

DERBYSHIRE COUNTY COUNCIL
REGULATORY, LICENSING AND APPEALS COMMITTEE

14 January 2019

Report of the Director of Legal Services

Wildlife and Countryside Act 1981
Claim to delete Public Footpath No. 30 – Parish of Breaston

1. Purpose of the Report

1.1 The purpose of this report is to enable Members to determine an application to amend the Definitive Map and Statement by deleting public footpath number 30 in the Parish of Breaston.

2. Information and Analysis

2.1 On 12 May 2016, Mr M Sail (“the Applicant”) submitted an application to Derbyshire County Council (“the Council”) to delete Public Footpath No. 30 from the Definitive Map and Statement. The application is accompanied by the Applicant’s statement of truth.

2.2 A plan showing the claimed route is attached (Appendix 1).

Consultation

2.3 An informal consultation exercise was carried out between 2 May 2017 and 6 June 2017. Notices were placed on the route and letters were sent to the statutory consultees, landowners and the local elected member, Cllr Robert Parkinson.

2.4 Nine people responded to the consultation with eight objecting to the claim and one with a query on timescale of closure.

2.5 A member of the public emailed the Council to ask if the closure is to go ahead and the timescale of the closure if it is likely to happen. She finished by saying ‘I’m currently organising a programme of guided walks over the summer and don’t want to plan to use this route if it is likely to be closing in the near future’.

2.6 An email was received from a representative of the Peak and Northern Footpath Society (PNFS) stating ‘... there is nothing in this statement to support a DMMO application. Peak and Northern have evidence on file from 1950/52 indicating that the path was correctly added to the definitive map under the provisions of the 1949 Act.’ He also adds that ‘Indeed we have

some evidence that the path should continue across the parish boundary into Risley, and are currently considering our own DMMO application to so extend the path.' He goes on to add that as things stand they would oppose this claim.

2.7 Another representative of the PNFS emailed the Council repeating the above reasons in more detail and adding that '... it is certain that this Society will object to any DMMO published to delete Footpath 30.'

2.8 The Council received an email from a member of the public objecting to the claim stating 'I would like to raise my objection to the removal of this footpath having walked it twice this weekend.'

2.9 The Parish Clerk for Breaston Parish Council emailed the Council a letter stating their objection to the application adding 'The Parish Council believes that all public rights of way should be protected for public amenity and as such objects to the proposed deletion of the footpath.'

2.10 A member of the public emailed the Council her objection to the claim. She states 'I strongly object to the claim by Mr M Sail of Cottage Farm, Breaston, to delete from the Rights of Way map a section of public footpath in a popular area walked by Breaston, Draycott and Risley residents along with their dogs.' She also added 'Please respect and protect the public's right to walk unimpeded on any land that is shown as a right of way on an archival map.'

2.11 A representative of the Erewash Ramblers sent an email to the Council objecting to the claim. She states '... I am aware that my predecessor and other people in the walking fraternity are looking into a historic path linking Breaston footpath 30 with Risley parish. Were this to be established and lead to an extension of the footpath network in that area I feel it would be short sighted at this juncture to delete this path.'

2.12 A member of the public sent an email enquiring about the changes indicated by the claim. She states 'I walk this walk daily with dogs as do plenty of others, but can obviously only speak for myself and my husband when I say we would be devastated if we were not allowed to use it any more as a public footpath.'

Documentary Evidence

2.13 Parish Survey

The route was surveyed in October 1950 by Breaston Parish Council in preparation for the production of the Definitive Map and Statement under the National Parks and Access to the Countryside Act 1949. The schedule of rights of way dated 1950 and produced as part of this survey described a route of Path No. 21. The end section of Path No. 21 eventually became recorded as the current Public Footpath No. 30. Para. 2 of the Schedule is headed 'Symbol distinguishing status of path' both 'CRF' & 'CRB' have been

crossed out but 'FP' (footpath) and 'BR' (bridle road) remains clear. A description of the path under Para. 6 describes the path as '.....From Cottage Farm, the F.P proceeds in a N.W. direction, crossing No. 20 F.P. in the Cottage Farm home field which is grassland (Viz the 4th field of No 20 F.P) – Between this field & the 2nd field (grass) there is a cart bridge having a single strand barbed wire obstruction fence, having neither stile nor gate. There is a fence stile exit from the 2nd field entering a 12/15 feet wide grassed enclosure with hedges both sides. This enclosure proceeds as far as the field bordering Risley Parish boundary with Breaston. This last field is ploughed & entry to it obstructed by barbed wire fences. F.P proceeds in Risley Parish to Derby Road. There are no signs of notice boards, & this 2nd section of the F.P. appears to be little used.' The rest of the schedule listed numerous paragraphs with details regarding the surveyed path-

- Para. 10 'Grounds for believing path to be public, including:-' with a subsection '(a) Uninterrupted public user over 40 years.' The words 'over 40' was handwritten onto the schedule by the surveyor.
- Para. 10 (b) 'Grounds for specifying status of path in para. 2' the following was handwritten 'Reference to ordnance map of Parish Council showing footpaths approved in 1934'.
- Para. 11 (a) 'Note as to general condition of the path' the following was handwritten 'Section 1 good, section 2 poor.'
- 'Para. 11 (b) 'Is the path passable at all seasons of the year?' handwritten 'yes'.

2.14 The Ordnance Survey map accompanying the schedule used by the surveyor to show the routes claimed for the parish shows the path which is labelled as 'F.P' (footpath) near Point B. Also at Point B 'F.B.' (Footbridge) and 'B.W.' (Barbed Wire) is handwritten. 'S' (Stile) is handwritten near where the path crosses the second field boundary. 'B.W.' is also hand written near the path 150 metres before Point C. Near Point C and between Point B and C there is a pencilled line from the path to a marked '?'. This may be a reflection of the fact that the surveyor was not absolutely clear about the alignment of the path at this location.

2.15 Definitive Map & Statement

The statement to accompany the Definitive Map for South East Derbyshire Rural District which was prepared under Section 32 of Part IV of the National Parks and Access to the Countryside Act 1949 is dated 25 August 1967 and describes Path No. 23 (the end section of Path No. 23 eventually became recorded as the current Public Footpath No. 30) as follows; 'Footpath from Holmes Rd. at junction with path No. 18 (498337) in a generally North Westerly direction via. Holmes Farm and Cottage Farm to parish boundary East of Isolation Hospital (450348)'. The statement listed the path as 'No. 23' and the nature of surface as 'Metalled Grass'. In the 'Remarks' column it mentions the whole path as having '4 Field Gates. 2 Cart bridges. 1 Footbridge. 1 Stile'. The definitive map, 01/01/53 – South East Derbyshire Rural District (formerly), shows a solid line which goes through Cottage Farm

to Point A then follows the alignment of Public Footpath No. 30 to the parish boundary. This is labelled '23.'

2.16 1st Edition 1:2500 Ordnance Survey Map c1880 – Sheet LVI.1 & LI.13

Cottage Farm is labelled as 'Breaston Cottage', Public Footpath No. 20 is shown as two dashed lines. Two dashed lines from Breaston Cottage follows the alignment of Public Footpath No. 30 to where it crosses the boundary of the second field via Point A. From this point there is two solid lines which indicates a track of some sort that goes along the alignment of Public Footpath No. 30 to the boundary of the third field 141 metres south east of Point C.

2.17 2nd Edition 1:2500 Ordnance Survey Map c1898– Sheet LI.13 / LVI.1

Cottage Farm is labelled as 'Breaston Cottage', Public Footpath No. 20 is shown as two dashed lines and labelled 'F.P.'. Two dashed lines from Breaston Cottage follows the alignment of Public Footpath No. 30 to where it crosses the boundary of the second field via Point A, this is also labelled 'F.P.'. From this point there is two solid lines which indicates a track of some sort that goes along the alignment of Public Footpath No. 30 to the boundary of the third field 141 metres south east of Point C.

2.18 On 9 July 2015 Derbyshire County Council confirmed an Order to extinguish part of Public Footpath No. 30. This followed the confirmation on 30 April 2015 to divert part of Public Footpath No. 20. The part extinguishment of Public Footpath No. 30 was from Point A in an east south easterly direction to Public Footpath No. 23 through Cottage Farm. The part diversion of Public Footpath No. 20 moved the footpath slightly away from Cottage Farm to where it is now.

Other Evidence

2.19 The applicant included with the application a statement of truth (SOT).

2.20 The SOT included in the application was signed and dated on 13 April 2016 by the Applicant. He explains that he owns the majority of the land over which Public Footpath No. 30 in Breaston runs. He goes on to add that he lived at Cottage Farm all his life and that his family has owned all the land affected by the Application throughout that time except the field adjoining the Parish Boundary which was sold four years ago. He states that 'the path goes nowhere because it comes to a dead end at the Parish Boundary. In all my years at Cottage Farm I have never seen anyone use the path and no one to my knowledge has enquired as to where the path leads. There has never been any evidence on the ground of the path having been used and there is nothing to view at the point where the paths meets the Parish boundary.' He goes on to explain that he had received an email and plan from Mr David Jenkinson of the Council's Economy, Transport and Environment Department dated 16 November 2015 which outlines issues affecting Public Footpath No. 30. A copy of this email and plan was attached to the SOT. The issues outlined by Mr Jenkinson were 'There is no gap/stile in the hedge and no

ditch crossing at Point 60, There is no gap/stile in the hedge and no ditch crossing at Point 61 and There is no gap/stile in the hedge or path between the hedges at Point 62.' The Applicant's response as outlined in the SOT was 'a) There has never been a gap or stile in the hedge at Point 60. There has always been a double hedge on either side of the brook. b) There has never been a gap or stile in the hedge at Point 61. Instead there has always been a hedge in place on either side of the ditch. c) The same applies at Point 62.' He goes on to finish by stating 'This is evidence in itself that the path has never been used, serves no useful purpose and is redundant.'

Site Visit

2.21 A site visit was undertaken on 14 November 2018. From Point A looking towards Point B there is no sign of the path on the ground. Where the path crosses the first field boundary at Point B there is a double hedge on either side of a brook. There is no sign of a gap or stile through the hedge and barbed wire was located on the western side of the hedge on the western side of the Brook. No evidence of the path was shown on the ground past Point B and being unable to access the rest of path without going on private land the site visit was ended.

Summary and conclusion

2.22 This claim is based on the Applicant's statement of truth.

2.23 Derbyshire County Council as the highway authority is required, by paragraph 3 of Schedule 14 to the Act, to investigate the matters stated in the application. However it is not for the authority to demonstrate that the map is correct, but for the Applicant to show that an error was made.

2.24 In *Trevelyan v Secretary of State for the Environment, Transport and the Regions (2001)* 'In this case the Court of Appeal held that where an application was made to delete a path from the definitive map, and it fell to the Secretary of State or an inspector to decide whether the right of way did in fact exist, he had to start with an initial presumption that it did. The standard of proof required to show that the inclusion of the path on the definitive map was incorrect was the balance of probabilities. But evidence of some substance had to be put in the balance if it was to outweigh the initial presumption that the way had been correctly included.'

2.25 For this application to be successful the Applicant must prove by discovery of evidence that Public Footpath No. 30 in the Parish of Breaston had been included on the definitive map and statement in error, there having been no public right of way over the path at the date of the preparation of the original definitive map which when considered with all other relevant evidence clearly shows that a mistake was made when the right of way was first recorded.

2.26 The parish survey which led to the inclusion of the path on the definitive map and statement pre-dates the applicant's knowledge of the path. It is possible, considering the comments made in that survey that the path may have already fallen into disuse and been potentially blocked by barbed wire at the time of the survey in 1950, but having been included in the various stages that led to the creation of the definitive map and statement there is no indication that the inclusion of the route was disputed at that time. The symbols of 'footbridge' and 'stile' along the route indicates there was indeed means of access along the path. The definitive map and statement is conclusive evidence of the particulars contained therein.

2.27 The statement of truth provided by the Applicant along with the application, although it suggests that the path was never used, went to a dead-end and had obstructions along its length, does not provide evidence that Public Footpath No. 30 was added to the Definitive Map and Statement in error.

2.28 In summary, the Applicant provided no evidence to show that Public Footpath No. 30 was added to the definitive map and statement in error to outweigh the initial presumption that the way had been correctly included. The reasons for deletion outlined in the Applicant's SOT including that the path serves no useful purpose and is redundant, are not relevant and cannot be taken into consideration under the Wildlife and Countryside Act 1981.

2.29 A finalised copy of this report has been sent to Cllr Robert Parkinson as the local member for the area prior to the Committee.

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 (3) the discovery by the authority of evidence which ... shows ... that there is no public right of way over land shown in the map and statement as a highway of any description, or [that] any other particulars contained in the map and statement require modification, (section 53(3)(c)(iii)).

3.4 In *Trevelyan v Secretary of State for the Environment, Transport and the Regions (2001)* 'In this case the Court of Appeal held that where an application was made to delete a path from the definitive map, and it fell to the Secretary of State or an inspector to decide whether the right of way did in fact exist, he had to start with an initial presumption that it did. The standard of proof required to show that the inclusion of the path on the definitive map was incorrect was the balance of probabilities. But evidence of some substance had to be put in the balance if it was to outweigh the initial presumption that the way had been correctly included.'

3.5 In brief, for an application to delete a public right of way to be successful the applicant must prove by discovery of evidence that the public right of way had been included on the definitive map and statement in error, there having been no public right of way over the path at the date of the preparation of the original definitive map which when considered with all other relevant evidence clearly shows that a mistake was made when the right of way was first recorded.

Other Considerations

3.11 In preparing this report the relevance of the following factors has been considered: social value, financial, prevention of crime and disorder, equality of opportunity, personnel, environmental, health, property, and transport considerations.

3.12 None of these factors are considered to be relevant for the purpose of this report.

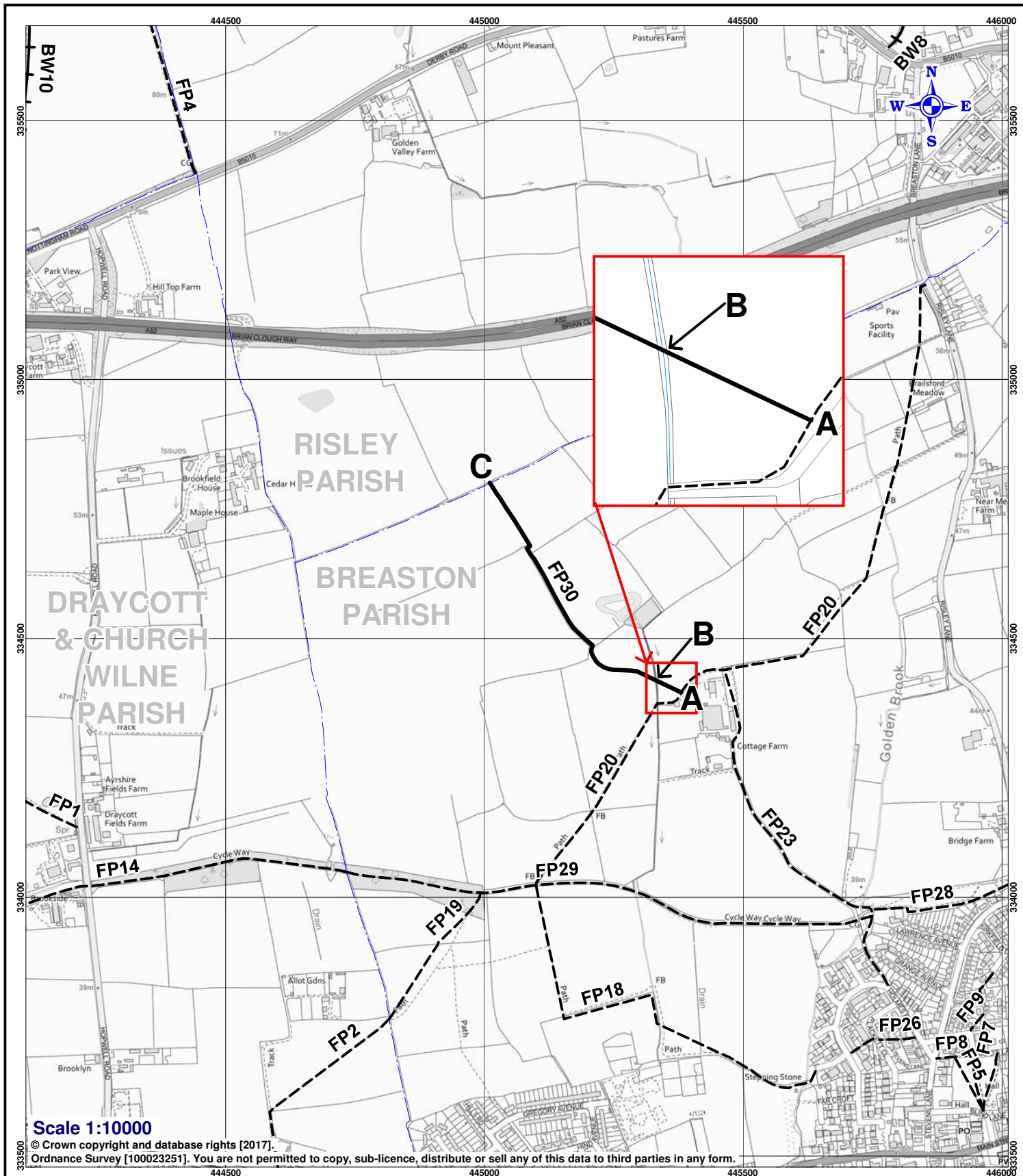
4. Background Papers

File held by Legal Services (ref: 68458)

5. OFFICER'S RECOMMENDATION

That the Committee resolves to authorise the Director of Legal Services to reject the application under section 53 of the Wildlife and Countryside Act 1981 to delete of the definitive map and statement public footpath number 30 in the Parish of Breaston as shown between Points A-C on the plan attached to this report.

Janie Berry
Director of Legal Services



Ref: TE/LF/X4083/Cttee/2018
Date: 15 November 2018



Mike Ashworth

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

Wildlife and Countryside Act 1981 Section 53

Claim to delete Public Footpath No. 30 - Parish of Breaston

Key:	Path to be deleted	
	Unaffected Footpath	
	Unaffected Bridleway	
	Parish Boundary	

