



Order Decision

Site visit on 7 March 2016

by Sue Arnott FIPROW

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

Decision date: 13 April 2016

Order Ref: FPS/W2275/4/44

- This Order 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 Kent County Council (Public Footpath ER183 (Part) Alkham) Public Path Diversion and Definitive Map and Statement Modification Order 2015 and is dated 19 June 2015.
- The Order proposes to divert part of public footpath ER183 at The Old Rectory in Alkham, as detailed in the Order map and schedule, and would modify the definitive map and statement accordingly.
- There were two objections outstanding when Kent County Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is confirmed.

Main Issues

1. The requirements of Section 119 of the Highways Act 1980 (the 1980 Act) are that, in this case, before confirming the Order I must be satisfied that:
 - (a) it is expedient in the interests of the owner of the land crossed by Footpath ER183 that the right of way in question should be diverted;
 - (b) the new termination point of the footpath (being on the same highway) will be substantially as convenient to the public;
 - (c) the new route to be provided will not be substantially less convenient to the public; and
 - (d) 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.
2. 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. I am also mindful of the requirements of the Equality Act 2010.

Reasons

Background

3. This Order was made by Kent County Council (KCC) at the request of the owners of The Old Rectory. Prior to making the Order, consultations locally indicated opposition to the proposed diversion from Mr Barrier (now a statutory objector) and Alkham Parish Council. The issues raised by the Parish Council
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related to a separate part of the proposal to downgrade the track north of point B on the Order route which was then recorded on the definitive map and statement as Restricted Byway ER183A. The minutes of the Parish Council meeting on 6 July 2015 note that the issue of concern would be addressed by KCC and record the Parish Council "*accepted the proposal from KCC to make the Orders*". Indeed Alkham Parish Council did not register a formal objection to either Order, and subsequently the Order to alter the status of ER183A to footpath was confirmed unopposed.

4. Two objections were received by KCC during the statutory period following the advertisement of the making of this Order, from Mr Barrier and Ms Gaskill; both are residents of Alkham. In addition, Mr Barrier is a Parish Councillor with responsibility for rights of way and is a Footpath Warden for Alkham. In reaching my conclusions, I have considered their objections and further submissions, together with the responses thereto from KCC and the applicant's agent, Mr Wood.
5. I have also taken note of further comments received from the Ramblers' Association, the British Horse Society and Alkham Parish Council. However I should make clear that an email from the Parish Council sent to the Planning Inspectorate on 9 November 2015 cannot constitute a statutory objection since it was received outside the prescribed period.
6. In this email (and contrary to the July 2015 Minute) the Clerk expressed the Parish Council's strong objection to "*the proposed extinguishment*" of sections of ER183 and ER183A. Whilst there seems to have been a degree of confusion arising from the two simultaneous proposals for ER183/A, I have extracted from this email points relevant to the diversion and have considered them where appropriate along with the other objections. Any irrelevant points are recorded below under '*Other Matters*' and have not been taken into account.

The interests of the owner of the land

7. An application to divert Footpath ER183 was made to Kent County Council by Mr and Mrs Loveday, owners of The Old Rectory in Alkham. The main reasons given for seeking the diversion were to address the impact of the public right of way on the safety and security of the residential property and its grounds (including a cottage occupied by a relative of the applicants), and the privacy of the applicants, compromised by the proximity of the path to their residential property and the path across their driveway and garden.
8. From the point marked B on the Order map, the definitive route of public footpath ER183 runs through the grounds of The Old Rectory, passing alongside the garage and across the parking area adjacent to the main house. South of the garden, the path continues through a small meadow before entering the grounds of St Anthony's Church where it joins Footpath ER162 at point A (as shown on the Order map).
9. Other than the churchyard, all the land over which the present route passes lies within the ownership of the applicants. The Old Rectory has been in their family since the early 1960s and the acquisition of neighbouring land in 2011 provided an opportunity to address their increasing concerns about security by seeking to divert the public footpath. Whilst this land forms part of an agricultural holding, the relevant area is not subject to any agricultural operations other than the mowing of the grass surface.

10. As regards security, it is asserted that the presence of the path in such close proximity to the house and outbuildings and directly through the grounds presents a security risk.
11. A number of criminal acts have occurred at the property over the last 40 years, including burglary, theft of garden ornaments and vandalism. Maintenance equipment housed in outbuildings close to the path cannot be satisfactorily secured whilst work is in operation so that expensive machinery is left on view. It is argued that the inability of the applicants to be able to secure the garden area and especially to challenge people found within the vicinity of the path means that the presence of the footpath presents an ongoing threat to the security of the property.
12. Both objectors question the need for a diversion on security grounds, pointing out that the property is often unoccupied, that boundaries are not secured and that the gate from Slip Lane (below Rectory Cottage) is always open. In fact one objector highlights the benefits of having the public pass by, "*spotting if things are amiss*".
13. Responding for the applicants, Mr Wood points out that diverting the footpath as proposed would benefit his clients; with the right of way outside The Old Rectory garden, it will be possible to properly secure the property boundary and to challenge any unauthorised persons found in the garden.
14. I accept that there have been several incidents here which have given the applicants cause for alarm although proof these were in any way connected to the public footpath appears to be scant. Nevertheless, the presence of a public highway so close to residential buildings does make opportunistic crime a very real fear. Even with improved way-marking so as to make clearer the line of the path, I accept that challenging people walking off the right of way will continue to be worry for the applicants and their family, especially when very young relatives want to be outdoors in a safe environment.
15. Turning to the second reason for the diversion, it is argued that privacy is seriously reduced for the residents of both The Old Rectory and Rectory Cottage as a result of the path running between the two dwellings. Several windows face the parking area across which the footpath passes and it is both disconcerting and intrusive to have members of the public walking so close to the house. Further, walkers have been known to stop for a picnic in the garden and dogs have fouled in the area.
16. Whilst one objector empathises with the desire for privacy and suggests planting hedges for screening, the other argues that the family is rarely in residence.
17. I agree with KCC that hedges or fencing would not be a practical solution where the right of way crosses the private parking area and elsewhere could alter the character of the path quite significantly.
18. I understand the general concerns often expected with a rural property of this nature and recognise the benefits residents would enjoy if the public footpath did not pass in close proximity to the house and through its otherwise private garden.
19. KCC points out that in considering the expediency of diverting a footpath in the case of *Ashbrook v East Sussex County Council* [2002] EWHC 481 (Admin) the

Court relied on the Concise Oxford Dictionary definition of expediency meaning 'suitable and appropriate'.

20. On the same issue, Mr Wood refers to the case of *Ramblers' Association v SSEFRA, Oxfordshire County Council and Weston* [2012] EWHC 3333 (Admin) where Ouseley J held (at paragraph 33) that: "*The question that has to be asked under section 119(1) is whether the diversion is expedient in the interests of the land owner ... If it is more convenient, beneficial or advantageous to him, it is expedient in his interests.*"
21. Applying that interpretation to the evidence presented here, I consider there to be little doubt that the diversion proposed by this Order would be expedient in the interests of the landowner.

Convenience to the public

22. In assessing the relative convenience of the present and proposed routes I have considered various factors including length, width, gradient, surface and limitations in the context of the role Footpath ER183 plays in the local network. In doing so, I note the main points put forward by the objectors: that the proposed new route will be longer, less direct and less commodious in terms of its surface.
23. Ms Gaskill's main objection is that the diversion would be substantially less convenient to users such as herself who use Footpath ER183 to get to church and to the centre of the village from the northern side of Alkham.
24. There is no doubt that to follow the diversion via B-C-D then along Footpath ER161 to point E almost doubles the distance along the definitive line B-A-E by adding around 130-140 metres. KCC points out that for Ms Gaskill and other residents of Warren Lane, the journey down to The Marquis Hotel is just over 1 kilometre in length, putting this additional distance into context.
25. Similarly, there is little doubt that the route would be less direct for walkers such as Ms Gaskill since the diversion would take them westwards to join Footpath ER161 at D before turning back towards the village.
26. In his objection, Mr Barrier suggested a spur path at the western end of the new route (from a point between C and D which I shall call X to a point on ER161 I shall call Y) should be considered as an amendment¹. Whilst this would lengthen the new route by around 5 metres, it would reduce the overall distance for comparison with the existing line by around 50 metres and would avoid the necessity to use the cross-field section of ER161 between D and Y.
27. Ms Gaskill expressed concern over the surface of D-Y as it crosses a cultivated field which can be wet and sticky with mud (other than in a dry summer) and is far from ideal when dressed for a church service, when visiting friends or when attending village functions. However I note that she considers a modification via the field edge (X-Y) would not mitigate the overall loss of convenience.
28. Several parties point out that to include X-Y would require steps up the bank at point X to address the change in levels. The Parish Council considers that X-Y would be preferable to crossing an annually ploughed field and that a field edge path is more likely to remain undisturbed. However KCC points out that a

¹ Before reaching my conclusions I invited further comments from interested parties on this suggestion, particularly in relation to the convenience of the public. I have taken account of all replies received.

- field-edge path is more likely to suffer from encroaching and overhanging vegetation than the cross-field ER161. It also reports that it has not received any complaints about the present condition of the path between D and Y.
29. For the applicants, Mr Wood points out that no concerns were expressed over the surface of the proposed route during consultations over the proposal. D-Y (which is part of the Pilgrim's Way) is not subject to flooding or pooling and whenever the surface is ploughed it is always re-marked with a tractor wheel and the high levels of use by walkers ensures compaction of the surface. He highlights the fact that the definitive path runs through a small meadow which has, in the past, been disturbed by horses kept in the field and that this may well occur again in future.
30. As regards limitations, the present Order route includes two kissing gates and one hand gate whereas the proposed route itself would have none, although the connecting section of Footpath ER161 would entail using a kissing gate, a hand gate and steps at D.
31. From its junction with Warren Lane and Slip Lane, the definitive footpath ER183 runs to the west of and broadly parallel to Slip Lane via the church, the village pub and to the busy Alkham Valley Road in the village centre. KCC suggests that Slip Lane, described as a quiet residential road, would offer an acceptable alternative to using the diverted Order route for walkers concerned about keeping their shoes clean (with Footpath ER162 giving access to the church) but that is not the issue.
32. The statutory test requires a comparison between present and proposed routes and I accept that the objectors are quite right in saying that the proposed route is significantly longer and less direct if walking broadly from north to south. For those people, I consider the diverted route would be less convenient, as would the new termination of the route at D rather than A (and whether or not the path ended at D or Y).
33. However, the question of convenience depends entirely in which direction the user is walking and, to an extent, the purpose of the journey. If approaching the village along ER161 with the intention of proceeding north via ER183 on a recreational walk (or vice versa), then the diverted route would be substantially more convenient in many respects, not less.
34. In its letter of support, the Ramblers' Association accepts that the proposed new route is longer but considers it not substantially less convenient to the walker. It notes that the new section will be on a wide, well-kept path avoiding a private garden and will take walkers directly to another right of way leading up the hillside. Letters from two other local residents (Mrs Sayers and Mr Tapsell) offer similar support for the diversion.
35. I have limited information from which to establish the main function of Footpath ER183. KCC states its original purpose to be as a route through to the village centre for a small handful of properties situated in Warren Lane and along the western part of Slip Road of which there are relatively few. Whilst ER183 is not a promoted route at present, KCC (and the Ramblers' Association) recognise the advantage of the more convenient link with the Pilgrims' Way, providing an easier access to rights of way to the north east of the village for recreational walkers.

36. ER183 is also said to be used by dog walkers who generally prefer to make use of a number of different circuits and it is unlikely that the proposed diversion would present any disadvantages to this group.
37. Alkham Parish Council has requested that both the new route B-C-D and the suggested X-Y be provided, effectively forming a triangle with ER161, and I can see some merit in that suggestion. However I note Ms Gaskill's comment that it would not significantly reduce the degree of inconvenience for journeys such as her own.
38. I also take into account that the new route has been made available and is already being used by the public. Mr Barrier queried the incorrect marking of this route with yellow waymarks (denoting a public footpath) but these have since been removed and were not present on the day of my visit. Mr Wood reports that the applicant has received no objections to this new path, only praise and approval. Whilst Alkham Parish Council wrote² that it was "*happy for the proposed new section of path marked in yellow to be adopted*", it also suggested that the new route B-C-D is "*likely to have acquired rights*" on the basis of implied dedication. However KCC points out that the landowners have followed the procedures set out in Section 31(6) of the 1980 Act to make their position clear and to rebut any such presumption.
39. In reaching my conclusion, I recognise that for a relatively small number of people, the proposed diversion will present a significant inconvenience when the Order route B-A(-E) is compared to the proposed B-C-D(-E). Put into the context of the total journeys such people will be making if using ER183, then the impact is much less. However I regard the disadvantage to this group of people is outweighed by the potential benefits to a much larger proportion of the walking public insofar as the proposed new route will offer a significantly better link with other paths in the local network and a substantially more convenient path.

Public enjoyment

40. The present and proposed routes are different in character in two main respects. Although both are country paths, the present route entails walking through the garden of The Old Rectory with pleasant but restricted views, whereas the proposed new route stays outside the curtilage of the residential property and reaches Footpath ER161 at a point offering far reaching views along the valley.
41. KCC submits that people generally feel reticent about walking through the gardens of private dwellings as they feel a sense of intrusion, despite having a right of way. In this respect, the diversion would offer an advantage, as will the extended views.
42. One of Mr Barrier's main objections is to the loss of what he regards as an ancient village footpath which he says has been used for centuries and goes to heart of the village, the church and on to the village hall.
43. Responding to this point, KCC and Mr Wood highlight the mapping evidence which shows Footpath ER183 probably developed in the mid-nineteenth century and that there is no evidence to show it had earlier ancient origins.

² In its email of 9 November 2015

44. I accept that some people do derive pleasure from following historical routes linked to particular buildings, events or people. Whilst I can respect Mr Barrier's reasons for wanting to retain the Order route for its role in the development of Alkham, no evidence has been produced to substantiate its particular significance.
45. It is not included in any of the several promoted walking routes around village. In fact Alkham Walk No 3 instructs walkers to use Slip Lane down to the village hall, not Footpath ER183, suggesting that the latter is not regarded locally as having any notable value for leisure walkers.
46. KCC also points out that the legislation recognises that the highway network is not set in stone. Section 119 of the 1980 Act facilitates the alteration of public paths within the statutory framework where necessary to adapt to changing circumstances.
47. Having considered the comments submitted and from walking the route myself, it appears to me the enjoyment gained from walking ER183 would not be detrimentally affected as a result of the diversion.

Other considerations

48. Compensation issues are not relevant here since the applicants own the land over which both the present and proposed routes pass. No adverse effects arising from the diversion on any of the land concerned have been drawn to my attention. The Parochial Church Council has confirmed it does not oppose the removal of part of Footpath ER183 from the churchyard and has no objections to the Order.
49. No issues have been raised in relation to KCC's Countryside and Coastal Areas Improvement Plan 2013-2017. Neither have any particular concerns been raised in relation to accessibility for all users although in reaching my conclusions on the relative convenience of the new route I have considered the reasonable needs of people with a range of disabilities.

Whether it is expedient to confirm the Order

50. In reaching a final conclusion on the expediency of this diversion I must weigh the advantages that would accrue to the landowner in whose interest the Order is made against any disadvantages that may result for the public.
51. 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.

Other Matters

52. In its email dated 9 November 2015, Alkham Parish Council suggested an alternative diversion for Footpath ER183 running to the east of the Order route, as did one of the objectors. This proposal was rejected by the applicants and dismissed by KCC. It is not before me for consideration and, since it would have resulted in a wholly different diversion, it would have been beyond the scope of my powers to modify this Order to propose such an alternative.
53. Although neither organisation registered formal objections to the proposed downgrading of Restricted Byway ER183A, both Alkham Parish Council and the British Horse Society (BHS) have expressed opposition to this. The Parish

Council argues that the restricted byway could have served the needs for disabled access³ and the BHS considered it a missed opportunity to improve the network for horse riders, suggesting that historically the route was a continuation of Warren Lane (although no evidence was provided to substantiate this). Since the downgrading of ER183A has not been at issue here, these matters are not ones I can take into account in determining this Order.

Conclusion

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

Formal Decision

55. I confirm the Order.

Sue Arnott

Inspector

³ It appears that the roadside gate was not passable at this time although pedestrian access has since been restored. A fully functional kissing gate was in place on the day of my visit.

