



Order Decision

Hearing held on 29 October 2019

by Sue Arnott FIPROW

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

Decision date: 9 January 2020

Order Ref: ROW/3209194

- This Order, dated 3 May 2018, is made under Section 119 of the Highways Act 1980 and Section 53A(2) of the Wildlife and Countryside Act 1981. It is known as the Cumbria County Council (Footpath Nos. 423011 and 423012 Parish of St Bees) Public Path Diversion and Definitive Map and Statement Modification Order 2018.
- The Order proposes to divert sections of two connecting footpaths leading from Sea Mill Lane in St Bees to the beach car park as detailed in the Order map and schedule, and would modify the definitive map and statement accordingly.
- There was one objection outstanding when Cumbria County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: The Order is confirmed with modifications, as set out in the Decision below.

Preliminary Matters

1. On 29 October 2019 I held a hearing at the Seacote Hotel in St Bees, having visited the site of the proposed diversion, unaccompanied, during the previous afternoon. At the close of the event I made a further inspection of the routes at issue with representatives of Cumbria County Council, St Bees Parish Council, Mr and Mrs Turpin (landowners) and Mr McConnell (the objector).

Main Issues

2. The Order was made by Cumbria County Council (CCC) under Section 119 of the Highways Act 1980 (the 1980 Act). Therefore, as required by the provisions of that section, if I am to confirm the Order I must be satisfied that, in the case of both Footpath 423011 and Footpath 423012:
 - (a) it is expedient in the interests of the owners of the land crossed by the footpaths that the right of ways in question should be diverted;
 - (b) the new routes to be provided will not be substantially less convenient to the public; and
 - (c) it is expedient to confirm the Order having regard also 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 path and the land over which the new path would be created together with any land held with it, having had regard to the provision for compensation.
 3. Further, in determining this Order I am required to have regard to any material provisions in any rights of way improvement plan for the area.
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Reasons

Background

4. The proposed diversion affects three separate land holdings. Between the points labelled A and F on the Order map the definitive line of Footpath 423011 crosses the Carnforth to Whitehaven railway line on land held by Network Rail Infrastructure Ltd. The proposed alternative route turns directly westwards from point A to cross the railway (A-B-C-D) then southwards alongside the railway embankment but on land belonging to Mr and Mrs Turpin (D-E-F). From point F, Footpath 423011 continues (unaffected by the Order) over land via a footbridge over Pow Beck to point G.
5. The second section of footpath to be diverted commences west of the footbridge at G, proceeding as Footpath 423012 over land owned by the Turpins to a gate onto the sea shore. Here the footpath continues, via a private concrete bridge over Pow Beck to reach the car park at the end of Sea Mill Lane which lies in the ownership of St Bees Parish Council.
6. The proposed alternative takes a line to the west of the present definitive footpath and then turns south eastwards to cross Pow Beck via a new bridge before re-joining the original definitive line in the car park.
7. The proposed diversions are promoted by CCC and have been triggered by the serious damage that occurred to the concrete bridge during extreme storms in recent years. The owner of the bridge has no interest in repairing this crossing. Consequently, working alongside current proposals for the England Coastal Path (ECP) long-distance trail, CCC erected a new wooden bridle-bridge¹ upstream of the concrete one. CCC therefore argues there is a fundamental benefit to the public in diverting the existing public right of way onto this safer and more sustainable crossing over Pow Beck.
8. In addition to this, Network Rail holds historical records from the initial development of this railway in the mid-1800s which, it says, shows that there has always been an error on the definitive map and statement insofar as these refer to a diagonal crossing under the railway. It submits, and CCC agrees, that all the other evidence available shows that the public right of way has always crossed the railway via A-B-C-D-E to F. That view was endorsed at the hearing by Mr and Mrs Turpin who are long-time residents of the village.
9. Anomalies and mistakes discovered in the definitive record are normally addressed by means of definitive map modification orders based on the evidence available. At the hearing I made clear that I am not in a position to judge the limited evidence before me here in order to reach an informed conclusion as to whether the route A-F is depicted on the definitive map in error (although I would observe there seems to be a reasonable case for this).
10. CCC decided it would be expedient to address this apparent anomaly at the same time as resolving the alignment issue relating to the new bridge. In practice, the two footpaths (423011 and 423012) form one continuous route and therefore the inclusion of a diversion at the rail crossing with the diversion onto the new bridge was considered by the Council to be a cost-effective means of addressing the issue in the public interest, a view supported by Network Rail.

¹ Although this bridge is intended for use by the public on foot only, it also accommodates other private uses.

11. Mr McConnell pointed out that a diversion under the 1980 Act is not the correct procedure for dealing with apparent errors on the definitive map. I agree, yet there is nothing to prevent a proposed diversion in these circumstances so long as the legal tests set out in Section 119 of the 1980 Act are met.

The interests of the owner(s) of the land and of the public

12. Taking firstly the effect of the diversion on the interests of the Parish Council, there would be no direct benefit from the proposal in land management terms but the proposed realignment of Footpath 423012 over its property would enable the public to reach the new bridge at a safer crossing point over Pow Beck in a less vulnerable position, some 40 metres further from the sea.
13. For Mr and Mrs Turpin, there would be a clear advantage in terms of enabling their fencing to enclose a larger area of summer pasture land for their horses whilst allowing sufficient width for the public to pass along on the new route. The land to the seaward side of the new Footpath 423012 may become subject to public access as 'spreading room' under the coastal access arrangements, but diversion of the public right of way would provide a clear boundary for their main grazing area on the landward side that could be secured.
14. Network Rail submitted that the main benefit it would derive from the proposed diversion would be to remove the anomaly on the definitive map. The present at-grade crossing over the railway between B and C is managed to be as safe as it can reasonably be; it has been used by local people for a great many years without complaint, and it would not be a good use of public money to attempt to introduce a new rail crossing point in accordance with the definitive map when no such crossing has ever existed here.
15. In his objection, Mr McConnell did not challenge the benefits to the Parish Council or the Turpins but did question the use of the diversion process to address a definitive map anomaly. He argued that, if an error had existed since the definitive map was first drawn, then it should have been addressed many years sooner. In response, both Network Rail and CCC noted that the issue here would be regarded as low priority and therefore take many years to be processed.
16. I was presented with no evidence to show that the anomaly was on any list of potential cases held by CCC, or of CCC's criteria for determining the priority for such issues. Nevertheless, I can see that it would be in the interests of Network Rail to resolve the confusion over the alignment of Footpath 423011 at this point by whatever method offers the speediest resolution.
17. Given the circumstances, I am satisfied it would be expedient in the interests of all three landowners for these two footpaths to be diverted as proposed.
18. As regards the public interest, I have already noted above (at paragraph 7) that CCC contends that the public would benefit insofar as people would have lawful access to the new bridge and therefore enjoy a safer and more robust crossing over Pow Beck.
19. Although proposals for the ECP are not finalised, the designated route is expected to utilise all or part of Footpath 423012 and therefore for this reason too the public interest would be well served by moving this path onto a more sustainable alignment.

20. In addition, as a Government-funded organisation, Network Rail is required to manage its funds in line with principles encompassed in guidance entitled "Managing Public Money"; given that its assessment of the current crossing (on the line of the proposed route of Footpath 423011) shows the level of risk to be relatively low, there is no justification for installing a different crossing at this point and the financial outlay that would be required for this.
21. Whilst I acknowledge the objector's criticism of the legislation employed here to address the definitive map anomaly, I am satisfied there are good reasons to accept that the proposed diversions would be expedient in the public interest.

Convenience for the public

Footpath 423011

22. When considering proposed extinguishments under section 118(6) of the 1980 Act, sub-section (6) requires that any temporary circumstances preventing or diminishing use of the path in question should be disregarded when determining the likely use that might be made of it. Although the same instruction does not appear in Section 119, it is usual to adopt a similar approach when considering proposed diversions.
23. That is relevant here in so far as the present definitive line of Footpath 423011 directly between points A and F cannot be used, at least not strictly in accordance with the definitive statement which describes the path taking a route "to and under the railway". In the absence of any underpass, I am obliged to consider the relative convenience issue as if such a route did exist.
24. Whilst Network Rail submitted detailed risk assessments for the crossing in active use (A-B-C-D) showing the danger to the public here to be relatively low, it is difficult to dispute Mr McConnell's submission that, in terms of safety, there can be no question that a route under the railway has to be safer than one that crosses the track at grade. That is unassailable and I recognise the strength of his argument.
25. However, whilst safety is an important aspect of convenience, it is not the only factor to be considered here. The gradient of Footpath 423011 (as used) is such that it descends from Sea Mill Road to the railway crossing then drops down the western side of the embankment with the aid of 14 steps plus a handrail, with a gradual slope down to the footbridge over Pow Beck.
26. For the theoretical route it is necessary to estimate the gradient of the path if one were to be constructed on the definitive line although there is no guarantee that such engineering works would be feasible in this location. I have noted the feature indicated on an old Ordnance Survey map which may conceivably have once been an underpass but could equally be a culvert. Indeed a watercourse emerges from the railway bank on the western side in this vicinity and may confirm the latter as the most likely explanation.
27. I think Mr McConnell is right in submitting that the gradient of a sloping path on the definitive line from A to F under the railway would (in theory) be preferable to the steps down the embankment, especially for people with limited mobility. Being mindful of the requirements of the Equality Act 2010, that is a disadvantage to which I must attach significant weight.

28. When considering the merits of this proposal as required by the 1980 Act, I cannot avoid the conclusion that a route in line with the definitive map and statement² would be substantially more convenient than the one that is now proposed, even though I fully accept there is good evidence to show that the present crossing has been used by the public and safely managed by Network Rail for a very long time. In short, I find the proposed new route would be substantially less convenient than the route which exists in law in line with the definitive map and statement.
29. Since this aspect of the Order fails the explicit requirement of Section 119(6) of the 1980 Act (that the new path "will not be substantially less convenient to the public in consequence of the diversion") I have no alternative but to reject this part of the proposal.

Footpath 423012

30. In terms of overall length, width and gradient there is little difference between the present and proposed routes for this path. On both, the surface is mostly grass and in places the ground is wet and marshy. If the Order is confirmed, CCC intends to carry out works to improve the surface of the proposed path (in line with ECP proposals where applicable) as has already been done on one section near the new bridge. There is one field gate on the present definitive line and, in comparison, only one gate would be necessary for stock control purposes at point J.
31. In his objection Mr McConnell argues that the new route would not provide access to the beach as does the definitive line. Currently people can walk on Footpath 423012 from the car park over the old concrete bridge and onto the shingle beach before entering the Turpin's field via a field gate. Walkers would no longer have that direct access from the proposed new route.
32. CCC responded by pointing out that there is no right of access to the foreshore beyond the definitive path. It argued that once the ECP proposals come into force here, the beach would be accessible to the public since it would form the 'spreading room' on the seaward side of the designated route. In fact that could apply equally to the present or proposed route.
33. For the Parish Council, Mr Taylor pointed out that in practice pedestrian access to the beach is available now from the car park via a concrete slipway and would continue to be so.
34. I have not been provided with any firm details of the ECP proposals although Mr Fewkes described the routes currently under consideration. Since this national project has not yet been finalised, I am not inclined to rely on the aspects which are said to affect Footpath 423012.
35. Taking a strict approach in that respect leads me also to take to a narrow view of the point raised by the objector; in law the public right of way that is Footpath 423012 provides the public with a right to pass and repass only, not to access the beach. If a public right of access to the foreshore is created through the ECP proposals, then so too will measures to ensure the beach continues to be accessible through the spreading room to the south west of the new Footpath 423012.

² For clarity, that means under the railway, not simply across it on a diagonal line at grade.

36. In conclusion I am satisfied that the proposed new route of Footpath 423012 (G-H-I-J-K-L) would not be substantially less convenient than the present definitive line (G-L). In fact for many reasons, it would be more so.

Material provisions in the rights of way improvement plan for the area

37. In April 2014 CCC published its Cumbria Countryside Strategy 2014-2019 providing a strategic framework for the management and improvement of countryside access and recreation in Cumbria. No specific references in this document have been drawn to my attention but there has been no challenge to CCC's statement that the proposed diversions are generally in line with its policies for improving public access.

Other considerations

38. Having considered the comments submitted, and from walking the routes myself, I consider the present and proposed routes of Footpath 423012 to be broadly similar in character and find no negative effect likely on public enjoyment if diverted as proposed.
39. Compensation issues are not relevant here since the path would remain in the same ownership(s). No adverse effects arising from the diversion on any of the land concerned have been raised.
40. My attention was drawn to the limitations listed in Part 3 of the Order Schedule and also to errors in the descriptions included in Part 4. Whilst Parts 1, 2 and 3 deal with the diversion itself, Part 4 contains the details for changes to the definitive map and statement.
41. I have no difficulty in accepting the changes requested by CCC to Part 3, including a minor amendment to the grid reference for a gate near to point J and of removal of a gate at point K which is no longer required on the new route of Footpath 423012. I am satisfied that these are relatively minor adjustments that would not prejudice any interest, public or private.
42. Since I have concluded that the diversion of Footpath 423011 cannot be confirmed under this legislation as it fails the 'convenience' test, I will need to delete all references to this part of the proposal in Parts 1, 2 and 3 of the Order Schedule and, as a consequence of this, I am able to amend Part 4 accordingly. Similarly, the changes to the limitations on Footpath 423012 in Part 3 that I have noted above can be altered in Part 4.
43. However the accuracy of the description of Footpath 423012 in Part 4 for a section of path that lies beyond the diversion has been questioned. That is a matter of evidence and any amendment is not required as a result of the realignment proposed by this Order. In these circumstances, I consider it prudent for me to delete the whole of Part 4 of this Order³; any corrections can be addressed by means of a separate legal event modification order to take account of the diversion of Footpath 423012 in the definitive record.

³ This will also address a further submission by the objector that correction of a grid reference for point G in Part 4 for the termination of Footpath 423011, and of a mistake in the description of that path, falls outside the powers of the Secretary of State under current guidance.

Whether it is expedient to confirm the Order

44. Before reaching a final conclusion on the expediency of this diversion I note my conclusion, in paragraphs 28 and 29 above, that when considering the relative merits of the proposed route of Footpath 423011 against the line as described on the definitive map and statement, I find that the new route would be substantially less convenient to the public.
45. I recognise that this conclusion rests on the premise that the definitive route has to be judged as if it were available to the public when the evidence before me appears to show that it has never been so. I must also accept that this may seem perverse, given the fact that the present crossing has been used apparently without complaint for very many years.
46. However, it was accepted by all present at the hearing that such matters are more usually dealt with by definitive map modification orders. Whilst I therefore intend to delete all references to Footpath 423011 from this Order, the realignment intended may be addressed through a different legal process.
47. In relation to Footpath 423012, I am required to weigh the advantages that would accrue to the public in general together with the landowners in whose interest the Order is made against any disadvantages that may result for the public. Overall, taking into account all relevant factors and having addressed the statutory tests in Section 119 of the 1980 Act, I conclude it would be expedient to confirm the diversion proposed by this Order but only in respect of Footpath 423012.
48. Since it appears the powers available to me do not extend to the correction of a mistake in the description of this path⁴ contained in Part 4 of the Order Schedule, I intend to delete the whole of the consequential 'legal event' from this combined order.

Conclusion

49. Having regard to the above and all other matters raised in the written representations, I conclude the Order should be confirmed but with the modifications outlined in paragraphs 41, 46, 47 and 48 above.

Formal Decision

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

In the Order:

- Amend the title of the Order by removing references to Footpath 423011 and to the modification of the definitive map and statement;
- Delete all references to modification of the definitive map and statement including the whole of the second paragraph and Article 2A;

In the Order Schedule:

- In parts 1 and 2 delete references to the diversion of Footpath 423011 between points A and F;

⁴ Other than as a consequence of changes I have made to Parts 1, 2 or 3.

- In Part 3 amend the grid reference for the first listed gate to 296959 510835 and delete the second listed gate;
- Delete the whole of Part 4;

On the Order map:

- Remove the proposed diversion of Footpath 423011 between points A and F

Sue Arnott

Inspector

APPEARANCES

In support of the Order

| | |
|--------------|---|
| Ms S Smith | Countryside Access Officer; Cumbria County Council |
| Mr G Fewkes | Countryside Access Officer; Cumbria County Council |
| Ms V Bentley | Liability Negotiations Advisor; Network Rail Infrastructure Ltd |
| Ms A Buckley | Liability Negotiations Advisor; Network Rail Infrastructure Ltd |
| Mr P Turpin | Landowner |
| Mrs V Turpin | Landowner |
| Mr E Taylor | Representing St Bees Parish Council |

Objecting to the Order

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| Mr D McConnell | Statutory objector |
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DOCUMENTS

1. Copy of the statutory objection
2. Statement of reasons why it is considered the Order should be confirmed submitted by Cumbria County Council and comments on the objection, together with relevant case documents
3. Statement of case for Network Rail Infrastructure Ltd
4. Statement of case for Cumbria County Council
5. Emails to the Planning inspectorate from Mr D McConnell dated 29/10/18, 22/11/18, 31/1/19, 7/2/19, 16/4/19, 18/4/19, 24/4/19, 17/5/19, 23/6/19, 27/7/19, 22/8/19, 2/9/19, 5/9/19, 6/9/19, 19/9/19



MAP NOT TO ORIGINAL SCALE

C = 296982 511133

B = 296988 511133

D = 296978 511132

A = 296997 511135

E = 296978 511104

H = 296941 511085

F = 296973 511091

G = 296965 511089

I = 296905 510892

J = 296965 510830

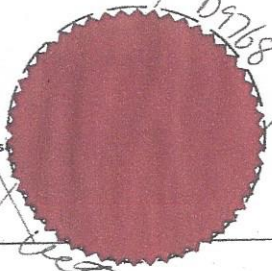
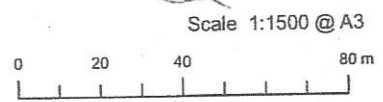
K = 296975 510825

L = 296961 510768

Legend

- Footpath to be Extinguished
- Footpath to be Created
- Routes to remain

Highways Act 1980 Section 119 and Wildlife and Countryside Act 1981 Section 53
 Public Footpath 423011 & 423012 Diversion Order and Public Path Modification Order
 Pow Beck, St Bees



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