

WILTSHIRE COUNCIL

WESTERN AREA PLANNING COMMITTEE

12 AUGUST 2015

HIGHWAYS ACT 1980 AND WILDLIFE AND COUNTRYSIDE ACT 1981
THE WILTSHIRE COUNCIL CORSLEY 29 (PART) DIVERSION ORDER AND
DEFINITIVE MAP AND STATEMENT MODIFICATION ORDER 2015

Purpose of Report

1. To:
 - (i) Consider the objection received to the making of “The Wiltshire Council Corsley 29 (part) Diversion Order and Definitive Map and Statement Modification Order 2015” under Section 119 of the Highways Act 1980 and Section 53 of the Wildlife and Countryside Act 1981.
 - (ii) Recommend that the Order be forwarded to the Secretary of State for Environment, Food and Rural Affairs for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification.

Relevance to Council’s Business Plan

2. 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.

Background

3. On 16 February 2015 Mr. and Mrs. Churchill of 22 Heathway, Corsley applied to Wiltshire Council to divert a short section of Corsley Footpath No. 29 under the Town and Country Planning Act 1990, (please see a location plan attached at **Appendix A** and the proposed diversion on the plan attached at **Appendix B**).
4. The diversion of the path is required to enable the construction of a rear extension to the property which has received planning approval. The proposed diversion not only seeks to divert that section of the footpath affected by the planning consent but the continuation of the path which is obstructed where it crosses the gardens of numbers 20 and 21 Heathway. When the former West Wiltshire District Council constructed the Heathway development it did not secure the diversion of Footpath 29 before building houses 20, 21 and 22 Heathway and the footpath appears to have been obstructed since that time. For this reason it is not appropriate to seek to use the powers under the Town and Country Planning Act 1990 to effect the diversion and Section 119 of the Highways Act 1980 would be appropriate.

5. Wiltshire Council carried out an initial consultation regarding the proposals and no objections were received.
6. The case Officer produced a Decision report, attached at **Appendix C**, in which they considered the application against the legal tests for diversion under Section 119 of the Highways Act 1980. The report made a recommendation to Senior Officers that the footpath should be diverted under Section 119 of the Highways Act 1980, in the interests of the landowners. This recommendation was approved on 17 April 2015.
7. The Order was subsequently made and notice duly served and posted.
8. Following the making of the Order, Wiltshire Council received an objection dated 5 June from Mr. Francis Morland.
9. Members of the Committee are now required to consider the objection received, against the legal tests for making and confirming a Public Path Diversion Order under Section 119 of the Highways Act 1980, in order to determine whether or not the Council continues to support the making of the Order.
10. If it does continue to support the making of the Order it must be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination and the Members of the Committee must decide the Wiltshire Council recommendation which is attached to the Order when it is forwarded to the Secretary of State, i.e.:
 - (i) that the Order be confirmed as made, or
 - (ii) that the Order be confirmed with modification.
11. Where Wiltshire Council no longer supports the making of the Order, Members of the Committee may determine that the Order is withdrawn.

Main Considerations for the Council

12. The Public Path Diversion Order is made under Section 119 of the Highways Act 1980. The requirements of this section of the Act are set out in full in paragraph 3.3 of the decision report attached at **Appendix C**.
13. The Planning Inspectorate's Advice Note 9 on 'General guidance on public rights of way matters' 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 views taken that subsection (6) has 3 separate tests to it:*
 - (1) *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.*

- (2) *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.*
- (3) *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.*

There may nevertheless be other relevant factors to do with expediency in the individual circumstances of an order.

28. *It is possible that a proposed diversion may be as convenient as the existing path but less enjoyable, perhaps because it was less scenic. In this event, the view in 'Young' 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 cannot be confirmed under section 119(6) if the path or way will be substantially less convenient to the public in consequence of the diversion."*
14. Mr. Morland has made the following objections to the making of the Diversion Order:

E-mail correspondence dated 5 June 2015:

"I refer to your Public Notice on page 2 of the Friday 8th May 2015 issue of the Warminster Journal newspaper.

I wish to object to the Order.

The description of the existing public path in the Notice does not appear to correspond with that shown on the Ordnance Survey 1:25000 Explorer sheet 143 (2004), and neither of the grid references shown for the two ends of the portion of the path in question (ST 8212 4570 and 8214 4574) appear to connect with any existing public path or highway.

Accordingly, I am doubtful that the Order achieves its intended purpose.

In any event, the Notice states that the diverted route is 70 metres in length compared to the existing route of 41 metres, and appears to put a substantial dog leg into it.

I reserve the right to amend or add to these grounds as and when further information reaches me; it appears that neither the order nor the order map are yet available on the Wiltshire Council public access website."

15. In response to the objection, Officers would make the following comments:
- (i) The description of the existing public path in the Notice and Order map does not correspond with the route of a footpath shown in this location by the Ordnance Survey on its 1:25000 Explorer map because the Order and Notice are made with reference to the route of the path as shown on the definitive map.
 - (ii) The Ordnance Survey grid references in the Notice and Order relate to the position of the footpath as it is shown on the definitive map and do connect with existing highway.
 - (iii) The diverted route is longer but Officers would argue it is expedient to confirm the Order since the alternative path has a tarmac surface for nearly half of its length making it more accessible than the existing route. In addition to this, that section of the path which will run in the field will provide the user with far reaching views across the surrounding countryside which are not currently available on the existing route. The existing route requires the user to cross the rear gardens of three houses. The open aspect of the alternative path allied with its better views, width and surface will increase public enjoyment of the route as a whole.
 - (iv) There is no requirement to publish copies of public path orders and order maps on the Council's website.
16. Officers believe it is clearly in the interests of the owners of the properties through which the right of way passes to divert the path.
17. With regard to whether the alternative path is substantially less convenient, whilst the alternative path is longer the tarmac surface on part of it will make the path easier for people with mobility problems and other impairments to use and consequently enjoy the views of the surrounding countryside which they cannot access on the existing path. The existing path does not have a legally defined width, whereas the alternative path will have a width of 2 metres.
18. It is not considered the proposed diversion will have any detrimental effect on any land served by the existing right of way.
19. The owners of the land over which the alternative route will cross have consented to the proposal.

Safeguarding Considerations

20. 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."

In making “The Wiltshire Council Corsley 29 (part) Diversion Order and Definitive Map and Statement Modification Order 2015”, Officers have followed the procedure set out in Schedule 6 of the 1980 Act and in doing so Wiltshire Council has fulfilled its safeguarding considerations.

Public Health Implications

21. There are no identified public health implications which arise from the proposed diversion of a section of Footpath No. 29 Corsley.

Environmental and Climate Change Considerations

22. The County Ecologist was consulted regarding the diversion proposals and no adverse comments regarding the environmental impact of the diversion were received.

Equalities Impact of the Proposal

23. The Wiltshire Council Rights of Way Improvement Plan 2015-2025 (WCAIP) recognises the Council’s duty to have regard to the Equalities Act 2010 and to consider the least restrictive option for public use. The proposed diversion provides a more accessible path than the present definitive line. Additionally, the proposed new route will have a recorded width of 2 metres, open and available for public use, over a defined route, where the definitive line has no width recorded within the definitive statement.

Risk Assessment

24. There are no identified risks which arise from the proposed diversion of the section of Footpath No. 29 Corsley. The financial and legal risks to the Council are outlined in the “Financial Implications” and “Legal Implications” sections below.

Financial Implications

25. The Local Authorities (Recovery of Costs for Public Path Orders) Regulations 1993 (SI 1993/407) amended by Regulation 3 of the Local Authorities (Charges for Overseas Assistance and Public Path Orders) Regulations 1996 (SI 1996/1978), permits authorities to charge applicants costs in relation to the making of public path orders, including those made under Section 119 of the Highways Act 1980. The applicant has agreed in writing to meet the actual costs to the Council in processing the diversion order. The applicant has also agreed in writing to pay any expenses which may be incurred by the Council and for any materials provided in bringing the new footpath into a fit condition for use by the public.
26. Where there is an outstanding objection to the making of the Order, the Committee may resolve that Wiltshire Council continues to support the making of the Order, in which case it should be forwarded to the Secretary of State for decision. The outcome of the Order will 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 £200 to £300; however, where a local hearing is held

the costs to the Council are estimated at £300 to £500 and £1,000 to £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.

27. Where the Council no longer supports the making of the Order, it may resolve that the Order be withdrawn and there are no further costs to the Council. The making of a Public Path 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 supports 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.

Legal Implications

28. If the Council resolves that it no longer supports the making of the Order, it may be withdrawn. There is no right of appeal for the applicant; however, clear reasons for the withdrawal must be given as the Council's decision may be open to judicial review.
29. Where the Council continues to support the making of the Order, it must be sent to the Secretary of State for determination, which may lead to the Order being determined by written representations, local hearing or local public inquiry. The Inspector's decision is open to challenge in the High Court.

Options Considered

30. Members may resolve that:
 - (i) Wiltshire Council continues to support the making of the Order, in which case the Order should be forwarded to the Secretary of State with a recommendation from Wiltshire Council that:
 - (a) The Order be confirmed without modification, or
 - (b) The Order be confirmed with modification.or that:
 - (ii) Wiltshire Council no longer supports the making of the Order, in which case the Order should be withdrawn, with clear reasons given as to why Wiltshire Council no longer supports the making of the Order, i.e. why the Order no longer meets the legal tests.

Reason for Proposal

31. Despite the objection received it is considered, for the reasons given in paragraphs 3.6.a to 3.7.d the Decision report (please see **Appendix C**), and in paragraphs 15 to 19 above, that "The Wiltshire Council Corsley 29 (part) Diversion Order and Definitive Map and Statement Modification Order 2015" continues to meet the legal tests for the making of a Diversion Order under Section 119 of the Highways Act 1980.

32. Additionally, the legal tests for the confirmation of a Public Path Diversion Order, as set out under Section 119 of the Highways Act 1980, appear capable of being satisfied and no new evidence has been submitted during the formal objection period which would lead Wiltshire Council to no longer support the making of the Order.

Proposal

33. That “The Wiltshire Council Corsley 29 (part) Diversion Order and Definitive Map and Statement Modification Order 2015”, be forwarded to the Secretary of State for the Environment, Food and Rural Affairs for determination, with a recommendation from Wiltshire Council that the Order be confirmed without modification.

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

None

Appendices:

Appendix A – Footpath Location Plan

Appendix B – Public Path Diversion Order Plan

Appendix C – Decision report