

Application to extinguish public footpath WB71 in Tunbridge Wells

A report by the Head of Regulatory Services to Kent County Council's Regulation Committee Member Panel on Friday 18th March 2016.

Recommendation: I recommend that the applicant be informed that the application to extinguish public footpath WB71 in Tunbridge Wells has been accepted.

Local Member: Mr Chris Hoare

Unrestricted item

Introduction and background

1. The Kent County Council has received an application to extinguish public footpath WB71 at Tunbridge Wells. The application has been made by the landowner, Town & Country Housing Group ("TCHG"), on the basis that the path is not needed for public use as there is a suitable alternative serving the same purpose (see **Appendix A** for a copy of the plan). Public footpath WB71 is not currently shown on the Definitive Map of Public Rights of Way (see **Appendix B** for an extract of the Definitive Map). Footpath WB71 commences on Burslem Road adjacent to property number 50 and runs generally south-east to its connection with Greggs Wood Road, adjacent to property number 135.

2. A Definitive Map Modification Order ("DMMO") was made on 18 June 2015 to record public footpath WB71 following the investigation of an application under section 53 of the Wildlife & Countryside Act 1981, dated 30 December 2011, by local Councillor Frank Williams (see **Appendix C** for a copy of the DMMO). The Order was made on the basis that public rights on foot were reasonably alleged to subsist due to use by the public over a period in excess of 20 years (see **Appendix D** for a copy of the delegated authority report). The decision to make this Order was finely balanced. Although no objections were received to the Order during the six week statutory notice period, a petition was received shortly after from local residents who were against the recording of the path, mainly due to the anti-social behaviour that had taken place in the garage area in the past. A number of those who had signed the petition had also given evidence of use of the Order route (see **Appendix E** for a copy of the petition).

3. The matter has become more complicated because a development of 6 dwellings had been built on the land over which footpath WB71 runs prior to the making of the DMMO. The area over which the footpath runs previously housed garages with vehicular access at either end and with bollards running across the centre to prevent cars cutting through. TCHG did not wish to apply to divert the path as it would not be in the interests of the occupiers of the new dwellings, or in the interests of a number of other local residents who had signed the petition against the path as mentioned above. There is an existing footway running from Burslem Road to Greggs Wood Road via Harries Road which serves the same purpose (albeit a bit longer), therefore it is considered that footpath WB71 is not needed for public use.

4. So whilst the DMMO has been made it has not been confirmed because it is considered that, in view of the change in circumstances, it makes better sense to extinguish this path by the making of a Public Path Extinguishment Order ("PPEO") and then to confirm the two Orders at the same time. In this way, footpath WB71 would never appear on the Definitive Map. The Order would be confirmed but instantly extinguished by the confirmation of the proposed PPEO.

Policy

5. The Countryside Access Improvement Plan, Operational Management document (2013) sets out the County Council's priorities for keeping the Definitive Map and Statement up to date. The main priorities in respect of Public Path Change Orders are:

Public Path Change Orders will normally be processed in the order in which applications are received, except in any of the following circumstances where an Order may be processed sooner:

- Where it will satisfy one or more of the relevant key principles set out in paragraphs 4.14 – 4.25 of the CAIP Operational Management document,
- Where an application has been made to the County Council in its capacity as Planning Authority
- Where the processing of an Order could save significant costs incurred in other Rights of Way functions
- Where a Public Path Change Order is made concurrently with Orders made under Section 53 of the Wildlife and Countryside Act.

6. The County Council will take into account whether the following criteria are satisfied before promoting a Public Path Change Order. Irrespective of the following, the statutory reasons (as set out within the Legal Tests section) for changing Public Rights of Way must apply.

- I. The status of the route must not be in dispute at the time of the application, unless the Public Path Order is being implemented concurrently with an application under Section 53 of the Wildlife and Countryside Act 1981.
- II. The applicant must agree to meet the County Council's costs of promoting the Order and bringing the new path into a fit condition for public use (as set out within section 3 of the Policy).
- III. The applicant must also agree to defray any compensation which may become payable as a result of the proposal.
- IV. The definitive line should, where it is considered by the County Council to be reasonably practicable, be open, clear and safe to use.

7. However, nothing in this policy is intended to prevent the County Council promoting a Public Path Change Order in any case where it considers it appropriate in all the circumstances to do so.

Legal Tests

8. Legislation relating to the extinguishment of a public path is contained within Section 118 of The Highways Act 1980; the procedure is contained within Schedule 6 of the same Act. The County Council must consider the following issues:

(i) The County Council may make an Order to extinguish a public path if it considers it expedient to do so on the grounds that it is not needed for public use.

(ii) The second major constraint is that the Order may not be confirmed, either by the County Council in the absence of objections or by the secretary of state when objections have been received, unless it has had regard to:

- (a) the extent to which it appears that the path would, apart from the Order, be likely to be used by the public; and
- (b) the effect which the extinguishment would have as respects land served by the path or way.

Consultations:

9. Consultations have been carried out as required and the following responses were received.

County Member and Borough Councillors

County Member Chris Hoare was consulted. Mr Hoare does not agree with the proposal as he has received a number of objections from elderly and infirm constituents who want this short-cut to the local shops, chemist and post office to remain.

Tunbridge Wells Borough Councillors Bob Backhouse, Lynne Weatherly and Frank Williams were consulted. No response was received from Councillor Weatherley. Councillor Williams wrote again to those people who had submitted evidence of use as part of his DMMO application (see paragraph 3 above). Of those 29 people, less himself, two have died and at least two have severe health conditions that prevent a response. From the thirteen responses he did receive back, eight were opposed to the path being extinguished, whilst five were in support of it being extinguished. Councillor Williams decided to follow the wishes of the majority and oppose the extinguishment. Councillor Backhouse agrees with the proposal, which highlights a difference of opinion between Councillors.

Tunbridge Wells Borough Council

Tunbridge Wells Borough Council's Planning Services were consulted but no response was received.

User Groups

The Ramblers, Open Spaces Society and British Horse Society were consulted. The only response received was from the Ramblers, who agreed with the proposal to extinguish the route and was surprised that TCHG had not objected to the DMMO.

Statutory Undertakers

None of the Statutory Undertakers who responded to the consultation objected to the proposal.

Area Public Rights of Way Manager

The West Kent Area Public Rights of Way Manager does not object to or support the proposal. He points out that the path does not contribute much to the overall network in the vicinity, there being no other rights of way in the area and its closure would not be a loss to the wider walking public. However he does recognise that it is the most direct link from a number of houses to the shops and facilities of Greggs Wood Road and its closure would be of dis-benefit to those limited number of houses.

The Case - the proposed extinguishment of public footpath WB71 at Tunbridge Wells

10. In dealing with the application to extinguish a public right of way, consideration must be given to the following criteria of Section 118 of the Highways Act 1980:

- a) Whether it is expedient to extinguish the path on the ground that it is not needed for public use;
- (b) The extent to which it appears that the path would, apart from the Order, be likely to be used by the public;
- (c) The effect which the extinguishment would have as respects land served by the path or way.

I will now take these points and my conclusions upon them individually:

a) Whether it is expedient to extinguish the path on the ground that it is not needed for public use

As I have already set out earlier in this report, it is expedient to extinguish the path. It appears that footpath WB71 might be used by some local residents to access the shops and community centre, which are located at point C on plan at Appendix A. However, considering the location of these shops to the footpath concerned, use is likely to be limited to a small number of residents from Burslem Road who would use this path rather than the existing footways. For example, it would be better for anyone living in Harries Road to continue on Harries Road to Greggs Wood Road; likewise, anyone living in Allandale Road or the southern end of Burslem Road would be better using Burslem Road southwards then Friars Way to connect to Greggs Wood Road from that direction. Although it may mean an additional 145 metres for some, it is considered that the existing footway via Harries Road generally serves the same purpose and is substantially as convenient. Therefore it is considered footpath WB71 is not needed for public use.

b) The extent to which it appears that the path would, apart from the Order, be likely to be used by the public

County Member Chris Hoare and local Councillor Frank Williams have stated that some of their more elderly and infirm constituents would use the path. The path has not been open for use for some time now, and although the County Council understands that this may have caused inconvenience for some, a balance should be sought. The legislation does not require that no one at all would use the path, but looks at the extent of that likely use. As explained at a) above, the path would, apart from the Order, be likely to be used only by a limited number of local residents.

c) The effect which the extinguishment would have as respects land served by the path or way

The land over which footpath WB71 runs is now a residential area of 6 dwellings. Originally the openings at either end were for vehicular access to and from the garages, although it also allowed for people to cut through from Burslem Road to Greggs Wood Road, primarily to access the local shops. The path is not needed to access that area now and so the extinguishment of the path will not adversely affect those new residents.

Recommendation

11. Therefore, for the reasons above, I recommend that the applicant be informed that the application to extinguish public footpath WB71 under Section 118 of the Highways Act 1980 has been accepted.

Accountable Officer:

Mr Mike Overbeke – Tel: 03000 413427 or Email: mike.overbeke@kent.gov.uk

Case Officer:

Mrs Maria McLauchlan – Tel: 03000 413420 or Email: maria.mclauchlan@kent.gov.uk

The case file is available for viewing on request at the PROW & Access Service, Invicta House, County Hall, Maidstone, Kent, ME14 1XX. Please contact the Case Officer for further details.

List of appendices

Appendix A - Plan of proposal

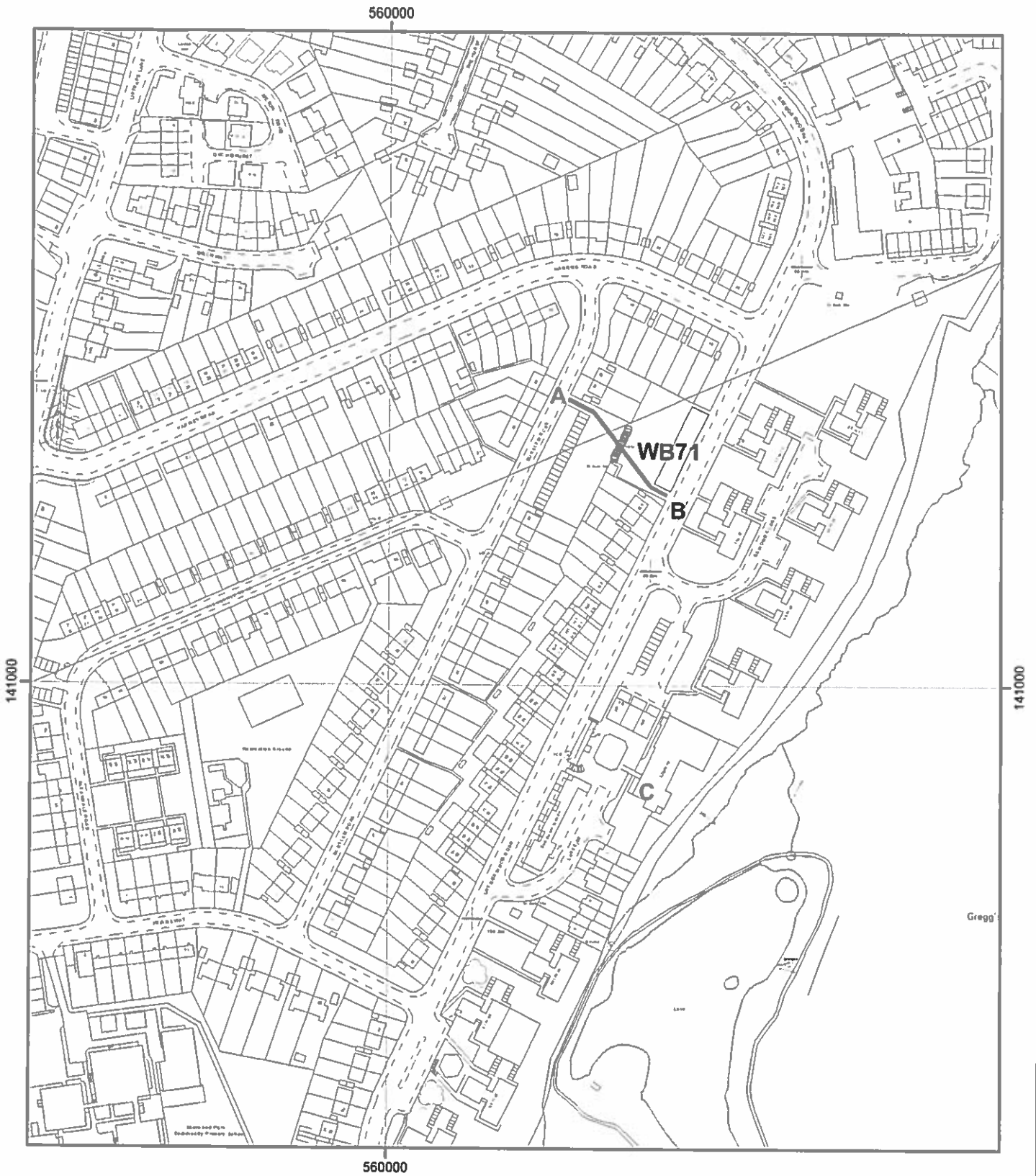
Appendix B - Extract from the Definitive Map, sheet 034 (TQ64SW)

Appendix C - Copy of the DMMO

Appendix D - Delegated authority report relating to the DMMO application

Appendix E - Copy of petition against the footpath

Case file - PROW/WB71/1489



Key

 Route to be extinguished

**Highways Act 1980
The Kent County Council
Proposed extinguishment of public footpath WB71
at Tunbridge Wells**

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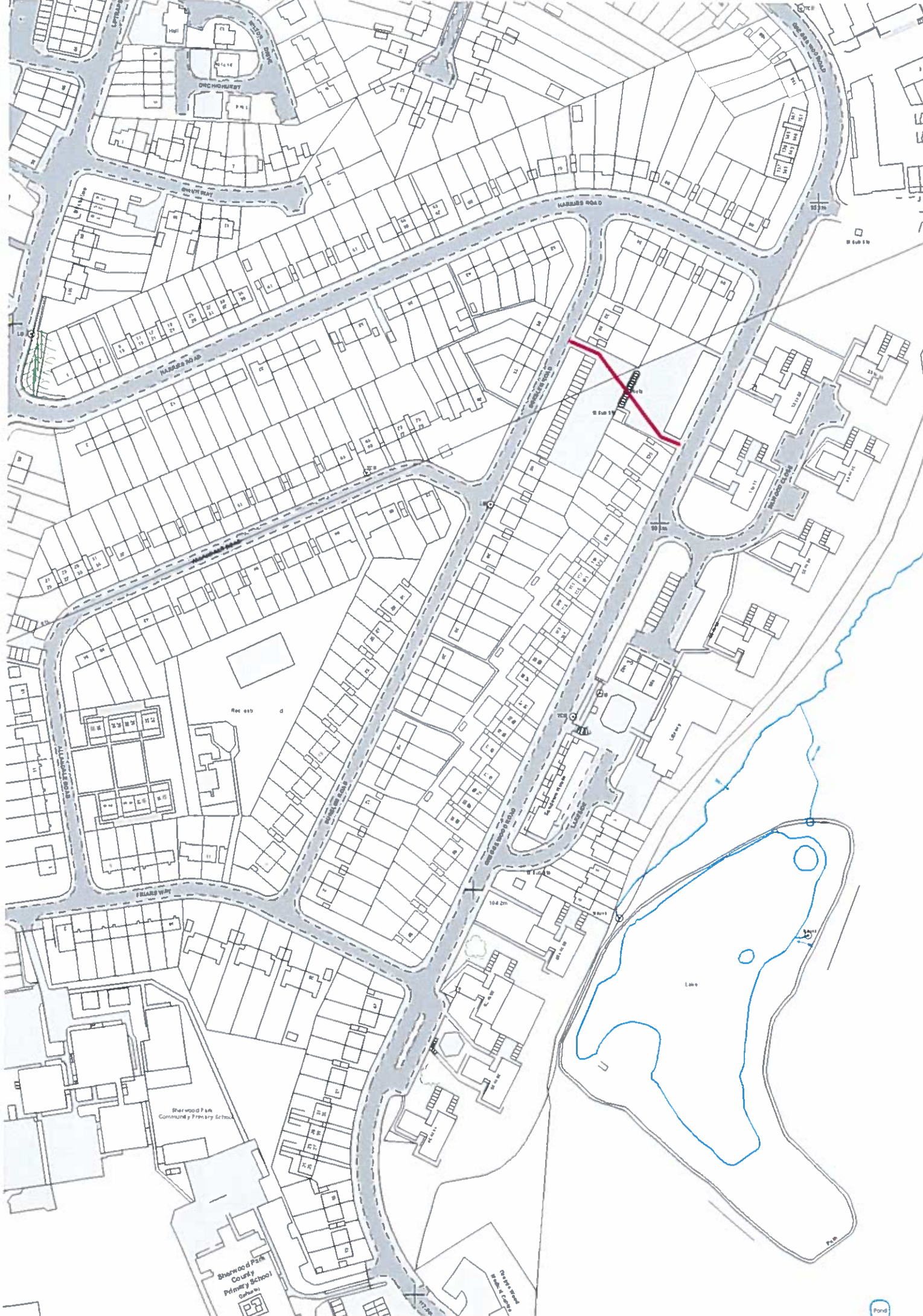
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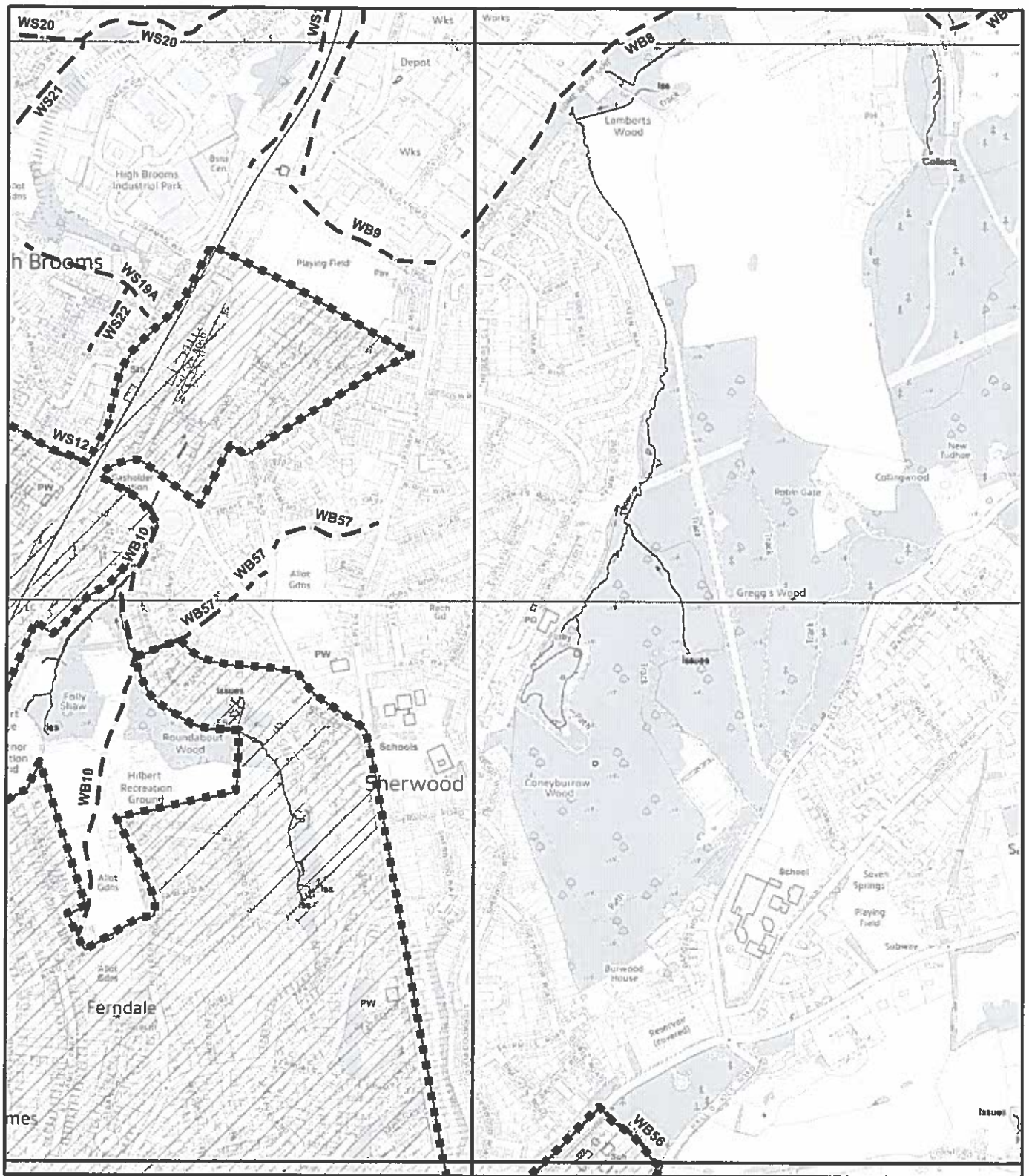
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Reference: PROW/WB71/ext









- Footpath
- · - Bridleway
- ∨ - ∨ Restricted Byway
- ⋈ Byway Open to All Traffic
- Point path number or status changes
- Boundary of area covered by 1:2500 scale Network Map
- ▨ Area covered by 1:2500 scale Network Map

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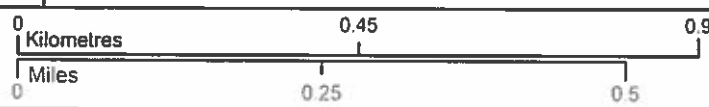
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Checked by:	MMcL
Issue Date:	20/01/16
Reference:	TQ64SW
Map sheet 034	



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IN THE BOROUGH OF TUNBRIDGE WELLS
WILDLIFE AND COUNTRYSIDE ACT 1981
DEFINITIVE MAP AND STATEMENT FOR THE COUNTY OF KENT
MAP SHEET 034 (TQ64SW)
THE KENT COUNTY COUNCIL
(PUBLIC FOOTPATH WB71, TUNBRIDGE WELLS)
DEFINITIVE MAP MODIFICATION ORDER 2015

This Order is made by the Kent County Council ("the Authority") under section 53(2)(b) of the Wildlife and Countryside Act 1981 ("the Act") because it appears to the Authority that map sheet 034 (TQ64SW) of the Definitive Map and Statement for the County of Kent requires modification in consequence of the occurrence of an event specified in section 53(3)(c)(i), namely the discovery of evidence by the Authority which shows 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 such that the land over which the right subsists is a public path or a restricted byway or, subject to section 54A, a Byway Open to All Traffic.

The Authority has consulted with every local authority whose area includes the land to which the Order relates.

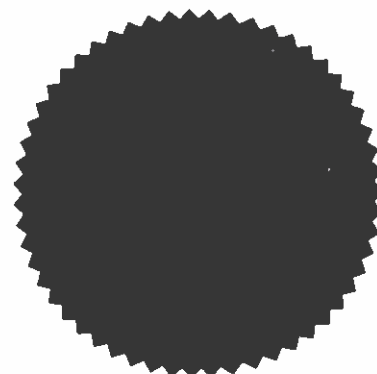
The Kent County Council hereby orders that:

1. For the purpose of this Order the relevant date is 1st June 2015.
2. Sheet 034 (TQ64SW) of the Definitive Map for the County of Kent and its associated Statement shall be modified as described in Part I AND Part II of the Schedule and shown on the map attached to this Order.
3. This Order shall take effect on the date it is confirmed and may be cited as the "*The Kent County Council (Public Footpath WB71, Tunbridge Wells) Definitive Map Modification Order 2015*".

GIVEN UNDER THE SEAL OF THE KENT COUNTY COUNCIL THIS 18th DAY OF JUNE IN THE YEAR TWO THOUSAND AND FIFTEEN

**THE COMMON SEAL OF THE KENT COUNTY COUNCIL
was hereunto affixed in the presence of:**

.....
AUTHORISED SIGNATORY



606-2015



SCHEDULE

PART I: MODIFICATION OF DEFINITIVE MAP

Description of path to be added

The effect of the Order is to add a public footpath, with a width of 1.2 metres, which commences on Burslem Road adjacent to property number 50 at NGR TQ 6008 4113 (point A) and runs generally south-east for approximately 13 metres, then turns to run generally south-south-east for approximately 44 metres and then turns to run generally south-east again for approximately 9 metres to its connection with Greggs Wood Road, adjacent to property number 135 at NGR TQ 6012 4108 (point B). Between points A-B on the Order plan).

PART II: MODIFICATION OF DEFINITIVE STATEMENT

The Definitive Statement is amended by the addition of the following entry:

WB71 – Footpath
Connections – Burslem Road, Greggs Wood Road

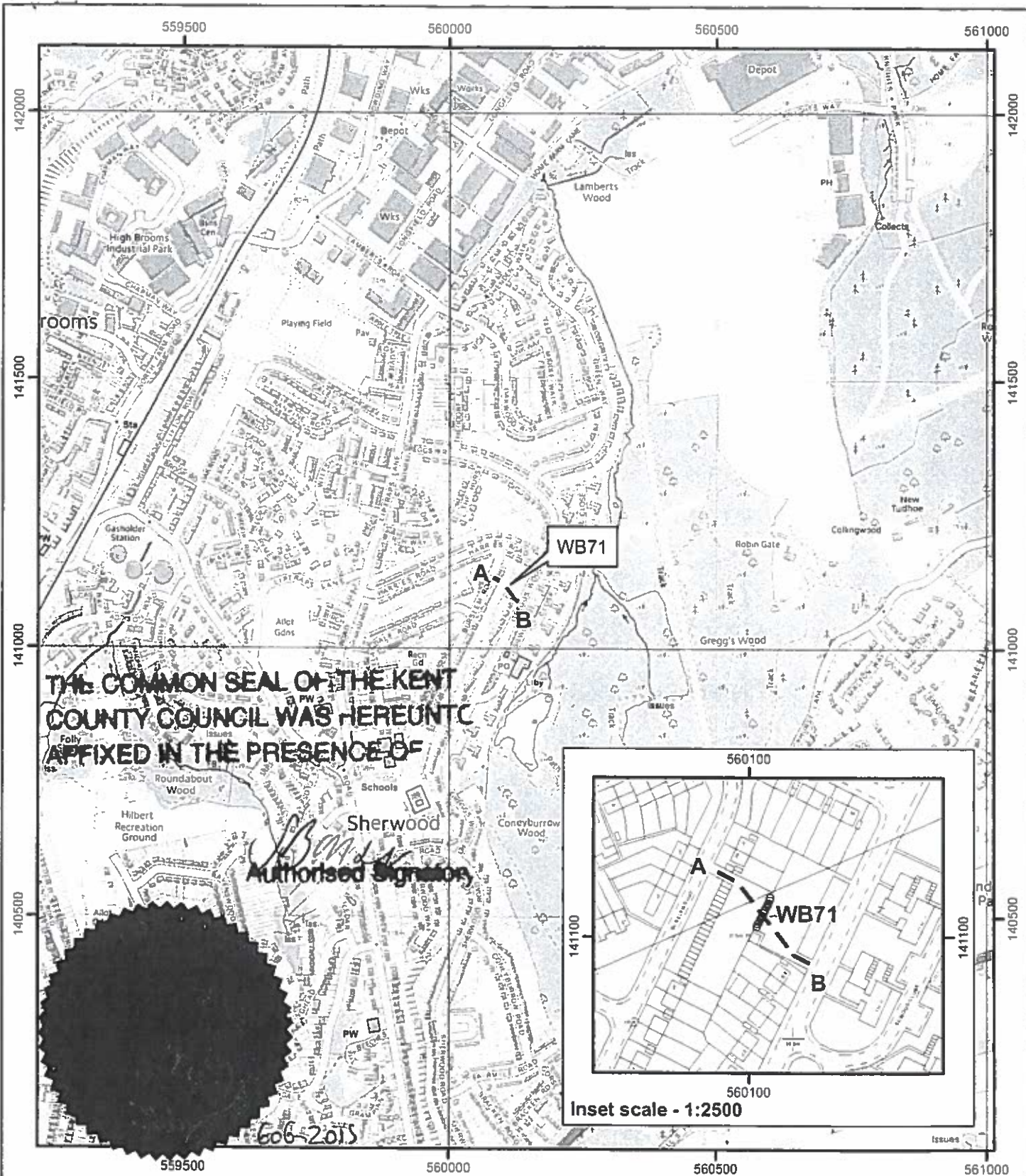
Added by The Kent County Council (Public Footpath WB71, Tunbridge Wells) Definitive Map Modification Order 2015 with a width of 1.2 metres for the new length of path.

WILDLIFE AND COUNTRYSIDE ACT 1981

**THE KENT COUNTY COUNCIL
(PUBLIC FOOTPATH WB71, TUNBRIDGE WELLS)**

DEFINITIVE MAP MODIFICATION ORDER 2015





Key

- - - - - Route to be Added

**Wildlife & Countryside Act 1981
The Kent County Council
(Public Footpath WB71, Tunbridge Wells)
Definitive Map Modification Order 2015**

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Kilometres

Created by: MMCL Checked by: CW

Reference: PROW/TWIC343

Public Rights of Way and Access Service





From: Maria McLauchlan (Public Rights of Way Officer – Definition Team)
To: Corporate Director of Growth, Environment & Transport
Subject: Claimed footpath running from Burslem Road to Greggs Wood Road at Tunbridge Wells
File Ref: PROW/TW/C343 **District:** Tunbridge Wells

Summary: To seek delegated authority to make an Order to modify the Definitive Map and Statement by adding a public footpath running from Burslem Road to Greggs Wood Road at Tunbridge Wells

FOR DECISION

Introduction

1. The County Council is the Surveying Authority for Kent and is responsible for producing a Definitive Map and Statement of Public Rights of Way. The current Definitive Map and Statement were published on 31st May 2013. Under the Wildlife and Countryside Act 1981, the County Council is under an obligation to keep the Map and Statement under continuous review.

Procedure

2. The Countryside Access Improvement Plan, Operational Management document (2013) sets out the County Council's priorities for keeping the Definitive Map and Statement up to date and ensuring that the status and alignment of all PROW are correct in accordance with statutory duties by:-
 - a) Investigating and determining all claims in accordance with the statement of priorities
 - b) Investigating and determining anomalies in accordance with statement of priorities
 - c) Processing applications to change PROW in accordance with policy and statement of priorities.
 - d) Ensuring all changes are covered by a formal Order

Definitive Map modification cases will normally be investigated in the order in which applications are received, except in any of the following circumstances, where a case may be investigated sooner:

- Where it will satisfy one or more of the relevant key principles set out in paragraphs 4.14 – 4.25 of the CAIP Operational Management document,
- Where the physical existence of the claimed route is threatened by development,
- Where investigation of a case would involve substantially the same evidence as a route currently under investigation or about to be investigated.

3. The investigation of this particular issue has been carried out in accordance with the report to the Sub-Committee in February 1990, which outlined the procedures to be used for sources of evidence and the legal tests to be applied.

Legal Tests

4. (a) Section 53 of The Wildlife and Countryside 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows 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 such that the land over which the right subsists is a public path or a restricted byway or, subject to section 54A, a Byway Open to All Traffic, it shall, by Order, make such modifications to the Map and Statement as appear requisite.

(b) Section 31 of the Highways Act 1980 states that "where a way over any land, other than a way of such 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 twenty 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". The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

(c) Alternatively, a public right of way may be established over a shorter period of time under Common Law. In *Mann v. Brodie* (1885), Lord Blackburn considered that where the public had used a route "for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was", i.e. the dedication of a way as a public right of way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

The Case

5. A plan showing the claimed route is included as **Appendix A** to this report and a detailed description of the case can be found in **Appendix B** to this report.

Investigation

6. Investigations have included the inspection of County Council records and documents available from other sources.
7. I have considered all of the evidence available. The documentary evidence and the results of the legal tests applied are set out and examined in **Appendix B**.

Conclusion

8. Investigations have been carried out in accordance with procedures and proper legal tests have been applied to the evidence gathered during the investigation. The result of the investigation is that a public right of way is reasonably alleged to subsist.

Recommendation

9. I recommend that the County Council makes an Order to modify the Definitive Map and Statement by adding a public footpath running from Burslem Road to Greggs Wood Road at Tunbridge Wells, as shown on the attached plan marked Appendix A.

Signature 
On behalf of the Corporate Director of Growth, Environment & Transport

Date 24 April 2015

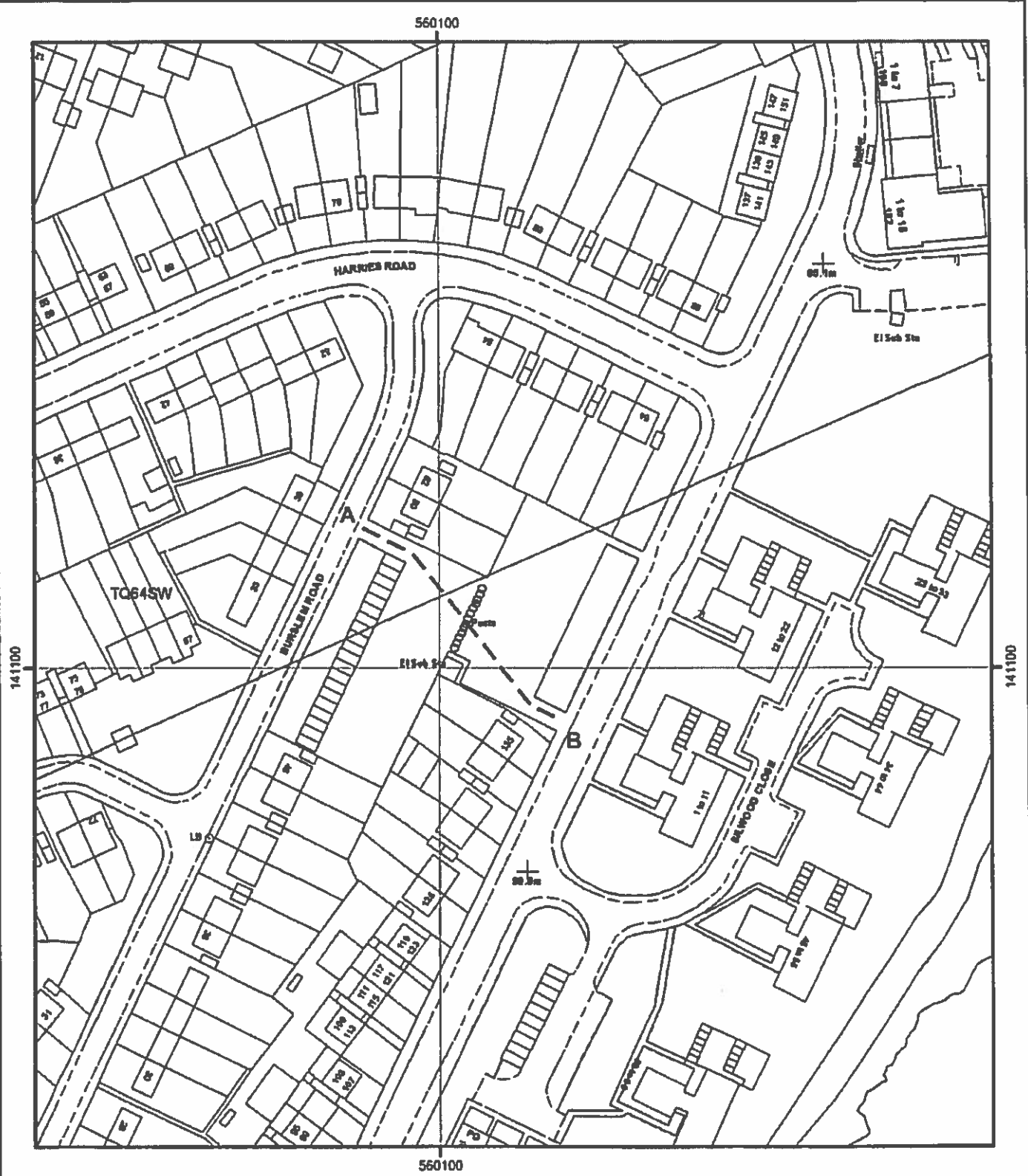
Background Documents:



- APPENDIX A – Plan showing the claimed route
- APPENDIX B – Main report
- APPENDIX C – Summary of user evidence in support of the application

Contact Officer:

Maria McLauchlan
Tel: 03000 413420

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<p>Key</p> <p>----- Claimed route</p>	<p>Wildlife & Countryside Act 1981</p> <p>Claimed footpath running between Burslem Road and Greggs Wood Road, Tunbridge Wells</p>		<p>N</p>  <p>1:1,250</p>
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<p>Public Rights of Way and Access Service</p>		<p>Reference: PROW/TW/C343</p>	



- — Footpath
- | — Bridleway
- < — | — Restricted Byway
- > — | — Byway Open to All Traffic
- ⌘ Point path number or status changes
- ■ ■ Boundary of area covered by 1:2500 scale Network Map
- ▨ Area covered by 1:2500 scale Network Map

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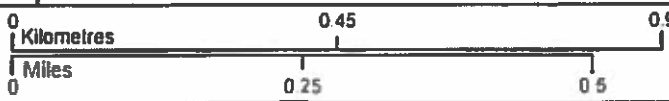
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Issue Date:
19/11/2014

Reference:
**Map sheet 034
TQ64SW**

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Case Title: Claimed footpath running from Burslem Road to Greggs Wood Road at Tunbridge Wells

Ref: PROW/TW/C343

APPLICANT'S SUBMISSION

10. The application (Schedule 7 dated 30 December 2011) has been made by Mr Frank Williams ("the applicant"), resident and local councillor. The applicant has applied for an Order under Section 53(5) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement for the area by adding a footpath running from Burslem Road to Greggs Wood Road ("the claimed route").

11. In support of the application, the applicant has provided evidence of use by 30 witnesses.

Description of route

12. The claimed route (shown on the plan at **Appendix A**) commences on Burslem Road adjacent to property number 50 and runs generally south-east for approximately 13 metres, then turns to run generally south-south-east for approximately 44 metres and finally turns to run generally south-east again for approximately 9 metres to its connection with Greggs Wood Road, adjacent to property number 135.

DOCUMENTARY EVIDENCE

The Wildlife and Countryside Act 1981 requires that, when investigating such applications, the County Council must consider 'all other relevant evidence available'. I have therefore interrogated the following documentary evidence:-

Tithe Map (circa 1840)

13. Tithe Maps were produced by the Tithe Commissioners, under the 1836 Tithe Commutation Act, to record all parcels of land that generated titheable produce. The Tithe Maps were concerned solely with identifying titheable land but nonetheless can sometimes provide useful supporting evidence about public rights of way.

14. In this case, the Tithe Map does not show the claimed route.

First Edition Ordnance Survey 1:2500 Map and Book of Reference (circa 1860)

15. The First Edition 25" Ordnance Survey Maps and accompanying Area Reference Books were produced by Ordnance Survey in an effort to map the entire country at 1:2500 scale. They were essentially topographical surveys and were not concerned with landownership and rights, but do provide useful information as to the existence of the routes on the ground at that time.

16. The First Edition OS Map does not show the claimed route. In addition, the subsequent OS Maps (2nd, 3rd and 4th Editions) do not show the claimed route.

Finance Act 1910 and Valuer's Field Book

17. The Finance Act 1910 Maps and Valuer's Field Books were documents which recorded the value of land holdings. The Act provided for the levying of a tax upon the incremental value of the land, and between 1910 and 1920 (when it was repealed), the whole country was surveyed in order to produce a comprehensive record of the site value of all land. Individual (private) land holdings were shown on the map in different colour wash with boundaries marked and hereditament numbers accorded to different parcels. The Valuer's Field Books recorded details about every parcel of land and listed categories for which a reduction in the amount of tax payable on the land holding could be sought. One such category was for public rights of way admitted to exist at the time by the landowner.

18. In this case, the Finance Act map does not show the claimed route.

Parish Map (1950)

19. In consequence of the National Parks and Access to the Countryside Act 1949, County Councils were required to undertake a survey of '*all lands in their area over which a right of way... [was] alleged to subsist*' and then to prepare a draft map showing on it those footpaths, bridleways and roads used as public paths which the County Council as Surveying Authority considered to be public rights of way. In practice, the initial surveys were undertaken by the Parish Councils who were required to call a Parish Meeting to consider the information to be provided and who then submitted maps and statements showing the alleged rights of way within their parish.

20. The Parish Map does not show the claimed route as one marked for inclusion.

Draft Map (1952)

21. Following consultation with the District Councils, the County Council then prepared a Draft Map from the information contained in the Parish Map.

22. The Draft Map does not show the claimed route.

Provisional Map (1952)

23. The Provisional Map for Tunbridge Wells with a relevant date of 1 December 1952 does not show the claimed route. There was opportunity for landowners, lessees and tenants to object to this map and no objections were received relating to the claimed route.

Definitive Map (Relevant date 1st December 1952)

24. The National Parks and Access to the Countryside Act (1949) required County Councils to survey all land over which a Public Right of Way was alleged to subsist and prepare a map showing these routes. The first Definitive Map and Statement of Public Rights of Way for the County of Kent was published with a relevant date of 1st December 1952.

25. The original Definitive Map for the County of Kent did not, therefore, show the claimed route.

Review of survey (1970)

26. Following the publication of the Definitive Map in 1952, the County Council, under the National Parks and Access to the Countryside Act 1949, had a duty to produce a revision of the original map. Consequently, and following broad consultation, the County Council published a Draft Revised Map with a relevant date of 1st October 1970.
27. The Draft Revised Map of 1970 did not show the claimed route as being one that was to be included at this review stage.

Definitive Map (Relevant date 1st April 1987)

28. The 1987 Definitive Map of Public Rights of Way did not, therefore, show the claimed route.

Definitive Map (Relevant date 31/5/13)

29. The current Definitive Map of Public Rights of Way does not show the claimed route.

Section 31(6) Deposits

30. Section 31(6) of the Highways Act 1980 allows a landowner to deposit with the County Council maps, statements and declarations (formerly statutory declarations) indicating what ways (if any) over their land have been dedicated as highways. Together, the deposit of the map and statement with any subsequent declarations is 'in the absence of proof of contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional ways as highways'. In Order to remain effective, the Act requires that any declaration be renewed within every 20 years (formerly 10 years and amended by *The Commons (Registration of Town or Village Greens) and Dedicated Highways (Landowner Statements and Declarations) (England) Regulations 2013*).
31. In this case no Deposit under section 31(6) of the Highways Act 1980 has been submitted relating to the land over which the claimed route runs.

CONSULTATIONS

Consultations have been carried out as required. The following responses have been received:

County Member

32. County Member, Chris Hoare, was consulted but no response was received.

Tunbridge Wells Borough Councillors

33. Councillors Bob Backhouse and Lynn Weatherly were consulted. Cllr Weatherly responded that she and residents of her care home had used the claimed route for 23 years but she had no issue with walking along Harries Road.

Tunbridge Wells Borough Council

34. Tunbridge Wells Planning Services were consulted but no response was received.

User Groups

35. The Ramblers, British Horse Society ("BHS") and Open Spaces Society ("OSS") were consulted but no response was received from any of these user groups.

USER EVIDENCE

36. In support of the application, 30 user evidence forms were submitted. These are summarised at Appendix C. Despite offers of interview to all those who had submitted a UEF, and a chaser letter, only 7 face to face interviews were undertaken. It is understood that two witnesses have died since the application was submitted and two were unwell and so could not be interviewed; one person had moved away. Two identical pre-drawn maps accompanied the UEFs submitted with the application – one map for UEFs 1-18 and another for UEFs 19-30, with signatures agreeing that the route shown on those maps was the one used by the witnesses.
37. There is evidence of use of a route on foot from Burslem Road to Greggs Wood Road since 1961. Frequency of use has varied, from some witnesses using it daily and others just occasionally. The majority of witnesses used the route to access the shops in Greggs Wood Road. None of the witnesses had ever been challenged or been given permission; there have never been any restrictions, obstructions or prohibitive notices.
38. 7 witnesses were interviewed face to face. In marking the route they used on a plan, and describing the route used, this varied somewhat. 2 of the witnesses interviewed used a different alignment to that claimed; 1 could not mark the plan due to poor eyesight, but her description was not precise enough to be clear; 1 other marked the route used as the claimed route but stated that he also used the alternative (north) exit onto Greggs Wood Road sometimes, his route varying depending on whether cars were parked in the garage area; 3, including the applicant, marked the route on the plan as claimed. 1 of the witnesses who was interviewed also stated that they rented a garage at that site for a number of years. In addition, 2 people who had signed UEFs submitted with the application, subsequently wrote stating that they had not used the claimed route at all.

LANDOWNER

39. The Town & Country Housing Group ("TCHG") has owned the land over which the claimed route runs since 1992; prior to that it was owned by Tunbridge Wells Borough Council. A representative from the TCHG stated that the area was a former garage site which attracted a great deal of anti-social behaviour (this has been corroborated by some residents whose properties back onto the site). Consultation events were held to make the local community aware of the development plans and the TCHG received no objections in regard to a possible right of way. Whilst designing the scheme TCHG took advice from the local Police Architectural Officer who stated that no walkway should be incorporated as this would result in continued anti-social behaviour. The TCHG has never erected and maintained any notices, barriers or other works on that site until April 2014 when hoardings were erected whilst the development took place. The TCHG has not received any complaints about the area being closed.

STATUTE AND LEGAL TESTS

40. Section 53 of The Wildlife and Countryside 1981 states that where the County Council discovers evidence which, when considered with all other relevant evidence available to it, shows 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 such that the land over which the right subsists is a public path or a restricted byway or, subject to section 54A, a Byway Open to All Traffic, it shall, by Order, make such modifications to the Map and Statement as appear requisite
41. Section 31 of the Highways Act 1980 states that 'where a way over any land, other than a way of such 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 twenty 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'. The period of twenty years referred to is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.
42. Alternatively, a public right of way may be established over a shorter period of time under Common Law. In the case of **Mann v. Brodie**¹, Lord Blackburn considered that where the public had used a route '*for so long and in such a manner that the [landowner]... must have been aware that members of the public were acting under a belief that the right of way had been dedicated and had taken no steps to disabuse them of their belief, it is not conclusive evidence, but evidence which those who have to find the fact may find that there was a dedication by the owner whoever he was*', i.e. the dedication of a way as a public right of way can be implied by evidence of use by the public (no minimum period is required) and of acquiescence of that use by the landowner.

¹ (1885) 10 App Cas 378

CONCLUSION

43. As there is little mapping or documentary evidence in support, the application rests solely on user evidence. Hence, in determining whether a right of way is reasonably alleged to subsist, it is necessary to have regard to the provisions contained within section 31 of the Highways Act 1980 (outlined above).

The 'date of challenge'

44. The first step is to identify the date upon which the right of the public to use the route was first brought into question ('the date of challenge'). There is no precise definition of what constitutes 'bringing into question' the public's right to use a particular route, but generally speaking the public's right is brought into question when there is some sort of overt and identifiable challenge to such use, for example, by way of the erection of a notice telling the public to 'keep out' or the locking of a gate to physically prevent access.

45. In this case, there is no evidence that the use of the claimed route has ever been challenged in any way prior to the date of application (it was subsequently blocked off by hoardings). Under these circumstances, as prescribed in section 69 of the Natural Environment and Rural Communities Act 2006, the date of challenge is to be taken as the date of application. I have therefore taken December 2011 as the date of challenge and have considered very carefully the twenty-year period between 1991 and 2011 ('the material period') in my investigation.

'as of right' use for a full period of 20 years

46. For use to have been 'as of right', it must have taken place without force, without secrecy and without permission²

47. In relation to the length of use, it is clear that people have cut through from Burslem Road to Greggs Wood Road on foot throughout the material period and until 2014 when the hoardings were erected. There is no evidence that use of the claimed route has been interrupted during this period.

48. There is no precise definition set out in statute as to the quantity of user evidence required in order to satisfy the tests for presumed dedication. This will invariably depend upon the particular circumstances of each case; for example, in a rural setting away from any significant place of public resort, use is likely to be far less frequent than a path serving a functional link within an urban area and thus the quantity of user evidence required to show that presumed dedication has occurred is likely to be lower.

49. In this particular case, the route is a semi-urban utility route, with the majority of witnesses citing their reason for use as 'going to the shops'. 30 UEFs were completed by witnesses and submitted with the application. From these 30, only 7 responded to the offer of a face to face interview and 2 wrote stating that they had not, in fact, used the claimed route. However, the other witnesses who submitted evidence as part of the application had all signed to state that they had used the route as depicted on the plans accompanying the application. 1 witness stated that they had rented a garage on that site, so their use was potentially not 'as of right', as they already had a right to be there.

² *R v. Oxfordshire County Council, ex p. Sunningwell Parish Council* [1999] 3 WLR 160

50. There is no evidence to suggest use was by force or that use took place at any unreasonable times; there is no evidence that anyone received permission to use the claimed route.

Evidence of non-intention to dedicate

51. Even if all the legal tests relating to quality and quantity of use have been met, a public right of way cannot come into being where there is evidence that the landowner demonstrated a lack of intention to dedicate the claimed route. This lack of intention must be communicated to the users of the claimed route, as confirmed by Lord Hoffman in the recent **Godmanchester**³ case: *'I think that upon the true construction of s 31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending... to 'disabuse [him]' of the notion that the way was a public highway'*.

52. In this case, the landowner has never erected prohibitive notices, barriers or other works to deter use until the present hoardings were erected around the site prior to the development commencing. There has never been a Deposit submitted under section 31(6) of the Highways Act 1980 by any owner of the land. Therefore, the conclusion can be drawn that the landowner has never shown an intention not to dedicate any way as a public right of way over the land in question.

53. In this case, there is no inference of dedication under Common Law. The area was a site for rented garages with an open area for cars. Bollards located at approximately half distance across the site were placed to prevent cars cutting through but clearly allowed access for pedestrians. There was never anything to mark out a specific pathway or route for walkers and therefore it can be reasonably deduced that there has not been an inference of dedication at Common Law.

Whether a right of way is 'reasonably alleged to subsist'

54. The tests contained in section 31 of the Highways Act 1980 (set out above) are to be considered in conjunction with the requirement in section 53 of the Wildlife and Countryside Act 1981 that a right of way must be shown to 'subsist' or is 'reasonably alleged to subsist'. This issue was considered in the case of **Norton and Bagshaw**⁴, in which the judge distinguished between the two tests to be applied and stated that in deciding whether or not to make a Definitive Map Modification Order the question to be asked is thus: *'does the evidence produced by the claimant together with all the other evidence available show that either (a) a right of way subsists? [known as 'test A'], or (b) is it reasonable to allege that a right of way subsists? [known as 'test B']*. The test to be applied is not therefore whether it is reasonable for the claimant to allege that a right exists, but rather whether a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

³ *R (Godmanchester) v Secretary of State for the Environment* [2007] 4 All ER 273 at page 284

⁴ *R v Secretary of State for the Environment, ex parte Norton and Bagshaw* (1994) 68 P&CR 404 at page 408

55. This approach was subsequently affirmed in the **Emery**⁵ case, in which the judge said this: *'where the applicant for a modification order produces credible evidence of actual enjoyment of a way as a public right of way over a full period of 20 years... then the allegation that the right of way subsists is reasonable'*.

56. In the present case, there is clear evidence that people have used the garage area as a cut through from Burslem Road to Greggs Wood Road (or vice versa) over the years. Although there are a couple of variations, the claimed route - both points of entry to the garage area being bounded on either side - has been frequently used by a large number of people over the material period without interruption. In addition, the landowner has not challenged that use in any way during the material period, nor made it clear to the public that it was not a right of way. Therefore, it is reasonable, having considered all the relevant evidence available, to allege that a right of way subsists over the claimed route.

Other matters

57. The County Council is aware that the landowner has commenced development of the site and that the right of way as claimed is no longer physically available on the ground. However, the County Council is unable to take that matter into account in reaching its decision on the application. Problems this may cause for both the landowner and users may need to be resolved under other legislation.

RECOMMENDATION

58. I therefore recommend that the County Council makes an Order to modify the Definitive Map and Statement by adding a public footpath running from Burslem Road to Greggs Wood Road at Tunbridge Wells, as shown on the attached plan marked **Appendix A**.

⁵ *R v Secretary of State for Wales, ex parte Emery* [1998] 2 All ER 367 at page 379

PROW/TW/C343 Claimed Footpath from Burslem Road to Greggs Wood Road at Tunbridge Wells

NAME	DATES WAY USED	BY WHAT MEANS	REGULARITY OF USE	REASON FOR USE	OBSTRUCTIONS / RESTRICTIONS / PERMISSIONS / NOTICES
Paul Barden (Initial UEF)	2000-2011	On foot	Occasionally	To go to the One-Stop shop and as a short cut.	None.
Mrs Ruby Bartlett (Initial UEF)	1962-2011	On foot	Daily	Shops and bus.	None.
Mrs Marion Bassett (Initial UEF)	1961-2011	On foot	2-3 times a week	Doctors or shopping.	None.
Jennifer Bays (Initial UEF)	1965-2011	On foot	Weekly	To go to the shops, to go to church, visiting friends, to talk to the TWBC rep about wheelie bins.	None.
Mrs Dawn Bush (Initial UEF)	1978-2011	On foot	Weekly	Shops and bus route.	None.
Edward Bush (Initial UEF)	1978-2011	On foot	Weekly	Shops and bus route.	None.
David Carr (Initial UEF + letter)	1970's-2011	On foot	Daily in the past, now occasionally	To go to the shops; dog walking.	None.
Mrs Lilian Carr (Initial UEF + letter)	1970's-2011	On foot	Weekly initially, now occasionally	To go to the shops; dog walking.	None.
Mrs Patricia Delaney (Initial UEF)	1997-2011	On foot	Daily	To go to the shops, post office; to catch the bus; to walk the dog.	None.
Mrs Audrey Clark (Interview)	1964-2014	On foot	3-4 times a week	To go to the chemist, post office & general store and TN2; to go to the bus stop	None. Route not marked on map and description not precise.
Mrs Joan Dunmall (Interview)	1971-2014	On foot	Weekly	To go to the shops, post office and chemist.	None. Route marked on map different to claimed
Sonia Funnell (Interview)	1978-2014	On foot	Daily	To go to the post office and bus stop.	None.
Jean Glass (Initial UEF)	?-2011	On foot	Daily	Going shopping.	None.
Ronald Glass (Initial UEF)	1962-2011	On foot	Daily	To go to shops.	None.
Thelma Hughes (Initial UEF)	1962-2011	On foot	Weekly	To go to the post office, library, chemist, community centre.	None.
Timothy Hughes (Initial UEF)	1962-2011	On foot	Weekly	To go to the shops, community centre, library, chemist, post office.	None.
J Leete (Initial UEF)	1983-2011	On foot	Daily	To the bus stop, shops, community centre.	None.

PROW/TW/C343 Claimed Footpath from Burslem Road to Greggs Wood Road at Tunbridge Wells

NAME	DATES WAY USED	BY WHAT MEANS	REGULARITY OF USE	REASON FOR USE	OBSTRUCTIONS / RESTRICTIONS / PERMISSIONS / NOTICES
Susan Leete (Initial UEF)	1983-2011	On foot	Daily	To the bus stop, shops, community centre.	None.
Mrs Doris Malyon (Initial UEF)	1961-2011	On foot	Between daily and weekly	To go to Greggswood post office and shops.	None.
Brian Martin (Initial UEF) *	1989-2011	On foot	Weekly	For access to shops and bus stop.	None.
Mrs Janice Carr- Martin *	1989-2011	On foot	Weekly	To go to the shops.	None.
Mrs M Quinnett (Initial UEF)	2001-2011	On foot	Daily	To go to the shops.	None.
Mr Alan Mepham- Chantler (Interview)	1981-2014	On foot	Weekly	To go to the shops.	None. Route marked on plan as claimed but also stated he would use alternative (north) exit on to Greggs Wood Road sometimes
Cyril Rowden (Initial UEF)	1984-2011	On foot	Daily	Shopping, going to the local post office.	None.
Mrs Daphne Scott (Interview)	1960's-2014	On foot	Daily	Shop TN2, bus stop.	None.
David Staden (Interview)	1963-2011	On foot	Weekly	Buses and shops.	None. Route marked on plan different to claimed
John Stevenson (Initial UEF)	1997-2011	On foot	Weekly	Dog walking, shops, bus, short cut.	None.
P Tilford (Initial UEF)	1997-2011	On foot	6 days a week	To see a friend.	None.
Mrs Celia Towner (Initial UEF)	1965-2011	On foot	Occasionally	To go to the shop, post office.	None.
Frank Williams (Initial UEF)	1983-2014	On foot	Occasionally	As a short cut.	None.

* Note dated 26/01/15 stating they had never used the claimed route!

7 Aug 2015

Mr & Mrs Spittles
 131 Greggs Wood Rd
 Tunbridge Wells
 Kent TN2 3JQ






Tel: 01892 519353

Petition

This is a petition to stop a public walkway between Burslem Road into Greggs Wood Road. There has never been a footpath or walkway between these two roads and residents do not wish this to happen.

Name	Address	Sig
Terrifer Bays	129 Greggswood Road T/WELLS	T R Bays
Philippa Spittles TREVOR SPITTLES	131 Greggswood Rd Tun wells 131 GREGGS WOOD ROAD, TUNBRIDGE WELLS.	P. Spittles T R Spittles
Emma Elias	133 Greggs Wood Rd	E Elias
Anthony Elias	133 Greggs Wood Rd	A Elias
Chris Turley	170 Greggs wood Rd	Chris
Becki Tunley	180 Greggs	Becki
Jenny Gardner	135 GREGGS WOOD ROAD	J Gardner
Katie Nash	135 A GREGGS WOOD ROAD	K Nash
STEVE NASH	135A GREGGS WOOD ROAD	S Nash

Name	Address	Sig
K. Clore	135C Greggswood	K. Clore
J. O. Williams	135D Greggswood road	J. O. Williams
P. Jackson	"	P. Jackson
A. Brown	62 HARRIES RD	A. Brown
P. Chanter	54 HARRIES RD	P. Chanter
R. Mills	52 Burslem Road	R. Mills
A. Shephard Chanter	50 BURSLEM TN 23TT	A. Shephard Chanter
P. D. Delaney	37 BURSLEM ROAD	P. D. DELANEY
A. D. Gibson	11 11 11	S. D. STEVENSON
PAUL CAMPBELL	34 BURSLEM RD	P. Campbell
SUFIA RAHMANN	48B BURSLEM ROAD	S. Rahman
CM Cummings	48a Burslem Road	CM Cummings

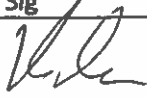




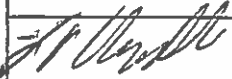


Name	Address	Sig
Kelly COLLINS Terry COLLINS	42 BURNHAM RD TN2 3TT T. Wells	 
Daniel Kent Lenore Fuller	62 Greenwood Road. Tunbridge Wells.	D. Kent L. Fuller.
Fahim	190 Greggswood Rd TN2 3JGZ	
TANI CUSHMAN HEATHER CUSHMAN	44 APRILS RD TN2 3TR TUNNELS	T C H C
Daphne Scott	128 Greenwood Road	D. Scott
J JOHNSON	129 GREGGS WOOD	
Joe & Stephen Bursane	125 GREGGSWOOD RD	

Tel: 01892 519353



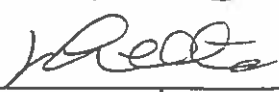


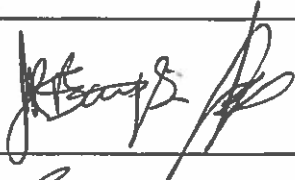
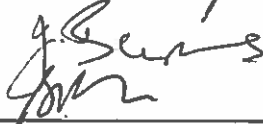

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Name	Address	Sig
Jennifer Bays	129 Greggswood Road T/WELLS	JRBays
Philippa SPITTLES	131 Greggswood Rd	P. Spittles
TREVOR SPITTLES	131 GREGGS WOOD ROAD TUNBRIDGE WELLS	T. Spittles
EMMA ELIAS	133 Greggs Wood Rd	Elmas
Anthony Elias	133 Greggs Wood Rd	Elmas
Chris Turley	170 Greggs Wood Road	Chris
Becki Turley	180 Greggs Wood Rd.	Becki & Turley -
JENNY GARDNER	135 GREGGSWOOD ROAD	J Gardner
KATIE NASH	135 GREGGSWOOD ROAD	K Nash
STEVE NASH	135A GREGGSWOOD RD	Steve Nash

Name	Address	Sig
K. CLARK	135C GREGGSWOOD	
J.O. Williams	135D GREGGSWOOD rd	
P. JACKSON	" "	
A Brown	62 HARRIES RD	AB
P. Chanter	54 HARRIES RD	PLC
R Hill	52 BURSLEM Road	
J. Shephard-Charles	50 BURSLEM TN 2377	J. Shephard Charles
P.D. DELANEY	37 BURSLEM ROAD	P.D. DELANEY
S.D. STEVENSON	" " "	S.D. STEVENSON
PAUL CAMPBELL	39 BURSLEM RD	P. Campbell
SOFIA RAHMAN	48B BURSLEM ROAD	
Cmcumming	48A BURSLEM Road	Cmcumming
	44 Burslem RD	
E.M. CHIAPPA	" "	

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Name	Address	Sig
KELLY COLLINS TERRY COLLINS	42 Burslem Rd T. Wells TN2 3TT	 
Sue HEETE John HEETE	36. BURSLEM Rd T WELLS TN2 3TS	Sd. Heete 
Daniel Kent Leanne Fuller	62 Greenwood Road. Turbridge Wells	D. Kent 
HEATHER CUSHMAN IAN CUSHMAN	64 HARTES RD T WELLS TN2 3TR	H Cushman I Cushman
Fahim	190 GREGGWOOD RD TN2 3JG	
Daphne Scott	128 Greggwood Road.	D Scott
John Johnson	129 GREGGWOOD Rd	
John Stephen Burns	125 GREGGWOOD RD	J. Burns 
		

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