

**WILDLIFE AND COUNTRYSIDE ACT 1981**

**THE TOWN AND COUNTRY PLANNING ACT 1990 SECTION 257**

**THE WILTSHIRE COUNCIL MARLBOROUGH 30 DIVERSION AND DEFINITIVE  
MAP AND STATEMENT MODIFICATION ORDER 2018**

**Purpose of Report**

1. To recommend that the Order be abandoned and withdrawn from consideration by the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA) as the Order no longer meets the legal tests for confirmation.

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

2. Working with the local community to provide a rights of way network which is fit for purpose, making Wiltshire an even better place to live, work and visit.

**Background**

3. Wiltshire Council received an application dated 18 April 2018 from David Burton of Redrow Homes, for an Order to divert public footpath 30 over land at Salisbury Road, Marlborough. The footpath required diverting in conjunction with planning applications 15/02026/OUT and 17/03219/REM. Wiltshire Council's planning officers approved these applications with conditions on 29 July 2016 and 20 September 2017 respectively.
4. The application would have diverted 65 metres of path to a new route with an approximate length of 75 metres. The new route would have been laid to tarmac and hoggin (compressed clay, gravel and sand). A copy of the order route can be seen at **Appendix 2A**.
5. Wiltshire Council conducted an initial consultation on the application which commenced on 3 May 2018 with an end date of 1 June 2018. This initial consultation was sent to Marlborough Town Council, the local Wiltshire Councillor, statutory undertakers, The Ramblers and other user groups. No responses were received.
6. All of the relevant tests were duly considered in the council's Decision Report appended here at **Appendix 1**. Applying the legal test contained within Section 257 of the Town and Country Planning Act 1990 (see **Appendix 1 paragraph 9**), the application met the requirements as planning permission had been granted by Wiltshire Council which made it necessary to divert public footpath MARL30 to enable the permitted development to proceed. An Order was made to divert the path as per the order plan at **Appendix 2A** and for the diversion to be recorded in the definitive map and statement.

7. The Order was duly advertised on site and in the Wiltshire Gazette and Herald and attracted seven objections (one now withdrawn).
8. The Order was considered at a meeting of the Eastern Area Planning Committee held on 1 November 2018 and members resolved to forward the Order to SoSEFRA with a recommendation to confirm the Order without modification.
9. The Order was subsequently forwarded to SoSEFRA for its determination. The applicant (Redrow Homes) was informed that it may take upwards of 30 weeks for The Planning Inspectorate (PINS) on behalf of SoSEFRA to determine the Order in the manner they saw fit, potentially via a hearing or a local inquiry.
10. The applicant contacted officers to inform them they wished to submit an application for a non-material amendment (NMA) for the development site which would allow the footpath to remain on its current alignment and not require a diversion.
11. The application for a NMA was submitted to Wiltshire Council on 30 November 2018 and approved on 14 December 2018 (see **Appendix 3**).
12. The applicant confirmed on 16 January 2019 to officers that they wish to withdraw the Marlborough 30 Diversion Order from consideration as footpath MARL30 is capable of remaining on its current alignment.

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

13. Section 53(2) of the Wildlife and Countryside Act 1981 places a duty upon the Surveying Authority to keep the definitive map and statement of public rights of way under continuous review.
14. The Order was made under Section 53(3)(a) of the Wildlife and Countryside Act 1981 with regard to Section 257(1) of The Town and Country Planning Act 1990:

*Section 53(3)(a) of the Wildlife and Countryside Act 1981*

*“-the coming into operation of any enactment or instrument, or any other event, whereby-*

- (i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;”*

*Section 257 of the Town and Country Planning Act 1990*

*(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.*

15. The diversion is no longer required to accommodate planning permission that has been granted and so would not meet the legal tests described in paragraph 14 above.

## **Overview and Scrutiny Engagement**

16. Overview and Scrutiny Engagement is not required in this case.

## **Safeguarding Considerations**

17. There are no safeguarding considerations associated with the withdrawal of this Order.

## **Public Health Implications**

18. There are no identified public health implications which arise from the withdrawal of this Order.

## **Corporate Procurement Implications**

19. There are no procurement implications associated with this Order. In the event the council does not withdraw the Order from consideration by SoSEFRA there are a number of opportunities for expenditure that may occur and these are covered in paragraph 24 of this report.

## **Environmental and Climate Change Impact of the Proposal**

20. There are no environmental or climate change considerations associated with the withdrawal of this Order.

## **Equalities Impact of the Proposal**

21. There is no impact on equality in consequence of the proposal. The footpath would not be diverted and any works to improve the existing footpath on its current alignment (widening to two metres and laying to hoggin surface (compacted gravel and sand)) are not affected by the withdrawal and abandonment of the diversion Order.

## **Risk Assessment**

22. There are no identified risks which arise from the withdrawal of this Order. The financial and legal risks to the council are outlined in the “Financial Implications” and “Legal Implications” sections below.

## **Financial Implications**

23. 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 to this point, though the council’s costs relating to the Order being determined by the Planning Inspectorate on behalf of the SoSEFRA may not be reclaimed from the applicant.

24. If it is resolved that Wiltshire Council should continue to support the Order then the outcome of the Order will 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.
25. 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**

26. If the council resolves to abandon the Order, 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. It is noted the applicant wishes for the Order to be abandoned in this case.
27. If the committee resolves to continue to support the Order it will remain with the SoSEFRA 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**

28. Members may resolve that:
- (i) Wiltshire Council no longer supports the making of the Order, in which case the Order should be abandoned and withdrawn from consideration by SoSEFRA; or
  - (ii) The committee's current resolution stands, Wiltshire Council continues to support the Order and it should be considered by SoSEFRA for determination.

### **Reason for Proposal**

29. An NMA has been granted by Wiltshire Council and, as a consequence, footpath MARL30 no longer requires a diversion to accommodate development. The legal tests set out in Section 257 of The Town and Country Planning Act would not be met and the Diversion Order would not be capable of confirmation.

30. The developer, who is the applicant, wishes the Order to be withdrawn and not confirmed. Wiltshire Council has no reason to continue to support the Order as the footpath will remain on its current alignment and be improved as part of the development works and actual costs for the making of the Order to this point will be covered by the applicant.

### **Proposal**

31. That “The Wiltshire Council Marlborough 30 Diversion and Definitive Map and Statement Modification Order 2018” be withdrawn from consideration by the Secretary of State for Environment, Food and Rural Affairs and the Order be abandoned.

### **Tracy Carter**

Director – Waste and Environment

Report Author:

### **Craig Harlow**

Acting 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 1 - Decision Report
- Appendix 2A - The Wiltshire Council Marlborough 30 Diversion and Definitive Map Order Plan
- Appendix 2B - “The Wiltshire Council Marlborough 30 Diversion and Definitive Map and Statement Modification Order 2018”
- Appendix 3 - NMA application and approval