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| **Order Decision** |
| Site visit made on 30 November 2021 |
| **by H Baugh-Jones BA(Hons) DipLA MA CMLI** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 24 February 2022** |

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| **Order Ref: ROW/3259266** |
| * This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act) and is known as North Kesteven District Council Public Footpath (Aswarby and Swarby) (Footpath No.1) Public Path Diversion Order 2020.
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| * The Order is dated 5 March 2020 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
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| * There were two objections outstanding when North Kesteven District 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.** |
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Procedural Matters

1. The diversion order has been made following the grant of outline planning permission for a dwelling on the land crossed by the footpath. However, I am concerned solely with the public right of way and not planning matters.
2. Both objectors live at the property next to the site outlined for development and across which the footpath runs. It is argued, as part of the objection to the diversion order, that the definitive footpath route has been incorrectly plotted on the plans by the District Council. However, the evidence tells me that the error was corrected prior to consulting on the Order. I am satisfied that the neighbours’ interests and those of any other party are not prejudiced because of this.
3. I have no evidence to indicate that anyone has been prejudiced by a perceived absence of consultation, as advanced by the objectors.

**The Main Issues and Legal Framework**

1. The Order was made under Section 119 of the Highways Act 1980. This requires that, before confirming the Order I must be satisfied that:

(a) it is expedient in the interests of the owner of the land crossed by the footpath that the right of way in question should be diverted;

(b) the new termination point of Footpath 1 (being on the same highway) is substantially as convenient to the public;

(c) the new route to be provided will not be substantially less convenient to the public; and

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

1. Further, in determining this Order I am required to have regard to any material provisions in any rights of way improvement plan for the area although no particular issues have been raised in this case. I am also mindful of the requirements of the Equality Act 2010.

Reasons

*Interests of the landowner*

1. The footpath runs diagonally across a parcel of overgrown land before heading through a neighbouring field and onwards to where it eventually joins a public bridleway. Given that the parcel of land benefits from an outline planning permission to construct a dwelling, there is a clear and unequivocal benefit to the owner of the land from diverting the footpath to a location at the edge of the property. Therefore, it would be expedient to divert the footpath in the interests of the landowner.

*Convenience to the public*

1. The available evidence tells me that a number of groups use the route. However, they would still be able to do so, and their overall experience would not be unduly harmed given the length of the diverted footpath in the context of it forming a substantially longer route. Moreover, the Order sets out that, for the most part, the width of the new footpath would vary between 2.0 to 2.6 metres (and of greater width where it would adjoin Swarby Road). This would allow walkers to walk two abreast and would enable an appropriate width to be legally defined in the definitive statement. There would be no material change to the gradient. There would be a very minor change to where the public would access the footpath. It would still connect to the same highway and cross the same parcel of land.
2. Consequently, taking all of this into account, the diverted route would not be substantially less convenient to the public and would terminate at a substantially as convenient point on Swarby Road.

*Public enjoyment*

1. If a dwelling is constructed as proposed, it is reasonable to expect that a fence would be erected to separate the footpath from the new garden area. Being bounded on both sides, the new path would have a quite different character to the current more open route. There would be a change to the current experience of crossing approximately 35 metres of the land out of a total diverted footpath length of 63 metres. It would not allow the current open views across the site to the fields beyond, but these would be lost anyway as a result of the creation of the proposed new dwelling. However, the lengths of the present and proposed routes are almost identical and leave Swarby Road only around 5 metres apart.
2. Given the modest length that would be affected in this way, I am satisfied that the new route would not diminish the overall experience of using Footpath No.1. There would be no adverse impact on the public’s enjoyment to any meaningful extent.

*Other considerations*

1. Compensation may be payable consequent on the coming into effect of a diversion order and is essentially a matter between the order-making authority and the relevant parties. In determining this Order, I need to take into account any effects on the land that *cannot* be remedied through financial compensation.
2. I acknowledge that the diverted footpath would run directly next to the neighbours’ boundary fence. I observed that the fence is of varying height. It is much lower towards the rear of the neighbours’ garden and it was easy to look into that garden and indeed directly towards the rear elevation of the house from the proposed footpath route. It was also possible to see over the higher section of fence but only if making a concerted effort to do so. There are trees and shrubs within the garden that go some way towards mitigating the effect of such action in any case.
3. Furthermore, the rear garden boundary fence is of post, rail and wire mesh construction. It is also of relatively low height. The consequence of this is that users of the current footpath are able to gain similar views into the neighbours’ garden and towards their house. I recognise that because the actual route of the footpath across the neighbouring field had been ploughed over (at least it had at the time of my site visit), walkers tend to take a different route along the rear of the garden boundary. However, that is a matter that sits outside the scope of my considerations.
4. There is no evidence to suggest that the proximity of the diverted footpath to the neighbours’ boundary would result in any materially harmful effects on their privacy, safety or security over and above those which already exist.

*Whether it is expedient to confirm the Order*

1. If the development proceeds as proposed, the diverted footpath would not be as enjoyable to the public as it is currently. However, it would be a perfectly useable route and retain its convenience. There would be a clear benefit to the landowner. I have not found that there would be unacceptable effects on the neighbouring landowner. This leads me to conclude that the tests in Section 119 of the Act are met it would be expedient to confirm the Order.

**Other Matters**

1. There is a Wild Service Tree (Sorbus torminalis) within the neighbours’ garden, and which overhangs the boundary. It was evident that it has previously been heavily pruned. The tree is not in a conservation area and nor is it subject to a Tree Preservation Order (TPO). The Council’s Tree Officer has confirmed that a TPO would not be placed on the tree due to its low quality. Whilst it may require more regular pruning to prevent it from obstructing the path, there is no evidence to demonstrate that such works would damage the tree’s health and vitality.
2. In making my decision, I have had regard to Article 8 of the Human Rights Act 1998 as this matter has been raised by the objectors. Article 8 affords the right to respect for private and family life. This is a qualified right, and interference may be justified where in the public interest. The concept of proportionality is crucial. There would potentially be a limited degree of interference by diverting the footpath closer to the neighbours’ boundary. However, the interference would be in accordance with the law and in pursuance of a well-established and legitimate aim: the continued provision of a public right of way. Given the circumstances overall, I find that confirming the Order would be proportionate and necessary.

Formal Decision

1. I confirm the Order.

H Baugh-Jones

Inspector

