
Order Decisions

Site visit made on 21 April 2016

by Martin Elliott BSc FIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 17 May 2016

Order Ref: FPS/E1855/3/6 ('Order A')

- This Order is made under Section 118 of the Highways Act 1980 (the 1980 Act) and Section 53A(2) of the Wildlife and Countryside Act 1981 and is known as the Worcestershire County Council Footpaths CP-514 (Part), in the parish of Cleeve Prior public path extinguishment and definitive map modification order 2013.
- The Order is dated 7 March 2013 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule. If confirmed, the Order will also modify the definitive map and statement for the area, in accordance with Section 53(3)(a)(i) of the Wildlife and Countryside Act 1981 Act, once the provisions relating to the extinguishment come into force.
- There were two objections outstanding when Worcestershire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed.

Order Ref: FPS/E1855/6/4 ('Order B')

- This Order is made under Section 26 of the Highways Act 1980 (the 1980 Act) and Section 53A(2) of the Wildlife and Countryside Act 1981 and is known as the Worcestershire County Council Footpaths CP-514 (Part), in the parish of Cleeve Prior public path creation and definitive map modification order 2013.
- The Order is dated 7 March 2013 and proposes to create a public right of way shown on the Order plan and described in the Order Schedule. If confirmed, the Order will also modify the definitive map and statement for the area, in accordance with Section 53(3)(a)(i) of the Wildlife and Countryside Act 1981 Act, once the provisions relating to the creation come into force.
- There were two objections outstanding when Worcestershire County 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 carried out an accompanied site inspection on 21 April 2016 when I was joined by representatives of the Council, one of the statutory objectors and other interested parties.
 2. Order route A is currently subject to a temporary closure on the basis that much of the route is hazardous and inaccessible. I was unable to walk the whole of Order route A but was able to view the land over which the route passes. Given the steep terrain over which the route passes it was also difficult to establish the exact alignment of the path. I am nevertheless satisfied, on the basis of my site visit, that I am able to reach a decision on Order A
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3. Following the Notice of Order submissions were received from new interested parties. Correspondence and a bundle of documents were received from a Dr and Mrs Clube. Although the correspondents state that the information provided regarding public rights of way is relevant, no submissions are made as to why the information is relevant to the consideration of the Orders. I have carefully examined the correspondence and the associated documents and in my view there is nothing contained therein which is relevant to the considerations set out at paragraphs 7 to 12 below. I have therefore not given the correspondence and associated documents any weight.
4. Mr Heelis makes the point that there was no information on the Orders online on the Council's website. Further, that the notice of the Order used Ordnance Survey grid references to identify the Order routes. He also doubts that the closure of Order route A has been sufficiently advertised.
5. As regards the provision of information online, there is no requirement to do so. In respect of the use of Ordnance Survey grid references these provide for an accurate identification of the Order routes. Whilst it would have been helpful to provide a more detailed description of the routes concerned by reference to physical features, the grid references are unambiguous. The intentions of the Orders will be clear by the notices which, at each ends of the Order routes, would have been provided with a plan. In the alternative the notice advises that copies of the plan could be viewed, or purchased, from the offices of the County Council. There is no evidence of any prejudice in consequence of the description of the Order routes in the notices. I note the concerns regarding the advertisement of the extinguishment Order. The Council have confirmed that the notices for both Orders A and B have been served in accordance with the statutory requirements; there is no evidence to suggest otherwise.
6. The submissions relating to Order A refer to a riverside path and it is apparent that a riverside path was, in the past, maintained by the Birmingham Anglers Association. This path is not Order route A. I also noted on my site visit the location of previously attempted restoration works. However, these do not form part of Order route A.

The Main Issues

Order A

7. Section 118 (2) of the 1980 Act requires that before confirming the Order I should be satisfied that it is expedient to stop up the footpath in question having regard to the extent that it appears that it would, apart from the Order, be likely to be used by the public; and that I should consider the effect which the extinguishment of the rights of way would have as respects land served by the path, account being taken of the provisions as to compensation.
8. Section 118 (5) provides that where proceedings preliminary to the confirmation of a public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation or diversion order then in considering the likely extent of use of the path proposed to be extinguished, regard may be had to the extent to which the creation or diversion order would provide an alternative path.

9. Paragraph 5.54 of Department for Environment, Food and Rural Affairs Circular 1/09 advises that account should be taken of the convenience of the route proposed to be created compared to that which is to be extinguished.
10. The Order route is currently unavailable and is obstructed by vegetation. Any circumstances preventing or diminishing the use of the path are to be disregarded and to be viewed as temporary when considering the Order.

Order B

11. Section 26 (1) of the 1980 Act requires that the factors to be considered in regard to the creation of a footpath are whether there is a need for a footpath and that it is expedient to create that footpath having regard to:
 - (a) the extent to which the footpath would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area; and
 - (b) the effect which the creation would have on the rights of persons interested in the land, taking account of the provisions as to compensation in Section 28 of the 1980 Act.

Orders A and B

12. In determining whether or not to confirm the Orders, sections 26(3), 118(6A) of the 1980 Act require that I should give consideration to any material provision of a rights of way improvement plan (ROWIP) prepared by any local highway authority whose area includes land over which the Order would create or extinguish a public right of way. Although the Council refer to the ROWIP no provision has been identified which is material to either of the Orders. I have therefore not considered this issue further.

Reasons

Order A

The extent to which the footpath would, apart from the Order, be likely to be used by the public

13. The Council asserts that the Order satisfies the requirements of section 118 because the affected part of footpath CP-514 has become unstable with no practical means of reinstatement. Further that an adequate, convenient and attractive alternative lies along CP-518, CP-519 and CP-515 with the associated creation order creating a convenient link between the remaining section of footpath CP-514 and bridleway CP-519.
14. In making the Order the Council will have concluded that the path is not needed for public use. However, in determining the Order, the issue which first needs to be considered is the extent which the footpath would, apart from the order, be likely to be used by the public. The Council have not given any detailed consideration as to any likely use of the path; the legislation directs me to have regard to this matter and this should have been addressed by the Council.
15. The assessment of any likely use is on the basis that the path is available to the public. Given the current condition of the path it would seem that any use would be minimal if indeed it could be used. However, the Council state that

- the public appear to have used a variety of ad hoc routes to avoid the hazardous footpath. This suggests to me that whilst the public are unable to use the path it is likely that if the path were available then some use would be expected.
16. Mr and Mrs Baker contend that the path has not existed on its definitive line for at least 40 years although this does not mean that the public have not attempted to use the path albeit on an unrecorded alignment. Mr Buswell stated that around ten to fifteen years ago he, with relatives, walked 'the river bank route' without difficulty in both directions. I do not understand this route to be the Order route but this evidence is suggestive of a desire to use a path between points A and D¹ and is consistent with the Council's view that people have taken other routes to avoid the hazardous nature of the Order route.
 17. Mr Carr refers to the Neighbourhood Development Plan (currently in draft), an essential feature of which is to maintain the riverside walk to the lock at Marlcliff. In the absence of the Neighbourhood Development Plan it is difficult to give the assertions any significant weight. However it does suggest a desire to use a route along the river corridor which can, in this location, currently only be provided for formally by the Order route. The Council do seem to accept that the route, although not a riverside path, forms a very minor part of a very lengthy riverside path.
 18. Mr Heelis indicates that the path is part of several walks listed on the internet and that there is reference to the route on the Avon Way in Warwickshire. I have not been provided with any further information as to references to the Order route although the Council advise that the Shakespeare's Avon Way follows bridleway CP-519 and not the Order route. In the absence of further information it is difficult for me to reach any conclusions as to the likely use of the route in consequence of the being part of walks listed on the internet or reference to the route on the Avon Way.
 19. Although the Parish Council did not initially object to the Order they make representations against the confirmation of the Order. They state that the parishioners and the Parish Council do not want the footpath to be extinguished. The Parish Council contend that the path has been in existence since 1884 meandering along the riverbank, much used by walkers and ramblers. It says that people in the parish want to keep the path fully operational in its current form. By this, given it is a representation against the Order, I understand it to relate to the current route as recorded on the definitive map.
 20. Whilst the Parish Council do not provide any information from parishioners as to their view on the extinguishment of the path, the Parish Council are a body representative of the parishioners. The evidence from the Parish Council suggests that a path has been well used until the temporary closure of the path albeit that the route used may not have followed the Order route.
 21. Although the evidence is not substantial, it suggests that the Order route, subject to accessibility, is likely, apart from the Order, to be used to some extent.

¹ Letters A to E refer to points identified on the Order map

The effect which the extinguishment of the right of way would have as respects land served by the path, account being taken of the provisions as to compensation

22. There is no evidence before me from which I could conclude that the extinguishment of the Order route would have any adverse effect in respect of this requirement of Section 118 of the 1980 Act.

Whether it is expedient to confirm the Order

23. The use of the word expedient in section 118 of the 1980 Act means that other considerations can be taken into account in determining the Order.

24. The Council contend that the Order route has become unusable with no practical means of reinstatement. The Council advise that highly technical and very expensive civil engineering works would be required to stabilise the hillside to provide a lasting solution. The reinstatement of the path is identified as option 1 in the technical memorandum submitted by the Council. Several sub-options have been considered which have been costed at between £153,000 and £193,000.

25. In my view, the substantial costs of reinstating the footpath weigh heavily in the balance when considering the Order. I note the observation made by Mr Buswell that the bank is not as unstable as claimed. However, some weight should be given to the technical memorandum which outlines the instability of the bank. There is no evidence to suggest that the conclusions contained in the report are wrong or that the difficulties in reinstating the path have been overstated so as to ease confirmation. As to the suggestion of using volunteers to reinstate the path, the Council states that the work to restore the path necessitates the use of professional engineers and contractors. The technical memorandum highlights the technical nature of the work and I do not consider that such work would be appropriate for volunteers.

26. Mr Buswell suggests that highway authority officers too often try to produce a 'gold plated solution' where users are more content to accept what is there. However, as noted above the Council has commissioned a report to consider the various options. There is nothing to indicate that the costed options are excessive. Further, the Council, as highway authority, must ensure that the route is safe for the use by the public. Whilst 'light maintenance' on a difficult route may only incur minimal costs with great benefit for users, in this case the land is unstable and 'light maintenance' is not appropriate. An engineered solution is necessary to make the path safe for the use by the public.

27. I note the assertions of Mr Carr that the temporary alternative (the route to be created by Order B) must have cost as much to construct as any works to the Order route. I have no figures as to the comparable costs. However, the technical memorandum identifies the current proposal, the extinguishment of part of CP-514 and the creation of a link to CP-519, as one of the viable options, the other being the reinstatement of the existing route. There is nothing to indicate that the costs of the current proposal are of such significance as to equal or outweigh the costs of reinstating the existing route. The Council state that the current proposal will not cost as much as the reinstatement of the existing route.

28. It is suggested by Mr Buswell that the diversion of the path to the riverbank would be more appropriate. It is not open to me to modify the Order so as to provide for the diversion of the route. Nevertheless the technical memorandum indicates that a new riverside path could be provided. However, this would require the building-out from the existing river bank in the vicinity of the steep river cliff. Such a structure would need to be over 150 metres long and would have adverse impacts on the natural function of the river in terms of flood risk and biodiversity and is unlikely to be approved by the Environment Agency. Whilst the Neighbourhood Development Plan is to maintain a riverside walk towards the lock at Marlcliff this would appear to be a significant hurdle in providing such a route. As to public rights arising along the riverside path through use by the public, this is not a matter for my consideration.
29. Mr Buswell makes reference to the Disability Discrimination Act² and asserts that improving access for those with impaired mobility is now a duty of local authorities. It is contended that this provides a good reason not to extinguish the path and that efforts should have been made on upgrading the existing riverside route for the disabled.
30. As noted above, account should be taken of the convenience of the route proposed to be created compared to that which is to be extinguished. The confirmation of the Orders will require the use of the route to be created (Order B) and footpath CP-515, which Mr Buswell says is steep and slippery, in order to return to the riverside path, although for those gaining access to and from Cleeve Prior it would be possible to use bridleways CP-519 and CP-520. However, in order to access point A from the north the existing route of footpath CP-514 requires a partial ascent of the river cliff. As such the route already passes over steep terrain although use of the alternative route will require greater ascent, and descent. Overall the use of the alternative route does amount to some inconvenience in that it will be necessary to ascend and descend the river cliff. This inconvenience will need to be put into the balance when considering whether or not the Order should be confirmed.
31. In respect of the Equality Act 2010, Section 149 establishes a general duty on public authorities to have due regard when carrying out their functions to the needs to eliminate conduct prohibited under the 2010 Act, advancing equality of opportunity and fostering good relations between people who share a protected characteristic and people who do not. As regards any impact on those with a protected characteristic it is necessary to have due regard. In having due regard it is not necessary for any provision to be enhanced or that there should be a similar level of provision. Where there are disbenefits these need to be considered in the overall benefits of the scheme.
32. As noted above, the confirmation of the Orders will amount to some inconvenience to those using footpath CP-514 this will include those with impaired mobility. This does amount to a disbenefit for those with a protected characteristic and again needs to be put into the balance in the determination of the Order. As regards the suggestion of Mr Buswell that the riverside path should be upgraded (paragraph 29) the evidence is that such a route is unlikely to be approved (paragraph 28). Further, to re-establish the Order route will incur substantial costs (paragraph 24 above).

² Now enshrined in the Equality Act 2010

33. Concerns are expressed that the alternative route (Order route B) is permissive and that access could be withdrawn at any time. The point is also made by Mr Buswell that the steps on the route to be created are steep and slippery. However, in the event of confirmation of Order B the route will be a public footpath recorded on the definitive map and the Council will need to ensure that the route is constructed to a standard suitable for its expected use.
34. Mr Buswell, who seeks to protect routes recorded on the definitive map, notes that in the event of confirmation the Order route will be lost for ever. However, whilst a route is recorded on the definitive map this does not preclude any changes to that route by any other enactment subject to the necessary criteria being satisfied.
35. The Parish Council raise the issue that the extinguishment of the footpath will have an effect on wildlife monitoring. Whilst the land crossed by the Order route falls within the 1km square identified by the Parish Council, there is nothing to indicate a reliance on the existence of the footpath for wildlife monitoring. In the absence of any such indication it is difficult to give this issue any weight. In any event, wildlife monitoring does not necessarily require access from public rights of way. Mr and Mrs Baker, the owners of some of the land crossed by the Order route, refer to requests from the Worcestershire Wildlife Trust to record on their land which have been agreed to with several visits having taken place.
36. Mr Buswell refers to changes in habitat types when following the Order route which are not available from the alternative routes other than for the younger and fit. I note this change but this will also be apparent in the event of confirmation when it would be necessary to use an alternative route. I refer to my comments above at paragraph 30 in terms of convenience of the alternative routes.
37. Mr Buswell contends that the fundamental problem in relation to the Order route is a long term failure to waymark and maintain the route. Whilst this may be the case, the land over which the Order route passes is unstable and has suffered from slippage. Mr and Mrs Baker refer to constant slippage and erosion of the land. The Orders seek to address this issue by the extinguishment and creation of the Order routes. It should be noted that the responsibility for the maintenance of the Order route rests with the Council and not the landowner.
38. Representations are made on the basis that confirmation of the Order will enable the land to be developed. The Council advise that the Order was made in 2013 with a planning application, subsequently withdrawn, made in 2015. The Council has made the Order, along with the creation Order, in an attempt to provide a solution to the condition of footpath CP-514. In the circumstances I do not give any weight to the suggestion that the Order is to facilitate development.
39. Having regard to all of the above, it is likely that the Order route if available would be used to some extent. The alternative route provided by Order B does introduce an element of inconvenience to those using footpath CP-514. However, the restoration of the Order route will require some considerable expenditure which will be avoided if the Order is confirmed. Putting all considerations in the balance, although finely balanced, I conclude that it is expedient to confirm the Order.

Order B

Whether there is a need for the footpath

40. The Council contend that the new footpath would provide an attractive and convenient route linking the existing section of footpath CP-514 to bridleway CP-519 and the rights of way network beyond.
41. Given my conclusion in respect of Order A there is a need to provide a route between points A and E so as to provide a link between CP-514 and the remaining network. In the absence of an alternative route CP-514 would become a cul de sac at point A.

Whether it is expedient to create the footpath having regard to

(a) the extent to which their creation would add to the convenience or enjoyment of a substantial section of the public, or to the convenience of persons resident in the area

(b) the effect which the creation of the footpath would have on the rights of persons interested in the land, taking account of the provisions as to compensation in Section 28 of the 1980 Act

42. Although the Council say that the Order route will provide an attractive and convenient route linking with the rights of way network they do not suggest that the creation of a route will add to the convenience or enjoyment of a substantial section of the public. However, in view of my conclusion in respect of Order A, the Order will provide a link between CP-514 and the remainder of the network of rights of way to the southwest. The creation of the route will therefore add to the convenience of those resident in the area who use the local network of rights of way.
43. No evidence has been put before me of any detrimental effect on the land crossed by the Order route. The Council advise that the landowner is agreeable to the Order.
44. Although the evidence is not substantial, bearing in mind my observations above, I conclude that it is expedient to confirm the Order.

Conclusions

Orders A and B

45. Having regard to these and all other matters raised in the written representations I conclude that Orders A and B should be confirmed.

Formal Decisions

Orders A and B

46. The Orders are confirmed.

Martin Elliott

Inspector

