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| **Appeal Decision** |
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| **by Susan Doran BA Hons MIPROW** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 06 March 2025** |

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| **Appeal Ref: ROW/3338161** |
| * This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Essex County Council not to make an Order under Section 53(2) of that Act.
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| * The Application dated 24 September 2019 was refused by Essex County Council on 9 January 2024.
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| * The Appellant claims that the appeal route, Footpaths 111 and 31 Brentwood should be upgraded to a Restricted Byway and a connecting length of Restricted Byway at Great Warley, Brentwood be added to the Definitive Map and Statement.
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| **Summary of Decision: The appeal is allowed in part** |
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Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under section 53(5) and paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 (‘the 1981 Act’).
2. I have not visited the site, but I am satisfied I can make my decision without the need to do so.
3. The appeal concerns an application made on behalf of the Essex Bridleways Association (‘the Appellant’).

Main issues

1. The application was made under section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement (‘DMS’) under continuous review, and to modify them upon the occurrence of specific events cited in section 53(3).
2. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic.
3. As made clear in the High Court in the case of *Norton and Bagshaw* (R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994]),this involves two tests:

 **Test A.** Does a right of way subsist on a balance of probabilities?

**Test B.** Is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

1. In relation to Test B, the Court of Appeal recognised in the *Emery* case (R v Secretary of State for Wales ex parte Emery [1998]) that there may be instances where conflicting evidence was presented at the Schedule 14 stage. Roche LJ held that *"…The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry."*
2. Section 53(3)(c)(ii) of the 1981 Act specifies that an order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description.
3. The evidence adduced is documentary. Section 32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document, which is tendered in evidence, giving it such weight as is appropriate, before determining whether a way has been dedicated as a highway.
4. The Appellant’s grounds of appeal are that the Council has not given the correct weight to the Inclosure records; the application and appeal turn on a proper construction of the Local Inclosure Act, the 1801 General Inclosure Act (‘the 1801 Act’) and the Inclosure Award and Plan. The interpretation of the inclosure documents taken together with the other historical evidence then provides a compelling case for making the order.

**Reasons**

1. The appeal route forms a continuous link between Great Warley Street and Warley Gap comprising, from the south, part of Footpath 111 from its junction with Great Warley Street to a point where it turns northeast towards Footpath 32, continuing in a north westerly direction to meet Footpath 31 south west of the old site of Barrack Reservoir, then east to where Footpath 31 terminates at Warley Gap.

***Documentary evidence***

*County and other Maps*

1. The earliest document available, Chapman and Andre’s 1777 map, shows a short cul-de-sac section at the southern end of the appeal route from Great Warley Street. At the appeal route’s northern end, a road runs directly between Warley Gap and Great Warley Street, part of which coincides generally with the appeal route. At its eastern end is a solid line probably indicating a gate or barrier before the route meets Warley Common.However, there is no connection between the two sections depicted. There is no key, but the map provides good evidence of the physical existence of sections of the appeal route at the time, but not their status.
2. A c1840 Map of roads 5 miles around Brentwood shows the appeal route as a through route. There is no key to the map.
3. Bartholomew’s half-inch map of 1919-24 depicts the appeal route as an uncoloured road (rather than as a footpath or bridleway) identified in the contemporary key as “inferior and not to be recommended”. The map was based on an earlier Ordnance Survey (’OS’) map and shows the appeal route as continuous, although the OS map of 1898 shows that prior to the publication of Bartholomew’s map the central section had disappeared as a feature.

*Ordnance Survey records*

1. The appeal route’s first depiction on OS records as an unobstructed through route came 22 years after Chapman and Andre’s map (paragraph 12). A surveyor’s drawing dated 1799 shows at its northern end a distinct ‘dog leg’ in the route’s alignment (consistent with the appeal route), beyond which a road heads northwest to and beyond a large enclosure (in the location of an area named The Wabbings shown on the later Great Warley Inclosure and Tithe records). There is no continuation west to Great Warley Street as shown in 1777. It is similarly depicted in the OS First Series Sheet of 1805 as an unobstructed route running between defined boundaries, seemingly forming part of the road network, including the link west to Great Warley Street and northwards to The Wabbings.
2. It is shown as a bounded and unobstructed feature on the 1866 OS map with ‘Barrack Reservoir’ and ‘Engine House’ shown adjacent to it. A well is marked at its eastern end. The southern section is annotated ‘Wabbings Lane’. A named route can be suggestive of it being public. The name may refer to a route between Great Warley Street and The Wabbings.
3. The 25-inch 1875 OS map shows the southern end of the appeal route coloured, which arguably could indicate a road, and again named ‘Wabbings Lane’. It is numbered 229, but the OS Book of Reference gives no description.
4. The continuation of the appeal route north and eastwards (on the adjoining map sheet) is uncoloured and numbered 54 which the OS Book of Reference describes as ‘occupation road’. It joins Warley Gap which is a coloured road. The appellant considers the description ‘occupation road’, which suggests a private way for the use of adjacent landowners, may relate to nearby Warley Barracks, located on Warley Common to the north, but argue the appeal route predated its construction in the 1860s and that of the Engine House at Barrack Reservoir.
5. However, it seems the Barracks existed well before the 1860s. The Council’s research indicates a seasonal military camp had been present on the Common from 1742. This was subsequently established as a permanent barracks in 1804, which coincided with the Napoleonic Wars (1803-1815). It had a significant cavalry contingent with space for some 2000 personnel and horses. Barrack Reservoir adjacent to the appeal route (where it heads east), as seen on the 1866 and 1875 OS map, it is suggested, may have been established to supply the Barracks. In 1842 the East India Company purchased the Barracks, and in addition to military personnel, family accommodation was provided. The Barracks was purchased by the War Office in 1861, becoming a depot for various regiments. Later OS mapping annotates the Reservoir as disused (1898). The Council considers the appeal route’s origins and use as a through route related to the Barracks, and therefore of private rather than public status.
6. The 1888 OS map shows the appeal route bounded on both sides, annotated Wabbings Lane, with Barrack Reservoir and Engine House depicted.
7. On the 1896 OS 1-inch map, Barrack Reservoir, whilst clearly an existing feature at this date (as evidenced above), is not shown. The same is true of the 1898 1-inch map. Both show the appeal route as a through route. However, the 1898 6-inch map shows the appeal route at its northern end from the east with a solid line where it leaves the highway then as a bounded feature terminating at Barrack Reservoir now annotated as disused, then continuing as a footpath directly west to Great Warley Street. From the south, the appeal route is a bounded track which then stops at a field boundary again with a solid line across it, with no connection shown to the Reservoir. A footpath leaves at this point heading north northwest.
8. The 1920/21 25-inch OS map (revised 1915) was used as the base map for the 1932 Act map, Parish Survey and First Definitive Map. As above, the central section of the appeal route is omitted, with either end depicted as on the 1898 map, although a second solid line appears across the southern track as it turns to the northwest.
9. These maps provide good evidence of the physical features in existence at the time of the surveys but are not considered to provide evidence of status. They have carried a disclaimer since the late 19th century as to the representation on the maps of a road, track or footpath not being evidence of the existence of a right of way, which is presumed to apply to earlier editions.

*Inclosure records*

1. The Appellant relies on the provisions of the 1801 Act together with the local Act and Award taken together with the totality of the evidence to support the modifications sought to the DMS.
2. The preamble to the Local Inclosure Act, the Great Warley Inclosure Act of 1838, refers to the 1801 Act with its provisions incorporated into the 1838 Act unless expressly excluded or overwritten by a contradictory provision in the Local Act.Section 8 of the 1801 Act gives the inclosure commissioners power to *“set out and appoint the publick Carriage Roads and Highways, through and over the Lands and Grounds intended to be divided, allotted, and inclosed…”*.
3. The Local Act provides that in setting out and appointing public carriage roads highways, bridle roads and footways, the Commissioners were authorised with the consent and written order of two Justices of the Peace to continue or discontinue such public carriage roads, highways, bridle roads and footways, through and over any of the old inclosed lands or grounds and to divert, turn or stop up any of them.
4. Several public carriage roads and some private roads were set out, but there is no reference to the appeal route. It is common ground between the Appellant and the Council that it is depicted on the 1843 Great Warley Inclosure map as a physical feature. There is a suggestion of a spur heading east at the parish boundary in the direction of the remainder of the appeal route, though it narrows considerably. A road also heads from here to The Wabbings. Unlike two other routes crossing the parish boundary the appeal route is not annotated with a named destination.
5. It also appears to be common ground that whatever status the appeal route enjoyed prior to the inclosure process, it continued to enjoy following that process. It is noted that two other routes leading from Great Warley Street and shown on the Award map close to the southern end of the appeal route are presently recorded as public roads. As such this would not rule out the same status applying to the appeal route. Indeed, it is the Appellants position that the appeal route was an existing public road which continued to be a public road in its existing course post-inclosure.

*Tithe records*

1. The appeal route is shown on the 1838 Great Warley Tithe Map between defined boundaries and with no tithe payable. It is depicted in a similar manner to the inclosure map (paragraph 27). There is a building marked at the location of the Engine House, though no indication of the Reservoir on this or on the Little Warley Tithe Map. The land parcel named The Wabbings to the north which is shown as a continuation of the appeal route in Great Warley is numbered 112 and is not assigned an owner or occupier.
2. The appellant believes the Little Warley Tithe Map, also 1838, depicts the appeal route’s eastern end in the same manner. However, numbered 43, the Apportionment describes it as “drift”, and names an owner and occupier. A solid line shown at the eastern end where the appeal route meets the Common would be consistent with a gate for stock management. Its description and depiction are inconsistent with the appeal route in this parish having the local reputation of a public road. The Barracks are depicted to the north on the Common.

*Finance Act records 1910*

1. Most of the appeal route from Great Warley Street up to the south-west corner of Barrack Reservoir is included within hereditament 495 with a deduction for public rights of way or user of £125. However, a short length is recorded under hereditament 1129 as waste land of the manor with a deduction of £275 for public rights of way or user, although other parcels of land are included within this. The northern end of the appeal route falls within hereditament 944 with a deduction of £30 for public rights of way or user.
2. This, the Council considers, is consistent with the appeal route enjoying public rights on foot. It could also be indicative of public bridleway rights, but it is unlikely to reflect public vehicular rights since the latter may be expected to be represented by the exclusion of a route from hereditaments.

*Definitive Map and other Highway Authority Records*

1. The Council’s 1906 Main Roads and Bridges map shows the appeal route in its entirety on the base mapping, although by this date the central section was missing as evidenced on OS mapping from 1896 (paragraph 21).
2. The County Road Map, 1929, also shows the whole of the appeal route on the base mapping. However, whilst the roads to which it connects are shown as publicly maintainable vehicular highways, it is not.
3. The 1932 County Surveyors Map was intended to record public rights of way within the County. It shows the appeal route’s northern section from Barrack Reservoir to Warley Gap as a footpath indicated by a dashed blue line. The Council comments it is possible the southern section was situated in an Urban District Council area, and thus one not required to provide such information.
4. The Parish Survey was carried out in 1951/2. There is no survey card for the appeal route comprising Footpath 111 (from Great Warley Street). Other than a description of the northern end of the appeal route (Footpath 31), there is no other information available. Both routes were recorded in the DMS as footpaths, with no connecting link between them, and this does not appear to have been disputed.
5. A First Review of the DMS was carried out in 1963, and published in 1970, and a Special Review was conducted in 1971 with a Draft Map published in 1971 before the review was abandoned. No changes to the status of Footpaths 31 and 111 were recorded, and there have been none on the current DMS published in 2002.

*Other records*

1. A history of Great Warley mentions the lanes around Great Warley Street in existence in the 1800s. Wabbings Lane and a road running from Little Warley to Great Warley Street are referred to. The Appellant contends these routes merged over time to form the appeal route. The Council does not support this view as there is no evidence of a ‘merging’ or of any legal event to divert a route(s).
2. Land Registry records indicate the appeal route is unregistered except for the western and southern parts. The Council comments the land was included in hereditament 944 in the Finance Act records and may have been excluded when the land was fragmented. However, no evidence to this effect has been submitted.
3. Aerial photographs dating between 1960 and 2010 show the appeal route. The earliest shows a track between a double hedge feature at the eastern end of Footpath 31 approaching the former Barracks Reservoir. To the west it is bounded by a single hedge line. A dotted tree line may indicate the route’s continuation. Towards Great Warley Street the route follows between a double hedge feature. Collectively, the Council concluded the photographs showed no evidence of a through route capable of accommodating vehicular traffic, past or present.

***Analysis***

1. A key consideration is the status enjoyed by the appeal route in Great Warley prior to the inclosure process. Whilst the Commissioners were empowered to stop up or divert pre-existing ways, there is no evidence of this for the appeal route. Accordingly, it must have ‘continued’, retaining its pre-existing status, though it is not clear what this status was. Early county and OS mapping show sections of it or show it connecting with a wider network of ways to the north, east or west over time. It is possible that the appeal route as a whole carried pedestrian, equestrian or vehicular rights, given its depiction as a bounded feature and that other ways similarly shown are public highways today, although unlike other ways it was not annotated with an onward destination. None of the maps provided assist beyond confirming its physical existence as a feature either in its entirety or in part.
2. The appeal route’s annotation in later OS records as ‘Wabbings Lane’ is suggestive of a destination to the north rather than east along the appeal route. Moreover, the recording of its eastern length in Little Warley as an ‘occupation road’ lends support to the Council’s view that it formed a private way associated with the common and / or the Barracks to the north. OS mapping was drawn up in the first instance for military purposes and the need to move troops. Accordingly, the coincidence of the appeal route’s first depiction as a continuous way in the late 18th / early 19th centuries in OS mapping and the nearby Barracks during the time of the Napoleonic Wars may have been important.
3. Similarly, the Tithe records differentiate the appeal route by parish. Those for Great Warley indicate a non tithed way, and for Little Warley a ‘drift’ road with an owner and occupier given. This description together with that of an ‘occupation road’ is inconsistent with this part of the appeal route being a public road. Moreover, it suggests the appeal route as a whole did not enjoy the same status. In addition, later mapping indicates the central section of the appeal route disappeared as a physical feature. Overall, these records are consistent in depicting the physical existence of the appeal route, or parts of it, and of its differing reputation.
4. The later Finance Act records are also inconsistent with a vehicular way, except for a short section at the appeal route’s southern end, but with deductions claimed for the remainder which could indicate the existence of a public footpath or bridleway.
5. That the appeal route is shown as a cul-de-sac at either end with the central section un-mapped for a considerable period of time suggests, if public, it was of limited significance when a through route.Later highways records indicate the northern section of the appeal route enjoyed footpath status, and public footpaths were recorded during the Definitive Map process, though not the central section.
6. The evidence is conflicting. However, on balance I am not satisfied that there is sufficient evidence to support the upgrading of Footpath 31 to a restricted byway. There is some evidence to suggest the southern section of the appeal route enjoys higher public rights. However, on balance I am not satisfied that there is sufficient evidence to support the upgrading of Footpath 111 to a restricted byway. As regards the ‘missing link’, I conclude Test B has been met and it is reasonable to allege the existence of a public right of way between the two footpaths which in view of the above and having regard to the tests set out (paragraphs 5-7), is reasonable to conclude enjoys at least public rights on foot.

**Other** **matters**

1. A range of legal cases were submitted by the Appellant but were neither referred to or seemingly relied on in support of the appeal.

**Conclusion**

1. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed in part, insofar as the addition of a public footpath between Footpaths 111 and 31 Brentwood.

Formal Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, the Essex County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act within 3 months of the date of this decision to modify the Essex County Council Definitive Map and Statement by adding a Footpath as shown on the plan attached to the application dated 24 September 2019 between Footpaths 111 and 31 Brentwood. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

S Doran

**Inspector**