

REPORT FROM: ASSISTANT DIRECTOR OPERATIONAL SERVICES

TO: WEST CRAVEN COMMITTEE

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

**Proposed diversion of public footpath FP1305054 at Craven Game Farm,
Kelbrook**

PURPOSE OF REPORT

The Committee are asked to decide on whether to make an order to divert a public footpath.

RECOMMENDATIONS

- (1) That the Head of Legal and Democratic Services be authorised to make an order under Section 119 of the Highways Act 1980 to divert public footpath FP1305054 at Craven Game Farm, Kelbrook as described in this report, and to confirm the order if there are no duly made objections, or if any so made are later withdrawn.
- (2) In the event of objections that the order is sent to the Department of Environment Food and Rural Affairs for an independent inspector to decide whether to confirm the order on behalf of the Secretary of State.

REASONS FOR RECOMMENDATIONS

- (1) The proposed diversion appears to be the most expedient way in which the longstanding obstruction of this public footpath can be resolved. The proposals appear to satisfy the requirements set out in the legislation.
- (2) A decision on confirming the order can only be taken by the Secretary of State in the event of any objections which are made and remain outstanding. An alternative to this recommendation would be to abandon the order in the event of objections.

ISSUE

1. Craven Game Farm is a residential property located just off Harden Road in Kelbrook. Public Footpath FP1305054 is indicated with a large arrow on the location map included as Appendix 1 with this report. This is an extract from the Ordnance Survey 1:25,000 map with public rights of way shown as green dashed lines. The small dashes are for footpaths and the slightly longer dashes are for bridleways.

2. The proposals map included as Appendix 2 shows the southern end of FP1305054. The proposals are that section A – B shown by a solid bold line is diverted to an existing access track shown with bold dashes on the line C – B. The new footpath would extend to the full width of the track with no stiles or gates.
3. Craven Game Farm is the building shown lying between the existing footpath A – B and the proposed diversion C – B. The existing footpath A – B is currently obstructed by the garden which it crosses, due to boundary structures and changes in ground level. Craven Game Farm has a date stone of 1979 and we believe the obstruction of the footpath must date back to around this time. We brought the issue of the obstructed footpath to the attention of the owners of the property who have applied for the diversion order which this report considers. The diversion route may have existed as an alternative route since Craven Game Farm was built and the public started using it. What the developer in 1979 failed to do was to secure the legal diversion of the footpath. The proposed diversion order aims to put this right.

Results of Informal Consultation

4. We wrote with details of the proposed diversion to Kelbrook and Sough Parish Council, Lancashire County Council, Pendle BC ward councilors, utility companies, the Ramblers Association (now called “The Ramblers”), the Peak and Northern Footpath Society and the owners, occupiers and rights holders of the land over which the footpath is to be diverted.
5. An objection has been received from the owner of part of the diversion route between points C and B. The grounds for the objection are these:
 - a) “The proposed path would run up my driveway and around the corner of my house – directly adjacent to my lounge window which would seriously affect our privacy. Normally public footpaths should be 20 yards or more from a private house.”
 - b) “I do not agree with your statement that “this has been used as if it were a public right of way on foot ever since the recorded line of the footpath became obstructed”. There are many walkers and walking groups that visit the Kelbrook area and the majority of these use either footpath FP1305053 or bridleway BW11305018 up Heads Lane. Furthermore, we have lived in this property for thirty-five years and only currently get occasional dog walkers using the path alongside my house.”
 - c) “Your proposal will adversely affect the value of my property and make it more difficult to sell (which we are intending to do over the next couple of years)”
 - d) “I would have a legal requirement to keep the route free of obstructions yet I have no power over our neighbours and their car parking. (my drive is currently a private right of way for use by myself and our immediate neighbours). If this proposal went ahead you would also need their approval.”
 - e) “It is possible that, as the land owner, I may become liable for maintenance costs yet the three other properties nearby are also using our drive and maintenance costs are currently shared.”
 - f) “I would likely need legal cover to protect against any legal challenges that may arise from someone injuring themselves on our land”.
6. Our response to these grounds of objection is as follows:
 - a. We are not aware of any requirement that a footpath should be a particular distance from a private house.
 - b. The existing use by dog walkers suggests a level of use as of right.
 - c. We have not consulted a professional land agent on this, but the view of the author is that any effect on the value of the land would be marginal, although on local authority searches the access track would show up as being a public right of way.
 - d. The application was that the new public right of way would extend to the full width of the driveway. This varies between 3.5m and 5m wide. We could reduce this to 3m wide on the centre of the access road so that parked cars on the Craven Game Barn side would be less likely to obstruct the footpath. This is a bit of a technicality; it is

difficult to foresee enforcement over a vehicle parked within a 5m wide footpath if 3m of the path remained available for public use. And in the absence of parked cars how would the public know which part was the public right of way if part of the width was excluded? It is simpler to go with the full width.

- e. The footpath would be maintainable at public expense (Highways Act 1980 Section 41). However, we don't generally carry out any maintenance where there are shared private vehicular rights. The highway authority would become liable for claims in the event of actionable surface defects, whereas the landowner is solely liable at the moment under Occupiers Liability Act.
- f. The owners should already have insurance covering them for any liability that they have as occupiers. With the diversion they are probably less exposed to the risk of claims – anyone injured by dint of a defect could claim from LCC as highway authority. Such claims away from urban routes are extremely rare.

Assessment of the proposals against the legal criteria

- 7. Under Section 119 of the Highways Act 1980 the Council may make a diversion order where it appears as respects a footpath *“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)”*.
- 8. The existing footpath on the line A – B crosses through an area at the rear of Craven Game Farm which is set out for use as a private garden. In the absence of a diversion order the route of the footpath would need to be re-opened through the garden. It is clearly expedient in the interests of the property owners that their garden is a safe and secure private space for use by them and any future owners of the property. The legislation makes explicit that the Council may divert a footpath across land owned by someone else.
- 9. There is also a requirement *“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.”*
- 10. In this application the start of the path at point A (i.e. the “point of termination”) is being moved to point C. Public bridleway BW1305018 acts as the connecting highway between these two points, because in legal terms all public rights of way are a type of highway. The two points are 25m apart and they would appear to be equally convenient.
- 11. The points above relate to the Council's decision in making an order, but there are further tests set out in the legislation about confirming an order. This report is for a decision both on making and confirming an order in the event of no objections. If the order is sent to the Secretary of State to be confirmed, we would also need to set out the reasons why we consider the Secretary of State should confirm the order. Therefore, the tests for confirming an order are given careful consideration. An extract from the legislation is given in paragraph 12.
- 12. *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) [i.e. paragraph 7] 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.

13. The expediency tests have already been considered in paragraph 8 above, but here we consider whether the new footpath C-B would be substantially less convenient than the existing path A-B. We have to make this comparison as if any obstructions to the existing path were not there, and we must also disregard any changes in ground level which may have occurred since the footpath became obstructed. Historically the footpath was a right of way across fields, i.e. an unmade path, and there is a recorded width of 4 foot wide, with 5 stiles across the footpath, one of which would have been at Point A.
14. The relative convenience of the existing path compared to the proposed diversion may be determined by a comparison of length, width, gradient, surface type and the presence or absence of limitations (i.e. stiles and gates). There may be some who would use footpath FP1305054 to connect with BW1305018 or FP1305053 for whom the diversion is slightly longer, but we would suggest that most people using the footpath would either be entering or leaving the village and for these the diversion would be no longer. The new path would be wider than the recorded width of the existing path. The gradient of the new footpath is probably a little gentler, and in the proposed diversion order there would be no stiles making the diversion route easier than the existing path. The surfacing on the new route would be more convenient than the existing unmade path.
15. Looking at paragraph 12a above we cannot see how confirming an order would have any negative impact on public enjoyment, because the diversion will not result in the loss of any views or any other amenity benefits compared with the old path. If anything, it would be preferable for the footpath not to be through a private garden compared to the more public facing space which the proposed diversion passes through.
16. Paragraph 12b has no relevance in this case because no other land is served by the existing footpath (i.e. nobody apart from the applicant needs the path to get to their land).
17. Paragraph 12c relates directly to the objection we have received, i.e. the effect on the land which the path is being diverted over. The new path passes close to Craven Game Barn where there is currently no recorded public right of way. A public right of way on foot may have come into existence, simply by public use of the route by the many years by people who use it as if they had right to do so, but any actual rights which may have been created in this way are unproven. However, the proposed diversion is at the front of the house, on the public facing side, and would already be used by anyone calling at the property. The track also carries private access rights to other land and properties, so there will be regular comings and goings up and down this track irrespective of the occasional dog walkers who also use it, all passing very close to Craven Game Barn. We therefore consider the effect of formalizing the diversion to have only a marginal impact on the owners of the other land which the diversion passes through.
18. When considering the provisions set out in paragraph 12c we can take into account compensation which may become payable to the owners of the land affected. If a diversion order is confirmed then every affected owner and occupier would receive a formal notice explaining how they can apply for compensation, and the grounds on which such applications may be made. The applicant in this case has already agreed to defray any compensation costs which become payable. Compensation can be paid for a loss in value of a person's interest in the land and any damages which may arise by being disturbed in their enjoyment of the land. In this and similar cases elsewhere in the district we suggest that the applicant and the other land owner start a conversation and come to a private arrangement with respect to compensation. But if this doesn't happen and a claim for compensation is received then the Council would itself need to determine what compensation should be paid and make an offer accordingly. If we get to this stage then we

would involve a professional land valuer to assist us in making an offer which is fair to both the applicant and any affected owners who make a claim.

19. The Council is required to have regard to 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. We have considered these proposals against the Lancashire Rights of Way Improvement Plan 2015 – 2025 but we have not identified any provisions in the plan which have any bearing in this case.
20. In addition, for any diversion proposal made under section 119 of the Highways Act we must have due regard to the needs of agriculture (including the breeding or keeping of horses) and forestry, and the desirability of conserving flora, fauna and geological and physiographical features. The proposed diversion is onto an existing track and therefore we do not foresee any negative consequences in this respect.

Conclusions

21. If the obstruction to the footpath cannot be resolved by a diversion order, this may result in action by the highway authority to reopen the footpath on its definitive line in accordance with its legal obligations. This would inevitably cause considerable distress to the applicants, far more so than any effects which may arise by formalising the changes on the ground which took place decades ago. The risk of doing nothing is that the C – B route currently has no legal protection, so current or future owners could install locked gates or to block this route in any other way would entirely close off FP1305054 until the A – B route could be re-opened. We often discover issues of this nature when properties are bought and sold, the consequence is to add extra complications buyers and sellers. Having public rights of way properly recorded and open to public use is important. We have been slowly resolving an inheritance of unofficial diversions over many years, and the recommendation given in this report seems to represent the best option in this case. As far as we can see this will re-route the footpath as intended by the developer all those years ago.

IMPLICATIONS

- Policy:** Our enforcement policy provides for longstanding obstructions to be resolved by a public path order where all the following criteria are met:
1. The obstruction or obstructions do not appear to have resulted from an action or actions by the current owner or occupier.
 2. 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.
 3. The proposed PPO will safely fulfil the requirements of the relevant PPO legislation.
- Financial:** The applicant has agreed to pay the costs associated with making and confirming a diversion order, and any costs which arise by a claim for compensation. We understand that these costs are being underwritten by a firm of solicitors or their insurers due to the footpath being missed in a personal search carried out on behalf of the applicant prior to them buying the property. If an objection is made and not subsequently withdrawn, then the costs of the staff time associated in preparing documents and liaising with the Planning Inspectorate (which acts on behalf of DEFRA) are excluded from the costs which can be billed to the applicant (government regulations say so).
- Legal:** As set out in the body of the report.
- Risk Management:** We may reasonably expect an objection if an order is made. There is therefore a high risk that some of the staff time costs will not be recovered (see financial implications).

Health and Safety: The recorded line of the existing footpath is obstructed by structures such as boundary walls which both prevent public use and form a hazard for anyone who attempted this route. The proposed diversion is a safe alternative without the need for enforcement action and construction work to create a safe path on a gentle gradient.

Sustainability: None arising directly from the report.

Community Safety: None arising directly from the report.

Equality and Diversity: None arising directly from the report.

APPENDICES

Appendix 1 Location Map

Appendix 2 Proposals Map

LIST OF BACKGROUND PAPERS

None.