

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 add a Footpath from Church Street to Public Footpath No. 20 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 Parish Council dated 03 March 2014 to add a footpath to the Definitive Map and Statement from Church Street to public footpath No.20 (FP20) in Denby. The application was accompanied by nine User Evidence Forms (UEFs), a plan showing the claimed route and five photographs of the claimed route.

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

Background information

2.3 Among the photographs submitted with the application is one of a cattle grid, with the annotation: *This replaced a bridge which collapsed about 10 years ago.*

The application was submitted in 2014 and it can therefore be assumed that the bridge collapsed circa 2004. Users have since had to cross a cattle grid in order to access FP20.

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 2014 have been considered in assessing the claim.

2.5 Nine UEFs were submitted in support of the application. All the plans have had the route clearly marked in yellow highlighter pen and one has been overwritten in green highlighter pen.**2.6** When describing the route on the UEFs, five of the users describe the route well, one in a way which could be

interpreted to include the claimed route, two do not describe any route and one states 'as marked on map'.

2.6 All of the witnesses refer to using the route on foot. Eight of the witnesses refer to seeing other people using the route on foot, with one also referring to seeing people using it on a pedal cycle and in a vehicle.

2.7 Seven witnesses claim to have used the route for a period of twenty years or longer. One user claims 17 years use and another for five years between 1938 and 1943.

2.8 One witness claims to have used the route daily, one three times per week, two weekly, two monthly, one five or six times per year, one three or four times per year and one less than monthly. The user who claims daily use previously lived at Abell's Farm and only used the route between 1938 and 1943. This user also confirms that the route was 'used by local residents'.

2.9 None of the witnesses recall the route being obstructed or diverted, being stopped from using the route, being given permission to use the route or seeing any notices on the route.

2.10 Four of the witnesses recall a stile and gate on the route with two specifying the gate was left open; two recall there was a stile on the route and one witness recalls a bridge over a stream. The witness who recalls the bridge used to live at Abell's Farm and used the route daily between 1938 and 1943; he has not claimed any use since.

2.11 One witness was told by the landowner 'about ten years ago' (circa 2001) that the lane was privately owned but she was not prevented from using the route and one witness was told by DCC that the route was not on the Definitive Map, but does not give a date.

2.12 The witness who was told by the landowner the route was privately owned used to access the track through 'a gate in our back fence' which suggests she may not have used the whole route until after that event. It was after this encounter that the witness decided to 'seal off' the gate from her property to increase security – which suggests that the route was used by the public.

Consultation

2.13 An informal consultation exercise was carried out between 22nd April 2015 and 27th May 2015. Notices were placed on the route at the start of the consultation period and letters were sent to the statutory consultees, landowners and the local elected member, Cllr Kevin Buttery.

2.14 Two emails were received in support of the application and one offering no opinion.

2.15 An email was received on 7th May 2015 from Denby Footpaths Group confirming that a meeting had been held and the group 'unanimously agreed to support this claim' and that there was historical evidence showing the lane. She adds that it was used 'as access to Abell's Farm and the public were allowed to use it according to the owner of the farm when it was there'. She confirms there has been 'no known deterrent' and it is still used. She refers to the stile which indicates 'that it has always been intended as a right of way'.

2.16 An email was received on 22nd May 2015 from a local resident stating that it 'has always been a footpath but the access has become impossible, because my dogs cannot negotiate the cattle grid'. She would like the footpath reinstated with a footbridge.

2.17 Peak and Northern Footpath Society emailed on 28th April 2015 to confirm they had no evidence to support the application.

Documentary Evidence

2.18 Sanderson's Map: Twenty Miles round Mansfield 1835

The claimed route is shown on the Sanderson's plan between solid lines which opens out into a small plot to the southeast. The junction with Church Street is crossed by a solid line, unlike other roads on the map and therefore the whole plot is enclosed, forming a hatchet-shaped area of land. The claimed route crosses the brook and would appear to provide access to the fields beyond.

2.19 Denby Tithe Plan 1847 and Award

The claimed route is shown coloured yellow as are other roads on the plan and as part of the general road network. The route terminates at the brook and there are no footpaths shown on the plan. The adjacent plots are described in the Award as; Cabbage Garden - Land; Homestead and Lane; Home and Garden and Home Close.

2.20 1st Edition Ordnance Survey Map 1881 Sheet XLV - 3

The claimed route is shown on the 1881 OS map. The route is shown between solid lines and midway it opens out to the west to incorporate a building and small plot of land. The track also provides access to buildings on the western side, FP20 and the fields to the south, where it terminates. There is a solid line across the southern end. The route's junction with Church Street is crossed by a dashed line, similar to other roads on the plan.

2.21 2nd Edition Ordnance Survey Map 1900 Sheet XLV - 3

The claimed route is shown on the 1900 OS map. The claimed route is shown between solid lines and connects to other paths marked 'F.P.' and the footbridge is marked as 'F.B.'. The track also provides access to buildings on the western side and the fields to the south where it terminates. Unlike in the

1st Edition the track does not open up into a plot on the western side. There is a solid line across the southern end. The route's junction with Church Street is crossed by a dashed line, similar to other roads on the plan.

2.22 Ordnance Survey Map 1916 Sheet XLV - 3

The 1916 OS plan is very similar to the 1900 plan.

2.23 Ordnance Survey Map 1938 Derbyshire Sheet SK38/3946

The 1938 OS plan is very similar to the 1900 plan.

2.24 Ordnance Survey Map 1962 Derbyshire Sheet SK38/3946

The claimed route is not shown although there is a gap in the road boundary with a dashed line across, at Point A on the attached plan. From this point the easterly field boundary remains as on previous plans but is open to the west, forming a plot of land which contains three buildings. At the southern end of the area there is a gap with a dashed line across where the claimed route meets FP20.

2.25 Ordnance Survey Map 1967 Derbyshire Sheet SK38/3946

The claimed route is shown by double dashed lines through an area of land similarly marked out as in the 1962 plan. There is a gap in the road boundary with a dashed line across, at Point A and at the southern end, the claimed route continues between double dashed lines turning in a southwest direction. A smaller path is shown heading off in a southerly direction.

2.26 Ordnance Survey Map 1995 Sheet 38/3946

The claimed route is shown on the 1995 OS map. The claimed route is shown initially between double dashed lines then between solid lines with a single dashed line down the middle and continues after the footbridge between double dashed lines, in a southwest direction as on the 1967 plan. The area to the west of the claimed route is divided into three main plots; the northerly plot containing three buildings is accessed by the claimed route and the other two from a lane to the west.

2.27 Ordnance Survey Map 2005 Sheet 38/3946

The 2005 OS plan is very similar to the 1995 plan with the exception that only the top row of buildings is accessed by the claimed route. Three plots below are accessed by the lane to the west.

2.28 Denby Parish Claim 1951

The claimed route is shown as it is on the 2nd edition plan. FP20 is shown travelling east to west just south of the claimed route. The claimed route is not marked as a public right of way.

Additional Evidence

2.29 A site visit was undertaken on 27 July 2017. The northern section of the claimed route which leaves Church Street (Point A) in a southerly direction is a metalled track for approximately 20 metres. It then continues on grass and natural earth in a generally south-south-easterly direction for approximately 110 metres to join FP20 (Point B). The route is bound on both sides by a combination of fencing, walling and hedging and is approximately 3 metres wide. At the southern end of the claimed route are the cattle grid and the remains of an old stile, as described in the UEFs, shortly before the claimed route's junction with FP20 (Point B).

2.30 At the time of the visit there was no obstruction to public use although there is no safe crossing aid at the cattle grid.

2.31 Two thirds of the way down the route is a manhole cover which suggests access is required at all times.

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

Summary and conclusion

2.33 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.

2.34 All nine witnesses claim to have used the route as of right and seven witnesses claim to have used the route as of right for 20 years or more. Four of the users recall a stile and gate at the southern end of the route where it meets FP20, two users recall just the stile and one refers to a footbridge.

2.35 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 or being prevented from using the route in any way.

2.36 One user was told by the landowner, circa 2001, that the route was privately owned but not prevented from using it and another witness was told by DCC that the route was not on the definitive map, but gives no date or details.

2.37 No users recall being given permission to use the route although one user did used to live at Abell's Farm and another used to access the route through a gate from a property midway down the lane. Both these users may have had a private right of access along the claimed route but both are supporting a public right.

2.38 There have been no objections to the application and therefore there is no evidence to suggest any landowner has shown a lack of intention to dedicate a right of way for the public along the claimed route.

2.39 One user recalls that when the cattle grid was first put in place the landowner also put in place 'a rail and planks across it' which could be interpreted as an act of dedication at common law. It should also be noted that the Council would not authorise the use of a cattle grid on an existing right of way without alternative access provision. However, in this matter the cattle grid has been constructed lawfully and the public have continued to use the route and have not considered the cattle grid an obstruction. If a DMMO Order were to be made, consideration should be given to including the cattle grid in the Order.

2.40 The available documentary evidence offers no conclusive evidence that the claimed route has ever carried public rights but the route has been on various plans as a track that connects to other marked 'paths' and specifically to FP20. The route is shown on the Denby Tithe plan as part of the general road network and although offering no proof of rights does support the evidence on other plans that the route is likely to have been used by the public.

2.41 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. The user evidence submitted with this application, though not substantial, is consistent and suggests that there has been use of the claimed route over a 40 year period or more, and the route appears to have remained open to the public throughout that period. The present cattle grid replaced a footbridge that had fallen into disrepair and the landowner initially aided access over the cattle grid by providing a 'rail and planks' which is consistent with the dedication of a public right of way by a landowner. Therefore the evidence available to the Council meets the requirements of the legislation.

2.42 In summary, the public do appear to have used the route 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 rights but taken as a whole would support the likelihood of use by the public and there has been no evidence submitted to suggest that the claimed route is not a public right of way. It is therefore considered that, on the balance of probabilities, there is sufficient evidence to show that a public right of way subsists.

2.43 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. 63730).

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.

Chief Officer



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Wildlife & Countryside Act 1981 Section 53

**Claim to add a footpath from Church Street to Denby Footpath No. 20
- Parish of Denby**

Key: Footpath to be added ————
Existing Footpath - - - - -

