



Order Decision

Inquiry opened on 2 November 2021

Site visit made on 3 November 2021

by C Beeby BA (Hons) MIPROW

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

Decision date: 13 January 2022

Order Ref: ROW/3249302

- This Order is made under Section 257 of the Town and Country Planning Act 1990 and is known as the Gloucestershire County Council Public Footpath CHL 9 Parish of Leckhampton Stopping Up Order 2019.
- The Order is dated 4 December 2019 and proposes to extinguish the public right of way shown on the Order plan and described in the Order Schedule.
- There were 117 objections and 4 representations in support outstanding at the commencement of the inquiry.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I carried out an unaccompanied site visit prior to the public inquiry and a further visit during the afternoon of its final day, when I was accompanied by parties supporting and opposing the Order.
2. I held the inquiry as a "blended event", which is to say that some people attended online by the use of screen technology at the physical event.
3. At the inquiry I accepted documents submitted by the applicant and objectors, with the exception of a photograph of a school site elsewhere (offered by the latter). I declined to accept that document as, having reviewed it, I considered that it would be unlikely to have a bearing on my determination of the Order.
4. I saw at my site inspection that construction of the development was underway. However, significant work evidently remained outstanding in order to complete the scheme. As a result, I am satisfied that the development is not substantially complete.
5. 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.

The Main Issues

6. Section 257(1) of the Town and Country Planning Act 1990 (the 1990 Act) provides for an Order to be made to authorise the stopping up (or diversion) of a footpath if it is necessary to do so in order to enable development to be carried out in accordance with planning permission already granted under Part III of the same Act. In this case the Order seeks the stopping up of Footpath CHL 9 in the parish of Leckhampton.
7. The statutory test outlined above firstly involves consideration of the "need" for the Order. If "necessary", the "merits" of the Order will fall to be considered as

set out in guidance contained in the Department for Environment, Food and Rural Affairs Circular 1/09. I shall also have regard to other guidance submitted by the parties.

Reasons

Background

8. The footpath in question (A-B) forms Public Footpath CHL 9, which connects Farm Lane and Public Footpath CHL 10 in the parish of Leckhampton.
9. Planning Permission (Local Planning Authority (LPA) reference 19/0058/CHR3MJ) was granted on 21 July 2020 (the 2020 planning permission) for the construction of a new secondary school building with a new all-weather pitch, sports playing fields, a multi-use games area, onsite parking and other associated works at land between Farm Lane and Kidnappers Lane, Cheltenham. The western section of footpath CHL 9 passes through the development site.
10. A subsequent Section 73 variation application concerning photovoltaic cells and an amendment to the external compound was granted permission on 19 March 2021. This became the new planning permission (LPA Ref 20/0032/CHR3MJ) (the 2021 planning permission).

Whether the stopping up of Public Footpath CHL 9 is necessary to allow development to be carried out in accordance with planning permission

11. For the purposes of this decision there is no dispute that the 2021 planning permission is the relevant permission, which has been implemented. It directly relates to the land crossed by Public Footpath CHL 9.
12. The need for an order under section 257 of the 1990 Act may be satisfied by the existence of either a legal or physical obstacle to the development proceeding. In this case it is argued that both matters give rise to the need for the Order.
13. The 2020 planning permission has an associated planning obligation under Section 106 of the 1990 Act dated 17 July 2020. In that obligation the site owner covenants with the Council that they will comply with the requirements of its approved integral Landscape and Ecological Management Plan (LEMP) and will not amend the LEMP without the Council's agreement in writing. The obligation binds any new planning permissions granted pursuant to Section 73 of the 1990 Act and the site itself without the need to enter into any subsequent deed of variation or new agreement. The obligation consequently relates to the 2021 planning permission.
14. The LEMP includes a superseded version (P19-0501_03) of the Landscape Masterplan. It depicts a proposed hedgerow and trees partially within the footpath's alignment. These features are largely unchanged on the current version of that plan (P19-0501_02 Revision D). At the inquiry the Council confirmed that it considers the footpath's alignment to be correctly depicted on the current version of the Landscape Masterplan.
15. Ecological mitigation measures including new planting within the development and the retention of existing planting around its perimeter are necessary as a European Protected Species (EPS) is considered to be affected by the

- development. The LEMP indicates that the hedgerow crossed by the footpath is intended to form an ecological corridor for dormice, which are an EPS.
16. It is submitted that, whilst the location of the hedgerow shown to affect the route of the footpath could be amended, this would require a further grant of planning permission due to the operation of Condition 2 to the 2021 planning permission. The condition sets out the documents and plans with which the development shall accord. It is argued that it is consequently necessary for the hedgerow to be within the footpath's alignment in order for the development to be carried out in accordance with the 2021 planning permission.
 17. Nevertheless, Condition 2 cannot require that all features shown on the plans are provided or retained, or that the development and all of its component parts must be completed. The condition can only ensure that the development accords with the plans if and insofar as it is carried out.
 18. If it were essential that a specific feature shown on the plans was provided, an additional condition would have been required to ensure that the feature is delivered and, if necessary, retained. Indeed, Condition 26 to the 2021 planning permission requires the tree, shrub and hedgerow planting scheme shown on approved plans on other County Council-owned land to be implemented as approved. However, there is no equivalent requirement to implement the hedgerow shown on the plans to lie within the development. Furthermore, it has not been satisfactorily demonstrated how a minor amendment to the hedgerow's location would trigger the need for a new application either in relation to any existing condition or for planning permission on the basis that it would constitute a different scheme of development.
 19. Moreover, the Section 106 agreement provides for alterations to the LEMP where authorised in writing by the Council. It therefore indicates that the hedgerow's location could be amended without the need for a further planning application.
 20. Any EPS licence granted in respect of the development is separate from the 2021 planning permission, which is the document to which I must refer in considering the need or otherwise for the Order. Therefore any incompatibility between the footpath's presence within the site and such a licence would not demonstrate a need to stop up the footpath.
 21. Turning to potential physical obstacles to the presence of the footpath within the development, it is argued that the use of the grass access track (which will lie partly along the footpath's route) by maintenance and emergency vehicles within the development is incompatible with the footpath's use as a public right of way, due to the suggested need to fence the path.
 22. Nevertheless, the Landscape Masterplan shows the alignment of the footpath and access track to be similar for part of their route, and that they would join a tarmac footway along Farm Lane at the same point. The evidence does not demonstrate why any fencing of the footpath would be considered incompatible with the occasional vehicular use of the track which is envisaged. Furthermore, there is no substantive evidence before me which would demonstrate that the track's reinforced grass surface would not be capable of accommodating the footpath.

23. It was stated at the site visit that the location of the sub station shown on the Landscape Masterplan to lie partially within the footpath's alignment has now altered so that it is not considered to affect the footpath.
24. Thus, in light of the above findings, there is no legal or physical obstacle to the development proceeding which demonstrates the need for the Order.

Other Matters

25. I am sympathetic to submissions regarding the challenges raised by the presence of the footpath within the school development, primarily with regard to safeguarding. Reliance is placed on documents submitted in support (Secured by Design New Schools Guidance (2014), The Independent School Standards (2019) and Keeping Children Safe in Education (2021) where these concern school security.
26. However, this matter relates to the management of the site rather than the legal tests which I am required to consider. Provisions within the Highways Act 1980 are available should concerns regarding the effect of the footpath's presence within the school site remain once the development is operational.
27. It is suggested that biodiversity enhancement elements of the 2021 planning permission are necessary in order to comply with the Environment Bill (now the Environment Act 2021 – the 2021 Act) in respect of biodiversity gain. However, the provisions of the 2021 Act relating to mandatory biodiversity gain are not yet in force, and even if this were the case it has not been suggested that these would form part of the planning permission under consideration. The lack of depiction of the footpath in some of the plans for the development is also referred to in support. Nevertheless, neither matter provides evidence of a legal or physical obstacle to the development proceeding.

Conclusions

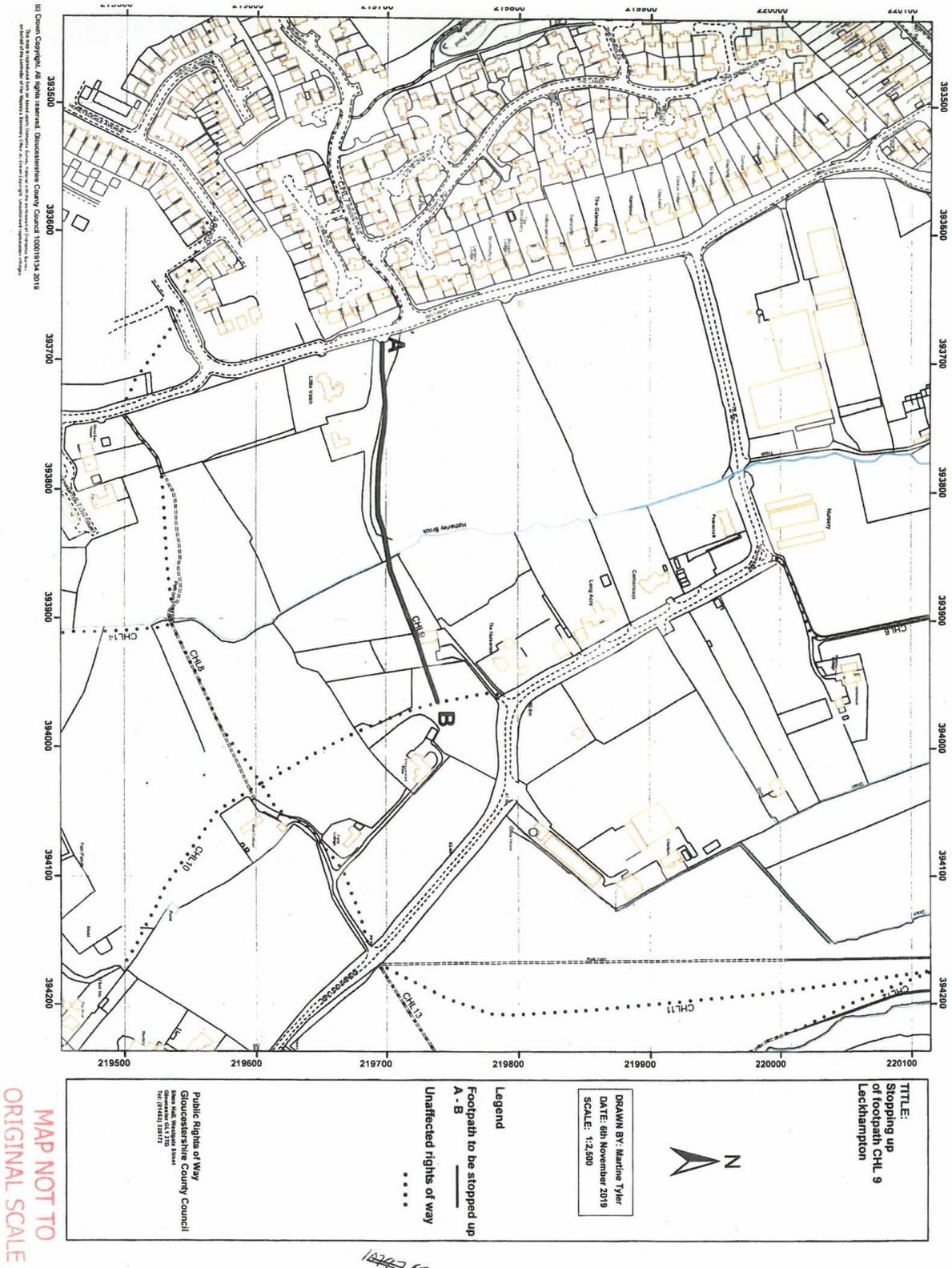
28. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should not be confirmed because it is not necessary to stop up Public Footpath CHL 9 in order to enable development to be carried out in accordance with planning permission.

Formal Decision

29. I do not confirm the Order.

C Beeby

INSPECTOR



MAP NOT TO ORIGINAL SCALE

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