

Appendix B

Legal and Policy Considerations

B.1. Section 117 of the Highways Act 1980 empowers a member of the public to request that Central Bedfordshire Council, as the Highway Authority, makes an application to the Magistrates' Court under Section 116 of the Act for an order to stop up or divert a public footpath, bridleway, restricted byway, or byway open to all traffic (BOAT) and is set out below:

117 Application for order under section 116 on behalf of another person

A person who desires a highway to be stopped up or diverted but is not authorised to make an application for that purpose under section 116 above may request the highway authority to make such an application; and if the authority grant the request they may, as a condition of making the application, require him to make such provision for any costs to be incurred by them in connection with the matter as they deem reasonable.

B.2. Section 116 of the Highways Act 1980 enables the Council to make an application to the Magistrates' Court for an order to stop public footpaths, bridleways, restricted byways, and or BOATs and is set out below:

116 Power of magistrates' court to authorise stopping up or diversion of highway

(1) Subject to the provisions of this section, if it appears to a magistrates' court, after a view, if the court thinks fit, by any two or more of the justices composing the court, that a highway (other than a trunk road or a special road) as respects which the highway authority have made an application under this section—

(a) is unnecessary, or

(b) can be diverted so as to make it nearer or more commodious to the public,

the court may by order authorise it to be stopped up or, as the case may be, to be so diverted.

(2) *(repealed)*

(3) If an authority propose to make an application under this section for an order relating to any highway (other than a classified road) they shall give notice of the proposal to—

(a) if the highway is in a non-metropolitan district, the council of that district; and]

(aa) *(omitted)*

(b) if the highway is in England, the council of the parish (if any) in which the highway is situated or, if the parish does not have a

separate parish council, to the chairman of the parish meeting;
and

(c) *(omitted)*;

and the application shall not be made if within 2 months from the date of service of the notice by the authority notice is given to the authority by the district council or Welsh council or by the parish or community council or, as the case may be, by the chairman of the parish meeting that the council or meeting have refused to consent to the making of the application.

- (4) An application under this section may be made, and an order under it may provide, for the stopping up or diversion of a highway for the purposes of all traffic, or subject to the reservation of a footpath, bridleway or restricted byway.
- (5) An application or order under this section may include 2 or more highways which are connected with each other.
- (6) A magistrates' court shall not make an order under this section unless it is satisfied that the applicant authority have given the notices required by Part I of Schedule 12 to this Act.
- (7) On the hearing of an application under this section the applicant authority, any person to whom notice is required to be given under paragraph 1 of Schedule 12, any person who uses the highway and any other person who would be aggrieved by the making of the order applied for, have a right to be heard.
- (8) *(omitted)*
- (9) Every order under this section shall have annexed to it a plan signed by the chairman of the court and shall be transmitted by a justices' clerk to the proper officer of the applicant authority, together with any written consents produced to the court under subsection (8) above.
- (10) Part II of Schedule 12 to this Act applies where, in pursuance of an order under this section, a highway is stopped up or diverted and, immediately before the order is made, there is under, in, upon, over, along or across the highway any apparatus belonging to or used by any statutory undertakers for the purpose of their undertaking.
- (11) In this section "statutory undertakers" includes operators of driver information systems.

B.3. Central Bedfordshire Council has recently adopted a new Rights of Way Applications Policy for Public Path Orders, Definitive Map Modification Orders, and Town & Country Planning Act 1990 Orders which includes requests for the Council to apply to the Magistrates' Court. The relevant sections of the new policy are set out below:

7 Applications to the Magistrate's Court

7.1 *(omitted)*

7.2 A member of the public may request that a public footpath or bridleway be diverted or extinguished by submitting the generic public path order application form. Unless the applicant explicitly requests that the matter

be dealt with by means of an application to the Magistrates' Court¹, the application will be treated as a request for an order under Sections 26, 118, and 119 of the Highways Act as appropriate. If the application explicitly requests that an application be made to the Magistrates' Court, then it must be determined on its merits and in accordance with this policy.

- 7.3 Government guidance, as embodied in the Department for the Environment, Food and Rural Affairs Rights of Way Circular 1/09, is: *"... There may be specific circumstances where it is appropriate to use the magistrates' court procedure under section 116 of the 1980 Act. It is considered, however, that authorities should make use of the other powers available to extinguish or divert rights of way unless there are good reasons for not doing so..."*. In light of this guidance, the Council's position is that there is a presumption in favour of using Sections 26, 118, and 119 of the Highways Act in preference to Section 116 for footpaths, bridleways and restricted byways. For this presumption to be overturned, an application must meet one or more of the criteria detailed in Section 7.6 below and be supported by the Council.
- 7.4 Applications to the Magistrates' Court will, however, be considered at any time where a BOAT is involved. It will remain at the Council's discretion whether any other paths associated with the application are sent to the Magistrates' Court, or dealt with by means of other powers under the Highways Act for diversions and extinguishments.
- 7.5 A common reason for a member of the public to request that we make an application to the Magistrates' Court is that a council has already tried unsuccessfully to achieve the outcome the applicant wishes by means of an order under Sections 118 or 119 of the Highways Act. The Council will not make an application to the Magistrates' Court if a similar application for a Public Path Order has been refused by the Council; or a Public Path Order made as the result of an application for the same, or very substantially similar, outcome has been abandoned or not confirmed within the last five years. The exception to this is if there have been significant changes to the circumstances to permit the Council to make a Council-generated application to the Magistrates' Court.
- 7.6 An application made by a member of the public requesting that the Council apply to the Magistrates' Court will only be considered if it meets one or more of the following criteria:
- Where the proposal would result in a recreational benefit to the public;
 - Where the proposal would resolve a Definitive Map anomaly;
 - Where the proposal would rectify an acknowledged error of this or another local authority;
 - Where the proposal is in the interests of the efficient management of the rights of way network;
 - Where the proposal would contribute to the implementation of the Outdoor Access Improvement Plan;
- 7.7 The application must be approved by and supported by the Council.
- 7.7 The application must also receive written consent from:

¹ Section 117 of the Highways Act allows members of the public to request that the Council take a case to the Magistrates' Court.

- All affected and adjoining land owners and occupiers;
- Anybody with a legal interest² in the land, including any statutory undertaker with equipment under, along or over the affected path;
- The local town or parish council or meeting.

7.9 If the consent of all of the above parties cannot be supplied in writing, the application will be refused.

7.10 The decision to apply to the Magistrates' Court will be taken by the Rights of Way Team Leader in consultation with the following: the relevant Portfolio Holder of the Council, the local Ward Members of the Council, the chairman of the relevant Council committee, the relevant Assistant Director, and the local town or parish council.

7.11 Applications from members of the public for a Magistrates' Court order will be processed and charged for in a similar manner to other ordinary Public Path Order applications as described above, and in Section 117 of the Highways Act and detailed in the accompanying document *Application for a Public Path Order to change the Public Rights of Way Network - Guidance on Costs*.

7.12 The applicant will be liable for all costs including administrative charges, legal fees, and court costs irrespective of the outcome.

B.4. Mr. Alan Bowers' application made under Section 117 is for the stopping up of a footpath. Policy point 7.3 explicitly states that there will be a presumption that such an application will be dealt with using other legislative provisions in the Highways Act unless it meets one or more of the criteria in policy point 7.6. The application would not provide a recreational benefit to the public as it would be extinguishing a well used link, nor would it resolve a Definitive Map anomaly in the local public rights of way network as none exists. 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 is a right of way and therefore should be recorded on the Definitive Map. Consequently there is no acknowledged error which requires resolution. 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; however, the stopping up of the footpath is unlikely to contribute to any implementation of either the old plan or the new one. Mr. Bowers' application does not therefore meet any of the above criteria for permitting the Council to make an application to the Magistrates' Court.

B.5. It has been more than five years since the former Mid-Beds District Council's two orders to extinguish Footpath No. 28 on Mr. Bowers' behalf were not confirmed. Mr. Bowers submitted a further extinguishment application in September 2004. However, as this application is to be determined at the same sitting of the Development Management Committee as this agenda item, it has no material effect on policy point 7.5 of the Applications Policy, nor

² Including any mortgage company or bank and those parties with sporting or other rights.

does it prevent the Committee approving his Magistrates' Court application if the other criteria are met.

- B.6. Mr. Bowers is reluctant to expend any more money on attempting to rid himself of the footpath across his land. Policy points 7.11 – 7.12 state that the applicant will be liable for all costs incurred by the Council in making an application irrespective of the outcome. This cost is could exceed £3000.
- B.7. The case of *The Queen (on the application of) Ashbrook v East Sussex County Council* [2002] EWCA Civ 1701 (20 November 2002) examined whether a County Council had complied with its own guidance when considering whether to forward an opposed diversion order to the Secretary of State for confirmation. The footpath in question had been deliberately obstructed and the obstructions not removed despite a Magistrates' Court order to do so. Dyson L.J. in his judgment stated at Paragraph 59:
- I agree that the court should be slow to interfere with the way in which the Council exercises its discretion in applying the policy set out in its Guidance Note. But it seems to me that in the present case the Council failed to take into account a material consideration when it decided that the removal of the obstructions was not "reasonably achievable". I accept that it was open to the Council to decide in the light of all the circumstances that it was not reasonable to require the obstructions to be removed. The fact that the Magistrates Court had made the Order that it had made, and the Council had earlier served notices under section 143 did not preclude a submission to the Secretary of State while the path remained obstructed. Like Schiemann LJ, I would reject the submission of Mr Laurence QC that, in view of the section 143 notices served on 20 March 2000, and the decisions of the Magistrates Court on 20 March 2001, the Council was bound to conclude that it was reasonable to require the removal of the obstructions when it submitted the Order to the Secretary of State. It had a discretion, but in exercising its discretion, the Council had to take into account all material considerations. The refusal to comply with the notices and the Magistrates Court Order were material considerations. In the present case, where the obstructions were deliberate and the refusal to comply was deliberate and flagrant, it was a consideration of some importance which the Council had to weigh carefully in the balance. In my view, its failure to do so requires the decision to be quashed, and the matter remitted for reconsideration.
- B.8. The Court of Appeal's judgment can be summarised as the Council had acted unlawfully in not fully taking into account a material consideration of a policy in respect of its decision relating to the making of orders under the Highways Act.
- B.9. The application of the Ashbrook (2002) case to Mr. Bowers' application dictates that Members of the Committee need to have regard to all of the criteria within Section 7 of the Council's Applications Policy before coming to a view on whether an application can be made to the Magistrates' Court for a stopping up order.

- B.10. Once the Committee decides that an application under Section 117 of the Highways Act meets the required Policy criteria for determination, it needs to address whether the application meets the legislative tests of the Act in order for an application to be made to the Magistrates' Court. In coming to a decision the Council needs to have regard to the case of *R. (Spice) v Leeds City Council* [2006] EWHC 661 Admin in which Ousely J. stated:

It seems to me that the question which is required to be answered under section 116, and hence to which the Highway Authority addresses its mind under section 117, just as it would address its mind when deciding itself whether to seek an order under section 116, is: what is the highway function being performed by that part of the highway which is the subject of the requested application? Is it unnecessary for that function to be performed by that part or whole of the highway? If the answer to that is that it is unnecessary for that function to be performed, the second question is: if it is unnecessary for the highway to perform those functions, are there any other reasons why a stopping up order should not be made?

- B.11. Before approving Mr. Bowers' application under Section 117, the Committee therefore must firstly be satisfied that Maulden Footpath No. 28 is unnecessary and, if it is found unnecessary, the Committee must then be satisfied that there are no other reasons why the footpath cannot be stopped up.

- B.12. The case of *Ramblers Association v Kent* (1990) 60 P&CR 464 gives further guidance on the issue of whether a right of way can be considered unnecessary. Here, Woolf L.J. gave the following guidance:

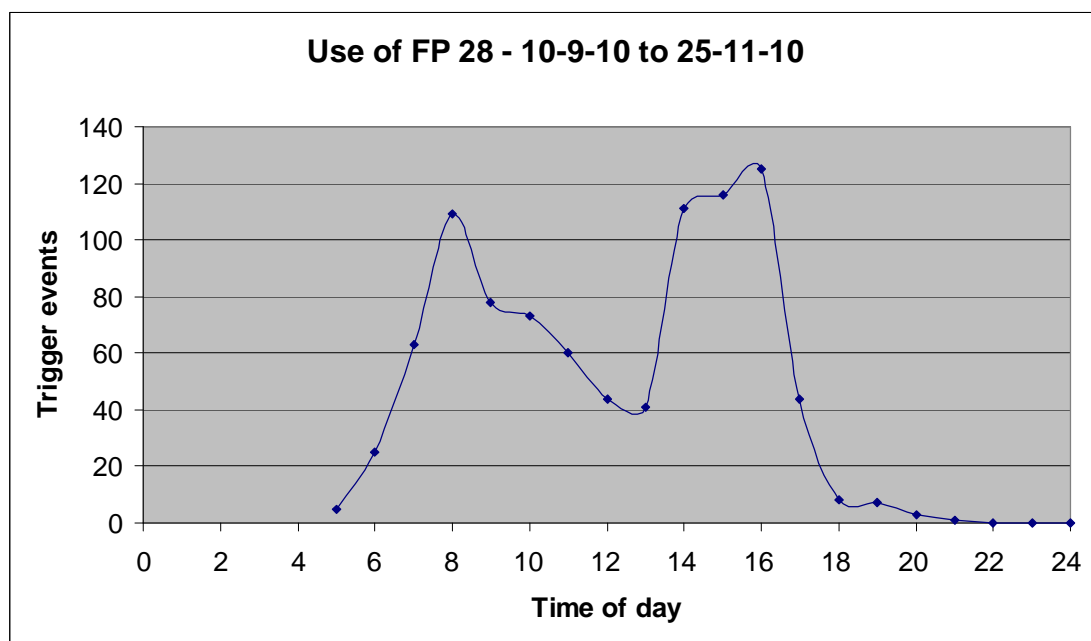
First of all I consider that magistrates, in deciding whether or not a highway is unnecessary, should bear in mind the question for whom the highway is unnecessary. It is to be unnecessary for the public. It is the public who have the right to travel up and down the way in question, and it is the public with whom the justices should be concerned because the right is vested in them... ..Then the justices might ask themselves, in considering an application under section 116, the question for what purpose should the way be unnecessary before they exercise their jurisdiction. So far as that is concerned, it should be unnecessary for the sort of purposes which the justices would reasonably expect the public to use that particular way. Sometimes they will be using it to get primarily to a specific destination—possibly here the shore. Another reason for using a way of this sort can be for recreational purposes... ..In my view, where there is evidence of use of a way, prima facie, at any rate, it will be difficult for justices properly to come to the conclusion that a way is unnecessary unless the public are or are going to be provided with a reasonably suitable alternative way. In deciding whether an alternative way is reasonable, it must be a way which is protected, so far as duration is concerned, in the same way as the existing way is protected. It must also be suitable, or reasonably suitable, for the purpose for which the public were using the existing way.

- B.13. In determining whether Footpath No. 28 is unnecessary the committee must therefore have regard to the level of public use. The footpath was

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.14. 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.15. The electronic monitoring indicates that Footpath No. 28 is used to a significant degree. Consequently it would be difficult to argue that it is unnecessary for public use. Were the footpath not stopped up, it is very likely that public use of a similar level would continue in the future.
- B.16. A consideration in determining whether a right of way can be stopped up on the ground that it is unnecessary 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. Bridleway No. 24 has some degree of surface dressing and has a 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.17. The Council recognises that Bridleway No. 24 could be utilised as an alternative route – and may already be used in preference by walkers approaching from the west. However, the entrance to the Headley 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 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, it is unlikely that members of the public from these developments would be significantly disadvantaged by having to use the nearby Bridleway No. 24 instead.
- B.18. 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 the Council to apply for a court order to stop up 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 Highways 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 apply for a stopping up order.