



Order Decision

Site visit made on 25 February 2020

by Martin Elliott BSc FIPROW

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

Decision date: 13 May 2020

Order Ref: ROW/3223735

- This Order is made under Section 326(5) of the Highways Act 1980 (the 1980 Act) and is known as The North East Lincolnshire Council Public Footpath Waltham No 72 (pt) Public Path Diversion Order 2016 (Variation) Order 2018.
- The Order was sealed on 15 June 2018 and proposes to vary the provisions of The North East Lincolnshire Council Public Footpath 72(part) Public Path diversion Order 2016 as shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when North East Lincolnshire 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.

Procedural Matters

1. Although an accompanied site visit had been arranged for 25 February 2020 one of the parties was unable to attend. An accompanied site visit can only take place where representatives from both sides are available. Consequently I carried out an unaccompanied site visit on the morning of 25 February.
2. I sought further information from the Council in respect of the interests of the public served by the Order. The response was circulated and I have had regard to the subsequent submissions where relevant.

The Main Issues

3. This Order is made under section 326 of the 1980 Act to vary the particulars contained within a public path diversion order made in 2016 ('the 2016 Order'¹) and subsequently confirmed as unopposed.
4. Section 326 provides that a public path diversion order confirmed by the Secretary of State, or confirmed as an unopposed order by the authority making it, may be revoked or varied in the like manner and subject to like provisions.
5. The 2016 Order was made under section 119 of the 1980 Act because it appeared to the authority that, in the interests of the public, it was expedient that the line of the way should be diverted. Section 119 of the Highways Act 1980 therefore requires that, before confirming the Order, I must be satisfied that:

¹ The North East Lincolnshire Council Public Footpath, Waltham No 72 (part) Public Path Diversion Order 2016

- (a) it is expedient in the interests of the public that the footpath should be diverted; and
 - (b) the path or way will not be substantially less convenient to the public; and
 - (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 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.
6. In addition to the above 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.
 7. 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 for the area covered by the Order.
 8. The existing route is obstructed. In considering the convenience of the alternative 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.
 9. The main issue is whether the 2016 Order contained errors which are of a type which can be varied under the section 326 process. Furthermore whether the tests under section 119 have been met. In respect of the tests set out above at paragraphs 5 and 6, other than that at 5(a), there is no evidence to suggest that the tests have not been met. Having considered all the factors before me I am satisfied that these relevant tests are met and I have not considered these matters further. The remaining issue is therefore whether the Order is in the interest of the public.
 10. No material provisions have been put before me from any Rights of Way Improvement Plan which are relevant to the determination of the Order.

Reasons

Whether the 2016 Order can be varied under section 326 of the 1980 Act

11. The 2016 Order sought to divert footpath 72 which ran beside the applicant's property and across the patio. The Order was confirmed and the applicant subsequently fenced in the diverted footpath with two gates being erected enabling pedestrians to cross the small paddock/garden. The Council say that in April 2017 a complaint was received, from the objector to the order before me, relating to the gates and the visibility of the route. However, I note that the April complaint relates to a wooden fence and vegetation. The gates were subsequently authorised under section 147 of the 1980 Act and following a further complaint the gates were replaced with field gates erected by the

Council. In June 2017 the objector served notice under section 130c(1) of the 1980 Act in respect of the fence.

12. The Council became aware that the gates may have been positioned in the wrong place by reference to the 2016 Order. A topographical survey in June 2017 revealed to the Council that the Order description and plan had been incorrectly drafted. The location of the path on the ground was found to be further east by 7.7 metres. The Council say that the variation Order would correct the 2016 Order to record the walked route in the Order which was intended to be the alternative route.
13. The applicant for the 2016 Order says that the route currently on the ground was the route discussed and agreed with the Council prior to the 2016 Order. The applicant met with the objector in March 2017 after the installation of the fence but at the time the applicant was unaware that 'any of the path was incorrect'.
14. The submissions from the Council suggest that the intentions of the 2016 Order were that the alternative route followed that identified in the variation Order (C-F-G-H on the order map). However, that the objector served notice on the Council for the removal of a fence suggests that the objector understood the correct route to be that shown in the 2016 Order. Nevertheless the Council subsequently approved the erection of gates under section 147 of the 1980 Act following the erection of gates by the applicant. Section 147 provides for the authorisation of gates, and other structures, on footpaths and bridleways. The fact that the Council authorised the gates suggests that they were of the view that they were on the route intended by the diversion; the authorisation relates to footpaths and bridleways and can only be granted for such routes.
15. Whilst the evidence is not substantial it is more likely than not that the intention of the 2016 order was that the alternative route at its eastern end followed the line C-F-G-H rather than C-D-E. Consequently a variation of the 2016 order is appropriate under section 326 of the 1980 Act.
16. The variation Order also provides for pedestrian gates and a ramp. There is no evidence that these features were omitted from the 2016 Order in error and they have subsequently been provided. As such the variation of the 2016 Order in this respect is not appropriate in the context of section 326 of the 1980 Act. It is noted that the gates have been authorised under section 147 of the 1980 Act. If the Order is confirmed I propose to delete these elements from the Order.

Whether the Order is expedient in the interests of the public

17. The objector questions the benefit to the public in moving the line of the path from a straight line to the zig zag and longer route which has been installed. It is not clear from the submissions whether this relates to the original 2016 diversion or the Order route before me. Nevertheless, the objection raises the issue as to whether the Order is in the interest of the public. A variation order should be made in the like manner and subject to the like provisions. The 2016 Order which is sought to be varied was made in the interest of the public. The Council had not addressed this element in their original submissions.
18. As noted above I sought further information from the Council in respect of the interests of the public. The Council say that there is no detriment to the public

using the diverted route and the diverted route is of public benefit being safer. In this latter respect the suggestion that the alternative route is safer is in the context of the 2016 Order. The Council have provided no evidence that the variation order is in the interest of the public. It may be the case that there is no detriment to the public but the test is whether the Order is in the interest of the public.

19. Given that it is not shown that the Order is in the interest of the public it follows that the Order should not be confirmed.

Other matters

20. The objector raises issues relating to the conduct of the Council in respect of the obstruction of footpath 72 and the handling of complaints. Whilst I note the concerns they are not matters which I can give any weight in respect of the determination of the Order.

Conclusion

21. Having regard to these and all other matters raised in the written representations I conclude that the Order should not be confirmed.




Formal Decision


22. I do not confirm the Order.

Martin Elliott

Inspector



Key:
 Unaffected Public Right of Way
 Public Footpath to be created
 Public Footpath to be extinguished

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