

DERBYSHIRE COUNTY COUNCIL
Regulatory Licencing and Appeals Committee

24 July 2017
Report of the Director of Legal Services

Wildlife and Countryside Act 1981
Claim to add a Footpath from The Vale to Haddon Street in Ilkeston.

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 to it a footpath in Ilkeston.

2. Information and Analysis

2.1 An application was received from Mrs Karen Oakley dated 01 February 2013 to add a footpath to the Definitive Map and Statement from The Vale to Haddon Street in Ilkeston. The application was accompanied by 24 User Evidence Forms (UEFs) and a plan showing the claimed route.

2.2 A plan showing the claimed route is attached (Appendix 1).

Background information

2.3 Following the erection of a notice warning that a gate crossing the route was going to be locked, the gate was locked in 2010.

2.4 An incomplete application accompanied by six UEFs was submitted for the same route in May 2011. It was returned to the applicant with a request for further information which was never provided. In June 2013, following Mrs Oakley's inquiry about submitting a new application, letters were sent to those six witnesses giving them the option of resubmitting their forms or submitting a new one as part of the new application. One witness responded and asked that her original form be included in the new evidence while three others submitted fresh UEFs with the new application. One of these witnesses originally claimed use from 1988 but in the later form, use was recorded as from 1963. Although there is a major discrepancy between the two forms, the witness has claimed over 20 years use on both occasions. The other two witnesses to complete new forms provided the same information on both forms.

User Evidence

2.5 It is considered that the locking of the gate at Point B by the landowners in 2010 prompted the application and 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 this date have been considered in assessing the claim.

2.6 The witnesses who submitted UEFs with the incomplete 2011 application claimed use of 5 – 22 years with three claiming use in excess of 20 years. Three of the witnesses mention a gate with one saying a gate had recently been installed; another saying there was a stile/gate at the eastern end when fitted; and the third saying there was a gate which was always open, never closed.

2.7 Twenty five UEFs were submitted in support of the application in 2013 giving a total of 31 forms from 28 witnesses to be considered. The route has been marked on all of the plans accompanying the forms as between Haddon Street and The Vale.

2.8 When describing the route on the UEFs, 15 of the users describe the route well, two in a way which could be interpreted to include the claimed route, one which does not specify any of the claimed route and seven do not describe any route although three of the seven do refer to the claimed route later in the form.

2.9 All of the witnesses refer to using the route on foot, five of whom have also used it on a cycle and one in a vehicle. All of the witnesses refer to seeing other people using the route on foot, with eight of these also referring to seeing people using it on a pedal cycle and one in a vehicle: the same user who claims to have used it in a vehicle.

2.10 Fourteen witnesses claim to have used the route for a period of twenty years or longer; with six claiming over thirty years use and two over forty years use. Of the remaining users, two have used the route for less than ten years and nine between 10 and 18 years.

2.11 Fourteen witnesses claim to have used the route daily, nine weekly, one monthly and one offers no information.

2.12 One of the witnesses recalls the route being obstructed when a bungalow was built but, the witness cannot remember the dates and does not give details as to which building is being referred.

2.13 Ten of the witnesses recall a gate on the route; five of whom state it was left open with two specifying it was '*beyond repair*'; one states it was erected after the new-build; one says it was installed in 2010 and one witness states that there used to be a stile but there is now a gate but does not give dates. One witness states that there is a gate now but not previously.

2.14 Five of the witnesses refer to seeing notices on the route warning that the gate was going to be locked, one of which states 'about one year ago' (which would have been 2010) and one witness refers to a notice 'on The Vale' but gives no other information.

2.15 No witnesses recall being stopped from using the route before 2010.

2.16 One witness was told the route was not a public right of way but was given permission to use the route; he/she states that, '*Permission was granted and a gate key provided by the owners of the houses 4 and 5 The Vale*'. The witness, who lives adjacent to the route, does not give any dates.

Consultation

2.17 An informal consultation exercise was carried out between 26th January 2015 and 2nd March 2015. Notices were placed on the route at the start of the consultation period and letters were sent to the statutory consultees, landowners and the local elected member, Cllr Glennice Birkin.

2.18 Seven letters and a petition were received in objection to the claim, one letter in support and two offering no opinion.

2.19 The petition, submitted with a letter dated 16 July 2013 and another undated letter from The Vales' '*oldest resident*', is signed by 16 residents of Nos. 1-11 The Vale, excluding No. 4 which was unoccupied at the time. The wording of the petition reads as follows:

"Re. Application made by Karen Oakley on 3^d July 2013 for footpath from the top of Haddon Street through The Vale and on to Broadway Ilkeston.

We the residents of The Vale vehemently oppose this footpath as it compromises our safety and security.

The Police advised the footpath remain closed as evidence of drug taking and sexual activity was found to be taking place also incidents of theft and vandalism. There is also the nuisance of people dropping their litter on their way through and allowing their dogs to foul our environment.

The area between no. 4 and no. 5 The Vale is a private road."

The resident's letter states that the claimed route has been a private road since circa 1950 and there '*has always been a barrier to prevent access except on the occasions due to various incidents when a temporary walk through existed*'. She states that the original gates were stolen and eventually replaced by a brick wall but, the wall was dismantled several years ago to allow vehicular access for building purposes. Once the building work was

complete the present gates were erected. It was during that period that many people started to use the claimed route.

She adds that there was a small gate included for the use of No.s 4 and 5 The Vale and keys given to two sets of neighbours on Haddon Street, one being the applicant. The chain and lock were later stolen and replaced and again keys were offered to the same neighbours, although the applicant didn't accept the second set of keys. The resident adds that the adjacent properties had been burgled and *'The Police were very concerned about security, as the thieves had entered from Haddon Street'*.

2.20 The applicant confirmed in an email sent 27 January 2015 that she had lived on Haddon Street for 30 years and had used the claimed route since before houses were built on The Vale. She adds that no one who had completed a UEF had ever been refused access until recently, by the locked gate.

2.21 Two local residents sent an email and a letter, both dated 29 January 2015. The email stated that they and all other occupants of The Vale objected to the claim and raised concerns over the poor state of the road and lack of street lighting. The letter included the petition and letter already considered above and five photographs of the route. The photographs show the route to be a poorly maintained metalled road and one photograph also shows the locked gate at the top of Haddon Street, some free-standing concrete posts and a loose timber obstruction next to the gate and within the area of the claimed route.

The same couple also sent another letter dated 08 March 2015 with a copy of a conveyance dated 22 February 1950, stating that they had engaged the help of Cllr Custance, who has 43 years' experience in the Land Registry. Cllr Custance had obtained the relevant conveyance document and *'is of the opinion that this document proves that this is private land and unadopted by the Council therefore any public right of way without permission is trespass'*. They also refer to a nearby alternative public footpath.

2.22 An email was received on 01 February 2015 from two local residents objecting to the application on grounds of security and safety. They have been the victims of crime and attach a letter from Derbyshire Constabulary relating to the theft of pedal cycles. They also refer to alternative routes.

2.23 A letter was received, by email, dated 11 February 2015 from two local residents objecting to the application. They state there are alternative routes already available and that *'while the opening was unclosed due to building work... a few of us were burgled... The police were involved and they admitted that there were too many openings for perpetrators to escape'*. They continue to add that The Vale has been more secure since the route has been closed, it is a private road with a poor surface, no lighting and would cost the Council money to *'justify the satisfaction of a couple of residents on*

Haddon Street... They also raised concerns over safety if motorbikes and cars used the route.

2.24 An affected landowner wrote a letter dated 20 February 2015 objecting to the claim. She confirms that she has lived there since 1951 and the land upon which The Vale was developed was purchased in the 1930s/40s *'with a view to forming a small haulage firm'*. She states that the claimed route has never been a footpath, before or since The Vale was built and temporary access was only gained following certain incidents including the theft of metal gates and the demolition of a block wall when Granet Lodge was being built. She adds that the period following the removal of the wall was *'horrendous'* due to antisocial behaviour which involved *'people congregating... and leaving behind syringes, needles, condoms etc'* and that *'a footpath would create a dangerous situation and not one envisaged when they (homeowners) bought their houses'*. She also refers to the gate lock being vandalised, the key being stolen twice and contacting the Police who were *'most concerned about the problems and made visits... providing us with personal alarms...'* She states that the claimed route is a cul-de-sac and a private road for Nos.4 and 5 The Vale. There are no dates provided of when the gates or wall were in place or when the gates were locked.

2.25 An email was received on 02 March 2015 from a local resident objecting to the application on the grounds that the footpath would put their children at risk, who can currently play out on the road without supervision. He also raises concerns over security, stating that there had been two opportunistic thefts between him moving to the area in 2007 and the closure of the route but none since.

2.26 An email was received on 01 March 2015 from two local residents objecting to the application on grounds of safety and security, noting that the Police are also opposed to it due to the risk of increasing *'drug taking, sexual activity, theft and vandalism'*. The objectors have also analysed the (redacted) UEFs and comment that many of the questions on the forms have been left unanswered and some users have failed to give relevant information. Attached to the email was a spreadsheet of the answers given in the UEFs and a photograph showing two metal signs which read, "PRIVATE PROPERTY. No public access or thoroughfare" and "Access to No.s 4 & 5 The Vale Only". They have not provided any dates for when the signs were erected.

2.27 Peak and Northern Footpath Society emailed on 31 January 2015 to confirm they had no evidence to support the application.

2.28 Cllr Glennice Birkin emailed on 04 March 2015 to say she had no objections to the route being adopted as a footpath.

Documentary Evidence

2.29 2nd Edition Ordnance Survey Map 1898

The claimed route is not shown on the 1898 OS map. Haddon Street is shown, similarly to other roads on the plan but terminates at Point B on the attached plan. The area between the western end of Haddon Street and Heanor Road is shown as undeveloped fields. There are no paths shown from Haddon Street.

2.30 Ordnance Survey Map 1960 Sheet 46/4743

Although there are three buildings depicted on the plot of land west of Haddon Street, the access to these buildings is from Charlotte Street to the south. There is a solid line across the western end of Haddon Street (Point B) and no path is shown leading from it. A footpath that corresponds with the Broadway road and connects High Holborn and Heanor Road is shown on the map.

2.31 Ordnance Survey Map 1996 Sheet 46/4743

Both Broadway and The Vale have been built. The access to the plot of land west of Haddon Street is shown as from Charlotte Street and there is a solid line across the western end of Haddon Street (Point B). The roads on the plan are shown between two solid lines with parallel dashed lines within. The Vale and Haddon Street are shown in the same way but the dashed lines do not continue over the claimed route; for Haddon Street, the dashed lines stop at the western end (Point B) and for The Vale, the dashed lines cross between No.s 3 and 6 in line with the current adopted highway (Point A). The area crossed by the claimed route is shown as separate from any plot and bound by solid lines.

2.32 Ordnance Survey Map 2009 Sheet 46/4743

The 2009 plan is similar to the 1996 plan with the following exceptions: The double lines from The Vale continue as far as plot boundaries for No.s 4 and 5. Granet Lodge has now been built SW of Point B and there is a break in the solid boundary line of the area crossed by the claimed route which would provide access to Granet Lodge from The Vale. The western end of Haddon Street is still crossed by a solid line.

2.33 Ilkeston Parish Claim 1950

The land between Haddon Street and Heanor Road is shown as undeveloped fields and there is no path shown from the end of Haddon Street. There is a footpath shown from the western end of High Holborn connecting to Heanor Road; this follows the line that is now Broadway.

Additional Evidence

2.34 On 12 January 2017 a letter was sent to the landowner who provided a history of the area (paragraph 2.24) asking for more details, including dates. In her letter of 14 February 2017 she confirms that gates were erected across the route at the junction with Haddon Street, after her niece had lost control of her bike and ended up on the steep slope of Haddon Street. The gates were in place for '*quite some time*' before being stolen. After the gates were stolen, they were replaced by a brick wall and a gate. Although she is unable to give any dates, she confirms that all the gates were always kept locked but were periodically vandalised. She does recall that the brick wall was demolished in 2004/5 when Granet Lodge was built, gates erected when the build was completed and a sign made stating '*Private Road to No's 4 and 5 The Vale*' in approximately 2006.

2.35 A site visit was undertaken on 22 February 2017. The Vale is an adopted highway. At the southern end of The Vale (Point A) the maintained highway leads into a private road which provides access to Nos 4 and 5. The private road is in much poorer condition than the adopted highway and there is recessed concrete edging across the junction of the two roads which marks the extent of the adopted highway.

The claimed route runs along the private road, which provides access to the residential properties and where there is space for parking.

The private road leads SSW then SW and then narrows as it turns WSW and continues to the western end of Haddon Street with a high wooden fence on the south and a low brick wall to the north. At Point B there are large metal gates. The gates comprise of a large double gate giving access to a private residence, Granet Lodge behind the high wooden fence and a small pedestrian side-gate giving access to Haddon Street from the private road.

At the time of the visit the pedestrian gate was locked by a large combination lock.

2.36 During the site visit on 22 February 2017, an adjacent landowner introduced himself and invited the Council officer into his house for a chat.

The officer spoke to the residents about the claim and the route and they were able to clarify some useful details: They had spoken with the above mentioned landowner and were advised by the officer that although she had written to the Council, some relevant dates remained unclear.

The residents confirmed that they moved into The Vale in April 1990 and although they can't remember if there were locked gates at that time there certainly were locked gates soon afterwards in the early 1990s and there have been ever since. They themselves have bought locks for the gates as have the owners of Nos 4 and 5. The gates and locks have been vandalised

and stolen on various occasions over the years but the gate has been locked off and on since the early 1990s.

They confirmed that when Granet Lodge was built, the wall and gate were removed and at that time there was an increase in use of the claimed route. At other times people had climbed over the gate.

In the past they have had various problems with people loitering in the area; having sex and selling drugs etc. About 10 years ago the landowner was advised by the police to keep the gate locked. Keys were offered to two houses on Haddon Street, one being the applicant, Mrs Oakley; both neighbours accepted the keys. The gate or lock was then stolen again and a new lock fitted. One neighbour accepted a new key but Mrs Oakley did not and later the application was made to DCC.

The couple confirmed that the landowner's niece, mentioned above, was 60 years old now. It can therefore be assumed that when the landowner talks about her niece losing control of a bike and ending up on Haddon Street, it was probably about 50+ years ago. Therefore, it can be assumed that the gates which were put up in response to that incident would have been up before 1970.

2.37 An internet search indicates that Granet Lodge was built in about 2003.

2.38 The County Council's Declaration Register has been checked and no Section 31(6) declaration has been made which covers this route.

Summary and conclusion

2.39 The test which has to be applied when considering the addition of a route to the Definitive Map and Statement under s53(3)(c)(i) is in two parts:

Test A – does a right of way subsist on a balance of probabilities? This test is satisfied by showing clear evidence in favour of the right of way and no credible evidence to the contrary.

Test B – is it reasonable to allege on a balance of probabilities that a right of way subsists? If there is a conflict of credible evidence and no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist, then the answer must be that it is reasonable to allege that a right of way does subsist.

2.40 All the witnesses claim to have used the route as of right and fourteen witnesses claim to have used the route as of right for 20 years or more. Several of the users recall a gate across the route prior to 2010 but they do not recall it being closed or locked before 2010. Although one of the objections points out that there are many unanswered questions on the UEFs, it is common in these instances for some users to leave a section of the form

blank where they have no information to offer or their answer would simply be 'no'; the overall impression of the user evidence is clear and consistent.

2.41 Prior to the notice in 2010 warning that the gate was going to be locked, none of the witnesses recall being told the route was not a public right of way, being given permission to use the route or challenged in their use of the route. One of the users does state that the route was obstructed when a bungalow was built but does not stipulate when or which building.

2.42 The letter from the 'oldest resident' states that there has always been a barrier across the route to prevent access and that temporary access has only been available on certain occasions. She also refers to the gates being stolen and the wall being demolished when Granet Lodge was built and a subsequent increase in use of the claimed route. The same person also refers to the erection of gates due to an incident involving her niece on a bicycle, probably before 1970.

2.43 During a conversation with two adjacent homeowners it was confirmed that there have been locked gates across the top of Haddon Street since the early 1990s and that those gates and locks have been vandalised and stolen on several occasions. They also confirmed that people used to climb over the gates and that use of the route noticeably increased when Granet Lodge was built.

2.44 There have also been several concerns raised regarding alternative routes, health and safety, antisocial behaviour and criminal acts, which though understandable are not matters that can be considered under current legislation as they do not relate to whether or not the route has been used by the public for a period of 20 years. Similarly, the assertion of Cllr Custance that the route is an un-adopted private road and any use is therefore trespass is again not relevant under current legislation; most rights of way are on private land and uninterrupted use for a period of 20 years is the principle upon which presumed dedication of a right of way is based.

2.45 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 unless there is sufficient evidence of a lack of intention during that period to dedicate. Although the user evidence submitted with this application suggests that there has been use of the claimed route over a 20 year period, the objectors have provided strong evidence that use of the route has been restricted by a succession of gates and by a wall since the 1990s and possibly as early as the 1960s and that use of the route has been by force and not as of right. There appears to be consensus that the route was open during the period that Granet Lodge was being built in about 2003 and during this time it was well used by the public but it does not appear to have been available before then. The present gates appear to have been erected after Granet Lodge was occupied. The landowners describe locking the gates with a padlock and chain and replacing these when they were removed or damaged. The use of a succession of

locks to secure the gates, and the provision of keys to neighbours are both actions which are inconsistent with a public right of way and suggest that use of the route was by permission and not as of right. Therefore the evidence available to the Council does not meet the requirements of the legislation.

2.46 In summary, although the public do appear to have used the route for 20 years, that use has not been as of right and without secrecy, permission or force as required by the legislation. On the contrary, there seems to have been repeated forced entry and use by some people with permission. Having considered the evidence for and against the existence of a footpath it is considered that there is insufficient evidence to show that a public right of way is reasonably alleged to subsist and the application should be rejected.

2.47 A finalised copy of this report has been sent to Cllr Glennice Birkin as the local member for the area prior to the Committee meeting.

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 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 A 2015 High Court decision (*Ali v Secretary of State for Environment Food and Rural Affairs* [2015] EWHC 893) held that closing a path on Christmas Day was ineffective to make it clear to the public that there was no intention to dedicate a public right of way when that path led to shops and businesses which were closed over the Christmas period making it less likely that the public would use the path. An overt act is needed to communicate the owner’s intention.

3.11 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

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

4. Background Papers

- 4.1** File held by Legal Services (ref. 61269).

5. OFFICER'S RECOMMENDATION

- 5.1** That the Committee resolves to reject the application made under Section 53 of the Wildlife and Countryside Act 1981 to amend the Definitive Map and Statement by adding a footpath in Ilkeston, as shown between Points A and B on the plan attached to this report.

Chief Officer



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Wildlife and Countryside Act 1981 Section 53

**Claim to add a Footpath from
The Vale to Haddon Street
Ilkeston**

Key:

Claimed Footpath (A-B) - - - - -

Existing Footpath - - - - -

