

|  |
| --- |
| **Order Decision** |
| Hearing held on 7 February 2023 |
| **by Claire Tregembo**  |
| **An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
|  |
| **Decision date: 23 March 2023** |

|  |
| --- |
| **Order Ref: ROW/3284596** |
| * This Order is made under Section 119 of the Highways Act 1980 and is known as the Central Bedfordshire Council (Husborne Crawley: Parts of Footpath Nos 1 and 7) Public Path Diversion Order 2021.
 |
| * The Order is dated 22 January 2021 and proposes to divert the public right of way shown on the Order Plan and described in the Order Schedule.
 |
| * There were six objections outstanding when Central Bedfordshire Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.
 |
| **Summary of Decision: The Order is confirmed.**  |
|  |

**Preliminary Matters**

1. I made an unaccompanied site visit on 6 February 2023 where I was able to view the existing footpath, part of the proposed diversion, and the surrounding area. I also made an accompanied site visit after the close of the hearing with representatives from the Central Bedfordshire Council (the Council), Woburn Safari Park (the Park), and the objectors. I was able to view the full length of the proposed diversion.
2. Two objectors appeared at the hearing and another person, who had not previously made an objection, also appeared and presented additional written objections to the Order.
3. The Council confirmed that they were satisfied that the applicant was acting in his capacity as manager of the Park with the knowledge and authority of the landowners. Notices were also served on the owners and occupiers of the land in accordance with the prescribed regulations. The Park confirmed who the landowners were and that they were acting with their authority. I am satisfied that the landowners were aware of the Order and provided with an opportunity to object.
4. An earlier Order to divert Husborne Crawley Footpath Nos 1 and 7 was made on 10 September 2020 which received forty two objections. However, this Order contained errors and a new Order was made in 2021. Everyone who objected to the 2020 Order was informed of the 2021 Order when it was made. I have only seen a summary of the objections to the 2020 Order and have not been provided with copies of them. However, the 2020 Order has been revoked and I can only determine the 2021 Order before me.
5. Although the Order route is numbered as two separate footpaths it effectively forms one continuous route. Therefore, for the purposes of my decision, I will refer to it as the footpath. I will also refer to various sections of the Order route using the letters shown on the Order Plan appended to the end of my decision.

**Main Issues**

1. Section 119(6) of the Highways Act 1980 (The 1980 Act) 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 the 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 any 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 owner of the land that the path in question should be diverted***

1. The section to be diverted runs through the Park along the side of the elephant house and enclosure which was built circa 2007. At that time, it exceeded British and Irish Association of Zoos and Aquariums (BIAZA) standards. Since then, there has been a UK wide push for increased welfare of elephants in captivity. In 2017 the Secretary of State’s Standards of Modern Zoo Practice introduced a requirement for elephants to have 24 hour access throughout the year to indoor and outdoor accommodation to allow them to choose where they spend their time. The 2019 BIAZA Guidelines for the Management of Elephants has a similar requirement and states that “animals should not be shut in overnight under normal circumstances”.
2. Elephants are a Category 1 species, likely to cause serious injury or serious threat to life. The Park has significant concerns about the risk to members of the public who may try to interact with the elephants, due to the close proximity of the footpath to the elephant house and enclosure. Additionally, there are concerns that food or other items could be given to the elephants or thrown into the enclosure, which may cause them harm.
3. During the day keepers are present to intervene and keep the public and elephants safe. However, there is little that staff can do to control public activity and they are not present at night to protect the public or the elephants. Staff who live on site have seen walkers at night, including those using head torches. Discarded alcohol bottles and rubbish are regularly found along the footpath during morning checks.
4. Although elephants are diurnal, they remain active long after staff have left, with increased activity between six pm and midnight. Night-time observations indicate that the Park’s elephants sleep between two am and six am. During the elephant inspection in 2019, the Department for Environment Food and Rural Affairs (Defra) approved restricted night-time access for the elephants based on public safety concerns and potential harm to the elephants from discarded items. However, to improve elephant welfare and to achieve the new legal requirement for 24 hour outdoor access, the diversion of the footpath is considered necessary.
5. During the Covid-19 lockdown in 2020 members of the public posted details of their walk and photographs of the elephants on social media which led to a significant increase in use of the Order route. Staff witnessed members of the public calling elephants over, interrupting their natural behaviour. The bull elephant had to be encouraged away from the fence by keepers, further interrupting his natural activity and increasing keeper interaction. Loud noises from excited walkers and children caused the elephants to spook and stress related behaviours were witnessed. Similar incidents occurred with the wallabies and other animals. Although use has declined, these welfare concerns remain.
6. Relocating the elephants, either within the Park or to another facility, or having additional night security was discussed as an alternative to diverting the footpath. Due to the legal requirements for keeping elephants, there is insufficient space elsewhere in the Park. Elephants can only be moved to another facility if it has equal or better standards. There are currently no suitable facilities available and the timeframe for providing them would be three to five years at a cost of millions. Therefore, this is not a realistic option.
7. Improving security was considered, but someone with experience in handling elephants would need to be present at all times to mitigate the risk to the public and intervene if an incident were to occur. Adding it to a patrol route would not be sufficient. Security lighting or solid fencing to prevent access by the public would be detrimental to elephant welfare due to twenty-four-hour light and loss of 360-degree views which would lead to a feeling of isolation. It would also impact on the public’s enjoyment of the footpath by removing views and enclosing it. Therefore, these options were not considered to be reasonably practical and I share this view.
8. The diversion of the footpath away from the elephant house to improve animal welfare and meet the legal requirements and guidelines from Defra and BIAZA, would significantly benefit the Park and its animals. It would also reduce their liability in relation to public safety. I am satisfied that it would be expedient to divert the footpath in the interest of the owners and occupiers of the Park.

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

1. I need to consider whether matters such as length, width, gradient, and surface conditions will render the path substantially less convenient to the public.
2. The existing footpath has a tarmac surface between points A and B and the rest of the footpath has a natural grass and earth surface. Section A to just northeast of point C is unenclosed and passes through woodland. It continues to point D running between fences with the elephant enclosure and pasture to the west and animal enclosures and an access road to the east. There are high deer-proof kissing gates at either end of the enclosed section. Although there is not a recorded width for most of the footpath, it is approximately 4 metres wide throughout its length, with the exception of a short section between point C and the southeast corner of the elephant house, which is approximately 1.5 to 2 metres wide. This section also has a steep gradient with the rest of the footpath being flat. It has a length of 1,440 metres.
3. The proposed footpath would have a width of 2 metres, a natural grass and earth surface throughout, and a total length of 1,300 metres. Section A to E would run through woodland, section E to F would run across a pasture field, and section F to D would run along a wide grass verge alongside Sandy Lane. Section E to F would be enclosed between 1.2 metre high fences 3 metres apart with the rest of the footpath left unenclosed. Deer-proof kissing gates are proposed at points E and F to prevent deer and sheep from entering the enclosed section. The footpath climbs up between A and E, then runs along the top of the hill through the pasture parallel to the elephant enclosure before descending to F.
4. The proposed footpath is slightly shorter than the existing footpath, therefore the length will not affect the convenience to the public.
5. Concerns were raised about the surface of the proposed footpath. It was thought to be less firm and even than the existing footpath with the potential for it to become muddy and difficult to use. Path users had taken wheelchairs along section A to C and from D to the southeast corner of the elephant house but did not believe this would be possible on the proposed footpath.
6. The Council advised that section B to C of the existing footpath can become loose and muddy in wet weather due to water running down the steep slope to the north onto the footpath. This can take time to dry out because of the surrounding woodland. At the time of my site visits, although it was largely firm, some sections were slightly slippery. Section A to E of the proposed footpath runs through the same woodland and the surface was in a similar condition at the time of my site visits.
7. The rest of the proposed footpath would run through a field which, prior to the elephant enclosure, was part of the same field as the existing footpath. The Council considered that although it may not be as firm initially, given time and use, it would become as firm and even as the existing footpath. It was confirmed that the Park would continue to maintain the proposed footpath in the same way as the existing footpath and other public rights of way across their site.
8. As the proposed footpath would have the same surface and run over land with the same usage as the existing footpath, I do not consider there will be much change in the convenience due to the surface.
9. The diversion would result in a reduction in the recorded width of the Order route between D and the southeast corner of the elephant house. The proposed width is narrower than the available width along most of the existing footpath. The recorded width was added when the footpath was diverted under the Town and Country Planning Act 1990 to allow the building of the elephant house. The Council normally require a width of 2 metres for diversions, but it is believed that a 4 metre width was provided because the 1.8 metre high fencing created an enclosed feel. There are no standard widths required for diverting public rights of way but an appropriate width should be provided. I consider 2 metres to be an appropriate width which would allow path users to easily pass each other. Furthermore, most of the proposed footpath would be unenclosed and would run through woodland or along a wide grass strip alongside an access road. This would allow additional space for the public to pass each other.
10. The Park intends to fence the proposed footpath between E and F with 1.2 metre high fencing at a width of 3 metres. This would provide a half-metre wide grass strip on either side of the footpath. It was requested that the fencing be included in the Order as it would prevent the encroachment onto the footpath from the agricultural land to the side ensuring it remained convenient to use. The Council did not include the fencing in the Order because it is outside of the proposed highway. I agree with this view. Furthermore, there are other provisions in place to ensure that footpaths are not disturbed without authorisation.
11. The diversion would introduce some additional gradient. Currently, there is only one short, but very steep, slope on the footpath to be diverted. The proposed footpath would have ascents between A and E and between F and the middle of the field. However, the new gradients are gradual and easier than the very steep section on the existing footpath. Furthermore, the gradient on Husborne Crawley Footpath 7 and Woburn Footpath 1 to the east of the diversion is greater than those on the proposed diversion. Anyone using the Order route as a through route would have to walk the steeper footpath as part of their journey. Although the additional length of gradient would be less convenient, in my opinion, it would not be substantially less convenient to the public. The diversion would also have the advantage of removing the very steep section of the existing footpath.
12. The proposed new gates are intended to be more accessible than the existing kissing gates to improve access, particularly for families with prams and pushchairs. The existing kissing gates have limited access and other gates within the Park are easier to use. The provision of more accessible gates would make the footpath easier to use and more convenient. However, the new gates are not included in the Order before me, and the Council intends to authorise them under Section 147 of the 1980 Act.
13. It was stated that some people were only using the flat sections of the Order route between A and C and from D to the southeast corner of the elephant house. Therefore, the gradient, width and surface would make the footpath much less convenient for them. However, these sections of the footpath can only be reached by existing public rights of way with steeper gradients, narrow widths, or uneven woodland surfaces. The Park was aware that some members of the public were walking or driving along Sandy Lane, but it is not a public right of way and should not be used as one.
14. Overall, I find that the diversion would not lead to the footpath being substantially less convenient to the public.

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

1. It is clear from objections and comments at the hearing, that much of the public’s enjoyment comes from being able to view the Park’s animals. Some people have indicated that they would be less likely to use the footpath if the Order was confirmed. There would be a loss of views of the elephants, giraffes, wallabies and potentially animals in the large paddock to the east of the existing footpath. It would still be possible to see the elephants from the proposed diversion, although this would be over a greater distance. It would no longer be possible to see giraffes or wallabies. The paddock to the east of the existing footpath would still be visible from the unaffected part of Husborne Crawley Footpath No. 7 and Woburn Footpath No. 2. If the public were using the Order route only to view the animals, there would be a significant loss of enjoyment from the diversion.
2. The test requires me to consider the impact that the diversion would have on the enjoyment of the path *“as a whole.”* The Council considered that this could extend to the whole of the Park from Turnpike Road to the west, Ridgmont Road to the north, Berry End to the east and beyond Woburn Abbey to the south. I agree that the whole path would include the routes through the park to reach the road network. However, a road is crossed before reaching Woburn Abbey and I would not consider anything south of this road to be part of the whole path.
3. Different views of the meaning of enjoyment within legislation were put forward by the parties. *“Enjoyment**”,* as defined in the dictionary, involves not just receiving pleasure or joy from something but also included using or possessing something and the exercise of a legal right. Therefore, in the 1980 Act “*enjoyment”* could be substituted for *“use”* without affecting its meaning and in some cases “*enjoyment*” appears more likely to mean “*use*”.
4. However, if the Order was confirmed, the public would legally be able to use the new route. Therefore, the enjoyment test in the 1980 Act would not be a necessary consideration for confirming the Order unless *“enjoyment”* meant pleasure or joy. I prefer this view which recognises that the enjoyment of a route is different from its physical use.
5. The Order route is predominantly used for recreation and leisure with limited use to reach local facilities, workplaces, or homes. Path users stated they also enjoyed the footpath for its access to the countryside, the natural environment and woodland, its views, and what was described as a “tree cathedral”. The proposed diversion would still offer a recreational route with access to the countryside, natural environment, and woodland. Therefore, these factors would have limited impact on the enjoyment of the footpath.
6. The existing woodland section between B and C is described by path users as an open, natural tree-lined boulevard or tree cathedral. The proposed woodland section between A and E has a more natural feel than the existing section between B and C which is wide, and straight. I consider that, despite the differences between the two sections, both are enjoyable, scenic routes. Although some path users would enjoy the existing woodland footpath more, others would find the proposed woodland section more enjoyable. In my opinion, there will be comparable levels of enjoyment within the woodland sections of the diversion.
7. On the uphill section from point F towards point E, views were limited due to the slope of the land. However, once reaching the top, views were similar to those on the existing footpath between point D and the southeast corner of the elephant house. In my opinion, the loss of views would have a minor negative impact on the enjoyment of the footpath.
8. The proposed footpath between E and F is intended to be fenced with 1.2 metre high fences. Some path users may find enclosed footpaths less enjoyable than unenclosed routes. However, the existing footpath is fenced on both sides between D and the southeast corner of the elephant house. Most of this fencing is 1.8 metre high chain link (or similar). This impacts on the views of the Park and makes the footpath feel enclosed, particularly alongside the elephant enclosure. Although part of the proposed footpath would still be enclosed, it would have a more open feel due to lower fencing which people can see over. This could make the proposed footpath more enjoyable for some than the existing footpath, even with the reduced width.
9. It was suggested that sections A to C and point D to the north-eastern corner of the elephant enclosure could be left available for public use as cul-de-sacs. This would retain the most enjoyable sections of the footpath whilst resolving the Park’s animal welfare and public safety concerns. However, there would still be welfare concerns for the animals on the south side of the footpath between A and C and it could lead to members of the public gathering and to anti-social behaviour. Some people were already straying off this section of footpath. People using it as a through route could also go the wrong way, adding to their journey and making the footpath less convenient. For these reasons, I do not believe that it would be reasonable to create cul-de-sac footpaths.
10. Overall, I consider that the diversion would make the footpath less enjoyable to the public, primarily due to the loss of views of the Park’s animals, but also due to reduced landscape views.

***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. The current and proposed footpaths run over land owned and occupied by the same parties and the Order was made in their interests. I have not been presented with any evidence to indicate that there would be an adverse effect on any land served by the existing or proposed footpaths.

***Rights of Way Improvement Plan***

1. The Council have advised that the proposed diversion does not conflict with the aims of their ROWIP and nothing has been raised by any other party.

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

1. I have concluded in paragraph 15 that it is in the interests of the Park and its animals to divert the footpath. I also found in paragraph 29 that the footpath would not be significantly less convenient to the public. However, in paragraph 39 I have also concluded that the footpath would be less enjoyable to the public. Therefore, I need to weigh up the interests of the Park against those of the public to determine if it is expedient to confirm the Order.
2. The diversion would allow the Park to meet the legal requirements for animal welfare set out by Defra and BIAZA. Other options were considered but were not realistic or reasonably practical. The diversion would also reduce the Park’s health and safety liability. The benefit to the Park and its animals will be felt at all times. The safety of the public would be improved by moving the footpath away from a Category 1 species. I consider that the animal welfare, legal requirements, and other benefits to the Park outweigh any loss of enjoyment to the public. Therefore, it is expedient to confirm the Order.

**Other Matters**

1. Inappropriate parking by walkers and food vans has led to road safety issues and damage to grass verges. Local residents felt that the diversion may solve some of the issues arising from the use of the footpaths within the Park. These matters do not relate to the diversion or the tests I need to consider, therefore I have not given any weight to them.

**Overall Conclusion**

1. Having regard to the above, and all other matters raised in the written representations, I conclude that the Order should be confirmed.

**Formal Decision**

1. I confirm the Order.

*Claire Tregembo*

INSPECTOR

**APPEARANCES**

 **For the Council:**

Adam Maciejewski Senior Definitive Map Officer

 **For the Applicant:**

 D Fellows Woburn Safari Park

 Drew Mullin Woburn Safari Park

 Katie Chapman Woburn Safari Park

 Kevin Tack Woburn Safari Park

 **Objectors:**

Mike Clarke

 Stephen Richardson

 James McNulty

 **Neutral Party:**

Cllr. John Baker Aspley & Woburn Ward Councillor

**DOCUMENTS PRODUCED AT THE HEARING**

1. Statement of Case from Mike Clarke
2. Meaning of Enjoyment from Central Bedfordshire Council
3. Objections from Joanne Aurora, Sarah McNulty, Nick Barrington, Richard Parkes, Nina Andrew, Pip Blowfield, Phil Gedny, Helen Taylor, Alison Walker, Sophie Malcomber, Carol Boswell and Dave Askew.

**ORDER MAP**

