

DERBYSHIRE COUNTY COUNCIL

Meeting of the Regulatory, Licensing and Appeals Committee

23 May 2016

Report of the Director of Legal Services

**WILDLIFE AND COUNTRYSIDE ACT 1981 – APPLICATION TO CHANGE THE
DESCRIPTION OF BYWAY OPEN TO ALL TRAFFIC NO. 157 – PARISH OF
ASHOVER**

1. Purpose of the Report

To ask Members to consider the evidence relating to a definitive map modification order (DMMO) application with regard to Byway Open to All Traffic (BOAT) No. 157 in the Parish of Ashover.

Please find attached to this report plans showing the route.

2. Information and Analysis

(i) Background to the Claim

On 18 March 2014 the applicant submitted a DMMO application to the effect that certain evidence he was aware of showed that the current description of Ashover BOAT No. 157 in the definitive statement held by the Council was inaccurate and required modification.

The application was specifically concerned with the section of the BOAT extending from the junction with the access road leading to Marsh Green House generally north westwards to the ford crossing of Marsh Brook and related to 2 issues; namely 1) the issue of what width the route ought to be recorded as having and; 2) the lack of any reference in the Order to historic gating points along that section of the route.

In terms of the width of the route: The applicant acknowledged that, following public inquiries in October 2008, December 2009 and April 2010 into the matter of how the route should be recorded on the definitive map and statement, the Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs concluded that the route was a BOAT, and that the section described above continued along a; “walled track, with a width varying between 5 and 7 metres...”

However, in his submission the applicant stated that the public inquiries referred to above appeared to concern only the issue of whether the route carried public vehicular rights and ought to be added to the definitive map and statement as a BOAT: He asserts that; “...the width of the route and alignment does not appear to have been of any concern or interest.”

He quotes from the final decision issued by the Planning Inspectorate on 28 June 2010 where, under the heading 'Width', the Inspector states: "The modifications I proposed in my Interim Decision to the widths specified in the Order drew no objections and I set them out again."

The applicant concluded that the lack of objections at that time regarding the matter of width led the Inspector to make an incorrect presumption that the whole of the route between the stone walls had been dedicated as a public highway. He went on to suggest that, had the issue of width been thoroughly examined, the Inspector would have been able to consider evidence which showed that in this particular case the adjacent walls did not represent the highway boundaries:

The applicant explained that historically (as far back as 1600) the buildings at Marsh Green were farm buildings. He stated that the field gates and the walls adjacent to BOAT No. 157 are positioned in such a way as to facilitate ease of access for carts travelling to and from Marsh Green and that this demonstrated that; "...the creation of the walls was undertaken to accommodate farming requirements and containment of livestock."

He then went on to discuss the fact that the gate posts at the Marsh Brook ford crossing limit the available width to 1.4 metres and that this defines the width of vehicles that can use BOAT No. 157 as a through-route. He suggested that, mindful of this width restriction, the Inspector ought to have concluded that the walls on either side of the highway were set out for the benefit of farming practice and bear no relation to the use of the route as a highway.

He also stated that the presence of a stone structure used either as a cart wash or as a plimming pit constructed within the walls bounding the route, by and for the landowners of the day, strengthened the argument that this was primarily an agricultural access route built by the individual landowners and occupiers who used it. He also referred to an area of the route which was used for turning and parking farm carts and carriages. He stated that; "The creation of a wider area would only have been carried out for the benefit of the farm and walls set out to suit this need rather than that of any highway."

In terms of historic gating points along the route: The applicant stated that the Inspector appointed by the Secretary of State gave no consideration to retaining gating points which were present at the time of the 1783 Ashover Enclosure Award and that, as with the issue regarding widths, this was because no one had raised any objection regarding this matter when the Inspector's Interim Order Decision was published.

It should be noted that the 1783 Award cited above was of crucial importance at the various inquiries held into this particular route because it set out the part of the route which fell within its scope as a 40 foot wide public carriage and drift road forming part of a longer public carriage and drift road route connecting the road known these days as Moor Road/Cripton Lane in Ashover village with the main Matlock to Chesterfield road (the A632).

In terms of how the definitive statement should be modified: As well as the insertion of the historic gating points the applicant suggested that the 1.4 metre width available at the Marsh Brook ford crossing ought to be applied to the whole of the section of BOAT No. 157 subject to his claim. A plan included with the application identifies a 1.4 metre wide strip of land between, but not abutting, the stone wall

boundaries; which swathe of land he suggests ought to form the extent of the highway as written into the definitive statement. The proposed modified alignment would thereby limit public use to the centre of the route, leaving the verges open to private use only.

(ii) Consultation

On 17 February 2016 the County Council consulted the District and Parish Councils on the application it had received.

The consultees were asked whether they were aware of any evidence or information which might be helpful to the Council in terms of deciding whether to modify the definitive map.

A resident of Marsh Green Lane (Ashover) wrote to the County Council on 22 February 2016. He stated that he supported the application to record on the definitive map and statement those “gates which are demonstrated to have existed historically...and (if required) re-establish gates at those points.”

He also stated that he supported the restriction of the way to just 1.4 metres and added that this width limit is “effectively constrained by the clearance between the existing gate posts (as set in 1834) where the way crosses Marsh Brook.”

The resident included a plan on which he annotated various features considered relevant to the application, including; the location of the width restriction at the Marsh Brook and the locations of three claimed historic gating points.

(iii) Other Evidence relating to the Claim

Much of the rural road network is made up of roads which comprise a metalled carriageway with verges of varying widths on either side and which are delineated by physical boundaries of stone walls, fences or hedges. Whilst the origins of many of these roads are so distant in time as to be unknown, the courts, in the absence of evidence to the contrary, have tended to adopt the so-called ‘fence to fence’ presumption that the physical boundaries (be it stone walls, fences or hedges) were put up with reference to the highway; that is, to separate the adjoining land from the highway.

The circumstances relating to BOAT No. 157, i.e. adjoining field gates facing in a particular direction and boundaries of varying shape and width, are common to many similar public carriage roads throughout Derbyshire. The fact is that public carriage roads in rural areas are used by farmers and other landowners to access fields as much as by other types of traffic and the boundaries of such roads often reflect that fact. It should also be noted that it is not uncommon for walled public carriage roads to run in close proximity to farm buildings.

In the case of BOAT No. 157, we know that it was a public carriage road as of 1783 (at which time it was set out as such in the Ashover Enclosure Award of that date) and have very good evidence that it existed as a highway from at least as early as 1751: At one of the public inquiries referred to above, evidence was heard relating to an 1891 County Court case held to decide the ownership of a fallen tree that had probably been growing in the verge of the section of BOAT No 157 subject to this application (also known as Ralph Lane). An account of those proceedings reveals

that the Plaintiff and then landowner, the Revd Nodder, was in possession of evidence to show that, whilst that particular section of the route fell outside the scope of the 1783 Award, it had nevertheless been enclosed by 1751, i.e. by that date the stone wall boundaries delineating the route from the surrounding land had been put up.

Throughout the proceedings (as reported in the Derbyshire Times of 25 April 1891) at no time did Revd Nodder ever suggest that the verges of Ralph Lane were not part of the public highway: His legal representative (Mr Wilson, a Sheffield solicitor) acknowledged that the public had a right to use the road, including “any portion” of it.

The Revd Nodder agreed that the tree in question was growing in the highway and Mr Wilson accepted that the local authority (the then Surveyor of Highways for Ashover) had a right to cut down trees growing in the highway: However, he argued that that authority could not then treat the property as theirs to sell.

The plaintiff's claim to ownership of the value of the tree rested not on an assertion that the verges were not part of the highway but on his repeated contention that, since he owned land on either side of the road, he was entitled to the value of any timber growing from it. This is based on the idea that in the case of most highways the highway authority only has control of the surface of the route and the stratum of soil below the surface which in any reasonable sense can be required for the purposes of protecting and maintaining the highway: The surface layer is said to be ‘vested’ in the highway authority but the ownership of the ground below that layer remains within private ownership.

Regarding the gate posts positioned 1.4 metres apart at Marsh Brook; as referred to by the applicant, these are dated 1834. They therefore post-date the establishment, by 1783 at the latest, of the route as a public carriage and drift road and appear to have been erected by the then landowner when a new (private) vehicular access road to Marsh Green House was constructed along the route now known as Ashover footpath 50 in the early 1800s.

The applicant suggests that the definitive statement ought to be modified to record the location of historic gating points present at the time of the 1783 Ashover Enclosure Award, however that particular document does not record the specific location of any gates that might then have existed and the Council is not aware of any other documents which might provide such information.

As referred to above, the local resident who wrote to the County Council in support of the claim included a plan showing the route and the location of three gates which he says are depicted on the 1st and 2nd edition 1:2500 O.S. plans of 1875 and 1898 respectively: However, an examination of these plans reveals that the lines shown on the later OS plan are probably dashed plot-demarcation lines rather than physical features such as gates and the line which he says is shown on the earlier plan appears not to be shown at all.

3. Analysis and Conclusion

Contrary to what the applicant suggests, Inspectors at a public inquiry are not just concerned with issues of status; they also have to decide how the route ought to be

described in the definitive statement in terms of width and any other relevant information.

The 1.4 metre restriction in width at Marsh Brook, which the applicant would like to see applied to the length of way subject to his application, constitutes a ‘pinch’ point in terms of the traffic using the highway. However, it is not unusual to find gates (and corresponding posts) across highways – the width of a highway is a question of fact based on the available relevant evidence. It would be wrong to conclude that merely because a particular gating point is of a certain width that the highway itself must also be of the same restricted width.

Just as in the 1891 Court case described above, there was no evidence examined at any of the public inquiries held into this route in 2008, 2009 or 2010 which showed that the usual ‘fence to fence’ presumption regarding width should not apply. The evidence of the parties involved in both the 1891 Court Case and the much later public inquiries firmly points to the verges forming part of what has historically (since 1751 at the latest) been a highway defined by stone walls.

In terms of the claim that the location of historic gating points ought to be recorded in the definitive statement; there is insufficient evidence on which to base such a modification.

In summary; many of the roads and tracks which criss-cross the countryside are centuries old and there is probably no way of knowing whether Ashover BOAT 157 was a private access road which later became established as a highway or vice versa.

Whatever its origins it seems likely that historically it has been a route intended for use by vehicles (including carts and carriages) and such routes, whether public or private, often include verges. There is no evidence to support the claim that those verges present along the Ralph Lane section of BOAT 157 have not historically formed part and parcel of the highway that existed in 1751 and which was described as a public carriage and drift road between Ashover village and the Chesterfield to Matlock turnpike road in 1783. What evidence that does exist supports the conclusion arrived at by the Inspector at the public inquiries referred to above, i.e. that the route subject to this claim is a “walled track, with a width varying between 5 and 7 metres...”

4. Legal and Human Rights Considerations

Under Section 53 of the Wildlife and Countryside Act 1981 the Council is under a duty to make an order to modify the definitive map and statement (‘a DMMO’) as soon as reasonably practicable on the occurrence of certain specified events which include the discovery by it of evidence which (when considered with all other relevant evidence available) shows that “...any other particulars contained in the map and statement require modification.” (Section 53(3)(c)(iii)). Relevant evidence can take the form of historical records, documentary evidence and/or evidence of use.

5. Other Considerations

In preparing this report the relevance of the following factors has been considered: financial, human resources, environmental, prevention of crime and disorder; equality of opportunity; health and property considerations.

6. Background Papers

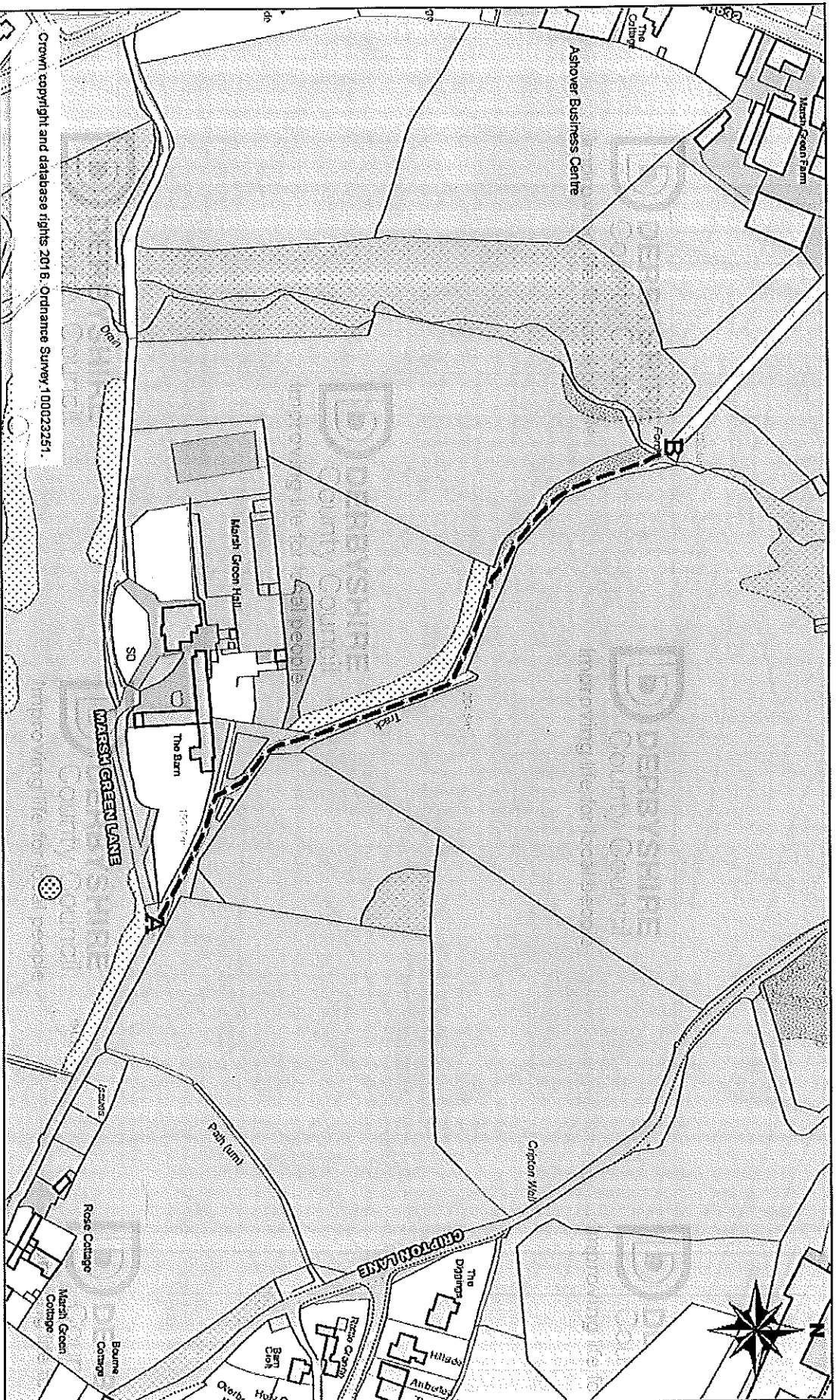
The items of evidence referred to in this report (copies with Director of Legal Services' file 68048).

7. Officer Recommendation

That the Committee resolves to reject the claim to modify the definitive map and statement for BOAT No. 157.

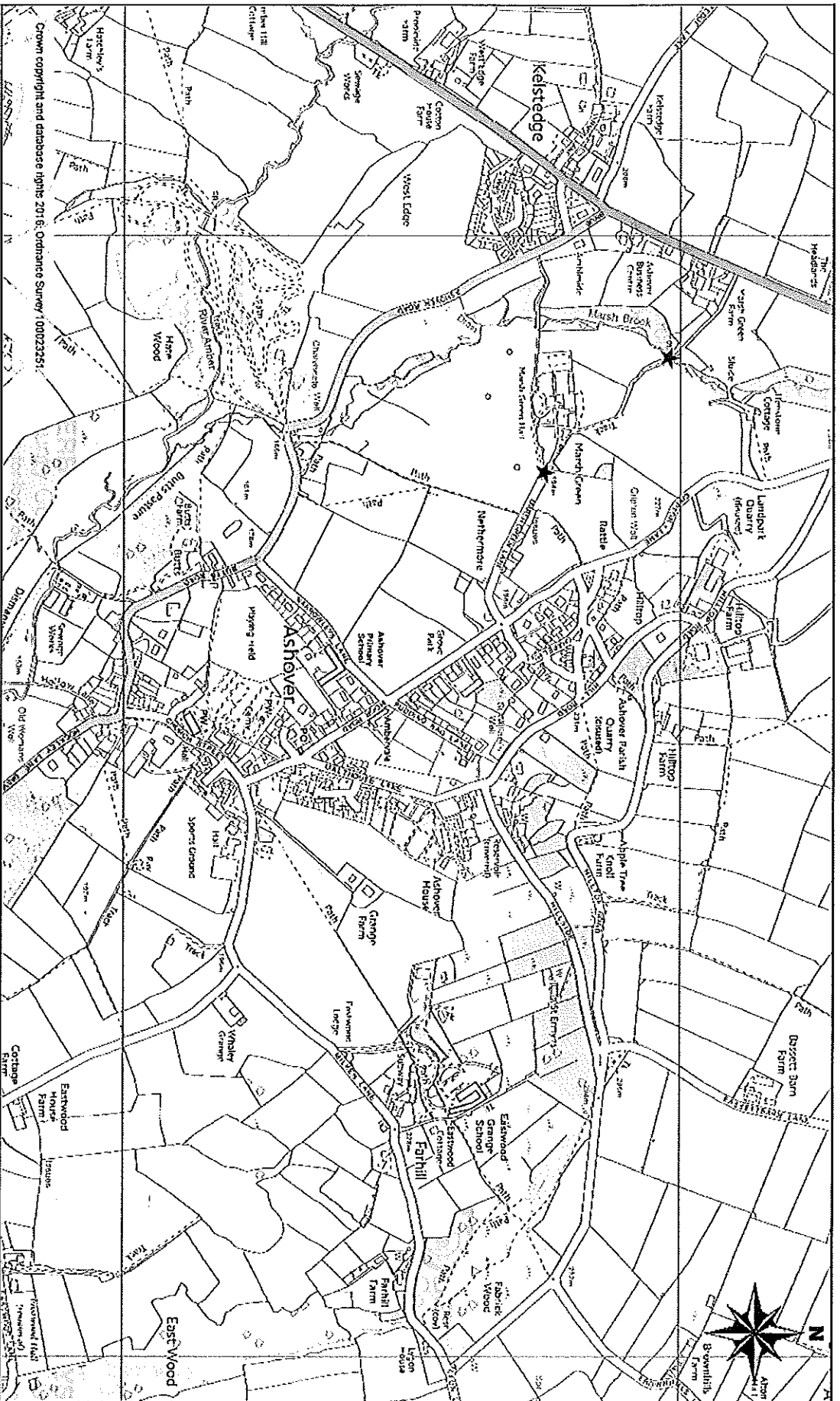
**JOHN McELVANEY
DIRECTOR OF LEGAL SERVICES**

Wildlife and Countryside Act 1981 - Application under s53 to modify the description of Byway Open to All Traffic No. 157 between points A & B - Parish of Ashover



Scale 1 : 2500

Location Plan



Scale 1 : 10000

17-Feb-2016