Appendix 3A

Wildlife and Countryside Act 1981 – Section 53 and Sch.15

The County Council of Bedfordshire (Definitive Map and Statement for Bedfordshire)(Maulden: Footpath No. 28) Modification Order 1995

Inspector Ronald Holley's decision – 26 August 1997

valid planning permission brings into effect Section 257 of the Town and Country Planning Act 1990 and the Owner would immediately make application for extinguishment; it is therefore unprofitable to add the path to the Definitive Map. The adjacent Bridleway offers an appropriate alternative; it is now well surfaced and drainage is no longer a problem; it is also free of stiles or gates.

CONCLUSIONS

Statutory Criteria

33. Section 53 of the Wildlife and Countryside Act 1981 requires, among other things, that the surveying authority shall keep the Definitive Map under review and make such modifications as appear requisite in response to the discovery of evidence which shows that a right of way, which is not on the Map, is reasonably alleged to subsist. Section 53(3)(b) provides for addition of a way to the Definitive Map on the expiration of any period over which enjoyment of that way by the public raises a presumption that it has been dedicated as a public path.

34. Criteria for that presumption are set out in Section 31 of the Highways Act 1980 which provides that, if the way has actually been enjoyed by the public, as of right and without interruption, for a full period of 20 years, before the date on which it is first brought into question, then it is to be presumed that the landowners have dedicated the way, unless they can show that it was clear at the time that they did not intend to do so.

35. The phrase 'as of right' has been interpreted as follows:

> *'..the user must have been by persons who honestly believed that they had a legal right to do so, as distinguished from user by persons who thought that they had the express or tacit licence of the owner, or were regardless of the rights of such owner.'*
>
> (Jones v Bates (1938) 2 All ER 237 to 253)

A number of other precedents have been quoted by the Council (Paragraphs 13,15,21 & 42); copies of the judgments have not been provided but I am familiar with them and accept their relevance to the extent indicated below.

36. Section 56 of the Wildlife and Countryside Act 1981 (Paragraph 9) provides that,

> *(1) A definitive map and statement shall be conclusive evidence as to the particulars contained therein ...*
>
> *(a) where the map shows a footpath, the map shall be conclusive evidence...*

(e) where ... the map is conclusive evidence ... any particulars contained in the statement as to the position and width thereof shall be conclusive evidence...

The Order Route

37. During the accompanied site visit, the parties indicated that the route would pass between the hedge and the west wall of the house numbered 123B (Paragraph 5). In my view, examination of the Order Map and the Definitive Map shows that this is not the case: superimposing the Order route on the approved plan for development of the house and garage (Paragraphs 10 & 32), I find that the route would pass through the west side of the house by a distance well in excess of the mapping accuracy; it is not disputed that it would pass through the as yet unbuilt garage (Paragraph 10).

38. I note (Paragraph 32) that confirmation of the Order could be followed by action to seek stopping up, in accordance with Section 257 of the Town and Country Planning Act, but that is a matter which lies outside my powers to determine; I conclude only that determination of the current Order would first be necessary.

Documentary Evidence

39. It is claimed that the route did not lead anywhere and only provided access to the allotments (Paragraphs 17,23 & 28), yet it is not contested that Ordnance Survey Maps showed the route in the 1880s (Paragraph 18), before the allotments came into being; whatever the use may then have been, no evidence has been presented to show that it was a cul-de-sac and I conclude that it would have been possible to gain access to the woods, as claimed (Paragraph 18).

40. Whatever the entry in the Definitive Statement may have been (Paragraph 9), I am quite clear that it could not be held to be conclusive of anything, under Section 56 of the Wildlife and Countryside Act 1981; a definitive statement acquires its validity from the corresponding map. In any event, the entry was eliminated in 1995 and I discount speculation about the origin of the anomaly or what may have been in the minds of the local authorities at the time (Paragraphs 9 & 28). I conclude that the route was not recorded as a public right of way and this is sufficient reason for it not to appear in a Land Charge search or the Planning Permission (Paragraphs 10,17 & 27).

Compliance with Section 31

Challenge and Interruption

41. It is not disputed that use was physically challenged and interrupted in 1992 and not resumed (Paragraphs 16 & 25). Further, it is not disputed that the field gate at the southern end of the route was locked by the landowner in 1956/7, with the intention of preventing use (Paragraphs 12,19,24 & 29), but

that the Applicant's family successfully contested the closure (Paragraphs 12,13 & 30). The Council's case is that the landowner conceded a public right to use the route by opening the gate during the day time; the Objector claims that the concession was permissive and applied only to the Applicant's family (Paragraphs 24,25,26,28 & 30).

42. I find no evidence to show that, at the relevant times, the landowner publicly expressed an intention to limit use of the route to the Applicant's family; there is ample evidence that others did in fact use it prior to 1956/7 and thereafter (Paragraphs 11 & 14). I conclude that the challenge or interruption in 1956/7 was ineffective and that this tends to support the view that the route was a public right of way (Moser v Ambleside 1925) (Paragraph 13).

Periods of use

43. Even though the interruption was ineffective, the events in 1956/7 might be described as having first brought the use into question; the consequence of this would be to make the relevant period of use 1936 to 1956. If the view were taken that successful resumption of use negated the bringing into question, then the period of use would be from 1972 to 1992. In both cases I find that there is adequate evidence of use covering the relevant 20 year periods.

Use by the Public

44. It is my understanding that the word 'public' here means the public at large and not some definable limited part of the public, such as the neighbours of the landowner; I am aware of two judgments supporting that view (Poole v Huskinson 1843 and Blount v Layard 1891). It is claimed on behalf of the Objector that the use was mainly by members of the Applicant's family (Paragraphs 24,25,26 & 30) but I find that there is evidence from many other users who have not been shown to be other than members of the public at large (Paragraphs 13 & 14).

45. It is also claimed, on behalf of the Objector that there are a number of discrepancies in the user statements (Paragraph 31), yet no specific cases have been quoted. The Council has attempted to identify the discrepancies (Paragraph 20) and I accept that the latter are not of such gravity as to invalidate the evidence.

46. The Objector also observes that most of the evidence is not sworn. Each side has submitted three sworn statements (Paragraphs 11 & 23). I know of no statutory regulation requiring evidence forms or statements to be sworn and none has been quoted; no further test can be applied to the evidence without recourse to an Inquiry.

As of Right

47. The users must be persons who, at the beginning of the relevant period, held an honest belief in a public right of way (Paragraphs 21 & 35). Whilst I accept that the question of

belief may be adequately raised by an appropriate question on an evidence form, in my view it is the answer to that question which must be tested to establish its credibility.

48. In this case, I conclude that the evidence of use runs over such an extensive period that the belief probably did arise in many minds simply from the practices of older family members (Paragraph 18). There are also uncontested personal recollections of such a nature that I believe they are probably reliable memories (Paragraphs 18 & 20). I therefore accept that the use was as of right.

The Intention of the Landowner

49. I accept (Paragraph 15) that any action claimed by the landowner to be indicative of an intention not to dedicate, must be shown to have been evident to the public who used the route (Fairey v Southampton 1956); some of the actions which might be appropriate are indicated in Section 31(3)(5) & (6).

50. In this case I find no evidence of appropriate actions being taken other than in 1956/7 and 1992. The evidence of a notice (Paragraphs 20 & 29) is ambiguous and it has not been accompanied by any reliable indication of the dates between which it may have been seen by the public.

Overall Conclusion

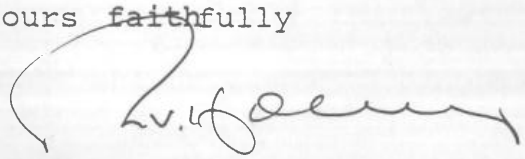
51. Taking all of the foregoing into account, I conclude that the Order meets all of the criteria contained in Section 53 of the Wildlife and countryside Act 1981 and Section 31 of the Highways Act 1980. I have taken into account all other matters raised in the written representations but they do not outweigh the considerations leading to my decision.

DECISION

52. For the above reasons, and in exercise of the powers transferred to me, I have decided to confirm the Order. The confirmed Order is enclosed together with an explanatory memorandum.

53. Copies of this letter have been sent to the objectors and other interested persons.

Yours ~~faith~~fully



Ronald Holley CB FRAeS MIMechE MIEE
Inspector

Appendix: List of Documents and Plans

Appendix 3B

Town and Country Planning Act 1990 - Section 257

The District Council of Mid-Bedfordshire (Part of Footpath No. 28, Maulden) Public Footpath Stopping Up Order No 2 – 1998

Inspector B.W. James' decision - 23 April 1999

CONCLUSIONS.

12.1 In reaching the following conclusions I have taken account of all the objections and representations, the observations made at my site visits and all other relevant considerations.

12.2 To confirm the order I have to be satisfied, under section 257 of the 1990 Act, that the stopping up is necessary to enable the development to be carried out in accordance with planning permission granted under Part III of that Act, namely the permission mentioned in paragraph 8.1. If I am satisfied that the stopping up is necessary, I have also to be satisfied that it is expedient (*K.C.Holdings (Rhyl) Ltd v Secretary of State for Wales 1990 JPL 353* refers) .

The necessity for the stopping up.

12.3 The application for which planning permission has been granted is in the following terms -

> "Demolition of existing barn, erection of new detached house with detached garage, alterations to existing vehicular access and change of use of part of site from paddock to garden".

12.4 It is clear from the decision in *Ashby v Secretary of Sate for the Environment 1980 1 All ER 508* that if the development has been substantially completed it will not be necessary for the footpath to be stopped up to enable the development to be carried out, and that the powers given by section 257 of the 1990 Act will not be available . The main part of the development in this case, namely the erection of the house, has been substantially completed and is occupied. The part of the development which consists of the demolition of a barn and the erection of a detached garage has not started.

12.5 The gist of the Council's contention (and that of the supporter) is that the development must be looked at as a whole, and the completion of one part of it does not prevent those powers being used as another part of the development has not been started. That contention must be considered in the light of the judgement in *Hall v Secretary of State for the Environment (18 March 1998)* where the Deputy Judge said (B to D on page 15 of the transcript of his judgement) -

> "Nevertheless it does seem to me that it is right that when a discrete and substantial part of the planning permission is completed in accordance with that permission, then that part of the permission has been completed and achieved, and is spent insofar as that aspect of the permission is concerned.".

12.6 The substantially completed house is by far the most substantial part of the development. It is arguable that the house is a discrete part of the development and that the

completion of the house excludes the powers given by section 257 of the 1990 Act, at least in so far as the footpath goes through the house if not in respect of the whole of the development site. If I were to reach the conclusion that the completion of the house prevents the powers given by section 257 of the 1990 Act from being exercised, I could not confirm the order. However, I think the stronger argument is that -

(i) The house and the garage should be treated as one for the purpose of ascertaining what is a discrete development;

(ii) the development which remains to be done (under the same planning permission as that which governs the house) is also substantial, and

(iii) the development is therefore not substantially complete so as to make the powers given by section 257 of the 1990 Act unavailable.

12.7 It is contended on behalf of the Bedfordshire County Council (as mentioned in paragraph 10.2) that the stopping up of the footpath is not necessary because it would be possible to divert it. I find that contention unsound. The provisions of section 254 of the 1990 Act enable land to be compulsorily acquired for certain purposes. They include providing a highway which is to be provided following an order under section 247. Those purposes do not include providing a highway which is to be provided under section 257. In the absence of powers to acquire the title to the land, or rights over the land, needed for a new footpath to be provided by a diversion or creation under section 257 and, in the absence of any statutory power to provide compensation, the consent of the landowner is needed for the provision of a new public right of way under section 257. (Circular 2/93, Annex C, paragraph 22 refers). That consent is not forthcoming in this case.

12.8 On the basis that that consent is not forthcoming, I conclude that if the house is to remain and if the garage is to be built it is necessary for that the length of the footpath which goes through the land to which the planning permission relates to be stopped up whether or not that stopping up is done in conjunction with the creation of a new length of footpath either under a diversion or by creation under section 257(2)(a) of the 1990 Act.

<u>The expediency of the stopping up.</u>

12.9 The Council contends that the creation of a cul-de-sac ending at point B can be overcome by an order under section 118 of the Highways Act 1980 providing for the stopping up of that part of the footpath which would remain between point B and the junction with bridleway 28.

12.10 I agree the claim mentioned in paragraph 11.2, that the stopping up would leave the rest of the route as a cul-de-sac of

no value to the public. Considerations of a public right of way ending in a cul-de-sac have much to do with the adage that a *highway leads from a highway to a highway*. That adage is subject to exceptions, some of them embodied in case law, as where the right of way leads to a place of public resort such as a waterfall or the top of a hill. Point B is not a place of public resort; I do not accept the Council's contention, mentioned in paragraph 8.3, that persons may wish to walk along the footpath from its junction with bridleway 24 to point B to view an area and return. Further, that contention seems to militate against the Council's contention that bridleway 24 would be a suitable alternative and that steps are intended to stop up this remaining length of the footpath by an order under section 118 of the Highways Act 1980.

12.11 It would be mistaken to presume upon an order under section 118 of the 1980 Act coming into force. Any such order would have to satisfy the relevant criteria specified in that section; it would be subject to the procedural requirements specified in schedule 6 to that Act, and those procedures are of course meaningful. The provisions in section 118(5) of the 1980 Act allowing for orders under that section to be processed concurrently with other types of order do not extend to order under section 257 of the 1990 Act.

12.12 Paragraph 21 of Annex C to circular 2/93, mentioned in paragraph 11.8, relates to the creation of alternative highways. Part 2 of the schedule to the order is headed "Description of alternative highway". Under that heading there appears the one word "None". Thus the order makes no provision for the creation of an alternative highway pursuant to section 257(2)(a) of the 1990 Act.

12.13 However, the Council contend that bridleway 24 provides a suitable alternative route. Bridleway 24 can be taken into account in assessing the expediency of the proposed stopping up of part of footpath 28. But there is force in the objection that the route of this bridleway (which has two bends) carries private vehicular rights which detracts from the suitability of the bridleway for use by walkers.

12.14 The distance between point A and the junction of bridleway 24 with Clophill Road is only about 55 metres. There would be room for a footway to be constructed at the side of the carriageway under section 66 of the Highways Act 1980 if that were required. Therefore this distance would not significantly disadvantage pedestrians.

12.15 It is clearly unsatisfactory that the order would result in a valueless length of footpath between bridleway 24 and a dead end at point B. That result would come from the footpath being stopped up between points A and B, with no provision for a diversion or the creation of an alternative footpath under section 257 of the 1990 Act.

Overall conclusion.

12.16 The Council promotes this order as a solution of the problem which arises from the incompatibility between the implementation of the planning permission and the continued existence of at least part of footpath 28 on its present line. This solution would create another problem, namely a valueless length of footpath between bridleway 24 and a dead end at point B. The Council contends that this other problem is to be solved by an order under section 118 of the 1980 Act by virtue of which that remaining length of the footpath would be stopped up. Any proposal which may emerge for the footpath to be diverted would have to be the subject matter of another order. No order under section 118 of the 1980 Act nor any order providing for the diversion of the footpath can be presumed on. I therefore have to reach a decision solely on the basis of the result of the order submitted for confirmation.

12.17 I conclude that the stopping up to which the present order relates would not be expedient for the following reasons -

(a) The proposed stopping up would result in a valueless length of footpath between bridleway 24 and a dead end at point B.

(b) A link between Clophill Road and Maulden Woods in this vicinity is important. The proposed stopping up would leave bridleway 24 as the only public right of way which could be used as such a link. The use of that route by motor vehicles in exercise of private rights results in the bridleway not being a suitable alternative to footpath 28.

Therefore I conclude that the order should not be confirmed.

DECISION

13.1 For the above reasons, and in exercise of the powers transferred to me, I have decided not to confirm the order. The order, in duplicate, is therefore returned.

13.2 Copies of this letter are being sent to each of the objectors and to other interested persons.

Yours faithfully,

B.W.James, C.B.E.
INSPECTOR

Appendix 3C

Highways Act 1980 – Section 118

The District Council of Mid-Bedfordshire (Maulden: Footpath No. 28) Public Path Extinguishment Order No 3 – 2000

Inspector Felix Bourne's decision – 10 August 2001

File MAL/24

Order Decision

Inquiry held on 19 June 2001

by Felix Bourne BA(Hons) Solicitor Legal Associate RTPI

an Inspector appointed by the Secretary of State for the Environment, Transport and the Regions

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Date 10 AUG 2001

Order Ref: FPS/J0215/3/1

- This Order is made under Section 118 of the Highways Act 1980 and is known as the District Council of Mid Bedfordshire (Maulden: Footpath No. 28) Public Path Extinguishment Order No. 3 – 2000.
- The Mid Bedfordshire District Council submitted the Order for confirmation to the Secretary of State for the Environment, Transport and the Regions.
- The Order is dated 29 September 2000: there were 18 Objections outstanding at the commencement of the Inquiry. In addition a petition supported by something over 50 people, some of whom have submitted individual objections, was submitted.
- The Order proposes to extinguish the full length of Maulden: Footpath No. 28 (Footpath 28).

Summary of Decision: The Order is not confirmed.

PROCEDURAL MATTERS

1. The effect of the Order, if confirmed without modification, would be to extinguish the full length of Footpath 28, which runs from Clophill Road (C100) at Ordnance Survey Grid Reference (OSGR) TL 0766 3757 in a generally northerly direction for a distance of approximately 155 metres to its junction with Bridleway 24, Maulden (Bridleway 24), at OSGR TL 0763 3772.

2. I have been appointed to determine the Order in accordance with the provisions of Paragraph 2A of Schedule 6 to the Highways Act 1980 ("the 1980 Act").

3. I held a public local inquiry into the Order at Mid Bedfordshire District Council Offices, The Limes, Dunstable Street, Ampthill, on Tuesday 19 June 2001. I made an unaccompanied site inspection on Wednesday 13 June and a further accompanied site inspection on the day of the Inquiry, following the close thereof.

THE MAIN ISSUE

4. In accordance with the requirements of Section 118(2) of the 1980 Act, the main issue is whether it is expedient to stop up the public footpath having regard to the extent that it appears that the path would, apart from the Order, be likely to be used by the public; and the effect which the extinguishment of the right of way would have as respects land served by the path, account being taken of the provisions as to compensation.

INSPECTOR'S REASONING

History

5. Before looking at the main issue it is helpful to place the application, made by Mr Bowers of 123b Clophill Road (the applicant), into an historical context.

6. The applicant purchased land, previously used as allotments and for market gardening, in 1989. At the time there were no recorded public rights of way crossing the land. The land was subsequently fenced, around June 1992, and this resulted in the obstruction of a route which was claimed, by a local resident, to be a public path. In October 1992 a formal application was made to Bedfordshire County Council (BCC), to consider user evidence which suggested that this path was a public right of way.

7. BCC commenced processing the claim in October 1994 and, in September 1995, made an Order to record the path, on the Definitive Map, as a public footpath (the 1995 Order). This was submitted to the Secretary of State for the Environment for confirmation, which was forthcoming by letter dated 26 August 1997 (DoE ref: FPS/M0200/7/25).

8. In the meanwhile the applicant had, in October 1993, bought the house and garden known as 123a Clophill Road, the boundary of which at that stage included land now forming part of 123b Clophill Road. In March 1994 he applied to build a residential unit on the land. Outline planning permission was granted, on appeal, by letter dated 3 November 1994. In the course of his decision letter the Inspector referred to the claim that had been made for a footpath crossing the site to be added to the Definitive Map. Reserved matters were approved in May 1995.

9. In September 1995, when BCC made the 1995 Order, the applicant applied to Mid Bedfordshire District Council (MBDC) for a "without prejudice" application for the extinguishment of the path. At around the same time works on site relating to the construction of the house (now 123b Clophill Road) began. However, it appears that BCC advised that, if a right of way existed, the garage, not the house, would be over the line of the path and that, in line with their advice, the applicant built only the house at that time.

10. By the time that the 1995 Order was confirmed, in August 1997, the house had largely been built. In December 1997 BCC surveyed the property and confirmed that the footpath was obstructed by the house. In the meanwhile, the applicant had, in September 1997, re-applied to MBDC for the extinguishment of the length of footpath crossing the site. In 1998 an Order, under the Town and Country Planning Act, was made (the 1998 Order), attracted 17 letters of objection, and was passed to the Secretary of State. Following a Public Inquiry (the 1999 Inquiry) the Inspector decided not to confirm the Order. In his decision of 23 April 1999 (reference FPS/J0215/5/5)(the 1998 Order decision), the Inspector highlighted the disadvantage of extinguishing part only of the footpath, resulting in the creation of a "dead end". He also concluded that the use of Bridleway 24 was not a suitable alternative to the public footpath, because of the use of the bridleway by motor vehicles in the exercise of private rights.

11. In May 2000 BCC commenced informal consultations on the proposed re-routing of Footpath 28, through the curtilage of 123b Clophill Road, by the creation of a new footpath and extinguishment of the existing route The applicant then approached MBDC for the extinguishment of Footpath 28 and submitted an application in June 2000. In due course MBDC resolved to make an application along the lines requested and the resultant Order is that subject of this decision. BCC members are sympathetic to the aims of the Order but the County Council is not a formal supporter of the Order.

12. Having set out the relevant background to the Order I shall next consider the main issue looking, first, at the extent to which the footpath would, apart from the Order, be likely to be used by the public.

The extent to which the footpath would, apart from the Order, be likely to be used by the public

13. Section 118(2) of the Highways Act 1980 states, amongst other things, that the Secretary of State shall not confirm a public path extinguishment order unless he is satisfied that it is expedient to do so having regard to the extent (if any) to which it appears to him that the path would, apart from the order, be likely to be used by the public. However, in reaching a view on this point Section 118(6) of the Highways Act 1980 requires the Secretary of State to disregard any temporary circumstances preventing or diminishing the use of a path or way by the public. I shall therefore examine, first, the question of whether or not the existing obstructions are "temporary circumstances" for the purpose of Section 118(6).

14. In this case a number of obstructions prevent the use of the footpath, including a wall along the frontage of 123b Clophill Road, part of the house and conservatory, and garden sheds and shelters in the paddocks to the rear of the property. However, the Order-making authority suggest that the house should not be treated as a "temporary circumstance", on the basis that it is likely to endure. This is a test propounded by Phillips J in the Queen's Bench Division case of **R v Secretary of State for the Environment ex parte Stewart [1980] JPL 175**, a case where the learned Deputy Judge revisited legislation that he had previously examined in **Wood v Secretary of State for the Environment [1976] JPL 307**.

15. I have a great deal of sympathy for the applicant. Whilst he was forewarned by BCC that there could be a right of way across his land it appears that BCC were under the impression, until the survey of December 1997, that the line of the footpath missed the house and passed, instead, through the proposed garage. This impression, it has to be said, appears to have been at variance with that of at least some local residents, though I have no reason to doubt that the advice that BCC gave to the applicant was consistent with that impression and that he acted accordingly.

16. There is, therefore, and quite understandably, a reluctance on the part of both BCC and MBDC to require the removal of the dwellinghouse. Indeed both authorities have, in a Joint Briefing Paper, taken the view that it would not be reasonable to seek the removal of the applicant's house. It seems to me that this is, in the circumstances, an appropriate sentiment, at least until all other alternatives have been fully explored. However, BCC have a statutory duty to assert the public's right to use the footpath and that remains the case whether or not their stance thus far has been challenged in the Courts.

17. It therefore seems to me that, whilst it would be wrong not to allow for the possibility that the dwellinghouse might endure, it would be premature to reach the view that it is likely to do so. Whilst Phillips J did not identify this as the only consideration he did put it forward as the main question to be asked, and there is no evidence on other points that would lead me to a different view on this point. I am therefore of the opinion that the dwellinghouse should be regarded as a temporary circumstance for the purposes of Section 118(6) of the Highways Act 1980. That being the case it seems to me that the other lesser obstructions to which I have referred, including the frontage wall, should also be treated as "temporary circumstances".

18. My view on this point does not mean that everything must of necessity be treated as a "temporary circumstance" but seems to me consistent with Phillips J's opinion that only rarely could it be right to make an order stopping up a highway on the ground that, as a result of an unlawful obstruction, it was difficult (in this case impossible) to use it.

Moreover, whilst Government Circulars set out advice, and do not necessarily represent an authoritative guide to the law, I note that my approach is also consistent with that set out at paragraph 32 of Annex C to Circular 2/93: Public Rights of Way.

19. Having determined that I should disregard the existing obstructions I can proceed in my consideration of the extent to which the path would, apart from the Order, be likely to be used by the public. Here there are a number of elements to consider.

20. The Inspector who determined the Order proposing to add the footpath to the Definitive Map found evidence from many users who had not been shown to be other than members of the public at large. He also accepted that the use was as of right. The footpath has not been available for use at any time since that decision was issued, on 26 August 1997, because, by then, the applicant's house had been built, or largely built. Since that time the nearest alternative route into Maulden Woods has been Bridleway 24.

21. MBDC suggested, first, that, notwithstanding the 1998 Order decision, Bridleway 24 had proved itself a satisfactory alternative route in that there had been no reported accidents and, second, referred to research that suggested that the perception of conflict between those on foot and those on bike or horse was greater than the reality. Councillor Lockey also suggested that the Inspector at that Inquiry had been misled by the introduction of what he, Councillor Lockey, considered to be unrealistically high figures for vehicular traffic along the bridleway. On this same point the applicant, whilst accepting that he was not looking constantly, indicated that, from his home, he had not noticed more than about four vehicles a day using the bridleway whilst Mr and Mrs Hazzard, who live nearby, suggested, in their letter of 4 September 2000, that the number of vehicle movements is so insignificant that it can almost be discounted.

22. Looking at these three points in turn, whilst there may not have been any reported accidents along the bridleway, Mrs Cottrell referred to her own experience of a "near-miss". Additionally, the Council's own research into the possibility of culverting the stream that runs along the western side of Bridleway 24, a scheme abandoned on the grounds of cost, would suggest an acceptance by the Council that the bridleway was, at the least, less than ideal.

23. As to potential for conflict to arise from shared use of the bridleway, a Countryside Agency research note, CRN32, submitted by the Council, suggests that the perception of conflict arising from a shared use of a right of way by a range of non-motorised users may be greater than the reality. I also appreciate that there are many rights of way where walkers share enclosed routes with other users, including some that may be used in conjunction with Footpath 28. However, it seems to me that a perception of conflict is on its own likely to discourage people from using a right of way, and there is ample evidence, some of which I refer to later, that in this location members of the public would prefer a route where such potential conflict did not arise. Moreover the Research Note to which the Council refer appears to examine the conflict between non-motorised users of a route whereas there are also private vehicular rights over Bridleway 24.

24. With regard to the extent of use of the bridleway by vehicular traffic, the Inspector at the 1999 Inquiry appears to have been told that there were up to 20 vehicle movements a day and, from the evidence of Mrs Cottrell, this does not seem to me unrealistically high. It is, of course, a relatively low number and no doubt many walkers would traverse the bridleway

without encountering a motor vehicle. However, such encounters, when they do occur, have, in my view, the ability to lead to significant pedestrian/vehicular conflict.

25. The bridleway had, at least at the time of my site visit, a reasonably sound surface and enjoys a width that, at its minimum, approaches the Council's recommended width for a bridleway. On the other hand it also has, for much of its length, a fence to one side and a ditch to the other, with little verge to which pedestrians may retreat in order to allow vehicles to pass. Moreover I was told, in particular by Mrs Cottrell, that the verge which exists can become overgrown in summer months.

26. Whilst use of Footpath 28 might also give rise to some potential for vehicular/pedestrian conflict this would be over a very limited length of the way (possibly in the forecourt of 123b but otherwise only where the footpath meets Bridleway 24) and would not therefore be of such significant disadvantage as with use of the bridleway along its length, where conflict can occur over something approaching 190 metres.

27. Examining some other relevant factors, there is a significant proportion of the population to the east of the bridleway for whom the footpath would be a shorter route to the woods. Moreover, for those coming from the southern side of Clophill Road, it is relatively straightforward to cross at that point of the road opposite the southern end of the footpath. However, as there is no footway on the northern side of Clophill Road in the vicinity of the southern entrance to Bridleway 24, pedestrians coming from the east would have to cross close to the junction, where they would need to check that the roads were clear in three directions. It seems to me that, because of the road layout and the speed of traffic, this would be a less attractive prospect, especially for children.

28. I am also aware, from the evidence of Mrs Cottrell and Mrs Fenton, that in recent years the bridleway has, from time to time, been subject to flash flooding as the ditch, which carries rain waters away from Maulden Woods, overflows, and that, at those same times, the route of the footpath has not flooded, a point confirmed by the applicant.

29. There is also considerable evidence from those opposing the Order that, apart from the Order (and the temporary circumstances) the footpath would continue to be used. Save for a suggestion from Councillor Lockey that some people sign a petition without much considered thought, this evidence was uncontested.

30. Looking at this evidence in more detail, Mrs Cottrell, for example, indicated that, if she were able, she would prefer to use the footpath to access the woods, and that to have this facility restored now for her younger children would greatly enhance their family life. A number of objectors referred to the historic use of the footpath. However, amongst the letters of objection received, Andrew and Ann Simmons expressed the view that the footpath should be reinstated and would be used regularly by our community, whilst Helen Butler, who lives in Flitwick but stated that she visits Maulden frequently, indicated that she would much prefer to access the woods via the footpath, rather than via the nearby bridleway, because of the traffic. Likewise, Mr Ken Izzard referred to Footpath 28 being the only way in which Maulden Woods can be directly accessed by pedestrians in safety, whilst B G Blott and J S Blott referred to having previously attempted to use the footpath, indicating that, had it been available, they would have used it in preference to the alternative road and bridleway route on road safety grounds.

31. Mr Turner similarly pointed out that, if the extinguishment were allowed, walkers would have to use a bridleway that is also used by motor traffic, whilst Mr John Barnes, of 84 Mandeville Road, Hertford, argued that the main benefit that pedestrians derive from footpaths is that they should be routes free from vehicular traffic, and that he needs the footpath because, when walking, he seeks to reduce the proportion of his journey on highways that are shared with other traffic. Mr Cooper's objection was on similar lines.

32. As far as the petition was concerned, this was signed by over fifty people, including some of those who also objected separately. The petitioners indicated that they would, were it not obstructed, use Footpath 28 in preference to Bridleway 24, because of the risk from vehicles using the bridleway. Over a dozen of the signatories were also people who say that they had known and used the path in the past.

33. Thus, taken at face value, it seems to me that there is ample evidence to support the view that, if it were not obstructed, the footpath would receive a significant amount of use.

34. However, the Council suggested that, even if the existing obstructions were removed, the site would probably be redeveloped. They also pointed to changes in the local environment, to fear of crime, and to likely impediments on the route, as discouraging any future use of the footpath. In addition, the applicant, who does not admit the existence of a public right of way, indicated that, were a path made through his land, he would erect fences as high as he could and for as long as he could, in order to retain his security and privacy.

35. I have to reach a view based on the statutory tests. I cannot tell what might happen in the future and it would be wrong of me to seek to suggest the appropriate way forward. I accept the view of the Inspector at the 1999 Inquiry who, in his decision, expressed the view that if the house is to remain it is necessary for that length of the footpath which goes through the land to which the planning permission relates to be stopped up whether or not that stopping up is done in conjunction with the creation of a new length of footpath.

36. In practical terms, it would be unrealistic of me not to accept that the removal of the applicant's house is likely to be viewed as a last resort. However, I know, from the evidence before me, that BCC have, following the 1998 Order decision, considered possible diversions of the footpath. In addition, MBDC, as local planning authority, will no doubt be aware of their powers to restrict permitted development rights, including those in relation to the erection of fences and other means of enclosure. Moreover, 123b Clophill Road may not always be owned by one so averse to the concept of a footpath crossing his land. Overall, I believe that a public footpath could be reinstated across the land without it being made so unattractive as to discourage those who wish to use it from doing so.

37. In the light of the above I conclude, on a balance of probabilities, that the footpath would be likely to be used, and to a significant extent, by the public.

The effect which the extinguishment of the right of way would have as respects land served by the path, account being taken of the provisions as to compensation

38. Apart from the applicant's own land, there are two other sets of landowners who could potentially be affected, to some degree, by the extinguishment. These are those who own Nos.123a and 125 Clophill Road, which are situated at either end of Footpath 24. However, Mr and Mrs Worsley, of 125a Clophill Road, support the application whilst Mrs H M Izzard

objects to the Order, but not on this ground. I do not therefore have evidence before me that would lead me to reject the application on this ground.

39. I therefore conclude that, were this to be the only aspect requiring consideration, I would not be precluded from confirming the Order.

Other Matters

40. Reliance was placed, both by MBDC and by other supporters of the Order, on the support of Bedfordshire Police for the extinguishment of the footpath. However, the footpath existed for many years, prior to its obstruction, and I was not told of any illegal or anti-social acts that resulted therefrom. Were it to prove necessary, in the future, to divert the footpath I would expect the relevant authorities to seek to achieve as safe and secure a route as possible, for the benefit of both local residents and users of the footpath.

41. The Parish Council supported the extinguishment of the footpath, but apparently based on the view, expressed in their letter of 28 May 2000 to BCC, that the footpath was never a public footpath. However, the status of the footpath has already been established. Councillor Lockey supported extinguishment on the ground that the footpath was not needed for public use, as did Mr and Mrs Worsley. However, whilst that is a relevant test for the Order-making authority in determining whether it is expedient to make an Order, it is not a test that is directly before me.

42. Mrs Cottrell also suggested that Bridleway 24 might shortly be tarmacced by some of those with vehicular rights. If this occurred it would allow vehicles to travel at greater speeds and this could in turn increase the risk of conflict on the bridleway, particularly at its southern end, where visibility is less good than elsewhere. However, I have no firm evidence to indicate that this will happen and have therefore placed little weight on this aspect.

43. The East Herts Footpath Society sought to apply for costs against the Council, setting out the details of their claim in the statement accompanying their letter of 15 June 2001. I do not have power to consider an application submitted in writing to an Inquiry. However, I think it fair to point out that the Order that I have determined was under different legislation to that previously promoted, whilst the result of my confirming this Order would also have been different. Thus, whilst I have, like the Inspector who determined the 1998 Order, refused to confirm the Order before me, I can find no abuse of power on the part of the Order-making authority.

OVERALL CONCLUSIONS

44. I have had regard to all matters raised with me, including all objections and representations. However, my conclusion at paragraph 37, as to the likely level of future use of the footpath, leads me also to conclude that it would not be expedient to confirm the Order. I shall therefore exercise my powers accordingly.

FORMAL DECISION

45. In exercise of the powers transferred to me the Order is not confirmed.

FELIX BOURNE Inspector

Appendix 3D

Highways Act 1980 – Section 119

The County Council Bedfordshire (Part of Footpath No. 28, Maulden) Public Footpath Diversion Order 2004

Inspector Erica Eden's decision – 6 June 2006

4. Part of the footpath proposed for diversion is obstructed by a dwelling and cannot be used. Inspectors are advised that they should normally ignore any obstructions on the route which is to be diverted, even if they are blocking the way. I will therefore consider the criteria above as if the existing path was open and available.

Reasons

Background

5. Mr A Bowers owns the land crossed by the existing route and the proposed diversion. He is the main objector. The Council and Mr Bowers disagree about some of what has occurred over the last 15 years with regard to Footpath 28. I have tried to identify the key events, which are generally not disputed. In 1989 Mr Bowers purchased a field in front of what was then his home, 125a Clophill Road. At that time there were no recorded public rights of way across the land. In 1992 he erected fencing which obstructed a track, which was subsequently claimed as a public footpath. An application was made, in October 1992, to modify the Definitive Map and Statement by adding a public footpath through the field.

6. In 1993 he bought the house and garden known as 123A Clophill Road the boundary of which, at that stage, included what is now Mr Bowers' home, 123B Clophill Road. In 1994 Mr Bowers applied for planning permission from Mid Bedfordshire District Council ("the District Council") to build a house on the field. The District Council refused permission but it was subsequently granted on appeal. The permission made no reference to the footpath. In May 1995 Mr Bowers obtained approval for reserved matters which included the erection of a new house and garage.

7. In September 1995 the Council made a Definitive Map Modification Order to add a footpath ("the 1995 Order") across his land. Mr Bowers objected to the 1995 Order and consequently it was submitted to the Secretary of State for determination by means of written representations. The 1995 Order, for what is now Footpath 28, was confirmed in August 1997.

8. In October 1995 the Council advised Mr Bowers that he should not build on the line of the path. Mr Bowers started to build the house in September 1996 and finished it in April 1997. He said he understood the Council to have told him that the footpath ran where the garage was to be sited and therefore the garage was not constructed. The Council carried out a survey in December 1997 which showed that the footpath was obstructed by the house.

9. At the same time as the 1995 Order was made Mr Bowers applied to Mid Bedfordshire District Council ("the District Council") for an order to stop up the path under the Town and Country Planning Act 1990. The District Council made an order to extinguish the route in March 1998 ("the 1998 Order"). Following objections, the 1998 Order was referred for determination to the Secretary of State and an inquiry was held. However, the 1998 order was not confirmed.

10. There had been ongoing complaints from the public about the obstruction of the footpath and in 1999 the Bedfordshire Rights of Way Association ("BROWA") asked the Council what steps were being taken to overcome the obstruction caused by the house. The Council decided to prosecute Mr Bowers for obstructing the footpath. In January 2000 this resulted in Mr Bowers being convicted of obstructing a right of way and he was fined.

11. In June 2000 Mr Bowers submitted another application to the District Council to extinguish the footpath. In September 2000 the District Council made an extinguishment order ("the 2000 Order") under the 1980 Act. It attracted objections and the order was therefore submitted to the Secretary of State for determination. Following an inquiry the order was not confirmed.

12. There were continuing complaints about the Council's failure to assert the rights of the public with regard to Footpath 28. Discussions and mediation with Mr Bowers took place to try to find a resolution.

13. In 2002 the Council carried out consultations on 5 options for re-routing the path within Mr Bowers' property. The Council's officers recommended option 1 to its Development Control Committee. However, in March 2004 the Council decided to make the diversion order for option 4, which is the subject of this decision.

14. Mr Bowers objected to the order as did other people. The substance of nearly all the objections to the order was that the path should be extinguished and not diverted.

Whether in the interests of the owner it is expedient that the footpath should be diverted

15. The Council said that, despite Mr Bowers' objection, the order is expedient in his interests. The land crossed by both the existing and the proposed route is owned by Mr Bowers. It recognised that Mr Bowers wants the route extinguished and has made another application to do so. However, two attempts to extinguish the path have failed and the Council had legal advice that to try again, when there had been no material change in circumstances, would not only have little chance of success but might be deemed an unreasonable use of its discretionary powers. The only options open to it were to do nothing, to divert the path or to remove the obstruction. The Council has a duty under Section 130 of the 1980 Act to assert and protect the right of the public to use the footpath and therefore it was not possible to do nothing. Clearly, for Mr Bowers the diversion is preferable to opening the route through his property which would involve demolishing his home. Faced with the two options, it must be right that the option of diverting the path and retaining his home is best for him. It pointed out that Mr Bowers had said his house was not saleable while the path obstructed it and, although he said it was also not saleable with the proposed diversion, it is a matter of commonsense that it must be in his financial interests to have the path along the side of the house rather than underneath it and being under constant threat of the property being demolished.

16. Mr Lopez, representing Mr Bowers, said that the interests of Mr Bowers are not met by the diversion. The Council claim that the diversion is in his interests because it would remove a future "threat" of the demolition of Mr Bowers' house arising out of its duties with regard to Section 130 of the 1980 Act. However, that duty is qualified by what is reasonably practicable in the circumstances with regard to the policy and alternative statutory powers under the 1980 Act. The removal of the house would not be reasonably practicable and the Council was unlikely to proceed with such a threat. It would be a matter of discretion for the Council whether or not to institute such proceedings. The Council could also discharge its duty by giving the public use of an existing alternative route or by means of a different diversion. This diversion is not appropriate.

17. The Council responded that it is in exercising the powers reasonably under Section 130 that it has decided to make the diversion order. During the consultations on the 5 options for

diversion, Mr Bowers' solicitor had written to say that Mr Bowers, without prejudice to his contention that the path should not run through his garden, preferred option 4. The Council said that the Committee had taken this into account along with other comments in making its decision on which route was the best option. It pointed out that Mr Bowers had built the house knowing that the 1995 order had been made and might be confirmed. He had always insisted that when a Council officer, in October 1995, had advised him not to build on the claimed footpath, she had said the path ran along the west side of his boundary in a similar position to this proposed diversion. While the Council did not accept that the officer said this, clearly Mr Bowers believed that was the line of the claimed path and had consequently not built the garage. He has always maintained that he had taken the officer's advice and had not built on the line of the path. Therefore this diversion is appropriate. The correct starting point cannot be, as Mr Lopez suggests, that the Council is in a position to do nothing and let the obstruction remain. To assess Mr Bowers' interests against that supposition assumes that Mr Bowers can benefit from his unlawful obstruction of the highway.

18. Mr Bowers said that he had not wanted to choose any of the 5 options put forward for the diversion but his solicitor had insisted that he should. He had not really given any thought to which option he preferred.

19. Mr M Westley, a Supporter, said that another reason why the order is in Mr Bowers' interests relates to the right of the public to deviate around unlawful obstructions. He pointed out that Mr Bowers has said he is concerned about security, yet currently he has little or no right to challenge strangers near any part of his house. They could even be said to be lawful inside the house if following the line of least resistance to overcome the obstacles.

20. Under cross-examination from the Council, Mr Bowers reluctantly accepted that it would be better for his privacy and security if people walked along the side of the house rather than through it.

21. Bearing in mind the history of the two attempted extinguishments, I think that Mr Bowers favoured solution of extinguishment has little prospect of success and certainly not in the near future. Whilst I agree with Mr Lopez that the Council would be unlikely to take action to remove the house, just the threat of removal does make the house not saleable and that situation would continue until the line is diverted or extinguished. I think the Council is right that, in comparison, a footpath alongside the house has a lesser effect on the value of the house; it might reduce the value but would not necessarily prevent its sale. While Mr Bowers said that he was not intending to move house, nonetheless the effect on the asset is greater while the house obstructs the path. The obstruction of the footpath is, as the Council says, unlawful and I think that Mr Bowers must want to resolve the situation so that it is lawful.

22. Mr Westley's point about security, while taken to its extreme, does have some merit and it would clearly be beneficial for there to be a defined and available path to prevent those with ill-intentions from taking advantage of the current situation. I understand Mr Bowers' reluctance to accept that position and I can see that, to some degree, whatever route the path took across his land there might still be security issues.

23. While I appreciate Mr Bowers' position that there should no path across his land, the line of the proposed diversion appears to be the best option for him out of the 5 routes and although

he implies that he made no choice, I find it difficult to believe that his solicitor was not acting under his instruction. He did not suggest that any other route would be better.

24. I think that it is in Mr Bowers' interests to have the problem of the path being obstructed by his house resolved. The diversion order would resolve the unlawful obstruction, put Mr Bowers on the right side of the law and would lessen the negative effect on the value of the house. When these factors are balanced against his opposition to the order, I find that they outweigh it and conclude, on the balance of probabilities, that in the interests of the owner it is expedient to divert the path.

Whether the path will not be substantially less convenient to the public

25. The Council said that the proposed diversion is not substantially less convenient than the existing route. The difference in length is insignificant, with the existing path being 35 metres and the proposed diversion 37 metres. The width of the route is 1.5 metres for 31 metres of the length. For about 9 metres the proposed diversion would run between the house and a boundary fence. This means that at its narrowest point it is 1 metre wide for a distance of 1 metre and then it is 1.3 metres wide for 5 metres. This is narrower than the Council would normally make a public footpath, but in the overall context it considered that the narrow width would not make the path substantially less convenient.

26. Mr M Clarke representing BROWA said that it had preferred the option 3 route and since that was not pursued it did not feel able to fully support the order but did not object to it. He did not consider that the proposed diversion was substantially less convenient with regards to the increase of 2 metres in length. He noted that the existing route has no defined width, whereas the proposed diversion would have a width of 1.5metres for 31 metres out of the 37 metres length, which is the default width of a field edge path.

27. A number of objectors make the point that the path would be very narrow. Mr Lopez said that the Council was ignoring its own policies with regard to the width. A 1994 policy states that new headland paths are required to be at least 2 metres wide, except where there are location restrictions. This policy applied only to new applications for diversions. A 2005 policy states that there should be minimum widths of 2 metres for a field edge path and 1 metre where width is physically restricted. New cross field paths should be 1.5 metres except where they are likely to be fenced. The latter is to be applied where there are significant structures which physically prevent the allocation of a greater width. Caveats state that: *The acceptability, or otherwise, of widths of 1 metre for footpaths should be assessed carefully and only implemented if those widths are felt to be reasonable in all the circumstances of the case. Where there are localised intrusions and/or short lengths over which the path would be less than 1 metre this may be acceptable depending on the circumstances.*

28. Mr Lopez said that the location of the proposed diversion may not properly be described as "restrictive", and where it may be so described, it was chosen by the Council. The policies advise that 1 metre is a minimum recommendation and does not state that such a width is appropriate or desirable. It is unreasonable in all the circumstances and would produce significant inconvenience to users. He submitted that Mr Brawn, the Council's witness, conceded that part of the diversion would be narrower than would usually characterise a footpath and that an isolated pinch point on an otherwise open path would be created. However, the evidence demonstrates that the entire length of the proposed diversion is narrower than the policy states and that this comprises about a quarter of the length of the

whole of Footpath 28. Mr Lopez said he was not seeking an increase in the width of the route.

29. The Council explained that the 1994 policy was in place when the diversion order was made and it makes provision for "location restrictions", which it says apply in this case. However, this order was not the result of an application, new or otherwise, to divert the footpath and therefore the policy need not be applied. It considered that, nonetheless, the width of the proposed diversion is in line with the 2005 policy and is reasonable in all the circumstances.

30. I agree with Mr Lopez that the northern part of the diversion where it passes through the garden might, according to the policies, be considered to be a headland path and therefore the order could have specified a width of 2 metres, instead of 1.5 metres, for these last 10 metres. However, none of the parties suggested that the width in the order should be modified. The southern end passes across the drive. This would appear to best compare with a cross field path and therefore the width of 1.5 metres is consistent with the policies, unless it is fenced. My reading of the policies is that they allow a considerable degree of flexibility. It appears to me that the Council has generally followed its policies but, in any case, I must look at the order in the context of the criteria for confirmation. I think that, even at its narrowest, it is wide enough for a person to walk through. It may not be wide enough for people from opposite directions to pass where it is less than 1.5 metres wide, however, I find that for the very short distance involved it would not cause much inconvenience to have to wait to pass. While a wider path would certainly be more convenient, I am not satisfied that the widths in the order cause the path to be substantially less convenient to the public.

31. Mrs S McParlin, an Objector, who lives at 123 Clophill Road, expressed very grave concerns about the proposed diversion passing directly next to her boundary and the effect on her privacy and security. She said she would consider erecting a 2 metre fence in place of her existing one.

32. Mr Bowers said that to retain his privacy, if the order is confirmed, he would consider erecting 2 metre high fences at the front and rear of the house beside the diverted path, even though this would be detrimental to himself, as it would block natural light to windows and his conservatory.

33. The objectors suggested that such fencing would create a tunnel-like path which would be unpleasant, unsafe and deter the public from using it. The bend in the route at point Z on the order plan would prevent walkers from seeing anyone approaching from the other direction and meeting head on in a very narrow, confined, space. It could also provide opportunities for those with criminal intentions to lie in wait for passers-by.

34. The Council responded that it does not require fencing to be undertaken and considers it unlikely that Mr Bowers would be able to exercise permitted development rights to build such a fence without going through the requirements of Article 8 of the Town and Country Planning Act General Development Order and the effect on the footpath would then need to be taken into account. As the Objectors themselves think that fencing would be harmful to the footpath it would probably not be given permission.

35. Mr Clarke thought that if Mr Bowers had built his house so that it did not obstruct the footpath it was highly likely that he would have fenced the Definitive line. Therefore he

sees little difference to public safety between the Definitive line being fenced and the proposed diversion being fenced.

36. It seems to me that the Council's submissions on permitted development rights indicate that this could not be done by Mr Bowers without proper consideration of its impact on the footpath. While I appreciate the reasons why the landowners might consider erecting fencing; I cannot tell whether this would actually occur. I think I must therefore consider the path as if no further fencing was to be erected.

37. I accept that the bend in the route near point Z reduces visibility slightly but I am not satisfied that this presents a significantly increased risk or inconvenience compared with the existing route if it was unobstructed.

38. Overall, I am satisfied, on the balance of probabilities, that the proposed diversion would not be substantially less convenient to the public.

Whether it is expedient to confirm the order having regard to:

The effect which the diversion would have on public enjoyment of the path as a whole

39. The Council said that the proposed diversion would diverge very slightly from the existing line by some 4 metres at its further point. Therefore it would have a minimal effect on the enjoyment of the footpath as a whole. The Objectors considered that the matters raised above in relation to convenience would also have an effect on public enjoyment. Nothing else of consequence was raised in relation to this issue. I agree with the Council that the deviation from the existing route is very small. I conclude that the effect of the issues raised under convenience would be insignificant in relation to the public enjoyment of the path as a whole.

The effect the order would have on land served by the existing right of way

40. The Council said that as neither of the termination points of Footpath 28 is being altered, the diversion would have no effect on land served by the existing path. Mrs M Fenton is an Objector who owns land adjacent to Footpath 28 to the north of the order route. She argued that she could access Footpath 28 from her land by climbing over her fence and therefore the existing footpath serves her land and the order would affect it. The Council disagreed that her land fell within this definition, but pointed out that even if it did, the diversion order did not affect Footpath 28 where it ran alongside her boundary and there was no change to the effect on her land. She responded that if the diversion order was confirmed the footpath would be open and available for use and there could be considerable number of people passing very close to her land. This would have a significant impact. The Council suggested that the unavailability of the path is an artificial benefit as a result of the illegal obstruction.

41. I tend to agree with the Council that the interpretation of this criterion was not intended to include land on the other side of a boundary fence from the footpath. Nonetheless, it is the case that the diversion does not change the part of Footpath 28 adjacent to Mrs Fenton's land. It is because the route is illegally obstructed that there is no current use. In considering the existing route as if it was not obstructed I find the order would have little effect on land served by the existing right of way.

The effect the new path would have as respects the land over which it is created and any land held with it

42. The Council said that the proposed diversion runs over land in the same ownership. Therefore the net effect will be very little, as a direct consequence, except to remove the threat of demolition of the house as an illegal obstruction.

43. Mr Lopez said that the proposed diversion would enable recurrent acts of vandalism and facilitate entry by trespassers to Mr Bowers' property. It would present a considerable security risk to Mr and Mrs Bowers who, being elderly, would be particularly vulnerable. Mr Bowers said that he had seen groups of youths loitering in the area of the nearby bridleway and he expected that if the path was diverted they would loiter around his house. The diversion would alter his whole way of life; he would be reluctant to invite anyone to visit, his grandchildren would not be able to play freely in the garden, he would not feel able to leave his wife alone in the house in the evening and would have to curtail his social and business activities accordingly. He stored valuable equipment in an outbuilding and erecting the fence that he felt would be necessary between it and the house would mean the outbuilding would no longer be visible from the house and this would lead to an increased risk of theft. In effect, it was an impossible choice of whether to fence the path and improve some aspects of security at the expense of a serious loss of light to the house and less security for the outbuilding.

44. Bedfordshire Police had objected to the order. It wrote that the diversion would increase the opportunities for crime and perceived disorder, particularly for the residents of 123 and 123B Clophill Road.

45. As I have already said, there might be security issues whether the path stays where it is or is diverted. The reason that they are not so apparent at the moment is because the public are prevented from walking the path because it is obstructed. Therefore it is possible that if it were open and available it might, as suggested by the Police increase the opportunities for crime and perceived disorder. However, I am not satisfied that the diversion of the path would have an affect on the land which would be any different to the existing path, if it was available.

46. Having regard to the above matters, I conclude, on the balance of probabilities, that it is expedient to confirm the order.

Other matters

47. Mrs Fenton and Mrs McParlin asked that the order be modified to divert the route onto the eastern side of Mr Bowers' land. There was no support for this proposal from Mr Bowers or the Council. The Council said that there could be any number of permutations for the diversion but the inquiry was into the order for this particular route.

48. I noted that the proposed modification was for a totally different line to the diversion in the order and I concluded that it would create a very different order and the differences were too great for me to consider it.

49. Mrs McParlin said that the proposed diversion would mean that the path would run between 1.40 and 1.90 metres from the side of her house. There are living room, bedroom, bathroom and kitchen windows on that side. Her fence is currently 1.30 metres high and therefore it

would be possible for passers-by to see directly into the rooms from the proposed path. Currently the house is relatively secure from intruders; the opening of the footpath on the diverted line would mean that her boundary was less secure. She argued the proposed diversion would have a devastating effect on her human rights and would seriously affect her privacy and security. I understood her to be claiming that her rights would be violated under Article 8(1) and Article 1 of the First Protocol of the Human Rights Act 1998 ("the 1998 Act").

50. The Council explained that adjoining land in different ownership is not part of any of the tests of Section 119 of the 1980 Act and that the case Allen v Bagshot Rural District Council [1970] ("the Bagshaw case") clarifies that adjoining landowners are not within the class of person whose interests have to be considered in relation to diversion orders.

51. I agree with the Council that the tests that I am applying for this order do not allow me to consider the adjoining landowners. However, I have considered the effect on Mrs McParlin of the proposed diversion in relation to the 1998 Act. While I think the legitimate use of the public footpath may cause mild interference, on balance, I conclude that this would be proportionate when weighed against the benefits of the diversion as a whole.

52. The burden of most of the objections was that the footpath should be extinguished as it is not necessary and there is a public bridleway nearby which could be used as an alternative. The order before me is an order to divert the path. Section 119 of the 1980 Act does not allow for the need for the path to be considered. I have no powers to consider whether the footpath should be extinguished or to modify the order to that effect.

53. Objectors said that there is no public footpath over the line in the order. The Council provided a copy of the Definitive Map which clearly shows Footpath 28 including the order route. The Definitive Map is conclusive evidence of the existence of a right of way and therefore questions on this issue are not within my purview of this order.

Conclusions

54. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude, on the balance of probabilities, that the order should be confirmed.

Formal decision

55. I confirm the order.

Inspector

Appendix 3E

Development Management Committee – 13 February 2013

Approved Minutes

(c) **Prior Local Council Consideration of Applications**

Member	Item	Parish/Town Council	Vote Cast
Cllr A Shadbolt	9 & 10	Leighton Buzzard Town Council	Did not Vote
Cllr P N Aldis	17	Sandy Town Council	Did not Vote

DM/12/326 **Planning Enforcement Cases Where Formal Action Has Been Taken**

RESOLVED

That the update on Planning Enforcement cases where formal action has been taken be noted.

DM/12/327 **Late Sheet**

In advance of consideration of the Planning Applications, the Committee received a Late Sheet advising of additional consultation / publicity responses, comments and proposed additional conditions. A copy of the Late Sheet is available at the following link:

http://www.centralbedfordshire.gov.uk/modgov/ieListDocuments.aspx?CId=631&MId=4083&Ver=4

DM/12/328 **The consideration of an application to delete Maulden Footpath No. 28 under Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981**

The Committee received and considered a report of the Head of Service for Transport, Strategy and Countryside Services. The report set out evidence behind the application to delete Maulden Footpath No. 28 under the legislation contained within the Wildlife and Countryside Act 1981.

The report sought a decision on whether the application should be approved or refused.

RESOLVED

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

DM/12/329 **The consideration of an application to extinguish Maulden Footpath No. 28 under Section 118 of the Highways Act 1980**

The Committee received and considered a report of the Head of Service for Transport, Strategy and Countryside Services. The report set out the evidence behind the application to extinguish Maulden Footpath No. 28 under Section 118 of the Highways Act 1980.

The report sought a decision on whether the application should be approved or refused.

RESOLVED

That the Committee:-

(a) Approved the application by Mr A Bowers to make a Public Path Order under Section 118 of the Highways Act 1980 to extinguish Maulden Footpath No. 28 between points A-B on the grounds that the footpath is no longer needed.

(b) Required the applicant Mr A Bowers to pay the costs associated with the carrying out of works to provide pedestrian refuges on the nearby Maulden Bridleway No.24 to accommodate increased levels of pedestrian traffic.

DM/12/330 **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**

The Committee received and considered a report of the Head of Service for Transport, Strategy and Countryside Services. The report set out the history and policy and legal considerations behind the application requesting the Council to apply to the Magistrates Court for a court order to stop up Maulden Footpath No. 28 under Section 116 of the Highways Act 1980.

The report sought a decision on whether the application should be approved or refused.

RESOLVED

That the Committee:-

1. Approve the application by Mr A 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 meets the criteria in the Council's Rights of Way Applications Policy for making an application to the Magistrates' Court.

(b) Bridleway No. 24 nearby is close enough to be used as an alternative route by those members of the public currently using the footpath.

(c) As the bridleway has not undergone significant improvements to enable the Council to disregard the earlier decisions by independent Inspectors who concluded that the bridleway was not suitable alternative to the footpath, the applicant Mr A Bowers will be required to pay the costs associated with the carrying out of works to provide pedestrian refuges on the alternative route to accommodate increased levels of pedestrian traffic

The Committee adjourned at 12.15pm and reconvened at 12.55pm

DM/12/331 **Planning Application No. CB/12/02071/OUT**

RESOLVED

That Planning Application No. CB/12/02071/OUT relating to Retail Part at Grovebury Road, Leighton Buzzard be approved as set out in the schedule appended to these Minutes.

DM/12/332 **Planning Application No. CB/12/03290/OUT**

RESOLVED

That Planning Application No. CB/12/03290/OUT relating to Unit 7, Grovebury Road, Leighton Buzzard be delegated to the Head of Development Management to refuse the application for the reasons set out in the schedule appended to these Minutes.

Councillors Mrs S Clarke, Mrs R Drinkwater and R Johnstone left prior to the consideration of Item 12

Appendix 3F

Wildlife and Countryside Act 1981 – Schedule 14

An Appeal against the decision of the Central Bedfordshire Council not to make an order to delete Maulden Footpath No. 28

Inspector Mark Yates' decision – 20 September 2013

contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put into the balance, if it is to outweigh the initial presumption that the right of way exists".

6. Paragraph 4.33 of Department for Environment, Food and Rural Affairs Circular 1/09 states that "*The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement ... will need to fulfil certain stringent requirements. These are that:*

   - *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."*

Reasons

7. The appeal route was added to the definitive map by way of an order made by the former Bedfordshire County Council in 1995[1] and confirmed by an Inspector appointed by the Secretary of State for the Environment on 26 August 1997[2]. As outlined above, an order to delete a right of way cannot be founded on a re-examination of the evidence that was considered when the route was first added to the definitive map, which I take in this case to be the evidence available to the Inspector in 1997.

8. It is apparent that the Inspector had regard to various issues in reaching his decision. He concluded that the evidence, primarily user, was sufficient for him to confirm the order. In reaching his decision, the Inspector identified two relevant periods for the purpose of statutory dedication[3], namely 1936-56 and 1972-92. Many of the points raised by the appellant were addressed by the Inspector in 1997. Whilst the appellant refers to particular conclusions reached by the Inspector, it is not my role to review his decision. It should also be borne in mind that this appeal relates to the Council's decision to not make an order to delete the route from the definitive map. It is not an opportunity to challenge the decision of the former surveying authority to make an order in 1995.

9. The appellant has made reference to certain court judgments. I note that, on the whole, the cases cited pre-date the Inspector's decision. It is submitted that the case of *Lewis v Thomas [1950],* which was referred to by the Inspector, has been superseded by the judgment in the case of *Rowley and another v Secretary of State for Transport Local Government and the Regions [2002]*. However, this is not evident from reading the Rowley judgment.

10. The evidence relied upon by the appellant includes a copy of a letter from the County Surveyor to Mrs Izzard of 21 October 1957 informing her that the route

[1] The relevant surveying authority for the area until 31 March 2009
[2] Following an exchange of written representations and accompanied site visit
[3] In accordance with Section 31 of the Highways Act 1980

was an occupation way and not a public path. However, I note that this evidence was before the Inspector in 1997, as outlined in paragraph 30 of his decision. He also records that a previous landowner, Mr Sharp, had made enquires of the District Council and was correctly advised that the route was not shown on the definitive map[4].

11. A photograph supplied by the appellant shows Mr Sharp transporting produce from his land via the route. It is asserted that this is supportive of the appeal route being used for occupational purposes. I do not doubt that the route was used for the purposes of access and transporting produce. However, public and private rights may co-exist over the same route. I note that the Inspector acknowledged that there was evidence to show that at one time the appeal route was considered to be an occupation path[5].

12. The new evidence provided predominantly relates to fifteen statements and the Council conducted interviews with ten of these witnesses. In respect of the views expressed regarding the appeal route being used for access purposes, I have addressed this issue above. It is clear that the witnesses do not consider the route to be a public footpath. What cannot be determined from some of the statements is the reason for such a view. Clearly the appeal route was not a designated public right of way prior to 1997. Nor is it likely to have been previously signed as a footpath. Some of the witnesses were not aware of any public use of the route. Nevertheless, it cannot be ascertained, in most cases, the degrees to which people were present in the locality of the appeal route. I consider that the greatest weight should be given to the few people who have worked on land in the locality of this route.

13. The new evidence only reveals that certain people were not aware of any public use of the route. It does not demonstrate that the use did not occur. In this case, there is evidence of use of the appeal route over a significant period of time. The new evidence conflicts with the user evidence considered by the Inspector. However, in my view, it does not provide cogent evidence of the occurrence of a mistake when the route was added to the definitive map. It is also apparent that the evidence of these witnesses predominantly relates to the later period identified by the Inspector.

14. A few of the witnesses say that Mr Sharp stated that the appeal route was not a public footpath when rights of way issues were discussed at parish council meetings[6]. Although the Council points out that there is no record of any references regarding the route in the parish council minutes of 1936-74, there is nothing to suggest that the subsequent minutes were examined. However, there is no evidence to corroborate the statements made in relation to this issue. The Inspector noted particular challenges in relation to the use of the appeal route. I do not consider that it can be determined from the new evidence that Mr Sharp took any additional measures which were sufficient to communicate to the public that there was a lack of intention to dedicate a footpath.

15. Having regard to the above, it is my view that, on the balance of probabilities, the evidence discovered is not of such substance to displace the presumption that the definitive map and statement are correct. I do not find that there is

[4] Paragraph 12 of the decision
[5] Paragraph 17 of the decision
[6] The details provided reveal that Mr Sharp was the Chairman of Maulden Parish Council between 1976-91

cogent evidence of the occurrence of an error when the appeal route was included in the map and statement.

Other Matters

16. The appellant makes a number of allegations in respect of the Council's conduct regarding the appeal route. Whilst I note these observations, the consideration of the appeal is based on the evidence before me measured against the relevant criteria outlined in paragraphs 4-6 above. Further, issues such as the need for a footpath in this locality are not relevant to my decision.

17. I understand that there are two proposals outstanding to extinguish the appeal route under Sections 116 and 118 of the Highways Act 1980. These proposals do not impact upon my decision and will be determined in due course.

Conclusion

18. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

Formal Decision

19. The appeal is dismissed.

Mark Yates

Inspector

Appendix 3G

In the High Court of Justice
Queen's bench division
Administrative Court

R (on the application of) Alan Bowers

– and-

Secretary of State for Environment, Food and Rural Affairs

- and-

Central Bedfordshire Council

Consent Order

11 April 2014

CO/117/14

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

CO/ 2014

R (on the application of) Alan Bowers

Claimant

-and-

Secretary of State for Environment, Food and Rural Affairs

Defendant

-and-

Central Bedfordshire Council

Interested Party

~~[Draft]~~ Consent Order

TAKE NOTICE that the parties HEREBY CONSENT to an Order in the following terms:

1. That the decision made by the Defendant on the 20th day of September 2013 be quashed

2. That the Defendant do pay the reasonable costs in the case.

PARTICULARS

3. These proceedings concern an application for Judicial Review of the Appeal Decision made on the 20th day of September 2013 by an Inspector appointed by the Defendant under paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 following his refusal to direct Central Bedfordshire Council to make a Definitive Map Modification Order to delete Maulden Footpath No.28.

   The Defendant concedes that in relation to Ground 1 of the Claim the Inspector erred in law when he refused to consider evidence which had not been considered by the Committee.

4. If the decision is quashed it is unnecessary for the Court to consider the balance of the Claim.

Alan Bowers Ein-Ty 123B Clophill Road Maulden Bedfordshire MK45 2AE	For the Treasury Solicitor Treasury Solicitor's Department One Kemble Street London WC2B 4TS	Central Bedfordshire Council Priory House Monks Walk Chicksands Shefford Bedfordshire SG17 5TQ
The Claimant *Ref:*	Solicitors for the Defendant Ref: Z1315109/SEJ/B5	For the Interested Party Ref:
Dated: 4/3/14	Dated: 17/3/2014	Dated: 17/3/14

By the Court

Appendix 3H

Highways Act 1980 – Section 118

The Central Bedfordshire Council (Maulden: Footpath No. 28) Public Path Extinguishment Order 2013

Inspector Martin Elliot's decision – 1 July 2014

the 1980 Act to which objections have been raised. As a consequence the Council has referred the Order to the Secretary of State for determination. I have been appointed to determine the Order. The matters relating to the 1981 Act and the actions of the Council, and the former Bedfordshire County Council, are not relevant to my consideration. The relevant considerations are identified at paragraphs 7 to 9 below. There was nothing before me which suggested that the inquiry should not proceed and on that basis continued the inquiry.

6. The Council suggested that I might wish to defer any post inquiry site visit until the proposed refuges had been constructed. I did not consider this necessary. The locations of the refuges are clear on the ground, particularly having been marked out, and it was in my view possible to make an assessment as to the benefits of the refuges. I consider the provision of refuges further at paragraphs 24 to 26.

Main Issues

7. The Order is made under Section 118 of the Highways Act 1980. This requires that, before confirming the Order, I must be satisfied it is expedient to stop up the footpath having regard to the extent that it appears that the path or way would, apart from the Order, be likely to be used by the public. I must also have regard to the effect which the extinguishment of the right of way would have as respects the land served by the path or way, account being taken of the provisions as to compensation.

8. I must also take into account any material provision of a rights of way improvement plan prepared by any local authority whose area includes land over which the order would extinguish a public right of way.

9. I was referred to the cases of *R v SSE ex parte Stewart (1980) 39 P&CR 534* (*Stewart)* and *R v SSE ex parte Cheshire [1991] JPL 537* which are relevant in respect of the tests to be applied in confirming the Order. At the confirmation stage it is necessary to consider whether confirmation is expedient having regard to the likely use of the way. The use of the word expedient means that other factors may be taken into account. However, *Stewart* clarifies that the prime consideration is that of user by the public. Both *Stewart* and *Ramblers Association v SSEFRA [2012] EWHC 3333* provide clarification as to the use of the word expedient in the 1980 Act.

Reasons

The extent to which it appears that the path would, apart from the Order, be likely to be used by the public

10. The Council had monitored use of the Order route for a period of 363 days between 10 September 2010 and 20 September 2011. The monitoring recorded a total of 3540 trigger events equating to an average of 9.8 journeys per day. The Council suggested that this could represent as few as 5 people making return journeys a day or even fewer dog walkers making more than one return journey in one day. However, the monitoring only records trigger events and no conclusions can be reached as to whether the use relates to a limited number of individuals. It can only be concluded that the route was used during the survey period on average 9.8 times a day and it the likely use that needs to be considered.

11. Correspondence from a Mr Tebbutt, a resident of one of the properties to the northern end of the Order route indicates that some of the use during the monitoring period would have been by his children using the path morning and evening. From the evidence before me it cannot be concluded that this use was necessarily throughout the monitoring period or that a proportion of the use was all by his children or friends; the correspondence suggests that on occasions the children used bridleway 24. I do not accept that this evidence suggests that a relatively high proportion of the use would be by the members of one family.

12. I note the fact that in considering an extinguishment order in 2001[1] Inspector Bourne draws on the finding by the Inspector who determined the 1995 definitive map modification order[2] that many of the path users had been using the footpath as of right prior to its obstruction. However, the monitoring survey provides the most recent evidence as to the use of the way.

13. In my view the monitoring does not suggest that the way is used to any great extent by the public but it does show continued and regular use of the way; the levels of use are not insignificant. There is no evidence to suggest that use has increased since the monitoring or that the route is likely to be used more in the future. However, the route continues to be used as evidenced by a defined trodden surface along the path which is consistent with regular use of the way. Whilst new residential development in the area might provide a source of potential users there is nothing to indicate that further development will take place or that this will result in any significant changes in the levels of use. I note the point made by the Council that there is no groundswell of local opinion which suggests that there is no significant demand to use the path. Further, I note that those appearing at the inquiry in opposition to the Order indicated limited use of the way by them and only one objection has been received from a local resident.

14. Having regard to the above footpath 28 would, apart from the Order, continue to be used. Although the use is not substantial it is not insignificant.

The effects which the extinguishment would have as respects land served by the path, account being taken of the provisions as to compensation

15. There is no evidence that the Order route provides access to land such that there would be any adverse effects in the event that the Order is confirmed.

Rights of Way Improvement Plan

16. The Council did not rely on any material provision within any rights of way improvement plan in support of the Order and I was not referred by any other party to any relevant provision.

Whether it is expedient to stop up the footpath in question

17. In opposition it was contended that the alternative route to footpath 28, namely bridleway 24 was not a suitable alternative. My attention was drawn to the findings of other Inspectors in relation to the determination of previous

[1] An order made under section 118 of the 1980 Act in 2000.
[2] In 1995 the former County Council made an order to add footpath 28 to the definitive map and statement, the Order was confirmed in 1997 following determination by way of written representations.

orders[3] but my determination must be based on the current circumstances. Concerns were raised as to the fact that, whilst the Order route was only available to pedestrians, the alternative route would have to be shared with horse riders, cyclists and vehicular traffic. Use of the bridleway would also require the crossing of Clophill Road in very close proximity to a three way road junction. However, crossing the road to access the Order route would only require the crossing of a two way road; there being no footway on the north side of Clophill Road. It was also pointed out that despite improvements to the drainage the bridleway was still subject to flash flooding. It is also said that the Order route provides a pleasant and direct link to Maulden Woods and the wider rights of way network including the Greensand Ridge Walk.

18. The Council argued that it was expedient that the footpath should be extinguished on the basis that the existing footpath raised privacy and security concerns for the two adjacent properties. There was an alternative route, bridleway 24, and there were no objections based on amenity grounds. The contrary factors related to conflict, safety and flooding. In terms of the additional length required in using the alternative route this was not considered to be a significant disadvantage. The Council contended that when the contrary factors were taken into account it remained expedient to confirm the Order.

19. Although the evidence identified by the Council makes reference to security issues there is nothing to suggest that the existence of the footpath is facilitating crime or presents any significant security issues. In terms of privacy the initial section of footpath leading from Clophill Road is enclosed by 2 metre high fencing and views into the adjacent properties are limited. Whilst the path opens up and offers views of the adjacent land I do not consider that any effects on privacy are significant.

20. I accept the evidence that the Order is expedient on privacy and security grounds was not challenged and I acknowledge that the adjacent landowners will have such grounds for concern. The effect on privacy and security must be put into the balance when considering whether or not it is expedient to confirm the Order.

21. In terms of highway safety issues, Dr Hollowell submitted that the Order route terminates directly on Clophill Road alongside a hedge which can obscure vision, whereas there were no safety implications in respect of bridleway 24. However, the Council's Senior Traffic and Safety Engineer has looked at the approaches to the junctions of the bridleway and footpath with Clophill Road and the utilisation of the southern footway to the dropped kerb near to the three way road junction. The engineer concluded that the current and alternative routes along/across Clophill Road have a similar low level of risk.

22. Whilst I note the concerns in relation to the three way road junction, and I accept crossing the road at this point will require greater vigilance, some weight should be given to the view of the Senior Traffic and Safety Engineer. There is nothing before me to indicate a significant safety issue in this area bearing in mind that the bridleway will be currently used by the public and there is no evidence of any incidents which might suggest that access is unsafe.

[3] An order made in 1995 by the former Mid-Bedfordshire District Council under section 257 of the Town and Country Planning Act 1990 and the 2000 order (see footnote 1).

23. I note the point that the Order route provides a traffic free route whereas bridleway 24 provides vehicular access to two dwellings and will therefore be subject to vehicular traffic. I accept that some walkers may prefer to use the footpath but the vehicular use of the route by the owners/occupiers, visitors and others gaining access to the premises on bridleway 24 is likely to be low. However, the route is not wide and there are limited opportunities for pedestrians and other users to pass vehicles using the route. I note the point made by Mr Westley that where public rights pre-exist any private vehicular rights then the public rights take precedent. However, even if I am minded to confirm the Order, which will result in an increased use of the way by pedestrians, there is nothing to indicate that the private vehicular use of the way will be to such an extent to create a nuisance for those exercising public rights.

24. The Council intend to install two pedestrian refuges and improve an existing refuge to enable vehicles using the route to pass other users more easily. Mr Westley made the point, by reference to *Hertfordshire CC v SEEFRA [2006] EWCA Civ 1718* that a vague promise to carry out minor works on an existing right of way should be ignored. He nevertheless accepted that the works had been ordered and that these would take place regardless of the Order. As pointed out by the Council, by reference to the same case, it is possible to take account of future events with the appropriate weight given depending on the likelihood. The Council have raised an order for the works which are specified on a plan (inquiry documents 3 and 4), and these works are due to take place regardless of the Order.

25. In the circumstances it is appropriate to have regard to the works to provide refuges. At the inquiry there was some discussion regarding who would pay for the works and whether the costs should be placed into the balance in terms of expediency. Given that the works will be carried out regardless of whether or not the Order is confirmed the costs do not have any bearing on the determination of the Order. The issue as to any contributions by the applicant is not a matter for my consideration.

26. The refuges will provide an opportunity for pedestrians and other users to pass vehicles using the bridleway. However, there is a significant proportion of the northern part of the route where there are limited opportunities for vehicles to pass users. The verge to one side is narrow and to the other side there is in part an open ditch. This may present difficulties should walkers encounter vehicles on the route but given the likely use of the way by vehicles this is not likely to be a frequent occurrence. In addition, whilst the refuges will provide a haven for pedestrians, whilst vehicles pass along the bridleway, the visibility along the southern section is limited. Given the likely use by vehicles I consider that this limited visibility presents a low level risk in terms of the safety of the users. I do not accept that the refuges will make the route less suitable for walkers or other path users, their presence can only be of benefit along this section of bridleway 24.

27. Although there are concerns regarding conflicts between equestrians, cyclists and pedestrians no evidence has been provided which suggests that there are any problems on the route arising from the current use of the route. The prospect of conflict is in my view limited.

28. As regards the flooding of the alternative route, since the 2000 order two sections of the adjacent ditch have been piped which has lessened the risk. The Council nevertheless accept that these works have not fully alleviated the risk of minor flash flooding following extreme weather conditions. In my view any flash flooding is likely to be infrequent and temporary. In contrast there is no evidence before me to suggest that the Order route is prone to flooding or would become impassable in extreme weather conditions. It may be that those using the Order route in such conditions may get wet but this is in consequence of the presence of vegetation which the Council accepted there was an obligation to clear. Given that flash flooding is likely to be infrequent and temporary I consider any disbenefits in respect of the alternative route to be minimal.

29. I was made aware of flooding on Clophill Road in consequence of blocked drains but there is no evidence that this impacts on the use of bridleway 24.

30. In respect of the Order route providing a pleasant and direct link to Maulden Woods and the wider rights of way network, the path at its southern end is enclosed by fences and the gable end wall of 123b Clophill Road. The northern end, whilst still enclosed provides views, of the surrounding countryside. Whilst some may find the route pleasant I do not consider that loss in terms of physical enjoyment of the way would be significant. The alternative route provides a similar experience to that provided by the Order route although it is accepted that some may prefer to use a traffic free route with exclusive rights for pedestrians. I note Mr Cowling's reference to the sales particulars for 123b Clophill Road which refer to numerous beautiful walks and nature trails locally. However, there is no indication that this specifically relates to the Order route and I do not consider that the sales particulars add weight to the non-confirmation of the Order.

31. I accept that the Order route provides direct access to Maulden Woods and the wider rights of way network and it is likely that those using the Order route will come from the east. The confirmation of the Order will increase the distance in accessing Maulden Woods and rights of way in the area but this will not be a significant increase.

32. Although not referred to in closing, Dr Hollowell considered that the confirmation of the Order would be expedient as it will resolve a long standing issue which had been a drain on Council finances and manpower for many years. I am aware of the long history relating to the Order route but the power to make orders under section 118 of the 1980 Act is discretionary. Whilst there are ongoing matters pursuant to section 53 of the 1981 Act, the continuous review of the definitive map is a duty of the surveying authority. Bearing this in mind, although confirmation of the Order may resolve long standing issues, I do not consider that this adds weight to the confirmation of the Order.

33. Having regard to all of the above, the path apart from the Order will continue to be used. Whilst there are benefits to the adjacent occupiers in terms of privacy and security I do not consider that these benefits will be particularly great. Although bridleway 24 provides an alternative route there are certain disbenefits which, whilst not significant, must be put into the balance when considering the Order. I note the correspondence from the Open Spaces Society (inquiry document 8) which states that bridleway 24 is '*already*

perfectly suitable for public use'. However, whilst the route may be suitable for public use I need to consider the disadvantages in the context of the way providing a suitable alternative to the Order route. As noted above, although there are disadvantages with bridleway 24 being used as the alternative route.

34. Taking all factors into account, having regard to the prime consideration being public user, although the issue is very finely balanced, I do not consider that it is expedient to confirm the Order.

Conclusions

35. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Order should not be confirmed.

Formal Decision

36. The Order is not confirmed.

Martin Elliott

Inspector

Appendix 3I

Wildlife and Countryside Act 1981 – Schedule 14

An Appeal against the decision of the Central Bedfordshire Council not to make an order to delete Maulden Footpath No. 28

Inspector Peter Millman's decision – 2 October 2015

1950s, although for reasons now unknown it was recorded in the Definitive Statement. An application was made by Mrs H Izzard to Bedfordshire County Council in 1992 to add the route to the Definitive Map as a footpath. The County Council made an order in 1995, to which there was one objection, from Mr A Bowers, the appellant. Because of the objection the order was submitted to the Secretary of State. It was confirmed by an inspector in 1997 on the basis of written representations and an accompanied site visit, and no inquiry or hearing was held. The appellant states that his legal advisers at the time, Messrs Molyneux Lucas, advised him to agree to the written representations procedure.

4. In 2008 Mr Bowers made an application for an order to delete the path from the Definitive Map, following unsuccessful attempts to extinguish it under the Highways Act 1980. The Council refused the application in 2013. Mr Bowers appealed against that refusal to the Secretary of State. The Secretary of State appointed an inspector to consider the appeal. The inspector decided that it should be refused. Mr Bowers applied for judicial review of that decision, and was successful. The decision was quashed on the grounds that the inspector who considered the appeal erred in law when he refused to hear evidence which had not been considered by the Council Committee which decided to refuse Mr Bowers' application in 2013. The appeal must now be re-determined.

5. A non-statutory inquiry into Mr Bowers' appeal was to have been held in January 2015, but at the last minute the inspector directed to hold it became unavailable for personal reasons. The inquiry was therefore rescheduled for September 2015.

The Main Issues

6. Section 53(3)(c)(iii) of the 1981 Act provides that an order to modify the definitive map and statement must be made following the discovery of evidence which (when considered with all other relevant evidence available) shows that there is no public right of way over land shown in the map and statement as a highway of any description.

7. In the case of *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001], Lord Phillips MR held that: *Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.*

8. In *Trevelyan* the Court also quoted with approval guidance which had been published in Department of the Environment Circular 18/90. The guidance stated that it was for those who contended that there was no right of way to

prove that the definitive map was in error and that a mistake had been made when the right of way was first recorded; it also stated that the evidence needed to remove a right of way from the record would need to be cogent, and that it was not for the surveying authority to demonstrate that the map was correct.

9. Circular 18/90 has been superseded by Defra Circular 01/09. Circular 01/09 states at paragraph 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:*

   - *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.*

10. The principal issues therefore are whether any new evidence has been produced and, if so, whether, when considered with all other relevant evidence, it shows on the balance of probabilities that there is no public right of way over footpath 28 and that an Order should be made to delete it from the Definitive Map and Statement.

Whether any new evidence has been produced

11. The decision to confirm the order adding footpath 28 to the Definitive Map in 1997 was based primarily on evidence of the use of the route by people the inspector considered were members of the public. The inspector, Rear Admiral Holley, decided that this evidence satisfied the test in s31 of the Highways Act 1980: *(1) Where a way over any land... 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...*

12. Inspector Holley found that the test was satisfied with respect to two separate 20 year periods. The first ended in 1956 when the route was obstructed for a short time, bringing the right of the public to use it into question. The second 20 year period ended in 1992 when the appellant blocked the route. The evidence considered included completed user evidence forms and records of interviews carried out by Council officers.

13. The Council accepts that new evidence, in the form of statements from local people, provided by the appellant in connection with his 2008 application for an order to delete footpath 28, shows that the statutory test for deemed dedication (paragraph 11 above) was not met for the period ending in 1992. What is at issue, therefore, is whether new evidence has been produced in relation to the earlier period between 1936 and 1956.

14. Mr Bowers argued that a letter written in 1957 by the County Surveyor to Mrs Izzard, the applicant for the 1995 order, (see below at paragraph 28) should be regarded as new evidence. It was not considered by the Committee which decided in 1995 to make the order, but it was, however, before Inspector Holley in 1997. It seems to me that 'new evidence' can only be evidence which was not before the ultimate decision maker, the Inspector. In a letter to the Development Management Committee of the Council dated 20 April 2013 Mr Bowers also referred to 'new evidence': *in the form of letters illustrating the collusion and impartiality* [sic] *of Rights of Way Officers when they presented their case to the meeting of members held 19 July 1995*. I have seen no evidence that relevant information was withheld from Inspector Holley in 1997.

15. When Inspector Holley considered user evidence in 1997, he noted at paragraph 11 of his Decision Letter in reporting the County Council's case: *A table has been drawn up to illustrate the years of claimed use; 13 of the users are related, some distantly, to the Applicant.* The Council produced, at the 2015 inquiry, a table, said to have been produced before the 1997 inquiry and possibly before the Committee meeting in 1995. It lists those who had given evidence of use. Beneath the column in the table headed 'Relationship to H Izzard', which shows the relationship of some users to the applicant for the order, whose family owned the land over which the footpath ran from 1936 to 1946, is the figure '13'. In my view it is likely that Inspector Holley took his figure of 13 from this table.

16. Mr Bowers argues that there has been a new analysis of the user evidence, and new information about the relationships of users to Mrs Izzard, which casts doubt on Inspector Holley's conclusions. He produced a chart at the inquiry, and in the evidence of one of his advisers, Mr R Connaughton, is a document headed *Analysis of user evidence forms submitted to Rights of Way officers presented to Committee members, 19 July 1995. Period to be considered 1935-1956.* Both these documents showed, they argued, that none of the user evidence considered by Inspector Holley was valid.

17. Counsel for the Council took Mr Bowers through his chart in great detail in cross-examination, comparing it with the 1995 table. In my view the cross-examination revealed that the evidence contained in the chart was essentially the same as that considered by the Inspector in 1997. It cannot be considered new evidence. The *Analysis* also contains no new relevant evidence.

18. I noted above at paragraph 13 that Mr Bowers' production of statements about footpath 28 persuaded the Council that the test for deemed dedication was not met for the period 1972 to 1992. Seventeen people provided information and the Council carried out additional telephone interviews with some of them. It was clear that this was new evidence, not before Inspector Holley in 1995.

19. Although this evidence only persuaded the Council to change its view of the later, 1972 to 1992, period, some relates to the earlier period of 1936 to 1956. Much of this is of minimal use in relation to that period; one person, for example, whose age was not stated, wrote that as a child she always walked along the nearby bridleway 'as footpath 28 did not exist.' Two of the seventeen people, however, had lived in Maulden from the 1930s. One had lived there since 1934 and stated that he did not walk the path and that the owner between 1946 and 1956 said it was not public. Another, who had lived there from 1937 to 1960, stated that he 'would not dream' of walking up the

appeal route. He stated further, 'It was only a track to the allotments, not a public footpath.'

20. The evidence considered in the previous paragraph is new. On its own it is far from cogent, and certainly would not outweigh the initial presumption that public footpath rights exist over footpath 28. But I now consider it in the light of the evidence available to Inspector Holley in 1997, bearing in mind, as noted by Andrew Nicol QC in *Burrows v Secretary of State* [2004], that an Inquiry: *cannot simply re-examine the same evidence that had previously been considered when the definitive map was previously drawn up. The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification.*

Whether, when considered with all other relevant evidence, the new evidence is cogent and of sufficient substance to displace the presumption that the right of way exists

21. Although there is no new evidence of significance about those who stated that they had used the appeal route from 1936 to 1956, Mr Bowers and his advisers attacked Inspector Holley's conclusions about the user evidence on a number of grounds.

22. It was argued that the Inspector should have completely discounted the evidence of users who had not used the route throughout the 20 year period. If someone had walked the route for only 19 years, for example, his or her user evidence was invalid. Mr Bowers appeared to concede at the inquiry that this argument showed a misunderstanding of the law.

23. Mr Bowers also argued that Inspector Holley should have discounted a large amount of the use because users were family, friends and neighbours of the applicant for the 1995 order, whose family owned the land over which the appeal route ran from 1936 to 1946. Their use, it was argued, would not have been 'as of right' (paragraph 11 above); it would have been by permission or by a private right.

24. It is clear from his Decision Letter that Inspector Holley considered the relationship of users to the applicant's family in concluding that: *there is evidence from many other users who have not been shown to be other than members of the public.* In any event, no significant evidence was produced to the 2015 inquiry which suggested that permission was granted by a landowner between 1936 to 1956 to any person to use the path or that any private rights were granted or claimed.

25. Mr Bowers argued further that the users could not represent the public as a whole; they were a clearly defined part of it. His advisers referred to the judgment in *Poole v Huskinson* (1843), in which it was stated that there could not be a dedication to a limited part of the public. It is clear, however, that the law does not require a cross-section of users from the whole country to walk a path for dedication to the public to be deemed or implied. It is equally obvious that in a small hamlet such as Hall End would have been before 1956, with no wider attraction as a tourist destination, the great bulk of the users of local footpaths would have been local people. That does not mean that they are not representative of 'the public.'

26. Mr Bowers expressed his regret that he had chosen not to exercise his right to be heard at a public inquiry in 1997 (paragraph 3 above). I accept that the weight to be given to user evidence untested by cross-examination at a public inquiry may not carry as much weight as evidence which has been tested and which has stood up successfully to that testing. Nevertheless the new evidence referred to in paragraph 19 above, considered with the matters referred to in the preceding five paragraphs, is insufficient to lead to a conclusion that the user evidence considered by Inspector Holley in 1997 needs re-evaluation.

27. I consider finally other attacks on Inspector Holley's decision, mounted by Mr Bowers' advisers but not said to involve new evidence. I noted above at paragraph 14 a letter written to Mrs Izzard, the applicant for the 1995 order, in 1957. It read as follows: *Dear Madam, With reference to the interview you had with my assistant on Friday last, I enclose herewith a map showing the route of the public path* [this is agreed to have referred to the bridleway into which the appeal route runs (paragraph 3 above)]. *The broken red line indicates the occupation way* [now footpath 28], *which of course, is not a public path and therefore is not shown on the Draft Survey Map.* Inspector Holley considered that letter, but his conclusions are attacked on a number of grounds.

28. First it was argued that if a route is an occupation way it cannot be a public right of way. In my view that argument is based on a misunderstanding of the law; an occupation way which carries no additional rights will be private, but public use of such a path which satisfies the test in s31 of the Highways Act 1980 (paragraph 11 above) will, subject to the proviso about evidence of a lack of intention to dedicate, be deemed to have been dedicated to the public.

29. It was argued by Mrs M Masters, another of Mr Bowers' advisers, that when the County Surveyor told Mrs Izzard that the appeal route was not a public right of way, it must be presumed that he carried out a thorough investigation of all the then available evidence relating to the route. It must be presumed that everything that should have been done, she argued, was done properly. This is, it seems to me, intended to be an expression of the presumption of regularity. Mr Connaughton put it a different way. He argued that the County Surveyor would not have made the statement he did 'without the truth to back it.' I do not accept these arguments; the presumption is that acts will have been carried out lawfully, not that whoever carried them out will have had knowledge of all relevant facts and will have come to the correct conclusion.

30. Mrs Masters also argued, on the same basis, that because the original Definitive Map for Bedfordshire did not show what became footpath 28, and because it must be presumed that those who compiled it carried out their investigations correctly, this was strong evidence that no public rights existed over the route. I reject that argument for the same reason that I reject Mrs Masters' argument about the County Surveyor's letter.

31. Mr Connaughton argued that, had the appeal route carried public rights, the fact would have shown up in the conveyance when the land was sold in 1946. That is, in my view, an assertion without evidential foundation.

32. Mr Connaughton also argued that all people 'of sound mind' would recognize the logic that no owner of a market garden (such as the owner of the land crossed by the appeal route from 1946 to 1956) who sold his produce to local people would allow the public to cross his land. That is not an argument based, as far as this route is concerned, on evidence.

33. Mr Connaughton noted the conclusion of the Inspector whose decision was quashed (paragraph 4 above) that the appeal route was not a 'designated right of way prior to 1997'. It followed, he argued, that it was therefore not a public right of way in 1956. It is clear to me that the Inspector's statement indicated nothing more than that the appeal route was not included in the Definitive Map and Statement prior to 1997.

34. Both Mr Connaughton and Mrs Masters argued, for various additional reasons, that owners of the land crossed by the path between 1936 and 1956 could not and would not have dedicated public rights of way across it. It seems to me that these arguments miss the fundamental point that to satisfy the test in s31 of the Highways Act 1980 (paragraph 11 above) actual dedication does not need to be proved. Upon the satisfaction of the test, dedication is **deemed** to have occurred, in other words, the effect of qualifying use of the route is the same as if dedication had actually occurred.

35. I conclude that the new evidence, considered together with all existing relevant evidence, is not cogent, and falls far short of displacing the presumption that the Definitive Map is correct in depicting footpath 28.

Conclusion

36. Having regard to these and all other matters raised at the inquiry and in the written representations I conclude that the Appeal should be refused.

Other matters

37. At the inquiry there was an attempt to air grievances about the conduct of the Council and its predecessors, as well as allegations about widespread malpractice within local authorities, the Planning Inspectorate and Defra. I made it clear that I could hear no such grievances and allegations or make any findings in connection with them.

Formal decision

38. I refuse the Appeal.

Peter Millman

Inspector

Appendix 3J

High Court of Justice (QBD)

R.(oao Alan Bowers) v Secretary of State for Environment, Food and Rural Affairs and Central Bedfordshire Council

Application for permission to apply for Judicial Review

Mrs. Justice Lang DBE

21 January 2016

and

9 May 2016

In the High Court of Justice
Queen's Bench Division
Planning Court

CO/6548/2015

In the matter of an application for Judicial Review

THE QUEEN

on the application of

ALAN BOWERS

Claimant

versus

SECRETARY OF STATE FOR ENVIRONMENT FOOD AND RURAL AFFAIRS

Defendant

CENTRAL BEDFORDSHIRE COUNCIL

Interested Party

Application for permission to apply for Judicial Review
NOTIFICATION of the Judge's decision (CPR Part 54.11, 54.12)

Following consideration of the documents lodged by the Claimant and the Acknowledgement of service filed by the Defendant;

Order by the Honourable Mrs Justice Lang DBE

1. Permission is hereby refused.

2. The Claimant do pay the Defendant's costs of preparation of the Acknowledgment of Service in the sum of £3,384.00. The Claimant do have permission to make written representations to the Court in opposition to this order for costs, within 14 days of the date of service of this order upon him; any such representations must also be served on the Defendant. The Defendant do have leave to file and serve a response to any representations by the Claimant on this order for costs.

Reasons:

This claim ought to have been commenced as an application for statutory review under paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 and CPR Pt 8. The time limit for such an application is 42 days from the date of decision and so expired on 13 November 2015.

It is an abuse of process for the Claimant to apply instead for judicial review. Moreover, he has done so more than a month after the expiration of the deadline for a statutory review, on 22 December 2015.

As to the merits of the claim, the Claimant has failed to establish any error of law on the part of the Inspector in reaching his decision. The Claimant plainly disagrees with the Inspector's conclusions on the evidence, but that is not a sufficient basis to quash a decision. The grounds based upon procedural irregularities, bias, bad faith, and a failure to have regard to the evidence are unarguable in my view.

Signed Kevin A- Lang

21.1.16

The date of service of this order is calculated from the date in the section below

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For completion by the Planning Court

Sent / Handed to the Claimant, Defendant and any Interested Party / the Claimant's, Defendant's, and any Interested Party's solicitors on (date): - 2 FEB 2016

Solicitors:

Ref No.

Notes for the Claimant

If you request the decision to be reconsidered at a hearing in open court under CPR 54.12, you must complete and serve the enclosed FORM 86B within 7 days of the service of this order. A fee is payable on submission of Form 86B. ***For details of the current fee see the Court website***. Failure to pay the fee or lodge a certified Application for Fee remission may result in the claim being struck out. The form for Application for Remission of a Fee is obtainable from the Justice website http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do

In the High Court of Justice
Queen's Bench Division
Planning Court

CO/6548/2015

In the matter of an application for Judicial Review

THE QUEEN

on the application of

ALAN BOWERS

Claimant

versus

SECRETARY OF STATE FOR ENVIRONMENT FOOD AND RURAL AFFAIRS

Defendant

CENTRAL BEDFORDSHIRE COUNCIL

Interested Party

On the Claimant's application for an extension of time to renew his application for permission to apply for judicial review;

Following consideration of the documents lodged by the parties;

Order by the Honourable Mrs Justice Lang DBE

1. The Claimant is granted an extension of time to apply to renew his application for permission to apply for judicial review, until 14 days after service of this order upon his solicitors.

2. Costs reserved.

Observations

Owing to an administrative or postal error, the Claimant's solicitors were not served with my order of 2 February 2016 refusing permission. It is appropriate to grant an extension of time for a renewal application to be made.

The Administrative Court lawyer has referred my order back to me since, in the light of submissions from both parties, he has concluded that his previous advice was incorrect, and this claim was correctly brought by way of a judicial review, not a statutory appeal. I am inclined to agree. However, even if the procedural reason for refusal is disregarded, the merits reason remains. That ought properly to be considered by another judge upon renewal, in the usual way.

Signed Lang A Lang 9.5.16

The date of service of this order is calculated from the date in the section below

For completion by the Planning Court

Sent to the Claimant, Defendant and any Interested Party / the Claimant's, Defendant's, and any Interested Party's solicitors on (date): 12 MAY 2016