



Order Decision

Inquiry opened on 25 November 2015

by Peter Millman BA

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

Decision date: 24 February 2016

Order Ref: FPS/P0430/7/52

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Buckinghamshire County Council (Parish of Lower Winchendon) Definitive Map Modification Order 2014.
- The Order is dated 30 June 2014 and proposes to modify the Definitive Map and Statement for the area as shown on the Order plan and described in the Order schedule.
- There was one statutory objection outstanding when Buckinghamshire County Council ("BCC") submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: I have confirmed the Order with a modification.

Procedural matter

1. The evidence was heard on 25 November, following which the inquiry was adjourned until 1 February 2016, when closing submissions from the objector, represented by Mr G Laurence Q.C., and BCC, represented by Miss H Emmerson, were made.

Main issue

2. The main issue is whether it may be concluded from the evidence and submissions that public footpath rights exist over the route shown on the Order plan ("the Order route") (copy attached at the end of this decision). The relevant part of the statutory test for confirmation of modification orders is set out in s31 of the Highways Act 1980 ("the 1980 Act"). It reads as follows: *(1) Where a way over any land... has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question...* The standard of proof is the balance of probabilities.

Reasons

Background

3. The following matters are not in dispute except where noted. There is a public footpath, no. 10A, which runs east-north-eastwards from a lane near the Old Mill at Nether Winchendon (known also as Lower Winchendon) to join footpath 3 after about half a mile (see the Order plan appended below). Footpath 10A crosses a single field, which, before 1978, was pasture. In 1978 the objector's father, who owned the land, decided to give up dairy farming and convert the
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field to arable. The presence of footpath 10A made cultivation of this field difficult, so he applied to Aylesbury Vale District Council ("AVDC") for an order to divert part of 10A onto what is now the Order route, or a route very similar to it (the plan attached to the diversion order is missing, but the description of the proposed diverted route suggests it is very close to the Order route). The Order route runs between the buildings of the Old Mill, then along the south side of a hedge and ditch, through a meadow along the south side of which runs the River Thames. A diversion order was made and published in 1980. Notice of the order would have been placed at each end of 10A and each end of the Order route. There were objections to the order and it was not processed further.

4. After 1978 the landowners acted as if the diversion order had been made and confirmed and that 10A had in fact been diverted as proposed. Footpath 10A was not reinstated or marked out after ploughing and other operations, and the Order route was made available for public use (although evidence given to the inquiry suggested that it was already in use by then). The Order route was waymarked and it was used by the public. The objector stated that signage was provided by BCC or AVDC. Crops such as winter wheat, oilseed rape, field beans and barley were grown on the arable field. At a date after 1978 which is not certain, a drain was dug running north/south across the line of footpath 10A (shown on the Order plan). A bridge was subsequently erected across this drain by BCC, the objector believes before 1995. Although in his proof of evidence the objector stated that use of the Order route had always been by permission, he conceded in cross-examination that before he heard from BCC in 1995 that the 1980 diversion order had not been confirmed he must have taken the view that it had 'gone through' and that the Order route carried a public right of way on foot. Indeed it was noted by the objector's solicitor in March 2013 that: *...there is no question of use of the claimed route during any periods of obstruction of the legal route of FP10A being, as claimed by our client, permissive...*
5. In 1995 the landowner was made aware by BCC that the 1980 diversion order had not been confirmed and that 10A would have to be reinstated. The landowner asked, in 1996, that the diversion order be progressed. The route of 10A was not reinstated. In 1997 AVDC placed an advertisement in a local newspaper stating that the 1980 order, not having been confirmed, was withdrawn. The situation on the ground remained as it had before 1995, in that members of the public used the Order route.
6. In 2001 there was a national outbreak of foot and mouth disease. Local authorities were given powers to forbid access to the countryside and to footpaths and rights of way. It has not been ascertained precisely what powers were exercised in Nether Winchendon, but the evidence given at the inquiry suggests that the Order route was not used by the public from the end of February 2001 at least until early June the same year, and that there was little, if any, use of it until after the end of August. There were official notices forbidding entry at or near the junction of footpaths 10 and 10B and probably at some point east of the eastern end of 10A between February and early June. The objector erected his own additional notices in February (at points B and D on the Order plan) which had stayed in place until August 2001. These stated, he said, something like 'Foot and Mouth, Keep Out.' No supporters of the Order who gave evidence at the inquiry could recall having seen these notices, but in any event most did not start to use footpaths in the countryside again until well after August 2001.

7. In 2002, BCC, having consulted with Nether Winchendon Parish Meeting, made and published an order to divert footpath 10A, but it was not progressed because of unresolved objections. The Ramblers' Association argued that the Order route, having been used since 1978, was already a public footpath. The objector was informed by BCC that the 2002 order had not been confirmed. Footpath 10A was not reinstated, and the Order route remained available to, and was used by, the public until 2010, when notices were placed at its ends in July stating that permission to use it was withdrawn. This precipitated the application, made by Cuddington Parish Council in 2011, for the current Order. Footpath 10A was reinstated, i.e. its line was marked after cultivation and a route was cleared through growing crops.

The statutory test

The date when use was brought into question

8. The public's right to use a route is brought into question when the landowner, or some other person, puts up a notice or otherwise makes it clear to the public that their right to use the way is challenged. BCC and the objector agree that the public's right to use the Order route was brought into question in July 2010 when the objector erected notices at either end.
9. Mr Laurence argued that the public's right to use the Order route had, in addition, been brought into question on a number of occasions in the years preceding 2010, in 2002 when a diversion order was made and published (paragraph 7 above), in 2001 when the objector's notices about foot and mouth were erected (paragraph 6 above) and in 1980 when a previous diversion order was made and published (paragraph 3 above). He did not pursue, in submissions, a previous argument that advertisement in 1997 of the decision not to proceed with the 1980 diversion order (paragraph 5 above) had also brought use of the Order route into question.
10. Mr Laurence contended, in his closing submissions, that BCC did not, before or during the inquiry, seek to rely on any 20 year period other than 1990 to 2010. In oral submissions, he stated that he had conducted his cross-examinations on that basis and that I should not, therefore, consider any other period in coming to my decision on this Order. I do not agree. Mr Laurence proposed a number of other possible 20 year periods. BCC, in its Statement of Case, which Mr Laurence would have seen before the inquiry, noted that: *The landowner suggests that there may be other possible dates of calling into question arising from the attempted diversion of Footpath 10A in 1978, 1997 and 2001, and that it relied 'primarily' on the period 1990 to 2010.* In its opening statement to the inquiry, BCC listed as one of the matters for determination: *When was the Order route called into question?* It would be wrong of me, simply because BCC's favoured date for bringing into question was 2010, not to consider other possibilities that were canvassed.
11. I consider first the events of 2002. Notices advertising the diversion order would have been placed at the ends of 10A and at the ends of the Order route. The notices would have described 10A and stated that it would be diverted to a new route (or words to that effect) which would also have been described.
12. One witness at the inquiry remembered seeing a notice about, as she put it, the re-routing of 10A, at around that time.

13. Mr Laurence argued that such a notice would have presupposed the non-existence, in law, of the Order route, and would thus have put the public on notice that its use of it was questionable. He put it in this way: *It was a proposal, brought to the notice of the world (having earlier been consulted on locally), which only made sense on the basis that there were no existing rights over the Order route: in other words it implicitly invited those who disagreed to say so. It brought into question the existing right of the public to use the Order route by stating in terms that 28 days after confirmation there 'shall be' a footpath over the Order route. It obviously made no sense to assert that there 'shall be' a footpath over the Order route if there already was such a footpath.* I do not find that argument persuasive. Putting aside the possibility that many people might have given such a notice no more than a glance, it cannot be expected that many members of the public, reading the notice, would have been aware of the case law which determined that it is not possible in law to divert a footpath onto an already existing right of way. Activists in the Ramblers, or others versed in rights of way law, might have been aware, but it seems most unlikely, in my view, that members of the public in general who were using the Order route at that time would have understood the notice to have implied clearly, and thus had it brought home to them, that their right to use it was in question.
14. A notice erected by a landowner inconsistent with the dedication of a way as a highway may, according to Section 31(2) of the 1980 Act, also operate to bring the right of the public to use the way into question. The notices advertising the 2002 diversion order, however, were not erected by the landowner. I do not accept Mr Laurence's argument that they must inevitably, or were even likely to have brought the public's right to use the Order route into question.
15. I conclude that the public's right to use the Order route was not brought into question in 2002. Identical, or extremely similar, considerations apply to the diversion process in 1980 (paragraph 3 above). The advertisement in the Bucks Herald in 1997 giving notice of the abandonment of the 1980 order (paragraph 5 above) read: *WITHDRAWAL OF DIVERSION ORDER RELATING TO FOOTPATHS NOS 10A AND 10C PARISH OF NETHER WINCHENDON The above Order, made on 9 July 1980 (which has never been confirmed) has been withdrawn by Aylesbury Vale District Council. The Order has been withdrawn for procedural reasons and, pending the making of a new Order and, the legal route of the above footpaths remains unchanged.* For a member of the public to have understood that his or her right to use the Order route was in question he would have to have been aware of the numbering of footpaths on the Definitive Map, that 'footpath 10A' was a particular footpath of which all trace had been obliterated for almost 20 years, and that the Order route had been its proposed replacement. He or she would also have to have been aware of the legal matters mentioned in paragraph 13 above. It is extremely unlikely, in my view, that this advertisement would have alerted a reasonable member of the public using the Order route that his or her right to do so was in question, even had he or she been aware of it or read it.
16. I now consider the events of 2001, specifically the erection of notices by the objector telling people to 'keep out' because of the foot and mouth outbreak (paragraph 6 above).
17. Mr Laurence argued as follows: *Anyway, after May the Council's signs were down and if people like Mrs Wagner [one of BCC's witnesses who said she might have walked the Order route after May although she could not recall*

doing so] resumed use of the public footpaths and tried to use the Order route they'd have encountered the objector's signs at B and D. The signs said keep out and were complied with. They obviously also stopped time running [i.e. brought public use of the Order route into question].

18. It might seem that if there is no evidence that any member of the public saw these notices (paragraph 6 above), they cannot have brought the public's right to use the Order route into question. However, in the case of *Fairey v Southampton County Council* (1956), Denning L.J., in a judgment which has subsequently been approved in the House of Lords, held that: *The landowner can challenge [the public's] right, for instance, by... putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge... But whatever the public do, whether they oppose the landowner's action or not, their right is 'brought into question' as soon as the landowner puts up a notice...*
19. Lord Hoffman, in *Godmanchester* (2007) in the House of Lords, after quoting Lord Denning's judgment in the *Fairey* case, noted that there will ordinarily be a symmetry between an action which will bring the public's right into question and one which is sufficient evidence of an intention not to dedicate a right of way. He said: *Thus section 31(3) provides that an appropriate notice will be sufficient evidence to negative the intention to dedicate, and section 31(2) provides that the right may be brought into question 'by a notice such as is mentioned in subsection (3) below or otherwise'. The notice will therefore both negative the intention to dedicate and bring the right into question.*
20. It was not argued before me that the objector's notices would not have had such a dual effect, and I conclude that the right of the public was brought into question by the landowner's notices forbidding access in June 2001, once the official notices had been removed.
21. Having considered the evidence and arguments set out in the preceding paragraphs I find that there is a relevant 20 year period to be considered between June 1981 and June 2001.

Whether 'the public' used the Order route during that period

22. Although the number of people who provided evidence that they used the Order route from the start of the 1980s is not large (there were only eight in 1980), the number increased year on year, and it was not disputed by the objector that from the time when 10A was obstructed in 1978 the public who had been using it began to use the Order route. It was shown on Ordnance Survey 1:25000 maps in the 1990s as a 'leisure route'. The objector did not contend that an insufficient number and range of people to represent 'the public' used the Order route between 1981 and 2001. I conclude that the public used the Order route.

Whether use was 'as of right'

23. Use which is 'as of right' is use which is *nec vi, nec clam* and *nec precario*, in other words neither by force or contentiously, not in secret and not by the revocable licence of the landowner. There is a distinction between use 'as of right' and use 'by right'. Use 'as of right' is use which would have the appearance (to an outside observer) of the assertion of a right, but which is, in fact, trespassory, whereas use 'by right' is use by virtue of a right, or a licence, to do so.

The 'by right' argument

24. BCC argued that use of the Order route by the public was as of right throughout the period 1981 to 2001. Mr Laurence argued that it was not. He contended that while footpath 10A was obstructed by crops, or after it was ploughed but before reinstatement, the public used the Order route by virtue of the right to deviate to get round obstructions. That there is such a right is not in dispute. The first matter at issue is whether those members of the public who used the Order route but were unaware of the existence of footpath 10A (which was the case for the great majority of those who gave evidence in support of the Order) could be said to have been exercising a right to deviate from it. The second matter is whether the obstructions to 10A were such as to bring into play the right to deviate, and the third is whether, if they were, the right to deviate would have extended to use of the Order route rather than a nearer route.
25. Mr Laurence argued as follows: the public used the Order route by right because as a matter of law they were entitled to do so because at all material times from 1978 the official route [10A] was obstructed. The public were therefore entitled to deviate over the Order route. He wrote: *The state of mind of the (few) users who gave evidence is irrelevant. If you have a right to walk a path, of which you are unaware, your use is still by right. You may think you are a trespasser or you may think you have permission or you may think the way is already a right of way – none of this is relevant (Sunningwell). What matters (Billson) is whether as a matter of law you have a right.*
26. In my view that argument is flawed. A walker, arriving from the west at point A on the Order map (see below) at some time between 1981 and 2001 and wanting to walk in a north-easterly direction, not having a map and relying on waymarks and other signs to guide him or her, would have seen no sign directing her (or him) along 10A (which was probably obstructed and was certainly not waymarked). This walker would probably, however, have seen waymarks indicating the Order route. If she followed the Order route knowing nothing about footpath 10A, then it cannot be said that she was deviating from it. The word 'deviate' comes from the Latin 'deviare' meaning to turn out from a way. This walker is not 'turning out' from any way; she is not deviating from it. If the walker is not deviating, then she cannot be said to be exercising a right to deviate. The walker would neither believe that she was deviating, which, in any event, as Mr Laurence pointed out, is irrelevant, nor would she appear, to an objective outside observer, to be deviating from another path.
27. Contrast that situation with that of a walker, perhaps with a copy of an accurate Ordnance Survey map showing footpath 10A, coming along Mill Lane towards its south-western end. She looks for this path, which she intends to follow, but is faced with a growing crop of field beans. She decides instead to follow a waymarked path, not on her map perhaps, but which seems to lead in roughly the same direction. In this case it could, I consider, be said that she is deviating from 10A and, depending on the line of the alternative taken, possibly exercising a right to do so.
28. Mr Laurence directed me to the headnote in *R v Secretary of State for the Environment ex parte Billson* (1998) where it is stated: *Held... that, since the users of the tracks on the common were doing what they were permitted to do by the 1929 deed under section 193 of the Law of Property Act 1925, their enjoyment of the ways was by licence even though they genuinely believed it*

to be as of right. The attempt to add public rights of way across the common to the definitive map failed.

29. In my view the situation in *Billson* is not analogous to that believed by Mr Laurence to be the case at Nether Winchendon for similar reasons to those already given. As in the situation where a walker wanted to use footpath 10A (paragraph 27 above) the operation of the right in the case of *Billson* would have been triggered by the intent to carry out a particular action, in that case to ride horses on tracks on Ranmore Common. The right to use the tracks would not be exercised by someone not intending to go for a ride there, as the right to deviate from 10A would not be exercised by someone not intending to use it and therefore not needing to deviate from it.
30. The evidence given at the inquiry by the great majority of those who used the Order route was that they were unaware of the existence or the course of footpath 10A until 2010. One or two knew of its existence but were not, they said, deviating from it when deciding to use the Order route; they were using it because it was a pleasant walk. Only one witness referred to the use of a map when walking, and, since it is clear that from 1981 to 2001 footpath 10A was neither kept clear nor signed, it is hardly surprising that most walkers were unaware of its existence.
31. I conclude that, of the significant quantity of public use of the Order route before 2001, only a very small amount was use in the exercise of a right to deviate from footpath 10A when it was obstructed. I do not, therefore, need to deal with the second and third issues mentioned above at paragraph 24.

The 'permissive use' argument

32. When the application for a modification order was made in 2011, the objector argued, replying to consultation, that use of the Order route had, after 1980, been permissive.
33. An interview was carried out with the objector by officers from BCC in December 2012. He was subsequently supplied with a note of what was said. This records him as stating that: 'Villagers and a few known local people asked for permission to use an alternative route' [after it was decided to plough up the field through which 10A ran]. The permissive route was allowed from about the mid-1980s. 'Permission was given verbally to those who were found to be walking there.' 'Permission was initially for villagers and local people most of whom we know, with the majority initially asking permission from the beginning.'
34. Although, in his witness statement, and through his solicitor (paragraph 4 above) the objector conceded that while it was obstructed use of the Order route was not by permission, and further conceded in cross-examination that after 1980 and before 1995 he 'must have' believed that the 1980 diversion order had gone through and that the Order route was a public right of way, he appeared, when giving evidence at the inquiry, to be reviving the argument that use of the Order route had been by his permission, or that of his mother when she was alive.
35. None of those who gave evidence in support of the Order stated that they had been given permission to use the Order route, either verbally or in writing. I have seen no credible evidence that any permission was communicated to those using the Order route between 1981 and 2001. An e-mail from Phil

Turner, a rights of way officer for BCC, to a colleague, written in 2012, uses the term 'permissive' no less than thirteen times in a half-page message with reference to the Order route. However, it does not provide any evidence of how or when permission might have been communicated to the public, stating only, for example, *I have always clearly understood that this was a permissive path in all my dealing with the estate and with senior ROW officers and colleagues.*

36. I conclude that use of the Order route was not by permission between 1981 and 2001.

37. I have seen no evidence in this case that use of the Order route was forcible or contentious or that it was carried out in secret between 1981 and 2001. I conclude that use of the Order route was as of right between those years.

Whether use was interrupted

38. I have seen no evidence which would show that use of the Order route was interrupted between 1981 and 2001.

The intentions of landowners

39. Sufficient evidence of an intention not to dedicate a right of way requires objective acts on the part of the landowner perceptible to the relevant audience, i.e. the users of the way. In this case, although it is entirely possible, if not probable, that the objector and his forebears subjectively only intended that public rights should come into existence on the stopping-up of footpath 10A, it is what was perceived by the users of the Order route during the period 1981 to 2001 which matters.

40. The sole relevant activities which could have been brought to the attention of users of the Order route during that period were the consultation in 1997 between AVDC and Lower Winchendon Parish Meeting about the 1980 diversion order, the advertisement in the Bucks Herald the same year that the 1980 order had been withdrawn, and the correspondence between the Ramblers and BCC about the re-making of a diversion order in which the Ramblers stated that they suspected that the Order route was already a public highway, having been used for 16½ years.

41. In submissions, Mr Laurence did not seek to argue that any of these activities could constitute sufficient evidence of a lack of intention to dedicate. It does not seem to me that any of these activities was likely to or did bring home to those using the order route that the landowner did not intend to dedicate a public right of way. I conclude that they did not.

42. Mr Laurence did, however, argue that it could not have been expected that the objector or his mother would object to use of the Order route before 1995, since it was assumed generally that the 1980 diversion had gone through, and that the same was true for the period between 1997 and 2002 when it was assumed by the objector that a fresh diversion order was being promoted. I do not see, even if he is correct, that it could make a difference to the conclusion I reached in the previous paragraph. In any event, however, I consider that a reasonably diligent landowner would have made enquiries of the order-making authority to ascertain the position before obstructing a public right of way.

Conclusions on the statutory test

43. I conclude that the statutory test is satisfied for the period 1981 to 2001.

Other matters

Modification

44. At the inquiry I pointed out that if I were to confirm the Order as made, the modification of the Definitive Statement in part II of the Schedule would not make sense; it refers to 'point A on the attached map...'. Someone coming across the Definitive Statement in years to come would have no idea what the 'attached map' was. I suggested that the Schedule should be modified to read (in part II) 'point A on the map forming part of the Buckinghamshire County Council (Parish of Lower Winchendon) Definitive Map Modification Order 2014...' BCC agreed with that proposal.

The foot and mouth outbreak

45. A substantial part of the inquiry was taken up with consideration of whether there had been either (a) an interruption to a 20 year period of public use of the Order route between 1990 and 2010 and/or (b) no enjoyment by the public of a 'full' period of 20 years (see paragraph 2 above) between those dates. This was because it is likely that no members of the public used the Order route between February and May 2001, and few, if any, used it between May and the end of August 2001. Because of the conclusions I have reached already I do not need to come to any view on the arguments that were presented, and in particular whether Planning Inspectorate Advice Note 15 – *Breaks in User Caused by Foot and Mouth Disease* – is wrong.

Conclusion

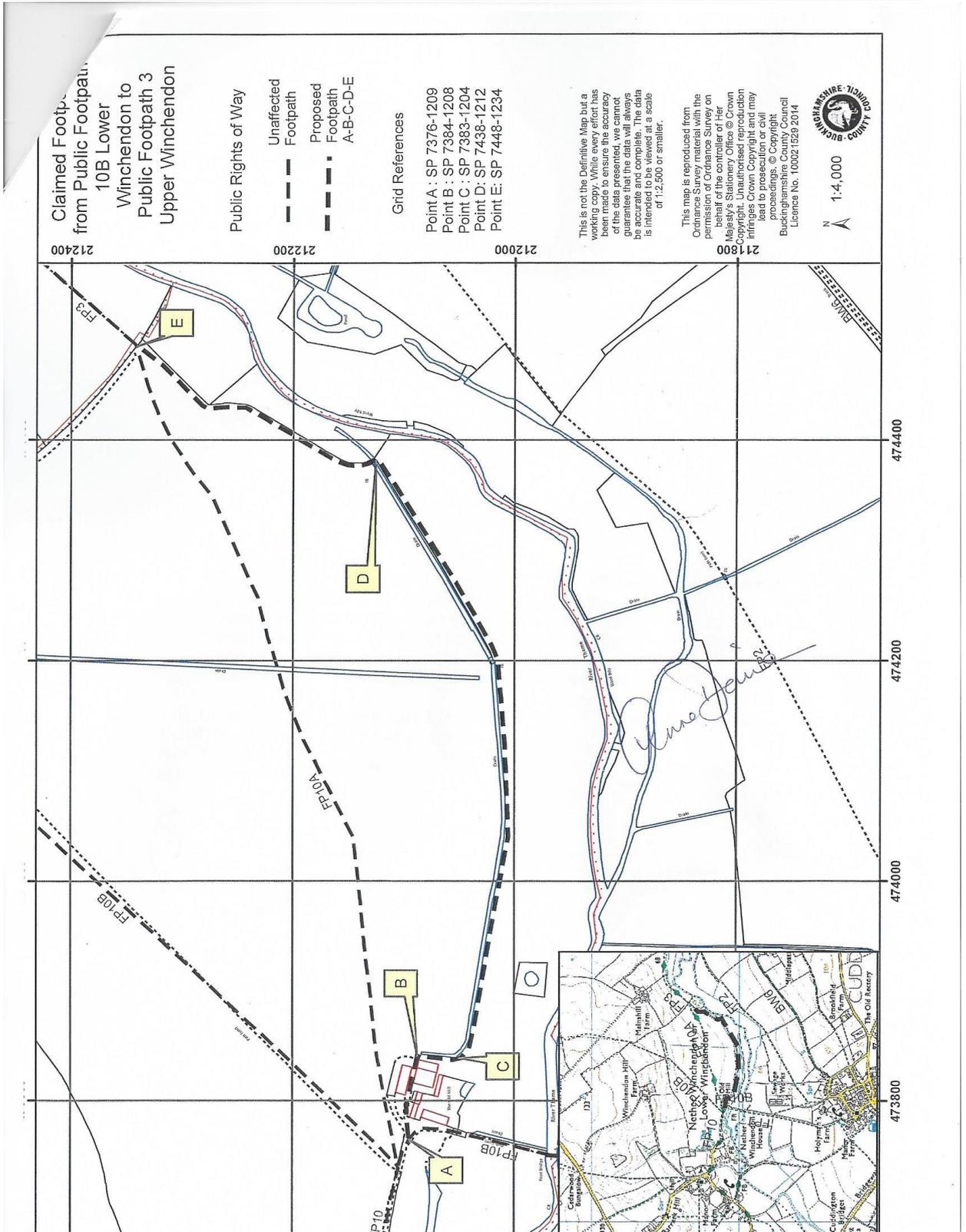
46. Having regard to these and all other matters raised both at the inquiry and in written representations I conclude that the Order should be confirmed with the modification referred to in the preceding paragraph.

Formal Decision

47. I confirm the Order with the following modification: in part II of the Schedule to the Order delete the words 'attached map' and insert 'map forming part of the Buckinghamshire County Council (Parish of Lower Winchendon) Definitive Map Modification Order 2014'.

Peter Millman

Inspector



APPEARANCES

For Buckinghamshire County Council

Miss H Emmerson of
Counsel

Instructed by Buckinghamshire County Council

She called:

Mr R Carr
Mrs A Sanderson
Mr C Sanderson
Mrs J Cowper
Mr K Birkby
Mr M Collins
Mrs A Cox
Mr B Davies
Mrs H Wagner
Mr M Hall
Mr R Bates
Mrs V Duncan
Mrs C Thompson

Robin Carr Associates

For the objector

Mr G Laurence Q.C. of
Counsel

Instructed by Parrot and Coles

He called:

Mr R Spencer Bernard

The objector

Documents handed in at inquiry

1. Miss Emmerson's opening statement
2. Miss Emmerson's closing submissions and bundle of authorities
3. Mr Laurence's closing submissions and bundle of authorities