

DECISION REPORT

APPLICATION TO DIVERT PART OF LEA AND CLEVERTON 1A, PART OF MALMESBURY WITHOUT FOOTPATH 13, PART OF MALMESBURY WITHOUT FOOTPATH 17, THE FULL EXTENT OF MALMESBURY WITHOUT FOOTPATH 16 AND EXTINGUISH MALMESBURY WITHOUT FOOTPATH 15 UNDER SECTIONS 118 AND 119 OF THE HIGHWAYS ACT 1980

1. Purpose of the Report

- 1.1 To consider and comment on an application by Sustrans to make the above alterations to the rights of way network. These are shown on the plan attached as Appendix A
- 1.2 Mr Millington of Sustrans has explained the reasons for submitting this application as follows. As part of the planning application for the nearby Cowbridge development, Wiltshire Council required a contribution towards converting the nearby old railway to a pedestrian and cycle route. This would provide an attractive, direct link from the development into the centre of Malmesbury and vice versa
- 1.3 In order to agree to this permissive route, the landowner has requested some alterations to the rights of way network elsewhere on his land. Sustrans agreed to submit an application for this on his behalf
- 1.4 As shown on the plan, the following alterations are proposed:
 - Diversion of the full extent of footpath MALW16, changing it from a cross-field path to the western boundary
 - Extinguishment of footpath MALW15, which would otherwise become a cul-de-sac following the diversion of MALW16
 - Diversion of part of footpath MALW13 from a cross-field path to the southern edge of the field
 - Diversion of part of footpaths MALW17 and LECL1A to cross the weir bridge

2. Consultation responses to the application

- 2.1 Consultation took place with the parish council and the relevant non-statutory consultees on the proposed application in June. Responses were sought from statutory consultees in July.
- 2.2 The existing rights of way and proposed diversions all cross land in the ownership of Mr Trevor Baker of Southfield Farm, Lea. A consultation letter was sent to him, with no reply having been received to date.

2.3 Mrs Judy Hible, who represents the Ramblers Association, has previously expressed to Sustrans her support for the proposal. She raised no objections to the proposal in this consultation.

2.4 St Paul Malmesbury Without Parish Council responded to the consultation by letter, as follows:

“The Parish Council has been working with Sustrans for a good number of years to achieve the introduction of a footpath from the residential development at Cowbridge to Malmesbury. The alteration of these footpaths is a critical aspect of the scheme and as such is heartily supported by the Parish Council. We believe the diagram attached to your letter of the 5th June reflects the agreements reached with the landowner and contained in the jointly signed License of the 13th November 2014.”

2.5 There are no issues relating to the location of statutory utilities.

3. Main considerations for the council

3.1 The main considerations relate to the legal tests that must be satisfied for an order to be made. The proposed extinguishment would have to meet the tests under section 118 of the Highways Act 1980 as amended by the Wildlife and Countryside Act 1981. The diversions would be undertaken under section 119 of the Highways Act 1980.

3.2 Section 119 of the Highways Act 1980 says:

119 Diversion of footpaths and bridleways.

(1) Where it appears to a council as **respects** a footpath or bridleway in their area (other than one that is a trunk road or a special road) that, in the interests of the owner, lessee or occupier of land crossed by the path or way or of the public, it is expedient that the line of the path or way, or part of that line, should be diverted (whether on to land of the same or of another owner, lessee or occupier), the council may, subject to subsection (2) below, by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order,—

(a) create, as from such date as may be specified in the order, any such new footpath or bridleway as appears to the council requisite for effecting the diversion, and

(b) extinguish, as from such date as may be specified in the order or determined in accordance with the provisions of subsection (3) below, the public right of way over so much of the path or way as appears to the council requisite as aforesaid.

An order under this section is referred to in this Act as a “public path diversion order”.

(2) A public path diversion order shall not alter a point of termination of the path or way—

- (a) if that point is not on a highway, or
 - (b) (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public.
- (3) Where it appears to the council that work requires to be done to bring the new site of the footpath or bridleway into a fit condition for use by the public, the council shall—
- (a) specify a date under subsection (1)(a) above, and
 - (b) provide that so much of the order as extinguishes (in accordance with subsection (1)(b) above) a public right of way is not to come into force until the local highway authority for the new path or way certify that the work has been carried out.
- (4) A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.
- (5) Before determining to make a public path diversion order on the representations of an owner, lessee or occupier of land crossed by the path or way, the council may require him to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,—
- (a) any compensation which may become payable under section 28 above as applied by section 121(2) below, or
 - (b) where the council are the highway authority for the path or way in question, any expenses which they may incur in bringing the new site of the path or way into fit condition for use for the public, or
 - (c) where the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by subsection (9) below.
- (6) The Secretary of State shall not confirm a public path diversion order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that the diversion to be effected by it is expedient as mentioned in subsection (1) above, and further that the path or way will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the effect which—
- (a) the diversion would have on public enjoyment of the path or way as a whole,

(b) the coming into operation of the order would have as respects other land served by the existing public right of way, and

(c) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it,

so, however, that for the purposes of paragraphs (b) and (c) above the Secretary of State or, as the case may be, the council shall take into account the provisions as to compensation referred to in subsection (5)(a) above.

(6A) The considerations to which—

(a) the Secretary of State is to have regard in determining whether or not to confirm a public path diversion order, and

(b) a council are to have regard in determining whether or not to confirm such an order as an unopposed order,

include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would create or extinguish a public right of way.

(7) A public path diversion order shall be in such form as may be prescribed by regulations made by the Secretary of State and shall contain a map, on such scale as may be so prescribed,—

(a) showing the existing site of so much of the line of the path or way as is to be diverted by the order and the new site to which it is to be diverted,

(b) indicating whether a new right of way is created by the order over the whole of the new site or whether some part of it is already comprised in a footpath or bridleway, and

(c) where some part of the new site is already so comprised, defining that part.

(8) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path diversion orders.

(9) Section 27 above (making up of new footpaths and bridleways) applies to a footpath or bridleway created by a public path diversion order with the substitution, for references to a public path creation order, of references to a public path diversion order and, for references to section 26(2) above, of references to section 120(3) below.

The key tests to be met under section 119 are as follows.

3.3 **In the interests of the owner of the land and / or the public**

The proposed diversions would achieve the following:

MALW16 – to divert the footpath away from Southfield Farm for the privacy of Mr Trevor Baker and away from the middle of the field to the field edge, which would be easier to maintain. There is evidence that some members of the public are walking around the eastern edge of the field. However, it appears that a greater number of people are walking down the west side of the field where it is proposed to divert the route to and where a wide headland is maintained.

MALW13 – to divert the footpath to follow the edge of the field. This would be easier to maintain. Members of the public are already using the wide headland at the edge of the field.

MALW17 and LECL1A - divert the footpath onto the bridge over the weir, i.e. onto the line that is already walked by members of the public.

3.4 Convenience to the public

Convenience includes a number of factors including length, width, surface, gradient and public enjoyment.

MALW16 and MALW13 – the distance from the northern end to where MALW13 meets MALW15 (which is proposed to be extinguished) is currently 910m. To get to the same point via the proposed diversions of MALW13 and MALW16 is 1110m – not significantly further given that the use of these paths is largely for leisure purposes. The legal line of these routes is not currently available, however, if it was, it is likely it would be narrower than the proposed routes as it runs through the crops. The surface of the proposed diversions appears to be firm and there are no significant gradients.

MALW17 and LECL1A – diverting the route over the bridge is more convenient to the public than the existing legal line through the river.

3.5 Public enjoyment

The public enjoyment of a route needs to be considered as this is a consideration in terms of convenience.

MALW16 - the proposed alternative route is along the field edge. The grass here appears to be kept very short, so it would be much more open than a route cut through the crops on the current line. The view may not be quite as good with the proposed diversion as it would be more difficult to see over the hedges to the west. The proposed alternative requires passing a sewage works, which is just on the other side of the hedge. A width of 2m would be required, as set out in Wiltshire Council's Countryside Access Improvement Plan

MALW13 – the proposed alternative route is much more open than a route cut through the crop on the current line would be. Views would be similar. A width of 2m would be required.

MALW17 and LECL1A – the route over the bridge would be much more acceptable than attempting to use the current legal line straight through the river

While there are a couple of drawbacks to the proposed diversion routes when compared with the existing routes. Diverting them to the wide field edges would be considerably more enjoyable and convenient than the existing legal routes through the crop.

3.6 Impacts the coming into operation of the order would have as respects other land served by the existing public right of way

The proposed alternative is not considered to have any detrimental effect on any other land served by the existing rights of way.

3.7 The effect any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it.

The proposed diversions would run through land in the same ownership as the current route, so this would not be an issue.

3.8 The application is also to stop up footpath MALW15. The legislation relating to this is as follows.

3.9 Highways Act 1980, section 118 - Stopping up of footpaths and bridleways.

(1)Where it appears to a council as respects a footpath or bridleway 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.

An order under this section is referred to in this Act as a “public path extinguishment order”.

(2)The Secretary of State shall not confirm a public path extinguishment order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 above as applied by section 121(2) below.

(3)A public path extinguishment order shall be in such form as may be prescribed by regulations made by the Secretary of State and shall contain a map, on such scale as may be so prescribed, defining the land over which the public right of way is thereby extinguished.

(4) Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path extinguishment orders.

(5) Where, in accordance with regulations made under paragraph 3 of the said Schedule 6, proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation order, public path diversion order or rail crossing diversion order then, in considering—

(a) under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use, or

(b) under subsection (2) above to what extent (if any) that path or way would apart from the order be likely to be used by the public,

the council or the Secretary of State, as the case may be, may have regard to the extent to which the public path creation order, public path diversion order or rail crossing diversion order would provide an alternative path or way.

(6) For the purposes of subsections (1) and (2) above, any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded.

(6A) The considerations to which—

(a) the Secretary of State is to have regard in determining whether or not to confirm a public path extinguishment order, and

(b) a council are to have regard in determining whether or not to confirm such an order as an unopposed order,

include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would extinguish a public right of way.

The legal tests to be met are as follows.

The path is not needed for public use

3.10 MALW15 currently serves two purposes. It provides access to path MALW16 and then continues to Southfield Farm. If footpath MALW16 is diverted as proposed, this would leave MALW15 as a dead end path up to the farm. Access to the farm does not serve a useful purpose for the public so the path would then not be needed for public use.

The effect which the extinguishment of the right of way would have as respects land served by the path or way

3.11 The proposed extinguishment is not considered to have any detrimental effect on any other land served by the existing rights of way.

Extent to which the public path diversion order [for MALM16 and MALW13] would provide an alternative path of way

- 3.12 The proposed diversions of MALW16 and MALW13 would provide the alternative to the existing route of MALW15 (with MALW16). As discussed above, the diversions are felt to be an acceptable alternative to the existing route.

Other considerations

- 3.13 Both Section 118 and 119 of the Highways Act 1980 requires the council to have regard to any material provision of the Rights of Way Improvement Plan (called the Countryside Access Improvement Plan).

While the proposal does not specifically support the actions in the document, it equally does not conflict with any of the actions.

- 3.14 The Equality Act 2010 places a duty on all authorities as follows:

‘(1) An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result in socio-economic disadvantage.’

The Act places a duty on authorities to make reasonable adjustments to avoid disadvantage. Section 149 of the Act details the ‘public sector equality duty’ placed on a public authority to:

‘in exercise of its functions, have due regard to the need to-

- a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.’

The current route (MALW15 and MALW16) has three stiles. The proposed alternative (MALW13 and MALW16) 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 is likely to be better year round and will not be subject to ploughing. It 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 to some people with mobility problems. Overall, accessibility would be marginally better than the current route so requirements under the Equality Act would be met.

- 3.15 In making diversion orders, sections 29 and 121(3) of the Highways Act 1980, require authorities to have due regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological physiographical features. Section 40 of the Natural Environment and Rural Communities Act 2006 also place a duty on every public authority exercising its functions to have regard to the

conservation of biodiversity, so far as it is consistent with the proper exercise of those functions. In this section, conserving biodiversity includes that in relation to a living organism, or type of habitat and restoring or enhancing a population or habitat.

Consultation with the County Ecologists has resulted in their not raising any concerns. The proposed diversions are within land used for agriculture, the needs of the farmer in terms of privacy/security and maintenance have been taken into consideration in this process.

Conclusion

- 3.16 It is concluded that the proposed diversions are in the interest of both the landowner and members of the public.

4. Safeguarding considerations

- 4.1 The proposed diversion would improve the privacy and possibly also the security of the Southfield Farm buildings and occupants while having no adverse effect upon path users.

5. Public Health Implication

- 5.1 There are no expected adverse implications from this proposed diversion.

6. Risk Assessment

- 6.1 No added risks have been identified as a result of this proposed diversion.

7. Financial Implications

- 7.1 DEFRA's Rights of way Circular 1/2009 Guidance for Local Authorities states at 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 Act.'

It is not considered there are any risks associated with following the recommendation of this report for the council.

- 7.2 The recommendation of the report is to approve the making of an order on the grounds that the legal tests to make and/or confirm the order have been met and the applicant has agreed to pay the council's costs in processing the application. The applicant has also confirmed that he will pay any compensation which may arise in consequence of the coming into operation of the order and any expenses which may be incurred in bringing the new route into a fit condition for use by the public.
- 7.3 If an objection is received to the making of the order and the order is not abandoned by Wiltshire Council, the order will be forwarded to the Planning Inspectorate for

determination by an Inspector appointed by the Secretary of State. The additional costs accrued from the time the order is submitted to the Secretary of State to its determination will fall to Wiltshire Council. If the order were to be determined by written representations these costs would be negligible, a hearing would cost in the region of £200 - £300 and a Public Inquiry may be in the region of £5,000-£6,000.

8. Options considered

- 8.1 i) To refuse the application, or
ii) To make the order as applied for

9. Reasons for the Recommendation.

It is considered the legal tests for making and confirming the order under section 118 and 119 of the Highways Act 1980 have been met.

10. Recommendation.

- 10.1 To make an order under sections 118 and 119 of the Highways Act 1980 and section 53(2) of the Wildlife and Countryside Act 1981 to divert footpaths MALW13, MALW16, MALW17 and LECL1A and extinguish footpath MALW15 as shown on the plan at Appendix A to this report. Additionally that the order be confirmed if no objections or representations are received to it and the definitive map and statement be modified accordingly.

Michael Crook

Countryside Access Development Officer

08 September 2015