



Order Decision

Site visit carried out on 30 October 2015

by Peter Millman BA

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

Decision date: 11 November 2015

Order Ref: FPS/D1835/5/4

- This Order is made under Section 257 of the Town and Country Planning Act 1990 ("the 1990 Act") and is known as The Worcester City Council (Footpath no. WR-669)(formerly Footpath no. 125) Public Path Diversion Order 2014.
- The Order is dated 26 August 2014 and proposes to divert a footpath as shown on the Order Map and described in the Order Schedule.
- There were two objections outstanding when Worcester City Council submitted the Order to the Secretary of State for confirmation.

Summary of Decision: I have confirmed the Order with a modification.

Main issues

1. The Order states that it was made because Worcester City Council was satisfied that it was necessary that the footpath be diverted in order to allow development, for which it had granted planning permission under part III of the 1990 Act, to be carried out. Before confirming the Order, I am required by Section 257 of the 1990 Act to be satisfied that there is a valid planning permission, and that it could not be implemented without diverting the footpath.
2. Even if I am satisfied on those issues, my confirmation of the Order is discretionary. In exercising this discretion I must consider the merits and demerits of the proposed diversion in relation to the particular facts of the case, and in particular the effect the confirmed Order would have on those entitled to the rights that would be extinguished by the Order. I must also approach the exercise of my discretion on the footing that the issue has been resolved in favour of the development being allowed to proceed, and consider whether the disadvantages and losses flowing from the proposed diversion would be of such significance that I should refuse to confirm the Order.
3. As development had commenced before the date of my site visit I must also be satisfied that it has not been substantially completed, since if it has, the powers of the 1990 Act would no longer be available to confirm the Order.

Reasons

The planning permission

4. The Planning Consent referred to by the Order, reference P13K0248, is for the *Approval of Reserved Matters (pursuant to Outline Approval P11K0588) for the development of the Health and Well Being campus comprising 40 close care*

apartments, 60 Extra Care apartments, a community hub and a 60 bed care home.

5. I have seen copies of the relevant consent and the associated approved plans for P13K0248. These show that the permitted development would not be possible unless the footpath was diverted; the plans show that the current footpath passes through buildings housing the extra care apartments, and the care home.
6. The area to be developed under the outline approval reference P11K0588, granted in 2012, is much greater. With reference to the Order plan, a copy of which is attached to the end of this decision, the approved matters consent covers roughly A to a point a little way short of F, while the outline consent, not referred to by the Order, covers the whole of A to B. Development of the land between F and B has not begun.

Whether development is substantially complete

7. The Ramblers Association ("RA") argues that development is substantially complete and that therefore the Order cannot be confirmed (see paragraph 3 above).
8. When I carried out the site visit, I was escorted through the development by two representatives of Sanctuary Group ("Sanctuary"), the developer, so that the Heras fencing blocking the proposed diversion route could be moved. The development approved under reference P13K0248 had the appearance of having been completed. All the buildings appeared to be occupied. Although I could not discuss the merits of the case with those escorting me, I asked one of them to point out any part of the development which had not been completed. As we passed the two storey care home (through the centre of which the footpath would currently pass if it were not the subject of a temporary closure order under the Road Traffic Regulation Act 1984) my attention was directed to the communal garden area immediately to its south. A few workmen were engaged in constructing a wall and what appeared to be the framework of a conservatory, or something similar, attached to the care home. This work was being carried out a few metres south of the line of the current footpath.
9. Guidance in Defra Circular 1/09, to which the parties refer, states at paragraph 7.21: *Where the development, in so far as it affects a right of way, is completed before the necessary order to divert or extinguish the right of way has been made or confirmed, the powers under sections 257 and 259 of the 1990 Act to make and confirm orders that [sic] are no longer available since the development, which the order is intended to enable, has already been carried out... In this respect development should be regarded as completed if the work remaining to be carried out is minimal.*
10. In my view, the remaining work to be carried out under reference P13K0248 is minimal and I conclude that that development is complete.
11. It would perhaps be possible to refuse to confirm the Order for that reason alone. I shall not do so, however, for the reasons given in paragraphs 12 to 19 below.
12. While the terms of the Order as submitted are quite clear, it is equally clear, from a study of the voluminous correspondence between Sanctuary, the City Council, the RA and the Open Spaces Society ("OSS"), that these parties were

corresponding with each other on the basis that it was the whole of the area covered by the outline permission that was being considered when negotiating the route to be followed by the proposed diversion.

13. An architectural practice, One Creative, was commissioned to provide consultation material about the proposed diversion of footpath 669. Plans in this material showed the whole of the proposed development under the outline permission, how it affected footpath 669 and where it was proposed to divert it. This material was sent to, among others, the RA and the OSS.
14. The City Council, in response to objections, wrote to the OSS: *In addition, in order to address one of Mr Castle's [the RA's representative] concerns it was agreed to divert the whole route in one diversion order (planning permission having been granted at outline stage for development affecting the whole route pursuant to application P11K0588) rather than on a piecemeal basis.* Paragraph 6.3.2 of the joint Statement of Case of Sanctuary and the University of Worcester states: *The Order is necessary to allow the development to be carried out in accordance with planning consent P11K5088...*
15. It is clear from this and much other correspondence that both the RA and the OSS, as well as other consultees, would have been aware of the whole of the proposed development and not just the Health and Wellbeing Campus.
16. I have the power to modify the Order (Schedule 14 to the 1990 Act), should I decide that, apart from the issue of whether the development is complete, it merits confirmation. The question then arises, would it be fair, or could it be prejudicial to any party, if I were to consider confirming the Order with a modification so that it referred in addition to the outline planning permission, development under which has clearly not been completed?
17. Circular 1/09 states at paragraph 7.2: *Most outline planning applications do not contain sufficient information to enable the effect on any right of way to be assessed... and consequently such matters are usually dealt with during consideration of the matters reserved under the planning permission for subsequent approval.* The RA stated: *We can understand the logic of seeking a more extensive diversion than was strictly necessary to accommodate the development approved under application P13K0248. However, in our view this was not possible under Section 257. Until details are approved for the relevant parts of the University site it will not be possible to determine what alignment is necessary for the diversion in those areas.*
18. I have looked carefully at the outline permission, the attached conditions and the plan. If the hotel and an office block are constructed where planned, they will impinge on the footpath in its current position, so it would be necessary to divert the path. While the outline permission does not preclude the possibility of some alteration in the position of buildings, the proposed diversion runs adjacent to an historic hedge which, the City Council states, is required to be retained and protected. A path running alongside this hedge is unlikely to need further alteration. In my view, there is sufficient information in the documentation for a reasoned decision to have been made on where to relocate the footpath, and for the decision to be considered by user groups such as the RA and the OSS.
19. It would not be unfair or prejudicial to any party, in my view, to modify the Order so that it referred to the outline permission, and if I do so I would conclude that the development is not substantially complete.

The merits and demerits of the proposed diversion

20. I shall first of all describe the current footpath (as far as it still exists) and the proposed diversion before considering the additional arguments put forward by the two objectors, the RA and the OSS, as to why the Order should not be confirmed.
21. The part of the footpath proposed for diversion starts from the A44 Bromyard Road and runs in a west-south-west direction for about 350 metres. Before development started it would have run across open fields. The eastern half of the path has been totally obliterated by the development. The western half crosses ground which has the appearance of having once been cultivated, but which has been left to itself for a number of years, so that it is now covered in rough grass and saplings. There is no sign of use on the Definitive line, but the line of the proposed diversion (roughly F to G) is clearly used.
22. The proposed diversion starts from the same point on the Bromyard Road. It runs roughly south-south-west on a hoggin path through a 'landscape buffer' between the development and residential properties to the east. Where the land surface dips to the east of a large tree, the path continues on a timber boardwalk, before turning north-west and then west to run north of and parallel to a cul-de-sac road giving access to the close care bungalows and staff parking. The proposed diversion is separated from this road by a wide grass verge, and there is an existing protected hedgerow to its north. The path crosses the spine road for the University Park on a raised platform marked as for a zebra crossing. West of the spine road the proposed diversion continues as an unsurfaced path on rough grassland on the south side of a hedge before turning sharply to the north through a gap in the hedge to re-join the line of the existing path.

The Open Spaces Society arguments

23. The OSS's Statement of Case, compiled by Mr E Powell, lists six grounds of objection.
24. The first is: *Consistent failure to effectively engage, to any or any sufficient extent, with principles identified in the Defra Guidance 1/09 in the matter of consultation between the Order Making Authority and the prescribed public user interests.* It seems to me, from the material before me, that consultation was widespread and detailed, and that an effort was made by Sanctuary and the City Council to engage with user interests, including Mr Powell, who is on record as having attended meetings chaired by the City Council and involving Sanctuary. However, it is my role to decide whether this Order should be confirmed, not to make a judgement on whether pre-order consultation was properly carried out.
25. The second ground is: *Whereas only 80 metres of the path proposed for diversion intersects the footprint of the development, the whole 355 metres is proposed to be diverted.* There is no legislative requirement, when making a diversion order under section 257 of the 1990 Act, that only the length of path directly affected by development may be diverted. Indeed, it is often sensible to divert a greater length to avoid, for example, sudden changes of direction.
26. The third ground is: *The public path design criteria [for the new path] fails to comply with... authoritative guidance and statutory provisions intended to deliver safe, convenient and enjoyable public use. Over considerable distances*

the proposed diversion provides inadequate width being contrary to the Equalities Act 2010 requirements to accommodate disabled wheelchair users. Mr Powell adds that: the proposed path takes a very convoluted and indirect line offering many hiding places and is not overlooked to any or any sufficient extent.

27. Mr Powell suggests that 8 metres would be an appropriate width and appears concerned that the described width of the proposed diversion varies along its length. The Order gives the width of by far the greater length of the path as 3.8 or 3.5 metres. It is narrower where it passes through a gate and two gaps, and there is a short section of about 50 metres, part of which runs on a fenced boardwalk, where it has a width of 1.5 metres. I accept that 1.5 metres may be insufficient for two wheelchairs to pass each other, but the short distance where it is that narrow and also fenced is clearly visible from both ends, so there would be little chance of two wheelchairs meeting in the middle and one having to reverse. On the whole, the width of the proposed diversion is more than adequate. The width of the current path is defined in the Definitive Statement as being a minimum of 1.5 metres. There is no specific requirement, in the Equality Act 2010, to provide a path which would be wide enough at all points for wheelchair users to pass each other.
28. Footpath 669, as it was before development commenced, would not have been overlooked at all. The proposed diversion would be overlooked from buildings within the development throughout its length, and I have seen no evidence to support the view that it would offer hiding places for criminals. Not only would the path be overlooked, but it has an open aspect, and is largely free of artificial boundaries. The proposed diversion, as completed at the time of my site visit through the Health and Wellbeing Campus, is well designed and would, in my view, provide an attractive walking experience or an easily usable route for wheelchair users.
29. Like the RA representative Mr Castle, Mr Powell is critical of the proposed diversion because, he believes, it would run next to an estate road and cross the spine road for the whole University Park development. I have had the advantage of walking along the route of the proposed diversion. It is true that a short length runs parallel to a cul-de-sac estate road leading to some 'close care' bungalows, but it is well separated from the carriageway by a wide strip of grass, and the road is not, and could not become, busy, and nor could traffic move fast. The proposed diversion, as does the existing path, crosses the spine road. Where it crosses it runs on a platform and is coated with zebra crossing stripes, although it cannot be an official zebra crossing: visibility is very good in both directions. There is no way that a crossing of the spine road could have been avoided, and I consider that the crossing which has been provided is safe and sensible.
30. Mr Powell quotes at length from 'Secured by Design', published by the Association of Chief Police Officers, and states: *It is clear from even a superficial examination of the diversion proposal that the design of the path... fails all of the design criteria.* It does not. I shall give one example. Section 4.3 (which he quotes) states: *Where a segregated footpath is unavoidable, for example a public right of way... designers should consider making the footpath a focus of the development and ensure that it is: as straight as possible, wide, well-lit, devoid of potential hiding places, and overlooked by surrounding buildings and activities.* The part of the proposed diversion already in place meets these criteria. Sanctuary states that: *the development of part of the*

site (planning approval P13K0248) has received a full SBD [Secured by Design] award and comments by the officer regarding the quality of the design to achieve SBD and a request to formally present the award to Sanctuary (copy available if requested). That claim is not disputed by Mr Powell.

31. The OSS's fourth ground of objection is: *The Order suffers from fatally inaccurate cartography which is capable of seriously misleading the public, unintelligible description in part 2 of the schedule indicating points of width change, absence of description of or reference to key structures material to both public appreciation of the proposal and subsequent amendment of the statement, inadequate and/or inappropriate reference to structures which the public will be required to negotiate if the order is confirmed.* I accept that it is difficult, if not impossible, to provide a base map for an order showing a proposed route when the development in question has not been recorded by the Ordnance Survey, whose maps and plans are, in my experience, invariably used for such base maps. But this Order map is unambiguous in what it shows, and the Order schedule describes the route in accurate, if rather convoluted, detail. One of the principal purposes of the order map, as opposed to the consultation maps provided by Sanctuary, is to show what is to be recorded on the Definitive Map if the Order is confirmed.
32. Mr Powell's fifth objection is: *I object to this diversion on grounds of the additional costs which will be imposed on the public finances, if the order is confirmed, by the imposition of extensive and costly boardwalk sections not required or necessary on the existing path.* The future maintenance costs of the diverted route are a matter to which I cannot attach significant weight in deciding whether to confirm the Order.
33. Mr Powell continues: *the boardwalk is not mentioned anywhere in the text but it represents an access limitation concern and it is a material consideration about which the public have a right to be informed as a part of the Order in order to assist with the formation of their opinion of the proposal.* The boardwalk is in place. It covers part of the route between C and E. In my view it enhances the quality of the proposed diversion by providing a flat, level and secure surface where otherwise the path would run through a significant dip. It would make the path easily usable by people in wheelchairs. Even if the boardwalk was considered to be a limitation on the rights of the public there is no provision in *The Town and Country Planning (Public Path Orders) Regulations 1993* for the description of limitations and conditions in an order as there is in *The Public Path Orders Regulations 1993*. Furthermore, the Order cannot come into effect until the new path has been created to the reasonable satisfaction of the highway authority, Worcestershire County Council. The consultation document produced by One Creative (paragraph 13 above) made it clear that part of the diverted route was intended to run on a boardwalk.
34. The sixth objection is similar: *I object to this order because a boardwalk poses an area of considerable doubt regarding its maintenance liability.* The question of who would be liable in future to maintain the diverted route is a matter for the highway authority.
35. In addition to the six grounds of objection, Mr Powell provided a lengthy legal submission.
36. His first submission was: *that the temporary closure order made pursuant to the Road Traffic Regulation Act 1984, for the purposes as stated thus in the Order "to facilitate construction works on development site University Park,*

Worcester", undermines and is entirely contrary to the validity and purpose of the necessity to make an order under the Town and Country Planning Act 1990 Section 257 for what in effect is exactly the same purpose as that provided for in the temporary closure order.

37. I consider that the fact that there is a temporary closure order in effect can have no bearing on my decision whether or not to confirm this Order. As Mr Powell himself noted, section 257(3) of the 1990 Act makes specific mention of such a situation: *An order may be made under this section authorising the stopping up or diversion of a footpath, bridleway or restricted byway which is temporarily stopped up or diverted under any other enactment.* I accept that it might be considered that Sanctuary and the University were adopting a risky strategy by starting the development before a permanent diversion order had been confirmed, but their strategy in this respect is not my concern. My concern is whether the Order before me meets the tests for confirmation set out in the legislation.
38. The second submission concerns a previous order made under section 257 of the 1990 Act in January 2014. This was withdrawn after it was discovered to contain errors, and the current Order was subsequently made in August the same year. I cannot concern myself with the earlier order, since it is not before me for consideration.

The Ramblers Association arguments

39. The gist of the RA's case is as follows: the outline permission [P11K0588] incorporated the aspirations of the planning policy documents to protect and enhance the existing public footpaths on the development site. However, the reserved matters permission [P13K0248] had a harmful impact on the convenience and attractiveness of the footpath in that it took it into close proximity of and along the side of a highway carriageway for part of its length. The footpath would become little more than a roadside footway and would not have the traffic-free character which is the essence of a public right of way. In addition, the proposed diversion would be too narrow on the boardwalk section, given the amount of pedestrian traffic that is likely to be generated. The RA was satisfied, however, with the route of the diversion to the west of the Health and Wellbeing Campus.
40. I have considered the route of the proposed diversion in relation to the cul-de-sac estate road at paragraph 29 above.
41. The section where the route has been provided on a boardwalk 1.5 metres wide is around 50 metres long. This section is visible from each end and is, in my view, ample for two pedestrians to pass each other (see also paragraph 27 above). I have seen no estimate of the likely traffic it would attract, but it would have to be very significant before it became problematic.
42. The proposed diversion can never replicate, in character or appearance, what it is intended to replace, but that is because planning permission has been given to develop a rural area into something quite different. I conclude that what is proposed to be provided (and has already, to a large extent, been provided) is an alternative path which, given the nature of the development, is reasonably attractive, reasonably direct, safe and easy to use.

The development and disadvantages and losses

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43. The only loss to walkers, or others, seems to be the loss of the rural character of the path. This, however, will be the result of the planning permission, and not the diversion.
 44. The development itself is clearly of considerable significance in terms of attracting growth, jobs and investment to Worcestershire. It is identified as a key employment site in the emerging plan for the area. This significance undoubtedly outweighs any loss caused by the diversion of footpath 669. The balance comes down very firmly on the side of allowing the diversion of the footpath to go ahead.

Conclusion

45. 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

46. I confirm the Order with the following modification:

- In the preamble to the Order, insert after the words '1990 namely:' the following words: 'Outline Planning Consent P11K0588 granted by Worcester City Council for mixed use development comprising education, business, hotel, care home/extra care, crèche and nursery, health and fitness and retail, and'

Peter Millman

Inspector

