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## Order Decision

Inquiry commenced 5 March 2024

Site visit 2 March 2024

**by Nigel Farthing LLB**

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

**Decision date: 24 April 2024**

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### Order Ref: ROW/3316971

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and is known as the Essex County Council Public Path Diversion Order 2022 Footpath 25 Castle Hedingham in the District of Braintree.
- The Order is dated 21 July 2022 and proposes to divert the public right of way as shown on the Order Map and described in the Order Schedule.
- There were 35 objections outstanding when Essex County Council ('the 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

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#### Procedural Matters

1. I undertook an unaccompanied site inspection during the early afternoon of Saturday 2 March 2022.
2. I held an inquiry at Gosfield Village Hall, Church Road, Gosfield on 5 and 6 March 2024. At the close of the inquiry, it was agreed that no further site visit was necessary.
3. In writing this decision I have found it convenient to refer to points A, B and C marked on the Order Map. I therefore attach a copy of this map.
4. The Order was made by the Council under the 1980 Act, section 119. It proposes to stop up that section of footpath 25 currently recorded on the Definitive Map and Statement (DMS) between points A and B on the Order Map (the DMS route) and to create a public footpath between the points A, C and B as shown by a broken line on the Order Map (the proposed route).

#### The Legal Framework

5. Section 119(6) of the 1980 Act involves three separate tests for an Order to be confirmed. These are;

Test 1: whether it is expedient in the interests of the landowner, occupier, or the public for the paths to be diverted. This is subject to any altered point of termination of the path being substantially as convenient to the public.

Test 2: whether the proposed diversion is substantially less convenient to the public.

Test 3: whether it is expedient to confirm the Order having regard to the effect which; (a) the diversion would have on public enjoyment of the path as a whole, (b)

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the coming into operation of the Order would have as respects other land served by the existing public rights of way, and (c) any new public rights of way created by the Order would have as respects the land over which the rights are so created and any land held with it.

6. In determining whether to confirm the Order at Test 3 stage, (a)-(c) are mandatory factors. On (b) and (c) of Test 3, the statutory provisions for compensation for diminution in value or disturbance to the enjoyment of the land affected by the new path must be taken into account, where applicable. Other relevant factors are not excluded from consideration and could include those pointing in favour of confirmation.

### **Main Issues**

7. I must be satisfied that the Order meets the criteria set out in the legal framework above, specifically;
  - That in the interests of the landowner it is expedient for the Order to be confirmed.
  - That the termination points are on the same, or a connected highway, and are substantially as convenient to the public.
  - That the diverted route is not substantially less convenient to the public.
  - That having regard to the issues detailed above, and all other matters, including the relevant Rights of Way Improvement Plan ("ROWIP"), it is expedient to confirm the Order.
8. To assist in the interpretation of these criteria, I have had regard to the judgement in the case of *R (Young) v Secretary of State for Environment, Food and Rural Affairs* (QBD) [2002] EWHC 119 (Admin) ('*Young*') and *The Open Spaces Society v SSEFRA* [2021] EWCA Civ 241.

### **Site visit**

9. Both the DMS and proposed routes lie within the same parcel of land which is known as Scotch Pasture (the field). This is roughly oblong in shape with a length of approximately 350 metres and a width of approximately 60 metres. The south-eastern boundary (from the corner east of A to C) is fenced and beyond it lies a wooded area within the grounds of Hedingham Castle. The north-western boundary (A to B) is not fenced but along the central section there are some trees and bushes forming a hedge. There is a post and wire fence (the fence) approximately 100 metres south-west of point B which divides the field into two compartments which are in separate ownership.
10. The field slopes down from Rosemary Lane. On the alignment of the DMS route the slope is of roughly even gradient for its full length. On the proposed alignment the section from A towards C is relatively level for approximately the first two thirds of its length before rising steeply to point C, from where there is a more gentle gradient to B.

11. At B there is a gate leading from Rosemary Lane. There is also a gate in the fence approximately on the DMS alignment of the Order route. At B there are the remains of a gate structure but otherwise the bottom end of the field is open and unenclosed.
12. The field is rough grass. At the time of my visit there were no livestock within either compartment.
13. On the day of my visit, it had been raining heavily following a prolonged wet spell and as a result the ground was saturated. A worn route between A and B was readily apparent which was, for the most part, approximately 2 – 2.5 metres wide. In especially boggy sections it was obvious that users had deviated in a search for drier ground and consequently the worn line was wider. Between Rosemary Lane and the fence, the worn route appeared to broadly conform to the DMS depiction of FP 25. Beyond the fence the worn line departs from the DMS alignment, running further into the field before returning to the DMS alignment before A is reached. I shall refer to this as the walked route. The extent of divergence varied but I estimate that at its widest was possibly some 10 to 15 metres from the DMS route.

## **Reasons**

### ***Test 1. Whether it is expedient in the interests of the landowner that the path or way be diverted***

14. The diversion order was requested by the landowner. At the heart of the reasons for making the application was a concern about the effects of trespass by people using the footpath and their dogs.
15. The landowner's evidence was that some users of the footpath strayed, sometimes significantly, and had used Scotch Meadow for wider recreational purposes. He was particularly concerned about dogs which were either not on leads or not under control and which roamed the field (and beyond) at will. The field is used for growing hay and the landowner explained that dog faeces would contaminate the crop. The owner of the smaller compartment, who uses it for grazing with sheep at certain times of the year, gave evidence about actual and potential conflict between dogs and livestock.
16. The landowner explained that he had spoken with various users in an effort to ensure that they kept to the footpath and kept their dogs under control. It was clear from the users' evidence that his efforts, which I accept may have been clumsy, had not been well received.
17. The landowner has concluded that to prevent issues arising in the future he should enclose the public footpath with fencing on both sides. To fence the path on the DMS or the walked alignment would have the effect of dividing his holding into two compartments. Whilst he acknowledged it would be possible to have gates in the fencing, he was not convinced this would be satisfactory and his solution is to divert the path to the proposed route, which is at the edge of the field, and to fence it on the inside providing a usable width of 2 metres.
18. The advantages to the landowner of the diversion are that it would enable him to limit significantly the opportunity for trespass by people or dogs, and to do so in a manner which would not restrict his ability to manage agricultural operations on his land.

19. Evidence was given by the objectors about other ways in which the landowner could address his concerns without having to divert the path. I accept that other options are available, but I am not required to make a qualitative judgement about the best solution. When considering the first test, I am only required to assess whether the diversion is in the interests of the landowner. The other affected landowner supports the application and gave evidence at the inquiry. For the reasons given I find that in the interests of the landowner it is expedient for the Order to be confirmed.

***Whether the altered termination points of the highway will be substantially as convenient to the public.***

20. The proposed diversion uses the same termination points as the DMS route.

***Test 2. Whether the path will be substantially less convenient to the public as a consequence of the diversion***

21. Guided by the judgement in *Young* I need to consider whether, in terms of convenience, matters such as the length of the diverted path, the difficulty of walking it and its purpose will render the path substantially less convenient to the public.
22. I have referred to the fact that the route currently walked by the public, as evidenced by the worn state of the ground, is not on the DMS alignment. This Order seeks to divert the DMS route, and it is that route I must use as the comparator when considering whether the proposed route is substantially less convenient. The significant difference between the DMS route and the walked route is that the DMS route runs alongside the remaining section of hedge and for that section is effectively a headland path. The remainder of the DMS route, like the walked route, is across the open field.

Length

23. The DMS route is 353 metres in length. The proposed route is longer, but there was disagreement about how much longer. The calculations range from 22 metres to 44 metres. The Council consider that a change in distance of up to + or – 50% would generally be considered insufficient to render the change substantially less convenient. In contrast, one objector considered any additional length should be considered an inconvenience. In my judgement neither position represents a reasonable approach to the issue, and it is necessary to consider the change in length in the context of the route as a whole.
24. In this case the existing route is mainly used for recreational purposes and the modest increase in distance is, in my opinion, not less convenient, let alone substantially less convenient.

Topography

25. I have described the general topography of the field. In the main the field slopes from B to A and from the north-west to the south-east; in other words, from top to bottom and from side to side.

26. The slope from A to B is of relatively even gradient and, whilst representing a 'pull' for an average walker, it is manageable relatively comfortably even for an older person.
27. The current topography of the proposed route is rather different to the DMS route. From A to the fence the land is reasonably level, but from the fence to C it rises quite steeply with the steepest gradient involving a rise of between 2 and 2.5 metres over a distance of approximately 5.5 metres which, it was eventually agreed, is a gradient of 24.4 degrees. When I walked the proposed route from A to C I found this section to be demanding, but short. I do not consider it would cause any problem for a fit younger person, but an older person, or anyone with limited mobility, would find this difficult, and for some it may be more than they could manage.
28. Walking the proposed route the other way, from B to C to A, can pose greater difficulty. Walking down the steep slope is uncomfortable at best and when wet and slippery is potentially dangerous, something which the Applicant recognised. For these reasons I have no difficulty in finding that the proposed route, as it stands, is substantially less convenient than the existing route. However, the Applicant invites me to consider matters in the light of works he proposes to carry out if the Order is to be confirmed.
29. The landowner explained that he is the owner of a civil engineering company and has experience in projects involving the reprofiling of land and the movement of soil. He outlined works that he would undertake to the proposed route to ameliorate the problem of the gradient between points C and B. He felt that he had the necessary technical expertise to carry out the works and had not sought external advice and did not consider it necessary, He understood that planning consent would not be required because, in his opinion, the works would be an agricultural operation for the better use and management of the land. He was confident that a gradient of 1:16 could be achieved (although he accepted this would require work to both sections B to C and from C towards A). He understands this gradient would be acceptable to the Council and considers it would be accessible to wheelchair users. He provided no technical drawings detailing how the works would be carried out, or what the impact would be on the character of the field.
30. One of the objectors, who is a chartered surveyor, gave evidence that, in his opinion, the works proposed by the Applicant were technically unachievable, or would involve work of such magnitude as to significantly alter the nature and character of the field. It was his view that the works would require planning consent, and given the proximity to Hedingham Castle, would require an archaeological survey and the involvement of Natural England.
31. In my judgement the evidence given by the Applicant in relation to the proposed works was lacking in sufficient detail for me to be satisfied that they would produce a route not substantially less convenient than the existing route. If I am being asked to provide for the Order to become effective on the completion of certain works, I would have expected to be provided with detailed drawings showing the nature of the works and a visualisation of the completed project. Without such detail I cannot specify, other than in very general terms, what has to be achieved before the creation Order would become effective. I would also have expected clear evidence about planning and other requirements and some comfort that relevant consents

would be forthcoming. Instead, the proposals were vague with no clear plan of work for what is a significant landscaping project. Instead, I was being asked to rely upon the assurances of the Applicant that the works could be undertaken satisfactorily and lawfully even though the viability of the scheme was challenged by a competent professional. Consequently, I do not have confidence that the suggested works can be achieved, or that if they could, that the outcome would be to produce a satisfactory route without significant change to the character of the land.

32. In the absence of a clear scheme of works, I have to compare the topography of the proposed route as it is currently with that of the existing route. For the reasons I have given I conclude that the proposed route would be substantially less convenient to the public.

#### Width

33. The DMS does not record a width for FP 25. The width of the existing path is relevant when considering the relative convenience of the proposed route. The Order provides for the proposed route to have a width of 2 metres, but with the expectation that the usable width would be set back 0.5 metres from the crown of the ditch, giving an effective width of 2.5 metres.
34. The objectors argue that the width of the existing path is that which has been ordinarily used by the public, and that this is in excess of 5 metres. I accept that this is a correct statement of the relevant legal principles where reliance is placed upon usage, but it is subject to a requirement that such use has been by the public for a period of at least twenty years without interruption and that the use has been undertaken as of right. Furthermore, any presumption of dedication arising from such use could be rebutted if there is evidence that during the twenty-year period the landowner has demonstrated a lack of intention to dedicate. Alternatively, the width could be established at common law.
35. The evidence given at the inquiry was as to use of the walked route and not the DMS route. Accordingly, there is no evidence before me as to the extent and manner of use of the DMS route.
36. For these reasons there is insufficient evidence before me to make a judgement as to the legal width of the DMS route. I accept that there is currently some evidence of use of the walked route to a width in excess of 2 metres, but that does not help me in relation to the DMS route. Furthermore, I have no evidence of the historic position, and I am conscious that the current state of the walked route will be affected by the very wet weather and the current boggy nature of the ground.
37. In comparing the relative convenience of the DMS and proposed routes in terms of width I must take into account the evidence of the landowner that if the Order is not confirmed he will fence either side of the DMS route (save where it is enclosed on one side by the hedge). Thus, I must compare the DMS route assuming it is fenced on both sides with the proposed route fenced to a usable width of 2 metres. A benefit of fencing the route would be that the existing gates could be dispensed with, making use of the route more convenient to all users.
38. I recognise that it may be established that the true width of the DMS route is more than two metres. The test I have to apply is whether the proposed route is substantially less convenient than the existing. In my judgement a usable width of 2

metres is a suitable width for a rural path and even if it should be proved that this is less than the existing route, I do not consider this would represent a substantial inconvenience to the public. I acknowledge that a reduced width may impact upon enjoyment of the route, but that falls to be considered under test 3.

#### Surface

39. The objectors raised concerns about the surface of the proposed route, suggesting that as it is lower lying than the DMS route it is likely to become wet and boggy. The Applicant countered that the proximity of the proposed route to a ditch would improve drainage and the proximity to trees would result in the tree roots taking moisture from the ground.
40. On my visit the walked route was very wet underfoot, no doubt in part due to regular footfall. I will assume that the DMS route would be similar if being used. In contrast the proposed route was relatively dry, although there were no signs that it had been used. I accept that with regular use the surface of the proposed route would deteriorate. However, the test I am required to apply is a relative one and given the very wet condition of the walked route, I do not consider that the proposed route would be substantially less convenient by reason of the surface.

#### Trees

41. The objectors expressed concerns about the fact that the proposed route runs alongside woodland, and this would create a risk to users from falling trees and branches. The Applicant stated that he would seek to maintain any overhanging branches (the trees are not on his land) to mitigate any risk.
42. I accept that the presence of trees along one side of the proposed path creates a degree of risk that does not exist with the walked route. However, the DMS route, which is the appropriate comparator, does run alongside a hedge which includes some trees. On the basis that the proposed route has a longer exposure to woodland, I must recognise that there is a higher risk than from the DMS route, but I do not accept that this is significant nor that it will, of itself, render the proposed route substantially less convenient to the public.

#### Safety

43. Various objectors were concerned that the proximity of the proposed route to woodland gave rise to issues of personal safety, providing, as they consider it does, a place for concealment of persons intent on crime. Having heard evidence from various individuals on this subject, I accept it is a genuine cause for concern. However, the hedge along the DMS route offers similar scope for concealment, albeit over a shorter distance.
44. Concern was also expressed about the safety implications of users being confined within an enclosed route with no easy means of escape. Whilst I understand those concerns, the situation would be no different to that which would pertain if the DMS route were fenced in as the landowner has indicated will happen.
45. Taking account of all relevant factors, I am not persuaded that this element, of itself, would be sufficient to lead me to a conclusion that the proposed route is substantially less convenient.

## Conclusions on Test 2

46. Overall, on the question of whether the diversion would be substantially less convenient to the public, I consider that whilst in many ways the diverted route would not be less convenient, in the absence of a satisfactory solution to the problem of the gradient of the section B to C, this remains a significant factor which, on its own, leads me to the conclusion that the proposed route would be significantly less convenient to the public.
47. Having concluded that the proposed route would be substantially less convenient to the public it is not open to me to confirm the Order and thus not strictly necessary for me to consider Test 3. However, for the sake of completeness I deal with the relevant issues below.

### ***Test 3. Whether it is expedient to confirm the Order having regard to the effect which:***

- a. *the diversion would have on public enjoyment of the path as a whole*
48. The existing route is a very well used and much-loved path as demonstrated by the number of objectors and the passion they showed in their evidence. This was also reflected in the stance taken by Castle Hedingham Parish Council. The objectors estimate that there are up to 150 users per day and the landowner did not argue with this figure. Most of the use is for recreational purposes by local people, often with dogs. It is understandable that a path across an open grass field is a welcome contrast to an enclosed route or a headland path alongside a field in cultivation. The proximity of the field to the village of Castle Hedingham is undoubtedly a further attraction.
49. Various objectors spoke of the expansive views available from the existing route. This was not my experience. It is undoubtedly an attractive location with a sense of rurality despite its proximity to the village and the castle, However, the field is enclosed on one side by established woodland and for a significant section of the other side, by a hedge which includes mature trees. At the south-west end tall trees obscure longer views. Walking down from B a distant view over the Colne valley is available but this is quickly lost as one descends. Walking up the field from A to B the horizon is the top of the field. Accordingly, my sense was one of enclosure rather than of expansiveness.
50. One objector suggested that views of the castle are available from the existing route, but not from the proposed route. When walking the route, I looked carefully to see if the castle is visible but did not see it. It is possible that a limited view is available through the trees when they are not in leaf, but I did not see this and at no point is the castle structure visible above the tree line.
51. I accept that the views to be had from the two routes are slightly different. On the DMS route, walking from B to A the view over the Colne valley is available in the early stages, but thereafter the view to the right is constrained by the hedge, the view to the left is over the field (approximately 60 metres wide) to woodland and the view ahead is of trees. Walking in the same direction but on the proposed route, the initial views over the valley remain available. Heading from C to A the view to the left is into woodland with the opportunity to see the abundant flora and fauna close to. To the right the view is over the grass field to the hedge and lower down over

the adjoining field, which rises preventing more distant views. The view towards A is constrained by trees in the same way as it is from the DMS route.

52. Having regard to the foregoing, I am not persuaded that there is any material advantage in the available views from one route over the other. For some, the proximity of the proposed route to the woodland would be an attraction.
53. Other factors that may impact enjoyment include aspect, gradient, surface, width and safety, some of which have been discussed in relation to convenience.
54. Distilling the comments made in 35 objections, various statements of case and in oral evidence, my sense is that the feature most valued by the objectors is the open and unrestricted nature of the existing route. I recognise why this is appealing but I must also recognise that the right of the public is limited to a right of way on foot over the route recorded on the definitive map and that the landowner is entitled to enclose this route with fencing and has said that he will do so if the Order is not confirmed. In assessing relative enjoyment of the DMS and proposed routes I should do so on the basis that each is enclosed with fencing.
55. I accept that the fencing of the proposed route would render its use less enjoyable, but given the likely fencing of the DMS route, that will be the case whether or not the Order is confirmed. The removal of gates would however add to the convenience, and probably enjoyment of the route.
56. Objectors compared the unshaded nature of the existing walked route with the shade that will be cast by the trees alongside the proposed route. Photographs were produced showing the site of the proposed route in shade, and with frost lingering as a result.
57. The orientation of the proposed route is such that the sun rises behind the woodland causing the route to be in shade in the morning. I accept that on a frosty morning it is likely that any icy conditions may persist longer than on a route exposed to the morning sun. The hedge alongside the DMS route will cast a shadow over it later in the day whilst the proposed route enjoys the evening sun. Overall, the proposed route would probably receive less sun than the DMS route and it might be argued this will impair enjoyment, but I do not regard this to be a significant factor.
58. Safety concerns are twofold; first those relating to the surface of the route, and second issues relating to personal safety which have been covered under convenience. As for the surface, I have earlier concluded that there is no evidence that the surface of the proposed route will be any more wet and boggy than the existing route. I accept in freezing conditions the surface of the proposed route may stay frozen longer than the existing route, but I do not consider this a sufficiently regular occurrence to be material.
59. I have considered concerns about personal safety when discussing convenience where I concluded that safety issues on each route were similar such that I did not find the proposed route to be substantially less convenient.
60. I heard evidence from several objectors on the question of personal safety and I accept that for some users this is perceived to be a genuine concern which would impact their enjoyment of the route.

61. I have dealt at length with the issue of gradient, and for the same reasons I accept that the gradient of the proposed path, without reprofiling, would adversely impact enjoyment of the route.

*b. the effect of the coming into operation of the Order on land served by the existing public rights of way.*

62. The Order would have no effect on land served by the existing right of way.

*c. the effect of the new public right of way on the land over which it is created (or land held with it).*

63. The proposed route would be advantageous in terms of the beneficial agricultural use of the field as it would confine the public right of way to the margin of the field and allow the remainder to be used without the restrictions of a cross-field path.

#### *The expediency of confirming the Order*

64. In considering the expediency of confirming the Order I am required to take into account the mandatory considerations a. to c. above and the provisions of any relevant ROWIP. I am also entitled to take account of my conclusions in respect of Test 1. I am then required to balance these considerations in order to determine whether it is expedient for the Order to be confirmed.

65. I have been provided with relevant extracts from the Essex ROWIP. The relevant provisions are:-

- To improve accessibility on the public rights of way network
- To promote safety
- To promote improved health and quality of life through the use of the public rights of way network

These provisions align with the issues explored when considering matters of convenience and enjoyment.

66. Although I have concluded that it is in the interests of the landowner for the Order to be confirmed I have also recognised that there are other avenues available for the landowner to address his main concerns. In my judgement the concerns about the gradient of the proposed route, as matters of both convenience and enjoyment, are sufficient to outweigh the value to the landowner of diverting the path and for these reasons I would, if I were required to do so, find that it is not expedient to confirm the Order.

#### **Other Matters**

67. The Applicant outlined his proposals for creating access tunnels beneath the proposed route to facilitate animals passing between the Castle woodland and the field. The viability of these proposals was questioned by the Objectors. I do not consider it is a matter relevant to the convenience or enjoyment of the respective routes and is thus not a matter on which I am required to make a finding.

68. It was drawn to my attention that the existing route is part of a longer route designated as 'The Magna Carta Way' running from Castle Hedingham to Clare. Although the title suggests long historic provenance, I understand the route was

devised in 2015. Although the path has been in existence since at least the late nineteenth century I cannot attribute any significant weight or relevance to its historical character.

**Conclusions**

69. Having regard to these and all other matters I conclude that the Order should not be confirmed.

**Formal Decision**

70. I do not confirm the Order.

*Nigel Farthing*

Inspector

## **APPEARANCES**

### **Order Making Authority**

Mrs Baker who called:-

Mr J Botelho

### **Applicant**

Mr S Whipps

Holmes and Hills Solicitors

Who called:-

Mr D Collins

Mrs L Doe

Mr I Coward

### **Objectors**

Mr P Zollinger-Read

Representing numerous objectors

Who called:-

Mrs S Parker

Mr M Hume

Mrs S Stent

Mr N Pavely

Mr R Van Dulken

Mr J Bushell

Mr A Temperton

Mr Jones

Mr C Gandy

Cllr. G Southgate

Representing Castle Hedingham Parish Council

Mrs K Evans

Representing The Ramblers

## **DOCUMENTS**

1. Notes prepared by Mr J Lindsay
2. Mr Whipps – opening statement
3. Mr Gandy ‘The removal of the protective fence and gate’
4. Mr Gandy ‘ Fencing in the existing footpath’
5. Castle Hedingham PC - Statement of G Southgate
6. Mr R van Dulken – statement
7. Mrs S Parker – ‘Historical Factors and use of the footpath’

