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## Order Decision

Inquiry Held on 2 July 2019

by **K R Saward Solicitor**

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

Decision date: 12 July 2019

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### Order Ref: ROW/3208912

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as The Essex County Council Definitive Map Modification No. 635 (Footpath 19 Mayland, Maldon District) Order 2017.
- The Order is dated 20 December 2017 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 proposed for confirmation subject to the modifications set out below in the Formal Decision.**

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### Procedural Matters

1. An application to modify the definitive map and statement (DMS') was originally submitted to Essex County Council as Order Making Authority ('OMA') on 6 March 2016 for a public footpath between Sea View Parade and Nipsells Chase. The application was returned by the OMA when it emerged that Sea View Parade is a private road over which no public rights are recorded. The application form was subsequently amended and re-submitted on 11 October 2016 for a claimed path between North Drive and Nipsells Chase.
2. The application was accompanied by 25 user evidence forms ('UEFs'). Ahead of the Inquiry, three of those witnesses withdrew their evidence on the basis that they had mistakenly thought the claimed route was one they had used which went next to a pond. A fourth witness withdrew their evidence for the same reason, but there was no UEF for that person within the bundle forwarded from the OMA. At the Inquiry, Mayland Parish Council ('the Parish Council') expressed concerns over the reasons for the withdrawal of evidence stating that each witness had seen the map and confirmed the route. As those individuals now say they used another route, I must discount their evidence. A further 10 UEFs were submitted after the Order was made which I will take into account.
3. It transpired that some of the UEFs sent to the Planning Inspectorate by the OMA after the Order was made had the wrong plans attached. They showed the route as claimed originally. The OMA has since provided the correct plans. There were also some missing pages which have also been supplied.
4. The Order follows a successful appeal to the Secretary of State under Schedule 14 of the 1981 Act. Notwithstanding that decision<sup>1</sup>, I shall consider the matter afresh on the totality of evidence before me including the submissions made at

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<sup>1</sup> Appeal ref: FPS/Z1585/14A/14 issued on 30 November 2017.

the Inquiry. I should also emphasise that the tests differ for the making of an Order and for its confirmation. I return to this below.

5. As the Order was made on the direction of the Secretary of State, the OMA took a neutral stance at the Inquiry. The case in support of confirmation was made by the Parish Council.
6. The claimed route affects two landholdings. The only objection made within the statutory period was by the owners of 3 Sea View Parade who, at the time, owned the land affected by the western half of the route. They have since sold the land and the new landowner opposes the Order as an interested party although he has no personal knowledge of its prior use. The landowner of the other part of the claimed route lives at Nipsells Farm and is also an opposing interested party. She acquired the land in 2015 but is familiar with the whole of the land having lived nearby since a child.
7. The day before the Inquiry opened, I undertook an unaccompanied site visit but was only able to see each end of the claimed route and the general surroundings from public vantage points. An accompanied site visit took place at the end of the Inquiry with the current landowners and representatives of the Parish Council and OMA. Not all of the route could be walked due to dense thicket preventing access. For this reason, the Parish Council had expressed reservations beforehand over the purpose of a site visit. Despite the scrub, I was able to see the general alignment of the claimed route, albeit part was from a distance, and the location of certain features referenced in the evidence.

### **Main Issue**

8. The Order was made under section 53(2)(b) of the Wildlife and Countryside Act 1981 ('the 1981 Act') in consequence of an event specified in section 53(3)(c)(i).
9. Therefore, the main issue is whether the discovery by the OMA of evidence which (when considered with all other relevant evidence available) is sufficient to show that a right of way which is not shown in the map and statement subsists over land in the area to which the map relates.

### **Reasons**

#### **Background**

10. Whilst it suffices for a public right of way to be *reasonably alleged* to subsist to justify an Order being made, 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 right of way subsists along the Order route. The burden of proof lies with those who assert the existence of a public path.
11. In essence, I must consider whether the evidence shows that in the past the Order route has been used in such a way that a public footpath has been established.
12. The evidence adduced is primarily of claimed use by the public. It is necessary for me to consider whether dedication of the way as a public footpath has occurred through public use. This may be either by presumed dedication as set out in the tests laid down in section 31 of the Highways Act 1980 ('the 1980 Act'), or by implied dedication at common law.

13. For a presumption to be raised that the route had been dedicated as a public footpath under section 31 of the 1980 Act it must be "other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication". In addition, there must have been use of the claimed route by the public as a footpath 'as of right'<sup>2</sup> and without interruption, over a period of 20 years immediately prior to its status being brought into question. The presumption may be rebutted if there is sufficient evidence that there was no intention on the part of the relevant landowner/s during the 20-year period to dedicate the way for use by the public.
14. Should the test for statutory dedication fail under section 31, then it may be appropriate to consider the dedication of the way at common law. This requires consideration of three issues: (i) whether any current or previous owners of the land had capacity to dedicate a highway (ii) whether there was express or implied dedication by the landowners and (iii) whether there is acceptance of the highway by the public. There is no fixed period of use at common law and depending on the facts of the case it may range from a few years to several decades. There is no particular date from which use must be calculated.

### **Statutory dedication – section 31 of the Highways Act 1980**

#### *Bringing into question*

15. The first matter to be established in relation to Section 31 of the 1980 Act is when the public's rights were brought into question.
16. Several users refer to fencing and gates being erected across the route with 'keep out' signs. Evidence at the Inquiry identified this fencing as extending beside the private road in Sea View Parade preventing entry beyond point B. There is some variance in the year given for this by users who cite 2014-2016. A number refer to 2014. This corresponds with the evidence of the statutory objectors who confirmed that they erected fencing and 'keep out' signs soon after acquiring the land in July 2014.
17. One objector argued that there had been gates and fencing across the claimed route at a much earlier time from at least the 1970's when the alignment would have meant walkers entering the driveway and garden of a chalet bungalow. There is now only a pile of rubble in the vicinity where that building once stood. Those arguments are more a case of challenging whether users did in fact use a path along the alignment that is claimed whilst the site was occupied. Indeed, the objector raising the issue acknowledges that the claimed route was in use from around 1984 until early in the 1990's.
18. In the course of the proceedings reference was made by the same objector to the deposit in 2012 of a substantial pile of cleared thicket across the claimed route which remains in rotted form and which users would have been unable to climb over. I have considered whether this might constitute an act of bringing the public use into question. No-one else refers to encountering such an obstruction. Of course, that could be because use of that section of path had already ceased or the date might be wrong. Given that some users claim use past 2012, I am not satisfied that this was sufficient to have called use into question at an earlier date.

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<sup>2</sup> Meaning without secrecy, force or permission.

19. Although there is disagreement between objectors and supporters over which route was used and when, it is evident that any public use of the claimed route was stopped by the erection of fencing in or around July 2014.
20. During oral evidence some users and objectors referred to one or more scaffold type poles erected across the start of the private road at point A from early in the 1970's until the 1980s when the road surface was improved. There was general consensus that this was in situ to stop vehicular traffic to the boatyard just past point A at a time when the road was in poor condition. It did not stop walkers who were able to pass easily by the end of the barrier. There is no evidence before me that the pole was intended or did deter pedestrians.
21. Therefore, I take July 2014 as the date the right of the public to use the path was brought into question. The requisite 20-year period for the purposes of section 31 is thus 1994-2014.

*Evidence of use by the public*

22. Following the withdrawal of some user evidence, the application was supported by a total of 32 UEFs. All users say they used the route on foot. A few claim use on horseback and a very small number say they used the route by motor vehicle. The route between A-B leads from North Drive to Sea View Parade and to the Sailing Club. If use took place to access these destinations as a lawful visitor, it will not count towards demonstrating use as of right.
23. From the UEF's completed prior to the Inquiry around 18 users claim a full 20 years or more use, but not all over the same period. Only a few claim to have used the route up to 2014 when the fencing was erected. Some claimed use up to 2 or 3 years beforehand. For others their use had ceased earlier.
24. The UEFs are not sworn evidence, but some witnesses attended the Inquiry and their evidence was tested by cross-examination. Eight individuals gave evidence of their use in support of the Order. Three people gave evidence in opposition and one gave evidence taking a neutral stance.
25. A number of witnesses refer to using the route to access a pond. From the oral evidence given, this is the same pond which is shown on the Order Map midway between points C-D to the north of the path. Users insisted that they would divert off the path to access the pond and then re-trace their steps to pick up the path again.
26. Two witnesses had a distant memory of a wooden footpath sign near to the property known as 'Klaxons' which pointed along the eastern end of the route. They could not recall when it would have been there or when it was removed. One objector suggested the sign was for 'Balmoral Road' which is still in place in metal form. As the original sign has been removed, it is not possible to know with certainty what it said, but no other witnesses recalled it which seems surprising if it was so signed. It appears more likely it was not a footpath sign.
27. The owner of Nipsells Farm challenges whether the route referred to by some users is the same as that claimed. She moved to Nipsells Farm as a child with her family in the summer of 1976 and believes the claimed route was the driveway to the house owned by a Mr and Mrs Katz. With their permission, she used the driveway to hack her horse between their property and her family home. The gates would be left open for this purpose. In her recollection the house (a chalet bungalow) was destroyed, probably by fire, some time around

1980-81. Thereafter, the owners stayed in a caravan in the grounds until about 1984.

28. The point being made was that if users really had used the path between B-C (or thereabouts) prior to 1980-81 then they would have needed to walk along the private driveway and through the garden of this property which was enclosed by gates and fencing on which 'private' signs were erected.
29. The objector expressed surprise when supporters who gave evidence could not recall the distinctive chimney of the chalet bungalow covered with different colours of 'crazy paving' if indeed they had used the route claimed. However, what makes an impression on one person will not necessarily have the same impact upon someone else.
30. The Parish Council suggested that this landowner was mistaking the chalet bungalow for another property called 'Lawling' that had burned down. This is unlikely as she was able to describe both properties and appeared clear in her recollections that 'Lawling' was a totally different property that burnt down in the early 1980's. Her memories of the owners and the property across which she says the route must have gone were triggered with reference to the ponies that she rode at the time.
31. No other witnesses recalled the chalet bungalow in a habitable state. In oral evidence, those whose evidence extended back far enough thought the bungalow was derelict by about the mid 1970's. The building can be seen in aerial photographs obtained by the OMA said to be dated 1960 and 1970. By 1981 there is a feature in the same place, but it no longer has the clearly defined shape of a building. It is consistent with evidence from both sides that the dwelling was demolished by this time.
32. It appears that one side is mistaken over the time when the bungalow became derelict, but it does not matter in establishing if there was 20 years use over the relevant period (ending in July 2014) for the purposes of section 31.
33. There is no dispute that the public used the route after the departure of Mr and Mrs Katz in 1984. However, according to one objector the path was completely overgrown with dense scrub by the late 1980's and impassable by 1990. This is corroborated by some supporters.
34. At the Inquiry one user explained how she approached from Nipsells Chase end (point D) and used the whole route which was "definitely a footpath" from 1978 until moving away in 1986. Over that period, she had used the route daily with her children. They would come off the path to go to the pond to look at the frogs and wildlife before retracing their steps to continue the walk. She described seeing the concrete base remaining of the bungalow near to point C on the left and fir trees<sup>3</sup> on the right before exiting onto Sea View Parade to continue along the sea wall. By the time the family returned in 1990 they were unable to find the path at all because it was so overgrown.
35. Another user described the path as becoming overgrown from 1981 to 1990 onwards. His use stopped in the late 1990's because it was too overgrown.
36. One user taught Scouts and Guides and at least once per month they would use the route. The children had great fun playing games and loved the pond.

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<sup>3</sup> A number of witnesses described fir or conifer trees which appear to have been cypress trees.

Sometimes they just went to the pond and at other times they walked the whole route. Her use commenced in 1976 until the late 1980's by which time she could reach the pond from Sea View Parade but was unable to get any further because it was so overgrown. This witness could remember the chimney of the bungalow and insisted there was a path between A-D following a defined line from B-C to the bungalow and then through a 'rough' area with protruding roots from C onwards. Under cross-examination she admitted that she did "wander freely" over the land because it was possible to go anywhere. When asked to clarify, the witness said she wandered freely both on and off the path.

37. This corresponds with the evidence of another witness whose use covered the period 1965-1980 who confirmed that there were lots of different paths through the orchards. That witness could not be certain which one she had used.
38. A user who had claimed use up to 2013 clarified in oral evidence that she had found the route in 2000-2002 when her children were young. The route was already quite overgrown but they would go blackberrying. By the mid 2000's the route had become so overgrown it was only possible to go as far as the fir trees between B-C. From then until 2013 her use became limited to part of the route by the overgrowth. However, it emerged in evidence that the path they followed involved crossing a ditch at the entry to the wooded area which is south of the claimed path. A line is shown on the Order map going from east to west below points C-D which may represent a ditch line. I was able to see part of the ditch on my site visit and where part has been filled in. Its location does not correspond with the claimed route. The witness acknowledged that it could have been another path that she used along this stretch.
39. The statutory objectors say in their written submission that they lived in Sea View Parade from July 2000. For as long as they can remember the land in question was overgrown and impassable.
40. At least some level of overgrowth is to be expected in the countryside. How much is needed to deter a user will vary. Some people confronted with dense vegetation will plough on regardless whereas others will not attempt to pass.
41. For instance, one supporter gave evidence that she walked her dog along the path from 2000-2005 around 2-3 times per week. She recalled the path being very overgrown by about 2002/3, but she would still get through.
42. That is reinforced by another supporter who claims use from 1976-2008. This user lived close to the route in Sea View Parade and was absolutely certain about the route used which she described as "extremely clear". During the 1970's the route was wide enough for a landrover to pass, but then trees started to grow over it. Her evidence was that the bungalow was always derelict. She would cycle and walk the path from each direction as a child to go to Guides and into the village. In later years whilst the walk was not easy going due to the level of overgrowth she would still proceed through undeterred even though it involved crashing down the vegetation to reach the pond. Her use had been until "12 years ago or so".
43. Of those users who gave evidence at the Inquiry, none had used the whole of the claimed route in the years immediately preceding the public use being brought into question in 2014. From the oral evidence given they either used another route, at least in part, or their use had ceased by 2010 at the latest.



44. This broadly tallies with the evidence of a resident of the end property nearest to the claimed route in North Drive. From her garden and side balcony she can see towards part of the route between B-C. There was scrub up until 2014 which prevented her seeing an awful lot, but she thought she would “probably” have seen movement if anyone had been walking between B-C after 2011. She had never seen anyone using the path.
45. There remain five other users who claimed use up to 2014 when the fencing was erected who did not give oral evidence at the Inquiry.
46. One claimed use between 2006-2014 once a fortnight over the winter months when there was better access. This user stuck to the path except when it was inaccessible. How often this occurred is not specified. Another person claimed almost daily use for pleasure and dog walking between 1990 and 2014 but wandered freely into the woodland to see the wildlife. This suggests that the user did not stick to the claimed route. Reference is also made to youths calling the path “Cherry Alley” which another witness mentioned in oral evidence as a different path. This raises the question over the actual path used.
47. Similarly, a user who claimed use about 10/11 times per year for pleasure and Scout activities from 1976 (no end date is given) claims to have wandered freely between the start and finish. A further user says their use was between 2001-2015, but the Parish Council accepts that the route had already been blocked off by fencing in 2014 and so the use cannot have extended for as long as claimed. The use is expressed to be 6 times per year as a shortcut and to visit the pond. Given the evidence of others that the route past the pond had become impassable over time it is unclear if this use was for the whole route for the entirety of the period.
48. The remaining UEF claims use between 1972-75 and then again between 2012-2014 for dog walking 12 times a year. During the last period of use the user refers to keeping to the path claimed which was “rather overgrown” and using it as a circular trip from her home in North Drive, near to the start of the route. Again, such use cannot have gone beyond July 2014.
49. The evidence of those individuals was not tested at the Inquiry to verify that their use was of the claimed path as a through route rather than another path as had materialised with some other users. This limits the weight that I can give to their evidence. It is also evident from the written answers in the UEFs that the end date cannot be correct in all cases and it does not suffice if users wandered freely between points rather than sticking to a defined path.

*Conclusions regarding the evidence of use*

50. No evidence was brought to dispute that the section of claimed path between points A-B follows a clearly defined road which has throughout the 20-year period been in public use. There is consistency among a reasonable number of users in terms of the route taken from A-B and the continuity of its use. No alternative line is available from A-B over which users might have deviated unlike the remainder of the route. Even if walkers were unable to use the full length of the path once it became obstructed by vegetation, there was nothing to stop them reaching point B. It is plausible that walkers used A-B and beyond for as far as the vegetation allowed and returned the same way.

51. The position regarding the remainder of the route between B-D is far less clear. There is inconsistency in the UEFs over when the route became inaccessible. Some say it was too overgrown to pass by 2000 and others say it was 2004 or 2010. This could vary due to the resilience and determination of the individual to pass. Ultimately, there is very little before me of use of the whole route continuing up until it was brought into question in July 2014. Whilst I take account of the UEFs the weight I can attach to them is reduced where it has not had the benefit of being tested. The weight of evidence indicates that it is most likely that use of the whole route had ceased by 2010. Moreover, the evidence points to there being various routes available through the orchards so that users did not necessarily use the claimed path between points B-D.

*Conclusion on statutory dedication*

52. Overall, there is sufficient volume and clarity of evidence over the requisite 20 years for a statutory presumption in favour of a route between points A-B to be raised. There is no landowner evidence produced to rebut that presumption.

53. There is insufficient evidence to demonstrate on the balance of probabilities that there was continuous public use of the entire claimed path over a 20-year period prior to it being brought into question to raise a presumption of a public footpath under statute over its whole length. Therefore, the first part of section 31 of the 1980 Act is not satisfied in terms of B-D and there is no need for me to consider the issue of statutory dedication further.

**Common law**

*Documentary evidence*

54. The Highways Records plan taken from 2016 shows double dashed lines between A-B annotated as a 'Track'. There are further double dashed lines which stop around point C whereupon a single solid line continues along the alignment of C-D which is annotated 'FP (um)' to indicate an unmade path. The plan appears to have an Ordnance Survey base as do the Title Plans registered at H.M Land Registry. All the plans show the physical presence of a route along the approximate alignment being claimed, but they do not verify its status.

55. The title deeds record private rights and restrictions upon the land. The imposition of restrictive covenants contained in the deeds are separate and distinct from the possible acquisition of public rights. A requirement to maintain fencing may be inconsistent with the exercise of public rights if the fencing were to prevent access to the path in question, but if there is no fence to keep the public out then public rights are potentially capable of being secured.

56. Aerial photographs show that in 1960 there was a clearly defined route between points A-B prior to the current housing developments in Sea View Parade and Nipsells Chase. The route appears to lead to the bungalow described in evidence which is clearer still in the 1970 image. Whereas the 1960 image is partially obscured by tree cover at point C, the 1970 photograph shows a clear and lighter coloured line cutting through the foliage. The line continues around the field edge to point D.

57. In the aerial photograph of 1981, a cleared path is shown beside the field edge in the vicinity of C-D which cuts between the trees around point C to Sea View Parade where a row of houses can now be seen. Despite dense green coverage



by the year 2000, a line is evident along the Order route from C-D which widens considerably towards point B where there is a wide track to point A.

58. By 2009/10 the section of route between B-D is more difficult to make out. On close examination a faint line can be seen but much of the section between B-C is obscured by vegetation. The section between A-B and angled turning point into B is very clear.
59. In objection it was argued that the aerial photographs up to 1981 show a chicane at point C with a hard edge whereas the claimed path is more curved. There is some disparity along a short stretch in this area. It is possible that this section of path moved over time or it could signify a change in how the land became used from the 1980's.
60. The documents provided are of limited evidential value. The aerial photographs assist in identifying when and where a cleared path existed on the ground. They confirm the presence of a physical route in the approximate location shown in the Order map from at least 1981 and for most of the route prior to 1970. They seem to provide evidence of continued existence of A-B over a longer period, which is supportive of my findings under the statute. None of the documents provide evidence of the use of the route as a whole as a public path.

#### *Evidence of use*

61. The earliest claimed use by the supporters attending the Inquiry was 1960 with 'seasonal' use around 10 times per year until 2010. Whilst describing the route as 'not easy going' in 2010 because of the scrub, the witness insisted that it was possible to get through. The witness was challenged on whether he actually used the claimed route between B-C because he described 'conifer' trees on the opposite side to where it was asserted they would need to be. The aerial photographs from 1960 to 1981 indicate that walkers would need to cross between the treeline around point C.
62. One witness who gave evidence of use twice a year from around 1965-1980 could not be certain of the dates and if use was throughout the entire period. The witness acknowledged being unsure if the trodden line followed was the same path shown in the Order. The route taken had come up through the orchards located on either side of the claimed path. The witness explained how it was possible to walk all over the orchards. That being so, it is unclear if the use by this witness was of the claimed path.
63. None of the witnesses claim to have gone through the garden or along a drive whilst a habitable bungalow stood on the land although most recall passing near to its derelict structure. During my site visit I saw the remains of three timber posts positioned in a row starting at a point not far from C and extending beyond it in a south-easterly direction. One post had traces of barbed wire at the top and rope wire at the bottom. This indicates the presence of a fence at some point in the past which ties in with an objector's recollection of a garden fence and gates for the bungalow. Remnants of brickwork in the ground of where the driveway would have been also remains apparent today. However, these features do not help establish when and where users actually walked.
64. Based upon the alignment apparent in the aerial photographs from 1960-1981, it appears that users would need to have crossed the point where there were gates or a fence to enter the grounds of the bungalow. If they did not enter the

grounds, then it indicates either that their use was of another path located further north of which there is no obvious sign in the aerial images, or their use did not coincide with occupation of the bungalow when fencing was intact.

65. The most likely explanation is that users did not go through the garden of the bungalow whilst it was occupied. The evidence indicates the bungalow was destroyed somewhere between 1974-1981, based upon the earliest and latest dates given in accounts of its derelict state. According to the owner of Nipsells Farm, the former occupants remained on site in a caravan until 1984. Her evidence has credence as she was able to relay vivid recollections of the land with reference to her experiences as a child and the ponies that she rode between certain ages. Her descriptions of the bungalow and area were detailed and told with conviction.
66. On the other hand, those who recalled the bungalow were consistent in stating that it was derelict earlier than 1980-81. For instance, one witness had a specific memory of his son coming home covered in paint in 1978 at the age of 8 years after he and his friends found cans of paint in the derelict bungalow. This witness insisted the bungalow was already derelict in 1974.
67. For everyone involved, they were trying to recall what happened a very long time ago. Memories can obviously fade, and it is possible to have a firmly held belief of places and events which may transpire to be flawed or misplaced.
68. What is undisputed is that the claimed path was in use from about 1984. One objector says that the route was impenetrable by 1990 or 1991 at the very latest. It is unknown if the landowners of the time knew of the public use. However, there are consistent accounts from users of a clear line along a sandy/gravel path from B to around C and a clear trodden line to D. There will have been visual evidence on the ground of a path for the landowners to see what was going on. The users say that their use was never challenged.
69. The statutory objectors who acquired the land in 2014 say that the land was previously owned by a development company and it was well-known locally that they hoped to undertake residential development of the land. If that was the case, then they may have had motive to resist the acquisition of any public rights over the land. However, they would need to have acted upon that to prevent the exercise of public use. It is suggested that 'private property' signs were erected upon the land, but no-one seemed to recall the signs during their period or use. Moreover, such signs would not necessarily mean the public were prevented from using the path. It could simply act as notice to users not to stray from the path.
70. There is a 5-6 period of uncontested public use of the path from 1984. I heard evidence from six people who claimed use over at least part of that period on a reasonably regular basis. Three of those users claimed ongoing use past 1991.
71. Use by one witness was 'seasonal' after 1985 into the 2000s. Another witness said his use had continued until the late 1990s. He described taking his son fishing in the pond and using the route to pick fruit over a 15-year period. He was firm in his belief over use of the claimed path. The final witness was also adamant that he carried on using the path, the last occasion being in 2010.
72. A neutral witness who attended the Inquiry described occasional use starting in the 1950's. He had no recollection of a habitable bungalow, but he told the

story of his wife becoming stuck up a tree in the orchard whilst 'scrumpling' in the early 1990's. From his account, at least some of his use was off the path and it is not entirely clear if he always used the same line as now claimed.

73. There is a reasonable volume of written user evidence, but it transpired at the Inquiry that not all users could be certain if it was the claimed route that they used. This casts some doubt on whether other users who did not appear may also have been mistaken. The UEFs cannot be verified one way or the other where individuals did not give oral evidence to explain their use of the land.
74. The supporters directed me to the UEF of a witness considered to have particular credibility as a Solicitor. The stated use was very occasional being about every other year from 1980 to 2001 and once or twice a year since about 2002. Notably, the user says that once entering the undergrowth he would use the best route that it permitted. Therefore, such use did not always follow a defined path.
75. The picture drawn by users is of fairly regular use of the land crossed by the claimed path. A number referred to using the route to go 'scrumpling' in the orchards or other forms of fruit picking. Some others describe using the path to reach the pond which meant diverting off. From the accounts given both verbally and in the UEFs it was possible to wander through the orchards and the use was not always confined to the defined path. The evidence points to other paths being available.
76. The evidence indicates that it ceased to be used as a through route from A-D when the land became overgrown with dense scrub. There is a divergence of views over when this occurred, but this is perhaps reflective of the conditions which people are prepared to tackle. The evidence suggests that some users were still going as far as the pond until into the 2000s but were not necessarily using the whole route by that time.
77. When considering the position as a whole, there is simply not enough evidence overall of a through route in regular use for more than a few years in order to conclude that dedication at common law has occurred. Even if I were to accept what the users say and take a longer period prior to 1984 there is still not a very large body of tested evidence upon which to place reliance. It is supplemented by UEFs but the weight to be attributed to the forms is reduced from not being tested, as mentioned above.

#### *Conclusion on common law*

78. Having regard to the totality of evidence I do not find that a claim at common law is made out.

#### **Other Matters**

79. In arriving at a decision, I am unable to take account of other matters outside the legal tests. Therefore, issues raised over the effect of a public path on any proposed residential development, the effect on land value and whether a path is needed are all matters that fall outside my consideration.
80. Whether or not the Parish Council had expressed any interest in purchasing land affected by the claimed route has no bearing on my decision.

81. As the claimed route is not presently recorded on the definitive map and statement, it is unsurprising that the presence of a path was not revealed during the conveyancing process upon acquisition of the land. The omission does not signify that there can be no public rights which have been acquired.

### **Overall Conclusions**

82. Having regard to these and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be confirmed between points A-B only and not confirmed from B-C-D.

### **Formal Decision**

83. I propose to confirm the Order subject to the following modifications:

In the Order schedule: Part I

- Delete the words "then turning south eastwards on the south western side of the boundary with a width of 4m before crossing to the north eastern side of the boundary (B-C on the Order plan), continuing easterly then north eastwards, with a width of 2m to exit onto Nipsells Chase (C-D on the Order plan)"

In the Order schedule: Part II

- Delete the words "then south eastwards with a width of 4m. Turns eastwards then almost immediately south eastwards with a width of 2m and continues easterly before turning north eastwards to meet Nipsells Chase"

On the Order map

- In the key, delete reference to "A-B-C-D" and substitute "A-B".
- Amend the line of the footpath to be added to remove the section B-C-D as shown.

84. Since the confirmed Order would (if modified) not show a way as it is shown in the Order as made, Paragraph 8(1)(b) of Schedule 15 to the 1981 Act requires that notice shall be given under Paragraph 8(2) of the proposal to modify the Order and to give an opportunity for representations and objections to be made with respect to the proposal. A letter will be sent to interested persons about the advertisement procedure.

*KR Seward*

INSPECTOR

## **APPEARANCES**

### **For Mayland Parish Council**

Councillor John Oatham  
Councillor Peter Spires  
Councillor Barry Edwards

### **Also in support of the Order:**

Jean Hawkes  
Maureen Rae  
Sharon Sibthorpe  
Meryl Scrivener  
Sylvia Batt  
Linda Haywood

### **In opposition to the Order:**

Ian Corcoran	Statutory objector
Sue White	Interested party
Kay Harvey	

### **Others who spoke:**

Brian Gilbey

### **DOCUMENTS submitted at the Inquiry**

1. Annotated aerial photograph marked up by Miss White to show the location of historic gates and fencing.
2. Chart produced by Miss White to analyse periods of claimed use (duplicate)
3. Commentary on blanket Tree Preservation Orders produced by Miss White
4. Extract of site allocations plan for Mayland from Maldon District Council development plan produced by Mayland Parish Council
5. Extract of a letter dated 21 February 2018 from Mr & Mrs Corcoran to Essex County Council



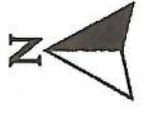
**Key**

**Footpath 19 Mayland**

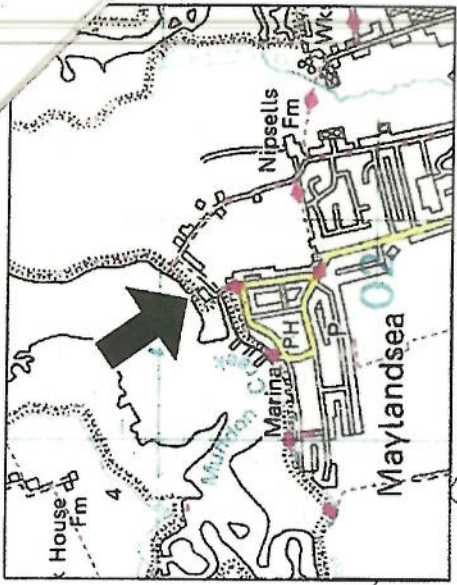
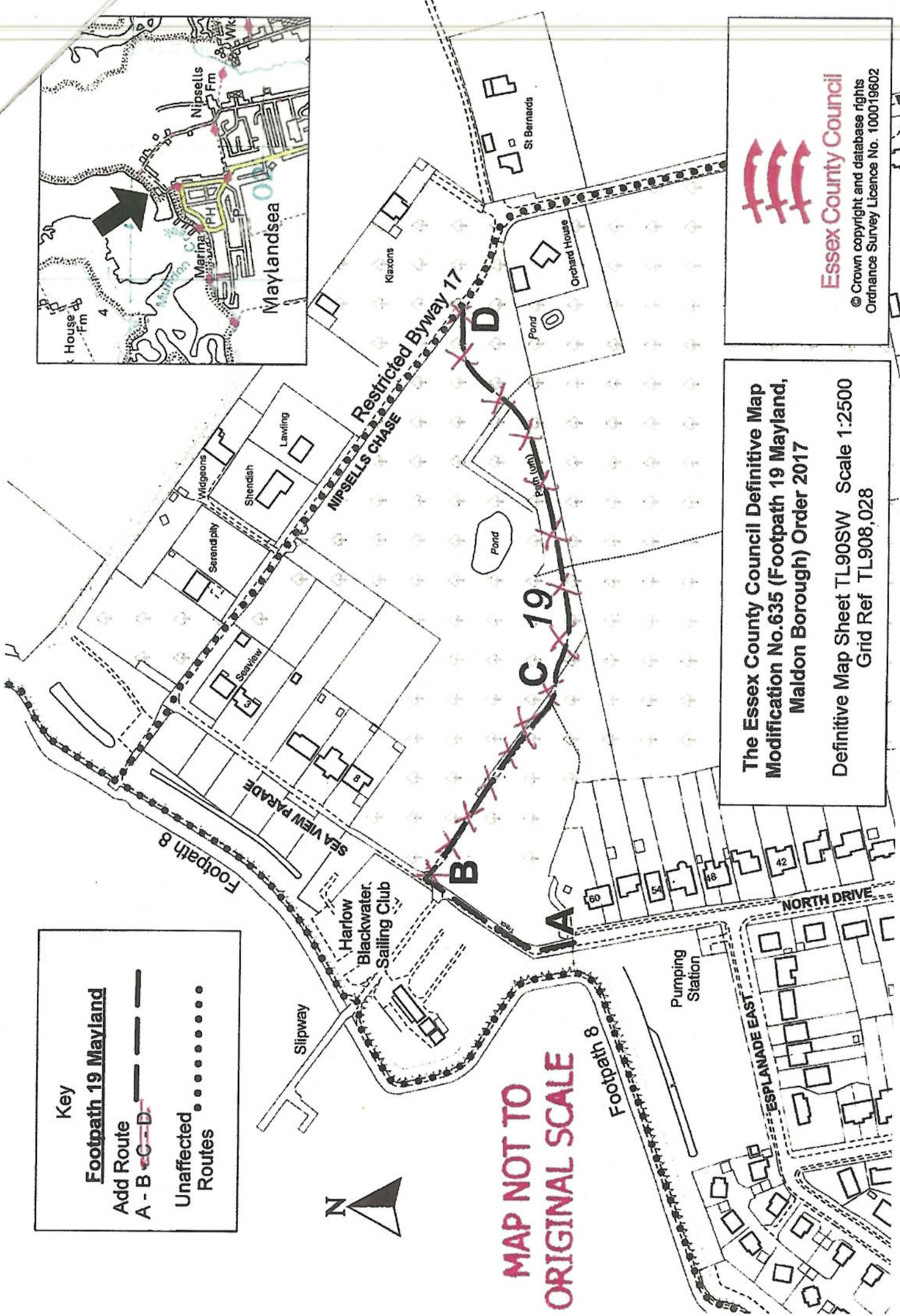
Add Route ———

A - B - C - D -

Unaffected Routes .....  
.....



**MAP NOT TO ORIGINAL SCALE**



**Essex County Council**

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**The Essex County Council Definitive Map  
Modification No.635 (Footpath 19 Mayland,  
Maldon Borough) Order 2017**

Definitive Map Sheet TL90SW Scale 1:2500  
Grid Ref TL908,028