

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

**27 February 2017**  
**Report of the Director of Legal Services**

**Wildlife and Countryside Act 1981**  
**Claim to add a Footpath from Footpath No. 139 to Footpath No. 118 in**  
**Chesterfield.**

**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 Chesterfield.

**2. Information and Analysis**

**2.1** An application was received from Mr Peter Brown dated 31 May 2013 to add a footpath to the Definitive Map and Statement from Footpath No.118 to Footpath No.139 in Chesterfield. The application was accompanied by 28 User Evidence Forms (UEFs), two plans and an aerial photograph taken from Google.

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

**Background information**

**2.3** Derbyshire County Council (DCC) held discussions in 2006 with regard to creating a footpath along a line similar to that of the claimed route, except that the created route would have avoided the football field by travelling easterly and parallel with the touchline before turning south once it had passed the goal line. The creation agreement did not come to fruition and it would appear that although there was agreement from DCC and Chesterfield Borough Council (CBC), the third landowner did not consent. The adjoining footpaths (118 and 139) were both made by 'creation agreement': FP139 in 1994 and FP118 in 2008.

**User Evidence**

**2.4** It is considered that the blocking of the route at Point B by the landowners in 2013 prompted the application and 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 this date have been considered in assessing the claim.

**2.5** Twenty eight UEFs were submitted in support of the application. The route has been marked on all of the plans accompanying the forms in the same manner, presumably by the applicant, as between FP118 and FP139 which are identified by hand and highlighted in pink. The claimed route is

identified as '129' and highlighted in green. 129 was the number given to the proposed footpath creation in 2006, by DCC.

**2.6** When describing the route on the UEFs, ten of the users describe the route by referring only to the proposed footpath number 129, one of whom adds '*marked on enclosed map*'; six by referring to FPs 118, 129 and 139; two refer only to FPs 139 and 129; two refer to FPs 18, 129 and 139; one user describes the route as via FP139 from Hady Lane to proposed route 129 but, only as far as former refuse tip access road and back to Hady Lane; another as, '*walking the dogs, going to school 118, 129, walking dogs 139*'; another as, '*dog walking round the field including use of path 118, 129, 139*'; one user describes use of all routes marked on map and part of 129; one as '*Hady Points 139-129 highlighted on map*'; one as '*boundary of school access road to disused railway crossing playing field*'; one as beginning at side of former railway above Spital play area, adjacent Hady Lane Farm and following the boundary of the farm and the boundary to the former garages then either right and through the stile by the locked gates and onto Hady Lane or across the football field. She adds that '*at some point*' CBC added a fence and gate around the field so one could either climb over the gate or walk towards Hady Lane to another entrance to the field behind the pavilion. One witness offers no information.

**2.7** All of the witnesses refer to using the route on foot, one of whom has also used it on a cycle and one also on a horse. All of the witnesses refer to seeing other people using the route on foot, with eight of these also referring to seeing people using it on a pedal cycle and one on horseback. None of the witnesses claim to have used the route in a motor vehicle though one has seen other people using the route on quad bikes.

**2.8** Fourteen witnesses claim to have used the route for a period of twenty years or longer; with seven claiming over thirty years use and three over forty years use. Of the remaining users, five have used the route for less than ten years and seven between 10 and 17 years.

**2.9** Seven witnesses claim to have used the route daily, one daily/weekly, eight weekly, six monthly, five less than monthly and one offers no information.

**2.10** Eleven of the witnesses recall the route being obstructed; four by a gate, one of whom specifies a locked gate; four by the landowner putting up a fence, one of whom refers to the landowner blocking the '*diverted route*'; one refers to the Council taking top-soil off the farmers land, '*so my walk ended at the garage site*'; one states it was restricted in part '*during the period of landfill operations*' and one who states, '*partially*', by the gate erected by DCC and kept locked.

**2.11** Two of the witnesses refer to the route being diverted by a locked gate, one of whom states, '*to avoid climbing the DCC locked gate it was possible to divert about two metres to the left until Dec 2011 when Travellers fenced that section. From then on diverted on to Hady Lane*'.

**2.12** Twenty one of the witnesses refer to gates or stiles on the route, six of whom specify that a gate was locked.

**2.13** Five of the witnesses refer to seeing notices on the route, three are referring to planning notices but, the other two refer to notices relating to trespass, one stating '*Private Land. Keep Out*' on the Traveller fencing, the other '*Private Property. No Trespassers*' around the Travellers site, though neither give any dates.

**2.14** Three witnesses recall being stopped from using the route; one when the Travellers were developing the area; one does not specify and one who states that the gate '*causes redirection... no real right of way when walking a dog*'. One witness writes, '*All though the land was owned by the farmer at one time he never really had very secure fencing etc so you would walk through the field. Only when altercations were made did you only walk as far as the garages, waste disposal etc*'. None of the witnesses give any dates.

**2.15** Four witnesses recall being told the route was not a public right of way; one when the landowner was repairing a fence and referred to people damaging his property; two during a presentation about the 'Rother Strategy' at the Hady Residents Group AGM and one by a '*Mr \*\*\*\* who lived at Hady Lane Farm and worked the adjoining farmland*'. None of the witnesses give any dates.

**2.16** None of the users state that they have had permission to use the route.

### **Consultation**

**2.17** An informal consultation exercise was carried out between 26<sup>th</sup> January 2015 and 2<sup>nd</sup> March 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 Sharon Blank.

**2.18** Four people responded in support of the claim and one in objection.

**2.19** A local resident confirmed in an email sent 30 January 2015 that the '*footpath has been used for well over 20 years for people in Spital to walk their children too (sic) and from Hady Primary School, and also by residents for leisure*'.

**2.20** Cllr Blank sent an email on 13 February 2015 stating that she fully supported the application. She states that the '*path has been used for well over 35 years and was originally fenced in with stiles... I used the path regularly...to Hady Primary School (approx. 1983 – 1991)*' and still uses it occasionally. Cllr Blank also provided a chain of emails between her and the Council's Rights of Way team from 2007 regarding the possible creation agreement. In her email, Cllr Blank recalls the owner of the field had erected a fence to keep horses in but local walkers had broken it down. A proposed solution was to create this path; Cllr Blank's only concern was that it crossed the football field.

The correspondence, between Cllr Blank and the Rights of Way team, supplied by Cllr Blank dates from March 2006 to May 2007. In March 2006 the Rights of Way team wrote that the owner of the triangular piece of land was having considerable problems with trespass and damaged fences. They also referred to an old stile and a permissive path from the old garages southwards through the woodland to the Dismantled railway. In September 2006, Cllr Blank wrote that she had spoken to a man erecting fencing for the landowner who was still having them knocked down by local people. The landowner was hoping to leave a gap for walkers in the corner of the field. The Rights of Way team wrote in November 2007 that the landowner had agreed to create a footpath where there had previously been a permissive path. In May 2007, Cllr Blank stated that she had no objection as long as it had no implications for the football field area. She also asked if there were plans to make *'an opening in the concrete fence that borders the school path'*. It was noted on a site visit undertaken in January 2017 that there is no opening in the fence to allow access to the claimed route (see below).

**2.21** An email was received on 23 February 2015 from a local resident in support of the *'long-proposed'* path stating that he had lived there for over 20 years and had *'habitually'* walked the path, along with other locals. He adds that he has seen much wildlife and fauna in the area but has concerns that the path runs through the old garage site *'which the council is proposing to lease to a group of Travellers'* and would *'put the general public and the travellers in direct confrontation'*.

**2.22** An email was received on 06 March 2015 from a local resident in support of the application stating that it had been used *'for well over 20 years'*. He also wished to bring to the Council's attention two village green applications for the area.

**2.23** CBC emailed a letter dated 25 February 2015 objecting to the claim stating that the land is leased from DCC on a 99 year lease from 01 October 1985. CBC also states that the land is used as playing fields and the line of the claimed route bisects the football pitch and is therefore *'not compatible with the established sporting use'*. An alternative route is suggested that does not cross the football pitch.

### **Documentary Evidence**

#### **2.24 2<sup>nd</sup> Edition Ordnance Survey Map 1898**

The claimed route is not shown on the plan and neither are the two footpaths that it connects: FPs 139 and 118. Hady Primary School is not shown but the railway line is on the map, along which the Footpath now known as 139 runs.

#### **2.25 Ordnance Survey Map 1962 Sheet 38/3970**

Footpaths 139 and 118 are not shown and neither is the claimed route or the school. The railway line is shown and labelled as dismantled railway.

**2.26 Ordnance Survey Map 1970 Sheet 38/3970**

The school is shown on the plan and the route now known as Footpath 118 is also shown. The dismantled railway is labelled as such but there are now double dashed lines shown along its length.

**2.27 Chesterfield Parish Claim 1950**

Footpaths 139 and 118 are not recorded on the parish claim and neither is the claimed route.

**Additional Evidence****Lease to Chesterfield Borough Council**

**2.28** Some of the land crossed by the claimed route (including the area of land which contains the football pitch) is leased by the Council to CBC. This means that CBC can use the land to provide indoor or outdoor sports and recreation facilities for the public and may make those facilities available either for free or subject to a charge.

**Town and Village Green Applications: 2013 & 2014.**

**2.29** Two applications were made to DCC to register the land crossed by the claimed route as a town or village green. The applications were considered by an independent Inspector at a public inquiry on 29 February and 01 March 2016. In his report, the Inspector refers to the area of land known as the Playing Field and specifically the submissions by the Borough Council, which referred the Inspector to the terms of the lease. The Borough Council argued that those using the Playing Field did so by permission of the Borough Council and therefore, in accordance with a decision of the Supreme Court, their use was by right and not as of right.

**2.30**

**2.31** The Inspector considered the argument to be correct and on that basis omitted the Playing Field from the application land. The Inspector's overall conclusion and recommendation stated, for the 2013 application, '*that the use for sports and pastimes of the part of the land shown as "Playing Field" on the map... has been by right, not "as of right"*'. For the 2014 application, he stated '*that use of the garages on the Land, for as long as they lasted, was probably in the most part by those entitled to use them under leases, and thus use by right, not as of right*'. The Inspectors recommendation not to register the land as a town or village green was considered by the Regulatory, Licencing and Appeals Committee on 25 July 2016 (Minute No. 30/16) and it was determined not to register the land as a town or village green.

**2.32 A site visit was undertaken on 05 January 2017.**

The claimed route was approached via FP118, which leads from Hady Lane to the Primary School.

There is a concrete post fence all the way along the Southern boundary of FP118 to Hady Lane Primary School. There is no gap in the fence at Point A where the application route allegedly joins FP118 but, if one continues approximately 40 metres round the corner to the point where FP118 turns ESE there is a gap to allow entry into the playing field.

The claimed route crosses the grass playing field and bisects a marked out football pitch in a SW direction. There is no walked line across the field though there are two faint trodden lines ENE parallel with FP118.

There is a fence across the route at approximately Point B and one has to divert through the old garage site but there is no obvious way through to the claimed route. For this reason, the southern section of the route from FP139 was approached from the play area, south of the route near Taylor's Crescent.

From the play area there is a walked line to FP139. From FP139 there is a faint trodden line which corresponds with the claimed route from Point C. However, the route soon forks NW and NE; the NE fork corresponds with the claimed route and was followed. The route is overgrown and difficult to follow. It then comes to a fence line. There is a wooden fence and a gap with gate posts at either side.

The only visible trodden line turns easterly at the gate posts and follows the fence line. It is unclear where people would have walked to follow the claimed route through to the playing field.

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

#### **2.34** Aerial imagery taken from Google Earth

Images of the area crossed by the claimed route can be found on Google Earth for the following dates: 31/12/1999, 31/12/2000, 21/06/2006, 26/09/2007, 31/12/2010 and 28/09/2011. On none of those dates is there a noticeably worn route from FP118 across the football pitch to the old garage site. In the 1999 and 2000 images there are two lines of wear from FP118, one to the east and one to the west of the football pitch, but neither corresponds with the claimed route. The 2006 image is very clear and there appears to be a fence along the length of FP118 from Hady Lane to the school, which corroborates the aforementioned reference to making a gap in the concrete fence for the proposed footpath creation agreement. In all of the images there is a clearly worn patch of earth just inside the triangle of land south of the Playing Field and approximately 50 metres west of the claimed route: from this point there are several worn lines which crisscross that area of land, one worn line runs southwest to the edge of the woodland to the same place where the claimed route enters/exits. Throughout the period 1999 – 2011 the only major change in the landscape is the development of a small Travellers site adjacent the old garage site. The worn line mentioned before is less visible in the 2011 image.

## Summary and conclusion

**2.35** 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.

**2.36** Although 14 witnesses claim to have used the route for 20 years or more: two haven't actually given a 'used to' date, so their use could be less than 20 years and they also offer very little other information; two users refer to the route being obstructed by a gate to the playing field which was 'bypassable'; one user refers to DCC fencing off the land 'at some point' so one had to either climb over the fence or divert onto Hady Lane. One user describes her use as, 'to football matches' and also recalls the route being obstructed when DCC took off top soil from the farmer's land and so she only walked as far as the garages. The same user also refers to the farmer keeping insecure fencing and so one could walk through the field except 'when altercations were made'; One user describes their use as from FP139 only as far as the former refuse tip and states that the route was obstructed 'during land fill operations'. The same user was also told by the farmer that it was not a public right of way.

**2.37** A further three users recall being told the route was not a public right of way and eight recall the route being obstructed or diverted during the period prior to 2013, four of whom refer to a locked gate. Climbing over a locked gate or destroying fencing to access land is use by force and not as of right.

**2.38** The plans attached to the UEF appear to have all been completed by the same hand and three routes marked and labelled, including the application route. As such it is not entirely clear which route or routes the users have walked, how often or for how long. The application route crosses a playing field and area of land which has been leased by CBC in order to provide a recreational area specifically for members of the public. It is inconceivable that the public would walk directly across a football pitch during a match and the public must therefore have been required to divert around the pitch on match days.

**2.39** An independent inspector appointed to advise the Council on a town and village green application concluded that use of the land known as the Playing Field was by right and not as of right.

**2.40** 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. The user evidence submitted with this application does not show on a balance of probabilities that there has been uninterrupted use of the claimed route as of right over a 20 year period. The users have provided evidence that there have been challenges to their use, that there have been obstructions to the route and that they have been required to divert from the claimed route. There is also doubt over where the users have walked and where they have joined FP 118, as raised in correspondence which refers to the need to make a gap in the concrete fencing along FP 118. The land crossed by the route is leased to CBC and under the terms of that lease the public have been provided with a recreational area. Therefore their use is by right and not as of right. They are also permitted to use all of the land and so the public will have been able to wander all over the leased area and not just walk one defined route. Some of the descriptions of use in the UEF suggest that at least some of the witnesses may have wandered over the whole land. Therefore, the evidence available to the Council does not meet the requirements of the legislation.

**2.41** In summary, use of the route is not physically possible due to the long-standing concrete fence along FP118, use has been challenged, users have not walked one defined route and use has been by force (breaking down or climbing over fences and locked gates) or by right, not as of right as required by legislation to make an Order to amend the DMS.

**2.42** A finalised copy of this report has been sent to Cllr Blank 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, 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.

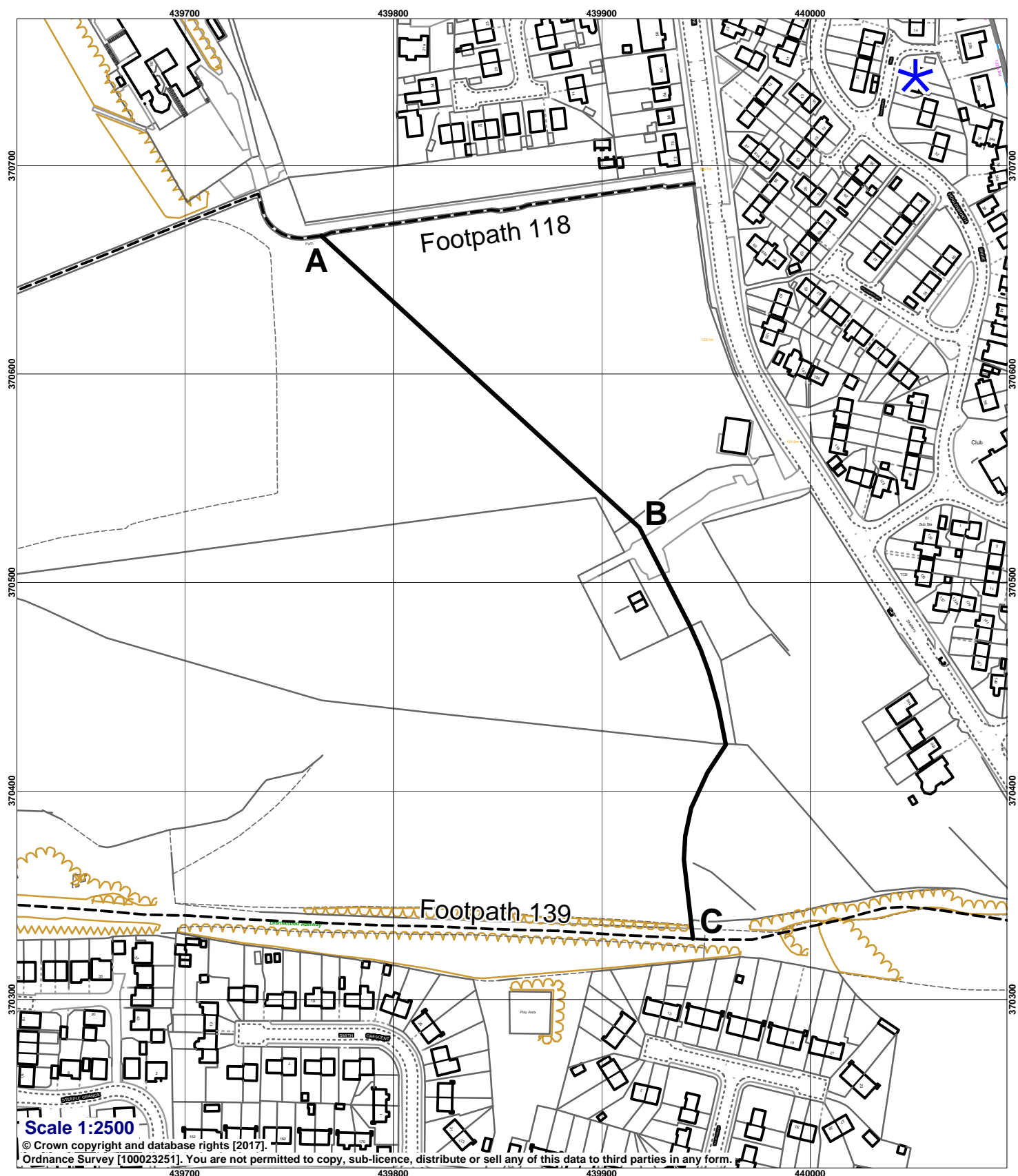
## **4. Background Papers**

**4.1** File held by Legal Services (ref. 61269).

## **5. OFFICER’S RECOMMENDATION**

**5.1** That the Committee resolves to reject the application 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 between Public Footpaths 118 and 139 in Chesterfield as shown on the attached plan.

**Chief Officer**



Ref: TE/BS/X3934/Cttee/2017



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Produced by Public Rights of Way on 15 February 2017

### Wildlife and Countryside Act 1981 s.53

**Claim to add a Footpath from Public  
Footpath No. 139 to Public Footpath  
No. 118 - Chesterfield Parish**

#### Key:

**Claimed Footpath**

**A B C**

**Existing Footpaths**

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