



Order Decision

Site visit made on 7 March 2024

by **Wendy McKay LLB Non-practising Solicitor**

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

Decision date:

Order Ref: ROW/3311134

- This Order is made under Section 119 of the Highways Act 1980 (“the 1980 Act”) and is known as the Bath and North East Somerset Council (Public Footpath BA19/22, Skylark Farm, Peasedown St John) Public Path Diversion Order 2022.
- The Order is dated 13 January 2022 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were five objections outstanding when Bath and North East Somerset Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Preliminary Matters

1. I undertook an unaccompanied site inspection during the morning of Thursday 7 March 2024.
2. The footpath to be created would commence at Point A on the Order Map and continue in a generally north easterly direction for about 212m to a junction with FP BA19/21 at Point C on the Order Map (“the proposed FP”).
3. The footpath to be stopped up is the full width of the public footpath BA19/22 from Point A on the Order Map continuing in a generally north westerly direction for about 333m to a junction with Woodborough Farm Road and FP BA19/21 at Point B on the Order Map (“the existing FP”).
4. At the time of my site visit there was a fallen tree across the existing FP at the point where it goes up the first flight of steps after passing Point A in a north westerly direction. Section 118(6) of the 1980 Act in relation to the stopping up of footpaths provides that, any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded. Whilst section 119 of the 1980 Act in relation to the diversion of footpaths does not contain the same provision, it is reasonable to similarly disregard any temporary circumstances affecting the existing route and compare the existing and proposed routes as if the existing were fully available for use. I have therefore formed my opinion disregarding this temporary obstruction and on the assumption that the existing route is available to the public to its full extent.

Main Issues

5. Section 119(6) of the 1980 Act involves three separate tests for an Order to be confirmed. These are:

TEST 1: whether it is expedient in the interests of the landowner, occupier or the public for the path to be diverted. This is subject to any altered point of termination of the path being substantially as convenient to the public.

TEST 2: whether the proposed diversion is substantially less convenient to the public.

TEST 3: whether it is expedient to confirm the Order having regard to the effect which - (a) the diversion would have on public enjoyment of the path as a whole, (b) the coming into operation of the Order would have as respects other land served by the existing public right of way, and (c) any new public right of way created by the Order would have as respects the land over which the right is so created and any land held with it.

6. In determining whether to confirm the Order at Test 3 stage, (a)-(c) are mandatory factors. On (b) and (c) of Test 3, the statutory provisions for compensation for diminution in value or disturbance to enjoyment of the land affected by the new paths must be taken into account, where applicable. Regard must also be had to any material provision contained in a rights of way improvement plan ("ROWIP") for the area under section 119(6A). Other relevant factors are not excluded from consideration and could, for instance, include those pointing in favour of confirmation.

Reasons

Whether it is expedient in the interests of the owners of the land that the path in question should be diverted

7. In this case the Order has been made by the Bath and North East Somerset Council, the Order Making Authority ("the OMA") in the interests of the landowner of part of the public footpath BA19/22. That landowner is also the owner of the land over which the full length of the proposed FP will pass if the Order is confirmed. The current route of the existing FP takes a line through the landowner's farm complex running between existing poultry houses and over four flights of steps including a bund over the northern boundary of the poultry houses. The intention is to make the farm workings more secure and provide a route for the public which does not include the steps.
8. More specifically, the existing issues for farm management include danger from agricultural machinery movement, breaches to biosecurity and site security. These concerns are exacerbated by the public being able to walk through the site at any time of day or night. The landowner requested the diversion to improve the management of the farm by taking the existing FP away from the poultry houses and yards to enable better biosecurity and site security and remove potential danger to the public from farm machinery.
9. Beyond the farm buildings the existing FP runs over a separate field to the north in which FP BA19/21 also runs. This land is in separate ownership and has been set

aside for conservation. That landowner is concerned that at present the public walk over the field without regard to the route of the public footpaths to the detriment of his conservation aims. I consider that to have only one footpath across it would encourage people using it to remain on the route of that footpath thereby benefitting the conservation management of that field.

10. I conclude that the diversion of the existing FP is expedient in the interests of the landowners to improve the safe and beneficial management of the poultry farm, and the conservation of the land to the north.

Whether any new termination point is substantially as convenient to the public

11. The existing FP and proposed FP start at the same point on the same path. The proposed FP joins the same path (FP BA19/21) as the existing FP at a point about 279m further south-east. The public can then walk along the generally flat surface of FP BA19/21 across the same field as the existing FP to the original junction with Woodborough Farm Road. Alternatively, should the public wish to walk along FP BA25/15, the termination point would be substantially more convenient than the existing termination point. The proposed route would be more direct and would be some 400m shorter than if FP BA25/15 were accessed via the existing FP BA19/22 (north-westwards) and FP BA19/21 (south-eastwards). The new route would also be more convenient than the alternative route to the junction of FP BA25/15 which currently involves walking on a road without a footway using FP BA19/23 from its junction with FP BA19/22 and Gassons which is a Class 4 Highway with no footway. Taking all these factors together, I concur with the OMA that the proposed termination point would be substantially as convenient for the public to use as the existing termination point.

Whether the proposed new path is substantially less convenient to the public

12. On the question of the assessment of convenience to the public, matters such as the length of the diverted path, changes in direction, gradient and width, the difficulty of walking it and its purpose are relevant factors. As indicated above, in terms of how the proposal affects the length would depend on where the walker wishes to go. A walker wishing to reach Woodborough Farm Road from point A (south-north) would have about a further 158m to walk. However, a walker wishing to reach FP BA23/15 from FP BA19/24 and avoid using the Gassons road would have some 161m less distance to walk.
13. As regards, the difficulty of negotiating the route, the proposed FP does not pass through any field boundaries requiring kissing gates. However, I saw when I visited the site that there are kissing gates on FP BA19/21 that would still need to be negotiated if taking that route to Woodborough Farm Road. Nevertheless, the existing FP goes up a steep slope and over the first of four flights of steps before running between poultry houses and over the remaining flights of steps. It also passes through two field boundaries with kissing gates. In contrast, the proposed FP has a gentle slope and avoids the need to negotiate the steps and has no kissing gates. I consider that these features of the proposed route taken together would improve the overall ease of use for the walker.
14. Turning to the purpose of the path, I agree with the OMA that this is likely to be both for leisure purposes and to get from point A to point B on the Order Map.

Having regard to the wider Public Rights of Way (“PRoW”) network, the extra distance would be unlikely to adversely affect a leisure walker. The OMA also indicates that the walk from Braysdown to Writhlington was mentioned as a more purposeful walk in the pre-order consultation. My attention has been drawn to a pre-consultation objection by a Braysdown resident on the grounds of the suitability of the proposed FP and the necessity of diverting the existing FP. It is asserted that the proposed FP is not as convenient for locals and once point C is reached, the public would instead walk down the busy Gassons road to join BA19/23 because its shorter and quicker.

15. Whilst I recognise the convenience of a shorter route for those using the path for a specific purpose, I do not find the increase in length of 158m in the context of an overall walk of about 2km to be disproportionate or likely to dissuade walkers from using it, especially given the other advantages of using the new route compared to Gassons road. I find no reason to disagree with the OMA that for most walkers the easier terrain and fewer field boundaries would more than offset the inconvenience of the extra distance.
16. I conclude that, on balance, the proposed FP would not be substantially less convenient to the public.

The effect of the diversion on public enjoyment of the path as a whole

17. I observed when I visited the site that the existing FP runs between poultry houses and an associated smell is experienced. In addition, I note that farm machinery is regularly in use in the vicinity of that route. As previously mentioned, the existing FP also runs over a bund which necessitates negotiating two flights of steps and a further two flights of steps between the poultry houses.
18. The proposed FP would avoid the farm complex and divert the public onto a route through woodland and grassland. It would be 2m wide and would be created without any limitations or conditions. The proposed FP takes in a gentle slope through a wooded area which affords improved views over the valley. I therefore anticipate that the walk along the proposed FP would be more enjoyable for the public. Moreover, the public would still be able to walk in the field to the north of the poultry houses by walking along FP BA19/21 from the termination point C on the Order Map. This would provide similar topography and experience to the route of the existing FP to the north of the poultry houses that would be stopped up.
19. The issue of the safety of those walking through the woodland from dangerous trees has been raised with specific reference being made to woods currently suffering a large percentage of ash dieback. The main objector has had a qualified tree surgeon assess his own adjacent property and at the same time assess the wood in question with that in mind.
20. The OMA comments that safety has not been an issue in the past even though the existing FP passes through the same woodland as the proposed FP. That said, as indicated above, when I visited the site there was a fallen tree on the route of the existing FP which had to be negotiated. However, given the comparable length of the proposed and existing footpaths that would run through the same woodland, I do not believe that any such potential risk would materially increase as a result of the Order being made. As the OMA points out, the woodland surrounding the

proposed FP would be managed by the landowners in accordance with their legal duty of care to footpath users. I am content that the OMA would ensure that this would take place in accordance with the statutory duty to assert and protect the public's rights under section 130 of the 1980 Act.

The effect of the diversion on other land served by the existing path and the land over which the new path would be created

The field to the north of the poultry houses served by the existing FP

21. The existing FP that runs through the field to the north of the poultry houses would revert to the landowner's use and benefit giving the biodiversity of that field the opportunity to improve. I note that this is welcomed by that landowner.

The farmyard area

22. The existing FP would be made safer for farming purposes with the removal of public access through the farmyard. No known adverse effects on other land served by the existing FP have been identified.

The effect of the diversion on the land over which the new path would be created

23. The proposed FP and land held with it is owned by the applicant who wishes the proposed FP to come into effect. The proposed FP is currently being used as a permissive path with a well-defined route already available through the wooded area. I am satisfied that there would therefore be no adverse effect on this land if it was to be used as a public footpath.

Rights of Way Improvement Plan ('ROWIP')

24. It is also necessary to have regard to the relevant ROWIP for the area. In this case it is the Joint Rights of Way Improvement Plan 2019-2026 Statement of Actions which guides the councils concerned in developing and improving the PRoW network.
25. The Statement of Actions includes Action 4.1 to "*Identify improvements to enable travel for all by foot/on bike to employment, health services, education, leisure & transport nodes*". The proposed diversion would remove the need for people using the footpath to negotiate flights of steps and would also remove the route from the vicinity of farm machinery in the farmyard area. The increased use of the footpath network would be encouraged by providing an alternative to FP BA19/23 and Gassons to access FP BA25/15. I consider that these improvements would contribute towards the achievement of this action.
26. In relation to Action 4.2 to "*Identify and carry out improvements for people with mobility difficulties and visual impairments*", the proposed diversion would improve connectivity with FP BA25/15 and remove the need to negotiate four flights of steps and the route directly through the farm complex in the vicinity of farm machinery. In my view, these improvements would contribute towards the achievement of this action.
27. In addition, Action 4.3 is to "*Identify low maintenance gaps in the wider recreational network that will improve accessibility and connectivity*". The proposal would contribute towards this by providing improved accessibility with a gentle slope

rather than a steep slope and steps and would also improve connectivity with FP BA23/15.

28. I therefore conclude that the proposed diversion would be consistent with the aims of the ROWIP and would contribute towards the meeting of actions within the Statement of Actions that the relevant authorities have committed to progress.

Duty to have regard to agriculture, forestry and nature conservation

The needs of agriculture and forestry

29. In making a diversion order under section 119 of the 1980 Act, authorities are required under sections 29 and 121(3) of the 1980 Act to have due regard to the needs of agriculture and forestry (including the breeding or keeping of horses) and the desirability of conserving flora, fauna and geological and physiographical features.
30. In this case, my observations at the time of my site visit confirmed that the proposed FP is not currently in active cultivation and there are signs at both ends indicating that it is available to use as a permissive path. Its use as a public footpath would not be detrimental to the general needs of agriculture or forestry. The removal of public access through the farmyard in the limited space between the poultry houses avoids regular disturbance to that enterprise. This represents a positive and beneficial effect for the farming operation.

The breeding and keeping of horses

31. It is also necessary to specifically consider the effect on the breeding and keeping of horses on the basis that the route of the proposed FP would pass to the north of land which may be used to keep horses within the definition of agriculture. The adjacent field has been and would continue to be used to graze horses and there is a manege positioned within it.
32. The OMA points out that the proposed FP would be about 24m to the north of the manege and some 18m from the field boundary. In contrast, the unaffected length of FP BA19/22 between Point A and its junction with BA19/23 and BA19/24 ("the remaining FP") at the point where it runs through the main objector's field is on natural ground level close to the north-west side of the manege. The OMA's position is that the proposed FP would have a minimal effect on the use of the adjoining land given the distances involved and the impact of people using other unaffected FPs in the vicinity.
33. Nevertheless, the objectors have all raised concerns in relation to the effect that the proposed FP would have on the use of the manege by horses and riders. The main objector explains that the manege has not been used since 2005 when an accident occurred whilst it was in use, and it is currently being renovated. He states that the permissive path which follows the same route as the proposed FP was created whilst the application for the Order was in motion. Due to this, he has stopped all reinstatement work and he has not conducted any further work on the manege since 2021. He submits that the permissive path cannot therefore be relied upon to show that there would be no adverse effects as the manege is not currently being used.

34. The manege is proposed to be used as a training facility for teaching children and training horses and as an exercise arena for multiple family members riding horses. It is perceived that there would be a negative impact associated with the footpath diversion on the primary use of the riding facility. The main objector contends that harm would come in the form of added activity by the general public and their dogs going along the path in the woods above the manege which would be an extra cause for horses to spook. The concerns raised by other objectors are similar and include the removal of privacy from the manege/training area and the prospect of having walkers in the direct eye line of young horses being trained with the potential for spooking the horses thus creating risk to the safety of both horses and riders.
35. The adjacent landowner and other objectors have also suggested alternative proposals to the OMA which they submit shows that a diversion of the footpath could be made to meet all the relevant criteria and would provide a safer route. The OMA explains that before the Order was made, it considered the suggested alternative diversions, and it has set out the reasons for the rejection of those proposals in its comments on the objections and representations. For the purposes of this case, I can only deal with the application before me and the merits or otherwise of the alternative routes are not for my consideration.
36. In order to put the potential impact of the proposed FP in context, it is relevant that the remaining FP already passes through the field in question and alongside the longer north-west side of the manege about 2-3m away from it. In addition, FP BA19/23 runs diagonally across the field in which the manege lies from its junction with FP BA19/22 to where it links with Gassons. These FPs and their spatial relationship with the manege would continue to exist and would be unaffected by the Order being made.
37. Furthermore, the site of the manege has been cut in at the north end and raised up at the south end to make it flat thereby creating an increased difference in height between the manege and the remaining FP. This would still be used by the public whatever the outcome of this proposal. The OMA asserts that this difference in height does not appear to have created any problems for the use of the manege in the past.
38. In response, the man objector indicates that the risk of spooks from unexpected noises from the remaining FP has been the subject of a Risk Assessment. The recommendation of that assessment was to block it off with a 2m high fence along the side of the manege which he submits would remove this hazard completely for the remaining FP. This is the maximum height that can be erected as permitted development without the need for planning permission. It has not yet been erected whilst the proposed diversion Order has been under consideration.
39. He contends that the same outcome could not be achieved for the proposed FP given the greater difference in levels at that point. His Risk Assessment indicates that due to the topography of the land with the proposed FP at a higher level than the heads of the horses using the manege, it would not be safe even though the path would be 18m from the boundary. If the Order is made, he submits that he would not be able to get planning permission for a fence tall enough to effectively block out the danger of horses spooking in the manege, as this would need to be

- over 2m tall on the northern boundary. The issue for him is that for the proposed FP there is no mitigation which he can undertake without planning permission that would overcome the anticipated hazard.
40. In response to the concerns raised, the OMA moved the proposed FP further back from its originally proposed route and the boundary with the adjoining land. The OMA does not believe that the proposed FP in this position would pose an additional risk to users of the manege. This is based on the expert advice of a rights of way practitioner who is a retired horse rider, founding member and Trustee of The Trails Trust and a Member of IPROW with 31 years' experience as a PRow officer. In her statement, she confirms that she cannot envisage any conflict between walkers using this footpath and the use of the adjoining land. In support of that view, she provides details of other local equestrian related establishments that have public access directly beside them and where there has been no known conflict with lessons or schooling sessions taking place.
41. Whilst I have had regard to the criticism made by the main objector of the evidence of the OMA's expert, I nevertheless believe that her practical experience as both a horse rider and PRow officer is both pertinent and relevant to the consideration of this case. Notwithstanding the particular circumstances of the other centres mentioned and the specific relationship that would prevail between the main objector's land and the elevated route of the proposed FP, I find that her evidence provides strong support for the view that no undue conflict between the two uses would occur.
42. I have given serious consideration to the safety of horses and riders. However, the unaffected FPs will remain in use by the public whatever the outcome of this proposal. Those FPs are in close proximity to the manege and the potential for disturbance to be caused to horses and riders by members of the public and their dogs using them already exists and will not change as a result of the diversion. I accept that there is the option to erect a 2m high fence within the main objector's land to remove the visual aspect of any disturbance from the remaining FP. Furthermore, this option would not be available to screen the proposed FP due to the topography of the land and the requirement for planning permission. However, I consider that this would be more than offset by the distance that the proposed FP would be set back from the field boundary and the manege within it compared to those other FPs. Although positioned at an elevated level given that set-back distance, I do not consider that the proposed FP would exacerbate the existing position, nor compromise the safety of those using the manege.
43. As regards loss of privacy, I concur with the OMA that the proposed FP poses less threat to that consideration and would not worsen the existing position compared to the remaining FP and FP BA19/23 which will continue to run through the main objector's field close to the manege. I conclude that the proposed FP would have little effect on the keeping or breeding of horses and would not otherwise adversely affect the needs of agriculture or users of the adjoining land.
44. In reaching that conclusion, I note that that since compensation is only payable under the 1980 Act for land over which the right is created and any land held with it, the adjoining landowner would have no recourse to apply for compensation for any personal or financial loss that may result from the diversion of the footpath.

Conserving flora, fauna and geological and physiographical features

45. As previously mentioned, that part of the existing FP which runs over the northern field will revert to use for conservation and is likely to result in a consequential improvement to the flora and fauna within it. The proposed FP is already being used as a permissive path and there is unlikely to be any adverse effect on flora or fauna if its status is subsequently change to a public footpath. I am content that there would be no flora, fauna, geological or physiographical features adversely affected by the proposed FP.

The Equality Act 2010

46. The Public Sector Equality Duty (PSED) is set out in section 149 of the Equality Act 2010. The OMA considers that it has carried out its actions without discrimination on any ground such as sex, race, colour, language, religion. I agree with that proposition. Furthermore, I concur that path users with mobility, hearing and sight impairments would benefit from the more level route on the proposed FP and from not having to walk through the farmyard. The proposed diversion would have a neutral effect on those with other disabilities or other protected characteristics. I have had due regard to the PSED in reaching my conclusions, but I do not consider the making of the Order would be discriminatory under the provisions of the Equality Act.

Human Rights

47. The objectors make reference to human rights including Article 1 of the First Protocol and Article 14 of the Human Rights Act 1998 which brought the European Convention on Human Rights (ECHR) into UK law. Article 1 is a qualified right and the discrimination under Article 14 must be within the scope of another ECHR right. They submit that the OMA has prioritised the safety of the footpath users over the equestrian users of the manege which shows discrimination pursuant to Article 14 and a failure to protect property under Article 1 of the First Protocol.

48. The OMA does not accept that peaceful enjoyment of the main objector's land would be disturbed as no changes are proposed within about 18m of that land. I concur with that submission and for the reasons set out above, I do not consider that there would be any interference with the objectors' rights to the peaceful enjoyment of their possessions. In addition, I am content that the OMA's actions have been carried out without discrimination in any way.

49. In any event, the OMA points out that Article 1 provides that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The action for the diversion of the FP is in accordance with the 1980 Act and the principle of proportionality. Therefore, even if it was considered that those rights were interfered with, any interference would accord with the law and be in pursuance of a well-established and legitimate aim and be proportionate. I am satisfied that there would be no violation of the objectors' human rights.

Conclusions on whether it is expedient to confirm the Order

50. In comparison to the existing FP, the route of the proposed FP has obvious advantages in terms of public enjoyment including improved views, safety, and

ease of access in particular for those with certain physical impairments. I find that the proposed diversion of the FP would enhance the public enjoyment of the path as a whole. This is a factor to which I give considerable weight.

51. There would also be benefits for other land served by the existing FP. In relation to the field to the north of the poultry houses, the existing FP would revert to the landowner's use and benefit with consequential improvements to its biodiversity. As regards the farmyard area, the existing FP would also be made safer and more secure for farming purposes with the removal of public access to the farmyard. The benefit to these landowners would be significant and this is a factor to which I attribute substantial weight.
52. On the question of the effect of the diversion on the land over which the new path would be created, the proposed FP and land held with it is owned by the applicant who wishes the proposed FP to come into effect. The proposed FP is currently being used as a permissive path. I am satisfied that there would no adverse effect on this land, if used as a public footpath.
53. The proposed diversion would be consistent with the aims of the ROWIP and would contribute towards the meeting of actions within the Statement of Actions.
54. I have considered other competing interests and other matters raised including the objections made by the owner and potential users of the adjoining field and manege. I find little merit in those concerns, and I attribute neutral weight to them in the overall balance of considerations.
55. I have concluded that the proposed diversion would not be substantially less convenient to the public than the existing route. In the light of that finding, I am satisfied that the proposed diversion would be expedient in the interests of the landowners to improve farm management and conservation.
56. Taking all these various factors into account together with all other matters raised in the written representations, I conclude that it is expedient to confirm the Order.

Overall Conclusion

57. Having regard to the above, and all other matters raised in the written representations, I conclude that the Order should be confirmed.

Formal Decision

58. I confirm the Order.

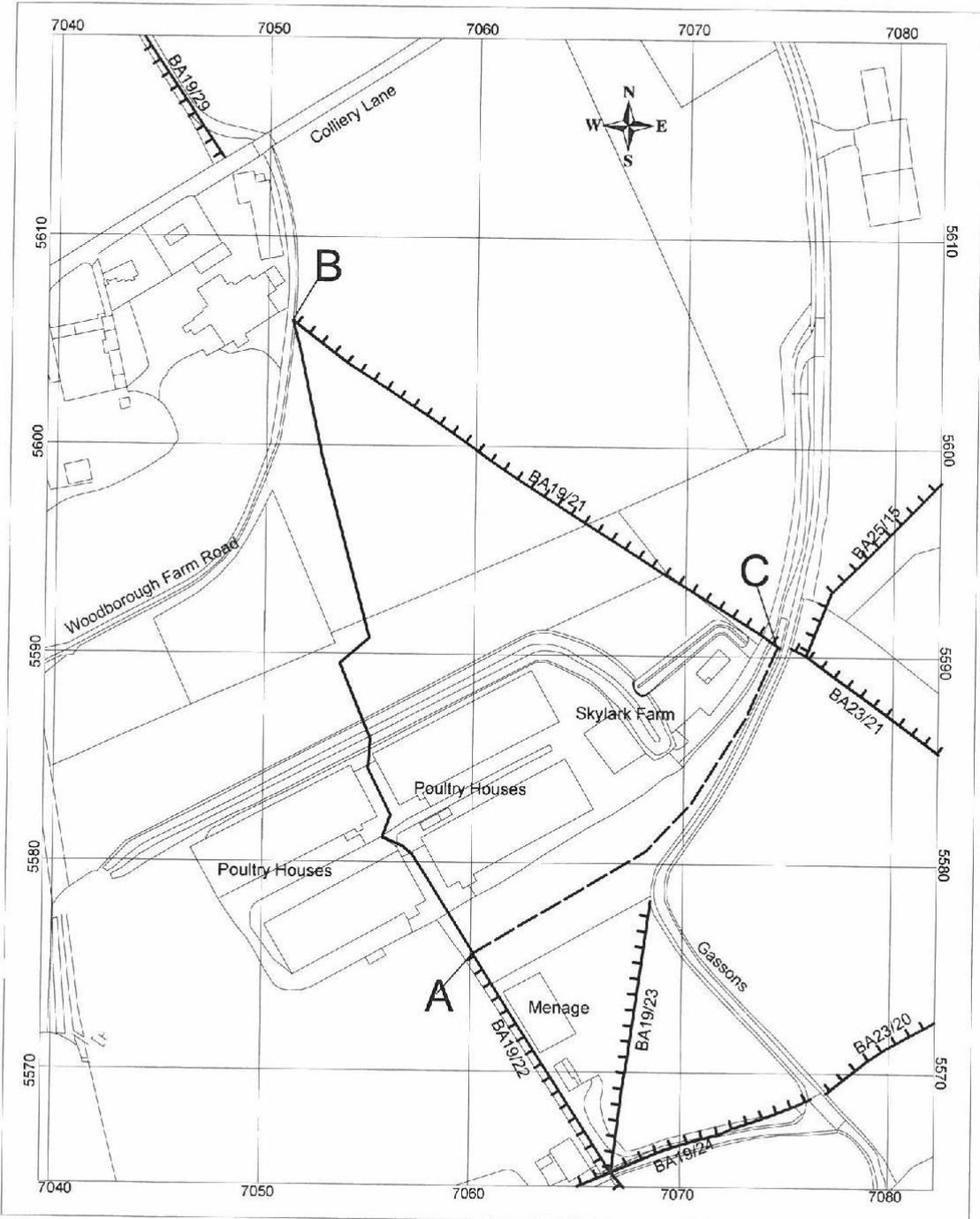
Wendy McKay

INSPECTOR

This map forms part of the Bath and North East Somerset Council (Public Footpath BA19/22, Skylark Farm, Peasdown St John) Public Path Diversion Order 2022

Public footpath to be stopped up **A** _____ **B**
Unaffected public footpath _____
Public footpath to be created **A** - - - - - **C**

Scale: 1:2,500



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