
Order Decision

by Alan Beckett BA MSc MIPROW

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

Decision date: 5 September 2016

Order Ref: FPS/Z1585/7/85

- 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. 606 footpath 53 Frinton and Walton (Tendring District) Order 2015.
- The Order is dated 26 August 2015 and proposes to modify the Definitive Map and Statement for the area by adding a public footpath as shown in the Order plan and described in the Order Schedule.
- There was 1 objection outstanding when Essex County Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Procedural Matters

1. Shortly after making his objection to the Order, the sole objector to this Order passed away and the Council has been unable to identify any individual who wishes to take the objection forward. I have therefore considered this case on the basis of the written representations forwarded to me. I am satisfied that I can make an assessment of the evidence against the relevant statutory criteria and reach satisfactory conclusions on the basis of the evidence supplied without the need to undertake a site visit.
 2. The Council has requested two minor modifications to the Order. The first modification relates to the relevant date of 4 August 2010 specified in paragraph 3 which the Council says is a simple typographical error which should read 4 August 2015. The second modification is the insertion of the words "Part II" into the Schedule to show that the modifications to the definitive statement form the second part of the Schedule.
 3. Schedule 2 to the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 stipulates that the relevant date set out in a definitive map modification order must not be earlier than 6 months before the making of the Order, and the same Schedule stipulates that part I of the schedule to an order will describe the modification of the definitive map and that part II will describe the modification of the definitive statement.
 4. No evidence has been submitted to lead me to conclude that the relevant date of 4 August 2010 or the omission of the words "Part II" from the schedule are anything other than administrative errors in the drafting of the Order. There is nothing before me to suggest that these errors have prejudiced the interests of
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any person, have rendered the Order misleading as to its purpose or would result in incorrect information being recorded in the Definitive Map and Statement ('DM&S'). If the Order is to be confirmed, I will modify it as requested by the Council.

The Main Issues

5. The Order was made in consequence of an event specified in section 53 (3) (c) (i) of the 1981 Act which provides that the DM&S should be modified where evidence has been discovered which shows that, when considered with all other relevant evidence available, a public right of way which is not currently shown in the DM&S subsists.
6. In a case where there is evidence of claimed use of a way by the public over a prolonged period of time, the provisions of section 31 of the Highways Act 1980 (the 1980 Act) are relevant. Section 31 provides that where a way has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, that way is 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 to be calculated retrospectively from the date when the right of the public to use the way was brought into question, either by a notice or otherwise.

Reasons

The date on which the right of the public to use the way was brought into question

7. In October 2014 a resident of Churchfield Road, Walton-on-the-Naze submitted an application to the Council to record the claimed path as a public right of way. The application was supported by 25 user evidence forms (UEFs) each accompanied by a map showing the route that each respondent had walked. The maps show that the respondents used the path to access and cross land now used as a car park as part of longer journeys on foot to destinations north of Churchfield Road.
8. The application made to the Council to add the path to the DM&S was made following the erection in 2014 of a fence at the northern end of the route by Tending Borough Council. The fence defines the boundaries of the Borough Council's car park and the fence effectively obstructed access to the car park from the claimed footpath. The relevant 20-year period of use for the purposes of section 31 (2) of the 1980 Act is therefore 1994 to 2014.

Whether the claimed right of way was used by the public as of right and without interruption for a period of not less than 20 years ending on the date the public right was brought into question

9. Of the 25 UEFs submitted in support of the application, three forms show that the respondents had ceased using the path prior to 1994, but had used the path for periods between 3 and 39 years prior to that date. Of the remaining 22 UEFs, 11 respondents claim use in excess of 20 years ending in 2014; two respondents claim use of more than 50 years and one claims use in excess of 40 years.
10. The remaining 11 UEFs provide further evidence of use of the claimed footpath but for periods of less than 20 years prior to the erection of the fence in 2014.

Some of the users claim to have walked the path on a daily basis, others walked along the path on a weekly or fortnightly basis. Use was for the utilitarian purposes of travel to the nearby medical centre, for dog walking and as a short cut to other areas of the town.

11. Prior to the application to record the footpath being made, the only evidence of an obstruction was given by some respondents who recalled a gate which had been erected at the car park end of the path. However, none of the respondents were able to put a precise date as to when this gate had been erected but one suggested it had been around 1989. The consensus was that the gate had been present only for a few days before "*the council*" had taken action to have the gate removed as an obstruction. As the evidence regarding this gate is that it had been erected and removed prior to the commencement of the relevant 20-year period, I have placed little weight upon it as evidence that use of the path had been interrupted. Other than this, none of the users reported any obstruction which hindered use of the path and none had been challenged as to their right to walk along it.
12. I am satisfied that the user evidence submitted demonstrates use of the path by the public as of right and without interruption for a period of not less than 20 years which ended in 2014. It follows that the evidence is sufficient to raise a presumption that the path has been dedicated as a public right of way.

Whether there is sufficient evidence of a lack of intention to dedicate

13. The presumption of dedication is a rebuttable presumption under the proviso to section 31 (1) of the 1980 Act. In order to take advantage of the proviso, the owners of the land crossed by the path have to provide evidence of overt and contemporaneous action having been taken against those using it. The ownership of the land over which the claimed footpath runs is not registered at Land Registry; the Council have not been able to identify the owner of the land although the adjoining properties may own up to the centre line.
14. The owners of the properties to either side of the claimed footpath have not provided any evidence from which it could be concluded that they had confronted people walking along the path, or that they had erected signs along the path which prohibited people from doing so.
15. Other than concerns regarding the impact the footpath may have upon the ability to undertake periodic maintenance of his property, the objector did not provide any evidence that the landowners had taken any steps during the relevant 20-year period to demonstrate there had been no intention to dedicate a public right of way. I conclude that there is insufficient evidence to rebut the presumption of dedication raised by the user evidence.

Other Matters

16. The sole objector's concern was that the recording of the route as a public footpath would impinge upon his ability to undertake periodic maintenance works upon his house, its guttering and fascias. As such works required the use of ladders or scaffolding the objector was of the view that the path would have to be closed for such maintenance work to be undertaken.
17. None of the users mentioned any restriction on their use of the path arising from maintenance of the houses either side of it. However I consider that users must have accepted that from time to time passage along the path would have

been made more problematic by the requirements of adjacent householders to undertake repairs to their properties which could only be done from the path.

18. It must therefore be the case that if a presumption of dedication of a public right of way has arisen through long use, that presumption of dedication must have been on the understanding that adjacent buildings would require periodic maintenance and that maintenance would restrict but not prevent passage along the footpath. I propose to modify the Order by adding a part III to the Schedule to reflect that limitation.

Conclusion

19. Having regard to these and all other matters raised in the papers received I conclude that the Order should be confirmed subject to the modifications outlined in paragraphs 4 and 18 above.

Formal Decision

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

in paragraph 3 of the Order, the deletion of "2010" and the insertion of "2015";

in the Schedule to the Order, the insertion of "PART II" before 'modification of the Definitive Statement';

in the Schedule to the Order the insertion of

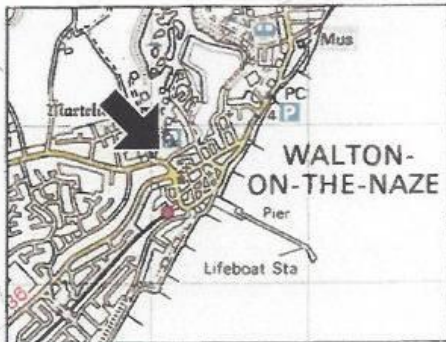
"PART III

Limitations and Conditions

This path is used subject to the periodic restriction of the available width between Nos. 20 and 22 Churchfield Road by ladders or scaffolding to facilitate the maintenance and repair of those buildings."

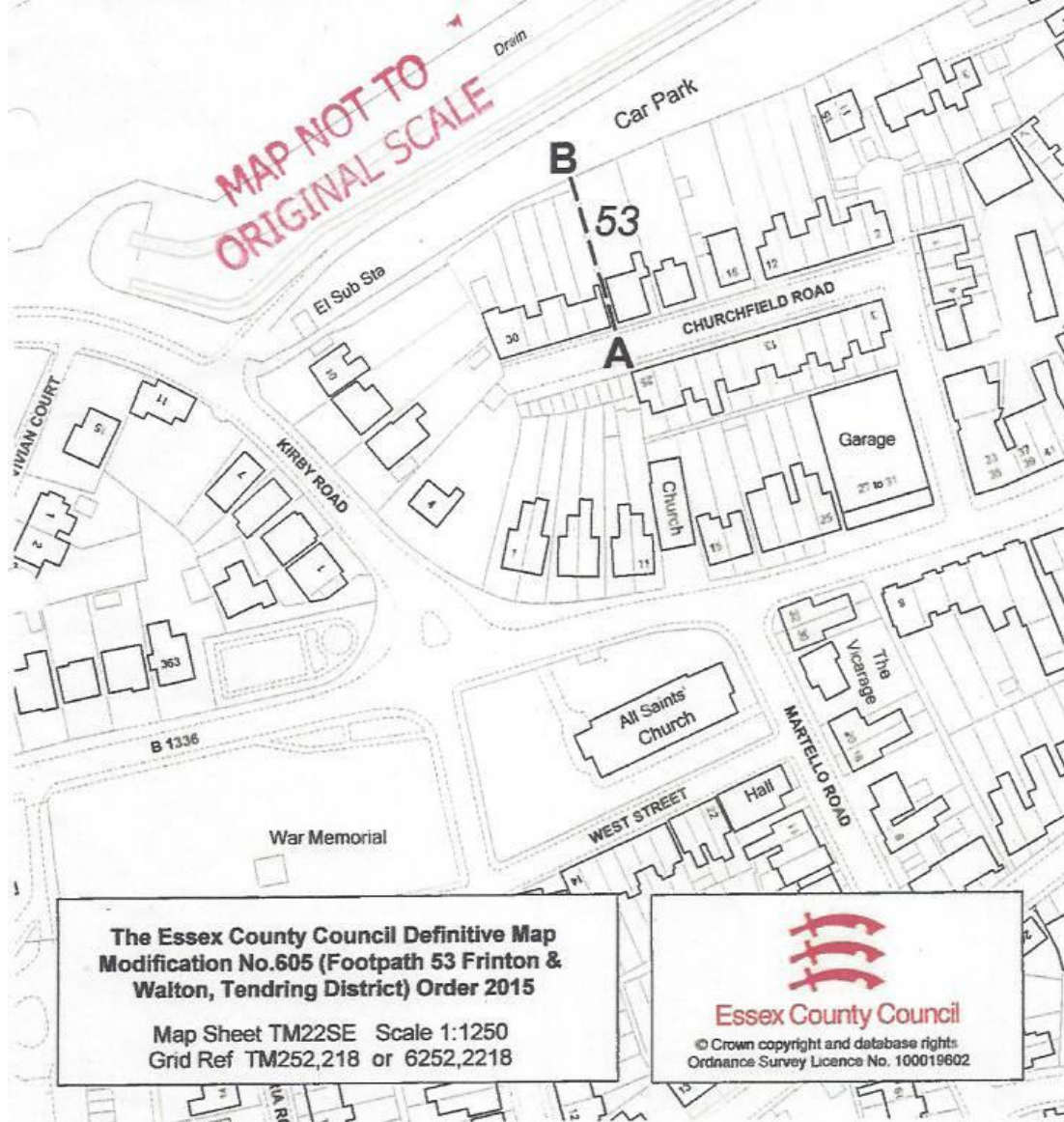
Alan Beckett

Inspector



Key
Footpath 53 Frinton & Walton
Add Route A - B ————

MAP NOT TO
ORIGINAL SCALE



**The Essex County Council Definitive Map
Modification No.605 (Footpath 53 Frinton &
Walton, Tendring District) Order 2015**

Map Sheet TM22SE Scale 1:1250
Grid Ref TM252,218 or 6252,2218



Essex County Council

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