

## **Rights of Way Committee**

**25 June 2019**

### **Highways Act 1980 Section 119**

#### **Ansty and Staplefield – Request for Diversion of Part of Bridleway (Bw) 40CR at Mizbrooks Farmhouse**

#### **Report by Director for Highways, Transport and Planning**

##### **Executive Summary**

A request has been received for the diversion of part of Public Bridleway 40CR at Mizbrooks Farm near Cuckfield. The definitive line runs on the access drive to the farmhouse, enters the garden and runs close to the house. An alternative route just outside the garden appears to have become established as the used route for some years. Paragraph 2 of this report refers.

The application is made under the provisions of Section 119 of the Highways Act 1980. Members are requested to refer to paragraphs 4.2 and 4.4 of the "Guide to the Law for the Rights of Way Committee".

Officers are able to support the proposal because the legal tests for the making and confirmation of Diversion Orders, as set out in paragraphs 5.1 to 5.3, are considered to be met. However, in response to consultation, adverse comments were received from the Open Spaces Society (OSS) which is opposed to this diversion for the reasons summarised in paragraphs 7.1 to 7.5. The applicant has requested the proposal is still considered and so, in line with agreed practice, and as officer delegation powers are invalid, the Committee is asked to decide whether an Order should be made and submitted for confirmation.

##### **Conclusion**

Having reviewed the points of concern about the diversion of Bw 40CR raised by the OSS, the officers' view remains that the tests for the making and confirmation of a Diversion Order under S119 of the Highways Act 1980 are met and it is recommended that an Order *be made*.

##### **Recommendation**

That the Director of Law and Assurance be authorised to make a diversion Order under Section 119 of the Highways Act 1980 in respect of bridleway 40CR and to take reasonable steps to implement the proposal.

## **1. Introduction**

- 1.1 A request has been received from Savills on behalf of the Borde Hill Estate for the diversion of part of the above bridleway at Mizbrooks

Farmhouse. The site was inspected by the Rights of Way Officer on 28 February 2019.

## **2. Location of Bw 40CR and the Existing Route – Location plan 01760**

- 2.1 Bridleway 40CR runs east from Cleavers Lane in the parish of Ansty and Staplefield to the north west of Cuckfield. It runs on the access drive to Mizbrooks Farmhouse and on reaching the farm buildings passes to the south of barns at **A** before approaching the brick and tile hung traditional style farmhouse. The definitive line runs immediately alongside the southern elevation of the house passing through an old bridlegate at **B** to enter the presently unmanaged garden area surrounding the house.
- 2.2 Records indicate that the legal route over this stretch has fallen into disuse over some years and a slightly more southerly line to the south of a ditch and outside the garden has become established and waymarked as the used route.
- 2.3 On exiting the eastern boundary of the garden via a slight embankment at **C**, Bw 40CR descends a slope where scrub clearance and levelling has recently taken place to restore the grazing land. At point **D** a field gate and substantial culvert over a deep ditch provide access into woodland, from where a well defined woodland track takes the bridleway on a gradually rising route to a field gate at **E**, which allows access into the adjoining grazing field.
- 2.4 The bridleway route continues eastwards beyond the length proposed for diversion on an unfenced southern headland. It enters woodland adjoining Cuckfield Golf Course before continuing east via Sparks Lane towards Brooks Street.

## **3. Reasons for the Application**

- 3.1 The applicant states that on its present route the bridleway has a considerable impact on the tenants' privacy and on the security of the house and garden. The definitive line enters the garden area surrounding the farmhouse and passes extremely close to the house itself, thereby reducing the residents' feeling of privacy and their enjoyment of the house, or if sitting out in the garden.
- 3.2 Mizbrooks Farmhouse is a fairly secluded property and the fact that the definitive line would allow a potential burglar direct views into ground floor windows is a security concern.
- 3.3 The need to allow access into the garden also means that gates cannot be secured to make the garden dog proof – a dog kept by the residents could not be given free access to the garden.
- 3.4 There are plans to improve the house and to landscape the garden and the bridleway on its present route would be a limitation to this. The applicant would therefore like to improve the privacy and security of the

farmhouse by diverting the bridleway away from the house onto a field edge route to the north, as shown on plan 01761a.

#### **4. The Proposed Diversion of Bw 40CR – Plan 01761a**

- 4.1 It is proposed that from its western end at **A** the proposed bridleway will turn north on a 3.5m wide hard surfaced farm access track. After approximately 118m the route turns east north-east at point **G** to enter a field via a gate with hard standing, and continues on the southern headland of grassland adjoining a hedge. The route offers a firm grassland surface with attractive long distance views northwards over woodland and farmland. At point **F** the proposed route crosses into the adjoining field via a gate and culvert over a fairly small drainage ditch. Some improvements around the gates will be required to ensure convenient access at points **G** and **F**. Beyond **F** the proposed route continues north-east on southern headland adjoining woodland to rejoin the definitive line at point **E**. There is evidence the route is already in use by horse riders.

#### **5. The Tests**

##### **5.1 The Making Test for the Diversion of part of Bw 40CR**

###### **5.1.1 *The grounds:***

*An authority may make an order to divert a public path if it is satisfied that it is expedient that the line of the path or way, or part of it, should be diverted in the interests of the owner, lessee or occupier of land crossed by the way; or in the interests of the public; or both.*

The application to divert the bridleway is made in the interests of the owner. The reasons given, as outlined in paragraph 3, are that on its present route the path has an adverse impact on the privacy of the tenants who live at Mizbrooks Farmhouse and on the security of the property. A diversion of the path onto a route away from the house and garden would enable this situation to be much improved.

###### **5.1.2 *The point of termination and convenience:***

*The authority must also be satisfied that 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.*

The points of termination of the path would not be changed.

###### **5.1.3 Conclusion on the Making Test**

The applicant has demonstrated that it would be in his interests for the path to be diverted away from the area surrounding the house because it would enable the residents' privacy and security to be improved. Therefore, the part of the tests concerning the making of the Diversion Order is satisfactorily met.

## **5.2 The Confirmation Test for the Diversion of part of Bw 40CR**

### **5.2.1** *Is the proposed route substantially less convenient to the public?*

The present route proposed for diversion **A-B-C-D-E** is some 295 metres (m) in length and the proposed path **A-G-F-E** is a little shorter at 276m. The present route requires users to negotiate 4 gates whereas on the proposed route this will reduce to 2. On balance, the diversion is not considered to be substantially less convenient to the public.

### **5.2.2** *Is it expedient having regard to:-*

- a)** *the effect on public enjoyment of the way as a whole?*
- b)** *the effect on other land served by the existing way?*
- c)** *the effect on land over which the way is created?*

**a)** The present path allows some close views of Mizbrooks Farmhouse, an attractive traditionally built building, but it will still be available to view from the existing/ proposed path although at a slightly greater distance. The new route offers attractive long distance views over wooded countryside, especially to the north. Many path users prefer to avoid passing through a private area close to a house, especially in an isolated rural location, and so in this respect may find the proposed route more enjoyable.

**b)** It is not anticipated that other land will be directly affected by the diversion.

**c)** It is understood that the applicant owns all the land over which the path is to run and the tenant farmer has been consulted.

## **5.3 Conclusion on the Confirmation Test**

The proposed route is not considered substantially less convenient to the public, and walkers' and riders' enjoyment of the path as a whole is not likely to be significantly adversely affected as a result of the diversion. On balance it is considered the legal test for confirmation, as set out in Section 119 of the Highways Act 1980, is met.

## **6. Costs and Works to be undertaken by the applicant**

- A width of 3m is to be provided for the new bridleway along its full length.
- The gate at **G** is to be improved for horse riders by the removal of the barbed wire adjacent to the latch end of the gate. The existing latch is suitable for equestrian use but the chain and hook cannot be easily operated from horseback and must be removed.
- The gate at **F** also has a satisfactory equestrian latch but there needs to be a guard rail to protect against stepping off the edge into the ditch at the latch end of the gate.
- Waymarking will be adjusted and new waymarkers installed by the County Council as necessary.

The costs associated with the diversion order process, the usual administrative fees plus advertising charges will be borne by the applicant together with the cost of all works and adjusting the waymarking.

## **7. Consultations**

- 7.1 Letters of consultation were sent to the relevant user groups, district and parish councils and other interested parties, and notice of the proposal was included in the Members Information Sheet. The Society of Sussex Wealdmen advised that it has no objection to the diversion. The British Horse Society also do not object, their County Access & Bridleways Officer for West Sussex commenting that the proposed route "is in the main a very pleasant field edge path, which would be enjoyable to use" and also, as a user of the path, would prefer not to be in such close proximity to the house and garden.
- 7.2 The Open Spaces Society (OSS) representative replied to the consultation with adverse comments in opposition to this diversion. These are summarized in the context of the legal tests and comments provided as follows.
- 7.3 The Making Test  
*Is the diversion in the interests of the owner, lessee or occupier of land?*

**OSS Comment:** It has been cited that the bridleway has an adverse impact on privacy and security but it is noted that a former hedge on the perimeter of the garden has been removed and a new hedge planted. No evidence of privacy or security issues having been suffered has been provided and so it is difficult to see how the diversion can be in the interests of the applicant.

**Applicant Comment:** The impact of the bridleway on the residents is set out in para 3. The new hedge on the perimeter of the garden, when grown, will offer partial screening from the unofficially used route but would not provide benefit if the true definitive route is used. The applicant is aware that the new hedge must allow access for the definitive line.

**Officer Comment:** The applicant has demonstrated that it would be in the interests of the owner, occupier or lessee of the land for the path to be diverted for the reasons set out in paragraph 3 of this report. Furthermore, it should be noted that the privacy and security issues reported by the present residents of Mizbrooks Farmhouse relate mainly to the use of the bridleway on its unofficially used route slightly to the south and outside the garden. Current file records indicate that a route other than the definitive line has been in use at least since 2004 and aerial photographs would suggest much earlier. So, in terms of the adverse effect of the actual definitive line of the bridleway, if in use, the impact would inevitably be greater than is currently experienced by the residents.

#### 7.4 The Confirmation Test

*Is the proposed route substantially less convenient to the public?*

**OSS Comment:** The existing route B to D has been obliterated by earth movements and re-grading of the field. The re-instatement of the definitive route should be enforced.

**Applicant Comment:** The farmer is in the process of bringing this field back into agricultural condition after it became overgrown. Scrub vegetation has been cleared and the surface regraded. Further cultivations will follow in due course prior to it being re-seeded to create a grass field. The farmer has in hand the re-instatement of the line of the bridleway.

**Officer Comment:** At the time of inspection the surface was found to be devoid of vegetation but not difficult to use. The farmer has agreed to define the line of the bridleway as required.

**OSS Comment:** The proposed route uses a private road A to G which appears to serve other dwellings and fields. OSS policy is to oppose diversions along farm tracks.

**Applicant Comment:** The track serves Sidnye Farm to the north and is only used by the farm to access fields and the farm buildings at Mizbrooks for agricultural purposes.

**Officer Comment:** The existing route runs east from Cleavers Lane on the access drive to Mizbrooks, and between A and B passes through the entrance area where vehicles are parked and manoeuvre. This area is avoided by the diversion. The farm track A-G takes farm traffic as explained by the applicant and is not considered likely to present difficulty or inconvenience to path users.

**OSS Comment:** There is concern that cyclists would find the proposed arrangement significantly inferior to the existing route because the proposed field edge route G-E would deteriorate under use by equestrians over unsuitable terrain, making cycling difficult or impossible.

**Applicant Comment:** There is no reason to expect the ground conditions on the proposed bridleway to be any worse than the existing route or for G-F-E to deteriorate any more than the existing route east of E, which is in good condition.

**Officer Comment:** This is a bridleway and so subject to use by horses. The proposed route has a greater length of hardened surface than the present route. The field-edge section has been in use for some time with no deterioration to the surface or evidence to suggest that this route would be more subject to wear or less convenient than the present route. Cycling UK together with a local cyclist group was included in the consultation but no response received.

#### 7.5 *Is it expedient having regard to the effect on public enjoyment of the Way as a whole?*

**OSS Comment:** Between D and E the delightful ancient track of the existing bridleway, both cambered and hard, though in a woodland setting would be abandoned by this proposal, creating loss of enjoyment

to users. The confirmation test in s.119 (6) and the effect on public enjoyment of the way is not met.

**Officer Comment:** Part of the existing route, which is a pleasant woodland bridleway, will not be available to users if the path is diverted. However, the enjoyment of a route is a matter of individual preference and may balance a number of issues. The character of the proposed route is different but will provide a pleasant farmland route with attractive long distance views over wooded countryside, especially to the north. Further, as cited by another consultee, many bridleway users prefer to avoid passing close to a house and garden and so, in this respect, may find the proposed route more enjoyable. It is considered that, on balance, the proposed diversion will not make the way as a whole less enjoyable to users.

#### 7.6 Other adverse comment:

**OSS Comment:** *The Rights of Way Review Committee Practical Guidance Note 6 2007* recommends at para 8, "where ways are not enclosed, footpaths should be of a minimum width of 2 metres and bridleways and byways 3.5 metres. If the way is to be enclosed by fencing, hedging or buildings then footpaths should be of a minimum width of 4 metres and bridleways and byways 6 metres". It is presumed that the diverted way G-F-E would be enclosed, particularly where other horses might be grazing in the field.

**Applicant Comment:** There is no requirement to enclose the proposed route G-F-E by fencing – it will run on the field edge in the same way as the existing route east of E. The landowner is aware of the width requirement.

**Officer Comment:** The continuation of this route eastwards, beyond the diversion, runs along the field edge and is unfenced. In rights of way terms this is the preferred option and it is understood the landowner has no need to fence this bridleway.

## 8. West Sussex Rights of Way Management Plan Considerations

- 8.1 The proposal has been examined in the context of the Rights of Way Management Plan and is considered to be in accordance with relevant provisions of the Plan, such as reducing the number of gates and thereby improving accessibility.

## 9. The Equality Act 2010 and Equality Impact Report

- 9.1 The Committee should be aware that the Equality Act 2010 bans unfair treatment, and seeks equal opportunities in the workplace and in wider society. It also introduced a Public Sector Equality Duty (PSED). The PSED requires the County Council to have due regard in all decision-making processes to the need to:

a) Eliminate discrimination, harassment, victimisation or other prohibited conduct;

b) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and

c) Foster good relations between those who share a relevant characteristic and those that do not share it.

9.2 The relevant protected characteristics are age, disability, gender reassignment, marriage/ civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

9.3 The protected characteristic that could, potentially, be impacted upon by a bridleway diversion is disability. It is an overriding aim of the County Council to provide a path network that is accessible to all users and the needs of the disabled was a consideration of this application. The provision of a gap in place of a stile may make the path more accessible to the less mobile user. No other relevant impact upon any of the protected characteristics in the Equality Act 2010 emerged during the consideration of this application.

## **10. Crime and Disorder Act 1998 – Implications**

10.1 The Sussex Police Designing Out Crime Officer has been consulted and advises that he supports the proposal.

## **11. Human Rights Act 1998 – Implications**

11.1 It is unlawful for a public authority to act in any way which is incompatible with a convention right. The rights which should be considered are rights pursuant to Article 8, Article 1 Protocol 1, and Article 6.

11.2 Article 8 protects the right to respect for private and family life including an individual's home. This is a qualified right and there may be interference by a public authority if that authority does so with an intention of protecting the right and freedom of others.

11.3 Article 1, Protocol 1 deals with the protection of property. Again this is a qualified right and interference of it may take place where it is in the public's interest to do so subject to the conditions provided by law. Any interference, however, must be proportionate. The main body of the report identifies the extent to which there is interference with these rights and whether the interference is proportionate.

11.4 The Committee should be aware of Article 6, the focus of which (for the purpose of this report) is the determination of an individual's civil rights and obligations. Article 6 provides that in the determination of these rights, an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Article 6 has been subject to a great deal of case law. It has been decided that for rights of way matters, the decision making process as a whole, which includes the right of review by the High Court, complies with Article 6.

## **12. Resource Implications and Value for Money**

- 12.1 It is the County Council's practise to exercise its power to consider applications for diversions from landowners. The applicant for this diversion has undertaken to pay the cost of making and advertising the Order and for works necessary to implement it as referred to in para 6. In the event of objections being received the cost of referring an Order to the Secretary of State cannot be charged to the applicant and must be covered by existing resources. Should the Secretary of State decide to hold a public inquiry or hearing, the County Council would bear this cost.
- 12.2 Cost/resource implications could also arise if the decision of the Committee should be challenged by way of Judicial Review.

## **13. Risk Management Implications**

- 13.1 The decision to make a public Path Order is one that must be taken on strict legal tests. Officers believe that the tests have been satisfied in this case. If the application has not been determined in accordance with the tests, this could lead to a successful legal challenge by way of Judicial Review.

## **14. Overall Conclusion**

- 14.1 The tests for the making and confirmation of a Diversion Order under S119 of the Highways Act 1980 are considered to have been met and it is recommended that an Order be made.

### **Matt Davey**

Director of Highways, Transport and Planning

### Background Papers

- (a) Applicant's letters dated 12 July 2016, 30 May 2017 and 28 February 2019 from Savills to the Rights of Way Officer.
- (b) Consultation documents dated 22 March 2019 and 10 April 2019 sent to: Ansty and Staplefield Parish Council; Mr Pete Bradbury, local County Council Member and Chairman of Central and South Mid Sussex County Local Committee; Mid Sussex District Council; the Ramblers; the Open Spaces Society; the South Downs Society; the Society of Sussex Wealdmen; The British Horse Society, County Access & Bridleways Officer for West Sussex; CyclingUK; West Sussex Cycling Forum; Sussex Police Designing Out Crime Officer and the utility companies.
- (c) Consultation replies from the Society of Sussex Wealdmen (27 March 2019), the Open Spaces Society (4 April 2019, 26 April 2019, 9 May 2019), the Sussex Police (1 May 2019), the British Horse Society (15 May 2019).
- (d) Equality Impact Report.

- (e) Rights of Way Officers emails to Open Spaces Society (24 April 2019, 8 May 2019).
- (f) Rights of Way Officers emails to Savills (29 July 2016, 6 March 2019, 9 May 2019)
- (g) Email dated 21 May 2019 from Savills to the Rights of Way Officer.

#### Appendices

Appendix 1 - Location Plan 01760

Appendix 2 - Proposal Plan 01761

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