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| **Order Decision** |
| Site visit made on 6 July 2021 |
| **by J J Evans BA (Hons) MA MRTPI** |
| **appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 05 October 2021** |

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| **Order Ref: ROW/3241619** |
| * This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and is known as the Herefordshire Council Footpaths VO53 and VO57 (part) Vowchurch Public Path Diversion Order 2019.
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| * The Order is dated 3 July 2019 and proposes to divert the public rights of way shown on the Order Plan and described in the Order Schedule.
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| * There were 6 objections outstanding when Herefordshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
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| **Summary of Decision: The Order is confirmed subject to a modification that does not require advertising.**  |
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**Preliminary Matters**

1. My site inspection of the existing and proposed footpaths was undertaken on an accompanied basis. I was accompanied at all times by Mr Hemblade, a representative of Herefordshire Council, the order making authority (OMA). The owner of The Old House, Mr Waistell, and the owner of the agricultural land crossed by the paths, Mr Prior, were also in attendance. In addition, a representative of Vowchurch and District Group Parish Council, Mr Picton was present, as well as a local resident, Mr Langton.
2. During the site inspection Mr Langton and Mr Picton asked whether it was possible to discuss the case and submit additional evidence. The procedures for written representation appeals are described in “The Guidance on Procedures for Considering Objections to Definitive Map and Public Path Orders”. This document explains the written representations procedure, including what to do if anyone who has made a duly made objection wishes to be heard, the nature of the site visit, what can and cannot be discussed, and the provision of late evidence. In this instance I am unaware of any extraordinary circumstances for accepting late evidence. Consequently, I have considered the appeal as a written representation case, on the basis of the evidence before me.
3. Queries have been raised as to whether extinguishment would be appropriate rather than diversion. However, I am unable to consider whether a different type of Order could or should have been made.

**Main Issues**

1. Section 119 of the Highways Act 1980 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.

1. In determining whether to confirm the Order at Test 3 stage, (a)-(c) are mandatory factors. On (b) and (c) of Test 3, the statutory provisions for compensation for diminution in value or disturbance to enjoyment of the land affected by the new paths must be taken into account, where applicable. Regard must also be had to any material provision contained in a rights of way improvement plan (“ROWIP”) for the area under Section 119(6A). Other relevant factors are not excluded from consideration and could, for instance, include those pointing in favour of confirmation.

**Reasons**

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

1. St Bartholomew’s Church is an attractive historic building set within a churchyard that is bounded in part by both the River Dore and by the C-class road that runs through the village. Within the churchyard there are two public footpaths. Footpath VO54 runs from the road along the path to the main church entrance and continues to the easternmost corner of the churchyard. In addition to this path, there is a further one through the southern side of the churchyard (Footpath VO53) that links with Footpath VO57. The public footpath runs through the garden of The Old House and then onwards through agricultural fields to eventually terminate at the B4347 road.
2. The application was made by the owner of The Old House. This timber framed listed building has a garden that extends towards the River Dore. The garden comprises lawns, shrubberies, and planting borders, as well as gravelled areas near to the house that are enclosed by tall hedges. The legal line of the path through the garden of The Old House is blocked by hedgerows and planting, with alternative access points and varying routes through the garden having been used on a permissive basis for several years. The Order seeks to remove the public footpath (Points A-B-C-D) away from the garden of The Old House, through creating a new link to Footpath VO56 (Points D-E).
3. Although the legal line of Footpath VO53 has in places been obstructed, the route would provide walkers with direct views from a few metres away into several windows of The Old House. There would be a loss of privacy experienced both within the garden and within the house, and particularly so with regard to those rooms within the front and south-facing elevations. In addition, the owners of The Old House have cited incidences of property damage, trespass and harassment from people using the permissive paths through the garden.
4. Diverting the path away from the house and its garden would be in the interests of the occupiers of The Old House, as occupiers of this property would benefit from improved privacy both in their home and in their garden. In addition, their safety and security would be enhanced, as well as improving their enjoyment of their property in consequence.
5. Objections have been made that the footpath previously ran through a field rather than a garden and that it is the removal of former hedgerows and the change of use of land that has created the privacy issues for the occupiers of The Old House. The presence of a footpath would not prevent the submission of a planning application, albeit the landowner would be obliged to ensure the legal route was free from obstruction. In addition, the awareness of the presence of a path at the time of purchase of a property is irrelevant to the question of whether it should be diverted.
6. There appears to have been use by the public of alternative permissive routes through the garden of The Old House, with claims being made that these other routes have become public rights of way through a period of long use. Although it might be possible for claims to be made that alternative routes through the garden have become public rights of way, such a claim would only apply to those particular sections. Moreover, in this instance there appear to be two alternative routes. If the Order is confirmed, then any subsequent application under Schedule 14 of the Wildlife and Countryside Act 1981 would only relate to the section of the path which diverges from the existing definitive line.
7. Beyond the garden of The Old House, the proposed diversion would pass through two fields, which at the time of my site visit were used for arable. The owner of the fields has raised no objection to the proposed diversion. The diversion would be in the interests of the owner of the fields as it would reduce the length of public paths over their land, thereby having land management and agricultural production benefits.

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

1. The proposed termination would incorporate linking into Footpath VO56 at Point E. Footpath VO56 connects into the other public path through the churchyard (ie Footpath VO54) in the vicinity of Commerce House, thereby providing connectivity to Point A. The diversion would maintain connectivity within the network and would be as substantially convenient to the public.

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

1. The proposal to divert the paths would increase the total distance and journey times, as there is a difference in distance between the routes between Points A-B-C-D compared to Points D-E-A of around 50m additional metres. The direction of travel would be broadly similar. The surface across the fields would be agricultural, albeit given the arable use, they would be ploughed and cultivated at various times during the year. Nevertheless, the landowner is required to reinstate paths that are disturbed by ploughing and cultivation. There would be a short section of the compacted gravelled drive to The Old House existing between Commerce House and the entrance of Footpath VO54 into the churchyard, with the path then being grassed and paved towards Point A. The proposed path would have a width of 2m with clear sight lines between Points D-E given the level nature of the field.
2. There are no limitations present between Points A-E-D, with gaps present in the field hedges. From the evidence of the parties, it appears that a stile on Footpath VO56 near Commerce House has been removed, with a step now present from the level of the field surface down onto the access drive near Commerce House. The step would be more readily negotiable by most users than a stile. The drive would accommodate some vehicular traffic, but as it serves only a few properties movements would be limited, and there is clear visibility for pedestrians both along the drive and when emerging from the field.
3. Although there would be a slight increase in total distance travelled, for the above reasons, the proposed diversion would not be substantially less convenient to the public.

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

1. Some users may feel uncomfortable walking through a domestic garden, especially if the legal line is blocked and there is uncertainty arising from walking alternative routes. In addition, walking through the churchyard between Points A-B would necessitate going very close to and in some cases over graves, which again some people may not be comfortable undertaking. The proposed diversion would remove the requirement for pedestrians to walk close to The Old House and through its gardens, whilst the use of Footpath VO54 through the churchyard would provide a clearly defined route avoiding graves and memorials.
2. Both St Bartholomew’s Church and The Old House are attractive historic buildings and diverting the footpath away from the latter would reduce the close views of this attractive timber-framed building. However, public enjoyment has to be balanced against the privacy of the occupiers of this property. Whilst unrestricted public access through the churchyard cannot be assumed to be maintained in perpetuity, the proximity of Footpath VO54 to the church and The Old House provides views of both buildings. The attractive nature of these buildings and their settings, along with their relationship to the river and road bridge, would all remain visible, as would the legible appreciation of their landscape context and historic relationships.
3. Objectors have referred to the historic nature of the legal paths, providing a route along the Golden Valley, linking Dore Abbey, nearby churches and historic buildings. I saw at my visit that Vowchurch and the surrounding area is rich in historic features, including St Mary’s Church at Turnastone and several earthworks near to Chanstone Mill. There are other public paths either side of the River Dore. Given this, no substantiated evidence has been provided that either Footpaths VO53 or VO57 have any historical significance or interest. Moreover, the proposed diversion would maintain the direction of travel within the valley as well as the connectivity with other routes.
4. The legal line of Footpath VO53 through the churchyard provides views of the River Dore, albeit during the summer months the verdant nature of the bankside trees and vegetation provide only glimpses of the water. Between Points B-C-D the river flows in a broadly southerly direction, with the path traversing in a south-east direction. Given the increasing separation occurring between the river and the path, the views of the river rapidly diminish beyond Point B, with hedges and trees further obscuring views of the water. Objectors would like alternative routes considered through the garden of The Old House and within the fields. However, it is my role to consider the merits of the diversions in the Order rather than alternative proposals favoured by objectors.
5. Moreover, in walking towards Points E and D there are attractive panoramas of the surrounding countryside, including of the Brecon Beacons. On balance, the enjoyment of those who seek pleasure from informal recreation would not be substantially diminished as a result of the diversion.

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

1. There is no evidence before me that the Order would have any effect separately identifiable from those considered above in relation to the other requirements of Section 119 of the Act.
2. The proposed path between Points D-E would run over land in a different ownership to the applicant. Compensation issues have not been raised as being relevant, and there is no evidence before me that the diversion would have any adverse effect on land served by the existing routes or on the land over which the alternative routes would be created.

**Other Matters**

1. An objection has been received that contends the confirmation of the Order would set an unwelcome precedent for other footpath diversions. In this case, the fears raised are of a general nature of a precedent. I am obliged to consider each case on its individual merits having regard to the particular circumstances of each situation being weighed against the statutory tests found in Section 119 of the Act. In this instance there is no evidence before me that this case would set a precedent for the diversion of other paths.
2. Finally, the objectors and the applicant have raised issues regarding each other’s behaviour. Whilst this would be of concern to the parties involved, such matters have to be pursued by other means separate from the appeal process and are not for me to consider.

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

1. I have found that the Order is expedient in the interests of the landowners. The proposed route would not be substantially less convenient and I am satisfied that it is expedient for the Order to be confirmed having regard to its effect on public enjoyment and upon other land served by the existing path and that over which the new path would be created. There is nothing in the submissions nor what I observed at my site visit that would lead me to conclude that it would not be expedient to confirm the Order.
2. In Part 2 of the Order Schedule the OMA have described the new route as “being a minimum of 2 metres in width”. Since the Order was made the OMA have received advice that the use of minimum is contrary to current guidance within “Rights of Way Advice Note 16 – Widths on Orders”. The OMA have requested that if the Order is to be confirmed that it should be modified to remove the words “a minimum of”. Minimum widths can lead to uncertainty regarding the position, area, maintenance, and obstruction of a right of way. As the deletion of the words would provide clarity to the Order, I have modified the Order accordingly.

**Overall Conclusion**

1. Having regard to the above and all other matters raised in the written representations, I conclude the Order should be confirmed with the modification that does not require advertising, as outlined in the paragraph above.

**Formal Decision**

1. The Order is confirmed, subject to the following modification: within Part 2 of the Schedule delete the text “a minimum of”.

J J Evans

INSPECTOR

