

Central Bedfordshire Council

Decision by the Assistant Director - Highways under Delegated Powers 08/11/2017

The determination of an application to delete part of Haynes Footpath No. 4 on the ground that it is incorrectly recorded on the Definitive Map

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Purpose of this report

1. To determine whether an application to delete the northern end of Haynes Footpath No. 4 should be approved and a definitive map modification order made to delete the affected section of footpath on the ground that it is incorrectly recorded on the Definitive Map.
2. The affected section of footpath is currently obstructed by No. 3 Northwood Lodge and the garage extension of No. 3 Park Palings Walk and has been so for many years. The co-owners of No. 3 Northwood Lodge cannot sell their house because of the footpath running through it.

RECOMMENDATIONS

The Assistant Director - Highways is asked to:

1. Refuse the application to delete the northern section of Haynes Footpath No. 4 between points X-Y-Z as shown on the plan at Appendix A under Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 on the ground that the evidence neither demonstrates that, on the balance of probability, this section of footpath is recorded in error nor does the evidence provide a compelling argument to merit the making of a definitive map modification order to delete the path.
2. Approve the making of an order under Section 53(3)(c)(iii) of the 1981 Act to amend the Definitive Statement to record the section of Haynes Footpath No. 4 between points X-Y-Z on the plan at Appendix A – but to hold this approval in abeyance until the parallel public path extinguishment order application is either refused or made but not confirmed.

Issues

3. Mrs. South and her daughter, Mrs. Crosse, have been trying to sell No. 3 Northwood Lodge so that Mrs. South can move into more appropriate accommodation for her increasing welfare needs. Unfortunately the presence of Haynes Footpath No. 4 running through the main body of the house has caused recent offers to fall through.
4. Mrs. South and Mrs. Crosse submitted an application in June 2017 under Section 53 of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by having the northern section of Haynes Footpath No. 4 deleted on the ground that it is recorded in error. This application is being dealt with in parallel with another application by Mrs. South and Mrs. Crosse to extinguish the northern section of this footpath under section 118 of the Highways Act 1980 on the ground that it is not needed for public use: members of the public have used the nearby Park Palings Walk path as the alternative route for over 45 years due to the legal line being obstructed: this application is the subject of a separate report.
5. Because of concerns for Mrs. South's welfare, the decision has been made with the full support of Cllr. Angela Barker, the local ward member, to process both deletion and extinguishment applications in parallel to speed up the decision-making process and any consequent deletion or extinguishment of the path.
6. The northern section of Haynes Footpath No. 4 starts at its junction with Plummers Lane and Northwood End Road (point X on the plan at Appendix A) and heads westwards through a set of (generally) closed gates and along The Carriage Drive (also known as Back Drive) for approximately 34 metres to point Y. At point Y the legal line of Footpath No. 4 turns south-south-west for approximately 58 metres, running through the front and rear gardens of No.3 Northwood Lodge as well as through the dwelling itself and then possibly through the garage extension to No .3 Park Palings Walk and that property's front garden before having its junction with Park Palings Walk which is adopted carriageway (point Z). The footpath then continues generally south-westwards for approximately 900 metres to terminate at its junction with Church End Road.
7. It appears that the footpath between points X-Y-Z has been blocked since at least c.1970-72 when the obstructing property was built and potentially before 1953 when the original Draft Map of Public Rights of Way was published as this showed the section of footpath between points Y-Z as obstructed by barbed wire.

Historic Evidence

8. Mrs. Cross adduced a number of copied extracts from historic documents as part of her application:
 - 1839 Tithe Map extract
 - Extracts of several maps (including 1949 Act mapping process)
 - Haynes Estate 1914 sales plans
 - Rateable value plans (1925 Finance Act)
 - Copy of Definitive Statement for Footpath No. 4

- 3 recent Land Registry Title plans

Additionally Mrs. Crosse supplied supporting statements from neighbouring land owners, namely: Mr. & Mrs. Phillips, Mr. Paul Cosford & Ms. Gillian Leng, and Mr. & Mrs. Welham. This evidence, along with other documents held by the Council and in the Bedfordshire and Luton Archives, is discussed in detail at Appendix B.

9. Prior to the enactment of the National Parks and Access to the Countryside Act 1949 there was no documentary/mapping evidence which indicated that a public right of way subsisted northwards of Park Palings Walk and along the Carriage Drive (line Z-Y-X). The evidence for the existence of this section of Footpath No. 4 comes from the 1949 Act process of recording public rights of way. The route X-Y-Z was first depicted on the Haynes Parish Council survey map and then on the subsequent Draft, Modified Draft, Provisional and Definitive Maps.
10. There is some uncertainty in the Council's processes: firstly with the wording of the survey statement that became the Definitive Statement; secondly in the recommendation of Mr. Simes Q.C. and the consequent Notice in the London Gazette.
11. The walking survey states that the footpath started at the Primary School - which was not shown on the Ordnance Survey maps of the time - rather than at the junction of Plummers Lane and Northwood End Road (point X on the plan at Appendix A). At this time (c.1952-3) the section Y-Z was obstructed by a barbed-wire fence and so the available route did start effectively from the Primary School. The walking survey subsequently became the Definitive Statement.
12. Mr. Sime's report recommended that the "*North end branch*" be deleted. Whilst this wording can be interpreted in a number of ways (see Appendix B.15.), the preparatory maps and the Modified Draft Map are both clear in that the northern fork was retained and the eastern fork was deleted. These maps are likely to have been prepared during the time that Mr. Sime was available for to clarify any queries so it is possible that any confusion could have been avoided. There does not appear to have been any objection to the deletion of the Park Palings Walk spur of the footpath - an action which was commented on in contemporary letters from the Parish Council.
13. Subsequent correspondence after the publication of the 1964 Definitive Map generally reflects the depiction of the footpath as running through No. 3 Northwood Lodge. Overall, when the documentary evidence is weighed up, it does not provide any compelling reasons to overturn the presumption that the Definitive Map process was correctly carried out.
14. Local residents have commented that the obvious route of Footpath No. 4 would have been along Park Palings Walk. This route, whilst available on the ground, was the subject of a deletion in the 1963 Schedule of Modifications to the Draft Map of Public Rights of Way. The route of Park Palings Walk is now adopted and so any footpath, had it been retained, would now be subsumed within the adopted carriageway and thus would not now be recorded on the Definitive Map.

15. The evidence for two alternative routes for Footpath No. 4 (current route and Park Palings Walk route) are tabulated, weighted and ranked in Appendix B. The results suggests that there is an aggregate of positive legal evidence for the existence of a public footpath along the current definitive line but negligible legal evidence for a footpath along Park Palings Walk – notwithstanding its later subsumation within the adopted carriageway.

Legal and Policy Considerations

16. The legal and policy considerations are discussed in detail at Appendix C and summarised below.
17. The Wildlife and Countryside Act 1981 places a duty on Central Bedfordshire Council as the Surveying Authority for Central Bedfordshire to keep the Definitive Map and Statement under continuous review and, following the discovery of evidence that shows the map or statement requires modification, make any orders that it deems requisite as a consequence of that evidence.
18. It is for the applicants, Mrs. South and Mrs. Crosse, to provide evidence which shows the Definitive Map and Statement is in error and requires modification. This evidence must be new, in that it has not previously been considered by the Council, it must be sufficient to displace the presumption that the Definitive Map and Statement is correct and it must be cogent – that is compelling on the balance of probability.
19. The Council has to consider all the available evidence and determine whether it makes, on the balance of probability, a compelling case showing that a public right of way does not exist: in doing so it must disregard other issues such as whether the path is obstructed or needed. If the evidence shows that no public right of way exists it is required to make an order to delete the section of footpath. If the evidence does not show that a public right of way does not exist it has to refuse the application and make no order. If no order is made the applicant has a right to appeal to the Secretary of State for a direction that a modification order be made. The Council may choose to support or object to the directed order or to take a neutral stance.
20. Where no order is made under the Wildlife and Countryside Act 1981, and without prejudice to their right to appeal, the applicants can apply for a public path extinguishment order under Section 118 of the Highways Act 1980. The applicants have already done this; however, this cannot prejudice the determination of the current application to delete the footpath.

Consultations

21. Mrs. Crosse and her mother, Mrs. South are owners of No. 3 Northwood Lodge are the applicants and fully support the deletion. The other affected landowners: Mr. & Mrs. Phillips (of Northwood End Farm), Mrs. Fiona Turner (of No. 4 Park Palings Walk), Mr. Paul Cosford & Ms. Gillian Leng (of No. 3 Park Palings Walk) were all consulted and all support the proposed deletion (see their comments in Appendix B).
22. Haynes Parish Council was consulted and has no objections to the proposal.

23. Cllr. Angela Barker was consulted and supports the deletion as it resolves the issue with the elderly occupant on No. 3 Northwood Lodge.
24. The Chiltern Society and Ramblers were also consulted. The area is too far from the Chilterns for the Chiltern Society to have an interest and the Ramblers has not responded to date.

Reasons for Decision

25. Defra's Rights of Way Circular 1/09 and case law (*Trevelyan 2001*) stipulates that in order to delete a path the evidence must be new, of sufficient substance to displace the presumption the map is correct and cogent – that is compelling. Whilst some of the evidence is new and does cast some doubt on the accuracy of the map and statement, it is not of enough substance to show that the process of drafting the Draft and Modified Draft Maps was conducted incorrectly. As such, there is not a compelling argument to merit the making of a definitive map modification order to delete the current route of Footpath No. 4 between points X-Y-Z.
26. Similarly there is no evidence to show that a route of a status that ought to be recorded on the Definitive Map is missing along Park Palings Walk: this is because any public footpath that *may* have subsisted has, in any case, been subsumed within the current adopted carriageway.
27. A modification order could be made to amend the Definitive Statement to recognise the missing section of footpath between points X-Y-Z. However, as this section of the footpath is subject to an application to extinguish it, the requisite modification should be held in abeyance until the outcome of any public path extinguishment order is known.

Council Priorities

28. The determination of this proposal fulfils the Council's statutory duty under the 1981 Act as the Surveying Authority for the Definitive Map and Statement for Central Bedfordshire. In doing so it is at odds with some of the stated priorities of the Council, namely:
 - Enhancing Central Bedfordshire
 - Delivering great residents' services
 - Protecting the vulnerable, promoting wellbeing
29. However, the Council is aware of this and, under its discretionary powers contained within the Highways Act 1980, is considering a parallel application to extinguish the footpath.

Corporate Implications

Legal Implications

30. The recommended refusal of Mrs. South and Mrs Crosse's application to delete part of Footpath No. 4 could result in an appeal to the Secretary of State for

Environment, Food and Rural Affairs. However, it is more likely that, in the interests of expediency, they will instead support the determination of their already submitted application for a public path extinguishment order.

31. Whilst the refusal of Mrs. South and Mrs Crosse's deletion application will leave a contradiction between Definitive Map and Definitive Statement the likely confirmation of a subsequent public path extinguishment order would ultimately resolve this issue. Consequently the second recommendation is that the decision to make an order to modify the Definitive Statement would be held in abeyance until the parallel public path extinguishment order was either not made or not confirmed.
32. It is likely that if an order is ultimately made to modify the Definitive Statement to record Footpath No. 4 as passing between points X-Y-Z this would be objected to by the applicants and neighbouring land owners; the fate of this order would then be determined by an independent Inspector appointed by the Secretary of State.

Financial Implications

33. The refusal of Mrs. South and Mrs Crosse's deletion application will not cost the Council any additional money beyond the cost of Council administration already expended as part of the Council's duties under the 1981 Act. The Council receives money from central government for maintaining the Definitive Map and Statement and so cannot recoup these costs directly from applicants.
34. If an order is eventually made to modify the Definitive Statement and this is objected to it is likely to cost around £1500 in Council administration and advertising which would be met out of Council Highways budgets for the years 2017/18 and 18/19. The cost of dealing with any objection to such an order would also be met out of the same budget and is likely to cost between £750 and £2000.

Equalities Implications

35. Section 6 of the Human Rights Act 1998 states it is unlawful of the Council to act in a way which is incompatible with a Convention right unless, as the result of one or more provisions of primary legislation, the authority could not have acted differently; or in the case of one or more provisions of primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
36. It has been established in court through case law that modification order determinations have no human rights implications. When the Council determines a modification order application made under the primary legislation of the Wildlife and Countryside Act it is exempted from having to adhere to Section 6(1) of the Human Rights Act 1998 when coming to its decision. This is because the committee is only concerned in the evaluation of the evidence to show whether public rights do, or do not, exist. The Council's Assistant Director of Highways, in coming to his decision based on the evidence at

hand, will have acted as required by the primary legislation and thus in accordance with the 1998 Act.

37. The recommendations in the report would not affect the diversity of those entitled to use the right of way and would not directly impact on the use of the way by any section of the public.

Community Safety Implications

38. The Council has a statutory duty under the Crime and Disorder Act 1998 to consider the community safety implications that may result from making the decision set out in the report. The route of Footpath No. 4 is currently obstructed by a house, garage and garden vegetation. The recommendation of this report is to maintain the status quo and seek an alternative means of resolving the network anomaly.

Conclusion and Next Steps

39. There is no historic evidence for the physical or legal presence of the northern section of Haynes Footpath No. 4 as depicted on the Definitive Map. This section of footpath was mapped by the Parish Council in c.1952 and, following a public inquiry in c. 1954-56, was eventually recorded on the Definitive Map. Whilst some of the Council's records are contradictory, there is no direct evidence to show that this mapping process was carried out incorrectly. When all the evidence is evaluated the evidence is not compelling enough to warrant the making of a Definitive Map modification order to delete the current footpath.
40. The documentary evidence indicates the presence of a physical route along Park Palings Walk. However, there is evidence to show that this route was deleted as part of the National Parks and Access to the Countryside Act 1949 process. Notwithstanding that, Park Palings Walk is now an adopted carriageway so any unrecorded lower rights would have been subsumed and now not required to be shown on the Definitive Map and Statement.
41. Mrs. South and Mrs. Crosse have submitted a parallel application for a public path extinguishment order under Section 118 of the Highways Act 1980. This is the subject of a separate report. It is recommended that this separate public path order be followed through to its conclusion before making any order to modify the Definitive Statement for Footpath No. 4 by adding the missing segment X-Y-Z.

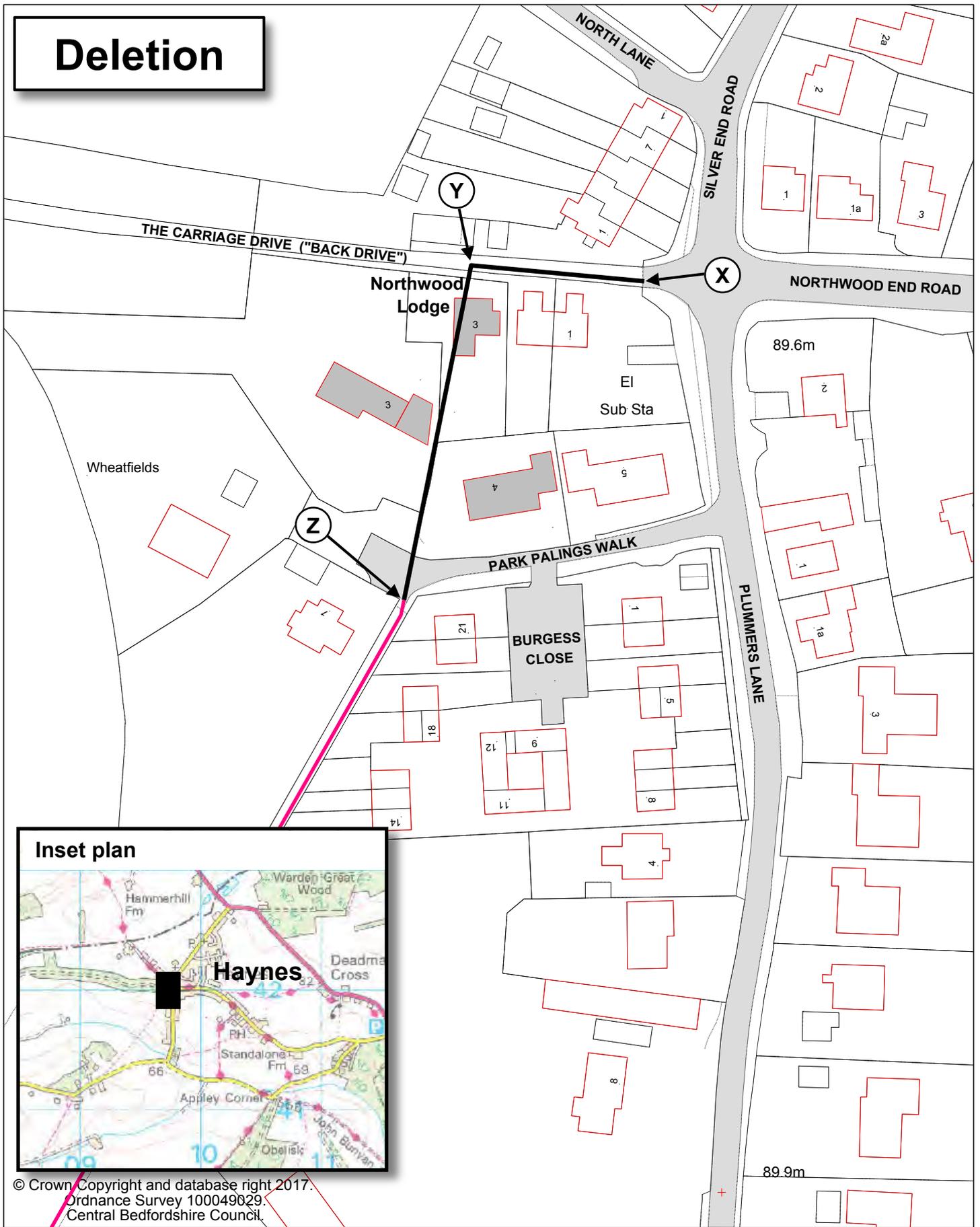
Appendices

Appendix A – Plan of applied for deletion

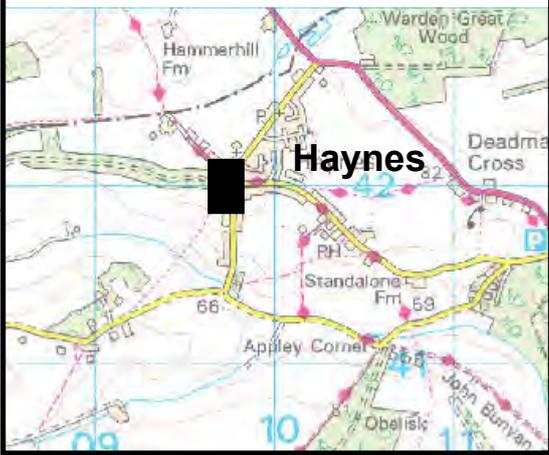
Appendix B – Historic Evidence

Appendix C – Legal and Policy Considerations

Deletion



Inset plan



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Ordnance Survey 100049029.
Central Bedfordshire Council.

WILDLIFE AND COUNTRYSIDE ACT

Proposed Deletion of Part of Haynes Footpath No. 4



FP 4 to be deleted



Unaffected footpath

Alternative route
along footway
Adopted highway



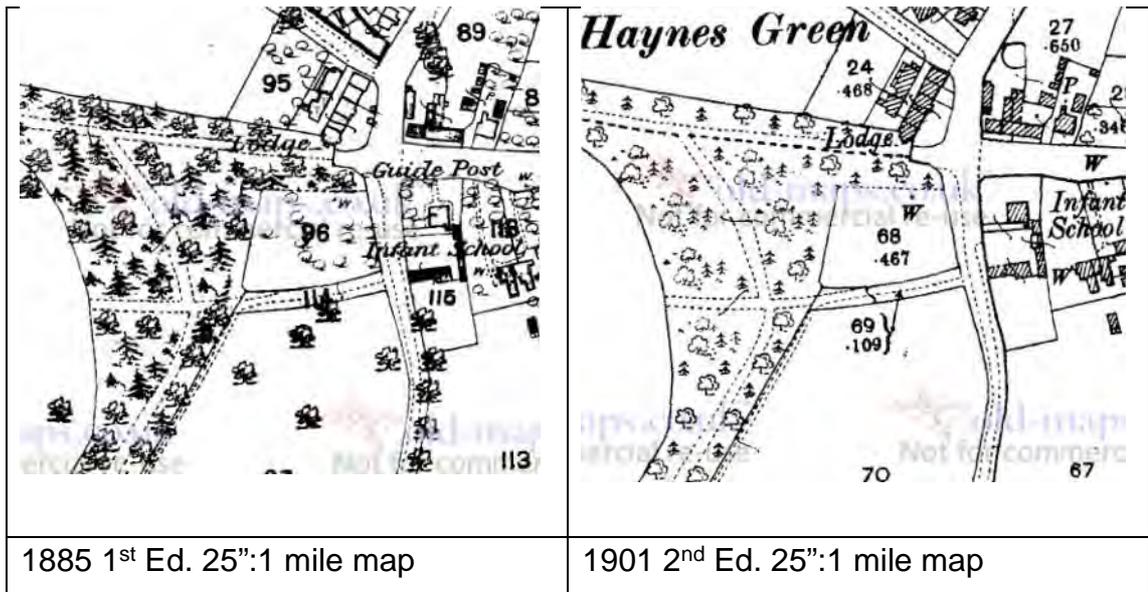
Date: 5 July 2017
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Historic Evidence

- B.1. The 1839 Tithe Map [MAT. 19/1] extract shows the route of the southern section of Footpath No. 4 as a dashed line up to what is now Park Palings Walk: Park Palings Walk is shown as a wider trackway crossing the footpath. There is no depicted continuation northwards of any path or track towards the Carriage Drive/Back Drive. The eastern junction of the Carriage Drive with Plummers Lane is shown gated (arrowed) on the plan. The presence of a gate does not preclude the existence of public rights along The Carriage Drive although it does make them less likely.



- B.2. The parish of Haynes underwent only a partial Parliamentary Inclosure – with certain parcels of land being exchanged by the Inclosure Commissioners in 1854 [SA. 17]. The area in question was not affected.
- B.3. The Ordnance Survey began large scale (25":1 mile) mapping at the end of the 17th Century. The maps below show the first two surveys in 1885 and 1901. The 2nd Ed. map shows Footpath No. 4 with the annotation "F.P." for footpath: this recognised the physical characteristic of the path as a permanent footpath as opposed to a bridleway, cartway or temporary private/occupation track or animal path: it did not convey any inference of whether the way carried public rights - which were deliberately not recorded on early Ordnance Survey maps. The line of the footpath as marked by a double-pecked line ("= = =") does not continue northwards of the end of the track that is now called Park Palings Walk. On both maps the entrance to the Carriage Drive is marked by a solid line as opposed to a dashed line which can indicate a barrier (such as a gate). Whilst not common on public roads, the presence of a gate does not preclude the existence of public rights. Both maps locate the Infant School on the eastern side of Plummers Lane.



- B.4. The enactment of the 1910 Finance Act required that all lands be surveyed for tax purposes. The tax assessors recorded land valuations in a Valuation Book referenced to an accompanying map. The map and Valuation Book were statutory documents produced to ensure that taxation on the land could be fairly, and accurately, apportioned. These documents were available for public scrutiny and appeal and misrepresentation of land holdings was a criminal offence. Public roads were not taxable and hence were not included in the survey. To this end public roads and shared accesses with no intrinsic productivity value usually are shown as uncoloured.
- B.5. The map [BDV3/202] and valuation book [DBV1/48] cover the parish of Haynes. On the map the main roads are shown uncoloured and thus not recorded for tax purposes.



Nos. 10, 313 and 282 added for identification purposes)

No.10 Haynes Park Manor & garden – no public right of way deduction

No. 318 Carriage Drive – no public right of way deduction

No. 274 Northwood End Land (comprised of three land parcels) – no public right of way deduction

No. 282 Land off Plummers Lane – no public right of way deduction

No. 313 Woodland Strip – no public right of way deduction

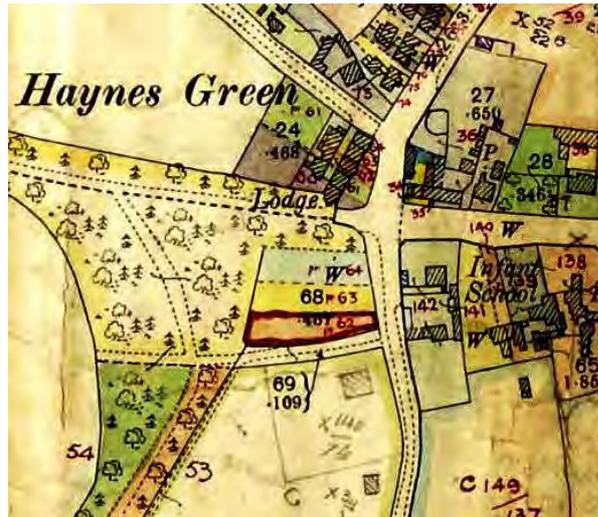
Nos. 293 and 287 are further south – no public right of way deduction

Park Palings Walk is depicted as a short track which served a number of land parcels. The track is left uncoloured: probably as no taxable income could be earned from the shared access: the uncoloured nature does not indicate whether the route is public or private.

- B.6. In 1914 the Haynes Park Estate was sold off in a multitude of lots of varying sizes. The sales catalogue and plans [Z. 22/85] shows that the land surrounding Footpath No. 4 was divided into a number of lots: Lot 135 is Northwood End Farm: this lot specifies that the owner of the lot has to maintain The Carriage Drive as indicated by the red line of Plan 1. No public right of way is mentioned. Similarly, no public right of way is mentioned through Lots: 134 (now Northwood Lodge), 75 (woodland), 133 (now Burgess Close.), 131 or 130.

<p>The Carriage Drive is indicated by the red line on Plan 1.</p>	<p>The entrance to the Carriage Drive is shown on Plan 3</p>

- B.7. It should be noted that public rights of way are often not recorded in such documents as these are intended to record private rights (easements) rather than public rights. It is also possible that Footpath No. 4 may have come into being after 1914. The sales plans are taken from the 1901 2nd Ed. 25": 1 mile Ordnance Survey map. Both the estate plan and Ordnance Survey map show a solid line separating the Carriage Drive from Plummers Lane. This is suggestive of the Carriage Drive being gated: although this does not preclude public access.
- B.8. The 1925 Finance Act similarly required the evaluation of the land for tax. The extract below [DV2/J19] shows that the main road and what was to become Park Palings Walk are both left uncoloured, and thus not registered.



The route of Footpath No. 4 is included in the green-bounded hereditament (C159/52) and would then continue northwards within the perimeter of the yellow-bounded hereditament for Haynes Park Farm. The Ordnance Survey base map is again the 1901 2nd Ed. 25" map and shows no continuation of the footpath northwards from what would become Park Palings Walk.

- B.9. The c.1948 6":1 mile Ordnance Survey map was used by the former Bedfordshire County Council as its mapping base for the survey of public rights of way. This map still shows the Infant School to the east of Plummers Lane – even though the new Primary School had been opened in what is now Burgess Lane in 1934 (denoted by the square building – arrowed). This plan again shows Footpath No. 4 south of Park Palings Walk as a double-pecked line with no northwards continuation.



National Parks and Access to the Countryside Act 1949 process evidence

- B.10. The National Parks and Access to the Countryside Act 1949 required all County Councils to survey, prepare and publish a Definitive Map and Statement of public rights of way for their areas. As part of this process Bedfordshire County Council asked each parish council to produce a map of those rights of way it considered public and to accompany this with a walking statement for each path detailing its type, nature and any features present along it.
- B.11. The extract from the c.1952 Haynes Parish Council survey map shows Footpath No. 4 in red crayon running north-eastwards past the end of Park Palings Walk and continuing north-north-eastwards then curving eastwards to run



parallel to the Carriage Drive/Back Drive: rather than along it. A short grey pencil line at the termination of this drawn line may indicate the location of the field gate at the eastern end of the Carriage Drive. An additional section of path has been subsequently added to the map in grey pencil along Park Palings Walk. The date of this addition is unknown as is the identity of the person adding it.

- B.12. The walking survey for Footpath No. 4, dated 10.4.51, was the basis for the later Definitive Statement for the path

From: *The Primary School*

To: *The Cottage*

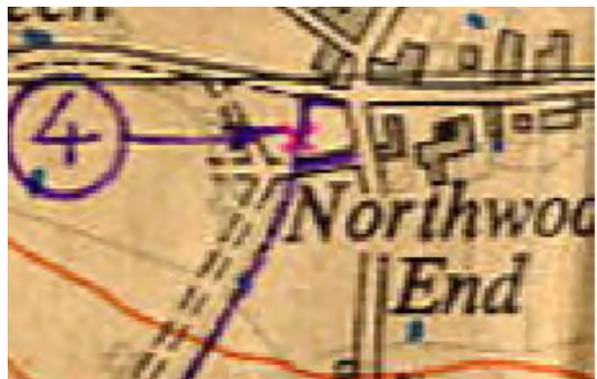
Description: *It starts at the Primary School and leads directly to Church Road, joining it at The Cottage...*

The Primary School is not marked on the parish council's Ordnance Survey base map as this was out of date. The school shown on the map as "Infant School" was closed in 1934 when the new Primary School was opened just off Park Palings Walk (on what is now the Burgess Close estate). However, the new school was not annotated on Ordnance Survey maps until the 1975 1:2,500 map was published. However, this map was never used for rights of way mapping purposes.

It is probable that the new Primary School used as part of the walking survey description - rather than the Infants' School which had closed some 17 years previously. The survey statement does not refer to the footpath starting at Plummers Lane, nor at Park Palings Walk, but at the "Primary School". This description implies that the footpath started/terminated at the school and the track to Plummers Lane was a road rather than a footpath. The term "leads directly" suggests a straight route rather than one with bends in it.

Consequently the survey statement suggests that the surveyor considered at the time of writing that no footpath extended either northwards via the Carriage Drive nor eastwards along Park Palings Walk.

- B.13. The County Council collated the survey information from all the parish councils and incorporated it in four district-based maps called the Draft Map of Public Rights of Way (hereafter the "Draft Map"). The Draft Map was publicised on 25 April 1953 and the County Council received many objections to the routes shown on it and to those omitted from it. An extract from the Draft Map is shown to the right. This shows two routes at the northern end of Footpath No. 4: one along the current line running via the Carriage Drive and another running along Park Palings Walk. The 1953 Draft Map shows



both the northwards and eastwards sections of Footpath No. 4 in purple pen. The northern section is additionally marked with a pink "x" to indicate this route was obstructed by barbed wire at the time.

- B.14. Haynes Parish Council wrote to the County Surveyor at the County Council on 14 April 1954 stating that the "...Path marked 4 on your map... There is no trace of this path and there appears to be no knowledge of its use for very many years..." There is also a comment in the letter "...It does appear rather unfortunate that on your last map you have instituted different numbers on the paths from those given on our previous report as this may in the future lead to some confusion..." Consequently I am unsure whether "Path 4" is indeed Footpath No. 4 as no accompanying map is held on file.
- B.15. The objections to the Draft Map were heard at a series of public hearings by a solicitor, Mr. Sime Q.C. between September 1954 and September 1956. His recommendations were submitted to the County Council in October 1956 and led to the County Council publishing the Schedule of Modifications to the Draft Map of Public Rights of Way in September 1963. Mr. Sime's report recommended that the "North end branch" be deleted. The wording of Mr. Sime's recommendation can be interpreted in a number of ways:
- a) *"the northern branch/fork (rather than the eastern branch/fork) of the footpath should be deleted"*
 - b) *"the branch (sticking out to the east) at the north end of the long linear footpath should be deleted"*
 - c) *Assuming a spelling mistake: "the branch at North(wood) End should be deleted".*

Interpretation "c" is completely ambiguous and interpretations "a" and "b" are contradictory with markedly different implications and it is not completely clear which was intended.

- B.16. Following the production of the report produced by Mr. Sime, the Council undertook the process of producing an internal map showing the recommended changes. This appears to have been accompanied by a checklist (see below). These documents, although undated, appear to have been drafted prior to the publication of the Schedule of Modifications in 1963.

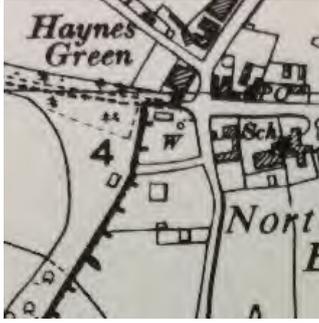
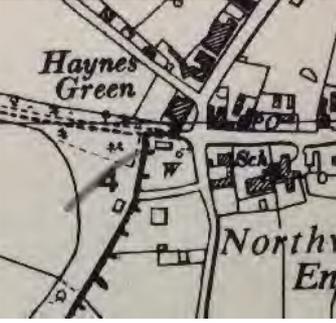
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		6	✓	?	FP	not possible to check description																																																												
4	Clapham	A1	✓	✓	BR																																																													
		8	✓	✓	BR																																																													
4	Chickens	12	-	-	BR	in Haynes																																																												
4	Haynes	4	✓	✓	FP																																																													
		18	✓	✓	FP																																																													
<p>Draft version of map (see enlarged inset).</p>	<p>Post Sime's Report checklist.</p>																																																																	

B.17. Once all the changes recommended by Mr. Sime Q.C. had been examined, the County Council published the Schedule of Modifications to the Draft Map. The 12 July 1963 London Gazette notice for the Schedule of Modifications simply indicated that Haynes FP 4 was being modified and thus sheds no light on what was meant by “North end branch” as stated in Mr. Sime’s report.

B.18. The County Council produced a non-statutory map counterpart to the Schedule of Modifications to the Draft Map called the Modified Draft Map. This map showed all the changes introduced by the Schedule and was subsequently adopted as the statutory Provisional Map. Haynes Footpath No. 4 is depicted on this map, published in December 1963, as shown below. The northern fork of the footpath through Northwood Lodge and then along the Carriage Drive has been retained whilst the eastwards fork along Park Palings Walk is hatched in red denoting its deletion from the map.



B.19. The Definitive Map was a map bearing the official seal of Bedfordshire County Council and was kept in the Bedfordshire & Luton Archives after its publication in March 1964. The Council used an unsealed version of the map for day-to-day office work. There appear to have been several versions of this map, all undated, which used the symbology of the 1964 Definitive Map. These maps were used for different purposes – none of which are now clear and so are of little evidential value.

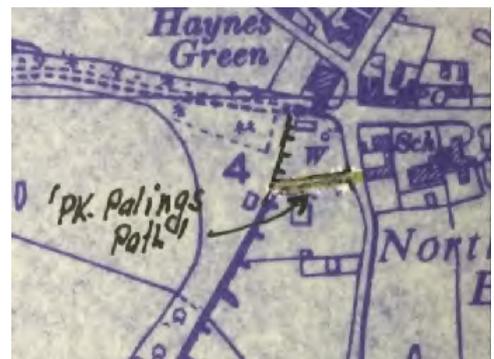
		
<p>Non-annotated version of unsealed (and thus unofficial) Definitive Map.</p>	<p>Version used to check something as path numbers all crossed through.</p>	<p>Version with northwards extension of FP 4 crossed out in pencil and alternative route along Park Palings Walk pencilled in.</p>

B.20. A Haynes Parish Council note relating to “Information given by Colonel Stanley on October 25th and 31st 1963” states: “...*The eastern branch at the top of the Path No.4 was also deleted by direction of Mr. Sime QC in 1956, because it is not marked as a public footpath on the map. Colonel Stanley was of the opinion that the landowner would have no difficulty in getting an order to have the present northern extension of this path stopped up and the eastern extension reinstated as a public footpath. Unless this is done the green public footpath signposts which the County Council will erect will make the Authority look ridiculous in the eyes of the village...*”

B.21. In the mid 1970’s there was a significant amount of correspondence between the County Council and Haynes Parish Council about the surfacing of the long section of Footpath 4 (referred to in the file as the “Park Palings Footpath”). During this period the County Council used a map which incorrectly depicted Footpath No. 4 as running along Park Palings Walk rather than up to the Carriage Drive and then eastwards along it to Plummers Lane. The mistaken use of this route would not create a public right of way along Park Palings Walk nor would it legally extinguish the definitive line of the footpath via the Carriage Drive (Back Drive).



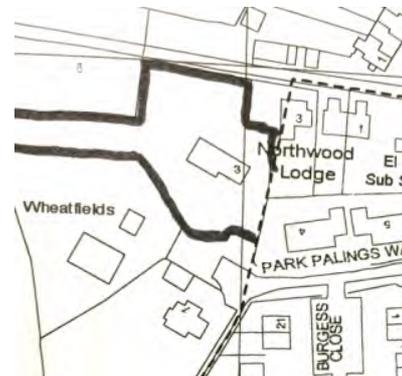
B.22. In August 1978 Haynes Parish Council submitted to the County Council a report about the conditions of its footpaths and included a schedule of the paths and a map. The entry for Path No. 4 was “*Park Palings Path’ One arm of sign at the school end has been broken off. The path is in bad condition and is the subject of*



correspondence C.C.Humphries & Son of Maulden are the land users.” The map clearly is an amended version of the map shown at B.21 above with the eastern fork tipexed out and the northern fork drawn in.

- B.23. In November 1987 the County Council received a quote and plan for resurfacing of Footpath No. 4. This included Park Palings Walk as shown on the plan: the section of footpath via the Carriage Drive was not shown on the works plan.
- B.24. In the early 1990s the County Council began to digitise its Definitive Map and, in so doing so, discovered a large number of errors and omissions: these are collectively known as “map or network anomalies”. In 1992-3 as part of a project to rationalise the public rights of way network for Haynes, the County Council considered extinguishing the northern part of Footpath No. 4 where it runs through Northwood Lodge: however this project was dropped due to Council budget cuts.

- B.25. In January 2000 a planning application (22/00/0078) was submitted to Mid-Beds District Council for the redevelopment of No. 3 Park Palings Walk. In response the County Council’s Area Rights of Way Officer contacted the District Council to state *“Footpath 4 runs within the eastern boundary of the development site. I enclose a plan to this effect... although Northwood Lodge already obstructs this path, the applicants must still ensure that the section of path through their property is kept free from obstruction and available for use during the development.”*



- B.26. In mid-May 2000 the County Council contacted all the affected residents in Northwood Lodge and Park Palings Walk to inform them that Footpath No. 4 crossed their properties.
- B.27. The County Council investigated in c.July 2000 whether Haynes Footpath No. 4 was correctly recorded on the Definitive Map and Statement and concluded that it was. However, these findings were, in part, predicated on the assumption that the school mentioned in the Definitive Statement was situated where it is shown on the Definitive Map – rather than where it was at the time of the survey which was in the un-mapped Burgess Close. Because of the flaws in this investigation it is not scored in the matrix at B.37 below.
- B.28. Mrs. Crosse adduced a number of supporting statements as part of her S.53 application: these were from: Mrs. Fiona Turner (of 4 Park Palings Walk), Mr. Andrew Phillips (of Northwood End Farm), Mrs. Charlotte Phillips (also of Northwood End Farm), Mr. Paul Cosford and Ms. Gillian Leng (of 3 Park Palings Walk), and Mr. and Mrs. C. Welham (of 2 Northwood Lodge).
- B.29. Mrs. Turner states that her neighbours at No. 3 Park Palings Walk applied for and received planning consent to build a garage which stands over the line Y-Z. Mrs. Turner also states that since moving to No. 4 there has never been

a right of way or access along the boundary between Nos. 3 and 4 Park Palings Walk (line Y-Z).

B.30. Mr. Phillips states that his parents bought Northwood Farm in 1965 and used The Carriage Drive to access cottage on the farm. He recalls that there has always been a gate at point X which was closed when Haynes Park was occupied Hawnes and then Clarendon Schools. He states that there has never been a footpath sign at point X. When he and his late mother purchased the Carriage Drive in September 1995 the local search (CON29) indicated the presence of the footpath running along the drive and then through No. 3 Northwood Lodge. Mr. Phillips states that he has never seen anybody walk the section of footpath X-Y nor has he received any complaints about the impassibility of the route.

B.31. In a separate e-mail, dated 27 July 2017, Mr. Phillips commented on the evidence, stating:

With regard to deletion I believe that the Definitive Map needs modifying to delete the section of footpath X to Y to Z. I list the evidence below under various headings:

Mapping

- *1839 Tithe Map - This shows a gate at the end of the carriage drive and also shows Park Palings Walk. There is no path shown between Points Y and Z.*
- *1885 Ordnance Survey Map 25 inches to 1 mile – This also shows a gate at the end of the carriage drive. This map clearly shows a footpath coming from the Church End direction and entering Park Palings Walk. There is no northern branch showing connecting to the carriage drive i.e. from Point Z to Y.*
- *1901 Ordnance Survey Map 25 inches to 1 mile – This shows the same as the 1885 map.*
- *1914 Haynes Estate Sale Plan 1 – This clearly shows the footpath from Church End going to Park Palings Walk and no further north.*
- *1914 Haynes Estate Sale Plan 3 – This shows the gate at the end of the carriage drive.*
- *1951 Haynes Parish Council Survey Map – This map is misleading as the route in red does not follow the route Z, Y, X. The route shown is not drawn very carefully and appears to exit onto Plummers Lane south of the carriage drive. It looks as though the map is creased where Park Palings Walk is and that the person drawing it thought that the carriage drive was Park Palings Walk, and North Lane was the carriage drive.*
- *1975 Ordnance Survey Map 1:2500 – This again shows the footpath leading into Park Palings Walk. It also shows that 3 Northwood Lodges and 3 Park Palings Walk have been built and there is no footpath connecting with the carriage drive.*

- *Circa 2000 Haynes Parish Paths Footpaths and Bridleways map – with support from Bedfordshire County Council shows the path entering Park Palings Walk and not connecting with the carriage drive.*

Historical/Legal

- *The name of the road Park Palings Walk indicates that this was originally a footpath.*
- *1951 The footpath was surveyed by Haynes Parish Council and the statement says quite clearly that the footpath starts at the Primary School and leads to Church Road, joining it at The Cottage. The Primary School is shown on the 1975 OS map referred to above and is immediately to the south of Park Palings Walk.*
- *1956 Mr. Simes QC produced a report and recommended that the “north end branch” be deleted. This was very straightforward and clear advice in order to correct the map to agree with the statement.*
- *9th March 1965 Draft report on footpaths and their signs. Paragraph 17 states that there is a footpath sign at Point Z with one finger pointing south and one finger pointing east along Park Palings Walk. It is stated that the route along Park Palings Walk has been deleted from the provisional map. This is because it is an adopted highway and does not need to be shown as a footpath. There was probably some doubt at the time as to whether it was adopted or not, but records have shown that it was adopted a long time before.*

Development

The planning authority has allowed development to take place twice over the northern route of this footpath. The most recent development was a double garage over the footpath MB/07/01505. This happened as recently as 29.08.2007 and leads me to believe that this northern route does not exist because otherwise local residents and consultees such as the Parish Council would have objected.

- B.32. All of the above points have been touched on within this appendix except the 2007 planning application for a double garage (MB/07/01505). The application incorrectly stated that no public right of way was affected and so it seems Mid-Beds District Council did not consult the former Bedfordshire County Council as the Surveying and Highway Authority for the area. Had the County Council been notified it would have objected to the development unless the affected footpath was stopped up or diverted.
- B.33. Mrs. Phillips has stated that since 1983 has never seen anybody walk the section of footpath X-Y nor has she received any complaints about the impassibility of the route.
- B.34. Mr. Cosford and Ms. Leng state that since moving to No.3 Park Palings Walk in 2003 there has never been a footpath through their property. They also state that they built a garage with planning consent which either abuts,

impinges or potentially obstructs part of the footpath. They state that no question was raised about the possibility of a footpath at that time. It should be noted that the Agent for the application (07/01505) incorrectly stated that there was no public right of way affected by the development and so the former County Council, as Highway and Surveying Authority, was not consulted on the application. For a prior 2000 planning application (see 00/0078 at paragraph B.25 above) a response indicating that a public right of way existed was given by the County Council.

- B.35. Mr. and Mrs. Welham have stated that since they moved to No. 2 Northwood Lodge in 2002 they are not aware of any issues relating to the footpath as recorded on the Definitive Map as the footpath has been clearly signposted to run along Park Palings Walk. They state that it would appear that since the 1970s (when No.3 Park Palings Walk was built) the footpath was redirected on the ground without the Definitive Map being updated.
- B.36. None of the statements by any of the above residents provide evidence that no public right of way exists along the current definitive line of Footpath No. 4 beyond corroborating that the route has not been used to the best of their knowledge. Mrs. Crosse has also adduced 3 Land Registry plans: two are modern plans and one is an older (c.1980s) plan. None of these show either the c.2007 garage at No. 3 Park Palings Walk nor depict any physical route between points Y-Z.
- B.37. The following table summarises the evidential score given to the above pieces of evidence relating to whether a public right of way does or does not exist along the application route. Later evidence can override earlier negative evidence due to the potential creation/dedication or subsequent legal extinguishment of rights of way. This scoring only relates to whether a public right of way exists along the legal line (X-Y-Z) and not whether any public right of way subsists along Park Palings Walk (which would in any case be subsumed within the adopted carriageway).

Paragraph	Evidence	Score (-5 - +5)*
B.1.	Tithe Map	-1
B.2.	Parliamentary Inclosure Award	0
B.3.	Ordnance Survey 25" maps	-1
B.4.	1910 Finance Act	-1
B.6.	Sales Plans and Catalogue	-1
B.8.	1925 Land Valuation	-1
B.9.	1948 6" map	-1
B.11.	Haynes Parish Council c.1952 survey map	3
B.12.	Parish Council 1951 walking survey (and consequent Definitive Statement)	-3
B.13.	1953 Draft Map	4
B.14.	Haynes Parish Council 1954 letter	1
B.15.	Sime's recommendation	0

B.16.	Draft of Modified Draft Map	3
B.17.	Schedule of Modifications to the Draft Map	0
B.18.	Modified Draft and Provisional Map	5
B.19. + B.21.	Office/working copies of Definitive Map	2
B.20.	Haynes Parish Council note	2
B.22.	Haynes Parish Council letter and plan	1
B.23.	Works plan	0
B.25.	County Council 2000 Planning response	4
B.27.	County Council 2000 investigation of footpath	Not scored
*Scoring: -5 = very strong legal evidence of no public right of way 0 = no evidence either way +5 = very strong legal evidence of existence of a public right of way		Score: +16 <hr/> 100
Score breakdown:		
Score prior to 1951 Haynes Parish Council survey		-6
Score for 1949 Act process		+13
Score after 1964 Definitive Map publication		+9

- B.38. The scores show that prior to the 1949 Act process there was some minor evidence to show that no public right of way subsisted. However, during the 1949 Act process which was specifically designed to record public rights of way the process identified the application route as a public footpath. Even if the post-Definitive Map scoring is separated out, as these documents are predicated on the depiction of the footpath on the Definitive Map, the remaining score still suggests the existence of public rights – with no cogent evidence indicating, on the balance of probability, that no public rights exist.
- B.39. A similar scoring exercise can be carried out on whether an unrecorded public right of way subsists along Park Palings Walk between point Z and Plummers Lane, notwithstanding its current adopted carriageway status.

Paragraph	Evidence	Score (-5 - +5)*
B.1.	Tithe Map	1
B.2.	Parliamentary Inclosure Award	0
B.3.	Ordnance Survey 25" maps	1
B.4.	1910 Finance Act	2
B.6.	Sales Plans and Catalogue	1
B.8.	1925 Land Valuation	1
B.9.	1948 6" map	1
B.11.	Haynes Parish Council c.1952 survey map	2
B.12.	Parish Council 1951 walking survey (and consequent Definitive Statement)	1

B.13.	1953 Draft Map	4
B.14.	Haynes Parish Council 1954 letter	0
B.15.	Sime's recommendation	-5
B.16.	Draft of Modified Draft Map	-3
B.17.	Schedule of Modifications to the Draft Map	0
B.18.	Modified Draft and Provisional Map	-5
B.19. + B.21.	Office/working copies of Definitive Map	-2
B.20.	Haynes Parish Council note	-2
B.22.	Haynes Parish Council letter and plan	3
B.23.	Works plan	1
B.25.	County Council 2000 Planning response	0
B.27.	County Council 2000 investigation of footpath	Not scored
*Scoring: -5 = very strong legal evidence of no public right of way 0 = no evidence either way +5 = very strong legal evidence of existence of a public right of way		Score: +1 <hr/> 100
Score breakdown:		
Score prior to 1951 Haynes Parish Council survey		+7
Score for 1949 Act process		-6
Score after 1964 Definitive Map publication		0

B.40. The scores for the evidence suggest that a public footpath was considered to exist prior to and during the initial stages of the 1949 Act process. During the 1950's and '60's the idea that a footpath existed fell out of favour and the post-1965 evidence is polarised on the matter. Overall the score is just +1 out of a maximum score of +100. Moreover, the length of Park Palings Walk to the east of point Z is now adopted public carriageway and so any public pedestrian rights that may have existed have now been subsumed within the carriageway.

Legal and policy Considerations

C.1. Section 56(1) of the Wildlife and Countryside Act 1981 (“the 1981 Act”) 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...”

C.2. Consequently under normal circumstances the Council must rely on the Definitive Map to provide the legal position of Footpath No. 4 and use the Definitive Statement to provide particulars as to the more precise position and width of the footpath. However it is clear from the Definitive Map and Statement that there is a contradiction between these two documents.

C.3. The case of *R. (oao Norfolk County Council) v Secretary of State for Environment, Food and Rural Affairs EWHC QBD 119 Admin [2005]* addressed just such a contradiction. In that case Pitchford J. stated (at Paragraph 66 of his judgment):

“[66] Where the map and statement conflict as to the position of a public right of way I can see no basis for the application of an evidential presumption in favour of one at the expense of the other. As Mr Laurence rightly observes the fact finder starts from the position that both the map and the statement were prepared following the correct procedures. Save perhaps in the case of demonstrably false particulars in the statement, the natural inference is that the surveying authority was at least attempting conscientiously to record the position of the footpath shown on the map. What is required at review is, in my judgment, simply a consideration which (or which other) route, on a balance of probability, is correct, if any, in the light of all the relevant evidence, including the terms of the map and statement. The judgment being exercised in a case such as this is whether, under section 53(3)(c)(iii), any particulars in the map and statement require modification unless it emerges that either a new footpath should be added or the footpath shown on the map, or part of it, should be deleted altogether. It may, by an examination of the documents together and an inspection on the ground, be a straightforward task to identify the mistake or inaccuracy in the preparation of the documents. It would be inappropriate in such an exercise to impose what would be an artificial presumption in favour of one document or the other simply because, until modification, it is treated as the primary document. For example, the precision of terms used in the statement may, by reference to features on the ground, provide a compelling case, subject to extrinsic evidence, that an error was made in the marking of the way on the map. On the other hand, the terms of the statement may be so at odds with natural features on the ground that it demonstrably cannot be relied upon for any purpose.”

- C.4. This judgment supports the case of using the Definitive Statement as evidence which, when considered with all other available evidence, demonstrates that there is a mismatch with the Definitive Map which thus requires resolution.
- C.5. The later case of *Kotarski & Kotarski v Secretary of State for Environment, Food and Rural Affairs* [2010] EWHC 1036 reviewed a number of cases including the above Norfolk case. In *Kotarski*, Simon J. stated in his judgment:

[24] *“...The precondition for the exercise of the statutory power of review is the discovery of evidence which (when considered with all other relevant evidence) shows that particulars contained in the map and statement require modification. The discovery that there is a divergence between the two is plainly the discovery of such evidence, and it is unnecessary that it should be characterised as 'new evidence.' It is sufficient that there was the discovery of what the Inspector described as 'a drafting error', which was itself the result of what the Court of Appeal in ex. p. Burrows and Simms characterised as 'recent research.'*

[25] *I note that this approach is consistent with (a) the general approach of the Court of Appeal in ex. p. Burrows and Simms referred to in paragraphs 13 above and 'the importance of maintaining an authoritative map and statement of the highest attainable accuracy'; (b) a generally beneficial purpose that there should be powers to make definitive maps and statements consistent when they are found to be inconsistent; and (c) the decision of Potts J in Mayhew v. Secretary of State for the Environment (1993) 65 P & CR 344 at 352-3, in which he specifically rejected the argument that the s.53(3)(c) modifications should be restricted to cases where 'new evidence' had been discovered...”*

- C.6. Consequently where a discrepancy or contradiction is found between the Definitive Map and Statement this discovery is, in itself, sufficient to be considered “new evidence” for the purposes of Section 53 of the 1981 Act.
- C.7. Section 53(5) of the 1981 Act permits any person to apply to Central Bedfordshire Council, as the Surveying Authority for the Definitive Map and Statement, for an order to modify the Definitive Map and Statement under subsection 53(3) of the 1981 Act if they consider these are in error and need correcting.
- C.8. Section 53(2) of the 1981 Act places a duty on the Council, as the Surveying Authority, to modify the Definitive Map and Statement upon the occurrence of certain events detailed in Section 53(3) of the 1981 Act. Section 53(3)(c) gives details of some of the events which require the Council to modify the Definitive Map and Statement:

“53(3)(c) The discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows-

(i) (omitted);

(ii) (omitted);

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map or statement require modification...;”

C.9. Mrs. South and Mrs. Crosse have applied under Section 53(5) of the 1981 Act to delete Haynes Footpath No. 4 on the ground that it ought not to be recorded on the Definitive Map and Statement. With regard to the deletion of public rights, Defra's 2009 Rights of Way Circular 1/09 states, at section 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.*

While all three conditions must be met they will be assessed in the order listed. Before deciding to make an order, authorities must take into consideration all other relevant evidence available to them concerning the status of the right of way and they must be satisfied that the evidence shows on the balance of probability that the map or statement should be modified...”.

C.10. The requirement that the authority needs to determine an application to delete a right of way after weighing the evidence on the balance of probability is confirmed from the cases of *Todd and another v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin) and in *Leicestershire County Council, R (on the application of) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 171 (Admin).

C.11. In *Trevelyan v Secretary of State for Environment, Transport and the Regions* [2001] EWCA Civ 266, 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.”

This though is tempered by the later judgment of Pitchford J. in *Norfolk* above.

C.12. 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. Circular 18/90 has been superseded by Defra Circular 01/092 as detailed at C.9 above for paragraph 4.33

- C.13. The evidence available to the Council thus needs to be weighed up to see whether there is sufficient evidence of a cogent, that is compelling, nature to show, on the balance of probability, that no public right of way exists along the current route of the northern section of Haynes Footpath No. 4. If there is sufficient evidence to show that this section of footpath is recorded in error then the council is duty-bound to make a definitive map modification order to delete this section of footpath. If there is sufficient evidence to reasonably allege that a public right of way on a different alignment ought to be added to the Definitive Map and Statement then the Council ought to make the requisite order.
- C.14. Where there is insufficient evidence to demonstrate, on the balance of probability, that the current Definitive Map is in error, the opportunity arises under the Highways Act 1980 to make a public path order to extinguish the section of footpath if the Council is satisfied it is unneeded for public use and having regard to the amount of use the path would have if it were not obstructed by the current housing and vegetation.