
Order Decision

Site visit held on 24 January 2017

by Martin Elliott BSc FIPROW

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

Decision date: 15 February 2017

Order Ref: FPS/W2275/4/45M

- This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and Section 53A(2) of the Wildlife and Countryside Act 1981 and is known as The Kent County Council (Public footpath CC34 (part) Canterbury) Public Path Diversion and Definitive Map and Statement Modification Order 2015.
- The Order was sealed on 11 December 2015 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule. If confirmed, the Order will also modify the definitive map and statement for the area, in accordance with Section 53(3)(a)(i) of the Wildlife and Countryside Act 1981 Act, once the provisions relating to the diversion come into force.
- In accordance with paragraph 2(3) of Schedule 6 to the 1980 Act notice of the proposal to confirm the Order subject to modification has been given. Following the notice of the proposed modifications three objections and one representation of support have been submitted.

Summary of Decision: The Order is confirmed subject to modifications previously proposed and set out below in the Formal Decision.

Preliminary Matters

1. My interim decision was made on the basis of the papers on file as the objections to the Order had been withdrawn. However, given the objections to the proposed modifications I carried out an unaccompanied inspection of the Order route and surrounding area on 24 January 2017. I was unable to inspect the existing route as this is obstructed and has been so for a number of years; the Council indicate in excess of 30 years although I note that some obstructions to the existing route are more recent. Although I was unable to walk the existing route I consider that I am able to reach a decision on the basis of my site visit and the submissions before me.
2. In my interim decision I proposed confirmation of the Order subject to a modification to remove the reference to the alternative route being 1 metre from the existing boundary and to describe the alternative route by reference to a new fence. The wording of the proposed modification was provided by the Council. I also proposed that the Order be modified at paragraph 1 in respect of the time period for the stopping up of the existing route so as to be consistent with the time period specified at paragraph 3 of the Order. Further, that the duplicate order be modified to include the date on which the Order was sealed. Three objections and one representation of support were received in response to the notice of the proposed modifications.

3. Letters A to E referred to in this decision relate to points identified on the Order map.

The Main Issues

4. This Order has been made in the interests of the owners of the land crossed by the footpath. Section 119 of the Highways Act 1980 therefore requires that, before confirming the Order, I must be satisfied that:
 - (a) it is expedient in the interests of the owners of the land crossed by the section of footpath to be diverted that the line of the path or way, or part of that line should be diverted; and
 - (b) the path or way will not be substantially less convenient to the public; and
 - (c) that it is expedient to confirm the Order having regard to:
 - (i) the effect which the diversion would have on public enjoyment of the path or way as a whole; and
 - (ii) the effect which the coming into operation of the Order would have as respects other land served by the existing rights of way; and
 - (iii) the effect which any new public rights of way created by the Order would have as respects the land over which the right is so created and any land held with it, account being taken of the provisions as to compensation.
5. Section 119(6A) of the 1980 Act provides that I must have regard to any material provision contained in a Rights of Way Improvement Plan for the area covered by the Order.
6. As noted above the existing route is currently obstructed. An equitable comparison between the existing and proposed routes can only be made by disregarding any temporary circumstances preventing or diminishing the use of the existing route. The convenience of the existing route is to be assessed as if the way were unobstructed and maintained to a standard suitable for those users who have the right to use it.
7. A further consideration is whether there is any evidence which suggests that the proposed modifications should not be pursued.

Whether it is expedient in the interests of the owners of the land crossed by the footpath that the way should be diverted

8. The Council make the point that the diversion will remove the route from all the affected properties allowing for better security and privacy. The Council also referred to the effect on the retail value of the farm building being converted into a domestic dwelling. However, I noted during my site visit that the property is now fully developed and the submissions from Mr Oates indicate that the properties affected by the existing footpath have been sold.
9. In my view the existing footpath has a significant adverse effect on the privacy and security of the properties over which the route passes. The diversion of the route will therefore address such issues. Long standing and more recent issues relating to the obstruction of the way will also be resolved which will again be of benefit to the various landowners. It should be noted that in the

event that the Order is not confirmed any obstructions on the existing route would need to be removed to make the footpath available. The diversion of the path will also have benefits in terms of property values. As such I conclude that the Order is in the interests of the landowners over which the route passes.

10. Mr Randall makes the point that it is unfair that the proposed diversion should be framed in a way which benefits Mr Oates (the applicant). Mr Hayward also makes the point that financial considerations of the applicant have been given more weight than the views of the majority of residents. Whilst I note these points the first issue to be considered is whether the Order is in the interests of the landowners. It is then necessary to consider the other factors set out at paragraphs 4 and 5 above. I have concluded above that the Order is in the interests of the landowners.

Whether the path or way will not be substantially less convenient to the public

11. The existing route passes through the curtilage of a number of properties in a straight line. The proposed alternative route takes a slightly more circuitous route between points A and C and then takes a straight alignment to point B. No evidence has been put before me to indicate that the alternative route is substantially less convenient.
12. Although the alternative route is slightly longer and more circuitous I do not consider that this renders the route to be substantially less convenient.

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

13. No evidence has been put before me to indicate that the diversion would have an adverse effect on the enjoyment of the path or way as a whole.

The effect which the coming into operation of the Order would have as respects other land served by the existing right of way

14. There is no evidence that the diversion would have any effect on land served by the existing way.

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

15. There is no evidence of any adverse effect on the land over which the new route passes such that compensation issues are relevant.

Rights of Way Improvement Plan

16. No provisions from a Rights of Way Improvement Plan have been put before me which are material to my decision.

Whether it is expedient to confirm the Order

17. I have concluded above that the Order is in the interests of the landowners, that the proposed alternative route is not substantially less convenient and that there is no adverse effect on the enjoyment of the route as a whole. However,

the use of the term expedient in section 119 of the 1980 Act means that other considerations can be taken into account.

18. Mr Randall contends that the rights of the occupiers of Ashdown and Hoath Farm Cottages, to access the proposed alternative path, should be preserved either because the rights arising from the existing footpath or because they have established a right of way over the proposed route. It is further contended that a right of way extends to pass behind Oak Tree Cottages.
19. As regards access from the rear of the various properties onto the proposed route (C to B) this is not recorded as a public right of way and as such there is no public right of access along this route. No application has been made to add the route to the definitive map and statement under section 53 of the Wildlife and Countryside Act 1981. Further, whilst I note the assertions that the route between points C and B has been used for as long as anyone can remember I have been provided with insufficient information for me to conclude that the alternative route C to B and the route extending behind Oak Tree Cottages is a public right of way. It may be the case that there is other relevant information which is pertinent to the status of this route. In this respect I note the view of Mr Hayward that the strip of land to the rear of the properties, with the exception of the part immediately adjacent to his property, is not a public right of way. It is not my role to make a determination of an issue based on limited evidence. Such investigations should be properly dealt with under the provisions of the Wildlife and Countryside Act 1981. Furthermore, there is no evidence before me that the route C to B or to the rear of Oak Tree Cottages carries private rights of access.
20. Bearing in mind the above any access to the existing footpath using any part of the route between C and B, or to the rear of Oak Tree Cottages, is not as a consequence of any right of way. I therefore do not give this element any weight in determining whether it is expedient to confirm the Order. I note the point as to the creation of a ransom strip but this should be seen in the context that there is currently no right of access to the route C to B.
21. As regards being able to access the remainder of footpath cc34 from the existing public right of way it will be the case that those properties through which the existing route passes will have a right of access along that route; this does not extend to a right to use the section of path C to B. Whilst the diversion of the footpath will prevent access along the existing footpath for these properties to the remainder of the footpath access to cc34 will not be prevented. It is accepted that to access cc34 it will be necessary to follow Bekesbourne Lane for a short distance, and I note concerns raised as to the use of this road. However, when taking all factors into account I do not think this means that it is not expedient to confirm the Order.
22. In reaching my conclusion at paragraph 21 above I note that, with the exception of Mr Hayward, none of the occupiers of the properties crossed by the existing footpath have raised an objection in this respect. Mr Hayward's objection relates to access from his rear boundary at point B and I address this below at paragraph 23. This does not suggest to me that the occupiers have particular concerns as to access to cc34 along its current route through the properties. One of the initial objectors to the Order as made withdrew her objection on the basis of the proposed modification relating to the position of

the proposed alternative route. However, the objection makes no reference to the need to use the current route to access the remainder of cc34.

23. Mr Hayward makes a number of representations in respect of access to the footpath. Whilst I note the assertion that the gap provided in the fence is not on the alignment of the path the Order specifically provides, at Parts II and IV of the schedule to the Order, for access to the footpath from the rear of Mr Hayward's property. As such any access to footpath cc34 for Mr Hayward from the rear of his property will be maintained.
24. Ms Voigt, whilst agreeing to the proposed alternative route A to C raises concerns as to the enclosed nature of the section of path C to E. I appreciate the concerns in respect of community safety but there is no evidence as to current issues in this respect and whilst there is a potential adverse effect on community safety I do not consider that this will be significant. Ms Voigt asks that the fencing at this point is reduced in height but this is not a matter over which I have any influence. My decision is based on the current circumstances.
25. Mr Randall and Ms Voigt put forward alternative proposals. Whilst I note these suggestions I have been appointed to determine the Order before me subject to the modifications requested by the Council. These modifications appear to be supported by the applicant who is the owner of the land crossed by this section of path. Alternative proposals are not for my consideration and in any event there is nothing to indicate that the alternative proposals are agreeable to the landowner.
26. Ms Voigt disagrees with the Council's equality assessment. I have had due regard to the Public Sector Equality Duty contained in section 149 of the Equality Act 2010. There is nothing before me to suggest that those with protected characteristics will be adversely affected by the diversion.
27. Concerns are raised by the objectors in relation to the development of Hoath Farm and compliance with regulations, views expressed by the County Council in respect of the development of The Pole Barn, the dumping of spoil on agricultural land and the obstruction of the footpath. Representations are also made in relation to the erection of the fence adjacent to the boundaries of the properties on Bekesbourne Lane in relation to its need, character, the effect on views and the health of the adjacent boundary hedge. Mr Randall also contends that no commercial or other case has been made in respect of the movement of the path between points B and C. Whilst I note these issues and concerns they are not relevant to my consideration of the Order and I give them no weight in respect of the issue of expediency. I am required to consider the Order measured against the relevant criteria of section 119 of the 1980 Act.
28. Mr Randall raises issues in respect of the width of the alternative route in the vicinity of point C. Should the Order be confirmed then the width of the footpath should be as specified in the Order.
29. Taking all factors into account I consider that on balance it remains expedient to confirm the Order. Further, there is nothing before me to suggest that the modifications set out in paragraph 7 of my interim decision dated 28 April 2016 should not be pursued.

Conclusion

30. Having regard to these and all other matters raised in the written representations I conclude that the Order should be confirmed subject to modifications previously proposed.

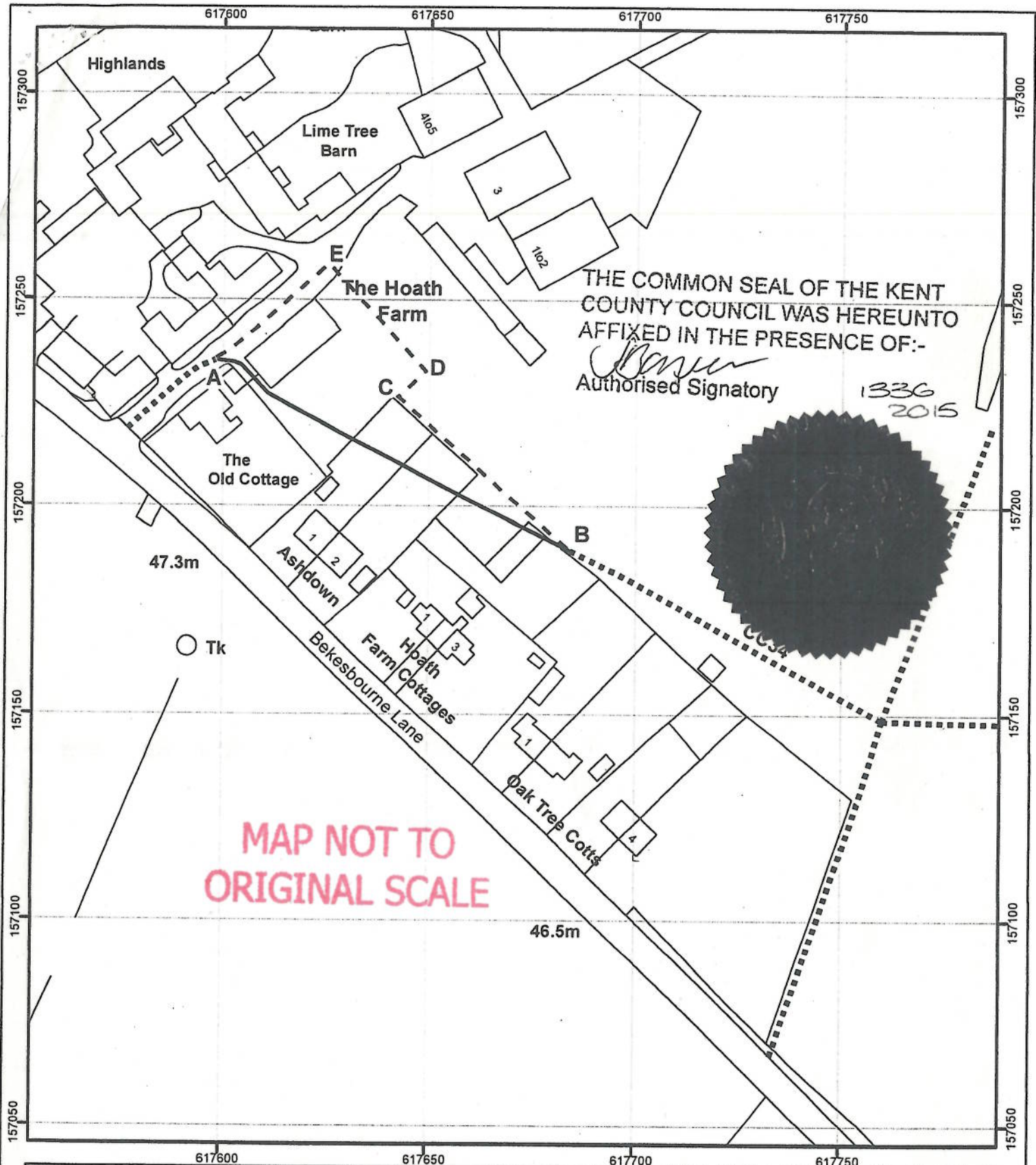
Formal Decision

31. The Order is confirmed subject to the following modifications:

- At paragraph 1 of the Order delete 'seven' and insert 'twenty eight'.
- At Part II of the Schedule to the Order from line 8 delete 'measured one metre to the north east of the existing boundary, for approximately 54 metres, to then turn for 1 metre in a generally south south easterly direction' and insert 'following the north eastern side of the fence-line for approximately 55 metres'.
- At page 2 of the duplicate Order at the end of the first line insert '11th'.

Martin Elliott

Inspector



Key

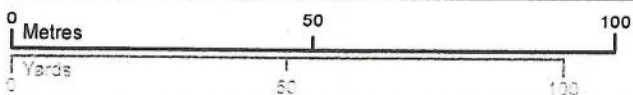
- Proposed diversion route
- Route to be extinguished
- Unaffected routes

Highways Act 1980
Wildlife & Countryside Act 1981
The Kent County Council (Public footpath CC34 (part) Canterbury)
Public Path Diversion & Definitive Map and Statement
Modification Order 2015

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