

WILTSHIRE COUNCIL

**SOUTHERN AREA PLANNING COMMITTEE
28 JANUARY 2010**

**PROPOSED DIVERSION OF TISBURY FOOTPATHS 65 AND 69
AT NEW WARDOUR CASTLE**

Purpose of Report

1. To:
 - (i) Consider and comment on twenty objections received to an application proposing the diversion of Tisbury Footpaths 65 and 69 under Section 119 of the Highways Act 1980.
 - (ii) Recommend that the application for an Order be refused on the grounds that the proposed diversions do not meet the requirements of Section 119 of the Highways Act 1980.

The Proposed diversions are shown on the plan labelled '**Appendix A**'.

Background

2. An application to divert Tisbury Footpaths 65, 66, 69 and 70 was submitted by Mr. Jeremy Martin of Wardour Estates Ltd. on 13 November 2003. Mr. Martin considered that existing footpaths were confusing and duplicated in places, that one section passed through two private gardens and within a few yards of the castle's main door and that the Wessex Ridgeway route lacked continuity here. The proposed diversions contained in the original application were different, though not entirely dissimilar, to the ones currently being considered. The original proposals are shown on the plan labelled '**Appendix B**'.
3. An initial public consultation was undertaken in July and August 2004. During this time nineteen objections to the proposed diversions were received.
4. Officers considered that the case for diverting the paths was weak and that there could be a costs application made against the Council as the Order Making Authority if there were no grounds, or only weak ones, for proceeding.
5. Officers held a site meeting with a representative of Wardour Estates in May 2006 to discuss the diversion of the routes but officers found it impossible to suggest diversions that could take into account points raised by objectors.
6. Wiltshire Council received a letter in February 2009 from the agents for Futuregroom Ltd., the owners of Wardour Court, a residential development within the grounds of New Wardour Castle in close proximity to Footpath 65 (as shown on **Appendices A and B**), enquiring about the application to divert paths and supporting the diversion of Footpaths 65, 66, 69 and 70 as this would remove the intrusion of privacy experienced by the owners of Wardour Court.

7. Officers reconsidered the original application and noted that the main basis of the objections received in 2004 had been the diversion of Footpath 66 (which leads across the front of Wardour Castle). An altered scheme of diversions was suggested to Mr. Tuersley of Wardour Estates which did not affect Footpath 66 or Footpath 70 and affected a shorter part of Footpath 69 (see **Appendix A**).
8. In September 2009 Mr. Tuersley confirmed that he wished to proceed as suggested and an initial consultation, based on the changes proposed in **Appendix A**, was held from the end of September 2009 to 23 October 2009. Mail delivery during this time was affected by industrial action and the period was extended. By the end of October ten objections had been received. A further ten objections were received during November 2009.
9. The twenty objections made it clear that the second scheme of diversions in **Appendix A** was not an acceptable compromise for Footpath 65 although officers considered that it may be possible to divert that part of Footpath 69 (shown in **Appendix A**) to the east of Wardour Castle.
10. Officers suggested to Mr. Tuersley that the diversion of Footpath 69 may be achievable and enquired whether he wished to proceed.
11. In a letter dated 5 November, 2009 Mr. Tuersley wrote stressing that there was little value in just diverting Footpath 69 as his key concern was the:

“re-routing of Footpath 65 because this passes through the private gardens of at least two properties (Wardour Court and the Temple House). We should be most grateful therefore if you would make an Order to that effect and, if necessary, the matter can proceed to public inquiry.”

Main Considerations for the Council

12. Wiltshire Council has the power to make Orders to divert public paths under Section 119 of the Highways Act 1980. The Order may be made in the interest of the landowner but can only be confirmed if the new path or way will not be substantially less convenient to the public, regard having been made of the effect of the diversion on the public enjoyment of the path or way as a whole.
13. The Council has received twenty objections to the proposed Order and extracts from these objections are shown in **Appendix C**.
14. Section 119(1) of the Highways Act 1980 states that:

“Where it appears to a Council as respect 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, or confirmed as an unopposed order –

 - (a) *create, as from such date as may be specified in the order, any such new 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.”

15. In *Hargrave v Stroud DC* [2002] EWCA Civ 1281, Schieman L.J. stated that:

“On the face of the subsection therefore the authority has discretion as to whether or not to make an order. I do not consider that the mere fact that it is expedient in the interests of the owner that the line of the path should be diverted means that Parliament has imposed on the authority a duty to make such an order once it is satisfied that this condition precedent has been fulfilled.”

16. Subsection (6) (see paragraph 17 below) sets out factors which are to be taken into account at the confirmation stage. However, it has been held that the Authority is entitled to take these factors into account at the Order making stage. In *Hargrave v Stroud* (above), Schieman L.J. held that:

“...the authority faced with an application to make a footpath diversion order is at liberty to refuse to do so. In considering what to do the Council is, in my judgment...entitled to take into account the matters set out in s.119(6). It would be ridiculous for the Council to be forced to put under way the whole machinery necessary to secure a footpath diversion order where it was manifest that at the end of the day the order would not be confirmed.”

17. Subsection (6) states:

“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”.*

18. It is not denied that the diversions, which are the subject of this report, are expedient in the interests of the landowner for the purposes of Section 119 (1). However, this is not the only test which the Council may take into account at the Order making stage. It is clear from the responses which have been received to the consultation that the proposed diversions fail the test contained in subsection (6)(a) – i.e., that the diversions would have a detrimental effect on public enjoyment of the path or way as a whole. In this particular case the grounds for objection are strong, with the paths affording unique views of New Wardour Castle and its grounds and gardens.

19. A number of the objections also claim that the proposed diversion of Footpath 65 fails the test of substantial convenience contained in subsection (6). In *Young v Secretary of State for Food and Rural Affairs* [2002] EWHC 844 (Admin), Turner J. said:

“...In my judgment the expression ‘substantially less convenient to the public’ is eminently capable of finding a satisfactory meaning by reference to consideration of such matters as the length, difficulty of walking and purpose of the path. Those are features which readily fall within the presumed contemplation of the draftsman of this section as falling within the natural and ordinary meaning of the word ‘convenient’.”

20. In this instance, the proposed route of Footpath 65 is longer and would proceed through woodland, which would need some clearance work to allow unhindered use. The proposed diversion of Footpath 69 would see the route shortened, and would change the official route to reflect the route which is actually being used ‘on the ground’.

Environmental Impact of the Recommendation

21. There would be no environmental impact in refusing to make an Order diverting Footpaths 65 and 69. If an Order were to be made, clearance work in woodland to remove vegetation would be necessary on both Footpaths 65 and 69. The vegetation would require clearance to allow a two metre wide footpath.

Risk Assessment

22. There are no risks associated with refusing to make an Order diverting Footpaths 65 and 69. If an Order were to be made and confirmed, diverting Footpath 65, users would have to cross a car park and the driveway to Wardour Court, exposing them to vehicular traffic and the associated risks.

Financial Implications

23. If the application for an Order is refused, Wiltshire Council will not incur any costs.
24. If the Order is made, not objected to and confirmed by the Council as an unopposed Order, the applicant will pay the costs.
25. If the Order is made and objected to, the Order may be abandoned by the Council. The Council would incur costs for advertising the Order which, combined with officer time, is estimated to be in the region of £1,000.
26. If the Order is made the Council may decide to support it, even if objections are received. The Order would be sent to the Secretary of State for determination which would be likely to result in a Public Inquiry being held, the full process costing the Council up to £10,000.

Options Considered

27. That:
- (i) The application for an Order is refused.
 - (ii) The Order is made, advertised and abandoned as incapable of confirmation.

- (iii) The Order is made, followed by a referral to the Secretary of State for determination at a Public Inquiry with the recommendation that it be confirmed.

Recommendation

28. That the application for an Order, diverting Tisbury Footpaths 65 and 69 as shown on plan '**Appendix A**', be refused.

Reasons for Recommendation

29. The proposed diversions fail the test contained in Section 119(6)(a) of the Highways Act 1980.

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

Correspondence from objectors and the landowner/his agent