

Appendix B

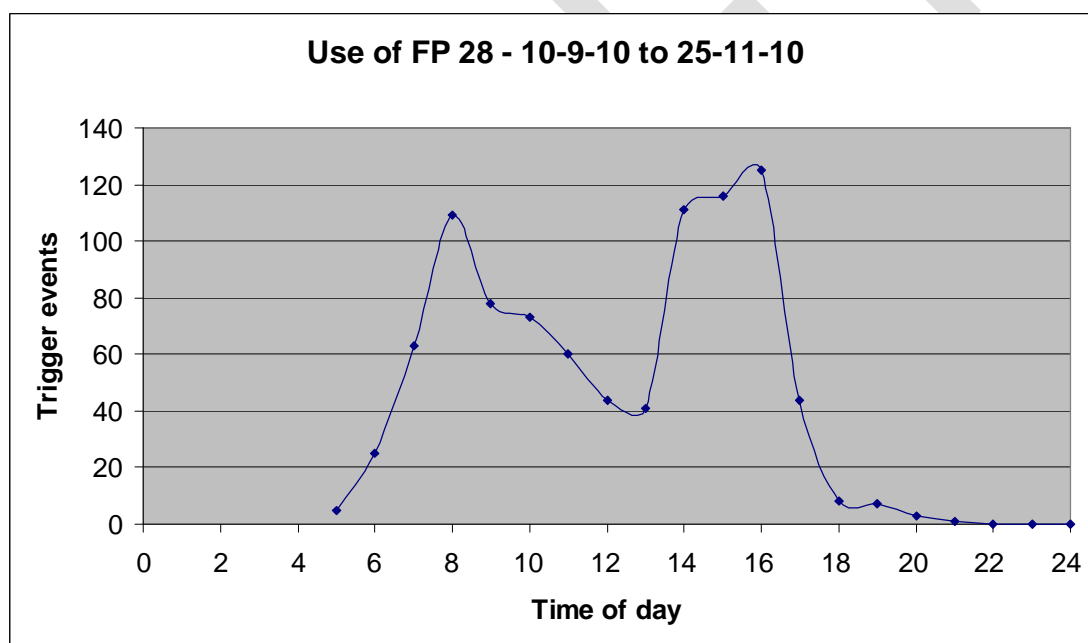
Legal and Policy Considerations

- B.1. Section 118 of the Highways Act 1980 enables Central Bedfordshire Council, as the Highway Authority, to extinguish public footpaths, bridleways, and restricted byways and is paraphrased below:
- (1) Where it appears to a council as respects a footpath, bridleway, or restricted byway in their area... ..that it is expedient that the path or way should be stopped up on the ground that it is no longer needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed by them as an unopposed order, extinguish the public right of way over the path or way...
 - (2) The Secretary of State shall not confirm a public path extinguishment order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied 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...
 - (3) - (4) (omitted)
 - (5) Where... ..proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a... public path diversion order... then, in considering-
 - (a) under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use; or
 - (b) under subsection (2) above to what extent (if any) that the path or way would apart from the order be likely to be used by the public;the council or secretary of state, as the case may be, may have regard to the extent to which the... .. public path diversion order... ..would provide an alternative path or way.
 - (6) For the purposes of subsections (1) and (2) above, any temporary circumstances preventing or diminishing the use of the path or way by the public shall be disregarded.
- B.2. Before the Council makes an extinguishment order under Section 118 of the 1980 Act it has to be satisfied that the path is no longer needed for public use. Footpath No. 28 has been electronically monitored for a total of 363 days between 10-9-2010 and 20-9-2011. During this period the average level of

use was 9.8 trigger events per day (a total of 3540 events). A trigger event is when a person passes along the path past the installed counter. The counter cannot distinguish between members of the public using the right of way and Mr. Bowers or his guests walking along the path. The data captured is summarised below.

Start date	End date	No of days	Number of trigger events	Average daily use
10/09/2010	25/11/2010	76	914	12.0
06/12/2010	16/02/2011	72	590	8.2
16/02/2011	09/05/2011	82	816	10.0
10/05/2011	09/08/2011	91	877	9.6
09/08/2011	20/09/2011	42	343	8.2
10/09/2010	09/08/2011	363	3540	9.8

- B.3. An analysis of the recorded use during the period 10-9-2010 to 25-11-2010 indicates that the two peak periods of use are between 06:00-11:00 and 13:00-16:00 and accounted for 42% and 39% of use respectively. There was no use between 22:00 and 04:00.

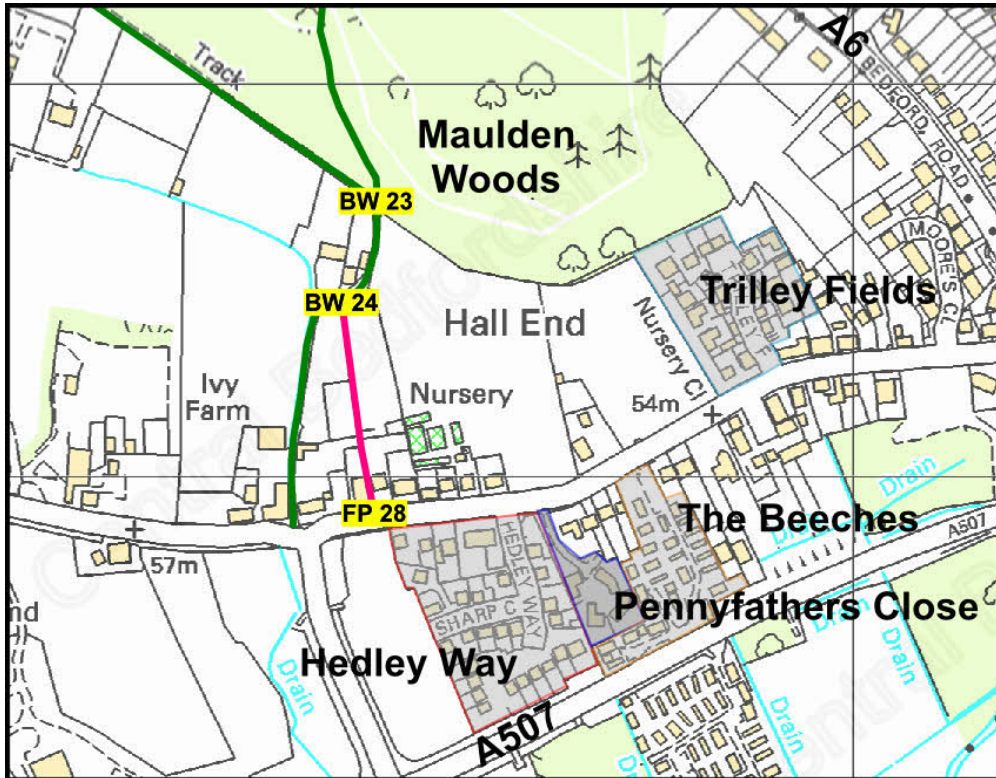


- B.4. The electronic monitoring indicates that Footpath No. 28 is used to a significant degree. Consequently it would be difficult to argue that it is not needed for public use. Were the footpath not extinguished, it is very likely that public use of a similar level would continue in the future.
- B.5. A consideration in determining whether a right of way can be extinguished is whether there is an alternative route available. The junction of Footpath No. 28 with Clophill Road (point A) is some 59 metres from the junction of Bridleway No. 24 with Clophill Road. The distance A-B along Footpath No. 28 is approximately 157 metres. The alternative route to point B via Bridleway No. 24 is approximately 239 metres – an increase in distance of approximately 82 metres. Footpath No. 28 is a well set out path, being bounded between either by panel fencing and brick wall or by post and rail

fencing with gravel or grass surfacing and a width of between 1.1 – 1.6 metres (see Appendix 2). Bridleway No. 24 has some degree of surface dressing and has surfaced width of approximately 2.5-3.5 metres with hedges to either side at its southern end, becoming enclosed by post and rail fencing for its northern half. Whereas the footpath only permits pedestrian use, the bridleway provides equestrian and cycle access to Maulden Woods as well as vehicular access to a small number of properties but appears to not be intensively trafficked.

- B.6. There is 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, shorter 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.
- B.7. Hodgson J. in *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...”.
- B.8. In determining whether an extinguishment order should be confirmed, the Inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs has to have regard to the extent that the path would be used “apart from the order”. The potential future use of the Footpath No. 28 does not preclude the confirmation of an extinguishment order however.
- B.9. This was addressed by Philips J. in the *Barry Stewart* case who stated the following “...One can see this under section 110 (2) : “ The [Secretary of State] shall not confirm ... unless he is satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him that the path would ... be likely to be used by the public ...” — so that confirmation is not necessarily ruled out by the fact that the path is, or is going to be, used to something more than a minimal extent, whereas the test that the Secretary of State has applied, which is that he shall not confirm unless he is satisfied that the path is not needed for public use, precludes confirmation if there is any more than minimal public need: “ need,” as distinct from “ use.” There are cases, however, and to some extent this case is one of them, where the test adopted by the Secretary of State would favour the would-be stopper-up, because it would mean that he could confirm, although the path was likely to be used, if he thought that, despite the fact that it was likely to be used, it was not needed— because, for example, there was another path.” Consequently, it is possible for the Secretary of State to confirm an extinguishment order if he considers that, despite the fact that a path was likely to be used, it was not needed if there was another path that could be used instead.
- B.10. The map overleaf sets out the hinterland to Maulden Bridleway No. 24 and Footpath No. 28. The four recent developments are shaded grey and identified by their principle road name. The developments contain in total about 80 dwellings. Of the four, Pennyfathers Close, The Beeches, and Trilley Fields have all been built since the former District Council made its

extinguishment orders. As can be seen from the map, there is very little development to the west of the footpath. Consequently most pedestrian traffic will approach from the east.



Locations of nearby estates likely to use Footpath No. 28.

- B.11. The Council recognises that Bridleway No. 24 could potentially be utilised as an alternative route – and may already be used in preference by walkers approaching from the west. However, the entrance to the Hedley Way estate is some 95 metres to the east of Bridleway No. 28. Residents of this estate, and of the adjoining Pennyfathers Close and Beeches developments and the nearby Trilley Fields estate are all likely to use Footpath No. 28 as the primary access route to Maulden Woods and, in doing so, would benefit from both its proximity and vehicle-free nature. However, in accordance with the cases of Bernstein and Barry Stewart, the Council considers that members of the public from these developments are unlikely to be significantly disadvantaged by having to use the nearby Bridleway No. 24.
- B.12. Given the evidence that Footpath No. 28 is used to a significant extent and would undoubtedly continue to be used, the Council has to consider, despite the fact that the bridleway would not significantly disadvantage the aforementioned residents, whether it is expedient for an order to be made to extinguish the footpath. There is a strong presumption in favour of not doing so based on the decisions of the two independent Inspectors who heard the 1995 order made under the Town and Country Planning Act 1990 and the 2000 order made under the 1980 Act. In both cases the Inspectors, in determining not to confirm the extinguishment of Footpath No. 28, concluded that Bridleway No. 24 was not a suitable alternative to the footpath. To my knowledge there have not been any significant alterations to the bridleway to

make these conclusions redundant or to warrant the Council considering it expedient to make a new order under the same legislation for the same outcome.

- B.13. Section 26(3A) of the 1980 Act imposes a duty on Central Bedfordshire Council to have regard to any material provisions within a Rights of Way Improvement Plan when determining whether or not to confirm an unopposed creation, diversion or extinguishment order. The proposals do not conflict with the aims of the Council's Outdoor Access Improvement Plan.
- B.14. Section 29 of the 1980 Act imposes a duty on the County 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 creation, extinguishment and diversion orders. The effect of the extinguishment would be to extinguish a fenced-off field edge footpath thus potentially allowing the fence to be removed and a larger area of land to be made available for grazing – should Mr. Bowers so wish.

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