

WILDLIFE AND COUNTRYSIDE ACT 1981

**THE BRISTOL CITY COUNCIL DEFINITIVE MAP & STATEMENT
MODIFICATION ORDER NO.7 2024**

PINS REF ROW/3363939

STATEMENT OF CASE ON BEHALF OF COTHAM SCHOOL

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INTRODUCTION

1. This is the Statement of Case filed on behalf of Cotham School (“**the School**”).
2. The School is an academy school. It is a comprehensive secondary school of circa 1645 students. It is operated and managed by Cotham School Ltd and run as a not-for-profit charitable trust. It is funded by the Department for Education and provides free-at-the-point-of-use education for young people who are resident in Bristol.
3. The School does not have sufficient land on its main site to meet the statutory requirements for outdoor space. Accordingly, and for that purpose, the School is entitled to possess the fields over which the new ways have been made at Stoke Lodge Playing Fields, Stoke Bishop, Bristol, BS9 1BN (“**the Land**”) by virtue of a lease, executed with Bristol City Council on 31 August 2011 for a term of 125 years.
4. The School’s use of the Land is strictly controlled by (i) the terms of the 31 August 2011 lease, (ii) the funding agreement with the Department for Education dated 1 September 2022 and (iii) its own memorandum and articles. Collectively, these documents restrict the use of the Land to educational purposes and for no other purpose.
5. Furthermore, the School is required to comply with the standards set down in the Education (Independent School Standards) Regulations 2010 and Department for Education Guidance “Advice on Standards for School Premises” for (amongst other things) physical education and outdoor space. The complex statutory regime which governs both the City Council’s duties and those in respect of the School is summarised at [53]-[62] of the judgment in **Cotham School v. Bristol City Council** [2025] EWHC 1382 (Ch). They will also be explained in the evidence of Jo Butler.
6. Prior to 2011, the Land was all held in possession by the City Council for educational purposes since 1947. It was laid out as the playing fields by 1963 at the latest for the use of Fairfield Grammar School and Cotham Grammar School (the predecessors to Cotham School). There is evidence of the Land being used for sports prior to 1963.

7. The history of unauthorised public use of the Land has been contentious. In 2011 an application was made to register the Land as a town or village green. Against the recommendation of its appointed Inspector, the City Council resolved to register the Land as such. However, that decision was quashed by the High Court (***R(Coatham School) v. Bristol City Council*** [2018] EWHC 1022 (Admin)) and, on remission, the City Council resolved not to register the Land. A further two applications were made in 2018, one of which was again granted against the advice of its appointed Inspector.
8. However, following a full trial on the merits, the High Court ordered the village green register to be rectified so as to delete the registration because public use was: (i) incompatible with the educational purposes for which the Land was held, (ii) rendered contentious by notices and conduct and either (iii) displaced by the School's use of the Land or (iv) contrary to the provisions of education legislation (***Coatham School*** – above)). The hearing took place between 27-31 January 2025 and 10 February 2025 before HHJ Paul Matthews sitting as a Judge of the High Court.
9. On 11 November 2024, the School's solicitors sent a letter to Bristol City Council, enclosing a draft Objection to the confirmation of the Order if it were to be made. On 27 November 2024, Bristol City Council's Public Rights of Way and Greens Committee resolved that on the balance of probabilities the claimed routes did subsist. The Order was made on 10 December 2024. On 5 February 2025, the School objected to confirmation of the Order.
10. The School objects to the confirmation of the Order because no presumption of dedication has arisen on the evidence either by operation of s.31 Highways Act 1980 or at common law and, even if it had, any such presumption would be rebutted by the clear evidence that the landowner did not intend to dedicate the ways as highway.

GROUND OF OBJECTION

General Approach

11. By s 53(3) Wildlife and Countryside Act 1981, the burden of proof is on the Order Making Authority (“**OMA**”) to persuade the Inspector that, on the balance of probabilities, that there has been a “discovery ... of evidence” which shows that a public right of way not shown on the Map and Statement subsists, see **Todd & Bradley v. Secretary of State for the Environment, Food and Rural Affairs** [2004] EWHC 1450 (Admin).
12. The School does not dispute that the user evidence forms submitted with the application for a DMMO constitutes the “discovery ... of evidence”, however disputes that such evidence raises a presumption of dedication on the balance of probabilities.
13. As to that burden, where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such an allegation rests on that party (here the Council and those supporting the order). If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him, see *Phipson on Evidence* (20th ed.) para.6-06.
14. Moreover, it might be the case that the Inspector is unable to determine that either version of events is more probable, in that circumstance the Order must be dismissed, as the editors of *Phipson* say at para.6-07:
- “While a judge or tribunal of fact should make findings of fact if it can, in exceptional cases it may be forced to the conclusion that it cannot say that either version of events satisfies the balance of probabilities. In such a case the burden of proof may determine which party succeeds”
15. As Pill LJ observed in **R v. Suffolk County Council, ex parte Steed** (1998) 75 P & CR 102 at p.111, to have public rights recorded over one's land is “no trivial matter” and, therefore, rights should only be recorded where the necessary statutory requirements have been “properly and strictly proved”.

The Relevant Date

16. By virtue of s.31(2) Highways Act 1980, the 20-year period referred to in that section is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.

17. In order for the right of the public to have been “*brought into question by notice as aforesaid or otherwise*” (within the meaning of what is now subs.(2)) there must be some act which raises the issue of the status of the way sufficient to bring it home to the public that their right to use the way is being challenged, so that they must be apprised of the challenge and have a reasonable opportunity of meeting it. Those acts need not be by the landowner and may include the erection of notices or acts which would amount to an “interruption”, see: **Godmanchester Town Council v. Secretary of State for Environment, Food and Rural Affairs** [2008] AC 221.

18. Here, the very latest date on which the public use was brought into question was 1983 with the erection of six notices, prohibiting the use of the Land without permission. The OMA appear to accept that those notices had the effect of bringing the public’s use into question but assert that they were erected in 1985. However, it is clear that the signs were in place by 1983 as demonstrated by:

- a. **On 20 May 1983:** the *Bristol Evening Post* carried an article regarding the signage. Avon County Council is reported as confirming that “*it was private property and not a public right of way*”.
- b. **On 11 August 1983:** the *Bristol Evening Post* carried an article reporting the landowner’s view that walkers with dogs were not welcome but that the signs were being ignored.

19. The public’s use of the Land was unquestionably contentious post-1983 and well understood by the public to be contentious, as the following evidence demonstrates:

- a. **On 8 July 2010:** the *Bristol Observer* published “Anger at Fencing Plans”. The article reported that “[t]echnically the public have never been allowed access to the fields ...” and that there was “outrage” at a proposal to fence off the area “*to improve pitches and satisfy health and safety concerns*”.
- b. **On 4 March 2011:** an application to register the Land as a town or village green is filed with Bristol City Council by Save Stoke Lodge Parkland (“SSLP”). The cover letter (signed by the nine Committee members) explains that SSLP was formed with “*overwhelming public support*” at a

meeting attended by 250 people, to protest the fencing proposals which the authors record as *“aiming to preclude and frustrate the opportunity to secure Town or Village Green status by preventing unfettered public access as of right”*. Notwithstanding the fencing proposal has been dropped in September 2010, the application was said to be necessary because of the *“realisation that this precious open space will face ongoing challenges from various sources which will seek to take away public access”*, accordingly *“achieving Town or Village Green status is the only way of securing ongoing access ...”*.

- c. **On 11 May 2016:** Cllr Goulandris published a letter in the *Bristol Evening Post*, which explained that *“[r]ather selfishly in my view they [Cotham School] wish to exclude members of the public and prevent them enjoying use of the parkland ...”*.

20. However, it is clear from the aerial photography (filed with this Statement of Case) and the known historic uses, that the land was in active use as playing/sports fields, demonstrated by the marked-out sports pitches, by at least 26 July 1963. As stated above, there is also evidence that the Land was used for sports, including hockey and rugby, prior to 1963.. The School will call Chris Cox, an expert in interpreting aerial photographs, to assist the Inspector to interpret that evidence. Chris Cox will then strengthen the interpretations by using a stereoscope.

21. As well as newspaper clippings, there is an agreement dated 12 October 1928 between [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED] of Stoke Bishop Cricket Club, for a cricket field at Stoke Lodge, Stoke Bishop (consisting of three and a quarter acres in the north west section of the site) which likely would have interrupted use of the claimed routes.

22. The use of the Land for playing cricket, football and athletics would clearly amount to an actual and physical stopping of the enjoyment of the ways which are the subject of the order, and therefore qualify as an “interruption”, see ***Merstham Manor v. Coulsdon*** [1937] 2 K.B. 77, 85 and ***Lewis v. Thomas*** [1950] 1 K.B. 438, 447.

23. As Judge Matthews held in relation to the use of the Land for cricket, football and athletics between July 1998 and July 2018 in **Cotham School v. Bristol City Council** [2025] EWHC 1382 (Ch) at [312]:

“No one taking a shortcut across the land in this case, or walking a dog on the land, pauses *for an hour or so* to allow the game to finish before continuing on his or her way across the pitch. There is a qualitative difference between the two cases. The public can properly be said to have been displaced by the games for the length of time that they took to play. If a gate had been locked to deny access to certain land to the public for that time, it could not be said that the public had access as of right during that time. The same is true if the landowner excludes the public by playing organised sports on the land.”

24. It follows that the use of the Land for playing cricket, football and athletics, at least from 26 July 1963, as demonstrated by the aerial photography, brought the public’s use of the ways into question. There is also evidence that the Land was used for sports prior to 1963.

25. The School will accordingly submit that the correct period for consideration of these ways is **July 1943 to July 1963**.

Ground 1 – No actual enjoyment by the public

26. It is now well established that when considering whether a public right has been asserted, the evidence must be scrutinised to determine whether “... *the user by the public was of such an amount and in such a manner as would reasonably be regarded as the assertion of a public right*” at **R(Lewis) v. Redcar & Cleveland BC** [2010] 2 AC 70 [75].

27. It follows that the number of users “*must just be such as might have been reasonably expected if the road in dispute had been an undoubted public highway*” see **Mann v. Brodie** (1885) 10 App. Cas. 378, 392.

28. That approach has been re-asserted more recently in **Wright v. Secretary of State for the Environment, Food and Rural Affairs** [2016] EWHC 1053 (Admin) at [21] where it was held that “...[t]he use had to be sufficient to bring home to the mind of the reasonable non-absentee landowner that the public were asserting a continuous right to use each route in question. The user over the twenty year period did not have to be by the same people.”

29. Whilst it may be practically more difficult to provide evidence of actual use by the public in decades past, that does not undermine the strict requirements of the Act. It is an error of law to proceed on the basis of use of the land merely being available to be used as highway without clear evidence it was actually used as such. As the High Court held in **DPP v. Instone** [2022] 1 WLR 5358 at [38]:

“That was simply evidence of a mere physical opportunity to cross the paved area, and not actual use asserting a right which the landowner needed to resist if it did not intend to dedicate the land as a highway. Accordingly, there was no evidence from which it would have been permissible for the court to infer that any part of the paved area had been, or even might have been, dedicated by the owner as a highway. In my judgment, for these reasons alone the appeal should succeed.”

30. Applying those principles, if the Inspector were to accept that July 1963 is the relevant date on which the use of the ways was brought into question, there is plainly no evidence from which it could rationally be concluded that the use of the ways was the assertion of a **public** right. There are only 4 users who claim to have used Route 1 (F-G-B-A) prior to 1963, two who claim to have used Route 3 (F-G-E) prior to 1963 and no users claim to have used Routes 2 (C-D-E-B-I-H and Route 4 (F-G-I) prior to 1963 at all. That would clearly fall well below what could rationally be described as the assertion of a **public** right.

31. However, even accepting the relevant date is the erection of notices in 1983 and taking the user evidence at its highest, there is evidence only of:

- a. 13 users for Route 1;
- b. 11 users from Route 2;
- c. 5 users from Route 3; and
- d. 4 users from Route 4.

32. On any view, those numbers are well below what would reasonably be expected from the use of a suburban footpath surrounded by residential properties (cf. **Mann** (above)). It would not be use sufficient to place the landowner on reasonable notice that a **public** right was being asserted over the land.

33. In any event, the evidence should not be taken at face value because it is inconsistent with objectively verifiable facts at the time:

- a. Route 1 (F-G-B-A): At Point A, there was an unbroken stone wall until 1957. In 1957, Parry's Lane was widened, a section of wall was removed, and a pedestrian pavement and chain link fence (to prevent access and egress to the playing fields) were installed.
- b. Route 2 (C-D-E-B-I-H): At Point H there stood a Pavillion from 1966, the footprint of which extended over the line of the way. The Pavillion was reduced in size following a fire in 2003 and further reduced in 2006. It was rebuilt in 2021 on the post-2006 footprint. Moreover, prior to 1966 a solid stone wall blocked the access from West Dene. Finally, prior to 2014, the gate at Point C was locked daily.
- c. Routes 1, 2, 3 or 4: there is no evidence of worn paths on the aerial photographs as would reasonably be expected with regular use by the public. That is to be contrasted with the visible perimeter path from 2017 and the clear markings associated with the playing field use (e.g. lines where bowlers have run-up to the cricket crease).

34. The School will call Michael Wood, a rights of way expert, to provide his analysis of the user evidence.

35. Overall, there is insufficient evidence to demonstrate that the public asserted a public right over the ways in the period prior to 1963 or prior to 1983.

Ground 2: No use for a full period of 20-years without interruption

36. As set out above, interruption means, interruption in fact: an actual and physical stopping of the enjoyment of the ways which are the subject of the order, which may be in consequence of steps taken by the landowner or otherwise, see **Merstham Manor** and **Lewis** (above).

37. The interruption and the enjoyment do not carry equal weight: *"a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment"*, see **Poole v. Huskinson** (1843) 152 ER 1039.

38. There is clear evidence from the aerial photographs of the Land being in active use for cricket, football and athletics since at least 1963. There is also evidence that the Land was used for organised sports before 1963 which would have plainly interrupted any unauthorised use. The use of the Land in that way plainly represented an actual and physical stopping of the enjoyment of each and every one of the ways for a material amount of time. The nature of cricket, football and athletics was rightly found by Judge Matthews in **Cotham School** (above) to displace the public during the times they were ongoing.

39. It follows that the public use (such that there was) was not for a “full period” of 20-years and was not “without interruption”.

Ground 3: the use was not “as of right”

40. Any public use taking place when a landowner has made clear that such user is contentious or allowed only under protest will be by force (or vi), such that the user cannot be as of right. Put positively, qualifying user must be peaceable **R(Lewis) v. Redcar & Cleveland BC** [2010] 2 AC 70 at [87].

41. Plainly any use after 1983 was not “as of right” because it was rendered contentious by the erection of the notices. The notices were held in **Cotham School** to be prohibitory in wording and sufficient to render the unauthorised use of the Land by the public to be contentious and therefore not “as of right”. Moreover, it was understood widely by the local community to be contentious, as recorded in the local newspaper articles (see above).

42. Prior to 1983, the use of the ways during the playing of cricket, football or athletics would have interrupted the use of the Land by the School (and its predecessors) for that purpose. Use of a way in a manner which gives rise to a criminal offence is not user as of right and no presumption can arise under s.31 Highways Act 1980, see: **Network Rail Infrastructure Ltd v. Welsh Ministers** [2020] EWHC 1993 (Admin). From 13 September 1982, it was a criminal offence to cause or permit, nuisance or disturbance to the annoyance of persons lawfully using school premises, see s.40(1) Local Government (Miscellaneous Provisions) Act 1982. Any undue interference with the comfortable and convenient use of land could be sufficient to satisfy the elements of the offence, see **Sykes v. Holmes** [1985] Crim

LR 791. Plainly walking right through a game of cricket or football or athletics would be to interfere with the comfortable and convenient use of the Land and not therefore qualify as user as of right.

43. Alternatively, if the public only used the ways other than when a game of football, cricket or athletics was in progress, the use would have been by implied permission. In ***R(Mann) v. Somerset CC*** [2017] 4 WLR 170 at [71] it was held that the exclusion of members of the public from part of the land for a few days in the year (for a beer festival and a funfair, for which entrance charges were made) was sufficient to demonstrate that public access to all the land for the rest of the year was permissive. By parity of reasoning, the exclusion of the public by the playing of games, was an overt act of management and control by the landowner which gave rise to the inference that the use of the Land as a footpath outside those times was by permission.

Ground 4: there is contrary evidence of an intention to dedicate the Land

44. In consequence of Grounds 1-4, the School will submit that no presumption of dedication arises either under s.31 Highways Act 1980 or at common law for the period 1943-1963 or 1963-1983.
45. However, even if a presumption has arisen, there is plainly strong contrary evidence of an intention to dedicate the any of the Land as highway:
- a. First, the assertion of management and control via the playing of organized games of cricket, football and athletics interrupted the public's enjoyment of the ways and/or gave rise to an implied consent to use the Land outside those times of control, which thereby gave rise to a contrary intention to dedicate.
 - b. Second, the presence of boundary walls, a locked gate at Point C and a building over the way at Point H, all were plainly overt acts which cut against an intention to dedicate.
 - c. Third, those acts are wholly consistent with the subsequent steps taken by the Landowner (in the form of prohibitory notices and control of access to the land by various fencing proposals).

Ground 5: the body in possession of the Land has no capacity to dedicate the Land

46. Section 31(8) Highways Act 1980 preserves the common law rule on capacity that a statutory company has no power to grant a public right of way where the enjoyment by the public is incompatible with the statutory objects of the company. The question of incompatibility is one of fact, the test being whether at the date when the question is considered by the tribunal of fact, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertakers' statutory duties, see: ***British Transport Commission v. Westmorland CC*** [1958] A.C. 126.
47. The rule on capacity is not confined to a statutory undertaker and can extend to a charitable trust, see: ***Easteye Ltd v Malhotra Property Investments Ltd*** [2020] EWHC 2606 (Ch).
48. The relevant date to assess capacity, is the date when the fact-finding tribunal is considering the question, see ***Ramblers Association v. Secretary of State for Environment Food and Rural Affairs*** [2017] EWHC 716 (Admin) at [44]-[45].
49. The focus of s.31(8) is on the body in possession of the Land. However, a tenant in possession does not have the capacity to create a highway without the freeholder's consent, see ***Jaques v. Secretary of State for the Environment*** (unreported, 27 May 1994). It follows that where the statutory question at s.31(8) of the 1980 Act falls to be determined at a point where the freeholder (here Bristol City Council) is dispossessed by its tenant (here Cotham School), the question is whether the freeholder has the capacity to consent to its land being dedicated as highway. Here, the City Council has no capacity to dedicate Land held for education purposes as highway and therefore its consent cannot be inferred.
50. As recently explained in ***Easteye*** (above) at [391], s.31(8) prevents dedication in circumstances where:

“...the secondary use would preclude the landowner from using the land for the purpose for which it is held. If the land can be used for the statutory or public purpose consistently with the secondary use”.

51. There can be no dispute that the freehold to the Land is held by the City Council for statutory education purposes. That was common ground between the OMA and the School in the High Court litigation and was recorded by the Judge in **Cotham School** (above) at [256].
52. The Judge also found at [261] that, given the School's lease, its funding agreement and its own constitutive documents require the School to use the leased land only for the educational purposes for which it was originally acquired or appropriated, the statutory education purposes for which it was originally acquired or appropriated are still being carried out by the School on the Land.
53. The Judge found at [267] that the Land could not be used for its statutory education purposes in compliance with the safeguarding legislation if the Land were a town or village green.
54. The OMA is of course right to observe that the Court's findings were in relation to designation of the Land as a town or village green, rather than the implications of a highway dedicated over the Land. However, the essential issue is the same. The evidence of the Headteacher (Jo Butler) was before the High Court (and will be before the Inspector) that use by the public of the ways would preclude the use of the Land as school playing fields in accordance with the safeguarding duties. Confirmation of the Order would disable the School from restricting access to the Land and requiring members of the public to leave once on the land is inconsistent with its legal obligations. That is consistent with the finding of the Judge in **Cotham School** at [270] who found that “[registration of the Land as a village green] prevents the physical education of the children in compliance with the law ...”.
55. Insofar as the OMA seeks to undermine those findings by the Judge in this inquiry, the School will rely on the principle in **Thrasylou v. Secretary of State for the Environment** [1990] 2 AC 273, which provides that a public authority in public inquiry proceedings is precluded by issue estoppel from reneging on an issue determined in prior proceedings to which it was a party.

56. The OMA do not engage with that central plank of the Judge's findings. Instead, the OMA makes two irrelevant points:

- a. First, the OMA submits that the right at issue is confined to a right to pass and repass along a defined route, which is different to a village green right to be all over the Land for lawful sports and pastimes. That is true but misses the point that the ways criss-cross the entire Land such as to in practice affect the entire site. Moreover, it forgets the core issue which is that the creation of the paths as highway would mean the public could not be restricted from those defined routes, even if their use for passing and repassing would cause a nuisance or annoyance to the use of the Land for educational purposes.
- b. Second, the OMA submits that there are various statutory mechanisms to divert footpaths. That may be true but that is legally irrelevant to whether a presumption of dedication has arisen in the first place and the statutory question at s.31(8). Moreover, there is no evidence that the OMA would exercise those powers to move the ways in the event an Order were to be confirmed.

57. It follows that the person with possession of the Land (here the School) does not have capacity to dedicate the Land as highway, as that would be inconsistent with the terms of its lease, funding arrangement and charitable objects.

58. Moreover, even if the School did have capacity to dedicate, the School could not dedicate the Land without the consent of the freeholder (Bristol City Council). The City Council has no capacity to dedicate the Land as highway because that would be inconsistent with the statutory educational purposes for which it is held (and presently being used).

59. On either analysis, dedication is prevented by operation of s.31(8) Highways Act 1980.

Conclusion

60. The relevant period is 1943-1963 or, at the very latest, 1963-1983. The evidence does not give rise to a presumption of dedication either at s.31 Highways Act 1980 or at common law for either period. In any event, there is evidence of a contrary intention to dedicate the ways as highway, such that any presumption of dedication would be rebutted.

GOODENOUGH RING LLP
FOR AND ON BEHALF OF COTHAM SCHOOL

14 JULY 2026.

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A1147	Appendix 62 – 28 June 1969 – Bristol Evening Post article re tennis
A1148	Appendix 63 – 19 July 1969 – Bristol Evening Post article re cricket
A1149	Appendix 64 – 25 August 1969 – Bristol Evening Post article re cricket
A1150	Appendix 65 – 25 July 1970 – Bristol Evening Post article re cricket
A1151	Appendix 66 – 12 December 1970 – Bristol Evening Post article re football
A1152	Appendix 67 – 18 June 1971 – Bristol Evening Post article re St Michael's sports day
A1153	Appendix 68 – 14 August 1971 – Bristol Evening Post article re cricket
A1154	Appendix 69 – 28 June 1972 – Bristol Evening Post article re football
A1155	Appendix 70 - 30 March 1973 – Bristol Evening Post article re cricket
A1156	Appendix 71 – 30 September 1974 – Bristol Evening Post article re football
A1157	Appendix 72 – 13 May 1978 – Bristol Evening Post article re cricket
A1158	Appendix 73 – 20 May 1983 – Bristol Evening Post article 'Public scared off'
A1159	Appendix 74 – 11 August 1983 – Bristol Evening Post article re dog fouling
A1160	Appendix 75 – 8 January 1990 – article on Guerilla Tactics
A1161	Appendix 76 – 16 January 1990 – Bristol Evening Post article re no dog signs, dog fouling and health/safety risks
A1162-1167	Appendix 77 – 1998 – Fairfield – 1898-1998 The Life of a School
A1168	Appendix 78 – 8 July 2010 – Bristol Observer article
A1169-1171	Appendix 79 – 4 March 2011 – TVG1 application cover letter
A1172-1173	Appendix 80 – 11 May 2016 – Cllr Goulandris letter published in the Bristol Evening Post
A1174-1777	Appendix 81 – Cricket Grounds – Stoke Bishop Cricket Club Archive (including 1928 lease map)
	Part 5 – Maps and related evidence
A1178-1180	Appendix 82 – Maps showing unbroken stone wall in 1936, 1951 and in 1957 the widened Parry's Lane and pedestrian footpath
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A1195-1196	Appendix 87 – Google Street view images of the pedestrian gate at Point C and the position before 2014
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WITNESSES

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