

MEETING:	REGULATORY COMMITTEE
DATE:	9TH FEBRUARY 2009
TITLE OF REPORT:	HIGHWAYS ACT 1980, SECTION 119. PROPOSED PUBLIC PATH DIVERSION ORDER, FOOTPATH LW4 (PART) IN THE PARISH OF LLANWARNE
PORTFOLIO AREA:	ENVIRONMENT and Culture

CLASSIFICATION: Open

Wards Affected

Pontrilas

Purpose

To consider an application under the Highways Act 1980, section 119, to make a public path diversion order to divert part of footpath LW4 in the parish of Llanwarne.

Key Decision

This is not a Key Decision.

Recommendation

THAT a public path diversion order is not made under Section 119 of the Highways Act 1980, as illustrated on the attached plan D52/245-4 and that the application is rejected.

Key Points Summary

- The Regulatory Committee has considered this matter on two separate occasions.
- The applicants wish to divert the right of way out of their garden onto land which is not in their ownership.
- The owners of the land where the proposed route passes, have not provided their agreement to the proposals and would have a right to claim compensation if the diversion were to go ahead.
- The applicants will not sign a form indemnifying the Council against any possible compensation claim.
- Under Section 119 of the Highways Act 1980 the Council has the power to make diversion orders. It does not have a duty to do so.

Further information on the subject of this report is available from
Rob Hemblade, Interim Parks, Countryside and Leisure Development Manager on (01432) 261981

Alternative Options

- 1 Under Section 119 of the Highways Act 1980 the Council has the power to make diversion orders. It does not have a duty to do so. The Council could make a diversion Order without the affected landowners' consent and without the applicants being required to indemnify the Council against potential compensation claims. There is a risk that such an Order would be opposed, leading to additional demand on existing staff resources; if confirmed, the council could be required to pay compensation to the affected landowner.

Reasons for Recommendations

- 2 The recommendation for this report is that the application to divert the path is rejected. This is because the applicants have repeatedly refused to sign a form indemnifying the Council against possible compensation claims as a result of the proposals. The owners of the land on which the proposed route would pass have not agreed to the proposals despite many attempts over many years. The proposals are in the applicants' interests and not necessarily in the wider interests of the public, or in the interests of the landowner of the proposed route.

Introduction and Background

4. The Regulatory Committee has considered this application on two previous occasions, in January 2006 and then again in January 2007. On both occasions, the making of a decision has been deferred.
5. Mr and Mrs Sevenoaks, the landowners of the Old Coach House, Llanwarne made the application on 19th September 1987. The reason given for making the application was that they had recently bought a piece of land (encompassing the public footpath) to extend their garden; the proposed diversion would move the path to lie entirely outside their garden boundary.
6. In 1987, the legal line of the footpath LW4 (running through the gardens of the Old Coach House and The Old Rectory) was open for use. The proposed diversion route ran down the edge of what was at the time, an open field. Between September 1987 and March 1993, the proposed diversion route of the path seems to have become established as a permissive route. A site inspection in March 1993 showed that the legal line had become obstructed, whilst the proposed diversion route had become enclosed on both sides due to the building of Knowle House and was signed as a right of way with a Council signpost at the roadside.
7. The former Hereford and Worcester County Council carried out pre-order consultation (with statutory undertakers only) in 1988 and a diversion Order was made and sealed following this in 1989. However, there is no evidence that it was ever advertised, as is required under section 119 of the Highways Act 1980. Due to the time elapsed, a new Order would need to be made if the path were to be diverted.
8. It was identified in 1993 that the written permission to the diversion had never been provided by Mr Birchley, owner of the land over which the new route would run. The applicants and Mrs Darby, owner of The Old Rectory at the time, were informed that his consent would be needed before the application could be processed further, Repeated efforts were made to secure this consent between June 1993 and September 2004, but without success.
9. A diversion Order could be made without the consent of Mr Birchley; this would present a risk that the Order may be formally opposed and that if confirmed, it may result in a compensation claim being made under section 28 of the Highways Act 1980. Applicants for diversion orders that are felt to be primarily in their interests are normally expected to meet the costs of any such compensation claimed. In line with this, Major and Mrs Sevenoaks and Mrs Darby were

asked to sign forms indemnifying the Council against any such costs. The Council did not receive these forms from them.

10. Given the lack of progress, a letter was written to the applicants and Mrs Darby in June 2004, to inform them that the Rights of Way department would be recommending to the Regulatory Committee that the application be rejected. The local member at the time, former Councillor Davies, was consulted. He discussed the application with Llanwarne Parsh Council, who were unaware that the proposed diversion was not, in fact, the legal line of the path. He requested more time to allow him opportunity to contact Mr Birchley. Owing to this and reorganisation within the Council, the report was not submitted to the Regulatory Committee until January 2006. A decision was then deferred for 6 months to allow time for either Mr Birchley to provide consent or for compensation indemnities to be signed by the applicants.
11. In the interim, it was discovered that the ownership of The Rectory had changed in 2002, when Mr Burton purchased it. Although a property search was carried out prior to his purchase and did include querying the location of any rights of way, Mr Burton was of the impression at the time of the sale that the permissive (proposed diversion) route was the legal line of the path. The presence of a fingerpost pointing along the permissive route is one factor that is likely to have contributed to this; in addition, the Public Rights of Way information provided at the time would have been an extract from the Definitive Map at a scale of 1:10,000. The scale of the plan, combined with the new land boundaries and properties (which would not have been shown on it) could lend some ambiguity in defining the exact location of the right of way, given that the proposed diversion route runs parallel with and within approximately 5 metres of the legal line. When he realised the situation, Mr Burton made attempts to resolve it; unfortunately this did not result in the required consent from Mr Birchley or in compensation indemnities being submitted to the Council.
12. A second report was submitted to the Regulatory Committee in January 2007; again it was recommended that the application be rejected. A decision was deferred on that occasion because the Regulatory Committee requested additional information. In accordance with this, the Council's County Land Agent was asked to provide a valuation for the land crossed by the proposed diversion route, for the purposes of a possible compensation claim. The valuation given in 2007 was in the region of £3000.
13. At their January 2007 meeting, the Regulatory Committee also considered the suggestion that a Definitive Map Modification (DMMO) application may be made to record the proposed diversion route as a public right of way on the basis of uninterrupted useage. The Council's Legal Services department were asked to provide an opinion as to whether such a claim was likely to be successful. There is likely to be a delay of some years in processing a DMMO application, if made in respect of this route, owing to the current backlog. However, even if successful, such a claim would not extinguish the part of footpath LW4 that is subject to this diversion application. To do so would require an additional Public Path Extinguishment Order (under section 118 of the Highways Act 1980) to be made and confirmed. Despite the presence of a second route in close proximity, it cannot be guaranteed that an extinguishment application would be successful. In the interim the Council would continue to have legal responsibilities in respect of both this section of footpath LW4 and any new route added via DMMO.
14. Following a telephone conversation with Mr Burton in October 2008, a letter outlining the options was sent out to Mr Burton and to Major Sevenoaks. These are as follows:
 - To continue with the diversion application for which Mr Burton and Major and Mrs Sevenoaks would be required to meet the administration and advertising fees and the cost of any compensation claimed. A successful diversion would result in the

simultaneous extinguishment of the existing right of way and creation of the proposed new route of the right of way.

- For the diversion application to be rejected by the Regulatory Committee or withdrawn. If this were to happen, it would be necessary to reopen the legal line to protect the public right of access, given that the landowner of the permissive route would have the right to close access to it if they so wished. Given that the circumstances surrounding Mr Burtons' property search and the incorrect position of the signpost, it has been agreed that the PROW section would pay for the provision and installation of two new gates to replace the old stiles on the garden boundaries (2 x wooden KGs @ £234 each = £468 plus £550 for the gang for a day to install them = £1,018).

15. It was requested that if the Sevenoaks or Mr Burton wished to continue with the diversion that they respond and submit signed compensation indemnity forms by 4th December 2008. No response has been received. Mr and Mrs Sevenoaks were then sent the forms again by recorded delivery in June and asked to reply by return of post, but have again not replied to the correspondence. It should also be noted that if the landowner's written permission were received, the landowner could still claim compensation.
16. When asked to express his views on the proposals, the local member, Cllr. R H Smith, responded that he confirmed his support for the recommendation that the application be rejected. Cllr. Smith also expressed his view that the applicants had been given every opportunity to facilitate their approval and that there should not be any further local enquiries or consultation.

Key Considerations

18. Under section 119 of the Highways Act, 1980, a council may make an order to divert a footpath if it is satisfied that it is expedient to do so in the interests of the landowner. Herefordshire Council received an application to divert this section of footpath LW4 in 1987.

Community Impact

19. The Parish Council responded to a pre-order consultation (2004) stating that they thought that the diversion order had already been made as the proposed route is the route which is largely used.

Financial Implications

20. If the order is rejected there will be a cost in enforcing the opening up of the existing route, however, this would be payable by Amey Herefordshire, as they currently hold the PROW maintenance budget. Costs are likely to include the installation of two gates on the landowners' garden boundaries (£1018). Any obstructions to the existing path would be removed at the landowners' expense. If the Committee were to decide to make an order to divert the path, compensation could be claimed as a consequence of the order. A separate compensation budget does not exist, therefore any compensation claimed would be made from the existing PROW maintenance budget. A valuation estimated in 2007, by the County Land Agent, for a possible compensation claim, was approximately £3000.

Legal Implications

21. If the application is rejected as proposed the existing legal route of the public right of way will

require enforcement action to open it up to public access.

Risk Management

- 22 There is a risk that if the path is not diverted as proposed at this stage, a DMMO claim could be made at a later date in respect of the permissive route that is currently in use. If this were successful, it could result in there being two parallel rights of way in very close proximity; either the Council or an affected landowner may then seek to extinguish one of the paths via a Public Path Extinguishment Order.

Consultees

- Statutory Undertakers
- Local Member – Cllr. R H Smith

Appendices

Order Plan, drawing number: D52/245-4

Background Papers

- None identified.