



Order Decision

Inquiry opened on 26 November 2019

by Heidi Cruickshank BSc (Hons), MSc, MIPROW

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

Decision date: 15 June 2020

Order Ref: ROW/3224376

- The Order is made under Section 119 of the Highways Act 1980 and is known as The Cornwall Council Public Footpath No. 3 Colan (Trevithick Manor Farm) Public Path Diversion Order 2018.
- The Order is dated 20 November 2018 and proposes to divert the footpath running generally north-west – south-east from the junction with the A392 near the King’s Head to the C0181, Trevilley Lane, in the parish of Colan onto an alternative alignment, as shown in the Order map and described in the Order Schedule.
- There were 11 objections and representations outstanding when the Cornwall Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is proposed for confirmation subject to modifications set out in the Formal Decision.

Preliminary Matters

Status of the existing route

1. There was concern that the route to be diverted, shown A – B on the Order map, did not reflect the route that was remembered. The land was formerly fields but is in the process of development by Persimmon Homes (“PH”), with the estate known as The Goldings. The properties on the land crossed by the existing and proposed route were completed and sold, or for sale, at the time of the Inquiry.
2. Section 56 of the Wildlife and Countryside Act 1981 provides that the Definitive Map and Statement (“the DMS”) shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot. I have not been made aware of any application to record an alternative route on the DMS. On balance I am satisfied that the route A – B accurately reflects the route of the footpath recorded on the DMS; this legally exists unless and until an Order altering it is confirmed. I shall consider this Order on that basis.

Status of the proposed route

3. The question was raised as to whether the proposed route was already a public right of way, such that the use of section 119 of the Highways Act 1980 (“the 1980 Act”) would be inappropriate, side-stepping a stopping up order under section 118 of that Act. It is noted that Cornwall Council, the Order Making Authority (“the OMA”) anticipate that the route would be adopted as a publicly maintainable highway under section 38 of the 1980 Act. It was made clear at
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the Inquiry that this process was incomplete and, furthermore, that public maintenance was not necessarily determinative of public rights.

4. I note that PH have done nothing to prevent public access to and through The Goldings, which suggests that, at some point, public rights would be likely to be established across the estate, including on foot. However, no formal claim that such rights already exist has been made to the OMA. The Goldings, and therefore the estate roads and footways, have not been in existence for any great length of time such that rights would be likely to already have ripened. As such, on the evidence before me, I am satisfied that the proposed route is not at the present time subject to existing highway rights.

Potential approach

5. Queries were raised as to whether extinguishment would be appropriate, rather than diversion, with the roads around the site, the A392 and C0181, Trevilley Lane, providing access between the end points of the footpath. I am unable to consider whether a different type of Order could or should have been made.

Requested modifications

6. Particular concerns had been raised regarding the proximity of the proposed route to properties lying west of point D and the effect on allocated parking in this area. The OMA made a request to modify the Order to place the proposed route on the opposite footway on the south of the cul-de-sac. I am satisfied that this would be an appropriate modification and have considered the proposed route in this decision as if running to point D1, rather than point D.

Procedural Matters

7. I made an unaccompanied site visit on 25 November 2019 walking the proposed route; walking and viewing so much of the existing route as was physically possible; and, driving and walking along the surrounding roads to understand the general location. The parties were content that there was no need for a further accompanied site visit. I opened a Public Inquiry into the Order on 26 November.
8. Due to queries regarding advertisement of the Order in relation to those who had already bought properties adjacent to the proposed route, or on the existing route, a further advertisement period was organised. As this matter came to light at the Inquiry I adjourned, with the opportunity for me to resume the Inquiry at a later date, should I consider it necessary to do so.
9. Further correspondence was received in the additional notice period, which ran from 5 December 2019 – 10 January 2020. Following written representations on the matters raised I was satisfied that there was no need for me to resume the Inquiry and so I closed it in writing on 2 March 2020.
10. This decision is taken in light of all the relevant matters, whether submitted beforehand, orally or in writing during the Inquiry or during the subsequent period prior to closing.

Main Issues

11. An issue that was raised related to public safety, in relation in particular to car parking and to opening access onto Trevilley Lane.

12. The matter of the effect on properties and home life, in relation to both those who own, or seek to purchase, properties on the existing alignment of the route and those who own properties on the proposed alignment was before me. I have considered these matters in relation to my duties under the Human Rights Act 1998 ("the 1998 Act").

Legal Framework

13. The Order is made under section 119 of the 1980 Act in the interests of the owners of the land. Sub-section (6) of section 119 sets out that "*The Secretary of State shall not confirm a public path diversion order...unless [he is]...satisfied that the diversion to be effected by it is expedient...in the interests of the owner...of land crossed by the path...it is expedient that the line of the path...or part of that line, should be diverted...and further that the path...will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the effect which—*
- (a) *the diversion would have on public enjoyment of the path or way as a whole,*
 - (b) *the coming into operation of the order would have as respects other land served by the existing public right of way, and*
 - (c) *any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it,*
- so, however, that for the purposes of paragraphs (b) and (c) above the Secretary of State...shall take into account the provisions as to compensation referred to in subsection (5)(a)..."*
14. Sub-section 2 sets out that a "*...diversion order shall not alter a point of termination of the path or way...(where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public.*"
15. Sub-section (5) sets out that "*...the council may require [the owners] to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,—*
- (a) *any compensation which may become payable..."*
16. I must have regard to the material provision of a rights of way improvement plan ("ROWIP") prepared by any local highway authority whose area includes land over which an Order would create or extinguish a public right of way.
17. In relation to the fact that parts of the recorded route are already built over it should be noted that sub-section 6 of section 118 of the 1980 Act states that "*...any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded.*" Although section 119 of the 1980 Act, under which this Order is made, does not contain such wording, longstanding guidance requires me to treat temporary circumstances in the same manner as under s118. Whilst houses may not appear to be 'temporary' I will consider the existing route as if it was open and available for public use where appropriate to do so.
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18. It will be noted that a definition of 'expediency' provided by the Oxford English Dictionary is: "*convenient and practical although possibly improper or immoral*", "*suitable or appropriate*". I consider that there is a measure of discretion in relation to the matters that may be taken into account when deciding whether or not to confirm an Order of this type.
19. The 1998 Act enshrines in UK law most of the fundamental rights and freedoms contained in the European Convention on Human Rights ("the ECHR"). It is unlawful for a public authority to act in a way which is incompatible with a Convention right and, given the points raised in objection, I asked for submissions in relation to this matter. In particular, I was concerned to address Article 8, which states:
1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Reasons

Whether it is expedient, in the interests of the owner of the land, that the right of way in question should be diverted

20. The main affected landowner is PH, whom I understand to own the entirety of the land that would be crossed by the proposed route C – D1. This route follows what are now footways and roads within The Goldings. PH applied to divert the recorded route A – B in April 2016. As it became clear that application was not acted on the matter was queried in August 2018, leading to this Order.
21. One of the reasons for ensuring advertisement of the Order was carried out correctly was due to the fact that some properties had been, or were in the process of being, sold. The recorded route passes through the gardens of some properties, which can be seen on the section south-east of point A. Additional properties have been constructed on the section north-west of point B, some of which are not clear on the Ordnance Survey base map used for the Order plan when it is copied. However, it is clear that the properties themselves are affected by the existing route.
22. I consider that the proposed diversion would be expedient in the interests of PH, as the main owner. Whilst the granting of planning permission does not provide any right to obstruct a public right of way it is clear that the intention had been to divert the route. The existence of a public right of way through properties, whether gardens or houses, would be likely to lead to problems in conveyancing, which would not be in the interest of the owners, whether PH or subsequent landowners.
23. In relation to those properties already sold, or in the process of sale, it may be that the owners have not fully understood the potential significance and effect upon their property. I was made aware of difficulties arising in relation to a

particular conveyance, with the mortgage offer affected by the fact that the recorded right of way passes through the property, which was delaying completion. I consider that it would be expedient in the interests of new and potential property owners affected by the existing route of the footpath for it to be diverted.

24. Furniture, such as the proposed kissing gate at point D1, is generally erected in the landowner's interest and expense. In this case the limitation has been agreed to address safety concerns with regard to access onto Trevilley Lane. Whilst concerns have been raised about future management and maintenance in relation to leasehold, or freehold properties with management fees, I consider this to be a matter separate from this process. The Order has been made and considered in relation to the current ownership situation, which, as explored at the Inquiry, remains with PH for the proposed route.

Whether the new route will be substantially less convenient to the public

25. In considering the convenience of the proposed route in terms of general matters I have taken account of the existing route as if it were open to the public. I should note here that I do not consider that there remains a valid way through the estate to the legally existing exit without physically demolishing new properties. I am satisfied that there is no significant difference in the gradient that would be followed on either the existing or proposed routes. In relation to the reference to a hill it appears that there may have been some landscaping as part of the development. The proposed route would not be significantly longer than the existing.
26. Whilst considering the existing route as open to use that does not mean I am considering how it was when it crossed fields; I cannot ignore that opening up the route now would mean that it would, in places, cross gardens and through properties, which would have to be demolished to allow that. The sections of the routes south-east of points A and C provide a similar experience. Beyond the road, Hyns an Vownder, the existing route runs both alongside and through gardens and properties, crossing roads, whilst the proposed route would follow roads and footways, alongside existing properties, also crossing roads.
27. Concerns were raised regarding the sharing of pedestrian and vehicular space, car parking and streetlighting, or lack thereof. The existing route would still be affected by the same issues, although perhaps to a lesser extent in terms of shared vehicular space. The development has been designed with some footways and some shared space areas. Whilst there may be some inconvenience in terms of shared space I do not consider that the proposed route would be *substantially* less convenient for public use than the existing, which is the test I must apply (my emphasis).
28. Taking account of all the relevant points I am satisfied that the proposed route would not be substantially less convenient to the public than the existing route.

The effect of the diversion on public enjoyment of the route as a whole

29. As pointed out in objection guidance¹ indicates that in considering potential revisions to an existing right of way to accommodate planned development any alternative alignment should avoid the use of estate roads wherever possible,

¹ Defra Rights of Way Circular (1/09) Guidance for Local Authorities, Version 2, October 2009

with preference to the use of made up estate paths through landscaped or open space areas away from vehicular traffic. Unfortunately we are not in the situation where this guidance can be taken into account as the planning permission has not only been granted but has now been implemented.

30. I do not consider that I should refuse to confirm an Order due to failure to follow guidance; I have to deal with the situation as it now exists. The changes to the landscape and character of the area arise from the implementation of the planning permission. These changes are such that the existing and proposed routes would provide a similar experience, walking through a housing estate. Unless separately fenced, which would reduce the area of gardens, it appears that at least parts of the existing route would pass within the gardens of some properties, which I believe some users would find a potentially embarrassing situation.
31. Inappropriate dog fouling is an issue that might arise on either the existing or proposed route, or within children's play areas; it is the case that public policy generally places an obligation on dog owners to clear up after their animals. Given the currently unimpeded access to The Goldings this is likely to be an existing issue which I do not consider would be any different due to the Order.
32. Considering the two routes as they are – and assuming the existing route to be open for use - I am satisfied that there would be no negative effect upon public enjoyment in the use of the route if the diversion was confirmed.

Whether the point of termination of the new right of way will be on the same highway or highway connected with it, and will be substantially as convenient to the public

33. Points A and C are in a similar location and would provide connection to the A392 adjacent to the King's Head. As was explained at the inquiry the boundary wall at point C would be opened to provide access in this location. Point D1 would connect to Trevilley Lane a little further north than point B.
34. Concerns were raised about the use of Trevilley Lane by pedestrians, however, whether the access was via the existing or proposed route there would still be a right of access to and from this road. Concern about pedestrian use of the lane was not expressed in relation to the idea of using it with the A392 as an alternative to the proposed diversion. PH commissioned a Road Safety Review ("RSR") and objectors provided some traffic counts for Trevilley Lane.
35. I understand the desire of people to avoid risk, however, I am satisfied that the RSR was carried out by an appropriate person. The findings reflected my own observations of the lane. I am aware that these observations were all outside the main summer season, however, taking account of all the evidence I am satisfied that the use of Trevilley Lane, and of point D1 rather than point B, does not raise significant safety concerns when dealt with as suggested by the RSR. This includes provision of a kissing gate and a width of 'landing area' within the current verge. The road and footpath are highways and so open to enhancement if required to address changes in use over time.
36. Taking account of the short distance between the two accesses I am satisfied that the diverted route would be substantially as convenient to the public.

The effect the coming into operation of the Order would have with respect to the land served by the existing route and the land over which the new route is created

together with any land held with it, account being taken of the provisions as to compensation

37. As noted the majority of the land crossed by the existing and proposed routes is within the ownership of PH. Those interests would not be negatively affected and the Order sets out that any compensation which becomes payable in consequence of it coming into force would be defrayed by PH.
38. I agree with the OMA that there would be no adverse impact on the ability of users to access land. Concerns regarding effects on adjacent properties are dealt with below.

Human Rights Act considerations

39. Concerns were raised regarding the proposed right of way passing close to properties, which have now been sold, in particular in relation to some situated on the cul-de-sac south-west of point D1. It was felt that confirmation of the Order would affect privacy and enjoyment of properties here, particularly in relation to children playing unsupervised in this area. I have considered this in relation to the right to respect for private and family life and home under Article 8 of the First Protocol to the ECHR, as enacted by the 1998 Act.
40. Whether there may be financial implications as a result of the proposed route, in terms of property values, Council tax or insurance, are matters which may be relevant under the compensation provisions of the 1980 Act, referred to above; however, that is not a matter on which I can make a finding. Whilst the new owners of properties may not have been aware that PH had always intended that the boundary line at the end of the cul-de-sac (now point D1) would be opened into Trevilley Lane to provide access, the indicative masterplan dated February 2015, which was part of the Reserved Matters approval, is clear on this point.
41. It is noted that the requested modifications would move the right of way onto the footway on the opposite side of the cul-de-sac from that originally intended by the Order. I consider that this addresses some of the concerns raised as the route would no longer pass across parking spaces.
42. In relation to the issue of children potentially accessing the lane unsupervised it is noted that there is an intention to place a kissing gate, to slow people – including children – as they access the road. Those raising the issue very fairly acknowledged that the safety of their children remained their responsibility.
43. With regard to concerns that undesirable people may gain access to the estate and/or use the right of way as an escape route I consider that the same issue could be similarly ascribed to the existing route. The right of way provides access to and from properties, including holiday sites, shops – from the local farm shop to the superstore – entertainment venues and public transport, within and around The Goldings. Concerns about negative elements, including potential illegal vehicular access, should not prevent the positive outcomes arising from continued public access on foot into, out of and across the estate, in line with sustainable transport policies.
44. Taking account of the potential negative effects on the human rights of those with properties on the existing route; the fact that the proposed route would run on routes likely to become subject to public rights over time; and, the

public interest in maintaining public access on foot in this location, I consider that any likely harm or interference to property adjacent to the proposed route is proportionate when balanced against the benefits to PH and other affected landowners, and the overall public interest. I am satisfied that any potential interference is in accordance with the 1980 Act provisions and does not constitute a violation under the 1998 Act.

Conclusions

45. I am satisfied that the proposed route would not be substantially less convenient than the existing route, with public enjoyment not negatively affected and the termination points being substantially as convenient. I am satisfied that the effect on public use is not such as to weigh against confirmation of the Order.

Rights of way improvement plan

46. The OMA indicated that their ROWIP2 had no material provisions to assist in this case. Policy PL1 indicates that the OMA would require the public rights of way network to be protected from the negative effects of proposed development. Related actions indicate working with planning colleagues to secure access improvements where appropriate. In this case it may be fair to say that some opportunities may have been missed in the delivery of the policies and actions.

47. However, the OMA have remained committed to resolving the matter with PH, which would otherwise leave the existing footpath obstructed by homes, with all the difficulties that this would entail. I do not consider that the ROWIP policies weigh against confirmation of the Order.

Overall Conclusions

48. I conclude that it is expedient to confirm the Order in the interests of the owners of the land. In terms of the effect on the public I am satisfied that the changes are not such as to be substantially less convenient or have a negative effect upon their enjoyment.

49. Having regard to these, and all other matters raised at the Inquiry and in the written representations, I conclude that the Order should be proposed for confirmation, subject to the requested modifications.

Other matters

50. It is noted that page 51 of the Inquiry bundle was a duplicate of page 50. The original copy of this 5 page document, collated within the bundle, was part of the original submission to the Planning Inspectorate with all pages correctly numbered. The document should have been on deposit and/or copied to the relevant parties. Given the matters raised by all the parties I am satisfied that no-one has been prejudiced by this copying error within the Inquiry bundle.

51. As set out above the Order has been made in the interests of the landowner, predominantly PH. As a result, I agree with the OMA that there is no requirement for public benefit to arise from the Order. The legal framework is set out above, from paragraph 13.

² Cornwall Countryside Access Strategy 2007

52. Concerns regarding parking and or driving on a footpath were raised, with section 34(1) of the Road Traffic Act 1988 setting out that “...if without lawful authority a person drives a mechanically propelled vehicle...on any road being a footpath, bridleway or restricted byway, he is guilty of an offence.” I agree with the OMA that the relevant term is that “...without lawful authority...”. In this case PH are the landowners of the proposed route, some of which, such as Stret Lowarth, has been designed as a shared use space in any event. There would be no logical reason why PH would not provide lawful authority for access to properties in The Goldings. Matters relating to whether the parking provision is adequate for the estate are not relevant to the decision on this Order, other than as already dealt with.
53. I understand that marking of the route on the ground within the estate is not intended. The route would be denoted by public footpath signs at either end.
54. I do not consider that the potential change in parish boundaries is relevant to the matters before me.

Formal Decision

55. The Order is proposed for confirmation subject to the following modifications:

- Within Part 2 of the Schedule:
 - replace text “...314...” with text “...323...”;
 - amend “...SW 8291/6004...” to “...SW 8291/6003...”;
 - amend “...point D...” to “...point D1...”;
- Within Part 3 of the Schedule:
 - replace text “...Pedestrian...” with text “...Kissing...”;
 - amend “...SW 8291/6004...” to “...SW 8291/6003...”;
 - amend “...point D...” to “...point D1...”;
- On Order map:
 - modify part of alignment of FP3 to the south;
 - remove point D;
 - add point D1.

56. Whilst it was suggested that as the affected land belonged to the same party there was no need for further advertisement. I have considered the matter but believe that the legislation requires readvertisement in these circumstances. As the confirmed Order would affect land not affected by the Order as submitted I am required by virtue of paragraph 2(3) to Schedule 6 of the 1980 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

Heidi Cruickshank

Inspector

APPEARANCES

For the Order Making Authority:

Ms V Davis Legal Officer, Cornwall Council
who called:

Mr M Eastwood Countryside Access Team Leader for Cornwall Council

In Support of the Order:

Mr S Wagemakers *on behalf of Persimmon Homes*

In Objection to the Order:

Mr C Haines

Mrs K Haines

Ms K Perry

Mr A Yarwood

Mrs D Yarwood

INQUIRY DOCUMENTS

- 1 The Order
- 2 Cornwall Council Inquiry bundle
- 3 Cornwall Council closing
- 4 Information on point C proposals
- 5 Closing comments on behalf of Persimmon Homes
- 6 Post-Inquiry opening correspondence

NOT TO SCALE

