

**Highways Act 1980, Section 118 & 119
Proposed Concurrent Diversion & Extinguishment Orders
Public Footpaths, Tamworth 81c and 83
at Wilnecote Quarry, Tamworth**

Recommendation:

That the Deputy Chief Executive and Director for Families and Communities be authorised to:

- a) make concurrent Orders under Sections 118 and 119 of the Highways Act 1980 to divert and extinguish parts of Public Footpaths No 81c & No 83 at Wilnecote Quarry in the Parish of Tamworth as shown on Plans 1 & 2 attached to this report;
- b) that if no objections are duly lodged, or if objections are duly lodged and are subsequently withdrawn, the above Orders be confirmed; or,
- c) If objections are duly lodged, and not subsequently withdrawn, the Orders be referred to the Secretary of State for determination.

Report of Deputy Chief Executive and Director for Families and Communities

PART A

Why is it coming here - what decision(s) is (are) required?

- 1 Consideration of applications to divert, extinguish or create public rights of way under the Highways Act 1980, falls within the responsibility of the Countryside and Rights of Way Panel of the County Council's Planning Committee, although some such decisions are delegated to Officers.
- 2 The proposal considered within this report seeks to:
 - a) divert the sections of Public Footpaths Tamworth No. 83 and 81c shown by a solid black line (A-B-C) on Plan1 onto the route shown by a broken black line (A-C) on Plan 1. The proposed new route will have a width of 1.8 metres and will be a highway maintainable at public expense. In accordance with Mines and Quarries legislation appropriate fencing will be provided between the line of the new footpath and the quarry site.
 - b) concurrently extinguish that part of Public Footpath, Tamworth No 83 which is shown by a solid black line (D-B) on Plan 2. The diversion or extinguishment of this section of footpath is necessary to facilitate the diversion proposals shown on Plan 1

Reasons for recommendations:

3. Applications to divert and extinguish public rights of way may be made under Sections 118 & 119 of the Highways Act 1980, providing that certain criterion are met. In this case, it is considered that the proposals are capable of meeting the legislative criteria, and if successful, the Orders will resolve a longstanding problem (obstruction by quarrying) on these paths. It is therefore considered

that it would be expedient to make the Orders and it is recommended that they be made.

PART B

Background:

- 4 Staffordshire County Council is the Highway & Surveying Authority for the area within which Public Footpaths Tamworth No. 81c and No. 83 runs.
- 5 The consideration of applications for Public Path Orders is a discretionary power of the authority, rather than a statutory duty
- 6 The decision whether or not to make a Public Path Order is “quasi-judicial” in nature. This means that the decision must be made having taken into account all of the available and relevant evidence, along with consideration of any submissions made by any party with an interest in the matter.
- 7 In order to progress applications to divert, extinguish or create public rights of way without any undue impact on the Authority’s statutory (non-discretionary) duties, the County Council has instructed consultants (Robin Carr Associates) to process a number of applications on their behalf. One such application seeks to divert and extinguish parts of Public Footpaths, Tamworth 81(c) and 83 as shown on Plans 1 and 2 attached.
- 8 Whilst the previous owners of the Wilnecote Quarry site obtained planning permission to undertake quarrying works, they failed to obtain the necessary permissions to divert or extinguish the affected sections of Public Footpaths, Tamworth 81(c) and 83, where they cross the quarry site. As a result, parts of these two footpaths have been destroyed by the quarrying operations. The net result of these past unlawful actions is that the footpaths no longer physically exist, and there is no reasonable chance of them being reinstated, albeit they do legally still exist but cannot be used.
- 9 The County Council has, for quite some time, been working with the current owners of the site, who have inherited this problem from their predecessors, with a view to finding a reasonable and acceptable solution to this problem. In doing so, both the County Council and the landowners have been minded that the legislation requires that any diversion or extinguishment proposal must be considered, in part, as if the existing paths are open and available for use (i.e. the past quarrying activity which destroyed the footpaths cannot be taken onto consideration).
- 10 As a result of the above discussions, the current site owners have submitted an application to concurrently divert the parts of Public Footpaths, Tamworth No 81(c) and 83 shown by a solid black line (A-B-C) on Plan 1 onto the alignment shown by a broken black line (A-C).
- 11 The proposed diversion moves the public footpath onto an alignment closer to the boundaries of the working site and is considered to be primarily in the interests of the landowner. The proposed new route will have a width of 1.8 metres and will be a highway maintainable at public expense.

- 12 A consequence of the diversion proposal is that the section of Public Footpath, Tamworth No 83 which is shown by a solid black line (D-B) on Plan 2 will no longer link into the above-mentioned diverted footpath. It is therefore proposed to extinguish this section of footpath on the grounds that it is no longer needed for public use.
- 13 Access will still be available towards Hockley Road using a combination of the footway along Hedging Lane and Public Footpath, Tamworth No 81(c) using the new diverted route.
- 14 Consideration has been given to diverting this footpath to provide a link to Public Footpath, Tamworth No 81(c) but this is not considered viable or desirable. This is partially because the existing and available section of the footpath runs across a busy working industrial site which raises its own challenges with regard to conflicts between vehicles and the public and public safety etc.
- 15 This report seeks to advise the County Council of the outcome of statutory and non-statutory consultations, and an assessment against the relevant legislative criteria, thus enabling the Council to consider whether or not to promote the Order requested.

Summary of Legislative Criteria:

- 16 Section 119 of the Highways Act 1980 gives local authorities the powers to make orders to divert footpaths, bridleways or restricted byways where it is considered expedient to do so in the interests of either the owner/lessee/occupier of the land and/or the public.
- 17 Such an Order must not alter the termination point of a path or way if that point is not on a highway; or (where it is on a highway) otherwise to another point on the same highway, or a highway connected with it, and which is substantially as convenient to the public.
- 18 An Order made under Section 119 of the 1980 Act shall not be confirmed unless the Authority (or where appropriate, the Secretary of State) is satisfied that it is expedient, as described above, and that the path will not be substantially less convenient as a consequence of the diversion. The Authority (or the Secretary of State) must also have regard to the effect to which:
 - The diversion would have on public enjoyment of the path as a whole
 - The effect on other land served by the path
 - Any provisions for compensation
 - Any material provision within the Rights of Way Improvement Plan
 - The needs of agriculture and forestry; biodiversity; and disability discrimination/inclusivity legislation
- 19 Section 118 of the Highways Act 1980 gives local authorities the powers to make orders to extinguish footpaths, bridleways or restricted byways where it is considered expedient to do so on the grounds that the path or way is not needed for public use. Before confirming such an Order consideration must be given to the extent to which the path would be used if the Order were not being

made. Where such an Order is made concurrently with a Public Path Diversion Order consideration may be given to that Order in assessing the extinguishment tests. Section 118 of the Highways Act 1980 also requires that any temporary circumstances (such as obstructions etc) be disregarded when considering the legislative tests.

Consultations:

- 20 As part of the application process, the proposal has been subject to informal consultation including user interest groups and the posting of consultation notices on site. Tamworth Borough Council and local County Councillor(s) have also been consulted. A number of objections have been received in respect of the extinguishment Order element of the proposals. These are considered below.

Consideration of the Proposal Against the Legislative Criteria:

Proposed Public Path Diversion Order (as shown on Plan 1)

Expediency

- 21 There is no definition of expedient in the Highways Act 1980 even though it occurs frequently in relation to the making and confirmation of orders. In *Ashbrook v East Sussex County Council* [2002]¹ Mr Justice Grigson considered the meaning of expedient in the context of a diversion order under S119 of the Act, at paragraph 24 and 25 of the judgement he says:

*“The Concise Oxford Dictionary gives two definitions of expedient;
“:i) convenient and practical although possibly improper or immoral.
ii) suitable and appropriate.”*

I think it safe to assume that Parliament had in mind the second though I dare say the Claimants would suggest that the first is an apt description of the Council’s conduct.”

- 22 The County Council should therefore be satisfied that making the requested Order is a suitable and appropriate course of action taking into account the considerations discussed below.

Landowner/Occupier or Public Interest

- 23 The applicants state that their reasons for diversion are that:
“Historic quarry workings pre-2004 when the applicant acquired the site, worked through sections of Tamworth 83, and more recent permitted development of water management lagoons have occurred along the route of part Tamworth 81(c).

The proposed diversion will resolve this conflict, maintaining the link between 81(c) and 83, between Hedging Lane and Hockley Road, whilst staying away from the operational quarrying areas and providing a high-quality alternative footpath route between the established footpath infrastructure along Hedging Lane to Hockley Road”.

- 24 Whilst the provisions of Section 118 of the Highways Act 1980 (extinguishment orders) require that temporary circumstances be disregarded when considering the extinguishment of a path, there is no similar provision contained within Section 119 of the Highways Act 1980 (diversion orders). This may suggest that temporary circumstances may be taken into consideration when considering a diversion order; albeit that it should not lead to any presumption in favour of a diversion resulting from the unlawful obstruction of the highway. Indeed, wherever reasonably practicable and possible a path should be free from obstructions before any diversion application is considered.
- 25 In this case the footpaths have, at least in part been totally destroyed by the quarrying works and it would be impossible for them to be reinstated in the foreseeable future. Whilst there are no planned timescales for reinstatement at this time, when such works are undertaken, it will be possible to secure additional replacement public rights of way as part of the reinstatement scheme. This may be a long-term objective, but it is outside the scope of matters currently under consideration.
- 26 If the current circumstances are taken into consideration, it may be argued that the proposed diversion is in the interests of the landowner, because it allows for the more efficient management of the land and resolves the problems they inherited when they purchased the land.
- 27 It may also be arguable that the diversion is in the interests of the public because it will result in the reinstatement of the footpath link between Hedging Lane and Hockley Road. There are also obvious public safety considerations and benefits by moving the footpath out of the working area of the site.
- 28 Alternatively, if the current circumstances are to be disregarded, the diversion proposals do still move the footpath out of the working area of the site, and as such it still facilitates the more effective use and management of the land. There is therefore still a case in favour the "landowner interest" test being satisfied.
- 29 On the matter of expediency, the options available are to make Public Path Orders to divert and extinguish parts of the footpaths, or to allow the current situation to remain for an unspecified period of time and until the site can be fully restored. This latter option would leave the current site owners liable to criminal proceedings for obstruction of the highway and also the County Council open to proceedings in respect of it failing to meet its own Statutory Duties in respect of asserting and protecting the public rights of way network. Making the requested Orders may therefore be the most expedient course of action.

Whether the diversion will result in the path being substantially less convenient

- 30 When considering the convenience of a proposal, a variety of matters may be taken into consideration including, but not necessarily restricted to, distance, gradient, ground conditions and the existence of path furniture etc.
- 31 In terms of distance, anyone using Public Footpaths, Tamworth No 81(c) and 83 (A-B-C on Plan 1) would have a distance of approximately 514 metres to

walk whereas the proposed diversion (A-C) is approximately 376 metres in length representing a reduction in distance of around 138 metres. The proposed route is therefore, in terms of distance, prima facie more convenient than the existing route

- 32 It is not possible to objectively consider ground conditions, but the proposed new route will be provided to a standard approved by the County Council. This will include some groundworks and culverting to improve/pass over drainage or wet areas along the route.
- 33 The proposed new footpath will also have a width of 1.8 metres compared to the width of the current footpath (between 1 & 1.2 metres).
- 34 There are no proposals for the installation of any path furniture along the route of the diversion. It should however be noted that in line with Mines & Quarries Health & Safety obligations under Quarry Regulations 1999 appropriate safety/security fencing will be installed between the footpath and quarry site.
- 35 Taking the above factors and available information into account there is nothing to suggest that the proposed route will be substantially less convenient than the existing route. On the contrary in terms of distance it is more convenient.

Effect on Enjoyment of the Path as a Whole

- 36 The proposed diversion offers what may be considered a minimal change to the rights of way network, and is unlikely to have any negative impact on the enjoyment of the path as a whole. On the contrary, moving the path out of the working quarry area of the site into a belt of woodland may be considered to have a positive impact on enjoyment.

The effect on other land served by the path

- 37 No reliance is placed on the existence of the public footpaths for the purposes of access to land or property.

Any provisions for compensation

- 38 The land crossed by both existing and proposed routes is all in the same ownership, and the applicants (the landowners) have agreed to defray any compensation that may become payable.

Any material provision within the Rights of Way Improvement Plan

- 39 There are no provisions within the Rights of Way Improvement Plan that would have a negative impact on the consideration of these proposals.

Consideration of the needs of agriculture and forestry; biodiversity; and disability discrimination/inclusivity legislation

- 40 There are no matters arising from these proposals that have any negative impact on agriculture, forestry, or biodiversity. The proposals may be considered to have a positive impact on accessibility as the new route will have a greater width than the existing route. The proposed new route will also be free from stiles and gates.

Proposed Public Path Extinguishment Order (as shown on Plan 2)

Expediency

- 41 The same considerations in respect of expediency apply to the extinguishment of public rights of way as they do to their diversion. These are discussed in paragraphs 21 and 22 above.

Is the Path Needed for Public Use?

- 42 Consideration of the issue of whether or not a path is needed is, broadly speaking, somewhat subjective.
- 43 Old Ordnance Survey Maps show that this footpath ran from Hockley Hall in the east over to Hockley Hall Colliery in the west and then with northerly links to the old brick kilns on Hedging Lane. The original use of these paths was therefore most likely in connection with these industrial sites (e.g. getting to and from work etc). Given the demise of both the quarry and the kilns, it is easy enough to conclude that the path is no longer needed for its original purposes.
- 44 In more recent years however use of the path is likely to have evolved into being more recreational in nature. Notwithstanding this, such use may have been limited due to the industrial nature of the of the area and the path passing through a busy industrial facility before reaching the quarry area itself. A further consideration, at least in terms of any east/west/ journey, is that Hedging Lane is well served with a footway, is a more direct, shorter; and therefore, more convenient & safer alternative.
- 45 Whilst not entirely a material consideration in the decision-making process it should be noted that the diversion of those parts of Public Footpaths, Tamworth No. 83 and 81c shown on Plan 1 cannot take place unless the section of Public Footpath, Tamworth No 83 shown on Plan 2 is either diverted or extinguished, otherwise it would leave this section of footpath a cul-de-sac.
- 46 Options for the diversion of Public Footpath, Tamworth No 83 shown A-B on Plan 2 were considered prior to accepting the extinguishment application. Any such diversion would require significant engineering works to physically create a suitable path corridor. This may also have a negative impact on a number of environmental issues, such as the Great Crested Newts in the balancing ponds etc. On balance it was considered that a diversion was not an expedient option.
- 47 Having taken into account all the relevant considerations, it would not be unreasonable to conclude that, if the diversion of those parts of Public Footpaths, Tamworth No. 83 and 81c shown on Plan 1 takes place, then section A-B (on Plan 2) of Public Footpath, Tamworth No. 83 is not needed for public use.

Likely Use that the Path may receive if not Extinguished

- 48 Before a Public Path Extinguishment Order can be confirmed consideration must be given to the likely use the footpath would receive it were not extinguished. This recognises the fact that whilst a footpath may not be needed it may still be subject to a certain amount of use. In other words, that the fact that a path may be subject to actual use does not prevent it being determined to be not needed.

- 49 The issue of projecting likely use is somewhat subjective, and in this case is further complicated by the fact that the footpath is not actually available for use, and has not been for a considerable time. There is therefore no indication of current use from which any decision can be made. This issue must be considered as if the footpath were open and available for use.
- 50 If the footpath was open and available for use it would still run across a busy industrial site and then through the area subject to quarrying. Where the path runs through the quarry site it would be subject to mines and quarry legislation which would require it to be fenced off from the rest of the quarry site. The path has a width varying between 1 and 1.2 meters and the County Council has no powers to insist that any fencing is placed any further apart. Overall, it would not be a pleasant path to walk and it is considered that use would be minimal.

Summary of Objections to the Proposals

- 51 Whilst the user representative groups - Ramblers, Peak and Northern Footpath Preservation Society etc have stated that they will not object to the proposals, nine local residents objected, two of which have subsequently withdrawn their objections.
- 52 The objectors are broadly in support of the diversion elements of the proposals, but object to the proposed extinguishment of section A-B (on Plan 2) of Public Footpath, Tamworth No 83.
- 53 The Objectors are, quite understandably, upset at the fact that these footpaths have been unlawfully obstructed, and in parts destroyed, primarily for profit and at the expense of an historic public amenity. Whilst there may be some sympathy for this position, these very circumstances must be disregarded during the decision-making process. The application must be considered as if the paths were open and available for use.
- 54 The objectors also feel that the path should be diverted rather than extinguished. Such a proposition was, indeed, the starting point for discussions with the applicants. However, once the site had been visited and the overall situation considered, by both the applicants and the County Council's appointed Consultant, it became clear that a diversion was not viable without significant and possibly prohibitive amounts of engineering works and expense. Furthermore, the decision whether or not to make the requested Extinguishment Order must be made by reference to the legislative criteria and the relevant facts of the case. Issues such as possible alternative proposals do not fall within such considerations.
- 55 Objectors have also stated that they would use the footpath if it was diverted and made available, from which it may be inferred that if the path was open and available in its current route, they would use it as well. The fact that a path may be subject to some use is considered in paragraphs 48- 50 above, and is not a bar to the success of an Order, if made.
- 56 In conclusion, the Objectors are both unhappy with the current situation and unhappy with the proposed solution. They are generally accepting of the fact

that any solution is likely to involve the diversion of the footpaths, but are opposed to the loss of any path.

Equalities implications:

57 As far as is practical a site inspection of the existing and proposed routes has been undertaken. The proposals are not considered to have an adverse impact on any protected groups.

Legal implications:

58 The effect of the concurrent Extinguishment and Diversion Orders, if confirmed, will be to permanently alter the alignment of Public Footpaths No 81 (c) (pt) & No 83 (pt) and extinguish a further section of Public Footpath No 83 at Wilnecote Quarry in the Borough of Tamworth. As part of the legal order process, the Definitive Map and Statement for the area will also be updated.

59 Sections 118 and 119 and Schedule 6 of the Highways Act 1980 provides the County Council with the powers to extinguish and divert public footpaths using legal Orders known as a Public Path Orders. Section 53 and Schedule 15 of the Wildlife and Countryside Act 1981 provide the necessary powers to modify the Definitive Map and Statement using a legal Order known as a Definitive Map Modification Order. The legislation allows for both types of Order to be combined into a single legal order, which both changes the path on the ground and modifies the Definitive Map and Statement at the same time.

Resource and Value for Money implications:

60 The cost of making and advertising Public Path Orders, along with the cost of any works on the ground to establish the new path to an acceptable standard, will be met fully by the applicants.

Risk implications:

61 As with any recreational pursuit, there are risks to users accessing the countryside. The proposals under consideration are not considered to increase such risks.

62 Any person who is aggrieved by the proposal, has a statutory right to object, and if the County Council decide to still proceed with the Order, the matter will be referred to the Planning Inspectorate for determination.

63 In addition, any person with an interest in the land crossed by the existing or proposed route, has a right to seek compensation as a result of any loss suffered by the coming into effect of the Order. The applicants have agreed to underwrite any such claims should they be made.

Available Options:

- 64 If the County Council is minded to make the requested Orders, it is recommended that they resolve to:
- a) make concurrent Orders under Sections 118 and 119 of the Highways Act 1980 to divert and extinguish parts of Public Footpaths No 81c & No 83 at Wilnecote Quarry in the Parish of Tamworth as shown on Plans 1 & 2 attached to this report;
 - b) that if no objections are duly lodged, or if objections are duly lodged and are subsequently withdrawn, the above Orders be confirmed; or,
 - c) If objections are duly lodged, and not subsequently withdrawn, the Orders be referred to the Secretary of State for determination.
- 65 Alternatively, if the County Council is minded to refuse the application for the Orders, they should advise the applicant of the grounds upon which the application has been refused, and that there is no right of appeal.
- 66 Members of the Panel will also need to decide how the Council is to deal with the issue of the obstructed footpaths, being mindful that if section A-B of Public Footpath, Tamworth No 83 were to be diverted (as opposed to extinguished) without the consent of the landowners, the County Council would have to fund all works to bring the new path into being, and potentially also pay the landowners compensation in respect to any loss caused by such an Order coming into effect. Such funding is likely to run beyond the scope of the County Council's entire annual public rights of way budget.

Recommendation:

- 67 Whilst the decision to make Public Path Orders rests solely with the County Council, it is recommended that they resolve to:
- a) make concurrent Orders under Sections 118 and 119 of the Highways Act 1980 to divert and extinguish parts of Public Footpaths No 81c & No 83 at Wilnecote Quarry in the Parish of Tamworth as shown on Plans 1 & 2 attached to this report;
 - b) that if no objections are duly lodged, or if objections are duly lodged and are subsequently withdrawn, the above Orders be confirmed; or,
 - c) If objections are duly lodged, and not subsequently withdrawn, the Orders be referred to the Secretary of State for determination.

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List of background papers:

Application form and accompanying documents.
Consultation responses.