



Order Decision

Inquiry opened on 14 December 2020

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 12 May 2021

Order Ref: ROW/3225371

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Surrey County Council Footpath No. 612 (Oxted), 613 (Oxted & Limpsfield) and 614 (Oxted) Definitive Map Modification Order 2018.
- The Order is dated 8 August 2018 and proposes to record three footpaths lying generally to the north-east of Oxted. Full details of the routes are given in the Order Map and Schedule.
- There were four objections outstanding when Surrey County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Procedural Matters

The Inquiry

1. This Inquiry was scheduled to open on 1 April 2020 but was cancelled due to the Covid-19 pandemic. On reorganising the date, and taking account of the Government restrictions, the Inquiry was held as a virtual event, that is online. Following a test event/pre-Inquiry meeting held on 3 December 2020 I opened the Inquiry on 14 December. Just prior to the opening of the Inquiry I was made aware that notice of the Inquiry had not been given as required by the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007. As a result, I asked the parties to identify potential resumption dates which we discussed at the opening of the Inquiry, subsequently adjourned to 8 March 2021. The Inquiry closed on 12 March 2021, having sat for all five days.

Site visit

2. I made a site visit on 25 November 2020 and was able to walk the majority of the claimed route sections, with the exception of G – H¹. I viewed this from Chichele Road and within the field, as this section was overgrown. There was no request for an accompanied site visit at the close of the Inquiry.

Costs

3. A costs application was made, initially in writing and expanded upon orally at the close of the Inquiry on 12 March 2021. That application is dealt with in a separate decision.

Main issues

4. The Order is made under section 53(2)(b) of the Wildlife and Countryside Act 1981 by reference to section 53(3)(c), which states that an Order should be

¹ Letters A – N and A1 & I1 refer to letters as used in the Order map

made to modify the Definitive Map and Statement on the discovery of evidence which, when considered with all other relevant evidence available, shows:

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

5. Surrey County Council, the order-making authority ("the OMA") relied on the statute, section 31 of the Highways Act 1980 ("the 1980 Act"). The subsections of particular relevance are set out below:

(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

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

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

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

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

...

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

(6) An owner of land may at any time deposit with the appropriate council—

(a) a map of the land ..., and

(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, ... declarations [in valid form] made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—

(i) within [the relevant number of] years from the date of the deposit, or

(ii) within [the relevant number of] years from the date on which any previous declaration was last lodged under this section.

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

...

6. Before a presumption of dedication can be inferred under the statute, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'brought into question'. The OMA and supporters identified dates of January 2012 in relation to land crossed by the section L – M – N – K and March 2013 for the sections to the south of point L as the dates on which use was brought into question. This would provide twenty-year periods of 1992/3 – 2012/13.
7. The case for the objectors² referred to fencing being erected and re-erected throughout the identified twenty-year period such that the use was interrupted, and dedication could not be presumed. They suggest that the relevant date should be 1988, when there was locking of gates and re-erection of fences. In relation to access from Chichele Road, via point G, they argued that 2004 should be used. These dates would give rise to earlier twenty-year periods.
8. To give rise to a presumption of dedication, the use must be 'as of right', that is without force, secrecy or permission, throughout the relevant twenty-year period. The objectors indicated that fences had been broken down such that the use had been by force and/or contentious throughout any relevant period.
9. If the matter failed under the statute, then I would need to consider whether there was evidence of dedication at common law. The OMA specifically argued that if section G – H did not succeed under the statute it should be considered under common law, in relation to periods either prior to, or subsequent to, blocking of the route in 2004 due to works carried out at the adjacent St Mary's Primary School ("SMPS")³.
10. I can only confirm the Order if I am satisfied, on the balance of probabilities, that public rights of way subsist.

Reasons

Background

11. The town of Oxted and village of Limpsfield lie to the south of the M25 and east-west of the Oxted railway line. The claimed routes run on agricultural land to the north-east of the built-up residential and business area. SMPS is adjacent to part of the claimed routes to the west, off Silkham Road, and Oxted

² In this decision the term 'objectors' refers to those who were represented and took part in the Inquiry for Oxted Residential Limited ("ORL"). Their interest related to the land to the south of point L, referred to as School Field. Section I1 – J Footpath 613 ("FP613") is in separate ownership. Statutory objections were also made by the owners of the land crossed by the route section L – M – K – N of Footpath 612 ("FP612"); and owners of property on Greenacres, to the west of alignment K – M, FP612. I shall take account of these objections as appropriate.

³ Shown as 'Oxted St Marys School' on the Order map

School to the south-east, off Bluehouse Lane. Footpath 75, which is accessed from point J, is part of the Greensand Way, a long-distance walking route.

12. The land is designated as Metropolitan Green Belt. The owners of School Field, the land south of point L, from 2008, ORL, seek to develop the land and have undertaken work towards this aim.
13. The applications to record the routes were made on behalf of Oxted and Limpsfield Residents Group ("OLRG") on 20 November 2013. Having investigated the matter, the OMA were satisfied that the evidence supported a reasonable allegation of public rights and made the Order accordingly.

Section 31 of the Highways Act 1980

The relevant twenty-year period

14. In relation to the land north of point L I agree with the OMA that the deposit of a statutory declaration made under section 31(6) of the 1980 Act – see paragraph 5 above - on 23 January 2012 provides a clear date on which use was brought into question. This was related to the purchase of the land as part of Court Farm, completed just a few days earlier. At the same time, they also erected new barbed wire fencing and notices saying, 'Private Land No Public Right of Way Court Farm'.
15. For School Field I generally agree with the OMA that there is a clear date, being March 2013 when ORL installed hoardings across the land at points B and between G and H. OLRG refer to this event and, having gathered their evidence of use, made the applications to record the routes six months later.
16. However, in relation to access from Chichele Road at point G I consider that there was an earlier date at which use was brought into question and that was in 2004, in relation to works at the OSMS. It appears that this started in late March 2004, with the intention to complete by the September term start but, according to the SMPS Bursar, it was not completed until the beginning of December 2004.
17. I agree with the OMA that the intention of the interruption may be relevant, following *Lewis v Thomas (1950)*⁴. However, whilst the works were not carried out by the landowner, it was clearly undertaken with their consent and without provision for continued access, either for public or private use; the Farm Manager of Titsey Estates ("the Farm Manager") was involved in the management of the land and indicated that from 2004 there was no tractor access from point G and so his access was from the south, via points A – B.
18. I am not satisfied that eight months is simply a temporary break or that the facts of this case show that there was, or remained, an intention to dedicate or recognise public rights over this land. With subsequent evidence of fencing I consider that public use here was brought into question in March 2004, following *Godmanchester and Drain v Secretary of State for Environment, Food and Rural Affairs*⁵ ("Godmanchester").
19. In relation to access via point B, OLRG referred to the owner of 18, Chichele Road, occasionally telling people they could not walk the track at the bottom of his garden, past his garages. I understand that this owner was present from

⁴ [1950] 1 KB 438

⁵ [2007] UKHL 28

1977 – 2000 but people generally ignored him on the basis that he did not own the land in question, although it is my understanding that he had legal rights of access over it. I consider there to be a wide range of matters which can bring use into question and that those actions need not be taken by, or on behalf of, a landowner. The actions of this party were clearly known to the general public, being referred to by OLRG. Following *Godmanchester*, I am satisfied that they were sufficient to bring into question the use of section A – A1 – B, potentially as early as 1977.

20. Although there was some suggestion that users had been turned back or told that there was no public access when in the fields, this generally appears to have arisen subsequent to 2013, when stronger actions were being taken to prevent public access onto the land. Nevertheless, I saw evidence of use, including at the time I was present, during my site visit in 2020. I agree with the OMA that the lack of notices, until after 2013, was at odds with the claim of trying to prevent use at an earlier date. Although it was argued that notices were, and would be, removed, there remains provision for dealing with this under section 31(5) of the 1980 Act as set out in paragraph 5 above.
21. A main issue raised by the objectors related to the breaking down of fencing in order to access the routes. Although I consider one of the directors of ORL to be referring to very recent actions, which he appears to associate with people trying to prevent the development of the land, I consider that there is evidence of fencing being broken down at earlier times.
22. The main access gates are at points A1, B, G and N. In relation to point A1 the objectors suggested that it would not have been possible to walk through, as it was locked, and that the vegetation to the side would have prevented people from by-passing the gate. This argument did not stand up to the clear evidence of the Farm Manager, who used this area for access and indicated that he did not find this gate locked.
23. However, this fair and reliable evidence also provided evidence that the gate at point B was padlocked, with the public accessing the land to the sides of the gate until the hoarding was erected in 2013. The Farm Manager was aware of people on the land, sometimes on the claimed routes and sometimes in the middle, on a diagonal between points I and C.
24. A former owner of the land, now a Director of ORL, indicated that his father had farmed the land, initially as a tenant from the 1950s and as the owner from the 1970s. His father ran a dairy herd until about the end of 1975, with access to the milking sheds via the route G – H, and occasionally had youngstock on the land until the early 1980s. The land was subsequently used for arable crops. He recalls there being problems with fencing being cut, particularly at point G, and having to be repaired. Farming as a tenant himself in the period 1988 – 2008 he repaired fencing mainly adjacent to the gates at points B and G but occasionally at point N, which land was in his brother's ownership from 1993.

Evidence of use

25. The evidence of use arises from the user evidence forms (“UEFs”) submitted in connection with the applications, interviews undertaken by the OMA and evidence given to the Inquiry. I found the evidence I heard to be reliable and the claimed use entirely understandable, reflecting what may be expected in an

urban fringe area, walking dogs and/or children, in this case particularly to and from school, with the draw of the wider landscape of the North Downs for longer rambles. There was use by groups such as youth groups and those undertaking walks or runs for fitness and wellbeing.

26. The evidence covers use from 1966 to 2013, when the applications were made. The reported frequency of use was variable, from a couple of times a year to daily. Although the objectors raised doubts as to use 'every day' I consider this could be reasonable where a dog requires walking, for example. Despite concerns that people completing UEFs were not living in the area, due to Land Registry information, I agree that there are explanations, such as renting or name changes due to marriage or divorce.
27. Overall, I consider the type and amount of use reported capable of supporting the claimed rights. I consider the cross-examined evidence that I heard was supportive of the use reported and assisted in clarifying certain matters.

Use as of right

28. In order for use to give rise to a presumption of dedication it is necessary to look at matters relating to whether or not that use was 'as of right'. To be as of right the use must be without force, without secrecy and without permission. There was no suggestion of use by permission, with the exception of use for shooting by one party in the period 2007 - 2015. There was some suggestion of secrecy, but the issue of force was a main focus of the Inquiry.

Secrecy

29. Although there was a suggestion of use in secret, with some people using the land in the early morning for example, I consider the evidence shows open and visible use. The aerial photographs support the existence of physical routes on the ground, which appear to have come into being due to footfall, for example a route similar to section B - C - D - E can be seen in the photograph of May 2008. I consider that these routes, visible from the air, would be similarly visible on the ground to a reasonable landowner, making it clear that there was use of the land. I note that section K - L - M also shows use of a differing route running approximately K - L, which suggests wandering in this area.
30. The WS Planning Scoping Report ("WSPSR") on behalf of Village Developments PLC⁶, dated February 2008 refers to 'Public Footpaths' stating "*The site is accessed via a public footpath to the west and south. The southern footpath links the site with Oxted town centre.*" Later in the report it is stated that "*Footpaths currently link the site to Bluehouse Land and Chichele Road.*" One of the Directors of ORL suggested this had been an error and could refer to another site, known as Barrow Court, which lies to the west of this site. As this site has one bridleway passing through it and links, via other rights of way, to Barrow Green Road, this explanation does not make sense.
31. Whilst I was asked to treat this document as little more than a 'sales pitch', aimed to persuade Tandridge District Council ("TDC") to allow development on the site, I consider that it is a report of an independent party recording what they saw and understood to exist on the ground. The photographs in the report assist in confirming that the routes referred to relate to, at least, the

⁶ A company related to ORL

claimed route sections A – B and G – H. I consider this supports the claimed use and suggests that it was open and visible, not secretive.

Force

32. The main issue between the parties related to whether there was use by force due to fencing being broken alongside gates and between fields. I am entirely satisfied that the users I heard from did not find their way barred by fencing prior to the clear bringing into question of use in 2013. The objectors were at pains to agree that they did not think that the fences had been broken by the supporters. I am satisfied that people would not have walked through areas with barbed wire with their children or dogs or, where relevant, clients. The evidence was clear that users did not find barbed wire blocking their route during use, otherwise they would not have used the routes in question.
33. However, the objectors indicate that fencing was present, and was repaired to prevent access. I suspect there is some conflation of the repair of fences since more recent efforts to exclude the public from the land over the last eight or so years and repairs in the previous period, when there was less incentive to keep the public out, with no animals present. However, the evidence of more recent breaking down of fences supports the contention that this was a continued pattern from the earlier period. The user evidence clearly shows that people did not always access the claimed routes by way of the gates. The reasonable explanation for existence of a gap alongside a gate is that the gate formed an obstruction to use, at the very least at times.
34. At point B I am satisfied that the gate was locked from at least 2011. However, even prior to that it seems that many users walked to the side of the gate, mostly it seemed to the western side, although I understand there was also a gap to the east at times.
35. Dealing with the gates at point G I am satisfied that the used access since December 2004 was to the east of the existing gates, near the lamppost and bus stop. The easternmost section of fence was broken and pulled back to allow access as the gates were padlocked as shown by Google Street View and photographs in the WSPSR. Whilst the users evidence supported this as the access point, they had not themselves encountered fencing in this area. A former owner said that he mended this fence, taking it back to the hedge line to form a barrier, on many occasions.
36. There was little clarity from users to show that the used access prior to the interruption in March 2004 was any different. Although I note the reference in the 2006 letter from the Rector of St Mary's Church to the gate being capable of being opened even the lead supporter indicated that, whilst using the pedestrian gate prior to 2004, in later years the gate was locked. Even if I were to accept that use was via the gates in the period 1984 – 2004, in my view the level of use is insufficient to raise a presumption of dedication.
37. For point N people have referred to walking either through the gate or alongside through the gap, which is on the northern side of the gate. In the period 1988 – 2008 it was said that the former owner, a brother, was told when the fence or padlock was broken and required repair. The current landowners informed the OMA that when they bought the land the gate was locked with a broken barbed wire fence across the gap. The person with

- permission to shoot referred to having a key for a padlock on this gate, although often finding the gap open.
38. In relation to point I1 the tenants of the land to the east indicated that they had repaired the boundary fence from at least 2004. Whilst users generally were unaware of fencing there was some acknowledgement of rusty wire in the overgrowth. I noted older fencing on/around tree trunks on my site visit and heard from the Farm Manager of having to retrieve livestock out of School Field, which had come from the adjacent field, contrary to the belief of some that there were never livestock in that area.
39. It is clear that when there were livestock on the land there must have been fences, which must have been repaired or replaced to keep animals secure. Subsequently there would be less imperative to keep fences in place but there is some evidence that this occurred. I find a tension between the claim that fences were regularly repaired and the fact that there were a number of back garden entrances onto the land, which were apparently only fenced off recently. If public access was an important issue the easy people to tackle were those who were taking access through gates from their properties. Nevertheless, the point I must deal with is the access over the claimed routes.
40. The Order sets out the gates as the access points, but it seems that the public have been using the gaps as much, if not more than, the gates. I accept that *Fernlee Estates Ltd v City & County of Swansea and the National Assembly for Wales (2001)*⁷ might support the use of an alternative line for a short period in certain circumstances but find *R v SSE ex parte Blake, (1984)*⁸, relevant with regard to the fact that locked gates, even if bypassed, indicate the landowners lack of intention to dedicate a public right of way.
41. On the balance of probabilities, the gates have been locked and the fences repaired at times throughout any potential twenty-year period. Although I accept that the users providing evidence directly to the Inquiry have not found their way barred I consider that the breaking of fences means that subsequent use must be contentious and, therefore, by force, following *Taylor v Betterment Properties (Weymouth) Ltd., 2012*⁹ and *R (Lewis) v Redcar and Cleveland Borough Council, 2010*¹⁰. As a result, I have not considered whether the claimed routes could be recorded through the gaps rather than the gates.

Conclusions

42. In relation to the section A – B of FP612 I consider that the actions of the neighbouring landowner brought use into question over such a period of time that the user, which continued despite knowledge of objection, was incapable of giving rise to a twenty-year period of use as of right. Additionally, the use of a gap, or gaps, alongside the gate at point B, which were subject to fencing at times leaves this continued use contentious. Therefore, no presumption of dedication arises over this section of claimed route.
43. For section G – H of FP613 I am satisfied that use was brought into question in March 2004, which would give rise to a potential twenty-year period from 1984 – 2004. As noted earlier, the best evidence is that the used route in this

⁷ [2001] EWHC Admin 360

⁸ [1984] JPL 101

⁹ [2012] EWCA Civ 250; [2012] 2 P&C.R.3

¹⁰ [2010] UKSC 11

location was to the east of the gates, through a fenced, or formerly fenced, area. As such I am not satisfied that the use can be as of right, as it would be by force, albeit that the individuals supporting the Order had not themselves forced their way through or broke fencing. As such no presumption of dedication can arise in relation to this section for this period. If use had been via the gate prior to 2004 I find the evidence before me insufficient to raise the presumption of dedication in the period to 1984.

44. In relation to the section I – J of FP613 I again consider that there is evidence of older fencing and some replacement of fencing in later years. I am not satisfied that there is clear evidence of a twenty-year period where use could have been as of right. Therefore, no presumption of dedication arises in relation to this section.
45. At point N, FP612, I consider there is again evidence of fencing, some replacement of fencing and use through the adjacent gap. Therefore, I am not satisfied that the use can be as of right and no presumption of dedication arises in relation to this section.
46. Taking all the above into account I consider that the entrance points to the land are not capable of providing evidence of a clear twenty-year period of use as of right. As such I do not consider the use of the remaining sections of routes as capable of raising a presumption of dedication, as they would have no end point on a public highway, or place of interest. There is also some evidence of wandering other than on the claimed route, for example in aerial photography on alignment K – L and in relation to use of the ancient woodland alongside route E – I at certain times, such as to see the bluebells.
47. I have separately considered the section F – N, on the recording of which the landowner, TDC, has taken a neutral stance. Whilst it is possible in law for a cul-de-sac route to be recorded I consider the evidence of use here does not relate to such use; people were not walking back and forth in order to use this specific section but, from the evidence, to use other routes, primarily the claimed route but I also note the route to the north, on which I was not hearing evidence, which appears to run behind houses on Silkham Road. Taking these matters into account I am not satisfied that the evidence supports the recording of this section of the claimed route of FP612 as a separate entity.
48. Taking account of all these matters I consider, on the balance of probabilities, that the Order should not be confirmed by reference to the statute.

Common law

49. It was suggested by the OMA I could find under common law in relation to the use of section G – H after 2004. However, the issues of broken fencing remain a barrier to finding that use was with the intention of the landowner to dedicate a public right of way over the land in question. I do not consider that the use in the shorter period 2004 – 2013 is sufficient to support dedication at common law.
50. Turning to the common law position in relation to the entirety of the claimed routes, the same issues arise with regard to showing the intention of the landowners to dedicate public rights. The erection and maintenance of locked gates and fences does not support an intention to dedicate. Taking account of the evidence as a whole I do not consider, on the balance of probabilities, that the burden of proof to show common law dedication has been met.

Other matters

51. I was referred to a large number of judgments, the majority of which I have not found it necessary to mention within the decision. I have, of course, taken them into account in reaching this decision.
52. I am unable to take account of the concerns raised regarding mixing of dogs and livestock and potential effects on farm incomes. I also cannot take account of concerns of trespass, privacy and security for adjacent property. I fully understand the importance of these matters to those involved.
53. It was clear that there was a view that the routes were being claimed to prevent development of the land. I consider that the evidence I heard showed use of the land over many years, with no indication of skewing of evidence to a particular agenda. Although from the evidence I have determined not to confirm the Order, I would note that the recording of public rights of way would not in any way prevent the development of the land.
54. I would also note that the National Planning Policy Framework supports promoting healthy and safe communities in a number of ways. In particular paragraph 98 sets out that "*Planning policies and decisions should protect and enhance public rights of way and access, including taking opportunities to provide better facilities for users, for example by adding links to existing rights of way networks including National Trails.*" As such the development of the land would not prevent additional public access and would be likely to require such provision.

Conclusions

55. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should not be confirmed.

Formal Decision

56. I have not confirmed the Order.

Heidi Cruickshank

Inspector

APPEARANCES

For the Order Making Authority:

Mr T Ward of Counsel *instructed by* Surrey County Council
who called:

Mrs D Jones Senior Countryside Access Officer

In Support of the Order:

Mr P Giles
who called:

Ms H Ashby

Mr A Bunce

Ms J Houghton

Mrs A Rivers

Mr N Sweeting

Mrs J Wren

In Objection to the Order:

Dr A Bowes of Counsel *instructed by* DMH Stallard *on behalf of*
Oxted Residential Limited & the Tory Family
who called:

Mr N Greenhalgh

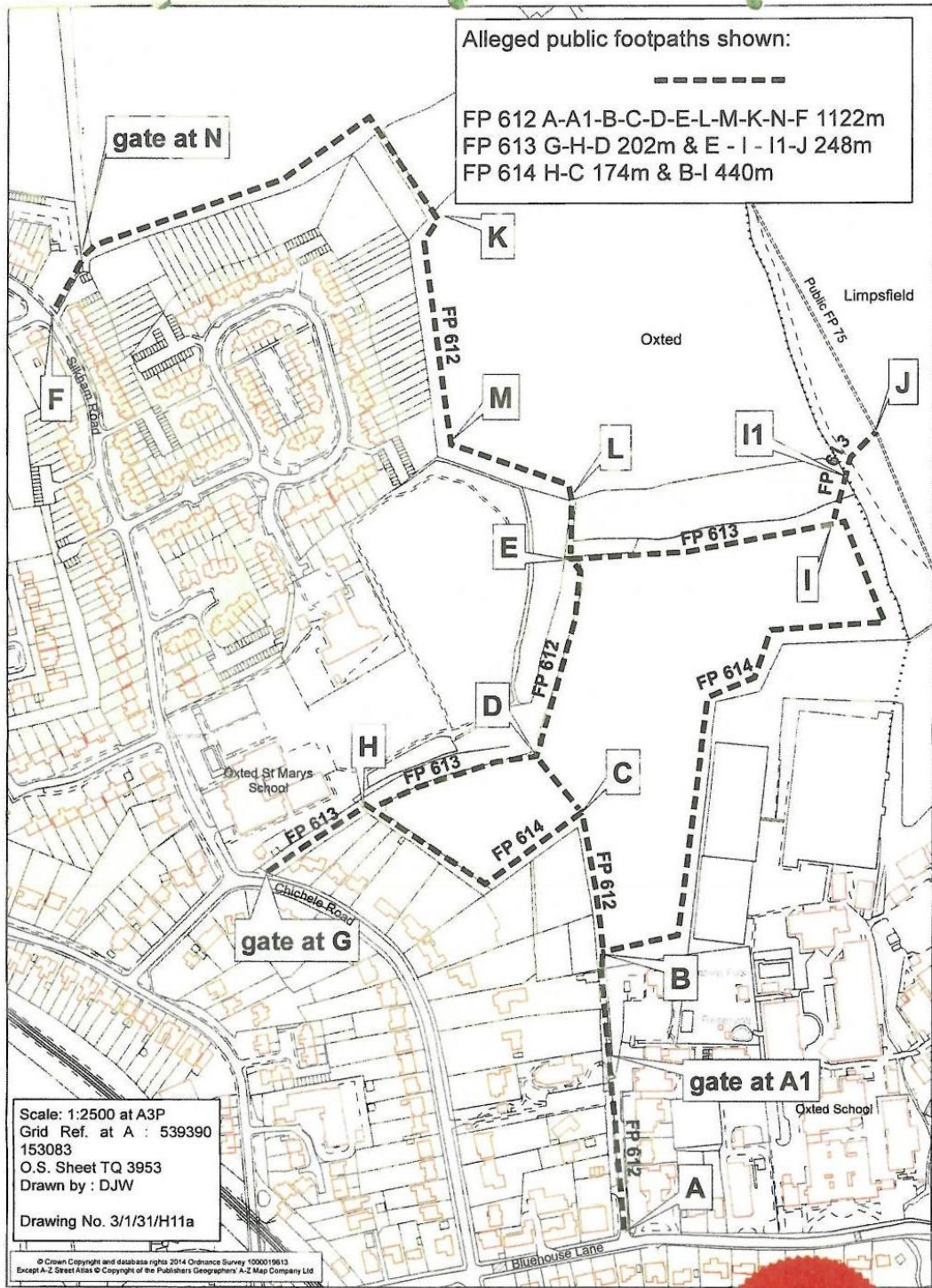
Mr W Peters

Mr D Rapoport

Mr C Tory

INQUIRY DOCUMENTS

- 1 The Order
- 2 Closing submission and legal cases bundle on behalf of the OMA
- 3 Photographs from Mr Giles on behalf of Oxted & Limpsfield Residents Group
- 4 Closing Statement of Mr Giles on behalf of Oxted & Limpsfield Residents Group
- 5 Opening Submissions on behalf of Oxted Residential Limited
- 6 Oxted Residential Limited Land Registry documents
- 7 Oxted Residential Limited photographs, legal charge and Land Registry documents
- 8 Correspondence Oxted Residential Limited/Oxted & Limpsfield Residents Group
- 9 Closing submissions on behalf of Oxted Residential Limited
- 10 Oxted Residential Limited Legal cases bundle
- 11 Oxted Residential Limited costs application
- 12 Surrey County Council chronology of contacts in relation to costs application



WILDLIFE AND COUNTRYSIDE ACT 1981
MAP MODIFICATION ORDER
DISTRICT OF TANDRIDGE
PARISHES OF OXTED & LIMPSFIELD

MAP NOT TO ORIGINAL SCALE