



Order Decision

Site visit on 30 January 2018

by **Sue Arnott FIPROW**

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

Decision date: 27 February 2018

Order Ref: ROW/3180801

- This Order, dated 1 March 1989, is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Lincolnshire County Council (Amendment of Lindsey County Council (Rural District of Louth) Definitive Map and Statement – Evidential Events) (No 1) Modification Order 1989.
- The Order proposes to modify the definitive map and statement for the area by recording a public footpath between Mill Lane and Footpath No 218 at Grimoldby, as shown on the Order map (Map 2) and described in the Order schedule.
- There were three objections outstanding, together with one representation, when Lincolnshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is not confirmed.

Procedural matters

1. The Order, as made, sought to record two public footpaths in Grimoldby. Objections were initially made in relation to both routes but were subsequently withdrawn in respect of one of these paths (shown on "Map 1"). Consequently, Lincolnshire County Council (LCC) was able to sever the Order¹ so as to confirm the unopposed footpath on 1 October 2004 (in part) with the process being fully completed on 12 June 2017. That path is now recorded on the definitive map and statement and is not at issue in this Decision.
2. However the objections to the route shown on "Map 2"² were maintained, thus requiring the Order to be sent to the Secretary of State for determination. There may have been some misunderstanding when the objectors were encouraged to withdraw their opposition to the route shown on Map 1, but there is no provision in the legislation for opposed definitive map modification orders to be simply set aside by the order-making authority.
3. The evidence which initially justified the making of the Order still stands and needs to be considered by the Secretary of State when deciding whether the Order should be confirmed. That is the statutory procedure, even in this case where neither the applicant (Grimoldby and Manby Parish Council) nor LCC are now actively seeking confirmation.
4. I have therefore examined all the evidence available in this case, including that supplied by both LCC, the objectors and other parties.

¹ Under the provisions of Schedule 15 (5) of the Wildlife and Countryside Act 1981

² I shall refer to this as **the Order route** in this Decision.

5. LCC has very candidly admitted that it has been unable to provide the documentation required to prove that the consultations and advertisements it carried out when the Order was made complied with the relevant legislation and regulations in force at the time. I have considered very carefully whether steps should now be taken to repeat the notification process with further advertisement of the Order. On balance, given the limitations of the evidence, the lack of support for the Order and the significant length of time that has elapsed since it was made, I have concluded that the public interest would not be best served by doing so³.
6. For the record, I did not walk the full length of the Order route. I was able to observe it sufficiently well from point A⁴ and by walking westwards along the claimed footpath from point B within the area recorded as common land.

Main Issues

7. The Order was made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) on the basis of an event specified in Section 53(3)(c)(i), namely the discovery of evidence which shows a right of way which is not recorded in the definitive map and statement subsists over land in the area to which the map relates.
8. In short, the case for the Order requires me to consider whether the evidence shows that at some time in the past the route in question has been used in such a way that a public footpath has been established.
9. Whilst the evidence need only be sufficient to *reasonable allege* the existence of a public right of way to justify an order being made, the standard of proof required to warrant confirmation of an order is higher. In this case and at this stage, evidence is required which shows, *on the balance of probability*, that a right of way subsists along the Order route.
10. The Order states that the relevant date is 9 January 1989. In the unusual circumstances of this case, where almost thirty years has passed since the relevant date, I should emphasise that the issue here is whether or not a public footpath was in existence on 9 January 1989. It is not for me to consider whether one has been established since then, although my inspection of the route, and the construction (post-1985) of a double garage across the line of the Order route, suggests that would be unlikely.
11. It was not clear whether LCC made the Order on the basis that dedication of a public footpath along the Order route could be inferred under Section 31 of the Highways Act 1980 (the 1980 Act) or at common law. In both cases, the burden of proof lies with those that assert the existence of a public path.
12. Under the statutory approach, the 1980 Act requires that I first consider whether there has been use of the claimed route by the public on foot, as of right and without interruption, over the period of twenty years immediately prior to its status being brought into question so as to raise a presumption that the way has been dedicated as a public footpath. If so, I must consider

³ My conclusions would not prevent a further application being made to record the Order route if additional evidence came to light in future.

⁴ Although I realise this lies beyond the easternmost point of the publicly maintainable highway recorded along Mill Lane by the highway authority.

whether there is evidence that, during this period, the landowners demonstrated a lack of intention to dedicate the route as a public right of way sufficient to rebut the presumption.

13. Alternatively under the common law I would need to be satisfied that, during any relevant period, the owners of the land in question had the capacity to dedicate a public right of way, that there was express or implied dedication by the owners, and also that there is evidence of acceptance of the claimed right of way by the public.

Reasons

14. An application was made to record the Order route as a public right of way in October 1985. The applicant, Grimoldby and Manby Parish Council, submitted 2 user evidence forms from people who, in 1985, had known the footpath for periods dating back 23 and 40 years respectively.
15. Although both forms refer to local people being told by the owner in March 1985 that the path was private, both also note the route had been diverted approximately 4 years previously.
16. One of the objectors⁵ has provided details of a deed witnessing the grant of a private right of way, 10 feet⁶ in width, for the owners of the field to the south of the Order route⁷ (Mrs and the late Mr Baxter) to gain access over land at Eastfields owned by Mr and Mrs Jacklin since 1980. It appears that on the same date this deed was signed, 4 October 1984, the Jacklins sold their property to the late Mr D Martin and Mrs Martin (now Brockway).
17. Following the sudden death of Mr Martin in June 1987, the house at Eastfields was sold to Mrs Cooper (now Cook). Mrs Martin retained ownership of the field (4413) although this was rented to Mrs Baxter.
18. The plan attached to the 1984 deed showed a strip of land between Eastfields and Field 4413⁸ which was not shaded as being in the ownership of the Jacklins at that time. This strip is clearly visible on Map 1, ostensibly as an extension of Mill Lane and forming part of the Order route, narrowing towards the eastern end near the northern corner of the Eastfields garden. It is not my role to adjudicate on landownership issues but it is not clear to me how this area later came to lie within the area now registered to Eastfields.
19. If both claimants are correct, then the "diversion" they refer to would have taken place around 1981 during the ownership of Mr and Mrs Jacklin. It seems most likely that this coincided with realignment of the access to field 5108⁹, described as "the roadway" in the deed.
20. The deed describes the roadway as "*joining the public highway there known as Mill Lane*" at the point where the highway authority's records show the publicly-maintainable highway ends. It is drawn onto the plan as a brown line but this is hard to identify precisely as it runs close to the green line demarcating the

⁵ Mrs Brockway (formerly Martin) is now represented by her son, Mr S Martin. Mr Martin is now owner of the field numbered 4413 on Order Map 2.

⁶ 3.05 metres

⁷ Number 5108 on Order Map 2

⁸ This is numbered 159 on the plan attached to the deed.

⁹ Number 160 on the 1984 plan.

Jacklins' property boundary on the north side of the strip. I interpret the brown line as identifying the track which lies to the north of and broadly parallel to the Order route.

21. It seems to me that the "diversion" had clearly taken place by 1984 and had probably occurred in or around 1981 when members of the public began to use this slightly different line.

Dedication under statute

22. As I have noted above, I have before me the written evidence of only two people although there are other references to the path being well used in the past which I shall take into account.
23. Following the statutory approach, it seems that the status of the Order route was brought into question in March 1985 when the two claimants report people being challenged, most probably by the Martins. However, I conclude that the public's right was also questioned at some time in 1981 when the route was re-aligned, albeit apparently without complaint from users at the time.
24. This establishes two possible twenty year periods, 1965-1985 and 1961-1981, in which it is necessary to demonstrate there was sufficient use by the public, as of right and without interruption, to raise a presumption that the path had been dedicated for public use.
25. Examining the evidence forms more than thirty years after they were completed creates difficulties, not least because the standard to which such forms probe relevant issues has developed in the intervening years. For example, the present expectation is that each form is accompanied by a plan on which the claimant has marked the route they used; here, no plans or maps are attached although the written description of the start and end points of the path do tally with the Order route.
26. Yet, even extending the utmost latitude to the interpretation of the two statements and the weight I place on them, I cannot accept that so few path users can be sufficient to represent the public, even in a rural context such as this.
27. Consequently, the case for dedication under Section 31 of the 1980 Act must fail since no presumption is raised by the evidence submitted.

The common law approach

28. When next considering whether dedication of a public right of way might have been established under common law, the issues to be examined focus on the actions of the landowner(s) in relation to the possibility of express or implied dedication of a public right of way, and use by the public as evidence of acceptance of the claimed right.
29. Before doing so I note the extensive historical research carried out by LCC to establish the background to the Order route.
30. Many of the small scale maps researched by LCC are of little assistance but the Ordnance Survey (OS) First Edition map, surveyed in 1888, is the first to show clearly the extension of Mill Lane eastwards, in fact in much the same way as it later appears on the base map used for the Order, which probably dates from the 1970s.

31. The tithe map of 1846 does not show the full length of Mill Lane¹⁰. The records prepared for the 1910 Finance Act show the eastern and western parts of the Order route excluded from adjacent land parcels for tax purposes. [The latter comprised the land now recorded as common land and the former is consistent with the 1984 deed plan insofar as it appeared to be an extension of Mill Lane.] The 1929 Highway Handover map confirmed the extent of the publicly-maintainable length of Mill Lane but offered no information as regards the status of its eastward continuation.
32. A survey of public rights of way was carried out in the 1950s in preparation for the first definitive map and statement required under the National Parks and Access to the Countryside Act 1949. The route in question was not surveyed although its continuation eastwards¹¹ was recorded, as were other connecting paths to the north and south of Mill Lane. The OS 1:25 000 map on which the survey was recorded appeared to show Mill Lane extending as far as point B on Map 2 (and a little to the east).
33. The most plausible explanation is that it must have been assumed by the local parish surveyors that the highway along Mill Lane extended all the way to the end (near Point B). An unfounded assumption such as this may also explain the lack of any questions being raised at the time over its omission from the draft, provisional and final versions of the definitive map.
34. It would appear that the omission was not discovered by the Parish Council until problems arose along the Order route in the 1980s. It may have turned a blind eye to the diversion put in place by the Jacklins but when people were challenged by the Martins, the matter no doubt came to a head. From a letter dated 15 February 1985 to LCC¹² it seems that the matter was being pursued by the Parish Council in the belief that there had been "public user on a continuing basis over a period of upwards of 40 years".
35. And yet it was only able to submit to LCC user evidence from two people. Had the application been submitted thirty years later, current practice would have ensured the applicant was aware that two witness statements would be unlikely to be treated as sufficient evidence of public use.
36. In a letter to LCC dated 1 July 1985 the Parish Council's Chairman wrote:
- "The Parish Council feel that it is important that this path is reinstated and put on the definitive map, as there is now no direct access to the common land or to footpath 218 (the main village footpath) from Mill Lane. Also maintenance of this footpath is minuted in Parish Council records in January 1954, therefore it has been recognised as a public right of way for some considerable years now."* However, the minutes referred to cannot now be located.
37. There is no evidence of express dedication in this case. It might be argued that the formation of the diversion by the Jacklins and the invitation to the public to use it might be construed as implied dedication (though not of the Order route) but I have before me no evidence this was used by anyone other than the two claimants between 1981 and 1985.

¹⁰ And could imply the land to the south and east of it (including the Order route) were then owned by the Church.

¹¹ Footpath 4 is described as leading from the end of Mill Lane to Eastfield Farm.

¹² The letter is sent by a local solicitor but it is not entirely clear on whose behalf he was writing.

38. OS maps clearly support the existence of a track and path along the Order route dating back to the late nineteenth century at least. In the 1950s it seems highly probable that the path was thought to be a continuation of Mill Lane and therefore already a highway; thus it was not surveyed for inclusion on the definitive map. In the 1980s there was undoubtedly a belief amongst some local people that the route had been walked by the public since the 1940s at least. Amongst the comments submitted to LCC before the Order was made is a response from the Divisional Surveyor dated 13 November 1985 which states that he had "*always understood that the path ... was a public footpath and has treated it as such in the past.*"
39. There is therefore some good evidence that the Order route had a reputation as a public right of way and was well used prior to 1981. Yet I find little in the way of tangible evidence to substantiate this, other than the two user evidence forms. Consequently I am again led to the conclusion that the evidence available to show use by the public falls short of that required to confirm the establishment of a public right of way along the Order route.
40. It is entirely possible that had this Order been forwarded for determination shortly after the objections were lodged, a public local inquiry may have uncovered more evidence, either in support of a public path or against it. However, on the basis of the available information, my conclusion must be that, on a balance of probability, there was no public right of way over the Order route on 9 January 1989 and that the Order cannot be confirmed.

Other Matters

41. The objections refer to the serious implications of re-opening to the public the original (pre-diversion) Order route, not least because of the double-garage that now obstructs it at Eastfields.
42. Such arguments are not relevant to the matter at issue here and I have given no weight to it. The question is whether the evidence is such as to show that a public right of way has been established in law, irrespective of the merits or disadvantages of the Order route.

Conclusion

43. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should not be confirmed.



Formal Decision

44. I do not confirm the Order.

Sue Arnott

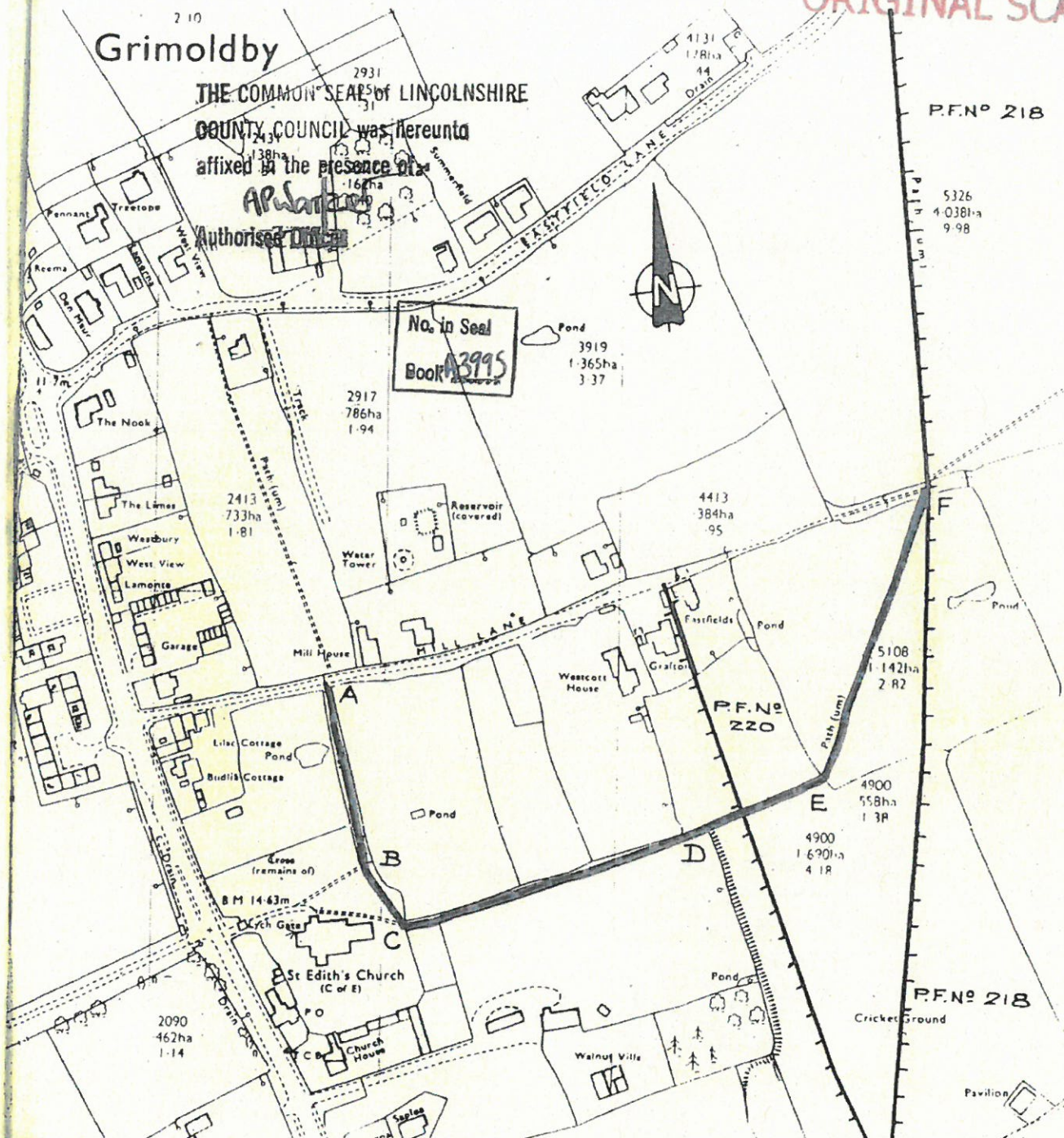
Inspector

LEGEND

-  Claimed public footpath.
-  Existing public footpath.

Map 1

MAP NOT TO ORIGINAL SCALE



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DIRECTOR OF RECREATIONAL SERVICES

Lincolnshire

Dr/Date
11/85
Scale
1:2500
Checked
Approved

GRIMOLDBY :- Lincolnshire County Council
(Definitive Map Modification Order).
Addition of claimed public footpath
from Mill Lane through Churchyard to
public footpath No 218.

O.S. sheet reference
TF 3887 - 3987
TF 3888 - 3988
File/Drawings No.
PL/C/8/7



Drawing No.
A4/1195/5

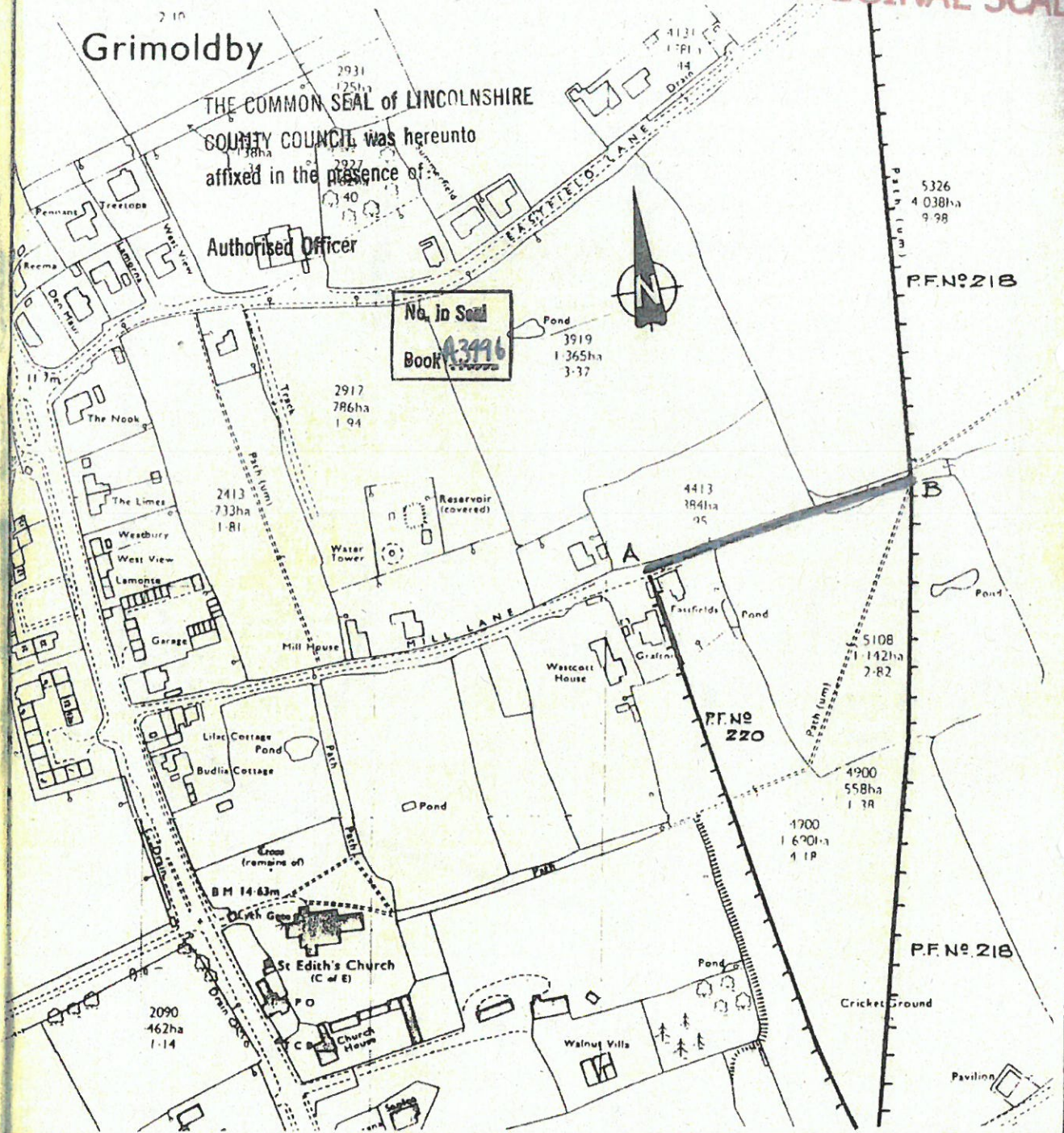
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Map 2

MAP NOT TO ORIGINAL SCAL

LEGEND

-  Claimed public footpath.
-  Existing public footpath.



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DIRECTOR OF RECREATIONAL SERVICES

Lincolnshire

Lincolnshire County Council County Offices, Lincoln	Dr/Date ND 11/85	Scale 1:2500	GRIMOLDBY:- Lincolnshire County Council (Definitive Map Modification Order). Addition of claimed public footpath from Mill Lane eastwards to public footpath No 218.
	Checked	Approved	
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