

REPORT FROM: ASSISTANT DIRECTOR OPERATIONAL SERVICES

TO: WEST CRAVEN COMMITTEE

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**PROPOSED DIVERSION OF PUBLIC FOOTPATH 57 AT RAIKES HILL,
BARNOLDSWICK**

PURPOSE OF REPORT

This report is intended to provide relevant information for the Committee to review a resolution made at its 28th March meeting. It sets out two options for a decision on the proposed diversion of public footpath 57.

RECOMMENDATIONS

- (1) That the diversion order as made is sent to the Secretary of State for Environment, Food and Rural Affairs to be determined.

REASONS FOR RECOMMENDATIONS

- (1) The diversion order as made safely satisfies the legislative criteria, and therefore the risk is low that the independent inspector appointed to determine the order would decide not to confirm the order.

ISSUE

1. During the development of Raikes Hill and Raikes Wood Close houses and gardens were built over the line of public footpath 57. The diversion order made at the time could not be confirmed because part of the new footpath was less than the minimum width of 2 metres wide as set out in the order. The applicant subsequently applied to divert the footpath through the adjoining woodland. There were no objections at the informal consultation stage so a diversion order was made on this basis under delegated powers, but after making and advertising the order there were two objections relating to the loss of trees. The objections were reported to this committee which resolved to divert the western half of the footpath onto the driveway between the houses and divert the other half onto the tarmac path that was built along where the houses and the side of the wood met.

2. The Committee's resolution, hereafter referred to as Option 2, has not yet been implemented and this report is intended to allow this option to be assessed in the same way as any other diversion proposal. If Option 2 continues to be the committee's preference then the Committee should make a resolution not to confirm the diversion order as made, now referred to as Option 1.
3. The initial report to the Head of Legal Services dated 05/01/2023 is included as Appendix 1. The report to this committee on confirming the order, dated 28/03/2023 is Appendix 2. The diversion order map as made is headed Option 1. The revised proposals map to implement the Committee's recent resolution is headed Option 2.
4. Following the resolution in favour of Option 2 we spoke to the applicant, Berkeley Deveer, which has agreed to proceed with this option if this is what the Committee decides. We have consulted once more with ward councillors, affected landowners, Barnoldswick Town Council, Lancashire County Council, public rights of way user groups and statutory utility companies.
5. There have been two objections to the Option 2 proposal as a result of the consultations carried out. The Public Rights of Way Manager for Lancashire County Council has objected on the grounds that the width of 1.2m is too narrow and not in accordance with the County Council's required standards of a 2.0m minimum width for a diverted footpath, which is exacerbated by being tight against a hedge which is likely to require much staff time in future to manage. We have been told that in the event of a new order being made the County Council would formally object.
6. An objection has been received from one of the residents consulted, whose concern is that during spring new growth of the trees and bushes will encroach on the footpath and fallen leaves in autumn would make it treacherous under foot. Also, the fact that the footpath is of a sub-standard width which exacerbates the problem.

ASSESSMENT OF OPTION 2 FOR MAKING AN ORDER

7. Our assessment for making a diversion order as shown on the Option 2 Map is identical to our assessment for the Option 1 diversion. This assessment is included in Appendix 1, paragraph 5.

ASSESSMENT OF OPTION 2 FOR CONFIRMING AN ORDER

8. To confirm a diversion order, the Council, or in the case of objections an independent inspector on behalf of the Secretary of State, would have to be satisfied that:
 - a. *the path will not be substantially less convenient to the public; and*
 - b. *that it is expedient to confirm the order having regard to the effect which:*
 - i. *the diversion would have on public enjoyment of the path as a whole; and*
 - ii. *the coming into operation of the order would have as respects other land served by the existing right of way; and*
 - iii. *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, account being taken of the provisions as to compensation.*
9. In order to make a fair comparison between the existing footpath and the new route then the structures set up across the existing footpath need to be treated as if they were not there. Section 118 of the Highways Act (relating to extinguishment orders) includes the provision

that “temporary circumstances preventing or diminishing the use of the path or way by the public shall be disregarded”. Although there is no direct read across to Section 119 (relating to diversion orders) the advice given by the Planning Inspectorate is that the convenience of the existing route is to be assessed as if the route were unobstructed and maintained to a standard suitable for those users who have a right to use it.

10. Therefore, the presence of the rear fences of 6 – 12 Raikes Wood Close and a detached garage which obstruct the line of the existing path need to be disregarded, as do the houses built across the footpath. Prior to the housing development starting the site was a field, and whilst the path had no recorded width it was unenclosed so that people could easily walk side by side or pass people coming the other way. It is safe to assume that the existing footpath was used by the public to a width of at least 2m wide.
11. When considering factors relating to the convenience of a new path, we generally take into account the path’s length, it’s width, gradient, surface type and any limitations such as gates or stiles which need to be negotiated. In this case, the only factor which would serve to make the footpath less convenient between points A and C is the width of the path, which at 1.2m wide, would be less than that of the existing path based on the assumption given above. There is no minimum width set by legislation for a new path created by a diversion order, so in the event of an order being made with no objections it is up to the Council to make a judgement as to whether this width, taken into account with all the other factors, complies with the legal requirement set out at paragraph 8a above of being not substantially less convenient.
12. We gave details in paragraphs 5 and 6 of the two objections received when we consulted informally on the Option 2 proposals. If we go ahead and make a diversion order, then the Council would only be required to take account of any duly made objections received during a 28-day notice period which would be advertised in the local press and by site notices. In the event of duly made objections, which are expected in view of the informal consultation, then the Council is required by legislation to send the order to the Secretary of State for a decision on confirming the order. An Inspector appointed by the Secretary of State would be called upon to make the judgement as to whether the Option 2 path is not substantially less convenient. The inspector would no doubt be mindful of any objections received, and the fact that on one side the footpath is enclosed by a hedge, which is likely to further reduce the width of the path during the growing season unless it is kept regularly trimmed back. The legal situation is that landowner, in this case Berkeley Deveer, would be responsible for keeping the hedge trimmed back, but it is the responsibility of the highway authority to ensure that this happens, and if necessary to serve enforcement notices as and when required for the hedge to be kept trimmed back. Under our current working relationship with Lancashire County Council on public rights of way matters then Pendle Borough Council would take on this responsibility. As a district council we also have notice serving powers to require that hedges growing alongside footpaths are kept cut back.
13. The relevant section of path A – C is only short and therefore it would be reasonable to acknowledge a certain loss of convenience owing to the width of this section, but nevertheless take a view that this does not make the path substantially less convenient because it affects only a short section of path. Arguably the tarmac surface more than compensates for the loss of width by helping keep the path dry underfoot throughout the year. In the event that the Council makes an Order for the Option 2 diversion, i.e. on the basis that the Committee considers that this route is not substantially less convenient, then this view would be advanced by the Council in event of a local hearing or inquiry.
14. Moving on to the first of the expediency factors, i.e. the effect which the diversion would have on the enjoyment of the path as a whole, we have to stretch our imagination to consider how the original footpath may be enjoyed now as an unobstructed route. There would no houses, outbuildings or fences across the line of the footpath, and the gardens of

8 – 12 Raikes Wood Close would be appreciably shorter to accommodate the footpath. On this basis the existing footpath is more open than the proposed diversion, albeit through an area where the new houses unaffected by the footpath would still have been built. The proposed diversion by comparison would be through a more enclosed route with boundary structures tight on either side between points A – C, thereby representing a degree of loss of enjoyment.

15. There appear to be no implications from the Option 2 proposals in relation to the second and third of the expediency factors (from paragraph 8 (b) (ii) and (iii) above).
16. Before confirming an order the Council (or the Secretary of State) must also consider the provisions of any Rights of Way Improvement Plan (ROWIP). We have consulted Lancashire County Council's ROWIP 2015 – 2025 but this does not include any provisions relating to public path diversion orders.

DISCUSSION

17. This issue has come about because the developer applied to divert the footpath to a new 2m wide footpath, but it built a 1.2m wide footpath meaning that the original diversion order made under the Town and Country Planning Act, could not come into operation.
18. For the construction phase, the developer applied for and was granted a temporary closure order for the existing footpath, during which time the footpath was not simply temporarily closed, but rendered comprehensively obstructed by a substantial retaining wall and the newly built houses. There is no longer a temporarily closure order in force, but the developer is no longer responsible for the obstructions, i.e. the houses, walls, garages, sheds and fences, because all of the land containing these structures has been sold to the new residents. The implication for the affected properties if these proposals to divert the footpath fail is the difficulty which may be experienced in trying to sell these houses, as well as the impact on the public of a footpath shown on a map which cannot be used due to obstructions, and absence of legal protection for what are currently informal paths. Potentially, the County Council could serve formal enforcement notices on each affected property, in accordance with its statutory responsibilities, to ensure that the issue is very prominently flagged until such time as the issue is resolved. But obtaining a mortgage on any of the affected properties could prove difficult even without such notices being served.
19. The diversion order as made, i.e. the Option 1 route, would provide for an alternative route which safely satisfies the criteria set out in the legislation as set out in the Appendix 1 Report. We are confident that these proposals would result in the order being confirmed if the Committee resolves to refer the order to the Secretary of State, as required for an order with outstanding objections.
20. In the case of Option 2 we would be less confident about being able to resolve this issue. Having consulted on this option we advise that objections are likely to be received and we are concerned that an inspector may not take the view that the new footpath is not substantially less convenient because of the limited width of the new footpath, which is less than our stated minimum for public footpath diversions. The inspector could be expected to give considerable weight to any objection from the County Council due to its role as highway authority.
21. Whilst understanding the Committee's natural wish to sympathize with objectors who do not want to see the loss of any trees, a decision for the Option 2 diversion carries with it a significant risk that this matter would remain unresolved. As a result our recommendation is in favour of the Option 1 diversion proposals. In the event that the Committee remains committed to the Option 2 proposals we set out an alternative resolution below.

ALTERNATIVE RESOLUTION

- (1) That the Borough Council of Pendle Public Footpath 57 Barnoldswick Public Path Diversion Order 2023 dated 30th January 2023 is not confirmed.
- (2) That the Head of Legal Services be authorised to make a new diversion order under Section 119 of the Highways Act 1980 to divert Public Footpath 57 as described in this report as the Option 2 route and shown on the map attached.
- (3) That the Head of Legal Services be authorised to confirm the order as an unopposed order or in the event of objections send it to the Secretary of State for Environment Food and Rural Affairs to be decided.

REASONS FOR RESOLUTION

- (1) To avoid the loss of trees on the route of the proposed diversion.
- (2) The West Craven Committee is satisfied that the proposed diversion meets the criteria for making a diversion order.
- (3) The West Craven Committee is satisfied that the proposed diversion meets the criteria for confirming a diversion order.

IMPLICATIONS

	Option 1	Option 2
Policy	None.	The Option 2 footpath is 1.2m wide. This is less than our stated minimum width of 2m wide.
Financial	<ul style="list-style-type: none"> • The applicant has already been invoiced for the costs of making the order. This was an interim invoice. • We would not be able to pursue Option 1 and invoice for our work to date in pursuing Option 2 (for staff costs are currently estimated at £338.42). • We are not entitled to be reimbursed for the staff costs involved in sending the order to the Secretary of State to be decided. • But following an inspector's decision we can continue to charge for our costs until the case is completed. 	<ul style="list-style-type: none"> • The reimbursement of £1,243.09 to the applicant for not sending the Option 1 order to be confirmed. There is no budget provision for these costs. • However, the applicant can be invoiced for the ongoing costs in staff time and advertising up until the point at which objections are received, i.e. the £338.42 so far. • The expected costs in staff time of referring an Option 2 Order to the Secretary of State to be decided. • The expected objection from Lancashire County Council would trigger a hearing or local inquiry, not the written representations process which is usually followed. This is likely to result in additional costs. • The potential for future maintenance costs for keeping the option 2 path clear of overhanging vegetation and leaf-mould on the surface.

Legal	A diversion order can only be made and confirmed if it meets the tests set out in Section 119 of the Highways Act 1980.	
Risk Management	This option is considered low risk because the proposed diversion has been assessed as being in accordance with the legislation. See Appendix 1 paragraphs 6 - 11	This option is considered to be higher risk by our assessment in this report, because there is more doubt that the proposed diversion meets the tests set out in the legislation.
Health and Safety	None.	None.
Sustainability	The diversion would require the loss of 5 – 10 small trees.	None.
Community Safety	None.	None.
Equality and Diversity	None.	None.

APPENDICES

Appendix 1 – Report to Head of Legal Services dated 5th January 2023.

Appendix 2 – Report to West Craven Committee dated 28th March 2023.

Option 1 Map – Diversion Order map as made.

Option 2 Map – Consultation map drafted following the Committee resolution of 28th March 2023.

LIST OF BACKGROUND PAPERS

Report to Head of Legal Services dated 22nd January 2018 concerning the first diversion order made under the Town and Country Planning Act with respect to this footpath (available on request).