

**Decision Maker:** Rights of Way Sub-Committee

**Date:** 4<sup>th</sup> February 2015

**Decision Type:** Non-Urgent Non-Executive Non-Key

**Title:** PROPOSED DIVERSION OF PART OF PUBLIC FOOTPATH  
258  
2 PECKS COTTAGES CHURCH ROAD CHELSFIELD

**Contact Officer:** Duncan Gray, Project Engineer  
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**Chief Officer:** Nigel Davies, Executive Director of Environment and Community Services

**Ward:** Chelsfield and Pratts Bottom

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1. Reason for report

To obtain the necessary authority to enable the Council to make a combined Public Path Diversion Order and Definitive Map Modification Order under the provisions of section 119 of the Highways Act 1980 and section 53 of the Wildlife and Countryside Act 1981.

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2. **RECOMMENDATION(S)**

**That the Director of Corporate Services in consultation with the Executive Director of Environment and Community Services, be authorised to take the necessary steps to make a Public Path Diversion Order for part of Footpath 258 as shown on drawing no. 11858-01, and if no objections are received, or any such objections are withdrawn, to confirm the Order subject to the relevant tests set out in the Highways Act being satisfied .**

### Corporate Policy

1. Policy Status: N/A.
  2. BBB Priority: N/A.
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### Financial

1. Cost of proposal: Estimated cost Net nil as the £1.5k costs will be recovered from the applicant
  2. Ongoing costs: Non-recurring cost.
  3. Budget head/performance centre: Highways
  4. Total current budget for this head: £2.096m
  5. Source of funding: Existing revenue budget 2014/15
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### Staff

1. Number of staff (current and additional): 0.4
  2. If from existing staff resources, number of staff hours: 40
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### Legal

1. Legal Requirement: Statutory requirement. Section 119 Highways Act 1980 and Section 53 of the Wildlife and Countryside Act 1981
  2. Call-in: Call-in is not applicable.
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### Customer Impact

1. Estimated number of users/beneficiaries (current and projected): All users of FP 258
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### Ward Councillor Views

1. Have Ward Councillors been asked for comments? Yes.
2. Summary of Ward Councillors comments: None received

### 3. COMMENTARY

- 3.1 Public right of way 258 runs from Pecks Cottages Church Road at its northern end, southwards in varying sections of Footpath, Bridleway and Byway, as shown on the extract from the Council's Definitive Map at Appendix A, for some 3.5km to the Borough Boundary with Kent County Council at Washneys Road.
- 3.2 The Definitive Statement of Public Rights of Way, which sits alongside the Definitive Map, records the width of the entire length of the way as 4.5m. However, there are sections of the whole route that are much narrower than this and, most likely, were so at the time the width of 4.5m was first recorded. The photographs at Appendix B show examples of the nature and width of the footpath sections of right of way 258 elsewhere along its route together with photographs of other footpaths nearby.
- 3.3 The section of the route affected by the current diversion application relates to a short, approximately 36m, length of footpath running from Church Road diagonally through land at 2 Pecks Cottages as shown on drawing. It is the intention in the current application to offer a diverted route with an overall width of 2.0m.
- 3.4 A similar diversion, albeit proposing a path width of 4.5m and a set of steps to Church Road at point C, both of which resulted from negotiation between the then applicant and the Ramblers Association, was proposed by the previous owner of the property in 1995. That application was considered by the then Environmental Services (Operations) Sub-Committee on 3 September 1996, when it was resolved to make a Public Path Diversion Order under the provisions of section 119 of the Highways Act 1980. A copy of the report and minute are included at Appendix C.
- 3.5 The ensuing diversion order was subsequently made and objections were received from both the Ramblers Association and EnBro on a number of grounds. These resulted in the matter being considered at a Public Inquiry held in November 1998.
- 3.6 Those objections are described in detail in the Inspectors report dated 5 March 1999, a copy of which is attached at Appendix D (paras. 21 – 37 refer). The Inspector considered all of these grounds and found that in all but one issue he was not opposed to the Order. However on the ground of public enjoyment of the way as a whole he found the objector's argument persuasive and decided not to confirm the Order. The paragraphs in the Inspector's report that relate to his assessment of this particular issue are 57-61.
- 3.7 The current owner of the property, which is shown on drawing as 2 Pecks Cottages, has been made aware of the history and has, nonetheless, decided to make the current diversion application to the Council under section 119 of the Highways Act 1980 on the basis that such diversion is in his interest. This application differs from the previous application in that it offers a narrower alternative route, 2.0m as opposed to 4.5m, does not include the provision of steps at point C and would have 1.6m high close boarded fencing on the garden side of the route for the majority of its length as opposed to low open stock fencing.
- 3.8 It is generally accepted, in public rights of way terms, that a width of 1.5m/2.0m is sufficient for pedestrians to pass each other. Thus a width of 4.5m for purely pedestrian use can be considered to be generous and perhaps not necessary. In such circumstances the proposed width of 2.0m for the diversion over such a short length could be considered not to significantly affect public enjoyment/commodiousness, although the presence of high close boarded fencing to one side may mitigate against this.
- 3.9 The current route of the footpath runs diagonally across land that, although having an agricultural designation, is currently being used for garden purposes. It is understood that a similar area of agricultural land associated with the neighbouring property, 1 Pecks Cottages,

was successfully re-designated, through the Town Planning process, as garden land and it is the intention of the applicant to make a similar application for a change of use to the Council in due course.

- 3.10 The applicant has recently fenced the garden land and created a permissive alternative route for use by walkers around the garden. The route of the affected section of footpath has low unlocked gates across it at points A and D indicated on the drawing, erected by the owner at the same time as the fencing. These have replaced squeeze posts/a stile that previously restricted width at these locations. The route of the footpath through the garden is not enclosed by fencing and so, apart from at the gates, the full 4.5m width is currently available for use by the public, although it is unlikely that such width is fully utilised.
- 3.11 The proposal is for the path to run around the outside of the fenced garden along the permissive route currently available, running parallel to Church Road for the first 36m approx. and then turning south eastwards to run along the end of the garden for a further 21m approx. to re-join the current route of the footpath. It is proposed that the diverted route would have a width of 2.0m, but due to the presence of a wooden post and chain fence between A and B and mature trees and hedgerow elsewhere, the useable width varies between 1.4m at a couple of pinch points, through 1.7m to 2.0m along the bottom of the garden. A mirror has been erected at Point C to assist with visibility at the bend. The nature of the proposed route is indicated in the photographs attached at Appendix E.
- 3.12 The applicant has made the diversion request on the ground that it would enable him to maximise his use/enjoyment of the land by not having a footpath running diagonally across the middle of the garden. Diversion is also perceived to have security benefits for the property following a number of break ins to this and other properties nearby. The applicant has felt the need to install an alarm, outside lights and CCTV as a result and considers having an open path across their garden to be a 'major security problem'. Concern has also been expressed regarding potential 'dog-napping'.
- 3.13 The applicant has made an informal offer to maintain the route of the diversion, on behalf of the Council, in future should their request ultimately prove successful. This could be beneficial to the Council due to the likely need for regular hedgerow pruning to maintain the useable width and in maintaining surface conditions, as well as in respect of the maintenance of the mirror and the post and chain fence. Such an informal arrangement would, however, not affect the Council's maintenance responsibility for the path as a highway and so may be viewed as having limited long-term benefit to the Council e.g. if the applicant were to sell the property in the future. Although in the short term it would enable the Council to consider retention of the post and chain fence and mirror, neither of which the Council would wish to maintain.
- 3.14 The route of the diversion would have a similar surface to the existing route in that it would be grassed for much of its length. It is not considered necessary to include any reference in the Order to bringing the surface of new route up to any higher standard than it is in currently or delaying the date on which the Order, if confirmed, becomes effective, to allow for any improvements, although it is open to the Council to include for any specific surfacing/clearance improvements it might consider necessary.
- 3.15 Extensive informal consultation has been carried out including Ward Members, Environment Bromley, local Residents Associations, local Ramblers Association and British Horse Society representatives and public utility companies. No objections have been received from the utility companies and the only comment received from the other consultees came from Enbro who consider '...the diversion to be minor and makes little difference to the walker whilst giving benefit to the landowner.'

#### **4. FINANCIAL IMPLICATIONS**

- 4.1 The Council's costs associated with the making and advertising of the Order, estimated at £1.5k will be recovered from the applicant.
- 4.2 The current route of the path through the garden is maintained by the applicant as part of the garden and so the Council's current costs in this respect are negligible. Similarly if the applicant continues to maintain the diverted section, the Council's maintenance costs should continue to be negligible. Although in the longer term, should such informal maintenance cease, the diverted route is likely to be more expensive for the Council to maintain than the existing route, involving hedge trimming and tree maintenance not required at present.

#### **5. LEGAL IMPLICATIONS**

- 5.1 The route of Footpath 258 is formally recorded in the Council's Definitive Map and Statement of Public Rights of Way and the legislation pertaining to the recording of such ways, the Wildlife and Countryside Act 1981, places a duty on Bromley, as the Surveying Authority, to keep those records under continuous review.
- 5.2 Therefore a Public Path Diversion Order under the provisions of the Highways Act 1980 is required in order to progress the applicant's request to divert part of the route of FP 258. A Definitive Map Modification Order under the provisions of the Wildlife and Countryside Act 1981 is also necessary to update the Map and Statement to reflect the resultant changes to the Footpath. More recent legislation, the Countryside and Rights of Way Act 2000, enabled the making of combined Diversion and Modification orders.
- 5.3 The diversion request must be considered by the Council in relation to the criteria set out in Section 119 of the Highways Act 1980, which are referred to in the following paragraphs together with an explanation of how the request fits with them.
- 5.4 The Council must be satisfied that it is expedient to make the Order in the interests of the owner, lessee or occupier of the land crossed by the path, or in the interests of the public. In this case it is clear that the diversion would make use of the garden land more practical for the owner. Also that security concerns would be addressed. The applicant indicates that they have spoken to users of the permissive route who have said they prefer to use the alternative route as they feel it is an invasion of the owners privacy to walk across their garden. This is, to some extent, endorsed by EnBro's comments in para 3.15 above. There may, thus, be some merit in considering that the proposed diversion could also have some benefit for the public.
- 5.5 Where a proposed diversion alters the point of termination of the path on a highway, it may be diverted only to a point which is on the same or a connected highway which is substantially as convenient to the public. The proposed route joins the same highways, namely Church Road and the continuation of FP 258 in existing locations. It is thus considered that, in this particular respect, the proposed new route would make no difference to users and can thus be considered to be substantially as convenient as the existing.
- 5.6 Also the path must not be substantially less convenient to the public as a result of the diversion and regard must be given to the effect of the diversion on the public's enjoyment of the path as a whole. The proposed path would run alongside Church Road for the first 36.0m of its length, albeit with some separation from the carriageway provided by the wooden post and chain fencing between points A and B and existing hedgerow between B and C with 1.8m high wooden close boarded fencing for the majority of this length on the other. The length between points C and D turns away from Church Road and would run between 1.8m high wooden close boarded fencing on one side and hedgerow on the other. At point C some reduction in the height of the hedgerows to Church Road and Chelsfield Lakes Golf Course, which surrounds the garden, has been made to afford local views for users of the proposed route. The diverted

route is some 21.0m longer than that of the existing route proposed to be extinguished. However, this would represent less than one minute's additional journey time for users of the path and could be considered not to significantly affect enjoyment. Also there would be no stiles, squeeze posts or gates on the diverted route.

- 5.7 Section 119 of the Highways Act 1980 allows for the width of any diverted path to be specified in a diversion order and as such an alteration to the definitive width of the affected length of footpath is possible under this section, although it is always open to challenge on the basis that use of a narrower way by the public would be less enjoyable/commodious.
- 5.8 Even though not for consideration by the Council at this stage of the proceedings, it is worth noting the Inspectors comments at paras. 57-61 of his report regarding public enjoyment of the route of FP258 as a whole. This was the one objection which resulted in the previous Order not being confirmed and such a view could prevail again should the Council agree to make a diversion order which is subsequently the subject of a Public Inquiry. Even if a Public Inquiry is not necessary in this case, the Council has to consider this issue at the time any unopposed Order is to be confirmed.

<b>Non-Applicable Sections:</b>	Policy; Personnel
Background Documents: (Access via Contact Officer)	Correspondence on Footpath File