



## **Committee Report**

**Planning Committee North – 14 June 2022**

### **Proposed Diversion of Lowestoft Public Footpath No 52 Highways Act 1980 Section 119**

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#### **1. Summary/Purpose of the Report**

- 1.1 To seek authority to make an order to divert Lowestoft Public Footpath No 52 under the provisions of Section 119 of the Highways Act 1980 as shown on the map at Appendix A.

#### **2. Background**

- 2.1 East Suffolk Council is proposing to divert Lowestoft Public Footpath No 52 in the interests of the owner of the land crossed by the footpath and of the public. The footpath crosses the site of a regeneration project known as The Ness. The proposal is shown on the map at Appendix A.
- 2.2 The existing definitive (legally recorded) route of the footpath is not currently available. It is obstructed by an earth bund and a fence close to its western end and a fence at its eastern end, all put in place as part of the recent site regeneration works. It is proposed to divert the existing footpath to a new route which has been constructed a short distance to the north of the existing footpath.
- 2.3 The proposal has been brought to the committee for a decision on whether a public path diversion order should be made because the land crossed by both the existing and the proposed footpath was until recently in the ownership of East Suffolk Council.

#### **3. Legislation**

- 3.1 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 interests 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 point be diverted where this is not on a highway (i.e. a cul de sac)

3.2 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.

3.3 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.

3.4 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 2020-2030 (Suffolk Green Access Strategy).

3.5 It is appropriate for an authority to consider whether the tests for confirmation can be met when deciding whether to make an order.

3.6 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.

3.7 The intention of the legislation is to balance the private interests of the owners of land with the public interest.

#### **4. Consideration of the tests**

##### **4.1 Expediency in the interests of the owner of the land and of the public**

Footpath No 52 crosses the site of a regeneration project known as The Ness. Ownership of the land was recently transferred from East Suffolk Council to Lowestoft Town Council. The site contains drying racks which were once used by the fishing industry for the fishing nets in the heyday of the herring trade. There is soil contamination on the site inherent with its history of use over the last two hundred years.

In accordance with the CLEA (Contaminated Land Exposure Assessment) model, appropriate remediation is necessary in this area to prevent any excessive disturbance of the ground to safeguard the public from over exposure to the soil, which has been determined to exceed the permissible levels of contaminants acceptable under the CLEA model. For this reason, the drying rack area has been fenced off to reduce the risk of ground disturbance and over exposure to the soil in that area. Until recently it was hoped that fencing could be avoided, but further specific testing in these areas confirmed that this was not possible.

Significant investment has been made to ensure that the remediation works conducted on the site ensure that the park is fit for purpose in terms of its future intended use. The main objective of the project is to encourage the public to visit and enjoy the site much more than in the past and this proposed increase in use has dictated the remediation work.

The fencing surrounding the drying rack area and the earth bund constitute obstructions to the existing footpath. Suffolk County Council could seek to remedy this by requesting that the obstructions are removed and taking action against the owner of the land if they do not do so. Therefore, it is in the interests of the owner of the land that the footpath is diverted.

It is in the public's interest to divert the footpath to ensure that walkers do not come into direct contact with the contaminated area.

#### 4.2 Termination points and convenience of the public

The proposed eastern termination point of the footpath is approximately 13 metres to the north of the existing termination point and will link to Lowestoft Public Footpath No 51. The proposed western termination of the footpath is approximately 28 metres to the north of the existing termination point and will link to the public highway (Whapload Road). Both the proposed termination points are considered to be substantially as convenient as the existing termination points.

Paragraph 2.2 above refers to obstructions on the existing route. In considering whether a right of way will be substantially less convenient to the public, 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 (Circular 1/09 and Rights of Way Advice Note 9).

The existing footpath has a legally recorded width of 1.5 metres. The proposed footpath will be 3.5 metres wide apart from close to its western end where it narrows to 3.35 metres passing adjacent to two cycle racks and where there are two lockable bollards reducing the available width in the centre of the footpath to 0.9 metres and with a width of 1.1 metres passing to each side of the bollards.

The proposed route runs almost parallel to the existing route. It is wider but similar in length. It is direct and easy to follow, with a surface which is part tarmac and part concrete. The surface is suitable for use in all weathers. Some users, such as those with pushchairs or using wheelchairs or mobility scooters, may find the route more convenient than the existing route.

#### 4.3 Effect on public enjoyment of the path as a whole

There will be no adverse effect on public enjoyment of the footpath. For those users who find the tarmac and concrete surface easier to use their experience of the footpath may be more enjoyable. The increased width will be an improvement for those people walking in groups. The views from the existing route and the proposed route are comparable.

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

There will be no adverse effect on other land served by the existing right of way. 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. Lowestoft Town Council has raised no objection to this.

4.5 Duty to have regard to any material provision of Suffolk County Council's Rights of Way Improvement Plan 2020-2030.

The proposal is not contrary to any of the provisions of Suffolk County Council's Rights of Way Improvement Plan 2020-2030 (Suffolk Green Access Strategy).

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

The area crossed by the existing footpath is a haven for wildlife, unique flora and fauna, and landscapes enriched with history over many decades and due to its ecological value is considered to be in need of conservation. Intense human activity and pedestrian movements in these areas is likely to be detrimental to its preservation. The fencing surrounding the drying rack area will provide the necessary protection.

Suffolk Wildlife Trust was consulted and informed the design and environment protection and management aspects of The Ness. The Trust has been consulted on the diversion proposal and has made no comments.

There are no adverse effects on agriculture and forestry.

## **5. Consultations**

5.1 Informal consultations have been carried out in accordance with best practice guidance. Lowestoft Town Council is the owner of the land. The Town Council has been consulted on the diversion proposal and has raised no objections.

5.2 Councillor Craig has no objections to the proposal, Councillor Patience is in support. Councillor Gandy approves the diversion of the public footpath and thoroughly approves of the improvements made to protect the drying racks and fully appreciates any steps to ensure the protection of the drying racks.

5.3 The Waveney Ramblers are in support of the proposal. The statutory undertakers have no objections. The Auto-Cycle Union Ltd, the British Horse Society, the Byways and Bridleways Trust and the Open Spaces Society did not reply.

5.4 Suffolk County Council supports the proposal.

## **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.

## **7. Costs**

- 7.1 East Suffolk Council is paying all the costs associated with this proposal.
- 7.2 If a legal order is made and it is opposed, and the Council decides to send it to the Secretary of State for determination, the costs for determination will vary depending on how the order is determined (see paragraph 6 above) but could range from £1000 up to £5000 approximately.

## **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, any opposing interests are not disproportionately affected. In this case it is considered that the proposal is in the interests of the owner of the land and of the public and that the tests for an order under section 119 of the Highways Act 1980 can be met.

## **9. Recommendation**

- 1. that Councillors authorise the making of a public path order under s119 of the Highways Act 1980 in the interests of the owners of the land and of the public to divert Lowestoft Public Footpath No 52.
- 2. that subject to no objections being received within the statutory notice period the Order be confirmed.

Map (Appendix A)



**PROPOSED DIVERSION OF LOWESTOFT PUBLIC FOOTPATH NO 52 -  
HIGHWAYS ACT 1980 SECTION 119**



- Footpath to be diverted (A - B)
- - - Proposed Footpath (C - D - E)
- ..... Unaffected Footpath

Scale 1:2500 @ A4

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