
Order Decision

Site visit made on 17 August 2015

by Mrs H D Slade MA FIPROW

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

Decision date: 26 August 2015

Order Ref: FPS/X2600/3/6

- This Order is made under Section 118 of the Highways Act 1980 ('the 1980 Act') and is known as the Norfolk County Council (North Lopham Footpath No.1 (Part)) Extinguishment Order 2014.
- The Order is dated 20 August 2014 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 Norfolk 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.

Procedural Matters

1. I undertook an unaccompanied site visit on Monday 17 August 2015 on a fine afternoon when I was able to walk the Order route (as available) and the adjoining routes (Tann's Lane (also known as Jubilee Lane), Primrose Lane and North Lopham Footpaths 1 and 4).
2. Having made the Order, Norfolk County Council (the Order Making Authority or 'OMA') has since taken a neutral stance whilst remaining satisfied that the Order meets the required tests.

Written representation procedure

3. The parties agreed to the use of the written representation procedures to determine this Order. There are no rules governing this procedure, but an informal procedure has been established and is set out in the guidance booklet produced by The Planning Inspectorate¹. That procedure requires the submission of statements of case by the relevant parties, followed by the submission of comments on those statements after they have been exchanged.
4. The statements of case should contain all the documents on which the parties intend to rely, together with a list of those documents. The subsequent comments should be restricted to answering points raised in the opposing parties' statements of case. In requesting the comments, parties are advised by The Planning Inspectorate in a letter that no other documents should be submitted.

¹ Guidance on procedures for considering objections to Definitive Map and Public Path Orders in England – current edition published May 2015 (previous edition dated March 2014)

5. In this case, the agent for the applicants did submit supporting documents with their response to the objector's statement of case submitted by Mr I Witham on behalf of the Open Spaces Society. Mr Witham objected to this. As a consequence, and in accordance with my power to require further information², I invited Mr Witham to submit any further comments he wished to make and these were then made available to the other relevant parties for information only. In the process I received further comments from Mr M Jones, which were also circulated for information.
6. I note the disquiet expressed by the objectors that the strict terms of the letter, dated 9 June 2015 and sent by The Planning Inspectorate inviting comments on the statements of case, were not adhered to. I am satisfied that by allowing further comments to be made by the objectors, together with the submission of any additional documents they wished to adduce, any possible prejudice has been avoided and the procedure has been fairly administered.

Advertisement of the Order

7. The objectors allege that the Order was not prominently advertised on site, resulting in the possibility that people may not have seen the notice and been unaware of the Order. The OMA and the applicants assert that the Order was advertised correctly and adequately and have provided photographs to support their view.
8. It is not in dispute that the notice of the Order was placed on the telegraph pole outside Chiltern Lodge. It does appear to have been positioned in a position relative to the pavement such that it is entirely possible that some people may not have seen the notice. However there is a school and a nursery immediately adjacent to Chiltern Lodge from where the notice would have been highly visible. There is also a waymark on the telegraph pole which, in itself, is rather ambiguous pointing as it does to the garden wall obstructing the path. Educational establishments generally result in a regular and significant footfall and I am confident that the notice would have been seen by anyone who was interested and whose curiosity was piqued.
9. The notice at the other end of the affected part of the path (Point F) would have been visible to anyone walking along Tanns Lane towards Primrose Lane (or vice versa) whether or not they were intending to use the Order route, which is clearly waymarked at that point. I am therefore satisfied that the publicity for the Order was adequate and fulfilled the legal requirements.

The Main Issues

10. In order to confirm the Order I must be satisfied that it is expedient to stop up the path having regard to:
 - the extent that it appears likely that the footpath in question would, apart from the Order, be likely to be used by the public, and;
 - the effect that the extinguishment of the footpath would have as respects land served by it, account being taken of the provisions as to compensation.

² Paragraph 6 of Annex B to the aforementioned guidance

11. I must also have regard to the material provisions of any public rights of way improvement plan ('ROWIP') which has been prepared for the area in which the path lies, and government advice contained in Circular 1/09.
12. In respect of the tests to be considered, I must have regard to the judgements in *R v Secretary of State for the Environment ex parte Stewart* [1980] JPL 537 and *R v Secretary of State for Environment (ex parte Cheshire County Council* [1991] JPL 537) in which the tests to be applied at confirmation were clarified. Whilst the OMA must consider the need for the public right of way at the time of making the Order, at confirmation I must look at the question of likely future use of the path concerned. Any temporary obstructions to use should be ignored for this purpose. The question of the expediency of stopping up the path enables a variety of matters to be taken into account.

Reasons

Background

13. The OMA's Statement sets out the background to the Order in some detail. In summary, the path was affected by development which was given outline permission in 1972 and detailed consent in 1974. The diversion order, made and confirmed in 1974, does not appear to have been recorded on the Definitive Map and Statement at that time and there has subsequently been some confusion over exactly where the path should be. The current owners of the property concerned, Mr and Mrs Brunning, seem to have been given conflicting information at various times by Breckland District Council ('the District Council') and Norfolk County Council as to its location.
14. Following complaints made by members of the public regarding obstructions to the footpath, the OMA proposed a diversion order to effect a solution. This did not progress, due to objections, and eventually a creation agreement was entered into in 2009 to facilitate the legal recording of an alternative route. The OMA hoped, in this way, to establish whether or not there was a need for the Order route, and thereby inform a decision on whether or not to proceed with an extinguishment order. The alternative route has been signed and waymarked since 2008.
15. The application by Mr and Mrs Brunning was made against this background and although there remain outstanding issues in terms of culpability, those are matters which do not affect my decision and lie outside my jurisdiction. My decision has been made solely by reference to the criteria contained in the 1980 Act and relevant guidance and precedents as set out above under 'Main Issues'.

The extent to which the footpath would be likely to be used

16. During my site visit I was able to see that there is some evidence of current usage of the route where it crosses the arable field. Where the path passes through boundary features there is evidence of a worn line, and through the crop the path has been cleared to bare soil, displaying evidence of recent boot prints. This accords with the evidence of the objector that the path is still in use by some people, and would appear to support the contention by the objectors that the path might continue to be used, particularly if cleared of obstructions or made clearer where it passes through Mr and Mrs Brunning's property, Chiltern Lodge. Mr Witham argues that the area crossed by the path

has not changed since it first came into use in Victorian times, and that there is consequently no reason to believe that usage of it would not continue.

Reference is made in the objectors' submissions to using the route to visit the local public house as part of organised events.

17. The applicants consider that the nature of the route has been palpably changed by the construction of Chiltern Lodge and that the path is consequently less attractive to the public, especially for the purposes that it may originally have had. The nearest public house would have been The Bell, which has been closed for some time. Furthermore, the only remaining public house in the village (The Kings Head) is well to the north of the Order route and better served by Tanns Lane. The agent for the applicant has made reference to draft guidance being prepared for local authorities dealing with public path orders and draws my attention to the weight to be given to the embarrassment some users may feel when faced with walking through gardens etc. However, I place no weight on this document as it has not been published and cannot therefore be considered to be official guidance.
18. Whilst I accept that some users might be anxious about the situation, I do not consider that the possible embarrassment which might be felt by some users of the path due to the proximity of the property, or by passing through the garden, would, in itself, be a reason to close the path. By analogy that would be like proposing to close the M1 motorway because some people felt nervous about driving along it; that would not be a reasonable or reasoned step to take. The crucial issue is whether that embarrassment is likely to result in a critical alteration to the level of overall usage of the route, such that it might be reasonable to consider the reduced usage as a contributory factor to the decision to close the path.
19. I consider that the present situation is indeed likely to deter potential users, particularly those of a less confident nature, because the access to the path from the street is obscured and far from obvious; and the access to the garden from the field is not inviting, despite being waymarked. Furthermore, the presence of dogs or geese is also rather intimidating to many people. However, I must disregard these temporary circumstances in trying to assess the likelihood of future use, and consider the matter as if the path were easily available. Consequently the only factor in this context that is relevant is the proximity of the house and the need to walk through the garden. This is not a temporary structure, and the path was diverted in accordance with the legal provisions available at the time to accommodate continued public use.
20. Mr Witham is a representative of the Open Spaces Society and as such potentially represents a larger number of users but does not identify possible users in any more detail; he merely speculates, whilst identifying that several newer rights of way have been recorded in the general area which might encourage walkers. Mr Jones clearly organises events which include walking on footpaths in the area, and Mrs Jones identifies that the Order route facilitates a convenient short circular walk around the village for which the public house would provide a stopping point, but does not live in the village itself. Mr Jack objects to the closure of the path but does not indicate how often, if at all, he actually uses the path.
21. With regard to historical usage, I do not consider that the fact that the path may have been used more frequently in the past to be of any particular

relevance to the current situation. What is important in this case is the likely use in the future.

22. I place no weight on the assertion by the OMA that the path serves no useful purpose for the public. Many paths are, these days, used entirely for recreational reasons which are just as valid. However, there has not been a general clamour from individual members of the public to retain the path because they wish to use it. I accept that if the path were clearer to see and easier to use where it passes through Chiltern Lodge it might be used more than it is, but that is speculation as there is no evidence to that effect. I also accept that there is now a network of paths within easy reach west of Point A (the junction with The Street) and the Order route also provide a link with paths to the east, so the potential for use does exist. However, there is an alternative route available and I need to consider what part that has to play in the expediency of confirming the Order.

The alternative route

23. Mr Witham points out that the Order route passes over rising ground giving elevated views of the countryside, where it crosses the arable land. The alternative route is, by contrast, on lower ground and surrounded by trees, hedges and banks. The views are quite constrained by these features for much of its length. Mr Witham also points out that the alternative route is slightly longer than the Order route, and that it exits onto the highway at The Street in a different place from the Order route. He also considers that it deflects users from their general direction of travel as it runs south of the line of the Order route, tending towards South Lopham. Furthermore he expresses his doubts as to the status of Primrose Lane in terms of public rights, as it is not recorded on the Definitive Map and Statement.
24. With regard to Primrose Lane, Norfolk County Council as Highway Authority has stated that it is recorded on its list of streets as being publicly maintainable. It is also signposted on the ground as a Restricted Byway, although it does not appear on the Definitive Map and Statement in that capacity. A route does not have to be on the Definitive Map and Statement in order to be a public right of way, although clearly it would be helpful if it were shown. If Primrose Lane is indeed a Restricted Byway, as signposted, it must at least carry rights as a public footpath (that being the lowest classification) and therefore would provide a link in the alternative route identified by the OMA.
25. Whilst I accept that the list of streets does not confer or record the level of public rights over a route, I have no reason to doubt the Highway Authority's assertion that it does carry public rights. Indeed, Mr Witham himself has pointed to the inclusion of the route on the list of streets as evidence in support of his application for a Definitive Map Modification Order, so it is perhaps a little disingenuous to argue, as he does in this case, that the inclusion of the route on the list of streets carries no weight in this regard.
26. When considering the ambience of each path, I do accept that they are quite different from each other. The Order route is more exposed and gives wider views of the surroundings. It also passes across arable land which would provide a changing pattern of immediate views, depending on the crop and the state of cultivation. The alternative route is much more intimate and enclosed, but a pleasant route nonetheless. It is bounded by hedges, trees and banks and contains its own interest in this regard.

27. It is of no concern to me whether or not the public already had the right to use what is now recorded as a public footpath (Footpath 4) or Primrose Lane, since I am not considering a diversion, but an extinguishment. Section 118 of the 1980 Act clearly envisages that it would be reasonable to consider the existence of an alternative route when assessing the expediency of confirming an extinguishment order by providing that regard may be given to any new route being created concurrently. It would seem perverse if regard could not be given to an existing alternative route.
28. I accept that there are likely to be members of the public who would use the Order route if it were retained, and particularly if it were made more accessible. But I believe these to be considerably in the minority, given that there have been no objections to its extinguishment from residents of the village of North Lopham itself nor from the Parish Council. The alternative route is pleasant to use and more sheltered, and is likely to offer a more inviting route for most users. I do not consider that the slightly increased length of the path is a significant disadvantage.
29. I also accept that the loss of the Order route will remove one option for a circular walk within the village but, again, only one person has alluded to this (Mrs Jones) and she does not live in the village itself.
30. The alternative route along Primrose Lane exits onto the Street very close to the current termination point, and would continue to provide a link to the onward routes, both new and old, to the east and west. Other circular walks would therefore still be possible. I understand the concerns that this is immediately adjacent to the school and that there may be vehicles present on occasion, but these will be largely restricted to regular hours. For most of the time there are likely to be few cars moving about, and those that are will be well aware of the possible presence of pedestrians, especially children.
31. I conclude that although there might be a few people who would feel that they had been disadvantaged by the stopping up of the Order route, on balance I consider that the Order route would not be likely to experience significant levels of use if the Order were not confirmed, as a perfectly satisfactory alternative route exists.

The effect that the extinguishment of the footpath would have as respects land served by it

32. Mr Witham highlights the fact that the stopping up of the path would remove the ability of the owners of Chiltern Lodge to obtain direct access to the public rights of way network to the east of their property. The applicants have indicated that this is of no concern to them.
33. I accept that future owners of the property will be similarly unable to use the footpath, but I do not consider that this is an issue which affects my decision as any perceived disadvantage would be accounted for in the price of the property. In other words, future owners would be compensated for this loss.
34. On the other hand, I acknowledge that the value of the property to Mr and Mrs Brunning (and future owners) may well be enhanced by the removal of the right of way, but that is not an issue which affects my decision. I have not placed any weight on it.

35. The landowner of the adjoining farmland has consented to the Order, and there are consequently no issues for me to take into account in this regard.

Other Matters

36. I understand the frustration expressed by the objectors over the failure to address the problems on the Order route sooner and more robustly, in their view. However these are not matters which directly influence my decision, other than taking into account the possible consequences on the potential level of usage. Where appropriate, I have disregarded the obstructions in making my assessment on this issue, and I have not been influenced by the confusion about the precise location of the path or the history of the dispute.

37. I place no weight on the OMAs statement that the extinguishment of the path would reduce the call on the maintenance budget and thus fulfil an objective of the ROWIP. I agree with the objector that there is a minimal maintenance liability in respect of the Order route, which passes across arable land and through a garden with no engineered path or surface vegetation which is likely to need managing by the County Council.

Conclusions

38. Having regard to these and all other matters raised in the written representations I conclude that it would be expedient to confirm the Order.

Formal Decision

39. I confirm the Order.

Helen Slade

Inspector