Definitive Map and Statement Modification Order Application
Long Row, South Tyneside

Objector's Further Submissions in response to the Supplementary Report of Robin Carr dated 26 January 2024

Note. These further submissions on behalf of the Objector should be read with

(1) the report of Robin Carr dated 30 March 2023 and Appendices RC1-14 thereto **(the Carr Report),**

(2) the Objector's Submissions in response thereto dated 25 October 2023 **(the Objector's Original Submissions),**

(3) the Bundle (see paragraph 1(1) below) and

(4) the Supplementary Report of Robin Carr referred to above dated 26 January 2024 and Appendix RC15 thereto (**Mr Carr's Supplementary Report**).

1. Introductory. For ease of reference, the Objector begins by repeating the definitions it introduced in the Objector's Original Submissions, namely:

(1)	**the Bundle:**	the bundle of materials submitted with the Objector's Original Submissions (see also (12) below)
(2)	**the council:**	South Tyneside Council
(3)	**the 1981 Act:**	The Wildlife and Countryside Act 1981
(4)	**DMS:**	Definitive Map and Statement

(5)	**the claimed footpath:**	The footpath which the Applicant sought to add to the DMS for the area of the council shown on RC1 (the plan referred to in (9) below) between points A and B
(6)	**the Applicant**	[redacted]
(7)	**the Application**	The application made by the Applicant on 29 July 2022 to add the claimed footpath to the DMS
(8)	**Mr Carr**	Robin Carr of Robin Carr Associates the author of the Carr Report and Mr Carr's Supplementary Report
(9)	**RC1**	The plan appended as Appendix 1 to the Carr Report and to the Objector's Original Submissions
(10)	**Point A**	Point A on RC1
(11)	**Point B**	Point B on RC1
(12)	**the New Evidence:**	The evidence comprised in the Bundle

(13)	**the 1980 Act**	The Highways Act 1980
(14)	**the RATS test**	the "reasonably alleged to subsist" test set forth in paragraph (c)(i) of section 53(3) of the 1981 Act (section 53 of the 1981 Act is reproduced where material in paragraph 8 of the Objector's Original Submissions)
(15)	**OMA:**	the order making authority, viz the council
(16)	**UEFs:**	user evidence forms with which the Applicant sought to support the Application
(17)	**the Proviso:**	the concluding words of section 31(1) of the 1980 Act "unless there is sufficient evidence that there was no intention during that period [i.e. the 20 year period of use required to satisfy section 31(1)] to dedicate it"
(18)	**ECP:**	English Coastal Path

2. Correction of typing errors. The Objector wishes to correct some minor typing errors in the Objector's Original Submissions as follows:

(1) Paragraph 19, line 6, fn 5. The dates of the photographs given in line 4 of the footnote should be amended to read "… part of the claimed footpath was in the *sea* until the sea was filled in by an unknown date between the photographs of May 1998 and March 1999 referred to in paragraph 5 above".

(2) Paragraph 38, lines 4, 5: the quotation marks after the word 'established' in line 5 should come after the word 'alleged' in line 4, so that, as corrected, the words in parenthesis should read … (or might be "reasonably alleged" to have been established) …

3. Periods when use of part or all of the claimed footpath was impossible. To follow the Summary which appears in paragraph 5 below, RC1 is an insufficient plan. RC1 shows points A and B, but X is not a point and neither is Y. The Objector has accordingly amended RC1 to add 4 new points namely (going from north to south) points **Y1**, **Y2**, **X1** and **X2**. This annotated version of RC 1 (**the New Plan**) is attached hereto. The New Plan identifies sections of the claimed footpath as follows:

Y1-Y2: The section of the claimed footpath which was originally covered by sea water (see further paragraph 4 below)

A-X1: The section of the claimed footpath which, as stated in the Objector's Original Submissions paragraph 4(1), "was [between May 2007 and August 2008] entirely barred to public passage over most of its length i.e. between A and X1 on the plan at page 3.0 [of the Bundle]. See pp 3.1-3.6 and 3.9, 3.10 and 3.12".

A-X1-X2: The section of the claimed footpath over which public passage was impossible from December 2016 (see Objector's Original Submissions paragraph 4(3) and the references to the Bundle there given.

A-X1-X2-B: The entirety of the claimed footpath was barred to public passage from September 2017 onwards. See the Objector's Original Submissions paragraph 4(4) and the references to the Bundle

there given. (These references are amplified to refer also to the statement of [redacted] and further particularised in the last two sentences of paragraph 6 below).

4. The section of the claimed footpath between points Y1 and Y2 on the New Plan referred to above was still covered by sea water on 15 May 1998. See the Objector's Original Submissions paragraph 5, referring to a photograph dated 15 May 1998, Bundle pp 1.3 and 2.4-2.15. See also a photograph dated 19 March 1999 (Bundle p 2.2), which shows "the sea by then filled in". (Objector's Original Submissions paragraph 5). However, as Mr Carr acknowledges at paragraph 2.5 of Mr Carr's Supplementary Report, "it would appear that the dock was reclaimed and in-filled in late 1998/early 1999." See also the report of [redacted] at Bundle pp 2.4-2.5. She puts the earliest date of the infilling as being some time between "late 1998 and March 1999". See the Objector's Original Submissions, paragraph 19, referring to this evidence.

5. Summary. Those seeking to establish that a given path has become a public footpath by dedication based on public use of the path (whether at common law or under section 31 of the 1980 Act), must prove that the entirety of the route was used by the public over the whole of the relevant period. Here, the claimed footpath between points A and B on RC1 and on the New Plan did not come into physical existence until (at the earliest, late 1998). Until that date, as the New Plan illustrates, the sea continued to cover (what later became part of) the claimed footpath between points Y1 and Y2. After that date, as the New Evidence incontrovertibly shows, passage along the claimed footpath was only available until May 2007. In that month, passage ceased to be available between points A and X1. That state of affairs persisted until August 2008 (a total of 15 months). After that, the entirety of the claimed footpath was again open to passage but only until December 2016 when most of the claimed footpath was again barred to public passage, this time between points A and X2. By September 2017, passage along any of the claimed footpath A-B had ceased to be possible and has remained so ever since.

6. It should be noted that Mr Carr does not once refer to the September 2017 date anywhere in his Supplementary Report. He acknowledges that the New Evidence establishes the barring of the claimed footpath in December 2016 between points A and X2 and accepts that for the purposes of section 31 "the time period 1996 to 2016 cannot be considered further" (paragraph 2.4). But he continues to place reliance on what he describes as "the remaining twenty-year period 1998-2018" (paragraph 2.4). This is wholly untenable for two reasons. First, the complete barring of most of the route between A and X2 in December 2016 operated to bring into question the right of the public to use the entire claimed footpath in that month. (A single fence at only X2 would have had the same effect). Either way, time stopped running in that month. Between late 1998 (the earliest date of the infilling of the sea between points Y1 and Y2) and December 2016 is only 18 years. Second and in any event, there is also less than 20 years between late 1998 (when the sea was filled in) and September 2017 when, as the unchallenged evidence of [redacted] shows, the remainder of the claimed footpath between X2 and B (which had not been barred in December 2016) was also barred to public use. See

(1) [redacted] statement at Bundle p 4.24 (paragraph 2, last sentence) and plan at p 4.26);

(2) [redacted] statement at Bundle p 4.30 (paragraph 6) and plan at p 4.32; and

(3) [redacted] statement at Bundle p 4.40 (the last 3 sentences in particular – "The sole alteration … since December 2016").

7. Mr Carr does not precisely date the 2017 image at RC2 p9. That image appears not to show any barrier at point B. (Point B, though not marked, is just above the red car in the photograph, off the main road at the point where a pathway branches off to the left). Mr Carr does not suggest that the 2017 image proves the non-existence of a barrier at B throughout 2017. It plainly does not do so: the image might have been taken any time in the period January to August 2017 i.e. before the barrier was erected at B in September of that year. Mr Carr accepts

that the 2018 image on the following page (page 10) shows a barrier at point B. That image, too is not precisely dated. The two images are however entirely consistent with the evidence of [redacted] that the barrier at B was erected in September 2017, and Mr Carr does not suggest the contrary. He simply ignores their evidence, giving no reason for continuing to rely on "2018" as the end point.[1]

8. Section 31 in further detail. Section 31(1) of the 1980 Act contains some words which are shown in bold in paragraph 8 of the Objector's Original Submissions (page 6, bottom of the passage). The words are "… has been actually enjoyed by the public as of right and without interruption for the full period of 20 years". To succeed in a claim to deemed dedication under that section the words shown in bold impose three distinct requirements. To satisfy these requirements the public must prove that the path or way over which a public right of way on foot is being claimed:

Requirement 1 - has been actually enjoyed by the public as of right

Requirement 2 - has been actually enjoyed by the public without interruption

Requirement 3 - has been actually enjoyed by the public for a full period of 20 years

In the present case we are not concerned with Requirement 1. But it is clear on the plain wording of section 31(1) that Requirements 2 and 3 are distinct requirements, both of which must be satisfied. Thus, for example, even if a claimed footpath is actually used without any interruption (Requirement 2) but is only so used for 19 years, it will not have been used, as the Requirement 3 requires, for a full period of 20 years and the claim will fail.

[1] The image at RC2 p9 is in fact a cropped image. An uncropped image attached hereto, showing that the image was taken in July 2017.

9. At its simplest, this case based on section 31 can therefore be analysed as follows. There are 3 scenarios to consider.

(1) The public began to use the entire claimed footpath from A to B on an unknown date in late 1998 at the earliest (as Mr Carr accepts), following the sea being filled between Y1 and Y2. Use of the entire claimed footpath A-B (even ignoring the barring from A-X1 between May 2007 and August 2008) ended in December 2016 and was never thereafter resumed. The claimed footpath A-B was, on that basis "actually enjoyed by the public for the full period of" only about 18 years (late 1998 to December 2016) and not for the full period of 20 years as section 31 requires.

(2) Even if (i) the barring A-X1 between May 2007 and August 2008 is again ignored and (ii) the events of December 2016 are also wholly ignored, public use of the entire claimed footpath A-B ended in September 2017 and was never thereafter resumed. The claimed footpath was again, on that basis, "actually enjoyed by the public for the full period of" somewhat less than 19 years (late 1998 to September 2017) and so again not for the full period of 20 years as section 31 requires.

(3) If the cessation of use A-X1 between May 2007 and August is <u>not</u> ignored (as it should not be), then in the words of section 31(1):

(i) the claimed footpath A-B was "actually enjoyed by the public for the full period of" only 8 years and about six or seven months between late 1998 and May 2007 and

(ii) the claimed footpath A-B was again "actually enjoyed by the public for the full period of" only 8 years and 4 months between August 2008 and December 2016 (or 9 years and 1 month between August 2008 and September 2017) – in neither case nearly enough to satisfy Requirement 3.

10. The Objector notes that in his Supplementary Report Mr Carr continues to suggest, albeit somewhat tentatively, that the cessation of use of the section of

the claimed footpath from point A to point X1 between May 2007 and August 2008, might be ignored because the purpose of barring public use was merely the consequence of the "far wider purpose of securing the entire development site". See paragraph 2.8 of the Supplementary Report. The argument appears to be that the public can satisfy Requirement 2 i.e. can show that their use was without interruption if they can show that the landowner's object in preventing their use was not specifically to prevent them from acquiring a public right of way. If Mr Carr was right about that, the public could acquire a public right of way from A-B across a piece of land from which the landowner barred them for (say) 8 years of the 20 years prescribed by section 31(1). If an 8 year development began in year 6 and ended in year 14, with only 6 years of public use either end, the public would be able to claim, on Mr Carr's approach, that their use was "without interruption" because, but for the landowner's intervening wish to develop, it was more probable than not that the landowner would have had no objection to the public continuing to use the path at the end of year 6 for the next 8 years, and so the public should be treated as having done so throughout "without [the 8 year] interruption".

11. That conclusion, absurd as it is, also involves ignoring the express words of Requirement 3, words which were recently emphasised by Holgate J giving the only reasoned judgment of the Divisional Court in *DPP v Instone* [2022] 1 WLR 5358 at [33] and [39]. At [33] he said that

"... the presumption regarding the dedication of a highway, whether under section 31(1) of the 1980 Act or at common law, can only arise if a way over land has *actually* been enjoyed by the public ... for a full period[2] of 20 years" (judge's emphasis)

And at [39]:

[2] Insofar as the judge was saying that a dedication at common law always requires 20 years use, he was wrong about that. The Objector takes no point on that error i.e. the Objector acknowledges that in a proper case a common law dedication can occur on the basis of less than 20 years public use.

"Unless a court can and does properly conclude on the evidence that there has been actual enjoyment ... of a way capable of being dedicated as a highway without interruption for at least 20 years, the presumption in section 31(1) does not arise."

12. On the facts of that case there was no actual evidence of any public use of the claimed way at all, but the court's repeated emphasis on actual enjoyment for the full period of not less than 20 years is significant.

13. In the present case, the public use of the claimed footpath A-B which began (no earlier than late 1998), when the sea had been filled in between Y1 and Y2, was unambiguously and deliberately, as a matter of fact, interrupted between points A and X1 in May 2007 and remained so interrupted until August 2008. The council cannot in those circumstances conclude that it is reasonable to allege that public use took place from late 1998 onwards "without interruption". As a matter of law, when section 31(1) refers to public use having to be without interruption, that means (at worst for the landowner) "without interruption for which the landowner is responsible." The statute cannot be read as meaning that, even where, as here, a landowner deliberately cordons off some or all of a claimed footpath and other land in order to carry out a wider development within the cordon, the ensuing interruption of public use will not count as an interruption unless the landowner also proves that, in cordoning off some or all of the path, he intended to prevent the public acquiring a right of way.

14. The cases of *Owen* and *Fernlee* (as to which see paragraph 15 below) cited by Mr Carr cannot, either of them, be read as establishing the contrary. If they could, they would be contrary to the Court of Appeal decision in *Lewis v Thomas* [1950] 1KB 438, where, at pp 444 and 447 Lord Evershed MR and Cohen LJ held that it was merely necessary to prove that the public had been interrupted in fact. "If there were such an interruption, then the fact that the interruption had been created for some other reason than to block the pathway ... was irrelevant" (per Elias J, explaining the decision in *Lewis* in his judgment in *Rowley v SOSLGR* [2002] EWHC 1040 (Admin) at [37])). Lord Evershed at p 444 accepted "the intention with which a particular act is done may have a

bearing on the question whether or not there is an interruption in fact. [See also per Cohen LJ at p 447]" (per Elias J in *Rowley* at [38]). The circumstances envisaged by the court where intention might have a material bearing on whether there had been an interruption in fact (broken down vehicle and locking a gate at night to keep animals in) were far removed from those of the present case, as were the actual facts in *Owen* and *Fernlee.*

15. The *Owen* case nowhere considers the kind of substantial 15 month long interruption such as that in the present case. As to *Fernlee*, the Judge accepted that the order route A-B was in use by late May 1976 (see judgment, at [8], [10], [11] and [12], i.e. 20 years before it was brought into question in late 1996 (see judgment at [3]). So, relevantly for present purposes, the issue was whether use of the route A-B was "without interruption" between late May 1976 and late May 1996. The Inspector held that there was no operative interruption in that period sufficient to prevent the claim from succeeding. The judge recorded at [13] that "the Inspector was satisfied that the route existed as a useable route for horse riders and walkers for the full 20 years without interruption other than, possibly, ones of such a very temporary works-related nature as not to be significant". (Emphasis supplied). At [14] he records the evidence of a Mr Thomas who "admitted in evidence that blockage with dumped building materials and trench digging would only have amounted to very temporary interruptions on any access …". (Emphasis supplied). The case is an entirely unsatisfactory vehicle upon which to erect the edifice constructed by Mr Carr. These "insignificant", "very temporary" interruptions, said the Judge at [17], meant that the Inspector was entirely justified in concluding that there was "no interruption of the kind envisaged by the section" i.e. an interruption in fact. (There is a typing error in paragraph 16 where the judge refers to an "interruption of fact". He means "interruption in fact", the term used by Lord Evershed in *Lewis* at p 444).

16. All this is, in any event, by the by. The words of Requirements 2 and 3 (see paragraph 8 above) are still separately there and must both be satisfied. On the facts of the present case they cannot be because – as Mr Carr correctly concedes

– once you factor in the sea being filled in in late 1998, there simply is no proof of actual enjoyment of the path A-B for a full period of 20 years thereafter – even if the cessation of use between May 2007 and August 2008 is wholly ignored as not itself constituting an operative interruption and the public are therefore treated as having continued to use the whole of the claimed footpath A-B until either December 2016 or September 2017. See paragraphs 9(1) and 9(2) above.

17. It should be noted that Mr Carr accepts that once the claimed footpath was barred (on his case, in 2018) at point B, time stopped running. He relied on a single Google image, dated simply 2018, as showing that this occurred on some unspecified date in that year. He nevertheless expressed doubt in paragraph 2.15 of his Supplementary Report as to whether a full period of 20 years was available, saying

"This is because the infilling of the dock at point Y (RCA App 1 pg 1) circa 1998/1999 may cut the period short. If this is the case, then there would be no full period of twenty years available and any case pursuant to section 31 of the Highways Act 1980 would fail".

However Mr Carr had earlier accepted at his (first) paragraph 2.6 "that the old dock was not filled in and reclaimed until sometime between late 1998 and early 1999. Prior to that use [at Y] would have been impossible due to it being filled with sea water". It is therefore misleading and imprecise to use the loose term "circa 1998/1999" as he does in paragraph 2.15, which creates the impression of a 24 month band of time between January 1998 and December 1999 which is still only "circa" that band.

18. As to the 2018 end date on which Mr Carr continues to rely, the images of "2017" and "2018" at RC2 pp 9, 10 do not demonstrate that the permanent barring of the route at B could not have taken place at some time in 2017 and do not demonstrate that the barrier shown as existing at point B was erected only at some time in 2018 (as opposed to some earlier time). Once it is accepted, as Mr Carr correctly has, that the sea was not filled in until (at the earliest) late 1998,

the council would need to be satisfied, to create a "full period of twenty years," that the barrier shown at point B in the 2018 image (where the road is shown, in the middle of the image, branching off to the left from the main road) must itself have been erected at an even later date in 2018. Neither the 2017 nor the 2018 images can be relied on as proving that.

19. Thus, the only reliable evidence of when the barrier shown on the "2018" image at RC2 p 10 was in fact erected is that of [redacted] who all identify the date as September 2017. See paragraph 6 above.

20. Conclusion on section 31. Mr Carr correctly expressed the view that the RATS test was not, on balance, satisfied in relation to section 31. He could and should have expressed himself much more emphatically. The Objector respectfully submits that Mr Carr should have advised the council that there was no possible arguable basis upon which, based on section 31, it could reasonably be alleged that a right of way subsisted between points A and B. The public's use of the claimed footpath was, as a matter of law, not "without interruption" nor was the claimed footpath "actually used … for the full period of 20 years" as prescribed by section 31.

21. Common Law dedication. Mr Carr has considered this alternative and correctly concluded that it is unsustainable. He has accepted the Objector's evidence at 7.1.4 (RC 14 p 350) that (in Mr Carr's words) "there was … a period between 2014 and 2016 when the land was held by receivers … and during that period there would be nobody with capacity to dedicate". See his Supplementary Statement, paragraph 3.8. He has diffidently suggested that it might be inferred that the landowner's tenants and mortgagee (i.e. lender) would have agreed to the owner doing that which (as Mr Carr acknowledges) it had no power to do. He has correctly acknowledged that, without drawing such an inference, the landowner's lack of capacity to dedicate is a bar to a common law dedication. He has however without justification speculated that the tenants and lender might have "agree[d] to a dedication because the redevelopment of the site (including setting out the Application Route) would, overall, increase the

financial and amenity value of the land." (Supplementary Statement, paragraph 3.7).

22. It may or may not be correct that "setting out" the Application route as part of the 2007/2008 development might have operated to make the development more attractive to work in and so increase its financial and amenity value. It might or might not also have been foreseeable that the route would be attractive not only to those lawfully resorting to the development but also to the general public. Given the public use that did occur after 2008, there was no reason at that time why the landowner would not be happy to tolerate it. But there is no reason to think that the owner would have needed or intended to dedicate the route as a public right of way and none whatever to infer that the tenants and lender had agreed to its doing so.

23. In expressing himself as he has done at paragraph 3.7 of his Supplementary Statement Mr Carr has entirely ignored the Objector's detailed analysis of the *Folkestone*, *Sunningwell* and *Godmanchester* cases in its Original Submissions at paragraphs 24 to 28. He has simply assumed what has to be proved namely that public use of the newly-laid out path after August 2008 for 6 years until 2014 (in which year the landowner went into receivership, after which, as Mr Carr correctly acknowledges at paragraph 3.8, there was "nobody with capacity to dedicate") might justify a finding that the landowner (i) actually intended to dedicate and (ii) had actually reached an agreement with the tenants and lender to cure its lack of capacity to act on that intention.

24. Before 2008, the claimed footpath was not a made-up route at all. Between May 2007 and August 2008 the claimed footpath was unusable and unused. Between late 1998 or early 1999 when the sea was filled in and May 2007, the Objector accepts that there is some (until 2000 very sporadic) evidence of public use of the claimed footpath which the landowner did not object to. The explanation for its not doing so is however also to be attributed to toleration not to an actual intention to dedicate, as *Folkestone*, *Sunningwell* and *Godmanchester* show. The use endured for at most about 8.5 years from late 1998 to May 2007. (In

Folkestone, the use had endured for 80 years and was nevertheless, as Lord Hoffmann explained in *Sunningwell* and *Godmanchester*, justifiably attributed to the owner's toleration). Mr Carr rightly does not suggest that a common law dedication can have occurred in that period.

25. He bases the possibility of there having been a dedication on what happened after August 2008 when the development was complete. He says at paragraph 3.6:

"It may be possible to infer the landowner's intention to dedicate from the direct, clear and overt act of setting out and physically providing the route on the ground. The route was then thrown open to the public who used it in a nature [manner?] that may be considered to be as of right. Under such circumstances it is difficult to see how the landowner could not have been aware of the use yet took no steps to prevent it." (Emphasis supplied).

The Objector has not contended and does not contend that the landowner would have been unaware of the use. The Objector has not contended and does not contend that the landowner could not have taken steps to prevent the use. The Objector does contend that, being fully aware of the use, it should be assumed, on the basis of the analysis in *Sunningwell* and *Godmanchester*, the landowner was happy to tolerate it as opposed to having an intention to dedicate it – an intention to which it would in any event have had no power to give effect, as it lacked capacity to do so.

26. The irrelevance of the ECP. The Objector makes the points in paragraphs 21-25 above in order to demonstrate why, with respect, Mr Carr has been correct to advise that a decision to make a modification order based on common law dedication is also not appropriate. The ECP adds nothing to that conclusion. As RC 15 p 517 shows, the proposal to make what became the 2018 order (SI 2018 No 815) (RC 15 p 500) was published on 24 March 2017. Although there was no doubt some consultation between Natural England and various affected parties before that date, there is no evidence that these discussions included the landowner. Notice of the proposals was however given on 24 March 2017 and

it is therefore accepted that the landowner subsequently had the opportunity to make representations in relation to the proposals. The Objector nevertheless submits that that concession makes no difference to the task which now faces the council as surveying authority nor has any impact on its decision whether or not to make a modification order.

27. It is true that if the council accepts the advice of Mr Carr that it would not be appropriate to make a modification order, the making of the 2018 order will at first blush result in the public acquiring a statutory right of access on foot over the claimed footpath "albeit of a type that would not be recorded on the Definitive Map" (Mr Carr's Supplementary Report paragraph 4.1). However, that statutory right is unavailable to the public where, as here, the land traversed by the ECP qualifies as "excepted land". The statutory right of access which the 2018 order conferred derives from, and depends upon, the claimed footpath being "access land" as defined in section 1(1)(da) of the Countryside and Rights of Way Act 2000 as amended (**CROW**), but only if the access land does not include "excepted land" (being land which, under section 1(2) if CROW, is defined as "Land which is, for the time being of any of the descriptions specified in Part 1 of Schedule 1 …".) One of those descriptions being "Land covered by buildings or the curtilage of such land" (paragraph 2) and another being "Land as respects which development which will result in the land becoming land falling within any of paragraphs 2 to 8 is in the course of being carried out" (paragraph 9).

28. The fenced gardens of those who now occupy properties traversed by the claimed footpath form part of the curtilages of those properties. They therefore constitute excepted land as defined in paragraph 2 of Schedule 1 to CROW. Statutory rights of access thus do not apply to them and Mr Carr is wrong to have suggested the contrary at paragraph 4.1 of his Supplementary Report. In any event, none of this has any bearing on what the council as surveying authority must decide. The surveying authority must decide whether to make a modification order. If it decides not to do so, a statutory right of access will not be available for reasons discussed in the preceding paragraph. If it does decide

to make a modification order and the order is in due course confirmed (and not successfully subsequently challenged in the High Court), the claimed footpath will become a highway as defined in the 1980 Act.[3] A public footpath is one such highway as so defined. But in that event the statutory right of access would again be unavailable because, under paragraph 13B of Schedule 1 to CROW, excepted land is defined so as to include "Land which is coastal margin and is, or forms part of, a highway within the meaning of the Highways Act 1980". As submitted above, none of this has any bearing on what the council is required to do. Mr Carr does not suggest otherwise in his Supplementary Report. The Objector nevertheless hopes that the analysis above will confirm, to the satisfaction of the council, that it can and must continue with its duty (under paragraph 3(1) of Schedule 14 to the 1981 Act) to decide whether or not to make a modification order, without considering further the events relating to the ECP.

29. A coda on bringing into question. The map dated April 2018 at Mr Carr's exhibit RC 15 at p 521 shows that by that date a number of owners had erected fences which plainly obstructed the claimed footpath. Those fences would have been more than sufficient to bring into question the public's right even if the erection of the gate at B in September 2017 had not already done so. Between the filling in of the sea between late 1998 and the erection of the new owners' fences even as late as April 2018 is less than 20 years. Mr Carr should have so advised. He should also have advised that the claimed footpath traversed the curtilages of the houses as marked by those fences, which meant that the land between the fences was excepted land and so could not have become subject to statutory access rights upon coming into force of the 2018 order reproduced at RC15 pp 499-502.

[3] See section 328(1) referring to a "highway" as meaning the whole or part of a highway and section 329(1) defining a footpath as meaning "a highway over which the public have a right of way on foot only, not being a footway".

30. Conclusion. The council is respectfully invited to follow Mr Carr's recommendation that it would not, in all the circumstances, be appropriate to make a modification order in response to the Application.

[redacted]

Date **14 May 2024**

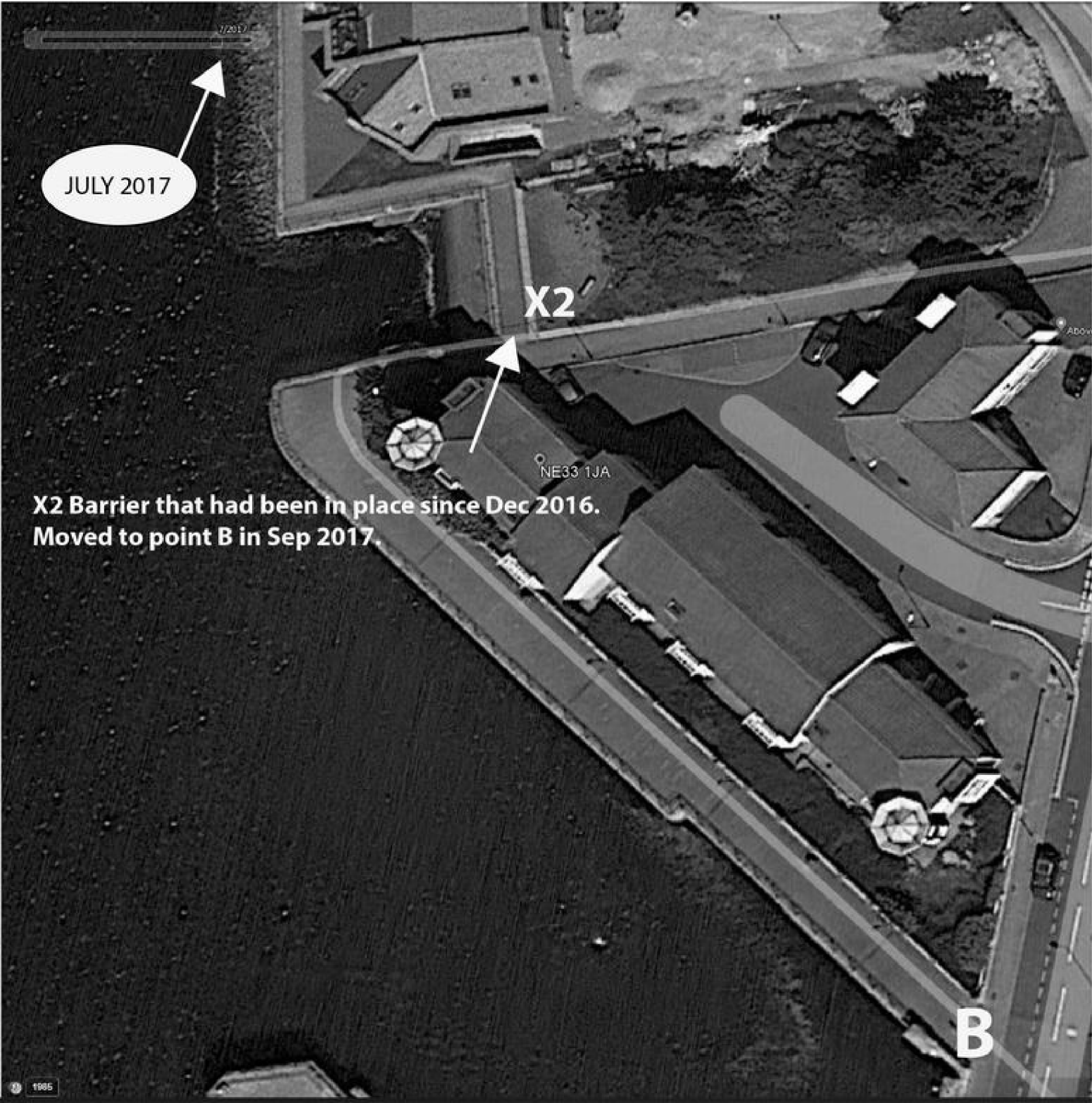
Appendix 1

New Plan


N
NZ 35 67
A
Y1
Y2
X1
X2
B
Mean High Water
MLW
MHW
Mud and
Shingle
24.4m
KEY
Application Route

Appendix 2

Uncropped photograph of Point B dated July 2017


JULY 2017
X2
NE33 1JA
X2 Barrier that had been in place since Dec 2016.
Moved to point B in Sep 2017.
B