

Order Decision

Site visit made 30 June 2016

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 29 July 2016

Order Ref: FPS/T1600/4/53

referred to as 'Order A'

- This Order is made under Section 119 of the Highways Act 1980 and Section 53A(2) of the Wildlife and Countryside Act 1981. It is known as The Gloucestershire County Council, Public Footpaths GNE 106, GNE 108, GNE 109, Parish of Newent, Diversion Order 2015.
- The Order is dated 29 May 2015 and proposes to divert the whole or parts of three footpaths running over land at Okle Clifford Farm, Newent, as shown in the Order map and described in the Order Schedule.
- There was one objection outstanding when Gloucestershire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Order Ref: FPS/T1600/3/17

referred to as 'Order B'

- This Order is made under Section 118 of the Highways Act 1980 and Section 53A(2) of the Wildlife and Countryside Act 1981. It is known as The Gloucestershire County Council, Public Footpaths GNE 106, GNE 108, GNE 110, GNE 112 (Parish of Newent) Extinguishment Order 2015.
- The Order is dated 29 May 2015 and proposes to extinguish parts of four footpaths running over land at Okle Clifford Farm, Newent, as shown in the Order map and described in the Order Schedule.
- There was one objection outstanding when Gloucestershire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Preliminary Matters

1. The Orders have been produced as a package, to be considered together. As the objector noted if one of these Orders was not confirmed, whilst the other was, this would leave routes with no connections. It can be difficult, therefore, to consider such packaged proposals, when each of the routes needs to meet the relevant tests under the Highways Act 1980 ("the 1980 Act").
 2. Sub-section 118(5) of the 1980 Act allows that "*Where...proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a...public path diversion order...then, in considering—*
 - (a) *under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use, or*
-

(b) *under subsection (2) above to what extent (if any) that path or way would apart from the order be likely to be used by the public,*

...the Secretary of State...may have regard to the extent to which the...public path diversion order...would provide an alternative path or way."

3. Therefore, I shall first determine the diversion order, Order A. However, ignoring the extinguishment under Order B would mean that parts of some routes would be left unconnected, which could not be anything other than substantially less convenient to the public. I bear in mind that section 119 has an element of expediency attached and am satisfied that it is appropriate for me to be able to bear in mind that the two Orders could come into effect simultaneously.
4. Generally, I consider it preferable to draft a diversion Order such that extinguishment of existing routes does not occur until such time as the highway authority certifies that the works to put the new route in a fit condition for public use have been completed. I had been minded to modify Order A to ensure that. However, as I am unable to make the confirmation of Order B dependent upon the certification in relation to Order A, this would leave a situation where there were unconnected routes.
5. On balance, given the difficulties which could arise from the Orders not being confirmed simultaneously, I consider that it would not be appropriate for me to modify Order A as I had intended. I instead rely upon those with an interest in the matter to ensure that all the rights of way are open and available to public use as soon as is reasonably practicable.
6. Although Gloucestershire County Council, the order-making authority ("the OMA"), say that the previous tenant had allowed the public rights of way to fall into disrepair, it should be remembered that the highway authority has a duty to assert and protect the rights of the public in the use of their highways. Where this does not occur it leads to avoidable discontent when proposals such as this one are put in the public domain. There are legal remedies for the public should such duties not be met, but they should not be placed in a position of having to take such action.

Procedural Matters

Notices

7. The objector raised concerns about the notices for the Orders, which he felt were not fit for purpose, with some difficulty in understanding the overall effect. Although it was suggested that the Orders should be rejected for this reason, the correct way forward is for me to consider whether the Orders need to be readvertised to remedy any potential prejudice which may arise.
8. The requirements for notices are set out in Schedule 6 to the 1980 Act and the Public Path Orders Regulations 1993. The OMA have certified that the notice requirements have been met. They indicate that when two of the notices posted on site were taken down they were replaced as soon as was practicable. I note that the objector indicates that the second notice which he reported missing was not replaced.
9. I have considered whether to require an additional notice period to ensure public awareness of the proposal, although I am unclear how notices in late June/early July could miss 'seasonal walkers'. As the objector indicates that

there were others who object [to the Order], but had not found time [to write in], it seems that there has been awareness of the proposal. On querying the changes to be made the objector was sent a copy of a map, dated 14 July 2015, showing the effect on the network overall, if both Orders were confirmed. It is reasonable to assume that anyone else asking about the effect of the Orders would have been supplied with the same information.

10. I agree with the objector that a package of changes such as this can be confusing but I consider that the notices, which were also given in the local newspaper and served on the Parish Council and other statutory parties, as required, have done as they should in raising awareness of the proposed changes. An objection has been raised and I will consider the Orders against the relevant tests. I am satisfied that no prejudice has arisen and so no further advertisement is necessary in this case.

Site visit

11. No-one requested to be heard with respect to the Orders and so I made an unaccompanied site inspection, taking account of the written representations.

Main Issues

12. Order A is made under section 119 of the 1980 Act in the interests of the owners of the land crossed by the footpaths. Sub-section (6) of the 1980 Act sets out that "*The Secretary of State shall not confirm a public path diversion order...unless [she is]...satisfied that the diversion to be effected by it is expedient...in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted...and further that the path or way will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the effect which—*
- (a) *the diversion would have on public enjoyment of the path or way as a whole,*
 - (b) *the coming into operation of the order would have as respects other land served by the existing public right of way, and*
 - (c) *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,*
- so, however, that for the purposes of paragraphs (b) and (c) above the Secretary of State or, as the case may be, the council shall take into account the provisions as to compensation referred to in subsection (5)(a)..."*
13. Sub-section 2 sets out that a "*...diversion order shall not alter a point of termination of the path or way...(where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public.*"
14. Under sub-section 4, "*A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.*"

15. In relation to the tests arising under section 119 of the 1980 Act the objection raised concerns regarding convenience and enjoyment. The OMA believed that the matters raised were generally subjective.
16. Order B is made under section 118 of the 1980 Act. This sets out that "*...the Secretary of State shall not confirm a public path extinguishment order...unless [she is]...satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to [her]...that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 above as applied by section 121(2)...".*
17. The objection raised concerns about the overall loss of a percentage of the rights of way network as a result of the two Orders.
18. For both Orders the considerations to which the Secretary of State is to have regard in determining whether or not to confirm the Orders include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would create or extinguish a public right of way.

Temporary circumstances

19. In relation to both Orders there were obstructions to parts of the routes by fences and gates which were difficult to use in places. Sub-section 6 of section 118 of the 1980 Act states that "*...any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded.*" Although section 119 of the 1980 Act, under which Order A is made, does not contain such wording Circular 1/09¹ indicates that in forming an opinion on whether the replacement route is not substantially less convenient to the public, a fair determination can only be made on the assumption that the existing route is available to the public to its full legal extent. In considering the potential effect of the proposals upon use of the routes by the public I have considered the existing footpaths as if they were all open and available for use.

Reasons

Background

20. I understand that the Orders were made following a report of a fence obstructing Footpath GNE 108² north-east of Okle Clifford Farm ("the farm"). Following discussions between the OMA and the Land Agent proposals arose to make changes to the footpaths in the vicinity of the barns, which are to be sold and converted for residential use. The Farm Manager for the current farm tenant, Hartpury College ("the College"), asked whether additional changes could be made. An application was made on 17 March 2015.

¹ Department for Environment, Food and Rural Affairs, version 2, October 2009

² As all the affected routes are public footpaths I shall refer to them by their reference number, e.g., GNE 108

Order A

Whether it is expedient, in the interests of the owners and occupiers of land crossed by the paths or ways, that the footpaths in question should be diverted

21. In their statement of case, the OMA have referred to the Order being in the interests of both the landowner and occupier, although the Order itself states to have been made in the interests of the owners of the land. I consider that it is better for Orders to set out the correct interested parties from the outset, so that the public are clear as to the beneficiaries. In this case, the objector has commented on the Orders on the basis of benefits said to be arising in relation to both the landowner and occupier and so I am satisfied that no prejudice has arisen from the Order as made. Nonetheless, I shall modify the Order to set out the appropriate beneficiaries for the sake of clarity.
22. The objector has raised concerns that the Order was motivated by the residential development opportunity in relation to the barns which are situated to the north-east of the farm and, therefore, was only in the interests of the landowners. As set out in the *Main Issues* this is one of the reasons allowed for such Orders under the legislation.
23. I understand that the landowner has an application on hold for diversion under the Town and Country Planning Act 1990 in connection with the planning proposal. I am satisfied that the diversion of GNE 108 would be in the owners interest, allowing development of the barn and surrounding land without needing to make provision for a right of way or make other applications.
24. In relation to the proposal that the rights of way skirt the farmyard area, the objector comments that he felt this was an attempt to separate the public from College students. The OMA and the agent for the landowner confirm that health and safety are factors in the proposal.
25. I agree with the objector that it may be helpful for an Agricultural College to teach students how to deal with rights of way within a farmyard situation. I also note his concern that advantage should not be gained by making routes difficult to use and then seeking diversion; this would be poor practice to teach to students. However, whilst it is clear from the objector's photographs that in June 2015 at least some of the rights of way were not available for easy public use, I found the routes generally open. There were some issues, for example, the stile at point H³ was very overgrown with the fencing along the eastern side of the new access track to the barns blocking the route of GNE 108 and there was no gate or stile through the fence at point C. There were also some changes which were clearly intended to assist public access, for example, footbridges over the drains and ditches between points A and K on GNE 107. In this instance it appears that the problems were not made by the current occupants, the College, who have tried to improve matters, albeit that the OMA may wish to check that all new structures are appropriate and authorised.
26. I am satisfied that the alterations would be in the interests of the landowner and occupier, providing a practical solution to aid modern farming practices and increasing safety for residents and students. The proposals would move the footpaths from the vicinity of residential and working farmyard areas, with animals, lorries, tractors and trailers.

³ The reference letters A – K are used on both Order maps

27. I consider that the proposed diversions would be in the interests of the owners and occupiers of the land crossed by the footpaths and therefore, in that respect, it would be expedient to confirm the Order.

Whether the new routes will be substantially less convenient to the public

28. The most significant part of the objection relates to the reduction in overall path length as a result of the proposals. The OMA have calculated this to be 27.4% of this part of the network. The objector indicates that taking parts of the area out of public access, with no like for like replacement, makes the routes substantially less convenient, removing public amenity, although it is not clear how he believes this to affect convenience. I believe that most loss of length of route arises from the proposed extinguishment of parts of GNE 106 and GNE 112, under Order A, not Order B.
29. The proposed alignments of all three routes to be diverted, GNE 106, GNE 108 and GNE 109 are a little longer than the existing sections, with the continuations in the original directions making the routes a little longer overall. This may be inconvenient in routes required for access to facilities but on recreational routes such as these, and bearing in mind the concerns of the objector about loss of route length, I am satisfied that it would not be substantially inconvenient in this instance.
30. In relation to GNE 106, the Order did not specify the requirement for a gate in one of the hedges and I will modify the Order in this respect. There will be a gate at point E and one to the south-west of this but, as gates or stiles would be required at points B and C, I am satisfied that there is no additional limitation on the public use as a result of the proposed diversion. Bearing in mind the new limitations which would be required on the existing routes of GNE 108 and GNE 109, given the fencing which has been relatively recently erected, I am satisfied that the proposed alignments produce no additional limitations.
31. Taking account of the written representations, and my observations on the site visit, I do not consider that the new routes would be substantially less convenient to the public.

The effect of the diversion on public enjoyment of the paths as a whole

32. Section B – C of GNE 106 passes through the farmyard and the objector says the enjoyment of using this route would be diminished as it would no longer be possible to see the old buildings, the livestock and the farm machinery. Although I accept that for some, such as the objector, there is enjoyment in this, others can be put off from walking in apparently private or working areas, with concern about safety in such situations. Although I understand the sentiment that people should be encouraged to be interested in what goes on in the countryside, there are public farms and farm open days for this purpose.
33. I found that views of the buildings, livestock and machinery remained, although not generally in such close contact in the farmyard. There were agricultural activities around the farm, with young cattle in a couple of the fields, topping occurring in one of those, and silage being brought in from others at the time of my visit. With regard to views in general, I agree with the OMA that these are a subjective matter. I generally found the views to be of farmed countryside, with the farm buildings forming a backdrop. I consider the proposed routes to form part of an enjoyable country walk.

34. Overall, I am satisfied that whilst for some individuals there would be a loss of enjoyment, the proposed diversions would not negatively impact upon public enjoyment of the paths as a whole.

The effect the coming into operation of the Order would have with respect to the land served by the existing paths and the land over which the new paths are created together with any land held with it, account being taken of the provisions as to compensation

35. The land crossed by the existing routes would remain part of the property that they cross, with the proposed routes apparently created on land in the same ownership. There was no evidence that there is land served by the existing routes that would not be adequately served by those proposed.

Whether the point of termination of the new footpaths will be on the same highway or a highway connected with them, and will be substantially as convenient to the public

36. The directions of travel provided by the existing routes are south, south-west and south-east from Golden Valley to Hook Lane near Brass Mill or the B4215 at Malswick. I am satisfied that the points of termination of the new footpaths will provide links to those highways and will be substantially as convenient to the public.

Conclusions regarding Order A

37. I conclude that it is expedient to confirm the Order in the interests of the landowners and occupiers. The proposed routes will not be substantially less convenient to the public; there will be no overall negative effect on public enjoyment, on the land served by the existing path, or the land over which the proposed path will pass. Whilst it was suggested that people should be encouraged to be in farmyards, to see livestock and farm machinery, I do not consider this outweighs the interests of the occupiers in removing the public from such working areas.
38. Having regard to these, and all other matters raised in the written representations, I conclude that Order A should be confirmed subject to the modification to record the interest of the occupiers and an additional limitation, as discussed above. I am satisfied that these modifications do not require further advertisement.

Order B

39. Whilst some of the matters raised in objection related to whether or not the OMA had shown that the route was not needed for public use it will be noted that this is a separate test under sub-section 118(1) of the 1980 Act. It is not directly a matter for me at the confirmation stage.

The extent to which it appears that the footpaths in question would, apart from the Order, be likely to be used by the public

40. The OMA indicate that the alterations proposed by this Order relate to sections of routes which, on confirmation of Order A, would be left without continuations. This is certainly the case for GNE 108, section H – C, which would end up as an isolated footpath with no link at either end. However, I consider the route of GNE 106 west of point B, GNE 110 between points B and F and the northern section of GNE 112 are a little different, as they could in theory remain and be used in connection with the new alignment of GNE 106. The question in my mind is whether this would be likely in practice.
41. Travelling from the west and then south I consider the route of GNE 107 and then GNE 110 would be chosen rather than GNE 106 to either point B or F and then south. Similarly, if wishing to travel to the south-east GNE 107, from point A to point K, provides a more obvious link than following A – B – F or A – B – K. I am therefore satisfied that it is appropriate to extinguish that section of GNE 110 between points B and F.
42. The objector has referred to difficulties in using the alignment of GNE 107 in the winter due to flooding of the drain. The OMA comment that they have no reports regarding boggiess on this route from records of complaints dating back to 1991, although I bear in mind that as there was an alternative via the other routes there may have been no need to complain.
43. Taking account of the recent provision of a footbridge over the drain in this area, the duties on the highway authority and the common law right of public diversion over land in the same ownership if routes are impassable, I consider that people will be more likely to choose GNE 107 as the east – west link in this area. On balance, therefore, I consider it appropriate to extinguish the alternative over parts of GNE 106 and GNE 112.

The effect which the extinguishment of the rights of way would have as respects land served by the footpaths, account being taken of the provisions as to compensation

44. There is no evidence that the extinguishment would affect land served by the existing routes.

Expediency

45. As noted in relation to Order A I believe that the main loss of network arises in relation to this part of the overall proposal. There is a matter of expediency in relation to the confirmation of extinguishment Orders and, therefore, I believe that I am able to take account of the concerns about loss of network length in the overall consideration of the Order.
46. I can understand the concern that a third of network in this area would be lost if the Orders are confirmed. Rights of way are a public amenity and alterations should not be undertaken lightly. However, comparing the routes as they

currently exist with the proposed final situation I am satisfied that the overall public amenity is not negatively affected. There will remain a good network of routes running north – south and east – west, connecting with other rights of way beyond the farm boundaries. I am satisfied that the loss of network by length does not negatively affect the expediency of confirmation of the Order.

Conclusions regarding Order B

47. Having given careful consideration to the above, and also to all other matters raised in the written representations, I conclude that it is expedient that Order B should be confirmed.

Other matters

48. Although there were legitimate concerns regarding the closure of other routes, it does not appear that these are in the same landownership and/or tenancy. Whilst I sympathise with the frustration of a local walker in finding public rights of way, such as that through Yew Tree Villa blocked, I have considered the routes before me as if open to public use throughout their length.

49. There were concerns that the proposals had altered between the application and the Orders being made. This may be the case, however, it is the Orders as made and advertised through the statutory processes that I must consider. Concerns were also raised regarding the comments of statutory consultees and OMA Officers.

50. The statement of case for the landlord referred to possible future alterations to public access in the area and changes made on other property within the portfolio.

51. I do not consider any of these matters relevant to my consideration of the Orders and I have not taken them into account.

Formal Decision

Order A

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

- In the recital to the Order:
 - after text “...interests of the owners...” add text “...and occupiers...”;
- Within Part 3 of the Order Schedule:
 - add text “Point X Kissing gate compliant with British Standard 5709:2006 at OSGR SO 7453/2574”;
- On the Order plan:
 - add Point X.

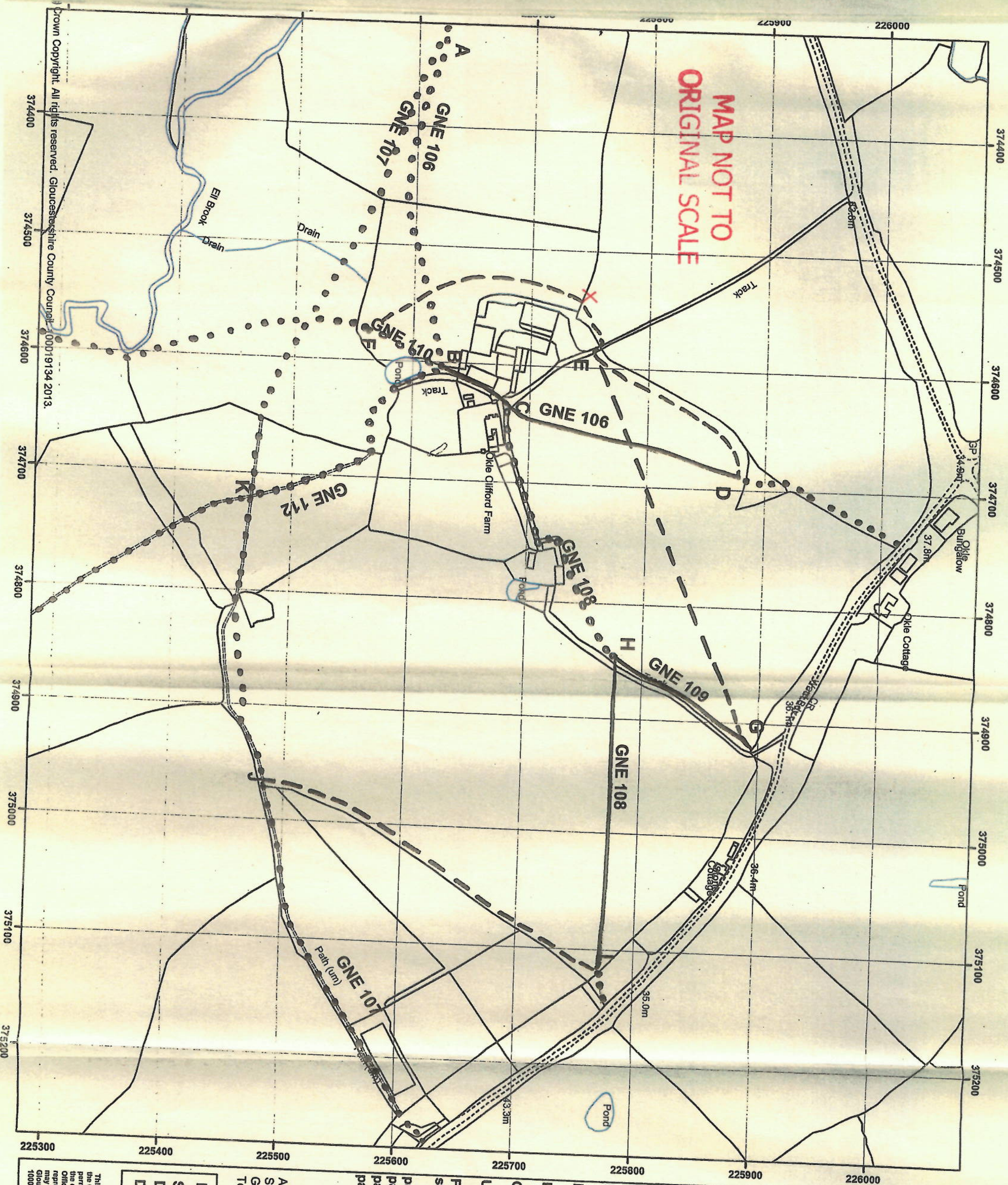
Order B

53. The Order is confirmed.

Heidi Cruickshank

Inspector

MAP NOT TO
ORIGINAL SCALE



Proposed diversion of
Public Footpath
GNE 106/108/109
Okle Clifford Farm
Parish of Newent

KEY:

Footpaths to be stopped up

B - C - D (GNE 106)

I - H (GNE 108)

G - H (GNE 109)

Replacement footpaths

D - E - F (GNE 106)

I - J (GNE 108)

G - E (GNE 109)

Unaffected footpaths

Footpaths proposed to be
stopped up by separate order

part GNE 106 A - B
part GNE 108 H - C
part GNE 110 F - B
part GNE 112 K - B

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DRAWN BY: Martine Tyler
SCALE: 1:3,000
DATE: 15th May 2015
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Proposed extinguishment of public footpaths
Public Footpaths
GNE 106/108/110/112
Okle Clifford Farm
Parish of Newent



KEY:

Footpaths to be stopped up

A - B (part GNE 106) ———

H - C (part GNE 108) ———

F - B (part GNE 110) ———

K - B (part GNE 112) ———

Footpaths proposed to be stopped up by separate order

B - C - D (GNE 106) ○ ○ ○

I - H (GNE 108) ○ ○ ○

G - H (GNE 109) ○ ○ ○

Footpaths proposed to be created by separate order

D - E - F (GNE 106) - - -

I - J (GNE 108) - - -

G - E (GNE 109) - - -

Unaffected footpaths ○ ○ ○

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