

HIGHWAYS ACT S.119

**APPLICATION TO DIVERT PUBLIC BRIDLEWAYS CALNE WITHOUT 89 (PART),
89A AND 89B AT THE MILL HOUSE, CALSTONE WELLINGTON**

Purpose of Report

1. To:
 - (i) Consider an application for an Order to divert lengths of public bridleways at The Mill House, Calstone Wellington, Calne.
 - (ii) Recommend that Wiltshire Council refuses the application for an Order to divert lengths of public bridleways at The Mill House, Calstone Wellington, Calne.

The officers' report and appendices are appended at **Appendix 1**. **Appendix 1.F** is a plan showing the existing route and the proposed change and is provided for reference purposes.

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 statutory duties to maintain the record of public rights of way in Wiltshire (excluding the Borough of Swindon), to maintain the rights of way shown therein, and to assert and protect them for the use and enjoyment of the public. These duties are not discretionary.
4. In addition to these duties the Council also has a power to make Orders to alter the rights of way network (though not for highways carrying a right for the public to use mechanically propelled vehicles). These Orders are known as public path Orders and they may create, extinguish or divert public rights of way. Wiltshire Council accepts applications for these Orders and processes them amongst work relating to its statutory duties.
5. The law permits applications to be made in the interests of landowners though it is clear that criteria laid out in the legislation must be met before any Order can be made or confirmed.

6. Applications for public path orders may be made under a variety of sections of the Highways Act 1980. Section 119 allows for the diversion of public paths where the existing route would be extinguished but a new route provided in its place. The new route must meet a number of tests or considerations largely reliant on comparison with the existing route and the effect of the loss of the existing and the creation of the new.
7. This comparison cannot take account of obstructions on the existing route or of any lack of maintenance. The comparisons must be made as if the existing route were open and available for the public and in a condition suitable for the local traffic of the area.
8. In May 2018 Wiltshire Council received an application for an Order under Section 119 from the owners of land at The Mill House, Calstone Wellington to divert a length of public bridleway leading over a bridge over the River Marden and past their house to a new route over land owned by them but situated up to approximately 100 metres to the west of the house. The new route also requires a bridged crossing of the River Marden.
9. The new route has already been constructed and is available for the public to use as a permissive path. The applicant has collected data relating to use of both the existing route and the permissive route and it is clear from their data that the permissive route is popular. It is especially well used by horse riders but also by walkers and cyclists. The data shows that largely the public choose to use the new route instead of the existing route but the data cannot take account of the fact that the existing route currently has a narrow bridge, overhanging tree growth, other uncleared vegetation, a neglected and in places poor surface, two gates which are unauthorised highway obstructions and at times has parked vehicles on it. All of which are factors that will have affected the choice of users but which must be disregarded for the purposes of comparison for Section 119. Although the Council has a duty to rectify the problems on this route and acting on complaints from local riders around 2003 had identified an alternative bridge to install, it has been unable to agree a solution to the problems without resorting to enforcement action, which it is always reluctant to do.
10. A number of responses from users of the permissive route are included at **Appendices 1.E** and **1.G** and have been categorised at 7.2 page 31 of the officers' report (**Appendix 1**). It is clear that respondents have included the narrow bridge, poor drainage and matters such as dogs and parked cars as all or part of the reasons for their preference for using the permissive route.
11. The existing route is a former road and as late as the 1960s was used by vehicles. Letters dating from this time from both Rural District Council and Parish Council support this. The bridge over the River Marden is a bridge maintainable at public expense number R.7/98. However, in 1968, the bridge then in place had suffered such flood damage as to be unrepairable and it was temporarily closed and then demolished by Wiltshire Council later that year.
12. A temporary footbridge was put up in its place and replaced over the years with similarly narrow temporary bridges. Wider and more suitable replacement bridges have been scheduled at various times (including as late as 2004) but works have, for a variety of reasons, not happened. It should be noted that the bridge on the proposed diversion route does not currently meet the construction standards that Wiltshire Council would require before accepting the route as a publicly maintainable highway (and hence bring effect to any Order).

13. The public vehicular right (for both mechanically propelled vehicles and horse drawn ones) over the route of the former road between Manor Farm and road u/c7008 was extinguished in 2007 and the remaining rights recorded as bridleways Calne Without 89, 89A and 89B (CALW89, CALW89A and CALW89B).
14. The public right now exists for the public on foot, riding or leading a horse, on a bicycle or with cattle.

Main Considerations for the Council

15. The legal tests that must be applied by Wiltshire Council in considering whether or not an Order should be confirmed are contained within Section 119 (1) and (2) of the Highways Act 1980. The Council is entitled to further consider the tests for confirmation contained within Section 119(6) at this stage. In the event that an Order is made under Section 119 the Council must further consider the tests contained within Section 119(6) of the 1980 Act. This matter would therefore return to this area planning committee to reconsider. However, this requirement to consider Section 119(6) at the confirmation stage does not preclude the Council from considering it at the Order making stage.
16. In the Court of Appeal *Hargrave v Stroud DC*¹, at para.15 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.”
17. Subsection (6) (see paragraph 21 of this report) sets out factors which are to be taken into account at the confirmation stage. In *Hargrave v Stroud* (above), at para. 17 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.”
18. **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

¹ R(on the application of Hargrave and another) v Stroud DC [2002] EWCA Civ 1281

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’.

19. **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”.*

20. **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.*

21. **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.*

22. 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.
23. The Council must also have regard to the needs of agriculture, forestry and the conservation of biodiversity.
24. The officers' report and appendices containing all details of the case are appended at **Appendix 1**. The following paragraphs 25 to 37 summarise the view contained within the report.

25. **S.119(1) – The landowner's interest**

The applicants are the landowners. It is agreed that the diversion of the right of way leading in front of the house and outbuilding to the field edge route would enable the landowners to securely fence and/or gate their property and to further screen it with trees or other planting. The diversion would therefore be in their interest.

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

The termination point of the route south of the River Marden is unaffected. The termination point of the route north of The Mill House is affected. The current route joins road u/c 7008 as a straight line continuation of the highway. The proposed route involves an approximately 90 degree turn from or onto the road as a 'T junction' shared with a footpath. The u/c road continues south towards the Mill House and the diversion of the bridleway would leave a cul-de-sac length of that highway. The termination point is not considered to be substantially as convenient.

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

It is important to compare the convenience of the two routes (the test being that the new one must not be substantially less convenient to the public) as if the existing route was open and available with no obstructions and a suitable bridge and maintained surface. The Planning Inspectorate's Advice note no. 9 at paragraph 29 states:

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 should not be confirmed, since a diversion order cannot be confirmed under s.119(6) if the path or way will be substantially less convenient to the public in consequence of the diversion."

28. The effect of the diversion is to more than double the length of the existing path proposed to be extinguished (see **Appendix 1** para. 9.24). The new path also includes four changes in direction compared to the existing path which leads in a straight line.

29. When considering convenience matters relating to enjoyment of the route should not be included. Convenience is to be given its ordinary meaning and accordingly officers cannot see that increasing the length by more than double and introducing a number of turns and bends can be anything other than substantially less convenient. The new path has a reduced gradient as a result of the extra length (though has a steeper section near the bridge) but this is unlikely to outweigh the considerable inconvenience of having to go further, change pace or break cadence and turn.

30. **S.119(6) – Effect on public enjoyment of the path or way as a whole**

Correspondence received by the Council is divided on this point. It is clear that while many people enjoy the new route, they have incorrectly made the comparison with the existing route; inter alia they have highlighted the narrow bridge and unmaintained surface as factors affecting their choice of route. Other respondents have indicated that they value the historical nature of the route and that forms part of their enjoyment. Both the Mill House and the outbuilding on the opposite side of the highway are listed buildings and the route itself is undoubtedly historic.

31. Some users have made it clear that they do not enjoy passing so close to the Mill House as they feel uncomfortable doing so. It is not unusual to pass roadside houses but the proximity of users to the windows does exacerbate feelings of intrusion for users of the path in addition to the concerns of the residents.

32. Where the effect on the use and enjoyment is not clear, the expediency of the confirmation of an Order may be balanced against the interests of the owner.

33. In a 2011/2012 case at Purton a diversion Order was made and supported by Wiltshire Council. It had 39 objections and 83 representations in support when the matter was considered by an Inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs at a public inquiry. Despite the Council's support for the diversion the Inspector refused to confirm the Order finding that the loss of the historic route had a detrimental effect on the public use and enjoyment of the route as a whole. He also found that the making of the Order itself was not in the interest of the public though was in the interest of the landowner. The case had several similar circumstances to those at Calstone Wellington, especially relating to the partially obstructed and poorly maintained nature of the existing route and members' attention is accordingly drawn to it. A copy of the Inspector's decision is appended here at **Appendix 2**.

34. **S.119(6) – Effect on land served by the existing right of way**

It is considered that there is no risk of compensation arising from the extinguishment of the existing route.

35. **S.119(6) – Effect on land served by the new right of way**

It is considered that there is no risk of compensation arising from the creation of the new route.

36. **Consideration of the Rights of Way Improvement Plan**

Wiltshire Council's rights of way improvement plan is entitled Countryside Access Improvement Plan 2015 – 2025. The plan outlines the Council's duties and policy with respect to rights of way (policy 4), bridges (policy 6) and structures on rights of way (policy 7.2.2) but contains no policies related specifically to the proposed diversion. The condition and availability of the bridleway CALW89, 89A and 89B as a whole falls short of the Council's policies. Fulfillment of the policies for an extensive rural network remains challenging with current resource provisions but remains a framework in which the Council should work. Priority is given to wholly obstructed and unavailable rights of way and CALW89, 89A and 89B are open and available, albeit with temporary limitations to access.

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

The land has been acquired for the development of the proposed route which has been approved through the usual planning processes. No concerns were raised then or have been now.

Overview and Scrutiny Engagement

38. Overview and scrutiny engagement is not required in this case.

Safeguarding Considerations

39. There are no relevant safeguarding considerations associated with the refusal to make this Order additional to matters relating to the landowners' interest.

Public Health Implications

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

Corporate Procurement Implications

41. There are no additional procurement implications associated with this recommendation.

Environmental and Climate Change Impact of the Proposal

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

Equalities Impact of the Proposal

43. The inconvenience of covering additional distance may be disadvantageous to some users while a lesser gradient may be advantageous to others. However, the route as a whole is rural in nature and any access for users who are less mobile is likely to be restricted by the wider nature and limitations of the route or

network as a whole. The Council's duties under the Equality Act 2010 are further examined in **Appendix 1** at paragraphs 3.4 – 3.6 and 12.0 – 12.1.

Risk Assessment

44. In the event that the Order is not made Wiltshire Council will need to consider prioritisation of maintenance works relating to the existing route to minimise risks to users. The financial and legal risks to the Council where an Order is not, or is, made are outlined in the "Financial Implications" and "Legal Implications" sections below.

Financial Implications

45. 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 application where an Order is made though the Council's costs relating to any Order being determined by the Planning Inspectorate on behalf of the Secretary of State may not be reclaimed from the applicant. Where an application for an Order is refused no costs are payable by the applicant. In this instance, if an Order is made and confirmed the cost to the applicant will be £1,875 plus the cost of any associated works incurred by the Council. The applicant has agreed to this.
46. In the event that an Order is made there may be financial implications related to the confirmation of that Order. In the event that any Order made attracts duly made objections or representations that are not withdrawn, the matter would return to the area planning committee for further consideration. At this point the committee would be required to decide whether to abandon the Order or to forward it to the Secretary of State for determination (with or without any modifications). An appreciation of those wider costs would only be relevant at that stage, should it arise.
47. A judicial review of the Council's decision from any party may have financial implications. These are covered below.

Legal Implications

48. Any decision of the Council is open to an application for judicial review in the high court. An appeal may be made by any aggrieved party and may be the result of a decision to either make an Order or to refuse to make an Order.
49. If the appeal is allowed to be heard in the high court and the Council loses its case, all costs would be paid by the Council. If the Council wins its case, all costs would be paid by the opposing party. Further appeal may be made by either party. If the court finds against the Council in judicial review proceedings, the potential costs to the Council would potentially be in the region of £50,000.

Options Considered

50. (i) To make an Order to divert part of bridleway Calne Without 89, 89A and 89B under Section 119 Highways Act 1980.
- (ii) Not to make an Order to divert part of bridleway Calne Without 89, 89A and 89B under Section 119 Highways Act 1980.

Reason for Proposal

51. The officers' report attached at **Appendix 1** considers and includes matters relevant to this application. It is agreed that the proposed diversion is in the interests of the landowner. However, it is considered that the application fails the legal test relating to the convenience of the termination point at the northern end of the bridleway. This means that an Order should not be made.
52. Additionally, it is considered that the application fails the legal test relating to whether the new route is not substantially less convenient. This means that any made Order should not be confirmed.
53. Matters relating to the use and enjoyment of the route as a whole (Section 119(6)(a)) and the expediency of confirmation are more difficult to judge against the backdrop of respondents failing to compare the two routes in the appropriate manner. There is undoubtedly a value to be put on the history of the route and the proximity and views of the listed buildings but equally it is appreciated that some users dislike the feeling of intrusion that the existing route gives them.
54. In the case of the Purton public inquiry (see **Appendix 2**) a smaller number of objectors (39) were able to bring forward stronger arguments for the historic route than a greater number of supporters (83) and the value of the history of the route should not be underestimated. The matter is not simply one of numbers in favour as opposed to numbers against.
55. Matters relating to use and enjoyment may be balanced against the interest of the landowner when determining expediency of confirmation but it is noted that officers are of the view that the application already fails a legal test for making an Order and another for confirmation.

Proposal

56. **That the application to divert parts of CALW89, 89A and 89B as applied for is refused.**

The attention of members is drawn to further considerations and comments from officers at paragraph 16 – 16.5 of Appendix 1.

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

None

Appendices:

Appendix 1	Decision report
Appendix 1.A	Applicants' reasons for diversion
Appendix 1.B	Consultation response from Wiltshire Bridleways Association
Appendix 1.C	Consultation response from the British Horse Society
Appendix 1.D	Applicants' response to objections received at consultation stage
Appendix 1.E	Unsolicited correspondence
Appendix 1.F	Reference plan
Appendix 1.G	Late correspondence
Appendix 2	Inspector's decision Purton 104