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| **Order Decision** |
| Site visit made on 13 July 2021 |
| **by Andrew McGlone BSc MCD MRTPI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 20 September 2021** |

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| **Order Ref: ROW/3246107** |
| * This Order is made under Section 257 of the Town and Country Planning Act 1990 and is known as the Borough of Burnley (Footpath part of Footpath Cliviger 89 and Footpath Cliviger 90) Public Footpath Diversion Order 2019. |
| * The Order is dated 26 September 2019 and proposes to divert the footpaths shown on the Order plan and described in the Order Schedule and create alternative routes. |
| * There were some 18 objections outstanding when Burnley Borough Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs. |
| **Summary of Decision: Order is confirmed.** |
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The Main Issues

1. Section 257(1A) of the Town and Country Planning Act 1990 (as amended) (‘the Act’) provides for an Order to be made authorising the stopping up or diversion of any footpath if it is satisfied that an application for planning permission in respect of development has been made under Part III of the Act, and if the application were granted it would be necessary to authorise the stopping up or diversion in order to enable the development to be carried out. The Order is for the diversion of Footpaths 89 and 90 (FP89 and FP90) and the creation of alternative lengths of footpath as shown on the Order Plan.
2. The DEFRA Circular 1/09 version 2 makes clear that, in determining an order of this kind, the merits of the development are not at issue. However, it should not be assumed that because planning permission has been given necessitating closure of a footpath that confirmation of the ensuing order will automatically follow. Any disadvantages or loss likely to arise as a result of the path closure to members of the public may be weighed against the advantages arising from the development when determining the Order.
3. There are three issues to be considered. The first is whether the works that have already been carried out mean the Order cannot be confirmed. The second and third issues relate to legal tests described as ‘the necessity test’ and ‘the merits test’. Confirmation of the Order requires both to be satisfied[[1]](#footnote-1). In deciding whether or not to confirm the Order, I am obliged to take into account: (a) any significant disadvantages or losses the diversion of the path would cause to the general public, or to other individuals whose actionable rights of access would be extinguished by the process; (b) any countervailing advantages to the public, or those individuals; and (c) the planning benefits of, and the degree of importance attaching to, the development.

Reasons

**Whether works have already been carried out**

1. FP’s 89 and 90 cross the land from its south western corner and southern boundary before converging at a stile on the site’s Red Lees Road frontage. The footpaths were unsurfaced and form part of a wider public rights of way network to the north, south, east and west of the land which FP’s 89 and 90 cross. The land generally slopes from east to west. A further footpath (FP 88) follows the inner side of the southern boundary to the land.
2. The site is allocated as part of the Burnley Local Plan to deliver housing in Burnley. Planning permission was granted by the Council on 2 September 2020 subject to numerous conditions (‘the planning permission’). The planning permission was granted for the erection of 125 dwellings including means of access, areas of public open space and all associated works. The proposal affects FP’s 88, 89 and 90 and involves the diversion of FP’s 89 and 90. FP 88 is unaffected by the Order and will be maintained along its existing route which links to Red Lees Road, though re-dedicated as a Public Bridleway. A later non-material amendment was approved by the Council on 22 December 2020 to substitute house types. This did not change the approved layout.
3. The Order was then made by Burnley Borough Council in its capacity as local planning authority. The Council was satisfied that it is necessary to divert parts of FP’s 89 and 90 to enable the development to be carried out in accordance with planning permission granted under the Act.
4. The Secretary of State for Transport has extended a Temporary Traffic Regulation Order pursuant to Section 14 of the Road Traffic Regulation Act 1984 restricting the use of the parts of FP’s 89 and 90 within the site. This Order was initially in place from 5 July 2019 for a 6-month period, before it was extended until 5 July 2021, and apparently now until 5 July 2022.
5. Works on site have commenced and are actively taking place. These do not wholly accord with the hatched area on the plan[[2]](#footnote-2), but they broadly do. Works thus far include the formation of the access from Red Lees Road and the formation of internal access roads; the partial construction of a number of dwellings and the formation of the sustainable drainage system (SUDS) pond. None of the dwellings are substantially complete as they are not ready for occupation. Nor is there any parking or garden provision available. Therefore, I do not consider there to be an inability to confirm the Order as evidently considerable work remains across the site to carry out the planning permission.

**The ‘need’ case**

*Whether the stopping up of Footpaths 89 and 90 are necessary to allow development to be carried out in accordance with planning permission already granted*

1. The need for an Order under s257 of the Act may be satisfied by the existence of either a physical or legal obstacle to development proceeding. In this case both are considered to make the Order necessary. Condition No 34 of the planning permission prevents development from taking place that obstructs or removes any part of FP’s 89 and 90 on the site until a diversion order has first been obtained. Condition No 2 also requires the development to be carried out in accordance with the approved plans which includes a site layout plan. This plan details how the approved development is to be laid out and built.
2. The current alignment of FP’s 89 and 90 combined would have a direct effect on 28 of the approved dwellings, their gardens, boundary treatments and/or off-street parking provision. Hence, the development would permanently affect the ability of persons to use these footpaths. The development would also not be able to be physically or legally be carried out without the Order in accordance with the conditions imposed on the planning permission. Therefore, parts of FP’s 89 and 90 need to be diverted as without the Order there would be a physical and legal obstacle to the planning permission proceeding.

*Other merits or disadvantages of the alternative route that will be made available for public use*

*The effect on members of the public*

1. FP’s 89 and 90 are used by members of the public as part of walks locally and further afield, such as to the Towneley Estate. The diversion of FP 89 would result in a longer route for users in the region of an extra 85 metres. This is around a 28% increase. However, the additional length and less direct route would not be a significant increase in the context of a longer use of the public rights of way network, or even for local users, given the options that would remain through FP’s 88 and 90 to return to Red Lees Road. Even so, there would be some limited disadvantage to members of the public.
2. I do not, however, consider that by diverting FP’s 89 and 90 there would be a downgrade of the physical health benefits of users as the alternate routes would either be the same or longer and still traverse a similar topography.
3. The development granted planning permission needs to be allowed to proceed, but in doing so, there would be a change to the character, users experience and enjoyment (including the connection with nature and their mental health) of the FP’s concerned and through the surfacing of those routes. The development would also inhibit user’s wider appreciation of the landscape to the south and west primarily which is aided by the topography in the area. These would be of limited disadvantage to members of the public.

*Any countervailing advantages to the public*

1. The diversion of FP’s 89 and 90 would enable their use by a wider range of users such as those with prams or wheelchairs due a ramped access which would replace the existing stile. The new routes would be lit, subject of natural surveillance and be close to open space. The diverted paths would still feed into the existing right of way or highway network which means that they could still be used as part of wider journeys. Overall, there would be moderate accessibility improvements to the public.
2. The planning permission would deliver a considerable number of new homes which would help address the identified need in Burnley. Significant economic and social benefits would flow from these during the construction phase and upon occupation of the dwellings both directly and indirectly.

*Weighing the advantages and disadvantages*

1. There are moderate advantages to the public flowing from the Order and

significant benefits of the development itself. Balanced against these are the limited disadvantages to the public and/or individuals from the diversion of FP’s 89 and 90. There would be a change to how the public access and travel across the land, but the diverted routes would facilitate use by multiple modes of travel and onward connections to the rest of the rights of way network. Overall, the disadvantages that arises from the Order and the development are not sufficient to outweigh the advantages of the development and they are not individually or collectively significant enough to prevent the confirmation of the Order.

**Conclusion**

1. Having regard to these, and all other matters raised in the written representations, I conclude that the Order should be confirmed.

**Other matters**

1. Many of the objections received relate to the merits of the planning permission. In considering the Order it is not an opportunity to revisit the merits of the planning permission. I note the points about the timing of the Order being made but planning permission has now been granted.
2. Points relating to an equitable process for all as part of the allocation of the site within the Local Plan and the subsequent planning application are not relevant when considering the merits of the Order, but I understand residents expressed their concerns in relation to the development of the land as part of the Local Plan and the planning application.

Formal Decision

1. The Order is confirmed.

Andrew McGlone

INSPECTOR

1. A point articulated by Lindblom LJ at paragraph 51 of his judgement in the Court of Appeal case *R (Network Rail*

   *Ltd) v SSEFRA [2018] EWCA Civ 2069* [↑](#footnote-ref-1)
2. Statement of Case for the Applicant, Appendix 6 [↑](#footnote-ref-2)