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## Order Decision

Site visit made on 8 October 2018

by **Gareth W Thomas BSc(Hons) MSc(Dist) PGDip MRTPI**

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

Decision date: 09 November 2018

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### Order Ref: ROW/3197809

- This Order dated 1 November 2017 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 No.634 Footpath 70 Writtle Chelmsford City Order 2017.
- The Order proposes to modify the Definitive Map and Statement for the area by deleting a section of public footpath 70 Writtle Chelmsford and adding in its place an alternative section as shown in the Order plan and described in the Order Schedule.
- There was one objection outstanding when Essex County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

### Summary of Decision: The Order is not confirmed

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#### Procedural Matters

1. Neither party requested an inquiry or hearing into the Order. I have therefore considered this case on the basis of the written representations submitted to me. I made an unaccompanied site visit on 8 October 2018.

#### The Main Issues

2. The Order seeks both to delete an existing footpath A-B-C and add a new footpath D-C so as to re-align part of the route.
3. The Order has been 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). The main issue is therefore whether the discovery of evidence by the OMA when considered with all other relevant evidence available is sufficient to show, on the balance of probabilities, that a public footpath which is not shown in the map and statement subsists on the route in question such that the definitive map and statement require modification and that the definitive map and statement require modification because there is no public right of way over land shown in the map and statement as a highway of any description.
4. In the Leicestershire<sup>1</sup> case, which is of similar provenance to the subject Order, the Court considered the approach to determine the correct route to be shown on the definitive map. The initial presumption is that the definitive map and statement are correct. The starting point is s53(3)(c)(iii) and only if there is sufficient evidence to show that that was wrong (i.e. on the balance of probabilities the alternative was right) should change take place. If there is insufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in everyone's

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<sup>1</sup> Leicestershire County Council v SSEFRA [2003] EWHC 171 (Admin)

interest that the map is to be treated as definitive. The Leicestershire case held that 'It would be difficult to imagine that a finding that is less than that the alternative exists on the balance of probabilities would be sufficiently cogent evidence to change what is on the map'.

5. The OMA acknowledges that the provisions of section 31 of the Highways Act 1980 (the 1980 Act) as to whether dedication of the way as a public footpath has occurred through public use over a prolonged period does not apply in this case as evidence of use over time is not available.
6. Instead, the OMA relies on evidence to be considered under common law principles, whereby a right of way may be created through expressed or implied dedication and acceptance. The onus of proof lies with the claimant, in this instance the OMA, to show that the landowner, who must have the capacity to dedicate, intended to dedicate a public right of way; or that public use has gone on for so long as it could be inferred; or that the landowner was aware and acquiesced in public use. Use by the public must be as of right (without force, secrecy or permission). However, there is no fixed period of use which may range from a few years to a period of decades, according to the facts of the case. By the same token, there is no particular date from which the use as a public right of way must be calculated retrospectively.
7. The OMA thus relies on implied dedication under common law. Section 32 of the 1980 Act requires me to take into account any map, plan or history of the locality or other relevant document and to give such weight to it as is justified by the circumstances. This includes aerial photographic evidence.
8. I have had regard to the guidance provided by the Department for Environment, Food and Rural Affairs ('Defra') in Circular 1/09 on Public Rights of Way, and to relevant legal judgements.
9. With regards to deletions from the definitive map, I am mindful of the advice contained in Defra<sup>2</sup> Circular 1/09. At paragraph 4.33, it explains that 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:
  - i) 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;
  - ii) the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;
  - iii) the evidence must be cogent.

## **Reasons**

### **Background**

10. The Council and Order making Authority (OMA) alleges that the Footpath route shown on the Definitive Map and described as Points A-B-C on the Order Map was incorrectly drawn when the Map was first produced and which has been perpetuated thereafter. The OMA argues that an alignment to the west of the field boundary commencing at Point D on Lodge Road and leading in a

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<sup>2</sup> Department for Environment, Food and Rural Affairs

southerly direction to a footbridge at Point C has been used by the public for a considerable period of time and is the proper route.

11. The sole objector to the Order and landowner (Mr Thorogood) disputes that the Definitive Map is incorrect but has accepted that a route to the west of the field boundary has been used by the public for a number of years. Mr Thorogood maintains that a footbridge once provided access into the eastern boundary of the field between points A and D with the footpath running along the eastern boundary to point B before turning to follow a westerly route to the footbridge at Point C.
12. Whilst there is recognition that a route to the west of the field boundary has been in regular use by the public, the landowner does not accept the precise alignment of the route leading across the field from Points D to C (the cross-field route). In particular, whilst the OMA believes the route taken by the public has been by way of a direct alignment diagonally across the field, the landowner maintains that the public have taken a slightly longer edge of field alignment to avoid obvious farming activities.
13. There is an understanding between the parties that the more direct alignment crosses a ploughed arable field and that the alternative edge of field route has been the route most favoured by the public.

#### ***Deletion of A-B-C***

14. There is no evidence of this route being shown on historic maps until the production of the Parish Survey Map for Writtle (1951/52) when both the cross-field route D-C to the west of the field boundary was indicated in purple and the definitive map alignment A-B-C to the east of the field boundary shown as a dark blue line. In addition, a footbridge was indicated in the south-east corner of the field boundary at point B, which would have been necessary at this point in order to cross the watercourse. Furthermore, a field gate and stile at the northern boundary with Lodge Road, although at different points along Lodge Road, are annotated on the map. The accompanying card does not describe the gate and stile as being situated at different locations. Similarly, whilst the OMA suggests that there would have been a requirement to provide a crossing over the watercourse at this location, this would have depended upon the precise location of the gate and stile mentioned by the Parish, which from the evidence is inconclusive. Similarly, I do not accept the OMA's assertion that the Parish Survey card would have inevitably recorded that the field gate and stile were some distance apart.
15. The thrust of the OMA's case is that the path currently recorded on the definitive map is more probably than not, an alignment that was subject to a temporary wartime diversion or a near alternative to that line. The temporary wartime provisions under which the changes would have been made expired on 31 December 1958. The OMA have no record of any order having been made making these provisions permanent and that the original definitive map of 1953 continued to depict the route A-B-C. However, despite the acknowledgement by the OMA that there remains a degree of 'confusion' in relation to the dual recording of the route, it maintains that the cross field route as depicted on the Parish Survey Map is the route that should be formalised on the definitive map. However, there is no evidence other than conjecture to suggest that the definitive map is incorrect and the inclusion of the cross-field route on Ordnance Survey maps does not add to the case

presented by the OMA as Ordnance Survey maps were not produced to record public rights of way and should not be taken as evidence of their existence.

16. On the basis of the evidence I find that the OMA has not identified any new evidence; the 'evidence' that has been drawn together is not of sufficient substance to displace the presumption that the definitive map is correct and; the evidence, in my judgment, is not cogent.

***Addition of D-C***

17. As stated above, the OMA has placed reliance on the evidence in the form of Ordnance Survey maps. In addition, some reliance is placed on the Parish Survey together with available aerial photographs.
18. Whilst there is no clear documentary evidence of the existence of this route, the 1920 Ordnance Survey Map - New Series Edition shows the cross-field route D-C. The part of the route leading south from point C is annotated "FP" for footpath. However, I have already commented on the evidential value of such maps.
19. As explained in paragraph 14, The Parish Survey Map for Writtle shows the route of Footpath 70 as following the Ordnance Survey map and is coloured purple with the definitive map alignment in dark blue. There is no evidence to suggest that the correct route was not transposed from The Parish Survey Map onto the definitive map incorrectly. Similarly as noted above, no firm conclusion can be reached that the definitive map is incorrect solely on the basis that it is not shown on Ordnance Survey mapping.
20. The 1946 aerial photograph appears to show a route that follows the field edge to the west of the field hedge boundary (but not the cross-field route); however, this is not absolutely clear. The 1960 photograph by contrast seems to indicate a route either side of the field hedge boundary. However, it appears to me that that the width of the well "trodden" paths in the photograph may have been made by farm vehicles and this photograph is not of sufficient veracity to demonstrate that D-C is the clear route. An aerial photograph from 1970 appears to show the definitive map alignment although the OMA points out that it is uncertain how the alignment would have crossed the field ditch. There is also an indication that a trodden path followed the field edge to the west of the field boundary.
21. A worn route is shown on the aerial photograph taken in 1981 as following the western side of the field boundary; however in a 1990 photograph, there is no clear sign of a route either side of the field boundary and the exit on to Lodge Road is also not apparent. The aerial photographs from 2000 and 2010 clearly show the route following the field edge on the western side of the field boundary as well as the footbridge at point C.
22. The aerial photographs provide evidence as to the physical characteristics of the land on the day taken as well as the likely entrance on to Lodge Road and the existing footbridge to the south. However I do not consider that they provide sufficient evidence as to public rights of way over the land and most importantly any evidence of the cross-field route.
23. The statement on behalf of the OMA asserts that crossing points over the watercourse would have been necessary between points at D-A and at B-C and that currently there is no means of crossing at these locations or evidence that

crossings once existed. However in my view, these assertions carry with them a great deal of uncertainty and are not indicative that the definitive map and statement were prepared in error. Moreover, the reference in the landowner's evidence of his worker recollecting that a crossing existed at point B adds to this uncertainty. There remains ambiguity in the precise route that appears to be presently followed by the public wishing to walk the route between points D-C. From what I saw at my site visit and from the evidence, the cross-field route does not appear to be in regular use by the public and the aerial photographic evidence such as it is remains inconclusive.

24. Whilst the landowner acknowledges use of a route that follows an edge of field route on its eastern side, there is insufficient evidence to suggest that there has been a dedication at common law.
25. There is insufficient evidence to show that the alternative route D to C subsists.

### **Conclusion**

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

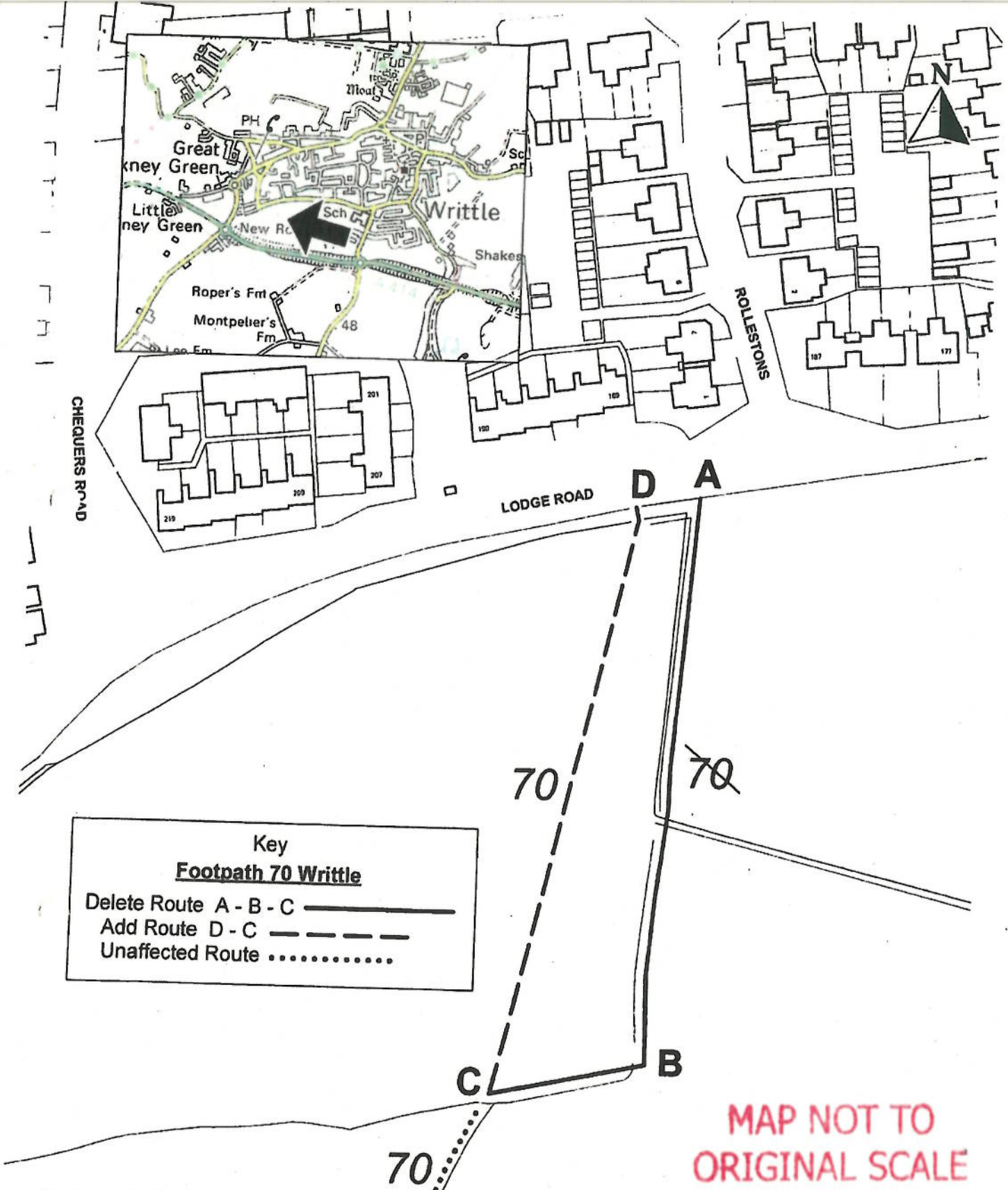
### **Formal Decision**

27. I do not confirm the Order.

*Gareth W Thomas*

INSPECTOR





**Key**  
**Footpath 70 Writtle**

Delete Route A - B - C —————


Add Route D - C - - - - -

Unaffected Route .....

**MAP NOT TO ORIGINAL SCALE**

**The Essex County Council Definitive Map Modification No.634 (Footpath 70 Writtle, Chelmsford City) Order 2017**

Definitive Map Sheet TL60NE Scale 1:1250  
 Grid Ref TL 668,058

  
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