


**COVERING PAGE FOR DECISION REPORT ON HIGHWAYS ACT 1980 – SECTION 119 AND 118
PROPOSED DIVERSION OF FOOTPATHS WESTBURY 29 (PART) DILTON MARSH 20 (PART) AND
EXTINGUISHMENT OF WESTBURY 28 (PART) DILTON MARSH 19 (PART) AND SECTION 53A OF
THE WILDLIFE AND COUNTRYSIDE ACT 1981 – FOOTPATHS WESTBURY 29 (PART) DILTON
MARSH 20 (PART) WESTBURY 28 (PART) DILTON MARSH 19 (PART)**

Name	Signature	Date	Approved Yes/No
Sally Madgwick Definitive Map and Highway Records Manager		09 August 2021	Yes
Natasha Gumbrell Head of Countryside Management	Copy for information only		
From:	Ali Roberts Definitive Map Officer		
Date of Report:	5 August 2021		
Return to:	Ali Roberts		

Nature of Report:

This report by Ali Roberts (Case Officer) is seeking authorisation from the officer with the delegated power to effect the recommendation to consider an application dated 28 July 2021, from Mr Robert Taylor and Nicole Lamour, Dilton Vale Farm, Old Dilton Road, Old Dilton, Westbury, BA13 3RA to divert Footpaths Westbury 29 (part), Dilton Marsh 20 (part) and extinguish Westbury 28 (part) and Dilton Marsh 19 (part) under Section 119 and 118 of the Highways Act 1980. The effect of the application is to divert and extinguish the rights of way out of Dilton Vale Farm garden and away from close proximity to the home to routes to the eastern and northern boundaries of the property having recorded legal widths of 3 metres. Although Westbury Town Council objected to the proposal on the grounds that rights of way are sacrosanct there have been 18 supporting representations received including Dilton Marsh Parish Council. Many of the supporters' state to be regular users of the routes over a number of years and that they find the proposed routes more enjoyable. This proposal is in the interests of the landowner due to privacy and security concerns and the officer believes the proposed routes are not substantially less convenient and there is no detrimental effect on public enjoyment of the routes. Officers therefore consider that at present the legal tests for the confirmation of an order are met and the order would be capable of being confirmed.

Officer's Recommendation:

That an order be made under Section 119 and 118 of the Highways Act 1980 to divert Footpaths Westbury 29 (part), Dilton Marsh 20 (part) and extinguish Westbury 28 (part) and Dilton Marsh 19 (part), and Section 53A of the Wildlife and Countryside Act 1981, to amend the definitive map and statement of public rights of way and to confirm the order if no representations or objections are received.

DECISION REPORT

HIGHWAYS ACT 1980 – SECTION 119 AND 118

PROPOSED DIVERSION OF FOOTPATHS

WESTBURY 29 (PART), DILTON MARSH 20 (PART) AND EXTINGUISHMENT OF FOOTPATHS WESTBURY 28 (PART) AND DILTON MARSH 19 (PART) AND SECTION 53A OF THE WILDLIFE AND COUNTRYSIDE ACT 1981 – WESTBURY 29 (PART), DILTON MARSH 20 (PART), WESTBURY 28 (PART) AND DILTON MARSH 19 (PART)

1. Application

Application No: 2020/10P
Application Date: 28 July 2020
Applicant: Robert Taylor and Nicole Larmour
Dilton Vale Farm
Old Dilton Road
Old Dilton
Westbury
Wiltshire BA13 3RA

1.1. The landowner has proposed this diversion for the following reason:

“There is a confluence of 5 public footpaths within the garden and passing either side of the house. The house, itself, is set in a very rural and isolated location, well away from other public highways. For a very rural property this is far from ideal for any family home, let alone one with young children. ... The paths are highly intrusive for the applicants and their family and expose them to an increased potential threat of antisocial or criminal activity without affording opportunity to provide additional security and privacy to the property ...The proposal retains the integrity of the local footpath network and provides

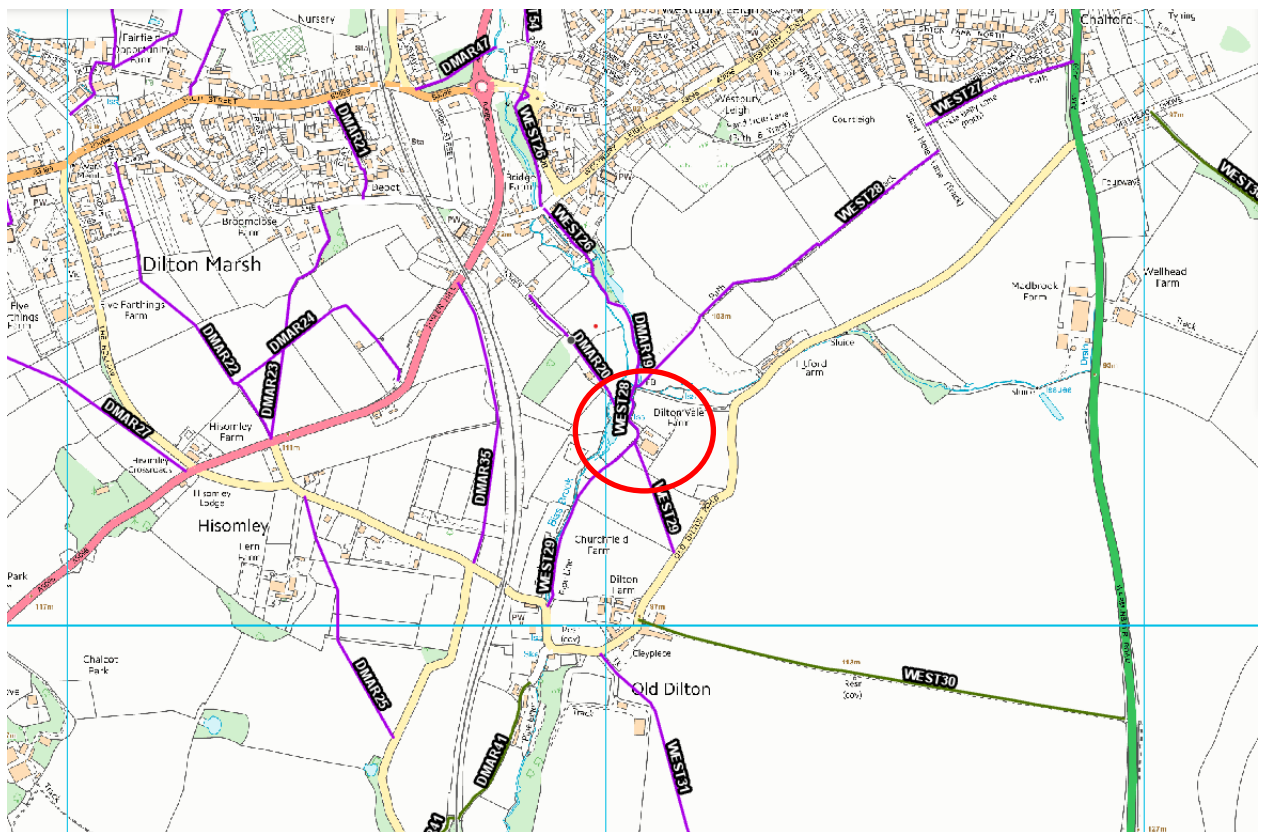
enjoyable paths across the property whilst allowing for them to be less intrusive on family.”

1.2 The supporting document for the application detailing the reasons in full can be seen at Appendix A.

2. Relevance to Council’s Business Plan

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

3. Location Plan and working copy of the definitive map and definitive statement



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Highways Act 1980 (Section 119 and 118) – Proposed Diversion of Footpaths Westbury 29 (part) Dilton Marsh 20 (part) and extinguishment of Footpaths Westbury 28 (part) Dilton Marsh 19 (part)



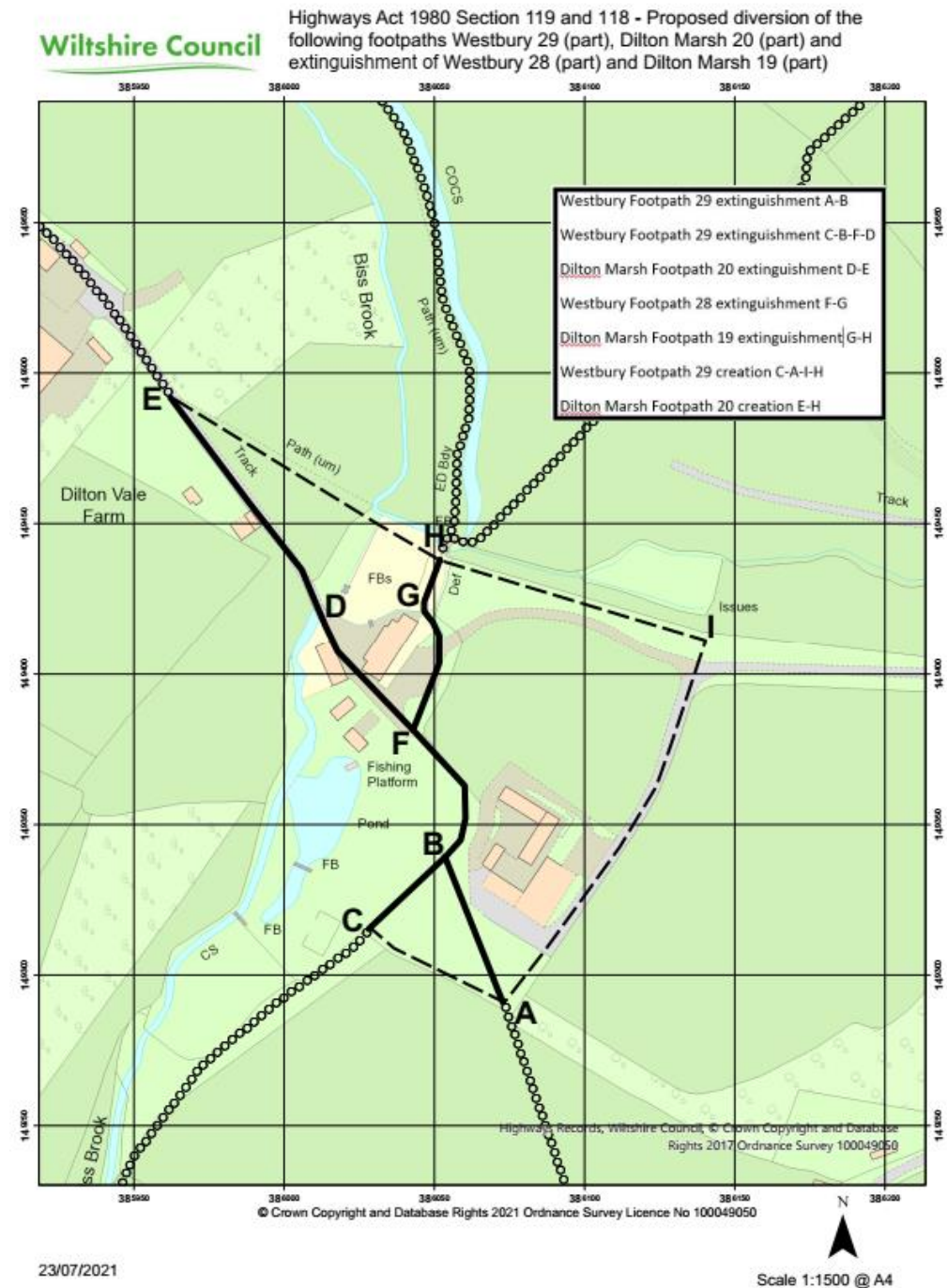
Westbury 29 FOOTPATH. From Old Dilton Road, 146 m north of Dilton Farm, leading north-west to Dilton Vale Farm and path No.20 in the Parish of Dilton Marsh with a branch from Dilton Vale Farm leading south-west to the Old Dilton Road at the Church on the Dilton Marsh Parish boundary.

Approximate length 640 m.

relevant date
6th October 1992

Dilton Marsh	20	<p><u>FOOTPATH.</u> From the southern end of road U/C 6188 at Penknap leading south east to path no.19 on the Westbury Urban District boundary at Dilton Vale Farm.</p> <p>leading south-east to path No.19 on the Westbury Urban District boundary at Dilton Vale Farm.</p> <p>Approximate length 275 metres.</p>	<p>Relevant date 23rd December 1992</p>
Westbury	28	<p><u>FOOTPATH.</u> From Leigh Fields Lane leading south-west to the Dilton Marsh parish boundary at Dilton Vale Farm, where it joins path No.29. Approximate length 823 m.</p>	<p>relevant date 6th October 1992</p>
Dilton Marsh	19	<p><u>FOOTPATH.</u> From the Corn Mill at Westbury Leigh leading south alongside Biss Brook to the Westbury Urban District boundary at Dilton Vale Farm.</p> <p>Approximate length 302 m.</p>	<p>Relevant date 23rd December 1992</p>

4. Proposed Diversion Plan



4.1 It is proposed to divert Footpath Westbury 29 from A-B and C-B-F-D, Dilton Marsh 20 from D-E, and extinguish Westbury 28 from F-G and Dilton Marsh 19 from G-H as shown by a bold continuous line on the plan. Creating new sections of Footpath Westbury 29 from C-A-I-H and Dilton Marsh 20 from E-H as shown by a bold broken line on the plan.

5. Photograph of site



5.1 Current Westbury 29 A-B

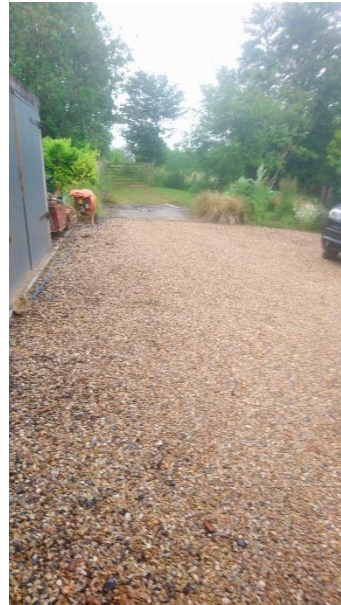


5.2 Current Westbury 29 C-B-F-D



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5.3 Current Dilton Marsh 20 D-E



5.4 Current Westbury 28 F-G



5.5 Current Dilton Marsh 19 G-H



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5.6 Proposed Westbury 29 C-A-I-H



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5.7 Proposed Dilton Marsh 20 E-H



6. Applicant and Registered Landowner

6.1. Landowner

Robert Taylor and Nicole Larmour
Dilton Vale Farm
Old Dilton road

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Old Dilton
Westbury
Wiltshire B13 3RA

7. **Legal Empowerment**

7.1. The application to divert footpaths Westbury 29(part), Dilton Marsh 20 (part), Westbury 28 (part) and Dilton Marsh 19 (part) is made under Section 119 of the Highways Act 1980 and states:

“119. Diversion of footpaths, bridleways and restricted byways

(1) 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’.

- (2) *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.*
- (3) *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.*
- (4) *A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.*
- (5) *Before determining to make a public path diversion order on the representations of an owner, lessee or occupier of land crossed by the path or way, the council may require him to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,-*
- (a) *any compensation which may become payable under section 28 above as applied by section 121(2) below; or*

(b) where the council are the highway authority for the path or way in question, any expenses which they may incur in bringing the new site of the path or way into fit condition for use for the public; or

(c) where the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by subsection (9) below.

(6) 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;

so, however, that for the purposes of paragraph (b) and (c) above the Secretary of State, or as the case may be, the council shall take into account the provisions as to compensation referred to in subsection 5(a) above.

(6A) The considerations to which-

(a) the Secretary of State is to have regard in determining whether or not to confirm a public path diversion order, and

(b) a council are to have regard in determining whether or not to confirm such an order as an unopposed order include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would create or extinguish a public right of way.”

7.2 The extinguishment of Footpaths Westbury 28 (part) and Dilton Marsh 19 (part) is made under Section 118 of the Highways Act 1980 and states:

“118. Stopping up of footpaths, bridleways and restricted byways

(1) Where it appears to a council as respects a footpath, bridleway or restricted byway in their area (other than one which is a trunk road or a special road) that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way.

An order under this section is referred to in this Act as a ‘public path extinguishment order’.

(2) The Secretary of State shall not confirm a public path extinguishment 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 it is expedient so to do having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions as to compensation contained in section 28 above as applied by section 121(2) below.

- (3) *A public path extinguishment order shall be in such form as may be prescribed by regulations made by the Secretary of State and shall contain a map, on such scale as may be so prescribed, defining the land over which the public right of way is thereby extinguished.*
- (4) *Schedule 6 to this Act has effect as to the making, confirmation, validity and date of operation of public path extinguishment orders.*
- (5) *Where, in accordance with regulations made under paragraph 3 of the said Schedule 6, proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a public path creation order, public path diversion order or rail crossing diversion order then, in considering –*
- (a) *under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use; or*
- (b) *under subsection (2) above to what extent (if any) that path or way would apart from the order be likely to be used by the public;*
- the council or the Secretary of State, as the case may be, may have regard to the extent to which the public path creation order, public path diversion order or rail crossing diversion order would provide an alternative path or way.*
- (6) *For the purposes of subsections (1) and (2) above, any temporary circumstances preventing or diminishing the use of a path or way by the public shall be disregarded.*
- (6A) *The considerations to which-*
- (a) *the Secretary of State is to have regard in determining whether or not to confirm a public path extinguishment order, and*
- (b) *a council are to have regard in determining whether or not to confirm such an order as an unopposed order,*

include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would extinguish a public right of way.”

8. Background

8.1. An application to divert these footpaths away from the proximity of the dwelling was refused in 2018 as it was considered the legal tests for confirming the order had not been met as the proposed alternatives were not substantially as convenient. Both Westbury Town Council and Dilton Marsh Parish Council had objected to the proposal and the Countryside Access Officer was concerned about the ongoing maintenance of the alternative routes. Officers informed the landowner that they were entitled to apply again with another option if they wished to. A further application was received on 28 July 2020 from Robert Taylor and Nicole Lamour of Dilton Vale Farm, Old Dilton with a revised proposal diverting the footpaths around the eastern and northern boundary of the property under Section 119 of the Highways Act 1980.

8.2 The landowner proposed this diversion for the following reason:

“There is a confluence of 5 public footpaths within the garden and passing either side of the house. The house, itself, is set in a very rural and isolated location, well away from other public highways. For a very rural property this is far from ideal for any family home, let alone one with young children. ... The paths are highly intrusive for the applicants and their family and expose them to an increased potential threat of antisocial or criminal activity without affording opportunity to provide additional security and privacy to the property ...The proposal retains the integrity of the local footpath network and provides enjoyable paths across the property whilst allowing for them to be less intrusive on family.” The supporting document for the application detailing the

reasons in full can be seen at Appendix A.

- 8.3. There are 5 rights of way from all directions culminating in the garden of Dilton Vale Farm passing in close proximity to both sides of the home and through the driveway at front of the house. It is proposed to divert the rights of way to the eastern and north boundaries of the property away from the dwelling. The current rights of way do not have recorded widths however the proposed alternative rights of way will be recorded as 3 metres. The total length of rights of way to be deleted is approximately 326 metres and adds approximately 380 metres.

9. Public Consultation

- 9.1. A public consultation exercise was carried out on 2 June 2021. A closing date for all representations and objections was given of not later than 5:00pm on Friday 2 July 2021.
- 9.2. The consultation included landowners, statutory undertakers, statutory consultees, user groups and other interested parties, including the Wiltshire Council Members for Westbury East and for Ethandune, Westbury Town Council and Dilton Marsh Parish Council.
- 9.3. As Dilton Marsh Parish Council would not be sitting until Thursday 15 July 2021 an extension on responses was given to Monday 19 July 2021 so that the council would have an opportunity to debate the proposal.
- 9.4. There were 18 supporting responses received including Dilton Marsh Parish Council who had objected to the previous application "*Dilton Marsh PC has resolved to support the proposed diversions*". Many of the supporters' state to be regular users of the routes over a number of years. Comments on the proposal included:

- The proposed route is more enjoyable; “The walk rambles through open countryside so the route passing directly past the property seems completely unnecessary”, “I enjoy the lovely views it is a very pleasant walk”, “ It is a better route to walk offering better views of the house”
- This diversion would have no impact walkers but offer the landowners privacy.
- Comments on walking at such close proximity to the property include “*Use of the route feels intrusive*” “ *it feels an imposition on the owners*” and terms used include, *uncomfortable, invasive, awkward*
- Footpath use is much heavier now as the population of the area has grown due to the expansion of new housing in Westbury Leigh.

9.5 Westbury Town objected to the proposal.

“At a meeting held on Monday 21st June 2021, Westbury Town Council Highways, Planning and Development Committee considered the proposed diversion on Westbury 29 (part), Dilton Marsh 20 (part), Westbury 29 (part) and Dilton Marsh 19 (part). Westbury Town Council object to the diversion, with the following response: Public footpaths are for the public. It is difficult to see any merit in this application when the occupiers bought the house next to the public footpath and being aware of the footpath. Public footpaths are sacrosanct, and we move them at our peril, creating a precedent for the future.”

9.6 In response to this objection; arguments that when a landowner buys a property in full knowledge of the existence of a right of way and therefore should not be able to alter it were considered in *Ramblers Association v SSEFRA Oxfordshire County Council and Weston EWHC 3333 (Admin) Case No. CO/457/2012*. It confirms that there is no statutory bar to a person making an application in such circumstances. The question that must be asked under s119(1) is whether the diversion is expedient in the interests of the landowner and occupiers.

Mr Justice Ouseley at paragraph 33 [2012] EWHC 3333 (Admin) *“The question that has to be asked under section 119(1) is whether the diversion is expedient in the interests of the landowner. I cannot see that the question of whether the land owner bought knowing the footpath, or bought not knowing of it, or bought taking a chance that he might be able to obtain a diversion order, has got anything to do with whether it is expedient in his interests that the order be made. If it is more convenient, beneficial or advantageous to him, it is expedient in his interests. I cannot see either that the question of whether the order which set a disadvantageous precedent has anything to do with the expediency of the order in his interests, nor historical integrity. Those issues only arise when it comes to the consideration of section 119(6), the second question.”*

Public rights of way are not sacrosanct, requirements on land where rights of way are situated can change therefore legislation is in place to divert routes within highway law, Highways Act 1980 and planning law, Town and Country Planning Act 1990. The extent of rights of way recorded at Dilton Vale Farmhouse travelling from all directions is likely to be because it was formally part of a fulling mill and spinning factory and would have been a significant employer for the area as stated by Historic England *“associated with a former fulling mill and spinning factory, an industry for which this part of Wiltshire is well known”*. The property is now a private home.

- 9.7 All representations and objection on this application can be found in Appendix B.

10. Main Considerations for the Council

- 10.1. The main considerations for the council relate to the legal tests to be satisfied for an order to be made to divert the footpath in the manner the applicant

desires.

10.2 s.119. Diversion of footpaths, bridleways and restricted byways
(1) Expediency in the interests of the landowner/public

10.2(a) The landowner has applied to move the footpath as stated in the application
“There is a confluence of 5 public footpaths within the garden and passing either side of the house. The house, itself, is set in a very rural and isolated location, well away from other public highways. For a very rural property this is far from ideal for any family home, let alone one with young children. ... The paths are highly intrusive for the applicants and their family and expose them to an increased potential threat of antisocial or criminal activity without affording opportunity to provide additional security and privacy to the property.”

10.2(b) There are 5 rights of way in total culminating in the garden of Dilton Vale Farm passing in close proximity to both sides of the home in touching distance of the windows, as can be seen in the photographs at 5.2, 5.3 and 5.4. It is clear that the paths are intrusive to the landowner as they provide little if any opportunity for privacy.

10.2 (b) As can be seen by the location plan at 3 the house is in a rural setting isolated away from other settlements therefore the landowners have understandable concern regarding a greater potential risk for antisocial or criminal activity. It is proposed to divert the rights of way to the eastern and north boundaries of the property away from the dwelling which would allow an opportunity for increased security for the family home.

10.2(c) Use of these footpaths has increased as the population has grown due to the expansion of new housing in the local area. Lockdown has also increased the

use of the local rights of way network. As a result the effect on the landowners and their feeling of intrusion has increased.

10.2(c) The officer is therefore satisfied that it is in the interests of the landowner to divert the path

10.3 s.119 Diversion of footpaths, bridleways and restricted byways (2) Alteration of the termination point

10.3(a) The diversion of the footpath must not alter the termination points of the path where these are not on a highway and where they are on a highway they must not be altered, other than to another point on the same highway or a highway connected with it and which is substantially as convenient to the public. The termination points will not be altered by the diversion.

10.3(b) The officer is satisfied it is expedient in terms of section s.119(2) that the termination points are on the same or connected highways and are substantially as convenient to the public.

10.4 In *Hargrave v Stroud* (2002) EWCA Civ 1281, Lord Justice Schieman stated:

‘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.’

10.5 Subsection s.119(6) sets out the 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), Lord Justice Schieman stated:

‘..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 section 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.’

10.6 The Planning Inspectorate produce a number of Advice Notes to provide some general background information on rights of way matters. Advice Note 9 is a publicly available guide to some of the various types of rights of way Orders which are submitted to the Secretary of State for confirmation. The Note provides a definition of local authorities in the context of the relevant legislation and sets out the primary and secondary legislation and guidance. In relation to Orders made under section 119 of the Highways Act 1980 the Note states:

2.3.4. Section 119(6) requires that before confirming a public path diversion order, the decision-maker must be satisfied that it is expedient in the interests of the owner, lessee or occupier of land crossed by the way or of the public.

2.3.5. In addition, he must be satisfied that the 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:

- *The diversion would have on the public enjoyment of the way as a whole;*
- *The coming into operation of the order would have upon other land served by the existing way; and*
- *The new way created by the order would have upon the land over which it is created.*

2.3.8. *The decision in Ramblers Association v SSEFRA, Weston and others [2012] EWHC 3333 (Admin) acknowledges that section 119(6) involves three separate tests (as endorsed by the High Court in The Open Spaces Society v Secretary of State for Environment, Food And Rural Affairs [2020] EWHC 1085 (Admin)):*

Test 1: *whether the diversion is expedient in the interests of the owner, lessee or occupier of land crossed by the path or of the public (as set out in section 119(1) and subject to section 119(2) – see paragraphs 21 and 22 above). This was described in R (Hargrave) v Stroud District Council [2001] EWHC Admin 1128, [2002] JPL 1081 as being a low test.*

Test 2: *whether the proposed diversion is ‘substantially less convenient to the public’. In order to meet this test, the path or way must not be substantially less convenient to the public in consequence of the diversion (as per the wording in section 119(6)).*

Both of these tests can be described as gateway tests - unless they are passed the decision-maker does not get to the third test.

Test 3: *whether it is expedient to confirm the Order having regard to the effect: (a) of the diversion on the public enjoyment of the path or way as a whole,*
(b) of the Order on other land served by the existing public right of way; and
(c) of any new public right of way on the land over which it is to be created and any land held with it.

Any material provisions of a rights of way improvement plan must also be taken into account.

2.3.9. *Those specified factors in Test 3 must be taken into account by the decision-maker but the expediency test is not limited to those matters, as confirmed by the Court of Appeal in The Open Spaces Society v SSEFRA [2021] EWCA Civ 241. The decision-maker may have regard to any other relevant matter including, if appropriate, the interests of the owner over which*

the path currently passes, or the wider public interest. Use of the word “expedient” indicates that a broad judgement is to be made and it will be for the decision-maker to weigh the different considerations.

2.3.10. It is possible that a proposed diversion may be as convenient as the existing path but less enjoyable, perhaps because it was less scenic. In that scenario, it is correct for the decision-maker to take account of the degree of benefit to the owner and the extent of loss of public enjoyment together with any other factors both for and against the diversion to arrive at a finding on the expediency of confirming the Order under Test 3.

*2.3.11. 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 section 119(6) if the path or way will be substantially less convenient to the public in consequence of the diversion. The issue of convenience in Test 2 is separate from the question of expediency in Test 3 (see *R (on the application of Young) v SSEFRA [2002] EWHC 844*).*

10.7 s.119(6) Convenience of the path

10.7(a) In assessing the relative convenience of the present and proposed routes, consideration has been given to various factors including length, width, surface, gradient, etc.

10.7(b) Length of path – The length of rights of way to be deleted in total equals approximately 326 metres and the proposal adds approximately 380 metres. These are recreational rather than a utility routes therefore the minimal changes to distance will have no impact on public convenience.

10.7(c) Width and direction of the paths - The new footpaths will have a recorded width of 3 metres, they are well defined tracks and easy to follow as can be seen at 5.6 and 5.7. Currently the paths have no recorded widths, they weave around the property and are significantly narrow in places.

10.7(d) Surface condition and gradient – The surfaces for both the current routes and proposed routes are very similar encompassing grass and gravel tracks. There is not a substantial change in gradient of the current definitive routes and the proposed routes. Part of the section of Westbury 28 proposed to be diverted is eroding significantly as can be seen in the photograph below. As the path continues to wear away it would require expensive works to be undertaken by the highway authority or cease to exist entirely, A Guide to Law and Practice John Riddall and John Trevelyan states: “*Where the line of a right of way ceases physically to exist, as where a path that follows the side of a river is eroded away ... the right of passage ceases to exist also (Rowland v Environment Agency (2002)). No right to deviate exists (Gloucestershire CC v Secretary of State for the Environment, Transport and the Regions and the Ramblers Association (2000)). Once the path has been destroyed it seems that the authority may be relieved of any obligation to reinstate it.*” The proposal would mean that this section of path is diverted alleviating these concerns



Decision Report

Highways Act 1980 (Section 119 and 118) – Proposed Diversion of Footpaths Westbury 29 (part) Dilton Marsh 20 (part) and extinguishment of Footpaths Westbury 28 (part) Dilton Marsh 19 (part)

10.7(f) Furniture – There is no additional furniture on the proposed routes. There are 3 bridges on the current rights of way; a bridge on Dilton Marsh 20 which also provides private vehicular access; the bridge in the above photograph on an eroding section of Westbury 28 these bridges will no longer be on public rights of way and therefore no longer publicly maintainable; the 3rd bridge is on Dilton Marsh 19 and will remain on the network. A further bridge will be required on the proposed route of Dilton Marsh 20. The landowner will provide 2 new bridges at these locations to Wiltshire Council's specifications prior to certification, this has been agreed by the Countryside Access Officer.

10.7(g) Purpose of paths – The 5 paths in their entirety pass through open countryside and are relatively direct to Dilton Vale farm with minimal deviation. Once at the property they meander around the garden and dwelling and are not well defined. However the proposed routes are clear and obvious tracks and from the representations received this option is already taken by many users of the paths.

10.7(h) The officer is satisfied that it is expedient in terms of section s.119(6), i.e. convenience of the paths.

10.8 Section 119(6)(a) Effect of the diversions on public enjoyment of the path or way as a whole

10.8(a) Consultation responses – The evaluation of enjoyment is subjective, and the balance may be altered by representations and objections received during the consultation period. Although Westbury Town Council objected to the proposal on the grounds that rights of way are sacrosanct there have been 18 supporting representations received including Dilton Marsh Parish Council. Many of the supporters' state to be regular users of the routes over a number of years. Comments include their preference for the proposed routes as they are more enjoyable; *"I enjoy the lovely views it is a very pleasant walk"*,

10.8(b) Historic building and views –Dilton Vale Farmhouse is listed as a Grade II building. The existing route leads close to the property offering a close to view of the property. However walking from I to H and from A to I on the diversion plan a view of the property in full can be appreciated as can be seen at 5.6. Representation comments on this point include; *“It is a better route to walk offering better views of the house”*, *“It’s actually a better route to walk in my opinion, offering better views of the house but discreetly from a distance”*.

10.8(c) Privacy/embarrassment – Many users of the route may have discomfort in walking at such close proximity to the dwelling, within touching distance from the windows as can be seen at 5.2, 5.3 an 5.4. This discomfort may be more conspicuous due to the properties isolated location. Many of the representations received made such comments and include *“Use of the route feels intrusive”* *“ it feels an imposition on the owners”* *“we walk regularly and have done for years ... the footpath takes us directly past their windows and very close to their house which is unnecessary and a diversion would be far more peaceful for everyone”* and terms used include, *uncomfortable, invasive, awkward*. *“The walk rambles through open countryside so the route passing directly past the property seems completely unnecessary”* These comments can be viewed in full in Appendix B.

10.8(d) The officer is satisfied that the public enjoyment of the path would not be affected by the proposed diversion.

10.9 Section 119(6)(b) Effect of the diversion on lands served by the existing right of way

10.9(a) The path has no utility purpose beyond recreational access for the public.

10.9(b) As the applicant owns all the land affected by the proposal there would be no concern about payment of compensation.

10.10 Section 119(6)(c) Effect of the diversion over which new rights of way are proposed

10.10(a) Works on the proposed route must be undertaken to the Countryside Access Officer's satisfaction before the route can be certified.

10.11. Officers consider that at present the legal tests for the confirmation of the order appear to be met and the order appears capable of being confirmed, however this is subject to a further consultation period once the formal order has been made.

10.12 **Section 118** – allows the Highway Authority to extinguish a footpath, bridleway or restricted byway, where they consider it expedient to do so on the grounds that the path or way is not needed for public use.

10.12(a) It is proposed to extinguish 48 metres of Footpath Westbury 28 and 13 metres of Footpath Dilton Marsh 19 as they would result in an unnecessary spur from the diverted route around Dilton Vale Farm boundary which would no longer be needed for public use.

10.12(b) The legislation states that the authority should take into account the effect of the extinguishment on other land served by the path or way and the provisions for compensation. The land subject to a public path extinguishment order is in the ownership of the applicant.

10.13. 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.

ROWIP 2 recognises the Council's duty to have regard to the Equality Act 2010 and to consider the least restrictive option:

- At 4.1 page 16 the Council recognises that considering the needs of those with mobility impairments is a statutory responsibility:

"..consider the needs of those with mobility impairments when maintaining the network and authorising structures (e.g. stiles and gates) on the rights of way network and seek improvements to existing structures where it would be beneficial (Equality Act 2010).";

There is no additional furniture on the proposed routes. The new footpaths will have a recorded width of 3 metres, they are well defined tracks and easy to follow. The current paths have no recorded widths, they weave around the property and are significantly narrow in places.

- At 7.4 page 32 the Council recognises the following:

"The requirements for improving accessibility for people with these sorts of disability are generally the same as discussed in conclusion 5."

Conclusion 5 states:

"If older people are to keep active and therefore healthy, they will need a more accessible network as they are more likely to find stiles (and sometimes surfacing and latches) difficult than other people. This highlights the need to replace stiles with gaps or gates on key routes, which can also benefit wheelchair users and parents with buggies and children."

- ROWIP 2 refers to the Council's Gaps, Gates and Stiles Policy. This is Policy number 7 and is appended to ROWIP2

The Policy recognises that the authority must consider the needs of those with mobility impairments when managing rights of way and access and that this requirement particularly applies when authorising structures (e.g. stiles and gates) on rights of way and seeking improvements to existing structures to

make access easier.

There is no additional furniture on the proposed routes.

- ROWIP Appendix 8 – Strengths, weaknesses, opportunities and threats assessment of the Countryside Access Network, Weaknesses, W1 states: *“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”*. The extensive number of rights of way culminating at Dilton Vale Farmhouse travelling from all directions is likely to be because it was formally a significant employer for the area, the property is now a private home.

Wiltshire Council relies on DEFRA (2010) Good Practice Guidance for Local Authorities on Compliance with the Equality Act 2010 version 1 and recognises at 7.2.1 that:

A highway authority has a duty, under the Highways Act 1980, to assert and protect the rights of the public to use and enjoy a highway. The Equality Act 2010 adds a further dimension by requiring (broadly) that in carrying out their functions, public authorities must make reasonable adjustments to ensure that it is not impossible or unreasonably difficult for people with disabilities to benefit from those functions as others would do or to show that there are good reasons for not doing so.

As previously stated there is no additional furniture on the proposed routes..

10.14 In making diversion orders, Sections 29 and 121(3) of the 1980 Act, require authorities to have due regard to the needs of a) agriculture and forestry and b) the desirability of conserving flora, fauna and geological physiographical features. Section 40 of the Natural Environment and Rural Communities Act 2006 also place a duty on every public authority exercising its functions to have regard to the conservation of biodiversity, so far as is consistent with the proper exercise of those functions. In this section, conserving biodiversity

includes that in relation to a living organism, or type of habitat and restoring or enhancing a population or habitat.

There will be no likely adverse impact on biodiversity, agriculture or forestry.

10.15.(a) The Court of Appeal upheld the High Court's decision in the case of *The Open Spaces Society v Secretary of State for the Environment, Food and Rural Affairs [2020] EWHC 1085 Admin* as to the correct criteria to be applied when considering applications to divert a footpath, under Section 119 of the Highways Act 1980. The judgment confirms that in carrying out the test of expediency under Section 119(6) of the Act, the decision making is not confined to determining the matter solely on the basis of the criteria under Section 119(6)(a), (b), and (c). The benefit of the diversion to the landowner can be one of the factors taken account when carrying out the expediency test under Section 119(6)(a) to (c) of the Act.

10.16 If 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. The proposal is the interests of the landowners offering considerable improvements to privacy and security. The officer believes the proposed new paths are not substantially less convenient to the public and that public enjoyment of the paths would not be affected, in fact from the representations received public enjoyment would increase.

10.17 Officers therefore consider that at present the legal tests for the confirmation of an order are met and the order would be capable of being confirmed. However, once an order is made it is advertised for a period of at least 28 days and during this time any person or body may make representations or objections to the order which will need careful consideration before the order is either supported and forwarded to the Secretary of State for determination

or abandoned by the Council.

11. Safeguarding Considerations

- 11.1. DEFRA's "Rights of Way Circular (1/09) Guidance for Local Authorities" Version 2, October 2009, states at paragraph 5.5:

"The statutory provisions for creating, diverting and extinguishing public rights of way in the 1980 Act have been framed to protect both the public's rights and the interests of the owners and occupiers. They also protect the interests of bodies such as statutory undertakers. The requirements for making, confirming and publicising orders are set out in Schedule 6 to the 1980 Act."

If an order to divert Footpaths Westbury 29 (part), Dilton Marsh 20 (part) and the extinguishment of Footpaths Westbury 28 (part) and Dilton Marsh 19 (part) is made, Wiltshire Council will follow procedures set out in Schedule 6 of the 1980 Act and in doing so Wiltshire Council will fulfil its safeguarding considerations.

12. Public Health Implications

- 12.1. There are no environmental or climate change concerns associated with the confirmation of the making of this Order. This is wholly rural and recreational route and is unlikely to form any part of a sustainable transport route now or in the future.

13. Risk Assessment

- 13.1. There is a risk to the council in making the orders. If objections were received to it and the council believes the grounds for the confirmation of the orders are still met, notwithstanding the objection, the orders should be sent to the Secretary of State for determination where associated costs must be borne by

Wiltshire Council. To not send the orders to the Secretary of State when the council believes it is capable of being confirmed would be arguably unreasonable and the applicant could seek redress in law against the council decision.

14. Financial Implications

- 14.1. 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), permit authorities to charge applicants costs in relation to the making of orders, including public path diversion orders. Authorities may charge only the actual costs incurred.
- 14.2. The applicant has agreed in writing to meet the actual costs to the Council in processing the order, including advertising the making of the order and should the order be successful, the confirmation of the order and certification that the new route has been provided to a suitable standard for use by the public, in one local newspaper, (i.e. three advertisements).
- 14.3. The applicant has agreed in writing that if diversion made, to pay any compensation which may arise in consequence of the coming into operation of the order.
- 14.4. The applicant has also agreed in writing to pay any expenses which may be incurred in bringing the new footpath into a fit condition for use by the public, as required by the Council.
- 14.5. If an order is made under Section 119 and 118 of the Highways Act 1980 and there are no objections to the making of the orders, Wiltshire Council may itself confirm the order and there are no additional costs to the Council.

- 14.6. If there are outstanding objections to the order which are not withdrawn and the Council continues to support the making of the order, it must be forwarded to the Secretary of State for decision. The outcome of the order would then be determined by written representations, local hearing or local public inquiry, all of which have a financial implication for the Council. If the case is determined by written representations, the cost to the Council is negligible, however where a local hearing is held the costs to the Council are estimated at £200-£500 and £1,000 - £3,000 where the case is determined by local public inquiry. There is no mechanism by which these costs may be passed to the applicant and these costs must be borne by Wiltshire Council.
- 14.7. The making of a diversion and extinguishment 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 continues to support it, for example where it is considered that the proposals no longer meet the legal tests set out under Section 119 and 118 of the Highways Act 1980.

15. Legal Considerations

- 15.1. There is no right of appeal for the applicant where the Highway Authority refuses to make a public path order diversion ; however the Council's decision would potentially be open to judicial review.
- 15.2. If the Council does make a public path diversion order and objections are received, where the Council continues to support the order it may be forwarded to the Secretary of State for decision which may lead to the order being determined by written representations, local hearing or local public inquiry. The Inspector's decision may be subject to challenge in the High Court.

16. Options Considered

- 16.1. (i) To refuse the application, or
- (ii) To make an order to divert Footpaths Westbury 29 (part), Dilton Marsh 20 (part) and extinguish Footpaths Westbury 28 (part) and Dilton Marsh 19 (part), under Section 119 and 118 of the Highways Act 1980 and Section 53A of the Wildlife and Countryside Act 1981, to amend the definitive map and statement of public rights of way and to confirm the order if no representations or objections are received.

17. Reasons for Proposal

- 17.1. It is considered that in this case the legal tests for the making of a diversion and extinguishment order to divert Footpaths Westbury 29 (part), Dilton Marsh 20 (part) and extinguish Footpaths Westbury 28 (part) and Dilton Marsh 19 (part) under Section 119 and 118 of the Highways Act 1980 have been met as discussed in paragraph 10. i.e. the order can be made in the interests of the landowner to divert the footpaths away from the proximity of the dwelling to the boundaries of the property and extinguish the unnecessary spur as a result of this diversion.
- 17.3. It is also considered that at this stage the legal tests for the confirmation of the order appear to be met. However, it is recognised that the evaluation of the diminution of use and enjoyment is subjective. The balance of the legal tests may be altered by representations and objections received during the advertisement period meaning that Wiltshire Council must again consider the balance of issues affecting this proposed diversion before forming a view on the merits of confirmation.
- 17.4. The proposed diversion and extinguishment also meets other considerations which the Council must take into account such as the provisions of the

ROWIP, the Equalities Act 2010 and the needs of agriculture, forestry and biodiversity.

18. Proposal

18.1. That an order be made under Section 119 and 118 of the Highways Act 1980 to divert Footpaths Westbury 29 (part), Dilton Marsh 20 (part) and extinguish Footpaths Westbury 28 (part) and Dilton Marsh 19 (part), and Section 53A of the Wildlife and Countryside Act 1981, to amend the definitive map and statement of public rights of way and to confirm the order if no representations or objections are received.

Ali Roberts

Definitive Map Officer

5 August 2021