

21/11/13.

 The Planning Inspectorate

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Mr R Halstead
57 Bowers Mill
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HX4 0AD

Your Ref:
Our Ref: FPS/G3300/7/91
Date: **20 NOV 2013**

Dear Sir

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53
Somerset County Council
(No. 7) Modification Order, 2012 Parishes of Coleford and Mells

I enclose for your information a copy of the Inspector's interim decision on this Order following the Inquiry on Thursday 31 October 2013.

This is an interim decision because the Inspector has proposed a modification to the order, which will need to be advertised before a final decision can be made. You are entitled to comment on the Inspector's proposals and I will write to you again shortly about how you can do this. In the meantime, you will find information about the modification process at section 7 of our booklet *Definitive Maps and Public Path Orders*. Please let me know if you require a copy of this booklet.

If you have any complaints or questions about the way we have handled the order to date, or about the conduct of the Inspector at the inquiry, please write to me at the above address. We will investigate your complaint and you can expect a full reply within three weeks.

An electronic version of the decision will shortly appear on the Inspectorate's website.

Yours faithfully
Helen Sparks
(Rights of Way Section)

Despatch 1M



Order Decisions

Inquiry opened on 31 October 2013

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date:

20 NOV 2013

Order Ref: FPS/G3300/7/91

referred to as Order 'A'

- This Order is made under Section 53(2) of the Wildlife and Countryside Act 1981 and is known as The Somerset County Council (No. 7) Modification Order, 2012.
- The Order is dated 23 November 2012 and proposes to record a public bridleway on the Definitive Map and Statement in the Parishes of Coleford and Mells. Full details of the route are set out in the Order Map and Schedule.
- There were eight objections and representations outstanding when Somerset County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Order Ref: FPS/G3300/7/90

referred to as Order 'B'

- This Order is made under Section 53(2) of the Wildlife and Countryside Act 1981 and is known as The Somerset County Council (No. 6) Modification Order, 2012.
- The Order is dated 16 November 2012 and should have proposed to record a public bridleway on the Definitive Map and Statement in the Parishes of Coleford and Mells. Full details of the route are set out in the Order Map and Schedule.
- There were two objections and representations outstanding when Somerset County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I made an unaccompanied site inspection on 30 October 2013 and opened the Inquiry on 31 October. I made an accompanied site visit as part of the Inquiry on that day and closed the Inquiry on 1 November 2013.

Background

2. In April 2003 an application was made on behalf of Mendip Bridleways and Byways Association ("the MBBA") to Somerset County Council, the order-making authority ("the OMA") under Section 53(2) of the Wildlife and Countryside Act 1981 ("the 1981 Act") to upgrade existing footpaths to the status of bridleway. The original line generally followed the Order route, but ran in an approximately straight line between points B and F¹ across the working area of Newbury Concrete Works ("the Works"), however, in April of that year an Order ("the Diversion Order") was made by Mendip District Council ("the District Council") to divert part of the footpath onto a southern alignment.

¹ Points A – P are used on the Order map and I have proposed an additional point 'X'

3. Prior to the OMA investigating the application, the Mendip Cross Trails Trust ("the MCTT") began negotiations with the landowners regarding the possibility of dedication of the route. Landowners signed forms which were to have led to express dedication. It appears to have been as the result of a change in management priorities for the OMA that the route was not recorded on the Definitive Map and Statement ("the DMS") as a bridleway, as had clearly been intended by that process.
4. Formal investigation of the application commenced in April 2009 and the report of February 2011 found sufficient evidence to indicate that the route should be recorded as a bridleway. However, matters raised in response to this led to a revised report issued in November 2011 finding insufficient evidence to indicate that the route should be recorded as such. The application was rejected in February 2012 and the MCTT, now The Trails Trust ("TTT"), having formally taken on the application process from the MBBA, appealed against this decision². In October 2012 the OMA were directed by the Secretary of State for Environment, Food and Rural Affairs to make this Modification Order.
5. As the OMA were directed to make the Order, they decided not to support it and took a neutral stance at the Inquiry, although assisting in technical matters. The case in support of the Order was made by TTT.

Main issues

6. The Order is made under section 53(2) of the 1981 Act by reference to: section 53(3)(c)(i) which refers to whether a right of way which is not shown in the Map and Statement subsists over land in the area to which the map relates; 53(3)(c)(ii) which relates to whether there has been a discovery of evidence which, when considered with all the other relevant evidence, shows that a highway shown in the DMS as a highway of a particular description ought to be there shown as a highway of a different description; and 53(3)(b), in relation to the expiration of any period such that enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a bridleway.
7. Reliance is placed upon express dedication at common law, which depends upon there being an intention on the part of the landowner to dedicate a right of way in perpetuity and acceptance by the public, to be the general public and not a limited class thereof. Questions were raised as to the capacity to dedicate for some of the relevant land.
8. Matters were raised regarding the possibility of nuisance to walkers at common law, in particular in the area around the Works.
9. I will confirm the Order if I am satisfied, on the balance of probabilities, that it meets the test that the route 'subsists' as a bridleway.

² To clarify, this appeal under Schedule 14 of the 1981 Act was made on written representations and not by way of an Inquiry as some parties thought had been the case.

Reasons

Order A: The Somerset County Council (No. 7) Modification Order, 2012

Nuisance

10. The main objection made by Coleford Parish Council ("the Parish Council") related to the width of the Order route to the south of the Works, points B – C – D – E – F; the Parish Council were concerned that there may be a conflict between walkers and horse-riders. However, prior to the Inquiry, works were carried out on this section of the Order route, by TTT on behalf of the Works, to remove overgrowth and ensure that the full width of the route was available. As a direct result of these works, and following discussions between the parties during the Inquiry process, the Parish Council felt able to accept that the possibility of conflict was ameliorated and the Order route suitable for use as a bridleway, subject to modification of the width to be recorded by the Order.
11. For section A – B, the route is similar in character to the narrow public road it joins, where vulnerable users and traffic must coexist. The lorries on this section are associated with the Works and there is sufficient visibility for users on foot, horse, bicycle or vehicle, to wait at appropriate points in order to pass each other safely. The junction to the road at Vobster Cross is not relevant as this is an existing road which all users have a legal right to in any event.
12. There was anecdotal evidence of potential fear for some people in using a shared route. However, those giving evidence to the Inquiry, who had used the route on foot, horse and bicycle, had not encountered problems with different users. They may stop at a wider section, or slow down to pass others, but this was little different to the consideration required when using the narrow lanes and other similar bridleways in the area. There was insufficient evidence to demonstrate that there was a danger to lawful users of the footpath, such that it may constitute a nuisance at common law, as referred to in the *Encyclopedia of Highway Law and Practice*. I am satisfied, taking account of all the evidence before me, that the character of the way is such that it is suitable for use as a bridleway and it was open to the landowners to dedicate it as such.

Intention to dedicate

13. Four landowners signed forms which had been prepared and supplied by the OMA as part of an agreement process under section 25 of the Highways Act 1980 ("the 1980 Act"). This was one of several routes where the process of negotiating with landowners, rather than follow the Modification Order course of action, was used, with the involvement of the OMA and the District Council.
14. It was argued that the intention to dedicate might be fettered by an inability of the OMA, in their role as highway authority, to fulfil the stated intention to maintain the route as a bridleway. However, I consider that the evidence relates to the intention of the owners. Forms were signed at different times by the owners of different sections of the route and further statements of intent were supplied to the Inquiry both in writing and orally. Taking account of all the formal and informal paperwork, as well as the oral evidence, I consider it abundantly clear that the relevant landowners intended to dedicate the route as a public bridleway. Furthermore, it is clear that the intention was for it to be

available to the general public and not simply a limited or defined class of the public. It is also clear, particularly in relation to the land that has been sold subsequently, that it was intended to be dedicated as such for all time.

15. The route was physically constructed, where it was not already existing, and bridleway signs and waymarkers were put in place, although removed relatively recently by unknown parties. There is no evidence that any landowner has taken action in the period since the route was thrown open to the public, it seems in early 2005, to prevent use of the route as a bridleway.

Capacity to dedicate

16. A matter which led to the OMA deciding not to make the Order was a concern that the landowners did not have the capacity to dedicate the land as a public bridleway. There were suggestions that there may be other landownership in relation to the western end, however, Land Registry searches did not reveal any different ownership and the relevant party did not provide any documentary evidence of such title.
17. In relation to land to the east there were suggestions that a mortgage may affect matters. The landowner herself was satisfied with regard to her capacity to dedicate. In the absence of evidence that there was a mortgage with terms which would prevent dedication, I consider, on the balance of probabilities, that it has not been demonstrated that there is a lack of capacity to dedicate a bridleway on the part of any of the landowners.

Acceptance by the public

18. I heard evidence from a number of people of use of the Order route on horse-back, as well as on foot and bicycle. Some of this use pre-dates the dedication discussed above, and relates to the original route through the Works. It had been argued in objection that the number of horse users was slight. Whilst it may not have been sufficient were I considering the matter under presumed dedication at common law, or the statute of the 1980 Act, I am satisfied that for express dedication the user by the public need not be significant; it is only necessary to show that the route has come into use.
19. Looking at the user evidence in its entirety, I agree with the supporters that it is sufficient in both quantity and quality to demonstrate the acceptance of the route as a bridleway by the public since it was thrown open to them in the early part of this century. I am satisfied that the users are representative of the general public and not simply a defined class of user.

Past use

20. There was conflicting evidence as to whether there had been use of the route as a bridleway in the past. From the evidence heard under cross-examination I am satisfied that such use did occur. Whilst the route has not been formally recognised as a bridleway in the past, this does not fetter the ability of the landowners to make such a dedication on their own land. For the reasons set out below I have not found it necessary to consider the matter under presumed dedication in relation to historical use.

Conclusion

21. Taking all the above matters into account I am satisfied that there has been a clear intention on the part of the landowners, with a capacity to do so, to dedicate a public bridleway over this land. That offer of dedication has been accepted by the public who have taken to using the route on foot, horse and bicycle, since at least 2005, with some of that use having previously been undertaken on parts of the route in the past. There is insufficient evidence that such use is a nuisance at common law to prevent such dedication. On the balance of probabilities a bridleway subsists.

Alignment

22. There is a complication regarding the alignment of the route, which was noted by the Parish Council when they submitted their statement of case. The Order route between points B and F does not follow the alignment shown on the Order plan, instead running a little to the south, outside the boundary of the Works. The Order route reflects what was shown in the 2003 Diversion Order.

23. It is abundantly clear from the discussions on paper; the evidence of the former Senior Rights of Way Officer for the District Council, who drew the map; and, the subsequent works to create the route, that the intention was for the diverted route, which was then to be dedicated as a bridleway, to be accommodated on the perimeter of the site. The Officer indicated that she may have made an error in drawing it in the location it is now shown, which is partly within the working area.

24. The '*Description of site of new paths or way*' in Part 2 of the Schedule to the Diversion Order describes the relevant section as "*...turning in a generally southerly direction for approximately 44 metres, then in a generally easterly direction on perimeter track within woodland for approximately 230 metres, then north for approximately 78 metres...*". The '*Dedication of public bridleway*' form, completed by landowners, describes the relevant part of the route as "*...follows a newly constructed perimeter path around the southern side...*".

25. This clearly describes the constructed and used route outside the bund which forms the perimeter of the Works area. During the accompanied site visit it was noted that there were mature trees on the bund and so this was clearly a long-standing landscape feature, albeit not noted on the base mapping used in the Diversion Order. It does not seem that the alignment shown by the Diversion Order has ever been available or used.

26. The Definitive Map provides conclusive evidence as to a highway shown thereon, whilst the Definitive Statement provides the particulars as to the position or width thereof. In this case there is a discrepancy in the position of the route as shown on the Map, which differs from the clear description within the Schedule to the Diversion Order, which would form the Statement. I consider that Parish Council and TTT were correct to suggest it may be within my powers to modify the Order to correctly record the route which was actually dedicated and used and should have been reflected in the DMS as a result of the Diversion Order.

Width

27. It is clear that the concerns over the width in the area to the south of the Works were looked at from the view of what people might desire. This would be relevant were I dealing with a creation order under the 1980 Act, however, I need to be satisfied that the recorded width is that which has been dedicated by the landowners and accepted by the public.
28. The diverted route was constructed as part of a project overseen by a taskforce involving the OMA, the District Council, the Mendip Hills Area of Outstanding Natural Beauty and the Somerset Aggregates Levy Sustainability Fund. The OMA were noted to be interested to ensure that any works were of a high standard and future maintenance properly evaluated. The Diversion Order records that the diverted route would be a minimum of 1.8 metres and so the recording of a 1 metre width over the sections B – G is clearly incorrect.
29. Taking account of the now visible path and bund on site, also shown in a picture dating from 2004 when newly engineered, I am satisfied that the originally built route was wider than the 1 metre proposed by this Order and also generally wider than the 1.8 metres specified in the Diversion Order as a minimum width.
30. There has clearly been overgrowth on the route over time, which has reduced the perceived width as demonstrated by the survey carried out by the Parish Council. However, I am satisfied that the originally available width as a result of “...*expensive construction works...*” and left open to the public, with the knowledge of the landowners at that time, was as seen on the ground during my site visits. The public have used that width, including the bund and verges should they wish to do so.
31. For B – E I am satisfied that the original width would have been 3 metres. In relation to section E – G I am not satisfied that a width of 3 metres could have physically existed, even taking verges into account and I consider the width to be 2.5 metres in relation to E – F but only 2 metres from point F to the end of the Works, a point I intend to identify on the Order map as ‘X’. There are minor pinch points on the corners at points E and F, which are the minimum 1.8 metres referred to in the Diversion Order.
32. No matters were raised with regard to the width to be recorded in Mells Parish Council area. I am satisfied from all the evidence before me that the recorded width is correct in this case.
33. Whilst I recognise the desire for a greater width, and the intention of the Parish Council to act in the interests of those of their parishioners who walk, as oppose to ride, I can only record that where it physically exists. I am satisfied that I should make modifications to record the widths mentioned above, as dedicated and used by the public. I remain satisfied with regard to the matter of potential nuisance, discussed earlier.

Order B: The Somerset County Council (No. 6) Modification Order, 2012

34. This Order was made in response to the direction under Schedule 14 of the 1981 Act. As such it should have recorded the Order route as a bridleway. However, in the last line of the fourth paragraph of the preamble to the Order it refers to a public footpath, where it should have referred to a bridleway.
35. Two objections had already been made to this Order before the error was noticed and the Order was remade as Order A, correctly referring to bridleway throughout. The two objectors were advised to resubmit their objections in relation to Order A and I have already considered the relevant matters above.
36. As the Order does not address the matters raised by the direction, and is contradictory, I agree with the OMA that Order B should not be confirmed.
-

Other matters

37. Concerns were raised regarding the cost to the public purse; who had authorised the works to create a bridleway; who would benefit from them; and, the disadvantages to horse-riders, particularly youngsters, who would be forced to use the roads network if the route was not recorded as a bridleway.
38. Whilst I understand that these concerns are the matters of most importance to people living and working here, the 1981 Act does not permit personal considerations to be taken into account. A decision to confirm the Order, or not, is lawful as provided by s6(2) of the Human Rights Act 1998.

Conclusions

39. I consider, on the balance of probabilities, that there has been dedication and use of the Order route, on the proposed alignment, as a public bridleway such that express dedication at common law has been demonstrated.
40. Having regard to these and all other matters raised at the Inquiry, and in the written representations, I conclude that the Order A should be confirmed with modifications as set out below, whilst Order B, not reflecting the intention of the Secretary of State in the direction, should not be confirmed.

Formal Decision

Order A

41. I propose to confirm the Order subject to the following modifications:
- In Part 1 of the Schedule to the Order:
 - in line 4 replace text "...southerly..." with text "...south south easterly...";
 - in line 4 replace text "...40..." with text "...35...";
 - after text "...to point C..." remove text "...at its junction with FR 4/34...";
 - in line 5 after text "...runs in a generally..." remove text "...east...";
 - in line 6 replace text "...55..." with text "...50...";

- in line 7 replace text "...160..." with text "...150...";
- after text "...the width between..." replace all text with *"...Points A and E will be 3 metres; points E and F will be 2.5 metres; points F and X will be 2 metres; points X and N will be 3 metres; this width includes the verge to the south side between points C and E and the verge to the east side between points E and F; this width is subject to minor pinch points to a minimum of 1.8 metres at points E and F;*
- In the Order map:
 - insert point X;
 - modify the alignment of the route between points B and F to show the route on the ground, as agreed by the parties to the Inquiry.

42. Since the confirmed Order would affect land not affected by the Order submitted, I am required by virtue of paragraph 8(2) of Schedule 15 to the Wildlife and Countryside Act 1981 to give notice of the proposal to modify the Order and to give the opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Order B

43. I have not confirmed the Order.

Heidi Cruickshank

Inspector

APPEARANCES

For the Order Making Authority (neutral stance):

Miss W. Burge Rights of Way - Definitive Map Team, Somerset County Council

In Support of the Order:

Mr R Halstead *on behalf of The Trails Trust*
who called:
Rachael Thompson

Mrs I Cairns

Ms C Clayden

Ms A Goold

Ms J Ham

Miss M Martin

Mr J Martin

Ms S Petherbridge

Mr K Reynolds

Ms R Wallace

In Objection to the Order:

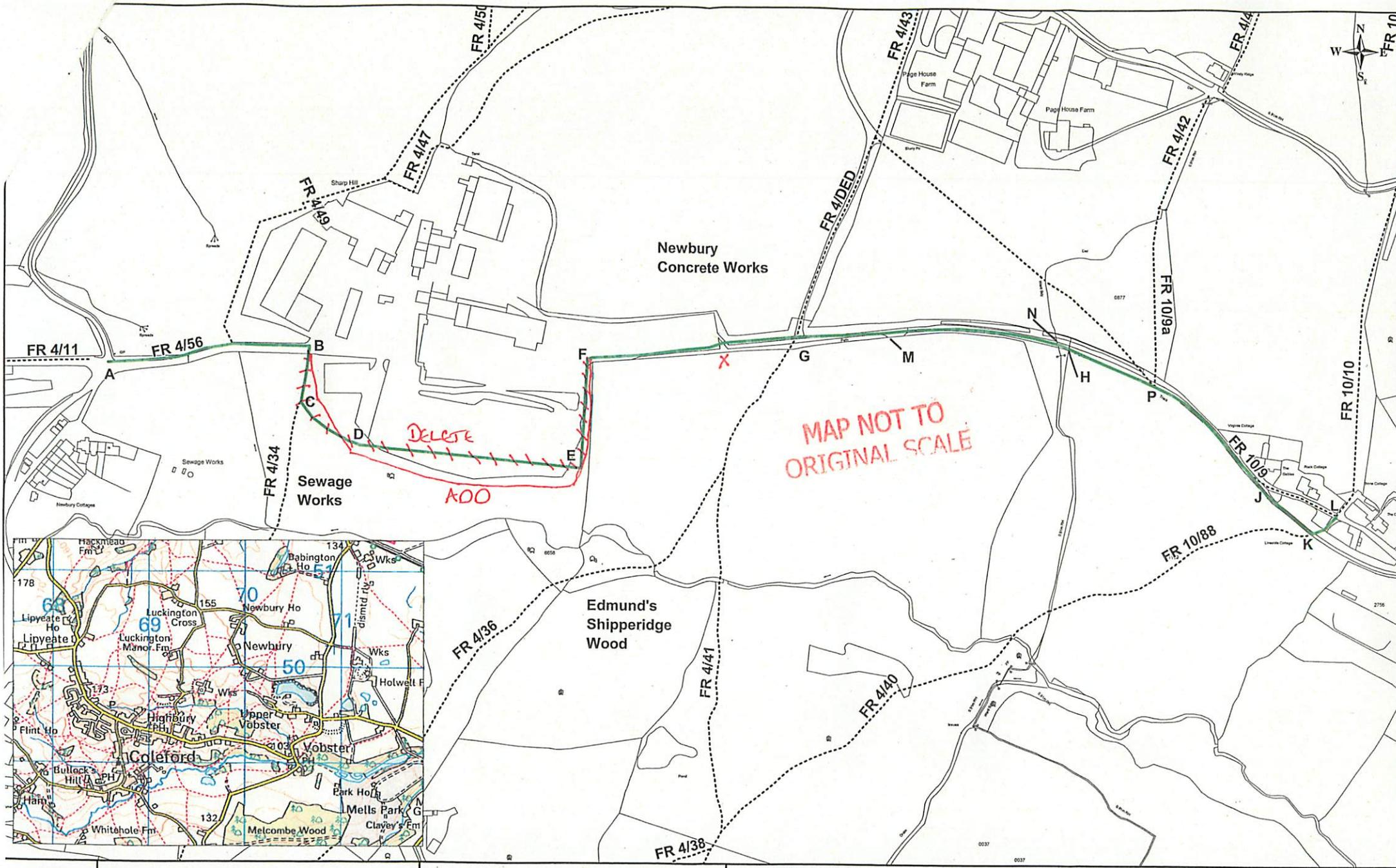
Mr R Bradbury *on behalf of Coleford Parish Council*

Mr P Ham

Mr K Marshall

INQUIRY DOCUMENTS

- 1 The Order
- 2 2003 Diversion Order plan
- 3 Plan showing extent of unclassified highway
- 4 Agreed amendments 1 November 2013
- 5 E-mail correspondence from the owner of the Works
- 6 Spare copies of statements read to the Inquiry
- 7 Closing submissions on behalf of the Supporters
- 8 Summing Up on behalf of Coleford Parish Council
- 9 Late correspondence to the Inquiry



Parish: Coleford and Mells
 District: Mendip
 Date: 30/10/2012
 Drawing No: H213-2008
 Drawn By: MHardwill
 Grid Ref: 369840 149760
 Scale: 1:2500

Wildlife and Countryside Act 1981
 The Somerset County Council
 (No. 7) Modification Order 2012
 Parishes of Coleford and Mells

SOMERSET COUNTY COUNCIL - ENVIRONMENT DEPARTMENT

The precise line of a Right of Way can only be determined by reference to the Definitive Map (1:10560 scale) and the attached plan has been produced by transposing the Rights of Way Definitive Map onto a larger scale. The County Council can accept no responsibility for any error or inaccuracy which may arise from the transposition of the Rights of Way Definitive Map to a different scale.
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