



## Order Decisions

Inquiry held on 16 August 2016

**by Heidi Cruickshank BSc (Hons), MSc, MIPROW**

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

**Decision date: 7 September 2016**

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**Order Ref: FPS/W1850/7/13**

**referred to as 'Order A'**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The County of Herefordshire District Council Wildlife and Countryside Act 1981 Addition of Footpaths in the Parish of Fownhope (To Be Known as Fownhope FWB12, Fownhope FWB13, Fownhope FWB14 and Fownhope FWB15) Modification Order 2002.
- The Order is dated 30 April 2002 and proposes to record four footpaths on land generally to the north of Fownhope, in the Parish of Fownhope. Full details of the routes are given in the Order plan and described in the Order Schedule.
- There were seven objections and representations outstanding at the commencement of the Inquiry.

**Summary of Decision: The Order is not confirmed.**

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**Order Ref: FPS/W1850/7/12**

**referred to as 'Order B'**

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The County of Herefordshire District Council addition of Footpaths FWB12, FWB13, FWB14 and FWB15 Modification Order 2009.
- The Order is dated 11 March 2009 and proposes to record four footpaths on land generally to the north of Fownhope, in the Parish of Fownhope. Full details of the routes are given in the Order plan and described in the Order Schedule.
- There were nine objections and representations outstanding at the commencement of the Inquiry.

**Summary of Decision: The Order is not confirmed.**

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### PRELIMINARY MATTERS

#### The two Orders

1. The County of Herefordshire District Council, the order-making authority ("the OMA"), submitted these Orders to The Planning Inspectorate, requesting confirmation of Order B and that Order A be set aside. They indicated that they had received a legal opinion in 2009 that, due to the length of time from the making of Order B, they should remake the Order. This led to the making and advertisement of Order A. It was agreed by the parties to the Inquiry that the Orders are identical, seeking to add the same four footpaths to the Definitive Map and Statement ("the DMS") for the area.
  2. The making of a new Order is an unusual course of action. As there is no opportunity for Orders made under the Wildlife and Countryside Act 1981 ("the 1981 Act") to be abandoned, opposed Orders must be submitted to the Secretary of State for confirmation. Schedule 15 to the 1981 Act gives no specification of the timescale for submission of an Order to the Secretary of State.
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3. I agree with the matter raised in objection that there appear to be no legally relevant grounds for the making of Order B as section 53(3)(c)(i) of the 1981 Act relies upon "...*the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows...*". It does not appear that there has been further evidence discovered in the period 2002 – 2009 to require that a further Order be made, although some has subsequently arisen.
4. The OMA fairly admitted that the advice had been given in the past and this was not necessarily the way in which they would proceed now. However, the intention had been to ensure that all relevant parties were aware of the Order and had the opportunity to respond. I consider that this could have been achieved by simply re-advertising the Order, rather than remaking it.
5. In the circumstances, and having discussed the matter at the Inquiry, I am satisfied that I should first consider Order A. If that Order is confirmed then Order B becomes unnecessary as the route(s) would be added to the DMS with the relevant date 30 April 2002, pre-dating the making of Order B on 11 March 2009. If Order A were not confirmed then Order B would need to be considered, taking account of any additional evidence.
6. As I set out at the Inquiry I am satisfied this does not mean that I should not take account of the later objections and representations made to the 2009 Order; there is some duplication of comments in any case. I shall take account of all relevant evidence in considering the Orders.

### **Prejudice arising**

7. It was argued that, as the OMA had failed to submit either Order to the Secretary of State in a reasonable time, there was unavoidable prejudice arising for those objecting to the Orders and, therefore, they should not be confirmed. As noted by the OMA it is, unfortunately, not unusual for such cases to take many years to reach a conclusion.
8. By reference to the Human Rights Act 1998 ("the 1998 Act") it was argued that the affected property owners and/or occupiers, as well as the applicant, had been disadvantaged by the time that it has taken for this matter to be brought to the stage of a public Inquiry. The initial applications were made in October 1992, with the Order A made in April 2002 and Order B in March 2009. The Orders were submitted to the Planning Inspectorate in October 2015, resulting in the calling of this Inquiry.
9. The 1998 Act enacts the European Convention of Human Rights ("the ECHR") in the United Kingdom and the matter relating to the right to a fair trial is found in Article 6 of the ECHR. Article 6 states that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*" I agree that this Inquiry is such a tribunal. As I commented at the Inquiry, I believe that the time taken to reach this stage means that the prejudice falls on both sides of the table.
10. I was referred to *R(Church Commissioners for England) v Hampshire County Council (2014)*<sup>1</sup> ("*the CCE*"), where the issue was the effect of correction of an application to register a town or village green on the application date and the time that may be given for such a correction. In that case the court determined

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<sup>1</sup> EWCA Civ 634

that an extension of time given to the applicant to correct the application was more than the 'reasonable opportunity' allowed under Regulation 5(4) of *The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007*<sup>2</sup>. As a result, the appeal was allowed.

11. Paragraph 7(1) of Schedule 15 to the 1981 Act sets out that "*If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.*" No timescale is given for such a submission, despite the observation of the objector that timescales are set out for other parts of the procedures elsewhere in the 1981 Act. I consider this similar to the point made in *the CCE* that "*Parliament has not used words such as "an opportunity which in the opinion of the registration authority is reasonable". In my judgment, it would have used such words if it had intended the registration authority to decide what a reasonable opportunity required. As it is, that power is not expressed...it seems to me that Parliament would have to have used clear words if it had intended that the decision of the registration authority should be reviewable only on Wednesbury grounds. No such words are used, let alone clear words.*"
12. It was also said that "*...the question of whether an applicant has had a reasonable opportunity is a question of law for the court...*". As a result, I do not consider it to be a matter for me to determine that the Orders cannot be confirmed due to the passage of time. It is not my understanding that the Secretary of State can simply turn away an Order on the grounds of the time taken for the matter to come to an Inquiry. Therefore, I have heard and considered all the evidence available to me and made a decision on that basis.

### **Requested modifications**

13. The OMA have requested a modification in relation to a grid reference relating to the path FWB13. As I am not confirming the Order with respect to this route I have not considered this matter further.

### **The evidence to be considered**

14. There was some discussion as to whether I could, or should, take account of evidence relating to a hearing held with respect to part of one of the Order routes in connection with the production of the original DMS. I am satisfied that my Inquiry does not 'reopen' that hearing. However, I agree with the OMA that the new evidence, provided by the application, means that all other relevant evidence available must be considered. The question will be the weight to be given to it.
15. Section 53(3)(c)(i) of the 1981 Act refers to "*...the discovery by the authority of evidence which (when considered with all other relevant evidence available [my emphasis] to them) shows...*". I am satisfied that the documents supplied are part of the 'relevant evidence' and should be taken into account, bearing in mind the requirements of section 32 of the Highways Act 1980 ("the 1980 Act"), which sets out in relation to *Evidence of dedication of way as highway* that:

*"A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence,*

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<sup>2</sup> SI 007 No. 457

*and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."*

### **Legal submissions**

16. There was some discussion as to whether I could or should take account of legal cases relied on by the OMA, which it was said had been introduced at a late stage. Although I understand the concern of equality of arms there is no requirement for legal submissions to be made ahead of time. I provided opportunities for adjournment to ensure that everyone had the opportunity to comment on the case law should they wish. As a result, I am satisfied that no prejudice arose from the consideration of case law.

### **PROCEDURAL MATTERS**

17. On 26 October 1992 three applications were made to the OMA, under Section 53(2) of the 1981 Act, to add three footpaths to the DMS for the area. Having investigated the matter, the OMA were satisfied that an Order should be made to record the routes now under consideration.
18. I made an unaccompanied site visit on 15 August 2016. I held a Public Inquiry into the Order on 16 August at The Royal National College for the Blind, Hereford. I made an accompanied site visit in relation to part of the Order routes following the close of the Inquiry.

### **Costs**

19. An application for a full award of costs was made by one of the objectors against the OMA. My decision on the costs application will be issued separately.

### **MAIN ISSUES**

20. The Orders are made under section 53(2)(b) of the 1981 Act by reference to section 53(3)(c), which states that an Order should be made to modify the DMS for the area on the discovery of evidence which, when considered with all other relevant evidence available, shows:

*"(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies."*

21. Where a case relies upon the statute, under section 31 of the 1980 Act the sections of particular relevance, as set out below, apply:

*(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, 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, whether by a notice such as is mentioned in subsection (3) below or otherwise.*

*(3) Where the owner of the land over which any such way as aforesaid passes—*

*(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and*

*(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,*

*the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.*

...

*(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.*

...

*(7) For the purposes of the foregoing provisions of this section "owner", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5) and (6) above "the appropriate council" means the council of the county...*

*(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.*

*(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act."*

22. Before a presumption of dedication can be inferred under statute, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'called into question'. There appeared to be events occurring in 1991 which related to two of the Order routes. Where there is no specific event, as set out above, the date of application is relied upon.
23. In relation to the routes FWB12 (A – B<sup>3</sup>) & FWB13 (C – D), which are situated within the woodland to the north-west of Woolhope Road, the statutory objections were made by Fownhope Parish Council ("the Parish Council") and a Parish Councillor<sup>4</sup> as an individual. The objections were made on the basis of there being inadequate evidence of user and/or of a past owner who may be deemed to have had the power to dedicate the routes at common law.
24. In relation to the routes FWB14 (H – E – F – I – J) and FWB15 (F – G), in the area of Fownhope Court, it was argued in objection that use had not occurred and that the application really related to a desire for private access. I shall need to determine the relevant twenty-year period(s) and then consider whether the user evidence is sufficient to raise a presumption of dedication. For such a

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<sup>3</sup> Letters A – J as used in the Order plan

<sup>4</sup> At least at the time of the objection to Order A in 2002

presumption to arise it needs to be shown that there has been sufficient use, as of right, that is without force, secrecy or permission, throughout the relevant twenty-year period, without interruption. There was a question as to whether some of the claimed routes could ever have been used.

25. By reference to signs placed on the driveway it was argued that a lack of intention to dedicate a public right of way had been shown within the relevant twenty-year period.
26. The OMA had originally suggested that the procedures in connection with the drawing up of the DMS indicated that a right of way had already been dedicated over part of the route around Fownhope Court. I shall therefore need to consider whether there is any case at common law on the basis of the evidence as a whole. This depends on the whether the evidence of use of the route by the public, and the actions of landowners, together with all other relevant evidence, enables an inference to be drawn that a public footpath has been dedicated. However, at the Inquiry the OMA indicated that they were no longer actively supporting confirmation of the section F – I – J, which was not part of the 1992 application and relies only on earlier evidence from the 1950s. They place reliance on the user evidence from the 1990s.
27. To confirm the Order I must be satisfied, on the balance of probabilities, that the claimed public rights of way subsist.

## **REASONS**

### **Routes FWB12 (A – B) & FWB13 (C – D)**

28. These routes lie to the north of Fownhope, within woods marked on the Ordnance Survey (“OS”) base mapping as Fownhope Park, with Cherry Hill to the south-east of the claimed routes. These routes were claimed as public rights of way by the Parish Council when they were making submissions for the DMS in the 1950s. Neither route was added to the DMS at that time, apparently following an informal objection by the then landowner. However, there is nothing to prevent a route subsequently being dedicated as a public right of way.
29. Whilst two of the objections<sup>5</sup> referred to these routes there was no substantive case made against their confirmation at the Inquiry.

### ***Section 31 of the Highways Act 1980 – the statute***

#### *Calling into question*

30. The OMA rely on the statute to show presumed dedication of these routes, with no lack of intention to dedicate shown by any relevant landowner within the relevant twenty-year period. Section 31(2) of the 1980 Act sets out that the period of twenty years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.
31. There appears to have been no event preventing use of either of these routes to trigger the application with respect to them. In such cases the date of application itself is taken as the date of bringing into question. As a result, the relevant twenty-year period would be October 1972 – October 1992.

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<sup>5</sup> Two made to each Order

### *Use of the routes*

32. Evidence of use of the Order routes was given on user evidence forms (“UEFs”) submitted with the applications. The same eleven people completed UEFs for both routes, indicating use by ten of them for twenty years or more, general use being on a weekly basis. The OMA have, perhaps not unreasonably, taken the date of completion of the UEFs as the date of last use, as the standard form used does not ask for specific dates. It was agreed between the parties that the apparent completion of a couple of the UEFs in 1991 and 1993 must be an error as they had been submitted with the applications themselves.
33. I am satisfied that the quantity of user evidence is sufficient to raise a presumption of dedication of rights of way at face value, leading to a reasonable allegation of public rights. However, in considering an Order, which makes a legal alteration to the status of land, the test I must apply is whether the public rights subsist on the balance of probabilities; I therefore consider that the quality of the evidence is an important matter.
34. I find the UEFs limited in the information they provide, primarily due to their age; most modern UEFs ask more relevant questions and can provide better information allowing reliance on the written evidence alone. There are no maps attached to the individual UEFs and the applicant<sup>6</sup> appears to have completed the information on the “*Route of Path claimed*” on each UEF, rather than the individuals. For FWB12 one person mentions a gate halfway along, although open, but everyone else responds that there were no stiles, farm gates or hand gates. For FWB13 the same person is the only one to refer to a fallen tree.
35. Whilst the OS shows these routes physically existing over a number of years, I consider the UEFs insufficient in detail to allow me to place weight on them as referring to the routes in question. Unfortunately, no further evidence has been submitted in the way of interviews, letters or witnesses available to the Inquiry, to allow me to clarify the information provided.
36. Taking all the relevant evidence into account, I am not satisfied that the evidence is of sufficient quality to raise a presumption of dedication under the 1980 Act.

### *Common law*

37. Not being satisfied as to the case under the statute I have considered whether the evidence supports a dedication at common law. The matter of quality and weight of evidence remains an issue. Whilst there has been no objection raised by the landowners, who have altered in the period since the making of the application, I do not consider that this can be said to demonstrate an intention to dedicate the claimed routes as public rights of way. I am not satisfied that the burden of proof to demonstrate the dedication of public footpaths over the Order routes at common law has been met.

### *Summary*

38. Considering the evidence as a whole I am not satisfied, on the balance of probabilities, that it has been shown, either under the statute or at common law, that the routes FWB12 or FWB13 should be recorded as public footpaths.

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<sup>6</sup> This is an assumption but it is recognised that it may have been another party

### **Routes FWB14 (H – E – F – I - J) & FWB15 (F – G)**

39. FWB14 runs generally easterly from Woolhope Road along a driveway associated with Fownhope Court and a number of properties which have, or appear to have, private access rights over the driveway. The section I – J lies to the north-east of a wall, within Nover Wood.
40. There was some discussion at the Inquiry about the identification of the route F – G, which leads into Nover Wood, when the application was first made. The then, and current, owner of Nover Wood, which I understand that he bought in 1991, lives in the property Lavenda, just to the south-west of point J. He believed that the application related only to the applicant desiring access from his property, The Paddocks, access to which is also off the driveway, between points E and F.
41. I heard concerns that the applicant had had several opportunities to alter his application to deal with issues raised by the objector. However, as the OMA said, this is a fairly normal process, trying to establish the route being claimed.

### **Section 31 of the Highways Act 1980 – the statute**

42. As noted, the OMA revised their position to support the route H – E – F – G. The application related to the section E – F – G, from the grid references used in the application form, and the OMA added section H – E, giving access to the junction of the driveway onto Woolhope Road.

#### *Calling into question*

43. When Nover Wood changed hands the new owner erected fencing along the boundary with Fownhope Court. There is now a gate at around point F with a notice saying "PRIVATE NO PUBLIC RIGHT OF WAY NOVERWOOD ESTATE".
44. In relation to the question "*Have you ever known any locked gates or other obstructions to the ways?*" two people referred back to question 7, which the applicant had completed in relation to whether the way had been changed, by filling in "FENCE ERECTED ACROSS PATH NOVEMBER 1991." Individual comments were also made by others to the new owner of the woods putting up fencing and so, on the balance of probabilities, events in 1991 brought the right of the public to use the way into question. As a result, the relevant twenty-year period, for section H – E – F – G, would be November 1971 – November 1991.

#### *Use of the routes*

45. Ten of those completing the UEFs above and an additional person gave evidence in relation to this route. As already referred to the UEFs are limited in the information they provide. However, although the applicant appears to have again completed the information on the "*Route of Path claimed*" there are details from a couple of the individuals as to where they were going to and from: "*home to the Court*" and "*Noverwood to Woolhope Road/Fownhope Court*".
46. I agree with the OMA that the quantity of user evidence may be sufficient to raise a presumption of dedication of a public right of way. The individual references within the UEFs, in conjunction with the physical existence of the driveway over the relevant period, allows me to place a little more weight on them in relation to use of this part of the route. However, I have to agree with the owner of Nover Wood that the route F – G as indicated appears improbable at this time. Unfortunately, without the benefit of OS mapping to show the physical route, UEF

marked maps or verbal user evidence to indicate where people walked in the past, it is difficult to give weight to the identified Order route.

47. Two residents of Fownhope Court since 1984, one a statutory party, wrote in support of the route F – G, which they said they had previously used for access to and from Nover Wood and the school, which is situated to the south of Nover Wood. One also referred to having used the route F – I – J. I agree with the objectors that residents' use of the driveway itself would seem to be 'by right' and therefore would not be in connection with any public right over this section.
48. The owner of Nover Wood, who attended the Inquiry, said that there was no physical route on any of the claimed alignments prior to works he carried out in the early 1990s. He supplied photographs and letters from his son and those who had carried out works for him at that time to support his position. Without clarification of where people were walking, when and how often, I feel that greater weight must be given to the understanding of the owner that no-one was walking there.
49. On the balance of probabilities, I am not satisfied that the user evidence is sufficient to raise a presumption of dedication under the 1980 Act in relation to any of these routes.

#### *Common law*

50. The common law situation is a little more complicated with the DMS processes, referred to below, presenting quite a convoluted picture.

#### *The inclusion of the Order route on the Definitive Map and Statement*

51. The National Parks and Access to the Countryside Act 1949 introduced the concept of the DMS and set out specific procedures and requirements to be followed in their production. In this case the Parish Council submitted the survey of the rights of way to be recorded, which included FWB14, although with a little variation on the section F – I – J, as part of a route numbered A.10.b.
52. The relevant section is noted on the Parish Council Schedule of Information ("the SOI") as "...to junction with A. 11 at N.W. corner of Church Croft. Continues through KG with A.11 & then continues NE skirting N of Fownhope Court leading into drive. Then along drive ...Woolhope Rd by WG (blocked), main drive gate being used.". It is referred to as having been in public use for 20 years, as of right and without interruption or obstruction. The names of three witnesses who would state that the use had occurred were given. The form was completed and signed by local people. However, notes on the back of the SOI show that "*Fownhope Court Estate Agent states that although the path is sometimes used it is not a public right of way.*" This appears to be the reason why this route was not approved for the Draft Map, which was subsequently produced.
53. Following the publication of the Draft Map and Statement the Parish Council wrote to the County Council noting that 61 footpaths that they had put forward had not been included. This included not only the part of FWB14 referred to but a continuation to the north-east to the junction with A.6., S.E. of Shears Hill and the routes of FWB12<sup>7</sup> and FWB13<sup>8</sup> referred to earlier in this decision. The County

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<sup>7</sup> Reference B.1.c.

<sup>8</sup> Reference B.10.b.

Council suggested that the Parish Council gave careful consideration to each of the footpaths and, subsequently, the Parish Council objected to the omission of the part of this footpath which was not included on the Draft Map and Statement, registered objection No.257, along with other routes. I understand that they did not object to the omission of the routes FWB12 or FWB13.

54. Objection No. 257 set out "*There is no doubt as to the right of way extending from the N.E. corner of Church Croft round the N of this field & N.E. of Fownhope Court & down the drive to Woolhope Road. It is regularly used & has been for many years.*" The Agents for Trustees of Fownhope Court Estate made a counter-objection on 29 May 1953, reference No. 414 indicating that "*Any user of the footpath is restricted to particular persons, and is not a public right of way.*"
55. It was suggested that there were two reports of the hearing into objection No. 257 and certainly one 'report' indicates that no modification of the particulars contained in the draft map and statement shall be made. However, this is undated and unsigned whereas the signed and dated report sets out that the route should be included. This decision was taken following evidence of use and observed use given in person by three individuals. The recorded decision of the Authority on 23 October 1954 was to add the path A10b. Page 2 of the SOI shows the route added at this date and objection 414, which had been made on behalf of the landowners, was withdrawn.
56. It seems that the intention of the County Council, following the hearing, was that the route should be added to the DMS. The amended Draft Statement does that, referring to the route from "*Fownhope Court Drive*" to "*FP.A10E S.E. of Shears Hill*". However, the later maps appear to have still failed to show the entirety of the route in question, ending it instead at the junction with FWA10G, with no continuation west to FWA11A or along the driveway.
57. A review of the DMS led to a first and special review map being produced with a relevant date of 15 December 1972. This showed the same sections of FWA10B on the map and an alteration to the statement to refer to the route as running from "*FP. A10g 240 yds. ESE of Fownhope Court.*" It has remained recorded in that manner, although subject to a diversion in association with the development of the housing estate south of Nover Wood prior to the production of the DMS with relevant date 1 April 1989.
58. A number of maps and statements have been produced over time in connection with the DMS but a coherent record is not available, for example there is no record of the amended version of the draft map and the provisional map is not available, only the statement. I noted a discrepancy in the depiction of FWA11 in the Map identified as the first Definitive Map, where it was shown following part of the claimed route I – J. The discrepancies and gaps, appearing to arise from administrative matters, lessen the weight I consider I should place on the DMS process documents.

#### Other evidence

59. The owner of Nover Wood said that the route F – I – J was blocked by a barn, which was only removed in the mid-1980s. The conveyances supplied from 1962 and 1969 showed the barn and the location of private rights. They also show a physical route to the north-east of the barn, leading onto the route I – J on the Nover Wood side of the wall.

60. Looking at all the other mapping evidence this route is shown from at least the 1846 tithe map, as well as on OS mapping from 1904, 1905, 1928, 1931 and 1953. Whilst the existence of a route on an OS map cannot demonstrate that public rights exist, this does show that a route, capable of use, existed for over one hundred years. However, I do note that the continuation, claimed as part of the Parish Council route over the northern part of Church Croft, was not shown by the OS after 1905 and so there is a question in my mind as to whether the entirety of the route claimed at that time was in fact being used.
61. Mention was made of the Parish Council having decided that there was no route in this vicinity in the mid-1970s. I am unclear on what basis the Parish Council would have been considering this matter, although it could perhaps have been to do with the review of the DMS referred to earlier.
62. Reference was made in the OMA report and statement of case to use or knowledge of use by others, for example, former residents. However, the original evidence, which may have been letters or notes of telephone conversations, was not submitted. I find it difficult to give weight to such reported use in this way.
63. There was some discussion of signs, such as 'Private' and/or 'Private Driveway' having been in place on or near the Woolhope Road entrance from around the mid-1960s. It was also said that one of those completing a UEF had been stopped from walking along the driveway by a resident of Fownhope Court in the early 1970s, although this was not mentioned on her UEF. Reference was made to the case of *Burrows v Secretary of State for the Environment, Food and Rural Affairs* (2004)<sup>9</sup>; however, I am inclined to agree with the objector that this related to a different circumstance, where there was also a footpath sign, which is not the case here.
64. A number of properties use the driveway for vehicular access and one party supplied information of the grant of private rights in this respect. I agree with the OMA that it is not unusual for public rights and private rights to coexist. The existence of the private vehicular rights provides no evidence that public rights could not exist over the driveway.

### Summary

65. Considering the evidence as a whole I am satisfied that a route physically existed in the location of FWB 14 from at least the mid-nineteenth century, although varying a little from that shown by the Order in the section E – F – I, which followed the former mapped alignment. The Parish Council put this route forward in the 1950s, claiming it to have been used by the public for over twenty years prior to that time. When the route was not included on the Draft DMS the Parish Council objected to the omission, with the resultant hearing allowing the testing of the user evidence. As a result of the hearing the intention was that the route should be added to the DMS but this did not occur.
66. The issues arising from the drafting of the various Definitive Maps and Statements lessens the weight I place on the DMS processes and there has been no objection to any later versions of the DMS, even though they did not show the route claimed. As set out in *The History of the Law of Prescription in England*, to

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<sup>9</sup> [2004] EWHC 132 (Admin)[2004] EWHC 132 (Admin)

which I was referred, "*Experience teaches us that owing to the perishable nature of all evidence, the truth cannot be ascertained on any contested question of fact after a considerable lapse of time...*".

67. Considering the evidence as a whole I am not satisfied, on the balance of probabilities, that it has been shown that a route the same as, or similar to, that included in the Order as FWB14 should be recorded as a public footpath.
68. I am not satisfied, on the balance of probabilities, that it has been shown, either under the statute or at common law, that the route FWB15, F – G, should be recorded as a public footpath.

### **THE EFFECT ON THE ORDERS**

69. I consider that Order A should not be confirmed. In relation to Order B, there is limited additional evidence arising in the seven year period between the making of the two Orders, relating to some user evidence from two residents of Fownhope Court. I do not consider that what is available to me is sufficient to support the confirmation of Order B.

### **OTHER MATTERS**

70. The law does not allow me to consider such matters as the desirability or otherwise of the route in question; privacy or security concerns; noise, littering or dog fouling concerns; maintenance costs; house values; insurance; or, issues that may arise from parking.
71. Reference has been made to the 1998 Act, however, it is not my understanding that article 8, the right to respect for private and family life can be read in conjunction with the primary legislation of the 1981 Act and, therefore, the primary legislation takes precedence.
72. Whilst I absolutely understand that these are the matters of most importance to those potentially affected by Orders, my determination must be based upon the evidence before me and the criteria in the relevant part of the 1981 Act. Therefore, I have not taken account of these issues.

### **CONCLUSIONS**

73. Having regard to these and all other matters raised at the Inquiry, and in the written representations, I conclude that neither Order A nor Order B should be confirmed.

### **FORMAL DECISIONS**

#### **Order A**

74. I have not confirmed the Order.

#### **Order B**

75. I have not confirmed the Order.

*Heidi Cruickshank*

**Inspector**

## **APPEARANCES**

### **For the Order Making Authority:**

Mr M Walker                      contracted to Balfour Beatty, who manage highway functions on behalf of Herefordshire Council

### **In Objection to the Order:**

Mr C.G.B Prosser

Mr C Whitmey  
*who called:*

Mr I Quayle

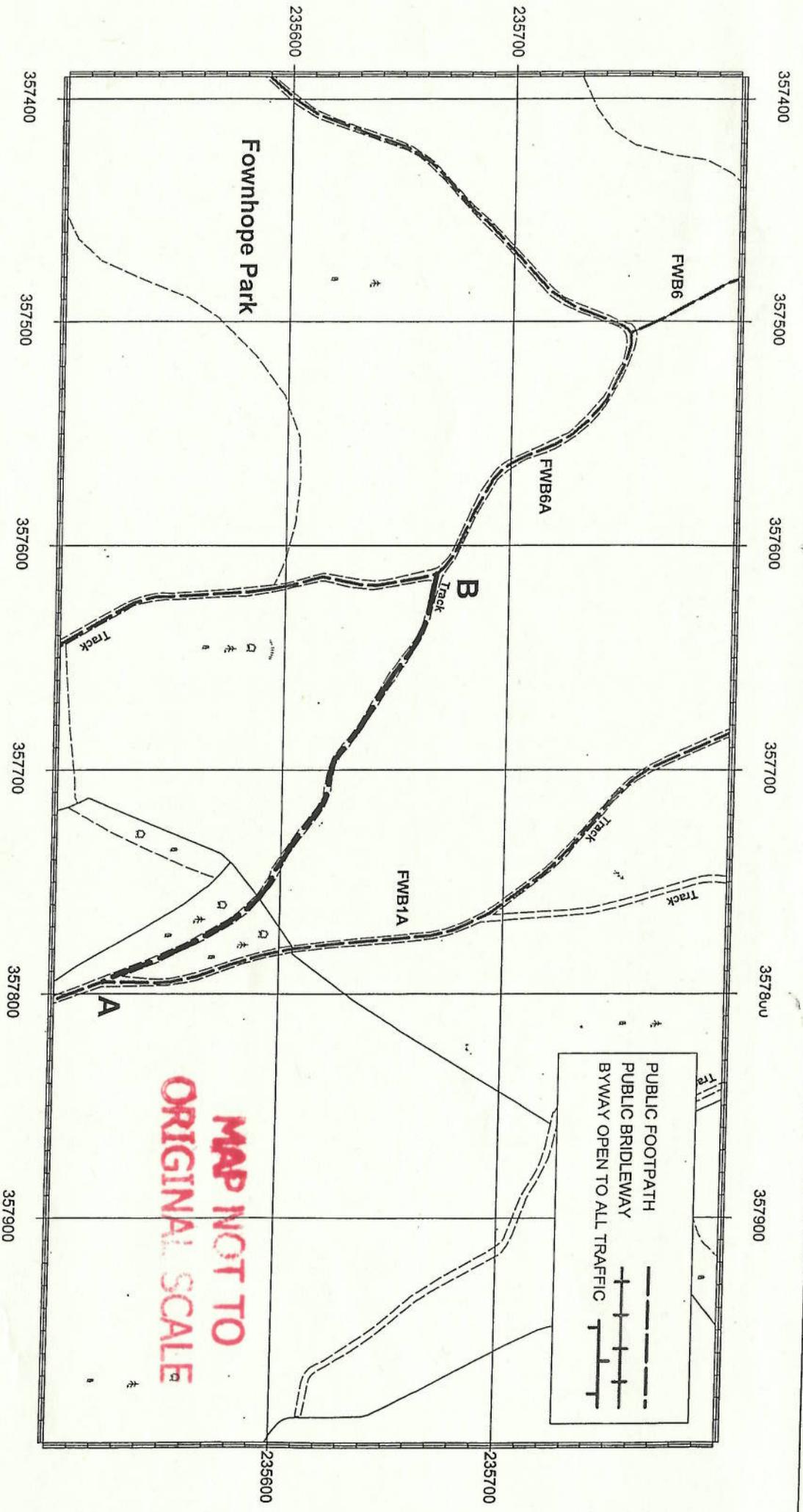
## **INQUIRY DOCUMENTS**

- 1     The Order
- 2     Opening on behalf of Herefordshire Council
- 3     Documents associated with the application process (OMA held)
- 4     Maps of the Order routes
- 5     Closing statement on behalf of Herefordshire Council
- 6     Documents associated with the application process (objector held)
- 7     Addendum to statement of case of Mr Whitmey
- 8     Proof of evidence of Mr Quayle
- 9     Costs Application – Response by Herefordshire Council



ST TOMAS

1880



**PARISH OF FOWNHOPE. MODIFICATION ORDER  
 PROPOSED ADDITION OF FOOTPATH  
 DWG No. M111/149-GEN  
 SCALE 1:2500**



**PROPOSED ADDITION OF FOOTPATH**  
 A ————  
 B ————

**MAP NOT TO  
 ORIGINAL SCALE**

**PUBLIC FOOTPATH**  
**PUBLIC BRIDLEWAY**  
**BYWAY OPEN TO ALL TRAFFIC**

Herefordshire Council  
 Directorate of Environment  
 Engineering Services  
 PO Box 234  
 Hereford  
 HR1 2ZD  
 Tel.: (01432) 260000  
 Fax.: (01432) 261983

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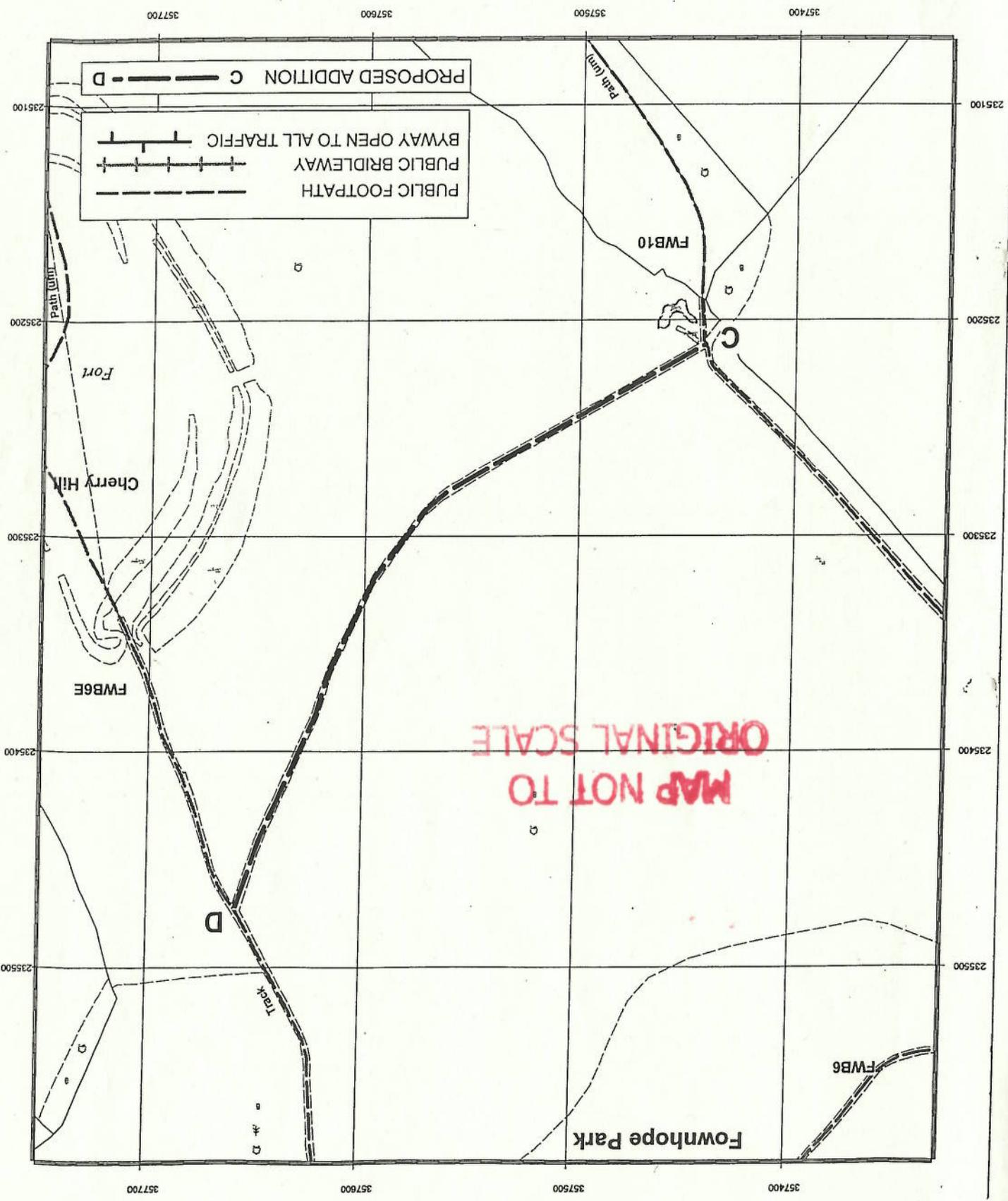


NORTH

PARISH OF FOWNHOPE.  
MODIFICATION ORDER, PROPOSED  
ADDITION OF FOOTPATH  
DWG No. M112/149-GEN  
SCALE 1:2500

Herefordshire Council  
Directorate of Environment  
Engineering Services  
PO Box 234  
Hereford  
HR1 2ZD  
Tel.: (01432) 260000  
Fax.: (01432) 261983

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OF TOM BAY