

HIGHWAYS ACT 1980 - SECTION 119
PUBLIC PATH DIVERSION ORDER - FOOTPATH 53 MERE (PART)
(SHEET NO. ST 83 SW)

Purpose of Report

1. To consider the objections received by the County Council following the making of a public path diversion order under Section 119 of the Highways Act 1980, to divert that part of Footpath 53 Mere, Maypole Field, as shown on the plan attached at **Appendix A**. Members are requested to consider the objections in order to decide whether or not the County Council continues to support the making of the order. If Members continue to support the order, it should be forwarded to the Secretary of State for decision, with the County Council recommendation that the order be confirmed without modification. If Members no longer support the making of the order, it should be withdrawn.

Background

2. The plan attached at **Appendix B** indicates the location of Maypole Field, Woodlands Road, Mere.
3. The applicants for the diversion order are in the process of building a residential property on the site of Maypole Field, Woodlands Road, Mere. The legal line of Footpath 53 currently crosses the field. The planning consent granted by Salisbury District Council contains conditions relating to the footpath, as follows (see Salisbury District Council Approval of Matters Reserved following Grant of Outline Planning Permission, including Maypole House site plan, attached at **Appendix C**):

“6. No development shall take place until a stockproof post and wire fence has been erected between the public footpath and the land edged in BLUE.

7. All public rights in respect of footpath Mere 53 shall be safeguarded.”

These conditions have been imposed for the following reasons:

“6. To safeguard the rights of users of the public footpath.

7. To protect the integrity of the public right of way.”

4. The land shaded blue is agricultural land located on the south-western side of Footpath 53, whilst the land edged red forms the residential curtilage of the new build property on the north-eastern side of Footpath 53 (see **Appendix C**). Condition 4 of the Approval of Reserved Matters relates to the implementation of landscaping proposals submitted by the applicants as part of their planning application, including the erection of a stockproof fence along the south-western boundary of the application site (edged in red), as a means of enclosing the residential curtilage. Condition 6 requires the erection of a stockproof post and wire fence along the south-western side of Footpath 53 “... in order to prevent any animals emerging from the adjacent woodland from coming into conflict with the users of the public footpath ...”

5. As part of the development, the applicants have erected a maintenance path alongside the southern and western boundaries of the plot to facilitate access to control growth from the hedge which forms the boundary to the plot.
6. On 25th June 2004 the site developers applied for a diversion order to divert part of Footpath 53 Mere onto this maintenance path. This was followed by an initial consultation regarding the proposals by the County Council, amongst landowners, statutory undertakers and other interested parties, on 3rd August 2004. (The correspondence is available for inspection in the **Members' Room**).
7. The initial consultation resulted in a number of objections being made. The Regulatory Committee considered these objections at its meeting on 2nd February 2005 and resolved that a public path diversion order should be made to divert the path as shown on **Appendix A**.
8. Due to the planning requirements to place a fence between the public footpath and the land edged in blue, the applicants consulted the County Council regarding the location of the legal line of the footpath before erecting the fence to try and ensure that it would not cause obstruction of this route. The Rights of Way Section advised on the location of the path to the best of its ability. However, prior to making a formal diversion order, the legal line of the path on the ground was very much disputed and the siting of the developers' fence on the south-western side of the path (erected to comply with Salisbury District Council planning conditions) was brought into question. Officers therefore instructed an independent survey of the legal line which was then formally set out. It was discovered, following accurate survey, that the developers' fence did in fact obstruct the legal line of the path. Once this was established the fence was removed and objections regarding the exact location of the legal line and the obstruction of that line have now been fully addressed.
9. Officers made a diversion order under Section 119 of the Highways Act 1980, dated 18th August 2005, to divert that part of Footpath 53 Mere, as shown on **Appendix A**. The making of the formal diversion order was advertised, posted on site and circulated to statutory undertakers, landowners and other interested parties. This was followed by a statutory objection period of 28 days, during which time members of the public were able to put forward, in writing to the County Council, representations and objections regarding the making of the order.
10. The responses to the advertisement of the Order included 12 letters of objection.

Objections to the Order

11. Copies of the letters of objection are available for inspection in the **Members' Room**. The objections are summarised, together with Officers' responses, in **Appendix D**. They cover a number of subject areas which are set out below, together with the main points of objection relating to that subject.

Planning Permission

12. The application for a diversion order is a retrospective application which has been made to try to change a very carefully worded planning approval.
13. The purchasers of Maypole Field were aware of the location of the footpath prior to the purchase of the land.
14. The planning permission granted to the landowners has a condition that the footpath should remain in-situ.

15. The diversion order condones the illegal re-routing of an old right of way for personal gain. The owners of the property have already been allowed to build in a “green area” under special rules. Moving the path would allow them to extend their domain further and this is not what was envisaged when the planning permission was granted.
16. To reward the developers for ignoring procedure and unilaterally altering an ancient right of way is wrong and an insult to residents of Mere who uphold the law.
17. The purchase and development was undertaken in the full knowledge of the condition for the development of maintenance and fencing of the footpath. The condition has failed to be adequately enforced throughout the development and granting the diversion makes a further mockery of a considerably flawed planning system.
18. The planning application granted by Salisbury District Council included a detailed planting plan of trees, long grass and wild flowers and the construction of a mound on the land between the present path and the boundary of Woodlands Manor. Such planting would be an acceptable and laudable use of the space and would provide a screen for the owners of Woodlands Manor and preserve its seclusion.
19. The lack of enforcement and bad judgement has cost the ratepayers and public officials a considerable amount of totally unnecessary time, effort and money when there was a reasonable planning condition placed on the development and no need for a footpath diversion.
20. The footpath diversion is being carried out for the financial gain of the landowners. Newcomers arrive and want to change things to suit themselves for their own benefit.
21. Condition 6 of the planning consent has been broken as no stockproof post and wire fence has yet been erected on the south-western side of the footpath.
22. The diversion application is in defiance of Conditions 4, 6 and 7 of the planning permission. The developers are attempting to break out of the clearly defined residential curtilage and incorporate into the planned area the agricultural land to the south-west of the footpath. They have made no change of use application to Salisbury District Council. By accepting the planning permission they locked themselves into a situation where they agreed not to interfere with Footpath 53 and they must now carry out the agreed planting plan along the boundary with Woodlands Manor to create a screen for the benefit of the owners of the adjoining property.
23. The County Council’s Regulatory Committee should not be party to this illegal, attempted seizure of land and at their meeting of 2nd February 2005 Members were misled by the Officer’s report which contained references to a “private garden”. There is no such thing and this is what the developers would like to achieve.
24. The footpath was not diverted under the planning procedure (i.e. under Section 257 of the Town and Country Planning Act 1990) as there was not sufficient need to do so. The Local Planning Authority has in fact expressly required the preservation of the definitive line of Footpath 53 Mere by the conditions attached to the planning consent. The diversion of the footpath is cutting across the planning conditions.
25. In this particular case, planning and highways issues must be viewed together.
26. The site owners bought the land with the full knowledge of the existence of the footpath and the rules to protect it. The building on site has already exceeded planning parameters and further disregard should not be condoned.

Effects on Woodlands Manor

27. The diversion of the path is to the detriment of the neighbouring property, Woodlands Manor.
28. The diversion would be detrimental to the privacy and interests of the owners of Woodlands Manor.
29. Woodlands Manor is a grade I listed building, i.e. it is of “exceptional interest” and this classification covers only 2% of listed buildings. The Government Planning Policy Guidance Note 15 (PPG 15) “Planning and the Historic Environment” states that “setting is often an essential part of the building's character.” In the planning consent the new house is located centrally within the plot (Maypole Field). Planning Officers therefore considered that there would be no adverse effect upon the amenities of Woodlands Manor due to the separation distance and tree screening to be planted to the boundary of Woodlands Manor. The effect of this is negated if the footpath is moved.
30. The diversion enhances the risk of trespass and the chances of public scrutiny of Woodlands Manor.

Suitability of Alternative Route

31. The continuation of the footpath to the north towards Mere is already a narrow jungle for much of the year. Walkers would not wish to proceed on the proposed path closer to the tree line when it is possible to proceed in open land on the current designated path.
32. The footpath had a stone base as it was on clay and took the route that best avoided the wet areas of Maypole Field. There is no reason to alter the wisdom of previous generations by siting the footpath to follow the hedge as this is an area that can be wet and soggy.
33. There is no public benefit in the siting of the proposed diverted footpath.
34. The responsibility for maintenance of the footpath and its adjacent fences rests with the owners of the property. The diversion of the path alongside the adjacent landowner's hedges will transfer responsibility for overhanging trees, hedges etc to this landowner, where they were previously unencumbered. This is solely in favour of the applicants and is an unacceptable derogation of responsibility at the expense of others.
35. Footpath users presently have an unobstructed access across this field. By diverting the footpath nearer to the boundary of hedges and trees, it may become obstructed by overhanging branches etc. Whilst the current owners of Maypole Field may well undertake to keep the footpath clear, this may not always be the case and they will not legally be responsible for the hedges and trees which are outside their ownership.

Historic Footpath

36. There are no relevant grounds for moving an historic footpath that has been in place for a substantial number of years.
37. The footpath appears on OS maps held by Mere Museum dating back to at least 1901 and there seems to be no good reason for alteration being necessary.

38. The diversion of the footpath sets a dangerous precedent and will encourage anyone that has a public footpath over their property to seek similar unwarranted diversions.
39. Object to the changing of traditional routes of very long standing. The section of path in question forms part of a route from Whitehill Farm to Mere Church for pedestrians, long before there were other forms of travel to and from this ancient church.

Public Opinion

40. It is astonishing that the opinions of both the Parish Council and long established local people have been dismissed by representatives of the County Council as if being of little importance.
41. No reasons have been given as to why the diversion order has been made, in spite of written objections by members of the public and Mere Parish Council.
42. It is of great concern that civil servants appear to be able to override the views of Members of Mere Parish Council.

Main Considerations for the Council

43. Section 119 of the Highways Act 1980 provides for the diversion of footpaths and bridleways. Sub-Section 1 states:

“Where it appears to a council as respects a footpath or bridleway 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 ownership or of another owner, lessee or occupier), the council may, subject to subsection (2) (as set out in paragraph 9 of this report), 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 or bridleway as appears to the council requisite for effecting the diversion; and*
 - (b) extinguish, as from such date as may be so specified in accordance with the provisions of subsection (3), the public right of way over so much of the path or way as appears to the council requisite as aforesaid.”*
44. The application meets the legal tests as set out above as the diversion is in the interests of the owner of the land, relocating the footpath further away from the newly built property, away from the edge of the residential curtilage to the field edge.
45. Additional public benefits have been identified:
- (i) The alternative path is level and surfaced, suitable for all users, including the disabled, the elderly and those with prams, pushchairs etc, at all times of the year. The applicants have noted that some path users are deliberately choosing to use the field edge path in preference to the definitive line, even though the diversion order has not yet been confirmed.
 - (ii) Walkers using the footpath may feel less intimidated following a field edge route rather than walking on the definitive line which currently runs directly alongside the residential curtilage of the new build property.

- (iii) The legal line of the path is flooded and very boggy at certain times of the year. The field edge diversion will be level and surfaced for use in all weathers. However, Officers have noted that land drainage works have been carried out on site as part of the development and it is unlikely that drainage problems will prevent use of the present legal line of the path in the future.
- (iv) When the applicant moved to the site much of the path was very overgrown and neglected and path users could only walk it with great care. The true definitive line was therefore undefined and indeterminate as it crossed Maypole Field. The new route will provide a defined, well maintained, level, surfaced path, free from obstructions caused by overgrowth and vegetation. However, Officers have noted that since this matter was first brought before the Regulatory Committee on 2nd February 2005, the true legal line of the path through Maypole Field has now been surveyed, set out and fenced (at present with temporary fencing) so it is unlikely that the present legal line will become indeterminate and undefined in the future.

46. Sub-section 2 of Section 119 of the Highways Act 1980 states:

“A public path diversion order shall not alter a point of termination of the path or way -

(a) if that point is not on a highway; or

(b) (where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public.”

47. The diversion route has the same termination point at its northern end. At its junction with Woodlands Road the commencement of the path is moved slightly to the south but remains on the same highway and therefore the diversion meets the legal criteria as set out above.

48. At the meeting on 2nd February 2005, Members of the Regulatory Committee considered that the diversion proposals met the legal tests and therefore resolved that a diversion order should be made under Section 119 of the Highways Act 1980. However, there are further tests to be applied in the confirmation of the order and Members must consider whether or not the diversion order as made is capable of being confirmed based on the following additional criteria set out at sub-section 6 of Section 119 of the Act as follows:

“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).”

49. The diverted footpath will not be substantially less convenient to the public. The diversion route adds approximately 6 metres to the length of Footpath 53 as a whole, ie between Whitehill and Rook Street. However, Officers consider that the public enjoyment of the path will be enhanced by the provision of a well maintained, level, surfaced way for use in all weathers by users of all abilities. The path is moved onto land within the same ownership and has no effect upon the land served by the right of way.
50. Section 28 of the Highways Act 1980 provides for compensation for loss caused as a consequence of the coming into effect of a Public Path Creation Order and also applies in relation to Public Path Diversion Orders. Therefore a claim for compensation may be made if *"...it is shown that the value of an interest of a person in land is depreciated or that a person has suffered damage by being disturbed in his enjoyment of land..."*
51. Officers consider that the effect of the diversion upon the neighbouring property, Woodlands Manor, is negligible. This property cannot be seen from Footpath 53 Mere in its present position or its proposed diversion route as there is a wooded area between the path and Woodlands Manor (see aerial photograph attached at **Appendix E**). Officers have also consulted with the Conservation Officer at Salisbury District Council regarding the effect upon Woodlands Manor and its setting as a grade I listed building. The Conservation Officer has confirmed that there will be no adverse effect upon the property (see correspondence attached at **Appendix F**). Officers do acknowledge that the adjoining landowners could be affected by taking on responsibility for cutting back vegetation from land in their ownership which could cause an obstruction on the footpath. However, to Officers' knowledge, the diversion route has been open and available to the public since at least June 2004 and vegetation from neighbouring land has not caused any problem during this time. It is not anticipated that this will be a problem in the future.
52. Officers consider that the order should be forwarded to the Secretary of State with a recommendation from the County Council that the order be confirmed without modification, as Officers consider that it does meet the legal tests and is capable of being confirmed in the light of the criteria set out in sub-section 6 of Section 119 of the Highways Act 1980.

Environmental Impact of the Proposal

53. None.

Financial Implications

54. As the making of a diversion order is a discretionary duty for the Surveying Authority rather than a statutory duty, the applicants have confirmed that they will meet the reasonable costs of the County Council in the making of the order, which include advertising. If Members do continue to support the order, in which case it should be forwarded to the Secretary of State for decision, there may be a Public Inquiry into the matter. The cost of a Public Inquiry must be met from the rights of way budget. The alternative route has already been provided by the applicant.

Options Considered

55. If Members consider that the diversion does not meet the legal tests as set out under Section 119 of the Highways Act 1980, taking into account the objections received, the present legal route of Footpath 53 Mere as it crosses Maypole Field could be retained.

56. If Members consider that the diversion does meet the legal tests as set out under Section 119 of the Highways Act, there would be no reasonable grounds for refusing to divert the path as the Council should recommend that the Secretary of State confirm the Order.

Reasons for Recommendation

57. Officers consider that although objections have been received to the proposals to divert that part of Footpath 53 Mere as it passes through Maypole Field, the diversion order is capable of being confirmed and there are clear benefits of the diversion to both the owner of the land and the public as follows:
- (i) The footpath is removed from the edge of the residential curtilage, further away from the newly built property.
 - (ii) The alternative path is level and surfaced, suitable for users of all abilities in all weathers.
 - (iii) The public may feel less intimidated by walking at the edge of the field rather than following a route at the edge of the residential curtilage of the new build property.
 - (iv) The diverted path will not be substantially less convenient to the public. The diversion route adds approximately only 6 metres to the length of the path, it retains the same termination point at its northern end and its junction with Woodlands Road is relocated only slightly to the south.
 - (v) Officers consider that overall the public enjoyment of the path will be enhanced by the provision of a well maintained, level, surfaced route, for use in all weathers by people of all abilities, outside the residential curtilage of the newly built property.

Recommendation

58. That the public path diversion order, made under Section 119 of the Highways Act 1980, be forwarded to the Secretary of State with the recommendation from the County Council that the order be confirmed.

GEORGE BATTEN

Director of Environmental Services

Report Author

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Rights of Way Officer

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

Application for a public path diversion order regarding Footpath 53 Mere dated 25th June 2004

Initial consultation by the County Council dated 3rd August 2004 and subsequent responses