

**TOWN AND COUNTRY PLANNING ACT 1990**

**WILTSHIRE COUNCIL BOROUGH OF MARLBOROUGH PATH NO. 26 (Part)  
STOPPING UP ORDER AND DEFINITIVE MAP MODIFICATION ORDER 2014**

**Purpose of Report**

1. To:
  - (i) Consider an Order extinguishing part of footpath Marlborough No. 26.
  - (ii) Recommend that the Order be submitted to the Secretary of State for Environment, Food and Rural Affairs for determination and that Wiltshire Council supports the Order.

**Relevance to the Council's Business Plan**

2. Working with the local community to provide a rights of way network fit for purpose.

**Description of the Route**

3. The Order is attached to this report at **Appendix 1** and contains a map showing the part of the route to be extinguished.
4. Marlborough footpath No. 26 leads from the A4 across the forecourt of Bridge Garage to the River Kennet. The path then leads across the river, past the church to its junction with the B3052 (George Lane). There is no access across the river. The banks are steep and inaccessible and no evidence of a bridge has been found from either documents (1773 onwards) or a ground survey.
5. The route across the garage forecourt was diverted in 1981 by an Order made under Section 210 of the Town and Country Planning Act 1971.

**Background**

6. A full report relating to this Order is appended at **Appendix 2**.
7. The Order is made as a result of an application to Wiltshire Council (application number 2014/14) to extinguish the section of path from the A4 south to the River Kennet to enable a permitted development to proceed. One objection to the Order has been received and the Council must now decide whether to abandon the Order or whether to send it to the Secretary of State for the Environment, Food and Rural Affairs for determination.

8. Planning permission was granted on 15 May 2014 for the redevelopment of the garage to accommodate six new dwellings and conversion and extension of a grade II listed cottage to accommodate four dwellings.
9. Nothing in the planning permission permits the development to proceed unless the right of way is either extinguished or diverted.
10. The permitted development obstructs parts of the footpath with parking bays for units 8, 9 and 10 and there is no reasonable route for diversion of the path or relocation of the bays.
11. Wiltshire Council, as surveying authority, does not have a statutory duty to make Orders altering the network (for example diversions or extinguishments) and will generally not make them where there is a high level of relevant local dissent to the proposal. However, the granting of planning permission that requires the diversion of rights of way to proceed, places an additional responsibility on the surveying authority where that authority is a unitary authority.
12. The Department for Environment Food and Rural Affairs Guidance for Local Authorities, Rights of Way Circular 1/09 Version 2 at 7.15 states:

*“The local planning authority should not question the merits of planning permission when considering whether to make or confirm an order, but nor should they make an order purely on the grounds that planning permission has been granted. That planning permission has been granted does not mean that the public right of way will therefore automatically be diverted or stopped up. Having granted permission for a development affecting a right of way, however, an authority must have good reasons to justify a decision either not to make or not to confirm an order. The disadvantages of loss likely to arise as a result of the stopping up or diversion of the way 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 proposed order.”*
13. The Defra Guidance referenced at paragraph 12 above states at 7.11:

*“The grant of planning permission does not entitle developers to obstruct a public right of way. It cannot be assumed that because planning permission has been granted that an order under section 247 or 257 of the 1990 Act, for the diversion or extinguishment of the right of way, will invariably be made or confirmed. Development, in so far as it affects a right of way, should not be started and the right of way should be kept open for public use, unless or until the necessary order has come into effect. The requirement to keep a public right of way open for public use will preclude the developer from using the existing footpath, bridleway or restricted byway as a vehicular access to the site unless there are existing additional private rights.”*
14. It is therefore clear that until such time as an Order diverting or extinguishing the affected rights of way is made and confirmed, the development cannot proceed.

## **Main Considerations for the Council**

### The statutory requirements

15. Section 257(1) of the Town and Country Planning Act 1990 states the following:
- “(1) Subject to Section 259, a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway 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”*
16. It is considered that this is met. The parking bays, when used for that purpose, would obstruct the public right of way. Associated traffic movements could also cause nuisance or danger to walkers.

### Effect of the proposal on other parties

17. Paragraph 7.15 of Defra Circular 1/09 advises that in considering whether or not to confirm the Order, the disadvantages or loss likely to arise as a result of the stopping up or diversion, either to members of the public generally, or to persons whose properties adjoin or are near the existing public right of way, should be weighed against the advantages of the proposed Order.
18. The Order was duly advertised in the newspaper, by notice to prescribed and interested parties and placed on site for a period of 28 days. One objection was received.
19. The objection was made by Councillor Stewart Dobson who sent the following by email on 26 August 2014:
- “I wish to object most strongly to the above Order.*
- This Right of Way is an ancient and historic path which is an important part of our town’s heritage. Previous owners of the site have always protected the route and acknowledged their responsibility.*
- When the present owners of Bridge Garage presented their development plans for the site they assured myself and members of the Town Council that they were aware of the path and would protect the route in their plans. I see no reason to stop and divert this route.”*
20. Officers have considered Cllr Dobson’s objection and agree that the route is undoubtedly one of antiquity. However, it is a fact that the line of the path is obstructed by the permitted development and owing to the constraints of the site there is no scope for diversion. Additionally, the route is a ‘dead end’, currently being interrupted by bushes and the river. Although it is possible to get reasonable views of the river from the south side, it is not possible to do so from the Bridge Garage side.

21. Additionally, the central section across the forecourt was diverted in 1981 and has therefore lost its historic route.
22. As a result of these considerations officers wrote to Cllr Dobson on 18 September 2014 inviting him to withdraw his objection. No response has been received.
23. The letter stated:

*“The advertisement period for the above Order has now expired and Wiltshire Council has received no objections or representations to the Order other than the one that you submitted dated 26 August 2014.*

*If your objection is not withdrawn the Order will be put before the Eastern Area Planning Committee who must resolve to either abandon the Order or to forward it to The Planning Inspectorate for determination.*

*The Order was made as the result of an application to extinguish the path arising from the grant of planning permission for application 13/05263/FUL. Guidance issued by the Department for Environment Food and Rural Affairs – Rights of Way Circular 1/09 Guidance for Local Authorities Vers 2 says at para. 7.15 ‘Having granted planning permission for a development affecting a right of way however, an authority must have good reasons to justify a decision either not to make or not to confirm an order’.*

*In the Council’s decision on 13/05263/FUL the case officer identified that vehicles parked in bays would obstruct the route of the footpath and that the applicant would need to apply to extinguish or divert the footpath. The footpath is obstructed by parking bays for units 8, 9 and 10 and there is no reasonable route available for diversion. The only possible route would lead very close to the entrance to unit 9 and past the window to the downstairs toilet before reaching the dead-end which is the river, the route would also be closer to the A4 at this point than historically and hence more disturbed by traffic noise. The developer has indicated that they are not prepared to provide a riverside walk or riverside seating and given the constraints of the site this is an understandable response.*

*Although it is clear that Marlborough 26 is a historic route, the purpose and character of the section north of the river are long lost. It is noted that part of the route was diverted some years ago, resulting in the loss of the historic line and any further diversion would lead to a route that would be restricted in width, unclear in purpose, of little or no utility to the public but with a considerable burden of maintenance cost to be found from public monies. For these reasons any officer’s report to the planning committee is likely to support the confirmation of the Order.*

*If you could please confirm with me whether you wish to sustain or withdraw your objection I would be very grateful. If I do not hear from you by 10 October 2014 I will assume that objection is upheld and will prepare a report for the planning committee.*

*If you have any queries please do not hesitate to contact me.”*

### **Safeguarding Considerations**

24. Considerations relating to safeguarding anyone affected by the making and confirmation of an Order made under Section 257 of the Town and Country Planning Act are not relevant considerations for this Order.

### **Public Health Implications**

25. Considerations relating to any public health implications of the making and confirmation of an Order made under Section 257 of the Town and Country Planning Act are not relevant considerations for this Order.

### **Environmental Impact of the Recommendation**

26. No environmental impact has been identified.

### **Risk Assessment**

27. The public would no longer be able to walk from the A4 to the River Kennet , a distance of 64 metres at this site. The alternative route is via the reserved footway beside the A4 for a similar distance.
28. The extinguishment of this section of footpath is unlikely to either decrease or increase any risk to members of the public.

### **Financial Implications**

29. The applicant has agreed to pay all costs relating to this Order but they may not be charged for any costs related to sending the matter to the Planning Inspectorate for determination. If the Council agrees to support the Order, costs could be in the region of up to £2,500. However, in this case, with only one objection it is likely that Planning Inspectorate would consider the case by either written representations (no additional cost to the Council) or at a local hearing (cost to the Council in the region of £200) if the objector wishes to be heard.
30. The Planning Inspectorate in Advice Note No. 1 (as revised May 2013) advises that sometimes an Order Making Authority (OMA) is content to make the requested Order but is not prepared to support it at an inquiry. It continues to say that this often occurs when an Order is made under the Town and Country Planning Act 1990 to enable development to proceed and that the OMA may choose to remain neutral as regards confirmation of the Order. There is no cost associated with this.

### **Options Considered**

31. To:
- (i) Forward the Order to the Secretary of State with the recommendation that it is not confirmed.
  - (ii) Forward the Order to the Secretary of State with the recommendation that it be confirmed with modifications.

- (iii) Forward the Order to the Secretary of State with the recommendation that it be confirmed as made.
- (iv) Forward the Order to the Secretary of State and maintain a neutral stance.
- (v) Abandon the Order.

### **Reasons for Recommendation**

- 32. It is considered that this part of the path has no purpose and utility and should therefore be extinguished. This would enable the permitted development to proceed.
- 33. The site is small and constrained and does not lend itself to facilitating a diversion, a riverside walk or even a viewing point. With the A4 bridge over the River Kennet so close it is highly unlikely that the Council would consider building a bridge for the footpath, even if this was deemed acceptable by all parties.

### **Recommendation**

- 34. That the Wiltshire Council Borough of Marlborough Path No. 26 (part) Stopping Up Order and Definitive Map Modification Order 2014 is forwarded to the Secretary of State for the Environment, Food and Rural Affairs with the recommendation that it be confirmed as made.

**Tracy Carter**  
**Associate Director, Waste and Environment**

Report Author  
**Sally Madgwick**  
Rights of Way Officer

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

Correspondence with the Town Council, user groups, other interested bodies and members of the public

### **Appendices:**

- Appendix 1 - Order and Order Plan
- Appendix 2 - Decision Report