

WILDLIFE AND COUNTRYSIDE ACT 1981

THE TOWN AND COUNTRY PLANNING ACT 1990 SECTION 257

**THE WILTSHIRE COUNCIL PARISH OF ROYAL WOOTTON BASSETT No. 10
(PART) AND No. 111 (PART) DIVERSION ORDER AND DEFINITIVE MAP
AND STATEMENT ORDER 2018**

Purpose of Report

1. To:
 - (i) Consider one objection to the Wiltshire Council Parish of Royal Wootton Bassett No. 10 (part) and No. 111 (part) Diversion Order and Definitive Map and Statement Order 2018.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs, with a recommendation from Wiltshire Council that the Order be confirmed without modification.

Relevance to the 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. Wiltshire Council has made an Order under Section 119 of the Highways Act 1980 diverting two public footpaths over land at Woodshaw Meadows on the south eastern slopes of Brynard's Hill, Royal Wootton Bassett. The Order was made pursuant to an application made by Wainhomes (South West) Holdings Ltd.
4. One objection has been made to the Order and has not been withdrawn; accordingly, Wiltshire Council cannot confirm the Order and must consider whether to abandon the Order or to submit it to the Secretary of State for Environment, Food and Rural Affairs for determination.
5. The land over which the footpaths lead is affected by planning application 15/10486/FUL (92 dwellings with associated roads, footways, parking, landscaping and drainage works) which was approved by Wiltshire Council in September 2016. The permitted development obstructed the route of the footpaths Wootton Bassett 10 (WBAS10) and Wootton Bassett 111 (WBAS111) with dwellings and associated garden fencing and driveways.

6. Construction started on site before the rights of way had either been temporarily closed or permanently diverted and accordingly Wiltshire Council received complaints from members of the public in May and June 2017 that the paths were blocked and a notice of obstruction was served on the council under Section 130A of the Highways Act 1980 in late June 2017. Wiltshire Council then served notice on the developer (Wainhomes (South West) Holdings Ltd on 7 July 2017 requiring the rights of way to be made open and available to the public. Following this, the paths were temporarily closed for reasons of public safety by a temporary traffic regulation order (TTRO). This has now expired.
7. It is usual for the developer to apply to have the rights of way diverted at the earliest opportunity (which in this case would have been in 2015 when the application for planning permission was made) but the council did not receive an application to divert the paths until August 2017, after development had started.
8. After due consultation, on 30 November 2017, an Order to divert the paths was made under Section 257 of the Town and Country Planning Act 1990 and one objection was received. Section 257 enables the diversion of paths which are affected by development but the Order cannot be confirmed if the development is substantially complete. Officers visited the site in February 2018 and found the development to be substantially complete with regard to the properties built over the rights of way. Accordingly, that Order is incapable of being confirmed and is unproceedable.
9. Officers considered alternative ways of diverting the rights of way and after due consultation an Order under Section 119 of the Highways Act 1980 was made on 21 May 2018 and duly advertised. This is the Order being considered here (see **Copy of Order Appendix A**).
10. Section 119 requires the council to have regard to different legal tests to those contained within the planning legislation used for the Order referred to at paragraph 8.

Main Considerations for the Council

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 Section 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 Sub-section (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 council must also have regard to the needs of agriculture, forestry and the conservation of biodiversity.
19. The matters contained within paragraphs 12 to 18 were considered by officers at the Order making stage (see **Decision Report Appendix B**) and reviewed in the light of the objection received to the Order (paragraphs 21 to 31 below).
20. **Objection**

Further consideration must be given to the content of the objection. This has been made by a member of the public and is as follows:

“I object to both diversion proposals for the reasons set out below.

I note that the routes currently proposed differ from those to which I objected when Wiltshire Council proposed diversions under s.257 of the TCPA. However, the reasons for objection then still apply. Indeed, the new proposed routing of WBAS10 is substantially worse.

WBAS111

I object to this diversion.

The revised proposal suffers from all the concerns that I raised about the earlier proposal. In addition, the proposed diversion now seeks to run the path along the footway to a road for a significant length. I set out my objection to this in the section headed “The legal impact of diverting a path along estate roads” in my letter dated 12 January 2018.

The diversion originally proposed with the planning application (1629/06) is entirely feasible, is more consistent with national and local planning policy and has other practical advantages.

I further note that:

1. *The image of this proposal is not available on Wiltshire Council's website. See below.*

[pasted image of web page]

2. *Although we have an agreement that you will send me copies of notices relating to the north Wiltshire area, I have not received this notice from you directly. I would be grateful if you could post or email me a copy."*

Letter dated 12 January 2018:

"...I object to both diversions for the reasons set out below.

WBAS10

The proposed diversion redirects the path westward of the existing line where it turns back on itself to head north to re-join the existing line.

I have a number of objections:

1. *This is not the diversion which accompanied the approved planning application (Drawing 1629/06).*
2. *The proposed diversion continues to use a stretch of the existing path which follows a line through a boggy area behind the bund.*
3. *The proposed diversion continues to use a stretch of the existing path which follows a line across a stream where there is no bridge.*
4. *The proposed diversion adds an unnecessary extra loop into the line of the path. In practice, many users are likely to ignore this loop and follow the line set out in drawing 1629/06 anyway.*
5. *The proposed route does not meet the requirements of NPPF para 75 and Wiltshire Core Policy 52 that developments should protect or enhance the green infrastructure.*

The line of 1629/06 suffers from none of the above shortcomings.

The route of 1629/06 would benefit from a bridge across the concrete sluice so that walkers did not have to negotiate the slope. The cost of such a bridge would be trivial in the context and cost of this development. A bridge would be consistent with national and local policy as set out in 5 above. It would also be consistent with Wiltshire Council PIG scheme. It is also relevant that the line of 1629/06 is already the official temporary diversion so walkers have become used to using it and may be less inclined to revert to the previous, now much less convenient, route than if the temporary diversion had never existed. If the public is going to use this route anyway then Wiltshire Council has a duty of care whether or not it is an official footpath. Attempts to block off this route would likely cost more than a bridge as well as introducing additional risk for determined users seeking to circumvent the blockage.

The line of 1629/06 incorporating a bridge would be far more accessible to users with restricted mobility than the proposed line through the bog and across the stream (where there is no bridge). It also affords level access to an attractive walk along the top of the bund.

I object to this diversion.

WBAS 111

The Facts

The drawing dated August 2017 showing the proposed “diversion” of WBAS 111 indicates a route that is substantially along estate footways adjacent to roads.

Law/policy

1. Policies on retention of green infrastructure

A number of national and local policies emphasise the retention or enhancement of green infrastructure when open country is developed:

1 National Planning Policy

The National Planning Policy Framework (NPPF) is the main document to guide planning decisions. Paragraph 75 states:

Planning policies should protect and enhance public rights of way and access. Local authorities should seek opportunities to provide better facilities for users, for example by adding links to existing rights of way networks including to National Trails.

Government Planning Practice Guidance is available online to complement and elaborate on the NPPF. This states:

Public rights of way form an important component of sustainable transport links and should be protected or enhanced. The Defra Rights of Way Circular 1/09 gives advice to local authorities on recording, managing and maintaining, protecting and changing public rights of way. It also contains guidance on the consideration of rights of way in association with development. The Circular also covers the statutory procedure for diversion or extinguishment of a public right of way.

2 Wiltshire Core Policy

In January 2015, Wiltshire Council adopted its Core (Planning) Strategy. Paragraph 1.3 states as a key principle:

Protecting and planning for the enhancement of the natural, historic and built environments, including maintaining, enhancing and expanding Wiltshire’s network of green infrastructure to support the health and wellbeing of communities.

Strategic objective 5 is identified as “protecting and enhancing the natural, historic and built environment”.

Paragraph 3.8 explains that this includes “maintaining, enhancing and expanding Wiltshire’s multi-functional green infrastructure network”. The glossary defines green infrastructure network as including “green corridors, cycling routes, pedestrian paths and rights of way”.

The strategy contains a specific Core Policy (52) relating to green infrastructure. The Core Policy states (inter alia):

Development shall make provision for the retention and enhancement of Wiltshire’s Green Infrastructure network, and shall ensure that suitable links to the network are provided and maintained. Where development is permitted developers will be required to:

- *Retain and enhance existing on site green infrastructure.*
- *Put measures in place to ensure appropriate long-term management of any green infrastructure directly related to the development.*
- *Provide appropriate contributions towards the delivery of the Wiltshire Green Infrastructure Strategy if damage or loss of existing green infrastructure is unavoidable, the creation of new or replacement green infrastructure equal to or above its current value and quality, that maintains the integrity and functionality of the green infrastructure network, will be required.*

Development will not adversely affect the integrity and value of the green infrastructure network, prejudice the delivery of the Wiltshire Green Infrastructure Strategy, or provide inadequate green infrastructure mitigation.

Green infrastructure projects and initiatives that contribute to the delivery of a high quality and highly valued multi-functional green infrastructure network in accordance with the Wiltshire Green Infrastructure Strategy will be supported. Contributions (financial or other) to support such projects and initiatives will be required where appropriate from developers.

- 3 *WC’s Rights of Way Improvement Plan (ROWIP)*
Paragraph 3.6.3 of WC’s ROWIP states:

One aspect of improving access is to look at the planning process and individual development proposals as a means of maintaining and enhancing the public rights of way network. This approach is supported by the planning teams which have policies recognising the importance of access to the countryside and the need to improve opportunities to use public rights of way.

- 4 *Wiltshire Council’s Countryside Access Improvement Plan (CAIP)*
Page 33 of the CAIP states:

“new developments should retain or create good links in the Countryside Access Network.”

2. The legal impact of diverting a path along estate roads

When a public right of way is diverted on to a pavement which is part of the public highway (whether adopted or not), the footpath status ceases to

exist, the route then becoming one answering to the description of footway in Section 329 ('Further provisions as to interpretation') of the Highways Act 1980. This provides that "footpath" means a highway over which the public have a right of way on foot only, not being a footway; "footway" means a way comprised in a highway which also comprises a carriageway, being a right of way over which the public have a right of way on foot only.' So the pavement is not a public footpath at all but a pavement which would have been provided in any case. Where a road is made without a pavement, there is a right of way on foot in any case. In both cases the right of way on foot, whether on the footway or in the carriageway, now derives from the status of the way as a vehicular right way. It is therefore ultimately misleading to describe the proposals as a diversion when there will in fact be an extinguishment of the footpath.

The "diversion" of a footpath along an estate road constitutes a legal event under Section 53 (3)(a)(ii) of the Wildlife and Countryside Act 1981 whereby:

(ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description;

In such circumstances Section 53(2)(b) of the WCA requires the path to be deleted from the definitive map and statement.

Basis of objection

- 1. The proposals amount to the deletion of the "diverted" section of WBAS111. They therefore breach national and Wiltshire Council policy.*
- 2. Moreover, diverting walkers along housing estate pavements will necessarily reduce their enjoyment of the path or way as a whole. The public likes to go for "Country Walks" not "Housing Estate" walks.*
- 3. In another recent case where Wiltshire Council sought to close a path under s.257 of the TCPA 1990, local walkers proposed a diversion. However, Wiltshire Council rejected it as being insufficiently convenient compared to the route it would replace. This current proposal also contradicts Wiltshire Council's convenience criterion. The diverted route is well over twice the length of path to be extinguished. That would not matter if the diversion was scenic but it is not, it is along estate roads."*

End of objection.

21. Comments on the Objection

It is necessary for the council to consider the application of the legal tests contained within Section 119 of the Highways Act 1980.

22. **S.119(1) – The landowner’s interest**

The applicant is the landowner and developer for this site. It is clearly in their interest to divert the rights of way away from properties being developed to enable them to develop and sell the properties. They submitted the application and have agreed to reimburse the council for costs related to making and confirming the Order, both of which are actions that demonstrate their obvious interest and appreciation of the benefits.

23. **S.119(2) – Location and convenience of termination points**

The termination points of both routes (WBAS 10 and 111) are unaltered by the Order. There is therefore no alteration in the termination points and no reduction in the convenience of them as a result of the Order.

24. **S.119(6) – Convenience of the new path**

The diversion of WBAS111 moves the path to a direct line. 305 metres of path is extinguished by the Order and replaced by 310 metres of footpath. The route leads over a path beside a hedgerow and is not associated with any vehicular highway or footway. It is considered that there is no change to the convenience of the path.

25. The diversion of WBAS 10 moves the route in three distinct parts: one length of path moves to lead alongside a hedgerow (A to C on Order plan) and another length moves to cross an area of open land (D to B on Order plan). Neither of these lengths is associated with any vehicular highway or footway. The central section leads along the footway of Evening Star. This is a road that is the subject of an adoption agreement and which will eventually become a road and footway maintainable at public expense. However, in order to preserve the continuity of the footpath it is necessary to include this stretch of path in this Order, even though it will eventually be deleted from the definitive map. The new path is unlikely to be less convenient to use as although it is longer it includes a well-drained section of footway that is easy to follow and use. This length is approximately 100 metres in length which, on a path that is 2.7 kilometres in length overall, is not a significant increase in length or decrease in convenience. It is also noted that for anyone joining WBAS10 midway through (from properties along Evening Star, the north-east or the close to the north of it) the proposed route for joining the unaffected section of WBAS10 over the stream is more convenient. Likewise, for anyone travelling from the railway line boardwalk section over the bridge and onto areas to the north-west and east the order route offers a convenient route. For example, anyone seeking a recreational walk from Interface Business path to the railway and canal would find the order route more convenient than the existing.

26. Officers have considered other options for the route but consider there are none. The alternative route suggested by the objector is not possible for a number of reasons including accessibility and safety.

- (i) Part of the land is not in the developer’s ownership and there is no consent from the owner.
- (ii) It would take the public along and over a significant flood defence feature.

- (iii) The route would cross a large open ‘weir’ arrangement, designed to manage flood water. It incorporates water, which would be fast flowing at certain times of the year, and a significant drop and slope above the water and metal grills protecting it (see **Appendix C Images of Flood control**).
 - (iv) The Environment Agency has indicated it would object to any Order taking a public footpath over this area.
 - (v) There is no funding or consent for a bridge to be erected over the flood defence feature. Any bridge at this location, even if consented, would by necessity be large and costly to both build and maintain.
27. Details of the route favoured by the objector were shown in a plan approved as part of the planning permission for the development (Plan 1629/06), but the planning consent does not – and cannot – alter the public right of way and whilst it is regrettable that problems associated with the suggestion were not identified at the planning stage, neither the developer nor the council is bound in any way to proceed with that diversion.
28. **S.119(6) – Effect on public enjoyment of the path or way as a whole**
- WBAS10** Notwithstanding that there has only been one objection to the proposed diversion of this path from the public it is difficult to see that the diversion itself detracts from the public enjoyment of the path as a whole. The development of the Brynard’s Hill/Woodshaw area undoubtedly detracts from the enjoyment of the path as a whole for anyone wishing for a quiet rural walk but the diversion itself only exposes the public to approximately 100 metres of pavement walking which, given the easy nature of following the route and the fact that Evening Star is likely to be a relatively quiet estate road, cannot be said to have a significant effect on public enjoyment of the route as a whole.
29. It would seem certain that crossing the stream via the rustic bridge and raised walkway on Royal Wootton Bassett 10 offers a more pleasant and enjoyable route than crossing the industrial style flood defence mechanism beside the railway line that is the suggested alternative of the objector (see **Appendix C**).
- WBAS111** The diversion of this path is relatively insignificant and public enjoyment is unlikely to be affected one way or the other.
30. **S.119(6) – Effect on land served by the existing right of way**
- WBAS10** The privacy of the affected properties and their gardens is greatly improved by moving the footpath to the hedged boundary of the site and across the open land.
- WBAS111** The privacy of the affected properties and their gardens is greatly improved by moving the footpath to the hedged boundary of the site and across the open land.
31. **S.119(6) – Effect on land served by the new right of way**
- WBAS10 and WBAS111** There is no detrimental effect.

32. Consideration of the Rights of Way Improvement Plan

None of the diverted sections have any stiles or gates on them and surface improvements undertaken as part of the development will assist accessibility for all users, particularly as many users of these paths in future will be residents of the development.

33. Regard to the needs of agriculture, forestry and conservation of biodiversity

The land has been acquired for development and is being developed. There has been a clear impact on agriculture and the fauna and flora of the site, however, the diversion of the rights of way does not have any additional effect.

Overview and Scrutiny Engagement

34. Overview and Scrutiny Engagement is not required in this case.

Safeguarding Considerations

35. There are no safeguarding considerations associated with the confirmation of this Order.

Public Health Implications

36. There are no identified public health implications which arise from the confirmation of this Order.

Corporate Procurement Implications

37. There are no procurement implications associated with this Order.

38. 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 42 to 44 of this report.

Environmental and Climate Change Considerations

39. There are no environmental or climate change considerations associated with the confirmation of this Order.

Equalities Impact of the Proposal

40. The proposed new route will not contain any limitations to use (i.e. stiles or gates) and in parts will have a more accessible surface than the existing route.

Risk Assessment

41. There are no identified risks which arise from the confirmation of this Order. The financial and legal risks to the council are outlined in the “Financial Implications” and “Legal Implications” sections below.

Financial Implications

42. 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 recover costs from the applicant 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 this Order though the council's costs relating to the Order being determined by the Planning Inspectorate on behalf of the Secretary of State may not be reclaimed from the applicant.
43. 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 determination. The outcome of the Order will then be decided 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 external 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.
44. Where the council no longer supports the making of the Order, it may resolve that the Order be withdrawn and revoked 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. However, where there is a pre-existing grant of planning permission the council must make very clear its reasons for not proceeding with the Order.

Legal Implications

45. If the council resolves that it does not support the Order, it may be abandoned. There is no right of appeal for the applicant; however, clear reasons for the abandonment or withdrawal must be given as the council's decision may be open to judicial review. This could be more likely where a grant of planning permission has already been made.
46. Where the council supports the making of the Order, because it has an outstanding objection, 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

47. Members may resolve that:

- (i) 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 abandoned and revoked, 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

48. Officers consider that the tests contained within Section 119 of the Highways Act 1980 have been met and this Order should be confirmed.
49. The Order has a small error in it regarding the date it was sealed. The Order was sealed on 21 May 2018 but the date is given as “21st day of May 201”. Wiltshire Council has no power to amend the Order and insert the number “8”. However, the Secretary of State has the power to amend the Order and the council may request that he does this. It is noted that this is not a matter that has been raised by the objector to the Order.

Proposal

50. That The Wiltshire Council Parish of Royal Wootton Bassett Path No. 10 (part) and No. 111 (part) Diversion Order and Definitive Map and Statement Modification Order 2018 is forwarded to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that it is confirmed with a modification to the Order to correct the year of sealing to read “2018” at the end of the Order.

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

None

Appendices:

- Appendix A - Copy of Highways Act Order
- Appendix B - Decision report to make Highways Act Order
- Appendix B.A - Decision report to make Town and Country Planning Act Order
- Appendix B.B - Town and Country Planning Act Order
- Appendix C - Photographs of flood defence structures