

**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.32 to Public Footpath  
No.58 in the Parish of Denby.**

**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 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 public footpath No.32 (FP32) to public footpath No.58 (FP58) in Denby. The application was accompanied by ten 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** At the time the application was submitted, the land crossed by the claimed route was unregistered. There are two definitive footpaths in the field; FP32 which follows the northern boundary of the field from Point A and FP58 which roughly follows the eastern boundary of the field towards Point B, a total distance of approximately 110 metres. The claimed route cuts across the field in a slight curve between Points A and B, a distance of approximately 90 metres. There is a wide gap in the southeast corner of the field near Point B, through which FP58 passes and to where the application route is claimed. On paper, Point B is southwest of FP58, however the definitive statement does not provide a width for FP58 and it must be assumed that users of FP58 can use the entire width of the gap. It should also be noted that the plans upon which the users and the applicant have marked the claimed route do not show the definitive lines of other footpaths. However, it could be interpreted that the claimed route does not connect to FP58 or any other public right of way.

## **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. Six users claim use to 2014, two to 2015 and two to 2013 and so for the purpose of this report the period of use under consideration is 1994 to 2014.

**2.5** Ten UEFs were submitted in support of the application. The users have described the route they have used, one of whom describes the route as between FP32 and FP58, two refer only to the marked plan and the remaining users' descriptions do not provide sufficient information for a reader to be certain they are describing the claimed route.

**2.6** Attached to each UEF is a plan, upon which the individual user has marked the route they have walked. One user marks a route very similar to that claimed and six users mark a route similar to that claimed. Three of the users have marked different routes and their evidence shall not be considered further within this report. For the purpose of this report, seven users' evidence shall be considered.

**2.7** All seven 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** Five witnesses claim to have used the route for a period of twenty years or longer up to 2014. One user claims 16 years use to 2013 and another, 15 years to 2013.

**2.9** Three witnesses claims to have used the route weekly, two monthly, and two less than monthly.

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

**2.11** One witness recalls a stile or gate on the route but does not specify whether it is a stile or gate or where it is located, stating only, "always present".

## **Consultation**

**2.12** An informal consultation exercise was carried out between 18th December 2015 and 22nd January 2016. The land was unregistered at the time of the consultation and letters were sent to the statutory consultees and the local elected member, Cllr Kevin Buttery.

**2.13** There were no responses received within the consultation period but an email was received from a new landowner in 2017, objecting to the claim.

**2.14** An email was received on 5th September 2017 from the new owner of the field crossed by the claimed route stating that in order to enable them to safely graze livestock they wished to fence the field, leaving a pathway along the original footpath. The landowner states that “if this modification is passed, it renders the field unable to be grazed as we do not wish to expose members of the public direct access to our livestock”. They also “struggle to see why the modification would be considered” when there are already footpaths in the field.

### **Documentary Evidence**

**2.15** Sanderson's Map: Twenty Miles round Mansfield 1835

The claimed route is not shown on the Sanderson's plan.

**2.16** Denby Tithe Plan 1847 and Award

The claimed route is not shown on the Tithe plan. The field crossed by the claimed route is allotted plot number 711. There are no paths shown within the plot although the Tithe Award describes the plot as 'First Close & Lane'. There is no sign of any lane within plot 711 but it is accessed by a lane from the north more or less in line with FP58.

**2.17** 1<sup>st</sup> Edition Ordnance Survey Map 1881 Sheet XLV: 3

The field crossed by the claimed route is shown on the 1881 plan and a path is shown, by double dashed lines, running along the inside of its northern boundary which correlates with FP32. A further path, shown by double dashed lines is shown which continues from the northern access lane in a south-westerly direction to the southern field boundary, and which correlates with FP58. A third path is shown, by double dashed lines which connects the other two. It starts at the north-western corner of the field and crosses the field in a WSW direction to join FP58 approximately midway down the field. Although the third set of double dashed lines start at approximately the same point as the claimed route and follows a similar trajectory it does not continue to Point B, at the end of the field. There are no houses abutting the line of FP32 and the street now named Pippin Hill is not shown.

**2.18** 2<sup>nd</sup> Edition Ordnance Survey Map 1900 Sheet XLV: 3

The 1900 plan shows the same three routes as the 1881 plan in the same way except that FP32 is shown by a single dashed line.

**2.19 Ordnance Survey Map 1916 Sheet XLV: 3**

The 1916 OS plan is very similar to the 1881 plan with the exception that the access lane is open into the field and continues along FP58.

**2.20 Ordnance Survey Map 1938 Sheet XLV: 3**

The 1938 plan is similar to the 1881 plan.

**2.21 Ordnance Survey Map 1962 Derbyshire Sheet SK40/4146**

The 1962 plan shows a route linking FP32 and FP58 by straight double dashed lines, approximately Point A to Point B. The residential street known as Pippin Hill is not shown.

**2.22 Denby Parish Claim 1951**

The Parish Claim uses the OS 1938 plan and records both FP32 and FP58. Although the map shows the double dashed lines which cut the corner between the two footpaths, it is not marked in any way by the parish recorders and therefore it is apparent that in 1951 the claimed route was not considered a public right of way.

**Additional Evidence**

**2.23** A site visit was undertaken on 24 November 2017. The claimed route begins at FP32 and travels from the north-western corner of a field in an ESE direction across the field to FP58 in the south-eastern corner, a distance of approximately 90 metres. A route is apparent on the ground that correlates with the claimed route although the route on the ground does meander. The route of FP32 has been mown and both FP32 and FP58 are also clear on the ground.

**2.24** 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. The correspondence is accompanied by a plan which does not show any other route through the field, other than FP32 and FP58.
- The second correspondence, dating from November 1964, relates to a track which connects Church Street and FP32, 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. FP32 and FP58 are marked.

**2.25** At least one property 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 A moved southwest by approximately 9 metres which means that the witnesses will have only walked to Point A since 1999, a period of just 16 years to when the application was made to the Council. Under current legislation a route must have been used for any period of 20 years to acquire public rights. As there isn't 20 years use since 1999, the 20 period up to 1999 should also be considered. One user claims to have used the application route for more than 20 years before 1999.

**2.26** 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**

**2.27** 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.

**2.28** Seven witnesses claim to have used the route as of right and five witnesses claim to have used the route as of right for 20 years or more.

**2.29** 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.

**2.30** One user recalls there being a stile or gate but does not state which or where.

**2.31** There has been one objection to the application from the landowner stating that the addition of a third footpath would prevent them from fencing the field to enable the grazing of livestock and also pointing out that there are already two footpaths in the same field that connect Points A and B.

**2.32** The available documentary evidence offers no conclusive evidence that the claimed route has ever carried public rights. The historical plans show that a different route to that claimed 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. The line of FP32 has been diverted twice, most recently in 1999 and as a result, Point A falls approximately 9 metres from the line of FP32 prior to the diversion. Therefore, the users have only used the claimed route for a maximum of 16 years to 2015. Only one user claims 20 years use of the claimed route before its diversion in 1999 and their use is not sufficient on its own to make an Order to add a footpath to the original line of FP32.

**2.33** 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.

**2.34** The user evidence submitted with this application is inconsistent and although there may have been a route on the ground for many years which runs diagonally across the field between FP32 and FP58, that route has been recorded differently at different times, it was not considered a public right of way in 1951 and the line of FP32 has moved twice since 1960 which means that people walking diagonally between FP32 and FP58 have not walked from the same point before and after 1999. Only one user claims 20 years use of the claimed route prior to 1999. Therefore the evidence available to the Council does not meet the requirements of the legislation.

**2.35** In summary, whilst the public do appear to have taken a short cut between FP32 and FP58 that short cut has not been along a consistent line for a 20 year period, due to the line of footpath 32 being diverted on two occasions. Although the documentary evidence shows that there has been a route on the ground, that route is not consistent with the route as claimed and 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.

**2.36** 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**

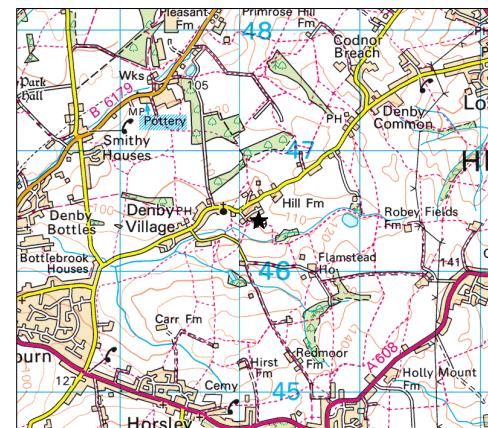
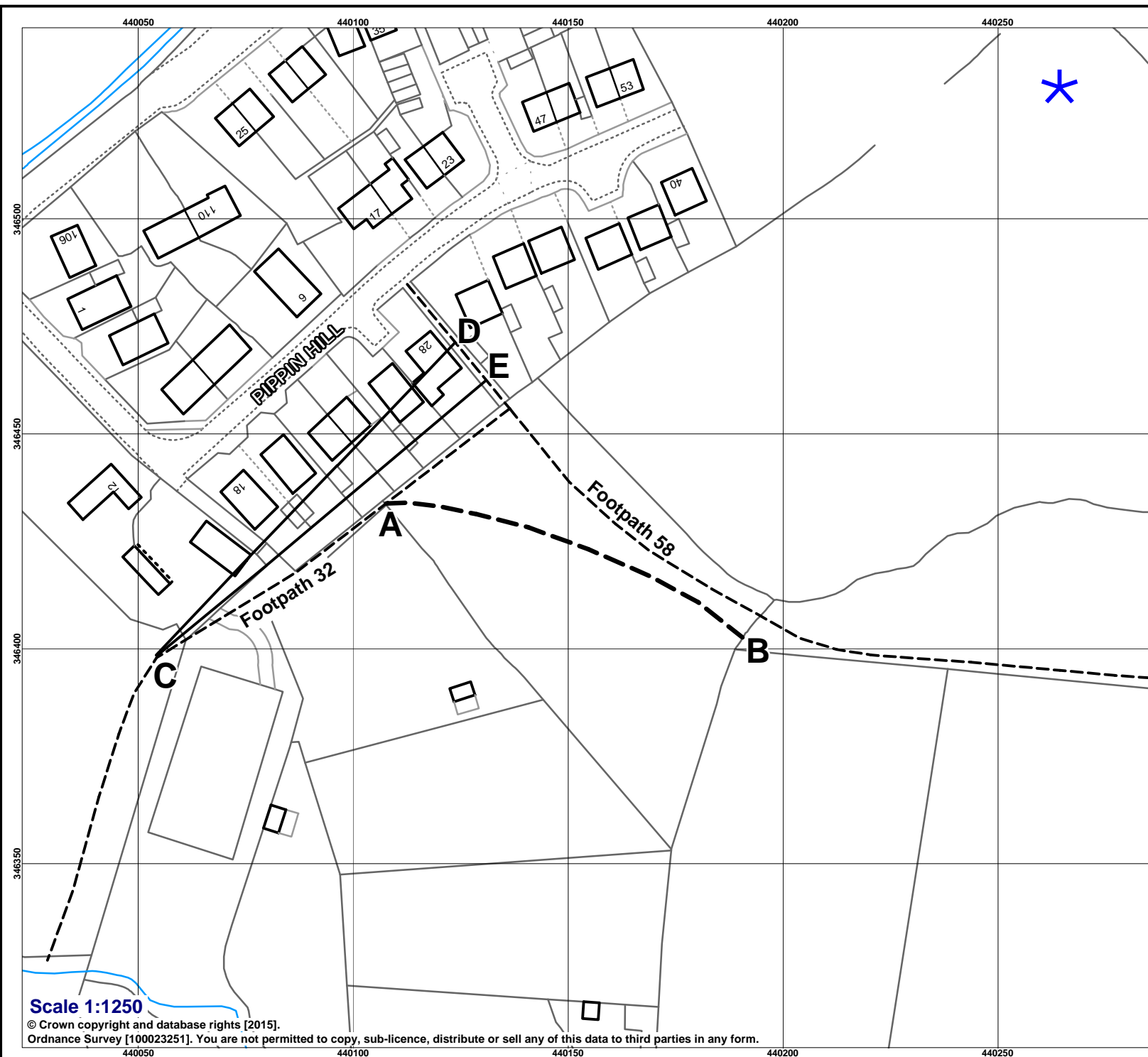
**4.1** File held by Legal Services (ref. 66308).

## **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**





# **Wildlife and Countryside Act 1981 S.53**

**Claim to add a Footpath from  
Public Footpath No. 32 to  
Public Footpath No. 58 -  
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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Produced by Public Rights of Way on 4 December 2017  
Ref: **TE/CH/X4018/Cttee/2018**