



# Order Decision

Inquiry held on 4 February 2003  
Second Site Visit made on 4 February  
2008

by **Helen Slade MA FIPROW**

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

The Planning Inspectorate  
4/11 Eagle Wing  
Temple Quay House  
2 The Square  
Temple Quay  
Bristol BS1 6PN

☎ 0117 372 6372  
email: [enquiries@pins.gsi.gov.uk](mailto:enquiries@pins.gsi.gov.uk)

Decision date:  
**14 February 2008**

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## Order Ref: FPS/E0535/7/9R

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Cambridgeshire County Council (Public Footpath No 15 Godmanchester) Definitive Map Modification Order 2002.
- The Order is dated 20 March 2002 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath around Monks Pit, as shown on the Order plan and described in the Schedule.
- There were two objections outstanding when Cambridgeshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
- This decision is a re-determination; the first decision having been quashed in a judgement given by the House of Lords.

## Summary of Decision: The Order is confirmed subject to modifications

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### Preliminary Matters

1. I held a public local inquiry at the Queen Elizabeth School in Godmanchester on 4 February 2003, following which I declined to confirm the Order. That decision was subject to judicial review, and was eventually quashed following a judgement given by the House of Lords<sup>1</sup>.
2. I have been appointed to re-determine the matter, and the parties have agreed to the written representation procedure. Accordingly, I have had access to all the papers associated with the case including the previous inquiry documents and my own notes taken at that inquiry.
3. Further submissions have been made on behalf of the landowners – the Church Commissioners – who have maintained their objection. No correspondence, except the original letter of objection, has ever been received from the other remaining statutory objector, Mr M Wyman.
4. I have received a submission from the Ramblers' Association ('the RA') in support of the Order; and correspondence from some of the other supporters who appeared at the inquiry. The user witnesses have all indicated that they wish to rely on their original testimony.
5. Cambridgeshire County Council ('the County Council') has made no submission, maintaining the neutral stance it took at the inquiry.

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<sup>1</sup> R (on the application of Godmanchester Town Council and Drain) v Secretary of State for Environment, Food and Rural Affairs and others [2007] UKHL 28 ('*Godmanchester*')

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6. I visited the site twice at the time of the inquiry in 2003: once on my own prior to the inquiry and once in the company of the parties to the matter following the close of the inquiry. I made a further unaccompanied site visit on 4 February 2008 when I was able to walk the entire length of the claimed route by negotiating a barbed wire fence (point C on the Order plan) and passing through an unlocked wrought iron gate at point A on the plan.

### ***Modifications to the Order***

7. At the inquiry, I indicated that there appeared to be an error in the description of the path in the schedule. The County Council asked me to correct this if I confirmed the Order and also asked me to identify with the appropriate letters the points given by grid references.
8. I now consider that by identifying the lettered points with the appropriate grid references, the description of the route of the path is clear, and not in error.
9. If I confirm the Order I intend to modify the Schedule by identifying the grid references with the appropriate lettering for clarification purposes. These changes would not require advertisement.

### **Main issues**

10. The Order was made on the basis of an event cited in Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 ('the 1981 Act'). If I am to confirm the Order I must be satisfied that the evidence which has been discovered, together with all other relevant evidence available, shows that a public footpath which is not currently shown on the definitive map and statement subsists over the land in question. The test I must apply is the balance of probabilities. It is not appropriate at the confirmation stage to apply the lesser test – that the existence of the footpath has been reasonably alleged. At the inquiry, this issue was raised by Mr Birkett on behalf of the Church Commissioners, and a subsequent judgement has clarified the point.<sup>2</sup>
11. With respect to the evidence of use, Section 31 of the Highways Act 1980 ('the 1980 Act') states that where a way, which is of a character capable of giving rise to a presumption of dedication at common law, has been enjoyed by the public as of right and without interruption for a full period of 20 years, that way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.<sup>3</sup> The period of 20 years is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, either by a notice or otherwise.
12. It is also open to me to consider whether dedication of the way has taken place at common law. This requires me to examine whether the use of the path by the public and the actions of the landowner or previous landowners (whomsoever they may have been) have been of such a nature that dedication by them can be shown to have occurred expressly or, alternatively, whether dedication can be inferred. No prescribed period of use is required at common

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<sup>2</sup> Todd and Bradley v Secretary of State for Environment Food and Rural Affairs [2004] EWHC 1450

<sup>3</sup> This qualification or potential for rebuttal is usually referred to as 'the proviso'

law. The length of time required to allow such an inference to be made will depend on all the circumstances.

### **Reasons**

13. Although the issue on which my previous decision was challenged related solely to the question of sufficient evidence of a lack of intention to dedicate, in the recent submission on behalf of the principal objector (the Church Commissioners) a number of issues have been raised which need to be examined. No further evidence of use has been submitted and I therefore rely on the evidence provided before and during the inquiry in that respect. This accords with the requests of the supporters to whom I have referred in paragraph 4 above.

### ***The date on which the right of the public to use the way was brought into question***

14. On behalf of the principal objector it is argued that the date on which the right of the public to use the way was brought into question was 1989, at which time a sign was erected with wording which, it is asserted, unambiguously made it clear that the public were not to use the claimed route. The wording of the sign is not in dispute. It read as follows:

PRIVATE PROPERTY  
No Vehicular Access  
Pedestrian Access along  
Footpath Route only  
The Water Pit is Dangerous  
All uses of the Water are Prohibited

15. The objector considers that when taken in context the wording on the sign clearly demonstrates an intention to exclude the public from private land. Furthermore the reference to the pedestrian access ought to be construed as a reference to the footpath recorded in the Definitive Map and Statement, and thus as a challenge in relation to the use by the public of any other route. The sign is alleged to have been placed to the right hand side as one emerged from the tunnel under the A14 road. The recorded public footpath turns to the left at that point, and thus the sign is believed by the objector to have been purposefully positioned to discourage the use of the claimed route, which turns to the right. The objector also relies on the use of the singular term 'footpath' as further support for the fact that there was only one path available to be used, and that was the definitive line of Footpath 4.

16. In contrast, the RA states that as most land is private property, it must also be assumed that most public rights of way cross private property. The use of such words on a sign does not necessarily deny the existence of public rights of way across the land in question. They further argue that the evidence supports that the public considered that the sign was directed at vehicular users of the water and its surrounds, and not to walkers. This is demonstrated, in their view, by the fact that the loss of the sign was actually reported to the land agents by one of the pedestrians who claims use of the way. She was concerned that

unauthorised vehicular use of jet-skis and other inappropriate activities would begin again.

17. These arguments were extensively aired and debated at the inquiry and nothing which has been submitted subsequent to that time introduces any new facts. I find the arguments expressed by the RA in their submission are persuasive. Given the fact that a path was visible around the lake at the time that the notice was erected, I cannot ascribe to it the clarity which is claimed by the objector. The photograph of the sign in the objector's bundle shows no evidence of any barrier to pedestrian passage. Any reasonable person seeing such a notice; seeing physical evidence of a walked route; and not being physically prevented from accessing that route would, I believe, understand that they were being asked to keep to the path and not digress. The warnings with regard to the dangers of the site provide further support that it is reasonable to assume that pedestrians took the sign to be advice provided for their safety whilst using the footpath, and not instructions preventing their use of it.
18. It is not credible to suggest that this notice brought the use of the way by the public into question; the actions of Mrs Mardsen, one of the user witnesses, in reporting the theft of the sign in August 1989 could not be a clearer demonstration of the ineffectiveness of the sign in this regard. She would hardly have been likely to report the theft if she had understood the sign to have been challenging her use of the path.
19. Use of the way by pedestrians continued until the fence was erected in 1999; an event which prompted the application from Godmanchester Town Council ('the Town Council') and which clearly did cause the public concern. No evidence has been submitted to suggest that any other event might qualify, and I note that the objector accepts that if their submissions in respect of the notice are rejected, the appropriate date is 1999. I conclude that the erection of the sign in 1989 did not call the right of the public into question, but that the erection of the fence clearly did. The relevant period of 20 years in respect of Section 31 of the 1980 Act is therefore 1979 to 1999.

***Whether the way has been used by the public as of right for an uninterrupted period of 20 years***

*Whether there has been use of the way for 20 years*

20. No further evidence of use has been submitted since the date of the inquiry, and no evidence has been submitted by the objectors to challenge the generality of that use.
21. The Town Council submitted 10 user evidence forms with their original application. Four of the people who completed evidence forms gave evidence at the inquiry, and two other witnesses were able to clarify details of their use of the path at the inquiry. Some of the user evidence related to the years prior to the excavation of the pit, and it became clear that this evidence related to use of Footpath 4 along its original route, before it became obstructed by the excavation. I am satisfied that the use of the Order route can only have taken place since approximately 1975, which is when the bypass was opened, and excavations had ceased.

22. Evidence was given that the obstruction of Footpath 4 was unlawful, and that it was not until 1984 that the diversion of the path was successfully completed. Until that time, the public walked around the lake, in both directions, to avoid the obstruction and to regain the legal line of Footpath 4. They also appear to have used the path to complete a circuit of the lake for pleasure. Mr Flynn, on behalf of the principal objector, gave evidence that the discussions about the preferred line for the diverted path went on for several years, and it was finally decided to place the diverted route of the definitive path on the north-western bank of the lake. However, it was clear from the evidence given by the users that they continued to walk around the lake, forming a continuous circular walk. Mr Flynn also confirmed that until the sign was erected in 1989, no action was taken on the part of the landowner to indicate that such use was not permitted. I have already indicated that the erection of the sign appears to have had no effect on the use of the path by the public, and it is therefore apparent to me that the path has been used between the years of 1975 (approximately) and 1999, a period in excess of 20 years.

*Whether there has been any interruption to use*

23. In 1989, remedial works to the bypass were carried out, during which time the contractors established a crushing plant adjacent to the lake. The works also provided the opportunity for the landowner to have the banks of the lake reinforced, as they had become eroded through wave action caused by the action of the prevailing wind and also, possibly, the use of the lake by jet skiers. The contractors who undertook the work apparently applied for the temporary closure of Footpath 4 on safety grounds, due to the movement of plant in the vicinity of, and along the route of, the definitive path. It was stated at the inquiry that the period of closure was 3.5 months. Mr Flynn took the view that the closure of the definitive route caused an interruption to the use of the claimed route, and that as a consequence it was therefore an interruption to the 20-year period of use.
24. No evidence of the temporary closure has been submitted, but it was agreed by several of the witnesses at the inquiry that such a closure would not have been unreasonable. However, none of the witnesses recalled seeing any indication on the route of Footpath 4 that the path was closed, and that in the evenings and at weekends, when the machinery was not in use, access around the lake and beyond continued to be taken. The work was undertaken in the late spring and early summer of 1989, and was completed by July of that year.
25. I accept that the contractors are likely to have sought a temporary closure of Footpath 4, and that such an Order may have been made. Nevertheless, no evidence was provided that notices or barriers were erected to enforce the closure, and it is apparent from the user evidence that some use of both Footpath 4 and the claimed path did continue.
26. On behalf of the principal objector it is argued that the question of what constitutes an interruption needs to be seen in the light of the judgement in *Jones v Bates [1938] All ER 237*. In that judgement, Scott LJ stated as follows:

*"The next requirement of the statute, 'without interruption', means that the enjoyment of the right must not have been interrupted. ....A mere absence of*

*continuity of the de facto user proved will not prevent the statute from running.... No interruption comes within the statute unless it is shown to have been an interference with the enjoyment of the right of passage."*

27. Thus, it is argued, an interruption is not simply a period when the public do not make use of a route, but rather an activity undertaken by the landowner which is an 'interference with the enjoyment of the right of passage'. The substantial works that were described by Mr Flynn in his statement at the inquiry<sup>4</sup> were stated by him to have obstructed the route and made it impassable to walkers.
28. The RA, on the other hand, argues that to constitute an interruption to use it is necessary for the interruption to have been with the specific intention of preventing public user of a way. The authorities relied upon by the RA<sup>5</sup> post-date the judgement in *Jones v Bates*, and suggest that if the obstruction caused was incidental to some activity (such as building works) and not designed specifically as a barrier to public user, then no interruption with respect to Section 31 of the 1980 Act can be taken to have occurred.
29. Mr Doherty, at the inquiry, gave very particular details of picking his way around the lake in those places where the banks were being reinforced, and all the witnesses stated that they saw no notices or barriers which would have prevented them using the route of either Footpath 4 or the claimed route. Mr Doherty stated that he saw other people using the way at that time, in addition to himself and his wife. Certainly there is no evidence of any barriers on the photographs submitted by Mr Flynn which were taken at the time. The photographs supplied by him show the work in progress, but do not indicate to me that it would have been impossible to walk along either route.
30. Furthermore, there is no suggestion by the objectors that any temporary closure order which existed in relation to the definitive route of Footpath 4 also applied specifically to the claimed route. For it to have done so would, in my view, have amounted to a tacit acknowledgement of public rights on the alleged route. Although it was clearly necessary to make use of Footpath 4 to access the claimed route, and although the usage of the claimed route may have been difficult at times during the period of the works, I do not consider that it has been shown that usage actually ceased. Indeed at the inquiry Mr Flynn acknowledged that use of the way would, in fact, have been possible.
31. Consequently, and in view of the absence of any physical or legal barrier, I am satisfied that any interruption to user which did take place was not with the specific intention of preventing use by the public, and therefore no interruption of the claimed route has taken place in the context of the 1980 Act. I find that the path has been used for the requisite 20-year period, and that the use of it by the public has been without interruption.

*Whether the use by the public has been as of right*

32. For use to be considered to be as of right, it must be shown to have been exercised without permission, without force and without secrecy.

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<sup>4</sup> The same statement has been relied upon in the recent submission

<sup>5</sup> *Lewis v Thomas* [1950] 1KB 438; *Fernlee Estates v City and County of Swansea and the National Assembly of Wales* [2001] EWHC Admin 360; *Ward and Ward v Durham County Council* [1995] 70 P & CR 585

33. Although only six people gave evidence of use at the inquiry, five of the witnesses confirmed that they had used the path, to a greater or lesser degree, throughout the 20-year period prior to 1999. One person was able to provide evidence of use since moving to the area in 1986. Evidence was given that the route was well used by dog-walkers, some of them using it daily, and many of them using it regularly. Despite the erection of the fencing, witnesses confirmed that the path was still in use, and this was evident during my site visits in 2003 when a clear trodden path was visible. Although not tested at the inquiry, the remaining user evidence forms indicate patterns of usage similar to those described by the witnesses at the inquiry and I can see no reason to doubt their truthfulness.
34. None of the witnesses demonstrated that they had at any time received permission to walk the alleged route. The only permission for which any evidence exists is that granted to St Ivo School in 1997. The use made of the route by the school on that one occasion was clearly not in the exercise of any public right, but that does not detract from the claimed use made by other local people over the relevant 20 years without such permission.
35. Although there were reports of occasional differences of opinion with anglers fishing in the lake, these appear from the letters of objection to have been mainly concerned with the behaviour of dogs. Those user witnesses who mentioned such incidents indicated that they took place in 1999, which corresponds to the year in which the right of the public was brought into question. It was apparent at the inquiry that it was generally understood by walkers that the path was believed to be an amenity for the town, acquired as a result of the building of the bypass. In his statement, Mr Flynn claims to have spoken to a member of the public during the period 1983 to 1994<sup>6</sup>, but at the inquiry he could not provide any further details, except to say that he recalled more men than women so it was probably a man.
36. I can place little weight on Mr Flynn's rather vague recollections but in any case he makes no suggestion of subsequent use by force. I do not consider that there is any evidence of use of the way by force until the erection of the fence in 1999; consequently there is no evidence of user by force within the relevant 20 year period.
37. Mr Flynn also acknowledged at the inquiry that no action was taken with respect to pedestrian access whilst the various discussions about the diversion of Footpath 4 were on-going (i.e. between 1975 and 1982/4). He accepted that there may have been a trodden path in existence during that time. The letter to the County Council Planning Department dated 27 July 1990 clearly shows that continued pedestrian access to the area was acknowledged. The permission given to St Ivo School in 1997 demonstrates that there must have been a means of access around the lake, otherwise it is unlikely that the school would have requested permission to use it. I can find no reason to conclude that the use made of the way during the relevant period was secretive.
38. Thus it follows that I find the claimed use of the way has been use as of right.

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<sup>6</sup> Paragraph 12

*Whether there is sufficient evidence of a lack of intention to dedicate*

39. My earlier findings on this issue were the subject of the legal challenge to my previous decision. I found that a letter written to the County Council's Planning Department in July 1990 expressed sufficiently clearly a lack of intention to dedicate a public footpath anywhere other than on the diverted route of the existing Footpath 4. The requirements for sufficient evidence to satisfy the 'proviso' are now clearly set out by the House of Lords. Lord Hoffman states, at paragraph 32 of the judgement:

*"I think that upon the true construction of S31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be."*

It is clear that the 1990 letter, the contents of which were not known to the users of the path, does not satisfy that requirement.

40. In the recent submission on behalf of the Church Commissioners, three actions are set out which are considered to meet this requirement: the personal challenges alleged to have been made by Mr Flynn; the erection of the sign referred to in paragraph 14 above; and the works undertaken in 1989 and referred to in paragraph 23 above.

*The verbal challenges by Mr Flynn*

41. In the submission, it is alleged that Mr Flynn claimed to have stopped a member of the public between 1983 and 1984. In fact, Mr Flynn's statement<sup>7</sup> gives the period as between 1983 and 1994, and my inquiry notes do not indicate that any alteration was made to that date by Mr Flynn at the inquiry. Nevertheless no further details have been submitted as to who that person was. It is implied by the objector in the recent submission that the acknowledgement by Mrs Newman on her user evidence form that she was, on one occasion, stopped and told that she was trespassing refers to the same event. Mrs Newman did not give evidence at the inquiry, but her form makes no mention of the date on which the incident occurred, nor does it give any indication of who stopped her. The incident could have taken place at any time up to, and including, 1999 which she gives as her latest year of use.<sup>8</sup>
42. The RA counters this argument by pointing out that Lord Scott of Foscote expressed the view in *Godmanchester* that regular challenges to users might suffice to qualify as sufficient evidence of a lack of intention to dedicate. The RA argues that it is implicit in this statement that a single act of verbal challenge would not suffice, and even several verbal challenges *might* not be sufficient.
43. I find Mr Flynn's recollections to be insubstantial, and I also note that since he felt it was more likely to be a man that he had challenged (see paragraph 35 above), it is less likely to have been Mrs Newman. The single challenge cannot objectively have indicated to all the members of the public who were using the way that the landowner was challenging their rights since usage continued; even if there was more than one challenge it is evident that usage continued as

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<sup>7</sup> paragraph 12 (see also my paragraph 35 above)

<sup>8</sup> Her user evidence form is signed, but undated

before. Consequently, applying the guidance provided by *Godmanchester*, it does not provide sufficient evidence of a lack of intention to dedicate a public footpath along the claimed route.

*The sign*

44. With respect to the sign erected in 1989, the objector considers that it is inconceivable that a member of the public reading it could have been in any doubt that the landowner sought to prevent any new rights being acquired.
45. I have already concluded that the erection of the sign did not amount to an act sufficient to call the rights of the public to use the way into question (paragraph 19 above). In paragraph 37 of *Godmanchester*, Lord Hoffman expresses the following view:

*"I do not say that all acts which count as negating an intention to dedicate will also inevitably bring the right into question..... I should think that they probably would because their purpose is to give notice to the public that no right of way is acknowledged."*

46. The general tenor of the whole judgement is in accordance with that view. I have already expressed the view that the wording of the sign was not such that a reasonable person would have thought that the landowner's intention was to prevent them from using the path. Likewise, I see nothing in the wording of the sign, reproduced in paragraph 14 above, to indicate that there was no intention to dedicate a footpath. In fact it appears to me likely to have had the opposite effect, and suggest that there was a footpath. This is clearly how it appeared to the users of the way, and consequently does not fulfil the test identified in *Godmanchester*.

*The construction works in 1989*

47. The objector considers that the works to strengthen the banks of the lake were undertaken in a manner which clearly demonstrated that the landowners believed they were entitled to make use of the land in a way which was inconsistent with the existence of any public right of way. Being responsible landowners, it must have been manifestly clear to the public that the Church Commissioners had no intention to dedicate a public right of way over the land.
48. I find this argument carries little weight. The original route of Footpath 4 was completely obstructed by the excavation of the lake some years earlier, just prior to 1975. There is no suggestion that Footpath 4 was not a public right of way. It was, and is, recorded on the Definitive Map and Statement. The land was similarly owned by the Church Commissioners, although I accept that the excavation was undertaken by Monks (the contractors at that time). It is a regrettable fact that works are often carried out on recorded public rights of way which interfere unlawfully with the public's rights, regardless of the standing of the landowner.
49. From an objective perspective, the public could not be expected to infer from the bank reconstruction works that there was no intention to dedicate a footpath. It might indeed be more likely for them to infer the opposite: that the existence of the path was being secured. I am unable to find that these

works demonstrated sufficient evidence of a lack of intention to dedicate the route.

*Cumulative effect*

50. I am asked by the objectors to find that, even if individually these actions are found to be insufficient, the cumulative and consistent effect of the landowner's actions can only point to the clear conclusion that there was no wish to allow the claimed right to become established.

51. The RA draws my attention to paragraph 75 of the judgement in *Godmanchester* in which Baroness Hale expresses the approach she considered appropriate to this test.

*"If the public enjoy the way as of right and without interruption for 20 years, the statute tells us what an objective outsider is to assume – that the landowner intends to dedicate it as a highway. To rebut that, the landowner has to do something which the objective outsider would understand to mean that he had no intention."*

52. Several courses of action are open to a landowner to demonstrate a lack of intention to dedicate a public right of way. Looking firstly at those specified within Section 31 of the 1980 Act itself, I have already concluded that the 1989 sign was not inconsistent with the dedication of the way as a footpath<sup>9</sup>. Guided by the judgement in *Godmanchester*, the letter to the County Council Planning Department cannot be considered to constitute sufficient evidence of a lack of intention because it would not have come to the attention of the users of the path or satisfied any of the alternatives methods of negating intention to dedicate in Section 31.<sup>10</sup> No deposit and declaration was made under Section 31(6) within the relevant time period. Therefore none of the statutory measures open to the landowner can be demonstrated to have been fulfilled.

53. If the public had responded to the last of the three specific events referred to by the objectors (i.e. the erection of the sign in 1989 following the completion of the works) it might have been possible for me to apply a cumulative approach to the test. This was not the case. It was the erection of the fence ten years later which prompted the public to retaliate. I cannot therefore find that there was sufficient evidence of a lack of intention to dedicate a public right of way, either as the result of an individual action or as a consequence of the cumulative effect of several actions, until the erection of the fence, which also called into question the right of the public to use the path in question.

***Common Law***

54. In the light of my conclusions in respect of Section 31 of the 1980 Act, it is not necessary for me to consider the matter at common law.

**Conclusion**

55. Having regard to all the evidence given at both the inquiry and in the written representations, and guided by the judgement in *Godmanchester*, I conclude

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<sup>9</sup> Section 31(3)

<sup>10</sup> Paragraph 42 of the judgement in *Godmanchester*

that the requirements of Section 31 of the 1980 Act have been satisfied and the claimed path is deemed to have been dedicated as a public footpath.

**Formal Decision**

56. I confirm the Order subject to the modifications set out below:

- In Parts 1 and 2 of the Schedule to the Order insert, after the first grid reference, '(Point A)', and after the second grid reference '(Point C)'.

*Helen Slade*

**Inspector**