



## Order Decision

Inquiry opened on 7 February 2017

**by Mark Yates BA(Hons) MIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 21 March 2017**

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### **Order Ref: FPS/D1780/5/8**

- This Order is made under Section 257 of the Town and Country Planning Act 1990 ("the 1990 Act") and is known as The City of Southampton (Footpath at Bitterne Park Primary School) Public Path Diversion Order of Southampton N0.3/2015.
- The Order was made by Southampton City Council ("the Council") on 1 April 2016 and proposes to divert a footpath, as detailed in the Order Map and Schedule.
- There were eleven objections to this Order outstanding at the commencement of the inquiry<sup>1</sup>.

**Summary of Decision: The Order is confirmed subject to modifications set out below in the Formal Decision.**

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### **Procedural Matters**

1. I held a public inquiry into the Order on 7-8 February 2017 at Southampton Civic Centre having undertaken an unaccompanied visit to the site and the surrounding area the previous day. I undertook a further visit on 9 February 2017 when I was mainly accompanied by the various interested parties.
2. A list of the people who spoke at the inquiry is attached to this decision. Clearly there are a large number of additional people who have objected to the diversion or submitted a representation in support of the proposal. When referring to the "objectors" or the "supporters" I do so in relation to issues generally raised by these parties. All of the points referred to below correspond to those delineated on the Order Map.
3. One of the objectors (Ms MacGillivray) was unable to attend the inquiry but she was present during the accompanied site visit. As I pointed out during the site visit it is not appropriate to hear further evidence in the absence of other parties after the close of the inquiry. Ms MacGillivray did nonetheless provide a written statement and supporting documents in advance of the inquiry which I have taken into consideration.

### **Main Issues**

#### ***The statutory test***

4. If I am to confirm the Order, I must be satisfied that it is necessary to divert the footpath to enable development to be carried out in accordance with the planning permission granted.

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<sup>1</sup> I have also considered the objections and representations made to the two earlier Orders, involving the same diversion, which were rejected by the Secretary of State on technical grounds.

### **Other material considerations**

5. The merits of the planning permission granted for the development is not an issue before me. However, paragraph 7.15 of Department for Environment, Food and Rural Affairs Circular 1/09 ("the Circular"), advises in respect of Orders made under Section 257 of the 1990 Act:

*"That planning permission has been granted does not mean that the public right of way will therefore automatically be diverted or stopped up. Having granted planning permission for a development affecting a right of way however, an authority must have good reasons to justify a decision either not to make or not to confirm an order. The disadvantages or loss likely to arise as a result of the stopping up or diversion of the way to members of the public generally or to persons whose properties adjoin or are near the existing highway should be weighed against the advantages of the proposed order".*

### **Background Matters**

6. The Order proposes to divert a footpath which generally proceeds adjacent to a playing field to the west and passes the Bitterne Park Primary School<sup>2</sup> ("the School") to the east. It lies within an area known as Riverside Park. In the absence of available land within the existing site, the School has made use of the playing field. The footpath itself is not presently recorded as a public right of way. However, the Council, who is both the landowner and highway authority, accepts that it has been dedicated as a public footpath. On this issue, an application was made to add a footpath to the definitive map and statement<sup>3</sup> and this was supported by a number of evidence forms. I accept that it is appropriate for me to consider the diversion of a footpath.
7. There is a lack of recorded public rights of way in the locality of Riverside Park. Nonetheless, it is apparent that the park and routes within it are subject to heavy public use. In particular, there is a segregated path along the side of the river ("the riverside path") for cyclists and pedestrians, a worn path to the north of the development site and a path which proceeds northwards towards Woodmill Lane. There are also links between the park and Manor Farm Road.
8. The playing field has been appropriated by the Council for educational purposes with planning permission granted for the associated works. An agreement is in place to enable the field to be used by community groups during permitted hours and by the public during the Christmas, Easter and summer holidays. In terms of the footpath, a unilateral undertaking completed on the final day of the inquiry makes provision for public use during the three main school holidays. Due to the fact that the existing path would be stopped up if the Order is confirmed I am unable to modify the Order to provide the additional safeguard for public access requested by Mr Linecar.
9. The main aim of the appropriation of the field and the related planning permission is to provide a safe and clean field for the School to use. Details have been provided of the problems encountered in terms of the presence of dog excrement and other items. Checks need to be undertaken before the field can be used by pupils. Reference is also made to conflicts which have occurred with members of the public using the field and dogs being off their lead. In

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<sup>2</sup> This is an amalgamation of the Bitterne Park Infant and Junior Schools and has in excess of 600 pupils.

<sup>3</sup> Stated by the Council to have been received and accepted on 28 January 2015

terms of the latter, the Council refers to the potential impact on particular pupils, for instance those who may be scared of dogs<sup>4</sup>. The Chair of the School Governors (Mr Whitehead) draws attention to the risk of disease from dog faeces.

10. The objectors mention measures that could have been taken to alleviate the problems that have occurred. For instance, Mr Cook says there has been a lack of action to enforce the 'no dog zone' and he points to the absence of dog bins. Mr Martin is critical of the risk assessments undertaken on behalf of the School. An issue not generally accepted by the School's Executive Head Teacher (Mrs Montague). However, it is apparent that the School chooses to have a greater than the recommended teacher per pupils ratio for various activities.
11. It is not possible to determine at this stage whether the potential measures suggested by the objectors would have significantly reduced the problems that have been encountered by the School. In particular, I need to consider the Order in light of the matters outlined in paragraphs 4-5 above. Whilst the problems identified relate primarily to the playing field, the development as a whole would incorporate the path into the site along with the field.

### **The Order**

12. I raised some issues in relation to the Order at the inquiry and these were addressed by the Council in the closing submissions delivered by Mr Ward. None of the other parties commented on these technical matters. Nor in my view do these issues impact on the validity of the Order before me. However, I accept that, if confirmed, there will be a need to modify the Order in relation to particular matters addressed below.
13. I agree that the references in the Order to it also modifying the definitive map and statement should be removed in light of the absence of any provision in the Order Schedule for the map and statement to be modified. As the Order was made on 1 April 2016, I consider that it would be appropriate for this year to be specified in the title of the Order.
14. In light of the uncertainty regarding the locations of the stated variants to the width of the footpath<sup>5</sup> and the fact it is not recorded in the definitive statement, I consider the Order should make it clear that the whole width of the existing path would be stopped up. I address the width of the proposed path in paragraph 30 below.
15. The Council confirms that all of the statutory requirements in relation to the making of the Order have been undertaken. It is not my role to consider the extent of the consultations undertaken in terms of the appropriation of the playing field or the planning application.

### **Reasons**

#### ***Whether it is necessary to divert the footpath to enable development to be carried out***

16. Planning permission was granted on 17 August 2015 for the: "*Demolition of part of existing school boundary wall, enclosure of existing playing field with*

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<sup>4</sup> On this issue I note the letter of support from Mr and Mrs Taylor mentions that their young daughter has a severe phobia of dogs

<sup>5</sup> Specified as 1.8 – 2.4 metres

*new gates and fence (height 2.1m), stopping up of the existing footpath and diversion to new route around perimeter of the fence".*

17. The objectors refer to potential alternative proposals which would mean that there is no requirement to divert the footpath. However, I need to consider whether the diversion is necessary for the purpose of implementing the planning permission. There are also particular advantages mentioned which sit outside of the planning permission, or works that do not require the diversion of the footpath, such as the proposal to demolish the pavilion building and the removal of a section of the School's boundary wall.
18. As outlined above, the diversion of the footpath is a requirement of the planning permission. In particular, permission has been granted for the erection of fencing and gates which would physically obstruct the path at two locations. The locking of these gates outside of the periods when public use will be permitted conflicts with the acknowledged public right of way. In my view, it is clearly necessary to divert the footpath to enable development to be carried out in accordance with the planning permission granted.

***The extent to which the diversion would disadvantage members of the public generally or persons whose properties adjoin or are near to the footpath affected by the Order***

19. The Council's stated intention is for the footpath to be available to the public during the Christmas, Easter and summer holidays and provision is made for this arrangement in the unilateral undertaking. Nonetheless, if the diversion is implemented, the existing public rights would be lost. I therefore proceed on the basis that, if the footpath is diverted, the path would remain open for the public to use during the specified school holidays but consider that limited weight should be given to this arrangement in the circumstances. I note the point made by Mr Ward that the path may be more extensive than a permissive path as it is secured by the unilateral undertaking. However, it is not a public right of way and it will only be available for a proportion of the year.
20. Some of the matters raised by the parties relate to aspects of the planning permission that has been granted, for instance the visual impact of the proposed fencing and the removal of a tree from within the site. These issues were considered as part of the planning process and they are not matters that I need to directly address when considering the merits of the diversion.
21. The objectors are concerned about the increased distance of approximately 182 metres between points A-B that would arise out of the diversion. People who wish to walk directly between River View Road and the play area near to point B would be faced with a longer walk if the footpath is diverted. On this issue, reference is made to the use of the path by residents of the retirement development on River View Road (Homespinney House) and people with children and/or pushchairs. Mr Cook also refers to the route from the car park near Woodmill Lane being shorter via the footpath than the riverside path in order to reach the miniature railway, which is open between April and October.
22. I do not find that the extra distance would be significant for people accompanied by children or pushchairs given the nature of the proposed path to be provided. The information supplied by Mrs Read indicates that Homespinnery House is not a care home but some residents do receive care. There could be some elderly users of the footpath or people with limited mobility who would find the extra distance to be a problem. However, there is

- a lack of direct evidence to indicate the extent to which this would arise. People wishing to walk for a short distance before turning back would not necessarily be inconvenienced by the diversion. Although less pleasant than a path through the park, the Manor Farm Road footway offers a reasonably direct alternative route between River View Road and the play area.
23. Whilst the route highlighted by Mr Cook may be shorter, if used in conjunction with the existing path in the Order, any increased distance has to be weighed against the length of the overall route used. I am not necessarily convinced that the riverside path can be viewed as a direct alternative to the existing path. The objectors also do not view the riverside path to be particularly safe. Mrs Maugy refers to a tragic incident when a person fell into the river and Mr Martin draws attention to the potential risks of collisions between cyclists and walkers. Nonetheless, from my observations of the area it is clearly a well-used path.
24. The position is further complicated by the number of potential means of access to the park and the availability of other routes. People may choose to always walk a particular route or this could vary in light of the circumstances on a given day. The route used will be influenced by where a person is travelling to or from. Given the widespread housing which is located to the east of the School, there will potentially be a number of people who do not use the footpath to access the park or the play area. Further, I note from looking at the evidence forms provided<sup>6</sup> that a number of these people will need to travel a fair distance in order to reach the path if they had walked from their present home.
25. The increased distance could impact upon some local residents, particularly those with limited mobility. However, the extra distance needs to be balanced against the other issues outlined above. In terms of access to the park and the play area, I am not satisfied that the evidence presented to the inquiry indicates that the extra distance would have a significant impact on local residents. Furthermore, the location of the footpath suggests that it is used to a large extent for recreational purposes, such as dog walking or as part of a longer route. This was evident to some extent during my visits to the site. In this sense the extra distance is unlikely to be problematic.
26. The objectors refer to instances when flooding has occurred and this is evident from the photograph taken in 2010 by Ms MacGillivray. This shows the river breaching the eastern bank, including the riverside path. The evidence at the inquiry indicated that the playing field can become waterlogged and there were some places where surface water was evident during the accompanied visit. However, a tarmac path, if constructed to the appropriate standard, should assist with the provision of an all-weather path in the same manner as the existing path. Whilst I note the concerns of the objectors regarding the environmental impact of an additional tarmac path in this location, this has to be balanced against the provision of a convenient route for the public.
27. I do need to consider the fence in the context of the proposed path. The intention is that a green mesh fence will be erected which will create a much more open feel than a solid fence. I do not say that the visual aspect of the playing field from the proposed path will be as pleasant as the one currently enjoyed from the existing path but views of the field would remain. Further, the views to the east from the existing path are not appealing at the present

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<sup>6</sup> In support of the path being added to the definitive map and statement

- time. The proposal to plant climbing plants inside the western boundary of the fence should help to soften its impact to some extent.
28. The erection of fencing of such a height can create a tunnelling effect and lead to people having security concerns. However, the general open nature of the fence will be a mitigating factor. The use of mesh fencing will provide a degree of surveillance. It is clear that the A-E and F-B sections of the proposed path would proceed over a curved alignment through relatively wide areas of land. Whilst I share some of Mrs Read's concerns in terms of the more enclosed nature of the E-F section, the existing vegetation to the west will be thinned. It is also apparent that the chain link fencing which exists in places will be removed. In terms of the security concerns, I note that some of the supporters refer to incidents of anti-social behaviour in the locality of the existing path. The proposed layout of the path should mean that Mrs Maugy's point regarding the potential problem for people negotiating corners with pushchairs will not arise.
29. Mr Martin highlights that the diversion would take the path away from the remaining cherry trees. Although this needs to be considered in light of the setting of this section of the existing path. It also appears to be the case that the trees will be in bloom during the Easter holiday when access will be permitted through the site. I noted during the accompanied site visit the potential need to cut back a tree to accommodate the F-B section but there is nothing to suggest that this cannot be achieved. Nor is there any evidence to show that wildlife habits would be damaged by the proposed thinning of the boundary vegetation outlined above.
30. The Order specifies that the proposed path will have a width of 2.4 metres. This width is comparable with the maximum width of the surfaced part of the existing path. Further discussions by Council Officers indicate that whilst this is acceptable a width of 2.5 metres might be more appropriate. However, as Mr Ward indicated in closing, the Council could make provision for this minor change to the recorded width to be implemented later. In my view, if the Order is confirmed, this offers a more timely option in light of the potential requirement for an opportunity to be provided for further representations or objections to any increase to the width specified in the Order.
31. Mr and Mrs Callaway state in their objection that the proposed path would have a detrimental impact on properties in River View Road with reference to environmental and security issues. However, they have not expanded on these concerns further. In terms of the issue of security, the land to the rear of the properties is presently subjected to public access.
32. I am not satisfied that the diversion would provide any significant benefits in terms of dispersing the flow of children entering or leaving the School at the start and end of the day. There are already multiple entrances to the School. It was also generally agreed by the parties at the inquiry that the diversion will not ease congestion or assist with the problem of parked vehicles in the locality of the School at these times of the day.

## Conclusions

33. I have outlined that there are some potential disadvantages arising out of the diversion of the footpath for the public, most notably in relation to the extra distance between points A-B. However, paragraph 7.15 of the Circular advises that there must be good reason to not confirm the Order. Having

regard to those matters detailed above and my conclusions regarding the issues relevant to my decision, I am not satisfied that it has been shown that any disadvantages to the public arising out of the proposed diversion are sufficient to outweigh the benefits of confirming the Order.

### **Other Matters**

34. The costs involved in implementing the diversion of the footpath and the potential future loss of public assets in terms of the School are not relevant to my decision. Nor am I satisfied that the extracts provided from the Council's Strategy of 2016-20 and the Southampton Green Space Strategy have any material bearing on the diversion of the footpath.

### **Overall Conclusion**

35. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should be confirmed with modifications.

### **Formal Decision**

36. I confirm the Order subject to the following modifications:

- Delete "No.3/2015" from the title of the Order and insert "2016".
- Delete all of the references in the Order to provisions contained in the Wildlife and Countryside Act 1981.
- Delete the first and second lines of the description in Part I of the Order Schedule and insert "*The whole width of the footpath which has a length of 166.7 metres. The Ordnance Survey Grid*".
- Amend the map key in light of the above modification to the width of the existing path.

*Mark Yates*

**Inspector**

## **APPEARANCES**

### **For the Council:**

Mr T. Ward

Barrister instructed by the Council

He called:

Mr A. Gregory

Planning Officer

### **Other Supporters:**

Mr G. Sumpter

Mr H. Whitehead

Cllr I. White

Mrs G. Montague

Ms E. Butler

Chair of the School Governors

Executive Head Teacher

### **The Objectors:**

Mr D. Perry

Mrs S. Maugy

Mr B. Cook

Mrs D. Read

Mr G. Linecar

Representing the Southampton Commons &  
Parks Protection Society

Mr R. Martin

Mr D. Hutchings

## **DOCUMENTS AND PLANS**

- 1 Photographs of the site
- 2 Emails regarding the width and surface treatment for the proposed path
- 3 Site maps
- 4 Statement of Mrs Maugy
- 5 Email from Cllr Baillie of 7 February 2017
- 6 Statement of Mr Martin
- 7 Copy of unilateral undertaking
- 8 Closing submissions on behalf of the Council



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A-B = 175 metre width  
Length = 166.7m  
Min Width = 1.8m  
Max Width = 2.4m

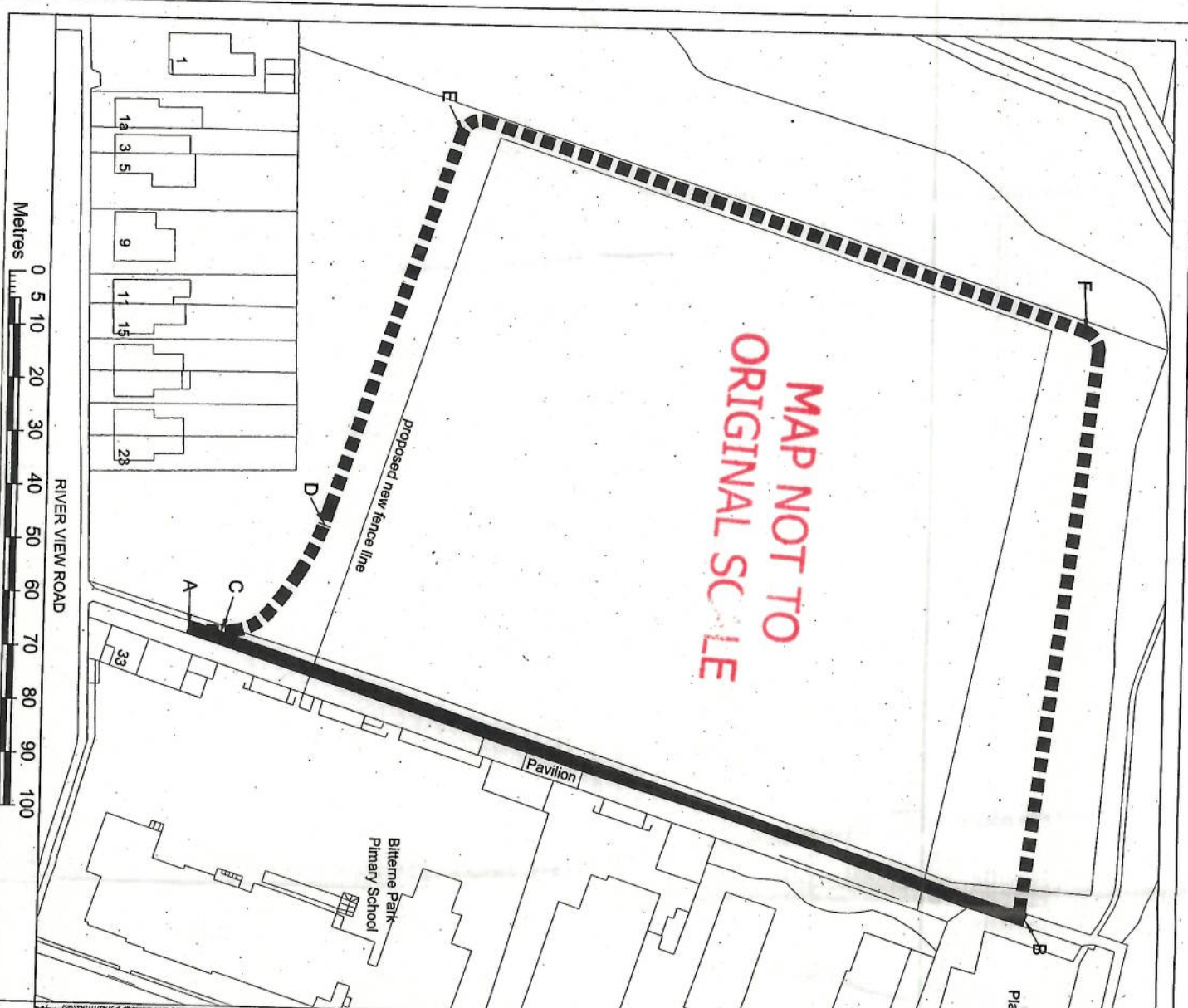
A-C-D-E-F-B  
Length = 349.0m  
Width = 2.4m



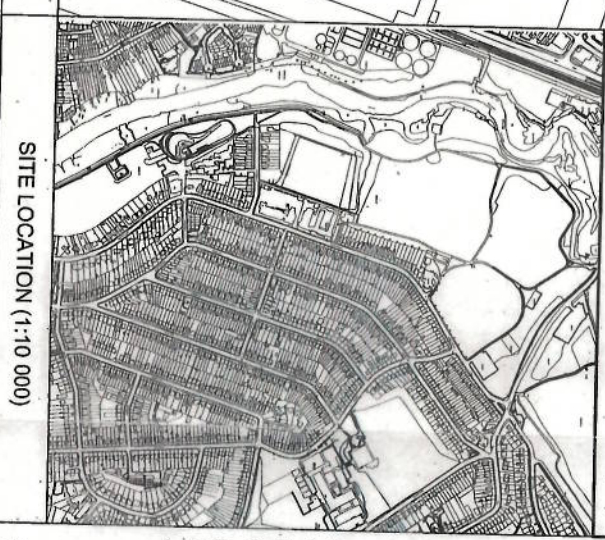
A-C-D-E-F-B footpath diversion to follow line of proposed new playing field fence as conditional planning approval reference 15/00273/FUL.

**EXISTING ROUTE OF FOOTPATH**  
A TO BE STOPPED UP B  
NEW DIVERTED FOOTPATH  
A C D E F B

GRID REFERENCES (Easting, Northing)	
A =	422699, 144026
B =	472850, 300206
C =	422907, 148690
D =	402604, 167528
E =	328573, 192167
F =	362900, 310376



MAP NOT TO ORIGINAL SCALE



RIVER VIEW ROAD

Scale @ A3	Drawn	Checked	Checked2
1:1250	JS	VO	NS
Project No.	Date		
CS/076629	18/02/2015		
Drawing Identifier	level	site type	note
BP CA ZZ	ZZ	DSP AR	910 005 P02

One Gladwin Square, Above Bar Street, Southampton, SO14 7FP, T 023 8083 4841 / 4846 www.capita-property.co.uk  
Capita Property and Infrastructure Ltd



Project  
Bittene Park Primary School  
Playing Field

### DIVERSION ORDER

Purpose of Issue	By / Check / Date
Client	
Rev/Description	
P02 / Footpaths format amended	VO / 16.12.2015
P01 / Diversion order issue	VO / 26.08.2015
P00 / Preliminary first issue	JS / VO / 18.02.2015

### Footpath Diversion Order