



## Order Decision

Site visit made on 1 September 2020

**by K R Seward Solicitor**

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

**Decision date: 21 September 2020**

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### Order Ref: ROW/3233972

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and is known as the Bedford Borough Council (Kempston Rural: Part of Footpath No.14) Public Path Diversion Order 2018.
- The Order is dated 12 December 2018 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There were three objections outstanding when Bedford Borough Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

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### Preliminary Matter

1. During my site visit I was accompanied by the applicant, an objector and officer from Bedford Borough Council as Order Making Authority ('OMA').

### Main Issues

2. Section 119(6) of the 1980 Act involves three separate tests for an Order to be confirmed. These are:

TEST 1: whether it is expedient in the interests of the landowner, occupier or the public for the path to be diverted. This is subject to any altered point of termination of the path being substantially as convenient to the public.

TEST 2: whether the proposed diversion is substantially less convenient to the public.

TEST 3: 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, (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.

3. None of the parties suggest that the Order is contrary to any material provision contained in a rights of way improvement plan for the area.

## Reasons

### ***Whether it is expedient in the interests of the owner of the land that the path in question should be diverted***

4. Part of the existing footpath No.14 ('FP14') crosses a field used in the past to cultivate cereal crops and periodic grazing of livestock. Whilst arable cropping will continue in future, the owner proposes to also use the land for livestock in coming years as part of a mixed farming rotation land management plan.
5. The landowner wishes to make a large stock-proof area to graze animals and to assist with the eradication of blackgrass which has infested the field. Objectors say there is not a need to divert the path to eradicate black grass which they consider has grown due to a failure to follow proper crop rotation. Why the infestation occurred is not for me to determine nor is it a question of whether the path could remain where it is. The test is whether it is expedient in the interests of the landowner to divert the path rather than the need for a diversion. In essence, the point made by the landowner is that the location of the path impedes the most efficient land management.
6. The landowner describes how the field must be managed as two parcels because it is bisected by the path making it more difficult, costly and less efficient than a field edge path. Logically, by diverting the footpath to the undisturbed field edge would result in more economic use of this land.
7. Clearly, there are many examples of public footpaths crossing open pasture where livestock are grazed and my attention was drawn to one (FP19) nearby. By enclosing the field, the farmer seeks to provide a safe and secure area for livestock and prevent ingestion of litter and bags of dog faeces said to be often dropped or thrown in the field. The landowner acknowledges that there is no reason to suggest that dog owners will behave more responsibly on a field edge path, but it would give the owner greater confidence of excluding dog faeces from the animal and human food chain.
8. From what is said, I am not satisfied that littering amounts to a significant problem associated with the footpath. Nevertheless, I accept that there is potential risk to humans of contact with stock and also animal safety which could be addressed by a fenced field edge path. To illustrate the point the landowner provides statistics of public fatalities in incidents involving cattle as recorded by the Health and Safety Executive. It is also highlighted how incidents are regularly reported of dogs attacking and fatally wounding sheep and lambs. I do not regard it unreasonable for the landowner in this case to wish to take a precautionary approach by preventing direct contact between humans and livestock.
9. The landowner further expresses concern over potential damage to cropped areas when walkers deviate due to the route becoming waterlogged over the winter months. Having seen the photographs illustrating how the existing path floods in places, it is inevitable that walkers will divert from the definitive line with resultant damage if the field is under cultivation.
10. In principle, diverting the path from across the field to the edge would provide some benefits to the landowner in terms of facilitating more effective land management and alleviating damage from walkers diverting from the definitive

line during periods of surface flooding. Stock control may be easier and it may also potentially reduce the likelihood of disturbance to stock with the associated safety implications. Although I do not consider that any benefits to the landowner will necessarily be significant, I accept nevertheless that it is expedient in the interests of the landowner to divert the path.

***Whether any new termination point is substantially as convenient to the public***

11. Point A is unchanged. Existing termination point B exits onto Tithe Road along a bend in the road. If the Order is confirmed then new termination point C would lie approximately 210m north-west of point B at the juncture of bridleway No 21 ('BW21') with footpath No 35. Termination point B could still be reached from point C via BW21, which runs along a track known as Gypsy Lane at the edge of the neighbouring fields.
12. Objection is raised on the basis that walkers would be forced to use BW21 between points B-C and face exposure to possible conflict with farm vehicles. For that reason, it is argued that point C is substantially less convenient.
13. The track which BW21 passes along is under different ownership and it does not provide access to the applicant's farmland. The landowner understands that historically BW14 was a cart track providing access from Tithe Road to the old brick kilns in the adjacent fields behind Kempston House. It is reported that BW14 is no longer used by the current landowner to access the field and it is not in use for any regular farming practices. That situation could change. Also, the track extends beside cropped fields which will require attention involving the use of farm vehicles, equipment and machinery even if only occasionally.
14. The alignment of this section of BW21 is relatively straight with good visibility in each direction for walkers and users of farm vehicles/machinery to spot each other with plenty of notice. The track is wide enough for walkers to be able to step aside for certain types of traffic. There may be times when walkers would need to wait a short while for safe passage if large machinery is in use. However, it appears unlikely to happen very often.
15. There is nothing to suggest that safety implications have arisen through use of BW21 in the past to give any cause for concern over increased use on foot. It seems to me that the likelihood of encountering farm vehicles or machinery will be very occasional so that any inconvenience to walkers would be minor.
16. I find that the new termination point is substantially as convenient to the public.

***Whether the new path will not be substantially less convenient to the public***

17. The existing path proceeds generally westwards beside a newly planted hedgerow before changing to a north-westerly direction across the open field for a total distance of 310m. Instead, FP14 would run in a more northerly direction beside the field boundary for 180m. However, to reach the same termination point B involves a total distance of 392m from A-C-B. Thus, to walk between the same end points would be around 82m longer along the diverted path which is also less direct as it involves walking two sides of the field.

18. In terms of travelling time, it would take longer than a few seconds to walk the extra distance. Obviously, the amount of time will vary depending on the individual and prevailing conditions. However, it would not take a disproportionate length of time to walk a further 82m in the context of a longer walk given that neither A nor B are destination points. Indeed, objectors describe using the route as part of a wider network. One objector has provided an illustration of a broadly circular walk going past Kemspton House, Kempston Wood and through part of the Forest of Marston Vale. For some users the additional distance would be an inconvenience, but from what objectors say, the route is used for recreational purposes. In such cases, there will often be less impetus to arrive between points via the fastest route.
19. FP14 provides a link with a network of other public paths. For walkers heading north-west from the south or east then the route will not be as direct as the existing footpath. For others looking to head north-east along FP35 or travel south from that direction then the route will be more direct. The impact upon convenience will ultimately depend on a walker's destination.
20. Objectors say the proposed route has a shorter but greater incline. According to the OMA the gradient of the existing route is 1:26 compared with 1:25 along A-C. Therefore, on paper there is not much difference between the routes. From my own observations the incline along the existing route when travelling away from point B is gradual and steady. From point C heading south-east the incline seems steeper initially until it levels out partway along towards point A. The difference is noticeable but not dramatic and the incline on the proposed route is by no means arduous.
21. Neither termination point can currently be seen from the other end due to the topography. The proposed route is easier to navigate as it extends beside the hedge line rather than cross field where the alignment may not always be clear on the ground.
22. One objector contends that the existing grassed path does not suffer greatly from a muddy surface unlike other agricultural fields. I gather that the field has not always been grassed and may not be in future.
23. As the soil is clay based the field apparently becomes waterlogged and boggy along the existing route where ground levels are flat along the eastern section. The parties disagree on whether the headland surface can drain more freely than the existing cross-field path and thereby improve convenience.
24. Being a cross field path, the existing route is in a more exposed position than the proposed route which is sheltered by the hedgerow. However, there is no cause to believe that the existing route will dry out quicker or that snow and ice will take longer to thaw on the proposed route. Indeed, the evidence points to the contrary. Photographs supplied by the OMA from the winter of 2019 to illustrate the extent of waterlogging along the existing route show water pooled on the surface. There is no sign of a similar problem along the proposed route in another photograph said to be taken on the same day.
25. I also note the consultation response on behalf of the local Ramblers group raising no objection to the diversion in which it is stated that "*the existing path*

*is difficult to use in winter as it is very muddy. Indeed, many people do use the proposed route (even though it is not a RoW) to avoid the mud."*

26. The roots of the mature trees will invariably assist land drainage of the new path to some extent. It was partly in shade during my mid-morning visit on a bright and sunny day, but the position of the hedge allows the path to be exposed to sunlight. There is also a continuous slope along the length of the new path which I accept would allow better land drainage compared with the flat surface of the existing route. A combination of these factors indicate that the proposed path will not suffer from pooled water and mud in the same way as the existing path. There is no difference between the paths in terms of likely surface damage from livestock. If anything, the proposed path would be less likely to be churned up if it is separated from the land being grazed.
27. The landowner submits that the existing path crosses very heavy clay soils and when cultivated it makes for very heavy walking. The proposed route is already grassed and should not deteriorate in the same way making it more easily accessible year round. In terms of walking conditions under foot, I consider that the proposed path will be an improvement for all year use.
28. Objectors repeat the argument over potential conflict with farm traffic whilst using BW21. As discussed above in connection with the proposed termination points, I do not consider that the risk posed by infrequent farm traffic to be a significant one. The prospect of encountering traffic could possibly cause a level of anxiety for some users, but the risk appears low. There may be a very limited effect on public enjoyment if the need arises for a walker to wait for clear passage or to step aside. This is unlikely to be a frequent occurrence.
29. The test is not whether the route would be less convenient but *substantially* less convenient. Whilst the diversion will be less convenient for some walkers for whom it will be further and less direct, there will be other users who will find the route more convenient. Taking all factors into account, I do not consider that the diversion would be substantially less convenient to the public.

***The effect of the diversion on public enjoyment of the path as a whole***

30. The proposed path runs alongside the hedge line making the alignment clear, but the hedgerow is mature and obscures views to the east. The existing alignment may not be easy to follow if there is no mown line or trodden path but there are more expansive unobstructed views. Clearly, they are not identical but both routes offer views of the fields.
31. Neither route is at a particularly elevated level, but the flat topography allows some distant views. For instance, high rise blocks in Bedford are visible on the horizon. Those same buildings can be seen from the proposed path at point C.
32. When travelling west along the unaffected part of FP14 there is a view virtually straight ahead beyond the field edge gate of the section of path proposed for diversion. Some walkers may find this appealing when the path is visible rather than turning 90 degrees to follow the diversion. However, the route ahead may not always be apparent if the field is under cultivation. It may be anticipated that there will be other users who will prefer the clarity offered by the diverted path and be untroubled by the change in direction to continue along FP14.

33. The OMA submits that land drainage is better along the proposed route because the water can run downhill which will make it easier to use. From what the local Ramblers say some people have already expressed a preference for the new route by choosing to walk it instead of the definitive line when it becomes wet and muddy. Objectors express disagreement over its condition.
34. It is evident that the existing path is prone to waterlogging as shown in the photographs provided and confirmed by the local Ramblers representative. When this occurs, it could deter some users altogether or adversely affect the enjoyment for walkers faced with finding a way ahead.
35. Objectors fear that the route will become fenced off from the field so that both sides of the route are enclosed giving rise to a sense of confinement. The landowner openly admits that it is possible some or all of the field over which both routes run will be fenced in order to provide a stock proof enclosure.
36. In a letter to one objector, the OMA asserted that an Inspector had concurred with its view that an objection to fencing is not relevant to the tests in the legislation. The Order Decision (ROW/3207764) concerned part of footpath A5, Turvey and I was the Inspector. I made no finding to suggest that fencing is irrelevant to the tests for diversion of a highway. The potential impact on public enjoyment from enclosure of the route was treated as a relevant consideration but in that case the effect would have been minor. It is plain that the enclosure of a path can potentially affect public enjoyment and whether it is enough to defeat confirmation of an Order will depend on the particular circumstances.
37. When livestock are introduced the field boundaries would need to be supplemented by fencing. It is anticipated that such fencing would be wooden post fencing of the style already installed elsewhere along the southern boundary of the same field. Fencing of this type would not bar views, but it would be a physical barrier all the same. Of course, there can be no guarantees over the type of fencing actually used, but it appears highly unlikely to be of a type and height that would obscure views given its intended purpose.
38. Some users will dislike and feel restricted by walking between fencing and hedgerow in comparison to the freedom experienced of open views all about. Other people may welcome the clarity it brings over the line to follow and ability to observe livestock in the fields whilst being safely separated. Indeed, some walkers would be deterred from walking cross-field amongst cattle due to safety concerns. That may apply particularly to dog walkers who need not fear their dog will stray into the adjoining fields if the proposed route is enclosed. The effect on enjoyment will depend upon individual preferences.
39. Concerns are expressed over the available width diminishing as the hedgerow alongside it grows. Part of the canopy of two mature trees, growing on neighbouring land, overhangs the proposed path. The foliage is well above head height. It is the outward growth of the hedge which is more liable to affect free passage. According to the landowner the mature hedgerow alongside the proposed path is cut every other year and last cut in 2018. There would be a responsibility to ensure the full width of path remains free from obstruction. Moreover, the OMA has powers to require removal of encroaching hedges/vegetation causing an obstruction under section 154 of the 1980 Act.

40. A path of 2m in width must be maintained as specified in the Order. As drafted, the Order does not say where the 2m width is measured from. A post and wire fence extends along the boundary on the eastern side of the hedge. The OMA says that the nominal centre line of the proposed footpath is defined as 3m away from the adjoining boundary fence to the east. This is not reflected in the Order. A modification is requested by an objector to say that the centre line is 3m from the roots of the boundary hedge on the eastern side.
41. There is a clear stated intention by the landowner to fence the field and outward growth of the hedge could become an issue if there is uncertainty over the point from which the path width is to be measured. I acknowledge that the wording of the Order would benefit from clarification. Care is needed to describe the width by relation to the hedge which could alter over time or be lost for whatever reason. The fence is a fixed physical feature that defines the boundary along the entire length of path. It would be most sensible for the fence to be identified as the point from which the width should be measured. With such a modification there should be sufficient buffer to ensure that public enjoyment is not harmed due to the hedge encroaching.
42. Given that both the existing and proposed paths are within the same field there is no reason to believe that wildlife will be any less visible. The owner suggests that, if anything, wildlife spotting opportunities will be enhanced as walkers along the field edge path will be less noticeable to wildlife. Whether or not that is so, the hedgerow itself will no doubt attract certain species that can be enjoyed at much closer range than the existing path.
43. Objectors suggest that a sense of history would be lost by not being able to walk along a section of path used by residents of settlements to the north-west of the parish to reach the Church at Church End. An extract from the Ordnance Survey map surveyed in 1881-1882 is produced to illustrate the point. Whilst the route may well have existed for a considerable period of time, there is nothing before me to indicate that it is of any particular historical note or value.
44. Some people will prefer the existing route across an open field with wider views. Others will prefer the clarity of the proposed route over a surface less liable to flood and which still affords views of the surrounding countryside. There are advantages and disadvantages of each and the effect on enjoyment will depend upon personal preferences. All matters considered I find the effect on public enjoyment of the route as a whole to be neutral.

***The effect of the diversion on other land served by the existing path and the land over which the new path would be created***

45. There is nothing to indicate that the diversion will have any adverse effect on land served by the existing route or on the land over which the alternative route will be created.

***Conclusions on whether it is expedient to confirm the Order***

46. I have found the diversion to be expedient in the interests of the landowner and the new termination point to be substantially as convenient to the public. I am satisfied that it is expedient the Order be confirmed having regard to its effect on public enjoyment. Nothing in the submissions or from my site visit leads me to conclude that it would not be expedient to confirm the Order.

### **Overall Conclusion**

47. Having regard to the above, and all other matters raised in the written representations, I conclude that the Order should be confirmed subject to the modification described above in connection with the width to be recorded.

### **Formal Decision**

48. I confirm the Order subject to the following modification:

In the Order Schedule: Part 2

- At the end of the second paragraph insert the words "*with its centre line 3.0 (three) metres from the adjoining boundary fence to the eastern side*".

*KR Seward*

INSPECTOR



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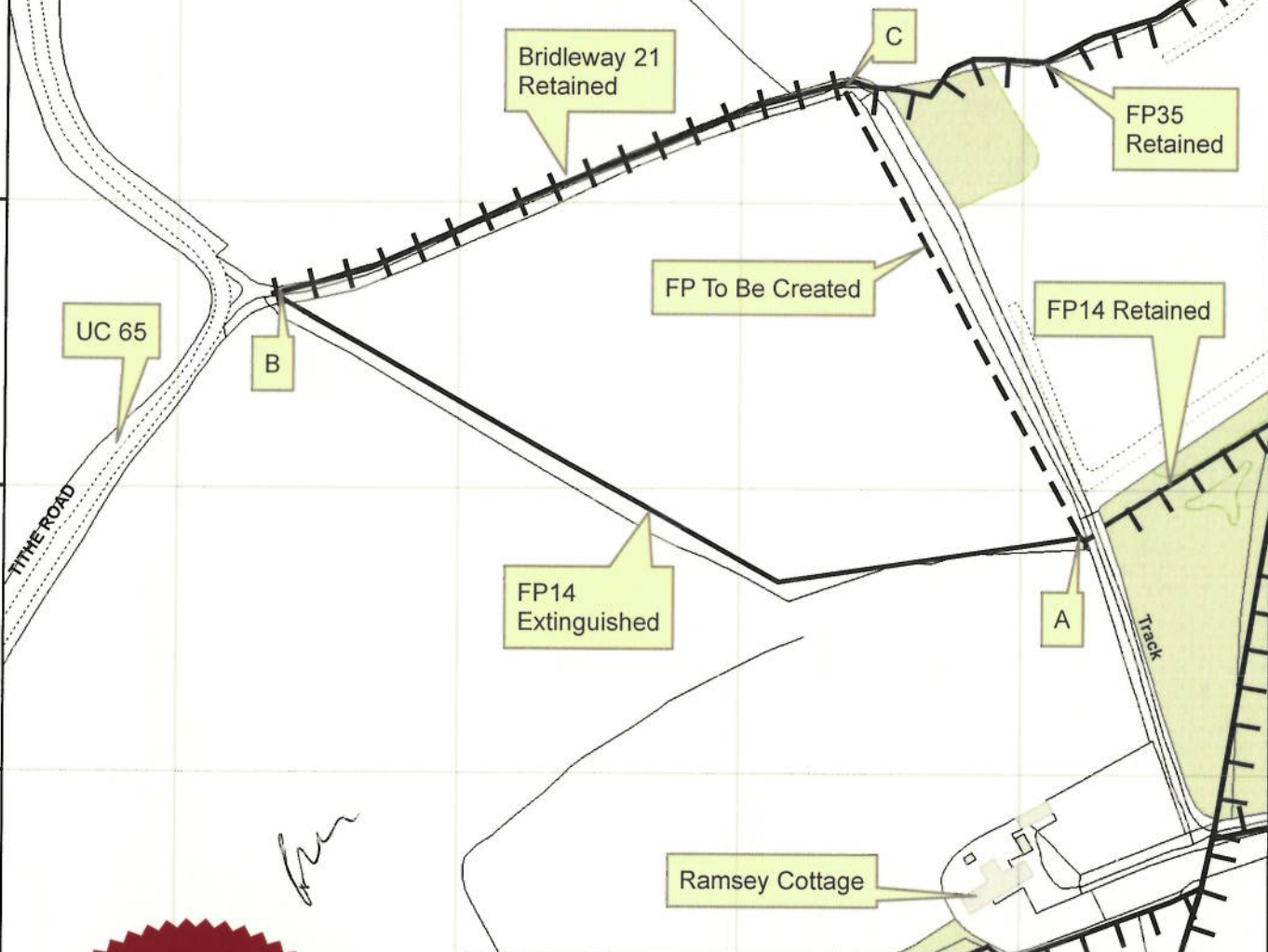
**BEDFORD BOROUGH COUNCIL**  
**(KEMPSTON RURAL: PART OF FOOTPATH No.14)**  
**PUBLIC PATH DIVERSION ORDER 2018**

Case Reference: HAD 088 KER Drawn by: AQ 30 November 2018  
 HA 1980 Section 119



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SCALE: 1:2,500 OS Sheet TL 00/47

- Public Footpath to be Extinguished A - B
- Alternative Footpath to be Created A - C
- Public Footpath to be Retained
- Public Bridleway to be Retained

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