

DERBYSHIRE COUNTY COUNCIL
REGULATORY LICENSING AND APPEALS COMMITTEE

29 October 2018

Report of the Director of Legal Services

Application to record Road Used as a Public Path (now Restricted Byway) No. 69 in the parish of Barlow, continuing in Barlow parish as a non-classified highway called Johnnnygate Lane, on the Definitive Map and Statement as a Byway Open to all Traffic

1. Purpose of the Report

To enable members to determine an application to record the above route in Barlow parish, known as Johnnnygate Lane, on the Definitive Map and Statement as a Byway Open to all Traffic.

2. Information and Analysis

An application dated 20 January 2006 was received from Mr Neil Costello on behalf of the Trail Riders Fellowship to record the above route known as Johnnnygate Lane, heading north eastwards from the junction with Far Lane at Moorhall towards the junction with the B6051, as a Byway Open to all Traffic on the Definitive Map and Statement. The application was supported by a plan showing the claimed route and a list of documents, which the applicant stated provided evidence that the route should be upgraded.

A plan showing the claimed route is attached to this report.

2.1 Documentary Evidence

Parliamentary Enclosure Evidence

The south western section of this through-route, the entire length of which is these days known as Johnnnygate Lane, is shown on the 1820 Barlow Enclosure plan and is set out in the accompanying Barlow Enclosure Award (also dated 1820) as Hollin Wood Road. The description in the Award is as follows;

“One other Public Carriage Road called Hollin Wood Road of the breadth of thirty feet from the west end of Hollinwood Lane in a westerly direction along the bottom of Ridding Bank to Moor Hall”

A short stretch of the same through-route at its north eastern end also fell within the scope of the enclosure process and is set out in the Award as follows;

One other Public Carriage Road called Jonny Gate Road of the breadth of thirty feet from the north east end of Jonny Gate Lane in a north eastwardly direction on the west side of Mire Burn Common to the Brook”

Definitive Map Evidence

In the 1950s, when public rights of way were being claimed for inclusion on the draft definitive map and statement, Johnnnygate Lane was not claimed as a right of way. However, the entire through-route was identified on the survey material as a publicly maintainable highway, and in fact public rights of way were claimed which connected with the highway, demonstrating that the route was accepted as being public.

It seems likely that, as has been found in many similar cases, because the route was already recorded as a highway on Council records, it was not thought necessary to also include it on the definitive map and statement.

Following the publication of the draft map and statement, an objection to the omission of the unsealed (i.e. non-tarmac) part of this through-route, i.e. the section lying to the south and east of Barlow Woodseats and Woodseats Hall Farm, was received and on 7th January 1964 the Council's Rights of Way Sub-Committee met to decide on this and other similar matters.

The Committee report produced at the time, which was signed off by 'R.N. Hutchins Solicitor', outlined the information taken into account when deciding whether the route ought to be recommended for inclusion in the definitive and statement: The principal piece of evidence was the fact of the route's setting out as a public carriage road in the relevant enclosure award.

The report also stated that; "There was some evidence of user in many years past by the ordinary traffic of the neighbourhood. There was evidence of more recent user for motor trials including motor cycle trials"

The report's conclusion on the evidence was that;

"In view of the documentary evidence of an Enclosure Award which has statutory effect, this way should be classified as a carriage road
bridleway"

At that time any public carriage road that was being used mainly by walkers and/or horse riders qualified for inclusion on the definitive map and statement as a Road Used as Public Path (RUPP). Such routes were often described either as 'carriage road used mainly as a footpath' (CRF) or 'carriage road used mainly as a bridleway' (CRB), depending on the balance of user.

The result was that as well as being shown on the Council's highway maintenance records as publicly maintainable highway, part of Johnnygate Lane became recorded on the definitive map and statement as Barlow RUPP No. 69.

Site survey information

The north eastern half of this through-route is a good tarmac road which serves several properties. To the south east of Barlow Woodseats and Woodseats Hall Farm the highway becomes a roughly metalled track and continues in this way to its junction with Far Lane near Moorhall.

Analysis and Conclusion

The fact that part of the through-route was dealt with as a public carriage road at the time of Parliamentary Enclosure provides very strong evidence for the existence of such rights, not just for the parts of the route subject to that specific process, but for the entire length of the through-route.

The route's treatment as part of the process of producing the definitive map and statement, which started with the National Parks and Access to the Countryside Act 1949 and continues to this day, reinforces the notion that this was a route which was considered to be a vehicular highway, part of which had declined in importance and was being used mainly by walkers and horse riders.

The legal definition of a RUPP had always been problematic because strictly speaking it left unclear whether public vehicular rights always existed over such routes. In practice many RUPPs turned out to carry lesser highway rights, e.g. of bridleway status.

The Countryside and Rights of Way Act 2000 (Sections 47 to 52) provided for the blanket reclassification of all remaining RUPPs to the newly created status of 'restricted byway'. Restricted byways (or RBs) are defined as carrying a right of way on foot, on horseback or leading a horse, and for vehicles other than mechanically propelled vehicles. In other words, such routes are open to all traffic except public motor vehicular traffic.

As referred to below (under 'Legal and Human Rights Considerations') the provisions of the Natural Environment and Rural Communities Act 2006 ('the NERC Act') have now extinguished public motor vehicle rights over routes recorded as restricted byways and even, as in the case with this particular route, where public carriage road rights can be shown to have existed, such routes cannot be recorded to Byway Open to All Traffic (BOAT) status.

There are certain exceptions to the extinguishment of public motor vehicle rights, e.g. where the route concerned is one over which the main lawful use by the public during the 5 year period ending on 2nd May 2006 was use by the public with mechanically propelled vehicles (motor vehicles), however none of

the exceptions have been found to apply with respect to the part of the route recorded as restricted byway, i.e. Barlow RUPP No. 69.

The section of the through-route which is not currently recorded as a public right of way, i.e. the north eastern half of the route, does fall into at least one of the exceptions to extinguishment (Section 67(2)(b) – see below under ‘Legal and Human Rights Considerations’) because, while it is currently not recorded as a right of way on the definitive map and statement, it is shown on the County Council’s list of streets.

This means that any public vehicular rights existing over that section will be excepted from the NERC Act extinguishment provisions and that, providing that the route satisfies the legal definition of a BOAT (see below under ‘Legal and Human Rights Considerations’), it can be recorded on the definitive map and statement as such.

Historically the entire through-route would probably have been capable of being used by the ordinary vehicular traffic of the neighbourhood. Whilst that is no longer possible (s34 of the Road Traffic Act 1988 makes it an offence to drive a mechanically propelled vehicle without lawful authority on a restricted byway, as well as a footpath and bridleway) the section of the route excepted from the NERC Act extinguishment provisions is nonetheless a good tarmac road used frequently by motorists, primarily in the course of reaching properties accessed off the public carriage road.

A BOAT is defined in law as being a carriageway, and thus a right of way for vehicular traffic, but one which is used mainly for the purposes for which footpaths and bridleways are used, e.g. by walkers and horse riders. Having conducted a site survey of the route it appears that this ‘excepted’ part of Johnnygate Lane is probably used at least as much by motorists in the course of accessing property as it is by walkers and horse riders and therefore does not qualify for inclusion on the definitive map and statement as a BOAT.

Therefore, having investigated the BOAT claim and found that the through-route is an historic public carriage road, it is nevertheless considered that the claim of BOAT status must be rejected on the grounds a) that such rights have been extinguished over the restricted byway section and b) that the remaining section of the route is a public carriage road of a type that does not belong on the definitive map and statement as a BOAT.

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 66 of the Wildlife and Countryside Act 1981 defines a Byway Open to All Traffic (BOAT) as;

“...a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is use by the public mainly for the purpose for which footpaths and bridleways are so used...”

- 3.5 The Countryside and Rights of Way Act 2000 (Section 48(4)) defines a restricted byway as a right of way on foot, on horseback or leading a horse and for vehicles other than mechanically propelled vehicles, with or without a right to drive animals of any description along the highway.

Section 50 of the Countryside and Rights of Way Act 2000 states that; “Any owner or lessee of premises adjoining or adjacent to a relevant highway shall, so far as is necessary for the reasonable enjoyment and occupation of the premises, have a right of way for vehicular and all other kinds of traffic over the relevant highway”

This means that people relying on a restricted byway for access to premises will retain a private right of vehicular access.

- 3.6 Section 67(1) of the Natural Environment and Rural Communities Act 2006 (‘the NERC Act’) extinguishes an existing public right of way for mechanically propelled vehicles (broadly speaking motor vehicles) over ways that, immediately before commencement of the NERC Act on 2nd May 2006, were either not shown in a definitive map and statement or were recorded only to footpath, bridleway or restricted byway status.

- 3.7 Subsection 67(2) contains several exceptions to the above extinguishment provisions including where:

“(a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement [of the NERC Act] was use for mechanically propelled vehicles.

(b) Immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to

be kept under Section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense).”

Other Considerations

- 3.11 In preparing this report the relevance of the following factors has been considered: financial, social value, prevention of crime and disorder, equality of opportunity, human rights, personnel, environmental, health, property, and transport considerations.
- 3.12 None of these factors are considered to be relevant for the purpose of this report.

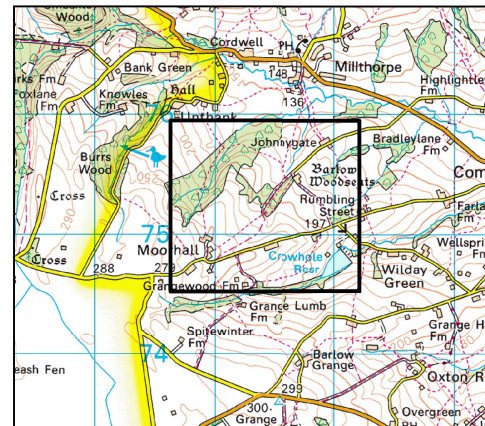
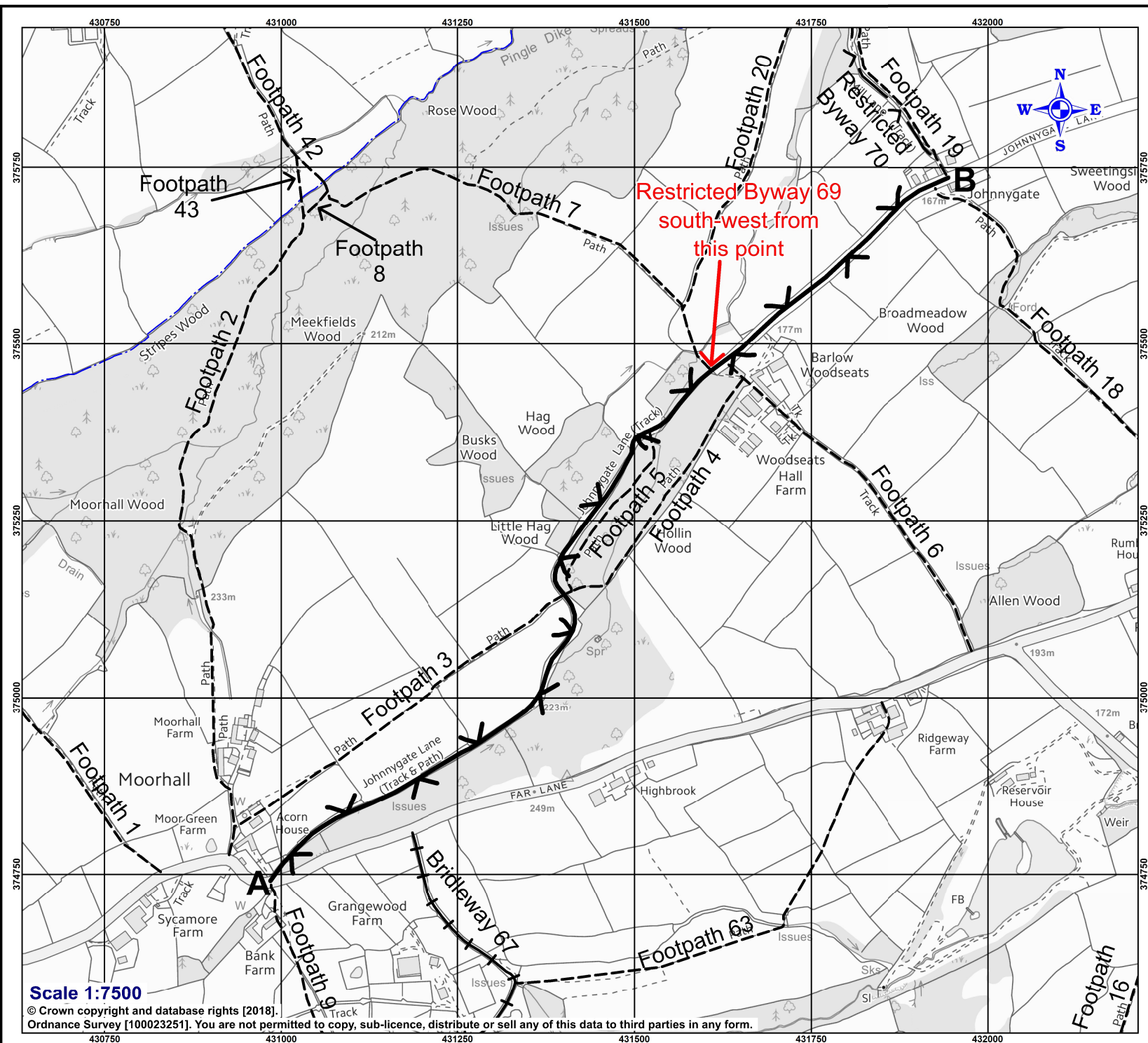
4. Background Papers

Held in Legal Services on file number 36053.

5. OFFICER'S RECOMMENDATION

To reject the application to record RUPP (now Restricted Byway) No. 69 in the parish of Barlow, continuing in Barlow parish as non-classified highway called Johnnygate Lane, to a Byway Open to all Traffic

Janie Berry
Director of Legal Services



Wildlife and Countryside Act 1981,
Section 53

**Claim to record Barlow Restricted
Byway No. 69 and Part of
Non-classified Highway called
Johnnygate Lane as a
Byway Open to All Traffic**

Key:

Route claimed as Byway Open to All Traffic	
Existing Footpath	
Existing Bridleway	
Existing Restricted Byway	
Parish Boundary	

Ref: TE/LF/X3232/Cttee/2018

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