
Meeting: Development Management Committee
Date: 30th March 2011
Subject: The direction by the Secretary of State for the Environment, Food and Rural Affairs for Central Bedfordshire Council to make a Definitive Map Modification Order to add three sections of footpath to the Definitive Map and Statement in Clophill

Report of: Head of Service for Transport Strategy and Countryside Services

Summary: Members are asked to approve the making of a Definitive Map Modification Order to add three sections of footpath to the Definitive Map and Statement in the parish of Clophill as Directed by the Secretary of State for the Environment, Food and Rural Affairs

Contact Officer: Adam Maciejewski - Definitive Map Officer - Countryside Access Team - 0300 300 6530
Public/Exempt: Public
Wards Affected: Maulden & Houghton Conquest - Cllrs. A. Barker and H. Lockey
Function of: Council

CORPORATE IMPLICATIONS

Council Priorities:

Statutory Duty / Direction by Secretary of State for the Environment, Food and Rural Affairs. The proposal would also tie-in with the Council's priority of promoting healthier lifestyles.

Financial:

The Council, as Surveying Authority, has a statutory duty to investigate and make Definitive Map Modification Orders where appropriate. Central Government consequently provides some degree of funding for this purpose.

The Council will have to advertise a modification order in the local press and, as the order is going to receive objections, will have to advertise the date and location of a probable Public Hearing or Public Inquiry plus pay for the hire of an appropriate venue. Irrespective of whether the Council supports or objects to the modification order the Council will have administrative costs and to hire a suitable venue.

All costs would be met from the existing service budgets and no growth is requested.

Legal:

Central Bedfordshire Council was directed by the Secretary of State for Environment, Food and Rural Affairs in October 2010 to make a Definitive Map Modification Order. If the Council does not make a modification order it is unclear what sanctions the Secretary of State can impose to compel the Council to make the order as directed. It may be possible for the applicant to lodge a complaint with the Local Government Ombudsman if the Council does not make an order

If the Committee resolves that a Definitive Map Modification Order should be made there is nothing preventing the Council either taking a neutral stance or objecting to its own order.

Risk Management:

No risk issues in my opinion.

Staffing (including Trades Unions):

No staffing issues in my opinion.

Equalities/Human Rights:

No equalities issues in my opinion.

Community Safety:

No safety issues in my opinion.

Sustainability:

No sustainability issues in my opinion.

RECOMMENDATION(S):

- 1. That the Committee approve the making of an order under Section 53(2) of the Wildlife and Countryside Act 1981 to add three sections of public footpath to the Definitive Map and Statement in the parish of Clophill. The making of the order is consequent to a Direction by the Secretary of State for the Environment, Food and Rural Affairs under Paragraph 4(2) to Schedule 14 of the 1981 Act. This is because she considers that there has been a discovery of evidence under Section 53(3)(c)(i) of the Act which, when considered with all other relevant evidence available to the Council, shows that “...*a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates...*”. The footpaths to be added between points C-D, D2-E-F, and E-G-H-I would have the widths described later in this report.**
- 2. That the Committee support the proposition that Central Bedfordshire Council takes a neutral stance to the recommended Definitive Map Modification Order on the grounds that the direction is contrary to legal Opinion and the determination of the former County Council.**

Introduction

1. Central Bedfordshire Council has received a direction from the Secretary of State for Environment, Food and Rural Affairs in October 2010 to make a Definitive Map Modification Order to add three sections of footpath to the Definitive Map and Statement in Clophill. The direction comes after the successful appeal by Mr. Maurice Lewis against the former County Council's decision not to make a similar order in March 2009.
2. The footpaths the Council has been directed to add to the Definitive Map are shown at Appendix 1 and would cross public amenity land owned by the Council, land owned by Henlow Parish Council and managed as allotments, and farmland recently purchased by Mr. W. Webb.
3. Mr. Lewis originally made an application under Section 53 of the Wildlife and Countryside Act 1981 in July 2006 to add a whole network of paths to the Definitive Map. Mr. Lewis' application was supported by 62 user evidence forms. A Definitive Map Modification Order for some of the claimed paths has already been made and objected to. This order is waiting to be forwarded to the Secretary of State for confirmation. However, it makes sense to wait and forward both orders to the Secretary of State at the same time so the same evidence can be seen by the same inspector and heard at the same public hearing or inquiry.

Background to case

4. The fields to either side of Church Path in Clophill were owned by the former County Council and rented out to a tenant, Mr. Clarke. Mr. Clarke subsequently bought the land from the former Council in 2000. Neither the former County Council, nor Mr. Clarke fenced off the land, or acted in a way to deter members of the public from walking over the land. Members of the public have therefore taken the opportunity to use a number of paths over the land as dog-walking routes and for general recreation for many years.
5. In 2003 Mr. Clarke sold the fields to either side of Church Path to a local businessman, Mr. "Eddie" Edwards. Mr. Edwards immediately fenced off the land and erect gates and prohibitive notices - thus calling into question the public's right to use the established routes. Mr. Edwards was subsequently plagued with persistent vandalism of his fences and gates as a small number of local residents continued to use the routes over the two fields.
6. The actions of Mr. Edwards ultimately lead to an application by Mr. Maurice Lewis to the former County Council in July 2006 for a Definitive Map Modification Order to add a network of footpaths to the Map and Statement. Mr. Lewis alleged that a number of footpaths subsisted not only on land owned by Mr. Edwards, but on adjoining land owned by Clophill Parish Council as woodland and allotments. Mr. Lewis also claimed a footpath across the consecrated graveyard at St. Mary's Church and across the adjoining deconsecrated medieval graveyard owned by the Council as a public amenity site. The paths claimed by Mr. Lewis can be seen at Appendix 1.

7. The former County Council took Counsel's Opinion on whether a public right of way could be dedicated across the current graveyard between points D-D2 and whether (given that no such dedication could legally occur) it would be possible for the adjoining sections to be dedicated as dead-end paths. Counsel's Opinion confirmed the former council's view that no dedication could have occurred across the current graveyard as it was consecrated land. Moreover, Counsel's Opinion was also that the section D2-E could not have been dedicated as a footpath as the graveyard was not the users' destination but merely a waypoint on a circular walk and it would therefore not be appropriate to consider that the claimed path had been dedicated as a *cul-de-sac*. This subtle but important point was at the centre of the former County Council's decision.
8. Mr. Lewis' application was finally determined in March 2009. The former County Council decided to make a Definitive Map Modification Order for only two footpaths (between points A-B and J-Z on the map at Appendix 1) and to refuse to make orders for the other ones claimed by Mr. Lewis. A Definitive Map Modification Order was eventually made by Central Bedfordshire Council in March 2010. This has received objections from both Mr. Edwards and from the new owner of the two fields, Mr. Webb, as well as from a local resident.
9. Upon being notified that the former County Council was not making a Definitive Map Modification Order for all of the claimed paths, Mr. Lewis appealed against the decision to the Secretary of State for Environment, Food and Rural Affairs. In October 2010 Central Bedfordshire Council received a direction from the Secretary of State to make a Definitive Map Modification Order for the three sections of footpath between points C-D, D2-E-F, and E-G-H-I shown on the plan at Appendix 1.
10. The Inspector appointed by the Secretary of State stated in his decision letter that "... *There is no absolute rule that states that cul-de-sac paths cannot subsist. It is in my view at least arguable that a graveyard is a place of public resort that could form an appropriate terminus of a right of way, even if most users of that right of way were not planning to end their journey there... ..it is my view that there is no incontrovertible evidence that ways cannot be reasonably alleged to subsist... ..and it is at least reasonable to allege that they do...*".

Legal and Policy Considerations

11. The Wildlife and Countryside Act 1981 empowers Central Bedfordshire Council, as the Surveying Authority for the Definitive Map and Statement, to make legal orders to add, delete, or modify any particulars of rights of way (footpaths, bridleways, restricted byways, and byways) shown on the Definitive Map which is the Council's legal record of such rights.
12. Section 53(5) of the Wildlife and Countryside Act 1981 allows any person to apply to the Council to modify the Definitive Map and Statement by order if they believe it to be wrong.

13. Paragraph 4 to Schedule 14 of the Wildlife and Countryside Act 1981 states:
“Appeal against a decision not to make an order.
 (a) *Where the authority decide not to make an order, the applicant may, at any time within 28 days after service on him of notice of the decision, serve notice of appeal against the decision on the Secretary of State and the authority.*
 (b) *If on considering the appeal the Secretary of State considers that an order should be made, he shall give the authority such directions as appear to him necessary for the purpose...”*
14. Legal advice indicates that under the current Central Bedfordshire Council’s Constitution the Secretary of State for the Environment, Food and Rural Affairs is not a valid authority for the sealing of an order made by the Council. The Development Management Committee is therefore requested to consider whether to approve the making and signing of a Definitive Map Modification Order in accordance with the Secretary of State’s direction.
15. The Development Management Committee under the Central Bedfordshire Council’s Constitution (Section 1 of Part E2) is the appropriate body to determine whether the Council, as Surveying Authority, should make a Definitive Map Modification Order under the Wildlife and Countryside Act 1981 to add public footpaths to the Definitive Map and Statement.
16. This agenda item cannot be determined by powers delegated to the Head of Service for Transport Strategy and Countryside Access under Section 4.2.147 of Part H3 of the Constitution as the representations of the landowners constitute *“significant objection”* - the absence of significant objection being a pre-condition of the Head of Service’s power to authorise the making of orders.
17. Defra guidance issued in its Circular 1/09 at Section 4.16 requires that all modification orders include a description of the width of the paths. The Countryside Access Service does not consider that there is sufficient evidence to indicate what widths the paths to be included in the modification order should have. Defra’s 12th February 2007 non-statutory guidance to order making authorities suggests that the alleged footpaths should have widths *“...appropriate with regard to usage, nature and location...”*. Where no evidence exists and a route is unconstrained I have therefore proposed a width of 1.8 metres and, where a claimed route is constrained, I have proposed the usable width at that point. These are:

Section	Width	Section	Width
C - D	1.8 metres	E - G	1.8 metres
D2 - E	1.8 metres	G - H	1.0 metre
E - F	min 2 metres - max 3.0 metres	H - I	min 1.5 metres - max 3.0 metres

18. The Definitive Map Modification Order to add the three sections of footpath will be made on the basis that the paths can be *reasonably alleged* to subsist - which is relatively relaxed test of the evidence. If the order is objected to, any Inspector appointed by the Secretary of State to hear the order must be satisfied that the paths subsist on the *balance of probability* before he could confirm the order - which is a much stricter test of the evidence. This difference in testing of the evidence can unfortunately lead to the paradox where an order can be validly made that has no hope of being confirmed.

Consultations

19. Mr. W. Gibb purchased the fields to either side of Church Path from Mr. Edwards in c.March 2010. Mr. Gibb has objected to the March 2010 Order and has stated that he will object to a second order to add even more paths across his land.
20. Clophill Parish Council has been informed of the Secretary of State's direction. At the time of writing (January 2011) the Parish Council has not responded.
21. The tenants who use the allotment have also been informed of the Secretary of State's direction. At the time of writing (January 2011) none of the tenants have responded.

Council's formal position

22. The former County Council had evaluated the available evidence and had determined that the claimed paths that are the subject of this report could not have been dedicated as they were effectively *cul-de-sacs*. The Inspector appointed by the Secretary of State re-evaluated the evidence and, whilst recognising the claimed routes would still be *cul-de-sacs*, considered that there were insufficient reasons why a Definitive Map Modification Order could not be made to add them anyway. Hence the Secretary of State's direction that the Council to make the recommended order.
23. If a Definitive Map Modification Order is objected to, the Council must forward the order to the Secretary of State so that it can be either confirmed or quashed. Normally the Council would support its own order as it would have sound reasons for making it. However, the Council has been directed to make an order as a result of the former County Council deciding that there were sound reasons not to make an order in the first place. The Council can choose to:
 - (a) Support its own order against the reasoning of the former County Council and Counsel's Opinion on the matter. This would strengthen the case in support of the paths which would increase public access to the countryside.
 - (b) Take a neutral stance on the order and, whilst facilitating any public hearing or inquiry, ask the applicant to be the main proponent of the order. This approach strikes a balance against the perceived network gains and the evidence and legal Opinion sought by the former County Council and is the course of action recommended by the author.

- (c) Oppose its own order citing the reasons put forward by the former County Council when it determined Mr. Lewis' original application. The Council would again facilitate any public hearing or inquiry and would ask the applicant to be the main proponent of the order. This would weaken the case against the applicant and could lead to fewer paths being added to the map.

Conclusions

24. The Secretary of State for the Environment, Food and Rural Affairs has directed Central Bedfordshire Council to make a Definitive Map Modification Order to add three sections of footpath to the Definitive Map and Statement in Clophill from the High Street to the old St. Mary's Church.
25. The direction is the result of a successful appeal against the decision by the former Bedfordshire County Council to refuse the 2006 application by Mr. Maurice Lewis to add the claimed footpaths to the Definitive Map.
26. As the Central Bedfordshire Council Constitution does not recognise the Secretary of State for the Environment, Food and Rural Affairs as an authority for the sealing of orders, the Development Management Committee is asked to ratify the Secretary of State's direction. The Development Management Committee will therefore become the authority for sealing the directed Definitive Map Modification Order.
27. It is very likely that the recommended order will be objected to by Mr. Webb and adjoining landowners necessitating its forwarding to the Secretary of State for Environment, Food and Rural Affairs for confirmation. In my opinion the taking of a neutral stance on the order would balance the potential network gain against the arguments and legal Opinion of the former County Council.

Appendices:

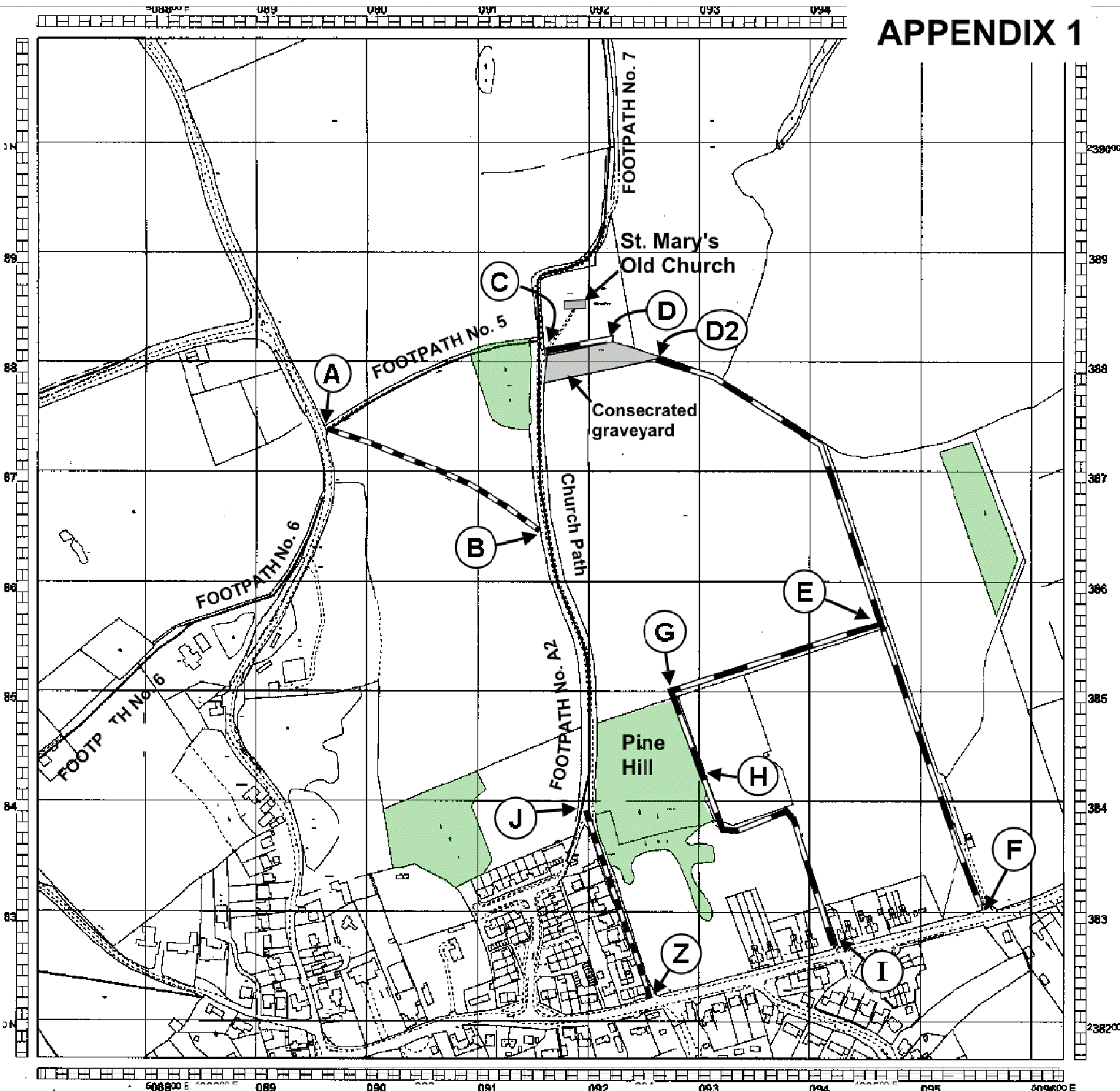
Appendix 1 – Plan showing the claimed routes and paths directed to be added to the Definitive Map and Statement

Background Papers: (open to public inspection)

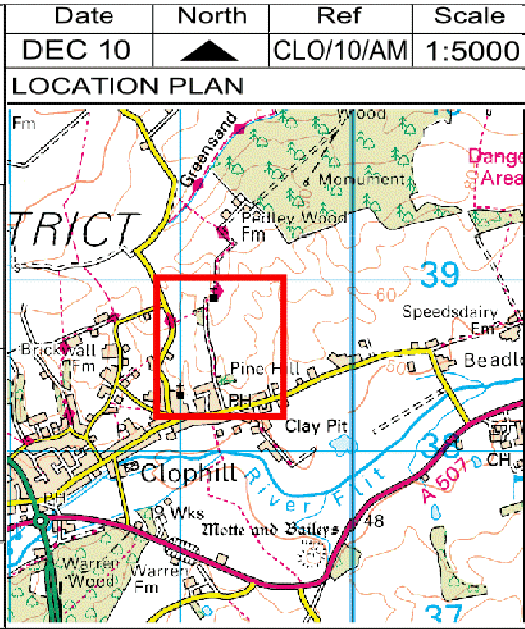
- Bedfordshire County Council's Development Control Committee's agenda item for 5th March 2009 entitled *The determination of an application made under Section 53 of the Wildlife and Countryside Act 1981 to modify the Definitive Map by the addition of claimed footpaths in the parish of Clophill.*
- Inspector Barney Grimshaw's decision letter entitled *Wildlife And Countryside Act 1981 Report into an Appeal by Mr. Maurice Lewis against the decision of Bedfordshire County Council not to make an order under Section 53(2) in respect of two claimed paths at Clophill, Bedfordshire* recommending to the Secretary of State that Central Bedfordshire Council makes a Definitive Map Modification Order.
- Secretary of State for Environment, Food and Rural Affairs' direction to Central Bedfordshire Council to make a DMMO, dated 7th October 2010.

Location of papers:

- Technology House, 239, Ampthill Road, Bedford, MK42 9BD



Key									
DIRECTED ADDITION OF FOOTPATHS IN CLOPHILL									
Footpaths to be added by 1 st Definitive Map Modification Order	<table border="0"> <tr> <td>A</td> <td>B</td> </tr> <tr> <td>J</td> <td>Z</td> </tr> </table>	A	B	J	Z				
A	B								
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Footpaths directed to be added by a 2 nd Definitive Map Modification Order	<table border="0"> <tr> <td>C</td> <td>D</td> </tr> <tr> <td>D2</td> <td>E</td> </tr> <tr> <td>F</td> <td>G</td> </tr> <tr> <td>H</td> <td>I</td> </tr> </table>	C	D	D2	E	F	G	H	I
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Unaffected Public Footpath									



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 Central Bedfordshire Council.
 100049029, 2010.

This Map does not constitute an Official copy of the Definitive Map