FULL EXCHANGE OF CORRESPONDENCES WITH MR IVES

Dear Graeme

I write with reference to your letter of 12 December 2008. There appears to have been no previous informal consultation.

While I have yet to visit the site I am anxious to develop the question of expediency. As you aware such applications are the subject to what are often referred to as three legal tests one of which is whether the Council is satisfied that the application is expedient in the interests of the landowner. Your requirement is ensure that these three tests are met before confirming the order i.e. not necessarily at the making stage.

The word test indicates to me that the arguments/evidence provided should be able to be investigated/critiqued both by you and "the public". It should not be possible to simply state that a change of line to a public right of way is required "on demand". In order that that such investigations are possible it is therefore necessary, in my opinion, that the landowner's interests must be specific and stated as a part of the application and in any subsequent order made. As regards the meaning of the word "expedient", the version I prefer to use is "suitable and appropriate" whereas others use "justified and right".

As you are aware the present order, as made, simply states that the application is made in the interests of the owner. As such I must ask that you consider whether this is sufficient to meet your criteria or should a more specific reason be given with supporting evidence and then investigated.

Depending on the response received (which may also have an impact on future applications) I shall decide whether or not to object on this point. I will in the meantime arrange to visit the site and comment on the other relevant tests. Meanwhile I trust you guys will all have a great Christmas and a Happy New Year.

Regards
John Ives
20 December 2008

Dear Graeme

I visited the site on 24 December 2008 and detail my findings.

This appears to be a clear case in which the landowner or predecessor has constructed an alternative to the legal line and is belatedly applying for a diversion. While the alternative planned route is obviously well used this to me is a matter of procedure which cannot be condoned.

The main problem it seems with the existing route is that the landowner in order to facilitate the breeding of horses has constructed a paddock using a railed fence with stock proof wiring and has thereby obstructed the legal line at point Z.

As such I believe that the order should not have been made given the advice given on p184 of the blue book viz
"the Council should regard a calculated refusal to remove an obstruction that has been deliberately created by the landowner as a factor of considerable weight, tending to suggest that it is reasonable to require its removal before an application can be considered.

My view is quite simply if you have agreed procedures then you should stick to them or else you end with the public being taken advantage of. I would see it as being part of the HAs role to control and monitor these procedures.

I therefore advise that at this stage I mark up potential objections as regards

- the expediency issue and
- the obstructed legal line issue although I realise this is not a valid reason for objection but a matter of presenting to the Regulatory Access Committee with a recommendation not to confirm

I therefore await your prompt comments i.e. well before the deadline date for objections.

Regards
John Ives
24 December 2008

Dear John

Thank you for your e-mail and I would like to confirm receipt of your objection.

I will consider the points you have raised and write again in a couple of days.

Best regards,

Graeme Stark.
07 January 2009

Dear John

Further to my e-mail dated 7th January 2009, I am writing in response to your objection to the Long House Farm Diversion Order.

An informal consultation was carried out by my predecessor, Stuart Higgins, in February 2007. Unfortunately it appears that Stuart consulted with the Open Spaces Society's head office in Henley-On-Thames but not with

yourself as the organisation's Local Correspondent; I apologise for this oversight and will ensure that all consultation letters are sent to yourself in future.

The wording of the actual diversion order is set out in secondary legislation, namely the 'Public Path Orders Regulations 1993', and the Council is not therefore at liberty to state in the Order itself anymore than that "...in the interests of the owner of the land...it is expedient..." We can, of course, expand the grounds as to why it is expedient in the covering letter and you have raised the helpful point that this would be useful for those assessing the merits of an order. I will ensure that in future this is done in the covering letters accompanying all future orders but for the meantime let me explain the grounds in this particular case. The barn to the southeast of point X on the Order Plan has been converted into a residential dwelling and the field between points Y and Z is now used for the breeding of thoroughbred horses. Firstly, the footpath is proposed to be diverted to improve privacy for the occupants of the newly converted barn. The front of the house is shielded from the footpath to the south (CL4/20) by a hedge but the section of the footpath between points W and X looks through the windows on the side of the house. Diverting the footpath away from the immediate curtilage of the house would therefore allow the landowner to erect a fence and improve their privacy. Secondly, diverting the section of the footpath between points Y and Z would improve the management of the thoroughbred horse breeding business. Members of the public currently have the right to walk through the field in which the horses are kept and this has previously caused problems with dogs harassing the horses. Given the unusually high value of these animals, the diversion would be in the landowners interests because it would allow them to provide secure fencing to protect the horses and segregate them from the public.

Although an alternative route has been provided, I don't believe the landowner has intentionally obstructed the public right of way in this instance. It was not until my colleague Jenny King drafted the Order in September 2008 that it became apparent that the right of way was not open and available at point Z on the Order Plan. For a large number of years, the landowner and the Council were under the misapprehension that the footpath crossed the field boundary at point B on the Order Plan and in fact, to this end, the Council erected a bridge and waymarking at point B. It was not until the paths were surveyed prior to drafting the Order than this came to light. While I agree that the deliberate obstruction of a right of way should be a material consideration in relation to a diversion order, I don't believe that this was the case at Long House Farm.

If you would like to meet on site to discuss this matter, please do not hesitate to contact me on 01225 477650.

Best regards,

Graeme.

Dear Graeme

Having had previous experience of promised replies not arriving by the published final day for objections I write to confirm (with just two days to go) that I will be objecting to this application on the grounds that the reasons for the application have not been stated, investigated and commented upon.

As you are aware before progressing any S119 application the OMA is required to appraise the validity of the application.

At this stage the main concern and consideration for a good and alert order making authority is "would this proposal be likely to be found to be popular with or at least acceptable to the public".

If the OMA believes there is a reasonable chance that overall the proposal would be found to be acceptable to the public the proposal is most usually put out to pre-order consultation.

As you are aware one of the three legal tests to determine whether the application is able to be confirmed is whether the application is deemed to be expedient in the interests of the landowner. Previously this test seems to have been given little weight in the acceptance and order making procedure and the mere fact that an application has been made has tended to generate a tick in the box.

I believe that this is fundamentally wrong and that the reasons for any application must be clearly stated and supported by evidence. In this case there seems to be no reason stated.

Also in the absence of any comments about the apparent deliberate obstruction of the legal line I confirm that I intend to speak along the lines suggested at the confirmation stage.

Regards
John Ives
19/01/2009

Dear John

Thank you for your e-mail dated 19th January 2009 in which you have formalised your objection; I would further like to confirm receipt of your objection.

I did respond to the points you raised in an e-mail towards the end of last week. I presume though that this has not arrived in your inbox, so I have copy and pasted it's contents below and will forward on the original e-mail;

Dear John

Further to my e-mail dated 7th January 2009, I am writing in response to your objection to the Long House Farm Diversion Order.

An informal consultation was carried out by my predecessor, Stuart Higgins, in February 2007. Unfortunately it appears that Stuart consulted with the Open Spaces Society's head office in Henley-On-Thames but not with yourself as the organisation's Local Correspondent ; I apologise for this oversight and will ensure that all consultation letters are sent to yourself in future.

The wording of the actual diversion order is set out in secondary legislation, namely the 'Public Path Orders Regulations 1993', and the Council is not therefore at liberty to state in the Order itself anymore than that "...in the interests of the owner of the land...it is expedient..."
We can, of course, expand the grounds as to why it is expedient in the covering letter and you have raised the helpful point that this would be useful for those assessing the merits of an order. I will ensure that in future this is done in the covering letters accompanying all future orders but for the meantime let me explain the grounds in this particular case. The barn to the southeast of point X on the Order Plan has been converted into a residential dwelling and the field between points Y and Z is now used for the breeding of thoroughbred horses. Firstly, the footpath is proposed to be diverted to improve privacy for the occupants of the newly converted barn. The front of the house is shielded from the footpath to the south (CL4/20) by a hedge but the section of the footpath between points W and X looks through the windows on the side of the house. Diverting the footpath away from the immediate curtilage of the house would therefore allow the landowner to erect a fence and improve their privacy. Secondly, diverting the section of the footpath between points Y and Z would improve the management of the thoroughbred horse breeding business. Members of the public currently have the right to walk through the field in which the horses are kept and this has previously caused problems with dogs harassing the horses. Given the unusually high value of these animals, the diversion would be in the landowners interests because it would allow them to provide secure fencing to protect the horses and segregate them from the public.

Although an alternative route has been provided, I don't believe the landowner has intentionally obstructed the public right of way in this instance. It was not until my colleague Jenny King drafted the Order in September 2008 that it became apparent that the right of way was not open and available at point Z on the Order Plan. For a large number of years, the landowner and the Council were under the misapprehension that the footpath crossed the field boundary at point B on the Order Plan and in fact, to this end, the Council erected a bridge and waymarking at point B. It was not until the paths were surveyed prior to drafting the Order than this came to light. While I agree that the

deliberate obstruction of a right of way should be a material consideration in relation to a diversion order, I don't believe that this was the case at Long House Farm.

If you would like to meet on site to discuss this matter, please do not hesitate to contact me on 01225 477650.

Best regards,

Graeme.

Best regards,

Graeme Stark.

Dear Graeme
Could you please ensure that any future response is added to my file? This way I find that all correspondence about a given case is available all in one place.

Let me first say that when it comes to establishing the expediency situation I have a received the following advice from DEFRA

In answer to you queries we can offer the following advice.

When making an order local highway authorities must be prepared to show why they consider the diversion proposed is in the interests of the owner, lessee or occupier or of the public, since it or the Secretary of State, when considering the confirmation of the Order, must be satisfied that the diversion is expedient on the ground stated.

You raise issues over what is meant by 'privacy'. Privacy is often linked to issues such as security and health and safety and the circumstances will tend to vary from case to case and the Order Making Authority or the Secretary of State will have to duly consider those individual circumstances in the making and confirming of any diversion order.

In this case irrespective of whether the crossing point is at point B or Z the paddock has been deliberately fenced in and it appears from what I have been told that this has been accepted as "part of the deal" by both the RA and BANES. That is not right as all it will do is encourage other landowners to take the law into their own hands, deliberately divert PROWs and offer alternatives as a "fait accompli" and with a "sorry didn't understand the rules" smirk on their face.

As regards the alleged interference with horse breeding what evidence is there of this? Is it just the landowners say so, because "she would say that wouldn't she"?

My opinion is that quite simply that diversions from the legal line should be only be accepted when truly warranted ***and justified*** not when there are just desirable. The whole issue of "right to privacy" must be made clearer and

quantified i.e. is there such a thing as a right to privacy? After all landowners should (when buying property) be fully aware of the situation. Caveat emptor. To this end I have welcomed the project agreed by the JLAF i.e. for the members to write an internal policy detailing S 119 acceptance procedures but here we are over a year or more later and absolutely nothing has been agreed as I see it. I attended a meeting some time ago with Bill Tate (as a guest) and put forward ideas as to what should be included but none of these were included in the draft presented to the JLAF some time ago and to me this indicates that we are in for "more of the same". This should not be rocket science and would certainly facilitate fewer objections in that most problem areas would be pre-empted.

Now I am not stupid enough to die in a ditch over one case in the full knowledge that a better ongoing system will be in place so I guess it is over to you. I believe that a culture exists for S119 applications to go through too easily and that the acceptance procedures are too lax. I believe a policy should be written and available to applicants to read before putting "pen to paper." This case illustrates to me all that is wrong with the present system i.e landowner buys land, diverts footpath because it doesn't suit, speaks to the HA who say "we are where we are" lets put it through the S119 procedure and see what happens.

As the guidelines stand I have grounds for objection on the issue of expediency (I have not formed a view on enjoyment etc) and reasons to request non confirmation. What my long term aim is however is a policy which weeds out most the reasonable objections and it may be that you see that an urgent meeting between all interested parties is the way forward here. If not well I shall let matters take their course.

Incidentally your E mail of 16 Jan never arrived, very strange!

Regards
John Ives
20 January 2009

Dear John

Thank you for your e-mail dated 20 January 2009.

Although a paddock has been built in the field through which the footpath runs, the landowner installed structures at each point where they believed the footpath crossed the paddock fence. A structure was installed near point B because on the ground the bridge makes it appear that this is where the footpath runs. As I said in my earlier e-mail, it was Avon County Council who installed the bridge at point B over 15 years ago believing that this was where the footpath crossed the field boundary. B&NES Council had not received any complaints from members of the public or user group representatives to

say that the footpath was obstructed at point Z, and that the boundary crossing was wrongly located, until now.

Although the fence does cross the path *near* point Z, even if this wasn't in place, the path would be impassable immediately to the north *at* point Z because of a hedge and the absence of a means to cross the ditch. I don't believe it would be a prudent use of public money to install a bridge at this point in time while a public path order is still being processed which, if confirmed, would have the effect of diverting the path away from point Z and negate the need for a crossing there.

The landowner did not present a 'fait accompli' but rather came to the current proposals through discussions and negotiations with Chew Stoke Parish Council, the Ramblers' Association and local residents who regularly use the path. The landowner's original proposal differs from that contained within the Order and I believe that all those involved in the consultation are satisfied with the effect of the Order.

The landowner's, and indeed the Council's, view that the diversion would be expedient, in part, to improve farm management is based on previous experience of farming the land. Dogs belonging to users of the path have in the past become aggressive towards to the landowners horses and foals and this has led to the horses becoming badly spooked. This created a danger both to the stable-hands while leading the horses and of the horses injuring themselves. There was also the credible threat that the aggressive behaviour of the dogs would have result in the horses being bitten.

The landowner has also previously experienced problems with members of the public leaving the footpath and going down towards the barn to see the horses. Previously this unexpected occurrence has led to foals and youngstock becoming spooked and again creating a danger for stable-hands in the barn with them and to the foals themselves. The landowner raised these issues with our Field Officer prior to making the application.

The landowner isn't claiming a 'right to privacy'; simply that it would be in their *interests* to have the greater privacy that the diversion would grant. The landowner has resided at Church Farm for over 20 years but it is only since converting the building immediately to the east of point X into a residential dwelling that privacy has become an issue. The footpath allows members of the public to look into the house and this has been the landowners experience since moving in; diverting the footpath to the west would therefore allow them to enjoy much greater privacy.

I believe that diverting the footpath would achieve the aims of increasing privacy and improving farm management and that the Order is therefore expedient in the interests of the landowner.

With regards to the public's enjoyment of the path, I think that the diversion would have a positive effect rather than simply a neutral effect because users would no longer have to negotiate any structures on the route. The two stiles on the bridge at point B were voluntarily removed by the landowner last year

and the footpath would no longer cross the paddock boundary which would otherwise necessitate gates. Additionally, the landowner has also entered into a dedication agreement, whereby a public footpath will be created between point B and the Two Rivers Way/public footpath CL4/20 to the southwest.

I have not, to date, been involved in the joint Public Path Order Policy, however I agree that it is important that a robust policy is formulated. I have contacted Nicola Chidley, who is the lead officer on the project at South Gloucestershire Council, but she is currently on leave.

I would be delighted to meet you out on site to discuss the issues involved. Unfortunately, I don't have your telephone number but would 9am on Friday 30th January be suitable for yourself?

Best regards,
Graeme Stark
27 January 2009

Dear Graeme

Let me first deal with the issue of the crossing point at the edge of the paddock. I have no problem that this be at point B.

What I have a problem with is the fact that the existing legal line is obstructed by the stock fencing adjacent to the bridge. This effectively means that the existing legal line is not usable. The indications are that this has been done with the full knowledge and apparent agreement of yourself, the RA and the PC. This I find totally unacceptable given the advice issued in the blue book and to me says that the public are being given the strongest possible indicator that the proposed route is the one to be used and therefore the impression that they no longer have a public right of way across the paddock.

I also accept that any application can include other matters separate from the diversion itself which can bring the public additional added benefits. As regards the reasons for the application what I am saying is that **evidence must be produced** of problems not simple statements. Personally, I know that horses can be a damn sight more aggressive than stock and I fail to see the difference between a horse having to deal with a dog and a human having to deal with a horse. Both are problematical but what recourse do the public have in such scenarios?

When I visited the site before Christmas I was told by walkers that the paddock wiring had been in situ for several years. This clearly indicates to me that a decision was made to effectively block the legal line some time ago and then talk about a diversion.

While I have no doubt that this lady is altruistic I am concerned how the foregoing circumstances have been allowed to evolve. To me the reasons are

due to the fact that a comprehensive diversion acceptance procedure does not exist and as such sometimes things are done on a “wing and a prayer”.

As I have said I have met previously (16 April 2008) with your project team and here we are 10 months later and absolutely nothing has happened. I am a strong believer in Total Quality management and part of that is “agreed customer requirements”. Clearly I believe public path orders are far too easily achieved and this can only be remedied by a clear and unambiguous policy. I believe 10 months is long enough after all the main bones of contention are well known to all parties.

This Friday sounds fine to me but can we make it 0930 please?
Regards
John Ives
01275-543198

Dear John

Thank you for your e-mail dated 27 January 2009.

9:30 on Friday is fine for myself, so I look forward to meeting you then.

Best regards,

Graeme.

Dear John

I am attending a meeting tomorrow afternoon with officers from the other two local authorities involved with the PPO Policy. It is intended that the final draft of the policy will be completed and agreed upon. The final draft policy is then an item on the Regulatory (Access) Committee’s agenda for 7 April so that the Committee can comment on the policy. We will then consult with all interested parties prior to the Cabinet Member making the final decision on whether or not to adopt the policy.

In an email to Nicola Chidley you suggested a number of points which you would like to see included in the policy. Although your comments will be considered at tomorrow’s meeting, I think I can address the majority of your concerns here and now, as a number of them fall on the procedure side of the slightly hazy divide between policies and procedures.

Prior to making an Order, B&NES Council always carry out an informal consultation to gauge people’s opinions. In future, I intend to carry out consultations for PPO’s following the same procedures which I adopted for

the recent proposed changes to the rights of way network in the parish of Charlcombe. This includes writing to:

- the Parish Council,
- the local member,
- all statutory undertakers (i.e. utility companies),
- and all interested user groups.

The OSS's head office and yourself are already included in the consultation list. Additionally, an article was recently placed in the Council's 'Highways and Transportation News' magazine inviting any groups which we aren't already aware of to contact us for inclusion on future consultation lists.

The letter provides the consultees with a 6 week window (unless longer is needed) in which they can make comments. The letter includes:

- a written description of the proposed changes,
- a plan showing the proposed changes and their wider context,
- details of any structures which are proposed to be included as limitations or subsequently authorised (our standard Section 147 structure authorisation agreement already includes a clause stating that the structure is only authorise while it is required to control the ingress and egress of animals),
- the legislation under which the proposals are being made,
- who's interest the proposals are in,
- and how they are in their interests.

Incidentally, the application form also includes a field requiring the applicant to state in what way they regard the diversion to be in their interests. During this period, notices were posted on site and on the Council's website inviting comment on the proposals.

From previous experience I have found it fairer to arrange a group site visit once I know the availability of everyone who's interested in attending. The problem with specifying a date in the consultation letter is that some people are unlikely to be able to attend. I am always happy to meet on site to discuss proposals and am happy to address any questions such as the precise line or land use involved.

Once an Order has been made, the Council is then of course required to advertise the making of the Order. All previous consultees will receive a notice specifying the period during which they can make formal objections.

B&NES Council has not experienced any problems with applicants refusing to pay once the Order has been made. However, if this was ever to arise the applicant would be pursued through the courts as they would have already entered into a legally binding contract to pay.

Another issue which we discussed during our site meeting on 30 January 2009 was the surface of public footpath CL4/20 between the track at the bottom and point A on the Order Plan. As you may recall, the green lane was

particularly muddy underfoot; I have spoken to the landowner and the access officer for the area and it has been agreed that the section will be surfaced if the diversion goes ahead. The surfacing will be done in crushed concrete, the same as the track at the bottom, which will provide a firm, even surface underfoot while maintaining the character of the green lane.

In light of the timetable for taking the PPO Policy forward, the improved consultation procedures and the proposed surfacing, would you be prepared to reconsider your objection to the Church Farm Public Path Diversion Order?

As ever, if you would like to discuss any of these issues please do not hesitate to contact me.

Regards,

Graeme Stark.

Dear Graeme

I have replying to your letter by E mail as I have copied in a wider audience but I will add it to “our file”. Let me first the OSS’ s policy is to oppose all diversions that are not overall to the public benefit. In order to achieve the best deal for the public there is a great deal to learn about what is acceptable and what is not as well as trying to understand the decision making processes and what interpretations one can put on various bits of law. That knowledge comes with experience.

As I have said before I firmly believe that many of the problems with diversions could be avoided if the initial acceptance procedure pre-empted the “top ten” known problems. As regards the Long House Farm application as you know I became involved only recently and was unaware of all the historic wheeling and dealing that had gone on.

My assessment of the application at the moment is that the reasons for the application won’t stand up to scrutiny; the alternative route is inferior and does not consider the needs of the disabled. Add to this the effective blocking of the existing line means that this application would normally be one that I would love to get my teeth stuck into. In short I think the landowner has been allowed to go ahead and do things which any good Order Making Authority should have stood up and said “No we are not having this”. Unfortunately most Highway Authorities simply walk away from taking enforcement action and I am sorry to say but such actions give landowners the confidence to go ahead and do things which are to me unacceptable. I am not however saying that in this case that the lady concerned has not shown a degree of altruism but I do believe she had a very weak case to start with and has done things which I believe are unacceptable.

I did however give my word that if BANES came up with an acceptable path order policy backed up with a suitable diversion application form then I would reconsider my objections in this case. I have to say that if you know me such a decision goes very much against the grain but recently I have perhaps mellowed a bit and realise that sometimes you have to play the long game. Equally I realise that much of this particular case was prepared before you arrived.

My position at the moment is that until I have seen the revised policy I am not prepared to jump one way or the other. I would however like you to ensure that one thing is included and this relates to the definition of the application being “expedient in the landowner’s interests”. Basically my interpretation is that any application must be submitted for a reason which must be backed up with evidence. I also see the issue of increased privacy would always be very difficult to substantiate. It is unacceptable for any application to be considered just because it is desirable. The existing line has when all is said and done, been legally agreed with the landowner and should not be interfered with lightly.

I am quite happy to debate any of the foregoing with any of the recipients.

Regards
John R. A. Ives

Dear John

Thank you for your email dated 3 March 2009.

I have noted your comments and will keep you informed with regards progress on the Public Path Order Policy.

The Order is also likely to be an item on the agenda for the Regulatory (Access) Committee’s meeting on 7 April 2009. I will write again soon though to confirm whether this is indeed the case and to confirm the details of the meeting.

Regards,

Graeme Stark.