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## Order Decision

Site visit made on 27 September 2016

**by Helen Slade MA FIPROW**

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

**Decision date: 6 October 2016**

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### **Order Ref: FPS/Y3940/5/4**

- This Order is made under Section 257 of the Town and Country Planning Act 1990 and is known as the Wiltshire Council Town and Country Planning 1990 Section 257 Wildlife and Countryside Act 1981 Section 53(A)(2) Langley Burrell 22 (Part) Stopping Up Order and Definitive Map Modification Order 2015.
- The Order is dated 15 December 2015 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule.
- There were four objections outstanding when Wiltshire 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.**

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### **Procedural Matters**

1. The parties have agreed that this matter can be determined by the written representation procedure. I carried out an unaccompanied site visit during the afternoon of 27 September 2016.
2. I was unable to walk the definitive line of the existing public footpath as it is currently subject to a temporary closure made under Section 14 of the Road Traffic Act 1984. The definitive line is obstructed by security fencing around the new stock yard, stock-piled products in the newly-built stocking area, the bund or bank along the north eastern side of the development site, and the partially completed new access road alongside the bund. The access to the new car park also crosses the line of the public right of way, but it does not form an obstruction as such. I was able to walk along the footway running along the edge of the newly-constructed car park from where I could get a good view of the site.
3. I was able to walk along that part of Footpath 22 between its junction with Footpath 5 in the adjoining field to the stile in the fence adjacent to the site-boundary bund which, despite the temporary closure affecting it, is still accessible.
4. One of the objectors, Julia Mannering, withdrew her objection after the matter had been referred to the Planning Inspectorate. Three other objections remain outstanding. I received statements of case from two of the objectors: David Mannering, and Judith Hible (on behalf of the Chippenham Ramblers). I also received statements on behalf of the applicants, Wavin Plastics Ltd. Wiltshire Council (the Order Making Authority or 'OMA') relied on their initial Statement of Grounds and did not submit any supplementary statement, thus offering no further comments or clarification on issues raised in the objectors' statements.

### ***The validity of the Order***

5. Mr Mannering raised some issues that relate to the validity of the Order with which I must deal at the outset, to ascertain whether or not I can continue to determine the Order itself on its merits.

#### *Order not compliant with the format set out in relevant Regulations*

6. Mr Mannering points out that nowhere in the Order is the width of the affected path indicated. He states that the regulations relating to orders made under the Town and Country Planning Act 1990 ('the 1990 Act')<sup>1</sup> and those that refer to modification orders made under the Wildlife and Countryside Act 1981 ('the 1981 Act')<sup>2</sup> state that the description of the affected routes should contain a description of the width. He refers to guidance produced by the Planning Inspectorate<sup>3</sup> which indicates that it would be acceptable to simply describe the width using a phrase such as 'the whole width' where the intention is to extinguish all of the affected section of the way.
7. I accept that it is certainly good practice to include details of the width of routes, but the Regulations do state that the form of any order can be in a format "*substantially to the like effect with such modifications as may be required*". The model forms themselves also indicate that the words included in square brackets can be amended by insertion or omission, as appropriate. The description of how the existing path or way should be identified, shown in Part 1 of Schedule 1, is contained in square brackets and may thus be modified as appropriate.
8. I note from the Definitive Statement for Footpath 22 that it does not contain any description of the width and thus the OMA could have included in the Order the words suggested in the guidance ('the whole width'). However, I do not think that the omission of this description is likely to have caused any confusion about what was intended by the Order as the affected length of the path is clearly shown on the plan. The word 'part' in the title to the Order refers to the fact that only part of the length of Footpath 22 is being stopped-up, but I do accept that it could be misinterpreted.
9. I have powers to modify certain aspects of public path orders if I consider it appropriate. Given the opportunity to do so, if I confirm the Order I intend to modify Part 1 of the Schedule accordingly to indicate that it is the whole width of that part of Footpath 22 which is affected.
10. However, I am unable to modify that part of the Order which relates to the automatic modification of the Definitive Map and Statement. I comment further on this matter in paragraph 26 below.

#### *Incorrect date on the Notice*

11. Mr Mannering asserts that the date of the letter sent to him containing Notice of the making of the Order was 16 December 2016, whilst the Notice itself was post-dated as 24 December 2016. The Notice apparently appeared in the local press on 17 December 2016, also prior to the actual date of the Notice. I have not seen a copy of the press advertisement to which he refers.

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<sup>1</sup> The Town and Country Planning (Public Path Order) Regulations 1993

<sup>2</sup> The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993

<sup>3</sup> Rights of Way Advice Note 16, paragraph 13

12. I note, however, that the copy of the Notice submitted by the OMA with its Statement of Grounds was from the Wiltshire Gazette, dated 24 December 2016: the same date as the Notice. If the Notice was published a week earlier in error, this was clearly rectified the following week by re-advertising it.
13. It seems to me that it cannot be fatal to the Order to advertise it slightly earlier than the date of the Notice, provided that the consultation period specified in the Notice itself is correct, and adhered to. In fact, given that the consultation period spanned the Christmas and New Year holiday season, the slightly earlier advertisement of it was probably beneficial rather than prejudicial. I have no evidence that the consultation period was compromised in any way, and I conclude that this issue does not render the Order invalid.

*Failure to advertise the Order correctly*

14. Mr Mannering complains that the Order was not advertised correctly as it was not available in the local area, as required by the relevant regulations. He drew attention to Schedule 14 of the 1990 Act and in particular the requirements for the Notice of the Order to name a place in the locality where it could be inspected and where copies could be obtained at a reasonable charge. He points out that the Notice in this case referred only to the main offices of the OMA which are at a distance of some 35 miles from the path concerned, whereas there is a local office of Wiltshire Council in Chippenham at Monkton Park only 5 minutes away from the Order route.
15. I agree that it might have been helpful to have made the Order available at an office in closer proximity to the area affected, but in taking the action they did, the OMA has not actually acted in a manner which is contrary to the requirements; merely less helpfully than it might have done. The remaining advertising requirements were, as far as I am aware, complied with in their entirety, including serving Notice on the local Parish Council. I have no evidence to suggest that anyone has in fact been prejudiced by their inability to obtain a copy of the Notice and so on this occasion I consider that, however unhelpful it may have been, the Order was not incorrectly advertised in this respect.
16. However Mr Mannering also considers that the requirement to post a copy of the Notice in a prominent position at the ends of so much of the affected path as is to be stopped up or diverted was not adhered to. He submits a photograph of what he claims to be the Notice at some distance from the line of the path where it crosses the north eastern boundary of the development site. He claims that anyone using the path would have been unlikely to see the Notice as it was so far off the line of the route.
17. Whilst I accept that the photograph appears to confirm what Mr Mannering claims, I do not have a copy of the notice itself, as it appears in the photograph. Neither do I know the date that the photograph was taken. As the path is subject to a temporary closure under the Road Traffic Act 1984, it could be a notice relating to that order rather than the Order I am considering.
18. However, I notice that the bund was already in position at the time the photograph was taken, together with some rather flimsy site fencing in front of it. Although it is difficult to tell from the photograph, it would seem that the footpath route was probably already obstructed by this time. A walker trying

to use it would probably have been searching round for an explanation and is likely to have seen the notice, whatever it actually said.

19. In fact, the notice should have been positioned on the stile at the junction with Footpath 5, that being one end of the length of Footpath 22 affected. The OMA has provided certification that the notice was positioned correctly, although they have not availed themselves of the opportunity to comment on Mr Mannering's assertions.
20. It is open to me to request that the Order be re-advertised to overcome any perceived shortcomings in the process as a whole, and I could ask for that to be done in this case if I felt that anyone was likely to have been prejudiced as a result. However, since I cannot be sure that the Notice in Mr Mannering's photograph is the Notice relating to the Order I am considering, and I have certification from the OMA that the notice was posted correctly, I conclude that I have insufficient evidence to suggest that the advertisement of the Order on site was non-compliant.
21. I therefore conclude that none of the issues raised by Mr Mannering prevents me from continuing to determine the Order.

*Omission of wording from the Order*

22. One other issue regarding the Order also came to light after the Order had been submitted to the Planning Inspectorate.
23. Orders of this nature, referred to as 'combined orders', contain a section which provides for an automatic modification of the Definitive Map and Statement, upon confirmation of that part of the Order relating to its effect on the footpath on the ground. The Regulations governing the drafting of such orders are contained in The Public Rights of Way (Combined Orders) (England) (Amendment) Regulations 2010. Paragraph 9 describes the changes to be made or words to be inserted into an order schedule to achieve the changes to the Definitive Map and Statement.
24. Paragraph 9(e) sets out the wording that needs to be added to an order when a path is being extinguished by a 1990 Act order, which is as follows: <sup>4</sup>  
  
*"insert, at the end of paragraph 2 of the Order, the words 'and upon the occurrence of that [stopping up] the [Calne and Chippenham Rural District Council] definitive map shall be modified by deleting from it the path or way referred to in paragraph 1 of this order, and the definitive statement shall be modified as described in [Part 2] of the Schedule.'"*
25. In the Order I am considering, I note that the OMA has not included the above wording, and in Part 2 of the Schedule has not indicated which part of the path is to be deleted from the Definitive Map and Statement. It has merely included a revised description of the part of Footpath 22 which will remain on the Definitive Map and Statement.
26. Whilst I could modify the first part of the Order to include the omitted words that I have set out in paragraph 24 above, it is not open to me modify that part of the Order which constitutes the modification to the definitive map and statement.

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<sup>4</sup> I have inserted the correct paragraph and schedule numbers as appropriate for the Order I am considering.

27. Without specifying the deletion from the Definitive Map as set out in the Regulations the Order is, in my view, incomplete. As a consequence, and because I cannot amend that part of it, I intend to delete that section of the Order which has been made pursuant to Section 53(A)(2) of the 1981 Act, if the Order is confirmed. This is not fatal to the Order as the OMA can make a separate modification order to correctly modify the definitive map and statement.

### **The Main Issues**

28. Section 257(1) of the Town and Country Planning Act 1990 provides for the stopping up or diversion of a footpath if it is necessary to do so in order to enable development to be carried out in accordance with planning permission already granted under Part III of the same Act.
29. In considering whether or not to confirm such an order, I have discretion to consider the advantages and disadvantages arising from the diversion of the path in general<sup>5</sup>, and also any disadvantage or loss which might be suffered either by the public entitled to use the route, or by those with properties near or adjoining the existing highway<sup>6</sup>. I must weigh any such disadvantages against the advantages of the proposed order.<sup>7</sup>
30. I must take account of relevant case law and guidance, and the advice in Defra's Rights of Way Circular 1/09.

### **Reasons**

31. In this case, although the original intention of the applicant was to divert the path, the OMA pointed out that the alternative suggested was already comprised of routes which were highways, and thus the proposal was to stop-up or extinguish, and not to divert.
32. The provisions of Section 257 of the 1990 Act are only applicable where the development has not already taken place. The advice on Planning Permission and Public Rights of Way in Circular 1/09 is contained in Section 7. Paragraph 7.11 makes clear that the grant of planning permission does not entitle developers to obstruct a public right of way as it cannot be assumed that an order to divert or stop up a right of way under Section 257 will invariably be made or confirmed. Development in so far as it affects a right of way should not be started, and the right of way should be kept open for public use until the necessary order as come into effect.
33. Whilst it is now permissible for orders to be made in advance of planning permission being granted, the requirement to keep the path open and available until confirmation of the relevant order remains in place. In this case, the Order was made after planning permission had been granted, but it has not yet been confirmed.
34. The developers applied for, and were granted by Wiltshire Council, a temporary closure of the path under the provisions of Section 14(1) of the Road Traffic Act 1984. The reason for the temporary closure is given in the notice of that order as being the likelihood of danger to the public due to the construction of a car

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<sup>5</sup> *KC Holdings Ltd v Secretary of State for Wales* [1990] JPL 353

<sup>6</sup> *Vasiliou v Secretary of State for Transport* [1991] 2 All ER 77

<sup>7</sup> Paragraph 7.15 of Defra Circular 1/09

park and a stockyard: in other words, due to the implementation of the planning permission which had been granted. Copies of correspondence submitted by the OMA show that the developers were warned of the risk involved in pursuing this course of action. Nevertheless, the applicants clearly decided that it was a risk worth taking, and Wiltshire Council appears to have facilitated that request twice, as the temporary closure has now been extended until September 2017.

35. During my visit to the site it was clear to me that the development had not only started but that the car park and the stock yard were both in use for the purposes for which they were intended. As I have described in paragraph 2 above, the definitive line of the path, notwithstanding the fact that it is temporarily closed, was completely obstructed and has, to all intents and purposes, been obliterated.
36. Paragraph 7.21 of Circular 1/09 makes it clear that where development, in so far as it affects a right of way, is completed before the necessary order to divert or extinguish it has been confirmed, the powers under Section 257 to make and confirm orders are no longer available since the development, which the order is intended to enable, has already been carried out. There is consequently no basis for an order to be made under those provisions. The guidance states that in these circumstances, the development should be regarded as completed if the work remaining to be carried out is minimal.
37. In this case, the car park is complete and in use, and the stock yard (on the line of the definitive footpath) is being used to store considerable amounts of the plastic products produced by the applicant. Lorries were present within the stock compound, presumably for the purpose of collecting items for distribution. The security fencing is in place and the landscape planting between the car park and the stock yard has been undertaken. Both the security fencing and the planting cross the definitive line of the path. The new access road is laid out with kerbing and drainage, complete with the relevant ironwork, and the sub-base has been rolled and compacted. The ironwork is up-standing and, although not in use, the road only requires the addition of the final wearing surface to be applied, at the point where the line of the footpath crosses it, for it to be complete. I accept that the junction with the B4069 has yet to be constructed but, as far as it affects the footpath, the road is substantially in place.
38. I can reach no other conclusion than that the work undertaken by the developer has rendered the 1990 Act Order inapplicable because the development, as far as it affects the subject public right of way, is substantially complete. The Order cannot be confirmed.
39. It is, of course, open to the local authority to consider what action, if any, it might take to secure the diversion or extinguishment of the right of way by the exercise of other powers that are available. Under the circumstances, it is neither appropriate nor necessary for me to consider the remaining issues raised, either by the objectors, the OMA or the applicant, nor to comment upon them.

**Conclusions**

40. Having regard to these and all other matters I conclude that the Order should not be confirmed.

**Formal Decision**

41. I do not confirm the Order.

*Helen Slade*

**Inspector**

Wiltshire

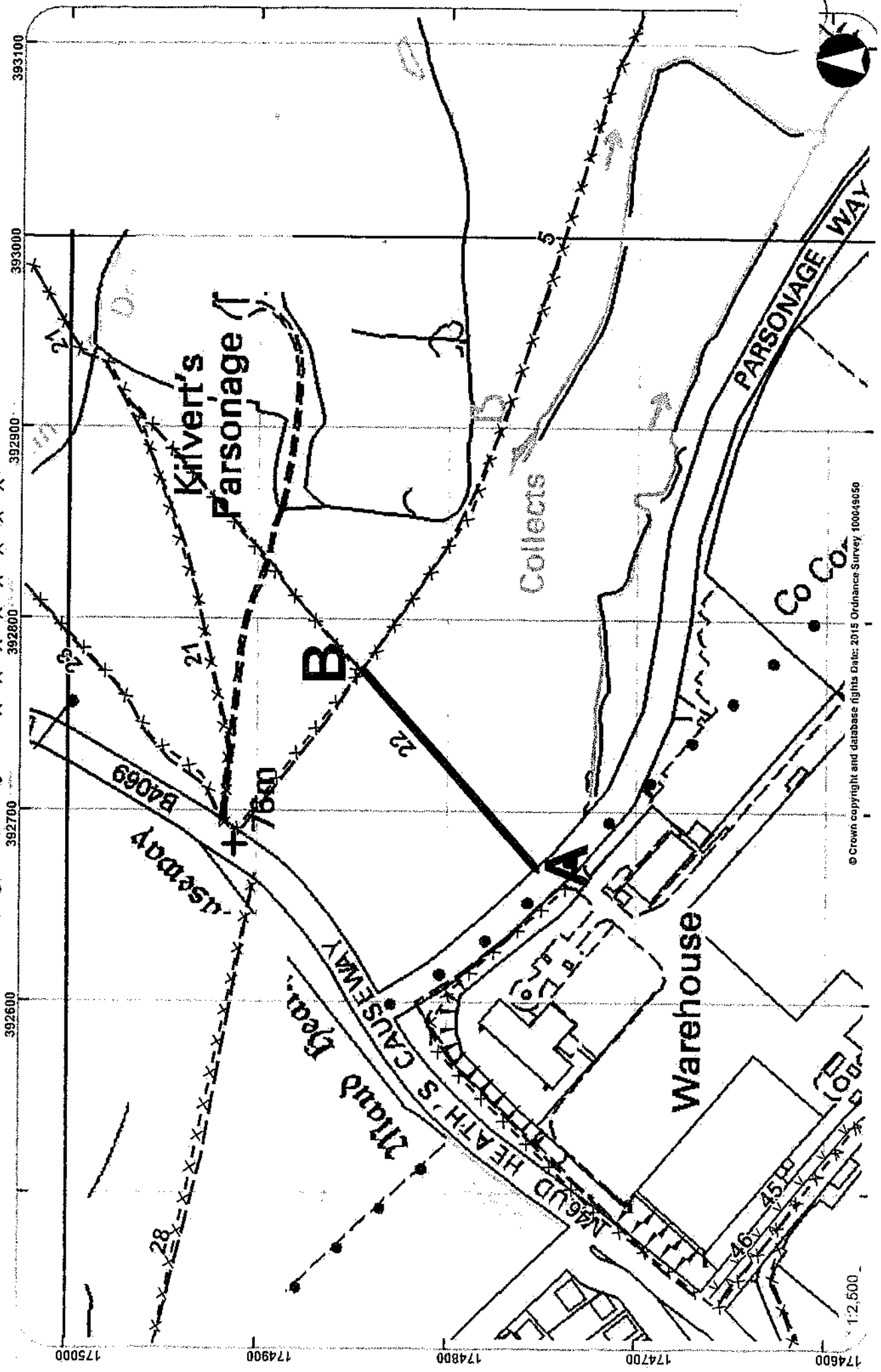
ORDER PLANNING - EXTINGUISHMENT OF LANGLEY BUCKLE 22 (pt)

Footpath to be stopped up A

Unaffected rights of way B

Scale 1:2,500

Date: 12/10/2015





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