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## Order Decision

Site visit made on 9 September 2019

**by Helen Slade MA FIPROW**

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

**Decision date: 27 September 2019**

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### **Order Ref: ROW/3220607**

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and is known as the Herefordshire Council Footpath HD4 (part) Hope under Dinmore Public Path Diversion Order 2018.
- The Order is dated 6 July 2018 and proposes to divert the public right of way as shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Herefordshire 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 not confirmed**

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#### **Procedural Matters**

1. I undertook an unaccompanied site inspection during the early afternoon of Monday 9 September 2019. There had been rainfall overnight and it continued to be showery. It was therefore wet underfoot.

#### **The Legal Framework**

2. Section 119(1) of the 1980 Act 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 one of the landowners. 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.
3. 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>1</sup>
4. 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;

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<sup>1</sup> Section 119(2)(b)

- 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.

### **Main Issues**

- 5. I must be satisfied that the Order meets the criteria set out in the legal framework above, and also consider whether or not the alternative route is already a highway, as alleged by the objector.
- 6. To assist in the interpretation of these criteria, I have had 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*'), and also to the various judgements referred to by the applicants, Network Rail, and the Council.

### **Reasons**

#### ***Whether it is expedient in the interests of the landowner that the path or way be diverted***

- 7. The diversion order was requested by Network Rail. The current line of Footpath HD4 crosses the railway line which runs between Shrewsbury and Hereford. A formal risk assessment of the crossing has been undertaken using the All Level Crossing Risk Model ('ALCRM') and supplemented by input from the Line Crossing Manager and the new Narrative Risk Assessment procedures. The crossing is identified as having an ALCRM rating of C9, where C represents the individual risk of fatality to a regular user of the crossing, and 9 represents the collective risk to users, trains staff and passengers. The individual risk is ranked A-M, where A is the highest; and the collective risk is ranked from 1-13, where 1 is the highest. There is no record of any incidents at this particular crossing.
- 8. Whilst the ALCRM identifies a level of risk which could be mitigated by taking certain measures to improve the usability of the crossing for pedestrians, this would involve expenditure on the part of Network Rail and would not remove the potential liability for any accident. Network Rail considers that it is preferable to remove the risk of contact between pedestrians and trains entirely and is following a national policy to that effect. It also considers that the cost of mitigation would not be matched by any potential benefits and is unlikely to be considered good value for money. As a body in receipt of public money, Network Rail considers this is to be an important factor.
- 9. The crossing is currently used infrequently by the public, on the basis of a 12-day survey undertaken in March 2017. However, there are apparently plans for housing development in the immediate vicinity of the public footpath and the level crossing, and Network Rail anticipates that usage may therefore increase. The risk would correspondingly increase; and the risk of mis-use may also be greater due to the altered demographics of the area. Studies have shown that children and young adults are particularly vulnerable in this respect.

10. I accept that, although the risk rating of the crossing does not warrant an order under the specific Rail Crossing provisions in the 1980 Act (i.e. a Section 119A order), it is in the interests of Network Rail, as one of the landowners, to minimise or remove the risk of injury to the public as a result of operating its business, and also to reduce its liabilities, both in financial terms and in terms of health and safety. The existence of a nearby grade-separated crossing as an alternative route would provide these benefits to Network Rail.
11. Other landowners have been consulted and are supportive of the application. I therefore conclude that it is expedient in the interests of the landowner (i.e. Network Rail) that the public footpath be diverted.

***Whether the proposed alternative route is already a highway***

12. Mr Newton, the objector, alleges that the proposed alternative route is already a highway. He bases this claim on information contained in the deposited plans, sections and Books of Reference in relation to the planning and construction of the Shrewsbury and Hereford Railway. He has not submitted any of these documents but gives the reference number at the Hereford Record Office (Q/RW/R1A. O/U280). He states that the proposed route is referred to as No. 31.
13. Network Rail has examined the documents concerned and provided evidence to counter Mr Newton's contention. Network Rail submits that the route of No. 31 is, in fact, the route of the present Footpath HD4, and that the proposed route is listed as No. 28, being described as an occupation road. The entry in the Book of Reference shows No. 28 is listed with a private owner (Mr John Arkwright) whilst the entry for No. 31 gives the description of public footpath with the owner as James Vaughan, Surveyor.
14. Mr Newton also claims that the route is already used by the public, but, according to the Council, no application to modify the Definitive Map and Statement has been made, and I have not seen any evidence of one.
15. Mr Newton has not challenged the information provided by Network Rail, and has not submitted any evidence of current usage. I therefore accept that the proposed diversion route in this Order is not currently recorded as a highway.

***Whether the altered termination points of the highway will be substantially as convenient to the public.***

16. The proposed diversion would remove a section of Footpath HD4 and effectively transplant it slightly further north, such that there would be two new termination points. Furthermore, there would be a short spur of Footpath HD4 remaining between the Unclassified road U94001 and Point A on the Order plan; and a continuation of the same numbered footpath commencing at Point B on the Order plan and running to the west. As written, the Order would create a new length of Footpath HD4 running between Points C and D, and not directly connected to the rest of the same numbered footpath.
17. Whilst this situation may result in a rather confusing description in the Definitive Statement, the numbering of paths is an administrative function, and could no doubt be addressed by the Council in its role as Surveying Authority when making the associated legal event Definitive Map Modification Order.

18. Nevertheless, this Order is not a Creation Order and I must apply the legislative requirements to the proposal as presented as a Diversion Order. This means that there are two altered termination points to consider: Point A would become Point C and Point B would become Point D.
19. The objector considers that neither of these two new termination points is as convenient to the public as the present ones. The meaning of the convenience of the new termination point is not set out in the 1980 Act and therefore I should apply a normal dictionary interpretation to it.
20. Taking Point C in the first instance, the termination point of the highway will meet the same unclassified road as the original termination point, only 60 to 70 metres further along that road. There is a footway alongside the road between these two points. In the absence of any information about actual usage of the path, I consider that the altered termination point will be substantially as convenient to the public as the present one.
21. Point D is, in my view, more problematic. Although it links to the same numbered footpath as Point B (HD2) I agree with the objector that it does not deliver the user to the same onward routes directly available to the user at Point B. At my site visit it was evident from the worn routes visible on the ground that, at present, users are more likely to use the continuation of HD4 to the west of Point B, or the route of HD2 to the south of that same point.
22. The route of HD2 between Point B and Point D (which would need to be used to enable the onward use I have referred to above) would seem from the evidence of its condition to be rarely, if ever, used. It is currently overgrown with brambles and tangled vegetation and is, in fact, impassable part way along. Tree branches overhang the path in several places making it very difficult to negotiate. It is also confined between two fences which are in varying states of repair and both of which include barbed wire. The path is rather narrow, being only about 4 feet wide, and is uneven underfoot resulting in a risk of tripping or falling. Given the nature of the fencing this could result in injury. Although a new kissing gate has been installed at Point D, the stile onto the route near Point B is very awkward to negotiate and is not compliant with the current BS standard.<sup>2</sup> At the time of my site visit this situation was exacerbated by the wet conditions which made the stile slippery and, in my view, there was a risk of injury to users due to the design of the stile.
23. No information has been provided to demonstrate that there is an intention to improve the route of the footpath between Points B and D other than the installation of the kissing gate, which has already been put in place. The Council indicates in its submission that the level of maintenance applied to these types of recreational routes is minimal. I therefore assume that the current state of maintenance of that section of Footpath HD2 path is indicative of its usual or normal condition. Given that the main onward use visible on the ground is west and south of Point B, for a user standing at either Point B or Point D it would be difficult to conclude that the termination point at D is substantially as convenient to the user as the termination point at B. At present it would be impossible to get to Point B from Point D for a walker suitably attired for a recreational walk.

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<sup>2</sup> British Standard 5709-2018 recently updated to BS 5709-2019

24. A proposal failing in this particular element of the necessary criteria is fatally undermined and I would be entitled, if not bound, to conclude that the Order should not be confirmed on this basis. It is arguable that it might have been more appropriate to use other procedures to effect this proposed alteration of the footpath (for example a concurrent extinguishment and creation order perhaps) where the necessary criteria would not have included the requirement set out at Section 119(2) of the 1980 Act.
25. However, given that the Order must satisfy the criteria set out in the relevant section of the Act under which it has been made, and given the overall expediency test which must be applied in considering whether to confirm the Order, I intend to examine the remaining aspects of Section 119 to see if there are any mitigating factors which might render it possible to place a more favourable interpretation on the relative convenience of the termination point at Point D.

***Whether the path will be substantially less convenient to the public as a consequence of the diversion***

26. Guided by the judgement in *Young* I need to consider whether, in terms of convenience, matters such as the length of the diverted path, the difficulty of walking it and its purpose will render the path substantially less convenient to the public.
27. The Council compares the lengths of the two routes concerned in relation only to the lengths of the extinguished section of the route and the proposed diversion (i.e a comparison of A-B against C-D). However, I agree with the objector that the comparison needs to take account of the distance a user would have to walk to regain their intended onward route. At present, anyone using Footpath HD4 between points A and B would seem, from the evidence of the worn routes on the ground, to be more likely to continue west or south of Point B, or conversely, to arrive at Point B from the west or the south. Therefore it seems to me that the appropriate comparison is the distance a walker would have to walk to return to (or to return from) Point B.
28. A camera survey was undertaken by Network Rail over a period of 12 days in February 2017 to try to ascertain usage figures. This showed very limited usage by two separate people during that period. At the time of my site visit, however, there was a clear line of use through the grass in the fields between the unclassified road and the railway line. I think it is reasonable to conclude from that evidence that there may be either more than two people using the route, or that the usage of the route is variable and more frequent, perhaps, during the summer months as claimed by the objector. This would not be an unreasonable assumption.
29. For anyone using the existing route, therefore, and wishing to use the most obvious and well-used continuation routes on the far side of the railway (or in reverse of course) it would be necessary to walk at least the distance between Points B-D-C. Depending on their line of approach, the additional distance might or might not also include walking between Point A and Point C,<sup>3</sup> or at least the present junction of Footpath HD4 with the unclassified road and Point C. All of these options are considerably longer than the present choice, and

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<sup>3</sup> I note that, despite the objector's concerns, there is a footway alongside the unclassified road between these points.

- even if a walker approached Point C from the north west wanting to cross the line of the railway and continue to the west or south, the route that would need to be used would be slightly longer than using the existing definitive routes.
30. In terms of the length of the path as a consequence of the diversion, the additional distance might not be excessive, but some people may find it inconvenient, depending on their intended route. Nevertheless, in my view this factor alone would not render the diversion substantially inconvenient to the public.
  31. When considering the purpose of the path and its ease of use, I need to refer to the comments I have made in relation to the termination points of the proposed path. The purpose of the path would, in my view, be somewhat frustrated by the proposed diversion as it would result in the need to use a rather poorly maintained existing right of way (Footpath HD2 between Points B and D) to regain the onward journey most likely to be favoured. The Council appears to have ignored or down-played the need to walk along this section of the alternative route, and made no reference to its current impassable condition. I accept that the proposed route between Points C and D is likely to be easier to walk underfoot than any part of the present route, but I do not consider that this potential advantage completely outweighs the drawback of having to use a less accessible route thereafter.
  32. I note at this point that the Order proposes to record a width for the diverted route of 2 metres. At my site visit it was clear to me that the surfaced area of the road between Points C and D was wider than 2 metres; being approximately 2.7 metres wide. I assume that the intention is that the full width of the surfaced area should be available to the public and therefore that is the width that ought to be recorded if I were to confirm the Order.
  33. I did not meet any vehicles on the proposed diversion route during my site visit, but I acknowledge that there is the potential to do so. This must be balanced, correctly in my view, against the potential of contending with trains travelling at much higher speeds. Many people would be likely to consider that sharing the route with the occasional vehicle travelling at rather lower speeds was not substantially less convenient, but perhaps rather more desirable.
  34. The obvious advantage in terms of the ease of use of the proposed route is the opportunity it provides to pass underneath the railway line, rather than to cross it at grade. Although Network Rail has indicated that the outcome of the risk assessment of the crossing would not have supported an application for a Rail Crossing Order (under Section 118A or 119A of the 1981 Act), it is nevertheless a major part of their case that a grade-separated crossing is preferable under any circumstances. It has advantages for users of the path and users of the railway, in terms of health and safety, and it has advantages for the owner of the infrastructure in terms of liability; both financial and safety. At this stage however I am only considering the question of convenience for the path user.<sup>4</sup>
  35. The present crossing has high stiles on either side (again – not conforming to BS 5709) although in this instance a non-slip surface has been added to the step boards. On the east side of the railway (referred to in official terms as the 'down side') there is a steep ballast embankment with a stairway, fitted with a

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<sup>4</sup> I have already concluded that the diversion is in the interests of Network Rail.

- handrail. The actual rail crossing is not boarded out so users must negotiate the rough and uneven ballast surface, stepping over the rails themselves. The line curves gently to both the north and south of the crossing, resulting in less than ideal visibility, whilst still apparently meeting current safety requirements.
36. Network Rail's assessment refers to the noise of low flying aircraft potentially interfering with the sound of approaching trains. I did not encounter such a distraction, but it was clear to me that the constant, low level noise from the traffic on the nearby A49 was a background distraction which had the capacity to confuse someone listening out for trains.
37. I also note that, despite the alleged the provision of whistle boards, neither of the two trains that I saw using the up line sounded a whistle before reaching the crossing although, bizarrely, there was a whistle board visible beyond (i.e. to the north of and thus after) the crossing. The train approaching on the down line, where the visibility is poorest, did sound a whistle, but nevertheless the approach is rather sudden and the decision point for the user seems very close to the rails.
38. I therefore accept that many people would be anxious about crossing the line in these circumstances and for them it would be better not to have to negotiate an awkward crossing of the lines. Thus the proposed diversion would not, in this respect be substantially inconvenient, but rather preferable.
39. I also take account here that the Parish Council has not maintained an objection to the proposal, and the local representative of the Ramblers indicated that they would not object to the Order, and did not do so.
40. Overall, on the question of whether the diversion would be substantially less convenient to the public, I consider that in many ways the diverted route would not be substantially less convenient to the public, largely because of the advantages of avoiding the at-grade crossing.
41. However, it does not seem to me to be reasonable to provide an alternative route which it is not actually possible to use. Whilst the Order provides a commitment to bring the site of the new footpath into a fit condition for use by the public,<sup>5</sup> the Council makes clear in their submission that the existing section of Footpath HD2 between Points B and D does not form part of the diversion as it is an existing public right of way. It is thus not covered by this provision. Consequently, the present difficulty presented by the poorly maintained section of Footpath HD2, and the lack of any commitment to overcome that situation, renders the proposed diversion substantially inconvenient to the public.
42. I accept that for any user wishing to walk to the north from Point D, the designation of C-D as a public footpath would be advantageous. However, other powers are available to the Council to achieve that aim if that is appropriate. I must apply the criteria set out in the 1980 Act in respect of a diversion of the route in question and any advantage resulting to users wishing to travel in that direction has to be weighed in the balance. In the absence of any figures in relation to actual user, I have no reason to conclude that any advantage in this respect outweighs the substantial inconvenience to people

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<sup>5</sup> No work appears to be needed in this regard

wishing to continue their journey from Point B and for which there is current evidence on the ground.

***Whether it is expedient to confirm the Order having regard to the effect which:***

*a) the diversion would have on public enjoyment of the path as a whole*

43. In general terms (relating to the ambience of the path) I accept that the diversion would not be likely to adversely affect the enjoyment of the path as a whole by the public. There may be some people who appreciate the ability to see the trains at close quarters, but this could be achieved from the north (or up-side) of the crossing, without actually having to venture onto the line itself.

44. However, the use of the path as a whole does require the ability to use the route of Footpath HD2 between Points B and D and, as I have already found, this is likely to be a serious impediment to the public enjoyment or use 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);*

45. No issues have been identified in respect of the affected land, in terms of either the existing or the proposed route, which I need to consider.

*The expediency of confirming the Order*

46. Having found that the altered termination of the path at Point D is not substantially as convenient to the public as the existing termination at Point B, I would have been entitled not to confirm the Order. However, I have examined the proposal carefully to see if there were any factors which might overcome this drawback and allow the confirmation to take place.

47. In the light of my conclusion about the overall inconvenience of the proposed diversion, I am unable to identify sufficient mitigation and thus the Order cannot be confirmed.

48. Under these circumstances there is no opportunity to weigh any of the remaining matters in the balance and it is not expedient to confirm the Order.

**Other Matters**

49. Despite the statement of Network Rail that safety was not the primary argument for the proposed diversion, much of their submission revolved around the general safety issues surrounding rail crossings in general. Each Order must be considered on its merits and I have not given significant weight to the generalised arguments on this issue.

50. Whilst acknowledging that there may be future development planned for the field crossed by Footpaths HD3 and 4, no current application appears to be in existence, and I have not given significant weight to the arguments made in relation to such a development.

51. I note that potential measures to improve the level crossing have been proposed should the Order not be successful. Whilst being aware that these



measures are available, I have not taken them into account in assessing the advantages and disadvantages of this proposal other than to acknowledge that avoiding the cost involved would be beneficial to the landowner. I have assessed the proposal against the relevant criteria based on the current situation, there being no guarantee that such improvement works would be executed.

**Conclusions**

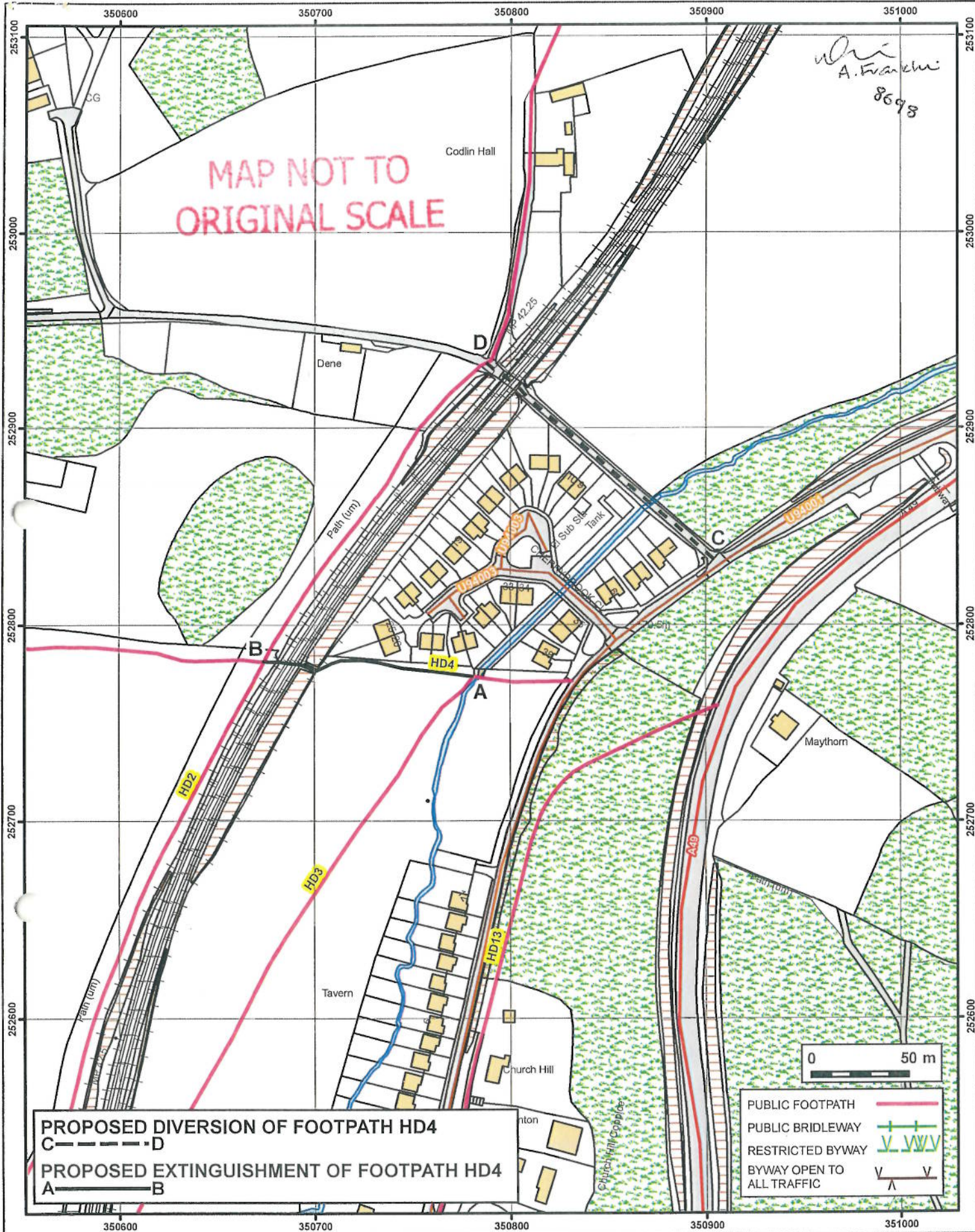
52. Having regard to these and all other matters raised at the in the written representations I conclude that the Order should not be confirmed.

**Formal Decision**

53. I do not confirm the Order

*Helen Slade*

Inspector



**PROPOSED DIVERSION OF FOOTPATH HD4**  
 C-----D  
**PROPOSED EXTINGUISHMENT OF FOOTPATH HD4**  
 A-----B

PUBLIC FOOTPATH  
 PUBLIC BRIDLEWAY  
 RESTRICTED BYWAY  
 BYWAY OPEN TO ALL TRAFFIC



Highways Act 1980, Section 119  
 Herefordshire Council Public Footpath HD4 (part)  
 Parish of Hope Under Dinmore  
 Public Path Diversion Order 2018  
 DWG No.: D485/190-4  
 SCALE 1:2,500 @ A4

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