



Order Decision

Inquiry opened on 8 December 2020

by Sue M Arnott FIPROW

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

Decision date: 16 February 2021

Order Ref: ROW/3230978

- This Order is made under Section 257 Of the Town and Country Planning Act 1990. It is known as the (Public Footpath 223003 Land off Strawberry How Road Cockermouth) Public Path Stopping Up Order (No.1) 2019.
- The Order is dated 14 February 2019. It proposes to stop up a section of public footpath over land on which residential development is proposed to the north of Strawberry How Road in Cockermouth, as shown on the Order map and described in the Order schedule.
- There were 17 objections outstanding when Allerdale Borough Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

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

Preliminary Matters

1. This inquiry was scheduled to be held in Cockermouth in June 2020. The introduction of restrictions as a result of the Covid-19 pandemic meant that a public meeting of this nature could not be held as planned and consequently the proceedings were put on hold.
 2. In order to progress this matter without further delay, all interested parties were invited to consider whether a change of procedure would be acceptable in these circumstances. As a result, it was agreed that the Order would be determined by means of an inquiry held virtually.
 3. I therefore held the event on 8 and 9 December 2020 with the aid of Microsoft Teams technology. I am extremely grateful to all concerned for their assistance in making this alternative arrangement during difficult times.
 4. In advance of the inquiry, I made an unaccompanied inspection of the Order route, the definitive footpath (223003) and its immediate surroundings on 1 December 2020. At the close of the event, no-one requested that I make a further visit to the site.
 5. At the inquiry it came to light that the scale of the Order map was not 1:2500 as stated but had been enlarged to a scale of approximately 1:1600. I am satisfied that the Order itself is otherwise perfectly clear in its intention and the likelihood of anyone being misled or prejudiced in any way is slight. I therefore propose to modify this detail for the avoidance of doubt in future.
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The Main Issues

6. Since the Order is made under Section 257 of the Town and Country Planning Act 1990 (the 1990 Act), if I am to confirm it I must be satisfied that it is necessary to permanently close the way in question (shown as A-B on the Order map) to allow development to be carried out in accordance with a valid planning permission.
7. Government Circular 1/09 version 2 (Defra) makes clear that, in determining an order of this kind, the merits of the development are not at issue. However it should not be assumed that because planning permission has been given necessitating closure of a footpath that confirmation of the ensuing order will automatically follow. Any disadvantages or loss likely to arise as a result of the path closure to members of the public¹ may be weighed against the advantages arising from the development when determining the Order².
8. In short there are two issues that must be considered here. These legal tests have been described by the Courts as 'the necessity test' and 'the merits test'. Confirmation of the Order requires that both are satisfied³.
9. Whilst I must also have regard to any material provisions in any rights of way improvement plan for the area when determining this Order, no issues have been raised in this respect. In addition, in reaching my conclusions I have considered the requirements of the Equality Act 2010 where appropriate.

Reasons

10. The section of footpath in question (A-B) forms part of a public right of way which leads from Bellbrigg Lonning and the Windmill Lane residential estate in Cockermouth generally eastwards across fields to the summit of Slate Fell and beyond to connecting paths within the Lake District National Park. This is a well-used footpath and one which is an important and easily accessible facility for many Cockermouth residents.
11. In short, planning permission has been granted (subject to a number of conditions) for the construction of 224 new homes in the field through which section A-B passes. The plan devised by the developers, Story Homes Ltd, in association with the planning authority and highway authority, is to close the existing right of way but to maintain access for members of the public to walk between points A and B by means of a permissive route that will change at various stages during the construction works. These are set out clearly in the 'Footpath Management Plan' (required by condition 20) and are not directly at issue here.
12. Once construction is complete it is intended that the public will be able to walk via a line mostly to the south of the original definitive route, essentially along footways beside new estate roads in a broadly east-west direction with connecting non-vehicular links at either end, joining Bellbrigg Lonning at the west and Footpath 223003 at the east. The route would be signposted and waymarked, and would benefit from engraved stone flags inset into the path surface at intervals along its length.

¹ ... or to persons whose properties adjoin or are near to the existing highway, of whom none have been identified in this case.

² As established in the case of *Vasiliou v Secretary of State for Transport* [1991] 61 P&CR 507

³ A point articulated by Lindblom LJ at paragraph 51 of his judgement in the Court of Appeal case *R (Network Rail Ltd) v SSEFRA* [2018] EWCA Civ 2069

13. The legal status of this final alternative would remain a permissive path unless and until the new estate roads are constructed to the required standard and adopted as publicly maintainable highways by Cumbria County Council. After this, the public would use the route by right but not one recorded on the definitive map. However condition 24 secures a management and maintenance plan for a permanent pedestrian route through the site in the event that it is not adopted as a highway.

Whether the stopping up of Footpath 223003 is necessary to allow development to be carried out in accordance with planning permission

14. The Order was made by Allerdale Borough Council (ABC) in its capacity as local planning authority. The Council was satisfied that it is necessary to close the section of Footpath 223003 in question (shown as A-B on the Order map) to enable development to be carried out in accordance with planning permission granted under the 1990 Act.
15. The planning history of the site is complex since the development that is particularly relevant here forms the second phase of a much larger scheme on the north side of Strawberry How Road in Cockermouth. Phase 1 has seen the construction of 96 new dwellings in the area closest to the road; phase 2 is proposed to the north of this estate, on land for which permission now exists for a further 224 homes.
16. Outline approvals 2/2014/0381 and 2/2016/0670 were granted to Story Homes Ltd by ABC, followed by approval of a hybrid application under reference 2/2016/0670⁴, all of which are noted in the Order, together with the reserved matters for Phase 2 (2/2018/0155). However the latter was amended in February 2020 (after the Order was made) under reference VAR/2019/0025. Since it is this permission which Story Homes intends to implement, I have been asked to modify the Order to include this reference too.
17. In October 2018 an application was submitted by Story Homes to stop up the definitive footpath which crosses the site. Considering the request in the context of the reserved matters approved in 2018 and supporting approvals, ABC accepted that an order would be necessary to stop up around 355 metres of Footpath 223003 to enable the construction of plots 51-57, 58-92, 100-105, 113-122 and the proposed highway beyond plot 50. Subsequently it made the Order that is now before me for determination.
18. Although a number of changes were made through the variation of reserved matters in 2019, the layout of the proposed houses in the plots through which the existing footpath passes has altered very little.
19. The need for an order under section 257 of the 1990 Act may be satisfied by the existence of either a physical or legal obstacle to development proceeding. In this case it is argued that both make the Order necessary. The effect of condition 18 of the revised reserved matters (VAR/2019/0025) is to prevent the commencement of development in respect of the affected plots unless and until a stopping up order has been made in respect of A-B.
20. Combined with the physical obstruction that would be caused were construction to begin on the plots listed above, both ABC and Story Homes contend is sufficient to prove the need for the Order. In short, they submit the footpath

⁴ This included full planning permission for 96 houses in phase 1 and outline permission for 224 homes in phase 2.

cannot remain in place if the development of these particular properties is to proceed.

21. It would be hard to disagree with the logic of that statement and I accept that it is clearly necessary for the existing public right of way to be removed from its present alignment if these new homes are to be built. But the argument put forward by objectors concerns whether it is necessary to *stop up* the public right of way when it could instead be *diverted*.

Whether stopping up is necessary as opposed to diversion

22. Several objectors questioned whether it really is necessary for the section of footpath A-B to be closed. Some argued that it should be retained as a 'greenway' through the new estate, particularly when the development as a whole is seen by some to be impacting negatively on the biodiversity and amenity of this popular path.
23. Others accepted that the public right of way would need to be re-routed in order to enable construction to proceed in accordance with the approved plans but argued strongly that the footpath should instead be *diverted*, not simply stopped up.
24. As regards the first point, planning permission has been granted for the layout shown in the plan approved under the 2019 variation (which reflected the 2018 reserved matters approval). That layout is not at issue here and I am not at liberty to propose any changes to that plan. The Order must be determined on the basis of the relevant valid planning permission and, as I noted above, condition 18 specifically requires the confirmation of a *stopping up* order.
25. On the second matter, I am aware that Story Homes originally intended to seek diversion of this footpath onto a 'green corridor' as a key feature of a linear park within the development. As objector Dr Abernethy pointed out, that is what was shown in the early proposals. He drew attention to what he described as an "abrupt change of plans" by the company with "no cogent design reason for this change" of process.
26. Story Homes explained that this change in procedure resulted from a meeting with Cumbria County Council's Public Rights of Way Team. The main issue seems to have been that, for operational reasons, the proposed alternative to the definitive route could not be completed and made suitable for public use before construction needs to start across the old route.
27. As a result the County Council advised that a diversion was not possible. It noted that the proposed alternative to A-B (via footways through the housing development) is intended to become part of the adopted highway in due course anyway and there is no (other) suitable or convenient diversion route available within the proposed development. Closure was therefore recommended.
28. Story Homes argues these are entirely reasonable, rational, valid, lawful and justifiable reasons as to why a stopping up order is necessary and a diversion is simply not feasible.
29. Whilst I fully accept that practical constraints arising from the phasing of the site development mean that the proposed alternative cannot be made available to the public before building needs to begin over the existing right of way (A-B), I can see no reason why a diversion order could not have been made and

- confirmed if used in conjunction with a traffic regulation order to temporarily divert the public from the (unfinished but legally existing) new route onto the various temporary routes that are outlined in the Footpath Management Plan.
30. I recognise that this would result in the new definitive line eventually being subsumed within the intended adopted highway but this process would have offered to local people a far greater degree of certainty that their much valued right of access to Slate Fell would be preserved, albeit on a different line and through a new housing estate.
31. Dr Abernethy drew attention to published guidance⁵ which states: "*The inspector is not obliged to confirm an order, even if it appears necessary to enable the development to take place. There is discretion⁶. Non-confirmation of the order might be justified where the way proposed to be stopped up could be diverted instead, or the proposed diversion would not be the most suitable and the order could not be modified.*"
32. In my view, a stopping-up order was not the only means of resolving the issue here. A diversion order *could* have been made and would have been more appropriate. Instead the planning authority has needed to make great efforts to secure public access for the future through the use of planning conditions.
33. Yet there remains a degree of uncertainty, simply because the intended substitute highway cannot be guaranteed in the same way as could have been achieved with an order to divert the path. That is not to question the honest intentions of the developers who are clearly committed to pursuing their plans in accordance with those conditions⁷. Neither is it a criticism of ABC who, through its representative Mr Sharp, made a clear commitment to ensuring that the planning authority would play its part in enforcing the scheme which is designed to ensure public access to Slate Fell continues through the site at all material times. It is quite simply that the permanent closure of a definitive public right of way will need to be confirmed long before any new route carrying equivalent rights of way will (barring the unforeseen) be fully secured.
34. I fully accept the submission of Counsel for the applicant that there is no legal or policy requirement that any alternative highway should be provided as part of the process offered by Section 257 of the 1990 Act, or that it should be provided in advance of any extinguishment. But in this case the issue concerns a locally important public right of way that would be truncated, were an alternative not made available.
35. In conclusion, it is clear that the footpath between A and B cannot continue to exist on its definitive alignment if the development is to proceed and therefore it is necessary that it be closed. In my view diversion would have been an option, and a more secure one from the public's perspective, but that is not the proposal before me. There remains a risk that the intended substitute highway may never materialise although the conditions attached to the planning permission by ABC would ensure that access through the site would still be available to the public although the legal status of that route is uncertain. It is an unsatisfactory situation but to reject this stopping up order on the basis that

⁵ Advice Note No.9 "General Guidance on Public Rights of Way Matters" issued by the Planning Inspectorate (updated 3 June 2019) at paragraph 44

⁶ K C Holdings Ltd v Secretary of State for Wales (DC) [1990] JPL 353

⁷ I note the reassurance of Story Homes' representative, Mr Hayward, in his proof of evidence at paragraph 5.4(i):" ... **the permanent route is intended to be dedicated and adopted once completed.**"

a diversion order should be made instead would ignore the equally valid public interest in seeing a significant number of new homes built as soon as possible. On balance, the risk that the public would lose access between points A and B is small and cannot justify rejection of this order simply because it proposes stopping up rather than diversion.

36. In the circumstances I accept that it is necessary to stop-up Footpath 223003 between A and B as proposed to enable the approved development to proceed.

Other merits or disadvantages of the alternative route that will be made available for public use

37. This stopping up order does not make any reference to the alternative highway that is intended (eventually) to provide a substitute means of crossing from one side of the estate to the other (from A to B). Clearly this alternative does not exist at present although it is shown in the plans approved in the 2019 variation. A comparison between the two routes must factor in the risk that the alternative *might* never become a public right of way although for the reasons I have noted above, I acknowledge the clear intention of the relevant parties that it should.
38. I am aware that 280 objections were received to the initial proposal to close this section of footpath. It is undoubtedly a popular path with local residents, not least because it offers a relatively easy walk to the fell top with no steep or rocky climbs, and with the benefit of fine views of the Lake District mountains. Objectors make the point that it is important for the physical and mental health of the community; no doubt that is particularly true during the current Covid-19 related restrictions.
39. Both ABC and Story Homes are quick to highlight the benefits of the proposed alternative, not least that it will continue to provide an important link in the route up to Slate Fell but in addition would offer a more accessible surface for many people, especially in poor weather conditions when the present grassy path can get wet and boggy.
40. Whilst Story Homes accepts that the experience of walkers would be quite different to the previous open field, they highlight the sensitive design of the route through the development. The Company argues that a green corridor *will* exist with wide grass verges beside the carriageway and an avenue of trees linking two major public open spaces within the development.
41. In considering these points I am aware that Government Circular 1/09 v2 advises (at paragraph 7.8): "*In considering potential revisions to an existing right of way that are necessary to accommodate the planned development, but which are acceptable to the public, any alternative alignment should avoid the use of estate roads for the purpose wherever possible and preference should be given to the use of made up estate paths through landscaped or open space areas away from vehicular traffic.*"
42. In strict terms that advice has not been followed. However it is clear that the design of the development has sought to relate the most convenient line of passage between A and B to two 'green' open areas (one being around the

much valued old Oak tree) whilst improving the path's ambience by separating it from the vehicular carriageway with a grass verge and street trees.

43. Other aspects of the existing definitive line and the intended alternative compare favourably: as regards convenience there is little difference in overall distance between points A and B and the gradient is likely to be more level than the present slope. No new limitations in the form of gates or stiles would be added and no issues have been raised in relation to either the width of the Order route or its accessibility taking account of the requirements of the Equality Act 2010.
44. However Cllr Malloy raises valid concerns over the potential impact of vehicular traffic movements within the new estates, given that the alternative route would involve crossing up to four roads. He argues that these roads will provide access for around 100 houses and therefore traffic will present a significant danger to path users, one which they do not encounter at all at present.
45. In response, Story Homes confirmed that the issue of pedestrian safety had been discussed with its traffic consultants, ABC and the highway authority during the planning process and all were satisfied that the approved layout would be satisfactory. Indeed Mr Haywood drew attention to the many estate roads that must be crossed on the approach to Bellbrigg Lonning in order to reach point A.
46. The safety of the public is a serious consideration. Every road crossing carries a risk, both for vehicle drivers and for pedestrians. The question is whether adequate measures are in place to limit that risk. The likely number of traffic movements, the speed at which they will be travelling, and the layout of the crossing points to ensure adequate sight lines are all factors to be taken into account. Clearly the resulting risk will be greater than walking across a field but any comparison between present and proposed risks must acknowledge that planning permission for development now exists. On that basis I am satisfied that any potential danger at these crossing points has been minimised to an acceptable level.
47. At the inquiry both Cllr Malloy and Dr Abernethy commented on the historical importance of this footpath to the people of Cockermouth. I do not dismiss this argument without careful thought. Local traditions are to be valued and it is clear that many people benefit in many ways from walks to and from Slate Fell. However they would not be prevented from doing so, either during the development or once the permanent alternative is in place. The present right of way A-B crosses a field; it does not, for example, follow an ancient sunken way or other physical feature of vernacular significance that would be lost as a result of the development if allowed to proceed. It is for this reason that I conclude that the significance of this path to the people of Cockermouth would not be lost although its character over this section would be transformed.
48. Undoubtedly the change from open grass field to residential estate footway will have an effect on the public's enjoyment of Footpath 223003 but the design of the intended route should lessen the impact once the new planting matures.

Final conclusions

49. In the final process of weighing the relative benefits of the development against any disadvantages likely to result from the Order, I have noted that planning permission for this site will enable 224 new homes to be built. I have also concluded that a number of this would be constructed over the definitive line of Footpath 223003 and therefore that section needs to be closed if the development is to proceed.
50. I have considered the effects on those who use this footpath, comparing the convenience and enjoyment of the present route and the intended alternative. Although there would be a significant change in character, I have concluded that there may be some benefits but that any disadvantages would not be of sufficient weight to prevent confirmation of the Order.
51. Whilst I have found merit in the arguments advanced by some of the objectors that diversion of the definitive route A-B should have been pursued, rather than stopping up, in the particular circumstances of this case and given the planning conditions which seek to ensure a degree of protection for continued public access, I consider that, on balance, it would not be in the public interest overall to reject this Order in favour of a different process.
52. I therefore conclude that the Order should be confirmed but modified in two respects: firstly, so that it also refers to the most recently approved planning permission (VAR/2019/0025)⁸, this being the one that will be implemented, and secondly, to correct the scale stated on the Order map⁹.

Conclusion

53. Having regard to the above and all other matters raised at the inquiry and in the written representations, I conclude the Order should be confirmed subject to the two minor modifications described in the preceding paragraph, neither of which require further advertisement.

Formal Decision

54. I confirm the Order subject to the following modifications:
- In line 5, delete "2/2018/0155" and substitute "VAR/2019/0025"; and
 - On the Order map, change the scale to 1:1600.

Sue Arnott

Inspector

⁸ Paragraph 16 above refers

⁹ See paragraph 5 above

APPEARANCES

In support of the Order

FOR THE ORDER-MAKING AUTHORITY

Mr Leader Of Counsel, instructed by Mr S Sharp of Allerdale
Borough Council (ABC)

Who called

Mr S Sharp Planning and Building Control Manager, ABC

FOR THE APPLICANT

Ms R Stockley Of Counsel, instructed by Mr M Iveson of Gateley Legal
(Solicitors) representing Story Homes Ltd

Who called

Mr D Hayward Senior Development Planner, Story Homes Ltd

Objecting to the Order

Dr J Abernethy Statutory Objector

Cllr D Malloy Statutory Objector; also representing Cockermouth Town
Council (Statutory Objector)

Mr P J Gentry (Statutory Objector)

DOCUMENTS

1. Copies of statutory notices and certification
2. Copy of the statutory objections
3. SCC Statement of grounds on which it is considered the Order should be confirmed and comments on the (statutory) objections
4. Statement of case (final) submitted by Allerdale Borough Council with appendices 1-11
5. Proof of evidence of Mr S Sharp on behalf of ABC
6. Statement of Case on behalf of Story Homes Ltd with appendices 1-18
7. Proof of evidence of Mr D Hayward on behalf of Story Homes Ltd with appendices 1-12
8. Statement of case of Dr J I Abernethy (final draft)
9. Proof of evidence of Dr J I Abernethy
10. Statement of Cllr D Malloy(undated)
11. Email recorded on 5 November 2020 from Chris Holt-Davis
12. Email recorded on 5 November 2020 from Caroline Turner
13. Email recorded on 17 November 2020 from Hannah Kozich