

Meeting: Development Management Committee
Date: 13 February 2013
Subject: The consideration of an application to delete Maulden Footpath No. 28 under Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981
Report of: Head of Service for Transport Strategy and Countryside Services
Summary: The report examines the evidence behind the application to delete Maulden Footpath No. 28 under the legislation contained within the Wildlife and Countryside Act 1981. Members are asked to come to a view on whether the application should be approved or refused.

Advising Officer: Trevor Saunders, Assistant Director of Planning
Contact Officer: Adam Maciejewski – Senior Definitive Map Officer - Countryside Access Team - 0300 300 6530
Public/Exempt: Public
Wards Affected: Ampthill ward
Function of: Council

CORPORATE IMPLICATIONS

Council Priorities:

The determination of the application is a statutory duty of Central Bedfordshire Council as the Surveying Authority for the Definitive Map and Statement.

Financial:

1. Keeping the Definitive Map and Statement up to date and determining applications to modify the Definitive Map and Statement is a statutory duty of the Council and, as such, there is a degree of direct funding from central government to fulfil this duty. Definitive Map modification orders are made at no cost to the applicant. Consequently the costs of any Council administration, the costs of advertising the making and confirmation of any order, and the costs of any works would be borne by the Council; as would the costs of any public hearing or inquiry and the cost of any appeal to the Secretary of State if the Council initially declined to make an order. These costs – which are estimated to total approximately £3000 - £4000 (excluding legal fees of possibly £4000) - would come out of existing budgets and no growth is required.

Legal:

2. Section 53(5) of the Wildlife and Countryside Act 1981 permits a member of the public to apply to the Council (as Surveying Authority) to modify, by order, the Definitive Map and Statement if they consider it to be incorrect. The Definitive Map is the Council's legal record of public rights of way.
3. The Council has a statutory duty to determine the application and must look at all available evidence when coming to its decision. The decision must focus on whether a public right of way does or does not exist. Ancillary matters, such as issues of privacy, security, and whether the path is needed should be disregarded.
4. Footpath No. 28 was originally added to the Definitive Map and Statement by means of a Definitive Map modification order made in 1995. In July 2004 the footpath was diverted by public path order and in 2010 this order was the subject of a variation order which re-aligned the footpath to its current position. Consequently the current line of the majority of Footpath No. 28 is correctly shown on the Definitive Map through it being created as part of a public path diversion order. However, the Council's legal advice indicates that as these alterations are relatively small and if the original line of Footpath No. 28 can be shown to have been erroneously recorded in the first instance, the current line of the footpath should be deleted from the map.
5. Defra's Rights of Way Circular 1/09 requires that when considering an application to delete a right of way, the evidence must be new and cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made. The evidence must also be of sufficient substance to displace the presumption that the Definitive Map is correct and this evidence must be cogent (compelling).
6. If an order to delete Footpath No. 28 was made, this would need to be advertised in a local paper and on-site. An objection period of at least five weeks would then ensue, during which anybody could object to the order. Given the user-evidence history of the path, objectors would probably end up being heard at a local public inquiry.
7. If the Council chooses not to make an order to delete the footpath, the applicant would most likely exercise his right to appeal the decision to the Secretary of State for Environment, Food, and Rural Affairs. The Secretary of State could, if so minded, direct the Council to make an order to delete the footpath. Such an order would again require publicising and would again be likely to receive objections.

Risk Management:

8. The existence of Maulden Footpath No. 28 has been disputed by the applicant, who for 20 years has been the owner of the majority of the land over which the footpath runs. The actions of the former County Council and Mid-Beds District Council, in dealing with this footpath, have been the subject of at least seven complaints to the Local Government Ombudsman (“LGO”) by not only the supporters of any attempt to extinguish the footpath, but also by those seeking to retain it. None of the complaints of maladministration by either Council were upheld.
9. Mr. Bowers’ application to delete Maulden Footpath No. 28 has the support of the Police¹, Maulden Parish Council, the local ward members, and local MP, Mrs. Nadine Dorries. The application does not have the support of local and national user-groups however, which treat this long-running case as a *cause célèbre*. Central Bedfordshire Council, as the Surveying Authority for the Definitive Map and Statement has a duty to act impartially and to determine the application solely on the evidence of whether the footpath does, or does not, exist and consequently has to disregard local views as to whether the footpath is suitable or desirable.
10. The long-standing dispute between the various parties has so far resulted in five legal orders, three public inquiries, and three prosecutions. Consequently, the Council’s decision is likely to receive significant press interest (the case was keenly followed by the Open Spaces Society who have given this matter national coverage). In summary, the key risks to the Council are:
 - Reputational risks,
 - Risk of failure to discharge statutory responsibilities and legislative issues,
 - Risk of further challenge/appeal/legal action/judicial review, or risk of legal action being taken against officers of the former County Council or Central Bedfordshire Council.

Staffing (including Trades Unions):

11. Not Applicable.

Equalities/Human Rights:

12. Section 6 of the Human Rights Act 1998 states it is unlawful of the Council to act in a way which is incompatible with a Convention right unless, as the result of one or more provisions of primary legislation, the authority could not have acted differently; or in the case of one or more provisions of primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

¹ The Police’s national Secured by Design guidelines state that “public footpaths should not... ..provide access to gardens, rear yards, or dwellings as these have been proven to generate crime...” and so, by default, the Police support any extinguishment of a public right of way through any domestic property.

13. It has been determined in court cases that modification order determinations have no human rights implications. When the Council determines a modification order application made under the primary legislation of the Wildlife and Countryside Act it is exempted from having to adhere to Section 6(1) of the Human Rights Act 1998 when coming to its decision. This is because the committee is only concerned in the evaluation of the evidence to show whether public rights do, or not, exist. The Development Management Committee, in coming to its decision based on the evidence at hand will have acted as required by the primary legislation and thus in accordance with the 1998 Act.
14. The recommendations in the report would not affect the diversity of those entitled to use the right of way and would not directly impact on the use of the way by any section of the public.

Public Health

15. Not applicable

Community Safety:

16. The report proposes that Maulden Footpath No. 28 be retained from Clophill Road to its junction with Bridleway No. 24. Use of the footpath by local residents removes the requirement for pedestrians to use a bridleway which has occasional equestrian, cycle, and vehicular traffic. Footpath No. 28 has a junction with Clophill Road, Maulden. The road is straight with a footway on the opposite side. Were the footpath to be deleted, walkers would either have to walk in the road for some 43 metres between points A -C or to walk along the footway on the southern side of Clophill Road to cross at the nearby three-way road junction. The Council's Senior Traffic and Safety Engineer has appraised both the current and alternative routes on Clophill Road and considers both to have similar low levels of risk – however, crossing away from the road junction would help to minimise any inherent risk. A road-side sign has also been erected to draw attention to the footpath. Walkers using Footpath No. 28 are constrained within a narrow path between 1.1 and 1.6 metres wide and so would have little space to avoid unauthorised cyclists or an aggressive dog. A gate has been installed at the request of the land owner, Mr. Bowers, to deter cycle use of the footpath. By contrast, Bridleway No. 24 is wider with a surfaced width of between 2.5 and 3.5 metres (measured verge-verge) but pedestrian use is shared with cyclists, equestrians, and motor vehicles. No incidents have been reported on either path.

Sustainability:

17. Not Applicable.

Procurement:

18. Not applicable.

RECOMMENDATION:

The Committee is asked to:

- 1. Refuse the application by Mr. Alan Bowers to make an order under Section 53(2) of the Wildlife and Countryside Act 1981 to delete Footpath No. 28 under Section 53(3)(c)(iii) of the Act because no new substantive and cogent evidence has been discovered which demonstrates on the balance of probability that a valid non-intention to dedicate existed during the period 1936 – 1956.**

Introduction

19. In 1989 the applicant, Mr. Alan Bowers, purchased a plot of land off Clophill Road, Maulden. In 1992 he fenced off the land and locked the access gate. In 1994 Mrs. Izzard, his neighbour, subsequently applied to the former County Council for a Definitive Map modification order; Mrs. Izzard claimed that a public footpath existed over the line of what was a narrow track used by the previous owner, Mr. Cecil Sharp, as an occupation way through his market garden.
20. In September 1995 the former County Council made a Definitive Map Modification Order to add Maulden Footpath No. 28 to the Definitive Map and Statement, based upon evidence of public use of the route. Mr. Bowers objected to the modification order which was subsequently heard by an independent Inspector using a process based on exchanges of correspondence. The 1995 order was confirmed in 1997 by an independent Inspector appointed by the Secretary of State for the Environment, by which time Mr. Bowers had built his house, No. 123b Clophill Road, over the line of the footpath.
21. Since 1997 Mr. Bowers has applied three times for Footpath No. 28 to be extinguished. The former Mid-Beds District Council made two extinguishment orders: one under the Town and Country Planning Act 1990 in March 1998; and one under the Highways Act 1980 in September 2000. Neither order was confirmed by independent Inspectors following public inquiries so the footpath remains on the map. Appendix F (F.8-F.16) details the former County Council's involvement in these orders. Mr. Bowers' third application to extinguish the footpath was submitted to the former Bedfordshire County Council in 2004 and is the subject of two further agenda items put to this sitting of the Development Management Committee ("the Committee").
22. In October 2008, at the suggestion of former County Council officers, Mr. Bowers submitted an application to delete Footpath No. 28 as he held the view that it ought not to be shown on the Definitive Map. However, Mr. Bowers did not supply any evidence to support his application until March 2009. The evidence consisted of nine signed statements by people who knew Mr. Bowers or the previous owner of the land, Mr. Cecil Sharp, to the effect that the path was not a right of way. In early 2012 Mr. Bowers submitted a further six statements. The 15 statements of non-use of the path comprise

new evidence which was not considered by the former County Council when it considered the matter in 1995.

Legal and Policy considerations

23. Section 53(5) of the Wildlife and Countryside Act 1981 enables a member of the public to apply to the Council if they consider that the Definitive Map and Statement, which is the Council's legal record of public rights of way, needs modifying to correct an error or omission. The applicant must support their application with evidence. If the evidence is sufficient the Council has a duty to make an order to modify the Definitive Map and Statement.
24. Mr. Bowers has applied to delete a Footpath No. 28 from the map and statement. Mr. Bowers wishes to have Footpath No. 28 deleted from the Definitive Map and Statement because he believes that the public use considered by the former County Council and Inspector for the original 1998 modification order either did not happen, or if it did happen, it could not have resulted in a dedication of public rights – and consequently the current footpath is recorded erroneously. Defra Circular 1/09 states that the evidence necessary to delete a path under the Wildlife and Countryside Act must be new and not previously considered by the authority; it must be sufficient to displace the presumption that the Definitive Map and Statement is correct; and thirdly that the evidence must be cogent (i.e. compelling).
25. The non-user evidence supplied by Mr. Bowers in March 2009 and heard at interview in 2012 has not previously been considered by the former County Council, which made the 1995 Definitive Map modification order, or by the Inspector appointed by the Secretary of State for the Environment who confirmed the order. Consequently the evidence can be considered to be “new” evidence to trigger a fresh investigation – the findings of which are detailed in this report.
26. The fact that the original user evidence was re-evaluated some 16 years ago by an independent Inspector means that any new evidence must be sufficiently compelling to not only overturn the presumption that the Definitive Map and Statement is correct, but also overturn the findings of the Inspector who confirmed the order.
27. Defra's Rights of Way Circular 1/09 states that where an applicant wishes to delete a right of way it is for them to prove the map and statement requires such a modification. The authority must investigate the subject of the application but it is not required to prove that the map and statement are correct (see Section B.9 at Appendix B).

Land ownership

28. Prior to June 1911 the land in question was owned by the Duke of Bedford. This was sold at auction and purchased by an unknown person; with that part to the west of Footpath No. 28 being made into a series of allotments. By 1925 the land over which Footpath No. 28 runs was in the ownership of the Izzard family and it remained so until Messrs. Cecil and Alfred Sharp purchased the land in 1946 for a market garden. In 1956 Mr. Cecil Sharp became the outright

owner of the land affected by the footpath.

29. In December 1989 Mr. Alan Bowers bought the market garden land from Mr. Sharp. In 1990 Mr. Sharp sold No. 123 Clophill Road to a Mr. Brown who in turn sold the plot now occupied by 123b Clophill Road to Mr. Bowers in October 1993. In November 1995 Mr. Bowers transferred a small portion of the land at the intersection of Bridleway No. 24 and Footpath No. 28 to Mr. & Mrs. Worseley. This small land parcel is currently owned by Mr. & Mrs. Tebbutt of 125a Clophill Road (see Appendix A).

Historic Evidence

30. The Maulden Parliamentary Inclosure Award does not refer to Maulden Footpath No. 28. Early privately produced plans similarly do not record the line of the footpath. This though is primarily due to the small scale of most maps and the fact that many were produced for users of carriages or horses, rather than walkers.
31. The 1st edition of the Ordnance Survey's 25":1 mile map of 1883 records a track along the original line of Footpath No. 28 as well as the brick "Pound" by the roadside – see Appendix E for extracts from a variety of maps. The 1901 2nd edition of this map also records the track, this time with the annotation "F.P" indicating it had the characteristics of a permanent footpath. Whether this path was private or public cannot be ascertained though. With the exception of the Ordnance Survey's 1938-1950 6 inch:1 mile map, all the maps looked at up to the 6" map of 1991 record the physical presence of a defined track along the alignment of Footpath No. 28.
32. There is no historical documentary evidence that indicates a statutory creation of public rights over what is now Footpath No. 28. Evidence of public rights must therefore come from public use of the footpath, leading to a presumption or inference of a dedication of public rights along the path. Aerial photographs taken in 1947 and 1976 corroborate the physical presence of a track on the ground along the routes depicted by the Ordnance Survey maps at this time which the public could have used.

Definitive Map History

33. In c.1952 Bedfordshire County Council asked Maulden Parish Council to undertake a survey of all the paths it considered public as the first step towards creating a Definitive Map of Public Rights of Way under the National Parks and Access to the Countryside Act 1949. Maulden Parish Council recorded on its survey map a footpath (path "J") along what is now the line of Footpath No. 28. This path however was then crossed through with an "X" – see Section E.14 at Appendix E.
34. In the accompanying survey statement, under Path No. 23 which was a bridleway, the footpath "J" was described in an addendum as:
- "At the point near the bungalows occupied by Sharman and Izzard the bridleroad No. 23 is joined by a footpath which leads from this point through the adjoining land in a southerly direction which [sic] it joins the main Clophill

Road near the Hurdle Barn [the Pound]”

35. The Draft Map of Public Rights of Way was published in April 1953. No right of way was recorded along what is now Footpath No. 28. However, what was then Footpath No. 24 was recorded along the lane currently occupied by Bridleway No. 24. The statement for Footpath No. 24 reads:

“It starts: from Bridle Road No. 23 at a point near the bungalow occupied by Sharman & Izzard and leads through the adjoining land in a southerly direction directly and joins the main Clophill Road near the Hurdle Barn.”
36. The discrepancy between the mapped route and text description of Footpath No. 24 caused some confusion as to the actual legal line of the path. A 1956 note of a telephone conversation between F. Roberts of the former County Council and a Mr. H. Robinson records the agreement that the route of the Footpath No. 24 was along the lane now occupied by Bridleway No. 24.
37. The Modified Draft and Provision Maps of 1963 recorded changes made to the Draft Map by a number of local hearings and inquiries. These maps show that Footpath No. 24 had been upgraded to its current bridleway status; however, no footpath was shown along the current line of Footpath No. 28 – see Appendix E.
38. The 1964 Definitive Map recorded Bridleway No. 24 along the lane, but did not record the presence of any footpath. However, the Definitive Statement continues to record Bridleway No. 24 as a footpath passing along approximately the route of Footpath No. 28 through Mr. Bowers’ property.
39. In 1995 the former County Council made a Definitive Map modification order to add Footpath No. 28 to the Definitive Map and Statement. The order was made on the basis of evidence contained within 36 submitted user evidence forms and 16 subsequent interviews. The forms were received by the former County Council in two batches, the first being primarily from relatives of the applicant, Mrs. Izzard, whose family had owned the land before 1946, and the second from local residents after Mrs. Izzard was prompted by a Council officer to submit additional evidence from non-relatives as these would strengthen her application. The forms and interviews gave a picture of regular public use of Footpath No. 28 between 1907 and 1992. Two periods of interruption of the footpath were identified: the first in 1956, and the second in 1992 which precipitated the modification order application. Following objections to the order by Mr. Bowers, the order was forwarded to the Secretary of State for the Environment for confirmation. After an exchange of correspondence between the Planning Inspectorate and the various parties involved, the order was confirmed by an independent Inspector on behalf of the Secretary of State for the Environment in August 1997. By this time Mr. Bowers had built his house, No. 123b Clophill Road, over the line of the added footpath. The Inspector’s decision is summarised below at Section 52.
40. Mr. Bowers initially applied to divert the footpath, however the former Mid-Beds District Council refused to approve the application as it affected an (at the time) unmapped footpath and sought to provide an alternative route over an existing right of way. Mr. Bowers then applied twice to the former District

Council for Footpath No. 28 to be extinguished. The former District Council made two extinguishment orders: one under the Town and Country Planning Act in March 1998; and one under the Highways Act in September 2000. Both orders were not confirmed by independent Inspectors following public inquiries in February 1999 and June 2001 respectively (see Appendix F) and so the footpath was retained on the map.

41. In July 2004 the former County Council made a public path diversion order to divert Footpath No. 28 out of Mr. Bowers' house onto a route down the western side of the property. Mr. Bowers, the local Parish Council, and 163 individuals objected to the diversion order. Following a public inquiry, an Independent Inspector confirmed the diversion order in June 2006.
42. In September 2004 Mr. Bowers applied to the former County Council for public path extinguishment order under the Highways Act 1980. This application is the subject of two further agenda items at this sitting of the Development Management Committee.
43. Following the demolition in 2008 of the roadside brick storage building (known variously as "the Hurdle Barn" or "Pound" – hereafter "the Pound") situated next to Footpath No. 28, the route of the 2004 diversion order was altered by a variation order made and confirmed in 2010.

Actions of the former Bedfordshire County Council

44. Mr. Alan Bowers, the applicant, has made several allegations concerning:
 - (a) How officers of the former County Council gathered the evidence for the original 1995 Definitive Map Modification Order;
 - (b) The position of the former County Council and its officers in relation to the two extinguishment orders made by the former District Council;
 - (c) The actions of former County Council's Members and officers in relation to how the authority dealt with the footpath in the period 2000-2003; and
 - (d) The relationship between former County Council officers and user-groups.

These allegations are addressed in Appendix F to this report – the inclusion of which was requested by both Mr. Bowers and Cllr. Paul Duckett.

User Evidence

45. Mr. Bowers supplied 15 statements from people who know the land or the previous owner, Mr. Cecil Sharp. Several of these people are also known to Mr. Bowers as relatives, friends or acquaintances. These witnesses all attest to their non-use of the footpath. The periods covered by the non-users vary but are between 1950 - 2010.
46. The experiences of the non-user witnesses also varies considerably, from somebody employed to work a neighbouring field, through to friends of Mr. Cecil Sharp and members of the local parish council, to somebody who passed the entrance to the market garden on the way to school as a child.

47. The recollections of the non-users are that Footpath No. 28 was not used as a public footpath, but rather was an occupation track used by the Sharps for the purposes of their market gardening. Two or three other people did use the path – principally Mrs. Hilda Izzard and Mr. Jack Williams. This use was thought by the non-users to be with the permission of Mr. Cecil Sharp.
48. At interview, none of the non-users could recall anybody having been challenged by Mr. Sharp. Most recalled a farm gate by the roadside, although only one non-user stated it ever being locked. Several of the people interviewed recalled that Mr. Cecil Sharp was heavily involved in the local Methodist Chapel and youth group and so often had children visiting the property and potentially using the footpath. As such, this would have been as guests rather than “as of right”.
49. A number of the non-users interviewed have been members of Maulden Parish Council and have stated that whenever rights of way matters arose at parish council meetings Mr. Cecil Sharp would declare that his track wasn’t a public footpath. There is, however, no record of any such statement within the parish council minutes for the period 1936 -1974. One non-user also recalls Mr. Cecil Sharp stating he intended to lock his gate once a week against a potential claim for a footpath. Other non-users also recalled Mr. Sharp’s apparent eagerness to go and intercept anybody he saw using the footpath.
50. The evidence of public use of Footpath No. 28 comes from the original evidence forms and statements submitted as part of the original claim for the 1995 definitive map modification order. Six of these users are related to the applicant of the original 1995 Definitive Map modification order, Mrs. Izzard, and consequently their use of the footpath prior to 1946 when the land was sold by the Izzards to the Sharps has to be disregarded as this use was “by private right” rather than “as of right”. Similarly, one other user was a relative of Mr. Sharp and so her use after 1946 should be disregarded.
51. Those members of the public who submitted user evidence forms and were subsequently interviewed by the former County Council about their use of the footpath have described public use of Footpath No. 28 from c.1907 through to 1992. Several of the users report that the route was used regularly except for one or two weeks in 1956 when Mr. Cecil Sharp had locked the gate and challenged users and turned them back. I have taken this to be the first calling into question of the public’s right to use the footpath. Most of the witnesses also commented on Mr. Bowers’ more recent blocking of the footpath in June 1992 which precipitated the claim for a footpath and subsequent modification order.
52. The inspector appointed by the Secretary of State to hear the 1995 modification order identified two relevant 20 year periods of public use - one preceding each calling into question; these were: 1936 – 1956 and 1972 – 1992. Thirty-three users stated that their use was for all or part of the 20 year period prior to Mr. Alan Bowers’ fencing of the path in 1992. Nineteen users stated that their use was for all or part of the 20 year period prior to Mr. Cecil Sharp’s challenges in 1956: 9 users prior to 1946 (excluding the Izzard family) and 18 users after 1946 (excluding the Sharp family). The Inspector found that public use within each of these relevant periods was “as of right” – that is

without permission, force or stealth and that use was by the public at large. The Inspector therefore concluded that the dedication of a public right of way on foot could be deemed to have occurred in either of these two relevant periods. Dedication in the earlier period would, of course, negate the requirement to deem that dedication had occurred in the later period.

53. The earliest recollections of users indicate that the footpath was used in preference to the nearby lane occupied by Bridleway No. 24 owing to the poor condition of the lane's surface and flooding problems. In 1987 Mr. Bowers and the former County Council jointly contributed to improving the lane's surface. This is evident from the later statements of the non-users who reported better surface conditions on the bridleway and a tendency for it to only flood at the road junction.
54. Many of the users recall that a farm gate existed at the roadside and that a stile of one form or another existed at the northern end of the footpath for many years before eventually becoming a gap by c.1963 – although this may have been replaced by another stile at a later date.
55. It would appear, historically, that Footpath No. 28 was used by local villagers to access Maulden Woods for the purposes of collecting firewood produced as a by-product of the pit-prop industry which existed prior to World War II. Other uses of the path were for recreation and as a route to chapel. Consequently it is likely that many, if not all the locals walked this route on a regular basis. It appears that several of the users either worked for, or were related to each other or to the owners of the land. This is probably not an unusual situation for a small pre-war hamlet and consequently I consider that use was by the public at large.
56. Mr. Cecil Sharp's attitude to public use of the footpath across his market garden appears to have varied considerably with time; ranging between assuring some users that they and their family could use the path along with other villagers², through tolerating use or granting permission, to locking gates, challenging walkers, and stating there was no public right of way. It does seem, however, that from c.1956 through to at least the mid-1980s, Mr. Sharp acted in a manner that was generally consistent with a non-intention to dedicate the path as a public right of way – even though this non-intention appears to have not always been made apparent to every user of the footpath. However, prior to 1956 there is no evidence of any actions by Mr. Sharp to indicate that at this time he had no intention of dedicating a right of way over his land.

Consultations

57. In January 2012, Central Bedfordshire Council simultaneously consulted on all three of Mr. Bowers' applications. Several of the responses received gave a broad response rather than concentrating on those aspects relevant to each application. In such cases, those aspects of a consultees' response which reflect their general views are given below.

² User evidence form completed by Mrs. Margaret Morison – see Appendix C.
Non-Executive report template August 2011

58. Mr. Alan Bowers, the applicant, has been supplied with drafts of this report and has commented in detail on them. Where relevant to the evidence of whether public rights do or do not exist, his comments have been included in the report and appendices thereto. At the request of Mr. Bowers and Cllr. Duckett, details of the former County Council's democratic and investigative processes have also been included at Appendix F.
59. Mr. & Mrs. Tebbutt of 125a Clophill Road own a small parking area on the southern side of Bridleway No. 24 which is crossed by the northern-most 10 metres of Footpath No. 28 (near point B on the plan at Appendix A). Although they were never consulted by Mr. Bowers in the statutory manner when he originally applied, they were consulted on the proposed deletion in November 2012. Consequently I do not consider their rights to comment on or object to the proposal have been prejudiced. Mr. Tebbutt responded on 16-11-2012 stating "...I have no real strong view in favour of the footpath remaining as it was not in existence when we moved to this address... ..don't get me wrong I will be glad to see the end of the footpath...". Mr. Tebbutt added to his comments on 19-11-2012, stating:"... I really have no view either way on the up keep of it or indeed its existence or non existence as the case may be - my comments were merely an observation that it is really a couple of walkers and my kids using it which really deems it pointless . I hope this information is of some help in bringing this to a conclusion - a conclusion which really does not effect us at 125A which ever way it goes...".
60. In response,- the former County Council made a Definitive Map Modification Order in 1995 to record the existence of the footpath based on a presumed dedication in potentially 1936. However, the path had not been usable since before 1995 until a 2009 Magistrates' Court order forced Mr. Bowers to remove a number of obstructions on the footpath.
61. Maulden Parish Council was consulted but has not commented directly on the deletion of the footpath. It has, however, responded to a parallel consultation on the extinguishment of the footpath. In its response the parish council stated that it "...feels very strongly that this footpath should be extinguished on the grounds that it is unnecessary and supports Mr. Bowers and your Council in an application to the Magistrates' Court for an extinguishment order...".
62. Mrs. Sylvia McParlin of No. 123 Clophill Road, whose property abuts Footpath No. 28, was consulted and wrote a letter in support of the deletion, stating "...The access to the path is on a main road whereby you step straight out onto the main road, as no path exists on that side. Cars stop over the entrance thus blocking the view of oncoming traffic....".
63. Mr. & Mrs. Fenton of No. 121 Clophill Road, whose property abuts the northern half of Footpath No. 28 has been consulted but has not yet responded.
64. The Ramblers was consulted and in its response, argued that deletion of the path would detrimentally affect the local public rights of way network and would increase the risk of pedestrian-vehicle conflict.

65. In response to the above – case law³ has established that the need for a right of way, and issues of safety or convenience are not matters that can be considered when establishing whether a public right does or does not exist and consequently the above comments ought to be disregarded.
66. The three local ward members were consulted. Cllr. Blair responded stating “...I can only say that on the information I have been given, I have to agree with Mr. Bowers that the original DMMO should never have been made, since a public right of way never previously existed. By various means, it appears that a simple work access route was somehow turned into a footpath based upon very questionable evidence – clearly a situation acknowledged by Mid-Beds District Council when they made their subsequently thwarted extinguishment orders....”.
67. Cllr. Smith responded stating “...I can't see anything wrong with the deletion of this footpath, especially as it simply joins an existing bridleway just behind the houses along Clophill Road....”.
68. Cllr. Duckett responded, stating “...I wholly support this deletion as it is a path that goes nowhere and serves no purpose....”.
69. In response – the Ward Members raise a number of points. Cllr. Blair's observation that the footpath “never previously existed” is correct in that there is no evidence of a historical statutory creation of the footpath. However, use of the route by members of the public between 1936 and 1956 did enable the former County Council to deem that Mr. Sharp had, perhaps unwittingly, dedicated the route as a public footpath during this period. The evidence used was scrutinised by the former County Council's Definitive Map Officers, by members of the former County Council's Rights of Way Sub-committee, and by an independent Inspector appointed by the Secretary of State for the Environment. Cllrs. Smith and Duckett have also commented on the need and purpose of the footpath. The Mayhew (1992) case established that only evidence of whether a public right does or does not exist can be considered when determining a modification order application. Consequently, Members' views that Footpath No. 28 is un-needed or serves no purpose must be disregarded.
70. Mrs. Nadine Dorries M.P. has been supporting Mr. Bowers' case for many years and, in a letter dated 11-1-2012, stated “...There is written evidence in the form of a letter dated 21 October 1957 from the County Surveyor stating that the path was not a public footpath. This was confirmed in searches instigated by Mr. Bowers when he purchased the property... ...I understand that neither the current or previous owners were interviewed , but rather officers conducting the survey encouraged people supporting the creation of a path to speak to them and even paid their legal expenses...”.
71. In response – the 1957 letter from the County Surveyor would have been based on his desk-based inspection of the Draft Map of Rights of Way and possibly other relevant documents, such as the Maulden Inclosure Award. A right of way created through contemporaneous public use would not be

³ Mayhew v Secretary of State for the Environment [1992] QBD
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documented or known to the County Surveyor at the time of his response. Likewise, when Mr. Bowers purchased the land behind his house, no right of way had been recorded on the Definitive Map and so would not be disclosed on a CON29 property search form. The non-depiction of a right of way on the Definitive Map does not preclude its unrecorded existence – indeed Section 56 of the Wildlife and Countryside Act explicitly states that the map is only conclusive as to what is actually shown upon it. The former County Council's actions over acquiring user evidence are addressed at Appendix F; I have found no evidence to suggest that the evidence used to establish the existence of Footpath No. 28 is either invalid or erroneous. The former County Council paid for solicitors to carry out home visits to obtain statutory declarations from three key witnesses (Mrs. Hilda Izzard – then aged 82, Mr. WJ Burgoyne – then aged 76, and Mrs. Florence Huckle – then aged 93). The obtaining of statutory declarations from key witnesses for a public inquiry was standard practice in 1997. Given the age of the witnesses, travelling to meet them seems a practical and reasonable course of action for the former County Council to take.

72. The Open Spaces Society (“OSS”) was consulted and responded stating: “...We strongly oppose its extinguishment or deletion... ...you can only make a definitive map modification order if you discover evidence that the footpath has been incorrectly shown on the definitive map of public rights of way. This cannot be the case since the order was confirmed by your predecessor council in 1995...”.
73. The Bedfordshire Rights of Way Association was consulted and in its response, it stated that “...Your Council can only make a Definitive Map Modification Order if it discovers evidence to show that Footpath No 28 is incorrectly shown on the Definitive Map. There is no such evidence because the present line of Footpath No 28 appears on the Definitive Map as result of statutory legal processes...”
74. In response – contrary to the views of both the OSS and BRoWA, legal advice obtained by this Council has confirmed that the current route of Footpath No. 28 could be deleted from the Definitive Map if it could be shown that the original line of the footpath ought not to have been recorded – notwithstanding that two Highways Act orders have subsequently been made to slightly vary the route of the original path.

Conclusions

75. There are no historic documents which positively identify the path through Mr. Bowers' land as a public right of way. Aerial photographs and early large-scale Ordnance Survey maps indicate the persistent presence of a non-vehicular route generally along the line of Footpath No. 28 prior to the 2004 diversion order. The route of Footpath No. 28 was initially recorded by Maulden Parish Council in c.1952 but this was not carried over onto any subsequent statutory map. None of the documentary evidence therefore identifies any public right of way along the line of Footpath No. 28.
76. User evidence suggests that the route of Footpath No. 28 has been used since at least 1907. Whilst some use of the route has been by members of the

owners' family, other use has been by the public at large, although in such a small hamlet there is always the potential for some indirect connection between land owner and user.

77. Two distinct events have called into question the public's right to use the path: Mr. Cecil Sharp's challenges in 1956, and Mr. Alan Bowers locking of the gate in 1992. These were identified by the Inspector appointed to hear the 1995 modification order who concluded that 1936 -1956 and 1972 -1992 were the relevant periods and that dedication of the footpath could have occurred in either period.
78. The recent evidence submitted by Mr. Bowers, and the subsequent interviews of non-users has led me to conclude that Mr. Cecil Sharp's actions between 1956 and at least the mid-1980s, although erratic, were sufficient to bring the public's right to use the path into doubt. Consequently I can no longer accept the previous finding of the Inspector with regard to dedication occurring during the later period between 1972 -1992. My investigation however still supports the finding that Footpath No. 28 can be considered, on the balance of probability, to have been dedicated during the earlier period of 1936-1956.
79. The non-user evidence submitted by Mr. Bowers does not provide any direct or indirect evidence of any challenges to public user during the first identified period of 1936 - 1956, nor of any evidence of a non-intention to dedicate the footpath by the Sharps before 1956. This is corroborated by the user evidence submitted for the 1995 modification order application which generally was "as of right". Consequently, Footpath No. 28 can be deemed to have been dedicated at the start of the period 1936 – 1956.
80. The lack of evidence of sufficient substance to displace the statutory presumption that the Definitive Map and Statement is legally conclusive - and correct in recording the dedicated footpath, means that there is no compelling reason to overturn the Inspector's decision to confirm the 1995 modification order adding Footpath No. 28 to the Definitive Map and Statement.

Appendices:

Appendix A – Plan of rights of way

Appendix B – Legal and policy considerations

Appendix C – User and non-user evidence - summaries of statements

Appendix D – Timeline

Appendix E – Historical evidence

Appendix F – The democratic process at the former Bedfordshire County Council