



## Order Decisions

Inquiry opened on 27 February 2018

Site visit made on 28 February 2018

**by Alan Beckett BA MSc MIPROW**

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

**Decision date: 27 April 2018**

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### **Order Ref: ROW/3172809**

- This Order is made under Section 53 (2) (b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') and is known as the Humberside County Council City of Kingston upon Hull Definitive Map and Statement of Public Rights of Way Kingston upon Hull City Council Restricted Byway No. 1 (The passageway between Victoria and Park Avenues, with entrances between 8 and 10 Park Avenue and 18 and 20 Salisbury Street) Definitive Map and Statement Modification Order 2016.
- The Order is dated 3 March 2016 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway as shown in the Order plan and described in the Order Schedule.
- There were 96 objections outstanding at the commencement of the inquiry.

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

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### **Order Ref: ROW/3172810**

- This Order is made under Section 53 (2) (b) of the 1981 Act and is known as the Humberside County Council City of Kingston upon Hull Definitive Map and Statement of Public Rights of Way Kingston upon Hull City Council Restricted Byway No. 2 (The passageway between Victoria and Park Avenues, with entrances between 1 Victoria Avenue and 1 Avenues Court and between 4 Park Avenue and 141 Princes Avenue) Definitive Map and Statement Modification Order 2016.
- The Order is dated 3 March 2016 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway as shown in the Order plan and described in the Order Schedule.
- There were 96 objections outstanding at the commencement of the inquiry.

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

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### **Order Ref: ROW/3172811**

- This Order is made under Section 53 (2) (b) of the 1981 Act and is known as the Humberside County Council City of Kingston upon Hull Definitive Map and Statement of Public Rights of Way Kingston upon Hull City Council Restricted Byway No. 3 (The passageway between Westbourne and Marlborough Avenues, with entrances between 79 Westbourne Avenue Westbourne Health Centre and 108 and 110 Marlborough Avenue) Definitive Map and Statement Modification Order 2016.
- The Order is dated 3 March 2016 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway as shown in the Order plan and described in the Order Schedule.
- There were 96 objections outstanding at the commencement of the inquiry.

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

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### **Order Ref: ROW/3172812**

- This Order is made under Section 53 (2) (b) of the 1981 Act and is known as the Humberside County Council City of Kingston upon Hull Definitive Map and Statement of Public Rights of Way Kingston upon Hull City Council Restricted Byway No. 4 (The passageway between Westbourne and Park Avenues, with entrances between 2 Westbourne Avenue and 125 Princes Avenue and 3 Park Avenue and 139 Princes Avenue) Definitive Map and Statement Modification Order 2016.
- The Order is dated 3 March 2016 and proposes to modify the Definitive Map and Statement for the area by adding a Restricted Byway as shown in the Order plan and described in the Order Schedule.
- There were 96 objections outstanding at the commencement of the inquiry.

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

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#### **Procedural Matters**

1. I held a public local inquiry into the Orders at the Guildhall, Kingston upon Hull on 26 and 27 February 2018 having made an unaccompanied inspection of the Order routes the evening before. I carried out a further inspection of the route in Order A in the company of the parties on the afternoon of 27 February.
2. At the inquiry, Hull City Council ('the Council') adopted a neutral stance having been directed to make the Orders by the Secretary of State. That direction had arisen from a successful appeal by the applicant, Mr Sandham, against the Council's decision not to make the Orders. At the inquiry, the case in support of the Orders was put by Mr Sandham with the case against the Orders being led by Mrs Gilbert. I am grateful to both individuals for the helpful and courteous way in which they endeavoured to assist me in the course of the Inquiry.
3. The evidence put forward by Mr Sandham in respect of all four routes at issue was of evidence of long use of the claimed routes by members of the public. Proofs of evidence had been prepared by witnesses in relation to each of the four routes at issue although save for an alteration to refer to each route by name, the proofs for each of the four routes were to all intents and purposes identical. I offer no criticism of the proofs submitted and it enabled the user evidence to be dealt with expeditiously at the inquiry with each witness only having to be called once. The principal route with which Mrs Gilbert was concerned was that shown in Order A, although some of her witnesses had made individual objections to all four routes. Although the case put by Mrs Gilbert primarily focused upon the route in Order A, I consider that the submissions made in relation to Order A are equally applicable to Orders B, C and D.

#### **The Main Issues**

4. The Orders have been made in consequence of events set out in Section 53 (3) (b) and section 53 (3) (c) (i) of the 1981 Act which provide that the Definitive Map and Statement should be modified following the expiration of a period such that the enjoyment by the public of the way during that period raises the presumption that the way has been dedicated as a public path; and the discovery of evidence which when considered with all other relevant evidence, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over the land in question. In these cases the Orders relate to an alleged restricted byway. At the confirmation stage of the Order I must be satisfied that the right of way subsists.

5. With respect to evidence of use (such as is claimed in this case), section 31 of the Highways Act 1980 ('the 1980 Act') states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, either by a notice or otherwise.
6. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
7. I have had regard to the guidance<sup>1</sup> provided by the Department for Environment, food and Rural Affairs ('Defra') and relevant legal judgements and the test I must apply to the available evidence is the balance of probabilities.

## **Reasons**

### ***Background information***

8. The four routes at issue are, by and large, hard surfaced and provide links between adjacent streets. These routes are to the rear of domestic properties and provide a means of vehicular and other access to the rear of those properties. The rear access routes are known locally as 'tenfoots'; a term derived from the general width of the ways. It is accepted that the ownership of each tenfoot is shared between the properties which abut, each owning to the middle of the tenfoot for the width of each individual property. For the purposes of the inquiry, the routes at issue were referred to as RB1, RB2, RB3 and RB4.
9. The tenfoot which commences on Victoria Avenue between 99 and 101 Victoria Avenue and runs south to cross RB1 and which emerges onto Park Avenue between 94 and 96 Park Avenue was referred to at the inquiry as RB5. This route was the subject of a public local inquiry in May 2008 into a modification order to record the route as a public footpath; the Order was not confirmed.
10. The area of Hull in which the Order routes are located was developed around the late nineteenth and early twentieth centuries and was laid out in a grid pattern of intersecting streets; from the names given to many of those streets, the area is referred to locally as 'the Avenues'. It is accepted that the owners and occupiers of the properties abutting each tenfoot benefits from an easement for vehicular and other traffic over those parts of the tenfoot owned by neighbouring properties.
11. The land registry title for Nos 18 and 20 Salisbury Street (the properties at the western end of RB1) provide examples of the nature of the private easements which the properties benefit from. The Charges Register entries record the details of covenants made as part of conveyances dated 29 November 1905 and 22 March 1906 that "*the said Patrick Neal would make construct maintain*

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<sup>1</sup> Rights of Way Circular 1/09 – Guidance for Local Authorities Version 2 October 2009

*and keep in repair and unbuilt upon a backroad or way twelve feet in width between the points marked A and B on the said plan and would put down maintain and keep in repair at his expense a crossing and curbing at the opening of the said backroad into Salisbury Street to the satisfaction of the Hull Corporation which backroad and crossing should be for the use of himself and all others the owners and occupiers for the time being of all other plots on the said Park Avenue Estate”.*

12. The deeds for 101 Victoria Avenue state *“TOGETHER with a right of foot and carriageway for the Purchaser her heirs and assigns and her and her tenants servants and workmen at all times over the Southern half of the said backroad twelve feet wide”*. The land registry entry for 119 Victoria Avenue is in similar terms: *“TOGETHER with a right of road at all times and for all purposes for the Purchaser his heirs and assigns and his and their tenants agents servants workmen and others over the said roadway twelve feet wide at the south end of the piece of land hereby conveyed so far as such roadway is not included in the piece of land hereby conveyed into and from Salisbury Street and Park Avenue aforesaid”*.
13. It is clear from the deeds to the properties at the western end of RB1 that the owners have a private right of way for all purposes over RB1 and all other tenfoots within the Park Avenue Estate and that the properties on Victoria Avenue have a private right over RB1. As part of her objection, Miss Cain provided a copy of a plot plan she had located within the Hull History Centre. The plan is entitled *‘Park Avenue Estate’* and although the copy submitted is small and the name of the developer is indistinct, the date 1875 can clearly be made out. According to the plan, the Park Avenue Estate was that parcel of land bounded by Princes Avenue to the east, Victoria Avenue to the north, Salisbury Street to the west and Victoria Avenue to the south.
14. In the absence of any evidence to the contrary, I concur with Miss Cain’s view that the Park Avenue Estate to which the deeds refer is that shown in the plan of 1875. Although the deed extracts are phrased slightly differently, the early twentieth century deeds provide evidence that residents had a private right of access over the tenfoots within the Park Avenue Estate which would encompass RB1, RB2 and RB5. Any use of these three routes by residents of the Park Avenue Estate or their visitors would be *‘by right’* and not *‘as of right’*. I have not been provided with copies of the deeds for any of the properties within the same blocks of houses which surround RB3 and RB4, but it is probable that the developer of those parts of the Avenues site also sold individual plots on similar terms to those seen in the Park Avenue Estate; that is, residents and their visitors would enjoy a private right of access over the tenfoots within each block of housing. The understanding of those residents who spoke at the inquiry was that was the case.
15. However, although the tenfoots at issue are privately owned by the occupiers of the properties which abut them and were originally constructed subject to private rights of access, this does not preclude the subsequent dedication of the way to the public by the landowners or the subsequent acquisition of public rights through long use.

**Statutory Dedication under section 31 of the 1980 Act**

**The date on which the right of the public to use the ways was brought into question**

16. In December 2008 Mr Sandham made his applications to add the four routes at issue to the definitive map and statement. With regard to RB2, RB3 and RB4 no evidence has been submitted of any other event likely to have brought use of these tenfoots into question, consequently the application made in 2008 can be regarded as the end date of the period of use to be considered for the purposes of section 31 (2) of the 1980 Act in regard of RB2, RB3 and RB4.
17. With regard to RB1 it is not disputed that in or around the summer of 2008 the owner of 18 Salisbury Street erected a notice on the side of the house facing into the tenfoot. The notice read '*Private Road. No public right of way*'. Mr Sandham submitted that in relation to RB1 this notice brought public use of the route into question. The effect of the notice is to be considered from the objective viewpoint of anyone reading it; any reasonable user reading such a notice was highly likely to realise that the owner of the land (whoever he, she or they may be) was denying the existence of public rights.
18. I heard from Mrs Barker that four notices bearing the wording described in paragraph 17 above had been obtained in 2005 by the then owner of 99 Victoria Avenue for erection at the entrances of RB1 and RB5. Mrs Barker had erected one of the notices on her property in 2005 following the erection of a gate between 99 and 101 Victoria Avenue. The notice at the western end of RB1 had been erected in late 2008; it was not known when the notice at the southern end of RB5 had been erected and the notice which had been obtained for the eastern end of RB1 between 8 and 10 Park Avenue had not been erected.
19. It was part of Mrs Gilbert's case that RB1 and RB5 could not be considered in isolation from one another; RB5 crossed RB1 and was co-incident with it for approximately 15 metres. Furthermore, the question of whether a public right of way subsisted over that 15 metre section had been determined in the negative following a public inquiry in 2008. In addition one of the individuals (a Mr Percival) who provided evidence in support of Mr Sandham's claim had stated on his user evidence form that he had stopped using RB1 when the northern part of RB5 had been gated in 2004. In Mrs Gilbert's view, all these factors pointed towards RB1 and RB5 being part of the same route. As one access into the tenfoots had been gated in 2004, that action was evidence of a lack of intention to dedicate RB1/RB5 as a whole or served to bring use of RB1/RB5 into question.
20. Mr Percival did not appear at the inquiry so it has not been possible to determine when his use of RB1 ceased. However given that the UEF notes that use was '*via passage between 99 and 101 Victoria*' it is likely that his use would have ceased following the erection of the gate between 99 and 101 Victoria Avenue. Notwithstanding the inference that some people may have ceased using RB1 after 2004, it remains a fact that RB1 can be used in its entirety without having to make use of RB5 (other than the section which is common to both). I am aware of the outcome of the 2008 inquiry but that inquiry was into whether a public footpath subsisted over RB5, whereas the Order before me concerns the claimed existence of public vehicular rights over RB1, a higher level of public rights than the pedestrian rights originally claimed

by Mr Sandham over the co-incident section following the gating of RB5 in 2004.

21. Although Mr Percival's use of RB1 appeared to have been curtailed by the erection of a gate on RB5, the gate would not have prevented others from using RB1 in its entirety as a means of east-west travel. There is no evidence before me of any other event which took place along RB1 which would have brought the right of the public to use the path into question prior to the erection of the notice at the western end in the summer of 2008. Consequently, with regard to RB1, the relevant 20-year period of use is from mid-1988 to mid-2008. With regard to RB2, RB3 and RB4, the event which brought public use into question is the application made by Mr Sandham in December 2008 to record the routes as restricted byways. For these routes, the relevant 20-year period is December 1998 to December 2008.

### ***Evidence of use 1998 to 2008***

22. Twenty one user evidence forms were submitted in relation to RB1; twenty six forms were submitted in relation to RB2; 52 user forms were submitted in relation to RB3 and 28 in relation to RB4.
23. With regard to RB1, of these individuals 16 claimed to have used the path throughout the 20-year period. The frequency of claimed use varied between daily and weekly use although four individuals responded that their use had been 'frequent', 'occasional', 'several times' or 'various'. One user had only used the route twice per year. The user evidence forms indicate that use by these individuals was not interrupted and without express permission. None of the respondents recalled gates, signs or notices along the way during their period of use.
24. A number of individuals who had completed user evidence forms gave evidence at the inquiry as to their use of all the restricted byways at issue. Mrs Kearney had been a resident of the Avenues between 1940 and 1963, had moved away until 1967 and then had lived towards the western end of Park Avenue from 1967. Mrs Kearney confirmed her use of the RBs until she left the area in 2006. The tenfoots were a convenient way of moving around the Avenues area to get to school, work and the shops. Mrs Kearney did not live on a part of Park Avenue which abutted RB1 or any of the other tenfoots at issue.
25. Mr Wilson said he had used the RBs since 1971 as a means of visiting friends, for travel to work and for canvassing for a political party. Mr Wilson acknowledged that some of the friends which he had visited had lived at 61 Victoria Avenue and entered their house from RB1. Mr Wilson also said that he had used RB5 when visiting friends at 78 Victoria Avenue and once RB5 had been gated he walked along Salisbury Street. Mr Wilson had primarily used RB3 as part of his canvassing work as it was a short cut from his home on Marlborough Avenue; RB1 was not used for canvassing as it did not provide access to homes for the delivery of electoral and other material. Mr Wilson acknowledged that the tenfoot at the rear of his property which led into RB3 had been gated as the majority of his neighbours had wanted it closed off.
26. Miss Muston had used the RBs since 1980 to visit friends whose properties did not abut the routes at issue, to reach the local shops and the college. Ms Muston had walked and cycled along the routes at issue considering them to be a safe alternative to cycling on the road. In oral evidence, Ms Muston's use of

- RB3 and RB4 as part of a route to the local college had taken place between 1980 and 1981 and extended to twice per week during that period. Ms Muston could not provide an estimate of the frequency with which she had used RB1 other than it had been more than once per year.
27. Mr Chalk said he had used the routes at issue since 1976 and had walked and ridden a pedal cycle over each of the ways. His use of RB1, RB2 and RB4 had been around once per week with use of RB3 (the closest to his home) being around four times a week. Mr Chalk said that he had used the routes for recreational purposes as part of a walk or ride around the area; he was used to cycling on uneven surfaces and the condition of the tenfoots did not pose a problem. Mr Chalk acknowledged that he had visited friends at 28 Victoria Avenue and had used the RB1/RB5 tenfoots to reach the house.
28. Miss Fare said she had used the routes at issue for recreational purposes such as taking her dog for a walk, as part of a route to the local shops or when visiting friends in the neighbourhood. In her written proof of evidence Miss Fare had stated that she had lived at a number of properties within the Avenues area, none of which abutted the routes at issue. At the inquiry, Miss Fare said that her proof contained an error and that 187 Victoria Avenue should have read 87 Victoria Avenue. Miss Fare was resident at that address between 2010 and 2014. 87 Victoria Avenue is within the Park Avenue Estate and therefore any use of RB1, RB2 and RB5 during that period would have been 'by right' not 'as of right'. Miss Fare also conceded that she had lived at 20 Westbourne Avenue from 1998 until 2010; any use of RB4 during this period is therefore likely to also have been 'of right'.
29. Miss Fare's proof also stated that she had used the routes at issue most days of the year since 1997; however, in cross-examination Miss Fare stated that between 1994 and 2002 she had spent periods of time in SE Asia where her work contracts had extended for periods between 2 months and one year. Despite Miss Fare stating that she would have used the routes in those periods when she was not abroad, it simply was not possible for Miss Fare to have used the routes "*most days of the year*" throughout the relevant 20-year period when there were periods of time when she was not in the country. Miss Fare's original proof was misleading in many respects and had it not been possible to examine her evidence at the inquiry a different conclusion may have been drawn as to the weight that could be accorded to her evidence.
30. The 5 witnesses I heard from was the sum of the user evidence called in support of the Orders. None of those who gave evidence to the inquiry had been prevented from using the routes; none had seen any gates on any of the routes or prohibitory notices other than the ones erected at the western end of RB1. Mrs Gilbert asked each witness to show by way of a map the routes which they had taken from home to their claimed destination; it was Mrs Gilbert's contention that to use RB1 as part of a journey between Pearson Park and the shops on Chanterlands Avenue (such as described by Miss Muston) was illogical; the direct route being along Westbourne Avenue. Although some of the routes shown by the witnesses may have no apparent logic to them, Miss Muston said the route she would take was dependent upon the weather and the time she had available to her for such a journey. The issue here is not whether the use of the routes was logical or not, but whether they have been used by the public.

31. Of the untested user evidence submitted in support of RB1, four individuals stated that visiting friends or family was the purpose for use, however no further clarification was given as to where those friends or families lived; some use by the respondents may therefore have been using RB1 in connection with a private right. Of the remaining users, 4 claimed to have used the route daily, 3 on a weekly basis, 3 monthly or less with 3 only giving vague responses such as '*occasionally*', '*several times*' or '*regularly*'.
32. It was Mrs Gilbert's case in relation to RB1 that use of the route by some of those who had completed user evidence forms should be discounted as they had been exercising a private right which they held either in relation to their own property or as a result of visiting friends or relatives within the Park Avenue Estate. In Mrs Gilbert's view the forms completed by Ms Price, Mr Langler and Mr Wilson fell into this category. Furthermore, it was argued that the forms completed by Mr & Mrs Percival should be discounted as their use of RB1 had been interrupted by the erection of the gate at the north end of RB5.
33. Mr Sandham did not accept that RB5 formed part of RB1 but even if it did and the erection of the gate had interrupted some use, the gate could equally be regarded as an action which brought use of the route into question. In Mr Sandham's view, there was sufficient evidence of use of RB1 in the 20 years before 2004 for dedication to be deemed to have occurred.
34. I have already concluded that RB5 and RB1 are to be regarded as separate routes. Whilst the erection of the gate in 2004 appears to have interrupted use of RB1 by some people the oral evidence of use I heard was that use of RB1 as a whole continued.
35. Mrs Gilbert's case was that a number of residents within the Park Avenue Estate had taken steps to demonstrate to those found in the tenfoot who had no right to be there that there was no public right of way. Mrs Gilbert submitted that there were approximately 140 houses which abutted RB1, RB2 and RB5; consequently there were around 400 or so residents with private rights of access. Whilst Mrs Gilbert knew her immediate neighbours by name and others by sight, the vast majority of those with private rights were unknown and she had great difficulty in being able to distinguish between those who had a private right and those who did not. It was also Mrs Gilbert's case that the nature of all the tenfoots was that any use of the tenfoots would have been hidden from view of the residents who had not had the opportunity to resist that use.
36. In support of these contentions, Mrs Gilbert called a number of witnesses. Mrs Barber had lived in Victoria Avenue since 1981 and stated that she walked in RB1 on a daily basis to walk her dog and was in the tenfoot a couple of times a day between 6AM and 6PM depending on the time of year. Mrs Barber said she rarely saw anyone else in the tenfoot, but when someone else was present, the vast majority were those who had a private right to be there. Mrs Barber had questioned those she did not recognise as to why they were in the tenfoot and if they were not visiting, she asked them to leave. In Mrs Barber's experience, there were only a handful of people to be found in the tenfoot on a daily basis the vast majority of which had a private right to be there.
37. Mrs Hunt had been resident on Victoria Avenue since 2007 but had lived in the Avenues since 1979. Mrs Hunt stated that she would be in the tenfoot once per day. She asserts in common with other witnesses that the private ownership of

the tenfoots and the nature of private rights over them is general knowledge amongst those who live in the Avenues. Like Mrs Barber, Mrs Hunt had challenged those she found in the tenfoot where she suspected they had no right to be present. Mrs Hunt considered that there may have been occasions where unauthorised persons had used the tenfoot without challenge but drew attention to the physical characteristics of the tenfoots; the properties had 45 metre gardens with no view into the tenfoots from house or garden. In Mrs Hunt's view, use may have been made of the tenfoot by the public of which the owners were unaware.

38. Mrs Parkey's evidence was that she had been resident in Victoria Avenue since 1997 but had lived in and visited the Avenues for around 50 years. Although since being a resident, Mrs Parkey had contacted the police on a number of occasions regarding criminal and anti-social behaviour she had encountered in the tenfoot, she had also made such challenges to those whom she simply did not recognise as to their right to be present on private land; this included children from other streets playing in the tenfoot and adults she encountered. When challenged, these persons were said to have left and had not returned.
39. Miss Cain objected to all four Orders but had little by way of direct evidence to offer in relation to any of them. Miss Cain had no personal interest in the routes but expressed a desire to see the tenfoot behind her property gated, a process which she said could not occur until the question of the current Orders had been resolved. Miss Cain considered that the challenges which residents had issued were sufficient to demonstrate a lack of intention to dedicate a public right of way. Miss Cain had not walked any of the tenfoots at issue prior to the Orders being made; as the Avenues had been laid out on a grid pattern, the tenfoots provided no advantage to travel around the area; the tenfoots were unattractive and she would not choose to use them.
40. Cllr Robinson had, with the exception of the period 2012-2016, been a City Councillor for the Avenues ward since 1999 and had been active in campaigning on behalf of his party in the area since 1986. Cllr Robinson had been resident in Park Avenue since 2005; the view he had gained from speaking with constituents about the tenfoots in the Avenues area was that residents considered them to be "*private areas which were privately owned*". Since being a resident of the Park Avenue Estate Cllr Robinson had challenged groups of adolescents, van drivers and people "*hanging around*" in the tenfoot as to their right to be there. Cllr Robinson said that he tended not to use the tenfoots; if needing to speak to constituents he would approach their front doors. In connection with his duties as Ward Councillor he had been along RB2, RB3 and RB4 once in around 20 years but only in response to a resident's complaint or concern.
41. Mr Sandham acknowledged that some of the user witnesses called had used RB1 in connection with a private right but at other times would have been exercising a public right. When Mr Wilson visited friends at 61 Victoria Avenue he would have used RB1 as an invitee and therefore by private right; however when using RB1 and RB5 to visit friends at 78 Victoria Avenue he would have been using the tenfoots as a member of the public as his friends at 78 Victoria Avenue had no private rights over RB1 and RB5.
42. When assessing the evidence of use in a case such as this where there are a considerable number of individuals (Mrs Gilbert estimated around 400) who

- hold a private right of access over RB1, RB2 and RB5, the question of use has to be approached from how such use would have appeared to a reasonable owner who was in a position to observe that use. Where an individual such as Mr Wilson was present in the tenfoot to access his friend's house at 61 Victoria Avenue he would have had good reason for being present as an invitee if a resident had questioned his right to be there. If on a subsequent occasion, Mr Wilson had been seen in the tenfoot by the same resident, what would that resident likely to have concluded from his presence? I consider it highly likely that the conclusion would have been that Mr Wilson was paying another visit to his friend's house. In such circumstances it would have been very difficult for residents to differentiate between use in connection with a private right and use which was not.
43. Furthermore, I saw from my accompanied site visit to Mrs Gilbert's and Mr Robinson's properties that residents had no view into the tenfoot from either the garden, ground floor of the house or the first floor windows; anyone passing along the tenfoot is likely therefore to have done so unobserved. However, not all those who attempted to use the tenfoot went unobserved and unchallenged as the evidence of Mrs Barber, Mrs Hunt, Mrs Parkey, Mrs Gilbert and Mr Robinson demonstrates. Whereas the use by those witnesses called by Mr Sandham was not challenged, use by others clearly was.
44. As noted above, the evidence called by Mr Sandham in relation to RB2, RB3 and RB4 was the same as that called in relation to RB1. Ms Muston's use of RB3 and RB4 was limited to a period outside the relevant 20-year period. Mr Wilson lives in a property whose tenfoot runs into RB3; any use of RB3 by him is therefore likely to have been 'of right' and not 'as of right'. Miss Fare's evidence has to be treated with some caution because of the inconsistencies identified above. Mrs Kearney could not describe with any degree of certainty the frequency with which she had used the tenfoots. Mr Chalk lives in the block of houses bounded by Westbourne Avenue, Marlborough Avenue, Princes Street and Richmond Street and is likely therefore to enjoy a private right of access over RB3 in common with Mr Wilson.
45. Of the 26 individuals who completed a user evidence form in relation to the use of RB2, 11 noted that their use had been in connection with 'social visiting'. Of the 52 individuals who completed a UEF in support of RB3, 36 had used the path as part of social or family visits; with regard to RB4, 12 out of 28 respondents had used the path for this purpose. As the majority of these respondents did not appear at the inquiry, it is not known where those 'social visits' took place. Some of those visits, like those of Mr Wilson, may have been to friends and relatives in those blocks of houses which abut the tenfoots and would there have been use 'of right' and not 'as of right'. In relation to RB2, RB3 and RB4, it would have been very difficult for the landowners to differentiate between those who were using the tenfoots in connection with the existing private rights and those who were not.
46. There are around 140 properties in the Park Avenue Estate with approximately 400 residents; there is likely to be similar densities of populations in neighbouring blocks of houses which surround the other tenfoots at issue. It is estimated that there are around 3000 people who live in the Avenues area and Councillor Robinson said that there were around 6000 houses in the Ward which he represents. Even taking the estimated population of the Avenues as the potential user base of the routes at issue, the number of people who claim

to have used the tenfoots as public rights of way as a public right of way is remarkably small. Even taking the claimed use of the tenfoots at its greatest, use by 52 people (the number of individuals who claimed use of RB3) is unlikely to alert adjacent resident owners that a public right of way was being asserted given the number of people who had a private right of access. In a densely populated area such this part of Hull is, the occasional use of the tenfoots by a limited number of people is likely to have gone unnoticed by resident owners, particularly where in ordinary circumstances it would not be possible for such use to be observed.

## Conclusions

47. Having taken into account all the evidence submitted in regard to use of the ways at issue, I acknowledge that there is some evidence of use of the claimed ways by the public. However, I place limited weight upon the untested written evidence as it is unclear as to what extent use was in connection with a private right, and given the physical characteristics of the tenfoots at issue, it lacks the quality to have put a reasonably alert owner on notice that a public right of way was being asserted. The oral evidence of use I heard was limited to five individuals, one of whose evidence would have been misleading had it not been tested through cross-examination.
48. For there to be sufficient level of use to raise a presumption of dedication, that use has to be of a quantity and frequency for the owners to be aware of it and resist it if they chose to. Given the particular characteristics of these routes and the extensive nature of private rights of access, it is highly likely that the relevant landowners would not have been in a position to challenge use.
49. Of the limited number of individuals who claimed to have used the tenfoots, around half reported use of them on a pedal cycle as well as on foot. The UEFs do not identify what proportion of the claimed use was on foot and what was by pedal cycle. However, the same issues regarding the ability of the landowners to differentiate between private and public use on foot apply equally to any use of the tenfoots by bicycle; resident landowners are unlikely to have been in a position to challenge the limited use which is claimed to have occurred.
50. I do not consider the limited evidence of use of the routes on a pedal cycle by a limited number of individuals to be sufficient to raise the presumption that the routes have been dedicated as restricted byways under the statutory scheme or sufficient to allow an inference of dedication at common law to be drawn. Furthermore, given the densely populated urban setting of the routes at issue, I do not consider the overall evidence of use adduced to be sufficient to raise a presumption of dedication of the routes as public footpaths or for an inference of dedication to be drawn at common law. It follows that I conclude that the Orders should not be confirmed.
51. Notwithstanding the conclusion I have reached with regard to the overall sufficiency of use, it is clear from the evidence of the objectors that actions have been taken on their part during the relevant 20-year period to bring home to some users of the tenfoots in the Park Avenue Estate that unauthorised use was contested and that there was no intention to dedicate public rights. The evidence I heard was that such challenges were not restricted to those engaging in criminal or anti-social behaviour but were also directed at those whom the owners did not consider had a right to be in the tenfoots. In relation to RB1 I also conclude that there is sufficient evidence of a lack of intention to

dedicate public rights. Even If the extent of use of RB1 was sufficient to raise a presumption of dedication, that presumption would be rebutted; this is a further reason as to why Order A should not be confirmed.

**Formal Decisions**

**Order A**

52. I do not confirm the Order.

**Order B**

53. I do not confirm the order.

**Order C**

54. I do not confirm the Order.

**Order D**

55. I do not confirm the Order.

*Alan Beckett*

Inspector

## APPEARANCES

For Hull City Council (neutral stance)

Mr C Atkinson                      Town Clerk's Service, Hull City Council, The Guildhall,  
Alfred Gelder Street, Hull, HU1 2AA.

In Support;

Mr R Sandham

Who called:

Mrs M Carney

Mr M Chalk

Ms L Muston

Mr P Wilson

Ms J Fare

In Objection:

Mrs J Gilbert

Who called:

Mrs J Gilbert

Mrs S Walker

Mrs C Barber

Mrs C Hunt

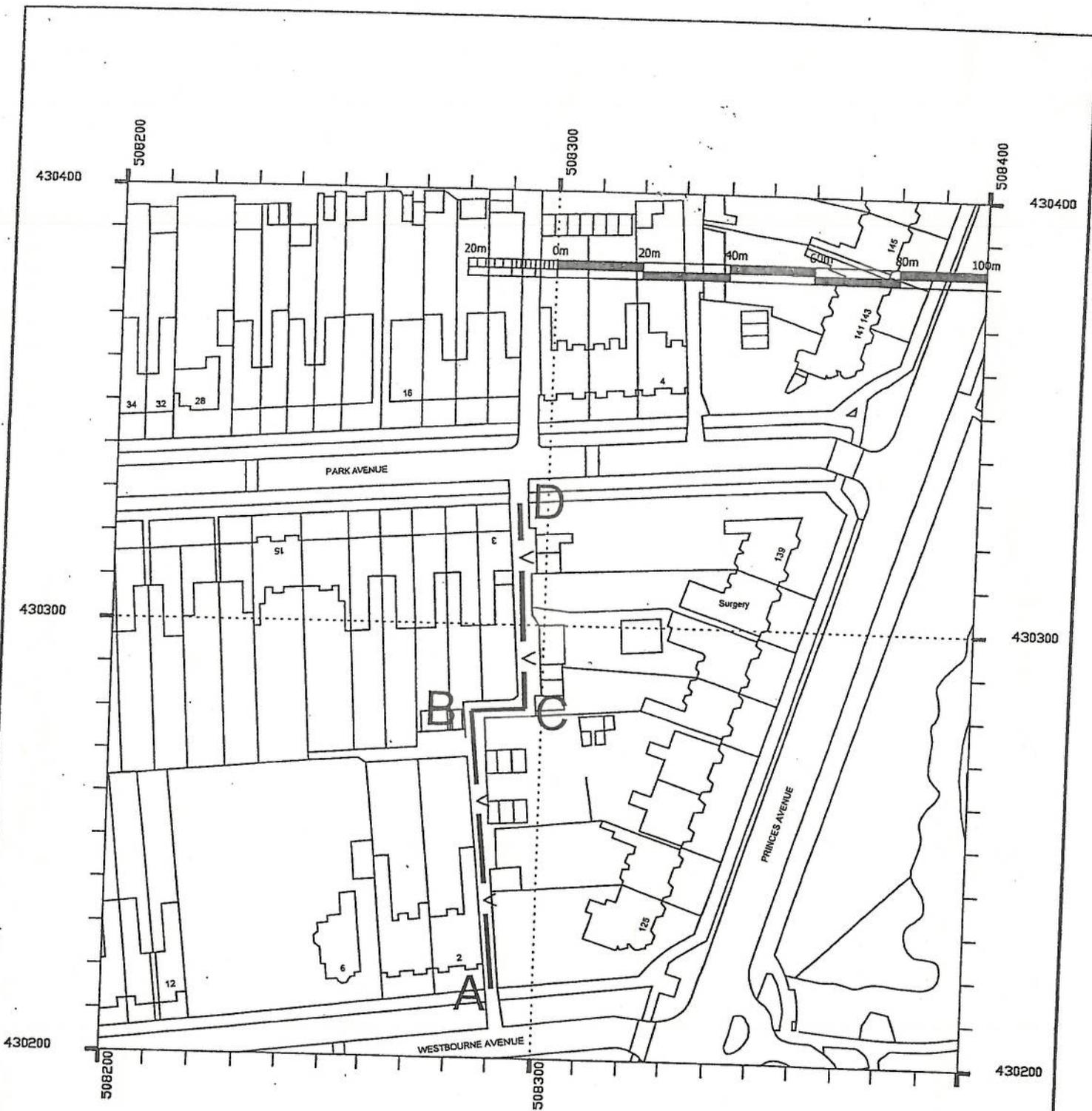
Miss L A Cain

Mrs J Parkey

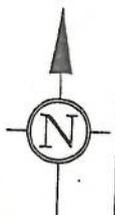
Cllr J Robinson

## Inquiry Documents

1. Letter from Miss Fare outlining the reasons for her absence on the opening day of the inquiry.
2. Opening Statement of Mr Sandham.
3. Maps of routes used marked by Mr Sandham's witnesses.
4. Opening statement by Mrs Gilbert.
5. Statement of Mrs Hunt.
6. Closing submissions by Mrs Gilbert.
7. Closing submissions by Mr Sandham.



MAP NOT TO ORIGINAL SCALE



KEY:

**V—V** Restricted Byway (A-B-C-D)

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 Definitive Map and Statement Modification Order 2016



Andy Burton  
 City Streetscene Manager, Festival House,  
 93 Jameson Street, Kingston Upon Hull, HU1 3JJ

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REVISION:



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KEY:  
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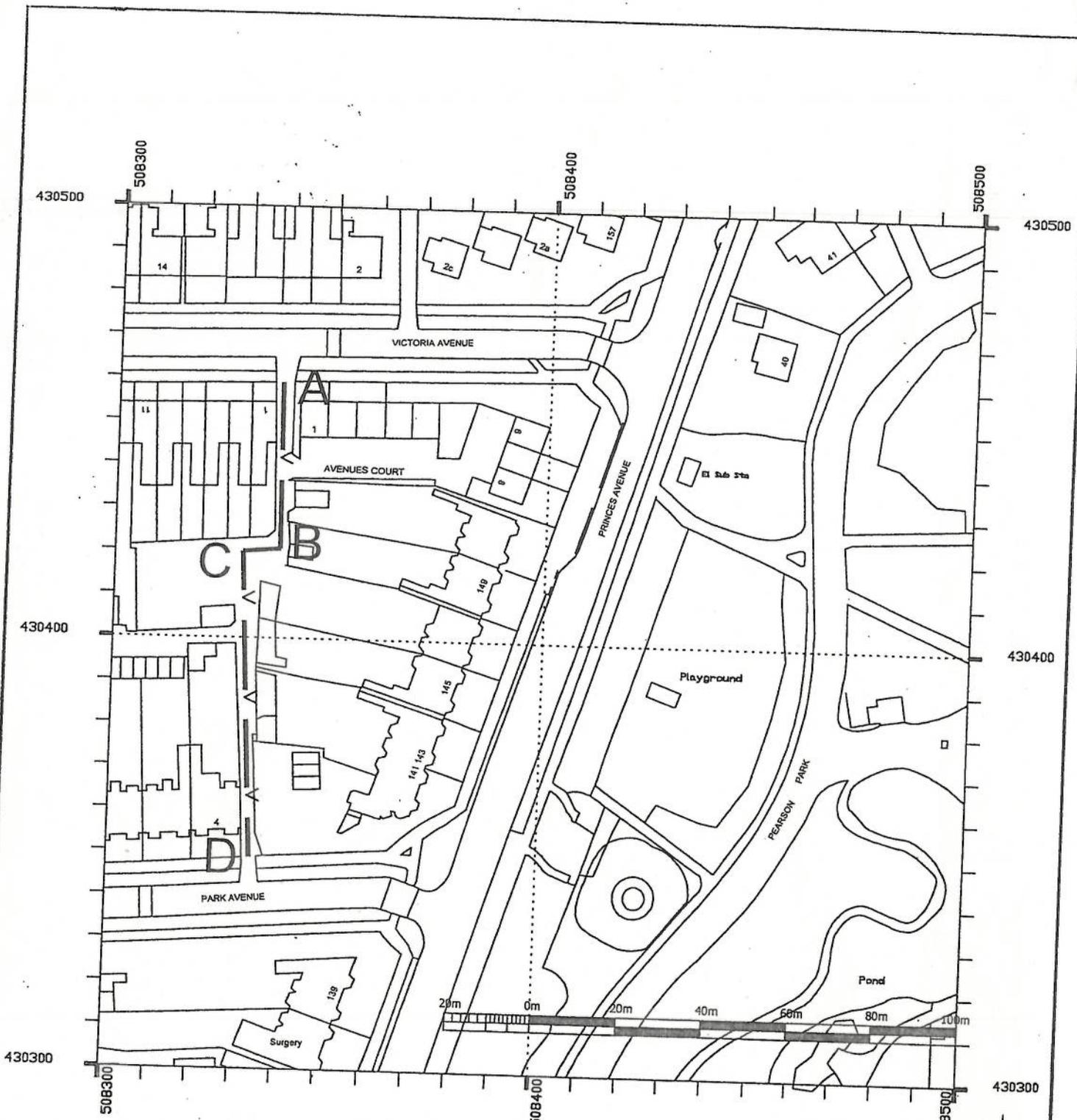
DRAWING TITLE:  
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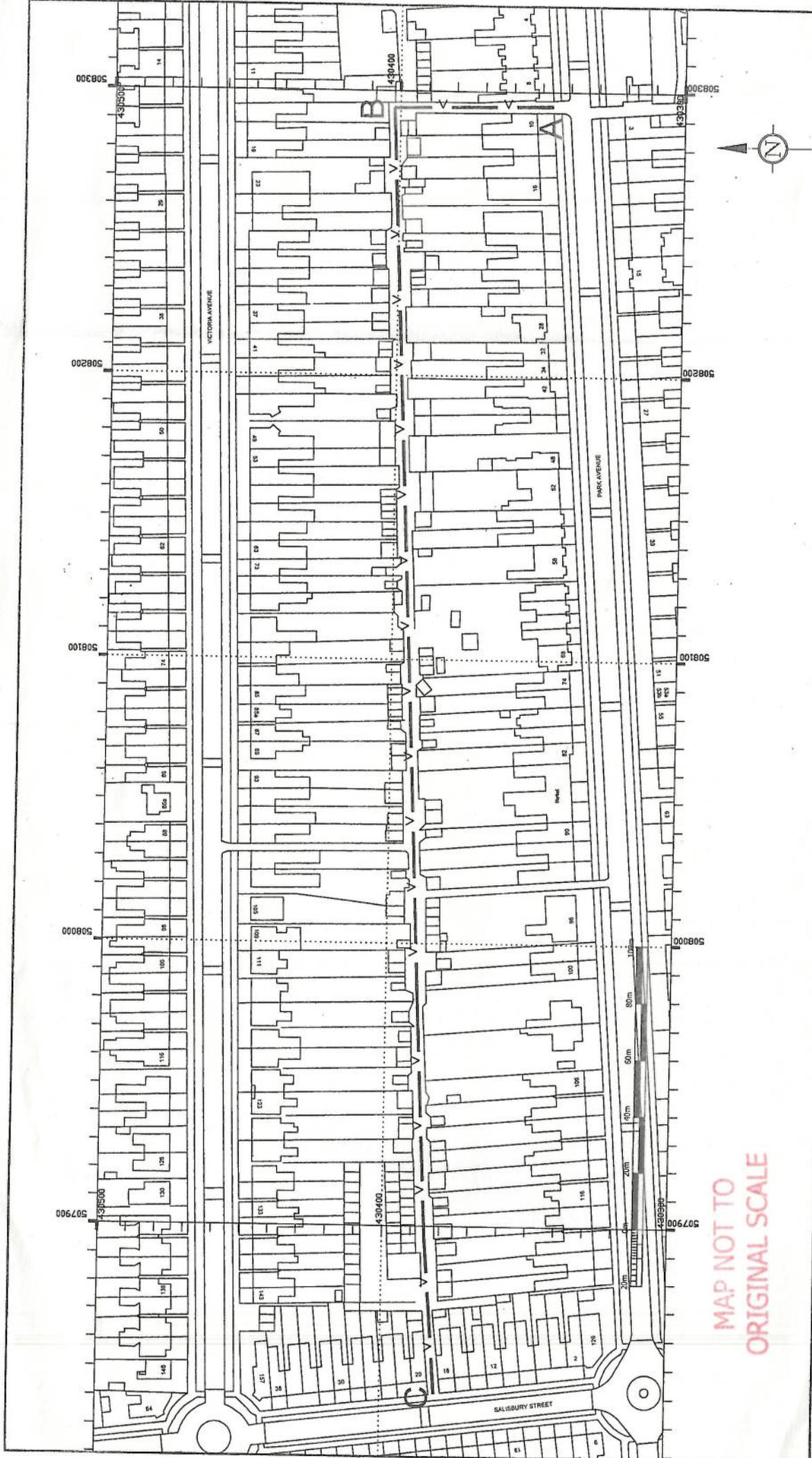
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— V — V — Restricted Byway (A-B-C)

**Kingston upon Hull City Council**  
**Restricted Byway No. 1 (The passageway between Victoria and Park Avenues, with entrances between 8 and 10 Park Avenue and 18 and 20 Salisbury Street)**  
**Definitive Map and Statement Modification Order 2016**



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