

HIGHWAYS ACT 1980 SECTION 119
THE WILTSHIRE COUNCIL BRATTON 42 DIVERSION AND DEFINITIVE MAP
AND STATEMENT MODIFICATION ORDER 2021

Purpose of Report

1. To:
 - (i) Consider the 66 representations and 20 objections to The Wiltshire Council Parish of Bratton Path No.42 Definitive Map and Statement Modification Order 2021.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs (**SoSEFRA**) with a recommendation from Wiltshire Council that the Order be confirmed without modification.

APPENDIX 1. The made Order and Order Plan showing the existing route and proposed change.

APPENDIX 2. The officers' report following the initial consultation on the proposal.

APPENDIX 3. The representations and objections to the made Order in full.

APPENDIX 4. Photographs of the current route, the proposed route and the continuation of the path showing Footpath Bratton 42 in its entirety.

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 Order to add Footpath Bratton 42 to the definitive map was confirmed on 31 October 2018 following a public inquiry; Wiltshire Council received an application to divert a section of the right of way five days later under Section 119 of the Highways Act 1980. The application was made by the landowner, Henry Pelly, Luccombe Mill, Imber Road, Bratton, Wiltshire, BA13 4SH predominantly on the grounds of privacy, the landowner also lists health and safety and wildlife concerns within his application. The proposal is to divert the footpath from Luccombe Mill garden running along the mill pond and create a route on the other side of the hedge line through the neighbouring paddock to have a recorded legal width of 2 metres. The diversion route will re-join the footpath at the bridge prior to the locations known locally as watercress beds and paradise pool. The proposal deletes approximately 170 metres of footpath and adds approximately 160 metres.

4. The new route has already been constructed and is available for the public to use as a permissive path. Representations to the Order and evidence of use on the ground suggest the route is popular and well used.
5. An initial consultation on the proposal took place between 12 August 2020 and 10 September 2020. The consultation included landowners, statutory undertakers, statutory consultees, user groups and other interested parties, including the Wiltshire Council Member for Ethandune and Bratton Parish Council. A notice of the application was also placed on site as it was believed there was a great deal of public interest in this right of way following its addition to the Definitive Map and Statement in 2018 as a result of a public inquiry. There were 8 supporting responses received to the proposal; additionally Bratton Parish Council and the Countryside Access Officer did not object to the proposal. There were 30 objections received including the Ramblers and West Wilts Ramblers.
6. A decision report was written and can be seen in full at **Appendix 2** in which the legal tests are discussed in detail. The report concluded that in this case the legal tests for the making of a diversion Order to divert Footpath Bratton 42 under Section 119 of the Highways Act 1980 were met. The proposal is in the interests of the landowner and the route not substantially less convenient. From the initial consultation responses there was concern that the proposed diversion does have an adverse effect on public enjoyment due to its historic nature and unique location. However, when looking at the path in its entirety access to the watercress beds and paradise pool remain. If the diversion fails, the landowner has reiterated in several correspondences that a 2 metre high fence will be installed along the current path to protect the privacy of the property; therefore, views of the mill pond are expected to cease. The officer believes the public will continue to use the route in its entirety if this section was diverted; therefore, the diversion would have minimal impact on the level of public use (notwithstanding any loss of views and enjoyment) but would make a considerable difference to the landowner.
7. The proposed diversion also meets other considerations which the Council must take into account such as the provisions of the Rights of Way Improvement Plan, the Equalities Act 2010 and the needs of agriculture, forestry and biodiversity. The report concluded that at the initial consultation stage the legal tests for the confirmation of the Order appear to be met. However, the report recognised that the evaluation of enjoyment is subjective. The balance of the legal tests may have been altered by representations and objections received during the advertisement period for the made Order meaning that Wiltshire Council must again consider the balance of issues affecting this proposed diversion before forming a view on the merits of confirmation.
8. The Order was made under Section 119 of the Highways Act 1980 to divert Footpath Bratton 42, and Section 53A of the Wildlife and Countryside Act 1981, to amend the Definitive Map and Statement of public rights of way on 16 February 2021. The consultation ran from 26 February 2021 to 9 April 2021 and included the previous consultees; it was advertised on site and in the Warminster Journal on 26 February 2021. All respondents to the initial consultation were contacted asking if they wished their comments to be taken to the next stage of the process.

9. In total, there were 65 responses received in support of the made Order, additionally Bratton Parish Council and the Countryside Access Officer did not object to the made Order. There were 3 withdrawn objections, the Ramblers, West Wilts Ramblers and another objector who wished to withdraw her previous objection as she was now in support of the made Order. In total there are 20 objections to the made Order. Of the responders to the initial consultation 5 of the 8 supporters asked for their support to be taken forward to the next stage. Bratton Parish Council and the Countryside Access Officer continue to not object to the made Order. Of the 30 initial objections to the proposal 13 asked for their comments to be taken to the next stage and as previously stated 3 objectors withdrew. All responses to the made Order can be read in full in **Appendix 3**.
10. Due to the objections received, the Order now falls to be considered by the Western Area Planning Committee whose Members should consider the legal tests for diversion against the objections received, in order to decide whether Wiltshire Council continues to support the making of the Order.
11. Where the Authority continues to support its original decision to make the Order, it should be forwarded to the SoSEFRA for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification, or with modification.
12. Where the Authority no longer supports its original decision to make the Order, it may be withdrawn with reasons given as to why the legal tests for diversion are no longer met. The making of a public path diversion order is a discretionary duty for the Council, rather than a statutory duty; therefore, the Order may be withdrawn at any time.

Main Considerations for the Council

13. The legal tests that must be applied by Wiltshire Council in considering whether or not an Order should be confirmed are contained within Section 119 (1) and (2) of the Highways Act 1980. The Council is entitled to further consider the tests for confirmation contained within Section 119(6) at this stage.
14. **Section 119(1)** of the Highways Act 1980 states that:

“Where it appears to a Council as respects 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. **Section 119(2)** of the Highways Act 1980 states:

"A public path diversion order shall not alter a point of termination of the path or way:

- (a) *if that point is not on a highway; or*
(b) *(where it is on a highway) otherwise than to another point which is on the same highway, or a highway connected with it, and which is substantially as convenient to the public".*

16. **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.*

17. The Council must also have regard to the Wiltshire Council Rights of Way Improvement Plan (ROWIP) - the current plan is entitled Wiltshire Countryside Access Improvement Plan 2015 – 2025 – Rights of Way Improvement Plan 2.

18. The Council must also have regard to the needs of agriculture, forestry and the conservation of biodiversity.

19. **S.119(1) – The landowner's interest**

The application is made predominantly on the grounds of privacy. The landowner also lists health and safety and wildlife concerns within his application. The footpath is approximately 70 metres from the house and opinion has been voiced by some objectors that it is not in the garden. However, the landowner clearly believes this footpath is within the garden and that use of the route affects the privacy of the property. Privacy is clearly of principal importance to the landowner, the application to divert the section of footpath was received 5 days after confirmation of the Order to add Footpath Bratton 42 to the Definitive Map

and Statement of Public Rights of Way. The landowner states in correspondence received during the consultation process *“If the diversion does not get approved, then regrettably we would erect a 2m high solid wooden fence ... This action although not attractive for us, would at least solve the problem of privacy which I cannot stress highly enough is paramount”*.

20. Objectors have stated that the landowner would have known about the footpath from searches on the property and surveyors would have seen the route on the ground. *“The owner of the house at Watercress walk should have discovered through his pre-contract searches that a footpath existed on his proposed purchase and made his purchase decision accordingly.”* *“I would like to reiterate that the landowner would have been in full knowledge of the path on his land, prior to purchase.”* However, the right of way was not recorded on the definitive map and no application under Section 31(1) of the 1980 Highways Act to add Footpath Bratton 42 had been received prior to the purchase of Luccombe Mill so legal searches would not have shown a public right of way at this location. The previous owners had stated during the public inquiry that use of the land was by permission throughout their ownership. This would have meant the use of the path was by right and therefore a right that could be withdrawn at any time by the landowner. However, it was found during the public inquiry that the use of the path by the public had been not by right but as of right, i.e. without force, without secrecy and without permission and without interruption for a full period of 20 years and therefore the right of way had become established and is required to be recorded in the Definitive Map and Statement. Therefore, it is demonstrated that the diversion would be in the landowner’s interests based on privacy.

21. **S.119(2) – Location and convenience of termination points**

The diversion of the footpath must not alter the termination points of the path where these are not on a highway and where they are on a highway they must not be altered, other than to another point on the same highway or a highway connected with it and which is substantially as convenient to the public. The current route starting point although different is off the same highway (Imber Road) and the termination will not be altered by the diversion. Therefore, termination points are considered to be substantially as convenient.

22. **S.119(6) – Convenience of the new path**

23. It is important to compare the convenience of the two routes, the test being that the new one must not be substantially less convenient to the public than is the existing one. Convenience of the path is covered in full in **Appendix 2** paragraph 10.7. In summary:

24. The length of the diversion is 160 metres, 10 metres shorter than the current route and the width would be recorded at 2 metres, 0.5 metres wider than the current route.

25. The surface of the current route has a distinct camber towards the mill pond and several tree roots protrude from the surface. Most of the proposed route runs through a paddock on a level grass route, the last 20 metres runs down a gravel bank made easier to negotiate by the installation of wide steps. When using the right of way in its entirety there are steeper gradients to negotiate and steeper steps to access the bridge.

26. Bratton 42 was added with historic stiles in situ and remains in place at point A on the Order plan **Appendix 1**. The proposed route is accessed via kissing gates and a kissing gate has now been provided at the northern access point of Bratton 42 on to Imber Road which would mean the entirety of the route would be kissing gate accessed.
27. Objections have been received stating the proposed route is less convenient *“I still find the proposed diversion unsafe for the more elderly or slightly infirm”*. However, there is an obvious walked route along the proposed path so this is clearly an option already taken by many users as confirmed by the 65 supporting representations received to the made Order, many noting the improvement to accessibility for example:
“I have lived in the village for over 40 years and believe this is a great improvement on the previously used path. The kissing gates make access really easy, especially with children and dogs and the ground underfoot is level and firm”
“The new route has certainly enabled me, my mum, and others to enjoy our outdoor activities as well as enjoying the continued loop around Danes’ Ley”
“Mr Pelly has made many improvements to the new pathway i.e. several kissing gates, easy access for dogs, hardcore on the ground and has introduced new levelled steps (great for the elderly)”
“it is a far better and more accessible route, We use it regularly with our dog and our parents who are in their 80s can now access and enjoy the walk.”
“The new route through the paddock is much easier and safer for small unsteady feet, and we much prefer the open field, avoiding uneven ground, trees roots and low branches. Our children love the kissing gates ...”
“the owner has made considerable adjustments to make the walk a lot easier.”
28. The proposed route is considered to be expedient in terms of section s.119(6), i.e. convenience of the paths.
29. **S.119(6) – Effect on public enjoyment of the path or way as a whole**
- Public enjoyment of the path is covered in full in the decision report, **Appendix 2** paragraph 10.8. It should be noted that the decision report states that public enjoyment of the path would be adversely affected. However, the report was written prior to the consultation on the making of the Order to which 65 supporting representations were subsequently received. The report did recognise that the evaluation of enjoyment is subjective, and the balance may be altered by representations and objections received during the consultation period and thus need to be considered again to inform a view on the merits of confirmation.
30. Correspondence received is divided on public enjoyment; however, in balance the majority of representations, 65 in total, many of whom are local residents, were in support of the diversion detailing the improvement the proposed route provides and state that their enjoyment is not adversely affected. For example:
“The owners have gone above and beyond to create excellent alternative access for all residents, visitors and walkers – it is a vast improvement, creates a beautiful walk that will continue for generations because the owner has invested in landscaping and use of natural materials and respected the site”

“the new route offers far better views of the Luccombe Bottom and Edington Hill beyond”

“I have lived in the village for over 40 years and believe this is a great improvement on the previously used path ... the views are open and spectacular”.

31. However, there have been 20 objections received stating that enjoyment would be affected for example:

“It would be a stretch of credulity to suggest that the public amenity of the walk through the field along the proposed diversion compares with the beauty of the Watercress Walk”

“I feel strongly that the original footpath must be maintained for the benefit of villagers who have enjoyed these views for over 40 years”

“The attraction of a walk which encompasses this short stretch in much enhanced by the beautiful views one has of the lade and the old mill”

“My young family and I love the Watercress Walk. The surroundings are so distinctive, and my three children love the surrounding wildlife”

“The public enjoyment and indeed our own family’s enjoyment of the stunning views over the valley and Paradise Pool would be severely impacted by the proposed new route”

“I do hope the Council will now listen to the voices of the local residents and walkers, and prevent this historic and popular route being blocked off and diverted onto what will be a more boring, muddy and probably badly maintained new route”

“This is very disappointing, and it is evident that the Council is disregarding the wishes of most of the Bratton residents and other walkers from out of the immediate area.”

32. Following the consultation for the made Order the vast majority of responses received were in support of the diversion. Many of these respondents are local residents. However, there can be no denying that the characters of the current route and proposed route are very different. The current route runs through a tree-lined path with view of the mill pond and the proposed route runs through an open grass paddock with a view of Luccombe Down access land. It is clear that there are extremely disparate views on the effect of enjoyment of the diversion on the public and it is recommended that a site visit is undertaken to appreciate the unique nature of the location. Looking at the path in its entirety from the bridge the path continues through a wooded area providing the canopy of large trees. However, it does not provide a view of the mill pond but does continue to provide access to the watercress beds and paradise pool, regularly referenced as the destinations of the walk.

” My wife and I have lived in Bratton for 17 years and have always enjoyed our walks through the watercress beds ... the main purpose of these walks is to enjoy the unusual scenery beyond Mr Pelly’s millpond, than that of his garden itself. The new route of the footpath ... makes no substantial change to the highlight of the walk beyond”

“I am pleased to hear we can still visit paradise pool as normal”

33. Concern has been raised regarding the proposed route running through the open paddock *“The proposed diversion passes through land which is leased for farming activities. In the event that the diversion was to be confirmed, I would worry about unruly dogs worrying sheep and lambs, and also in the event that*

cattle with young were grazed, the danger posed to walkers from cattle protecting their young". The landowner has responded to this concern as follows: "Dogs in the paddock vs livestock. There are many PROWS that pass through fields that have livestock. In this particular case, the paddock, as you know, is owned by me and only occasionally do I have sheep grazing. This is to help out the local farmer. Dogs should, if they are not properly trained (or incapable) should be kept on a lead. Should the rights of way officer find this to be an issue, then it can be easily resolved by running an additional line of stock fencing to enclose the path. The reason I haven't done this, is because many people in the village like to let their dog run free when there are no livestock present. A nice gesture from me and one that is widely appreciated."

34. Some users have made it clear that they do not enjoy passing through Luccombe Mill garden and feel uncomfortable in doing so:
"In particular I have enjoyed being able to walk through to the watercress beds and beyond without feeling like I am intruding on the owner's privacy, something I would not wish to do and I am sure there are many others who feel the same"
"It feels like I am unnecessarily intruding on Mr Pelly's privacy"
"I would prefer the new path, because you can still access the pool and enjoy a walk. Also, the current path makes me feel like I am invading someone else's space, you can see the residence and the tenants when there are using their garden, which makes me feel like I am in their garden".
35. The Court of Appeal upheld the High Court's decision in the case of *The Open Spaces Society v Secretary of State for the Environment, Food and Rural Affairs [2020] EWHC 1085 Admin* as to the correct criteria to be applied when considering applications to divert a footpath, under Section 119 of the Highways Act 1980. The judgment confirms that in carrying out the test of expediency under Section 119(6) of the Act, the decision making is not confined to determining the matter solely on the basis of the criteria under Section 119(6)(a), (b), and (c). The benefit of the diversion to the landowner can be one of the factors taken account when carrying out the expediency test under Section 119(6)(a) to (c) of the Act.
36. If the effect on the use and enjoyment is not clear, the expediency of the confirmation of an Order may be balanced against the interests of the owner. The officer believes the public will continue to use the route in its entirety if this section was diverted; therefore, the diversion would have minimal impact on the level of public use notwithstanding potential loss of views and enjoyment to some users, but it would make a considerable difference to the landowner.
37. **S.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.
38. **S.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.

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

Wiltshire Council's rights of way improvement plan is entitled Countryside Access Improvement Plan 2015 – 2025. Within the plan on 4.1 page 16 the Council recognises that considering the needs of those with mobility impairments is a statutory responsibility and Policy number 7 Gaps, Gates and Stiles recognises that the authority must consider the needs of those with mobility impairments when managing rights of way and access and that this requirement particularly applies when authorising structures (e.g. stiles and gates) on rights of way and seeking improvements to existing structures to make access easier. Bratton 42 was added with historic stiles in situ and remains in place on the current line. The proposed route provides two kissing gates, one at each of the access points to the paddock. The landowner has already replaced a stile with a kissing gate at the northern intersection of the path on to Imber Road, therefore if the diversion is successful the whole circular route would be accessible by kissing gate.

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

There will be no likely adverse impact on biodiversity, agriculture or forestry however the diversion will take people into the paddock and away from the tree-lined path resulting in less footfall impact on the exposed tree roots.

Overview and Scrutiny Engagement

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

Safeguarding Considerations

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

Public Health Implications

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

Corporate Procurement Implications

44. In the event this Order is forwarded to the SoSEFRA there are a number of potential requirements for expenditure that may occur and these are covered in paragraphs 46, 47 and 48 of this report.

Environmental and Climate Change Impact of the Proposal

45. There are no environmental or climate change concerns associated with the confirmation of the making of this Order. This is wholly rural and recreational route and is unlikely to form any part of a sustainable transport route now or in the future.

Equalities Impact of the Proposal

46. Issues with accessibility have been addressed in the report at paragraph 37.

Risk Assessment

47. There are no identified risks which arise from the confirmation of the making of the Order. The financial and legal risks to the Council are outlined in the “Financial Implications” and “Legal Implications” sections below.

Financial Implications

48. The applicant has agreed to pay all of the Council’s costs associated with the making of the Order, with the advertisement of the confirmed Order and with the creation of the new path (works which have been completed). However, Wiltshire Council is not empowered to charge the applicant any costs related to forwarding the application to the SoSEFRA for confirmation by the Planning Inspectorate and accordingly will have to fund these from existing rights of way budgets. 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 £2,225 plus the cost of any associated works incurred by the Council. The applicant has agreed to this.
49. Where there are outstanding objections to the making of the Order, the Committee may resolve that Wiltshire Council continues to support the making and confirmation of the Order. The Order will then be determined by the Planning Inspectorate by way of 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 negligible; however, where a local hearing is held the costs to the Council are estimated to be around £200 if no legal representation is required and £1,000 to £3,000 where the case is determined by local public inquiry with legal representation.
50. There are no costs associated with the Council resolving to abandon the Order though the decision may be subject to judicial review and the Council may incur associated costs as a result of that action (see Legal Implications below).

Legal Implications

51. Where the Council does not support confirmation of the making of the Order and resolves to abandon it, clear reasons for this must be given and must relate to the legal tests contained within Section 119 of the Highways Act 1980. The applicant may seek judicial review of the Council’s decision if the process followed is seen as incorrect. The cost for this may be up to £50,000.

Options Considered

52. Members may resolve that:
- (i) The Order is forwarded to the Secretary of State for Environment, Food and Rural Affairs for confirmation as made.

- (ii) The Order is forwarded to the Secretary of State for Environment, Food and Rural Affairs for confirmation with modifications.
- (iii) The Order is revoked and abandoned.

Reason for Proposal

- 53. Unless the objections and representations are withdrawn the Order must be forwarded to the SoSEFRA for determination.
- 54. It is considered that in this case the legal tests for the making of a diversion order to divert Footpath Bratton 42 (part) under Section 119 of the Highways Act 1980 were met, and the additional legal tests for confirmation contained within Section 119(6) have also been met.
- 55. The Order is made in the interests of the landowner for privacy reasons as the diversion would take the path out of Luccombe Mill garden to the neighbouring paddock. The proposed route is not substantially less convenient and although correspondence received is divided on public enjoyment, in balance the majority of representations were in support of the diversion detailing the improvement the proposed route provides and state that their enjoyment is not adversely affected. If the effect on the use and enjoyment is not clear, the expediency of the confirmation of an Order may be balanced against the interests of the owner. The officer believes the public will continue to use the route in its entirety if this section was diverted; therefore, the diversion would have minimal impact on use of the route by the public but would make a considerable difference to the landowner.
- 56. The proposed diversion also meets other considerations which the Council must take into account such as the provisions of the ROWIP, the Equalities Act 2010 and the needs of agriculture, forestry and biodiversity.

Proposal

- 57. That the Wiltshire Council Footpath Bratton 42 Diversion Order 2021 and Definitive Map Modification Order 2021 be forwarded to the Secretary of State for the Environment, Food and Rural Affairs with the recommendation that it be confirmed as made.

Jessica Gibbons

Director – Communities and Neighbourhood Services

Report Author:

Ali Roberts

Definitive Map Officer

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

None

Appendices:

- Appendix 1 - Order and Order Plan
- Appendix 2 - Decision report for the making of the Order
- Appendix 3 - Representations and objections in full
- Appendix 4 - Photographs of the current route, the proposed route and the continuation of the path showing Footpath Bratton 42 in its entirety