

BRISTOL CITY COUNCIL

**PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE
26 APRIL 2010**

FRIARY ROAD ENFORCEMENT ACTION, HIGHWAYS ACT 1980
(Report of the Director of City Development)

(Ward: Bishopston)

Purpose of Report

- 1 To seek approval to undertake enforcement action and to remove the obstructions within public right of way 585, a restricted byway, known as Friary Road.
- 2 To brief members as to the obstructions on the public right of way.

Background

- 3 Highway Authorities have powers under the Highways Act 1980 (HA80) to enable them to perform their duty to protect the public's right of free passage over a public highway. The public highway to which this report refers was added to the Definitive Map and Statement as a restricted byway after the application to modify the definitive map and statement was determined by an Inspector, appointed by the Secretary of State, at a hearing on 7 October 2008. Modification Order No.1 2007 was subsequently confirmed by the Inspector on 16 October 2008, as shown on the Order map at appendix A. The width of the public right of way includes the verge area adjacent to 111 Berkeley Road. On this verge are three trees acknowledged to have been planted by the owner of 111 Berkeley Road prior to the deposit of earth and building of the retaining wall. We are not recommending that any action is taken in relation to the three trees.
- 4 The confirmed order refers to the condition and extent of Friary Road as it was prior to the public's right being called into question. The action in 2000 which called this into question was the enclosure of the verge area by the erection of fencing, the erection of a retaining wall and the altering of the ground level of the verge on what had been the eastern side of Friary Road. This is the area of public right of way 585 subject to the enforcement action. The photographs in appendix B show the area in question at different dates.

- 5 Following guidance set out in the adopted public rights of way enforcement policy an advice letter was sent to the owner of 111 Berkeley Road on 22 July 2009 reminding the owner of the findings of the Inspector. It detailed the work required of them and set out the actions open to the Highway Authority if the informal approach did not achieve removal of all the obstructions, on the public highway.
- 6 The obstruction by the retaining wall is not a current issue as this has been removed in stages since 2000 and since October 2009 is no longer apparent on the ground, see appendix B.
- 7 After correspondence between the owner of 111 Berkeley Road and other interested parties a notice under Section 143 HA80 was served on 20 November 2009 requesting the removal of the fencing.
- 8 The owner of 111 Berkeley Road then raised the issue with Mr Terry Bullock, Traffic Manager and this resulted in an offer to suspend the enforcement action until 28 February 2010.
- 9 The obstruction by the fencing was resolved on the 28 February 2010 as the temporary fencing, which had been set back in stages in the autumn, was realigned to follow the original boundary wall shown on the land registry plan.
- 10 The further enforcement action against the bank and trees is currently suspended in view of the interest and comments generated by the enforcement action and it is felt appropriate that any further decisions regarding enforcement action are considered and taken by the Public Rights of Way and Greens Committee based upon officer recommendation.
- 11 The evidence presented to the Inspector, appointed by the Secretary of State described pedestrians as being able to step onto the grass verge to avoid the traffic. This is the condition the Highway Authority is required to re-establish. From photographic evidence the height against the former boundary wall of 111 Berkeley Road is estimated as 300mm that being the height of four brick courses above ground level. The cross sections provided in appendix C show the current bank level and estimated pre 2000 condition when the area acted as a verge to the highway.

Procedure

- 12 The Council, as Highway Authority, is under a statutory duty imposed under section 130 of the Highways Act 1980 (HA80) *“to assert and protect the rights of the public to the use and enjoyment of”*, and *“prevent so far as possible, the unauthorised stopping up or obstruction”* of this public right of way.
- 13 As owner of the surface of a publicly – maintainable highway an authority has power to remove anything placed on or planted in that surface without its permission or without lawful authority. The powers to require the removal of specific types of obstruction or other nuisance are conferred by various sections of the Highway Act 1980.
- 14 The definition of carriageway is found in s329(1) HA80 which states *'a way constituting or comprised in a highway, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles'*.
As a restricted byway it allows for a right of way in or on vehicles, other than mechanically propelled vehicles, this is sufficient for a restricted byway to be classed as a carriageway for the purposes of the act. This approach is supported by the comments in a RUPP's consultation paper issued by Defra in 2003 which stated *'We consider the term restricted byway falls within the definition of carriageway in section 329(1) of the Highways Act 1980 by virtue of the reference there to ‘vehicle’*.
- 15 Removal of earth

Section 149 HA1980 provides a power for the Highway Authority to issue a notice if anything is deposited on a highway so as to constitute a nuisance. The notice is served on the person responsible for depositing the item. If that person fails to comply with the notice then the authority may make an application to the court to obtain a removal and disposal order and expense recovered.

Specialist Advice

- 16 To understand the implications and possible mitigations which might be relevant to the enforcement action specialist advice was obtained. The arboriculturist advised on the effect of removal of soil on the trees and an engineer to dig a slit trench to view the soil horizons of the bank.

- 17 The Bristol City Council arbouriculturist who attended the site reports that the three trees are a: Birch (*Betula pendula*), b: Purple Leaf Plum (*Prunus cerasifera* 'pissardii') and c: Rowan (*Sorbus aucuparia*). These are all species which Bristol City Council currently plant and manage within the highway and as such could be maintained cyclically as part of the Risk Based Pruning Program. The trees would require some initial pruning to lift the canopies to statutory highway clearance. It would then be recommended that they were inspected every 4 years during the summer inspection and work program.
- 18 The report continues by detailing the effect the removal of the deposited earth may have on the trees, a method statement and the mitigation measures if any of the trees become unsafe due to the works, this is found at appendix D.
- 19 An engineer from the Engineering consultancy of Bristol City Council who attended the site visit reports that the investigation showed that at the point of the slit trench which was 5m from the front wall and 1.6m from the edge of the surfaced lane that it appears the made ground is a mixture of topsoil, stones, clay and even lumps of tarmac surfacing. There was an area of clay at the base of the tree approximately 300mm from the present surface. In his view the trench was inconclusive in terms of showing the original profile of the bank.
- 20 From bank height measurements taken, at trees a: birch; the difference between Friary Road verge ground level and bank level is 270mm b: Purple Leaf Plum, 230mm and c: Rowan, 200mm.

Legal Implications

- 21 The Highway Authority is under a statutory duty to assert and protect the right of the public to enjoy the highway and prevent the obstruction of the highway. Officers are of the opinion that the earth bank constitutes an obstruction to the verge area. Failure to resolve this issue leaves the Authority vulnerable to action under section 130A HA1980. This provision allows for a member of the public to serve a notice on the Highway Authority requesting them to secure the removal of an obstruction from the highway. If the Highway Authority fails to secure removal, an order of the court may be sought against the Highway Authority to effect removal.

Options

- 22 Take enforcement action: To restore the public right of way to the extent as existed when the route was called into question and the application to modify the definitive map and statement was served on the Council acting as Surveying Authority. The reduction in height may affect the three existing trees but the mitigation advised by the arboriculturist is to plant two single stemmed trees in the vicinity 10 metres apart.
- 23 There are no other options open to the Highway Authority who are required to follow the statutory duties imposed by HA80 Section 130.

Officer comments

- 24 The obstruction to public right of way 585 requires resolution. The Inspectors decision has established that the route should revert to the conditions prior to the actions which brought about the claim for a public right of way. This entails removing the earth and any other material which increased the bank height after the wall was built in 2000. The likely stability of the trees which survived the earth being banked up around the trunks has been assessed and is found in Appendix D. If the trees are affected by the actions of restoring the public's right then the recommendations of the arboriculturist found in Appendix D would be observed.
- 25 The confirmed modification order refers to the condition and extent of Friary Road as it was prior to the public's right being called into question. The action in 2000 which instigated the application was the owner of 111 Berkeley Road enclosing an area of land by building a wall and changing the ground levels, on what had been the eastern side of Friary Road. This is the area of public right of way 585 subject to the enforcement action. As the introduction of earth and creating a bank, which includes the trees, was the action which precipitated the claim it would not be appropriate to class the action as de-minimus.

RECOMMENDATION:

- (1) **That approval be given for a notice to be served under Section 149 of the Highways Act 1980 to ensure that the obstruction by**

earth is removed. If the obstruction is not removed within the period of compliance that officers be authorised to make an application to the magistrates court to obtain a removal and disposal order.

- (2) The report and method statement by the arboriculturist is noted and will be implemented at an appropriate time.

Appendices: Appendix A - Plan of Confirmed Modification Order
Appendix B - Pictures of the Site
Appendix C - Bank Profile at the Tree Locations
Appendix D - Bristol City Arboriculturist Report

Consultation

Internal – Legal Division, Central Resources
Arboricultural Officer, Parks and Estates
Engineering Consultancy, City Development

Legal and Resource Implications:

Legal:

The legal implications are as set out in the report above.

Financial:

None arising directly from this report

Other Approvals Necessary None

LOCAL GOVERNMENT (ACCESS TO INFORMATION ACT) 1985 Background Papers:

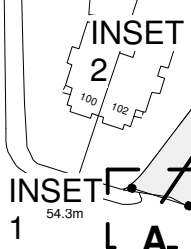
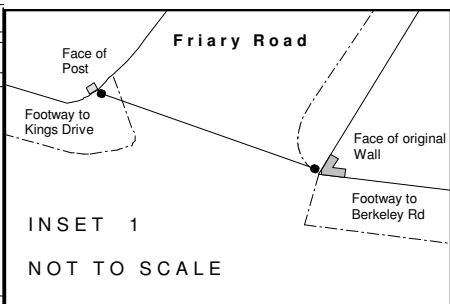
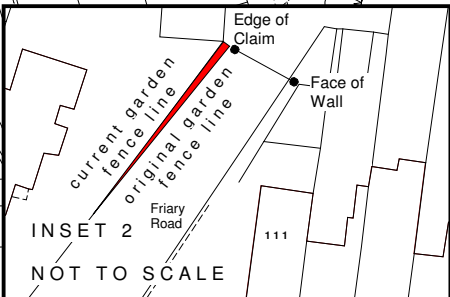
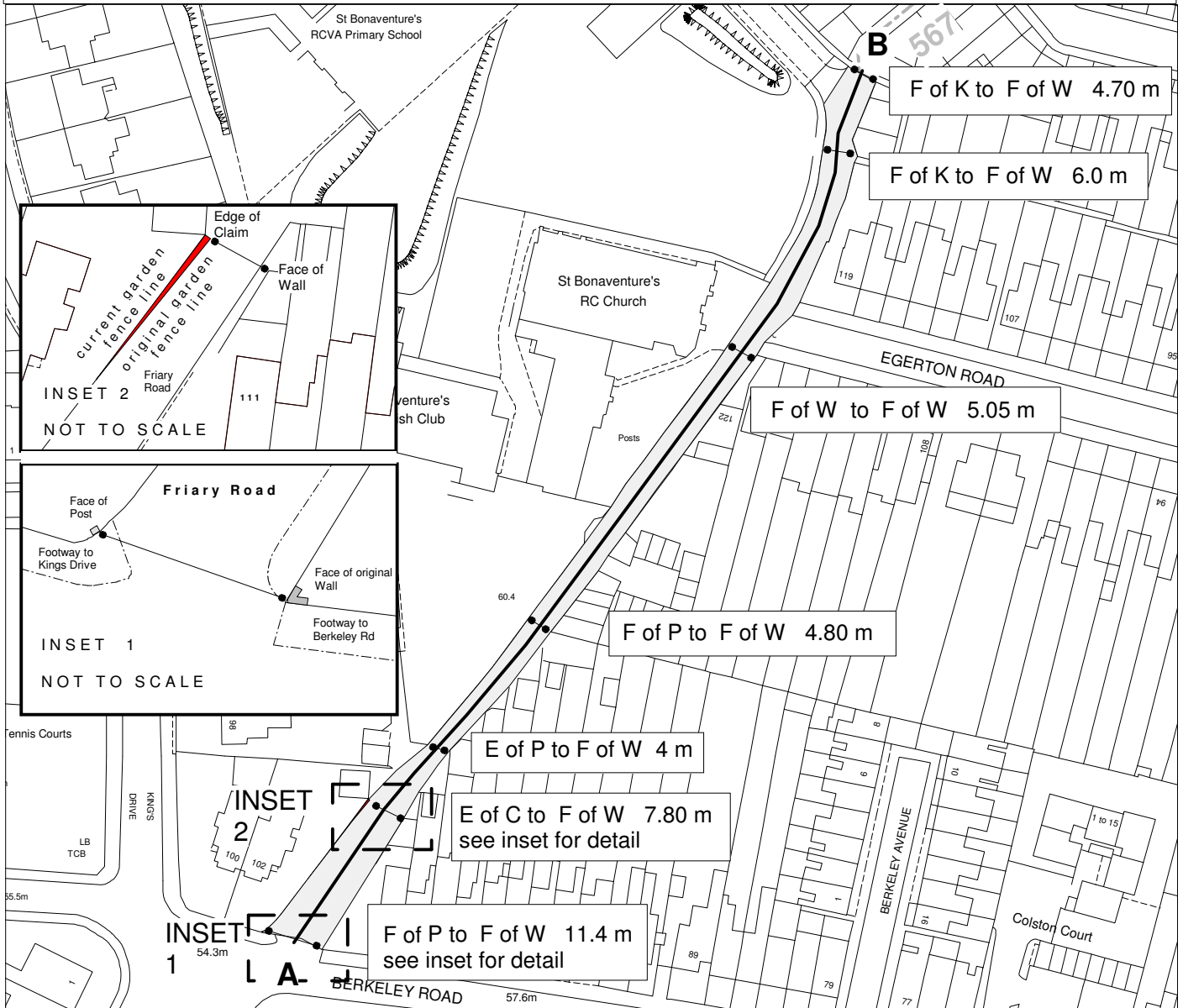
1. Highways Act 1980
2. Bristol City Public Rights of Way Enforcement Policy

Officer presenting report: John Roy, Team Manager - Road Safety, Walking and Cycling, City Development

Contact telephone number: (0117) 9036670

Bristol City Council
 Definitive Map & Statement Modification Order No.1 2007
 Wildlife & Countryside Act 1981 - Section 53

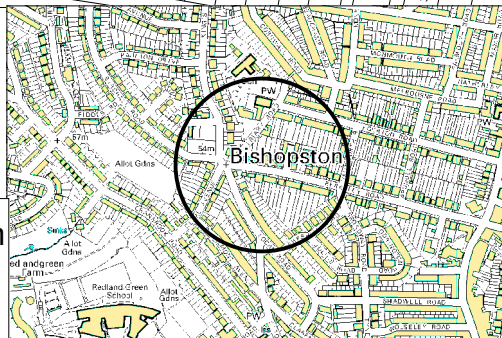
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Way to be Added

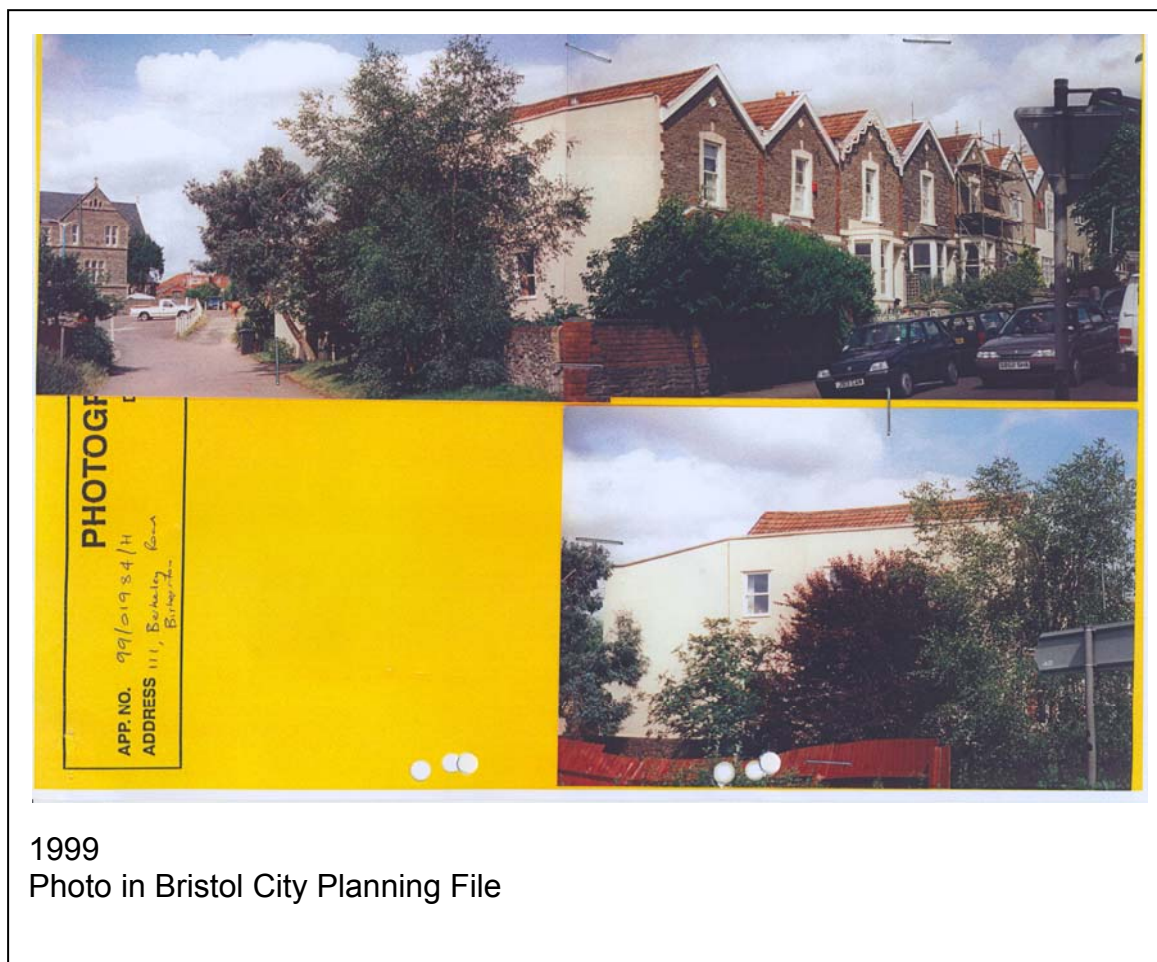
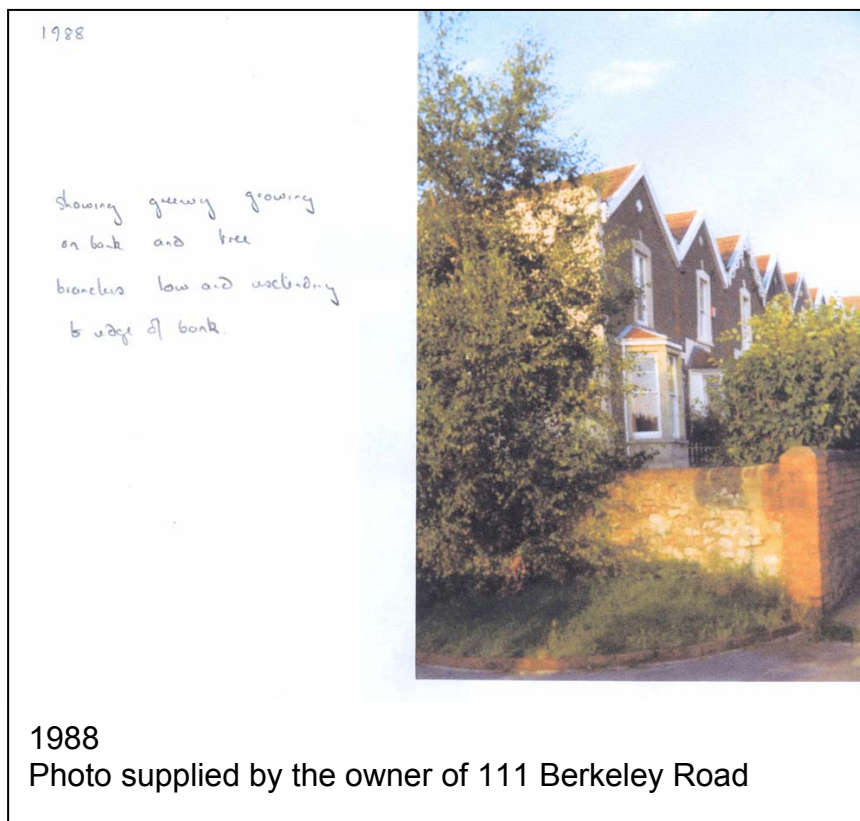
A  B width in metres

F of W Face of Wall E of C Edge of Claim
 F of P Face of Post
 F of K Face of Kerb



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Photographic evidence used in the modification order



Parents say youngsters must walk in road



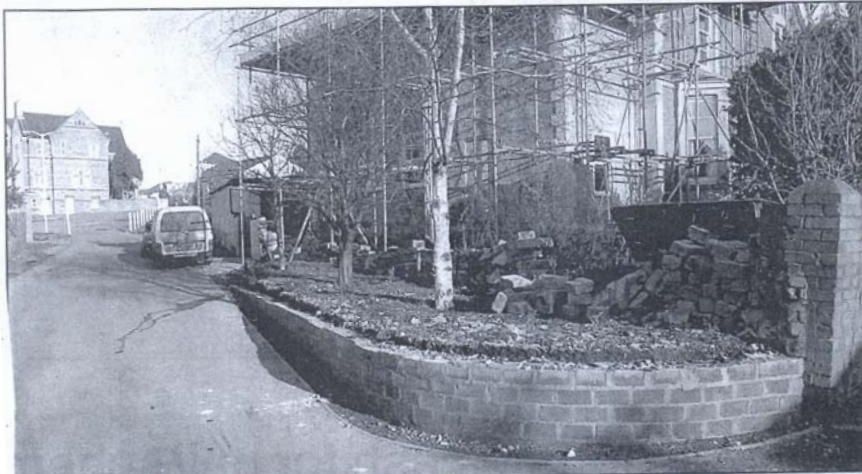
Going up: The wall being built over the verge on the approach road to St Bonaventure's Primary School

Under construction Evening Post 4 October 2000



Finished Wall

Parents demolish wall after safety row



Tulled down: The site of the wall in Bishopston which parents claimed prevented pupils from walking to school safely

Evening Post January 2001





Photo taken March 2010



Photo taken March 2010

APPENDIX B

Key

-  Existing Ground Profile
-  Estimated former verge

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Rev.	Date	Description	By
A	March 10	Minor amendments to cross sections	SCW

Project
**FRIARY ROAD
RESTRICTED BYWAY**

Title

CROSS SECTIONS

Client
Mary Knight - Traffic and Transport

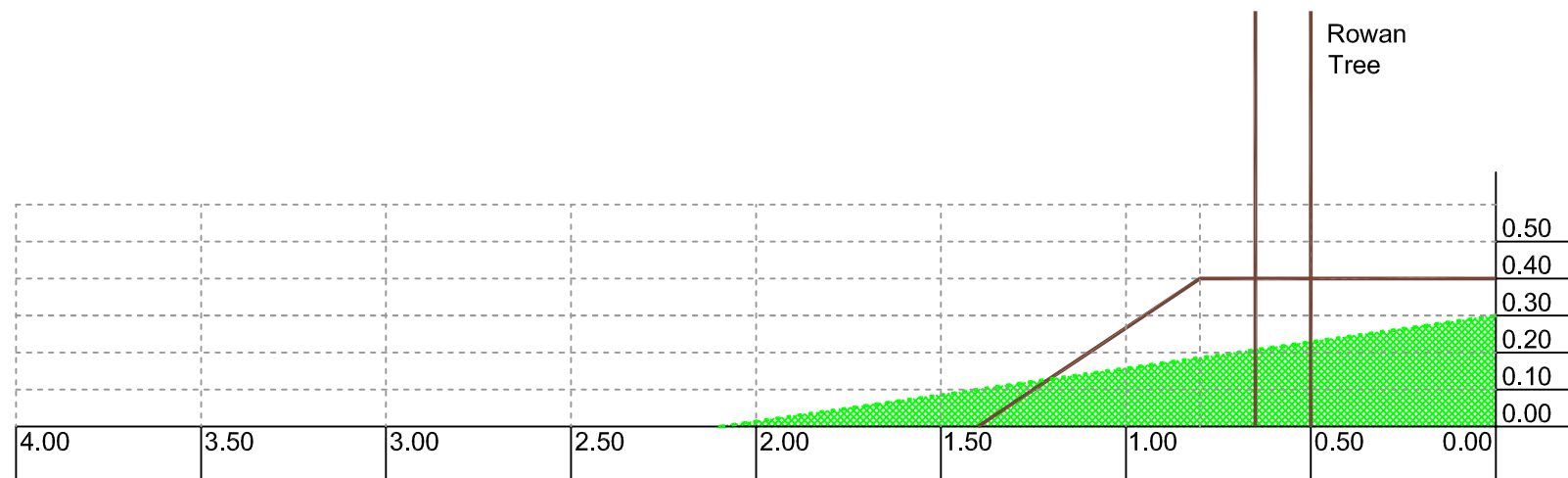
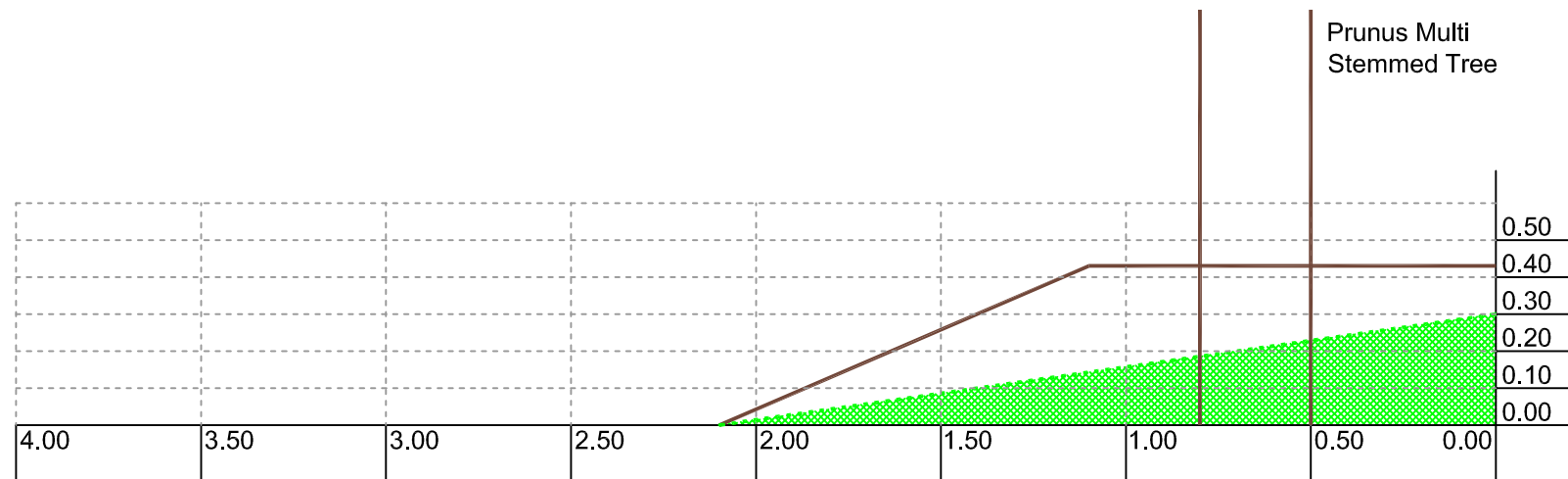
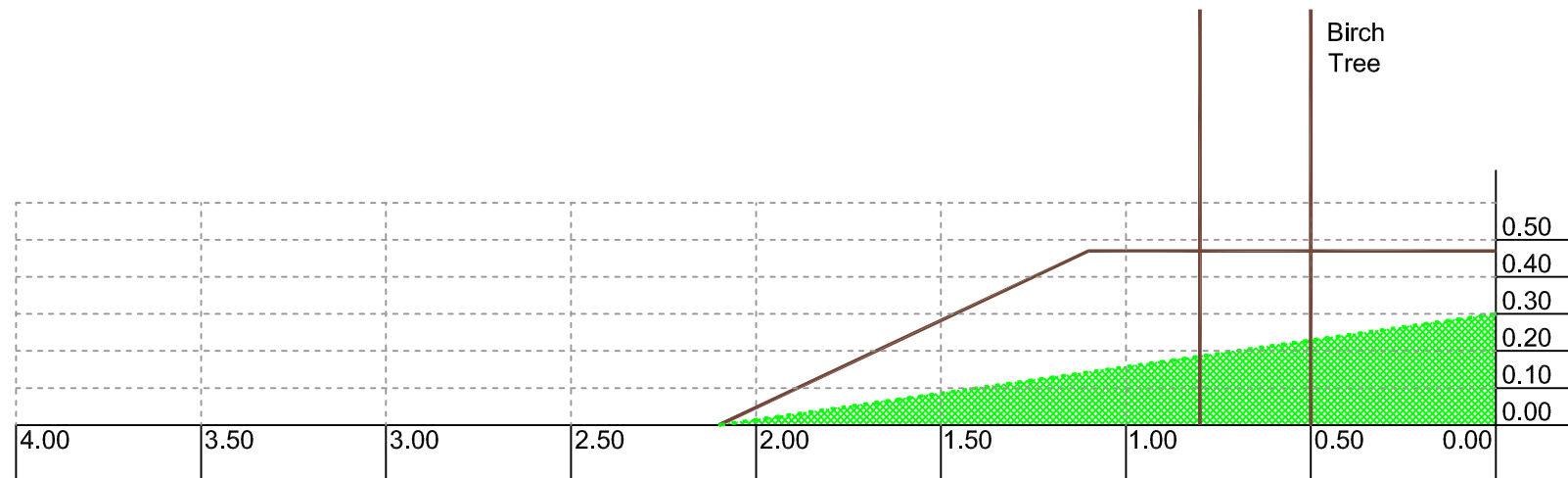
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Telephone Number 01179 223478	Checked by JDS
Drawn by SCW	Date Issued March 2010
Date Drawn March 2010	Issued by JDS

STATUS

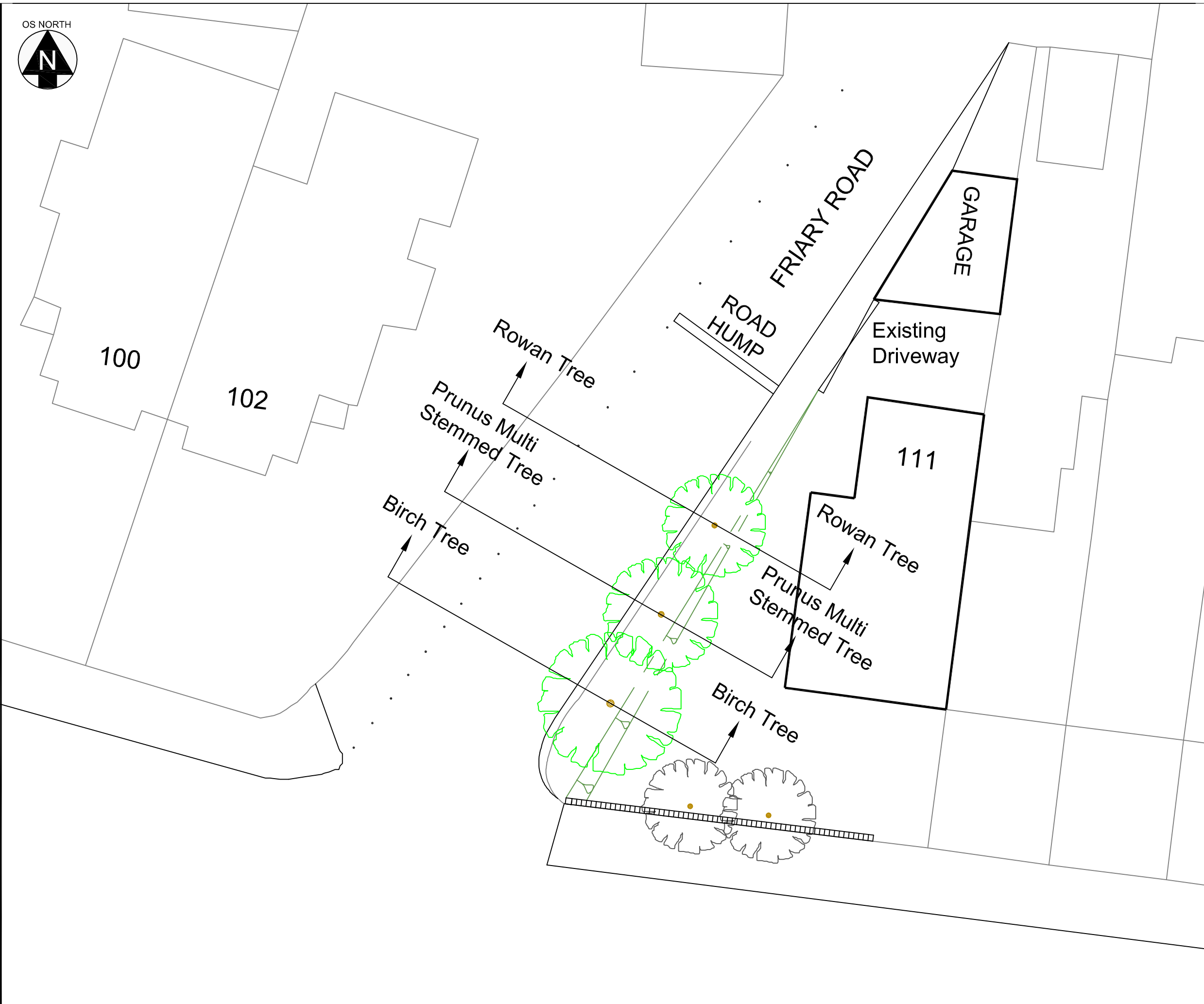
- Preliminary
- Tender
- Construction
- As Built

DRAWING NUMBER

Project Number Drawing Revision
DC0514-08 - 003 - A



OS NORTH



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Rev.	Date	Description	By

Project
**FRIARY ROAD
RESTRICTED BYWAY**

Title

SECTION LOCATIONS

Client
Mary Knight - Traffic & Transport

Project Manager Jon Sawyer Telephone Number 01179 223478 Drawn by SCW Date Drawn March 2010	Scale 1:150 @ A3 Checked by JDS Date Issued March 2010 Issued by JDS
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STATUS

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DRAWING NUMBER

Project Number	Drawing	Revision
DC0514-08 -	004	-

Bristol City Council Arboriculturist Report

A site visit was undertaken on 11 February 2010.

Re-profiling the bank to its estimated level prior to the work in 2000.

1. During my meeting with an officer from Engineering Consultancy we excavated a trial trench from the road surface toward the stem of the birch tree. Its depth was 300mm at the deepest point, which was next to the tree. Whilst excavating we encountered a number of fine lateral and feeding roots between the depths of 50mm and 300mm, this shows that the tree has produced root within the made up ground. This would be expected as the tree needs its fine roots within the top 300mm for oxygen diffusion and the uptake of water and nutrients.
2. Any excavation of the bank is likely to cause damage to at least the finer roots up to 30 mm diameter. The tree uses these roots predominately for water and nutrient uptake and also to a lesser degree for support through cohesion with the soil.
3. Depths of excavation and likely root damage.
All of the proposed excavation work is well within the canopy spread of the tree, and as such you will encounter roots.

Up to 100mm

Over the whole length of this verge excavation to this depth is likely to cause significant damage to the finer lateral and feeding roots.

100mm - 300mm

Excavation to these depths is likely to cause damage to the feeding roots and supporting lateral roots. If a number of the supporting lateral roots are severed this may cause instability of the tree.

300mm -600mm

Excavation to these depths will sever major supporting roots close to the stems of the trees rendering the tree unstable and liable to failure. If you need to excavate to this depth

Bristol City Council Arboriculturist Report

then I would recommend removal and replacement of the trees.

It is possible to find major roots at shallower depths than stated, especially close to the tree, the depths given are only a rough guide.

All excavation within the verge must be done using an air spade with an arboriculturist present to assess the extent of roots, possible damage and thus the safety of the tree, at the given depth.

4. In the event of tree removal the advised mitigation measures. If it is considered that the trees removal is the best course of action to allow the bank to be re-established to its previous height, I would recommend that 2 trees are replaced 10m apart. This would allow the trees to grow into maturity without over crowding the bank.

The species I would recommend would be either Birch (*Betula pendula*) or Rowan (*Sorbus aucuparia*). These are both native species which are good for wildlife due to flowers, berries, and nesting material for birds. They also both have a good Autumn colour which is attractive for local residents.