

HIGHWAYS ACT 1980 SECTION 119
THE WILTSHIRE COUNCIL WESTBURY 29 AND DILTON MARSH 20
DIVERSION AND DEFINITIVE MAP AND STATEMENT MODIFICATION
ORDER 2021
HIGHWAYS ACT 1980 SECTION 118
THE WILTSHIRE COUNCIL WESTBURY 28 AND DILTON MARSH 19
EXTINGUISHMENT AND DEFINITIVE MAP AND STATEMENT MODIFICATION
ORDER 2021

Purpose of Report

1. To:
 - (i) Consider the 13 representations and 4 objections to The Wiltshire Council Parish of Westbury 29 and Dilton Marsh 20 Definitive Map and Statement Modification Order 2021 and The Wiltshire Council Parish of Westbury 28 and Dilton Marsh 19 Definitive Map and Statement Modification Order 2021.
 - (ii) Recommend that the Orders be forwarded to the Secretary of State for Environment, Food and Rural Affairs (**SoSEFRA**) with a recommendation from Wiltshire Council that the Orders be confirmed without modification.

APPENDIX 1. The made Orders and Order Plans showing the existing route and proposed changes.

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. Objections to the Orders and officer responses.

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. An application to divert these footpaths away from the proximity of the dwelling was refused in 2018 as it was considered the legal tests for confirming the Order had not been met as the proposed alternatives were not substantially as convenient. Both Westbury Town Council and Dilton Marsh Parish Council had objected to the proposal and the Countryside Access Officer was concerned about the ongoing maintenance of the alternative routes. Officers informed the landowner that they were entitled to apply again with another option if they

wished to. A further application was received on 28 July 2020 from the landowners Robert Taylor and Nicole Lamour of Dilton Vale Farm, Old Dilton, Westbury, Wiltshire, BA13 3RA with a revised proposal diverting the footpaths under Section 119 of the Highways Act 1980. There are five rights of way from all directions culminating in the garden of Dilton Vale Farm passing in close proximity to both sides of the home and through the driveway at front of the house. The proposal is to divert the rights of way towards the eastern and north boundaries of the property away from the dwelling to improve privacy and security of the residence. The current rights of way do not have recorded widths however the proposed alternative rights of way will be recorded as 3 metres. The total length of rights of way to be deleted is approximately 326 metres and adds approximately 380 metres.

4. The five paths in their entirety pass through open countryside and are relatively direct to Dilton Vale farm with minimal deviation. Once at the property they meander around the garden and dwelling and are not well defined. However, the proposed routes, which are available as permissive paths, are clear and obvious tracks and from the representations received this option is already taken by many users of the paths.
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 Westbury East, Council Member for Ethandune, Westbury Town Council and Dilton Marsh Parish Council. There were 18 representations received to the proposal including Dilton Marsh Parish Council and 1 objection was received from Westbury Town Council.
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 Footpaths Westbury 29 (part) and Dilton Marsh 20 (part) under Section 119 of the Highways Act 1980 were met. And that the legal tests for the making of an extinguishment Order for Footpaths Westbury 28 (part) and Dilton Marsh 19 (part) under Section 118 of the Highways Act 1980 were also met. The proposal is in the interests of the landowners and the routes are not substantially less convenient. There are five rights of way in total culminating in the garden of Dilton Vale Farm passing in close proximity to both sides of the home in touching distance of the windows. It is clear that the paths are intrusive to the landowners as they provide little, if any, opportunity for privacy. It is proposed to divert the rights of way towards the eastern and north boundaries of the property away from the dwelling which would allow an opportunity for increased security for the family home. The new footpaths will have a recorded width of 3 metres, they are well defined tracks and easy to follow. The current paths have no recorded widths, they weave around the property and are significantly narrow in places. The officer believes the public will continue to use the routes in their entirety if these sections were diverted; therefore, the diversion would have minimal impact on the level of public use but would make a considerable difference to the landowners.
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 making 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 be altered by representations and objections received during the advertisement period for the made Orders meaning that Wiltshire Council must again consider the balance of issues affecting this proposed diversion and extinguishment before forming a view on the merits of confirmation.

8. An initial Order was made on 11 August 2021 under Section 119 of the Highways Act 1980 to divert Footpaths Westbury 29 (part) and Dilton Marsh 20 (part) and extinguish Footpaths Westbury 28 (part) and Dilton Marsh 19 (part), and Section 53A of the Wildlife and Countryside Act 1981, to amend the Definitive Map and Statement of public rights of way. The consultation ran from 20 August 2021 to 17 September 2021 and included the previous consultees a notice was placed in the Warminster Journal 20 August 2021 and all respondents to the initial consultation were contacted asking if they wished their comments to be taken to the next stage of the process. The consultation received 8 representations and 10 objections. An error was found in this Order so new Orders were drawn up separating the diversions and the extinguishments. The diversions are to be processed using Highways Act 1980 Section 119 and the extinguishments under Highways Act 1980 Section 118. These are the Orders being considered at this committee. The consultation on these Orders ran from 5 November 2021 to 3 December 2021 and included the previous consultees, it was advertised in the Warminster Journal on 26 February 2021. All responders to the previous incorrect Order were contacted explaining that to follow process and regulation they would need to resubmit their response for it to be a duly made representation or objection.
9. In total 13 representations were received in support of the made Orders, including Dilton Marsh Parish Council. There were 4 objections received including Westbury Town Council and 1 objector to the previous Order wished to withdraw their previous objection as they had misunderstood what was being proposed and their issue was further along one of the rights of way and not on land owned by the applicant. All responses to the made Orders can be read in full in **Appendix 3**.
10. Due to the objections received, the Orders must be considered by the Western Area Planning Committee whose Members should consider the legal tests for diversion and the legal tests for extinguishment against the objections received, in order to decide whether Wiltshire Council continues to support the making of these Orders.
11. Where the Authority continues to support its original decision to make these Orders, they should be forwarded to the SoSEFRA for determination, with a recommendation from Wiltshire Council that the Orders be confirmed without modification, or with modification.
12. Where the Authority no longer supports its original decision to make the Orders, it may be withdrawn with reasons given as to why the legal tests for diversion and extinguishment are no longer met. The making of a public path diversion and extinguishment orders are a discretionary duty for the Council, rather than a statutory duty; therefore, the Orders 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 the diversion 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. The legal tests that must be applied by Wiltshire Council in considering whether or not the extinguishment Order are contained in Section 118.

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. **Section 118. Stopping up 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 which is a trunk road or a special road) that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed as an unopposed order, extinguish the public right of way over the path or way.”*

18. 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.

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

20. **S.119(1) – The landowner’s interest**

The landowner has proposed this diversion for the following reason: *“There is a confluence of 5 public footpaths within the garden and passing either side of the house. The house, itself, is set in a very rural and isolated location, well away from other public highways. For a very rural property this is far from ideal for any family home, let alone one with young children. ... The paths are highly intrusive for the applicants and their family and expose them to an increased potential threat of antisocial or criminal activity without affording opportunity to provide additional security and privacy to the property ... The proposal retains the integrity of the local footpath network and provides enjoyable paths across the property whilst allowing for them to be less intrusive on family.”* There are five rights of way in total culminating in the garden of Dilton Vale Farm passing in close proximity to both sides of the home in touching distance of the windows. It is clear that the paths are intrusive to the landowners as they provide little if any opportunity for privacy. It is proposed to divert the rights of way to the eastern and north boundaries of the property away from the dwelling which would allow an opportunity for increased security for the family home.

21. Objectors have stated the reasons for applying to divert the rights of way are not for the privacy and security of their family home but because of the interference with business interests such as holiday lets and a wedding venue on the property naming Dilton Vale Farm rural enterprise(s). The applicant/landowner has confirmed that Dilton Vale Farm is a family home and is not run as a business. There is no wedding business on site and the only holiday let is in the building north of point A on the Order plan. The rural enterprise referred to is a charitable venture. However, if there were businesses run from the property this would be irrelevant to the making of an Order, if the applicant had applied to divert the

routes due to business requirements this would still meet with s.119(1) in the interests of the landowner and occupiers.

22. Objectors also state that the landowner would have known about the footpaths prior to the purchase of the property. However, a landowner is legally entitled to apply to divert a right of way if it is in their interests even if they were aware of a right of way at time of purchase. In this case the applicant has lived at the property for 11 years, over time the use of the footpaths has increased due to the growth of the population of Westbury and it has been found that there has been a general increase of use of local networks due to lockdown. The question that must be asked under s.119(1) is whether the diversion is expedient in the interests of the landowner and occupiers.
23. In its objection Westbury Town Council states *“Public footpaths are sacrosanct, and we move them at our peril, creating a precedent for the future”*. However, these Orders would not set a precedent, requirements on land where rights of way are situated can change therefore legislation is in place to divert routes within highway law, Highways Act 1980 and planning law, Town and Country Planning Act 1990. Wiltshire Council policy recognises one of the weaknesses of the rights of way network is that it is historic and may not meet present and future needs. ROWIP Appendix 8 – Strengths, weaknesses, opportunities and threats assessment of the Countryside Access Network, Weaknesses, W1 states: *“The network is largely historic and although it has evolved, in places it does not meet the present and likely future needs of users and potential users”*. The extensive number of rights of way culminating at Dilton Vale Farmhouse travelling from all directions is likely to be because it was formally a significant employer for the area, the property is now a private home. It is therefore demonstrated that the diversions are in the landowner’s interests.

24. **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 termination points will not be altered by the diversion. Therefore, termination points are substantially as convenient.

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

26. It is important to compare the convenience of the current routes and the proposed routes, the test being that the new ones must not be substantially less convenient to the public than is the existing ones. Convenience of the paths are covered in full in **Appendix 2** paragraph 10.7. In summary:

27. The length of rights of way to be deleted in total equals approximately 326 metres and the proposal adds approximately 380 metres. Depending on which direction you are coming from, and are intending on travelling to, the proposal either lengthens or shortens your journey. However, these rights of way are recreational not utility routes therefore the minimal changes in distances will have no impact on public convenience of the paths. Users will already have chosen to walk significant distances to get to these rights of way at Dilton Vale Farm. Taking each of the five routes in turn from their intersection with highway; Honey Lane UC road to diversion point E approximately 180 metres, from Westbury Leigh to diversion point H approximately 400 metres, from Sand Hole

Lane to diversion point H approximately 730 metres, from St Mary's Church Old Dilton Road to diversion point C approximately 325 metres, from Old Dilton Road north of Dilton Farm to diversion point A approximately 160 metres.

28. The five paths in their entirety pass through open countryside and are relatively direct to Dilton Vale farm with minimal deviation. Once at the property they meander around the garden and dwelling, are not well defined and in places quite narrow. However, the proposed routes are clear and obvious tracks and will have a recorded width of 3 metres. From the representations received this option is already taken by many users of the paths.
29. The surfaces for both the current routes and proposed routes are very similar encompassing grass and gravel tracks. There is not a substantial change in gradient of the current definitive routes and the proposed routes. When walking the entirety of these lengthy paths the conditions are the same. Part of the section of Westbury 28 proposed to be diverted is eroding significantly, as the path continues to wear away it would require expensive works to be undertaken by the highway authority or it will cease to exist entirely. The proposal would mean that this section of path is diverted alleviating these concerns. A section of the proposed route has been repaired with land drainage to prevent the previous boggy condition. New bridges are to be installed by the applicant to Wiltshire Council's specification before the Orders are certified.
30. There is no additional furniture on the proposed routes. There are three bridges on the current rights of way. The proposed route will require two which the landowner will provide to Wiltshire Council's specifications prior to certification.
31. The proposed route is considered to be expedient in terms of section s.119(6) i.e. convenience of the paths.
32. **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. Although 4 objections have been received to the proposal including Westbury Town Council there have been 13 supporting representations received including Dilton Marsh Parish Council. Many of the supporters' state they are regular users of the routes over a number of years.
33. Dilton Vale Farmhouse is listed as a Grade II building. The existing route leads close to the property offering a close to view of the property. However, the diversions offers a view of the property in full. Representation comments on this point include; *"It is a better route to walk offering better views of the house"*, *"It's actually a better route to walk in my opinion, offering better views of the house but discreetly from a distance"*.
34. Many users of the route may have discomfort in walking at such close proximity to the dwelling, within touching distance from the windows. This discomfort may be more conspicuous due to the properties isolated location. Many of the representations received made such comments and include *"Use of the route feels intrusive"* *"it feels an imposition on the owners"* *"we walk regularly and have done for years ... the footpath takes us directly past their windows and very close to their house which is unnecessary, and a diversion would be far more peaceful for everyone"* and terms used include, *uncomfortable, invasive, awkward*. *"The walk rambles through open countryside so the route passing*

directly past the property seems completely unnecessary". These comments can be viewed in full in **Appendix 3**.

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. The officer believes the public will continue to use the routes in their entirety if these sections are diverted; therefore, the diversion would have minimal impact on the level of public use, but it would make a considerable difference to the landowner.

37. **S.119(6) – Effect on land served by the existing right of way**

As the applicant owns all the land affected by the proposal 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**

As the applicant owns all the land affected by the proposal it is considered that there is no risk of compensation arising from the creation of the new route.

39. **Section 118** – allows the Highway Authority to extinguish a footpath, bridleway or restricted byway, where they consider it expedient to do so on the grounds that the path or way is not needed for public use. It is proposed to extinguish 48 metres of Footpath Westbury 28 and 13 metres of Footpath Dilton Marsh 19 as they would result in an unnecessary spur from the diverted route around Dilton Vale Farm boundary which would no longer be needed for public use. The legislation states that the authority should take into account the effect of the extinguishment on other land served by the path or way and the provisions for compensation. The land subject to a public path extinguishment order is in the ownership of the applicant.

40. **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.

There is no additional furniture on the proposed routes. The new footpaths will have a recorded width of 3 metres, they are well defined tracks and easy to follow. The current paths have no recorded widths, they weave around the property and are significantly narrow in places.

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

There will be no likely adverse impact on biodiversity, agriculture or forestry.

Overview and Scrutiny Engagement

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

Safeguarding Considerations

43. There are no safeguarding considerations associated with the confirmation of the making of these Orders.

Public Health Implications

44. There are no identified public health implications which arise from the confirmation of the making of these Orders.

Corporate Procurement Implications

45. In the event these Orders are forwarded to the SoSEFRA there are a number of potential requirements for expenditure that may occur, and these are covered in paragraphs 49, 50, 51 of this report.

Environmental and Climate Change Impact of the Proposal

46. There are no environmental or climate change concerns associated with the confirmation of the making of these Orders. 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

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

Risk Assessment

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

Financial Implications

49. The applicant has agreed to pay all of the Council's costs associated with the making of these Orders, 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 Orders are 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.
50. Where there are outstanding objections to the making of these Orders, the Committee may resolve that Wiltshire Council continues to support the making and confirmation of these Orders. The Orders 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.
51. There are no costs associated with the Council resolving to abandon these Orders 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

52. Where the Council does not support confirmation of the making of these Orders and resolves to abandon them, clear reasons for this must be given and must relate to the legal tests contained within Section 119 and 118 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

53. Members may resolve that:
- (i) The Orders are forwarded to the Secretary of State for Environment, Food and Rural Affairs for confirmation as made.
 - (ii) The Orders are forwarded to the Secretary of State for Environment, Food and Rural Affairs for confirmation with modifications.
 - (iii) The Orders are revoked and abandoned.

Reason for Proposal

54. Unless the objections and representations are withdrawn the Orders must be forwarded to the SoSEFRA for determination.

55. It is considered that in this case the legal tests for the making of a diversion order to divert Footpaths Westbury 29 (part) and Dilton Marsh 20 (part) under Section 119 of the Highways Act 1980 have been met, and the additional legal tests for confirmation contained within Section 119(6) have also been met. The Order is in the interests of the landowner to divert the footpaths away from the proximity of the dwelling towards the boundaries of the property for privacy and security reasons. The proposed route is not substantially less convenient, and the majority of responses received were in support of the diversion detailing a preference of using the proposed routes away from the dwelling. 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. It is considered that in this case the legal tests for the making of an extinguishment order for Footpaths Westbury 28 (part) and Dilton Marsh 19 (part) under Section 118 of the Highways Act 1980 have been met as an unnecessary spur would be left as a result of the diversion.
57. 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

58. That the Wiltshire Council Parish of Westbury 29 and Dilton Marsh 20 Definitive Map and Statement Modification Order 2021 and The Wiltshire Council Parish of Westbury 28 and Dilton Marsh 19 Definitive Map and Statement 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.

Peter Binley

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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 - Objections to the Orders and officer responses.