



Nottinghamshire  
County Council

## Report to the Rights of Way committee

27 JUNE 2012

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 MISSON

#### Purpose of the Report

1. To consider an application made by Misson Parish Council to record a route as a public footpath on the Definitive Map and Statement for the Parish of Misson. 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 Bawtry Road past the houses on Norwith Hill to join Misson Bridleway No. 2, also known as Hollin Causeway and Bryans Close Lane.

#### Information and Advice

3. The application for a Modification Order was made by Mission Parish Council in June 2008 and as they wanted to act as just the facilitator for the application they did not submit any evidence in support with it. In total, 49 user evidence forms were submitted along with, letters and other forms clarifying certain details concerning the claimed use of the path. This evidence mainly came from people living in Misson and Austerfield. This included some user evidence forms that were completed in 2005 (when another resident of Newington was considering making an application for a modification order but no formal application was then made). Interviews were carried out with 16 of the claimants who had used the route for a considerable length of time. A summary of the user evidence is shown in **Table 1**.
4. As well as this, interviews were also carried out with the previous farmer, whose family farmed the land from 1978 to 2003, with the current tenant farmer who farms the fields on either side of the claimed route from 2003 onwards, and with the builder, who supervised the building development at Norwith Hill from 2003 to 2008. Other information was also supplied by the developers, who bought Norwith Hill Farm and lived on site whilst building work took place, another resident at Norwith Hill and from 2 other landowners who own

part of the farmland over which the claimed path runs. A great deal of information has been submitted by both supporters and objectors to the application, and there have been three requests to view the submissions made under Freedom of Information Act legislation. What follows is a summary of the evidence that has been submitted from both sides.

## **Legal Background**

5. 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”.
6. 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”.
7. 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’ (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 brought into question.
8. 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.
9. 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**

10. The claimed route currently exists as a surfaced access road from Bawtry Road to a metal gate approximately 60 metres from the main road which when closed crosses the entire

width of the lane. When this gate is shut there is insufficient room to be able to walk or ride around it. The gate is shown in **Photograph 1**. The claimed route continues along the road and past a gated track which was constructed when the area was quarried. The route then continues on a surfaced road to what was Norwith Hill Farm which has been converted into private residences. This section is shown in **Photograph 2**. The route then continues around the converted buildings on the surfaced route as shown on **Photograph 3**. The claimed route then used to continue along a track at the side of the farm buildings but this has now been incorporated into the gardens of properties at Norwith Hill although a road has been constructed to the east to enable access still to be maintained to the properties. The path then goes across a section of field for a distance of approximately 150 metres and then joins up with a grass track that then joins Misson Bridleway No.2. This section of the route is shown in **Photograph 4**.

## Site History

11. The route from Bawtry Road to Norwith Hill is first shown on the 1843 Misson Tithe map but no continuation is shown from Norwith Hill to Misson Bridleway No.2. No information was included in the Tithe Award that gave any indication that this route had public rights on it. It is not until the 1885 Ordnance Survey 6" plan that the entire claimed route from Bawtry Road to Misson Bridleway No. 2 is shown, however the route was not named or labelled to indicate any status. In 1901 a plan was produced for the North Eastern Railway (Railway No. 11) which showed the route of the proposed railway crossing the claimed route. The book of reference described the route that crossed the railway as being a 'road' and that it was in the ownership of George Brooke. The route was not excluded in the 1910 Finance Act plans nor were any deductions made for a route going through any of the land parcels. None of the subsequent Ordnance Survey plans label the claimed route to indicate any status. The route wasn't claimed as a public right of way by the Parish Meeting in 1953, although it has to be noted that only 7 paths out of the current 12 were claimed at that stage. Subsequent Ordnance Survey plans show the claimed route as a double pecked line and label it as 'CT' (cart track) and 'Tk' (track).
12. The aerial photographs dated 1971, 1974, 1979, 1984, 1992, 1996, 2000, 2004 and 2007 all show the claimed route physically existed, however, the resolution on the photographs is such that it is difficult to determine whether there were any gates or barriers across the route. The aerial photographs dated between 1996 and 2000 cover the period when quarrying took place on either side of the claimed route on the section from Bawtry Road to Norwith Hill. The photograph dated 2000 shows the new quarry road for the first time which was constructed to take material to be processed. This quarry road can be seen on the 2000 aerial photograph to the west of the northern section of the claimed route. An oblique aerial photograph dated 2002 shows the original gate across the road at the southern end of the claimed route. The aerial photographs from 2004 show that the buildings at Norwith Hill were being demolished with all but one of the new houses completed on the 2007 photograph. The 2007 photograph also shows that there were building materials and a caravan on the line of the claimed route. This is shown in **Photograph 5**. The 2009 aerial photograph shows that the section of the claimed path to the east of the buildings at Norwith Hill has now been incorporated into the gardens of the properties. This photograph also shows that part of the track along which the claimed route runs north of Norwith Hill has been incorporated into the adjoining fields and is shown in **Photograph 6**.

13. In September 1995 the County Council was contacted by a member of the public who lived in Newington, concerning a number of paths which he believed to be public bridleways, but which were not recorded on the Definitive Map for Nottinghamshire. A plan was submitted to the County Council showing all these routes, one of which included the current claimed route as part of a much longer one. As part of the investigation into these claims, an officer of the County Council made a site visit in February 1996 to investigate this claim and made a note of what was there. There was a padlocked metal gate across the entrance of the route on Bawtry Road with 0.4 metre gap to the west and a 1.07 metre wide gap to the east. There was a small sign by the gate saying 'Private Property'. There were hoof prints in the eastern gap and hoof prints and horse droppings along the claimed route. At that time though, no formal application was made to claim this route and after brief investigation, the County Council did not make a Legal Order due to insufficient evidence (as very little user evidence had been submitted in support and there was no documentary evidence to indicate that there were any unrecorded public rights).
14. In 2004 the old farm buildings at Norwith Hill were bought by a developer who obtained planning permission to convert the farm and buildings into a number of separate properties. The developer lived on-site as the properties were being converted.
15. In February 2008 the issue of the route from Bawtry Road to Misson Bridleway 2 was raised at a Misson Parish Council meeting where 2 members of the public spoke in favour of an application to have the path registered as a public footpath stating that it had been used by parishioners. Several residents of Norwith Hill were also at the meeting saying that the path had never been a right of way, that it was not in frequent use and that there were concerns over safety and for the privacy of residents. In March 2008 a representative from the Countryside Access Team of Nottinghamshire County Council was invited to speak at the Parish Council meeting to explain the process of how an application is made for a Modification Order and how the evidence is assessed. Following the receipt of the application in June 2008, a meeting was held in July 2008 with the affected landowners and an officer of the County Council to discuss the process and what kind of evidence would be useful for them to submit. Also at the meeting there was a discussion about if the claim was successful there would be an opportunity to divert the route of the path to a more convenient location that would avoid the farm buildings and gardens. The owners said that they would prefer to focus on defeating the claim rather than consider a diversion.

## **Claimed use**

16. **Date of Challenge.** According to the evidence submitted by the claimants, the date when their use of the path was challenged appears to be in 2007, which was when they were verbally challenged by residents living in the new properties at Norwith Hill and when signs were erected along the route. The claimants state that this date seems to coincide with when the building work at Norwith Hill was finishing and people were moving in to the houses. If 2007 is taken to be the date of challenge this would make the relevant 20 year period between 1987 and 2007.
17. However, it should be noted that the public's use of the claimed route may have been challenged at an earlier date, when, in 2004 the old gate at the southern end of the path

was removed and a new gate erected 60 metres further up the claimed route. According to the developer this gate was locked from the time it was erected and there was insufficient room to be able to squeeze around it. If this is taken to be the challenge date the period of 20 years use would be from 1984 to 2004.

18. 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 at least the 1960's with 7 people claiming to have used it at least since that date. Use does seem to be continuous with none of the claimants saying that there was a time when the route was unavailable. If the claim period is taken to be 1987 to 2007 then 48 people have used the route for at least part of the 20 year period with 26 of them claiming that they have used it for the full 20 years. If the claim period is taken to be the earlier one from 1984 to 2004, then 47 people have used the route for at least part of the 20 year period with 23 of them claiming that they have used it for the full 20 year period.
19. **Category of use.** The application made by Misson Parish Council was for a footpath and of the 46 forms submitted, 42 of them indicated that they had used the route on foot. However, evidence was also submitted that the route had been used by 17 people on horseback. There have been a number of livery stables in Newington and Austerfield and quite a number of the riders claiming to have used the route have or did have their horse stabled at one of them. Therefore, it is necessary to consider this use by equestrians to see if the evidence indicates that bridleway rights have been dedicated.
20. **Purpose and frequency of use.** The evidence indicates the main use stated by the claimants was for pleasure and that it is part of a circular route linked up to other public rights of way in the area that avoids using the busy main roads. A common route does seem to have been to use the claimed route, then Bryans Close Lane (Misson Bridleway No. 2) to Misson and then back along Slaynes Lane as shown on **Plan A**. Frequency of use varied from 27 people who have used it at least once a week to those who have used it occasionally.
21. 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 secrecy, licence or compulsion. Whilst the user evidence shows that these requirements have been met the evidence of the claimants is disputed by the property owners at Norwith Hill and by the previous and present farmers and landowners. It is necessary, therefore, to examine in detail the three elements of secrecy, licence and compulsion.

## **Use in Secret**

22. **Time of day.** The claimants do state that they used the path at a time when it would reasonably be expected that someone would be out walking or riding. For example, some of them have said that they used it in the afternoons, evening and weekends. Two of the claimants were more specific saying that they used the claimed path regularly at 9:30 am and at 10:00 am. Therefore, the use of the path was quite open and would have been evident to any landowner. The objectors to the application have stated that there was very little use with people mainly using the quarry road rather than the claimed route through the farm buildings.

## Use by licence

23. **Use with permission.** Six of the claimants have stated that they used the claimed route with some kind of permission from the owners. For example, one of the claimants has stated that she had been given permission to use the track by the owners, firstly Mr. Brooks and then by Mr. Arden and also by Tom Coggon who used to work for Mr. Arden. This permissive use would not make her use of the route as of right. The same would be true for the others who say that they were given some kind of permission to use the claimed route. However, this does leave 42 claimants who stated that no one gave them permission to walk or ride the path with some of them stating that they didn't believe that they needed to ask anyone to use the path.
24. The previous and current landowners state that they have given permission for a very few people to use part of the claimed route. Paul Arden, who farmed the area from 1978 to 2003, states that the only person that had permission to use the path was Kevin Moody (who has not submitted any evidence in support of this claim). John Gelder, who has owned part of the land over which the claimed path runs from 2004, has given permission to 2 runners from Bawtry who also have not submitted any information of their use of the route. John Gelder also gave permission to Mr. and Mrs Gibbons from Newington Hall to deliver manure to Norwith Hill and their use of the path may have also been by permission. John Gelder also states that John Sutcliffe, the neighbouring landowner, has permission to use the path and that evidence of use given by two of the claimants is compromised by them being either related to Mr. Sutcliffe or working for him.

## Use by Compulsion

25. There is no suggestion from the claimants that they had to use force to use the claimed route, although this is disputed by the objectors to the application and is discussed in more detail in the following paragraphs in relation to the gates and the gap at the side of them.

## Use without interruption and no intention to dedicate

26. **The old gate.** A lot of the claimants state that there was a gate at the start of the route on Bawtry Road, although none of them give a date of when it was first erected. The experience of most of the claimants was that this gate was always open and that it was pushed back; indeed, some of the claimants state that they never really noticed it. However, some of the claimants have said that this gate was sometimes closed but not locked, with a chain thrown over the top. However, according to Mrs Gibbins who lived opposite the entrance to the claimed route and used the path very frequently, it appears that in the late 1990's the gate may have started to have been locked last thing at night and opened first thing in the morning. The reason that this happened was that things started to be stolen from the farm buildings and that it was locked by Tom Coggon, one of the farm workers working for Paul Arden. Another claimant also said that this gate was locked for a short time when there were cows in the field further up the lane to stop the cows getting out on to the road.

27. **The old gate.** The previous and current landowners disagree with what the claimants say about this gate. Paul Arden, the previous landowner stated that the gate was open from about 7.00 am in the morning to 4.00 pm in the evening but it was locked outside those periods and if no one was on site. Mr. Arden remembers this about the locked gate as he lived in Lincolnshire and always had to make sure he had a key with him so that he didn't have to go back and fetch one. When John Gelder, the present owner of part of this route, first viewed the property in 2003, he remembers that this gate was locked and he had to get a key to access the track. At a Parish Council meeting in February 2008, prior to the application being made, one of the property owners at Norwith Hill says that two of the claimants acknowledged that this first gate had been locked for 10 to 15 years.
28. **Gap at the side of the gate.** The claimants also say that there was a gap in the hedge adjacent to the east side of the gate that they could use when the gate was closed. None of the claimants say that they had to force their way through at this point with some of them saying that there was a well used worn path through the gap. One of the claimants says that the gap was big enough to be able to get a large horse through without any problems. Paul Arden, the previous landowner, does acknowledge that there was a gap at the eastern side of the gate but he remembers that it was blocked with an agricultural implement, preventing its use.
29. **The new gate.** According to John Gelder (the present owner) and his site foreman working on the development, the old gate was removed and a new one erected in 2004 sixty metres further up the lane so that lorries could pull in off the road. When the new gate was erected no gap was left on either side of the gate. He states that the new gate was locked firstly with a padlock, and then with a combination lock, as more people made deliveries as the properties on Norwith Hill were being developed. Mr. Gelder states that this gate was locked to prevent theft of materials and to stop horse riders and walkers using the lane. The locking of the gate has also been confirmed by people who had occasion to visit the site from 2005 onwards where they had to telephone the Gelders to ask them to unlock the gate. Mr. Gelder's foreman stated that towards the end of the development the gate may have been left open a few times, but his memory of it was that it was mostly locked. One of the property owners has stated that at a Parish Council meeting some of the claimants said that they had climbed over this gate when it was locked (which would be user by force and therefore not 'as of right') and that some of the users knew the combination of the lock and used it to open the gate.
30. **The new gate.** The claimants state that with the new gate there was not enough room for horse riders to get around the side but some walkers could. The claimants also state that this gate was on occasions locked. For example, one of the claimants says that it was always open even after the contractors had finished on site, whilst another says that in 2005 the gate was sometimes chained and locked. Mrs Foster and Mrs Gibbins both say that the new gate had a combination lock on it and that their husbands knew the combination of the lock as their husbands needed access for their work or to deliver things for the Gelders at Norwith Hill. However, neither of them says that they had to unlock the gate when they were using the path on foot or on horseback.
31. **Signs.** All of the landowners say that there were signs along the route, with Paul Arden stating that there signs at the Bawtry Road end saying 'private property'. It is presumed that this is the sign noted on the site visit as mentioned in paragraph 13. After 2004, the site foreman on behalf of Mr. Gelder states that he put up lots of signs saying 'private road

keep out', but they kept getting taken down with one sign only lasting 5 minutes. Again, after 2004 one of the other property owners says she has erected 18 signs along the route saying 'private no public right of way', with all but one having been vandalised or removed. However, no notice was submitted to the County Council under Section 31(5) of the Highways Act 1980 which would be taken as evidence that the route is not dedicated as a right of way.

32. **Signs.** The information submitted by the claimants indicates that there were signs erected along the route, although they give the date of when these appeared as some time in 2007, although one person does remember that sometime after 2004 a sign was erected saying 'access by permission only-private land'.
33. **Challenges prior to 2004.** Paul Arden, who farmed the land during this period, states that he was on site once a week for about 5 hours and during cultivation every day and during that period he "never really saw anyone and, therefore, there was no need to challenge anyone". He had 2 farm workers based at the site called John Pinder and Tom Coggon who were there much more frequently and would have challenged people using the route. In the 1980's an infra red burglar alarm was installed that would have called Tom Coggon back to the farm if anyone was going through and he would have then challenged people.
34. **Challenges prior to 2004.** None of the claimants say that they were ever challenged during the period up to 2004, even though there appears to have been times when they saw farm workers during their use of the path. One claimant says that farm workers were always accommodating when she was on her horses and pulled in their vehicles to let her past. Another of the claimants says that she met farm workers when she was riding, as well as the game keeper, but was never told she couldn't use the path. Seven of the claimants specifically mention Tom Coggon and John Pinder and say that they often used to stop and chat with them but nothing was said from them to the claimants not to use the path or giving permission to do so. Three of the claimants also mention the alarm system that Tom Coggon had and according to Michael Booth, who used to work with him, it was only switched on at night to stop thefts from the buildings at Norwith Hill.
35. **Challenges after 2004.** 2004 is the date when the Gelders started to develop the properties at Norwith Hill and moved the gate further up the lane. The current tenant farmer, states that he would be on site 2 times a month but during the 2 weeks of cultivation for about 15 hours a day. When he was there he challenged everyone he saw. He also states that he has never seen people use the section of the claimed route from Norwith Hill north to Bridleway No. 2. The Gelders, who lived at Norwith Hill from April 2005, onwards also state that they challenged people from the time they moved in and this is confirmed by their foreman. However, most of the claimants state that they were not verbally challenged until 2007, which coincided with when the majority of the building work was completed at Norwith Hill and people started to move into the properties.
36. **Use during quarrying.** Two areas on either side of the claimed route were quarried sometime between 1996 and 1998 and a haul road was constructed to remove material from the extraction area. One of the managers of the Quarry company believes that the claimed route was capable of being used and recalls the old gate as either being locked or capable of being locked. All the claimants said that the area quarried was quite small and the quarrying did not interrupt their use of the claimed path. After the quarrying had



finished the claimants say that they continued to use the claimed route but also used the haul road as it made a circular route. Two of the claimants, Mr. and Mrs. Oglesby, say that they got permission from the quarry manager to use the new quarry road but still used the original claimed route for which they did not think that they needed any permission. Both the previous farmer and the current tenant farmer did notice use of the haul road by members of the public as did Mr. Gelder. One of the residents of Norwith Hill thinks that some of the claimants may be mistakenly claiming the route past Norwith Hill when they have used the haul route instead. However, this has been one of the questions specifically asked of the claimants who have confirmed that the route being claimed is not the quarry haul road, although this route has been used as well.

37. **Use during the development.** The claimants also state that they continued to use the claimed path whilst the site at Norwith Hill was being developed. For example one claimant said that he talked to the site manager a few times who said the path was a public right of way, whilst another says that he went along the path as frequently as four times a week but was never challenged by the builders or the man in charge. The claimants seem to agree that it was in 2007 when the building work was nearing its completion and some of the properties were sold that they were first verbally challenged in their use.
38. **Use during the development.** The objectors to the application state that it would have been difficult for people to use the claimed route because the access to Norwith Hill was resurfaced in 2005 taking 5 weeks to carry out. It was also stated that there were times when building materials and a caravan were on the line of path that would also have made it difficult to use. Mr. Gelder also mentioned that there were a few people who came to look at the development as it progressed, but that they came in from the quarry road rather than along the claimed route.
39. Most of the claimants say that they saw other people riding or walking along the claimed route. Some of the people mentioned had also completed rights of way information forms but there were 23 others that had not completed a form or submitted any information. In addition to this, the claimed route had been used 5 or 6 times a year from 1979 to 2005 by groups of children from the Austerfield Field Studies Centre. Andrew Jagger, the Head Teacher of the Field Studies Centre says that there would have been up to 32 children in each group along with supervising adults and members of staff and that he never sought permission to use it thinking it was 'another public right of way'.

## Consultations

40. Consultations have been carried out with statutory undertakers, user groups and Bassetlaw District Council into the proposal to register this path as a public footpath. No significant information has been submitted either in support of or against the application.

## Conclusion

41. There is no documentary evidence that exists that indicates that this route is a public right of way. Although the route is shown on Ordnance Survey plans from 1885 and can be

seen in the aerial photographs, there is no indication of the status of the route. Therefore, the relevant evidence to consider relates to the issue of presumed dedication.

42. As shown in **Table 1**, the earliest claimed public use dates back to the 1930's with use appearing to increase in volume up until 2007/8. Seventeen of the claimants were interviewed and many of the others provided additional information to substantiate the initial user evidence forms that were submitted and there is no indication that any of the claimants have colluded with each other. Certainly all interviews, apart from two, were carried out on an individual basis. The user evidence does show use of the route has been consistent, with no breaks in that use. The users are clear about which route is being claimed and although some have used the quarry haul road this was in addition to the route past the farm buildings at Norwith Hill. The claimants state that the use of the route has been as of right with only a few indicating that they have had any permission to use it from any of the landowners, tenants or farm workers. The majority of claimants have used the route on foot, although consideration has to be given to those who have claimed equestrian use.
43. The evidence provided by Paul Arden, the farmer up until 2004, does conflict with claimants' evidence with respect to the old gate being always locked when no one was on site. For the most part the claimants remember this gate being open, and when it was closed and sometimes locked there was sufficient room to get around the gap at the eastern side and that this was never blocked. There is no suggestion from the claimants that they had to force their way through. Paul Arden also mentions the sign next to the gate with the wording 'Private Property' which was also noted at the site inspection in 1996. The wording of this notice does not emphatically challenge use of the claimed route, however, as it does not directly refer to the existence or non-existence of any right of way on foot or on horseback. Again there is a conflict of evidence between the claimants who said that they used the route and sometimes talked to the farm workers who were present on site, and Paul Arden who says that the farm workers would have challenged this use.
44. In 2004, when the Gelders bought Norwith Hill Farm and the land surrounding it the old gate was removed and replaced with a new one further up the lane and the Gelders have stated that this was then locked. Unlike the old gate, there was no gap at the side of the new gate when it was closed or locked and it is significant that it was confirmed as being locked by the claimants and that they had to try get around the side of the gate. However, some of the claimants state that they never found this gate to be closed (let alone locked) although one of the claimants states that it was locked when it was first put in. One possible interpretation of this is that initially the new gate was locked in 2004 but as more and more contractors came onto site the gate was left open more and more and users came through it. Depending on how complete this closing and locking of the gate was, this date could be taken as the date when the right to use the claimed route was being challenged. Aside from the locking of the new gate, there is again conflicting evidence of use whilst the development of the Norwith Hill properties was being carried out with the Gelders, their site foreman and the tenant farmer all stating that use was challenged both verbally and with signs but with the claimants stating that this was not the case. In 2007 the majority of the claimants say that their use of the route was verbally challenged when new residents moved into the Norwith Hill properties.

45. As stated in paragraph 5, according to Section 53(3)(b) of the Wildlife and Countryside Act 1981, the legal test that must be satisfied in order to require the Council to make a Modification Order is: “ the expiration... 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”. Therefore, consideration must be given to both potential challenge dates of 2007 (when the right to use the path was verbally challenged, which would then give the 20 year period 1987 to 2007) as well as the challenge date of 2004 (when the new gate was erected and locked, which would then give the 20 year period of 1984 to 2004). The evidence currently before the Council suggests that whilst the 2007 date was the more effective challenge, the 2004 date was a sufficient challenge, which prevented use of the route causing users to go around the side of the gate where no gap existed.
46. Having ascertained the date of challenge it is necessary to consider what the status of the route is. As stated in paragraph 19, Misson Parish Council made an application for a Modification Order for a footpath to be added to the Definitive Map, but some of the information that was submitted has come from equestrians. However, when asked specifically about permission to use the route, some of the riders have indicated that they did have permission to use it. As well as this, some of the equestrians have also said that they have used the route on foot as well as on horseback and it has been impossible to quantify with any certainty what use claimed was solely on horseback rather than a mixture of pedestrian and equestrian use.
47. It is important to bear in mind that the evidential threshold to **make** an order is comparatively low i.e. all that is required to be shown is that the right of way is reasonably alleged to exist. In **Norton v Bagshaw (1994)** it was held that the wording of Section 53(3)(c)(i) referred to in paragraph 6 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.
48. In **Emery (1996)**, the court of Appeal confirmed that it was appropriate to make an Order provided that at least the lower test (test B) was met, and that this test was met where there was credible evidence of public user over a twenty-year period and no incontrovertible evidence that a right of way could not reasonably be alleged to exist.
49. Having analysed the evidence currently before the Council, it is the officers’ view that there is not sufficient evidence to indicate that the equestrian use has been as of right and for the full 20 year period in sufficient numbers. The use of the route on foot, however, does appear to satisfy the above legal criteria for making a modification order, even having disregarded evidence of use of the route given by people who had been given direct permission, or to any evidence of use which may have arisen from a potentially implied permission given to those who may have had some connection with any adjoining landowners.
50. In this case whilst there is a conflict of evidence, there is no incontrovertible evidence that a right of way cannot reasonably be alleged to exist. Therefore, having considered that there is a credible body of user evidence to show that the claimed routes have been used for a minimum period of 20 years and little evidence to show that the landowner had, prior

to the application, effectively challenged public use or directly otherwise demonstrated a lack of intention to dedicate the claimed route, it is the officers' view from their investigations that a public right of way on foot is reasonably alleged to exist along the claimed route, and that as such the claim should be accepted and a Modification Order should be made.

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

1. This report contains an analysis of the evidence submitted and it fulfilled the relevant statutory criteria outlined in paragraph 5.

### **Statutory and Policy Implications**

2. 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**

- 1) It is RECOMMENDED that Committee approves the making of a Modification Order to modify the Definitive Map and Statement by adding the footpath for which the application was submitted 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.

**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 – 31/05/2012)**

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 22.05.2012)**

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**

Misterton

Councillor Liz Yates

H/AT/ROW82 - Add Footpath to Definitive Map & Statement in Parish of Misson  
12 June 2012