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| **Order Decision** |
| **by** **Edward Cousins BA, BL, LLM, Barrister** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date:**  **13 December 2021** |
| **Order Ref: ROW/3260595**   * This Order is made under section 257 of the Town and Country Planning Act 1990 and is known as the Hassocks Public Footpath No 5K (Part) Public Path Diversion Order 2020 (No 2). | |
| * The Order is dated 30 July 2020 and proposes to divert part of Public Footpath No 5K in Hassocks. Full details of the route are given in the Order plan and Schedule. | |
| * There was one objection outstanding at the date when Mid Sussex District Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation. | |

**Summary of Decision: The Order is confirmed**

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**Procedural Matters**

1. On Tuesday 14 September 2021 I made an unaccompanied inspection of the Order Routes. On my visit I was able to view both the existing and proposed routes.
2. The OMA made two Orders. The first of these was made on 6 April 2020 (“the First Order”) to which there were four objections. One of these objections was from Mr James Blake, a local resident, who raised an objection to the diversion of the proposed route of Footpath 5K. It then transpired that a procedural error had been made by the OMA. The OMA then decided not to confirm the First Order, and to seek to address the objections made to it. Duly the second order was made on 30 July 2020 (“the Second Order”).
3. Only one objection was made to the Second Order, that of Mr Blake. He stated that the terms of his original objection to the First Order had not changed i.e., these objections still stood and remained valid in so far as the Second Order is concerned. It is the Second Order which is the subject matter of this Decision.

Main issues

1. The Order was made because it appeared to the OMA that it was necessary to divert part of Public Footpath No 5K in order to enable development to take be carried out in accordance with planning permission granted under Part III of the Town and Country Planning Act 1990 (“the 1990 Act”), namely, to facilitate the development of 130 dwellings by Rydon Homes Limited (‘Rydon Homes’) in accordance with planning permission reference no DM/19/1897.

**Legal position**

1. The power to authorise the stopping up or diversion of a footpath is subject to the provisions of Section 259 of the 1990 Act which provides that an order made under Section 257 of the Act shall not take effect unless confirmed as an unopposed order by the Council, or where the order is opposed by the Secretary of State. Section 259(2) provides that the Secretary of State shall not confirm an order under Section 257 unless satisfied as to every matter as to which the authority making the order are required under Section 257.
2. Section 259(1) of the 1990 Act requires that, before confirming the Order, I must consider whether the tests provided for under section 257(1) have been satisfied in order to enable the development to be carried out in accordance with the planning permission already granted, but not substantially completed.
3. The two tests to be considered are referred to as the “necessity test,” and the “merits test.” The necessity test provides that it would be necessary to authorise the diversion to enable the development to be carried out in accordance with the terms of its planning permission i.e., I must be satisfied that the stopping up or diversion of the footpath is necessary for the purpose of the development.
4. The second merits test raises the question of the exercise of my discretion and relates to the consideration as to whether the disadvantages, either to the public or to individuals, of diverting the route, balanced against the advantages of the diversion to the public and individuals, are significant enough to justify refusal of the Order. The advantages include the planning benefits of the development.

**Reasons**

*Background*

1. The planning permission in the present case is for housing, associated access and change of use of part of the land to Country Open Space following the provision of a new pedestrian tunnel under the main railway line. Footpath 5K will pass through the tunnel to be built on Network Rail land, rather than via the existing surface crossing over the railway embankment, as is the present case. However, it is to be noted that the Order does not affect that section of Footpath 5K which lies to the east of point F shown on the Order Plan.
2. Footpath 5K is one of part of a key network of footpaths that runs to the north of Hassocks and Keymer joining Hurst Wickham in the west to Ditchling in the east. It also joins Footpath 11 to the south of Woodside Grange. Footpath 11 then runs south to residential areas of Hassocks village centre and various local facilities.
3. The current position is that Footpath 5K lies on a west/east trajectory between the A273 London Road and the London to Brighton main railway line. At its western end it the crosses a small wooden bridge over the Herring Stream close to its junction with the A273. Footpath 5K then runs along the southern edge of an agricultural field (formerly in arable production, but currently rough grassland), bordering and parallel with the rear boundary of the Shepherd’s Walk Estate. it then follows a narrow fenced and often muddy track to the main railway line.
4. Footpath 5K at present crosses the main railway line via the Woodside Pedestrian Level Crossing. This is at present an unmanned crossing accessed from a flight of wooden steps up the railway embankment on each side. On the other side of the railway line Footpath 5K runs through a small wooden area and then crosses agricultural fields to the east towards Ockley Manor.
5. I now turn to the following tests: -

***Whether it is necessary to divert part of the Footpath to enable development to be carried out***

1. The Herring Stream runs along the western boundary of the proposed site for housing development, and it is said that this part of the site is currently susceptible to localised flooding. As a result, it is proposed that the first section of the new vehicular access will run across a short stretch of undeveloped flood plain with the main housing area to the east beyond the floodplain area. It is proposed that the main access road will then pass over a new bridge crossing the Herring Stream and will be raised above the level of the floodplain. It is also intended to create a flood compensation area which covers the current route of Footpath 5K parallel to the southern boundary of the proposed development.
2. Further, it is said that it is not practical for Footpath 5K to run through the flood compensation area because it is steep sided and may contain water at times. It is therefore necessary to close the western part of Footpath 5K and to divert it up to the new access road in front of the new housing, and then to re-join the original route of Footpath 5K alongside the southern site boundary as the footpath continues to the east.
3. The OMA contends that the diversion is required for the following reasons: -
4. To reflect the approved site access arrangements and new crossing of the Herring Stream.
5. The proposal follows closely the submitted illustrative master plan which was a material consideration in the grant of planning permission.
6. Rydon Homes are satisfied that no alternative layouts that could preserve the current route of Footpath 5K are practically available*.*
7. It is therefore asserted by the OMA that the diversion is therefore necessary to enable development to be carried out in accordance with the planning permission granted under Part III of the 1990 Act.

18. It has been argued by Mr Blake the current condition of the proposed diverted route is unsuitable, and that the flood compensation works should not be carried out.

19. As to Mr Blake’s other points, to the effect that: -

(1) there should be timing coordination of the footpath diversion and the construction of the pedestrian tunnel under the railway line. It is apparent that these will be coordinated in any event, when reference is made to Article 3 of the Second Order. This provides that diversion of the footpath shall have effect on the date when the OMA certify that there has been compliance with the terms of Article 2; and

(2) the OMA must hold Rydon Homes to all the pre-development conditions of the planning permission. It is clear that to fail to do so would be in breach of the planning conditions on the part of the OMA, and therefore would be unlawful.

***Conclusion on the necessity test***

20. On balance and taking into account these various contentions, I have come to the conclusion that the necessity test has been satisfied in all the circumstances. My reasons are as follows: -

1. The proposals that the main access road will pass over a new bridge crossing the Herring Stream and will be raised above the level of the floodplain, together with the creation of a flood compensation area which covers the current route of Footpath 5K parallel to the southern boundary of the proposed development, in my judgment, together address the potential issue of susceptibility to localised flooding.
2. It is not a pragmatic solution for Footpath 5K to run on a trajectory through the flood compensation area for the reasons that it is steep sided and may contain water at times. It is therefore necessary to close the western part of Footpath 5K and to divert it up to the new access road to address these considerations.
3. These proposals reflect the approved access and the new crossing of the Herring Stream.
4. I am satisfied that no alternative layouts that could preserve the current route of Footpath 5K are practically available*.*

21. I am therefore satisfied on the evidence that it is necessary to divert Footpath 5K in order to enable development to be carried out. I disagree with Mr Blake that the current condition of the proposed diverted route is unsuitable, and that the flood compensation works should not be carried out, for the reasons stated above.

***Whether the development is substantially complete***

22. At the time of my site visit no works had been commenced in relation to the construction of the new housing estate. I am therefore satisfied that the development is not substantially complete.

***The disadvantages or loss likely to arise as a result of the diversion***

1. Paragraph 7.15 of Defra Circular 1/09 recognises that the granting of permission does not mean that the right of way will automatically be diverted. It states that *“the disadvantages of loss likely to arise as a result of the diversion, either to members of the public generally, or to persons whose properties adjoin, or are near to the existing highway, should be weighed against the advantages of the proposed Order.”*
2. The only objection that has been made as to the disadvantages or loss likely to arise as a result of the diversion is again by Mr Blake. He contends that certain disadvantages arise, namely that: -
3. The direction and route of the footpath should not be diverted, nor should the diversion works be allowed to disrupt the work to the footbridge over the Herring Stream and the impact of works to construct the new road bridge on the current use of the footpath.
4. The current condition of the proposed diverted route is unsuitable.
5. The re-routing of the footpath across the newly constructed access road does not seem to be a particularly safe option.
6. Having regard to the overall circumstances, I conclude that there may be some disadvantages in giving effect to the scheme. Thus, although the footpath may have to close in due course so as to facilitate the works to the new bridge and to replace the existing footbridge over the Herring Stream, and the implementation of the agreed drainage strategy, such closure will be temporary.
7. However, in my judgment, on balance the overall public interest lies in favour of such closure in order to allow the footpath to be diverted and to enable such other access roadway and bridge works to be completed to give effect to the grant planning permission. This will assist in the creation of a new footpath route that is accessible and one which safely connects to the main London Road. I also find that the proposed pedestrian crossing point over the access road is accessible and safe.

**Overall Conclusions**

1. In essence, therefore, having regard to the submissions made by the OMA, as set out above, and the various points made by Mr Blake, I come to the following conclusions: -
2. Unless the Second Order is confirmed the development will not proceed. It is clear that the footpath will not be diverted until the pedestrian tunnel under the railway line is completed. The current condition of the proposed diverted route is unsuitable, but this will be addressed by the flood compensation works. There will be diversion of Footpath 5K to the new access road and access issues will be addressed. A new bridge will be constructed over the Herring River and raised above the level of the flood plain to facilitate walkers and road users, and the development will not proceed unless and until the various conditions included in the planning permission are fulfilled.
3. Accordingly, I am satisfied that there is development for which planning permission has been granted, which could not be carried out if the route remained in the current location. I accept that there may be some people who currently use the existing route who may not wish to use the proposed route, or who may suffer temporary inconvenience. However, taking all matters into account, I consider that the advantages conferred by the Second Order outweigh the disadvantages that may arise.
4. I am therefore satisfied that it is necessary to divert Footpath 5K as proposed to allow the development to be carried out in accordance with planning permission already granted, but not substantially completed.
5. I conclude that there is no substantive reason why the Second Order should not be confirmed.

**Formal Decision**

1. I confirm the Order.

Edward Cousins

**Inspector**

