

HIGHWAYS ACT 1980 and WILDLIFE AND COUNTRYSIDE ACT 1981

THE WILTSHIRE COUNCIL PARISH OF TISBURY PATH NO. 83 DIVERSION ORDER AND DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2017

Purpose of Report

1. To:
 - (i) Consider the thirty objections received to the making of The Wiltshire Council Parish of Tisbury Path No. 83 Diversion Order and Definitive Map and Statement Modification Order 2017;
 - (ii) Recommend that the Order be revoked and the application abandoned.

A copy of the Order is appended at **Appendix A**.

Relevance to Council's Business Plan

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

Background

3. Although applications to divert and extinguish paths are accepted and processed by Wiltshire Council, it is not a statutory duty to do so and accordingly officers must prioritise other work that forms a core duty for Wiltshire Council. This has resulted in a waiting time of approximately two to three years for applications to divert or extinguish paths as they are given a lower priority than other work.
4. This situation is common in other local authorities and in some cases external consultants are used to perform the initial consultation stages of the application. This can have the effect of relieving the pressure on officers to deal with applications to divert and extinguish and can also expedite the process for applicants.
5. In this case an application to divert footpath Tisbury 83, received in April 2016, had already been the subject of a local consultation performed by a consultant (Mr M Walker) employed by the applicant. The application was accompanied by a comprehensive report addressing the proposal to divert, the legal tests, the objections and representations received during the consultation and the alterations made to the proposal in light of comments received.

6. The application was to divert footpath Tisbury 83 from its route past The Priory, St Annes Cottage and Wardour Catholic Primary School (where it passes across a playing field and along a driveway accessing two residential properties and the school) to a route leading around the perimeter of a cultivated area attached to The Priory, across the driveway to St Annes Cottage, across a field and past an electricity sub-station to join the road, the C.21.
7. The application was made by the owners of The Priory who seek to improve the security and privacy of their home by taking the path further away from the immediate frontage of their house. The applicant also pointed out the advantages for the school of removing the public and their dogs from the school site and especially, the playing field.
8. Officers of the council considered the application and the consultant's report, concluded that the legal tests contained within Sections 119(1) and (2) of the Highways Act 1980 had been met and recommended that an order be made. A copy of the council's decision report with the Consultant's report appended is included here at **Appendix B**.
9. The order was duly made and advertised. Thirty objections were received within the advertisement period with a further three received after the closing date. Wiltshire Council may not now confirm the order and must decide whether it supports the order or not. If it no longer supports the order it may decide to abandon it and revoke it. If it supports the order then it must be sent to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it be confirmed, either with modifications or as made.

Main Considerations for the Council

10. Copies of the Objections are appended at **Appendix C**. No representations in support of the order were received.
11. The legal tests that must be applied by Wiltshire Council in considering whether or not the order should be confirmed are contained within Section 119 of the Highways Act 1980.
12. **Section 119(1)** of the Highways Act 1980 states that:

“Where it appears to a council as respects a footpath, bridleway or restricted byway 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, bridleway or restricted byway 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'.

13. **Section 119(2)** of the Highways Act 1980 states:

"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".*

Section 119(3) of the Highways Act 1980 states:

"Where it appears to the council that work requires to be done to bring the new site of the footpath, bridleway or restricted byway 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.*

14. Although the council is only required to consider Sections 119(1) and (2) to make an order it is clear that it must consider Section 119(6) at the order confirmation stage.

15. **Section 119(6)** of the Highways Act 1980 states:

"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*

16. The council must also have regard to the Wiltshire Council Rights of Way Improvement Plan (ROWIP) - the current plan is entitled Wiltshire Countryside Access Improvement Plan 2015 – 2025 – Rights of Way Improvement Plan 2.
17. At 2-5 page 38 the council recognises opportunities for improving access:
 - Make routes more accessible, undertake surface improvements and improve maintenance.
 - Work within the framework of Wiltshire Council’s Gaps, Gates and Stiles Policy.
 - Encourage landowners to follow best practice for furniture design as set out in the above mentioned policy.
 - Work in partnership to promote and create accessible trails.
18. The proposed new route would have two gates along it. The current route has no gates recorded in the definitive statement though does have four gates along it. None of these gates have been authorised for stock control (or any other reason) and accordingly should not be taken into account when comparing the accessibility of the path. However, it is recognised that two gates would be necessary for stock control purposes; accordingly it is likely that there is no net gain with the new route when compared with the old.
19. Where a route is being diverted Wiltshire Council will specify a level of accommodation works that must be met before the new route is accepted by the council and any order made comes into force.
20. The council must also have regard to the needs of agriculture, forestry and the conservation of biodiversity.

Comments on the objections

21. Members of the Committee are now required to consider the objections received. The applicant has considered the objections and their comments are appended at **Appendix D**.
22. The tests within Section 119 (Diversion of footpaths, bridleways and restricted byways) in relation to the order require the council to be satisfied that the diversion is expedient as detailed in Section 119(1) and (2) i.e. relating to interest of the landowner and whether any new termination point is substantially as convenient and whether the new path or way will not be substantially less convenient for the public. Further (Section 119 (6)), that it is expedient to confirm the order having regard to the effect which the diversion will have on public enjoyment of the path or way, the effect on land affected by the removal of the ‘old’ path and the effect on land affected by the addition of the ‘new’ path.
23. The objections have highlighted a number of failings in the original application with regard to the effect on land served by the existing path:

Section 119(6)(b) – regard to the effect of:

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

24. Contrary to the applicants' claim that no persons have an interest in the land over which the existing path passes (question 6(c) application form) other than them it is apparent that the existing path passes over land owned by The Wardour Chapel Trust (the owners of Wardour Catholic School) and a small unregistered parcel of land at St Annes Cottage.
25. Both the Wardour Chapel Trust and the owners of St Annes Cottage have objected to the order and would like to see the existing path retained over their land.
26. The Wardour Chapel Trust objects on four grounds (objection number 9 Appendix C). One ground is that currently the children from Wardour Catholic Primary School walk along the footpath Tisbury 83 to attend chapel every Tuesday. They access the path from their own grounds but if the path were to be diverted they would not be able to do so. Although the applicant has made it clear they are willing to enter into an arrangement for a more convenient access for the school children, this could be revoked at anytime and is subject to the opinion of the landowner at any time.
27. Other grounds of objection made by the Trust include:
 - “(i) the footpath provides a sensible route for people travelling between the school and the church – the diversion would make the route less straightforward and unnecessary*
 - “(ii) the footpath was originally created for local people who needed to access the church; This has not changed and a diversion would take away that simple route which is steeped in historical usage.*
 - “(iii) The school children who use this path every week would be denied their easy straightforward walk to church with a longer diversion.”*
28. The owners of St Annes Cottage (Objection No. 6 Appendix C) also object to the diversion. Their response makes it clear that they are content with the path in its current position and that they object to the proposed change.
29. Taking just these two objections into account it can be seen that the order is not in all of the landowners' interest (and hence Section 119(1) fails) and that the diversion has a significant impact on the owners of the land over which the existing route passes in respect of the School (Section 119(6)(b) also fails). It is noted that The Wardour Trust own approximately 40% of the length of the land over which the existing route passes, which is considered a significant proportion of the total length affected.
30. Other tests contained within Section 119(6) are more subjective. The council must consider the convenience of the new path (the new path or way must not be substantially less convenient) and it must also consider the effect on the public's enjoyment of the way as a whole.

31. The new path can only be less convenient for the pupils of the school when making their weekly walk to the chapel and also to the residents of the houses by the school should they wish to walk north along the path to visit the chapel or the greater network. The two houses by the school are called Spring Cottage and School Cottage and representatives from both properties have objected to the order (objections numbers 24 and 32 Appendix C).
32. It is considered that it can also only be less convenient to walk across an open field (that may be stocked with animals) than to follow a defined route with at least one clear boundary. When officers visited the site in May 2017 the field was being grazed and the definitive line of Tisbury 83 had been fenced to separate the public from the stock. This would not happen if the path led diagonally across the field. There have also been a number of objections relating to the lack of convenience in having to walk along a length of highway verge from the sub-station at point H to the school entrance. Objectors who raise these points include Nos 3, 8, 9, 21, 24, 25 and 33 (Appendix C).
33. A considerable number of objectors consider that their use and enjoyment of the path would be lost if it failed to follow its historic route. It is accepted that the line of the path at the school was varied in 2011. The line of the path was moved by a maximum of 10 metres and a width of 4 metres was recorded for the affected section. However, maps provided by objector No.1 (Appendix C) demonstrate a path existing from at least the late 19th century. There was clearly a link between the School, the convent (now The Priory) and the chapel and various objectors have made it clear that they value that sense of history which they would not get from the new path which lacks the sense of purpose of the existing.
34. The existing path forms part of a promoted walking route, The Wessex Ridgeway, and it is likely that the historic aspect is enjoyed by users of that route also.
35. It is noteworthy that amongst the objectors are Tisbury Parish Council, West Tisbury Parish Council, the Tisbury Footpath Club, The Ramblers and the Open Spaces Society. This is in addition to the owners of the School land, St Annes Cottage and residents from School and Spring Cottages. Although it is clear that some of the points of objection raised are irrelevant to the legal tests contained within Section 119 of the Highways Act 1980, the substantive body of individual objections raised to this order does demonstrate that a significant number of users of the path do consider that their enjoyment would be lessened by the diversion of the path.
36. The committee should be aware that points raised by objectors relating to:
 - (i) whether or not the applicants knew about the footpath when they bought The Priory;
 - (ii) the addition of the path to the definitive map and statement in 1997 and all related processes (including the public inquiry and the Inspector's report);
 - (iii) the diversion of part of the path in 2011;

- (iv) whether it is 'right' that a path can be diverted in the interest of the landowner;

are irrelevant points that must not form a part of the council's reasoning or decision making process.

Safeguarding Considerations

37. Although some respondents have referred to the diversion improving the school's ability to safeguard the children it is noted that no response has been received from Wardour Catholic Primary School either in support or objection to the application or the order. At the initial consultation stage the applicant received 22 short emails of support from people with children at the school but 16 of these were identical and it is not clear how much information the respondents had about the diversion or how their support was canvassed.
38. The existing path leads across the school's playing field and around the edge of the site. It was clearly not considered a risk to the children's safety in 2011 when the path was only moved by a minimal extent to facilitate a development and although it is reasonable to say that safeguarding would be improved by the path's removal, the owner of the school land has objected to the diversion and the school itself is silent on the matter.
39. Safeguarding has not been given as a concern raised by the applicants with regard to The Priory end of the path.

Public Health Implications

40. There are no identified public health implications which arise from the confirmation of the making of this order.

Corporate Procurement Implications

41. 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 45 to 47 of this report.

Environmental and Climate Change Considerations

42. There are no environmental or climate change concerns associated with the confirmation of the making of this order.

Equalities Impact of the Proposal

43. The existing route leads over a number of differing surfaces, some well drained and 'weatherproof' and others grass and soil. The proposed new route leads over mown grass and field grass. On balance, it is considered that the new route may be more problematic for someone walking with a mobility aid or who was vision impaired though it is accepted that in dry conditions there would be little difference. Currently, there are four gates on the existing route compared to two on the proposed new route. However, although two of the gates on the existing route could be authorised for stock control it is difficult to see how the other gates could be lawfully authorised and accordingly they have not been counted for comparison purposes.

Risk Assessment

44. The financial and legal risks to the council are outlined in the “Financial Implications” and “Legal Implications” sections below.

Financial Implications

45. The applicant has agreed to pay all of the council’s costs associated with the making of the order, with the advertisement of the confirmed order and with the creation of the new path. However, Wiltshire Council is not empowered to charge the applicant any costs related to forwarding the application to the Secretary of State for the Environment, Food and Rural Affairs for confirmation by the Planning Inspectorate and accordingly would have to fund these from existing rights of way budgets.
46. Where there are outstanding objections to the making of orders, the committee may resolve that Wiltshire Council continues to support the making and confirmation of the orders. The orders will then be determined by the Planning Inspectorate by way of 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 negligible; however, where a local hearing is held the costs to the council are estimated to be around £200 and £1,500 to £3,000 where the case is determined by local public inquiry with legal representation (£200 without). The estimate is based on a one day inquiry.
47. There are no costs associated with the council resolving to abandon the orders though the council may be liable to judicial review and associated costs as a result of that action (see paragraph 48 below).

Legal Implications

48. Where the council does not support confirmation of the making of the orders and resolves to abandon them, it must be clear that decision relates to the legal tests contained within Section 119 of the Highways Act 1980. The applicant may seek judicial review of the council’s decision if this is seen as incorrect. The cost for this may be up to £50,000.

Options Considered

49. Members may resolve that:
- (i) The order is forwarded to the Secretary of State for Environment, Food and Rural Affairs for confirmation as made.
 - (ii) The order is forwarded to the Secretary of State for Environment, Food and Rural Affairs for confirmation with modifications.
 - (iii) The order is revoked and abandoned.

Reason for Proposal

50. Although on the face of it the application appeared to meet the legal tests contained within Section 119(1) and (2), on advertisement of the order and the wider publicity that is given by way of site notices it has become apparent that the owners of the land at Wardour School object to the proposal and that the order cannot be in their interest. Also the owners of St Annes Cottage object to the proposal and so do the local users of the path including Spring and School Cottages.

51. It is therefore doubtful that the proposal ever met the test contained within Section 119(1) of the Highways Act 1980 despite the application giving the appearance that it did.

52. In the decision report to make the order (Appendix B) officers observed the following:

“It should however be noted that the proposed diversion generated an unusual amount of correspondence and interest for a diversion and that although the applicant has worked with local people and the Senior Rights of Way Warden, Nick Cowen, to address concerns, it is possible that the Order will attract objections when made. The applicant is aware of this.

The making and confirmation of an Order under s.119 of the 1980 Act involves different and distinct legal tests to be applied. Although it is hoped that the proposal has met and satisfied all objections voiced initially....if it does receive objections that are not withdrawn the Order must be considered by the Southern Area Planning Committee.”

53. The ‘different and distinct’ legal tests to be applied at the confirmation stage relate to those contained within Section 119(6) of the Highways act 1980.

54. The council must have regard to the effect of the coming into operation of the new route on land served by the existing right of way. The owners of the school land have objected as have other properties served by the rights of way, that is St Anne’s Cottage (though arguably they may still exercise a private right of access along their drive and access the path), Spring Cottage and School Cottage (whose residents would have a much longer walk to access the path to the chapel). In fact, the only person immediately affected who does not object is the applicant; the owners of The Priory.

55. In addition to the regard the council must take to the above matters, it must also have regard to the effect of the diversion on the enjoyment of the path as a whole. Not one representation has been received in support of the new route being a better or more enjoyable alternative yet objections have been received from Tisbury Parish Council, West Tisbury Parish Council, The Ramblers, Tisbury Footpath Group, the Open Spaces Society, affected landowners and a range of users of the path.

56. Officers are satisfied that the responses are individually generated and given and that they reflect a sense of loss that the public will feel if it loses the right to use the existing path. Officers consider that they have demonstrated that their enjoyment would be severely affected by the diversion of the whole of the path.
57. Accordingly, it is considered that Section 119(6) of the Highways Act 1980 is not met with regard to the loss of enjoyment of the path as a whole and also as a result of the adverse effect on land served by the path as identified by the Wardour Chapel Trust, owners of St Annes Cottage and Spring and School Cottage.

Proposal

58. That the Wiltshire Council Parish of Tisbury Path No. 83 Diversion Order and Definitive Map and Statement Modification Order 2017 is revoked and the application abandoned.

Tracy Carter

Director – Waste and Environment

Report Author:

Sally Madgwick

Rights of Way Officer – Definitive Map

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

None

Appendices:

Appendix A – Order

Appendix B – Decision Report to make the Order

Appendix C – Objections to the Order

Appendix D – Applicant’s comments on the objections to the Order