

**DERBYSHIRE COUNTY COUNCIL**  
**REGULATORY LICENSING AND APPEALS COMMITTEE**

**10 September 2018**

**Report of the Director of Legal Services**

**Wildlife and Countryside Act 1981**  
**Claim to add a footpath from Bridge Street (A6) to Morrison's Service**  
**Road – Belper.**

**1. Purpose of the Report**

To enable members to determine an application to amend the Definitive Map and Statement by adding to them a footpath from Bridge Street (A6) to Morrison's Service Road – Belper.

**2. Information and Analysis**

**2.1 Details of the application**

An application was received from Mr Trevor Burton dated 17 September 2015 to add a footpath from Bridge Street (A6) to Morrison's Service Road – Belper to the Definitive Map and Statement. The application was supported by a plan showing the claimed route, photographs and 28 User Evidence Forms.

A plan showing the claimed route is attached to this report.

Following receipt of the notice of application correspondence was received from the landowners in opposition to the application, the details of which are summarised below:

- That the public are allowed from the A6 through the private sports ground towards the river and this is only a concessionary path.
- That there is a duty of care to young children and people who use the facilities.
- A public footpath would make it more difficult to monitor the site and prevent eviction of trouble makers.
- Referred to a recent event when an abusive drunk accessed the site and was persuaded to leave when advised that they had no right to be there and that the police would be called.
- Concerned about the potential conflict between vehicles and pedestrians.
- Signs have been erected stating that the land is private.

Further correspondence was received from the same landowner in opposition to the application, the details of which are summarised below:

- States that usage has been permitted.
- The application to record a public right is unwelcome as it would add further constraint on the site and remove the ability to control access.
- There was never any intention to withdraw permission to use the route but the damage to the water main necessitated the fencing of the excavation giving the appearance that the access would be closed long term.
- Has no objection to the general public walking across the care park to access fields as long as dogs were on a lead, did not foul and people didn't drop litter and respected the grounds and the members.
- Needs to reserve the right to close the access according to the landowner's needs.

A further e-mail was received re-iterating the position on the matter and refers to notices on display in various places on the land

An e-mail was received from the applicant advising that:

- A locked gate had been installed at the exit from the sports field and that a gate had been installed at the path from Belper library.
- The footpath changed from the other side of the football club and has been in use for 25 years.
- This is the first time that access from the sports field/football field has been prevented in living memory.

## **2.2 User Evidence**

The application to add the footpath was received on 17 September 2015. There is evidence contained within the user evidence forms that suggests that notices stating that the land was private were erected prior to this date however no information has been submitted which confirms the actual date.

The Council's Declaration register shows that a declaration under Section 31(6) Highways Act 1980 was made by one of the landowners over which the claimed route runs and deposited with the Council on 03 March 2014.

A number of letters in opposition to the recording of the route as a public footpath were received on the basis that signs were posted at the gated entrances indicating that the land was private and additional signs were posted to indicate that the path was a "permitted" one with dogs to be kept on leads. There is no information to suggest when these signs were erected and it is not felt that it would be sufficiently conveyed to members of the public by that wording that they were entitled to use the path by right, with the permission of the landowner, rather than as of right, without force, permission or secrecy.

It is therefore considered that the depositing of the declaration proved that the landowner had no intention to dedicate the route as a public right of way and therefore for the purposes of Section 31(2) Highways Act 1980 only evidence and events prior to 2014 have been considered in assessing the claim and therefore the relevant period is 1994-2014.

All of the user evidence forms have plans attached to them with claimed route marked on, however all of the forms have the route marked on with biro and then the route highlighted with a highlighter pen, the majority of these being the same colour. The letter G is also marked on all of the plans at the same location to identify a gate and some of the witnesses have stated that they do not recall any gates on the route, this indicates that the plans were marked up prior to the forms being provided to the witnesses for completion.

None of the users have stated that they have ever been challenged when using the route or told that it was not a public right of way, however one user has indicated that permission was granted as part of a private right of access granted to the fishing club and therefore the evidence of this user has not been considered any further.

Three of the users describe using a route running down towards the river and following a path by the river, this description is not in accordance with the plan attached and is different to that described in the application, therefore the evidence of these users has not been considered any further as they are describing usage of a different route.

The evidence of the remaining 24 users is analysed below.

Of the 24 users 19 users claim to have used the route on foot for the entirety of the relevant 20 year period, one user claims to have used the route on foot for the 20 year period and on a bicycle for less than 20 years within this period, four users claim to have used the route on foot for less than 20 years but within the relevant period.

The majority of the users claim to have used the route on a regular basis and describe the width of the route as being between 0.5 and 6 metres.

Twenty of the users claim to have witnessed others using the route on foot and four users claim to have witnessed others using the route on foot and on bicycle.

Thirteen of the users describe gates on the route, all of these identify a gate between the sports club car park and the football club, five of these also mention a gate at the service road at Morrison's. None of the users state that these gates have prevented access along the route and several have referred to a gap in the fence at the service road (Point B). Four users have referred to stiles on the route and one has described a gap between two old posts at the Thornton copse.

One of the users has referred to a notice regarding an honesty box on the entrance to the sports club area gate. Nine users refer to a notice to request owners to keep dogs on a lead or under control, all of those that have stated a location have stated that this was on the entrance to the sports club car park, one of the users was unsure but thinks there may have been a notice asking owners to keep dogs under control. One user refers to a sign stating that the land was private and that dogs must be kept under control and no fouling of the paths. One user refers to notices posted within recent years, but is unsure of the date, advising that it was Private Ground and requests to clear up after dogs. One user has referred to a notice stating that there was no right of way attached to the fence by the stile, the same witness previously described a stile at Thornton's Copse and therefore it is believed that this is the location of the notice.

Although the description of the path provided on the user evidence forms matches that shown on the plan and described within the application five of the users have described their usage as accessing the river which is not consistent with the description of the claimed route. Within their comments nine of the users have either referred to access to the river either by themselves or anglers, or the amenity of the river to the public, again this is not consistent with the claimed usage of the route.

Seven of the users state that there have been some alteration to the route, three referring to the construction of Morrison's potentially affecting the line of the route, one referring to the construction of Morrison's and the football pitch and tree referring just to the construction of the football pitch. One user refers to the route being blocked on two occasions, for the construction of the path and to carry out spraying. Further investigation has shown that Safeway, which became Morrison's was constructed in 1988 and in the evidence provided by the applicant it is stated that the football pitch had been constructed for 28 years. The blockage of the route described in the evidence is consistent with closure for maintenance work and not a challenge on usage. The information provided with regards to the change of alignment and closure of the route therefore have no bearing on the relevant date.

## **2.3 Consultation**

An informal consultation exercise was carried out between 18 April 2017 and 23 May 2017. Notices were placed at either end of the route at the beginning of the consultation period and letters were sent out to the statutory consultees, landowners and the elected Local Members at that time Councillors' John Owen and David Taylor.

The consultees were asked to provide any evidence or information relating to the history or the use of the claimed route which they considered might be relevant to the determination of the application.

## **Responses received in support of the application**

Belper Town Council sent an e-mail stating that they support application 67240 but no further detail was provided.

A further e-mail in support of the application was received from an individual advising:

- They were in full support of the applications.
- They feel that during recent years in Belper they have lost access to too many places where people thought they had the right to walk but where it turned out there were no official public footpaths.
- Often walks in Belper meadows and would be delighted if the route were to be declared a public footpath.

### **Responses received in opposition to the application**

An e-mail was received from Robertshaws Chartered Surveyors re-iterating that a Section 31(6) declaration had been deposited with the County Council.

A further e-mail was received from Robertshaws Chartered Surveyors stating that some of the evidence forms are obviously wrong as people could not claim to have used the footpath to Morrison's in excess of 20 years.

Forty letters and e-mails were received from members of Belper Meadows Sports Club, these were identical in content with names and addresses inserted, the reasons for the opposition are summarised below:

- It objects to the application as it feels it is ill considered.
- There is a duty of care to safeguard members including young people, loose dogs and fouling could cause issue to this.
- Usage of the land is permitted.
- Signs are posted at the gated entrances indicating that the land is private.
- Additional signs are posted to indicate that the path is a "permitted" one with dogs to be kept on leads.
- BMSC has taken the decision to permit the public to cross its land in the spirit of sharing an asset with the community.
- Access to the site needs to be had has been restricted when events have taken place including for the fireworks event that has taken place every November for over 12 years.
- Access is restricted for safety during construction and flooding. A permanent right of way would restrict the clubs endeavours to further the site as centre of sports for the local community.
- It is thought that the current permitted access is reasonable and that the application should be rejected.

Three letters were received with the above wording with additional comments added on including

- They would like to think their children and grandchildren were enjoying sport in as safe as possible environment.
- Writer is satisfied to walk along the paths provided away from cricket balls and sports facilities used by children.
- There have been varies when access was restricted and the gates were locked including Good Friday 2009, February 15 2011, June 21 and 22 2011 and at the annual firework event that has taken place every November for the last 12 years.
- Access is also restricted at times in the interests of safety including when construction work is undertaken and at times of flooding.
- A permanent right of way across the site would restrict the club's endeavours to further the site as a centre for sports for the local community.

Correspondence was received from Belper Meadows Sports Club, the basis for their objection is summarised below:

- The principal aim of the charity is promotion of participation in sport.
- There is a duty to safeguard children and this can only be done if there control of the premises.
- The area over which the footpath runs is used for fundraising activities which is essential for the future of the charity.
- Is disappointed that the generosity of allowing access is being taken advantage of, it will however continue to allow access save when necessary to safeguard interests.

Correspondence was received from an individual in opposition to the application, the basis for their objection is summarised below:

- Concerns regarding safeguarding issues and the possible future curtailing of activities.
- Understands that the routes are accessible on a permissive basis most of the time and feels this is the best option as it allows the footpath to be closed for safety reasons.
- Addition of the path would signal to other permitted paths on their land that these should be closed permanently to prevent the same happening to them.

Correspondence was received from an individual in opposition to the application, the basis for their objection is summarised below:

- Existing permissive footpath has been operating for several years, and allows the path to be closed.
- A public right of way exists but is blocked by Belper Town Football Ground.
- The approach through the library ground is a health hazard due to discarded dog mess bags, there would be no right to close it on health grounds if it became a right of way.
- A public right of way would limit options for future development.

An e-mail was received from Robertshaws Surveyors in opposition to the application, the basis for their objection is summarised below:

- It cannot see how anyone has walked to Morrison's for over 30 years when it hasn't been there that long.
- It cannot see how walking over rough grass and squeezing through a gap in the fence is easier for disabled people than tarmac pavement, but can see why there is demand for public access.
- When witnessed out on site the majority of walkers have walked round in a circle with their dogs, this is different to the use described in the statements.
- The former tenant has stated that they would explain to people that there was no footpath and that they shouldn't be there.
- The new tenant has tried the same approach but as long as the crop isn't destroyed is calm about it.
- Is prepared to look at possible creation agreement with its client and the council to provide routes.

## **2.4 Documentary Evidence**

### **Burdett's c1760s Map of Derbyshire**

There is no indication of the claimed routes on this document, however it is drawn at a fairly small scale (less than 1 inch to a mile) so that is probably to be expected.

### **Duffield, Belper, Hazlewood and Makeney Enclosure Award of 1791**

The claimed route does not appear to be set out in the 1791 Award and there is no indication of the route on the accompanying enclosure plan.

### **George Sanderson's 1835 Map of the country twenty miles round Mansfield**

This document (drawn at a scale of about 2 ½ inches to a mile) gives no indication of the claimed route.

### **Belper Tithe Plan of 1844**

There is no indication of the claimed route on this large scale plan.

### **1<sup>st</sup> ed 1:2500 Ordnance Survey plan of c1880**

There is no indication on the c1880 plan of the claimed route.

### **2<sup>nd</sup> ed 1:2500 Ordnance Survey plan of c1898**

This later 1:2500 plan shows the situation on the ground in exactly the same manner as the earlier document and therefore there is no indication of the claimed route.

### **Definitive Map Evidence**

Following the National Parks and Access to the Countryside Act 1949 which introduced the formal recording of public rights of way on definitive maps and statements, surveys were carried out throughout England and Wales in order to ascertain the rights of way network. The claimed route is not identified on the Parish Claim for Belper at the time of the original rights of way survey in the 1950s, which may have happened if there was any local knowledge of the claimed route existing as a right of way previously.

## **2.5 Summary and Conclusion**

The test which has to be applied when considering the addition of a route to the Definitive Map and Statement under s53(3)(c)(i) is in two parts

**Test A** – does a right of way subsist on a balance of probabilities? This test is satisfied by showing clear evidence in favour of the right of way and no credible evidence to the contrary.

**Test B** – is it reasonable to allege on a balance of probabilities that a right of way subsists? If there is a conflict of credible evidence and no incontrovertible evidence that a right of way cannot be reasonably be alleged to subsist, then the answer must be that it is reasonable to allege that a right of way does subsist.

A number of letters in opposition to the recording of the route as a public footpath were received on the basis that signs were posted at the gated entrances indicating that the land was private and additional signs were posted to indicate that the path was a “permitted” one with dogs to be kept on leads and that use of the land has always been by permission. There is no information to suggest when these signs were erected or that it would be sufficiently conveyed to members of the public by that wording that they were entitled to use the path by right, with the permission of the landowner, rather than as of right, without force, permission or secrecy.

Only information regarding the usage of a route may be considered when recording rights of way on the Definitive Map and Statement under the Wildlife and Countryside Act 1981 and therefore objections on the grounds of safety, security and fouling have not been considered.

Although 24 users have provided evidence of usage of the claimed route, further investigation has shown that 14 of these users have referred to usage of walking to and along the river or access for fishing. Usage of an alignment along the river is not consistent with the claimed route and access for fishing will be by right of private rights granted to the angling club.



The user evidence appears to suggest that there are a number of routes walked across the fields between Points A and B and the structures, therefore it is not possible to identify that one specific route has been walked as claimed.

### **3. Considerations**

#### **Legal and Human Rights Considerations**

- 3.1 Under the Wildlife and Countryside Act 1981 the Council is obliged to make a Modification Order as soon as reasonably practicable on the occurrence of certain specified 'events'. These events include:
- 3.2 (1) the discovery by it of evidence which (when considered with all other relevant evidence available) shows that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates (section 53(3)(c)(i)); and
- 3.3 (2) the discovery by it of evidence which (when considered with all other relevant evidence available) shows on the balance on probability that that a highway shown on the map and statement as a highway of a particular description ought to be shown as a highway of a different description, (section 53(3)(c)(ii)).
- 3.4 Section 31(1) of the Highways Act 1980 provides that where a way over land is enjoyed by the public "as of right" and without interruption for a full period of 20 years the way is presumed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. Enjoyment by the public "as of right" means use by the public without force, without secrecy or permission.
- 3.5 Section 31(2) provides that the 20 year period referred to in section 31(1) is to be calculated retrospectively from the date when the public right to use the way is brought into question.
- 3.6 Section 31(3) provides that a notice erected on site by an owner of land over which a way passes in a manner visible to persons using the way, and maintained by him is, in the absence of proof to a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate the way as a highway.
- 3.7 Section 31(6) provides that an owner may provide sufficient evidence to show of his lack of intention to dedicate by depositing with the Council a map and statement showing any ways over the land he admits to having been dedicated as highways and denying the existence of other ways over it and then lodging statutory declarations to deny the addition of any ways at intervals of not less than 10 years. This will be, in the absence of proof to a contrary

intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional way as a highway.

- 3.8 A House of Lords legal judgement in 2007 (the ‘Godmanchester’ decision) has clarified what other evidence could be evidence of “no intention to dedicate” for the purpose of section 31(1). The evidence can relate to just one point in time during the period of enjoyment, ‘during’ in the context of section 31(1) need not be through out the whole period. ‘Intention’ in this context means what the relevant audience (the users of the way) would reasonably have understood the landowner’s intention to be. A letter from the landowner to his own solicitor or estate agent would not be enough; some element of communication to users of the way of an absence of intention by the owner to dedicate must be shown. In terms of section 31(1), an act by an owner which demonstrates ‘no intention ... to dedicate’ is likely in practice also to amount to an event which ‘brings the public right of way into question’.
- 3.9 In brief, unless evidence is provided of one or more specific steps having been taken by a landowner within the period to communicate overtly to the public using the route that (s)he does not intend to grant a public right of way over it, the presumption of dedication will arise under section 31(1) where there is a full period of 20 years of uninterrupted public use, calculated from the date when the public right to use the way is brought into question.
- 3.10 Where there is insufficient evidence to establish a presumption to dedicate under section 31(1) of the Highways Act 1981, there is sometimes sufficient evidence to establish an inference of dedication by the landowner under common law. In the case of *Nicholson v Secretary of State for the Environment* (2006), Dyson J stated: “*Prima facie the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication...*”. No minimum period of use is required to raise such an inference, but there must be evidence which is sufficient to infer that there was an intention to dedicate a public right of way.

### **Other Considerations**

- 3.11 In preparing this report the relevance of the following factors has been considered: financial, social value, prevention of crime and disorder, equality of opportunity, human rights, personnel, environmental, health, property, and transport considerations.
- 3.12 None of these factors are considered to be relevant for the purpose of this report.

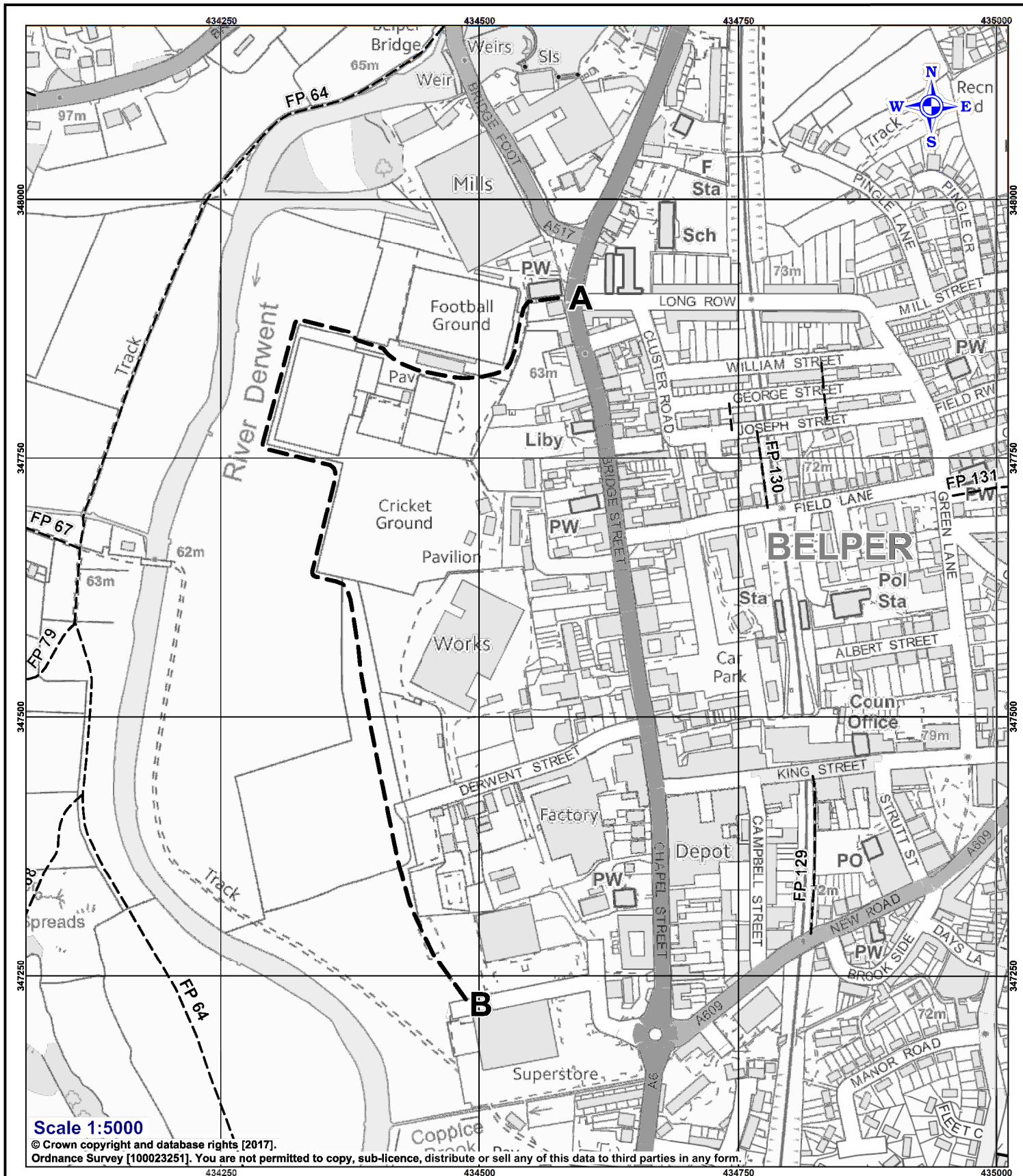
## **4. Background Papers**

File held in Legal Services under reference number 67240.

**5. OFFICER'S RECOMMENDATION**

That the Committee resolves to reject the application to add a footpath from Bridge Street (A6) to Morrison's Service Road – Belper.

**Janie Berry**  
**Director of Legal Services**



Ref: TE/LF/X4050/Cttee/2018



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Produced by Public Rights of Way on 20 August 2018

Wildlife & Countryside Act 1981 Section 53

**Claim to add a Footpath from Bridge Street (A6) to Morrisons Service Road - Belper**

**Key:**

Footpath to be added



Existing Footpaths

