

## APPENDIX B





Photograph 1

Photograph 2





Photograph 3

Photograph 4





Photograph 5

Photograph 6





FP 259 off Church Road by St Martins Church to the north of FP 258

Also FP 259





Also FP 259

FP 259





FP 259

FP 248A between Church Road and Court Road to the north of FP 258





## APPENDIX C

## LONDON BOROUGH OF BROMLEY

COMMITTEE: Environmental Services (Operations) Sub-Committee  
DATE: 3rd September 1996  
SUBJECT: PUBLIC FOOTPATH 258 - PROPOSED DIVERSION  
CHIEF OFFICER: Director of Environmental Services  
CONTACT OFFICER: Duncan Gray, Ext. 4556  
WARD: Chelsfield and Goddington

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## 1. SUMMARY

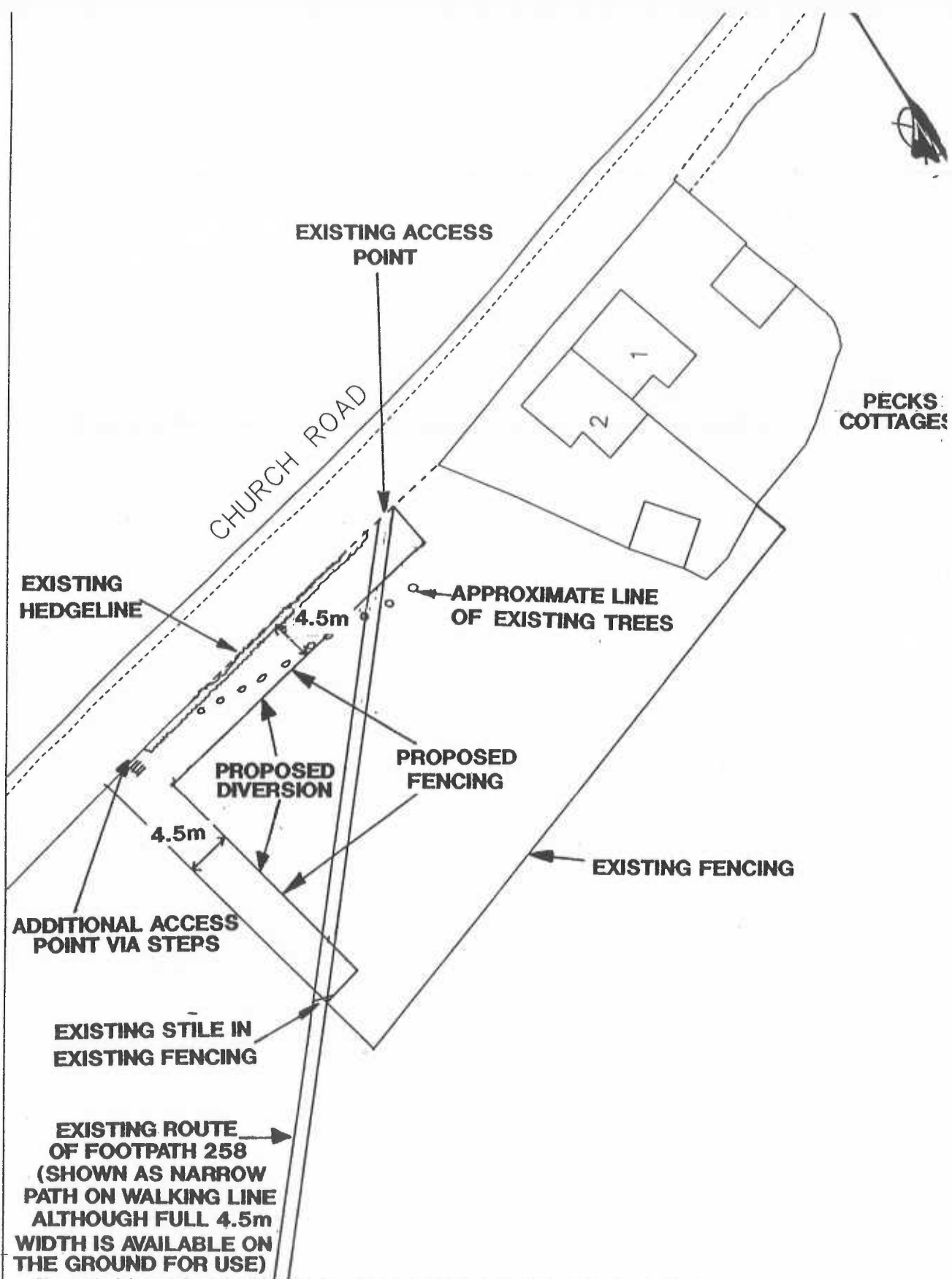
- 1.1 Consideration of this report was deferred at the meeting of the Sub-Committee held on 21st May 1996. The report advises Members of a request from the owner of No. 2 Pecks Cottage to divert the route of part of Public Footpath 258 around the edge of land adjacent to his property which he has recently purchased.

## 2. RECOMMENDATIONS


- 2.1 The Borough Secretary be authorised to take the necessary steps to make an Order under Section 119 of the Highways Act 1980 to divert part of public footpath 258 as indicated on drawing EHP/7786/2.

## 3. INFORMATION

- 3.1 Consideration of this item was deferred previously to allow the Ramblers' Association time to investigate claims that another public right of way exists in the vicinity of this section of FP258. Although this is on-going, the Ramblers' Association has confirmed that currently the evidence they have suggests there is no technical impediment to consideration of this request.
- 3.2 Following the purchase of an area of land adjacent to his property, the owner of No. 2, Pecks Cottage, Church Road, Chelsfield has applied to the Council for the diversion of that part of Public Footpath 258 which runs across his newly acquired land.
- 3.3 The area of land together with the existing route of the footpath and the proposed diversion are indicated on drawing no. EHP/7786/2. The fencing proposed will be in the form of open mesh with wooden posts to a height of approximately 1 metre. The current route of the path is unenclosed over the affected length and thus the defined width of 4.5m. is available to walkers.
- 3.4 The Ramblers Association and Environment Bromley (EnBro) have been consulted. The Ramblers Association has had discussions with the owner which have resulted in the proposals being amended by increasing the width offered for the proposed route from the 2.0m originally offered to 4.5m and the provision of a further access point to Church Road at the south western corner of the site, which will necessitate a set of steps being provided by the applicant. The Ramblers acknowledge that the proposal as it now stands is an improvement on the original in going some way to meeting the requirements, as they see them, of Policy L.4 of the Unitary Development Plan.



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 THE LONDON BOROUGH <b>ENVIRONMENTAL SERVICES DEPARTMENT</b>	<b>JOB</b> CHURCH ROAD, CHELSFIELD	<b>Scale</b> 1: 500
	<b>TITLE</b> PROPOSED DIVERSION OF PUBLIC FOOTPATH 258	<b>Drg No</b> <b>EHP/7786/2</b>

- 3.5 Policy L.4 of the Unitary Development Plan says in the supporting text that "diversion should normally be in the interests of both the public as users of the route and of the owner of the land". The Ramblers believe that this statement in the Policy means that there must be a positive benefit to users, not just that there is no disbenefit. In this case they acknowledge some benefit in relation to the additional access to be provided to Church Road, although they point out they did not seek this access.
- 3.6 Nevertheless, they are opposed to what they see as a reduced width, their argument being that as the 4.5m being offered is measured from the centre line of the existing hedge approximately 0.5m will be lost to users which they consider to be a disbenefit to users. They would like to see the 4.5m measured from the face of the hedge so that the full width is available. It seems entirely proper for the width to be considered to the centre line of adjacent hedges as this offers a fixed datum rather than the variable one offered by the face of a hedge, i.e. the face of a hedge can be trimmed and depending on the degree of trimming will vary in position.
- 3.7 The Ramblers take the view that this is unprecedented and impracticable and ask for a reasonable allowance to be made for hedge growth and in this case other obstacles (trees) along the proposed line of the diversion. They suggest 0.5m as being a reasonable allowance and ask for a width of 5.0m from the centre line of the hedge. If this is accepted, they would be prepared to overlook the obstacle created by the trees. However, if the Council accepts measurement to the centre line then the Rambler Association will in all probability object to any order.
- 3.8 EnBro is generally opposed to the diversion of a footpath where the purchaser of land is fully aware of its presence at the time of purchase. However, in this instance EnBro has not objected, believing the diversion to be minor, which would not detract from users' enjoyment of the way, and that it may even obviate possible future conflicts of interest between users and owners.
- 3.9 The Ramblers Association believes EnBro has not given sufficient time and resources to the issue of public enjoyment to be able to reach a considered view.
- 3.10 As referred to above, the Ramblers believe there may be evidence of the existence of a further right of way in the immediate vicinity which they have been investigating since May this year, but to date have been unable to resolve the issue. Nevertheless, they say they are unable to accept the proposed diversion of FP.258 until the other matter has become clearer.
- 3.11 Despite the Ramblers position, the Council can still consider this request but it is likely that if the matter proceeds as proposed in this report, the Ramblers Association will object and a public inquiry will most likely be necessary to resolve the situation.
- 3.12 Photographs indicating the existing hedge, trees and fencing will be on display at the meeting.
- 3.13 It may be helpful to Members to bear in mind that it is generally accepted that a highway, which term includes public footpath, may often consist of both a part that is regularly used and a part that is left unused, for example, a verge or, in this case, the section which would be occupied by hedge growth which is nonetheless part of the highway. Also that a width of 2.0m is generally considered to be adequate for convenient public use of a footpath.
- 3.14 The applicant has been made aware of the Ramblers position and is still desirous that his request be considered by Committee.
- 3.15 The Statutory Authorities have been consulted and have no objections to the proposal.

4. **WARD MEMBERS' VIEWS**

- 4.1 The Ward Members have been consulted and have raised no objections.

5. **POLICY/CORPORATE PLAN/SERVICE PLAN CONSIDERATIONS**

- 5.1 Policy L.4 of the UDP indicates that "diversion of existing rights of way will only be acceptable in appropriate circumstances". This is qualified in the supporting text by saying that diversion will only be considered if the request complies with all the requirements of the relevant legislation and that it should normally be in the interests of both the public as users of the route and the owner of the land.
- 5.2 At the meeting of this Committee on 18th July 1995 it was resolved to request Development Control Committee to review the supporting text of Policy L.4 under the current review of the Unitary Development Plan in order to clarify the Council's position with respect to the diversion/extinguishment of public rights of way. (Minute 45 refers).
- 5.3 The Ramblers Association has been appraised of the Council's position and is opposed to it as shown by its stance in respect of this application. Furthermore, the UDP review is unlikely to be resolved in the next 18 months and so this request needs to be considered in the light of the Policy as it exists at present.
- 5.4 The view taken in July 1995 was that any request which is made in accordance with the appropriate current legislation should be acceptable to the Council unless specific circumstances suggest otherwise.
- 5.5 As one user group, EnBro, feels that public enjoyment of the route would not be diminished in this instance, Members may feel that Policy L.4 is not compromised and feel able to consider this particular request on its merits.

6. **FINANCIAL CONSIDERATIONS**

- 6.1 The Council's costs associated with the Diversion Order are to be borne by the applicant, as are the costs associated with providing the new route, including appropriate signage, and steps to the Council's satisfaction.

7. **PERSONNEL CONSIDERATIONS**

None

8. **LEGAL CONSIDERATIONS**

- 8.1 The Borough Secretary's view is that the supporting text of Policy L.4 does not necessarily prevent orders being made for diversion since it indicates that ideally, both the owners of the land and the users of the route should concur with the arrangements, whereas as a matter of fact it is most unlikely that the interests of both parties could ever be fully accommodated in any particular case and the UDP never intended to prevent the diversion of rights of way taking place.
- 8.2 Section 119 of the Highways Act 1980 allows for the width of any diverted path to be specified in the Order and as such an alteration to the definitive width of the affected length of footpath is possible under this section, although this is always open to challenge on the basis that use of it by the public would be less enjoyable/commodious.

8.3 In this case the definitive width is being offered and although part of this would be lost through the presence of the hedge, the measurement of a highway is normally considered as being to the centre line of adjacent planting and, as such, the width offered can be considered to meet the requirements of legislation.

9. **CONCLUSIONS**

- 9.1 An application for diversion has been received by the Council which complies with appropriate legislation.
- 9.2 Users have been consulted and the Ramblers' Association has raised objections in relation to Policy/width issues, neither of which preclude an order being made by the Council.
- 9.3 The diversion proposed is not objectionable to some users viz. EnBro's comments, and the Statutory Authorities and can therefore be supported.

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3rd September 1996

Three of the petitioners' letters which had been received had also requested the erection of a 'No Ball Games' sign in the turning area at the end of Millwood Road. Both the provision of such a sign and the suggested footpath closure were strongly supported by the local Ward Members.

The Sub-Committee was informed that further investigation would require to be made into the level of public usage of the footpath and as to the ownership of the sub-soil. Members were also reminded that the Council's existing policy was that 'No Ball Games' signs were only erected on grassed amenity areas where there was an evident need. Such signs had not been considered appropriate for erection in streets where such activity was only enforceable by the Police.

**RESOLVED** that consideration of the request to close the above footpath be deferred pending investigation into both the level of public usage and of the ownership of the sub-soil of the footpath and for the result of detailed consultation with the statutory authorities, and the petitioners be informed accordingly.

**RECOMMENDED** that the Council's existing policy in relation to the erection of 'No Ball Games' signs be varied to enable such signs to be erected on hard-standing areas of the highway as well as on grassed amenity areas.

62 **PUBLIC FOOTPATH 258: PROPOSED DIVERSION**  
**Report ES96407**

Following the purchase of a area of land adjacent to his property, the owner of No. 2, Pecks Cottage, Church Road, Chelsfield had applied to the Council for the diversion of that part of Public Footpath 258 which ran across his newly-acquired land. The area of land, together with the existing route of the footpath and the proposed diversion were indicated on Drawing No. EHP/7786/2. The current route of the path was not enclosed over the affected length and thus the defined width of 4.5m was available to walkers.

Both the Ramblers Association and Environment Bromley (EnBro) had been consulted over this proposal. Following discussions which had been held with the owner, the Ramblers Association had acknowledged that the amendment of the width for the proposed route from the 2.0m which had originally been offered to 4.5m and the provision of a further access point to Church Road at the south western corner of the site represented improvements to the original proposal and, to some extent, met the requirements, as interpreted by the Association, of Policy L.4 of the Unitary Development Plan. This, in its supporting text, required that a diversion should normally be in the interests of both the public as users of the route and of the owner of the land.

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3rd September 1996

However, the Ramblers Association was opposed to what it perceived as a reduction in the width of the proposed footpath although the grounds for these objections were not supported by the Director of Environmental Services. The Ramblers Association had also indicated that it could not accept the proposed diversion of FP.258 until the investigations which it was carrying out regarding the existence of a further right of way in the immediate vicinity had been completed. In these circumstances, it was likely that if the Council agreed to make an Order under Section 119 of the Highways Act 1980 to divert the above footpath, objections were likely to be received from the Ramblers Association and a public inquiry would most likely be necessary to resolve the situation. The applicant had been made aware of the Ramblers' position and had still requested that this application be considered by the Sub-Committee.

It was reported that EnBro had not objected to the proposed diversion as that organisation had considered that the proposal would not detract from users' enjoyment of the right of way and that it might even obviate possible future conflicts of interest between users and landowners. The Statutory Authorities had also been consulted and had no objections to the proposal.

The Borough Secretary was of the opinion that the supporting text of Policy L.4 did not prevent diversion orders from being made. Section 119 of the Highways Act 1980 allowed for the width of any diverted part to be specified in the Order and, as such, an alteration to the definitive width of the affected lengths of the footpath was possible under this Section although this was always open to challenge on the basis that its use by the public would be less enjoyable/commodious. In this case, the definitive width was being offered and could be considered to meet the requirements of the above legislation.

The Council's costs associated with the Diversion Order would be borne by the applicant, together with the costs associated with providing the new route, including the provision of appropriate signage and steps to the Council's satisfaction.

RESOLVED that the Borough Secretary be authorised to take the necessary steps to make an Order under Section 119 of the Highways Act 1980 to divert part of Public Footpath 258 as indicated on Drawing No. EHP/7786/2.

**63            EXTINGUISHMENT OF HIGHWAY RIGHTS AT 102 PETERSHAM  
DRIVE, ST PAUL'S CRAY  
Report ES96404**

A planning application had been received from the owner of 102 Petersham Drive, St Paul's Cray to incorporate an area of grass verge, as indicated on Drawing No. EHP/7925/1, within the curtilage of this property. In view of its open nature, highway rights might have been established and, therefore, extinguishment was considered to be necessary. Planning permission for the change of use had been granted for this application.



## APPENDIX D



# The Planning Inspectorate

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LONDON BOROUGH  
OF BROMLEY  
9 MAR 1999  
BOROUGH SECRETARY

The Borough Secretary,  
London Borough of Bromley Council,  
Bromley Civic Centre,  
Stockwell Close,  
BROMLEY  
Kent BR1 3UH

Your Reference:  
L9 18/3/136A  
Our Reference:  
FPS/G5180/4/7

Date: **05 MAR 1999**

Dear Sir

HIGHWAYS ACT 1980, SECTION 119 AND SCHEDULE 6  
LONDON BOROUGH OF BROMLEY COUNCIL  
FOOTPATH NO. 258 CHURCH ROAD, CHELSFIELD  
PUBLIC PATH DIVERSION ORDER NO. 1 1997

1. I refer to the above named Order, submitted by your Council to the Secretary of State for the Environment, Transport and the Regions for confirmation, which I have been appointed to determine in accordance with the provisions of paragraph 2A of Schedule 6 to the Highways Act 1980 ("HA"). I held a public local inquiry into the Order at The Bromley Civic Centre on 10 and 13 November 1998, and made an accompanied inspection of the line of the affected part of Footpath No. 258 Church Road, Chelsfield ("FP258") and the route of its proposed diversion on 13 November 1998.
2. The effect of the Order, if confirmed without modification, would be to divert that part of FP258 which runs across land adjacent to No. 2 Pecks Cottage, Church Road, Chelsfield between Point A on the Order Map (Grid Reference 47897/63575) and Point B (Grid Reference 47890/63530) to a line along the boundary of the land with Church Road between Points A and C (Grid Reference 47872/63548), including access to Church Road at Point C, and then along the south-western boundary of the land between Points C and B, the diversion having a minimum width of 4.5m (measured from the centre line of the adjacent hedge along the length of A-C).
3. The Council as Order Making Authority ("OMA") confirmed its compliance with the statutory formalities. Two objections were made to the Order. The OMA was represented at the inquiry by Mr A Tompkins, Senior Solicitor with the Council, who called Mr D Gray, Senior Engineer with the Council, and Mr M Duncombe, the applicant and owner of the land affected. The Objectors to the Order, the Ramblers Association ("RA") and Environment Bromley ("EnBro"), were jointly represented at the inquiry by Mr K Wright, who gave evidence and called Mr R Handforth, Mr R Croft, and Mr C Kirkby as witnesses. In my determination I have taken into account all written and oral representations.

## DESCRIPTION OF THE PATH AFFECTED AND THE PROPOSED DIVERSION

4. The overall route of FP258 has a total length of 3.46 km (2.15 miles). FP258 is described in the Definitive Statement as having "an approximate width of 4.5m". Its route, part of the Green Street Green Circular Walk, includes sections of bridleway and byway as well as footpaths.

5. The path affected is the northernmost part of FP258, about 43m long, in the section of FP258 between Church Road, Chelsfield and the A21 at Pratts Bottom. Church Road at this point is an unclassified country lane, about 5m wide, and without any footways. The path affected runs over a small roughly rectangular area of open land on the east side of Church Road, south of an isolated pair of semi-detached houses, 1-2 Pecks Cottage. This open area is now owned by Mr and Mrs Duncombe who occupy the adjoining house, 2 Pecks Cottage. To the south and east this area is adjoined by a recently constructed golf course (from which it is separated by a post and wire fence), and to the north (from which it is undivided) by the curtilage of 2 Pecks Cottage.

6. After leaving Church Road at a waymark sign at Point A, and passing between squeeze posts 0.48m wide, the path runs diagonally south-west across the area of open land. Part of this area, west of the path, is cultivated as a vegetable plot. This part includes a hawthorn hedge which runs along the roadside verge, and 2 lines of poplars. One of the lines of poplars runs diagonally across the roadside verge bank between the points marked x-x on the Order Plan. The other line of poplars runs diagonally across the line of the path about 10m south of Point A. The rest of the area of open land is rough grass or bramble and nettles. After crossing the line of poplars the path follows a slightly curved route southwestwards to reach a stile at Point B, set in the fence which runs along the line C-B, about 6.5m north-west of the southern corner of the fence. On the south side of the stile the path then continues south-west over the golf course.

7. The proposed diversion would have 2 sections. That between Points A and C would run south-west for about 42m parallel to the road, along the vergeside bank, with a width of 4.5m measured from the centre line of the roots of the hawthorn hedge. This line of the proposed diversion would cut through the row of poplars between the points marked x-x on the Order Map. At Point C a new access would be provided onto Church Road by new steps as the carriageway here adjoins a bank about 1.1m above road level. As measured on site, vision splays for a pedestrian standing at the roadside edge available at Point C are: 61.3m to the left; and 143m to the right. The remaining section of the proposed diversion would then run south-east for about 31.6m from Point C to Point B, with a defined width of 4.5m, enclosed on both sides by fencing.

8. The above measurements relating to the path were all taken and agreed at my site inspection. It was also agreed at the inquiry that the position of the proposed diversion between Points C and B is not precisely as shown on the Order Map, but is more angled to the north, as shown on Plan DDG1 (prepared by the OMA) and Plan KJW1 (prepared by Mr Wright).

## SUBMISSIONS OF THE PARTIES

### The case for the OMA

9. The Order satisfies all the criteria of S119(6) of the HA. The first question to be considered is whether the diversion is expedient in the interests of the owner. The Council properly made the Order under S119(1) of the HA, because it appeared to the Council that in the interests of the landowner it was expedient to do so. The order making process was not flawed. Under delegated powers it was for the Director of Environmental Services to determine whether the proposed Order complied with S119(1). The Environmental Services (Operations) Sub-Committee at its meeting on 3 September 1996 did not have to take into account the considerations set out in S119(6) at the initial order-making stage. Having decided that the order complied with S119(1), the further questions under S119 (6) did not fall to be addressed until the Order came to be confirmed - see the High Court decision by Mr Justice Collins on 9 June 1997 in R v. SSE ex parte Patterson (CO 4224-96), and the commentary by Mr Michael Orlik.

10. As to whether it was expedient to make the Order, "expedient" means "advantageous", "suitable", "appropriate", "a means of attaining an end". Mr Duncombe's evidence shows that he and his wife acquired this land to enhance their enjoyment of their home, and also to gain control of the land and trees planted on it. The trees, in particular, being poplars represented a threat to the stability of their property. Mr Duncombe has always intended to exploit the agricultural use of the land with a view to some degree of self-sufficiency in his retirement. He wishes to graze animals for which he has already acquired permission for winter housing. The presence of a footpath 4.5m wide running diagonally across this land and effectively bisecting it must inhibit Mr and Mrs Duncombe in maximising the effective use and management of the land. If the path remains there would be a section of land which Mr Duncombe would be unable to use efficiently. The width of 4.5m, much greater than most footpaths, means a disproportionately greater loss of land occupied by the path having regard to the overall size and shape of the plot. Diverting the path as proposed must be both advantageous and a means of attaining an end, which thus satisfies the requirement that the diversion is expedient in the interests of the land owner.

11. The second question is whether the proposed diversion would be substantially less convenient to the public. In cross-examination Mr Wright admitted that FP258 is mainly if not exclusively used for recreational purposes. Mr Wright also conceded that for recreational walkers time is not of the essence. Therefore walking such footpaths is an activity to be enjoyed and savoured at a leisurely pace to suit the individual, and is not governed by constraints of time. This is not a case of a path leading to a railway station or shops or some other place where the sole use and purpose of the footpath is as a means to get from A to B as quickly as walking may allow. The short diversion which the Order makes should not inconvenience any recreational walker. The additional distance to be travelled is so small that no walker could be regarded as being "substantially" inconvenienced. It is not helpful to talk in terms of percentage increase when the length of the path in question is so small anyway. However, on this basis the percentage increase was 40%, not 61.5% as suggested by Mr Wright. Even a 61.5% increase of a short length of path is only a very small increase even if the figure seems impressive as a percentage increase. The principal issue is whether the typical recreational walker would be substantially inconvenienced by the proposed diversion. On this evidence it is not reasonable to say that they would be.

12. The next matter to be considered is the question of public enjoyment. Arguably this is the most subjective of the tests set out in S119(6). If the effect of the proposal would be to remove completely from the walk a particular feature, a fine view, or a lake or pond setting for example, public enjoyment would be diminished. However this does not apply here. Mr Handforth said that he objected to losing the view across open land which currently exists when joining this footpath from Church Road. However, this is a subjective matter. Although this view is "open", it is not an exceptional one. In any event, if the diversion took effect the view would not be denied but merely delayed by the additional time it would take to walk the diverted path and rejoin it at the stile. There would be no reduction in enjoyment when coming to the view at the stile, arguably this might enhance the view because a view would suddenly be presented to the walker as the final corner is turned. Additional enjoyment might also be gained from walking alongside a hedge. The decision in *Byeway and Bridleway* 1998/1/4 confirms that local users are not averse to changes in direction offering different perspectives of surrounding countryside, and often enjoy "poking about" in hedges.

13. Policy L4 of the adopted Bromley UDP states: "The Council will keep under review the Definitive Map of public rights of way and will promote, in collaboration with interested organisations and landowners, the creation of new footpaths and bridleways; the

extinguishment or diversion of existing rights of way will only be acceptable in appropriate circumstances". Although this Policy applies where a diversion matter arises, it should not be interpreted as restricting the OMA to making Diversion Orders only in those cases where some tangible benefit, or quid pro quo, can be given to walkers. That interpretation would seriously limit the powers of the OMA to make Orders where applications might otherwise meet legislative requirements. Therefore, Policy L4 cannot be interpreted so as to take precedence over the legislation.

14. In any case, in this case two positive benefits would accrue to the walker: firstly, the additional access point at Point C; and secondly, the shorter walking distance for those approaching the path in Church Road from the direction of the A 21. The real benefit here is the facility to leave the road sooner than if progressing to Point A.

15. As to danger for pedestrians when joining or leaving the footpath at Point C, this is a common hazard, familiar to walkers who inevitably encounter country lanes or roads at some point during most walks. Right angle turns may be undesirable in urban locations, but the risk at this location is very small. With proper steps and signs, this new junction should not be unduly hazardous, even with the existing 60 mph speed limit. This risk is likely to be reduced yet further in the near future is, as now intended, Church Road (in common with other rural roads in the Borough) becomes subject to a 40 mph speed limit. On balance, therefore, the benefit of the diversion outweighs any increased safety risk.

16. As to security of pedestrians, there are many other risks to walkers in the countryside, for example, from farmyard dogs and other animals. It should be assumed that walkers are aware of such possibilities. The risk of attack on the diversion from muggers or sexual predators, although not non-existent, is small. Furthermore, most walkers tend to walk in groups of 2 upwards, which further reduces this risk.

17. It is agreed that the appropriate width for the diversion should be the same as set out in the Definitive Statement for FP258, approximately 4.5m. There is no statutory or other specific guidance or precedent as to measurement in these circumstances. Measurement from the outer boundary of the land in a line with the roots of an existing hawthorn hedge is the most appropriate method. It would be impractical to measure from the face of the hedge, which is irregular and not ideal as a datum point. Conversely, the roots are fixed, certain, and in line with each other and appear to follow the outer boundary of the land. Using the roots system as a datum will give more than adequate room for walkers, notwithstanding the likely growth of the hedge and of any hedge which may develop on the opposite boundary.

18. As to appropriate minimum cleared usable width, Schedule 12A of the HA refers to a minimum width of 1.5m in the case of a field edge footpath. Mr Gray's evidence should be accepted that, even with growth from either side, 3.5m would remain in a usable condition. Even if the evidence of Mr Wright on this point were preferred, 2m effective width would remain, which would be adequate. It is not realistic to expect the entire 4.5m to be available, nor on the evidence is this necessary.

19. The erection of the stile is not a good reason for refusing to confirm the Order. Mr Duncombe erected this stile genuinely unaware that he needed permission to do so. He had done this for the better protection of his land. The Council exercised its discretion to await the outcome of this matter, consistent with advice in Circular 1/83 that authorities should try to resolve problems arising from obstruction amicably before resorting to legal proceedings or

other statutory action. Should the Order not be confirmed, consent might be given for the retention of the stile if animals are grazed on the land. There had been no complaints about the stile, which had not been erected until after Mr Duncombe's initial approach to the Council, and then on the advice of a fencing contractor. Therefore, this stile had not been placed with any underlying motive on the part of the applicant to secure this diversion.

20. On balance, therefore, the Order complies with the requirements of S119, and subject to formal amendment in its title, should be confirmed. It is agreed that the title of the Order should be modified to make clear that that the diversion applies only to "Part of" FP258.

#### The case for the Objectors

21. The deliberations of the OMA Committee in authorising the making of the Order were defective, because the OMA failed to apply its own relevant policy considerations under Policy L4 of the UDP. The supporting text at paragraph 8.13 of the UDP clearly states that proposals for diversions should be considered only if they are in the interests of the owner, occupier or lessee and of the public as users. This Order is not in the interests of the public. Therefore, it should never have been made.

22. The above approach is supported by the report of the Local Plan Inspector into the current UDP. The legitimacy of this approach, to give precedence to the relevant policy provisions of the OMA under its development plan, is further supported by the fact that policies with similar precedence are pursued or seriously contemplated by other Highway Authorities - see copies of extracts from relevant documents from Oxfordshire, Bedfordshire, Kent and Wiltshire. Therefore, the provisions of Policy L4 take precedence over those of S129 of the HA.

23. The OMA has not negotiated the first hurdle of Policy L4 requiring the diversion of a right of way to be in the interest of the public as users, because

(i) the offered additional access/egress point, C, is more dangerous than that which now exists at Point A. Entering the path from Church Road at Point C a group of walkers might have to wait in the narrow, dangerous road, (with fast-moving traffic approaching) for others to ascend what, in some conditions, might be slippery steps. Alternatively, if leaving the path here, a group of walkers might exit straight on to the road at this difficult point;

(ii) it has been shown that some people entering through this gap for years may have established a right of way but, regardless of its duties, the Council has done nothing to establish or refute this;

(iii) it is in any case clear that under S66 of the HA the Council ought to address its statutory duty to provide a safe path for pedestrians;

(iv) adequate assurances have not been given that the line A-C would be kept as clear as the existing cross-field path. The OMA's past record in this and other cases, and the cosy relationship between the landowner and the OMA, makes it difficult to be confident that this arm of the proposed diversion would not in time become obstructed and unusable, leaving users to enter and exit from the less safe point C.

24. The order-making process was flawed, because the report to Committee on the proposal

to divert the path gave no details of the grounds on which the diversion would be expedient in the interests of the owner, nor an assessment of the relative convenience of the existing and the proposed diversion routes, nor any judgment of the effect on public enjoyment of the path as a whole. This stems from the failure by the OMA to appreciate that the power given by the HA to make such orders is only a power, not a duty. This power cannot be exercised in disregard of the tests set out in S119 of the HA or of the Council's own policies.

25. In making the Order the OMA failed to pay due regard to the real reasons of the applicant for wanting it, or to the tests set out in S119 of the HA or to the statutory duty of the OMA to assert and protect the public's rights (S130(1) of the HA) or to the OMA's own UDP policies. The OMA had not properly exercised its discretion in making the Order. Lack of resources cannot be pleaded here by the OMA as a legitimate excuse for such failure to perform its statutory duty - see the decision of the House of Lords on this point in R v East Sussex CC ex parte Tandy in re T (a minor) Times Law Report 20/5/98.

26. Moreover, there had been a lack of even-handedness in the manner in which this matter has been handled. The correspondence shows that the OMA treated the applicants much more favourably, and more courteously, than the Objectors. There is an absence of natural justice in the way business is conducted by the OMA. This makes it difficult to develop effective working relationships; to have any faith in the reliability of the OMA; or for the Objectors to believe, if decisions go against them, that they have had a "fair rub of the green".

27. The RA has already made known to the OMA and the owner its concern about the line of the right of way. The present line on the ground appears incorrect, since from Church Road it approaches and passes through a line of trees, only recovering the correct line at the unauthorised stile (Point B). The available width of the path between A and B is also less than the definitive width of 4.5m. However, the RA does not press for clearance of the affected path to the full width since it accepts a lesser cleared width for short stretches where a path is neither fenced nor close-hedged.

28. There are significant problems about the accuracy of the Order Plan as to the dimensions and true plotting of the proposed diversion. Mr Croft's survey, based on the Land Registry drawing which accompanied the applicant's letter of 25 July 1995 to the OMA, shows the areas of land east and west of the existing right of way to differ from those portrayed. It also shows the angle subtended on it by the southern boundary of the plot with the road to be no more than 80 degrees.

29. Therefore, if it is decided to confirm the Order, the Order Plan should be redrawn to show the gap or stile at the correct distance from the boundary centre of the hedge. If it is decided not to confirm the Order, then the OMA should require the path to follow the right line as, otherwise, walkers will be encouraged to trespass on the golf course as they leave or approach the site. In any case, pending a decision, the line of the path ought to be corrected and the stile removed.

30. As to the test of expediency under S119(1) of the HA, the existence of FP258 on roughly its present line long preceded the applicant's ownership of the land it crosses. This land lies in the Green Belt, and is subject to long-standing policies which require the land to be kept open and accessible. The original grounds advanced for seeking the diversion, namely concern about security and privacy are no longer relied on, or sustainable.

31. The grounds now put forward for seeking the diversion are the wish to grow crops and to graze animals. However, cropped and grazed land is widespread without the need to divert paths which cross it. Significantly, so far no animals have been put on the land, although the stile had been in place for 3 years. This leads one to question whether, if the diversion were permitted, this land would not be used as a garden rather than for agriculture - but such garden use would clearly be inappropriate development, contrary to Green Belt policies.

32. A further reason relied on seeking the diversion is a need to avoid the stealing of fruit by walkers. However, there is no evidence of prosecution or complaints to the police. FP258 passes unfenced through an orchard south of the diversion, but this has not caused any problem. A general fear of crime cannot be a valid reason for a diversion; it would become impossible if every complaint of actual or potential crime were to result in action to move even small highways. Therefore, the test of expediency in the interests of the landowner cannot be satisfied.

33. As to the test of convenience, the proposed diversion would be substantially less convenient than the existing line because -

(i) based on Mr Croft's measurements, it would increase the length of this section of the path by over 60%, a proportionate increase of too great a magnitude for any diversion, however short; and, in the light of possible further attempts by the OMA to divert sections of the same path in the future, would contribute to significant absolute increases in the path length;

(ii) it would introduce 2 dog-legs, one an acute one, into an otherwise straight path, also making it less safe;

(iii) it would render maps out of date and present a new complication of route finding for the less experienced walker round the Green Street Green Circular Walk. Such complication can turn a walk into a chore rather than a relaxing pleasure;

(iv) unlike the existing path, the diversion would be closed in, and would be more likely to become muddy than the present path which is open to sun and wind and likely to become obstructed by growth and fallen branches etc; and

(v) the diversion would be narrower, and would afford less opportunity to avoid mud and other obstacles, than the existing width and would present more problems for the buggy or wheel-chair user, should the squeeze posts and stile remain unnecessary.

34. As to the test of enjoyment, the diversion would harm public enjoyment of the path as a whole. For this purpose the path "as a whole" should be taken to be the stretch of FP258 between Church Road and the A21. This stretch is a clear entity, unlike the rest of FP258, which contains sections which previously were separately numbered, including some with a different status.

35. The effect of the proposed diversion would make this section of FP258 less enjoyable as a whole, for the reasons already given above, and because

(i) it departs, if relatively briefly, from the line of an old path, used by past generations, losing, without good reason, the link with the past - the case cited from Cleethorpes (FPS/E2015/4/1) confirms that "public enjoyment deals with people's perception of the value



of a footpath. One of these pleasurable perceptions is walking a path that has been used by past generations..."

(ii) it would prolong the walk alongside a "cut through" road from the A21 onto the A224, with fast-moving traffic - the Cleethorpes decision also referred to "walkers' distaste for a diversion partly routed close to a road used by fast moving traffic.."

(iii) it would be narrower and fenced/hedged on each side rather than open, deferring the sense of freedom and the inviting, open view of the route ahead available from point A, but substituting instead constriction and constraint.

36. In particular, the effective reduction in width proposed is tantamount to extinguishing a strip of the path. The idea of using the roots of the hedge as a datum line is not opposed. However, it is wrong to use these roots as a datum line in the case of a hitherto open path to be diverted from cross-field. In this case there are problems of choosing the line of the roots, and of the datum at the north end of A to C. It has been thought appropriate, both elsewhere and in Bromley, to allow for growth over and above the definitive width in such circumstances. If the Order is confirmed, 1m should be allowed for growth, with a clear undertaking that trimming would not be neglected, and 0.5m allowed for trees and fencing.

37. The OMA claims that it is appropriate when diverting a path to reduce width in order to reduce maintenance costs. However, since the OMA does not intend to ask local volunteers to clear the diversion line, by diverting from cross-field to field edge the OMA transfers responsibility for path maintenance from the owner to themselves, thus increasing OMA costs.

## CONCLUSIONS

38. Although involving only a short section of footpath, as will be seen from the above summary, this proposed diversion has been the subject of considerable opposition, involving relatively complex arguments, which were well prepared on both sides with full citation of supporting references and case law. For this reason, allowing also for site inspection at a time of year when daylight hours are limited, the case lasted 2 days.

39. There is also the complication of an inaccuracy in the Order Map. Although the extent of the inaccuracy is disputed, even on the OMA's case the section C-B of the proposed diversion follows a line 10 degrees north of that shown on the Order Map at Point B. In these circumstances, even preferring, as I do, the case of the OMA on this point, the admitted discrepancy in my view is too great to be ignored under the de minimis principle, as was suggested by the OMA. Therefore, in my opinion before any confirmation of this Order this error would have to be corrected by modification, which (unlike the agreed formal modification of the title of the Order) would require further notice, since it would affect land not affected by the Order.

40. Turning to the substance of the case, I will deal first with the preliminary point taken by the objectors that the order-making process was flawed, because the OMA then failed to have regard either to its own policy considerations under the adopted Bromley UDP or to the relevant statutory criteria under S119 of the HA, and misinterpreted its statutory powers. The objectors also say that this process was vitiated by a failure by the OMA to observe the rules of natural justice.

41. As already noted, Policy L4 of the adopted Bromley UDP provides (inter alia) that "the diversion of existing rights of way will only be acceptable in appropriate circumstances". Reference is made to the supporting text at paragraph 8.13 of the UDP, which refers to the need for proposals for diversions to be in the interests of the public as users, as well as of the landowner or occupier. I also take into account the text of the previous corresponding UDP Policy, and the comments of the Local Plan Inspector to which I was referred.

42. All these matters were undoubtedly material considerations for the OMA to take into account in deciding whether or not to make this diversion order. However, I do not see anything inconsistent in these provisions with the general statutory requirements of S119 of the HA, which I consider must be treated in any event as the overriding criteria to be satisfied, since they form part of the primary highways legislation.

43. Therefore, I agree with the OMA, Policy L4 should not be interpreted as preventing the OMA from making a diversion order in a case which otherwise meet legislative requirements, because of a lack of public benefit required by this Policy. Accordingly, I cannot accept the submission of the Objectors that Policy L4 should be interpreted as taking precedence over the legislation. In any case, I also agree with the OMA, in this case the OMA was entitled at this stage to regard the proposed diversion as being in the interests of the public, since it provided benefits for walkers by the additional access/departure point at Point C, and a shorter road walking distance for pedestrians wishing to use the diversion. Therefore, in my view the OMA were entitled to form the view at this stage that this diversion complied with Policy L4.

44. With regard to the other matters relied on by the Objectors in their challenge to the validity of the order-making process, from the relevant documentary evidence I do not detect in this case any failure by the OMA to carry out proper procedures or misconception on its part of its powers and duties in this regard. The decision of the High Court in R v. SSE ex parte Patterson confirms that in making such an order in the first place (as opposed to confirming an unopposed order at a later stage) an OMA is concerned only with the criteria in S119(1) of the HA - that is to say, whether in the interests of the owner, lessee or occupier of the land to be crossed by the path or way or of the public, it is expedient to make the order. As pointed out in the article by Mr Orlik to which the OMA referred, the effect of this decision is that if a diversion order appears to an OMA to be in the interests of the owner, then the OMA does not have any discretion not to make an order, despite the use of the word "may" in S119(1). At this initial stage, questions of the convenience of the routes and public enjoyment of the path, which arise under S119(6), do not fall to be considered.

45. In the present case the OMA had before it when making the Order material which showed that the owners wished to put this land to agricultural use, by cultivation and grazing of animals, which use was restricted by the presence of the cross-field path, but which would be enhanced by its diversion to a field-edge path. In these circumstances, notwithstanding the points made by the Objectors, I consider that the OMA were entitled to form the view that the proposed diversion was expedient in the interests of the owners. Indeed, on this basis on the authority of Patterson, the OMA were not only entitled, but obliged, to make the Order.

46. As to the other matters urged by the Objectors in support of their case that the order-making process was flawed, from the correspondence and the Committee papers I do not detect any improper conduct by the OMA which would justify a challenge to the order on the basis of lack of procedural fairness and natural justice. On the contrary, the submitted

correspondence satisfies me that before making the Order the OMA went to considerable lengths to consult fully with the Objectors, in order to assess the objection, and to explore whether this might be overcome by adjustment of the proposed diversion route. This correspondence shows that during these discussions both RA and EnBro apparently accepted at least in principle the reasonableness of a diversion. This is further confirmed by the evidence at the inquiry of Mr Gray, Mr Duncombe and Mr Wright. In these circumstances, I cannot accept the case put forward by the Objectors that the OMA acted unfairly towards the Objectors, or that there was any improper relationship between the OMA and the applicant, or that the Order was tainted by undue bias on the part of the OMA in favour of the applicant.

47. I now turn to the specific tests laid down by S119(6) of the HA as matters which have to be satisfied before such a diversion order can be confirmed. I will deal in turn with the relevant tests which are in issue, which may be summarised (in the order in which they appear in the Act) as: expediency of the diversion in the interests of the landowner; whether the diversion will not be substantially less convenient to the public than the existing path; and the effect of the diversion on public enjoyment of the path as a whole.

48. As to the issue of expediency, in addition to the matters already outlined which were considered by the OMA at the order-making stage, evidence was given at the inquiry by Mr Duncombe on this point. In this evidence Mr Duncombe explained - and I accept - that with the path in its present position, the land is effectively bisected in a way which considerably limits its use for grazing of animals and cultivation. In these circumstances, taking also into account the documentary evidence already referred to, I am satisfied that this proposed diversion is expedient in the interests of the landowners, for the reasons given above. I conclude, therefore, that the proposed order meets this part of the requirements of S119 of the HA as matters which have to be satisfied before a diversion order can be confirmed.

49. I now turn to consider the question whether the proposed diversion would be substantially less convenient to the public. The first matter raised by the Objectors in this context is the increased length of this section of FP258. As measured on site, the total length of the existing path is 43m. This compares with the total length of the 2 arms of the proposed diversion, which is 73.6m. However, it must be borne in mind that walkers approaching from the south (who may reasonably be assumed to form a substantial proportion of users) might well choose to leave Church Road at Point C, thus only needing the section C-B which has a length of 31.6m, which represents a saving in distance of about 12m.

50. The diversion, therefore, means a total increased length of over just over 30m for someone walking both limbs of the diversion. Reference was made to the percentage increase in the length of this section of FP258, but in my view, with distances of this short length, this is not very meaningful for assessment of practical convenience. The significance of percentages is also less in my view in cases such as this, where it is agreed that the path in question is mostly walked for recreational enjoyment, and not as a means of necessary travel between fixed points where time is of the essence. In these circumstances I do not regard the extent of the percentage increase (about 59%) as significant, or as tending to show that the increase in length is realistically very great. Nor, bearing in mind the saving in distance for those approaching from the south, and the potential reduction in road walking, do I consider that the altered length means that the route will be substantially less convenient to the public in consequence of the diversion.

51. Safety is also referred to. However, with proper provision of steps and hazard signs at

Point C, I consider that the visibility splay figures set out above at Point C are sufficient to avoid risk of undue hazard for walkers entering or leaving Church Road at this proposed new access/egress. Moreover, the safety of pedestrians at this point is likely to be yet further reduced in the near future by the intended introduction of a 40 mph speed limit for traffic in Church Road. In addition, I see force in the point made by the OMA that the diversion would provide a benefit in terms of safety and convenience for walkers because it would enable those approaching from the south to leave Church Road sooner.

52. With regard to the security of walkers, particularly females, from mugging or attack, there is no evidence that this is a particularly hazardous area. Bearing in mind the short sections of enclosure, the likely height of the hedgerow and fencing, and the proximity of the road and the golf course, I do not consider that the diversion can be said to increase the risk of such hazard to such degree as to make the diversion for this reason substantially less convenient to the public than the existing path.

53. Similarly, bearing in mind the short lengths involved, I do not consider that the introduction of 2 dog-legs instead of a straight path can be said to result in a path which is thereby substantially less convenient. With adequate signing I see no reason why the diverted path would be so difficult to follow for inexperienced walkers using the Green Street Green Circular Walk that the diverted route should therefore be regarded as substantially less convenient to the public.

54. Much of the inquiry was taken up with the debate about the likely reduction in width of the path by reason of the measurement being taken from the centre of the hedgeroots. However, even on the Objectors' own assessment, a cleared minimum width of at least 2m would probably remain. The Objectors in evidence accepted that in practice a cleared width of 1.5m was sufficient for normal footpath use to allow persons to pass in opposite directions. In these circumstances, bearing in mind the very short length of these sections, and the fact that with squeeze posts and a narrow track the available width of the present path between A and B is also less than the definitive width of 4.5m, I do not consider that the likely reduction in width is such that it makes the diversion substantially less convenient to the public. Nor do I consider that these short stretches of enclosed paths would have any significantly greater tendency to muddiness or obstruction from growth or fallen branches which would substantially affect the convenience of the public.

55. Reference is also made to the unauthorised stile at Point B, but here too I accept the case for the OMA, for the reasons set out above, that this is more likely to be removed if the order is confirmed. Therefore, insofar as the stile affects the merits (which in my view is only marginally), I regard it as a factor which if anything favours the diversion. Accordingly, I do not regard the erection of the stile as a good reason for refusing to confirm the Order.

56. For all these reasons I am satisfied that the diverted path would not be substantially less convenient to the public in consequence of the diversion.

57. I now turn to consider the question whether it is expedient to confirm the order having regard to the effect which it would have on the public enjoyment of the path as a whole. It is agreed that the word "enjoyment" in this context should be liberally construed so as to include aesthetic matters such as views and pleasure. This is illustrated in the decisions cited, which turn of course on their own facts, but nonetheless provide useful guidance as to the approaches taken by different Inspectors in their assessment of the effect of a particular proposed diversion

on public enjoyment of a path as a whole. In my view such assessments are not an easy exercise, since they involve difficult comparisons between the pleasures derived from walking two different, albeit nearby alternative routes. To some extent inevitably such comparison involves a subjective judgment, about which opposing views may reasonably be held.

58. In the present case I was impressed by the strength of the evidence of members of the RA, including those who spoke at the inquiry, about their enjoyment of the view across open land which currently exists when joining this footpath from Church Road. The present route, I agree with the Objectors, has a pleasant, open quality, which gives a sense of relief from the relatively narrow Church Road which lacks any pedestrian facility at this point. This sense of relief is all the greater because of the presence in this country lane of a relatively high level of fast moving traffic. By contrast, I consider that the proposed diversion would not be so enjoyable to walk, since it would involve 2 doglegs, both enclosed by hedging or fencing on both sides, and one routed close to a road used by fast moving traffic. The views would be limited, and the roadside path would be subject to greater traffic noise. The effective width of the diverted path would be narrowed, so as to give a greater sense of constraint.

59. Moreover, as I saw on my inspection, considerable clearance of vegetation would be needed to achieve the proposed diversion route. I agree with the Objectors that this clearance would diminish public enjoyment of the path as a whole, because it would reduce the present open rural character of this area. Together with necessary new signing and steps, all this would in my view tend to give the new route a contrived appearance of a diversion from the line of an old path, thus losing a link with the past. This would affect public enjoyment in the pleasure of walking a path used by past generations.

60. I accept the advantages of the diversion, in terms of increased potential for agricultural use of the land over which the present path crosses. However, given the small size of this land, this potential must in my view be regarded realistically as only limited. I also allow for the added enjoyment for pedestrians of reduction in road walking and of the pleasures of a hedgside walk, as well as the increased chances of removal of the stile at Point B. However, in this case I do not consider that these advantages are sufficient to outweigh the harm to public enjoyment of the path as a whole caused by loss of the existing path.

61. For all these reasons in this case I consider that the proposed diversion would have a detrimental effect on public enjoyment of the footpath as a whole. I therefore conclude that the requirements of the Act have not been satisfactorily met and that the Order should not be confirmed. I have had regard to all other matters raised at the inquiry and in the representations, but they do not outweigh the considerations leading to my decision.

#### DECISION

62. For the above reasons, and in exercise of the powers transferred to me, I have decided not to confirm the Order. Both copies of the Order are accordingly returned.

63. A copy of this letter has been sent to the objectors and to other interested persons.

Yours faithfully,

*R.F. Woodhouse*

R F WOODHOUSE MA (Cantab) Barrister  
Inspector

APPEARANCES

FOR THE LONDON BOROUGH OF BROMLEY COUNCIL

Mr AB Tompkins Senior Solicitor with the Council

He called:

Mr DD Gray FIHIE Senior Engineer with the Council

Mr MG Duncombe 2 Pecks Cottage, Church Road, Chelsfield, Orpington BR6 7SP  
(Applicant and owner of the land affected).

FOR THE OBJECTORS

Mr KJ Wright Forelands, Oldfield Road, Bromley BR1 2LF  
(Group Footpath Secretary of the Ramblers Association for the London Borough of Bromley)  
who gave evidence and also called:

Mr RB Handforth 67 Murray Avenue, Bromley BR1 3DJ

Mr RI Croft c/o Forelands, Oldfield Road, Bromley BR1 2LF

Mr CW Kirkby 6 Cromwell Close, Bromley BR2 9AH

LIST OF DOCUMENTS

- Document 1 Copy of Notice of Inquiry published by Council.
- Document 2 List of persons present at the inquiry on 10/11/98.
- Document 3 List of persons present at the inquiry on 13/11/98.
- Document 4 Statement & Appendices I - IX produced by Mr Gray.
- Document 5 Additional statement produced by Mr Gray.
- Document 6 Bundle of correspondence pages numbered 1-111 produced by Council.
- Document 7 Bundle of correspondence with statutory undertakers produced by Council.
- Document 8 Statement produced by Mr Duncombe.
- Document 9 Transcript HC R v SSE ex parte Patterson 9/6/97 produced by Council.
- Document 10 Commentary on above decision by Mr Michael Orlik produced by Council.
- Document 11 ROW D/L (Cleethorpes) 12/4/96 FPS/E2015/4/1 referred to by the Council.
- Document 12 A & B 2 letters 11/10/98 3/11/98 to Inspectorate supporting objections.
- Document 13 Statement & Appendices A - P produced by Mr Wright.
- Document 14 Further Statement (9/11/98) & Appendices produced by Mr Wright.
- Document 15 Extract Byway & Bridleway 1998/1/4 referred to by Mr Wright.
- Document 16 Policy Statement 9/12/96 Oxfordshire CC produced by Mr Wright.
- Document 17 Bedfordshire CC resolution 1/12/94 produced by Mr Wright.
- Document 18 Kent CC Subcommittee statement 11/3/94 produced by Mr Wright.
- Document 19 Wilts CC Subcommittee Minutes 30/3/94 produced by Mr Wright.
- Document 20 Statement produced by Mr Kirkby.

PLANS

- Plan A DDG1 Order Map marked by Council to show true position of diversion.
- Plan B KJW1 Order Map marked by RA to show true position of diversion.
- Plan C RIC1 Plan drawn by Mr Croft to show true position of diversion.