



## Order Decision

Site visit on 23 June 2015

by **Mark Yates BA(Hons) MIPROW**

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

**Decision date: 7 August 2015**

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### Order Ref: **FPS/Z1585/4/20**

- This Order is made under Section 119 of the Highways Act 1980 ("the 1980 Act") and is known as 'Public Path Diversion Order Footpath 4 (part) Navestock'.
- The Order was made by the Essex County Council ("the Council") on 28 May 2014 and proposes to divert a section of Footpath No. 4, in the parish of Navestock, as detailed in the Order Map and Schedule.
- There was one objection and two representations outstanding when the Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

**Summary of Decision: The Order is confirmed subject to modifications set out below in the Formal Decision.**

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### Procedural Matters

1. I sought clarification from the Council on certain matters and the relevant information has been circulated to the other parties. The Council confirms that the reference to "20 metres" in the description in Part 1 of the Order Schedule should not have been included in the Order. Therefore, if the Order is confirmed, this reference would need to be removed.
2. The objector (Mr Bird<sup>1</sup>) refers to a reference to the garden of Brook Cottage in the previous notice issued in relation to the Order. This notice was subsequently amended and no procedural issue arises out of the description included in the revised notice which serves to identify the extent of the proposed diversion.
3. All of the points referred to below correspond to those delineated on the Order Map.

### Main Issues

4. Section 119 of the 1980 Act requires in this case that, before confirming the Order, I must be satisfied that:
  - (a) it is expedient, in the interests of the owners of the land crossed by the footpath<sup>2</sup>, that the path should be diverted;
  - (b) the new path to be provided will not be substantially less convenient to the public;
  - (c) it is expedient to confirm the Order having regard to:

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<sup>1</sup> On behalf of the Essex Area of the Ramblers Association

<sup>2</sup> Paragraph 5.32 of Department for Environment, Food and Rural Affairs Circular 1/09 advises that an Inspector is entitled to confirm an Order where the reasons for doing so differ from those of the Authority who made the Order, provided that the Inspector is satisfied, in the interests of the owner, lessee or occupier or the public, it is expedient to divert the way.

(i) the effect of the diversion on public enjoyment of the path as a whole, and

(ii) the effect the coming into operation of the Order would have with respect to other land served by the existing path and the land over which the new path would be created together with any land held with it.

5. I must also have regard to any material provision contained in a Rights of Way Improvement Plan ("ROWIP") for the area covered by the Order.

## Reasons

### ***Background***

6. The Council says that some time ago the original bridge crossing over the stream fell into disrepair and was washed away. A new bridge was placed in the wrong location by Brentwood Borough Council which led to an unofficial route being used by the public. Sections of the existing path<sup>3</sup> are also obstructed by features. Whilst these issues pre-date the acquisition of Brook Cottage by the present applicants (Mr and Mrs Dollery)<sup>4</sup>, who it is asserted would benefit from the diversion, when considering the convenience of the routes included in the Order it is equitable to disregard the obstructions on the existing path.
7. It is not my role to reach a conclusion regarding when particular action occurred or how long the existing path has been unavailable but to consider whether the path should be diverted in light of the main issues outlined above.

### ***Whether it is expedient, in the interests of the owners of the land crossed by the footpath, that the path should be diverted***

8. Sections of the existing path, between points A-D and in the locality of point C, proceed over land in the ownership of the Church of England. No reason has been put forward why the diversion would be in the interests of this landowner. Further, I note that a tenant of the land (Mr Parrish) states that the diversion is of no benefit to the land which he farms. Whilst the diversion may assist the Council in resolving an issue with the route available on site, I cannot conclude from the information provided or my observations that it would benefit the relevant landowner or indeed the lessee. This means that the diversion would not be in the interests of one of the landowners. Therefore, I now need to consider the diversion in relation to the land within the title of the applicants.
9. The Council refers to the path being fenced off to prevent wild deer and the public roaming over the applicants' property. In respect of the latter, it is stated that the public wander away from the legal route of the footpath. However, there is no actual evidence of the public significantly deviating away from the footpath prior to the path being unavailable.
10. Reference is made by the Council to the existing path being intrusive where it passes through the garden of Brook Cottage. From looking at the approximate location of the footpath on the ground, I found that it would have some impact upon the privacy of the garden of Brook Cottage, which I distinguish from the larger adjacent grass area to the north.

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<sup>3</sup> As recorded on the definitive map

<sup>4</sup> The original application was submitted by the previous landowner.

11. In respect of the grass area, I note the submission made by Mr Bird regarding the land being a paddock rather than a garden and the restriction on development, including a change of use, within the green belt. Any application for a change of use would be a matter for the relevant local authority to determine. I proceed on the basis that this land is not part of the garden of the property. However, it is clearly used by the applicants' young child as was evident from my visit to the site. I therefore consider the applicants concerns about the safety of their child due to the existing path crossing this piece of land to have some justification.
12. In light of the above, I accept that it is expedient to divert the footpath in the interests of the applicants. However, this would not apply in respect of the land owned by the Church of England. Therefore, I find the reference to "*the owners of the land*" in the preamble of the Order to relate solely to the applicants.

***Whether the new path will be substantially less convenient to the public***

13. There are no structures recorded in the definitive statement for this footpath but I am mindful that the statement contains limited information. The current use of the land may mean that structures would endure at particular locations irrespective of whether the Order is confirmed.
14. In respect of the existing path, it is probable that some kind of structure would be required at the boundaries to the south-west of point A and north-east of point D as the field is used for the grazing of horses. However, I agree with Mr Bird that a bridge would not be needed near to point A. There may also be a need for structures to be put in place to prevent deer wandering onto the land belonging to Brook Cottage. In relation to the proposed path, the Council now says that it will request the removal of the stile near to point A and gate near point C<sup>5</sup>.
15. Having regard to an earlier statement by the Council and the use presently made of the land, I consider that there is a possibility that a gate will be erected in the locality of point A should the Order be confirmed. Should an authorised structure be put in place in the future, it would be for the Council to ensure that it is constructed and maintained to the appropriate standard.
16. I find there to be a lack of certainty regarding what structures would exist should the diversion not be implemented. However, there is the potential for the number of gates or stiles to be less on the proposed path. The additional bridge crossing near to point A could render the proposed path less convenient but there is scope to improve it for instance by way of the provision of a handrail. It should also be borne in mind that the specified width for the proposed path is 2 metres and this is likely to require a wider structure than the one that presently exists.
17. The issue regarding the structures relates to some extent to their present design and, therefore I requested clarification regarding the type of structures proposed. Mr Bird draws attention to the need for the path to be accessible with reference to the ROWIP. I have addressed the additional bridge on the proposed path above. The Council did not provide clarification regarding the design of the stile that would remain to the north-east of point B, but states that any structures approved elsewhere would need to comply with the

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<sup>5</sup> I note that the applicants state that they are happy for the gate to be removed if it is deemed unnecessary.

Council's own standard. In light of the lack of precision on this matter, I consider that, if confirmed, the Order should record the existence of a stile at the boundary to the north-east of point B compliant to the relevant British Standard. The future maintenance of the footpath would be something for the Council to address.

18. I am not satisfied that it can be determined that the path would be less convenient for the public, including those people with limited mobility, by virtue of the number or type of structures on the proposed path in comparison to the existing path.
19. Mr Bird raises concerns about the risk of flooding in the locality of points B-C and he refers to the issue of debris and the heights of the banks of the stream. He states that the enclosed nature of the proposed path means that there is no way of deviating in flooded or muddy conditions. This issue could lead to a lengthy diversion along Shonks Mill Road. In support, he has provided extracts of comments attributed to Mr Parrish and Navestock Parish Council. Mr Bird says that during the winter of 2014/15 the proposed path was flooded on several occasions.
20. In response, the Council states that the entire area has been designated by the Environment Agency as an area at risk of flooding. It is submitted that the risk of flooding is no different between the existing and proposed paths and occurs relatively infrequently. Reference is also made to measures undertaken by the applicants to mitigate the risk of flooding. In support, the applicants say that the path has flooded on only four meaningful occasions during the two winters they have lived at Brook Cottage and the surface water was only around for about 12 hours at a time. They also say that debris is removed from the stream every year.
21. The applicants and Mr Bird have supplied a number of photographs in support of their respective positions regarding the impact of flooding on the two routes but no expert opinion has been provided regarding the risk of flooding in relation to each path. I accept that a greater length of the proposed path will be exposed to the risk of flooding after prolonged or heavy rainfall. However, both routes will be susceptible to flooding at the point they cross the stream and this is clearly evident on particular photographs supplied. Whilst the water may disperse over the grass area to the extent that a proportion of this section of the existing path is not under water, it will still be unavailable to the less determined or mobile walker in the locality of the stream. Therefore, both paths are likely to be problematic when the stream floods.
22. In light of the above, I do not consider that the diversion would necessarily lead to any greater access problems for walkers during those occasions when the stream is in flood. The information supplied by the applicants from their personal experience is also supportive of these incidents being relatively rare and short-lived. Nonetheless, I do accept that after spells of prolonged or heavy rainfall, the proposed path is likely to be more prone to being wet or muddy. Whilst this issue is likely to make the proposed path less convenient on occasions, its impact would not in my view be substantial.
23. The 2 metres width for the proposed path would be sufficient to accommodate a public footpath in this locality and there should be no pinch points with a lesser width. Whilst I noted that there may be some locations where the current available width is slightly less than 2 metres, this would need to be

resolved should the Order be confirmed. I address the nature of the section of the route between points B-C below.

24. Having regard to the information supplied and my observations of the site, I accept that there may be some loss of convenience by virtue of the diversion. However, I do not find that the diversion would lead to the footpath being substantially less convenient for the public.

***The effect that the diversion would have on public enjoyment***

25. From looking at the photographs supplied of the site, I was initially concerned about whether the footpath would have an oppressive character where it passes between trees and the fence. However, this was not evident during my site visit and I found the path to have a fairly pleasant nature between points B-C. In my view, it is not significantly less enjoyable than the open character of the corresponding section of the existing path. The existing and proposed paths to the east of the stream are broadly similar in nature.
26. Overall, I do not find that the diversion would lead to any significant loss of enjoyment for the public.

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

27. No issues are apparent in relation to any land served by the existing path or the land over which the new path would be created. The Church of England has not raised any objection to the diversion over its land. Further, there is provision for the landowner to apply for compensation under Section 28<sup>6</sup> of the 1980 Act for any depreciation to the value of the land, or disturbance to their enjoyment of the land, arising out of the Order.

***The consideration of the Order in light of any material provision contained in a ROWIP***

28. I have addressed above the issue of the structures on the proposed path. In doing so I had regard to the ROWIP and the particular sections highlighted by Mr Bird. In light of my conclusions regarding the convenience of the proposed path in comparison to the existing path, I do not find that the Order is contrary to the relevant provisions in the ROWIP.

***Conclusions***

29. I have concluded that it is expedient to divert the footpath in the interests of the applicants and that the proposed path would not be substantially less convenient than the existing path. Having regard to my conclusions regarding the other relevant matters, I conclude that it is expedient to confirm the Order.

***Other Matters***

30. The parties have briefly referred to the termination points for the footpath. However, this issue is not relevant to my decision as the diversion would not alter either of the termination points.

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<sup>6</sup> As applied by Section 121(2) of the 1980 Act.

### **Overall Conclusion**

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

### **Formal Decision**

32. I confirm the Order subject to the following modifications:

- Delete "20 metres" from the third line of the description in Part 1 of the Order Schedule.
- Delete "stile" from the third line of the description in Part 2 of the Order Schedule and insert "footbridge".
- Delete "through a field gate" from the sixth line of the description in Part 2 of the Order Schedule.
- Insert at the end of the description in Part 2 of the Order schedule "Limitation of a stile compliant with BS5709:2006 at point X on the Order Map".
- "Insert "X" on the Order Map at the location of the stile on the proposed path.
- Delete "Stile" and "Gate" from the Order Map.

*Mark Yates*

**Inspector**