

## DECISION REPORT

### APPLICATION TO DIVERT A SECTION OF CORSLEY FOOTPATH 29 UNDER SECTION 257 OF THE TOWN AND COUNTRY PLANNING ACT 1990

#### 1. Purpose of the Report

- 1.1 To consider and comment on an application by Mr and Mrs Churchill of 22 Heathway, Corsley to divert a short section of Corsley footpath 29 as shown by a broken black line on the plan included with their application form. The plan is attached at Appendix A. The diversion of the path is required to enable the construction of a rear extension to the property which has received planning approval.
- 1.2 On the 10 September 1987 Mr and Mrs Brown the then occupants of 22 Heathway purchased the property from West Wiltshire District Council. Mr and Mrs Churchill bought the property from Mr and Mrs Brown in November 2014. On the application form, the applicants state the route of the footpath which passes through their and two adjoining properties does not exist on the ground indeed the hedges which bound the housing concerned were planted by the former District Council when the Heathway development was managed as part of the District Council's housing stock. The alternative route is already in situ, for half of its length it has a tarmac surface provided by the former District Council and has been signed by Wiltshire Council as a public footpath. There is a metal kissing gate of the brand and style usually installed by Wiltshire Council, leading from the tarmac section of the path in to the pasture field to the rear of the properties in Heathway.

#### 2. Consultation responses to the application

- 2.1 On the 25 February 2015 I consulted with the parish council, statutory undertakers, statutory and the usual non statutory consultees and owners and occupiers of land affected by the application on the proposed diversion proposal asking for comments to be sent to me by the 31 March.
- 2.2 The route of the alternative footpath will cross land in the ownership of Mr Michael Aylesbury and Selwood Housing both of whom have no objections to the proposed diversion and support regularising the current position on the ground. The Occupiers/Owners of 20 and 21 Heathway whose gardens the path crosses do not object to the proposed diversion.
- 2.3 Mr Brian Micklam who represents the Ramblers Association has no objections to the proposal.

- 2.4 The council's ecologist has confirmed there are no ecological constraints affecting the proposal.
- 2.5 Wiltshire Councillor Fleur De Rhe-Philippe supports the application.
- 2.6 Scottish and Southern Energy has confirmed it has no objection to the proposed change and an on line search has not revealed any other statutory undertakers apparatus affected by the proposed change.

**3. Main considerations for the council and officers comments on them in relation to the application**

- 3.1 The application has been made for an order under section 257 of the Town and Country Planning Act 1990. Section 257 states:

Footpaths and bridleways affected by development: orders by other authorities

- (1) Subject to section 259, a competent authority may by order authorise the stopping up or diversion of any footpath, bridleway or restricted byway if they are satisfied that it is necessary to do so in order to enable development to be carried out-
  - (a) in accordance with planning permission granted under Part III, or
  - (b) by a government department.
- (2) An order under this section may, if the competent authority are satisfied that it should do so, provide-
  - (a) for the creation of an alternative highway for use as a replacement for the one authorised by the order to be stopped up or diverted, or for the improvement of an existing highway for such use;
  - (b) for authorising or requiring works to be carried out in relation to any footpath, bridleway or restricted byway for whose stopping up or diversion, creation or improvement provision is made by the order;
  - (c) for the preservation of any rights of statutory undertakers in respect of any apparatus of theirs which immediately before the date of the order is under, in, on, over, along or across any such footpath, bridleway or restricted byway;

- (d) for requiring any person named in the order to pay, or make contributions in respect of, the cost of carrying out any such works.
- (3) An order may be made under this section authorising the stopping up or diversion of a footpath, bridleway or restricted byway which is temporarily stopped up or diverted under any other enactment.
- (4) In this section "competent authority" means-
  - (a) in the case of development authorised by a planning permission, the local planning authority who granted the permission or, in the case of a permission granted by the Secretary of State, who would have had power to grant it; and
  - (b) in the case of development carried out by a government department, the local planning authority who would have had power to grant planning permission on an application in respect of the development in question if such an application had fallen to be made."

### 3.2 Section 259 of the Act states:

#### Confirmation of orders made by other authorities

- (1) An order made under section 257 or 258 shall not take effect unless confirmed by the Secretary of State, or unless confirmed, as an unopposed order, by the authority who made it.
- (2) The Secretary of State shall not confirm any such order unless satisfied as to every matter of which the authority making the order are required under section 257 or, as the case may be, section 258 to be satisfied.
- (3) The time specified-
  - (a) in an order under section 257 as the time from which a footpath, bridleway or restricted byway is to be stopped up or diverted; or

(b) in an order under section 258 as the time from which a right of way is to be extinguished,

shall not be earlier than confirmation of the order.

(4) Schedule 14 shall have effect with respect to the confirmation of orders under section 257 or 258 and the publicity for such orders after they are confirmed

3.3 The application seeks to not only divert that section of footpath 29 affected by the planning consent but the continuation of the obstructed path which crosses the gardens of numbers 20 and 21 Heathway. For this reason it is not appropriate to seek to use powers under the Town and Country Planning Act 1990 to effect the diversion and section 119 of the Highways Act would be appropriate. Section 119 of the Highways Act 1980 states:

(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 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.'

3.4 The owners and occupiers of the properties 20, 21 and 22 Heathways approve the diversion of that part of footpath 29 crossing their property as shown on the application submitted by Mr and Mrs Churchill and a case may be made that it is in the householders/owners interest to divert the footpath out of their property. A case may also be made that the change to the route of the footpath sought is in the public interest. All the grounds under section 119 will be examined in the following paragraphs.

3.5 In *Hargrave v Stroud* (2002) EWCA Civ 1281, Lord Justice Schiemann 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.'*

3.6 Subsection 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 Schiemann 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.'*

***The interests of the owner of the land and or the public***

- 3.6.a** The proposal seeks to divert the public footpath out of the gardens of the three properties affected by it to not only allow the applicants to extend their property but to afford privacy and security for the inhabitants of all three properties and to regularise the legal position of the footpath providing security and confidence for users of the footpath. I am satisfied that the diversion order sought by the applicants would be expedient in the interests of the owners of the land to divert the footpath. The line of footpath 29 as shown on the definitive map through the gardens of the three properties is not currently available but even if it was made available its position would mean that members of the public are more likely than not to meet with the occupiers of the properties in this informal setting where they could feel as if they are very much intruding on the occupier's quiet enjoyment of their property. For this reason I believe the proposed diversion is also in the public interest.

***Convenience to the public***

- 3.6.b** In assessing the relative convenience of the present and proposed route, consideration has been given to various factors including length, width, surface and gradient and public enjoyment of the way as a whole.

- 3.6.c** The Planning Inspectorate's Advice Note 9 entitled 'General guidance on public rights of way matters' states at paragraph 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 section 119(6) if the path or way will be substantially less convenient to the public in consequence of the diversion.'

- 3.6.d** The length of the route to be diverted is approximately 41 metres and the length of the alternative route is 76 metres, not quite twice the length. The alternative route however has a tarmac surface for nearly half its length and that section of the path which will run in the field to the rear of the properties will provide the user with far reaching views across the surrounding countryside which are not available on the definitive route. The existing route requires the user to negotiate four fence/hedge lines to access the path whereas the alternative is open but for one kissing gate making it a much

more enjoyable, easier and convenient for the public to use. The applicants have stated on their application form the alternative path will have a width of 2 metres.

### ***Public enjoyment***

- 3.6.e** The open aspect of the alternative path affords better views of the surrounding area which allied with removing the feeling of encroaching on the privacy of the occupiers of the properties will I feel, increase public enjoyment of the route as a whole.

### ***The coming into operation of the order would have as respects other land served by the existing public right of way***

- 3.6.f** It is not considered the proposed diversion will have any detrimental effect on any other land served by the existing right of way.

### ***The effect 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.***

- 3.6.g** The owner of the land over which the alternative route will cross has consented to the proposal.

### ***3.7 Other considerations***

- 3.7.a** Section 119 of the Highways Act 1980 requires the council to have regard to any material provision of any Rights of Way Improvement Plan. The Wiltshire County Council Rights of way Improvement Plan dated 2008 – 2012 includes the following aims:

Increase access to the countryside for buggies, older people, people with mobility problems and other impairments; and

Increase access to the countryside for people who are blind or partially sighted.

The application does not conflict with any of the aims of the Improvement Plan, nor the shortly to be published revised Plan now called the Countryside Access Improvement Plan which will cover the period 2015 – 2025.

- 3.7.b** The Equality Act 2010 places a duty on all authorities to:

‘(1) An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result in socio-economic disadvantage.’



The Act places a duty on authorities to make reasonable adjustments to avoid disadvantage. Section 149 of the Act details the 'public sector equality duty' placed on a public authority to:

'in exercise of its functions, have due regard to the need to-

- a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

The proposed alternative takes users out of the gardens of the properties through which the existing path crosses. I believe a walker could feel very uncomfortable walking, potentially with children and or their pets, through these gardens, and such use could expose them to potential conflict and physical hazards. The alternative path removes the user from this situation and also only necessitates one boundary to be crossed thereby increasing accessibility on the path.

- 3.7.c** In making diversions orders, sections 29 and 121(3) of the Highways Act 1980, require authorities to have due regard to the needs of agriculture and forestry and 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 it 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.

The proposed diversion would not affect land under cultivation and no objections have been made by the County Ecologist to the effect the proposal may have on the flora, fauna, geological and physiographical features.

- 3.7.d** The owner of the land over which part of the alternative route will cross is already burdened with the remainder of the path crossing his land no compensation issues have arisen. The remainder of the alternative path is owned by Wiltshire Council.

#### **4. Safeguarding considerations**

- 4.1** The proposed diversion will, if confirmed, improve the privacy and security of the three properties crossed by the existing path.

#### **5. Public Health Implication**

5.1 There are no expected adverse implications from this proposed diversion

## 6. Risk Assessment

6.1 No added risks have been identified as a result of this proposed diversion.

## 7. Financial Implications

7.1 DEFRA's Rights of way Circular 1/2009 Guidance for Local Authorities 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 Act.'

It is not considered there are any risks associated with following the recommendation of this report for the council.

7.2 The recommendation of the report is to approve the making of an order on the grounds that the legal tests to make and/or confirm the order have been met and the applicants have agreed to pay the council's costs in processing the application. The applicants have also confirmed that they will pay any compensation which may arise in consequence of the coming into operation of the order and any expenses which may be incurred in bringing the new route into a fit condition for use by the public.

7.3 If an objection is received to the making of the order and the order is not abandoned by Wiltshire Council the order will be forwarded to the Planning Inspectorate for determination by an Inspector appointed by the Secretary of State. The additional costs accrued from the time the order is submitted to the Secretary of State to its determination will fall to Wiltshire Council. If the order were to be determined by written representations these costs would be in the region of £200 - £300 or £1000-£5000 for a public inquiry.

## 8. Options considered

- 8.1 i) To refuse the application to divert the footpath, or  
ii) To make the order

## 9. Reasons for the Recommendation.

It is considered the legal tests for making and/or confirming the order under section 119 of the Highways Act 1980 to divert a section of Corsley footpath 29 have been met for the reasons given in paragraphs 3.3 – 3.7.above.

## 10. Recommendation.

To make an order under section 119 of the Highways Act 1980 and section 53(2) of the Wildlife and Countryside Act 1981 to divert a section of Corsley footpath 29 as shown on the plan at Appendix A to this report. Additionally that the order be confirmed if no objections or representations are received to it and the definitive map and statement be modified accordingly.

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