

17th July 2013

Agenda Item:

**REPORT OF THE CORPORATE DIRECTOR (ENVIRONMENT AND
RESOURCES)**

**CONSIDERATION OF AN APPLICATION UNDER SECTION 53(2) OF THE WILDLIFE AND
COUNTRYSIDE ACT 1981 TO ADD A FOOTPATH TO THE DEFINITIVE MAP AND
STATEMENT IN THE PARISH OF ARNOLD**

Purpose of the Report

1. To consider an application made by Ashley Turner to record a route as a public footpath on the Definitive Map and Statement for the Parish of Arnold. A map of the route under consideration is shown on **Plan A** and marked between points 1 and 4.
2. The effect of the application, if accepted, would be to add a footpath from Mansfield Road to Woodthorpe Drive.

Information and Advice

3. The application for a Modification Order was made by Ashley Turner in September 2012. Thirty nine user evidence forms were submitted in support of the application, all claiming use of the route on foot. Six of the claimants were interviewed giving additional information on their use of the path and of the remaining claimants, 22 of them submitted additional information. A summary of the user evidence is shown in **Table 1**. A consultation was carried out which included owners of the land over which the claimed path runs and adjacent property owners. What follows is a substantive summary of the evidence that has been submitted.

Legal Background

4. The application is made under the provisions of the Wildlife and Countryside Act 1981 (WCA81). Section 53(3)(b) of WCA81 requires the Surveying Authority (Nottinghamshire County Council) to modify the Definitive Map and Statement following "the expiration in relation to any way ... of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path".

5. In addition, under Section 53(2)(b) of WCA81 the surveying authority has a duty to keep the Definitive Map and Statement under continuous review and to make such modifications to the Definitive Map and Statement that appear to be requisite in consequence of the occurrence of events described in Section 53(3)(c)(i); namely “the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows: that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates”.
6. Section 31 of the Highways Act 1980 (HA80) raises a legal presumption that a right of way has been dedicated and therefore exists as a highway if the route has been used by the public ‘as of right’ (without force, secrecy, or permission) and without interruption for a period of 20 years unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period is to be calculated retrospectively from the date when the right of the public to use the way is first brought into question.
7. If it is accepted that dedication may be presumed at law, consideration must also be given to the category of highway that is believed to exist i.e. footpath, bridleway, restricted byway or a byway open to all traffic. This point should be based on an evaluation of the information contained in any documentary and/or user evidence.
8. Should the test under Section 31 fail, then it may be appropriate to consider whether the way has been dedicated at common law. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. Evidence of the use of a path by the public ‘as of right’ may support an inference of dedication and may also show acceptance by the public.

The Current Situation

9. The claimed route currently exists as a privately maintained tarmaced access road off Woodthorpe Drive as shown on **photograph 1**. This road gives access to eight houses. There are currently three signs at this end of the path: one with wording ‘Private Road No Access’ another is a street nameplate saying ‘Woodthorpe Drive’ and giving details of which properties use this access road, and there is also a Neighbourhood Watch notice. At the end of the tarmac section the claimed path continues as an unsurfaced track between boundaries along a section with trees and bushes either side of a worn path in the middle. A little way in from the start of this unsurfaced section there are 5 concrete fence posts evenly spaced out across the full width of the track. However, there is no sign of any fence ever being attached to these posts. This section is shown on **photograph 2**. The claimed path continues through a locked gate in a metal fence at the rear of a Tesco and Subway shop as shown in **photograph 3**. The final section of the claimed route is along the

side access of Tesco and then on to Mansfield Road. This final section is shown in **photograph 4**.

Documentary Evidence

10. The claimed route is shown for the first time on an Ordnance Survey plan dated 1836 as a continuous route from Mansfield Road to Woodthorpe Drive. The 1842 Tithe Award and plan show the area in more detail and apportioned parcel numbers for the claimed route all of which indicated that the route was privately owned and with the surface being described as 'grass'. The claimed route is shown on the Ordnance Survey plans dated 1883, 1886, 1887 and 1900 although no information is given concerning the route's status or its ownership.
11. The claimed route is shown on the 1910 Finance Act where it is shown as being all in the same ownership as the property to the south of the lane. The field book, which is a written description of land and buildings shown on the plan, indicates that there was no deduction for 'public Rights of Way or User'. From a conveyance plan dated 1927, the western section of the claimed route is shown and labelled as being a 'private road'. Later Ordnance Survey plans still show the route at the same width but with development on both sides of the path.
12. The path was not claimed in the Arnold Parish Schedule when other rights of way were claimed in the 1950's. On the Ordnance Survey plan dated 1974 a line of posts are shown about halfway down the route and labelled as 'posts'. It is presumed that these are the posts shown on photograph 2.
13. All the land along the claimed route is registered with the Land Registry with houses along the northern side of the claimed route having ownership of the section directly adjacent to them. Some of the land registry entries mention the route of the claimed path being a private right of access. For example in the entry for Castle Bar Properties who own the Tesco and Subway site, it states that the owners are 'entitled...at all times hereafter to use the whole extent in length and width of the private road into Woodthorpe Drive as a horse carriage drift and footroad'. Owners of one of the properties that use the route as their private access show in their land ownership details that the owners have a 'right of way along the portions of the said private road'. The Land Registry details of one of the properties on Black Swan Close states that they are 'entitled to a right of user...of the private road as lies on the land hereby conveyed.'

Claimed use

14. A previous application for a Modification Order for this path was submitted by Mr Proctor in 2008 along with only 3 user evidence forms in support of the claim. This first application was triggered as a result of a fence and gate being erected at the rear of Tesco in November 2007. In January 2008 a notice was

then erected on this gate with the wording 'this gate will be locked from 1800-0600 Hours' with another notice erected on a pole at the eastern end of the claimed route with the wording 'no pedestrian access to Mansfield Road between 1800-0600'. The user evidence forms did not show sufficient evidence of the use of the path over a 20 year period and so the claim was turned down and Mr Proctor did not appeal. In April 2012 this gate was permanently locked 'around the clock'.

15. **Date of Challenge.** Evidence supplied as part of the current application confirms that the gate at the rear of Tesco was locked from 2008 onwards during the evening and night as some of the claimants' use of the path during these times was interrupted. Even though the gate may have been unlocked between 6am and 6pm, the locking of the gate outside these times is considered to be a challenge by interrupting use of the claimed route. Therefore the date of challenge is considered to be 2008 when the gate was first locked in the evenings and the relevant 20 year period would therefore be from 1988 to 2008.
16. The information provided by the claimants has been summarised in **Table 1**. As can be seen, the use of the claimed route does go back to the 1940's with there being 19 people who claimed to have used the path for the full 20 year period with a further 14 people claiming to have used it for at least part of the relevant period. The path is claimed to have been used frequently with 27 of the claimants stating that their use of the route has been at least once a week and with 7 of those using the path at least once a day.
17. In order for this evidence to be valid, it must be demonstrated, in accordance with **Jones v Bates (1938)** that use was 'as of right' and was not exercised in secrecy, with permission or by force. The claimants that have provided information state that they have used the path in the morning and evenings, during the week and weekend. This use would be when it could reasonably be expected that someone would be out walking and so it is considered that the use has not been in secret. None of the claimants have stated that they have not ever been given any permission by any of the owners to use the path nor did they consider it necessary to seek any permission. However, one of the claimants submitting a user evidence form does live in one of the properties that use the first part of the claimed route as access to their house. Therefore they would have a private right of access over the claimed route. Furthermore, none of the claimants state that they ever had to use force to gain entry to or along, or to otherwise use the path.
18. As stated in paragraph 14 there was a previous application in 2008 for a modification order for this path which was turned down. The reason for this was that only a very few user evidence forms had been submitted with only two showing use of 20 years. However, there is no bar in the legislation to prevent a fresh application being made if further evidence of use of the path has been discovered. The interviews and additional information submitted for this second application appears to indicate that whilst the locking of the gate at night had affected some people's use of the route, the majority of the claimants still continued to use the route whilst the gate was open during the

day. This perhaps explains why only 4 user evidence forms were submitted for the first application when the gate was locked at night but that when the gate was permanently locked 39 were submitted.

19. **Use without interruption and no intention to dedicate.** Only one claimant out of the forty nine says that they were ever verbally challenged and that this took place only once. This occurred when the claimant was cutting back nettles overhanging the path and they were challenged by one of the residents adjacent to the path. The claimant gives no date when this took place or if it was within the relevant 20 year period of 1988 to 2008. However, this challenge appears to be to the cutting down of the vegetation rather than the use of the claimed route. This has to be considered along with the fact that none of the other claimants state that they were verbally challenged, and indeed some of them say that they occasionally saw the house holders who live next to the path whilst they using it, but no challenges were ever made.
20. None of the claimants say that their use of the path was ever blocked by anything to suggest their use of the path was being challenged. Although some of them have stated that the middle section of the path did get overgrown at times, none of them has said that they were not able to get through at this point. There is a line of concrete fence posts across the path towards the middle of the claimed route but none of the claimants say that there was any fencing between the posts to stop their use. Four of the claimants mention the rebuilding work that took place when Subway and Tesco was being developed and that it did interrupt their use of the path. However, after a few months and once the rebuilding had finished they continued to use the path.
21. All but two of the claimants say that there were no other signs along the route apart from the ones that were erected in 2008 about the night-time closure of the path. Two claimants say that they did notice a sign on the telegraph pole along the route but gave no details about how long it was there and what the wording on the sign was (although some information on this sign has been provided by residents, and this is covered below).

Consultation

22. A consultation was carried out and information was submitted from current landowners, from residents who own part of the claimed path or who are adjacent to it as well as from the local police.
23. **Castle Bar Properties.** Information was submitted by the current owners Tesco and Subway who own the section of the path from Mansfield Road to the locked gate. They state that in 2005 when they acquired the building there was no evidence of usage of the path as it was overgrown. They also state that between June and November 2006 there was no access to the path due to building works of Tesco and Subway and that no complaints were received from members of the public. Planning permission had been gained for the development of the site and in the Gedling Borough Council planning report

the route is described as being private. It also states in the report that due to previous buildings suffering from attacks of vandalism that a self-closing gate should be fitted across the path. Information was also submitted from the Nottingham Police Architectural Liaison Officer who referred to a significant number of crimes in this general area of Mansfield Road that the footpath from Mansfield Road to Woodthorpe Drive is not maintained and suggests that the path be closed.

24. There have been discussions between the owners of Tesco and Subway and with the Old Woodthorpe Residents Association who state that the route is a private right of way and wanted the path to be closed off. Tesco and the residents then decided to lock the gate from 6 o'clock in the evening to 6 o'clock in the morning. The locking of the gate was done by staff from Tesco. Subsequent meetings took place periodically for 3 years to monitor what happened with this partial locking of the gate and to deal with anti-social behaviour problems which continued after the completion of the building work. A decision was then taken by Tesco and the residents to permanently lock the gate and this was welcomed by local residents and the police and no one raised any issues about access to the path directly with Castle Bar Properties. They have also stated that this helped to address safety issues for pedestrians crossing the service yard and side of the building as that is where lorries reverse.
25. One of the adjoining property owners submitted information saying that the path is overgrown and that since 2008 when the gate was erected the claimants have used the pavement around Woodthorpe Drive and Mansfield Road instead of the claimed path. He also made the point that residents are concerned if it was made into a right of way, the owners would be liable for any accident that took place. He also states that he has personally challenged people using the route and that there was a sign on the telegraph pole at the eastern end of the path which said 'private land' which was in place until the early 1990's.
26. Another adjoining property owner refers to two identical signs that were erected sometime after 2008 at the back of his property that pointed out to people that the path is not a public right of way. One of the signs is shown in **photograph 2**. He also states that he has challenged people using the path but does not give any details about when this took place. He also refers to a sign on a telegraph pole on the claimed route saying 'private land' but has not given details about how long this was there for and who erected it. The final point made was that there has been a reduction in crime and anti-social behaviour since the gate was locked and that people who have a private right of access were to be provided with a key to the locked gate.
27. Another resident who backs on to the path but doesn't own any of it says that there was a problem with youths congregating outside the new shops in the evenings which resulted in disturbances along the path. Following closure of the path at night by Tesco staff in 2008 and the permanent closure in 2012 this resulted in the path not being used and the rowdiness being reduced.

28. **Crime Reduction Manager for the Police.** Confirmation was sent in from the Crime Reduction Manager for the Police that there has been a reduction in crime since Tesco have been locking their gate at night and that they would not support this path being 'made into a public right of way'. (However, as Committee will appreciate, this report is concerned with whether a public right of way already exists (or can be reasonably alleged to already exist), not with the creation of a new public right of way.)

Conclusion

29. There is no documentary evidence that indicates that a public right of way exists along the route. The information from the Land Registry does show that there is a private right for some of the adjoining householders to use the route. However, the existence of these private rights does not exclude the possibility of public rights having been acquired over a period of 20 years.
30. The user evidence that has been submitted shows use of the claimed route in excess of 20 years without interruption. The use has been without force or permission and exercised at a time of day when people would normally be expected to use a public footpath.
31. A number of the replies from the consultation have focused on the issue of crime and anti-social behaviour and the effects of erecting and locking the gate after 2008. Although these are issues that are of concern to those living adjacent to the path, and with which the Authority undoubtedly has some sympathy, they are not matters that can be taken into consideration as to deciding whether or not a path is reasonably alleged to subsist and therefore whether an order should be made.
32. Two of the adjoining residents have said that they have challenged people using the path telling them that the route is private and apart from one person mentioned in paragraph 18 who was spoken to when she was cutting back nettles, none of the claimants have stated that they have been challenged.
33. One of the residents does mention that there was a sign on the telegraph pole on the eastern end of the route saying that the land was 'private land'. There has been no indication as to who erected this sign and how long it was in place although according one resident it appears that it was in place up until the early 1990's. However, the wording on the sign is sufficiently ambiguous as not to amount to being a challenge (in legal terms) to those using the path. It can also be considered significant that when the sign fell apart it was not replaced. There are 3 existing signs at the eastern end of the path, two of which would not be sufficient to challenge the use of the path: one being the Neighbourhood Watch notice, and the other being a street nameplate sign saying 'Woodthorpe Drive'. The final sign with the wording 'Private Road, No Access' was put up after the date of challenge and so is not relevant to the claim. The most important signs for consideration are the ones erected in 2008 when the gate was closed from 6pm to 6am. These are significant as they do state that the path will be closed off during certain hours of the day and therefore do challenge use of the path by the public. In the middle of the

claimed route on the northern side of the path there are now two notices both with the wording 'Highways Act 1980 Sec 31. Private Land, no public right of way via foot, cycle or horseback'. This sign was erected after the date of challenge and therefore is not relevant to the claim even though on this particular sign the wording is much more specific than other signs that were erected and would prevent rights from being acquired as a result of use since their erection.

34. Some of residents have stated that, historically, the middle section of the path became overgrown so that the path could no longer be used. However, although the claimants agree that this section did become overgrown they state that it was never so bad as to prevent use of the path. Indeed, as can be seen from photograph 2 taken in 2008 there is a very distinct wear line caused by use of the path.
35. There was a period of 6 months between June 2006 and November 2006 when the route was blocked off due to the building works of the Tesco and Subway when according to the owners it would have been impossible to use the path. However, what is significant is that after the building works were completed the path remained open for people to be able to use and it was not until 2 years later that the path started to be closed off between 6pm and 6am. For the interruption to be effective it must be shown that it was done with the intention to prevent public use and not for some other purpose. Therefore in this case the building works cannot be considered as an interruption or challenge to the public use of the path as shown in **Fernlee Estates v City and County of Swansea and the National Assembly for Wales (2001)** where it was held that building materials and the digging of trenches in connection with building works had temporarily blocked the line of a path but did not amount to an interruption or challenge of the kind envisaged by Section 31 of the 1980 Highways Act.
36. In **Norton v Bagshaw (1994)** it was held that the wording of Section 53(3)(c)(i) referred to in paragraph 5 above, provides that in deciding whether a public right of way exists, there are two tests; a) *whether a right of way subsists* (known as '**Test A**') and b) *whether a right of way is reasonably alleged to subsist* ('**Test B**'). It was also held that for Test B to be met, it is necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a public right of way exists.

Reason/s for Recommendation/s

37. This report contains an analysis of the evidence submitted and it fulfils the relevant statutory criteria outlined in paragraph 6. Having analysed the evidence currently before the Council, it is the officers' view that Test B has been met, on the basis that the existence of a public footpath is at least reasonably alleged.

Statutory and Policy Implications

38. This report has been compiled after consideration of implications in respect of finance, the public sector equality duty, human resources, crime and disorder, human rights, the safeguarding of children, sustainability and the environment and those using the service and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

RECOMMENDATION/S

- 1) It is RECOMMENDED that Committee approves the making of a Modification Order to modify the Definitive Map and Statement by adding a footpath from Woodthorpe Drive to Mansfield Road, Arnold for the reasons set out above, as the evidence demonstrates on a balance of probabilities that public footpath rights are reasonably alleged to exist.

TIM GREGORY
Corporate Director (Environment and Resources)

For any enquiries about this report please contact:

Angus Trundle (0115) 9774961
Definitive Map Officer

Constitutional Comments (SJE – 11/06/2013)

This decision falls within the terms of reference of the Rights of Way Committee to whom the exercise of the Authority's powers relating to public rights of way has been delegated.

Financial Comments (DJK 18.06.2013)

The contents of this report are duly noted; there are no financial implications.

Background Papers

Except for previously published documents, which will be available elsewhere, the documents listed here will be available for inspection in accordance with Section 100D of the Local Government Act 1972.

The Modification Order Application case file

Electoral Division(s) and Member(s) Affected

Arnold South

Councillor Roy Allan

ROW94
20.6.13