

WILTSHIRE COUNCIL**APPLICATION TO DIVERT PARTS OF FOOTPATHS ROYAL WOOTTON
BASSETT 10 and 111****1 Purpose of Report**

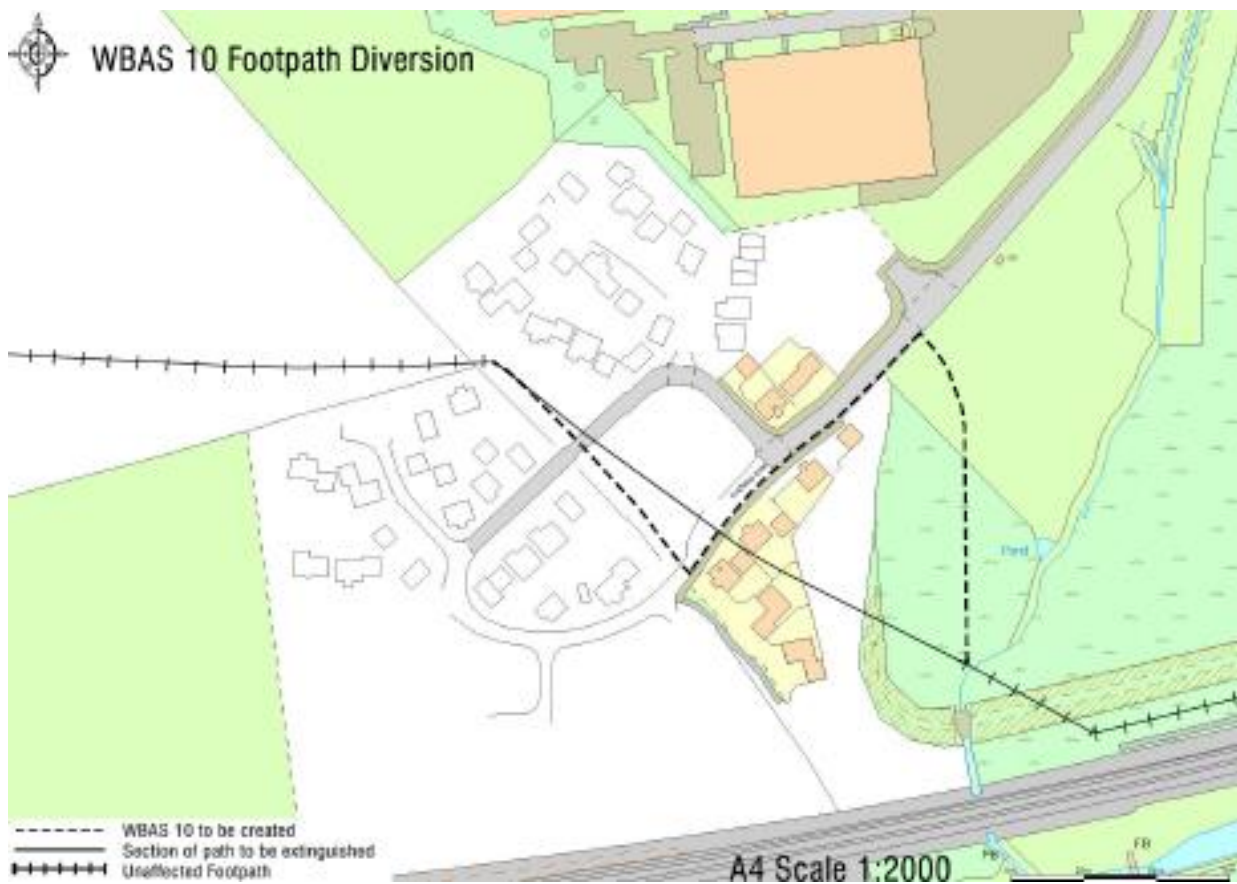
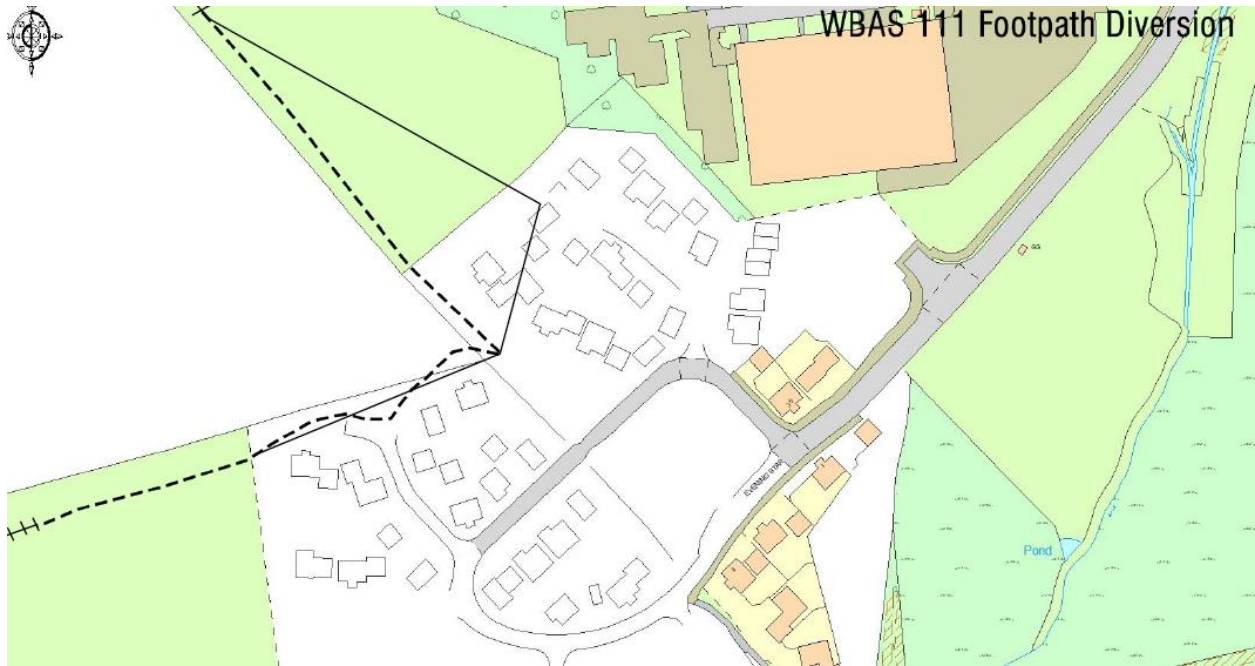
1 To:

- (i) Consider and comment on an application to divert footpaths over land at Woodshaw Meadows, Brynard's Hill, Royal Wootton Bassett to enable a permitted development to proceed and to avoid existing structures.
- (ii) Recommend that an Order be made to divert the footpaths under s.119 of the Highways Act and to confirm the Order if no representations or objections are made. The Order will be drafted to require the certification of works before the Order comes into effect.

2 Background

- 2.1 In August 2017 Wainhomes (South West) Holdings Ltd applied for an order to divert parts of footpaths 10 and 111 where they crossed the site of a permitted development at Brynard's Hill, Royal Wootton Bassett. The diversion of the paths was necessary to enable the permitted development to proceed and a decision to make an order was made. See Appendix A.
- 2.2 On 30 November 2017 Wiltshire Council made an order under s.257 of the Town and Country Planning Act 1990 to divert the paths (see Appendix B). The order was duly advertised and attracted one objection. As a result of the objection officers of the Council once again visited the site to investigate the comments made in objection and noted that the development was substantially complete with respect to the right of way.
- 2.3 Where a permitted development is substantially complete an order made under s.257 of the 1990 Act cannot be confirmed and accordingly the Council has no choice but to abandon the order.
- 2.4 The development (housing, gardens and garages) now obstructs the rights of way through the site and the developer continues to require a diversion of the paths. Accordingly officers of the council have considered the diversion of the footpaths under s.119 of the Highways Act 1980.
- 2.5 It is a feature of this location that it is on a hillside leading down to the canal and the mainline railway in the south. This area towards the bottom of the hill is prone to waterlogging and has a significant drainage feature managed by the Environment Agency to the south east. See images at paragraph 7.3 Appendix A. There are no public rights along the embankment that forms part of the flood defence but it has been observed that members of the public do walk in this area.
- 2.6 Owing to the purpose of the features here (flood management), the ownership and control of them (the Environment Agency) and risks associated with slipping and falling, children playing and fast flowing water the rights of way may not be diverted along these routes or over these features.

2.7 There is therefore relatively little scope to divert the paths whilst retaining their rural character and their accessibility. However, a proposed route for path no 111 has been identified that leads south east beside a hedge line before leading south west through proposed green space. A proposed route for path no 10 has been identified that in part leads beside a hedge line, in part along an estate footway and then across a landscaped space to re-join the definitive line of path no 10 over an existing bridged crossing of a stream.



3 Consultation

- 3.1 A consultation into the above proposals was circulated to those listed at Appendix 1 paragraph 6.2 between 29 March and 04 May 2018.

4 Consultation responses

4.1 27 April 2018 The Ramblers, Swindon and North East Wiltshire

“You refer to the problem of the poor drainage on parts of this site. In our opinion the diversion route proposed in your letter dated 29 March does not overcome this problem as it will still require walkers to use the section of the existing route of WBAS 10 which runs between the footbridge and the flood defence bund. As you know, this section of path is on very marshy ground and we believe this is why walkers have been using an alternative route along the top of the bund, causing the legal route to become overgrown and unusable. We believe most walkers will continue to use the alternative route unless the Council improves the legal route by installing a boardwalk across the marshy ground as well as rebuilding the footbridge. Clearly this could be rather expensive.

You say in your email that any route that leads over the flood defence system will not be considered. We agree that the crossing of the watercourse on this route is currently unsafe but it could be made safe by the installation of a metal handrail/safety barrier and the removal of a small section of the brickwork. We believe that these works might be less expensive for the Council than the required improvements to the legal route; they would also legitimise use of a route which is still likely to be used anyway.

We would therefore ask the Council to reconsider the proposed diversion.”

- 4.2 **Officer’s comment:** the Senior Rights of Way warden has explained to the Ramblers respondent that works will be undertaken to improve access over the wet area of the definitive line south of the footbridge and has also explained the constraints that the Council would have for building any sort of structure on the Environment Agency’s asset. Any new route would not be certified as acceptable until it was formed in accordance with the council’s specification.

4.3 30 April 2018 Wiltshire Bridleways Association

“With reference to your letter of 29th March 2018 concerning the proposed diversion of Paths WBAS 10 & WBAS 111, Wiltshire Bridleways Association objects to this diversion for the following reasons:

WBAS 10 has Higher Rights as exemplified by the Finance Act 1910 Valuation Map and is a restricted byway and as such cannot be diverted as a footpath.

Please note our objections accordingly.”

4.4 Officer’s comment:

Wootton Bassett path no. 10 is a long path (approximately 2.5 km in length) and whilst it is accepted that a section south of the railway and the canal is uncoloured on the Finance Act plan the section of path leading over Brynards Hill that is affected by this proposal is coloured and included in the valuation of the hereditaments. This section of the path has been consistently shown as a footpath in historic Ordnance Survey mapping and officers are unaware of any evidence to support any higher rights over this part. Accordingly the objection of the Wiltshire Bridleways is unlikely to manifest in the event that an Order is made as it is believed their objection relates to a part of path no 10 that is unaffected by the Order and is in fact separated from it by both the railway and the canal. No higher rights were found at the point where path no 10 crossed the railway when it was built and path no 10 was preserved across the railway line as a foot crossing on the level.

5 Considerations for the Council – Legal Empowerment

5.1 To effect the diversion it will now be necessary to apply s.119 of the Highways Act 1980 as it is no longer possible to divert these rights of way under s.257 of the Town and Country planning Act 1990.

5.2 **The Highways Act 1980 s.119** states:

“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.

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”.

5.3 Although the Council is only required to consider s.119(1) and (2) to make an order it is clear that it is appropriate for it to also consider s.119(6) at the order making stage.

5.4 In *Hargrave v Stroud DC* [2002] EWCA Civ 1281, Schieman L.J. stated that:

“On the face of the subsection therefore the authority has discretion as to whether or not to make an order. I do not consider that the mere fact that it is expedient in the interests of the owner that the line of the path should be diverted means that Parliament has imposed on the authority a duty to make such an order once it is satisfied that this condition precedent has been fulfilled.”

5.5 Subsection (6) sets out factors which are to be taken into account at the confirmation stage. However, it has been held that the Authority is entitled to take these factors into account at the order making stage. In *Hargrave v Stroud* (above), Schieman L.J. held that:

“...the authority faced with an application to make a footpath diversion order is at liberty to refuse to do so. In considering what to do the Council is, in my judgment...entitled to take into account the matters set out in s.119(6). It would be ridiculous for the Council to be forced to put under way the whole machinery necessary to secure a footpath diversion order where it was manifest that at the end of the day the order would not be confirmed.”

- 5.6 Additionally then, after making an order the Council should also consider the second test under Section 119(6) which must be met at the Order confirmation stage.

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

- 5.7 The Council must have regard to The Equality Act 2010. This act requires (broadly) that in carrying out their functions, public authorities must make reasonable adjustments to ensure that a disabled person is not put at a substantial disadvantage in comparison with a person who is not disabled. The Equality Act goes further than just requiring a public authority does not discriminate against a disabled person. Section 149 imposes a duty, known as the “public sector equality duty”, on the public bodies listed in sch. 19 to the Act, to have due regard to three specified matters when exercising their functions.

- 5.8 These three matters are:

- Eliminating conduct that is prohibited by the Act
- Advancing equality of opportunity between people who have a disability and people who do not; and
- Fostering good relations between people who have a disability and people who do not. The Equality Act applies to a highway authority’s provision of public rights of way services. (DEFRA Guidance *Authorising structures (gaps, gates and stiles) on rights of way* Oct 2010)

- 5.9 The Council must also have regard to the Wiltshire Council Rights of Way Improvement Plan (ROWIP). The ROWIP recognises the Council’s duty to have regard to DDA95 (replaced by the Equalities Act 2010) and to consider the least restrictive option.

- 5.10 The Council must also have regard to the needs of agriculture, forestry and the conservation of biodiversity.

- 5.11 The Council is also empowered to make a ‘combined order’ under s.53(2)A of the Wildlife and Countryside Act 1981. The effect of this means that on the confirmation of the order the definitive map and statement may be changed without the further need to make an order under s.53(3)(a)(i) of the 1981 Act (also known as a ‘legal event order’ or an ‘unadvertised order’).

- 5.12 Any Order made may come into effect a set time after confirmation. It is therefore important that works to create the new path are completed to the satisfaction of Wiltshire Council before the end of this period or in a manner prescribed in the Order.

- 5.13 Where the new path requires construction that falls within s.55(1) of the Town and Country Planning Act 1990 planning permission for the works will be required.
- 5.14 Section 55(1) of the 1990 Act states that development means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. Engineering Operations is defined within the 1990 Act (s.336(1)) as including the formation or laying out of means of access to highways and means of access includes any means of access whether private or public for vehicles or for passengers, including a street.

6 Comments on Considerations - Highways Act 1980 s.119

6.1 s.119 (1) – Expediency in the interests of the landowner

The landowner needs to divert the paths to prevent enforcement action by the Council to remove the obstructions to the highway. The obstructions are significant and form part of the overall design of the residential development.

6.2 s.119(2) – Alteration of the termination point

The termination point of the paths are unaltered. Joining points for the diverted sections are as convenient or more convenient than the existing ones.

6.3 s.119(6) – Convenience of the path

WBAS111

The proposed new route follows a more direct and natural line utilising some green features of the site. The new route is of similar length (existing = 305 metres, proposed = 310 metres).

WBAS10

The proposed new route leads south east from the existing length of WBAS10 to Evening Star where it leads along the reserved footway for 120 metres before leading broadly south to rejoin WBAS 10 near to a bridge over the stream. The proposed new route is longer (existing = 200 metres proposed = 341 metres), however, the ease of access offered by this new route is considerably better than the existing which leads over wet ground (the Council is obliged to consider the route without the obstructions it currently has – i.e. fences and buildings). In this area the closer you get to the railway and the canal the worse the drainage of the site is. Anyone walking this route would have further to go, but it would be easier to do so. In an area that is already popular with recreational walkers and is likely to become more popular with the spread and occupancy of the residential development and the development of the Wilts and Berks canal, the diversion of the path to an area of better drainage can only be advantageous from a perspective of convenience.

6.4 s.119(6) – Effect of the diversion on public enjoyment of the paths or ways as a whole

WBAS10 and WBAS111

The diverted paths will provide a clearer path through the development which can be used with greater confidence by the public. There is no doubt that the loss of rural aspect of the paths is regrettable from the perspective of anyone out to enjoy the countryside but it is an inescapable fact that the development in this area has altered the character of many of the paths and WBAS 10 is especially affected by this. The options for diversion are constrained by drainage features (especially flood relief features), soil type and development and it is considered that the public

enjoyment is better served by a clearly defined route that can be used confidently rather than by a more obscure route threading through the estate.

6.5 **s.119(6) – Effect on lands served by the existing right of way**

The use of the land over which the right of way leads has altered with the development of the area, the diversion of the rights of way will have little or no effect on any land served by them, other than to accommodate the permitted development.

6.6 **s.119(7) – Effect on lands over which new rights of way are proposed**

The use of the land over which the right of way leads has altered with the development of the area, the diversion of the rights of way will have little or no effect on any land served by them, other than to accommodate the permitted development.

6.7 **Material provisions of the Rights of Way Improvement Plan**

Wiltshire Council's Countryside Access Improvement Plan 2015 – 2025 (Rights of Way Improvement Plan 2) identifies that the network is largely historic and although it has evolved, in places it does not meet the present and likely future needs of users and potential users (appendix 4 page 19 W1).

6.8 It is clear that there would be mutual benefit if the route was moved from its historic course to allow the development of the area and to provide a more readily accessible route.

iv) **Environmental Impact of the Recommendation**

6.9 Planning Consent has been granted with full consideration of the environmental impacts of the proposal. The diversion of the right of way has no identified environmental impact.

v) **Risk Assessment**

6.10 There are no risks to users of the path associated with the propose diversions. Alternative routes that lead over or near the Environment Agency's flood relief features are considered to represent an increased risk to the public, especially to children and anyone at risk from slipping or falling. Officers are unaware of any incidents at this location but consider it an unacceptable risk for the Council to accept.

6.11 The applicant will pay the actual costs associated with the application. If both routes are put on the same order the costs associated with advertisement will be reduced to half of what they would be for two orders. This is clearly advantageous but does carry with it the risk that if an objection to only one part of the order is made, it will have the effect of holding up the process for the other part of the order.

vi) **Legal Considerations and Financial Implications**

6.11 The applicant will meet costs related to the application and will meet all costs related to the confirmation of the order excluding any costs associated with sending the Order to the Secretary of State (SoS) for determination. This occurs if objections are received. The SoS may choose to determine the order by written representations (no additional cost to the Council), a local hearing (approximate cost £200-£300) or a public inquiry (approximate cost £3000).

6.12 Although the making of public path orders is a power that Wiltshire Council has and is not a duty, where the planning authority and the highway authority are the same authority, a duty is implied. If Wiltshire Council fails to make an order following the granting of planning permission it is liable to application for judicial review from the developer. This has a potential cost to the Council of up to £50000.

vii) Equality Impact

6.13 The Council must have regard to The Equality Act 2010. This act requires (broadly) that in carrying out their functions, public authorities must make reasonable adjustments to ensure that a disabled person is not put at a substantial disadvantage in comparison with a person who is not disabled. The Equality Act goes further than just requiring a public authority does not discriminate against a disabled person. Section 149 imposes a duty, known as the “public sector equality duty”, on the public bodies listed in sch. 19 to the Act, to have due regard to three specified matters when exercising their functions.

6.14 These three matters are:

- Eliminating conduct that is prohibited by the Act
- Advancing equality of opportunity between people who have a disability and people who do not; and
- Fostering good relations between people who have a disability and people who do not.

6.15 The Equality Act applies to a highway authority’s provision of public rights of way services. (DEFRA Guidance *Authorising structures (gaps, gates and stiles) on rights of way* Oct 2010)

6.16 The Council must also have regard to the Wiltshire Council Rights of Way Improvement Plan (ROWIP). The ROWIP recognises the Council’s duty to have regard to DDA95 (replaced by the Equalities Act 2010) and to consider the least restrictive option.

6.17 None of the routes will have any limitations or conditions attached to them and there will be no stiles or gates. Wiltshire Council would require all paths to be provided in a well drained form to maximise accessibility.

7 Options to Consider

- i) To make one order under s.119 of the Highways Act 1980 to divert both of the routes discussed in this report.
- ii) To make two orders under s.119 of the Highways Act 1980 to divert the routes.
- iii) To make no orders at all and instead to enforce the legal line of the paths through properties and through the site.

8 Reasons for Recommendation

8.1 It is clearly expedient to amend the definitive map in this area in respect of the existing development and to divert parts of the paths to enable the permitted development to proceed lawfully.

8.2 Officers are satisfied that the diversions discussed in this report meet all of the legal tests for making and confirming an Order made under s.119 of the 1980 Act.

8.3 Making one Order will incur less costs for the applicant.

8.4 Diverting the public footpath at this time will allow the development to proceed and would prevent the need for enforcement of the definitive line where there are existing obstructions.

9 Recommendation

63 **That Wiltshire Council makes an order under s.119 of the Highways Act 1980 and s.53 of the Wildlife and Countryside Act 1981 to divert parts of Royal Wootton Bassett paths 10 and 111 and to confirm the order if no objections or representations are received and to amend the definitive map accordingly.**

Sally Madgwick
Rights of Way Officer

15 May 2018