

**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 Pippin Hill to Public Footpath No. 32 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 Denby Village.

**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 Pippin Hill to public footpath No.32 (FP32) in Denby. The application was accompanied by nine 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** The claimed route runs in a southerly direction from Pippin Hill to FP32, a distance of approximately 33 metres.

**User Evidence**

**2.4** 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. Most users claim use to 2014, one to 2015 and one to 2013 and so for the purpose of this report the period of use under consideration is 1994 to 2014.

**2.5** Nine UEFs were submitted in support of the application. The users have described the route they have walked and have generally described the route in a way that can be understood to relate to the route claimed, though one user describes the route as 'top of Pippin Hill'. Descriptions of the width of the route vary between 2-3 metres and 8-10 feet.

**2.6** Attached to each UEF is a plan, upon which the individual user has marked the route they have walked. Six users mark a route as claimed. Two users have marked a route slightly to the west of the claimed route, through

the yard and outbuilding of the adjacent small holding and one user clearly marks a route through the yard of the small holding and these UEFs shall not be considered further within this report. For the purpose of this report, six users' evidence shall be considered.

**2.7** All six of the witnesses claim to have used the route on foot and to have seen other people using the route on foot, with one also referring to seeing people using it on horseback.

**2.8** All but one of the users have walked the claimed route as part of the Denby Footpaths Group.

**2.9** Five witnesses claim to have used the route for a period of twenty years or longer up to 2014 and one user for 51 years to 2013.

**2.10** One witness claims to have used the route daily, two weekly, two monthly, and one less than monthly.

**2.11** None of the witnesses recall the route being obstructed or diverted, being stopped from using the route, being told it is not public or being given permission to use the route or seeing any notices on the route.

**2.12** One witness recalls a 'footpath notice giving direction from Pippin Hill'.

**2.13** Five witnesses recall a stile on the route with four placing the stile between the buildings and providing access to FP32.

### **Consultation**

**2.14** An informal consultation exercise was carried out between 18th December 2015 and 22nd January 2016 and letters were sent to the statutory consultees, adjacent landowners and the local elected member, Cllr Kevin Buttery.

**2.15** An email was received on 04 January 2016 from one adjacent landowner confirming that they had no objection.

**2.16** An email was received on 20 January 2016 from the landowner. The landowner states that when they purchased the property in 1999 they were told a public footpath already existed down the track and this was reiterated by a DCC officer when they applied to divert FP32, to enable them to incorporate some of the field to the south of the property into their garden. The landowner states that had they known the track was not a definitive footpath they would have taken a different approach to people using it. The landowner points out that there is another footpath "less than 50M further up the road which joins the path no.58/32" and considers use of the claimed route to be superfluous to the existing one.

## **Documentary Evidence**

### **2.17 Sanderson's Map: Twenty Miles round Mansfield 1835**

The claimed route is shown on the Sanderson's plan as part of the road network. Its northern end opens into Church Street and its southern end is also open, though it opens into an enclosed plot of land before the field now containing FP32.

### **2.18 Denby Tithe Plan 1847 and Award**

The road leading from Church Street towards Point B is shown on the Tithe plan as part of the road network and is coloured yellow, as are other roads on the plan. There is a solid line across the southern end of the route where it meets the field and another solid line across the route just prior to that boundary which would correlate with the fence and stile currently in place. Although the landscape has changed over the years and the residential street, Pippin Hill, is not shown on the plan, it would appear that the track shown does not extend as far as the definitive line of FP32.

### **2.19 1<sup>st</sup> Edition Ordnance Survey Map 1881 Sheet XLV: 3**

The track leading from Church Street towards Point B is shown on the 1881 plan as part of the road network, with a dashed line across its northern junction. The road is shown between solid lines and terminates at the field boundary to the south; there is no continuation or connection to FP32, which is shown (pre-diversion). The street now named Pippin Hill is not shown.

### **2.20 2<sup>nd</sup> Edition Ordnance Survey Map 1900 Sheet XLV: 3**

The 1900 OS plan is very similar to the 1881 plan.

### **2.21 Ordnance Survey Map 1916 Sheet XLV: 3**

The 1916 OS plan is very similar to the 1881 plan.

### **2.22 Ordnance Survey Map 1938 Sheet XLV: 3**

The 1938 OS plan is very similar to the 1881 plan.

### **2.23 Ordnance Survey Map 1962 Derbyshire Sheet SK40/4146**

The 1962 plan shows a route leading from Church Street towards Point B. The route opens into Church Street. The western boundary of the route is shown by a solid line and the eastern side by a dashed line which is labelled 'FP'. To the east of the route is open land while the southern end of the route terminates at a solid field boundary. The residential street known as Pippin Hill is not shown. To the east, the section of FP58 that connects Pippin Hill to the fields is shown as a through route to Church Street (with a solid line across midway) and is labelled 'CT & FP'.

## **2.24 Denby Parish Claim 1951**

The Parish Claim records FP32 and also shows FP58 as continuing through to Church Street. The road leading from Church Street which incorporates the claimed route is shown between solid lines and terminating at FP32. It is apparent that in 1951 the claimed route was not considered a public right of way.

### **Additional Evidence**

**2.25** A site visit was undertaken on 27 July 2017. The claimed route begins at an adopted highway called Church Street and travels southeast between two properties to FP32, a distance of approximately 33 metres. At the southern end of the track is a five-bar gate and stile which provides access to the field and from there, to FP32. The gate was closed and chained at the time of the visit. There is a small wooden stake stuck into the ground in the centre of the track, towards the northern end, with a piece of string tied between the stake and the fence of the property to the east. Directly before the stake and the string are the tracks of a vehicle and it is apparent that a vehicle is regularly parked on the track at the northern end. The vehicle would obstruct access to the eastern side of the track but pedestrians may be able to get between a vehicle and the hedge to the west. The stile is also on the same side of the track.

**2.26** The Council's old Highways correspondence files were studied and there were two pieces of correspondence relating to land at Pippin Hill, Denby.

- The first set of correspondence, dating from May 1961, relates to the slight diversion of FP32 between Point C on the attached plan and its junction with FP58 at Point D. The correspondence is accompanied by a plan which shows the track along which the claimed route runs; Pippin Hill is not shown on the plan and nor are the buildings within the smallholding to the west.
- The second correspondence, dating from November 1964, relates to the track which connects Church Street and FP32, incorporating the claimed route, stating the track "*appears to be an occupation road which may in due course become a private street*". The accompanying plan marks the existing footpaths in purple and the claimed route is not marked purple but coloured red.

**2.27** At least one property owner on Pippin Hill bought some of the field at the rear of the property to incorporate into their garden. FP32 was subject to a further diversion Order made under the Highways Act 1980. The Order was confirmed in 1999 but with a clause that meant Amber Valley Borough Council (AVBC) had to certify the Order for it to come into force. AVBC did not certify the Order until 04 February 2016. However, the route on the ground was diverted at the time of the confirmation. As a result of the diversion, the line of FP32 at Point B moved approximately six metres SW which means that the period of use for the southernmost section of the

claimed route can only date back to 1999, a period of just 16 years. Two users claim to have used the application route for more than 20 years before 1999.

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

### **Summary and conclusion**

**2.29** 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.

**2.30** All the witnesses claim to have used the route as of right for 20 years or more.

**2.31** None of the witnesses recall the route being obstructed or diverted, 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.

**2.32** One user recalls seeing a footpath notice 'giving direction from Pippin Hill' and the majority state there is a stile providing access to the field.

**2.33** There has been one objection to the application from the landowner stating that they were informed by DCC in 1999 that the track was already a footpath and as a result of that information have not challenged use of the route by the public. Had the landowners been correctly informed they may have taken action against public use. They also consider the route superfluous as there is another footpath approximately 50m to the east which provides access to FP58.

**2.34** The available documentary evidence offers no conclusive evidence that the claimed route has ever carried public rights. The historical plans show that a route has been on the ground since 1881 but, that route was not considered a public right of way in 1951 when the Parish Claims were made or in 1964 when DCC confirmed it was an 'occupation road which may in due course become a private street'. Not only was the route not considered to be a public right of way in 1964 but there was no intention on the part of the County Council for it to become one either. The line of FP32 has been diverted twice, most recently in 1999 and as a result, Point B falls approximately six metres from the line of FP32 prior to the diversion.

Therefore, the users have only used the whole of the claimed route for a maximum of 16 years to 2015. Two users claims 20 years use of the claimed route before the diversion of FP32 in 1999.

**2.35** 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.

**2.36** The user evidence submitted with this application is inconsistent and although there has been a route on the ground for many years, it was not considered by the Council a public right of way in 1951 or in 1964 and the line of FP32 has moved twice since 1960 which means that people walking the claimed route from Church Street to FP32 have not walked to the same point before and after 1999. In 1999, the landowner was misinformed by DCC that the claimed route was a public footpath and as such has not taken any action to prevent public use, use that they may have challenged had they been aware the track was not recorded on the definitive map. Only two users claim 20 years use of the claimed route prior to 1999.

**2.37** In summary, whilst a small number of the public do appear to have walked the claimed route, that route has not been consistent for a 20 year period as the terminus has moved and the documentary evidence offers no proof of public rights. It is therefore considered that, on the balance of probabilities, there is insufficient evidence to show that a public right of way subsists or is reasonably alleged to subsist.

**2.38** 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. 66306).

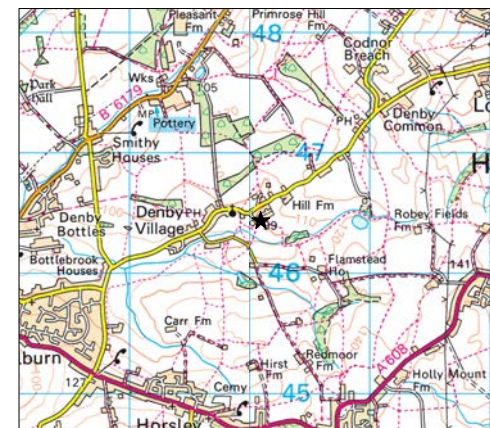
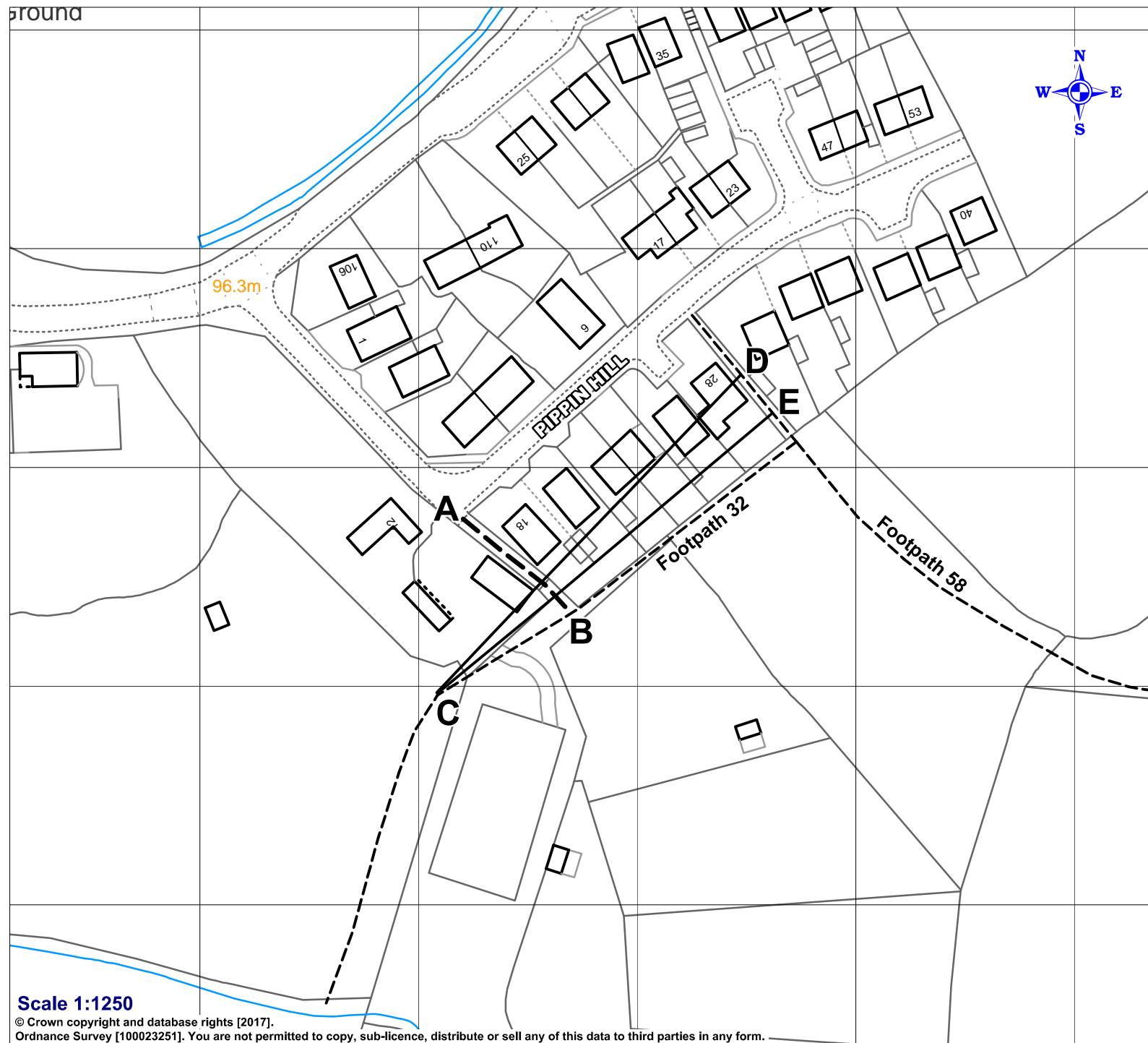
## **5. OFFICER'S RECOMMENDATION**

**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 the Parish of Denby, as shown between Points A and B on the plan attached to this report.

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



ground



**Wildlife & Countryside Act 1981 S.53**

**Claim to add a Footpath from  
Pippin Hill to Public  
Footpath No. 32  
- Parish of Denby**

**KEY**

Claimed Footpath (A-B)	-----
Line of FP32 in 1961 (C-D)	-----
Line of FP32 in 1999 (C-E)	-----
Existing Footpath	-----



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