

Order Decision

Hearing opened 9 April 2025

by **Nigel Farthing LLB**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 29 April 2025

Order Ref: ROW/3301931 (The First Order)

- This Order is made under Section 119 of the Highways Act 1980 ('the 1980 Act') and Section 53(2)(a) of the Wildlife and Countryside Act 1981 ("the 1981 Act") and is known as the Wiltshire Council Westbury 29 (part) and Dilton Marsh 20 (part), Diversion and Definitive Map and Statement Modification Order 2021.
- The Order is dated 25 October 2021 and proposes to divert the public rights of way as shown on the Order Map and described in the Order Schedule.
- There were four objections outstanding when Wiltshire Council ('the Council') submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of decision: The Order is confirmed

Order Ref: ROW/3301934 (The Second Order)

- This Order is made under Section 118 of the 1980 Act and Section 53(2)(a) of the 1981 Act and is known as the Wiltshire Council Westbury 28 (part) and Dilton Marsh 19 (part), Extinguishment and Definitive Map and Statement Modification Order 2021.
- The Order is dated 25 October 1921 and proposes to extinguish the public rights of way as shown on the Order Map and described in the Order Schedule.
- There were four objections outstanding when the Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of decision: The Order is confirmed

Procedural Matters

1. I undertook an unaccompanied site inspection during the morning of Tuesday 8 April 2025.
2. I held a hearing at the offices of the Council on 9 April 2025.
3. In writing this decision I have found it convenient to refer to the points A to I marked on the Order Map. I therefore attach a copy of this map.
4. The First Order was made by the Council under section 119 of the 1980 Act. It proposes to stop up the sections of Westbury footpath 29 between points A and B and points C to D. It also proposes to stop up the section of Dilton Marsh 20 between points D and E. I shall refer to these sections of footpath proposed to be

stopped up as 'the Definitive map and Statement ('DMS') routes'. The Order also proposes to create a public footpath as part of Westbury footpath 29 between the points C, A, I and H and a public footpath as part of Dilton Marsh footpath 20 between points E and H, as both routes are shown by a broken line on the Order Map. I shall refer to these as 'the proposed routes'.

5. The Second Order was made by the Council under section 118 of the 1981 Act and proposes to extinguish that part of Dilton Marsh footpath 19 between points H and G and that part of Westbury footpath 28 between points F and G. I shall refer to these as 'the extinguished routes'.

The Legal Framework

6. Section 119(6) of the Highways Act 1980 (the 1980 Act) involves three separate tests for an Order to be confirmed. These are: -

Test 1: whether it is expedient in the interests of the landowner, occupier, or the public for the paths to be diverted. This is subject to any altered point of termination of the paths being substantially as convenient to the public.

Test 2: whether the proposed diversion is substantially less convenient to the public.

Test 3: whether it is expedient to confirm the Order having regard to the effect which; (a) the diversion would have on public enjoyment of the paths as a whole, (b) the coming into operation of the Order would have as respects other land served by the existing public rights of way, and (c) any new public rights of way created by the Order would have as respects the land over which the rights are so created and any land held with it.

7. In determining whether to confirm the Order at Test 3 stage, (a)-(c) are mandatory factors. On (b) and (c) of Test 3, the statutory provisions for compensation for diminution in value or disturbance to the enjoyment of the land affected by the new paths must be taken into account, where applicable. Other relevant factors are not excluded from consideration and could include those pointing in favour of confirmation.
8. Section 118 of the 1980 Act makes provision for the stopping up of a public right of way and involves different tests to be applied at the Order making stage and at the confirmation stage.
9. At the Order making stage the test is 'that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use.' At the confirmation stage the test is 'that it is expedient to do so having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way, account being taken of the provisions for compensation'.

Main Issues

10. To confirm the First Order, I must be satisfied that it meets the criteria set out in the legal framework above, specifically.

- That in the interests of the landowner it is expedient for the Order to be confirmed.
- That the termination points are on the same, or a connected highway, and are substantially as convenient to the public.
- That the diverted route is not substantially less convenient to the public.
- That having regard to the issues detailed above, and all other matters, it is expedient to confirm the Order.

11. To assist in the interpretation of these criteria, I have had regard to the judgement in the case of *R (Young) v Secretary of State for Environment, Food and Rural Affairs* (QBD) [2002] EWHC 119 (Admin) ('Young') and *The Open Spaces Society v SSEFRA [2021] EWCA Civ 241*.

12. To confirm the Second Order, I must be satisfied that the routes to be stopped up are not needed for public use having regard to the extent to which the paths would be used if not stopped up and the effect of stopping up the paths on the land they serve.

Site visit

13. The Orders concern five footpaths which converge on a property known as Dilton Vale Farm ('the Farm'). The Farm was historically part of a fulling mill and spinning factory and was a significant employer in the area. It is suggested that the various footpaths arose to accommodate those working at or visiting these premises. Any such commercial use of the premises ceased long ago, and current use of the footpath network is mainly recreational.

14. The Farm straddles the parishes of Westbury and Dilton Marsh. A stream, Biss Brook, runs through the property which is situated in a bowl with the ground rising on all sides. The parish boundary is the centre line of Biss Brook.

15. I approached the Farm from Old Dilton church by way of footpath Westbury 29. This footpath runs alongside the brook and thus provides a relatively level means of accessing the Farm. At point C there is a kissing gate and from here the range of buildings comprising the Farm come into view. There was a sign encouraging users to take the permissive path (which is the proposed route) leading in a south-easterly direction to point A.

16. From point C the DMS route is not clearly defined but winds through rough grass interspersed with trees to point B where the surface changes to gravel. At this point the range of outbuildings are a few yards away. From point B the route continues to point F from where a view is available of the eastern elevation of the farmhouse.

17. From point F the route continues over gravel in a north westerly direction passing very close to the corner of the farmhouse and the outbuilding on the western side. At this point, which I will describe as at the rear of the farmhouse, there is a patio accessed by French doors from the dwelling. There were chairs, planted pots and other features of domestic life, suggesting that the area is well used by the occupants and which were sufficient for me to feel a sense of real intrusion.

18. Point D is located on the parish boundary. The gravel gives way to rough grass with a semi-defined track passing between some newly planted trees. Beyond point E there is a metal gate which I understand to be on the property boundary. Footpath Dilton Marsh 20 continues beyond.
19. From point E I walked the proposed route to point H which is adjacent to a bridge over the brook. Walking from points E to H, good views of the rear elevation of the farmhouse are available. Between the proposed route and the dwelling is a vegetable garden with raised beds but the distance from the dwelling is sufficient to avoid any significant sense of intrusion. The surface and character of the DMS route D to E and the proposed route E to H are very similar, both being semi-defined tracks over rough grass only a short distance from each other and with similar views over the wider landscape. At point H footpath Dilton Marsh 19 joins from the north (carrying also traffic joining from footpath Westbury 28 which intersects with it only a few yards to the north).
20. At point H the DMS route for Dilton Marsh 29 continues in a broadly southerly direction along a narrow strip of land between a fence to the west and the brook to the east. This route continues almost to the corner of the farmhouse before crossing the brook and veering across the drive and parking area in front of the farmhouse to point F.
21. From point H the proposed route continues in a broadly westerly direction uphill and over rough grass between some young trees to point I. A short stretch of this route was a little soft, but straw had been laid so that the surface was perfectly adequate.
22. At point I the proposed route is within the vehicular drive from the west. The drive continues to the front of the farmhouse. The proposed route turns to a broadly southerly direction along an improved vehicular track to point A where it meets Westbury 29 joining from the south-west. The route between points I and A passes close to a range of outbuildings, the most proximate of which is an open barn which appeared to be used for storage. I understand that part of these outbuildings is used as a dwelling, but this was not visibly apparent from the proposed route. Along this section of the proposed route views were available of the front elevation of the farmhouse, which is seen in context, nestled at the bottom of the bowl in the landscape.
23. Point A is on the property boundary and there is an existing stile to accommodate FP Westbury 29. The proposed route lies within the Farm property, so it was not necessary to cross the stile before walking along the grassy hedge-side path back to point C to complete my visit.
24. At relevant points signs were displayed inviting the public to use the proposed routes on a permissive basis. The clear evidence of use would suggest that the public have adopted the proposed routes in preference to the DMS routes.

Reasons

Test 1. Whether it is expedient in the interests of the landowner that the path or way be diverted

25. The Order was requested by the landowner because of concerns about security and privacy. The Objector who attended the hearing did not dispute that the proposed diversions would be in the interests of the landowner.
26. The Farm has the sense of being in a rural and isolated setting. It is an attractive range of buildings, apparently with an interesting history, which would enhance the appeal of the routes for recreational walking. The proximity of the DMS routes to the dwelling gives rise to the sense of intrusion that I referred to in the description of my site visit. The advantages to the landowner of the diversion are that it would remove the public footpaths from the immediate curtilage of the house and thus allay the landowners concerns over privacy and security.
27. Government guidance on the diversion of public rights of way that pass through private dwellings, their curtilage and gardens, published in August 2023 ("the Guidance"), emphasises that a home owner is entitled to 'a reasonable expectation of being able to relax in the garden or spend time with family and friends without strangers appearing in the same confined space' and that such an expectation is relevant no matter that the public right of way has existed for centuries.
28. The courts have made clear that in considering this first test the issue is confined to whether the diversion is expedient in the interests of the landowner. In *Ramblers Association v SSEFRA, Oxfordshire County Council, Weston et al [2012] 3333 (Admin)*, Ousley J said; -

"The question that has to be asked under section 119(1) is whether the diversion is expedient in the interests of the landowner. I cannot see that the question of whether the landowner bought knowing the footpath, or bought not knowing of it, or bought taking a chance that he might be able to obtain a diversion order, has got anything to do with whether it is expedient in his interests that the order be made. If it is more convenient, beneficial or advantageous to him, it is expedient in his interests."
29. I accept the Applicant's evidence as to the reasons why the diversion will benefit him and following the guidance of Ousley J set out above, I have no difficulty in concluding that the proposed diversion is expedient in the interests of the landowner.

Whether the altered termination points of the highway will be substantially as convenient to the public.

30. The proposals encompassed within the Orders are confined to the parcel of land belonging to the applicant. The parcel of land is effectively the hub for the confluence of 5 public footpaths and the proposed changes to the network are confined to that hub. The termination points are A, C, E and H. These will remain the points at which the proposed routes will connect to the existing network. Accordingly, the convenience of the network to the public will be unaffected.

Test 2. Whether the path will be substantially less convenient to the public as a consequence of the diversion

31. Guided by the judgement in *Young* I need to consider whether, in terms of convenience, matters such as the length of the diverted path, the difficulty of walking it and its purpose will render the path substantially less convenient to the public.

Length

32. The proposed diversions will impact on various combinations of route: -

- A to C. The DMS route necessitates walking from A to B to C. The proposed route would take the walker directly to point C, using one side of a triangle rather than two and is thus shorter.
- C to E. The DMS route is from C to B and thence to E via B, F and D. The proposed route would require the walker to travel to E via I and H. The DMS route is approximately 223 metres whilst the proposed route is approximately 388 metres, an increase of approximately 165 metres, equivalent to approximately 74%.
- A to E. The impact on this permutation will be similar to C to E, but the difference will be less because the section A to B is avoided.
- H to E. The proposed route is a direct line between these points and thus shorter than the two sides of the triangle required by the DMS route via G, F and D.
- H to C. This incorporates a significant part of the variation C to E and will involve a similar increase in length.

33. The net result is that some variations of route will be slightly shorter and some modestly longer.

34. In this case, as I have set out earlier, the existing route is now mainly used for recreational purposes. Although in some cases an increase in length of 74% might be significant, in this case the greatest additional length arising from the proposed diversion is 165 metres, equivalent to 2 or 3 minutes' walk. In the context of a recreational route, I would consider this a very modest increase in distance, falling well short of the threshold of being substantially less convenient to the public.

Topography

35. The DMS routes and the proposed routes are very similar in their topography with no obvious detriment arising from the scheme. Part of the section of FP Westbury 28 which is proposed to be diverted, has eroded significantly resulting in considerable narrowing.

Width

36. No width is recorded for the DMS routes which, in some places are narrow, meandering and not easy to follow. In a situation where the width is not recorded in the Definitive Statement, the legal width will be that which has been ordinarily used by the public. When I visited there was little evidence of actual use by the public and it was generally difficult to assess what would be the appropriate width. The route D to E is an established track over grass with a width which I would estimate to be less than 3 metres.

37. The proposed routes will have a defined width of 3 metres throughout save where they pass over footbridges.

38. The Objectors have not expressed any concerns about the width of the proposed path, and I consider the stated widths of 3 metres to be appropriate in the context of this location and to represent a significant improvement upon the DMS routes.

Surface

39. In describing my site visit I have recorded the surface conditions of both the DMS and proposed routes. For the most part they are very similar. The proposed routes are currently available for use by the public on a permissive basis and it is evident on the ground that at least some members of the public have chosen to use these in preference to the existing definitive routes. The Objector who attended the hearing did not take issue with the surface of the proposed routes.

Limitations

40. The existing routes have a stile at point A, a kissing gate at point C and a gate north of point E. These structures lie outside the proposed diversions and will be unaffected thereby. There are 3 bridges on the DMS routes, two of which will not be on the highway network if the Order is confirmed. There will be one additional bridge which has been provided by the applicant on the proposed routes and which is in use on a permissive basis.

41. Overall, on the question of whether the diversion would be substantially less convenient to the public, I conclude that it will not. The difference in distance is not in context or absolute terms, material. The topography and surface are largely similar. The proposed route will benefit from having a defined and adequate width.

Whether it is expedient to confirm the Order having regard to the effect which:

a. *the diversion would have on public enjoyment of the path as a whole*

42. Four objections were submitted to confirmation of the orders, one from Westbury Town Council and the remaining three from individuals. One objector attended and participated in the hearing.

43. The principal and common element of the objections is concern that the Orders, if confirmed, will alter the alignment and context of historic routes. One objection states “*my concerns centre on the historic importance of the location of Dilton Vale Farm, at the junction of no less than five public footpaths.*” The objection from Westbury Town Council includes the sentence “*Public footpaths are sacrosanct, and we move them at our peril, creating precedent for the future*”. The objection also states that the application is inappropriate as the applicant purchased the property in the knowledge of the existence and location of the routes which are proposed to be diverted. Similar sentiments are expressed by the other objectors.

44. The Town Council comment that whilst the applicant stated in his application that the property is a family home, it was being run as a business and wedding venue. The Applicant has clarified that one building on the site is used as a holiday let but subject thereto, there no business is operated from there.

45. Thirteen representations supporting the Orders were received, each referring to the intrusive nature of the existing routes and the discomfort the users felt as a result. Each supporter endorsed the merits of the proposed routes which have been

available for use by the public on a permissive basis and which they had each adopted.

46. The Objectors express their concern in terms of the historic importance of the location but do not articulate how the proposed diversions will adversely impact this. I have taken the objection to relate to the historic buildings at the Farm and the proximity to these which is afforded by the DMS routes. I recognise the importance of heritage and the value of historic buildings to the interest of the landscape. However, I have been provided with no evidence to suggest, other than the buildings, any features of the industrial heritage of the site remain, and I saw none on my site visit.
47. I have considered whether the proposed diversions could be said to adversely impact the view that is available of the historic buildings. From the DMS routes, an oblique view of the front elevation of the main farmhouse is available as one approaches from point B. A much closer view is available from the route F to G, but at no point can the front elevation be seen in the context of its location within the 'bowl'.
48. Between points F and D the DMS route passes within touching distance of the farmhouse and outbuilding. I have referred to the profound sense of intrusion this may cause users. Between points D and E, particularly when walking this section from point E, good views are available of the rear elevation of the farmhouse, but these are largely replicated using the proposed route E to H.
49. The DMS route H to G is along a narrow strip of land between a 6' wooden fence to the west and the brook to the east. No meaningful views are available from this section of path.
50. The proposed route H to I and I to A affords excellent views of the farmhouse and the complete assemblage of buildings, seen within their true setting and context. These views add to the enjoyment of the walk and, in my view, more than compensate for any perceived detriment from loss of proximity.
51. Having regard to the foregoing, I conclude that public enjoyment of the path as a whole will not be adversely impacted by reason of the available views of the historic buildings and setting.
52. I have considered whether any other factors arising from the proposed diversion may have an impact on public enjoyment of the path. I do not attribute any weight to the Objectors' assertion that the route of a public footpath is 'sacrosanct'. Self-evidently that is not a correct statement of the law, given the procedures available under sections 118 and 119 of the 1981 Act and the Guidance which specifically provide a regime for diversion of public rights of way. The Guidance states, at paragraph 6 "*Even where a public path through a private garden or farmyard has existed for centuries, and perhaps even pre-dates the use of the land for these purposes, there may be one or more reasons why its presence could be problematic for the landowner.*"
53. I recognise that at the date of making the Order the Guidance had not been issued and at that time the stance taken by the Objectors may have had greater foundation than it has now with the Guidance in place.

b. the effect of the coming into operation of the Order on land served by the existing public rights of way

54. The Order would have no effect on land served by the existing right of way.

c. the effect of the new public right of way on the land over which it is created (or land held with it)

55. No issues have been identified in respect of the affected land, in terms of either the existing or the proposed routes, which I need to consider.

The expediency of confirming the Order

56. In considering the expediency of confirming the Order I am required to take into account the mandatory considerations a. to c. above. I am also entitled to take account of my conclusions in respect of Test 1. I am then required to balance these considerations, taking account of the Guidance, in order to determine whether it is expedient for the Order to be confirmed.

57. I have concluded, and the objectors would seem to accept, that it is in the interest of the landowner for the Order to be made.

58. The only issue potentially in contention is the effect of the diversion on the ability of the public to enjoy the proximity Dilton Vale Farmhouse. I have concluded that the Objector's concerns are overstated or without foundation and that the Orders, if confirmed will bring benefits in terms of improved views from some aspects and removal of the discomfort felt by many users as a result of the intrusive proximity of the DMS routes to the dwelling.

59. In considering the overall expediency of confirming the Order I am entitled to take into account the value to the landowner of the proposed diversion. I must also have regard to the terms of the Guidance.

60. The preface to the Guidance quotes from Hansard in relation to the effect of the Guidance that it will "*act as a presumption to divert or extinguish public rights of way that may cause hardship because it goes through the garden of a family home.....*". It concludes that "*in making a decision as to whether the existing path should be diverted or extinguished, an authority should consider in particular the impact on the property owner and/or occupier against the benefit that having the right of way through the land brings to the public, taking account of this guidance*".

61. I have found that in addition to benefits in terms of security, the diversion would also afford the landowner the level of privacy which guidance and authority indicates they are entitled to. I recognise the value placed by the Objectors on the historic context of the route but, for the reasons given, I consider that the proposed diversions will significantly mitigate those concerns, and I do not find that these, or any other considerations are sufficient to rebut the presumption in favour of confirmation which arises from the Guidance.

62. Balancing these factors, I am satisfied that the relevant tests are met and that the First Order should be confirmed.

The Second Order

63. The Second Order would, if confirmed, stop up the southernmost section of FP Dilton Marsh 19 and the northernmost section of FP Westbury 28. The test to be applied is whether the routes are needed, and in applying that test I am required to have regard to the extent to which the paths would be used if not stopped up, and the effect stopping up will have on the land served by the routes. The Guidance recognises that stopping up a route using the provisions of section 118 of the 1980 Act can be an appropriate way of achieving the objects of the Guidance.
64. The Second Order is part of the overall scheme for diversion of existing paths away from Dilton Vale Farmhouse in accordance with the Guidance and there is thus a presumption in favour of confirming the Order. The confirmation test is to be applied contingently upon confirmation of the First Order so that I am required to consider the necessity of the sections proposed to be stopped up on the basis that the diversions proposed by the First Order have been effected.
65. The current purpose of the paths to be stopped up is to enable a user of FPs Westbury 29 and Dilton Marsh 20 to gain access to FPs Westbury 28 and Dilton Marsh 19 and vice-versa. The purpose will be achieved by means of the diversions provided for in the First Order. As outlined in discussion of the convenience of the diverted routes, some permutations will be longer, and some shorter but in all cases the diverted routes will accommodate any route a user might wish to take and, on this basis, I am satisfied that the routes to be stopped up will not be needed and therefore that the test for confirmation is met. I also take account of my earlier finding that the routes to be stopped up are so proximate to the dwelling as to give rise to legitimate concerns about privacy and security.

Rights of Way Improvement Plan (ROWIP)

66. I am required to have regard to the Councils ROWIP, the current version of which covers the period 2015 – 2025.
67. The ROWIP requires regard to be had to the provisions of the Equality Act 2010 and to take the least restrictive option. Consideration must be given to the needs of those with mobility impairments.
68. I note that the proposed routes will have a minimum width of 3 metres and be over well-defined tracks with no additional furniture or limitations. This contrasts with the narrow, meandering and poorly defined nature of the existing routes.
69. I am satisfied that the requirements of the ROWIP are met by the terms of the two Orders and that the proposed routes will result in an improvement to the accessibility of the routes in question to those with mobility impairments.

Other matters

70. At the hearing the Objector raised an issue as to the precise location of point H on the Order map. The First Order provides for the creation of a section of footpath within the parish of Dilton Marsh between points E and H. The point made was that the parish boundary is the mid-point of Biss Brook but the creation of the new sections of footpath E to H and H to I appear to assume that point H is on the parish boundary whereas it is, in fact, on dry land immediately to the west of the brook. I recognise that the Objector's point is well-founded, but as both the mid-

point of the brook and point H are encompassed within the tolerance of the same OS grid reference, I do not consider that any confusion will be caused by this.

Conclusions

71. Having regard to these and all other matters I conclude that the Order should be confirmed.

Formal Decision

72. I confirm the Order.

Nigel Farthing

Inspector

APPEARANCES

Order Making Authority

Ali Roberts

Janice Green

Sally Madgwick (virtual)

Paul Millard (virtual)

Supporters

Jonathan Lloyd-James

Alex Clarke

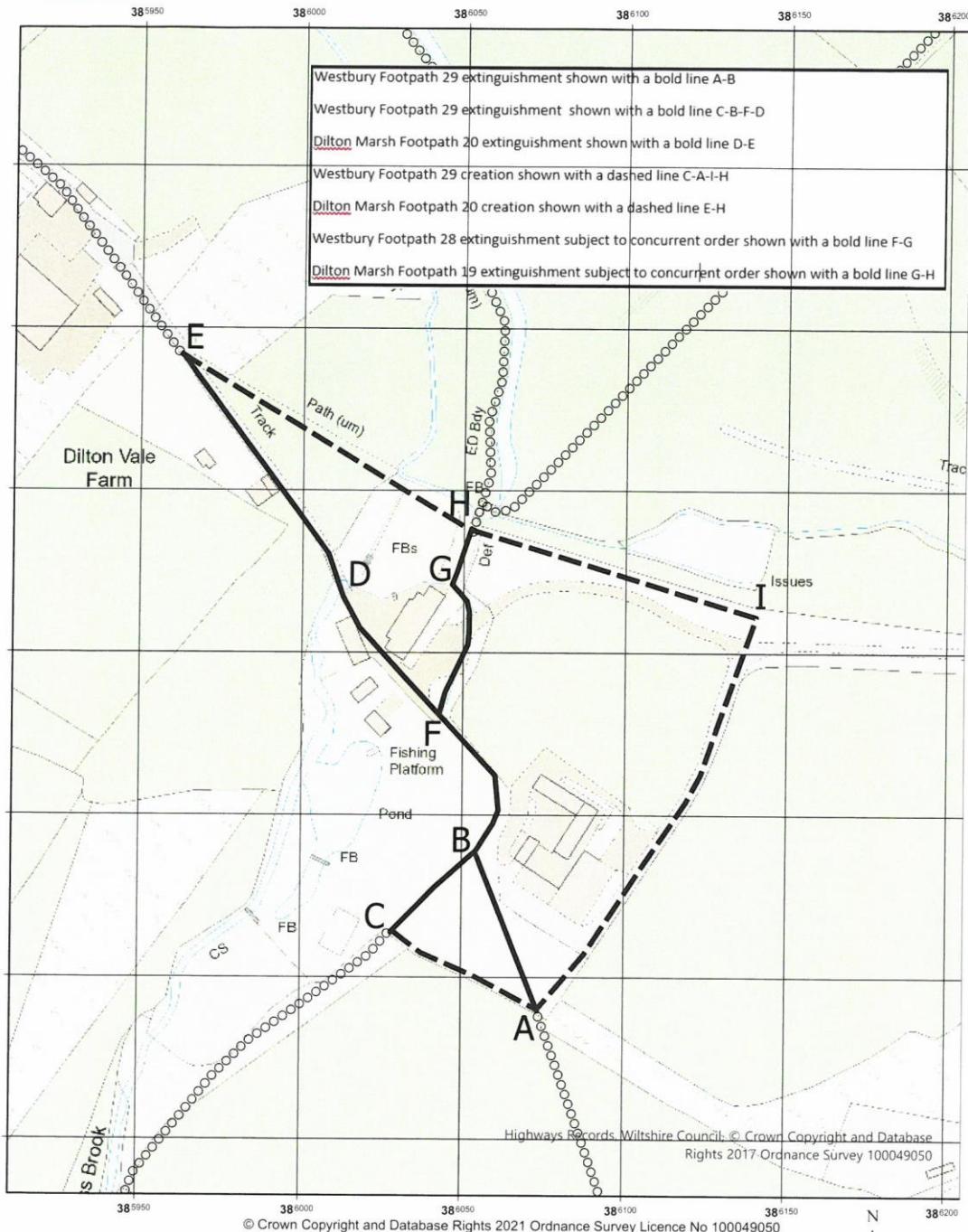
Objector

Francis Morland

ROW/3301931

Wiltshire Council

The Wiltshire Council Parish of Westbury Path no.29 (part)
and Dilton Marsh Path no.20 (part) diversion
and Definitive Map and Statement Modification Order 2021



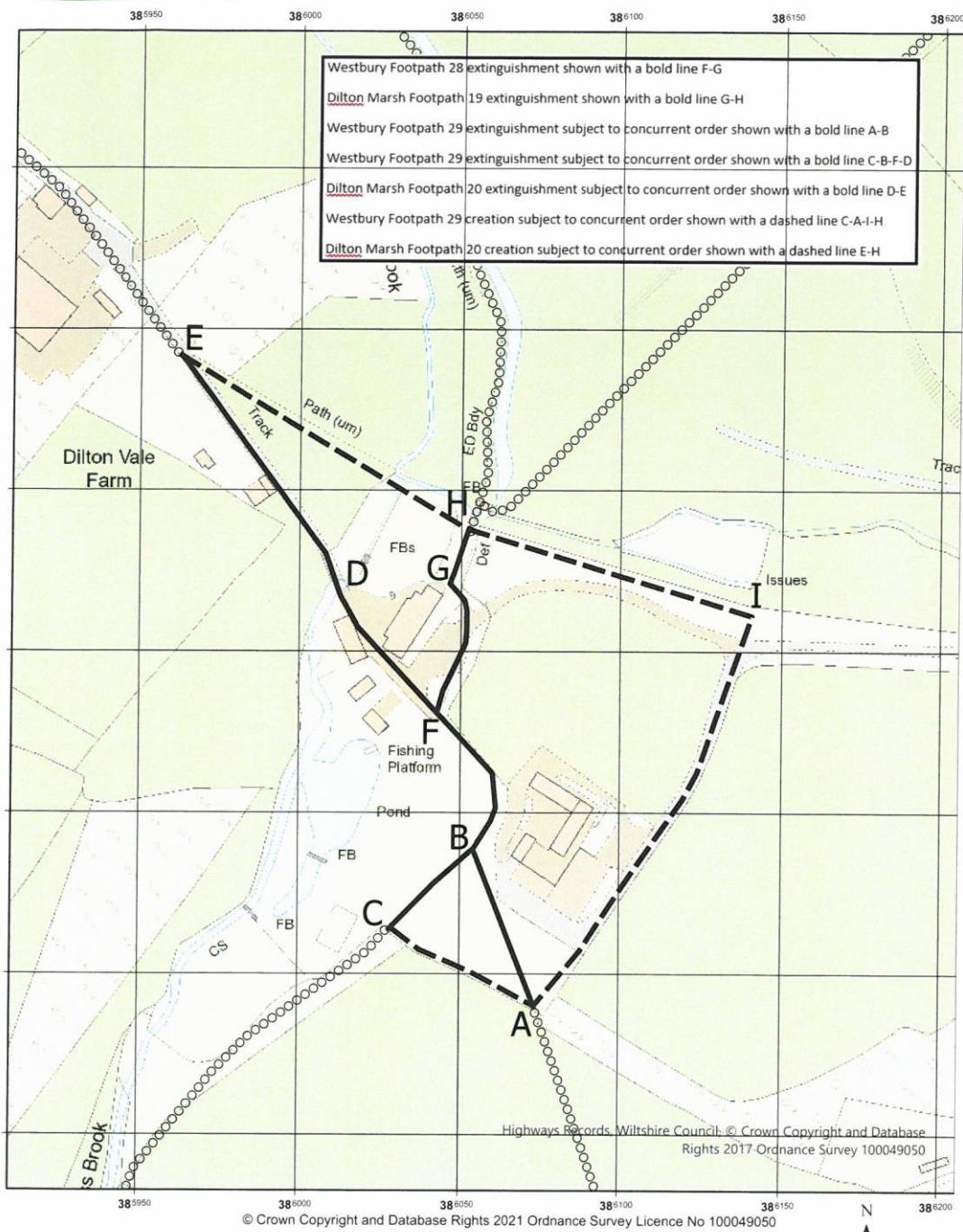
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ROW/3301934

Wiltshire Council

The Wiltshire Council Parish of Westbury Path no.28 (part)
and Dilton Marsh Path no.19 (part) extinguishment
and Definitive Map and Statement Modification Order 2021



14/10/2021

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