

MEETING:	REGULATORY COMMITTEE
DATE:	7 DECEMBER 2010
TITLE OF REPORT:	HIGHWAYS ACT 1980, SECTION 118 & 119. PROPOSED PUBLIC PATH DIVERSION ORDER FOOTPATH BM12 (PART) AND PUBLIC PATH EXTINGUISHMENT ORDER FOOTPATH BM13 (PART) IN THE PARISH OF BODENHAM
PORTFOLIO AREA:	HIGHWAYS AND TRANSPORTATION

CLASSIFICATION: Open

Wards Affected

Hampton Court

Purpose

To consider a proposal to make a public path diversion order to divert part of footpath BM12 and a public path extinguishment order to divert part of footpath BM13 in the parish of Bodenham under the Highways Act 1980, sections 118 and 119.

Key Decision

This is not a Key Decision.

Recommendation

That a public path diversion order relating to Public Footpath BM12 (C-D to C-E) is made under Section 119 of the Highways Act 1980 as illustrated on attached drawing number: DWG No: D174/42-12&13 but that the proposal for a public path extinguishment order relating to Public Footpath BM13 (B-A & F-G) is not pursued and instead an alternative resolution of the problem is sought, which may include a limited diversion of Public Footpath BM13, as referred to in the alternative options section of this report

Key Points Summary

- Public Footpath BM13 has been obstructed for several years following the construction of a brick-built garage / workshop just to the west of point A as shown of the attached plan. The section of path F-G has also been unavailable for long periods due to the locking of a gate and other obstructions.

- The complex background to this issue was reported to this Committee in October 2009 and officers were instructed to commence the process for the consideration of a public path order to extinguish the sections of Public Footpath BM13 marked A-B and F-G on the attached plan.
- The only reasonable alternative route for people who would otherwise use the affected section of BM13, travelling to or from the west of the village, is to use Public Footpath BM12. This path is also obstructed, in this case following the development of Orchard Close in the 1970s. As part of the consideration of the extinguishment of BM13, it has therefore also been necessary to develop a concurrent proposal to divert BM12 to provide an appropriate alternative route.
- The proposals were sent to pre-order consultation. The proposed diversion of BM12 has received general support although the Ramblers and the Open Spaces Society (OSS) have expressed a preference for the new path to travel diagonally across the field rather than following the perimeter.
- Whilst the proposed extinguishment of BM13 received support from several consultees, the Ramblers, the Malvern Hills District Footpath Society (MHDFS) and the OSS objected to it on the grounds that the route is needed for public use.

Alternative Options

- 1 Public Footpaths BM12 and 13 are obstructed and the Council has a statutory duty to resolve the problem. If the proposals under consideration in this report are not proceeded with or are unsuccessful then alternatives include
 - i) the removal of the obstructions which currently consists of a brick work shop, garden wall, fence and locked gate on BM13 and 7-8 fences on BM12. This would cause significant inconvenience to local residents and is likely to be unpopular with the local member and parish council and might receive adverse publicity.
 - ii) a limited diversion of BM13 onto adjacent land in the ownership of the Seward James Trust. This is likely to result in objections from the Seward James Trustees and a claim for compensation. However the compensation claim will be covered by the insurers for the search company.

Reasons for Recommendations

- 2 The proposed public path diversion order affecting BM12 should be made because it is felt that it meets the criteria set out in s119 of the Highways Act (see Report paras 21-24) and the criteria of Herefordshire Council's Public Path Order Policy (see Report para 17-24) . The making of this diversion order will resolve a long term obstruction of the rights of way network and ensure that the footpath is open and useable to the public.
- 3 The proposed public path extinguishment order affecting BM13 should not be approved because it is felt that it does not meet the criteria set out in s118 of the Highways Act (see Report paras 13-20) and the requirements of Herefordshire Council's Public Path Order Policy (see report paras 17-20). Were the order to be made it is likely to receive objections which officers believe would probably be upheld in any subsequent determination by the Secretary of State.

Introduction and Background

- 4 Public Footpath BM13 has been obstructed for many years following the construction of a brick-built garage / workshop and a garden boundary to the west of point A as shown on the

attached plan. The owners of the property did not realise the path was blocked until 2003 when, following the receipt of a complaint, officers started looking into the matter and brought it to their attention. The owners of the property disputed the fact that the path ran through their property and referred to a property search that had been carried in 2001 when they purchased the house. The search was subsequently found to be inaccurate and the insurers of the search company have, in principle, agreed to fund the resolution of the problem.

- 5 When the Regulatory Committee considered this issue in October 2009 it instructed officers to commence the process for the consideration of a public path order to extinguish the sections of Public Footpath BM13 marked A-B and F-G on the attached plan. The only reasonable alternative route for people who would otherwise use BM13 is to use Public Footpath BM12. This path is also obstructed, in this case by the development of Orchard Close. As part of the consideration of the extinguishment of BM13, it has therefore also been necessary to develop a concurrent proposal to divert BM12 to provide an appropriate alternative route
- 6 Informal pre-order consultations have been carried out to gauge attitudes to the package of proposals. Consultees included relevant statutory undertakers, Bodenham Parish Council and local representatives of user groups prescribed in Defra's Rights of Way Circular 1/09. Whilst responses have been generally supportive, adverse comments and objections have been received from the Ramblers and the OSS. The MHDFS also have an interest in the issue and have indicated their likely objections to the proposed extinguishment of BM13. More detail on all these objections is given below.
- 7 The Ramblers, whilst supportive in principle of the diversion of BM12 to resolve the Orchard Close obstruction, wish to see a modification to the proposal so that the new path runs north-westerly from point E on the plan diagonally across the field rather than around the perimeter of the field via point C.
- 8 The Amey PROW Manager has met with the landowner of the field over which the relevant existing and proposed parts of BM12 would run. Whilst he is not opposed in principle to the proposals insofar as they affect him, his preference would be for the diverted route to run along C-E subject to reaching agreement as to suitable compensation. The diagonal route preferred by the Ramblers would require greater compensation and would create a cross-field route with potential difficulties for the farmer should he decide to cultivate it in the future.
- 9 More significantly, the Ramblers are opposed to the extinguishment of the part of BM13. In their response to the consultation they state:

"In view of the long standing problems on rights of way in Bodenham, that the paths are needed for public use and that there are sensible and suitable alternatives, the extinguishment of paths is not the solution, therefore we object to this order.

Public Right of Way BM13 through points G, F & A to B is the continuation of BM13 from OS Grid Reference SO548506, thus providing a continuous route, without the need to walk up the road, through to Bodenham bridge and onto Bodenham school and church. It can be seen that this could provide a safe route to school for pupils living on the housing estate. The route through F & G also provides pedestrian access from the housing estate to the south of the village and this portion of the path can be opened simply by the removal of obstructions, being a locked pedestrian gate and clearing of overgrowth from hedging.

Public Right of Way BM13 is an important part of the network of paths within the parish of Bodenham."
- 10 The OSS has replied in similar terms to the Ramblers, being supportive of the diversion of BM12 but recommending that the direct route across the field is established as the legal line of the path. With regards to BM13 the OSS correspondent notes that :

“We should certainly strongly object if an Order were to be made to Extinguish any of the path. It forms a useful through-route continuing on both East and West, any possible alternative routes are along roads, some without footways.

There can be no possible justification for closing section A-G as this part of the path is not affected by the building which obstructs the separate section to the West.

In my view this Extinguishment proposal is legally flawed, has no prospect of success and would be a complete waste of money.

The obvious solution would be to make a Creation Order to by pass the obstructing building along an existing private path to the North, meeting the road adjacent to point A”

11 The MHDFS have commented:

“The Malvern Hills District Footpath Society is likely to object to an extinguishment order. Our justification for objection is likely to be:

a. We believe that the proposed alternative route path length is approx 900 yards between Point D and the junction of BM12 & BM13 at Point C on the plan presented to the Regulatory Committee. We estimate that the original path length of BM13 between Point D and the junction of BM12 & BM13 at Point C was approx 500 yards. We believe that nearly doubling the path length to be walked when combined with a more complicated navigation need to change directions several times makes the proposed alternative route 'substantially less convenient to the public' than the original route. Moreover the proposed alternative route also removes the potential of a short circular walk using BM12 & BM13 for the local community, eg dog walkers, walking for health initiative walks, etc.

b. We believe that there is a user demand for this path to be open. This demand is indicated by both the County's and our own records of complaints that the path has been obstructed for a number of years. Although the total number of complaints will be quite small, we suggest that this is because the path has not been signed so some local people will not have known that it should be there and because a number of potential users will not have known how to complain or will have just not bothered to complain (possibly knowing that complaints are rarely dealt with expeditiously). Moreover for a rural village path, unless someone organises a local campaign, even a small number of complaints and complainants would be unusual and thus indicate a robust user demand. In spite of the comment made by the Ward Member to the Regulatory Committee in October 2009 that the interest in this path seemed to be limited to one local resident, I personally am aware that our own Society have wished to walk this path about seven times during the past five years and we live some 15 miles away. Finally, we note that your proposed diversion of footpath BM12 is already 'well trod' on the ground which indicates that there are regular walkers in this locality who would probably also be using footpath BM13 if it were open.

c. Three alternative options seem to have been offered to the Regulatory Committee and all are described as 'no cost to the Council'. Only one, and now apparently the preferred of these options, involves the closure of the path. It seems to us that by selecting this option when other options are available that would keep the path open, the Herefordshire Council has not been diligent in its statutory duties under Section 130 of the Highways Act 1980 'to protect .. the rights of the public to the use ... of highways ...' and 'to prevent as far as possible the stopping up of those highways'.

I would also comment that the report made to the Regulatory Committtee in October 2009 seems to be in error in claiming that extinguishment would remove path BM13 from two other gardens (I believe only one other garden is involved) and seems to offer no justification for the proposal to remove the path from the garden between Brockington Road and the C1125...”

Key Considerations

- 12 Whilst these proposals have been put forward as a package, two separate public path orders would be needed to give effect to them and each order must be assessed on its own merits independently of each other and against the relevant statutory and policy requirements.

Extinguishment of BM13

- 13 A public path extinguishment order is made under s118 Highways Act 1980. An order may be made where the Council is satisfied that the path is not needed for public use. However, such an order may only be confirmed where it is expedient to do so having regard to the extent to which the path would be likely to be used by the public apart from the order and the effect on the land served by the path. The Council must also have regard to any material provision of its Rights of Way Improvement Plan (ROWIP) 2007-2011.
- 14 The test of whether a path is needed for use is often assessed by the extent, if any, of actual use. In this case, where the path has been obstructed for a number of years and use has been impossible, such an assessment cannot be made. However since 2002 the PROW Management System has recorded complaints regarding obstructions on the affected section of BM13 on nine separate occasions thus indicating a demand for its use. Nonetheless, the Regulatory Committee made it clear, at its October 2009 meeting, that given the alternative routes available - BM12 in place of section A-B and the metalled path across the public open space some 55m north of section F-G - it is satisfied that AB and FG are not needed for public use.
- 15 The second element of the test is whether it would be expedient to confirm the order having regard to the extent that the path would be likely to be used apart from the order. S118(6) specifically requires that any temporary circumstances that might limit use of the path, such as the current obstructions of BM13, should be disregarded. It seems highly likely that any walkers using BM13 as part of a longer walk east to west or vice versa would choose to use the existing legal line if available as opposed to the suggested alternative routes as they are more direct and reflect the original, historical line of the path. This is reinforced by the demand for the reopening of BM13 referred to above. In light of this it would appear that it will be difficult to meet this element of the statutory tests.
- 16 The third element of the test is the effect of the proposal on land served by the path. It is considered that there are no adverse effects in this respect.
- 17 Finally the Council must have regard to any material provisions of the ROWIP. Appendix A of the ROWIP contains the Council's Public Path Order Policy. This sets out particular criteria that the Council requires to be considered insofar as they affect the public's enjoyment of the path. Whilst the document refers to the need to take these criteria into account when taking decisions on diversions, it is clear that, in this context, the considerations should apply to the alternative route that will be available if the extinguishment of BM13 proceeds. Three criteria set out in the ROWIP of particular relevance are given below:
- 18 *"Directness*
The proposed new route should not unreasonably lengthen the path other than where it is in the interests of an overall improvement to the local network. The proposed new route should avoid introducing unnecessary "dog legs" into the path, or be overly circuitous. It should retain or improve a connection with another public right of way to reduce the distance travelled along metalled carriageways."

The approximate length of BM13 proposed to be extinguished, B-A-G-F, is 480m. The alternative route, following BM12 as diverted and then Orchard Close and the C1125, B-C-E – G, is about 820m. This is clearly a significant lengthening of the distance travelled. Whether it could be considered reasonable depends upon the context of the whole walk being undertaken it but it would not be possible to justify it as being in the interests of an overall improvement to the local network. It also reduces the connectivity of the network and requires walkers to walk some 315m along the road much of which is without a footway. It would appear difficult therefore to argue that the proposal satisfies this requirement.

19 *“Status*

There will be no downgrading of the existing rights other than where it is in the interests of an overall improvement to the local network.”

The proposed extinguishment could be construed as a downgrading of rights. Again, it would not be possible to justify it as being in the interests of an overall improvement to the local network and thus it would appear difficult therefore to argue that the proposal satisfies this requirement.

20 *“Alternatives*

The applicant will be required to demonstrate that they have considered alternatives to the altering of a right of way, i.e. amending proposals, changing boundary locations etc.”

The principle underlying this factor is that the Council has an overarching duty to protect the rights of the public and thus that the presumption should be against making alterations to the network. Where changes are considered necessary, then the impact on the public should be minimised; in this case this would suggest that a diversion of section A-B should be preferred to extinguishment. Whilst the Siward James Trust may be opposed to a diversion of the path onto their land due to concerns about the possible impact on vulnerable residents who live there, the route would not run across individual private gardens and through appropriate fencing and screening the effect on residents could be limited.

With regards to section F-G, it is possible to consider this section independently from section A-B. There is no obvious other alignment onto which it could be diverted and thus the alternative is to reopen the legal line. Whilst this might be opposed by the owner of the property, the route of the path is already segregated from much of the garden by hedging and thus with some minor works the reopening should also have limited effect on the owner.

Diversion of BM12

21 A public path diversion order is made under s119 Highways Act 1980. An order may be made in the interests of the landowner, lessee or occupier of land crossed by a path or of the public. To confirm the order, the Council must also be satisfied that the path will not be substantially less convenient to the public and broadly must consider the effect of the diversion on public enjoyment of the path as a whole and the effect it would have on land served by the path. The Council must also have regard to any material provision of its Rights of Way Improvement Plan (ROWIP) 2007-2011.

22 The proposed diversion can be considered to be in the interests of the owners of the land crossed by the affected section of BM12 as to reopen the legal line of the path would required the removal of property boundaries and garden buildings from nine properties and the resulting reduction in their privacy and security.

23 The alternative route proposed, C-E-D, is approximately 185m in length compared to the original, C-D, 115m and the surfacing is comparable or better so the proposed new route is considered to be not substantially less convenient. There are not considered to be any

adverse effects on the land served by the path taking into account the potential payment of compensation to the landowner. A valuer from Herefordshire Council Property Services has estimated that the level of compensation appropriate to this proposal is approximately £250 plus surveyors / legal fees. With regards to the effect on public enjoyment, there would also appear to be little adverse impact.

- 24 The relevant provisions of the ROWIP are the Public Path Order Policy criteria relating to Directness (see previous para 18) and Alternatives (see previous para 20) discussed above in relation to BM13. Whilst there is an increase in length arising from the proposal, it is not considered to be unreasonable nor is the connectivity of the network significantly affected. Whilst some of the alternative route (E-D) runs along the cul de sac Orchard Close carriageway, there is a footway in place for all of this length. With regards to alternative options, apart from reopening the legal line there is no other reasonable route that it can be diverted to.

Community Impact

- 25 The Parish Council has been consulted as part of the pre-order consultation process and supports the proposals to extinguish part of BM13 and divert part of BM12.

Financial Implications

- 26 The insurers of the search company, who carried out the defective search on behalf of the owners of 44 Brockington Road, Bodenham have, in principle, agreed to fund the full costs of implementing these proposals. A formal agreement to this effect would be concluded before any order making is commenced. Should only the proposals affecting BM12 and or section F-G of BM13 be agreed, then the costs of the process, and any compensation payable, would have to be met from the existing Public Rights of Way budget.

Legal Implications

- 27 Under sections 118 and 119 Highways Act 1980 the Council has the power to make extinguishment and diversion orders. It does not have a duty to do so. It is likely that, in regards to the proposed extinguishment of BM13 under s.118 of the Highways act 1980, the appropriate legal tests have not been met. It is probable therefore that objections to an extinguishment order for BM13 will be received, which will, most likely, lead on to a public Inquiry which is a costly process, as regards officer time, and with the probability that the inspector will recommend that the order is not confirmed

Under section 130 Highways Act 1980 the Council has an overriding duty to protect the rights of the public to the use and enjoyment of public rights of way and to prevent, as far as possible, the obstruction or stopping up of public rights of way. In this regard, the Council could pursue legal action in respect of the present obstructions but it is noted that this would be unpopular with residents and the local member, with the possibility of adverse publicity, and therefore an alternative remedy, as suggested in the report, would be desirable

Risk Management

- 28 There is a risk that any order made may receive objections which would then increase demands on officer time (for instance in the determination of the order at a Public Inquiry). Given the responses to the proposals at pre-order consultation, a Public Inquiry would appear to be a likely outcome if an order to extinguish BM13 is made and, in view of the statutory

tests, it is probable that the order would not be confirmed.

- 29 The alternative option for BM13 of seeking a diversion order to take the path across adjacent land in the ownership of the Siward James Trust may also result in objections and a Public Inquiry. However, it is considered that such an order would be more likely to be confirmed.

Consultees

- Prescribed organisations as per Defra Rights Of Way Circular 1/09.
- Malvern Hills District Footpath Society
- Local Member – Cllr. Grumbley
- Bodenham Parish Council.
- Statutory Undertakers.

Appendices

- Order Plan, drawing number: DWG No: D174/42-12&13

Background Papers

- None identified.