



Order Decision

Site visit on 24 June 2008

by **Sue Arnott FIPROW**

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

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Decision date:
08 July 2008

Order Ref: **FPS/W1850/4/3**

- This Order is made under Section 119 of the Highways Act 1980 and is known as the County of Hereford and Worcester (Footpath No WZ1 (Part) Walterstone) Public Path Diversion Order 1995.
- The Order is dated 30 March 1995 and proposes to divert a section of public footpath to the north west of Walterstone.
- There were 2 objections outstanding when Herefordshire Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.

Summary of Decision: The Order is not confirmed.

Preliminary Matters

1. The Order was made in 1995 by Hereford and Worcester County Council. Since then, jurisdiction for highway matters for the area covering Walterstone has passed to Herefordshire Council (HC).
 2. Given the length of time since this Order was made, the lack of any recent information to confirm the present position of the relevant landowners or the statutory undertakers is a source of concern. The only submission from the applicant appears to be the application form dated 1991; the owners of the land crossed by the proposed route indicated their support for the diversion in 1993; and the statutory undertakers responded to consultations also in 1993.
 3. Whilst I draw no particular conclusion from the delay in forwarding this case to the Secretary of State, I cannot presume that the situation remains the same in all respects as in 1995 when the Order was made. The proposed diversion needs to be considered in present-day circumstances, not those that existed over thirteen years ago.
 4. When visiting the site I was unable to walk along the section of footpath in question between the points shown as B and C on the Order map. Although I found stiles in the fences at both locations, passage was blocked by hedge growth and trees and at C a sign stated "Private House: footpath this way »". I was, however, able to walk the majority of the proposed route (shown as A-F-E-D on the Order map) since, with the exception of A-F, this is now waymarked as a public right of way. The line A-F is not accessible; there is a barbed-wire fence across it near A (although the path is currently marked via a gate near B) and, as far as I can judge, the proposed path A-F runs through a small group of trees and bushes surrounded by nettles and thistles.
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5. At first glance it may appear that the Order has largely come into operation in practice, if not in law, and one might draw the conclusion that the landowners and utility companies have nothing further to say on the diversion. However, the objectors have recently re-asserted their position and confirmed that their objections still stand.
6. Where public path extinguishment orders are concerned, Section 118(6) of the Highways Act 1980 (the 1980 Act) requires that any temporary circumstances preventing or diminishing use of the path in question be disregarded when determining the likely use that might be made of it. The same instruction does not appear in Section 119 under which this Order is made but, as far as I am able, I propose to adopt the same principle when considering this diversion.

The Main Issues

7. The requirements of Section 119 of the 1980 Act are that before confirming the Order I must first be satisfied that:
 - (a) it is expedient in the interests of the owner of the land crossed by the footpath that the right of way in question should be diverted;
 - (b) the new route to be provided will not be substantially less convenient to the public;
 - (c) it is expedient to confirm the Order having regard to:
 - (i) the effect of the diversion on public enjoyment of the path as a whole, and
 - (ii) the effect the coming into operation of the Order would have with respect to other land served by the existing path and the land over which the new path would be created together with any land held with it, having had regard to the provision for compensation.
8. Paragraph 9 of Schedule 6 to the Countryside and Rights of Way Act 2000 inserts into the 1980 Act a requirement that I should have regard to any material provision in a rights of way improvement plan prepared by any local highway authority whose area includes land over which the Order would create or extinguish a public right of way. However the plan for this area has not been finalised and no issues arising from the draft plan have been raised.

Reasons

Whether it is expedient in the interests of the owner of the land crossed by Footpath WZ1 that the right of way in question should be diverted

9. On the application form in 1991 the applicant¹ stated that the reason for the requested diversion was to gain privacy in the newly created private property. In addition HC submits that the diversion would increase the property value and thus benefit the landowners.
10. The objectors argue that the effect of the footpath should have been taken into consideration when planning permission was granted for conversion of the barn

¹ The application form lists both Mr and Mrs Barnard as applicants. However the Order refers to the "owner" in the singular and I have therefore referred to the 'applicant' in the singular here for consistency.

to a dwelling. They point out that privacy and seclusion are not noted in Section 119 of the 1980 Act, nor is there any reference to diverting paths to enhance property values. They submit that these are not reasons for altering the line of a longstanding definitive footpath.

11. The definitive map records the line of Footpath WZ1 as almost touching the north western corner of the original building. Although I have no information as to the internal layout of the house, it seems reasonable to conclude that the proximity of the path would indeed be intrusive and that a diversion to take the path further from the house would be desirable.
12. From the little I could see of section B-C on my site visit, the profile of the path seems to have changed considerably from what I assume to have been a pasture field surrounding the barn. Retaining the garden landscaping and planting might be in the owner's interests (although this has not been argued) but would not necessarily justify the proposed diversion to A-F-E-D.
13. In my view, a property's value may well increase as a result of diverting a public footpath but that factor alone is not sufficient to justify an Order.
14. As I have already indicated, I cannot assume that the applicant is still the owner of the property crossed by section B-C when seventeen years have passed since the diversion was first requested. Nevertheless it is difficult to conceive of a way that the Order would not be in the interests of the present owner (and occupier) of the converted barn.
15. I am satisfied that the Order was properly made in 1995 in the interests of the owner as stated. However I have doubts about the expediency of confirmation today in 2008 in the absence of any assurance of the present owner's position. What may have been expedient in the early 1990s cannot be assumed to be expedient today without supporting evidence and I am not satisfied this has been adequately demonstrated.

Whether the new route to be provided would be substantially less convenient to the public

16. HC considers that the proposed route would not be substantially less convenient to the public although it is slightly longer. It does not regard the slope of the 'new' path as onerous in the overall context of the route.
17. The objectors disagree, arguing that both the additional distance and the steep gradient of section E-D cause a substantial inconvenience. In addition, they argue that no account has been taken of the requirements of the Disability Discrimination Act 1995.
18. In my view the question of convenience depends to a large extent on the user, particularly the purpose of the journey and the capabilities of the people walking the path in question. In terms of length, I do not consider the extra distance as significant in this context. Since there is no defined width for the existing right of way, I regard a two-metre wide new path² as an improvement.

² The Order Schedule states the width of the 'new' footpath as being "a minimum of 2 metres in width". Since that leaves open the question of its maximum width, if the Order were to be confirmed I would propose a modification to remove the words "a minimum of".

19. The Order specifies three locations where stiles, gates or gaps would limit use of the path although two of these lie at the start and finish of the section to be diverted and appear to relate to both present and proposed routes. In fact an additional limitation would need to be incorporated if the fence currently across section A-F is to be retained. That would result in the same number of fence crossings on both present and proposed routes and therefore no difference in that respect in terms of relative convenience.
20. Although I find it hard to be quite certain about the slope of the present route when I have not had the opportunity of walking along it, my observations from B and C suggest that the rise from A to D via B and C is much more gradual than via the alternative now in use via A-F-E-D. Comparing the two routes in isolation I would say that the 'new' is less convenient in terms of its gradient but put into the context of the whole path I consider it is not substantially so.
21. However, my interpretation of the Order map suggests to me that the line drawn between A and F runs directly through a group of trees on a short but steep bank. Nettles and thistles can easily be cut but the trees themselves clearly provide shelter for grazing sheep and their removal may not have been intended. With no further details of this particular section, I cannot accept that a footpath along A-F would be at all convenient for the public because of the ground conditions and trees.
22. That being the case, I consider the new route (as shown on the Order map) would be substantially less convenient for the public.

The effect the diversion would have on public enjoyment of the whole path

23. The Council submits that the public's enjoyment of this footpath may increase since the views from the 'new' path would be better than the existing line, being on the western side of the garden boundary hedge. Also, it would remove the likelihood of the public feeling embarrassed at having to walk through a private garden. I am told Footpath WZ1 now forms part of a route promoted as the Monnow Valley Walk although I have no further details.
24. The objectors make no comment on this aspect of the proposed diversion.
25. I agree with the Council that the views are likely to be better from section E-F than B-C but without having walked the latter it is difficult to be certain. The views from B-C may be obstructed by trees and shrubs but it is higher than E-F and might possibly afford long-distance views along the valley. Whether or not that is the case, walkers are able to appreciate similar views both north and south of the section of Footpath WZ1 in question so that I consider the effect on public enjoyment would be minimal.
26. As regards the privacy issue, I accept that generally people feel uncomfortable about walking very close to private houses where they feel they are intruding on the personal space of the occupiers, even where a public right of way is acknowledged. In the present case, I would accept that may be true of a part of the Order route as it passes the house, but not necessarily the whole of the garden between B and C.
27. Overall I accept there may be some benefits to the public from removing the footpath from the immediate vicinity of the house. Whilst the effect on views is

uncertain, I find no significant detrimental effects on public enjoyment of the whole of Footpath WZ1 are likely to arise from the proposed diversion.

The effect the coming into operation of the Order would have with respect to the land served by the existing path and the land over which the new path is created together with any land held with it, account being taken of the provisions as to compensation

28. No adverse effects on the land in question have been drawn to my attention. Compensation issues have not been raised but, when the Order was applied for, the proposed route was to run over land belonging to Pentwyn Farm, not the applicant. The Order therefore states that the owner of the land crossed by the (existing) footpath had agreed to defray any compensation that may be payable as a consequence of the Order coming into operation.
29. This may still be the case but there is no information before me to confirm that the present owner of the converted barn is willing to make that undertaking. However it could be that since the majority of the proposed 'new' route has been in operation for some years, compensation may no longer be applicable. Nevertheless the lack of certainty is a reason for caution.

Whether it is expedient to confirm the Order

30. Whilst I accept that the proposed diversion would not significantly affect public enjoyment of Footpath WZ1 in its entirety, the lack of up-to-date and comprehensive information seriously compromises the evidence in support of other aspects of the Order. With no recent communication to confirm the present landowners' positions, I cannot be assured that the Order would be in the interests of the landowner, or that any compensation matters that might arise would be satisfactorily resolved. Without more recent consultation with the relevant utility companies, I am not satisfied that the rationale behind the statutory requirements has been met, even if the order-making authority fully complied when the Order was made. Further, I consider the proposed route as shown on the Order map would be substantially less convenient to the public, primarily because of unresolved issues relating to section A-F.
31. HC acknowledges that this Order is not ideal but felt obliged to submit it for confirmation to the Secretary of State because of the time that had passed since it was made by the former Authority.
32. Taking all these matters into account I cannot agree that it would be expedient to confirm this Order in the absence of so many relevant facts.

Conclusion

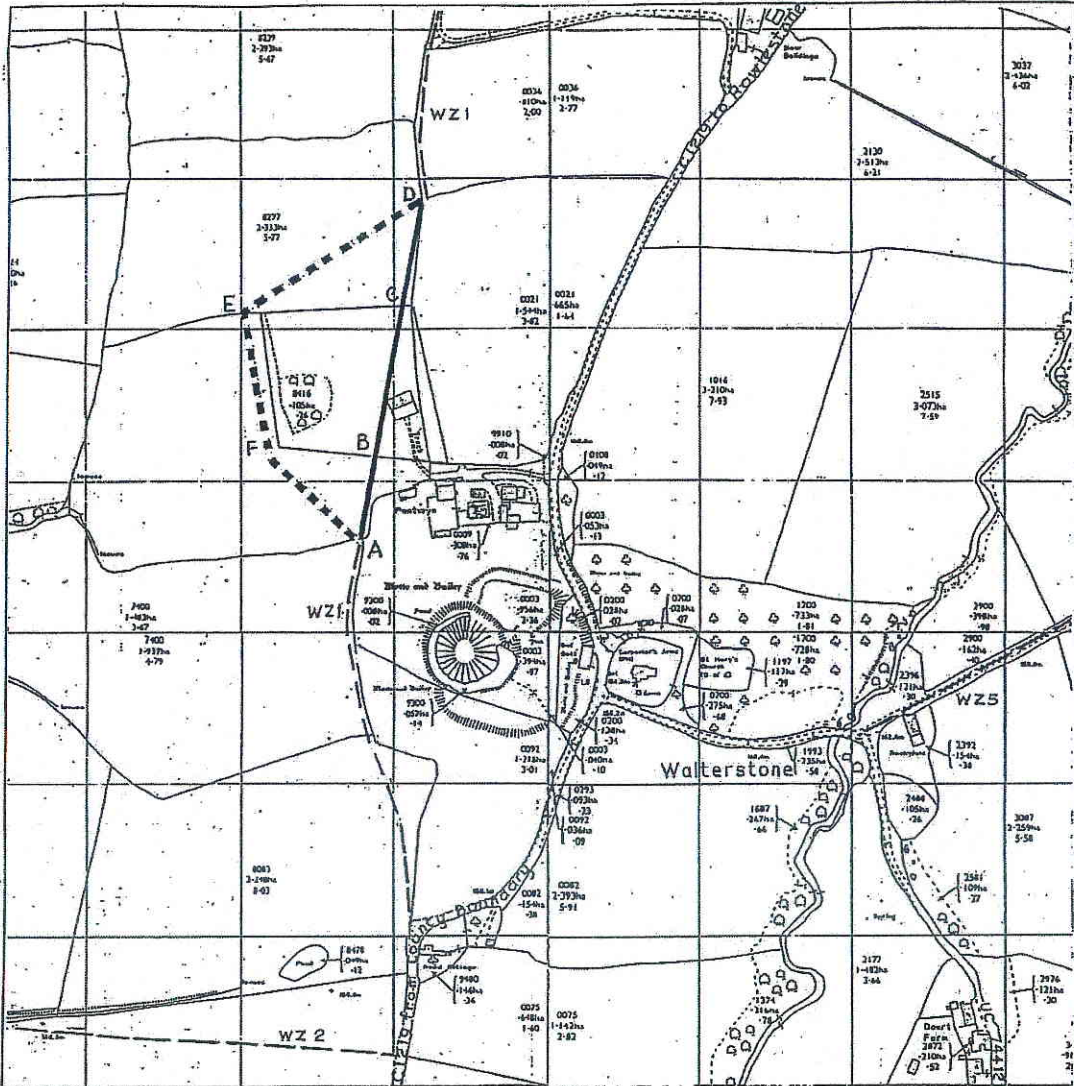
33. Having regard to all matters raised in the written representations, I conclude the Order should not be confirmed.

Formal Decision

34. The Order is not confirmed.

Sue Arnott

Inspector



Map reduced - not original scale

PROPOSED EXTINGUISHMENT A B C D
 PROPOSED DIVERSION A B C D
 EXISTING RIGHTS OF WAY

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BASED ON O.S. SHEET NOS 3324, 3325, 3424 & 3425



HEREFORD AND WORCESTER COUNTY COUNCIL PARISH OF WALTERSTONE SOUTH HEREFORDSHIRE PROPOSED DIVERSION OF FOOTPATH NO. 1 (PART)		DRAWN B.G.	DATE 12-1-93	SCALE 1:2,500 DRG. No. 397/1	1	Dr. Marilyn Hayes County Engineer and Planning Officer County Hall, Spetchley Road, Worcester WR5 2TP
		CHECKED B.G.	DATE 12-1-93			

