

Appendix B

Legal and Policy Considerations

Validity of the Definitive Map and duties of the Council

B.1. Section 56(1) of the Wildlife and Countryside Act 1981 states:

“(1) A Definitive Map and Statement shall be conclusive evidence as to the particulars contained therein to the following extent, namely-

Where the map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map...

(b)-(d) (omitted)

(e) Where by virtue of the foregoing paragraphs the map is conclusive evidence, at any date, as to a highway shown thereon, any particulars contained in the statement as to the position or width shall be conclusive evidence as to the position or width thereof at that date...”

B.2. Under normal circumstances the Council would rely on the Definitive Statement to provide particulars as to the precise position and width of the footpath. Where a width is not recorded the Council has to try to use other evidence, such as the likely historic width based on map evidence to ascertain a legal width. Unfortunately the Definitive Statement does not specify a width for the section of footpath between points A-B.

B.3. The centreline of Footpath No. 5 runs on the northern side of the forecourt boundary wall, inside the Garage’s extension (second work bay) and inside the rear boundary fence of No. 72 Stotfold Road. The historic Ordnance Survey maps (see extracts in the main report) show that the access track has evolved over time – with the width of the footpath being presumed to be the physical extent useable in 1937.

B.4. Section 1 of Schedule 12A to the Highways Act 1980 provides that where the width of a highway is proved that width will be both the minimum and maximum width. In any other case the minimum width of a footpath which is not a field-edge path is 1 metre and the maximum is 1.8 metres. I have used the historic width of the access track to indicate the maximum width of the footpath which would include the present alleyway rather than the unproven maximum width of 1.8 metres which would include very little of the alleyway and which would run through the Garage and rear garden of No. 72 almost in its entirety.

B.5. Section 130 of the Highways Act 1980 (*“the 1980 Act”*) puts Central Bedfordshire Council, as the Highway Authority, under a duty to *“...assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority...”*. The High Court case of *Regina v Surrey County Council (ex parte Send Parish Council) 1979*, mandates that the Council, as highway authority, carries out its duty in a reasonable and

appropriate manner to facilitate use of the route by those legally entitled to do so. Central Bedfordshire Council has discretion in how and the extent to which it discharges its duty. Currently members of the public cannot use the majority of the width of the footpath and the Council therefore needs to take action. The Council can either enforce the legal width where it is obstructed or it can reduce the legal width to a width that is not obstructed having regard on the effect that such a width reduction would have on the use of the path by the public.

- B.6. Section 130(6) of the 1980 Act also specifies that where a Highway Authority receives representations from a parish council that a right of way under its control has been unlawfully stopped up or obstructed the Council has a duty to take proper proceedings accordingly to resolve the issue. Arlesey Town Council has made representations to Central Bedfordshire Council that Footpath No. 5 is obstructed and has provided what it deems to be an acceptable means of resolution, see main report.

Central Bedfordshire Council Policy

- B.7. Central Bedfordshire Council's *Rights of Way Enforcement Policy* defines the Arlesey Garage as a "*permanent feature*", being an operational commercial building. It is unsure whether the Garage can also be classified under the policy as a "*long-lived feature*" as these are defined as being constructed before 1 March 1964 – the extension being built sometime in the mid-60's. The forecourt wall and the garden shed, trees and garden fence to the rear of No. 72 Stotfold Road are classified as "*temporary features*".
- B.8. Section 3 of the Enforcement Policy relates to obstructed paths subject to an application for a public path order or definitive map modification order which would resolve the obstruction issue. It states:
- 3.1 *Keeping paths open and available for public use is a general duty of both the landowner and Central Bedfordshire Council . The execution of the Council's duty, however, must be reasonable and proportionate. Whilst there is no justification in directly linking the presence of obstructions on an existing path with the processing of an application to divert or extinguish it, the presumption shall be that all paths that are the subject of an application will be open and available for public use until such time as an extinguishment or diversion order is made and confirmed (and where necessary, certified).*
 - 3.2 *The decision as to whether enforcement action is appropriate, and whether an application to divert or to extinguish a path is appropriate, should be made by the Rights of Way Team Leader on the merits of each individual case.*
 - 3.3 *The Case Officer, in consultation with the Rights of Way Team Leader, may temporarily waive the requirement that a path should be open and available for public use where he or she deems it appropriate having regard to all the circumstances of the particular case.*

3.4 *Where the legal line of the path is obstructed by temporary structures that can be removed the applicant will be required to open up the path on the legal line until an order has been confirmed and, where necessary, certified.*

B.9. The above policy requires that the execution of the Council's duty under Section 130 of the 1980 Act must be "*reasonable and proportionate*". As the footpath is useable along some of its width, but not the full width, it is not considered reasonable to require that the temporary features (wall, trees, fence and shed) should be removed pending the making and confirmation of the proposed extinguishment order which would obviate the need for enforcement action. The waiving of the requirement to remove the obstructions has been authorised by the Senior Definitive Map Officer in consultation with the Highway Assets Team Leader.

Extinguishment of public paths

B.10. Section 118 of the Highways Act 1980 enables Central Bedfordshire Council, as the Highway Authority, to extinguish public footpaths, bridleways, and restricted byways and is paraphrased below:

(1) *Where it appears to a council as respects a footpath, bridleway, or restricted byway in their area... ..that it is expedient that the path or way should be stopped up on the ground that it is no longer needed for public use, the council may by order made by them and submitted to and confirmed by the Secretary of State, or confirmed by them as an unopposed order, extinguish the public right of way over the path or way...*

(2) *The Secretary of State shall not confirm a public path extinguishment order, and a council shall not confirm such an order as an unopposed order, unless he or, as the case may be, they are satisfied that it is expedient to do so having regard to the extent (if any) to which it appears to him or, as the case may be, them that the path or way would, apart from the order, be likely to be used by the public, and having regard to the effect which the extinguishment of the right of way would have as respects land served by the path or way...*

(3) - (4) (omitted)

(5) *Where... ..proceedings preliminary to the confirmation of the public path extinguishment order are taken concurrently with proceedings preliminary to the confirmation of a... public path diversion order... then, in considering-*

(a) *under subsection (1) above whether the path or way to which the public path extinguishment order relates is needed for public use; or*

(b) *under subsection (2) above to what extent (if any) that the path or way would apart from the order be likely to be used by the public;*

the council or secretary of state, as the case may be, may have regard to the extent to which the... .. public path diversion order... ..would provide an alternative path or way.

(6) *For the purposes of subsections (1) and (2) above, any temporary circumstances preventing or diminishing the use of the path or way by the public shall be disregarded.*

- B.11. Before making an order under Section 118 the Council has to be satisfied that the section of path to be stopped up is no longer needed for public use. Were the entirety of the footpath open and available for use by the public it would be used and there would be occasions when the extra width would be necessary to allow two pushchairs or mobility scooters to pass. However, the section to be narrowed between points A-B on the plan at Appendix A is a straight line and users can wait safely at either end until convenient to pass. Convenience is different to need. I consider that the section of footpath to be stopped up between points A-B, whilst desirable, is not *needed* for public use.
- B.12. The Council also has to consider the expediency of the stopping up. In doing so, it has to consider the impact of the stopping up on the public use of the route and weigh this against the impact of enforcing the route on the current owners of the Garage and No. 72 Stotfold Road. As part of the expediency test the Council can consider whether enforcement action is in the public interest and is a reasonable and proportionate use of its power. I consider that it is expedient for the Council to stop up that part of Footpath No. 5 obstructed by the Garage
- B.13. Before the Council or the Secretary of State for Environment, Food and Rural Affairs confirms the order it, or he, must be satisfied that it is expedient to do so, having regard to the extent to which the footpath would be used. In considering this use any temporary circumstances preventing the public using the route must be disregarded. Whilst the garage itself can be considered a permanent feature, the forecourt wall and the trees and rear fence of No. 72 Stotfold Road are temporary and thus must be disregarded.
- B.14. The Council also has to have regard to the effect of the proposed extinguishment on the land to either end of the footpath. In practice the proposed extinguishment would not detrimentally affect the use of the right of way or the land to either end. The retention of a greater width would benefit the lands served by the path by improving access for buggies and mobility scooters and allowing people to pass these on the majority of the affected part of the route.
- B.15. If the footpath were open and available for public use across the forecourt and through the rear garden of No. 72, it is likely that members of the public would utilise this wider width to avoid having to squeeze past each other. It would also facilitate easier use of pushchairs and mobility scooters. This path – in its reduced width form – is used on a daily basis and would continue to be used irrespective of whether any stopping up of the obstructed width occurs. Disregarding the temporary obstruction, the reduction in width would detrimentally affect the public's use of the footpath. However, more complaints have been received by the Council about the surfacing of the path than its narrowness. Given the effect that opening up the footpath would have on the owners of the obstructed sections and the specific – but limited - benefit of a wider path I consider it would be expedient to stop up the obstructed portion of the footpath and thus confirm the order.

Case law

- B.16. The case of *Ashbrook, R (on the application of) v East Sussex County Council* [2002] EWCA Civ 1701 (“*Ashbrook*”) concerned whether an order to remove a footpath from a farm building could be forwarded to the Secretary of State and whether doing so contravened the Council’s own policies on applications relating to obstructed paths. Compounding the issue was the recent conviction of the landowners under Section 137 of the 1980 Act for obstruction of the footpath and the ongoing failure to remove those obstructions.
- B.17. The County Council (“*ESCC*”) had a policy whereby applications would not be processed if paths were obstructed unless “*the removal of the obstruction is not considered reasonably achievable*”. Schieman LJ. held that whilst the *ESCC* was correct in coming to the conclusion that the removal of the barn was not reasonable, the deliberate and persistent flouting of the law was something that should have been considered. It was not and neither were the judgments of the Magistrates’ Court and therefore the decision to forward the order to the Secretary of State was quashed.
- B.18. Central Bedfordshire Council’s Enforcement Policy, see above, permits an application to be processed even if the path is obstructed. Consequently this report’s recommendation is in accord with *Ashbrook* on policy issues.
- B.19. The case of *R. (oao) Send Parish Council) v Surrey County Council* [1980] HL QBD 40 P&CR 390 (“*Send*”) related to the actions of Surrey County Council in trying to extinguish an obstructed route and substitute for it a less convenient alternative – rather than enforcing the original line which was supported by Send Parish Council. In his judgment, Lane LJ. held that the County Council, in doing so, had acted in the interests of the obstructors and not in the interest of those who had a right to use the footpath and that no reasonable authority could have so acted if they truly had in mind the ambit of their duty under the Highways Act (of 1959).
- B.20. There are similarities between the *Send* case and Arlesey Footpath No. 5. However, I consider the extended period of obstruction of the footpath and the public’s ability to use the narrow unobstructed portion is sufficient to differentiate the two cases and to allow the Council to take what can be considered a reasonable and proportionate stance in stopping up the historically obstructed portion of the footpath.

Enforcement of public rights of way

- B.21. There are a number of sections of the Highways Act 1980 relating to enforcement action and the removal of obstructions from public rights of way:
- A. Section 130(A) relates to the serving of notice on the Highway Authority by members of the public for obstructions. It specifically excludes buildings and any structure that can be used as a dwelling but does include trees and walls.

- Action under Section 130(B) is taken by the complainant in the Magistrates' Court which would direct the Council to take such steps as necessary to remove the relevant obstructions.
- B. Section 143 which gives the Council the power to remove structures erected or set up on a highway. Structures include "...*any machine, pump, post or other object of a similar nature as to be capable of causing obstruction...*" and can be considered to include fences, walls and sheds. As proper buildings are not included within the definition it is unlikely that these are covered by this section of the Act but the garden shed would be included.
- Action under Section 143 would require serving of notice requiring the removal of the obstructions no sooner than 7 days hence. If no action is taken within one month of the notice being served the Council can act to remove the obstructions and seek recovery of the costs incurred from the owners of the obstructions.
- C. Section 149 permits the removal of "things" deposited on the highway. Whilst the nature of "things" is not defined, it can be assumed that these relate to miscellaneous materials (including surfacing/paving) rather than structures or buildings.
- Action under Section 149 would require serving of notice requiring the removal of the obstructions no sooner than 7 days hence. If no action is taken by the deadline, the Council can apply to the Magistrates' Court for an order empowering them to remove and dispose of the obstructions and seek recovery of the costs incurred from the owners of the obstructions.
- D. Section 154 enables the Council to serve notice on the owner of overhanging hedges, trees or shrubs to remove these if they endanger or obstruct the passage of users.
- Action under Section 154 would require serving of notice requiring the removal of the obstructions no sooner than 14 days hence. The recipient of the notice can appeal to the Magistrates' Court.
 - If no action is taken by the deadline and no appeal is made, the Council can take action to remove the vegetation in question and seek recovery of the costs incurred from the owners of the land.
- B.22. Section 137 is an additional power which enables the Council to prosecute any person for wilfully obstructing a highway. The erection of any structure and its subsequent maintenance constitutes a continuous offence. Additionally, Section 137ZA empowers the Court to order anybody convicted of an offence of wilful obstruction to remove the obstructions by a specified date.
- B.23. Prosecution is achieved by laying an information or complaint before the Magistrates' Court to the effect that:
- i. Footpath No. 5 is shown on the Definitive Map as running along the alleyway and has a width of approximately X metres (as specified in any prior confirmed stopping up order)

- ii. Part of the width of Footpath No. 5 is obstructed by specified items (walls, trees, fences, shed etc.)
- iii. That notice requiring the removal of the specified items has been served and expired and that these still obstruct the footpath and thus constitute a continuing offence.