

DERBYSHIRE COUNTY COUNCIL

Meeting of the Regulatory, Licensing and Appeals Committee

14 January 2019

Report of the Director of Legal Services

**WILDLIFE AND COUNTRYSIDE ACT 1981
CLAIM TO ADD A FOOTPATH FROM CHEVIN ROAD ALONG THE RIVER
DERWENT TO PUBLIC FOOTPATH NO 64 - BELPER**

1. Purpose of the Report

To enable Members to consider the application made under the Wildlife and Countryside Act 1981 to add a footpath from Chevin Road along the River Derwent to Public Footpath No 64, Belper to the Definitive Map and Statement as shown on the attached map.

2. Information and Analysis

2.1 Details of the Application

The application was made on 1 October 2015 by Richard Everett of Milford to add a footpath from Chevin Road along the River Derwent to Public Footpath No 64, Belper, to the Definitive Map and Statement. The application included a map showing the claimed route.

The application was supported by 27 Public Way Evidence Forms and supporting documents which were a copy of the 1900 Ordnance Survey Map, evidence of NFU signage, photographs of the claimed route and a supporting letter. Mr Everett also included a covering note in his submission and stated that user evidence was included from organised groups of walkers and members of the local horticultural society attempting to eradicate invasive Himalayan Balsam. In addition the riverside part of the route was used for several years by the public for the Belper Raft Race.

The applicant stated that the claimed path had been used as an alternative to walking along Chevin Road which was a narrow and hazardous section with no refuge from traffic. This section was also dark, due to being heavily overgrown with trees.

Mr Everett claimed that the route was of some antiquity as the northern section corresponded with the line of a track marked on the 1901 Ordnance Survey Map.

The applicant stated that there was acceptance of public use evidenced by the construction of wooden stiles (one of which was removed when the 'Private Land' notice went up) and the National Farmer's Union and 'sheep' posters at access points along the route. The applicant's photographs show the claimed route as well

trodden and he believed that the route should have been included on the original Definitive Map and Statement which he now wanted to rectify.

The application was submitted when a gate at the Chevin Road, Milford end of the claimed route (Point A on the attached map) was chained and locked to prohibit access and a sign erected by the gate saying 'Private Land'. This coincided with other changes to stiles and gates along the route and the erection of other signage.

The application included a letter of support from the Chairman of the Milford and Makeney Community Group, stating that the claimed footpath had been used as an amenity for many years.

2.2 User Evidence

The 27 completed User Evidence Forms were examined and found to contain varying accounts of the use of the claimed path. All the witnesses marked the claimed path on their attached maps, except for one whose map was missing. A small number of witnesses omitted to answer certain questions, however, these forms still contributed to the whole picture of use of the claimed path over many years.

The User Evidence Forms show the following use of the claimed path:

Number of Years Route Used	Number of Witnesses
Less than and up to 10 years	2
11 – 20	9
21 – 30	3
31 – 40	8
41 – 50	4
51 – 60	1
Total	27

The evidence forms showed that 16 witnesses claimed to have used the path for over 20 years with the majority of 13 of these for between 31 and 53 years. All the witnesses had used the claimed route on foot with two also using a pedal cycle. All the witnesses had seen other walkers, eight witnesses recalled seeing pedal cyclists and one seeing a horserider.

The witnesses had largely described the claimed route in a detailed way, some having walked from Belper to Milford and the others in reverse. Nineteen forms described the route from the field gate on Chevin Road, Milford, following a route along the west side of the river, under the railway bridge and along the river to join Footpath No 64 on the road which leads to Belper Sewage Works. Seven more witnesses referred to the maps attached to their forms for their description and one witness did not answer the question

A variety of widths were offered for the claimed path with ten of the witnesses claiming approximately one metre; three others claimed between half and two metres. Eleven witnesses gave the width in feet ranging from one to ten and that

the width varied along the route. One witness suggested 'person' width and another 'footpath' width, whilst two stated that it was undefined and one failed to answer the question.

When reverting to the plans completed by witnesses, all except one where the map was missing, had marked a route which corresponded with that attached to the application. The route marked was drawn along the same line on all of the completed maps and many witnesses had included their recollections of the location of stiles and gates along the route.

With regard to the reasons for use of the claimed route, two witnesses had used the path to visit places along it, fifteen as part of a longer journey and ten for both purposes. The predominant journey was given as travelling between Milford and Belper and back. The route had also been used by witnesses as a circular walk and to gain access to other places or various points of interest in the locality. Six witnesses had walked from a northerly direction from Belper Mill and the bridge over the River Derwent on the A517 with another witness covering a longer distance with walks from Milford to Ambergate, Shottle and Alderwasley.

Reasons for walking had been to go to the shops in Belper, visit people, attend events, walking to work, taking children to school, recreation, dog walking along the river and running.

A small number of the witnesses had used the claimed path as part of a group including a monthly walk to the Black Bulls Head pub (1), a group who met annually to remove Himalayan Balsam (1 and referred to by the applicant), Belper Harriers Running Club (1), scout trips (1) a witness who attended the Belper Raft Race and a witness who stated that children from Milford Primary School had made visits to the river.

Frequency of use of the claimed path is as follows:

Frequency of Use	Number of Witnesses
Daily	2
Weekly	8
Monthly	6
Less than monthly	3
Varying	8
Total	27

Eighteen of the witnesses alleged that the claimed path had never been blocked or diverted, whilst five stated that the path had been blocked in 2015. Two of these five witnesses specifically said that the gate at the Chevin Road end of the route (Point A) was locked and one witness stated that a stile had been removed and signs erected; two said that the route had never been blocked until three months before the application was made.

A further witness stated that the claimed path had been blocked by new fences and another said that although the path had been blocked, there were a few ways to access the field. Two of the user evidence forms were left blank for this question.

Witnesses recalled a variety of gates and stiles along the claimed route with 11 recalling one gate (at the Chevin Road end) and two stiles and marking them on their plans. The other users had differing recollections of the number of stiles and gates and their locations whilst another witness said that there were three stiles, but did not mark them on his plan. One witness stated that there were no gates or stiles along the claimed route and two failed to answer the question.

Specifically, with regard to stiles, 17 witnesses attested that one was in place at the Belper Sewage Works end and 17 that there was a stile under the railway bridge; several referred to this stile being removed a few months before the claim was made. Two witnesses referred to the stone step stile in the wall between fields and another remarked that the gates and stiles were open.

The applicant provided extensive evidence regarding stiles and gates along the claimed path over a lengthy period. Mr Everett alleged that from the start of his use of the route from the mid-1970's there was always a gate at the southern end. At that time this was a poor, unhinged wooden gate which was propped up by the posts to provide a gap. More recently this gate was swapped for a metal gate, again without hinges.

Mr Everett stated that access along the riverbank between the southern and middle fields was for many years simple as there was no barrier. More recently a two-strand wire fence had been put up which the applicant claimed was easily negotiated.

When Mr Everett first walked the path, access under the bridge travelling north was via a stile between a gate and a fence. This fell into disrepair and for a long period, which Mr Everett does not date, there was no barrier. A few years before the application was made the gate and stile were reinstated, but in June 2015 the stile was removed.

The applicant stated that when the road access to the sewage works was built (not dated) a wooded fence was erected on the southern side at Point B. This incorporated a stile a few yards from a gateway which for a long period did not have a gate.

A notice appeared to have been placed at Point A on Chevin Road in 2015, a few months before the application was made to the County Council. This read 'Private Land. No Access' and was referred to by six witnesses; another did not refer to wording, but stated when the sign went up. There were approximately ten references to other signs requesting that dogs were kept on leads due to sheep and lambs being in the fields. One witness claimed that there were Public Footpath signs on the route, six claimed that there were none and five failed to answer the question.

None of the witnesses were working for anyone connected with the land. With regard to permission 20 witnesses stated that were never given permission to use the claimed path. One witness said that they had never been granted permission,

but the signs were clear, two that they always thought it was public and wouldn't need permission and another witness said that the route was a clearly worn path with a stile. A further witness said that he was given permission in 1984 when the Raft Race started and was sure that the claimed route was mentioned in the publicity as a way to watch the race. Two users did not answer the question.

Twenty-three witnesses had never been stopped or turned back. Two users had seen the farmer on the path, one when the farmer was on his tractor, but he had not stopped either of them. One witness was told by the farmer in September 2013 that he could not cross the railway bridge onto his land (this would have led the user to the riverbank path). One witness did not answer the question.

Twenty-five users had never been told that the claimed path was not a public right of way, whilst one did not answer the question. The witness who had been stopped by the farmer stated that the farmer made reference to this when he stopped him.

2.3 Comments made by witnesses

Thirteen witnesses made extra comments on their user forms. Four witnesses referred to using the claimed path to avoid walking along a narrow section of Chevin Road where there was no refuge for pedestrians. One said that the lack of access to the claimed route caused a danger to pedestrians and another wanted to avoid traffic on the A6.

One witness described the claimed route as a lovely walk along the river and another that the claimed footpath was an important amenity for Milford and would appreciate the Council's assistance to protect it use for future generations.

Another witness had used the claimed route for dog walking for 22 years whilst another could not understand why use of claimed path had been deterred as she believed it was a public footpath. This witness strongly objected to any change as this was a well established and important route and another user was dismayed at its closure on her recent return to the area.

Others referred to the stiles being blocked or removed and the claimed path being difficult to use whilst a regular walker and runner had used the route several times a week without hindrance and stated that the farmer had only recently erected the signs to prevent use.

Two other witnesses referred to the claimed path being used by the scouts, for educational purposes and by the Blooming Milford group to tackle Himalayan Balsam.

2.4 Consultation

On 18 April 2017 a consultation letter was sent to the landowner, local members, user groups and statutory undertakers.

2.4.1 One of the statutory groups, The Green Lane Association Ltd. (GLASS), responded by email on 18 April to inform the Council that the group had no evidence

of public use of the route alongside the river, but had no objection in principal to the adding of the footpath as shown.

2.4.2 Councillor Ben Bellamy from Amber Valley Borough Council emailed the County Council on 19 April 2017 to say that he would be very supportive of the claim and that he had used the path himself for a number of years.

2.4.3 As a result of the consultation notices being put up at either end of the claimed path, an email was received on 20 April 2017 from a member of the public who very much supported the claim for a footpath which would connect Chevin Road and Footpath No 64.

2.4.4 On 25 April 2017 an email was received from the Peak and Northern Footpaths Society which had no evidence relating to the application.

2.4.5 An email was received on 3 May 2017 from a couple who supported the addition of the claimed path. They stated that it would be a valuable addition to existing footpaths in the area and in particular, with the connection to Footpath No 64, providing a continuous footpath from Milford to Bridgefoot in Belper. They added that when considering the detail of the position of the claimed footpath, when it passed through fields downstream from Footpath No 64, it needed to be positioned on the field side of the existing barbed wire fence. They stated that there was insufficient width even for a solitary walker to pass between the fence and the foliage growing along the top of the river bank.

2.4.6 An email was received from a member of the public who had seen the consultation notice on what he said 'used' to be a footpath. The walker claimed that the riverside route had been used as a footpath for decades until it was closed and that he had personally used it from the 1980's. The walker said that like many other people he had used the claimed path thinking that it was a public right of way. Whilst reading the Council's consultation notice the walker had noticed a man walking his dog along the route.

2.4.7 An email was received from Belper Town Council on 18 May 2017. The Clerk sent an extract from the draft minutes which stated that the Town Council had resolved to object to the application on the basis that to the Council's knowledge there had always been a physical barrier to entering the land across which the footpath was claimed at the south end of the proposed footpath.

2.4.8 A further member of the public who had read the consultation notices, emailed the Council on 22 May stating that as a Belper resident and regular walker he was in full support of the application for the claimed footpath and had thought he had a right to walk this path. The walker regularly used the route from the sewage works to Milford until it was closed some months before and would be delighted if the route was to be declared public footpath.

2.4.9 A resident on Chevin Road sent an email dated 23 May 2017 fully supporting the application. The resident had used the claimed route on a very regular basis for 12 years and infrequently for over 30 years prior to that without any dispute or complaint when he met the farmer/landowner on the land during that time. On occasions the resident had assisted the farmer with managing his stock. The

resident stated that the farmer had recently sprayed the field several times in what appeared to be an effort to discourage walkers. The resident included a copy of a painting from 1700 showing the fields above Hopping Mill Weir being used for leisure purposes.

2.4.10 An undated letter was received from a consultant of Art and Associates Ltd., Land Agents on behalf of the landowners, the Kingairloch Settlement. Having reviewed the application and the documents in support the consultant submitted the following information and evidence.

The application was in part predicated on the claim that the claimed path bore a relation to a path shown on the 1900 Ordnance Survey map which showed a footpath crossing these fields. This path was removed from later editions of Ordnance Survey maps for the area. The Estate's contention was that the route shown on the 1900 OS map was utilised by workers walking to the mills that were in operation at the time. The consultant attested that this route differed from that of the claimed path and the physical evidence of the old mill entrances to the field, which had long ceased to be used. A photograph of an overgrown area was submitted to qualify this.

The consultant stated that the claim was also based on the evidence provided by witnesses in the user evidence forms, who alleged to have used the claimed route consistently, unhindered or unchallenged, by the owner or their tenants, for the requisite period of more than 20 years and that this provided sufficient evidence to establish a public right of way. The Estate's contention was that 12 (actual number 11) of the 27 user evidence forms covered periods shorter than the requisite 20 years and this was therefore insufficient evidence. The Estate's current and previous tenant occupiers provided evidence dating back to 1967, to the effect that access to the land was not taken unhindered or unchallenged. The tenants stated that anyone accessing the land was trespassing and would have been challenged in instances where the tenant was aware of their presence.

The consultant stated that many of the witnesses claimed that the field was accessed through unlocked gates at the points of entry and that there were other stiles over fences which previously partitioned the fields which had been in place for many years for the use of people utilising the footpath, before being removed prior to the claim being made. The Estate's contention was that the gates to the field had never been open to the general public. Four photographs were attached as evidence that various gates had been locked for many years.

The consultant stated that in any event the existence of an unlocked gate was not an invitation to the general public to take access to land; it merely represented a barrier capable of being opened by the legitimate user of the land to access it for his own purposes. He further stated that the stiles and other points of access referred to were clearly there to service the fishermen who had a legitimate right to access the land as part of their fishing rights along the riverbank. This was evidenced by numerous signs, near to the points of access, which referred to the private rights specific to the fishermen. The consultant stated that the reason for the removal of stiles prior to the making of the footpath claim was to facilitate the fishermen's access to the river following the construction of a fence alongside the riverbank. The

consultant also explained that the partition fences were no longer necessary as the fields were currently occupied and farmed as a whole.

The consultant referred to the signs regarding sheep and lambs in the fields and a request to keep dogs under control, mentioned in the user evidence forms. Some witnesses believed that the notices represented an acknowledgement by the landowner that the path was walked. The Estates contention was that the signs were erected as a means of notification to those trespassing on the land that vulnerable livestock were present and that there could be serious consequences if dogs were allowed to roam freely.

A further ground for objection was that the events such as the Belper Raft Race, clearance of Himalayan Balsam and recreational walking groups, referred to by witnesses did not constitute evidence of general public access to the land as of right. They were merely references to events and activities to which the landowner and occupier did not express a specific objection to and did not form part of a continuous chain of events, which gave rise to the existence of a public right of way.

2.5 Documentary Evidence

2.5.1 The Enclosure Award and Tithe Map for the area were examined and were found not to show any evidence relating the claimed path.

2.5.2 Ordnance Survey 1st Edition 1880 (Sheet nos. 45/1 & 45/5)

The first edition map does not show any pecked lines or markings which correspond with the claimed path.

2.5.3 Ordnance Survey 2nd Edition 1898 (Sheet nos. 45/1 & 45/5)

The second edition map shows a double pecked line from the point at which the claimed path joins what is now Footpath No 64, Belper (Point B). The track follows the river and continues under the railway bridge veering away from the claimed path. As the track connects with a bend in the river it becomes a single pecked line. A pecked line would be the usual way to mark a recognised footpath.

2.5.4 Later editions of Ordnance Survey maps do not show the claimed path.

2.6 Additional Evidence

2.6.1 Site Visit

A site visit was undertaken by an officer from the County Council's Legal Services Department on 17th September 2018.

The path was accessed at Point B (north end) from Public Footpath No 64, where a large, wide metal gate was in place. The gate was unlocked and closed with a top lever fastening and led into a field where a walked line was visible along the grassed surface.

The path continued under a railway bridge where a metal gate had been discarded and leaned against the fencing to the left of the path; an old wooden gate post was in situ to the left. At the other side of the bridge was a metal gate opened to the right. The fence post to the left had a chain around it. The surface was slightly muddy under the bridge with sheep droppings.

Once under the bridge the path entered a further field and traversed up a gradient. Two walked lines were visible; one which continued directly ahead which corresponded with the claimed path and a second which continued by the boundary wall towards the railway line. At the top of the gradient the field opened out, but the claimed path was evident dropping down towards the river.

The path continued along the line of the river bank, eventually veering off away from the river to the right, along a clearly defined track, up a gradient to reach Point A. There was no access to Chevin Road at this point as a seven bar metal gate was leaned against the opening and fastened with a rusty chain and padlock; the opening was overgrown on one side. There was evidence that this had been used as an access point in the past as the opening was set in an old stone wall between stone posts and on the Chevin Road side a short, grass worn track from the road to the gate could be seen.

The officer walked back the same way.

2.6.2 Additional Evidence relating to use

During the investigation of the claim the case officer wrote to the applicant to clarify a number of points. The officer asked about an old wooden post under the railway bridge at the north end of the route and Mr Everett was able to explain that there had never been any fencing attached to this post since his use began in 1974.

The case officer asked for how long the gate at Point A on Chevin Road had been in situ and how had users passed through it. Mr Everett reported back that the metal gate, now in place, was a replacement of an earlier wooden one. Since 1974 neither gate had ever been hung on hinges and the metal gate had no hinges or latches. Both gates had been leaned into the gateway with, he believed, the wooden one being fastened roughly with binding twine and the metal one with a chain. The fastenings were originally slack enough to leave a space between gate and post so the twine or chain could be stepped over or ducked under. The chain was tightened to close the gap a few months before the claim was made.

The applicant was asked further to elaborate on this evidence and after liaising with other users he stated that the binder twine, fastening the wooden gate to an iron bracket in the stone gate post, could be lifted off its end post. The applicant confirmed that most users didn't do this and ducked under or stepped over the fastening. Later the chain fastening the metal gate was negotiated in the same way. When the gap was closed before the claim was made, walkers then used the gate as a stile. The applicant stated that as the wooden and subsequently metal gates were unhinged they were hurdles rather than gates. He believed that they were not intended against walkers and that the wooden one became too decayed to be an effective livestock barrier.

2.7 Summary and Conclusion

2.7.1 The user evidence forms show that the claimed route appears to have been walked over a period of many years with 11 of the users alleging use for between 21 and 40 years and another five between 41 and 53 years, well in excess of the requisite 20 year period to acquire public rights. Another 11 witnesses claim use up to 20 years and whilst this use is less than the requisite period this additional use demonstrates that it has been continuous and new users have continued that chain of use; it also consolidates previous use.

2.7.2 A number of witnesses came forward at consultation stage having seen the notices on the claimed route, including the local Amber Valley member, to state that they had used the claimed path. This backs up the already substantial user evidence submitted in the forms.

2.7.3 There is no evidence to suggest that use of the claimed path should be recorded as anything other than footpath, as cycle use was recorded by only two users and witnessed by eight others with one additional witness seeing a horserider. This is insufficient to establish a higher right.

2.7.4 Whilst the user evidence shows years of use over many years the frequency of this use is less substantial with only ten users walking the claimed route on a daily or weekly basis over any given period. Some witnesses spoke of using the route as a walk to school, but this is very minimal. Only nine witnesses have used the route on a monthly or less than monthly basis with an additional eight varying their use over the time they walked the claimed path. This evidence indicates that the route has been used occasionally by walkers rather than being a path that walkers have relied on either on a daily or a weekly basis.

2.7.5 The witnesses' descriptions of the claimed path were consistent in that they described it in some detail or marked it on their attached plans. The predominant walk was for use between Milford and Belper and the reverse, but a number of witnesses have incorporated their use of the claimed path as part of a longer walk with several describing a route from Belper Mill further north of the river. This is evidence to suggest that the route could be included as part of a larger network in the area. There is limited use of the claimed path by organised groups.

2.7.6 There are a variety of recollections as to the number of stiles and gates on the claimed path. Eleven users refer to the gate at the Chevin Road end and 17 refer to a stile at the Belper Sewage Works end which would indicate that these structures have been in place over a long period of time given the length of years use. The stone step stile over the wall between fields is referenced by only one witness, but this stile is not on the line of the claimed path.

2.7.7 The most significant notice on the claimed route appears to be the 'Private Land. No Access' sign attached to the Chevin Road gate prior to the claim being made, indicating an intention to prevent use by the public along with the chaining and locking of the same gate. There appears to be some recognition by the tenant or landowner that dog walkers use the route by their request notices that dogs are kept under control. However, this cannot be taken in account as evidence of use by the public and could have been a precautionary measure on the part of the

landowner given that they were aware that the land was being accessed. Furthermore, fishermen with a private right of access may bring a dog.

2.7.8 References to the claimed path being an alternative to a dangerous road or to wildlife cannot be taken into account in the determination of the claim as they are not relevant issues in determining public use of a route.

2.7.9 The challenge most referred to by witnesses and which appears to have called the route into question, was the chaining and locking of the gate at Point A on Chevin Road in 2015. Prior to this two witnesses say that they were not challenged by the farmer on meeting him on the route, but another was stopped by the farmer in September 2013. This witness was told by the farmer that he could not cross the railway bridge from Chevin Road onto his land and more or less told him that the way was not public. This challenge is not relevant to the claimed footpath along the riverbank as the railway bridge access is not along this claimed line.

2.7.10 The stile and fence under the bridge at the north end of the route appears to have changed over time until being removed in June 2015. There is also another stone post under the bridge which is old and at some point may have had gates attached. The history of the gates and stiles does not in itself provide evidence of use and these may have been put in place by the landowner to control stock or for the private purposes of the tenant. There have also been changes to gaps, stiles and gates at the entrance from the sewage works road at Point B. Seventeen users did refer to a stile at this point which could have indicated an intention to dedicate the claimed footpath as there appears to have been no clear instruction by the landowner as to public access, over the user period, at this point.

2.7.11 Mr Everett's evidence regarding the gates and stiles along the route is helpful in that he used the route from the mid 1970's and is able to recall the changes to features along the route over a long period to 2015.

2.7.12 Mr Everett provides evidence that a two-strand wire fence was erected between the southern and middle fields in his more recent use of the claimed path, but does not specify an exact date. This appears to have been an attempt by the landowner or tenant to prevent access. By stating that this fence was easily negotiated demonstrates some use by force. Another witness when prohibited from using the claimed path stated that there were a few ways to access the field again suggesting use by force and in this case that the user had not adhered to the claimed accesses at Points A and B and sought alternatives.

2.7.13 From the evidence it is apparent that a gate, albeit unhinged, has been in place at the Chevin Road end (Point A) throughout the period of use. This was originally a wooden gate and later replaced by a metal one. Belper Town Council believed this to be a physical barrier to use of the path from its objection at consultation stage. It would appear from the applicant's evidence that the gate has always has some kind of fastening which was until 2015 negotiated by either climbing over it or ducking under it and passing through a gap. Further enquiry regarding this issue provided even more substantial evidence that the applicant and other users had passed through the gap this way and that even when the gate was chained they had still persisted in accessing the path by climbing over it; the applicant described using the gate as a stile and also a hurdle. Whilst the applicant

believed the gate was not intended against walkers and its purpose was as a livestock barrier, this way of accessing the claimed path must be considered as use by force and not as of right as it shows an intention by the landowner not to dedicate a right of way.

2.7.14 Of the members of the public who came forward at consultation stage to say that they had used the claimed footpath, one couple had stated that the position of the claimed path, as it passes through fields downstream should lie on the field side of the existing barbed wire fence as it was not wide enough to walk. The route can only be considered as claimed by the applicant and not positioned or indeed repositioned according to available width.

2.7.15 The objection from the landowner's consultant firstly deals with the evidence of an ancient path shown on the 2nd Edition Ordnance Survey Map. It is likely that this was a path used by mill workers as it deviates from the claimed line to the area of the mill. The path ceased to exist when it was not used for this purpose, but in any event, the claim is based on user evidence and any documentary evidence would only serve to consolidate this.

2.7.16 The consultant claims that 12 (actual number 11) users of the route have not provided sufficient length of use to establish a presumption of dedication, however, 16 other users have provided such evidence and over a long period well in excess of 20 years. The landowner's contention that this use was not unhindered or unchallenged in some instances by the tenant farmer is indeed the case as illustrated by the erection of the wire fencing and other attempts to deter use. However, the consultant's use of photographs of chained gates does not provide sufficient evidence of challenge over the whole period of user.

2.7.17 The consultant stated that even an open gate represents a barrier to potential users, but if it is unlocked this may be perceived by the public of an intention to dedicate a public footpath. The consultant's evidence that stiles and gates along the route were there to service the fishermen's access to the river may be the case, but this does not have appeared to have deterred walkers. The notices relating to private fisherman's rights would have not have affected the rights of public use along the claimed path. Notices should have been specific to the footpath in order to convey the lack of intention to dedicate. Notices to this effect did not appear along the claimed path until the 2015 notice on the Chevin Road gate. It is acknowledged that the dog control signs were in place to protect livestock should any person access the land and not an intention to dedicate the route. Whilst the landowner does not appear to have objected to specific events on the path over the years, the Council agrees that this alone does not give rise to the existence of a public right of way. In relation to use by groups, not enough witnesses provided evidence of this to establish use.

2.7.18 The site visit revealed a well worn track along the claimed path for the majority of its length, evidence that the route had been walked over for a considerable period of time. It was also evident that various stiles and gates had been in place and that these had changed over time, but this in itself does not determine public rights on foot.

2.7.19 Examination of the evidence for this claimed footpath has revealed a conflict between use of the route over a period longer than the requisite 20 years and attempts by the landowner and tenant farmer to prohibit such use. It is clear that the claimed path has been walked over a period of many years and indeed that evidence of clear challenges to this use by the landowner and tenant only appear to have been made since 2015. However, the evidence has raised concerns as to how users have accessed the claimed path at Point A. It is evident that the Chevin Road, Milford gate at Point A was accessed by either ducking under or climbing over the fastenings during the requisite period of use, if use is calculated back from the first clear challenge in 2015, and this is not sufficient to trigger section 31(1) of the Highways Act 1980.

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 of 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 throughout 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, 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.

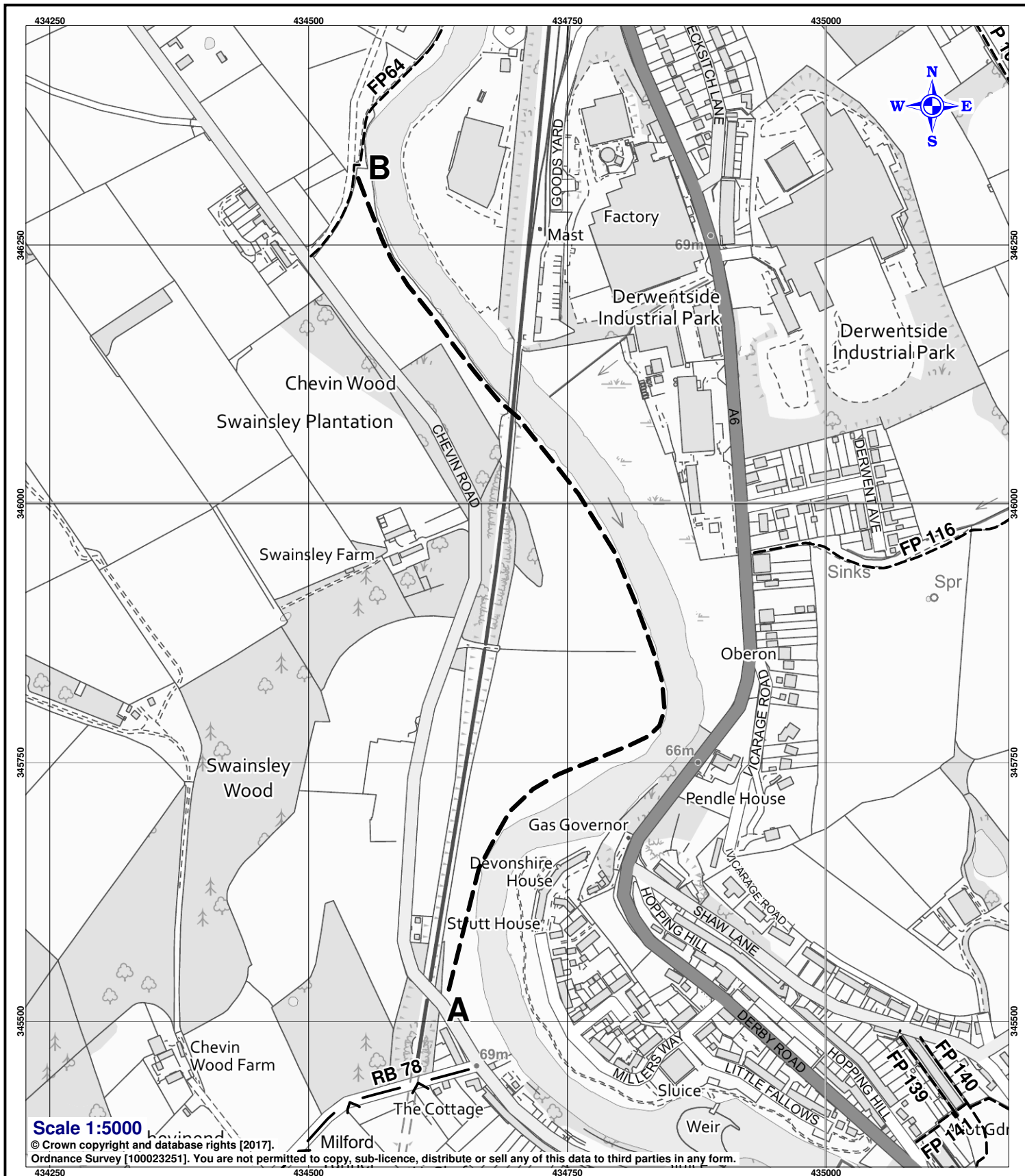
4. Background Papers

4.1 Director of Legal Services reference 67436.

5. OFFICER'S RECOMMENDATION

5.1 That the claim to add a footpath from Chevin Road along the River Derwent to Public Footpath No 64, Belper be rejected.

**JANIE BERRY
DIRECTOR OF LEGAL SERVICES**



Ref: TE/LF/X4055/Cttee/2019
Date: 14 November 2018



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Wildlife and Countryside Act 1981 Section 53

**Claim to add a Footpath from Chevin Road
along the River Derwent to Public Footpath
No. 64 - Belper**

Key:

- Footpath to be added ————
- Existing Footpath - - - - -
- Existing Restricted Byway ———— V ———— V

