

27 November 2013

Agenda Item: 6

REPORT OF THE CORPORATE DIRECTOR (ENVIRONMENT AND RESOURCES)

CONSIDERATION OF APPLICATIONS UNDER SECTION 53(2) OF THE WILDLIFE AND COUNTRYSIDE ACT TO ADD THREE BRIDLEWAYS AND A FOOTPATH TO THE DEFINITIVE MAP AND STATEMENT IN TOTON IN THE PARISH OF BEESTON AND STAPLEFORD

Purpose of the Report

1. To consider Applications made by a Mr and Mrs Bakewell and a Mrs Daykin for the registration of routes as two public bridleways and a public footpath (Mr and Mrs Bakewell) and a public bridleway (Mrs Daykin) in Toton in the Definitive Map and Statement in the parish of Beeston and Stapleford. The routes being claimed are shown on Plans A1 and A2.
2. The effects of these Applications, should a Modification Order to add the routes be made and subsequently confirmed, would be to:
 - Register a bridleway between Bessell Lane and the mid-point of a bridge over the River Erewash spanning the Nottinghamshire – Derbyshire county boundary (Route A);
 - Register a bridleway starting at Route A and re-joining Route A (Route B);
 - Register a bridleway between Route A and the mid-point of a bridge over the River Erewash to the south-west of Banks Road Open Space spanning the Nottinghamshire – Derbyshire county boundary (Route C); and
 - Register a footpath between Route B and Route C (Route D).

Routes A, B and D have been applied for by Mr and Mrs Bakewell, and Route C is the subject of Mrs Daykin's Application.

3. Some of the information contained in the user evidence forms relates to a route which is not covered either by Mr and Mrs Bakewell's Application or by Mrs Daykin's. In the absence of an Application covering this additional route, the authority is still required to consider whether this should be added to the Definitive Map and Statement. It has a general duty, as set out in Section 130 of the Highways Act 1980, "to assert and protect the rights of the public to the use and enjoyment of any highway," as well as the duty specified in Section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981 to make requisite modifications to the Definitive Map and

Statement in consequence of the discovery of evidence which shows that a right of way subsists or is reasonably alleged to subsist. It must therefore determine whether the evidence relating to this additional path shows that a right of way exists over the route in question on the balance of probabilities or can reasonably be alleged to exist. If a Modification Order to add this route was made and confirmed, the effect would be to:

- Register a public right of way between Route A and Route D (Route E).

Legal Background

4. The Applications are made under the provisions of the Wildlife and Countryside Act 1981. Subsection (5) of Section 53 of the Act allows any person to apply to the authority for an order under subsection (2) of the Act, which will make such modifications to the Definitive Map and Statement as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3) of the Act. In this case, the relevant event is the expiration of a 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. The evidence in this case relates to the text in Section 31 of the Highways Act 1980, which states that “where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of 20 years referred to... is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.”
6. In order to accept a right of way claim on the basis of user evidence forms submitted by the public, it is not necessary to be able to show that the claimed right exists beyond all reasonable doubt. The tests to be applied are commonly known within the rights of way profession as ‘Test A’ and ‘Test B.’ In ‘Test A,’ the question to be answered is whether the right of way exists on the balance of probabilities. There must be clear evidence of public rights, with no credible evidence to the contrary. In ‘Test B,’ the question is merely whether it is reasonable to allege that a right of way exists. If there is a conflict of evidence, but no incontrovertible evidence that a right of way cannot be reasonably alleged to exist, ‘Test B’ is satisfied, the right of way is reasonably alleged to exist, and the claim should therefore be accepted.
7. Some of the information contained in the user evidence forms relates to a route which is not covered either by Mr and Mrs Bakewell’s Application or by Mrs Daykin’s. In the absence of an Application covering this additional route, the authority is still required to consider whether this should be added to the Definitive Map and Statement. It has a general duty, as set out in Section 130 of the Highways Act 1980, “to assert and protect the rights of the public to the use and enjoyment of any highway,” and must therefore determine whether the evidence relating to this additional path shows that a right of way exists over the route in question on the balance of probabilities or can

reasonably be alleged to exist. If a Modification Order to add this route was made and confirmed, the effect would be to:

- Register a public right of way between Route A and Route D (Route E)

The Current Situation

8. The claimed routes cross land at Toton Sidings and Banks Road Open Space. The owner of the Toton Sidings site is currently pursuing development proposals through Broxtowe Borough Council's Local Plan process, and the site is also being considered as part of the proposals for High Speed 2 Rail. Banks Road Open Space is owned and managed by Broxtowe Borough Council.

The Applications

9. The Applications are supported by Public Rights of Way User Evidence Forms as follows:
 - Route A – Three users on horseback, eleven with bicycles, and six on foot.
 - Route B – One user on horseback, four with bicycles, and nine on foot.
 - Route C – Two users on horseback, twenty-one with bicycles, and thirty-four on foot.
 - Route D – Two users on horseback, sixteen with bicycles, and nineteen on foot.

In addition, for Route E there are two users on horseback, nine with bicycles, and fourteen on foot.

Documentary Sources

10. The available documentary evidence for Toton has been examined at the Nottinghamshire Archives, and nothing was discovered regarding the possible existence of public rights over the routes in question.

Aerial Photographs

11. Aerial photographs from 1984, 1992 and 1996 were examined for evidence of wear lines along the claimed routes and of physical features pertinent to the claims. Although no clear evidence can be discerned from the 1984 photographs, the 1992 and 1996 photographs show clear wear lines and tracks between lines of trees corresponding to various sections of the claimed paths.

Consideration of User Evidence

12. The information contained in the User Evidence Forms relates to the presumed dedications of highways based on uninterrupted use as of right over a full twenty year period. This period has to be calculated retrospectively from the date when the right of the public to use the routes was brought into question, by some means sufficient to show to the public that their right to use the routes was being challenged.
13. The date of challenge in this case is October 2009 when the gate at the southern end of Bessell Lane was locked. Although this act did not prevent access to the routes under consideration, it was a clear indication to the public that their use of the routes was being challenged.
14. The User Evidence Forms suggest use of the Routes A to E by the public for over twenty years prior to the challenge date. 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 by 'compulsion, secrecy or licence.' The User Evidence Forms do not indicate that any force was involved in the exercise of the claimed right of way, or that use of the paths was secretive in any way. There is no indication in any of the Forms of anyone asking for, or being given, permission to use any of the routes.
15. It also has to be considered whether there is sufficient evidence of the landowner's intention not to dedicate rights of way during the twenty year period prior to the challenge date. The land adjoining Toton Sidings was owned during the relevant period by Rail Property Ltd, a subsidiary of the British Railways Board, later renamed as BRB (Residuary) Ltd. Banks Road Open Space was owned during the relevant period by Broxtowe Borough Council.
16. The earliest correspondence on file from Rail Property Ltd. dated 22 March 2000 stated that there was a gate at the Bessell Lane entrance to the site, but gave no indication that it was locked, and that "There are signs erected indicating that this is private land." A later letter dated 1 November 2000 states the Bessell Lane gate is secured with a lock "to prevent unauthorised access," and an 'appropriate sign' attached "to deter trespassers." It also states that "attempts to secure the eastern boundary of the site have been met with limited success," and that "it is proposed to install warning signs at other locations along the eastern boundary to advise members of the public that there are no dedicated rights of way over the site."
17. The information provided by Rail Property Ltd. should not be regarded as providing sufficient evidence of their intention not to dedicate any highways over the site in question. There is a lack of consistency in relation to the presence of a lock on the Bessell Lane gate, and the failure to specify the wording of the sign on the gate means that it cannot be concluded that it conveyed a clear message to the public that there were no rights of access for the public over the site. The Evidence Forms make no reference to the Bessell Lane gate being locked prior to October 2009, do not support the suggestion that the eastern boundary was fenced off in some way and give no indication that any "warning signs" were erected anywhere along this boundary.
18. There is no evidence of any notices being in position during the relevant period on the Rail Property Ltd. site indicating a lack of intention to dedicate any highways. There is also no evidence of any fences or other structures at any point along the claimed

routes, and no references to challenges of any kind by anyone acting on behalf of Rail Property Ltd.

19. No Statutory Declaration was received by the County Council from Rail Property Ltd. during the relevant period to indicate their lack of intention to dedicate public rights of way over the routes in question.
20. No evidence has been provided by Broxtowe Borough Council to indicate a lack of intention to dedicate any public rights of way over Banks Road Open Space.

Responses to Consultations

21. Letters were sent out to the standard list of consultees, including Broxtowe Borough Council and the local member, advising them of the claims and inviting comments. No objections were received to any of the proposed routes. Broxtowe Borough Council stated that they were supportive of the creation of bridleways in this area. They regarded the routes as “very popular” and particularly welcomed “the link down to Bessell Lane.”
22. Barton Willmore have objected on behalf of the current owners of the Toton Sidings site, a Mr and Mrs Sahota. The grounds of objections are:
 - The site has “notable tree cover” which has prevented the establishment of footpaths and bridleways on the site;
 - There is a lack of documentary evidence which could confirm the use of the land;
 - The user evidence lacks validity and credibility and is “unverified” and “anecdotal,” and also “contradictory and inaccurate;”
 - The routes referred to in the Evidence Forms do not match those identified in the Applications;
 - The variety of routes highlighted in the Forms means that there is not “an identified route” which should be considered by the County Council;
 - Only five Forms out of the sixty-nine submitted reflect the routes that have been applied for;
 - Many Forms refer to the footpath Application as a bridleway, and vice-versa.

Conclusion

23. In order to proceed to the making of a Modification Order for any of the routes in question, it is necessary to satisfy either ‘Test A’ or ‘Test B,’ as described above. By considering all of the information relating to Routes A to E, it is apparent that there is a conflict of credible evidence, for example, with regards to the sufficiency or otherwise of the actions undertaken by Rail Property Ltd. to indicate they had no intention to dedicate any highways across their site.
24. With regards to the objection from Barton Willmore, there is a credible response to all of the points they have made in attempting to dismiss the user evidence. The site

does not in fact have “notable tree cover,” as the trees which used to grow on the site were cut down by their clients shortly after their purchase of the property. When the trees were still there, they clearly defined at least two of the claimed routes, which still run on ash or similar material between the areas where the trees used to be. Far from preventing the establishment of footpaths or bridleways on the site, the trees made it obvious where the paths ran.

25. Barton Willmore also attach significance to the lack of documentary evidence, but the lack of such evidence is not unusual for claims based on public users and does not undermine the weight to be attached to the User Evidence Forms. They also allege that there is no “identified route” which the County Council is capable of considering, despite the fact that four routes are clearly identified on Mr and Mrs Bakewell’s and Mrs Daykin’s Applications, and that the user evidence lacks any credibility because of the variety of routes shown on the maps attached to the Evidence Forms, the approximate lengths of time given for using a particular path, and the fact that many Forms refer to a path having a different status to that specified in the Applications. Given the number of routes in contention and the length of time over which public use is claimed, it is to be expected that the Evidence Forms may lack precision at certain points and may not be 100% consistent with each other. The fact that they can refer to a footpath application as a bridleway is equally insignificant, as an individual path user can understandably regard that path as a bridleway if they see horse riders using it, but have only used it themselves on foot. In the absence of compelling evidence to the contrary, the User Evidence Forms should be regarded as credible testimony of public use of the routes in question, and Barton Willmore’s objection should not be regarded as providing incontrovertible evidence that rights of way cannot be reasonably alleged to exist. It is also significant that Barton Willmore have not provided any evidence to suggest that any of the ways in question are “of such a character that use of it by the public could not give rise at common law to any presumption of dedication.” Unless specified otherwise below, ‘Test B’ is therefore satisfied for each of the routes A to E, as there is a conflict of evidence, but no incontrovertible evidence that rights of way cannot be reasonably alleged to exist, and so the rights in question can be reasonably alleged to exist and should be the subject of a Modification Order to add them to the Definitive Map and Statement.

Route A

26. The evidence indicates use by twenty members of the public (six on foot, eleven by bicycle and three on horseback), usually on a weekly basis, over the relevant period. Most of the use was by people on bicycles, and in accordance with the judgement in Whitworth & others v Secretary of State for Environment, Food and Rural Affairs (2010), this supports the presumption of a dedication by the landowner of the ‘least burdensome’ status of highway, which would be bridleway rather than Restricted Byway.

Route B

27. The evidence indicates use by fourteen members of the public (nine on foot, four by bicycle and one on horseback), usually on a weekly basis, over the relevant period. The combination of use on horseback, on bicycle and on foot is sufficient to raise the presumption of a dedication by the landowner of a public bridleway.

Route C

28. The Application for Route C was not properly completed as Notices of Application were not served on the affected landowners. The user evidence submitted in support of the Application must still be assessed, however, in order to determine whether the route, or part of it, should be incorporated in a Modification Order.
29. The first section of the route runs from the junction with Route A up and over an embankment to the junction with Route D. The evidence indicates use by fifty-three members of the public (thirty-two on foot, nineteen by bicycle and two on horseback), often weekly or several times a week, over the relevant period. The level of use by people on bicycles supports the presumption of a dedication by the landowner of a public bridleway.
30. The second section of the route runs from the first section to the junction with Beeston and Stapleford Footpath No. 17. The evidence indicates no use by horse riders, inconsistencies between the evidence forms and the aerial photographs regarding the likely level of cycle use, and use by seventeen people on foot over the relevant period. This supports a presumption of a dedication by the landowner of a public footpath.
31. The third and final section of the route initially runs along part of Beeston and Stapleford Footpath No. 17. It continues over what is now Banks road Open Space, before rejoining Footpath No. 17 and continuing to a bridge over the River Erewash. Analysis of the aerial photographs indicates that the majority of this section did not physically exist on the claimed line until 1993 at the earliest, and therefore it appears that the whole of the claimed route was not used for the required minimum of twenty years. A claim would still be possible under common law, but this would require a much higher level of use than is indicated by the evidence forms. There is no evidence of horse use, only one user of the whole of the final section on bicycle, and only five users on foot. As the evidence appears to show that no higher rights exist over the relevant parts of Beeston and Stapleford Footpath No. 17, it should not be modified and should remain as a public footpath.

Route D

32. The first section of the route runs between Route B and the junction with Route E. The evidence indicates use by eleven members of the public (five on foot, six by bicycle), usually weekly or several times a week, during the relevant period. Although there is no evidence of use on horseback, the combination of use on foot and with bicycles is sufficient to raise the presumption of a dedication by the landowner of a public bridleway.
33. The second section of the route runs between the junction with Route E and the junction with Route C. The evidence indicates use by thirty-six members of the public (nineteen on foot, fifteen by bicycle and two on horseback), usually weekly or several times a week, during the relevant period. The combination of use on foot, on horseback and with bicycles is sufficient to raise the presumption of dedication by the landowner of a public bridleway.

Route E

34. The evidence indicates use by twenty-five members of the public (thirteen on foot, ten by bicycle and two on horseback), in over half of the cases weekly or several times per week, during the relevant period. The combination of use on foot, on horseback and with bicycles is sufficient to raise the presumption of a dedication by the landowner of a public bridleway.

Statutory and Policy Implications

35. This report has been compiled after consideration of implications in respect of crime and disorder, finance, human resources, human rights, the NHS Constitution (Public Health only), the public sector equality duty, safeguarding of children and vulnerable adults, service users, sustainability and the environment and ways of working and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

RECOMMENDATIONS

Route A

36. It is RECOMMENDED that the Committee accepts the claim for Route A and authorises the making of a Modification Order to register it as a public bridleway, as for the reasons set out above, the evidence demonstrates that public bridleway rights are reasonably alleged to exist.

Route B

37. It is RECOMMENDED that the Committee accepts the claim for Route B and authorises the making of a Modification Order to register it as a public bridleway, as for the reasons set out above, the evidence demonstrates that public bridleway rights are reasonably alleged to exist.

Route C

38. It is RECOMMENDED that the Application for Route C is turned down as the correct procedures have not been followed, but that Committee authorises the making of a Modification Order to register the first section of the claim (as shown on Plan A(2)) as a public bridleway and the second section as a public footpath, as for the reasons set out above, the evidence demonstrates that public bridleway rights and public footpath rights respectively are reasonably alleged to exist.
39. It is RECOMMENDED that the Committee does not authorise the making of a Modification Order to register the third section of the Application as a public bridleway, as for the reasons set out above, the evidence does not demonstrate that public bridleway rights are reasonably alleged to exist either as of right or at common law.

Route D

40. It is RECOMMENDED that the Committee accepts the claim for Route D but authorises the making of a Modification Order to register it as a public bridleway rather than a public footpath, as for the reasons set out above, the evidence demonstrates that public bridleway rights are reasonably alleged to exist.

Route E

41. It is RECOMMENDED that the Committee authorises the making of a Modification Order to register Route E as a public bridleway, as for the reasons set out above, the evidence demonstrates that public bridleway rights are reasonably alleged to exist.

TIM GREGORY

Corporate Director of Environment and Resources

Comments of the Service Director – Finance [SEM 30/08/13]

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

Legal Services' Comments [SLB 04/09/2013]

Rights of Way Committee is the appropriate body to consider the content of this report.

Background Papers Available for Inspection

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

Rights of way claims at Toton – case file.

Electoral Division(s) and Member(s) Affected

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Amended 13/18.11.13