

Broads Authority

27 September 2019

Agenda item number 12

Extinguishment of Public Rights of Way

Report by Head of Planning

Summary

To apprise Members of the current situation regarding the Public Rights of Way (PROWs) which have been diverted as a consequence of the Broadland Flood Alleviation Project (BFAP) and advise them of the need to extinguish the previous routes.

Recommendation

To approve the preparation of Public Path Extinguishment Orders for the PROWs which have been diverted under the BFAP.

Contents

1.	Introduction	1
2.	The effect of the work on Public Rights of Way	2
3.	The current position on Public Rights of Way diversions from the BESL works	3
4.	The principle of extinguishment of the existing Public Rights of Way	4
5.	The process for extinguishment of the existing Public Rights of Way	5
6.	Financial implications	6
7.	Conclusion	6

1. Introduction

- 1.1. The Broadland Flood Alleviation Project (BFAP) was set up in 2001 as a long-term project to provide a range of flood defence improvements, maintenance and emergency response services within the tidal areas of the Rivers Yare, Bure, Waveney and their tributaries. It was initiated and funded by the Environment Agency, who appointed Broadland Environmental Services Ltd (BESL) to deliver these services. Over the subsequent years BESL, in partnership with the Agency, has been implementing the 20-year programme of works. The initial 12 years of the project saw the completion of the major works, with the remaining seven years focused on

maintenance. The programme is due to finish in May 2021, after which the defences must have a further life of at least seven years.

1.2. The main aim of the work has been to strengthen existing flood defences and restore them to a height that existed in 1995 (defined by the Environment Agency) and make additional allowances for sea level rise and future settlement of the floodbanks. This has been achieved through:

- Strengthening the existing floodbanks by restoring them to agreed levels where excessive settlement has occurred;
- Replacing existing erosion protection that is in a poor condition using more environmentally acceptable methods wherever possible;
- Providing new protection where erosion is currently threatening the integrity of the flood defences; and
- Carrying out works at undefended communities.

1.3. These improvements have been maintained by monitoring crest levels and undertaking crest raising where further settlement has occurred.

1.4. In total, improved protection against flooding has been provided to approximately 240km of floodbanks which protect approximately 21,300 hectares of Broadland containing more than 1,700 properties, of which more than 1,000 are residential.

2. The effect of the work on Public Rights of Way

2.1. Three main techniques have been used in the works, comprising strengthening, rollback and setback:

- Strengthening is usually used where there is still a good band of rond (vegetated area on the front side of the flood bank) between the river and the floodbank. It involves strengthening the existing floodbanks in their present locations by putting material on the back and/or front slope.
- Setback is usually used where the river is already hard up against the floodbank and the flood defence is protected by erosion protection, such as piling. This solution involves building a new clay floodbank inland from the river edge with the floodbank set back far enough from the existing line of flood defence so that a new rond can be created and natural vegetation established. The existing erosion protection will then be removed once the new floodbank is in place and the new rond has become established.
- Rollback is similar to setback and is usually used when rond/erosion protection is insufficient to allow for just bank strengthening and where ground conditions do not permit full setback. It is similar to setback, but the distance the floodbank is moved inland is considerably less.

- 2.2. As can be seen from this, the techniques of setback and rollback involve the physical relocation of the flood defence inland, with the actual distance of the relocation dependent on factors including ground conditions.
- 2.3. Many of the Broadland rivers have footpaths running beside them, which may be either formal Public Rights of Way (PROWs) or permissive paths. Typically, these paths run along the top of the flood bank as this is usually the highest and driest route and therefore the safest and most convenient one. It can be seen, therefore, that the relocation of a flood bank will also require the rerouting of any associated PROW or permissive path onto the line of the new bank to continue to provide a safe and convenient route. It may also be required because the previous bank is no longer physically present or because the previous route is now underwater as the flood defences have been moved inland.
- 2.4. There are a number of ways in which a formal re-routeing of a PROW can be achieved, including the following which are frequently used:
- Section 257 of the Town and Country Planning Act 1990 allows for a PROW to be stopped up by a Local Planning Authority (LPA) if this is necessary to allow a development which has been granted planning permission to take place. It must be undertaken prior to the substantial completion of the development that requires it and the LPA can create a replacement route if it is satisfied that it should do so.
 - Section 25 of the Highways Act 1980 is an alternative approach. It allows for the diversion of a PROW where this is not associated with development or where the associated development has been substantially completed. It is a more collaborative approach and involves written agreements and undertakings with landowners and the formal dedication of a route.
- 2.5. The responsibility for securing the diversions lies with the developer and this is done through a formal Dedication Agreement signed by the landowner(s).
- 2.6. A permissive path is operated under an agreement with the landowner and any diversion or relocation of such a route is usually done through an informal, negotiated process.

3. The current position on Public Rights of Way diversions from the BESL works

- 3.1. The BESL Works have resulted in the need to divert sections of PROW in 13 locations. These are:
- Compartment 1 (FP1 at Upton with Fishley);
 - Compartment 2 (FP1 at South Walsham);
 - Compartment 9 (FPs 4 and 5 at Ashby with Oby);

- Compartment 10 (FP10 at West Caister);
 - Compartment 11B (FP6 at Acle and Stokesby with Herringby and FP12 at Mautby);
 - Compartment 12 (FP18 at Cantley and FP1 at Reedham);
 - Compartment 21 (FP5 at Langley with Hardley); and
 - Compartment 37 (FP5 at Acle and FP4 at Upton with Fishley).
- 3.2. The process for the legal diversion of seven PROWs and the completion of the Dedication Agreements has been completed in respect of the following Compartments:
- Compartment 10 (FP10 at West Caister);
 - Compartment 11B (FP6 at Acle and Stokesby with Herringby and FP12 at Mautby);
 - Compartment 12 (FP18 at Cantley);
 - Compartment 21 (FP5 at Langley with Hardley); and
 - Compartment 37 (FP4 at Upton with Fishley).
- 3.3. The process for the legal diversion of the remaining six PROWs is underway, with the process being well advanced for most of them.
- 3.4. It is noted that all of these PROWs are in Norfolk.

4. The principle of extinguishment of the existing Public Rights of Way

- 4.1. When the formal diversion process has been completed the new route becomes the legal PROW and is entered as such on the Definitive Map held by the relevant County Council, which in this case is Norfolk County Council.
- 4.2. The previous route needs to be formally extinguished. If it is not formally extinguished it continues to have a legal status as a PROW, meaning that there is an obligation on the part of the landowner to keep it clear and on the relevant authority (usually the County Council) to maintain it.
- 4.3. The formal legal process for the extinguishment of a PROW is a Public Path Extinguishment Order and this is set out under section 118 (1) of the Highways Act 1980. There is only one ground for making an extinguishment order and this is:
- “Where it appears to the council as respects a footpath, bridleway or restricted byway in their area (other than one which is a trunk road or a special road) that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way.”

- 4.4. The Act goes on to state that neither the Secretary of State or Local Planning Authority should confirm an extinguishment order unless they are satisfied it is expedient to do so, having regard to the likelihood of the PROW being used by the public and the effect the extinguishment would have on the land served by the existing PROW. There is also a requirement to take account of the provisions around compensation set out in section 28 of the Highways Act 1980.
- 4.5. The question of whether a path is or is not needed for public use hinges on whether there is a viable alternative route that would be more likely to be used by the public. In this case, the process for the creation of replacement routes is underway, with seven in place and six underway, so it is clearly the case that there are or will in each location be a viable alternative route in place. It is also the case that the alternative route will be more likely to be used by the public because the routes being extinguished have already been removed or otherwise made unusable by the works (certainly at high water) so are not available. On this basis, it is considered that the tests set out in section 118 are met.
- 4.6. With regard to the provision for compensation within the legislation, the PROWs being created are replacement rather than new routes and there would be no depreciation in land value resulting from the extinguishments. On this basis, it is considered that the requirement of section 28 is met.

5. The process for extinguishment of the existing Public Rights of Way

- 5.1. There are a number of ways in which the extinguishment of a PROW can be achieved, including through the use of section 118 of the Highways Act 1980, which is a commonly used approach. It requires consultation with all other local authorities in the area affected by the orders and Natural England prior to the making of an order. There is no statutory requirement to consult users, landowners or local councils, although it is considered best practice to do so. The form of order is set out in the regulations and the orders must be advertised in accordance with the regulations.
- 5.2. If no objections are received, the Authority can confirm the orders as unopposed orders. If objections are received and not withdrawn, and the Authority decides to proceed with them, they would have to send the orders to the Secretary of State and ask him to confirm them. At that stage the power of decision goes to the Secretary of State. He may make the decision after considering written representations from the order-making authority and objectors or by convening a local public inquiry, at which an inspector would hear the evidence and make a decision.
- 5.3. If confirmed, the confirmation would then need to be advertised and the confirmed orders served on a list of bodies and organisations prescribed in the regulations.
- 5.4. The authority to divert or stop up public paths is delegated to the Planning Committee from the Authority under 2 (6) (viii) of the Authority's Terms of Reference

of Committees, but the authority to extinguish such routes is retained by the Authority.

- 5.5. The matter was referred to and considered by the Planning Committee at their meeting on 13 September 2019. At this meeting Members supported the preparation of Extinguishment Orders under s118 as outlined above and resolved to refer the matter to the Authority for a decision.

6. Financial implications

- 6.1. There is a significant staff cost associated with the negotiation and preparation of the Dedication Agreements required to create the replacement routes. This has been borne by BESL.
- 6.2. There is also a cost associated with the preparation of the Public Path Extinguishment Orders, including preparation and consultation. This is anticipated to be £1,850 per order and would amount to £24,050 for 13 orders. However, there is a mechanism whereby Orders can be bundled together, thereby reducing the costs, and Officers are investigating this.
- 6.3. There is no established protocol over where these costs should be borne. It is noted that there is no benefit to the developer (BESL) in the existing paths being diverted, as they have met their obligations in providing replacements. There would be a potential cost to Norfolk County Council were the existing paths not to be extinguished, as they would have a statutory responsibility to maintain them, despite the impracticality of this. It is appropriate for the Authority to pursue the completion of these Orders so that the matters associated with the flood defence project are satisfactorily and legally concluded.
- 6.4. The Authority has offered to share the costs of this work equally with BESL and Norfolk County Council. BESL have confirmed that this is acceptable to them, however Norfolk County Council have declined direct financial support. NCC have offered a way to reduce costs. Officers continue to have discussion with Norfolk County Council regarding this and have also raised the matter with the Environment Agency. Members will be updated verbally of the result of these discussions.

7. Conclusion

- 7.1. The BFAP is reaching the end of its programme and BESL is completing the contracted works. The major engineering works have been concluded and the final stages of the monitoring works is underway. At the conclusion of the project in May 2021 the responsibility for the flood defences will be handed back to the Environment Agency and the County Councils will take on the maintenance and management of the PROWs.
- 7.2. One of the final tasks is to complete the PROW diversions, which is underway, and to extinguish the routes which are no longer necessary.

- 7.3. If the Authority approves to extinguish the PROWs listed in section 3.1, the officers will proceed with the formal legal process for the seven PROWs for which a Dedication Agreement is completed. Officers would proceed with the six PROWs for which the legal diversion is under way only once their Dedication Agreements are completed.

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[Broads Plan](#) objectives: 6.1