

Southend-on-Sea Borough Council

Report of Corporate Director for Corporate Services
to

General Purposes Committee

on

27th November 2013

Report prepared by: Tim Row (Principal Committee Officer)

Agenda
Item No.

Public Footpath FP86 Leigh-on-Sea from Castle Drive to Hadleigh Country Park

A Part 1 Agenda Item

1. Purpose of Report

- 1.1 The purpose of this report is to inform Members of ongoing work and proposals to resolve the situation regarding FP86 and the claim by the Ramblers Association. The claim is that a public right of way for persons on foot subsists or could reasonably be alleged to subsist over land at the nature reserve adjacent to Belton Way West and farm land owned by the Salvation Army.
- 1.2 The report also seeks the Committee's support of the preferred option from those set out in section 5 below.

2. Recommendations

- 2.1 **That the ongoing work to resolve the situation regarding FP86 be noted.**
- 2.2 **That Option 5 or 6 as detailed in Section 5 of this report is recommended as the most appropriate and preferred alternative option to resolve the situation regarding FP86 and the claim by the Ramblers Association.**

3. Background

- 3.1 Public Footpath 86 (FP86) is recorded on the Definitive Map for the Borough of Southend-on-Sea. It runs from the end of Castle Drive, Leigh-on-Sea in a generally westerly direction crossing through the middle of the field, owned by The Salvation Army, which is used for arable farming, to the Borough Boundary. It then continues in a north-westerly direction as Public Footpath 11 Castle Point (FP11). The definitive route is illustrated as a red dotted line between points A-J-H-G on the plan attached at [Appendix 1](#).
- 3.2 The route of FP86 has been a contentious issue for some time. Between the late 1970's and early 1990's a proposal to divert the footpath along a line that is/was actually used by walkers was investigated and the statutory process was commenced.

- 3.3 In the early 1990's, the British Horse Society claimed that higher rights of use existed over this right of way and submitted a claim for bridleway status. The proposed diversion was therefore not progressed until the status of the right of way had been established. Following consideration of the evidence Essex County Council, the local highway authority at that time, determined that an Order for bridleway status should be made and commenced the statutory process for the claim.
- 3.4 The matter was considered at a public inquiry which took place on 1st & 2nd October 1997. As a result, the Inspector from the Planning Inspectorate on behalf of the Secretary of State determined that, on the balance of probability, the Order for upgrading the route to bridleway should be confirmed. Subsequently however, the confirmed Order was successfully challenged by the Salvation Army in the High Court on a matter of procedure and the Order was quashed on 13 March 2001.
- 3.4 In 1998, the local secretary of the Ramblers Association submitted an application to Southend-on-Sea Borough Council claiming that a new right of way for persons on foot (i.e. a public footpath) should be added to the Definitive Map for Southend. The route claimed crossed land at the nature reserve adjacent to Belton Way West and farm land owned by the Salvation Army. The line of the claimed footpath is illustrated by points A-X-B-C-Y-E-F-G on the plan attached at [Appendix 1](#). The grounds for the application was on the basis that this route had been used and enjoyed by the public as of right and without interruption for a period of 20 years or more. A number of statements supporting the claim were included with the application.
- 3.5 As this claimed route crossed the Borough boundary into neighbouring Castle Point, authority was sought from, and subsequently granted by, Essex County Council (as highway authority for that area) for Southend-on-Sea Borough Council to consider and deal with the claim in its entirety. This was on the basis that the majority route claimed was located within the Borough of Southend-on-Sea.
- 3.6 Following research, consideration of the evidence and negotiations with all interested parties (i.e. the land owners, lessees and their agents, the Hadleigh Castle Country Park Joint Committee, all the local authorities in whose area the claimed route crossed and the Ramblers Association) it was determined at that time that the existing footpath shown on the Definitive Map as FP86 could be diverted along the route claimed by the Ramblers Association. This was consistent with the evidence of usage, which had been witnessed during a site visit undertaken by officers at that time. It revealed that the definitive route FP86 showed signs of limited, if any, use at all on the ground. There was however, clear evidence that a route along a line of the route claimed along the northern edge of the southern boundary of the Hadleigh Castle Country Park had been widely used.
- 3.7 It is not clear why the definitive line of Footpath 86 was not being used although it is extremely likely that users were/are unclear of its correct and definitive route. As mentioned in paragraph 3.1 above the field crossed by the path is used for arable farming by the Salvation Army and is ploughed by the farmer. The path appears not to have been re-instated following the farming activities. The

Council has on numerous occasions reminded the land-owners of their responsibility to re-instate the footpath to a suitable condition that is convenient for use after ploughing. Any crops growing on or over the footpath should also be removed. This may have been the cause of the uncertainty of the correct definitive line of the footpath.

- 3.8 On 9th October 2003 a diversion order was made and the appropriate notices etc served and published in accordance with the statutory requirements. In response to the notices, objections to the diversion were received from the local representative of the British Horse Society. This was on the grounds that the route should be shown on the Definitive Map as a bridleway, on the basis of the result of the claim considered and determined by the Inspector back in 1997.
- 3.9 This issue was given further consideration and the possibility of upgrading the diverted route, should the Order be confirmed, was investigated. The British Horse Society was approached to seek the withdrawal of their objection to the diversion on the basis that an upgrade would be examined subsequently in the event that the diversion could proceed. This would enable the Council to confirm the diversion order as unopposed without the need for a public inquiry. Unfortunately no formal response was received from them and their objection remained unresolved.
- 3.10 Discussions continued with Essex County Council regarding a suitable route for cyclists and pedestrians to the Olympic Mountain Bike Course prior to the Olympics and beyond as part of the Olympic legacy but as yet no definitive route has ever been finalised.
- 3.11 Although the route of FP86 is clearly recorded on the Definitive Map, it is not apparent on the ground and there is no clear evidence that it has been used by the public at large for a number of years. There has however been clear regular usage, which has been witnessed, of an alternative route within the Belton Hills Nature Reserve. This is the route claimed by the Ramblers Association. The status of this route has not been legally determined.
- 3.12 A proposal which seeks to accommodate the needs and requirements of all key parties and which would fulfil the Council's statutory requirements has been identified. Preliminary discussions have been held with all those parties on this proposal and they have indicated their support of it.
- 3.13 The options to resolve the issues surrounding FP86 and the claim by the Ramblers Association are set out and discussed in section 5 below.

4 Overview of Legal Points

- 4.1 The ploughing of the field and the planting of crops by the land-owner has in all probability contributed to the users of definitive footpath FP86 to walk the route claimed by The Rambler Association. Whilst ploughing the field, including the footpath which crosses it, is permitted the land-owner/occupier must re-instate the footpath to a suitable condition so that is convenient for use after ploughing. They also have a duty to remove any crops that may grow on or encroach over the minimum width footpath so that the route is apparent on the ground at all times. The Council can prosecute the land-owners/occupiers under sections 134

and 137A of the Highways Act 1980 if they fail to comply with these requirements.

- 4.2 Although the evidence suggests that the farming of the land crossed by the footpath was the causal factor behind the new route being claimed there is a legal adage, “once a highway always a highway”. Even though the definitive route appears not to have been used for some time and it is not visible on the ground it continues to have legal existence. The fact that walkers have used another or alternative route does not necessarily mean the definitive route of FP86 should be diverted. The Council, as local highway authority, still has a statutory duty to consider the route claimed by the Ramblers Association and must follow it through to a legal conclusion.
- 4.3 There are a number of key issues and factors that must be taken into account when considering this claim, in particular:
- both routes have the same start and finishing points;
 - their close proximity; and
 - the evidence of different levels of usage of each of the routes on the ground.
- 4.4 The common law presumption is that land has been dedicated as a highway if it has been used by the public at large as of right. This means that the use must have been enjoyed without force (i.e. without breaking locks or fences etc.), secrecy (e.g. use at night time only etc) or permission (i.e. with the permission of the land owners only). The route does not have to be used for a particular length of time but is dependant on the particular circumstances. This presumption can be rebutted by the land owner(s) by showing that they have stopped people using the route through the erection of a physical barrier such as a fence or gate and/or the erection of notices indicating that the route is private and turning them back, or by restricting a particular section of the public for example it is only allowed to be used by his employees or tenants on their land etc. No such gates or fences were erected and there are no notices to indicate that this route is not for public use. This cannot be done retrospectively.
- 4.5 Under section 31(1) of the Highways Act 1980 a highway can be established if there has been 20 years’ use of the way over the land by the public as of right, without interruption, force, secrecy or permission unless the land owner can show that during that period there was no intention to dedicate it. Perhaps its use was tolerated, for example whilst the farming activities were taking place. Although this issue of tolerance of use by land owners has been grounds for the refusal to imply dedication, over time this tolerance may could be deemed as an intention to dedicate the route.
- 4.6 The main difference between the implied dedication of a right of way described in paragraph 4.4 above and dedication under section 31 of the Highways Act 1980 is burden of proof. At common law, the claimant must show that the land owner intended or had presumed to have intended to dedicate a public right of way. Under statute as described in paragraph 4.5 above, the land owner must be able to rebut the presumption to dedicate. This may be though erecting and maintaining appropriate clearly visible notices or by lodging with the local authority, a statement and declaration to this effect under section 31(6) of the Highways Act 1980. These statements can only relate to future claims and cannot be made retrospectively.

- 4.7 The status of a right of way can be also upgraded through long use. Use of a footpath by horse riders is trespass against the land owners but it is not a criminal offence. The use of a bicycle on a footpath is also trespass against the land owner. As bicycles are not a natural accompaniment of a walker, pushing a bicycle would also amount to trespass. Cyclists may however, use a bridleway but must give way to pedestrians and horse riders.
- 4.8 A footpath can be converted into a cycle track by way of a conversion order under Section 3 of the Cycle Tracks Act 1984. The Act does however, provide that any person who has an interest in agricultural land which is crossed by the footpath, must have granted their consent to the order in writing. The Council could also be liable to pay compensation for any depreciation in value of the land as a result of the creation of the track or damage caused by any conversion works.
- 4.9 There could be further implications if a sufficient numbers of people cycle over a footpath over a sustained period of time. Such usage could theoretically amount to a deemed dedication of a byway open to all traffic (BOAT). This is on the basis that a bicycle is treated as a vehicle for some offences under the Road Traffic Act 1988 and, for the purposes of the Highways Act 1980, it is defined as a carriage. This hypothesis has not yet, however, been tested in the courts and no such claim has been received. It is therefore essential that the status of the route claimed by the Ramblers Association is resolved and appropriate signage is erected to prevent a future claim for a BOAT.
- 4.10 In determining whether to make an Order to divert the definitive route of FP86 under Section 119 of the Highways Act 1980, the Council must consider that it is expedient in the interests of the owner, lessee or occupier of the land crossed by the path or way or of the public that the path should be diverted.
- 4.11 Any objections to an Order for the diversion of FP86 or for the additional route claimed by the Ramblers Association would result in the matter being referred to the Planning Inspectorate to determine on behalf of the Secretary of State. This would inevitably be by way of a public inquiry. If however, the Council can resolve the matter without objections or can satisfactorily negotiate the withdrawal of any objections received, it may itself confirm the Order(s) as unopposed without the need or expense of an inquiry.
- 4.12 For such an Order to be confirmed the Council, as local highway authority, or the Secretary of State would need to be satisfied not only that it would be more expedient to divert the right of way, but also that it would not be substantially less convenient. In particular, regard must be had to the effect of the diversion would have on:
- (i) the public enjoyment of the path;
 - (ii) other land served by the right of way taking into account the provision for compensation; and
 - (iii) the land over which the new route would pass.
- Therefore, the important considerations to increase the likelihood of the Order being confirmed would include issues such as the effect of the diversions on other paths in the area, whether the new route would be easier to walk and/or provide better views.

- 4.13 It should be noted that there is a risk of costs being awarded against the Council at an inquiry if it acts in a frivolous or inappropriate manner. This potentially could also apply to any objectors who make a frivolous objection which leads to an unnecessary public inquiry.
- 4.14 Concerns relating to the possibility of any future plans or applications to develop the land over which the definitive route of FP86 crosses are not matters that the Council should take into account when determining the claim. The costs of providing a footpath over the route claimed is also not a material factor in determining whether the right of way exists. The land-owners/occupiers will be written to again to remind them of their responsibilities to re-instate the definitive footpath and to keep it clear of crops until this matter has been resolved.

5. Options

5.1 Option 1: Retain FP86 along its definitive route and resolve the claim by the Ramblers Association (A-X-B-C-Y-E-F-G)

- (i) This would meet the Council's statutory duty as local highway authority.
- (ii) If the claim by the Ramblers Association is successful, this would result in two public rights of way for persons on foot. One would be along the line shown on the definitive map. The other would in part be through the nature reserve between the Salvation Army Land and Belton Way West.
- (iii) Given that objections to the claimed route were received to the diversion order, it is anticipated that objections would more than likely be received on the grounds. These objections were that the claimed right of way should have higher rights to that of a bridleway. If this is the case, the matter would need to be referred to the Secretary of State for determination, probably by way of a public inquiry.
- (iv) If bridleway rights are granted, cyclists and horse riders would be permitted to use the route through the nature reserve. The Council would be required to cut back some of the vegetation to accommodate the right of way to ensure that a minimum width of 3 metres is provided and ensure it is safe.
- (v) There would also be some safety implications should the claimed route become a bridleway. The topography along this section is not currently suited for such uses. There are also various other "permissive" walkways through this nature reserve from Belton Way West. Walkers using these obscured walkways may not be clearly visible to cyclists or horse riders. Horses may be "startled" by dog walkers and other uses of the nature reserve within an extremely limited space.

5.2 Option 2: Consider the diversion of FP86 on the route claimed by the Ramblers Association

- (i) This would also meet the Council's statutory duty as local highway authority. It would fulfil the necessary tests for the diversion under the Highways Act 1980 but would not necessarily address the material considerations in determining whether the Order should be confirmed.

- (ii) This option was considered and the statutory process was commenced back in 2003. As a result of the objections received from the British Horse Society on the grounds set out in paragraph 5.1(iii) and it was not progressed any further.
- (iii) Undoubtedly, objections would again be likely to be received to such a proposal on the same grounds as before. If the Council was to consider the upgrade of the diverted route to bridleway to satisfy those objections, the same concerns set out in paragraphs 5.1(iv) and (v) above would apply.
- (iv) I would also anticipate objections from the Ramblers Association to the loss of a footpath as their claim is for an additional right of way.
- (v) This would inevitably result in a public inquiry.

5.3 Option 3: Retain FP86 along its definitive route and provide a bridleway along the perimeter of the field along the route illustrated as A-X-Y-E-F-G.

- (i) This would result in two public rights of way over the land within the ownership of the Salvation Army and would anticipate that they would object to such a proposal.
- (ii) It would also require the Ramblers Association to agree to the withdrawal of their claim for the Council to fulfil its statutory duty or the Council could be duty bound to consider the claim which could result in a third route.

5.4 Option 4: Retain FP86 along its definitive route, upgrade the route to bridleway and resolve the claim by the Ramblers Association (A-X-B-C-Y-E-F-G)

- (i) This would meet the Council's statutory duty as local highway authority. It would fulfil the necessary tests for the diversion under the Highways Act 1980 and would meet the material considerations in determining whether the Order should be confirmed.
- (ii) This proposal would resolve the claim by the Ramblers Association, provide a significant improvement to the rights of way network by providing a bridleway that links to the bridleway network in Castle Point. It would also provide a new route for walkers only through the nature reserve. However, objections are likely to be received from the farmer of the land or indeed the Salvation Army, as land owners, to such a proposal. If these could not be overcome, the issues raised by the British Horse Society would remain unresolved and may result in an objection from them if the upgrade of the definitive route is not sought.
- (iii) This would inevitably result in a public inquiry.

5.5 Option 5: Divert FP86 around the internal perimeter of the field along the route illustrated as A-X-Y-E-F-G, upgrade this route to bridleway and consider the claim by the Ramblers Association for a new footpath along the southern edge of the nature reserve between points X-B-C-Y

- (i) This would meet the Council's statutory duty as local highway authority. It would fulfil the necessary tests for the diversion under the Highways Act 1980 and would meet all the material considerations in determining whether the Order should be confirmed.
- (ii) This proposal would resolve the claim by the Ramblers Association and provide a significant improvement to the rights of way network. It would establish bridleway links to the bridleway network in Castle Point along a safe route retained over land owned by the Salvation Army, whilst providing a separate section for walkers only through the nature reserve over the route claimed by the Ramblers Association. Both routes would have better of the surrounding scenery and would be far more convenient for the land owner(s).
- (iii) The upgrading of the diverted route to bridleway would provide a suitable off road route for cyclists to the Olympic mountain bike course from Leigh Station, as part of our Olympic Legacy. Any potential conflict of use between cyclists and horse riders along this route would be far safer than that through the nature reserve.
- (iv) Initial discussions on this proposal have been held with Essex County Council, Castle Point Borough Council, Leigh Town Council, the Ramblers Association, the British Horse Society and the Salvation Army. All are supportive of this proposal and it is unlikely that any objections would be received from those parties. The diversion and upgrade of the footpath and the addition of the new footpath claimed would be dealt with simultaneously and could be resolved relatively quickly. Given the level of support for this proposal from main recognised user groups, the Council would be likely to have more success in negotiating the withdrawal of any objections that may be received from the public.
- (v) This would enable the Council to confirm any order as unopposed avoiding the need or expense of a public inquiry

5.6 Option 6: Divert FP86 along the route claimed by the Ramblers Association (A-X-B-C-D-E-F-G) and create a bridleway around the internal perimeter of the field along the route illustrated as A-X-Y-E-F-G

- (i) This would meet the Council's statutory duty as local highway authority. It would fulfil the necessary tests for the diversion under the Highways Act 1980 and would meet the material considerations in determining whether the Order should be confirmed.
- (ii) This proposal would achieve the same outcome as Option 5 above and could also be completed relatively quickly. A bridleway could be created around the perimeter of the field by way of a creation agreement between the land-owner and the Council and upgrading the relevant sections of the

diverted footpath. The statutory process for diverting FP86 would need to be commenced again due to the significant timescale that has now elapsed since the diversion order back in 2003. However, it is unlikely that any objections would be received from the statutory consultees this time given that the same outcome as the proposal discussed with all the interested parties would be achieved.

6. Other Options

- 6.1 Do nothing – this is not an option as the Council has a statutory duty to consider the claim by the Ramblers Association to a legal conclusion and to keep the Definitive Map of Public Rights of Way under review.

7. Corporate Implications

- 7.1 Contribution to Council's Vision and Critical Priorities – Becoming healthy, safe, excellent and high performing organisation.
- 7.2 Financial Implications – There are no direct financial implications as a result of the recommendations as the Council has a statutory duty to deal with such matters. However, any actions that may require additional finance or have financial implications will need further consideration, as currently no provision has been made in the revenue or capital budgets for any additional physical improvements to the rights of way network (e.g. signage, fencing, maintenance etc.). If the matter is taken to public inquiry there will be some additional costs for legal support.
- 7.3 Legal Implications – The Council has a statutory duty to resolve the claim by the Ramblers Association.
- 7.4 People Implications – None.
- 7.5 Property Implications – An additional right of way would be created within the nature reserve adjacent to Belton Way West, Leigh-on-Sea.
- 7.6 Consultation – Initial consultation has been undertaken with the key parties but there is a statutory consultation process that would need to be undertaken for any Orders that will be required.
- 7.7 Equalities Impact Assessment – The report deals with a rural footpath over uneven terrain. It may result in the replacement of a stile at both ends of the right of way with a gate, which would make the route more accessible to those less able or less agile.
- 7.8 Risk Assessment – it is recommended that a risk assessment be undertaken on whichever option is selected.

8. Background Papers

- 8.1 General Correspondence on file
- 8.2 “Public Rights of Way and Access to Land” – Angela Sydenham

8.3 Current Legislation

9. Appendices

- 9.1 Appendix 1 – Plan illustrating Definitive Route of FP86 and possible diversions/upgrades and alternatives.