

 Nottinghamshire County Council	Report to Rights of Way Committee
	28 November 2012
	Agenda Item:6
REPORT OF CORPORATE DIRECTOR (ENVIRONMENT AND RESOURCES)	
APPLICATION TO ADD A BRIDLEWAY TO THE DEFINITIVE MAP AND STATEMENT IN THE PARISHES OF CLIPSTONE AND WARSOP	

Purpose of the Report

1. To consider an application made in 2008 by Mr S Parkhouse, Ms P Whitehead and Mr T Harkness on behalf of Clipstone Parish Council, to record New Buildings Drive, Clipstone as a public bridleway on the Definitive Map and Statement. A map of the area is shown as Plan A, with the route under consideration marked between points A and B.
2. The effect of this application, if accepted and confirmed, would be to add a public bridleway along an existing track leading from Peafield Lane (A6075), Warsop, opposite Warsop Bridleway No.21, continuing along New Buildings Drive and the track leading to Clipstone Bridleway No.8.

The Law

3. The application was 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”.
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 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 the HA80 Section 31 fail, then it may be appropriate to consider the dedication of the way at common law. Dedication at common law requires consideration of three issues: whether any current or previous owners of the land in question had the capacity to dedicate a highway, whether there was express or implied dedication by the landowners and whether there is acceptance of the highway by the public. Evidence of use by the public 'as of right' may support an inference of dedication and may also show acceptance by the public.

Information and advice

8. New Buildings Drive is in the ownership of Mrs Yvonne Glennie and is also subject to an agricultural tenancy to Mr Robert Bealby who farms in adjacent fields. The land which incorporates New Buildings Drive has been continuously owned by members of the Glennie/Bealby Family since 1945. The route comprises a wide, mainly stoned track nearly 2.1 kilometres in length which leads from Peafield Lane to Clipstone Bridleway No.8. In approximately 1998, a barrier was erected across the track at the northern end of the route. Members of a model aeroplane club are allowed access around the barrier through a side gate in order to use one of the fields for their flying activities. Visitors to Sherwood Forest Caravan Park and horse riders belonging to the Cavendish Lodge Liveries also have permissive use of the route. A series of photographs taken along the course of the route are shown as Photos B1-3.
9. The evidence in support of the Application comprised of 40 Public Rights of Way User Evidence Forms and a number of historic maps.

Historic Documentary Evidence

10. Along with maps submitted as part of the application, additional documents were examined to see whether there was any evidence for pre-existing public rights of way over the claimed route. The historic documents comprised:
 - Sanderson's Map 'Twenty Miles Round Mansfield' 1835
 - Ordnance Survey 2" map 1840
 - Clipstone Tithe Map 1841
 - Deposited plans for the proposed Lancashire Derbyshire & East Coast Railway 1896
 - Encyclopaedia Britannica map 1902
 - Finance Act map and valuation book 1910
 - Guilford's Map of Nottinghamshire 1927
 - Ordnance Survey map extract 1927
 - Ordnance Survey extract 1940
 - Parish Schedules for Clipstone and Warsop 1953

11. Dealing with the documentary evidence in chronological order, the earliest record for the existence of New Buildings Drive is found in Sanderson's map of 1835. The map describes New Buildings Drive as a 'Coach Road' shown passing through Clipstone Park (then owned by the Duke of Portland). Clipstone Park is shown enclosed by a 'Park Fence' and therefore probably incorporated a gate at the New Buildings Drive entrance. Another 'Coach Road' is also shown passing through Clipstone Park. Sanderson's map gives no indication as to whether these coach roads were for public or private use.
12. The Ordnance Survey map of 1840 confirms the existence of New Buildings Drive but gives no indication of status.
13. The 1841 Clipstone Tithe map shows New Buildings Drive coloured brown. However, all roads and tracks are coloured in this way, therefore this map does not give any indication as to the status of New Buildings Drive.
14. The deposited plans for the Lancashire Derbyshire and East Coast Railway (1896) were inspected. The plans indicate the location where the proposed railway crossed the claimed route. In the accompanying schedule New Buildings Drive is referred to as a 'Road' in the ownership of the Duke of Portland. This suggests that it was believed to be a private road with no public rights over it.
15. Documents prepared for the purposes of the Finance Act 1910 (FA10) were also examined. The purpose of FA10 was to levy a tax on the estimated value of land. The valuer allowed deductions for any public rights of way affecting land ownership. According to the relevant FA10 maps, the claimed route is incorporated into parcel No.65 which is privately owned and therefore suggests that New Buildings Drive was not thought to be a public road. The accompanying book of reference indicates that no deductions for public rights of way were claimed.
16. Nothing contained in the 1902 Encyclopaedia Britannica map, the 1927 Guilford map or the 1927 and 1940 Ordnance Survey maps gave any indication as to the status of the claimed route.
17. No rights of way are recorded on New Buildings Drive in the County Council's Parish Schedule for Clipstone. This schedule was prepared in 1953 for the identification of public rights of way under the provisions of the National Parks and Access to the Countryside Act 1949. However, the schedule for the adjacent parish of Warsop contains a map showing New Buildings Drive annotated with the wording "Notice Private Road Tress. will be prosecuted" and "Considered Private Road by the Clipstone Divisional Surveyor". These notes appear to be contemporaneous with the schedule and therefore suggest that the route was not considered to be a public right of way in 1953.
18. In summary, the documentary sources do not show any evidence of public rights over New Buildings Drive. The deposited railway plans, Finance Act documents and the Parish Schedules suggest that the route was believed to be a private road with no public rights of way over it.

User Evidence

19. User evidence forms and landowner statements have also been considered 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 raise a presumption of dedication in order to meet the requirements of WCA81 Section 53 (3) (c) (i): namely “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”. 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.
20. The information contained in the user evidence forms and in the subsequent interview transcripts relate to the presumed dedication of a highway based on uninterrupted use over a twenty year period. This period has to be calculated retrospectively from the date when the right of the public to use the way was brought into question. The landowner has submitted that the barrier (Photo B1) was placed at the northern end of the route in 1998 to prevent vehicles from entering the land and to show that it was privately owned. It is also contended that the barrier (even though the public went around it), constitutes an interruption in user for the purposes of section 31 of the Highways Act 1981. The case of The Queen v Secretary of State for the Environment, ex parte William Greaves Blake (QBD, 1983) appears to support this view, and therefore the period during which public use can be considered is between 1978 and 1998.
21. 29 evidence forms indicate continuous use throughout the specified 20 year period. Further examination of the forms indicates 13 users cycled on the route throughout the relevant period with evidence of use from one horse rider. Frequency of use varies from daily to yearly. A chart showing overall use is shown as Appendix C.
22. In respect of evidence of signs or notices, the user forms suggest that the landowner did not take sufficient steps to show the public that there was no intention to dedicate a right of way. For example one user states “There used to be a sign which said ‘private – keep dogs on a lead’...that’s the only sign I’ve seen’. Another user stated ‘I have never seen any signs on New Buildings Drive. There was an unreadable sign on the un-named track near the junction with the RUPP [Clipstone Bridleway No.8]’ while another refers to a ‘notice board at the flood dykes end – no message’. One user refers to a ‘Private Property...Keep Out’ sign which he believed referred to the New Buildings Farm site rather than New Buildings Drive itself.
23. Both Mrs Glennie and Mr Bealby have submitted statements in respect of their knowledge of the land and their attitude towards access along New Buildings Drive. Mrs Glennie has stated that she is seldom on the farm, but is aware that permissive access is given to various groups and individuals. Mrs Glennie also refers to the ‘old, now illegible’ sign at the Southern end of the route indicating private land (Photo B3).
24. In his statement, Mr Bealby describes how New Buildings Drive and the surrounding farmland has been in the ownership of his family since 1945. Mr Bealby states that he uses the route on a daily basis when inspecting sheep and crops. He also lists the groups and individuals who have been granted permissive access i.e. a model aeroplane club, a local livery, the local hunt/shoot etc. Mr Bealby states that anyone seen using the route that he does not recognise, is told it is ‘private’ and ‘if you misbehave you’re off’.

25. There is no evidence of any obstructions preventing public use of the route during the period 1978 to 1998.
26. Apart from the 1953 Warsop Parish Schedule, there is little information regarding the sign which was in place at the northern end of the route. The sign read "Private Road Tress. Will Be Prosecuted". Mr Bealby states that this sign fell down "probably during the 80's or 90's", although none of those who completed user evidence forms recall a sign at this location. Furthermore, the wording "Private Road" is open to interpretation, for example it could relate to preventing vehicular users only. A similar sign reading 'Private Land' already exists at the southern end of the route on Clipstone Bridleway No.8 (a definitive right of way). Accordingly, if the intention of the sign was to prevent all public use, a notice which read 'No Public Right of Way' would have been more appropriate.
27. Mrs Glennie and Mr Bealby both make reference to the sign (Photo B3) at the southern end of the route which they state indicates that the route is private. This sign was observed at a site visit in November 2009. It is severely weathered and dilapidated, only the wording 'CAVEND' and an arrow can be distinguished (Cavendish Lodge is located nearby). There is no further evidence of this sign having any effect in respect of demonstrating there was no intention to dedicate a public right of way.
28. There is evidence of public use on the claimed route for in excess of twenty years prior to 1998. In order for this evidence to be valid, it must be demonstrated, that use was 'as of right' and was not exercised in secret or by force or with permission. The evidence forms show that use was not in secrecy or by force. In respect of whether use was with permission, the evidence is conflicting. The situation is complicated by the fact that a number of people have permissive use of New Buildings Drive and this may have had the effect of camouflaging some public use.
29. In respect of verbal permission, Mr Bealby states that he knows most of the users by sight and that he regularly informs members of the public that the route is not a public right of way. He also states that any unknown users are approached and allowed to use the route on the understanding that they do not 'misbehave'. By contrast, the information contained in the evidence forms presents a different version of events. One walker refers to passing a farm worker who said nothing 'in fact I think he [the farm worker] waved'. Another who used the route on a daily basis states that he was once told to put his dog on a lead but was not told it wasn't a public right of way. Another refers to being asked to wait while a crop spray went across the track but was not told that use of the route was with permission. A number of users state that they have never spoken to Mr Bealby or any of his workers, while others refer to farm vehicles driving past them without any verbal exchange. Some users say that they would pass the time of day but nothing more. Although there is evidence that Mr Bealby did inform some individuals that use was with his permission and that the route was not a public right of way, there is no evidence to demonstrate that this message was effectively communicated to the wider public.

Consultation

30. Correspondence received from Burges Salmon LLP (representing the landowner) makes the following points in respect of the application:

- Installation of the barrier (Photo B1) at the northern end of the route in 1998 is evidence that permission is required to use New Buildings Drive. The barrier was erected to prevent vehicles from entering the land and to show that the land is private.
- The barrier constitutes an interruption in use for the purposes of HA80 Section 31. Therefore the legislative test needed to raise a presumption that the route has been dedicated as a highway has not been met.
- The user evidence is poor quality, limited in number and inconsistent. The weight that can be attached to the user evidence is minimal.
- 19 evidence forms refer to use of the route once per month or less.
- The user forms were collected by the applicant who has not made it clear over what period the use has occurred.
- User evidence referring to barriers and signs along the route indicates that use was not 'as of right' but with permission.
- The Parish Survey of 1953 records New Buildings Drive as a private road with appropriate signage. This is consistent with the statement made by the farmer.
- Use of the route around the eastern side of the gate could only have taken place since improvements to the Parliament Oak amenity area took place in 2008 and that use has switched from one side of the gate to the other.
- One evidence form acknowledges use by permission stating that the farmer does not consider the route to be a public right of way. Reference is made to people using the route without being challenged but no basis for this assertion is given.
- Failure by users to refer to waste disposal lorries, and by members of the aero club indicates limited knowledge of the route.

31. The following responses relate to the points raised by Burges Salmon:

- A 20 year period can be calculated prior to the barrier being erected in 1998. If the barrier demonstrated that subsequent use was permissive, public use prior to that time could still be as of right.
- It is accepted that the barrier constituted an interruption to public use, however the statutory test relates to any full period of 20 years use. In this instance it would appear that the relevant period had elapsed between 1978 and 1998.
- Inconsistencies in evidence forms are not uncommon. The Council has endeavoured to clarify any inconsistencies that may have a bearing on the matter. The weight placed on the evidence forms is based on the combined evidence contained in them which gives an overall view of the situation.
- Taking into account user evidence between 1978 and 1998, 10 evidence forms relate to use between once and 6 times yearly, 5 forms relate to use on a monthly basis, 8 forms relate to use between a weekly/daily basis. In respect of the assertion by Burges Salmon that the user evidence is limited in number, the levels of use alleged here are not significantly different from other user claims which have been confirmed by Inspectors on behalf of the Secretary of State.
- It is commonplace for an applicant to collect together evidence forms. This does not call into question the validity of evidence contained in them. The applicant is not required to specify the period over which use has occurred. Such information will be established through an evaluation of the evidence.
- There is no conclusive evidence to suggest that the barriers and signs along the route indicated that use was not 'as of right' during the period 1978 to 1998.

- The Parish Survey of 1953 suggests that the route was not considered to be a public right of way at that time. However, actions taken in 1953 do not necessarily prevent rights being acquired at some later date.
- Although a barrier was placed at the northern end of the route in 1998, the public may have already acquired rights by presumed dedication by that time. Issues regarding use either side of the barrier after 1998 are outside of the specified 20 year period and are therefore not relevant.
- Evidence that one user acknowledged use was with permission relates to a conversation between the applicant and the tenant which took place after the Modification Order Application was submitted and is not relevant to the acquisition of rights during the relevant 20 year period.
- Failure by some users to refer to vehicular traffic along the claimed route could be attributed to a number of reasons, either it was not thought to be relevant, it wasn't noticed, or that memories have faded. One user recalls that he stepped to the side to allow vehicles to pass, while another, when leading a group walk, recalls being asked to wait for vehicles to pass before proceeding along the Drive. Although relatively few users have referred to vehicles using the tip area, this is not itself a point which would show that presumed dedication had not taken place. Such evidence could be tested if an order is referred to the Secretary of State for a decision.

Responses from other Consultees

32. BT Openreach - *No objections to the proposals*
33. Environment Agency - *Assets owned or operated by the Environment Agency will not be affected.*
34. E-On - *We do not object to the developments as proposed.*
35. NCC Conservation Service - *The scheme is unlikely to have any significant impact on the Special Protection Area (possible future designation under Conservation of Habitats and Species Regulations 2010).*

Reason/s for Recommendation/s

36. There is no documentary evidence to suggest that New Buildings Drive was a public right of way prior to 1953.
37. The sign at the northern end of the route which read 'Private Road Trespassers will be prosecuted' is known to have existed in 1953 by virtue of the Warsop Parish Schedule. However, it appears this sign was not replaced when it fell into disrepair. If the sign survived into the 1990s as stated by Mr Bealby, this view conflicts with evidence contained in the user evidence forms which make no reference to it. The sign at the southern end of the route does not appear to have contained any wording which challenged public use of the route and therefore is not considered relevant. If the landowner (or tenant) intended to rely on signs to demonstrate that there was no public right of way, it would be reasonable to assume that such signs would be renewed from time to time and would contain clear and unambiguous wording such as 'No Public Right

of Way'. Furthermore, no declarations in respect of public rights of way have been lodged with the County Council under Section 34(6) of the Highways Act 1959, or subsequently by Section 31(6) of the Highways Act 1980, and no notices have been received under Sections 34(4) and 31(5) of the respective Acts stating that the claimed paths have not been dedicated as highways.

38. Assuming the barrier at the northern end of the route was erected in 1998, this is considered to be an effective interruption and challenge to public use at that time. The relevant period during which a bridleway can presumed to have been dedicated is therefore between 1978 and 1998.
39. Verbal permissions given by the tenant, Mr Bealby, appear to have been directed at certain groups and individuals seen using the route. However, Fairey v Southampton C.C. (1956) established that in order to show a lack of intention to dedicate, the landowner must demonstrate "sufficient evidence that there was no intention to dedicate the way" and "there must be evidence of some overt acts on the part of the landowner such as to show the public at large...that he had no intention to dedicate". The evidence submitted in the user evidence forms suggests that many users were not challenged despite having been seen by farm workers. It does not appear that the landowner's intentions were sufficiently made known to the 'public at large' either through verbal challenges or by placing signs along the route stating that use was with permission only.
40. Although user evidence in respect of presumed dedication is conflicting, there is no incontrovertible evidence to demonstrate a lack of intention by the landowner to dedicate a public bridleway between 1978 and 1998. Therefore it is considered that there is sufficient evidence for it to be reasonably alleged that a right of way subsists.
41. 13 evidence forms (for the whole 20 year period) relate to use by cyclists. 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. In right of way terms, cyclists are entitled to use byways, restricted byways, and bridleways. The least burdensome of these categories is that of public bridleway.

Statutory and Policy Implications

42. 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

43. It is RECOMMENDED that Committee accept the application and approve the making of a Modification Order to add a bridleway to the Definitive Map and Statement 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 subsist.

Eddie Brennan
Definitive Map Officer

For any enquiries about this report please contact:

Eddie Brennan (0115 9774709)
Definitive Map Officer

Constitutional Comments (SJE – 06/11/2012)

44. 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 31.10.12)

45. The content 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.

Modification Order Application case file

Electoral Division(s) and Member(s) Affected

Rufford	Councillor John Peck
Warsop	Councillor John Allin

ROW 87 Clipstone and Warsop
8 November 2012