

|  |
| --- |
| **Order Decision** |
| Site Visit on 22 June 2021 |
| **by Sue Arnott fiprow** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 1 October 2021** |

|  |  |
| --- | --- |
| **Order Ref: ROW/3247279** | |
| * This Order, dated 5 November 2018, is made under Section 119 of the Highways Act 1980. It is known as the Newcastle City Council (Footpath 4 Brunswick and Footpath 6 Dinnington) Diversion Order 2018. | |
| * The Order proposes to divert connecting footpaths leading from Sandy Lane to Morley Hill, west of Brunswick Village, as detailed in the Order map and schedule. | |
| * There were two objections outstanding when Newcastle City Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs. | |
| **Summary of Decision:** | **The Order is not confirmed.** |

**Preliminary Matters**

1. I made an unaccompanied visit to the site of the proposed diversion on 22 June 2021. I was unable to walk the current definitive line due to obstructions along Footpath 4 (Brunswick) between B and C and between D and E. However, I was able to walk the line of the proposed new footpath H-I and the affected sections of Footpath 6 (Dinnington) so was able to form a good impression of the nature of the routes concerned here.
2. In addition to the two statutory objections, further representations have been submitted by 6 other parties. I have taken these into consideration in reaching my conclusions along with the objectors’ further submissions.

**Main Issues**

1. The Order was made by Newcastle City Council (NCC) under Section 119 of the Highways Act 1980 (the 1980 Act). Therefore, as required by the provisions of that section, if I am to confirm it, I must be satisfied that:

(a) it is expedient in the interests of the owners of the land crossed by the footpaths that the rights of way in question should be diverted;

(b) the new routes to be provided will not be substantially less convenient to the public;

(c) the new termination point of Footpath 4 (being on the same highway) will be substantially as convenient to the public; and

(d) it is expedient to confirm the Order having regard to (i) the effect of the diversion on public enjoyment of the path as a whole, (ii) the effect the coming into operation of the Order would have with respect to other land served by the existing path and (iii) the effect which the proposed new rights of way would have as respects the land over which the new path is so created together with any land held with it, (iv) having also had regard to the provision for compensation.

1. Further, in determining this Order I am required to give consideration to any material provisions in any rights of way improvement plan for the area.
2. In addition, I note that Dinnington Parish Council sought assurance “*that disabled access has been taken into consideration in the footpath diversion*”. In that connection, I am happy to confirm that I have taken account of the requirements of the Equality Act 2010 in determining this Order.

Reasons

***Background***

1. The two footpaths in question, Footpath 4 (Brunswick) and Footpath 6 (Dinnington) form one continuous route between busy local roads to the north and south. The Order proposes to divert the currently obstructed path A-B-C-D-E onto a new line A-F-G-H-I[[1]](#footnote-1). Between D and E, metal fencing surrounding the several industrial units within Brunswick Industrial Estate have prevented passage by the public since the 1970s and, to the north of point B, a garden wall, garage and wooden fence at Morley Hill Cottage have likewise obstructed the footpath since the 1980s.
2. A proposal in 2012 to extinguish both footpaths drew objections and the subsequent order was not confirmed by the Secretary of State[[2]](#footnote-2) since the Inspector in that case found that if the path were actually open and made available for use by the public then it would be used by local residents.
3. This Order therefore seeks to address the challenges presented by obstructions which have existed, and been allowed to continue, for a great many years.
4. In addition, it seeks to enhance access opportunities for the future residents of a new residential development currently under construction immediately to the south and east of the proposed new path F-G-H, via a link into the estate.

***The interests of the owner(s) of the land***

1. There is little doubt that the several owners of industrial units through which the definitive line of Footpath 4 passes would benefit significantly from having the public right of way removed from their land. So too would the owner/s of Morley Hill Cottage. None of these people have made representations in relation to this Order and I consider it safe to assume that to be a recognition that its confirmation would be to their advantage.
2. However, the remaining land over which the definitive route passes is in the ownership of Messrs Ireland, the owners of Morley Hill Farm. Although they did not make their position known when the Order was advertised, they have subsequently made strong representations, making clear their opposition to the proposed route between A and F.
3. Messrs Ireland sold the land that is now being developed for housing. Along with the initial developers[[3]](#footnote-3) and the planning authority, both signed a Section 106[[4]](#footnote-4) agreement dated 30 March 2017 related to planning permission 2015/1665/01/OUT. Amongst many other things, the agreement made provision for the diversion and public access on foot between the estate and Footpath 4. The Irelands now say that it was their understanding that the footpath would be diverted through the new estate and out of their farmyard.
4. That is not what is being proposed by this Order. The new route of Footpath 4 would enter the yard at point F (instead of point B) and proceed alongside an agricultural building where it would then join the existing definitive line. Thus, the public would continue to walk through the yard and down the vehicular access drive to the public road, Coach Lane.
5. The Irelands argue that the yard is a busy and dangerous place for the public. Not only are agricultural operations carried out here but also a haulage business is based at this site. They have 12 members of staff each with vehicles, two articulated wagons with trailers, two 6-wheeler trucks, two pick-ups with trailers, a transit tipper, six tractors and other farming equipment. In addition, they undertake livestock and straw haulage and have an agricultural contracting enterprise involving substantial balers and associated equipment. The effect of this Order, together with the intended connection from the new estate, would be to encourage members of the public into this potentially dangerous place. That would create a significant safety risk, particularly for unsupervised children.
6. NCC submits that the impact on the Irelands will not be significantly worse. The section of Footpath 4 from a point north of B via C to D would be removed from their land, and NCC contends that the residents of the new estate are more likely to use estate roads and tracks within the development to head south, rather than walking through Morley Hill Farm.
7. Iaccept there is a fair argument that, since the right of way already passes through the Morley Hill farmyard, the proposed route is no worse than at present. However in judging the expediency of this Order, I cannot ignore the development and the planning obligation to provide access to the proposed alternative footpath (G-H) from the newly built estate. Since that is what would follow confirmation of this Order, I consider the Irelands make a valid point about the likely increase in usage and the heightened risks they would face as a consequence.
8. There is of course already a public right of way at present, although one little used because of obstructions further north. I agree with NCC that it is unlikely that people from the estate would choose to use this path simply to walk southwards when there are no directly connecting paths beyond. However that ignores the scope for short circular dog walks, and also the likely interest from children simply exploring ‘exciting’ places close to home regardless of the dangers.
9. Whilst I accept that the Order would be advantageous to some of the affected landowners, I consider the benefits to the Irelands from removing the footpath (B)-C-D from a grazing field to be greatly outweighed by the increased safety risks arising from the public walking through their yard. For this reason, I am not satisfied that the proposed diversion would be expedient in the interests of *all* the landowners concerned.
10. In the alternative, NCC argues that it would be expedient to confirm the Order nonetheless but, instead, in the interests of the public. The council highlights the long-standing obstructions along the route and the obvious benefits of having a path that could actually be used. That is a view echoed by some of the later representations[[5]](#footnote-5).
11. In response, the Irelands argue that may be the case as respects resolution of the obstruction issue but not as regards the route west and south of point F. The diversion proposed would not give better access to any part of the rights of way network, it would not remove the public from a hazardous area or in any way improve the experience of using the footpath. In short it merely retains the status quo when the obstructions are discounted as they must be for the determination of this Order.
12. I fully understand the imperative to achieve a right of way that is usable by the public within the difficult parameters here, namely the nature of the long-standing blockages. However, I cannot ignore the likelihood of increased use of Footpaths 4 and 6 by people joining from the new estate, particularly by children and dog-walkers. On balance I cannot accept that it would be in their interests to re-align the right of way so as to direct potentially vulnerable path users into an area where dangerous activities take place on a daily basis.
13. The Irelands (and another late representation) suggested an amended route which would see the footpath proceed southwards from G or through the linear park/open area that will run diagonally through the new estate. Although I can see merit in both those options, it is not within my limited powers of modification to propose such an extensive change to the Order before me.
14. In summary, I am not satisfied that the diversion proposed by this Order would be in the interests of *all* the owners affected by it although some would benefit substantially. Further, whilst I accept there would be some benefit in pursuing this Order nonetheless in the public interest, I consider the advantages of creating a usable alternative path northwards to Sandy Lane are outweighed by the increased risks to the public arising from such easy (and lawful) access to the significant risks of the agricultural and haulage-related operational area at Morley Hill Farm. I therefore decline to make any alteration to the interests in whom the Order is pursued.

***Convenience for the public***

1. When considering proposed extinguishments under Section 118 of the 1980 Act, sub-section (6) requires that any temporary circumstances preventing or diminishing use of the path in question should be disregarded when determining the likely use that might be made of it. Although the same instruction does not appear in Section 119, it is usual to adopt a similar approach when considering proposed diversions.
2. That is relevant here in so far as the present definitive line of Footpath 4 cannot be used in its entirety as I have explained above.
3. Firstly, addressing the relative convenience of the point of termination of Footpath 4, I have no difficulty at all in concluding that points E and I (as shown on the Order map), being 3 metres apart, are equally as convenient, whichever direction the walker is intending to travel along Sandy Lane.
4. Turning to the relative convenience of the present and proposed routes, and disregarding the obstructions which exist today, there is very little difference in terms of gradient or length, the existing footpath measuring 537m against the intended 549m long route. No gates or stiles are listed as lawful limitations along the definitive route (although in practice several may be required to re-open the path) and consequently the one gate proposed on the new route at point F is of little significance in terms of overall convenience. Although Footpath 4 has no definitive width at present, Footpath 6 is stated to be “5 feet” (1.524m); thus, the proposed width of 1.5m matches that.
5. Thus, I have no hesitation in finding the new path proposed by the Order to be ‘not substantially less convenient to the public in consequence of the diversion’. Indeed, if access is enabled between the new estate and the proposed route of Footpath 4, it would provide residents with a very convenient means of travelling northward on foot to Sandy Lane and beyond.

***Material provisions in the rights of way improvement plan for the area***

1. As I have noted, there are two objections to this Order, both arguing that discussions and negotiations that had been ongoing for some time before the recent development began resulted in agreement to replace Footpath 4 and 6 with a bridleway. Since this Order fails to afford any recognition of the benefits that a multi-user route would bring to the rights of way network here, both objectors ask that the Order be rejected.
2. They point to the Tyne and Wear Rights of Way Improvement Plan (the ROWIP) which states that the “*Authorities’ aim is to: enable equestrian activity to take place as safely as possible, across Tyne and Wear on the road and bridleway network through the promotion and creation of regional, borough and local bridle route networks within the framework of the development of the (Rights of Way Improvement Plan)*”[[6]](#footnote-6).
3. Both objectors are incensed that NCC appears to be ignoring its commitment, particularly when agreement had been reached with the developers at an early stage. Indeed the land over which the proposed new route H-I would pass was sold to the developer by objector Mr Thompson specifically so that a public bridleway could be provided. It appears there was an understanding that once the footpath had been diverted, it would be upgraded to a bridleway and linked to the development. I understand his anger and frustration that this is not being pursued.
4. In her representations, Ms Bray also argues that a multi-user route is needed to connect Sandy Lane and Coach Lane, particularly linking with the Havannah Nature Reserve bridleway (parallel to Coach Lane), either through the central open space or along the western boundary of the development site.
5. That is also a view supported by the Bridleways Action Group, Cycling UK and Brunswick Parish Council. Dinnington Parish Council does object to the Order and would like the diversion to go ahead as soon as possible but likewise believes there is merit in upgrading to a bridleway.
6. In reply, NCC recognises its duty under the 1980 Act to administer “*diversions, extinguishments and additions (to the legal record)*” as required by Appendix D.5 of the ROWIP, and is acting in accordance with Appendix D.13: “*Where longstanding built and residential obstructions are identified, the appropriate course of action will be determined on a case by case basis*”. Also, it highlights published guidance which advises that “*a diversion can only amend the definitive map and statement insofar as the course or line of the right of way is concerned, it cannot alter the status of the way*.”
7. Further, NCC takes the view that there would be no purpose in the creation of a bridleway between H and I and no benefit to the public.
8. I acknowledge that NCC is correct insofar as a diversion order is not an appropriate mechanism for changing the status of a public right of way. It is not open to me to consider whether this Order might be modified so as to propose the substitution of the current (obstructed) definitive footpath with a public bridleway.
9. Nevertheless, there is clear support for the establishment of a multi-user route in this location and indeed that was the whole purpose of the sale of the strip of land between points H and I over which a pedestrian-only route is now proposed. Although it is not for me to comment on any of the alternative routes suggested for a bridleway to the south of point H, there are clearly options for negotiation which could avoid the potential dangers of the Morley Hill farmyard and also for links with the bridleway that runs south of and parallel to Coach Lane. Although a diversion order made under Section 119 of the 1980 could not achieve this, concurrent orders under Sections 26 and 118 could do so.
10. Insofar as this has relevance to my determination of the Order before me now, I find the proposed diversion is not against aims of the ROWIP but it is a missed opportunity to take a step towards the improved network for horse-riders and cyclists so craved by many vulnerable users of public rights of way.

***Other considerations***

1. Under this heading I will consider first the effect of the proposed diversion on public enjoyment. Even disregarding the current obstructions, I recognise that the proposed section H-I would present a more attractive option than D-E, being screened from the industrial site by thick hedging to the east. For the section D-C-B, I consider the new route H-G-F to have the advantage of avoiding Morley Hill Cottage and any feeling of intrusion into a ‘private’ garden which some walkers find uncomfortable. Other than that, there is little difference between A-B and A-F other than the latter necessitating a slightly longer walk within the farmyard with exposure to agricultural machinery and other heavy goods vehicles. Overall I consider the new route would be more enjoyable than the existing alignment.
2. In respect of land served by the existing right of way, no negative effects have been raised. However strong representations have been made in relation to the effect the proposed new footpath would have on the land over which it would be created and other land held with it, details of which I have noted above.
3. There are rights to compensation for those affected by these issues[[7]](#footnote-7). Indeed the Section 106 agreement required the original developers to indemnify NCC in relation to any claim for compensation and to cover the costs of the Order. However, having considered the submissions made on behalf of the Irelands, I am not satisfied that the increased health and safety risks for the owners of Morley Hill Farm that would result from confirmation of this Order could be dealt with adequately through financial compensation.

***Whether it is expedient to confirm the Order***

1. Before reaching a final conclusion on the expediency of this diversion I note my finding, in paragraph 28 above, that when considering the relative merits of the present and proposed routes, the new route would not be substantially less convenient to the public and the proposed new point of termination would be substantially as convenient.
2. In considering the question of expediency, here I am required to weigh the advantages of the proposed diversion, whether for the landowners (in whose interest the Order is made) or for the public, against any disadvantages that may result.
3. I have considered very carefully whether confirmation of the Order (as made) would be expedient, taking particular account of the fact that the public would at least regain access to a footpath to which they have been denied for many years, and that further negotiations may subsequently take place to establish the multi-user route sought by many parties. However, setting aside the bridleway issue, I am not satisfied that facilitating access from the new estate into the farmyard would be in the public interest and I have little doubt that it would not benefit the owners of Morley Hill Farm. To confirm this Order simply as an interim step towards a more widely acceptable solution could risk that the second stage never comes to fruition.
4. Overall, taking into account all relevant factors and having addressed the statutory tests in Section 119 of the 1980 Act, I conclude it would not be expedient to confirm the diversion proposed by this Order.

**Conclusion**

1. Having regard to the above and all other matters raised in the written representations, I conclude the Order should not be confirmed.

**Formal Decision**

1. I do not confirm the Order

Sue Arnott

**Inspector**

1. I agree with Brunswick Parish Council that it appears the proposed new route between H and I would probably lie within Dinnington Parish rather than Brunswick as stated in the Order. [↑](#footnote-ref-1)
2. Reference FPS/M4510/3/1 issued on 24 January 2014 [↑](#footnote-ref-2)
3. Banks Property Ltd; I note that the company also agreed to defray any compensation which becomes payable in consequence of the coming into force of the Order and any expenses incurred in bringing the new site of the path into a fit condition for use by the public. [↑](#footnote-ref-3)
4. Of the Town and County Planning Act 1990 [↑](#footnote-ref-4)
5. Although qualified by the expectation that the route would subsequently be upgraded to a bridleway. [↑](#footnote-ref-5)
6. ROWIP Appendix K5: Aims and Objectives [↑](#footnote-ref-6)
7. As provided under Section 28 of the 1980 Act and applied by Section 121(2) [↑](#footnote-ref-7)