

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 Footpaths within the grounds of Sherwood Lodge – Old
Bolsover Town

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 public footpaths within the grounds of Sherwood Lodge in Old Bolsover Town.

2. Information and Analysis

2.1 On 3 March 2016, Jean Langley (“the Applicant”) submitted an application to Derbyshire County Council (“the Council”) to add public footpaths to the Definitive Map and Statement. The application is accompanied by thirty-two user evidence forms (two of these were completed as a couple), a copy of a transcript of conveyance dated 24 June 1941 between the vendors of Sherwood Lodge and the Urban District Council of Bolsover, a copy of Land Registry titles and copy of the applicant’s letter & enclosures dated 21 September 2015 addressed to the Economy, Transport and Environment department.

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

2.3 An application to register the grounds within Sherwood Lodge as a town or village green was rejected by the Council’s Regulatory, Licensing and Appeals committee held on 10 June 2013.

User Evidence

2.4 There is suggestion in the user evidence that around October 2015 four witnesses were challenged by the police with three of these witnesses acknowledging they were told it was private property. 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 challenge, 1995 to 2015 (“the relevant period”). The user evidence submitted in fact spans the years from 1950 to 2016.

2.5 All of the witnesses refer to using the route on foot, with seven also claiming to have used it on pedal cycle and six claiming to have used it on motor vehicle. All of the witnesses refer to seeing other people using the route on foot, with five seeing use on horseback, twenty-four seeing people on pedal cycle and fifteen seeing use in or on a motor vehicle.

2.6 Twenty-two witnesses claim to have used the route for a period of twenty years or longer, with thirteen claiming over forty years use and with three claiming over sixty years.

2.7 Six of the witnesses refer to using the route daily, eleven weekly, three monthly, two less than monthly, one weekly and monthly, one daily and monthly, three varies throughout the years between weekly/monthly/less than monthly and six did not say.

2.8 Two witnesses reported seeing the claimed route blocked, one of which stated '...unsure of excat (sic) dates but the route would sometimes be blocked', while the other stated it was blocked with overgrown trees, bushes and branches etc. One witness reported the claimed route being diverted for tree cutting. None of the remaining witnesses reported seeing the claimed route blocked or diverted.

2.9 Six witnesses made reference to gate at the Hill Top entrance (Point A), four of these witnesses stating that the gates were always open. None of the remaining witnesses reported recalling any stiles or gates on the claimed route.

2.10 Five witnesses reported recalling seeing notices on the claimed route, two of these were notices regarding tree cutting and archaeological digs, two were car signs regarding one way traffic & speed limits and the last one was when Bolsover District Council (BDC) was selling the land and did a site survey. None of the remaining witnesses reported recalling any notices on the claimed route.

2.11 None of the witnesses reported working for the owner or occupier of the land or occupying any of the land affected by the claimed route.

2.12 Three witnesses refer to permission being given by the organisers of galas, committee events and fetes that took place on the grounds within Sherwood Lodge. None of the remaining witnesses reported being given permission to use the claimed route.

2.13 Four witnesses referred to being stopped by the Police while three of these were also told by the Police that it was private property and that this took place around October 2015. None of the remaining witnesses reported being stopped or turned back or having been told by anyone that the route was not public.

2.14 An informal consultation exercise was carried out between 2 May 2017 and 6 June 2017. Notices were placed on the route and emails/letters were sent to the statutory consultees, landowners and the local elected Member, Cllr Joan Dixon.

2.15 Six people responded to the consultation with one acknowledging the consultation letter, one stating they have no further comments to make and four against.

2.16 The Applicant responded acknowledging the consultation letter and with queries regarding the timescale of the application.

2.17 A representative of the Chesterfield, North East Derbyshire and Bolsover Ramblers emailed the Council to advise that they were not involved in or consulted on the making of these claims. They go on to add that they have no further comments to make and to 'leave DCC to assess the claims based on the user evidence provided.'

2.18 BDC as former owners of the land and buildings at Sherwood Lodge responded to the consultation outlining their objection to the application. Firstly they outlined the history of the site and how they relocated from its offices at Sherwood Lodge in 2013 and sold the property to Optimisation Developments Limited (ODL) in August 2014. The objection is based on the grounds that the paths at Sherwood Lodge have been used 'by right' and not 'as of right'. They go on to say that 'BDC's predecessor authority, Bolsover Urban District Council (BUDC), acquired Sherwood Lodge and its ground in 1941. In November of that year the Council dedicated the land to be used for public use'. They added 'This public use continued until the land was appropriated for planning purposes by the District Council in 2011. Consequently anyone who used the land did so 'by right'.' They also outlined that they put this argument when defending a claim to register the grounds within Sherwood Lodge as a Village Green back in 2013. This was rejected at the Council's Regulatory, Licensing and Appeals Committee held on 10 June 2013, on the recommendation of the Council's appointed inspector, Dr Charles Mynors, on the basis that BUDC then BDC had made the land available for public use and therefore the public could not subsequently claim that the use was 'as of right'.

2.19 A senior property manager from Wm Morrison Supermarkets Plc responded to the consultation confirming their intention to contest the application. He signs off stating that their solicitors will provide a formal response by 6 June 2017.

2.20 The Solicitors acting on behalf of ODL, who are linked with Wm Morrison Supermarkets Plc, wrote to the Council enclosing a statement and appendices outlining their objection against the claim. They outlined that their client acquired the land at Sherwood Lodge from BDC in 2014. They state

that they believe 'the legal test for creation of a footpath is not met in this case and that the application should be rejected by the County Council'. The statement focuses on the requirement for usage to be "as of right", adding that following its acquisition on 24 June 1941 BDC passed a resolution on 25 November 1941 to dedicate the Land as a public open space. Adding that 'From 1941 until 2014, the Sherwood Lodge grounds, forming part of the land, were made available by the District Council as public open space. It follows that the use of the paths within the Land, which are the subject of the application, was with the express licence or permission of the District Council during this period and accordingly "by right". In these circumstances, it is not possible for the applicant to demonstrate use of the paths "as of right", it is not therefore possible for the applicant to demonstrate dedication of the paths as public footpaths...' The statement makes reference to the application to register the land as a town or village green which was rejected and outlined the inspector's conclusion. The statement finishes off by stating 'The Land was subsequently held as public open space throughout the period from 1941 until its sale to ODL in 2014. Use of the Land throughout this period was with the licence or permission of the District Council and thereby "by right". It follows that use was not "as of right" and that the statutory presumption of dedication under section 31(1) does not apply in this case. On the basis that the legal requirements for the creation of a highway are not met in this case, ODL objects to the application to amend the Definitive Map and Statement in respect of the claimed footpaths over the Land.'

2.21 Old Bolsover Town Council emailed the Council with their concerns for claimed footpath from Point E to F which is a private access to their depot and workshop. They state that while the public may have been using this part of the claimed route, it was without their consent or permission. They add that this part of the route is used by them with large equipment such as JCB's and tractors etc. Thus have concerns regarding health & safety for pedestrians with the area being unlit and have further concerns regarding anti-social behaviour in this area. They state that there is evidence that it was gated in the past with a signage adjacent to the gate which remains which says 'No parking in this driveway. Access required at all times for Council vehicles'. They add that the Sherwood Lodge site is bound by Public Footpaths No. 19, 20 and 21 so any additional footpaths would not be of much benefit for the public. Finally they state that when Sherwood Lodge was in ownership of BDC they did not prevent access of their grounds for public enjoyment however the ownership has now changed and the site is now privately owned.

Documentary Evidence

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

2.23 1st Edition Ordnance Survey Map 1875 – Sheet XXVI-6

The land within Sherwood Lodge is undeveloped with a number of tree symbols. Public Footpaths Nos 19, 20 and 21 are shown as two dashed lines

but not labelled. There is no evidence of a footpath over any of the claimed routes.

2.24 1st Edition Ordnance Survey Map 1877 – Sheet XXVI-6

The land within Sherwood Lodge is undeveloped with a number of tree symbols. Public Footpaths Nos 19, 20 and 21 are shown as two dashed lines but not labelled. There is no evidence of a footpath over any of the claimed routes.

2.25 2nd Edition Ordnance Survey Map 1898 – Sheet XXVI-6

The land is labelled 'Sherwood Lodge' with numerous small buildings within the grounds. Public Footpaths Nos 19 is shown as two dashed lines while No. 20 is shown between a solid line and a dashed line and No. 21 is shown as two solid lines- none are labelled. There is two dashed lines that reflects similarly to the claimed route from A to B and two solid lines that has some similarity to the claimed route from H to E. None of the other claimed routes is shown.

2.26 3rd Ordnance Survey Map 1918 – Sheet XXVI-6

The land is labelled 'Sherwood Lodge' with numerous small buildings within the grounds. Public Footpath No 19 is shown as two dashed lines that widens at the southern end and not labelled. Public Footpath Nos 20 and 21 is shown between two solid lines and labelled 'F.P.'. There is two dashed lines that reflects similarly to the claimed route from A to B while the similarity to the claimed route from H to E has given way to part of land with tree symbols. None of the other claimed routes is shown.

2.27 Modern Ordnance Survey 25" Map 1962 – sheet 46/4770

The land is labelled 'Sherwood Lodge' with 'U D C Office' in brackets underneath with numerous small buildings within the grounds. Public Footpath No 19 is shown as two dashed lines that widens at the southern end and labelled 'F.P.'. Public Footpath Nos 20 and 21 is shown between two solid lines and labelled 'F.P.'. Most of the claimed route is shown on the map as two dashed lines as well as other routes not included in the application. Claimed routes B to K, D to E and E to F is not shown.

2.28 Modern Ordnance Survey 25" Map 1970 – sheet 46/4770

The land is labelled 'Sherwood Lodge' with 'U D C Office' in brackets underneath with numerous small buildings within the grounds. Public Footpath No 19 is shown as two dashed lines that widens at the southern end and labelled 'path'. Public Footpath Nos 20 and 21 is shown between two solid lines and is not labelled. Most of the claimed route is shown on the map as two dashed lines as well as other routes not included in the application. Claimed routes B to K, D to E and E to F is not shown.

2.29 Modern Ordnance Survey 25" Map 1995 – sheet 46/4770

The land is labelled 'Sherwood Lodge' with the Council offices shown and labelled 'District Council Offices'. Public Footpath No 19 is shown as two dashed lines that widens at the southern end where it is labelled as a 'car

park'. Public Footpath Nos 20 and 21 is shown between two solid lines and is not labelled. Most of the claimed route is shown on the map as two dashed lines. Claimed route B to K and E to F is not shown.

2.30 Modern Ordnance Survey 25" Map 1998 – sheet 46/4770

The land is labelled 'Sherwood Lodge' with the Council offices shown and labelled 'District Council Offices'. Public Footpath No 19 is shown as two dashed lines that widens at the southern end where it is labelled as a 'car park'. Public Footpath Nos 20 and 21 is shown between two solid lines and is not labelled. Most of the claimed route is shown on the map as two dashed lines. Claimed route B to K and E to F is not shown.

Other Evidence

2.31 The applicant included with the application a transcript of conveyance & plan, two Land Registry registers & plans and correspondence to the Council with enclosures.

2.32 The transcript conveyance document is regarding a conveyance made on 24 June 1941 between E Rhodes and E Sykes as 'the vendors', and BUDC regards to the sale of the Land around Sherwood Lodge. A section of the conveyance mentioned a right to use cartways '*...(.... all other persons having from time to time the right to use the cartways hereinafter mentioned) at all times hereafter by day or by night and for all purposes and with or without horses carts carriages wagons or other vehicles whether drawn or self-propelled and whether laden or unladen to go pass and repass along over and upon the roadways which are delineated on the said plan and thereon coloured green...*'. The plan referred to in the conveyance was included and has two 'Right of Way' marked on in a shaded blue background, one which follows the alignment of Public Footpath No. 20 when it leaves Oxcroft Lane to Point B, this then turns into a single solid line which goes along the northern boundary of the land marked as 'F.P.', this is the same alignment of Public Footpath No. 20 as it is now. The other one is from Point F to Point E2.

2.33 A copy of the register and title plan dated 9 July 2012 for Title DY173308 was included in the application. This shows the land ownership for the claimed route from Point E to Point E1 and from Point E two thirds down the claimed route towards Point F and buildings lying South of Point E and South West of Point E2. The land ownership in this register was listed as 'Old Bolsover Town Council'. Under the Property Register at point three it mentions 'The land has the benefit of a right of way over the land tinted brown on the filed plan with or without motor vehicle.' The plan which may show the land tinted brown (more of an orange colour) goes from Point E1 to E2.

2.34 A copy of the register and title plan dated 11 September 2014 for Title DY399347 was included in the application. This shows the land ownership for the land within part of Sherwood Lodge. The land ownership in this register was listed as 'Bolsover District Council'.

2.35 Also included with the application is a letter with enclosures from the Applicant to the Council dated 21 September 2015. Enclosed with this letter is an online query form completed by the Applicant with queries if there is any public right of way around Sherwood Lodge, response from the Council with a plan showing the ROWs in the area and a letter dated 6 February 2013 from BDC to a member of the public with the conditions of the granted planning proposal for Sherwood Lodge. In the letter containing the conditions of the granted proposal for Sherwood Lodge mentioned the claimed routes ‘...there are concerns about the proposal to fence off the historic route/walkway through to the town centre. These historic routes are considered to contribute to the overall character of the area and the loss of this through route is regrettable.’

Town or Village Green Application 2012

2.36 An application made on 15 August 2012 to the Council to register land known as Sherwood Lodge, Bolsover, as town or village green under section 15 of the Commons Act 2006. An independent inspector was appointed by the Council to make representations in relation to the determination of the application.

2.37 The inspectors conclusion was that ‘*The Field was “appropriated for the purpose of public recreation” by the UDC and its successor the Borough Council, under an express statutory power to provide and thereafter maintain it as a recreation ground. Throughout the 20-year period the local inhabitants indulged in lawful sports and pastimes on the Field by right, and not as of right.*’ The inspector considering the decision in *Barkas*, in relation to the Sherwood Lodge application goes on to say ‘*It follows that, in the present case, even assuming that the Application Land was used for 20 years up to the date of the application for qualifying lawful sports and pastimes by a significant number of the inhabitants of a locality, such use was “by right” and not “as of right”.*’ The Inspectors recommendation not to register the land as a town or village green was considered by the Council’s Regulatory, Licencing and Appeals Committee on 10 June 2013 (Minute No. 35/13) and it was determined not to register the land as a town or village green.

Site Visit

2.38 A site visit was undertaken on 3 September 2018. Concrete road blocks were located at Point A, Point B and at junction between Public Footpaths No. 19 and 20. At Point A is a green metalled gate with ‘No unauthorised vehicles’ signed on posts at either side of the gate and there is also a dog bin on the right hand side. Another sign was located 35 metres northerly from Point F towards Point E on the right hand side wall ‘Old Bolsover Town Council – Depot Vehicle Access – No parking in this driveway access required at all times for Council vehicles’. Below the sign is what looks like an old wooden gate post with little of what’s left from the wooden gate against the wall. Most of the claimed routes were either tarmac or paved with

little of the claimed route (E-G) being natural earth. Most of the old BDC offices within Sherwood Lodge was knocked down with the remaining older building being boarded up and fenced off.

Summary and Conclusion

2.39 This claim is based on evidence of use and supported further by documents which the Applicant suggests evidence of intention to dedicate the claimed routes as a public rights of way.

2.40 The user evidence indicates the use of a claimed routes around Sherwood Lodge. There is significant evidence of use of the route, on foot for a period of more than twenty years prior to 2016, with a number of witnesses claiming to have used the route in excess of forty years.

2.41 Under 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.

2.42 The conveyance by which the grounds of Sherwood Lodge was transferred to the UDC in 1941 does not refer to any specific statutory power, but the Baths and Recreation Committee of the UDC resolved on 11 November 1941 that the grounds of Sherwood Lodge be dedicated as public open space. This resolution was confirmed by the full Council two weeks later.

2.43 An independent inspector appointed to advise the Council on a town or village green application concluded that the use of the grounds within Sherwood Lodge was by right and not as of right.

2.44 The right to use cartways and rights of way mentioned in documents provided by the Applicant and explained in paragraphs 2.24 and 2.25 are noted however these could well be describing private rights.

2.45 The County Council’s Declaration Register has been checked and no Section 31 (6) declaration has been made which covers the claimed route.

2.46 In summary, the claimed routes within the land of Sherwood Lodge dedicated as ‘public open space’ by BUDC was used by right, not as of right as required by the legislation to make an Order to amend the definitive map and statement. Claimed routes D to E1 and F – E2 which is located outside the land dedicated as ‘public open space’ does not meet the criteria for creation of a highway because it does not connect from highway to highway.

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

2.48 A finalised copy of this report has been sent to Cllr Joan Dixon as the local member for the area prior to the Committee.

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 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, 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.

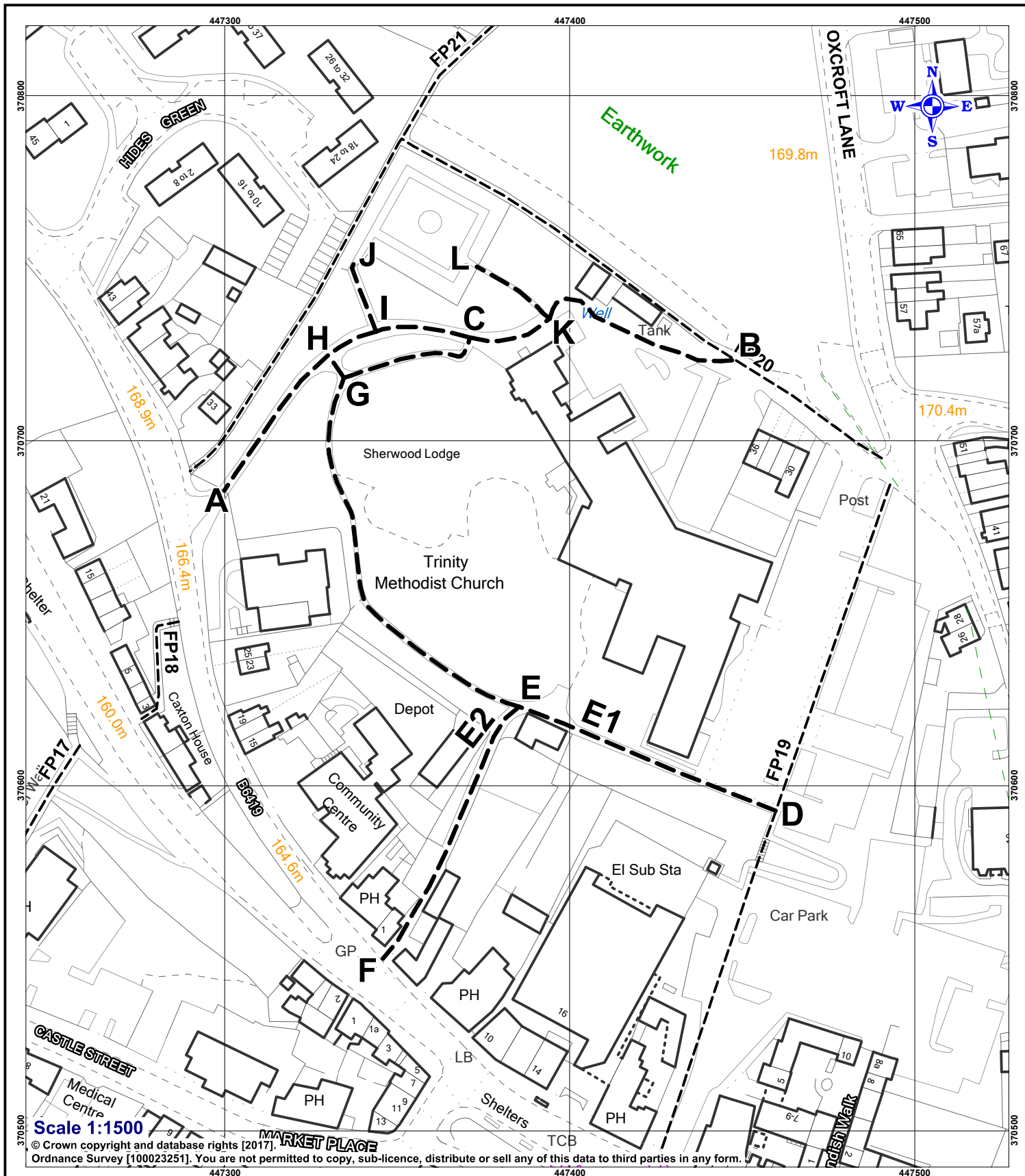
4. Background Papers

File held by Legal Services (ref: 68125)

5. OFFICER'S RECOMMENDATION

That the Committee resolves to authorise the Director of Legal Services to reject the application under section 53 of the Wildlife and Countryside Act 1981 to add to the definitive map and statement footpaths within the grounds of Sherwood Lodge in Old Bolsover Town as shown on the plan attached to this report.

Janie Berry
Director of Legal Services



Ref: TE/LF/X4069/Cttee/2018

Date: 05 September 2018



Mike Ashworth

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Wildlife and Countryside Act 1981 Section 53

Claim to add footpaths within the grounds of Sherwood Lodge - Old Bolsover Town

Key: Existing Footpath	---
Footpath to be added	---
(A-B)	
(C-D)	
(E-F)	
(G-H)	
(I-J)	
(K-L)	

