

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

**30 October 2017
Report of the Director of Legal Services**

**Wildlife and Countryside Act 1981
Claim to Upgrade to Bridleway Public Footpath Nos. 7, 8 (Part), and
9 (Part) in the Parish of Langwith.**

1. Purpose of the Report

To enable Members to determine an application to amend the Definitive Map and Statement by upgrading to bridleway, public footpath nos. 7, 8 (Part), and 9 (Part) in the Parish of Langwith.

2. Information and Analysis

2.1 On 14 October 2013 Stephen Parkhouse submitted an application to the Council to upgrade FP Nos. 7, 8 (Part), and 9 (Part) in Langwith to bridleway. The footpaths are all connected and while the sections of FP8 and FP9 form a single route running north to south along the County boundary, FP7 runs west to east terminating at FP8 (a footpath continues easterly from FP8 in Nottinghamshire). The applicant has divided the claimed upgrade of FP8 and FP9 into three sections: A-B, B-C and C-D. FP7 is marked between C and E. The applicant has also claimed connecting routes in Nottinghamshire. The application is supported by 32 user evidence forms.

2.2 A plan showing the claimed routes is attached (Appendix 1). Route A-B-C-D being the claimed sections of FPs 8 and 9 and Route C-E being FP7.

2.3 The claimed routes are recorded on the Definitive Map & Statement as footpaths which are publically maintainable. Route A-B-C-D is approximately 1500 metres long with a well-worn surface of stone and natural earth. Route C-E is approximately 720 metres long with well-worn surfaces of natural earth and stone and earth.

User Evidence

2.4 There have been no specific actions that have brought use of the routes on horseback or bicycle into question and so for the purpose of this report the date on which the application was submitted has been taken to be the date use of the route was brought into question, which was October 2013. However, many of the UEFs were completed in 2012. The period under consideration is therefore between 1992/93 and 2012/13.

2.5 **Route A-B-C-D:** Of the 32 witnesses, twelve have used the claimed route on horseback (eight of whom have used the route on a bicycle as well) during the period under consideration; seven for a 20 year period or more to 2012 (three for 30 years or more), three between 10 and 20 years and two

who claim less than 10 years use. The user evidence on horseback covers the years from 1977 to 2013 with the longest user claiming use for 35 years.

2.6 Twenty-six witnesses have used the claimed route on pedal cycle (including the eight who have also used the route on horseback) during the period under consideration; twenty for a 20 year period or more to 2012 (eight for over 30 years and three for over 40 years), five between 10 and 20 years and one who claims 9 years use. The user evidence on cycle covers the years from 1964 to 2013 with the longest user claiming use for 48 years.

2.7 Twenty-five witnesses have seen other users on horseback and 32 have seen others on pedal cycle.

2.8 Of the 32 witnesses who have used the route (or part of) on horseback or cycle: thirteen claim to have used the route monthly, eight weekly, two 3 times a week, one daily, one fortnightly, one weekly for 10 years and monthly before that (42 years in total), one 'some weekly some monthly', and five less than monthly.

2.9 The applicant has completed all the forms himself to describe the width of the route as 2 – 3m and none of the users contradict this information.

2.10 The applicant has also completed all the forms himself to describe the route as, 'The path from East View, Langwith Junction (A) over the Robin Hood Line (B) to Langwith Drive (D), Langwith – branching at C to Basset Hill (E), Langwith. Although the route is described as 'to Langwith Drive' the applicant has added Point D short of Langwith Drive.

2.11 The users have all marked the route they have used on a plan and all 32 have used the route on horseback or cycle. 30 users clearly show use of the claimed route from A – D.

2.12 Although the Application Plan had Point D marked just south of Langwith Drive and therefore not connecting to a highway of bridleway status or higher, the UEFs vary in where they claim use to, some mark their use to Point D and others to Langwith Drive. The Applicant contacted the Users in an attempt to confirm use of a short spur between FP8 and Langwith Drive and he received five replies, all confirming use of the spur. Therefore, in total, 15 users have shown or confirmed use of the connecting path between Point D and Langwith Drive while a further 13 drew a route that stops at Point D. When considered in conjunction with the description of the route on both the application and the UEFs it would be sensible to conclude that those users who have drawn a route that stops at Point D have continued from Point D onto Langwith Drive.

Two users did not use the whole of the route: one only used section A-B and the other used section A-B-C.

2.13 None of the users report seeing any stiles or gates nor do they remember the path being diverted or blocked, being stopped or told there was no public right of way or being given permission to use the route on horseback or cycle.

2.14 Route C-E: Of the 32 witnesses, twenty-five have used the claimed route. Eleven have used the claimed route on horseback (eight of whom have used the route on a bicycle as well) during the period under consideration; six for a 20 year period or more to 2012, three between 10 and 20 years and two who claim less than 10 years use. The user evidence on horseback covers the years from 1977 to 2013 with the longer user claiming use for 35 years.

2.15 Twenty-two witnesses have used the claimed route on pedal cycle (including the eight who have also used the route on horseback) during the period under consideration; Fifteen for a 20 year period or more to 2012 (five for over 30 years and two for over 40 years), six between 10 and 20 years and one who claims 9 years use. The user evidence on cycle covers the years from 1964 to 2013 with the longer user claiming use for 48 years.

2.16 Twenty-one witnesses have seen other users on horseback and 25 on pedal cycle.

2.17 Of the 25 witnesses who have used the route on horseback or cycle nine claim to have used the route monthly, eight weekly, two 3 times a week, one twice a week, one fortnightly, one weekly for ten years and monthly before that (42 years in total), one 'some weekly some monthly' and two less than monthly.

2.18 The applicant has completed all the forms to describe the route as 'The path from East View, Langwith Junction (A) over the Robin Hood Line (B) to Langwith Drive (D), Langwith – branching at C to Basset Hill (E), Langwith' with a width of 2 – 3m. None of the users contradict this information.

2.19 The users have all marked the route they have used on a plan and 23 clearly show use of the claimed route C-E either on pedal cycle or horseback. A further two users mark the route from Point C to the dismantled railway, now the 'Archaeological Way', shortly before reaching Point E.

2.20 None of the users report seeing any stiles, gates or barriers nor do they remember the path being diverted or blocked, being stopped or told there was no public right of way or being given permission to use the route on horseback or cycle.

Consultation

2.21 An informal consultation exercise was carried out between 24 February 2016 and 30 March 2016. Notices were placed on the routes and letters were sent to the statutory consultees, landowners and the local elected member, Cllr Joan Dixon.

2.22 Following the consultation, four representations were received, none of which objected to the application.

2.23 Cllr Dixon sent an email on 29 February 2016 stating, "In general I would be supportive of this, but given the fact that: 1. a new multi-user track has opened on the railway line which runs parallel to much of the proposed path (and) 2. overriding in the nearby Scarcliffe Park has effectively closed a footpath to walkers and cyclists and is costing a considerable sum to restore 3. The council PROW budget is under extreme pressure and this change might put further financial strains on the budget then I would like to see why a new bridleway is necessary".

2.24 The British Horse Society emailed on 01 March 2016 "in support of this claim" but offer no evidence or reasons.

2.25 A DCC Estates Surveyor sent an email on 02 March 2016. The surveyor asked if the adjacent school had been consulted and whether there would be any physical change to the route to accommodate horses, cycles and off road vehicles.

2.26 The Chesterfield, North East Derbyshire and Bolsover Group of the Ramblers emailed on 28 March 2016. The email offered no evidence or opinion either in support or objection to the application.

2.27 A Chatsworth Estate Surveyor sent an email on 29 March 2016 which offered no evidence but, comments on the possible measures that could be taken to prevent wheeled vehicles (motorbikes and carts) from using the route.

2.28 The Council was contacted by Gleeson (builders and developers) in January 2017. Gleeson's own land at the southern end of FP9 upon which they intend to build housing. Gleeson's intend to apply for a diversion Order in respect of the southern section of FP9 and have been advised by the Council in respect of the DMMO application regarding possible bridleway rights and that if their application to divert the footpath was successfully made before this DMMO application has been determined, then any bridleway rights that may exist would not be diverted and would remain along the original line of FP9. Further, it may not be possible to divert them onto the proposed new line as that would have been dedicated as highway in its own right. However, if this DMMO application is confirmed before the diversion application is submitted, Gleeson's application would be to divert the bridleway.

Documentary Evidence

2.29 Enclosure and Tithe Evidence

The Langwith Enclosure Plan and Award, The Scarcliffe Enclosure Award (No Plan) and The Upper Langwith Tithe Plan and Award were inspected but no evidence was found relating to the three footpaths.

2.30 Burdett's Map of Derbyshire Circa 1860

The map does not show the claimed routes.

2.31 Sanderson's Map – Twenty Miles round Mansfield 1835

The map does not show the claimed routes.

2.32 Blackwell Rural District Definitive Statement 1948

Footpath 7 is described as a 'Footpath from the Upper Langwith - Shirebrook road NW of Langwith Bassett School (522 692) in E direction crossing railways and path No 8 to the parish boundary N of New Plantation (529 693)' and as 0.456 miles in length.

Footpath 8 is described as a 'Footpath from path No 9 W side of New Plantation at the parish boundary (528 690) in NE direction along the parish boundary thence to Poulter Street SE of Apsley Grange (529 702)' and as 0.760 miles in length.

Footpath 9 is described as a 'Footpath from N end of East View, Langwith Junction (527 686) in NE direction over railway bridges thence N to path No 7 NW of New Plantation (527 693) alongside railway' and as 0.418 miles in length.

2.33 Ordnance Survey 1st Edition 1:2500 Derbyshire Sheet 26:12 c.1892

FP8 is shown as a single dashed line north of its junction with FP7 but does not continue south. One railway line is shown (north to south) approximately 195 metres to the west of FP8. FP7 is shown as a single dashed line between the railway footbridge and FP8 while the footbridge and the path to the west are shown between solid lines. The southern part of FP9 is shown by double lines running north to the railway line but, there is no footbridge. From the railway the double dashed lines continue NW to join FP7 while a single dashed line follows the railway as far as FP7 and the aforementioned footbridge. None of the paths are labelled as any type of right of way.

2.34 Ordnance Survey 2nd Edition 1:2500 Derbyshire Sheet 26:12 c.1898

The plan shows a second parallel railway line to the west of the one shown on the 1st edition. FP7 is shown running west to east between solid lines and crossing both railways by footbridge. The eastern section between FP8 and the footbridge is shown by a single dashed line along the field boundary and is labelled F.P.

FP8 is shown running north to south by a single dashed line along the county boundary then SW to a footbridge approximately 25 metres south of the footbridge used by FP7. FP9 continues WSW over the railway footbridge then SSE adjacent the railway line for approximately 100 metres. The path

then runs S to Langwith Junction and crosses another footbridge in a SW direction and then turns SSE, which corresponds with the kink shown by the current definitive line. FP9 also continues north from the FP8 junction along the eastern side of the railway to FP7. The footbridges are shown between two solid lines while the remaining path is shown by double dashed lines. All sections of FPs 8 and 9 are labelled F.P.

2.35 Ordnance Survey 3rd Edition 1:2500 Derbyshire Sheet 26:12 c.1918

The three FPs are shown similarly to the 2nd Edition. The footbridges crossed by FP7 are not labelled as such while the bridge used by FP9 is labelled F.B. There is another path shown from FP9 at the footbridge in a NE direction to FP7.

2.36 Ordnance Survey 1:2500 Derbyshire Sheet 26:12 c.1938

Langwith Drive and the adjacent housing development are shown on the plan. FP8 is shown between solid lines alongside the housing development and then continues S between double dashed lines to the footbridge. It is labelled 'Foot Path'. The footbridge is labelled F.B. and FP9 is shown similarly to the 2nd edition and is labelled F.P. FP7 is shown similarly to the 2nd Edition and neither the footpath nor the footbridges are labelled.

2.37 Ordnance Survey Derbyshire 1961 Sheets SK52/5268 & 52/5369

SK52/5268 The footbridge over Langwith Junction is shown between solid lines and is labelled F.B. FP9 continues N between double dashed lines to the railway line then NNW between solid lines as on earlier plans.

SK52/5369 FP9 continues between solid lines to and across the footbridge, which is labelled F.B. and then continues NNW between double dashed lines to FP7. FP8 is shown similarly to the 1938 plan. FP7 is shown between solid lines from its western end to and across the first footbridge and then between double dashed lines to its junction with FP8. Both footbridges are labelled as footbridges. All three paths are labelled as footpaths.

2.38 Ordnance Survey later Editions

The claimed routes are shown on later plans consistent with the 1961 edition and they offer no further information.

Additional Evidence

2.39 A site visit was undertaken and photographs taken of the claimed route on 20th September 2017. The points referred to in the description below are shown on the attached plan and all measurements are approximate.

Route A-B-C-D (Footpath Nos. 8 and 9)

2.40 FP9 starts at Point A and heads N along a rough metalled path from the adopted highway named East View. After 25m there is a metal 'A-Frame' barrier with a wide gap to the east and a thick wooden gatepost. Although the A-Frame would cause a hindrance to horses and bikes it is not known when it was installed or how long the gap at the side has been there or whether there was a gate in place previously. The frame itself is wide enough to allow access to push bikes and some horses while the adjacent gap is wider still.

2.41 Shortly beyond the barrier there is an area of land fenced off for building development and it is not possible to walk on or see the line of FP9. The walked path (shown on current mapping) continues with a natural earth surface, to the east of the fencing, and heads NNE between the fence and thick weed and shrub growth for 80m before rejoining FP9. Just before this point, to the east of the path are the remains of the old footbridge steps and footings that once crossed the railway line. This is interesting as it shows that the line of FP9 was at some time east of the definitive line and would have crossed the railway at a higher level than the current line. This was corroborated by a dog walker who used to stand on the bridge when trainspotting as a young person.

2.42 FP9 continues along a stone and earth surface in a northerly direction for 120m, initially between hedges (woodland) and then with woodland to the east and open field to the west. The path then turns NNE for 95m and has trees on either side and a metal fence on the east, it turns ENE between fencing and crosses a footbridge; the width between fences is 1.8m.

2.43 FP8 continues NW from the footbridge along a field boundary with woodland to the east for 300m to its junction with FP7. FP8 continues N for 85m with woodland to the east and open field to the west then between open fields for 155m. At this point there is another A-Frame barrier and a five bar gate across the route. The gate is not locked but at the time of the visit it could not be opened due to damage. The path continues N with a housing estate to the west and hedgerow and fields to the east for 295m and then the eastern side becomes fenced and hedged, providing access to a sportsground and 'Rhubarb Farm' (a lottery funded community project), for a further 200m to Point D.

2.44 The short section of path between Point D and Langwith Drive is well trodden and has a stone surface. Although there is a wooden post in the gap between a hedge and a wall there is room for cyclists and horses to pass through.

Route C-E (Footpath 7)

2.45 From its junction with FP8, FP7 crosses open agricultural land in a westerly direction for 180m before it follows a farm track between metal fencing for 40m and across a railway bridge. The track continues across open fields for a further 320m where there is a broken down five bar gate with an

adjacent A-Frame barrier to the north. A stone track leads N to the 'Archaeological Way' which is accessed via a metal field/bridle gate or an A-Frame barrier.

2.46 FP7 continues along a stone track and over another railway bridge with wall and fencing on either side for 30m then continues between hedges and past a school for another 150m to Point E.

2.47 The A-Frames and adjacent structures appear relatively new. The Rights of Way files have been viewed and although no information was found confirming the date of installation there is correspondence relating to the proposal of barriers circa 2012. It is likely that the barriers were installed sometime after 2012, which postdates the application and the period of use under consideration in this report. None of the users recall these barriers which suggests they were not in place in 2012 when the majority of UEFs were completed.

Summary and conclusion

2.48 The test which has to be applied when considering the upgrading of a route on the Definitive Map and Statement under s53(3)(c)(ii) is on the balance of probabilities.

2.49 The earliest document which records all three footpaths in entirety is the Ordnance Survey 2nd Edition of 1898 and the routes have been recorded fairly consistently since that date. Although the routes are shown on the Ordnance Survey (OS) maps and appear to carry at least footpath status, OS maps are not a record of the status of rights of way; they only show what is on the ground. The claimed routes are recorded as Footpaths on the Definitive Map and Statement and the Parish Claim offers no evidence of anything different.

2.50 Route A-B-C-D: Seven users claim to have ridden the route on horseback for a period of 20 years or more while twenty users claim cycle use for 20 years or more throughout the claim period.

2.51 Route C-E: Six users claim to have ridden the route on horseback for a period of 20 years or more while fifteen users claim cycle use for 20 years or more throughout the claim period.

2.52 The vast majority of the witnesses have seen other people using the routes on horseback.

2.53 The Council has received no objections to the claim to upgrade the footpaths to bridleways. When considering whether a landowner is deemed to have dedicated a bridleway or restricted byway, it has been considered by Carnwath, LJ (see paragraph 3.12) that it would be appropriate to infer the form of dedication by the owner that is least burdensome to him, which would be a bridleway. In this case the positioning of a bollard at Point D would prevent the use of horse and cart as well as four-wheeled motorised traffic and so a bridleway would appear more suitable.

2.54 Current case law suggests that regular use of a route by horse riders and cyclists is consistent with presumed dedication of the route as a bridleway because it has been legal for cyclists to use bridleways since 1968 (see below).

2.55 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.

2.56 Although the application plan shows Point D just south of Langwith Drive and the applicant amended all the UEF plans to show the same point, several users have shown use of a short spur to Langwith Drive. Only one user has depicted their use as following FP8 to the main road. In conjunction with the wording of the application and the description of the route, also provided by the Applicant, the user evidence suggests that the majority of users have continued from FP8 onto Langwith Drive. If an Order were to be made, the short spur between FP8 and Langwith Drive would need to be included as an addition of bridleway to the DMS.

2.57 The Council's Declaration Register has been checked and no S31(6) statutory declarations have been made which would affect the claim.

2.58 In summary, the public do appear to have used the route C-E and the route A-B-C-D-Langwith Drive as bridleway for 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 bridleway 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 routes (and the spur between FP8 and Langwith Drive) have not been used as public bridleway and it is therefore considered that, on the balance of probabilities, there is sufficient evidence to show that public bridleways subsists.

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 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 without 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 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.
- 3.11** Section 30(1) of the Countryside Act 1968 provides that any member of the public shall have, as a right of way, the right to ride a bicycle, not being a mechanically propelled vehicle, on any bridleway.
- 3.12** In *Whitworth v Secretary of State for Environment, Food and Rural Affairs* ([2010] EWCA Civ 1468) the Court of Appeal concluded that the route under consideration in that case had acquired bridleway status by 1968. Subsequent use of the route by cyclists would have been permitted by the Countryside Act 1968 and the route had no higher rights than those of bridleway. Carnwath LJ expressed the opinion that the same conclusion would have been reached even if there had been no finding of pre-existing bridleway rights and that although, use by horse riders and cyclists was also consistent with an assumed dedication as a restricted byway, it was appropriate to infer the form of dedication by the owner that is least burdensome to him.

Other Considerations

- 3.11** 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.
- 3.12** None of these factors are considered to be relevant for the purpose of this report.

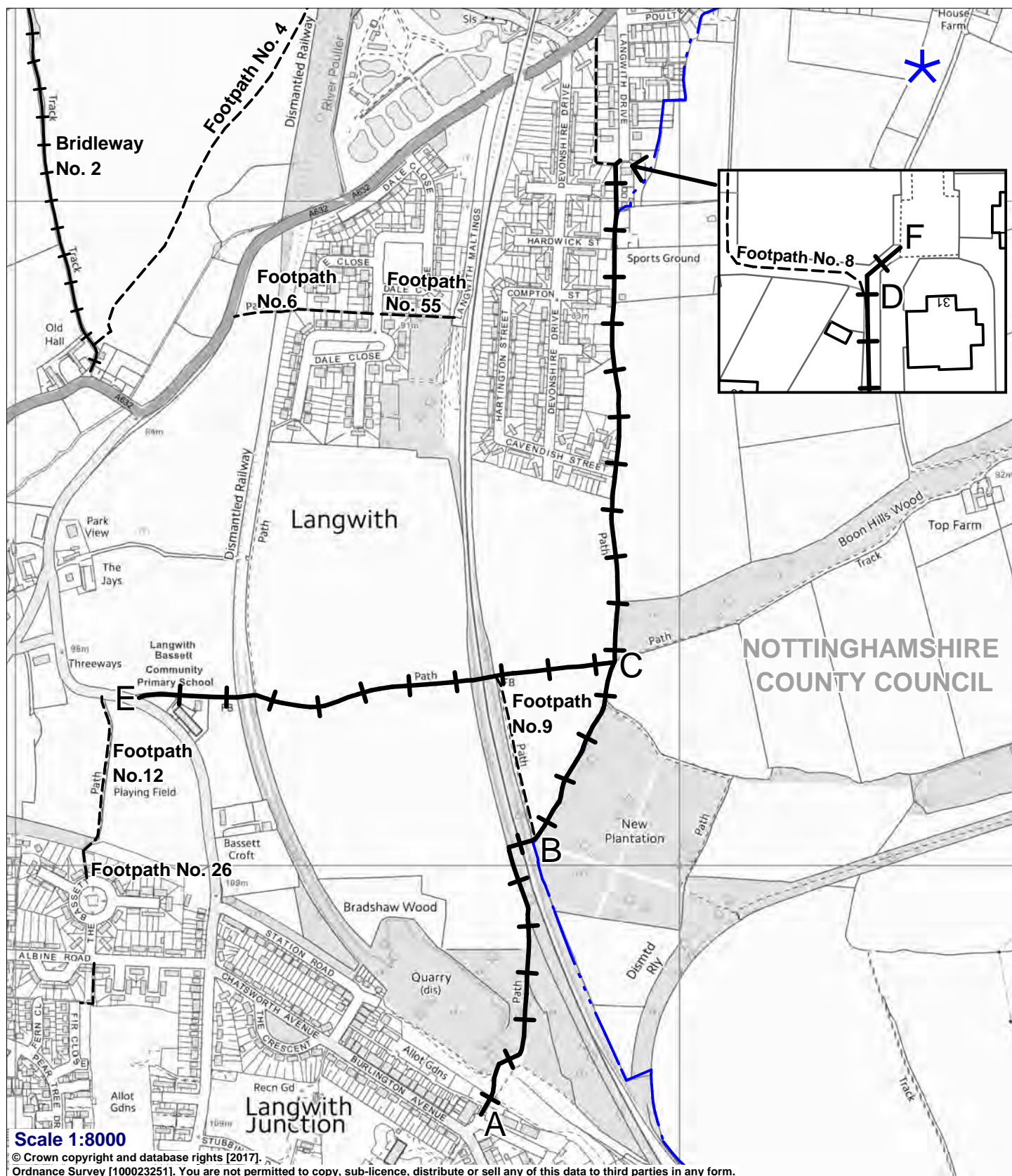
4. Background Papers

Files held by Legal Services (ref. 63899).

5. OFFICER'S RECOMMENDATION

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 upgrading to bridleway, Public Footpath Nos. 7, 8 (part) & 9 (part) in Langwith which are shown between Points C-E and A-B-C-D respectively and to add a bridleway from Langwith Drive to Point D, as shown on the plan attached to this report.

Chief Officer



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 Date: 4 October 2017



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Wildlife & Countryside Act 1981 Section 53
Claim to Upgrade to Bridleway Public
Footpath Nos. 7, 8 (Part), and 9 (Part)
- Parish of Langwith.

Key:	Path to be upgraded to Bridleway	
	Existing Footpath	
	Existing Bridleway	
	County boundary	

