Appendix B

Legal and Policy Considerations

B.1. Section 56 of the Wildlife and Countryside Act 1981 (the "1981 Act") explicitly states that the Definitive Map is conclusive evidence as to the public rights shown upon it, though this is without prejudice to the subsistence of any higher right. The accompanying Definitive Statement is conclusive evidence as to the described position and width of the public right and to any limitation or condition recorded.

B.2. Section 53(5) of the 1981 Act, however, permits any person to apply to Central Bedfordshire Council, as the Surveying Authority for the Definitive Map and Statement, for an order to modify the Definitive Map and Statement under subsection 53(3) of the 1981 Act if they consider these are in error and need correcting.

B.3. Section 53(2) of the 1981 Act places a duty on the Council, as the Surveying Authority, to modify the Definitive Map and Statement upon the occurrence of certain events detailed in Section 53(3) of the 1981 Act. Section 53(3)(c) gives details of some of the events which require the Council to modify the Definitive Map and Statement:

> "53(3)(c) The discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-
>
> (i) *(omitted)*;
>
> (ii) *(omitted)*;
>
> (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map or statement require modification…;"

B.4. Mr. Alan Bowers has applied under Section 53(5) to delete Footpath No. 28 on the ground that it ought not to be recorded on the Definitive Map and Statement. With regards to the deletion of public rights, Defra's Rights of Way Circular 1/09 states at section 4.33:

> "The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this would equally apply to the downgrading of a way with "higher" rights to a way with "lower" rights, as well as complete deletion – will need to fulfil certain stringent requirements. These are that:
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> - the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made.
> - the evidence must be of sufficient substance to displace the presumption that the definitive map is correct;
> - the evidence must be cogent.

> While all three conditions must be met they will be assessed in the order listed. Before deciding to make an order, authorities must take into consideration all other relevant evidence available to them concerning the status of the right of way and they must be satisfied that the evidence shows on the balance of probability that the map or statement should be modified…".

B.5. The requirement that the authority needs to determine an application to delete a right of way after weighing the evidence on the balance of probability is confirmed from the cases of *Todd and another v Secretary of State for the Environment, Food and Rural Affairs [2004] EWHC 1450 (Admin)* and in *Leicestershire County Council, R (on the application of) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin).*

B.6. 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 its being created as part of the statutory process of a public path diversion order. However, the Council's legal advice indicates that as these alterations are relatively small, if the original line of Footpath No. 28 can be shown to have been erroneously recorded then the current line of the footpath should be deleted from the map.

B.7. As stated at Section B.1 above, the Definitive Map and Statement is conclusive evidence of the existence of those rights recorded. However, where there is a discrepancy or contradiction between the map and statement, the case of *R. (ex parte Norfolk County Council) v Secretary of State for Environment, Food, and Rural Affairs(2005)* has held that it is the map that is conclusive evidence of the status and alignment of the right of way. In the event of a review, however, the matter is to be determined by reference to the evidence presented, with neither the map nor the statement having precedence.

B.8. The case of *Morgan v Hertfordshire County Council (1965)* confirmed that even if a public right of way was recorded erroneously on the Definitive Map and Statement, the map was still conclusive evidence of the public's right to use the path so recorded.

B.9. The Definitive Map and Statement is legally conclusive as to the rights shown upon it. Defra's Rights of Way Circular 1/09 states at section 4.34 that:

> "…Applications may be made to an authority under section 53(5) of the 1981 Act to make an order to delete or downgrade a right of way. Where there is such an application, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be downgraded or deleted. The authority is required, by paragraph 3 of Schedule 14 to

the Act, to investigate the matters stated in the application; however it is not for the authority to demonstrate that the map reflects the true rights, but for the applicant to show that the definitive map and statement should be revised to delete or downgrade the way…" (emphasis added).

B.10. Consequently it is the responsibility of the applicant to provide the cogent (compelling) evidence in favour of an order deleting a right of way and for the authority to weigh this evidence against the presumption the Definitive Map and Statement is correct, and not for the authority to defend the conclusiveness of the Definitive Map and Statement as it stands.

B.11. A highway can be created either by statute or can be dedicated by the landowner. Dedication of a highway may be:

a) "Express" - where the owner openly declares that he is dedicating the way as a public highway;

b) "Deemed" - where public user is for a period of 20 years or more. This is regulated by Section 31 of the Highways Act 1980 ("the 1980 Act");

c) "Inferred" - where user has been sufficient to infer that the way has been dedicated as a public highway at common law.

B.12. Where a highway has been dedicated, the dedication must be accepted by the public. This is usually demonstrated by their use of the route.

B.13. Section 31 of the 1980 Act describes how a highway may be deemed to have been dedicated by the landowner - as indicated by long use of the way by the public. It states:

"1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question…

3) Where the owner of the land…

(a) has erected… …a notice inconsistent with the dedication of the way as a highway…

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

4) In the case of land in possession of a tenant… …[the owner] shall, notwithstanding the existence of the tenancy, have a right to place and maintain such a notice…

5) Where a notice… …is subsequently torn down or defaced, a

notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in absence of proof of a contrary intention, sufficient evidence to negative the intention of… [the landowner] …to dedicate the way as a highway.

6) An owner of land may at any time deposit with the appropriate council…a map… … and… …statement indicating what ways (if any) over the land he admits to having been dedicated as highways… …to the effect that no additional way… …has been dedicated as a highway since the date of the deposit… …[and is] sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway…

(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.

(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.

8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over land as a highway if the existence of a highway would be incompatible with those purposes…

9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less than 20 years…"

B.14. It is important to determine that use of a way by the public has been "as of right", which has been defined, as in the judgment of Pill J. in O'Keefe v. Secretary of State for the Environment (1996), as being "…nec vi, nec clam, nec precario…" which equates to "…without force, without stealth, and without permission…". Use of land by the permission of the owner or on the basis that the user is visiting or in the employment of the landowner would generally mean that the use was not "as of right".

B.15. For a way to be deemed to have been dedicated under the terms of Section 31 the following applies:

- It must have been enjoyed by the public at large and not, for example, only by tenants or employees of the landowner or residents of a particular street. Use must be of sufficient frequency to amount to enjoyment by the public; use by one or two people once or twice a year would not suffice.
- Use of the way must be as of right and not merely with the landowner's permission.

- Use must be without interruption, i.e. without physical challenge by the landowner or someone acting lawfully on the landowner's behalf.
- Use must be for a full period of 20 years counted backwards from the date on which the right of the public to use the way was brought into question.
- The owners must be capable of dedicating a public right of way across the land.
- There must not be sufficient evidence to indicate that the landowner had no intention to dedicate a public right of way over their land. Any evidence of a non-intention to dedicate should be overt and contemporaneous with the use and does not have to be continuous throughout the 20 years of use.

B.16. A dedication at common law does not require a calling into question or for there to be any specific period of public user. At common law, the question of dedication is one of fact. Public user is no more than evidence, and is not conclusive evidence. Any presumption that public user is the result of an earlier dedication can be rebutted.

B.17. The case of Mayhew v Secretary of State for the Environment [1992] QBD considered, amongst other things, what was required to trigger a modification order. In the case, Potts J. stated that:

> "…section 53 [limits] the modifications which ought to be made in consequence of the occurrence of a relevant event to those which would give effect to the rights of way which were found to exist rather than those which might be thought suitable or desirable… …The surveying authority's duty under section 53 was to ascertain public rights of way and to modify the map so that it correctly defined those rights; no more and no less…".

As a consequence of this judgment, the Council, as Surveying Authority, can only consider evidence showing whether a public right of way does or does not exist. Issues of suitability or desirability – and by analogy: privacy, security, and need cannot be considered in establishing what rights, if any, exist when determining whether to make a definitive map modification order.