

HERTFORDSHIRE COUNTY COUNCIL



Rights of Way Service

Modification Order Application
Reasons for the Decision

King's Walden Footpath 8

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Application Details

An application has been made to delete from the Definitive Map of Rights of Way a section of King's Walden Footpath 8 in the vicinity of Browning's Cottage, Breachwood Green (n.b. this cottage was originally two dwellings which were amalgamated around 1966). An extract of the 2015 Definitive Map is attached showing the route running between Point A and Point B. This application was made by Mr D Marlow on 30th October 1996 and was deemed to be in the prescribed form at that time. Included with the application were letters of support and associated user evidence forms from eight persons.

Although some preliminary discussions were held regarding possible diversion of the route along the currently walked route (A-C, see photo below), at the time of writing no such application to divert has been made.

Description of Route

King's Walden footpath 8 (FP8) is located to the west of the hamlet of Breachwood Green, in the north-west of the county and close to the boundary with Bedfordshire. The nearest town is Luton, the outskirts of which are under 2km to the west. Luton airport is a notable feature to the west south-west.

The landscape is characterised by gently rolling fields and woodland although the course of FP8 is broadly across flat land. FP8 commences at a junction with Darley Road, heading south-east across a field to Colemans Road, at a point approximately 130m south-west of its junction with The Heath. FP8 then continues generally east then south through several smallholdings before turning west north-west then south south-west towards a junction with Colemans Road adjacent to Brownings Cottage.

This application is to delete the 35m long section of route heading south south-west from the point the route turns south into the garden (Point A) crossing what is now the garden/driveway of Brownings Cottage to a junction with Colemans Road (point B). This section has been blocked by a hedge and fencing for an undetermined (at the time of this report) period at point A and the walked route has instead continued 30m west south-west along the field headland to meet Colemans Road (point C). The width of the headland walked section varies from 1.25m at the divergence from the DM line to 2.5m at the junction with the road.



Weight of evidence and burden of proof

Section 56(1) of the Wildlife and Countryside Act 1981 states that “where the [Definitive] Map shows a footpath, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map, and that the public had thereover a right of way on foot”. The Department of Environment’s Circular 1/09 states that in the event of applications to delete or downgrade paths shown on the Definitive Map “the evidence must be of sufficient substance to displace the presumption that the Definitive Map is correct” (paragraph 4.33). The burden of proof therefore lies with the applicant to show that the Definitive Map is incorrect. This view was approved in the case of *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 WLR 1264, where the Court of Appeal held that an Inspector deciding whether a right of way existed had to start with the initial presumption that it did. In order to show that the right of way did not exist, the standard of proof required is on the balance of probabilities, but clear and cogent evidence of some substance is needed to outweigh the initial presumption that the right did exist.

Documentary Evidence

For each investigation, we check at least 10 primary sources of information for any historic evidence relating to the application route. You can view the documents listed below at Hertfordshire Archives and Local Studies (HALS) or at the Rights of Way Service (ROW). The documents are listed below with a reference number (if it has one) and where you can find it.

For further information contact:

Hertfordshire Archive and Local Studies (HALS) -
01438 737333 (or 01923 471333 from area codes 01923 and 020)

www.hertsdirect.org/services/leisculture/heritage1/hals/

Rights of Way Service (RoW) - 01992 555279 to make an appointment.

If you would like more information about documents and how they are important in investigating public rights of way, please go to the Planning Inspectorate’s website and view their Guidance Booklet for Definitive Map Orders: Consistency Guidelines. See <http://www.planningportal.gov.uk/planning/countryside/rightsofway/rightsofway> which also gives details about related articles and case law.

Where the document shows information relevant to the area of the application route, it is listed with the following information:

- The Document’s name, date and where it can be found (location and reference)
- Why we consider the document important when making our decision
- What is shown by the document in the area of the application route
- Investigating Officer’s comments

Investigation of the following historical documents has not provided evidence with regard to the application route. Please note that where there is no evidence found relating to the application route, this has just been recorded as “no evidence found, and where there are no records for the document listed, this has been recorded as “No records found.”

1. Dury and Andrews Map, 1766 – Ref: HALS – CM26

No evidence found.

2. **Inclosure Records, Act 1797, Plan, Award 1802 – Ref: HALS – 67083, QS/E/67**
No evidence found.
3. **Bryant’s Map, 1822 – Ref: HALS – CM88**
No evidence found.
4. **Tithe map for King’s Walden**
No records found
5. **Highway Diversion/Extinguishment Records**
No records found.
6. **Railway and canal plans**
No records found
7. **Highways Maintenance Records**
No records found

8. Ordnance Survey maps

Date: 1801 - date Ref: RoW/HALS various

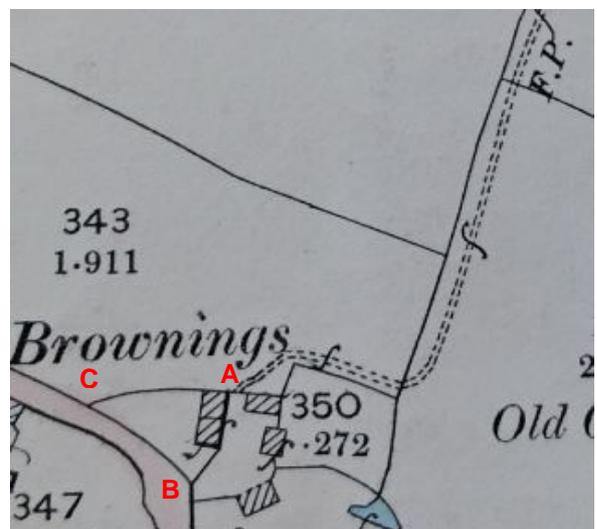
8.1 Why we consider these documents important

The original surveys were carried out by Royal Engineers at the time of the Napoleonic wars in order to better plan the transportation of ordnance around the country. It was only in the early 20th century that the OS evolved to become a public service that sold its mapping information to the public. Since the 1960s this mapping information has included public rights of way, which are derived from each county’s Definitive Map.

The Ordnance Survey has produced a series of topographic maps at different scales notably the one inch, six inch and 1:2500. The detailed, large scale 1:2500 maps from the 1870s onwards provide the best evidence of the position and width of routes and the existence of any structures on them. These maps provide good evidence of the physical existence of routes at the time the map was surveyed. When compared with earlier, less accurate maps they can help corroborate the existence of routes. Ordnance Survey maps show features that physically exist and may label routes as footpaths and bridleways etc. However, the disclaimer which has been added to all editions since the 2nd edition maps (circa 1897/8 in Hertfordshire), along with official guidance to the surveyors of the maps at the time, states that the representation of any track or way is no evidence of a public right of way.

8.2 What is shown by these documents in the area of the application route?

The course of what is now FP8 is shown on O.S. maps dating back to the 1:2500 2nd edition of 1898 (extract opposite), depicted by two dashed lines and annotated “F.P”. The dashed lines stop at the boundary with the Brownings Cottage yard (point A on the plan), and no distinct depiction of the route is made through the yard area to the road (point B). This depiction continued on O.S. 1:2500 and 1:10000 maps held by HCC dated 1924 to 1971.



8.3 Decision

The O.S. maps clearly depict the course of FP8 with the exception of the section through the yard which is the subject of this application. HCC decided that the fact that the application route isn't depicted is not in itself conclusive evidence that the route did not pass through the yard. There are a number of other examples locally of routes depicted by pecked lines stopping at what appear to be yards which adjoin roads.

9. Inland Revenue Documents

Date: 1910

Ref: HALS IR1/44/1, IR2/44/1, IR3/44/1

9.1 Why we consider these documents important

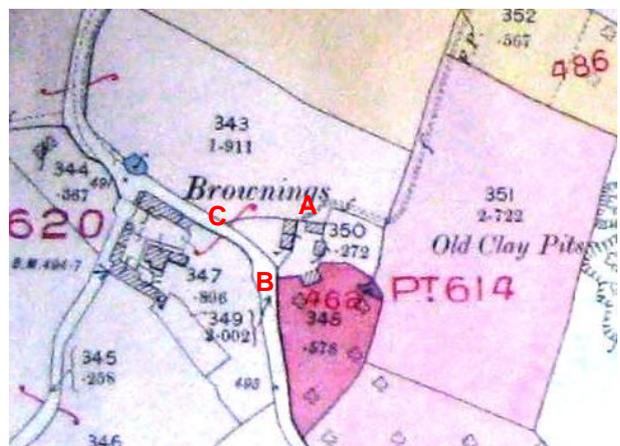
The Finance (1909-1910) Act 1910 was passed in order that a tax could be levied on any increase in the value of land when it changed hands. In order to ascertain the value of all land as at 30th April 1909, a survey was carried out assessing each piece of land. The OS 2nd Edition Plans (usually from 1898) were used as the base maps and annotated. Details were recorded in field books and valuation books. These books included a column which allowed a deduction in tax if a public right of way crossed the land. Every property was given a plot or 'hereditament' number which was then referred to in the valuation books and maps. Hereditaments were coloured on the maps to identify land holdings. Not all land was coloured.

Once a provisional valuation of a property had been reached, landowners were given the opportunity to appeal. The whole process was carried out under statutory authority by the Valuation Department of the Inland Revenue and there were criminal sanctions associated with the falsification of evidence. It would have been negligent to omit such land from the survey, including private roads, which might have had value. However, it was not a criminal offence not to deduct tax if a right of way did cross your property. Consequently, the resultant records carry a high level of evidential weight as to the routes which they show to exist, but are unlikely to be good evidence that rights of way do not exist.

Where a route is shown uncoloured on the plans and excluded from the taxable land this provides very strong evidence of it being public highway. Usually this will be of vehicular status unless there is other contemporary evidence to indicate otherwise. Where footpaths and bridleways cross privately owned land these may be recorded as a reduction to the tax. However, where routes cross large hereditaments it can be difficult to establish which route is considered to be the right of way without additional details.

2.2 What is shown by these documents in the area of the application route?

(N.B. see section 1 above on O.S. mapping for comments on the underlying mapping) The section of FP8 which is subject of the application was located within hereditament 620: the hereditament is made up of several distinct plots intersected by roads, but the whole hereditament is shaded pink and the plots are braced together with red bracing. The hereditament comprises an area of 91 acres and 4 roads which is referred to in the accompanying reference book as 'Ho: Gdn: Homestd (indecipherable) and 'Land'. The OS basemap shows hereditament 620 as being crossed by a number of rights of



way. Brownings Lane, which crosses the hereditament, is uncoloured, as is the course of King's Walden Bridleway 52 nearby, but the application route is not, nor is the course of King's Walden Footpath 9 to the west.

Hereditament 620 has no deductions for Public Rights of Way or User.

9.3 Decision

Footpath 8 is shown on the OS basemap with double pecked lines and annotated "FP". However, hereditament 620, through which it passes, is crossed by multiple rights of way and yet no deductions in the tax due were claimed. HCC decided that it was not possible to draw any conclusions regarding the application from this evidence.

10.0 HCC Survey of Public Footpaths & Bridleways: Hitchin Rural – West

Date: 1938 Ref: HALS

10.1 What we consider this document shows

In 1938 a survey of public footpaths and bridleways was undertaken by HCC, and the plans from the survey of the Hitchin Rural District (West) can be found in HALS. There are no accompanying descriptive notes.

What is now known as FP8 is marked as a line of red dots over the underlying OS mapping, and the public vehicular highway Coleman's Road is depicted coloured sepia (the map key records these as Public Footpath and Unclassified County Road respectively). The route is annotated '8'. The application route is clearly shown as part of route '8' joining Coleman's Road as currently recorded on the Definitive Map, i.e. running through the cottage yard .



10.2 Decision

HCC decided that this document provides evidence that at the time of the 1938 survey the application route was considered to be an integral part of the public footpath which became FP8.

11. Definitive Map Records

The National Parks and Access to the Countryside Act 1949 required the County Council to prepare a Definitive Map and Statement to show and describe the public rights of way in the county. The Map is conclusive evidence of what it shows, but is without prejudice to what is not shown.

The process resulting in today's Definitive Map and Statement consists of several stages which are dealt with below:

- a) the Parish Survey
- b) the Draft Map, Provisional Map and first Map and Statement (1953)
- c) the Special Review (following the Countryside Act 1968)

11a. Definitive Map Records – King's Walden Parish Survey

Date: 1951 Ref: RoW

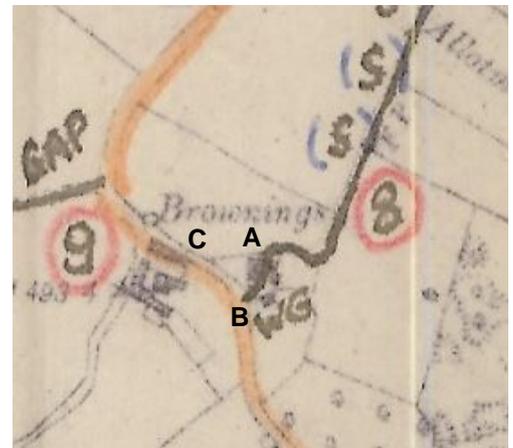
11a.1 Why we consider these documents important

Under the National Parks and Access to the Countryside Act 1949 the county council was required to show all public paths which were defined as “footpaths”, “bridleways” and “roads used as public paths”. This last term was never properly defined and has resulted in much confusion ever since. There was no requirement to record public vehicular highways.

In Hertfordshire each parish carried out a survey of the paths which were believed to be public. Sometimes additional surveys were carried out by the Ramblers’ Association or the Youth Hostel Association; or comments were made by them on the parish’s survey. The surveys once completed were sent to the County Council for collating and publishing as the Draft Map.

11a.2 What is shown by these documents in the area of the application route?

FP8 was surveyed on 21st July 1951 by G Angell (the Parish Clerk), and was described thus: “Commences at WG (denotes wicket gate) opposite Brownings Farm passes through cottage yard between buildings to stile (no step) E. along hedge of meadow over stile (no step) along edge of meadow (part orchard) over stile (overgrown) along hedge of allotments, over stile and NW along meadow to stile on Brownings road...”. In the ‘Additional Remarks’ column are the entries “No signpost”, “Not used from farm to third stile for some years, remainder used frequently” and “1st Edition O.S. did not confirm”. The accompanying annotated map is consistent with this description.



The Youth Hostel Association (YHA) subsequently surveyed the parish in December 1951 and January 1952, and their survey listed a significant number of additional paths to those listed by G Angell (91 rather than 44). The YHA numbering system was different to that of the Parish and there is no accompanying plan, but from the descriptions it appears that path 42 most closely describes what became FP8. The description of the relevant section was: “... Path continues well marked over grass to Brownings, where it enters the garden of Brownings by a stile, though access may be gained to road through field gate to right.”

A meeting to discuss the situation was held between P Flanagan of the YHA and G Angell on 22nd March 1952. The YHA noted the significant difference between their list and the list of routes recognised by the Parish Clerk as rights of way, but YHA number 42 and the Parish’s number 8 appear to be the same route, and subsequently this was deemed to be a public footpath.

11a.3 Decision

HCC decided that this evidence shows FP8 was considered a public right of way by both the Parish Council and the YHA at the time, and that the section of route subject of this application for deletion was considered be part of it.

11b. Definitive Map Records – Draft, Provisional and First Definitive Map

Date: 1951-4

Ref: RoW

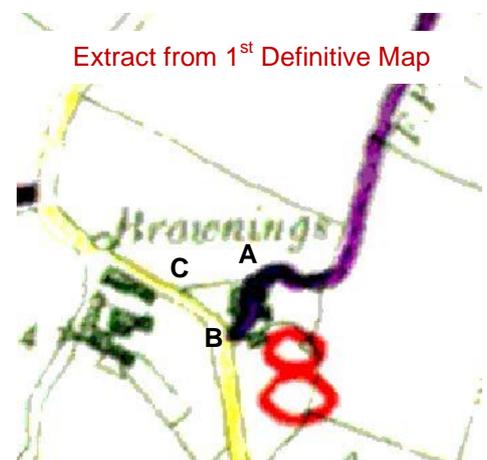
11b.1 Why we consider these documents important

The parish surveys were collated into the Draft Map and Statement. Notices were published advertising that the Draft Map and Statement had been produced so that the public (including landowners) could object to what was included or to what was omitted. Hearings were held to consider these objections and recommendations were made based on the evidence presented.

The Draft Map and Statement was amended following the hearings to produce the Provisional Map and Statement. As before, notice of the production of the Provisional Map and Statement was advertised but this time only landowners, lessees and tenants could apply to the crown court to amend the map – the public could not. The map and statement were then amended to reflect the court's finding.

Please note that these records vary across the county as a full sequence of Draft Map and then Provisional Map has not always been kept.

After the amendments to the Provisional Map and Statement were made, the First Definitive Map and Statement for Hertfordshire was produced. The Map and Statement together provide conclusive evidence of the existence of those public rights of way shown at the 'relevant date' of 1953; i.e. the information shown was correct at that date.



11b.2 What is shown by these documents in the area of the application route?

FP8 was listed in the handwritten Draft Statement dated 1st November 1953, which described the route thus: "Commences from county road E. of Brownings Farm thence NE to NW corner of allotments..."

There is no copy of the Draft or Provisional Map available covering the vicinity of the application route, but records do exist of the objections made in King's Walden and the outcome of hearings into them. There is no record of an objection being made to the inclusion of the application route on the Draft and Provisional Map and Statement .

As no objections were received, King's Walden 8 was recorded as a public footpath on the 1st Definitive Map running through the yard of Brownings Cottage (as shown on the adjacent extract) and described in the accompanying Statement as "Commences from county road E. of Brownings Farm..."

11b.3 Decision

HCC decided that the recording of FP8 was not challenged, and that the 1st Definitive Map therefore provides conclusive evidence that the application route runs north-east from Brownings Road through the yard of Brownings Cottages.

11c. Definitive Map Records - Special Review

Date: 1977-84

Ref: RoW

11c.1 Why we consider these documents important

The Countryside Act 1968 created the new designation right of way to be recorded - a "byway open to all traffic". This was the first time that vehicular rights were recorded on the Definitive Map. It also required county councils to carry out a Special Review to reclassify all

“roads used as public paths” as either “footpaths”, “bridleways” or “byways open to all traffic”. In Hertfordshire the Special Review was started in 1977. This was later extended to include all the amendments to the network made by diversions since the first Definitive Map. It also showed if applications had been made to add or amend details of routes. Copies of the Special Review Draft Map showing all these changes were published, inviting objections from the public. Due to the number of objections received and not resolved, the Secretary of State ordered the abandonment of the Special Review in Hertfordshire in 1984. The Definitive Map and Statement was amended to show all changes which did not have outstanding objections, and these were shown on the Definitive Map and Statement produced in 1986.

11c.2 What is shown by these documents in the area of the application route?

The application route was not considered as part of the Special Review process.

11c.3 Decision

HCC decided that this document provides no evidence in support of the application.

12. Contemporary Evidence of Use

12.1 Why we consider the evidence important

Evidence is generally provided through the completion of evidence questionnaires by users and from information provided by the owner of the land. User evidence may support historic evidence of a right of way. However, where there is no historic evidence of a route it is possible for a public right of way to come into existence if it can be shown that members of the public have used it ‘as of right’ without interruption (usually) for a period of 20 years. In order for the public’s use of a route to have been ‘as of right’ it must have been:

- **without force** (e.g. not breaking down a fence to access the route)
- **without secrecy** (e.g. not just using the route when landowners were away)
- **without permission** (i.e. not having the permission of the landowner).

Unless there is historic evidence of rights as well, legislation requires there to be evidence of 20 years’ use which ends with a ‘date of challenge’ (section 31 of the Highways Act 1980). The ‘date of challenge’ is the date at which the landowner challenges the use of the route e.g. by putting up a notice. Where there is no evidence that use has been challenged, section 31(7B) of the Highways Act 1980 specifies that the date of application should be used as the end of the 20 year period.

Under common law a right of way can also come into existence in less than 20 years if it can be shown that there was dedication of the route by the landowner and acceptance of the route by the public.

Under Section 31, after a period of 20 years use, it is presumed that a right of way has come into existence. Where a landowner can produce evidence to show that they have taken steps to prevent the accrual of new public rights of way through use of a route by the public, no such right will be dedicated. Such steps must be overt and make the public aware of the landowner’s intentions. They can include placing and maintaining notices on site stating that the route is not public or that it is used with permission; by erecting and locking gates; or by telling people seen using the route that it is not public, etc.

In addition to placing notices on site, section 31(6) of the Highways Act 1980 (following on from the Rights of Way Act 1932) allows landowners to deposit a map and statement with the

County Council showing the public rights of way across their land. Following this, declarations need to be made regularly to the effect that no additional ways have since been dedicated. It should be noted that making such deposits and declarations will not affect pre-existing rights.

This case is different from the norm as it is an application to delete a section of route recorded on the Definitive Map, and the user evidence forms currently to hand are all from persons asserting that the section of route in question is not a public right of way.

12.2 Summary of Evidence

Evidence was provided by the applicant from 8 witnesses who asserted that the application route had never been a public footpath. This took the form of letters and HCC User Evidence forms (UEF). These are summarised below:

Witness No.	Evidence summary
1	Former Chairman of Parish Council & familiar with area since 1932, had employee tenanted in one of the Brownings cottages. Asserts that the footpath was a private one giving access to allotments near Heath Fm. Was surprised to find the route on the DM when he checked in 1991. Further correspondence on file between this witness and HCC (see below). UEF states "Never has been a footpath" but little other information to assist investigation.
2	Applicants. Lived at Brownings Cottage since 1966, assert path never went through the property from S side. Believe 1951 DM wrongly marked, route was private & used by farmworkers to access (now closed) village shop. Cites 1898 OS 2 nd edition showing route starting from N boundary of property.
3	Witness is long term resident (born in area in 1938) and farmer of adjacent land. Asserts path was access for cottage tenants and that route "Never has been a footpath".
4	Resident of Medlow Farm from 1940 to 1970, asserts route is access for the cottages & until recently (1996) had "...never seen anyone other than the cottage people use it." UEF states "Never been a footpath".
5	Local resident since birth (1902). States that route is access to cottages, never known anyone use it as public footpath. UEF states "This has never been a footpath".
6	Lived at Brownings Cottages for 2.5 yrs working for witness 1. States route was never used as public footpath during this time. UEF states "Not used as a footpath".
7	Known property for almost 80 yrs (1996). Application route never used as public footpath, was used by cottage residents only. Was on parish council at time of Parish Survey and says some routes were wrongly marked on map. UEF states "This route has never been a footpath".
8	Local resident, supports the applicants, says route is private. UEF states "Never has been a footpath".

HCC wrote to Witness 1 as they had been on the Parish Council at the time of collating information used in producing the 1st DM, querying why Mr Angell had included the application route if it had not been considered a public footpath, or if they had any further information. There is no record of any reply to this letter.

Although the application route is not covered by a s31(6) deposit the area crossed by the currently walked route (A-C on the plan) was part of a parcel of land which was included in a deposit dating from 1992 which is held by HCC under the reference number 133/2/11, 18/06/1992.

12.3 Decision

HCC decided that although several longstanding residents clearly assert that the application route was never a public footpath this is not sufficient evidence to show that this route was wrongly recorded as a public footpath. There has been no information forthcoming as to why no objection was made to the recording of this path during the research into and production of the 1st DM.

Conclusion

Section 56(1) of the Wildlife and Countryside Act 1981 states that the Definitive Map and Statement is conclusive evidence of the rights that it shows, and this must be the basis upon which the evidence in relation to this application is assessed.

The Department of Environment, Food and Rural Affairs (Defra) has published Circular 1/09 (published October 2009), part of which deals with this. Paragraphs 4.30 and 4.31 state:

“4.30 The procedures for identifying and recording public rights of way are comprehensive and thorough. Authorities will be aware of the need to maintain a map and statement of the highest attainable accuracy. Whilst the procedures do not preclude the possibility that rights of way may need to be downgraded or deleted, particularly where recent research has uncovered previously unknown evidence or where the review procedures have never been implemented, it is unlikely that such a situation would have lain undiscovered over, what is in most cases, many decades without having been previously brought to light.

4.31 Once prepared, and until subsequently revised, the definitive map and statement is conclusive evidence in rights of way disputes. Authorities are under a duty to make an order modifying the definitive map and statement where they have evidence that a public right of way should be downgraded or deleted. They may discover evidence themselves or evidence may be presented with an application to modify the map and statement.”

Paragraph 4.33 of Circular 1/09 states:

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.

Paragraph 4.34 of Circular 1/09 shows that

“it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be downgraded or deleted. The authority is required, by paragraph 3 of Schedule 14 to the Act, to investigate the matters stated in the application; however it is not for the authority to demonstrate that the map reflects the true rights, but for the applicant to show that the definitive map and statement should be revised to delete or downgrade the way.”

The Circular received judicial approval in *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] 1 WLR 1264. In it the Court of Appeal held that where an inspector had to consider whether evidence showed that a path should be deleted from the Definitive Map, he should start from a presumption that the path existed. Evidence of some substance had to be provided if it was to outweigh the presumption that the route was correctly recorded.

HCC's decision is based on the fact that on the first Definitive Map it was recorded as a public footpath. This was supported by the 1938 survey, which recorded the course of King's Walden FP8 as running along the application route. King's Walden FP8 was never challenged by the landowners or any other person until 1996 (the date of this application).

HCC decided that none of the evidence supplied with the application or discovered in the investigation of this application is sufficient to outweigh the presumption that the Definitive Map & Statement is correct in recording the route as a public footpath.