

**TOWN AND COUNTRY PLANNING ACT 1990 AND  
WILDLIFE AND COUNTRYSIDE ACT 1981  
THE WILTSHIRE COUNCIL**

**WILTSHIRE COUNCIL PARISH OF HEYWOOD PATHS 6 (PART), 7 AND 8 (PART)  
STOPPING UP AND DIVERSION ORDER AND DEFINITIVE MAP AND STATEMENT  
MODIFICATION ORDER 2016**

**Purpose of Report**

1. To:
  - (i) Consider the objections and representations received to the making of Wiltshire Council Parish of Heywood Paths 6 (part), 7 and 8 (part) Stopping Up and Diversion Order and Definitive Map and Statement Modification Order 2016 made under Section 257 of the Town and Country Planning Act 1990 and Section 53 of the Wildlife and Countryside Act 1981.
  - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination.

**Relevance to Council's Business Plan**

2. 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.

**Background**

3. Wiltshire Council has granted Planning Permission for the formation of a new business park, access and associated works over land at Hawkeridge, known as Hawke Ridge Business Park. The permission allows for the development to be implemented on a phased basis.
4. A location plan is attached at **Appendix A**.
5. Footpaths Heywood 6, 7 and 8 lead across the site and the Notification of Outline Planning contains the following informative:

*"There are public rights of way crossing the site, intended to be diverted; the appropriate legal procedures for diversion, both temporary and permanent shall be followed."*

The removal of the rights of way from the site is also a component of Condition 29 (see paragraph 24 this report).

6. On 18 November 2015 Wiltshire Council received an application from Hawke Ridge Business Park Limited to divert the footpaths leading across the land affected by the development.
7. Officers carried out an initial consultation from 9 December 2015 to 31 January 2016 and further to a decision to make an Order diverting and stopping up the rights of way an Order was made and advertised between 19 February and 18 March 2016.
8. The Council's decision report is appended at **Appendix B** and a copy of the Order is appended at **Appendix C**.
9. The Order attracted two objections, one from Daniel McGinn and the other from Francis Morland.
10. Wiltshire Council may not now confirm the Order which can either be abandoned or forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination.

### **Main Considerations for the Council**

11. The Order attracted two objections:

#### **(i) Mr Daniel McGinn, Hawkeridge Farm**

*"I would like to express my objection to the diversion of the respective footpaths; Heywood 6, 7 and 8 for the following reasons:*

*1) The proposed diversion leads walkers through an area that continually floods; making the ground completely saturated with the slightest rainfall and practically impassable.*

*2) I am not convinced that the drainage systems that will be installed will improve the situation. As informed by HPH at a recent Heywood Parish Council meeting, the saturation level would be no worse off. Which indicates that it won't be any better.*

*3) The desktop flood zone report said that this area is only subject to flooding 1 in a 100 years. Looking at the photographs attached I dread to think how badly the area would flood should the 100 year level be met.*

*4) The order plan does not show the continuation of all highways affected by the order and this is unacceptable.*

*5) On the decision report point 8.4*

*It had only been possible to make an order under Section 257 of the Town and Country Planning Act 1990 where planning permission had already been granted under Part III of the 1990 Act, however, the amendment of the 1990 Act under the Growth and Infrastructure Act 2013, also allows an order to be made where an application for planning permission has been made under part III of the 1990 Act and where, if the application is granted, it would be necessary to divert or extinguish the footpaths in order to enable the development to continue. Any such order cannot be confirmed until full planning permission has been granted.*

*Therefore if this type of order can only be granted when a FULL PLANNING PERMISSION has been granted, then why is it being pushed through at an OUTLINE permission stage? Surely once Full planning permission has been granted can you then decide where the footpath needs to be diverted though. Thus at this point the process making the stopping up order.*

*I reserve my to add further reasons as I so wish should any other observations come to light.”*

N.B. A copy of Mr McGinn’s objection including the photographs is appended at **Appendix D.**

**(ii) Mr Francis Morland**

*“I refer to the above Order made on 09 February 2016 and to the Public Notice of it on page 2 of the Friday, 19th February 2016 issue of The Warminster Journal.*

*Please accept this e-mail as my duly-made objection to the Order.*

*My principal grounds are that the Order is in error in stating that it is necessary to stop up and divert the footpaths to which it relates in order to enable development to be carried out in accordance with planning permission granted under part III of the Town and Country Planning Act 1990, because the only planning permissions granted and in force are in Outline only and do not permit any actual development to take place within the application site which would obstruct the existing routes of the footpaths in question, or otherwise make it necessary to stop up and divert them. Thus, the Order is outside the powers given by section 257 of the Town and Country Planning Act 1990.*

*Furthermore, the scale of the stopping up proposed is not reasonable and not in accordance with the Wiltshire Countryside Access Improvement Plan - it is contrary to policy to sweep the whole of an application site free of all public rights of way, however large it is, and replace them solely with routes following its perimeter. That simply creates endless dog legs in the existing network.*

*The full length of the public rights of way lost should be replaced by creating new public rights of way elsewhere in the vicinity.*

*The proposals create routes which are unduly circuitous and not adequate or appropriate to replace those to be stopped up.*

*It would make the position better if the Developers were willing to fund the replacement of the missing footbridge over the stream on the route of Heywood 8 just beyond the boundary of the application site.*

*I reserve the right to add to or amend these grounds in due course.”*

## Comments on the objections

12. Members of the Committee are now required to consider the objections received.
13. If the Committee does continue to support the making of the Order it must be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination and the Members of the Committee must decide the Wiltshire Council recommendation which is attached to the Order when it is forwarded to the Secretary of State, i.e.:
  - (i) that the Order be confirmed as made, or
  - (ii) that the Order be confirmed with modification.
14. Where Wiltshire Council no longer supports the making of the Order, Members of the Committee may determine that the Order is abandoned. Where this occurs Members must give clear reasons for the decision.
15. This Order is made on the landowner's application and where members consider that the legal tests for confirmation are made it can recommend that the Order be forwarded to the Secretary of State for determination. However, given budgetary constraints at this time, no legal representation can be given to the Order in the event of a public hearing or inquiry.
16. The Public Path Diversion Order is made under Section 257 of the Town and Country Planning Act 1990. The requirements of this section of the Act are set out in full in paragraph 8.0 (Legal Empowerment) of the decision report attached at **Appendix B**.
17. The following matters have been raised by the two objectors:
  - (i) Risk of flooding
  - (ii) Order plan fails to show continuation of all highways affected by the order
  - (iii) That the Order does not satisfy the legal test for s.257 of the Town and Country Planning Act 1990
  - (iv) Inadequate provision of new routes
  - (v) Issues relating to the footbridge for Heywood 8

**(i) Risk of flooding**
18. Officers have walked the existing paths and the proposed new paths and have found that in very wet periods considerable lengths of the existing paths are more difficult to use than the proposed new routes. There is an area of clay to the east of Hawkeridge Farm which currently retains water making the existing paths muddy and poorly drained. The flooding shown in the images is not caused as a result of the flood plain from the nearby Bitham Brook. The proposed new paths will be constructed to the Council's specification and will provide a more accessible surface at all times of the year. The required construction will be a geotextile membrane with 150 mm of compacted type 1 gravel topped with 50 mm of Cerney gravel, Mendip dust or equivalent.
19. The Site Specific flood risk assessment (IMA 13-054 Rev C dated 25 February 2014) that accompanied the original planning application demonstrates that the whole area is above the approved Environment Agency contour of 47.51 AOD

and lies inside the so called Zone 1 flood plain on which the commercial development is permitted. In fact, once the buildings, hard standings and landscaping are in place a comprehensive drainage strategy will ensure that existing areas of pooled water will be attenuated via a SUDS (Sustainable Urban Drainage System) which will ensure that water no longer pools on the site. The development of the business park will therefore bring a net benefit to the area of concern for Mr McGinn as all rainwater will be managed and any risks associated with the flooding of the footpath will be significantly reduced.

**(ii) Order plan**

20. It is agreed that the continuation of Mill Lane which is Heywood Footpath 9 is not shown as an unaffected path on the plan. However, this section of Footpath 9 has the same character and appearance as the unclassified road, Mill Lane. Anyone viewing a map or visiting the site would be likely to assume that the road Mill Lane extended for the entire length as this is how it is shown on the underlying mapping, regardless of the footpath rights recorded over it. Accordingly, it is considered that no disadvantage or confusion is, or has been, caused by this omission.
21. Of further note is that the Order, being a combined Order which may alter the definitive statement, makes it clear that there is a short linking section of footpath in Mill Lane (Part III of the Schedule to the Order).

**(iii) Applicability of S.257 Town and Country Planning Act 1990**

22. S.257 enables an authority to stop up or divert a public path if they are satisfied that it is necessary to do so in order to enable development to be carried out. The development must be in accordance with planning permission granted under Part III of the 1990 Act.
23. There are three extant planning permissions affecting this site (14/03118/OUT, 14/10780/VAR and 15/04092/VAR) granted under Part III of the 1990 Act.
24. The removal of the rights of way from the site is a requirement of Condition 29 (the development being permitted in accordance with specific plans):

*“The development hereby permitted shall be carried out in accordance with the following approved plans submitted on application reference number 14/03118/OUT approved by the Local Planning Authority on 26/09/14:*

.....

*Parameters Plan Rev C received on 23<sup>rd</sup> June 2014*

*REASON: For the avoidance of doubt and in the interests of proper planning.”*

Parameters Plan Rev C can be found at **Appendix E**.

25. The plan clearly shows the rights of way diverted in the same way as the Order plan.

26. It is argued that it is not necessary to remove the rights of way from the site and that the statutory test is therefore not met. The Concise Oxford Dictionary gives that the word necessary means inevitable or required to be done. It is considered that without removing the rights of way from the site it is not possible to satisfy the Conditions of the planning permission. It is required by Condition 29 as it is shown on the plan. Additionally, it is not reasonable even if it were possible to make applications to divert or stop up sections of path every time any part of the phased development was implemented. Significant alterations to the rights of way network are inevitable to develop the site in the approved manner.
27. It is further suggested by Mr Morland that the approach of the Council in making this Order “simply creates endless doglegs” but this is far from the case. The Order in front of this Committee creates a continuous route with purpose and preserves and protects the rural aspect of the footpaths that will be lost if they were to lead through the developed site. Any approach that involved diverting and stopping up sections of footpaths everytime a unit was applied for would inevitably lead to a fragmented path network with little sense of purpose and it is suggested that this approach would be far more likely to lead to “endless doglegs” the main purpose of which is to avoid buildings or busy areas.

#### **(iv) Inadequate provision of new routes**

28. Mr Morland considers that the proposed new routes are “unduly circuitous” and “not adequate or appropriate replacements”. He also considers that the full length should be replaced with an equal length.
29. S.257 of the 1990 Act permits the diversion or the stopping up of public paths. There is no requirement to substitute equal length and nor would it be sensible to do so. Once the environment through which a path leads changes and once the use of that path changes it is a far more sensible approach to create a new network that meets modern needs. Use of the paths in this area is likely to be recreational and the provision of pleasant field and stream edge walks offers far greater recreational facility than retaining paths through a built environment.
30. It is noted that Heywood Parish Council, representing people living locally, has no objection to the proposed diversions.
31. Considerations relating to the disadvantage or loss likely to arise as a result of the development and the provision of the alternative routes are discussed in **Appendix B** paragraphs 12.7 to 12.21. These are important considerations for the Council but officers consider that the alternatives proposed by the Order do not disadvantage the public to any degree and weighed against the benefit to the landowner (who needs to divert the paths to implement the permission granted), the Order routes are preferred. In any event, the approach of considering all of the rights of way affected by the business park development initially appears to be beneficial for all parties assisting in the efficient delivery of not just the changes to the rights of way network but also the development of the business park and the employment and economic advantages that that will bring.
32. It is noted that the Order contains the provision that it will only come into effect when the new ways have been created to the satisfaction of Wiltshire Council.

There is therefore no risk that the public will be left with an unusable or incomplete network.

33. A further benefit to the diversion as proposed in the Order is that in addition to the diverted footpath the business park will be provided with a number of roads and footways accessed off the new roundabout that is currently being constructed on Hawkeridge Road. These routes are proposed for adoption and it is therefore very likely that the ultimate road layout will result in an aggregate length of public rights of way on the land which will exceed the current 854 metres that currently cross the land.

#### **(v) Issues relating to the footbridge at Heywood 8**

34. Mr Morland considers that the position would be better if the developers were willing to fund the bridge over the stream on Heywood 8. This is a short section of footpath that is currently unavailable linking Heywood 9 (Mill Lane) with the Order route at point J (see Order plan at **Appendix C**). It is an irrelevant consideration for the purposes of this Order.
35. Although matters relating to temporary obstructions to rights of way must be disregarded for the purposes of considering an Order, Wiltshire Council has a duty to make this route available to the public. There have been discussions with the owner of the mill about removing the wall obstructing the definitive line and with the developer about funding for a new bridge. The developer has confirmed that they are willing to fund this. Further to recent discussions between Wiltshire Council, the developer and the landowner for the obstructed section it is proposed that the reopening will be implemented by the end of May 2016.
36. There are additional opportunities to improve the network of paths in this area, perhaps by diverting the linking section of Heywood 8 past Hawkeridge Farm to emerge opposite Heywood 6 at Bitham Brook rather than involving a section of Mill Lane. However, different legislation would need to be used to achieve any additional changes and in any event, they could not be pursued until such time as matters relating to the rights of way related to the planning consent are resolved.

#### **Safeguarding Considerations**

37. There are no safeguarding considerations associated with the making of this Order.

#### **Public Health Implications**

38. There are no identified public health implications which arise from this Order.

#### **Procurement Implications**

39. There are no procurement implications associated with the withdrawal of this Order.

40. In the event this Order is forwarded to the Secretary of State there are a number of opportunities for expenditure that may occur and these are covered in paragraph 47 of this report.

### **Environmental and Climate Change Considerations**

41. There are no environmental or climate change considerations associated with this Order.

### **Equalities Impact of the Proposal**

42. The proposed new routes will be more accessible to anyone with mobility or visual impairments.

### **Risk Assessment**

43. There are no identified risks which arise from this Order. The financial and legal risks to the Council are outlined in the “Financial Implications” and “Legal Implications” sections below.
44. The proposed diversion was fully consulted on at the planning stage as plans submitted with the application clearly showed the proposed changes. No risks were identified at this stage.

### **Financial Implications**

45. 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), permits authorities to recover costs from the applicant in relation to the making of public path orders, including those made under Section 257 of the Town and Country Planning Act 1990. The applicant has agreed in writing to meet the actual costs to the Council in processing this Order though the Council’s costs relating to the Order being determined by the Planning Inspectorate may not be reclaimed from the applicant.
46. Where there is an outstanding objection to the making of the Order, the Committee may resolve that Wiltshire Council continues to support the making of the Order, in which case it should be forwarded to the Secretary of State for decision. The outcome of the Order will 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 £200 to £300; however, where a local hearing is held the costs to the Council are estimated at £300 to £500 and £1,000 to £3,000 where the case is determined by local public inquiry with legal representation (£300 to £500 without). There is no mechanism by which these costs may be passed to the applicant and any costs must be borne by Wiltshire Council. It is therefore considered appropriate where an Order is made under the Council’s powers to do so in the landowners’ interest that the Council does not provide any legal support for the Order at a hearing or inquiry thus minimising the



expenditure of public funds even though it considers that the legal tests have been met.

47. Where the Council no longer supports the making of the Order, it may resolve that the Order be withdrawn and there are no further costs to the Council. The making of a Public Path 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 supports it. However, where there is a pre-existing grant of planning permission the Council must make very clear its reasons for not proceeding with the Order.

### **Legal Implications**

48. If the Council resolves that it does not support the Order, it may be abandoned. There is no right of appeal for the applicant; however, clear reasons for the abandonment or withdrawal must be given as the Council's decision may be open to judicial review. This could be more likely where a grant of planning permission has already been made.
49. Where the Council supports the making of the Order, because it has outstanding objections, it must be sent to the Secretary of State for determination, which may lead to the Order being determined by written representations, local hearing or local public inquiry. The Inspector's decision is open to challenge in the High Court.

### **Options Considered**

50. Members may resolve that:
- (i) The Order should be forwarded to the Secretary of State for determination as follows:
    - (a) The Order be confirmed without modification, or
    - (b) The Order be confirmed with modification.
  - (ii) Wiltshire Council no longer supports the making of the Order, in which case the Order should be abandoned, with clear reasons given as to why Wiltshire Council no longer supports the making of the Order, i.e. why the Order fails to meet the legal tests.

### **Reason for Proposal**

51. Notwithstanding the effect of Planning Condition 29, it is considered that the loss of footpaths through the site to the public is outweighed by the inconvenience of having to accommodate a footpath through the site. Such a path would not only disadvantage the operation of the site, and potentially its security, but would provide the public with such a diminished walking experience that there would be a significant loss to them even if the paths were retained. In the event that members consider the paths should be retained through the site the developer

will need to apply for individual orders associated with each reserved matters application submitted. This would, in officers' opinion, render the outline permission granted undeliverable as Conditions relating to the final location of the rights of way could not be met.

52. An adequate alternative route will be created for the public which is more pleasant to use.

### **Proposal**

53. That "Wiltshire Council Parish of Heywood Paths 6 (part), 7 and 8 (part) Stopping Up and Diversion Order and Definitive Map and Statement Modification Order 2016" is forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination with the recommendation that it is confirmed without modification.

### **Tracy Carter**

Associate Director – Waste and Environment

Report Author:

**Sally Madgwick**

Rights of Way Officer – Definitive Map

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

None

### **Appendices:**

Appendix A –Location Plan  
Appendix B – Decision Report  
Appendix C – Order  
Appendix D – Objection from Mr D McGinn  
Appendix E – Parameters Plan Revision C