

**REPORT FROM: NEIGHBOURHOOD SERVICES MANAGER**

**TO: COLNE AND DISTRICT COMMITTEE**

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**PROPOSED DIVERSION OF PUBLIC FOOTPATH 61 AT PENNY POT COTTAGE,  
SKIPTON OLD ROAD, LANESHAW BRIDGE, COLNE**

**PURPOSE OF REPORT**

The owner of Penny Pot Cottage has made an application to divert a public footpath. This report sets out the background to the case. A decision by members of the Committee is sought on whether the Council should make the diversion order applied for.

**RECOMMENDATIONS**

- 1) That the Committee defers making a decision on the proposed diversion of the footpath until enforcement action has been taken to remove obstructions from the existing footpath or the offender has been prosecuted.
- 2) That the Legal Manager be authorised to pursue enforcement action against the land owner.

**REASONS FOR RECOMMENDATION**

- 1) The application satisfies the legal criteria for making a diversion order but the Council's power to make a diversion order is discretionary and in this case the Council's policy on public rights of way enforcement means that when all the circumstances are considered a diversion order should not be made.
- 2) To ensure that appropriate action is taken for the unauthorised obstruction of a public right of way prior to an application to divert the footpath being considered.

**THE PROPOSALS**

1. The application to divert the footpath is illustrated by a map which is included as Appendix 1 to this report. The proposal is that the existing line of part of footpath 61 as shown as a solid bold line A – B is diverted to a new line shown by bold dashes on the line C – D – B.
2. The new footpath would be 2 metres wide with a 1 metre wide gap at Point C and a pedestrian gate at Point D. The new footpath would run on the stone surface of the farm yard area from point C – D and then on grass as far as point B.

## **BACKGROUND INFORMATION**

3. Penny Pot Cottage is situated in farmland approximately 2½ miles north east of Colne as shown on the location map in Appendix 2. This area is well served by a network of public rights of way and footpath 61 runs north east from the Penny Pot Cottage to the houses at Pasture Farm and then north to Skipton Old Road near the Black Lane Ends Public House.
4. The application to divert the footpath was made during an investigation by the Countryside Access Officer which started in October 2016. At this time we discovered that the footpath had become obstructed by a new fence line (indicated by a line on the proposals map running through point D). Work had also started on a building, the outline of which had been laid out over the line of the path. The position of the building can be seen as a rectangular shape on the proposals map crossed by the line A – B. The path had been unofficially diverted to pass through a narrow stile and two field gates. On the day of the site visit the building had not risen above ground level and we therefore immediately contacted the owner in writing to request that any further work on the building was stopped in order to prevent a substantial and immovable obstruction being built over the public right of way.
5. The applicant evidently decided to continue with the building work and therefore we started to investigate whether a prosecution could be brought for the willful obstruction of the footpath without lawful authority. We invited the land owner to attend an interview under caution. This would have been his opportunity to account for his actions and to state what lawful authority he had to build over a right of way, but he did not attend. A person under investigation has the right not to attend such interviews and a right not to say anything when questioned but had this case gone to court then not saying anything may have harmed his defence.
6. We received the application to formally divert the footpath whilst this investigation was ongoing.
7. As a result of our investigation a file of evidence was prepared within two months of the alleged offence. We asked Legal Services to consider bring proceedings against the owner the land for obstructing the footpath by the willful action of continuing with the building work over the line of the path. However, legal proceedings did not take place because authorisation for the prosecution was not given by the Neighbourhood Services Manager. The offence of obstructing a footpath is a summary offence which means that there is a statutory 6 month time limit for bringing proceedings from the date of the offence.
8. The building has since been completed and now stands as an agricultural storage building. It has planning permission but planning permission does not constitute lawful authority to build across a public footpath. There are special provisions which allow a Council to divert a footpath on the grounds that its diversion is necessary to allow planning permission to be carried out. These provisions no longer apply in this case because the work on the building has been substantially completed.

## **THE RESULTS OF INFORMAL CONSULTATION**

9. We have written to various local walking groups, Laneshawbridge Parish Council, Lancashire County Council, the ward councilors and various public utility companies about the proposed diversion. There have been no objections.

## **ASSESSMENT OF THE PROPOSED ORDER AGAINST THE LEGAL CRITERIA**

10. Section 119(1) of the Highways Act 1980 states that:

*“Where it appears to a council as respects a footpath or bridleway in their area [...] that, in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted (whether on to land of the same or of another owner, lessee or occupier), the council may, subject to subsection (2) below, by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order,—*

*(a) create, as from such date as may be specified in the order, any such new footpath or bridleway as appears to the council requisite for effecting the diversion, and*

*(b) extinguish, as from such date as may be in accordance with the provisions of subsection (3) below, the public right of way over so much of the path or way as appears to the council requisite as aforesaid.*

*An order under this section is referred to in this Act as a “public path diversion order”*

11. The owner has not provided any reason why it is in his interest for the footpath to be diverted. However, it clearly is in his interests that the public right of way should avoid the building. Otherwise the building remains liable to be removed as an obstruction if either Pendle Council exercises its powers to assert and protect the rights of the public, or if the highway authority acts in accordance with the statutory duty placed to keep the public's rights free of obstruction. Even if such action is not taken the presence of a building obstructing a right of way is likely to be identified if the property is advertised for sale and a prospective purchaser carries out a search. This is likely to have an adverse effect on selling the property . Therefore, it is in the interests of the owner of the land that the footpath should be diverted to avoid the building.
12. Section 119(2) states:

*“A public path diversion order shall not alter a point of termination of the path or way—*  
*(a) if that point is not on a highway, or*  
*(b) (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public.”*
13. Under the proposals the termination point at Point B is unaffected and the termination point at Point A is moved 12 metres to Point C. In our view the altered termination point is substantially as convenient.
14. Section 119(3) states:

*“Where it appears to the council that work requires to be done to bring the new site of the footpath or bridleway into a fit condition for use by the public, the council shall—*  
*(a) specify a date under subsection (1)(a) above, and*  
*(b) provide that so much of the order as extinguishes (in accordance with subsection (1)(b) above) a public right of way is not to come into force until the local highway authority for the new path or way certify that the work has been carried out.”*
15. The new footpath crosses a stoned up farm yard area between points C and D and is then through a gate and onto farmland. The footpath is not heavily used and therefore we do not consider that any additional surfacing would be required.
16. Section 119(4) states:

*“A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or*

*conditions of any description) subject to such limitations or conditions as may be specified in the order.”*

17. The “limitations and conditions” mentioned in the legislation refer to gates and stiles. The proposed diversion includes a gap at point C and a gate at point D. The proposed diversion order would specify that the gap is a minimum of 1 metre wide, and that the gate must be maintained according to a standard which would be set out in the order so that it is easy to use.

18. Section 119(5) states:

*“Before determining to make a public path diversion order on the representations of an owner, lessee or occupier of land crossed by the path or way, the council may require him to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,—*

*(a)any compensation which may become payable under section 28 above as applied by section 121(2) below, or*

*(b)where the council are the highway authority for the path or way in question, any expenses which they may incur in bringing the new site of the path or way into fit condition for use for the public, or*

*(c)where the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by subsection (9) below.”*

19. As part of the application the owner of the land has entered into an agreement which allows us to recover any expenses which are incurred.

## **ASSESSMENT OF THE PROPOSALS AGAINST THE TESTS FOR CONFIRMING AN ORDER**

20. If there are objections to the diversion order then the order may be passed to the Secretary of State for the Environment who would appoint an independent inspector to consider the above criteria and a number of other legal tests. If there are no objections then we may confirm the order, but we are required to consider same tests that the Secretary of State would consider before confirming an unopposed order.

21. Section 119(6) of the Highways Act 1980 states that:

*“The Secretary of State shall not confirm a public path diversion order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that the diversion to be effected by it is expedient as mentioned in subsection (1) above, and further that the path or way will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the effect which—*

*(a)the diversion would have on public enjoyment of the path or way 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,*

*so, however, that for the purposes of paragraphs (b) and (c) above the Secretary of State or, as the case may be, the council shall take into account the provisions as to compensation referred to in subsection (5)(a) above.”*

22. If we disregard the effect of the obstructions on the route of the existing footpath then the effect of the diversion will only have a minimal impact on footpath users because there is

only a slight change to the line of the footpath. The introduction of a gate introduces a small level of inconvenience.

23. With regards to the public enjoyment of the path as a whole the diversion will have only minimal effect on the views which can be enjoyed.
24. We must consider the impact of the diversion on land served by the existing right of way but the existing footpath does not give access to any land apart from that owned by the applicants.
25. We must also consider the impact of the diversion on the land crossed by the new footpaths. The footpath will continue through the same yard area so we foresee no additional impact.
26. Section 6A states:  
  
*“The considerations to which—*  
*(a) the Secretary of State is to have regard in determining whether or not to confirm a public path diversion order, and*  
*(b) a council are to have regard in determining whether or not to confirm such an order as an unopposed order,*  
  
*include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would create or extinguish a public right of way”*
27. The Lancashire County Council, Blackpool Council and Blackburn with Darwen Borough Council Rights of Way Improvement Plan 2005 has been consulted. None of the policies in the plan has direct relevance to the circumstances of this diversion application.

## **DISCUSSION ABOUT THE MERITS OF MAKING A DIVERSION ORDER AS APPLIED FOR**

28. The Council has adopted a Public Rights of Way Enforcement Policy which sets out when it is acceptable to make an order to divert a footpath if it is already obstructed. One of the criteria for making a diversion order in these circumstances is that the obstruction, in this case an agricultural building and fencing, is that it “does not appear to have been a deliberate attempt by the current owner or occupier to interfere with the public’s use of the route”. In this case what has occurred on site is that the footpath has been unofficially moved, and when it was brought to the attention of the landowner that the proposed building work would further obstruct the footpath he continued with the building work nonetheless. These were deliberate acts and therefore the policy requires that the diversion of the footpath is not an acceptable alternative to enforcement action.
29. The Council could defer making a decision about whether the footpath should be diverted until such time that appropriate enforcement action has been taken. The Council could have prosecuted for the alleged willful act of obstructing the footpath within 6 months of the construction of building over a footpath through malfeasance (i.e. the willful and intentional act of building), however this option is now out of time due to the expiration of the six month time limit. The alternative option for enforcement action is that the Council demands the removal of all obstructions from the footpath, and then if the applicant fails to act the Council would be in a position to prosecute for the willful obstruction of the footpath through nonfeasance (i.e. the failure to act where action is required).
30. If the owner of the building is prosecuted and fined then the Council can then demonstrate that it has acted not to condone the obstruction of the footpath and the matter could still be

resolved by the diversion order applied for. This would no longer be in conflict with our enforcement policy.

## **ALTERNATIVE COURSE OF ACTION**

31. If the Council decides that the diversion order should be approved without enforcement action then the following resolution should be made:
  - i. That the Legal Manager be authorised to make an Order under Section 119 of the Highways Act 1980 to divert part of footpath 61 as set out in paragraphs 1 and 2 of this report.
  - ii. If any objections are made that the Legal Manager be authorised to send the order to the Secretary of State for the Environment to be determined and that if there are no objections he be authorised to confirm the order as an unopposed order.

## **CONCLUSIONS**

32. The proposed diversion satisfies the legislative criteria and there have been no objections from the groups we have consulted.
33. The benefit to the public of the order being made is that the footpath can then be clearly waymarked and maintained as a public footpath on an alternative route, and this new route would then have the same protection as other rights of way.
34. However, the proposal is counter to the provisions of the Council's rights of way enforcement policy and therefore in accordance with that policy the application should be refused or deferred on the grounds that if the Council made the order it may appear to condone the willful obstruction of a public footpath.

## **IMPLICATIONS**

- Policy:** The proposal is contrary the Council's Public Rights of Way Enforcement policy (see main body of report).
- Financial:** If we make the proposed diversion order and objections are received then there are additional costs in staff time associated with referring the order to the Secretary of State. These costs cannot be lawfully recovered from the applicants. However, as a result of the informal consultations which have been carried out we do not anticipate any objections. If the application is refused then the costs of £545 which have been incurred to date (i.e. at the costs at time of writing) cannot lawfully be recovered.
- Legal:** Pendle Council has a number of powers as a district council with respect to public rights of way. These include a power to assert and protect the rights of the public to use such rights of way, and also the power to make an order to divert a public footpath. We are under no legal obligation (i.e. we do not have a statutory duty) to do either. However, if we exercise the power to make a diversion order contrary to our own policy then the decision could be challenged by judicial review.
- Risk Management:** The risk judicial review is low as is the risk of objections to the order being made. The risk of doing nothing is that the legal line of the path

may remain obstructed for decades to come and the alternative route will enjoy no legal protection.

**Health and Safety:** None arising directly from the report.

**Sustainability:** We have considered the effect of the proposals on the flora and fauna of the site and we do not foresee any negative implications.

**Community Safety:** None arising directly from the report.

**Equality and Diversity:** The gap and gate which are proposed as part of the diversion will be reasonably accessible to all users.

## **APPENDICES**

Appendix 1: Proposals Map

Appendix 2: Location Map

## **LIST OF BACKGROUND PAPERS**

Public Rights of Way Enforcement Policy January 2013