

**DERBYSHIRE COUNTY COUNCIL
Regulatory Licencing and Appeals Committee**

**26 February 2018
Report of the Director of Legal Services**

**Wildlife and Countryside Act 1981
Claim to add a Footpath from Public Footpath No. 54 to Public Footpath
No. 100/101 in the Parish of Denby.**

1. Purpose of the Report

1.1 To enable Members to determine an application to amend the Definitive Map and Statement by adding to it a footpath in the Parish of Denby.

2. Information and Analysis

2.1 An application was received from Denby Footpaths Group dated 18 March 2015 to add a footpath to the Definitive Map and Statement from public footpath No.54 (FP54) to the junction of public footpaths, No.100 and 101 (FP100) in the parish of Denby. The application was accompanied by 12 User Evidence Forms (UEFs) and a plan showing the claimed route.

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

User Evidence

2.3 There is no evidence of challenges to use of the route or that the route has been obstructed or that the public have been unable to use the route freely and so it is considered that it is the application that has 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 2015 have been considered in assessing the claim. The majority of the users completed their UEFs in 2014.

2.4 Twelve UEFs were submitted in support of the application. Attached to each UEF is a plan, upon which the individual user has marked the route they have walked and all the users have clearly marked the claimed route.

2.5 Eight users have also described the route, while three have failed to provide a description. Descriptions of the route's width vary between 7-12 feet and 1-4 metres.

2.6 All 12 of the witnesses claim to have used the route on foot and to have seen other people using the route on foot. One witness has used the route on a cycle and two in a vehicle. Four users recall other people using it on horse, three on cycle and one in a vehicle. It should be noted that the two people claiming use in a vehicle share a surname and an address adjacent to Hawley House Farm. The couple both claim use from 1978 to 1990 and have

also provided other information which relates to land in that area, not the route.

2.7 Seven witnesses claim to have used the route for a period of twenty years or longer up to 2014 and one user claims 19 years use to 2014. One user claims 18 years use from 1942 to 1960; one claims 18 years use from 1972 to 1990 and two claim 12 years use from 1978 to 1990. The user evidence covers the years from 1942 to 1960 and from 1968 to 2015.

2.8 Six witnesses claim to have used the route weekly, one daily, one monthly, one 4-6 times per year, one 2-3 times per year, one 1-2 times per year and one less than monthly.

2.9 The witness who claims use from 1942 to 1960 states that the route was obstructed by opencast mining circa 1965, which may explain why there is a gap in the user evidence between 1960 and 1968. Two other users (the same couple who live adjacent to Hawley House and only claim use until 1990) recall the route being obstructed by the construction of new stables, however the stables are at Hawley House Farm, not on the claimed route and so will not have prevented use of the claimed route.

2.10 Three users recall being given permission to use the route; the same couple who live next to Hawley House and recall the route being blocked by the building of stables and a new drive were told by the owners of Hawley House in 1978 that they no longer had a right of way. Another user, who claims use from 1968, was also given permission to use the route by the owner "at the time of Hawley House Farm" but does not give a date. It is not clear whether the users are referring to the claimed route or other land around Hawley House, specifically access from Codnor Denby Lane and it is also possible that the users are referring to a time before the 20 year period under consideration for the purpose of this report.

2.11 One user states that there are stiles at either end of the route.

2.12 There is no clear evidence to suggest that use of the claimed route has been challenged at any time in the 20 year period from 1994 to 2014 and therefore any use of the claimed route during that period has been as of right.

Consultation

2.13 An informal consultation exercise was carried out between 18th December 2015 and 1st March 2016. Letters were sent to the landowners, statutory consultees and the local elected member, Cllr Kevin Buttery.

2.14 There were no responses to the consultation.

Documentary Evidence

2.15 2nd Edition Ordnance Survey Map 1900 Sheet XLV: 3

The claimed route is not shown on the 1900 plan.

2.16 Ordnance Survey Map 1938 Sheet XL: 15 1:2500

The claimed route is not shown on the 1938 plan.

2.17 Ordnance Survey Map 1962 Derbyshire Sheet SK40/4148 1:2500

The claimed route is not shown on the 1938 plan.

2.18 Ordnance Survey 1974 Derbyshire Sheet SK44 NW 1:10000

The claimed route is shown between solid lines and continues between solid lines past Lumb Farm in the west and between dashed lines to Hawley House in the east.

DCC Economy Transport & Environment provided an extract from a plan dated 1974 which did not show the claimed route so it must be assumed that the route was constructed circa 1974.

2.19 Ordnance Survey Map 2005 Derbyshire Sheet SK40/4148 1:2500

The 2005 plan shows the claimed route between solid lines. There is a single dashed line running along approximately two thirds of the length of the track from the eastern end.

2.20 Denby Parish Claim 1951

The Parish Claim does not record the claimed route and the route is not shown on the 1938 OS plan used for the claim.

Additional Evidence

2.21 A site visit was undertaken on 27 July 2017. The claimed route begins at FP54 near Lumb Farm and travels in a generally ESE direction along a track bound by hedges to the junction of FP100 and FP101, a distance of approximately 620 metres. There is evidence that the route may once have been a metalled track although it now has a predominantly earthen surface. There are no gates or other limitations across either end of the claimed route but there are stiles that lead from the claimed route to other definitive footpaths. The claimed route itself is a continuation of two other footpaths that creates a through route from Derby Road to Codnor Denby Lane.

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

2.23 Satellite images found on the internet (Google Earth) show that the route was constructed as early as 1999.

Summary and conclusion

2.24 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.

2.25 Seven witnesses claim to have used the route as of right for 20 years or more to 2014 and one for 19 years to 2014.

2.26 None of the witnesses recall the route being obstructed or diverted, seeing any notices on the route suggesting it was not a public right of way, being prevented from using the route in any way, being given permission to use the route or being told the route was not a public right of way during the period 1994 to 2014.

2.27 One user recalls there being a stile at either end of the route.

2.28 There have been no objections to the application.

2.29 The available documentary evidence offers no evidence that the claimed route has ever carried public rights. The historical plans show that the claimed route has been on the ground since 1974 and satellite imagery shows the route on the ground in 1999.

2.30 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.

2.31 The user evidence submitted with this application is consistent and shows that the route has been used for over 20 years and that that use has been as of right. One user recalls that when the route was constructed, the landowner allowed locals to drive along it. However, there is no reliable evidence of use other than on foot (and one cycle user) to suggest the route has acquired public rights any higher than footpath.

2.32 The claimed route is a clearly defined track that links two definitive footpaths, providing a through route from Derby Road to Codnor Denby Lane;

one which has been accepted by the public and used openly and freely. When a landowner constructs a route and the public use it openly and freely, without challenge it can be presumed that the landowner has dedicated the route by common law as a public right of way.

2.33 There have been no objections from the landowner or any other interested party and no evidence submitted which would suggest use of the route by the public has been challenged or prevented or has not been used as of right.

2.34 In summary, the public do appear to have used the route as a footpath for an uninterrupted period of 20 years or more, that use has been as of right; without secrecy, permission or force and as required by the legislation. The documentary evidence offers no proof of public footpath rights but, the application to modify the definitive map is based on user evidence. There has been no evidence submitted to suggest that the claimed route has not been used as a public footpath and it is therefore considered that, on the balance of probabilities, there is sufficient evidence to show that a public footpath subsists.

2.35 A finalised copy of this report has been sent to Cllr Kevin Buttery 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, social value, 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.

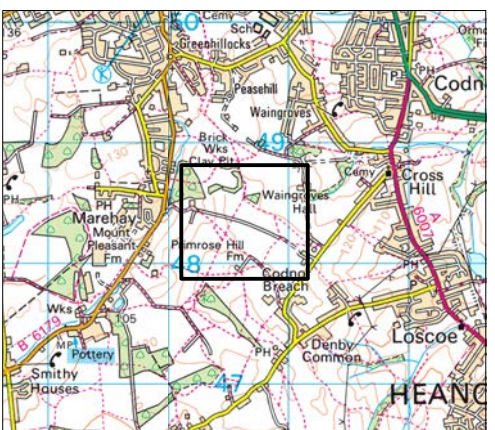
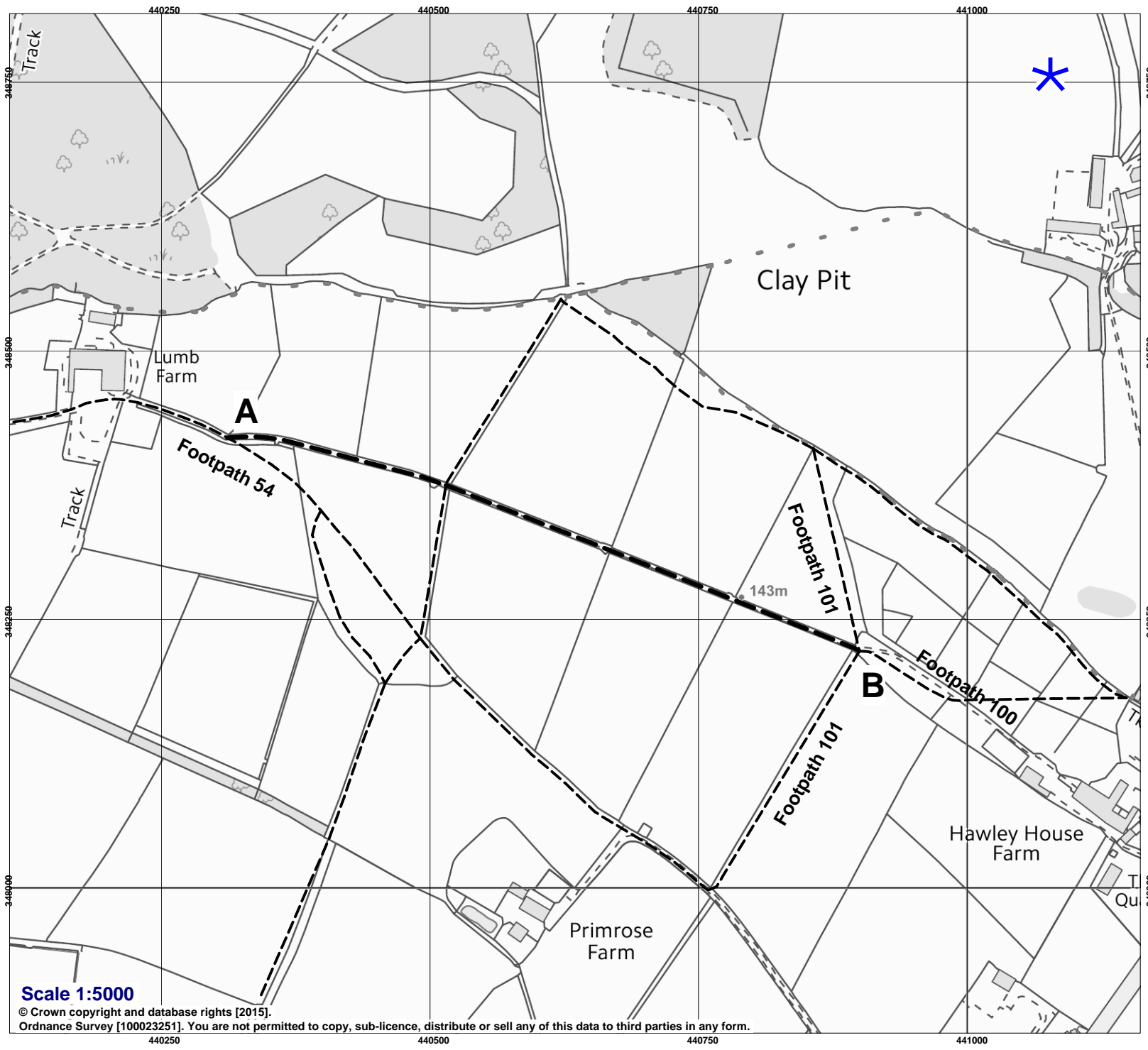
4. Background Papers

- 4.1** File held by Legal Services (ref. 66305).

5. OFFICER’S RECOMMENDATION

- 5.1** That the Committee resolves to authorise the Director of Legal Services to make an Order under Section 53 of the Wildlife and Countryside Act 1981 to amend the Definitive Map and Statement by adding a footpath in Denby as shown between Points A and B on the plan attached to this report.

John McElvaney
Director of Legal Services



Wildlife and Countryside Act 1981
S.53

Claim to add a Footpath from Public Footpath No. 54 to junction between Public Footpath Nos.100 and 101 - Parish of Denby

KEY

- Claimed Footpath - - - - -
- Existing Footpaths - - - - -



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