
Order Decision

Site visit made on 10 April 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: 27 June 2018

Order Ref: ROW/3178762

- This Order is made under Section 257 of the Town and Country Planning Act 1990 and is known as the Cumbria County Council (Footpath No 431024 Parish of Whitehaven) Public Path Diversion and Definitive Map and Statement Modification Order 2017.
- The Order is dated 21 March 2017 and proposes to divert the public right of way as 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, once the provisions relating to the diversion come into force.
- There were two objections outstanding when Cumbria County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed

Procedural Matters

1. I made an accompanied site inspection, taking account of the written representations.
2. The section of path proposed to be diverted has been closed by a temporary traffic regulation order. Although the existing route is not available for use its line was ascertainable on my site visit such that a comparison could be made between the existing and proposed routes.

The Main Issues

3. For the Order to be confirmed, s257 of the Town and Country Planning Act 1990 ("the 1990 Act") requires that I must be satisfied that it is necessary to divert the footpath to enable development to be carried out in accordance with the grant of planning permission already issued but not yet implemented.
4. The merits of the planning permission granted for the development are not relevant and, since the permission in question remains valid and not legally challenged, nor is the consultation process that preceded it.
5. If I were to find it necessary to divert the path to allow the development to proceed, confirmation of the Order is still discretionary. In exercising this discretion I must consider the disadvantages or loss likely to arise from the diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing public right of way, and weigh these against the advantages of the proposed Order.¹

¹ Paragraph 7.15 of Department for Environment, Food and Rural Affairs Circular 1/09

Reasons

Whether the diversion of part of footpath 431024 is necessary in order to allow development to take place

6. Planning permission Ref 4/16/9014 was granted by a resolution of Cumbria County Council's relevant planning committee on 15 February 2017, for development described in the application as "*Construction of new school building for St Benedicts Catholic High School and Mayfield School with associated sports pitches and facilities including new car park. New service access from Red Lonning (north). Demolition of St Benedict's Roman Catholic school.*"
7. The existing, and proposed diversion of, the footpath lie within the grounds of St Benedict's School, a site with an inverted triangular shape, formed by Red Lonning on its north and west boundary and Moresby Road to the east. These longer boundaries meet at the southerly point, being the tip of the triangle.
8. The permission granted was a full permission with no matters reserved. Several plans were approved as part of the scheme with Condition 3 requiring that the development proceed in accordance with the approved plans, "except where modified by the conditions to this permission".
9. The application referred to two plans in response to the question whether the proposal affected a right of way and if so to provide details on plans/drawings. The first plan cited, IT(16)069_(9-)L001P, appears to have been superceded by "IT(16)069_(9-)L001 Rev PD – Site Masterplan" before permission was granted. The earlier plan contained no reference to the existing or proposed diversion of footpath 431024, and similarly, the revised plan, made expressly subject to Condition 3, omits any reference to the existing or proposed route.
10. The second plan referred to in the application, IT(16)069_(9-)L008P – Access and Security, is expressly referred to in Condition 3. As with both versions of the masterplan it contains no details whatsoever of footpath 431024, contrary to what was claimed in the application.
11. The original statement provided by the applicant for the Order is dated January 2018. It refers to planning permission Ref 4/16/9014 in general terms but does not refer to or append any plans or drawings approved under that permission that show the line of the existing footpath affected by the development. It however states that "it would no longer be possible to walk the route of the existing footpath once the enclosed sports facilities have been completed". To this end it refers to a plan Ref IT(16)069_(9-)L310 PL1. Rev PL1. Yet, whilst the plan shows the relationship between the proposed route and the development, it fails to show the line of the existing footpath.
12. The applicant's statement also refers to a section 73 application, submitted to amend the layout of the scheme. In a lengthy footnote the details of the application are given from which it is apparent that Conditions 3 and 25 are to be amended, including to the layout and area of the sports pitches and facilities. No plans are appended, and the footpath is not referred to in the description of the changes except in noting that the scheme affects public right of way 413024. Also the committee report for the diversion order states that a significant part of the existing path will be built over and so a diversion will be required if permission is granted for the construction of the new school.

13. Turning to the statement of Cumbria County Council as the Order Making Authority (OMA), it explains in general terms the need for the Order in relation to the approved scheme and the existing footpath. In reply to an objector who claims that the Order is unnecessary it is stated that the existing route passes directly over "an area of proposed development". The objector's case includes that the existing footpath already crosses a sports field, and there is no reason why on a site of this size a right of way could not be integrated into the development. However it is not for me to amend the approved scheme.
14. From what I have read and seen the footpath does cross a sports field although it is now churned with mud as a result of the site works currently taking place. It is important to bear in mind that the main issue is not the merits or otherwise of the scheme, but whether it is necessary to authorise the diversion in order to enable the development to be carried out in accordance with the permission. It is established that "necessary" in this context does not mean "essential" or "indispensable", but "required in the circumstances of the case."
15. The development is in progress but has not been completed. It will be achieved in two phases; phase 1 would be the construction of the new school building, new access road and car parking and phase 2 would be the demolition of the existing St. Benedict's School and construction of external sports facilities. When I visited the outside sports facilities were not yet constructed.
16. The report that was considered by councillors before permission was approved, suggests that on completion of the development the existing line of the footpath would be affected "*by the All Weather Pitch, changing rooms and Multi Use Games Area.*" However on the evidence submitted including the plans which I have referred to above, it is not at all clear how any new built form of development such as changing rooms would affect the existing footpath.
17. In view of the difficulty in determining the effect as claimed, of the planning permission on the existing footpath, I have considered the later planning permission Ref 4/17/9016 that was granted on 24 January 2018. It includes a change to the layout of the sports fields. The plans that form part of this permission include IT(16)069_(9-)L001 Rev PL3 dated 26 September 2017, an amended masterplan, but that does not show the existing route of the footpath. I have however been provided with a plan that does show both the existing footpath and the proposed development, Ref IT(16)069_(9-)L012 Rev PB dated 13 January 2017, with an annotation: "Revision to PROW" dated 7 February 2017. This appears to correspond with Plan IT(16)069_(9-)L012 PL3 – Details of footpath diversion, in Condition 1 of the s73 varied permission.
18. A permission granted under s73 of the 1990 Act is a separate planning permission and the developer has a choice as to which to implement. Furthermore there is nothing in principle to prevent a developer electing to continue and complete a development under a later permission rather than the first permission. It would be otherwise of course, where steps taken under a planning permission make it impossible in practice to implement a second permission, where both consents are for inconsistent developments.
19. Therefore, when it is suggested in the context of orders made under s257 that the applicant cannot "mix and match" permissions, the essential point is that the promoters of the Order should make it quite explicit as to what permission or what combination of permissions are being relied upon to make it necessary for the Order to be confirmed. Of course if reliance on the necessity test

involves a physical obstruction it is also helpful if this is illustrated clearly by reference to the relative positions of the line of existing footpath and the new development.

20. Having examined the relevant s73 approved plans they also do not contain any indication of new built form such as changing rooms, being constructed over the line of the existing footpath. However in both schemes, it is possible to identify that the line would be obstructed by a significant lower part of the proposed Rugby League all weather pitch, although it would avoid all other facilities, including the nearby proposed Football Pitch and Rugby League Grassed Pitch, marked respectively as 18 and 22 on the amended masterplan and whose outlines can be seen on the plan IT(16)069_(9-)L012 PL3.
21. Therefore I am not convinced by the applicant's statement that "the proposed development necessitates the diversion, as it would no longer be physically possible to walk the route of the existing footpath once the enclosed sports facilities have been completed." Clearly however, obstruction might otherwise be caused by the school and community sporting events. In addition the site boundary fence would be moved to exclude the new diverted footpath and access to the entire school site will be restricted by 1.8m high security fencing.
22. The objector has pointed out, which appears to be the case, that the route of the proposed diversion will mean that the originally proposed balancing pond in the southern area of the site will be reduced in size, in accordance with approved drainage plans. Nevertheless this goes to the planning merits of the scheme and is not relevant to the criteria to consider in relation to the Order.
23. Other factors referred to by the OMA such as enhancement do not go to the issue of necessity. However the new security fence would be a physical obstruction to the existing footpath, and there would also be a conflict as a consequence of the use of the land on which the improved facilities to be provided for the school and wider community are located. I am therefore satisfied that the Order is required in these circumstances to enable development to proceed in accordance with the grant of planning permission.

The extent of loss and inconvenience likely to arise to the public, or to persons whose properties adjoin, or are near the existing public right of way as a result of the proposed diversion

Impact on members of the public generally

24. The route of the public right of way would be realigned so that it traverses a shorter section of the existing school site which would be outwith the proposed new school boundary. However that would entail a longer walk along Red Lonning and Moresby Parks Road. The new route would be closer to traffic but include a section inside the boundary, parallel to Moresby Park Road. I have no reason to doubt that any section of the diversion route would not provide a safe passage for users.
25. The proposed diversion would be slightly inconvenient to some members of the public who use the footpath to cross the grounds of St Benedict's School from Moresby Road to Red Lonning, rather than having to use the proposed new route which skirts the boundary of the school before traversing it further south. However the extra distance would not be significantly inconvenient.

Impact upon persons whose properties adjoin or are near the footpath

26. The land crossed by the current and proposed footpaths is in the ownership of the applicant for the diversion; there are no other properties adjoining or near to the footpath which would be affected by the proposed diversion.

Whether the Order should be confirmed

27. The Order has been made to enable the applicant to implement the planning permission already granted and as varied. It is clear that the scheme approved under Ref 4/16/9014 whether or not varied by the later s73 planning permission, would obstruct footpath 431024. The advantage of the Order is that the planning permission already granted can be carried out whilst providing an alternative route in the form of the proposed diversion that would not result in any significant inconvenience or loss to the public or other persons. Therefore the Order should be confirmed.

Conclusion

28. Having regard to these and all other matters raised in the written representations, I conclude that the Order should be confirmed.




Formal decision

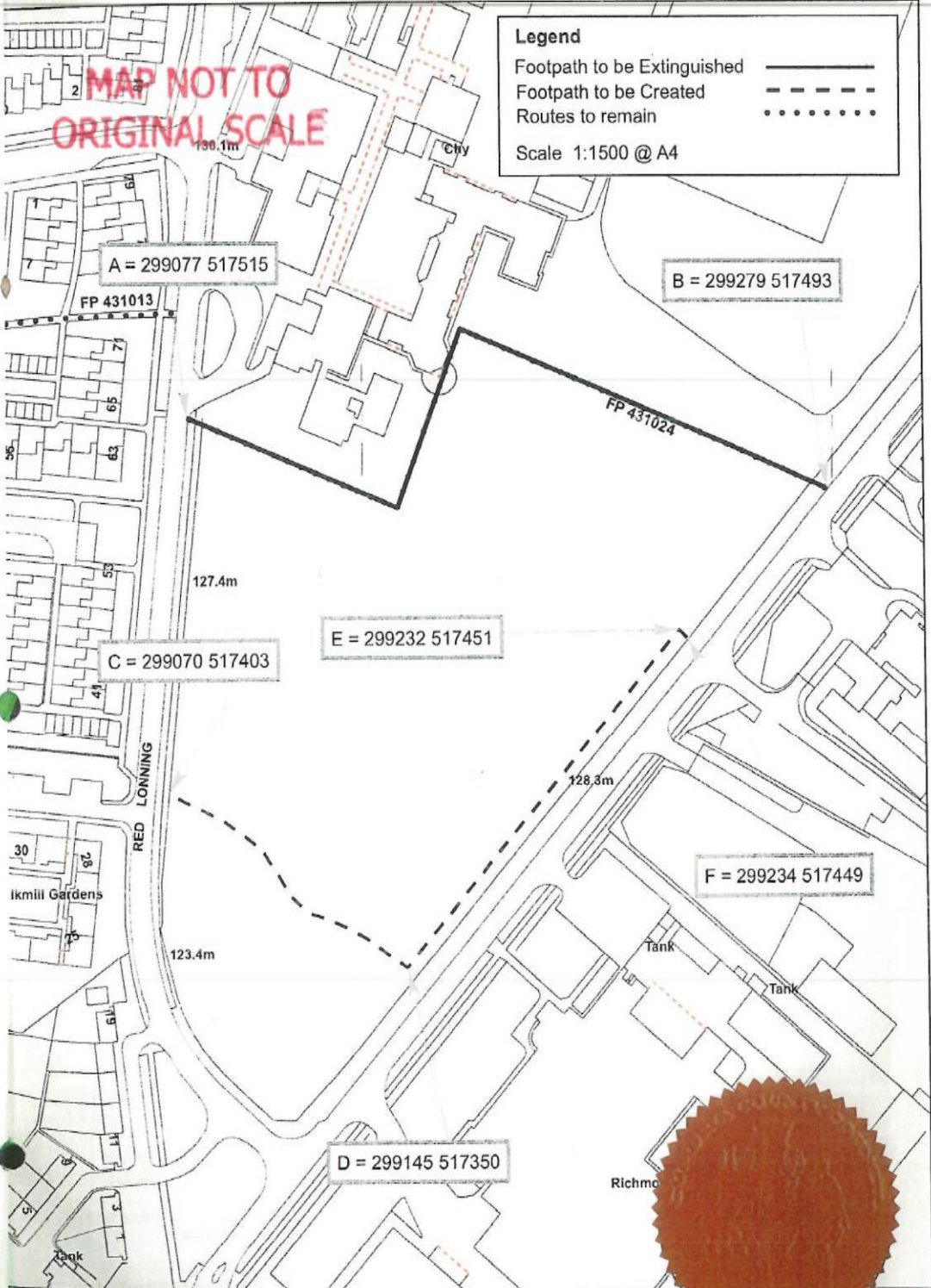
29. I confirm the Order.

Grahame Kean

INSPECTOR

MAP NOT TO ORIGINAL SCALE

Legend
Footpath to be Extinguished 
Footpath to be Created 
Routes to remain 
Scale 1:1500 @ A4



A = 299077 517515

B = 299279 517493

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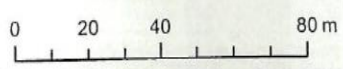
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D = 299145 517350



Town and Country Planning Act 1990 Section 257
Public Footpath 431024 Diversion Order
St Benedicts Campus, Whitehaven



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S. V. S. J.