

REGULATORY COMMITTEE
19th NOVEMBER 2008

PURTON: DIVERSION OF PURTON PUBLIC FOOTPATH 104 (PART)

Purpose of Report

1. To:
 - (i) Report on the representations and objections received by the County Council, following advertisement of an Order made under Section 119 of the Highways Act 1980 to divert the public right of way shown in the Definitive Map as Public Footpath No. 104, Purton at Mud Lane, Restrop, to a new route that is to be designated as a Public Bridleway, as shown on the plan attached at **Appendix A**.
 - (ii) Seek the approval of the Regulatory Committee for the Order to be forwarded to the Secretary of State for the Environment, Food and Rural Affairs with the recommendation that it be confirmed.

Background

2. At the meeting of the Regulatory Committee on 21st May, 2008 Members resolved that a Public Path Diversion Order should be made in respect of the part of Public Footpath 104 at Restrop, Purton, where it passes along an ancient sunken lane, known as Mud Lane. A copy of the report considered by the Committee at that meeting is attached at **Appendix B**.
3. The Order was made on 9th July, 2008 and advertised on 24th July, 2008, with a deadline of 21st August, 2008 for the receipt of statutory representations and objections. Forty nine representations in support of the diversion and 41 objections were received.
4. The majority of the representations and objections were received from individual members of the public. Of the prescribed organisations to which copies of the Order were sent responses were received as follows:

Support for the Order:

- Purton Parish Council
- Wiltshire Bridleways Association
- British Horse Society

(the last of these was not received until 2nd September and so cannot be treated as a statutory representation).

Objections to the Order:

- The Ramblers' Association
- The Open Spaces Society.

The Purton Historical Society also objected to the Order.

It should be noted that Purton Parish Council has qualified its support for the Order on the undertaking of the landowner that if the Diversion Order is confirmed he will enter into a covenant with the Parish Council to allow local people to have permissive access to Mud Lane on foot for the purposes of nature and historical study, which will bind any future landowner. However, the Regulatory Committee should not take the intended covenant into account when making its decision about whether or not the Diversion Order should be confirmed, because the permissive access proposed cannot be considered to be a satisfactory alternative for a public right of way. If the path is diverted, it is only the diversion route which will have the level of legal protection of a public right of way.

5. The representations and objections, together with the number of respondents making each point have been summarised in the table at **Appendix C**. The summary includes the Officer's comments. Fourteen of the objectors advised that their objection was, "*on the grounds of public interest*". Officers wrote to all fourteen objectors asking for explanation as to why they considered this to be the case, in order that more detailed information could be provided to the Regulatory Committee to assist Members with the decision on how they wish to proceed. Only four replies were received to this request. The clarification provided by the four respondents has been included in the specific issues tabulated.
6. Copies of all the representations and objections together with all further correspondence between the Council and the supporters and objectors are available for inspection in the **Members' Room**.

Main Considerations for the Council

7. Section 119 of the Highways Act 1980 sets out a two-stage test which must be satisfied. The legal requirements to be met at the Order making stage are set out below. Section 119(1) provides:

"where it appears to a Council as respects a footpath, bridleway or restricted byway in their area...that, 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) the Council may, subject to Sub-section (2) below, by order made by them and submitted to and confirmed by the Secretary of State, or confirmed by them as an unopposed order -

- (a) *Create, as from such date as may be specified in the order, any such new footpath, bridleway or restricted byway as appears to the Council requisite for effecting the diversion; and*
- (b) *Extinguish, as from such date as may be specified in the order or determined in accordance with the provisions of Sub-section (3) below, the public right of way over so much of the path or way as appears to the Council requisite as aforesaid."*

8. Section 119 (2) of the Highways Act 1980 states:

"A public path diversion order shall 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".*

9. At the meeting of the Regulatory Committee on 21st May, 2008 Members decided that the above test was met and resolved that the Diversion Order should be made.
10. The Committee must now consider the second test under Section 119 (6) which must be met at the order confirmation stage:

“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 Sub-section (1) 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 paragraph (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 referred to in subsection (5)(a) above.”

11. It is considered that the proposed diversion route will not affect the public enjoyment of the path as a whole.
12. The proposed new route, which is already in use as a permissive bridleway, follows a level grass-surfaced and well drained path which has a useable width of between 4 and 6 metres. The path was created as a permissive bridleway in April 2005 and has since been in frequent use by walkers and horseriders and occasional use by cyclists, without any apparent problems having arisen.
13. The existing route, even if it were to be cleared of obstructions, follows a sunken lane which has a central low point in the surrounding landscape, has a useable width of approximately two metres, and serves as a wet ditch during the winter months, becoming severely flooded in periods of prolonged wet weather. Shared use by walkers, horseriders and cyclists can be expected to cause damage to the surface which is likely to make the path inconvenient to use for much of the year. The British Horse Society has stated that it considers that shared use of such a narrow sunken route with no easy means of escape will be dangerous. However, objectors to the proposed diversion hold the strongly expressed view that the historic nature of the lane gives it an appeal of its own that should be preserved, and that this would be lost if the path were to be diverted to the new route.
14. The Committee is therefore required to consider whether or not the convenience of the proposed diversion route, safety of users and ease of maintenance together outweigh the desire to preserve the historic right of way for public enjoyment. The Rights of Way Improvement Plan requires an analysis to be undertaken of the existing rights of way network taking into account the present and likely future needs of path users, and for such provision to be made as the authority considers necessary. The agenda is one of modernisation, taking into account the particular needs of less able users. While appreciating that this does not suggest that the historical value of the rights of way network should be disregarded, officers take the view that on this occasion, the majority of present and future users will be better served by the proposed diversion route.

15. The creation of the new route is subject to certification by the local Rights of Way Warden and a new route will not be accepted until the Highway Authority is satisfied that the diversion route is provided to a suitable standard, fit for use by the public.
16. The landowner, Mr. Moseley, has confirmed that he is the only landowner over whose land the proposed diversion passes, therefore no compensation costs are envisaged.
17. Members considered the above issues when deciding in May 2008 whether or not the Order should be made, but are now required to consider them for the purpose of deciding whether or not the Order should be confirmed.

Environmental Impact of the Recommendation

18. There are no significant environmental implications arising from the recommendations set out within this report.

Risk Assessment

19. There are no risks arising from the recommendation set out within this report.

Financial Implications

20. The making of a public path diversion order is a discretionary duty for the Highway Authority rather than a statutory duty. Provision has been made within existing budgets for the costs involved in processing the application, including advertising costs.
21. The proposed new path is already in use and has been constructed by the landowner at his own expense to a standard that is already acceptable to the County Council as Highway Authority. The new path will, however, need to be formally certified by the County Council as acceptable. Officers do not expect that there will be any significant additional expense to the Council in providing the new path.
22. Mr. Moseley has confirmed that he is the only landowner affected by the proposals; therefore, no compensation costs or expenses are envisaged.
23. If the Committee decides to refer the Order to the Secretary of State with the request that it should be confirmed, the Secretary of State must decide the most appropriate method of reaching his decision. In cases where there are few objections to an Order and these are of a relatively straightforward nature it is often appropriate to make the decision after an exchange of written representations or by means of a Hearing. However, where it is clear that there are a large number of representations and objections the most appropriate way to decide the matter is by a Local Public Inquiry. It can therefore be presumed that the Secretary of State will wish to hold an Inquiry into this Order, at which the County Council will have to provide the venue and meet its own costs. These are likely to be in the region of £4,000 - £5,000, for which provision has been made within existing budgets.
24. The report considered by the Regulatory Committee in May 2008 stated that the cost to the County Council, and therefore to the public, of re-opening the existing path along Mud Lane, and the work needed to make it accessible as a bridleway, were not relevant considerations when assessing whether or not the new path will be substantially as convenient to the public and public enjoyment of the path as a whole and whether it is expedient to make the Order in the interests of the public.

25. However, a decision by the Secretary of State in June 2008 to confirm a Diversion Order made by Devon County Council established that, although Section 119A of the Highways Act 1980 does not specifically provide for these considerations to be taken into account, the relative costs of the proposed diversion, as opposed to the re-instatement of the definitive lines of the paths concerned, were a material factor that should be taken into consideration as to whether this was the best use of the resources available to the Council. A copy of the Inspector's decision letter is attached at **Appendix D** of this report,(see paragraphs 12 and 13 of the letter).
26. Officers consider that the Secretary of State's decision in the Devon case provides useful guidance when considering the diversion of Purton Footpath 104 and that the cost of re-instatement of the definitive path along Mud Lane is now a matter that can and should be taken into account. Officer's original estimate was that the cost of re-instatement would be approximately £50,000. In order to check this estimate a quotation was obtained from M. J. Church in May 2008 which detailed the work that needed to be carried out to re-instate a safely useable bridleway along Mud Lane. The cost of carrying out this work was quoted as £148,434.17 (approximately three times greater than the Officers had anticipated). It is likely that the actual cost of re-instatement would be significantly higher as the quotation did not include such items as design fees and site security measures. A copy of the quotation is attached at **Appendix E** of this report.
27. The total annual maintenance budget for 2008-09 for public rights of way in Wiltshire is £280,000 of which just £60,000 is available for the North Wiltshire District in which Purton Footpath 104 is situated. In these circumstances, officers consider that it would be difficult to justify the expenditure of more than £148,000 on the re-instatement of approximately 380 metres of public bridleway as the best use of resources which would otherwise be available to spend elsewhere on the rights of way network or to remove the liability on the public purse.

Options Considered

28. To:
- (i) Forward the Diversion Order to the Secretary of State with the request that it should be confirmed.
 - (ii) Re-open the existing path along Mud Lane and to make a Definitive Map Modification Order to upgrade it to a Public Bridleway.

Reasons for Recommendation

29. Officers consider that the proposed diversion will provide a more easily useable, all year round, route for all users with improved safety and enjoyment than would the existing path, even if the existing path were to be made available as a public bridleway. It will also free up scarce funds to be spent elsewhere on the public rights of way network or remove the liability on the public purse.

Recommendation

30. That the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs with the request that it should be confirmed.

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The following unpublished documents have been relied on in the preparation of this report:

None