

DERBYSHIRE COUNTY COUNCIL

Regulatory Licensing and Appeals Committee

31 October 2016

Report of the Director of Legal Services

Wildlife and Countryside Act 1981

**Claim to Add Three Footpaths Between Yeadsley Lane and Park
Crescent, Furness Vale – Parish of Whaley Bridge.**

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 three footpaths in Furness Vale.

2. Information and Analysis

2.1 An application was received from Mrs E Crowther dated 28 November 1988 to add three footpaths to the Definitive Map and Statement from Yeadsley Lane to Park Crescent in Whaley Bridge. Following correspondence with the applicant it was agreed to remove one of the claimed routes from the application, leaving two routes to be considered. The application was accompanied by a plan and 19 User Evidence Forms. It would appear that following the public consultation in 1989 the matter was put on hold after one of the witnesses indicated that several of the witnesses wished to withdraw their evidence and submit fresh information. The further evidence was never submitted and the file was closed.. The matter was brought back to the attention of Legal Services when an email was received on 20 September 2016 from the representatives of a potential buyer of an adjacent property. The searches had revealed the claim was still on the Council's Register of Applications.

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

User Evidence

2.3 Although it was the siting of a gate with a notice reading "PRIVATE ENTRANCE TO YEARDSLEY HALL ONLY" in 1986 that prompted the application, there are various references in the user evidence forms to earlier obstructions and it is therefore considered that the obstruction of the route in 1981 brought the status of the route into question for the purposes of Section 31(2) of the Highways Act 1980 when a board was placed across the routes. Only evidence and events prior to this date have been considered in assessing the claim. The 20 year period under consideration is 1961 to 1981.

2.4 Nineteen user evidence forms were submitted in support of the application although one user submitted two forms, one claiming use from 1956 and the second from 1955. For the sake of this report the 1956 date shall be used. Thirteen of the users have described a route between Yeadsley Lane and Park Crescent.

2.5 Thirteen of the users have not provided a plan showing the routes they are claiming to have used, two users have provided sketched plans that do not clearly show any of the claimed routes, one witness (who has not actually used the route) provides a clear plan and one witness provides a plan which marks various routes: she describes a route that the applicant subsequently asked to withdraw as the used route and the longer of the claimed routes as a 'possible alternative'. All of the witnesses refer to using the routes on foot.

2.6 Nine witnesses claim to have used the routes for a period of twenty years or longer up to 1981; one for 18 years, one for 17 years, two for thirteen years, one for 7 years, one for five years and one witness has never used the route. One user (now 91 years old) describes his years of use as 'early years at school' and another as 'in the past'. It is not clear whether the information given in the evidence forms relates to all the routes or if different parts relate to different routes.

2.7 Some witnesses state that there have been gates or stiles on the routes but, without plans it is not possible to pinpoint where, while others state that there are no gates or stiles on the routes.

2.8 Several of the witnesses refer to seeing a notice on the routes, generally the notice which prompted the application, whilst others state there have been no notices.

2.9 Two users had permission to use the routes, one of whom has claimed 21 years use and the other for 18 years. One witness who has claimed 36 years use answers the question regarding permission with the phrase, 'just a friend'. This brings the number of users who can be considered to be claiming 20 years use as of right down to seven.

2.10 Five of the witnesses recall the route being obstructed or diverted other than by the gate. Two recall a board being placed across the route for a period in 1981, one of whom also recalls the route been blocked by rubble and timber in 1983. Three other witnesses state that the route was blocked or diverted by the development of new housing but do not give dates or state to which buildings they are referring although the Applicant confirmed that the houses were built in 1966/67.

2.11 None of the witnesses refer to being stopped from using the route before 1981.

Consultation

2.12 A consultation exercise was carried out from 10 March 1989; no deadline was set for representations.

2.13 There were four responses to the claim.

2.14 High Peak Borough Council confirmed in a letter dated 21 April 1989 that they had no information to support or negate the application.

2.15 Whaley Bridge Town Council confirmed in a letter dated 11 April 1989 that they 'would support the addition of two of the footpaths... but feel that the footpath marked 'A'... is not necessary and would not support its inclusion'. The Town Council offers no reasoning for its position or evidence to support the application.

2.16 A letter dated 03 April 1989 was received from an owner of land crossed by Route 3 objecting to the application. He states that he has owned the land since 1984 but has spoken with his predecessor, who lived there from 1968 and they have similar experience. He understands that the owner before his predecessor would also support their position. He makes several points as detailed below:

- 'There would be little point, given a clearly used route, to deviate from it to the extent that people recognise three routes... it strongly suggests...three alternative and unapproved short cuts which it has been expedient for the users to vary from time to time as the landowners objected to persistent or unreasonable trespass. The probable difference on the last occasion was that (in 1986) private notices were posted as a reminder on the green and blue routes simultaneously whilst the red route was so overgrown as to be an impractical trespass'.
- He can state categorically and is prepared to do so under oath that since his ownership, nobody has used his gate without being challenged, whenever it was practical, and then it was always children or walkers who were lost. His ownership post-dates the claim period but his predecessor, who is a barrister, is willing to state the same. He is not aware of any occasion when his gate has been used by any of the claimants or any other local adult.
- Only two of the witnesses are claiming to have used his gate, and neither in the last 20 years
- One must question the applicant's motives or sense of direction as she lives adjacent to Yeadsley Lane and has claimed to use the paths to access Whaley Bridge and Disley. Disley is in the opposite direction and the paths would be a long way round to return to Yeadsley Lane.
- There has been a 'degree of selection and inter family orchestration' in collecting evidence. The applicant 'has recruited witnesses who shall remain nameless but who, one has to say, are sufficiently pliable to confirm the structure of the moon as blue cheese if so asked...'

2.17 Two letters were received from Chafes Solicitors dated 18 April 1989 and 17 July 1989 on behalf a landowner. The first letter stated the following:

- The land has been in the ownership of the same family since 1955 and the title deeds made reference to private rights of way over two of the alleged routes (the green and orange).
- The 'orange' route follows a vehicular right of way to the Hall then follows an accommodation road to a barn and midden. The landowner can only recall extremely infrequent use by residents walking their dogs, not as a shortcut to Yeadsley Lane. Any use has been with the 'tacit consent' of the landowner as he has known those using it for dog walking.
- The farm was sold in 1960 and the roadway was completely overgrown and incapable of use.
- The landowner has prevented members of the public using the route and advised people it was private.
- The 'blue' route did not exist till the owners of Hall Farm (and friends of the landowner) moved to Park Crescent and laid a line of flags in 1968 or 69 to enable them to visit the landowner. Prior to 1968/69 there was a stone wall between the Hall and Park Crescent.
- The landowners have given some people permission to use the 'blue' path but have told others it is not public and turned them back.
- With regard the 'green' route, prior to Park Crescent being built in about 1968/69 it joined the private track to the Hall and farm.

2.18 The second letter focuses on an analysis of the evidence submitted with the application and points out various relevant issues:

- Seven of the witnesses have never been seen using any of the claimed routes though four of them have been seen walking on Yeadsley Lane.
- Nine of the witnesses are personally well known by the landowners and another witness had a daughter who was close friends with another landowner.
- Nine witnesses have been given permission to use the route created in 1969.
- One witness has been seen using the route created in 1969 on occasions, who had not been given express permission, but has been told it is private.
- One witness describes his reason for using the route to travel to Longsight Road, which is in the wrong direction.
- 'Harsh words' were exchanged with one witness in 1986. He was advised the route was private, requested to leave and told not to use the path again.
- Two witnesses will have used the route(s) as part of their work – one being a meter reader and the other a postman.
- One witness, claiming 22 years use to 1986, was a school friend of the landowner's son and used to visit the property to play.

2.19 The letter then refers to the Applicant and her evidence, suggesting the Applicant's 'geography is somewhat suspect': to walk to Disley, the claimed routes would be in the wrong direction and to walk to Whaley Bridge or Kettleshulme she would be taking a detour. One of the landowners has never seen the Applicant on any of the claimed paths but she had asked his spouse if she could use a path. She was advised that it was private but consent was given. The solicitors do not say when this event occurred.

2.20 The landowners make two further relevant points: The private footpath to Yeadsley Hall was diverted in 1968 when six houses were built on the Orchard and the pathways have been 'blocked on various occasions for many reasons' giving the example of when the paving flags were removed by the new owner of 33 Park Crescent.

Summary and conclusion

2.21 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 on a balance of probabilities that a right of way subsists? If there is a conflict of credible evidence and no incontrovertible 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.

2.22 Much of the user evidence contradicts that submitted by the landowners who have given specific examples of permission being sought and granted to use the land for purposes such as walking dogs. The user evidence itself does not provide a clear picture of which routes have been used or how and the plans which were provided are not convincing.

2.23 The route(s) was realigned in 1969 and obstructed in 1981. As one landowner points out, it seems likely that users of the routes have been challenged or prevented from using one route or other on various occasions and reverted to another, until two routes were closed simultaneously in 1985. At that point the third route was impassable. There is no evidence to suggest the route(s) have been used for a full uninterrupted 20 year period.

2.24 Park Crescent was built circa 1968-69 and the routes were obstructed in 1981. As the claimed routes terminate at Park Crescent there has not been a 20 year period of use.

2.25 Various OS maps have been checked but offer no suggestion of a public right of way along any of the claimed routes. This is unsurprising given

that Park Crescent wasn't built until 1968-69 and therefore there would have been no reason for the routes to exist as public rights of way.

2.26 The objectors' evidence is more specific and convincing than that of the witnesses and raises many questions about the use of the routes by the public. They challenged use or gave explicit permission to certain people to walk over their land. Their actions and those of their predecessors (including the construction of Park Crescent over what must have been part of any route before 1968-9) are inconsistent with a public right of way.

2.27 Various routes appear to have been used at different times and the available evidence does not suggest use of a single route by the public throughout the claim period so as to raise the presumption of dedication.

2.28 Finally, when adding a right of way to the definitive map and statement the way must run from 'highway to highway'. Yeardsley Lane is not an adopted highway and is not recorded on the definitive map as carrying any public rights.

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 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.

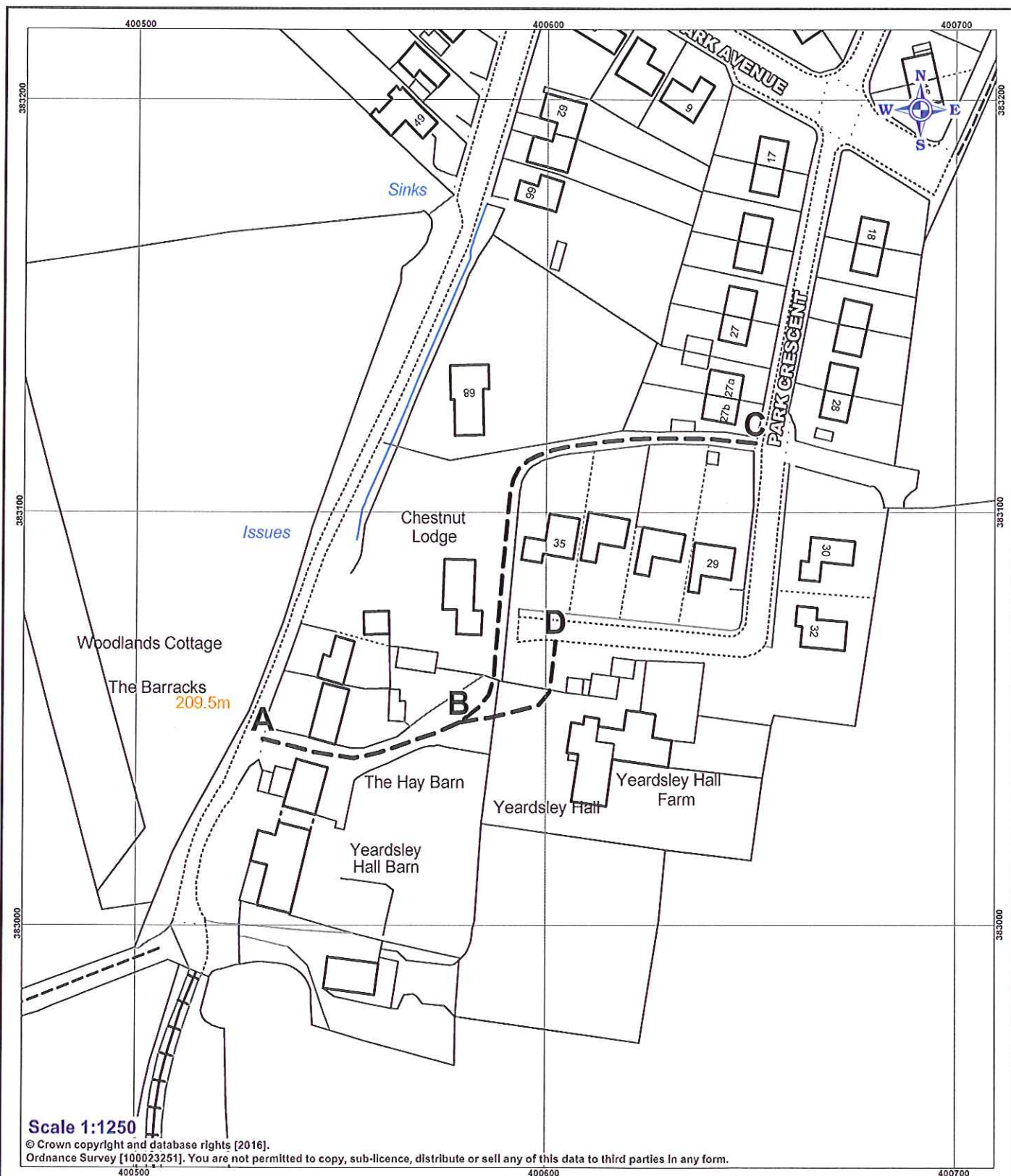
4. Background Papers

Files held by Legal Services (ref. 69081).

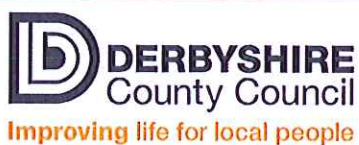
5. OFFICER'S RECOMMENDATION

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 three footpaths between Yeardsley Lane and Park Crescent in Furness Vale as shown on the attached plan.

Chief Officer



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Wildlife and Countryside Act 1981, Section 53

**Claim to add two footpaths from
Park Crescent to Yeadsley Lane,
Parish of Whaley Bridge**

Key:

Claimed Footpaths ————
Existing Footpath - - - - -
Existing Bridleway + + + + +

