



## Order Decision

Inquiry held on 4 August 2015

Site visit made on 3 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: 12 August 2015**

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### **Order Ref: FPS/W3005/5/1**

- This Order is made under Section 257 of the Town and Country Planning Act 1990 and is known as the Footpath on Land Lying to the South West of the A611, Hucknall, Nottingham (Proposed Business Park Access Road) Hucknall Footpath 16 (Part) Diversion Order 2014.
- The Order was made by Ashfield District Council and is dated 4 August 2014.
- The Order proposes to divert the public right of way shown on the Order plan and described in the Order Schedule to facilitate the construction of an access road.
- There were 13 statutory objections outstanding at the commencement of the inquiry, and three letters of representation.

**Summary of Decision: The Order is not confirmed.**

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### **Procedural Matters**

1. I carried out an unaccompanied site visit the day before the inquiry to familiarise myself with the general area of the Order route.

### **The Order**

2. The wording of the Order as made suggested that the associated planning permission had already been granted prior to the date the Order was published. The preamble to the Order uses the form of words set out in the Town and Country Planning (Public Path Orders) Regulations 1993 ('the 1993 Regulations') for situations where a diversion is necessary to enable development to be carried out for which planning permission has been granted under Part III of the Town and Country Planning Act 1990 ('the 1990 Act').
3. From the papers on the file it is evident that the actual approval was not issued until 14 November 2014. Ashfield District Council (the Order Making Authority or 'OMA') had advised the Planning Inspectorate on 21 January 2014 in an email that *'the [planning] application went to committee in March 2014 but the decision notice was produced with the Section 106 in November. There is only one decision notice ...'*.
4. The Growth and Infrastructure Act 2013 ('the 2013 Act') provides for public path orders under Section 257 of the the 1990 Act to be made in advance of permission being granted; and the Town and Country Planning (Public Path Orders)(Amendment)(England) Regulations 2013 ('the 2013 Regulations') set out the form that such an order should take. At the time the Order was made the 2013 Act and Regulations were in force, but the wording of the Order does

not reflect the form of Order specified in the Regulations for orders made in advance of the grant of planning permission.

5. In circumstances where an application for planning permission has been made but not yet granted the wording of the pre-amble should be as follows:<sup>1</sup>

"This order is made by [*name of authority*] under Section 257 of the Town and Country Planning Act 1990 because it is satisfied that –

- a) an application for planning permission has been made under Part 3 of that Act, namely: [*insert description of development*], and
  - b) if the application were granted it would be necessary to authorise the [stopping up][diversion] of the [footpath][bridleway][restricted byway] to which this order relates in order to enable the development to be carried out."
6. Prior to the opening of the inquiry, I had invited submissions from the parties as to the effect on the Order of the form of wording used in the preamble. Since my conclusion in respect of those submissions would affect the running of the inquiry, I dealt with this issue at the outset.
7. Having heard the initial submissions, I suggested a way forward which was the subject of further submissions. I deal with both these issues below.

### ***Submission on behalf of the Order Making Authority and the Applicants***

8. Mr Westaway, on behalf of the OMA and the Applicants, set out the legal background to orders made under the 1990 Act, and pointed out that the 2013 Regulations amended the 1993 Regulations. By amendment, the 1993 Regulations provided alternative wording for the preamble to cater for orders made either as a result of planning permission already granted which necessitated the diversion or stopping up of a right of way; or as a result of a planning application which, if granted, would require the diversion or stopping up of a right of way. This latter circumstance was legislated for in the 2013 Act.
9. Mr Westaway drew my attention to the Explanatory Memorandum which accompanied the 2013 Regulations and which states as follows:
- "The Town and Country Planning (Public Path Orders) Regulations 1993 prescribe the form that such rights of way orders must take. An amendment is required to the prescribed form of order set out in the regulations to accommodate the amendments to the Town and Country Planning Act made by the Growth and Infrastructure Bill. This will avoid the risk of orders needed to implement planning permissions being delayed by a legal challenge on the grounds that they do not conform to the prescribed form of order, or are not 'substantially to like effect'".*
10. He stated that the OMA had used the first form of words from the suggested preambles which set out that the order was made 'to enable development to be carried out in accordance with planning permission granted'. He acknowledged that, at the time the Order was made, the planning permission had not been

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<sup>1</sup> Paragraph 2(1) of the 2013 Regulations

- granted, but was of the opinion that there was no material difference between the development for which permission was resolved to have been granted (at the Committee meeting on 19 March 2014), and the permission that was granted eight months later.
11. He submitted that the test for me to consider was whether or not the wording of the preamble was so fundamentally an error such that it could not be corrected by modification; a course of action which he considered was open to me. He stated that the Order as made did not fail to reflect the 1993 Regulations since it utilised wording contained in Schedule 1 to those Regulations. He also considered that due to the timing of the decision to make the Order in relation to the resolution to grant planning permission neither version of the suggested preambles would have fitted the situation.
  12. He also submitted that the requirement that the order be in the form set out in Schedule 1 or '*substantially to the like effect*' made it clear that flexibility was intended rather than exactitude, and that the further, optional, wording was introduced by the 2013 Regulations to avoid the risk of orders being delayed by legal challenges and not to create a trap for order making authorities.
  13. He considered that the intention of the Order as made was clear to all Council officers, committee members and all consultees, including members of the public, and that no prejudice had been caused to anyone as all interested parties had been able to participate in the process.
  14. He further considered that, since the Council's committee had resolved to continue to support the Order after the date on which the grant of planning permission had actually been made (i.e. at the meeting on 27 November 2014), and because the Order cannot in any case be confirmed until after the granting of permission, the correct wording of the preamble on 4 August 2014 when the Order was made was, at this stage of the proceedings, historic and academic.
  15. I was invited to confirm the Order for the reasons given in the Council's evidence and that of the applicant on the basis that the wording of the preamble was substantially in accordance with Schedule 1 of the 1993 Regulations, although he accepted that it could have been clearer. He stated that, on any view, it was not a fundamental matter that should prevent the consideration of the merits of confirming the Order and that, if I considered it necessary, I could modify the Order accordingly.

***Submission in response to my suggestion***

16. Having considered my suggestion about the possibility of continuing with the inquiry whilst simultaneously remaking the Order, and then adjourning until the second statutory notice period had expired, Mr Westaway did not agree that there was any evidence of prejudice or that the Order was invalid.
17. However, having consulted his clients again, he concluded that the only sensible solution was to remake the Order as soon as possible and to proceed in the usual manner, requesting that the Order would be dealt with as expeditiously as possible since the planning development was a large and important one.

***Submission on behalf of the objectors***

18. Mr Carter responded on behalf of the objectors by accepting the legal background set out by Mr Westaway, but pointing out that the use of the word "shall" in the 1993 Regulations, and not "may", indicates that the requirement to use the suggested wording is mandatory and not optional.<sup>2</sup> In the absence of any legal precedent it is necessary to read the statute with its ordinary meaning. He submitted that there should be strict compliance with the Regulations and that the form of wording should be substantially to the like effect.
19. He stated that the wording of the Order before me was plainly not to the like effect of the relevant suggested preamble as introduced by the 2013 Regulations. To suggest otherwise would be to completely undermine the meaning of the Regulations which Parliament clearly saw fit to amend to distinguish between the old and the new. The position is that there are two forms of order to be used and, in the case before me, the wrong one has been used. There has to be a different form of preamble to cater for the different reasons for making the Order.
20. In his view the outcome of this situation was that there was no valid Order for me to confirm, as it did not conform to the regulations. Modification of the Order was not the approach to take. A fair-minded observer reading the Order would have thought that planning permission had been granted. The premise for determining this type of Public Path Order is that the merits of the associated planning permission is not an aspect for consideration, but at the time of the making of the Order the objectors were not aware that the permission had not, in fact, been granted. The Order was misleading in this regard. This is a material factor and goes against natural justice.

***Submission in response to my suggestion***

21. Mr Carter was not in favour of my suggestion to continue with the inquiry, adjourning before closings to allow the order to be re-made, re-published and for a second objection period to expire, before resuming the inquiry to a close. He had a number of reasons for taking this view.
22. Firstly there were issues about the suitability of the venue<sup>3</sup> which had not been resolved to his clients' satisfaction, and these would need to be dealt with before continuing with any inquiry.
23. Secondly there was the very real possibility that there were some residents who would have opposed the Order but did not do so because they thought the planning permission had already been granted at that time. It was not for the objectors to show that prejudice had occurred but for the Council, as a public authority, to show that no prejudice had been caused. It might cause further confusion to have two inquiries.
24. Thirdly, the residents needed to take legal advice on whether or not to challenge the planning permission in the light of the changed circumstances regarding the granting of it. Whilst the success of that could not be known, the outcome could make matters very different.

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<sup>2</sup> Paragraph 2 (1) of the 1993 Regulations both before and after amendment by the 2013 Regulations

<sup>3</sup> Raised with the Planning Inspectorate prior to the inquiry: see Other Matters

## Discussion

25. Before continuing to hear evidence in relation to the Order, it was necessary for me to decide whether or not the Order as made could be determined. In considering the matter I took account of all the views expressed, but was persuaded by the views of Mr Carter that the wording of the preamble to the Order which had been used by the OMA had created a situation where there was the distinct possibility of prejudice. My view on this is strengthened by the fact that two of the objectors withdrew their objections on the basis of a letter sent to them by the OMA. Although I do not have a copy of the actual letter sent to the objectors, the response from Mr and Mrs Eagle to a letter of 4<sup>th</sup> November 2014 makes very clear that they withdrew their objection on the basis of the contents of it. Mr and Mrs Eagle state:

*"We were not aware that planning permission had already been granted for the building of the housing, building park and access park. In view of this it seems that disruption of the area surrounding the Farleys Lane Nature Park area is unavoidable (...) In view of this it seems that our objections will not make a great deal of difference ..."*

26. The letter to which they were responding pre-dates the Approval Notice of 14 November 2014. It is clear that the impression given in the correspondence was that the planning permission had already been granted and was instrumental in persuading Mr and Mrs Eagle to withdraw their objections. I think it is equally likely that the impression given by the Council in drafting the Order in the way that it did may have had a similar effect in dissuading other people from objecting in the first place. Whether or not it is the objectors or the Council who must show prejudice or the lack of it respectively, it is the perception of prejudice which is important.

27. The wording of Paragraph 2 (1) of the 1993 regulations, both before and after amendment, is as follows:

*"A public path order **shall**<sup>4</sup> be in the relevant form set out in Schedule 1 to the Regulations or in a form substantially to the like effect, with such modifications as may be required, and shall be sealed and dated."*

28. Mr Westaway himself identified the reason for the alternative preamble being introduced into the Regulations, and it seems to me that this case presents a prime example of the problem that the amended Regulations were designed to avoid. Although this Order may not have been challenged in the courts (a point made by Mr Westaway) a statutory public inquiry is a legitimate opportunity to subject the Order to scrutiny, and the problem has been highlighted as a result.

29. Modification of the preamble now would clearly not overcome the problem of the erroneous impression given in the Order when it was published. There would be no further right for the public to object to the principles of the Order after such a modification was made and the Order confirmed, other than by way of judicial review in the courts.<sup>5</sup> This would in my view result in actual prejudice and is not a viable way forward.

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<sup>4</sup> My emphasis

<sup>5</sup> The modification would not fall into a category which would require re-advertisement

30. It might have been possible to allow the OMA to remake the Order (in exactly the same terms as it was originally made<sup>6</sup>) and to continue with the inquiry to a certain point; adjourning and then resuming at a later date once any new objections had been made. However, in the absence of agreement between the parties on this suggestion it was not sensible for me to attempt to continue the event. Mr Westaway eventually conceded the point whilst maintaining his view that there was no evidence of prejudice or that the Order itself was invalid.
31. I disagree with Mr Westaway, and consider that there is evidence of prejudice; but more seriously there is a perception of prejudice. Whether or not the Order is invalid, I consider that, for accuracy's sake, it is incapable of confirmation without modifications which would, in themselves, confirm the perception of prejudice and would risk causing actual prejudice.
32. I therefore closed the inquiry without hearing any evidence in relation to the merits of the Order.

### **Other Matters**

33. The suitability of the venue had been an issue prior to the inquiry, raised by the objectors on the basis that it was too far from the site of the Order route, and difficult to get to by public transport. Having investigated alternatives put forward by the objectors, and considered the response of the OMA, the Planning Inspectorate had determined that the Council Offices fulfilled all the requirements of the Facility Note produced by the Inspectorate and that none of the other suggested venues did so. The distance from the site was not considered to be excessive, but the OMA was invited to consider providing some form of more easily accessible transport.
34. Mr Carter stated that, had the inquiry continued, he would have made submissions on this matter, but in view of the fact that I closed the inquiry these arguments were not explored any further.

### **Conclusions**

35. In the light of my conclusion about the misleading impression given by the preamble to the Order, and the likelihood of prejudice having been caused as a result, I conclude that the Order should not be confirmed.

### **Formal Decision**

36. I do not confirm the Order.

*Helen Slade*

**Inspector**

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<sup>6</sup> now that the permission has been granted

**APPEARANCES**

FOR THE ORDER MAKING AUTHORITY AND THE APPLICANT:

Mr Ned Westaway                      Counsel (Francis Taylor Buildings) instructed by  
Addleshaw Goddard LLP

FOR THE OBJECTORS:

Mr Tom Carter                      Counsel, Ropewalk Chambers, Nottingham

**DOCUMENTS**

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|--|---|
| 1. Summary and Proof of Evidence with appendices | Rose Arbon, Ashfield District Council       |
| 2. Summary and Proof of Evidence                 | Christine Sarris, Ashfield District Council |
| 3. Summary and Proof of Evidence with appendices | Neil Lewis, Nottinghamshire County Council  |
| 4. Summary and Proof of Evidence with appendices | Andrew Wooddisse, AECOM                     |
| 5. Summary and Proof of Evidence with appendices | Gareth Howells, WSP Parsons Brinckerhoff    |
| 6. Statement of Case                             | Ashfield District Council                   |
| 7. Statement of Case                             | Muse Developments Ltd                       |
| 8. Submission on 1993 Regulations                | Ned Westaway, Counsel                       |
| 9. Statement                                     | Mrs J Barlow                                |
| 10. Statement and photographs                    | Christopher Williams                        |
| 11. Statement                                    | Davina Williams                             |
| 12. Statement                                    | Sally Wyatt                                 |
| 13. Statement                                    | Christa Bales                               |
| 14. Statement                                    | Paula Newcombe                              |
| 15. Statement                                    | Mr and Mrs Hargreaves                       |
| 16. Statement                                    | Barrie Green                                |
| 17. Statement                                    | Ms C Terzza                                 |
| 18. Statement and appendices                     | Mr T Rose                                   |
| 19. 1993 Regulations                             | Tom Carter, Counsel                         |