

|  |
| --- |
| **Order Decision** |
| Site visit made on 17 January 2024 |
| **by Claire Tregembo BA (Hons) MIPROW** |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 05 March 2024** |

|  |
| --- |
| **Order Ref: ROW/3311412** |
| * This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Essex County Council Definitive Map Modification Order No. 694 (Restricted Byway 47 Epping Upland, Epping Forest District) Order 2022.
 |
| * The Order is dated 26 May 2022 and proposes to modify the Definitive Map and Statement for the area by adding a restricted byway as shown in the Order plan and described in the Order Schedule.
 |
| * There was one 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. An application was made under Section 53 of the Wildlife and Countryside Act 1981 (the 1981 Act) on 28 March 2019 to add a restricted byway (RB) between Shingle Hall and Savers Green to the Definitive Map and Statement (DMS). Servers Green is part of Epping Forest and Shingle Hall Road is a public highway maintainable at public expense.
2. Following the investigation of the application, Essex County Council (ECC) resolved not to make a Definitive Map Modification Order (DMMO). An appeal was made against this decision under Section 53(5) and paragraph 4(1) of the 1981 Act. The appeal decision dated 11 May 2022 directed an Order be made on the basis that a right of way was reasonably alleged to subsist. ECC made the Order as directed but is not supporting the confirmation of the Order. The case in support of the Order is made by the Essex Bridleway Association (EBA) which made the application for the DMMO.
3. The Order records the width of the RB as a ‘nominal width’ of three metres. Minimum or approximate width should not be used on Orders as they do not provide certainty as to the position, area, and width. I consider a ‘nominal width’ to be a minimum or approximate width and I will need to modify the Order to show an actual width if I confirm it. All parties were contacted and asked for their comments on the actual width of the Order route.
4. EBA considers the evidence indicates the RB continues over Servers Green. They suggest the Order may need to be modified to record the route over Servers Green to reach Epping Long Green. If I find there is evidence of public rights continuing over Servers Green, I will consider modifying the Order. If I did this the modifications would require advertising and all parties would be given and opportunity to make representations and objections.
5. I have appended a plan of the Order route which includes an insert of the wider area to the end of my decision.

The Main Issues

1. The Order has been made under Section 53(2)(b) of the 1981 Act in consequence of an event under Section 53(3)(c)(i) which requires me to consider if, on the balance of probabilities, the evidence shows that a public RB subsists along the Order route. This is a higher standard of proof than the reasonably alleged to subsist test to determine if an Order should be made.
2. The Order has been made on the basis of documentary evidence. Section 32 of the Highways Act 1980 requires me to take into consideration any map, plan or history of the locality, or other relevant document provided, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
3. I shall examine the evidence as a whole to establish whether a public right of way for vehicles exists along the Order route. However, the Natural Environment and Rural Communities Act 2006 extinguished rights for mechanically propelled vehicles subject to certain exceptions set out in Section 67 of that Act. In this case, it is not argued they have been saved by any of these exceptions. Accordingly, should I find in favour of public vehicular rights existing, the way should be recorded as a RB.

Reasons

*Epping Tithe Map 1839*

1. The Order route is shown with double solid edges as part of a longer route between Upland Road and Servers Green. There is a line across it at Servers Green and another near the southern end which could indicate gates or possibly the boundaries of the land parcels. Most of the Order route is shown as parcel 516 but the very southern end is shown as parcel 517 along with Shingle Hall Road. Parcels 516 and 517 are described as ‘Road’ in the ownership of the Reverend George William Daubeney and occupied by James Scruby. The general road network is listed under waste as ‘Roads’ in the apportionment along with Servers Green and other commons.
2. The purpose of tithe records was to identify titheable land that was capable of producing crops. They were not produced to record public rights of way, although they can sometimes be helpful in determining the existence and status of such routes.

*Estate Plans and Sale Catalogues*

1. The 1868 Plan of Copped Hall Estate shows the Order route as part of a longer route with Shingle Hall Road between Upland Road and Servers Green. It is coloured brown as are other public roads.Shingle Hall is not part of Copped Hall Estate.
2. Shingle Hall is not part of the Copped Hall Estate on the 1869 Sale Plan. The Order route and Shingle Hall Road are shown as a continuous route between Servers Green and Upland Road in the same way as other public roads. However, some cul-de-sac routes to fields and farms are also shown in the same way.
3. The Sale Catalogue for Takeleys and Shingle Hall 1900 shows Shingle Hall Road and the Order route as part of a continuous route between Servers Green and Upland Road. Shingle Hall Road is coloured sepia from Pinch Timber Farm to the entrance to Marles Farm Cottage as are other public roads. The Order route and the rest of Shingle Hall Road are coloured pink indicating they are included in the sale. The Ordnance Survey (OS) parcel number for most of the Order route and Shingle Hall Road is 163 which is listed in the Catalogue as a grass road. The very northern end of the Order route is shown as Parcel 147 and listed as a grass lane.
4. The Order route is included in Lot 5, Shingle Hall Farm, in the Sale of Takeleys Farm 1977. It is described as a track with an area of 0.54 acres. Lot 5 is sold subject to rights of way over the track along the northeast side of it as contained in 1964 and 1976 conveyances. Shingle Hall Road is not included in the sale.

*Finance Act Maps*

1. Most of the Order route is shown as excluded from the surrounding parcels on the working copy of the Finance Act map. However, just north of Shingle Hall, pencilled along the Order route it states, ‘lane to be included in 1702’ and braces across it to the adjoining land suggest the Order route is part of that parcel. The very northern end of the Order route, Servers Green, and Epping Long Green are shown coloured blue as part of parcel 201. Shingle Hall Road is also excluded from the surrounding parcels, and braces here indicates it is not part of the adjoining parcels.
2. Most of the Order route also appears to be excluded from the surrounding parcels on the final map held at the National Archives with only the very northern end shown included in parcel 201.
3. In the valuation book, 1702 is listed as Takeleys Farm which is part of Copped Hall Estate. There is a deduction of £275 for public rights of way (PROW) but the valuation book does not indicate which rights of way are referred to. An extract of the valuation book for parcel 201 is not before me.
4. An unenclosed road through Rye Hill Common is excluded from the common on the Finance Act map. The continuation of the Order route across Severs Green to Epping Long Green is not excluded from the common.
5. The Finance Act 1910 imposed a tax on the increase in land value, which was payable when the land changed hands. Maps were produced to show taxable land following a survey by the Board of Inland Revenue. It was a criminal offence to make false statements to reduce tax payments. The existence of PROW over land reduced its value and the liability for tax so were recorded in the survey. The exclusion of a route from the adjoining hereditaments could indicate public rights which were more likely to be at least bridleway status. However, it could also be argued that private rights had the same effect on the land.

*Highway Records*

1. On the 1906 County Road Map (CRM), the Order route and Shingle Hall Road are shown as part of a continuous route between Upland Road and Epping Long Green. It is shown with double solid edges and the key indicates it is an ‘other road’. Other public and private roads are also shown in this way. ECC only maintained major roads at this time and the Order route is not shown as a route they were responsible for.
2. The Local Government Act 1929 transferred responsibility for unclassified publicly maintainable roads from Rural District Councils to County Councils. Handover maps were produced to show which roads were transferred. The 1930 CRM is based on the Handover maps sent to ECC. Routes coloured green and brown are maintainable at public expense. The Order route is not coloured. Shingle Hall Road is shown coloured brown and numbered 172 from Upland Road to the entrance to Marles Farm Cottage. Upland Road and Forest Way are also coloured brown and numbered 172.
3. All of Shingle Hall Road is shown in the current ECC Highway Records as a highway maintainable at public expense, but the Order route is not.

*Farm Survey Map 1941*

1. The Farm Survey shows the Order route within Takeleys and Marles Farm. Epping Long Green is excluded from the surrounding farm parcels as it is the whole of Severs Green and most public roads. However, part of Rye Hill Road is also included within Takeleys and Marles Farm and Dorrington's Farm.

*Definitive Map Records*

1. The Order route is not shown on the 1951/ 1952 Parish Survey map. Epping Footpath No. 21 (FP21) is shown. The card for FP21 describes it as ‘across arable field to lane (cart track), rather rough and joins path no. 18. Never used’. This suggests part of FP21 may run along the Order route rather than along the edge of the adjoining field.
2. The Order route is not shown on Draft DMS 1953, but FP21 was. Remarks in the statement indicate it was admitted under the Rights of Way Act 1932, but the documents admitting it are not available. There were no objections to the omission of the Order route from this map. Objections were made about the omission of other routes and additional routes were added to the Provisional DMS.
3. The Order route is not shown on the Provisional or 1960 DMS. Reviews were undertaken in January 1963 and 1971 revised DMSs were published in 1989 and 2002 but the Order route is not shown. Epping Long Green was added to the DMS as a BOAT following the 1971 review.

*Ordnance Survey Maps and Records*

1. OS Surveyors drawings dated 1799 show the Order route as part of a longer route with Shingle Hall Road from Upland Road to Servers Green with double solid edges. A route continues along the western boundary of the green to Epping Long Green.
2. The Order route is shown on Mudge’s 1805 first edition 1-inch map of South Essex as part of a longer route with Shingle Hall Road from Upland Road to Servers Green with double solid edges. At the southern end of Servers Green, it forks into two routes running along the eastern and western edges to Epping Long Green.
3. On the OS 1896 25-inch map, the Order route and Shingle Hall Road are shown as an enclosed track between Upland Road and Servers Green. There are double dashed lines along part of Shingle Hall Road which continue into Shingle Hall, but none along the Order route. A line is shown across the Order route where it meets Servers Green. A route is shown with double dashed lines continuing along the eastern boundary of the green towards Little Marles Farm and then across the green in a north westerly direction to Epping Long Green. FP21 is shown heading south from Servers Green by double dashed lines running alongside the western edge of the enclosed track and then forks off in a south westerly direction across a field about two-thirds of the way along the track. The OS 1870s 25-inch is similar, the only difference being that the double dashed lines in Shingle Hall Road now continue along the Order route to Servers Green and trees are shown along the edges of the track. The OS 1920s New Series map is the same as the 1896 map.
4. The New Popular Edition OS map of 1946 shows the Order route and Shingle Hall Road with double solid edges between Servers Green and Upland Road. The key indicates it is a minor road. FP21 is also shown to the side with a single dashed line.
5. A 1950s OS map of Greater London shows the Order route and Shingle Hall Road as a continuous route between Upland Road and Epping Long Green. The key indicates it is an unmetalled road.

*Commercial Maps*

1. Eyre’s Survey of the Parish of Epping 1751 shows the Order route coloured brown as are other public roads. Epping Long Green, a recorded byway open to all traffic, is uncoloured. However, some of the field boundaries are also coloured brown and other field boundaries and tracks appear to be coloured yellow. There is no key to indicate what the colouring shows.
2. On Chapman and Andre’s Map of Essex 1777, the Order route is shown as part of a longer route with Shingle Hall Road from Upland Road to Servers Green with double solid edges. There is a line across it where it meets Servers Green which could indicate a gate, the start of the green or a change in ownership. Other public roads are shown in the same way but so is the road to Marles Farm which is not considered to be a public road.
3. Cruchleys Road and Railway Map of Essex circa 1885 shows the Order route and Shingle Hall Road as part of a continuous route between Epping Long Green and Upland Road in the same way as other public roads.
4. Cary’s map of Essex 1887 shows a route similar to the Order route with double solid edges. Other public roads are shown in the same way.
5. On Bartholomew’s map of 1919-24 the Order route and Shingle Hall Road are shown as part of a continuous route between Epping Long Green and Upland Road. They are uncoloured and the key indicates it is ‘inferior and not recommended for cyclists’. Epping Long Green is also shown in the same way as the Order route, as are several cul-de-sac routes which end at farms or properties. Footpaths and bridleways are shown with dashed lines.

*Aerial Photographs*

1. Most of the Order route is shown on the 1947 aerial photograph and part of the western boundary appears to be hedged. A worn line can be seen along the line of FP21.
2. On the 1960, 1970 and 1981 aerial photographs the Order route is visible as a clear track and there do not appear to be any gates or obstructions across it. There do not appear to be any hedges alongside the track in 1960 or 1970 but on the 1981 photograph, there appears to be a hedge along part of the western boundary. On the 1960 and 1981 photographs there appears to be a worn line corresponding with FP21 alongside the track, but the cross-field section is not visible. The Order route is still visible on the 1990 aerial photograph, although it is less defined than Shingle Hall Road to the south and the tracks to properties at the northern end.
3. The Order route is visible on the 2000 and 2010 aerial photographs with a surfaced track and verges to the sides. There do not appear to be any gates or obstructions across it. A line of trees has been planted along the eastern boundary by 2010 and there appear to be hedges along some parts of the western boundary.

*Guideposts*

1. A copy of Chapman and Andre’s map is marked up with the location of guideposts shown on the 1898 OS map. There is a guidepost at the junction of Upland Road and Shingle Hall Road and another at the western end of Epping Long Green, but these are no longer present. Other guideposts are also marked in the wider area. There is no evidence before me to show the destinations on the guideposts.
2. The Highways Act 1697 required surveyors of highways to erect a direction post or stone at cross highways. Later Highways Acts required guideposts to be set up where highways meet for the convenience of travellers, with the name of the next market town, village, or other place.

*Witness Statements*

1. Witness statements from residents, farmworkers, landowners, and a Forest Constable refer to Private Road signs and keep-out signs at the southern end of the Order route. The earliest memory of these signs is from the 1950s. Witnesses also recall gates across the Order route which have generally been kept closed. Some witnesses recall use by walkers, but no one remembers horses using the Order route.

*Conclusions on the documentary evidence*

1. The commercial and OS maps provide evidence of the physical existence of the Order route from 1751. It is largely shown as a continuation of Shingle Hall Road and in the same manner as other minor public roads. However, many of the maps also show private roads in the same way. Furthermore, since the late 19th Century, OS maps have carried a disclaimer that tracks and paths shown provide no evidence of the existence of public rights.
2. Commercial maps were produced for travellers and there would have been little point in showing a road if the public did not have a right to use it. However, I need to assess the documents before me to determine how much weight to give them. I consider the commercial and OS maps to be suggestive of public rights of at least bridleway status, but there are also private routes shown in the same way as the Order route on most of the maps. This reduces their evidential value.
3. The Order route is shown in the same way as other public roads on the 1868 Estate plan and the 1869 Sale plan and was not part of the Copped Hall Estate. This could suggest it was considered to be a public road, but there may have been other reasons for showing it. I also note that there are cul-de-sac routes to fields or farms shown on the Sale plan which are more likely to have been private.
4. Later Sales Catalogues and a Farm Survey include the Order route within private ownership suggesting it was private, not public. One refers to a right of way but as it references conveyances, these are likely to have been private rights to other properties. I consider the Estate plans, Sales documents, and Farm Survey to be more suggestive of private rights.
5. I consider the listing of the Order route in private ownership when general roads were listed under the heading wastes suggests the Order route was not part of the public road network.
6. The Order route is largely excluded from the surrounding parcels on the 1910 Finance Act map which could suggest public vehicular rights. However, notes and bracing on the working copy of the map indicate that it was to be included within Parcel 1702. This brings into question the Order route’s exclusion from the surrounding parcel, and I consider it reduces the weight I can give to the Finance Act evidence. Part of the Order route and its continuation over Servers Green are included in Parcel 201. The continuation across Servers Green is also shown differently to another unenclosed route over a different common. I do not consider the Finance Act map provides any indication of public vehicular rights across Servers Green. I do not consider it is possible to make conclusions about the existence of public rights of their status for the Order route.
7. The Order route is not shown as maintainable at public expense in the highway records and is not shown as a right of way in the Definitive Map records. I consider these records do not provide any evidence of public rights over the Order route.
8. The guidepost at the junction of Shingle Hall Road and Upland Road, suggests public vehicular rights along Shingle Hall Road, but this is not in dispute. However, without knowing what was on the guidepost, it is not possible to determine if these rights ended at Shingle Hall or continued along the Order route to Servers Green or another destination. There is also no guidepost shown on Epping Long Green to direct travellers, which would have been required under the relevant Highways Acts if a public highway continued across Severs Green.
9. The aerial photographs provide evidence of the physical existence of the Order route. However, they do not provide any evidence as to who used the Order route or how it was used. I do not consider they provide any evidence to support public rights over the Order route.
10. Witnesses recall seeing some walkers using the Order route but not horses. Furthermore, there is evidence of notices stating the road was private and ‘keep out’ from the 1950s. There is no user evidence before me to show use of the Order route by the public.
11. I must consider the evidence before me as a whole, weighing up the evidential value of each document accordingly. A consistent depiction of the appeal route over many years can be a positive indication of status. I need to consider if there is synergy in the documents that point, on the balance of probabilities, to the appeal route having public vehicular rights.
12. The evidence before me is finely balanced. Some documents are suggestive of public rights at a higher status than footpath, but others are more suggestive of private rights. I do not consider the four maps which pre-date the Tithe map, to be sufficient on their own to show public rights over the Order route. The Tithe map and apportionment indicates the Order route was a private road and not part of the public road network. The Finance Act map suggests public rights, but the working copy also indicates it was part of the adjoining parcel bringing into question its reliability. Later sale plans show there were private rights over the Order route. Overall, I do not consider there is sufficient evidence, on the balance of probabilities, to show public rights over the Order route or across Servers Green. As I do not consider there to be sufficient evidence of public rights, I do not need to consider the width of the Order route.

Conclusions

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

Formal Decision

1. I do not confirm the Order.

Claire Tregembo

INSPECTOR

**Order Map**

****