



Order Decision

Site visit carried out on 5 July 2016

by Peter Millman BA

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

Decision date: 15 July 2016

Order Ref: FPS/P0240/3/8

- This Order is made under Section 118 of the Highways Act 1980 ("the 1980 Act") and is known as the Central Bedfordshire Council (Houghton Regis: Footpath no. 11) Public Path Extinguishment Order 2015.
- The Order is dated 8 May 2015 and proposes to extinguish a footpath as shown on the Order Map and described in the Order Schedule.
- There was one objection outstanding when Central Bedfordshire Council ("the Council") submitted the Order to the Secretary of State for confirmation.

Summary of Decision: I have not confirmed the Order.

Main issues

1. The Order was made because it appeared to the Council that it was expedient to stop up the footpath as it was not needed for public use. Section 118 of the 1980 Act requires that, before confirming the Order, I am satisfied that it is expedient to stop up the footpath having regard to the extent (if any) to which it appears to me that it would, apart from the Order, be likely to be used by the public. I must also have regard to the effect the extinguishment of the footpath would have as respects the land served by it.
2. The use of the word 'expedient' means that I may take into account considerations other than those specifically set out in the 1980 Act. I do not have to be satisfied that the path proposed for extinguishment is not being, or is not likely to be, used in order to conclude that it is not needed for public use. I could confirm the Order if I concluded that a path was likely to be used to a limited extent but was not actually needed.
3. I must take into account any material provision of the Council's Rights of Way Improvement Plan.
4. When considering likely use I must disregard temporary obstructions to the current path.

Reasons

Background

5. The Order plan shows three rights of way leaving the west side of the A5120 at Bidwell, a hamlet within Houghton Regis. These rights of way are shown on the plan attached at the end of this Decision. They are in close proximity. None of these rights of way exists as a path on the ground. Within the last year, however, confirmed Orders have changed the situation. An order to
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delete the route shown as BW (bridleway) 12 from the Council's Definitive Map (made at the same time as this Order) has been confirmed. An order to divert footpath 53 has been confirmed. It has been diverted so that it now runs along a concrete track from the A5120 until shortly before it meets footpath 4, following a field-edge path for the last 40 metres or so. I have marked the line of the diverted footpath 53 in green on the plan below. This path is open and in evident use. Public rights over footpath 11, with which this decision is concerned, still exist as shown on the plan below, but it is inaccessible because it is crossed by barbed wire fences and locked gates, and obstructed by rampant vegetation.

6. Thus the present situation is that there are two roughly parallel public rights of way leading from the A5120 (Bedford Road) to footpath 4. Their junctions with the A5120 are about 10 metres apart, their junctions with footpath 4 about 12 metres apart, and they diverge, at the most, by about 45 metres. Both paths run (or would run) on level surfaces and are about 270 metres long.
7. One of the owners of land crossed by footpath 11 applied for it to be extinguished some 10 years ago. I have seen no evidence as to the reason for the application. The area surrounding it and footpath 53 could currently be characterised as semi-rural, but the fields through which footpath 11 passes have the neglected feel of abandoned rural land awaiting a change of use. In fact, much of the land in this area is likely to be developed for housing in the near future. The Council's evidence refers to an additional 7000 dwellings. Some planning applications have already been approved.

The tests for confirmation

Likely use of footpath 11

8. Footpath 11 has been blocked and inaccessible for many years; I ignore the obstructions (see paragraph 4 above) for the purposes of assessing its use if it were available.
9. Before deciding to make the Order the Council consulted organizations representing local people (Houghton Regis Town Council) and walkers (the Ramblers). The Town Council wrote supporting the making of the Order. The Ramblers reported to the Council that its local Footpaths Officer had not established any local interest in opening up footpath 11 owing to the presence of the nearby footpath 53.
10. When a path is blocked it is difficult to assess what its use would be if it were opened. In this case, if both footpath 11 and footpath 53 were available, it is likely that some people would choose to use footpath 11, but it seems to me that use would probably be less than use of footpath 53 if the ground was wet, since most of footpath 53 runs over a concrete track. The current Definitive Statement describes footpath 11 as having 'stiles in fair condition'. If these stiles were legitimately present, but footpath 11 was otherwise available, then people with large dogs and those people who find it difficult to negotiate stiles would probably choose to use footpath 53. That path, however, runs under a canopy of trees for around half its length, and some people might prefer to walk through a more open landscape. On the whole footpath 53 would be easier to use, and its junction with the A5120 appears to be slightly safer than the junction of footpath 11 because of better visibility. It seems to me more likely than not that footpath 53 would attract rather more use than footpath 11 if both were available, but that use of footpath 11 would not be insignificant.

Effect on land served by footpath 11

11. Neither the Council nor the sole objector, the Chiltern Society, argued that the stopping up of footpath 11 would have an adverse effect on the land served by the path.

Whether footpath 11 is needed

12. Given the availability of footpath 53 there is no need for footpath 11 simply as a pedestrian route to get from the A5120 at Bidwell to footpath 4.

Other factors affecting the expediency of confirming the order

13. In the case of *R v Secretary of State for the Environment, ex parte Stewart* [1979] Phillips J noted that the test for confirmation of extinguishment orders 'concentrated on user being at all events the prime consideration', but that 'the word "expedient" must mean that, to some extent at all events, other considerations could be brought into play.'
14. The Chiltern Society, which is a statutory consultee for rights of way orders in this part of Bedfordshire, objected to the confirmation of the Order on a number of grounds, some of which I have taken account of when considering use and need above.
15. It argues that since the two paths, 11 and 53, have different characters, they are complementary rather than alternatives to one another. If both were kept, then they would allow for circular walks from the A5120 without retracing one's steps.
16. The Council's response is that there is a clear distinction between 'need' and 'desire'. A path, it argues, is needed for use if there is no suitable or accessible alternative. A path may be desired in preference to an alternative route if it is prettier or better surfaced, for example. In support of this argument it cites the judgment in the case of *R v The Lake District Special Planning Board, ex parte Anne Bernstein* (1982). This case was concerned with two paths which served essentially the same purpose as each other. The Council states: 'Hodgson J... commented that 'need' could be distinguished into that "of the stranger visiting the area for the first time: it would not matter which path was to be closed because his only requirement would be a clearly indicated track. Secondly, the case of the local person, familiar with the local rights of way: such a person would wish to use the familiar path...".'
17. In fact those are not the words of Hodgson J; they are the words of the solicitor to the Planning Board. They were quoted with approval by Hodgson J, but they did not attempt to 'distinguish' need from desire; the section which I quoted in the previous paragraph was prefaced with the words: 'it would be relevant in the circumstances to consider the question of need from two points of view.'
18. The Council did not cite the comment – actually made by Hodgson J in his judgment in the *Bernstein* case – that, 'Even if the Board had concluded that it [the path] was not needed for public use, the Board could still have thought that it was not expedient to make the order. Even if they considered it both expedient, in the sense of politic, to make the order that it was not needed for public use [sic], they still had the discretion as to whether they ought to deprive the public of a long-established right.'

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19. The Council argues that, 'There is no statutory requirement to consider locals' - or in this case a not particularly local organisation's [i.e. the Chiltern Society] - desires for duplicated routes with different characters. Consequently the Chiltern Society's argument fails'. It seems to me, however, that although there is no specific statutory requirement, the Chiltern Society is considering 'need' from a different point of view from that of the Council's understanding of it and that it is a legitimate point of view relevant to the expediency of confirming this Order. It should therefore be given some weight.
20. The Chiltern Society argues next that in considering whether it is expedient to confirm the Order, the balance between the interests of the people who would use the path should be balanced against the gain to the applicant for the Order from extinguishing the right of way. There is no specific test concerning such a balance set out in section 118 of the 1980 Act, and it seems to me that it would not be appropriate for me to balance the interests as suggested by the Chiltern Society. As I noted above at paragraph 7, however, the Council has provided no information as to why the application to extinguish footpath 11 was made or what benefits, if any, extinguishment would bring to the owners of the land crossed by it. Both the Council and the Chiltern Society imply in their submissions that the desire to extinguish the path might be connected with the likely future housing developments in the area. It seems to me that I should give weight, in coming to my conclusions on whether it is expedient to confirm the Order, to the lack of evidence concerning the application, and the Society's views about the benefits to the public of keeping both paths open.
21. The Chiltern Society argues that given the strong likelihood of significant housing development in the area – it suggests an increase in population within 1 km of footpaths 11 and 53 of 5000 – both paths would be subject to considerable use. I concur. While footpath 11 might not be needed for public use in the utilitarian sense, it would be used if it were available, to a not insignificant extent, and perhaps more if the development goes ahead. The Council accepts that there will be 'massive' development in the area, and appears confident that the fields crossed by footpath 11 will be used for infill development and inevitably lose any open and rural characteristics they currently have. It states that 'the open nature of onwads travel will be lost as footpaths are either diverted into green corridors or incorporated into the proposed estates' road network'.
22. It seems to me that these circumstances, where it is not disputed that there is a very strong likelihood of significant housing development in the area, but no information about how this development would impinge on the existence and use of footpaths 11 and 53, where there is no evidence of what precipitated the application to extinguish the path, and where there is legislation specifically designed to deal with the diversion and extinguishment of rights of way affected by development, support the view that it would be expedient not to confirm this Order.

The Council's Rights of Way Improvement Plan

23. The Council argues that the extinguishment of footpath 11 would not conflict with any of the aims of its Rights of Way Improvement Plan. The Chiltern Society, quoting at some length extracts from the Plan, concludes that stopping up footpath 11 would conflict with its vision and its policy on development proposals. I have not been provided with a full copy of the Improvement Plan, and those extracts from it with which I have been provided are not particularly

helpful. Aim 13, however, which the Chiltern Society sets out, states: *Aim: The quantity and quality of rights of way and greenspaces meet the needs of current and future communities. Outcome – we will understand the needs of users and non-users and the role that the site and access routes play in the green infrastructure network. This will steer our future management and site development.* Although this, like the other extracts provided by the Council, is generalised aspiration rather than detailed provision, it does suggest that it might be prudent, and expedient, not to confirm this Order, but wait until more is known about the detail of future housing development in this area and what the needs of the 'future community' will be.

Conclusion

24. Taking into account that user is the 'prime consideration' (paragraph 13 above), but that there is no need (in the utilitarian sense) for two paths fulfilling very similar functions, and having had regard to the likely future development of the surrounding area, as well as all other matters raised above and in the written representations, I conclude that it is not expedient to confirm the Order.

Formal Decision

25. I do not confirm the Order.

Peter Millman

Inspector

