

NORTHERN AREA PLANNING COMMITTEE

14 MARCH 2012

PROPOSED DIVERSION OF PURTON BRIDLEWAY 104 (PART)
KNOWN AS MUD LANE

Purpose of Report

1. To:
 - (i) Consider and comment on the representations received to an Order, made under Section 119 of the Highways Act 1980, proposing to divert a section of Purton Bridleway 104.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for the Environment, Food and Rural Affairs (DEFRA) for confirmation as made.

A copy of the Order, Schedule and Plan is attached at **Appendix A**.

A location plan showing the surrounding land and path network is attached at **Appendix B**. Photographs of the existing and proposed routes are attached at **Appendix C**.

Background

2. The Council has a power to divert any public path, or part of any public path, under the Highways Act 1980 Section 119 if it is expedient to do so in the interests of the public or of the landowner and if certain legal tests laid out below, in paragraphs 10 and 11, are met.
3. Following a meeting of the Wiltshire County Council Regulatory Committee on 21 May, 2008 Members resolved that a Public Path Diversion Order should be made in respect of the part of Public Footpath 104 at Restrop, Purton, where it passes along an ancient sunken lane, known as Mud Lane, to a new route that would be designated as a Public Bridleway (this original diversion was proposed on the same route as the current diversion).
4. An Order was subsequently made on 9 July 2008 in the interests of the public and the owners of the land crossed by the footpath. The Order attracted 49 representations in support of the diversion and 41 objections. The Order was then sent to the Secretary of State for DEFRA, for a confirmation decision, and Wiltshire Council was advised that the Order was not capable of confirmation until the public footpath to be diverted was upgraded to the same status as the proposed diversion route i.e. public bridleway. There was already a longstanding application backed by historical documentary evidence to upgrade the existing footpath to bridleway status and, after wide public consultation, an Order upgrading the existing footpath to bridleway was duly made and advertised and after receiving no objections was duly confirmed.
5. A new public consultation was undertaken for the diversion of Mud Lane, which now has bridleway status, between 5 May and 17 June 2011, inviting comments concerning the proposed diversion. In total, the consultation received 143 responses with 96 in support and 47 against. A diversion Order was subsequently made by the Corporate Director of Neighbourhood and Planning on 20 September 2011.

6. The Order has attracted 126 responses, comprising 4 neutral responses, 39 against and 83 in support. The Objections and Representations of Support have been put into table format, along with Officer's Comments, and attached as **Appendix D** to this report. There were 4 neutral representations made and these all called for a Public Inquiry. Altogether, twenty of the responses expressed the view that the interests of the public would be best served by holding a local Public Inquiry, a view shared by Officers.
7. The Committee should be aware that two of the letters from principal objectors listed concerns regarding the Order-Making process. These were from Purton Parish Council and 'P's & Q's' (Purton's Qualities, a local community and heritage organisation). The contents of these two letters, along with Officer's Comments on the points raised, are attached to this report as **Appendices E** and **F** respectively. Also, these two objecting organisations wished to see a deeper analysis of the supporter's comments to the pre-Order consultation; these are attached as **Appendix G** to this report.
8. Advantages to the public of the diversion over the old route can be seen from the analysis of views shown in depth through Officer's Comments in **Appendix D**, supporters comments in **Appendix G** and briefly laid out in the section entitled Main Considerations for the Council (paragraphs 11–18 below).

Legal Empowerment

9. Section 119 of the Highways Act 1980 allows:

- (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 for DEFRA, or confirmed as an unopposed order, -*
 - (a) *create, as from such date as may be specified in the order, any such 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.*

10. **The Act requires in Section 119(6) that:**

(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 the 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).

Main Considerations for the Council

11. The Council has received objections to the proposed Order and Members have to decide whether they still wish to support the Order or formally resolve not to proceed with it.

12. The Council must decide if the legal tests for confirmation, as laid out in paragraphs 9 and 10 above, are met, namely:

(i) That it is expedient to make the diversion in the interests of the landowner or of the public.

Officer's Comment: Mrs Moseley (joint landowner) puts a very compelling case showing this diversion to be expedient in the interests of the landowner for reasons of privacy and security, both of which are acceptable reasons, her comments are as follows:

"I continue to support the diversion. As a mother of three young children, security is among my chief concerns. When we first moved to Restrop Farm nine years ago, we frequently had people trespassing through our driveway and farmyard, walking in any direction they wished. It was disconcerting to say the least. With the addition of the permissive path all this has changed. Walkers have felt happy and confident to walk a clearly marked route away from a domestic house... On the rare occasions that people still seek the old, impassable footpath, they walk right by our house and frequently look in the windows. It is a big infringement on our privacy and makes the children feel vulnerable and frightened. Footpath 104 runs right along our garden and if it were to be made passable again, I would feel unable to allow our children to play freely outside. We have had repeated incidents involving questionable characters trespassing on the farm as documented in police reports. With crime levels as high as they

are, it is in our best interests and those of future families that may live here, to keep people a safe distance away from the house”.

It is also considered to be expedient in the interests of the public (see Officer’s Comments in points (ii) and (iii) below).

- (ii) That the path will not be substantially less convenient to the public in consequence of the diversion:

Officer’s Comment: The new path will not be substantially less convenient to the public because the surface of the diversion is level, better drained and not prone to flooding. The width of the proposed diversion has variable useable widths between 3.5 metres and 7.5 metres, similar to that of the existing path which is recorded as having a width varying between 12 feet and 25 feet.

- (iii) That it is expedient to confirm the Order having regard to:

- (a) *the effect which 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.*
- (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.*

Officer’s Comment: The new path makes the route more enjoyable for horse riders, cyclists, and families and less able walkers; this is shown by the testimony of the 96 people who have written in support of the application and already use the route. All users would find the new route more accessible as it has two user-friendly gates whereas the definitive line has two abrupt four foot height changes and would need four gates/stiles for stock-control purposes. There is no other land affected by the diversion. All considerations in Officer’s Comments above have been made as if the existing way was open to use, but without the engineering works that would be necessary for it to meet current standards of acceptability for a public bridleway.

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

- (i) *Eliminating conduct that is prohibited by the Act*
- (ii) *Advancing equality of opportunity between people who have a disability and people who do not.*
- (iii) *Fostering good relations between people who have a disability and people who do not.*

The equality Act applies to a highway authority's provision of public rights of way services (DEFRA Guidance: *Authorising Structures (Gaps, Gates and Stiles) on Rights of Way* - October 2010).

Officer's Comment: The new path is better drained and easier to use being wide, level and having user-friendly gates.

14. In reaching a decision the Council must also have regard to the Wiltshire Council Rights of Way Improvement Plan (ROWIP). The ROWIP recognises the Council's duty to have regard to the Disability Discrimination Act 1995 (now replaced by the Equalities Act 2010) and to consider the least restrictive option. The ROWIP also has as its aims:

- (i) *The promotion and development of the public rights of way network, enabling pedestrians, cyclists and horse riders to avoid heavy or intrusive traffic. (p.46.3).*
- (ii) *To provide a more usable public rights of way network, suitable for changing user demands (p.46.1).*
- (iii) *Increase access to the countryside for buggies, older people, people with mobility problems and other impairments (p.43.1 – 5).*
- (iv) *Increase access to the countryside for people who are blind or partially sighted (p.43.4 and 5).*

Officer's Comment: By having gates that are compliant with the current BS5709 standard which is the Government recommended standard for ease of use, the new route meets the aims of Wiltshire Council's current ROWIP (2008) i.e. making a more useable network and increasing access for buggies, older people, people with mobility problems and other impairments.

15. The Council must also have regard to the needs of agriculture and forestry and the desirability of conserving flora, fauna and geological and physiographical features (C.R.O.W. Act 2000).

Officer's Comment: The diverted route is not considered to adversely affect any flora, fauna or agricultural or forestry use. The existing route is an old sunken hollow-way bounded on each side by ancient hedgerow and as such will still have protection under the Hedgerow Regulations 1997 after public rights of way over the route are removed. The Hedgerow Regulations make it a criminal offence to intentionally or recklessly remove such a hedgerow.

16. Section 40 of the Natural Environment and Rural Communities Act 2006 places a general duty on every public authority in exercising its functions to have regard to the conservation of biodiversity.

Officer's Comment: Some objectors have commented on the fact that conifers have been planted along the diverted route. These were planted in combination with shrubs, such as blackthorn and hawthorn, and were planted to give temporary cover until a deciduous hedgerow is well established and are being systematically thinned year by year until they are gone, a third have already been removed. The ditch and two hedgerows that form the existing path will remain. It is considered that this diversion does not adversely affect biodiversity.

17. The Council should also note that in a recent Highways Act 1980 s.119 confirmation decision (Planning Inspectorate reference number FPS/J1155/4/32) an Inspector appointed by the Secretary of State for DEFRA confirmed a diversion in Devon where to reinstate the definitive lines would have incurred a cost of between £2,000 and £3,000. Whilst the Inspector agreed with the objectors that although:

'...although consideration of the cost of operations to assert and protect the rights of the public does not feature in the 1980 Act, I also concur with the Council that the relative costs of the proposed diversion as opposed to the reinstatement of the definitive lines is a material factor that should be taken into consideration'.

The Inspector goes on to say:

'At a time of increasingly scarce resources within local government I do not consider the expenditure required...would be the best use of those resources which are available to the Council, given that the proposed diversion would result in bridleway 24 following a course above the spring line which land on which no such structures would be required. I take the same view with regard to the clearance of vegetation that would be required to make the definitive route accessible: whilst the Council conceded that such clearance would not be particularly expensive, it nonetheless represents an additional expense that the proposed diversion would avoid. If the proposed diversion has the effect of freeing up resources to be spent elsewhere on the local rights of way network, or removing the liability on the public purse to erect and maintain a stream crossing, I am of the view that the proposed diversions can be said to be in the public interest'.

Officer's Comment: Costs for bringing Mud Lane into suitable condition for a public bridleway have been quoted by approved contractors at £150,000 (although the Ramblers have estimated the costs at £30,000 and Purton Parish Council believing the figure to fall in between these widely differing figures). Officers believe that, in order to provide a safe and fully accessible bridleway for use by walkers, horse-riders and cyclists, the upper figure of £150,000 is realistic (2008 and 2011 quotes from M J Church are attached to this report at **Appendix H**). The entire Rights of Way operational budget for the North of Wiltshire to maintain/improve public paths is set at £49,000 for the year 2011-2012. It is therefore considered to be in the interests of the general public and also, more specifically, Wiltshire taxpayers that the offered bridleway is accepted in favour of the existing route.

18. In the confirmation decision [as was the case in the Order decision] the two routes should be equitably compared by disregarding any temporary circumstances preventing or diminishing the use of the existing route by the public. The DEFRA Rights of Way Circular 1/09 states at 5.25:

'Section 119 of the 1980 Act does not specifically entitle an authority to disregard temporary circumstances, including any buildings or structures preventing or diminishing the use of the existing way in considering whether or not to make an order and the consideration is equally not available to the body confirming the order. The Planning Inspectorate Advice Note 9 22 (s28) indicates that in forming an opinion on whether the replacement route is not substantially less convenient to the public, a fair determination can only be made on the assumption that the existing route is available to the public to its full legal extent'.

Officer's Comment: The existing way has been heavily overgrown and impassable since the 1960's, probably mainly due to its tendency to flood. However, temporary obstructions such as this should be ignored when comparing both routes under s.119 for the purpose of a diversion Order. The barrier formed by the abrupt 4-foot height changes half way along the existing route however, is not of such temporary nature and would certainly need considerable engineering works in place to allow free passage and therefore should be considered. The diversion route is level.

Environmental Impact of the Recommendation

19. There are no significant environmental implications arising from the recommendations set out within this report.

Risk Assessment

20. There are no risks associated with the diversion that are over and above the normal risks associated with using any other rural public bridleway. In contrast, there are higher risks associated with opening up the existing route, which has many tree roots and is prone to flooding.

Financial Implications

21. The making of a Public Path Diversion Order is a discretionary duty of the Highway Authority, rather than a statutory duty. Provision has been made within existing budgets for the costs involved in processing this Order.
22. If the Committee decided to refer the Order to the Secretary of State for DEFRA with the request that it should be confirmed, the Secretary of State must decide the most appropriate method of reaching his decision. In cases where there are many objections to an Order it is appropriate to make the decision after a local Public Inquiry. Provision has been made within existing budgets to cover this.
23. If Wiltshire Council decides not to continue with the diversion Order, or the Order is not confirmed, Wiltshire Council will be under a legal duty to open the old route, whereupon the financial costs to the Council are likely to be in the region of £150,000 (see point 7 in the table in section 7).

Options Considered

24. The following options have been considered:
 - (i) Not to continue with the Order.
 - (ii) That the Order be referred to the Secretary of State for DEFRA for determination with the recommendation that it be confirmed as made.

Reasons for Recommendation

25. The diversion Order meets the tests for confirmation contained in Section 119 of the Highways Act 1980 and that it is in the interests of the public that the case is now determined by local Public Inquiry.

Recommendation

26. That the Order be referred to the Secretary of State for DEFRA for determination with the recommendation that it be confirmed as made.

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

Correspondence with landowners, parish councils, user groups, other interested bodies and members of the public