

**REPORT FROM: ENVIRONMENTAL SERVICES**

**TO: WEST CRAVEN COMMITTEE**

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**PROPOSED STOPPING UP OF THE PUBLIC FOOTPATH FROM BAWHEAD ROAD TO BAILEY STREET AND THE PROPOSED STOPPING UP OF PART OF FOOTPATH 16 EARBY**

**PURPOSE OF REPORT**

The Council has received an application to make an order to stop up (i.e. to permanently close) two public footpaths in connection with the planning application for 12 dwellings on Bailey Street. The Council is asked to make a decision on the proposed stopping up of the footpaths. This report sets out the issues so that the relevant matters can be taken into consideration.

**RECOMMENDATIONS**

- (1) That the Head of Legal Services be authorised to make an order under Section 257 of the Town and Country Planning Act 1990 to stop up the public footpath from Bawhead Road to Bailey Street (A-B) and part of footpath 16 Earby (A-C).
- (2) If an order is made, planning permission is granted and no objections are received after making the order, or if any objections made are subsequently withdrawn, that the Head of Legal Services be authorised to confirm the order under Section 259 of the Town and Country Planning Act 1990 as an unopposed order.
- (3) If an order is made, planning permission is granted and one or more objections are duly made and remain outstanding, that the Head of Legal Services be authorised to send the order to the Secretary of State of the Department for Environment Food and Rural Affairs to be determined.
- (4) If the committee is minded that the Council should not make a stopping up order then it should indicate if it would be willing to consider a diversion application.
- (5) If the committee decide not to make a stopping up order and are not willing to consider a diversion proposal then the report should be referred to the Council's Policy and Resources committee, together with this committee's reasons and any recommendations.

**REASON FOR RECOMMENDATIONS**

- (1) To enable the Council to make an order necessary for the development in planning application 19/0620/FUL to be carried out.

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| (2) | To allow that order to be confirmed in the event of no objections.  |
| (3) | To allow the order to be confirmed if there are objections  |
| (4) | So that officers may consult the applicant on applying for a diversion, and the residents who may be affected by this and bring a new report to committee with proposals for a diversion order made under the same legislation. |
| (5) | This recommendation is made due to the serious policy implications for the Council of a decision which would seemingly make it impossible to carry out the development, should planning permission be granted.                  |

## **Issue**

1. An application has been made for planning permission to erect 12 semi-detached dwellings and associated hard-standing and landscaping at Bailey Street, Earby (planning reference 19/0620/FUL). The proposed layout of the new development is included as Appendix 1 to this report.
2. The site in question is crossed by two public footpaths which are shown by a map included as Appendix 2. The footpath from Bawhead Road to Bailey Street is a well-used footpath which is shown on the map running from point A to B, which is referred to in this report as public footpath A-B. The effect of the proposed development would be for the semi-detached houses with plot numbers 1 – 4 and associated hard-standing and landscaping being constructed over the line of this path.
3. Part of public footpath 16 is also affected by this planning application. The section of footpath from point A to C would be extinguished to allow the rear gardens of the proposed dwellings to extend to the rear gardens of Wentcliffe Drive.
4. Once a planning application has been received the Council may make an order under Section 257 of the Town and Country Planning Act 1990 authorising the stopping up or diversion of any footpath if it is satisfied that this is necessary in order that the development may be carried out if planning permission is granted. Whilst the Council may make an order before a planning application has been decided, such an order can only be confirmed if planning permission is granted.
5. The application to stop up the footpaths has been received from PEARL Together Limited.
6. The impact of a development on a public footpath is a material consideration for the decision on the planning application. It is clear that these footpaths would be seriously impacted by the proposed development. The decision about whether to grant planning permission will no doubt consider all relevant factors, planning policy and so forth, including the impact on these footpaths. Therefore the arguments for granting planning permission or otherwise should not be taken into account or revisited in considering whether to make an order under Section 257 of the Town and Country Planning Act.

## **Informal consultation on the proposals**

7. We wrote to the local ward councillors, representatives of footpath user groups, the occupiers of the land crossed by the footpaths, neighbouring properties, the parish council, the county council and statutory utility companies. There have been eight written objections which have been received. These were from Earby Town Council, local residents, the ward councillors who submitted comments made jointly and the Peak and Northern Footpaths Society.
8. The grounds of objection are:
  - a. The footpath is regularly used by dog walkers, children going to school, people going to work and so forth.

- b. It is presumptuous for the Council to consider the closure of the footpath before the planning application has been decided.
- c. The Council's countryside access officer commented on the planning application that plots 1-4 should not be developed because of the footpath.
- d. The existing footpath (A-B) is a safe route for children to be able to avoid traffic on part of their route to school and this helps young children to gain some independence by walking ahead within a traffic free environment.
- e. If the development goes ahead it will be a long time before the closure of the path will be necessary.
- f. The footpath is a short cut for pedestrians. The other existing footpaths which would remain would result in a longer route.
- g. The proposals would take away direct access from the rear of Wentcliffe Drive to footpath 16 (A-C) leading to significant additional distance for children of the affected properties getting to school.
- h. Earby Parish Council objects on the grounds that the footpath has been in use for over 50 years, the footpath is used by children going to and from school and is a useful resource in maintaining the children's lifestyle and health. Closing the footpath would result in a longer journey to school and the need to cross roads. The suggested alternative would cause conflict between cyclists and pedestrians.
- i. The Earby ward councillors objected because the paths are regularly used by children going to school and have been for over 50 years. They are a safe way to get to school and the councillors insist that they are left open.
- j. The Peak and Northern Footpath Society (PNFS) would object to the proposed order on the grounds that the public interest would be harmed, and that the alternative to use the footway along Bailey Street is not considered adequate compensation for the loss of Earby 16 (part) and the unrecorded path. The benefits of these paths are self-evident. They are well used and benefit the local community by providing a valuable route used by school children and families alike. PNFS is of the view that if these paths are stopped up it will be a dis-benefit to the public.

### **Comments on the objections**

- 9. The comments highlight that there is widespread opposition to the proposed stopping up of the footpaths. The comments would perhaps be of more relevance if they had been made in connection with the planning application, but the proposal to make an order under Section 257 of the Town and Country Planning Act does not include the scope to consider or re-consider the merits of the planning application as referred to in paragraph 6 above.
- 10. It is clear that the majority of the comments relate to the footpath A – B and that this is a popular path used primarily by local people going about their day to day activities. The path is a shorter route than other available footpaths but it is clear that it is also valued as a traffic-free route, particularly due to its proximity to Springfield Primary School.
- 11. None of the comments received have suggested that the path should be diverted rather than stopped up. This may indicate that even if there was a way of diverting the footpath this would be unlikely to satisfy these objections, although a diversion would have the effect of retaining a traffic free route which may be attractive to parents and their children.
- 12. We received one comment relating specifically to footpath 16 on the line A-C. This was from a resident who had access to the footpath directly from their rear garden. There is no doubt that residents who back onto footpath 16 have the right to step from their land onto the footpath. But footpath 16 only provides access between Bawhead Road and the rear of

these properties. There is no indication that any other use, i.e. for the residents of Wentcliffe Drive to walk straight from their back gates to a point Bailey Street, could be regarded as use of a public right of way. The residents may argue that they have established private rights of access to do this but private rights are not under consideration in this report.

13. In fact, only one of the properties on Wentcliffe Drive has a means of access, in this case a gate, onto footpath 16. The other properties are separated from the footpath by a wall.

### **The legal criteria**

14. The relevant part of Section 257 of the Town and Country Planning Act 1990 for the purpose of this report is that:

*“a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway if they are satisfied that an application for planning permission in respect of development has been made, ...and if the application were granted it would be necessary to authorise the stopping up or diversion in order to enable the development to be carried out.”*

15. Section 259 of the Act reads that:

*“An order under Section 257...may not be confirmed unless the Secretary of State or (as the case may be) the authority is satisfied that planning permission in respect of the development has been granted, and it is necessary to authorise the stopping up or diversion in order to enable the development to be carried out in accordance with the permission.”*

### **Possible courses of action**

16. The application is to stop-up the footpaths but the Council could decide that the footpaths do not need stopping up if they could instead be diverted. The planning application does not show any options for diverting the footpaths. But if the Council decided not to make the stopping up order which has been applied for then the development could be carried out if a diversion order to divert footpath A-B was made instead. There is only limited scope for a diversion but it seems possible that with some modifications to the layout proposals, the development could still go ahead without any reduction in the number of dwellings if the footpath was diverted.

### **Guidance from the Department for Environment, Food and Rural Affairs**

17. The guidance from Defra<sup>1</sup> is that the local planning authority should not question the merits of planning permission when deciding to make an order, but nor should it make an order purely on the grounds that planning permission has been granted. Planning permission does not mean the right of way will be automatically stopped up or diverted. However, having granted planning permission the local authority must have good reasons to justify a decision not to make an order. The disadvantages or loss likely to arise from the stopping up or diversion need to be weighed against the advantages of the proposed order.

### **Discussion on the stopping up of footpath A-B**

18. The following discussion adopts the Defra guidance on weighing up the disadvantages of the proposed order compared to the advantages and relates primarily to the footpath A-B.
19. If planning permission is granted then even with slight modifications to the layout it is difficult to see how the main disadvantage of the route being a popular short cut could be overcome. But the proposed order also represents the loss of a route through an area of green space. Apart from the convenience of the path it is valued because it is traffic-free and this is especially important for children who may come this way on foot from some

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<sup>1</sup> contained in Rights of Way Circular (1/09)

distance on their journey to school. Being away from traffic encourages play and the loss of a traffic free path is a disadvantage in its own right apart from the loss of convenience. This is a disadvantage of the route being stopped up rather than diverted.

20. There are very few options which would make it be feasible to divert the footpath in a way which could accommodate the proposed development without reducing the number of dwellings. The most likely of these options would be to divert the footpath to the southern edge of the development site so that it runs over or adjacent to the line of an existing culvert. If the footpath was diverted a green corridor with public access would be created, albeit a green corridor of limited width. Thus local people would continue to have a short-cut, although a much less advantageous one being only 9 metres shorter compared to taking the footway on Aspen Grove and Bailey Street, and children and others could continue to enjoy a traffic free route.
21. The advantage of the proposed order is based on the argument that it would be preferable not to have the path at all because any diversion which accommodates the development would have little benefit to the local community as a whole.
22. Many people would find a path diverted to the edge of the site much less attractive because of the loss of openness and the introduction of a dog-leg on the route, i.e. a sharp bend which prevents a view along the length of the path and which could become a hiding place for an attack, although this could be overcome to some extent with street lighting. In addition, people may no longer find the path, as diverted, as being a useful short cut, being only 9 metres shorter than the existing alternatives.
23. If diverted then the use of the path may diminish for these reasons. This could create its own problems, it is not unreasonable to anticipate that the path could become a gathering point for people engaging in antisocial behaviour to the detriment of residents on all sides of the footpath.

#### **Some background information on part of footpath 16 Earby A-C**

24. This section of public footpath 16 has been something of an enigma for many years, and well before the current development proposals. This section of footpath was shown as it is currently on the definitive map prepared by the former West Riding Council. The map has a relevant date in 1952 but did not become the definitive map for West Riding Council until 1973. It is now on the definitive map for Lancashire. Footpath 16 is shown stopping at point C with no onward connection to any other footpath or road. Similarly, public footpath 16 resumes from a point west of Wentcliffe Drive which is unconnected to any other road or footpath. In the definitive statement (the document which carries a description of each path and which when considered with the definitive map gives conclusive evidence in law of a right of way) the description of public footpath 16 can be read as if it is a single continuous footpath.
25. Where there are anomalies of this nature there is likely to be an explanation. One possible explanation is a drafting error in the definitive map if it does not show accurately the rights of way which in fact existed at the relevant date. Another possible explanation is that part of footpath 16 was stopped up or diverted to allow construction of Wentcliffe Drive, but a second order was never made and confirmed to connect the remaining ends of footpath 16 back onto Wentcliffe Drive when construction finished. Or perhaps an order was made and confirmed but a separate "legal event" order has never been made to update the definitive map accordingly.
26. These matters could only be resolved if detailed research into the history of the footpath succeeded in finding documentation which supported any one of these suppositions.
27. If there is any evidence that the definitive map does not correctly show the rights of way which currently exist, then if this was brought to the attention of Lancashire County Council

by an application made in the prescribed manner and LCC considers that on the balance of probabilities that the current map should be modified accordingly, then it may make a definitive map modification order to update the definitive map, which could itself be challenged if the evidence or conclusions from that evidence were contested.

28. If there is evidence of a linking path between point C and Wentcliffe Drive and the definitive map is subsequently amended to this effect, then the proposed stopping up order for footpath A-C considered by this report would mean that this section of footpath 16 would no longer exist. Therefore any linking path opened up between point C and Wentcliffe Drive would be a further dead-end footpath if the Council makes this order. We therefore need to have some regard to whether the proposed stopping up order may compromise a public right of way which should be, but isn't currently shown on the definitive map.
29. Under current legislation<sup>2</sup> any rights of way which existed in 1949 but which have not been recorded on the Definitive Map since then will, with some exceptions contained in the legislation, be automatically extinguished on 1<sup>st</sup> January 2026. Until then there will not be certainty over unexplained anomalies such as dead-end sections of footpath 16.

### **Discussion on the stopping up of part of footpath 16 Earby A-C**

30. It seems unlikely that footpath 16 between points A and C is used apart from the residents of one property. Part of the route is unavailable for public use due to the garden boundaries of 59 Wentcliffe Drive and fencing erected in the land adjacent to 54 Aspen Grove. But even if these garden boundaries were removed to the extent necessary for the recorded route to be free of obstruction then the level of use would of this path would still be minimal.
31. Therefore, the disadvantages of making an order to stop-up the footpath are that a small number of residents would no longer have the right to step from their back garden onto the footpath to walk to Bawhead Road at point A.
32. The Council could consider the implications of compromising an as yet unrecorded right of way as explained in paragraphs 24 to 29 as a disadvantage, but without evidence that a right of way not on shown on the definitive map exists this would be a very difficult argument to sustain if the Council's decision were challenged. Indeed, the Council may consider that any rights of way across Wentcliffe Drive are best left undiscovered until they are automatically extinguished in 2026 because of the disruption their discovery may cause to a number of residents who own then land of the linking paths from Wentcliffe Drive.
33. These limited disadvantages must be balanced against the advantage for the residents in the new properties created by the development who would feel more secure in their homes by their not having public access to the rear, and who would be able enjoy a slightly larger gardens if the stopping up order goes ahead. Similarly, if the development goes ahead then the advantage for the residents on Wentcliffe Drive of the footpath being stopped up would be greater security by not having public access to the rear of their properties. There would also be a substantial advantage for the owners of the land adjacent to 54 Aspen Grove who would be able to use the land far more effectively without a busy public footpath running through it. And sope advantage for the owner of 59 Wentcliffe Drive who may find that having a footpath shown on the definitive map running through the garden causes difficulties if they try to sell their property, for example if the issue was raised by a prospective purchaser following a local authority search.

## **IMPLICATIONS**

### **Policy**

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<sup>2</sup> Countryside and Rights of Way Act 2000 Section 53

34. If the Committee decide not to make the stopping-up order for footpath A-B as applied for and planning permission is granted, then this would not prevent the development of plots 1 – 4 of the proposed development being carried out. If this occurs we would expect to invite the applicant to apply to divert the footpath so that the site can be developed if the committee decided that this was the more appropriate than the course of action recommended. However, if the Council through its decisions sought to prevent a development which had been granted planning permission then a decision to this effect could be challenged by judicial review.

### **Financial**

35. There are no financial implications arising from the recommendations within this report. The cost of stopping-up the footpath falls to the applicant. 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 Secretary of State 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**

36. The Council's decision needs to conform to Sections 257 and 259 of the Town and Country Planning Act 1990 which this report gives advice on. The power to make an order under this legislation is discretionary but if the Council were minded not to make an order it would need to give careful thought to its reasons in case its decision were subsequently challenged.

### **Risk Management**

37. There is a risk that the right of way may be closed to the public and built on before the order making process has been completed. It is important therefore that the footpaths are kept open and unobstructed until the statutory process authorising the closure has been completed. It needs to be made clear to the developer that even if planning permission is granted and the Council makes a stopping up order it may not under any circumstances commence building houses and other structures over either footpath which are intended to be permanent until the order has been confirmed.

38. There is also a risk that as a result of this process and footpath being stopped up, then due to factors over which we have no control the development may not go ahead. For example, if an order was made and planning permission was granted and a stopping up order is subsequently confirmed. If the land owner decided not to develop the land then we would have lost a footpath which would otherwise have been protected. In these circumstances the Council could take action to revoke the order.

### **Health and Safety**

39. None arising directly from this report.

### **Sustainability**

40. The proposal would result in the loss of green space with public access.

### **Community Safety**

41. The effect of stopping up the footpath for community safety is likely to be beneficial if the development goes ahead, compared diverting the footpath which could have the unintended consequences of creating an environment which is more conducive to crime and antisocial behaviour.

### **Equality and Diversity**

42. None arising directly from this report.

## **CONCLUSIONS**

43. If planning permission is granted the Council does have discretion to decide not to make the stopping up order applied for. Or to decide to make a stopping up order only for one of the footpaths which this report refers to.
44. If the Council decided that the stopping up order should apply only to footpath A-B then in order for footpath 16 (A-C) to be retained the proposed development could go ahead with only minor modifications to the layout of the proposed rear gardens.
45. However, if the Council decided not to make a stopping up order, then it would need to give the applicant the opportunity to request that the footpath be diverted. Otherwise, if the Council granted planning permission would find itself in a difficult position that on the one hand it had decided to grant planning permission which affects a public footpath, but on the other hand it had decided not to make an order which would enable that planning permission to be implemented.
46. The recommendation of this report is that the Council makes the stopping up order which has been applied because this appears to be a better solution than diverting the footpath. If the footpath were to be diverted to the southern edge of the development then the effect of the proposals would so harm the character and convenience of the footpath compared to what currently exists that it is highly questionable whether a diverted footpath would be worthwhile. The recommendation in this report is that the Council should approve the stopping order because the existing footways on Aspen Grove and Bailey Street would serve largely the same purpose as any diversion which could be proposed, but without the possibility of a diverted footpath falling into misuse for the purposes of crime and antisocial behaviour to the detriment of users and the surrounding properties.
47. The report also recommends that the stopping up order encompasses footpath 16 A-C. With the footpath being a dead-end route it could only serve any useful purpose to 6 properties on Wentcliffe Drive and 8 of the proposed new dwellings. Only one of the properties on Wentcliffe Drive currently has a means of access onto the footpath and on balance it is suggested that the interests of current and future residents are best served by the footpath being closed to prevent public access to the rear of their properties. The footpath does not serve any need to the wider public, but if it was left open it would most likely fall into disrepair and could be used as a site for the disposal of garden and other waste. It seems likely that the land could be far better used if it was not a footpath and we therefore conclude that the advantages of the proposed order outweigh the disadvantages.

## **APPENDICES**

Appendix 1: Proposed development layout plan.

Appendix 2: Proposals map.

Appendix 3: Photographs

## **LIST OF BACKGROUND PAPERS**

None.