

 Nottinghamshire County Council	Report to Rights of Way Committee
	11 September 2013
	Agenda Item:
REPORT OF CORPORATE DIRECTOR (ENVIRONMENT AND RESOURCES)	
APPLICATION TO ADD A RESTRICTED BYWAY TO THE DEFINITIVE MAP AND STATEMENT IN WORKSOP	

Purpose of the Report

1. To consider an application made in 2010 by Mr S Hunt of South Parade, Worksop, to add a restricted byway to the Definitive Map and Statement for Worksop. A map of the general area is shown as Appendix A with the claimed route marked between points A-B-C. The effect of the application, if accepted and an Order confirmed, would be to record a restricted byway, leading between Carlton Road and South Parade/Sunny Bank in Worksop.
2. To consider two unrecorded paths shown between points B-E and D-E-F on Appendix A, which also appear to have been used over the land in question. If it is accepted that rights of way subsist on these routes, appropriate steps must be taken to record these on the Definitive Map and Statement.

The Law

3. Section 53(3)(b) of the Wildlife and Countryside Act 1981 (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. 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.
5. 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”. The case of *R v SSE ex parte Bagshaw and Norton* (1994) has clarified the law in respect of the meaning of ‘subsists’ (Test A) and ‘reasonably alleged to subsist’ (Test B).

- 'Test A' requires, on the balance of probabilities, 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 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 an Order should be made.
6. If it is accepted that dedication may be presumed at law, 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 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 use by the public 'as of right' may support an inference of dedication and may also show acceptance by the public.

Information and advice

8. During the latter part of the twentieth century and in the early 2000s the land crossed by the claimed route A-B-C was in the ownership of Bassetlaw District Council. The land was subsequently purchased in 2008 by Tesco Stores Ltd for the construction of a new store. No information has been found in respect of when Bassetlaw DC first acquired the land. For a number of years prior to 2008 the route A-B-C existed as a pedestrian link between Carlton Road and Sunny Bank/South Parade passing alongside an area of grassed open space. A short section of the route near to point A consisted of a tarmacked roadway which served as access to the land in question and also as vehicular access for Nos. 142 and 144 Carlton Road. A series of photographs of the route/land in question is shown as Appendix B1-12.
9. Subsequent information discovered by officers when investigating the application suggests that an unrecorded right of way might also exist on route B-E which led from the route being claimed to the south east corner of the site through a residential garage site, and also on route D-E-F which is currently in public use and runs alongside a railway. Accordingly, this report will also consider whether or not routes B-E and D-E-F ought to be added to the Definitive Map and Statement as public footpaths.
10. The routes A-B-C and B-E appear to have been laid with stone surfacing and were furnished with pedestrian access barriers (Appendix B2, B5, B7). Two lighting columns were located on path A-B-C (Appendix B4). Records confirm that the lighting columns were maintained by the County Council under an agreement with Bassetlaw District Council.

11. Evidence is conflicting as to whether any signs or notices existed on the paths. Some users state that notices existed which variously read 'No Cycling' or 'No Motor Cycles' or 'No Dog Fouling' (i.e. acknowledging public use of the land), while other users state there were no notices at all. Bassetlaw District Council does not hold any records in respect of prohibitory notices on the land. The undated photograph (Appendix B2) indicates a sign was present at some time near point A, however it has not been possible to determine details about the wording on the sign.
12. One photograph (Appendix B7), confirms the presence of a 'squeeze gap' type barrier between points B and E. Close examination of the aerial photographs taken in 1978 and in 1984 (Appendix D2, D3) suggests that it was some time during this period that the squeeze gap was erected. The squeeze gap would have had the effect of restricting any motorcycles and bicycles attempting to access the land. The photographs supplied by Bassetlaw DC appear to show a sliding gate to the side of the squeeze gap (Appendix B7). It appears that this would have made it possible to close off pedestrian access if required. However, no evidence has been found to show that the gap was closed off at any time.
13. The path running alongside the railway (D-E-F) exists on land which is owned by Tesco Stores Limited and by Network Rail. The path currently has a locked gate placed across it with a pedestrian access barrier to one side (Appendix B9). The gate is controlled by network rail and provides access for maintenance and emergency vehicles. In 2009 (approximately) signs were placed along route D-E-F which read "This is a private footpath owned by Tesco Stores Limited and is not a public right of way. Persons using the footpath do so with the permission of Tesco and entirely at their own risk". Network Rail do not appear to have placed any signs along the section of the route owned by them.

Documentary Evidence

14. A 1:2500 Ordnance Survey map (published in 1960) depicts a roadway or track on the same alignment as the claimed route A-B-C. No gates or barriers are depicted on the route which therefore suggests that it was possible for the public to use it. The map depicts a 'post' at point C which probably prevented vehicles (cars and vans etc.) from using the route as a cut through. The OS map also shows that part of route B-E existed as an access road/track to a 'depot' and also to resident's garages. However, the existence of the depot suggests that route B-E did not physically exist as a through route in 1960. Route D-E-F appears to have existed as an access road or track in 1960. Two gates or barriers are depicted on the route, one at the Carlton Road end (point D) and another approximately half way along the route. No further information can be derived from the OS map to determine whether any public access along D-E-F was taking place in 1960. An extract taken from the 1960 Ordnance Survey Map is shown as Appendix C.
15. Aerial photographs taken in the 1970s, 80s, 90s and 2000s serve to confirm the physical existence of routes A-B-C, B-E throughout this time period. The photographs indicate that although the adjacent land was criss-crossed with trodden paths, the most clearly defined paths across the open space land were the routes A-B-C and B-E. Route D-E-F can be seen as a worn path from 1992 onwards. Extracts taken from the aerial photographs are shown as Appendix D1-7.

16. A street plan of Worksop published by C J Utting (circa 1990s) depicts the presence of routes A-B-C and D-E. The depiction of these routes would suggest that the paths were sufficiently well known or well used to be shown on a commercial street map. An extract of the Utting map is shown as Appendix E.

User Evidence - Route A-B-C

17. 42 evidence forms have been submitted in support of the Application route A-B-C. The majority of claimed use relates to use on foot although 16 people claim to have used the route on cycles. Much of the evidence relates to use on a daily basis or even several times per day. Various reasons are given for using the route including use as a route to school/college, for going to work, going to the town centre and for accessing the nearby railway station.
18. The information contained in the user evidence forms relates to the presumed dedication of a highway based on uninterrupted use over a twenty year period. This period has to be calculated retrospectively from the date when the right of the public to use the way was brought into question. According to Tesco Stores Limited, the path was closed to the public in August 2009 when hoardings were erected around the land prior to construction work taking place, and has remained closed since. Therefore the period during which 20 years public use prior to challenge appears to have taken place is between August 1989 and August 2009.
19. No evidence has been discovered which suggests that public use **on foot** was ever challenged during the period 1989-2009. However, as previously mentioned, pedestrian access barriers have been in place for a number of years near point A and at point C (Appendix B2, B5). Although it has not been possible to establish exactly when these barriers were erected, one local resident states that they were already in situ when he moved to the the area in 1984. This point appears to be confirmed by close inspection of the aerial photograph of the same date (Appendix D5). The case of *Fairey v Southampton County Council* (1956) has clarified the law in respect of the type of action which constitutes bringing a right of way into question (and demonstrating a lack of intention to dedicate a public right of way). Denning LJ found “whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway”. Although both pedestrian access barriers allow for the free passage of pedestrians, they would have physically restricted use by bicycles either causing riders to dismount or by blocking access completely. Accordingly, it is considered that the pedestrian access barriers constituted a challenge to use by cyclists in 1984 (at the latest). Information contained in User Evidence Forms relating to cycle use over an earlier twenty year period of 1964 to 1984 only shows use by four cyclists. It is also noted that six users have referred to ‘No Cycling’ signs being present on the land. It is therefore reasonable to conclude that the evidence is not sufficient to meet the test that it is reasonable to allege that a right of way (i.e. a bridleway or restricted byway) for cyclists subsists.
20. In respect of use on **foot**, the evidence demonstrates uninterrupted use by 35 members of the public throughout the relevant 20 year period 1989-2009. In order for this evidence to be valid, it must be demonstrated, that use was ‘as of right’ and was not exercised in secret or by force or with permission. The Evidence Forms clearly demonstrate that use of route

A-B-C was quite open, and there is no evidence that any force was involved in the exercise of the route, or that such use was on a permissive basis. Furthermore, public use appears to have been acknowledged through the provision of a surfaced path, street lighting and pedestrian access barriers. There is no evidence that Bassetlaw District Council (as landowner prior to 2008) took any steps to prevent public use on foot, or to demonstrate that use was by permission only.

User Evidence - Route B-E

21. Nine evidence forms submitted in respect of the application route A-B-C also indicate use of route B-E. The evidence relates to claimed use on foot, much of which appears to be on a daily basis. The path is visible in photographs taken by Bassetlaw District Council (Appendix B3, B6, B7). This path was also closed to the public in August 2009 when hoardings were erected around the land prior to construction on the site. Again, the period during which 20 years public use prior to challenge appears to have taken place is between August 1989 and August 2009.
22. The evidence demonstrates uninterrupted use by 6 members of the public on foot throughout the relevant 20 year period 1989-2009. In order for this evidence to be valid, it must be demonstrated, that use was 'as of right' and was not exercised in secret or by force or with permission. The Evidence Forms demonstrate that use of route B-E was quite open and there is no evidence that any force was involved in the exercise of the route or that use was on a permissive basis. Public use of the route appears to have been acknowledged through the provision of a surfaced path and a squeeze stile along the route. There is no evidence that Bassetlaw District Council (as landowner prior to 2008) took any steps to prevent public use on foot, or to demonstrate that use was by permission only.

User Evidence - Route D-E-F

23. Route D-E-F though not forming part of the Application route is currently used by pedestrians for access between the Kilton area of Worksop and Carlton Road. The footpath is not currently recorded as a public right of way and is not recorded as being highway maintainable at the public expense. In early 2013, as part of the on-going development of the Tesco site, much of the path was edged and laid with tarmac. Photographs of the path taken in 2009 are shown as Appendix B8-B12.
24. The path exists on land which is currently owned by Network Rail and by Tesco Stores Ltd. Before 2009 the path consisted of a tarmacked/stone surface with a gate placed across it near to the Carlton Road end (point D). Pedestrian access was possible around one side of the gate via a pedestrian access barrier. It is important to note that any notices erected after the public have already acquired rights are of no legal effect. As such, it is considered that the notices erected in 2009 which read "This is a private footpath owned by Tesco Stores Limited and is not a public right of way...." have no effect as by the time the notices were erected the path had already been in use for a number of years, and it is more likely than not that the public had already acquired a right of way over the path prior to 2009. An Aerial photograph (Appendix D4) suggests that the route already existed as a worn path in 1992. Earlier aerial photographs are indistinct for the purposes of helping to determine public use.

25. No evidence has been submitted by either landowner in respect of whether any other steps were taken prior to the notice in 2009 to demonstrate that there was no intention to dedicate a public right of way.
26. One local resident who states his father used the route for access to his private business states that pedestrian access was 'not allowed' between 1952 and 1965, and that a gate existed across the route which prevented access. However, he also states that when the adjacent malt kilns fell into disuse in around 1968, the public began using the route without any restrictions. Another resident has stated he used the route on foot without any impediment since 1985.

Consultation

27. Consultation has been carried out with all known land owners, occupiers, interested parties, user groups and public utility companies. Any responses are summarised below (with the officer's response in italics).
28. Bassetlaw District Council;
"I would draw your attention to there being an implemented planning permission on this site to erect a retail store. The Council has recently resolved to grant planning permission for a larger retail store on the site subject to the completion of a legal agreement. In both cases the store building would be sited on the indicated line of the byway".
The granting of planning permission does not extinguish public highways. If a public highway is shown to exist steps may subsequently be taken to seek to divert any public rights of way affected by the development. For information a plan indicating routes A-B-C, B-E and D-E-F is shown as Appendix F with the development superimposed.
29. Berwin Leighton Paisner LLP (on behalf of Tesco Stores Ltd);
"Tesco Stores Limited (the "Landowner") does not intend to comment at this stage. The Landowner formally reserves its position and therefore does not accept that the routes recorded on the plan attached to the Modification Order Application Plan (marked as routes A-B-C, B-E and D-E) are public rights of way".
Regrettably, Tesco Stores Limited have chosen not to supply any information at this stage. For the purposes of Committee's decision, it is noted that no evidence has been presented to demonstrate that the claimed route could not subsist.
30. Venus Bathroom and Kitchen Studio Ltd, 146 Carlton Road;

"This would not be a safe environment for non-motorised vehicles or pedestrians and could even be quite dangerous to be classed as a public right of way, because the area between 146 and 144 Carlton Road is used for vehicular access to our car parking spaces and to the garages that belong to 144 and 142 Carlton Road. We also have many daily deliveries brought by large lorries. We therefore object to this proposal on the grounds that we consider it unfit for the purpose".
Unfortunately issues of suitability and of public safety are not something that can be taken into account during consideration of the application, however there is no evidence of dangerous incidents occurring when the route was previously available to the public. If the route were to be recorded as a public right of way, and a situation arose whereby public use

was found to be unsafe, the County Council would then explore any appropriate practical or legal solutions to address this.

31. Resident of South Parade;
“As I was born on South Parade in 1972, I have used this and other paths on an almost daily basis for nearly 39 years. During the short period of time I did not actually reside on the street, I still used it several times weekly to visit relatives”.
32. Two residents of South Parade;
“We have lived on South Parade for 37 years and always used this land on a daily basis to go to work or go to the railway station. Our children, along with their friend, used this path [A-B-C] on a daily basis on their way to the local comprehensive school. A blind lady and her dog always used the footpath across the site to go to town or the railway station, but now she has to use a revised route which is not acceptable to walk miles round onto Shepherds Avenue, Blyth Road and then onto Carlton Road”.
33. Resident of South Parade;
“My family moved to South Parade in 1960 and the footpath between South Parade and Carlton Road was in existence at that time. Until 1970 I used the footpath daily on my walk to school. Since then I have used it regularly when in Worksop, at least once a fortnight when visiting my parents. I used the path until the route was blocked by fencing. In total I have been using the path [A-B-C] for 50 years”.
34. Resident of Sunny Bank;
“I was born in 1958. My mother using the path [A-B-C] took me to town shopping. From the age of eleven, I went to Valley Road School, using the path four times a day. When starting work in 1974 I used the path twice a day and also other times when shopping or going out for pleasure until Tesco closed it without notice in September 2009”.
35. Resident of South Parade;
“I have used the footpath [A-B-C] between Carlton Road, Sunny Bank/South Parade for approximately 25 years, taking my children to a toddler group, using it twice a day for about 19 years going to work”.
36. Resident of South Parade;
“My parents used this footpath [A-B-C] as a route to Gateford Road where my grandparents lived at least twice a week. Whilst at secondary school and later as a resident of South Parade, I used the path in question and also with friends and family going to the Valley Sports Centre and also to North Notts College”.
37. Resident of Carlton Road;
“I have lived at Carlton Road since 1984. During that time there has always been pedestrian access [on A-B-C]. Although it has never been a tarmac footpath it has been a footpath nevertheless. I can also confirm that it has never in any way shape or form been a cycle friendly path or way. On the contrary there has been flap gates/kissing gates in place to prevent cyclists also there were signs at the entrances to the field saying no cyclists. The main footpaths that were in constant daily use were the one on your map [A-B-C] but there was also the one [B-E-F] that went from Carlton Road to the old substation and going to the far south-eastern corner of the site near to the railway viaduct. These were the only two main paths across the site. We have no objection whatsoever to a footpath but we

would strongly object to a cycle path/way as there has never been one and we feel that this would attract the wrong element if not properly lit or security patrolled”.

38. Resident of Worksop

“I took this route [A-B-C] on my way to and from the scout meeting on East Gate, my home was then on Gateford Rise”.

Reason/s for Recommendation/s

39. The 1960 Ordnance Survey map and the aerial photographs between 1974 and 2007 when taken together confirm the physical existence of the routes, A-B-C (in 1960), B-E (in 1974) and D-E (in 1992).
40. It is noted that the Application for route A-B-C was made in respect of recording a **restricted byway** on the basis of use by pedestrians **and** cyclists. Although the pedestrian barriers and squeeze gap on routes A-B-C and B-E, did not prevent or restrict pedestrian access, they did sufficiently demonstrate that the landowner had no intention of dedicating a right of way which could be used by cyclists. Accordingly, the category of route which can be presumed to have been dedicated is that of a public footpath only.
41. The user evidence and photographic evidence submitted in respect of routes A-B-C and B-E suggest that these routes were in regular public use over a twenty year period between 1989 and 2009. Such use appears to have been uninterrupted and ‘as of right’ (without force, not in secret and not by permission).
42. Although little evidence has been submitted in respect of route D-E-F (as the evidence was primarily focused on the application route A-B-C), the route ‘on the ground’ has every appearance of a being footpath in regular public use. Given this use, and that it appears to have been used over a number of years, possibly dating as far back as 1968, and in the absence of any evidence to the contrary, it would be appropriate to add this route (by making a Modification Order) to the Definitive Map and Statement as a public footpath 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” (Para. 3).
43. No declarations in respect of public rights of way have been lodged with the County Council under Section 34(6) of the Highways Act 1959, or subsequently by Section 31(6) of the Highways Act 1980, and no notices have been received under Sections 34(4) and 31(5) of the respective Acts stating that the relevant paths have not been dedicated as highways.

Statutory and Policy Implications

44. This report has been compiled after consideration of implications in respect of finance, the public sector equality duty, 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 rejects the application for a restricted byway but approves the making of a Definitive Map Modification Order to add a footpath to the Definitive Map and Statement as per route A-B-C (Appendix A) on the basis that, for the reasons set out above, it is considered by the Authority that a right of way on foot subsists.
- 2) It is RECOMMENDED that Committee approves the making of a Definitive Map Modification Order to add a footpath to the Definitive Map and Statement as per route B-E (Appendix A) on the basis that, for the reasons set out above, it is considered by the Authority that a right of way on foot subsists.
- 3) It is RECOMMENDED that Committee approves the making of a Definitive Map Modification Order to add a footpath to the Definitive Map and Statement as per route D-E-F (Appendix A) on the basis that, for the reasons set out above, it is considered by the Authority that a right of way on foot subsists.

Eddie Brennan
Definitive Map Officer

For any enquiries about this report please contact:

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Definitive Map Officer

Constitutional Comments (SJE – 21/08/2013)

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.

Financial Comments (SEM 30/08/13)

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

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.

Modification Order Application case file

Electoral Division(s) and Member(s) Affected

Worksop East

Councillor Glynn Gilfoyle

ROW 97