

Appendix B

Legal and Policy Considerations

- B.1. Section 118 of the Highways Act 1980 (“the 1980 Act”) empowers the Council, as Highway Authority, to make and confirm an order to extinguish a public footpath subject to it meeting a number of legislative tests. The following sections discuss the application of the legislative tests to the sections of footpath in question.

Considerations for making a public path extinguishment order

- B.2. The Council can **make** a public path extinguishment order if it is expedient to do so on the ground that it is not needed for public use.
- B.3. “Expediency” is a subordinate test within Section 118 – with the questions of whether a path is needed or would be used if not extinguished being the primary tests. In considering what could be considered “expedient” Philips J. in the case of *R. v Secretary of State for The Environment, ex parte Barry Stewart (1980) 39 P. & C.R. 534* stated:
- “...Now, the only criterion that section 110(2) [now s.118(2) of the 1980 Act] lays down is whether it is ‘expedient’ to confirm the order having regard to the extent to which it appears to the Secretary of State that the path would be likely to be used. It thus concentrates on user as being, at all events, the prime consideration. I agree, however, with the submission made on behalf of the applicant that the word ‘expedient’ must mean that, to some extent at all events, other considerations can be brought into play, because, if that were not so, there would be no room for a judgment, which is bound to be of a broad character, as to whether or not it is ‘expedient’...”*
- B.4. The notion of “expediency” can therefore include Members’ considerations of ancillary matters – such as the privacy, security and health and safety issues included in Mr. Moffitt’s representations at Appendix C. However, these matters are subordinate to the primary tests and consequently are unlikely to carry sufficient weight to overturn a finding that the footpath is either needed or would be used if retained.
- B.5. The section of Footpath No. 33 between points A-C-B runs parallel to and at a lower level to Sewell Lane which is a very quiet dead-end lane serving only Sewell Farm and Sundial Cottage. There are very few vehicle movements along the lane and the verge is wide enough for walkers should a vehicle need to pass. The section of footpath between points B-C follows the driveway down to Lane Farm and Springwell Cottage. Access to the remainder of Footpath No. 33 via the point B would necessitate scrambling up a steep 3 metre high

grassed bank to point D whereas access from point E would be comparatively level. Consequently it is unlikely that this route can be considered needed for public use.

- B.6. The section of footpath between A-C has been partly infilled and raised by the land owner to the level of the road as part of the construction of a parking area for Sundial Cottage. Again this section is not needed for public use as it is literally alongside the main lane.
- B.7. The section of Footpath No. 33 between points C-D descends a gravelled driveway and then climbs back up the aforementioned grassed bank. The proposed retention of the section of footpath which runs along a grassed terrace at the top of the bank between points D-E makes the retention of the remainder of the width of the footpath redundant and unneeded.
- B.8. The section of Footpath No. 36 between points Y-Z starts at the entrance to Sewell Farm and proceeds north-westwards along the main access track to the farm's barns before veering off onto a grassed track to go past a pond and then across a meadow in an arc to terminate at its junction with an unaffected part of Footpath No. 33 at point Z. This route slopes gently downwards from Sewell Lane to point Z and effectively duplicates the northern section of Footpath No. 33 between points Z-D-E. Because of this duplication it can be considered unneeded although it could be argued that its retention is desirable owing to its more open nature and picturesque views. There is, however, a significant difference between "need" and "desire". A way is needed for use if there is no suitable or accessible alternative. A way may be desired in preference to an alternative route if it is prettier or better surfaced for example. This is addressed in Section 118(2) of the 1980 Act which requires that the Council be satisfied that the extinguishment is expedient having regard to the extent that the path would be used apart from the order (see Paragraph 19 below). Hodgson J. in the case of *R. v The Lake District Special Planning Board ex parte Bernstein (1982)* commented that "*need*" could be distinguished into that "*...of the stranger visiting the area for the first time: it would not matter which path was to be closed because his only requirement would be a clearly indicated track...*", and "*...the local person familiar with the local rights of way: such a person would wish to use the familiar path...*". The current proposal seeks to retain a public footpath along the route currently used and marked on older pre-modification order Ordnance Survey maps, be it with a reduced width. This is also the route used by local residents and those further afield who regularly walk Footpath No. 33. The proposed extinguishment of Footpath No. 36 between points Y-Z would therefore seem to satisfy both of Hodgson J.'s criteria and can be considered not needed for public use.
- B.9. The section of Footpath No. 36 between points V-W climbs diagonally up the almost vertical southern face of the Sewell cutting which has a height of about

10 metres. Historically there was a flight of steps built onto the face of the cutting in the c.1950s but here is no trace of this today. To construct a new flight of steps would cost approximately £3000. Access to Bridleway No. 35 at point V is arguably easier via the underbridge at the end of Sewell Lane and then ascending the gentler gradient of the bridleway from its junction with BOAT No. 35 rather than negotiating both the northern and southern faces of the Sewell cutting. Consequently it is considered that the section V-W is not needed for public use.

B.10. The section of Footpath No. 36 between points W-X climbs slowly southwards from Sewell Lane across uneven ground to the lip of the Sewell cutting and then descends a gentle slope to the floor of the cutting approximately 3-4 metres below. The cutting is used for the Sewell Greenway which is a permissive cycle path between Houghton Regis and Stanbridge. Although Mr. Moffitt has applied for this section of the footpath to be extinguished I consider that it could provide a shorter and more convenient link to the Sewell Greenway for walkers than the alternative via the underbridge at the end of Sewell Lane and Bridleway No. 35. Consequently I consider that this section is potentially needed for public use. Work would need to be undertaken to construct steps down the slope of the cutting. These would cost approximately £2000.

B.11. Consequently it is expedient to **make an order** to extinguish the sections of footpath between points A-C-B, C D, Y-Z and V-W on the ground that these sections are not needed for public use. The section of Footpath No. 33 between points D-E and the section of Footpath No. 36 between points W-X should be retained as these are needed for public use.

Considerations for confirming a public path extinguishment order

B.12. Before **confirming** a public path extinguishment order the Council must be satisfied that it is expedient to do so having regard to the extent that the footpath would be used by the public if not extinguished and the effect of the extinguishment on the lands served by the paths. In considering whether the public would use a path, any temporary circumstance diminishing or preventing public use must be disregarded.

B.13. The section of Footpath No. 33 between points A-C-B runs parallel to Sewell Lane. The section C-B runs along a lower section of driveway to Springwell Cottage and then over new landscaping and up a steep bank to connect to the line C D. Whilst it is possible that walkers may wish to use this route, it is less convenient than walking along the higher part of the main lane. Consequently public use is likely to be minimal for this section. The section A-C runs directly in front of Sundial Cottage and adjoins the Sewell Lane. Its closeness to the windows and door of the cottage means that members of the public walk along

the main lane in preference and so it is unlikely that this section would be used if not extinguished even if it were not obstructed by the raised level of the new driveway.

- B.14. The section of Footpath No. 33 between points C-D descends a gravelled driveway from Sewell Lane and then ascends a steep grassed bank to point D. The alternative route to be retained crosses a gravelled parking area and then follows a grassed terrace along the top of the grassed bank to the existing gate at point D which is a much more easy and preferable route. Consequently it is very unlikely that walkers would use the wider area between points C-D if it was not extinguished – especially once further revetment works are carried out to widen and slightly level the current grassed terrace.
- B.15. The section of Footpath No. 36 between points Y-Z passes through a locked farm gate and runs along the access track to the yard of Sewell Farm before passing to the west side of a pond and descending a long gentle grassed slope through a meadow to connect to an unaffected section of Footpath No. 33 at the meadow's northern boundary (point Z). This is an attractive route with open views to the north and also views of a pleasant farm house and yard. The low/intermittent levels of use by farm vehicles would neither detract from the public's enjoyment of the route nor dissuade walkers from using it in my opinion. If the route was signposted and made available for public use it would, in my opinion, be used by the public if it was not extinguished. Whether the footpath would be used as much as or in preference to the nearby section of Footpath No. 33 between points E-D-Z is unknown.
- B.16. The section of Footpath No. 36 between points X-W-V slowly climbs southwards from Sewell Lane across uneven ground to the lip of the Sewell cutting and then descends a gentle slope to the floor of the cutting before climbing diagonally up the cutting's almost vertical southern face. Were the route open and available for public use it is likely that some of the more adventuresome walkers would use this route to access Bridleway No. 35 at point V. Many though may prefer to use the alternative route via the underbridge at the end of Sewell Lane and then to ascend the more gently sloping bridleway from its junction with BOAT No. 35 to point V or to switch onto the more level Sewell Greenway to access point W. However, it is likely that walkers would use the section W-X to access the Sewell Greenway as this route is more open and does provide good views to the north. I therefore consider that the section X-W is more likely to be used than its continuation W-V.
- B.17. The Committee also has to have regard to the effect of the extinguishments on the land served by the footpaths. Auld J. in *R v Secretary of State for the Environment ex parte Cheshire County Council* - [1991] JPL 537, CO/1012/89 clarified that this meant having to consider whether the extinguishment of a

right of way would be detrimental to a landowner – rather than of any benefit. In his judgment he stated:

“...Looking at section 118(2), Mr Cross relies on the words in this part of his case which follow the general test set out there, ‘having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way’. I agree with Mr Kent that this provision is clearly directed to the consideration of adverse effects from extinguishment on nearby landowners who derive a benefit of one sort or another from the use of the footpath. It is clearly directed to a case where extinguishment is on the cards, and where the Secretary of State is asked to consider whether that would in some way harm nearby landowners. That view is supported by the concluded words of section 118(2) ‘...amount being taken of the provisions as to compensation contained in section 28 above...’.”

- B.18. Based on Auld J’s clarification the extinguishment of the sections of footpath in question would not be detrimental to the interests of the owners of the land served by the footpaths.
- B.19. Consequently it is expedient to **confirm an order** to extinguish sections A-C-B, C-D, and V-W on the ground that these sections of footpath are unlikely to be used to a significant extent were they open and available for public use and not extinguished. I consider that the sections of Footpath No. 36 running through Sewell Farm between points Y-Z and point X-W to the south are likely to be used if retained. Consequently an order extinguishing these sections could not be confirmed and therefore an extinguishment order ought not to be made.

Other relevant considerations

- B.20. Sections 28 and 121 of the 1980 Act relate to the right to compensation for anybody with a legal interest in land affected by a public path order. However, the applicants have signed a waiver agreeing to defer any compensation that becomes payable as a result of the coming into operation of the order. Moreover, where the Council does not make an extinguishment order, there is no right to compensation consequent to the opening up of a public right of way.
- B.21. The Council has a duty under Section 118(6A) of the 1980 Act to consider any material provisions contained within a Rights of Way Improvement Plan (“RoWIP”) when determining whether or not to confirm a public path order. The Council’s Outdoor Access Improvement Plan acts as its RoWIP. The proposal does not conflict with any of its aims.
- B.22. Section 29 of the 1980 Act imposes a duty on the Council to have regard to the needs of agriculture and forestry, and the desirability of conserving flora, fauna and geological and physiographical features when determining whether to make and confirm a public path order. The effect of the order would be to

extinguish a number of sections of footpath that have either been surfaced or heavily landscaped or that cross part of the Sewell Greenway County Wildlife Site. The three sections of footpath that are proposed to be retained (sections: C-D, W-X and Y Z) cross land which is either within an Archaeological Notification Area or within a County Wildlife Site. Works to open up these rights of way will have a minimal impact on the archaeology of the area but may have some impact upon the flora on the southern side of the railway cutting. The effect of the extinguishments on fauna, geology, physiological features and agriculture is likely to be negligible. However, retention of the sections of Footpath No. 36 between points W-X and Y-Z could have a negative effect on farming activities – particularly the security of farm equipment kept at the barns at Sewell Farm.

- B.23. Central Bedfordshire Council's Constitution (Section C of E2 at Annex A) identifies the Development Management Committee as the appropriate body to determine whether the Council, as highway authority, should make orders under the 1980 Act to create, divert, or extinguish a public right of way. The Constitution (H3 at Section 4.3.74.) further authorises the Director of Community Services "*...To carry out the functions of the Council in respect of public rights of way, including the exercise of the Council's powers and duties under the Wildlife and Countryside Act 1981, the Highways Act 1980, Sections 257 and 258 of the Town and County Planning Act 1990 (including the maintenance, protection, enforcement, extinguishments, creation, diversion and modification of public rights of way) and the making of road traffic regulation orders in respect of public rights of way...*". The use of such delegated powers are "*...Subject to consultation with the relevant ward member, and subject to the Assistant Director Planning's power to authorise the making of orders in respect of public rights of way applying only in so far as no significant objection has been made to the application, proposal or matter concerned...*". As the report seeks to refuse most of Mr. Moffitt's application, this constitutes significant opposition; consequently the case falls to be determined by the Development Management Committee rather than under delegated powers.