

DERBYSHIRE COUNTY COUNCIL
REGULATORY, LICENSING AND APPEALS COMMITTEE

29 February 2016

Report of the Director of Legal Services

Wildlife and Countryside Act 1981

**Claim to add a Footpath from Woodlands Close to Public Footpath No. 7-
Parish of Melbourne**

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 a public footpath from Woodlands Close to Public Footpath No. 7 in the Parish of Melbourne.

2. Information and Analysis

2.1 On 11 February 2014, Melbourne Footpaths Group ("the Applicant") submitted an application to Derbyshire County Council ("the Council") to add a public footpath to the Definitive Map and Statement, in the Parish of Melbourne. The application is accompanied by twenty-two user evidence forms and photographs of the claimed route.

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

2.3 On 23 December 2014 South Derbyshire County Council granted planning permission to Persimmon Homes for 66 dwellings on land crossed by the claimed route.

User Evidence

2.4 Neither the user evidence submitted, nor the application form, suggests a date that use of the route was brought into question. There is no suggestion in the application or supporting evidence that use of the route has been brought into question by a recent act, or challenge, by a landowner or anyone acting on a landowner's behalf. In considering whether a dedication of the route can be presumed on the basis of user evidence the relevant period of use has been taken to be the 20 year period leading up to the date of receipt of the application, 1994 to 2014 ('the relevant period'). The user evidence submitted in fact spans the years from 1970 to 2014.

2.5 All of the witnesses refer to using the route on foot with one witness also claiming to have used it on pedal cycle. All of the witnesses refer to

seeing other people using the route on foot, with one also seeing people on horseback and five seeing use on pedal cycle.

2.6 Three of the witnesses refer to using the route daily, one daily & weekly, nine weekly, six monthly, two less than monthly and one did not say.

2.7 Two of the witnesses refer to the route having been inaccessible or unavailable before the Woodlands housing estate was built in the mid to late sixties. They refer to the land being market gardening land, with gates and hedges, prior to the construction of the Woodlands estate. Another witness refers to the land being occasionally too muddy; however, none of the remaining witnesses reported it having been blocked or diverted during the relevant period.

2.8 One of the witnesses who referred to the use of the land as a market garden also reported being stopped and turned back when the land was in use for that purpose, and being told by the owners that it was private land, although this witness continued to use the route during the relevant period. None of the remaining witnesses reported being told it is not public or it having gates or stiles. The use of the route during the 1960s and restriction of use during that period is in any event outside the relevant period.

2.9 None of the witnesses reported seeing any notices, working for the owner/occupier or having permission to use the claimed route.

2.10 One witness reported being stopped, 'once or twice but not recently'. That witness is no longer living in the area and officers were unable to speak with her to clarify that comment. None of the remaining witnesses reported being stopped or turned back during the relevant period.

2.11 The description and width of the route appears to have been pre-completed on all but five of the evidence forms, presumably by the applicant. No particular inference is drawn from this, and the witnesses have signed the forms to confirm the truth and accuracy of the information provided. If the width of the route was in doubt then this may limit the weight to be given to the user evidence in this regard.

Consultation

2.12 An informal consultation exercise was carried out between 22 April 2015 and 27 May 2015. Notices were placed on the route and letters were sent to the statutory consultees, landowners and the local elected member, Cllr Linda Chilton.

2.13 Thirty-one people responded to the consultation with twenty-five supporting the claim (fifteen of those had already completed an evidence form), four against, one stating that they have no evidence and one suggesting the route should follow a different alignment.

2.14 Seventeen of the twenty-five people who responded to the consultation in support of the claim responded with emails that had contents suggesting

some collaboration with regard to their responses. They point out that they strongly support the claim on the grounds that it provides a useful link for local people and visitors wishing to connect Derby Road to Main Street, King's Newton. The emails go on to say that the route has been used by dog walkers and people living on the Woodlands to reach the bus stop on Derby Road. They also claim the route is being used by people from the Derby Road/Spinney Hill area to walk their children to school on Packhorse Road. Finally they say that there is strong evidence that the route has been walked for over 30 years without any attempts to prevent access.

2.15 A resident of Woodlands Close emailed the Council expressing concerns that once the building is completed, 'even more people will use this path'. She points out that Woodlands Close is an 'unadopted road the ownership of which is unknown. It has no lighting, pavements or drainage and is in a poor state of repair and is also too narrow for a road'. She also states that, 'this footpath has been used for many years but not on a large scale so the increase in footfall following the completion of the new houses will greatly affect mine and my neighbours properties'. She also raises concerns about private vehicular access.

2.16 Peak and Northern Footpaths Society responded to the consultation to confirm that the society has no evidence concerning the existence of the alleged footpath.

2.17 Three people who live on Melton Avenue, with their gardens backing onto the claimed route, each responded to the consultation by email supporting the claim. One of them points out that they and three of their neighbours have gates onto the path and have been using the path for over 40 years, since the Woodlands estate was built. They all go on to mention that they see others using the path to take children to school or to the scout hut on Packhorse Road, as well as many dog walkers.

2.18 A couple living on the Woodlands emailed the Council stating that they have been using the claimed footpath most days of the week for well over 20 years until it was blocked off by the property developer. The couple state that 'the previous landowner had permitted access for over 40 years and never refused anyone using the path'.

2.19 The Open Spaces Society sent an email to the Council stating that they strongly support the claim, pointing out that it provides a useful link for local people and visitors wishing to connect Derby Road to Packhorse Road.

2.20 A representative of Melbourne Parish Council emailed the County Council stating that they support the claim but suggesting that it should be on a different route due to planning permission granted to Persimmon Homes.

2.21 A resident of The Woodlands, which adjoins Woodlands Close, sent an email detailing his reasons for opposing the claim. He states that there is no intention to allow a public right of way over Woodlands Close by adjoining owners. He also raises concerns about; anti-social behaviour, increase in footfall, no lighting, it being extremely unsafe and attracting undesirable

activity due to the curved nature of the path. He points out that the proposed footpath 'is only used by a handful of dog walkers. The vast majority of locals do not even know the footpath exists.' He finishes by saying that Public Footpath No. 7 takes care of the public rights of way in the area and that the proposed footpath does not provide any local benefit.

2.22 Another resident of Woodlands Close sent three emails to the Council detailing his opposition to the claim. The first email relates to the completed form W.C.A 6, by which the applicant notifies the Council that they have informed the landowner or landowners of the application. This is said to contain out-of-date information. Reference was made to page nine of the Planning Permission dated 23 December 2014, for the development of the land crossed by the claimed route, which comments that the claimed route is private and does not form part of the public highway.

2.23 The second email from this resident makes reference to the conditions attached to the 1970 planning permission, for the construction of the Woodlands Estate, in particular condition 8 which provided that: 'The cul-de-sac serving plots Nos. 60 and 61 shall be replaced by a private drive'. The resident indicates that these plots relate to 3 Woodlands Close and 109 The Woodlands. He states that property deeds show that access over the private drive is granted to houses with frontage, with no other rights of way granted, and that upkeep of this road is by the owner with contribution by the four houses that have right of way. Access to the field is also granted for agricultural vehicles only. This resident expresses concerns on who will have responsibility for maintenance and Woodlands Close not being wide enough to accommodate a footpath.

2.24 The third email from this resident points out that Woodlands Close is an unadopted road and raises concerns about future increased use. A number of potential problems are raised including anti-social behaviour, litter, lack of pavement and parking problems.

2.25 Another resident of The Woodlands sent a letter to the Council by email strongly supporting the claim, stating that the route has been used as a public right of way for more than 20 years with almost 36 years personal usage.

2.26 Derby and South Derbyshire Ramblers sent an email response to the Council stating that they strongly support the claim as it provides a pedestrian link between Derby Road and Packhorse Road.

2.27 The developers of the land, Persimmon Homes, sent an email to the Council indicating their opposition to the claim. This is on the basis that the approved plan does not accommodate the claimed route. However they point out that the scheme accommodates a route through the development for pedestrians/dog walkers. Persimmon Homes made a point that 'there was, and still is no right of way through this private land in this area.'

Documentary Evidence

2.28 The applicant makes no reference to map evidence but the following documents have been considered:

Ordnance Survey Map 1968

The land crossed by the claimed route is shown as fields with a solid line indicating garden boundary for houses on Melton Avenue. No evidence of routes over those fields except for Public Footpath No. 7 which is shown as dashed lines and labelled 'Path'. The Woodlands Estate is not shown on here neither is the claimed route.

Ordnance Survey Map 1982

The land crossed by the claimed route is shown as fields with a solid line indicating garden boundary for houses on Melton Avenue and Woodlands Close. No evidence of routes over those fields except for Public Footpath No. 7 which is shown as dashed line. The Woodlands Estate is shown as well as Public Footpath No. 7. The claimed footpath is not shown.

Ordnance Survey Map 1995 & 1998

The land crossed by the claimed route is shown as fields with a solid line indicating garden boundary for houses on Melton Avenue and Woodlands Close. No evidence of routes over those fields except for Public Footpath No. 7 which is shown as dashed lines and labelled 'Path'. The Woodlands Estate is shown as well as Public Footpath No. 7. The claimed footpath is not shown.

Additional Evidence

2.29 An examination of the Council's List of Streets (the record maintained by the Council as highway authority, in accordance with requirements of the Highways Act 1980) confirms that Woodlands Close is not an adopted (ie. publicly maintainable) highway. No specific evidence has been presented by the applicant as to the status of Woodlands Close, and the 1970 planning permission for the Woodlands estate (referred to at 2.23 above indicates that it was not intended to dedicate that road as a public highway at that time. In the absence of later documentary evidence of dedication consideration has been given to the presumed dedication of Woodlands Close in accordance with the statutory test set out in section 31 of the Highways Act 1980.

2.30 Additional questions were asked of those who had previously completed user evidence forms, the responses to which indicate that most of those users walked over Woodlands Close. Additional questions were sent to twenty-two people, seventeen responses were received and thirteen users confirmed their use of Woodlands Close, with eleven of these users having over 20 years usage of the Woodlands Close and three of them having over 40 years.

Summary and conclusion

2.31 This claim is based entirely on evidence of use and the Council has found no historic evidence of the claimed route. The submission by a resident of Woodlands Close, that the application form has not been correctly

completed due to the inclusion of 'out-of-date information', is not accepted. The land ownership details provided in that form were correct at the date of application, and all affected landowners and others with an interest in the land affected by the claim have had an opportunity to comment on it. There is a further opportunity for representations or objections to be made following the making of an Order.

2.32 The user evidence indicates the use of a route linking Footpath No 7 to Woodlands Close and from Woodlands Close to The Woodlands. There is significant evidence of use of the route, on foot for a period of more than twenty years prior to 2014 with a number of witnesses claiming to have used the route in excess of forty years. 16 users claim twenty or more years usage, 15 of them within the twenty year period under consideration (1994 – 2014) with four of them using the route for a period of twenty years or longer prior to 1994.

2.33 The addition of a public footpath to the Definitive Map and Statement is dependent on there being "evidence (when considered with all other relevant evidence...)...that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist". The evidence of use in this case is consistent with a presumed dedication of the route in accordance with the statutory test set out in section 31 of the Highways Act 1980 (as set out below).

2.34 The evidence of use covers a period in excess of 20 years, up to the date of the application. There are only two references in the user evidence to a challenge to use, one dating back to the mid-1960s, when the land was in use as a market garden and one possibly more recently (although it has not been possible to confirm a date with the user herself) . Presumed dedication relies on uninterrupted use of a route for a period of 20 years, and may be disproved by sufficient evidence that there was no intention during that period to dedicate it. There is no evidence before the Council of any challenge to use of the claimed route, or the continuation of the route over Woodlands, during the period from 1994 to 2014.

2.35 The seventeen emails that had contents suggesting some collaboration with regard to their responses. The emails are not identical although there may have been discussion of the matter, and of the issues likely to be taken into account by the Council. This is not considered to reduce the value of those comments. There is no suggestion that the comments are not made by the named individuals, and on the face of it they support the case for a modification of the definitive map and statement.

2.36 The comments from the couple living on the Woodlands stating that 'the previous landowner had permitted access for over 40 years and never refused anyone using the path' is noted. No other witnesses have suggested that use has been with the permission of a landowner and it is not clear whether the witnesses are referring to permission that was communicated to them, such that their use would not have been 'as of right' (see 3.4 below)

2.37 Many of the points raised in opposition to the claim, in response to the consultation, raise issues that relate to the suitability of the route, potential increase in footfall, anti-social behaviour, dog mess, litter and maintenance issues. The comments of the Parish Council are noted but as the claim made is based on a route used for a 20 year period the County Council's decision must be made on whether the existence of that route has been proven or not. Many representations were received in support of the claimed route.

2.38 The development granted planning permission in 2014 does not accommodate the claimed route. The use of a route over the development land appears to have been considered by the developer and provision was made for a route linking Public Footpath No.7 to Woodlands Close in the development plans. If the Committee approve the making of an order the developer will have to seek a legal diversion of that route if they wish to pursue their development in accordance with the approved plans.

2.39 On balance, the evidence suggests that a right of way subsists over the claimed route, extending over Woodlands Close to its junction with the highway known as The Woodlands.

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 through out 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.

Other Considerations

- 3.11 In preparing this report the relevance of the following factors has been considered: financial, prevention of crime and disorder, equality of opportunity, personnel, environmental, health, property, and transport considerations.

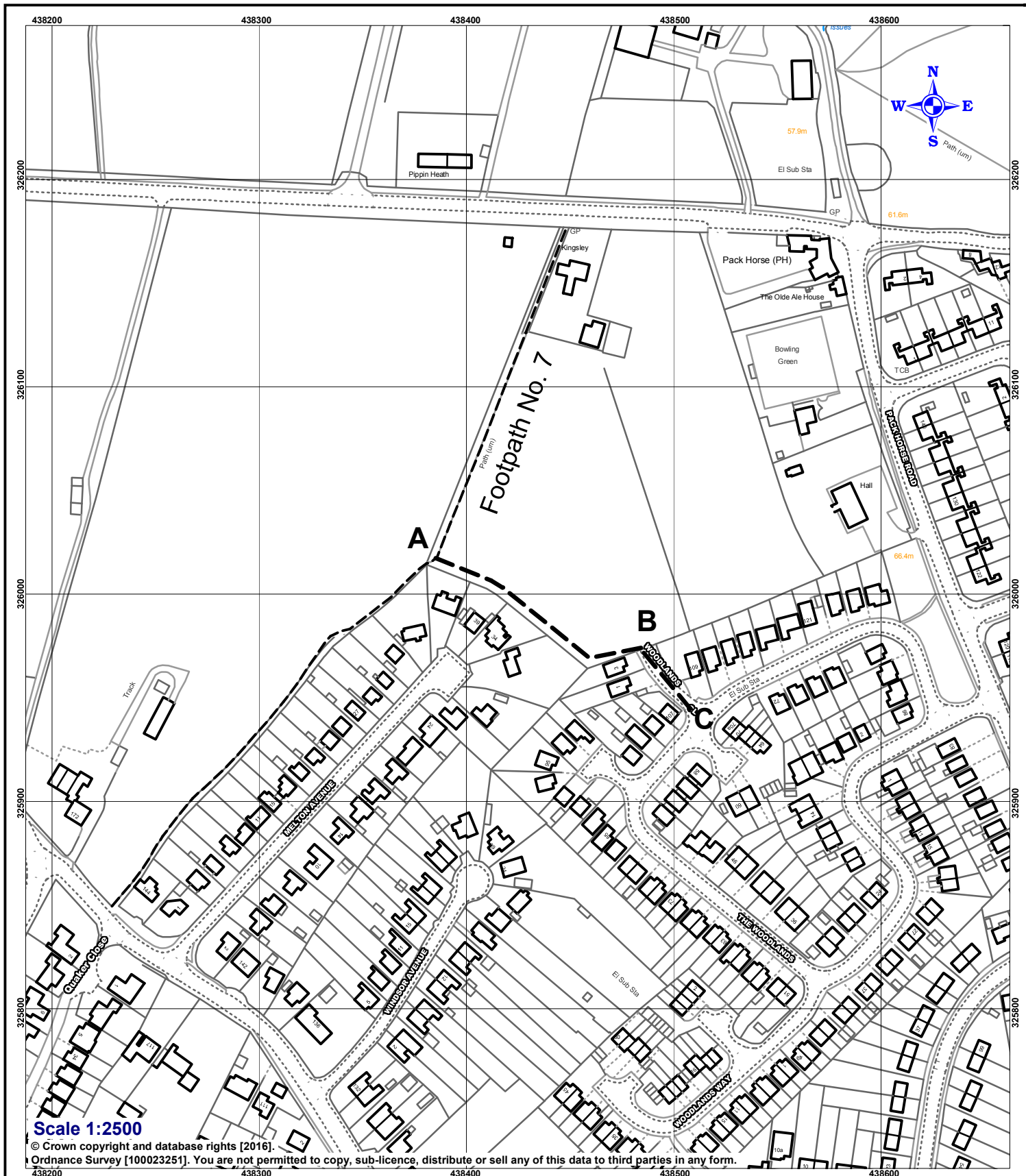
4. Background Papers

File held by Legal Services (ref: 63640).

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 add to the definitive map and statement a footpath from Public Footpath No. 7 to The Woodlands in the Parish of Melbourne as shown between Points A-B-C on the plan attached to this report.

John McElvaney
Director of Legal Services



Ref: PE DC X3953 CTTE 2016



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Wildlife & Countryside Act 1981 Section 53

**Claim to add a Footpath from
Woodlands Close to Public Footpath
No. 7 - Parish of Melbourne**

Key:

Claimed Footpath

Existing Footpath

A-----C

