

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

**23 May 2016  
Report of the Director of Legal Services**

**Wildlife and Countryside Act 1981  
Claim to add a Footpath from Carr Road to Public Footpath No. 42 -  
Buxton**

**1. Purpose of the Report**

**1.1** 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 from Carr Road to Public Footpath No. 42 in Buxton.

**2. Information and Analysis**

**2.1** On 8 April 2013, Hugh Gillies-Smith ("the Applicant") submitted an application to Derbyshire County Council ("the Council") to add a public footpath to the Definitive Map and Statement, in Buxton. The application is accompanied by seven user evidence forms, a copy of the deed plan produced by Gleeson Homes for No. 1 Carr Road, Buxton, a copy of a letter/notice appealing for people to complete user evidence forms and photographs of the claimed route.

**2.2** A plan showing the claimed route is attached (Appendix 1). The western section of the route labelled B to C on the attached plan is recorded as definitive footpath No. 42 (FP42) and would not form part of any definitive map modification order.

**2.3** On 18 July 2013 High Peak Borough Council granted planning permission to Copperleaf (Buxton) Ltd & Woolford Lane Ltd for 12 dwellings on land crossed by the claimed route. In June 2015 the land was sold to Davies & Davies Properties Limited.

**User Evidence**

**2.4** It would appear that the application was made in response to the proposed blockage of the claimed route by a new development. In considering whether a dedication of the route can be presumed on the basis of user evidence the relevant period of use has been taken to be the 20 year period leading up to the date of receipt of the application, 1993 to 2013 ('the relevant period'). The user evidence submitted spans the years from 2005 to 2013; a period of just eight years with the exception of one user who claims to have used the route from 1976 to 1996 and then from 2009 to 2013: 24 years in total but only seven within the claim period.

**2.5** All seven of the witnesses claim to have used the route on foot. All of the witnesses have seen other people using the route on foot, with two witnesses also seeing other people using the route on bicycle.

**2.6** Three of the witnesses refer to using the route weekly and four monthly.

**2.7** Three witnesses claim to have used the claimed route for three years, one for four years, two for eight years and one for 24 years. It should also be noted that the the claimed route was only made available when FP42 was obstructed by developers, circa 2005, presumably as a temporary alternative. The user claiming 24 years states he was living abroad between 1996 and 2009 and therefore 20 years of his use was before the route existed on the ground. It is therefore likely that he is referring to use of another path in the area. The user states that the claimed route is a, '*very convenient shortcut to Rock Bay Garage*'. There are two alternatives to the claimed route which would be a very similar distance.

**2.8** The eastern section of the claimed route did not exist before 2005 (the housing estate was built from 2005 onwards) so the witness with 24 years use, from 1976 to 1995 and from 2010 to 2013 would most likely be describing his use of FP42 for his earlier period of claimed use. Therefore only four of the 24 years are relevant to the claim. He also referred to gates stating, 'Yes there used to be two – one at the farm the other on Leek Road'. The claimed route does not join with Leek Road or a farm, the gates mentioned could relate to FP42, 40 or 38. None of the remaining witnesses reported any stiles or gates.

**2.9** None of the witnesses reported the route being blocked or diverted, seeing any notices, working for the owner/occupier, having permission to use the claimed route, being stopped or told that the route was not a public right of way.

## **Consultation**

**2.10** An informal consultation exercise was carried out between 15 December 2014 and 19 January 2015. Notices were placed on the route and letters were sent to statutory consultees, landowners and the local elected member, Cllr Tony Kemp.

**2.11** A representative of the High Peak Area Ramblers Association emailed the County Council on 16 December 2014 stating that it 'seem(s) like a sensible idea'.

**2.12** One letter and two emails were received in objection to the claim.

- Objectors 1 state in a letter dated 02 January 2015 that: the claimed route was 'never intended to be a right of way as adequate footpaths are already in existence on the land'; 'no diversion was made despite it being installed on the ground' and that it would cause them inconvenience and impact upon their privacy. They ask whether the application should be withdrawn due to the applicant no longer living in the county. The objectors also refer to the proximity of other footpaths that were obstructed by previous developers and should be reinstated.

- Harrison, Townend & Ormeshers Solicitors submitted an email on 09 January 2015 on behalf of their clients, Copperleaf Buxton Limited (developers at the time of the consultation period) stating that their clients opposed the claim. They state that the land in question is in private ownership and is intended as garden land as per their client's planning permission. They requested, and were sent, copies of all supporting documentation which was submitted with the application. No further correspondence was received.
- Objector 3 states in an email dated 12 January 2015 that he supports the complaint of Objector 1 and that the residents of No. 1 Carr Road stand to suffer the main inconvenience. He continues to state that the 'basic reason for this matter lies in the temporary closures of Footpaths No 40 and 42' and that people should be free to use these footpaths'.

### **Documentary Evidence**

#### **2.13 Deed Plan for 1 Carr Road, Buxton.**

The applicant submitted a copy of the deed plan with the application, as supporting evidence and records it in the 'List of Documents' as, 'Extract taken from title document of No. 1, Carr Road, Burbage, Buxton showing route of reservation on title for footpath'.

The plan was produced by Gleeson Homes and does not make any reference to footpaths, public or otherwise, and the area of the claimed route SE of 1 Carr Road, which is part of FP42, is shown as being fenced in. More pertinently, the north-easterly section which is not recorded on the definitive map appears to be recorded on the plan as either, 'shared access' or 'shared driveways'. It should also be noted that the plan is inaccurate in that the plan has been rotated 90 degrees so that the north arrow actually points to the east.

**2.14** The development of the Carr Road estate did not begin until circa 2005 and there is no historical evidence to support the application.

### **Additional Evidence**

**2.15** A letter was sent to the current landowners, Davies and Davies Limited on 04 March 2016 to establish whether FPs40 & 42 will be retained after the development is completed and to advise that as there are currently no temporary closure orders in place and that the footpaths should be kept unobstructed and available to the public. There has been no further correspondence.

**2.16** Environmental Services (Rights of Way) files have been examined and although there were records of diversion Orders to other footpaths in the vicinity, namely FP39 and 40, (though neither were diverted along the claimed route), there was no record of any diversion to FP42.

## **Summary and conclusion**

**2.17** The applicant moving away from the area does not affect the validity of the application; anyone may make an application under s53 of the Wildlife and Countryside Act 1981 and the Council has a legal duty to investigate all applications that are validly made. There is no provision under the WCA to consider as relevant the number and proximity of other rights of way, privacy or inconvenience to individuals who live near the route.

**2.18** Under the Highways Act 1980, if a route is used 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. The evidence submitted with this application shows that the route has only be used for a maximum period of eight years and so does not meet the requirements of the legislation. It is therefore right that the application should be considered at common law.

**2.19** There is no official diversion order or creation order for the claimed route.

**2.20** The claimed route appears to have been put in place by the developers as an alternative to Public Footpath Nos 40 & 42 which were obstructed when the land was being developed. The planning application plans appear to incorporate the existing public footpaths but do not include the claimed route. The area of the claimed route is incorporated into garden.

**2.21** The developer’s marking of the area of the claimed route as shared access implies a private right for neighbours and a not a right for the general public. As such there is no clear evidence of an intention to dedicate the route as a public right of way and the common law test of dedication has not been met. To consider a right of way to have been dedicated at common law, it is not enough for the route to have just been put in by the landowner; there needs to be an acceptance by the public. The more open and intensive the use the more persuasive the evidence and the shorter the period required to assume dedication. However, the evidence submitted as part of the application does not show intensive use. Four out of seven users have four years use or less and four out of seven only claim to have used it on a monthly basis; nobody claims to have used it more than weekly.

## **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.

#### **Other Considerations**

- 3.11** In preparing this report the relevance of the following factors have been considered: financial, prevention of crime and disorder, equality of opportunity, human rights, personnel, environmental, health, property, and transport considerations.

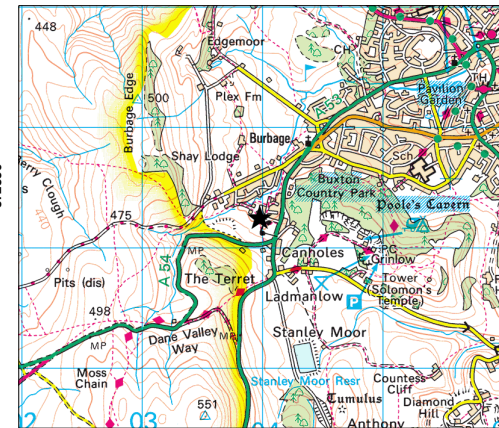
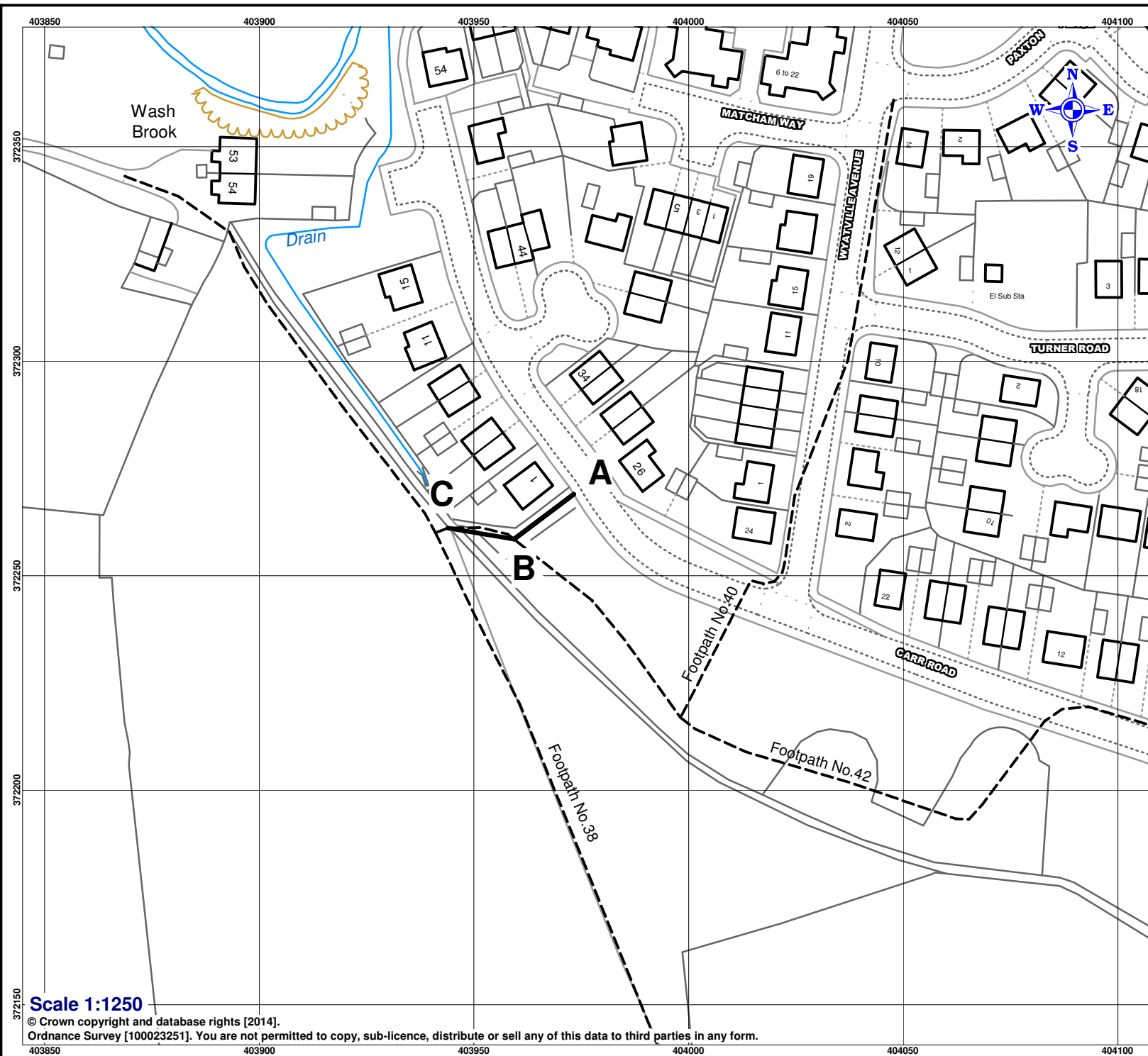
#### **4. Background Papers**

File Held by Legal Services (ref: 60152).

#### **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 in Buxton from Point A to Point B on the attached plan.

**John McElvaney**  
**Director of Legal Services**



# **Wildlife and Countryside Act 1981 S.153**

**Claim to add a Footpath from  
Carr Road to Public Footpath  
No. 42 - Buxton**

## **KEY**

Claimed Footpath **A — B — C**  
Existing Footpaths - - - - -



**Mike Ashworth**  
Strategic Director - Economy, Transport & Environment  
  
Shand House  
Dale Road South  
Matlock  
Derbyshire  
DE4 3RY

Produced by Public Rights of Way on 17 November 2014

Ref: ETC\_HW\_X3905\_Cttee2016

**Scale 1:1250**

© Crown copyright and database rights [2014].  
Ordnance Survey [100023251]. You are not permitted to copy, sub-licence, distribute or sell any of this data to third parties in any form.