

**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 between Johnson Drive and Restricted Byway
No. 12 - Parishes of 'Heanor and Loscoe' and 'Aldercar and Langley
Mill'.**

1. Purpose of the Report

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 between Johnson Drive - Parish of Heanor and Loscoe and Restricted Byway No. 12 – Parish of Aldercar and Langley Mill.

2. Information and Analysis

2.1 Judith Wooley ("the Applicant") submitted an application to Derbyshire County Council ("the Council") dated 25 May 2012, to add a public footpath to the Definitive Map and Statement, in the Parishes of 'Heanor and Loscoe' and 'Aldercar and Langley Mill'. The application is accompanied by 20 user evidence forms (UEFs) (one form was submitted by a married couple but was only signed by the husband and the evidence shall be treated as that of one individual).

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

2.3 The claimed route is approximately 470 metres long.

User Evidence

2.4 One of the users refers to an incident circa 2005 when she was 'kicked to the ground' while using the route. She also recalls the route being diverted by some landowners who diverted water from the brook onto the footpath circa 2007. The Applicant recalls it being diverted/blocked due to 'house building and opencast', but does not give dates or details: it may be she is referring to the building of Johnson Drive circa 1980 as the claimed route itself is unaffected by any building in the vicinity. The majority of the user evidence was completed in 2011 and therefore the 20 year period of use under consideration for the purposes of this report shall be; 1991 to 2011.

2.5 Of the 20 UEFs submitted, 19 witnesses offer a description of the route. Of those 19, only six, including the Applicant, offer a description that could obviously correlate with the claimed route. The other descriptions offer insufficient detail to be sure which route is being described; two users describe a route that could be deemed similar to that claimed while the

descriptions by eleven users do not offer any information that indicates use of the claimed route, for example, 'Home and School'. The user who offered no description has not completed any part of the form, though the route is drawn on the attached plan in a similar style to 17 of the others.

2.6 All the forms have a plan attached with the route marked on them, though it would appear that some may have been marked by the same person, or as part of a group as 18 are marked by a repeat-arrowed line; ten are marked in black (one overwritten in pink highlighter pen); five in blue and three in both blue and black. One user has marked the route in a very faint and feathery black line while one has marked the route very clearly by blue dots. Although the drawn lines do not mark exactly the same route, 14 do join onto Johnson Drive, five terminate to the east of Johnson drive and one forks at the southern end – one fork to Johnson Drive and the other to the east. All the routes depict the route running north to south from RB12 off Bailey Brook Drive.

2.7 All but one of the witnesses claim to have used the claimed route on foot during the period under consideration; 8 users claim use for a 20 year period or more, three for 12 years, one each for 11, 9 and 7 years, three for 5 years, two for 1 year and one who failed to state when they have used the route. The user evidence covers the years from 1962 to 2012 with the longest period of use being 37 years as claimed by two users.

2.8 Six witnesses claim to have used the route daily, three between daily and weekly, five weekly, two monthly, two less than monthly and one twice a year. One user does not state the frequency of their use.

2.9 Descriptions of the width of the route vary between one to five metres and 2'6" to six feet. Eleven witnesses failed to offer any indication of the width.

2.10 No users report the presence of gates or stiles on the route.

2.11 One of the users recalls being stopped and told the route was not a public right of way. She wrote, "I had a run in by a Mr ***** who was driving a tractor 6 yrs ago. He put his foot out and kicked me to the ground. I didn't take action against him. As I didn't want any "come back" from the issue". The witness was called on two occasions in December 2015 and messages were left, she was also sent a letter requesting further information which was not replied to. The witness answered a third call and it was agreed to resend her the letter requesting further information. She did not respond to the second letter and therefore it is not possible to know where the challenge took place or the circumstances of that challenge. Furthermore, she has not confirmed which route or routes she has used.

2.12 Two witnesses refer to the route being diverted or obstructed. The Applicant states that, "For the last five years the upper part has been ploughed up and made difficult" and "Part of route was blocked and diverted

due to house building and opencast". The other witness recalls the footpath being damaged four years ago, by water being diverted from the brook by the landowners and also by night time ploughing into the brook. There are no further details of any diversions.

2.13 One witness recalls a notice on the route but offers no details.

Consultation

2.14 An informal consultation exercise was carried out between 15 December 2014 and 19 January 2015. Notices were placed on the route and letters were sent to the statutory consultees, landowners and the local elected members, Cllr Paul Jones and Cllr Celia Cox.

2.15 Following the consultation, correspondence was received from the Peak and Northern Footpaths Society stating they could offer no evidence for or against the claim, Cllr Celia Cox (Member for Heanor Division) stating she has no objection and Futures Housing Group stating, 'I am aware a major redevelopment of this area is being considered and as a result Johnson Drive may be extended and the scheme would naturally include footpaths'.

Documentary Evidence

2.16 2nd Edition Ordnance Survey 1900 1:2500 Sheet 45:4

FPs 139, 51 & 12 are marked on the plan as 'FP' and FP 52 is shown but not labelled. There is nothing to show a route that would correlate with that claimed and neither Johnson Drive nor Marshall Street are shown as built. There is a path, marked by double dotted lines, to a bridge over the railway which would roughly correlate with the starting point of the claimed route but it then leads NE to a nearby building and does not continue further.

2.17 1962 Ordnance Survey 1:2500 SK 4247 / 4347 / 4246 & 4346

FPs 51, 52 & 12 are marked on the plan as 'FP' but there is nothing to show a route that would correlate with that claimed. Johnson Drive is not shown as built and though the eastern end of Marshall Street is shown, the whole road as it stands now, and specifically the stretch that meets with Johnson Drive, has not been built. There is a track leading from Marshall Street to a bridge over the dismantled railway which would roughly correlate with the starting point of the claimed route but it then leads NE to Red Barn Farm as opposed to NW and both ends are enclosed by a solid line. There is also a track heading further south that is not marked as FP which also ends enclosed by a solid line. The area crossed by the claimed path is divided into fields.

2.18 1971 Ordnance Survey 1:2500 SK 4246 & 4346

The area crossed by the claimed route is not shown on this plan but it does show that Johnson Drive has not been built or the western end of Marshall Street. The track heading south from the bridge is no longer shown on the plan and the

area of dismantled railway to the west of the bridge is now labelled as a 'refuse tip'. The track from Marshall Street to the bridge is still shown, enclosed by solid lines.

2.19 1996 Ordnance Survey 1:2500 SK 4247 / 4347

Bottle Brook Drive is now shown on the plan as are other paths. Approximately half the claimed route is shown as a dotted line from Bottle Brook Drive. It does not continue along the claimed route but turns west and continues to FP12. The East to West section is labelled 'path'. Red Barn Farm and the majority of the field boundaries are no longer shown. There is nothing to suggest any walked path from Johnson Drive / Marshall Street.

2.20 2005 Ordnance Survey 1:2500 SK 4247 / 4347 / 4246 & 4346

Marshall Street and Johnson Drive are both shown on the plan as are other paths. A path is shown from Bottle Brook Drive, as on the 1996 plan by a dotted line, heading SW then WSW to FP12. There is nothing to suggest any walked path from Johnson Drive / Marshall Street.

2.21 Heanor Parish Claim 1952

The Parish Claim for Heanor does not record the path as a right of way and neither is it shown on the accompanying plan. Public rights of way 12, 51, 52, 94 (now RB12) and 139 are shown and recorded.

2.22 There have been no statutory declarations made to declare the accepted Rights Of Way on the land crossed by the claimed route.

2.23 From internet research it would seem that the development of Johnson Drive was completed circa 1980.

Additional Evidence

2.24 Internet research has revealed undated satellite imagery which does not show the claimed route but does show alternative routes which join the claimed route further north of Johnson Drive. From the imagery one would assume that people turn either left or right at the end of Johnson Drive before entering the area of land crossed by the claimed route. There are several tracks that lead into, across and around the area. Photographic imagery from the NE end of Johnson Drive shows there are paths that head east and west but no trodden path along the line of that claimed, the line of the claimed route is overgrown and appears to be blocked by shrubs/bushes/trees.

2.25 Site Visit

A site visit was undertaken on 21 December 2015. The claimed route runs NNE from the end of Johnson Drive and curves N to Point B on the attached plan; it then continues NNE to Point C.

At the end of Johnson Drive there is a pathway running E and W but there is no walked route heading Northerly across the grassland. An officer attempted to walk an approximation of the claimed route but it was not possible to see where the claimed route ran. The surface was of natural

earth and the route ran through long grass, bulrushes, brambles and shrubs. It was possible to traverse the area and there were several furrows running through the grass in various directions which could have been caused by people or animals. The whole area was overgrown and only passable by traversing to avoid brambles and shrubbery. There were no standout features and no walked line to record, until some distance N of Johnson Drive at approximately Point B on the attached plan. A walked route was found and followed as far as Bailey Brook Drive. Only then was it determined that this was the claimed route.

Walking N to S there was an obviously walked route. The route was extremely muddy and in places boggy/waterlogged. Along the northern length of the route there were patches where a type of small grade red gravel could be seen through the mud, though whether this had been there for a long time or added because of the muddy nature of the path could not be determined. Although there was a great deal of water on the ground there was no obvious pond as described by one user. The path did cross some large concrete piping as described by another user, through which ran a stream and further S there was a short section where some boards had been laid down, presumably in an attempt to raise the walked line clear of the mud. There was evidence of several other walked paths off this route, running both E and W though most were to the W. The route continued in a SSW direction and finished at a point approximately 55 metres WNW of Point A, at Johnson Drive.

2.26 Further correspondence

A letter was sent out to the majority of the people who had completed UEFs asking them to confirm the route or routes they had used on an attached plan and to provide other details. There were seven responses, only one of whom drew the claimed route. All of those who replied drew other routes than that claimed, though four did draw the northern section of the claimed route. One person drew a route which began at Point A but curved round to the E and then SE to Mansfield Rd.

- One of those who responded recorded her frequency of use as 5 days a week in summer and as weekly in winter. However, the only route she marks across the open land is different to that claimed. She doesn't mark use of the route A to B, though she does mark B to C and then WSW along a different (non-definitive) path. On her UEF, she marked several routes she had used, by a single red line, while the claimed route is marked by an arrowed blue line. She did not mark any of the claimed route in red, which would suggest the claimed route was marked by someone else.
- One user replied and her frequency of use remains as daily for her one year of use within the claim period. However, like the person above she only marks use of part of the claimed route, between B and C.
- Another user replied and his frequency and dates of use remain the same. However, like both the users above he only marks B to C of the claimed route.
- One user returned the plan and had marked several routes on it, including a route from Johnson Drive to Bailey Brook Drive. The drawn route from Johnson Drive runs in a NW then NNE direction to Point B.

In his reply he claims to have used the path (or paths) about once a week from 1995 and mainly in the summer as the ground becomes too wet in winter, a period of 17 years. His initial claimed period of use was recorded as 37 years in total, over different periods in time.

- One user drew a route which begins at Point A and runs in a NNE direction in accordance with the claimed route before curving round to the E and then SE to Mansfield Rd. He does not record use of more than approximately 90 metres of the claimed route.
- One user does mark the claimed route, among others, though her frequency of use for that specific section is unclear as it has increased from, 'about twice a year' on her UEF to, 'once a month' and as, 'a couple of times a week' between 2009 and 2013.
- The final person to respond does not mark any of the claimed route on the attached plan.

2.27 Attempts were made to trace and contact by telephone those witnesses who did not respond to the letter:

- Two witnesses had not provided telephone numbers and although attempts were made they could not be traced
- Two witnesses' numbers were invalid and they could not be traced, one of whom had not completed any part of the UEF other than her personal details (in black) and the plan, which was marked with an arrowed line in a different colour pen
- Three witnesses were telephoned and voicemails were left, to which they did not respond
- One witnesses' phone remained unanswered
- One witness described a very different route than that claimed; one that did not sound like it crossed the area of 'wasteland' at all. When asked if she had ever walked up Johnson Drive and across to Bailey Brook Drive, she stated that she had never walked anywhere near there.
- One witness described the route he had used very clearly but it was a completely different route to that claimed. He described a route from the junction of Mansfield Road and Marshall Street, along FP54 to Greenacre Avenue, then along FP146, FP4, RB12 & FP5 to Bailey Brook Drive.
- Another witness spoke briefly on two occasions to confirm the nature of the call and then agreed to call back the following day. He was called again and he suggested that we spoke with the applicant as 'it was her thing really' and when told it was details of his use that was required, he questioned how his phone number had been obtained. He offered no details of his use and stated that he was too busy to talk about it.

2.28 There is a current planning application with Amber Valley Borough Council for a major housing development, including provision of a route connecting Johnson Drive and Bailey Brook Drive, on the area of land crossed by the claimed route. There was knowledge of the proposed development at the time of the claim and there was no objection raised by the developers. However, Futures Housing Group did state that the scheme would include rights of way. The plans for the development do contain various rights of way and there is a proposed 'vehicular access point' linking to a 'footway/cycleway' that would roughly correlate with the claimed route.

Summary and conclusion

2.29 The test which has to be applied when considering the adding of a route to the Definitive Map and Statement under s53(3)(c)(i) is whether there is sufficient evidence to show 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.

2.30 The claimed route is not shown on any of the historical evidence considered during the investigation into the claim. The northern section of the route is shown on OS maps from 1996 onwards but turns west to join FP12 and before Johnson Drive was built circa 1980, there would be little reason for people to have used the southern section of the claimed route.

2.31 No historical evidence has been found that would suggest the route has acquired any rights and so the Council must rely entirely on the user evidence submitted and the additional evidence obtained during the investigation.

2.32 There has been no objection to the claim and nobody responded to the consultation in support of the claim.

2.33 No witnesses have referred in their user evidence to gates or stiles and none have described any notices.

2.34 Fourteen witnesses claim to have used the route on a more regular basis than monthly.

2.35 The user evidence shows that the route has been used by people since the building of Johnson Drive circa 1980 but, the user evidence is inconsistent in where the route meets the disused railway line adjacent Johnson Drive.

2.36 The witnesses were written to and asked to confirm the routes they had used. The majority (85.5%) of those who replied had not used the claimed route from Johnson Drive, as depicted on their UEF. The additional evidence would support an assumption that the routes drawn on the plans attached to the UEFs were not specific to the individuals' use and that the majority may have been drawn by one person or as part of a group. The site visit found that there was no obvious walked route from Johnson Drive and that there were many tracks on that area of land, leading in various directions. Taking the additional information into account, it would be fair to assume that the information on the UEF relates to use of the area as a whole and not the claimed route specifically. This is supported by the presence of many tracks on the land that would suggest that the public have wandered all over the area and not used one specific route from Johnson Drive to RB12.

2.37 Evidence of one challenge to use circa 2005 was provided but this would not amount to a challenge 'to the general public' and no details have been given as to the location or circumstances. However, in conjunction with

the evidence that the route has been diverted, obstructed and damaged by the landowner since approximately the same time, it could be concluded that since 2005, the landowner has made clear, a lack of intention to dedicate the route as a public right of way. If 2005 were taken to be the date when the route was brought into question (resulting in the period under consideration being 1985-2005) then there would be only four users claiming 20 years use, one of whom has not marked any of the claimed route in his additional evidence, one who has confirmed she has never used the claimed route at all, one who cannot be traced and one who has not used the exact line of the claimed route, but something close. His use was originally recorded at 37 years, however, in his additional evidence he records use as from 1995, which would amount to only ten years use.

2.38 Although Johnson Drive was not built till circa 1980, there are two users who claim 37 years use, one from 1974 and the other from 1962. The user who claimed use from 1962 confirmed in his additional evidence that he had used a slightly different route, and only from 1995. Johnson Drive was not built and a section of the dismantled railway adjacent Point A on the plan was a 'refuse tip', from some time before 1971 and this would suggest that these two users may have been describing use of a different route(s), for part if not necessarily all of the period they have given evidence for. Two other users refer to other routes in their evidence; one stating, "Great short cut seeing as they have built over the other one' and the Applicant who states, "Over the years it was used to replace the original one to enable people to access the remains of 78". This further adds to the confusion of where has been walked as FP 78 is some 340 metres to the east of the claimed route.

2.39 There is evidence of a lack of intention to dedicate a public right of way since 2005 and there is insufficient evidence to raise a presumption of dedication that would satisfy the requirements of s31 of the Highways Act 1980.

2.40 Considering the evidence available and the lack of any evidence of an act of dedication or intention on the part of the landowners, it cannot be considered that the claimed route has been dedicated at common law.

2.41 Whilst there is evidence to show that the claimed route has been used, there is doubt over where users have walked. Although paths in the area have been used by local people, only four of those claiming 20 years use describe the route they have used as that claimed; one being the Applicant, one who cannot be traced in order to confirm she has used the claimed route and one who has replied confirming only ten years use of several routes, including one close to that claimed.

2.42 Of the 18 witnesses written to, only seven have replied and all have recorded other routes than that claimed. In the absence of any stronger evidence and confirmation of individuals' use of the claimed route, it cannot be concluded that the route is reasonably alleged to subsist.

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 of 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 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 1980, 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, 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.

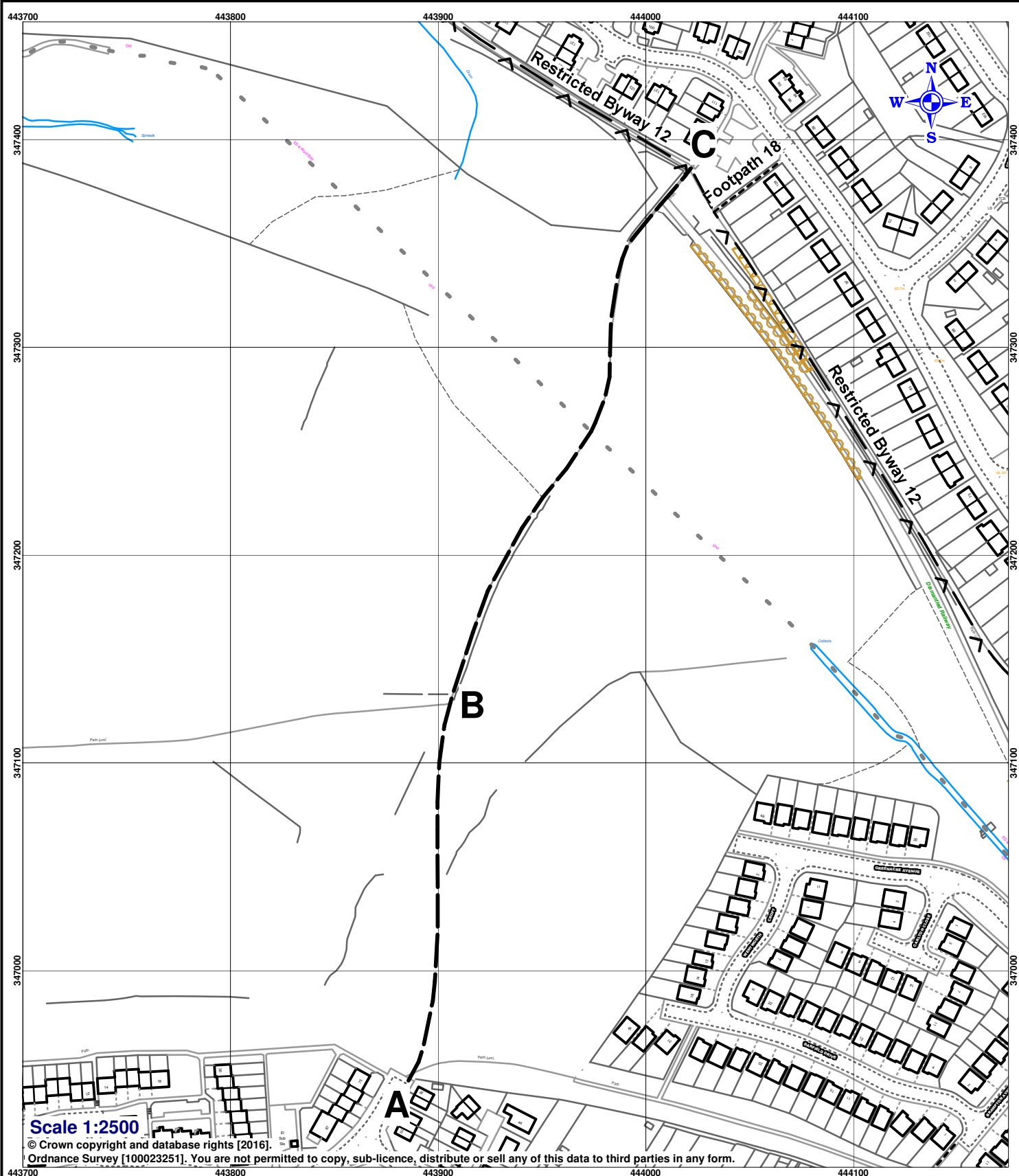
4. Background Papers

File held by Legal Services (ref. 57535).

5. OFFICER'S RECOMMENDATION

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 public footpath in the Parishes of 'Heanor and Loscoe' and 'Aldercar and Langley Mill' from Point A to Point C on the attached plan.

Chief Officer



Ref: TE/HW/X3878/Ctte/2016



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Wildlife & Countryside Act 1981 Section 53

Claim to add a Footpath between Johnson Drive and Restricted Byway No. 12 - Parishes of 'Heanor and Loscoe' and 'Aldercar and Langley Mill'.

Key:	Claimed Footpath	— — — — —
	Existing Footpaths	- - - - -
	Restricted Byway	— — — — —
	Parish Boundary	- - - - -

