

meeting **RIGHTS OF WAY COMMITTEE**

date **21 APRIL 2010**

agenda item number **7**

REPORT OF THE CORPORATE DIRECTOR (COMMUNITIES)

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 WEST BRIDGFORD

Purpose of the Report

1. To consider an application made by Mr Jones of West Bridgford to record a route as a public footpath on the Definitive Map and Statement for the Parish of West Bridgford. A map of the general area is shown as **Plan A** while the route under consideration is shown on **Plan B** marked between points A and B.
2. The effect of the application, if accepted would be to add a public footpath along a route from Landmere Lane, on the south side of the A52, through the underpass under the A52 and then along a short path that leads back to the north side of the A52.

Legal Background

3. 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 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. 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”.

5. 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. The 20 year period is to be calculated retrospectively from the date when the right of the public to use the way is brought into question.
6. If it is accepted that a presumption of dedication has taken place, consideration must also be given to the category of highway that is believed to subsist 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 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

8. The claimed route currently exists as a path leading from Landmere Lane to the A52 underpass. The underpass itself is 5.4 metres wide and 2.4 metres high and has been completely blocked at the northern end by a mound of soil. The path then continues along what was a track at the side of the field before exiting through a gap in the fence on to the A52. **Photograph A** taken in 2006 shows the underpass before it was blocked and **Photograph B** taken in 2008 shows the mound of soil completely blocking the northern end of the underpass.

The Application

9. The application is supported by 31 user evidence forms, letters and interviews, as well as aerial photographs from 1978 to 2007 showing the route on the ground. There is no documentary evidence that indicates that this is a public right of way and has yet to be recorded.

Site History

10. The underpass was constructed in the early 1960s when the A52 was constructed and it was built as an agricultural access for Mr Machin of Hall Farm as the new road separated the farm from the fields north of the A52. An agricultural access was also established 60 metres to the east of the

underpass further along the A52 to allow vehicular access to the fields that had been severed by the A52.

11. In 1990 planning permission was granted to a Mr Wells, who is the owner of land to the north of the A52 for the creation of a new access in the fields to the west of the underpass. As part of the submission the agent who was acting on behalf of Mr Wells stated that 'the applicant wishes to retain the existing tunnel under the A52 as a pedestrian link'. This was also confirmed by a plan produced by Rushcliffe Borough Council that showed the underpass and labelled it as a pedestrian tunnel. The planning permission for this new access was renewed several times.
12. On 12 June 2006 Mr Jones contacted the County Council to inquire about a number of well used paths in the Sharphill Wood area to see if they could be registered as public footpaths. Mr. Jones was advised that he could make an application to the County Council for a Modification Order to add these paths to the Definitive Map but evidence of use of these paths would also need to be submitted in support.
13. On 20 November 2006 Mr Jones wrote to all the owners of the land over which the paths ran to see if they were prepared to enter into a Creation Agreement with the County Council. Mr Wells did not want to enter into any agreement, although he did say that he was in discussions with Rushcliffe Borough Council about the Sharphill Wood area which would include some sort of public access. As yet there is no formal agreement in place.
14. Mr Jones then made an application to the County Council on 14 February 2007 for a Modification Order for 11 paths to and through Sharphill Wood. One of the claimed paths was for the same route as the current application. Following an assessment of the evidence that was submitted, the County Council accepted 8 of the claimed paths and turned down the other 3 for which no appeal was made. On 20 June 2008 the County Council then made a Modification Order to add these paths to the definitive Map and Statement. Two objections were made to the Order, but one of these was subsequently withdrawn. The other objection was from Mr Wells stating that he only objected to the path through the underpass and saying that he had not received the notice from Mr Jones for this particular path when the application was originally made in February 2007. He also stated that he had taken steps to prevent use of this path by members of the public.
15. The County Council then received authority from the Planning Inspectorate to confirm as public footpaths those paths that were not objected to and so West Bridgford Footpaths Nos. 26-32 became public footpaths.
16. A fresh application was then made by Mr Jones on 21 May 2009 for just the path leading from Landmere Lane under the A52 and back around to the northern side of the A52, and this time ensuring that the required Notices had been served on the affected landowners.

17. A planning application was submitted to Rushcliffe Borough Council in 2008 for housing development of land to the east of Sharphill Wood. As part of that development one of the site plans did show the route of path for which the Modification Order application was made as being part of a 'proposed footway/cycleway route' and part of 'existing retained rights of way/informal routes'.

Claimed use

18. A total of 33 members of the public provided information of their use of the path in either user evidence forms, letters or through being interviewed. According to the evidence submitted, the date when the public use of the path was challenged was in 2007 when the northern entrance to the underpass was completely filled in with soil. This would then make the 20 year period between 1987 and 2007. The user evidence indicates that during this period 17 members of the public have used this route continuously up until that right was called into question in 2007. However use of the path predates 1987, with use going back to 1969 for one of the claimants.
19. The main purpose for using the route appears to be on foot with people stating that their reason for using the path was for pleasure. Some of the claimants have mentioned that they used this path because it was a safe way of getting across the A52. Some of the claimants live on the south side of the A52 and they used this path to get to the paths around and in Sharphill Wood.
20. 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 shows that these requirements have been met. The claimed route was widely believed to be a public right of way and use of it was quite open. It does appear that prior to the tunnel entrance being filled in there were some soil mounds at the northern entrance which made the path awkward to use, particularly in wet weather. However these soil mounds never blocked the route completely. The presumption from some of the claimants was that these mounds had been placed there to prevent vehicles using the underpass to get onto the fields. Some of the claimants have also mentioned that there were at times some agricultural machinery in the underpass but that this never obstructed their use of the path. None of the claimants stated that the path was ever blocked as it came out onto the verge of the A52 and they all confirmed that it was always open.
21. The claimants do state that they used the path at a time when it would reasonably be expected that someone would be out walking. For example, some of them have said that they used it in the afternoons, evening and weekends. One claimant was more specific saying that she used the path at least 2 times a day with the first being at 6:30 am and the second at 3:30 pm. The use of the path was quite open and would have been evident to any landowner.

22. None of the claimants state that they were ever given permission to use this path, although one of them does refer to a notice that they saw on the fence next to the start of the path on the A52. A photograph of this notice dated 5 February 2006 shows this sign, part of which says the gap that had been left in the fence to allow walkers to get through the old field entrance from the A52 was to be closed off. Contact details for Rushcliffe Borough Council were given for any member of the public to make representations to them to keep it the gap open. However, when the vehicular entrance was closed off, a purpose made gap was still left in the fence which would still have allowed walkers to get through.
23. Another notice was also in place in February 2006 which refers to the new farm access off the A52 that was created to the west of the underpass. Part of the notice says that 'the landowners welcome responsible walkers to this area' and that access will be kept available 'particularly the tunnel as long as it is not abused. If this happens we will have no alternative but to completely fill the tunnel with stone'. However, it is made clear in the notice that the type of abuse the landowner had in mind was 'fly tipping and motorcycles causing damage to the area' not use by the public on foot. The notice also gives some telephone numbers of the Police and Rushcliffe Borough Council so that any members of the public could report any problems to them.
24. None of this wording on either notice indicates that the landowner was granting a permissive right for people to use the path. Instead it appears to be an acceptance on behalf of the landowner that the public right on foot was being exercised and that he was happy that it should continue.

Consultations

25. Consultations have been carried out with statutory undertakers, user groups and Rushcliffe Borough Council into the proposal to register this path as a public footpath. The only letter of objection that has been received is from Mr Wells. In his letter dated 8 June 2009 he states the reason for closing off the underpass was to stop motor cyclist using it as an escape route. No mention was made that it was to prevent walkers from using it. This does seem consistent with the 2006 notice attached to the fence saying that walkers were welcome. However, in his letter Mr Wells also says that he has a number of reliable witnesses 'who will state that this has not been used as a regular walked path' but as yet he has not provided any of this additional information.
26. In a previous letter from Mr. Wells dated 5 August 2008 he says that the soil bank was put in the tunnel in the autumn of 2004 and that for about a year it was not possible to even crawl through for about a year until the soil settled and then people were able to crawl through. He then says the tunnel was completely filled in at the north end. However, Mr Wells also says that the path may have been used in the past and that when the old access off the A52 was fenced he left a gap for the walkers.
27. The Highways Agency also responded to the consultation where they confirmed that they do not own the underpass only the bridge that crosses it

and that they need access to it for maintenance. They also indicated that they were in favour of the provision of the path.

Conclusion

28. From the evidence presented by the claimants it can reasonably be alleged that use of this path has been exercised for more than 20 years without any challenges and that the legal tests set out in HA80 Section 31 have been met. There is no evidence of any verbal challenges being given to anyone, nor were there any clear notices stating that use of the path was with the owner's permission. Although there may have been some agricultural machinery in the underpass this never prevented its use on foot. The 2004 soil mound mentioned by Mr Wells is mentioned by the claimants but with them saying that the path became awkward to use but did not prevent their use. The photograph dated 5 February 2006 does show that the underpass was still able to be used. If this Order is made and confirmed, it will be the landowners responsibility to remove the soil mound so that the path can be used again.

Statutory and Policy Implications

29. This report has been compiled after consideration of implications in respect of finance, equal opportunities, personnel, crime and disorder and those using the service and where such implications are material they have been described in the text of the report.

RECOMMENDATION

30. It is RECOMMENDED that the Committee approves the making of an Order under Section 53 of the Wildlife and Countryside Act for the path for which the application was submitted.

TIM MALYNN

Corporate Director (Communities)

Legal Services' Comments

The recommended decision is within the terms of reference of the Rights of Way Committee, pursuant to the resolution of the County Council at its meeting on 24 September 2009 at agenda item 12. [JI - 29/03/10].

Comments of the Service Director - Finance

The contents of this report are duly noted; the report deals with a footpath application and has no direct financial implications. [DJK – 31/03/10]

Background Papers Available for Inspection

Office case file

Electoral Division(s) Affected

West Bridgford Central and South

Councillor Barrie Cooper and Councillor
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PSP.AT/RH/ROW23
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