

**DERBYSHIRE COUNTY COUNCIL****Meeting of the Regulatory, Licensing and Appeals Committee****21 May 2018****Report of the Deputy Director of Legal Services****WILDLIFE AND COUNTRYSIDE ACT 1981  
ADDITION OF A LENGTH OF FOOTPATH FROM MILL LANE TO JOIN  
FOOTPATH NO 43, PARISH OF DETHICK, LEA & HOLLOWAY****1. Purpose of the Report**

To enable Members to consider evidence relating to a section of footpath from Mill Lane to join Footpath No 43 in the Parish of Dethick, Lea and Holloway and its addition to the Definitive Map and Statement. The route is shown as A-B on the attached plan.

**2. Information and Analysis****2.1 Details of the evidence**

In July 2008 the County Council received an application from Dethick, Lea and Holloway Parish Council to modify the Definitive Map and Statement by adding a footpath from Lea Road to Footpath No 38 which was supported by 119 Public Way Evidence Forms. The route had been called into question when it was obstructed by the installation of electric gates by the landowner. The application was investigated and reported to the Regulatory, Licensing and Appeals Committee in March 2012 when the recommendation to make a Modification Order was approved. The Order was made on 17 May 2012 and an objection to it received from the landowner. The Order was determined at a public inquiry held in September 2015 and the Inspector appointed confirmed the Order. The route is recorded on the Definitive Map and Statement as Public Footpath No 43, Dethick, Lea and Holloway.

The first section of Footpath No 43 runs from Lea Road at X to Point B on the attached plan. To the east, on the other side of the triangle, there is a corresponding 'arm' from Point A on Mill Lane which joins Footpath No 43 at Point B. During the investigation of the claim, it was apparent that some witnesses had accessed Footpath No 43 from this eastern 'spur'. The village of Holloway, which is the most densely populated area adjacent to Footpath No 43, lies to the east and therefore it is likely that many of those who walked this path would have accessed it from that direction.

On the original application for Footpath No 43, Dethick, Lea and Holloway Parish Council chose to claim the western section from Lea Road, X-B, even though some users had indicated that they had walked along A-B.

During the preparation for the Public Inquiry in 2015, it became clear that the eastern section, A-B, had been used in much the same way as the claimed route and Council officers addressed this issue at the Inquiry. A request was made that if the Inspector decided to confirm the Order that it be modified to show the eastern 'arm' section A-B.

Referring to this section A-B as the eastern 'limb', the Inspector acknowledged that it was evident that witnesses had used this section, in some cases as frequently as their use of Footpath No 43, depending on where they were travelling to and from. However, the Inspector stated that if she concluded that there was sufficient evidence to support the existence of a public right of way on foot over the eastern limb it would not be possible for her to modify the Order. Although almost all of the eastern limb route was shown on the Order plan, the northernmost section extended beyond the area of land shown. The Inspector could not therefore modify the Order as it was not possible to show the full extent of any such modification on the Order plan.

Following the Public Inquiry and the confirmation of the Order for Footpath No 43, Dethick, Lea and Holloway Parish Council were keen to secure the legal recording of this additional section of path. As the Council are in possession of existing evidence relating to this route there was no requirement for the Parish Council to make a formal application and it is appropriate to seek Members' consideration of this matter.

## **2.2 User Evidence**

When witnesses were interviewed in preparation for the Public Inquiry for Footpath No 43, a number of them spoke of accessing the Order path from the eastern end providing user evidence along the section of path A-B.

The following witnesses described their use:-

Witness 1 used both 'arms' from Lea Road depending on which approach she had taken on foot or where she had parked if she had driven there. The witness's use was from 1971/2 to the placing of the obstruction in 2008; her use was once a week or more.

Witness 2 stated that he used Footpath No 43 from Lea Road and that there were two short sections of path, the order route and another path from the Holloway end (the eastern limb). The witness would use both of these to access the track and used the main section of the claimed path (now Footpath No 43) to get to the canal and to gain access to the entrance to Lea Wood etc. The witness had lived in Lea from 1969 and Holloway from 1984 and had used the claimed path and the 'eastern limb' (A-B) from 1969 until it was obstructed in 2008.

Witness 3 stated that his deceased wife walked Footpath No 43 from the disused cottage by the canal and along the path back to Lea Road and to Holloway which suggests that she used the 'spur' path. The witness stated that he had a leg disability and used to drive down to the path when he walked it with his wife. They would have used Footpath No 43 and the spur path depending on where they parked. They walked the route from 1990 with the witness's wife using it several times a week and the witness, once a week.

Witness 4 said that in addition to Footpath No 43 from Mill Lane she used an alternative path to point B which was just to the east ie the spur path. This was this witness's principal access to point B and Footpath No 43.

Witness 5 had known Footpath No 43 from 1980 and lived on Church Street, Holloway to the north east of the path from 1980 to 1985. After a gap of 4 years from 1985 to 1989 the witness had since resided north of Footpath No 43. The witness's use did not include the short section from Lea Road as he would walk along the eastern spur that leaves Mill Lane east of Footpath No 43, meeting at point B. The witness had used the route regularly from 1980 to 2008.

Witness 6 had used Footpath No 43 since 1980 until its obstruction, twice a week. When the witness moved to her current address of Nightingale Close aged 22 she used the route daily. Whilst the witness may have occasionally used the section from Lea Road to access the main path she most often used the alternative track from Mill Lane to the east, ie the eastern spur.

Witness 7 moved to area in 1982 and began walking Footpath No 43 immediately. This witness walked the section from Lea Road, but used A-B on the other side of the triangle more regularly and favoured this alternative as it was the most direct route for her; she walked it most days.

Witness 8 often walked on the A-B section of path, but sometimes walked up the first part of Footpath No 43 (X-B) from Lea Road. This witness used the path from 1971.

Witness 9 used both the section of Footpath No 43 from Lea Road and the unclaimed track A-B, a little further up the hill, to access the remainder of the path and walked it from 1971 until it was obstructed.

Witness 10 used the path from January 1972 and always used the short section of path from where Mill Lane meets the Old Post Office spur, A-B and walked past the Lodge until the barrier was erected in 2008.

Witness 11 used Footpath No 43 from 1988. The witness moved to Holloway in 1993 and then moved to Lea. He used the 'arm' section A-B, but used the section X-B more regularly.

Witness 12 used Footpath No 43 from 1987 at least every couple of months. The witness moved to Holloway in 1999 and used the route at least weekly. The witness would not have used the Order route section to access the main path, but would have accessed the route along the spur just to the east ie A-B.

Witness 13 used Footpath No 43 every month or two from 1987. The witness moved to Holloway in 1999 and used the path many times each week for dog walking using

the spur section of path closest to the properties to access Footpath No 43 and not along the first section of Order path.

Witness 14 used the path occasionally from 1971 for 33 years. The witness moved to a property in Lea Wood in August 2004 and would walk the path from his garden. The witness had private vehicular use from Lea Road to home. In addition to Footpath No 43, both during periods of visits to the area and then living there, the witness also used the section of track A-B to the east.

Witness 15 used to live at Lea Wood and could access Footpath No 43 from her property. She had walked the path from September 1985 and referred to the spur path as 'the vehicle track', used in a vehicle by neighbouring properties. The witness used this track on foot.

### **2.3 Consultation**

On 29<sup>th</sup> January 2018 a consultation letter was sent to the landowners, the District and Parish Councils.

The only respondent was the landowner of the property which adjoins the length of footpath in question. The landowner asked if the section of route was evidenced on any historic maps and stated that to his knowledge this private road was not shown as a right of way on historic maps. Whilst the landowner acknowledged that some villagers may have used the section A-B as a short cut, his legal representative's view was that this was trespass.

The landowner stated that as there was now a public right of way leading from Lea Road there was no necessity for another public footpath in such close proximity. He added that there would always be marginally shorter routes that people trespass across to save time and inconvenience and this should not be a reason to make A-B a public footpath.

### **2.4 Documentary Evidence**

#### **2.4.1 Ordnance Survey 1<sup>st</sup> Edition (1880)**

The corresponding path to A-B is shown as a wide track from Lea Bridge continuing to what is now Footpath No 43. The route is not marked in any particular way to denote a public right of way and depicted by a bold boundary line on one side and a pecked line on the other. This section is wider than the section on the other side of the triangle from Lea Road, which is now recorded as part of Footpath No 43.

#### **2.4.2 Ordnance Survey 2<sup>nd</sup> Edition (1899)**

The corresponding path to A-B is again shown as a wide track from Lea Bridge with no demarcation to show a right of way. The boundary lines are depicted in the same way as for the 1<sup>st</sup> Edition map. This section is wider than the section on the other side of the triangle from Lea Road, which is now recorded as part of Footpath No 43.

**2.4.3 Agreement between William Edward Nightingale, Samuel Smith and Joseph Wass (1836)** During the investigation into Footpath No 43, documents were examined to determine whether or not the then claimed route had acquired higher rights than that of footpath status. In 1819 a road was put in place called the 'Coal

Road' which served the wharf and ran along the line of the newly confirmed Footpath No 43. An agreement formalising the action of 1819 was made between three local industrialists in 1836 and describes 'the Carriage Road in Lea Wood'. This road directly coincides to Footpath No 43 from a memorandum and plan spelling out the heads of terms of the 1836 agreement.

2.4.4 Footpath No 43 would appear to have existed as a towpath and whilst it had been in a walkable condition and used since the 1820's, the memorandum refers to the putting in of a new road. This meant that it had to be properly made up under the terms of the 1836 agreement. The 1836 agreement describes the new road to the wharf as a 'Private Road' with an open gate which Mr Wass was to close every Good Friday.

2.4.5 The two 'arms' of footpath from 'X' and 'A' on the attached plan are clearly shown, but there is no indication from the plan, the memorandum or the agreement whether the one or both of the tracks were used to access the Turnpike Road.

## **2.5 Additional Evidence**

On the ground the track is a well defined path of a gravel/stone surface with grass verges at each boundary. At point B two very large, old stone gate posts still remain. The track is wide enough to carry a vehicle and more commodious for this purpose than the corresponding 'arm' X-B, which forms the first section of Footpath No 43.

## **2.6 Summary and Conclusion**

2.6.1 It is clear from the fifteen witnesses that the length of path A-B has been walked on a regular basis for as long as the use of Footpath No 43. The Inspector at the Inquiry concurred that this was the case and from her comments it is likely that she would have modified the Order had the entire length of the route been depicted on the Order map.

2.6.2 In terms of a 20 year period of use the witnesses state that they ceased to use the section A-B when Footpath No 43 was blocked by the electric gates in 2008. Eleven of the witnesses claim to have walked this section for over 20 years, with the longest user alleging 39 years use. The Inspector at the Inquiry concluded that the period for the presumption of dedication of Footpath No 43 was made out during the 20 year period prior to 2008. The use of the A-B length of route would coincide with the use of Footpath No 43 and it is therefore safe to assume that the same calling into question ie the erection of the electric gates on Footpath No 43 applies.

2.6.3 The documentary evidence supports the existence of a right of way at A-B and backs up the user evidence on which the case relies. The Ordnance Survey early editions of 1880 and 1889 clearly show the section A-B with this length shown as slightly wider than X-B which is the confirmed route. The plans show A-B as the more obvious continuation of Footpath No 43 adjoining the main road.

2.6.4 The 1836 Agreement shows that at one time the route of Footpath No 43 was a cart road used via a private right for commercial interests of the locality. In relation to the section A-B it is worth noting that on neither the Agreement, the memorandum referred to above nor the plan showing the Carriage Road, there is no mention of which of the 'arms' to the Turnpike Road, was the continuation of this private track.

As neither length of path ie X-B or A-B is singled out, both of these lengths were probably used and given equal credence. The plan to the Agreement shows a line across the bottom of each 'arm' which could indicate where gates were placed.

2.6.5 The route was deemed private and the gates were closed every Good Friday to protect the private rights of the route, but it is likely that once the commercial enterprises closed the annual closure was also abandoned. There is no evidence of such a closure to be found in the user evidence or objection for Footpath No 43 or for the section of route A-B.

2.6.6 During the time of vehicular use the documentary evidence suggests that the paths were also used on foot and there was no evidence provided to negate the substantial use on foot until the claim was made for Footpath No 43. The longevity of Footpath No 43 as a right of way was evidenced by much historical reminiscences and documentation and this evidence applies as much to the length of route A-B as for Footpath No 43. The documentary evidence shows that the two 'arms' and indeed the whole length of Footpath No 43 were in the past given equal weight and as 'X-B' now has recognised public rights this should apply to A-B.

2.6.7 Private rights of access in a vehicle exist today for a number of landowners and occupiers. The route A-B appears to be a more commodious route by vehicle than X-B and this may have been the case during the time when the commercial agreement was in place.

2.6.8 The landowners comments made following the consultation exercise relate to whether the route in question is evidenced on historic maps and that it is private. Land ownership alone does not preclude the acquisition of public rights, as all rights of way traverse private land. The landowner acknowledges that the section A-B has been walked, but believes this to be trespass. That would only be the case if use of the path had been challenged during the relevant 20 year period of which there is no evidence. The landowner purchased his property in 2012 which is outside of the relevant period. The further comments made by the landowner cannot be considered under the Wildlife and Countryside Act 1981.

### **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: social value, 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 purposes of this report.

#### **4. Background Papers**

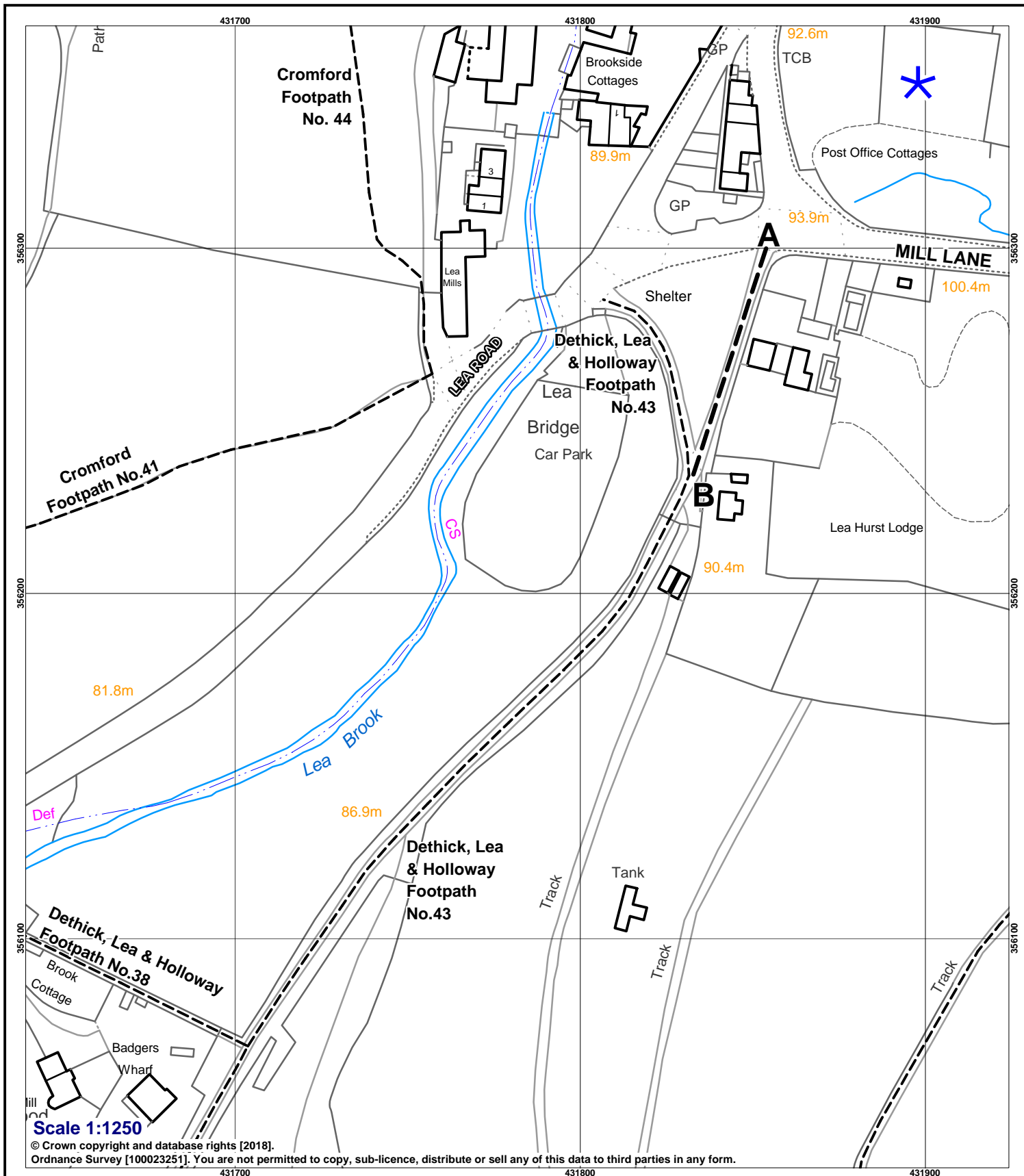
4.1 Deputy Director of Legal Services reference 40965.

#### **5. OFFICER’S RECOMMENDATION**

5.1 That the Committee resolve to authorise the making of an Order under Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981 to add a Footpath from Mill Lane to join Footpath No 43 in the Parish of Dethick, Lea and Holloway.

**SIMON HOBBS  
DEPUTY DIRECTOR OF LEGAL SERVICES**





Ref: TE/CH/X---/Cons/2018  
Date: 23 January 2018



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**Wildlife & Countryside Act 1981 Section 53**  
**Addition of a length of footpath from Mill Lane to join Footpath No. 43**  
**- Parish of Dethick, Lea and Holloway**

**Key:**

- Footpath to be added ————
- Existing Footpath ————
- District boundary ————

