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## Order Decision

Inquiry Held on 27 November 2018

Site visit made on 28 November 2018

**by Helen Slade MA FIPROW**

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

**Decision date: 18 January 2019**

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### **Order Ref: ROW/3193897**

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and is known as the Essex County Council Footpaths 10, 11 and 12 Mistley and Footpaths 8, 11 and 12 Bradfield Public Path Diversion Order 2017.
- The Order is dated 13 October 2017 and proposes to divert the public footpath rights over the ways at Mistley and Bradfield as shown on the Order plan and described in the Order Schedule.
- There were three objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is confirmed subject to the modifications set out below in the Formal Decision.**

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### **Procedural Matters**

1. I carried out an unaccompanied visit of the site the afternoon prior to the Inquiry and a further, accompanied, site visit on the day after the Inquiry.

### **Modification of the Order**

2. Prior to the inquiry, Mr Horlock, one of the objectors, raised several issues relating to the manner in which the Essex County Council (the Order Making Authority or 'OMA') had handled the case, including comments made which he considered to challenge his integrity. At the start of the Inquiry I allowed time for these matters to be aired, and I am satisfied that they mostly do not affect my consideration of the Order. However, as a result of Mr Horlock's concerns and also an issue raised by Mr Cunningham, it was agreed that a number of minor administrative alterations should be made to the wording of parts of the Order to correct a path number and to remove ambiguity in the descriptions. If the Order is confirmed I intend to modify it accordingly.

### **The Main Issues**

3. Section 119(1) of the 1980 Act states that an order can be made where it is considered by the authority that it is expedient in the interests of the owner, lessee or the occupier of land crossed by the path or way, or of the public, that the line of the path in question should be diverted. This Order has been made in the interests of the owner of the land. Section 119(6) of the same Act states that, if I am to confirm the Diversion Order, I too must be satisfied in this respect. Furthermore, before the Order can be confirmed I

must be satisfied that the path will not be substantially less convenient to the public as a consequence of the diversion.

4. Where an Order proposes to alter a termination point of the path in question, I must be satisfied that the altered terminus is on the same highway or a highway connected to it, and that it is substantially as convenient to the public<sup>1</sup>.
5. If I am satisfied on the above points, I must then consider whether it is expedient to confirm the Order, having regard to the following issues:
  - a) the effect that the diversion would have on public enjoyment of the path as a whole;
  - b) the effect of the coming into operation of the Order on land served by the existing right of way; and
  - c) the effect of the new public right of way on the land over which it is created (or land held with it);having regard also, with respect to b) and c), to the provisions for compensation as set out in Section 28 of the 1980 Act.
6. I must have regard to the material provisions, if any, of the Rights of Way Improvement Plan ('ROWIP') produced by the Council and I must also take into account government advice, relevant legal precedents and other legislation which is applicable.

## Reasons

7. A number of suggestions were made by the objectors, both prior to the Inquiry and during it, regarding the location of the proposed diversions and whether they would be more acceptable if slightly altered. However the landowner, Mr Peter Schwier, made it perfectly clear that he would not be interested in considering any modification of the routes in this way and I have consequently not taken any of these suggestions into account in coming to my decision.
8. The Order arose from an application by Mr Schwier to divert part of Footpath 12 Mistley/12 Bradfield (between Points A and B as shown on the Order plan) to a new route. As a result of his discussions with the OMA a package was devised to regularise a number of other route locations, which Mr Schwier freely accepted that he had not realised were not being cleared or used on their legal line. The Order reflects all these proposals.
9. I intend to deal with each diversion separately as some of the proposals have not received any substantive objection. Each section must meet the relevant legal criteria (set out above) but in determining whether or not it is expedient to confirm the Order I will take account of the view of the OMA that the diversions form a package which should be considered together.

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<sup>1</sup> Section 119(2)(b)

**Footpath 12 Bradfield (points L to M)**

10. No objections have been raised in principle to the diversion of Footpath 12 Bradfield (presently running between points L and M via point N) which would rationalise the route onto the field-edge line currently used by the public (direct between points L and M). The existing route does not follow the field edge but arcs slightly into the field.
11. I accept that it is in the landowner's interest to define the route along the field edge, in line with the rest of the path and it will not be substantially less convenient to the public as a consequence. In fact it is likely to be more so, as that is where they currently walk. The legal line will be easier to follow and there are no adverse effects on the land to be considered. I am satisfied that this small diversion meets the criteria of Section 119 of the 1980 Act. The number of this path would remain the same.

**Footpath 10 Mistley/11 Bradfield (points H-G)**

12. Similarly, Footpath 10 Mistley/11 Bradfield (points H to G) is currently cleared and used along the line of the proposed diversion (points J to I) and Mr Schwier stated it had always been there, to his recollection. His family has a long association with the land and since there is a long-standing gateway at point J in an established hedgerow, I am happy to accept his assertion. No-one was able to offer any evidence to the contrary. Neither was any substantive objection made to the proposed diversion of this section.
13. I am satisfied that the rationalisation of this route is in the interest of the landowner, and that the altered termination points at either end are substantially as convenient to the public. There was some talk of moving the location of point J to more closely meet a footpath on the opposite side of the road, but I have already indicated that no modifications to the proposed route locations are acceptable to Mr Schwier. In any case, the route on the opposite side of the road is only a matter of metres away.
14. The path would not be substantially less convenient to the public as a result of the diversion as it is of equivalent length and runs in a directly parallel route only a few metres east of the existing route.
15. Mr Schwier currently cultivates different crops to either side of the proposed route. This resulted in the Order being written to reflect this but, as pointed out at the Inquiry by the objectors, this may not always be the case. I accept that the description of the new route in the Order is overly prescriptive and the OMA agreed to its modification accordingly. I therefore intend to remove the reference to the new route running 'along an arable field boundary' if the Order is confirmed.
16. With regard to the enjoyment of the route overall I find that there will be no discernible difference for the majority of users, since any historical connections are not immediately obvious. Even Mr Cunningham, who placed great weight on the heritage aspects of rights of way, was not aware that the route had not been available on its legally recorded line.
17. I am therefore satisfied that the diversion meets the relevant criteria set out in the 1980 Act. However the number of the path would need to be

changed. It currently lies partly in Mistley parish and partly in Bradfield parish and thus has two numbers. For some unexplained reason, the Order as written retains two numbers for this path despite the fact that it would lie entirely within Bradfield parish. It was agreed at the Inquiry that it would be more logical to give it one number, and that the appropriate number would be 11 Bradfield. If I confirm the Order I intend to modify it accordingly.

**Footpath 11 Mistley/8 Bradfield (points F to E)**

18. The existing line of this path appears incongruous on the Order plan as it meanders its way across the field, but Mr Cunningham was able to produce historical evidence showing the reasons for this. A farm holding existed part way along the route but has been non-existent for many years although traces of it can still be found. Nevertheless it is likely that most walkers have not followed the legal line and are more likely to have followed a route resembling the proposed diversion, whether or not Mr Schwier has actually demarcated it following cultivation. When he has reinstated this path, Mr Schwier stated that he had always done it along the line of the proposed diversion, which matches the direction of cultivation and is relatively easy to achieve. He stated that the path had been in this location since at least 1969. Mr Cunningham made the point that it was, nevertheless, not always clear of crops, as required by the legislation.
19. I have no difficulty in concluding that the proposed diversion would be expedient in the interests of the landowner because it would facilitate its reinstatement following cultivation, when required, and also avoid the possibility of committing an offence by not reinstating the legal line. Any failure to reinstate would be a matter for enforcement by Essex County Council as Highway Authority.
20. The termination of the proposed diversion at the western end would not alter (point E) but at the eastern end it would move further south to join Footpath 12 Bradfield rather than Footpath 11 Bradfield (moving from point F to point A). However these two routes are connected and the change is not significant. I am satisfied that the altered termination point would be substantially as convenient as it does not alter the purpose or the general directional trend of the path.
21. In terms of the general convenience of the path, the proposed diversion would not add to the length of the path and nor would it be any less accessible. I am satisfied that the path would not be substantially less convenient to the public as a consequence of the diversion.
22. In terms of the enjoyment of the route as a whole, Mr Cunningham felt that the loss of the historical connection was seriously detrimental and that the public benefitted from being educated about their history. I acknowledge his passion for the heritage of his local area, and his desire to share it, but I have to accept that no-one else raised this as an issue. It would still be possible to view the site of the farmstead from the proposed route, which at one point would run only a matter of metres from the existing route, and I was given no reason to believe that the historical connection in this instance was of special significance, despite its potential antiquity.

23. As if to underline this, Mr Coe, for the Ramblers, was keen to promote a diversion which would take the route even further from its original line<sup>2</sup>. I have already made it clear that I am not going to consider any alternative routes to those proposed by the Order, but this demonstrates that the value of the route in terms of enjoyment is very fluid. Presumably Mr Cunningham would have found himself arguing against this proposal from one of his fellow objectors, had I entertained it, which illustrates the difficulty of trying to please everyone.
24. Solutions to these problems are rarely perfect, and in this case I am satisfied that, in general terms, the effect on the enjoyment of the route as a whole by the majority of people likely to use it would not be adversely affected by the proposed diversion. It therefore meets the criteria set out in Section 119 of the 1980 Act for diversion.

**Footpath 12 Mistley/12 Bradfield (points A to E)**

*Whether it is expedient in the interests of the landowner that the path should be diverted*

25. The principal objections relate to the proposal to divert this path to a new route which, instead of running diagonally across the field for most of its length, would run along the field edge in close proximity to the B1035 (Clacton Road). The proposed diversion also includes a short extension to the south, such that neither end of the proposed route would actually remain the same.
26. It was this path which was the primary reason for Mr Schwier seeking a diversion order from the OMA, because it runs across the line of cultivation where it lies cross-field and I accept that it would be expedient in his interests if the path were to be diverted.
27. However, the objectors pointed out many drawbacks to this proposal in their view, which were explored at the Inquiry and on which they were immovable.

*Altered termination points*

28. Taking the remaining relevant criteria in turn, I must firstly address the altered termination points. The proposed diversion would not terminate anywhere on Bradfield Footpath 12, but rather on Mistley Footpath 11, on the opposite side of the field. To reach point A (the existing termination point) from point E (the altered northerly termination point) would mean walking along the proposed diverted route I have described in the preceding section, assuming that the Order is confirmed in that respect. Otherwise, it would be necessary for someone to walk the existing route from point E to point F, and then to turn south to reach Footpath 12 Bradley at point G before continuing their walk (i.e. by-passing point A entirely). In terms of convenience, it is hard to see how the proposed termination point at E could be 'substantially as convenient' as point A. This test sets a high bar and one which I do not consider that this proposal meets.

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<sup>2</sup> Several metres further to the south to run due west to east opposite Skiphatch Lane

29. With regard to the southerly termination point, point B would move south by approximately 71 metres to a field access point for vehicles. This was promoted as a better point for pedestrians to exit onto the road (which is an inevitability on this path as there is no continuing public right of way off road). I was not convinced about the claimed superiority of the visibility at this point, but I do accept that it would at least keep pedestrians off the road for a further 71 metres, and in that sense it may be considered to be substantially as convenient, or perhaps a little more convenient.

30. Nevertheless, I do not consider that any slight benefit to the public from moving the access point slightly further south outweighs the failure of the altered termination point at E to be substantially as convenient to the public. At this point I would be entitled to determine that this particular proposal could not be confirmed, as Section 119(2) of the 1980 Act states that:

*"A public path diversion order shall<sup>3</sup> not alter a point of termination of the path or way...(b)...otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public."*

31. The word 'shall' implies that this is a fundamental test which must be met, and I am not satisfied that this proposed diversion does meet that test. Nevertheless, I think it would be helpful if I continue to examine the proposal against the other criteria in Section 119 so that there is no opportunity for ambiguity.

*Whether the path would be substantially less convenient to the public as a consequence of the diversion*

32. Having concluded that the altered termination point from point A to point E would not be substantially as convenient to the public it would be difficult, if not impossible, to be satisfied that the diversion as a whole could be anything other than substantially less convenient to the public. Nevertheless, in considering this matter I have had regard to the submission made by Mr D Nicholls on behalf of the Bradfield Footpath Walking Society ('BFWS') in support of the proposal.

33. The path would be substantially longer for anyone wishing to use the path for its current purpose (providing a route between Horsleycross Street and Bradfield and beyond). The current route from point B to point A is approximately 500 metres and the proposed route would be 914 metres (to include the use of the length of the proposed diversion of Footpath 11 Mistley/8 Bradfield required in order to get to point A).

34. The purpose and the directional trend of the path would be completely different from that served by its present route. I note that the BFWS considers that the additional distance and change of direction would not inconvenience its members, and that they support the diversion. Unfortunately Mr Nicholls had to leave the Inquiry before being able to present his oral evidence and so this aspect could not be fully explored. Some of the reasons given for the support for the proposal relate to the difficulties caused by unlawful obstructions caused by cropping and the like.

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<sup>3</sup> My underlining

Whilst I accept that the proposal might alleviate that difficulty, I need to compare the routes as if no obstructions existed,<sup>4</sup> and for anyone wanting to walk to or from Bradfield I consider that the additional length and the disruption to the purpose of the path would be substantially less convenient to the majority of the public.

35. It was strongly argued by the OMA that the diversion would allow walkers to walk off-road to access Bridleway 13 (Skiphatch Lane) on the opposite side of the road and that the landowner had agreed to build a new bridge (at point D) to provide direct access to it. If there had been substantial evidence that this was something that would be of great benefit to the public I might have been able to consider it as mitigation, but little evidence was provided to me. I acknowledge that the BFWS support the off-road aspect and the new link; but whilst the objectors were happy to express support for such a link across the road, it related more to the onward use of a route towards (or from) Bradfield using Footpath 11 Mistley/8 Bradfield, either on its currently recorded route or, more practically, on the route which has been in use on the ground (i.e. the proposed diversion).
36. I accept that an alternative provision for pedestrian access along the line of Clacton Road might be beneficial, but I do not consider that the substantial inconvenience to users wishing to go in the direction of the existing route of Footpath 12 would be outweighed by the provision of an off-road route going in a completely different direction. Anyone wanting to use Skiphatch Lane to or from Bradfield can currently do so (and will continue to be able to do so) by using a very minimal length of road verge to go from one path to the other. It was confirmed to me that Footpath 11 Mistley will continue to link to the Clacton Road at point E regardless of whether or not the new access at point D is created.
37. It was also argued by the OMA that the current route forms (principally) a cross-field route which may be muddy after cultivation and reinstatement whereas the proposed diversion would be a field edge path and would be regularly cut by the landowner to facilitate passage. This point was also made by BWFS. However, the objectors were concerned that the liability to maintain field edge paths rests with the County Council as Highway Authority and not with the landowner. Given budget cuts they were worried that if the landowner did not carry out the work (for which he had no legal duty) the path would become overgrown and difficult or impossible to use. I cannot give this argument a great deal of weight as the 1980 Act provides mechanisms for the public to ensure that an authority carries out its statutory functions.
38. With regard to the conditions underfoot however, and despite recent wet weather at the time of the site visit, the cross-field path was not overly muddy. In any case the proposed diversion would not eliminate the need to use a cross-field path. If the purpose of the walker was to get to or from Bradfield (in line with the path's current objective) it would be necessary to use the substantial length of cross-field path between point E and point A (or between points E-F-G if that proposed diversion is not confirmed). I

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<sup>4</sup> See Paragraph 5.25 of the Rights of Way Circular 1/09 published by Defra – version 2 October 2009

therefore give no weight to this argument as justifying the loss of convenience I have already identified.

39. I am therefore satisfied that the path would be substantially less convenient to the public as a consequence of the proposed diversion.

*The effect on the public enjoyment of the path as a whole*

40. The proposed route would run along the field edge a few metres from the road, and for much of its length it lies slightly below the road surface. It was acknowledged by Mr Schwiers that Clacton Road is a busy road, and the objectors had taken time to undertake an informal traffic survey indicating that the number of vehicle movements per hour averaged approximately 500. Although the OMA attempted to undermine this information, suggesting that Mr Horlock lacked the qualifications to undertake such a study, I agree with the objectors that simply standing on the road side for a timed period and counting the vehicle movements does not require particular training. My own observations on site would suggest that the figures quoted by the objectors were adequately representative of the traffic flows.
41. The road carries commercial traffic as well as cars, and the close proximity of the traffic certainly felt uncomfortable when using the path. In poor weather I can envisage that road-spray would also be a problem, particularly if the wind was in the west or south-west – the normal prevailing direction. Whether or not the public using the path would actually be at risk of being the victim of a road accident is difficult to say, since the accident figures for the road do indicate that this is likely to be a problem. However, on the current route any such risk would be confined to the very start of the route at point B.
42. Although the arguments put forward by the objectors relating to the possible effects of pollution on walkers cannot be other than anecdotal in the absence of scientific research, I do consider that the proximity of the road to the proposed route would be likely to make the path less pleasant to use, and the ambience of the path would be quite different. I noted that when using the existing route the noise of the traffic was left behind quite quickly, whereas on the proposed route it was a constant intrusion. The approach of larger vehicles could be quite daunting to anyone using the proposed diversion.
43. I therefore conclude that there would be an overall detrimental effect on the public enjoyment of the path as a whole, given its purpose. If it is considered necessary to provide an off-road route alongside Clacton Road, other powers are available to the Highway Authority to achieve this.

***Whether it is expedient to confirm the Order***

44. The Order was made in the interests of the landowner and I was urged to consider it as a package. I consider that, despite the difficulties with the proposal in relation to Footpath 12 Mistley/12 Bradfield that I have set out above, it is expedient in the interests of the landowner that the paths are diverted.

45. However, although I am satisfied that three of the routes meet the remaining required criteria, I am not satisfied with regard to Footpath 12 Mistley/12 Bradfield.
46. It is open to me to modify the Order by removing all reference to the diversion of Footpath 12 Mistley/12 Bradley and only confirming the Order in relation to the remaining three proposals. Since the diversion of Footpaths 12 was the principal reason behind Mr Schwier's request for a diversion order, it might seem rather anomalous to confirm an order which did not include that proposal. The provisions of Schedule 6 to the 1980 Act would not require me to advertise such a modification.
47. Alternatively I could decide not to confirm the Order at all, because of the failure of the principal proposal. Nevertheless, I am satisfied that the overall package, even without the diversion of Footpaths 12, is still in the interest of the landowner as it would legalise the lines of the paths currently provided by him, and in use by the public. This would allow the removal from the Definitive Map and Statement of the current legal lines and avoid any possible (albeit perhaps inadvertent) offences in relation to their obstruction with crops.
48. I do not consider that the detriment to the public which would arise from the diversion of Footpath 12 Mistley/12 Bradfield can be mitigated in any way by treating the package as a whole. Nevertheless I do not consider that it would be in the public interest not to confirm those proposals which meet the test, and I therefore conclude that I should merely remove the proposal in respect of the path that fails.

### **Conclusions**

49. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that it is expedient that the Order should be confirmed but with modifications, none of which require advertisement.

### **Formal Decision**

50. I confirm the Order subject to the following modifications:

In the Order itself:

- On the front and rear cover pages of the Order and in the heading to the Order remove the references in the title of the Order to Footpath 12 Mistley and insert the word 'and' between the numbers 10 and 11;
- In paragraphs 1 and 2 of the Order, remove the reference to Footpath 12 Mistley and insert the word 'and' as before;

In Part 1 of the Schedule:

- In the last line of the description of the existing route of Footpaths 11 Mistley and 8 Bradfield correct the name of the linking footpath to 11, rather than 10, Bradfield;
- Delete the entire description of the existing route of Footpath 12 Mistley and 12 Bradfield;

- In the first line of the description of the existing route of the Footpath 12 Bradfield (between points L and M) delete the word 'further';

In Part 2 of the Schedule which describes the new paths or ways:

- In the description of Footpath 11 Mistley and Footpath 8 Bradfield delete the words in the second line 'along an arable field boundary';
- In the description of Footpath 11 Bradfield and Footpath 10 Bradfield delete the words 'and 10 Bradfield' in the underlined heading;
- In line four of the same description delete the words 'along an arable field boundary';
- Delete the entire description of Footpath 12 Mistley;

On the Order Map:

- Remove the references in the title of the map to Footpath 12 Mistley and insert the word 'and' between the numbers 10 and 11;
- On the new route of the path between points J and I delete the number '10';
- Cross through with red hatching the line of the existing path between points A-B, and the proposed new route between points C-B-D-E,
- In the key to the Order Map, delete the reference to the closure of B-A and the reference to the new route of C-B-D-E.

*Helen Slade*

**Inspector**

## **APPEARANCES**

### FOR THE ORDER MAKING AUTHORITY:

Robert Lee	Public Rights of Way and Records Analyst – Essex Highways
Sarah Potter	Area Public Rights of Way Inspector – Essex County Council

### FOR THE LANDOWNER:

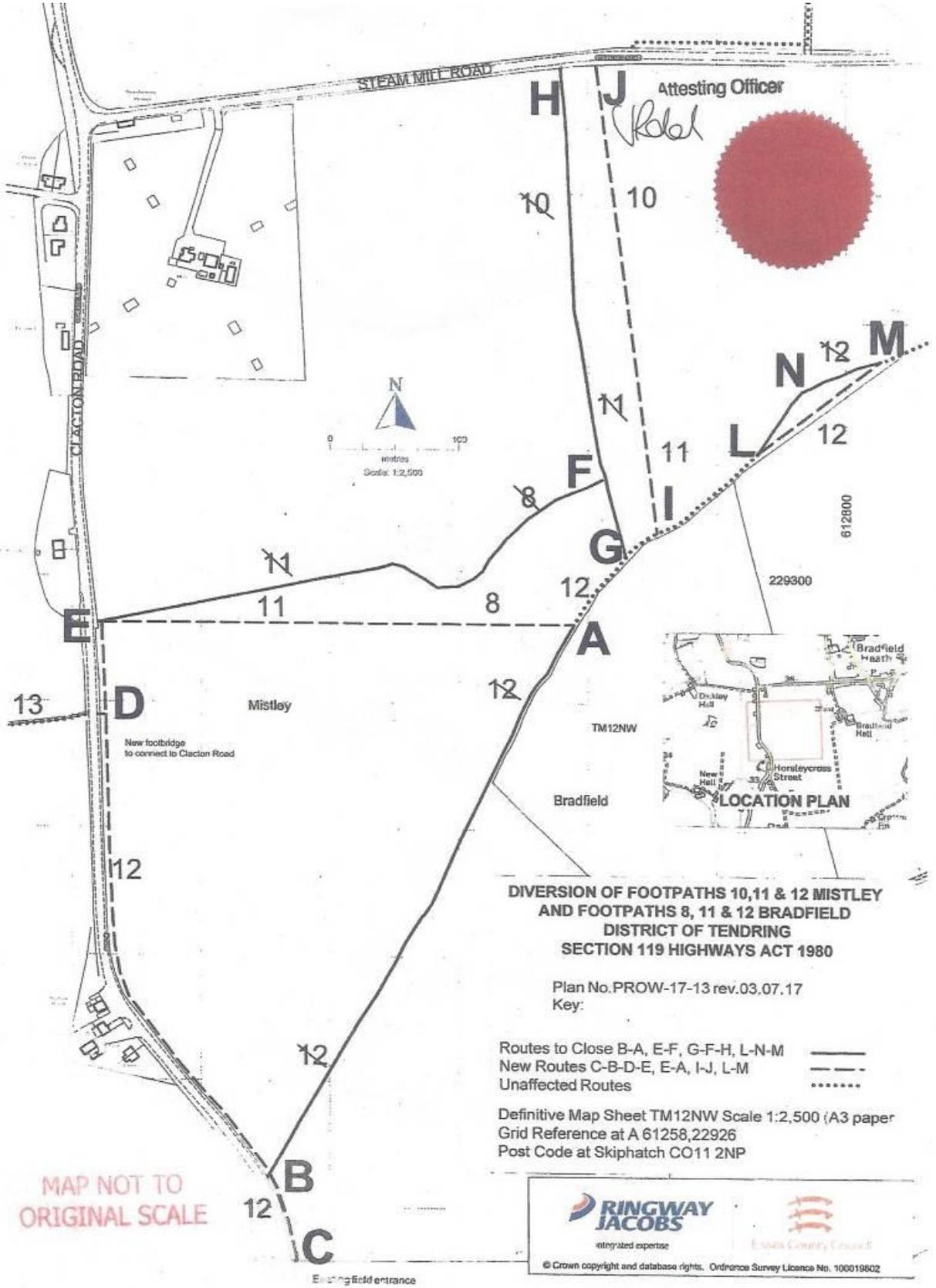
Michael Wood	ET Landnet Limited
He called	
Peter Schwier	Landowners: GF Schwier, WF Schwier and PG Schwier

### OBJECTORS:

Robert Horlock	
Philip Cunningham	Manningtree Museum and Local History Group
Jeffrey Coe	Ramblers

### DOCUMENTS

- 1 Statements of Case and Proof of Evidence of Robert Lee and Sarah Potter on behalf of the Order Making Authority
- 2 Statement of Case and Proof of Evidence on behalf of the landowners – Messrs Schwier
- 3 Statement of Case and Proof of Evidence of Robert Horlock
- 4 Statement of Case of Jeffrey Coe
- 5 Statement of Case and Proof of Evidence of Philip Cunningham
- 6 Statement of Mr D J B Nicholls, on behalf of Bradfield Walking Society
- 7 Closing submissions of Michael Wood on behalf of the landowners



Attesting Officer

*[Signature]*



**DIVERSION OF FOOTPATHS 10, 11 & 12 MISTLEY  
AND FOOTPATHS 8, 11 & 12 BRADFIELD  
DISTRICT OF TENDRING  
SECTION 119 HIGHWAYS ACT 1980**

Plan No. PROW-17-13 rev.03.07.17  
Key:

- Routes to Close B-A, E-F, G-F-H, L-N-M
- New Routes C-B-D-E, E-A, I-J, L-M
- Unaffected Routes

Definitive Map Sheet TM12NW Scale 1:2,500 (A3 paper)  
Grid Reference at A 61258, 22926  
Post Code at Skiphatch CO11 2NP

MAP NOT TO ORIGINAL SCALE



integrated expertise



Essex County Council

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Existing field entrance