



Order Decision

Hearing Held on 15 October 2019

by K R Saward Solicitor

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

Decision date: 31 October 2019

Order Ref: ROW/3217703

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and section 53A(2) of the Wildlife and Countryside Act 1981 and is known as The Oxfordshire County Council Rollright Footpath No. 7 (Part) Public Path Diversion and Definitive Map and Statement Modification Order 2015.
- The Order is dated 28 May 2015 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Oxfordshire 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 subject to the modifications set out below in the Formal Decision.

Preliminary Matters

1. If the Order is confirmed, then the definitive map and statement will also be modified.
2. As I have found it convenient to refer to points shown on the Order Map along the existing and proposed routes, I have attached a copy for reference purposes.
3. The application was made by the previous landowners. Since the Order was made, the current landowners have agreed with the Council as Order Making Authority ('OMA') that works should be undertaken to the proposed diverted route between points G-D if the Order is confirmed. Those works involve the hire of plant and operators to bring material to site and to regrade the banking to create a wide and even path. Given the significant cost, the landowners have not yet undertaken those works and would only do so upon confirmation of the Order. It is anticipated that the works would take up to 3 months to complete.
4. In addition to those works, it emerged at the Hearing that a section of the diverted route which is already laid out and in use narrows as it passes by the corner of an agricultural building. Fencing would need to be moved and vegetation cleared to accommodate the proposed 2m width.
5. To reflect the time needed for the various works, an amendment to the wording of the Order has been requested by the OMA and landowners to the effect that the new path shall be created 3 months after confirmation of the Order. The existing path would not be extinguished unless and until the OMA certifies that the new path has been brought into a fit condition for public use.
6. The proposed wording could potentially allow a gap between extinguishment of

the existing route and the creation of the diverted route. Amended wording was discussed and agreed at the Hearing to overcome such anomaly. It was further agreed that the revised wording should make clear that the certification needed is from the Council in its capacity 'as the local highway authority'.

7. Should I find in favour of confirming the Order I am satisfied that such modifications to the Order are necessary and can be undertaken without the need for the Order to be re-advertised.
8. The one outstanding objection was made by the Open Spaces Society ('OSS'). In arriving at my decision, I have taken all written representations and documents into account as well as the oral submissions made at the Hearing.
9. An accompanied site visit with all attendees present at the Hearing took place during the Hearing.

Main Issues

10. The Order has been made in the interests of the owners and occupiers whose land is crossed by Rollright Footpath No 7 ('FP7'). By virtue of section 119 of the Highways Act 1980, for me to confirm the Order I must be satisfied that:
 - (a) the diversion to be effected by the Order is expedient in those interests;
 - (b) the new path will not be substantially less convenient to the public in consequence of the diversion;
 - (c) it is expedient to confirm the Order having regard to:
 - (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 paths and the land over which the new path would be created together with any land held with it.
11. I shall also have regard to any material provision contained in a rights of way improvement plan ('ROWIP') for the area when considering the Order.

Reasons

Background

12. The Order aims to divert the section of FP7 which runs through the enclosed residential garden of Manor Farm. A failed application to divert the path was made in 2009. At that time, both the OMA and landowner believed that the definitive line ran outside (to the east) of the high garden wall so that it was physically separated from the house and garden. Following investigation by the OMA it later emerged that the path does not pass along the alignment as marked on the ground and was in use. Instead, the public path runs immediately inside (to the west) of the garden wall.
13. Extensive remodelling works were undertaken after a change in ownership in 2003 when the property ceased to be a working farm. Those works included the erection of the garden and retaining walls in 2007. The planning application explained that the walls were to afford privacy to the area immediately surrounding the main house. It was therefore intended to exclude the public path from the enclosed garden. Somehow the wall was built in the wrong place

resulting in it enclosing the path inside the garden.

14. It transpires that the garden path, a gateway, a brick-built greenhouse, a high retaining wall and garden/water features are all constructed over the definitive line. An alternative route has been provided for the public where the retaining wall obstructs the path at the southern end of the garden. This includes the provision of wooden steps (also described as a 'ladder') up the steep bank. Structures built over the path would need to be removed if it remains in the current position as the entire path must be open and available for public use.

Whether it is expedient in the interests of the owners and occupiers of the land that the footpath in question should be diverted

15. The current landowners of Manor Farm acquired their property after the Order was made in 2015. The family has a high media profile and are the subject of press interest. Concerns are expressed over their privacy and this is the basis on which the OMA made the Order. The OSS considers the effect on privacy to be exaggerated.
16. The occupiers may have a greater awareness and concern for privacy because of the interest in their lives. Clearly, at some point the occupants will change. New owners or occupiers may not have the same sensitivity to the public access of the garden afforded by the path. Nevertheless, I must determine the position as things now stand in terms of the owners/occupiers who are affected. That said, I do not consider that the public profile of any individual occupier would increase their right to privacy although I daresay it might influence how they feel about people entering their garden and perceive the situation. It is not suggested that there have in fact been any incidents of press intrusion or that the identity of the occupants has triggered increased interest from the public in the use of the path. Indeed, their representative referred to the public use of the path through the garden as 'rare' although this may be in consequence of signage directing users away from the definitive line to an alternative permissive path which avoids the garden.
17. For anyone, it would feel intrusive to have members of the public walking through their private garden. In this case the garden is large, and the path is at the end of the garden where it runs next to the garden wall. However, that does not lessen the sense of intrusion that is bound to arise when members of the public exercise their right to use the path. The path is still within a private space whatever size the garden might be. The OSS argued that a low garden wall serves as a buffer between users and most of the garden. However, it was apparent at the site visit that this does not provide a physical or visual barrier as the wall is broken by multiple exit points leading off the path into the garden space nearest the house.
18. The issue of privacy is not confined to a few people straying from the path as the OSS suggests. Parts of the house are obscured by garden vegetation, but there are unobstructed views of a large upper storey bedroom window. During my unaccompanied visit, the light to this room was on allowing some but restricted views inside. This in itself is intrusive even though the views are long range. It may well cause the inhabitants to feel a loss of privacy.
19. Despite the vegetation, there are also views towards the croquet lawn and a terrace with seating at one side of the house where occupiers might reasonably expect to enjoy a greater level of privacy. During the site visit the parties

agreed that the path at its nearest point is approximately 50m or so away from the seating area. It would be a similar distance to the house. Thus, they are not close-range views, but people using these outside areas would be seen from the path to the detriment of their privacy.

20. Arguments that the landowner bought the property in full knowledge of the existence of a right of way, and so should not then be able to alter it, were considered in *Ramblers' Association v SSEFRA, Oxfordshire County Council and Weston*¹. It confirms that there is no statutory bar to a person making an application in such circumstances. The question that must be asked under section 119(1) is whether the diversion is expedient in the interests of the land owner and occupiers. As set out by Mr Justice Ousley "If it is more convenient, beneficial or advantageous to him, it is expedient in his interests".
21. An issue was also raised by the applicants over security and this was discussed at the Hearing. An incident had occurred a few months previously when a couple of people had wandered through the garden and were found by the kitchen door. Until the day before the Hearing the route through the garden was not signed and there is no reason to believe that this one incident was a deliberate diversion off the definitive path. Other security measures are in place and whilst the occupants may fear for their own security and that of their property, there is little evidence that the presence of the path has increased that risk in reality.
22. On privacy grounds, I am satisfied that it is in the interests of the landowners and occupiers for that part of FP7 affected by the Order to be diverted.

Whether the new footpath will not be substantially less convenient to the public

23. When comparing the convenience of the routes included in the Order it is appropriate to assess the existing route as if it were available for use by the public without obstruction. Therefore, I shall disregard the fact that the definitive line is presently obstructed by various structures.
24. The proposal is to divert FP7 along the alignment of an existing permissive path between points A-G. Works would be undertaken to the southern part of the route between points G-D, which cannot currently be walked due to the raised bund and trees. From point D the path would pick up the remainder of FP7 heading south. Except for the distance between G-D, the owners submit that the diverted route has been set out on the ground for more than 12 years and is used extensively by the public.
25. Whilst there is no recorded width for the existing path, the diverted path would be 2m wide. No issues are raised regarding the width.
26. At 240m in length, the diversion is approximately 12m longer than the recorded route. It also involves more changes in direction as it curves in various places whereas the existing path through the garden follows a straight line. The additional 12m or so of diverted path would take very little time to walk. The OSS agreed that the increased length is immaterial. The termination points would be unchanged.
27. I consider that there would be negligible impact on convenience. There was consensus at the Hearing that the new path will not be *substantially less*

¹ [2012] EWHC 3333 (Admin)

convenient to the public which is the test that must be applied. I have no reason to disagree.

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

28. FP7 forms part of the 'd'Arcy Dalton Way', a promoted long-distance route of some 65 miles established in 1986 following the boundary of Oxfordshire with Warwickshire, Gloucestershire and Wiltshire. It is clear that the public use of the existing path is for recreational purposes and there is no dispute on this point.
29. The dwelling at Manor Farm comprises, in part, the original farmhouse being a Grade II listed building said to date from 1633. As a listed building it is clearly of historic interest. The remainder of the house is a modern substantial addition which the OSS considers to be very attractive in its own right and a 'very convincing Georgian extension' by a renowned architect. I note that the house has merited description and comment in a published series of books on buildings of England.
30. At present, the path enters the garden to Manor Farm through a door in the wall² towards the northern end of the route. For the most part the path follows a gravel path beside what the applicants call the 'formal garden' but described by the OSS as a 'pleasant but unordered scene'. The garden is laid out with an assortment of raised flower beds and other features. It offers clear views of the house. The setting is one which many people may find pleasing.
31. At the Hearing the OSS emphasised that it is a combination of these three factors i.e. the original farmhouse, the newer addition and the gardens, which offer a view of 'considerable charm' and interest. By comparison, the OSS says the diversion is along a farm track which is perfectly serviceable but the sort of thing of which there are many in the vicinity and County.
32. If the lawful diversion of FP7 cannot be achieved, then it is the stated intention of the landowners to build a second stone wall 2m in height along the western side of the public path to a similar specification and finish as the existing wall. It is unclear if listed building consent would be required, but that does not affect my considerations. The implication is that FP7 could run between two high walls for a distance exceeding 100m. Should that happen, there would be an oppressive tunnel like effect for walkers and no views of the house or gardens. It would hardly be enjoyable for users. This does not appear to be an idle threat as monies were withheld from the purchase price to cover such an eventuality should the Order not be confirmed.
33. Nevertheless, the existing route is currently open on one side and I attach little weight to the possibility of the path being enclosed when it has not happened yet and might not occur. If the owners were so inclined, they could have erected another wall or suchlike before now and not pursued the diversion. In most scenarios a landowner could potentially enclose the sides of a public path.
34. Putting that issue aside, the diverted route would offer more views of the countryside. At the Hearing it was argued for the applicants that the diversion is more in keeping with a rural walk running through the farm without entering the owners' private space. When walking south from point A, the applicants consider there would be a good open vista to the east where cattle are grazed and longer views over the fields. In response the OSS accepted that there would be views

² Described by the applicants as a garden gate

from the diverted route but stated that those views would be much of a piece with those obtainable throughout the length of FP7. Whilst the views would be pleasant as expected of the Cotswolds, they would be 'nothing special'. In contrast, the OSS believes that the house and garden are special with nothing else like them along FP7 or the whole of the d'Arcy Dalton Way.

35. Once the works are complete between G-D and trees are cleared, at least part of the house should be visible, but those views will be distant glimpses. They will not allow the same level of appreciation of the house and garden as is currently available.
36. Not everyone will be enthused by the view of the garden and extended house or interested in its architecture. However, I concur with the OSS that most people would prefer the current views from within the garden to those sections along the diverted path where it is enclosed on both sides with high vegetation and passes by agricultural buildings of utilitarian appearance. The existing gravel garden path also offers a firm and flat surface suitable in all weathers. In comparison, the diversion could be liable to become muddy in wet conditions as was already evident during the site visit which followed heavy rain.
37. The OSS does not doubt that many users may be uncomfortable in entering an enclosed private garden. In the proceedings it was suggested that successive landowners have made efforts to make the existing route through the garden appear to be private. This, it is claimed, has arisen from the high retaining wall and greenhouse obstructing the path, the layout of the garden, having a door in the garden wall which is normally closed and inaccurate signage steering walkers away. The OSS believes that these various measures intend to make the public feel as though they are intruding so that they avoid using the route.
38. It is clearly a matter for the owners/occupiers how they choose to layout their garden provided the legal line of the public path is unimpeded and available for use. The entrance to the garden is kept unlocked as required. With correct and better signage and removal of obstructions, I consider it likely that more people would choose to walk the existing route and gain pleasure from the gardens and/or the architectural and historical merits of the house. For some others it may still not be a comfortable experience walking through a private garden. Much depends on the individual and their preferences.
39. The landowners argue that The Ramblers have not opposed the Order and they would have done so had public enjoyment been adversely affected. However, I note that The Ramblers accepted the proposed diversion 'with extreme reluctance' and in knowledge that a worse outcome could be the construction of a second wall. This argument therefore carries little weight. Indeed, a representative of The Ramblers attended the Hearing to lend support to the OSS. The fact that only the OSS objected does not necessarily mean that the wider public is unconcerned by the diversion. It may simply reflect that walkers have become accustomed to using the permissive path and/or believed the signage which indicates that such path is part of the d'Arcy Dalton Way.
40. In my view the diversion would be less enjoyable than the existing route for most people, but the effect on enjoyment must be considered in the context of the path as a whole.
41. FP7 commences at Great Rollright and proceeds in a southerly direction to pass through Little Rollright and beyond to connect with FP6. The OMA confirmed at

the Hearing that the total length of FP7 is approximately 3225m. The section of path proposed for diversion measures 228m and so the diversion affects only about 7% of FP7. From that viewpoint the loss of enjoyment would not be significant. The house and garden may be unique and unlike anything else along FP7. However, they do not in my view constitute such a major attraction of the route for the loss of enjoyment to be regarded as more than relatively minor when taking into account enjoyment of the path in its entirety.

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

42. No issues are raised to suggest that the diversion would have any adverse effect on land served by the existing route or on the land over which the alternative route will be created.

Rights of Way Improvement Plan

43. There is no suggestion that the Order is contrary to any material provision contained within the OMA's adopted Rights of Way Improvement Plan.

Whether it is expedient to confirm the Order

44. I have concluded above that the Order is expedient in the interests of the landowners and occupiers on the grounds of privacy. The proposed route will not be substantially less convenient. There would be a diminution in public enjoyment, but this would not be significant in terms of the effect on the use of the path as a whole.

45. The judgment in *R (oao) Young v SSEFRA*³ is authority that in deciding whether to confirm an order, the criteria in s119(6) should be considered as three separate tests, two of which may be the subject of a balancing exercise. Where, as in this case, the proposed diversion is considered expedient in terms of test (i), is not substantially less convenient in terms of (ii), but would not be as enjoyable to the public, the Inspector must balance the interests raised in the two expediency tests i.e. the interests of the applicant (i), and the criteria set out in s119(6)(a) (b) and (c) under (iii) to determine whether it would be expedient to confirm the order.

46. The OSS invites me to take a contrary approach to that followed in *Young*. It submits that on a proper reading of section 119(6) if the diversion fails any one of the tests comprised in section 119 then the diversion must fail. According to the OSS no balancing exercise should be undertaken.

47. However, *Young* is settled law and I see no reason to depart from it. In this case, there is a relatively minor loss of public enjoyment of the path as a whole which must be weighed against the interests of the owners/occupiers. On balance, I consider that the benefits to the owners and occupiers outweigh the loss of public enjoyment. As such it would be expedient to confirm the Order.

Conclusion

48. 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 modifications set out in the formal decision.

³ (QBD)[2002] EWHC 844 (Admin)

Formal Decision

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

- In Article 1, delete the words "*from the date of confirmation of this Order*" and substitute with the words "*on the date upon which Oxfordshire County Council, as the local highway authority, certifies that the route described in Article 2 (below) has been brought into a fit condition for use by the public*"
- At the end of Article 1 insert a new paragraph to read "*In this Article the date of certification shall not be before the day on which a public footpath takes effect under Article 2*"
- In Article 2, delete the words "*There shall be from the date of confirmation*" and substitute with the words "*There shall be three months from the date of confirmation of this Order*".

KR Seward

INSPECTOR

APPEARANCES

For the Order Making Authority:

Andy Sylvester, Rights of Way Officer

For the applicants

Michael Wood
ET Landnet Ltd

Claire Goodman-Jones
Birchill Access Consultancy

Tom Macfarlane
The Estate Office, Little Rollright

In objection:

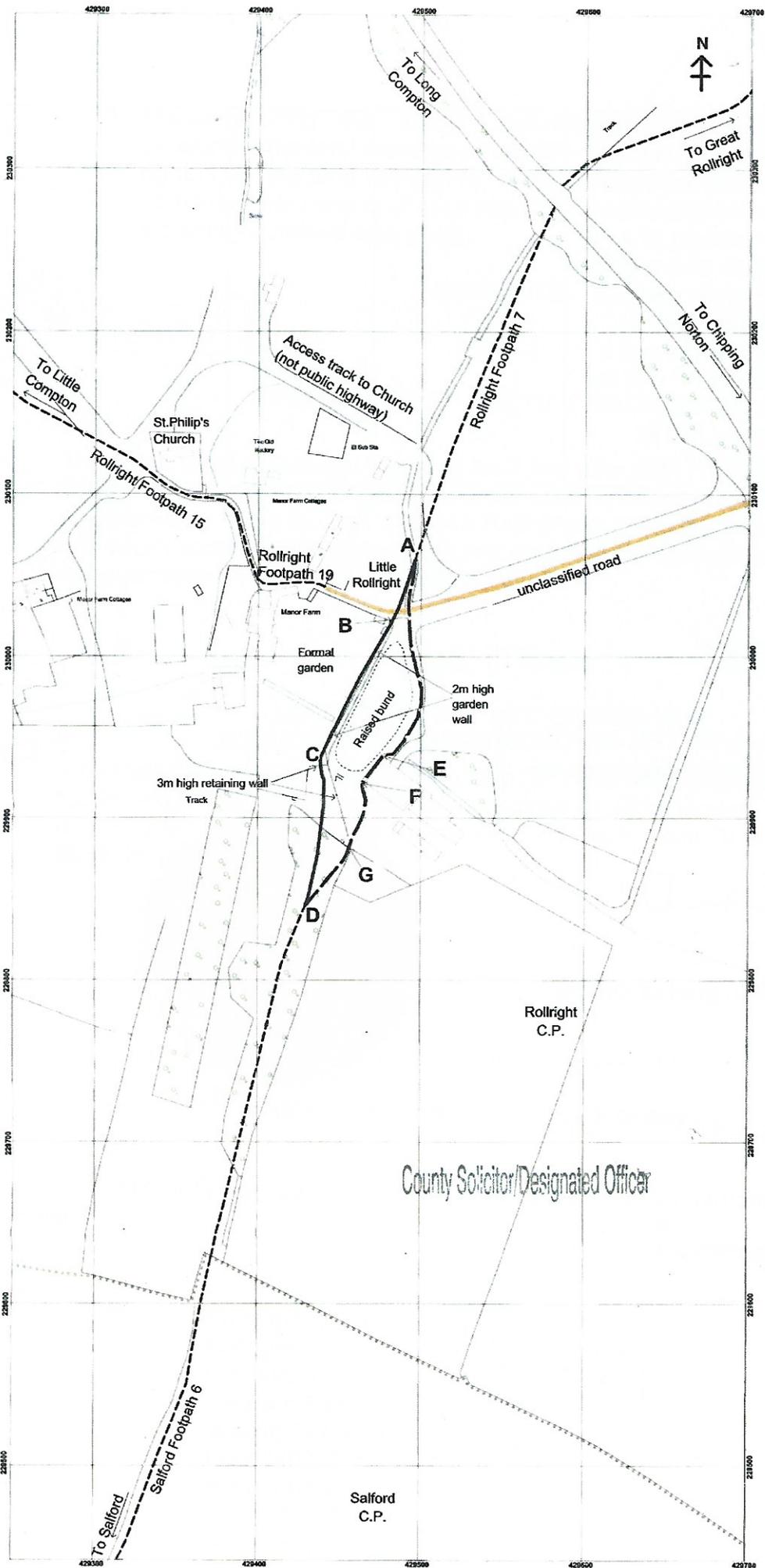
Mr Chris Hall Local Correspondent (Oxfordshire) The Open Spaces Society	Statutory party
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James Parke Chairman of Oxfordshire branch of The Ramblers Association	Interested party
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David Godfrey Secretary, Oxford Fieldpaths Society	Interested party
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HEARING DOCUMENTS

1. Written argument by the Open Spaces Society on the application of section 119(6) of the Highways Act 1980
2. Photograph of where the diverted route narrows by the corner of a building



County Solicitor/Designated Officer

**Highways Act 1980
Sec 119**

**Order to Divert
Rollright Footpath
No. 7 (part)**

CS

**Existing Rollright Footpath
No. 7 to be deleted**

A - B - C - D
Length: 228m approx.

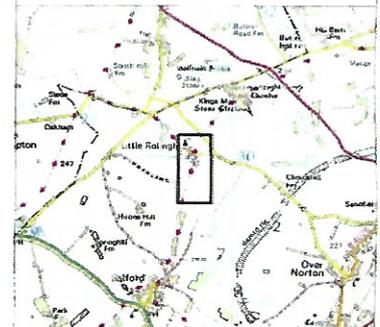
**Proposed new route
of Footpath**

A - E - F - G - D
Length: 240m approx.
Width: 2m

**Approximate route of
unaffected rights of way**

Length of unclassified road

Parish boundary



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OS Reference: SP 2929, SP 2930

Scale 1:2500 @ A3

Date: 13 May 2015

Drawn By: DJR

Drawing No: HA1980/461f

