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## Order Decisions

Site visit made on 7 January 2016

**by Mrs H D Slade MA FIPROW**

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

**Decision date: 28 January 2016**

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### **Order Ref: FPS/D0840/4/11**

### **'Order A'**

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and is known as The Cornwall Council (Footpaths Nos. 186 (Part), 184 (Part) and an unrecorded footpath, St-Just-in-Penwith)(Chyrose) Public Path Diversion Order 2014.
- The Order is dated 30 July 2014 and proposes to divert the public rights of way at Chyrose Farm as shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Cornwall Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is not confirmed.**

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### **Order Ref: FPS/D0840/3/4**

### **'Order B'**

- This Order is made under Section 118 of the 1980 Act and is known as The Cornwall Council (an Unrecorded Public Footpath at Chyrose Farm, St Just-in-Penwith) Public Path Extinguishment Order 2014.
- The Order is dated 30 July 2014 and proposes to extinguish an unrecorded public right of way at Chyrose Farm as shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Cornwall Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

**Summary of Decision: The Order is not confirmed.**

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### **Procedural Matters**

1. Both Orders were made on the same day and relate to paths which are connected. There is one objection to each Order. The Ramblers have objected only to the extinguishment order (Order B) on the basis that unless the diversions proposed in Order A are confirmed there will still be a need for the path affected by Order B. Whilst each Order needs to be considered on its own merits, I acknowledge the comments of the Ramblers and intend to deal with the diversion order (Order A) before considering Order B, taking account of the provisions of Section 118(5) of the 1980 Act (See paragraph 7 below).
2. Mr R J Rogers has objected to the diversion order (Order A) on behalf of the West Cornwall Footpaths Preservation Society.

### **The Main Issues**

#### **Order A**

3. Section 119(1) of the 1980 Act states that an order can be made where it is considered by the authority that it is expedient in the interests of the owner, lessee or the occupier of land crossed by the path or way, or of the public, that

the line of the path in question should be diverted. This Order has been made in the interests of the landowner. Section 119(6) of the same Act states that, if I am to confirm the Order, I too must be satisfied in this respect. Furthermore, before the Order can be confirmed I must be satisfied that the path will not be substantially less convenient to the public as a consequence of the diversion.

4. If I am satisfied on the above points, I must then consider whether it is expedient to confirm the Order, having regard to the following issues:
  - a) the effect that the diversion would have on public enjoyment of the path as a whole;
  - b) the effect of the coming into operation of the Order on land served by the existing right of way; and
  - c) the effect of the new public right of way on the land over which it is created (or land held with it);having regard also, with respect to b) and c), to the provisions for compensation as set out in Section 28 of the 1980 Act.

### **Order B**

5. In order to confirm this Order I must be satisfied that it is expedient to stop up the path having regard to:
  - the extent that it appears likely that the footpath in question would, apart from the Order, be likely to be used by the public, and:
  - the effect that the extinguishment of the footpath would have as respects land served by it, account being taken of the provisions as to compensation.
6. In respect of the tests to be considered, I must have regard to the judgements in *R v Secretary of State for the Environment ex parte Stewart* [1980] JPL 537 ('Stewart') and *R v Secretary of State for Environment (ex parte Cheshire County Council* [1991] JPL 537) ('Cheshire') in which the tests to be applied at confirmation were clarified. Whilst the order making authority must consider the need for the public right of way at the time of making the Order, at confirmation I must look at the question of likely future use of the path concerned. The question of the expediency of stopping up the path enables a variety of matters to be considered.
7. Where an extinguishment is being considered concurrently with a diversion order, Section 118(5) provides that I may have regard to the extent to which a path provided by the diversion order will provide an alternative path or way when considering the likely future use of the path proposed for extinguishment.

### **Both Orders**

8. I must have regard to the material provisions, if any, of the Rights of Way Improvement Plan ('ROWIP') produced by the Council. I must also take into account government advice, relevant legal precedents and other legislation which is applicable. In particular, in this case, I must have regard to the

purpose of conserving and enhancing the natural beauty of the area, which is part of the West Penwith Area of Outstanding Natural Beauty ('AONB')<sup>1</sup>.

## **Reasons**

### **Order A**

9. No objections have been raised to the principle of the diversion. The objections made to the proposals by the West Cornwall Footpaths Preservation Society ('WCFPS') relate to the provisions in the Order for the crossing points of field boundaries.
10. I have no information to suggest, therefore, that the Order does not meet the main criteria that I have set out at paragraphs 3 and 4 above. I am satisfied that the Order has been made in the interests of the landowner because the existing path runs through a working farmyard and the garden of the farmhouse, and it will be more convenient for him to remove it. I am also satisfied that the path will not be substantially less convenient to the public as a consequence of the diversion, since there have been no objections in principle. No detailed comments have been made in connection with the enjoyment of the path as a whole, or the ease of walking it, and there is no suggestion that other land will be adversely affected.
11. My consideration of the objections therefore falls into the category of the general expediency of confirming the Order, bearing in mind other matters which I must take into account: principally the adverse effects on the AONB which the WCFPS considers will arise. As pointed out by the WCFPS, this issue might also fall into the category of enjoyment of the path as a whole, particularly for people familiar with the local landscape, although the issues might be less obvious to occasional visitors to the area.

### *Duty to have regard to the purposes of conserving and enhancing the AONB*

12. Section 85 of the CROW Act places the duty on public bodies when exercising their functions in relation to land within an AONB to have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty. Relevant bodies which must fulfil this duty include County and Parish Councils, and any person holding public office. It is therefore incumbent upon me, as a public officer, to consider this issue when determining the Order, just as it was for Cornwall Council ('the Council') when making the Order.
13. Extracts from the AONB Management Plan provided by Mr Rogers on behalf of WCFPS indicate that the landscape in the area of Chyrose Farm is ancient and that the Cornish hedges are of prehistoric origin, having been in continuous use for their original purpose since they were made. Their ongoing conservation and management is an important principle of the Management Plan.
14. The ROWIP, which is incorporated within the Cornwall Council Access Strategy produced by the Council, apparently also recognises the need to retain the historic fabric of the landscape whilst trying to achieve the least restrictive option for access where possible. Mr Rogers, in quoting this Strategy, refers to Action AA32. The extract of the ROWIP supplied by the Council does not include reference to this particular Action, but Mr Eastwood (the Council's Countryside Access Team Leader) refers in his letter of 1 December 2015 to

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<sup>1</sup> Section 85 of the Countryside and Rights of Way Act 2000 ('CROW Act')

- the same objective as being Action AA2. Despite the fact that I have not seen this, there is clearly no dispute that the objective exists.
15. Mr Rogers has sought to demonstrate that a diverted route following a line very close to that which is proposed in Order A could have been achieved by utilising existing boundary crossing points (two existing gates or gateways) rather than by constructing two new kissing gates as indicated in the Order. One of the proposed kissing gates would require the destruction of a relatively recently built Cornish granite stile (Point KG1 on the Order plan), and the other would require a new breach in the existing Cornish hedge (Point KG2 on the Order plan). By utilising existing field gates or gaps in close proximity to both these locations, Mr Rogers believes that an acceptable alternative route could have been provided which does not require any work to be done to either of the hedges concerned; thereby achieving the objectives of the AONB Management Plan and also providing the least restrictive option for access in accordance with the ROWIP.
  16. I can see much merit in Mr Rogers' arguments so the responses from the Council and the applicant, Mr Matthews, are crucial in determining whether or not I should depart from the stated policies.
  17. Mr Matthews argues that gateways can become muddy when used by stock and that therefore it will be less convenient for the public to use the same gateways as are used by his cattle. He also argues that keeping stock and animals apart is in the interests of public health and safety. Placing the path at the very edge of the field is therefore desirable in this respect.
  18. The Council considers that kissing gates are the least restrictive option whilst keeping to the objectives of ensuring that appropriate land management can take place. The Council states that Mr Matthews has undertaken to build kissing gates in the local 'Penwith-style' but has not provided any drawings or examples of what that may entail, other than indicating that he will be using 'existing' materials on the site to build gates which would be of a type similar to others in the local area.
  19. During my site visit I paid particular attention to the landscape and the types of boundary crossing in the area. Apart from some new wooden fencing with pedestrian gates around a small car park and picnic area adjacent to the B3306 near to Higher Bojewyan, I saw no other pedestrian gates in the vicinity. All the field crossings consisted either of field gates (one with a wooden stile adjacent) or traditional Cornish granite stone stiles (whether original or built more recently in an appropriate style). In the absence of any details from either the Council or from Mr Matthews I am therefore at a loss as to know what is meant by 'Penwith-style kissing gates'.
  20. I was able to see the gap and field gate referred to by Mr Rogers in his statement of case, and I could also see that by utilising those features the path could still run against the edge of the relevant field, thus overcoming one of Mr Matthews points. I noted the use by Mr Matthews of electric ribbon fencing to protect the public from cattle whilst using the permissive route (which would largely become the proposed right of way) and can see no reason why that method could not continue, if he so wished, to protect a slightly revised route.
  21. I accept that field gates used by cattle can become muddy, but I visited the site during a period of extended wet weather. The stock were inside

- (presumably for the winter) and the ground, although wet, was not particularly muddy. When the stock is in the fields I accept that the situation might be different, but walkers in this area are used to conditions such as mud and are prepared for it. I agree with Mr Rogers on this point. I place no great weight on Mr Matthews' concerns in this regard.
22. The Council appears to be concerned to ensure that crossing points must meet the guidelines set out in the Cornwall Countryside Access Strategy 2007 and consider that anything other than Kissing Gates will not achieve the desired objective. Whilst I accept that a gap might not enable effective land management, the gap suggested by Mr Rogers is pre-existing and must therefore be acceptable to the landowner. However, a field gate could be erected if needed, without damaging the existing Cornish Hedge. A field gate already exists at the other location suggested by Mr Rogers.
23. I note that Mr Eastwood suggests that the AONB Management Plan is guidance only and is not backed by legislation. However, my duty (and the Council's) to have regard to the need to conserve and enhance the features of the AONB is backed by legislation. I therefore consider that I am bound to take into consideration the guidance in the Management Plan.
24. The Order as made is, in my view, contrary to the objectives of the AONB Management Plan since it involves damaging features which are particularly distinctive. Nevertheless, I see no inherent barrier to fulfilling the need to conserve and enhance the AONB, whilst at the same time providing crossing points which satisfy the 'least restrictive option' with regard to public access, yet still facilitate suitable land management. The alternative route proposed on behalf of the WCFPS seems to overcome any perceived or actual conflict between relevant policies and it therefore seems to me that I would be entitled to modify the Order to show the route suggested by Mr Rogers as fulfilling both requirements. Such a modification would require advertising.
25. However, the Order has been made in the interests of the landowner, Mr Matthews, and he has already expressed his opposition to the alternative route proposed by Mr Rogers. I am therefore unable to modify the Order because the diversion would not then, evidently, be in the interests of the landowner.
26. It would be open to me to consider altering the basis on which the Order was made to show that it was in the public interest, but I have no information to suggest that the diversion of the path is, in fact, in the interests of the public. Just because there are no objections to the principle of diverting the path, does not automatically equate to it being in the interests of the public to divert it. That would be an assumption too far in my view.
27. I therefore conclude that it is not expedient to confirm the diversion order, due to the conflict with the government policy of conserving and enhancing the AONB. If there had been no way of avoiding the harm to the AONB, I might have given other factors more weight, but I am not convinced by the arguments put forward by Mr Matthews and Mr Eastwood. I agree with Mr Rogers that there is an alternative solution which would avoid the need for any harm to existing hedges, thereby giving the AONB the protection it warrants, whilst still fulfilling the needs of stock management and ease of pedestrian access required by the ROWIP.

**Order B**

28. In the light of my conclusion on Order A, the extinguishment proposed by Order B becomes untenable. This route provides the link to the route running east to west through the farmyard which is provided by Footpaths 184 and 186, and the unrecorded link between the two. Whilst the Order route is not shown on the Definitive Map and Statement, it has clearly been accepted as a highway by the Council. In the absence of a confirmed diversion, this path provides a crucial link in the network and it would clearly be used by the public if the extinguishment order were not made.
29. Order B therefore fails the criteria for extinguishment and I conclude that it is not expedient to stop it up.

**Conclusions**

30. Having regard to these and all other matters raised in the written representations I conclude that neither Order should be confirmed.

**Formal Decision**

**Order A**

31. I do not confirm the Order.

**Order B**

32. I do not confirm the Order.

*Helen Slade*

**Inspector**