



Order Decision

Site visit on 13 February 2018

by Sue Arnott FIPROW

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

Decision date: 20 February 2018

Order Ref: ROW/3175839

- This Order, dated 15 July 2016, is made under Section 119 of the Highways Act 1980. It is known as the Hertfordshire County Council (Ayot St Peter 25) Diversion Order 2016.
- The Order proposes to divert a section of Public Footpath No. 25 at Brick Kiln Cottage in Homerswood Lane, Ayot St Peter, as detailed in the Order map and schedule.
- There was one objection outstanding when Hertfordshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: The Order is confirmed with a modification as set out in the Formal Decision below.

Procedural matters

1. I visited the site on Tuesday 13 February 2018 accompanied by Mr P Gill (the applicant), Mr Harrison (his agent) and Mr J Gill, together with Mr Harbour-Cooper and Mr Goldsmith on behalf of Hertfordshire County Council (HCC), and Mr M Westley (the objector) representing East Hertfordshire Footpaths Society.
2. One of the two main grounds of Mr Westley's objection concerns the validity of the plan attached to the Order to supplement the Order map. I address the issues raised in relation to this point under 'Other Matters' below.
3. Two additional representations were considered by HCC, one in support being received before the statutory period for receipt of objections and one received afterwards. The latter expressed concerns similar to those outlined by Mr Westley and the matters it raised have therefore been addressed through my consideration of his objection.

Main Issues

4. The Order was made under Section 119 of the Highways Act 1980. This requires that, before confirming the Order I must be satisfied that:
 - (a) it is expedient in the interests of the owner¹ of the land crossed by the footpath that the right of way in question should be diverted;
 - (b) the new termination point of Footpath 25 (being on the same highway) is substantially as convenient to the public;

¹ I note that the Order states it is made "in the interests of the land crossed by the footpath ...", omitting the crucial word "owner". This mistake has not been highlighted by any party and it seems to me unlikely that any prejudice will have resulted from the omission when the intention of this Order is otherwise perfectly clear. Nevertheless, to avoid any misunderstanding in future, I propose to modify the Order to add the words "the owner of" (the land...).

- (c) the new route to be provided will not be substantially less convenient to the public; and
 - (d) it is expedient to confirm the Order having regard also to (i) the effect of the diversion 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 other land served by the existing path and the land over which the new path would be created together with any land held with it, having had regard to the provision for compensation.
5. Further, in determining this Order I am required to have regard to any material provisions in any rights of way improvement plan for the area although no particular issues have been raised in this case. I am also mindful of the requirements of the Equality Act 2010.

Reasons

6. An application was first made to divert Footpath 25 in 2001. Sometime before that Mr Gill set out on the ground an alternative footpath over his land and a strip he purchased from a neighbour for the purpose (now forming part of the section shown on the Order map as Y-D). This was (and still is) clearly marked as a permissive footpath.
7. Members of the public have therefore had the opportunity to use this 'new' route between points A and Y for many years, and have done so without complaint, although the definitive footpath X-Y remains open and available.

The interests of the owner of the land

8. The proposed diversion seeks to remove the section of Footpath 25 (X-Y) from close proximity to Brick Kiln Cottage. Whilst the public cannot walk immediately beside the windows of the house even at the closest point, it seems clear that the property will enjoy greater privacy, both inside and out, if the path is relocated as proposed. As a result the owner will benefit from the diversion.
9. Mr Westley challenges the degree to which "*most users find it uncomfortable to walk so close to a private house*" as asserted by HCC. Indeed HCC has pointed out that some people have referred to the current route as feeling "*intrusive*" although there is nothing to prevent people walking X-Y.
10. There is little doubt that it would be expedient to divert this footpath in the interests of the landowner but I recognise there may also be advantages to *some* members of the public in avoiding this residential property.

Convenience to the public

11. The statutory test requires a comparison between the present and proposed routes. However, the legislation does not require positive benefits for the public, only that the diversion should not be substantially less convenient.
12. In assessing the relative convenience of the existing and alternative paths here I have considered a variety of factors, especially the change in length, width and character in the context of the role Footpath 25 plays in the local network.
13. I firstly note that despite being approximately 90 metres apart, there is no dispute that point A represents an equally convenient point of termination as the present point X. Both points lie on Homerswood Lane, this having been rendered a cul-de-sac to the south by works to the A1(M) in 1939. To the

- north, Homerswood Lane joins Whitehill, another public ("Quiet") road, where the nearest definitive footpath² is at least 600 metres further north. In effect the proposed new route would reduce the length of road walking necessary to connect with other public paths. It seems to me that point A thus provides a *more* convenient point of termination, not merely one that is substantially as convenient.
14. The existing section of Footpath 25 X-Y is approximately 90 metres in length; the proposed new route A-B-C-D-Y is 155 metres or so. However, when considering the overall change to the route length between points Y and A, the public would need to walk around 25 metres less. I could not regard that as an inconvenience, let alone a substantial one.
 15. One other possible advantage to derive from the proposed route would be the lack of any gates or stiles limiting public use of the path. Although no such features are recorded on the definitive statement for Footpath 25, pedestrian gates exist at points X and Y (although the lawfulness of both is not certain).³
 16. Footpath 25 was originally a private road within the former brickworks, leading from Homerswood Lane to the old station yard located at its western end. This was a road of vehicular width and is clearly shown on the old Ordnance Survey (OS) maps submitted by Mr Westley, these dating back to 1881. At both ends are solid concrete posts demarcating the vehicular entrance with the pedestrian gateway to the north side. The slightly raised surface of the old road can be traced on the ground although it is now grassed over with the exception of the part within the immediate curtilage of Brick Kiln Cottage which is block-paved.
 17. There are two main points raised in Mr Westley's objection which arise from a comparison of the present and proposed routes. The first concerns the width and the second relates to the gradient, both potentially having consequences in times of flood.
 18. The present route is generally straight, and more or less level. Even where it has a grass surface, this is fairly robust on account of following the old gravelled road beneath. There is no definitive width recorded for Footpath 25. It is argued by Mr Westley that the usual presumption must apply insofar as it should be acknowledged that, in the absence of evidence to the contrary, as the public has been at liberty to use the full width of the road, the full width is therefore presumed to have been dedicated by the landowner⁴. In his submission the width of Footpath 25 is at least 4 metres⁵.
 19. Consequently it is argued that the width of the proposed new path, described as varying between 2.1 and 4.5 metres⁶ and clearly narrower than the present route, is less convenient to the public. However I do not accept that is an inevitable conclusion, but even if it was, the question is one of degree: is the new route *substantially* less convenient to the public?

² Ayot St Peter Nos 10 and 22

³ Only the former is known to have been in situ when the definitive map was first prepared and thus may have a lawful basis as a limitation. The gate at point Y was installed by Mr Gill at least 15 years ago. However it is not for me to determine whether these are lawful limitations.

⁴ The case of Attorney-General v Esher Linoleum Company [1901] 2 Ch. 647 is referred to.

⁵ Again, it is not for me here to determine the legal width of Footpath 25 (although I am inclined to agree with Mr Westley on this point).

⁶ Aside from three pinch points where passage is narrowed by mature trees, measured during my inspection as 1.98, 1.6 and 1.3 metres.

20. The gradient of the new footpath is highlighted by Mr Westley. He comments: "A-B-C-D has several undulations down to a sump at B".
21. On the OS base used for the Order map the old pits associated with the former brickworks are visible. These wind around an area mostly to the north of the Order route but parts affect the proposed path A-B-C-D. These ditches and hollows were pointed out during my inspection and I consider Mr Westley quite correct in describing the route as having 'undulations', the lowest point being in one particular dip around point B.
22. The exact gradients of this section have not been precisely measured but I can appreciate that the slopes may be more difficult to walk for people with mobility issues, albeit they are fairly gentle. I would regard this change in gradient as an inconvenience to be weighed in the balance although not a substantial one, given the rural context of the path.
23. Mr Westley is especially concerned about the proposed new route becoming muddy, at times flooded, and consequently needing a greater width between the fences enclosing the path so as to enable people to get around surface problems.
24. It was apparent on site that Mr Gill has undertaken a great deal of work to engineer a reasonably level path dressed with a crushed stone to provide a satisfactory walking surface along the proposed route. The footpath is fenced on both sides so that, apart from the curved section B-C-D, the width between boundaries is little more than the 2.1m proposed as the public right of way.
25. Objectors are concerned that encroachment of vegetation over time, and the collection of water in the hollows leading to muddy puddles, will restrict the public's ability to walk the route, exacerbated by the inability to get around these problems because of the restrictions of the fencing. Further there is concern that in future the fences may be altered so as to be close-boarded and higher, preventing views into adjacent woodland and creating a tunnel effect.
26. Having carried out my inspection of the proposed footpath during the winter months and noted the terrain, I am not convinced that flooding is likely to be a problem here or that surface drainage in the hollows will inevitably result in pools of standing water such as to cause a serious challenge to passage along the path. As it stands at present the surface provided is perfectly acceptable and, as the highway authority, HCC is satisfied it is adequate for the purpose; further the authority has not raised any concerns about future maintenance liability.
27. As for the width to be provided, I note Mr Harrison's submission that guidance published by the Fieldfare Trust⁷ recommends a minimum useable width of 1.2m to enable two people to walk side by side and 2.0m to allow for "free movement of two-way traffic by all pedestrians (including wheelchair users and double pushchairs)". The Order records the proposed new route as 2.1m widening to 4.5m at the bend.
28. It is quite clear that the proposed route would, for most of its length, be narrower than the width ostensibly available to walkers along X-Y. However it seems to me that the alternative path would be slightly more convenient in

⁷ The Countryside for All Good Practice Guide (2005) published by the Fieldfare Trust

some respects and slightly less in others. Overall, balancing the shorter length and reduced road-walking against the restricted, but adequate, width between fences, and undulations in the surface, I conclude that the proposed new route would be less convenient to a degree for some but not substantially so.

Public enjoyment

29. The present and proposed routes are rather different in character. Whilst X-Y has a quite open aspect, passing along the access drive of Brick Kiln Cottage and through its garden, A-Y is confined between fences, albeit possible to appreciate views through the woodland on both sides. Whilst some people are uncomfortable walking through residential land with a 'private' feel to it, others have no such concerns. One local resident expressed her preference for the proposed route; indeed it appears she has used it for several years. HCC considers the route through the trees to be "*a more attractive rural walk in keeping with the general area*" than the driveway shared with parked cars. Whilst I do not disagree with that view, I recognise that 'enjoyment' is subjective and, to some extent, a matter of personal preference. Even so, the slight inconvenience I have accepted above does not necessarily diminish enjoyment of Footpath 25.
30. In the context of the path as a whole, it seems to me unlikely that the substitution of the proposed A-B-C-D-Y for the length that would be diverted (X-Y) would have an adverse impact on the public's enjoyment to any significant extent.

Other considerations

31. Compensation issues have not been raised as being relevant here and no adverse effects arising from the diversion on any of the land concerned have been drawn to my attention. The owner of the land affected by the proposal is the applicant and clearly supports the Order.

Whether it is expedient to confirm the Order

32. In reaching a final conclusion on the expediency of this diversion I must weigh the advantages that would accrue to the landowner in whose interest the Order is made against any disadvantages that may result for the public whilst recognising there could also be some benefits for path users. Overall, taking into account all relevant factors noted above and those raised by all parties, I conclude it would be expedient to confirm the diversion proposed by this Order.

Other Matters

33. Mr Westley submits that the Order is not in the form prescribed in the Public Path Orders Regulations 1993 (the Regulations). He highlights the plan attached to the Order map entitled "Inset Plan" which is clearly marked "Not to scale". This shows (at a larger scale than the 1:1250 Order map) the proposed curved section B-C-D. On this plan the path is shown in grey shading and the widths at B and D are labelled "2.1 metres" and "4.5 metres" at C. Mr Westley argues that labelling the inset "not to scale" renders it worthless.
34. HCC has explained how its internal guidance advises that where inset plans are used to illustrate areas in greater detail at scales greater than 1:1250, then it should be labelled 'not to scale' and have no gridlines unless it has been surveyed at the scale shown. In this case the purpose of the inset plan is to

- show how the width changes around point C, following advice in Defra Circular 1/09⁸ which states that the map contained in an order should provide sufficient detail to show the effect of the proposed change.
35. Firstly I note that the Regulations⁹ require a public path order to be "*in the appropriate form set out in Schedule 1 to these Regulations or in a form substantially to the like effect*". Thus the form is not expected to be a straight-jacket that cannot be varied if circumstances dictate changes.
 36. The Regulations continue¹⁰: "*The map required to be contained in an order shall be on a scale of not less than 1:2500 or, if no such map is available, on the largest scale readily available.*"
 37. It is not disputed that the main Order map, being drawn at 1:1250, is at a valid scale and is fully comprehensive in terms of identifying the present and proposed routes of Footpath 25.
 38. The Public Path Order Regulations do not appear to anticipate the inclusion of an inset plan, yet the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 accept the principle, explicitly stating¹¹ that "*where the surveying authority wishes to show on a larger scale any particulars required to be shown on the map, in addition, an inset map may be used for that purpose.*"
 39. In a letter sent on 12 February 2007 to all order-making authorities in England, Defra offered non-statutory guidance on the matter of recording widths in orders. Where the width of a path is to vary along its length, the advice advocated reference to a shaded area on a plan attached to the Order to demarcate the extent of the right of way (although it was silent as to its scale).
 40. There is no dispute that the intention of this inset plan is in accordance with current guidance or that it seeks to identify in detail the extent of the proposed new footpath between points B, C and D, all of which appear on the Order map.
 41. The question raised by the objection is whether or not the inclusion of this 'not to scale' inset plan somehow invalidates the Order and/or renders it misleading. If it is simply "worthless" it can be ignored.
 42. In my view it is none of these things. When interpreted alongside the Order Schedule and the main Order map, it is quite clear that the inset plan is intended to explain in greater detail the variable width between the three points at the curve. There is no ambiguity here. The distances between the points is recorded in the Order Schedule and the position of the points is clearly visible on the Order map with grid references for each noted in the Schedule. Whilst the inset is quite obviously a supplement to the main Order map, I see no difficulty in this being diagrammatic if it assists in the interpretation of the Order.
 43. That is not to say that it would not have been better to include the scale if it is known. However, having considered the argument carefully, I reject the concerns expressed by objectors as regards the inset map in this case.

⁸ At paragraph 5.14

⁹ At paragraph 2 (1)

¹⁰ At paragraph 2 (3)

¹¹ At paragraph 2

Conclusion

44. Having regard to the above and all other matters raised in the written representations, I conclude that the Order should be confirmed subject to the minor modification noted at Footnote 1 above.

Formal Decision

45. I confirm the Order subject to the following modification (which does not require further advertisement):

- In line 3 of the Order recitals, after "*interests of*" insert "*the owner of*".

Sue Arnott

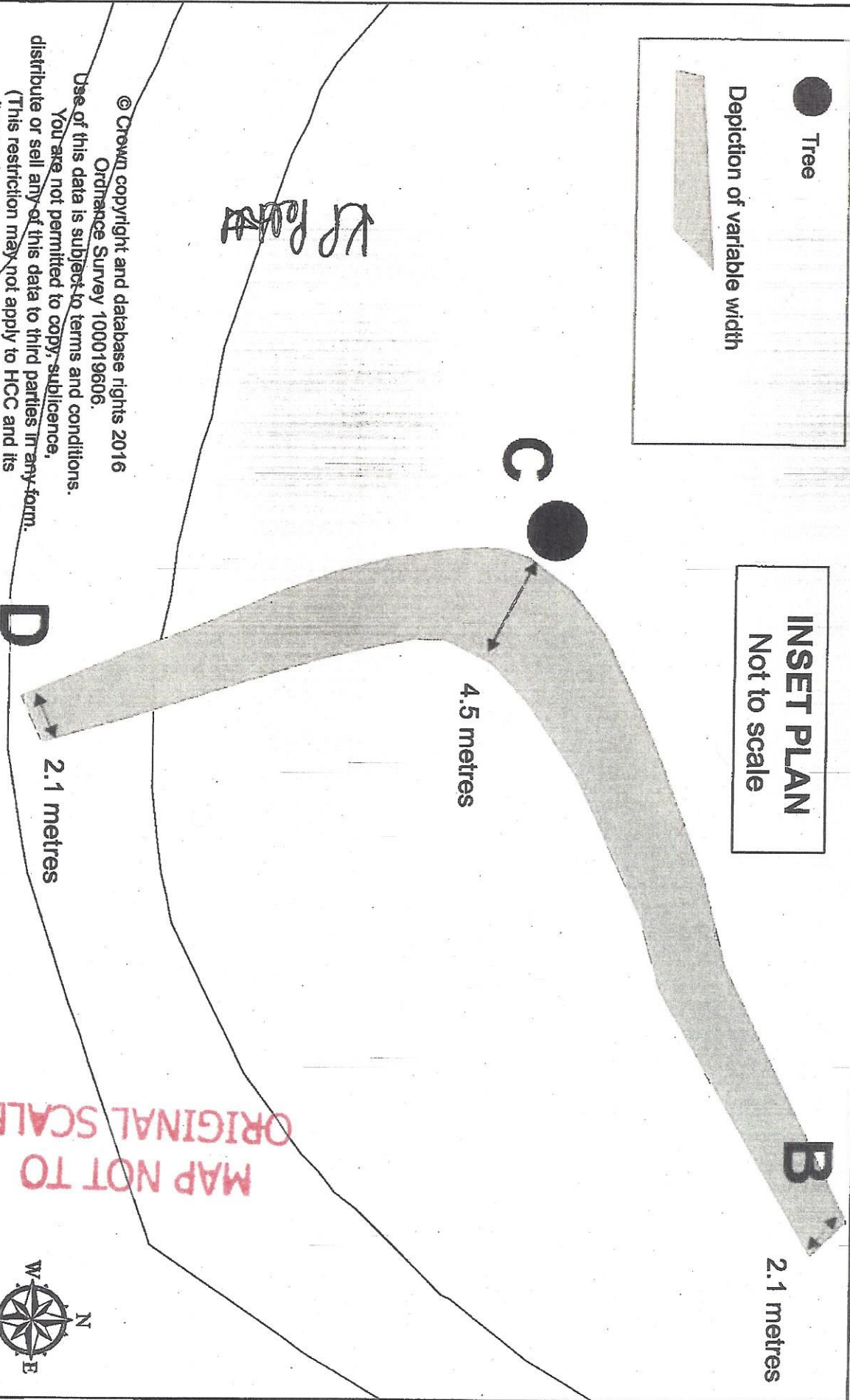
Inspector

THIS PLAN FORMS PART OF THE HERTFORDSHIRE COUNTY COUNCIL
(AYOT ST PETER 25) DIVERSION ORDER 2016

● Tree

Depiction of variable width

INSET PLAN
Not to scale







MAP NOT TO ORIGINAL SCALE



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 Existing footpath
 Footpath to be stopped up
 Footpath to be created
 Parish boundary

0 5 10 20 30 40 Scale 1:1,250
Metres

Appears on Definitive Map sheet 57

MAP NOT TO ORIGINAL SCALE



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K.P. Pickett