

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

**THE WILTSHIRE COUNCIL PARISH OF WESTBURY PATH NO. 15 (PART)**  
**DIVERSION ORDER AND DEFINITIVE MAP AND**  
**STATEMENT MODIFICATION ORDER 2019**

**Purpose of Report**

1. To:
  - (i) Consider the objection received to the making of Wiltshire Council Parish of Westbury Path No. 15 (part) Diversion Order and Definitive Map and Statement Order 2019 made under Section 257 of the Town and Country Planning Act 1990 and Section 53 of the Wildlife and Countryside Act 1981. The order is at **APPENDIX A**.
  - (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. On 11 January 2019 Wiltshire Council received an application to divert part of Westbury Footpath No. 15 (WEST15) to enable a permitted development to proceed.
4. WEST15 leads from Oldfield Road, Westbury, across the railway line to head west and south-west towards Penleigh and Dilton Marsh. The land over which the eastern end leads is subject to planning permission to build 300 dwellings with public open space, play areas, teenage facility and associated infrastructure. Planning application numbers 15/12551/OUT, 17/0314/VAR and 17/12194/REM are relevant to the development.
5. WEST15 currently leads across an open field but is affected by the consent to develop the site and will need to be diverted a small amount to follow the paths and footways leading to and alongside the roads on the site.

6. Plans showing the permitted road and path network are contained within application 17/12194/REM and one is included at **APPENDIX B**. The definitive map line for WEST15 has been overdrawn and shows the conflict with properties on the site.
7. Wiltshire Council made a decision to make an Order in March 2019 and the Order was duly made and advertised between 12 April and 14 May 2019. The decision report relating to this is included at **APPENDIX C**.
8. One objection has been received to the Order and accordingly the Order may not be confirmed by Wiltshire Council. Wiltshire Council has the power to either abandon the Order or to send it to the Secretary of State for Environment, Food and Rural Affairs for determination.
9. This Committee is therefore asked to consider all of the evidence available to it and to decide on the Council's course of action.

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

10. The Order attracted one objection:

#### **Mr F Morland 14 May 2019**

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

*I outlined my grounds in an e-mail I sent to you on Mon 25/02/2019 14:45 (see below). May I add:-*

*By Core Policy 32 of the Wiltshire Core Strategy adopted January 2015, a new strategic housing allocation of land at Station Road for 250 dwellings was made, to be brought forward through a master planning process agreed between the community, local planning authority and the developer and to be delivered in accordance with the Development templates for strategic allocations set out in Appendix A - Land at Station Road, Westbury (at pages 263 to 266).*

*The 4 bullet points on Transport set out in the Development template were and are vital to the acceptance of the strategic allocation and are reflected in the master plan for the site which specifically protected the existing route of Westbury No. 15 public footpath from obstruction by any of the proposed development.*

*We were assured that the increase in the number of dwellings by 50 above the allocation figure did not undermine that requirement, and the master plan demonstrating that was incorporated into the first Outline Planning Permission granted to Square Bay (Westbury) LLP (15/12551/OUT permitted 21 December 2016).*

*The Variation Planning Permission subsequently granted to Square Bay did not alter the position (17/01314/VAR permitted 8 June 2017).*

*The application quoted in your e-mail sent Tue 26/02/2019 11:27 (see below) and in the Order itself and in the Notice of making the Order is merely a Reserved Matters Application (17/12194/REM approved 8 June 2018) and not a*

*Planning Application, and cannot override the Outline Planning Permission (see above).*

*So I dispute that the diversion is required to enable development to be carried out in accordance with any planning permission granted under the Town and Country Planning Act 1990.*

*In any case, the encroachments over the existing public footpath route by any of the proposed house plots are impossible to identify on the plan you sent me and are trivial (if they exist at all). This Order appears to be more about making the existing public footpath as difficult for users to continue using as possible by the present developers (Linden Homes Western, not Square Bay, who were granted the Planning Permissions), than about enabling any of the permitted development. I dispute that an Order is necessary or appropriate merely to follow the footways and road crossing points shown on the Developer's Plans. A much better approach would be for Linden Homes Western to bring forward the dedication of the additional highway land required by the Planning Permissions.*

*I reserve the right to amend or add to these grounds as and when additional information becomes available.*

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**From:** Madgwick, Sally <[Sally.Madgwick@wiltshire.gov.uk](mailto:Sally.Madgwick@wiltshire.gov.uk)>

**Sent:** 26 February 2019 11:27

**To:** F M

**Subject:** RE: Application to divert part of Westbury footpath No. 15 at Oldfield Road - Your ref: SM/2019/01 WEST 15

Dear Mr Morland

*Thank you for your e.mail. Please find attached a plan which forms part of application **17/12194/REM**. The plan clearly shows the retention of an access route north to the station within the development. The alignment of Westbury 15 only requires slight alteration to follow footways and road crossing points, the definitive line lies to the south of the proposed road but appears to 'clip' parts of a number of properties. I have sketched this on in pink.*

Best regards

Sally

Sally Madgwick Team Leader Definitive Map and Highway Records  
Rights of Way and Countryside Waste and Environment Wiltshire Council  
County Hall Bythesea Road Trowbridge Wiltshire BA14 8JN  
Tel. 01225 713392 [sally.madgwick@wiltshire.gov.uk](mailto:sally.madgwick@wiltshire.gov.uk)

**From:** F M

**Sent:** 25 February 2019 14:46

**To:** Madgwick, Sally

**Cc:** rightsofway; Hawker, Russell

**Subject:** Application to divert part of Westbury footpath No. 15 at Oldfield Road - Your ref: SM/2019/01 WEST 15

*Hi Team Leader Rights of Way and Highway Records,*

*I believe that this right of way (the cinder path) was specifically protected when the site was allocated in the Wiltshire Core Strategy, so I am unhappy if the process by which Square Bay undermined the terms of that allocation has also affected this route, and I am surprised that Westbury Town Council allowed it to occur. Indeed, I thought that at the outline planning permission stage Square Bay had agreed that the width of this route would be enlarged so that the promised enhanced vehicular access to Westbury station for buses could be achieved off the extension to the distributor road north of the Westbury avoiding line at some time in the future.*

*If this has not been reflected in subsequent variations and reserved matters approvals, then clearly something has gone badly wrong and will need further investigation to put right.*

*Do you have the drawings showing what the features are of the permitted development which the proposed footpath diversion is now said to be required to enable to proceed - viz. why has the existing route not been safeguarded and enhanced as envisaged?*

*In particular, I am baffled by the suggestion that the existing route "crosses a number of housing plots and needs to be re-aligned"!*

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**From:** F M

**Sent:** 16 February 2019 15:21

**To:** [enquiries@lindenhomes.co.uk](mailto:enquiries@lindenhomes.co.uk); [customerservices@lindenhomes.co.uk](mailto:customerservices@lindenhomes.co.uk); [website@lindenhomes.co.uk](mailto:website@lindenhomes.co.uk)

**Cc:** [bristol@tpa.uk.com](mailto:bristol@tpa.uk.com)

**Subject:** Project: Station Road, Westbury, Wiltshire

*Hi Linden Homes,*

*I understand that an application has been made/is to be made on your behalf to Wiltshire Council to divert public rights of way to enable the development.*

*I must draw your attention to Section 53 of the Great Western Railway (Additional Powers) Act 1905 creating/diverting public rights of way which may also affect this project.*

*Unfortunately, repeated requests to Network Rail to elucidate the position have been fruitless and, as you are no doubt already aware, an appeal is currently in progress (Ref: FPS/Y3940/14A/11)."*

### **Comments on the objections**

11. Members of the Committee are now required to consider the objection received.

12. 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.
13. 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.
14. 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 though it remains open for the applicant to do so.
15. 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 9.0 (Legal Empowerment) of the decision report attached at **Appendix C**.
16. The objector refers to Appendix A – Land at Station Road, Westbury as being in the Wiltshire Council Core Strategy at pages 263 to 266. This appears to be an error and it is actually at pages 366 to 370.
17. The objector refers to the four bullet points on Transport as set out in the development template and these are:
  - *Improved access to Westbury railway station.*
  - *Provision of a link road connecting Station Road and Mane Way, via a new railway bridge crossing, part of the cost of which is already held in a bond.*
  - *Access for buses through the development from the railway station access road and from either Oldfield Road (across the railway line) or Station Road. Extension of existing town bus service through the development.*
  - *Improvements must be made to public transport connectivity and pedestrian cycling linkages to the station and town centre.*
18. Officers can see nothing in this that would lead to the specific protection of the existing route of WEST15 (as claimed by the objector) or indeed a requirement for any specific protection of this route in any document.
19. The objector is incorrect to say that the Council must rely upon the outline planning permission 15/12551/OUT. It is rare for outline consents to contain sufficient detail to enable the diversion of a right of way to proceed and this is the case here.

20. In both applications 15/12551/OUT and 17/01314/VAR Condition 13 prohibits development until details of estate roads, footways, footpaths, verges, junctions, street lighting, sewers, drains, retaining walls, etc. are agreed with Wiltshire Council. The reason for this is given as:

*“REASON: the application contained insufficient information to enable this matter to be considered prior to granting planning permission...”*

21. It was only the reserved matters application 17/12194/REM that contained sufficient detail of the development to enable the effect on the rights of way to be considered.
22. In the Department for Environment, Food and Rural Affairs Rights of Way Circular (1/09) Guidance for Local Authorities, at paragraph 7.3:
- “7.3 Most outline planning applications do not contain sufficient information to enable the effect on any right of way to be assessed (and are not required to do so) and consequently such matters are usually dealt with during consideration of the matters reserved under the planning permission for subsequent approval.”*
23. Plan 0638-107-3 Adoption Plan contained within 17/01314/VAR also shows that the extent of the proposed highway maintainable at public expense network creates a conflict with the line of the right of way.
24. The effect of the diversion is relatively minor but it is clear, not least from the developer’s application itself, that the right of way will need to be moved a small amount to follow the lines of the proposed paths and roads.
25. The objector dismisses the alteration as trivial and suggests that the new road and footways could be dedicated in advance of the development. Even in the event that this happened it would not resolve the situation where the footpath passes over land that will ultimately form part of the residential estate. Not only would it be unlawful for the developer to obstruct this right of way but it would also present problems for anyone wishing to buy or sell affected houses in the future as the definitive map line of the path would appear through their properties on any local authority searches they were carried out.

### **Safeguarding Considerations**

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

### **Public Health Implications**

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

### **Procurement Implications**

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

29. 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 35 of this report.

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

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

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

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

### **Risk Assessment**

32. 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.
33. The proposed road network and site layout was 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**

34. 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.
35. 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.

36. 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**

37. 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.
38. Where the Council supports the making of the Order, because it has an outstanding objection, 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**

39. 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**

40. In order for the development to proceed the public footpath must be diverted. The resultant changes are likely to be advantageous to the applicant and to the public.

### **Proposal**

41. That "the Wiltshire Council Parish of Westbury Path No. 15 (part) Diversion Order and Definitive Map and Statement Modification Order" is forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination with the recommendation that it is confirmed without modification.

**David Redfern**  
**Director Communities and Neighbourhood Services (Acting)**

Report Author:  
**Sally Madgwick**  
Definitive Map and Highway Records Manager

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

None

**Appendices:**

**Appendix A** Order

**Appendix B** Plan from 17/01314/VAR showing extent of road and path network and plan for housing layout

**Appendix C** Decision report to make the Order