

|  |
| --- |
| **Order Decision** |
| Hearing held on 14 September 2021 |
| **by Heidi Cruickshank BSc (Hons), MSc, MIPROW** |
| **appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 08 November 2021** |

|  |
| --- |
| **Order Ref: ROW/3241933**  |
| * This Order is made under section 257 of the Town and Country Panning Act 1990 and section 53A(2) of the Wildlife and Countryside Act 1981. It is known as The Hampshire (Hart District No. 4) (Parish of Eversley - Part of Bridleway No. 11) Public Path Diversion and Definitive Map and Statement Modification Order 2019.
 |
| * The Order is dated 7 August 2019 and proposes to divert part of Bridleway No. 11 in the Parish of Eversley. Full details of the route are given in the Order plan and Schedule.
 |
| * There were two objections outstanding at the commencement of the hearing.
 |
| **Summary of Decision: The Order is proposed for confirmation subject to the**  **modifications set out below in the Formal Decision** |
|  |

Preliminary Matters

*The making of the Order*

1. An Order to divert part of Bridleway 11 (BR11) was made by Hampshire County Council, the order-making authority (the OMA), on 29 January 2018 (the 2018 Order). During the statutory period for publicising the 2018 Order three objections were duly made. However, the 2018 Order was not made in the prescribed format and therefore was remade on 7 August 2019.
2. During the statutory period for publicising the Order now before me, 16 August 2019 to 13 September 2019, two objections were duly made, by two of those who had objected to the 2018 Order. I have also taken account of the relevant matters raised by the remaining objection made to the 2018 Order.
3. I understand that there was some confusion in notices, with the 2018 Order referred to at one point. I am satisfied that due to the overlap in objectors there was no prejudice arising from this matter. Everyone attending the hearing understood the matter in hand, which related to the diversion of BR11.

*The use of the Town and Country Planning Act procedures*

1. I note the concern that the land on the Busta triangle (also referred to as Buster and Butser) to the east of the A327, Brickhouse Hill, points C – D and F as indicated on the Order map, lies outside the area directly affected by the planning permission. I am satisfied that it is appropriate to include this area within the Order to align with the section from point E. I do not consider it would be good practice to require a separate Order to deal with a small section linking to the affected continuation of the bridleway.

*Consultation*

1. I understand the objector who participated in the hearing was actively involved in discussions regarding the use of BR11, the operational site(s) and surrounding land since at least 2010, at one time as a representative of the British Horse Society (BHS). There was concern that the Order route had been agreed without informal consultation, subsequent to what some understood to be agreement to their preferred route to the north of The Welsh Drive. It is clear from the information provided that there were a number of constraints, such as landownership and conservation matters, preventing the use of that route; I have to consider the Order that has now been submitted, not a desired alternative.
2. There is no requirement for informal consultation in relation to the diversion of rights of way, although it is obviously good practice and there was evidence that there had been informal consultation in relation to the planned changes. Due to an oversight it seemed that the BHS had not been formally consulted on the Order but I am satisfied from the provided information that the required formal consultations were undertaken. The hearing process assisted in ensuring that no prejudice has arisen, providing further opportunity to raise relevant matters.

*Requested modification to the Order*

1. A modification to the Order is requested with regard to Part 1 description which should read ‘easterly’ rather than ‘westerly’. I am satisfied that this is appropriate to clarify the Order.

Procedural Matters

*The hearing*

1. Following a period of time where the Planning Inspectorate were organising hearings, in order to keep casework moving during the Covid-19 pandemic, the arrangements were moved back to the relevant local authorities, with effect from 13 September 2021. At the case management conference for this hearing the OMA agreed to take over the arrangements for the hearing. As all parties were ready to take part in a virtual format the hearing continued in this way. I thank the OMA for their assistance in organising and hosting this event.

*Site Visit*

1. I made an unaccompanied site visit on Tuesday 27 July to look at the routes as shown on the Order map and the surrounding area. There was no request for a further site visit at the close of the hearing.

Main issues

1. The Order was made because it appeared to the OMA that it was necessary to authorise the diversion of part of BR11 to enable development to be carried out in accordance with planning permission granted on 18 December 2015 under the Town and Country Planning Act 1990 (the 1990 Act); namely, a permanent secondary aggregate recycling facility with landscaping at Warren Heath Recycling Facility, The Welsh Drive, Eversley, RG27 0QB. The permission, reference 13/00755/CMA, was granted by the OMA in their role as the Mineral Planning Authority for the area.
2. Section 259 of the 1990 Act requires that I must be satisfied that the granting of permission makes confirmation of the Order necessary. This is one of two tests to be considered and may be referred to as the necessity test: the Order must be required, in the circumstances of the case, to enable development to be carried out in accordance with the terms of its planning permission.
3. The ‘merits’ test relates to consideration of whether the disadvantages, either to the public or to individuals, of diverting the route, balanced against the advantages to the public and individuals of the diversion, are significant enough to justify refusing the Order. The advantages to be taken into account include the planning benefits of the development.
4. The Order also allows for modification of the Definitive Map and Statement by reference to section 53A(2) of the Wildlife and Countryside Act 1981.

Reasons

1. The definitive line of part of BR11 runs across the site entrance of the secondary aggregate facility at Warren Heath Recycling Facility. BR11 runs generally south-east to north-west, crossing the A327, Brickhouse Hill, between points B - C. The section west of the A327 is known as The Welsh Drive and it passes along a track within forested land known as Warren Heath. The aggregate recycling facility lies to the south-west of the crossing of the A327, with vehicular access along The Welsh Drive. A second access/egress point to the west, near point A on the Order plan, is for Cemex, a concrete plant and quarry.

*Whether it is necessary to divert part of the footpath to enable development to be carried out – ‘the necessity test’*

1. Planning permission for the development was granted subject to an Order to divert the relevant part of BR11 being made and confirmed. The relevant conditions, and associated reasons, are set out below:

## Condition 3 Until the public bridleway (Eversley 11) has been permanently diverted to an alignment, design and construction approved by the County Council and displayed on the Hampshire County Council Rights of Way definitive map, no more than 50,000 tonnes of waste per annum shall be imported to the site per annum. After the formal adoption of the diverted bridleway, 250,000 tonnes of waste per annum may be imported to the site.

## Reason: To limit the volumes of traffic in the interests of the amenity of residents on and near the approaches to the site in accordance with Policies 12 and 10 of the Hampshire Minerals and Waste Plan (adopted October 2013).

## Condition 15 Until the public bridleway (Eversley 11) has been permanently diverted to an alignment, design and construction approved by the County Council lorry movements to and from the site shall be restricted to 42 per day (21in/21 out). After the formal adoption of the diverted bridleway, lorry movements to and from the site shall be restricted to 136 per day (68in/68 out). A daily record of lorries entering and leaving the site shall be kept at the site and made available to the Waste Planning Authority on request.

## Reason: To limit the volumes of traffic in the interests of the amenity of residents on and near the approaches to the site in accordance with Policies 12 and 10 of the Hampshire Minerals and Waste Plan (adopted October 2013).

## Condition 20 The public bridleway (Eversley 11) shall be permanently diverted to an alignment, design and construction approved by the County Council, prior to any increase in capacity of over 50,000 tpa of waste.

Reason: To safeguard public rights of way and to ensure a satisfactory means of access to the highway in accordance with Policies 10 and 12 of the Hampshire Minerals and Waste Plan (adopted October 2013).

1. I agree that these are Grampian conditions (*Grampian Regional Council v City of Aberdeen District Council (1983) 47 P & CR 633*), similar to those considered in Regina *(Network Rail Infrastructure Ltd) v Secretary of State for Environment, Food and Rural Affairs [2017] EWHC 2259 (Admin); [2017] P.T.S.R. 1662 (Network Rail)*. *Network Rail* set out that an order under section 257 of the 1990 Act may be made where the only necessity for the order arises from a condition in a planning permission which restricts the whole or some part of the development authorised unless and until the change to the right of way is authorised by order and then carried out. In this case the three conditions set out above, prevent full implementation of the planning permission until the diversion is undertaken and, therefore, the diversion of the relevant part of BR11 is necessary to enable the development.

*Whether the development is substantially complete*

1. It is agreed that for an Order to be confirmed under this section of the 1990 Act the development must not be substantially complete (*Ashby v Secretary of State for the Environment [1980] 1 WLR 673).* It was argued that it had been, such that it was no longer possible to confirm the Order. There appeared to be confusion in relation to an earlier temporary planning permission (06/02863/CMA) but the argument also related to physical works undertaken on the site, referred to in the statement of a Director of R Collard Limited (Collard) responsible for running the operation of the Warren Heath site since 2017. I am satisfied that this only shows commencement of the development in line with the planning permission.
2. The main argument in relation to substantial completion related to an increase in lorry movements over the route, condition 15 of the planning permission restricting lorry movements to and from the site to 42 per day (21 in/21 out). It was argued that a survey over three days in August 2018, showing numbers of 64 in an hour (30 in/34 out); 76 (39 in/37 out); and 88 (41 in/47 out), demonstrated that the permission was already implemented. A difficulty with this survey information is that it is not known where the survey was undertaken. With the Cemex site next door, from my own site observations, there would clearly be some lorries associated with access to and from that site. Even if all these movements were associated with the Collard site they do not reach the lorry movements that would be allowed after the formal adoption of the diverted bridleway, which would be 136 per day (68 in/68 out) and so would not show that the site was working at full capacity.
3. Following the close of the hearing the objector supplied information on the recorded lorry movements, which had been supplied to him by Hampshire County Council (HCC) following a request for information, handled in accordance with the Environmental Information Regulations 2004. As the information was late it was circulated for comment before completion of this decision. The data from April 2017 to July 2021 recorded the average daily movements.
4. I agree with the objector that the evidence suggests that there have been exceedances of the allowed lorry movements, although this is muddled by the request having been made to include data relating to Cemex. I do not know how many movements relate specifically to each of the sites. I understand that there was agreement to temporarily relax restrictions on lorry movements during the Covid-19 pandemic, which expired on 31 December 2020, which may explain the numbers seen in the latter part of 2020.
5. It was suggested that the apparent lack of enforcement undertaken by HCC meant that the increase was permitted and, therefore, the development was substantially complete. I agree with the applicants that a lack of enforcement does not demonstrate that use is lawful; as the OMA state, the relevant period for a breach of planning control to become immune from enforcement action is 10 years in the case of a planning control comprising the failure to comply with a condition subject to which planning permission has been granted (section 171B(3) of the 1990 Act).
6. The matter of whether or not to take enforcement action is for HCC to determine. It is not the limit on lorry movements under condition 15, nor the related limit on waste tonnage under conditions 3 and 20 which determine that the diversion is required by reference to *Network Rail.* All that those factors are intended to do is to give an incentive to the applicant to carry out the relevant works; in this case the diversion of the bridleway. In my view the site cannot operate lawfully, and therefore, the planning permission cannot be complete, until such time as the bridleway has been diverted. Taking account of all these matters I do not consider that it has been demonstrated that the relevant development is substantially complete.

*Summary*

1. I consider that the conditions require the diversion of the relevant part of BR11, as set out in the Order. I am satisfied that the relevant development is not substantially complete. I am satisfied that it is necessary to divert that part of BR11 identified to enable development for which permission has been granted to be carried out, such that the necessity test has been met.

***The disadvantages or loss likely to arise as a result of the diversion – ‘the merits test’***

1. Whilst satisfied as to the necessity test there remains a discretion as to whether or not to confirm the Order. The merits tests relates to a consideration of the adverse effect that confirmation of the Order would have on those entitled to the rights which would be diverted. In this case comments primarily related to the effect on horse-riders, although of course pedestrians and cyclists can also legally use the bridleway.
2. The point of the diversion was to provide an alternative route separating users from vehicular movements in this particular area. The reasons given for the conditions referred to in paragraph 15 above were to limit the volumes of traffic in the interests of the amenity of residents; to safeguard public rights of way; and, to ensure a satisfactory means of access to the highway.
3. Concerns were raised that the route set out in the Order differed from that set out in the section 106 agreement (the s106), dated 16 December 2015. This is a deed made pursuant to section 106 of the 1990 Act to secure planning obligations which are required in order to make a proposed development acceptable in planning terms. The s106 Interpretation sets out that the ‘New Right of Way Plans’ are the plans marked “Proposed Indicative Bridleway Safety Improvements (Illustrative Only)” and numbered 006 Rev 14 007 Rev 1 and 008 Rev 1. I am satisfied that the s106 related to illustrative plans and note that in relation to the ‘New Right of Way’ the s106 Interpretation sets out that “…the line of which route is shown for illustrative purposes only and the exact line of which shall be agreed by the County Council prior to making the Order.”
4. I do not consider that the s106 requires that specific alignment to be recorded by the Order and I do not find the difference in the route alignments, helpfully set out by the BHS in their Updated Statement of Case dated 16 August 2021, to differ significantly. The OMA were neutral as to the matter whilst the applicant was satisfied that the eastern alignment was correct and that the western section of the route remained to be constructed, which they were content could be done safely in accordance with the Order and their s106 obligations.
5. It was suggested that the alignment shown by the s106 in relation to the crossing of the access road for the Collard site was better for users than that proposed by the Order, as it was shorter and more direct. I agree with that the on-site limit of 5 miles per hour (mph) compares well in terms of providing time and visibility to the standard 20 or 30mph in crossing an urban road or up to 60mph in a rural situation. Furthermore, the proposed signage, with priority given to bridleway users, assists in this regard. Nevertheless, I agree with the BHS that a ‘straight across’ crossing, which was plainly what was initially envisaged, would be more appropriate for all users in this location and I shall propose a modification.
6. With regard to the proposed route re-joining the alignment of BR11 at point A there were some concerns about the location of point A in relation to the Cemex site access. It was also suggested that a more recent planning permission for Cemex, application No: 20/03158/HCC, granted 31 March 2021, would affect users, however, the information provided suggests that this is retention of existing working plant rather than new works. The applicants for the Order indicated that Cemex was operational in 2015 and, therefore, the vehicular traffic was taken into account at the time. The bridleway diversion has been sought in relation to the planning permission for Collard and I am satisfied that they intend that the bunding is reduced in height to ensure that the sightlines at this crossing point are as advantageous to users as possible within the terrain.
7. In relation to signage the BHS made a number of suggestions, which it was clear that the applicant and the OMA were willing to discuss. I note that Schedule 3 of the s106 sets out that “…[the Developer] *shall provide and complete the diversion and construction of the New Right of Way (including but not limited to associated furniture horse pens fencing planting bollards and signage at points to be agreed in writing by the County* Council).” I am satisfied that matters of signage can be agreed by the appropriate parties, not least the highway authority, and that it is not necessary, or appropriate, for any matters relating to signage to be referenced in the Order itself.
8. There was discission regarding concrete blocks which had been placed on some bridleway entrances to prevent vehicular access and fly-tipping. On my site visit I noted similar on the continuation of the route to and across the B3016 to the east of the site. There was some discussion through the hearing as to whether these, or a different feature, should be included in the Order as a limitation. I am satisfied that there are alternative means for such features to be recorded and that the Highway Authority are best placed to determine this matter. This may also fall under Schedule 3 to the s106 as mentioned above.
9. Holding pens are proposed at the ends of the bridleway on either side of the A327 so that users can stand in a secure area whilst establishing when they wish to cross the road. In order to deliver the holding pen to the east of the A327, on the Busta triangle, it was necessary for a lease to be entered into as the land was not already in the control of Collard. The lease was limited to the term from and including 11 June 2015 to and including 10 June 2045, at which point the land would revert to the Secretary of State for Environment, Food and Rural Affairs, care of the Forestry Commission. There was concern that the bridleway may become unavailable on expiration of the lease. I am satisfied that the confirmation of the Order would create a bridleway over the land in question, which could not be stopped up simply due to the ending of a lease period. It is clear that the landowner – the Secretary of State – understands the use to which the land will be put as the Authorised Use in Part 2 of the Particulars of the lease is for ‘The use of the Premises as a compound area to facilitate the bridleway’. It is noted that no objection has been made on behalf of the Secretary of State.
10. The BHS were concerned that the holding pens were not sufficiently recorded by the Order as made and requested a modification to record the widths, illustrated by the s106 plans to be 5m x 10m. The applicant argued that the pens need not be recorded as they were simply apparatus to allow the 5m bridleway to pass through. However, I consider that the holding pens must be part of the bridleway width in this location, albeit that they also then provide a limitation of width to 3m at the road edge, in order to provide the refuge behind fencing alongside the access. I consider that the Order width should be modified in this respect.
11. The BHS suggested a sketch diagram to illustrate the holding pens on the Order map, however, taking account of the guidance provided by Advice Note 16, I am satisfied that specification of the width in the Order Schedule, Part 4 of which will form part of the Definitive Statement, is sufficient. I note the concern that the grid references as 10m squares may not be sufficiently detailed. I am satisfied that the grid references provide sufficient specificity for the location of the holding pens, particularly taking account of the need to carry out works in a limited area, potentially subject to currently unknown groundworks restrictions.
12. There is a need for a certificate of completion prior to the stopping up of the existing alignment on The Welsh Drive, as set out in article 1 of the Order. This is helpfully clarified in the s106 Interpretation to relate to the “*confirming completion of the construction of the New Right of Way in accordance with the Scheme to the complete satisfaction of the County Council*”. Taking all these matters into account I am satisfied that the Order route is capable of delivery and will not disadvantage users, including in matters of surfacing of the route and in relation to both access crossings as well as other relevant matters.

*The advantages to be conferred by the proposed order*

1. There seemed to be general agreement that it was better for the users not to mix with vehicular traffic, taking account of the increased volume of lorries associated with the development of the site. Whilst Collard have been operating at the site for over ten years, and there has been no complaint from users regarding the shared access, I consider that there would be benefits to all in separating, so far as possible, the vulnerable users from the HGV access on The Welsh Drive. I consider this to be an advantage over the situation even prior to the increased traffic which would arise through the implementation of the planning permission.
2. The Order will allow full implementation of the planning permission, which has already been considered and approved by the OMA as the relevant planning authority. If it was not confirmed the permission could not be fully implemented, limiting the amount of waste which could be processed through the site.

*Conclusions on the merits test*

1. I am satisfied that the merits test falls firmly in favour of confirmation of the Order, particularly taking account of the works to be done to improve the existing access for vulnerable users. Whilst there may be other routes that people would prefer those are not before me in relation to this decision.

Other matters

1. It is noted that Schedule 4 of the s106 sets out that an application shall be made to enable the bridleway to return to its original line along The Welsh Drive at the appropriate time. Comments regarding maintenance and the efficacy of the s106 are separate matters.

Conclusions

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

Formal Decision

1. I propose to confirm the Order subject to the following modifications:
	* Within Part 1 of the Schedule:
		+ replace text “…*westerly…”* with text “…*easterly…”;*
	* Within Part 2 of the Schedule:
		+ add text “*The width of the bridleway is 10 metres for a length of 5 metres west from point E and 5 metres east from F (for use as equestrian holding pens).”;*
		+ after text “*…south easterly direction…”* add text “*…through points X – Y – Z…”;*
	* Within Part 3 of the Schedule:
		+ replace text “*Equestrian holding pens…”* with text “*Width restriction to 3m at points E and F”;*
	* Within Part 4 of the Schedule:
		+ after text “*5 metres wide between 7834 5967 and 7858 5961”* add text “*10 metres wide for a length of 5 metres west from 7856 5961 and 5 metres east from 7857 5961”;*
	* On the Order map:
		+ Add points X – Y – X and show the crossing of the works site entrance as a straight route.
2. Since the confirmed Order would affect land not affected by the Order as submitted, I am required by virtue of Paragraph 3(6) of Schedule 14 to the 1990 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modification. A letter will be sent to interested persons about the advertisement procedure.

Heidi Cruickshank

**Inspector**

**APPEARANCES**

|  |
| --- |
| **For the Order Making Authority:** |
| Jacqueline Lean | of Counsel, *instructed by* Hampshire County Council |
|  |  |
| Tara Pothecary | Network Development Officer, Hampshire County Council |

|  |
| --- |
| **In Support of the Order:** |
| Daniel Stedman Jones | of Counsel, *instructed by* *instructed by* Blandy & Blandy *for* R Collard Limited |
|  |  |
| Karen Jones | Blandy & Blandy *for* R Collard Limited |
|  |  |
| Sue Rumfitt | *For* R Collard Limited |

|  |
| --- |
| **In Objection to the Order:** |
| RJ Milton |  |

|  |
| --- |
| **Interested Parties:** |
| Alan Kind | *on behalf of* the British Horse Society |
|  |  |
|  |  |

**HEARING DOCUMENTS**

|  |  |
| --- | --- |
| 1 | The Order |
|  |  |
| 2 | Lease (8 November 2017) |
|  |  |
| 3 | Various plan revisions (including as approved) |
|  |  |
| 4 | Appendices from Mr R Milton |
|  |  |
| 5 | Welsh Drive lorry count email (14 August 2018) |
|  |  |
| 6 | BHS Statement of Case, #4 |
|  |  |
| 7 | Advice Note 16 |
|  |  |
| 8 | Late documents submitted regarding lorry vehicle movements and responses |

**NOT TO ORIGINAL SCALE**

