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| **Order Decision** |
| Site visit made on 14 December 2021 |
| **by J Hunter BA (Hons) MSc MRTPI** |
| **appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 4 July 2022** |

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| **Order Ref: ROW/3255533** |
| * This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and is known as The Newcastle City Council (Restricted Byway 5 Newburn) Diversion Order 2018. * The Order is dated 1 November 2018 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule. * There were 2 objections outstanding when Newcastle-upon-Tyne City Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. |
| **Summary of Decision: The Order is confirmed subject to modifications.** |
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**Preliminary Matters**

1. I carried out an unaccompanied site inspection of Restricted Byway 5 Newburn on the morning of 14 December 2021. Whilst it was not possible to walk along all the legal alignment route between points A-E, I was able to see its general location from the proposed route (points B-C-D-E) which as I understand it has been used by the general public for a number of years. Nonetheless, my determination has been made as if the legal line of the Order route were currently available.
2. For ease of reference, I shall refer to the various points labelled on the Order plan, a copy of which is attached to this decision.

**Main Issues**

1. Section 119(6) of the Highways Act 1980 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 path 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) the coming into operation of the Order would have as respects other land served by the existing public right of way, and (c) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it.

1. 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 enjoyment of the land affected by the new paths must be taken into account, where applicable. Regard must also be had to any material provision contained in a rights of way improvement plan (“ROWIP”) for the area under section 119(6A). Other relevant factors are not excluded from consideration and could, for instance, include those pointing in favour of confirmation.

**Reasons**

**Background**

1. Restricted Byway 5 Newburn (the route) is recorded on the Definitive Map and Statement of Public Rights of Way as running from Ponteland Road, through a brickworks site (the brickworks) in a westerly direction before connecting with Drove Road.
2. The submitted information refers to a series of orders dating back to the 1970s and 1980s which sought to alter the line of route to that proposed by this Order. The owners of the brickworks site have since relied on those previous orders which have subsequently been found to be legally defective. The resulting situation is that the brickworks site has been developed and the original route is now obstructed. The OMA therefore considers that further action is required to rectify the situation and formally divert the route.
3. The proposed Order seeks to divert a section of the route onto an existing track that skirts the northern perimeter of the brickworks site. The proposed route follows the same route as featured within the previous defective orders.

***Whether it is expedient in the interests of the owner of the land and the public******that the path in question should be diverted***

1. The diversion of the route would resolve a longstanding issue because the legal alignment of the route is not available for use by the public and has not been used for a number of years.
2. The brickworks site is operational, and I saw during my site visit that there were industrial sized plant, machinery and vehicles on the site as well as raw materials. The use of the legal alignment of the route by members of the public would present the operators of the site with a number of practical problems, most significantly the potential safety implications of members of the public crossing an industrial site. The diverted route would offer a safer route which would be of substantial benefit to the owner and the public
3. Having regard to the above and given there has been no evidence to the contrary, I am satisfied that it is expedient in the interests of the landowner that the restricted byway be diverted.

***Convenience to the public***

1. In considering the relative convenience of the present and proposed routes I have considered various factors. The proposed route is longer by around 274 metres, and it is less direct. I have not been able to compare width because the legal alignment has no recorded width, furthermore, whilst I was able to see during my site visit that the proposed route was predominantly tarmac, I was not able to see the surface material of the legal route.
2. There are two main areas of concern raised by objectors to the proposed route. The first relates to the suitability of the tarmac track and whether or not its condition would be suitable for all restricted byway users. Mr Kind considers that there would be a conflict between users of the restricted byway and the heavy goods vehicles (HGV) that also use the track for access to the business which lies on the western side of the brickworks.
3. The proposed route between points B-E is measured at around 3 metres in width and I saw during my site visit that there were grassed verges to either side, as well as some wider passing points at intervals along the track. I acknowledge that there could be some degree of inconvenience caused when HGVs meet other users along the track, and I note Mr Kind’s comments in relation to whether or not other vehicles such as a horse and trap or cart would be able to reverse or manoeuvre out of the way of oncoming HGVs.
4. Mr Kind also notes that the existing humps in the road are non-standard and unlit and that they therefore pose a hazard to users of the route. I saw tarmac speed humps along the proposed route between points B-D that appear to have been installed to reduce vehicular speed although I have no evidence before me in relation to speeding along the route and consequently, I am not convinced that the humps are necessary. Furthermore, I have no evidence that the humps have been installed to an appropriate standard. In the absence of such evidence, I propose to remove reference to these features from the Order Schedule. As a restricted byway (and therefore a public carriageway), the safe management of traffic along the route B-E will be a matter for the highway authority.
5. Notwithstanding the above, the proposed route has already been in use for some years, and I have no evidence of previous incidents or issues of conflict between users. I also consider that the existing passing points and grassed verges, although not an ideal solution, would provide some refuge for users in the event that an HGV were passing. I am also mindful that no other alternative route alignment has been suggested and I could not see any other potential routes when I visited the site.
6. The second key area of objection relates to the revision of the route between points A-B. The eastern most point of the route which is shown as point A on the Order map would be omitted and the beginning of the route would be at point B, approximately 87 metres to the west of point A. The new termination point would be located on a spur to the of the roundabout that leads to the brickworks site. In accordance with Section 119 (2) of the 1980 Act, the proposed route would terminate on a highway which connects to the highway upon which the existing point of termination lies.
7. The proposed alignment would as a consequence require users to use the existing adopted highway network to reach the proposed point B before traveling around the northern perimeter of the brickworks rather than from point A, directly across Ponteland Road and then across the brickworks site.
8. The OMA suggests that users would be able to navigate the roundabout to join the proposed route at point B. However, I note the points made by the objectors in relation to safety particularly for those that are not travelling the route on foot. I consider that for equestrian users, in particular, navigating the busy roundabout would be particularly hazardous
9. The objectors suggest that a safer route would be to continue from point B southward along the fence line before crossing the highway close to the junction with Westway Industrial Estate. This would bring the termination point closer to the legal termination point at A and also closer to the public right of way which continues eastward from the industrial estate.
10. I saw during my site visit that there is already a made footway which cuts through the trees and along the fence line to the south of the brickworks’ entrance and running parallel with Ponteland Road. To the south of the trees the footway continues into the highway verge where there is a short, shallow incline running up to the road. This ‘informal route’ and the crossing point is, according to the submissions already in use and considered by the objectors, to be safer and more convenient although I note that there is a concern that unless this route is made formal it could be lost at a later date.
11. In response to the alternative route suggested by the objectors, the OMA’s response includes confirmation that the ‘informal route’ is currently a highway verge and should therefore be maintained as such. It is protected under section 130(1) of the Highways Act 1980 which states ‘It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it’. I take this to be an unambiguous acknowledgement that this informal route constitutes part of the existing highway network.

*Whether any new termination point is substantially as convenient to the public*

1. In terms of the change in the termination point, I concur with the views of the objectors in relation to likely issues that would arise as a result of users navigating the very busy roundabout. In my view, reliance on this as a part of the alternative proposed would be less convenient than the original route. However, the ‘informal route’, which is part of the adopted highway, is noted by users to be substantially more convenient. It will remain available to the public and therefore I conclude that overall, the change in termination point would be substantially as convenient as the existing.

*Whether the new path will not be substantially less convenient to the public*

1. The statutory test requires a comparison between present and proposed routes, and I accept that the proposed route would be longer and less direct than the legal alignment. Furthermore, there would be some inconvenience caused by the portion of the route between B-E that would be shared with HGVs. In addition, I have taken account of the objector’s concerns in relation to the proposed termination point at B and the suggestion to formalise the ‘informal route.’
2. The proposed route between points B-E has been in use for a number of years and I have no evidence of conflict in relation to other users. Furthermore, the legal alignment is not available so the diversion would resolve a longstanding issue which would bring a substantial benefit, albeit I acknowledge that the presence of the non-standard speed humps is not ideal. Nonetheless, I consider that this element could be resolved through proper management of the carriageway and consequently in relative terms, the proposed route would not be substantially less convenient.

*The effect of the diversion on public enjoyment of the path as a whole*

1. The present route is not available, although if it were its use would involve traversing a busy and operational industrial site and navigating the associated hazards. The proposed route would utilise an existing tarmac track (points B-E) albeit shared with HGVs accessing a nearby business. The route between points B-E is relatively quiet and verdant and provides access onwards and into the countryside to the west of the brickworks.
2. The proposed route would end at Point B rather than continuing onto A but the public would have an option to travel to point A via the existing established ‘informal route’ along the fence line south of point B. This route forms part of the highway verge and is therefore available for public use.
3. Overall, having considered the comments submitted and from walking the route myself, it seems to me that enjoyment gained from using the proposed route particularly when used with the existing ‘informal route’ would not be detrimentally affected by the diversion.

*The effect of the diversion on other land served by the existing paths and the land over which the new paths would be created*

1. I have no evidence before me to suggest that the existing landowners have raised an objection to the proposed diversion. The OMA submits that no issues of compensation have been raised.

*Rights of Way Improvement Plan (‘ROWIP’)*

1. No issues have been raised in relation to the Tyne and Wear Rights of Way Improvement Plan. I have had regard to the reasonable needs of people with a range of disabilities in assessing the relative convenience of the proposed route.

*Conclusions on whether it is expedient to confirm the Order*

1. In reaching a final conclusion on the expediency of this diversion I am satisfied that the diversion is in the interests of the landowner. The effect upon the public, in terms of convenience of the proposed route and the effect upon enjoyment, are not such that the Order should not be confirmed.
2. Overall, taking into account the relevant factors and having addressed the statutory tests in Section 119 of the 1980 Act, I conclude it would be expedient to confirm the diversion proposed by this Order subject to the modifications referred to in paragraph 14 above.

**Overall Conclusion**

1. Having regard to the above, and all other matters raised in the written representations, I conclude that the Order should be confirmed subject to the removal of the proposed limitations in respect of the speed humps.

**Formal Decision**

1. I confirm the Order subject to the following modifications.

* In the Order Schedule, Part 3, delete all limitations and conditions listed.

*J Hunter*

INSPECTOR

