



Order Decision

Site visit made on 23 April 2024

by **C Beeby BA (Hons) MIPROW**

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

Decision date: 01 May 2024

Order Ref: ROW/3319529

- This Order is made under Section 119 of the Highways Act 1980 (“the 1980 Act”) and is known as the Essex County Council Public Path Diversion Order 2022 Footpaths 29 & 26 Langham in the Borough of Colchester.
- The Order is dated 10 November 2022 and proposes to divert the sections of public right of way shown on the Order plan and described in the Order Schedule.
- There were three objections outstanding when Essex 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. In writing this decision I have found it convenient to refer to points marked on the Order Plan. I therefore attach a copy of this plan.
2. Government guidance on the diversion or extinguishment of public rights of way that pass through private dwellings, their curtilages and gardens, farmyards and industrial or commercial premises (known as the “Presumptions Guidance”) was issued in August 2023. The parties’ views were sought on any potential relevance of the guidance, as it was issued after the Order’s submission to the Secretary of State. It applies to certain land where the diversion or extinguishment of a right of way under sections 119 or 118 of the 1980 Act is under consideration. In all cases where the guidance applies, the order-making and confirming authority should weigh the interests of the owner and/or occupier against the overall impact of the proposal on the public as a whole.

Main Issues

3. 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.

4. 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 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 a 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.

Background

5. Both the existing and proposed paths lie in a paddock which is owned by the applicant and which lies adjacent to their dwelling and garden. The existing sections of footpath follow the paddock's eastern boundary with the garden and cross its north-west corner. The proposed paths would follow the paddock's western and northern boundaries.

Reasons

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

6. Access between the applicant's garden and the paddock is made via two gates on either side of the existing section of Footpath 29 in a small tractor carrying garden waste, primarily by the applicant's gardener. The applicant's family members intend to keep a small number of sheep in the paddock. Details of a holding number from the Rural Payments Agency regarding stock keeping are supplied. It is suggested that the presence of livestock would increase the need for maintenance of the field and consequently the frequency of crossings of the footpath made via the gates with a tractor and trailer. The available visibility of the path and any path users to the tractor driver is somewhat limited due to the surrounding extensive mature vegetation. Conflict between the tractor and users of section A-B or loose dogs on the path could, for example, deter the owner from driving across the path, or could result in action against them.
7. The Order would remove the potential for such conflict. It is consequently expedient in the interests of the landowner that section A-B of existing Footpath 29 should be diverted.
8. A fence adjacent to section D-B of Footpath 26 results in the separation of a small area comprising the field's corner from the remainder of the paddock. Reasons given for the presence of the fencing at this point are to prevent dog fouling and public access to the paddock. The presence of the fencing limits the availability of the whole paddock for use by the landowner. The owner submits that the path's diversion would enable the use of the small area of land which is currently fenced off.
9. Trespass may be committed against the holder of the land if path users or their dogs stray from the line of a public right of way across it. A potential alternative remedy to fencing consequently exists if unwanted public access occurred off the existing line of Footpath 26. Nevertheless, dog fouling within the paddock is likely to be particularly unwelcome as the land is used by the owner's family for recreation. Whilst dog fouling of a right of way may be an offence under a byelaw, it is unclear whether this is applicable at this location. This issue consequently may well be more difficult to resolve without the use of fencing. Thus, it is reasonably necessary for the fencing to be present along the existing route of Footpath 26. Its diversion would increase the area of the paddock available for use by the landowner. It is therefore expedient in the interests of the landowner that the section D-B of existing Footpath 26 should be diverted.
10. It is submitted that fencing erected on the paddock has been damaged. A police letter of 2015 acknowledging a reported crime is provided in support. The letter does not state the nature of the crime and therefore provides only minimal evidence to confirm whether it concerned damage to fencing. Furthermore, the location of the damaged fencing, and how

the diversion of the existing paths might prevent such issues in future, is unclear. Thus, this matter does not support the Order's expediency in the interests of the owner.

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

11. The termination points of the existing section of Footpath 26 at points B and D would be unaltered.
12. The southern termination point of the existing section of Footpath 29, at point A, would be altered to a point approximately 95 metres further to the west along the same footpath (57). This would add approximately 1 minute to the journey of those accessing the paddock from the east, at an average speed which the Order Making Authority (OMA) submits would be 3 miles per hour. Given the surface and topography of the proposed alternative route, this would not be an unreasonable pace for an average pedestrian user to proceed at. The increase in walking time to the new termination point would consequently be limited, and would be unlikely to give rise to inconvenience.
13. Path users accessing point B from Footpath 57 to the west would be more likely to use the section of Footpath 26 which passes near farm buildings than the existing section A-B, which would entail a longer dog-leg. Nevertheless, if they chose to continue on Footpath 57 and then to access the diverted Footpath 29 to continue north, point C would be 95 metres closer on such a route than point A, and hence would not be inconvenient.
14. In view of the above considerations, the southern termination point of Footpath 29 would be altered to a point which is on the same highway, and which is substantially as convenient to the public.
15. The northern termination point of Footpath 29 would be altered from point B to point D. Both points lie on the same highway, and are separated by a relatively short section of Footpath 26.
16. Thus, the new termination points of Footpath 29 would be substantially as convenient to the public.

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

17. The proposed alternative route of Footpath 26 around the field edge would be approximately 9 metres longer than the existing cross-field route. The increase in distance would consequently be minimal and hence would not be substantially less convenient to the public.
18. The journey of a user of the proposed alternative routes A-C-E-B would be increased by approximately 120 metres compared to use of the existing section A-B of Footpath 29, when accessing the paddock from point A. At an average walking speed of 3 miles per hour this amounts to an additional journey time of 2 minutes. Given the routes' rural location their use is likely to be primarily for recreational purposes, so that time concerns are less likely to be a consideration for path users and the increase is unlikely to inconvenience them.
19. Where path users choose to access Footpath 29 from point C, the routes C-E-B would have a similar or shorter length to C-A-B.
20. The gradients of the two proposed alternative paths are similar to those of the existing paths. The surfaces of the existing and proposed paths would generally be of a similar natural type, although the central section of the existing route A-B is subject to intermittent waterlogging which, even when the route is maintained, is likely to affect the convenience of some users if it prevents their passage. The proposed alternative route of Footpath 29 crosses higher ground and hence it may well remain dryer in wet weather, increasing the

convenience of these users. The new paths would both be 2 metres wide, allowing for a reasonable width for two people to pass. As a result of these considerations, the accessibility of the alternative routes would not give rise to inconvenience to, for example, those with reduced mobility or people using pushchairs.

21. Section 118(6) of the 1980 Act, concerning proposed path extinguishments, states that "...any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded." Section 119 does not contain such wording. However, in considering whether the right of way will or will not be substantially less convenient to the public in consequence of the diversion, an equitable comparison between the existing and proposed routes can only be made by similarly disregarding any temporary circumstances preventing or diminishing the use of the existing route by the public.
22. In considering the potential effect of the proposed diversion upon use of the Order route by the public, the existing route should consequently be assessed as if it was open and maintained to a standard suitable for those users who have the right to use it. The overgrown character of sections of the existing route A-B has consequently been disregarded in assessing Test 2.
23. On balance, having considered the matters raised, I do not find that the length, gradient, surface, width or accessibility of the proposed alternative routes would render them substantially less convenient to the public.

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

24. The existing route A-B would form a circular route when used with Footpaths 26 and 57. Whilst circular routes may be appealing to recreational path users because they reduce the need to retrace one's steps, that route has a relatively short distance and is only partially circular as it is accessed and left by the same route, which may limit its appeal in this way to the path's likely recreational users. Furthermore, a shorter "circular" route using the diverted Footpath 29 would remain possible if the Order were confirmed. As a result of these considerations, the Order would not reduce public enjoyment of the paths as a whole due to the loss of a circular route.
25. Hobday Wood lies to the north of the land at issue. This mature and extensive deciduous woodland has an attractive appearance which may be appreciated as one approaches via the existing route A-B. Views of the wood from the proposed alternative route A-C-E-B are very similar as, in following the opposite boundary of a relatively small paddock, it lies roughly parallel to the existing path. Any difference in the available views would consequently be so minimal as to have no harmful effect on enjoyment. This would additionally be the case for the proposal in respect of Footpath 26 because the existing and proposed alternative routes lie in close proximity.
26. How the longevity of the existing sections of path may contribute to the public's enjoyment has not been demonstrated. In any event, the relevant section of Footpath 29 resulted from a previous diversion in 2009, so that historic interest is unlikely to contribute to its public enjoyment. As a result, it does not form the suggested ancient route, and any right to haul logs along it has not been sufficiently evidenced to be considered as part of this decision.
27. Boggy conditions at the centre of the existing section A-B are likely to make use more challenging at certain times of the year, affecting public enjoyment of the path as a whole. The proposed route crosses higher and more open land and therefore it would be less likely to be subject to waterlogging. Access to the proposed route is consequently more assured to all users throughout the year, so that the diversion would increase enjoyment of the path as a whole in this regard.

28. In view of the above considerations, the diversions would have a beneficial effect on public enjoyment of the paths as a whole.

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

29. There is no evidence before me that the Order would have, in this respect, any effect separately identifiable from those considered above in relation to the other requirements of section 119 of the 1980 Act.

Rights of Way Improvement Plan ('ROWIP')

30. In determining orders made under section 119 of the 1980 Act it is necessary to have regard to any ROWIP relevant to that area. The OMA considers that the Essex ROWIP contains no relevant provision to the Order, and the evidence before me does not lead me to an alternative view.

Conclusions on whether it is expedient to confirm the Order

31. It is submitted that the existing route of Footpath 29 floods every winter. The OMA acknowledges that this is an issue which seasonally affects the path. An objection challenges this, suggesting that flooding from a blocked ditch only caused part of the path to become impassable for the first time last winter. Photographic evidence showing flooding on the path is provided.
32. The day of my site visit was preceded by a period of significant rainfall and a section towards the centre of section A-B had become founderous and was consequently difficult to cross. The land slopes down from the proposed alternative route C-E-B towards the boggy area on the existing path. That area is surrounded by substantial vegetation and the path's condition may be partially improved by its cutting back. Nevertheless, the land's topography is likely to contribute to the reported intermittent waterlogged conditions on the existing Footpath 29. The evidence before me does not suggest that the issues are caused in part by the management of the surrounding land.
33. The alternative route, as a whole, is on land which is higher and more open. Thus, its surface may well remain in generally better condition, with less resulting requirement for its maintenance at the public expense. Confirmation of the Order is consequently likely to result in public benefits in this regard. These would be limited in scale due to the relatively short length of the boggy section of Footpath 29.
34. The applicant and the OMA submit that the Order would improve the safety both of walkers and their dogs and those passing between the garden and paddock in a tractor. The gates are single and five bar in type and hence would accommodate only a small type of tractor. At the extremely slow speed necessary to cross the path, the sound and gradual visibility of the vehicle would sufficiently alert the majority of path users to its presence. The tractor's speed in crossing the path would be necessarily slow due to the needs for both its safe operation and for the opening and closing of two gates to cross the path. These pauses would provide the opportunity to check for any path users and to alert users to the tractor's presence. In view of these considerations, whilst there is some current risk of conflict arising between the tractor and path users or their dogs, it is low. This is supported by the absence of any records of such conflict.
35. Given the ages of the family members concerned, the stock keeping interest may be limited or brought to an end by changes in the household's composition within a few years

- and hence may endure for only a relatively brief time. As a result, the anticipated increased number of tractor crossings of the existing path may well be relatively limited.
36. Given the above considerations, the scale of public benefits of the Order which would arise in terms of safety due to the absence of tractor crossings of Footpath 29 would consequently be minimal.
 37. The proposal would increase the area of the paddock available for the landowner's use and would remove the potential for conflict between the owner's tractor and users of Footpath 29, resulting in benefits in the owner's interests. These benefits would be limited in scale as the area of land concerned would be small and, as identified above, the risk of conflict arising between the tractor and path users or their dogs is low.
 38. Fencing is present between the paddock and Hobday Wood. If dogs were allowed to run into the wood from the diverted section of Footpath 26 this may form trespass and consequently a remedy may be available without the need for the fencing's owner to reinforce it. Furthermore, no objection to the proposal has been received from the wood's owner. The evidence before me consequently does not suggest that confirmation of the Order would give rise to unacceptable costs to the wood's owner in providing new or reinforced fencing.
 39. Concern has been raised that the Order's confirmation could form a precedent for other such proposals, whether on the applicant's land or elsewhere. Nevertheless, every order must be dealt with on its own merits, subject to the evidence presented. Furthermore, the concern is not supported by evidence to indicate that an accumulation of such decisions could be seen to be harmful. The matter consequently does not weigh against the Order.
 40. There is nothing before me to suggest that the proposal could increase the likelihood of obstructions of the rights of way network on the applicant's land. In any event, the highway authority's duty to secure the removal of an obstruction remains applicable to a diverted route. As a result, this is not an issue which weighs against the Order.
 41. There is no statutory bar to an application to divert a right of way where the landowner bought the property in full knowledge of its existence. Therefore this matter does not adversely affect the application's validity.
 42. The diversion of the two paths is expedient in the interests of the landowner. The new termination points of Footpath 29 would be substantially as convenient to the public, and the new paths would not be substantially less convenient to the public. The diversion would have a beneficial effect on public enjoyment of the paths as a whole. There is no evidence before me that the Order would have any separate effect on other land served by the existing paths and the land over which the new paths would be created from the effects considered in relation to the other requirements of section 119 of the 1980 Act. The Essex ROWIP contains no relevant provision to the Order. As set out above, the Order may result in limited public benefits due to a reduced requirement for maintenance of Footpath 29, and minimal public benefits in terms of safety. As such, it is expedient to confirm the Order.

Overall Conclusion

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

Formal Decision

44. I confirm the Order.

C Beeby INSPECTOR

ORDER MAP - COPY NOT TO SCALE

