
Order Decision

Site visit made on 26 January 2017

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 23 February 2017

Order Ref: FPS/W1850/4/17

- This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and is known as the Herefordshire County Council Footpath CW29 (Part) Colwall Public Path Diversion Order 2016.
- The Order is dated 10 March 2016 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Herefordshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Procedural Matter

1. The objector cites case law (*Ashbrook*)¹ in advance of the proposition, which is accepted, that publication by an order making authority such as Herefordshire Council (OMA) of policy guidelines as to the exercise of its discretion to make an order, creates a legitimate expectation that the guidelines will be followed.
2. The objection alleges failure by the OMA to consider matters such as directness of the new route, consideration of the needs of all users and the like. These issues generally coincide with my duty to take into account similar matters in deciding whether to confirm the Order. However I cannot compel the OMA to follow their guidelines or refuse to confirm the Order simply due to any alleged failure to follow them. That is a matter for the objector to take up directly with the OMA as was the case in *Ashbrook*.

The Main Issues

3. The Order has been made in the interests of the landowner. Section 119 of the Highways Act 1980 ('the 1980 Act') requires that before confirming the Order, I must first be satisfied it is expedient in the interests of the landowner that the footpath in question should be diverted. Secondly, the new footpath must not be substantially less convenient to the public.
4. Thirdly, I must consider the expediency generally of making the Order but having specific regard to: the effect it would have on public enjoyment of the path as a whole; its effect on other land served by the existing right of way; and its effect on land over which the new rights would be created and any land held with it.
5. In addition, I have to take account of any rights of way improvement plan prepared by the Council that contains provisions relevant to these issues.

¹ *Ashbrook v East Sussex County Council* [2002] EWHC 481 (Admin); [2002] EWCA Civ 1701

Reasons

Whether it is expedient to make the order in the interests of the owner of land crossed by the footpath

6. The applicant for the Order is The Elms School, across whose grounds the footpath passes. The Elms has boarding pupils. The ages of the schoolchildren range from nursery age to 13 years. The existing route is not only close to the main school buildings and areas where children play but it cuts across the middle of a playing field marked out as a sports pitch. The proposed diversion would avoid conflict between users.
7. Furthermore exercise of the public right of way across the school grounds means that members of the public may walk through them at any time of the day or night. It is in the interests of the school, the pupils and wider community to minimise danger relating to strangers coming into contact with them. During winter months and dark evenings pupils must be accompanied to some facilities within the grounds. The risk to children is assessed by the school as low but with high potential adverse consequences.
8. Having regard to the above, I am satisfied that it is expedient in the interests of the landowner that the footpath should be diverted.

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

9. There are stiles to negotiate on the existing route and a salient feature is a raised railway crossing which is unmanned. The proposed diversion would have a natural grass surface throughout and, whereas the existing route has no definitive width, there would be a minimum width of 2m set for the new route.
10. At the time of my visit sections of the new path were soft underfoot but readily passable. The Environment Agency maps submitted demonstrate a risk of surface water flooding on parts of the route alongside the brook, which risk is not present in the route to be diverted. Generally however, whilst the new route may be damp and "soft going" in parts and deter wheelchair users, the existing route would also present obstacles such as the stiles and rail crossing.
11. The Order provides for a "2 in 1" gate at point H. The objector is concerned that some satisfactory means is found for crossing the brook in this vicinity. The Order requires that the proposed route be created to the satisfaction of the Council, so regard will have to be had to its design, layout and safety. Only when these requirements are met will the diversion come into effect. I do not therefore consider this issue is in itself a reason not to confirm the Order.
12. At about 767m in length the proposed new footpath would be some 57m longer than the diverted path. Account should also be taken of the extra length from Point A to Point F if walking north through the housing estate, as well as the extra length if walking south from point A south via CW29B to points E or I.
13. The north end of the proposed new path is at edge of the field where footpath CW30 is joined. CW30 then proceeds under the railway and through the housing estate to reach Walwyn Road, the main thoroughfare through this linear type settlement. On Walwyn Road the distance between point A where the existing route is to be diverted, and the junction with the housing estate road, is quite short. Given the lack of user testimony I am not persuaded that substantially fewer numbers of walkers, including those who may be from the

- estate, would elect to walk under rather than over the railway line or, if walkers started from further south on Walwyn Road, that they would not use CW29B.
14. CW29B is available further south on Walwyn Road which leads to the end point E of the section of path to be diverted. In the unlikely event that point E would be a destination point in itself CW29B would be more likely to be used albeit meeting more traffic on Walwyn Road. Given that the footpaths are in essence recreational in character, the other alternatives, including the new route from point A to point I, are substantially as convenient, and the changes in direction not materially significant as between them.
 15. The change of direction on the existing path between points C and D is said to be confusing, as I found to be the case when I veered from the path towards the school buildings. I see no reason why more effective signage would not clarify the existing route through the school. Around this section I encountered one or two vehicles but overall, from the information supplied this would not appear significantly different from the occasional use of tractors between points F and H of the proposed route.
 16. Network Rail supports the Order on grounds of safety and that it represents an inconvenience to footpath users. The order is not made under section 119A of the 1980 Act in the interests of safety of members of the public using the path or likely to use it. However it would be relevant to take such matters into account if they relate to the criteria set out in s119 of the Act, including that of convenience or general expediency.
 17. The permitted line speed over the 5.6m wide level crossing is 70mph. The objector's evidence has been considered, however Network Rail's level crossing risk specialist confirms that trains can and do pass over at 70mph. Network Rail does not regard it as a high risk crossing, however I agree that there is an inherent risk to all unmanned crossings without barriers, which rely on user vigilance in assessing overall safety. Visibility in both directions was good; however estimates of traverse times vary between 4.71 and 7.06 seconds. Therefore extreme care must be taken in making the crossing, not least by more vulnerable users. These inconveniences would not be present in the proposed route.
 18. In light of these factors and taking due account of the increased risk of parts of the new route to some surface water flooding following inclement weather, I am satisfied that on balance the new footpath will not be substantially less convenient to the public. I am also satisfied that the Order would not alter points of termination of the section of the path to be diverted (points A and E), except to points (respectively points F and I) which are on a connected highway, and which are in both cases substantially as convenient to the public.

Effect the diversion would have on public enjoyment of the path as a whole

19. I saw that the diversion route offers attractive views of the Malvern Hills and would run alongside a brook, possibly enhancing the overall walking experience for some as a country path, in place of the route through the school. However views of the hills are also obtainable from sections of the existing route.
20. CW29 extends considerably further to the north-west and south-east of the section to be diverted. It starts from Old Church Road and proceeds through The Elms School, across Evedine Lane and down to join CW30 west of

Woodlands Coppice. Taking into account the information submitted, and what I saw on my visit, in my view the enjoyment gained from walking CW29 would not be detrimentally affected as a result of the diversion.

Effect of the Order on other land served by the existing right of way

21. Apart from the effect on the school which is described above, the other owners of land, through which the existing route passes, have consented to the making of the Order. The Order would have no adverse effects in this regard.

Effect of the Order on land over which the new rights would be created and any land held with it

22. It is understood that an agreement has been entered into between the school and the owners of land subject to the proposed new route, under which the school will pay for works to create the new section of footpath. From the information supplied the Order would have no adverse effects on this land.

Expediency and other material considerations

23. I have found that it is expedient in the interests of the applicant that the Order should be made. The new footpath would not be substantially less convenient to the public and the enjoyment gained from walking the path as a whole would not be detrimentally affected due to the diversion. The Order would have no adverse effects on the land over which the existing and new sections of the footpath lie. In addition it would be expedient to divert the path away from the unmanned railway crossing on safety as well as convenience grounds. I take into account that Network Rail is aware of the need to take steps to alleviate flooding to which the underpass is prone, but overall I consider that a no less convenient alternative would be provided that makes use of the underpass where the new route of CW29 joins CW30.
24. No specific issue has been raised in relation to the Herefordshire Council: *Rights of Way Improvement Plan 2007 – 2011* that affects these findings. Further, in considering the relative convenience of the new route I have taken into account the reasonable needs of people with a range of disabilities.
25. No compelling evidence is supplied that persuades me that the section of path to be diverted has a historical connection with the school or has historical interest.

Conclusion

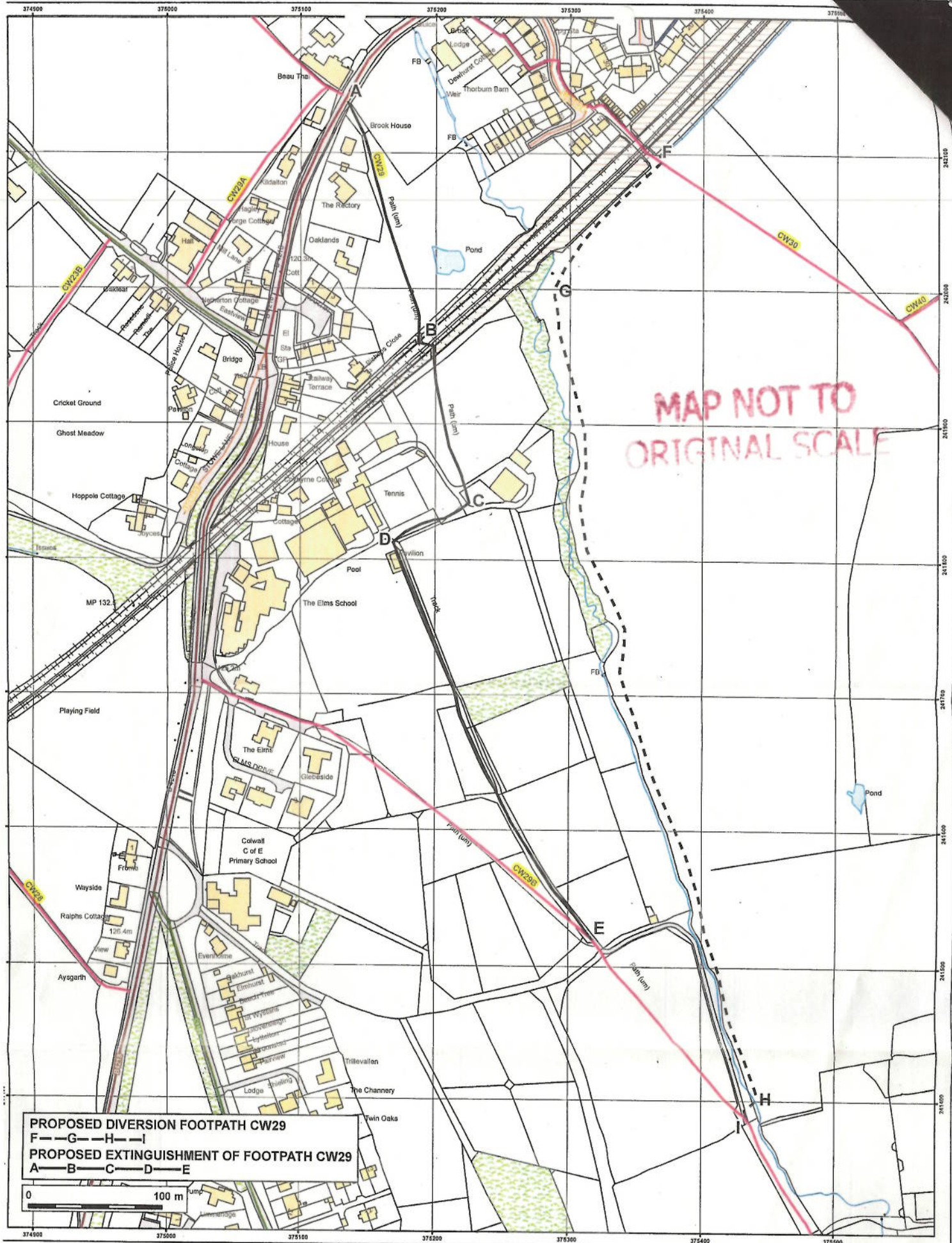
26. Having regard to the above and all other matters raised in the written representations, I conclude that it is expedient that the Order should be confirmed.

Formal Decision

27. The Order is confirmed.

Grahame Kean

INSPECTOR



PROPOSED DIVERSION FOOTPATH CW29

F—G—H—I

PROPOSED EXTINGUISHMENT OF FOOTPATH CW29

A—B—C—D—E

0 100 m

Highways Act 1980, Section 119
Herefordshire Council Public Footpath CW29 (part)
Parish of Colwall
Public Path Diversion Order 2016
DWG No.: D458/95-29
SCALE 1:2,500 @ A3

PUBLIC FOOTPATH
PUBLIC BRIDLEWAY
RESTRICTED BYWAY
BYWAY OPEN TO ALL TRAFFIC

Balfour Beatty Living Places
Unit 3, Thorn Business Park
Rotherwas Industrial Estate
Hereford
HR2 6JT

