

Report of the Head of Legal and Democratic Services

Planning Committee - 10 May 2016

PUBLIC RIGHTS OF WAY – DEFINITIVE MAP ANOMALY IN RELATION TO FOOTPATH 35

COMMUNITIES OF PENRICE & ILSTON

Summary

Purpose:	To determine whether to make a Public Path Diversion Order to divert the current definitive line of footpath no. 35
Policy Framework:	Countryside Access Plan 2007-2017
Statutory Test:	Section 119 Highways Act 1980
Reason for Decision:	Planning Committee previously determined that there was insufficient evidence to make an evidential modification order to correct the anomaly in the alignment of footpath no. 35. Therefore, there is a requirement to consider making a public path order to correct the anomaly and comply with the Council's legal duty to do so.
Consultations:	Councillor Richard Lewis; Penrice Community Council; Ilston Community Council; The Byways & Bridleways Trust; The Ramblers; The British Horse Society; The Open Spaces Society; Natural Resources Wales; The local representative of the Ramblers; the County Access & Bridleways Officer of the British Horse Society; The Penrice Estate; Local Landowners; Residents of Perriswood.
Recommendation:	It is recommended that: - A public path diversion order be made to divert the current definitive line of footpath no. 35 as set out in this report.
Report Author:	Kieran O'Carroll
Finance Officer:	Aimee Dyer
Legal Officer:	Sandie Richards
Access to Services Officer:	Phil Couch

- 1.1 The Council previously discovered evidence which suggested that an error existed on the Council's current definitive map of public rights of way in relation to the alignment of footpath 35.
- 1.2 The current definitive line of footpath 35 is shown via A-B-C-D-E on the Plan attached to this report as Appendix 1.
- 1.3 When consulting on the anomaly, it was claimed by some of the local residents that no public footpath existed 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 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 the evidence was not sufficient to show that the path should be deleted, whether the current alignment of the path was incorrect and whether there was sufficient evidence to realign the path.
- 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 given that these issues are not the subject of this report.
- 1.6 At the Committee of the 10th October 2012, it was decided that the evidence of local residents was not sufficient to show that the path did not exist; therefore 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 realignment at that time.

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 free from obstructions.

1.9 There are a limited number of alternative methods by which the Council could seek to resolve the issue, namely by the making of public path orders or agreements using its powers under the Highways Act 1980.

2 Public Path Creation Agreement

2.1 The entering of public path creation agreements under section 25 of the Highways Act 1980 would have been the preferred method of dealing with this issue.

2.2 Any landowner can enter into such an agreement with the Council to record a public path across their land.

2.3 Such agreements would not have been open to public objection and would allow the landowners in question to choose the least intrusive route across their land.

2.4 Once the agreements were in place and a new line for the footpath created, an extinguishment order would have been made under Section 118 of the Highways Act 1980 on the basis that the new route provides an alternative and therefore the former route is no longer needed for public use.

2.5 However, despite extensive negotiations with and between the landowners, a mutually acceptable route could not be agreed. As a result, it does not appear that this method will provide the solution required.

3 Public Path Diversion Order

- 3.1 Under Section 119 of the Highways Act 1980, where it appears to the Council that a public path should be diverted in the interests of the owner, lessee or occupier of the land crossed by the path or in the interests of the public, it is expedient that the path should be diverted, the Council may make a public path diversion order.
- 3.2 The result of such an order would be to create a new public footpath along an alternative alignment and to extinguish the public's right of way over the current alignment.
- 3.3 It is proposed that a public path diversion order be made to realign the footpath along the route shown via A-F-G-H-I-J-K-E on the Plan attached to this report as Appendix 1.
- 3.4 Such an order need not divert the path onto the correct historic alignment and in any event, the evidence is not sufficient to determine that alignment.
- 3.5 However, the route A-F-G-H-I-J-K-E does have a historical basis and therefore it is considered that this will provide an element of fairness to the landowners affected.
- 3.6 A detailed account of the historic ordnance survey map evidence is provided at paragraphs 8.1 to 8.6 of the 2012 report. Whilst these may not provide evidence of public rights of way, they do indicate the location of footpaths surveyed by the Ordnance Survey at the time. Evidence has also been found from the 1970's which supports the view that this route was the route considered to be a legal route of the footpath. A copy of a letter from the County Surveyors dated 29th July 1977 is attached as Appendix 3. The current owners of the property known as The Piggeries have also agreed that this was the route.

3.7 From the various historic ordnance survey maps available, it seems clear that a footpath existed in the location A-F-G-H-I-J-K-E when the area was surveyed in 1913.

3.8 It is considered that this route would provide the most convenient route for the public whilst offering a less inconvenient route to the landowners affected than the current definitive line.

4 Considerations for Diversion

4.1 As stated in Paragraph 3.1, in considering whether to make a public path diversion order, the Council must be satisfied that:

(a) it is expedient to make the order in the interests of the owner, lessee or occupier of the land crossed by the path or in the interests of the public; and

(b) the new path will not be substantially less convenient to the public.

4.2 It is considered expedient to make the order in the interests of the owners of those properties through which the current definitive line passes. The current line passes into the dwellings at Plum Tree Cottage and Woodside. The proposed route represents a far less intrusive route in relation to those properties. In addition, it is in the interests of the public given that the footpath has been obstructed for a number of years and the diversion will provide a useable unobstructed route for walkers.

4.3 The new path will not be less convenient to the public. Not only does evidence suggest that the current route is a result of a drafting error when the current definitive map was compiled, but the new route is more direct and is more convenient in its location where it passes through the gardens of properties. The current definitive line passes close to the dwellings and in some instances actually passes through the walls of those dwellings.

5 Informal Consultations

- 5.1 Consultations with landowners and interested parties were conducted on the 22nd May 2015 and representations or objections were invited by the 15th June 2015, and a draft copy of this report was sent to the interested parties on 5th February 2016.
- 5.2 All the four landowners affected have responded, three of whom have provided confirmation of their approval of the proposal. The owners of Plum Tree Cottage do not object to a diversion of the path, but are concerned about the proposed route of the new path between points J and K on the map in appendix 1. (see appendix 4)
- 5.4 The issues regarding the definitive map have already been discussed in detail in the report to Committee in 2012. The route of the footpath is shown in slightly different alignments in each edition of the map, some to the south of the boundary and some to the north. However, there is a strong belief that the people who drafted the maps one hundred years ago were attempting to follow the route shown on the 1913 O.S. map, and due to the small scale of the maps, and perhaps a lack of drafting skills, this was not achieved. None of the people involved in drafting any of the maps were professional surveyors or draftsmen. The drafting of the parish map in particular is imprecise, given the larger scale of this map. A number of the footpaths drawn on it do not precisely follow the clearly marked routes shown on the O.S. base map, one of which – footpath 23 (see appendix 5) – was and is a substantial farm track. The minor amendment suggested may not result in the outcome desired, as the line shown on the present O.S. map is not the actual line of the present fence between the garden and the field. A survey of this boundary undertaken in 2015 (see appendix 5) shows that the present fence is up to three metres further south than the line shown on the O.S. map. A footpath next to, and to the north of, this fence would therefore be on land owned by the Penrice Estate.

- 5.5 If the status quo is to prevail then the Council would be required to open the current definitive line as far as is practicably possible and the public would be able to take the shortest detour around any remaining obstruction. It is considered that this would be far more intrusive than the proposed diversion. The current route passes through the dwelling whereas the proposed diversion would locate the path within the garden.
- 5.6 One local resident has expressed her concern with regard to the proposal. It is her view that it was never proven that the public footpath exists and she considers it was likely only ever used as a private access for workers of the Estate. (see appendix 4)
- 5.7 Ilston Community Council have also expressed that they are unhappy with a diversion through Plum Tree Cottage as in their view there is no concrete evidence that a path ever existed.
- 5.8 The fact that the path appears on the Council's Definitive Map is itself definitive evidence of its existence. Evidence would need to be provided that the path did not exist at the relevant date of the first definitive map, 14th September 1954, in order for the path to be deleted by modification order. Whilst evidence was previously submitted to support the claim that no path ever existed, this evidence was considered in the 2012 report. Committee resolved that this evidence was insufficient to show that the path did not exist. It must therefore be presumed that the definitive map is correct in showing a public path.
- 5.9 It is of course open to any person to make a further application to delete the path from the Definitive Map provided that fresh evidence is submitted for consideration.
- 5.10 It is also open for any person to object to the making of the diversion order during the statutory consultation period following its making.

- 5.11 In addition, it will be open to any landowner who may become dissatisfied with the alignment of the footpath in the future to make an application to the Council for a further diversion order for an alternative route across their land.
- 5.12 The local resident referred to in paragraph 5.5 has also expressed her concern that the Council is causing distress to landowners, a reduction in property values, is destroying the community and is wasting time and money in dealing with this issue.
- 5.13 Members are reminded that the Council has a legal duty under Section 53 of the Wildlife and Countryside Act 1981 to keep the Definitive Map and Statement under review and to resolve any anomalies where discovered. In addition the Council has a legal duty to assert and protect public paths and to ensure they are free from obstruction under the Highways Act 1980.
- 5.14 Members are also reminded that there is already a public right of way through the affected properties as shown by the current definitive line A-B-C-D-E on the plan attached to this report. It is considered that the proposal to divert this route along A-F-G-H-I-J-K-E represents an improvement to the current position.
- 5.15 Penrice Community Council, the Gower Society and the Ramblers have indicated that they have no objection to the diversion order proposal.

6 Other possible methods

- 6.1 It is open to the Council to make a sole extinguishment order under Section 118 of the Highways Act 1980 where it considers a path is no longer needed for public use.
- 6.2 Any such order would be open to public objection. It is already known that such an order would be opposed. Given the evidence of a demand to use the footpath, it would be difficult for the Council to show

that the path is not needed for public use. It is therefore highly unlikely that such an opposed order would be confirmed by an Inspector.

- 6.3 In addition, a council initiated public path extinguishment order is always considered a last resort given that the Council has a duty under the Highways Act 1980 to assert and protect public paths.
- 6.4 It is also open to the Council to make concurrent creation and extinguishment orders under Section 26 and Section 118 of the Highways Act respectively. However, this would result in the same outcome as a single diversion order.
- 6.5 Where concurrent creation and extinguishment orders are opposed, there is a risk of one order being confirmed but not the other.
- 6.6 For the reasons given, it was decided that the proposed single public path diversion order would be the most appropriate method of dealing with the anomaly.

7 Compensation

- 7.1 Any public path creation, extinguishment or diversion order made will be subject to the provisions regarding compensation set out under Section 28 of the Highways Act 1980. If the proposal to make a public path diversion order is to proceed, the Council must have regard to these provisions.
- 7.2 Where any such claim shows that the value of an interest of a person in land is depreciated, or that a person has suffered damage, by being disturbed in his enjoyment of land, as a result of the coming into operation of an order, the Council shall pay to that person compensation equal to the amount of the depreciation or damage.

- 7.3 A claim for compensation would only be considered if a fully quantified claim with evidence of the depreciation is submitted within six months of the date upon which the order comes into effect.
- 7.4 The current view is that a public footpath already exists over the land and the diversion will result in a more convenient route. It is arguable that Plum Tree Cottage and Woodside could experience an increase in property value given that if the order is confirmed, the path will no longer be routed through the existing dwellings.
- 7.5 A full consideration of any such claim would be conducted by the Council's Valuers at the relevant time. Whilst it is uncertain as to whether any such claim would eventually succeed, it is anticipated that any such claim would be defended.

8 Conclusion

- 8.1 On the 10th October 2012, the former Rights of Way and Commons Sub Committee determined that whilst the evidence suggested that the alignment of the footpath on the current definitive map was an error, there was insufficient evidence to move the footpath onto any other alignment.
- 8.2 Given the Council's legal duty to review its Definitive Map and resolve any errors discovered and to assert and protect public paths, it is necessary to consider the correction of the error by way of public path orders.
- 8.3 It is considered that it would be in the interests of the landowners and the public that the path be diverted along the route shown A-F-G-H-I-J-K-E on the Plan attached to this report and that the new route would be far more convenient than the current line. Therefore, it is considered that Section 119 of the Highways Act 1980 could be satisfied and a public path diversion order made.
- 8.4 It should be noted that even if a diversion order is confirmed, point E on the Plan will not link to another recorded public highway. However, it

will be open to the Council to consider its options in relation to creating a further link in the future.

9 Financial Considerations

- 9.1 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. However whilst there is no specific budget to cover this, any overspend would have to be contained within the service area.

10 Legal Implications

- 10.1 The legal implications are as set out in the body of the report.

11 Equality and Engagement Implications

- 11.1 There are no such implications to this report

Background Papers: ROW-000224/KAO

Appendices:

- APPENDIX 1 – Plan showing the current definitive line of footpath 35 and the proposed diversion
- APPENDIX 2 – Report of the Rights of Way and Commons Sub Committee dated 10th October 2012
- APPENDIX 3 - Letter from the County Surveyors dated 29th July 1977
- APPENDIX 4 - Letters of Representation
- APPENDIX 5 - Survey Plan and Extract of Parish Map