
Order Decision

Inquiry held on 29 November 2016

Site visit made on 28 November 2016

by Alan Beckett BA MSc MIPROW

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

Decision date: 4 January 2017

Order Ref: FPS/H0928/5/1

- This Order is made under Section 257 of the Town and Country Planning Act 1990 ('the 1990 Act') and is known as the Eden District Council Public Path Stopping Up Order (No. 1) 2015 Cross Croft, Appleby (footpath 303028).
- The Order is dated 22 April 2015 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were 9 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I held a public local inquiry into the Order in the Council Chamber of the Town Hall, Penrith on Tuesday 29 November 2016 having made an unaccompanied inspection of the footpath at issue and the site of the Storey Homes development the evening before.
 2. At the inquiry, the objectors submitted that the Order was incapable of confirmation as the wording of the relevant condition attached to the planning permission was such that the statutory test found in section 257 of the 1990 Act could not be said to be satisfied.
 3. The development to which the Order relates is the construction of 142 dwellings including 26 units of affordable housing, open spaces and associated infrastructure at land off Cross Croft / Back Lane in Appleby. The Order goes further than what is required by regulation 2(1) of the Town and Country Planning (Public Path Orders Regulations) 1993 in that it sets out the details of the planning permissions (11/0989 and 14/0594) which were extant at the time the Order was made.
 4. Although the planning permission granted is for the development of 142 houses, condition 13 of 14/0594 limited the development to only 32 houses unless the footpath which crosses the Settle – Carlisle railway line just south of Appleby Station was diverted. This condition was imposed by Eden District Council ('the Council') in the light of an objection to the development made by Network Rail which contended that the housing estate would generate increased pedestrian traffic over the level crossing with a consequential increase in the risk of an accident occurring.
 5. Condition 13 of 14/0594 reads *"No development hereby approved shall take place beyond plots 1-22 and 133- 142 until a footpath diversion order has been made and confirmed. The order shall incorporate the diversion of the existing footpath adjacent to the cemetery, the stopping up of it to prevent any access*
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to the Carlisle – Settle public railway crossing from the site (including the erection of signage and fencing prohibiting such access) and re-routing of the footpath to the north east of the site that can in principle afford connectivity at Draw Briggs Lane. The footpath shall be fully completed, including lighting, and made available prior to the occupancy of plots 23-132. Reason – To ensure that the proposed development does not have an unacceptable impact on highway safety”.

6. In July 2014, the developer made an application to Eden District Council for condition 13 to be removed as an assessment of the safety of the crossing commissioned by the developer had suggested that the increase in risk posed by a potential increase in use of the crossing was marginal. The Council rejected this application.
7. In November 2015, the developer applied to amend its planning permission to allow the development of up to 64 houses on the site. Eden District Council approved this application and the new planning permission (15/1097) included a revised condition 13. In response to my question as to why the Council considered it acceptable to develop up to 64 houses when 32 houses had been considered to give rise to an increased risk of an accident at the level crossing, Mr Rackstraw responded for the Council that no-one had objected to the revised planning application.
8. Condition 13 of 15/1097 reads *“No development hereby approved shall take place beyond plots 1 -22, 49-53, 87-95, 73-74, 98-113 and 133-142 (64 units total) unless any of the following exceptions occur: i) A footpath diversion and stopping up order that incorporates the diversion of the existing footpath adjacent to the cemetery, the stopping up of it to prevent any access to the Carlisle – Settle public railway crossing from the site (including the erection of signage and fencing prohibiting such access) and re-routing of the footpath to the north east of the site that can in principle afford connectivity to Draw Briggs Lane, has been made and confirmed by the LPA or the Secretary of State, or ii) the Secretary of State, upon consideration of a lawfully made stopping up order as aforementioned in point i) does not confirm the order”.*
9. The objectors submit that the wording of the condition attached to the revised planning permission 15/1079 and the development which has already taken place on the site make the order incapable of confirmation. The effect of the “exception” described in ii) of condition 13 of 15/1097 being that closure of the path across the railway is not necessary to enable the development be carried out; consequently, the order does not meet the statutory criteria of section 257 of the 1990 Act and could not be confirmed.
10. In addition, it was submitted that it was not necessary to divert the path to allow development to take place as the houses were not being built on the footpath subject to the Order, the majority of which lay outside the development boundary. It was only because of the condition imposed by the Council could the diversion be considered necessary. Whereas that would have been true of condition 13 attached to 14/0594, condition 13 of 15/1079 provided that development could take place without the footpath being diverted. Furthermore, the objectors submitted that the planning permission which was being implemented was 15/1079 which was not cited in the order and that the order was therefore no longer valid.

11. In response to the question as to how many houses had been built on site, Mr McNally said that Storey Homes had completed the sale of 43 properties. I saw from my unaccompanied site visit that at least 46 houses had been constructed, the majority of which were already occupied; those which had been completed but remained unoccupied either had 'sold' or 'for sale' notices in their windows. I also saw that a footpath link had been built around the perimeter of the site which ended just to the north of the railway crossing; on the site plans this footpath layout is known as 'revision U'. Mr McNally claimed that the under 14/0594 what had been approved was a path to link to Drawbriggs Lane ('revision V') but that in granting 15/1097 the Council appeared to have mistakenly re-instated the path layout described in revision U.
12. From Mr McNally's responses and from what I found during my site visit it is clear that the planning permission being implemented is 15/1097; approximately 46 houses have been finished with others being in various states of development and the path layout on the perimeter of the site had been set out in accordance with the approved 'revision U' plan.
13. For the Council, Mr Rackstraw's view was that the order had not been invalidated by the granting of permission 15/1097 and the associated condition 13; the order would only have been invalidated if 15/1097 had resulted from an application for a wholly different development scheme. As it is, there remained a direct relationship between 15/1097 and the original planning permission which had been granted.
14. For Network Rail Mr Lopez submitted that the planning regime was on-going and fluid whereas the order had to be considered in the light of the planning permissions which were relevant at the time the order was made; that is, to 11/0989 and 14/0954 and the conditions which were attached to those permissions. That the order had been overtaken by 15/1097 was of no consequence; the order should be determined on the basis of whether it was necessary to stop up the footpath in order for the development under 14/0945 to be carried out. A proper understanding of the remit in relation to the order is that the Order was validly made and required confirmation to allow the development under 14/0945 to be carried out; in Mr Lopez's view, permission 15/1-97 was 'by-the-by'.
15. The objectors' view was that permission 15/1097 and the terms of condition 13 attached to that permission could not be overlooked, either as a matter of course but particularly in the light of what had been built on the site. The condition attached to the planning permission which was being implemented demonstrated that the LPA did not consider that the closure of the path was necessary.
16. I agree with Mr Rackstraw that the granting of planning permission under 15/1097 subsequent to the making of the order does not invalidate the order. It is not unusual for applications under section 73 of the 1990 Act to be made to vary some aspect or other of a development during either its planning or implementation stages and it is not necessary for a new section 257 order to be made each time a section 73 variation application is made. In my view, the order remains valid so long as the development to which it relates remains the same. The planning permissions in 11/0989, 14/0594 or 15/1097 all relate to the construction of 142 houses on the site and the order is relevant to that

development. Condition 13 attached to 15/1097 varies the phasing of the construction of those houses and the terms on which the full completion of the site can be achieved. I conclude that the order is validly made.

17. However, I am not persuaded that permission 15/1097 is incidental to my consideration of this Order under the statutory test found in section 257 or that consideration of the Order is limited to the permission and conditions which had been granted when the order was made. Although the Order was made at a point in time, the development to which it relates has moved on and the condition which regulates the development has changed. It is not possible to give consideration to this Order without reference to the latest iteration of the permission granted to the developer, to the conditions under which the development can currently proceed and to what has been implemented on site.
18. To consider the order against the merits of 11/0989 and 14/0594 to the exclusion of 15/1097 would be a wholly artificial approach to be taken given that what is being built on site which is in accordance with 15/1097. By building up to 46 houses on site I do not consider that the developer could be considered to be in breach of 14/0594 (which limited construction to 32 houses unless the old condition 13 was met) as 15/1097 permits the developer to build up to 64 houses without discharging the new condition 13. What is being implemented on site is 15/1097 and the Order has to be considered in the light of the current permission being implemented and the conditions which govern that development.
19. I acknowledge the debate about whether the revision V path layout was to be built and if it were what effect that would have upon the various permissions and consents. Permission 15/1097 made provision for revision U to be built and that has been laid out on site. If the developer wished to set out the path shown in revision V, it would be open to him to make a separate variation application under section 73 of the 1990 Act. Although revision V was permitted under 14/0594, the developer cannot mix and match between permissions as one of the purposes of granting planning permission is to provide certainty as to what will be built and where it will be built. In my view, 15/1097 and the conditions attached to it is the permission which the developer is implementing and a consideration of this Order cannot be blind to that fact.
20. The test to be applied under section 257 of the 1990 Act is whether it is necessary to divert the footpath at issue in order to allow development to take place in accordance with the planning permission granted. The development permitted under 15/1097 is in progress but has not been completed. The diversion of the path is not necessary to allow the physical construction of houses on the site to be carried out as the majority of the path at issue is outwith the boundary of the development.
21. If it is not necessary to allow physical construction to take place on site, the question arises therefore as to whether it is necessary to divert the path in order to satisfy condition 13 of 15/1097? Reading the condition, it would appear not; the second part of the condition would permit the full development of the site if the order was not confirmed.
22. In contrast to condition 13 attached to 14/0594 which would have prevented the development of more than 32 houses if the Order was not confirmed, condition 13 of 15/1097 permits the whole development of 142 houses to be

carried out irrespective of whether the Order is or is not confirmed. If the full development of the site can be carried out without the Order being confirmed, it cannot be necessary to divert the footpath in order for development to be carried out.

23. I concur with the objectors that, in the light of the terms of the condition attached to the planning permission being implemented the Order fails the statutory test for confirmation.

Conclusion

24. I conclude that as the diversion of the footpath is not necessary to allow development to take place, the Order should not be confirmed.

Formal decision

25. I do not confirm the Order.

Alan Beckett

Inspector

APPEARANCES

For Eden District Council

Mr D Rackstraw

Solicitor, Eden District Council

For Storey Homes

Mr A McNally

Storey Homes

For Network Rail

Mr J Lopez

of Counsel, instructed by Bond Dickenson LLP

Objectors

Mr A D Kind

Mr G Wilson

Mr A Duval

Local representative, Ramblers' Association.

MAP NOT TO
ORIGINAL SCALE

**Eden District Council
Public Path Stopping Up Order No.1 2015
Appleyby Cross Croft**

Public Footpath 303028

Line

- Alternative Route to be Provided
- Existing Route to be Stopped-Up

Point Grid Reference

- | | |
|---|----------------|
| A | 369122, 520198 |
| B | 369112, 520225 |
| C | 369121, 520236 |
| D | 369114, 520252 |
| E | 369143, 520270 |
| F | 369033, 520288 |
| G | 369025, 520302 |
| H | 368984, 520330 |
| I | 369045, 520340 |

P.P.P.

Proposed Development

Scale 1:2500