

**12 December 2017****Agenda Item: 5****REPORT OF CORPORATE DIRECTOR OF PLACE****APPLICATION TO ADD THREE PUBLIC FOOTPATHS TO THE DEFINITIVE  
MAP AND STATEMENT FOR WIDMERPOOL****Purpose of the Report**

To consider a number of Modification Order applications made by the Ramblers Association in 2005 which if implemented would add three public footpaths to the Definitive Map and Statement in the Parish of Widmerpool. A map of the general area is shown at APPENDIX A while the routes under consideration are shown at APPENDIX B marked between points A-B, C-D and E-F respectively.

**Information and Advice**

1. The claimed footpath between A-B commences at the junction of Definitive Footpath No.2 on Keyworth Road, Widmerpool and proceeds in a north-easterly direction across agricultural land, then follows an agricultural track to Thurlby Lane. Photographs taken at end points of the claimed footpath are shown at APPENDIX C1.
2. The claimed footpath between C-D commences at Thurlby Lane and proceeds in a north-easterly direction through the gardens of Hill Farm, through a pond, across agricultural land, through a copse, across the Old Dalby Railway Test Track, and through the curtilage of Pinewood Lodge before terminating at the A606 Melton Road. Photographs taken at end points are shown at APPENDIX C2.
3. The claimed footpath between E-F commences at Melton Road and proceeds in a north-easterly direction, through woodland, across the grounds of Roehoe Lodge/Widmerpool House, across agricultural land, across the carriageway of the new A46 before terminating at the western side of the old Fosse Road. Photographs taken at end points are shown at APPENDIX C3.
4. 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).

5. 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 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
6. The applicant relies on the Widmerpool Inclosure Award (1804) as evidence for the existence of the claimed footpaths. Accordingly, when investigating rights of way claims, legal documents such as inclosure awards can provide conclusive evidence for the existence of a right of way, but being of some antiquity they require careful study in order to determine their factual significance.
7. The Inclosure Consolidation Act (1801) also has a bearing in such matters. The 1801 Act introduced a set of clauses for incorporation into all local Inclosure Acts. Of particular relevance is Section 10 of the Act which gave Inclosure Commissioners (i.e. the executors of the award) the power to set out and appoint public footpaths *“as he or they shall think requisite”*. Furthermore, Section 11 states *“And be it further enacted, that after such publick and private Roads and Ways shall have been set out and made...all Roads, Ways, and Paths, over, through, and upon such Lands and Grounds which shall not be set out as aforesaid, shall for ever be stopped up and extinguished,...”* meaning that once the particulars of the award had been fully complied with, all pre-existing footpaths on awarded land, if not being ‘set out’ and ‘made’ again would be automatically extinguished.
8. Furthermore, in order to implement the local award, a private Act of Parliament was required to authorise the process. Accordingly, the Widmerpool Inclosure Act (1802) conferred to the Commissioners the necessary powers for setting out “Roads and Ways” and for stopping-up or diverting roads and ways on land which had already been enclosed if considered necessary.
9. The Widmerpool Inclosure Award (1804) was duly made and enrolled in accordance with the Acts of 1801 and 1802 and among other things describes all public / private roads and ways to be put into effect.
10. The three claimed footpaths correspond with one continuous route described in the award thus: *“To Kinolton...One other public Footway from an ancient Homestead in Widmerpool aforesaid belonging to the said James Robinson (and now in the possession of Richard Julian) in an Eastward direction into and over North Nook Close and the Ball Lane Close herein awarded to the said James Robinson and from thence Eastwardly over Rough Hoe Fields along a certain place called the Coney Hades into and over the Lands herein respectively awarded to the said James Robinson and to the Rector of Widmerpool in lieu of Tithes and across the public Carriage Road herein called Stanton Road and from thence over certain places called Milestone Nook Common and the Rough Hoe pasture herein awarded to the said James Robinson to and across the said Turnpike Road leading from Nottingham to Melton Mowbray and continued in the same direction into and over another allotment herein awarded to the said James Robinson in the said Rough Hoe Pasture called King Nook to an old Inclosure herein also awarded to the said James*

*Robinson called the Foss Close over which Close there is a Footway leading into the Foss Road being the Footway from Widmerpool to Kinolton”.*

11. The awarded footpath is clearly shown on the inclosure plan as the “Foot Path To Kinolton”. Relevant extracts from the award are shown at APPENDIX D1-3. N.B. No documentary evidence has been discovered regarding the continuation of a path into Kinoulton; however, as there was no statutory inclosure in Kinoulton Parish, the likelihood of finding evidence of ancient footpaths is significantly reduced.
12. Originally two maps were prepared for the purpose of implementing the award, the first being of a relatively small scale, and shown here at APPENDIX D1-2 was attached to the award itself. A second larger scale map was also produced, possibly for use as a working copy and appears to have been subsequently re-used and drawn over denoting many changes in ownership and sub-division of fields. Unfortunately, the awarded path is barely visible on the second map and was possibly erased at some point in time; however, this does not affect the legal status of the awarded footpath which is recorded on the enrolled copy (APPENDIX D1-2) and which could only be extinguished by application to the Quarter Session Court. Nevertheless, the second award map does suggest that the Widmerpool to Kinoulton footpath may have fallen into disuse in the early 1800s.
13. The Widmerpool Award shows the path starting and ending within ancient inclosures i.e. in parcels of land which had already been enclosed prior to 1804. The path in question starts at an “ancient homestead” (parcel No.30 on appendix D2) and ends at an “old Inclosure” (parcel No.1 on Appendix D2) which serves to demonstrate that the footpath existed prior to the award and shows that the ends of the path were retained in order to facilitate the awarded footpath.
14. Officers also considered the possibility that the awarded path was never made available for public use following the 1804 Award. In that case s.11 of the 1801 Act would come into play whereby the pre-existing footpath could only be extinguished **after** the the new footpath was ‘made’ (i.e. through the provision of openings/stiles and having an unobstructed walking surface). Accordingly, if the awarded path was never ‘made’ then s.11 of the 1801 Act (stopping-up and extinguishing ways) does not come into effect and therefore the pre-existing footpath still exists in law, unaffected by the 1804 Award.
15. Archived records relating to the proposed construction of the Midland Railway (1871) were also examined. Such documents often contain maps and tables describing any footpaths identified by the railway surveyors. Similarly, the earliest available Ordnance Survey plans (1884) were also examined. No footpaths were identified in either instance. It is important to note that the absence of a path in either document does not exclude the possibility that a public right of way existed, but only serves to demonstrate that no path was identified at the time of the respective survey.
16. The Quarter Session Records (1603-1974) held at the Nottinghamshire Archives were examined but contained no record of the awarded path being lawfully extinguished.
17. The Parish Schedule for Widmerpool (1954) was also examined. This document was completed by the parish council for the purposes of the National Parks and Access to the Countryside Act 1949 in preparation for the publication of the first definitive map in 1965. The schedule contains maps and descriptions of admitted rights of way following a survey

of the parish. It was standard practice at that time for local inclosure awards to be examined for evidence of footpaths and bridleways etc. Unfortunately, this does not appear to have happened in this instance as there is no mention of the Widmerpool Inclosure Award in the schedule. Consequently, the only footpaths listed are those recognised as being in actual use at that time.

18. Consultation has been carried out with all known owners, occupiers and businesses affected by the current claims in order to invite further information regarding the alleged existence of the footpaths. Letters have also been sent to the district council, the parish council, rights of way user groups and public utility companies. All responses, either in support or objecting to the application are summarised as follows (with the case officer's response in italics).

19. Widmerpool Parish Council: **Representation / Objection**

- Provided that the basis for this claim can be established in law the Parish Council might not raise an objection in principle
- The precise course of the path must take into account the privacy and security of residents and property owners as well as the 'well-being' of path users
- The footpath crosses an electrified railway cutting, an accident 'black spot' on the A606 as well as the new A46 trunk road. All of these would present serious hazards to walkers. Extensive diversions into open countryside will be required.

*Officer comment: This application is based on evidence of an ancient footpath which existed before the advent of railways, motorised traffic and prior to the construction of some homes and buildings. It is recognised that implementing this footpath would have a detrimental effect on privacy and expose the public to potential danger; however, the law does not allow such factors to be taken into account at this stage. The only issue which can be considered at this stage is whether, based on the facts, a right of way exists (or is reasonably alleged to exist) or not. If, after due process the existence of the footpath is proved, but the line of the path is unacceptable for the modern environment, the Council could then consider diverting the path, provided the relevant legal tests are met.*

20. Councillor John Cottee, Elected Member for the Keyworth Ward: **Objection**

- The footpath crosses three major obstacles which are dangerous and pose serious problems to walkers.

*Officer comment: Safety concerns are acknowledged by officers but unfortunately the law does not provide for them to be taken into account when deciding whether or not a public right of way exists or is reasonably alleged to exist. If, after due process the existence of the footpath is proved, but the line of the path is unacceptable for the modern environment, the Council could then consider diverting the path, provided the relevant legal tests are met.*

21. Mr and Mrs McKenzie, The Bungalow, Roehoe Lodge: **Objection**

- The proposed path cuts across the land near our home and would infringe privacy and cause danger to grandchildren playing in secluded areas around the property

- The gateway to the property is cited in a very dangerous position which does not accommodate vehicles as well as pedestrians.

*Officer comment: Safety/privacy concerns are recognised but unfortunately the law states that they cannot be taken into account when deciding whether or not a public right of way exists or is reasonably alleged to exist. If, after due process the existence of the footpath is proved, but the line of the path is unacceptable for the modern environment, the Council could then consider diverting the path, provided the relevant legal tests are met.*

22. G.R Garratt, of P. M. Garratt Ltd, Hill Farm, Widmerpool: **Objection**

- There is no evidence for the footpath on maps after 1804
- The footpath would have been for estate workers living in outlying cottages and not for the public
- It is unlikely that a public right of way would be sited where game birds were being raised
- Any right of way would have been along Station Road and Kinoulton Lane which is a more direct route
- The footpath depicted on the award map was a mapping error which was corrected on later maps
- All other footpaths to other villages do appear on later maps

*Officer comment: Although investigations did not find any evidence of a public footpath in the 1871 railway plans or the 1884 Ordnance Survey Plans, a public footpath was awarded in 1804 and unless lawfully extinguished still exists in law. The suggestion that the awarded path was intended for estate workers is not borne out by the evidence i.e. the Inclosure Commissioners could have set out a **private** footpath but expressly set out a **public** footpath. The suggestion that the footpath was depicted on the award map in error is not credible as the path is described in great detail and clearly replaces a pre-existing way. By way of example, three other local awarded paths (i.e. to Wysall, to Upper Broughton and to Wymeswold) were not shown on later Ordnance Survey maps and also failed to be included in the Parish Schedule (1954)*

23. Mr J.W. Nunn, Pinewood Lodge, Melton Road, Widmerpool: **Objection**

- Widmerpool Parish Council archives do not hold any evidence to substantiate the right of way
- A safer, more direct route would be to go down Station Road to avoid a dangerous railway crossing
- The proposed footpath poses a high security risk to my farm and home and will increase insurance premiums due to added risk
- The footpath runs straight through my property and as a breeder of horses, I consider this proposal to be a very high risk to pregnant mares
- Equipment we use may put the general public in danger
- The Council previously requested the closure of an exit onto the highway due to it being in this dangerous location. The gateway was moved accordingly
- Land Registry Searches did not identify a public footpath when buying the property

*Officer comment: The issues raised mostly relate to privacy and safety and unfortunately, while officers acknowledge these concerns, they cannot legally be taken into consideration at this stage. In relation to local searches carried out when buying property, it is only possible to inform landowners of paths which are known to exist at that time, but other paths (such as those which are subject to this report) may later be discovered. Accordingly, rights of way search replies carry the disclaimer “No definitive paths affected, but it is always possible that other public rights of way exist which have not yet been registered”. If, after due process the existence of the footpath is proved, but the line of the path is unacceptable for the modern environment, the Council could then consider diverting the path, provided the relevant legal tests are met.*

24. Mather Jamie Chartered Surveyors, on behalf of Mr and Mrs N.W.T. Woodhouse of Widmerpool: **Objection**

- The principal concern relates to considerable loss of privacy and security
- The Woodhouse family have resided at Widmerpool for over 50 years and are unaware of the presence of a footpath or any individual use
- The footpath crosses residential gardens and pastureland containing bulls. The imposition of the footpath would be detrimental to the security and management of the land and for health and safety i.e. bull keeping
- Old Ordnance Survey maps show no evidence of any footpath
- Bridleway No.11 is in close proximity negating the need for the footpath
- There is already a definitive footpath between Stanton-on-the-Wolds and the A46 rendering this path obsolete
- The footpath runs between two extremely dangerous roads and a point where there have been many serious accidents

*Officer comment: Unfortunately, none of the above points address the evidence in terms of challenging the existence of a public footpath albeit it is acknowledged that it would clearly be in a location which would have a negative impact on the current landowners. If, after due process the existence of the footpath is proved, but the line of the path is unacceptable for the modern environment, the Council could then consider diverting the path, provided the relevant legal tests are met. While reference is also made to Bridleway No.11 negating the need for this footpath, this is not a lawful reason to discount the existence of an awarded footpath. For Committee’s wider information, in terms of the suggested obsolescence, the fact that the Ramblers’ Association has submitted this application (which may be an indicator of demand to use the route) means that any extinguishment order to remove public rights would likely be unsuccessful.*

25. Fraser Brown Solicitors, on behalf of Mr N. Woodhouse, Widmerpool House: **Objection**

- It is noted that the applicants are relying on the 1804 Inclosure Award. There is no further evidence on property deeds, railway plans, and Ordnance Survey maps dating back to 1885 for the existence of the footpath
- Mr Woodhouse and his family have been the owners and occupiers of the land since the late 1950s and have not seen or been aware of any such footpath on the ground
- No reference was made to any rights of way when the property was purchased

- The line of the path currently runs through 4 hedges and therefore we cannot see how anyone could claim that this is a footpath

*Officer Comment: It is acknowledged that the awarded footpath has not been physically available for well over 200 years. However, the law has established that long periods of disuse do not cause a highway to be extinguished. In the case of Harvey v Truro Rural District Council (1903) Judge Joyce stated "It is an established maxim that once a highway always a highway...Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper". As such, while it is acknowledged that the existence of the footpath may be surprising, this does not mean that the footpath does not exist at law.*

26. Mr N Woodhouse, Widmerpool House, Widmerpool: **Objection**

- The proposed footpath will lead to a substantial reduction in the value of house and farm
- Security and fire risk. The path would go past farm implements / machinery / stores / hay and straw stacks
- The house is one of three in an isolated area and we have major security concerns about people walking during the day or night
- There would be an impact on farm animals namely heifers, calves, bullocks, bulls and valuable bloodstock horses
- It is an invasion of privacy and will put children at risk from uninvited strangers
- Access to the footpath via the A606 Melton Road would be very dangerous. My father was involved in a near fatal accident when trying to cross the road
- It would be sensible to use the Station Road Bridleway (Bridleway No.11) which is a short distance away and will give access to the countryside without any hazards
- As part of a compulsory purchase for the A46 scheme the Highways Agency provided a bridleway along the now disused Station Road giving access to the countryside

*Officer comment: Unfortunately, none of the above points address the evidence in terms of challenging the existence of a public footpath albeit that it is acknowledged that it would be in a location which would have a negative impact on the current landowners. If, after due process the existence of the footpath is proved, but the line of the path is unacceptable for the modern environment, the Council could then consider diverting the path, provided the relevant legal tests are met.*

27. J.R. Woodhouse: Roehoe Lodge: **Objection**

- The footpath runs along a private drive to my cottage and stables. If proceeded with this footpath will cause great anxiety to my wife and myself
- Having lived here for 45 years and being in an isolated position we have always been conscious of security which we maintain at a high level with livestock in our paddocks
- Being close to the busy and notoriously high speed road any straying livestock as a result of the footpath would cause a horrendous accident with dire consequences

*Officer comment: Unfortunately, none of the above points address the evidence in terms of challenging the existence of a public footpath albeit that it is acknowledged that it would be in a location which would have a negative impact on the current landowners. If, after due process the existence of the footpath is proved, but the line of the path is*

*unacceptable for the modern environment, the Council could then consider diverting the path, provided the relevant legal tests are met.*

28. Should Committee decide to accept the applications and authorise officers to make a Definitive Map Modification Order, the order will be publicised for 6 weeks providing a statutory period for making representations or objections. If no objections are received, the Council may confirm the order itself and record the footpaths on the definitive map and statement. On the other hand, if objections are received, the Council is required to refer the order to the Secretary of State for Environment for a decision. At that stage the Secretary of State would apply a higher legal test for deciding the matter, based on whether the claimed footpaths exist on the balance of probabilities rather than the aforementioned subsists/reasonably alleged to subsist test which applies only to making and processing of an order by the Council (see para.4).
29. When an Order is referred to the Secretary of State, the County Council must indicate whether it:
- supports the confirmation of the Order (i.e. where the evidence for the existence of the way is good and as a result the Council considers that the path exists)
  - wishes to remain neutral (i.e. where the evidence is finely balanced both for and against and the Council considers that the path is only alleged to exist)
  - opposes confirmation of the Order (for example when new evidence indicating that the path does not exist comes to light after the Order is made)
30. Accordingly, given that there is clear evidence in respect of the existence of the claimed paths, and no credible evidence to the contrary, officers consider that it would be appropriate for the Council to both make a Definitive Map Modification Order as per the applications from the Ramblers' Association and also to support the confirmation of the Order should it be referred to the Secretary of State (unless evidence which indicates to the contrary is later received). Again, if, after due process the existence of the footpath is proved, but the line of the path is unacceptable for the modern environment, the Council could then consider diverting the path, provided the relevant legal tests are met.

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

31. The Widmerpool Inclosure Award (1804) provides strong evidence for the existence of a public footpath which corresponds with the three claimed routes. It is more likely than not that the footpath was set out and made in accordance with the award but fell into disuse soon thereafter. There is no evidence to indicate that the awarded path was subsequently stopped up and extinguished at the Nottinghamshire Quarter Session Courts and therefore the footpath still exists in law. In the unlikely event that the provisions of the award were not strictly followed i.e. if the footpath was never 'made' on the ground, then the pre-existing public footpath would be preserved by virtue of the award not being properly implemented in the manner specified by s.11 of the 1801 Act.



## **Statutory and Policy Implications**

32. 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.

### **Human Rights Implications**

The making of a Definitive Map Modification Order does not create a highway – it merely recognises its pre-existence. While residents 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**

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**

### **Footpath A-B**

- 1) It is recommended that Committee approve the making of a Modification Order by adding the footpath 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).
- 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.

### **Footpath C-D**

- 3) It is recommended that Committee approve the making of a Modification Order by adding the footpath between points C-D (APPENDIX B) to the definitive map and statement on the basis that the evidence shows a right of way to subsist (Test A).
- 4) 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.

### **Footpath E-F**

- 5) It is recommended that Committee approve the making of a Modification Order by adding the footpath between points E-F (APPENDIX B) to the definitive map and statement on the basis that the evidence shows a right of way to subsist (Test A).
- 6) 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:**

### **Constitutional Comments (SJE – 13/11/2017)**

33. This decision falls within the Terms of Reference of the Planning & Licensing Committee to whom responsibility for the exercise of the Authority's regulatory functions relating to public rights of way and cycle paths has been delegated.

### **Financial Comments (SES 14/11/17)**

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

### **Background Papers and Published Documents**

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.

- Widmerpool footpath applications case file

### **Electoral Division(s) and Member(s) Affected**

- Keyworth Division                      Councillor John Cottee