

DERBYSHIRE COUNTY COUNCIL**Regulatory Licensing and Appeals Committee****21 May 2018****Report of the Deputy Director of Legal Services****Wildlife and Countryside Act 1981****Claim to upgrade Public Footpath No 11 to a Bridleway – Parish of
Hodthorpe and Belph****1. Purpose of the Report**

To enable members to determine an application to amend the Definitive Map and Statement by upgrading to Bridleway Public Footpath No 11 in the Parish of Hodthorpe and Belph

2. Information and Analysis**Details of the Application**

- 2.1 An application dated 04 December 2013 was received on behalf of the Sherwood Forest Project to upgrade Public Footpath No 11 to a Bridleway in the Parish of Hodthorpe and Belph. The application was supported by a plan showing the claimed route and 25 User Evidence Forms, two of the user evidence forms have been completed and signed by two people and therefore the use of 27 users has been considered.
- 2.2 A plan showing the claimed route is attached to this report.
- 2.3 The claimed route is recorded on the Definitive Map and Statement as a footpath which is publically maintainable. The route is approximately 380 metres long with a tarmac and compacted stone surface.

User evidence

- 2.4 As there is no evidence of challenges to the usage of the route on either bicycle or horseback or that the route has ever been obstructed, it is therefore considered that it is the application that has brought the status of the route into question for the purposes of Section 31(2) of the Highways Act 1980. Only evidence and events prior to 2013 have been considered in assessing the claim and therefore the relevant period is 1993-2013.

- 2.5 All 25 of the user evidence forms had plans attached with the route as used marked on them. Twenty one of the plans had the letters A & B at either end of the described claimed route printed on them and had then been highlighted by the users, these were not highlighted in identical ink which indicates that these were marked by the individual witness. Twenty of the plans also included the wording "mark the route" inside a box inserted onto the plan to be signed and dated by the user. Only one of the user evidence forms did not have the description of the route and the width pre-typed on to the form prior to completion by the individual. Only two of the plans attached to the evidence forms were not signed by the user which also indicated that the used route was marked on the plans by the individual users. All of the marked routes are an accurate reflection of the claimed route.
- 2.6 Of the 27 users one user claims to have used the route on foot and on bicycle, five users claim to have used the route on horse only, 18 claim to have used the route on bicycle only, and three claim to have used the route on horse and on bicycle.
- 2.7 Two users have used the route on horseback for 20 years or more, eight users claim to have used the route on horseback within the relevant period. Fourteen users have used the route on bicycle for 20 years or more, 22 users claim to have used the route on bicycle within the relevant period.
- 2.8 Twenty of the users claim to have seen others using the route on horse and bicycle, one user claims to have seen others using the route on foot, horse and cycle, five users claim to have seen others using the route on bicycle only, and one user claims to have seen others using the route on horse only.
- 2.9 None of the witnesses recall the route being obstructed or diverted, being stopped from using the route, or being given to permission to use the route on horseback or on bicycle.
- 2.10 One witness recalls seeing a notice on the route stating that they think it stated "Please close the gate"
- 2.11 Twenty five of the witnesses recall having seen a gate on the route, most have not provided the location of the gate but the ones that have state that the gate was located at the end of the car park. There is a gate located at Point B which is at the end of the car park and therefore it is assumed that this is the one to which the witnesses refer, none of the witnesses who have referred to the gate recall it ever being locked.

Consultation

- 2.12 An informal consultation exercise was carried out between 22 April 2015 and 27 May 2015. Notices were placed at either end of the route at the beginning of the consultation period and letters were sent to the statutory consultees, landowners and the elected Local Member, Councillor Duncan McGregor.
- 2.13 An e-mail in support of the application was received on 23 April 2015 from the applicant.
- 2.14 No objections were received to the application following the consultation.

Documentary evidence

2.15 Enclosure Evidence

The Whitwell Enclosure Award and Plan of 1824 refer to the extreme western end of the claimed route as being a footpath however, the remainder of the route falls outside the extent of the award.

2.16 Bolsover District Definitive Map and Statement 1985

Due to a Parish boundary change Hodthorpe and Belph Public Footpath No 11 is recorded on the Definitive Map and Statement as Whitwell Public Footpath No 49.

Footpath 49 is described as a 'Footpath from Craggs Lane S of Craggs Lodge (537744) in E direction to Bridle Road No 48 (Wayfield Lane) S of Ladycroft Wood (542745)' and as approximately .380 miles in length.

2.17 Ordnance Survey 1st Edition 1:2500 c.1892

Public Footpath No 11 is shown along the entire route as a double dashed line.

2.18 Ordnance Survey 2nd Edition 1:2500 c. 1898

Public Footpath No 11 is shown along the entire route as a double dashed line.

2.19 Ordnance Survey later Editions

The claimed route is shown on later plans consistent with the 1892 edition and they offer no further information

Additional evidence

- 2.20 A site visit was undertaken and photographs were taken of the claimed route on 13 October 2017.
- 2.21 Public Footpath No 11 starts at Point A and continues in a generally easterly direction down a three metre wide tarmac track through the car park where the surface comprises compacted stone. At the end of the car park is a gate and beyond the gate is the junction of Public Bridleway No 10. The majority of the witnesses refer to a gate within their evidence.

Summary and conclusion

- 2.22 The test which has to be applied when considering the upgrading of a route on the Definitive Map and Statement under s53 (3)(c)(ii) is on the balance of probabilities.
- 2.23 The Council has received no objections to the claim to upgrade the footpaths to bridleways. Although the landowner has expressed concern about the entire width of the route being used by all users due to the vehicular access to the car park and would prefer separation to be introduced.
- 2.24 When considering whether a landowner is deemed to have dedicated a bridleway or restricted byway, it has been considered by Carnwarth LJ (see paragraph 3.12) that it would be appropriate to infer the form of dedication by the owner that is least burdensome to him, which would be a bridleway. There are several other bridleways within the vicinity that would connect to this route and therefore a bridleway would appear more suitable.
- 2.25 Current case law suggests that regular use of a route by horse riders and cyclists is consistent with presumed dedication of the route as a bridleway because it has been legal for cyclists to use bridleways since 1968 when Section 30 of the Countryside Act 1968 came into force.
- 2.26 The County Council's Declaration Register shows that a statutory declaration was made on 12 August 2016 which affects the land but would not affect the claim as it was made following receipt of the application and therefore outside of the relevant period.
- 2.27 In summary, the public do appear to have used the route as bridleway for 20 years or more, that use has been of right, without secrecy, permission or by force as required by the legislation. The documentary evidence offers no proof of public bridleway rights but, the application to modify the Definitive Map and Statement is based on user evidence.

There has been no evidence submitted to suggest that the claimed route has not been used as public bridleway and it is therefore considered on the balance of probabilities, there is sufficient evidence to show that a public bridleway subsists.

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 through out 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.
- 3.11 Section 30(1) of the Countryside Act 1968 provides that any member of the public shall have, as a right of way, the right to ride a bicycle, not being a mechanically propelled vehicle, on any bridleway.
- 3.12 In *Whitworth v Secretary of State for Environment, Food and Rural Affairs* ([2010]) EWCA Civ 1468) the Court of Appeal concluded that the route under consideration in that case had acquired bridleway status by 1968. Subsequent use of the route by cyclists would have

been permitted by the Countryside Act 1968 and the route had no higher rights than those of bridleway. Carnworth LJ expressed the opinion that the same conclusion would have been reached even if there had been no finding of pre-existing bridleway rights and that although, use by horse riders and cyclists was also consistent with an assumed dedication as a restricted byway, it was appropriate to infer the form of dedication by the owner that is least burdensome to him.

Other Considerations

- 3.13 In preparing this report the relevance of the following factors has been considered: financial, social value, prevention of crime and disorder, equality of opportunity, human rights, personnel, environmental, health, property, and transport considerations.
- 3.14 None of these factors are considered to be relevant for the purpose of this report.

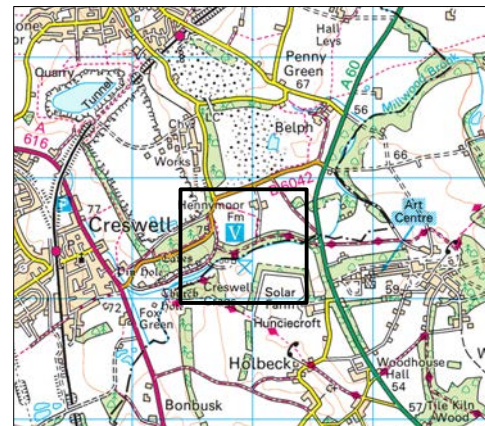
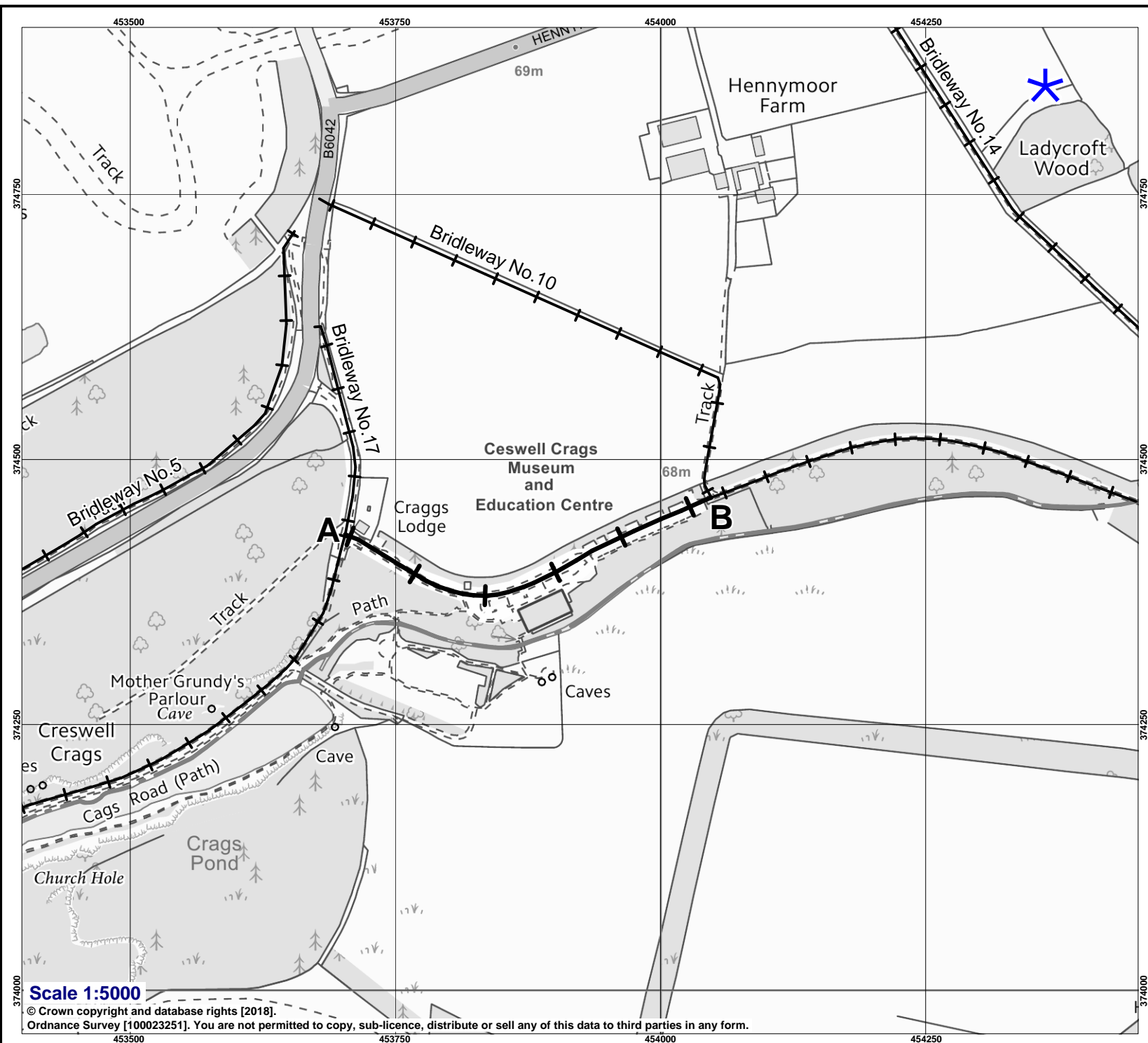
4. Background Papers

File held by Legal Services (Ref 63870)

5. OFFICER'S RECOMMENDATION

That the Committee resolves to authorise the Deputy Director of Legal Services to make an Order under s53 of the Wildlife and Countryside Act 1981 to amend the Definitive Map and Statement by upgrading to bridleway, Public Footpath No 11 in the Parish of Hodthorpe and Belph.

Simon Hobbs
Deputy Director of Legal Services



Wildlife & Countryside Act 1981 Section.53

**Claim to upgrade
Public Footpath No.11
to a Bridleway,
Parish of Hodthorpe and Belp**

KEY

**Footpath claimed
as Bridleway (A-B)** ————+———+

Existing Bridleway ————+———+———+



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