

meeting **RIGHTS OF WAY COMMITTEE**

date **22 JUNE 2011** agenda item number **6**

## **REPORT OF THE CORPORATE DIRECTOR (ENVIRONMENT & RESOURCES)**

### **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 RUFFORD AND CLIPSTONE**

#### **Purpose of the Report**

1. To consider an application made by Mr S Parkhouse of King's Clipstone, Nottinghamshire to record a public bridleway over a track which runs between Rufford Bridleway No.6 alongside Center Parcs Holiday Village and Sherwood Pines Forest Park. A map of the area is shown as **Plan A**, while the route under consideration is shown on **Plan B** marked between points A and B.
2. This report also gives consideration to a second route which exists as a track between the B6030 near King's Clipstone and Deerdale Lane/Eakring Road and is shown between points C and D on **Plan B**. This route does not form part of the application received, but evidence in relation to it was discovered during investigations into the matter and is considered to be relevant in respect of the discovery of historic highway rights.

#### **Legal Background**

3. 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".

4. Under Section 53(2)(b) of WCA81 the County Council 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”. The case of R v SSE ex parte Bagshaw and Norton (1994) has clarified the law in respect of the wording ‘subsists’ (Test A) and ‘or is reasonably alleged to subsist’ (Test B).
  - ‘Test A’ requires that the claimed right of way subsists i.e. clear evidence in respect of the claim and no credible evidence to the contrary.
  - ‘Test B’ requires that it is reasonable to allege that a right of way subsists i.e. even if the evidence is finely balanced, but there is no incontrovertible evidence that the claimed route could not subsist, then the test is met and an Order should be made.
5. 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.
6. 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.
7. Should the test under the HA80 Section 31 fail, then it may be appropriate to consider the dedication of the way at common law. This 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 and Site History**

8. Photographs taken along the route A-B are shown as **Photos C1-4**. Route A-B lies adjacent to the Center Parcs holiday village and is approximately 1730m long and surfaced with stone (photo C1). It is used by private vehicles in connection with Center Parcs, Sherwood Pines Forest Park and for access to adjacent farms and farm land. Guests staying at Center Parcs have permissive access to use the track on foot and on cycles. The track is owned by Scottish and

Newcastle Limited who acquired it in 1987 from the Forestry Commission as part of the Center Parcs Holiday Village business. The Center Parcs Holiday Village was subsequently sold in 2001, however the track was not included in the sale which remains in the ownership of Scottish and Newcastle. In 2007 a barrier was erected on the track (photo C2). The barrier was erected by Center Parcs and appears to be left open in the day and locked at night to prevent vehicular access. Bollards placed to one side of the barrier enable pedestrians, cyclists and possibly horse riders to pass through when the barrier is closed. A sign (Photo C3) said to have been in place since 1990 is situated near the barrier facing west and reads:

‘PRIVATE PROPERTY  
Although this is not a public bridleway,  
Access is permitted to guests of the  
Sherwood Forest Holiday Village  
On foot and bicycle.  
HOWEVER, ANY CAR PARKED ON THIS  
BRIDLEWAY IS LIABLE TO BE WHEEL CLAMPED  
Should your car be clamped you will be able  
To obtain its release by reporting to the  
Security lodge at the main gate between  
8.00am and 8.00pm every day  
and paying a charge’

9. Photographs taken along the route C-D are shown as **Photos D1-11**. This route is approximately 3.3 kilometres long and begins alongside the entrance to the Sherwood Pines Forest Park on the B6030 (photo D1). From here the route proceeds along a tarmac road past a sign which reads ‘No unauthorised vehicles’ and lockable gate near to Preston Lodge (photo D2). At one point some large rocks are placed across the route (photo D3), presumably to prevent unauthorised vehicular access. The route then continues through another lockable barrier (photo D4) on a stone track. Part of this track is currently used as a Forestry Commission family cycle trail (photo D5). Just before the route reaches Point A, a locked barrier has been placed across the track (photo D6). Again, the intention of this barrier appears to be to prevent vehicular use as access for cyclists using the trail is provided to either side of the barrier.
10. From this point the route continues along a wide track. The first part is set on an incline and is currently very muddy due to use by construction traffic working on a nearby development (photo D6). The route continues on a stone track (photo D7) which leads to Blooms Gorse Farm. Gates are in place either side of Blooms Gorse Farm with notices which state ‘Private No admittance’ and ‘Private Road Farm Access only’ (photos D8 and D9). The route then continues along the stone track (photo D10) finally reaching point ‘D’ where another lockable barrier is situated (photo D11).

## **The Application**

11. The application was supported by 21 Public Rights of Way User Evidence Forms, documentary evidence dating between 1630 and 1956 and a statement giving a short explanation of recent use and a summary of the historic evidence. Following receipt of the application, the County Council received a further 9 evidence forms. The historic documents submitted in support of the application comprise of the following:
- Map of Clipstone by W. Senior 1630
  - Map of Nottinghamshire by T. Kitchin 1750
  - Map of Nottinghamshire by E. Bowen 1755
  - Map of Clipstone by G. Ingham 1766
  - Map of Nottinghamshire by J. Harrison 1787
  - Map of 20 Miles Round Mansfield by G. Sanderson 1835
  - Ordnance Survey 2" map 1840
  - Clipstone Tithe Award Map 1844
  - Mansfield Woodhouse Inclosure Award 1853
  - Map of Nottinghamshire by the Encyclopaedia Britannica 1876
  - Rufford Highway Surveyors records 1882-83
  - Map of Nottinghamshire by the Encyclopaedia Britannica 1902
  - Ordnance Survey 6" map 1916
  - Ordnance Survey 1:25000 scale map 1927
  - Guilford Map 1927
  - Letter from Welbeck Estates Company to Nottinghamshire County Council 1956

## **Historic and Documentary Evidence**

12. In addition to the maps and documents submitted with the application, some additional documents were examined by the County Council to see whether there was any evidence of pre-existing public rights of way over the claimed route. These documents comprised:
- Map of Nottinghamshire by J. Chapman 1774
  - Edwinstowe Inclosure Award 1821
  - The Ellis Map of Nottinghamshire 1824-25
  - The Greenwood Map of Nottinghamshire 1831
  - Market Harborough & Worksop & Nottingham Railway Plans (1871)
  - Midland & Manchester, Sheffield & Lincolnshire Railway Plans (1872)
  - Rufford Estate Plan (1885)
  - Finance Act Records (1910)
  - Quarter Sessions diversion and extinguishments for Nottinghamshire

13. Although William Senior's 1630 map does not show any route which corresponds with the route A-B, it is notable that this map depicts a road at the western end of the route leading to/from Clipstone which corresponds with the route C-D.
14. The Kitchin Map of 1750, Bowen Map of 1755, the Harrison Map of 1787 and the Encyclopaedia Britannica Map of 1876 are not drawn to a scale to accurately establish whether or not the route being claimed is depicted.
15. The 1766 map of Clipstone by George Ingham appears to show the western end of the route A-B which is annotated 'To Rufford'. This suggests that the claimed route existed as a through road which would more likely than not be used by the public. The map also shows what appears to be a road leading to/from Clipstone which corresponds with the route C-D which is also suggestive of a public road.
16. The 1774 Chapman map, produced for commercial sale is designed to show Turnpike Roads, Inclosed Roads, Open Roads and Bridle Roads. It does not show any route which corresponds with the routes A-B or C-D (although C-D was known to exist by virtue of the Senior and Ingham Maps). The most likely explanation for the non-inclusion of route C-D could be due to a cartographic inaccuracy. The foreword notes accompanying a 2003 reprint of the map acknowledges the fact that "not all minor roads are included, and their absence from the map should not necessarily be interpreted as evidence that they did not exist".
17. No inclosure award was made for the parish of Rufford, however, the Edwinstowe Inclosure Award map of 1821 does show a road which is described as the 'Clipstone Bilsthorpe and Southwell Road' which corresponds with route C-D. The portrayal of this road corresponds with the Senior and Ingham maps and strongly suggests that the route C-D was a public carriage road.
18. The Ellis Map of Nottinghamshire was published in 1831 from a survey carried out in 1824-25. The map depicts the routes A-B and C-D as 'Cross Roads' which is suggestive of minor public roads. Any bridle roads shown on the map are annotated with the label 'B.R'. Neither route A-B or C-D are labelled as bridle roads. By comparison to other maps there is a difference in the alignment along the southernmost 250 metres of route C-D (i.e. a 45 degree deviation eastwards before connecting to Deerdale Lane). However, route C-D is for the most part depicted in the same way as the road shown in the Senior, Ingham and Edwinstowe Inclosure maps.
19. The Greenwood Map of Nottinghamshire was also published in 1831 from a survey carried out in 1824-25, possibly using the same survey as for the Ellis map. However, there are some distinct differences between the Greenwood and Ellis maps. The route A-B is not shown on the Greenwood Map while route A-D is shown on a different alignment (further to the east) than on other maps. This difference might be attributed to the inaccuracies of the small scale at which the

map is drawn. By reference to the key contained in the map, route C-D is depicted as a cross road which again suggests it was a minor public road. The term 'cross road' was used at that time for depicting and defining second-class public carriageways.

20. The Sanderson Map of 1835 depicts the routes A-B and C-D with parallel dashed lines which, according to the explanation, denotes a 'Cross Road' therefore adding some weight to the routes being public.
21. The Ordnance Survey 2" map of 1840 depicts both routes in a similar manner to the Sanderson Map, but gives no indication of status.
22. Although no Tithe Award was made for the parish of Rufford, the Clipstone Tithe Award Map of 1844 indicates the situation in the neighbouring parish. A route, which from its location, appears to be a continuation of the one being claimed (route A-B) is shown on the tithe award map and is denoted with the wording 'To Rufford'. As statutory documents, tithe maps provide good evidence for the location of the roads they portray, and although the Clipstone tithe map does not provide evidence in respect of status, the presence of a route denoted in the manner 'To Rufford' would more likely than not be suggestive of a public road or track. Other recognised public highways are depicted in the same way, including the route C-D which is denoted with the wording 'From Bilsthorpe' which again, is suggestive of public status.
23. The Mansfield Woodhouse Inclosure Award of 1853 does not appear to contain any information relevant to the claimed route.
24. The Market Harborough & Worksop & Nottingham Railway Plans of 1871 included proposals to construct a railway across the road to the north of Pittance Park near to the Ollerton Road. This road forms a continuation of the claimed route. The railway documents refer to the route as an 'occupation road and ornamental ground' in the ownership of the trustees of the late Earl of Scarborough. By comparison, other known public roads are shown in the ownership of the Ollerton District Highway Board. Accordingly, the railway plans suggest the road was believed to be a private road and that no additional public footpath or bridleway rights existed over it. As this road was a direct continuation of the claimed route, there is an inference that the remainder of the route would also be of the same status.
25. The Midland & Manchester, Sheffield & Lincolnshire Railway plan of 1872 included proposals for a railway which crosses the claimed route A-B. The route is again recorded as an 'occupation road' in the ownership of the trustees of the late Earl of Scarborough. Again this indicates that the road was believed to be private.
26. The Rufford Highway Surveyors records made in 1882-83 include a list of 'Public Roads repaired by the Parish' (n.b. before 1894 minor roads were repaired by the parishes). The route being claimed (route A-B) is not included within this list so it can be concluded that it was not maintained as a public road at that time (however it is noted that the list was not concerned with the maintenance of footpaths and bridleways).

The list does include details of a public road which is described as heading 'towards Clipston' which corresponds with route A-D. This document is therefore strong evidence for the route C-D being a public highway.

27. A plan of the Rufford Estate dated 1885 denotes the route A-B as a 'Private Park Road' maintained by the estate. Other categories of roads denoted on the plan are shown either as 'Public Roads repaired by the Estate', 'Public Highways' or 'Main Road'. The Estate plan of 1885, therefore provides strong evidence that route A-B was believed to be a private road in 1885. The status of route C-D is not recorded.
28. The 1902 Encyclopaedia Britannica map, the 1916 Ordnance Survey 6" map, the 1927 Guilford map and the 1927 Ordnance Survey 1:25000 map confirm the presence of the relevant routes but do not give any indication in relation to status.
29. Documents prepared for the purposes of the Finance Act 1910 (FA10) were examined. According to the relevant FA10 maps, route A-B is shown incorporated into the private assessment parcels. As public roads are normally shown excluded from these parcels, it can be concluded that the claimed route A-B was not thought to be a public road at that time. However, significant deductions are claimed in respect of public rights of way, but given that these particular assessments cover very large acreages, it is not possible to say whether or not these deductions relate to the claimed route. In respect of route C-D the FA10 maps also show this route within the private assessment parcels. Some of these land parcels include deductions for unspecified public rights of way while others do not include any deductions. Overall, the FA10 maps suggest that the landowners in 1910 did not believe route C-D to be a public road.
30. The Quarter Session records for Nottinghamshire were also inspected. These records list extinguishments and diversions of public highways in Nottinghamshire from 1658 to 1974. No records were found in relation to route A-B or C-D.
31. No rights of way corresponding to these routes are recorded within the Parish Schedules for Rufford or Clipstone. These schedules were prepared in 1954 for the purposes of identifying public rights for inclusion in the Definitive Map under the National Parks and Access to the Countryside Act 1949.
32. Correspondence from the Welbeck Estate relating to the preparation of the Definitive Map in 1956 states that there has been no interference with public use over the open moorlands. However, given that the correspondence was specifically concerned with footpaths in the Forest Town area, and not in the vicinity of the claimed route, this document carries little evidential weight in respect of the claimed route A-B.

33. On balance, the historic and documentary evidence in respect to the route alongside Center Parcs (route A-B) suggests that a historic right of way does not exist. Although the Ingham (1766), Ellis (1824-35), Sanderson (1835) and Clipstone Tithe (1844) maps provide indirect evidence suggesting the route to be a public road, the railway plans of 1871 and 1872 show the route to be a private occupation road. The fact that the route is not included in the Rufford Highway Surveyors records of 1882-83 strongly suggests that the route was not considered to be a public road at that time. This suggestion is strengthened further by the Rufford Estate Plan (1885) showing the route as a 'Private Park Road'. Finance Act documents also provide good evidence that the route was not considered to be a public road, but are inconclusive as to whether any footpath or bridleway rights exist.
34. In respect of the route leading from King's Clipstone to Eakring Road/Deerdale Lane (route C-D), the documentary evidence suggests that this route is a historic road and therefore ought to be recorded on the Definitive Map and Statement as a restricted byway. Although this route did not form part of the original application, the evidence discovered as part of the overall investigation must be taken into account by the authority under the duties contained in WCA81 s.53(3)(c)(i). Accordingly, this report contains two recommendations; one in respect of the application route (route A-B), and one in respect of the route for which evidence was discovered (route C-D).

### **Claimed Use**

35. The application in respect of route A-B must also be considered on the evidence submitted in the 30 User Evidence Forms in order to establish whether dedication has taken place by virtue of HA80 Section 31. The Committee must consider whether there is sufficient evidence to meet the requirements of WCA81 Section 53(3)(b): namely "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". Consideration must also be given, based on the available evidence, to what category of right of way is presumed to have been dedicated i.e. footpath, bridleway, restricted byway or a byway open to all traffic. A chart which demonstrates individual use against length of time is shown as **Appendix E**.
36. The information contained in the evidence forms and in the subsequent interview transcripts relates to the presumed dedication of a highway based on uninterrupted use over a twenty year period. This period is calculated retrospectively from the date when the right of the public to use the way was brought into question. Therefore consideration must be given to whether any actions by the landowner could be considered as sufficient evidence that there was no intention to dedicate the way and thereby indicate a point in time when public use was challenged.



37. Section 31(3) of HA80 states that where an owner of the land has erected and maintained a notice 'inconsistent with the dedication of the way', this is considered sufficient evidence of a negative intention to dedicate the way as a highway (in the absence of proof to the contrary). The previously mentioned sign (photo C3) needs to be considered in terms of whether or not it fulfils this statutory provision. Evidence submitted on behalf of the landowner suggests that the sign was put in place in 1990, and although it was only situated at one end of the claimed route, it would be reasonable to assume that members of the public using the route on a regular basis would have been aware of this sign. The wording used on the sign i.e. 'Although this is not a public bridleway, Access is permitted to guests of the Sherwood Forest Holiday Village On foot and bicycle' is considered to be sufficient evidence of a negative intention to dedicate a public right of way in 1990.
38. Accordingly, as public use of the route was challenged by the erection of the sign, the relevant 20 year period during which presumed dedication could be said to have taken place is from 1970 to 1990. User Evidence Forms from 18 members of the public demonstrate uninterrupted use throughout this period. A breakdown of use by type shows that 4 members of the public used the route on foot alone while 14 members of the public used the route on a combined foot and cycle basis. Frequency of use varies from weekly to 1-2 times per year. The most common frequency is on a monthly basis. Given that there is significant evidence of use by cyclists, consideration should be given to whether the route can be presumed to have been dedicated as a bridleway or a restricted byway.
39. One user does refer to obtaining a permit from the Forestry commission in order to walk in Clipstone Forest. However, no other evidence has been submitted to suggest that the Commission actively required persons using route A-B to apply for a permit
40. Prior to the construction of Center Parcs in 1987, the track (route A-B) was in the ownership of the Forestry Commission. No evidence has been discovered to suggest that measures were taken by the Forestry Commission to prevent public access along this route. Consideration must be given to HA80 s.327 which specifies that the Act can only apply to land belonging to the Crown and its departments when there has been an agreement between the Crown (or department) and the highway authority. No agreement was made between the Forestry Commission and the County Council and therefore the provisions contained within section 31 of HA80 i.e. presumed dedication after 20 years public use, are not applicable in this case.
41. Based on the information contained in the User Evidence Forms it would appear that there is no other period during which presumed dedication could be said to have taken place. As stated earlier in this report, if the test under the HA80 Section 31 fails, common law dedication should be considered. This 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.

42. In 1982 the Forestry Commission introduced a byelaw in relation to their land which stated (section 6(1)) 'no person shall bring or cause to be brought on to the lands of the Commissioners any vehicle other than a perambulator or wheelchair drawn or propelled by hand or by electrical power and used solely for the conveyance of a child or children or an invalid'. Although the byelaws do not provide a definition for the term 'vehicle', it would be reasonable to assume that this clause was intended to include bicycles (which in today's law are considered 'non-mechanically propelled vehicles'). It is therefore reasonable to assume that bicycles could be considered to be vehicles for the purpose of the 1982 byelaw which in turn can be regarded as evidence that the landowner did not intend to dedicate a right of way to cyclists during the period it was applicable (1982-1987). The byelaw remains silent regarding use on foot.
43. Accordingly, given that the byelaw is considered to be a challenge to use on cycles, the period prior to 1982 needs to be considered. The evidence forms show that prior to 1982, twenty four members of the public claim use of the route A-B (Appendix E). The period of use varies from between one year to 46 years. A breakdown of use by type shows that 6 members of the public used the route on foot alone, 2 on cycle alone while 16 members of the public used the route on a combined foot and cycle basis. Frequency of use varies from between once every two years to 100 times per year. The average frequency is approximately 20 times per year.
44. Some of the claimants refer to using the route from childhood through to adulthood. Many have used the route because it provided a direct route from Clipstone to Rufford Abbey and its lakes, or simply as part of a longer walk or ride. Some even used the route as part of a regular jogging route. When taken together, the information contained in the user evidence forms gives weight to the reputation of the route as a public right of way and demonstrates use 'as of right'.
45. In terms of the tests to be met in order for common law dedication to have taken place prior to 1982, there has clearly been a landowner capable of dedicating the claimed route (the Forestry commission), and there is also evidence of an implied dedication through use by the public over many years. This use has been exercised frequently in an open and obvious manner thereby demonstrating use 'as of right' and which was not exercised in secrecy or by force or with permission.

## Consultations

46. Consultation on a proposal to register the routes shown A-B and C-D as public rights of way, was carried out with all affected landowners, statutory consultees and other interested parties. Comments opposing the proposals are set out in bullet points below:
47. Heineken UK/Scottish and Newcastle Ltd - registered owners of the track alongside Center Parcs
- *The landowners have never intended to dedicate the route as a public right of way and have never acknowledged that any public rights existed.*
  - *A public right of way would be detrimental to the Center Parcs business and also to the security of its guests and would create unacceptable risks to health and safety.*
  - *Heineken confirm that they would support the route being part of a permissive path agreement.*
48. Wragge and Co. - Representing Center Parcs Holiday Village:
- *The current sign (photo C3), erected in 1990 by Scottish and Newcastle is a clear indication of the landowner's intention not to dedicate a public right of way.*
  - *A barrier (photo C2) was installed in 2007 and is locked at 7.00pm every day. The barrier is also further evidence of a lack of intention to dedicate a right of way.*
  - *The route is kept open during the daytime for guests using Center Parcs Holiday Village and that the aforementioned sign is a practical way of ensuring that public rights are not acquired.*
  - *Use of the track during the hours of darkness could give rise to break-ins in the guest accommodation.*
  - *The surface of the track is not safe for use during the hours of darkness.*
  - *Center Parcs would consider entering into a permissive agreement allowing public use during daytime hours*
49. Forestry Commission, Sherwood District – Registered owners of Sherwood Pines Forest Park
- *Members of the public using the track from Rufford would be arriving at Forestry Commission land which is dedicated as open access land under the Countryside and Rights of Way Act 2000.*

- *The category of any right of way will have a dramatic effect on the management of woodland.*
- *On a provisional viewing, only the Ordnance Survey 2" map 1840 shows a route with any clarity.*
- *Many maps show tracks which are private rights of way.*
- *The County Council should carry out an exhaustive search to ensure that historic rights of way have not been extinguished by inclosure awards or legal orders.*

50. Tracey Barlow Furniss & Co. representing Mr S. Bowring, Bloomsgorse Farm, Deerdale Lane

- *No one has exercised any kind of right between the points C to A or A to D apart from during the last two years when there have been trespassers on the land who when questioned have confirmed that they have been sent by a man from Clipstone to walk the land.*
- *We find it incredible that you have 30 evidence forms from members of the public who state they have used the route on foot and on bicycles between 1936 and 2008 and on each occasion when any trespasser who has been found on our Clients land they have been challenged and asked to leave the land.*
- *There is no historic right of way between points C to A and A to D.*
- *Point A could only have been accessed by trespassers who have been challenged.*
- *Use between the points A and B would be dangerous and could potentially endanger wildlife in the forest adjoining that footpath.*
- *There would be no way that anybody going westwards could continue from point B heading in a westerly direction.*
- *Use by Center Parcs customers and adjoining owners does not give rise to a public right of way.*

51. Mr and Mrs Stone, Bloomsgorse Cottage

- *Increased risk of illegal use by motorcycles and 4x4 vehicles;*
- *Increased risk of fly tipping;*
- *Damage to an area of natural beauty;*
- *Increased risk of burglary, theft and vandalism on isolated properties.*

52. Fiona Swain, Preston Lodge
- *Historic rights have 'no relevance' to current use;*
  - *Proposals will lead to fly tipping;*
  - *Creation of a cut through for motor vehicles, increased accidents, increased illegal use by motorcycles and 4x4 vehicles;*
  - *Damage to the forest;*
  - *Increased risk of burglary, theft and vandalism on isolated properties, a focus for anti-social behaviour;*
  - *Potential for accidents at the junction with the B6030.*
53. MM Fegan, The Pines, Deerdale Lane
- *The proposal would allow use by motor vehicles leading to the route from Deerdale to the B6030 at Clipstone becoming a cut through for motor vehicles;*
  - *Increased illegal use by off-road vehicles;*
  - *Increased fly tipping;*
  - *Increase in the risk of accidents to walkers, horse riders and cyclists.*
54. Mr Ian Hutchinson, Manager, Adrenalin Jungle, Deerdale Lane
- *Proposals will lead to an increase in anti-social behaviour;*
  - *Current public access is adequate and no further access is required;*
  - *The proposal will give little benefit.*
55. Mr Nigel Redmile, Manager of Sherwood Pines Café
- *Proposals will lead to increased fly tipping;*
  - *Create a cut through for motor vehicles, increased accidents, increased illegal use by motorcycles and 4x4 vehicles, damage to the forest;*
  - *Increased risk of burglary, theft and vandalism on isolated properties, a focus for anti-social behaviour;*
  - *Potential for accidents at the junction with the B6030;*
  - *Sherwood Pines Forest Park is open access land which does not restrict legitimate users;*
  - *The cafe has suffered numerous acts of vandalism and break-ins, and the proposals would encourage further incidents.*
56. Howard Wilcox, on behalf of the Motor Sports Association (in respect of Route C-D)
- *More rights of way will lead to increased costs when applying for temporary closures;*

- *Registering the routes as byways would lead to ‘access and enforcement issues’ causing difficulties for local residents, the Forestry Commission and authorised users;*
  - *Increased costs to the County Council in respect of extra signage and maintenance.*
57. Rufford Parish Council – Objection
- *Health and safety grounds ‘the path is currently used extensively by visitors to Center Parcs for cycling and horse riding the state and contours of the path are entirely unsuitable for this kind of use – particularly by the many children who cycle along the route;*
  - *The route was until recently only used as a farm track and was not used as a footpath by the public.*
58. Comments in support of the proposals and representations are set out in bullet points below:
59. Mrs C Orpwood, Deerdale Farm and Mrs L Ashley, Deerdale Farm Cottage – Representation
- *No objection as long as there are no proposals to make routes available to motorised traffic;*
  - *The proposed routes are used frequently on foot and on cycles and with permits for horse riding.*
60. Mr and Mrs Wilson, Deerdale Lane – No objection
- *Routes should be recorded as public bridleways to ensure controlled use.*
61. Mr P Hiley, Mansfield – Supports the proposals
- *The routes should be recorded as Restricted Byways*
62. Ramblers Association – Supports the proposals
- *If the routes are recorded as restricted byways, the County Council should apply to the Magistrates Court (HA80 s.116) for the removal of these rights subject to the reservation of bridleway rights.*
63. Nottinghamshire Footpaths Preservation Society – Representation
- *The routes should be recorded as public bridleways*
64. CTC (Cyclist’s Touring Club) – Supports the proposals.
65. Environment Agency – No objection.

## Comments on the Consultation responses

66. Information submitted by Heineken and Center Parcs states that the sign (photo C3), erected in 1990 gives a clear indication of the landowner's intention that no rights of way were being dedicated. However, matters such as the potential for crime or the suitability of the surface are not issues which can be taken into account when deciding whether a public right of way exists. If rights were found to exist, Heineken's proposal for a permissive agreement would not be relevant.
67. The Forestry Commission raised the matter of the Sherwood Pines Forest Park being open access land registered under the provisions of the Countryside and Rights of Way Act 2000. The public are entitled to roam freely on Open Access land on foot without having to stick to defined paths. A plan indicating the extent of open access land in the area is shown as **Plan F**. The Forestry Commission's comments regarding the status of the route i.e. whether the route would be recorded as a restricted byway, a bridleway or a footpath show that this would be an important issue for the Commission who have previously stated that barriers situated at various entry points are locked at night to act as a deterrent to illegal motorised use and fly tipping. However, the recommendation in this report can only be based on the evidence of whether rights of way exist, and not on what category would be the most desirable. If problems arise once public rights of way are registered, the County Council could consider taking measures to alleviate such problems. The Forestry Commission also state that routes included within the historic map could be private rights of way. However, this statement does not take into account the fact that the route C-D is shown on a number of maps in the same manner as public roads, and is referred to as the 'Clipstone Bilsthorpe and Southwell Road' in the Edwinstowe Inclosure Award of 1821. It is also listed as being a public road in the Rufford Highway Surveyors records of 1882-3. The County Council has also examined relevant documents in order to establish whether any historic rights have been extinguished, however nothing was found in relation to routes A-B and C-D.
68. The point raised by Tracey Barlow Furniss & Co incorrectly assumes that the user evidence relates to the track which passes Bloomsgorse Farm (Route A-D). However, the user evidence is only relevant in respect of route A to B alongside Center Parcs. The track which passes alongside Bloomsgorse Farm has only been assessed on the basis of discovered historic evidence as set out in this report. The statement 'there is no historic right of way, no historic bridleway' appears to have been made without any examination of the evidence and is not supported by any counter evidence. The suggestion that use of the route A to B would be dangerous is not something that the County Council can legally take into account when deciding whether or not a public right of way exists but could be addressed if the route was ultimately confirmed as a public right of way. It should also be noted that part of the track is already recorded as Rufford Bridleway No.6 with no known safety issues. Although not legally relevant, it is also highly unlikely that registering a public right of way would have any impact on wildlife in the forest given that the proposed routes are

already used by private motorised traffic. Finally, the comment that it is not possible to travel westwards along the claimed route seems contrary to the situation on site and contained in the user evidence forms.

69. The comments from Howard Wilcox on behalf of the Motor Sports Association are not points which can be taken into account when deciding whether or not public rights of way exist.
70. Some objections to the proposals appear to have been made in the belief that the County Council intends to register the routes as byways which can be used by vehicular traffic. However, footpaths, bridleways and restricted byways, cannot be legally used by the public in motorised vehicles. Many of the points raised in these objections relate to the potential for illegal motorised use, fly tipping, damage to flora and fauna, the increased risk of crime and safety risks. These are not matters which can be taken into account within current legislation. The only issue under consideration is whether public rights of way exist, and if they do, what category must be recorded.

### **Conclusion Route A-B**

71. Although there is some indirect evidence that the track A-B alongside Center Parcs might have been regarded as a public road in the past, this is substantially outweighed by direct evidence that the route has been regarded as a private occupation road since 1871 at the latest. However, the User Evidence Forms submitted with the application show that the route has been in public use for many decades. This use was challenged in 1990 following the erection of the sign by Center Parcs (photo C3). Use after 1990 was therefore with permission of the landowner and not 'as of right' as required by the legislation.
72. In order to fulfil the statutory requirement there must be some period of 20 years during which presumed dedication has taken place. Prior to 1987 the track was in the ownership of the Forestry Commission. However, s327 of HA80 prevents the statutory acquisition of a public right of way on land belonging to the Crown or a government department (unless there has been an agreement with the highway authority). As no such agreement was made on the land in question, it follows that the statutory requirement under s.31(6) HA80 could not have been met at any point throughout the period of claimed use.
73. Also the 1982 byelaw made it unlawful for cyclists to ride on Forestry Commission land, however there is no impediment to prevent common law dedication taking place prior to 1982.
74. Information contained in 24 evidence forms gives rise to a reasonable allegation (WCA81) that dedication under common law can be presumed to have taken place during the period of use commencing in 1936 and ending in 1982. Of these 24 forms, 18 forms indicate combined use on foot and/or cycles while 6 evidence forms indicate



use on foot alone. A chart which demonstrates use of the route by type is shown as **Appendix G**.

75. The case of *Whitworth v Secretary of State for Environment, Food and Rural Affairs* [2010] held that it is appropriate (when considering statutory claims under HA80 s.31) to infer the form of dedication which is least burdensome to the landowner. This decision arose from the fact that since the coming into force of the Countryside Act 1968, cyclists can lawfully use both bridleways and byways. Accordingly use by cyclists might therefore give rise to either category of right of way. However, as stated in 'Whitworth' the 'least burdensome' category to be applied would be that of a bridleway.
76. It is reasonable to assume that the principles set out in 'Whitworth' can also be applied here when considering evidence of common law dedication.
77. However 'Whitworth' (as set out above) does not apply to use prior to the 1968 Act and therefore consideration should be given to whether byway rights had already been acquired through use by this time. Further examination of the user evidence reveals only 6 claimants used the route on cycles prior to 1968. The average frequency of use is stated as being monthly, while two claimants began using the route only two years prior to 1968. It is therefore considered that the evidence is not sufficient to suggest that such use prior to 1968 is significant enough to demonstrate that the route could be presumed to be dedicated as a byway at this time.
78. It is considered that the appropriate test (WCA81 s.53(3)(b)) is met and it would therefore be appropriate to record this route as a public bridleway.

### **Conclusion Route C-D**

79. The combined historic evidence suggests that the route in question was a public road connecting Clipstone and Bilsthorpe. Any rights for mechanically propelled vehicles belonging to this road have been legally extinguished by virtue of Section 67 of the Natural Environment and Rural Communities Act. Therefore, it is considered that 'Test B' is met (WCA81 s.53(3)(c)(i)) and it would therefore be appropriate to record this route as a restricted byway in order to reflect existing rights for non-mechanically propelled vehicles, horse riders and walkers.

### **Statutory and Policy Implications**

80. This report has been compiled after consideration of implications in respect of finance, equal opportunities, personnel, crime and disorder and those using the service and where such implications are material, they have been described in the text of the report.

## **RECOMMENDATION**

81. It is RECOMMENDED:
- a) that Committee accept the application for route A-B and authorise the making of a Definitive Map Modification Order at public bridleway status.
  - b) that the Committee authorise the making of a modification order for route C-D at restricted byway status.

### **TIM GREGORY**

Corporate Director (Environment and Resources)

### **Comments of the Service Director (Finance)**

The contents of this report are duly noted; there are no financial implications.  
[DJK 01.06.2011]

### **Legal Services' Comments**

The matters set out in this report are matters for which Rights of Way Committee have responsibility by virtue of the Full Council decision of 24 September 2009. [SJE – 01/06/2011]

### **Background Papers Available for Inspection**

Rufford (Center Parcs/Sherwood Pines) Definitive Map Modification Order Application case file.

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

Rufford    Councillor Les Ward

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ROW56  
1 June 2011