Town & Country Planning Act 1990: Recommendation Report

Application: **Anstey RB20 & FP8**	HCC File Ref: EH**/496/DIV TCPA**
HCC officer: G Harbour-Cooper	Date: 13/12/2022

Recommendation Summary:

Recommendation: Make Order	Act & Section(s): TCPA 1990 s.257(1)
Status of new path: Restricted byway	Width of new path: 4 – 7 metres
Is Secretary of State permission required to post notices? No	

Application:

Applicant:	S & K Bagnall
Application to:	Divert part of Anstey restricted byway 20 & extinguishment of Anstey footpath 8
Planning permission reference:	3/19/2477/FUL and X/20/0466/CND
Planning permission effect:	Creation of a new access track with associated planting (retrospectively), removal of original access track, erection of fence and hedgerow planting at both ends of original access track to be removed (including personal gate adjacent to highway)
Has planning permission been granted:	Yes
Evidence of title:	Yes
Planning authority:	East Herts District Council
Consultation carried out by:	Hertfordshire County Council
Date(s) of consultation:	August 2022
List of consultees:	See attached list of consultees
Are there any outstanding objections?	Yes
Are any statutory undertakings affected?	No

Consultation:

Consultation:
HCC sent out a draft order consultation in August 2022. The Draft Order looked to divert that part of Anstey Restricted Byway 20 affected by the proposed development with the provision of an alternative restricted byway running to a new junction with Coltsfoot (public road) further south. The draft order looks to extinguish a very short section of Anstey FP8.

Consultation Responses:
5 responses were received to the initial consultation, 3 respondents confirmed they had no objections to the draft order, whilst The British Horse Society objected and the East Herts Footpath Society made a representation. Dr P Wadey, on behalf of The British Horse Society, made the following comments: 1. "We believe the use of a TCPA 1990 order is inappropriate as the development is substantially completed. A Highways Act 1980 order would not attract this element of objection. 2. There is no need for the diversion. The old route remains in existence, and could still be used despite the development. This also points towards a Highways Act order instead of a TCPA one. 3. We are concerned that the new route is shared with motor vehicles, whereas the current route is not. This is a major reduction in commodiousness of the route for equestrians. 4. We are unhappy with the legal width of the new route not being a minimum of 5m throughout. I am willing to discuss the detail of how much of the width of a hedge may be considered to be part of the legal width, but really a legal width of 5m is important here. Given the size of modern agricultural machinery, there could also be a need for passing places." Mr M Westley, on behalf of the East Herts Footpath Society, made the following comments: 1. "The Rural District of Buntingford (Main Roads) Order 1926, made on 8th November 1926 and confirmed on 2nd May 1927, declared 4 furlongs and 22 yards of the road past Coltsfoot to be a main road. I have only an indistinct copy of the order. which was photographed by Phil Wadey, but the original is filed in HALS under HCC3. The roads in this order were subsequently recorded in HCC's List of Streets and in early editions of the computerised Gazetteer. Coltsfoot Lane was also depicted as an ORPA on OS maps. 2. At some date after the OS had carried out its trawl for ORPAs, the length of Coltsfoot Lane recorded in the Gazetteer was shortened and Phil Wadey applied to record the rest as a Restricted Byway in 2015. The DMMO for a RB was confirmed in 2016 but this is without prejudice to the existence of MPV rights. The MPV rights declared by the 1926 order have never been lawfully extinguished and editions of the Gazetteer which omit part of the main road are inadmissible as evidence because of the Best Evidence rule. 3. That being the case, no Local Authority has power under TCPA1990 s257 to stop up Coltsfoot Lane and any order must be made by the Secretary of State under s247. It may be that MPV users will want the replacement highway to carry MPV rights. All users will want the replacement highway to be maintained fit for the traffic entitled to use it."

HCC assessment of the consultation responses:

Comments on the British Horse Society's response;

Following receipt of the comments from Dr Wadey the County Council sought legal advice, this can be found at **Appendix 1**. The advice considers the tests set out under S.257 of the Town & Country Planning Act 1990 and applies them to the specifics of this case, as known. It is clear that the advice considers there is grounds for making a diversion order under the provisions of the Town & Country Planning Act 1990.

With regards to the potential conflict between public users of the route and private vehicles; it is the understanding of the County Council that current route of Anstey RB20 does coincide with private vehicular rights and that as such the alternative route is considered no less commodious for the public.

The width of the new route as set out in the draft order is variable, between 4 – 7 metres. As stated, Dr Wadey feels that a minimum of 5 metres is necessary for the alternatively route, though there is scope for further discussion. It is the County Council's position that this discussion should be undertaken with possible scope in the width set out by the Order to accommodate passing sections along of the alternative route with minimal works required on site. It is noted however, that failure to find a consensus will likely lead to an objection to any order made and require determination by the Planning Inspectorate at additional time and expense.

Comments on the East Herts Footpath Society's response;

The County Council investigated an application to record Coltsfoot Lane on the Definitive Map & Statement in 2014. Following the investigation of the application the County Council made and then confirmed a Definitive Map Modification Order to record the Lane as a restricted byway in 2016. The Main Roads Order and the gazetteer records mentioned by Mr Westley were taken into consideration during the decision-making process and section 67 of NERC 2006 was applied to the evidence. The County Council's decision was that MPV rights had been extinguished on the order route. No objections, suggesting that this status was incorrect, were received when the order recording the route as a restricted byway was advertised. Had HCC considered that MPV rights continued to exist, the order would have been made to record the route as a byway open to all traffic ("BOAT"). This being the case S.247 has not been considered. It is not clear from the correspondence whether or not Mr Westley would object to the proposed diversion order, if made. However, the County Council is satisfied that following the confirmation of the Definitive Map Modification Order to record the route as a restricted byway the District Council have the power, under S.257 TCPA90, to divert the recorded public right of way.

Legal Tests for making an order – section 257

Hertfordshire Council has considered whether this application meets the relevant legal tests under s.257 of the Town & Country Planning Act 1990. These tests are set out below.

S.257(1) Is the stopping up or diversion of the public path necessary in order to enable development to be carried out (a) in accordance with planning permission; or (b) by a government department? Or, alternatively S.257(1A) Is the stopping up or diversion of the public path necessary in order to enable development to be carried out (a) where an application for planning permission has been made under Part 3 of the Town & Country Planning Act 1990; and if (b) the application was granted
At the time of this report retrospective planning permission has been granted for this site under the references 3/19/2477/FUL and X/20/0466/CND. It is therefore necessary to consider the tests set out under S.257(1). The County Council considers that it is necessary to divert the restricted byway in order to allow planning permission to be carried out. Please see the attached advice for detail of the assessment of the Application against the criteria of S.257(1) (**Appendix 1**). With regards to whether or not the development is considered 'substantially complete': Clarification on this point was sought from the Applications Agent. They confirmed that the remaining works consist of "the removal of the existing track over which the restricted byway runs, and the erection of fences and hedgerow planting at either end of the removed track.". it is the County Council's position that this is enough not to consider the development substantially complete.
S.257(2) Does the order provide for (a) the creation of an alternative highway or for the improvement of an existing highway; or (b) any works to be carried out to a new or alternative route?
Yes, as provided by the draft order the new restricted byway is to be constructed to the satisfaction of East Herts District Council, in consultation with Hertfordshire County Council.
S.257(3) Does the order stop up or divert a path that is temporarily stopped up or diverted under any other enactment?
No
Equality Act 2010 must be considered for each case
The Equality Act 2010 has been considered; the proposed alternative will be constructed with a firm level surface, and will be 4 – 7 metres wide with no limitations. The proposal has no detrimental effects on any of the protected characteristics outlined in the Equality Act 2010.

Recommendation:
In light of the information set out above the County Council considers that the legal tests set out under S.257(1) of the Town & Country Planning Act 1990 have been met and recommends to the District Council that the attached order (**Appendix 2**) may be made to divert part of Anstey Restricted Byway 20.

Additional matters:
Hertfordshire County Council is recommending that the District Council make an order under the provisions of S.257 of the Town & Country Planning Act 1990, as the requirements for making an order have been met. However, it is possible that objections to the Order will be received, specifically in regard to the width. The applicant will need to be aware of this and the potential for additional time and expense if the order needs to be determined by the Planning Inspectorate. In addition the County Council would also add that this recommendation has not considered any criteria that would be considered by an inspector if the Order is made and has to be sent to the Planning Inspectorate for determination. A further determination recommendation meeting will be held by the County Council if/when an order has been made and advertised.

Signature: ….. Date: 13/12/2022

Richard Cuthbert
Team Leader Definitive Map & Enforcement
Countryside & Rights of Way Service

Appendix 1

Legal Advice:

1. I am asked to consider whether s.257 TCPA 1990 would be an appropriate mechanism to use to divert the restricted byway in the present case. I have broken this down into four separate questions as follows:

Orders under s.257 TCPA1990 – what constitutes "necessary"?

2. The wording of section 257(1) TCPA1990 states that:

> ***257.— Footpaths, bridleways and restricted byways affected by development: orders by other authorities.***
>
> *(1) Subject to section 259 , a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway if they are satisfied that it is necessary to do so in order to enable development to be carried out—*
>
> *(a) in accordance with planning permission granted under Part III or section 293A, or*
>
> *(b) by a government department.*

3. There has been various caselaw on what constitutes 'necessary' in this context. In *R (Network Rail Infrastructure) v Secretary of State for the Environment, Food and Rural Affairs* [2017] EWHC 2259, Holgate J stated that the "*leading case*" on the ambit of section 257 TCPA1990 is the Court of Appeal's decision in *Vasiliou v Secretary of State for Transport* (1991) 61 P&CR 507. Holgate J helpfully summarised the principles established in *Vasiliou* at [49] as follows:

> *(i) The Secretary of State cannot make an order under section 247 or confirm an order under section 257 unless satisfied that a planning permission exists (or under sections 253 or 257(1A) will be granted) for development and that it is necessary to authorise the stopping up (or diversion) of the public right of way by the order so as to enable that development to take place in accordance with that permission (see also language to the same effect in section 259(1A)(b));*
>
> *(ii) But even if the Secretary of State is so satisfied, he is not obliged to confirm the order; he has a discretion as to whether to confirm the order and therefore may refuse to do so;*
>
> *(iii) In the exercise of that discretion the Secretary of State is obliged to take into account any significant disadvantages or losses flowing directly from the stopping up order which have been raised, either for the public generally or for those individuals whose actionable rights of access would be extinguished by the order. In such a case the Secretary of State must also take into account any countervailing advantages to the public or those individuals, along with the planning benefits of, and the degree of importance attaching to, the development. He must then decide whether any such disadvantages or losses are of such significance or seriousness that he should refuse to make the order.*
>
> *(iv) The confirmation procedure for the stopping up order does not provide an opportunity to re-open the merits of the planning authority's decision to*

grant planning permission, or the degree of importance in planning terms to the development going ahead according to that decision.

4. Holgate J added at [53] that:

> *The language used by Parliament in section 257(1) for the purpose of enabling, or facilitating, the carrying out of development, strongly suggests that the word "necessary" does not mean "essential" or "indispensable", but instead means "required in the circumstances of the case." Those circumstances must include the relevant terms of the planning permission.*

5. He also considered that:

> *"It is well-established that an order under sections 247 or 257 may be made… where a planning permission allows development to be physically carried out on the route of an existing footpath"*

6. In *Hall v Secretary of State for the Environment* [1998] JPL 1055, the High Court held that there was no power to make or confirm an order under s.257 TCPA where the development concerned had already been carried out. Although the Judge was not explicit on the point, he appeared to accept that a test of "substantial completion" applied in this context. As per the House of Lords' decision in *Sage v Secretary of State for the Environment, Transport and the Regions and Others* [2002] UKHL 22, in determining whether development is 'substantially complete', "*regard should be had to the totality of the operations which the person originally contemplated and intended to carry out.*" Lord Hope considered that this would be an "*easy task if the developer has applied for and obtained planning permission.*"

What constitutes 'development'?

7. As per the 4 September 2020 appeal decision, the proposed development in the present case was:

> "*New access track with associated planting (retrospectively), removal of original access track, erection of fence and hedgerow planting at both ends of original access track to be removed (including personal gate adjacent to highway), diversion of part of restricted byway Anstey 20, and stopping up of part of footpath Anstey 8"*

8. The planning inspector made clear, however, that the aspects relating to the diversion stopping up of Anstey 20 & 8 were not matters for the appeal and so had been removed from the description of development.

9. Given that the new access track is clearly already 'substantially complete', a question arises as to whether the remainder of the description ("*removal of original access track, erection of fence and hedgerow planting at both ends of original access track to be removed (including personal gate adjacent to highway*") constitutes "development" for the purposes of section 257 TCPA 1990. I will refer to these as the "remaining operations". The fact that those remaining operations are included within the "description of development" for the purposes of the planning permission is not in my view conclusive. To qualify as "development" for the purposes of section 257 TCPA 1990, in my view, the remaining operations must meet the statutory definition in section 55 TCPA. The defines "development" as:

"Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

10. There is an exception in section 55(2)(e) to the effect that "*the use of land for the purposes of agriculture*" will not constitute 'development'. As I understand it, the existing track is located in an agricultural setting and as such there is a potential that a court would find that it is not development. In my view, however, this is unlikely. The proposed operations are not simply the use of land for agricultural purposes, but rather the removal of hard surfacing and erection of a fence / hedgerow. As such I do not think that the exception applies.

11. In my view, therefore, the issue is whether the remaining operations constitutes either "*engineering… or other operations in, on, over or under land*" for the purposes of section 55 TCPA.

12. My view is that the remaining operations would fall into one of these categories. I am particularly influenced by the case of *RFW Coppen (Trustees of the Thames Ditton Lawn Tennis Club) v KJ Bruce Smith* [1988] JPL 1077 in which the Court of Appeal held that the breaking up and digging out of a tennis court constituted an engineering or other operation under section 55 TCPA1990. It strikes me that the removal of the hard surfacing from the existing track is very similar to this situation. I also note the case of *Beronstone Ltd v First Secretary* [2006] EWHC 2391, in which 554 marker stakes hammered into a field were capable as a matter of fact and degree of comprising "other operations". Although I caveat this advice slightly because I do not have information about the scale of the removal of hard surfacing or the fencing to be erected, in my view the remaining operations are likely to constitute development within the meaning of section 55 TCPA1990.

Is the development 'substantially complete'?

13. Again, I caveat the advice I provide here due to not having detail on the extent of the operations that remain to be carried out. If there was only a very small area of hard surfacing, for example, this may change my advice.

14. My provisional view, however, is that because the remaining operations do constitute development, in light of the House of Lords' decision in *Sage* the development is not 'substantially complete'. This is because there remains development still to be carried out, namely the removal of the hard surfacing and the erection of fencing / hedging. I take on board the fact that the new track is essentially already built (hence why its permission was retrospective), but I do not think that this means that the development as a whole is substantially complete.

15. I do not think therefore that an order under s257 TCPA1990 is precluded on that basis.

Is an Order under s.257 'necessary'?

16. In my view, the central point in determining this question is the fact that if the applicants carried out the remaining operations, they would clearly be obstructing the restricted byway (in particular through the erection of a fence). As you will know, this would constitute an offence under section 137 of the Highways Act 1980.

17. In my view, the fact that the applicants would be required to break the law as things stand in order to carry out the remaining development is likely sufficient to conclude that an Order under section 257 is "*required in the circumstances of the case*", in the language of Holgate J in *Network Rail Infrastructure*. It is difficult, in my view, to see how a different conclusion could be reached.

18. I note the objections made by Phil Wadey in the emails provided to me. In my view, his approach takes an overly narrow approach to what constitutes "development" under the planning permission granted.

19. I also note that the suggestion is made that an order could be pursued under section 119 of the Highways Act 1990. This is clearly correct. I note, however, the following paragraph from the judgment of Holgate J in *Network Rail Infrastructure*:

> *During the course of argument Mr Buley and Mr Jonathan Easton (who appeared for the Interested Party) both submitted that the stopping up and diversion of the footpath across the railway line could have been achieved under sections 118A and 119A of the Highways Act 1980. I understand that to be disputed by NR. However, this is not a matter which the Court needs to resolve, because both Mr Buley and Mr Easton accepted that this would not result in the Order failing the necessity test in Vasiliou. I agree. Their stance tacitly and rightly accepts the principle set out in paragraph [53] above. The necessity test does not require an order under section 257 (or section 247) to be indispensable or essential.*

20. In my view the same analysis would clearly apply to any suggestion in the present case that s.119 HA1980 could be used as an alternative.

21. Based on the authorities, therefore, I am of the view that the 'necessity' test in s257 TCPA1990 would likely be met in the present case.

Conclusion

22. It should be noted that even if I am correct that the 'necessity' test in s257 is met, per the judgment in *Vasiliou* the court would still retain a discretion not to grant an order under s.257 TCPA 1990. I am not asked to advise on this point specifically and I am not sufficiently informed of any disadvantages of the new proposed route which could lead to a conclusion that the discretion should not be exercised. I note, for example, that the proposed track is significantly longer than the existing track and would cross a field which has historically been open and undeveloped. In my view, however, these would likely be issues (if raised by anyone) whichever statutory route was taken, and so I am not of the view that this changes the central analysis that s257 would be an appropriate mechanism to use.

Appendix 2

Draft Order:

PUBLIC PATH STOPPING UP AND DIVERSION ORDER

TOWN AND COUNTRY PLANNING ACT 1990, SECTION 257

East Hertfordshire District Council (Anstey 8 and 20) Stopping Up and Diversion Order 2022

This order is made by East Hertfordshire District Council ('the authority') under section 257 of the Town and Country Planning Act 1990 because it is satisfied that it is necessary to stop up the footpath and divert the restricted byway to which this Order relates in order to enable development to be carried out in accordance with planning permission granted under Part 3 of the Town and Country Planning Act 1990 namely: a new access track with associated planting (retrospectively), removal of original access track, erection of fence and hedgerow planting at both ends of original access track to be removed (including personal gate adjacent to highway), diversion of part of restricted byway Anstey 20, and stopping up of part of footpath Anstey 8 under planning references 3/19/2477/FUL and X/20/0466/CND.

BY THIS ORDER

1. The footpath over the land shown by the bold black line on the attached plan ('the Order Plan') and described in Part 1 of the Schedule to this Order ('the Schedule') shall be stopped up as provided below.

2. The restricted byway over the land shown by the bold black line on the attached plan ('the Order Plan') and described in Part 1 of the Schedule shall be diverted as provided below.

3. There shall be created to the reasonable satisfaction of East Hertfordshire District Council an alternative highway for the use as a replacement for the said restricted byway as provided in Part 2 of the Schedule and shown by bold black dashes on of the attached Order Plan.

4. The stopping up of the footpath and the diversion of the restricted byway shall have effect on the confirmation of this Order.

5. Where immediately before the date on which the footpath is stopped up and the restricted byway is diverted there is apparatus under, in, on, over, along or across it belonging to statutory undertakers for the purpose of carrying on their undertaking, the undertakers shall continue to have the same rights in respect of the apparatus as they then had.

IN WITNESS whereof the COMMON SEAL of East Hertfordshire District Council was hereunto affixed this day of 2022

The Common Seal of
East Hertfordshire
District Council
was hereunto affixed
in the presence of:-

Authorised Signatory

SCHEDULE

PART 1
Description of Site of Existing Path or Way

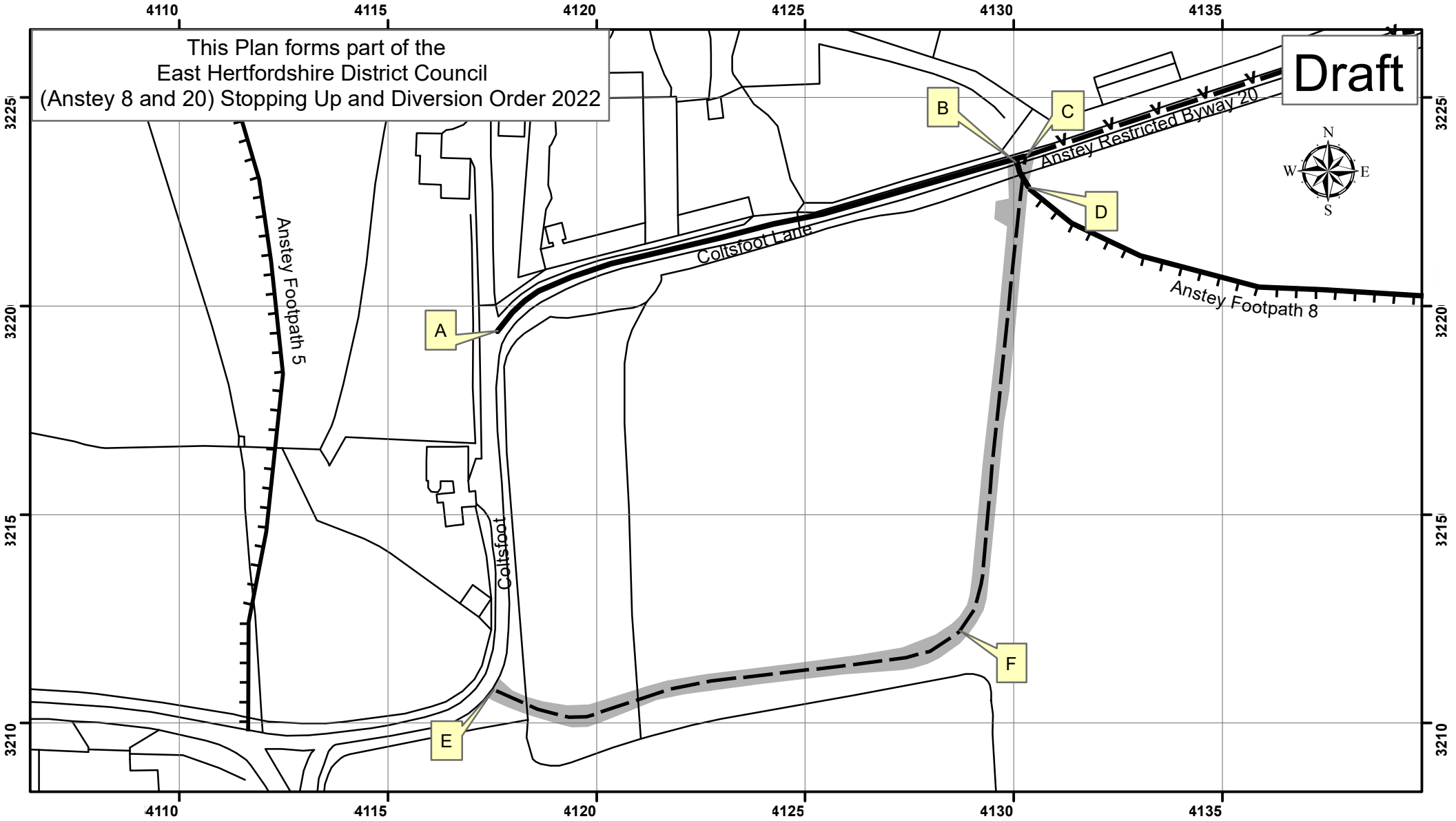
The full width of that part of Anstey Footpath 8 from TL 4130 3223 (point B on the Order Plan) running in a south south easterly direction for approximately 10 metres to TL 4130 3222 (point D on the Order Plan).

The full width of that part of Anstey Restricted Byway 20 from Coltsfoot (public highway) at TL 4117 3219 (point A on the Order Plan) running along Coltsfoot Lane in an east north easterly direction for approximately 140 metres to TL 4130 3223 (point C on the Order Plan).

PART 2
Description of Site of Alternative Highway

A public Restricted Byway commencing from Coltsfoot (public highway) at TL 4118 3210 (point E on the Order Plan) and running along the track in an east north easterly direction for approximately 110 metres to TL 4128 3212 (point F on the Order Plan). Continues in a north north easterly direction along the track for approximately 110 metres to a junction with Anstey Footpath 8 at TL 4130 3222 (point D on the Order Plan), then continues in a north north easterly direction along the track for approximately 10 metres to join Anstey Restricted Byway 20 at TL 4130 3223 (point C on the Order Plan).

Width: Varying between 4 metres and 7 metres between TL 4118 3210 (point E on the Order Plan) and TL 4130 3223 (point C on the Order Plan) as shown shaded on the Order Plan.



Footpath currently shown on the DM

Restricted Byway currently shown on the DM

Restricted Byway to be extinguished (A-B-C)

Footpath to be extinguished (B-D)

Restricted Byway to be created (E-F-C)

Scale 1:1,250

Appears on DM page no. 16

0 25 50 100 Metres