

NORTHERN AREA PLANNING COMMITTEE

22nd January 2025

HIGHWAYS ACT 1980 SECTION 119

WILDLIFE AND COUNTRYSIDE ACT 1981 SECTION 53A

**THE WILTSHIRE COUNCIL CASTLE COMBE 7 AND YATTON KEYNELL 25 DIVERSION
AND DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2023**

Purpose of Report

1. To:
 - (i) Consider the 7 statutorily made objections to The Wiltshire Council Castle Combe 7 and Yatton Keynell 25 Diversion and Definitive Map and Statement Modification Order 2023.
 - (ii) To recommend that the Wiltshire Council Castle Combe 7 and Yatton Keynell 25 Diversion and Definitive Map and Statement Modification Order 2023 is forwarded to the Secretary of State for the Environment, Food and Rural Affairs with the recommendation that it be confirmed with modification. That modification being to add the words at the end of paragraph 4 of the order “ *.And thereupon the Calne and Chippenham Rural District Council Area Definitive Statement dated 1953 shall be modified as described in part 3 of the Schedule to this Order*

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. Wiltshire Council received an application to divert part of footpath Castle Combe 7 (CCOM7) , to a new route which crosses the parish boundary into the parish of Yatton Keynell, on 2nd November 2020 from the landowner Mr Damian Betlles of Lower Colham

Mill, Castle Combe, Chippenham, Wiltshire, SN14 7HZ. The application was made under Section 119 of the Highways Act 1980.

4. The landowner submitted the following reasons for his application in November 2020.

1. Improved privacy for Lower Colham Mill.

2. To help prevent trespass by discouraging the use of the existing farm access road as a shortcut back to the village.

3. The field is used for lambing, and we have suffered numerous dog attacks in recent years, particularly during lambing season. The short diversion will allow the area nearest the house to be cordoned off for lambing.

4. The existing footpath passes across the old leat for the mill which floods during winter, the diversion will avoid this section.

5. The existing bridge suffers from erosion, particularly on the north side the diversion would allow the bridge to be relocated to a section of the river that does not suffer from erosion. A similar bridge relocation was undertaken further down the river in the same field.

5. A public consultation exercise was conducted regarding the proposed diversion from the 24th of August 2022, with comments requested by 23rd September 2022. The consultation included Castle Combe Parish Council, user groups, Cotswold AONB, the Wiltshire Councillor for the area, Natural England, and other interested parties. Yatton Keynell Parish Council were also consulted in August 2023.

6. A 31 page decision report was written and can be seen in full at <https://apps.wiltshire.gov.uk/RightsOfWay/Path/Detail/kZolpiV2?row=P2020015>. This can be accessed on the Wiltshire Council website within the rights of way page and the public path order register under application reference P/2020/015.

This report sets out the background and considers the legal tests set out in section 119 of the Highways Act 1980 in detail. It considered that in this case the legal tests for the making of a diversion Order to divert part of footpath CCOM7, under Section 119 of the Highways Act 1980 were met. Officers consider the proposed diversion is in the interests of the landowner and the alternative route is not substantially less convenient to the public and does not impact in any significant manner, negatively on public enjoyment of the path.

7. The proposed diversion also meets other considerations which the Council must consider such as the provisions of the Rights of Way Improvement Plan, the Equalities Act 2010, the needs of agriculture, forestry and biodiversity and the effect on land on or adjoining

the rights of way. The officers report concluded that at the initial stage the legal tests for the confirmation of the Order appear to be met. However, the report recognised that this is subject to consideration of responses received to the statutory consultation to the legal order once made.

8. The Order was made on 23rd August 2023 under Section 119 of the Highways Act 1980 to divert CCOM7 and record it as part CCOM7 and part YKEY 25, where it crosses the parish boundary. The order is also made under Section 53A of the Wildlife and Countryside Act 1981, to amend the definitive map and statement of public rights. The order consultation ran from September 7th, 2023, to 6th October 2023 and included the previous consultees and any respondents to that initial consultation. In addition, it was also advertised on site by notices on the current line of the path and in the Wiltshire Gazette and Herald on 7th September 2023 as required. A copy of the order can be seen at **appendix 1**.
9. Nine responses were received to the order during the statutory consultation period, and one outside of the statutory period. Of the ten responses received, 8 were in objection, one response from Cotswold AONB stating they have no objection and one from Natural England regarding the requirement to have SSSI consent. The eight objections are from residents in the local area. See **appendix 2** for order responses.
10. Due to the objections received, the Order now falls to be considered by the Northern Area Planning Committee whose members should consider the legal tests for diversion against the objections received, to decide whether Wiltshire Council continues to support the making of the Order and its subsequent confirmation.
11. Where the Authority continues to support its original decision to make the order and its confirmation, 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 where appropriate.
12. Where the Authority no longer supports its original decision to make or confirm the order, it may be withdrawn with reasons given as to why the legal tests for diversion are not 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 prior to its submission for determination by the Planning Inspectorate on behalf of the SoSEFRA.

Main Considerations for the Council

13. The legal tests that must be applied by Wiltshire Council in considering whether an Order should be made 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. The tests are considered in turn.

S.119(1) – The landowner’s interest

The application and order were made in the interests of the landowner, whose reasons are stated in their application and seen at 4 of this report. The current position of footpath CCOM7 leads within 4 metres of the boundary of the applicant’s property and garden. The diversion will lead to an increase in privacy and security for the landowner. The diversion of the path will also result in the landowner being able to reduce trespass onto the access track to their property which is used by the public as a route to the village. The diversion will also permit the landowner to cordon off part of the field to remove any conflict between users of the path and their dogs and any livestock grazed in the field. The other points raised by the applicant are regarding flooding and erosion of the current bridge. Both the current bridge location and proposed bridge location are within identified

flood zones, which applies to most of the length of the By Brook. The current bridge would require some maintenance by the highway authority and the new bridge will be paid for by the applicant, with subsequent maintenance passing to the highway authority. Neither of these reasons identified are relevant to s.119(1) i.e. reasons for making a diversion order. The test of S.119(1) is met where it is in the landowners' interest to divert the footpath for privacy and security of the property, to reduce trespass and reduce conflict between the public and the landowners or tenant's livestock.

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

The diversion of the footpath must not alter the termination points of the paths 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 and proposed starting points and termination points of the diverted path remains on the same highway (footpaths CCOM7 and YKEY25) and are as substantially convenient to the public.

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

The path or way should not be substantially less convenient to the public in consequence of the diversion. In assessing the relative convenience of the present and proposed routes, consideration has been given to various factors including length, width, surface, and gradient.

22. The proposed diversion of the footpath extinguishes approximately 220 metres of footpath and creates approximately 250 metres of footpath. An increase of approximately 30 metres is not substantially less convenient to the public, given the rural nature of the route. The proposed path will have a recorded width of 2 metres, other than the footbridge which will have a width of 1.4 metres. Whereas the current recorded width for the footpath is 0.6 metres. The increase in width will be a benefit to the public. The surface of the path will be similar in nature, both current and proposed routes will have a natural surface. The proposed route may be subject to more leaf litter where it is closer to trees but is not substantially less convenient to the public. The gradient of the paths is similar in comparison , both proposed and current routes are over substantially flat ground.

23. S.119(6) – Effect on public enjoyment of the path or way as a whole

The evaluation of enjoyment is a subjective matter and will differ between users of a path or way. It is clear from the responses received to the order that the public enjoy using the path and views offered by its setting in a wooded valley. Views of the valley will still be available to users of the way if the diversion is successful. The diversion will remove a section of the walk through the valley but the general experience of being in the valley and views offered by the path will remain. The proposed diversion will be along the bank of the brook, which will not be an unpleasant walk and is very similar in nature to the continuation of the path north. The enjoyment of the path or way as a whole, will not, in officers' opinion be substantially negatively affected, with similar views of the valley and brook remaining both on the continuation of the path north and south and on the part subject to diversion.

24. **S.119(6) (b) – Effect of the diversion on lands served by the existing right of way**

S.119(6) (c) – Effect of any new public right of way created by the order with respect to the land over which the right is so created, and any land held with it

There will be a positive effect for the landowner on the land served by the existing right of way because of the diversion, i.e. he will be able to graze livestock and reduce trespass onto other land in his control. S.119(6)(b) is met.

The land over which the diverted path is to be created is designated as a site of special scientific interest (SSSI) named Rack Hill and noted for its calcareous grassland. Natural England are the body responsible for monitoring and assessing the condition of SSSI land and as such have been consulted. Racheal Finch, advisor for Natural England has been consulted regarding the impact the diversion may have on the SSSI site. She has advised it is not possible to gain consent for works in the SSSI currently as a date of works is required (which is not possible currently prior to any confirmation of the diversion order), however she has advised on the general impact of the diversion. The full response can be seen at **appendix 3**. Extracts from that response are

25. *"I've had a look at the proposed plans and have concluded that these will have no significant effect on the designated lowland calcareous grassland on site. This is because the bridge will be located in the W8a area (woodland) which is not a designated feature of the site. Additionally, on the SSSI side excavation works will be carried out by hand and access will not be via the SSSI"... Whilst the diversion of the footpath could potentially lead to more footfall within the SSSI, this is not going to be located on any calcareous grassland areas. Furthermore, there is already an existing public right of way on the SSSI which borders calcareous grassland areas".... Any vegetation clearance will only involve the removal of small fallen trees and light bramble and will take place outside of the bird*

nesting season. Butterflies are an important feature of the SSSI, with 20 species associated with the site (although not designated), However, taking into account the small-scale removal of vegetation butterflies should not be significantly affected.”

26. As can be seen Natural England consider the diversion of the path will have no significant effect on the designated lowland calcareous grassland on site. Full consent for any works within the SSSI would be applied for before any works are undertaken. From the response received by Natural England it is apparent consent would likely be granted under the conditions identified in this proposal.
27. The construction of the new bridge for the proposed diversion has been granted by the Environment Agency (EA), consent is valid until March 2027. Any works undertaken for the construction of the bridge will in accordance with the permit granted by the EA.
28. A tree survey has been undertaken on the route of the actual diversion itself by a Wiltshire Council Tree Officer and the wider area by a qualified arborist by the landowner and can be seen at **appendix 3**. Several trees have been identified which need works, in the main due to ash die back, as noted it is likely these trees will need works/ removal in any case due to their proximity to the water course. The works identified will be carried out by the landowner.
29. With EA consent in place and SSSI consent likely to be granted as advised by Natural England, officers are satisfied that the effect on land over which the new footpath is to be created will not be in such a manner as to prohibit the confirmation of this diversion order. S.119(6)(c) is met as advised by the appropriate bodies.

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

Wiltshire Council's rights of way improvement plan (ROWIP) is entitled Countryside Access Improvement Plan 2015 – 2025. 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”. Objectors have stated the path should not be moved as they are historic. It is recognised paths have historic value and if a route has specific characteristics or features on its route then this would be taken into consideration. As explained earlier in this report the nature of the path and views offered by the path are not removed as a result of this diversion. The ROWIP recognises paths can be moved for present needs and section 119 of the Highways Acts facilitates the diversion of public rights of way.

31. 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 it states "*..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).*" The considerations above are met in this case. The surface of the proposed routes will be similar in nature to the current route, where the surface will remain in its natural state. No new stiles will be authorised as a result of this diversion and the width of the new bridge will have a useable width of 1.4 metres, which is wider than the current bridge in situ on the path. The diversion does not have a detrimental effect on any users with mobility impairments and increases the available width on the structure on the route.

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

EA consent has been granted for the construction of the bridge and Natural England have been consulted and responded that there will be no significant effect on the SSSI land. Full consent will be applied for when possible and the terms of the permits and consents will be abided by when any work is undertaken. No trees are to be felled directly on the route of the new path and only trees with disease within the footpath area would need to be removed, as would be undertaken in any case due to the proximity of those diseased trees and the watercourse. Officers are guided by the EA, Natural England and qualified arborist comments on these matters and the needs of agriculture, forestry and biodiversity are not negatively impacted to any degree which would prohibit the confirmation of this order.

Comments on Objections

33. The 8 objections to the order can be seen in full at appendix 2. A main point of objection is the environmental impact of the proposal as it is over a watercourse and into SSSI land. As discussed, the EA, Natural England and qualified arborists have been consulted. Those qualified bodies have given consent for the bridge works, have stated there will be little impact on the SSSI and any tree works will be undertaken on diseased trees which would be necessary in any case. Officers are guided by these experts.
34. The objectors also reply to the applicants' reasons for diverting the path. The landowner has supplied a supporting statement for committee members which sets out his reasons for his application this can be seen at **appendix 4**. The Highways Act 1980, section 119, which this order is made under, legislates for landowners to apply to divert public paths,

subject the application of the tests set out in that section. Officers believe those tests are met.

35. Other points regarding public enjoyment and convenience have been covered in this report and the original decision report.

36. It is noted neither Castle Combe parish council nor Yatton Keynell parish council have objected to the order. Neither have the Ramblers, who supported the proposal at the initial consultation phase. The Cotswold National Landscape (previously AONB) did respond to the order and have no objection to the proposal. The Countryside Access Officers, responsible for the maintenance and enforcement of public rights of way in Castle Combe and Yatton Keynell have no objection to this proposal.

Overview and Scrutiny Engagement

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

Safeguarding Considerations

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

Public Health Implications

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

Corporate Procurement Implications

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

Environmental and Climate Change Impact of the Proposal

41. There are identified 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. The relevant consents and from the EA and Natural England would be in place before any works were undertaken.

Equalities Impact of the Proposal

42. Issues with accessibility have been addressed in the report at paragraph 31.

Risk Assessment

43. 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

44. The applicant has agreed to pay all the Council’s costs associated with the making of the Order, with the advertisement of the confirmed Order and the creation of the new path, including the costs of any works required, this includes the costs of the new bridge, tree works and consents. 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. Where an order is made but latterly refused by committee or SoSEFRA the costs incurred by the council will be charged to the applicant, that being the advertising costs of the order.
45. 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 on behalf of the Secretary of State, 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 - £400 if no legal representation is required and £4,000+ where the case is determined by local public inquiry with legal representation. If SoSEFRA requests a public inquiry additional costs may be incurred to the council in hiring an appropriate venue and providing equipment to facilitate virtual attendance where requested.
46. 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 because of that action (see Legal Implications below).

Legal Implications

47. 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

48. 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 (where appropriate).
 - (iii) The Order is revoked and abandoned.

Reason for Proposal

49. Unless the objections and representations are withdrawn the Order must be forwarded to the SoSEFRA for determination if it is to be confirmed.
50. It is considered that in this case the legal tests for the making of a diversion order to divert paths Castle Combe 7 and Yatton Keynell 25 under Section 119 of the Highways Act 1980 were met, and the additional legal tests for confirmation have also been met.
51. The Order is made in the interests of the landowner for privacy reasons, reduce the conflict between users and livestock and reduce trespass on adjoining land. The diversions are not considered to be substantially less convenient to the public or have a negative effect on public enjoyment. Where the diversion requires works and crosses into SSSI, the relevant bodies have been consulted and either consent has been granted or will likely be granted at the appropriate time. The ROWIP, Equality Act, biodiversity, agricultural and forestry concerns have been considered and are not negatively impacted as a result of the diversions.
- The diversions benefit the public by adding a wider recorded width for the paths, of at least two metres for the footpath currently the recorded widths are narrower.
52. Where it has been identified that some text as per the regulations is missing on the order to ask an inspector to include these words. This change does not prejudice any objector or any other member of the public as to the intent of the order.

Proposal

53. That the Wiltshire Council Castle Combe 7 and Yatton Keynell 25 Diversion and Definitive Map and Statement Modification Order 2023 is forwarded to the Secretary of State for the Environment, Food and Rural Affairs with the recommendation that it be confirmed with modification. That modification being to add the words at the end of paragraph 4 of the order “ *.And thereupon the Calne and Chippenham Rural District Council Area Definitive Statement dated 1953 shall be modified as described in part 3 of the Schedule to this Order*”.

Samantha Howell

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Definitive Map Officer

Appendices:

Appendix 1 - Order and Order Plan

Appendix 2 - Responses to the order

Appendix 3 – Consents; EA, Natural England and arborist reports

Appendix 4 - Applicants supporting letter