



Interim Order Decision

Inquiry held on 14 January 2025

by J Ingram LLB (Hons) MIPROW

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

Decision date: 29 January 2025

Order Ref: ROW/3332917

- This Order is made under Section 119 of the Highways Act 1980 (the 1980 Act). It is known as The Nottinghamshire County Council (Southwell Footpath No.69) Diversion Order 2020.
- The Order is dated 6 January 2020 and proposes to divert part of footpath no.69. Full details are shown on the Order plan and described in the Order Schedule.
- There were twelve objections outstanding when Nottinghamshire County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

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

Preliminary Matters

1. I held a public inquiry into the Order at Trebeck Hall in Southwell on 14 January 2025, having inspected the route in question the previous afternoon, unaccompanied. During the inquiry there was some confusion on the exact location of the proposed route, as there was more than one visible walked route on the ground. Therefore, I adjourned the inquiry to visit the site again. On this occasion I was accompanied by supporters of and objectors to the Order, together with a representative of the Order Making Authority (OMA), Nottinghamshire County Council. The OMA are supporting the Order.
2. I have amended the Order plan by adding letters to each end of the existing and proposed routes, to enable ease of referencing. In this decision I will refer to these points on the routes as shown on the Order plan. I have appended a copy of the plan to the end of my decision.
3. After the Order was made, it came to light that the proposed route has no recorded width in the Order. The OMA have requested that the Order be modified to include a recorded width of 2 metres throughout. This is referred to at paragraph 43 below.

Main Issues

4. Section 119(6) of the Highways Act 1980 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.

5. 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.
6. The government guidance on “diversion or extinguishment of public rights of way that pass through private dwellings, their curtilages and gardens, farmyards and industrial or commercial premises” was issued by Defra in August 2023. It is also known as the ‘presumptions guidance’. Although this was issued after the making of the Order it now falls for consideration. It states that I should weigh the interests of the owner against the overall impact of the proposal on the public as a whole. Reducing or eliminating the impact of the current route of the right of way on the owner, in terms of privacy, security and safety are important considerations to which due weight should be given.

Reasons

Background

7. In making this decision the only routes I am concerned with are the existing definitive route, indicated between points A and B on the Order plan, and the proposed route indicated between points A-C-D. Any other routes that have been used by the public as a desire line are not relevant to my decision.
8. Originally the whole area including the garden and the field was open. As there was no defined boundary the landowner stated that animals and people would often stray from the footpath into the garden. The landowner has now defined their garden boundary, and in consultation with the OMA, has erected low fencing. This has been confirmed as permitted development by the district council. The OMA, the landowner and the objectors were of the opinion that the existing footpath ran just to the south of the fencing and was therefore entirely within the field rather than the garden area.
9. In addition, the objectors refer to a planning enforcement case where the extent of the residential curtilage was considered. In their submissions is an aerial photograph from this case, the photograph has a roughly drawn blue line to indicate what they likely considered to be the residential curtilage. The existing footpath falls outside of this blue lined area. Therefore, they considered that the presumptions

guidance, referred to in paragraph 6 above, was not relevant as the existing route did not pass through a private garden or curtilage.

10. Footpath no.69 has previously been diverted in 1956. The original alignment followed a direct diagonal line over the land, from the bridge over the river near to point B, to a point where Shady Lane (footpath no.70) and Burgage Lane meet. It was diverted to the current alignment which exits onto Shady Lane just to the north west of point A.
11. Having considered the definitive map, the diversion order from 1956, the aerial photograph with the definitive route overlaid, and from my own observations on the site visit, I consider that the definitive route does cut across the now fenced area. Therefore, the existing alignment starts in the field at point A for a short distance, it then crosses the fence into the garden area, it cuts across this area and then once again crosses the fence line back into the field. The remainder of the route goes across the field to point B. Although this means that I consider the existing route is currently partly obstructed, in this decision I have treated the existing route as if it is available for public use.

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

12. The diversion Order has been made pursuant to an application by the owner of the land over which the existing and proposed routes pass. The basis of the application is for privacy reasons, the landowner has also expressed concern for the safety and security of their family. They feel that by increasing the distance of the footpath from the property and garden this would help to alleviate their concerns. Currently the footpath is between 20-35 metres from the property, the proposal would increase this distance by approximately 15 metres.
13. At the inquiry the landowner explained that since making the application to divert the footpath, they have been the victims of a burglary where personal items were stolen. The police did indicate that access had been gained from footpath no.69.
14. The proposed diverted route would begin at point A and follow a south-south easterly direction to point C where it then turns in an easterly direction to point D, where it joins footpath no.68. The diverted route is entirely within the field and to the south of the existing route.
15. The objectors state it is not expedient to divert the footpath in the interest of the landowner, they claim there is no compelling reason to divert the footpath. They state that just by diverting the footpath, without any additional boundary treatment, the public could continue to use a route closer to the garden boundary fence. They claim the diversion offers no additional security for the landowner and it would be more expedient for additional fencing or a hedge boundary to be installed. This would increase privacy and security without the need to divert the footpath. Another objector claimed that the garden boundary fence now provides substantial screening and prevents people from straying off the footpath.
16. In addition, the objectors state the closest point to the house, point A, is not affected by the diversion, users of the footpath would still have a view of the garden and property from this point. Therefore, they believe diverting the footpath would have little impact on the landowners' privacy.

17. From my site visit when walking the existing route, or a route as close as possible to the existing route, I noted that it does pass through a private garden area. There are parts of the footpath that are screened from the garden with trees, but there is a section that passes through the garden and users of the footpath would have a full view of the garden and property from here. The landowners state that diverting the footpath would offer a greater degree of privacy for them. Users of the footpath would no longer be walking through or immediately adjacent to this area which is clearly used as a private outdoor space. At the inquiry the landowner stated that they believed the existing route does go through, what they consider to be, their garden. Under cross examination one objector conceded that by diverting the footpath there is some benefit to the landowner.
18. As I consider the existing route does pass through a private garden, then the presumptions guidance, referred to in paragraph 6 above, is relevant and I consider the guidance when weighing up all of the evidence in my conclusions below.
19. I consider that the diversion would enable the landowner to privately enjoy their garden and outdoor space. Although users of the footpath may still be able to see the property and parts of the garden from the proposed diversion and remaining section of the footpath, it would be less intrusive for the landowner. Although boundary treatments could be considered along the length of the existing alignment, by diverting the footpath away from the garden and further into the field, it would help the landowner to improve their privacy and make full use of the garden. I accept that it is expedient in the interests of the landowner for the footpath to be diverted.
20. The Order was also made in the interests of the public. The proposed diverted route is entirely within the area of land designated as a Main Open Area, referred to below in paragraph 27. I consider it is in the public interest to divert the route from the current alignment, which partly crosses an enclosed garden, to the area of open landscape. Therefore, I consider the diversion order is also in the interests of the public.

Whether any new termination points are substantially as convenient to the public

21. The eastern termination point would move from point B to point D; however, footpath no.68 runs between these points. Any user of the footpath who wished to continue walking along footpath no.69 would have to walk approximately 17 metres along footpath no.68 between points B and D.
22. There have been many comments on the surface conditions of footpath no.68. As it runs over lower ground and is close to the river the surface does get wet and muddy. On my site visit I noted the section between points B and D was slightly muddy, but it was not unreasonable for the time of year, other sections of footpath no.68 were in a worse condition. The OMA have acknowledged that this area does get muddy and have stated that works are proposed to address this irrespective of whether the diversion order is confirmed. In the context of footpath no.69, I do not consider an additional 17 metres to be a significant distance. Overall, I consider the new termination point would be substantially as convenient to the public.

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

23. The proposed route of footpath no.69 is similar in length to the existing alignment. As stated above, there would be an additional 17 metres to walk along footpath

no.68 to connect the two sections of footpath no.69. I do not consider this would affect the majority of users. I therefore do not consider the increase in length to be significant in the context of this path.

24. As stated above there have been claims that the surface conditions on the diverted route would impact users. In addition, one objector at the inquiry mentioned that the proposed route has a steeper gradient. I do not consider the surface of the proposed route to be detrimental to users of the public footpath. I consider the surface and gradient of the existing and proposed routes to be very similar. The poor surface conditions referred to above are not on the line of the proposed diversion, they are on the adjacent footpath no.68, however, I do not find the section D-B to be unreasonable.
25. On balance, having regard to all of these factors, I conclude that the Order route would not be substantially less convenient to the public.

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

26. The objectors state that the proposed diversion would negatively impact on the public's enjoyment of the route.
27. The field in question forms part of an area of land designated as a Main Open Area (MOA) in the local development plan. At the inquiry the objector explained that a designation of MOA is given as they seek to ensure open areas are protected from built development. They consider this particular area of open land is important as it provides a rural landscape in the centre of the town. MOA's are not always open to the public but most can be viewed from public land or have public footpaths that run through them. The MOA's were reviewed between 2011-2013 and this area was reduced in size by removing the garden land. This means that a section of the existing route between points A and B, referred to in paragraph 11 above where it cuts through the garden, is no longer within the MOA. The proposed route falls entirely within the MOA.
28. The objectors have also highlighted that the area is recognised in the Southwell Conservation Area Character Appraisal. Although it has been emphasised that the conservation area is very precious in terms of its characteristics, at the inquiry the objectors agreed that the diversion on its own would not impact on this designation.
29. The objectors state that as the current footpath crosses the field diagonally this gives views across the MOA. The objectors commented that the introduction of fencing and hedgerows gave the impression of a closed space, and this affects the landscape character of the MOA. They contend that the diversion would offer reduced views of the open landscape and therefore this would impact on the public enjoyment of the route.
30. However, after the accompanied site visit, the objector conceded that the field boundary to the south of the proposed route was not in as close proximity to the proposed diversion as they originally believed. In addition, the objector agreed that diverting the footpath from the edge to the centre of the MOA, when looking from point A in a southerly direction, would have a positive impact on enjoyment.
31. Also in opposition to the Order the inquiry heard from two local residents, one commented that the diversion would be inappropriate given its impact on the MOA, however, they agreed it was not helpful for the existing path to go through the

garden. They would support an alternative alignment along the garden fence line. The other resident believed that the overgrowth of hedges and brambles would be detriment to the openness of the land.

32. The OMA and landowner in support of the Order argue that the proposed diversion travels through the same area of grassland and there would be no significant departure from the existing route. In addition, the rural views would not be altered and therefore the diversion would be as enjoyable to walk as the rest of the path.
33. I appreciate the objectors concerns regarding the addition of fencing and hedgerows on the MOA and the effect this has had, or could have, on the enjoyment of the route for some users. However, this has been confirmed as permitted development. I consider that by diverting the footpath away from the garden fence line this would have a positive impact on the enjoyment of the route. The diverted route is entirely within the MOA and does have a more open feel. I consider the views of the landscape to be similar. On the site visit it was also noted that the view of the Southwell Minster was improved from the proposed route, although I appreciate with the surrounding trees this view would not be available in all seasons from either the proposed or existing route.
34. Furthermore, I recognise that some users of the current footpath may not be comfortable walking directly through or immediately adjacent to a garden, they may feel like they are intruding in a private space. Some users, therefore, may find the proposed route more enjoyable.
35. On balance, I find that any negative impact on the public enjoyment of the path as a whole would be limited, and some users may find the proposed route more enjoyable.

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

36. There is no evidence that the diversion would have any negative impact on the land affected by either the new route or the existing route. The applicant is the landowner for the new and existing route.

Rights of Way Improvement Plan (ROWIP)

37. The OMA's ROWIP states that a minimum width of 2 metres is required for footpaths when considering new routes. The OMA have therefore requested the Order be modified to include a 2-metre width for the proposed route. The objectors have not made any comments in relation to the proposed width. Nothing further has been raised by the parties in relation to the ROWIP.

Conclusions on whether it is expedient to confirm the Order

38. In reaching my conclusions I have considered the requirements of the Equality Act 2010 (the 2010 Act) and considered the effect of the Order on all sections of the community. I am satisfied that the requirements of the 2010 Act have been discharged.
39. I have concluded that it is expedient in the interests of the landowner to divert the path. The Defra guidance referred to at paragraph 6 above guides that I should weigh the interests of the owner against the overall impact on the public. The privacy and security issues, referred to at paragraphs 12 and 13 above, are

important considerations. Diverting the route would reduce the impact on the landowner. I consider the overall impact on the public would be minimal as the proposed route is not a significant distance from the existing route.

40. I have considered the new termination point and concluded that it would be substantially as convenient to the public. Overall, on balance, I consider the diversion itself would not be substantially less convenient to the public. I consider that for the majority of people the effect on their enjoyment of the route as a whole would be minimal. The proposed route may enhance the enjoyment for some users.
41. Having weighed up the competing interests, I am satisfied that it is expedient to confirm the Order.

Overall Conclusion

42. Having regard to the above, and all other matters raised at the Public Inquiry and in the written representations, I conclude that the Order should not be confirmed as made. However, I propose to confirm it with modifications to clarify it is the full width of the section A-B that is proposed to be stopped up, and add the width of the proposed footpath, as set out below.

Formal Decision

43. I propose to confirm the Order subject to the following modifications:
- In Part 1 of the schedule at the start of the paragraph insert 'The full width of the affected length of footpath no.69'.
 - In Part 2 of the schedule at the start of the paragraph insert 'A footpath'.
 - In Part 2 of the schedule after the paragraph insert 'The footpath will have a width of 2 metres throughout'.
 - On the Order plan insert letters A, B, C and D.
44. Since the confirmed Order would affect land not affected by the Order as submitted, I am required by virtue of Paragraph 2(3) of Schedule 6 to the 1980 Act to give notice of the proposal to modify the Order and to give an opportunity for objections and representations to be made to the proposed modifications. A letter will be sent to interested persons about the advertisement procedure.

J Ingram

INSPECTOR

APPEARANCES

In support of the Order

Ms Williams Counsel, representing Nottinghamshire County Council

Who called

Ms H Swift Commons, Greens and Definitive Map Officer –
Nottinghamshire County Council

Mr R Carr representing the applicant/landowner Mr K Heath

Who called

Mr K Heath Applicant/landowner

Opposing the Order

Mr J Kent representing Newark and Sherwood District Council

Who called

Ms E Raine Planning Policy Officer - Newark and Sherwood District Council

Mr M Norton Business Manager Planning, Policy and Infrastructure - Newark
and Sherwood District Council

Mr M Brock Southwell Town Council

Mr P Harris

Dr G Adams

DOCUMENTS

1. Copies of statutory notices and certification
2. Copy of the statutory objections and representations
3. Statement of grounds on which it is considered the Order should be confirmed and comments on the objections submitted by the Order Making Authority
4. Statement of case of the Order Making Authority including 6 Appendices
5. Statement of case of Mr Carr on behalf of Mr K Heath including 5 Appendices
6. Statement of case of Newark and Sherwood District Council including 3 Appendices
7. Statement from Southwell Town Council
8. Proof of Evidence of the Order Making Authority
9. Proof of Evidence of Mr K Heath
10. Minutes from Southwell Town Council Planning Committee
11. Proof of Evidence of Ms E Raine of Newark and Sherwood District Council
12. Proof of Evidence of Mr M Norton of Newark and Sherwood District Council
13. Letter of objection and additional email from Mr J Mitchell
14. Statement from Mrs J Craig

Submitted at the Inquiry

15. Opening remarks of the Order Making Authority
16. Opening remarks of Mr Carr on behalf of the applicant/landowner Mr K Heath
17. Opening remarks of Newark and Sherwood District Council
18. An aerial photograph submitted by Newark and Sherwood District Council showing the definitive route, the proposed route, an additional route that is used on the ground, and the area they consider to be the residential curtilage of the property.
19. A plan showing the definitive route and the proposed route with letter annotations and a key showing measurements between the points. The route of FP 68 has been revised and is shown slightly differently than on the Order plan.
20. Closing submission of Newark and Sherwood District Council
21. Closing submission of Mr Carr on behalf of the applicant/landowner Mr K Heath
22. Closing submission of the Order Making Authority

