

REPORT FROM: ENVIRONMENTAL SERVICES MANAGER

TO: NELSON COMMITTEE

DATE: MONDAY 2ND DECEMBER 2019

Report Author: Tom Partridge
Tel. No: 01282 661059
E-mail: tom.partridge@pendle.gov.uk

**PROPOSED DIVERSION OF PARTS OF PUBLIC FOOTPATHS NELSON 55
AND 237 AT CATLOW COURT, SOUTHFIELD, NELSON**

PURPOSE OF REPORT

The Council has received an application to divert a public footpath. This report examines the issues and provides the necessary information for a decision on making a formal public path order to bring the proposals into effect.

RECOMMENDATIONS

- (1) That the Head of Legal Services be authorised to make a public path order under Section 119 of the Highways Act 1980 to divert public footpaths Nelson 55 and 237 as illustrated in the map included as Appendix 2 to this report.
- (2) If the order has been advertised and there are no duly made objections, or if any such objections received are subsequently withdrawn, that the Head of Legal Services may confirm the order as an unopposed order. (NB this is subject to the proviso that any consent required for the removal of the hedge between points D and C has been obtained.)
- (3) If the order has been advertised and there are outstanding objections that the order and any objections received are sent to the Planning Inspectorate who on behalf of the Secretary of State for the Department of Environment, Food and Rural Affairs shall appoint an independent inspector to determine the order. (NB this is subject to the same proviso given in (2) above.

REASONS FOR RECOMMENDATIONS

- (1) After careful consideration of all the circumstances of the proposed diversion it appears to be expedient in the interests of the owners of the land that the Council should make the order which has been applied for.
- (2) If there are no objections then the Council may confirm the order as an unopposed order without further approval by this committee.

- | | |
|-----|---|
| (3) | If any objections are received during the statutory 28 day notice period, and not subsequently withdrawn, then the Council does not have the legal powers necessary to confirm the order. An independent inspector would be responsible for deciding whether the order should be confirmed in accordance with the legislation and in the light of the objections. |
|-----|---|

ISSUE

1. The Council has certain powers contained in the Highways Act 1980 to make formal orders to divert public rights of way. These powers are discretionary but the Council frequently uses them to enable owners and land-managers make more effective use of their land, or in the interests of their privacy and security. Applicants pay a fee according the costs in staff time and reimburse any other expenses which the Council incurs.
2. The legislation includes a number of safeguards to ensure that when the Council uses these powers that this does not make the new right of way significantly less convenient for the public. There are similar safeguards to protect anyone who has a formal interest in the land affected – for example if part of the existing right of way or the new right of way is owned by someone else.
3. The legal process operates in two parts the first of which is for the Council to make what is known as a public path order. Notices of making the order have to be advertised in the press, by site notices, by notices sent to a range of statutory consultees and by personal notices to everyone with a legal interest in the land. Only after a 28 day notice period may the second part of the process, the confirmation of the order, take place. The second part of the process is primarily concerned with the legal safeguards to the public and anyone with a legal interest in the land.
4. An order can only be confirmed by the Council if there have been no objections, or if any which were made are subsequently withdrawn. Otherwise the decision making powers pass to Secretary of State for the Department of Environment, Food and Rural Affairs. In practical terms this means an independent inspector appointed by the Planning Inspectorate.
5. There are two objections referred to in this report but these have been received during an informal process of consulting people who may potentially have an interest. Objections made at this stage do not affect the legal discretionary powers which the Council has to make an order, but they may influence a decision on whether the Council wishes to use these powers.

Public footpaths 55 and 237

6. Public footpaths 55 and 237 run as a single public footpath from a junction formed with four other footpaths at its western end and at Southfield Lane in the hamlet of Catlow at its eastern end. The location can be seen on the map at Appendix 1. The footpath primarily runs across farmer's fields used for grazing and silage, and these days the main use of the footpath is for informal recreation. It can be seen that the footpath is well connected with a wide network of public rights of way.
7. The reason why the path has two reference numbers is that the section at the eastern end of the path, where it passes through the hamlet of Catlow, was not originally shown on the Definitive Map for Lancashire. This section of footpath has now been added to the Definitive

Map and has been given the number 237. This was given effect by a Definitive Map Modification Order made by Lancashire County Council in 2001.

The proposed diversion

8. The proposals map can be seen in Appendix 2. It is proposed that the existing footpath shown as a bold black line A – B – C is diverted to the line shown as bold dashes marked A – D – C. This is illustrated by a separate 7 page document with photographs showing the existing footpath and the proposed diversion.
9. There are two sets of landowners whose land is crossed by the existing footpath. The first owns all of the land crossed by footpath 55 (A-B) and 1-2 metres in length of the land crossed by footpath 237 (B-C). The second owners own the remainder of footpath 237 (B-C).
10. With respect to the proposed diversion the same owners of the land crossed by footpath 55 (A-B) own the length A-D. And the owners of the land B-C also own the land C-D. One of the owners of the land B-C and C-D has applied for this diversion.
11. If the Council makes the order and there are no objections we will ask the applicant to carry out various works to bring the site of the new footpath into a fit condition for public use. If there are objections then we would only ask for these works to be carried out if the order is subsequently confirmed, the order would then come into effect when it has been certified that the works required have been completed to the satisfaction of the highway authority (Lancashire County Council).
12. The proposed works, which mainly relate to the section of path C-D, are:
 - a. Waymarking to be installed (by the Council) at Points A, D and C.
 - b. A section of a dry stone wall at point D to be removed.
 - c. The existing steps at point C to be retained.
 - d. A handrail to be installed alongside the steps at point C.
 - e. The existing fencing, electric cables and light fittings which are currently within the line of the proposed diversion to be removed.
 - f. The existing hedge within the line of the proposed diversion to be removed including the stumps.
 - g. The ground levels nearest the existing wall between points C and D will be reduced slightly in order that the 2m wide strip of land for the new path is level.
 - h. The section of new path between points C and D to be constructed with crushed stone or suitable reclaimed materials.
13. The proposed order would include a limitation on the right of way, namely the right of the owners to maintain a gate across the footpath at point D.

Background information

14. Prior to receiving an application to divert the footpath we discovered that a section of public footpath 55 nearest to point B on the proposals map had been obstructed by the garden boundary belonging to the owners of the adjoining property. We initially asked the owners to remove the obstructions (which include a gate, fencing and garden features), but owing to a number of factors we agreed that this could be left unresolved pending the outcome of a diversion application. These factors were: the impact which removing the obstructions would have had on the privacy and security of the residents, the removal of garden planting which they wished to retain, the owners were previously unaware of the issue, we were told that the fencing and so forth was installed by a previous owner, and the presence of a clear route nearby which people could use as an alternative to walk around the garden boundary.
15. Footpath 237 is fenced on either side between points B and C and this divides the land held with 2 Catlow Court. In order to get from the east part of the garden to the west the residents must negotiate 2 gates. The proposed diversion would move the footpath to the northern edge of the land (on the line D-C) and this would mean the owners could maintain as a single plot the land which is crossed by the footpath.

Informal consultation

16. Prior to preparing this report we contacted a number of organizations and individuals on an informal basis who may have had an interest in these proposals. This included neighbouring properties, local councilors and councils, representatives of footpath user groups, public utility companies and anyone else who appeared to us to have an interest.
17. A representative of the Peak and Northern Footpath Society visited the site and reported some concerns of a local resident who later responded separately to our consultation (see paragraph 18). But from the point of view of her organization the representative had no objections.
18. The local resident referred to above and one of his neighbours, both with houses on Catlow Row, expressed concerns relating to getting access to a septic tank which is shared by a number of properties. The septic tank, which can be seen by a number of flagstones on the surface, is located on the land held with 2 Catlow Court, just west of footpath 237. The Council's countryside access officer visited the site and met the residents but it does not appear that the existing footpath gives access to the septic tank. From the documents seen it appears that the residents have private access rights for the specific purpose of accessing and maintaining the septic tank. This does not appear to have any bearing on the proposal to divert the footpath.
19. We received a number of responses from public utility companies giving details of any assets which they own in the area, but none of these have objected to the proposals.

Objections to the proposed diversion

20. We received objections from two local residents. The grounds for objection given include:

- a. The proposals would move the footpath closer to the properties on Catlow Row resulting in a loss of privacy for the residents of these properties,
- b. changes in the historic route of the footpath within a conservation area and within close proximity to curtilage of listed buildings without listed building consent or planning permission,
- c. unauthorized removal of a hedge within a conservation area,
- d. removal of historic stone walls
- e. no wider benefit apart from to the people who own the land crossed by the existing path and the proposed diversion.
- f. the proposal seeks to avoid the need for the owner of the garden boundary which blocks footpath 55 to remove the unlawful obstructions. Approving the application may appear to reward law breaking,
- g. the footpath may have been moved illegally so it would be a shame to move it again,
- h. the applicant should have known about the footpath when he bought the property.
- i. when the applicant previously objected to a planning application within the Catlow hamlet he expressed views concerning the conservation of locally historic features which appear to be contradicted by this application to divert the footpath.

Consideration of the application against the Council's assessment criteria

Criterion 1 – does the application satisfy the legal tests?

21. The relevant legislation is section 119 of the Highways Act 1980. Under Section 119 the Council may make an order to divert a footpath if it is expedient to do so in the interests of the owner of the land. The proposal appears to be in the interests of both sets of owners for the reasons explained in paragraphs 14-15. Members need to consider if it is expedient in the interests of the owners of the land to make the order after considering all of the information in this report and any other matters which seem to them to be relevant.
22. A diversion order may not alter the termination point of a footpath where it terminates at a highway, unless it connects to another point on the same highway or a highway connected to that highway. In this case the proposal does not alter the termination point of the footpath so this needs no further consideration. Please note that in this paragraph we have used the word "highway" in a legal sense to describe any road, footpath, bridleway or byway.

Criterion 2 – directness

23. The criterion requires that the proposed new route should not unreasonably lengthen the path nor introduce "dog legs". The proposed diversion follows a slightly more direct route than the existing footpath and therefore we can be satisfied that this requirement is met.

Criterion 3 – width

24. The criterion requires a minimum width of 2m wide for a footpath. This is the proposed width of the proposed diversion.

Criterion 4 – landscape character

25. The criterion is that the proposed diversion should not result in any lower quality or diversity of views for the path users. The proposed diversion runs reasonably close to the line of the existing footpath and as a result the views which can be seen from the new route are largely similar to those which can be seen from the existing route.

Criterion 5 – features of interest

26. Other than in exceptional circumstances our requirement is that the proposed new route should not remove paths from significant features of interest, natural or manmade. Until the late 1990s the whole of the affected section of footpath 55 was surfaced with traditional flagstones laid end to end. Unfortunately these were removed unlawfully and this feature of historic interest was lost. With that surface having been removed there does not appear to be any disadvantage of the proposed diversion under this heading. Views of the historic buildings of Catlow can be enjoyed from the route of the proposed diversion in much the same way as they can be enjoyed from the existing path.

Criterion 6 – status

27. The proposal meets this criterion because there will be no downgrading of status from public footpath.

Criterion 7 – financial

28. The criterion is that the proposal should not result in a significant maintenance cost to the tax payer. The proposed works listed in paragraph 11 will ensure that the new path will be constructed to a high standard and therefore any future maintenance requirements should be very limited for many years to come.

Criterion 8 – safety

29. We require that any proposed new route should not subject users to any significant risk from potential hazards. It should not introduce conditions (e.g. darkness, narrowness, poor visibility, hiding places) likely to encourage antisocial or criminal behaviour against users, nor should it create a perception that this may be the case. In the case of these proposals the layout of the proposed diversion does not appear to present any risks in this respect.

Criterion 9 – disabled access

30. Wherever possible we ask that proposed new routes should provide for the least restrictive access along the path to assist the needs of mobility impaired users. For example gaps and gates rather than stiles, ramps rather than steps. In this case the proposed diversion starts from the bottom of a flight of steps at point C on the unaffected part of the existing footpath. The diverted path itself will be on a level surface which will be constructed between points C and D and then a grass surface as far as point A. The only structure which may limit disabled access is the proposed gate at point D. The proposed order would specify the minimum standard which the gate is required to be maintained to, and these requirements would make the gate easily accessible to people with disabilities.

Discussion and comments on the objections received

31. The proposed diversion appears to satisfy our assessment criteria. However, it needs to be kept in mind that unlike an application for planning permission the power to make diversion orders is discretionary. The Council is not under any obligation to make an order simply because these criteria have been satisfied and there is no appeal process for the applicants, other than by the process of judicial review which is open to anyone who wishes to challenge a decision taken by the Council. The Council is therefore encouraged to consider all of the factors which appear to be relevant.
32. Both objections refer to a loss of privacy for the residents of Catlow Row, although only one of the objectors is a resident. The proposed diversion would bring the footpath as a whole closer to Catlow Row. People walking east from point A to D would be facing the rear of the houses, and between point D and C the path lies immediately adjacent to the land at the rear of the houses. Along the line D-C the land lies at a level approximately 0.5 metres below the adjoining land and this in itself may restrict the views towards Catlow Row to some extent. The photographs in the accompanying report were all taken at eye level, and these show the extent to which Catlow Row can be seen from the route of the proposed diversion (see Photographs document, pages 6 – 7). The existing hedge would be removed and the likely effect of this also needs to be taken into account when considering any impact on a loss of privacy.
33. Objections about an impact on privacy have not been received from five of the six dwellings we consulted and the residents closest to the footpath who contacted us in relation to the septic tank did not object on these grounds. Arguably, no part of the proposed diversion has as much impact on the privacy of the residents as the unaffected part of footpath 237 at point C, where footpath users currently use the steps up to the same level as the houses. The removal of the hedge will improve the view of the surrounding countryside which some residents may consider to be an advantage.
34. The objectors say that the proposed diversion would have a negative impact on an old footpath within a conservation area and by being in close proximity to a listed building. The conservation area is highlighted in pink on the location map (Appendix 1), and the listed buildings, Catlow Farmhouse, Catlow Hall Farm and Catlow House are named on the proposals map (Appendix 2). Many of Pendle's public rights of way have been on a line they took a hundred or more years ago but we often make use of the powers provided by the legislation to allow changes to these rights of way as outlined in paragraphs 1 – 4. We do not have a policy which differentiates between diversion applications according to whether the site lies within a conservation area or close to a listed building, but in making its decision the Council can recognise a balance between the interests of the owners of land who wish to divert a footpath, and the wishes as expressed by the objectors that that the footpath should remain on the line on which it has historically run.
35. We contacted the Council's Conservation Officer who considered the proposals and advised us that listed buildings consent is not required.

36. One of the grounds of objection is that there is no wider benefit to the public. We recognise that this is the case to some extent, but a lack of any wider benefit as perceived by the objectors should not be a reason to refuse an application. The legislation provides for councils to make orders to divert public rights of way in the interests of private individuals who pay the costs of the process. And the income generated goes a small way towards helping the Council meet the cost of employing the staff who maintain the wider rights of way network. Through the decision making and legal processes we aim to safeguard the rights of the public so that a diverted footpath is not made substantially less convenient for people. Through the process we are able to define the width of the new path, minimum standards for the proposed gate and specify the works along the new route which in many respects will raise the standard of the new footpath compared to the old.
37. Planning permission is not required for the removal of a section of drystone wall at point D. This section of wall is less than 20 years old.
38. Following the objections received the applicant has applied for the necessary consent to remove the length of hedge between points C and D because of the location of the site within a conservation area. This may have been determined in advance of the date of this report in which case this will be reported verbally at the meeting. This does not prevent a decision on this report being made, but officers for the Council would not confirm an order as an unopposed order nor refer an order to the Secretary of State for confirmation until the necessary consent for the removal of the hedge has been obtained.
39. We also need to consider the suggestion that this proposal would seem to reward law breaking due to the unlawful obstruction of part of footpath 55 (see paragraph 14). The circumstances of this application are addressed to some extent by the Council's public rights of way enforcement policy. This states that in order to avoid appearing to condone the unlawful obstruction of a public right of way the making of PPO's (public path orders) to deal with such issues would only be acceptable in certain limited circumstances. These are:
- a. The obstruction or obstructions do not appear to have resulted from an action or actions by the current owner or occupier.
 - b. The obstruction or obstructions are of a scale and nature such that there is no prospect that the person responsible could reasonably be expected to make arrangements for it or them to be removed.
 - c. The proposed PPO will safely fulfil the requirements of the relevant PPO legislation.
40. Arguably the present owners could reasonably be expected to carry out the work necessary to remove any obstructions so that the existing footpath is reopened for public use. If the committee decides that the Council should take this approach then this should be included in the minutes of the meeting. However, this application has been made by an applicant on whose land there are no obstructions to the right of way and therefore this application which is in his interests should be considered on its own merits and not made subject to matters over which he has no control.

IMPLICATIONS

Policy:

41. If the Council decided to refuse the application and one of the grounds for refusal was the historical setting and location within a conservation area then this may be seen as being inconsistent compared to other decisions taken in similar circumstances. The Council should seek to make similar decisions in similar circumstances and therefore this may have implications for the assessment criteria we currently use.

Financial:

42. There are no financial implications arising from the recommendation within this report. The cost of changing the footpath falls to the applicant. As per paragraph 28, there will be no additional ongoing maintenance costs for the Council. It is reasonable to anticipate that objections may be received if the Council makes the order that has been applied for. When an order is referred to the Planning Inspectorate we are not entitled to recover the costs in staff time associated with preparing the necessary documents or in attending a hearing or inquiry. The work involved can take many hours of staff time, however, it will be accommodated within day to day business duties and therefore will not result in any additional cost. All other costs associated with the application will be recovered from the applicant.

Legal:

43. If there are no objections then the Council would need to consider the legal tests for confirming the order which are set out in the legislation. These tests are largely duplicated by the Council's assessment criteria which have been set out in this report. In the event of there being no duly made objections, or if any objections made are subsequently withdrawn then the Head of Legal Services would be asked to decide the confirmation of the order after considering an internal report which would be drafted for his benefit under powers which have been delegated to him. Otherwise the confirmation

Risk Management:

44. No implications in this respect have been identified.

Health and Safety:

45. The safety implications of the proposal are considered in paragraph 29.

Sustainability:

46. The proposals will require the removal of a mature leylandi hedge. The construction of the new path between points C-D does not specify whether materials must be brought in from sustainable sources. A decision to make and subsequently refer an order to the Secretary of State would inevitably result in a number of trips to the site by car by Council officers and others.

Community Safety:

47. No implications in this respect have been identified.

Equality and Diversity:

48. The unaffected parts of footpaths 55 and 237 would not be easily accessible to people with disabilities because of an existing stile at point A and steps at point C. However, the proposed diversion will not make this footpath any worse owing to the proposed order specifying a gate as considered by paragraph 30. We are not aware of any other implications under this heading.

CONCLUSIONS

49. The proposed diversion represents a minor change to the line of a public footpath within an area which is well served by public rights of way. The new footpath will be slightly more direct with few disadvantages and therefore the assessment of the proposal against our criteria points towards this being an application which the Council should approve. In the view of the author the issue on which the committee should focus most attention is whether diverting the footpath would have a significant negative impact on the privacy of the residents of the 6 houses on Catlow Row. We wrote to all 6 houses and one of these responded with an objection which included the potential loss of privacy as one of several grounds of objection. We spoke to two other residents whose concerns over access to a septic tank have been allayed, but who had no other objection to their neighbour's proposal to divert the footpath. The land at the rear of Catlow Row appears to be used primarily for car parking and has the appearance of a more communal area rather than an area which would ordinarily be considered as private, besides which part of the unaffected footpath already passes through this area. If this proposal made the impact on the privacy of residents a contentious issue then we would have expected a greater response from the residents who are said to be affected. The response was in fact comparatively muted and therefore we believe that this is not reason not to make the order applied for which has clear benefits for the applicant and the owner of the adjoining land.

APPENDICES

1. Location Map (scale 1:10,000)
2. Proposals Map (scale 1:1250)

LIST OF BACKGROUND PAPERS

1. Photographs