
Order Decision

Site visit made on 13 September 2017

by K R Saward Solicitor

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

Decision date: 05 October 2017

Order Ref: ROW/3169067

- This Order is made under Section 119 of the Highways Act 1980 ("the 1980 Act") and is known as Hertfordshire County Council (Barley 14) Diversion Order 2016.
- The Order is dated 17 June 2016 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were 2 objections outstanding when Hertfordshire 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.

Preliminary Matters

1. None of the parties requested an inquiry or hearing into the Public Path Diversion Order ("the Order"). In arriving at my decision I have taken into account all of the written representations.
2. I have found it convenient to refer to points along the existing and proposed routes as shown on the Order Map. Therefore, I attach a copy for reference purposes.
3. There are two statutory objectors, Mr Westley of The East Herts Footpath Society ("EHFS") and Mr Beney on behalf of The Open Spaces Society ("OSS"). Both have objected solely to the diversion of the northern part of footpath Barley 14 ("FP14") between existing points A-B. There are no objections to diversion of the existing southerly part of the route between F-G-H along the alignment F-J-K.
4. I conducted a site inspection accompanied by representatives for and against the Order along the proposed route between points E-B and to see the existing route of FP14 from point A to midway between points B and F. I walked the remainder of the existing and proposed routes on an unaccompanied basis being where the diversion of the route is uncontested.
5. A large part of FP14 between points A and B is currently inaccessible to the public. This is because the private gardens of some of the properties affected by the route have been enclosed by fencing. Similarly, part of the southern end of the route crosses a farmyard where barns have been built over the path. Whilst not all of the route could be walked due to these obstructions, I was still able to gauge its approximate position sufficiently to allow me to assess the proposal.

6. Originally, two separate applications were made to the County Council as the Order Making Authority ("the OMA") to divert different parts of FP14. The first application was made in 2002 by the owner of The Old Manor to divert that part of the footpath between existing points A-B. A second application was made in 2012 by Abbotsbury Properties LLC to divert the section of FP14 between F-G-H. The first applicant was replaced in 2015 by the owners of Crown House, Tythe Barn and Burnel's Barn¹, but has continued to support the application. The applications were subsequently combined and a single Order has been made.
7. The whole of the proposed route was made available for use by the public as a permissive path after the 2002 application.
8. The OSS has raised issues regarding the drafting of the Order. In particular, to the omission of a width for the footbridge along the proposed route and also to the completeness and precision of the limitations. I must therefore address whether the description of the footbridge is correct and whether all limitations have been included, and satisfactorily described, in Part 3 of the Order.

Main Issues

9. The Order has been made in the interests of the various owners whose land is crossed by FP14. 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) any new termination point for the path is substantially as convenient to the public; and
 - (d) 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 path and the land over which the new path would be created together with any land held with it.
10. In arriving at my findings I shall have regard to the judgment in *R (on the application of Young) v. Secretary of State for Environment, Food and Rural Affairs*² in which it was confirmed that section 119 contains separate tests. 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.

¹ Also referred to as 'Barn 1'

² [2002] EWHC 844

Reasons

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

11. Primarily FP14 crosses agricultural land, but the northern end of the route affects several residential properties. The path commences at Crown House where it crosses the lawn and sunken patio passing close by the house before continuing across the private driveway for The Old Manor. It crosses the garden and driveway of Old Manor Lodge. It proceeds across the gardens and patios of Tythe Barn and Burnel's Barn passing immediately adjacent to their windows and doors before reaching open countryside at point B.
12. It is clear to me that there is a considerable adverse effect on privacy to the occupiers where users are able to enter their gardens and walk extremely close to private living accommodation. As the footpath also crosses private driveways it gives rise to potential conflict between vehicles and walkers.
13. I consider that it is expedient in the interests of all of these landowners for FP14 to be diverted between points A-B. To do so will facilitate enjoyment of their land and improve privacy to the properties and also remove safety risks posed by the route crossing driveways.
14. There are large barns built over a section of the southernmost part of the existing route. It also crosses land used for clay pigeon shooting. In these circumstances, I am satisfied that it is expedient in the interests of the landowner for the route along F-G-H to be diverted.

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

15. When considering the convenience of the routes included in the Order it is appropriate to disregard the present obstructions of the footpath.
16. Currently, FP14 starts at one corner of Crown House at point A along Bogmoor Road. The route proceeds in a southerly direction through the residential grounds of the properties identified on the Order map as Old Manor Farm to arrive at point B.
17. The proposed route would commence further west along Bogmoor Road through a gap in the hedge. The path would run broadly parallel with the existing route up to point C before turning in an easterly direction along the field boundary to join existing point B. Between points B-F the route would be unchanged from its existing alignment.
18. The EHFS acknowledges that the condition of the route between C-D-X-E is good at present having been cleared of mud, levelled and with wood chippings in places. However, it expresses concern that as the ditch provides drainage for enclosures to the side of the route, water run-off could wash away the surface as it has in the past. These concerns are contradicted by supporters who have used the route and say it is well drained in all seasons. Apart from some wood chippings, the surface is grassed which could feasibly be prone to becoming muddy, but there is no evidence before me to indicate that the surface could become damaged as feared by the EHFS.

19. The OSS maintains that the route is less convenient to the public referring to an alternative alignment via the resident's access road which might be better as it would be more likely to be kept clear and is further way from the 'sewage outlet' at point X. There is no reason to believe that the proposed route would not be kept clear. Indeed, it has been in use as a permissive path with no mention of complaints regarding its condition or smells in the vicinity of X.
20. The EHFS describes the route between B-C as steep and fears it will suffer wear and tear from use. In comparison, the existing route has less maintenance risks and no steep gradient for walkers.
21. From my own observations, whilst there is a steady incline from point C-B it is not particularly steep. It is not a significant impediment in terms of convenience. It is certainly no worse than the gradient between existing points G-F which extends for a greater distance and which would be removed from the Order if confirmed. Thus, the introduction of a stretch of new path on an incline is offset by the loss of a longer section of existing path of a similar gradient running broadly parallel. The route as a whole would be no hillier for users to contend with than before.
22. Although C-B is grassed being at the edge of a field boundary, there are no signs that it has suffered wear and tear thus far when it has been in use as a permissive path for some time. It seems improbable to me that the gradient would cause the surface to become vulnerable to damage from use.
23. Parts of the existing route are not easily discernible particularly between points A-B and through the farmyard. The OMA and supporters identify the clearly defined new route as a benefit and prefer the way the route from E-B follows the hedge line.
24. There are no width or limitations for FP14 recorded in the Definitive Statement. The path would be 3m in width except for a 4m stretch at point X where it would reduce to 2m in width. Along the proposed route there is a footbridge at point D measuring around 1.35m in width over a ditch. The OSS has taken issue over the width of the footbridge at point D of the proposed route.
25. It submits that the narrow bridge dictates the useable width in the vicinity. Instead of approximately 1.35m, the OSS considers the width of the bridge should be at least 2m. This would correspond with the minimum width for footpaths sought by the Council as OMA. It is argued that a bridge of full 3m width is achievable at modest additional construction and maintenance cost. Further, the OSS points out that this is not an aid of passage to an existing path, but a proposed route.
26. However, this is an existing bridge and not one that is to be built. It is along a route that has been used as a permissive path for a number of years. In the 24 letters of support for the diversion, several people refer to the route in terms of its easy accessibility including with prams and pushchairs and it being wide enough for mobility scooters. No-one mentions any issues having been experienced over the narrowness of the bridge. From the information before me, the concerns of the OSS in this regard are not shared by those regularly using the route. Moreover, I was able to see at my site visit that the bridge is of sufficient width to accommodate the needs of users. In addition, I do not

consider there is any requirement for a highway authority to provide the full width at the crossing point.

27. At the southern end, the existing route turns in a westerly direction along the field boundary at point F. It turns again at Point G to proceed south across agricultural land and through the farmyard at Abbotsbury Farm. Large barns have been erected over a significant part of the route along this section necessitating walkers going around the buildings through an area of working farmyard before reaching FP16. The proposed route provides a shorter and straight connection from Point F to FP16 going solely through fields. No objections have been raised to this part of the proposed diversion and it is clear to me that it offers a much more convenient route.
28. In terms of length, the new route is approximately 470m compared with 620m for the existing route.
29. In taking all of these factors together, I do not find that the diversion would lead to the footpath being substantially less convenient for the public.

Whether any new termination point is substantially as convenient to the public

30. FP14 connects with the public highway along Bogmoor Road at point A being virtually opposite the junction with Shaftenhoe End Road. It is also next to a private vehicular access road which extends beside Crown House. Access to point A is gained over a raised grassed verge. The new path would terminate at another point further west along the same highway at point E where the surface is flat and the road is straight affording better visibility.
31. To reach point E from an easterly direction would involve walking along Bogmoor Road for a further distance than required for the existing route. The road is narrow and there is no footway. By the same token, point E is nearer to footpath Barley 11 which connects with Bogmoor Road to the west. A number of supporters suggest that they find this beneficial as it is the main route used by dog walkers to Barley village. For some walkers the termination point at E may be slightly less convenient depending on their destination, but the distances involved would have marginal effect.
32. Both statutory objectors suggest alternative routes which they consider to be preferable. It is submitted that safety will not be enhanced by creating another access point onto Bogmoor Road close to the crossroads. As exit point E is close to the driveway for Old Manor Farm, it is suggested that a safer termination point would be to the east of the driveway or along the driveway itself. Another possible route suggested by the EHFS could be via the gate at the north-west corner of the garden at Crown House past point A where there is also potential to link in with Freeman's Lane³ and FP15. Alternatively, it suggests diverting FP14 from a point between B-F eastwards along a field boundary to join Freeman's Lane.
33. There is no apparent support for such alternatives. In any event, the test is not whether there might be a preferable alignment to the proposed route. Rather, whether the new route as now proposed is substantially less convenient

³ For which an application has been made for a Definitive Map Modification Order

to the public than the existing route. Invariably with any proposed diversion there may be other routes which could be more desirable. The issue concerns this particular proposed alignment as shown in the Order and not some other route which may or may not be available.

34. Point E is separated from the driveway by a reasonably wide gap and it is some distance from the crossroads. Any motorist exiting the driveway would sensibly be looking in both directions. As this stretch of road is straight, visibility is reasonable for both walkers in the vicinity of point E and for motorists. Point E is not that close to the driveway to give rise to a highway safety concern. Indeed, its position is a significant improvement upon corner point A where walkers can experience traffic from different directions along a stretch of road with less visibility due to the curve of Bogmoor Road.
35. Therefore, I conclude that the new termination point is substantially as convenient to the public.

Expediency

36. The Old Manor and the converted barns are listed buildings. The existing path passes in such close proximity to the barns that there are close-up views of some elevations, but it is difficult to see their overall form and context.
37. In many respects, they can be appreciated to a greater extent stood back at vantage points along B-C and when passing between points C-D. From here the unusual roof line and form of the barns is visible. They can be viewed as a cluster of buildings with the chimneys of The Old Hall visible behind. The proposed route therefore offers a different perspective of the listed buildings and not necessarily one that is any less enjoyable than the existing route.
38. The permissive route is clearly popular with dog walkers and this is reinforced in the letters of support. Some users refer to feeling awkward walking through the private gardens of the dwellings affected by the current route. As it passes across lawns and close by the windows of dwellings, some people say they feel uncomfortable about using the current alignment. It is not difficult to see why people might prefer the proposed route around the edges of paddocks and through hedge lined pathway without fear of causing intrusion.
39. From parts of the existing route between A-B there are elevated views across fields in the distance. The EHFS objects to the loss of access to these views. In reality, whether anyone would be inclined to stop in the gardens of the converted barns to take in the view is perhaps questionable. Moreover, very similar views across the fields can still be enjoyed from point B. Elsewhere along the new path the farthest field cannot be seen, but the views remain unrestricted.
40. When considering all of these factors, the public enjoyment of the contested part of the route is not materially affected and in many ways it is enhanced.
41. Some people might find the uncontested part of the route from F-J-K offering views across the surrounding fields a far more pleasurable experience than the existing route which is longer and includes the farmyard.

42. The driveways and land within the residential gardens of the properties at the northern end of the route would no longer be affected. Land within the ownership of Mr and Mrs Thirlwell of The Old Hall would accommodate the new route along with land owned by Abbotsbury Properties, being one of the applicants. No issues have been raised over the effect on the land served by the existing footpath or the land over which the new path would be created.
43. Taken as a whole, I consider the diversion would not have an adverse effect on public enjoyment of the path.

The ROWIP

44. None of the parties suggest that the Order is contrary to any material provision contained in a ROWIP.

Other Matters

45. Aside from issues regarding the width of the footbridge (which I have addressed above), the OSS considers that the Order would benefit from two additions. Firstly, for the description of the new path to specify that the footbridge is "not less than [1.35] metres clear width". Secondly, for the words "The right of the landowner to maintain a bridged ditch at point D" to be added as a limitation of the route at Part 3 of the Order.
46. Section 328(2) of the 1980 Act sets out that a bridge forms part of the highway. Guidance on the recording of the widths of bridges is provided in '*Authorising structures (gaps, gates and stiles) on rights of way*'^[1]. The guidance states "*an order or creation agreement should define the route as intended, and therefore all bridges should be identified in the statement describing the way. Where a bridge is narrower than the full width of the way, this should not be expressed as a change in the width of the highway, nor as a limitation. The full legal width of the highway continues to exist either side of a narrower bridge, just as, at, for example, a gate or stile*".
47. The width of the route is given in the Order as 3m. The OSS submits that without modification it is unclear from the Order that the bridge would be less than the full 3m in width. However, the bridge would form part of the highway without there being a reduction in width. The highway would include the 1.35m in width of the bridge itself plus land on either side to a total width of 3m, much in the same way that unused grass verge is part of the overall width of a carriageway.
48. Whilst the applicants may not object to the width of the bridge itself being included in the description, there is no requirement for an Order to record a bridge as having a narrower width than the remainder of the highway. I recognise that there is nothing to say what form of identification a bridge can or should take in an Order. Nevertheless, the Order as drafted records the presence of the bridge and that is sufficient. Further elaboration is unnecessary.
49. I do not agree that the ditch would become an unlawful obstruction as soon as the diversion takes place unless it is recorded as a limitation in the Order. The

^[1] Defra, version 1 October 2010

Guidance defines 'limitations' in terms of anything (save for authorised structures) which would represent an illegal interference with the public's entitlement to full enjoyment of the specified rights associated with the way, were it not for the fact that the way had originally been created or dedicated subject to the limitation. It may be the result of a natural feature or it may be a physical feature installed by the landowner, such as a gate or stile.

50. The ditch does not prevent free passage of path users of the proposed route because it is crossed by a bridge and the proposed route follows the alignment of the bridge.
51. The OSS additionally suggests that the condition in Part 3 of the Order for a 2m gap in the hedge at Point E should be prefixed with the words "The right of the landowner to erect⁴ [sic] a 2 metre gap...." However, it is not a 'right' of the landowner for there to be a 2m gap, but a condition that would need to be met. The wording is clear and precise as it stands and no modification is required in this respect.

Conclusions

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

Formal Decision

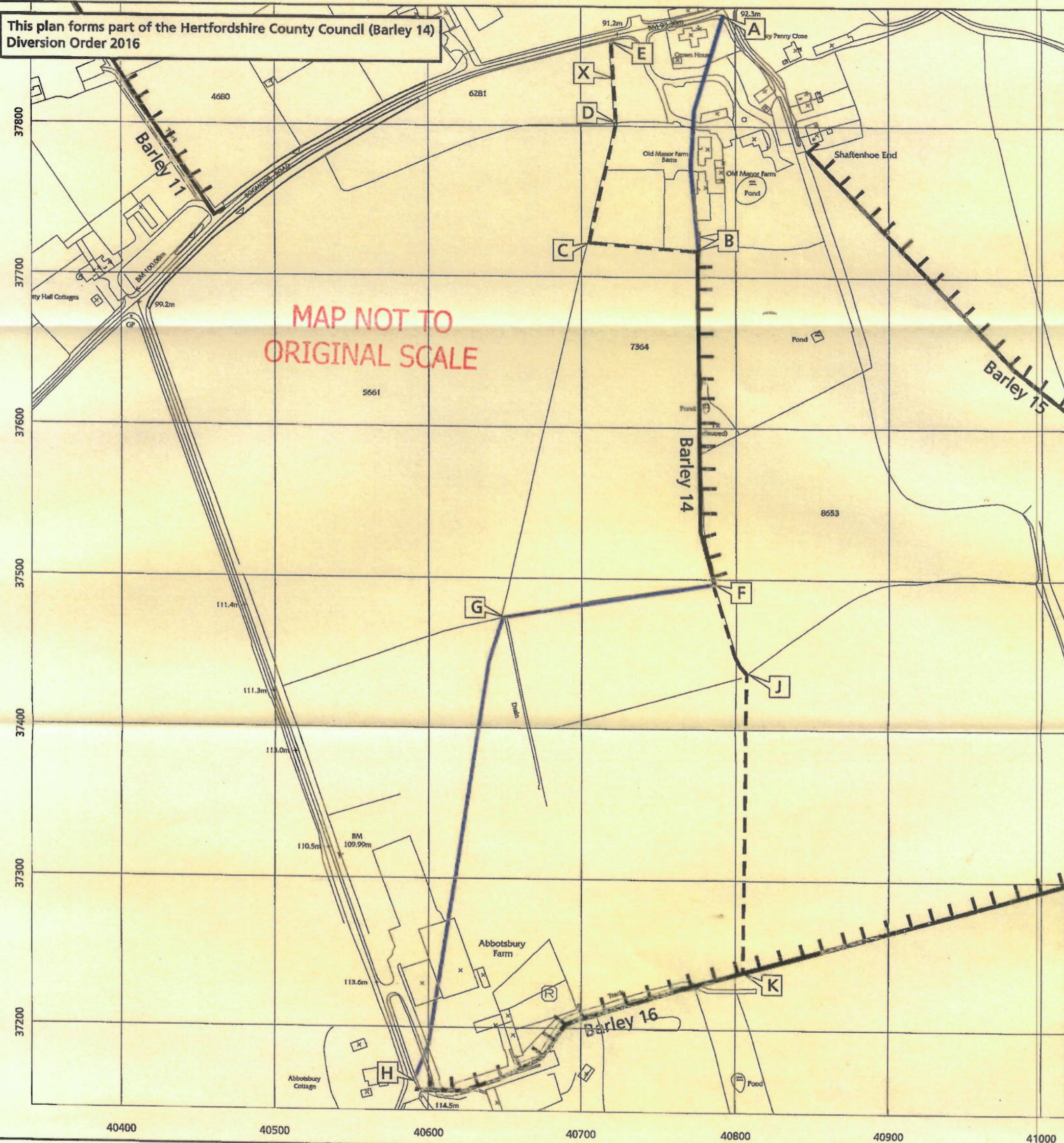
53. The Order is confirmed.

KR Seward

INSPECTOR

⁴ I take it that this was meant to say "maintain" rather than "erect".

This plan forms part of the Hertfordshire County Council (Barley 14) Diversion Order 2016



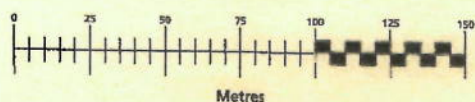
Notes:

Appears on DM sheet no. 9

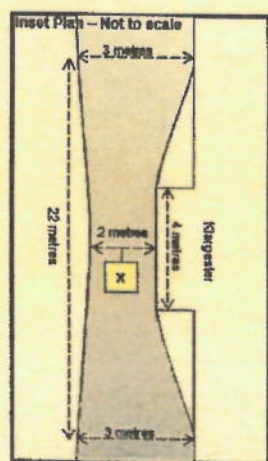
 Footpath: As currently shown on the DM

———— Footpath: To be deleted

— — — Footpath: To be added



Inset: Detail of point X



K	26/04/16	Inset
J	25/02/16	ORDER CHANGED TO 2016
I	13/08/15	X
H	23/03/15	ADD BARSCALE
G	06/06/15	INSET
REVISION	DATE	AMENDMENT
F	26/02/13	NTS
E	20/02/13	SHRINK TO A4
D	07/02/13	MAKE CHANGES TO PLAN

ANY ORIGINANCE SURVEY DATA USED IS BASED UPON THE ORIGINANCE SURVEY DATA WITH THE SANCTION OF THE
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SURVEYORS | PLANNERS | ARCHITECTS
THE GATEHOUSE, HADHAM HALL, LITTLE HADHAM, WARE, HERTS SG13 2ED
Phone (01279) 771388 Fax (01279) 771167 E-mail post@ewonders.com

SCHEME:

HERTFORDSHIRE
COUNTY COUNCIL

TITLE:	(BARLEY 14) DIVERSION ORDER 2016
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MAPPER: ASP	Copyright 2015, Swensson Agricultural. All rights reserved. The contents of this drawing remain the sole property of Swensson Agricultural and must not be copied or reproduced without prior permission.		
SCALE 1:2500	DRAWN BY MSM	26/04/16	CHECKED BY HS 26/04/16

CLIENT NO. ABB063	DRAWING No. 210271DWG007	REVISION K
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