

Bath & North East Somerset Council

MEETING:	REGULATORY (ACCESS) COMMITTEE	AGENDA ITEM NUMBER	9
MEETING DATE:	8th January 2007		
TITLE:	Objections received against Bath and North East Somerset (Public Footpath BA22/17 Bridge Farm, Southstoke) Public Path Diversion Order 2007		
WARD:	Bathavon West		
AN OPEN PUBLIC ITEM			
List of attachments to this report:			
Appendix 1 – Objection from Mr Maurice Nash against the Order			
Appendix 2 – Support received in favour of the Order			
Appendix 3 – Copy of Order with plan			

1 THE ISSUE

- 1.1 The Committee is asked to consider objections received against Bath and North East Somerset (Public Footpath BA22/17 Bridge Farm, Southstoke) Public Path Diversion Order 2007 and to decide whether to abandon the Order or to send it, along with objections not withdrawn, to the Secretary of State (SoS) for determination.

2 RECOMMENDATION

- 2.1 That the Committee resolves to send the Order and objections not withdrawn to the SoS for determination, with the recommendation that the Order is confirmed as made.

3 FINANCIAL IMPLICATIONS

- 3.1 The applicant has agreed to pay half of the Council's standard administration charge of £800 for making a Public Path Order and also the cost of advertising the making of the Order in the Bath Chronicle. The applicant will also be liable to cover the cost of bringing the proposed new route of the path into a condition suitable for public use.
- 3.2 If the Committee decides to abandon the Order, or if the Order has been invalidly made, then the applicant will be able to reclaim the costs he has paid to the Council so far. If the Committee decides to send the matter to the SoS for determination then the Council will have to meet the costs of preparation for any Public Inquiry, hearing or written representations that subsequently take place. The Council will also have to cover the cost of providing a location for any Inquiry or hearing.

4 HUMAN RIGHTS IMPLICATION

- 4.1 The Human Rights Act incorporates the rights and freedoms set out in the European Convention on Human Rights into UK law. So far as it is possible, all legislation must be interpreted so as to be compatible with the convention.
- 4.2 The Committee is required to consider the application in accordance with the principle of proportionality. The Committee will need to consider the protection of individual rights and the interests of the community at large.
- 4.3 In particular, the convention rights which should be taken into account in relation to this application are Article 1 of the First Protocol (protection of property), Article 6 (the right to a fair hearing) and Article 8 (right to respect for family and private life).

5 THE LEGAL BACKGROUND

- 5.1 The Council has a discretionary power to make Public Path Orders. When considering an application for a Public Path Order, the Council should first consider whether the proposals meet the requirements set out in the legislation and reproduced below. In deciding whether to make an Order or not, it is reasonable to consider the tests for both making and confirming the Order (*R. (Hargrave) v. Stroud District Council [2002]*). Even if all the tests are met, it may exercise its discretion not to make the Order.
- 5.2 Before making an order under Section 119 Highway Act 1980 it must appear to the Authority that it is expedient to divert the path in the interests either of the public or of the owner, lessee or occupier of the land crossed by the path.
- 5.3 The Authority must also be satisfied that the diversion order does not alter any point of termination of the path, other than to another point on the same path, or another highway connected with it, and which is substantially as convenient to the public.
- 5.4 Before confirming an order, the Authority or the Secretary of State must be satisfied that:
 - the diversion is expedient in the interests of the person(s) stated in the order,
 - the path will not be substantially less convenient to the public as a consequence of the diversion,
 - it is expedient to confirm the order having regard to the effect it will have on public enjoyment of the path as a whole, on other land served by the existing path and on land affected by any proposed new path, taking into account the provision for compensation.
- 5.5 It should be noted that this order was made under delegated authority following informal objections to which no objections were received. As duly made objections were received following the making of the Order the Council is unable to confirm the matter as an unopposed Order. The Regulatory (Access) Committee must now decide, in the light of these objections, whether to abandon the Order or to submit it to the Secretary of State for determination with a recommendation to confirm or not to confirm.

- 5.6 It should also be noted that if the Order is confirmed it will not come into full effect until the Council certifies that works to bring the new route of the path into a condition fit for use by the public have been carried out.

6 THE REPORT

- 6.1 The Order was made on 5th September 2007 and advertised on 12th September 2007, with the request that objections and representations be made by 11th October 2007.

Support

- 6.3 Combe Hay Parish Council wrote to support the Order in a letter dated 30th September 2007, recommending that the Order be confirmed.

Objections

- 6.7 Two duly made objections were received against the Order.
- 6.8 The agent of an owner of land¹ crossed by a section of the currently recorded route of public footpath BA22/17 objected on behalf of his client on the basis that he wished to lodge an objection until the could verify that the footpath would be diverted off his client's land and not onto it. As this is so, it is fully expected that this objection will be withdrawn. This objection letter is not presented with this report as the withdrawal of the objection is believed to be a formality.
- 6.9 The second objection was received from Mr Maurice Nash of Wellsway, Bath. The content of his objection is reproduced in Appendix 1.

7 OFFICER COMMENTS (POINT BY POINT RESPONSE TO MR NASH'S OBJECTION)

- 7.1 This footpath is part of the Limestone Link route and runs through an area of Outstanding Natural Beauty. The council has a stated policy of protecting this Right of Way in its Local Plan.
- 7.2 Response: The public right of way will continue to exist if the diversion is successful, albeit on an alignment marginally different to that currently recorded. The diversion will have the advantage of providing the path with an (ample) recorded width (1.8 metres) for the first time and will also provide a clear, unimpeded route: although a route has been open to the public in this area, neither the route described on the Definitive Map or Definitive Statement have been walkable.

7.3

¹ i.e. the owner of the canal basin lying immediately west of point C on the Order plan

To divert and reduce the width of this footpath for 350 metres would in my opinion seriously reduce the attractiveness of this part of a highly popular recreational walk. If this part of the Limestone Link is reduced to as little as 1.2 metres (as the unauthorised diversion currently does) then what is to stop other landowners doing the same. The whole of the Right of Way could then be reduced to a footpath that a lot fewer people would choose to use as a recreational walk. To be attractive to walkers a recreational footpath needs to be wide enough to allow 2 people to walk comfortably side by side, or to allow people to easily pass each other without standing aside. Although a short distance of narrow footpath may well be acceptable, a distance of 350 metres is not.

7.4 Response: the width of the proposed new path is stated as being 1.8 metres in the Order. This is accepted as being more than adequate for a public footpath. As mentioned above, no width is recorded for public footpath BA22/17 on the Definitive Statement and has never been proved (the records belonging to the Somersetshire Coal Canal Company that may have provided evidence of the precise width and nature of the towpath are lost and historic plans of the canal cannot be used to give an accurate width due to their relatively small scale). However, if the matter came to a head, it may be that the width of the existing public footpath is proved to be less than that of the proposed new route.

7.5 It should also be noted that only the central 270 metres of the current route will be diverted from what has recently been available to the public. The new route lies, for all intents and purposes, on the same plot of land as the current route, and runs entirely along the old canal bed and its northern and southern banks; the diversion will not change the basic nature of the route.

7.6

Footpaths that are fenced in on both sides invariably become more restricted as time goes on. A pathway of perhaps 2 metres width that seems acceptable at first quickly becomes reduced to less than 1 metre by undergrowth and/or hedge growth. A good example of this is the recently fenced-in Right of Way close to Rainbow Wood farmhouse. At least in this instance the farmer appears to have good reason to enclose the footpath as the field was used for lambing. Whereas at Bridge Farm the field has been notably lacking of any livestock since the unauthorised diversion was created.

7.7

Response: The proposed new route will be fenced on either side, leaving a width of 1.8 metres (the width recorded in the Order). As on all public rights of way in the area, it will be the responsibility of the Council to cut back excessive upgrowth on the path and to ensure that the relevant landowner cuts back any overhanging vegetation. There is nothing to stop the landowner from fencing the current path alignment in a similar fashion. He could argue that the existing route is less than 1.8 metres wide because no width is formally recorded; this would result in an even narrower fenced path being legitimately left for the public. The diversion will at least ensure a 1.8 metre path for the public.

7.8 The two stiles at either end of the fenced enclosure were authorized under s147 of the Highways Act 1980 for stock control purposes. Officers have noted the presence of two horses within the compound since August 2007.

7.9

During the spring of this year it became obvious that the proposed footpath would present problems that never occurred before. The unauthorised diverted footpath became extremely muddy and slippery with only a collapsed barbed-wire fence between the path and a sheer 4-metre drop. The path felt extremely dangerous to use.

7.10 Response: The applicants have stated that they will erect a new fence between the drop and the diversion route if the Order is confirmed. The Order will not come into effect until the Council has certified that necessary works on the new route of the path have been satisfactorily completed. As with any unsurfaced path, this route may become muddy in wet weather with heavy use. To counter this, the landowner has agreed to lay stone at certain sections along the path. If the Order is confirmed, responsibility for the surface of the path falls to the Council.

7.11

The council has in its Local Plan recognised the ever-increasing demand for recreational walks thus:

'B4.2 The demand for sport, recreation and leisure grew steadily throughout the 1980s and 1990s and this trend is likely to continue. Principal areas of growth include the participation of women, the middle-aged and elderly and non-professional workers. Although membership of clubs for formal sports remains low there is a considerable growth in the participation in informal recreation. This is reflected in Bath and North East Somerset where walking in the countryside and swimming are the most popular activities.'

The Local Plan also states:

'Development which adversely affects the recreational value of or access to existing and proposed routes for walking, cycling or horse riding including those shown on the Proposals Map and other public rights of way will not be permitted.'

This included:

*'Existing
Limestone Link: Compton Martin to Hinton Blewett and along Cam Valley to Dundas Aqueduct; along Kennet and Avon canal towpath and St. Catherine's Valley to Monkswood Reservoir.'*

The best way of ensuring that no development (that would affect the recreational value of this footpath) takes place here, would be to keep the Right of Way on its original line (as stated in the definitive map statement) and to a width that reflects its original historic width. This would ensure that this part of the Limestone Link retains its undoubted attraction for all walkers.

7.12 Response: There is no public rights of way legislation that can prevent development near to a footpath, provided that the footpath remains open and safe for public use. Building over a public right of way is an offence. Notwithstanding this, planning permission may be granted for development over a public right of way, although the path must be diverted before development can take place. It is therefore countered that a footpath diversion is not the best way of ensuring that unwanted development takes place, and that this falls within Planning Policy. The issue is not considered a relevant consideration under s119 HA1980.

7.13

The BA22/17 Right of Way is unique in that in addition to the picturesque quality of the Cam Valley, it also follows the historically interesting route of the old Somerset Coal Canal. The Somerset Coal Canal features in the Local Plan as a place of Special Historical Interest. Knowing that you are walking the same canal towpath that had been in use more than 200 years ago adds greatly to the joy of walking here.

- 7.14 Response: Much of the original route of the canal towpath has not been walked (or walkable) by the public in the area for many years. The public have in fact walked a route that combines short sections of the towpath, the actual filled-in canal itself and sections of the northern and southern canal banks, that would not have been walkable until the canal was filled in (this was done, piecemeal, during the Twentieth Century). The proposed new route will in fact run along what were the southern and northern banks of the canal. The land to the south of the new route, at the bottom of the adjacent slope, formed a subsidiary drainage arm to the canal – the new path is at least as historically interesting as the existing route and lies no more than 10 metres of the old canal bed.

7.15

Finally, I would question whether the notices posted on-site with regard to this order complied fully with the Highways Act 1980. The notices appear to have been fixed in an inconspicuous position to the fences that obstruct the legal Right of Way rather than conspicuously at each end of the Right of Way (part) it is proposed to divert.

Clearly the act intended that all users of a footpath would be made fully aware that a diversion order had been made and that objections could be submitted if they chose to do so.

In this instance as the landowner had already created an unauthorised diversion, was the council not under an increasing obligation to ensure the notices were conspicuously displayed where footpath users would see them?

- 7.16 Response: The notices were placed by the two stiles that cross the fencing erected earlier in the year across public footpath BA22/17. It is agreed that the effect of the Order will be to divert the full length of the footpath that lies between Anchor Lane in the west and Public Bridleway BA22/6 to the east, and that both of these end points lie approximately 35 metres out from the two stiles. However, both of the notices were placed on the public footpath referred to in the Order. Physically, the available route will not alter between Anchor Lane and the first stile, or between the second stile and bridleway BA22/6. It should also be noted that the easternmost end of the path to be diverted lies at the bottom of the inaccessible disused canal basin and that placing notices there would obscure them from public view. Placing a notice at the intersection of BA22/17 and bridleway BA22/6 would have meant that walkers approaching along BA22/6 from the north could quite conceivably have missed seeing the notice altogether.

Additional Comments received following objection period

- 7.17 A site meeting with Mr Nash was subsequently held to (unsuccessfully) elicit the withdrawal of his objection. Mr Nash has made a number of further requests for information and has since queried the correlation between the Ordnance Survey base-mapping and the actual lay of the land, and considers that this may have an effect on the accuracy of the path alignments used in the Order plan. Further

information has been provided to Mr Nash explaining the rationale for the alignments used in the Order but he remains unconvinced at this stage. Mr Nash has also stated that he believes that the correct route of the path to be diverted would have had a legal width greater than the 1.8 metres allocated for the new route and that the diversion will therefore reduce the width of the route legally available to the public. Even if this were ultimately proved to be the case, it is not considered that the diversion will be substantially less convenient to the public or that the public's enjoyment of the path will be unacceptably compromised.

- 7.18 If both of the objections received are withdrawn then the Council will be able to confirm the Order as an unopposed Order.

Summary to objections

- 7.19 The objections do not appear to show that the Order fails to meet the necessary criteria of s119 HA1980.

8 RISK MANAGEMENT

- 8.1 If the Committee decides to abandon the Order, or if the SoS decides not to confirm the Order, then the public footpath will remain recorded on the Definitive Map along an alignment that is believed to be both inaccurate and unwalkable – at present a section of the path is recorded over a 37 metre stretch of disused canal basin that lies several metres lower than the surrounding land. If the Committee decides to abandon the Order, or if it is found to have been invalidly made, then the applicants will be able to reclaim costs they have paid.

Resolution of the inaccuracy on the Definitive Map

- 8.2 Two confirmed Definitive Map Modification Orders will be required to alter the Definitive Map to show what is currently believed to be the correct alignment of the path – one to delete the incorrect alignment and one to record the correct alignment (it should be noted that there is always a risk that any Order made by the Council may fail to be confirmed and will have no legal effect).

Resolution of the unwalkable route shown on the Definitive Map

- 8.3 Although the currently recorded route is considered to be inaccurate, if the route believed to be correct cannot be successfully proved, the Council will be left with a duty to make the legal alignment walkable by the public, which may be costly and contentious to the landowner and will not benefit the public.
- 8.4 The Public Rights of Way Team will be required to prepare a case and accompanying documentation if the Committee decides to forward the matter to the SoS for determination. The Team must also present a case at either

9 ADVICE SOUGHT

9.1 Advice from the Council's Planning & Environmental Law Team has been taken upon this matter.

10 CONCLUSIONS

10.1 It is considered that the objections received against this Order fail to demonstrate that the criteria of section 119 HA1980 have not been met.

10.2 It is therefore recommended that the Committee should decide to submit the Order, together with objections not withdrawn, to the SoS for determination, with a request that the order be confirmed as made.

Contact person	Stuart Higgins, Public Rights of Way Technician (01225 477650)
Background papers	Public Path Order Diversion File (held by PROW team 01225 477650)