



11 July 2017

Agenda Item:8

REPORT OF CORPORATE DIRECTOR OF PLACE

PROPOSAL: APPLICATION TO ADD A FOOTPATH TO THE NOTTINGHAMSHIRE COUNTY COUNCIL DEFINITIVE MAP AND STATEMENT

LOCATION: PINGLEY LANE, STAYTHORPE

APPLICANT: MR VIC HIRD, PINGLEY LANE, STAYTHORPE, NOTTINGHAMSHIRE

Purpose of the Report

1. To consider an application for a Modification Order made by Victor Hird to record a route as a public footpath on the Definitive Map and Statement for the Parish of Staythorpe. A map of the surrounding area is shown on **Plan A** and route under consideration is shown on **Plan B** and marked between points A and C.
2. The effect of the application, if accepted, would be to add a footpath from its junction with the adopted section of Pingley Lane to its junction with Staythorpe Footpath No. 2.

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. 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”.
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’ (without force, without secrecy, or without 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.

6. If it is accepted that dedication may be presumed at law, consideration must also be given to the category of highway that is believed to 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.
7. 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

8. The claimed route currently exists as a track that extends from the adopted section of Pingley Lane at point A as shown in **photograph 1**. The first section of the track, A to B is owned by Luke and Danielle Ellison of Manor Farm and is used as access for them to get to their property. This section is shown in **photograph 2**. The second section B to C is owned by Latham Farms who use it to access fields. This second section is shown in **photographs 3-5**. Staythorpe Footpath No. 2 joins the track at the right angle bend at point C.
9. Staythorpe Public Footpath No. 3 starts at the end of Pingley Close (which joins Pingley Lane) which then joins on to Staythorpe Footpath No. 2 which then joins up the claimed route at point C. Although this route does provide an alternative route from Pingley Lane to point C this is not a factor that can be legally considered as it does not question the evidence of the existence of rights on the application route.

Documentary Evidence

10. There is no documentary evidence that indicates that this route was recorded as a public right of way in the past. However, it is useful to know some of that background of when the other paths in the parish of Staythorpe were claimed.
11. Following on from the National Parks and Access to the Countryside Act 1949, a survey of every Parish was carried out to show the location of public rights of way. The survey of the Parish of Staythorpe was carried out by the Nottinghamshire Footpaths Preservation Society in 1957 and what is significant is that on the plan that they used which was dated 1938, redevelopment of the Manor Farm Buildings had not taken place and so no path was shown on the Ordnance Survey base map. Staythorpe Footpath No. 2 was claimed as a public footpath leading off Pingley Close. The Ordnance Survey plan of 1972 shows that development at Manor Farm had taken place by this date and so the route for which this application has been made existed from at least that date.
12. However, between 1986 and 1993 there were protracted discussions concerning the diversion of Staythorpe Footpath Nos 2 and 3. In 1993, one of the consultees, the Nottinghamshire Footpaths Preservation Society, wrote a letter to the County Council giving

their views on the proposal but also making a comment on the route for which this application has been made. They stated in their letter that 'we have marked in red a route the local people appear to use and which we would like included'. There is nothing in the County Council files that this comment was followed up, but the Diversion Order was made and confirmed in 1995 diverting Staythorpe Footpath Nos. 2 and 3 to their present positions.

The Application

13. The application for a Modification Order was made by Victor Hird in November 2015. In total 41 user evidence forms were submitted in support of the application claiming use of the route on foot with some of them submitting additional information. A summary of the user evidence is shown in **Table 1**. A consultation was carried out following submission of the application which included the owners of the land over which the route runs. What follows in this report is a substantive summary of the evidence that has been submitted both in support of the application and in objection to it.
14. **Length and frequency of use.** In support of the applicant members of the public submitted forms giving details of their use of the path and some of them provided additional information including interview statements. Of those 41 users, at least 15 of them have used the path for more than the required 20 years with some of them the use goes back to the 1970's. According to the information submitted, the path has been used frequently, with 21 claimants stating that they used the path at least twice a week and with some of these their use was daily. A few of the claimants do state that they were visitors to the area when they used the path and therefore their use would only be a few times a year. Other users had previously lived in the village but have since moved away but their use continued when they came back to visit family or friends.
15. **Purpose.** Most of the claimants stated that purpose for using the route was for pleasure. Some people who lived in Staythorpe used the path to get to Upton and there are others who live in Upton who use it to get to Staythorpe as part of a longer walk. Some of the claimants said that they used the claimed route and then came back along Staythorpe Footpath 2 and along Pingley Close.
16. **Date of Challenge.** The date of challenge when the right to use the path was first called into question appears to be on the 3 October 2015 when a notice was erected at the end of the adopted section of Pingley Lane at point A as shown on Plan **B**. The wording of the notice was 'MANOR FARM. PRIVATE ROAD, NO ACCESS WITHOUT PERMISSION, PUBLIC FOOTPATH IS VIA PINGLEY CLOSE', as shown in **photograph 6**. It is considered that the erection of this sign and the emphatic wording on it was sufficient to challenge members of the public who were using the claimed route. The applicant contacted Nottinghamshire County Council following the erection of this sign to request information on how to claim this path as a public right of way. Therefore the relevant 20 year period which is under consideration runs from 1995 to 2015.
17. **Use without challenges and as of right.** None of the claimants state that their use was ever challenged by any notices or structures along the claimed path that ever prevented their use. None of the claimants said that their use was ever prevented by either the previous owner of Manor Farm, Sue Mitchell, or the present ones nor anyone from Latham Farms. Some of the claimants state that when they using the path they met Sue Mitchell and they stopped and talked with her. However, nothing was said about their use of the path.

18. **Use with permission.** Similarly none of the claimants sought permission to use the path and none was given. Two of the claimants did refer to permission being given with Hilary Snell clarifying the point that that was a discussion with her father and the landowners but no formal permission was given but 'just that there was no problem for him to use it'. The other claimant stated that he had had permission by Mr Latham to drive down the track to shoot pigeons and rabbits. However, it appears that this permission only extended to use with a vehicle and not to his use on foot.

19. **Consultation.** A consultation was carried out with statutory undertakers, user groups, Newark and Sherwood District Council as well as the 2 current owners, Latham Farms and Luke and Danielle Ellison. Section A to B is owned by Latham Farms and Section B to C was owned by Sue Mitchell of Manor Farm who lived at the property from 1977 to 2011 and then by Luke and Danielle Ellison who bought Manor Farm in 2012 and still own the property. Replies were received from the Sue Mitchell and Luke Ellison as well as a neighbouring landowner. Listed below are the main points that were made.

20. **Sue Mitchell owner of Manor Farm (1977-2011)**

- Manor Farm had been in her husband's family since 1967 and she lived at the farm from 1977 to 2011
- That there is an alternative existing footpath.
- That her family did not allow access and that she has challenged people and if the family had realised that it was being used as a public right of way then they would have put up a sign and gate to deny access.
- She spent a lot of time outside and never saw any of the claimants using the path.

21. **Luke Ellison current of Manor Farm (2012 onwards)**

- Didn't see anyone using the route during visits prior to buying Manor Farm nor afterwards and none of the neighbours referred to it as a public right of way.
- The route has been closed for several days when the conifers adjacent to it were felled and when a manhole was constructed.
- He started to challenge people in 2014 when dogs were fouling the route and were off the lead and in 2015 his neighbours started to use the route.
- He erected a sign in 2015 but it was vandalised and pulled down.
- He disputes the evidence that has been submitted and in particular that there are people who submitted evidence who don't live in the village

22. **John Burnett**

- States that there is no public right of way along the route but existing right of way nearby
- States that Latham farms have access down the route
- Aware that a sign was erected due to increased dog use but it was vandalised and taken down. Not aware of any other signs that were erected.

Reason for the Recommendations

23. As stated in the report, there is no suggestion from either the owners nor the claimants that there were ever any signs prior to the one erected in October 2015 during the relevant 20 year period of 1995 to 2015. Similarly there is no suggestion from either of the landowners, nor from the claimants that there was any physical barrier that would have prevented use of the path during the relevant 20 year period of 1995 to 2015. Therefore the critical element to

consider is has the path been used by members of the public for that 20 year period, and if there were any challenges to that use?

24. Although the 20 year period only goes back to 1995 many of the claimants state that they have used the route for much longer than this. One piece of information that is consistent with this and gives useful background to the reputation of the path claim was that in 1993 the Nottinghamshire Footpath Preservation Society stated that they were aware that local people were using the this path.
25. For a small village such as Staythorpe there were a large number of user evidence forms submitted. Of the 41 user evidence forms 29 people actually live in the parish of Staythorpe and considering the parish only had a population of 91 in the 2011 census that makes approx. one third of the residents have submitted forms showing use of the path. However, those people who do not live in the parish of Staythorpe, (some live in the neighbouring parishes of Upton and Averham) still provide evidence of public use and should not be discounted.
26. There is a conflict between what was said by the previous owner of Manor Farm, Sue Mitchell, who said that she never saw the people who are suggesting that they used it and with those who have submitted evidence of use. This is in conflict with what was stated by Mary and Hilary Snell, Keith Melton and Vic and Denise Hird who all state that they not only saw Sue Mitchell when they were using the path but stopped to talk to her and nothing was said about their use of the path. None of the claimants ever say that they were challenged by Sue Mitchell or given permission from her to use the path. One point to note is that the part of the path that goes in front of Manor Farm was separated by tall conifers and so this could have been a possible reason that Sue Mitchell did not see people using the claimed route. The information from the claimants does seem to be consistent on this point that the path was frequently used with no challenges from anyone.
27. In a similar way, after Manor House was sold to Luke Ellison in 2012 there is a conflicting information about if the route was used by the public. None of the claimants state that their use of the route changed and their use continued. However, Luke Ellison stated that when he first moved to Manor Farm he did not see anyone using the path nor was there evidence of use but it wasn't until there was an increase in dog use that he erected a sign in October 2015.
28. In **Norton v Bagshaw (1994)** it was held that the wording of Section 53(3)(c)(i) referred to in paragraph 5 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.
29. In this case whilst there is a conflict of evidence, there is no incontrovertible evidence that a right of way cannot reasonably be alleged to exist. Therefore, having considered that there is a credible body of user evidence to show that the claimed route have been used for a minimum period of 20 years and little evidence to show that the landowner had, prior to the date of challenge effectively challenged public use or directly demonstrated a lack of intention to dedicate the claimed route, investigations have shown that a public right of way on foot is at least reasonably alleged to exist along the claimed route and a Modification Order should be made.

Statutory and Policy Implications

30. This report has been compiled after consideration of implications in respect of crime and disorder, 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, sustainability and the environment and ways of working and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

RECOMMENDATION

1) It is recommended that Committee approves the making of a Modification Order to modify the Definitive Map and Statement by adding the footpath for which the application was submitted on the basis that, for the reasons set out above, it is considered by the Authority that the evidence shows that a right of way is reasonably alleged to exist.

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Corporate Director - Place

For any enquiries about this report please contact:

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Constitutional Comments [RHC 21/6/2017]

Planning & Licensing Committee is the appropriate body to consider the contents of this report.

Financial Comments (RWK 15/06/2017)

There are no specific financial implications arising directly 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.

- Modification Order Application case file