

Report of the Head of Legal, Democratic Services & Business Intelligence

Planning Committee – 1 August 2017

**PUBLIC RIGHTS OF WAY – PROPOSED PUBLIC PATH DIVERSION ORDER RELATING TO FOOTPATH NO. 35 AT PERRISWOOD
IN THE COMMUNITIES OF PENRICE AND ILSTON**

Summary

Purpose:	To determine whether to withdraw the existing Public Path Diversion Order made on the 26 th July 2016 and make a new Public Path Diversion Order
Policy Framework:	Countryside Access Plan 2007-2017
Statutory Test:	Section 119 Highways Act 1980
Reason for Decision:	Whilst this Committee previously determined to make a Public Path Diversion Order, it appears that at the informal consultation stage some consultees were provided a different and incorrect version of the Diversion Order Plan. The consultations have now been conducted properly with the correct plan sent to all consultees. All consultees have now had the opportunity to comment on the proposed diversion and the objections received are not considered sufficiently cogent to warrant the complete abandonment of the order. Therefore, it is proposed that a new diversion order be made
Consultations:	Legal, Finance and Access to Services and all the statutory consultees, including local members, landowners and the prescribed organisations.

Recommendation:	It is recommended that: - <ul style="list-style-type: none"> (1) The Public Path Diversion Order made on the 26th July 2016 be withdrawn; (2) A new Public Path Diversion Order be made on the same terms as the previous order; and (3) Should formal objections be made to any such order made and the Council becomes unable to confirm the order, to refer the order to the Planning Inspectorate for determination
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1 Background

- 1.1 The Council previously discovered evidence suggesting that an error existed on the Council's Definitive Map of public rights of way in relation to the alignment of footpath number 35.
- 1.2 The current definitive line of the footpath is shown A-B-C-D-E on the plan attached to this report at Appendix 1
- 1.3 It was claimed by some of the local residents that no public footpath existed at this location and that it should never have been recorded as a public right of way.
- 1.4 A report was submitted to the Rights of Way and Commons Sub Committee of the Planning Committee on the 10th October 2012 ("the 2012 report") in order to determine:
 - (a) whether the evidence submitted by the local residents was sufficient to show that no public footpath existed and whether it should therefore be deleted from the Definitive Map; and

(b) if that evidence was insufficient to show that the path should be deleted, whether the current alignment was incorrect and whether there was sufficient evidence to realign the path along another route.

1.5 The evidence considered in relation to these issues is set out fully in the 2012 report at Appendix 2 of this report and can be viewed as background information only given that these issues are not the subject of this report.

1.6 At the Committee of the 10th October 2012, it was determined that the evidence of local residents was not sufficient to show the path did not exist; therefore the legal presumption that the definitive map is correct in showing a path could not be rebutted and the path was to remain on the Definitive Map.

1.7 Whilst Members decided that the current alignment was an error, it was considered that the evidence available was not sufficient to determine the correct alignment. Hence, no modification order could be made for the realignment of the footpath.

1.8 Despite the fact that the anomaly could not be rectified based on the available evidence, The Council has a legal duty under the Highways Act 1980 to assert and protect public paths and to ensure they are available for public use. Therein lay a problem as the definitive line of the path was already known to be incorrect or at least very likely to be incorrect.

1.9 It was recognised that there were only a limited number of alternative methods by which the Council could seek to resolve this issue, namely by the making of a Public Path Order or a Public Path Agreement using its powers under the Highways Act 1980. On further investigation and consideration of each type of possible order, it was found that the only

suitable option would be to make a Public Path Diversion Order under Section 119 of the Highways Act 1980.

- 1.10 A report was submitted to the Council's Planning Committee on the 10th May 2016 ('the 2016 report'). That report can be found at Appendix 3 annexed to this report. The possible methods of dealing with this issue were set out and only the requirements for a Public Path Diversion Order could be satisfied.
- 1.11 It was concluded in the 2016 report that it would be in the interests of the landowner and the public that the path be diverted from the current definitive line A-B-C-D-E on the Plan at Appendix 1 along the route shown A-F-G-H-I-J-K-E on the same Plan and that this route would be far more convenient to the public and less inconvenient for the landowner.
- 1.12 The route proposed as the alternative was chosen in the interests of fairness as whilst evidence was generally poor, this path was the most likely path to be the true line of the public right of way.
- 1.13 The background for making a public path diversion order together with the consideration of the appropriate legal tests was set out in the 2016 report.
- 1.14 Objections and representations received in relation to the making of the order were set out and can be viewed in the report at Appendix 3.
- 1.15 On the 10th May 2016 it was determined by the Council's Planning Committee that a Public Path Diversion Order be made to divert the path as set out in Appendix 1 hereto.
- 1.16 Following the decision of the Committee, a Public Path Diversion Order was made on the 26th July 2016.

- 1.17 The procedure for making a diversion order is set out in Schedule 6 of the Highways Act 1980 and requires the service of a notice regarding the making of the order to be given to the owners or occupiers of the land, the local members, the community council and all statutory consultees and interested parties. It further requires a copy of the notice to be published in a local newspaper circulating in the area in which the order relates is situated.
- 1.18 This procedure was correctly followed and the statutory period for the submission of objections or representations to the order ran from 22nd August 2016 to 23rd September 2016. The notice appeared in the South Wales Evening Post on 22nd August 2016.
- 1.19 No formal objections were received to the diversion order. However, it became clear from the correspondence submitted that an administrative error had occurred resulting in several of the interested parties receiving a different version of the proposed diversion order plan for consultation to the plan which appeared in the 2016 report and based upon which the diversion order of the 26th July 2016 was made.
- 1.20 In the interests of fairness and so that all parties have an opportunity to comment on the correct diversion plan, it was decided that a further round of informal consultations was necessary, this time correcting the error and ensuring all parties received the correct version of the plan.

2 New informal consultations

- 2.1 The new consultation period ran from the 14th June 2017 to the 7th July 2017.
- 2.2 In response to the new consultation, four objections were received. However, many of the arguments raised by the objectors related to the existence or non-existence of the path. This matter was already resolved by the Rights of Way and Commons Sub Committee on 10th

October 2012 and no new evidence that has not previously been considered has been put forward.

- 2.4 If the objectors have any new evidence which necessitates the reconsideration of this matter, then they are able to make an application to the Council for a modification order based on the new evidence. The new evidence can then be considered together with the evidence considered previously and ultimately a new report will be submitted to Committee for determining the matter.
- 2.5 As it stands, no application has been made for a modification order to delete the path based on new or evidence not previously considered. As a result, this issue shall not be addressed in this report. Committee has already resolved that matter.

3 Objections and Representations

- 3.1 One local landowner opposes the proposed diversion on the grounds that it affects her land yet the Council has not obtained her permission to effect the diversion.
- 3.2 The Council has consulted widely on all matters regarding this footpath since the commencement of the matter in 2008. The Council has consulted this landowner and all other landowners affected at all stages including consulting on the most recent proposal for dealing with the issue on 14th June 2017. This landowner's concerns and objections have been carefully considered throughout the matter and the Council is proposing the current diversion as the fairest method of dealing with this issue. There is no requirement in the Highways Act 1980 that the Council must obtain the express consent of any landowner prior to implementing a Public Path Diversion order under Section 119 of the Act. There is merely a requirement to consult.

- 3.3 This objector suggests her preferred route for the path would be for the path to terminate as it does on previous legal records and proper procedures should be carried out to extend the path onto her land by order.
- 3.4 The Council has transposed the route of this path shown on the earlier drafts and editions of the Definitive Map onto plans as an explanatory tool in the past for its consultees. The Council is proposing that the route to be implemented is actually that shown on Ordnance Survey map evidence predating the draft Definitive Maps on the basis that the latter are likely to be attempts at drawing this path onto map of scale 1:25,000 which is an extremely difficult task without the aid of computer technology. The current proposed diversion only slightly differs from previous plans provided at earlier stages of the investigation as Council officers have now been able to plot the route more accurately. It is recognised that the proposed Diversion Order may resolve the alignment issue but will result in the path terminating at a dead-end i.e. a point from which there is no public right of access. However, the Council will consider the necessary action and propose any further orders that may be required at the appropriate time.
- 3.5 Finally she sets out her preferred methods of dealing with this matter including the abandonment of the footpath altogether. It has already been determined by Committee that the evidence is sufficient to show that a public footpath does exist at this location but the exact route is difficult to determine. The Council is proposing the route that is considered to most likely be the correct route based on all the evidence available. It is open to any member of the public to make an application for a public path extinguishment order to delete public footpaths. However, it would be suggested that any such applicant waits until the path is recorded correctly along a particular route e.g. as it would by the confirmation of the proposed diversion order.

It is worth noting at this point that the Council is not able to allow the status quo to prevail. It has a legal duty to resolve such anomalies that are discovered together with a further legal duty to assert and protect public paths and ensure they are available for public use.

3.6 A second landowner affected by the anomaly and a local resident has submitted letters of objection on the grounds that they consider that the evidence discussed previously does not support the public footpath's existence. Opinions have been provided on the legal records and their evidential value. However, it is not the intention of this report to re-open such discussions at this time. The evidence has been considered and Committee has already determined that the evidence favours a public footpath existing. However, the evidence was not sufficient to determine the exact route so no modification order could be made to correct the alignment of the path. The Council is therefore proposing a diversion order which is made on different grounds but is aimed to provide the most likely evidential route of the footpath according to officers.

3.7 It is of course open to any member of the public who discovers evidence not already considered by this Council to make an application for a modification order to have the path deleted from the Council's legal records if that is what they believe the evidence shows. However, it must be emphasised that they would need to provide new evidence before the matter could be considered.

4 Conclusion

4.1 This matter was reported to the Planning Committee on the 10th May 2016 and it was resolved that a Public Path Diversion Order be made.

4.2 This report proposes that the exact same Public Path Diversion Order be made. However, all parties have now received the correct plan with their consultation letters and have had an opportunity to comment on the proposed diversion.

5 Financial Considerations

- 5.1 There is a potential for compensation claims to be made under the provisions of Section 28 of the Highways Act 1980. The cost of any compensation would be charged to the Rights of Way budget should this situation arise. This was set out in the report dated 10th May 2016. The actual value of compensation cannot be quantified at this stage but will in the first instance be met from existing Rights of Way budget.

6 Legal Implications

- 6.1 The legal implications are set out in the body of this report and the report dated 10th May 2016

7 Equality and Engagement Implications

- 7.1 An Equality Impact Assessment (EIA) Screening has been conducted and a full report is not required

Background Papers: ROW-000224/KAO including EIA Screening Form

APPENDICES

APPENDIX 1 – Plan of Proposed Diversion

APPENDIX 2 – Report to the Commons and Rights of Way Sub Committee dated 10th October 2012

APPENDIX 3 – Report to the Planning Committee dated 10th May 2016