

DERBYSHIRE COUNTY COUNCIL
REGULATORY LICENSING AND APPEALS COMMITTEE

29 October 2018

Report of the Director of Legal Services

Wildlife and Countryside Act 1981
Claim to add a footpath from Moor Lane to Public Footpath No. 19 –
Parish of Kirk Ireton

1. Purpose of the Report

To enable members to determine an application to amend the Definitive Map and Statement for Derbyshire by adding to them a footpath from Moor Lane to Public Footpath No. 19 in the Parish of Kirk Ireton.

2. Information and Analysis

2.1 Details of the application

An application was received from Mr David Williams dated 07 March 2016 to add a footpath from Moor Lane to Public Footpath No.19 in the Parish of Kirk Ireton to the Definitive Map and Statement. The application was supported by a plan showing the claimed route and 12 User Evidence Forms.

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

2.2 User Evidence

There is no evidence of any specific action that has called the use of the route into question, it is therefore considered that it is the application that has brought the status of the route into question for the purposes of s31(2) Highways Act 1980. Only evidence and events prior to 2016 have been considered in assessing the application and therefore the relevant period is 1996-2016.

All 12 of the user evidence forms had plans attached with the route as used marked on, these all appear to be in identical red ink and therefore suggest that the route was marked on the plans prior to completion of the evidence forms by the user.

All of the 12 users claim to have used the route on foot, two for the entire 20 years of the relevant period, two users claimed to have used the route in excess of 20 years but not for the entire relevant period, seven of the users claim to have used the route for between 15 to 20 years within the relevant

period, one user claims to have used the route for six years within the relevant period and two users have not provided this information.

Two users claim to have used the route on a daily to weekly basis, three claim to have used the route on a monthly basis and seven claim to have used the route on a less than monthly basis.

Six of the users claim to have witnessed others using the route on foot, five of the witnesses claim to have witnessed others using the route on foot and by motor vehicle, and one of the users has not answered the question.

Of the 12 users, eight have stated that they do not recall any gates or stiles on the route, two users refer to stiles on the adjoining public footpath and two users have not answered the question.

Of the 12 users, one user has referred to there being notices at “each end” but does not provide a location or any details of the wording, nine of the users do not recall seeing any signs or notices on the claimed route and two of the users have not answered the question.

Of the 12 users, ten cannot recall the route ever being diverted or blocked and have not been told the route is not a public right of way or been given permission to be there. Two of the users have not answered the question.

One user stated “the track has been used consistently by walkers and villagers as part of the footpath network”. One user has stated they “have always assumed the track, as defined, was a public right of way”.

2.3 Consultation

An informal consultation was carried out between 02 May 2017 and 06 June 2017. Notices were placed at either end of the route at the beginning of the consultation period and letters were sent out to the statutory consultees, landowners and the elected member Councillor Irene Ratcliffe.

The consultees were asked to provide any evidence or information relating to the history or the use of the claimed route which they considered may be relevant to the determination of the application.

Responses received in support of the application

An e-mail was received from Derbyshire Dales Group of the Ramblers dated 03 May 2017 stating that they support the claim but did not submit any further information or evidence.

An e-mail was received from the applicant dated 21 May 2018 advising that a further evidence form had been completed by Councillor Morton supporting the application, this was received after the submission date. The applicant also advised that the proposed path is used by runners in the village children’s “Fell Races”.

An e-mail was received from Kirk Ireton Parish Council informing Derbyshire County Council that it supports the application but did not submit any further information or evidence.

Responses received in opposition to the application

Two letters were received in opposition to the application, the basis for which is summarised below:

Objector One

- Refers to a letter dated 01 December 2016 in relation to an application to “upgrade” the farm track to a “byway open to all traffic” and cannot believe that this has risen again following the previous explanation of why they believe that this should not have been proposed.
- Historically the track was made for access to the farmworker’s cottage and is now the owners and any subsequent owners have responsibility for the maintenance of the track and the boundaries either side of the track.
- The track is regularly and freely used by walkers with which there is no problem either now or in the future, however they do not agree to it being made a right of way due to the future impact of unwelcome difficulties and responsibilities in relation to this.
- Raises concerns with regards to their usage of the path in relation to farming activities and maintenance as they are currently able to close the track at will to facilitate this.
- They already have a footpath crossing one of the fields and have experienced problems with persons assuming responsibility for the maintenance of the path, without their consent or knowledge, by cutting back hedges near the stile to such an extent that there was a danger of livestock escaping. They do not wish to be responsible for the maintenance of another footpath nor do they wish to be liable should anyone fall or injure themselves.
- Strongly objects to the proposal of their track becoming a right of way and had someone taken the time to consult with them, then they could have examined the idea of a concessional footpath.

Objector Two

- Refers to a letter dated 01 December 2016 in relation to an application to “upgrade” the farm track to a “byway open to all traffic” and cannot believe that this has risen again following the previous explanation of why they believe that this should not have been proposed.
- Historically the track was made for access to the farmworker’s cottage and is now the owners and any subsequent owners have responsibility for the maintenance of the track and the boundaries either side of the track.
- The track is regularly and freely used by walkers with which there is no problem either now or in the future, however they do not agree to it being made a right of way due to the future impact of unwelcome difficulties and responsibilities in relation to this.
- They already have a footpath crossing through one of their fields and do not want to add to these potential difficulties.
- Strongly objects to the proposal of their track becoming a right of way and had someone taken the time to consult with them, then they could have examined the idea of a concessional footpath.

2.4 Documentary Evidence

Kirk Ireton Enclosure Award 1807

The Kirk Ireton Enclosure Award 1807 shows the claimed route and describes it as Twells Road carrying private carriage road rights. This suggests that the claimed route historically carried private vehicular access but that no public rights existed.

Definitive Map Evidence

Following the National Parks and Access to the Countryside Act 1949 which introduced the formal recording of public rights of way on the definitive maps and statements, surveys were carried out throughout England and Wales in order to ascertain the rights of way network. The claimed route is not identified on the Parish Claim for Kirk Ireton at the time of the original rights of way survey in the 1950’s. Kirk Ireton Public Footpath No.s 19, 25 and 25, which join the claimed route, were claimed as part of this survey and were subsequently recorded on the definitive map and statement. This suggests that there was no local knowledge of the claimed route existing as a right of way previously.

2.5 Additional Information

Site Visit

A site visit of the claimed route was carried out on Thursday 11 October 2018. The claimed route is a track which clearly provides vehicular access to the properties along the route.

The route has a hard constructed surface and is bordered either side by fencing and hedgerow, the approximate width of the claimed route is three metres.

2.6 Summary and Conclusion

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 that on a balance of probabilities? This test is satisfied by showing clear 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.

The Council's declaration register has been checked and no declarations have been made under s31(6) Highways Act 1980 have been submitted that would affect the claim.

Evidence has been submitted in support of the application that the general public have enjoyed usage of the route without force, secrecy or permission for in excess of 20 years.

The track over which the claimed route runs is unregistered although the objectors refer to the route as "our track". Within their objection they have acknowledged that "the track is regularly and freely used by walkers with which there is no problem either now or in the future" and although they have also stated that they object to the route being a public right of way there is no evidence to show that it was sufficiently conveyed to the public that there was no intention not to dedicate the route as a public right of way under s31(1) Highways Act 1980.

Under s53(3)(c)(i) Wildlife and Countryside Act 1981 the council is obliged to make a Modification Order as soon as reasonably practicable on 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.

In accordance with this duty the Council are obliged to investigate the application received. When considering what rights exist the Council can only

take into account evidence and information regarding historical documentary evidence and usage, therefore issues raised with regards to maintenance of the route, possible difficulties with regards to usage of the track, future impact, unwelcome difficulties, responsibilities and liabilities cannot be taken into account when determining the application.

Evidence has been received from users stating that they have used the claimed route as of right for in excess of 20 years, this usage has also been confirmed in writing by the landowners. Although the landowners have advised that it was never their intention to dedicate the route as a right of way there is no evidence to suggest that this has been sufficiently conveyed to the public. Therefore it is concluded that the public were using the route as of right and on a balance of probabilities it is believed that a right of way subsists.

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, 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.

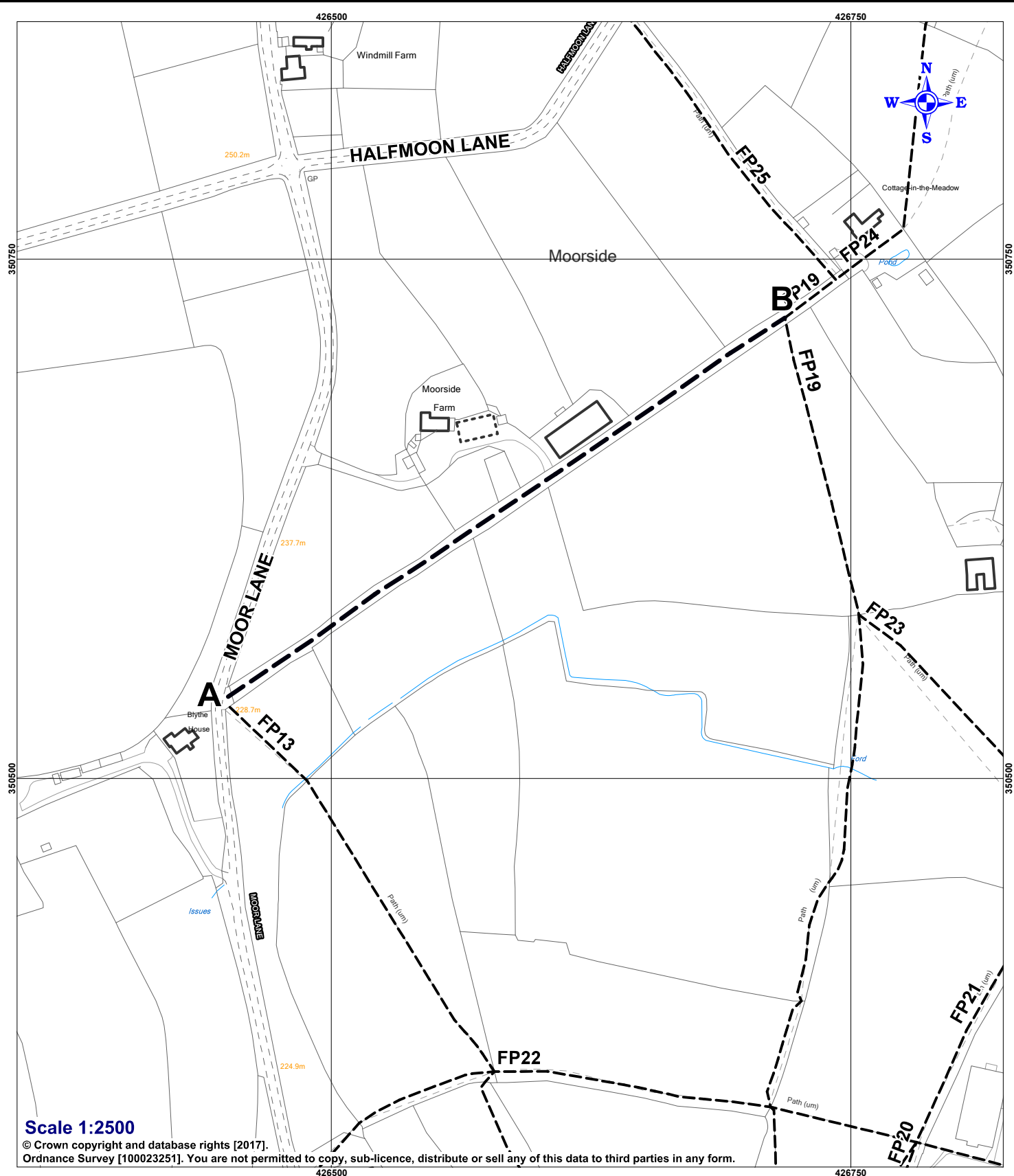
4. Background Papers

File held in Legal Services under reference number 68153.

5. OFFICER'S RECOMMENDATION

To authorise the Director of Legal Services to make an Order under s53 Wildlife and Countryside Act 1981 to add a footpath from Moor Lane to Public Footpath No 19 in the Parish of Kirk Ireton.

Janie Berry
Director of Legal Services



Ref: TE/LF/X4070/Cttee/2018

Date: 28 September 2018



Mike Ashworth

Strategic Director
 Economy, Transport & Environment
 Derbyshire County Council
 Shand House
 Dale Road South
 Matlock
 DE4 3RY

Wildlife and Countryside Act 1981 Section 53

**Claim to add a Footpath from Moor Lane
 to Public Footpath No. 19
 - Parish of Kirk Ireton**

Key: Existing Footpath



Footpath to be added



Parish Boundary

