

6th June 2018

Agenda Item: 7

REPORT OF CORPORATE DIRECTOR - PLACE

PROPOSAL: APPLICATION TO ADD A BRIDLEWAY TO THE NOTTINGHAMSHIRE COUNTY COUNCIL (AREA 6) DEFINITIVE MAP AND STATEMENT

LOCATION: BATTERY LANE, ELKESLEY

APPLICANT: ELKESLEY PARISH COUNCIL

Purpose of the Report

1. To consider an application for a Definitive Map Modification Order made in July 2016 by Elkesley Parish Council, which if implemented would add a public bridleway to the Definitive Map and Statement in the Parish of Elkesley. The route being claimed comprises a track approximately 230 metres long known as Battery Lane, leading from Brough Lane (a Byway Open to All Traffic) and terminating at the River Poulter (being the parish boundary). A map of the general area is shown at APPENDIX A, while the route under consideration is shown by the dashed line at APPENDIX B. Photographs taken at various points along Battery Lane are shown at APPENDIX C.

Information

- 2 Under Section 53(2)(b) of the Wildlife and Countryside Act 1981 ("WCA81"), Nottinghamshire County Council has a legal duty to keep the Definitive Map and Statement under continuous review, and to make modifications to the Definitive Map and Statement based on the discovery of evidence which (when considered with all other relevant evidence) shows that a right of way which is not shown in the map and statement "**subsists** or is **reasonably alleged to subsist**" (section 53(3)(c)(i) WCA81).
- 3 The case of R v Secretary of State for the Environment ex parte Bagshaw and Norton (1994) clarified the law in respect of the meaning of the test **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 requires 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 a Modification Order should be made.

4. Section 31 of the Highways Act 1980 (HA80) also states that where it can be shown that a way has been enjoyed by the public 'as of right' and without interruption for a period of 20 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. For use to be 'as of right' it must have taken place without force, not in secret, and not by permission.
5. Despite making enquiries both locally and at the Land Registry, it has not been possible to identify the current owner of Battery Lane. Archive documents held at Nottingham University indicate that in 1906 the lane belonged to The Duke of Newcastle. These documents also indicate that hedgerows were planted on the lane to prevent trespass into adjoining fields, and that the lane was sold to Mr Charles Longbottom in 1920. It was noted that Mr Longbottom owned substantial amounts of land in the area which were subsequently sold to Sir Albert Bingham (The Elkesley Estate) but it is not known whether Battery Lane was subject to such a conveyance. The land to either side of Battery Lane certainly did belong to the Elkesley Estate in the early twentieth century and was sold to various parties in 1948. Battery Lane was not listed in any of the 1948 sale documents.
6. Notwithstanding the above, it is clear that the owner of the lane (whoever that may be) has been absent for several decades and has not taken any steps by which it can be inferred that they have no intention of dedicating a public right of way.
7. In researching the origins of Battery Lane, George Sanderson's 1835 map entitled "Twenty Miles Round Mansfield" was examined. The map was produced from a survey carried out between 1830-34 and is regarded as being drawn to a high degree of accuracy. Although there is no evidence of a track corresponding with Battery Lane, another track is depicted on the opposite side of the River Poulter and may suggest the presence of a through route although it is not possible to say (on the evidence available) whether this was for public or private use. Nevertheless, the absence of Battery Lane on Sanderson's 1835 map concurs with the evidence (para. 5) which indicates that Battery Lane was physically formed some time after 1835 i.e. circa 1906. An extract from Sanderson's Map is shown at APPENDIX D.
8. Ordnance Survey (OS) plans spanning the period 1887-1920 were also examined. Although such plans provide good evidence of any depicted physical features, they do not indicate whether or not public rights of way existed. These OS maps denote "BatteryLane" as a double hedged lane with a gate near the junction with Brough Lane. The plans also denote a ford and a footbridge at the River Poulter end of the lane. Again, this is not an indication that the lane was a public highway, but serves to indicate a route which could have been used either on a public or a private basis. An extract taken from the OS 2nd series plan(1920) is shown at APPENDIX E.
9. Under the provisions of the National Parks and Access to the Countryside Act 1949, each parish was required to prepare a schedule, containing plans and descriptions of all rights of way in their area. The survey information was then used to prepare the original definitive maps and statements for Nottinghamshire. Accordingly, the Parish Schedule for Elkesley (1952-3) was examined. An extract taken from the Parish Schedule map is shown at APPENDIX F.
10. On the schedule plan Battery Lane has been annotated "BR No.3" indicating that it was considered to be a public bridle road. The accompanying description reads "...commences at Brough Lane about 50 yds West of Brough Farm and continues to River Poulter footbridge

over river". Responsibility for repair of the lane is given as being the Duke of Newcastle. It is notable that the grounds for inclusion in the survey are given as "*Uninterrupted use by public for 50 years*". Elsewhere in the schedule the Chairman of the Parish Council notes "...*the Parish Council...decided to give details on the schedules and maps of the footpaths and bridleways that were of use to the residents*". Both of these entries suggest that Battery Lane was known to be used by the public both at the time of the survey and also in the years leading up to it.

11. As was required, the Parish Schedule was forwarded to the Rural District Council and to the County Council for comments. Although no comments were recorded by the East Retford Rural District Council, the County Highway Surveyor made the following comment in respect of whether the route should be added to the Definitive Map i.e. "*? Omit as no continuity in West Drayton & Bothamsall*". The County Divisional Highway Surveyor described the lane as a "*Narrow trodden way between hedges. Former bridle road. Responsibility for maintenance of foot bridge has been refuted by Notts. C.C.*". These comments suggest the reason for the lane not being recorded on the definitive map was due it not connecting to another highway, and that it was believed to have been lawfully stopped-up at some point in time. In itself, a lack of connectivity is not a sufficient reason for not recording a public bridleway, highways can exist as culs-de sac. Furthermore, the reference to it being regarded as a "former" bridle road, suggesting that it was believed to have been stopped-up at some point in the past is not borne out by the Nottinghamshire Quarter Session Records (spanning 1603-1974 and held at the local archive offices) which contain no record of public rights along Battery Lane being extinguished.
12. In mid to late 2015, a gate and notice was installed on Battery Lane at the junction with Brough Lane (photo). The gate was erected by Mr Lorne Ffoulke-Jones who uses the lane for access to his adjacent land. The notice read "Private Land No Public Right of Way". It is these actions which appear to have triggered the application by the Parish Council.
13. The application was accompanied by forty nine user evidence forms (UEFs) submitted as evidence of actual public use. The information contained in the UEFs relates to the presumed dedication of a highway based on uninterrupted use over a twenty year period (para. 4). The 20 year period has to be calculated retrospectively from the date when the right of the public to use the way was brought into question. Accordingly, the installation of the gate and notice by Mr Ffoulkes-Jones in 2015 is considered to be the date when public use was brought into question thereby setting the relevant 20 year period as 1995 to 2015.
14. Of the 49 UEFs submitted, 47 were from residents of Elkesley, seven of which were from residents living on Brough Lane i.e. in very close proximity to the claimed route. 34 users claim to have used Battery Lane for the full period of 20 years (or more) prior to the installation of the gate and notice in 2015. The earliest claimed use dates from 1945. The UEFs do not refer to any type of obstruction such as gates or barriers prior to the one installed by Mr Ffloukes-Jones in 2015.
15. In order for public use to be valid, it must have been 'as of right' which means without force, not in secret and not by permission. There is no evidence to suggest that use during the 20 year period was by force or in secret, and although the majority of UEFs indicate use without permission, 3 users have stated that adjacent landowners granted them permission to use the lane. However, permission can only be given by the land owner or someone acting on

their behalf. Accordingly, there is no evidence that use has been by permission. Therefore, the evidence given in the UEFs suggests that use was as of right.

16. The frequency of claimed use varies from daily to yearly. Most UEFs refer to using the lane for pleasure, sometimes with dogs, while some mention using the lane to access the river either as children or with children. A number of UEFs refer to the reputation of Battery Lane as being that of an historic route used by villagers for generations. Many of those who completed UEFs refer to regularly seeing others on the route.
17. According to the UEFs, the majority of claimed use has been on foot, however 13 forms specify use on cycles, while 5 forms specify use on horseback. Where use is being claimed through cycle use, it is appropriate (when considering statutory claims under HA80 s.31) to infer the form of dedication which is least burdensome to the landowner (per Whitworth v Secretary of State for Environment, Food and Rural Affairs [2010]). In rights of way terms, cyclists are entitled to use byways, restricted byways, and bridleways. The least burdensome of these categories for the landowner is that of public bridleway. The information provided in the UEFs is summarised in the form of a table at APPENDIX G.
18. Consultation has been carried out with adjacent landowners, Bassetlaw District Council, user groups and public utility companies. Responses are summarised as follows with the case officer's comments in italics.
19. Mr Lorne Ffoulkes-Jones, Park Lane, Elkesley: **Objection**
 - There has been an unlocked gate at the top of Battery Lane for some years. A rope was used prior to that. This is important to prevent cattle straying onto the A1. This has been the case for the 35 years I have lived here and longer as I understand from my neighbours. *The UEFs do not mention the presence of a gate prior to 2015. The historic OS plans do indicate the presence of a gate, although this appears to have disappeared by the time of the parish survey in 1952-3. No gate or rope can be seen on Google Street View images taken in 2011.*
 - I have used the lane daily for 35 years to access my land, my father owning it before me. *Daily use would place Mr Ffoulkes in the position of witnessing any potential public use.*
 - For the last 35 years Battery Lane has been maintained by my family, Mr D. Rushby and Mr M. Horrocks in order to maintain fencing for livestock and to allow access for farm vehicles across the River Poulter. *Maintaining the lane does not prevent the public from acquiring rights over it.*
 - Battery Lane has always been regarded as a landowner's access and not a public bridleway or footpath. When approached by persons in the past for permission to use the lane, we have declined. *Information contained in the UEFs suggests that some residents regarded the lane as a village amenity. Permission to use the lane can only be granted by the landowner or someone acting on the landowner's behalf.*
 - Any persons found using the lane have been challenged and informed that it is not a public right of way. I strongly dispute the claim [in the UEFs] that use was unchallenged. The claims are false. I imagine that people have walked it at times when we have not been there to see them and challenge them. They will have done so knowing that it is not a public right of way. *The UEFs indicate that public use of Battery Lane was only sufficiently challenged by the installation of the gate and notice in 2015. The suggestion that people may have used the*

lane at times when Mr Ffoulkes-Jones was not present does not prove that use was deliberately in secret.

- Battery Lane has never been signposted as a public bridleway or public footpath (and is not labelled as such on the Ordnance Survey Maps) and has a clear notice of being private land which since the beginning of this dispute has repeatedly been damaged and removed, and repeatedly replaced by landowners.

Public rights of way are only signposted once they have been added to the Definitive Map and Statement. In reference to the sign replaced by Mr Ffoulkes-Jones, he has subsequently confirmed that he does not own Battery Lane.

- Battery Lane is now impassable due to overgrown flora.
Officers visiting the site in April 2018 were able to walk the full length of Battery Lane albeit that the last 20 metres or so was slightly overgrown.
- I dispute this apparent use since days of old as the original lane is no longer available.
Original documents from the 1950s (Parish Schedule) provide strong contemporaneous evidence of use as a public bridleway from 1900.
- The UEFs amount to less than 5% of the Elkesley Community.
In cases regarding a disputed right of way, 49 UEFs is considered to be a relatively high number.

20. Mr P. E. Ffoulkes-Jones former resident on Park Lane, Elkesley (1980-2007):
Representation

- Over the years a number of people approached me asking for permission to go down the lane to gain access to the river.
Permission to use the lane can only be granted by the landowner or someone acting on the landowner's behalf.
- One lady took her children down to the river to play
This is borne out in the UEFs.
- The Saville's used to sometime take their dogs for a walk down there but not very often because it didn't lead anywhere.
Evidence from two members of the Savill family indicate use on a daily basis between 1976-77 and 2015.
- I had words with a lady who took her dogs down the lane off the lead and I was worried about them attacking the goats. She never came down after that.
This comment appears to be mainly concerned with dogs not being under close control.
- John Douglas put his horses in the field for a time and so he had access for a while.
The UEF supplied by Mr Douglas indicates use on foot, horse and bicycle commencing in 1975. Mr Douglas regards Battery Lane as a byway open to all traffic and an historic right of way.
- I remember the Grove and Rufford Hunt using Battery Lane when the meet was held at Cheetham's Farm (Haughton Park Farm). Martin Horrocks was a member of the hunt so he could give permission.
There is no evidence that Mr Horrocks had authority to grant permission to use the lane.
- All the time I was there (1980-2007) I cannot recall anybody really using the lane, except perhaps a few local children.

21. Mr T Cheetham, Haughton Park Farm, nr Bothamsall: **Objection**

- My only interest in Batttery Lane is that I have personally been given permission by Mr Ffoulkes-Jones to use the lane as access to our land from Elkesley.

Mr Ffoulkes-Jones has confirmed that he does not own Battery Lane. There is no evidence that he has been given authority by the landowner to grant or deny access.

- For approximately the last eight years I have been using the lane two to five times a week exercising horses. Prior to this access has been less frequent by my family dating back 40 years. I can never recall meeting anybody on the lane apart from children playing in the river.

The UEFs claim that the lane was in frequent use by members of the public.

- The gate at the top of Battery Lane recently erected by Mr Ffoulkes-Jones has proved to be extremely valuable for retaining any straying livestock from surrounding fields.

This suggests that there was no gate prior to its installation.

- Before the gate was erected there was always string across the access to Battery Lane, this historically stemmed from the time when dairy cattle were walked along Brough Lane and thus prevented them from going down Battery Lane.

If the placing of the string/rope was to assist with driving cattle along Brough Lane, this is not regarded as being a challenge public use of Battery Lane. No horse riders or cyclists indicate being prevented from using the lane by these actions. The Google Street View image taken in 2011 does not appear to show anything across the lane.

- We are asked on a regular basis if there is access across the fields to Elkesley, the answer is always no.

Other Options Considered

22. This report relates solely to the determination of an application to modify the Definitive Map by recording a public bridleway along Battery Lane. The County Council is under a duty to consider the application as submitted. Issues such as the need or suitability of the route cannot be considered at this stage.

Reason/s for Recommendation/s

23. The information contained in the Parish Schedule suggests that Battery Lane had already been used as a public bridleway for fifty years by 1952-3, and as such provide some evidence for the pre-existence of a public bridleway along Battery Lane. According to the information contained in the UEFs public use appears to have continued until 2015 when challenged by the installation of the gate and notice reading "Private Land No Public Right of Way". No information has been found to suggest that public use was sufficiently challenged prior to that date. Accordingly, during the relevant twenty year period (1995-2015), the information contained in the UEFs suggests that the lane was in regular public use 'as of right' on foot, on bicycles and occasionally by horse riders. Public use during this period does not appear to have been challenged in a manner sufficient to bring public use into question at an earlier date. The landowner (who ever that may be) has offered no resistance to public use and may be presumed to have dedicated a public bridleway.

Statutory and Policy Implications

24. This report has been compiled after consideration of implications in respect of crime and disorder, data protection and information governance, finance, human resources, human rights, the NHS Constitution (public health services), the public sector equality duty,

safeguarding of children and adults at risk, service users, smarter working, sustainability and the environment and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

Data Protection and Information Governance

25. All members of the public who have completed User Evidence Forms (UEFs) regarding this application have been informed that copies of their representations, including their names and addresses, are publicly available and are retained for the period of the application and for a relevant period thereafter.

Human Rights Implications

26. The making of a Definitive Map Modification Order does not create a highway – it merely recognises its pre-existence. While interested parties may consider their human rights (such as the right to respect for private and family life and the right to peaceful enjoyment of property, for example) are impacted by recognition of the right of way, the rights of highway users to use the right of way are also impacted by not being able to use the right of way in accordance with their legal right to do so. The Authority is entitled to affect these rights where it is in accordance with the law (such as the statutory code set out for Definitive Map Modification Order) and is both necessary and proportionate to do so, in the interests of, amongst other things, protecting the rights and freedoms of others. The proposals within this report are considered to be within the scope of such legitimate aims.

Implications for Sustainability and the Environment

27. Public rights of way can play a key role in providing access to the countryside and have wider health benefits i.e. leading an active and healthy lifestyle.

RECOMMENDATION/S

1) It is recommended that Committee approve the making of a Modification Order by adding the bridleway between points A-B (APPENDIX B) to the definitive map and statement on the basis that the evidence shows a right of way to subsist (Test A) and there being no credible evidence to the contrary.

2) That the Authority will support the confirmation of the Order in the event of it being referred to the Secretary of State for determination, unless further evidence is received in the meantime which indicates to officers that either a neutral or objecting stance would be more appropriate, in which case officers are authorised to proceed accordingly.

Adrian Smith
Corporate Director - Place

For any enquiries about this report please contact: Eddie Brennan 0115 9774709

Constitutional Comments (RHC 15/5/2018)

28. Planning & Licensing committee is the appropriate body to consider the contents of this report.”

Financial Comments (SES 11/05/18)

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

Background Papers and Published Documents

30. 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.

- Application case file

Electoral Division(s) and Member(s) Affected

- Worksop South Councillor Kevin Greaves