

REPORT FROM: NEIGHBOURHOOD SERVICES MANAGER

TO: BARROWFORD AND WESTERN PARISHES COMMITTEE

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Public Footpath 38 at the Fence Gate Lodge (formerly the Bay Horse)

PURPOSE OF REPORT

A decision is required on whether to proceed with an application to divert a public footpath in circumstances which may be considered to be in conflict with the Council's Public Rights of Way Enforcement Policy.

RECOMMENDATIONS

- (1) That work on an application to divert part of footpath 38 at Fence Gate Lodge be suspended until appropriate enforcement action has been taken with respect to obstructions to the line of the recorded footpath at two locations.

REASONS FOR RECOMMENDATIONS

- (1) The proposed diversion is in conflict with the Council's Public Rights of Way Enforcement Policy and in the circumstances the proposed diversion to avoid the obstructions is not a suitable alternative to enforcement action.

ISSUE

1. Public footpath 38¹ runs through the site of the Fence Gate Lodge, formerly the Bay Horse, as shown by the bold black line A – B on the proposals map which is included as Appendix 1 of this report. We have received an application from the owner of the property to divert the footpath to the line C – D.
2. The existing footpath running on the line A – B is currently obstructed by a building adjoining the end of the former Bay Horse which is shown by a hatched area on the map at point A, and by a hedge which has been planted across the footpath at point B. The building at point A was constructed relatively recently, but it replaced a similar sized building which had existed for many years before the development of Fence Gate Lodge began.

¹ The full footpath reference is Public footpath 38 Higham-with-Wheatley Booth which reflects the old parish boundaries when the Definitive Map of public rights of way was created. Footpath 38 ran on the parish boundary line, just inside Higham parish. The footpath and the Fence Gate Lodge are now within the parish of Old Laund Booth.

3. When we receive an application to divert a public right of way there is a requirement that the existing right of way is kept open during the application process. However, there are sometimes issues of a longstanding nature where the most reasonable and practical solution is not to require that such obstructions are removed. The Council's Public Rights of Way Enforcement Policy sets out the circumstances when an issue affecting a footpath may be resolved by a diversion order. The Council's Enforcement Policy is included in Appendix 2. The most relevant sections are set out below.

6. Use of public path orders (PPOs)

- 6.1 *A number of obstructions may be longstanding and of such a nature that successful enforcement action would be costly, difficult to achieve or undesirable. An example of this might be where a building had been constructed over a public right of way some years ago.*
- 6.2 *In such cases the making of a PPO may appear a more appropriate and efficient response. In the majority of cases this will be by means of a diversion order to circumvent or avoid the obstruction.*
- 6.3 *Nonetheless, to act as an effective deterrent an enforcement policy must avoid the danger of appearing to condone obstructing a public right of way merely because it would be awkward or difficult to take direct action or prosecute. Consequently, the making of PPOs to deal with obstructions on public rights of way would be acceptable only in certain limited circumstances as set out in Policy EP3.*
- 6.4 *In cases where a PPO is considered acceptable then normal PPO procedures will be applied including provision for the recovery of our costs. In the event of an application being unsuccessful for any reason, then the case will be dealt with by alternative means in accordance with this policy.*

POLICY EP3

A Public Path Order (PPO) will be considered as an acceptable alternative to enforcement action only where all of the following criteria are met:

- 1. The obstruction 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.*
- 2. The obstruction is of a scale and nature such that there is no prospect that the person responsible could reasonably be expected to make arrangements for it to be removed.*
- 3. The proposed PPO will safely fulfil the requirements of the relevant PPO legislation.*

4. A decision is needed on whether, in the circumstances, we should proceed with the application process to divert the public footpath, or whether in the light of Council policy a diversion is not an acceptable alternative to enforcement action.

BACKGROUND INFORMATION

5. Planning permission for the Fence Gate Lodge was granted in 2015. The public footpath through the site was brought to the attention of the planning applicant who subsequently applied to Lancashire County Council for the temporary closure of the public right of way during the development.
6. In January 2017 when the development was well underway we received numerous customer reports complaining that a temporary footpath passing around the edge of the site had been closed off. It was the investigation surrounding this issue which led us to discover that the line of the path recorded on the Definitive Map was in fact affected, or at least had

been affected, by a long-standing obstruction at point A, in the form of a single story building to the side of the former Bay Horse. In January 2017 this building had been removed as part of the development but a hoarding had been placed across the footpath as part of the site compound.

7. We discussed the issues with the owner of the site and discovered that he planned for a new building, similar in shape and size to be built on the end of the Fence Gate Lodge, but which would similarly affect the footpath. The advice which we gave and confirmed in writing was as follows:

“I understand that you have obtained planning permission for a structure at the side of the Bay Horse Inn which is described on the plans submitted as “New 2 metres high random stone wall to form compound”. This structure is proposed to be built on the line of the public footpath. Therefore, the planning permission is in conflict with the legislation which exists to protect public rights of way from obstruction. Where such a conflict exists the planning permission does not give you the necessary consent to carry out the required work. There is a statement to this effect in your planning permission. If you continue with building a new structure across a public footpath then, once any temporary closure notice ends, you would be at risk of prosecution for the offence of wilful obstruction of a public right of way.”

8. We invited the owner to make an application to divert the public footpath for it to take a new line to avoid the proposed building. An application was subsequently submitted for the Council to make a diversion order under Section 257 of the Town and Country Planning Act. Under this legislation the Council can divert a footpath where it is necessary for development which has been granted planning permission to be carried out. However, the Council may not make an order under this legislation if the proposed development has been substantially completed. The work on the Fence Gate Lodge, including the extension across the footpath has been completed and therefore there is no longer a legal basis on which we can make a diversion order under the Town and Country Planning Act.
9. The application to divert the footpath, in addition to avoiding the building is proposed to alter the point at which the footpath passes from the car park onto Barrowford Road (i.e. the Padiham Bypass). However, in May 2017 we started receiving reports that the existing line of the footpath had already been blocked off by a new hedge being planted. We discovered that not only had a hedge been planted but that a tarmac path leading from car park across the highway verge to the road had been removed. When we spoke to the owner about this he was not willing to reopen the footpath where the hedge had been planted across it.

DISCUSSION

10. Some initial work has been carried out on the diversion application (such as the preparation of the attached proposals map). However, in order to proceed the applicant would be required to re-submit an application for an Order to be made under the Highways Act 1980 which uses different criteria to those contained in the Town and Country Planning Act. If the application process continues after a decision has been taken on this report, then our normal informal consultation process with representatives of rights of way user groups and others would still need to take place. Should there be any objections then a further report would be submitted to this Committee, otherwise the matter would be referred to the Legal Manager for a decision to be made under delegated powers.
11. The two issues which need to be considered in the light of the Council's policy EP3 are firstly the building constructed across the footpath at point A, and secondly the hedge planted across the footpath at point B. At each of the two locations the Council needs to be satisfied that each of the three elements of policy EP3 are satisfied.

12. The building shown by a hatched outline at point A is a new building and we took the opportunity of to inform the owner before it was constructed to advise him that he did not have the consent necessary to build across the right of way. The building work subsequently carried out was undoubtedly deliberate and it undoubtedly affected the right of the public to use of the right of way (people cannot walk through stone walls). The building work was carried out in full knowledge that the right of way would be affected and therefore the conclusion which should be drawn is that this was a deliberate attempt by the current owner to interfere with the public's use of the route.
13. With regard to the second criteria it would clearly be difficult and inconvenient for the owner to remove the building but under the Council's policy all three criteria of EP3 must be satisfied. It would not be unreasonable to require the owner to arrange for the building's removal considering the willful act in building over the public right of way which has taken place.
14. In considering the hedge which has been planted across the footpath at point B there is little doubt that the removal of a section of tarmac path from the highway verge and planting a hedge were both deliberate acts. Furthermore we have raised the issue with the owner who stated that he had no intention of removing the planting from the existing footpath and was only willing to open a way through the hedge on the line of the proposed diversion. Our conclusion again is that this was a deliberate attempt to interfere with the rights of the public.
15. With respect to the second criteria of policy EP3 the section of hedge which affects the footpath could be easily removed and therefore this element of the policy is not satisfied.
16. The effect of the building and the hedge may be considered together with respect to the third criteria of policy EP3. The proposed diversion no longer satisfies the requirements of the Town and Country Planning Act, but subject to consulting on the proposed diversion the proposals would be likely to safely satisfy the criteria for making a diversion order under the Highways Act 1980.

CONCLUSION

17. The proposed diversion of footpath 38 would require the regularization of changes on the ground which have already taken place. This would appear to set a precedent that the Council is willing to acquiesce with interference with the rights of the public. The requirement that a right of way is kept open to the public whilst diversion proposals are considered is important, not only because it is unlawful to obstruct a right of way, but because it would ensure that the views of the public and statutory consultees are properly taken into consideration and do not have the appearance of having been prejudged before the changes on the ground take place.
18. There are some cases where the circumstances are such that we will divert a public right of way retrospectively but our policy is that all three elements of Policy EP3 must apply. This is not the case with footpath 38 and therefore our recommendation follows that the obstructions to footpath 38 should first be removed. This can be achieved by formally requiring the removal of the obstructions at Points A and B. In the event that the necessary work is not carried out then the Council can prosecute for the offence of obstructing the right of way. If the Court finds an offender guilty of an offence (or if the offender pleads guilty) then they may impose a fine, and in addition they may order the removal of the obstructions.
19. If the obstructions are removed, or if case is prosecuted in accordance with the Council's Enforcement Policy then whatever the outcome in the Magistrates Court the requirements of Policy EP3 will have been satisfied. At such time the application to divert the footpath would

no longer be being considered as an alternative to enforcement action even if the case has gone to court, even if the court decides not to order the removal of the obstructions.

ALTERNATIVE COURSE OF ACTION

20. If it is the view of the Committee there are reasons for departing from policy EP3 when all of the circumstances are taken into consideration then the reasons should be set out with the resolution. Therefore, if the Committee decide that the Council should proceed with the diversion application process the resolution should be “That work on an application to divert part of footpath 38 at Fence Gate Lodge be continued.”

IMPLICATIONS

Policy: The policy implications are set out in the body of the report.

Financial: None arises directly from this report.

Legal: The Council’s decision on whether to proceed with the process of diverting the footpath could be challenged in the High Court by the process of Judicial Review. Such challenges are very rare but a decision could be successfully challenged if the Council failed to follow its own policy without good reason.

Risk Management: None arises directly from this report

Health and Safety: None arises directly from this report.

Sustainability: None arises directly from this report.

Community Safety: None arises directly from this report.

Equality and Diversity: None arises directly from this report.

APPENDICES

Appendix 1 – Proposed Diversion of public footpath 38 Higham at The Bay Horse Inn, Fence.
Appendix 2 – Pendle Borough Council Public Rights of Way Enforcement Policy.

LIST OF BACKGROUND PAPERS