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## Order Decision

Inquiry Held on 15 & 16 May 2019

**by Helen Slade MA FIPROW**

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

**Decision date: 30 May 2019**

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### **Order Ref: ROW/3206060**

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and is known as the Hertfordshire County Council (Much Hadham 22) Diversion Order 2016.
- The Order is dated 11 May 2016 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were seven objections outstanding at the commencement of the inquiry.

**Summary of Decision: The Order is not confirmed.**

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### **Procedural Matters**

1. I held a public inquiry at Much Hadham Village Hall on Wednesday and Thursday the 15 and 16 May 2019. The inquiry was originally scheduled for one day, but it was clear by lunch time on the first day that we would need a second day. The room we used on the first day was not available the second day, but a slightly smaller room at the same venue was free on the Wednesday and I was able to complete the inquiry on that day.
2. Timetabling for these events is not fixed and I tried to ensure that everyone who wanted to give evidence was able to do so. I was made aware on the second day that one of the witnesses for Hertfordshire County Council ('the County Council') was unable to give his evidence in person and an email from Mr Godfrey explaining his absence was read out to the inquiry by Mr Cuthbert. I am nevertheless able to take his written evidence into account in coming to my decision, and I have done so.
3. I carried out two site visits. The first one was on Monday afternoon prior to the inquiry when I was able to walk the entire length of both the proposed route and the existing walked route.<sup>1</sup> I undertook an accompanied visit at the end of the inquiry, also in the late afternoon. I am satisfied that, although I may not have seen the site at its busiest (i.e. school drop off and pick up) I did get a good impression, particularly on my unaccompanied site visit, of the situation at those times.

### **The Main Issues**

4. It is alleged that the Order has been made under the wrong legislation; and also that it is incapable of being confirmed because the proposed alternative route is already a highway. I must therefore first examine whether or not the Order has been correctly made, and whether or not it is capable of being confirmed. If I conclude that it cannot be confirmed for some legal or technical

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<sup>1</sup> The definitive line is obstructed in part by the school buildings

- reason, then I will not be able to consider the merits of the Order in relation to the criteria under which it has been made.
5. If I conclude that the Order is capable of being confirmed, I must then examine the merits of the proposal in relation to the criteria set out in Section 119 of the 1980 Act.
  6. Section 119(1) states that the first criterion on which I must be satisfied, if I am to confirm an order, is whether, in the interests of the owner, lessee or the occupier of land crossed by the path or way, or of the public, it is expedient that the line of the path in question should be diverted. In this case the Order has been made in the interests of the occupier of the land concerned (i.e. St Andrews CofE Primary School). Section 119(6) provides that I must also be satisfied, if I am to confirm the Order, that the path will not be substantially less convenient to the public as a consequence of the diversion.
  7. Where an order proposes to alter a termination point of the path in question, I must be satisfied that the altered termination is on the same highway or a highway connected to it, and that it is substantially as convenient to the public.<sup>2</sup>
  8. If I am satisfied on the above points, I must then consider whether it is expedient to confirm the Order, having particular regard to the following issues:
    - a) the effect that the diversion would have on public enjoyment of the path as a whole;
    - b) the effect of the coming into operation of the Order on land served by the existing right of way; and
    - c) the effect of the new public right of way on the land over which it is created (or land held with it);having regard also, with respect to b) and c), to the provisions for compensation as set out in Section 28 of the 1980 Act.
  9. To assist in the interpretation of these criteria, I must have regard to the judgement in the case of *R (Young) v Secretary of State for Environment, Food and Rural Affairs* (QBD) [2002] EWHC 119 (Admin) ('*Young*').
  10. I must also have regard to any material provision of the Rights of Way Improvement Plan ('ROWIP') and the guidance contained in Rights of Way Circular 1/09, published by Defra.

## **Reasons**

### ***Whether the wrong legislation has been used***

11. Mrs Logan pointed out that there is specific provision within the 1980 Act for diversions and extinguishments of rights of way which pass through schools.<sup>3</sup> She sought clarification from the County Council as to why those procedures had not been used.

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<sup>2</sup> Section 119(2)(b)

<sup>3</sup> Section 118B (extinguishment) or 119B (diversion)

12. Mr Cuthbert stated that it was because those sections are specifically for stopping up or diversion of paths for the purposes of crime prevention. The criteria are quite exacting and the St Andrews School was not able to provide the necessary level of detail to support such an order being made.
13. Whether or not Mr Cuthbert is correct in his assessment, I must consider the matter in relation to the criteria under which the actual Order has been made. It is perfectly possible for more than one type of order to be appropriate in a given set of circumstances, but I must look at this matter in the light of Section 119 of the 1980 Act as that is the procedure that the County Council chose to use.

***Whether or not the Order is capable of being confirmed***

14. The Order which has been made by the County Council as the Order Making Authority ('the OMA') is a diversion order, which purports to stop-up, or extinguish, an existing public right of way and create a new one in exchange.
15. The objectors, and particularly Mrs Logan, were of the view that the result of the Order as made will in fact be tantamount to an extinguishment order, since the proposed path is already a public right of way. There would thus be an overall loss of a public right of way, rather than an exchange.
16. Mr Cuthbert, on behalf of the OMA, and his expert witness, Mr Walker, considered that there was no evidence to show that the proposed route had already 'acquired' public rights and no application to record it as such had ever been made. Mr Walker did concede, as did Mr Cuthbert, that highway status did not depend upon an application for a Definitive Map Modification Order ('DMMO') having been made, but seemed to consider that the lack of an application suggested that there was no evidence to support such a claim.
17. During the inquiry I heard evidence that the route which the Order proposes to create as a public right of way has been in existence since the new buildings at the school were built in the mid-1970s. Mrs Taylor, who has been connected with the village since 1969, stated that the new buildings went right over the existing Footpath 22 (which she had used as a teenager), so the council made suitable arrangements for a new path running the other side of the school grounds, which she identified as the Order route A-C-D-E. There was some evidence that there may have been a small change in the route that was laid out at some point, but the route of the proposed diversion had been in use, on a daily basis, since at least the 1980s.
18. Mr Westley submitted a copy of an email that he wrote to the County Council in September 2004 in response to a draft diversion order produced at that time. In that email he pointed out that the proposed route (as set out in that Order between Points labelled A and C) had existed on the ground, and been used without let or hindrance, for more than 20 years. It had been maintained at public expense during that time, and had notices prohibiting fouling by dogs. The fine referred to related only to fouling of certain types of highway and other public places. Although no copy of that draft order was submitted to me, there was no suggestion from the County Council that the proposed route at that time was different from the proposed path shown in the current order.
19. Mr Westley also submitted the minutes of a meeting held on 15 May 2006 and headed 'Much Hadham School Meeting'. Mr Cuthbert, as Head of the Rights of

Way Department at the County Council, was present at that meeting, as were Mr Westley, Mr Beney, the local MP, and members of the school staff and governors, including Mrs Steel, the present Chair of the School Governors. The minutes show that Mr Cuthbert gave a brief outline of the legislation involved and the minutes indicate that it included an explanation of the extinguishment and diversion of paths under the 1980 Act legislation. The minutes also show that Mr Cuthbert then went on to explain that the southern route<sup>4</sup> had probably acquired highway rights through 20 years use and therefore could not be used as the diversion route unless new highway was also proposed.

20. At my inquiry, Mr Cuthbert was at pains to point out that the statement he made at that time was conjecture, and that the County Council had no evidence to support that public rights had been acquired. He considered that the reason that diversion order was not made at that time (i.e. 2006) was because of the level of opposition to it, rather than because everyone thought that no order could legally be made.
21. Mrs Logan considered that the statement made by Mr Cuthbert had influenced the way in which people perceived the 'southern route' and that everyone subsequently was entitled to assume that it was a public right of way. Mr Cuthbert continually referred to the proposed route as a permissive path but was unable to provide evidence to support his assertion. There is no evidence of any signs to that effect ever having been in place, nor any restrictions placed upon the use of the route by the public.
22. When challenged as to why he had made no DMMO application, Mr Westley pointed out that his focus is on claiming historical routes which will otherwise be lost due to the impending Deregulation Act provisions, and that since there had been no challenge to the use of the proposed route, there did not appear to be any urgency to claim it, particularly in the light of the expressed opinion of a senior and experienced member of the County Council's Rights of Way staff (i.e. Mr Cuthbert at the 2006 meeting). Mrs Logan pointed out that it would be a reasonable assumption for anyone to make that Mr Cuthbert had known what he was talking about since he was the expert on the subject.
23. The objectors drew my attention to two judgements which they considered to be relevant to this matter. The earliest one is the case of *R v Lake District Special Planning Board ex parte Bernstein* [1982] ('*Bernstein*') to which reference was made in a more recent case involving Hertfordshire County Council itself (*Hertfordshire County Council v SoS DEFRA* [2006] EWCA Civ 1718 ('*Tyttenhanger*'), on appeal from the High Court).
24. In *Bernstein*, the court was tasked with examining the purpose and scope of both Section 118 and 119 of the 1980 Act (before amendment) in relation to a judicial review of a decision by the Lake District Special Planning Board ('the Board') not to make an order under either provision. Acting on the advice of their solicitor at the time<sup>5</sup> the Board had concluded that a diversion order would not have been possible under Section 119 of the 1980 Act because the route onto which the extinguished path would have been transferred in that case was already a recorded public right of way. In his judgement Hodgson J states:

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<sup>4</sup> i.e. the proposed route along the southern boundary of the school

<sup>5</sup> Mr C J Chapman

*"I, myself, have no difficulty in construing Section 119. It seems to me clear that what Section 119 is concerned with is moving the line of an existing path and, therefore, providing a new path in which event the old one can be stopped.*

*...It seems to me that the construction of the Section is really made abundantly clear when one looks at the other sub-sections of the Section.*

*...That sub-section clearly contemplates, in my view, a new path and not an existing right of way.*

*...It is totally inappropriate for a so-called diversion of the path to an already existing right of way."*

25. Counsel appearing for the Board also pointed out that Section 119 assumes that a new right of way is going to be 'made' as any Order has to specify if any part of the new route is already a public right of way by defining the relevant part. Mr Westley pointed out that such a requirement still pertains.<sup>6</sup>
26. Hodgson J dismissed the application for a judicial review on all grounds, including the one discussed above.
27. It seems to me to be perfectly clear that it would be unacceptable to make a diversion order where the whole of the route was already a public right of way.
28. In *Tyttenhanger*, the situation in question was rather different, since the case was really about whether and to what extent a creation agreement could be taken into account as providing an alternative route for a path or paths which were being stopped up. It was a large rationalisation scheme. However, in explaining to the Court of Appeal why the OMA in that case<sup>7</sup> had not made diversion orders, Counsel for the County Council<sup>8</sup> is reported as saying that most of the "new" paths were already in public use and there was a possibility that some had already acquired highway status by long use under Section 31 of the [Wildlife and Countryside] Act [1981]. He submitted that it was not possible for the Council to use a public path diversion order if the proposed new path was already a public path, citing the decision in *Bernstein*.
29. Public rights are not 'acquired' through usage, but the usage of a way by the public is some evidence of its dedication. If such use has continued as of right for a continuous period of 20 years<sup>9</sup>, then a statutory dedication can be deemed to have occurred unless there is evidence that there was no intention during that period to dedicate a highway. At common law, the period of use may be much shorter, particularly if it is frequent and substantial use and there need be no event calling the usage into question. If the actions of the landowner are consistent with dedication, it would be possible to presume dedication had taken place. The test that would have to be satisfied is the balance of probabilities.
30. It is clear to me that the OMA has been aware, for many years and certainly for well over 20 years, that the route proposed as the diversion route in the Order

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<sup>6</sup> Section 119(7)(b) & (c)

<sup>7</sup> Hertfordshire County Council

<sup>8</sup> Mr V Chapman QC

<sup>9</sup> Dating retrospectively from an event which brings the use into question

I am considering may already be a public right of way. At the inquiry there was ample evidence that the route has been in constant, regular and frequent use for many years and, particularly since the construction of the Pre-School facility off Oudle Lane, on a daily basis. Usage by parents of children attending either the Pre-School, or the main school and nursery, gave evidence of using the path every day, and other people confirmed that they used it for dog walks and other recreational use.

31. I accept the arguments of the objectors that no application to add the route to the Definitive Map and Statement has been made because the need to do so was not apparent to them. The route had been provided by the school, was used every day by the public and there had never been any challenge to that use, or any indication that the use being made of the path was by some form of permission. It seems to me that all the elements required to presume that dedication had occurred at common law are present: the path was offered to the public by the landowner and the public used it as of right: openly, without force and without permission.
32. I accept that a very small part of the route, between D and E, has recently been widened and might possibly be construed as being 'new' if one put a great deal of imagination into it. However, it is included in the Order at the same width as the rest of the route, so the 'new' width is not actually part of the Order.
33. I consider it would be perverse to reach any other conclusion than that, on the balance of probabilities, the proposed diversion route is already a public right of way. Consequently, and guided by the decision in *Bernstein*, I agree with the objectors that it is inappropriate to make a diversion order using the southern route (A-C-D-E) as the alternative new route. I therefore consider that the Order I am considering is incapable of confirmation.
34. It is consequently not appropriate for me to go on to consider the merits of the proposal in relation to the requirements of Section 119 of the 1980 since the Order cannot be confirmed.

### **Other Matters**

35. I fully realise the importance to the school and most of the parents of being able to control and monitor access to the school grounds, particularly during the school day. I did consider, and put to the inquiry, the possibility of a compromise which would retain part of the existing public footpath route to permit continued access to the school from Point B on Oudle Lane. This seemed to receive a large measure of positive comments. However, given that the Order cannot be confirmed anyway, I have not given this possibility any further consideration.
36. I also recognise the disappointment and frustration that will be felt by all those involved that the situation will, once again, not have been resolved. Nevertheless, the County Council as OMA is able to try to achieve the desired result using more appropriate procedures and which better meet the relevant criteria.
37. The objectors did suggest that the existing route might be kept open by imposing limitations on its use, but I have not given any consideration to these

proposals as they do not form part of the Order that is before me. In any case, any modification to the Order would be inappropriate, since that would mean proposing confirmation of an Order I have already concluded is incapable of being confirmed.

**Conclusions**

38. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should not be confirmed.

**Formal Decision**

39. I do not confirm the Order.

*Helen Slade*

**Inspector**

## **APPEARANCES**

### FOR THE ORDER MAKING AUTHORITY:

Richard Cuthbert	Definitive Map Team Leader, Hertfordshire County Council
He called Himself Mr M Walker	Public Rights of Way and Countryside Access Consultant
Mrs J King Mrs L Steel Mrs P Taylor	Head Teacher, St Andrews CofE Primary School Chair of School Governors Chair of Much Hadham Parish Council and Local Resident
Mr S Webb Mrs R Green Mrs A Clarke Mr J Harris	Walker and Parent Parent Parent Parent

### OBJECTORS:

Mrs M Logan	Parent
Mr C Beney	Local Correspondent for the Open Spaces Society
Mr M Westley	Secretary of East Herts Footpath Society

### DOCUMENTS

- 1 Statement of Case and appendices submitted by Hertfordshire County Council ('HCC')
- 2 Bundle of Proofs of Evidence from HCC witnesses (including late proof from Mr M Walker)
- 3 Additional pages from a Petition in support of the diversion organised by St Andrews Primary School and submitted by HCC
- 4 Email from Mr J Godfrey submitted by HCC
- 5 Statement of Case and Appendices submitted by Mrs M Logan
- 6 Statement of Case and Appendices submitted by Mr C Beney
- 7 Statement of Case and Appendices submitted by Mr M Westley
- 8 Supplementary Statement submitted by Mr M Westley, with extract of Definitive Map and Statement, and photographs

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THIS PLAN FORMS PART OF THE  
HERTFORDSHIRE COUNTY COUNCIL  
(MUCH HADHAM 22)  
PUBLIC PATH DIVERSION ORDER 2016

- Existing footpath: 
- Footpath to be Extinguished: 
- Footpath to be Created: 

Appears on DM sheet No. 47

Scale 1:1250

19150

19100

19150

19100

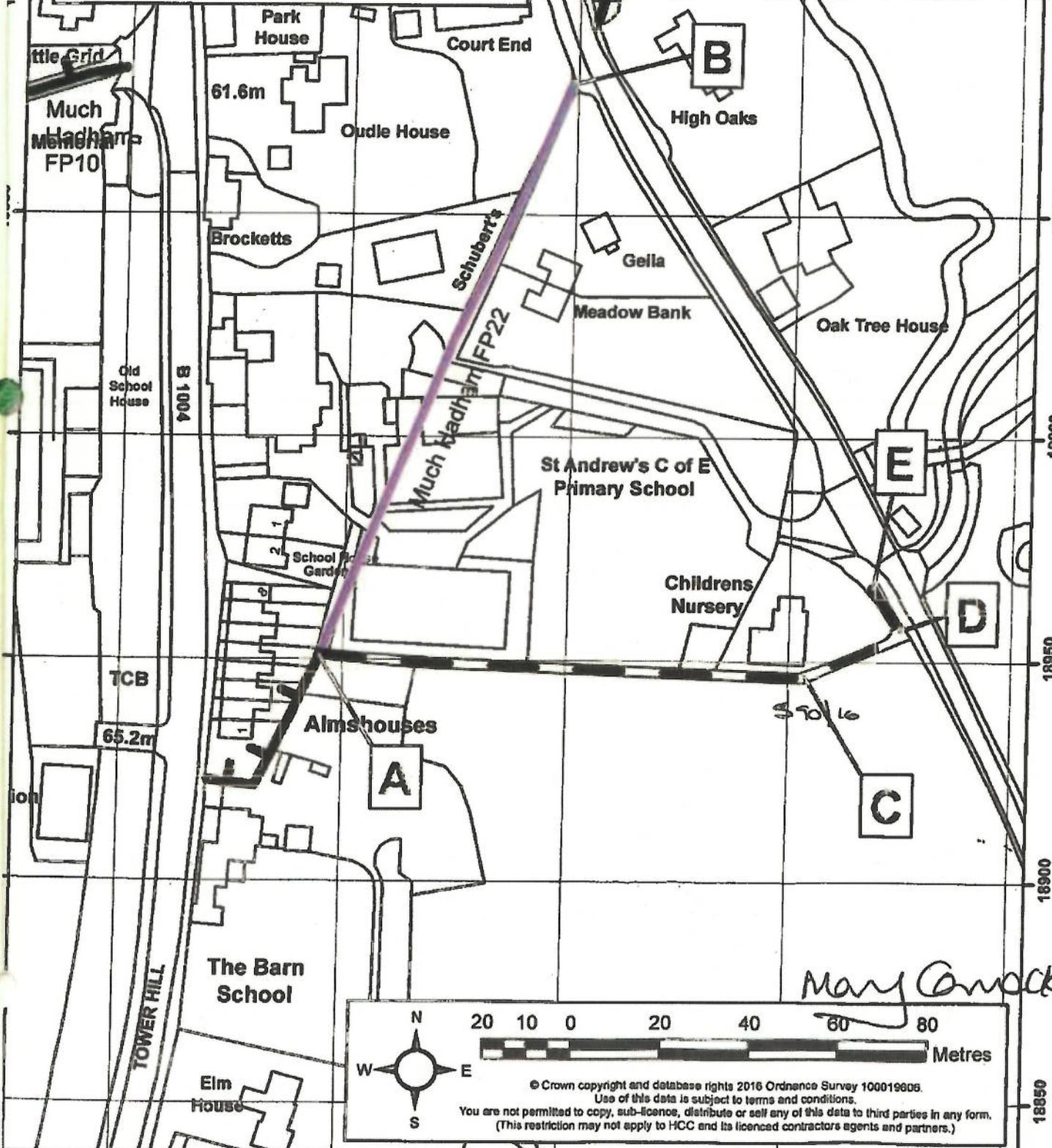
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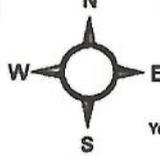
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*Mary Conock*

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