

## Order Decisions

Inquiry held on 26 April 2016

**by Barney Grimshaw BA DPA MRTPI(Rtd)**

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

**Decision date: 19 May 2016**

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### **Order Ref: FPS/D0840/4/12 referred to as Order A**

- This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and is known as The Cornwall Council (Footpath No. 38, St Buryan (Part))(Boskennal Barton) Public Path Diversion Order 2014.
- The Order is dated 2 September 2014 and proposes to divert the footpath to a new line passing around the edge of properties at Boskennal Barton as shown on the Order Map 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 modifications that do not require advertising.**

### **Order Ref: FPS/D0840/3/5 referred to as Order B**

- This Order is made under Section 118 of the Highways Act 1980 (the 1980 Act) and is known as The Cornwall Council (Bridleway No. 37, St Buryan (Part))(Boskennal Barton) Public Path Extinguishment Order 2014.
- The Order is dated 2 September 2014 and proposes to extinguish a short section of bridleway at Boskennal Barton as shown on the Order Map 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 modifications that do not require advertising.**

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### **Procedural Matters**

1. I held a public inquiry into this Order on 26 April 2016 at the St Clare Building, Penzance, Cornwall. I made an unaccompanied site inspection on 25 April 2016, when I was able to walk most of the Order routes and view the remainder. It was agreed by all parties at the inquiry that a further accompanied visit was not necessary.
2. In writing this decision I have found it convenient to refer to points marked on the Order A map to which I have added an additional annotated point (Point X). I therefore attach a copy of this map.

## **The Main Issues**

3. Order A is made in the interests of the owners of the land crossed by the footpath. Section 119 of the 1980 Act therefore requires that, before confirming the Order, I must be satisfied that:
  - It is expedient in the interests of the owners of the land that the footpath should be diverted;
  - The new footpath will not be substantially less convenient to the public;
  - The diversion is expedient with regard to:
    - the effect on public enjoyment of the right of way as a whole;
    - the effect on other land served by the existing right of way;
    - the effect of the proposed new right of way on the land over which it is created and any land held with it.
4. Order B is made under Section 118 of the 1980 Act the requirements of which are that, before confirming this Order, I must be satisfied that it is expedient that the bridleway should be stopped up having regard to:
  - the extent that it appears that the way would, apart from the Order, be likely to be used by the public, and
  - the effect, which the extinguishment of the right of way would have, as respects land served by the path, account being taken of the provisions as to compensation.
5. Consideration should also be given to any material provision of a Rights Of Way Improvement Plan (ROWIP) prepared by any local authority whose area includes land over which the footpath runs.

## **Reasons**

### **Order A**

6. At present the line of the footpath that is available on the ground does not precisely follow the definitive line although it runs close to it. I have assessed the effects of the Order as though the path was available to the public on the definitive line and with its proper width.

*Whether it is expedient in the interests of the landowners that the footpath be diverted*

7. The current definitive line of the footpath crosses properties known as Blue Barn, owned by Mr and Mrs Ryan, Barn 5, owned by Mr and Mrs Clark, Gwarachewenbyghan, owned by Mr Cathery, and a small area of land owned by Mr Jeffery. Mr and Mrs Ryan and Mr and Mrs Clark applied for the diversion to be made and Mr Cathery supports the confirmation of the Order. Mr Jeffery opposes it.
8. At present the line of the footpath runs across the property Blue Barn between a building housing a Studio/Games Room and the house itself and passes very close to living room and kitchen windows. It then crosses the curtilage of Barn 5, passing within 3 metres of the front door and bathroom window before

crossing the curtilage of Gwarachewenbyghan. The owners of these properties support the confirmation of the Order as they believe the diversion of the footpath will enable them to improve the privacy and security of their properties. Mr Clark also emphasised that without the diversion the outside area of his property could not safely be used by his grandchildren and pets without supervision as he would wish.

9. On behalf of the West Cornwall Footpath Preservation Society (WCFPS), Mr Rogers pointed out that many footpaths run close to occupied properties and that the request for this diversion was a matter of convenience rather than necessity. However, the 1980 Act does not require that a diversion must be 'necessary' only that it should be 'expedient'.
10. The land crossed by the proposed new footpath is an existing track which is not in the same ownership as most of that crossed by the existing path. I deal with the effect of the proposed diversion on this land later.
11. Overall, it seems clear to me that the proposed diversion is expedient in the interests of the owners of the majority of the land crossed by the existing footpath.

*Whether the new footpath will be substantially less convenient to the public*

12. The proposed new footpath is 217 metres long between Points A and C. The existing route between these points by way of Footpath 38 and Bridleway 37 is 100 metres long. Accordingly, the diversion would add 117 metres to the length of journeys between these points. However, the Order route forms a short section of a much longer route linking the village of St Buryan to Boskenna and St Loy which is likely to be used primarily for recreational purposes. In this context it was suggested that the relatively small increase in distance to be walked would not be significant.
13. The existing footpath was added to the definitive map as a result of a previous order made in 2008 and confirmed in 2010 (The 2008 Order). This describes the width of most of the path as varying between 0.9m and 2.0m. Other sections are described as having widths varying between 1.5m and 2.0m or 1.0m and 3.5m. As the order does not specify where the narrower and wider parts of each section lie, it would probably only be possible in practice for the highway authority to ensure that the lesser widths specified are available for public use. The proposed new footpath would be 2.0m wide throughout its length and occupy part of a wider track.
14. The existing footpath is subject to the limitation of a gate at Point B. No gate is currently present but one could be installed at any time without any further permission being required. The proposed new path would be subject to no lawful limitation.
15. The surface of the definitive route of the existing path varies, being partly gravel, partly natural and partly concrete. The proposed new path would follow an existing track with a hard compacted surface throughout. It was argued by objectors that this could become muddy and slippery at times of wet weather but path users and local residents stated that although there were sometimes puddles and potholes it was always easy to avoid these. There are no significant gradients on either route.

16. The proposed new footpath would run along an existing track used by agricultural vehicles to gain access to fields and by vehicles gaining access to properties at Boskennal Barton. It was said also to be used for driving cattle on occasion. No substantive evidence of the frequency of such use was made available but the general perception of path users and local residents appeared to suggest that vehicular use was infrequent. It was my impression, on the basis of the width of the track, the relatively clear sight lines and the possible infrequency of vehicle use, that it was unlikely that users of the path would be put at risk as a result of vehicular use of the track or that they would be caused any significant inconvenience or delay.
17. Overall, it is my view that although some people might find the new footpath slightly less convenient than the existing route it would not be substantially less convenient to the public.

*The effect on public enjoyment of the right of way as a whole*

18. It was argued on behalf of the WCFPS that the existing footpath followed a historic route that could have been in use for over a thousand years and should therefore be maintained. Although the Order route has only been formally recorded as a public right of way since 2010, when the 2008 Order was confirmed, a map showing churchway paths radiating from St Buryan includes a route through Boskennal linking the village to the ancient manor of Boskenna and the coast at St Loy. The route passes two crosses and it was said that these were carved in a three hundred year period between the 10<sup>th</sup> and 13<sup>th</sup> centuries to mark paths. It was however pointed out by supporters of the Order that, even if it is accepted that the path has historic origins, there is no evidence to confirm that the route of the section through Boskennal Barton followed the current definitive alignment.
19. The section of the path through Boskennal Barton contains no obvious evidence of any historic origins of the route although it runs close to some traditional farm buildings.
20. As already mentioned, the proposed new path would follow an existing track which is also used by agricultural and other vehicles and possibly the movement of livestock. It was argued that this would make it less attractive for walkers. On the other hand, the current definitive route passes through the curtilage of private residential properties and close to the properties themselves as does the existing route that is available to users. It was suggested that many users might feel uncomfortable using this route. Dr Fishburn stated that he has led a number of walks in the area and usually on arriving at Point C, having walked from St Buryan, he would inform walkers of the definitive route through Boskennal Barton but also that there was an alternative route by way of the of the track over which the new route is proposed. More often than not walkers chose to use this alternative. Others also stated that most people already used the proposed new route.
21. It was stated by objectors that the existing route would be more attractive to path users if it was waymarked and properly maintained and that in its current condition it is not obvious to users that there is a right of way through Boskennal Barton and even people who are aware of the way might have difficulty using it.

22. It was pointed out at the inquiry that the owners of properties crossed by the existing path could erect fences up to 2m in height alongside the path to increase their privacy and security without requiring any further permission. This raised the possibility of a significant section of the path being only 0.9m wide with 2m high fences on both sides, a situation which might be unappealing to many path users.
23. Views from the existing and proposed paths were referred to by parties. Supporters pointed out that more extensive views were available from two points on the proposed route whereas objectors stated that the existing route runs closer to interesting traditional buildings whereas the new route would run close to an unattractive agricultural building.
24. On balance, it is my view that some people might enjoy using the existing path more than the proposed new one but that some might prefer the new route. In the context of the Order route forming only a short part of a longer path, it would not appear to me that the diversion would have a significant adverse effect on public enjoyment of the right of way as a whole.

*The effect on other land served by the right of way*

25. I have seen no evidence to suggest that the proposed diversion would have an adverse effect on any land served by the existing path. There would appear to be no land to which existing public or private access would be lost as a result.

*The effect of the new right of way on the land over which it is created and other land held with it*

26. Mr Jeffery claimed to own the whole of the track over which the proposed new footpath would run and he opposes the Order on the grounds that public use would interfere with his use of the track in connection with agricultural operations.
27. In 1994, Mr Jeffery acquired farmland around Boskennal Barton but the land occupied by farm buildings was sold separately and these were subsequently converted into residential properties.
28. With regard to the section between Points A and X I have seen evidence in the form of a Property Register dated 20 February 2002 (Title No. CL 102466) that this was conveyed to Mr Jeffery in 1994 subject to a right of way for the vendors, the owners and occupiers of retained land and members of the public.
29. With regard to the remainder of the route (Points X to C), the ownership of the track was disputed by supporters of the Order. Attention was also drawn to a covenant contained in the Property Register to the effect that the purchaser of land at Boskennal Farm would not object to an application by the vendors for the diversion of the footpath to enable it to pass around the properties. Mr Jeffery claims that the land specified in the Property Register as being subject to this covenant is not in fact the land crossed by the current track and, in any event, the application for a diversion was not made by the vendors of the land.
30. In the 1990s orders were made to divert the then unrecorded path in a similar manner to that proposed now. However, these were subsequently withdrawn without being confirmed.

31. It is not for me to comment on the ownership of the track in the absence of substantive evidence which was not available to me. It is possible that the owner of the track may be able to claim compensation as a result of the creation of a public footpath over it if the Order is confirmed but this will be a matter for the highway authority to consider. For my part, I accept that Mr Jeffery uses the track in connection with his agricultural operations and feels that public use might interfere with this. However, I also note that the principle of shared use of a track seems to have been accepted in 1994 when the land was conveyed.
32. No clear evidence was available regarding the frequency of vehicular use of the track. Mr Jeffery stated that his use varied depending on the season and other factors but could be daily at some times. Local residents suggested that vehicular use was generally very infrequent.
33. On my visit I noted that the track seemed wide and open enough for walkers to pass even large agricultural vehicles without difficulty and that sight lines at bends would enable walkers to gain adequate warning of approaching vehicles.
34. On balance it is my view that the proposed diversion would not have a significant adverse effect on land over which the new path would be created but that, if any depreciation in value or other damage was caused this could be considered in accordance with the compensation provisions contained in the 1980 Act.

#### *The Rights of Way Improvement Plan (ROWIP)*

35. The ROWIP is incorporated into the Cornwall Countryside Access Strategy 2007. It was stated on behalf of Cornwall Council, the Order Making Authority (OMA), that this contained no policies and actions directly applicable to the Orders. Objectors, however, drew attention to Action AA2 of the strategy which reads "*Apply the principle of the 'least restrictive option' where it is reasonable and appropriate to do so, whilst considering the needs to retain the historic fabric of the landscape and ensuring that appropriate land management can take place*". It was suggested that the proposed diversion was not in accord with this action. The OMA pointed out that this action related specifically to access for people with limited mobility or visual impairments and it could be argued that the proposed new path would in fact be less restrictive for such people.

#### *Conclusion regarding Order A*

36. On balance, although it would appear that the proposed diversion might have some disadvantages for some path users and/or landowners, overall, these are outweighed by the likely benefits and the proposal satisfies the criteria set out in Section 119 of the 1980 Act. The Order should therefore be confirmed.

### **Order B**

#### *The likely use of the bridleway*

37. Bridleway 37 is currently a cul de sac terminating at Point B. if the Order is confirmed it will terminate at Point C reducing its length by about 18m. No evidence on usage of the route was presented but, on my visit I saw evidence of use by horse riders (hoof marks) on the route to the north-west of Point C

but none between C and B although the surface of this section would make it unlikely that hoof marks would be visible in dry weather.

38. At present there is a gate a short distance to the north-west of Point C which is relatively narrow and might be difficult to negotiate on horseback. It seems likely that horse riders using the bridleway generally proceed no further to the south-east than this gate.
39. There is no feature of public interest at Point B and no apparent reason why horse riders and cyclists would wish to proceed from Point C to Point B simply to then return. Walkers using this section of the bridleway would have an alternative route available to them as a result of the confirmation of Order A.
40. In my view, it is unlikely that The Order route would be used by the public to any significant extent after the confirmation of Order A.

*The effect of extinguishment on land served by the bridleway*

41. There would not appear to be any land to which access would be lost as a result of the proposed extinguishment.

*The ROWIP*

42. The ROWIP contains no policies and actions directly applicable to this Order.

*Conclusion regarding Order B*

43. On balance, after the confirmation of Order A, it is my view that the Order route would be unlikely to be used by the public and its extinguishment will not have an adverse effect on land served by the bridleway. The Order should therefore be confirmed.

**Other Matters**

44. A number of minor errors in the Orders were drawn to my attention on behalf of the OMA along with a request that they be modified to correct the errors.
45. The existing Order route in Order A is referred to as Footpath No. 38 but, as the 2008 Order has not yet been consolidated into the definitive map this is not strictly correct and it is suggested that the words "*Provisional Path Number*" should therefore be added in parenthesis after the number 38 where it appears in the title of the Order, Article 4 and Part 1 of the Schedule to the Order to avoid any confusion. The Order map also describes the Order route as part of Footpath 38 and the Order B map includes a similar reference. It is suggested that these references be deleted.
46. In Order A there are 2 Articles which are both numbered '2'. The second of these should be re-numbered '3' and the numbering of subsequent Articles modified accordingly.
47. The new Article 3 of Order A should be modified so that the new footpath is available 14 days after the confirmation of the Order rather than 21 days. This would bring it into line with the period specified in Order B.
48. Part 1 of the Schedule to Order A refers to the width of the existing path as recorded in the definitive statement. However, The Order route has not yet been recorded in the statement and the width referred to relates to other parts of Footpath 38 and not the Order route, the width of which is specified in the

2008 Order. It is suggested that this reference to the width of the existing path should therefore be deleted.

49. Part of the Schedule to Order A refers to Point C being "...approximately 52 metres north-west of the property number 1 "Boskennal Barton" at OSGR SW4121/2507". It is suggested that this be modified to read "west-north-west" so as to be more accurate.
50. The heading to Order B reads "*Public Path Diversion Order*". This should be modified to "*Public Path Extinguishment Order*".
51. It would clearly be sensible for these minor errors to be corrected to avoid any future confusion and I therefore intend to modify the Orders accordingly. However, I do not think the errors have misled any party or prejudiced their interests and it is not therefore necessary for the modifications to be advertised.

## **Conclusions**

52. Having regard to these and all other matters raised, I conclude that both of the Orders should be confirmed subject to the modifications mentioned above.

## **Formal decision**

53. I confirm both Orders subject to the following modifications:

### **Order A**

Re-number the second Article 2 as Article 3 and re-number subsequent Articles accordingly;

In the title of the Order, the new Article 5 and the first line of Part 1 of the Schedule to the Order, add the words "*(Provisional Path Number)*" after references to Footpath number 38;

Modify the new Article 3 of the Order so that it begins "*There shall be at the end of 14 days from the date of confirmation...*";

In the Schedule to the Order, Part 1, delete the first sentence of the second paragraph referring to the recorded width of Footpath 38;

In the Schedule to the Order, Part 2, amend the description of the location of Point C to read "...approximately 52 metres west-north-west of the property number 1 "Boskennal Barton"...";

Delete the reference to the part of Footpath 38 to be extinguished from the Order Map.

### **Order B**

Amend to heading of the Order to read "*PUBLIC PATH EXTINGUISHMENT ORDER*";

Delete the reference to the part of Footpath 38 to be extinguished in another Order from the Order Map.

*Barney Grimshaw*

**Inspector**



## **APPEARANCES**

### **For the OMA**

Vanessa Davis Legal Officer, Cornwall Council (CC)

Who called:

Mike Eastwood Countryside Access Team Leader, CC

### **Supporters**

Sue Rumfitt Rights of Way Consultant

Who called:

Trevor Clark Applicant and landowner

Gilbert McCabe Path user

Les Cathery Landowner

### **Objectors**

John Rogers West Cornwall Footpath Preservation Society

Dr Robert Fishburn Path user

Roger Jeffery Landowner

Marian Prowse Path user

## **DOCUMENTS**

1. Statement of Case of Cornwall Council.
2. Proof of Evidence of Mike Eastwood.
3. Copies of Orders with proposed modifications marked.
4. Statement of Case on behalf of Mr & Mrs Ryan and Mr & Mrs Clark, Sue Rumfitt.
5. Proof of Evidence of Trevor Clark.
6. Proof of Evidence of Gilbert McCabe.
7. Letter dated 23/02/16 from Mrs Male on behalf of St Buryan Parish Council.
8. Letter dated 25/02/16 from John Tarbard.
9. Statement of Case of RJ Rogers for the West Cornwall Footpath Preservation Society plus revised conclusion.
10. Email dated 07/01/16 from Mr & Mrs Jeffery.
11. Bundle of documents provided at the inquiry (copies of documents previously submitted by supporters).
12. Copy of extract from Cornwall Countryside Access Strategy 2007.
13. Copy of plan showing whole length of Bridleway 37 and Footpath 38.
14. Copy of 2008 Modification Order.
15. Introductory remarks, RJ Rogers.
16. Closing remarks, RJ Rogers.

Highways Act 1980 Section 119 Order Plan: Re File HAD 216

Parish: St Buryan Civil Parish Path Number: FP/110/38

Produced by Countryside Access Team: 28 August 2014

