

HIGHWAYS ACT 1980 - SECTION 119
WILDLIFE & COUNTRYSIDE ACT 1981 – SECTION 53A(2)
 GLOUCESTERSHIRE COUNTY COUNCIL
PUBLIC FOOTPATHS GDY 57 (PART) (PARISH OF DYMOCK)
AND GKE 38
(PARISH OF KEMPLEY)

**Gloucestershire County Council's Statement of Reasons for processing
a Public Path Diversion Order.**

BACKGROUND

1. This statement of reasons relates to an order made under section 119 of the Highways Act 1980 (“HA80”) and the Wildlife and Countryside Act 1981 section 53A(2) to divert part of public footpath GDY 57 in the Parish of Dymock and footpath GKE 38 in the Parish of Kempley as the result of a joint application made by [REDACTED]

The diversion application was made in the interest of the owners of the land crossed by the paths to move the footpaths, as shown on the Definitive Map, away from the driveway of The Redlands and the grounds of Felania for reasons of privacy and security.

The section of definitive path GDY 57 to be diverted crosses a field in a southwesterly direction to the parish boundary before continuing as footpath GKE 38 across an area of mown grass that forms part of the grounds of the property Felania. The path then continues along the driveway of the property The Redlands to a junction with road number C55 at Kempley Green.

Footpath GKE 38 is currently obstructed by a fence and a hedge at the boundary between the agricultural field and Felania and is further obstructed by a hedge at the boundary between Felania and The Redlands, and the path cannot be used on its definitive route.

The proposed route follows a hedgerow alongside the boundary of the field to a junction with footpath GDY 55 and would provide walkers with a convenient link to connect footpath GDY 57 with footpath GDY 55, restricted byway GKE 39 and footpath GKE 40. The diversion would create a pleasant circular walk to the east of Kempley Green and would provide a link to the promoted routes the Daffodil Way and the Three Choirs Way at Kempley Green that is not substantially less convenient than the definitive path.

2. On 15th November 2022 GCC consulted with the parish and district councils, the county councillor for the area and other user groups who have indicated that they wish to be consulted for such applications. Kempley Parish Council and the Windcross Paths Group both indicated that they supported the proposal, however an objection was received from the Ramblers.
3. The Diversion Order was made on 19th December 2023 and was advertised in accordance with the requirements of paragraph 1 of Schedule 6 of the HA 1980 on 11th January 2024. Once duly made objection and seven duly made representations to the Diversion Order were received during the period when the Order was advertised.

DESCRIPTION OF DIVERSION ORDER ROUTE

4. The definitive path GDY 57 to be stopped up starts at point A on the plan attached to the Diversion Order and proceeds in a south westerly direction for 151 metres diagonally across a grassy field to the parish boundary at point B. The path then continues as GKE 38 across the field for a further 5 metres before crossing the field boundary onto the property Felania. At the field boundary the path is obstructed by a hedge. The path then continues across the grounds of Felania in a south westerly direction for 97 metres before turning west southwest and proceeding for 48 metres along the driveway of The Redlands to join road number C55 at point C, 16 metres southeast of restricted byway GKE 28. The definitive path to be stopped up has a total length of 301 metres. The path is further obstructed by a hedge at the eastern end of the driveway of The Redlands.

The proposed path starts at point A and proceeds across a grassy field alongside the boundary hedge in a generally southerly direction for 141 metres to point D at the junction with footpath GDY 55.

The proposed path will have a grass surface throughout.

WIDTH AND LIMITATIONS

5. The new path will have a recorded width of 2.5 metres between points A to D and there will be no limitations recorded.

STATUTORY PROVISIONS AND DEFRA GUIDANCE

6. Section 119 of the Highways Act 1980 sets out as follows:

- (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 or bridleway into a fit condition for use by the public, the council shall—
 - (a) specify a date under subsection (1)(a) above, and
 - (b) provide that so much of the order as extinguishes (in accordance with subsection (1)(b) above) a public right of way is not to come into force until the local highway authority for the new path or way certify that the work has been carried out.
- (4) A right of way created by a public path diversion order may be either unconditional or (whether or not the right of way extinguished by the order was subject to limitations or conditions of any description) subject to such limitations or conditions as may be specified in the order.
- (5) Before determining to make a public path diversion order on the representations of an owner, lessee or occupier of land crossed by the path or way, the council may require him to enter into an agreement with them to defray, or to make such contribution as may be specified in the agreement towards,—
 - (a) any compensation which may become payable under section 28 above as applied by section 121(2) below, or
 - (b) where the council are the highway authority for the path or way in question, any expenses which they may incur in bringing the new site of the path or way into fit condition for use for the public, or
 - (c) where the council are not the highway authority, any expenses which may become recoverable from them by the highway authority under the provisions of section 27(2) above as applied by subsection (9) below.

(6) The Secretary of State shall not confirm a public path diversion order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that the diversion to be effected by it is expedient as mentioned in subsection (1) above, and further that the path or way will not be substantially less convenient to the public in consequence of the diversion and that it is expedient to confirm the order having regard to the effect which—

- (a) the diversion would have on public enjoyment of the path or way as a whole,
- (b) the coming into operation of the order would have as respects other land served by the existing public right of way, and
- (c) any new public right of way created by the order would have as respects the land over which the right is so created and any land held with it,

so, however, that for the purposes of paragraphs (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.

7. Section 53A (2) of the Wildlife and Countryside Act 1981 sets out as follows:

An Order made by the Authority to modify the definitive Map and Statement of Public Rights of Way in consequence of the occurrence of an event specified in Section 53(3) (a) (1) of the 1981 Act, namely the stopping up, diverting, widening or

extending (as authorised by the order) of a highway shown or required to be shown in the map and statement.

8. GCC also has a duty under section 29 of the HA80 to have due regard to—
 - (a) the needs of agriculture and forestry, and
 - (b) the desirability of conserving flora, fauna and geological and physiographical features.

Section 29 holds that “agriculture” includes the breeding or keeping of horses.

9. GCC also has a duty to consider its obligations under the Equality Act 2010.
10. DEFRA’s ‘Government guidance on diversion or extinguishment of public rights of way that pass through private dwellings, their curtilages and gardens, farmyards and industrial or commercial premises’, issued in August 2023, states that:

“The majority of public rights of way cross privately owned land. In general, members of the public and farmers/landowners are used to the concept and see no inherent inconsistency between the fact that land may be privately owned and the presence of public routes across it for both passage from A to B, and enjoyment of the countryside and the natural environment.

However, the general view of both groups can change markedly in situations where public rights of way pass through contained spaces such as private gardens, farmyards or commercial premises.

Members of the public may not be comfortable following a path through a contained space of this type because doing so feels like infringing on the privacy of a house owner, or potentially disrupting, or being endangered by, activities within a farmyard or commercial premises. Such path alignments can deter people from exercising the public’s right to use the path.”

and that:

“In all cases where the guidance applies, the order-making and confirming authority should weigh the interests of the owner and/or occupier against the overall impact of the proposal on the public as a whole. They should note that reducing or eliminating the impact of the current route of the right of way on the owner and/or occupier, in

terms of privacy, security and safety, are important considerations to which due weight should be given.”

The order-making authority should therefore be predisposed to make, and the confirming authority will be similarly predisposed to confirm, an order if it satisfies the respective relevant legislative tests.”

REASONS FOR MAKING A DIVERSION ORDER

‘Making’ Tests to be satisfied.

Is it expedient to divert the route in the interest of the landowner?

11. It is expedient to divert footpaths GKE 38 and GDY 57 in the interests of the owners of the land. The existing footpath GDY 57 crosses an agricultural field and GKE 38 passes through a grassy area that forms part of the garden of Felania before proceeding along the driveway of The Redlands, passing close to a garage. Diverting the footpath would increase privacy and security for the owners of Felania and The Redlands.

The new route following the field edge will enable the owner of the field to make better use of the land for grazing cattle or cultivating arable crops.

Is it expedient to divert footpaths GKE 38 and GDY 57 having regard to the points of termination and whether these are substantially as convenient to the public?

12. The existing and proposed routes both start at the same point. The definitive route A - B - C has a length of 303 metres and ends at the junction with road C55 at Kempley Green, although the route is obstructed by two hedges and is not useable. The proposed route has a length of 141 metres between points A and D, with an additional 271 metres along footpath GDY 55 and restricted byway GKE 39 to re-join road C55 at Kempley Green. From here there is an additional 245 metres along the quiet road to reach point C, the termination point of the definitive path.

The total distance from point A, the start point of the diverted route, to point C, the termination point of the definitive path would be 657 metres. Although this is 354 metres longer than the definitive path A - B - C, the increased distance is not

considered to be disproportionate in the context of a path that is mainly used for leisure walks.

Agreement made under section 119(5) of the HA80

13. The landowner has agreed to defray –
 - (a) any compensation which may become payable under section 28 as applied by section 121(2)
 - (b) any expenses which they may incur in bringing the new site of the path into a fit condition for use for the public.
14. All affected landowners have consented to the diversion proposal. Other than waymarking, there are no works required to bring the new path into being as the path will have a grass surface; the new path will be checked and certified before the order is confirmed.

GCC's obligations under section 29 HA80

15. The proposed diversion will benefit the needs of agriculture by moving a cross field section of footpath GDY 57 to the boundary of the same field to enable the landowner to make better use of the land.

GCC's obligations under the Equality Act 2010

16. A 50 metre section of the definitive path runs along a surfaced driveway, however most of the path has a grass surface as does the proposed route. The gradient on the proposed path is more gentle than that on the definitive path. There is an existing kissing gate at the junction between footpath GDY 55 and restricted byway GKE 39, however there will be no gates or stiles on the diverted section of path A - D.

REASONS FOR CONFIRMING A DIVERSION ORDER

17. The legal tests for the confirmation of a diversion order, by either a highway authority or the Secretary of State, are set out in section 119(6) of the HA80 set out

above in 5(6) and (6A). Paragraph **2 . 3 . 8** of the PINS Advice Note 9 states that:

"The decision in Ramblers Association v SSEFRA, Weston and others [2012] EWHC 3333 (Admin) acknowledges that section 119(6) involves three separate tests (as endorsed by the High Court in The Open Spaces Society v Secretary of State for Environment, Food and Rural Affairs [2020] EWHC 1085 (Admin)):

Test 1: whether the diversion is expedient in the interests of the owner, lessee or occupier of land crossed by the path or of the public (as set out in section 119(1) and subject to section 119(2)- see paragraphs 2.31 and 2.32 above). This was described in R (Hargrave) v Stroud District Council [2001] EWHC Admin 1128, [2002] JPL 1081 as being a low test.

Test 2: whether the proposed diversion is 'substantially less convenient to the public'. In order to meet this test, the path or way must not be substantially less convenient to the public in consequence of the diversion (as per the wording in section 119(6)).

Both of these tests can be described as gateway tests - unless they are passed the decision-maker does not get to the third test.

Test 3: whether it is expedient to confirm the Order having regard to the effect:

- (a) of the diversion 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 any new public right of way on the land over which it is to be created and any land held with it.

Any material provisions of a rights of way improvement plan must also be taken into account."

In relation to Test 2 above, paragraph 2.3.7 of PINS advice Note 9 states that:

"In terms of the expression 'substantially less convenient to the public', features which readily fall within the natural and ordinary meaning of the word 'convenient' are matters such as the length of the diverted path, the difficulty of walking it and its purpose."

Other factors to be considered in relation to Test 2 include the width, surface, gradient and accessibility of the diverted path compared to the existing path.

18. Paragraphs 11 and 12 above address the test of expediency and the termination points. As to the second test, the diversion being not substantially less convenient to the public, the length of the new route would be 141 metres plus an additional 271 metres to re-join the road and a further 245 metres along the road to point C, the termination point of the definitive path. Whilst this is longer than the definitive route, which is 303 metres, the new path would replace a path that is not useable and offers a pleasant route through a field to connect with footpath GDY 55.

There are no shops, pubs, public attractions or buildings of particular interest in the centre of Kempley Green village to attract walkers from outside the village, and local car parks for visitors are located on the edges of the village. Therefore, if the current path was available for use, it is likely that most people using it would be local people from within the village using it as part of a short circular walk, or for walking to or from New Grange Farm.

However, for walkers using the path as part of a longer walk, the proposed route will provide a convenient link between footpath GDY 57 and footpath GDY 55 for walkers wanting to join the Three Choirs Way and Daffodil Way promoted routes, which proceed in a southeasterly direction along footpath GKE 40. In addition, the link from the proposed route to the Daffodil Way, which follows footpath GKE 33 to the west of Kempley Green, is considered to be no less convenient than the link from the definitive path.

There are no significant changes in gradient or surface between the current and proposed route and the width of the definitive path is undefined whereas the new path will have a width of 2.5 metres.

19. The third test is addressed as follows: - Public enjoyment will be increased by the diversion of this path because it is generally accepted that walkers would prefer not to walk through what appears to be a private driveway and garden. This accords with the DEFRA presumption guidance as well. The proposed route is a pleasant walk along the edge of a grassy field with enjoyable views of the surrounding countryside.

There are no adverse effects in respects of neither other land served by the existing or the new public right of way nor the land over which the path is created.

Is the diversion in line with DEFRA guidance on changes to public rights of way through gardens and curtilages of private dwellings, working farmyards and other commercial premises?

20. The definitive path proceeds through the garden of Felania and along the driveway of The Redlands, passing a garage, before connecting with road C55. DEFRA guidance acknowledges that the public might not be comfortable following a path through a contained space such as the garden of a dwelling house, because doing so feels like infringing on the privacy of a house owner. Weighing the interests of the landowners in terms of privacy, security and safety, against the overall impact of the diversion proposal on the public as a whole, it is considered that the proposal meets the required legal tests and that diverting the path is in line with DEFRA guidance.

Is the Diversion Order affected by a Rights of Way Improvement Plan?

21. There are limited elements of the Rights of Way Improvement Plan relevant to this order, see

Annex D - Priority guidelines for public path orders

Part A – Landowner Interest

The following factors may be taken into consideration:

- Applications where the definitive route is affected by long-term obstructions or where considerable works/ expenditure would be required from the applicant to open up the definitive route;
- Applications that are fully paid for by the applicant;
- Applications that offer sizeable benefits to the applicant.

See the full Rights of Way Improvement Plan on the County Council webpages:

https://www.goucestershire.gov.uk/media/pelpxn1/rowip_2011_to_2026-45038.pdf

COMMENTS ON THE OBJECTIONS AND REPRESENTATIONS

22. There was one duly made objection to the Diversion Order from [REDACTED] and one duly made representation in support of it. Six neutral duly made representations were also received during the statutory 28 day consultation period.

The grounds given for objecting are based on the following:

- The [definitive] footpaths provide a link midway between GKE 29 and GKE 39 and provide a more natural onward link to GKE 33 (the Daffodil Way).
- Property owners fully aware of a right of way on their land chose to prevent its use. Due to this trend the PROW network is being eroded.
- The property owners have clearly prevented the use of the link and therefore it is not possible to establish current demand.
- The alternative [route] in no way contributes to the utility of the footpath network as it is hard to imagine a requirement to cut from halfway along GDY 55 to halfway along GDY 54 as these rights of way diverge.
- The existing route of the rights of way was established to provide convenient access midway in the village street where bus stops are provided and to give an onward link to GKE 33.
- A full network of footpaths provides resilience in the event of issues on individual links - for example flooding on GKE 39.
- [Diverting] the path would result in an inconvenient and circuitous route to the centre via the outskirts of the village.
- Any concerns of security and privacy should be little different from any other property adjoining a path or road.

- It is not necessary to remove the path in the Interest of the Landowner as the garage [of The Redlands] could be located to one side of the path and the hedge could contain a suitable gap.

23. [REDACTED] objected to the initial proposal at pre-order consultation stage, in January 2023. However, there was support for the diversion proposal at pre-order consultation stage from Kempley Parish Council and the Windcross Paths Group. Consideration was given to opening up the definitive line of the path, however in view of the support for diverting the path, and in line with DEFRA's 'Government guidance on diversion or extinguishment of public rights of way that pass through private dwellings, their curtilages and gardens, farmyards and industrial or commercial premises', Gloucestershire County Council decided to make a legal Order to divert the footpath.

24. GCC's response to the objection is as follows:

A response was sent to each of those who had made an objection or representation to the orders.

Following receipt of the objection to the Diversion Order Gloucestershire County Council suggested a site meeting with the objector and a representative from Kempley Parish Council, however the objector subsequently updated their objection to the Order and the site meeting did not come to fruition.

Although there are bus stops and a small car parking area in Kempley Green, there is no shop, pub, café or other amenities in the village to attract walkers from further afield. The paths to the east of the village are mainly used by local walkers for circular walks around the village, and the proposed diversion will provide a useful connection between footpaths GDY 54 and GDY 55, creating a good circular walk around Kempley Green. It is considered that onward connections to the Three Choirs Way and the Daffodil Way promoted routes are equally as convenient from the proposed route as from the definitive path GKE 38/GDY 57.

The mature hedges that currently form an obstruction to the definitive path in two places suggest that the path has not been used on its legal line for many years. The

owner of the agricultural field has agreed to accommodate the proposed diversion route on his land, which provides an opportunity to overcome a long-standing issue preventing use of the definitive line of the path.

Public footpath GDY 55 and restricted byway GKE 39, which the diversion route links to, are attractive paths. The grass on GKE 39 is usually kept mown short, and flooding on the restricted byway is a short term issue that has sometimes occurred when weather conditions have been particularly wet. The Order Making Authority has confirmed its willingness to put some stone by the kissing gate at the junction between GDY 55 and GKE 39 to mitigate any concerns about bogginess.

Privacy and security are valid reasons for diverting a public footpath in the interests of the landowner and diverting the path out of the garden of Felania and away from the driveway of The Redlands is in line with DEFRA's 'Government guidance on diversion or extinguishment of public rights of way that pass through private dwellings, their curtilages and gardens, farmyards and industrial or commercial premises'.

25. The Order was made in the interests of the landowners and GCC considers that all the relevant tests have been met to enable the Order to have been made and for it to be confirmed.
26. Gloucestershire County Council therefore respectfully requests the Inspector to confirm this Order.