

North Yorkshire Council

Environment Directorate

Corporate Director

15 March 2024

Opposed Public Footpath No. 15.65/3 (Crag Hill) Killinghall Diversion Order 2023

Report of the Assistant Director – IPT, Licensing, Public Rights of Way and Harbours

1.0 Purpose of the report

- 1.1 To advise the Corporate Director of Environment of the proposed submission to the Secretary of State (SoS) of an opposed Public Path Diversion Order. A location plan is attached to this report as **Plan 1**. The route is shown on **Plan 2**.
- 1.2 To request the Corporate Director, in consultation with the Local Member and Executive Member for Highways and Transportation, to decide whether to refer the opposed order to the SoS, and if so, to decide what stance the Authority should take in its submission, regarding the confirmation of the opposed Diversion Order.

2.0 Scheme of Delegation

- 2.1 Within the Council's scheme of delegation, it is delegated to the Assistant Director of Integrated Passenger Transport, Licensing, Public Rights of Way and Harbours, to decide whether to abandon an opposed Diversion Order where the Authority is of the opinion that the requirements to confirm the Order may not be met and where an Inspector appointed by the Secretary of State may decline to confirm the Order, or to recommend to the Corporate Director of Environment that the Order be referred to an Inspector appointed by the Secretary of State.

3.0 The Application

3.1

Applicant:	R Jenkins (via PoA D Gillanders)
Date of application:	15/11/2022
Type of Application	Diversion Order S.119 Highways Act 1980
Parish:	Killinghall
Local Member:	Cllr. Michael Harrison
Applicant's grounds for making the application	To remove the footpath from across the property (Crag Hill Cottage), and to regularise the alignment of the whole footpath onto the walked route.

4.0 General Description of Route & Proposal

- 4.1 The footpath, as shown on the Definitive Map, commences on Crag Hill Lane, lies across the front garden of Crag Hill Cottage and continues south-easterly across a pasture field to re-join Crag Hill Lane, shown on Plan 2 as A – B – C.

- 4.2 The proposal is to divert the footpath out of the front garden of Crag Hill Cottage where it has been obstructed since before the first Definitive Map was published (the property having been built in 1953), onto the walked alignment, shown D – F on Plan 2, and further, to formalise the walked section of the continuation of the footpath across the adjacent field to the southeast.
- 4.3 Part of the field section has been inadvertently fenced in by the third-party agricultural landowner on an incorrect alignment we believe, in good faith, between F – B, and the proposal also intends to divert the section via E – B onto the enclosed alignment between F – B. The next section between B – G also lies between stock-fences on agricultural land; but is on the correct alignment and will not be altered by the proposal. The remaining section G – C has also been enclosed but not quite on the correct alignment between G – H – C. It is the intention to divert G – C onto G – H – C to formalise the walked alignment.
- 4.4 All of the proposed diverted route is between low stock-fences or between a fence and a hedge. The usable width between the fences is adequate and serves to separate users of the route from the stock in the field. Apart from the hedge all these boundaries belong to the 3rd party agricultural landowner who is in agreement with the diversion.

5.0 Relevant legal criteria

- 5.1 Under Section 119 of the Highways Act 1980, the Council, having consulted any other local authority, may divert a Public Right of Way where it appears to the Authority that in the interests of the owner of the land crossed by the Public Right of Way described in the Order it is expedient that the line of the route should be diverted.
- 5.2 The Council charges applicants for the costs incurred in the processing/making of diversion Orders, as provided for by the Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 (S.I. 1993/407), amended by regulation 3 of the Local Authorities (Charges for Overseas Assistance and Public Path Orders) Regulations 1996 (S.I. 1996/1978).
- 5.3 Where an Order is opposed, the Council cannot confirm the Order; it can abandon the Order or, where it considers it is appropriate to do so, it can refer the Order to the Secretary of State requesting confirmation. The Secretary of State will confirm an Order if he/she is satisfied that:
- i) in the interests of the landowner, it is expedient to divert the footpath, and
 - ii) the diversion will not be substantially less convenient to the public as a result of the Order, and that it is expedient to confirm the Order having regard to the effect which:
 - (a) the diversion would have on public enjoyment of the route as a whole;
 - (b) the coming into operation of the Order would have, as respects other land served by the existing public right of way; and
 - (c) any new public right of way created by the Order would have, as respects the land over which the right is created and any land held with it.

6.0 Reason for the diversion of the footpath

- 6.1 It is likely that the section of the footpath across the garden of the property known as Crag Hill Cottage has not been available to the public since the construction of the property in 1953 and that the public have exited onto Crag Hill Lane at Point D on Plan 2 since that time. Nevertheless, the legal line remains across the garden. The presence of this unused section of footpath was considered to be a hindrance to the sale of the property. The applicant obtained the consent of the adjacent landowner to divert the path from through the garden exiting onto Crag Hill Lane at Point A, to outside of the garden exiting instead at Point D as shown on Plan 2. This also became the opportunity to formalise part of the cross-field section of the footpath to the southeast, to form a cohesive legal route.

- 6.2 The application was received on 15 November 2022 from the Acting Power of Attorney on behalf of the owner of Crag Hill Cottage who has since passed away. It transpired on examining the Map and the site that the enclosed sections of the footpath are not all on the legal alignment, notwithstanding the obstruction of very long standing by the garden, curtilage hedges, and front edge of the house.
- 6.3 Although the owner of Crag Hill Cottage passed away early in 2023, and the house has now been sold the original owner's estate will meet any remaining legal costs by written undertaking.
- 6.4 The diversion would be in the interest of both of the affected landowners. Firstly, because it would remove the footpath from the private curtilage of the cottage, and secondly because it would assist the agricultural landowner, enabling safer and more effective management of the fields of livestock (usually cattle) that are on either side of the proposed route, and through which the current legal alignment passes.
- 6.5 The diversion would also be in the interests of the public because it would remove the route from an open field used for cattle grazing, from a domestic garden and its boundaries, and from the proximity to the property windows, driveway, drainage ditch, and a garage. Furthermore, the diversion would only add 32 metres (8.8%) to the legal route, and it would formalise the used line that, in part, seems to have been in use for about 70 years. There would be no additional structures to those already recorded on the legal alignment.
- 6.6 The proposal to remove the public footpath from the curtilage of the cottage onto adjacent land with the agreement of the landowner is also respecting the Guidance issued by Defra in August 2023. The Guidance encourages the predisposition of authorities to remove public rights of way from gardens and curtilages of residential dwellings to reduce the impact of the right of way on the owner/occupier, where the respective relevant legislative tests can be met.

7.0 Responses to the initial consultations

- 7.1 One objection was received to the proposed diversion at the Informal Consultation stage, on the grounds that the hedge encroached on the used route, and that the top strand of the various wire fences were barbed wire, despite the adequate width of the physical path, and objected to the diversion itself in principal because it is a diversion from the legal recorded line. The points raised were not related to the formal tests for a Diversion Order; i.e. whether the diversion was in the interest of the landowner or of the public; and whether or not the proposed route would be significantly less convenient for the public.
- 7.2 The hedge was subsequently cut back by the owner of the cottage, and the fence-posts now have only plain wire on the 'public' side.
- 7.3 As the objection was not considered to be substantial, and that the matters of concern for the objector had been largely resolved, the Assistant Director approved making the Diversion Order.

8.0 Responses to the publication of the sealed order

- 8.1 The Order was made and was duly advertised by notice on 15th June 2023.
- 8.2 Two duly made objections were received although one was subsequently withdrawn. Therefore, only one objection remains.

8.3 **Objection**

The grounds were as follows:

- i. The Definitive Map and Statement is not re-printed as a hard copy after every Order so it is not up to date; a digital Working Copy of the Map is not acceptable.
- ii. At the northwest end of the Path the Consultation Notices were posted up at the legal terminus and the proposed (as-used) terminus (A and D, as well as Point C); the objector contends that the Notice at the legal terminus (A) was an after-thought.
- iii. The Order seeks to change the Definitive Statement (it is a Combined Order) but the site notices did not say this. The Order did not mention two existing stiles at C and B, and the proposed new alignment is tortuous and unnatural due to an 80 degree bend at F, and introduces a new set of steps at the northwest end (D).
- iv. The hedge alongside the used / proposed alignment near the north-west end belonging to the applicant, had over-grown the as-used route of the path F-D and also obstructs the legal alignment, as does a hedge / trees at the legal terminus (A). The stone steps at the proposed new roadside terminus at the northwest end (D), require a handrail.
- v. Killinghall Parish Council placed local 'point of interest' signage (non-NYC discs bearing the letter 'K') on the as-used / proposed alignment, about the time it was enclosed (by 2006). The diversion (as proposed) was later waymarked as if the legal route, using 'Footpath' arrows. The structure installed at the northwest end of the as-used path when enclosed, was a timber fence-rail, not a stile or a gate.
- vi. The physical diversion of the Path had been allowed before a legal diversion Order was Confirmed, and the path was enclosed (between 2000 and 2006) without regard to the definitive alignment.
- vii. Although there is a strand of plain wire on the public side of the fence-posts along various sections of the path, the barbed wire on the 'field' side is still too close to the public to be safe. The objector later stated that he thinks the barbed wire should be 30 cm. back from the plain strand.
- viii. The objector was not notified that the diversion had been applied for when he reported issues on this path but was told (rightly) that the Council was working with the landowners to resolve the issues. The plan for the consultation was dated before correspondence from the NYCC Maintenance Team regarding the above.
- ix. The Council behaved disingenuously by carrying out work on the Path after receiving the application to divert.
- x. The stile in the centre of the Path (B) on the old hedge-line, should be a gate.
- xi. The Parish Council was not consulted on the diversion. This Council (NYC, formerly NYCC) and the Local Member had colluded over the diversion.

8.4 **Officer Comment on the Objection:**

- i. It is standard practice among Local Highway Authorities nationally to hold an electronic 'working copy' of the Definitive Map for day-to-day management of the network, and for ease of reference by the public. Actual Definitive Maps are amended periodically and reissued, following an 'Omnibus Legal Event Modification Order'.
- ii. These notices were erected at the same time, as it was felt expedient that the notice should be seen by as many people as possible

- iii. The site notices refer to S.119 Highways Act 1980, and to the Wildlife and Countryside Act 1981; the latter is the legal instrument for changing the Definitive Map and Statement. It is entirely lawful for an authority to employ both elements of legislation in one Order. The changes to the Definitive Statement are in the Schedule Pt. 4, and the Officer would have explained the wording had he been asked to.

The two stiles referred to are unaffected by the Order, at the far southeast end of the Path and on an un-diverted central section. The stone steps are almost certainly at least 69 years old, although the Council did re-build them as they are within the maintainable highway verge. It would be perverse and illogical to have removed them pending the outcome of the Order.

The proposed diverted route and the legal alignment are within two metres of the same length, terminating on the same road 32 metres apart, meaning that the additional length of the proposed route to reach the same point is 32 metres, or 8.8%. For people using this Footpath and then the road network to create a circular walk back to the village the proposed diversion would take 32 metres *off* the circular route with no loss of amenity, views or convenience. The diverted sections of the proposed new alignment would have a legal width between 1.6 and 2 metres. The current route has a legal width of 0.9 m. (3 ft.). The enforcement of the reinstatement current legal line would result in a less commodious, less convenient route for the public. Most of the as-used path is 2 metres wide.

- iv. On being notified of an issue with the domestic hedge at the northwest end of the proposed (as-used) route (F - D), the cottage owner's representative had the path cleared within two weeks. The hedge has been maintained ever since. It is not the Council's policy to take enforcement action against landowners where there is a long-standing obstruction, and the owner is attempting to resolve the issues. The 3 steps within the roadside verge are wide, have a shallow riser-height and are not considered to need a handrail.
- v. Many Parish Councils publicise local walks that incorporate non-definitive sections of 'path'. The waymark, not fitted by NYCC, has been removed pending the resolution of the Order. The structure here was a timber stile but by November 2022 it had partly disintegrated which is why the Council re-built it as a stile with two steps
- vi. The landowner of the farmland informed us that he believed the route had been diverted onto the enclosed, now walked, route. In any event he is participating in the proposed diversion which will resolve alignment issues if confirmed.
- vii. The relevant legislation does not prescribe distances that barbed wire should be away from the public but it is clear that it would be unlawful if it is likely to cause a hazard. Some barbed wire has been removed completely, the remainder is not considered to be a risk to users of the path.
- viii. The objector was not a consultee in the initial Informal Consultation, which is for statutory bodies; i.e. other councils, utility companies and user-groups and at that stage does not include the public at large. The objector was included individually in the Formal Consultation after the making of the Order. The Council was working with the landowners to resolve the issues, and one of the ways we were doing this was to accept a Diversion Order application. Most likely the same Plan was used for the Informal and Formal Consultations and is not remarkable.

- ix. The Council improved the steps on the highway verge and replaced the adjacent stile at the northwest end of the used route in response to comments made, as this was felt to be in the public interest. Other works were done including the installing of plain wire on the 'public' side of the fenceposts by the same contractor, again in the interests of the public once the risk had been highlighted. Reasonable improvements are often made to routes where they are easily achievable, following comments from the public, or observations made by officers during site visits.
- x. This stile is lawfully recorded and is unaffected by the Order, therefore it is not required to be changed as part of this process.
- xi. The Parish Clerk was sent the consultation papers by the agreed method. What happens to communications after that is not a matter for the Authority. The Local Member contacted the Officer once to make a normal enquiry regarding the legal recognition of stiles.

8.5 The Definitive Map Officer and the Area Public Rights of Way Officer subsequently met the objector at the site to discuss the objector's points, but compromise could not be reached, and his objection remains outstanding. He proposed allowing the section of the old route through the garden to be diverted alongside the hedge to Point D but the remaining section of A-E-B should remain on the existing alignment. This would have resulted in a narrower width for the footpath which the third-party landowner would certainly enclose creating a less commodious path for the public than the route proposed. The proposed route has a legal and physical width of 1.6 to 1.8 metres from D to F, and 2 metres from F to B. The un-diverted length B to G is physically 2 metres wide and the remainder, G-H-C would be 2 metres.

8.6 **Response in support of the Order was as follows:**

- At the Informal Consultation stage, The Ramblers Local Representative supported the diversion but stressed that they would much prefer the new stile to be recorded at the north-west end (Point D), to have been a gate.
- **Officer Comment on Support:** The third-party agricultural landowner was approached about this stile (which would replace a dilapidated stile), but he would not concede to having a gate as he believed that gates are liable to be left open or damaged by the public so they would not close and sent the officer a photograph of a local example of this. On consulting with the Area Maintenance Team it was felt expedient to agree to a new stile, as there had already been three stiles recorded on the legal alignment (at A, B and C), so a stile at Point D was no greater an inconvenience for the public than on the existing route.

9.0 **Representation made by the local member**

9.1 The Local Member was consulted and does not object to the proposal.

10.0 **Financial implications**

10.1 If the opposed Order were to be submitted to the SoS, the Order would be resolved by a Public Inquiry, a Public Hearing or by written representations.

10.2 There would be a non-rechargeable cost to the Authority in preparing a submission to the SoS and responding to any queries raised by the SoS and these costs would be for officer time which would be met by the respective staffing budgets. If the Inspector chose to hold a Public Inquiry, the costs of arranging, hosting and supporting the Inquiry would fall to the Council but would be unlikely to exceed £1,000.

11.0 Equalities implications

11.1 There are no significant equalities implications arising from this report.

12.0 Legal implications

12.1 The opposed Diversion Order would be determined by an Inspector appointed by the SoS, by way of, as stated above, either a Public Inquiry, a Public Hearing or written representations, with the latter being considered the most likely.

12.2 The Inspector, on the basis of the legal criteria summarised in paragraph 4.3 above, would decide whether or not to confirm the opposed Diversion Order. If he/she decides to confirm the Order, parts of the existing route would be diverted, and the route as proposed would be added to the Definitive Map. If the Inspector decided to 'not confirm' the Order, the existing recorded alignment would need to be made available to the public.

13.0 Climate change implications

13.1 There are no significant climate change implications arising from this report.

14.0 Current decisions to be made

14.1 The Assistant Director has approved the forwarding of this report to the Director and the Executive Member to decide how this matter should be progressed.

14.2 The decisions to be made at this stage are, firstly, whether the Order is to be abandoned, or is to be forwarded to the SoS for resolution.

14.3 Secondly, if it is decided that the matter is to be forwarded to the SoS then a further decision will need to be made, namely which stance the authority would take within its submission to the SoS towards the confirmation of the Order; that is the Authority needs to decide if it:

- supports confirmation of the Order, or not;
or
- considers the circumstances are so finely balanced or are particularly unclear and wishes to take a neutral stance.

15.0 Conclusions

15.1 The eleven grounds for objection from the objector are not considered to be sufficiently robust to prevent the confirmation of the order.

They fall into three groups:

- 1) That it should be impossible to divert a Definitive Right of Way
- 2) That the Council has received reports of issues on the footpath and has then dealt with them, rather than anticipating them in advance; and;
- 3) That the landowners, Countryside Access Team and the elected Local Member have colluded to save the Council's face rather than enforce the legal alignment of the route.

15.1.1 This last point was somewhat diluted by the fact that at a later site-meeting with the Officer, the objector offered to remove his objection to the diversion of the footpath out of the cottage garden only, if the Council were to agree with his other objections.

- 15.2 The objections are still considered unsustainable and, if upheld, would result in a less convenient and narrower footpath. The current legal width is 0.9 metres (3 ft) whereas the width of the new alignments, if confirmed, would be 1.6 to 2 metres and the physically available width is at least this. The first point cannot be supported as diversions of public rights of way for the benefit of landowners are specifically provided for within the legislation and are also a normal way of resolving issues like the present one. The second point is a matter of expediency and is how Highway Authorities work in managing Public Rights of Way due to the diversity of the network and the funding normally available for the service. We largely rely on reports from the public to identify physical maintenance and encroachment issues, and once aware we endeavour to resolve them as soon as possible with regard to our prioritisation protocols. Resolving issues raised during a Diversion Order process is proactive good practice to expedite the matter and reduce staff time input to a case.
- 15.3 It is considered that the Diversion Order if confirmed would offer legitimate benefits for the applicant's estate, the new owner of the property and adjoining landowner, and would also succeed in providing an improved footpath for the public. In addition, the process would resolve a long-standing issue in that the legal line of the footpath has been obstructed by the cottage and garden for approximately 70 years.

16.0 Recommendation

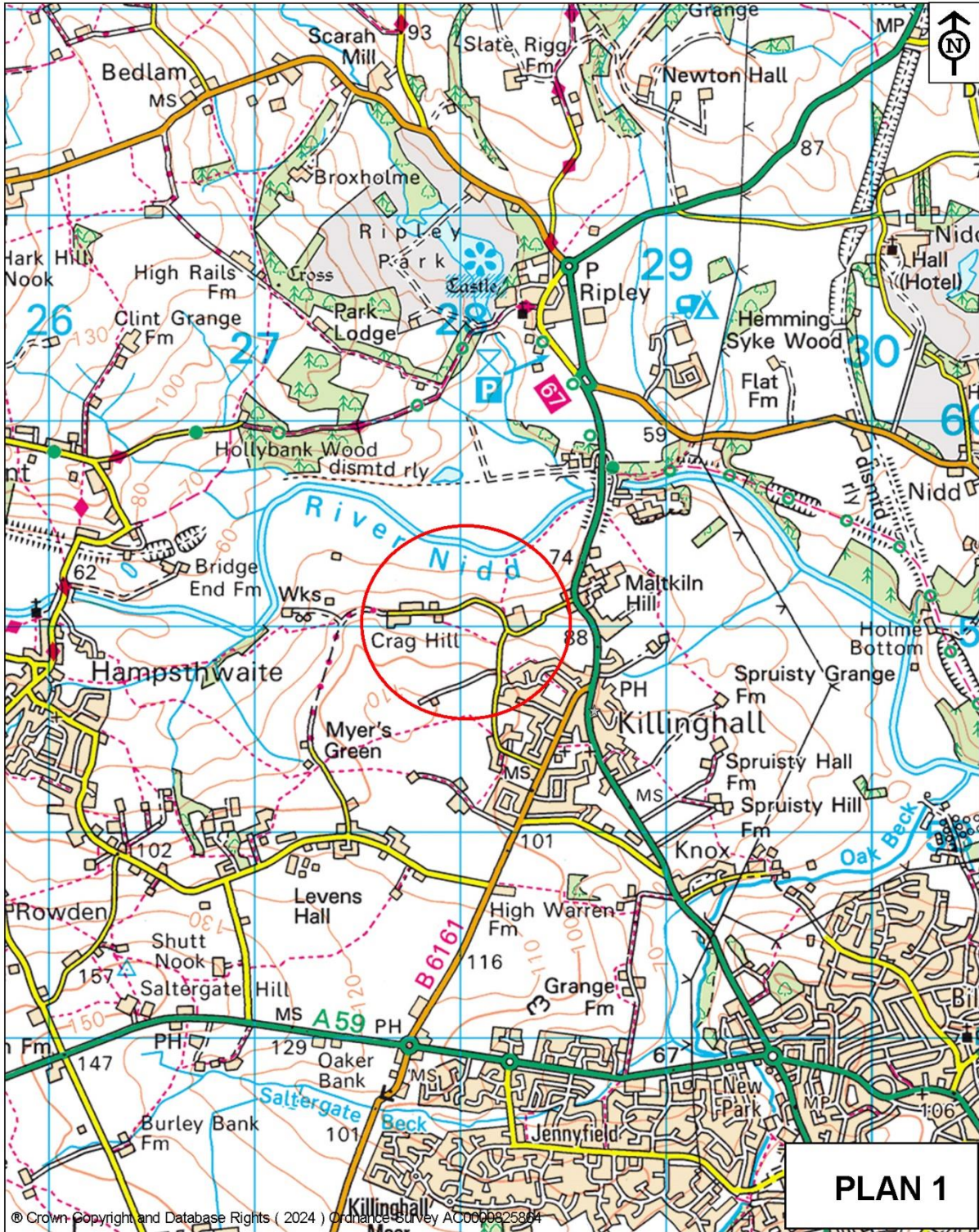
- 16.1 It is therefore recommended that the opposed Diversion Order should be referred to the Secretary of State for resolution, and that the Authority should support the confirmation of the Order within its submission to the SoS.

APPENDICES: None


BACKGROUND DOCUMENTS: File Ref: HAR/2022/17/DO

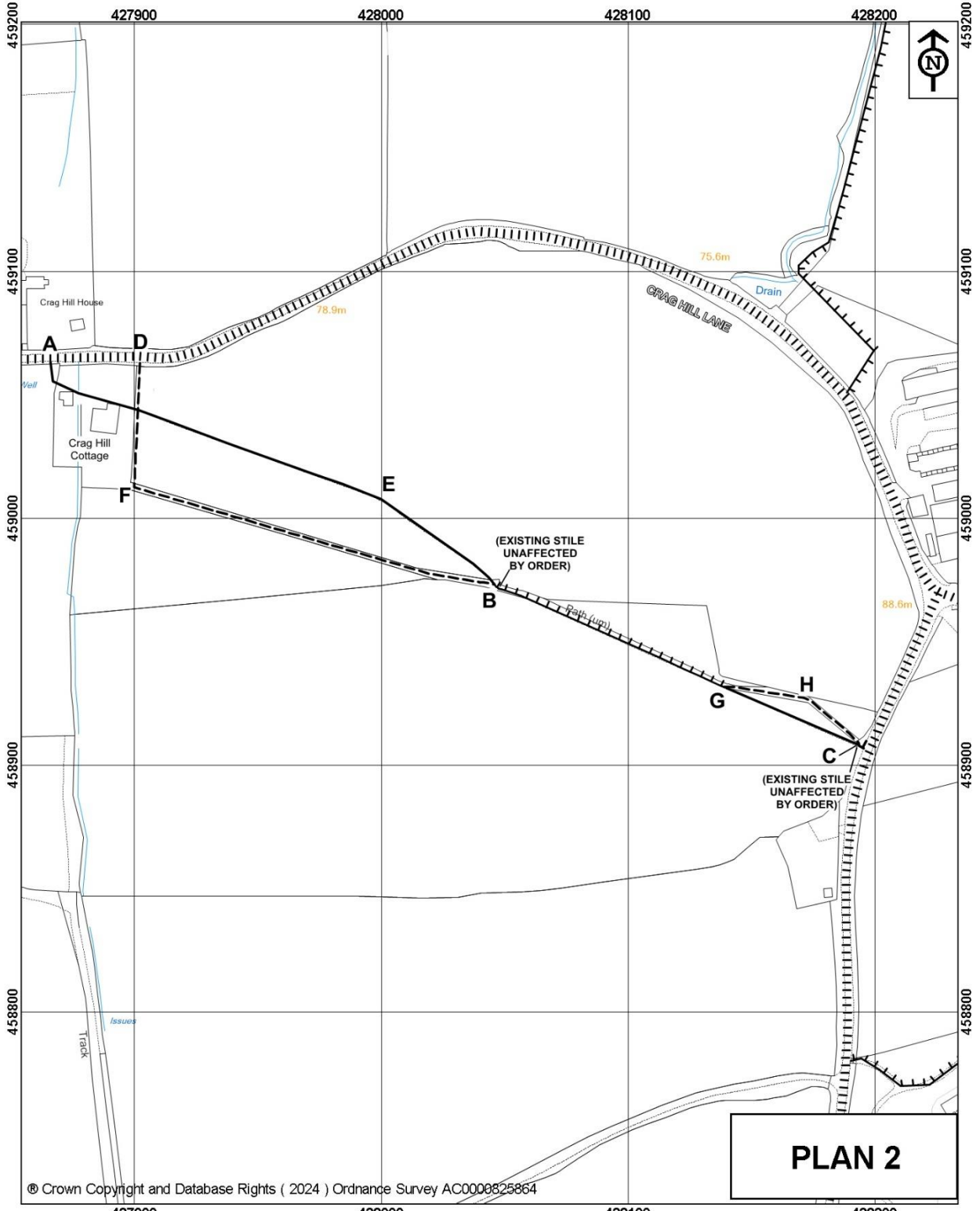
Paul Thompson
Assistant Director for IPT, Licensing, Public Rights of Way and Harbours
County Hall
Northallerton
15 March 2024

Report Author – Robin Richardson – Definitive Map Officer
Presenter of Report – Penny Noake – Principal Definitive Map Officer



PLAN 1

 <p>NORTH YORKSHIRE COUNCIL</p> <p>Public Rights of Way Countryside Access Service County Hall Northallerton DL7 8AH</p>	<p>LOCATION PLAN</p> <p>Map drawn on 31 January 2024 Drawn by Robin R</p>	<p><u>The North Yorkshire Council</u></p> <p>Crag Hill Killinghall</p> <p>FP 15.65/3 Killighall Opposed Diversion Order 2023</p> <p>Scale 1:25000 File Ref No. HAR/2022/17/DO</p>
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NORTH YORKSHIRE COUNCIL
 Public Rights of Way
 Countryside Access Service
 County Hall
 Northallerton
 DL7 8AH

Key:
 Footpath to be added - - - - -
 Footpath to be deleted _____
 Other footpaths - · - · - · -
 Maintainable highways ·········

Map drawn on 31 January 2024
 Drawn by Robin R Scale 1:2000

The North Yorkshire Council
Crag Lane Killinghall
FP 15.65/3 Killinghall
Opposed Diversion Order 2023

File Ref No. : HAR/2022/17/DO