



27 November 2013

Agenda Item: 5

REPORT OF THE CORPORATE DIRECTOR (ENVIRONMENT AND RESOURCES)

CONSIDERATION OF APPLICATIONS UNDER SECTION 53(2) OF THE WILDLIFE AND COUNTRYSIDE ACT TO ADD SEVEN FOOTPATHS AND A BRIDLEWAY TO THE DEFINITIVE MAP AND STATEMENT IN ANNESLEY AND KIRKBY IN ASHFIELD

Purpose of the Report

1. To consider Applications made by Robert Collier, Vice Chairman of A.C.C.E.S.S. (Annesley Community Committed to Ensuring Sustainable Settlements) for the registration of routes as seven public footpaths and a public bridleway in Annesley and Kirkby in Ashfield. The routes being claimed are shown on Plan A.
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 the A611 Derby Road and the western boundary of Little Oak Plantation (Route A)
 - Register a footpath through Little Oak Plantation north of Route A (Route B)
 - Register a footpath through Little Oak Plantation south of Route A (Route C)
 - Register three footpaths through Little Oak Plantation linking Route A and Route B (Routes D, E and F)
 - Register a footpath through Little Oak Plantation linking Route A and Route C (Route G)
 - Register a footpath between Forest Road, Annesley Woodhouse and the junction with Route B inside Little Oak Plantation (Route H)

Legal Background

3. 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.

4. The evidence in this case relates to the legal test 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.”
5. 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 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.

The Current Situation

6. Seven of the claimed routes run through the dense coniferous woodland known as Little Oak Plantation, which was the subject of a Planning Application in March 2012 for the construction of a foul and surface water drainage system to service a proposed residential development south of Forest Road. The remaining route mainly runs through former allotment gardens, now the subject of a Planning Application for the residential development in question, then continues into Little Oak Plantation. All of the affected land is currently owned by Taylor Wimpey UK Ltd.

The Applications

7. The Applications are supported by Public Rights of Way User Evidence Forms as follows:
 - Route A – fifty users on foot, eleven with bicycles, four on horseback, two mixed horse/cycle use

- Route B – Fifty-three users on foot, ten with bicycles, three on horseback, one mixed horse/cycle use
- Route C – Fifty-four users on foot, nine with bicycles, three on horseback, one mixed horse/cycle use
- Route D – fifty-two users on foot, six with bicycles, three on horseback, one mixed horse/cycle use
- Route E – Fifty-three users on foot, six with bicycles, three on horseback, one mixed horse/cycle use
- Route F – Fifty-one users on foot, six with bicycles, three on horseback, one mixed horse/cycle use
- Route G – Fifty-three users on foot, seven with bicycles, three on horseback, one mixed horse/cycle use
- Route H – Forty-nine users on foot, four with bicycles

Documentary Sources

8. The available documentary evidence for Annesley and Kirkby in Ashfield has been examined at the Nottinghamshire Archives, as have those documents submitted by the Applicant. Nothing in the available documents suggests the possible existence of public rights of way over the routes in question.

Photographs

9. The Applications are also supported by a DVD of site photographs, which show clear wear lines or a route on the ground corresponding to each of the claimed paths.

Consideration of User Evidence

10. 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.
11. The date of challenge in this case is March 2012, when Taylor Wimpey applied to Ashfield District Council for planning permission for the construction of a foul and surface water drainage system to serve a proposed residential development south of Forest Road. The proposed drainage system is within Little Oak Plantation, and the associated Planning Application and Planning

Statement did not recognise the existence of any public rights of way either within or adjacent to the plantation.

12. The User Evidence Forms suggest use of the Routes A to H 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.
13. A complicating factor in this case is that between 1949 and December 2010, Little Oak Plantation was leased to the Forestry Commission by its owners, the Chaworth Musters (Annesley) Estate. Under the terms of Section 327 of the Highways Act 1980, the provisions of the Act only apply to "land" belonging to a government department if there has been an agreement between that department and the relevant highway authority that the provisions in question shall be applicable. By virtue of Section 329 of the Act, "land" is defined as including "any interest or right in it", which would therefore cover the leasehold interest of the Forestry Commission in Little Oak Plantation. As no agreement was made between the Forestry Commission and Nottinghamshire County Council that the provisions of the Highway Act should apply to their "land", the provisions of Section 31 regarding the presumed dedication of a highway are not applicable to any of the claimed routes through Little Oak Plantation. The Applications claiming these routes by virtue of use as of right must therefore fail.
14. The remaining option is to determine whether public rights have been established at common law. Three key factors need to be considered in relation to a common law claim, all of which are again fatal to the claimed routes. If a lessee has a sufficiently great interest in a piece of land, the freeholders cannot dedicate without the lessee's consent. In this case, the Forestry Commission's interest in Little Oak Plantation was more than sufficient to require it to give its consent to the Chaworth Musters Estate's dedication of any highways through the land in question. There is no evidence that such consent was given.
15. Another factor to be considered is whether there has been any express act or declaration by the freeholder which suggests that highways have been dedicated over the land, such as the provision of structures or surfaces to accommodate public access. There is no evidence in this case of any such act or declaration.
16. The third factor to consider is whether the freeholder would have been aware of public use. Case law such as Greenwich Board of Works v Maudsley (1870), Webb v Baldwin (1911) and Folkestone Corporation v Brockman (1914) establishes that public use must have been so open and notorious that the freeholder must have known that it was taking place, but given that the Estate had surrendered the land on a long term lease to the Forestry Commission, there is no reason to suppose that the test of the use being 'within the knowledge of the owner of the fee' has been met.

17. The only remaining possibility for the Little Oak Plantation paths is a common law claim for the period after December 2010, when the lease lapsed and the land was acquired by Taylor Wimpey. The fatal factor here is that there has been an insufficient period of use to rely on to make the inference that dedication has occurred. The Maudsley case established that public use must occur “for so long a time that it must have come to the knowledge of the owners”, and the case of Rowley v Tottenham Urban District Council (1914) suggests that a minimum of three years use would be necessary. In this instance, there has only been about fifteen months use, between December 2010 and the date of challenge in March 2012. Furthermore, under common law, the legal burden of proving that the owner intended to dedicate rests with the applicant, and no evidence of such intention has been provided.
18. The final matter for determination is whether a public right of way exists or can reasonably be alleged to exist over that part of Route H between Forest Road and the access point into Little Oak Plantation, which crossed land that was not included in the lease to the Forestry Commission and could therefore potentially have been used as of right. There is no evidence that the use of the relevant section of Route H was exercised by ‘compulsion, secrecy or licence’.
19. It also has to be considered whether there is sufficient evidence of either the Chaworth Musters Estate’s or Taylor Wimpey’s intention not to dedicate a right of way during the twenty year period prior to the challenge date. The User Evidence Forms indicate that there was open access throughout this period at both ends of the route, and no fences or structures of any sort at any other point. No notices were seen anywhere along the route which indicated a lack of intention to dedicate a public right of way, and none of the claimants refers to challenges of any kind. A Statutory Declaration was lodged by the Chaworth Musters Estate in 1997, and therefore within the relevant twenty year period, which included the land affected by Route H. A Statutory Declaration is sufficient evidence of a lack of intention to dedicate a way as a highway, but only in the absence of proof of a contrary intention. Given the lack of any notices on site which would have been seen by the public and would have clearly communicated the landowner’s attitude towards public access, it is considered that this contrary intention can be proven. The 1997 Statutory Declaration should not therefore be regarded as providing sufficient evidence of the Estate’s lack of intention to dedicate a public right of way. No Statutory Declaration was lodged by Taylor Wimpey prior to the challenge date of March 2012. Another relevant consideration is that even if the 1997 Statutory Declaration was to be regarded as setting the challenge date, there has been unchallenged public use of the relevant part of Route H for over twenty years before 1997. Thirty nine individuals have testified to use prior to 1997, fifteen of them for over twenty years.

Responses to Consultation

20. Letters were sent out to the standard list of consultees, including Parish and District Councils and the local member, advising them of the claims and inviting comments. No objections were received to the proposed routes.
21. Eversheds objected to the claimed paths on behalf of Taylor Wimpey, but based the objections solely on the 1997 Statutory Declaration lodged by the previous landowner. No
22. additional counter evidence was submitted.

Conclusion

23. In order to accept the claims, it is necessary to satisfy either 'Test A' or 'Test B', as described above. By considering all of the relevant legal tests and case law, it is apparent that all of the claims relating to routes within Little Oak Plantation should be turned down, as it cannot be shown that rights of way exist or can reasonably be alleged to exist as of right or at common law. For the section of Route H outside Little Oak Plantation, even if it is accepted that there is a conflict of credible evidence in relation to the significance of the 1997 Statutory Declaration, there is no incontrovertible evidence that a right of way cannot reasonably be alleged to exist. 'Test B' is therefore satisfied, as a right of way based on twenty years' use as of right can reasonably be alleged to exist, and the claim should be accepted. Although there is some evidence of use with bicycles, this is not sufficient to suggest that there has been a dedication to the public of a higher right than a right of way on foot.

Statutory and Policy Implications

23. 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

1. It is RECOMMENDED that the Committee turns down the Applications for Routes A to G and the section of Route H within Little Oak Plantation, as for the reasons set out above, the evidence does not demonstrate that public rights exist or are reasonably alleged to exist as of right or at common law.
2. It is RECOMMENDED that the Committee accepts the Application for that part of Route H outside of Little Oak Plantation and authorises the making of a Modification Order, as for the reasons set out above, the evidence demonstrates that public footpath rights are reasonably alleged to exist.

Tim Gregory
Corporate Director of Environment and Resources

Financial Comments (SEM 10/10/13)

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

Constitutional Comments (SJE – 10/10/2013)

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.

Background Papers Available for Inspection

Except for previously published documents, which will be available elsewhere, no 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 Annesley and Kirkby in Ashfield – case file

Electoral Division(s) and Member(s) affected

Kirkby in Ashfield South - Councillor Rachel Madden

ROW101 – Annesley & Kirkby in Ashfield
16 September 2013
(amended 15.11.13)