

**DERBYSHIRE COUNTY COUNCIL**  
**REGULATORY LICENSING AND APPEALS COMMITTEE**

**29 October 2018**

**Report of the Director of Legal Services**

**Application to record Roads Used as Public Paths (now Restricted Byways) Nos. 71 in the parish of Barlow and 72 in the parish of Brampton, continuing in Brampton parish as a non-classified highway called Common 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, known as Mellor Lane in Barlow and Common Lane in Brampton, on the definitive map and statement as a Byway Open to all Traffic.

**2. Information and Analysis**

An application dated 25 January 2006 was received from Mr P K Allt to record the above route, leading southwards from the village of Barlow to Cutthorpe, 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 southern section of this through-route, in Brampton parish, is shown on the 1831 Brampton Enclosure plan and is set out in the accompanying Brampton Enclosure Award (also dated 1831) as Barlow Road. The description in the Award is as follows;

“One other Public Carriage Road No 6 on the said map from the south end of a lane in Barlow and proceeding in a southwardly direction over the westwardly side of Cutthorpe Common to and into the Turnpike Road leading from Four Lane Ends to Grange Hill at or near Cutthorpe and the said last mentioned Public Carriage Road is to be hereafter called ‘The Barlow Road’

The northern section (known as Mellor Lane) is shown on the plan accompanying the 1820 Barlow Enclosure Award but, as it falls outside the geographical scope of the enclosure process in that parish, it is not set out in the Award.

Nevertheless, the route is depicted in exactly the same manner as other roads, including known public carriage roads.

### Definitive Map Evidence

In the 1950s, when public rights of way were being claimed for inclusion on the draft definitive map and statement, neither the northern part of this through-route (Mellor Lane), nor the southern section (Common Lane), were claimed for inclusion.

Both the Barlow and Brampton sections of the through-route were identified on the survey material as 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. Mellor Lane in Barlow and the short unsealed section immediately south of Sud Brook, was received and on 7<sup>th</sup> 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 map 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 that in years past this lane had been used for the ordinary traffic of the neighbourhood. In recent years it had been used for motor trials, including motor cycle trials"

The report's conclusion on the evidence was that;

"In view of the Awards which have statutory effect, this 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, Mellor Lane became recorded on the definitive map and statement as Barlow RUPP No. 71 and the unsealed section of Common Lane immediately south of Sud Brook became recorded on the map and statement as Brampton RUPP No. 72.

### Site survey information

At the Barlow end, Mellor Lane is initially a tarmac route serving a property at the Wilkin Hill junction but soon becomes a roughly metalled track proceeding southwards to the parish boundary at Sud Brook. The roughly metalled character of the route continues in Brampton parish for a short distance before becoming a reasonably good tarmac road serving a number of properties. The tarmac section of the road in Brampton parish is known as Common Lane and it continues southwards like this to its junction with Main Road, Cutthorpe.

### 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 extremely strong evidence for the existence of such rights, not just for the part of the route subject to that specific process, but also for its continuation in Barlow parish.

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 2<sup>nd</sup> 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. 71 and Brampton RUPP No. 72.

The section of the through-route known as Common Lane in Brampton parish 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 Common Lane section of the route 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 Common 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 Common Lane 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.

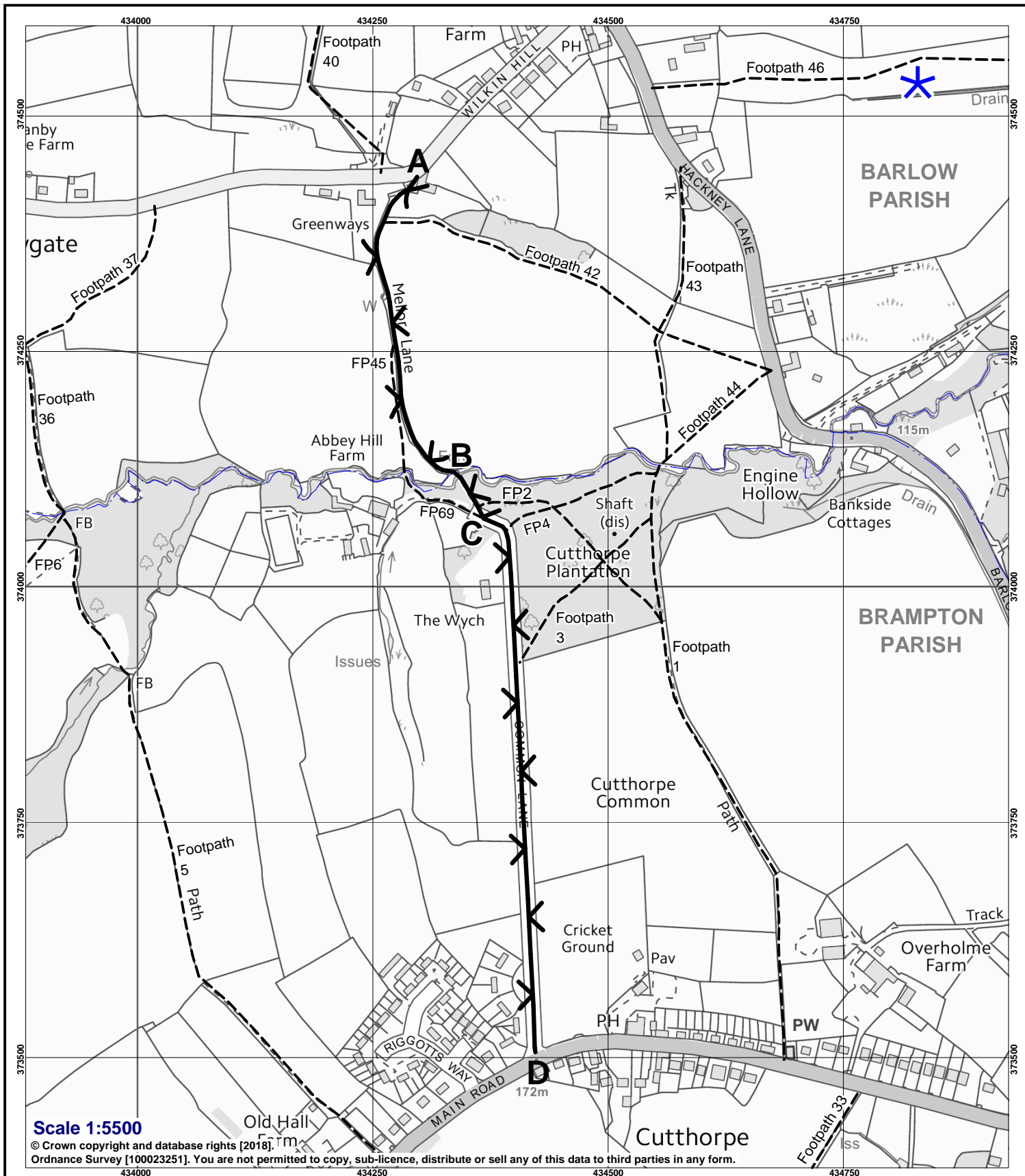
## **4. Background Papers**

Held in Legal Services on file number 36047.

## **5. OFFICER’S RECOMMENDATION**

To reject the application to record RUPPs (now Restricted Byways) Nos. 71 in the parish of Barlow and 72 in the parish of Brampton, continuing in Brampton parish as non-classified highway called Common Lane, to a Byway Open to all Traffic

**Janie Berry**  
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 Date: 15 October 2018



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**Wildlife and Countryside Act 1981, Section 53**  
**Claim to record Barlow Restricted Byway No. 71,**  
**Brampton Restricted Byway No. 72 and**  
**Non-classified Highway called Common Lane**  
**as a Byway Open to All Traffic**

**Key:** Route claimed as Byway  
 Open to All Traffic  
 (A-B) Barlow Restricted Byway No. 71  
 (B-C) Brampton Restricted Byway No. 72  
 (C-D) Non-classified highway  
 Existing Footpath  
 Parish Boundary

