



Order Decision

Site visit made on 11 August 2018

by Jean Russell MA MRTPI

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

Decision date: 01 October 2019

Order ref: ROW/3187611M

Cheshire East Borough Council (Public Footpath No. 14 (Part), Parish of Bunbury) Public Path Diversion Order 2017

- The Order was made under section 257 of the Town and Country Planning Act 1990 by Cheshire East Borough Council.
- The Order is dated 29 June 2017 and proposes to divert Public Footpath No. 14 (part) to enable development to be carried out in accordance with planning permission granted under Part III of the Town and Country Planning Act 1990.
- In accordance with Paragraph 3 (6) of Schedule 14 to the Town and Country Planning Act 1990, I have given notice of my proposal to confirm the Order subject to modifications.

Summary of Decision: The Order is confirmed subject to modifications set out below in the Formal Decision.

Preliminary Matters

1. The Order was subject to an Interim Order Decision (IOD) dated 23 October 2018 (ref: ROW/3187611 and ROW/3187612). The IOD also concerned the *Cheshire East Borough Council (Unrecorded Footpath, Land off Oak Gardens, Parish of Bunbury) Public Path Extinguishment Order 2017* which was confirmed without modification and is therefore not subject to this decision.
2. The proposed modifications to the Order set out in the IOD required advertisement before a final decision could be made. Objections to the modifications were received from six interested parties within the statutory notice period.
3. This decision on the modifications has been made on the basis of the 'written representations' procedure and on the papers. I received statements of case and final comments from the parties, and I have taken account of all representations.

Key Facts, Abbreviations and Findings set out in the IOD

4. This decision should be read in conjunction with the IOD, but I will summarise key facts, abbreviations and findings for ease of reference.
 - The Order was made pursuant to the outline planning permission granted on appeal (ref: APP/R0660/W/16/3165643) on 31 May 2017 for 'a residential development for 15 dwellings with associated works' on land at Oak Gardens. I shall refer to the 'outline permission' and the 'appeal decision' made by the 'previous Inspector'.
 - The IOD described the 'permission site' and surrounding land, the existing route of public footpath No. 14 (FP14) and the proposed diversion of FP14.
 - The surrounding land includes a 'fenced plot' that is used as garden land at the dwellinghouse known as The Willows – which adjoins the permission site on its

eastern side. FP14 crosses the fenced plot on its line between Bunbury Lane and the permission site, and this part of FP14 is subject to the Order.

- The first main issue for the IOD was whether the diversion met the 'necessity test' under s257(1)(a) of the Town and Country Planning Act 1990 (TCPA90). I found that the diversion of FP14 was necessary to enable the carrying out of the development approved under the outline permission, but it was not necessary to divert FP14 outside of the permission site. 'Modification 1' was to divert the path from point X on the site instead of point A on the fenced plot.
- On the second main issue for the IOD, I found that any disadvantages or loss likely to arise as a result of the diversion to members of the public or to adjacent or nearby residents would not outweigh the advantages of confirming the Order, subject to the path being widened between points F-C so as to conserve biodiversity through 'Modification 2'.

Main Issues

5. The main issues for this decision are whether, in the light of the representations received, it is necessary to divert FP14 as modified to enable the carrying out of the development approved under the outline permission and whether the disadvantages or losses arising from the modifications would outweigh the advantages of confirming the Order as modified.

Reasons

Necessity

6. The owner of the fenced plot and others have objected to Modification 1 and submit that FP14 should be diverted across the fenced plot as set out in the Order as originally drafted. The reasons for these objections properly fall to be considered as questions of disadvantage or loss. None of the objections demonstrate that FP14 ought to be diverted outside of the permission site in order to enable the carrying out of the development approved under the outline permission.
7. Objections to Modification 2 are that it did not go far enough, and FP14 should have been widened to 4.5m not only between points F-C on the Order map but also between points E-F and indeed X-E. Again, the representations largely go to the second main issue.
8. However, one point is relevant to the issue of necessity, and that concerns what has been approved under the outline permission. Objectors suggest that, because the layout of the permitted development of 15 houses was a 'reserved matter', there would be space within the permission site to further widen FP14. It is correct that the layout of the development has not yet been approved.
9. In the IOD, however, I found that the indicative layout plan responded to site constraints related to tree protection, living conditions and nature conservation. The plan was informed by the location of the site access that was approved under the outline permission. It was unlikely that the indicative layout could be altered at reserved matters stage so that no permitted houses would be built over FP14.
10. A reserved matters application has been submitted to the Council but is objected to and not yet determined. I have not seen details of the application¹, but I have been provided with a copy of the 'proposed site plan: general arrangement' which was submitted with the application. Since that application is not decided, the

¹ Council ref: 18/6338N; I have not followed the link provided by objectors to look at the application website, to avoid uncertainty as to what evidence this decision is based on and ensure no prejudice is caused to any party.

proposed site plan carries less weight than the indicative layout plan that was taken into consideration by the previous Inspector.

11. However, I will note that the proposed site plan retains space – to a greater or lesser extent – around the tree within the permission site, to the boundaries of neighbouring properties, to the woodland to the east and for an internal road from the approved site access. Unsurprisingly, the revised plan shows that, if the Order is not confirmed, FP14 would still pass through new properties.
12. Whether the revised plan is ultimately approved or not, it remains my view that it is necessary to divert FP14 along the route proposed in the Order – but only within the permission site – to enable the carrying out of the development approved under the outline permission. I shall consider the width and surfacing of the path below on that basis.

Disadvantages or Losses

Modification 1

13. The Order was made with FP14 diverted so as to follow the boundary between the fenced plot and adjacent properties at Wakes Meadows. The IOD noted that there were objections to this diversion – and I should say that representations have been received in support of Modification 1.
14. The objections to Modification 1 are that FP14 ought to be diverted as originally shown in the Order essentially so that the fenced plot becomes an integrated space which can function properly as garden space. It is said that if FP14 is not diverted, the area to the north west of the path will become a “no man’s land” that is difficult to use and maintain, will or could be subject to fly-tipping and will in any event have a poor appearance.
15. It is also said that keeping the path on its current line will mean that occupiers of the Willows face a greater loss of privacy in their garden, and greater disturbance from noise created by users of FP14. It is further submitted that it is simply more logical to divert the path so as to follow property boundaries – and the recent erection of fencing at the rear of houses at Wakes Meadows negates some of the objections to the original Order as described in the IOD.
16. I have some sympathy for the occupier of the Willows, but their objections are written on the basis that the kind of harm described above could or would happen if the Order is confirmed with Modification 1 – when in fact the modification will simply mean continuation of the status quo. FP14 already dissects the fenced plot, and yet there is no evidence of previous fly-tipping or other antisocial behaviour on the land. I am told that the Police have been called to investigate incidents at the old barn on the permission site, but not at the fenced plot.
17. I also note that it is not unusual for public rights of way to cross private gardens – and the occupier of the Willows has suggested that he could plant an orchard on the fenced plot so as to reduce potential problems. With regard to the letters in support of Modification 1, I find that the disadvantages or losses arising from the diversion would not outweigh the advantages of confirming the Order as modified.

Modification 2

18. S40 of the Natural Environment and Rural Communities Act 2006 (NERCA06) requires public authorities in exercising and so far as is consistent with the proper exercise of their functions to have regard to the purpose of conserving biodiversity.

19. After the Order was made, as described in the IOD, the Council's Principal Nature Conservation Officer (NCO) requested that FP14 be widened to 4.5m between E-F-C in order that there could be a 2.5m path and 2m buffer zone to an adjacent mature hedgerow. I agreed with the Council in the IOD that the Order should only be modified to widen the path between F-C because:
- The indicative plan suggested there was insufficient space for widening between E-F;
 - The path could be grassed between points E-F-C rather than hard-surfaced, and that would reduce the impact of footfall on tree and shrub roots so as to conserve biodiversity;
 - The Council could control the surface of the path when deciding the appearance and landscaping of the approved development at reserved matters stage, and when considering any application to discharge condition no. 9 on the outline permission, which required the approval of a right of way management plan.
20. Most of the objections received to Modification 2 rehearse these issues, and so I reiterate that, while the hedgerow enhances the biodiversity and indeed the character and appearance of the area, I cannot consider whether the approved development which necessitates the Order would adversely affect any protected species, or whether Natural England would refuse to grant a licence for any works. Outline permission remains granted for development.
21. Turning from there to the surfacing of the path, it strikes me that this matter is not straightforward. I noted in the IOD that if the diverted route was left grassed and no land is dug, it is not clear how walkers could be prevented from walking on any buffer zone beside the hedgerow. An objector to the modifications has suggested that it would be obvious that walking should be on 'cut grass' – but also that cutting grass on the buffer zone could damage protected species.
22. These submissions reinforce my view that it would be right for the Council to determine the most suitable surface for the path and buffer zone when they decide not only how the permission site should be landscaped, but also how FP14 should be maintained. These are questions for the applications for approval of the reserved matters and/or to discharge condition no. 9. None of the representations persuade me that it is necessary or appropriate to modify the Order so as to specify the surface of the path.
23. With regards to the width of the path, it is possible that the objectors will be proved correct and there will be space on the permission site for a 2m path and 2.5 buffer zone between points E-F as well as F-C. But whether that is the case will depend on what is approved at reserved matters stage. The indicative layout plan considered in the IOD has been superseded by a proposed site plan, and that has attracted objections; there is no detailed and approved layout plan before me.
24. Crabtree Homes Ltd stated that there would be room to widen the path between points E-F to 3.5m but not 4.5m. An objector has pointed out that this may not necessarily be the case, again because the reserved matters are not approved. They have also said they would not object to FP14 being 3.5m wide between E-F, but only if the 2m adjacent to the hedge was left uncut with wildflowers sown and the remaining 1.5m comprised cut grass for walkers.
25. If I was to propose a further modification to the Order so that FP14 is widened to 3.5m between points E-F, this would require further advertisement, meaning that a final decision on the Order is delayed. All parties would face further uncertainty, and yet the additional consultation would be likely to resolve nothing. The surface

of the path would remain unspecified for the reasons given above, and so the objectors would have no assurance of a 2m buffer zone to the hedgerow – while the possibility of reducing the effective width of the path to 1.5m could give rise to concerns regarding accessibility for walkers.

26. Finally, I note the objection that FP14 ought to be widened to 4.5m between points X-E so that there would be room for planting rather than a fence on the permission site boundary, so as to better screen the approved development from existing nearby houses. My remit does not extend to consideration of what the boundary treatment for the permission site should be; it would be wrong for me to propose a modification to the Order that is speculative and would risk prejudicing the determination of the reserved matters application.
27. While the objections are detailed and deeply-felt, they do not show that a decision to not modify the Order further, and not widen the path between points X-E and/or E-F would cause such harm that the disadvantages of the Order would outweigh the advantages. It is appropriate to confirm the Order subject to the proposed modifications and doing so would not conflict with the s40 duty to have regard to the purpose of conserving biodiversity.

Other Matters and Conclusion

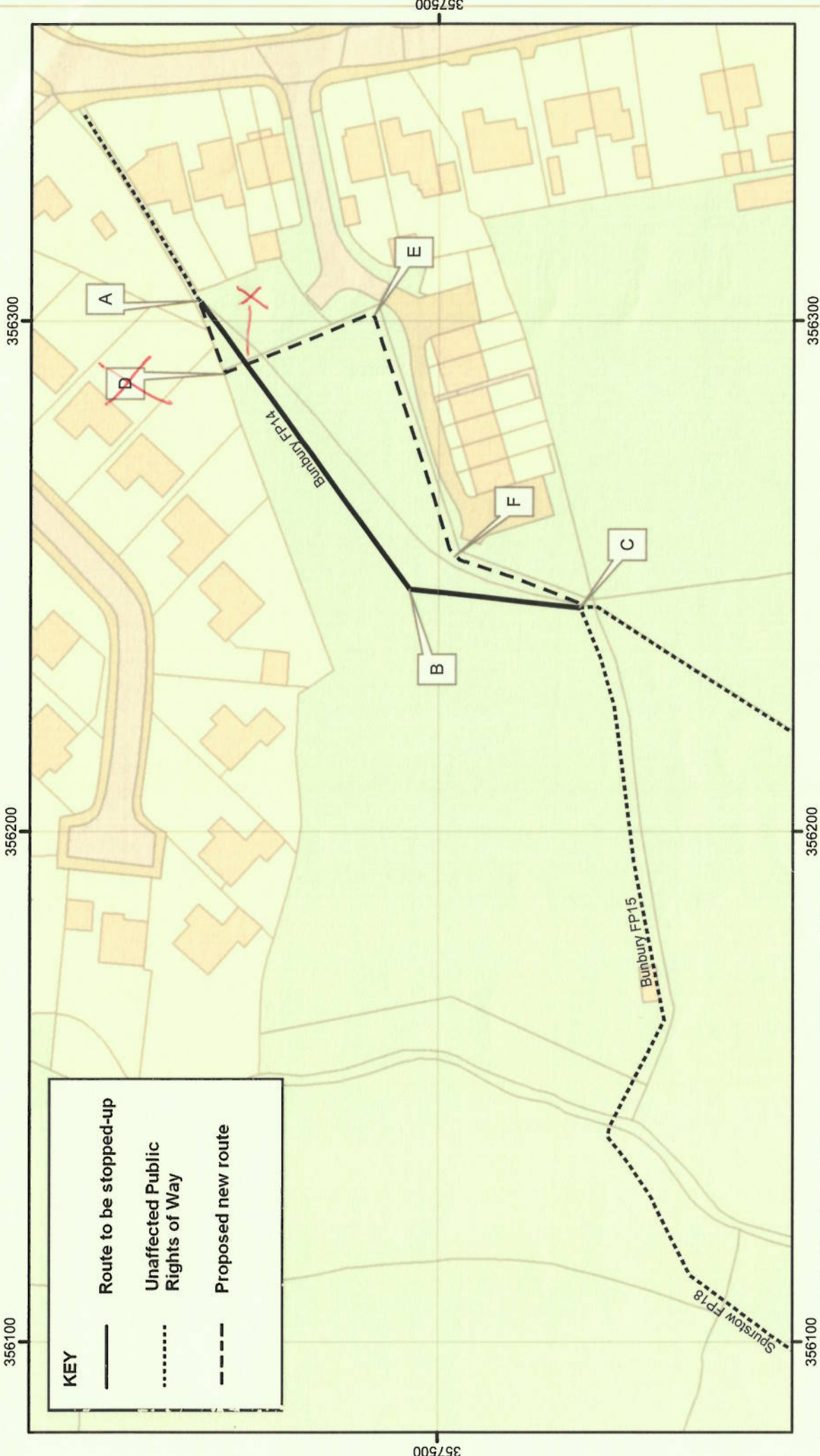
28. I understand why it is objected that the Order should commence at point X, but the modifications refer to point A so that the Order as a whole remains clear.
29. For the reasons given and with regard to all other matters raised, I conclude that the Order should be confirmed subject to the modifications identified in paragraph 1 of my IOD and as set out in the Formal Decision below. The Order as modified as meets the legislative tests set out in s257 of the TCPA90.

Formal Decision

30. In exercise of the powers transferred to me, the Order is confirmed subject to the modifications previously proposed:
- Within Part 2 of the Schedule, delete *'15 metres to O.S. grid reference SJ 5629 5754 (point D on TCPA/031A) and then running in a generally south south easterly direction for approximately 31 metres'* and substitute *'16 metres to point X on TCPA/031A and then running in a generally south south easterly direction for approximately 27 metres'*.
 - Within Part 2 of the Schedule, delete the final three sentences and substitute: *'A total distance of approximately 120 metres in length. The footpath will be 2 metres wide between points A-X, 2.5 metres wide between points X-E-F and 4.5 metres wide between points F-C'*.
 - On the Order map, delete point D and insert point X.

Jean Russell

INSPECTOR



| KEY | |
|-----|---------------------------------|
| | Route to be stopped-up |
| | Unaffected Public Rights of Way |
| | Proposed new route |



TOWN & COUNTRY PLANNING ACT 1990
 THE CHESHIRE EAST BOROUGH COUNCIL PUBLIC FOOTPATH NO. 14 (PART) PARISH OF BUNBURY
 PUBLIC PATH DIVERSION ORDER 2017



Plan No.
TCPA/031A