



Order Decisions

Inquiry opened on 13 September 2011

by Peter Millman BA

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

Decision date: 14 November 2011

Order Ref: FPS/A2280/3/2 – referred to as ‘the Extinguishment Order’

- This Order is made under Section 118 of the Highways Act 1980 and is known as the Medway Council (RS124 (Part)) Public Path Extinguishment Order 2010.
- Medway Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
- The Order is dated 23 April 2010 and there are seventeen statutory objections outstanding.
- The Order proposes to extinguish parts of a public footpath as shown on the Order map and described in the schedule.

Summary of Decision: I have confirmed the Order.

Order Ref: FPS/A2280/3/3 – referred to as ‘the Special Extinguishment Order’

- This Order is made under Section 118B of the Highways Act 1980 and is known as the Medway Council (RS124 (Part)) Public Path Special Extinguishment Order 2010.
- Medway Council submitted the Order for confirmation to the Secretary of State for Environment, Food and Rural Affairs.
- The Order is dated 23 April 2010 and there are seventeen statutory objections outstanding.
- The Order proposes to extinguish a public footpath passing through school grounds as shown on the Order map and described in the schedule.

Summary of Decision: I have confirmed the Order.

Preliminary matters

1. The part of Footpath RS124 with which these Orders are concerned runs from Cooling Road to Hilltop Road in Frindsbury. It is shown on both Order maps. Only the central section of this part of the path runs through land occupied by Hilltop School and could therefore be the subject of a special extinguishment order made under section 118B of the Highways Act 1980 (“the 1980 Act”). Medway Council (“the Council”) made an additional order under s118 of the 1980 Act to deal with the remainder of the footpath.

2. If I were to confirm only the Special Extinguishment Order, there would remain two cul-de-sac footpaths (A-C and B-F on the Order plans). Neither serves any properties apart from the School. No objector or other party argued that if the Special Extinguishment Order were to be confirmed the Extinguishment Order should not be. I have considered the evidence and the criteria which must be satisfied before an Order under Section 118 of the 1980 Act can be confirmed, and I am satisfied that if the Special Extinguishment Order were to be confirmed, the criteria for confirmation of the Extinguishment Order would be met.

The Special Extinguishment Order, main issues

3. The Council made the Order under section 118B(4) of the 1980 Act on the grounds that it was expedient that the part of Footpath RS124 which passes through the grounds of Hilltop School should be extinguished, in order to protect the pupils and staff of that school from violence or the threat of violence, harassment, alarm or distress arising from unlawful activity, or any other risk to their health or safety arising from such activity.
4. If I am to confirm the Order, I must be satisfied first that the path in question crosses land occupied for the purposes of a school. I must then be satisfied that it is expedient to stop up the path for the reasons set out in paragraph 3 above. In addition I must have regard to 'all the circumstances'; in particular to
 - any other measures that have been or could be taken for improving or maintaining the security of the school,
 - whether it is likely that the coming into operation of the Order would result in a substantial improvement in that security,
 - the availability of a reasonably convenient alternative route, or, if no reasonably convenient alternative route is available, whether it would be reasonably practicable to divert the path under section 119B of the 1980 Act rather than stopping it up, and
 - the effect which the extinguishment of the footpath would have as respects land served by it.
5. I must also take account of the needs of those with disabilities, and any relevant provision of the Rights of Way Improvement Plan for the area.

The Special Extinguishment Order, background

6. Hilltop Primary School fronts onto Hilltop Road. Behind the School is its grass playing field, on part of which is the playground used by the junior school. The central section of Footpath RS124 runs between the School and the field. It is fenced on both sides – chestnut paling on the field side, and chain-link fencing, through and over which trees and bushes have grown, on the School side. Pupils and staff cross the footpath through gates in these fences, which are padlocked when not in use. The field, where not adjoined by the footpath, is surrounded by palisade fencing, apart from a short part which joins Hilltop Road, where there is a pair of wooden 5-barred field gates.
7. The School first attempted to have the footpath extinguished in 1997, but at that time Section 118B had not been inserted into the 1980 Act, and a footpath could not be stopped up for reasons of school security.

8. When Section 118B came into force in 2003 the School applied again for an Order to extinguish the footpath. For technical reasons, i.e. to do with the form in which they were drafted, two successive orders were made but withdrawn or rejected by the Planning Inspectorate, and a satisfactorily drafted order was not made until 2010. This resulted in a lengthy period during which the School expected a fairly quick resolution to the question of the footpath's existence, which, in the event, will have taken about 8 years to achieve.

The Special Extinguishment Order, reasons

Whether the path crosses land occupied for the purposes of a school

9. Some objectors argued that the School only occupied the very short section of the footpath where pupils and staff crossed it to get to the field and playground. It is clear, however, that the land over which the central section of Footpath RS124 runs was purchased, along with the rest of the site, in order to build the School, and that the land is currently owned by the Council, which is the local education authority. It is clear too that the footpath crosses this large parcel of land which is occupied for the purposes of a school. I conclude that this part of the test is met.

Whether there has been violence or the threat of violence or harassment to pupils or staff; whether pupils or staff have suffered alarm or distress arising from unlawful activity; or whether there has been any other risk to the health or safety of pupils or staff arising from unlawful activity

10. Five teachers at Hilltop Primary School, as well as the site manager and the retired caretaker, gave evidence to the inquiry. Most of the teachers had taught at the school for many years; the head teacher has been in post for twenty-five. These people all had first-hand experiences of a few threats of violence or of harassment, and of much unlawful activity in the school grounds and in particular in the playing field, over a long period. Typical examples are the smashing of glass on the playground, the shouting of obscenities, owners allowing their dogs to foul the field, and the burning of wooden benches. Much of this activity has taken place outside school hours, but these witnesses, in my view, gave convincing evidence of the alarm and distress it has caused to pupils and staff.
11. The head teacher gave his view that there had not been a steady level of unlawful activity over the past 15 years or so, but that it was cyclical. At the present time it was at a relatively low level, although still occurring.
12. Two of the four objectors who appeared at the inquiry live locally and are familiar with the footpath. Neither had observed incidents of unlawful activity. They believed that the School was being alarmist. Two of the objectors were particularly concerned that crime statistics available from Kent Police did not support the view that there was a problem at the School. In my view, however, Police recorded crime and 'incidents' may not necessarily reflect the level of 'unlawful activity', with which the legislation is concerned. The shouting of obscenities or the discovery of dog faeces on the playing field are not the sort of things normally reported to Police. It would not be realistic to expect them to deal with them. Other written objections argued that problems of crime, unlawful activity or anti-social behaviour were non-existent or had been exaggerated. I prefer the evidence of the staff of Hilltop School. They are on site before, during and after school hours, whereas others can only have passed

along the footpath for a brief period each day. Their evidence was compelling and was not weakened by cross-examination.

13. I conclude that there has been unlawful activity causing alarm and distress and that it is continuing. I deal with the question of whether it would be expedient to stop up the footpath in order to protect pupils and staff from such activity below.

Whether any other measures have been or could be taken for improving or maintaining the security of the school

14. The gist of the argument put forward by objectors at the inquiry was as follows. It is very easy to access the School's playing field via the 5-barred gates (paragraph 6 above), and relatively easy to access all the School grounds from the footpath. The School has done little or nothing since the application for the Special Extinguishment Order in 2003 to replace the 5-barred gates with palisade fencing or to fence both sides of the footpath so that it is more difficult to access the School grounds. It should have tried such measures to see if they reduced the incidence of unlawful activity such that it would be unnecessary to stop up the footpath. It could not be argued that it was expedient to stop up the footpath to prevent the problems until these other measures had been tried. The evidence of unlawful activity was unclear in that it did not show that the unlawful activity emanated from the footpath.

15. The gist of the Council's (and School's) argument was as follows. It was clear by 2003 that the only means for improving the security of the School to a satisfactory level would involve the stopping-up of the footpath. There has been a continual expectation since then that the question of stopping up would be resolved shortly. It would have been foolish to spend money on short-term measures such as secure fencing either side of the path, or the replacement of the 5 barred gate with palisade fencing, which might be redundant or have to be undone if the Order was confirmed. The School intended to fence securely the remainder of the field where it abuts Hilltop Road if the Orders are confirmed.

16. In any event, the School has concluded that the option of replacing the 5-barred gates with palisade fencing, and fencing the footpath securely, would not provide a satisfactory solution if the footpath was retained. To have a long (almost 200 metres), narrow footpath with insurmountable fencing either side and no 'break-out' points would be contrary to all sensible advice about safety on footpaths, and in particular contrary to local Police advice. It would have no effect on the shouting of obscenities, and would not prevent the throwing of missiles. However securely the footpath was fenced it would be impossible to maintain locked gates on either side of it when children were in the playground or on the field; they needed to be able to get to and from the school grounds quickly and easily, and members of staff needed to be able to get quickly from the school to them. Several children were potential sufferers from anaphylaxis, and their 'EpiPens' for administering adrenaline were kept in the School office.

17. The School has considered suggestions by objectors that there could be some sort of system of swipe cards or a key-pad so that only children or staff could open the gates across the footpath, but believes that they are unrealistic. It considers as unrealistic too, one objector's argument that 'the obvious solution to crossing the public footpath is a covered in, fenced aerial walkway 1.8 metres wide and 2 metres high with slopes ascending and descending with a gradient of no greater than 1:12...'

18. The School provided evidence of a number of security measures that it had put in place since 2003. These include, among others, CCTV, external security lighting, two-way radios for staff using the field and playground, the daily inspection by staff of the playground and field, the positioning of the Deputy Head's room near to the footpath crossing and the bricking up of the windows of classrooms facing the footpath.
19. I first of all conclude on the submissions made by objectors in paragraph 14 above. It is not necessary to demonstrate that alternative means – other than the closure of a path – of suppressing unlawful activity have been tried and failed before a special extinguishment order may be confirmed. They must, however, at least have been considered, and there must be good reason for their rejection. Neither is it necessary to show that the unlawful activity emanates directly from the footpath. The question is whether there is unlawful activity which has caused alarm or distress. If the answer is in the affirmative, then the test is whether it would be expedient to stop up the footpath in order to protect pupils and staff from such activity.
20. As for the particular measures suggested by objectors, I do not consider it realistic to expect infants not to lose swipe cards or to be able to operate a key-pad with no difficulty. The cost of a raised covered walkway to the appropriate standard has not been calculated, but would be, in my view, very substantial. In any event it would involve long ramps either side of the footpath which would substantially increase the time taken to get to and from the field. I do not consider it to be a realistic proposal.
21. I noted at paragraph 8 above the long delay between the application for the Special Extinguishment Order and its determination. In my view the School has provided convincing evidence why it considered, but did not implement, some possible additional security measures, such as erecting fully secure fences along each side of the footpath. Security could probably have been improved by the replacement of the 5-barred gates with palisade fencing, but the reasons given for having delayed the decision to do so pending the determination of these Orders lead me to conclude that this does not provide support for the view that they should not be confirmed.
22. I conclude that the School could not provide adequate protection for staff and pupils from the results of unlawful activity solely by implementing the measures discussed above.

Whether it is likely that the coming into operation of the Orders would result in a substantial improvement in the school's security

23. It is not in dispute that if the Orders were confirmed the footpath would be fenced off at both ends and the gate between the playing field and Hilltop Road would be replaced by a secure fence. Where the path would not be incorporated into the School grounds, written agreements have already been made with adjoining landowners about the future ownership and use of the land over which the path currently runs.
24. I accept that it would still be possible to get into the School grounds from Hilltop Road at the front of the School, but this area is visible from the School office during the day, and is overlooked by houses at all times. I consider it unlikely that anyone intent on unlawful activity would find entry at the front of the School inviting. I conclude that the coming into operation of the Orders would result in a substantial improvement in the School's security.

The availability of a reasonably convenient alternative route, or, if no reasonably convenient alternative route is available, whether it would be reasonably practicable to divert the highway under section 119B of the 1980 Act rather than stopping it up

25. The alternative route suggested by the Council (shown on the Order plans) is via the footways of Cooling Road and Hilltop Road. It would add about 100 metres to the distance walked. The pavement is wide – significantly wider than the footpath, which is less than a metre wide in places – but some of it is not in particularly good condition, having been excavated by utility companies over the years. The surface is, however, much more even than that of the greater part of the footpath. Although no roads would be crossed by the alternative route, it would be necessary to cross the School entrance, where there are no dropped (sloping) kerbs. Gradients are less than on the footpath, but there is a long, although slight, slope on Cooling Road.
26. Objectors argued that pedestrians were in danger from cars entering and, in particular, backing out of properties, but no evidence was provided of any accidents or near accidents having happened, and the risk is, in my view, small. This route would be busy and perhaps unpleasant to use for a short period each day at School opening and closing times in term-time, but that would not negate its general convenience. I conclude that the alternative route is reasonably convenient. Objectors were concerned more about the difference in character between the footpath and the alternative footway route, and I consider this below at paragraphs 29 and 30.
27. It would be possible to divert the footpath around the eastern, northern and western sides of the playing field, between it and the gardens of neighbouring properties, but such a diversion would double its length and would require secure fencing either side. Although mentioned as a possibility by objectors, I do not believe that such a diversion was canvassed as a serious possibility. I conclude that there is no reasonable diversion route for Footpath RS124.

The effect which the extinguishment of the footpath would have as respects land served by the footpath, account being taken of the provisions as to compensation contained in Section 28 of the [1980] Act

28. Although the footpath runs between residential properties it serves only the School. As noted above (paragraph 23), the owners of neighbouring properties have made agreements with the School about the future of the path if the Orders are confirmed.

Other relevant circumstances

29. Footpath RS124 forms a link in a longer, though somewhat fragmented, route between Broom Hill and Upper Upnor on the River Medway. Objectors were concerned about the loss of part of this ‘historical’ route, although no evidence of any particular historical association was provided. One argued that it would set a precedent for the closure of additional sections, describing it as ‘death by a thousand cuts’. Objectors were also concerned about the loss of the ambience of the path which, although in an urban area, provides a view of the countryside to the north-east, and is free from the immediate noise and pollution of traffic.
30. I accept that walking along the footpath provides a different experience from that of walking on pavements, and that for some people it would be more

enjoyable. I accept too that in a predominantly urban area such as this it is desirable to retain footpath links, and that this is supported by the area's Rights of Way Improvement Plan. This evidence provides support for the view that Footpath RS124 should, if possible, be kept open, but it does not outweigh the importance of protecting the pupils and staff of Hilltop School from the effects of unlawful activity.

31. Some people with mobility problems, for example those who use buggies or scooters, would not be able to use the footpath and, because of the lack of a dropped kerb, would find the alternative route difficult without crossing Hilltop Road. If the continuation of the route eastwards was to be used, however, Hilltop Road would have to be crossed in any event. I do not consider it likely that anyone with a mobility problem which would allow them to use the footpath would find it any more difficult to use the alternative route.

Whether it is expedient to confirm the Special Extinguishment Order

32. I conclude that, for the purposes of protecting the pupils or staff of Hilltop Primary School from alarm or distress arising from unlawful activity, and having had regard to all other relevant circumstances, it is expedient to confirm the Special Extinguishment Order.

Both Orders, other matters

33. One of the objectors, having obtained copies of internal correspondence over a number of years within the Council, and between the Council and the School, was concerned that the head teacher had 'coaxed' and 'pressurised' the Council into 'misappropriating the law in order to incorporate the footpath and the playing field within the school, making it a single whole campus'. Section 118B of the 1980 Act, he believed, was not made for the provision of 'land grabs by schools'.
34. It cannot be for me to judge whether there has been any unlawful activity or improper conduct on the part of the School or the Council prior to the making of these Orders. I have been appointed to determine them based on the satisfaction of the criteria set out in the legislation.
35. Objectors called at houses in the neighbourhood of Footpath RS124 asking people to sign a petition headed 'Save Our Right Of Way'. About fifty people put their names to the statement 'We the undersigned object to the closure of the above footpath under Medway Council Special Extinguishment Order 2010.' Although one of the objectors explained how she had gone about collecting signatures in the proper way, telling people what the Order was concerned with, I can give this petition no significant weight, as no reasons are given by any signatory for objecting to the closure of the path.

Both Orders, conclusion

36. Having regard to these and all other matters raised at the inquiry and in written representations I conclude that both Orders should be confirmed.

Formal decision

37. I confirm the Special Extinguishment Order.
38. I confirm the Extinguishment Order.

Peter Millman

INSPECTOR

APPEARANCES

For the order making authority

Robin Carr of Robin Carr
Associates

who called

Annemarie Behn	Public Rights of Way Officer, Medway Council
David Coomber	Frindsbury Extra Parish Council
Stephen Cook	Kent Police
John Allen	Head Teacher, Hilltop Primary School
Carol Whetton	Chair of Governors, Hilltop Primary School
Len Murphy	Retired Caretaker, Hilltop Primary School
Julian Farrow	Site Manager, Hilltop Primary School
Gareth Porter	Deputy Head Teacher, Hilltop Primary School
Sarah Hills	Assistant Deputy Head Teacher, Hilltop Primary School
Rose Callaway	Teacher, Hilltop Primary School
Caroline Wooder	Teacher, Hilltop Primary School

Objectors

Mrs P Wilson, representing
the Open Spaces Society

Mr A Millsom Local resident

Mr M Hann, representing the
Ramblers

Mrs J Masey Local resident

DOCUMENTS

1. Additional material provided by Mrs Behn
2. List of security measures taken at Hilltop School
3. Photographs taken by Mr Allen
4. Extract from Guidance on the Equality Act 2010
5. Additional material produced by Mrs J Masey
6. Petition against closure of the footpath
7. Mr Carr's closing submissions