

Wiltshire Council

Western Area Planning Committee

17 August 2011

**Proposed Diversion of Part of Westbury Public Footpath No. 25 – Westbury
Primary Care Centre**

Purpose of Report

1. To:
 - (i) Consider and comment on an objection received to an Order, made under Section 257 and paragraph 1 of Schedule 14 of the Town and Country Planning Act 1990 and Section 53A of the Wildlife and Countryside Act 1981 proposing to divert a section of Westbury Footpath No. 25.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for the Environment, Food and Rural affairs for confirmation.

Background

2. On 9 July 2010 Wiltshire Council received an application from Westbury Group Practice to build a Primary Care Centre (PCC) on land north west of Westbury Leigh Primary School, Mane Way, Westbury. Application No. W/10/02170/FUL.
3. Part of the PCC building and the disabled parking spaces coincide with the line of part of Westbury Footpath No. 25.
4. Planning permission was granted on 17 November 2010 subject to 11 conditions.
5. Condition No. 6 states:

“No development shall commence on site until details of a bus lay-by and a pedestrian/cycle crossing facility at the southern leg of the access roundabout together with visibility improvements within the public highway for pedestrians viewing vehicles approaching the roundabout from the north have been submitted to and approved in writing by the Local Planning Authority; the approved improvements shall thereafter be completed prior to the first use of the development.”
6. Condition No. 7 states:

“Any diversion of Westbury Footpath 25 shall be constructed as a 2m wide tarmac path, or to an alternative specification approved in writing by the Local Planning Authority, and the route through the site shall always be available to the public when the Primary Care Centre is open”

7. There are three 'Informatives', number three relates to the public right of way:

"The public Right of Way traversing the site must be diverted prior to commencement of any development on the site via Section 259 of the Town and Country Planning Act. The applicant should liaise with the Public Rights of Way Section to arrange this. Rights of Way officers advise the applicants to be aware that the Right of Way cannot be legally blocked off for the construction until the diversion is dealt with. It should be noted that diversions take a number of months due to legal processes involved (and the outcome can't be guaranteed) so the applicants are advised to progress this diversion very early on."

8. On 8 December 2010 Wiltshire Council received an application from Leighton Health Ltd, Station Road, Westbury, to divert part of Westbury Footpath No 25. The reason for the diversion was that it was in accordance with a condition attached to the planning permission.
9. The application sought to divert the line of Westbury Footpath No 25 at its southern junction of Mane Way from a cross field route to a path leading around the eastern perimeter of the PCC site to join the roundabout where Mane Way splits from the A3098. The new path will be two metres wide and will have a tarmac surface. There will be no stiles/gates/gaps.
10. Westbury Footpath No. 25 is currently recorded in the definitive map and statement as a public footpath leading from Penleigh Mill at the Dilton Marsh parish boundary across two fields to Mane Way (A3098). It continues on the opposite side of Mane Way, leading broadly south-west through an area of undeveloped land and through a residential development at Westbury Leigh. Rights of way in the area are shown at **Appendix 1** and photographs of Westbury Footpath No. 25 are shown at **Appendix 1A**.
11. A consultation regarding the proposed diversion was conducted between 13 January and 14 February 2011. This is a non-statutory consultation. The following were consulted:

Savill Bird and Axon acting for Leighton Health Ltd
Persimmon Homes (Wessex)
The Auto Cycle Union
Commons, Open Spaces and Footpaths Society
Wiltshire Bridleways Association
Wiltshire Cycling Touring Club
British Horse Society
Mr R Hawker, Wiltshire Councillor
Westbury Town Council
Dilton Marsh Parish Council
Mr Francis Morland
Byways and Bridleways Trust
Wiltshire Council Senior Rights of Way Warden
Sonia Heywood, Wiltshire Ramblers Representative
Mr B Riley
British Driving Society
Wessex Water
Wales and West Utilities

Scottish and Southern Electric
Virgin Media
Linesearch (includes National Grid and a number of oil and gas pipelines).

12. Consultation Responses:

- No apparatus was affected by the extinguishment. Scottish and Southern drew attention to underground LV cables on the northern boundary of Mane Way.
- The Wiltshire Council Senior Rights of Way Warden confirmed that tarmac would be a suitable surface.
- Mr Francis Morland noted that the original plans submitted showed the diversion being on the western edge of the development, and not the eastern as consulted, but did not formally respond.
- Ramblers responded saying they have no objection to the proposed diversion.

No response was received from either the local ward Member or from Westbury Town Council.

Main Considerations for the Council

13. The Town and Country Planning Act of 1990 states, in Sections 257 and 259:

“257 Footpaths and bridleways affected by development: orders by other authorities.

(1) Subject to section 259, a competent authority may by order authorise the stopping up or diversion of any footpath or bridleway if they are satisfied that it is necessary to do so in order to enable development to be carried out—

(a) in accordance with planning permission granted under Part III, or

(b) by a government department.

(2) An order under this section may, if the competent authority is satisfied that it should do so, provide—

(a) for the creation of an alternative highway for use as a replacement for the one authorised by the order to be stopped up or diverted, or for the improvement of an existing highway for such use;

(b) for authorising or requiring works to be carried out in relation to any footpath or bridleway for whose stopping up or diversion, creation or improvement provision is made by the order;

(c) for the preservation of any rights of statutory undertakers in respect of any apparatus of theirs which immediately before the date of the order is under, in, on, over, along or across any such footpath or bridleway;

(d) for requiring any person named in the order to pay, or make contributions in respect of, the cost of carrying out any such works.

(3)An order may be made under this section authorising the stopping up or diversion of a footpath or bridleway which is temporarily stopped up or diverted under any other enactment.

(4)In this section “competent authority” means—

(a)in the case of development authorised by a planning permission, the local planning authority who granted the permission or, in the case of a permission granted by the Secretary of State, who would have had power to grant it; and

(b)in the case of development carried out by a government department, the local planning authority who would have had power to grant planning permission on an application in respect of the development in question if such an application had fallen to be made.

259 Confirmation of orders made by other authorities.

(1)An order made under section 257 or 258 shall not take effect unless confirmed by the Secretary of State or unless confirmed, as an unopposed order, by the authority who made it.

(2)The Secretary of State shall not confirm any such order unless satisfied as to every matter as to which the authority making the order are required under section 257 or, as the case may be, section 258 to be satisfied.

(3)The time specified—

(a)in an order under section 257 as the time from which a footpath or bridleway is to be stopped up or diverted; or

(b)in an order under section 258 as the time from which a right of way is to be extinguished,shall not be earlier than confirmation of the order.

(4)Schedule 14 shall have effect with respect to the confirmation of orders under section 257 or 258 and the publicity for such orders after they are confirmed.”

14. The West Wiltshire District Plan 2004 at R11 in relation to Footpaths and Rights of Way states that:

“The protection, enhancement and use of the public rights of way system will be sought. Where appropriate, extensions and improvements to the network will be sought as part of the development proposals.”

15. Section 257 of the Town and Country Planning Act requires that before the Order may be confirmed either Wiltshire Council (in the case of an Order that has not attracted objections) or the Secretary of State must be satisfied that it is necessary to divert the footpath in question in order to enable development to be carried out in accordance with planning permission granted.

16. Paragraph 7.15 of Circular 1/09 (Rights of Way Circular – Guidance for Local Authorities – DEFRA) advises that the disadvantages or loss likely to arise as a result of the diversion, either to members of the public generally or to persons

whose properties adjoin or are near the existing highway, should be weighed against the advantages of the Order.

Comments on Considerations

Whether it is necessary to divert the footpath in order to enable development to be carried out

17. Part of Westbury Footpath No. 25 passes over the land where the main PCC building will be built and over the land where parking spaces for the disabled will be allocated. Development cannot commence until the path is diverted. It is therefore necessary.

The disadvantages or loss likely to arise as a result of the diversion

18. Westbury 25 is a footpath linking the built environment with the rural environment. The route north of Mane Way currently crosses fields leading to Penleigh Mill. The development of the PCC on this land undoubtedly expands the built environment and users of Westbury Footpath No. 25 will inevitably find that the rural character of the route is lessened by this development regardless of where the diversion leads.
19. The planning permission requires, as a condition (7), that the diverted route shall be constructed as a two metre wide tarmac path, making the loss of rural aspect an inevitable consequence of the planning consent.
20. The proposed diversion makes the length of Westbury Footpath No. 25 longer; however, the land is flat and access on the surfaced route will be improved for the less able and for those with buggies or pushchairs. The existing path has a stile at its junction with Mane Way and the proposed route does not; hence, access is improved for the remainder of the path which becomes more accessible for all.
21. Dropped kerbs will be provided on the diverted route as appropriate at the pedestrian/cycle crossing; the existing route does not have dropped kerbs.
22. Users wishing to use Westbury Footpath No. 25 will find it is staggered as a result of the new development (it currently crosses Mane Way in a straight line). There is a designated footway along Mane Way and users wishing to link the staggered parts may use this. The new crossing point is likely to be safer than the existing crossing of Mane Way. It is also noted that the section of Westbury Footpath No. 25 from Mane Way to Westbury Leigh (south of Mane Way) appears more heavily used (from worn tracks on the ground) than the section affected by the PCC, suggesting that not all users use the continuous route.
23. A direct route close to the line of Westbury Footpath No. 25, where it passes through the PCC, will be available during PCC opening hours, offering members of the public a direct route at those times, should they want it.
24. A short section of the end of the diversion where it meets Mane Way will be shared with PCC traffic. It is noted, however, that crossing Mane Way at this point involves slower traffic than at its current crossing point.

25. An Order diverting part of Westbury Footpath No. 25 was made and advertised in accordance with the legislation on 15 April 2011 (see **Appendix 2**).
26. An objection was received from the local representative of the Ramblers' Association on 26 April 2011 but was subsequently withdrawn on 3 May 2011.
27. An objection was received from Mr Francis Morland on 20 May 2011 and has not been withdrawn. The objection remains a duly made objection and Wiltshire Council must consider the points made and decide whether to abandon the Order or forward it to the Secretary of State for determination.

Comments on Objection

28. The grounds on which the objection is made are as follows:
 - (i) The application for the planning permission granted under Part III of the Town and Country Planning Act 1990 on which the Order is founded (ref W/10/02170/FUL) showed a proposed diversion route of Westbury Footpath No. 25 adjacent to and along the south-west boundary of the proposed development, and not as now specified.
 - (ii) The diversion route now specified between point A and point B is not convenient or commodious for existing users of Westbury Footpath No. 25 and is excessively and unnecessarily lengthy and circuitous, being in excess of three times the original length.
 - (iii) It is not essential or reasonably necessary to enable development to be carried out in accordance with the planning permission granted. The only part requiring diversion is that part affected by the two-storey development itself. No diversion is required for the remainder of the development. The purpose of the legislation is to permit development to proceed and not to "sweep the whole of the application site clear of all public rights of way to enable future development not yet permitted".
 - (iv) The A3098 at Mane Way is already an adopted highway and no good purpose is served by creating a new length of highway from point A to the roundabout within its boundaries.
 - (v) The portion of the permitted development, comprising a macadam surfaced footway along its northern boundary, was designed primarily to serve the purposes of the development and there is no advantage to anyone to make it a public footpath (unless the entire length of Westbury Footpath No. 25 is surfaced similarly).
 - (vi) It is an additional and unnecessary hazard to users of Westbury Footpath No. 25 to have to cross the main vehicular access to the permitted development between points A and B.
 - (vii) A planning application for 24 dwellings on land fronting Mane Way (ref no. W/10/03876/FUL) is awaiting determination and if permitted will

require a diversion of Westbury Footpath No. 25 south of Mane Way. The character and usefulness of Westbury Footpath No. 25 is best preserved by co-ordinating the two diversions to a route generally to the south-west to a new junction with Footpath 23 adjacent to the western extremity of the permitted PCC development (to the west of point B).

29. A copy of the full objection is attached at **Appendix 3**.

Comments on the Objection

30. Councillor Francis Morland raised the point with officers that the original submission from Leighton Healthcare had been to divert the footpath along the western boundary of the site. It is agreed that the original design statement (at 3.1) did show this and may have been presented at public meetings during May and June and at an Area Board meeting. However, the relevant plans for the planning permission do show the proposed diversion as consulted (to the north and east of the site) and it is these plans that the permission was granted upon.
31. It is further noted that it was an aspiration of the designers (3.1 Design and Access statement) that:
- “The building’s orientation and placement on the site is used to create a “private” area behind the centre for staff parking where movement of people is minimal and the building plan was developed to allow most of the clinical areas to look out over the private spaces.”*
- Clearly it would be incompatible with this aspiration to divert the public footpath along that boundary.
32. It is also noted that any proposed diversion along the western edge of the site would require the boundary fence to be repositioned and the car park reduced to put the diverted path on the applicant’s land. This part of the site has a high security style fence around it and it is not considered that walking beside it would be especially pleasant.
33. Any diversion of Westbury Footpath No. 25 to the west of its current egress onto Mane Way would involve users having to climb a steep highway bank to emerge onto, or exit from, Mane Way. The land levels to the east where the proposed diversion will terminate.
34. A highway authority has a duty, under the Highways Act, to assert and protect the right of the public to use and enjoy a highway. The Equality Act 2010 (Formerly the Disability Discrimination Act 1995) adds a further dimension by requiring 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.
35. There is no specific reference in the Equality Act to any aspect of rights of way management and, as yet, no body of case law that can be referred to in the application of either the Equality Act or the DDA to rights of way. Nonetheless, it

is clear that authorities are required to have regard to their obligations under the Equality Act wherever changes or additions to the rights of way network are proposed and are encouraged to make improvements wherever appropriate opportunities arise.

36. The only other alternative would be to effect a very small diversion, effectively steering the path around the building and the disabled spaces. This is considered highly undesirable as the area is likely to be busy with PCC business which is unlikely to be compatible with recreational use. It would also prevent Leighton Health Care making their site secure outside opening hours, something they expressed a need to do in the original planning application. However, this route will be available during PCC opening hours.
37. The objector states that sharing the vehicular entrance of the PCC presents an additional hazard to users of Westbury Footpath No. 25. It is noted that the planning consent requires that the route through the PCC is open to the public during PCC opening hours. Hence, at times when traffic will be using the vehicular access, walkers do not have to walk that way. Only when the PCC is closed do walkers have to use the shared access which, at that time, would not be used by vehicles.
38. At point iv the objector states that the proposed footpath between point A and the roundabout is within the existing highway boundary. The s.38 Highways Act 1980 adoption plan shows that a two metre stretch leading from the roundabout past point A to footpath Westbury 54 has not been adopted as highway. Hence, the recording of this section as a public footpath is possible and preserves rights on foot. The Order Plan does require a small modification of the line to reflect this. The Secretary of State has the power to modify Wiltshire Council's Order prior to confirmation and a recommendation to make this modification would be appropriate. An Order Plan showing the required modification is attached at **Appendix 4**.

Environmental Impact of the Recommendation

39. Development of the site has been approved and it is considered that there is no additional environmental impact from the diversion of the path.

Risk Assessment

40. Although the making of an Order to divert a path under the Town and Country Planning Act 1990 is a power, and not a duty, of the Council, where that Council is a unitary authority and there is no other office (other than the Secretary of State) to whom the public may apply, a duty is implied. There are no risks associated with this diversion Order proceeding.

Financial Implications

41. The applicant will pay related costs where the Order is confirmed without objection. If objection is received and the Order is not abandoned by Wiltshire Council, it may be forwarded to the Secretary of State for determination. The applicant will not pay these additional costs which will fall to Wiltshire Council.

42. An Order so determined may be considered by written representations (no additional cost) or a public hearing (for which costs will be relatively low - £100 to £500) or at a public inquiry (for which costs may be higher if counsel is employed - £500 - £2500).

Options to Consider

43. To:
- (i) Abandon and revoke the Order
 - (ii) Forward the Order to the Secretary of State for Environment, Food and Rural Affairs with a recommendation that the Order be confirmed.

Reasons for Recommendation

44. It is considered necessary to divert Westbury Footpath No. 25 to allow development to proceed. The development includes not just a two-storey building but also the building of a car park. It is not practicable to divert the path through the site. Section 257 (1) of the Town and Country Planning Act 1990 is therefore satisfied.
45. Disadvantages or loss likely to arise as a result of the diversion, either to members of the public generally, or to persons whose properties adjoin or are near the existing highway, have been weighed against the advantages of the Order.

Recommendation

46. That the Wiltshire Council (Sheet ST 85 SE) Westbury 25 (part) Diversion Order and Definitive Map Modification Order No 22 2011 is forwarded to the Secretary of State for Environment, Food and Rural Affairs with the recommendation that the Order be confirmed with the modification to the Order Plan detailed at paragraph 38.

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

None