

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

**18 January 2016  
Report of the Director of Legal Services**

**Wildlife and Countryside Act 1981  
Claim to add a Footpath between Public Footpath No. 39 and a Private  
Track leading from Footpath No. 37 – Parish of Denby**

## **1. Purpose of the Report**

The purpose of this report is to enable Members to determine an application to amend the Definitive Map and Statement by adding a Public Footpath between Public Footpath No. 39 and a private track (known as Pottery Lane) in the Parish of Denby.

## **2. Information and Analysis**

**2.1** On 16 December 2013, 'Denby Footpaths Group' ("the Applicant") submitted an application to the Council to add a public footpath to the Definitive Map and Statement, Parish of Denby. The application is accompanied by 6 user evidence forms, an undated photograph of Park Meadows Farm, some information about the claimed route and 'related' footpaths and a list of 'historical map data', though no copies are provided.

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

**2.3** The claimed route is approximately 320 metres long and runs NE across a field.

### **User Evidence**

**2.4** Neither the user evidence submitted nor the application suggests a date that use of the route was brought into question. The user evidence submitted spans the years from 1936 to 1970 though only one user has claimed use since 1960 and only one user before 1938. The period of use under consideration is therefore 1940 to 1960. The table below shows the years that the claimed route has been used by more than one person.

1938	1939	1940	1941	1942	1943	1944	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960

**2.5** Of the 6 witnesses, all have used the route they have claimed on foot and one witness also claims to have used the route on pedal cycle and in a motor vehicle; two claim use for a 20 year period or more; one for 15 years;

two for 10 years, and one for 8 years. The user evidence covers the years from 1936 to 1970 with the longest user claiming use for 24 years. However, use by just one individual, or even two, does not constitute use 'by the public' and there is no 20 year period that the route has been used by more than two people.

**2.6** One witness claims to have used the route either daily or weekly, four weekly and one monthly.

**2.7** Descriptions of the width of the route given by the witnesses varied between 5 yards and 3 metres.

**2.8** Of the 6 users all have marked the route they have used on a plan but only one user marks a similar route to that claimed, the remaining five users mark different routes: three follow the field boundary to the south and two mark the route more laterally and to the south i.e. East-north-east as opposed to north-east.

**2.9** The user evidence suggests that there may have been gates on the route but that there may also have been stiles to the sides of the gates.

**2.10** One user recalls the route being diverted 'when it was outcropped (sic)' but does not give a date.

**2.11** Four of the witnesses' use appears to have been by right as opposed to as of right; two have walked to Park Meadows Farm to pick potatoes one of whom states that she worked for the owner; another witness states he was walking to a 'smallholding in field and cottages' and the fourth claims to have driven a motor vehicle on the route when she would have been only 15 years old or younger.

### **Consultation**

**2.12** An informal consultation exercise was carried out between 29 September 2015 and 16 October 2015. Letters were sent to the Local Authorities.

**2.13** Following the consultation, no further information was submitted to the Council.

### **Documentary Evidence**

#### **2.14 Burdett's Map of Derbyshire 1791**

The claimed route is not shown on the map.

#### **2.15 Sanderson's Map – Twenty Miles round Mansfield 1835**

The claimed route is not shown on the map.

**2.16 Denby Parish Claim 1951**

A route which appears to correspond to the claimed route is shown on the plan for the Parish Claim marked with a green dashed line and labelled 'OMMISSION?'. This label has been crossed out in pencil and the comment 'Private' added underneath it.

**2.17 Derbyshire County Council's List of Streets**

Pottery Lane is not on the List of Streets and is not shown as adopted highway on the County Council's mapping system.

**2.18 Ordnance Survey 2<sup>nd</sup> Edition 1899 1:2500 Derbyshire Sheet 35:7**

A route correlating with the claimed route is shown on the 1899 plan, between dotted double lines, but it is not marked 'FP' as the footpaths that connect to it are.

**2.19 Ordnance Survey 1961 1:2500 Derbyshire Sheets SK3847 / SK3947 and SK3846 / 3946**

There is a route shown which runs along a similar line to the claimed route, at least in part but it clearly runs across land marked as 'Opencast Workings'. It is not marked 'FP' as other paths in the vicinity are.

**2.20 Ordnance Survey 1966 1:2500 Derbyshire Sheets SK3847 / SK3947 and SK3846 / 3946**

The claimed route is not shown.

**2.21 Ordnance Survey 1995 1:2500 Derbyshire Sheets SK3847 / SK3947 and SK3846 / 3946**

The claimed route is not shown.

**2.22 Ordnance Survey 2005 1:2500 Derbyshire Sheet SK3846 / 3946**

A short section of the claimed route is shown running from the track in a NE direction to the edge of the plan but is not labelled as 'FP' and there is a solid line across the junction with the track.

**Additional Evidence**

**2.25** All rights of way on the land were suspended by Order (1979) to enable opencast coaling to take place and the Order was not revoked until 29 February 2008. All rights of way were officially suspended until February 2008 and therefore the acquiring of public rights of way would not be possible during that period.

**2.26** The evidence submitted by the Applicant does not add any information that shows the claimed route once carried public rights. The photograph simply shows two people standing on a vehicular track by a farm, the website from which it derives labels the picture as 'Park Meadows Farm - Tenant (Charles Allsop)'. The list of 'Historic map evidence' is not accompanied by any copies and the page titled, 'Routes related to claim' states the route was 'originally a track which went to Park Meadows farm (previously Heap's Nursery) and to a small holding with a thatched cottage' and also, 'as well as the track being used as a main route to other destinations, it would have been used by farm labourers and visitors. In 1867 a hosiery manufacturer worked from the outbuildings and so the track would have been used by these workers.'

### **Summary and conclusion**

**2.27** The test which has to be applied when considering the adding of a route to the Definitive Map and Statement under s53(3)(c)(i) is whether there is sufficient evidence to show 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.

**2.28** A route correlating with the claimed route is shown on the 1899 OS plan but it is not labelled as a footpath (as other routes are) and part of the route is shown on the 1961 OS plan. However, the route is not shown on the 1966 and 1995 OS plans. O.S. maps do not record the status of rights of way, they only show 'what is on the ground', however, it is common on such maps for used paths to be labelled.

**2.29** The Parish Claim of 1951 clearly defines the route as 'Private'. This view is reinforced by two of the witnesses who have stated they worked for the landowner, picking potatoes or farm produce and another who describes his use as '...to smallholding in field and cottages'.

**2.30** Of the six witnesses only one has drawn the claimed route on a plan, the others had drawn different routes (although this may be because the landscape has changed following open-casting and reinstatement of the land).

**2.31** The claimed route does not go from highway to highway and it does not lead to a place of public resort. The track from which the claimed route starts (Point A) did not exist until the reinstatement of the opencast site and there is no indication of where the users would have continued from Point A. The track at Point A was subject to an application which was rejected by the Regulatory, Licencing and Appeals Committee on 27 July 2015, and recorded in the minutes at 24/15.

**2.32** Two users claim to have walked the route for a period of twenty years or more though both have claimed a different route from that on the application. One of these two witnesses used to work for the landowner and

so her use would have been permissive, not as of right. The user evidence does not show that the claimed route has been used by the public, as of right for 20 years and does not satisfy the requirements for presumed dedication under s53(3)(b)(c)(i) of the WCA 1981 and s31(1) of the Highways Act 1980.

**2.33** The user claiming use in a motor vehicle claims to have used the route from the year of her birth in 1941 to the year she left Denby in 1956 – she would have been 15 years old when she moved away and so her use of the route in a vehicle must have been private/permissive. The Road Traffic Act 1930 introduced the minimum age of 17 for driving a motor vehicle on a public road.

**2.34** The evidence submitted by the applicant with the claim would also suggest that the track leading to Park Meadows Farm was a private track, predominantly used by workers and visitors to the various businesses that have been based there.

**2.35** There were various negotiations with the new landowner soon after British Coal Opencast had sold the land about dedicating the private track to which the claimed route connects as a public right of way but the track was not dedicated. It is therefore clear that there was no ‘intention’ on his part to dedicate any route on the land through his own goodwill.

**2.36** All rights of way on the land were suspended by Order during the period of opencast and the Order was not revoked until 29 February 2008. During the period of opencast mining it was not physically possible to use the route. Coupled with the very short time period between the reinstatement of the land and the selling of the land, it is not possible to infer a dedication by British Coal Opencast, especially when one considers the fact that all rights of way were officially suspended until February 2008 and therefore the acquiring of public rights of way would not be possible during that period. There has been no *animus dedicandi* (act of dedication) and there is no evidence to suggest the route was used by the general public prior to the opencast coaling or reinstatement of the land.

**2.37** There have been no objections to the claim.

**2.38** Considering the limited evidence of use available and the lack of any evidence of an act of dedication or intention on the part of the landowners, it cannot be considered that the claimed route has been dedicated at common law.

### **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 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 1980, 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.

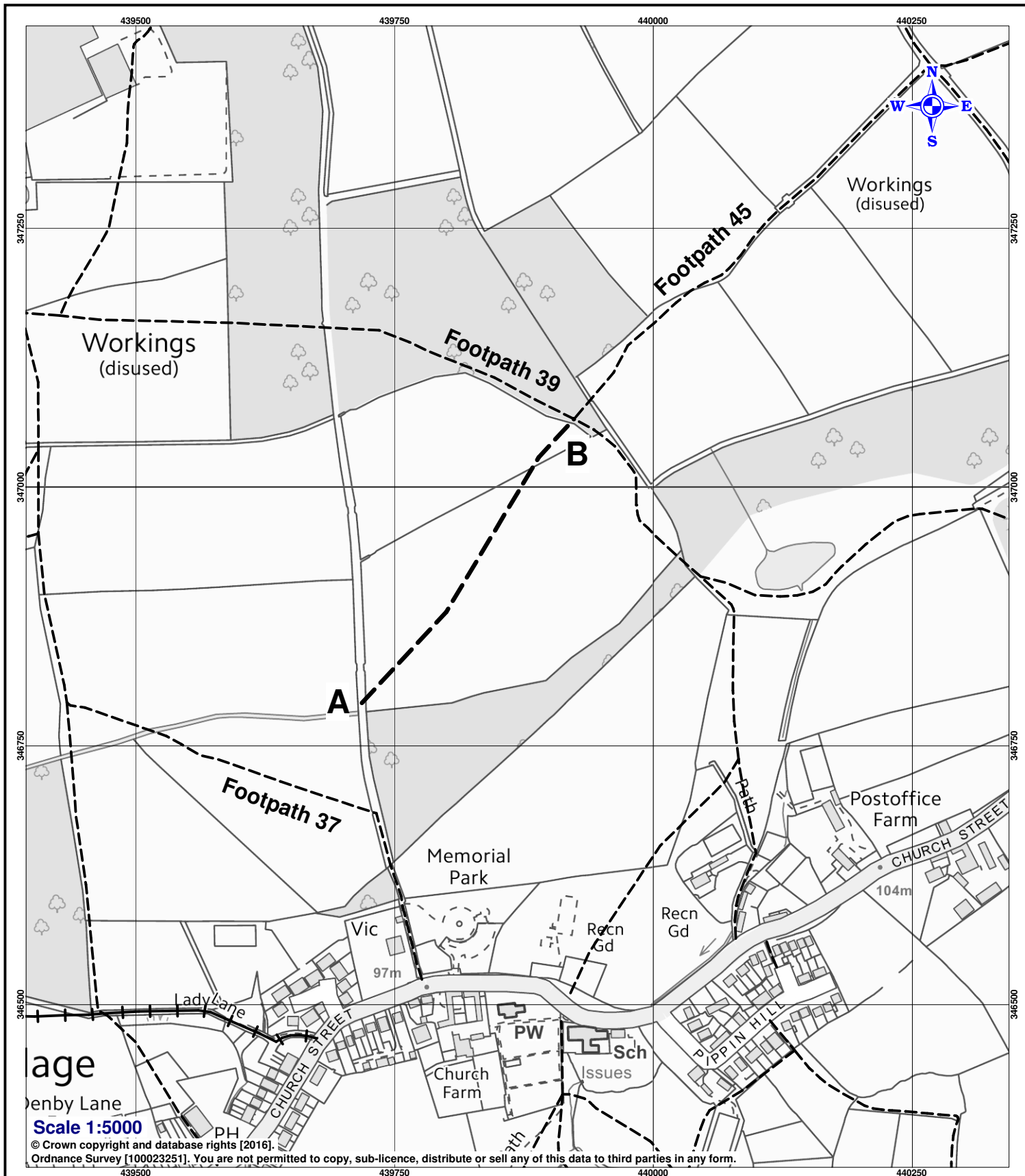
## **4. Background Papers**

File held by Legal Services (ref. 62802)

## **5. OFFICER'S RECOMMENDATION**

That the Committee resolves to reject the application to make an Order under Section 53 of the Wildlife and Countryside Act 1981 to amend the Definitive Map and Statement by adding a public footpath from Point A to Point B on the attached plan.

**Chief Officer**



Ref: TE/DC/X3944/CTTEE/2016



Mike Ashworth  
Strategic Director - Economy, Transport & Environment

Shand House  
Dale Road South  
Matlock  
Derbyshire  
DE4 3RY

Produced by Public Rights of Way on 6 Jan 2016

# Wildlife & Countryside Act 1981 Section 53

**Claim to add a Footpath between  
Pottery Lane to the junction of  
Footpath No. 39 and Footpath No. 45  
- Parish of Denby**

## **Key:**

Claimed Footpath	-----
Existing Footpath	- - - - -
Existing Bridleway	+ + + + +

