

## DECISION REPORT

### HIGHWAYS ACT 1980 – SECTION 119

### PROPOSED DIVERSION OF FOOTPATH BRATTON 42

### AND SECTION 53A OF THE WILDLIFE AND COUNTRYSIDE ACT 1981 – FOOTPATH BRATTON 42

#### 1. Application

Application No: 2018/14  
Application Date: 5 November 2018  
Applicant: Henry Pelly  
Luccombe Mill  
Imber Road  
Bratton  
Wiltshire BA13 4SH

1.1. The landowner has proposed this diversion for the following reason:

*“1. Privacy*

*“2. Protecting the birds which nest all along the edge of the lake from dogs*

*3. Better level access*

*4. Health and safety*

*(a) existing route is steep and banked and often slippery*

*(b) there are many trip hazards from large tree roots*

*(c) the avenue of mature trees frequently drop heavy branches*

*(d) the path at this section runs close to deep water”*

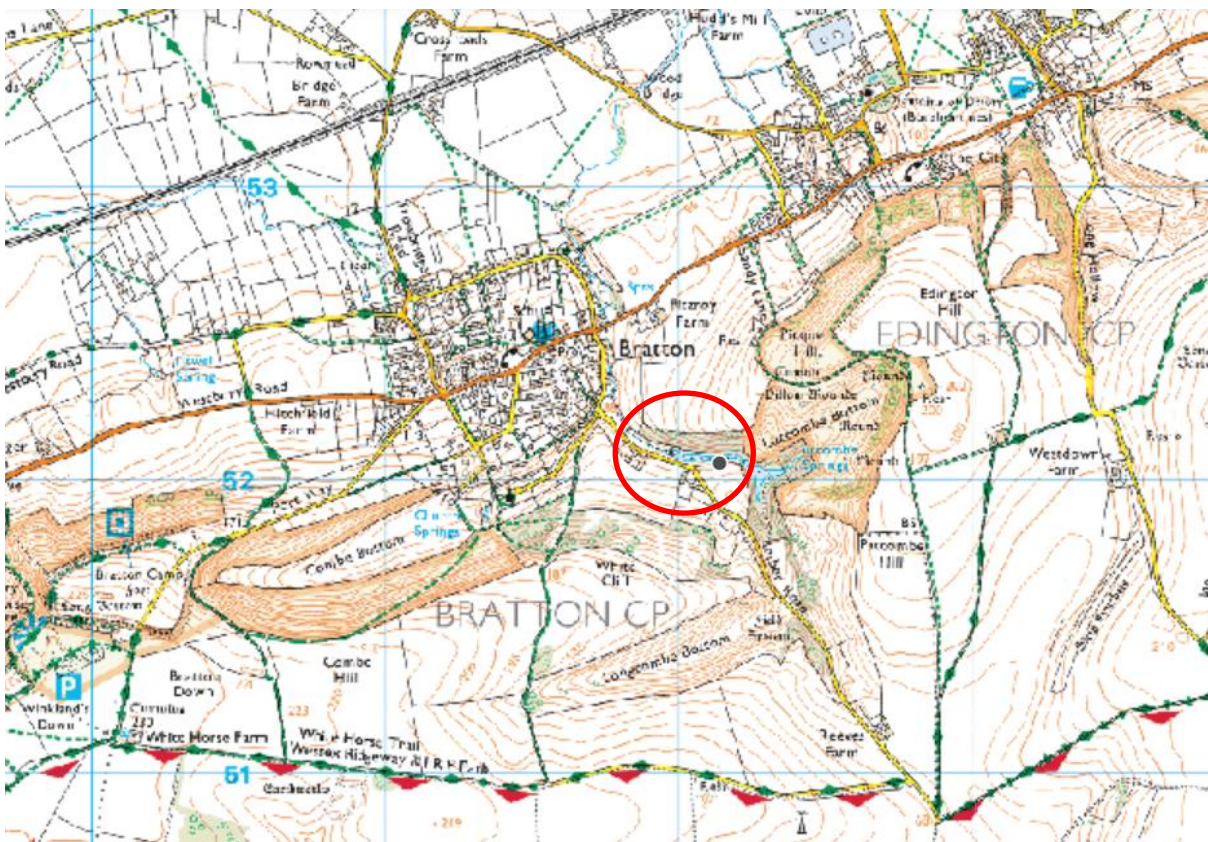
1.2. It is proposed to divert a section of Footpath Bratton no.42 under Section 119 of the Highways Act 1980 from Luccombe Mill garden situated through a treelined path close to the mill pond and create a route through the neighbouring paddock to have a recorded legal width of 2 metres. The diversion route will re-join the footpath at the bridge prior to the watercross

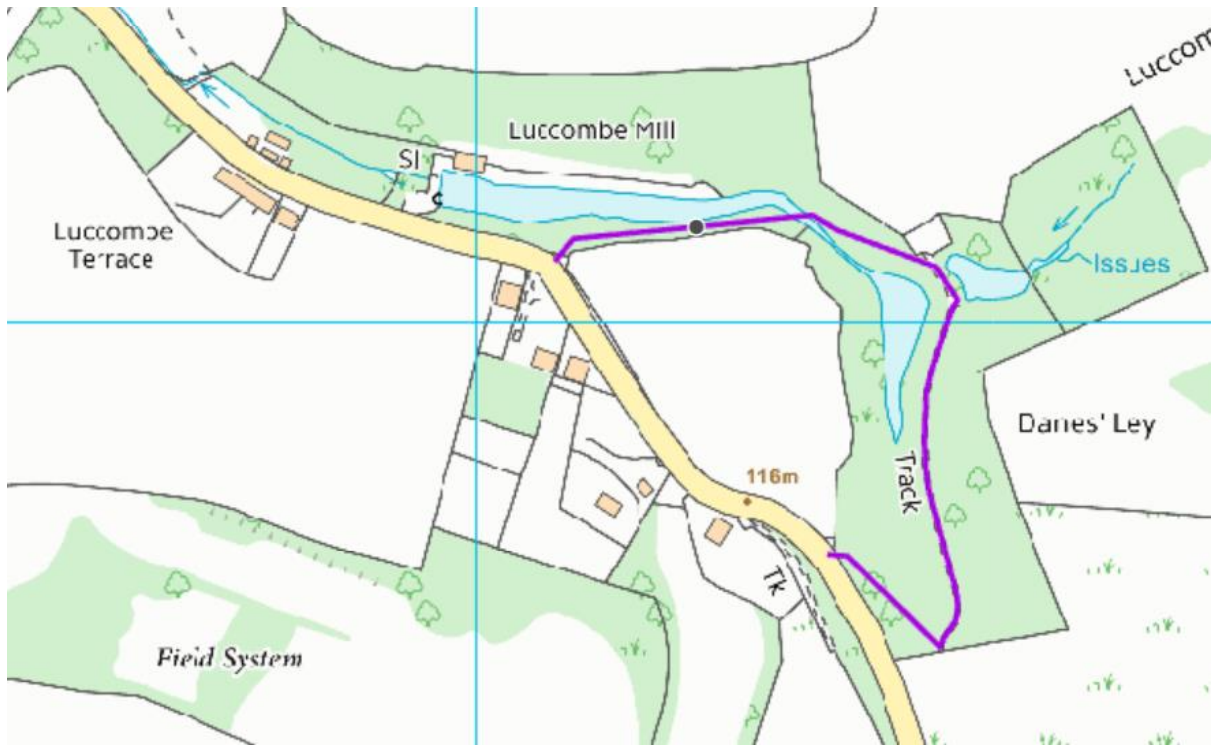
beds and paradise pool.

**2. Relevance to Council's Business Plan**

2.1. 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.

**3. Location Plan and working copy of the definitive map and definitive statement**



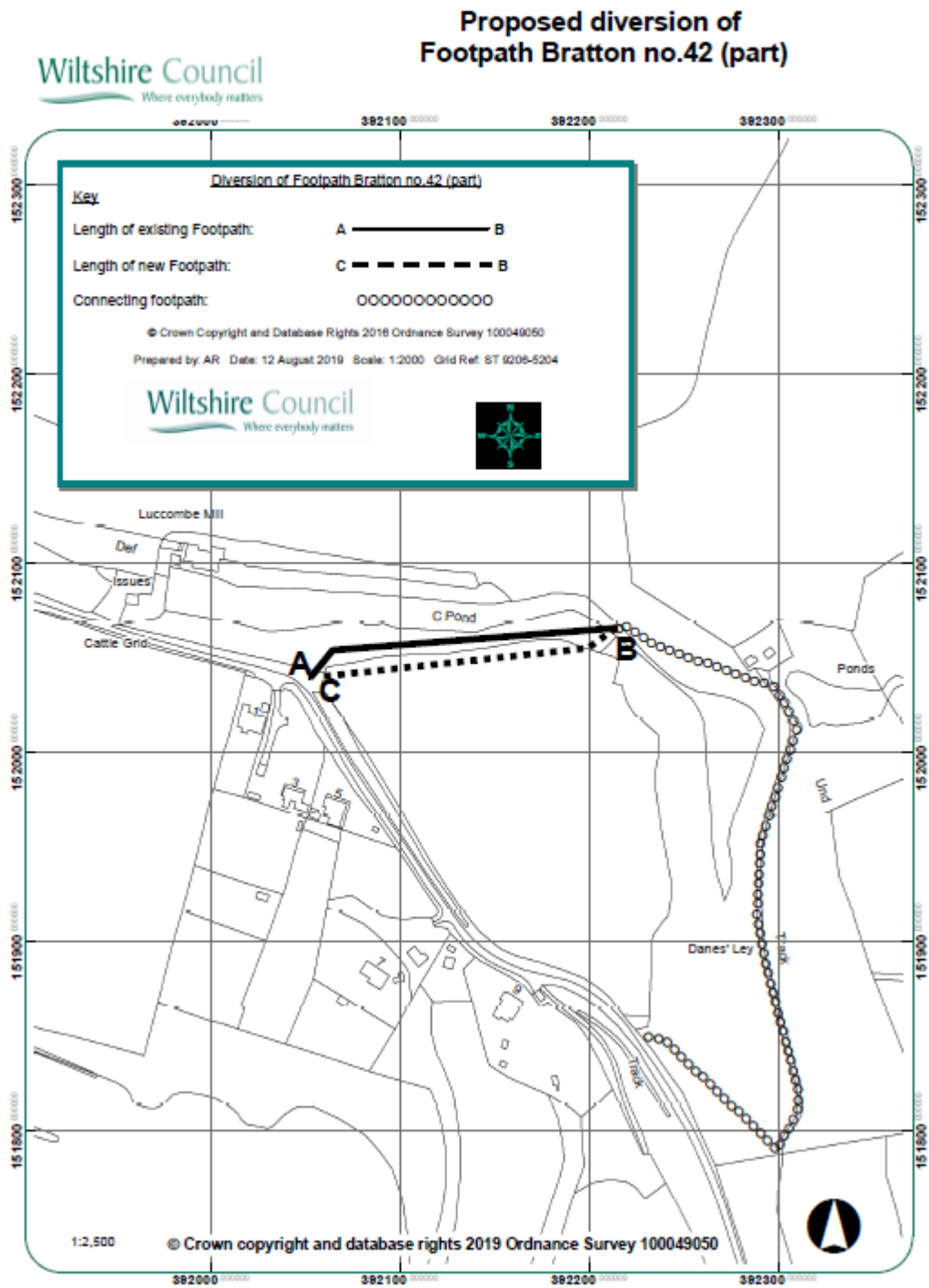


Bratton	42	<p><u>FOOTPATH.</u> From OS Grid reference ST 9205-5204 at its junction with Imber Road, Bratton leading in an east-north-easterly direction for approximately 165 metres where the path crosses onto a raised walkway across the waterbed to the Edington parish boundary at ST 9225-5204. At ST9230-5200 the path re-enters the parish of Bratton continuing in a southerly direction on a well-defined track to ST 9229-5179 where the path turns in a north westerly direction uphill to Imber Road at ST 9222-5184.</p>	<p>Relevant date</p> <p>31<sup>st</sup> October 2018</p>
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Approximate length 503 metres.

Width- 1.5 metres for length of path except the section over the raised walkway leading to the Edington Parish boundary which has a width of 1 metre.

#### 4. Proposed Diversion Plan



- 4.1 It is proposed to divert Footpath Bratton 42 as shown by a bold continuous line on the plan A-B and to create a new section of footpath as shown by a bold broken line on the plan C-B.

5. **Photographs of site**



5.1 Current route – heading from the access at point A on the proposed diversion plan there is a stile and locked gate as accepted by the Countryside Access Officer following the definitive map modification order to add Footpath Bratton 42. There is a view of Luccombe Mill which is limited during the summer months with tree foliage. The path continues along a treelined path with a view of the mill pond. The path is on a camber and there are tree roots protruding from the surface. The proposed section to be diverted culminates at the bridge where there is a waymark pointing towards the definitive route.



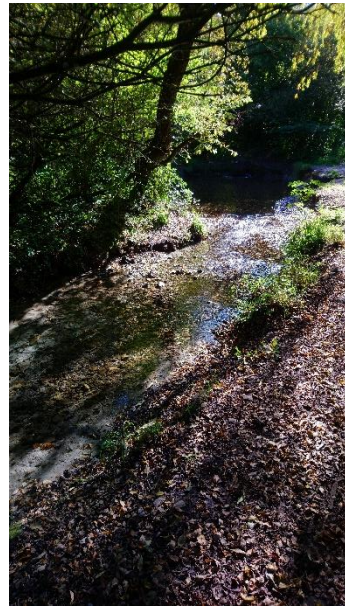
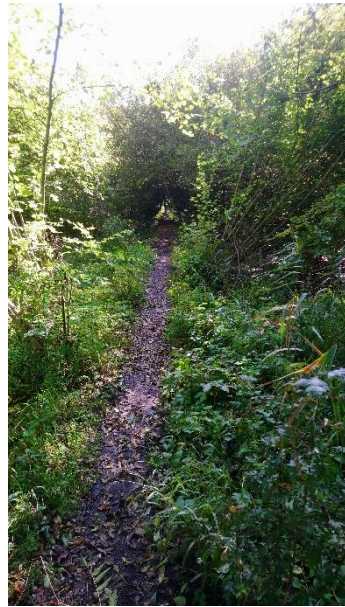


5.2 Proposed route – the route is accessed at point C via a kissing gate with a view of Luccombe Bottom access land to the east. The path runs through an open paddock which is periodically grazed by sheep. Although the field does camber the proposed route runs on generally flat land. Leaving the field via a kissing gate the path leads along a gravelled path down a steep bank to the bridge. There is a notice at this point requesting walkers use this path “Polite notice. Walkers please us this path through the paddock”





5.3 Footpath in its entirety leading from the proposed diversion route - there is a wooden bridge on the route past the proposed intersection point accessed by steps on both sides. – the footpath continues through the watercress beds and along to paradise pool. The route is treelined as it is situated through a wooded area and has a steep gradient bank to the footpath's intersection with Imber Road.



## 6. Applicant and Registered Landowner

### 6.1. Landowner

Henry Pelly  
Luccombe Mill  
Imber Road  
Bratton  
Wiltshire BA13 4SH

## 7. Legal Empowerment

7.1. The application to divert Footpath Bratton 42 is made under Section 119 of the Highways Act 1980 and states:

### ***“119. Diversion of footpaths, bridleways and restricted byways***

*(1) 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'.*

- (2) 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.*
- (3) 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.*
- (4) A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.*
- (5) Before determining to make a public path diversion order on the representations of an owner, lessee or occupier of land crossed by the path or way, the council may require him to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,-*

- (a) any compensation which may become payable under section 28 above as applied by section 121(2) below; or*
- (b) where the council are the highway authority for the path or way in question, any expenses which they may incur in bringing the new site of the path or way into fit condition for use for the public; or*
- (c) where the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by subsection (9) below.*
- (6) 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;*
- so, however, that for the purposes of paragraph (b) and (c) above the Secretary of State, or as the case may be, the council shall take into account the provisions as to compensation referred to in subsection 5(a) above.*

*(6A) The considerations to which-*

*(a) the Secretary of State is to have regard in determining whether or not to confirm a public path diversion order, and*

*(b) a council are to have regard in determining whether or not to confirm such an order as an unopposed order include any material provision of a rights of way improvement plan prepared by any local highway authority whose area includes land over which the order would create or extinguish a public right of way.”*

## **8. Background**

8.1. Wiltshire Council is in receipt of an application dated 5 November 2018 for Bratton 42 diversion from Henry Pelly, Luccombe Mill, Imber Road, Bratton, Wiltshire, BA13 4SH and has been applied for under Section 119 of the Highways Act 1980. The landowner has proposed this diversion for the following reason:

*“1. Privacy*

*2. Protecting the birds which nest all along the edge of the lake from dogs*

*3. Better level access*

*4. Health and safety*

*(a) existing route is steep and banked and often slippery*

*(b) there are many trip hazards from large tree roots*

*(c) the avenue of mature trees frequently drop heavy branches*

*(d) the path at this section runs close to deep water”.*

8.2. The Order to add Footpath Bratton 42 to the definitive map was confirmed on 31 October 2018 following a public inquiry, the application to divert the section of the right of way was received 5 days later. It is proposed to divert Footpath Bratton no.42 under Section 119 of the Highways Act 1980 from Luccombe Mill garden running along the mill pond and create a route 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 watercross

beds and paradise pool. The proposal deletes approximately 170 metres of footpath, approximately 30% of the path in its entirety and adds approximately 160 metres.

## **9. Public Consultation**

- 9.1. A public consultation exercise was carried out on 12 August 2020. A closing date for all representations and objections to be received in writing was given of not later than 5:00pm on 10 September 2020.
- 9.2. 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.
- 9.3. There were 10 supporting responses received including Bratton Parish Council and the Countryside Access Officer and 30 objection responses including the Ramblers. All comments on this application can be found in Appendix A

## **10. Main Considerations for the Council**

10.1. The main considerations for the council relate to the legal tests to be satisfied for an order to be made to divert the footpath in the manner the applicant desires.

### **10.2 s.119. Diversion of footpaths, bridleways and restricted byways (1) Expediency in the interests of the landowner/public**

10.2(a) The landowner has applied to move the footpath as stated in the application

*“1. Privacy*

*2. Protecting the birds which nest all along the edge of the lake from dogs*

3. *Better level access*

4. *Health and safety*

(a) *existing route is steep and banked and often slippery*

(b) *there are many trip hazards from large tree roots*

(c) *the avenue of mature trees frequently drop heavy branches*

(d) *the path at this section runs close to deep water”.*

10.2(b) The footpath is approximately 70 metres from the house and opinion is voiced by some objectors that it is not in the garden but part of the woodland e.g. *“I understand that the previous landowner allowed permissive access where the existing Right of Way is, so presumably privacy distance was defined then. The footpath that is in contention goes through beautiful parkland, it is not a back or front garden that most would define as private”, “The house is 70 metres away, few people have such a degree of privacy”.* The landowner clearly believes this footpath is within the garden and that use of the route affects the privacy of the property. *“I don’t think you really appreciate some of the things my partner and I have endured. It shouldn’t be much to ask, to be able to enjoy one’s own garden in relative peace and harmony. As you know, walking the current footpath affords no privacy as at any point along this small stretch, you can clearly view the entire garden. That is just the first point. Frequently people do not stick to the path and they come walking down to the edge of the lake to take photos or to just stop and stare. Dogs jump into the water frequently (they are never kept on a lead), I have had several drunken youths earlier this summer strip off completely and jump into the water to cool off.”*

10.2(c) The applicant may have a greater awareness and concern for privacy because of the interest in his life demonstrated by the press interest during the Definitive Map Modification Order process adding the applied for path which made the national news. This is also an apparently well used path established by the 81 user evidence forms received during the DMMO process.



10.2(d) A number of objectors have stated that the landowner would have known about the footpath from searches on the property *“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. It seems to me that he wants to circumvent planning law and that is unacceptable.”* *“We have long campaigned to get the route open again, following the landowners’ illegal closure, and do not want that effort wasted with a totally inappropriate revised route.”* Bratton Footpath 42 was not a recorded public right of way on the definitive map and Wiltshire Council did not have a Definitive Map Modification Order application to add a footpath at this location. The previous owners had not declared the footpath when they submitted their Section 31 (6) deposit. On 22nd January 2016 Francis Seymour made a deposit under s.31(6) Highways Act 1980 declaring no public footpaths had been dedicated over the land owned by Mary Seymour (his mother) at that time. A duly made deposit under s.31(6) HA80 is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway. It is noted that as part of the correspondence in relation to making the s.31(6) deposit the solicitor acting on behalf of Francis and Mary Seymour, Venetia Taylor, stated *“The plan attached to the statement shows all the land owned by Mrs Seymour edged in red. The area of particular concern is the western part of the property adjacent to the stream, where private footpaths converge around the mouth of the stream. I attach to this letter a hand-drawn sketch provided by Mr Seymour, showing the rough location of the private footpath he is concerned about.”* It appears Ms Taylor was mistaken when stating the ‘western part of the property’ as the path marked by Mrs Seymour is at the eastern end of the property and matches the claimed route of this application. A copy of the map is provided below.



There are also statements that the landowner would have been aware that there was a permissive path at this location and that his surveyors would have seen this route following a site visit *“Mr Pelly was fully aware of the situation before he bought the house, and he knew that many villagers and walkers used this path every day.”* The previous owners had stated during the public inquiry that use of the land was by permission throughout their ownership and a statement was provided from the Seymour family *“I find it slightly galling that the applicants seek to interpret my father’s community spirit and his generous easy going nature approach to use of the path by others as an indication that he intended to dedicate the path as a public right of way. This was never his intention for the reasons stated above there is no basis for presumed dedication when the use was with his permission.”*

Therefore the legal searches conducted when purchasing Luccombe Mill would not have shown a public right of way and if the landowner was aware of a path on the ground he would have been informed it was a permissive path and therefore used by right, a right that can be withdrawn at any time by the landowner. Section 31(1) of the 1980 Highways Act requires that the use by the public must have been as of right without interruption for a full period of 20

years as of right which is considered to mean without force, without secrecy and without permission.

Arguments that when a landowner buys a property in full knowledge of the existence of a right of way and therefore should not be able to alter it were considered in *Ramblers Association v SSEFRA Oxfordshire County Council* and *Weston EWHC 3333 (Admin)* Case No. CO/457/2012. It confirms that there is no statutory bar to a person making an application in such circumstances. The question that must be asked under s119(1) is whether the diversion is expedient in the interests of the landowner and occupiers.

Mr Justice Ouseley at paragraph 33 [2012] EWHC 3333 (Admin) *“The question that has to be asked under section 119(1) is whether the diversion is expedient in the interests of the land owner. I cannot see that the question of whether the land owner bought knowing the footpath, or bought not knowing of it, or bought taking a chance that he might be able to obtain a diversion order, has got anything to do with whether it is expedient in his interests that the order be made. If it is more convenient, beneficial or advantageous to him, it is expedient in his interests. I cannot see either that the question of whether the order which set a disadvantageous precedent has anything to do with the expediency of the order in his interests, nor historical integrity. Those issues only arise when it comes to the consideration of section 119(6), the second question.”*

10.2(d) Privacy is clearly of paramount importance to the landowner, the application to divert the section of footpath was received 5 days after confirmation of the Order to add Bratton 42. The officer is therefore satisfied that it is in the interests of the landowner to divert the path

### **10.3 s.119 Diversion of footpaths, bridleways and restricted byways**

#### **(2) Alteration of the termination point**

10.3(a) 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 start point although different is off the same highway Imber Road, the termination will not be altered by the diversion.

10.3(b) The officer is satisfied it is expedient in terms of section s.119(2) that the termination points are on the same or connected highways and are substantially as convenient to the public.

10.4 In *Hargrave v Stroud* (2002) EWCA Civ 1281, Lord Justice Schieman stated:

*‘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.’*

10.5 Subsection s.119(6) sets out the 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), Lord Justice Schieman stated:

*‘..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 section 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.’*

10.6 The Planning Inspectorate produce a number of Advice Notes to provide some general background information on rights of way matters. Advice Note 9 is a publicly available guide to some of the various types of rights of way Orders which are submitted to the Secretary of State for confirmation. The Note provides a definition of local authorities in the context of the relevant legislation and sets out the primary and secondary legislation and guidance. In relation to Orders made under section 119 of the Highways Act 1980 the Note states:

*'27. Section 119(6) was considered in R (on the application of Young) v Secretary of State for the Environment Food and Rural Affairs [2002] EWHC 844 and the view taken that subsection (6) has 3 separate tests to it.*

- (i) Firstly, that the Order is expedient in terms of section 119(1). i.e. that in the interests of the owner, lessee or occupier of land crossed by the path or of the public, it is expedient that the line of the path be diverted but not so as to alter the point of termination if not on to a highway or to a point on the same highway not substantially as convenient to the public.*
- (ii) Secondly, that the diverted path will not be substantially less convenient to the public in terms of, for example, features which readily fall within the natural and ordinary meaning of the word 'convenient' such as the length of the diverted path, the difficulty of walking it and its purpose.*
- (iii) Thirdly, that it is expedient to confirm the order having regard to the effect:
  - (a) The diversion would have on the public enjoyment of the path or way as a whole;*
  - (b) Of the order on other land served by the existing public right of way;*  
*and*
  - (c) Of the new path or way on the land over which it is to be created and any land held with it.**

## 10.7 s.119(6) Convenience of the path

10.7(a) In assessing the relative convenience of the present and proposed routes, consideration has been given to various factors including length, width, surface, gradient, etc.

10.7 (b) Length of path – The full length of the footpath is 610 metres including the short section of Footpath Edington 36 as the path briefly crosses the border of Bratton into Edington Parish. The proposed section to be diverted is 170 metres totalling approximately 30% of the entirety of the path. The proposed diversion route is 160 Metres and will have a recorded width of 2 metres, currently the right of way width is recorded as 1.5 metre.

10.7(c) Surface condition – In the application to divert the public right of way the landowner states *“the existing route is steep and banked and often slippery and there are many trip hazards from large tree roots.”* On the site visit officers found there to be a number of large tree roots protruding from the surface and there was a distinct camber of the path towards the mill pond. On a rural treelined walk this is not unexpected however the majority of the proposed route through the paddock does offer a level grassed route, the last 20 metres head down a steep gravelled bank will be made easier to negotiate by the landowner and is discussed at 10.7(d).

10.7 (d) Gradient – There is not a substantial change in gradient of the current definitive route, it is undulating but not significantly so. The majority of the proposed route is on grassed even ground except for (approximately) the last 20 metres towards the intersection with the bridge at point B. As stated in some objections to the application *“His 'new path' down to the bridge is steep and for the elderly it's not an ideal alternative route. The path has no retaining sleepers or a handrail to help those who might need better stability”*. Wiltshire Council's Countryside Access Officer also stated, *“The only concern I have about the diversion is the steep gradient of the path where it leaves the field at*

*ST 92206 52039 and heads towards the wooden footbridge”.*

When using the entirety of the path there is a steeper gradient to negotiate as the user heads towards the northern access point on to Imber Road.



To resolve the issue of the steep gradient of this section of the proposal the landowner suggested two solutions to the Countryside Access Officer

*“Regarding the path down to the bridge, the two options I had in mind was either to make some large steps on the second half of the slope where it is slightly steeper (there are steps on the bridge so didn’t think that would be an issue) or we could look at adding a turn in the path, which would extend the route slightly but reduce the gradient*

*These are the steps we have in the village, that go down past the church. This is a very popular public footpath ... (using concrete on the leading edges as its less slippery)”*



The Countryside Access Officer responded to the proposal of steps in the slope *“I’m happy for you to install some steps on the slope and providing they are constructed to the same standard as those found on the Public Rights of Way near the church in Bratton then that would be acceptable to me”*

The bridge on the path just after the proposed diversion does have steps at both access points so when using the entirety of the path steps are to be negotiated which are far steeper than those which are being proposed.



#### 10.7 (f) Access to the mill pond –

The landowner has raised health and safety concerns about access to the mill pond *“Since the lake was dredged last winter, the depth along the centre of the lake from the Mill to the duck house has a depth of 2.5m of clear water. The area at the far end has the same depth but in mud format. This area is particularly hazardous to those who trespass (particularly children)”*. Although no specific incidents have been documented as observed by a number of objectors e.g. *“If he considers the health and safety of the route so concerning we suggest he takes a walk along some coastal paths where there are often sheer drops within a few feet of a PROW.”* *“The path really does not run close to deep water and I am yet to hear of an incident regarding this.”*

The landowner also raises concerns regarding dogs trespassing and disturbing the wildlife on the mill pond. *“All the birds that currently reside on the lake, nest along this stretch of the bank. The reason they do this is*



*because it is away from the house and the bank is naturally formed, instead of the continuous brick wall the lines the opposite side. The birds that have nested here this year are: 2 families of ducks, a moorhen and the newly introduced pair of swans who started to build a nest but weren't successful this time. As already mentioned, dogs are never kept on a lead and frequently charge into the water to swim or to chase the birds"*

One objector suggested that the landowner erected a fence around the lake *"if Mr Pelly is really concerned about unruly dogs disturbing wildlife, it would be a relatively small matter to erect a 1 metre high fence with standard sheep netting along the lake side of the path. This would effectively deter those few dogs which are able to access the path from leaving the path and would be entirely reasonable.*

The proposed diversion would alleviate this concern as the route is situated predominantly through an open paddock away from open water.

- 10.7(f) Furniture – The definitive map modification order application to add a public footpath, now Bratton 42 stated *"Adding the footpath leading from the stile on Imber Road, Bratton at OS Grid Reference ST921521 to the stile at ST923520 which leads on land owned by Wessex Water"*. Many of the user evidence forms stated a stile is situated at the access point to Luccombe Mill. Therefore on the current definitive line there is a stile at point A there had been a stile at this location. The proposed route provides 2 kissing gates at the access points of the paddock for stock control.

Some objectors have raised concern that the current line does not provide dog access e.g. *"Mr Pelly has refused to include the customary dog access in the stile at the lower Imber Lane access point, only a few dogs which are young enough or fit enough or have owners capable of lifting them over the stile, can access the path."* The Countryside Access Officers states *"One of the main complaints that we have had from users of the path is that the stiles are difficult for some users to get over and that no provision for dogs has been made to get through the stile with the only option being to lift dogs over. This*

*application would solve that problem as the permissive path is already equipped with kissing gates". 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 and therefore useable without difficulty with dogs.*

10.7(g) An obvious walked route can be seen along the proposed path so this is clearly an option already taken by many users of the path.

10.7(h) The officer is satisfied that it is expedient in terms of section s.119(6), i.e. convenience of the paths.

**10.8 Section 119(6)(a) Effect of the diversions on public enjoyment of the path or way as a whole**

10.8(a) Consultation responses – Although there have been 30 objections received to this proposal including the Ramblers there have been 10 responses in support including Bratton Parish Council and the Countryside Access Officer.

10.8(b) Historic route – A number of objectors have raised concerns that the route of the public right of way may be diverted following an extensive DMMO process and lengthy public inquiry establishing the rights on the definitive route.

*"We have long campaigned to get the route open again, following the landowners' illegal closure, and do not want that effort wasted with a totally inappropriate revised route." "I fear that to change the route of the footpath adopted by the public enquiry by the inspector on behalf of The Secretary of State, would mean that we would be denied its use in the future." "It is, in my view, disrespectful to challenge an inspector who put in an extraordinarily large amount of time and emotional energy into this enquiry to make a fair decision."*

Legislation, i.e. Highways Act 1980 Section 119 is in place so that public rights of way can be diverted and the landowner is open to make an application if the diversion is in their interests

This is a historic path much loved and fought for by the residents of Bratton. *“The original route has many special memories and great historical interest. I took part in a local walking group many years ago arranged by women in the village. Mrs White who has since sadly died was on the walk and grew up in Bratton and re-laid childhood memories of the history of the cloth that was made at the water cress beds and hung out to dry against the walls that are still there. Red cloth for the Army uniforms. This was a wonderful walk with her explaining all the history of the watercress beds and its importance to Bratton and its people”. “A Wiltshire County Asset that is known as ‘The Watercress Walk’. I am sure that the landowner knows the Watercress Walk is special to the villagers and walkers who have walked it for many years and know it to be their right to do so for decades to come.”*

During the DMMO process the walk was referred to as The Watercress Walk and is still referred to as such. The importance of accessing Paradise Pool was also discussed at great length. Supporters of this proposal have stated that the watercress beds and paradise pool are the locations of the greatest interest. *“The destination of the path is paradise pool; this diversion does not detract from this destination”*. Access to these sites will not be affected by the diversion.

10.8(c) Character – There can be no denying that the character of the current route and proposed route are very different. The current route runs through a treelined path with views of the mill pond and the proposed route runs through an open grass paddock with a view of Luccombe Down access land to the east. *“The proposed alternative path may be the same distance, but it is the impact of being near the water and the lovely beech trees which make the first part of the official path so special” “The PROW is an integral part of the total*

*walk and the alternative is a totally different aspect. Some walkers may view the PROW as getting from A to B, as it were, but for walkers who have used the path for decades and for those who appreciate woodland and lake views this is much more preferable” “If the walk was changed to go through the paddock, it would be boring with very little to look at, the whole point of this walk is to enjoy walking under the canopy of the large trees with the water just to one side of you.”*

Looking at the path in its entirety from the wooden 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 and circles back to Imber Road. The report to Bratton Council stated, *‘Whilst the alternative route does not pass alongside Stradbrook, in my opinion, the loss of public enjoyment is minimal.’*

If the diversion of Bratton Footpath 42 cannot be achieved then it is the stated intention of the landowner to build a 2 metre fence along the current route preventing access to the mill pond. *“ If the proposed (very reasonable) request for a small diversion of the path does not go ahead, I will be faced with little alternative but to erect a solid 2m high fence that will run from the stile to the bridge. Thus protecting my privacy.”* This does not appear to be a baseless statement, and it is acknowledged by a number of objectors, as the landowner, at some cost, fought the DMMO to add this footpath to the definitive map, and privacy is clearly the motivation for seeking a diversion of the path.

- 10.8 (d) Stock in paddock – 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 were 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."*

10.8(d) The officer believes that the public enjoyment of the path would be affected by the proposed diversion for a number of users to the path. However when looking at the path in its entirety access to the watercress beds and paradise pool remain. The path continues through a wooded area providing the canopy of trees although views of the mill pond will cease but this is expected to happen anyway if the diversion fails with the installation of a 2 metre fence. 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 public but would make a considerable difference to the landowner.

**10.9 Section 119(6)(b) Effect of the diversion on lands served by the existing right of way**

10.9(a) The path has no utility purpose beyond recreational access for the public.

10.9(b) As the applicant owns all the land affected by the proposal there would be no concern about payment of compensation.

**10.10 Section 119(6)(c) Effect of the diversion over which new rights of way are proposed**

10.10(a) Works on the proposed route must be undertaken to the Countryside Access Officer's satisfaction before the route can be certified. These works include the installation of wide steps to minimise the impact of the gradient in the last 20 metres of the proposed route towards point B. The rest of the proposed route is already in place with kissing gates at both access points through the paddock installed.

10.11. Officers consider that at present the legal tests for the confirmation of the order appear to be met and the order appears capable of being confirmed, however this is subject to a further consultation period once the formal order has been made.

10.12. 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. ROWIP 2 recognises the Council's duty to have regard to the Equality Act 2010 and to consider the least restrictive option:

- At 4.1 page 16 the Council recognises that considering the needs of those with mobility impairments is a statutory responsibility:  
*"..consider the needs of those with mobility impairments when maintaining the network and authorising structures (e.g. stiles and gates) on the rights of way network and seek improvements to existing structures where it would be beneficial (Equality Act 2010)."*;

On the current definitive line there is one stile. The proposed route provides two kissing gates, one at each access point of the paddock. There is a proposal to install wide steps similar to the steps in place at Bratton church which the Countryside Access Officer has accepted as a suitable solution to the issue of the steep gradient..

32 the Council recognises the following:

*“The requirements for improving accessibility for people with these sorts of disability are generally the same as discussed in conclusion 5.”*

Conclusion 5 states:

*“If older people are to keep active and therefore healthy, they will need a more accessible network as they are more likely to find stiles (and sometimes surfacing and latches) difficult than other people. This highlights the need to replace stiles with gaps or gates on key routes, which can also benefit wheelchair users and parents with buggies and children.”*

refers to the Council’s Gaps, Gates and Stiles Policy. This is Policy number 7 and is appended to ROWIP2

The Policy 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.

The landowner has already replaced a stile with a kissing gate at the northern interection of the path on to Imber Road which would make the whole route, if the diversion is successful, accessible by kissing gate.

Wiltshire Council relies on DEFRA (2010) Good Practice Guidance for Local Authorities on Compliance with the Equality Act 2010 version 1 and recognises at 7.2.1 that:

*A highway authority has a duty, under the Highways Act 1980, to assert and protect the rights of the public to use and enjoy a highway. The Equality Act 2010 adds a further dimension by requiring (broadly) that in carrying out their functions, public authorities must make reasonable adjustments to ensure that it is not impossible or unreasonably difficult for people with disabilities to benefit from those functions as others would do or to show that there are good*

*reasons for not doing so.*

- As previously stated the proposed route provides two kissing gates, one at each access point of the paddock. There is a proposal to install wide steps similar to the steps in place at Bratton church which the Countryside Access Officer has accepted as a suitable solution to the issue of the steep gradient.

10.13 In making diversion orders, Sections 29 and 121(3) of the 1980 Act, require authorities to have due regard to the needs of a) agriculture and forestry and b) the desirability of conserving flora, fauna and geological physiographical features. Section 40 of the Natural Environment and Rural Communities Act 2006 also place a duty on every public authority exercising its functions to have regard to the conservation of biodiversity, so far as is consistent with the proper exercise of those functions. In this section, conserving biodiversity includes that in relation to a living organism, or type of habitat and restoring or enhancing a population or habitat.

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 treelined path resulting in less footfall impact on the exposed tree roots and a positive impact on the disturbance of birds.

10.14.(a) Officers must consider if the proposed 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 a view of the mill pond outweighs the landowner's interest in diverting the route. The Planning Inspectorate produce Advice Note 9 is a publicly available guide to some of the various types of rights of way Orders which are submitted to the Secretary of State for confirmation.



*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.*

.10.14 (b) 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 (s.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.

10.14 (c) The Appellant in that case, the *Open Spaces Society* (a statutory objector to this application) 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.

10.14 (d) However it is clear from the law as it currently stands at this time the council or other decision making body should 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.

10.15 This proposal is in the interests of the landowner, not substantially less convenient although it does have an effect on public enjoyment of the route of this section of the path. However when looking at the path in its entirety access to the watercress beds and paradise pool remain. The path continues through a wooded area providing the canopy of trees although views of the mill pond will cease but this is expected to happen if the diversion fails with the installation of a 2 metre fence. 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. Officers therefore consider that at present the legal tests for the confirmation of an order are met and the order would be capable of being confirmed. However, once an order is made it is advertised for a period of at least 28 days and during this time any person or body may make representations or objections to the Order which will need careful consideration before the order is either supported and forwarded to the Secretary of State for determination or abandoned by the Council.

## **11. Safeguarding Considerations**

11.1. DEFRA's "Rights of Way Circular (1/09) Guidance for Local Authorities" Version 2, October 2009, states at paragraph 5.5:

*"The statutory provisions for creating, diverting and extinguishing public rights of way in the 1980 Act have been framed to protect both the public's rights and the interests of the owners and occupiers. They also protect the interests of bodies such as statutory undertakers. The requirements for making, confirming and publicising orders are set out in Schedule 6 to the 1980 Act."*

If an order to divert Footpath Bratton 42 is made, Wiltshire Council will follow procedures set out in Schedule 6 of the 1980 Act and in doing so Wiltshire Council will fulfil its safeguarding considerations.

## **12. Public Health Implications**

12.1. None.

## **13. Risk Assessment**

13.1. There is a risk to the council in making the orders. If objections were received to it and the council believes the grounds for the confirmation of the orders are still met, notwithstanding the objection, the orders should be sent to the Secretary of State for determination where associated costs must be borne by Wiltshire Council. To not send the orders to the Secretary of State when the council believes it is capable of being confirmed would be arguably unreasonable and the applicant could seek redress in law against the council decision.

## **14. Financial Implications**

14.1. 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), permit authorities to charge applicants costs in relation to the making of orders, including public path diversion orders. Authorities may charge only the actual costs incurred.

- 14.2. The applicant has agreed in writing to meet the actual costs to the Council in processing the order, including advertising the making of the order and should the order be successful, the confirmation of the order and certification that the new route has been provided to a suitable standard for use by the public, in one local newspaper, (i.e. three advertisements).
- 14.3. The applicant has agreed in writing that if diversion made, to pay any compensation which may arise in consequence of the coming into operation of the order.
- 14.4. The applicant has also agreed in writing to pay any expenses which may be incurred in bringing the new footpath into a fit condition for use by the public, as required by the Council.
- 14.5. If an order is made under Section 119 of the Highways Act 1980 and there are no objections to the making of the orders, Wiltshire Council may itself confirm the order and there are no additional costs to the Council.
- 14.6. If there are outstanding objections to the order which are not withdrawn and the Council continues to support the making of the order, it must be forwarded to the Secretary of State for decision. The outcome of the order would 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 negligible, however where a local hearing is held the costs to the Council are estimated at £200-£500 and £1,000 - £3,000 where the case is determined by local public inquiry. There is no mechanism by which these costs may be passed to the applicant and these costs must be borne by Wiltshire Council.
- 14.7. The making of a diversion 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 continues to support it, for

example where it is considered that the proposals no longer meet the legal tests set out under Section 119 of the Highways Act 1980.

## **15. Legal Considerations**

- 15.1. There is no right of appeal for the applicant where the Highway Authority refuses to make a public path order diversion ; however the Council's decision would potentially be open to judicial review.
- 15.2. If the Council does make a public path diversion order and objections are received, where the Council continues to support the order it may be forwarded to the Secretary of State for decision which may lead to the order being determined by written representations, local hearing or local public inquiry. The Inspector's decision may be subject to challenge in the High Court.

## **16. Options Considered**

- 16.1. (i) To refuse the application, or  
(ii) To make an order to divert Footpath Bratton 42, under Section 119 of the Highways Act 1980 and Section 53A of the Wildlife and Countryside Act 1981, to amend the definitive map and statement of public rights of way and to confirm the order if no representations or objections are received.

## **17. Reasons for Proposal**

- 17.1. It is considered 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 have been met as discussed in paragraph 10. i.e. the order can be

made in the interests of the landowner to divert Bratton 42 out of Luccombe Mill garden to the neighbouring paddock.

17.3. It is also considered that at this stage the legal tests for the confirmation of the order appear to be met. However, it is recognised that the evaluation of the diminution of use and enjoyment is subjective. The balance of the legal tests may be altered by representations and objections received during the advertisement period meaning that Wiltshire Council must again consider the balance of issues affecting this proposed diversion before forming a view on the merits of confirmation.

17.4. 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.

## **18. Proposal**

18.1. That an order be 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 and to confirm the order if no representations or objections are received.

Ali Roberts

Definitive Map Officer

25 January 2021