



Order Decision

Site visit made on 9 May 2019

by **K R Saward Solicitor**

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

Decision date: 21 May 2019

Order Ref: ROW/3213828

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 (the 1981 Act) and is known as The Essex County Council Definitive Map Modification No. 639 Footpath 29 Great Sampford (Uttlesford District) Order 2018.
- The Order is dated 23 April 2018 and proposes to modify the Definitive Map and Statement for the area by adding a footpath as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Essex County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. The Order has been made under Section 53(3)(2)(b) of the Wildlife and Countryside Act 1981 in consequence of the occurrence of an event specified in Section 53(3)(c)(i). This requires there to be a "discovery" of evidence by the order making authority ('OMA') which shows that a right of way which is not shown in the definitive map and statement ('DMS') subsists or is reasonably alleged to subsist over land in the area to which the map relates.
2. No application was made for the route to be added to the DMS. Instead the Highways Department of the County Council, being the OMA, identified a "potential anomaly" which led to its investigation and the making of the Order. The OMA does not say explicitly what that anomaly was, but the Order was made on the basis that it is a missing part of Footpath 29, Great Sampford. Its research reveals discrepancies in the historical evidence which could have triggered the investigation. Also, from what I can gather there was a realisation that an objection made by Great Sampford Parish Council to the omission of the route from the draft definitive map in 1971 remained unresolved.
3. It is evident that there has been the discovery of evidence even if it was the realisation of a possible oversight or inconsistency in its records.
4. In deciding whether to add the path to the DMS the only matter to be determined is whether public rights exist in law. The criteria which may be taken into account under the 1981 Act are strictly limited, such that personal considerations including the effect on privacy of occupiers and increased risk to security are not relevant.

Main Issue

5. The main issue is whether the evidence discovered (when considered with all other relevant evidence available) is sufficient to show that a public footpath

which is not shown in the map and statement subsists over land in the area to which the map relates.

Reasons

6. Whilst it suffices under section 53(3)(c)(i) for a public right of way to be *reasonably alleged* to subsist, the standard of proof is higher for the Order to be confirmed. At this stage, evidence is required on the balance of probabilities that a public footpath subsists. One objection was made from an affected landowner.
7. The path links Sparepenny Lane (Byway 55 Great Sampford) to the north with the existing public footpaths (FP 26 and FP 29) to the south which meet at one corner of the recreation ground located behind dwellings along the lane.
8. The route is a relatively short stretch of path running through the front gardens of the dwellings known as 'Gill Mill' and 'The Cottage'. It commences via a small gate off Sparepenny Lane for 'Gill Mill' which is signed 'Leading to "The Cottage"'. It follows a cobbled path within their south-eastern boundary which is enclosed by post and rail fencing. Another gate part way along the path denotes the boundary between the two cottages. After a third gate in the corner of the garden of 'The Cottage' the path emerges through a gap in the hedgerow onto the recreation ground.
9. From its appearance and means of enclosure, the impression is given of a garden path within private gardens. Next to the Order path at its juncture with Sparepenny Lane is a much wider access following a differing alignment leading to other dwellings, but it has no exit point onto the recreation ground.

Documentary evidence

10. Section 32 of the Highways Act 1980 requires that documentary evidence is taken into consideration 'before determining whether a way has or has not been dedicated as a highway'. Such weight is to be given to the evidence as 'justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it was produced.'
11. The path does not appear to be shown on the Tithe Map of 1836 for the Parish of Great Sampford. Nor is it shown on the Chapman and Andre Map 1777 (compiled 1772-1774) being the first atlas drawn covering the whole of Essex.

Ordnance survey

12. The 1st edition OS map from the 1870's shows both FP16 and FP29 by double dashed lines. Along the Order route there are double solid lines with lines across each end which could denote gates. A dashed line outlines the triangular area of land in front of 'Gill Mill' which at one time was highway verge before being stopped up. The route is similarly shown on the 2nd edition 1896 OS map and new series edition from the 1920's.
13. The objector highlights that the dotted path is shown moving away from the cottages i.e. along the alignment of FP26. The fact that the route is shown by solid lines and not dotted lines does not mean it cannot be a public path. The OS maps record what appeared on the ground. So, in this case they identify a physical feature consistent with a path of some description along the Order

route. The OS maps contained a disclaimer and so the fact a feature is shown is not determinative of its status.

Finance Act 1910

14. The Finance Act 1910 required all land to be valued. Sometimes, reference can be found to a possible public right of way in the documentation used as part of the valuation process. Otherwise, where a route is shown uncoloured and unnumbered on the map record so that it is outside of the hereditaments it is indicative of a public highway and usually one which is vehicular. In this case Sparepenny Lane is uncoloured as is the triangular area between the lane and cottages. The land affected by the route is shown coloured within three hereditaments and the book of Reference makes no mention of any deductions. Both sides agree that there is no indication from this source of public rights across the land in existence at that time.

County maps

15. The County Road Map 1930 shows public vehicular routes only and so does not assist in establishing if a public footpath exists.

Definitive mapping

16. The Rights of Way Act 1932 was the first statute to refer to county councils holding maps of public rights of way that had been used for 20 or 40 years or more. It did not require the creation of a permanent record of public rights, but the County Surveyor's 1932 Book of Maps was compiled in Essex with the co-operation of the parishes who made recommendations of paths to be included. Those footpaths thought to have public status are marked by short blue dashes.
17. There are short blue dashed lines where FP26 and FP29 now exist. They appear to continue along the approximate alignment of the Order route to connect with the land along Sparepenny Lane which was a triangular grassed area. However, the small scale and quality of the print makes it difficult to be sure.
18. The requirement for county councils to produce a DMS was introduced by the National Parks and Access to Countryside Act 1949. In the first instance a survey was undertaken of every public path at parish level. The OMA explains that in Essex the parishes were supplied with plans identifying routes which the County Surveyor believed to be public paths. Various people walked and checked the routes and described them in a Parish Card. The corrected map and Parish Cards were returned to the county council after holding a Parish Meeting. The completed surveys were collated and published as the first draft map.
19. The Parish Survey Map 1950/51 clearly shows the Order route in purple ink starting at a point along Sparepenny Lane and extending past the cottages. The coloured line continues along the alignment of what is now FP26. The number 27 appears above this section of the path. Path 29 is also depicted by a purple line meeting path 27 at a point just south of 'The Cottage'.
20. The Parish Card entry of May 1951 describes path 27 as "Continues from F.P.26 to Cottages in Sparepenny Lane across arable field. Path ploughed considerable time." The word "omitted" is handwritten above the entry in a different colour ink. It is not known when this note was added, by whom or for what purpose.

21. The objector suggests that it meant the Order route should be omitted despite it being shown on the Parish Map. The OMA considers it most likely that the word "omitted" refers to the number 27 rather than the route. This is plausible as no footpath number 27 came to be shown on the first Draft Map. Instead, the path across the field became an extension of number 26. Moreover, the entry for number 27 includes the route across an arable field which is now the recreation ground. There is no reason to think that the entire route should be omitted and there is no indication that reference is being made to part only of the route.
22. The OMA acknowledges in its review report that it is the cottages which are described as the termination point rather than Sparepenny Lane. As the OMA suggests, the surveyor may have meant the end point of the most eastern cottage. To my mind, the mention of Sparepenny Lane is enough to tally up the route in the description with that shown in the map up to the lane.
23. The Parish Card entry for number 29 reads "Starts at Monks Corner and proceeds to cottage. It is completely blocked by an orchard planted about 1939." The OMA suggests that walkers using path number 27 would have no option but to continue past the cottages because of the established orchard. I do not draw the same inference. It is open to interpretation. The two paths meet just south of the cottages and it may, for instance, mean that any access past this point was blocked.
24. The First Draft Map that followed on 1 January 1953 continued to show the Order route but the number 27 had become number 26. However, the Statement describes FP26 as "From High Street in an easterly and north easterly direction to its junction with footpath 29." The entry for FP29 reads "From its junction with footpath 26 in a south easterly direction to the road."
25. Neither description encompasses the Order route. The terminus point for both footpaths is the junction at which the paths meet in the corner of the field which is now the recreation ground. Accordingly, there is direct conflict between the First Draft Map and its accompanying Statement.
26. In this regard, the OMA refers to *Norfolk County Council, R (on the application of) v Secretary of State for Environment, Food & Rural Affairs*¹. The judgment is authority that for the purposes of section 56 of the 1981 Act, the definitive map is the primary and source document. If the accompanying statement cannot be reconciled to it then the position shown on the map prevails and a degree of tolerance is permissible. Neither the map nor statement is conclusive evidence of its content at review stage. In the case of irreconcilable conflict between the map and statement there is no evidential presumption in favour of the map. The conflict is evidence of an error in their preparation. Each should be accorded weight as appropriate upon analysis of the documents themselves including the situation on the ground at the relevant date.
27. Of course, the Draft Map and Statement were simply in draft form and capable of change. As it was and despite the anomaly between the Draft Map and Statement, no objections were made. When the first Definitive Map and Statement was published subsequently (with a relevant date of 1 January 1953) the Statement remained as per the Draft i.e. omitting the Order route.
28. Three copies of the Map have been located. On the Parish copy the route past

¹ [2005] EWHC 119 (Admin)

the cottages has not been coloured in the same way as FP 26 and FP 29. From the sepia copy produced of the County copy it cannot be discerned if the section of route is shown. The OMA acknowledges that whilst it originally considered the route to be shown, the lamination of the copy makes it a 'little more uncertain'. On the District copy it is also unclear because the line would be in such close proximity to the dark shape denoting the cottages. However, the enlarged extract provided by the OMA does appear to show the coloured line extending past the cottages.

29. The objector believes that the first Definitive Map corrected the earlier error by omitting the Order route as reinforced by the Parish copy. On the other hand the OMA believes the Parish copy to be in error because there is no authority for a departure from the Draft Map.
30. Some clarification is contained within a letter from the County Council to the landowner of 'Gill Mill' in September 1984 under the heading "Footpath Alongside Gill Mill, Great Sampford". The letter advises that the path was recorded by the County Council in an informal way in about 1935 and that "*it was shown on the original rights of way map in 1953*". For some reason unknown the path was not shown on following issues and the conclusion is drawn that this was due to draftsman error.
31. Upon a review of the DMS under the 1949 Act no route is recorded as extending past the cottages in either the First Review Map or Statement. The relevant date is 1 January 1963. Whether that was deliberate or not is unclear.
32. The Draft Review Map of 1971 undertaken pursuant to The Countryside Act 1968 also omitted the path. On this occasion Great Sampford Parish Council raised an objection to the omission following a complaint made on behalf of local residents. The letter of complaint was counter-signed by several other individuals (some bearing the same surname as the letter writer). From the correspondence that followed it is evident that there was a dispute between the owner of 'Gill Mill' who acquired the property in 1968 and at least some local residents over the status of the path.
33. The County Surveyor responded to the complainant in October 1971 to say that it may very well be a public footpath, but as it is not shown on the DMS it remains to be proved. The same month the County Surveyor wrote to the Parish Council to say it may be a public path as it connects into recognised footpaths.
34. The letter of complaint had also concerned the owner of 'Gill Mill' having placed rocks around the triangular section of grassed highway verge in front of his property. This land was stopped up as highway by Order made in 1988. The plan is clearly confined to the triangular parcel of land. It did not stop up the Order route.
35. A letter from a resident in Sparepenny Lane to the County Council in September 1974 complains of the owner "doing his best to close the public footpath at the side of Gillmill Cottage, it has been a public footpath for the last century and before that, people who were born in Sampford can prove that."
36. The response from the County Council later that same month says that upon inspection a way about 4 feet wide was found to be unobstructed and available for public use. It goes on to say that although the short length of path is not defined as a public footpath on the statutory map of public paths, it is the

contention of the County Council that it is a public right of way. An assurance is given to the recipient that if an attempt is made to block up the path the County Council will very soon get it unblocked and that it could only be closed by a Closure Order.

37. When one of the cottages was in the process of being sold in 1978 the local search revealed that a public footpath appears to run along the south-eastern boundary of the property the subject of the search. This was queried in a letter from the Solicitors acting for the seller because the district council had informed them that the footpath is not a public right of way. The letter prompted internal communications within the County Council, but there is no record of its reply.
38. There is a memorandum from 1980 referring to the new owner of 'Gill Mill' having telephoned the County Council for information about the path to whom the Council officer suggested he might permit the public to use the path without prejudice to the eventual decision.
39. A letter from the owner of 'Gill Mill' to the Parish Council in June 1984 refutes the existence of a public footpath past his property and says that the area has been closed off so as to allow elderly people living in Sparepenny Lane to go to the Post Office or Moor End.
40. Correspondence indicates that the Parish Council objection was not resolved because the draft map had to be abandoned in view of the 1981 Act. The County Council advised in 1985 that those assertions should be dealt with under the provisions of the 1981 Act which had come into force. No further action appears to have been taken.
41. The 1963 DMS was replaced by the current DMS (relevant date 1 July 2002).

Aerial images

42. Aerial photography images taken at 10 yearly intervals from 1960² are of limited assistance because the section of route which would link to FP26 and 29 is obscured by trees.

Title deeds

43. A public right of way can exist without it being revealed in the searches undertaken during the conveyancing process when a property is purchased. That is because the only document to provide a legal record of public rights of way is the DMS and in this case the path is not currently shown.
44. The old title deeds reveal that the cottages were once in a row of three. The current registered land title for 'The Cottage' shows that it benefits from a right to pass over the footpath within the boundary of 'Gill Mill'. This footpath forms part of the path now claimed by the Order. The objector argues that as a right of way is needed to gain access to 'The Cottage' it proves the land is not a public right of way.
45. The OMA cites the Court of Appeal decision in *Huyton-with-Roby Urban District Council v Hunter*³ as authority that the absence of specified private rights within a conveyance is indicative of the presence of public ones. In that case the Court considered whether there was material on which the Justices could properly

² The 1980 photograph is missing

³ [1955] 2 All ER 398; [1955] 1 WLR 603

arrive at the conclusion that the road in question was a public highway repairable by the inhabitants at large. The conveyance was one piece of evidence. The road was shown in the conveyance and the absence of a reservation or right to use it indicated it was public highway in respect of which the purchaser did not require an express grant to give him the right to use it.

46. In this case, there is not an absence of private rights but the express grant of a private right of way flowing from those granted by Conveyance in 1957.
47. The Conveyances of 1965, 1968 and 1971 identify the land to be conveyed as including the title and interest in the footpath in front of the middle and end cottages. The Council suggests that it may refer to the 'highway presumption'. This arises where a piece of land which adjoins a highway is conveyed by general words, it is presumed that the soil of the highway passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it" (Berridge v Ward 1861).
48. The 1971 Conveyance makes specific reference to the "right title and interest of the Vendor in the soil [*my emphasis*] of the pathway..". This could suggest highway status, but it is a possibility only. Overall, I consider the position too vague to draw any firm conclusions. To my mind the title documentation does not indicate one way or the other whether the path has public status.

User evidence

49. Section 31 of the 1980 Act provides that where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years is calculated retrospectively from the date when the right of the public to use the way was brought into question.
50. When the Parish Council objected to the omission of the Order route from the 1971 Draft Review Map it did so based on "regular and uninterrupted use by the public at large for a period of twenty years and more and there are persons in the village who can vouch for this."
51. Upon reviewing the case the OMA acknowledged that there is insufficient detailed evidence of public use to apply the provisions of section 31 of the Highways Act 1980. I have no reason to disagree.
52. There is no need for there to be evidence of both use of the path over a 20-year period and supporting documentary evidence. One or other may suffice or dedication may be inferred at common law.

Analysis

53. In its assessment the OMA described the documentary evidence as "quite finely balanced". At that point the evidence may have sufficed to reasonably allege the existence of a public path but that is not enough at this stage of the process.
54. There is certainly no clear evidence to support the existence of a public path. The OS maps identify that a path has physically existed since at least the 1870's, as it does today, leading from the recreation ground and past the

cottages onto Sparepenny Lane. There is a distinction between how the paths at the recreation ground which are known to be public paths are shown in comparison to the path past the cottages. This could be reflective of their different status or just indicate physical differences.

55. Whilst not altogether clear from the copy, the archived correspondence appears to support the route being shown in the Rights of Way Act 1932 map. The most significant evidence is that contained within the Parish Survey Map 1950/51 and the First Draft Map that followed on 1 January 1953. The wording of the Parish Card does not explicitly identify the route as ending at Sparepenny Lane, but that conclusion may be drawn when read together with the Parish Survey Map. In my view, the word "omitted" inserted above the relevant entry in the Parish Card most likely refers to the path number because of its subsequent omission from the First Draft Map. I attach reasonable weight to the Parish Survey Map, but it is not altogether supported by what followed.
56. Although the route is shown on the First Draft Map it is contradicted by the draft Statement identifying the route as terminating at the point where FP26 and FP29 meet. Either the Draft Map or the Statement must be in error.
57. It is the OMA's view that the route was again shown in the first Definitive Map of 1953. This is reinforced by written communications within its archival records which confirm that was also the belief of County Council officers during the 1970's. The conflict arises with the accompanying Statement which repeats the wording of the Draft Statement and does not include the route by description. If the OMA is right and the route is shown on the map, the same mistake will have occurred as at draft stage whether it be in the map or statement.
58. The OMA draws upon the physical characteristics of the land at the time with reference made in the Parish Card to FP29 being blocked by an orchard. I am unpersuaded by the OMA's argument that this made it more likely the path went past the cottages when the precise location and extent of blockage is unclear.
59. I consider that the historical documents provide some evidence of public status, but it is contradictory which limits the weight that can be attributed.
60. The OMA points out that the original complainant in 1971 who benefited from local knowledge indicated use for 50 years and he was insistent and forthright in his view that a public path existed. I note comments that the Parish Council believes the path was typically used prior to the closure of the Post Office. However, none of this is supported by any statements or details. The owner who acquired two of the cottages in 1968 and 1971 was equally forthright in disputing public access, although I note that in a letter to the County Council in 1972 the original complainant said, "the footpath matter has been dealt with." Whether that was because the landowner had consented to its use is unclear. Similarly, the full circumstances are unclear when in September 1974 the County Council found the path to be unobstructed and available for public use.
61. More recent use appears to have been with the consent of the landowners. Of course, had the status of the path been investigated in the 1970's there may well have been residents who could have provided evidence of their use, but that is not the position now. The Council maintains that the written testimony of these past witnesses should be given full consideration as evidence of the local reputation of the Order route at the time the correspondence was exchanged.

62. Whilst I give some weight to the correspondence of the time, the evidence of use is essentially by one individual whose complaint was counter-signed by others without any details. That evidence thus lacks substance and cannot be afforded the level of weight the OMA suggests.
63. From reading the materials there is a strong sense that going back over time both the County Council officers and the Parish Council believed this to be a public path and there is some, albeit very limited evidence of public use. I do not doubt that the issue has been contentious locally. It is always possible that people can have a genuinely held, but mistaken belief over the status of a path. Its repute is simply not supported by enough firm evidence particularly as the documentary material, notably the First DMS, is unclear and contradictory.
64. The OMA suggests that the objector relies upon the OS evidence, but the main thrust of his objection casts doubt upon the strength of evidence overall.
65. When taken as a whole, it is my view that the evidence does not establish with sufficient clarity that a public path subsists.

Conclusion

66. I am not satisfied that on the balance of probabilities, the evidence suffices to demonstrate that a public right of way subsists.
67. Having regard to the above and all other matters raised in the written representations I conclude that the Order should not be confirmed.

Formal Decision

68. I do not confirm the Order.

KR Seward

INSPECTOR



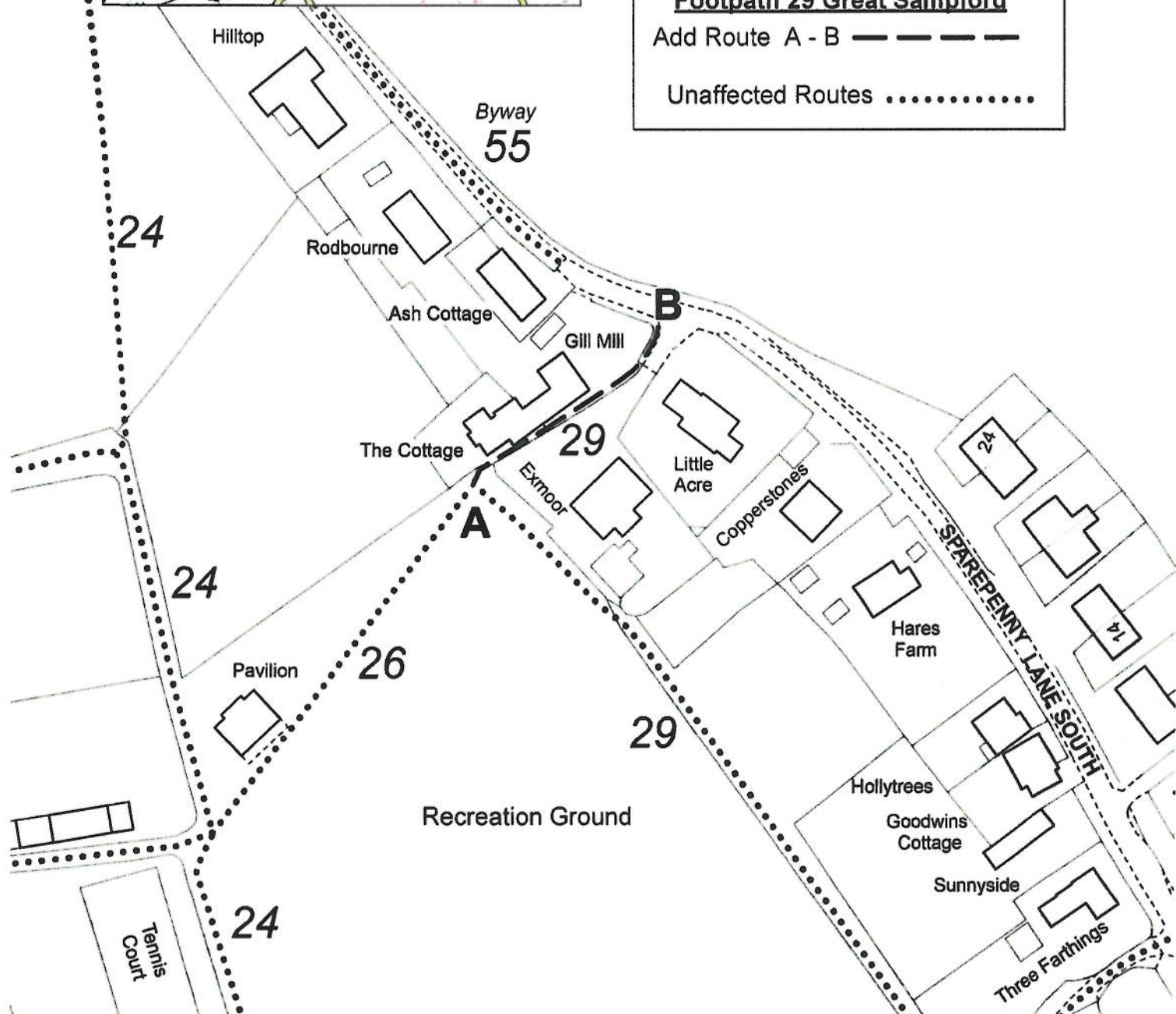
MAP NOT TO ORIGINAL SCALE

Key

Footpath 29 Great Sampford

Add Route A - B

Unaffected Routes



The Essex County Council Definitive Map Modification No.639 (Footpath 29 Great Sampford, Uttlesford District) Order 2018

Definitive Map Sheet TL63NW Scale 1:1250
Grid Ref TL644,357

Essex County Council

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