

**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 ALONGSIDE RAILWAY  
LINE CONNECTING BACK TO CHEVIN ROAD THEN 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 alongside the railway line connecting back to Chevin Road then 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 alongside the railway line connecting back to Chevin Road then 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 35 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.

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 old indicated by the old stone stile in the wall between the two southernmost fields and which corresponded with the line of a track marked on the 1901 Ordnance Survey Map. Mr Everett stated that the trimming of low branches which hindered use of the stile and the clearing of nearby undergrowth indicated that public use had been accepted until recently.

The applicant stated that this acceptance was further 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 35 completed User Evidence Forms were examined and found to contain varying accounts of the use of the claimed path. A small number of witnesses omitted to answer certain questions and some marked on a section of the claimed path rather than the whole length on their attached maps. These forms, however, 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:

<b>Number of Years Route Used</b>	<b>Number of Witnesses</b>
Less than and up to 10 years	4
11 – 20	11
21 – 30	6
31 – 40	8
41 – 50	6
<b>Total</b>	<b>35</b>

The evidence forms showed that 20 witnesses claimed to have used the path for over 20 years with the majority of 14 of these for between 31 and 43 years. All the witnesses had used the claimed route on foot with one also using a pedal cycle. All the witnesses had seen other walkers and four recalled seeing pedal cyclists.

The witnesses had largely described the claimed route in a detailed way, some having walked from Belper to Milford and the others in reverse. Twenty-three forms described the route from the field gate by Chevin Road railway bridge, alongside the railway line to a stone wall, around the end of the wall, around the edge of a field which dropped downhill, under the railway bridge and along the river to join Footpath No 64 on the road which leads to Belper Sewage Works. Ten more witnesses referred to the maps attached to their forms for their description and two witnesses attached a printed description which had also used been submitted by the applicant.

A variety of widths were offered for the claimed path with nine of the witnesses claiming approximately one metre; five others claimed between half and two metres. Several 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 five failed to answer the question.

When reverting to the plans completed by witnesses, 29 had marked a route which corresponded with that attached to the application. The route marked was drawn along the same line on nearly all of the maps and many witnesses had included their recollections of the location of stiles and gates along the route. One witness recorded a slight deviation of the line on his map around the Chevin Road railway bridge section and two maps were marked with half of the claimed path from this bridge to Footpath No 64, Belper at Point C. A map was missing from three evidence forms.

With regard to the reasons for use of the claimed route, four witnesses had used the path to visit places along it, nineteen as part of a longer journey and twelve 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. These included the Holly Bush Inn, Milford and Duffield and from a northerly direction walks from Belper Mill and the bridge over the River Derwent on the A517, Goods Road, Belper and longer walks from Milford to Ambergate, Belper Lane End and Alderwasley.

Reasons for walking had been to visit people and attend events, bird watching in the small copse on the claimed route, taking children to school and dog walking.

A small number of the witnesses had used the claimed path as part of a group including an over 60's walking group (2), a monthly walk to a Belper pub (1), a group who met annually to remove Himalayan Balsam which had included the scouts (1), a local running club (1), a witness who accompanied scout trips and a scout leader who lead walks along the claimed path once or twice a year for 21 years.

Frequency of use of the claimed path is as follows:

Frequency of Use	Number of Witnesses
Daily	1
Weekly	7
Monthly	10
Less than monthly	9
Varying	8
<b>Total</b>	<b>35</b>

Twenty-two of the witnesses alleged that the claimed path had never been blocked or diverted whilst eight stated that the gate at the Chevin Road end of the route (Point A) was locked, blocking the path in 2015, a few months before the application for the footpath was made. One witness claimed that this gate was chained shut in

2012, making it difficult to walk through. Five of the user evidence forms were left blank for this question.

Two of the witnesses stated that there were no gates or stiles along the claimed route and two failed to answer the question, however, the majority of witnesses recalled a variety of gates and stiles along the claimed route. Some had differing recollections of their location, including one witness who could remember that there were three stiles, but couldn't recall where they were placed.

Over 20 witnesses referred to the gate at the Chevin Road end with around four mentioning a gate at the Belper Sewage Works end. Approximately 12 witnesses referred to a gate at the entrance to the short section of claimed path, over the railway bridge, leading back to Chevin Road to Point B. Another recalled a stile at this point and a further witness stated that there was a second gate on Chevin Road at Point B.

With regard to stiles, over 20 witnesses attested that one was in place at the Belper Sewage Works end and around 20 that there was a stile under the railway bridge; several referred to this stile being removed in recent times. Six 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.

Until a few years ago there was no gate at the field bridge access further down on Chevin Road. At the time of the application a gate had been put in place with a large gap. Access to the fields at the other side of bridge (from Chevin Road at Point B) was intermittently gated, but when closed had a section of fence in the form of a climbable stile beside it. As the old stone stile in the wall between fields was overgrown it was easier to walk around the end of the wall; this stile had been recently cleared.

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 C. 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 two do not refer to wording, but stated when the sign went up. There were approximately fourteen 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, around 11 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 27 witnesses stated that were never given permission to use the claimed path. One witnesses said that was not needed as there was clear access at both ends, one that she did not think it was needed, two that they always thought it was public and wouldn't need permission, one that no permission was given or asked for, one that it was not applicable and two witnesses did not answer the question.

Twenty-eight witnesses had never been stopped or turned back; others mentioned being stopped by the recently locked gate and notice. Two users had seen the farmer on the path, but he had not stopped them. One witness was told by the farmer in September 2013 that he could not cross the railway bridge onto his land. Two witnesses did not answer the question.

Thirty-two users had never been told that the claimed path was not a public right of way, whilst two 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**

Fourteen witnesses made extra comments on their user forms. One user explained that the gate near the stile at the Belper end was open/broken around 2013/4, allowing access to the land; the witness did not state how the land was accessed prior to this. Another witness stated that there appeared to have been a change of attitude to the use of this footpath over recent years and to other routes in Belper, but did not qualify this statement. A further witness however, testified to many obstacles going up on paths in the area in the two years prior to the claim being made.

Five witnesses referred to using the claimed path as an alternative to walking along Chevin road to the Sewage Works, which they described as being 'scary' or 'dangerous' due to there being no pavement along this section and it being between two high walls. Another witness was puzzled and annoyed by signs on this long used path which provided a pleasant walk and access between communities; she objected to the closure of the path through the meadows which were a haven for wildlife. A further walker had used the claimed path regularly until 2002 when she left the area; she was dismayed that the route had been closed on her recent return.

One witness claimed to have used the claimed route several time a week to walk and run and had observed how the occupier had recently taken action to physically prevent access.

One user claimed that the path was used prior to 1974 and that a neighbour then had used the path for 50 years. Others referred to this being a well established route, used over decades.

## **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 objection to the footpath being added to the Definitive Map and Statement. The member recalled seeing photographs of trains taken from the line of the path so it appeared to him that the footpath had been in public use for some time. The member then sent a photograph showing people using the path over the bridge adjacent to Point B on the attached map. The member of the group had personally used a section of the claimed path from Point B towards Point A some years previously when photographing trains.

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. Councillor Bellamy stated that the claimed path completed a popular circuit and provided an alternative route which forced people onto a narrow road.

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.

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 The Ramblers' Association local representative sent an email dated 30 April stating that from 1987 to 2015 he had regularly used the claimed path and that the line shown on the map accurately reflected the route he had walked. The representative had always believed the claimed path to be a right of way.

2.4.6 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.

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 15 of the 34 user evidence forms (35 submitted) 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 1<sup>st</sup> 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 2<sup>nd</sup> 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 C). The track follows the river and continues under the railway bridge corresponding with the claimed path. As the track connects with a bend in the river it becomes a single pecked line and veers away from the line of the claimed path. 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 17<sup>th</sup> September 2018.

The path was accessed at Point C (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 and a second which continued by the boundary wall towards the railway line which corresponded the claimed path. At the top of the gradient the field opened out, but the claimed path was still evident along the field boundary with the railway line to the right.

After a short distance the path reached a dry stone wall. In the centre of the wall an old step stone stile was in place. At the end of the wall, to the western side, marked by an old stone post, was a gap wide enough for a vehicle to pass which led to the next field. At a right angle to the gap, a double metal gate was in place which was fastened together with twine prohibiting access to a short track rejoining Chevin Road at Point B on the attached map. The track provides a bridge over the railway line and had a grassed surface with vehicle track markings in evidence.

The officer continued through the next field along the boundary, up another slight 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 and on returning to her car drove along Chevin Road to view the connecting track/railway bridge from the other side at Point B. A large metal gate was opened to the right and for a very short distance, vehicle ruts revealed a metallised surface. A six foot metal pole was in situ to the right of the gate.

### **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 14 of the users alleging use for between 21 and 40 years and another six between 41 and 43 years, well in excess of the requisite 20 year period to acquire public rights. Another 15 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 and a representative of the Ramblers' Association, 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 one user and witnessed by four others. This is insufficient to establish a higher right.

2.7.4 Whilst the user evidence shows years use over many years the frequency of this use is less substantial with only eight users walking the claimed route on a daily or weekly basis over any given period of use. Some witnesses spoke of using the

route as a walk to school, but this is very minimal. The majority of witnesses, 19 in total, 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 weakens the regularity of use and indicates that the route has been used occasionally by walkers rather than being a path that walkers have relied on either 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 large 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 Whilst there are a variety of recollections as to the number of stiles and gates on the claimed path, there is consistency as to location. Over twenty users refer to the gate at the Chevin Road end and 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 a few witnesses, but would not have been used as there is a gap at the end of the wall. In any event the stone stile would mean that walkers would have had to slightly deviate from the claimed line which is not the case.

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 dogs.

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 Green Lane Association's photograph of the public, viewing trains from the bridge on the short section of claimed path to Chevin Road and a further image sent of a train taken from the claimed route, are moments in time and are not evidence either of continued use over a twenty year period or of the whole claimed path.

2.7.10 The challenge most referred to by witnesses and which appears to have led to the making of the Wildlife and Countryside Act 1981 claim, was the chaining and locking of the gate at Point A on Chevin Road. However, two of the evidence forms show a challenge before that date. One witness stated that in 2012 the Chevin Road gate was chained shut, making it difficult to get through and another was stopped by the farmer in September 2013. Whilst a few witnesses say that they were never

challenged by the farmer on meeting him on the route, this witness was told that he could not cross the railway bridge onto his land and the farmer more or less told him that the way was not public, showing a clear challenge to use.

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. It would appear that the Chevin Road bridge section was not always accessible as being 'intermittently gated' with a fence that could be climbed over. This would not appear to be access as of right.

2.7.12 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 C. Twenty 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.

2.7.13 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 that 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 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 The objection from the landowner's consultant firstly deals with the evidence of an ancient path shown on the 2<sup>nd</sup> 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.

2.7.15 The consultant claims that 15 users of the route have not provided sufficient length of use to establish a presumption of dedication, however, 20 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 illustrated by the challenge in

2013. However, the consultant's use of photographs of chained gates does not provide sufficient evidence of challenge over the whole period of user.

2.7.16 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.

2.7.17 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.

2.7.18 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 2012. However, the evidence has raised concerns as to how users have accessed the claimed path, particularly at Points B and 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 2012, 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 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 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**

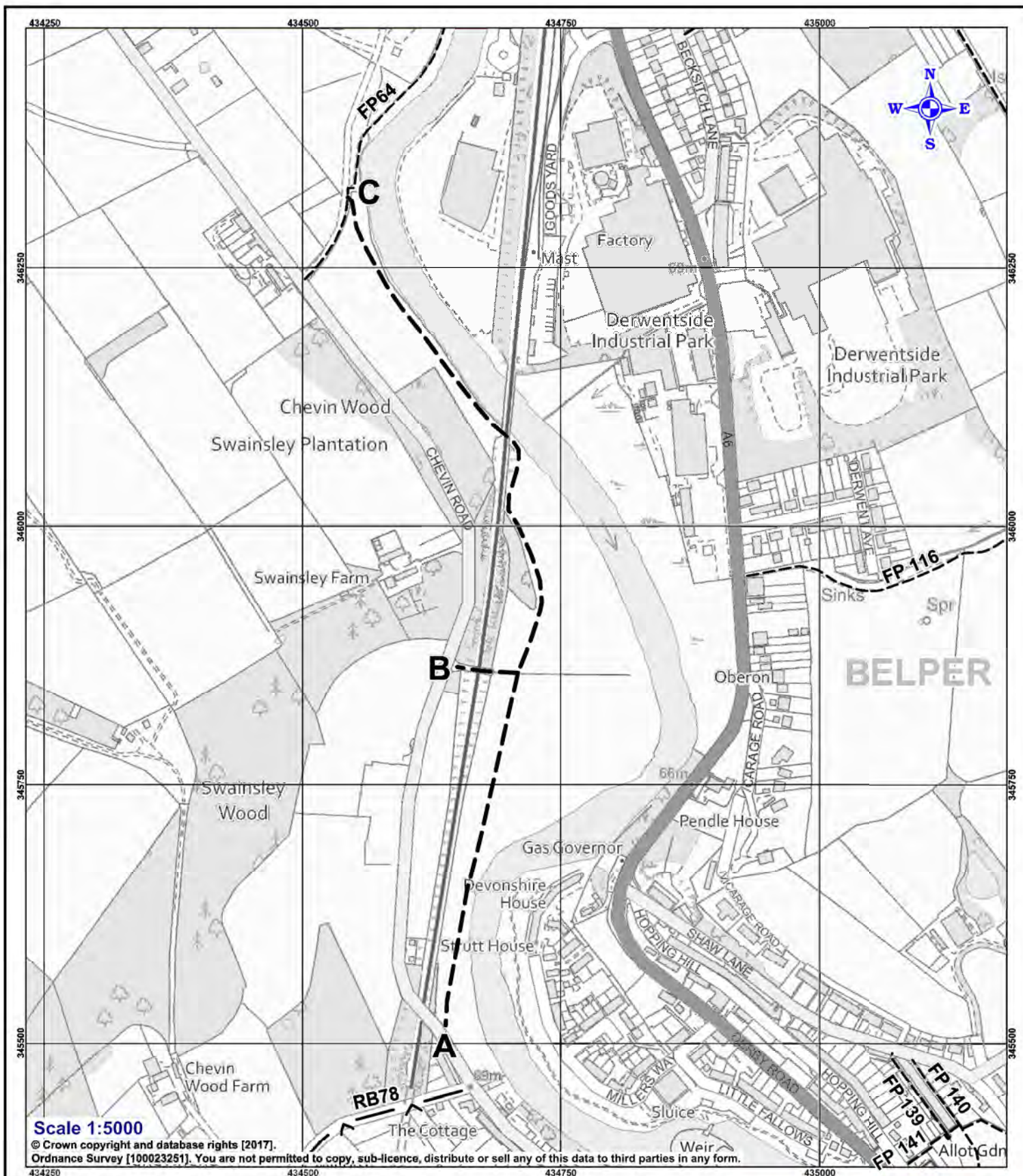
- 4.1 Director of Legal Services reference 67434.

#### **5. OFFICER’S RECOMMENDATION**

- 5.1 That the claim to add a footpath from Chevin Road alongside the railway line connecting back to Chevin Road then to Public Footpath No 64, Belper be rejected.

**JANIE BERRY  
DIRECTOR OF LEGAL SERVICES**





Ref: TE/LF/X4054/Ctee/2019  
 Date: 14 November 2018



**Mike Ashworth**

Strategic Director  
 Economy, Transport & Environment  
 Derbyshire County Council  
 Shand House  
 Dale Road South  
 Mallock  
 DE4 3RY

**Wildlife & Countryside Act 1981 Section 53**

**Claim to add a Footpath from Chevin Road alongside railway line connecting back to Chevin Road then to Public Footpath No.64 - Belper**

**Key:**

Footpath to be added ————

Existing Footpath - - - - -

Existing Restricted Byway ————v———v———

