
Order Decision

Site visit made on 26 February 2018

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

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

Decision date: 28 March 2018

Order Ref: ROW/3176226

- This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and is known as the Staffordshire County Council Public Path Diversion Order 2007 Public Footpath No 29 (part) Biddulph Parish.
- The Order is dated 10 May 2007 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Staffordshire County Council (the Council) submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Background to the Order

1. FP 29 runs eastwards from Woodhouse Lane across fields to the south of Sprinkside Farm, to Under the Hill Road. It is a well-used path that provides an alternative to walking the roads between Biddulph and Biddulph Moor. The Order if confirmed will divert a short section of the route that runs through a dry stone walled cutting and tunnel.
2. The tunnel comprises several large slabs of local stone laid across dry stone retaining walls. It was closed temporarily in 2004 when a retaining wall collapsed. English Heritage commissioned a structural survey of the tunnel in 2005 as it was feared another wall might suffer the same fate. It found that the footpath at this location is also the course of a stream/run off from the fields. This water and the run off from properties and the road above the path, combined with the footpath use, was considered partly responsible for eroding the tunnel base and undermining the walls. A specification was provided to repair the structure and provide drainage works to make it safe and allow walkers to continue to use the tunnel. However no works were carried out, a permissive route, north of the tunnel was secured with the landowner's consent and the tunnel entrances were fenced off in the interests of public safety.

Reasons

3. Section 119 of the 1980 Act requires that, before confirming the Order, I should be satisfied that:
 - a) The diversion is expedient in the interests of the owner, lessee or occupier of land crossed by the path or of the public;
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- b) the new route will not be substantially less convenient to the public;
 - c) it is expedient to confirm the Order having regard to its effect:
 - (i) 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 the land served by the existing path and the land over which the new path is created together with any land held with it, having regard to the provisions as to compensation.
4. In determining whether or not to confirm the Order, section 119 (6A) of the 1980 Act requires that I consider any material provision of a rights of way improvement plan (ROWIP) of any local highway authority whose area includes land affected by the Order.
5. I also need to consider the impact if any of the proposed diversion on the needs of agriculture and forestry, biodiversity and natural beauty of the area.¹

Preliminary issue: whether disrepair of tunnel is a temporary circumstance

6. Were an extinguishment order made, s118(6) of the 1980 Act requires that any temporary circumstances preventing or diminishing its use by the public shall be disregarded. It is generally accepted that a fair comparison between existing and proposed routes can only be made by applying this principle to orders made under s119. The question that arises here is whether the state of disrepair of the tunnel section of the footpath, that prevents the public from using it, is a temporary circumstance or, due to lack of funding or ability to enforce the repairing duties of the owner, is likely to endure permanently.
7. The Council as order making authority states that it has, with other parties, looked to see whether there was any funding available to repair and preserve the tunnel. It states that it cannot spend its own budget on maintenance where liability for its upkeep rests, as appears to be the case here, with the landowner at Sprinkside Farm. The Council asserts that the owner cannot afford the costs of repair but it has not provided any information that would explain how it has arrived at this conclusion. Indeed no information as to the estimated costs of the repairs to the tunnel has been provided. A letter from the owner merely states "we cannot afford anything". It also highlights health issues among family members, with which one has the utmost sympathy, but the Council has given no information as to discussions with the owner or any attempts to relate the costs of repairs to the likelihood of them being defrayed by the owner, either now or over time. The Order was made in 2007 but it is unclear just exactly what efforts were made since then to secure funding.
8. The Council asserts that the long term stability of the tunnel cannot be guaranteed. The only technical evidence supplied is from English Heritage who, in addition to specifying repairs to enable continued use of the tunnel, also have an "ideal structural scenario", to open out the tunnel so that the banks on either side are flattened to a safe slope, thus destroying the feature but retaining the line of the existing footpath. There are no costings for this apparently simpler option, or anything to suggest the Council has considered it separately. In any event as I read the specification for repair and continued

¹ S121 (3) of the 1980 Act; s40 Natural Environment and Rural Communities Act 2006; s11 Countryside Act 1968

use of the tunnel, I find it practical and well thought out with no suggestion that if implemented, the tunnel would be inherently susceptible to failure.

9. A margin of discretion rests with the Council as highway authority as to how to exercise its duty to assert and protect the rights of users of the highway in relation to ways that are in disrepair. It has powers to maintain a right of way whether or not maintainable yet if, understandably, it is unwilling to exercise them, then greater scrutiny should be paid to the exercise of its discretion to promote a diversion order rather than to enforce the repairing duties of the landowner. The lack of robust information that could persuade me that the latter course of action would be ineffective prevents me also from concluding that the disrepair has to be viewed as a permanent circumstance. Therefore I will consider the existing path as available to its full legal extent and properly maintained for those with rights to use it.

Whether it is expedient, in the interests of the owner or occupier of land or of the public that the footpath in question should be diverted

10. The owner of the land over which the section of FP 29 proposed to be diverted, supports the Order. It is understood that maintenance liability for the footpath, which would include the tunnel rests with the owner. Confirmation of the Order would remove liability as far as concerns repairs to the structure of the tunnel.
11. I conclude that it is expedient, in the interests of the owner of land crossed by FP No 29 that the line of the path should be diverted as proposed.

Whether the proposed footpath would be not substantially less convenient to the public

12. The proposed diversion would follow the line of the permissive route, from point A on the Order map in a westerly direction for 45m, 2m north of the existing route, via two flights of steps already in situ, to join² with the existing route of the footpath at point B. The diversion would add some 3m compared to the length of the existing route.
13. I found FP 29 easily accessible from both termination points. The terrain was that of a rural path with no surfacing. The snow that lay on the ground made the going difficult but otherwise the route was easily negotiated apart from the section through the tunnel that remains closed off. The permissive route has been used by the public for several years, including the wooden flights of steps at both ends, each having about 5 or 6 steps with a fairly steep gradient. It was said that the wood was beginning to deteriorate, however I find it to be adequate for the purpose. The Council as highway authority has not raised any concerns about future maintenance, liability for which would fall to it since the steps would be part of the newly created footpath.³
14. The steps would be inconvenient to some members of the public who are less bodily abled. However the specification of repairs to the tunnel also provided for steps at both ends so that it could be walked more safely, albeit that their position and gradient were not yet determined. A change in gradient would be an inconvenience but not a substantial one, given the rural context of the path.

² The Order uses the neologism "junct", a verb that I apprehend has not yet been fully accepted into mainstream English language, but the Order is none the worse for that.

³ See Highways Act 1980, section 36(2)(d) renders maintainable at the public expense "a highway, being a footpath...created in consequence of...a public path diversion order"

15. The extra distance required to walk the route and its slight deviation from the original are inconsequential. It is undisputed that the tunnel is unsafe without rebuilding work, however as discussed I disregard temporary circumstances preventing or diminishing its use by the public. That said, there are likely to be at least some users who may find it more comfortable to walk above ground than through a tunnel. Taking account of all the above factors, I find that the proposed diversion would not be substantially less convenient to the public.

Whether it is expedient to confirm the Order having regard to:

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

16. The tunnel and the adjacent archway are considered to be landscape features of historic local, but not national importance. They are said to be associated with James Bateman's mid 19c development of Grange Estate that included a woodland walk giving more convenient access towards Biddulph Moor.
17. I am sure many footpath users would, for a variety of reasons enjoy the intrigue and experience of walking through the tunnel. The diversion would deprive them of this opportunity. However as far as concerns the enjoyment to be derived from the path taken as a whole, this would not be significantly diminished, including for those who prefer to walk in the open air in a rural setting rather than underground. The open air section of the walk would be lengthened, and to that extent it would enhance views of the countryside or other features of interest visible from ground level.

The effect the coming into operation of the Order would have with respect to the land served by the existing path, account being taken of the provisions as to compensation

18. There is no evidence that the Order would have, in this respect, any material effects separately identifiable from those considered above in relation to the other requirements of s119 of the 1980 Act.

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

19. There is no evidence before me that the proposed diversion would have any detrimental impact on the land over which FP No 29 would run. Compensation under s28 of the 1980 Act is unlikely to be an issue in this case.

Summary

20. I conclude that it would be expedient to confirm the Order taking into account the effect the diversion would have on public enjoyment of the path as a whole, on land served by the existing and proposed paths and on any land held with it.

Other matters

21. There is no provision in the ROWIP that has been drawn to my attention that would affect the section of the path proposed to be diverted.
22. The land crossed by the proposed diversion is not designated as being of special importance in a national context and is not covered by any other local designations aimed at conserving habitat types or species diversity. There is no evidence that confirmation of the Order would impact on biological diversity.

Conclusion

23. Overall, taking into account all relevant factors noted above and all other matters raised in the written representations, I conclude that it would be expedient to confirm the diversion proposed by this Order.

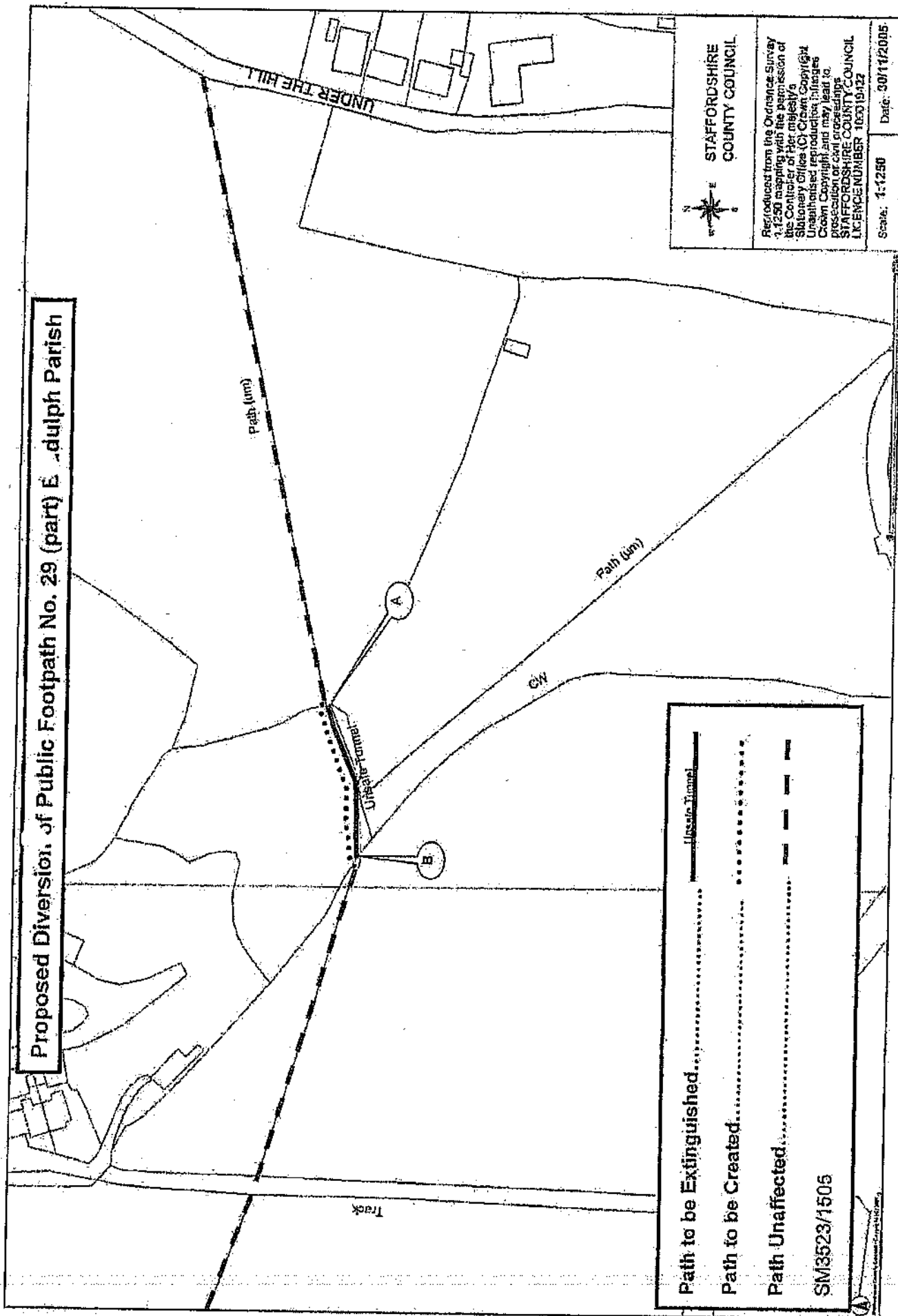
Formal Decision

24. I confirm the Order.

Grahame Kean

INSPECTOR

Proposed Diversion of Public Footpath No. 29 (part) E - Lulph Parish



Path to be Extinguished.....
Path to be Created.....
Path Unaffected.....
 SM3523/1506

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 COUNTY COUNCIL
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