
Order Decision

Inquiry held on 27 September 2016

by Alan Beckett BA MSc MIPROW

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

Decision date: 31 October 2016

Order Ref: FPS/M1900/4/21

- This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and is known as the Hertfordshire County Council (Shenley 23b) Diversion Order 2015.
- The Order is dated 30 January 2015 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were 5 objections outstanding at the commencement of the inquiry.

Summary of Decision: The Order is confirmed subject to the modification set out in the Formal Decision.

Procedural Matters

1. I held a public local inquiry into the order on Tuesday 27 September at the Radlett Centre. I made an unaccompanied inspection of the route at issue on the evening before the inquiry; I was not required to undertake a further inspection of the route following the close of the inquiry.
2. At the inquiry a request was made for a modification of Part 2 of the Schedule to reflect the fact that Mr Wernick had replaced the existing hedge along which the path was to run with a post and rail fence and had re-planted a hedge on the south-western side of the new fence. As a result of these works, the description of the alternative path as running on the east side of the hedge was no longer accurate. Agreement had been reached between Mr Wernick and Hertfordshire County Council ('the Council') that the proposed 4 metre width of the alternative path would be measured from a distance of 2 metres from the east side of the fence.
3. The works required to be undertaken to bring the proposed footpath into a condition fit for public use are set out in a section 119 (5) agreement made between Mr Wernick and the Council. The proposed modification of Part 2 of the Schedule is consistent with the revised agreement regarding the required works; if the Order is confirmed I propose to modify the Order in the manner requested.

The Main Issues

4. The Order is made in the interests of the owners of the land crossed by the current line of footpath Shenley 23b. Section 119 of the 1980 Act requires that, before confirming the Order, I should be satisfied that:
 - (a) it is expedient, in the interests of the owners of the land, that the footpath in question should be diverted;

- (b) the terminal points of the proposed highway are on the same highway as the path to be diverted or on a highway connected with it and are substantially as convenient to the public;
 - (c) the new footpath will not be substantially less convenient to the public;
 - (d) it is expedient to confirm the Order having regard to its effect;
 - i) 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 the land served by the existing path and the land over which the new path is created together with any land held with it, having regard to the provisions as to compensation.
5. In addition, in determining whether or not to confirm the Order, Section 119 (6A) of the 1980 Act requires that I should give consideration to any material provision of a rights of way improvement plan ('ROWIP') prepared by any local highway authority whose area includes land over which the Order would create or extinguish a public right of way.
6. Furthermore, I need to give consideration to what impact (if any) the proposed diversion would have upon the biodiversity and natural beauty of the area.

Reasons

Whether it is expedient, in the interests of the owners of the land, that the footpath in question should be diverted

7. Footpath Shenley 23b crosses land in two ownerships. The majority of the current line of the path crosses Mr Wernick's land with around 30 metres of the path to the south-west of point X crossing land in the ownership of members of the Wallace family ('the second landowners'). In response to Mr Wernick's initial consultation, the second landowners had given their written consent to the diversion.
8. Footpath Shenley 23b commences on Mimms Lane and runs over the rear lawn of Mr Wernick's house, passes over an area of raised decking and planting and passes within close proximity of the ground floor windows of the house. The path then runs over a patio area and a further area of lawn to run through Mr Wernick's kitchen garden.
9. Mr Wernick submitted that his ability to enjoy the amenity space to the rear of his house was limited by the existence of the footpath; use of the patio and decking could be interrupted at any time by members of the public making their way along the footpath. In addition to contributing to a lack of privacy the existence of the footpath also reduced the security of the property; general access to the property is via locked electric gates to the west of point Y, however the presence of the footpath diminishes the effectiveness of the general access arrangements.
10. I saw from my site visit the proximity of the footpath to the ground floor windows of Mr Wernick's house and that following the line of the path meant crossing the decking and patio areas adjacent to the property. I consider that the amenity of these areas would be enhanced if the footpath were to be diverted. The diversion of the footpath would also enable Mr Wernick to seal up the access at point Y, leaving his gates as the only legitimate means of access to his property.

11. One of the grounds of objection to the proposed diversion was that Mr Wernick knew of the existence of the footpath when the property was purchased and that the subsequent use made of the land by Mr Wernick did not provide a reason to seek the diversion of the footpath. To my mind, this argument does not take account of the provisions of section 119 (1) of the 1980 Act; Mr Wernick's awareness of the existence of the footpath at the time he purchased his property is irrelevant to the question of whether it would be in his interests for the footpath to be diverted.
12. I consider that the proposed diversion would be in the interests of Mr Wernick; the path would no longer run within a few metres of the windows of his house and would enhance the amenity of his decking, patio and lawn areas. In addition, the diversion would also be in Mr Wernick's interests as a means of enhancing the security of his property.
13. The second landowners did not appear at the inquiry nor were they represented at it. As already noted above, the second landowners had given their consent to the diversion when Mr Wernick had initially consulted them. However, when the Order was made, the second landowners objected to the diversion on the grounds that it would "*have a negative effect on the value of our land and property*". No further representation with regard to this objection was made on behalf of the second landowners; consequently I have no evidence before me as to whether the diversion would adversely affect the value of the property.
14. In the absence of the second landowners, it was argued on behalf of Mr Wernick that the diversion would be in the interests of the second landowners as the overall burden of public rights of way which crosses their land would be reduced; the section of proposed path A – B is shorter by 5 metres than the section south-west of X which would be stopped up.
15. The proposed path would not appear to interfere with the grazing of sheep in the field to the south-east of the Catherine Bourne as the A – B section of the proposed footpath would run outwith the field's internal fence. The proposed diversion is unlikely to interfere with current land use and although I acknowledge that the reduction in the length of the path that would cross the second landowners' property is not substantial, the diversion would reduce the overall burden of public rights over the land. I conclude that the proposed diversion would not have an adverse impact upon the interests of the second landowners.
16. For these reasons, I am satisfied that it is expedient in the interests of the landowners that the footpath should be diverted.
17. A number of the objectors were in favour of an alternative diversion which would retain part of the original route of Shenley 32b. This alternative route involved the use of a bridge constructed by Mr Wernick over the Catherine Bourne to the north-west of C. Whilst the objectors may have favoured this route, it was not supported by Mr Wernick as being in his interests as the area north-west of point C was being developed as a kitchen garden and orchard; to have the path remain in this area would constrain the design of this part of his garden.
18. Given that the alternative diversion proposed by the objectors fails the first of the statutory tests set out in section 119 of the 1980 Act, I will not give further

consideration to this suggestion even if the diversion proposed by the Order does not satisfy the remainder of the statutory tests.

Whether the terminal points of the proposed highway are on the same highway as the path to be diverted or on a highway connected with it and are substantially as convenient to the public

19. The proposed terminal points at A and D satisfy the first part of this test as the link to Mimms Lane and footpaths Shenley 23a and Ridge 20 would be retained.
20. I consider that the proposed terminal point at A would be substantially as convenient as the existing terminal point at X as these two points are separated by no more than the span of the bridge over the Catharine Bourne. I consider it highly unlikely that anyone travelling along Shenley 23a or Ridge 20 will be inconvenienced in any way by the diversion of the northerly terminal point of Shenley 23b.
21. The distance between points D and Y is approximately 180 metres. I concur with the applicant that point Y is not a point of destination for members of the public and anyone walking to that point is likely to continue his or her journey along other public rights of way in the area, the nearest being Shenley 22. From point D a pedestrian would have to walk the same distance to reach Shenley 22 as from point Y but would benefit from better sight lines up and down Mimms Lane than are available at Y. For anyone undertaking a journey along Shenley 23b and Shenley 22, the proposed terminal point at D would be substantially as convenient as the existing terminal point at Y.
22. For these reasons, I am satisfied that the proposed route would be substantially as convenient to the public as the existing route.

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

23. Footpath Shenley 23b is approximately 205 metres in length whereas the proposed path would be approximately 175 metres; the reduction in length of the path is unlikely to inconvenience most users. As noted above, the point at which the proposed path would connect with Mimms Lane is the same distance from Shenley 22 as the current outlet on Mimms Lane at Y; users wishing to continue a walk in the area via Shenley 22 are unlikely to be inconvenienced by the proposed diversion.
24. For those wishing to travel east along Mimms Lane or to walk bridleway Ridge 39, the proposed route would be more convenient. The opposite would be true for those wishing to travel west along Mimms Lane or wishing to make a journey along BOAT Shenley 33 as this would involve an addition 180 metres of road walking. However, it is likely than anyone wishing to travel along Shenley 33 from Shenley 23b would be undertaking a longer recreational walk in the area and the additional distance to be walked along Mimms Lane is therefore unlikely to represent a significant inconvenience to pedestrians.
25. I consider that the proposed route will be more convenient for some walkers as there will be no stiles or gates on the route for pedestrians to negotiate. At points B and D gaps will be made in the boundary hedges to allow access; as the route between A and B will be on the north side of the existing stock-proof fence there will be no requirement for a stile or gate. On the current route

- there are two stiles which users have to cross; in this respect, the proposed path would be more convenient for some users.
26. The proposed path will have a uniform width of 4 metres other than at the gap at Mimms Road. The increased width of the path available to users is unlikely to inconvenience those who seek to use it. Sight lines along Mimms Lane in either direction are better from point D than they are at point Y and the presence of a grass verge on the north side of Mimms Lane at D will provide an alternative to walking in the road for pedestrians travelling to ridge 39 or Shenley 22.
27. I understand that in times of heavy rainfall, the Catherine Bourne spills out over the road making onward travel from point Y difficult; the relocation of the path to join Mimms Lane at D would facilitate year-round use of the footpath even when the Bourne was in flood.
28. For the above reasons. I conclude that the proposed diversion would not be substantially less convenient to the public.

Whether it is expedient to confirm the Order having regard to:

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

29. Although the current route crosses Mr Wernick's decking and patio, it retains, by and large, the character of a rural path where it passes over pasture to the south-west of point X. The rural nature of the path is reflected in the proposed route which passes wholly over pasture or hay meadows. For those walkers who feel uncomfortable with walking close to residential properties or through the garden area of a house the proposed route is likely to give greater enjoyment than the current route.
30. The views of the surrounding countryside to be had from the proposed route are similar to those which are available from the current route. The exit onto Mimms Lane at D is at a more elevated position than the existing route and therefore affords an attractive view over the Catherine Bourne and the land to the north. I do not consider that the proposed diversion would have an adverse impact upon public enjoyment of the path in this respect.
31. The existing route does not follow the course of the Catherine Bourne but runs in a straight line between points X and Y. Nonetheless part of the path has been eroded by the collapse of the northern bank of the Bourne and the definitive line of the path has been unavailable for use for some years. The proposed path would run on the top of the southern bank of the stream on an even gradient which provides an adequate surface for a rural footpath. Although the section of proposed path C – D slopes upward to Mimms Lane, the gradient is shallow and is not dissimilar to the gradients on other paths in the immediate vicinity.
32. On balance, I feel the enjoyment of those who seek pleasure from informal recreation on footpaths such as this would not be diminished as a result of the diversion.

The effect the coming into operation of the Order would have with respect to the land served by the existing path

33. The diversion of the footpath would have a positive impact upon Mr Wernick's ability to manage the land immediately adjacent to his house. Mr Wernick is developing a kitchen garden and orchard near to the house and the diversion would allow him to develop this aspect of his property without having to have regard to public access. It is likely that the diversion will also have some positive impact upon the land belonging to the second landowners as the footpath will be diverted from a pasture used for sheep grazing.
34. I conclude that it is unlikely that the diversion would be any adverse impact upon the land served by the existing path.

The effect any new right of way created by the Order would have as respects land over which the new right is created together with any land held with it, account being taken of the provisions as to compensation

35. As noted above, although the occupier of the land over which the proposed path A – B would run made an objection to the diversion on the ground that the value of the land would be diminished, no further representations were made to substantiate that assertion. Given that the proposed path would run outside the stock-proof fence erected within the field and that the land crossed by A – B does not appear to have any current or ongoing agricultural use, the proposed route A – B would not interfere with the current use to which the land is put. If the proposed diversion did have an adverse impact upon the value of the land such that a claim for compensation under section 28 of the 1980 Act were to arise, it would be for the owner or occupier of the land to submit a claim to the Council.
36. The land crossed by the proposed route B – C – D is owned by Mr Wernick. There is no evidence before me that the proposed diversion would have any detrimental impact upon the land over which the remainder of the proposed path would run. The field is currently used for the production of an annual hay crop and the path would follow the margin of the field. Mr Wernick does not consider that the proposed footpath would significantly affect the agricultural use of his field or the crop that can be taken from it. Although Mr Wachtel suggested that at a width of 4 metres the path would reduce the productive capacity of the field, Mr Wernick's view was that the impact upon the land would be very low and that any such impact was acceptable to him.
37. Mr Wachtel claimed that the diversion of the footpath onto the B – C – D alignment would be contrary to the restrictive covenant which exists over the land which prevents use for any purpose other than agriculture. I am not persuaded that this objection has any relevance to the statutory tests which are set out in section 119 of the 1980 Act as a restrictive covenant is a matter of private law between two parties with one party being able to take enforcement action against the other for any breach which might take place. If the proposed diversion did result in a breach of a restrictive covenant then it would be a matter for the party that had the benefit of the covenant to take action through the civil courts.
38. In addition, the diversion of the footpath onto the B – C – D alignment is not incompatible with the use of the land for agricultural purposes. The existence of the footpath would not prevent the annual hay crop from being taken nor

would its existence prevent the use of the land for some other agricultural purpose such as the grazing of cattle or the cultivation of other crops. In itself, the diversion of the footpath is unlikely to result in a breach of the restrictive covenant which limits the use of the land to agricultural purposes.

39. Notwithstanding this conclusion, although Mr Wachtel benefits from those restrictive covenants which he imposed upon the sale of the land to Mr & Mrs Leaver and which Mr Wernick covenanted to observe upon his purchase of the land from the Leavers, Mr Wachtel is not the originator of the covenant regarding the use of the land solely for agriculture and would not therefore appear to be in a position to enforce that particular covenant.
40. The covenant which restricts the use of the land was imposed by the London County Council in 1938 upon its sale of the land to Hertfordshire County Council, who subsequently sold the land to Mr Wachtel. Successive owners of the land (Mr Wernick included) have indemnified Mr Wachtel against any breach of that restrictive covenant. If the footpath were incompatible with the restrictive 'green belt' covenant, it would be for the London County Council (or its successor authority) to take action to enforce the terms of the covenant.
41. On balance, I do not consider that the proposed diversion would have an adverse impact upon the land over which the new path would run or over any land held with it. Any adverse impact which the diversion may have with regard to the land crossed by A – B can be addressed by the provisions for compensation found in section 28 of the 1980 Act.

Summary

42. I conclude that it is expedient to confirm the Order having taking into account the effect the diversion would have on public enjoyment of the path as a whole, on the land served by the existing and proposed paths and on any land held with it.

Consideration given to the provisions of a ROWIP

43. The Council has prepared a ROWIP; I understand that there are no provisions within that plan of particular relevance to this case.

Consideration given to the conservation of biodiversity¹ and natural beauty²

Biodiversity

44. The land crossed by the Order routes is not classified as a Site of Special Scientific Interest and is not covered by any other local designations aimed at conserving habitat types or species diversity. Although the objectors claimed that the removal of part of the hedgerow at B would have an adverse impact upon wildlife, no evidence was submitted as to what if any species of plants or animals would be adversely affected by the creation of a gap in the hedge. Consequently, there is no evidence before me that the proposed diversion would have any impact upon biological diversity.

¹ Section 40 of the Natural Environment and Rural Communities Act 2006 - duty to have regard to the purpose of conserving biodiversity.

² Section 11 of the Countryside Act 1968 - duty to have regard to the desirability of conserving natural beauty and amenity of the countryside.

Natural beauty

45. Shenley 23a is not located within any area which is designated as being of special importance in a national context (such as an Area of Outstanding Natural Beauty) although the path is set in attractive countryside on the fringe of Potter's Bar. The diversion of the footpath is unlikely to have any adverse impact upon the conservation of the natural beauty of the area.

Conclusions

46. Having regard to these and all other matters raised at the inquiry and in the written representations, I conclude that the Order should be confirmed with modifications.

Formal decision

47. I confirm the Order subject to the following modifications:

In the Schedule, Part 2, lines 6 and 7 delete the words "on" and "hedge" and insert "two metres away from" and "fence".

Alan Beckett

Inspector

APPEARANCES

For Hertfordshire County Council:

Mrs R Emrys-Roberts	Definitive Map Team Leader, County Hall, Pegs Lane, Hertford SG13 8DE
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For the applicant Mr D M Wernick

Mr N Farthing	Solicitor, Birketts LLP, 24-26 Museum Street, Ipswich, HP1 1HZ
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Who called:

Miss A Trendler	Definitive Map Officer, Hertfordshire County Council
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Mr D M Wernick

Supporting the Order

Mr I Hardy MVO	Ramblers Association
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Mr C Beney	Open Spaces Society
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Objectors

Mr R Wachtel

Mr J E Fisher	Ridge Parish Paths Partnership
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Mr P Baker

Mr S Henderson

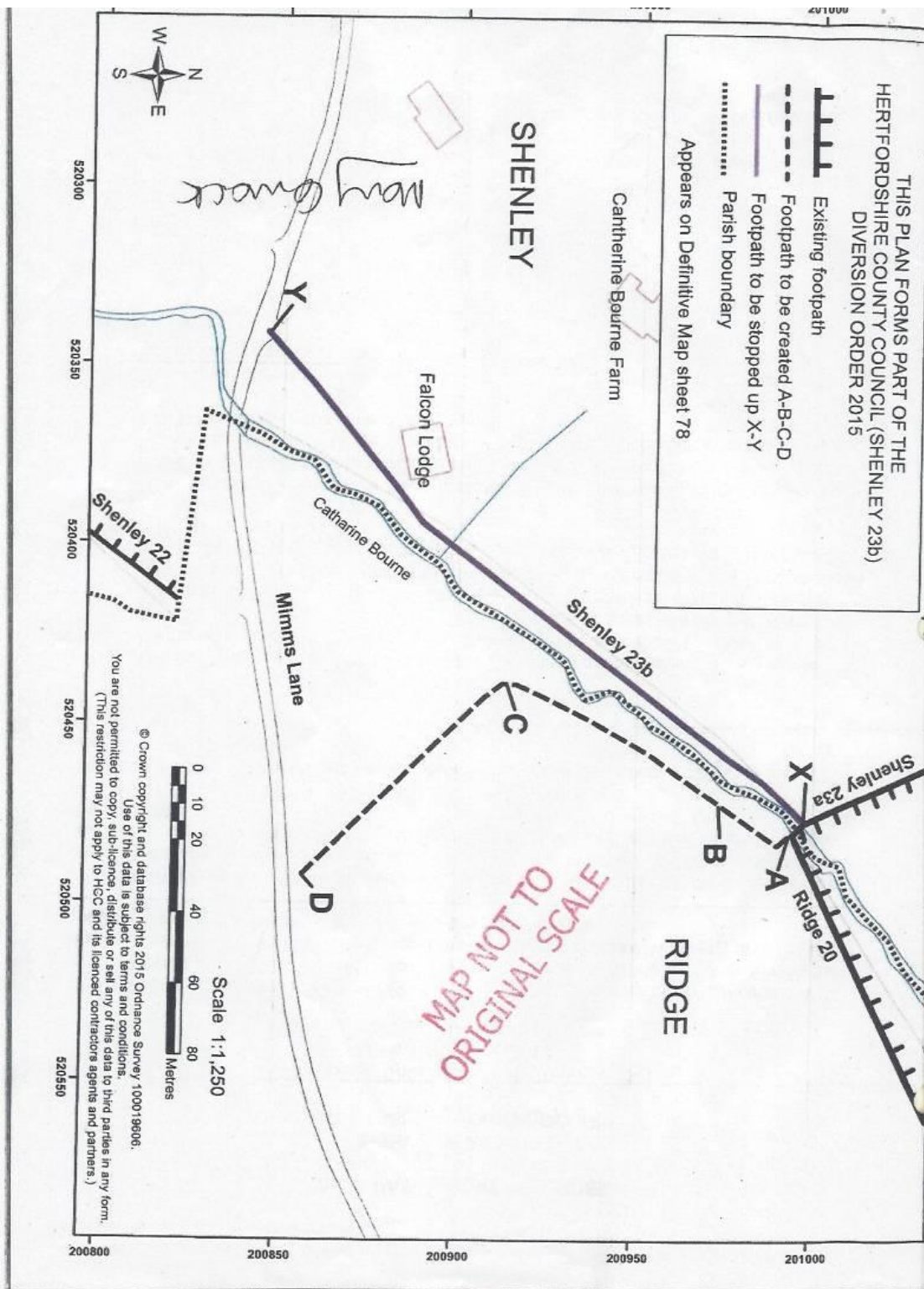
Inquiry documents

1. Bundle of title deeds submitted on behalf of Mr Wernick.
2. Closing submissions on behalf of Mr Wernick.

THIS PLAN FORMS PART OF THE
HERTFORDSHIRE COUNTY COUNCIL (SHENLEY 23b)
DIVERSION ORDER 2015

-  Existing footpath
-  Footpath to be created A-B-C-D
-  Footpath to be stopped up X-Y
-  Parish boundary

Appears on Definitive Map sheet 78



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