



Order Decision

by **K R Saward Solicitor**

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

Decision date: 30 July 2021

Order Ref: **ROW/3265850**

- This Order is made under Section 119 of the Highways Act 1980 (“the 1980 Act”) and section 53A(2) of the Wildlife and Countryside Act 1981 and is known as the Kirklees Council (Public Footpath Holmfirth 146 (Part) at Upper Millshaw Farm, Millshaw Lane, Hepworth) Public Path Diversion and Definitive Map and Statement Modification Order 2020 (“the Order”).
- The Order is dated 18 February 2020 and proposes to divert the public right of way shown on the Order plan and described in the Order Schedule.
- There was one objection outstanding when Kirklees Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is confirmed subject to the modifications set out below in the Formal Decision.

Preliminary Matters

1. There had been one objection to the Order made by the Peak & Northern Footpaths Society. One ground of objection concerned the surface conditions at the new termination point from pooled water at the juncture with bridleway 134 (‘BW 134’) and coverage of the proposed path with thick bracken. This raised drainage/maintenance issues and a potential health hazard from the chemical composition of the bracken and its habitat for parasitic ticks. The objector also maintained that following excavation works, the surface of the new path is not grass as identified in the Order.
2. After the objection was made, the applicant took steps to remove the bracken and drain the surface at the relevant junction. The applicant has also undertaken to carry out further improvement works. Those works include digging out more bracken, to lay geotextile and stone aggregate which would grass over time. Where works have taken place in the field to lay pipes, the applicant undertakes to reinstate the layers of ground materials with grass surface to the field. The Council also provided a written undertaking from its Service Director (Legal, Governance and Commissioning) that any new path or way to be provided will be ready for use before the Order comes into operation. In accordance with the terms of the Order, that would mean all works being completed within 14 days of confirmation.
3. In light of these measures the ground of objection over surface conditions was withdrawn on 22 June 2020.
4. Pursuant to section 119(3)(b) of the 1980 Act, where it appears to the Council that work is required to bring a footpath into a fit condition for use by the public an order extinguishing a public right of way is not to come into force until the local highway authority for the new path certifies that the work has been carried

out. Provision to that effect should be incorporated within the Order for clarity because of the works required.

5. Another ground of objection concerned a discrepancy between the Order map and the description of the new route in Part 2 of the Schedule to the Order. The map is confirmed as correct. It is the compass points which are incorrectly described and do not reflect the alignment shown on the map. Once the Council as Order Making Authority ("OMA") agreed that a modification to the Order is required to address this error, the remaining objection was withdrawn.
6. The definitive map and statement would be modified upon confirmation of the Order once the provisions come into force. I am invited by the OMA to modify the Order appropriately prior to confirming it.
7. As there are now no outstanding objections, the Order has been treated as though unopposed albeit I must still be satisfied of compliance with the relevant tests for the Order to be confirmed. I have arrived at my determination on the papers without the necessity of a site visit.

Main Issues

8. Section 119(6) of 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.

9. Regard must also be had to any material provision contained in a rights of way improvement plan ("ROWIP") for the area under section 119(6A).

Reasons

Whether it is expedient in the interests of the owner of the land that the path in question should be diverted

10. The Order was made in the interests of the landowner who made the application to divert part of public footpath Holmfirth 146 ('FP 146') which passes through Upper Millshaw Farm. I note that the applicant is/was developing the site to build a house. The existing path passes close to the house. The OMA is satisfied that the diversion would increase privacy both in and around the house and allow better use of the land and curtilage. It is an isolated location and diverting the footpath away from the buildings and yard would also increase security.

11. There is clear benefit to the landowner from the diversion which leads me to conclude that it is expedient in those interests.

Whether any new termination point is substantially as convenient to the public

12. The southern termination point would be unchanged. The northern termination point would meet BW 134 less than 90m further west, away from the farm buildings.
13. Some walkers would find the altered termination point more convenient whilst it would be less convenient for some others depending upon their destination.
14. For those seeking to head west from the unaffected part of FP 146, or vice versa, the new termination point would be more convenient. In contrast, for those travelling from the south and seeking to head east (and vice versa) the altered termination point would be further to reach and less convenient although not significantly so. Moreover, this is a rural location where an altered termination point which remains along the same bridleway may be less important to those going for a recreational walk in the countryside.
15. In the circumstances, the new termination point is substantially as convenient to the public.

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

16. The proposed path is approximately 147m in length compared with 133m for the existing path. Thus, it is longer but not by much in the context of a rural path. Both routes have changes in direction.
17. The new route would be a cross-field grass path. As the field is used for the keeping of sheep, a stock-proof gate is to be installed by the owner. Other works are also identified before the path is brought into use. There are undertakings in place for those works from the landowner and OMA although that is not necessarily a complete guarantee. A minor modification to reflect the provision within section 119(3)(b) of the 1980 Act would ensure that the existing path is not extinguished before the works are certified as completed satisfactorily.
18. At 2m in width, the proposed path would be wider than the existing path which has a recorded width of 1.2m. The additional width will facilitate the ease of use.
19. Both routes are described by the OMA as "similarly challenging" in light of the topography. The diverted route would avoid a very steep slope to bring about beneficial changes to the useability of the path.
20. I am satisfied that the new path will not be substantially less convenient to the public.

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

21. The OMA confirms that views from the new path "are still superb". With an improved wider surface over easier terrain, the new path should be more accessible for users to enjoy. The diversion may also be preferable to users who dislike walking in close proximity to property is residential use.

22. Subject to the required works being undertaken to bring the proposed path into a fit condition for use by the public, there is no reason to believe that there would be any adverse effect on public enjoyment. This can be secured through the certification process mentioned above.

The effect of the diversion on other land served by the existing paths and the land over which the new paths would be created

23. There is no evidence that the diversion will have any adverse effect on land served by the existing route or on the land over which the alternative route will be created.

Rights of Way Improvement Plan ('ROWIP')

24. The ROWIP for Kirklees 2010 identifies seven aims in furtherance of the vision for a rights of way network that is accessible for all, helps towards the health and well-being of its residents, supports the economy through tourism and helps to reduce Kirklees' 'carbon footprint'. There is no suggestion that the Order is contrary to any of the identified aims or provisions of the ROWIP.

Conclusions on whether it is expedient to confirm the Order

25. There is no indication that the coming into operation of the Order would have any effect on other land served by the existing path or land over which the right would be created or land held with it. The applicant has agreed to defray any compensation which becomes payable in consequence of the coming into force of the Order. There is no identified adverse effect on public enjoyment and the evidence indicates that improvements would be secured once the required works are complete.

26. I have found that the altered termination point is substantially as convenient and the new path would not be substantially less convenient to the public. I give weight to the clear benefits to the landowner from the diversion.

27. Nothing in the submissions leads me to conclude that it would not be expedient to confirm the Order subject to modifications.

Overall Conclusion

28. Having regard to the above, and all other matters raised in the written submissions, I conclude that the Order should be confirmed subject to the modifications described above to correct the error contained in the description of the new path in Schedule 2 to the Order and to ensure the existing path is not stopped up prior to the new path being fit for public use.

Formal Decision

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

- In Article 1, after the words "... shall be stopped up after 14 days from the date of confirmation of the order" insert the text "(but not before the date on which the local highway authority for the new highway mentioned in Article 3. certifies that such work has been carried out as required to be done to bring the new site of the footpath into a fit condition for use by the public)..."

- In the fourth line of Part 2 of the Schedule, delete the words "*in a west south-westerly direction*" and substitute "*generally west, then east-southeast, then south,*".

KR Seward

INSPECTOR

