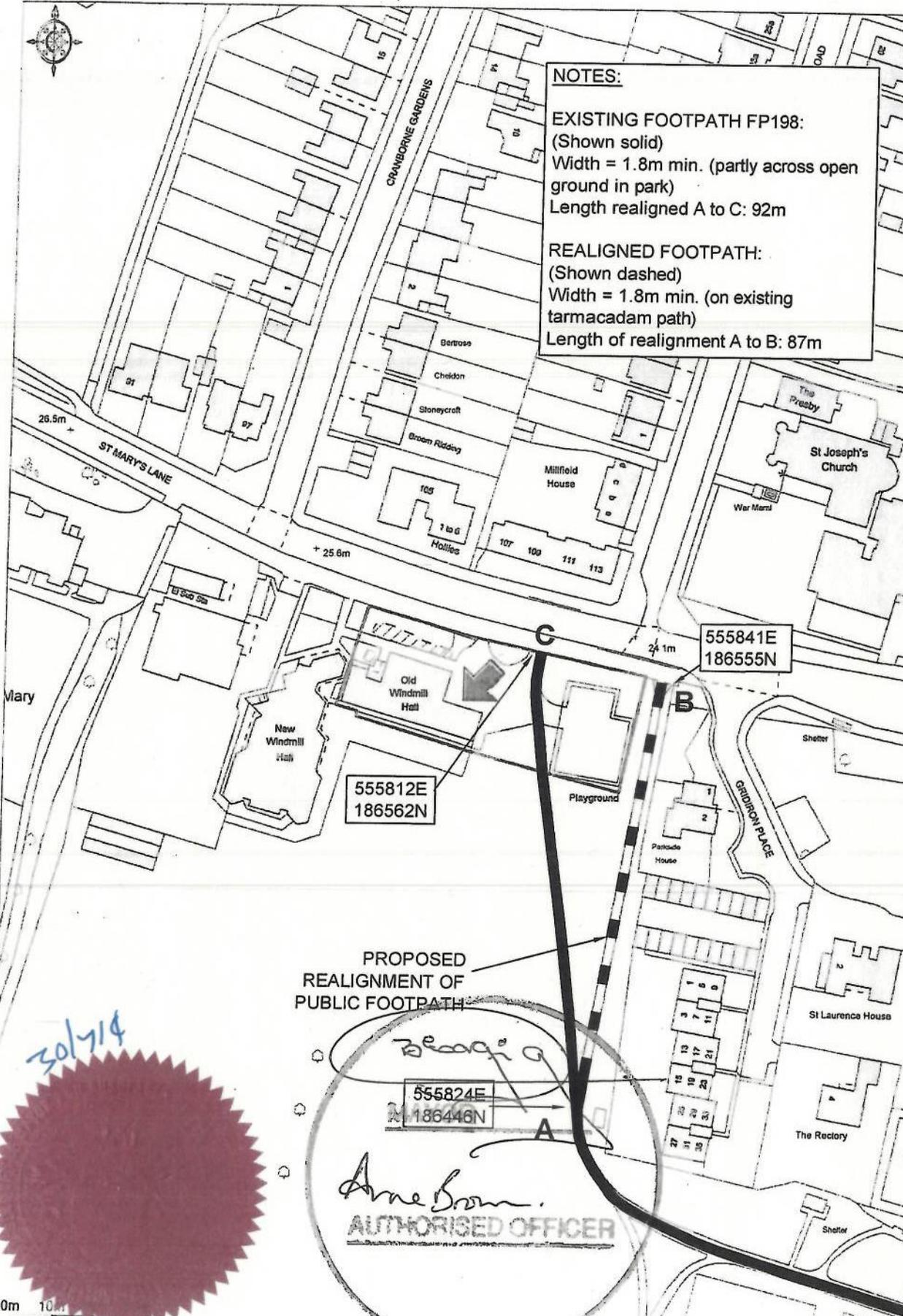
Inspector

# MAP NOT TO ORIGINAL SCALE

The Former Old Windmill Hall St Mary's Lane, Upminster, RM14 2QH  
1987 Footpath Realignment April 2015



**NOTES:**  
**EXISTING FOOTPATH FP198:**  
 (Shown solid)  
 Width = 1.8m min. (partly across open ground in park)  
 Length realigned A to C: 92m  
**REALIGNED FOOTPATH:**  
 (Shown dashed)  
 Width = 1.8m min. (on existing tarmacadam path)  
 Length of realignment A to B: 87m



555812E  
186562N

555841E  
186555N

555824E  
186446N

PROPOSED REALIGNMENT OF PUBLIC FOOTPATH

*Anne Brown*  
 AUTHORIZED OFFICER

*30/7/14*

0m 10m