

meeting           **RIGHTS OF WAY COMMITTEE**

date               **16 June 2010**

agenda item number

**6**

## **REPORT OF THE CORPORATE DIRECTOR (COMMUNITIES)**

### **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 WYSALL, WIDMERPOOL AND KEYWORTH**

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

1. A report was presented to the Rights of Way Committee at the meeting held on 18 November 2009, which related to a request for the creation of a public bridleway between Lings Lane, Keyworth and Keyworth Road, Wysall. That Committee resolved, firstly, not to proceed with the Creation Order. This was to allow investigation of a recently received Definitive Map Modification Order application, which alleged that bridleway rights already existed by virtue of user and/or documentary evidence. The second resolution of the Committee in relation to this matter was that a report be submitted to a future meeting of this Committee to determine whether or not a Modification Order should be made in respect of the claimed route.
2. This report therefore relates solely to a Definitive Map Modification Order Application that has been duly submitted by Mr Raymond Belton of Widmerpool to record a route as a public bridleway on the Definitive Map and Statement for the parishes of Wysall, Widmerpool and Keyworth. The route under consideration is shown on **Plan A**.
3. The effect of this application, if accepted, would be to add a public bridleway leading from the termination point of Keyworth Definitive Bridleway No.5 (Lings Lane, Keyworth) to the parish boundary with Widmerpool, then following field boundaries and crossing the parish boundary into Wysall at Fairham Brook. The path then continues along field edges before following a track named Occupation Lane, finally joining the Keyworth Road north of Wysall.

## **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’ and without interruption for a period of 20 years prior to the date of challenge, unless there is sufficient evidence that there was no intention during that period to dedicate it.
7. 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.
8. 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 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 claimed route is not currently available on the ground, and has not been accessible for a number of years. The application is supported by individuals who have submitted evidence to suggest that they have generally used the path up until the mid1980s.

10. At Point A on the Plan, there is a hedge and fence and it is not possible to enter the adjoining fields from the end of Lings Lane. There is a culvert at Point C to facilitate access for farm vehicles. The current landowner, Mr Butterfield, created a ford across Fairham Brook on the line of the claimed route in approximately 2007.
11. There are several gates on Occupation Lane. One is situated at the northern end of the lane (Point D) and is grown into the hedgeline. There is a second gate part of the way down the open section of the lane (Point E), and a third gate is located at Point B on the Plan. This gate was locked when a site visit was conducted in April 2010.

### **The Application**

12. The application is supported by 23 Public Rights of Way User Evidence Forms. Interviews were conducted with 7 of the witnesses in order to gain further clarification of their use of the path.
13. Following receipt of the User Evidence Forms, it was necessary to contact individuals to clarify the line of the path that they had used, as there were discrepancies in the evidence that was submitted. A further map was received, with a covering statement reading 'We the undersigned confirm that the route shown on the attached map is the route ridden by us in recent years between Occupation Lane, Wysall and Lings Lane, Keyworth'. Many of the individuals who had previously completed evidence forms were included in the list of signatories.
14. The application has therefore been considered on the clarified line that was indicated on the later map. Those users who agreed to be interviewed were asked whether this was the path that they had followed, and they confirmed that the later route was a true representation of the path that they wished to claim. This is the path that is shown on **Plan A**.

### **Documentary Sources**

15. A number of historic sources were examined to see whether there was any evidence for pre-existing public rights of way over the claimed route. The documents included Inclosure Award information for the parishes of Wysall, Widmerpool and Keyworth, and also Finance Act 1910 Valuation Maps and Field Books and various OS maps dating from 1899 onwards.
16. The Wysall Inclosure Map of 1801 shows Occupation Lane, which is described in the Award as 'one private horse, carriage and drift road of the breadth of thirty feet branching from the public carriage road herein before described from Wysall to Keyworth in an eastward direction over the Longcliffe Field between the allotments herein awarded to William Hardmett No.8 on the said Map, Elizabeth Griffin No.16 and James

Kearsley No.14 respectively on the southward side thereof and an allotment herein awarded to William Sheldon for Tithes No.9 on the northside thereof which said road is for the use of the owners and occupiers of the several allotments adjoining’.

17. Within the Keyworth Combined Inclosure Award and Map of 1799, Lings Lane is identified as both a private carriage road named Pasture Road, and also a public bridleroad to Widmerpool. The bridleroad is set out to a ‘breadth of twelve feet between the fences leading from the southwardly end of the Town Street in Keyworth and extending in a southwardly direction along the private carriage road hereinafter set out and described called the Pasture Road...to a bridle gate leading into the said Lordship of Widmerpool which said Bridle Road is hereby called Widmerpool Bridle Road’.
18. The Widmerpool Inclosure Award and Map of 1804 does not show any continuation of the bridle road that was awarded in the Keyworth documentation.
19. 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. In establishing this, the valuer allowed deductions for any public rights of way affecting the land in question. Evidence relating to the existence of a public right of way in FA10 documents usually arise in one of two ways:
  - reference to a public right of way in one or more of the various documents forming part of the valuation process, or
  - exclusion of a depicted route from the assessable parcels of land shown on the map record.
20. Within the Valuation Books for the land parcels through which the claimed route passes, several deductions are made for ‘Public Rights of User’. However, on further investigation using the Field Survey Books that are held at the National Archives at Kew, it has been possible to identify the field numbers for which the deductions were made.
21. The noted field numbers do not relate to the land affected by the claimed path, and can be attributed to Definitive Footpaths Widmerpool No.1, Keyworth No.2 and Keyworth No.3. Occupation Lane is shown as excluded from the land parcels on either side of it and has continuous boundaries for its entire length.
22. Ordnance Survey 6” and 25” maps from 1887 onwards show both Occupation Lane and Lings Lane. There is no evidence on any of the documents to suggest that a path existed over the field sections of the claimed route, with the only notation being a foot bridge (‘FB’) marked at Fairham Brook on the 1901 maps close to the crossing point

indicated in the bridleway application. Earlier and later versions of the maps do not contain this annotation.

23. Parish Schedules and Maps were prepared in 1953 for the purposes of identifying public rights of way under the provisions of the National Parks and Countryside Act.
24. The Widmerpool Parish Survey Map and Notes do not hold any relevant information. The Survey Map for Wysall parish has the annotation 'Green Lane – CRB' marked in pen on Occupation Lane, but the lane is not claimed or detailed in the Schedule.
25. The Parish Survey documents for Keyworth do not identify the claimed route, although the note 'BR to Widmerpool' is written in pencil on the Map. Transcribed descriptions from the Keyworth Inclosure Award are held on the file, relating to the two private carriage roads (Pasture Lane and Wolds Road) and the Bridleroad to Widmerpool. However, the routes are not marked on the Maps or detailed in the Schedules that form the survey documentation, and so were not included on the Definitive Map at this time.

### **Aerial Photographs**

26. Aerial photographs can often be used to identify changes in key features and land use over time. Several images, dating from 1979 through to 2007, were examined in relation to this case. The land has been used for a mixture of arable and pasture purposes, with the majority of fields in cultivation by 2000. Original images and colour copies of photographs will be made available for viewing at the Committee meeting.
27. Lings Lane is clearly shown on the photographs. On images taken in 1979 and 1984, a field entrance is visible at Point A on the Plan. Wear lines from vehicular use are evident, but it cannot be ascertained whether the access point is gated or open. Photographs from 1991 onwards show a hedge or fenceline across the entrance, with wheeled tracks from farm vehicles becoming less clear. In 1996, the planting has matured and there is no evidence of a way through at this location.
28. At Occupation Lane, a gate is visible at Point B on images dating from 1984 onwards. Whilst the gate crosses the width of the lane, it is not possible to deduce from the photographs whether or not it is locked.
29. With regard to the access across the Keyworth/Widmerpool parish boundary at Point C, there does not appear to be an obvious gateway or gap at this location until images dated 2004. In 1984, a track is visible on the Widmerpool side of the hedge, but by 1991 there is no headland visible in fields on either side. This situation continues until 2004, when clear wheel markings in fields on either side deviate towards a gap in the hedge.

30. Fairham Brook appears as a densely vegetated watercourse on all of the aerial photographs viewed. No crossing point in the vicinity of the claimed route can be clearly identified on any of the images.

### **Consideration of User Evidence**

31. The application should also be considered on the evidence submitted in the Public Rights of Way User Evidence Forms in order to establish whether dedication has taken place by virtue of HA80 Section 31.
32. The information contained in the user evidence forms and in the subsequent interview transcripts relates to the presumed dedication of a highway based on uninterrupted use 'as of right' 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 by some means to show to the public that their right to use the way was being challenged.
33. 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.

### **Claimed Use**

34. A total of 23 Public Rights of Way User Evidence Forms were submitted in support of the application. User evidence dates from 1938 with various end dates being given, ranging from 1952 through to 2010.
35. Five people state that they have used the route personally for in excess of 20 years, with the majority of use being in the 1960s, 1970s and 1980s. One witness stated 2010 as the end date of their use, but they were not available for interview and did not clarify this statement. A different user claimed to have used the route into the 1990s, but upon questioning confirmed that after 1982 when they moved from the area their use was very infrequent and was on foot.
36. The main purpose for using the route appears to have been on horseback for pleasure riding, sometimes as part of a circular route. There is little provision for riders in the form of bridleways in the area, so the route added to the variety of cross country options available. It also allowed users to access more paths further afield, such as those in Widmerpool, Willoughby on the Wolds and Bunny.

37. The most common frequency of use is given as approximately once a month, with some users stating occasional usage and others claiming more regular use. Most individuals comment that they often used the path with friends or family, and would meet other people along the route. Some witnesses recall riding or walking part of the route when following Hunt meets, or it being included in organised rides, but this was in addition to their use of the path 'as of right' (without express permission).
38. The latest date of challenge, according to the information provided by user evidence, would be in approximately 1984 when the gate at Lings Lane was replaced by a fence and hedge. Landowner evidence indicates that the gate at Lings Lane was blocked in 1984 following a change in landownership. This date would appear to be supported by both those who support and oppose the claim.
39. With regard to challenges prior to 1984, the profile of user evidence would suggest a number of potential dates ranging from 1972 to 1983. The nature of the challenge is consistently given as being a 'locked gate', at Lings Lane and/or Occupation Lane.
40. The owner of land in the vicinity of Occupation Lane maintains that the gate at Point B on the Plan has always been locked for their living memory, certainly since the 1960's. Most users acknowledge that there has been a gate at this location for many years, but that there is some disagreement as to whether it was locked for the entire time it has been in position. The possible dates stated in user evidence for the gate first being locked vary from the early 1970's through to the mid 1980's, with a number of alternatives within this range.
41. In addition to the matter of locked gates on both Lings Lane and Occupation Lane, the crossing point at Point C on the plan, at the parish boundary between Keyworth and Widmerpool, also requires consideration. The users consistently state that there was a culvert and a gate size gap at this location, and those that have been interviewed maintain that this was the case.
42. However, counter-evidence from the owner of the relevant land at that time has been presented that suggests that no access point existed at Point C prior to 1984. Before this date, the land on either side of the boundary was owned by different individuals. The fields to the north of the boundary (in Keyworth) were accessed via the gate at Point A from Lings Lane. Those to the south of the boundary (in Widmerpool) were reached from North Lodge Farm.
43. In 1984, the owner of North Lodge Farm purchased the fields to the north of the boundary and created the culvert at Point C on the Plan. At the same time, the gateway at Lings Lane (Point A) was removed and fenced as the access was no longer required.

## Consultations

44. Consultations have been carried out with landowners, statutory undertakers, user groups, parish councils and district councils in relation to this application. Widmerpool Parish Council, The Ramblers and The Footpaths Preservation Society have indicated that they fully support the recording of the claimed path.
45. The relevant Internal Drainage Board was consulted due to the potential effect of the claim on Fairham Brook, but responded that their interest did not extend to this section of the watercourse. The County Council's Countryside Conservation Team indicated that they would need to be involved in the planning of any necessary vegetation removal or other works.
46. The British Horse Society, Cyclists Touring Club and Trail Riders Fellowship did not provide any comments relating to the application. No response was received from Rushcliffe Borough Council or Keyworth Parish Council.
47. Wysall and Thorpe in the Glebe Parish Council did not reply to the consultation, although conversations with the Parish Clerk indicate that the matter was presented at a local Meeting. The outcome of the discussions was not communicated to the County Council.
48. As part of the consultation exercise, the current affected landowners were contacted, and meetings held with both Mr Butterfield (the current owner of North Lodge Farm) and Mrs Onions (the owner of land in the vicinity of Occupation Lane). Discussions were also undertaken with Mr Twidale, who owned much of the land surrounding North Lodge Farm before selling it to Mr Butterfield in 2005.
49. Mr Butterfield purchased North Lodge Farm and associated land holdings from Mr Twidale in 2005, and so the period of claimed use pre-dates his ownership. A letter was received on 30 April 2010 from iPlan Solutions (acting on behalf of Mr Butterfield) which states that 'it is submitted by the affected landowners that there is no evidence of an existing route in existence between Lings Lane and Occupation Lane by virtue of a historic Inclosure Award or other historic document...there is also no clearly compelling or consistent evidence base to justify the acceptance of the submitted User Rights evidence'.
50. With regards to the user evidence, the letter from iPlan Solutions suggests that the information is inherently conflicting and contradictory. It emphasises the fact that no users questioned why they could no longer use the path when access was first denied. Furthermore, it is also argued that the documentary research does not provide sufficient evidence to suggest that a bridleway exists across the land in question.



51. Mr Twidale has submitted a Statutory Declaration relating to his knowledge of the land when it was in his ownership from 1962 to 2005. He did not acquire part of the area in question (the field to the west of Lings Lane leading to Fairham Brook) until 1984. Prior to this date, the land belonged to Mr Colton (father of Mrs Onions).
52. In his statement, Mr Twidale states that 'during the 43 years that I owned and farmed land at North Lodge Farm I confirm that there was never a bridleway linking Lings Lane and Occupation Lane'. He maintains that there was no crossing point at Fairham Brook and no headlands around the fields. After he acquired land from Mr Colton in 1984/1985, he created a culvert at Point C. Mr Colton had previously accessed the land from Lings Lane via the gate at Point A, and this gate was blocked at approximately the same time as the culvert was installed.
53. Mr Twidale also asserts that he never gave any permission to any individuals or groups to access his land and public access was never requested, even after the gate at Point A was permanently blocked in 1984. He does not remember the gate at the end of Occupation Lane (Point D), marking the boundary between his land and that farmed by the Onions, ever being opened as it has always been overgrown.
54. Mrs Onions submitted a detailed letter outlining her views relating to the application. She recalls a gate at the end of Lings Lane (Point A) which was closed but not consistently locked, and a gate on Occupation Lane (Point B) which she states was always locked.
55. Mrs Onions' family has owned land in the area for many years, and she has produced records of land exchanges/transactions dating from the 1920s. For all of this time, she states that it has been family policy to prevent unauthorised access, and that no permission would have been given to any individuals to enter the land. Occasionally, her father would allow the local Hunt meet to use certain fields, but such instances were infrequent and would require express permission.
56. During discussions with Mrs Onions, she stated that she did not understand how it would have been possible for people to cross Fairham Brook as the banks were steep and overgrown, and the water was often deep at the field corner location.
57. She also does not recall there being a gap in the hedge at Point C until more recent years, and that from a farming point of view there would have been no requirement to cross the hedgeline. Until 1984/1985, when Mr Twidale bought the land from her father, the land on either side of the ditch was in different ownerships.

## Conclusion

58. The user evidence submitted in support of the claim details potential use of a path through fields linking Lings Lane, Keyworth to Occupation Lane, Wysall.
59. It is generally acknowledged by both users and landowners that the latest date of challenge was approximately 1984. At this time, the gate at Lings Lane (Point A) was blocked off following a change in landownership, which meant that there was no longer a need to access fields from this point. This situation is largely supported by aerial photographs, with an access way at Point A on the Plan shown on images from 1979 and 1984, and the same point hedged/fenced from 1991 onwards.
60. It is more difficult to establish the earliest possible date of challenge. Mrs Onions, owner of land in the vicinity of Occupation Lane, states that her family locked gates on their land as a matter of policy. She recalls the gate at Point C on the Plan being locked for her whole life, certainly from the 1960s onwards.
61. Users provide a number of dates when the route was blocked by a locked gate. Dates given range from 1972 through to 1987, with the general consensus being a date in the late 1970s or early 1980s.
62. However, the issue of the crossing point through the hedge at Point C needs to be addressed. Mr Twidale, the owner of North Lodge Farm prior to 2005, states that there was no access way through the hedge until at least 1984. At this time, he purchased land from Mr Colton, and prior to this date the land on either side belonged to different landowners.
63. Mr Twidale maintains that there was no need for a crossing point at this location until he acquired the land. Mr Colton would reach his fields on the north of the brook via a gate at Point A (Lings Lane), due to the lack of a crossing point over the Fairham Brook preventing access from Occupation Lane.
64. When Mr Twidale purchased the land in 1984, he created a culvert at Point C to facilitate access to the fields from North Lodge Farm. At this time, there was no longer a requirement for an entrance at Point A (Lings Lane), and so this was blocked off.
65. Evidence presented by landowners, users and aerial photographs provides a strong indication that the gate at Point A was removed and the entrance blocked in 1984, preventing use of the claimed route. The line of the path applied for and clarified by users would potentially have been impossible to use in the absence of a crossing point through the hedge and over the ditch at Point C on the plan, and also at Fairham Brook. It would appear from photographic and landowner evidence that

no crossing point was available at Point C until at least 1984, or perhaps a later date, and that the hedge was well established with no obvious gaps.

66. Given the evidence that has been presented from all sources, it would appear that the claimed route would not have been available for use for a period of 20 years. A definite date of challenge can be given as 1984, when the access at Point A was closed off. Prior to this date, there would have been no requirement for a crossing point at Point C, and the absence of such a crossing here and at Fairham Brook would have meant that users would have had great difficulty in following the line of the claimed path.
67. With regard to the available documentary evidence, the Wysall Inclosure Award and Map of 1801 depicts Occupation Lane as a private carriage road. This evidence suggests that Occupation Lane has historically had a private status.
68. In Finance Act 1910 documentation, Occupation Lane is shown as excluded from adjoining land parcels. Such exclusion within Finance Act documents can be indicative of public status, but when considered against conflicting Inclosure evidence, the Wysall Award and Map of 1801 would generally take precedence. This interpretation of the evidence is in accordance with the approach taken by the Inspector at a recent Public Hearing conducted for a Modification Order Application at Kirton.
69. The Keyworth Combined Inclosure Award and Map of 1799 includes a public bridleway named the Widmerpool Bridle Road. This is located in the vicinity of the claimed route, and extends from the end of Lings Lane in Keyworth to the parish boundary of Keyworth with Widmerpool. There is no continuation of this path in the Widmerpool Inclosure documents of 1804, and no further supporting information in any other sources studied as part of this research.
70. It is evident within the Keyworth Parish Schedule and Notes, compiled as part of the rights of way survey undertaken in the 1950s, that the Parish Council at this time was aware of the inclusion of this bridle road in the Keyworth Inclosure Award. However, the path was not put forward for inclusion on the Definitive Map produced as a result of the National Parks and Access to the Countryside Act 1949. This could demonstrate that the Inclosure evidence was considered, but that the Parish Council concluded that the path should not be recorded on the Definitive Map.
71. No documentary evidence has been identified to support the existence of a public path across fields between the Keyworth/Widmerpool parish boundary and Occupation Lane, or continuing along Occupation Lane to the Keyworth Road, Wysall.

72. It is therefore suggested that the documentary research undertaken does not provide conclusive evidence to support the existence of the claimed route.

### **Statutory and Policy Implications**

73. 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**

74. It is RECOMMENDED that the Committee turns down the application for a Definitive Map Modification Order for the reasons set out above.

### **TIM MALYNN**

Corporate Director (Communities)

### **Comments of the Service Director - Finance**

The contents of this report are duly noted, there are no financial implications.  
[DJK – 17/05/10]

### **Legal Services' Comments**

The matters set out in this report are matters for which Rights of Way Committee has responsibility by virtue of the Full Council decision of 24 September, 2009. [SJE – 26/05/10]

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

Claimed Bridleway – Wysall/Keyworth Definitive Map Modification Order Application case file.

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

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