
Order Decision

Site visit made on 2 December 2015

by Martin Elliott BSc FIPROW

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

Decision date: 17 February 2016

Order Ref: FPS/X2600/4/13

- This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and is known as the Norfolk County Council (Witton Footpath No. 15) Diversion Order 2015.
- The Order is dated 14 January 2015 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were four objections and seven representations of support outstanding when Norfolk County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Procedural Matters

1. I carried out an unaccompanied inspection of the existing and alternative routes on the morning of 2 December 2015. The existing route of footpath 15 is currently obstructed and an alternative route was also unavailable. I was therefore only able to walk part of the existing route at its northern end. I was however able to observe the remainder of the existing route from a number of vantage points. Although I was unable to walk the existing route I am satisfied, on the basis of my observations on site that I can make a decision on the Order.
2. The Council takes a neutral stance in respect of supporting the confirmation of the Order although is satisfied that the relevant tests for the making and confirming the Order have been met. The case in support of the Order is made by Rowtac Ltd on behalf of the applicant.
3. I sought further information from the applicant and the Council in respect of the Equality Act 2010. The responses were circulated to the parties and I have had regard to the additional representations in reaching my decision.

The Main Issues

4. This Order has been made in the interests of the owner of the land crossed by the footpath. Section 119 of the Highways Act 1980 therefore requires that, before confirming the Order, I must be satisfied that:
 - (a) it is expedient in the interests of the owner of the land crossed by section of footpath to be diverted that the line of the path or way, or part of that line should be diverted; and
 - (b) the path or way will not be substantially less convenient to the public; and
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- (c) that it is expedient to confirm the Order having regard to:
 - (i) the effect which the diversion would have on public enjoyment of the path or way as a whole; and
 - (ii) the effect which the coming into operation of the Order would have as respects other land served by the existing rights of way; and
 - (iii) the effect which any new public rights 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, account being taken of the provisions as to compensation.
- 5. In addition, Section 119(2) of the 1980 Act requires that a diversion order cannot alter a point of termination of the way if that point is not on a highway, or (where it is on a highway) otherwise than to another point which is on the same highway, or another one connected with it, and which is substantially as convenient to the public.
- 6. Section 119(6A) of the 1980 Act provides that I must have regard to any material provision contained in a Rights of Way Improvement Plan (ROWIP) for the area covered by the Order.
- 7. As noted above the existing route is currently obstructed at a number of points. An equitable comparison between the existing and proposed routes can only be made by disregarding any temporary circumstances preventing or diminishing the use of the existing route. The convenience of the existing route is to be assessed as if the way were unobstructed and maintained to a standard suitable for those users who have the right to use it.

Reasons

Whether it is expedient in the interests of the owner of the land crossed by the footpath that the way should be diverted

- 8. The existing route passes through the garden of Ebridge Farm house and through a number of farm buildings. The applicant argues that it is clearly in the interest of the owner that the path is diverted so that it no longer passes through the garden and farm buildings. It is also suggested that the diversion would result in the footpath interfering less with the use of the farm land as a whole for agriculture and with privacy.
- 9. In my view, although I have not been provided with evidence as to the effects of the existing path, the diversion would significantly lessen the impact of the footpath on the property. Issues as to privacy will be addressed by moving the path from the garden of the property and there will be less interference with the use of the land in consequence of the presence of the path. I conclude therefore that the Order is in the interest of the owner of the land.
- 10. Mr I Witham, objecting on behalf of the Open Spaces Society (OSS), observes that none of the land crossed by the existing route is registered with the Land Registry. The applicant confirms that the land is not registered with the Land Registry because it was purchased in 1977, before compulsory registration. Although I note the observation of Mr Witham there is nothing before me to suggest that the applicant does not own the land crossed by the existing route. The application confirms that the applicant is the owner of land at Ebridge Farm.

11. The OSS and Mr M Witham make the point that whilst not against moving the path away from buildings which obstruct the path it is possible to have served the interests of the landowner's interests by a more minor diversion. Whilst it may be possible to address the concerns of the landowner by an alternative proposal, and I note that another proposal has been considered, the issue to consider is whether the Order as made is expedient in the interests of the landowner. I have concluded that the Order, as made, is in the interest of the landowner.

Whether the path or way will not be substantially less convenient to the public

12. In opposition it is argued that the alternative route is longer by 52 metres and is less direct. Mr Witham refers to reduced mobility and dexterity which makes the alternative much less convenient. Objections refer to the fact that there are no limitations on the existing route whereas the alternative route has two field gates. It is stated that field gates are difficult to negotiate. No specification has been provided for the field gates and no reference has been made to the British Standard for Gaps, Gates and Stiles (BS 5709:2006) (I consider this further at paragraph 37 below). As such it is contended that the alternative route is much less convenient.

13. I accept that the alternative route is 52 metres longer than the existing route but I do not consider the additional distance renders the alternative to be substantially less convenient. The additional 52 metres is not significant in the context of the path. I also accept that the alternative is less direct, but any deviation from a direct line is minimal and again I do not consider that this means that the alternative route is substantially less convenient.

14. As regards any limitations, there are none recorded on the existing route (see paragraph 15 below). In contrast the proposed alternative is provided with two field gates. The gates will introduce an element of inconvenience in that it will be necessary for these to be opened and closed. However, the issue to be considered is whether the alternative route is substantially less convenient and in my view the need to use two field gates does not render the alternative route substantially less convenient.

15. In response to the OSS, in relation to the absence of recorded limitations on the existing route, the applicant refers to the policy of Norfolk County Council, when recording public rights of way on the definitive map; this is not to record any limitations or conditions affecting public rights. It is suggested by the applicant that if the Order is not confirmed then it is likely that some structures will be authorised along the existing route under section 147 of the 1980 Act. Whilst it is likely that structures will be authorised, the type of structure which might be authorised can only be speculative. As noted above, the convenience of the existing route is to be assessed as if the way were unobstructed and maintained to a standard suitable for those users who have the right to use it. Bearing in mind the above it is difficult to give any weight to the fact that in the event of non-confirmation there will be structures on the existing route.

16. I understand the point that given the lack of detail provided in the Schedule to the Order it would allow the owner to erect any other kind of gate including one which is harder for the public to use. However, any gate erected must allow free unhindered passage and the local authority has a duty to prevent the unlawful interference with a public right of way. Section 146 of the 1980 Act

imposes a duty on a landowner to maintain any gate in a safe condition and to a standard of repair required to prevent unreasonable interference with those using a right of way. Whilst this may not prevent a gate from being replaced by a different gate there is an obligation, enforceable by the Council, to ensure that the right of passage is not interfered with. I accept that field gates are large structures but bearing in mind the above there is nothing to suggest that any field gate will mean that the alternative route is substantially less convenient. Although I note the representations in respect of the condition of the gates it should be noted that the Order has not come into effect and the route remains permissive. If the Order is confirmed then the route will be a public footpath for which the above duties are applicable.

17. The Old Canal Company Ltd suggest that if the route Z to X were changed to the east side of the hedge then questions relating to gates will be resolved. However, it cannot be presumed that a route following this alignment could be achieved without the existence of any structures including gates.
18. Mr M Witham raises concerns that the ground alongside the canal looks moister and suggests that vegetation would grow more quickly on the alternative route than on the present route. In his view this would mean that the proposed alternative route would be less convenient. It may be the case that vegetation may grow faster where the ground is moist. However, on my site visit the ground appeared to be mown on a regular basis and free from any vegetation which may make use difficult. There is no reason to suspect that confirmation of the Order will mean that the land is no longer maintained by the landowner. In any event the highway authority is under a duty to maintain the surface of the highway to a standard suitable for its expected use. There is nothing to indicate that the alternative route will be substantially less convenient in consequence of the ground conditions promoting the growth of vegetation.
19. Having regard to all of the above I conclude that the proposed alternative route will not be substantially less convenient.

The effect which the diversion would have on public enjoyment of the path or way as a whole

20. In opposition it is contended that the proposed alternative route goes over lower ground and follows a hedge for some distance, blocking views. Further, that the hedge makes the route shady and dismal. This is said to make the alternative less enjoyable.
21. I accept that the alternative route, where it follows the hedge, is on lower ground such that views are more limited. However, views of the surrounding countryside are available on the section of path B to U. In addition, from point X to Z the alternative route provides good views of the mill pond and Ebridge Mill which are not available from the existing route. It will be the case that the adjacent hedge will make the path shady at certain times of the day or year but the path is not enclosed by hedges and any shading will not have a significant effect on enjoyment.
22. The OSS indicate that the existing route is very old and is shown on the tithe map for Witton of 1841. It may be the case that some take pleasure from following old routes, however, there is no physical evidence of any historic features on the route which the public might enjoy. I therefore give little weight in terms of the enjoyment of the way on the basis that the route is old.

23. A number of the representations in relation to the Order describe the alternative route as delightful and considerably more pleasant than the existing route. It is nevertheless accepted that given that the existing route is unavailable there is an element of conjecture in any comparison with the existing route.
24. As noted above (paragraph 18), Mr M Witham refers to the moist ground conditions. In addition to effects on convenience Mr Witham contends that this will make the path less enjoyable. I revert to my previous comments and for the same reasons I do not think that there will be any adverse effect on the enjoyment of the path or way as a whole.
25. In conclusion, whilst some may find the alternative route less enjoyable, I do not consider any loss of enjoyment of the route as a whole to be significant.

Whether the proposed point of termination is substantially as convenient as the existing point of termination

26. In opposition it is argued that the existing point of termination offers a good line of sight in both directions along the road and provides a safe crossing point with Gedge's Lane and Kitlings Beck Road just a short distance away. In contrast the proposed point of termination is on a bend and directly on the junction between North Walsham Road and Kitlings Beck Road. The proposed point of termination is considered to be much less safe and less convenient.
27. Mr M Witham refers to the unease of entering onto, and crossing, the road at this point because the traffic tends to come fast from three directions. It is also said that it is difficult to see traffic coming from the northeast direction from Happisburgh because of the bend in the road. Mr Witham also points out that he is hard of hearing and does not benefit from being able to listen for oncoming traffic. He is also unable to avoid traffic as quickly as he would like.
28. In respect of access to Gedge's Lane, I note that this route is not recorded on the definitive map but that an application has been made to add the route to the definitive map. It is not my role to consider the status of this route but it is clear that this is a route which people using the Order route will use as a continuation. It is appropriate to consider the use of this route in the context of the points of termination although in terms of distances between the existing and proposed points of termination and Gedge's Lane there is no significant difference.
29. To access Gedge's Lane from the existing and proposed routes it is necessary for users to cross North Walsham Road. In relation to the existing point of termination visibility along North Walsham Road is good although views to the south west are more limited. The termination point is opposite a large area of highway verge which provides a convenient link to Gedge's Lane. In terms of the proposed point of termination I accept that visibility to the north east along this road is more limited and more caution will need to be exercised in crossing the road; views to the south west are good. However, there is nothing before me to suggest that the crossing point is unsafe. On my site visit I observed a number of individuals crossing the road at this point, all without difficulty. I also note that one of those who has made representations in support of the Order considers the alternative point of termination to be safer than the existing route. I accept that there is limited highway verge between the

proposed point of termination and Gedge's Lane but the use of the carriageway is in my view no less convenient.

30. The proposed alternative route is closer to the junction between Kitlings Beck Road and North Walsham Road but I do not consider that this has any implications as to the safety in respect of the point of termination. From my observations on site Kitlings Beck Road does not endure the same levels of traffic as North Walsham Road which, whilst by no means a quiet road, is not heavily trafficked. Further, vehicles joining North Walsham Road from Kitlings Beck Road are required to give way to other traffic. As such I do not consider the location of Kitlings Beck Road presents a hazard to path users.
31. The applicant contends that the point of termination is closer to the route of public footpath 15 further to the southwest along North Walsham Road. However, this route is at some distance from the Order route and any benefits are minimal; I give this little weight in determining the Order.
32. Having regard to all of the above, although very finely balanced, I consider that the proposed alternative point of termination is substantially as convenient as the existing point of termination.

The effect which the coming into operation of the Order would have as respects other land served by the existing right of way

33. There is no evidence before me that the diversion would have any effect on land served by the existing way.

The effect which 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, account being taken of the provisions as to compensation

34. Both the existing and alternative routes pass over land in the ownership of the applicant who supports the Order. There is no evidence before me of any adverse effect on the land over which the new route passes such that compensation issues are relevant.
35. The Old Canal Company Ltd, one of the objectors, argues that the land between points X and Z is owned by the Company. Although I note that the Old Canal Company Ltd is in dispute as to ownership, the Land Registry records indicate that this land is registered in title to the applicant. The Land Registry records provide conclusive evidence as to ownership. As such it must be concluded that the land is in the ownership of the applicant and I refer to my comments in the above paragraph in this respect.

Rights of Way Improvement Plan

36. The applicant refers to pages 33 to 36 of the ROWIP although suggests that much of this section appears to have been superseded by current practices in respect of applications for orders. However, the applicant considers that the Order will resolve a long-standing problem on the network and contribute towards objective 1 to 'Develop a well signed, maintained and easily accessible network'. In my view the diversion is consistent with this objective although the objective could be met by making the existing route available. As such I give this little weight in support of confirmation of the Order.

Whether it is expedient to confirm the Order

Equality Act 2010

37. The proposed alternative route will be subject to the limitations of two field gates. The point is made in opposition that there is no reference to the British Standard BS 5709:2006. Whilst it is good practice to provide a specification, and any specification will facilitate enforcement duties, there is no requirement for such a specification to be identified in an order. Nevertheless the Council is required to have regard to the Equality Act 2010 in carrying out its duties.
38. I note the point made by the OSS, by reference to the Defra guidance¹, that there should be a minimum number of structures and that these should be the least restrictive. In respect of the limitations in the Order, whilst I note the representations as to the necessity of the field gates, the applicant is clear that the two gates are necessary for agricultural purposes. Some weight should be given to the assertions of the applicant, as owner and manager of the land, as to the need for these structures for agricultural purposes. I have no evidence before me to indicate that the assertions are incorrect. Whilst any limitation should be the least restrictive this should also be consistent with the landholder's requirement. In this case the field gates are required.
39. The Defra guidance does suggest that an authority may consider defining a specification which is variable according to the changes in land use. Whilst it is open to me to modify the Order I have no evidence before me to suggest that the field gates are not needed at certain times such that I can modify the Order accordingly.
40. Section 149 of the Equality Act 2010 establishes a general duty on public authorities to have due regard when carrying out their functions to the needs to eliminate conduct prohibited under the 2010 Act, advancing equality of opportunity and fostering good relations between people who share a protected characteristic and people who do not. In having due regard it is not necessary for any provision to be enhanced or that there should be a similar level of provision. Where there are disbenefits then this needs to be considered in the overall benefits the Order.
41. Whilst there are limitations on the proposed alternative route these do not render the alternative route substantially less convenient. There may be some impact on those with protected characteristics but I do not consider these to be significant. When taking all factors into account in this respect I take the view that it remains expedient to confirm the Order.

Other expediency factors

42. The OSS argue that it was not expedient for the Council to have made the diversion order when an alternative proposal, put forward by the applicant was available. It may be the case that an alternative proposal was put forward however, I have been appointed to determine the Order before me, an alternative proposal is not for my consideration. The Order satisfies the relevant tests and on that basis I consider it expedient to confirm the Order.

¹ Department for Environment Food and Rural Affairs, Authorising structures (gaps gates and stiles) on rights of way, October 2010.

43. The objectors refer to a number of issues in respect of the obstruction of the existing route, lack of signage and maintenance. I note these concerns but, notwithstanding my observations at paragraph 7 above, they do not have any bearing on whether it is expedient to confirm the Order and I give them no weight in determining the Order.
44. The Old Canal Company Ltd make the point that for repairs to the culvert, lock wall and overspill, which may take a year, the footpath would have to be closed with no alternative route. Whilst this may be the case it is not uncommon for rights of way to be closed to allow works to take place. Although the route may be unavailable during repair works I do not consider this makes it inexpedient to confirm the Order.

Conclusions on expediency

45. Having regard to all of the above I conclude that the Order is in the interest of the landowner, that the proposed alternative route is not substantially less convenient and that the point of termination is substantially as convenient. In terms of enjoyment, whilst for some there may be a loss of enjoyment I do not consider that any loss is significant. When balanced against the interests of the landowner I consider that it remains expedient to confirm the Order.

Conclusion

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

Formal Decision

47. I confirm the Order.

Martin Elliott

Inspector