

## **Rights of Way Committee**

**Wednesday, 17 July 2013 at 14:30**

**County Hall, County Hall, West Bridgford, Nottingham NG2 7QP**

<b>1</b>	<b>To note the appointment of the Councillor Pam Skelding as Chairman and Councillor Rachel Madden as V</b>	<b>1-2</b>
	Details	
<b>2</b>	<b>Membership and Terms of Reference</b>	<b>3 - 6</b>
	Details	
<b>3</b>	<b>M_6 March 2013</b>	<b>7 - 12</b>
	Details	
<b>4</b>	<b>Apologies for Absence</b>	<b>1-2</b>
	Details	
<b>5</b>	<b>Declarations of Interests by Members and Officers:- (see note below)</b>	<b>1-2</b>
	(a) Disclosable Pecuniary Interests	
	(b) Private Interests (pecuniary and non-pecuniary)	
<b>6</b>	<b>Declaration of Lobbying</b>	<b>1-2</b>
	Details	
<b>7</b>	<b>Countryside Access Team – Presentation</b>	<b>1-2</b>
	Details	
<b>8</b>	<b>Appeal decision by the Secretary of State for Environment, Food and Rural Affairs Clipstone Appeal</b>	<b>13 - 50</b>
	Details	
<b>9</b>	<b>Consideration of an application under Section 53(2) of the Wildlife and Countryside Act 1981 to add</b>	<b>51 - 66</b>
	Details	

(1) Members of the public wishing to inspect "Background Papers" referred to in the reports on the agenda or Schedule 12A of the Local Government Act should contact:-

Customer Services Centre 0300 500 80 80

(2) Persons making a declaration of interest should have regard to the Code of Conduct and the Council's Procedure Rules.

Members or Officers requiring clarification on whether to make a declaration of interest are invited to contact Dave Forster (Tel. 0115 9773552) or a colleague in Democratic Services prior to the meeting.

(3) Members are reminded that Committee and Sub-Committee papers, with the exception of those which contain Exempt or Confidential Information may be recycled.



## **REPORT OF CHIEF EXECUTIVE**

## **MEMBERSHIP AND TERMS OF REFERENCE**

### **Purpose of the Report**

1. To note the Committee's membership and terms of reference.

### **Information and Advice**

2. The Committee's membership is:-

Andrew Brown, Richard Butler, Steve Calvert, Jim Creamer, Sybil Fielding, Kevin Greaves, Roger Jackson, Darren Langton, Rachel Madden, Pam Skelding, Gail Turner.

3. The terms of reference for the Rights of Way Committee:-

4. The exercise of the powers and functions set out below are delegated by the Full Council:

- a. Responsibility for discharging the Council's regulatory powers relating to:
  - public rights of way
  - cycle tracks
  - gating orders on recommendation from the relevant committee or as necessary
  - common land
  - town and village greens
  - non-statutory public access routes
  - land management agreements
  - permissive paths
- b. Receiving reports on the exercise of powers delegated to officers in relation to functions for which this Committee is responsible
- c. Approval of consultation responses relating to the Committee's functions.
- d. Approving all Councillor attendance at conferences, seminars and training events including any expenditure incurred, within the remit of this Committee

and to receive quarterly reports from Corporate Directors on departmental officer travel outside the UK within the remit of this Committee.

### **Other Options Considered**

5 None.

### **Reason/s for Recommendation/s**

6 To inform the committee of its terms of reference.

### **Statutory and Policy Implications**

7 This report has been compiled after consideration of implications in respect of finance, equal opportunities, 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**

That the report be noted.

**Mick Burrows**

**Chief Executive**

**For any enquiries about this report please contact: David Forster 0115 977 3552**

### **Constitutional Comments**

10 As the report is for noting only, no constitutional comments are required.

### **Financial Comments**

11. Costs of attendance at conferences, seminars and training events including any expenditure incurred will be met from the Members Allowances budget.

### **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.

a) Report to Full Council – 16 May 2013 (published).

### **Electoral Division(s) and Member(s) Affected**



All



## minutes

Meeting	RIGHTS OF WAY COMMITTEE
Date	Wednesday 6 March 2013 (commencing at 10.00 am)

### membership

Persons absent are marked with 'A'

### COUNCILLORS

Bruce Laughton (Chairman)  
Gail Turner (Vice-Chairman)

Chris Barnfather  
Allen Clarke  
Jim Creamer  
Sybil Fielding  
John Hemsall

A Rachel Madden  
Sue Saddington  
A Andy Stewart  
Jason Zadrozny

### OFFICERS IN ATTENDANCE

David Forster	- Democratic Services Officer
Steven Eastwood, Snr	- Principal Legal Officer, Legal Services
Eddie Brennan	- Definitive Map Officer/Commons and Village Greens Officer
Dr Tim Hart	- Senior Definitive Map Officer
Neil Lewis	- Team Manager Countryside Access
Tony Shardlow	- Community Safety Officer

### MINUTES

The minutes of the meetings held on 23 January 2013 were taken as read and were confirmed and signed by the Chairman.

### MEMBERSHIP

It was noted that Councillor Chris Barnfather had been appointed to the committee in place of Councillor John Cottee

### APOLOGIES FOR ABSENCE

Apologies for absence were received from:-

Councillor

“ Rachel Madden  
“ Jason Zadrozny

## **DECLARATIONS OF INTEREST BY MEMBERS AND OFFICERS**

Councillor Bruce Laughton declared a private interest in agenda Items 5 (Consideration of Adding Footpaths in the Parishes of East Stoke and Elston) Item 6 (Consideration of Diversion of two claimed footpaths at Elston) and Item 7 (Consideration of the Extinguishment of three claimed footpaths in Elston) on the grounds that he was related to one of the landowners affected. He therefore informed Committee he would take no part in those items on the agenda

Following Councillor Laughtons declarations on agenda Items 5, 6 and 7, Councillor Gail Turner took the Chair

## **DECLARATIONS OF LOBBYING BY MEMBERS**

There were no declarations of Lobbying.

## **CONSIDERATION OF ADDING FOOTPATHS IN THE PARISHES OF EAST STROKE AND ELSTON**

Dr Hart introduced the report and highlighted the evidence was based solely on documentary evidence and not user evidence.

Following the opening comments by Dr Hart a number of public speakers were given the opportunity to speak and summaries of those speeches are set out below.

Miss Lockwood, who spoke against the addition of the footpaths, informed Members that her family had farmed the land since 1946. She stated that the addition of these footpaths would create a patchwork of farmable land and it would have a marked effect on the income of the farm. She also informed members that the report included a number of assumptions rather than documentary evidence and that these assumptions should be treated with caution.

There were no questions.

Mr Snowden, who spoke against the addition of the footpaths, informed Members they have been farming the land for over 34 years and in that time had never seen a rambler or walker near the area. These alleged paths have never appeared on any modern ordnance survey map so it seems the paths have died out. Local people who have lived in and around Elston all of their lives do not recall ramblers walking the area. He also informed members that some of the area around Meadow Farm is very wet for most of the year and therefore he believes it would never have been suitable for a footpath.

There were no questions.

Mr Thompson, Ramblers Association, highlighted the fact that historical evidence was all that was needed to add footpaths to the definitive map and the addition of these footpaths would create better links between Elston and other paths.

During discussions Members took into account the fact there was no evidence that these paths had been used for many years and as such there was no demand for them. Members also noted that there were a number of paths in the area already. They also highlighted localism/local democracy regarding decisions of this nature and the expense of installing a footbridge to span Car Dyke in these austere times. Members also felt that interests of the community, business and commercial Farmland should be taken into account when looking at this report.

Members asked for the legal position regarding the highways issues if a route may have existed but has not been stopped up.

Mr Eastwood informed members that this was a quasi judicial decision and as such the decision flowed from the facts as found. Mr Eastwood stated that considerations of a more suitability/desirability kind do not arise as part of this decision, but are more properly the subjects of Items 6 (diversion) and 7 (extinguishment), which are procedures which may be undertaken subsequent to any decision such as this one regarding recognition of a pre-existing way. Mr Eastwood stated that the report sets out the legal test in relation to the claimed paths existing on the balance of probabilities and there being no credible evidence to the contrary. Mr Eastwood stated that where this test (or the lower test of reasonable allegation) is considered on the facts to be met there is no element of discretion but a Modification Order should be made to enable the evidence to be tested.

A motion in terms of resolution 2013/004 was moved by Councillor Turner seconded by Councillor Barnfather it was:-

#### **RESOLVED 2013/004**

That a Modification Order to register the routes as set out in the report is not made on the grounds that the Committee felt that there was no evidence of historical or present use or recent demand for these paths, especially given the number of local paths already existing, and that there was also the issue of localism/local democracy as well as the community, and business and commercial intrests which should be taken into account.

In accordance with Standing Orders Councillors Jim Creamer and Sybil Fielding vote against the recommendation was recorded.

Following the decision as set out in Resolution 2013/004 Items 6 (Consideration of Diversion of two claimed footpaths at Elston) and Item 7 (Consideration of the Extinguishment of three claimed footpaths in Elston) on the agenda were withdrawn. At the request of Councillor Turner, Mr Eastwood explained for the benefit of members of the public attending committee that the decision in relation to Item 5 being that the potential existence of the ways was considered to not be sufficiently made out, the diversion or extinguishment of those claimed highways did not arise.

Councillor Bruce Laughton returned to the meeting and took the Chair.

#### **REQUEST TO AMEND THE REGISTER OF COMMON LAND: NORMANTON ON TRENT**

On a motion by the Chairman and seconded by the Vice-Chairman it was:-

## **RESOLVED 2013/005**

That the Register of Common Land for Normanton on Trent (CL14) is amended by striking out entry No.21 (Rights Section) in respect to rights of common owned by Clarice Thurston of Normanton on Trent and to add Charlotte Truswell Pennington of Oakham, Rutland as now holding those rights of common

### **UPDATE ON THE FINAL RESULTS FROM FURTHER CONSULTATION UNDERTAKEN REGARDING THE RESOLUTION THAT A GATING ORDER BE MADE TO CLOSE THE ALLEYWAY BETWEEN CEDARLAND CRESCENT AND NOTTINGHAM ROAD NUTHALL**

Mr Shardlow introduced the report and highlighted issues set out in the report.

Following the opening comments by Mr Shardlow a number of public speakers were given the opportunity to speak and summaries of those speeches are set out below.

Mr N Codd, local resident, spoke in favour of the closure and highlighted issues regarding damage to his property. He also informed members that he had had his house broken into and had hired a security firm to look after his property. He also informed members that he had personally witnessed anti social behaviour over the years and had informed the police on occasions.

In response to questions Mr Codd replied that he feels crime only reduced because the private security firm were regularly patrolling the area around his house.

Mrs Hatton local resident spoke in favour of the closure and highlighted issues of graffiti, criminal damage to a wall and youths urinating along the alleyway. She also informed members that she had had stolen goods thrown over her wall in the garden and also loutish behaviour with tomatoes and eggs being thrown at her house.

There were no questions

Mr Turville, local resident, spoke in favour of the opening of the alleyway and highlighted issue around access to amenities around the area. He informed members that as a dog owner he used the alleyway at least 6 times a day and also used it to access the local public house. If it were to be shut this would mean over a week it would add 15 miles to his journeys around the area. There has been a rest home built nearby which was derelict land and is therefore no longer an attraction to youths.

There were no questions

Mrs Smith, local resident, spoke in favour of the opening of the alleyway and highlighted issue around access to local transport. She also highlighted there are a

number of elderly living near to the alleyway. If it were to shut then they would have to walk further which they would not be able to do regularly and therefore this would cut them off from living a normal life.

There were no questions

Mrs Timpson, local resident, spoke in favour of the opening of the alleyway and highlighted if the alleyway was to be shut it would be adding extra time to walk around to catch a bus. Crime statistics don't show that there is a need to close this alleyway. She also highlighted that this was not the wish of the majority of Cedarland Crescent residents to close the alleyway.

There were no questions

Mr Hiley, representing the Local Access Forum, informed members that they supported the recommendation to keep the alleyway open. The issue of crime does not record that this alleyway is where they gain access or egress from so any crime statistics cannot form part of the reason to shut this alleyway.

The Chairman informed Members that he had received some views from the Local Member, who had asked that Committee ensure that the situation is monitored and reviewed in 6 months' time.

During discussions following all speakers, members highlighted the issues for closure did not outweigh the reasons for keeping the alleyway open and stated that they also considered it important that the situation is monitored and reported back to a future meeting. Members highlighted that they understood the position of the residents and that whilst it is important that Gating Orders are put in place where they would be of benefit it is important not to lose sight of the fact that it is people causing those issues and some times other actions may be more appropriate.

On a motion by the Chairman, seconded by Councillor Chris Barnfather it was:-

**RESOLVED 2013/006**

1. That the alleyway between Cedarland Crescent and Nottingham Road, Nuthall be kept open on the basis of information as set out in the report and the speakers heard at the meeting and
2. a report be presented in 6 months to inform Committee of any crime or anti-social behaviour reported to officers during that period and
2. that the situation be monitored by the local Community Safety Partnership for the next 12 months to ensure that if there should be any significant increase in the levels of crime, disorder or anti-social behaviour, facilitated by the alleyway, the issue of whether the making of a Gating Order would be an appropriate solution can be revisited upon receipt of any further application from the local Community Safety Partnership.

In accordance with Standing Orders Councillors Gail Turner and Sue Saddingtons vote against the recommendation was recorded.

The meeting closed at 11.25 am

**CHAIRMAN**

DRAFT



**17 July 2013****Agenda Item:****REPORT OF THE CORPORATE DIRECTOR (ENVIRONMENT AND  
RESOURCES)****APPEAL DECISION BY THE SECRETARY OF STATE FOR ENVIRONMENT,  
FOOD AND RURAL AFFAIRS REGARDING AN APPLICATION TO RECORD  
A PUBLIC BRIDLEWAY IN CLIPSTONE AND WARSOP****Purpose of the Report**

1. To inform Committee of the decision by the Secretary of State for Environment, Food and Rural Affairs to allow an appeal against the Authority's refusal to make a Modification Order, to decide whether the Authority should apply to the Administrative Court for a judicial review of the decision, and to consider the stance to be taken by the Authority should this matter subsequently be referred to the Secretary of State as part of the Modification Order process.

**Information and Advice**

2. On 23 January 2013 Committee resolved not to accept a Modification Order Application made by Mr S Parkhouse to register a public bridleway along a privately owned track known as New Buildings Drive. The Drive connects to Peafield Lane (A6075) at its northern end and to Clipstone Bridleway No.8 at its southern end. APPENDIX A shows the route under consideration marked between points A-B. A series of photographs taken along the claimed route is shown as APPENDIX B1-4. A copy of the January 2013 Committee Report and corresponding resolution are shown as APPENDIX C.
3. Following Committee's decision, Mr Parkhouse made an appeal to the Secretary of State for Environment, Food and Rural Affairs under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981. Subsequently, an Inspector was appointed on behalf of the Secretary of State to review the case.
4. Having taken into consideration the available historic and user evidence, the Inspector has concluded that a public bridleway can be reasonably alleged to subsist. A copy of the Inspector's decision is shown as APPENDIX D.
5. Accordingly, the Inspector has allowed the appeal and therefore directs this Authority to make a Definitive Map Modification Order as per Mr Parkhouse's original application. The Inspector's decision to direct the Authority to make a

Modification Order can only be challenged by applying to the Administrative Court for judicial review of that decision. Committee must therefore decide whether or not to pursue this option. However, it should be noted that the decision cannot be challenged simply because of disagreement with the Inspector's view. For a challenge to be successful it must be shown that the Inspector has not followed the proper procedures or has acted outside his powers and has so fundamentally misinterpreted the law as to cause him to make an irrational decision.

6. Although the Committee's previous decision on this matter is at variance with the Inspector's view, his decision takes into account all the relevant evidence and appears to be a correct interpretation and application of the law. It is worth emphasising that the evidential threshold in these matters is comparatively low i.e. all that is required to be shown is that the right of way is reasonably alleged to subsist. In this case, the Inspector has concluded that there is no evidence to suggest that this test cannot be met.
7. Should Committee decide not to seek judicial review (and to therefore authorise officers to make a Modification Order as per the Secretary of State's direction), there remains a possibility that such an order would be objected to. If objections are received and not subsequently withdrawn (which appears likely), the Authority cannot confirm the order itself but must refer the opposed order to the Secretary of State for determination.
8. Committee's earlier decision to refuse the application would ordinarily suggest this Authority would take an opposing stance at any ensuing hearing or public inquiry (where, as a decision against officer recommendation, Members would need to present their case / give evidence). However, taking into account the further views now provided in the Inspector's decision, it is also open to this Authority to adopt a neutral stance at an inquiry (with officers giving evidence) should an opposed Modification Order be referred to the Secretary of State.

#### **Reason/s for Recommendation/s**

9. The recommendations set out in this report enable compliance with the Secretary of State's Direction and will also enable the authority to progress the relevant Modification Order in the most appropriate and practical manner.

#### **Statutory and Policy Implications**

10. 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) That Committee resolves not to apply to the Administrative Court for judicial review of the Inspector's decision, and authorises Officers to make a Modification Order as per the Secretary of State's Direction (such Order proposing the addition of a bridleway to the Definitive Map as per Mr Parkhouse's application).
- 2) That Committee resolves to take a neutral stance in the event that the Modification Order is referred to the Secretary of State for determination.

**TIM GREGORY**  
**Corporate Director (Environment and Resources)**

**For any enquiries about this report please contact:**

Eddie Brennan  
Definitive Map Officer

**Constitutional Comments [SJE – 27/06/2013]**

11. The decisions within this Report fall 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 have been delegated.

**Financial Comments [SEM 03/07/13]**

12. There are no specific financial implications arising directly from this report.

**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**

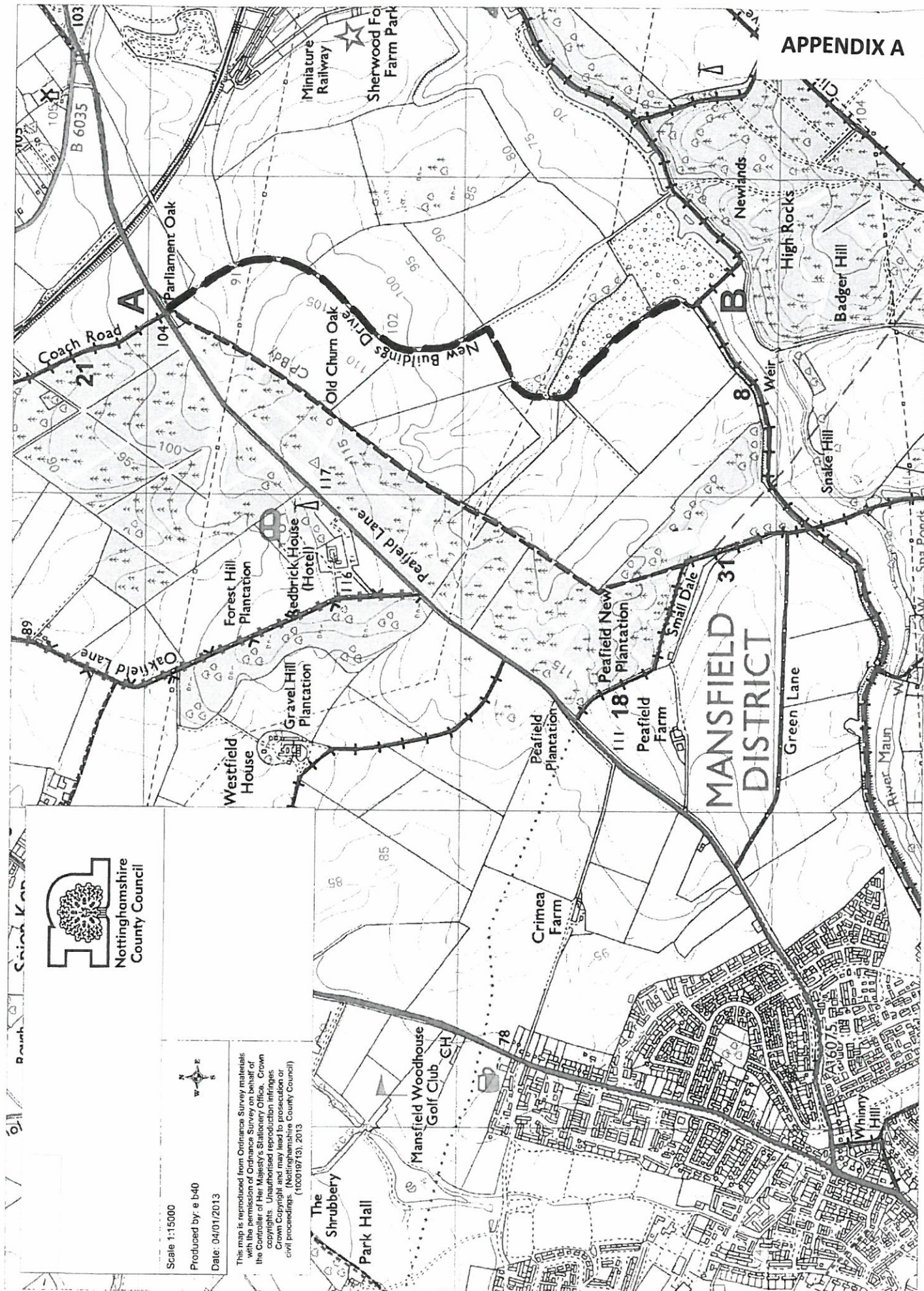
Rufford	Councillor John Peck
Warsop	Councillor John Allin

ROW 95





# APPENDIX A



Nottinghamshire  
County Council

Scale 1:15000

Produced by: a b40

Date: 04/01/2013



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## APPENDIX B1



Taken in 2011 from point 'A' facing south.

Showing the entrance to New Buildings Drive and the existing metal barrier (erected 1998).

The Parliament Oak can be seen to the right hand side protected by bollards and wooden fencing (erected 2009).

## APPENDIX B2



Taken in 2008 from Point A facing south.

Showing the old fence around the Parliament Oak and a gap to the side of the open barrier.



## APPENDIX B3




New Buildings Drive



## APPENDIX B4



Existing sign at the Southern end of the claimed route

 <b>Nottinghamshire County Council</b>	<b>Report to Rights of Way Committee</b>
	<b>23 January 2013</b>
	<b>Agenda Item: 5</b>
<b>REPORT OF CORPORATE DIRECTOR (ENVIRONMENT AND RESOURCES)</b>	
<b>APPLICATION TO ADD A BRIDLEWAY TO THE DEFINITIVE MAP AND STATEMENT IN THE PARISHES OF CLIPSTONE AND WARSOP</b>	

### **Purpose of the Report**

1. To consider an application made in 2008 by Mr S Parkhouse, Ms P Whitehead and Mr T Harkness on behalf of Clipstone Parish Council, to record New Buildings Drive, Clipstone as a public bridleway on the Definitive Map and Statement. A map of the area is shown as Plan A, with the route under consideration marked between points A and B.
2. The effect of this application, if accepted and confirmed, would be to add a public bridleway along an existing track leading from Peafield Lane (A6075), Warsop, opposite Warsop Bridleway No.21, continuing along New Buildings Drive and the track leading to Clipstone Bridleway No.8.

### **The Law**

3. The application was 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 in the area to which the map relates, 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".
4. Section 31 of the Highways Act 1980 (HA80) raises a presumption that a right of way has been dedicated as a highway if the route has been used by the public 'as of right' 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.

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”. The case of *R v SSE ex parte Bagshaw and Norton* (1994) has clarified the law in respect of the meaning of ‘subsists’ (Test A) and ‘reasonably alleged to subsist’ (Test B).
  - ‘Test A’ requires that the claimed right of way subsists i.e. clear evidence in respect of the claim and no credible evidence to the contrary.
  - ‘Test B’ is that it is reasonable to allege that a right of way subsists i.e. even if the evidence is finely balanced, but there is no incontrovertible evidence that the claimed route could not subsist, then the test is met and an Order should be made.
6. 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.
7. Should the test under the HA80 Section 31 fail, then it may be appropriate to consider the dedication of the way 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 use by the public ‘as of right’ may support an inference of dedication and may also show acceptance by the public.



## Information and advice

8. Originally constructed in the early 1800s, New Buildings Drive is currently in the ownership of Mrs Yvonne Glennie and is also subject to an agricultural tenancy to Mr Robert Bealby who farms in adjacent fields. The land which incorporates New Buildings Drive has been continuously owned by members of the Glennie/Bealby Family since 1945. The route comprises a wide, mainly stoned track nearly 2.1 kilometres in length which leads from Peafield Lane to Clipstone Bridleway No.8. In approximately 1998, a barrier was erected across the track at the northern end of the route. Members of a model aeroplane club are allowed access around the barrier through a side gate in order to use one of the fields for their flying activities. Visitors to Sherwood Forest Caravan Park and horse riders belonging to the Cavendish Lodge Liveries also have permissive use of the route. A series of photographs taken along the course of the route are shown as Photos B1-4.
9. The evidence in support of the Application comprised of 40 Public Rights of Way User Evidence Forms and a number of historic maps.

## Historic Documentary Evidence

10. Along with the maps submitted as part of the application, additional documents were examined (as is standard procedure) to see whether there was any evidence for pre-existing public rights of way over the claimed route. The historic documents comprised:
  - Sanderson's Map 'Twenty Miles Round Mansfield' 1835
  - Ordnance Survey 2" map 1840
  - Clipstone Tithe Map 1841
  - Deposited plans for the proposed Lancashire Derbyshire & East Coast Railway 1896
  - Encyclopaedia Britannica map 1902
  - Finance Act map and valuation book 1910
  - Guilford's Map of Nottinghamshire 1927
  - Ordnance Survey map extract 1927
  - Ordnance Survey extract 1940

- Parish Schedules for Clipstone and Warsop 1953

11. Dealing with the documentary evidence in chronological order, the earliest record for the existence of New Buildings Drive is found in Sanderson's map of 1835. The map describes New Buildings Drive as a 'Coach Road' shown passing through Clipstone Park (then owned by the Duke of Portland). Clipstone Park is shown enclosed by a 'Park Fence' which probably incorporated a gate at the New Buildings Drive entrance. Another 'Coach Road' is also shown passing through Clipstone Park. Sanderson's map gives no indication as to whether these coach roads were for public or private use.
12. The Ordnance Survey map of 1840 confirms the existence of New Buildings Drive but gives no indication of status.
13. The 1841 Clipstone Tithe map shows New Buildings Drive coloured brown. However, all roads and tracks are also coloured in this way, therefore this map does not give any indication as to the status of New Buildings Drive.
14. The deposited plans for the Lancashire Derbyshire and East Coast Railway (1896) were inspected. The plans indicate the location where the proposed railway crossed the claimed route. In the accompanying schedule New Buildings Drive is referred to as a 'Road' in the ownership of the Duke of Portland. This suggests that it was believed to be a private road with no public rights over it.
15. Documents prepared for the purposes of the Finance Act 1910 (FA10) were also examined. The purpose of FA10 was to levy a tax on the estimated value of land. The valuer allowed deductions for any public rights of way affecting the use/value of the land. The map used for the valuation shows the majority of the route was recorded as private land. The relevant book of reference shows that no deductions for public rights of way were claimed on New Buildings Drive. The junction of New Buildings Drive with Peafield Lane is excluded from the adjacent parcels of land (i.e. un-coloured) which suggests that it was regarded as part of the public highway. An extract from the Finance Act map showing the junction with Peafield Lane is shown as Plan C.

16. Nothing contained in the 1902 Encyclopaedia Britannica map, the 1927 Guilford map or in the 1927 and 1940 Ordnance Survey maps gives any indication as to the status of the claimed route.
17. No rights of way are recorded on New Buildings Drive in the County Council's Parish Schedule for Clipstone. This schedule was prepared in 1953 for the identification of public rights of way under the provisions of the National Parks and Access to the Countryside Act 1949. However, the schedule for the adjacent parish of Warsop contains a map showing New Buildings Drive annotated with the wording "Notice Private Road Tress will be prosecuted" and "Considered Private Road by the Clipstone Divisional Surveyor". These notes appear to be contemporaneous with the schedule and therefore suggest that the route was not considered to be a public right of way in 1953.
18. In summary, apart from where it meets Peafield Lane, the documentary sources do not show any evidence of public rights along any part of New Buildings Drive. The deposited railway plans and the Parish Schedules suggest that the route was regarded as a private road with no public rights of way over it.

### User Evidence

19. The information contained in the user evidence forms and in the subsequent interview transcripts relate to the presumed dedication of a highway based on uninterrupted use over a twenty year period. This period has to be calculated retrospectively from the date when the right of the public to use the way was brought into question. The landowner submits that the barrier (Photo B1) was placed at the northern end of the route in 1998 to prevent vehicles from entering the land and to show that it was privately owned. It is also submitted that the barrier constituted an interruption in use for the purposes of section 31 of the Highways Act 1981 even though a gap was left to one side by the Parliament Oak (Photo B2). The case of The Queen v Secretary of State for the Environment, ex parte William Greaves Blake (QBD, 1983) appears to support this view, and therefore the period during which public use can be considered is between 1978 and 1998.

20. Twenty eight evidence forms indicate continuous use throughout the specified 20 year period. Further examination of the forms indicates thirteen users cycled on the route throughout the relevant period with evidence of use from one horse rider. Frequency of use varies from daily to yearly. A chart showing overall use is shown as Appendix D.
21. In respect of evidence of signs or notices, the user forms suggest that the landowner did not take sufficient steps to show the public that there was no intention to dedicate a right of way. For example one user states "There used to be a sign which said 'private – keep dogs on a lead'...that's the only sign I've seen'. Another user stated 'I have never seen any signs on New Buildings Drive. There was an unreadable sign on the un-named track near the junction with the RUPP [Clipstone Bridleway No.8]' while another refers to a 'notice board at the flood dykes end – no message'. One user refers to a 'Private Property...Keep Out' sign which he believed referred to the New Buildings Farm site rather than New Buildings Drive itself.
22. Both Mrs Glennie and Mr Bealby have submitted statements in respect of their knowledge of the land and their attitude towards access along New Buildings Drive. Mrs Glennie has stated that she is seldom on the farm, but is aware that permissive access is given to various groups and individuals. Mrs Glennie also refers to the 'old, now illegible' sign at the Southern end of the route indicating private land (Photo C3).
23. In his statement, Mr Bealby describes how New Buildings Drive and the surrounding farmland has been in the ownership of his family since 1945. Mr Bealby states that he uses the route on a daily basis when inspecting sheep and crops. He also lists the groups and individuals who have been granted permissive access i.e. a model aeroplane club, a local livery, the local hunt/shoot etc. Mr Bealby states that anyone seen using the route that he does not recognise, is told it is 'private' and 'if you misbehave you're off'.
24. There is no evidence of any obstructions preventing public use of the route during the period 1978 to 1998.
25. Apart from the 1953 Warsop Parish Schedule, there is little information regarding the sign which was in place at the northern end of the route. The sign read "Private Road Tress. Will Be Prosecuted." Mr Bealby states that this sign fell down "probably during the 80's or 90's",



although none of those who completed user evidence forms recall a sign at this location. Furthermore, the wording "Private Road" is open to interpretation, for example it could relate to preventing vehicular users only. A similar sign reading 'Private Land' already exists at the southern end of the route on Clipstone Bridleway No.8 (a definitive right of way). Accordingly, if the intention of the sign was to prevent all public use, a notice which read 'No Public Right of Way' would have been more appropriate.

26. Mrs Glennie and Mr Bealby both make reference to the sign (Photo B4) at the southern end of the route which they state indicates that the route is private. This sign was observed at a site visit in November 2009. It is severely weathered and dilapidated, only the wording 'CAVEND' and an arrow can be distinguished (Cavendish Lodge is located nearby). There is no further evidence of this sign having any effect in respect of demonstrating there was no intention to dedicate a public right of way.
27. There is evidence of public use on the claimed route for in excess of twenty years prior to 1998. In order for this evidence to be valid, it must be demonstrated, that use was 'as of right' and was not exercised in secret or by force or with permission. The evidence forms show that use was not in secret or by force. In respect of whether use was with permission, the evidence is conflicting. The situation is complicated by the fact that some people have permissive use of New Buildings Drive and this may have had the effect of camouflaging some public use.
28. In respect of verbal permission, Mr Bealby states that he knows most of the users by sight and that he regularly informs members of the public that the route is not a public right of way. He also states that any unknown users are approached and allowed to use the route on the understanding that they do not 'misbehave'. By contrast, the information contained in the evidence forms presents a different version of events. One walker refers to passing a farm worker who said nothing 'in fact I think he [the farm worker] waved'. Another who used the route on a daily basis states that he was once told to put his dog on a lead but was not told it wasn't a public right of way. Another refers to being asked to wait while a crop spray went across the track but was not told that use of the route was with permission. A number of users state that they have never spoken to Mr Bealby or any of his workers, while others refer to farm vehicles driving past them without any verbal exchange. Some users say that they would pass the time of day but nothing more. Although there is evidence that Mr

Bealby did inform some individuals that use was with his permission and that the route was not a public right of way, there is insufficient evidence to demonstrate that this message was effectively communicated to the wider public.

29. Mr Parkhouse (the Applicant) recently submitted additional evidence indicating that some users have approached New Buildings Drive from a non-definitive path passing through Forestry Commission land. This path runs between points C and A (Plan A). Crown land or land belonging to a Government Department is exempted from the statutory provision (HA80 S.31) unless an agreement has been made with the Highway Authority under HA80 Section 327(2) whereby the Act can be made applicable. The fact that no such agreement has been made, and in the absence of further evidence to indicate Common Law dedication having taken place, means there is insufficient evidence before the Authority to consider a claim in relation to route C-A, or to consider such use as adding to the claimed route A-B. However, anticipating that this use could raise the question as to whether public use in the direction C-A-B is valid evidence for the claimed route (as it might not originate on a public highway), some further examination of the evidence has been undertaken, and it appears clear that the basis for the claim and the majority of the user evidence is one of use on the claimed route leading from and to Peafield Lane. Accordingly, the validity of some user evidence may depend on first establishing whether or not the junction of New Buildings Drive with Peafield Lane is public highway or not. Although some support may be found in evidence contained in the Finance Act documents which suggest that it was regarded as a public highway in 1910, no further evidence has been discovered to shed light on this point. Regardless of whether this 'connection' becomes a point to be decided at an Inquiry, there is no impediment to recording a highway which connects to another at only one end. Here, the claimed route would connect to Clipstone Bridleway No.8 and could, depending on the direction of use and any permissive use given by the Forestry Commission, connect to their land as 'a place of popular resort'.

## Consultation

30. Correspondence received from Burges Salmon LLP, representing the landowner makes the following points in respect of the application (officer's response in italics):

- Installation of the barrier (Photo C1, C2) at the northern end of the route in 1998 is evidence that permission is required to use New Buildings Drive. The barrier was erected to prevent vehicles from entering the land and to show that the land is private.

*A 20 year period can be calculated prior to the barrier being erected in 1998. If the barrier demonstrated that subsequent use was permissive, public use prior to that time could still be as of right.*

- The barrier constitutes an interruption in use for the purposes of HA80 Section 31. Therefore the legislative test needed to raise a presumption that the route has been dedicated as a highway has not been met.

*It is accepted that the barrier constituted an interruption to public use, however the statutory test relates to any full period of 20 years use. In this instance it would appear that the relevant period had elapsed between 1978 and 1998.*

- The user evidence is poor quality, limited in number and inconsistent. The weight that can be attached to the user evidence is minimal.

*Inconsistencies in evidence forms are not uncommon. The Council has endeavoured to clarify any inconsistencies that may have a bearing on the matter. The weight placed on the evidence forms is based on the combined evidence contained in them which gives an overall view of the situation.*

- 19 evidence forms refer to use of the route once per month or less.

*Taking into account user evidence between 1978 and 1998, 10 evidence forms relate to use between once and 6 times yearly, 5 forms relate to use on a monthly basis, 8 forms relate to use between a weekly/daily basis. In respect of the assertion that the user evidence is limited in number, the levels of use alleged are*

*similar to other user claims which have been confirmed by Inspectors on behalf of the Secretary of State.*

- The user forms were collected by the applicant who has not made it clear over what period the use has occurred.

*It is common practice for an applicant to collect together evidence forms. This does not call into question the validity of evidence contained in them. The applicant is not required to specify the period over which use has occurred. Such information will be established through an evaluation of the evidence.*

- User evidence referring to barriers and signs along the route indicates that use was not 'as of right' but with permission.

*There is no conclusive evidence to suggest that the barriers and signs along the route indicated that use was not 'as of right' during the period 1978 to 1998.*

- The Parish Survey of 1953 records New Buildings Drive as a private road with appropriate signage. This is consistent with the statement made by the farmer.

*The Parish Survey of 1953 suggests that the route was not considered to be a public right of way at that time. However, actions taken in 1953 do not necessarily prevent rights being acquired at some later date.*

- Use of the route around the eastern side of the gate could only have taken place since improvements to the Parliament Oak amenity area took place 2008. Use has switched from one side of the gate to the other.

*Although a barrier was placed at the northern end of the route in 1998, the public may have already acquired rights by presumed dedication by that time. Issues regarding use either side of the barrier after 1998 are outside of the specified 20 year period and are therefore not relevant.*

- One evidence form acknowledges use by permission stating that the farmer does not consider the route to be a public right of way. Reference is made to people using the route without being challenged with no basis for this assertion is given.

*Evidence that one user acknowledged use was with permission relates to a conversation between the applicant and the tenant which took place after the Modification Order Application was submitted and is not relevant to the acquisition of rights during the relevant 20 year period.*

- Failure by users to refer to waste disposal lorries, and by members of the aero club indicates limited knowledge of the route.

*One user recalls that he stepped to the side to allow vehicles to pass, while another, when leading a group walk, recalls being asked to wait for vehicles to pass before proceeding along the Drive. Although relatively few users have referred to vehicles using the tip area, this is not itself a point which would show that presumed dedication had not taken place. User evidence will be tested further if an order is referred to the Secretary of State for a decision.*

31. Following deferment of this matter at the last Committee (28/11/2012), a list of 154 signatories was submitted on behalf of the landowner/farmer of the surrounding land. It is stated that the list provides "irrefutable evidence that New Buildings Drive and the surrounding fields are and always have been private property and that it is generally known locally that there has never been a public right of way along the Drive or over the fields". The list is headed "We, the undersigned, confirm that we and our families have lived in the locality for many years and that New Buildings Drive and surrounding fields farmed by Robert Bealby are private property and it is generally known locally that there has never been a public right of way along the Drive or over the fields". The list is said to comprise of "mostly people who know the locality well...have visited over a long period of time to participate in recreational activities which include riding horses out of the local livery stables, fishing on the lakes by the River Maun, shooting, beating and picking up, flying model aeroplanes and jogging, walking etc...also those who live nearby and have done so for many years".

*It is noted that the signatories have specified the number of years they have lived in the area. The earliest has resided in the area since 1927, the most recent since 2007. The average figure amounts to 40 years. The signatories say that New Buildings Drive has 'never been a public right of way' although it is not known whether this statement is made in the knowledge of certain facts, or whether this view simply reflects their own permissive access. The view of the signatories clearly conflicts with that of the users who take the view that the route is a public right of way. However, while extensive use by permission might suggest that New Buildings Drive was not reputed to be a public right of way, this does not in itself constitute 'incontrovertible evidence that the claimed route could not subsist' (Test B in para.5).*

31. Also following the recent deferment, Mr Parkhouse, one of the Applicants submitted the following;

- The 'Blake' case is not applicable in this situation because the barrier did not extend across the full width of New Buildings Drive, nor did it force path users off the Drive into adjacent land. Public use was therefore uninterrupted in 1998.

*The width of New Buildings Drive between Peafield Lane and the barrier is defined by the Tarmac/stone surface. The land on the Parliament Oak side of the barrier has a grass/earth surface. Use which changes from being within one clearly defined route to being outside this route is regarded as use of a different route and therefore an interruption. Whether such deviation constitutes use of a different route is irrelevant if the barrier called the public's right to use the route into question in 1998.*

- Erection of the barrier did not bring into question the public's right to use New Buildings Drive in 1998.

*In respect of what constitutes 'bringing into question' the Planning Inspectorate guidelines state that the test to be applied is found in the case of R v SSETR ex parte Dorset County Council 1999 which established "Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway". In this case Mr Parkhouse has stated that*

*once the barrier was erected, he would either duck under it, or go around it. When it was open Mr Parkhouse has stated that that he walked through it "without leaving the width of the lane". It therefore appears that Mr Parkhouse did acknowledge the presence of the barrier which caused him to adapt his use accordingly. Furthermore, it is noted that the claim is for a public bridleway on the basis of use by cyclists. Clearly cyclists could not continue to cycle along New Buildings Drive in the same way they had before and would have been forced to deviate off the metalled surface. It is therefore clear that the public's right to use New Buildings Drive was challenged by the erection of the barrier in 1998.*

- Some path users approached the claimed route from the unregistered path (C-A Plan A).

*According to the Application, the route being claimed runs between Peafield Lane and Clipstone Bridleway No.8 (highway to highway). Whether any use from the unregistered path C-A is valid for the purposes of this claim is covered in paragraph 29 above. Any use of C-A can therefore be considered as a separate matter, for which insufficient evidence has been found and which would only be claimable on the basis of common law dedication (which is a different test with a higher evidential threshold).*

- Both before and after the erection of the barrier, some path users walked on the short section of verge alongside the Parliament Oak rather than the tarmac road.

*Given the passage of time, it would be extremely difficult to establish whether walkers deviated from the metalled surface when using this short section of the claimed route between 1978 and 1998. Use after 1998 is considered to be after the date of challenge and therefore not relevant.*

- The landowner has stated that the barrier was erected to prevent vehicles from entering and to show that the land is private. The case of *Mertham Manor Ltd v Coulsdon and Purley Urban District Council* (1937) defines 'interruption' as "an actual and physical stopping of the public's enjoyment". *Lewis v Thomas* (1950) established that "The interruption must be with intent to prevent public use of the way. It will not be sufficient if the interruption is shown to have been for some other



purpose". The barrier was erected to control motorised access and not to exclude the public on foot, cycle or horseback. The barrier could be got under by users and no signs were erected to challenge public use. The barrier was frequently left open in daylight hours.

*Matters relating to interruption after 1998 are irrelevant being outside the relevant period 1978-1998.*

- The gap at the side of the gate looked as if it was intended for walkers and cyclists to use. The actions of the landowner in 1998 appear to be more like an implied dedication. *Eyre v New Forest Highway Board [1892]* established that creation occurs when the landowner "either says in so many words, or so conducts himself as to lead the public to infer that he meant to say: I am willing that the public should have this right of passage".

*Again, the gap is only of significance after 1998 and therefore outside of the relevant period. Although by leaving a gap it could be construed that the landowner was content for pre-existing use to continue (albeit on a different alignment), equally, the landowner may say that the gap was left to allow known users to use the route on a permissive basis.*

## **Responses from other Consultees**

32. BT Openreach - *No objections to the proposals*
33. Environment Agency - *Assets owned or operated by the Environment Agency will not be affected.*
34. E-On - *We do not object to the developments as proposed.*
35. NCC Conservation Service - *The scheme is unlikely to have any significant impact on the Special Protection Area (possible future designation under Conservation of Habitats and Species Regulations 2010).*



**Reason/s for Recommendation/s**

36. There is no documentary evidence to suggest that New Buildings Drive was a public right of way prior to 1953.
37. The sign near the northern end of the route which read 'Private Road Trespassers will be prosecuted' is known to have existed in 1953 by virtue of the Warsop Parish Schedule. However, it appears this sign was not replaced when it fell into disrepair. If the sign survived into the 1990s as stated by Mr Bealby, this view conflicts with evidence contained in the user evidence forms which make no reference to it. The sign at the southern end of the route does not appear to have contained any wording which challenged public use of the route and therefore is not considered relevant. If the landowner (or tenant) intended to rely on signs to demonstrate that there was no public right of way, it would be reasonable to assume that such signs would be renewed from time to time and would contain clear and unambiguous wording such as 'No Public Right of Way'. Furthermore, no declarations in respect of public rights of way have been lodged with the County Council under Section 34(6) of the Highways Act 1959, or subsequently by Section 31(6) of the Highways Act 1980, and no notices have been received under Sections 34(4) and 31(5) of the respective Acts stating that the claimed paths have not been dedicated as highways.
38. Assuming the barrier at the northern end of the route was erected in 1998, this is considered to be an effective challenge to public use at that time. The relevant period during which a bridleway can be presumed to have been dedicated is therefore between 1978 and 1998.
39. Verbal permissions given by the tenant, Mr Bealby appear to have been directed at certain groups and individuals seen using the route. However, Fairey v Southampton C.C. (1956) established that in order to show a lack of intention to dedicate, the landowner must demonstrate "sufficient evidence that there was no intention to dedicate the way" and "there must be evidence of some overt acts on the part of the landowner such as to show the public at large...that he had no intention to dedicate". The evidence submitted in the user evidence forms suggests that many users were not challenged despite having been seen

by farm workers. It does not appear that the landowner's intentions were sufficiently made known to the 'public at large' either through verbal challenges or by placing signs along the route stating that use was with permission only.

40. Although user evidence in respect of presumed dedication is conflicting, there is no incontrovertible evidence to demonstrate a lack of intention by the landowner to dedicate a public bridleway between 1978 and 1998. Therefore it is considered that there is sufficient evidence for it to be reasonably alleged that a right of way subsists (Test B in para.5).
41. Thirteen evidence forms (for the whole 20 year period) relate to use by cyclists. The case of Whitworth v Secretary of State for Environment, Food and Rural Affairs [2010] held that it is appropriate (when considering statutory claims under HA80 s.31) to infer the form of dedication which is least burdensome to the landowner. In right of way terms, cyclists are entitled to use byways, restricted byways, and bridleways. The least burdensome of these categories is that of public bridleway.

### **Statutory and Policy Implications**

42. 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**

43. It is RECOMMENDED that Committee accepts the application and approves the making of a Definitive Map Modification Order to add a bridleway to the Definitive Map and Statement on the basis that, for the reasons set out above, it is considered by the Authority that the evidence shows that a right of way is reasonably alleged to subsist, and directs that, unless further evidence be disclosed to or discovered by the officer in the meantime, the Authority should adopt a neutral stance at any subsequent inquiry etc.

**Eddie Brennan**  
**Definitive Map Officer**

**For any enquiries about this report please contact:**

Eddie Brennan (0115 9774709)  
Definitive Map Officer

**Constitutional Comments (SJE 03.01.2013)**

45. 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 04.01.13)**

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

**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.

Modification Order Application case file

**Electoral Division(s) and Member(s) Affected**

Rufford	Councillor John Peck
Warsop	Councillor John Allin

ROW 91 To add Bridleway in the Parishes of Clipstone and Warsop  
11 January 2013





## minutes

Meeting	RIGHTS OF WAY COMMITTEE
Date	Wednesday 23 January 2012 (commencing at 10.00 am)

### membership

Persons absent are marked with 'A'

### COUNCILLORS

Bruce Laughton (Chairman)  
Gail Turner (Vice-Chairman)

	Allen Clarke		A	Rachel Madden
	John Cottee			Sue Saddington
A	Jim Creamer			Andy Stewart
	Sybil Fielding		A	Jason Zadrozny
	John Hemsall			

### OFFICERS IN ATTENDANCE

David Forster	- Governance Officer
Steven Eastwood, Snr	- Principal Legal Officer, Legal Services
Eddie Brennan	- Definitive Map Officer/Commons and Village Greens Officer
Angus Trundle	- Definitive Map Officer/Commons and Village Greens Officer
Neil Lewis	- Team Manager Countryside Access
Tony Shardlow	- Community Safety Officer

### MINUTES

The minutes of the meetings held on 28 November 2012 were taken as read and were confirmed and signed by the Chairman.

### APOLOGIES FOR ABSENCE

Apologies for absence were received from:-

Councillor	Jim Creamer
"	Rachel Madden
"	Jason Zadrozny

### DECLARATIONS OF INTEREST BY MEMBERS AND OFFICERS

There were no declarations of interest

## **DECLARATIONS OF LOBBYING BY MEMBERS**

There were no declarations of Lobbying.

## **APPLICATION TO ADD A BRIDLEWAY TO THE DEFINITIVE MAP AND STATEMENT IN THE PARISHES OF CLIPSTONE AND WARSOP.**

An amended appendix D to the report was circulated prior to the item being discussed.

Mr Brennan introduced the report and highlighted the issues around the erection of the barrier on New Buildings Drive. He also highlighted that no new evidence had been submitted by the landowners though they had submitted a petition stating that the road was not generally thought of as being for public use.

Following the opening comments by Mr Brennan a number of public speakers were given the opportunity to speak and summaries of those speeches are set out below.

Mrs Y Glennie, local landowner, spoke against the application. She informed members that although she does not walk this land now she did for many years and during the period 1978-98 as she trained racehorses and was therefore regularly on this farmland. She highlighted the dangers of a bridleway joining Peafield Lane by the Parliament Oak at the claimed point stating that it is dangerous because of visibility for both horse riders and walkers alike. She also informed members that she often approached and spoke to people on the land to whom it must have been obvious she was the landowner.

In response to questions Mrs Glennie responded as follows:-

- When speaking to people on the land, she would have always done so politely.
- She would have said to people politely that the land is private property
- She presumed that most people on the land have been given permission by her brother as he spoke with them.
- She would have challenged anyone she saw using the route people as a matter of course unless it appeared permission had been given by her brother.

Mr Brennan informed members that although desire, preference or safety is appreciated it cannot form part of the consideration before members.

Mr R Bealby, local landowner, spoke against the application. He informed members that various signs and gates had been erected over the years informing people that the Drive was private property. He also stated that he had been asked in the past by the Nottinghamshire Footpaths Preservation Society for permission to walk along New Buildings Drive, and that this was evidence that the Drive is not a public right of way and is private property. He also informed members that there had been heavy vehicles used during landfill operations, once this had finished heavy barriers were erected to stop people from accessing this private property.



In response to questions Mr Bealby responded as follows:-

- Signs had been erected over the years but they had not been maintained as scrupulously as they could have been.
- The sign shown in appendix B4 was erected by Cavendish Lodge Liveries and it originally said something like "Cavendish Lodge Private Road. No Access"
- The 1 metre gap left beside the barrier was left because the barrier was installed up to the boundary of their ownership, and the gap was on adjacent ownership.

Mr C Glennie, local landowner, spoke against the application. He informed members that on a number of occasions he had challenged walkers and informed them the Drive is private property. He highlighted the fact that Mrs Glennie and Mr Bealby have collected over 150 signatures from local residents indicating their view that the land is private and therefore is no public right of way.

In response to a question Mr Glennie responded as follows

- Although the family had given permission to "some" people to use the lane this was not a given right for all to use it and those were challenged.

Mr Parkhouse, joint applicant with Clipstone Parish Council, spoke in favour of the application. He stated that the Village Council of Kings Clipstone supports the application as many of the villagers have used this route to connect with Parliament Oak, with no opposition from the landowners. He also informed members that Warsop Parish Council also supports the recognition of New Buildings Drive as a public right of way. About 17,000 people are represented between both Councils.

In response to a question Mr Parkhouse responded as follows

- The number of evidence forms does not reflect the number of people who have used this Drive. Some people have used it once or twice over the 20 year period and their use is not significant, but the 40 forms show use of this route on a regular basis
- He saw no 'private property' signs, until after the application was made.
- During the period of claimed use there were no barriers erected - these were put up at the end of the period in question.
- There may have been a sign up stating it was private property in the 50's but this was not relevant to the claimed period, nor was any sign apparent during the period in question.
- Whilst it was not claimed by the Parish Council in the 50's, this was not relevant to whether public rights were acquired subsequently.

Mr Brennan responded to issues raised stating that 40 was not a small number of user evidence forms, he also informed members that as few as 6 evidence forms have been used in cases he is aware of and this had led to an order being made. Also in respect of the petition, its meaning is unclear, the signatories may only be saying that the drive is not currently recorded as a public right of way and therefore

they are simply expressing that opinion. Mr Brennan confirmed that the test upon which the Recommendation is based is that of officers considering Test B to be met, i.e. that the way is reasonably alleged to exist.

During discussions members took into account the fact that signs had been erected in the area at one time, although not maintained throughout. There was evidence that attempts had been made to stop the signs being vandalised by putting up barbed wire on the post. They also considered that attempts had been made by the landowner through challenging people whilst accepting that it could not be policed 24/7, and the erection of the barrier clearly demonstrated that the landowner did not think that it was a right of way. The 150+ petition is not credible evidence of fact though does show that the reputation is that a public right of way does not exist along New Building Drive.

On a motion by the Chairman seconded by the Vice Chairman it was:-

**RESOLVED 2013/001**

That a Modification Order not be made to modify the Definitive Map on the grounds that the evidence is not considered sufficient to demonstrate that existence of a bridleway is reasonably alleged

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**APPLICATION TO REGISTER LAND KNOWN AS TOTON SIDINGS IN TOTON NOTTINGHAMSHIRE AS A TOWN OR VILLAGE GREEN**

Mr Trundle introduced the report and highlighted that an application had been made for a Town and Village Green where two thirds was in Nottinghamshire and the other third was in Derbyshire. The report was written to decide whether to accept the offer of delegation from Derbyshire for determination of the application, not to discuss the evidence submitted or potential objections.

**RESOLVED 2013/002**

- 1) That the County Council accepts the delegation from Derbyshire County Council under Section 101 of the local Government Act 1972 to determine the application for registration of land known as Toton Sidings as a Town or Village Green.
- 2) That the County Council accepts the delegation on the basis of Derbyshire County Council paying one third of the costs of determination of the application and that a letter of appreciation be sent to Derbyshire County Council.
- 3) That authority be given for officers to proceed with the application and that Derbyshire County Council be kept informed of the progress of the application.

**UPDATE ON GATING ORDER – CEDERLAND CRESCENT AND NOTTINGHAM ROAD NUTHALL**

**RESOLVED 2013/002**

That the report be noted

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The Planning  
Inspectorate

## Appeal Decision

by Alan Beckett BA, MSc. MIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date:

25 JUN 2013

### Appeal Ref: FPS/L3055/14A/7

- This Appeal is made under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981 (the 1981 Act) against the decision of Nottinghamshire County Council ('the Council') not to make an Order under section 53(2) of that Act.
- The Application dated 8 December 2008 was refused by the Council on 24 January 2013.
- The Appellant claims that the definitive statement for Newark and Sherwood plus Mansfield should be modified by adding a public bridleway between Peafield Lane, Clipstone and public bridleway No. 8 Clipstone via a route known as New Buildings Drive.

### Summary of Decision: The appeal is allowed.

#### Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53 (5) and Paragraph 4 (1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. This appeal has been determined on the basis of the papers submitted.

#### Main issues

3. The need for an Order to be considered when evidence is submitted as to the possibility of rights of way existing is dealt with under Section 53 of the 1981 Act. Section 53 (3) (c) (i) of the 1981 Act provides that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, 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. As made clear by the High Court in the case of *R v Secretary of State for the Environment ex parte Norton and Bagshaw*, this involves two tests at the schedule 14 stage:

**Test A** - Does a right of way subsist on the balance of probabilities? This requires clear evidence in favour of the Appellant and no credible evidence to the contrary.

**Test B.** Is it reasonable to allege on the 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 one does subsist.

4. In a case where reliance is placed upon evidence of use by the public to support the claim that a public right of way subsists or is reasonably alleged to

subsist, that user evidence must be considered against the requirements of section 31 of the Highways Act 1980 (the 1980 Act). Section 31 (1) provides:

*"Where a way over land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it".*

Section 31 (2) of the 1980 Act adds that:

*"The period of twenty years referred to in subsection (1) is to be calculated retrospectively from the date when the right of the public to use the way is brought into question whether by a notice such as is mentioned in subsection (3) or otherwise".*

5. The main issue in this case is whether the available evidence demonstrates that a public right of way subsists over the claimed route (test A above) or whether the evidence is sufficient for the Appellant to reasonably allege that a public right of way subsists (test B).

## **Reasons**

### **Documentary evidence**

6. The application to the Council was made on the basis that the public had enjoyed access over the claimed bridleway for a considerable period of time. Nonetheless, the Council had consulted a number of documentary sources to determine how the claimed route had been depicted through time and to consider whether those sources provided evidence of the reputation of the route as a public right of way.
7. The documentary sources consulted by the Council demonstrate that the claimed route has been an identifiable feature in the landscape since at least 1835. Sanderson's Map of that date shows the route as forming part of 'Coach Road' lying within the pale of Clipstone Park. The Ordnance Survey map of 1840 and the Clipstone Tithe map of 1841 both show the claimed route but provide no indication of its status. The 1896 deposited plans of the Lancashire Derbyshire and East Coast Railway record the claimed route as a 'road' in the ownership of the Duke of Portland. With the exception of a minor section of the claimed route at its junction with Peafield Lane, the 1910 Finance Act map shows the whole of the appeal route as being in private ownership.
8. The Parish Schedule for Clipstone produced in 1953 as part of the survey of public rights of way under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) does not record the claimed route as a public right of way. The survey map for the neighbouring parish of Warsop recorded the existence of a sign near the Parliament Oak which read '*Private Road Tress will be prosecuted*'; the same map noted that the Divisional Surveyor considered New Buildings Drive to be a private road.
9. In summary, the documentary sources consulted by the Council do not demonstrate the existence of public rights over the claimed route prior to the 1953 survey. The non-existence of public rights prior to 1953 does not preclude the possibility that such rights have subsequently come into existence through use by the public. It is to the evidence of use that I now turn.



***The date on which the right of the public to use the claimed path was brought into question***

10. The Council considered that public use of the route had been brought into question in 1998 by the erection of lockable barrier gates near to the Parliament Oak. Mr Parkhouse (the Appellant) contends that as a gap through which pedestrians, cyclists and horseriders could pass was left between one of the gateposts and the fence which surrounded the Parliament Oak, the erection of the barriers had no impact upon public use. It is Mr Parkhouse's contention that public use was brought into question in 2008 when the fencing around the Parliament Oak was renewed and the gap between that fencing and the barrier gateposts was closed.
11. It is common ground that in 1998 two metal swing barriers had been erected across the northern end of the appeal route. The landowners have stated that these barriers were erected to combat fly-tipping and to prevent unauthorised vehicular access to their farmland. Mrs Glennie, the landowner who erected the barriers did not own the Parliament Oak or the land immediately adjacent to it<sup>1</sup> and the barriers were erected wholly on her land. Consequently, following the erection of the barriers a gap existed between the western gate post of the barrier and the Parliament Oak.
12. It is Mr Parkhouse's case that prior to 1998, the public had unfettered access to the full width of the northern end of New Buildings Drive and to the Parliament Oak land. When the barriers were locked shut, pedestrians and others made their way round the side of the barrier between the gatepost and the Parliament Oak.
13. Forty UEFs were submitted in support of the application to add the route to the definitive map. Question 16 of the UEF relates to the existence or otherwise of gates along the route. In response to this question, 18 respondents stated that there had been a gap at the side of the barrier through which they had walked. In the written record of interviews with a number of respondents, in response to the question *'has the barrier at the Parliament Oak end of the route prevented access to New Buildings Drive?'* 10 respondents noted that access had remained possible by passing round the side of the gate.
14. On the face of it the barriers erected in 1998 do not appear to have had any material impact upon use of the appeal route; the user evidence suggests that whilst walking along the centre of the drive from Peafield Lane would have been prevented when the barriers were locked, a means of access past those barriers remained.
15. The Council considered that the case of *R v Secretary of State for Environment ex parte Blake* was applicable in this case. In *Blake*, Walton J held that *"It would be impossible ever for a landowner to prevent the acquisition of a right of way over land...by the erection of a gate across any part, because given the nature of the terrain it would always be possible for persons wishing to use the path to find a way round and then ...claim that they were using the way; whereas what had happened in fact was that they were acknowledging the existence of the obstruction...by their very actions to avoid it"*.
16. I consider that the Council was correct in its application of Walton J's findings in *Blake* to this case. Although there was no physical boundary between Mrs

<sup>1</sup> The Parliament Oak was owned by Welbeck Estates but is now owned by the Sherwood Forest Trust

Glennie's land and the Welbeck Estate / Sherwood Forest Trust land, to walk on the Parliament Oak land to avoid the barrier is the kind of deviation that was at the heart of the *Blake* case<sup>2</sup>. Although users had made use of a small section of land owned by a third party, that deviation occurred over land that was wholly separate from the claimed route.

17. Given that there was no physical boundary between Mrs Glennie's land and the Parliament Oak land and that a means of access to New Buildings Drive remained possible after 1998, it is not surprising that an application was not made at that time to record the route as a public right of way. However, the evidence suggests that those members of the public who sought to use the route after the erection of the barriers modified their means of access by either walking round the barrier, or by ducking underneath it as Mr Parkhouse did. Consequently, it is likely that at least some users would have understood that unimpeded access along New Buildings Drive was being questioned.
18. I am of the view that despite continued access along the claimed route after 1998 having been possible, the erection of the barrier would have made some users aware that their right to do so was being brought into question.

*Evidence of use prior to 1998*

19. As noted above, 40 UEFs were submitted in support of the application. Of these, 28 users claim to have used the appeal route throughout the 20 years prior to 1998; seventeen of those respondents claim to have used the route for periods in excess of 30 years. The earliest claimed use was in the late 1920s with five other users claiming to have used the route from the 1940s. Frequency of use ranged from daily use to monthly use with 13 respondents having used the lane solely on foot, 14 on foot and with a pedal cycle, and 1 on foot and on horseback. With the exception of one respondent who provided no answer, all those who completed a UEF recalled seeing other people walking, cycling or riding a horse when they were using the route.
20. There is a significant body of evidence of regular and frequent use of the appeal route throughout the 20-year period which ended in 1998.

*Evidence regarding permission, challenges and signs*

21. None of those who completed a UEF recalled being challenged as to their presence on the route at issue. Whilst some recalled meeting people engaged in agricultural activities on the land and exchanging pleasantries, none recalled being told to leave or that they had no right to be on the land. There is nothing within the user evidence to suggest that permission to walk, ride or cycle along New Buildings Drive had been sought.
22. The owner and the tenant of the land submitted that permission to access New Buildings Drive had been given to members of the local shoot and to two livery stables operating from Cavendish Lodge. In addition, a model aeroplane flying club had permission to fly from one of the fields adjacent to the drive and held the combination of the lock on one of the barriers at the north end. Furthermore, it was submitted that when people were found on the land who the owner or tenant did not know by sight, they were told that the land was private but permission to remain was given if it was considered appropriate.

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<sup>2</sup> In *Blake*, the users had entered an adjacent field and walked within that field and the re-emerged onto the claimed path in order to circumvent a locked gate



23. The evidence regarding use with or without permission is conflicting; permission has been granted by the landowner to some people and the tenant has questioned some people regarding their presence on the land. However such challenges do not appear to have been made to those users who provided evidence by way of a UEF.
24. The UEFs do not suggest that any prohibitory signs had been erected along the claimed route. There is evidence from the 1953 parish survey that a sign had been present at the Parliament Oak end of the route which read '*Private Road Tress will be prosecuted*', but there is no evidence before me regarding the date at which the sign disappeared or that it had ever been replaced.
25. Reference was made in the UEFs to a dilapidated sign at the southern end of the claimed route; one respondent claimed that the sign was 'unreadable' whilst another stated that the sign carried 'no message'. The landowner submitted that the old illegible sign at the southern end of the claimed route had indicated that New Buildings Drive was private land. Photographs of this sign show that the only legible script on this notice was the word 'CAVEND' along with an arrow; the Council thought this might be a sign indicating the existence of the nearby Cavendish Lodge. The evidence of the parties with regards to the existence of signs, the wording of those signs and the interpretation of those words is also conflicting.
26. The landowner claimed that it was common knowledge that there was no public right of way over New Buildings Drive and submitted a petition containing the signatures of 156 people to that effect. The landowner stated that the signatories were those who knew the area well and had visited the land many times to participate in recreational activities from local livery stables, shooting, beating and picking up and flying model aeroplanes.
27. There is a body of evidence to show that the public have enjoyed uninterrupted access to the claimed route throughout the 20-year period which ended in 1998. The petition suggests that there is equally a body of people who consider that the route is not a public right of way.
28. Whilst the evidence regarding permission and signs is in conflict and there is a conflict between those who claim there is no right of way along New Buildings Drive and those who claim there is, the evidence submitted by the landowner simply demonstrates a different view of the question as to whether or not a public right of way subsists along New Buildings Drive; no incontrovertible evidence has been submitted by the landowner which would inevitably defeat Mr Parkhouse's application.
29. Consequently, following the guidance of the court given in *Norton and Bagshaw*, the Appeal fails against test A, but succeeds against Test B as no incontrovertible evidence has been submitted by the landowner to demonstrate that a public right of way could not be reasonably alleged to subsist.

#### Status

30. The application was made for the addition of a public bridleway. The evidence of use is primarily of use on foot and with a pedal cycle; use with a pedal cycle on a route which has no recorded status would give rise to a right of way for non-mechanically propelled vehicles if it gave rise to anything (section 68 (2) of the Natural Environment and Rural Communities Act 2006); that is, as a Restricted Byway.

31. Taking the user evidence at face value suggests that a Restricted Byway could be reasonably alleged to subsist. However, the application and appeal were made on the basis that a public bridleway could be reasonably alleged to subsist, and I will determine the appeal on that basis. There is evidence of use on horseback but the evidence is limited to two members of the public, although a number of users stated that they had seen horses being ridden on the claimed route. I consider that at this stage, sufficient evidence of equestrian use has been submitted for Mr Parkhouse to reasonably allege that New Buildings Drive is a public bridleway.

### **Conclusion**

32. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

### **Formal Decision**

33. In accordance with paragraph 4 (2) of Schedule 14 to the 1981 Act Nottinghamshire County Council is directed to make an order under section 53 (2) and Schedule 15 of the Act to modify the definitive map and statement for Newark and Sherwood plus Mansfield to add a public bridleway as proposed in the application dated 8 December 2008. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with his powers under Schedule 15 of the 1981 Act.

*Alan Beckett*

Inspector

**17<sup>th</sup> 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

**Photograph 1.** Looking west from the Woodthorpe Drive end of the claimed path. Dated 2008



**Photograph 2.** Looking west along the middle section of the claimed route. Dated 2008





**Photograph 3.** Looking west along the claimed route at the locked gate at the back of Tesco's. Dated 2008



**Photograph 4.** Looking east from Mansfield Road along the claimed route. Dated 2008.

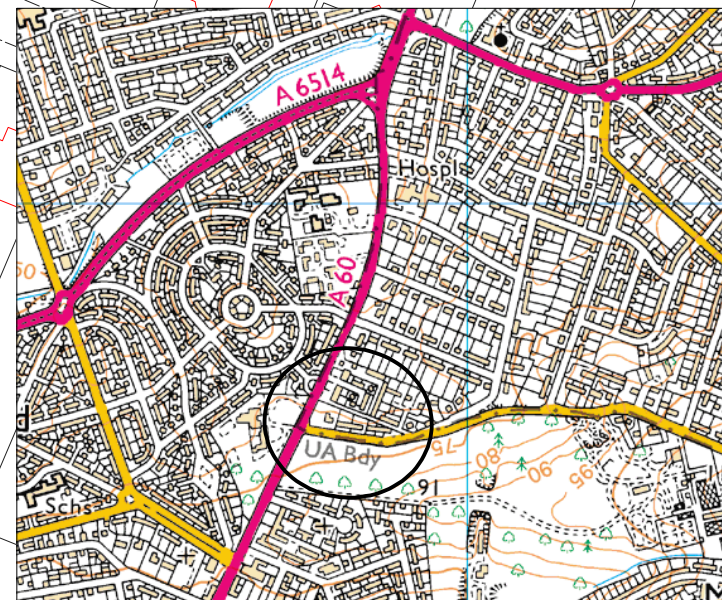


Claimed path from  
Mansfield Road to  
Woodthorpe Drive



----- Claimed Footpath

Location of  
photograph



Tesco and Subway

## Signs

Location  
of gate

## Posts

## Signs

Woodthorpe Drive





Claimants	Type of extra information	Years used	Frequency of use	Date of first use	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13																	
Use of route on foot																																																							
1	form	69	5xyear	1942																																																			
2	interview	67	2xday	1946																																																			
3		64	occasionally	1948																																																			
4	interview	36	5xweek	1957																																																			
5		46	whenever	1966																																																			
6		45	frequently	1967																																																			
7	form	42		1970																																																			
8	form	40+	regularly	1972																																																			
9	form	20+	4xday	1973																																																			
10	interview	38	2xmonth	1974																																																			
11	form	36		1976																																																			
12	interview	34	2xweek	1978																																																			
13	form	?	3xweek	70's																																																			
14	form	32	2xweek	1980																																																			
15	form	26	1xweek	1981																																																			
16	form	24	3xmonth	1984																																																			
17		30	4xday	1982																																																			
18	form	30	every week	1986																																																			
19	form	20+	5xweek	1987																																																			
20	form	20+	3xday	1989?										?																																									
21		22	2xweek	1990																																																			
22		22	1xweek	1990																																																			
23	form	29	1xmonth	1993																																																			
24	form	27	5xyear																																																				
25	interview	15	1xweek	1997																																																			
26	Interview		2xweek	1994																																																			
27	form	15	most days																																																				
28	form	13	3xweek	1999																																																			
29	form	13	5xweek	1999																																																			
30	form	13	6xweek	1999																																																			
31		12	1xday	2000																																																			
32	form	6	1xweek	2006																																																			
33		5	4xweek	2007																																																			
34		3	3xweek	2009																																																			
Unspecified use on foot																																																							
35	form	18	2xweek	1994																																																			
36		36	1xweek	1976																																																			
37	form	30	3xday	?																																																			
38		30	1xday	?																																																			
39	form	?	often	?																																																			
													1988																													2008	Date of challenge												

1988

2008 Date of challenge

Table 1

Table showing use of the claimed route from Mansfield Road to Woodthorpe Drive

