

Licensing and Regulatory Committee



St Edmundsbury
BOROUGH COUNCIL

Title of Report:	Highways Act 1980 Section 119 - Application to Divert Part of Rougham Public Footpath No 7
Report No:	LIC/SE/19/001
Report to and date/s:	Licensing and Regulatory Committee – 29 January 2019
Portfolio holder:	Councillor Peter Stevens Portfolio Holder for Operations Tel: 01787 280284 Email: peter.stevens@stedsbc.gov.uk
Lead officer:	<p>Cheryl Froud Job Title: Highways Officer Property Services Tel: 01284 757319 Email: Cheryl.Froud@westsuffolk.gov.uk</p> <p>Darren Dixon Job Title: Service Manager, Property Tel: 01284 757678 Email: darren.dixon@westsuffolk.gov.uk</p>
Purpose of report:	To seek authority to make an order to divert part of Rougham Public Footpath No 7 under the provisions of Section 119 of the Highways Act 1980 as shown on the map at Appendix 1, in light of an objection from a local resident. A location map and images are attached at Appendix 2.
Recommendation:	It is recommended that, Councillors (1) Consider the application for diversion of a footpath; and (2) Give authority to make an Order

Key Decision:	<i>Is this a Key Decision and, if so, under which definition?</i> No, it is not a Key Decision - <input checked="" type="checkbox"/>	
Consultation:	<ul style="list-style-type: none"> See Paragraph 4 	
Alternative option(s):	<ul style="list-style-type: none"> If a decision is taken that an Order should not be made to divert the footpath as proposed the applicants have no right of appeal. They do have the option of requesting Suffolk County Council to make an Order but an application of this nature is normally referred to the Borough Council and would take a low priority at the County Council. If no Authority is prepared to make an order the applicants can request the Secretary of State to do so. However, the Secretary of State exercises powers to make Orders only very rarely and in exceptional circumstances. 	
Implications:		
Are there any financial implications? If yes, please give details		Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> <ul style="list-style-type: none"> See Paragraph 7
Are there any staffing implications? If yes, please give details		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Are there any ICT implications? If yes, please give details		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Are there any legal and/or policy implications? If yes, please give details		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Are there any equality implications? If yes, please give details		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Risk/opportunity assessment:		Covered in the report
Ward(s) affected:		Rougham
Background papers: <i>(all background papers are to be published on the website and a link included)</i>		See attached
Documents attached:		Appendix 1 – Proposal map Appendix 2 – Location map & images Appendix 3 – Applicants’ statement of reasons for requesting the Order Appendix 4 – Letter of objection dated 21 October 2015

1. Background

1.1 The Borough Council has received an application to divert part of Rougham Public Footpath No 7, which crosses the garden of a property known as Water Cottage. The application was submitted by the owners of Water Cottage on the grounds that it is in their interests to divert the footpath for reasons of privacy and security. The full statement of reasons for the application is attached at Appendix 3.

1.2 The proposal also includes a minor diversion of a section of Footpath No 7 which crosses a meadow to the north east of Water Cottage. The proposed route through the meadow closely reflects the route that members of the public are currently walking. The owners of the meadow have consented to the diversion proposal.

1.3 The existing definitive (legally recorded) route of the footpath is not currently available. It is obstructed by an established boundary hedge at point C on the map, a post and wire fence at point B and dense vegetation south of point B. There is no bridge across the ditch at point B.

Walkers have been using an unofficial route for many years and currently access the applicants' land from the adjacent meadow through a pedestrian gate at point D. The route across the garden of Water Cottage is not clearly defined. Walkers currently exit the applicants' property via a stile at point G. The stile is not on the definitive line of the footpath.

1.4 The existing footpath has no legally recorded width. The proposed footpath will be 2 metres width. The applicants are proposing to remove the laurel hedge between points G – F and the conifer hedge between points D – E to achieve this width.

2. Legislation

2.1 Before making an order under section 119 of the Highways Act 1980 ("the Act") an authority must be satisfied that:

- i. it is expedient to divert the footpath in the interest either of the public or of the owner, occupier or lessee of the land: and
- ii. the diversion order does not alter any point of termination of the path, other than to another point on the same path, or another highway connected with it, and which is substantially as convenient to the public. Nor can the termination be altered where this is not on a highway (i.e. a cul de sac)

2.2 Before confirming an order an authority must be satisfied that:

- i. the diversion is expedient in the interests of the person(s) stated within the order;

- ii. the path will not be substantially less convenient to the public as a consequence of the diversion; and
 - iii. it is expedient to confirm the order having regard to the effect it will have on public enjoyment of the path as a whole and on land crossed by the existing path or to be crossed by the new one, taking account of the provisions for compensation.
- 2.3 Section 29 of the Act requires that in exercising its functions under Section 119 of the Act an authority must have due regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological and physiographical features. The term 'agriculture' includes the breeding or keeping of horses.
- 2.4 Section 119(6A) of the Act requires that regard must be had to any material provisions of Suffolk County Council's Rights of Way Improvement Plan.
- 2.5 It is appropriate for an authority to consider whether the tests for confirmation can be met when deciding whether to make an order.
- 2.6 An order must satisfy all the legal tests if it is to be confirmed. It is not sufficient for an order to satisfy some of the tests and not others.
- 2.7 The intention of the legislation is to balance the private interests of the owner of land with the public interest.

3. **Consideration of the tests**

3.1 **Expediency in the interests of the owners of the land**

The applicants' statement of reasons at Appendix 3 clearly explains why they believe it is in their interests to divert the section of Footpath No 7 which crosses their property. The diversion will take the footpath further from their property enabling them to enjoy the property without their current fears about privacy and security.

3.2 **Termination points and convenience of the public**

The termination points are unchanged.

The proposed route is more circuitous and longer than the existing route where it passes through the applicants' garden so there is an element of inconvenience. However, the nature of the footpath is such that its usage is likely to be primarily recreational and, in this context, the relatively short additional distance to be walked cannot be regarded as a substantial inconvenience.

The section to the north east of the applicants' land is to an extent already being walked on the proposed alignment. It is a very short distance from the existing route.

Paragraph 1.3 referred to obstructions on the existing route. In considering whether a right of way will be substantially less convenient to the public the

advice from the Planning Inspectorate states that any temporary circumstances preventing or diminishing the use of the footpath should be disregarded. The convenience of the existing route is to be assessed as if the way were unobstructed and maintained to a standard suitable for those users who have the right to use it.

3.3 Effect on public enjoyment of the path as a whole

The existing footpath through the applicants' garden is a very open route with clear views of their cottage. Some walkers will experience feelings of embarrassment or intrusion when using the footpath and this is likely to detract from the enjoyment of the footpath. For those walkers the proposed route will be more enjoyable.

The proposed route will be 2 metres wide. It will be clearly defined and easy to follow and some limited views of Water Cottage will be retained.

The proposed change to the footpath in the meadow to the north east of Water Cottage will have no discernible effect on public enjoyment of the footpath as a whole.

3.4 Effect on other land served by the existing public right of way and the effect the new public rights of way would have as respects the land over which the right is so created and other land held with it

The proposal will have a positive impact on the land within the curtilage of Water Cottage and no discernible effect on the adjacent meadow.

The diversion will have the effect of precluding use of the land over which the right of way is created for any purpose which is incompatible with the existence of the public footpath. This is acceptable to the owners of the land.

3.5 Duty to have regard to any material provision of Suffolk County Council's Rights of Way Improvement Plan (RoWIP)

The proposal is not contrary to any of the provisions of Suffolk County Council's RoWIP 2006-16.

3.6 Duty to have regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological and physiographical features

Suffolk Wildlife Trust has been consulted and has made no comments on the proposal. There are no adverse effects on agriculture and forestry.

4. Consultations

4.1 Informal consultations have been carried out in accordance with best practice guidance. Rushbrooke with Rougham Parish Council and the Borough Councillor are in support of the proposal. The British Horse Society, the Ramblers and the statutory undertakers have no objections. The Byways and Bridleways Trust and the Open Spaces Society did not reply. A local resident, was included in the informal consultations as he had responded to a pre-

application site notice. His objection to the proposal is unresolved and is considered below.

Suffolk County Council submitted a holding objection to the proposal on 19 November 2016 to allow further discussions to take place with a view to including the section of footpath west of Water Cottage in the diversion proposal. The proposal was not extended but the holding objection was withdrawn on 18 January 2018.

5. The objection and comments on the objection

- 5.1 An objection to the proposal dated 21 October 2015 is attached at Appendix 4. Since the objection was submitted there has been lengthy correspondence, telephone discussions and a meeting between Sharon Berry, the Rights of Way Specialist dealing with the application on behalf of the Borough Council, and the Objector. Suffolk County Council's Senior Definitive Map Officer has also been involved. However, it has not been possible to resolve the objection and the Objector confirmed on 19 December 2017 that his views have not changed.

The key points are summarised below:

5.1(1) The legally recorded alignment of the existing footpath

The Objector correctly states that the alignment of the footpath on the ground does not accord with the legally recorded alignment as shown on the definitive map. He believes that in the interests of expediency the true alignment of the footpath should be ascertained using powers available to Suffolk County Council under Section 53 of the Wildlife and Countryside Act 1981 before the diversion proposal is considered.

Section 53 of the Wildlife and Countryside Act 1981 makes provision for the Definitive Map and Statement to be kept under continuous review, and for what are known as Definitive Map Modification Orders (DMMO) to be made where the evidence supports it. The only criterion which the County Council may take into account under the 1981 Act is evidence. No consideration may be given to other factors such as the effect on the environment, the suitability of the route for a particular purpose, or the wishes of landowners or users.

Suffolk County Council's views on the objection have been requested. In a response dated 3 March 2015 the County Council acknowledged that there appeared to be a discrepancy between the definitive and walked alignments and that there was a possibility that the walked alignments may have acquired rights if they had been walked for over 20 years. However, it was not felt that there would be any public benefit from doing a DMMO investigation or making a DMMO to resolve the discrepancy. The County Council view was that a DMMO would be costly to the tax payer while delivering little significant benefit since a route was available and in use on the ground and that all the alignment issues could be addressed by the public path order proposal being considered by the Borough Council.

On 12 July 2016 the County Council advised the applicants that the Footpath No 7 alignment discrepancy is one of a large number of such cases. There are

many more cases than the County Council is able to progress so a prioritising system is in place which gives priority to those cases which potentially deliver the greatest public benefit. The Footpath No 7 alignment discrepancy would not score highly and it would therefore be a low priority for investigation and order making.

If it is decided that a public path diversion order should be made discussions will take place with the County Council to determine the extent of any unrecorded rights to be included in the diversion order, i.e. any unrecorded rights across the garden of Water Cottage can potentially be diverted together with the recorded rights.

Although the Objector believes there may be unrecorded footpath rights and that the Definitive Map is incorrect he has not submitted a claim for this to be investigated and the County Council has confirmed that no other claims have been submitted.

5.1(2) The location of the existing stile and the re-instatement of the legally recorded route

The Objector has concerns that a gap will need to be cut in the beech hedge forming the boundary to Water Cottage if the diversion application is successful. The current boundary crossing point is via a stile approximately 10 metres to the north of the definitive route. A gap should already be in place in the beech hedge at point C on the map regardless of whether a diversion order is made. It will be for the applicants to decide whether they wish to remove the stile which is currently in place on this boundary if their diversion application is successful. They may choose to leave it where it is.

There are also concerns about what will happen to the footpath on the land to the west of Water Cottage if the diversion application is successful. It will be for the County Council to decide how to deal with the alignment of the footpath west of Water Cottage if the diversion application is successful. The current definitive route has been surveyed by the County Council and the County Council does not share the concerns raised by the Objector about public safety should the definitive route be re-instated. The County Council has not expressed any intention to re-instate this section of the definitive route.

5.1(3) The removal of the direct line of the footpath

The Objector does not wish to lose the direct line of the footpath across the garden of Water Cottage and believes that the test that the path as a whole "*will not be substantially less convenient as a consequence of the diversion*" cannot be met. As mentioned above, the nature of the footpath is such that its usage is likely to be primarily recreational and in this context the relatively short additional distance to be walked cannot be regarded as a '*substantial inconvenience*' although as mentioned in Paragraph 3.2 it is recognised that there is an element of inconvenience.

5.1(4) The effect of the diversion proposal on public enjoyment of the footpath

The Objector believes that public enjoyment of the footpath will be “much reduced” by the diversion. He states that there is no advantage to the public. It should be noted that there is no requirement for an order made in the interests of the owners of land crossed by a footpath to confer an advantage to the public.

The loss of the direct route and some of the current views must be balanced against the benefit to some walkers of being further from the cottage, therefore minimising any feelings of intruding into a private space.

6. Determination of opposed orders

- 6.1 If an objection is received to an order, which is not withdrawn, the Council has no powers to determine the objection or to confirm the order. The Council can decide not to proceed with the order or it must be referred to the Secretary of State for the Environment, Food and Rural Affairs (SoS) for determination, where an Inspector will normally be appointed to determine it. The SoS has powers to either refuse confirmation of an order, to modify an order or to confirm the order as submitted by the Council. Before doing so he or she is required to hold either a local public inquiry or a public hearing or to consider written representations made by the affected parties.
- 6.2 On submission of an opposed order to the SoS the jurisdiction passes to the Planning Inspectorate (PINS) for the SoS. The objector may exercise their right to be heard or PINS may consider that a local inquiry is the method by which the order should be determined. The order cannot be abandoned by the order making authority (OMA) at this stage because the OMA does not have jurisdiction (Paragraph 1.7 of the ‘Guidance on procedures for considering objections to Definitive Map and Public Path Orders in England – January 2018’).

7. Costs

- 7.1 Some of the costs of the specialist advice required to assess the application will be recovered from the applicants. They agreed to pay £1500 at the start of the process, which was the Borough Council’s standard charge for public path order administration at the time. In addition to the £1500, they also agreed to pay the costs of advertising and site works. To date the costs for a rights of way specialist to deal with the application on behalf of the Borough Council amount to £4098.29. If a legal order is made and subsequently confirmed this will incur additional costs. These costs are likely to be in the region of £800 - SCC has agreed to contribute £300 towards SEBC’s order making costs in recognition of the complications that have resulted from the mapping anomaly and the fact that these are outside the control of SEBC or the applicant
- 7.2 If a legal order is made and it is opposed the Council cannot charge for costs incurred during the process of determining the opposed order. These costs will vary depending on how the order is determined (see Paragraph 6 above) but could range from £1000 up to £5000.

8. Conclusion

- 8.1 The purpose of a public path order is to allow changes to be made to the rights of way network to suit evolving needs and to ensure that, in making those changes, opposing interests are not disproportionately affected. In this case there is a fine balance between public and private interests. The tests for an order under Section 119 of the Highways Act 1980 can be met although the objection and associated costs arising from the matter being referred to the Secretary of State for the Environment, Food and Rural Affairs should be noted.