

Bath & North East Somerset Council

MEETING/ DECISION MAKER:	Planning Committee	
MEETING/ DECISION DATE:	8 March 2023	EXECUTIVE FORWARD PLAN REFERENCE:
		N/A
TITLE:	Application to divert Public Footpath BC62/3, Church Lane, Combe Down, Bath under Section 119 Highways Act 1980	
WARD:	Combe Down	
AN OPEN PUBLIC ITEM		
<p>List of attachments to this report:</p> <p>Appendix 1 – Decision Plan</p> <p>Appendix 2 – Numbered Photographs of Site</p> <p>Appendix 3 – Safeguarding Statement</p> <p>Appendix 4 – Summary of Consultation Responses</p> <p>Appendix 5 – Full Consultation Responses (redacted)</p>		

1 THE ISSUE

- 1.1 An application has been made to the Highway Authority (“the Authority”) to divert a section of Public Footpath BC62/3 adjacent to Monkton Preparatory School in Combe Down, Bath under Section 119 Highways Act 1980 (“the 1980 Act”).
- 1.2 The application has been presented by Mr Paul Pearce, Team Leader in the Council’s Parks & Green Spaces team. It is however being funded by Monkton Preparatory School (“the School”). The application seeks to divert a section of public footpath, off of land owned/occupied by the School, onto adjacent private land which is currently leased to the Council as allotments.
- 1.3 Whilst the application has been made by a particular team within the Council, the Council as a whole has not taken a position on these proposals and it is for the Committee to determine on behalf of the Highway Authority whether an order should be made.
- 1.4 The School is seeking the diversion for reasons of safeguarding – to divert members of the public away from the section of the School’s drive down which the current footpath runs; the public would instead follow a new route along the edge of the allotments, on the opposite side of the existing dry-stone wall from the School’s drive – a wall which would itself be re-built to a 1.5-metre height.

- 1.5 In accordance with the Authority's adopted Public Path Policy, an informal public consultation has been held and a total of 90 letters/e-mails have been received from members of the public in opposition to the proposed diversion. Agreed working practice is for "contentious" applications for the diversion of public rights of way to be referred to the Planning Committee for a decision, with "contentious" being defined as more than 12 objections, an objection from the parish/town council or an objection from one of the Ward Councillors.
- 1.6 The issue, therefore, is whether or not the Authority make an Order to divert the relevant section of Public Footpath BC62/3.

2 RECOMMENDATION

The Committee is asked to:

- 2.1 determine the proposals and, based upon the information presently before the Highway Authority, decline to make an order to divert a section of Public Footpath BC62/3 as detailed on the plan attached at Appendix 1 ("the Decision Plan").

3 STATUTORY CONSIDERATIONS

- 3.1 The Authority has a discretionary power to make Public Path Orders. When considering an application for a Public Path Order, the Authority should first consider whether the proposals meet the requirements set out in the legislation (which are reproduced below). In deciding whether to make an Order or not, it is reasonable to consider both the tests for making the Order and for confirming the Order. Even if all the tests are met, the Authority may exercise its discretion not to make the Order but it must have reasonable ground for doing so.
- 3.2 Before making an Order under section 119 of the Highways Act 1980 ("the 1980 Act"), it must appear to the Authority that it is expedient to divert the path in the interests of the public and/or of the owner, lessee or occupier of the land crossed by the path.
- 3.3 The Authority must also be satisfied that the Order does not alter any point of termination of the path, other than to another point on the same highway, or another highway connected with it, and which is substantially as convenient to the public.
- 3.4 In reaching its decision, the Authority must also have regard to:
- the needs of agriculture (including the breeding or keeping of horses) and forestry;
 - the desirability of conserving flora, fauna and geological and physiographical features;
 - the effect the path would have on members of the public with protected characteristics under the Equality Act 2010,
- 3.5 Before confirming an Order, the Authority or the Secretary of State must be satisfied that:
- the diversion is expedient in the interests of the owner, lessee or occupier crossed by the path, or in the interests of the public;

- 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 relevant provisions for compensation in the Act.

3.6 In addition to the legislative tests detailed above, the proposals must also be considered in relation to the Authority's adopted Public Path Order Policy. The Policy sets out the criteria against which the Authority will assess any Public Path Order application and stresses that the Authority will seek to take a balanced view of the proposals against all the criteria as a whole.

3.7 These criteria are:

- Connectivity;
- Equalities Impact;
- Gaps and Gates;
- Gradients;
- Maintenance;
- Safety;
- Status;
- Width;
- Features of Interest.

3.8 The Authority will also consider the effect of the proposals on Climate Change.

4 CONSULTATION

4.1 Affected landowners, the Bath & North East Somerset Allotments Association, national and local user groups, the Ward Councillors and statutory consultees were all consulted about the proposed diversion for a period of four weeks ("the Consultation Period"). Additionally, site notices were erected at each end of the proposed diversion. Details of the proposals were also placed on the Authority's website to seek the views of members of the public.

4.2 A total of 90 objections were received from a combination of members of the public, individual allotment holders and one of the Ward Councillors. Representations were also received from seven other parties. These objections and representations - and in particular their common themes - are summarised in Appendix 4. Redacted copies of the full objections and representations can be found in Appendix 5.

5 THE REPORT

5.1 The application proposes that a section of Public Footpath BC62/3, commencing from grid reference ST 7645 6243 (point A on the Decision Plan) and proceeding in a generally south-easterly direction for approximately 209 metres, along the side of the private road leading to Monkton Preparatory School, to grid reference ST 7659 6228 (point B on the Decision Plan) would be stopped up, as shown by a continuous black line (“the Existing Footpath”). The new line of the footpath would commence from grid reference ST 7645 6243 (point A on the Decision Plan) and proceed in a generally south-easterly direction for approximately 210 metres, along the edge of the allotment gardens, to grid reference ST 7659 6228 (point B on the Decision Plan), as shown by a dashed black line (“the Proposed Footpath”).

5.2 A number of pieces of construction & clearance work also form part of the proposals:

- The demolition of the dry-stone wall currently running between the Existing Footpath and the Proposed Footpath (including the pillars and pedestrian gateway set into it), with the wall then being rebuilt to a greater height of 1.5 metres;
- A two-metre wide gap would be left in the new wall at point A on the Decision Plan, for walkers to pass through¹;
- A two-metre wide gap would similarly be made in the green metal fencing at the southern boundary of the allotments, approximately seven metres northwest of point B on the Decision Plan²;
- Vegetation would be cleared along a 46-metre section immediately southeast of point A on the Decision Plan, and along a seven-metre section immediately northwest of point B on the Decision Plan;
- A stockproof fence, 1.2 metres in height, to be erected on the opposite side of the Proposed Footpath with a gate installed within it to allow allotment holders access to their plots, on foot;
- A surface of rolled stone would be laid on the Proposed Footpath³;
- The existing street lights, currently fixed over the Existing Footpath, would be swivelled 180 degrees to face the Proposed Footpath.

All of the above works would be commissioned and funded by the School.

5.3 It is recommended that the various tests outlined in Section 3 above are considered in turn. Issues raised during the consultation (and summarised in Appendix 4) are also addressed below:

5.4 Before making an Order under section 119 of the Highways Act 1980 (“Section 119”), it must appear to the Authority that it is expedient to

¹ The relevant section of existing wall can be seen in Appendix 2, Photo 2

² This fencing can be seen in Appendix 2, Photos 4 & 5

³ The application states the Proposed Footpath would be 1.6 metres wide. However the School has since confirmed that it would in fact surface the new footpath to a width of two metres, in accordance with the minimum permitted width for a new footpath under the Authority’s adopted Public Path Policy.

divert the path in the interests of the public and/or of the owner, lessee or occupier of the land crossed by the path:

- 5.5 The School, who occupy the land across which the Existing Footpath runs, are seeking the diversion for reasons of safeguarding – to divert members of the public away from its grounds and onto land occupied by another party, on the opposite side of a wall; the School’s Safeguarding Statement can be found at Appendix 3. If it was demonstrated that safeguarding would be sufficiently improved then this would be likely to satisfy the expediency test under Section 119 of the 1980 Act.
- 5.6 However 32 objectors have claimed that, notwithstanding the Existing Footpath running down the School’s drive, members of the public currently have access, daytime and evenings, to the School’s sports centre, which is reached by walking down that drive⁴. If this is indeed the case, and there are no plans to cease, or at least greatly restrict, this open public access down the School’s drive and into its sports centre following a diversion of the footpath, then it is difficult to see how there will be a sufficiently positive impact on safeguarding for the expediency test to be satisfied, as regards the owner, lessee or occupier of the land. It has therefore not been demonstrated that diversion of the footpath would be expedient, taking into consideration other safeguarding issues relating to access on site.
- 5.7 The Authority must also be satisfied that the Order does not alter any point of termination of the path, other than to another point on the same highway, or another highway connected with it, and which is substantially as convenient to the public:**
- 5.8 The termination points of the footpath are not changing so this test is satisfied.
- 5.9 The path must not be substantially less convenient to the public as a consequence of the diversion:**
- 5.10 Matters such as length, difficulty of walking and the purpose of the path pertain to convenience to the public. As the proposals simply divert the route walked to the opposite side of a wall, in a line running parallel to the existing line, there would only be a one metre increase to the overall length of the route as a consequence of the diversion and it follows therefore that there would be no decrease in convenience to the public in this particular regard.
- 5.11 It is however proposed that the new diverted section of footpath will have a rolled gravel surface, in contrast to the tarmacked surface of the Existing Footpath. This new section of path, whilst not likely to be used by motor vehicles with the frequency of a public road, is likely nevertheless to be passed over by such vehicles on occasions when heavy or difficult to handle allotment items are delivered to (or taken from) individual plots⁵.
- 5.12 As has been highlighted by a number of objectors, the new rolled stone surface – particularly with the added passage of motor vehicles - is likely to deteriorate more rapidly than the tarmacked surface of the current route, making walking

⁴ See Appendix 4, Section A2

⁵ See Appendix 4, Section A6

more difficult and muddy⁶. Such deterioration would make the use of the new footpath more difficult and consequently, less convenient.

- 5.13 There is also the matter that whilst walkers are currently separated from motor vehicles on the Existing Footpath (with the said path running along a pavement immediately adjacent to the School's vehicular driveway), they would share the same space with motor vehicles on the Proposed Footpath.
- 5.14 A number of objectors have submitted that the Proposed Footpath would be too narrow to be suitable for walkers and motor vehicles to share use⁷. The width originally proposed by the applicant for the Proposed Footpath was 1.6 metres⁸. However the minimum width permitted for a new footpath under the Authority's adopted Public Path Policy is two metres. There would not be space for a footpath much wider than two metres without it encroaching onto existing allotment plots. Although the frequency of motor vehicles, on the Proposed Footpath, is considered likely to be low and sporadic, use of the new path by walkers, on those occasions when motor vehicles are present, will be more difficult even at a two metre width, and consequently less convenient at those times.
- 5.15 The point has also been raised by one objector that members of the public using the School's Sports Centre and who access it by foot from the Mount Pleasant end, would have their walk lengthened by the proposals⁹. Indeed (and assuming that the School block off the access to the existing route at point B on the Decision Plan), this walk would be lengthened by approximately 400 metres for anyone using the footpath for this purpose so would be less convenient for those particular people.
- 5.16 It is worth emphasising however that a proposed new footpath can be less convenient and still pass this particular legal test as the requirement is that the new path must not be *substantially* less convenient. As the only motor vehicles taken on the Proposed Footpath will be those belonging to or commissioned by allotment holders at necessary times, it is considered that there will be a significant proportion of time when walkers using the new footpath will not have to share it with motor vehicles. Similarly, members of the public who use the School Sports Centre and who access it on foot from the Mount Pleasant end are likely to be a relatively limited proportion of the overall members of the public who use the path. This said, the gradual deterioration of the Proposed Footpath's rolled stone surface with the passage of vehicles will adversely affect all walkers.
- 5.17 The Authority must also give due regard to the effect the diversion will have on the needs of agriculture (including the breeding or keeping of horses) and forestry, the desirability of conserving flora, fauna and geological and physiographical features and the effect the path would have on members of the public with protected characteristics under the Equality Act 2010.**
- 5.18 Needs of Agriculture (including the breeding or keeping of horses) and Forestry:** This is a horticultural setting rather than an agricultural one and no

⁶ See Appendix 4, Section A3

⁷ See Appendix 4, Section A4

⁸ See footnote 2 above

⁹ See Appendix 4, Section A8

horses are kept on the land which is the subject of the diversion. Neither is it anticipated that any trees will need to be felled, as a result of the proposals.

5.19 Conserving flora, fauna and geological and physiographical features:

5.20 During the consultation, five objectors raised biodiversity concerns surrounding the proposed rebuilding of the dry-stone wall between the Existing Footpath and the Proposed Footpath, with the likely destruction of both flora and fauna being referenced.¹⁰ Concerns have also been raised surrounding the proposals to swivel the existing street lights from the Existing Footpath onto the Proposed Footpath— specifically that this will create a light pollution issue adversely affecting nocturnal creatures and pollinating insects.¹¹ However there is no specific biodiversity designation for this site.

5.21 The diversion would include a limited amount of vegetation clearance along a 46-metre section immediately southeast of point A on the Decision Plan, and along a seven-metre section immediately northwest of point B (this vegetation can be seen in Photographs 2 & 5 in Appendix 2). However this clearance is considered minimal.

5.22 There will be no effect on any geological or physiographical features.

5.23 The effect the path would have on members of the public with protected characteristics under the Equality Act 2010:

5.24 A number of objectors expressed the view that the rolled gravel surface of the Proposed Footpath would be unsuitable/less suitable than the current tarmacked path for elderly people and for users with visual/mobility issues.¹² It is considered certainly, that in comparison to the existing tarmac surface, the new surface would be more difficult for wheelchair users to pass along – particularly as it deteriorates due to use by motor vehicles. On those occasions when such vehicles are also on the footpath it would be difficult, particularly at a two-metre width, for both wheelchair users and persons with visual/mobility issues to navigate around them.

5.25 It must be expedient to confirm the Order having regard to the effect the diversion will have on public enjoyment of the path as a whole; the effect which the coming into operation of the order would have on other land served by the existing footpath; and the effect which any new public right of way created by the order would have on the land over which the right is created and any land held with it, taking into account the provisions for compensation in the 1980 Act.

5.26 Public enjoyment of the path as a whole:

5.27 The proposals include rebuilding the dry-stone wall, currently situated between the line of the Existing Footpath and the line of the Proposed Footpath, to a greater height of 1.5 metres and to also erect a stock fence, 1.2 metres in height, on the opposite side of the new footpath. A substantial number of objectors have raised various concerns about this, ranging from a loss of ambience and/or an open/safe feel of the walking; comments about the new

¹⁰ See Appendix 4, Section A1

¹¹ See Appendix 4, Section A5

¹² See Appendix 4, Section A3

fence being ugly/unsightly; observations that walkers would, in effect, be funnelled in a “long tunnel” that would have no exit point “for nearly a mile” (presumably when one also takes into account the continuation of the existing footpath towards Monkton Combe, beyond Point B on the Decision Plan).¹³

5.28 Furthermore, the objections already discussed in paragraphs 5.11 to 5.14 above relating to walkers having to share the Proposed Footpath with allotment vehicles, also pertain to loss of enjoyment.

5.29 The effect which the coming into operation of the order would have on other land served by the existing footpath:

5.30 Aside from the point made in paragraph 5.6 above about members of the public potentially continuing to access the School’s sports centre following the diversion of the footpath, there would be no effect on land served by the Existing Footpath following the coming into operation of any diversion order as the School is accessed by a private road and would continue to be, following the diversion, if ultimately made and confirmed.

5.31 The effect which any new public right of way created by the order would have on the land over which the right is created and any land held with it:

5.32 In addition to the existing track which runs down the side of the allotment land and onto which it is proposed the Existing Footpath be diverted, there is also a track branching off which runs around the perimeter of the allotment plots themselves.

5.33 Two objectors have emphasised that vehicular access is vital for transporting difficult to handle and heavy items to the plots¹⁴. As the BANES Allotments Association have then highlighted¹⁵, the fence currently proposed for running between the Proposed Footpath and the plots would run across this perimeter track, with no provision for vehicular gates, thus blocking off such access for allotment holders.

5.34 It also seems that even if vehicular gates were installed at the two points in the fence where the perimeter track would meet the Proposed Footpath, the fence would still block off vehicular access to the allotment plots that directly faced the new path. In this regard, it is considered that the Proposed Footpath would have an adverse effect on land held with the land over which it would be created.

5.35 Taking into account the provisions for compensation in the 1980 Act: All affected landowners have consented to the proposals.

5.36 In addition to the legislative tests detailed above, the proposals must also be considered in relation to the Authority’s adopted Public Path Order Policy:

5.37 **Connectivity:** The proposals do alter the start or finish point of the public footpath so there is no effect on connectivity.

¹³ See Appendix 4, Section A7

¹⁴ See Appendix 4, Section A6

¹⁵ See Appendix 4, Section B2

- 5.38 **Equalities Impact:** The negative impact is discussed in paragraph 5.24 above.
- 5.39 **Gaps & Gates:** There are no gates along the Existing Footpath and equally there would be no gates along the Proposed Footpath with walkers entering and exiting the allotment land via two metre wide gaps. This would be in keeping with the Authority's principles of "Least Restrictive Access".
- 5.40 **Gradients:** The Proposed Footpath would run parallel to the line of the Existing Footpath and there would be no difference in gradient between the two routes.
- 5.41 **Maintenance:** As already discussed¹⁶, the rolled stone surface of the Proposed Footpath would be likely to deteriorate more rapidly than the tarmacked surface of the Existing Footpath, particularly with the added passage of allotment vehicles. Whilst the Authority would not be responsible for maintaining the fence or rebuilt wall either side of the new path, it would be liable in law for the ongoing cost of maintenance of this stone surface.
- 5.42 **Safety:** A substantial number of objectors have raised safety concerns, most of these relating to the sharing of use between walkers and motor vehicles and the "inescapable corridor" that would be created by the 1.5-metre high wall on one side of the Proposed Footpath and the allotment fence on the other side, making walkers more vulnerable to attacks or muggings.¹⁷
- 5.43 **Status:** Although it is understood that allotment holders would have a private right to use motor vehicles on the Proposed Footpath, the public right created would be no more than the right to pass and re-pass, on foot. There would therefore be no effect on status.
- 5.44 **Width:** The legal width of the Proposed Footpath would be two metres which ordinarily would be a sufficient width for walkers. However the presence of motor vehicles on this particular path on occasions is likely to cause issues at this width (see paragraph 5.14 above).
- 5.45 **Features of Interest:** A considerable number of objectors raised strong concerns about the destruction of the existing dry-stone wall and a substantial number (and several representees) similarly objected to the removal of the historical gateway and stone pillars¹⁸ set into the wall¹⁹. Some objectors also commented about the proposed higher wall and new allotment fence spoiling views over the school playing fields and the allotment plots themselves²⁰.
- 5.46 The Authority will seek to take a balanced view of the proposals against all the criteria of the Public Path Order Policy as a whole. The proposals will negatively impact on Equalities, Maintenance, Safety, Width and Features of interest; and have a neutral effect on the remaining four criteria. The proposals therefore do not accord with the Authority's Public Path Order Policy.

6 RESOURCE IMPLICATIONS (FINANCE, PROPERTY, PEOPLE)

- 6.1 The School has agreed to pay the Authority's standard Public Path Order application fee. This covers the costs incurred by the Authority in all stages of

¹⁶ Paragraph 5.12 above

¹⁷ See Appendix 4, Section A4

¹⁸ Which can be seen in Appendix 2, Photograph 9

¹⁹ See Appendix 4, Sections A1, B2 & B4

²⁰ See Appendix 4, Section A7

the process except the determination of an opposed order by the Secretary of State. If the Council makes an order and it receives objections, which is highly likely given the responses to the consultation, then if the Authority chose not to abandon that opposed order it would have to submit it to the Secretary of State. The Secretary of State would then determine the order by way of a public inquiry, public hearing or exchange of written representations and the Authority would not be able to recover the costs it incurred from the School.

6.2 Should an Order be made and confirmed, the Proposed Footpath will become maintainable at public expense.

7 RISK MANAGEMENT

7.1 A risk assessment related to the issue and recommendations has been undertaken, in compliance with the Authority's decision-making risk management guidance.

8 EQUALITIES

8.1 An Equality Impact Assessment has been carried out and the Proposed Footpath is likely to be less suitable than the current tarmacked path for users with visual/mobility impairment. Additionally, users with visual/mobility impairments are likely to encounter greater difficulties when encountering motor vehicles due to the restricted width.

9 CLIMATE CHANGE

9.1 Public rights of way as a whole are a key resource for shifting to low-carbon, sustainable means of transport. The proposals are considered to have a small but nevertheless negative impact on the public footpath in terms of potentially dissuading the public from walking the route. The proposals will therefore not assist in tackling the Climate Emergency.

10 OTHER OPTIONS CONSIDERED

10.1 None

Contact person	Tim Haynes (01225) 477649 tim_haynes@bathnes.gov.uk
Background papers	<i>Background papers are available online at:</i> https://www.bathnes.gov.uk/services/streets-and-highway-maintenance/public-rights-way/prow-legal-order-case-documents/public
Please contact the report author if you need to access this report in an alternative format	