

WILTSHIRE COUNCIL

EASTERN AREA PLANNING COMMITTEE

10 MARCH 2016

HIGHWAYS ACT 1980 AND WILDLIFE AND COUNTRYSIDE ACT 1981
THE WILTSHIRE COUNCIL BAYDON 2 (PART) AND 11 (PART) DIVERSION
ORDER AND DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2015

Purpose of Report

1. To:
 - (i) Consider the objections and representations received to the making of “The Wiltshire Council Baydon 2 (Part) and 11 (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.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination.

Relevance to Council’s Business Plan

2. Working with the local community to provide a rights of way network fit for purpose, making Wiltshire an even better place to live, work and visit.

Background

3. On 11 May 2015 Mrs S Johnson of Baydon House Farm, Baydon applied to Wiltshire Council to divert sections of bridleways 2 and 11 under Section 119 of the Highways Act 1980. Please see a location plan attached at **Appendix A** and the proposed diversion on the plan attached to the Order at **Appendix B**.
4. Considerable changes to the layout and operation of both Baydon House Farm and the rights of way network therein have occurred since 2010. Public rights of way have recently been diverted by legal order on the north side of the farm to allow a development to proceed.
5. Unlike those changes, there is no permitted development affecting the paths in this Order, the applicant instead seeks to divert them to improve privacy and security for the farm and cottages.
6. The existing route is unavailable for use and is obstructed by garden fencing and hedging. The route has been largely obstructed for many years but must be considered as if it were available for the purposes of this Order and the legal tests within Section 119 of the Highways Act 1980.

7. Wiltshire Council has a duty to make this way available for the public but is mindful that a diverted route could provide a better walk and ride for people than the existing, 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 application to divert has been fully determined.
8. In 2011 Mrs Johnson applied to Wiltshire Council to extinguish the section of Baydon 11 that would be diverted by this Order. An initial consultation conducted by the Council revealed a significant level of local opinion that the path should remain and the application was subsequently turned down.
9. In 2013 and again in 2015 Wiltshire Council carried out an initial consultation regarding the proposal to divert the paths and this received a mixed response from consultees. However, it was considered that the diverted route met the requirements of the Act for making an Order and was likely to meet the further tests for confirmation if no objections or representations to it were received.
10. The case Officer produced a Decision report, attached at **Appendix C**, in which they considered the application against the legal tests for diversion under Section 119 of the Highways Act 1980. The report made a recommendation to Senior Officers that the paths should be diverted under Section 119 of the Highways Act 1980 in the interests of the landowner. This recommendation was approved on 10 August 2015.
11. The Order was subsequently made and notice duly served and posted.
12. Following the making of the Order, Wiltshire Council received four objections and two representations in support. The text of these is attached at **Appendix D**. Although received too late to be considered to be a formal representation, Baydon Parish Council considered the matter of the diversion at its meeting held on 26 October 2015 and on 5 November 2015 wrote to Wiltshire Council stating that 5 voting councillors had unanimously voted in favour of the diversion.
13. Members of the Committee are now required to consider the objections received, against the legal tests for making and confirming a Public Path Diversion Order under Section 119 of the Highways Act 1980, in order to determine whether or not the Council continues to support the making of the Order.
14. If it does continue to support the making of the Order it must be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination and the Members of the Committee must decide the Wiltshire Council recommendation which is attached to the Order when it is forwarded to the Secretary of State, i.e.:
 - (i) that the Order be confirmed as made, or
 - (ii) that the Order be confirmed with modification.
15. Where Wiltshire Council no longer supports the making of the Order, Members of the Committee may determine that the Order is withdrawn.

16. This Order is made in the landowner's interest and where members consider that the legal tests for confirmation are made it can recommend that the Order be forwarded to the Secretary of State for determination. However, given budgetary constraints at this time, no legal representation or support can be given to the Order in the event of a public hearing or inquiry.

Main Considerations for the Council

17. The Public Path Diversion Order is made under Section 119 of the Highways Act 1980. The requirements of this section of the Act are set out in full in paragraph 6.0 of the decision report attached at **Appendix C**.

18. The Planning Inspectorate's Advice Note 9 on 'General guidance on public rights of way matters' states:

"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 was 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.”*
19. It is noted that the objectors consider that their use and enjoyment of the existing route is compromised by the proposed diversion. It is, however, further noted that those supporting the Order do not. Enjoyment of a route is by its very nature subjective but the comments relating to views and the value of a circular route were put to the applicant along with a proposed alternative route suggested by all four objectors and shown here at **Appendix E**.
20. The applicant responded to the Council on 10 October 2015 explaining why the alternative proposal of a diversion south of Baydon House Farm joining Baydon 2 south west of the farm was unacceptable.
21. Not only are the landowners unwilling to offer the proposed new route, they also consider it would fail the legal tests relating to the convenience of the termination point (there is an additional gradient and distance) and convenience to the public overall. The proposal also has a negative effect on the privacy of Baydon House Farm meaning that the Order could not be made in the interests of the landowner.
22. For Wiltshire Council to pursue the proposed diversion the Order would need to be made in the interests of the public, funded by public funds and the Council would also be liable to pay compensation to the landowners in the event of a diminution in value of the property.
23. While officers appreciate the appeal of the proposed route in linking Baydon 8 with Baydon 2 to avoid Baydon House Farm, or to provide a short circular walk or ride, it is not considered to be an option unless the landowners were prepared to create the way. In this instance the landowners have been very clear in indicating that they are not prepared to do this.

Safeguarding Implications

24. DEFRA’s “Rights of Way Circular (1/09) Guidance for Local Authorities” Version 2, October 2009, 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 1980 Act.”*

In making “The Wiltshire Council Baydon 2 (part) and 11 (part) Diversion Order and Definitive Map and Statement Modification Order 2015” officers have followed the procedure set out in Schedule 6 of the 1980 Act and in doing so Wiltshire Council has fulfilled its safeguarding considerations.

Public Health Implications

25. There are no identified public health implications which arise from the proposed diversion of parts of Baydon paths 2 and 11.

Procurement Implications

26. There are no procurement implications associated with the withdrawal of this Order.
27. In the event this Order is forwarded to the Secretary of State there are a number of opportunities for expenditure that may occur and these are covered in paragraphs 31 and 32 of this report.

Equalities Impact of the Proposal

28. The Wiltshire Council Rights of Way Improvement Plan 2015-2025 recognises the Council's duty to have regard to the Equalities Act 2010 and to consider the least restrictive option for public use. The proposed diversion provides a more accessible path than the present definitive line. Additionally, the proposed new route will have a recorded width of 4 metres, open and available for public use, over a defined route, where the current definitive line has no width recorded within the definitive statement. It is imperative, however, that the full width of 4 metres is provided to minimise reduction of the available width owing to seasonal growth and ground conditions. The proposed route will be fenced, meaning that there will be no scope for the public to deviate round obstructions or difficult sections.

Environmental and Climate Change Considerations

29. The County Ecologist was consulted regarding the diversion proposals and no adverse comments regarding the environmental impact of the diversion were received.

Risk Assessment

30. There are no identified risks which arise from the proposed diversion of parts of Baydon paths 2 and 11. The financial and legal risks to the Council are outlined in the "Financial Implications" and "Legal Implications" sections below.

Financial Implications

31. 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 Section 119 of the Highways Act 1980. The applicant has agreed in writing to meet the actual costs to the Council in processing the diversion order. 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.

32. Where there is an outstanding objection to the making of the Order, the Committee may resolve that Wiltshire Council continues to support the making of the Order, in which case it should be forwarded to the Secretary of State for decision. The outcome of the Order will then 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 where an Order is made under the Council's powers to do so in the landowners' interest that the Council does not provide any legal support for the Order at a hearing or inquiry thus minimising the expenditure of public funds even though it considers that the legal tests have been met.
33. Where the Council no longer supports the making of the Order, it may resolve that the Order 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 Section 119 of the Highways Act 1980.

Legal Implications

34. If the Council resolves that it does not support the Order, it may be withdrawn. There is no right of appeal for the applicant; however, clear reasons for the withdrawal must be given as the Council's decision may be open to judicial review.
35. Where the Council supports the making of the Order, it must be sent to the Secretary of State for determination, which may lead to the Order being determined by written representations, local hearing or local public inquiry. The Inspector's decision is open to challenge in the High Court.

Options Considered

36. Members may resolve that:
- (i) That the Order should be forwarded to the Secretary of State for determination as follows:
 - (a) The Order be confirmed without modification, or
 - (b) The Order be confirmed with modification.
 - (ii) Wiltshire Council no longer supports the making of the Order, in which case the Order should be withdrawn, with clear reasons given as to why Wiltshire Council no longer supports the making of the Order, i.e. why the Order fails to meet the legal tests.

Reason for Proposal

37. Despite the objections received it is considered, for the reasons given in paragraph 7.0 of the Decision report (please see **Appendix C**), “The Wiltshire Council Baydon 2 (part) and 11 (part) Diversion Order and Definitive Map and Statement Modification Order 2015” continues to meet the legal tests for the making of a Diversion Order under Section 119 of the Highways Act 1980.
38. Additionally, the legal tests for the confirmation of a Public Path Diversion Order, as set out under Section 119 of the Highways Act 1980, appear capable of being satisfied and no new evidence has been submitted during the formal objection period which would lead Wiltshire Council to no longer support the making of the Order.

Proposal

39. That “The Wiltshire Council Baydon 2 (part) and 11 (part) Diversion Order and Definitive Map and Statement Modification Order 2015”, be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination, with a recommendation from Wiltshire Council that the Order be confirmed with a modification to the statement for Baydon 11 to replace text missing in Part 3. After “...at its junction with Baydon 30” add “where BRIDLEWAY leading south for approximately 60 metres to its junction with Baydon path no. 2.”

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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 Order and Plan

Appendix C – Decision Report

Appendix D – Objections and Representations

Appendix E – Proposed alternative route