



Order Decision

Inquiry Held on 2 July 2019

Site visit made 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: 16 April 2020

Order Ref: ROW/3208912M

- 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. 635 (Footpath 19 Mayland, Maldon District Council) 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.
- In accordance with Paragraph 8(2) of Schedule 15 to the 1981 Act I have given notice of my proposal to confirm the Order subject to modifications.

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

Preliminary Matters

1. The Interim Order Decision ("IOD") was issued on 12 July 2019. In my IOD I proposed modifications to the above Order and map to the effect that part of the way shown in the Order as submitted should not be confirmed and added to the Definitive Map and Statement. This Decision should be read in conjunction with my previous IOD.
2. One objection and one representation from the Essex County Council, as Order Making Authority ('OMA') were duly made in response to the advertisement of the proposed modifications. Two letters of support for the modified Order were submitted out of time by the landowners. As such they were not duly made and cannot be taken into account.
3. Following a written representation procedure, one of the landowners again submitted a late response to the objections. On this occasion exceptional circumstances were demonstrated for the late submission to be accepted. The objector's comments in reply have been taken into account.

Reasons

4. As set out in my IOD, having applied the tests in section 31 of the Highways Act 1980, I was satisfied that it was appropriate to propose confirmation of the Order in relation to part only of the claimed footpath as shown on the Order map between points A-B. However, I was not satisfied there was sufficient evidence to show that on the balance of probabilities a public footpath subsists over the remainder of the route from B-C-D in relation to the tests under section 31 of the 1980 Act or that dedication of the way has occurred at common law.
5. The application for a modification order had been made by Mayland Parish

Council and it has objected to the proposed modifications. The Parish Council feels strongly that there is overwhelming documentary evidence that has not been given due importance in my IOD along with the "signed testimony" of 35 people who completed user evidence forms ('UEF's). For the avoidance of doubt, I possessed a complete set of the forms.

6. Full consideration was given to the documents produced and analysis is contained within paragraphs 54-60 of my IOD. Having reflected on the position, I find no reason to alter my preliminary view that the documentary material is of limited evidential value for the reasons given previously.
7. With regard to the user evidence, some users had withdrawn their UEF's prior to the Inquiry reducing the number below 35. It became apparent during the proceedings that not all users had used the claimed route. The Parish Council asserts that despite the route becoming overgrown it remained in use up until 2013/2014, but that was not borne out by the evidence. Whilst there remained a reasonable number of witnesses after the withdrawal of some UEF's, relatively few gave oral evidence which could be tested. Analysis of that evidence is within paragraphs 22-49 and 61-77 of my IOD.
8. In arriving at my initial conclusions, reliance was not placed upon any one witness. My IOD recognises that there is a conflict in evidence between one landowner and some users on whether the claimed route was the path used prior to the early 1980's. As noted at paragraph 32, it does not matter who is right for statutory dedication to take place under section 31. That is because the relevant 20-year period under consideration did not start until 1994. At common law, a different period can be considered. Even so, there is insufficient clear and consistent evidence of use of the whole route along the alignment claimed. That is so regardless of the landowner's submissions on the passage of the claimed route past the chalet bungalow. There remains firm disagreement by the Parish Council on this point, but my decision does not rest on it. I further note the Parish Council's more recent comments that where users deviated from the claimed path, they would have retraced their steps to re-join it, but this does not alter my view.
9. Consideration has been given to the totality of evidence. The Parish Council strongly disagrees but in my judgement the evidence in support does not suffice to discharge the burden of proof between B-C-D. The footpath may at times have been a well-used and liked route through what was an orchard, but the evidence presented does not fulfil either the statutory tests or establish dedication at common law. I can understand the desire for it to be recorded as a public right of way and to supplement other existing public paths. However, the benefits of the path fall outside my considerations which are confined to assessing the evidence in accordance with the law.
10. It is argued that people would not have used the section of path between A-B unless they were going through the orchard. I appreciate this, but the key point arising from examination of the evidence was that use was not always along the same route after point B for the duration of claimed use.
11. Ultimately, the written and oral evidence was not consistent or sufficient to demonstrate continuous use of the entire route between B-D up until the time that the public use was brought into question or for dedication at common law.
12. The Parish Council considers my IOD to be contradictory when the Order had

been made at the direction of a Planning Inspector appointed by the Secretary of State. As emphasised in paragraphs 4 and 10 of my IOD, that decision followed a successful appeal under Schedule 14 of the 1981 Act where a lower threshold for evidence applies. For an Order to be made there need only be a reasonable allegation that a public right of way subsists. To confirm an Order the test of the evidence is the balance of probabilities. It is a higher test.

13. It is also important to note that when an Order is made, the evidence has not at that stage been tested. By the time of the Inquiry further evidence had been adduced and some of it had been withdrawn. The Inquiry process allows evidence to be examined in detail which can then influence the weight which is attached to the testimony of individuals. On paper, the evidence at the outset sufficed for an Order to be made. Once examined along with all other evidence at the Inquiry, the higher threshold required to confirm the Order was not met.
14. As set out in the heading of my previous decision, there was only one objection outstanding when the OMA submitted the Order to the Secretary of State for confirmation. It was this objection which triggered the Inquiry process. Once that had occurred, it was always open for other people to come forward whether in favour or against the Order. New evidence emerged from both sides.
15. Nothing within the submissions made by the Parish Council gives me cause to come to a contrary view on the evidence as a whole.
16. Although not formally objecting to the proposed modifications, the OMA has made representations concerning the effect of a modified Order which confirms only a public path along a short stretch of Sea View Parade.
17. The north-eastern terminus (point B) on the Order as modified would not connect to another recorded highway or a recognised place of popular resort. It ends part way along Sea View Parade opposite the sailing club.
18. The OMA refers to the decision in *Kotegaonkar v SSEFRA and Bury Metropolitan Borough Council*¹ which described the characteristics of a public highway and the importance of the termini as points to which the public has a legitimate right of access. In that case, the public had no right of entry at either end of the claimed path or at any point along its length. As such it was found not to be capable of being a public highway. In this case the section of path would not be an isolated path as it connects with the public highway in North Drive at point A. It may be a cul-de-sac, but it is possible that people have gone on to make a link with other locations albeit unclear where and the evidence has not sufficed to show an onward path from B-D.
19. The OMA describes some evidence of vehicular use of Sea View Parade which was raised during a previous Inquiry resulting in a restricted byway being added to the Definitive Map and Statement along Nipsells Chase. The Inspector's decision of 3 September 2014² is produced for my consideration.
20. The OMA questions whether the existence of public footpath rights terminating as a cul-de-sac part way along the length of Sea View Parade is the most accurate reflection of its status taking this additional evidence into account. I am invited to decline the Order in its entirety rather than record rights along part of its length which may not accurately record the full situation.

¹ [2012] EWHC 1976 (Admin)

² Order Decision Ref: FPS/Z1585/7/74

21. The Order before me is not for a restricted byway along any part of Sea View Parade and I have not heard evidence to that effect. The unopposed evidence is of public rights being exercised on foot along Sea View Parade between points A-B only. Walkers may have proceeded further along Sea View Parade, but that is not the case being made. As the OMA acknowledges, the modified Order would be without prejudice to any question of whether or not any other highway rights exist along the whole length of Sea View Parade.
22. Having been presented with evidence to demonstrate that a public footpath exists between points A-B, there is no basis for me to decline to confirm the Order with regard to this section of claimed path.
23. There is nothing to stop the OMA from undertaking a further investigation into the status of Sea View Parade and upgrading the section of path if considered to be appropriate.
24. I remain satisfied that it is appropriate for me to confirm the Order, subject to the same modifications, for the way between A-B only as it meets the statutory tests set out in section 31 of the 1980 Act, but that the case has not been made for the remainder of the route from B-C-D.

Conclusion

25. I conclude that the Order should be confirmed subject to the modifications identified in paragraph 83 of my IOD and as set out below.

Formal Decision

26. In exercise of the powers transferred to me, the Order is confirmed subject to the modifications previously proposed:

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.

KR Seward

INSPECTOR

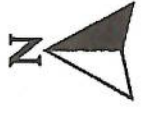
Key

Footpath 19 Mayland

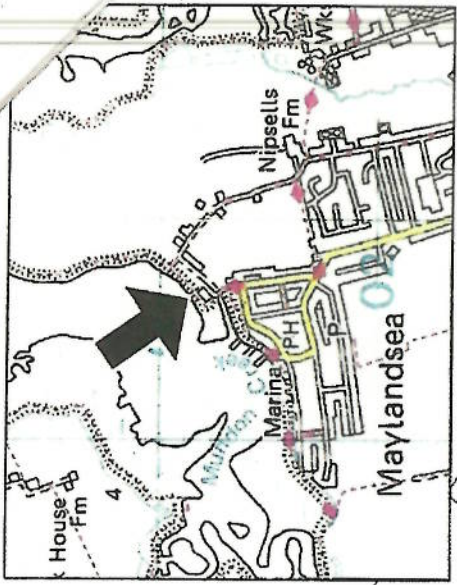
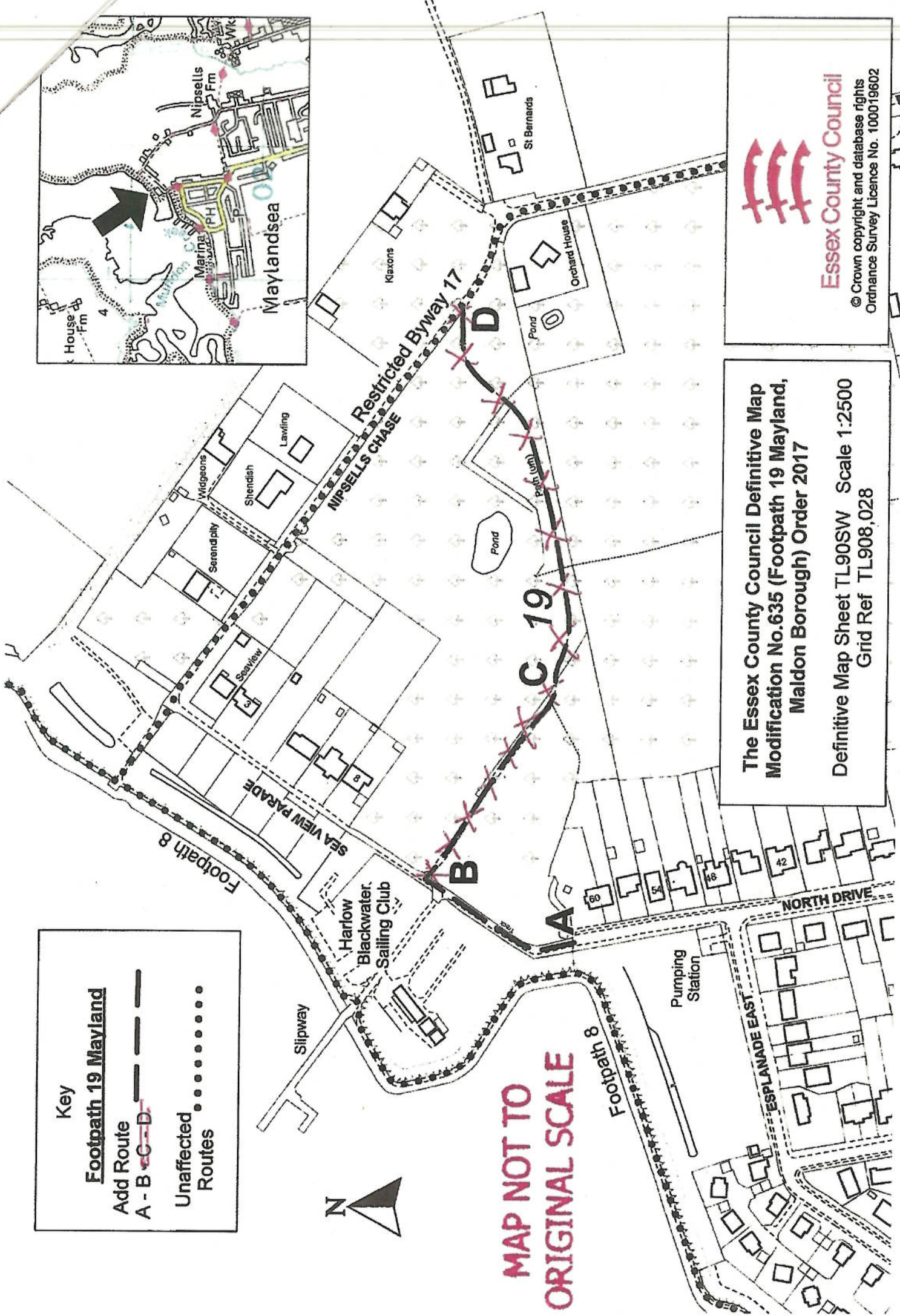
Add Route ———

A - B - C - D -

Unaffected Routes
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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