

**HIGHWAYS ACT 1980 AND WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE WILTSHIRE COUNCIL MALMESBURY ST PAUL WITHOUT 13 (PART), 16 (PART), 17 (PART) AND LEA AND CLEVERTON 1A (PART) DIVERSION ORDER AND DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2015**

**AND**

**THE WILTSHIRE COUNCIL MALMESBURY WITHOUT 15 EXTINGUISHMENT AND DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2015**

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**Purpose of Report**

1. To:
  - (i) Consider the objections received to the making of two legal orders; the Wiltshire Council Malmesbury St Paul Without 13 (part), 16 (part), 17 (part) and Lea and Cleverton 1A (part) diversion order and definitive map and statement modification order 2015 under Section 119 of the Highways Act 1980 and Section 53 of the Wildlife and Countryside Act 1981; the Wiltshire Council Malmesbury Without 15 extinguishment and definitive map and statement modification order 2015 under Section 118 of the Highways Act 1980 and Section 53 of the Wildlife and Countryside Act 1981.
  - (ii) Recommend that the Orders be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination, with a recommendation that they be confirmed without modification.

**Relevance to Council's Business Plan**

2. The proposals form part of a wider scheme to work with the local community and provide a rights of way network fit for purpose, which should help to encourage people to be more active.

**Background**

3. A large housing development was recently constructed at Cowbridge, to the east of Malmesbury. As part of the planning permission Wiltshire Council required a contribution towards converting the nearby old railway to a pedestrian and cycle route. The purpose of the route is to provide an attractive, direct link for pedestrians and cyclists from the development into the middle of Malmesbury and vice versa.

4. In order to agree permissive use of the old railway by the public, the landowner requested some alterations to the rights of way network elsewhere on his land. Sustrans, the sustainable transport charity who are promoting the new link, submitted an application for the alterations on the landowner's behalf. The area of interest is shown in **Appendix A**.
5. As shown on the plan in **Appendix B**, the following alterations were proposed.
  - (i) **Diversion** of part of footpath Malmesbury St Paul Without 16, changing it from a cross-field path to one running along the western boundary of the field.
  - (ii) **Diversion** of part of footpath Malmesbury St Paul Without 13 from a cross-field path to the southern edge of the field.
  - (iii) **Diversion** of part of footpaths Malmesbury St Paul Without 17 and Lea and Cleverton 1A to cross the weir bridge. There was an earlier bridge at this location, and the legal lines of the rights of way were defined as running across this bridge. Since then a replacement bridge has been constructed in a different place, but the footpaths were not diverted to run over the new bridge at the time of this change.
  - (iv) **Extinguishment** of footpath Malmesbury St Paul Without 15, which would otherwise become a cul-de-sac following the diversion of Malmesbury St Paul Without 16.
6. The existing legal lines of Malmesbury St Paul Without 13 and Malmesbury St Paul Without 16 pass through the farmer's crops and a clear line has not always been made available on the ground. There is evidence on the ground that walkers are currently using the edges of the field rather than seeking to use the legal lines of these routes. However, for the purpose of these Orders and the legal tests they must meet, the proposals must be considered as if the legal lines were available on the ground.
7. Wiltshire Council has a duty to ensure this route is available for the public but is mindful that the alterations requested by the landowner might provide a similar experience while also meeting the applicant's desire to improve privacy and security. As a result the Council has delayed enforcing the existing route until the applications have been fully determined.
8. In June 2015 Wiltshire Council carried out an initial informal consultation with statutory undertakers and user groups. No concerns were raised about the proposals. A decision report, which considered the application in accordance with Section 118 and Section 119 of the Highways Act 1980, was produced. This is attached as **Appendix C**. The report made a recommendation to senior officers to make orders to implement the alterations as proposed, a recommendation that was approved.
9. The Orders were subsequently made and notice was duly served and posted. Following the making of the Orders, Wiltshire Council received three objections.

10. To determine whether or not the Council continues to support the making of the Orders, members of the committee are now required to consider the objections. The decision must be made in accordance with the legal tests under Section 118 of the Highways Act 1990 for the Public Path Extinguishment Order and Section 119 of the Highways Act 1990 for the Public Path Diversion Order.
11. If the committee continues to support the making of the Orders they must forward them to the Secretary of State for the Environment, Food and Rural Affairs for determination. The members of the committee must decide the Wiltshire Council recommendation to be attached to the Orders, either:
  - (i) that the Orders be confirmed as made without modification, or
  - (ii) that the Orders be confirmed with modification.
12. If Wiltshire Council no longer supports the making of the Orders, members of the committee may determine that the Orders should be withdrawn.
13. Where members consider that the legal tests for confirmation are met, it can recommend that the Orders are forwarded to the Secretary of State for determination. However, given budgetary constraints at this time, no legal representation or support could be given to supporting confirmation of the Orders in the event of a public hearing or inquiry.

### **Main Considerations for the Council**

14. The Diversion Orders are made under Section 119 of the Highways Act 1980. The requirements of this section of the Act are set out in paragraph 3.2 of the decision report (**Appendix C**).
15. The Public Path Extinguishment Order is made under Section 118 of the Highways Act 1980. The requirements of this section of the Act are set out in paragraph 3.9 of the decision report (**Appendix C**).
16. Three objections were received, the details of which and the officer responses are set out in the paragraphs below.
17. **Objection 1 - Mrs Humpherson, Milbourne, 14/01/2016**

*I would like to make a point in respect to the request for to [sic] changes to the footpaths in Southfields, Malmesbury.*

*The footpaths that have existed for many years and have given a safe track for walkers [sic]. To my knowledge the Countryside Code has been adhered to by the people who have enjoyed and respected the opportunity of walking the paths.*

*Milbourne, where we live, has no footpaths at the side of the road. When our Grandchildren visit, how pleasant and much more safe are the paths that we have enjoyed across Southfields rather than dodging the traffic in the lanes, whether to get us to Lea or via the sewage park path and then onto Malmesbury.*

*The only trouble we have found on our walks recently is that the existing stiles are far from safe and do not make it easy to cross. Having said that, I would rather keep the pathways unchanged and continue to enjoy the access.*

18. The main concern of the first objector was based on the impression that the alterations would lead to them having to walk on the lanes more, with associated concerns about traffic. The proposals have no effect on any of the points where the footpaths meet the road network, the changes would be within the fields themselves. It would still be possible to leave the road network at the same points as at present so it is felt these concerns are unfounded.

19. **Objector 2 - Mr and Mrs Thomsons, Milbourne, 14/01/2016**

*I am writing with reference to the proposed closure of the footpaths from Southfield Farm, Crabb Mill Lea across to the sewage works or over to Milbourne. Having lived in Milbourne for five years now and being avid lovers of nature/countryside, let alone dog walkers I was distressed to read of the proposals, as these are walks that we regularly tread – let alone in our top five around the area.*

*Technically it is described as a redirection of footpath which I strongly object to. The proposal would take us out of our way and due to the change of terrain [sic] at least 15 minutes more of rutted ground to walk over; not to mention the added concern that in the summer cows graze in these fields. This would influence my decision to walk the path. Thus impeding on my civil liberties let alone “Joie de Vie”.*

*So it is for the reasons overleaf that myself and my husband strongly object to the proposed “redirection/closure” of the 2 footpaths.*

20. The second objection relates to the extinguishment of footpath Malmesbury St Paul Without 15 and diversions of Malmesbury St Paul Without 16 and part of Malmesbury St Paul Without 13. The key issues raised were as follows.

- (i) *Concerns about cows grazing the field in the summer.* The proposed alterations are within the same fields as the existing rights of way; therefore, this potential conflict could occur whether the alterations are made or not.
- (ii) *The proposed diversion would involve walking for 15 minutes longer over rutted ground.* The existing route, from the northern end where the diversion would begin, to where Malmesbury St Paul Without 13 meets Malmesbury St Paul Without 15 is 910 metres. To get to the same point via the proposed diversions of Malmesbury St Paul Without 13 and Malmesbury St Paul Without 16 is 1,110 metres. Given the use of the path is largely for leisure purposes it is felt this is not significantly further and it would not take significantly longer. The diversion would run along the edge of the field, where the landowner would be most likely to drive his vehicle. The surfacing at the time of the site visit in May 2015 did not appear to show that rutting was a regular issue. A 2 metre width would be allocated for the right of way; however, if rutting did occur the edge of the field is very open – assuming this was not fenced in it should be possible to avoid any poor surfacing.

21. **Objector 3 - Mr and Mrs Davies, Malmesbury, 15/01/2016**

Although Mr Davies initially said that he was minded not to object he has since decided to lodge an objection on the grounds set out below.

*After speaking with various people including former county councillor Caroline Pym I am currently minded NOT to object to the current proposals, even though I am deeply unhappy about them. I thought as a courtesy I should let you and your colleagues know.*

*However for me it is a great pity that these footpaths issues were not raised during the consultations about the Cowbridge - Malmesbury cycle path 2-3 years ago. They seem - it now appears - to be indelibly linked. I recall the cycle path consultations clearly but have no recollection that the closure of footpaths was raised as part of the deal.*

*Even though not formally objecting I am very unhappy about the closure of footpaths SPW 16 and LECL 15 for a number of reasons.*

*(a) a loss of public amenity as (despite note (b) below) members of the public do walk these paths;*

*(b) also this pair of footpaths could have been more used if the waymarking had been clearer and the true path not ploughed up or planted over, leaving only the tractor track as the nearest usable approximation;*

*(c) the proposal seems based on a worrying principle of the main reason for closure is that the landowner / farmer does not like paths / walkers / dog walkers going so close to the farmstead – a principle which could decimate through footpaths across England; and*

*(d) maybe a slightly selfish point, a significant loss of private amenity as I have much enjoyed the walk across that way to Crab Mill and then returning via SPW 13 or 17.*

*I do not see the formal definition of the path C to D as an alternative to SPW 16. The path along C to D is very arguably an extant right of way from Milbourne to Malmesbury, not Milbourne to Lea. There are many people who can attest that it has been used as a right of way over 20-30 years or more, and this could have been designated without the loss of SPW 16. But of course the formal designation is a small gain.*

*The only real quid pro quo for the extinguishment of SPW 16 and LECL 15 seems to be the permissive path along the railway line. I have been convinced on a very fine balance that there is (or may be in the future) a net public benefit from this, but it is quite fine, and I strongly feel that the quid pro quo closure of the footpaths might have been avoided if it had been publicised at the appropriate time.*

*Forgive me if I have been somewhat forthright, but if I am not to object I do feel that my - and others' - significant disquiet does need to be expressed. I would be grateful therefore if these concerns could be taken on board. Hopefully if there are any other local footpaths in danger, especially those in poor repair, we can have public discussion of them before draft orders are published.*

22. The key issues raised which relate to the legal tests for the third objection are set out below.
- (i) A loss of amenity as members of the public walk the existing paths and the suggestion that the proposed diversion route of MALW16 along the western edge of the field may already be an existing right of way due to previous use, however it has not been formally claimed and recorded. No specific reasons were given as to why it was felt the existing paths would be better than the proposed alterations so it is not possible to judge whether or not amenity would be compromised, other than considering the differences in distance (which are felt to be acceptable).
  - (ii) The proposals are for the benefit of the landowner rather than members of the public. Under the legislation a landowner can seek to alter the rights of way, the process seeks to weigh up potential benefits for them whilst taking into account the impact upon members of the public. The legal tests are set out in paragraph 19 of this report.

### **Legal tests for diversions under Section 119**

23. The Planning Inspectorate's Advice Note 9 on 'General guidance on public rights of way matters' includes the following paragraphs.

"27. *Section 119(6) was considered in R (on the application of Young) v Secretary of State for the Environment Food and Rural Affairs [2002] EWHC 844 and the views taken that subsection (6) has 3 separate tests to it:*

- (1) *Firstly, that the Order is expedient in terms of section 119(1), i.e. that in the interests of the owner, lessee or occupier of land crossed by the path or of the public, it is expedient that the line of the path be diverted but not so as to alter the point of termination if not on to a highway or to a point on the same highway not substantially as convenient to the public.*
- (2) *Secondly, that the diverted path will not be substantially less convenient to the public in terms of, for example, features which readily fall within the natural and ordinary meaning of the word 'convenient' such as the length of the diverted path, the difficulty of walking it and its purpose.*
- (3) *Thirdly, that it is expedient to confirm the order having regard to the effect:*
  - (a) *The diversion would have on the public enjoyment of the path or way as a whole;*
  - (b) *Of the order on other land served by the existing public right of way; and*
  - (c) *Of the new path or way on the land over which it is to be created and any land held with it.*

*There may nevertheless be other relevant factors to do with expediency in the individual circumstances of an order.*

28. *It is possible that a proposed diversion may be as convenient as the existing path but less enjoyable, perhaps because it is less scenic. In this event, the view in ‘Young’ was that the decision-maker would have to balance the interests of the applicant for the order against those of the public to determine whether it was expedient to confirm the order.*
29. *Conversely, a proposed diversion may give greater public enjoyment but be substantially less convenient (perhaps because the diverted route would be less accessible or longer than the existing path/way, for example). In such circumstances, the diversion order cannot be confirmed under section 119(6) if the path or way will be substantially less convenient to the public in consequence of the diversion.”*
24. (i) Test 1 – the diversion orders have been submitted in the interest of the owner. It is not felt that it would be substantially less convenient for members of the public to access other highways (i.e. footpaths and roads) in the area following the proposed changes.
- (ii) Test 2 – it is not felt the diversion is substantially less convenient, it is only marginally longer and the surface appears to be firm and level.
- (iii) Test 3 – It is not felt that any specific reasons have been put forward as to why the diversions would be less enjoyable than the current routes. Both the existing routes and the diverted routes are within the same landownership so there are no issues relating to this.

### **Legal test for extinguishments under Section 118**

25. The test for extinguishing Malmesbury St Paul Without 15 is that the route is not needed for public use. If the diversion of path Malmesbury St Paul Without 16 were to be confirmed, Malmesbury St Paul Without 15 would become a dead-end spur ending at Southfield Farm. It is felt this would not be needed for public use so would therefore meet the test.

### **Overview and Scrutiny Engagement**

26. None, as not required.

### **Safeguarding Implications**

27. DEFRA’s “Rights of Way Circular (1/09) Guidance for Local Authorities” Version 2, October 2009, includes the following paragraph 5.5.

*“The statutory provisions for creating, diverting and extinguishing public rights of way in the 1980 Act have been framed to protect both the public’s rights and the interests of the owners and occupiers. They also protect the interests of bodies such as statutory undertakers. The requirements for making, confirming and publicising orders are set out in Schedule 6 to the 1980 Act.”*

28. In making the Orders officers have followed the procedure set out in Schedule 6 of the 1980 Act so Wiltshire Council has fulfilled its safeguarding considerations.

### **Public Health Implications**

29. There are no identified public health implications which arise from the proposed diversions and extinguishment.

### **Procurement Implications**

30. There are no procurement implications associated with the withdrawal of the Order. If the Order is forwarded to the Secretary of State there are a number of potential financial implications, these are discussed further in paragraph 35.

### **Equalities Impact of the Proposal**

31. The Council has a duty to have regard to the Equality Act 2010 and to consider the “least restrictive” option for public use; for example, a stile is very restrictive to some users – a gap should be left instead if possible, or a gate when something is required to control stock. This approach is also supported in the Wiltshire Countryside Access Improvement Plan 2015 – 2025.
32. The current route of Malmesbury St Paul Without 15 and Malmesbury St Paul Without 16 has three stiles. The proposed alternative (Malmesbury St Paul Without 13 and Malmesbury St Paul Without 16) currently has three stiles. The landowner has agreed to the upgrade of one of these stiles to a kissing gate. The surfacing of the diversion route round the edge of the field will not be subject to ploughing and may be more walkable year round. The diversion will also be wider than the current legal line across the field is required to be, if reinstated to the minimum legal width. The stiles would still cause difficulties for some people with mobility problems. Overall, accessibility would be marginally better than the current route so the requirements under the Equality Act would be met.

### **Environmental and Climate Change Considerations**

33. The County Ecologist was consulted regarding the Orders and raised no adverse issues relating to the environmental impact.

### **Risk Assessment**

34. There are no identified risks which arise from the proposed diversions and extinguishment other than financial and legal risks, which are set out elsewhere in the report.

### **Financial Implications**

35. The Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 (SI 1993/407) amended by Regulation 3 of the Local Authorities (Charges for Overseas Assistance and Public Path Orders) Regulations 1996 (SI 1996/1978), permits authorities to charge applicants costs in relation to the making of public path orders, including those made under Sections 118 and 119



of the Highways Act 1980. The applicant has agreed in writing to meet the actual costs to the Council in processing the Orders. The applicant has also agreed in writing to pay any expenses which may be incurred by the Council and for any materials provided in bringing the new path into a fit condition for use by the public.

36. Where there is an outstanding objection to the making of the Orders, the committee may resolve that Wiltshire Council continues to support the making of the Orders, in which case they should be forwarded to the Secretary of State for decision. The outcome will either be determined by written representations, local hearing or local public inquiry, all of which have a financial implication for the Council. If the case is determined by written representations the cost to the Council is £200 to £300; however, where a local hearing is held the costs to the Council are estimated at £300 to £500 and £1,000 to £3,000 where the case is determined by local public inquiry with legal representation (£300 to £500 without). There is no mechanism by which these costs may be passed to the applicant and any costs must be borne by Wiltshire Council. It is therefore considered appropriate that the Council does not provide any legal representation for supporting confirmation of the Orders at a hearing or inquiry, thus minimising the expenditure of public funds.
37. Where the Council no longer supports the making of the Orders, it may resolve that the Orders be withdrawn and there are no further costs to the Council. The making of a Public Path Order is a discretionary power for the Council rather than a statutory duty. Therefore, a made Order may be withdrawn up until the point of confirmation, if the Council no longer supports it, for example, where it is considered that the proposals no longer meet the legal tests set out under Sections 118 and 119 of the Highways Act 1980.

### **Options Considered**

38. Members may resolve either that:
- (i) One or both Orders should be forwarded to the Secretary of State for determination with one of the following recommendations:
    - (a) One or both Orders be confirmed without modification, or
    - (b) One or both Orders be confirmed with modification

or

  - (ii) Wiltshire Council no longer supports the making of the Orders, in which case the Orders should be withdrawn.
39. If Members decide that the Orders should be withdrawn, clear reasons must be given, i.e. why the Order fails to meet the legal tests. Although there is no right of appeal for the applicant where the Order is withdrawn, the Council's decision is open to judicial review.

## **Reason for Proposal**

40. Despite the objections received it is considered that the proposed orders continue to meet the legal tests for an Extinguishment Order and Diversion Order as set out in Section 118 and Section 119 of the Highways Act 1980.

## **Proposal**

41. That “The Wiltshire Council Malmesbury St Paul Without 13 (part), 16 (part), 17 (part) and Lea and Cleverton 1A (part) diversion order and definitive map and statement modification order 2015” and “The Wiltshire Council Malmesbury Without 15 Extinguishment and Definitive Map and Statement Modification Order 2015” be forwarded to the Secretary of State for Environment, Food and Rural Affairs with a recommendation from Wiltshire Council that the Orders be confirmed without modification.

### **Tracy Carter**

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### **The following unpublished documents have been relied on in the preparation of this Report:**

None

### **Appendices:**

Appendix A – Location Plan

Appendix B – Public Path Diversion and Extinguishment Orders and Plans

Appendix C – Decision Report