

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 ADD A BYWAY
OPEN TO ALL TRAFFIC ALONG NON-CLASSIFIED HIGHWAY KNOWN AS
MINNINGLOW LANE AND GALLOWLOW LANE – PARISHES OF
BRASSINGTON AND BALLIDON**

1. Purpose of the Report

To ask Members to consider the available evidence relating to the non-classified highway known as Minninglow Lane and Gallowlow Lane and to determine whether to authorise the making of a definitive map modification order (DMMO) to add the route to the definitive map and statement.

Please find attached to this report a plan showing the route.

2. Information and Analysis

(i) Background to the Investigation

A DMMO claim dated 27 July 2005 was received by the County Council, the effect of which, if such an Order was confirmed, would be to add Minninglow Lane and Gallowlow Lane to the definitive map and statement of public rights of way as a Byway Open to All Traffic (BOAT).

In support of his claim the applicant provided copies of certain items of documentary evidence including the relevant Tithe plan, the Council's highway maintenance records and various other maps and plans showing the route.

(ii) Consultation

On 9 December 2015 the County Council consulted various groups and individuals on the claim it had received, including any relevant landowner(s), local and national rights of way user groups and the District Council and Parish Council.

The consultees were asked whether they were aware of any evidence or information which might be helpful to the Council in terms of deciding what level of public access rights existed over the claimed route.

A copy of the consultation letter and accompanying plan was also displayed on site.

The Peak District National Park Authority emailed the County Council on 17 December 2015 informing the County Council that, whilst it had no information on the status of the route, it is recorded by the authority as a 'priority route'. This means that, in terms of its use by the public with vehicles, it is considered to be potentially unsustainable and requiring improved management.

On 21 December 2015 the Chairman of the Peak & Derbyshire Vehicle User Group (PDVUG) emailed the Council stating that his group wished to register their support for the BOAT claim. He went on to say that his members had driven the route for many years and that he believed they could gather evidence of such use for the past 3 decades or more.

On 11 January 2016 the Clerk to Bradbourne and Ballidon Parish Council emailed the County Council stating that Parish Councillors were concerned that if the application was found to be successful the route may be "open to abuse by quads and land rovers who may cause excessive and long term damage to the area".

On 13 January 2016 the Clerk to Brassington Parish Council emailed the County Council stating that there were concerns regarding the fact that the application route crosses the High Peak Trail. In addition it was stated that there are already deep ruts along this route and Parish Councillors asked if the lane could be subject to a Traffic Regulation Order (TRO) prohibiting vehicular traffic.

(iii) User Evidence

A total of sixteen user evidence forms were received; fifteen of those from people who said they had driven along the route in or on a vehicle for varying periods of time. Five of the users had driven the route for a period of twenty or more years up till public rights along the route were called into question by the submission of the BOAT application in 2005.

Of the remaining ten motorists, three had driven along the route for periods of between ten and nineteen years and the remaining seven had either not used it at all prior to 2005 or had used it for less than ten years.

(iv) Site Visit

The claimed route runs from its junction with a minor road north northwest of Longcliffe in a generally northwest direction to the minor road junction north of Roystone Grange. The south east section of the route is generally labelled on maps as Gallowlow Lane whilst the north-west section is known as Minninglow Lane. This name also applies to the tarmac continuation of the claimed route running west north-westwards to the Parwich Lane junction (see attached plan).

The claimed route itself is predominately a roughly metalled limestone track either running between or alongside dry stone wall field boundaries.

(v) Documentary Evidence

Enclosure Award Evidence

Most of the route falls within Ballidon parish and unfortunately there is no enclosure award covering that area, however the eastern end of the claimed route lies in

Brassington parish and falls within the scope of the 1808 Brassington Enclosure Award:

The route is set out in that document as a 30' wide Public Carriage Road called 'Gallowslow Road' extending from its junction with Pikehall Road to a place called 'Moor Gate' at the Ballidon boundary. The accompanying Brassington Enclosure Plan also clearly shows the route entering the neighbouring parish at a point labelled 'Moor Gate'.

The continuation of the application route further westwards is called Cardlemere Lane (also claimed as a BOAT) and it was set out in the 1807 Hartington Enclosure Award as a 40' wide public carriage road called 'Wirksworth Road', described as "...leading from Manchester Road at the N corner of allotment 455 SE to 'Wirksworth Way Gate' (This particular location is on the Hartington and Parwich boundary just over a mile west northwest of the application route).

It is highly probable that the Minninglow Lane/Gallow(s)low Lane route (i.e. the application route) has historically formed part of this public carriage road through-route leading to Wirksworth from Hartington parish.

Early Published Maps

Burdett's c1760s map of Derbyshire shows the application route as a 'cross road' forming part of a through-route running from the direction of Hartington south eastwards towards Wirksworth. This through-route includes Cardlemere Lane.

It should be noted that Burdett does show some public bridleways falling into the 'cross road' category, however the route's depiction is consistent with the status of a public carriage road which, at the time of the Burdett's survey, was not also a turnpike road.

Greenwood's 1824/5 map of Derbyshire and Sanderson's 1836 of Derbyshire both show this route as a 'cross road'. These maps show some known private access roads and public bridle roads, as well as public carriage roads, falling into the cross road category.

However, the comments above regarding Burdett's map and the depiction of non-turnpike public carriage roads also apply to these maps.

Tithe Map and Apportionment

The 1850 Ballidon Tithe Plan shows only a limited portion of the township (at the time of the tithe survey it lay within the parish of Bradbourne). It shows the principal north to south highway in the township (Parwich Lane) coloured green with various roads heading off it to the east and west.

The westwards continuation of the Order route (shown as a 'yellow' road on current OS mapping) is shown branching off Parwich Lane eastwards whilst another route is also shown branching off westwards at the same junction. The former is labelled 'To Wirksworth' while the latter is labelled 'From Hartington'. This route forms part of the historic through-road between Hartington and Wirksworth, of which the application route forms part.

There is no tithe documentation for Brassington parish.

Early Ordnance Survey (OS) Maps and Plans

The application route is shown as an obvious physical feature on the c1840 1st ed 1" Ordnance Survey (OS) map. It forms part of a through-route leading generally north-west to south-east from the Hartington area towards Wirksworth. As stated above, Cardlemere Lane also forms part of this through-route.

The 2nd ed 1:2500 OS plan of 1899 shows the claimed route as an obvious physical feature throughout its length. At its eastern end it is shown running between a pair of solid field boundary lines. Where the route proceeds generally north westwards into Ballidon parish it is shown initially as an unfenced track running across fields which then continues between solid field edge boundaries. The claimed route's continuation westwards to Parwich Lane (which is shown as a 'yellow road' on current OS mapping – see below) is also shown running between solid field boundaries.

The eastern part of the route is named 'Gallowlow Lane' and the western part is named 'Minninglow Lane' – the change in name would appear to occur at or around the area of a 'Clay and Sand Pit' associated with the Minninglow Brick Works. The 1899 plan shows that for a short stretch a tramway associated with the above works runs alongside and over the claimed route; providing a link between the works complex and the pit area.

The route has its own OS plot number where it runs between solid field boundaries. Where it crosses fields it is depicted by means of a pair of dashed lines and shares the OS plot number of the fields it crosses.

Deposited Railway Plans

Plans produced for the construction of the 1824 Cromford and High Peak Railway have been examined (CRO Ref Q/RP2/119).

Early railway plans such as this lack the detail of later ones. The claimed route is clearly shown as a shaded through-route which is crossed by the proposed line. However, in common with other roads (including known public carriage roads) the route is not numbered where the planned railway line crosses the road.

On earlier plans such as this public and private roads were often not numbered and therefore were not identified in the accompanying book of reference. However, the accompanying section plans showing the planned railway line do make reference to the route. It is described as a 'lane'.

Finance Act 1910

The eastern end of the claimed route is excluded from hereditaments on the Finance Act working plans. This length corresponds to the part of the route in Brassington parish which was set out as a public carriage road in the relevant enclosure award.

Where it proceeds westwards into Ballidon parish, initially across fields as an unfenced track and then between fields, the route is included in the various hereditaments which encompass those fields (hereditament Nos. 20, 21 and 15).

These hereditaments are all quite large and may have included other rights of way as well as the claimed route. The Finance Act valuation book covering Ballidon parish notes a deduction for the presence of 'public rights of way or user' for all three of the plots: £75 for plot 15 (Grange Farm, Minninglow); £73 for plot 20 (Moor Farm, Ballidon) and £100 for plot 21 (Oldfield Farm).

The western end of the claimed route's 'yellow road' continuation (see below under 'Later OS Map Evidence') at its junction with Parwich Lane is also excluded from hereditaments.

Later OS Map evidence

The 1962 Ordnance Survey (OS) 1 inch to 1 mile 'Buxton & Matlock' map (reprinted in 1967 with minor changes and the addition of certain public rights) depicts the claimed route as uncoloured and falling into the 'minor roads in towns, drives and unmetalled roads' category. The central section across fields is identified as unfenced (i.e. lacking any obvious highway boundaries).

West of the junction with the minor public road leading south to Royston Grange and Ballidon, the westwards continuation of the claimed route is shown as a slightly wider uncoloured road. The key to the map identifies this section as an 'untarred road with under 14' of metalling'.

Recent OS mapping (1998 1:50 000 Landranger Map 'Buxton & Matlock') shows the westwards continuation of the application route as a 'yellow' road. The map's key identifies such roads as 'roads generally less than 4m wide'. This map shows the application route itself partly as an 'other road, drive or track' and partly as a 'path'.

The application route is also identified as an 'other route with public access': This category is used by the OS to identify those publicly maintainable ways that do not fall into any of the other (generally more important) categories.

Highway Maintenance Records

So-called 'handing-over' documents were produced by the old rural district councils (RDCs) in about 1929, when legislation provided for the transfer of maintenance liability of roads from the RDCs to the County Council. These documents comprise a plan showing the location of the roads and a schedule providing a brief description.

On the handing-over plan the claimed route, including its continuation north westwards (all the way to the A515), is numbered 39. The continuation route is known nowadays partly as Cardlemere Lane and partly as Cobblersnook Lane and there is good evidence to show that together with the claimed route they formed part of an historic through-route (see above).

The handing over schedule describes route No. 39 as "Off A515 near Ivy House over No. 34 at Cobblers Nook to No. 27 near Slipperlow Farm". The route is described as "mainly grass' and being 4.3 miles in length.

The claimed route, along with the north westwards continuation described above, is currently recorded on the County Council's record of highways maintainable at public expense (the so-called 'list of streets' which the Council is required to keep under section 36(6) of the Highways Act 1980) as a non-classified highway or NCH - the other types of routes shown on the list of streets are A roads, B roads and Class 3 roads.

The evidence shows that, as of commencement of the Natural Environment and Rural Communities Act 2006 on 2nd May 2006, the application route was included on the County Council's list of streets. (As explained under 'Legal and Human Rights Considerations' below, this is an important consideration in terms of the continued existence of public rights for motor vehicle users)

On the Council's list of streets there is a note to the effect that the inclusion of a way on the list of streets is not of itself proof of the existence of a particular highway status.

Definitive Map Evidence

Following the National Parks and Access to the Countryside Act 1949 which introduced the formal recording of public rights of way on definitive maps and statements, surveys were carried out throughout England and Wales in order to ascertain the rights of way network.

The entire length of the claimed route was identified on the plans provided by the County Council for completion of the survey as a pre-existing road maintainable at the public expense. The short length in Brassington parish was not claimed as a right of way for inclusion on the definitive map although a footpath was claimed which branches off it. The section of the route in Ballidon parish was claimed; as a 'carriage road used mainly as a bridleway (CRB).

The CRB designation (along with the designation 'carriage road used mainly as a footpath' or 'CRF') was devised to describe those highways which were used by vehicles (carriages) but which were mainly used by non-vehicular traffic. Routes claimed as such became shown on definitive maps as Roads Used as Public Paths (RUPPs). The designation implied the existence of *public* vehicular rights though this was not explicitly stated and subsequent legislation has been necessary to clarify the rights that do exist.

Nevertheless, the fact that Ballidon parish claimed the route as a CRB is consistent with it being a public carriage road used more by walkers and horse riders than by motorists or cart/carriage drivers. The fact that Brassington parish did not claim their part of the route for inclusion on the definitive map could also be interpreted as meaning that they too thought that the route was a highway of public carriage road rights but that it was used more by vehicular traffic than other types of highway traffic and therefore did not belong on the definitive map and statement.

The only other explanation for Brassington parish not claiming the route would be that they considered it was not a highway at all; however we know that that is not the case because they claimed a public footpath that terminated on it.

In the event neither section of the route became recorded on the definitive map. This may well be because at that time (the early 1950s) the County Council appears to have taken the view that it was unnecessary for a route that was already recorded on its highway maintenance records to be also recorded on the definitive map and statement.

In more recent years some of those NCH routes that were omitted have been found to carry either Byway Open to All Traffic or bridleway status and have been added to the definitive map and statement.

Other Publications

In 'Peakland Roads and Trackways' (Moorland Publishing: 1974) A.E. & E.M. Dodd refer to the application route in the course of describing a well-known packhorse route. With regard to this route they state that; "From the crossing of the Buxton road the way ahead would be along the remarkable series of lanes – Cardlemere Lane, Cobblersnook Lane, Minninglow Lane, Gallowlow Lane – which link to form a straight line aimed in the general direction of Wirksworth."

3. Analysis and Conclusion

Whilst only a relatively short section of the application route falls within the scope of the 1808 Brassington Enclosure Award, the fact that that section was set out as a public carriage road raises a very strong presumption that the whole of the through-route was also a public carriage road.

This argument is further bolstered by the fact that the historic continuation of this through-route in Hartington parish is also set out as a public carriage road and is described as being part of a pre-existing highway linking the Hartington area with Wirksworth.

Much of the other evidence examined is consistent with the application route forming part of this historic public carriage road through-route.

The County Council has received a reasonable number of user evidence forms completed by recreational motorists who say they have driven along the route in or on motor vehicles. However, in this case the documentary evidence is considered sufficiently strong in its own right to justify making and advertising a Byway Open to All Traffic Order: Any recent use of the route by motorists is considered to have been by way of the exercise of a pre-existing highway right.

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 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)). Relevant evidence can take the form of historical documentary evidence and/or evidence of use.

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 deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

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.

Section 66 of the Natural Environment and Rural Communities Act 2006 ('the NERC Act') restricts the ability to create new rights of way for mechanically propelled vehicles - evidence of use of a way by such vehicles after commencement of the NERC Act (2nd May 2006) will not give rise to a public right of way.

Section 66 of the NERC Act states:

“(1) No public right of way for mechanically propelled vehicles is created after commencement unless it is— .

(a) created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for such vehicles, or .

(b) created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles. .

(2) For the purposes of the creation after commencement of any other public right of way, use (whenever occurring) of a way by mechanically propelled vehicles is to be disregarded.”

Section 67 (1) of the NERC Act extinguishes an existing public right of way for mechanically propelled vehicles (broadly speaking motor vehicles) over ways that, immediately before commencement of the NERC Act on 2nd May 2006, were either not shown in a definitive map and statement or were recorded only to footpath, bridleway or restricted byway status.

Subsections 67(2) contains several exceptions to the above extinguishment provisions including where:

“(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement [of the NERC Act] was use for mechanically propelled vehicles.

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense).”

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 27799 or in Derbyshire Record Office).

7. Officer Recommendation

That the Committee resolves:

(1) to authorise the making of an order under section 53 of the Wildlife and Countryside Act 1981 to add the route known as Minninglow Lane and Gallowlow Lane, shown between points A and B on the attached plan, to the definitive map and statement for the area as a Byway Open to All Traffic.

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