

Order Decision

Hearing held on 4 April 2017

by Mark Yates BA(Hons) MIPROW

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

Decision date: 17 May 2017

Order Ref: FPS/Z1585/7/86

- 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. 617 Footpath 59 Nazeing (Epping Forest District) Order 2016.
- The Order was made by Essex County Council ("the Council") on 15 February 2016 and proposes to modify the definitive map and statement in relation to Footpath No. 59, in the parish of Nazeing, as detailed in the Order Map and Schedule.
- There were three objections outstanding at the commencement of the hearing.

Summary of Decision: The Order is proposed for confirmation subject to modifications set out below in the Formal Decision.

Procedural Matters

1. I held a hearing into the Order on 4 April 2017 at the offices of Epping Forest District Council. Following the close of the hearing I made a visit to the site accompanied by the interested parties.
2. All of the points referred to below correspond to those delineated on the Order Map.

Main Issues

3. This Order is made under Section 53(2)(b) of the 1981 Act, relying on the occurrence of events specified in Section 53(3)(c)(i) and (iii) of the Act. Therefore, I need to be satisfied that, on the balance of probabilities, evidence has been discovered which shows that:
 - a) a right of way which is not shown in the map and statement subsists; and
 - b) there is no public right of way over land shown in the map and statement as a highway of any description.
4. When considering the proposed addition of a section of footpath I shall consider whether the documentary evidence provided is sufficient to infer the dedication of a public right of way at some point in the past. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.
5. The case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions 2001* ("*Trevelyan*") provides judicial guidance regarding the deletion of rights of way from the definitive map. At Paragraph 38 of this judgment, Lord Phillips states "*where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a*

definitive map in fact exists, he must start with an initial assumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put into the balance, if it is to outweigh the initial presumption that the right of way exists”.

6. Further guidance on the deletion of public rights of way is found in Department for Environment, Food and Rural Affairs Circular 1/09. Paragraph 4.33 of the Circular states *“The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement ... will need to fulfil certain stringent requirements. These are that:*
 - *The evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.*
 - *The evidence must be of sufficient substance to displace the presumption that the definitive map is correct.*
 - *The evidence must be cogent.”*
7. If I do not find that the documentary evidence is sufficient to conclude that the section of footpath should be deleted, consideration will need to be given to the submission put forward by Mr Stephenson, on behalf of the applicant, regarding the physical destruction of this path.

Reasons

Background matters

8. The route of Nazeing Footpath No. 59 is a longstanding issue which has previously been the subject of court proceedings¹. In terms of the Order that I need to consider, an application was made on behalf of one of the objectors (Mr Pett) to delete a section of Footpath 59 from the definitive map and statement, where it crosses the plot containing the property known as Jamesmead (points A-D). A request was subsequently made to extend the application to encompass the remainder of Footpath 59 but the Council says that it had already commenced the process in relation to the original application.
9. The Council made an Order to delete the A-D section along with the proposal to record a footpath between points G-B-H-D. The latter is predominantly located within the garden of the property known as Selways, which is in the ownership of Mr and Mrs Speller. It then crosses over the physical boundary on site and probably proceeds over land in the ownership of Mr Joslin and Mrs Beldom.
10. Some of the parties suggest that the remainder of Footpath 59 to the north-east of point D should also be deleted. However, this section has been

¹ Mr Carr was instructed by the parties in the proceedings involving Mr Joslin and Mrs Beldom and the Council to produce an independent report but he acts for Mr and Mrs Speller in relation to the present Order.

realigned following the confirmation of a Diversion Order in 2015 pursuant to Section 119 of the Highways Act 1980. This Order created a new section of Footpath 59 and it is a legal event that postdates the relevant date of the definitive map.

11. From looking at the Diversion Order, it is apparent that if the present Order is confirmed as made there will potentially be a short gap between the different sections of Footpath 59 at point D. However, this would be a matter for the Council to resolve and I note that they consider it to be de minimis. It is not my role to look at resolving the issue unless there is any evidence to support such a modification. Further, the issue of whether any section of the path should be extinguished under different legislation is not a matter for me to determine.

The discovery of evidence

12. Mr Carr submits that the discovered evidence only relates to the G-B-H section. In contrast, Ms Morris for the Council says that this evidence needs to be considered to determine which route the footpath takes at its south-western end. On this issue, the discovery of evidence may constitute the identification of a drafting error when the way was first recorded in the definitive map and statement. I shall first consider the evidence provided before reaching a conclusion on this issue.

Consideration of the evidence

13. The Council relies to a large extent on the Nazeing Inclosure Award of 1858². This document described one of the public footpaths to be set out as: *"One other public Footway of the width of four feet numbered 50 on the said Map commencing at a point marked G thereon and extending thence along the West and North sides of the Allotment on Long Green numbered 49 on the same map to and terminating at a point marked H on the said map"*.
14. Some of the objectors question whether the awarded footpath corresponds to the relevant section on the Order Map between points G-B-H. Mr Carr also points to the absence of any overlaying exercise in relation to the different maps. However, I find from comparing the local authority boundary and the parcels shown on the inclosure map and the 1896 Ordnance Survey ("OS") map outlined below that the awarded footpath followed a route which corresponds to the western and northern boundaries of the present Selways plot as far as point H³. It is apparent that point H on the inclosure map was located where the path is shown proceeding through the narrow section of the field numbered 130 on the 1896 OS map. In my view, it is possible to conclude that the awarded footpath broadly corresponds to the G-B-H section on the Order Map.
15. The inclosure award provides powerful evidence in support of the existence of public rights between points G-B-H. In terms of the remainder of the route in the Order, as the objectors submit, the award itself provides no support of a continuation beyond point H. However, point H was located at the boundary of the land to be enclosed and therefore the land crossed by the H-D section would have been outside of the scope of the award.

² Ms Morris confirms that there was no local Act and the award was made pursuant to the Inclosure Act 1845.

³ As shown on the Land Registry plan for title number EX292306

16. The small scale 6 inch to a mile 1866-1880 OS map shows a pecked line running diagonally across the Selways plot from its western boundary to point H. This route is shown continuing in a north-north-easterly direction and no path is shown to the east where the boundary is obscured to some extent by trees. The former Smithy mentioned by the objectors is shown on this map and subsequent OS maps within the Selways plot.
17. The larger scale 25 inch to a mile 1896 OS map shows the area in greater detail. A drainage ditch is shown along the western boundary of the present Jamesmead plot and close to points A and D. This feature turns north-eastwards at point D and continues through to Middle Street which is beyond the extent of the Order Map. There is no path depicted between points A-D and near to the latter is a pond. Pecked lines are shown from point G across the Selways plot to points H and D and then along the northern side of the drain to Middle Street. This route is also annotated "FP", which is indicative of the existence of a feature that was interpreted by the surveyor to correspond to a route likely to have been used on foot.
18. The 1:2500 scale 1920 OS map records the relevant features broadly in the same way as the 1896 OS map. In contrast, no pecked line is visible within the Selways plot on the smaller scale six inch to a mile OS map of 1923. The Council says the latter served as the base map on which the later records involving the claimed public rights of way were shown. Further, the 1945 25 inch to a mile OS map is generally consistent with the earlier large scale OS maps. Whilst a 1:1250 scale OS map believed to originate from the 1960s or 1970s also shows the pecked lines shown on the earlier maps, there may be some variation within the Selways plot. The Council says that the provenance of this map cannot be determined.
19. The OS maps provide a good indication of the physical features present when the land was surveyed but they provide no confirmation regarding the status of the paths shown. Whilst the relevant path may have provided a means of access to the Smithy or the later piggery, as suggested by the objectors, this path is shown as a through-route between Middle Street and Waltham Road.
20. A map produced in relation to the 1910 Finance Act shows the Selways plot forming part of hereditament 236 and the Jamesmead plot within hereditament 305. The path shown beyond the Selways plot on the 1896 OS map through to Middle Street crosses the remainder of hereditament 236 and hereditament 18. A claimed deduction of £15 was claimed for taxation purposes in respect of hereditament 236 for "*Public Rights of Way or User*". It is also apparent that a deduction of £50 was claimed for the same reason for hereditament 18. No such claim was made for hereditament 305.
21. Two issues arise from the Finance Act evidence, namely that the failure to make a claim for a public right of way does not mean that no way existed within hereditament 305 and secondly that the records do not identify the alignment of the way for which a deduction was claimed. However, no path is shown through hereditament 305 on the OS maps and only one path is depicted through the other relevant hereditaments on these maps.
22. I do not find that much can be gleaned from the 1920 sales catalogue plan even from looking at the enlarged version provided. It is just possible to

determine that there is a pecked line leading out of Middle Street and the annotation "FP" is shown for this section.

23. In terms of the Groundsure plans provided, the small scale of most of these maps means that it is difficult to determine the existence or otherwise of particular features. The Council also draws attention to discrepancies on the OS map held by the National Library of Scotland and the 1937-1961 period covered by this map. In identifying the presence of particular features, I place greater reliance on the OS maps detailed in paragraphs 16-18 above.
24. A parish map was produced to show the ways that were claimed to exist for the purpose of compiling the original definitive map and statement⁴ for the area in accordance with the National Parks and Access to the Countryside Act 1949. Footpath 59 is shown by a thick line to such an extent that its precise alignment cannot be determined but it is located within the Jamesmead plot in the locality of points A-D. It then continues over a route which encompasses the path shown on the OS maps through to Middle Street. At Middle Street is the annotation "FG" which denotes a field gate. An accompanying description of 16 June 1951 refers to the path being obstructed in two places and passing through a field gate at each end. The location of the field gate at the south-western end cannot be determined. It is apparent that the description was supplied by a local landowner (Mr Nicholls).
25. The Council believes that the claimed rights of way were derived from information collected from an earlier exercise undertaken in respect of the Rights of Way Act 1932 ("the 1932 Act"). However, it can no longer be determined from the map produced in relation to the 1932 Act where the footpath was alleged to run. Nor is there any information to indicate why the route was claimed to be a public right of way.
26. The information outlined above was used in the production of the draft map. A purple line representing Footpath 59 is shown on the draft map proceeding from Middle Street in the same way as the path shown on the OS maps. It then turns south-south-east near point D where it appears to run more to the west of the drain. The accompanying statement only records the termination points and the general direction of the footpath. This path was not subjected to any amendment and was included on the provisional and definitive maps. However, it is apparent that the purple line representing Footpath 59 is shown on the original definitive map slightly to the east of the drain.
27. Mr Stephenson points to more pressing issues facing post-war Britain in comparison to the process to compile the original definitive map in the 1950s. However, in the absence of evidence to the contrary, I must presume that the proper procedures were undertaken when the definitive map was compiled. Parliament made provision for a process which involved the relevant local authorities and provided an opportunity to object to any way shown on the draft map. Accordingly the recording of Footpath 59 over a particular alignment on the original definitive map should be afforded a significant degree of weight.
28. The alignment of the A-D section has varied on subsequent editions of the definitive map which the Council puts down to poor drafting. The first review

⁴ It has a relevant date of 1 January 1953

map with a relevant date of 1 January 1963 shows the A-D section through the drain and the present definitive map with a relevant date of 1 July 2002 shows the path to the east of the drain. Nonetheless, the issue to be determined is whether the footpath was shown in error on the original definitive map.

29. Statements and letters have been provided which in some cases were compiled in relation to the earlier court proceedings. I consider that regard should primarily be given to the information that covers the period at or prior to the relevant date of the definitive map. A letter of 16 December 2015 from Messrs R and I Payne is supportive of the walked route of Footpath 59 previously proceeding across the Selways plot. It is stated that sometime after 1951 the route of the footpath was suddenly changed to the A-D alignment. Mr Ballard says in a statement of 2011 that he was told by Mr Nicholls⁵ that the footpath was diverted prior to 1951 by the landowner (Mr Mason). Other statements post-date the original definitive map and refer to a lack of more recent use. A record of a telephone call from Mr Culling outlines that he moved to the area in 1967 and he recalls that there was a little bridge over the ditch.
30. I share the concerns of Mr Carr regarding the evidential value of these statements. It was not possible for this evidence to be clarified at the hearing. Further, regard needs to be given to the relatively young ages of the witnesses at the time and the fact that the statements were compiled over fifty years after the relevant date of the original definitive map. Nor is there any evidence of a formal diversion being undertaken during this period. The Council also says that there is a lack of documentary evidence to show that Mr Mason owned both the Selways and Jamesmead plots.

Conclusions

31. The inclosure award evidence should carry a significant amount of weight in terms of the existence of a public footpath between points G-B-H. Point H was the extent of the award and there were no powers to set out the remainder of the route. There is nothing to indicate that there was any purpose in a public footpath terminating at point H and the map evidence is supportive of a path continuing through to Middle Street via a route that broadly proceeds over the alignment recorded in the Order.
32. The OS maps indicate that the public may have deviated from this route across the Selways plot. However, I consider that greater weight should be given to the inclosure award evidence. The location of the way or ways for which a deduction was claimed for the purpose of the 1910 Finance Act cannot be confirmed but an inference can be drawn from the fact that the only path shown through these hereditaments on the OS maps corresponds to the G-H-D section and the original continuation of Footpath 59.
33. I conclude on the balance of probabilities that a public footpath subsists over the route G-B-H-D. However, in light of the concerns expressed regarding the identification of the alignment of the footpath, I consider it appropriate to modify the Order to make it clear that the G-B-H section proceeds along the western and northern boundaries of the land held within Land Registry Title Number EX292306. The Order can be further modified to make it clear that

⁵ He states that Mr Nicolls passed away in around 1953/54

the H-D section continues outside of the Selways plot. There is no evidence to indicate that the width of the H-D section should be modified.

34. In terms of the A-D section, I concur to some extent with Mr Carr regarding there being a lack of new evidence specific to the question of whether this section was added to the definitive map in error. The map evidence does not point to the existence of a path on the ground but this does not demonstrate that an error occurred when the footpath was first recorded on the definitive map. There is nothing to suggest that a footpath could not have physically existed over the alignment to the east of the original drain between points A-D at the relevant date.
35. I am not satisfied that any significant degree of weight can be placed on the statements from Messrs R and I Payne and Mr Ballard. Whilst these indicate that there was a desire to re-route a public footpath through the Jamesmead plot, the information provided by the Council suggests that the A-D section was first claimed during the process undertaken in relation to the 1932 Act.
36. As outlined in *Trevelyan*, I have to start from the initial presumption that the right of way marked on the definitive map exists. The description of the path in the definitive statement is consistent with the map. Overall I do not find that there has been the discovery of evidence of sufficient substance to displace the presumption that the definitive map is correct in terms of the existence of a footpath between points A-D.

Whether the A-D section has been physically destroyed

37. Mr Stephenson submits that the A-D section has been completely eroded by the meandering of the drainage ditch following the passage of time and it has ceased to exist. This submission relates to the original ditch evident on the maps and not the more recent ditch to the east. In support, reliance is placed on the case of *R (on the application of Gloucester County Council v Secretary of State for the Environment, Transport and the Regions & Ramblers Association 2000* ("*Gloucester*"). Further, reference is made to the growth in vegetation and trees in this location. A relatively recent survey map submitted by Mr Stephenson shows the footpath and ditch generally proceeding over the same route. There is also a reference to this issue in the letter from Messrs R and I Payne.
38. It appears to me that for this submission to succeed in relation to the present Order it would need to be shown that erosion had destroyed a section of the footpath by the relevant date of the original definitive map. The *Gloucester* case related to the use of other powers to deal with the erosion of a right of way. In this case, it has not been shown that a section of the footpath had been destroyed by the relevant date of the original definitive map. Further, I share the concerns of Ms Morris and Mr Carr regarding the absence of cogent evidence to show that the land crossed by the A-D has been affected to any significant extent by erosion. In terms of the growth in trees and vegetation, as Mr Carr points out, this is a maintenance issue. Therefore, I do not consider that the A-D section should be deleted from the definitive map in accordance with Section 53(3)(c)(iii) of the 1981 Act.

Other Matters

39. Whether it is desirable for a particular route to be recorded as a public right of way is not relevant to my decision. This is also applicable to the safety concerns raised in relation to the termination points for Footpath 59.

Overall Conclusion

40. Having regard to these and all other matters raised at the hearing and in the written representations I conclude that the Order should be confirmed subject to modifications.

Formal Decision

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

- Delete all of the text relating to the provisions of Section 53(3)(c)(iii) of the 1981 Act.
- Insert after “route” in the fourth line of the first description in Part I of the Order Schedule, “*The footpath proceeds along the western and northern boundaries of the land held within Land Registry Title Number EX292306 (points G-B-H on the attached map). It then continues along the southern boundary of the land immediately to the north of registered Title Number EX292306 (points H-D on the attached map)*”.
- Delete the second description in Part I of the Order Schedule.
- Delete the solid line shown on the Order Map between points A-D and amend the map key accordingly.

42. Since the confirmed Order would not show a way shown in the Order as submitted I am required by virtue of Paragraph 8(2) of Schedule 15 to the 1981 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Mark Yates

Inspector

APPEARANCES

For the Council:

Ms M. Morris

Legal Executive

Objectors:

Mr R. Carr

Consultant instructed by Mr and Mrs Speller

Mr J. Speller

Mr D. Joslin

Mr A. Stephenson

Consultant representing Mr Pett

Mr W. Pett

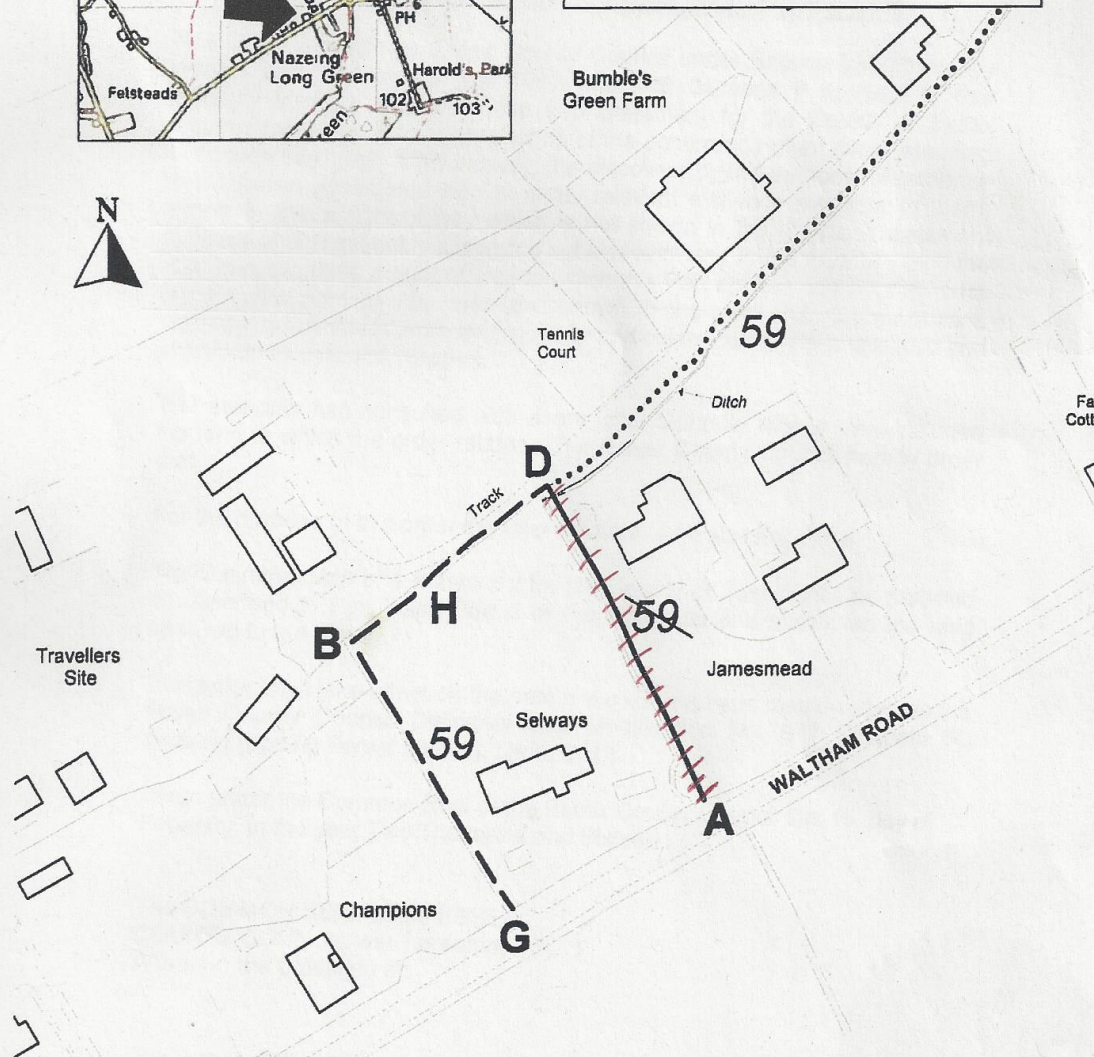
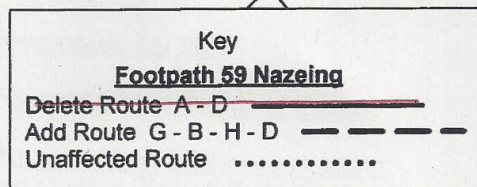
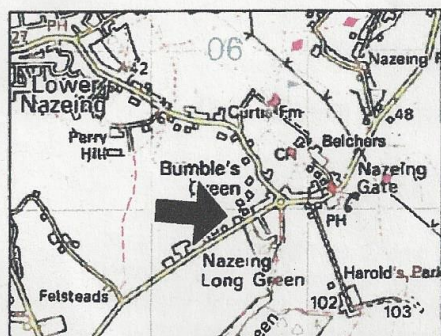
Mr W. Pett Senior

Mr R. Bray

DOCUMENTS

1 Statement on behalf of Mr Joslin and Mrs Beldom

2 Copy of 1845 Inclosure Act



**The Essex County Council Definitive Map
Modification No. 617 (Footpath 59 Nazeing,
Epping Forest District) Order 2016**

Definitive Map Sheet TL40SW Scale 1:1250
Grid Ref TL406,049 or 5406,2049



Essex County Council

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