

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

**14 September 2015
Report of the Director of Legal Services**

**Wildlife and Countryside Act 1981
Claim to add a Footpath between Beech Avenue and Lydford Road –
Alfreton.**

1. Purpose of the Report

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 between Beech Avenue and Lydford Road in Alfreton.

2. Information and Analysis

2.1 On 20 July 2009, Mr. D Johnson ("the Applicant") submitted an application to the Council to add a public footpath to the Definitive Map and Statement for Alfreton. The application is accompanied by 20 user evidence forms (though one person has submitted three forms and four people have submitted two forms containing different information) and photographs of each end of the claimed route.

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

2.3 The claimed route is approximately 235 metres long.

User Evidence

2.4 The user evidence submitted with the application does not refer to any challenges or periods when the route was blocked or diverted. The period of use under consideration is therefore taken to be the 20 year period prior to the application being submitted in 2009.

2.5 Of the 20 user evidence forms (UEFs) submitted, six are of no assistance as they deal solely with a possible extension to the claimed route. There was insufficient evidence to consider that route any further and the information provided in those six forms does not relate to the claimed route. One witness has not marked any route on the attached plan and nor has she attempted to describe the route so there is no way of telling where she has walked.

2.6 Of the 13 remaining UEFs, two witnesses have not marked the whole of the claimed route on their plan: one witness marks a route that runs east to west through the park, which doesn't connect with Lydford Road and he offers no description of the route. As such this does not provide evidence in support of the whole of the claimed route. The other witness only marks the entry/exit

points at Lydford Road and adjacent the garage off Beech Avenue and describes the route as: '1) Access to recreation area' and '2) Access to Meadow lane Ind. Estate'. A further witness fails to describe the route and on the plan draws a route that starts in the garden of 48 Beech Avenue and runs north through a further six gardens and then ends at the access point of the pathway to Lydford Road. It may be that the witness has simply marked an unusable route by mistake, although he also refers to a stile or gate at the 'corner of sewerage plant'. The nearest sewerage plant is approximately 350 metres northwest of Point D on the attached plan.

2.7 One witness does not mark any route on a plan but does describe the route as 'from garages on Beech Ave to Lydford Rd'. Of the remaining nine forms all the witnesses have drawn the route on the map and described the route adequately and so these ten forms shall be considered further.

2.8 Of the 10 forms being considered in more detail as part of this report all the witnesses claim to have used the claimed route on foot during the period under consideration and two say they have also used it on a cycle; seven users claim use for a 20 year period or more, one for 14 years, one for ten years and one for eight years. The user evidence covers the years from 1965 to 2009 with the longest user claiming use for 44 years.

2.9 Seven witnesses claim to have used the route daily, two weekly and one monthly.

2.10 Descriptions of the width of the route given by the ten witnesses were inconsistent: three witnesses failed to offer any indication of the width; one stated it was 'varied'; one as 4-5 feet; one as 5 feet; one as 2 metres; one as 4 feet at stile – open field – then 5 feet footway to Lydford Road and two as 3 feet to 1 acre.

2.11 Seven of the ten users report a stile on the route by the garages with one witness stating that it was put in by 'the council' and another that it was put in by 'AVBC around 1980'. Only one witness recalls the route being obstructed and that was 'when new gas pipes being installed'; the witness does not say where this was and as he draws a longer route than that claimed the works may not have actually been on the application route.

2.12 None of the witnesses recall any notices referring to the status of the route, being granted permission to use the route, being stopped, challenged or told that the route was not a public right of way.

2.13 One witness states that the path was in use before the play area or industrial estate were built; that it was once farmland and the farmer let people use the path to get to Westhouses 'before Lydford Way was made'.

2.14 An informal consultation exercise was carried out between 03 November 2014 and 08 December 2014. Notices were placed on the route and letters were sent to the statutory consultees, landowners and the local elected members, Cllr Paul Smith and Cllr Steve Marshall-Clarke.

2.15 Following the consultation, Alfreton Town Council expressed their support for the application but offered no evidence.

2.16 Futures Housing (Amber Valley Borough Council ('AVBC') transferred its housing stock to Futures Housing Group in 2003), submitted an email on 06 February 2015 stating, 'The diversion to take the shortcut footpath through Futures Homescapes garage forecourt has given rise to issues in the past such as anti social behaviour, dumping and attempts have been made to block it. Further, this affects the land as an asset and income from the garages of Futures Homescape which is a charitable organisation whose objectives are the provision of affordable housing to meet housing need'. The Council replied to Futures Housing advising what is and is not considered as a relevant objection under current legislation and although Futures Housing replied to say they would get clarification of any action taken, nothing has been submitted.

2.17 A further email was sent to AVBC on 12 August 2015 requesting further information, specifically how the land had been managed and whether there had ever been fencing or notices etc. There has been no reply.

Documentary Evidence

2.18 2nd Edition Ordnance Survey 1899 1:2500 Sheet 35:11.

The claimed route is not shown and neither is Beech Avenue or Lydgate Road. Where the claimed route now joins Lydgate Road it would have crossed a mineral railway.

2.19 Ordnance Survey 1961 1:2500 Sheet 40/4156.

The claimed route is not shown and neither is Beech Avenue or Lydgate Road. The very southernmost section of Beech Avenue is shown at its junction with Willows Avenue although it has not been named.

2.20 Ordnance Survey 1968 1:2500 Sheet 40/4156.

The claimed route is not shown and neither is Lydgate Road or the playground. Beech Avenue and the garage area are shown on the plan and there is a solid line adjacent the garages corresponding to where the current stile would be. The mineral railway is still shown in a position approximately on the line of Lydgate Road but there is no apparent access to the railway from the area crossed by the claimed route. There is a line of trees shown,

which roughly correlates with the section of the claimed route running north from the garage site.

2.21 Ordnance Survey 1996 1:2500 Sheet 40/4156.

The claimed route is not shown. Beech Avenue, Lydgate Road, Meadow Lane industrial estate and the playground are all shown. There are dashed lines running through the park area which correlate with the boundaries of the wooded areas. The access point from Lydgate Road to the claimed route is shown by a gap between two plots of land, as is an access point adjacent 125 Beech Avenue. There is a solid line adjacent the garages where the current stile would be.

2.22 Ordnance Survey 2005 1:2500 Sheet 40/4156.

The plan is similar to the 1996 plan and the access points remain the same. The wooded areas are shown but there are no footpaths shown.

Additional Evidence

2.23 A site visit was undertaken on 03 June 2015.

2.24 There is a wide gravelled area outside the garages where users of the claimed route must have crossed in order to access the route from the nearest highway (Beech Avenue) at Point A. There is an obvious dividing line between the two sets of garages and it would be fair to assume that users would have walked between the garages on the northern side and this line to the south (approximately 5 metres). There is a sign at the eastern end of the gravelled area warning that the garage rooves are protected by anti-climb paint. There are no signs as to ownership, rights of way, public access or permission. At the end of the garages on the northern side is a gap with metal footpath barriers at Point B on the attached plan, allowing pedestrian access along the side of the garages, suggesting a dedicated access point to the grassy area beyond. There is a well-trodden path alongside the garage. At the rear of the garages there is an open grassed area with no obvious walked line. There are fenced residential gardens to the west and a wooded area to the east. The route continues north and the grassed area narrows as it turns northwest and continues towards the playground and small football pitch. There is an obvious gap in the hedge line to the north, at Point C on the attached plan and a worn narrow track leading to Lydford Road. The track has been surfaced with pieces of broken concrete slabs until it reaches the perimeter fence of an adjacent works, the track then continues between two metal fences, with a natural surface and exits onto Lydford Road. As with the access point by the garages there are no signs relating to the route or play area.

2.25 Inquiries were made with the Land Registry and the land crossed by the claimed route is owned by Amber Valley Borough Council. The land is

subject to access rights for many local properties but the addresses of the witnesses who have provided evidence are not listed amongst them.

Summary and conclusion

2.26 The test which has to be applied when considering the adding of a route to the Definitive Map and Statement under s53(3)(c)(i) is whether there is sufficient evidence to show 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. A route can be presumed to subsist if there is clear evidence in favour of the application and no credible evidence to the contrary. If there is a conflict of credible evidence and no incontrovertible evidence that a right of way cannot be reasonably alleged to subsist then it is reasonable to allege that a right of way subsists and an Order should be made.

2.27 The claimed route is not shown on any of the documentary evidence considered during the investigation into the claim.

2.28 There have been no objections to the claim from the affected landowners and no record of any challenges to use has been made known to the Council. Although Futures Housing alluded to challenges they have not produced any evidence in support of that claim.

2.29 The claimed route runs across an area which appears to have been provided for use by the surrounding houses (many (193) have a right of access set out in their Land Registry title) and any use by them would be 'by right'. However it also appears that the area has been used by the public in general for recreational purposes and it is clear that people are able to walk all over this field. None of the users who have completed evidence forms live in properties that benefit from the private right of access. The users describe a route which links two highways have in general used the route to get from one highway to the other rather than to access the playing areas within the field.

2.30 The user evidence shows that the route has been used for over 20 years with one witness stating that the route was used before the playground was installed. Several witnesses refer to visiting the playground or using another route through the recreational field to Rodgers Lane but this is in addition to use of the claimed route. Looking at the evidence as a whole it would appear that while the public may have 'wandered' the whole area of land, there is sufficient consistent user evidence to show use of the claimed route as of right for a period of 20 years or more.

2.31 The installation of the footpath barriers, which were purportedly installed by AVBC in approximately 1980, at the access point by the garages is likely to be understood by the public as consistent with dedication and there is no evidence to suggest that the landowner has made any attempt to disabuse the user of such an understanding (e.g. there have been no signs stating that access is restricted to residents or is by permission only).

2.32 Considering the evidence available and the lack of any evidence to show the landowner's lack of intention to dedicate, it could also be considered that the claimed route has been dedicated at common law.

2.33 As set out in this report, the evidence in favour of making an Order is considered to be sufficient to conclude that the right of way is reasonably alleged to subsist; there is evidence of use of the route by the public that meets the requirements of s31(1) of the 1980 Act and while there is a suggestion that attempts might have been made to block the route, no substantiating evidence has been brought forward.

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 of probability 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** Where there is insufficient evidence to establish a presumption to dedicate under section 31(1) of the Highways Act 1980, 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 has been considered: financial, prevention of crime and disorder, equality of opportunity, human rights, personnel, environmental, health, property, and transport considerations.
- 3.12 None of these factors are considered to be relevant for the purpose of this report.

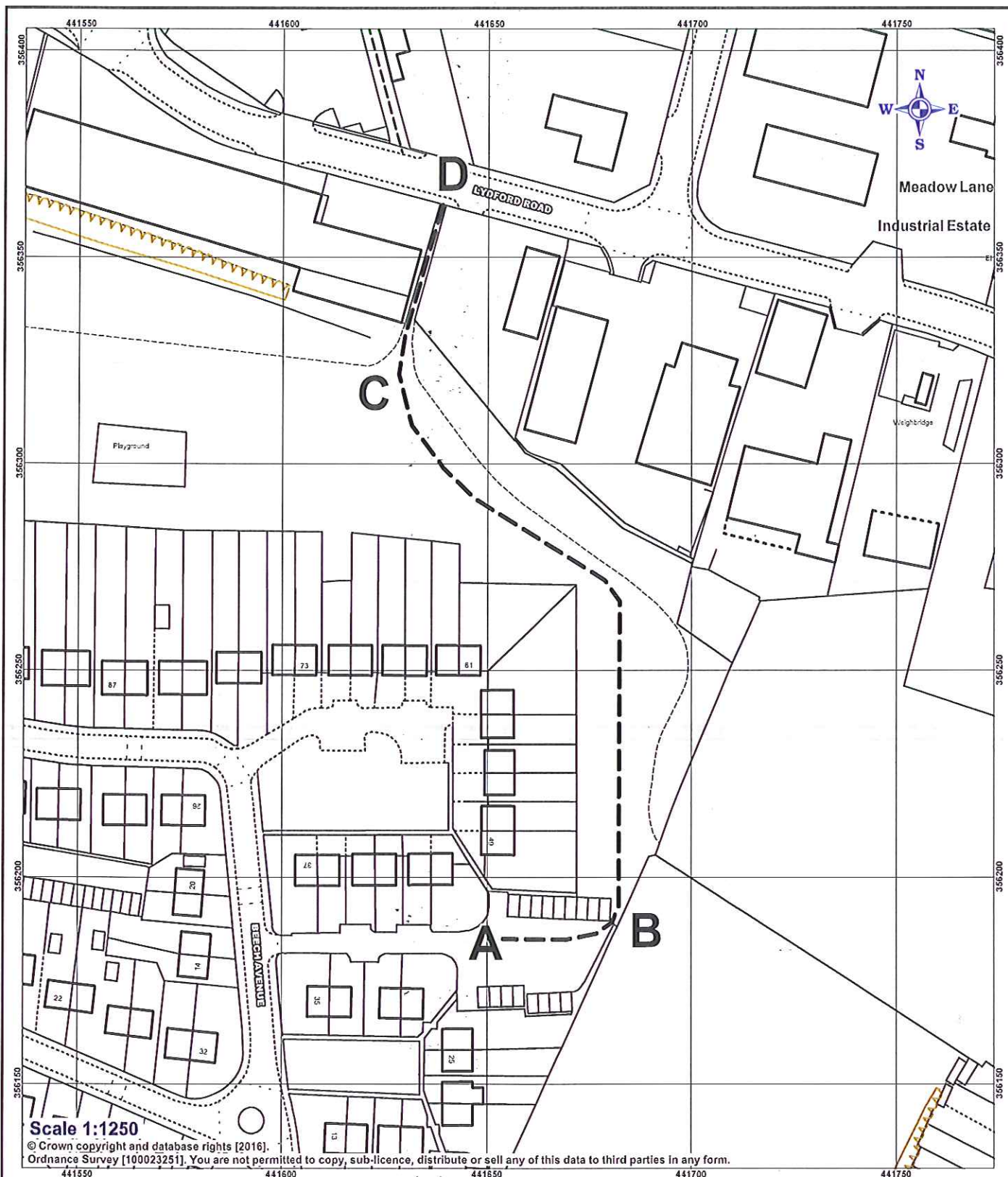
4. Background Papers

File held by Legal Services (ref. 55146)

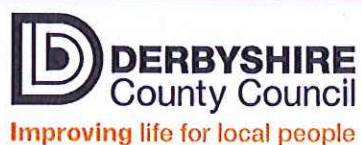
5. OFFICER'S RECOMMENDATION

That the Committee resolves to make an Order under Section 53 of the Wildlife and Countryside Act 1981 to add a footpath between Beech Avenue and Lydford Road in Alfreton as shown by the black dashed line on the plan attached to this report, to the Definitive Map and Statement.

Chief Officer



Ref: PE/DC/X3802/Cttee/2016



Mike Ashworth
Strategic Director
Economy, Transport & Communities
Derbyshire County Council
Shand House
Dale Road South
Matlock
DE4 3RY

Produced by Public Rights of Way on 12 July 2016

Wildlife and Countryside Act 1981 S.53

Claim to add a Footpath between
Beech Avenue and Lydford Road - Alfreton

Key:

Footpath to be added - - - - -
Existing Footpaths - - - - -

