



Order Decisions

Site visit made on 6 June 2018

by K R Seward Solicitor

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

Decision date: 22 June 2018

Order A: ROW/3185021

- This Order is made under Section 119 of the Highways Act 1980 ("the 1980 Act") and is known as Public Path Diversion Order 2016 Footpath 11 Great Waltham.
- The Order is dated 13 July 2016 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There was 1 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 confirmed subject to a modification set out below in the Formal Decision.

Order B: ROW/3185022

- This Order is made under Section 118 of the Highways Act 1980 (the 1980 Act) and is known as Public Path Extinguishment Order 2016 Bridleway 107 Great Waltham.
- The Order is dated 19 August 2016 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule.
- There was 1 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.

Preliminary Matters

1. Order A relates to the diversion of a public footpath (FP11 Great Waltham) whereas Order B relates to the extinguishment of a bridleway (BW107 Great Waltham). These public rights of way affect land within the same ownership but they are not physically linked and are some distance apart.
2. It is submitted that if both Orders are confirmed, the landowners propose to enter a creation agreement under section 25 of the Highways Act 1980 to upgrade the diverted footpath (FP11) measuring 2m in width to a bridleway of 3m width. The County Council as Order Making Authority (OMA) indicates that the landowners have signed a creation agreement to dedicate the route as a bridleway. A signed copy is not before me at this time, but I am satisfied that it would not alter my decisions for the reasons that follow in my discussion of the issues.
3. The extinguishment of BW107 has been made on the basis that a new bridleway will be created to offset the loss. The landowners' agreement to create the bridleway relies in turn upon the diversion being confirmed. For that reason the Orders are dealt with in a single decision document. The OMA describes the Orders as 'inextricably inter-linked', but clearly they are separate Orders requiring individual consideration and application of the relevant tests under each statute.

4. Part 1 of the Schedule of Order A incorrectly refers to the bridleway which connects with FP11 as 'Footpath 14 Great Waltham'. The public notices correctly referred to 'Bridleway 14'. There is also an error in the Schedule of Order B. It describes the existing bridleway to be extinguished as commencing at point H and "...travelling west across a field..." to point G. In fact, it is travelling east across fields (in the plural). Anyone inspecting the accompanying map would understand what was meant. The intention is thus clear and no-one will have been misled or prejudiced.
5. The errors above are capable of correction by modifying the Orders, if confirmed.
6. The one outstanding objection to both Orders is made by Katherine Evans expressed to be acting on behalf of the Essex Area of the Ramblers Association. The OMA has queried whether the Ramblers do in fact object because the local Ramblers group has no objection. I have no reason to believe that the objection was made without the authority of the Ramblers. In any event, any person can make an objection which would trigger a referral to the Secretary of State for determination.
7. A request is made by the statutory objector that I not confirm Order A as made, but to confirm an amended diversion to address the legal alignment of FP11 where it crosses a pond. That is not the proposed diversion before me and there has been no consultation on any such alternative.
8. No-one requested to be heard with respect to the Orders and so I made unaccompanied site inspections, taking account of the written representations.
9. I have found it convenient to refer to points along the routes as shown on the Order Maps. Therefore, I attach copies for reference purposes.

Order A

Main Issues

10. Order A has been made in the interests of the owners whose land is crossed by FP11. By virtue of section 119 of the Highways Act 1980, for me to confirm the Order I must be satisfied that:
 - (a) the diversion to be effected by the Order is expedient in those interests;
 - (b) the new path will not be substantially less convenient to the public in consequence of the diversion;
 - (c) any new termination point for the path is substantially as convenient to the public; and
 - (d) it is expedient to confirm the Order having regard to:
 - (i) the effect of the diversion on public enjoyment of the path as a whole; and
 - (ii) the effect the coming into operation of the Order would have with respect to other land served by the existing path and the land over which the new path would be created together with any land held with it.
11. I shall also have regard to any material provision contained in a rights of way improvement plan ("ROWIP") for the area when considering the Order.

Reasons

Whether it is expedient in the interests of the owner of the land that the footpath in question should be diverted

12. The application is made by the owner of Hill Farm. Presently, the footpath crosses the middle of a field in agricultural use for the cultivation of crops. The definitive route is not in a straight line, but changes direction and gently curves. Towards the eastern end, the legal line goes through a pond. In practice, I understand that walkers have taken a different straighter route clearly avoiding the pond. Maintaining a footpath that weaves across the middle of a field for a considerable distance must inconvenience the farmer. When I undertook my site visit the field was in crop without any trodden path.
13. I am satisfied that it is in the interests of the owner of the land for FP11 to be diverted.

Whether the new footpath will not be substantially less convenient to the public

14. Currently, FP11 starts at point M which is located along the B1008 road opposite a public house. It proceeds in an easterly direction across the field to exit at the junction for bridleway 14 (BW14) which runs to the north and south.
15. FP11 is not signed at either end and at the time of my site visit there was no evidence of a path through the crop. It is evident from a copy photograph supplied by the objector that there are other times when a line can be seen leading across the field.
16. The OMA measures the existing route at about 710m¹ in length. The statutory objector estimates the figure as nearer to 690m. There is no recorded width.
17. The diverted route would take users along the field boundary running parallel with the B1008 road at a specified width of 2m. The northern end of the route would extend past existing point M up to Black Chapel Lane. To get from point M-N or vice versa via the diverted route would involve using existing BW14. The OMA specifies that the total distance is about 950m whereas the statutory objector calculates it at 935m.
18. Whichever figures are more accurate, it is clear that the diverted route is much longer to get from M-N. This will be less convenient for walkers wishing to proceed north or connect with other public paths to the east. On the other hand, it will be more convenient for walkers wishing to connect with routes to the south. Ultimately, the convenience of the diverted route will depend upon a user's destination. Given that it would be much longer to get from M-N, I consider that the diverted route is less convenient, but not substantially so.
19. Complaint is made that to get to point N walkers must contend with BR14, described by the objector as extensively muddy with some grass and big puddles in places. The OMA refutes that this is an issue. BR14 is along a wide and well-worn farm track. At the time of my visit the track was dry. When it is wet, the surface is unlikely to be any muddier than the existing route across the middle of a field. The existing route is largely flat and does not bear indentations from horse hooves or other traffic as could occur with BR14.

¹ This is the measurement given in the Order as advertised. In its statement of grounds the Council gives the figure as 720m.

Nevertheless, the track is wide enough to enable walkers to pass by even if it is wet, muddy and indented in places without too much inconvenience.

20. I conclude that the new footpath will not be substantially less convenient to the public.

Whether any new termination point is substantially as convenient to the public

21. The existing footpath starts virtually opposite the public house along the B1008 road where the national speed limit applies. Traffic is fast moving and frequent. Users must enter or leave the carriageway of the B1008 close to a junction. This potentially has highway safety implications. Termination point P is along Black Chapel Lane which offers a safer access/exit point. In this respect, termination point P is more convenient than point M.
22. At the other end, proposed termination point Q is at the junction with BR14 where it exits onto the B1008 road whereas the existing route meets BR14 much further to the north-east. The existing termination point is less convenient for those wishing to connect with other public rights of way to the north-east. However, there would still be the option of proceeding north-east along BW14 from point Q. As the OMA point out, bridleway 96 is about 220m south east of point Q which is much closer than point N.
23. The convenience of point Q will depend upon a walker's end destination. Overall, I find that it is substantially as convenient to the public as is point P.

The effect of the diversion on public enjoyment of the footpath as a whole

24. The diverted route is field side of the boundary hedge that runs parallel with the B1008 road. There is traffic noise at regular intervals and glimpses of vehicles passing close-by through gaps in the hedgerow. This does adversely affect the enjoyment of the route. The diverted route is enclosed on one side by the hedgerow, but otherwise has expansive views of open countryside stretching into the distance.
25. In comparison, the existing route can offer a more pleasurable experience away from the road and traffic noise with the tranquillity, openness and views of the countryside all about.
26. The objector says that the position of the diverted route on the northern side of the hedge is prone to being damp or wet underfoot especially where the land dips. Copy photographs are supplied to illustrate evidence of hoof marks² in the soft field edge and a small puddle along the route in dry weather. Fears are expressed that the condition would worsen if upgraded to a bridleway making it uneven and potentially impassable. An extract from the 'Advice of Surfaces for Horses' by the British Horse Society is produced which suggests that clay paths usually need attention to drainage.
27. The objector raises concern over the public not having opportunity to object to a section 25 creation agreement to dedicate the route as a bridleway, but it is a procedure available in law.
28. Only a draft creation agreement has been produced. The terms provide that the agreement takes effect once this Order is confirmed. That agreement may not

² I saw nothing to indicate that the route is used already by the public as a bridleway

necessarily be completed unless Order B is confirmed. Even if it takes effect without Order B, the position is no different from any landowner choosing to allow their land to be used by other types of users. Moreover, the route is not currently established as a bridleway and so there is no reason to believe that it would not be adequately drained if it were recorded as a bridleway.

29. The OMA suggests that as the diverted route is a perimeter path it would always be available whereas the existing route is ploughed and not always available. However, there are restrictions on ploughing up a public right of way and it must be reinstated. Any lawful non-availability will be short term.
30. The shaded cover of the hedgerow could affect the surface condition of the diverted path, but it is unlikely to be appreciably worse than the existing route. Indeed, the hedgerow could shield the route to some extent from the elements whereas the existing route is in an exposed position which could impact on ground conditions and the experience for users depending on the weather.
31. Unlike the existing route, the diversion offers a relatively straight and clear alignment along the field edge making it easier to follow.
32. Thus, there are advantages and disadvantages of each route which impact upon the enjoyment by users. Taking account of the route as a whole, I am satisfied that there is no significant detrimental effect on public enjoyment.

The effect of the diversion on other land served by the existing footpath and the land over which the new footpath would be created

33. There would be no effect on other land served by the existing footpath. The land over which the new route would be created is within the same ownership. No adverse effect arises.

Rights of Way Improvement Plan ('ROWIP')

34. There is no suggestion that the diversion of the footpath under this particular Order is contrary to any material provision contained in a ROWIP.

Whether it is expedient to confirm the Order

35. I have concluded in my considerations above that the Order is expedient in the interests of the landowner. The new footpath will be longer and less convenient in consequence for users seeking to travel from point M-N, but not substantially so. Termination point P is likely to be more convenient for users and point Q is substantially as convenient.
36. An impediment to the existing route is its alignment across a pond requiring walkers to deviate.
37. The diversion provides a safer path away from road traffic for walkers who now need to contend with a long stretch of the B1008 between P-Q where there is no footway for much of it. This will benefit walkers seeking to access the public house by a more direct route and for those wishing to connect with public paths to the south.
38. Weighed against the diverted route are the amount of traffic noise and less scenic route with more inconvenience to users wishing to proceed north/north-east.

39. I am satisfied that it is expedient for the Order be confirmed having regard to its effect on public enjoyment. Nothing in the submissions or from my site visit leads me to conclude that it would not be expedient to confirm the Order.

Conclusion

40. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed subject to the modification described in paragraph 4 above.

Order B

Main Issues

41. Under section 118 of the Highways Act 1980, for me to confirm the Order I must be satisfied that it is expedient to stop up the bridleway having regard to:
- (a) the extent (if any) to which it appears likely that the bridleway would, apart from the Order, be likely to be used by the public; and
 - (b) the effect that the extinguishment of the right of way would have as respects land served by the bridleway, account being taken of the provisions as to compensation.
42. By virtue of section 118(6A) I must have regard to any material provision of a ROWIP in determining whether or not to confirm the Order.
43. Whilst the OMA must consider the need for the bridleway for public use when making the Order, I must look at the likely future use of the bridleway. Any circumstances preventing or diminishing the use of the way are to be disregarded and to be viewed as temporary when considering the Order.

Reasons

The extent to which the bridleway would be likely to be used

44. The applicants/landowners believe the bridleway should never have been recorded on the Definitive Map. They say that it originated from an historic arrangement between landowner and neighbouring farmer to allow access to be gained with working horses across the field. According to the landowners, use of the route ceased with horse power in the 1950's and it has not been used in the past 60 years.
45. The bridleway starts at point G along Wallace Lane next to the dwelling at Hill House. It is not signed and there is no indication that a bridleway exists. At the time of my site visit, the field behind Hill House was in crop and there was no marked out line for BR107. The route runs in a westerly direction across a paddock where there is temporary style fencing. It proceeds in a straight line across the agricultural field to exit along the B1008 Sandon Hill opposite Lavendar's Farm. The exit point is at an overgrown grassed bank where the route is unmarked.
46. I must consider the likelihood of use on the basis that the bridleway is maintained, open and available for public use.
47. The route connects with Bridleway 49 Great Waltham at point G. It provides a shorter and more direct connection between that bridleway and Sandon Hill than following the roadway. For horse riders to reach or exit at point H would involve

riding along the B1008 which the OMA describes as difficult and dangerous for equestrians. There is frequently passing traffic including HGV's along the road with curves and there are no other bridleways in the vicinity of point H. These factors may deter horse riders although some may wish to use it as an extension of their ride from BW49. If riders were intending to go from G-H anyway, the bridleway would afford a safer and quicker route avoiding a long stretch of road where there could be potential conflict with vehicular traffic.

48. A bridleway is not limited to equestrian traffic. The same road safety issues do not arise for pedestrians because there is a footway along the B1008 through the village in the approach to point H. Walkers may wish to use it as a shortcut between points H-G. If travelling in the opposite direction there is scope to connect with other public paths further along the B1008 to the north of point H.
49. There is housing and other built form on either side of the road between points H-G. For all users, BW107 is not only a shorter route between H-G but it is also quieter without traffic noise and offers views of the open countryside that cannot be seen by travelling along the road. Many people may prefer to use the existing route for all of those reasons.
50. It seems to me that if the route were signed and clear so that the public knew it exists then it would attract a reasonable amount of use.

The effect which the extinguishment of the right of way would have as respects land served by the bridleway

51. No adverse effects arising from the proposed closure on the land concerned have been drawn to my attention. Compensation issues have not been raised.

Whether it is expedient to confirm the Order

52. The Order shall not be confirmed unless I am satisfied that it is expedient to do so. Use of the word 'expedient' in section 118 means that other considerations can be taken into account in determining whether to confirm the Order.
53. The applicant intends to upgrade the diverted part of FP11 to a bridleway of 3m in width if Orders A and B are confirmed. The OMA states that a section 25 creation agreement has been signed by the landowners. The draft copy produced is expressed to take effect upon the date of completion of the agreement and subject to confirmation of Order A. It does not depend upon Order B being confirmed. Had it done so, then the agreement could not be taken into account.³ As I have confirmed Order A, the signed agreement would come into operation once dated. Nevertheless, it does not follow automatically that the extinguishment is acceptable because of that agreement.
54. An upgrade of FP11 to a bridleway of greater width does not provide a replacement for BR107 because the two routes are not in the same vicinity and the termination points are nowhere near. The creation agreement provides an upgrade to another part of the network enabling horse riders and cyclists the opportunity to go from point P to Q (as shown on Order Map A) without entering the busy B1008 road. It would also provide a bridleway link to Black Chapel Lane at point P and join existing BW14 at point Q.

³ Hertfordshire County Council v SSEFRA [2006] EWCA Civ 1718 applied.

55. Essex Bridleways Association supports the extinguishment on the basis that the benefits from an upgrade to FP11 outweigh the loss of BR107. They say that the new scheme would be a great benefit to horse riders in the area as it links several networks and enables circular rides which are also beneficial to horse riders. As FP11 now terminates along Black Chapel Lane, the Association welcomes the prospect of riding off road and the access to yet another network.
56. It is also suggested by the objector that the net results of both Orders A and B and the creation agreement would be contrary to the objectives of the ROWIP. In particular, 'Theme D: A more continuous network' which has amongst its aims improving and increasing the amounts of bridleways and off road cycling. There would be a loss of one bridleway, but the creation of another. An upgrade of a footpath to a bridleway is consistent with the improvements identified in Theme D. It is the loss of a route without a replacement for all users that is inconsistent with the ROWIP aim for the provision of continuous, high quality, rights of way.
57. First and foremost the test I must address is the likely use of the Order route if it were to remain. If the bridleway was signed, maintained and available for use it would in my view be likely to be used to a reasonable degree.
58. I attach limited weight only to the benefits that would accrue to horse riders from an upgrade of FP11 to a bridleway as it is not a replacement for that route as it is so far away. Moreover, walkers can already use FP11 and for them the loss of BR107 is not mitigated in any way by alternative provision. Even though BR107 has not been in use, it is a public right of way capable of use. Extinguishment of BR107 would be a loss to the network without replacement.
59. Taking all factors into account, I am not satisfied that it is expedient to confirm the Order.

Conclusion

60. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

Formal Decisions

Order A

61. I confirm the Order subject to modification by deleting the word "Footpath" from the last line of Part 1 of the Schedule and replacing it with the word "Bridleway"

Order B

62. I do not confirm the Order.

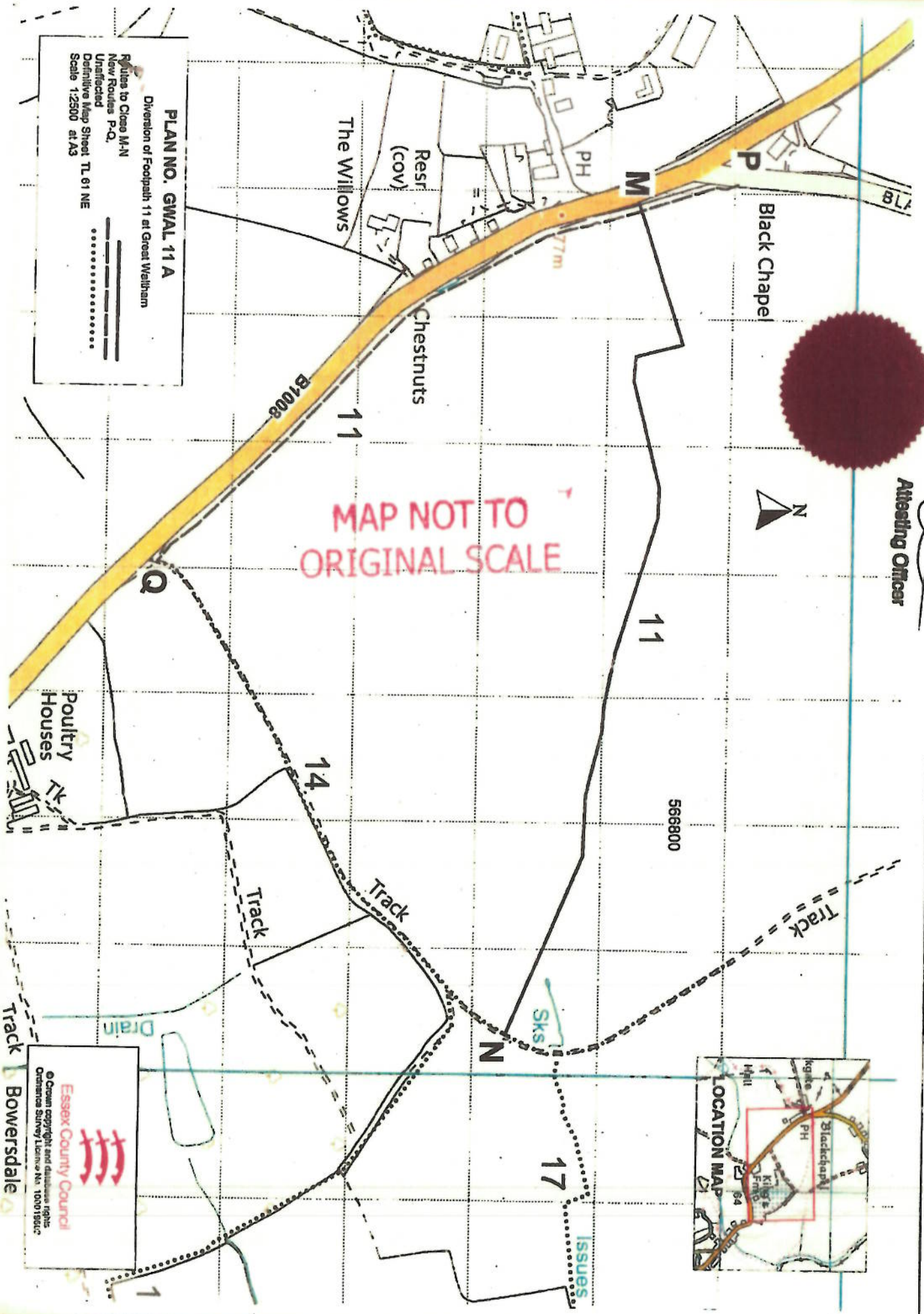
KR Seward

INSPECTOR

Attesting Officer



MAP NOT TO ORIGINAL SCALE



PLAN NO. GWAL 11 A

Diversion of Footpath 11 at Great Waltham

Routes to Close M-N
New Routes P-Q,
Unaffected
Definitive Map Sheet TL 61 NE
Scale 1:2500 at A3



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