

Meeting: Development Management Committee
Date: 13 February 2013
Subject: The consideration of an application to seek a Magistrates' Court order to stop up Maulden Footpath No. 28 under Section 116 of the Highways Act 1980
Report of: Head of Service for Transport Strategy and Countryside Services
Summary: The report examines the application to seek the stopping up of Maulden Footpath No. 28 by Magistrates' Court order. Members are asked to come to a view on whether the application should be approved or refused in light of evidence of recent use, the legislation contained within the Highways Act 1980, and the Council's adopted policy on such applications.

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Public/Exempt: Public
Wards Affected: Ampthill ward
Function of: Council

CORPORATE IMPLICATIONS

Council Priorities:

This proposal meets the following Council priorities:

- Creating safer communities – by providing a public right of way with a safe crossing point on Clophill Road
- Promoting healthier lifestyles by encouraging use of the countryside by providing easy access to the countryside from local residential developments.

Financial:

1. Section 117 of the Highways Act 1980 ("the Act") empowers anybody to request that the Council makes an application to the Magistrates' Court for a court order to stop up or divert a public right of way. The application to court under Section 116 of the Act is a discretionary function of the Council and consequently the Council may charge any fee it deems reasonable. The fee that an applicant would pay includes: Council administration and officer time, the cost of advertising the making of an application, any legal and court costs, and the costs of any works related to the court order. Where the Council does not make an application, any administration costs already incurred are borne by the authority. Should the Magistrates' Court not make a court order, the applicant

will still be liable for all administration, advertising, legal, and court costs incurred by the Council. Costs for the application are envisaged to total approximately £3000 exclusive of any works.

Legal:

2. The Council can use Section 116 of the Act to apply to the Magistrates' Court for a court order stopping up a public right of way. Defra's Rights of Way Circular 1/09 and the Council's own Applications Policy relating to public rights of way both consider that non-vehicular rights of way should be extinguished by means of an application for a public path extinguishment order – rather than by an application to the Magistrates' Court. Furthermore, the Applications Policy stipulates that a request that the Council applies to the Magistrates' Court for an order to stop up a footpath or bridleway will only be approved if it resolves an acknowledged error or network anomaly, results in a public benefit, or meets the needs of network management or aims of the Council's Outdoor access Improvement Plan. The proposal to stop up Footpath No. 28 would not meet any of these criteria.
3. Independent legal advice obtained by the Council suggests that the Magistrates' Court could not refuse to consider an application made by the Council solely on the basis of the earlier Inspectors' decisions to not confirm the previous two extinguishment orders. However, it is likely that the court, in determining the application, would have regard to these decisions in coming to a view on whether the footpath was unnecessary, and whether a suitable alternative route existed. A decision by the Magistrates' Court to consider the application would not preclude its decision to not make a stopping up order.
4. An application for a stopping up order can only be made if the local parish council gives written consent to the application and Maulden Parish Council has indicated it would do so. A stopping up order would only be made if two Magistrates consider that the right of way is unnecessary for public use and that all of the statutory requirements have been complied with. These requirements include the submission of a written consent by the local parish council and the advertising of the notice of the making of an application to the court.

Risk Management:

5. The existence of Maulden Footpath No. 28 has been disputed by the applicant, who is also the owner of the majority of the land over which the footpath runs, for 20 years. 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 these complaints of maladministration by either Council were upheld.

6. Mr. Bowers' application to stop up 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 Highway Authority, has a duty to act impartially and to determine the application based on the legislative tests of the Act. In doing so it can consider local views as to whether the footpath is needed or necessary.
7. The long-standing dispute between the various parties has so far resulted in five legal orders, three public inquiries, and three prosecutions and a degree of press coverage. Consequently, the Council's decision and any further decision of the Magistrates' Court is likely to receive significant press interest. 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):

8. Not Applicable.

Equalities/Human Rights:

9. Mr. Bowers has requested that the Council applies to the Magistrates' Court for an order stopping up Footpath No. 28 which crosses his property between Clophill Road and Bridleway No. 24. The footpath was originally added to the Definitive Map and Statement, which is the Council's legal record of such rights, in 1997 following a public inquiry into a 1995 Definitive Map Modification Order. This order formally recognised the existence of a previously dedicated public right. The footpath has had its legal line subsequently changed twice in response to building works on the land. The footpath passes along the eastern side of the boundary between Mr. Bowers and his elderly neighbour, Mrs. McParlin. Whilst most of the fence and hedge between Mr. Bowers and Mrs. McParlin is at least 1.8 metres high, there is a short section in front of several of Mrs. McParlin's bungalow's windows which is lower allowing walkers to look into her kitchen and bedroom.
10. Article 8 of the Human Rights Act 1998 relates to the right to respect for private and family life. Section 2 of Article 8 of the Act states that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of (amongst other things) the protection of the rights and freedoms of others. Whilst the stopping up of the footpath would improve the privacy of

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 domestic property.

Mrs. McParlin and possibly improve the security of both her and Mr. Bowers, these improvements must be weighed against the loss of a public right.

11. The 1995 Definitive Map Modification Order which added Footpath No. 28 to the Definitive Map and Statement would have been exempted from the restrictions of the later Human Rights Act as the decision to make the order was made on evidence of the pre-existence of public rights. The decision by the Development Management Committee not to make an application to the Magistrates' Court for a stopping up order would be in accordance with the Council's Rights of Way Applications policy as well as with the Council's duty to protect and assert the public's right to use this right of way.

Public Health

12. Not applicable.

Community Safety:

13. 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:

14. Not Applicable.

Procurement:

15. Not applicable.

RECOMMENDATION(S):

The Committee is asked to:

- 1. Refuse the application by Mr. Alan Bowers for the Council to make an application under Section 116 of the Highways Act 1980 to the Magistrates' Court for a stopping up order for Maulden Footpath No. 28 between points A-B, on the grounds that:**
 - a. The application does not meet any of the criteria in the Council's Rights of Way Applications Policy for making an application to the Magistrates' Court.**
 - b. There is evidence demonstrating that members of the public use the footpath – which provides a pedestrian-only route from the new developments to the south of Clophill Road to the bridleway linking into Maulden Woods and consequently it cannot be considered to be unnecessary.**
 - c. The land occupied by the footpath and the alternative route has not undergone significant change to enable the Council to disregard the earlier decisions by independent Inspectors who concluded that the bridleway was not a suitable alternative to the footpath.**

Introduction

16. In 1989 the applicant, Mr. Alan Bowers purchased a plot of land off Clophill Road, Maulden. His fencing of the land and locking of the access gate resulted in a neighbour applying to the former County Council for the Definitive Map and Statement to be modified by the addition of public footpath.
17. 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. Details of the evidence and actions of the former County Council are given in a separate report within the agenda which addresses Mr. Bowers' parallel application to delete the footpath using the Wildlife and Countryside Act 1981. By late 1995, Mr. Bowers had already applied for and received planning consent to build his new house, No.123b Clophill Road, over the line of the claimed footpath. 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 which time Mr. Bowers had almost finished building his new house.
18. Mr. Bowers was advised by the former County Council to apply to the former Mid-Beds District Council for an extinguishment order. In the end, the former District Council made two extinguishment orders, first under the Town and Country Planning Act 1990 ("the TCP Act") in 1995, and then under the Highways Act in 2000. Both orders to extinguish Footpath No. 28 were objected to by a small number of local residents and by user-groups resulting in two public inquiries. The former County Council appeared at the first (TCP

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Act) inquiry as an interested party and asked that the extinguishment order be modified so that a footpath could be retained within Mr. Bowers' property boundaries. Neither order was ultimately confirmed by the independent Inspectors appointed by the Secretary of State for the reasons discussed at Section 38 below.

19. Following legal advice, the former County Council made a public path diversion order under Section 119 of the Act in July 2004 to divert Footpath No. 28 out of Mr. Bowers' new house onto a route down the western side of his property. Mr. Bowers objected to the order. The Council received 180 other objections. 175 of the responses were copies of a typed proforma adding no individual perspective. Upon contacting these objectors, 16 either claimed they were fraudulent or withdrew their objection when the purpose of the diversion order was explained to them. Contacting objectors is part of the process of preparing an order for forwarding to the Secretary of State for confirmation. The Council has a responsibility to determine the validity and authenticity of objections and to try and seek their withdrawal if possible in accordance with the Defra Rights of Way Circular 1/09 Para. 10.6 "...Once an order has been advertised, local authorities are expected to make every effort to resolve objections and to secure their withdrawal. ...". Consequently all objectors, including the Parish Council, were written to in accordance with this guidance. Overall, 164 people maintained their objections; six of whom were called as witnesses against the 2004 Diversion Order at the ensuing public inquiry. The 2004 Diversion Order was subsequently confirmed in June 2006.
20. In September 2004 Mr. Bowers submitted an application to extinguish Footpath No. 28 either under Section 118 of the Act or at the Magistrates' Court under Section 116. The former County Council had decided that the applications should not be processed until the (as then) current 2004 public path diversion order was completed and the route was opened up and made available for public use. The footpath was finally opened up and made available in 2009 following the prosecution of Mr. Bowers' in the Magistrates' Court; this was begun by the former County Council and concluded by its successor Central Bedfordshire Council.
21. Following the removal of a brick storage building (known variously as "the Hurdle Barn" or "Pound") next to the footpath in 2008, the line of the 2004 diversion order was modified by a variation order made and confirmed in 2010.
22. The current route of Maulden Footpath No. 28 starts at the south-western corner of 123b Clophill Road at the roadside and proceeds due north along an unsurfaced strip approximately 1.1 - 1.6 metres wide (see photographs at Appendix C). The footpath is fenced-off to either side with (generally) 6 feet high panel fencing where it passes between the front gardens, houses, and main rear gardens of Nos. 123 and 123b. To the north of the more formal rear gardens of Nos. 123 and 123b the land is set to paddock. Here the footpath continues due North with a grassed surface between post and rail fencing until a gate where the footpath then crosses the edge of a small parking area to its junction with Bridleway No. 24 at point B (see Appendix A). This gate was installed after

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repeated requests² by Mr. Bowers for a structure to deter cyclists from using the path. Mr. Bowers subsequently modified his request so that the structure would be sited to help prevent children running into Clophill Road. However, The Council's Safety Officer did not identify the necessity and, as the requested roadside location proved unsuitable, the gate was eventually installed at the junction with the bridleway to fulfil the original purpose.

23. The level of public use on Footpath No. 28 has been monitored electronically between September 2010 and September 2011 as part of the condition of processing Mr. Bowers' application. Despite technical problems with the equipment which interrupted and curtailed the monitoring period, the data shows that the footpath was used on average 9.8 times per day over a 363 day period, see B.12 - B.14 at Appendix B.
24. Following Mr. Bowers' two unsuccessful attempts to have Footpath No. 28 extinguished, officers at the former County Council suggested that he apply to try and get the footpath deleted by means of a Definitive Map modification order; the grounds of the application being that the original 1996 modification order failed to consider evidence showing the footpath did not exist. Mr. Bowers has also applied to have Footpath No. 28 extinguished on the ground that it is not needed for public use. These applications are the subject of two other agenda items put to this sitting of the Development Management Committee.

Legal and policy considerations

25. Section 117 of the Act enables a member of the public to request that the Council, as Highway Authority, makes an application to the Magistrates' Court under Section 116 of that Act for a court order to stop up a highway. The Council can only apply to the Magistrates' Court if the local parish council gives written support to the application. Maulden Parish Council has already indicated that it supports the proposed stopping up. Two Magistrates must consider that the highway is unnecessary for public use for a stopping up order to be made and that all of the statutory requirements have been complied with. These requirements include the submission of written consent by the local parish council and the advertising of the notice of making an application to the court.
26. Whilst it is ultimately the decision of the Magistrates' Court as to whether the footpath is unnecessary for public use, the Development Management Committee should have regard to this legislative test when determining whether an application to the Magistrates' Court for an order should be made.
27. Central Bedfordshire Council's adopted Rights of Way Applications Policy ("the Applications Policy") specifies that it is the decision of the Rights of Way Team Leader whether to take a case to the Magistrates' Court. However, given the level of local and national interest in this case, it is appropriate for the Development Management Committee, under the Central Bedfordshire Council's Constitution (E2 at Annex C), to determine this particular

² A copy of Mr. Bowers' initial letter is included at Appendix D of the accompanying agenda item relating to his application to have Footpath No. 28 extinguished under S.118 of the Highways Act 1980.

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application³.

28. The requirements of the Applications Policy for an application under Section 117 of the Act to the Council requesting that it apply to the Magistrates' Court for a stopping up order are given in full at Appendix B; the main criteria are summarised below.
29. An application under Section 117 of the Act should be refused if an application for a similar result has been refused by the Council, abandoned or an order not confirmed within the last five years – unless there have been significant changes to permit the making of a further Council-generated application to the Magistrates' Court. No such application has been determined within the last five years; Mr. Bowers' parallel application to extinguish the footpath is not affected by this requirement of the Applications Policy, nor does it prevent the Committee approving his Magistrates' Court application if the other criteria are met.
30. The Applications Policy has a presumption that an application to stop up a footpath, bridleway, or restricted byway will be dealt with by means of an application under Section 118 of the Highways Act – rather than by application to the Magistrates' Court. This presumption reflects Government guidance⁴. For this presumption to be overturned, and the application approved, the application must meet one or more of the following criteria:
 - a. Where the proposal would result in a recreational benefit to the public;
 - b. Where the proposal would resolve a Definitive Map anomaly;
 - c. Where the proposal would rectify an acknowledged error of this or another local authority;
 - d. Where the proposal is in the interests of the efficient management of the rights of way network;
 - e. Where the proposal would contribute to the implementation of the Outdoor Access Improvement Plan;
31. Addressing the above criteria, it is clear that the stopping up of Footpath No. 28 would not provide a recreational benefit to the public, nor would it resolve a Definitive Map anomaly in the local public rights of way network. Whilst the sections of footpath and bridleway from Clophill Road can be considered parallel routes which meet at the same point (Point B at Appendix A), they have different statuses and consequently are not considered to be duplicates or anomalous.
32. Neither the former County Council nor Central Bedfordshire Council has made an error (legal or administrative) which would meet criterion (c) above. The parallel agenda item relating to Mr. Bowers' application for a Definitive Map Modification Order to delete the footpath reaffirms the findings of both the former County Council and the independent Inspector appointed by the Secretary of State for the Environment that Footpath No. 28 should be

³ The determination of Mr. Bowers' Section 117 application should not set a precedent for the determination of future applications elsewhere in the Authority's area.

⁴ Department for the Environment, Food and Rural Affairs Rights of Way Circular 1/09

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recorded on the Definitive Map. Consequently there is no acknowledged error in the Definitive Map and Statement – although Mr. Bowers disputes this finding. However, if Members consider that the footpath is recorded incorrectly, the appropriate course of action is to seek the correction of the map through the making of a Definitive Map modification order to delete the footpath.

33. The Countryside Access Team manages the public rights of way network and considers that Footpath No. 28 is a useful part of its network and should be retained as it provides a pedestrian only alternative to the nearby bridleway. The Council's Outdoor Access Improvement Plan is currently being re-written. Until the new plan is adopted the old plan is still in force. The stopping up of the footpath does not contribute to the implementation of any identified action within either the old plan or the new one.
34. It is my view, that Mr. Bowers' application does not meet any of the above criteria for permitting the Council to make an application to the Magistrates' Court. The case of Ashbrook (2002) related to the failure of Essex County Council to take material considerations of its own policies into account when determining whether to make an order (see Sections B.7-B.9 at Appendix B). Applying this case to Mr. Bowers' application requires Members of the Committee to evaluate all of the criteria within Section 7 of the Applications Policy before coming to a view on whether the Council can apply to the Magistrates' Court for a stopping up order. As mentioned in Sections 26 above and 36 below, the Committee also needs to have regard to whether the application meets the legislative test of Section 116 – that Footpath No. 28 is unnecessary for public use.
35. Mr. Tebbutt owns the northern-most section of the footpath and is indifferent to whether the path is stopped up or retained. He would most likely consent to the stopping up if asked to do so. Mr. Bowers' application has received written consent from Mrs. McParlin whose property abuts the footpath and from Maulden Parish Council which has long supported the extinguishment of the footpath. The application must also be approved by the Council.
36. The Council has sought independent legal advice in respect of Mr. Bowers' application under Section 117 of the Act. The advice indicates that there is no duty imposed on the Council to apply to the Magistrates' Court on Mr. Bowers' behalf and that, in considering whether to apply to the Magistrates' Court, the Council needs to be satisfied that Footpath No. 28 is firstly unnecessary, and secondly, that it is desirable to stop it up. The case of Ramblers Association v. Kent (1990) (see B.11 at Appendix B) held that the question of whether a path was unnecessary had to be considered purely in the interests of those members of the public entitled to use it and without regard to the interests of the landowner. In that case Woolf L.J. stated further that the Magistrates should hold the path unnecessary for the sort of purposes which they would reasonably expect the public to use the path. Woolf L.J. went on to state that where there was evidence of public use it would be difficult for Magistrates to come to a conclusion that a path was unnecessary unless they were going to be provided with a reasonably suitable alternative.

37. 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). 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 electronic monitoring indicates that Footpath No. 28 is used to a significant degree. Consequently it would be difficult to argue in court that that the footpath is unnecessary for public use.
38. The extinguishment of Footpath No. 28 has already been addressed twice at public inquiry. The conclusions of the first Inspector in not confirming the 1995 order made under the TCP Act were: the use of Bridleway No. 24 as an alternative route to the footpath was not an acceptable alternative to retaining the footpath, and that the leaving of a dead-end path had no value (the extinguishment only affected the southern half of the footpath). The conclusions of the second Inspector in not confirming the 2000 order made under the Highways Act were essentially three-fold:
- The fact the footpath was obstructed by the newly built house was not a consideration as the house could be removed.
 - The representations made at the inquiry indicated that "...the footpath would be likely to be used, and to a significant extent, by the public..." if not obstructed.
 - That the nearby Bridleway No. 24 was not a suitable alternative route as it could pose problems of conflict of shared use, and had been subject to flash flooding.
39. The Committee should have regard to the Inspectors' decisions when considering whether the footpath is unnecessary and, if it is unnecessary, whether there are any other reasons why a stopping up order should not be made. In considering whether Footpath No. 28. is unnecessary, Committee Members should have regard to the fact it is used on average 9.8 times every day, see Appendix B. Members should also take a view on whether Bridleway No. 24 is a suitable, or reasonably suitable alternative to the footpath (see below).
40. Independent legal advice for the Council suggests that the Magistrates' Court could not refuse to consider an application made by the Council solely on the basis of the previous Inspectors' decisions. However, it is likely that the Court, in determining the application, would have regard to these decisions in coming to a view on whether the footpath was unnecessary, and whether a suitable alternative route existed.

Alternative routes

41. The issue of the public being able to use Bridleway No. 24 as an alternative to Footpath No. 28 has been raised at both previous public inquiries held for the previous two extinguishment orders made by the former Mid-Beds District Council and is something that would likely be raised at the Magistrates' Court. The independent Inspectors appointed by the Secretary of State for both

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orders decided not to confirm the extinguishment orders, citing that the bridleway was not a suitable alternative route to the footpath as being one reason for not doing so.

42. Bridleway No. 24 starts at the three-way junction of Clophill Road with the A507 spur at point C at Appendix A (see also photographs at Appendix C). The bridleway, which has some degree of surface dressing, has a surfaced width of approximately 2.5 - 3.5 metres wide with hedges to either side at its southern end, becoming enclosed by post and rail fencing for its northern half. A ditch runs along the western edge of the bridleway. This has been piped in three locations along the southern half of the bridleway. The piped areas tend to be overgrown and currently have spoil from ditch clearance dumped on them and are not currently suitable as pedestrian refuges. Approximately 73 metres north of point C a gate in the bridleway and associated turning area widens the bridleway at this point to 6.5 metres. The bridleway provides vehicular access to a small number of properties but appears to not be intensively trafficked.
43. Walkers accessing Maulden Woods from the west would probably approach using the footway on the south side of Clophill Road (there is no northern footway). They would then have the opportunity of crossing Clophill Road at the corner of the junction at the dropped kerb to access the tarmaced entrance to the bridleway. Walkers wishing to use the footpath in preference to the bridleway would probably cross the A507 spur on the corner at the dropped kerb and then continue along the southern footway of Clophill Road until opposite Footpath No. 28 before crossing to use the footpath. Any walkers approaching from the A507 would also probably use the bridleway in preference due to its proximity.
44. Walkers accessing Maulden Woods from the east (including the Headley Way estate, the adjoining Pennyfathers Close, the Beeches, and the newer Trilley Fields developments) would probably approach using the footway on the south side of Clophill Road until opposite Footpath No. 28 before crossing on this straight section of road to use the footpath. To access Bridleway No. 24 walkers would need to either cross to the north side of Clophill Road and walk into oncoming traffic for about 35 metres until reaching the grassed area adjacent to Bridleway No. 24 or, more likely, carry on walking westwards along the southern footway of Clophill Road to cross the road at the dropped kerb approximately 10 metres before the junction with the A507 spur and then to walk over the grassed area adjacent to the bridleway. Additionally, only pedestrians are permitted on the footpath whereas walkers may encounter cyclists, horse riders, and motor vehicles on the bridleway.
45. Mr. Bowers has argued that use of Footpath No. 28 by users of the new estates should be disregarded as they did not use the paths during the time of its deemed dedication (1936-1956) and that use of a public right of way is for the public at large – not just an estate. However, the footpath is a public right of way and so the effect of it being stopped up on the nearby new estates is material consideration as these estates (and the surrounding houses) are where the public most likely to use the footpath would live.

46. The Council's Senior Traffic and Safety Engineer, Mr. Paul Salmon, has

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looked at the approaches to the junctions of the bridleway and footpath with Clophill Road and at the utilisation of the southern footway to the dropped kerb near the three-way road junction. He considers that the current and alternative routes along/across Clophill Road have a similar low level of risk. Following concerns raised by Mr. Bowers as to the safety of pedestrians exiting Footpath No. 28 onto the road, Mr. Salmon also looked at this aspect. Following a site visit, he concluded "...[the footpath has] at least a metre of footpath which is clear from obstruction before reaching Clophill Road, thus allowing clear visibility of traffic in both directions.....it is felt that this footpath does not pose a significant risk to someone exiting straight in to the highway without being aware of the road itself... ..To mitigate the risk of anyone inadvertently running directly on to the highway a hazard warning sign may be installed on the existing post at the entrance/exit of the [footpath] [This has been done]. In addition and to support this, pedestrian warning signs may be erected on Clophill Road to alert motorists that Non Motorised Users may be entering/exiting the footpath. It is not felt necessary that at this stage any type of barrier be installed on the footpath...". However, at Mr. Bowers' insistence, and after writing repeatedly to Central Bedfordshire Council, a gate was installed on the footpath principally to deter/prevent cyclists from using it. However, this was eventually installed close to the junction of the footpath with Bridleway No. 24 owing to problems digging the footings of the gate at the roadside.

47. Bridleway No. 24 could be utilised as an alternative route – and may already be used in preference by walkers approaching from the west. However, residents of the three developments to the east and south side of Clophill Road are probably more likely to use Footpath No. 28 as the primary access route to Maulden Woods and, in doing so, benefit from both its proximity and vehicle-free character. It is unlikely that members of the public from these developments would be significantly disadvantaged by having to use the nearby Bridleway No. 24 if Footpath No. 28 was stopped up.
48. Electronic monitoring has shown that Footpath No. 28 is used to a significant extent and is consequently not considered unnecessary by those users. The Council has to weigh up competing factors and reach a decision in the light of this evidence (accepting the likelihood that use of the bridleway would not significantly disadvantage potential users), whether it is expedient for an application to be made to the Magistrates' Court for an order stopping up the footpath. In my view the impact of stopping up the footpath would not be significantly detrimental, however there is a strong presumption in favour of not doing so based on the Council's own policies and the decisions of the two independent Inspectors who heard the 1995 TCP Act extinguishment order and the 2000 Highways Act extinguishment order. 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.
49. The Council has not been made aware of any significant alterations to the bridleway to make the above conclusions redundant, or to warrant the Council considering it expedient to make an application to the Magistrates' Court for a court order stopping up the footpath – especially now that monitoring has clearly shown the footpath is used. Mr. Bowers has stated that works have

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improved the bridleway by piping the ditch and creating pedestrian refuges. The Council has no record of these works and whilst it is evident that three sections of the ditch alongside the southern half of the bridleway have been piped, these areas are covered by vegetation and spoil from recent ditch clearance works and consequently do not currently form suitable pedestrian refuges. Similar works were proposed in October 2002 but these were never carried out according to Council records. Some minor works to surfacing and to prevent flooding have also been carried out opposite and to the east of No. 125a Clophill Road near Point B at Appendix A. Furthermore, since the 2000 extinguishment order was made, the new Pennyfathers, Beeches, and Trilley Fields developments which all lie to the east of Footpath No. 28 have provided a new local source of users of the footpath requiring access to Maulden Woods. This is especially so as the planning constraints for the Trilley Fields development prohibited a direct link from the estate into the adjoining woods.

Consultations

50. 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. A further consultation of the relevant portfolio holders, local Members, Committee Chairman, and Assistant Director – Planning, and Maulden Parish Council was carried out in late January 2012.
51. Mr. Bowers, the applicant, has commented on draft versions of this report. Where relevant, Mr. Bowers' comments have been included in the body of this report and its appendices.
52. 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. They were consulted on the proposed extinguishment in November 2012. 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. Very few people use the footpath as in the summer it is over grown with nettles - my two boys generally end up walking down the [bridleway] as do any walkers who are not aware of its existence or they are wearing shorts. In my view (taking aside local views) - the footpath is un maintained and pointless... ..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:"...Your counter would be correct in saying my kids use it for school runs but they are perfectly capable of walking down the [bridleway] if the nettles are out of hand or if the path is extinguished. 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...".

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53. In response, whilst Mr. Tebbutt clearly is not concerned about the fate of the footpath and considers that the connecting bridleway is an acceptable alternative he has stated that his children use the path as part of their journey to school.
54. Mrs. Sylvia McParlin of No. 123 Clophill Road, whose property abuts Footpath No. 28, was consulted and wrote a letter dated 14-2-2012 in support of the extinguishment, 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... A perfectly good bridleway not 50 mtrs [sic] with good access has always been used in the past...".
55. 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.
56. Maulden Parish Council was consulted and responded on 4-2-2012 stating 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...".
57. The three local ward members were consulted. Cllr. Blair responded stating "...I have to stand by Mr. Bowers' right to have made this application under s.116...". In commenting on the draft Applications Policy Cllr. Blair stated with regard to Mr. Bowers "...it does appear to make common sense for all concerned, for resort to the Magistrates Court under s116, only to be contemplated if procedures under Sections 118 and 119 have been exhausted... ...I must assume the proposed liability of the applicant for 'all costs including court costs irrespective of outcome' to be a reflection of this Guidance, rather than just proposed CBC policy. Given this, the further financial burden on Mr. Bowers could be substantial, and therefore to be avoided if at all possible. However, I would say that if the application is to 'rectify an acknowledged error of this or another local authority', then costs being borne by the Applicant – unless it is the Authority itself – would hardly seem justifiable... ... in view of the history of the case, it should be determined by the Development Management Committee, rather than at a senior officer level. ...". From this and other comments it appears Cllr. Blair is in support of an application to the Magistrates' Court.
58. Cllr. Smith responded on 31-1-2012, stating "...Having been at Maulden's Parish Council Meeting last Monday (attended by Mr Bowers) I support the Parish Council's view that the footpath should be extinguished. I would hope that the Development Control Committee would also endorse this view...". From this it appears Cllr. Smith is in support of an application to the Magistrates' Court.
59. Cllr. Duckett responded on 13-1-2012, stating "...I wholly support this deletion as it is a path that goes nowhere and serves no purpose...". From this and from meetings with Cllr. Duckett it is clear that he supports an application to the Magistrates' Court.
60. In response – Footpath No. 28 has been recorded on the Definitive Map following the making of a Definitive Map modification order in 1995 which was

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confirmed by an independent Inspector after evaluating the available evidence. Whilst there are no records of either the former County Council or this Council undertaking any work to improve the bridleway, it does appear that three sections of the ditch alongside the bridleway have been piped at some time in the past. The piped sections are not currently suitable as pedestrian refuges due to vegetation and spoil from recent ditch clearance works. Data from the installed people counters indicate that the footpath is used on a frequent basis and can therefore be argued that the route is not unnecessary – which is the test of Section 116.

61. Cllr. Dalgarno, Deputy Executive Member for Sustainable Communities – Services, was consulted on the proposal and the question of whether the Development Management Committee was a more appropriate forum for the determination of Mr. Bowers' application. Cllr. Dalgarno stated "...Having reviewed the history of the footpath and the previous decisions by inspectors I believe that taking this matter to the Development Management Committee would be the best option. This would enable the public to be fully engaged in the process and allow Mr Bowers to fully express why he feels the route should be removed..."
62. Mr. Trevor Saunders, Assistant Director Planning, was consulted on the proposal and supports the determination of Mr. Bowers' application within the constraints of the new Applications Policy by the Development Management Committee.
63. Mrs. Nadine Dorries M.P. has been supporting Mr. Bowers' case for many years and, in a letter dated 11-1-2012, stated "...the public would not be inconvenienced in any way by the removal of Footpath No. 28 due to the presence nearby of a bridleway. Indeed as the bridleway has been recently upgraded and has a better junction with the road, it is in fact safer for the public to use this than Footpath 28.... ...Footpath 28 was created erroneously and maintained by incompetence..."
64. In response – the Council's Senior Traffic and Safety Engineer has inspected to the footpath and its junction with Clophill Road and, in an e-mail dated 16-11-2010, stated "... I felt that this footpath does not pose a significant risk to someone exiting straight in to the highway without being aware of the road itself... ...to mitigate the risk of anybody inadvertently running directly on to the highway a hazard warning sign may be installed on the existing post at the entrance to the footway...". This sign has since been erected. The engineer has also evaluated the safety of the alternative crossing points on Clophill Road and the route between the two paths and considers these all to have similar low levels of risk. Whilst Mr. Bowers considers the footpath to be inherently more dangerous than the bridleway however, owing to its narrower width; this though has to be weighed against the fact that the bridleway carries equestrian, cycle, and vehicular traffic – albeit with a low frequency. The addition of Footpath No. 28 by means of the 1995 Definitive Map modification order went through the full statutory process and right to appeal. The footpath was held to exist and was added to the Definitive Map and Statement. The subsequent attempts by the former Mid-Beds District Council to extinguish the footpath also went through the full statutory process and right to appeal. Mrs. Dorries' assertions of erroneousness and incompetence are therefore

incorrect.

65. The Ramblers was consulted and their local Footpaths Officer stated in his detailed response, received 7-2-2012, that "...The path is a pleasant and eminently useable route, giving easy access to the extensive network of paths and tracks within the area of Maulden Wood... ...An examination of the grass surface of the path indicates that the route is well-used and it would appear to be a popular route for local pedestrians and others... ...Extinguishment or deletion will have a negative effect on the local public Right of Way network... ...I have walked the parallel BW24 route and I do not consider this to be an acceptable alternative to FP28. The track along which the BW runs is used by vehicles to gain access to several properties to the rear, and as a result the surface is uneven with water-filled depressions. It presents a much less pleasant route for pedestrians.....A further point to be taken into account regarding the bridleway is that access to it from the southern end is in very close proximity to a road junction. The road at this point carries traffic from Maulden to the A507. This could be potentially hazardous in the case, for example, of families with young children forced to use the bridleway to access the area to the north. There is no footway on the north side of Clophill Road between the FP and the BW... ...there appear to be no material changes since earlier attempts by the applicant to close this path were rejected....".
66. The Open Spaces Society was consulted and responded in a letter, dated 16-2-12, stating: "...We strongly oppose its extinguishment or deletion... ...clearly the path is needed for public use and it would not meet the tests [of the Highways Act]... we would oppose this [application to the Magistrates' Court] since it is an incorrect use of the s116 procedure and, in any case, there is no suitable alternative...". The Open Spaces Society has been opposed to the potential extinguishment of the footpath since it was first recorded on the Definitive Map and has threatened the former County Council with legal action when it considered making a third extinguishment order.
67. The Bedfordshire Rights of Way Association ("BRoWA") was consulted and in its response, dated 11-2-2012, stated that "...We have no need to tell you that the Secretary of State frowns upon the use of the Magistrates' Court to extinguish footpaths and bridleways. It is clear from your recent policy on making public path orders that it will only make an application to the Magistrates' Court where a succession of Highways Act 1980 orders have failed to bring about an outcome beneficial to the public. In this case only Mr. Bowers [the applicant] would benefit...".
68. In response – BRoWA appears to have misinterpreted the new policy - which is detailed at Appendix B. In brief it does allow members of the public to apply for footpaths and bridleways to be stopped up at the Magistrates' Court. However, the presumption is that, for a footpath and bridleway, this would be done under other legislation (Section 118 of the Act) unless specified criteria benefitting the public could be met – and not until at least five years after a similar application had failed.
69. Bedfordshire Police have not been consulted on the proposed stopping up as there is no requirement or practice to do so. However, Mr. Bowers did submit a letter from PC Knowles which stated "... I have written to you twice

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previously... ..indicating the support of Bedfordshire Police for [Footpath No. 28's] extinguishment. I would advise that this position remains unchanged, and is consistent with national Secured by Design scheme guidance; 'Footpath design... 4.1 Routes for pedestrians, cyclists and vehicles should not be segregated from one another. Networks of separate footpaths to unsupervised areas facilitate crime and anti-social behaviour and should also be avoided... 4.2 Public footpaths should not run to the rear of, and provide access to gardens, rear yards, or dwellings as these have been proven to generate crime...".

70. In response – the Police's Secured by Design guidelines are a set of national guidelines targeted at crime reduction and do not consider either the merits of public rights of way or their benefit to the general public. Sgt. Andy Rivers of Ampthill & Flitwick Area Neighbourhood Policing Team researched the crime figures relating to the area around Footpath No. 28. No reported crimes or incidences of anti-social behaviour have been reported since January 2011 which is as far back as he searched.
71. National Grid (gas), UK Power Networks (electricity), British Telecom, and Anglian Water were consulted on the proposals. At the time of writing (November 2012) only UK Power Networks has responded, stating that it had no objection to the proposals.

Conclusions

72. Maulden Footpath No. 28 was added to the Definitive Map and Statement in 1997 by a 1995 Definitive Map Modification Order based on evidence of long public use. Following the construction of Mr. Bowers' new house and subsequent diversion of the footpath in 2006, the footpath was eventually opened up for public use in 2009.
73. Two previous attempts by Mr. Bowers to have the footpath extinguished under the TCP and Highways Acts have seen extinguishment orders not confirmed by independent Inspectors following local public inquiries. Reasons for the non-confirmation of the orders included the view that the footpath would be used if not obstructed, and that the nearby Bridleway No. 24 was not a suitable alternative to the footpath.
74. Since the last two extinguishment orders were made several new developments to the east of Footpath No. 28 have occurred (Pennyfathers, Beeches, and Trilley Fields). It is likely that residents from these developments would use Footpath No. 28 to access Maulden Woods as this is their closest right of way.
75. There have been no significant changes in either the condition or utilisation of the land occupied by the footpath, or of the bridleway since these orders were made. The slight realignment of the footpath by the 2010 variation order has resulted in a straighter footpath which is adequately surfaced and fenced from the adjoining land.
76. Monitoring equipment has shown that the path was used an average 9.8 times per day between September 2010 and September 2011. This level of use for

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the environs of the path suggests that it is used to a significant extent. With this level of use it is difficult to say that the footpath is unnecessary – which is the legislative test of the Highways Act that would be addressed at the Magistrates' Court. In my view, having to use the nearby Bridleway No. 24 would not significantly inconvenience walkers who currently use of the footpath, however, the previous Inspectors' decisions were that the bridleway with its potential for equestrian and vehicular use was not a suitable alternative.

77. The Council's new Applications Policy for rights of way requires that the application to the Magistrates' Court must fulfil at least one of five criteria which seek, amongst other things, to: resolve anomalies, rectify errors, or provide a public benefit. Mr. Bowers' application does not meet any of the required criteria.
78. Mr. Bowers has submitted a parallel application to extinguish Footpath No. 28 under Section 118 of the Act which is the subject of another agenda item put to this committee. Under the Applications Policy, this parallel and simultaneous application does not restrict the Committee in determining whether an application should be made to the Magistrates' Court beyond there being a general presumption that Section 118 of the Act should be used instead of Section 116 of the Act to extinguish a footpath.
79. The Council's Applications Policy and relevant legislative tests of Section 116 of the Act both lead to the conclusion that Mr. Bowers' application should not result in an application to the Magistrates' Court for a stopping up order.

Appendices:

Appendix A – Plan of Footpath No. 28

Appendix B – Legal and Policy considerations

Appendix C – Photographs of Footpath No. 28 and Bridleway No. 24

Background Papers: (open to public inspection)

- Central Bedfordshire Council's Applications Policy - Public Path Orders, Definitive Map Modification Orders, and Town & Country Planning Act 1990 Orders – available from the Countryside Access Team, Technology House, 239 Ampthill Road, Bedford, MK42 9BD, or Tel. 0300 300 8085, or e-mail rightsofway@centralbedfordshire.gov.uk.
or www.centralbedfordshire.gov.uk/rightsofway