

**HIGHWAYS ACT SECTION 119**

**THE WILTSHIRE PARISH OF CALNE WITHOUT BRIDLEWAY 89 (part), 89A AND 89B DIVERSION ORDER AND DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2019**

**Purpose of Report**

1. To:
  - (i) Consider the five duly made objections to the above Order.
  - (ii) Recommend that Wiltshire Council ('the Council') exercises its power to abandon the Order.

**NB** A copy of the Order and plan is appended at **APPENDIX 1** to this report

**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. The Council, as the local highway authority, has a statutory duty to maintain the record of public rights of way in Wiltshire (excluding the Borough of Swindon), to maintain the rights of way shown therein, and to assert and protect them for the use and enjoyment of the public. These duties are not discretionary.
4. In addition to these duties the Council also has a power to make Orders to alter the rights of way network (though not for highways carrying a right for the public to use mechanically propelled vehicles). These Orders are known as public path orders and they may create, extinguish or divert public rights of way. The Council accepts applications for these Orders and processes them alongside work relating to its statutory duties.
5. The law permits applications to be made in the interests of landowners though it is clear that criteria laid out in the relevant legislation being Section 119 of the Highways Act 1980 must be met before any Order can be made or confirmed. The Council has a power to confirm public path orders but only where there are no outstanding objections.

6. An Order was advertised between 9 January and 7 February 2020 in the local newspaper, on site and by notice to interested parties. Five objections and no representations in support were received. See **APPENDIX 2**. The application was made by the Landowner in May 2018. The Council's Northern Area Planning Committee took a decision to make the Order at its meeting on 6 November 2019 - see **APPENDIX 3** and <https://cms.wiltshire.gov.uk/ieListDocuments.aspx?CId=147&MId=12286&Ver=4>
7. Copies of the objections were forwarded to the applicant for comment and on 28 February 2020 a response to the objections was sent to the Council. The case officer circulated a copy of this response to the objectors with the invitation for them to withdraw their objections. No objector withdrew their objection and one objector submitted a rebuttal to the applicant's response. The applicant's response to the objections and associated correspondence is appended at **APPENDIX 4**.
8. Now that the Order has been made, it falls to members of the committee to consider these objections and the effect of the Order in light of the legal tests contained in Section 119(6) of the Highways Act 1980. It is also noted that an additional consideration relates to part of the objection made by the Open Spaces Society and relates to Section 119(3).

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

9. **Section 119(3)** of the Highways Act 1980 states:

*“Where it appears to the Council that work requires to be done to bring the new site of the footpath, bridleway or restricted byway into a fit condition for use by the public, the council shall –*

- (a) specify a date under subsection (1)(a) above, and*
- (b) provide that so much of the order as extinguishes (in accordance with subsection (1)(b) above) a public right of way is not to come into force until the local highway authority for the new path or way certify that the work has been carried out.”*

10. **Section 119(6)** of the Highways Act 1980 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 Sub-section (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.”*

**Section 119 in its entirety can be found at pages 3 to 5, Appendix 3.**

11. The Council must also have regard to the Council's Rights of Way Improvement Plan (ROWIP) - the current plan is entitled Wiltshire Countryside Access Improvement Plan 2015 – 2025 – Rights of Way Improvement Plan 2.
12. The Council must also have regard to the needs of agriculture, forestry and the conservation of biodiversity.
13. The main points of objection raised by the five objectors can be summarised as follows:

(i) **M Haley**

- The gates on the existing route are unauthorised obstructions.
- Misleading signage has been erected to direct users to the permissive route (photographs included).
- Numerous requests to the Council have failed to get the bridge replaced.
- The Council has not received complaints relating to the condition of the route south of the bridge which is, at the applicant's admission, virtually impassable and slippery for only 6 weeks of the year, making it passable for 46.
- The definitive route is of antiquity and pleasure can be derived from using a route which has history, purpose and direction.
- The interests of the public outweigh those of the landowner, as the lane has existed for centuries and is of great historical value.

(ii) **K Ashbrook, Open Spaces Society**

- The Order does not comply with Section 119 of the Highways Act 1980.
- The diversion is substantially less convenient to the public and is circuitous and artificial.
- The change in direction would have an adverse effect on their enjoyment of the path.
- For walkers the diversion duplicates CALW41 on the south side of the river and other paths provide a shorter route for walkers.
- The Order is defective in that Article 1 does not prevent the existing way from being stopped up before the replacement is created. It also fails to specify the form of junction with the existing footpaths, i.e. gates or gaps in accordance with BS5709.

(iii) **Wiltshire Bridleways Association**

- Wiltshire Council has not provided a bridge of the correct standard for equine use.
- There is no signage to indicate the definitive route only arrows to the permissive route.
- Gate is difficult to open.
- The definitive line is obstructed by parked cars.

- People preferring the new route have cited the bridge and parked cars as reasons for preferring the new route.
- The Mill House has historic value and is listed by Historic England for its special architectural or historic interest.
- Much pleasure is derived from the clearly historic aspect of the route which should not be lost.

(iv) **B Riley**

- The original direct road is an integral part of the ancient local road network, it should not be lost.
- Nor should the views of the Grade 2 listed mill buildings.
- His enjoyment would be lost if diverted.
- The existing route has a sense of purpose and users have the knowledge that they are following in the tracks of countless generations past.
- The proposed diversion is substantially less convenient, is more than twice as long and has multiple changes in direction. It has no purpose.
- The diversion would mean a total loss of view of the listed outbuilding and potentially the Mill House if the owner decides to screen it.
- Privacy arguments are spurious as the house has frontage onto a public road.
- Public interests substantially outweigh those of the landowner.
- The Order fails to fully comply with the statutory tests of Section 119.

(v) **J Higgs**

- Statutory tests do not appear to be met.
- The diversion is less enjoyable, as the existing passes an attractive listed Mill House beside the River Marden.
- The proposed route is a longer, contrived detour given its sharp bends and deviance from the Mill House.
- The historic route is shorter and straighter and makes efficient use of the terrain to assist, rather than inconvenience public use.
- Horse riders may enjoy a longer route but it should not be to the detriment of other types of public use.

14. **Section 119(6) – Convenience of the new path**

It is important to compare the convenience of the existing route and the new route (the test for confirmation being that the new one must not be substantially less convenient to the public) as if the existing route was open and available with no obstructions, with a suitable bridle bridge and appropriately maintained surface. Paragraph 29 of the Planning Inspectorate's Advice note no. 9 states:

*“Conversely, a proposed diversion may give greater public enjoyment but be substantially less convenient (perhaps because the diverted route would be less accessible or longer than the existing path/way, for example). In such circumstances, the diversion order should not be confirmed, since a diversion*

*order cannot be confirmed under s.119(6) if the path or way will be substantially less convenient to the public in consequence of the diversion.”*

15. The effect of the diversion is to more than double the length of the existing path proposed to be extinguished. The new path also includes four changes in direction compared to the existing path which leads in a straight line. The northern termination point also presents a significant deviation from the line of travel affecting convenience.
16. When considering convenience, matters relating to enjoyment of the route should not be included. Convenience is to be given its ordinary meaning and accordingly officers cannot see that increasing the length by more than double and introducing a number of turns and bends can be anything other than substantially less convenient for users. The new path has a reduced gradient as a result of the extra length (though has a steeper section near the bridge) but this is unlikely to outweigh the considerable inconvenience of having to go further, change pace or break cadence and turn. Objectors have also identified that this is an issue for them, diminishing both the convenience and their enjoyment.
17. In its objection, the Open Spaces Society objects to the exclusion of the form of junction with footpaths where they join the proposed new route (one on the junction with CALW43 and CALW40, one on the junction with CALW40 and one on the junction with the new route and the u/c road). Although these stiles do not impact on the convenience of the proposed new route, they do impact on the convenience of using the adjoining footpaths. Section 119 contains no provision relating to the effect on adjoining public rights of way though in considering any subsequent applications for these stiles under Section 147 of the Highways Act 1980 (to control the ingress or egress of animals) the Council would be bound to consider its duty to form the least restrictive option in line with its Equality Act 2010 duty.
18. **Section 119(6) – Effect on public enjoyment of the path or way as a whole**

This is a more subjective test to consider. It is noted that objectors consider their enjoyment would be diminished by losing the historic nature of the route, its natural course and direction and of it being artificial. It is possible that horse riders enjoy a longer route if it keeps them away from the roads for a little longer but equally they too are affected by the loss of historic nature and enjoyment.
19. Officers visited the site on 19 October 2020 and noted that a considerable amount of tree and shrub cover had been reduced allowing an improved distant view of the sides of the listed outbuilding and The Mill House from the proposed new route compared with last year. Although this demonstrates that wider pleasant views can be made available, those views remain subject to seasonal growth and land management by owners in the future.
20. **Section 119(6) – Effect on land served by the existing right of way**

It is considered that there is no risk of compensation arising from the extinguishment of the existing route.

21. **Section 119(6) – Effect on land served by the new right of way**

It is considered that there is no risk of compensation arising from the creation of the new route.

22. **Consideration of the Rights of Way Improvement Plan**

The Council's rights of way improvement plan is entitled Countryside Access Improvement Plan 2015 – 2025. The plan outlines the Council's duties and policy with respect to rights of way (policy 4), bridges (policy 6) and structures on rights of way (policy 7.2.2) but contains no policies related to the proposed diversion. The condition and availability of the bridleways CALW89, 89A and 89B, as a whole, falls short of the Council's policies. Fulfillment of the policies for an extensive rural network remains challenging with current resource provisions but remains a framework in which the Council should work. Priority is given to wholly obstructed and unavailable rights of way and CALW89, 89A and 89B are open and available, albeit with temporary limitations to access.

23. **Regard to the needs of agriculture, forestry and conservation of biodiversity**

The land has been acquired for the development of the proposed route which has been approved through the usual planning processes. No concerns were raised then or have been now.

24. **Consideration of the Open Spaces Society Objection to the validity of the Order Section 119(3)**

It is considered that paragraph 1 of the Order (**Appendix 1**) causes the existing route to be extinguished only after the certification of the new route (described in Part 2 of the Schedule) as a highway maintainable at public expense.

25. It is agreed that the three new stiles erected on the adjoining footpaths are the result of the creation of the proposed new path but considered that they should not be included in the diversion order as they do not impact upon the route being diverted. These could potentially be authorised under Section 147 of the Highways Act 1980 for the purposes of stock control as the fields are used for grazing cattle. Officers consider it doubtful that a stile would be authorised but it is possible that a gate would be. Stock control is an important feature of the new route as its creation has altered land management making it necessary to separate the new route from the cattle (or any other stock) that now graze the adjacent field.

**Overview and Scrutiny Engagement**

26. Overview and scrutiny engagement is not required in this case.

**Safeguarding Considerations**

27. There are no relevant safeguarding considerations associated with the refusal to make this Order additional to matters relating to the landowners' interest.

### **Public Health Implications**

28. There are no identified public health implications which arise from the confirmation of this Order.

### **Corporate Procurement Implications**

29. There are no additional procurement implications associated with this recommendation.

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

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

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

31. The inconvenience of covering additional distance may be disadvantageous to some users while a lesser gradient may be advantageous to others. However, the route as a whole is rural in nature and any access for users who are less mobile is likely to be restricted by the wider nature and limitations of the route or network as a whole. The Council's duties under the Equality Act 2010 are further examined in **Appendix 3.1** at paragraphs 3.4 – 3.6 and 12.0 – 12.1.

### **Risk Assessment**

32. In the event that the Order is not made, the Council will need to consider prioritisation of maintenance works relating to the existing route to minimise risks to users. This is a statutory duty for the Council for which budgetary provision has been made. The financial and legal risks to the Council where an Order is not, or is, made are outlined in the "Financial Implications" and "Legal Implications" sections below.

### **Financial Implications**

33. 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 119 of the Highways Act 1980. The applicant has agreed in writing to meet the actual costs to the Council in processing this application where an Order is made though the Council's costs relating to any Order being determined by the Planning Inspectorate on behalf of the Secretary of State may not be reclaimed from the applicant. Where an application for an Order is refused no costs are payable by the applicant. In this instance, where an Order is made and confirmed the cost to the applicant will be £1,875 plus the cost of any associated works incurred by the Council. The applicant has agreed to this.
34. In the event that an Order is made there will be financial implications related to the confirmation of that Order. By reason of the objections the Council has no power to confirm this Order, which, if confirmation is supported by the Council,

must be forwarded to the Secretary of State for Environment, Food and Rural Affairs (SoSEFRA) through the Planning Inspectorate for determination.

35. SoSEFRA will determine the Order through the offices of the Planning Inspectorate who may determine the Order by way of written representations, a public hearing or a public inquiry. In the event that a hearing is held costs are likely to be in the region of £500 but if an inquiry is held they would rise to approximately £5,000 (for a two day inquiry). Officers consider it likely that an inquiry would be held in this instance.
36. A judicial review of the Council's decision from any party may have financial implications. These are covered below.

### **Legal Implications**

37. Any decision of the Council is open to a legal challenge by way of an application for judicial review in the High Court. Permission to bring an application for judicial review must first be sought from the court. The application may be made by any aggrieved party and may arise from a failure to support the confirmation of the Order, the support of the confirmation of the Order or any other perceived failing in the Council's process or interpretation of the law.
38. If the court grants permission for a party to bring the application, it will be heard in the High Court. If the Council does not successfully defend its case it will be potentially liable to pay the costs of the applicant plus bearing its own costs. If the Council is successful with its defence it will seek an Order for its costs to be paid by the unsuccessful party. A further appeal to the Court of Appeal may be made by either party.
39. The costs of losing a case in the High Court is likely to be in the in the region of £40,000 and the costs of losing a case in the Court of Appeal is likely to be in the region of £45,000.

### **Options Considered**

40. (i) To abandon the Order.
- (iii) To support the confirmation of the Order and to send it to SoSEFRA for determination. If the committee takes the decision to support the confirmation of the order and send it to the SoSEFRA it must also give detailed reasons for its decision to support the confirmation of the Order. If a public inquiry is held, it is likely that the Chair of the committee may be required to give evidence at the public inquiry.

### **Reason for Proposal**

41. In reaching its decision the committee must consider the statements of the objectors and the facts of the case. It must decide whether it considers that the new route is substantially less convenient and whether the negative impact on the public use and enjoyment caused by the loss of the historic route and views of the listed buildings outweighs the landowner's interest in diverting the route. It must consider the legal tests; whether it is expedient to confirm the diversion in

light of the tests contained within Section 119(6)(a – c) but may also take into account the test in Section 119(1).

42. The Planning Inspectorate’s non statutory Advice Note no. 9 (which is a basic guide to rather than an authoritative interpretation of the law and therefore has no legal force) at paragraphs 28 and 29 considers the following:

*“28. It is possible that a proposed diversion may be as convenient as the existing path but less enjoyable, perhaps because it is less scenic. In this event, the view in Young [R on the application of Young V SSEFRA [20020] EWHC 844] was that the decision maker would have to balance the interests of the applicant for the order against those of the public to determine whether it was expedient to confirm the order.*

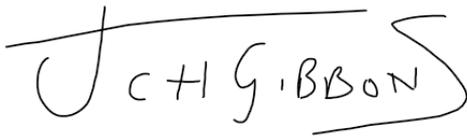
*29. Conversely, a proposed diversion may give greater public enjoyment but be substantially less convenient (perhaps because the diverted route would be less accessible or longer than the existing path/way, for example). In such circumstances, the diversion order should not be confirmed, since a diversion order cannot be confirmed under s.119(6) if the path or way will be substantially less convenient to the public in consequence of the diversion.”*

43. However, in a recent High Court case [2020] EWHC 1085 (Admin) Open Spaces Society v SoSEFRA Lieven J further considers the scope of any balancing test at the confirmation stage that can be considered and at paragraph 49 of the judgement Lieven J considers that PINS Advice note number 9 is over reliant on the judgement in the Young case (which addressed the matter of expediency as a separate test), and that the benefit to the landowner (Section 119(1) Highways Act 1980) may also be re-introduced into the weighing of the consideration of expediency when Section 119 (6)(a – c) are taken into account.
44. However, the Appellant in that case, the Open Spaces Society (a statutory objector to this Order) has just been granted leave to appeal. A Court of Appeal date has not yet been set but once the case is heard and decided it is expected that it will provide further clarity for this area of law.
45. Notwithstanding this appeal, it is clear from the law as it currently stands at this time that the committee is entitled to consider the benefits to the landowner of the diversion and weigh them against the loss to the public of enjoyment of use of the way as a whole, and other effects on affected land.
46. Officers consider that the objectors consistently highlight the concerns raised by officers in the first report to committee in November 2019 and that the additional length and lack of convenience (Section 119(6)), purpose and direction offered by the proposed new route (Section 119(6) and (6)(a)), the loss of historical context and enjoyment (Section 119(6)(a)) and the less convenient termination point at the northern end (Section 119(2)) cannot be outweighed by the interests of the landowner. Officers further re-iterate the point that all considerations must be made as if the existing route were open and fully available to users.
47. The applicant has been collecting data on users of the path for several years and the latest figures reveal that significantly more people use the permissive route than the existing definitive line. However, it must be considered that this is

against the background of a definitive line that has a narrow bridge on it, two unauthorised gates, obstructions from parked cars and the fact that signage directs users to the permissive route. The figures for the period January 2020 to 7 October 2020 are appended at **APPENDIX 5**.

## **Proposal**

48. That the Wiltshire Council Parish of Calne Without Bridleway 89 (part), 89A and 89B Diversion Order and Definitive Map and Statement Modification Order 2019 is abandoned and revoked.

A handwritten signature in black ink that reads "J C + I GIBBONS". The signature is written in a cursive style with a horizontal line above the letters and a flourish at the end.

**Jessica Gibbons**  
**Director Communities and Neighbourhood Services**

Report Author:

**Sally Madgwick**

Definitive Map and Highway Records Manager, Communities and Neighbourhood

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

None

## **Appendices:**

Appendix 1	Order
Appendix 2	Objections to the Order
Appendix 3	Decision report
Appendix 3.1.A	Applicants' reasons for diversion
Appendix 3.1.B	Consultation response from Wiltshire Bridleways Association
Appendix 3.1.C	Consultation response from the British Horse Society
Appendix 3.1.D	Applicants' response to objections received at consultation stage
Appendix 3.1.E	Unsolicited correspondence
Appendix 3.1.F	Reference plan
Appendix 3.1.G	Late correspondence
Appendix 3.2	Inspector's decision Purton 104
Appendix 4	Response to objections
Appendix 5	2020 data of use