



28 November 2012

Agenda Item:5

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 BRIDLEWAY TO THE DEFINITIVE MAP AND STATEMENT IN THE PARISHES OF CARLTON IN LINDRICK AND WALLINGWELLS

Purpose of the Report

1. To consider an application made by Mr. Walker to record a route as a public bridleway on the Definitive Map and Statement for the Parishes of Carlton in Lindrick and Wallingwells. A map of the general area is shown as **Plan A** while the route under consideration is shown on **Plan B** marked between points B and L.
2. The effect of the application, if accepted would be to upgrade Wallingwells Footpath No. 3 to a bridleway (point B to point D); to upgrade the western part of Carlton in Lindrick Footpath No.1 to a bridleway (point D to point F); to add a bridleway along an unregistered track between the junction of Carlton in Lindrick Footpath No. 1 and Owday Lane (point F to point G); to add a bridleway along the track and field from the junction of Owday Lane to its junction with Carlton in Lindrick Footpath No. 22 (point G to point I); to upgrade part of Carlton in Lindrick footpath No. 22 to a bridleway (point I to point K) and to upgrade the eastern part of Carlton in Lindrick Footpath No. 1 to a bridleway from its junction with Carlton in Lindrick Footpath No. 22 to its junction with Carlton in Lindrick Bridleway No. 18 (point K to point L) . The footpath between points F-K is not affected by the claim or by this report.

Information and Advice

3. The application for a Modification Order was made by Mr. Walker of Holme House Farm, Carlton in Lindrick in August 2010. Twenty four user evidence forms were submitted in support of the claim all claiming use of the route on horseback. Only three of these claimants agreed to be interviewed. A summary of the user evidence is shown in **Table 1**. As well as this, interviews were also carried out with the current farmer, and farm manager, the owners of the land as well as other people who had knowledge of the land around the claimed route. What follows is a substantive summary of the evidence that has been submitted.

Legal Background

4. 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”.
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 over land in the area to which the map relates”.
6. 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 first brought into question.
7. 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 exist 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.
8. Should the test under Section 31 fail, then it may be appropriate to consider whether the way has been dedicated 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

9. The County Council was contacted by Mr. Walker of Holme House Farm to ask if it was possible to upgrade part of Carlton in Lindrick Footpaths Nos. 1 and 22 and an unregistered path to a Bridleway from Holme House Farm to its junction with Carlton in Lindrick Bridleway No. 18 (E-F-G-H-I-K-L). Mr. Walker stated that he was prepared to dedicate a bridleway along the connecting

section of footpath that runs from Holme House Farm to the bridleway that runs from Owday Lane to Corn Mill Farm (E-D-B) that connects to a bridleway in Rotherham Metropolitan Borough Council running from points A to C. An officer of the County Council then contacted Ramsden Estates to see if they would be prepared to dedicate a bridleway from Holme House Farm to Carlton in Lindrick Bridleway No. 18 (E-F-G-H-I-K-L) to link up to the one that Mr. Walker was prepared to dedicate (E-D-B). It was also suggested that this proposal could be linked with a diversion of Carlton in Lindrick Footpaths No 1 and 22, as this had been something that Ramsden Estate had previously suggested. This was considered by the Estate and they decided that they did not want to agree to the proposals saying that there had been little horse use along the route until recently and that this use had been challenged. Following this, Mr. Walker then submitted an application for a Modification Order.

10. The claimed route currently exists as a track leading from the Bridleway on the County Boundary of Nottinghamshire and Rotherham Metropolitan Borough Council and proceeding to the south of Holme House Farm. The claimed route then continues through a small gate and then along a field edge path and then through a gap in the hedge adjacent to Owday Lane although it does not connect directly to the road. The claimed path then continues around the back of Owday Lodge and then across a field to join up with the existing bridleway.
11. For ease of reference in this report, the claimed route from the County Boundary to Owday Lane (B-D-E-F-G) is described as being the western route whilst the claimed route running from Owday Lane to join Carlton in Lindrick Bridleway No. 18 (G-H-I-K-L) is described as being the eastern route.

Documentary Evidence

12. The first time that any part of the claimed route is shown on any plans is on the 1768 Carlton in Lindrick Inclosure Award and plan. Part of the claimed route that runs from Owday Lane to the County Boundary (G-F-E-D-B) is shown on the Inclosure map and labelled as Wallingwells Road. The description of this route in the Inclosure award is as follows:

'another public horse and footway and private carriage and Driving way shall be made branching out of the said Shire Oaks Road at the east end of the said Holme Field and leading along the same allotments Nos. 70, 68 and 67, hereby made to the said William Mellish and John White respectively and on the north end of Jeremiah Whitehead's allotment no. 69 to an ancient gate leading into the park of the said John White in the liberty of Wallingwells where the said road hath here to fore usually gone which said road is hereby directed to be used by the owners and occupiers of lands at Wallingwells and Carlton'.

The crossfield section of Carlton in Lindrick Footpath No.1 and 22 (points J-K-L) are not shown on the Inclosure Award plan nor mentioned in the Award.

13. In an Estate map of 1769, one year later than the Inclosure Award and entitled 'Map of the Manor of Carlton in Lindrick in the County of Nottingham 1769', the

route mentioned in the Award is shown by a double dashed line with all the allotments named and numbered. This route is not labelled nor is there any key showing what status the plan gives this route but it is in exactly the same location as the Inclosure Award bridleway and identifies all the landowners and parcel numbers shown on the Award plan. Again, there is no mention on this Estate plan of the crossfield sections of Carlton in Lindrick Footpaths No.1 and 22, nor of the section of path that goes around the back of Owday Lodge.

14. The Chapman Map of 1774 shows the same route as the Inclosure Award and is marked on the map by a double dashed line and is described as being an 'open road' in the key. It is important to note that there is no mention on the key for footpaths and so this must be of a different status. Again, there is no mention on this plan of the crossfield sections of Carlton in Lindrick Footpaths No.1 and 22, nor of the section of path that goes around the back of Owday Lodge.
15. On the Sanderson Map of 1835 the awarded route is again shown from Owday Lane past Holme House Farm to the County Boundary and is shown by double dashed lines which are described in the key as being a 'cross road'. There is no annotation on the key for a public footpath. Nothing is shown on the plan for the continuation of the claimed route around the back of Owday Lodge nor for the crossfield sections of Carlton in Lindrick Footpaths No. 1 and 22.
16. On the Ordnance Survey first edition, dated sometime between 1830 and 1880, the Inclosure award route is shown as a partly enclosed route running from the County Boundary past Holme House and then joining Owday Lane near Owday Lodge. There is no indication of any of the eastern route.
17. The 1886 Ordnance Survey 25 inch plan shows the path set out in the Inclosure Award but being labelled as FP (footpath). For the first time the crossfield sections of Carlton in Lindrick Footpath No. 1 and Carlton in Lindrick Footpath No. 22 are shown. Both these are labelled as FP (Footpath). Nothing is shown on this plan for the claimed path around the back of Owday Lodge.
18. Only the eastern sheet for the 1910 Finance Act plan exists which does show the extreme eastern part of the Inclosure route as well as Footpaths No. 1 and 22 to the north of Owday Lodge. The claimed route is included in hereditament 210 pt, meaning that it is part of a much larger land holding. There was a reduction in recognition of there being a public right of way crossing the land but it is impossible to identify with any certainty to which path this relates as there are a number of paths that cross the land parcel.
19. The 1922 and 1923 Ordnance Survey 25 inch plans show the same arrangement of paths as the 1886 plan, apart from the labelling of the footpath on the western section no longer being on the claimed route but now on the footpath that connects to it.
20. In response to the National Park and Access to the Countryside Act 1949, Parish Schedules were completed for the Parishes of Carlton in Lindrick in

1954 and Wallingwells in 1953. The section of the path that falls within the Parish of Wallingwells, point B to point D, is marked on the plan and labelled CRB (Cart Road Bridleway) and records a field gate at either end of the section. The written entry in the Schedule shown as number 3, records the status of this path as 'cart road mainly used as a bridleway' indicating that it has 'uninterrupted user by public for over 30 years'. No mention is made of the Inclosure award of 1768.

21. The Carlton in Lindrick Parish Schedule recorded paths, not only in its own parish, but also some of those that were in the parish of Wallingwells. Not all of the route shown on the Inclosure award was claimed by the parish and the part that was claimed (D-E-F-K-L) was recorded in the schedule as a footpath with uninterrupted use for over 60 years and that it was part awarded in 1768. It is also stated in the Schedule that the Inclosure Award was a document that was considered. However, the section of path from F to G, which is the continuation of the Awarded path to Owday Lane, was not recorded on the Schedule. However, on the Schedule plan there is an annotation in pencil of 'BR' and 'Awarded as Private Occupation and Bridle Road' shown for this unrecorded section. There is no indication if this comment was written on the plan when the claimed paths were being considered or if it was included at some later date. The claimed path around Owday Lodge was not claimed on the Schedule although a footpath was shown leading from Owday Lane to join what was to become the eastern section of Carlton in Lindrick Footpath No. 1. This path is the current Carlton in Lindrick Footpath No. 22.
22. After the Parish Schedules were submitted to the County Council, the information was considered by the Divisional Surveyor in 1954 who noted that there was a conflict between the Schedules with the Wallingwells one showing the route from B to D as a 'cart road mainly used as a bridleway' and its continuation being shown in Carlton in Lindrick as a footpath. However, there is nothing in either Parish Schedule nor is there any file note contained in either the Wallingwells or Carlton in Lindrick parish files to indicate that the Divisional Surveyor considered the Inclosure Award. The only reference is a note in both Schedules to say that the paths were 'reclassified by the Divisional Surveyor' but no indication as to what status the path was to become. The status of this reclassification was shown on the 1955 Draft Map which showed that the 'cart road mainly used as a bridleway', section B to D, had been shown as a footpath as had the continuation from D to F to L. What is now Carlton in Lindrick Footpath No. 22 was also shown as a footpath. Nothing was shown for Section F to G, the remaining section of the Awarded path, nor the path that is being claimed around Owday Lodge. The same arrangement and status of paths was also shown on the Provisional Map published in 1957 and finally the Definitive map published in 1964, to which no objections were received. The Ordnance Survey plans published after the Definitive Map was produced do not provide any more additional information.
23. In 1993 an Order was made to change the boundaries between Nottinghamshire and South Yorkshire which transferred part of the parish of Wallingwells into South Yorkshire and this included what was Wallingwells

bridleway No. 2 leading from Owday Lane to the current Wallingwells Bridleway 1.

24. The aerial photographs dated 1996 and 2000 do not show a clear wear line along the track from E to G and it is not until 2004 that this becomes apparent. There is no distinct wear line for the claimed path around Owday Lodge. However, it must be borne in mind that aerial photographs are only of limited value in determining use of any particular route.

Claimed use

25. Twenty four rights of way user evidence forms were submitted in support of the application. However, these forms only contained basic information about the use of the claimed path and it is common practice in assessing applications for interviews to be carried out with as many people as possible to gather additional information on specific points concerning the claim. The majority of the claimants were contacted to see if they were willing to be interviewed but only three of them responded. Two other claimants sent in additional information following another letter sent from the County Council asking for points of clarification on some of the key points of the application. Therefore the analysis of the information in support of the claim has to take this into account.
26. One area that hasn't been clarified sufficiently is the extent of the claim, as 11 of the claimants do specify in their user evidence forms that the path that they are claiming is only from Church Lane to Owday Lodge or Owday Lane. The section from Owday Lodge to the Holme House Farm (E to G) has not been mentioned on these user evidence forms, although it is part of the route for which the application has been made. It is possible to presume that the claimants use included this section, as the plans submitted with the user evidence forms do show this section, but it appears that all the plans have been marked up by the same person as they are all in the same colour. Therefore it was necessary to clarify the extent of the claimants' use but as mentioned previously the County Council has only had a very limited response.
27. The other point to note is that none of the claimants state in their forms that they have used the section of path from Holme House Farm to the County boundary (E to B), although again this is shown on plans that were submitted. It is possible that the claimants have used this section on horseback with the permission of Mr. Walker the owner, but only one of the claimants stated this when she was interviewed. However, Mr. Walker has said that he is prepared to formally dedicate this section of the claim as a Bridleway anyway, as he is the owner of the land.
28. **Date of Challenge.** According to the evidence submitted by the applicant, the date when his use of the path was challenged appears to be in 2009 when a wire was put across the gap in the hedge at point G near Owday Lodge. At the same time a sign was erected with the wording 'no horses allowed, danger of

wire'. This date coincides with what the current farmer and land agent state. Therefore the relevant 20 year period would be from 1989 to 2009.

29. 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 1960 in the case of Mr. Walker, the applicant, with 3 people using from the late 1970's / early 1980's, and with 5 people starting in 1990. This makes 8 people who claimed to have used the route for the full 20 years from 1989 to 2009. Use then increases until 22 people have claimed use in 2010.
30. **Category of use and frequency.** As shown on **Table 1**, all of the claimants have stated that they have used the claimed path on horseback with none of them claiming use on foot. All but one of the claimants have stated that they have used the claimed route at least once a week, but there has been no clarification from them to indicate if this was the same throughout all the years of their use.
31. 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 in secrecy, with permission or by force. The claimants that have provided information have stated that they have used the path both in the morning and evenings and during the week and weekend. This use would cover when it could reasonably be expected that someone would be out riding and so would not have been in secret. In the user evidence forms none of the claimants say that they had been given any permission to use the route. However, one of the claimants did say that she had permission from Mr. Walker to use the track owned by him from (E to B). None of the claimants states that they had to use force to use the path.
32. **Use without interruption and no intention to dedicate.** Mr. Walker is the only one of the claimants who states that they were ever verbally challenged. He says that this was in 2009 when he was challenged by a tractor driver. Mr. Walker is also the only one of the claimants who mentions that in 2009 for about four weeks there was a wire strung across the gap between two fields at point G. He also mentions that there was a stile at point E near Holme House Farm which was erected without his permission but was removed after several weeks. According to Mr. Walker, whilst the stile was there, horses used a gap in the hedge to rejoin the path further down and after the stile was removed a gap remained for 2 years which was then replaced by a gate that is there now. Mr. Walker does not give any precise dates of when this took place.

Consultation

33. Following a consultation, information was submitted from the current landowners of the Ramsden Estate affected by the majority of the claim, the tenant farmer and foreman, the Parish Paths Warden and contractor, the manager of the Carlton Shoot as well as from four members of the public who have knowledge of the path.

34. **The stile.** According to Mr. Fisher, the tenant who farms the field to the east of Holme House Farm, there was a five bar gate at point E that was so overgrown people had to climb over it. When it could be opened there was only just enough room to be able to squeeze by but not wide enough to be able to get a horse through. Mr. Doughty, who was the Parish Paths Partnership warden for Carlton in Lindrick inspected all the public rights of Way in 1995 and then drew up a list of works to be carried out. Following on from this, a works schedule was then issued for the erection of stiles and finger posts as well as for grass cutting for the parish. Mr. Doughty remembers that it was proposed to erect a stile at this location, not for the purposes of stock control but to prevent unauthorised use and that he had agreement from the owner of Holme House Farm to erect it. The contractor who erected the stile thinks that this was probably in 1996 and remembers that he had to cut into the 5 bar gate to erect the stile, and at that point there was no other way through the hedge. The contractor who undertook maintenance in the parish remembers the stile being there for at least 4 years. The stile was confirmed as being in place up to at least 2000 by Mr. and Mrs Turley, as they used that path on a regular basis for running and by the owner of Owday Lodge who moved into the property in 2000. Mrs. Turley remembers an incident when the stile was in place when she was lifting her bike over the stile and she was challenged by Mrs. Walker (Mr. Walker's wife), who said that the path was only a footpath. The stile was also confirmed as being in place for a number of years by Mr. and Mrs. Hazlehurst, who were members of the Ramblers Association who took a keen interest in the paths in Carlton in Lindrick and Wallingwells.
35. **The gate.** It seems to be generally agreed that the stile at point E was replaced by Mr. Walker with a gate and Mr. Fisher, the tenant farmer thinks that this may have been as recently as 2007. Mr. Fisher and Mr. Rowley also state that when the stile was removed this seemed to coincide with a sharp increase in use of the claimed route by horses and with the number of horses that were kept at Holme House Farm.
36. **The Gap.** It seems that the gap at point G has been open for the majority of the claim period as it was a vehicular access between two fields, and only in about 2009 that a wire has been put across it to try and prevent use by equestrians. Mr. Fisher states that it has been cut and replaced 3 times. This is confirmed by Mr. Somers who helps to run the shoot, who states that the wire was cut within 2 days of it being erected. Due to the wire being cut a chain has now been put in the gap.
37. **Permission.** None of the current owners, tenants or land agents has given any permission for horse riders to use any part of the claimed route that is on the Ramsden Estates Land (between points E-F-G-H-I-K- L).
38. **Challenges.** The owners, the farmer and farm manager all have given instances of when they have seen people using the path on horseback and have challenged them. They state that despite the challenges, horse riders have still used the paths or have turned back once they have seen the farmer or shoot manager approaching them.

Conclusion

39. Of great significance is the Carlton in Lindrick Inclosure Award of 1768 which very clearly sets out a 'public horse and footway' from the County Boundary to Owday Lane, point B to G. Although this document was mentioned in the Carlton in Lindrick parish schedule, it appears not to have been known by the person who completed the Wallingwells schedule. The annotation on the Carlton in Lindrick plan about there being an Inclosure bridleway appears to have been added after the schedule was compiled. When the Divisional Surveyor considered the difference in status of the claimed path that crossed from Wallingwells to Carlton on Lindrick, no mention was made that he considered the evidence in the Inclosure Award nor as to why the whole of the awarded bridleway was not included on the Draft Map. There is no record of any investigation that was carried out to establish the correct status of the awarded bridleway.
40. No reference is made in either of the Parish Schedules nor the County Council Parish files that the Carlton In Lindrick Estate plan, the Chapman Map or Sanderson Map were ever considered as part of the 'reclassification' process by the Divisional Surveyor to record part of the Inclosure route as a footpath and these can therefore be described as being new evidence that was not previously considered when the Definitive Map was being produced. There is no record that the bridleway shown on the Award and plan has been stopped up by due process.
41. Turning to the user evidence that was submitted in support of the claim for a bridleway, whilst there are twenty four members of the public who submitted user evidence forms, only three of them agreed to be interviewed to provide additional information. It was particularly important to interview the claimants as there were a number of points that needed to be clarified as part of the investigation, concerning the extent of the route being claimed as well as information concerning the stile. Since the County Council got such a limited response for requests for interviews a letter with a form asking questions about use of the route was sent to the claimants which also received a poor response.
42. Mr. Walker was the only one of the claimants who provided information about the stile at point E who remembers it to have been there for only a matter of weeks. The landowner and tenant farmer disagree on this point saying that the stile was there from the mid 1990's and was there for about 8 to 10 years. However, the information provided by the Parish Paths Warden and the Parish Council contractor is detailed and is independent from both the claimants and the landowners and tenant. Therefore there seems to be a period between 1996 and at least 2000 when a stile was in place at point E which would have prevented horse use at that point. Although horses may have been going through the hedge at another point, as suggested by Mr. Walker, this would be a separate route to the one that has been claimed. Due to the fact that there has been no response from the majority of the claimants to clarify this point,

and the contemporaneous and independent nature of the Parish Paths Warden's records, the chronology provided by the Parish Paths Warden is considered to be the most accurate.

43. 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.
44. Having analysed the evidence currently before the Council, it is the officers' view that the stile at point E prevented horse use and would count as being an interruption. This would therefore mean that the part of the claimed route entirely reliant on user evidence, (between points G and L) had not 'been enjoyed by the public as of right and without interruption' during the 20 year period. However, there is documentary evidence showing that the section of the claimed route from B to G was shown on the Carlton in Lindrick Inclosure Award and therefore Test A is satisfied that a right of way subsists and that a Modification Order should be made for the section of path from Owday Lane to the Bridleway running from Corn Mill Farm to Owday Lane.

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 a bridleway from the County boundary to Owday Lane (points B-G) as, for the reasons set out above, the evidence demonstrates on a balance of probabilities that public bridleway rights exist.

- 2) It is RECOMMENDED that Committee turns down that part of the claim from Owday Lane to the junction with Carlton in Lindrick Bridleway No. 18 (points G-L) as, for the reasons set out above, the evidence does not demonstrate that the existence of a public bridleway is reasonably alleged.

TIM GREGORY
Corporate Director (Environment and Resources)

For any enquiries about this report please contact:

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Definitive Map Officer

Constitutional Comments [SJE – 13/11/2012]

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 – 13/11/2012]

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

Worksop North East and Carlton

Councillor Alan Rhodes

ROW 86