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| **Order Decision** |
| Site Visit on 28 September 2022 |
| **by Sue M Arnott FIPROW** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 13 October 2022** |

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| **Order Ref: ROW/3260774** | |
| * This Order is made under Section 257 Of the Town and Country Planning Act 1990. It is known as the (Footpath No 403001 Parish of Cleator Moor) Public Path Diversion Order 2020. | |
| * The Order is dated 31 July 2020. It proposes to divert a section of Footpath 403001 at Mill Hill in Cleator Moor as shown on the Order map and described in the Order schedule. | |
| * There was one objection outstanding when Copeland Borough Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs. | |
| **Summary of Decision:** | **The Order is confirmed subject to a minor modification as set out in the Decision below.** |

**Preliminary Matters**

1. The Order was made by Copeland Borough Council (CBC) in its capacity as planning authority. Following the submission of a duly made objection which has not been withdrawn, the Order was forwarded to the Secretary of State by Cumbria County Council (CCC), the highway authority, which is acting as agent for CBC in this matter.
2. I have determined the Order on the basis of the written representations and my visit to the site for which I was accompanied by Mr G Fewkes (for CCC), Mr G Reed (representing the applicant, High Grange Developments Ltd) and the objector, Mr D McConnell. We were not able to walk the full length of the definitive line B-A due to ‘Heras’ fencing surrounding the development site and a large spoil heap located towards the south of the route. Nevertheless, I was able to get a good impression of the existing footpath as it stands at present.
3. In his objection, Mr McConnell criticises several of aspects of CBC’s processes in dealing with the planning applications which relate to this site. He also submits that certain planning permissions which have been granted for residential development here were unlawfully approved.
4. CCC has responded by confirming that all the required planning protocols and legislation were followed in reaching the decisions to grant planning permission(s) for the development of this site.
5. The validity of a planning permission is not a matter on which I can comment. Only a Court can declare permission to have been unlawfully granted. For that reason it is outside my jurisdiction to examine the processes followed by CBC of which Mr McConnell complains.
6. However, insofar as it affects matters which are before me here, I note the objector criticises the planning authority for failing to fully consider the implications of the public right of way across the development site when determining the applications for planning permission. He has drawn to my attention the fact that none of the applications were advertised to the public as affecting a public right of way (as required by the Town and Country Planning (General Development Procedure Order 1995 (S.I.1995/419) although they clearly did so. Government guidance issued in Defra Circular 1/09 v2 (October 2009) makes clear that “*The effect of development on a public right of way is a material consideration in the determination of applications for planning permission*”.
7. Being a part of the planning process, (and as I have noted above), that is not a matter I can address directly, and the lack of notice does not invalidate the planning permissions subsequently granted. But it is a factor I would have been prepared to take into account had there been strong local opposition to the diversion proposed by this Order. Yet I note that when this proposal was publicised (and a previous order made in 2016 which also sought to divert this footpath) only one objection was submitted. That does not in any way diminish the arguments put forward in the objection but it does suggest to me that local users of this path are not exercised by the issues here.
8. Insofar as the procedures required in relation to the processing of this Order are concerned, I am satisfied that all matters have been attended to, although it is disturbing to discover that the objector was not supplied with a copy of the Order on request, as publicised in the statutory notice. That is not a matter that can be rectified at this stage in the proceedings, and it is clear that a copy was eventually provided, but such delays will not have been helpful to those parties seeking a timely decision.

**The Main Issues**

1. Since the Order is made under Section 257 of the Town and Country Planning Act 1990 (the 1990 Act), if I am to confirm it I must be satisfied that it is necessary to permanently divert the way in question (shown as B-A on the Order map) to allow development to be carried out in accordance with a valid planning permission and that the proposed new route (B-A-C) provides a reasonable alternative.

Reasons

1. Government Circular 1/09 version 2 (Defra) makes clear that, in determining an order of this kind, the merits of the development are not at issue. However it should not be assumed that because planning permission has been given necessitating the diversion of a footpath that confirmation of the ensuing order will automatically follow.
2. As was established in the case of *Vasiliou v Secretary of State for Transport [1991] 61 P&CR 507,* any disadvantages or loss likely to arise as a result of the path realignment to members of the public (or to persons whose properties adjoin or are near to the existing highway) may be weighed against the advantages arising from the development when determining the Order.
3. In short there are two issues that must be considered here. These legal tests were described in the case of *R (Network Rail Ltd) v SSEFRA [2018] EWCA Civ 2069* as ‘the necessity test’ and ‘the merits test’. Confirmation of the Order requires that both are satisfied.
4. Whilst I must also have regard to any material provisions in any rights of way improvement plan for the area when determining this Order, no issues have been raised in this respect. In addition, in reaching my conclusions I have considered the requirements of the Equality Act 2010 where appropriate.

***Whether diversion of Footpath 403001 is necessary to allow development to be carried out in accordance with a valid planning permission***

1. Outline planning permission was granted to High Grange Developments Ltd for residential development on land at Hopedene off Mill Hill in Cleator Moor. The decision notice issued on 16 August 2012 (4/12/2259/001) provided for the erection of 66 houses on the site and associated infrastructure. Further details were approved by the planning authority in stages.
2. It was not until the development reached phase 6 that public footpath 403001 was affected by the development being proposed. On 8 July 2016 CBC approved the reserved matters for phase 6 under reference 4/16/2181/OR1 and in accordance with drawing numbers 06/11/542-100 and 06/11/542-116. This recognised the line of Footpath 403001 across a part of the phase 6 site, showing to it be obstructed by the house proposed on plot 45 and crossing the corner of the garden in plot 44.
3. This prompted CBC to make an order to divert the footpath. This order was made on 11 October 2016 and showed a route very similar to that in the present order but without section B-C forming part of the alternative route. This was rejected by an Inspector on behalf of the Secretary of State in a decision issued on 19 March 2019, essentially because of uncertainty around the route of Footpath 403001 to the south and west of point A.
4. CCC explained that the definitive map at this point is very unclear and the continuation of the public right of way shown on the Order map (with a line of dots) is disputed. As a result, CBC resolved to make a further order but with the inclusion of B-C to establish beyond any doubt that the public would be able to access the realigned route of Footpath 403001. That is the proposed alternative route (B-E-D-A-C) now proposed in the Order before me for determination.
5. In the meantime, CBC approved plans for phase 7 through permission reference 4/18/2075/OR1 issued on 11 April 2018. The approved plan (06/11/542-127) shows that the footpath would be obstructed by a further 3 houses and would pass through the gardens of another 4 plots.
6. Orders cannot be made under the 1990 Act where the development that is to be accommodated by the diversion is substantially complete. In so far as the definitive line of Footpath 403001 is affected, only the dwelling on plot 44 has been built. On my visit to the site, Mr Reed drew attention to the position of the boundary fence for this plot which has been placed at an angle so as to ensure the definitive line lies outside of the property, not within its garden.
7. Although Mr McConnell questioned whether this was in accordance with the approved plans, in my view the adjustment of the boundary fence to accommodate the definitive line of the footpath would be regarded as ‘de minimus’.
8. It is quite clear that the majority of the development affecting Footpath 403001 is yet to be constructed although housing to the west of the site is now complete and occupied. The approved development would obstruct the public path in numerous places, either by the houses themselves or their garden boundary fences. Consequently, I have no doubt that diversion of the footpath between points A and B is necessary to enable this development to be constructed in accordance with the approved plans.

***The merits or disadvantages of the proposed alternative route***

1. Although the definitive route of Footpath 403001 is not now passable, a path around the edge of the site along the line of the proposed new route has been in place since the direct line was closed off. The intention of the developer is to construct the new footpath to the standard required as soon as possible upon confirmation of the Order.
2. The Order itself requires that the alternative highway should be created “to the reasonable satisfaction of the authority”, the authority there being defined as CBC. Since CCC is acting as agents here, it would be reasonable to conclude that it, in its capacity as highway authority, would be the body to assess the standard of the new route. I have been provided with a copy of CCC’s standard design for an aggregate surfaced path and the developer has agreed to complete any works to the satisfaction of the authority.
3. The objector contends that the new route is prone to flooding and is less enjoyable than “the route we once had”. He says the path was well defined before development began although a bit overgrown, and it has been recorded as a footpath on Ordnance Survey maps as far back as 1874. A Google aerial photograph from May 2008 and ground level photos from 2018 are provided to illustrate the point. In his opinion, “It has been turned from an open woody scrub area with views all around to a brutal urban route”. He contends that the developer wilfully destroyed the public right of way once outline planning permission had been issued, the site was fenced off and the diversion was then imposed on the public.
4. Although CBC included an ‘informative’ with the permissions it issued stating that “*No development shall take place until the Diversion Order for footpath number 403001 has been made and confirmed*”, these are advisory, not conditions and therefore not enforceable by the planning authority. I have not been made aware of any action taken by the highway authority in relation to the obstructions that appeared on and around the site when development commenced, and I understand the objector’s frustration with a system that appears to accede to such infringements.
5. In a situation such as this it is not possible for any decisionmaker to compare the routes precisely on the basis of what was once available and what will be provided in future. I may disregard the obstructions that exist along the present line when considering the pros and cons of the proposed route and take into account any problems that can be foreseen in relation to the new one.
6. In this case I consider there to be advantages in realigning the path around the edge of the site so as to retain views of the open country to the east albeit at a lower level than will previously have been possible. When constructed to the required standard, the path will be raised above its present level and the risk of flooding anticipated by the objector is unlikely other than in extreme conditions.
7. In contrast to the objector’s view, I have noted the comments of the Cumbria Local Access Forum, to the effect that the proposed diversion “incurs little more inconvenience nor loss of amenity to the user”. I agree with that assessment.
8. The objector also comments that the Order itself is defective and the proposals in the Order are nonsense. He takes issue with the inclusion of B-C in the proposal, arguing that this ‘creation’ cannot be added to a ‘diversion’ in this way.
9. I disagree with that interpretation. In fact the legislation allows for an alternative route to be provided in the case of proposals under the 1990 Act; that may quite properly include any section (such as B-C) which is necessary to connect with another highway so as to make sense of the path network.
10. As a result of my site visit, I consider it prudent to ensure the position of the proposed two-metre wide footpath is clearly defined in relation to adjacent boundaries. The intention is that the footpath should sit within a slightly wider open corridor, so I intend to modify the text of the Order Schedule to define the path’s position so that centre line lies no less than 1.5 metres from the adjacent hedge or fence, thus allowing for the path to run along an open corridor with a minimum width of 3 metres.

***Summary***

1. In the final process of weighing the relative benefits of the development against any disadvantages likely to result from the Order, I have noted that the relevant planning permission for this site will enable a further 12 new homes to be built as part of phases 6 & 7. Four of these would be constructed directly over the definitive line of Footpath 403001 and therefore section A-B needs to be realigned if the development is to proceed.
2. I consider the proposed alternative route would form a reasonably convenient and enjoyable diversion around the site but consider it advisable to define more closely its exact position in relation to the corridor in which it will be located.

Conclusion

1. Having regard to the above and all other matters raised in the written representations, I conclude the Order should be confirmed subject to the minor modification referred to in the preceding paragraph (which will not require further advertisement).

Formal Decision

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

* In the Order Schedule PART 2: Add to “**Description of length of new right of way**” the following text: “*The centre line of the new 2 metre wide footpath will be no less than 1.5 metres from any adjacent boundary*”.

Sue Arnott

**Inspector**

