



# Order Decision

Inquiry held on 2 March 2010

by Heidi Cruickshank BSc MSc MIPROW

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

The Planning Inspectorate  
4/11 Eagle Wing  
Temple Quay House  
2 The Square  
Temple Quay  
Bristol BS1 6PN

☎ 0117 372 6372  
email: [enquiries@pins.gsi.gov.uk](mailto:enquiries@pins.gsi.gov.uk)

Decision date:  
24 March 2010

## Order Ref: FPS/Z1585/7/42

- 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 No.388 Footpath 48, Frinton and Walton, Tendring District) Order 2008.
- The Order is dated 7 April 2008 and proposes to add a public footpath commencing from Footpath 31 at Foundry Creek, running in a generally southerly direction along the sea wall, by the backwater, to North Street, Walton-on-the-Naze. Full details of the route are set out in the Order Plan and Schedule.
- There were five objections and one representation in support of the Order outstanding at the commencement of the Inquiry

**Summary of Decision: The Order is confirmed.**

## Procedural Matters

### *The Inquiry*

1. The Inquiry was to be held in January 2010, however, adverse weather conditions made it impractical to open the Inquiry on that date and so it was postponed. I made an unaccompanied site visit on 1 March 2010 and held a Public Inquiry at the Columbine Centre, Walton-on-the-Naze, on 2 March 2010. No-one requested a further accompanied site visit at the close of the Inquiry.

### *Statutory notices – the application*

2. This Order arose from an application under Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). The application was made by Frinton and Walton Town Council ("the Town Council") in February 2006 following complaints about the blocking of the route due to the erection of a steel fence and gate at Foundry Dock, at the northern end of the route. The obstruction was apparently removed shortly after the application was made.
3. When making an Order under the 1981 Act there are certain procedures set out under Schedule 14 of the Act, however, whether these were complied with or not is not a matter for my consideration; I have only been appointed to determine the merits of the Order itself.

### *Statutory notices – the Order Making Authority*

4. Whilst investigating the claim Essex County Council, the order-making authority ("the OMA"), found that there were other landowners involved, who had not been notified at the earlier stage, however, they did not identify that residents of properties at the northern ends of Saville Street and North Street might be owners of part of the route. Due to the difficulties in relation to Land

Registry the OMA sought and received dispensation from the Secretary of State for Environment, Food and Rural Affairs to place a notice on-site as provided for by paragraph 3(4) of Schedule 15 to the 1981 Act. It appears that it was this notice, dated 5 June 2008, which drew the matter to the attention of at least one of the Saville Street residents and on 11 June the OMA served notice on the residents of the relevant properties.

5. I consider the on-site notice did as it should by notifying the residents and I am satisfied that the OMA fulfilled the statutory requirements. Whilst I understand that the residents were concerned that they had not been contacted at the earliest possible opportunity no reason was submitted to show that this would prejudice my consideration of the Order. A statement of case was submitted by one of the objectors and, whilst he chose not to attend the Inquiry, this shows that there was time for the objectors to be part of the statutory process.

### **Main issues**

6. The Order is made under section 53(2)(b) of the 1981 Act by reference to section 53(3)(c)(i) which refers to whether a right of way which is not shown in the Map and Statement subsists over land in the area to which the map relates.
7. It is appropriate to consider the Order with reference to the statutory requirements of section 31 of the Highways Act 1980 ("the 1980 Act"). The main issues are:
  - i. when the status of the claimed route was called into question;
  - ii. the extent and nature of the claimed use;
  - iii. whether there is evidence of a lack of intention to dedicate a public right of way.
8. Before a presumption of dedication can be inferred under statute, the 1980 Act requires that the relevant period of use be calculated retrospectively from the date on which the status of the way is 'called into question'. The use during that period must be shown to have been actually enjoyed by the public as of right and without interruption for a full period of twenty years.
9. Arguments were made that there had been an interruption to use by the owners of properties on Saville Street, through the erection of notices and telling people that the land was private. The OMA argued that use was called into question in 1978 by the erection of barriers across part of the route. I must decide when the right of the public to use the way was called into question and, if satisfied that the evidence of use allows a presumption of dedication to arise, whether there is sufficient evidence that any landowner had shown an intention not to dedicate the route as a public right of way within the relevant twenty-year period. Reference was made to *R (on the application of Godmanchester and Drain) v SSEFRA (2007)* ("*Godmanchester*"), which deliberated the issue of what might be considered 'sufficient evidence' that there was no intention to dedicate.
10. The objectors suggested that there was an alternative route to the north-east of Saville Street, near the sewage works, which was used by the public and should instead be recorded as a public route. There was also a query as to why a route to the south-west, leading onto Mill Lane, had not been included in

the Order despite having been part of an earlier application. My determination of public rights on any route will be on the basis that I am satisfied, on the balance of probabilities, that a public right of way subsists.

### **Reasons**

11. Although the application relies primarily on the user evidence the OMA have also looked at the documentary evidence which I consider below.

#### ***Documentary evidence***

##### *Early maps*

12. The Chapman and Andre map 1777, tithe map 1841, and Frinton and Walton Improvement Act 1841 appear to simply confirm the names of areas used in later documents; the non-inclusion of a route within documents does not mean that there was no route, although that might be the case, but is more likely to arise in these instances because any route would not be relevant to the reason that the document was produced.

##### *Tending Hundred Railway, Wivenhoe to Walton-on-the-Naze, 1863*

13. Documents associated with railway schemes can be given some weight in association with the matters they portray. Although the OMA said that there was a suggestion of a public footpath in the area south-west of the Order route, leading to Mill Lane, I consider that I am unable to place weight on it in this case as sufficiently clear copies of the original document were not supplied.

##### *Ordnance Survey maps*

14. The formation of the Ordnance Survey ("the OS") was in response to a military need for accurate maps in preparation for a possible Napoleonic War but, over the years, the OS has developed a variety of maps to meet the growing need for accurate and up-to-date maps. Instructions for surveyors laid down that their task was to show what was on the ground at the time of the inspection and they do not claim to determine whether a path was a public or private one.
15. The earliest is the first edition 1874 6" OS map and this, subject to limitations of scale, shows the same as the situation continuing throughout the mapping series to 1923 with a route appearing to exist on top of the sea wall. Properties are shown in the location of the Saville Street residences, earlier named as Canada Cottages. Up to the 1896 OS map a footbridge is indicated over the southern section of the Mill Pond. There does not appear to be any access between Mill Lane and the Order route alongside Walton Mere.
16. The OS maps do not provide evidence of status but they do show that parts of the Order route have existed as discreet physical features in the landscape since the late nineteenth century.

##### *Finance Act, 1910*

17. Documents associated with Finance (1909 - 1910) Act, 1910, can sometimes be given weight in these matters. The OMA suggested that the area was excluded from the taxable area payment, possibly due to the involvement of

the Improvement Commissioners, however, I consider that I am unable to place weight this as clear copies of the original document were not supplied.

#### *Definitive Map and Statement*

18. The Rights of Way Act 1932 urged surveying authorities to create a record of public rights of way and this was undertaken in Essex with the cooperation of the parishes. Such routes were marked on 1920s OS maps and held by the County Surveyor. There were no public routes recorded in this vicinity.
19. The 1951/52 survey in connection with the recording of rights of way on the Definitive Map and Statement under the National Parks and Access to the Countryside Act 1949 did not record any public rights and so no route was put on the Draft map. No objection was made to the exclusion of the route at any stage of the production of the Definitive Map and Statement, or the subsequent proposed revisions.

#### *Walking Route Leaflets*

20. Reference was made to leaflets dating from 1998 onwards which referred to the section alongside the caravan park as 'permissive'. As the earliest of these was written some twenty years after the date on which I consider use was called into question, see below, I do not give weight to them as more than indicative of the understanding of the authors.
21. The statement of case submitted by one objector referred to published walks drawn up by the AA, directing users onto a route in front of the Saville Street cottages; whilst this may indicate an additional route it does not affect the evidence of use of the Order route.

#### *Photographs*

22. Aerial photographs dating from 1946, 1960 and 1980 show the changes at the former Port Said, which was infilled during the improvement works carried out following the 1953 floods and now forms part of what some people refer to as 'Foundry Docks'. These changes were mentioned by some in their user evidence forms ("UEFs") and I consider that this allows me to give some weight to their evidence of use.

#### *Property Deeds*

23. Parts of some deeds and Land Registry entries relating to properties on Saville Street showed that there had to be reserved "...for the Coastguard a 3 feet right of way along the top of the sea wall on the rear of the premises..." As pointed out by objectors this physical feature would allow other users as well as the coastguard and some people referred to the existence of a clear physical route in their UEFs. I agree with the OMA that there were ways to prevent public rights from accruing in such circumstances, which do not appear to have been implemented.

#### *Summary*

24. The documentary evidence does not show that a public right of way was admitted, although sections of the route have physically existed over a long period, which supports the evidence of long use given by some. The

suggestion of a permissive route in local leaflets arose after the date on which use was called into question, see below.

***Section 31 of the Highways Act 1980***

*When the status of the claimed route was called into question*

25. It is necessary for the use of the route to have been brought into question by some means sufficient to bring it home to the relevant parties that the right to use it is being challenged and I have taken account of *Godmanchester* in reaching my conclusions on this point. I must establish the earliest date on which the rights of the public were called into question.
26. I heard evidence that in the 1960s a former resident of the northern-most property on Saville Street used to tell people that the land adjacent to his house was private, however, this was not recalled by any of the user witnesses, although they did mention other events which might challenge their use. His widow is apparently still resident at the property and erected a sign on adjacent land saying '*Beware of the geese*' or something similar; such a sign would not call rights into question and without further corroborative evidence relating to any actions by her husband I do not consider, on the balance of probabilities, that this provides sufficient evidence of a challenge to use.
27. On the other hand I heard evidence that the Caravan Park had erected fencing at two points across the route in the 1970s. This led to complaints about the blocking of the route, a petition of those who had walked the sea wall and an application to the Town Council to record the route. There were UEFs relating to this application, however, the individual forms did not have maps attached. Looking at the file the OMA identified that there was a map attached to it which seemed to relate to the UEFs. Taking account of the of the map on the file, the description of the route on individual UEFs and the memory of witnesses to my Inquiry who had complained about the route being stopped up on this earlier occasion, I am satisfied on the balance of probabilities that it was the same route as is now under consideration.
28. A couple of people who completed UEFs in 1978 mentioned fences being erected in 1976 or 1977, however, there is insufficient evidence to show whether this should be taken as an earlier date of calling into question. Taking account that the events in 1978 led directly to an application being made to record the route<sup>1</sup> I consider that this should be taken as the date on which the right of the public to use the route was first called into question, although the application appears to have led to the removal of the obstruction at that time.
29. There was some evidence of fences being erected in the late 1980s or early 1990s across the section of the route alongside the caravan park, which is marked on Order map as Naze Marine Holiday Park, but which has also operated under other names. One person also mentioned being stopped by a security guard here on one occasion in the 1990s. I consider that there is insufficient evidence to show that this called use into question and in any event arises after the date of the first effective challenge.

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<sup>1</sup> This was not followed up at an earlier date due to legislative changes and the administrative practice of Essex County Council

30. I heard from a resident of Saville Street that he had told people using the route that it was private, however, there is insufficient evidence that this was effective, as no such challenge is mentioned in any of the UEFs; in any case he moved to his property in 1989 which was after the date of the first effective challenge. He also mentioned that there were white posts in the ground across the Order route when he first moved to his property but there was no information as to why they were present or who put them in place.
31. The blocking of the route near the Foundry Dock led to the 2006 application and would be an effective date of calling into question, having led directly to the making of this Order; although I note that the landowner said that the barrier was aimed to prevent use of the route by motor vehicles it also effectively prevented walkers. This would give a separate twenty-year period of 1985 – 2005 and; as occurred thirty years previously, the application led to the to the removal of the obstruction.
32. The notice now placed on the south-western fence of 71 North Street would also provide an effective method of calling use into question, the wording being "*PRIVATE PROPERTY No public right of way exists*"; however, the available evidence of when this was first erected places it after the date on which the Order was made. Another resident referred to the erection of signs at an earlier date but this is not supported by any of the users, although many have mentioned other matters that challenged their use; there is insufficient evidence that any notices challenged use at an earlier date.
33. There have been a number of occasions when public use has been challenged, by different owners on different parts of the route and I have considered whether I should look at different times for different sections; however, taking the evidence as a whole I am satisfied that it is appropriate to consider the whole of the Order route in relation to the earliest clear date of challenge, as the evidence arising related to the whole. Therefore, on the balance of probabilities, I consider that the relevant twenty-year period is 1958 – 1978.

*Evidence of use*

34. The majority of the evidence of use for the relevant twenty-year period arose from the UEFs submitted in connection with the 1978 application, however, a number of the UEFs submitted in 2006 also referred to use in this period. Two people submitted UEFs covering this period in relation to both applications and I had the advantage of hearing from one of those at the Inquiry.
35. There were more than 50 UEFs in total, although as noted there were a couple who gave evidence in relation to both applications. I have looked carefully at all the UEFs and have discounted one which I could not be satisfied referred to the Order route, seeming instead to relate to FP 31 running north of Foundry Dock. The earliest evidence of use dated from 1914 and I had the benefit of hearing evidence at the Inquiry dating from the late 1940s. I have given no weight to the petition submitted in connection with the 1978 application as there is simply insufficient detail to be clear where people walked and when.
36. Despite the limitations naturally placed on evidence only available on paper I am satisfied, on the balance of probabilities, that I am able to place reliance on it. This is because of the references to features on the ground, such as the changes at Foundry Dock following the 1953 flood which were demonstrated by

the documentary evidence, and the correlation with the evidence that I did have the benefit of hearing, even if some of this arose only after the relevant twenty-year period.

37. In the period 1958 – 1978 there were a minimum of twenty-five people declaring use in each year, with a maximum of thirty-eight in the early 1970s. The frequency of use was variable, with some people using it seasonally, apparently in connection with staying at caravans at one of the caravan parks, and others weekly, or even daily. Most people used the route for pleasure, dog walking, or reaching the shops and some referred to using it to get to and from the school on Standley Road. There was some use with bicycles, however, this was insufficient to suggest a status other than footpath.
38. I do not consider that there was evidence that the use was other than 'as of right' and I consider, on the balance of probabilities, that the evidence as a whole shows that use has been actually enjoyed by the public without interruption for a full period of 20 years and, therefore, the Order route is presumed to have been dedicated as a public footpath.

*Whether there is evidence of a lack of intention to dedicate a public right of way within the relevant twenty-year period*

39. If there is evidence to show that the landowner did not intend to dedicate a public right of way within the relevant twenty-year period then the statutory presumption referred to above can be overturned.
40. The potential challenges to use by residents of Saville Street and North Street, either verbally or through notices, generally occurred after the relevant twenty-year period and so could not prevent the rights already established. Similar considerations apply to the potential interruption in the late 1980s/early 1990s in relation to the caravan park. Following *Godmanchester* the apparent actions of a resident within the relevant twenty-year period were insufficient to call use into question and there is no *sufficient evidence* that there was no intention to dedicate on the part of this owner.
41. The Order route has been clearly blocked twice, however, on both occasions, challenges to the actions of the relevant landowners led to the removal of the obstruction. This does not tend indicate a lack of intention to dedicate public rights but rather suggests that these owners accepted that there were public rights which they could not prevent. In relation to the actions of owners of other parts of the route there is either insufficient evidence to show that this indicated a lack of intention to dedicate or the actions occurred after the relevant twenty-year period.

*The alternative routes*

*The sewage treatment works, in front of Saville Street*

42. Objectors from Saville Street/North Street suggested another route might have been used in front of Saville Street and south-east from the sewage works, which was shown on some publications produced by the AA. There were certainly some UEFs that referred to use of a route to and from the sewage works, although not indicating the route used beyond that point, however, it was insufficient to show that a public right should be recorded. The small

amount of evidence available does not outweigh the evidence of use of the Order route to the rear of the Saville Street/North Street properties.

*South-west to Mill Lane*

43. The 1978 application and initial 2006 application included a section of route running south-west from the junction with North Street. The 2006 application was apparently altered by the Town Council following representations from the landowners of that section. There was evidence of use of a route in this area on the UEFs, some showing using through to Mill Lane and others, generally the more recent ones, showing access to Orlando Court.
44. The verbal evidence I heard was that users of the section through to Mill Lane were challenged in that use by the former landowner and, as children, saw it as a challenge to pass through this area. The current occupier indicated that the route had been blocked off for at least twenty-five years; unlike the rest of the route this has not led to sustained moves to open a route for walkers. The amount of evidence relating to the Orlando Court section was insufficient in volume in relation to the tests I must apply.
45. I note the concerns of the objectors that the reason that the matter was withdrawn was related to potential future development but this does not affect my determination of the Order. I simply cannot be satisfied, on the balance of probabilities, that the evidence as presented indicates that I should modify this Order to show public rights in the area at this time.

***Other matters***

46. Many people raised concerns regarding vandalism, verbal abuse, dogs, dog-mess, use by motor-bikes, loss of privacy, littering and fly-tipping. Whilst I realise that these are the issues important to those living in the area they are not matters that I can or have taken into account in reaching my decision on this Order.
47. There was no evidence that there were lawful limitations to the public use of the route within the twenty-year period and so the Order was correctly made without reference to any such limitations; management of the route will become a matter for the OMA in their role as the Highway Authority.

**Conclusion**

48. I consider that the public have been using the Order route as of right and without interruption over a twenty year period prior to their use of the route being called into question. There was no evidence of a lack of intention to dedicate a route to the public within the relevant twenty-year period 1958 – 1978 and later challenges could not stop the public rights already existing.
49. Having regard to these and all other matters raised at the Inquiry, and in the written representations, I conclude that the Order should be confirmed.

**Formal Decision**

50. I have confirmed the Order.

*Heidi Cruickshank*

**Inspector**

## **APPEARANCES**

### **For the Order Making Authority:**

Mr J Hutchon	Principal Legal Assistant for Essex County Council
<i>who called:</i>	
Mrs M Morris	Principal Legal Assistant, Definitive Map Review, Essex County Council
Mrs G Firminger	
Mr M Hutchings	
Mr B Meadows	
Mr J Rayner	
Mr T Strange	

### **In Objection to the Order:**

Mr F Parker

Mr G Shilston

### **Interested Party:**

Mr J Fletcher	Titmarsh Marina
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## **DOCUMENTS**

- 1 The Order
  - 2 Opening Statement of Essex County Council
  - 3 Labelled copy of the Order map
  - 4 Proof of evidence of William Tribble
  - 5 Copy of 1978 filed map
  - 6 Copy of 2006 application
  - 7 Closing submissions on behalf of Essex County Council
-