



**APPLICATION FOR DEFINITIVE MAP MODIFICATION ORDER
PROPOSED ADDITION OF TWO PUBLIC FOOTPATHS
(C109 AND C109A) AT GLEN OAKS, GREAT GLEN**

**REPORT OF THE
DIRECTOR OF ENVIRONMENT AND TRANSPORT**

PART A

Purpose of the Report

1. The purpose of this report is to seek the determination of an application by Mr. Michael Richard Burton of Great Glen, to add two Public Footpaths C109 and C109a, at Glen Oaks, in the Parish of Great Glen, in the District of Harborough to the Definitive Map of Public Rights of Way. The alleged public rights of way are shown on Plan No. M1134-C, attached as Appendix A.
2. Alleged Public Footpath C109 starts to the rear of houses on Coverside Road, Great Glen at its junction with Footpath C13 and runs in a generally east-south-easterly direction along a field edge, through Glen Oaks and along a field edge grass track for approximately 320 metres to join the western arm of Oaks Road. (A-B-C on the proposal plan).
3. Alleged Public Footpath C109a starts from a junction with alleged Footpath C109 at the northern end of Glen Oaks and runs roughly through the middle of Glen Oaks for approximately 350 metres to its junction with the southern arm of Oaks Road. (B-D) on the plan. An aerial photograph of the location is attached as Appendix D.

Recommendation

4. The recommendation is that an Order be made under the provisions of Section 53 of the Wildlife and Countryside Act 1981, to add two public footpaths to the Definitive Map, as shown on Plan No. M1134-C, attached as Appendix A to this report.

Reason for Recommendation

5. The application satisfies the relevant statutory criteria in that the evidence shows that the alleged two footpaths subsist or are reasonably alleged to subsist along the routes claimed.

Resource Implications

6. If a Definitive Map Modification Order is made and confirmed then the County Council, as Highway Authority, will become responsible for the maintenance of the surfaces of the public footpaths concerned which would add an extra 670 metres of footpath to the rights of way network which amounts to approximately £830 per annum of extra expenditure. This figure is based on the current per metre cost of vegetation clearance. Actual costs may well vary depending on rate of vegetation growth and the amount of use the path might be put to. In addition, the section of path A-B on the proposal plan is due to be provided with a gravel surface by the developers and therefore in future may require less maintenance of vegetation growth. The County Council will also have a statutory duty to assert and protect the public's right to the use and enjoyment of them.

Circulation under the Local Issues Alert Procedure

7. Dr. R.K.A Feltham CC

a) Officers to Contact

Edwin McWilliam, Access Manager, Environment and Transport Department,
Tel. 0116 305 7086 email: Edwin.mcwilliam@leics.gov.uk

Piers Lindley, Senior Access Development Officer, Environment & Transport
Department. Tel. 0116 305 7087, email: Piers.lindley@leics.gov.uk

b) Internal Consultation

The Director of Law and Governance has been consulted in the preparation of this report.

PART B

BACKGROUND

8. In March 2018 the County Council received an application from Mr. Michael Richard Burton of Great Glen, for the addition of two public footpaths to the Definitive Map at Glen Oaks, Great Glen. A copy of the Application is attached as Appendix B.
9. The applicant was prompted to consider applying for a Definitive Map Modification Order, in 2016 when an application for housing development was lodged with Harborough District Council affecting the first field adjacent to Great Glen village through which claimed Footpath C109 passes. The planning application, made by Miller Homes, was for the development of 170 dwellings.

10. The alleged footpath was not blocked off at this stage and remains open to this day, but the prospect of development prompted the applicant to apply for the alleged footpaths to be added to the Definitive Map as a means of protecting them.
11. Various revised planning applications and an appeal to the Secretary of State have culminated in a current plan for development as illustrated on Plan No. 19_01478 attached as Appendix C.
12. Miller Homes has not objected to the Definitive Map Modification Order application. As can be seen from the development plan Miller Homes has made allowance for the section of alleged path that runs through the site. The company has also agreed through the planning process, to surface the path with crushed stone.
13. The applicant's claim relies on user evidence he has presented that the route has been used for a period of 20 years or more by the public, on foot, as of right. The application was submitted on 20th March 2018. As the routes have not been brought into question by being blocked off or by any other action by the landowners then the date of calling into question should be taken as 20th March 2018. Therefore, for the Definitive Map modification Order (DMMO) application to prove successful, the applicant will have needed to establish that members of the public have used the paths as of right for a period of at least 20 years prior to 20th March 2018.

LEGAL CONSIDERATIONS

14. The County Council must have regard to the legal considerations set out in the Wildlife and Countryside Act 1981 and the Highways Act 1980 as detailed below.

Wildlife and Countryside Act 1981

15. The County Council's obligations are set out in Section 53(2) of the Wildlife and Countryside Act 1981. This states:-

S.53 (2) As regards every Definitive Map and Statement the {County Council} shall -

(a) as soon as reasonably practicable after the commencement date by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence before that date of any of the events specified in subsection (3) and

(b) as soon from that date keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence....of any of those events, by order make such modifications to the map and statement as appear to them to be required in consequence of the occurrence of that event.

16. Subsection (3) of S.53 says an event includes:-

(3) (c) the discovery by the authority of evidence which when considered with all relevant evidence available to them shows:-

(a) that a Right of Way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a Right of Way to which this part applies.

(b) that there is no public right of way over land shown in the map and statement as a highway of any description.

Test A and Test B

17. The issue before the County Council is to decide if the application satisfies the requirements of Section 53. The Council therefore has to be satisfied when it considers the evidence available, whether the case for the application satisfies either of the following two tests. These are usually referred to as Test A (that a Right of Way does subsist) or Test B (that it is reasonably alleged to subsist) over the land.

18. To meet Test A the County Council has to be satisfied that on the balance of probabilities a Right of Way is more likely than not to exist over the land in question. Test B sets a lower standard of proof, and it is generally accepted to mean that the case has been established to the extent a reasonable person, having properly evaluated the evidence, could conclude there was a reasonable case that a Right of Way existed.

19. Although Section 53 enables the County Council to decide whether an Order should be made it does not help local authorities to understand what constitutes good or sufficient evidence of the legal existence of a Public Right of Way. This is set out in the Highways Act 1980, detailed below.

Highways Act 1980

20. Section 31 of the Highways Act 1980 states that:-

(1) Where a way over any land, other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. In this case the relevant period dates back 20 years from 2003 when the route was blocked by two padlocked gates.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use

the way is brought into question, whether by notice such as mentioned in subsection (3) below or otherwise.

- (3) Where the owner of the land over which any such way as aforesaid passes:-
- (a) has erected in such a manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and
 - (b) has maintained the notice after the 1st January 1934, or any later date on which it was created.

The notice, in the absence of proof of a contrary intention, is sufficient evidence to negate the intention to dedicate the way as a highway.

21. Therefore if the application and any other evidence shows there to have been uninterrupted, unchallenged use over a period of at least 20 years on a route which can be identified with some certainty and such use is of a kind which in itself amounts in law to a right of user (as opposed to a mere licence or being invited onto the land) then the law assumes that there is an implied dedication by the owner of the land of a right of way. This implied dedication can be rebutted if the owner can show that there was no intention to so dedicate the land as a Right of Way.
22. A landowner can do this by producing evidence that users were successfully challenged or asked to leave the land. A landowner can also obstruct the route to prevent public use of it and this will be sufficient to prevent the route becoming a Right of Way if done for that purpose. The interruption need only be of a brief period. Section 31 also allows the landowner to rebut any claim of a Right of Way by erecting prominent signs which clearly indicate that there is no Right of Way and that the land is not subject to any such user right.
23. The landowner's actions must be open and obvious to anyone who might use the way. It is not sufficient to tell other third parties or even their own solicitor they had no intention to dedicate the way. Therefore, diary records, correspondence or private journals are not sufficient evidence there was no intention to dedicate once public use under Section 31 has been established. The users must have been made aware of the landowners' intentions.
24. Therefore, it has to be determined if the usage claimed by the applicants or others is sufficient in itself to establish an implied dedication under the provisions of Section 31 of the Highways Act 1980. If so then it must be considered if the landowner has successfully rebutted any such implied decision.
25. On the evidence available the County Council must first decide if there has been use of the route by the public for at least 20 years uninterrupted and unchallenged prior to this being brought into question.
26. The County Council must then decide if that presumed dedication by the owner is affected by any action taken by the relevant owner during that time to

challenge or show by some sufficiently overt act that there was no intention to dedicate the way.

MAP EVIDENCE

Definitive Maps and Surveys of Leicestershire

27. The following surveys, draft editions and published editions of the Definitive Map have been investigated:-

Great Glen Parish Survey Map and Statement 1951 –
(National Parks & Access to The Countryside Act 1949)

28. Neither of the claimed routes are shown on the Survey Map or Survey Statement.

Definitive Maps & Statements of Leicestershire

29. Neither of the routes are included on any of the published editions of the Definitive Map from 1952 and 1957 nor the abandoned Review of the Definitive Map of 1980.

DOCUMENTARY EVIDENCE IN SUPPORT OF THE APPLICATION

30. The claimed routes are not shown on any historical County Atlases nor any old Ordnance Survey maps and therefore the only evidence in support of the application is evidence of use.

USER EVIDENCE

31. A User Evidence Summary Graph is attached as Appendix E. The applicant originally submitted 12 user evidence forms. During preliminary consultations 30 letters/emails were submitted in support of the application. The 30 correspondents were then invited to complete their own user evidence forms. Nine did so bringing the total number of submitted user evidence forms to 21.
32. *The Route* – All the witnesses identify the same routes for the alleged paths; A-B-C on the proposal plan (Appendix A) for alleged Footpath C109 and B-D for alleged Footpath C109a. Most of the user evidence statements have the same plan attached showing these routes. Some of the plans have been separately annotated by the witnesses.
33. The witnesses have all identified a route for alleged Footpath C109 starting from a junction with existing Footpath C13, running along the southern side of a field boundary, crossing the top end of Glen Gorse Spinney and then following a grass track out onto the Oaks Road.

34. Likewise, they have all identified a route for alleged Footpath C109a leaving alleged Footpath C109 and running down through the middle of Glen Oaks, out onto the southern spur of Oaks Road.
35. *Type of Use and Status* – The applicant has claimed both the routes as public footpaths and all the other 20 people state they have used them for walking. None refer to use of the path on a bicycle, horseback or in a vehicle.
36. *What were the Purposes of Using the Path?*: The witnesses describe a variety of activities that they carried out along the route, including walking dogs, walking for pleasure and recreation, collecting eggs from a local farm and taking the family for a walk.
37. *Bringing into Question* – The existence of these routes as rights of way was first brought into question when the applicant submitted his application in March 2018 as a response to a planning application. Neither path is blocked off, so none of the witnesses refer to the paths being closed or that they have stopped using them other than one witness who has moved away from the area.
38. The start date for counting back 20 years of public use is from the date of application; March 2018. The 20-year period thus extends back to 1998. Therefore, there needs to be evidence of members of the public having used the alleged paths as of right for 20 years prior to 2018, at least as far back as 1998.
39. *Is the 20-Year Rule fulfilled?* Fifteen of the correspondents claim use of the path for walking for periods of 20 years or more prior to 2018. Ten of those witnesses claim use in excess of 30 years and of those, five claim use for 40 years or more. The longest period claimed is 46 years, dating back to 1972. (See graph attached as Appendix E).
40. The 20 Year Rule is fulfilled by a significant number of the correspondents and it would appear the path has been used for significantly longer than the minimum 20-year period.
41. *How frequently was the path used?* The most frequent use of the path was claimed to be approximately 24 times a month (6 times a week). The least frequent use was described as being a fraction less than 2 times every month. The average use was approximately 7 times a month.
42. *Were other Users Seen?* Only one of the 21 witnesses stated that they did not see anyone else using the paths. The other 20 said they had seen other people using the paths, some walking dogs; others with family. One witness stated they lived in a house overlooking the field and saw people walking the path every day.
43. *Tenants/Employees*: None of the correspondents state they were tenants or employees of the landowner.

44. *Was Permission given?* None of the witnesses state they were given permission to use the path.
45. *Was public use without interruption?* None of the witnesses make reference to their use of the paths being interrupted.
46. *Actions by the landowner/Agent to Prevent Use – Verbal:* None of the witnesses recall ever being challenged or deterred from using the routes by the landowner or his agents.
47. *Actions by the landowner/Agent to Prevent Use – Structures:* 19 of the witnesses make no reference to any structures being placed across the path to deter use. One of the 19 witnesses does recall that there used to be a gate at the boundary of the western most field and Glen Oaks Spinney about 20 years ago, but he describes this as only being closed when there was stock in the field. Therefore this does not appear to have been a structure installed specifically to prevent pedestrian access but rather for the purposes of stock control.
48. The remaining witness states there was a low fence around the early 2000s, at the point where alleged Footpath C109a exits Glen Gorse Spinney onto Oaks Road (south). However, he also describes this structure as a 'style'(sic).
49. *Actions by the landowner/Agent to Prevent Use – Signs:* None of the correspondents recall seeing any deterrent signs on the route over the 20-year period or beyond.

Characteristics of the Path

50. *Structures Facilitating Use of the Path:* 19 of the witnesses recall no structures that facilitated use of the path such as gates, stiles or bridges. One does recall the aforementioned stock gate, and he and another witness also recall there being a stile at point D on the proposal plan (Appendix A) at the southern end of alleged Footpath C109a where it comes out on Oaks Road.
51. *Width:* What width do the witnesses describe? Users describe the width in varying manners. The consensus would seem to be approximately 1.5 metres for alleged Footpath C109a and 1.5 metres for alleged Footpath C109 widening to the full width of the grassy track running between Glen Gorse Spinney and the Oaks Road (north).
52. *How well defined is the alleged path?:* All of the witnesses, bar one, describe the paths as well defined.
53. *Surface of Path:* The surface of alleged Footpath C109 from Footpath C13 to Glen Gorse is described by the witnesses variously as grass, flattened earth, well-trodden down and uneven soft earth. Where this path then leads from the wood along a grass track it is described variously as, soil, possibly concrete base, hardcore/tarmac, and field track. The surface of alleged

Footpath C109a, through the wood, is described variously as beaten earth and “woodland floor”.

54. *Maintenance and Repairs:* None of the witnesses had observed any maintenance of the paths but one stated that the farmer always left an unploughed headland along the field edge of alleged Footpath C109 for people to walk.

Summary of User Evidence

55. Fifteen witnesses described use over twenty years and a proportion over 40 years. Therefore, it seems reasonable to conclude that the 20-year rule has been well met.
56. One witness recalls a gate and a stile in place on the alleged paths; another the same stile, but none of the others do. None of the witnesses describe any physical barriers in existence that specifically prevent use of the paths, so public use does not appear to have been forced.
57. None of the witnesses describe being tenants of the landowner or ever having received permission to use the paths. It therefore seems reasonable to presume use was as of right rather than by permission.
58. None of the witnesses recall being verbally deterred from using the path or seeing any signs stating the routes were not public rights of way and or would not be dedicated as such. It appears from the user evidence, therefore, that the landowner took no overt action to prevent public use or to negate the potential for the presumption that they have been dedicated as public rights of way.

Therefore, the user evidence appears to provide cogent evidence that these two paths are public footpaths.

Evidence of Rebuttal (Objections to the Application)

59. There is one party objecting to the proposal. Mr. and Mrs. Robinson of Wrenbury Farm, Smeeton Westerby, Leicestershire, LE8 0QJ., who are being represented by Mr. Ian Mitchell of Oakham.
60. Originally all the land affected by the application for the Definitive Map Modification Order belonged to Mr. and Mrs. Robinson. They purchased the land in or around 1980. Subsequently the field proposed to be developed for housing, lying between the village and Glen Oaks Spinney (through which the section of alleged Footpath C109 between points A and B on the proposal plan runs) was sold to Miller Homes Ltd. of First Floor, Miller House, 2 Lochside View, Edinburgh Park, Edinburgh. EH12 9DH.

61. Miller Homes have not objected to the Definitive Map Modification Order and have made allowance for it in their permitted development plans for their site (See Appendix C). (The path they propose to provide would be 2 metres wide).
62. Mr. and Mrs. Robinson have retained ownership of the remainder of the land affected by the application in question. This includes Glen Gorse Spinney and the agricultural field to the east of it.
63. Mr. and Mrs Robinson's representative, Mr. Mitchell, wrote formally to Leicestershire County Council to object to the application on 9th August 2019. His letter is attached as Appendix F. He wrote again by email on 21st February 2020, in response to a further invitation to put forward evidence on behalf of his clients. This email is attached as Appendix G. With his correspondence he also submitted photographs which are attached as Appendix H and invoice from a fencing contractor, attached as Appendix I.
64. Extracts of the points made by Mr. Mitchell are reproduced below in italics together with the comments of the Rights of Way Officer.
65. *"The field was fenced for many years using an electric wired fence in addition to conventional hedgerows. The electric fence kept livestock within the field, and also discouraged any walkers or anyone else from attempting to access the land in question"*.
66. None of the people who have filled in user evidence forms recalled any structures preventing or discouraging use of alleged Footpath C109 and none recall an electric fence. If such fencing was erected, it does not seem to have acted to discourage use by the public. It seems unlikely that it was not noticed by people walking the path, but it is perhaps possible that they might have easily stepped over it, and thus not registered it as an obstruction.
67. *"Glen Oaks Wood presented a different problem to my Clients as the woodland presented itself as an attractive walk for local people, as well as being an area where children and others wanted to play from time to time. My Clients were aware of the problem and took steps to construct fencing at the point marked D on the Plan, thus preventing any access into Glen Oaks Wood. On occasion my Clients would repair damaged fencing which had been removed possibly by walkers or cyclists seeking to enter the Woodland. In September 2013 my Clients had new fencing constructed by their contractor WGT Cooper, and I attach an invoice dated 6/9/13 for that work.*

That fencing was very quickly destroyed, sawn off, and pushed to one side of the entrance into the Woodland".
68. The receipt referred to above is attached as Appendix I and a photograph showing the fence that Mr. Mitchel describes as being sawn off is attached as Appendix H (photographs A, B and D)

69. None of the people who completed user evidence forms recall coming across structures that prevented access onto alleged Footpath C109a. However, two of them describe something of a stile at the same location as the fence described by Mr. Mitchel.
70. Photographs of the location and the officers' site inspection would attest that a short section of fence does seem to have been in existence in the past at this location, and this corroborates the invoice from Mr. W.G.T. Cooper. It does not appear to have been a very high fence as two alleged users described it as a stile, one describing it as being low. It isn't clear that it necessarily effectively discouraged use or caused a suspension or interruption of use by the public. It does appear that at some point after installation it was removed by a person or persons unknown.
71. *"my Clients have never accepted the use by members of the public of any part of their land as either private or public footpaths, and from time to time they have taken steps to prevent such use. The policing of such matters is very difficult for any landowner to do, but in my opinion if he takes steps from time to time, he is showing that he does not agree to the creation of prescriptive rights of way, for which any user would have to show not less than 20 years continuous overt and unchallenged use. In my submission that is not the case here, because the landowner has attempted to stop such use acting reasonably and without taking any extreme measures, in order to prevent the creation of prescriptive rights".*
72. The landowners do seem to have acted at least once to prevent access to alleged Footpath C109a at the southern entrance of Glen Oaks Wood when they employed WGT Cooper to install a fence. However, Mr. Mitchel has not described any other specific actions that his clients took to negate a claim for public rights of way. There is no reference to any other barriers or signs being erected or maintained at the northern end of Glen Oaks Spinney where alleged Footpath C109a departs from alleged Footpath C109, nor where C109 starts or comes out onto the northern section of Glen Oaks Road by the field gate. Nor do any of the witnesses in support of the claim refer to ever coming across such barriers or seeing any signs.
73. *"I also wish to draw to your attention the consequences potentially of making such an Order in respect of woodland where there will be significant ongoing maintenance issues which would fall to LCC to discharge, and also public liability matters as well. My Clients wish to point out that many of the oak trees within Glen Oaks Wood are now approaching the end of their natural life and it is expected that branches and also trees will fall on a regular basis which will always present a potential hazard to users of the woodland. My Clients cannot be expected to provide public liability cover in such a situation where an Order may have been made to open up the area to members of the public."*
74. *"The trees are old and despite tree preservation orders will either fall down in the fullness of time, or need to be felled professionally. As an example, I*

would not allow young children to access the woodland now because I believe they would be at potential risk of suffering injury.”

75. While it is appreciated that the owners of the Spinney may have genuine concerns about liabilities, this is not something that the potential Order Making Authority can consider. The application relates to a claim that a public right of way already exists through the wood and therefore merely seeks to have the route formally recognised and added to the Definitive Map as a public right of way. Therefore, the Authority must consider the evidence for and against the existence of rights of way and cannot consider other issues such as this one when determining whether or not to make an order.
76. *“At point D on the plan the muddy path exits the wood and goes directly into Oaks Road. There is no pavement there and from the wood, a walker is on the roadway in a couple of steps. When I was there several cars drove past me at speed, and in my opinion a driver cannot see a walker about to exit the wood, and a walker cannot see any car approaching. The dangers are obvious, and with children or dogs an accident could easily happen.”*
77. As aforementioned the Authority can only consider the evidence for and against the existence of rights of way and no other issues. However, if the route concerned is a public footpath and has been used for many years then it would appear it has been used safely by the public thus far.
78. *“My clients believe that the land between points B-C and B-D on the plan should not be added to the Definitive Map for these reasons, and for the other reasons already submitted to you. If there is a determination to create public footpaths then it is my client’s opinion that the route shown by a green dotted line, within the Miller land would be a far safer route altogether”.*
79. *“The existing footpaths C13 and C14 provide walkers with excellent access towards Burton Overy and Kings Norton and Gaulby. C14 can be accessed simply by walking along Oaks Road from Coverside Road, and then walking into the well signposted field where C14 starts. The route A-B-D would provide no more than a pleasant, but potentially dangerous, short recreational loop which could easily be replicated by walking along existing footpaths and roadways (Coverside Road and Oaks Road).*
80. *The proposed footpath from B-C is unnecessary and an intrusion onto privately owned farmland, gated, which provides the landowner with access into his land. C13 and C14 do the job perfectly well and In my submission these proposals do not reasonably and properly create any new public footpaths which add anything to existing paths shown on the Definitive Map.*
81. The Order Making Authority must confine its deliberations solely to evidence for and against the existence of the alleged rights of way. Therefore, it cannot consider how the proposed rights of way fit into the wider network of paths, or whether they might be considered useful additions or not. Nor can it consider other proposed alternative routes, though formal diversions could be considered at a later time.

82. If the Authority decided, on the basis of evidence, to make an order adding these paths to the Definitive Map it would not be creating or imposing new public rights of way on the landowners; rather it would be recognising that they already exist.

Summary of Objections

83. If a landowner or landowners wished to negate a claim that rights of way exist on their land there are a number of actions they can take to do so.
- a) A landowner can challenge or ask people to leave the land concerned.
 - b) They can also obstruct the route or routes to prevent public use of it. This would be sufficient to prevent the route becoming a Right of Way if done for that purpose rather than say for stock control. The interruption need only be of a brief period.
 - c) Section 31 of the Highways Act 1980 also allows the landowner to rebut any claim of a right of way by erecting prominent signs which clearly indicate that there is no right of way and that the land is not subject to any such user right.
 - d) If signs are repeatedly removed or if it is impractical to maintain such signs then under the provisions of Section 31 (6) of the Act, the landowners can deposit with the County Council, a Statement and plan relating to the land concerned, together with a declaration stating there is no intention to dedicate any rights of way.
84. The information so far provided by the landowner's representative makes no reference to any challenge made of the public using the paths. It provides no evidence of the erection and maintenance of disclaimer signs. There is no record of a Section 31 (6) Deposit of Plan and Statement.
85. It is stated that an electric fence was used in the field nearest to the village for stock control and also be for prevention of access by the public. However, none of the witnesses refer to this fence so it does not appear to actually have prevented, deterred or interrupted use.
86. Evidence has been submitted for the erection of a fence across the entrance to alleged Footpath C109A at Glen Oaks Road. It is not clear whether this fence prevented or interrupted use. None of the witnesses refer to being prevented from using this alleged path because of it. Two witnesses describe it as a stile, one of them, a low stile, so it is possible people simply took to climbing over it.
87. Even if the view is taken that this fence interrupted public use of this path, then it would not fully negate the claim that there is a public footpath at this location. The fence was erected in 2013. However, witnesses describe use going back as far as 1972 and 19 of the 21 witnesses claim use prior to 2013.

Seven of the 21 still claim 20 years use prior to 2013. 20 years uninterrupted use would still apply.

Site Survey by Leicestershire County Council

88. A site survey of the alleged public footpaths was made by officers on 22nd May 2018. An aerial photograph of the location is attached as Appendix D and site survey photographs and a survey plan are attached as Appendices J and K.
89. During the survey no disclaimer signs were observed. No obstructions to free passage to pedestrians were noted.
90. A clearly worn and visibly well-trodden pathway was observed running beside the growing crop between points 'A' and 'B' on the plan. At point 'B' this path diverged from claimed Footpath C109a which turned south to head through the Spinney. Meanwhile the route of alleged Footpath C109 widened out to form a farm track as it emerged from the top end of Glen Gorse Spinney. This grassy track then continued along the field edge before emerging through an unlocked field gate out onto Glen Oaks Road (north) at point 'C'. See photographs 1 to 7 in Appendix J.
91. Starting from point 'B', alleged Footpath C109a was observed to follow a well-trodden slightly winding path through woodland until reaching point 'D' on the plan. At this point it passed a solitary round light brown timber post on the left-hand side and a short section of remnant fencing terminated by a wooden post on the right. The gap was approximately 80 centimetres wide. There appeared to be no sign of this opening being fenced off or blocked in the recent past. There were no notices at this location.
92. It was noted that several pathways branched off the main route and swung off deeper into the trees then re-joined the main path at various places further along. These paths generally were narrower and more overgrown and do only appear to be secondary to the main path.
93. At the time of the survey the surfaces of both paths were dry and easy to walk. Between points A and B on alleged Footpath C109 it was observed that the passage of feet had worn away the grass and a very slight amount of the crop to a width of about 30 centimetres. In places the vegetation had been trodden flat to a width around 1.5 metres. From point B onwards, the same path followed a 3-metre-wide (plus) grassy track.
94. There was a clearly visible path through the woodland. However, plotting this route on a plan is made difficult because it cannot be seen in aerial photographs owing to the dense tree canopy. The county of Leicestershire has recently been surveyed from the air using LIDAR. LIDAR technology 'sees' through tree cover to reveal the surface of the landscape below. This technology gave clues as to the course of the trodden path under the trees

allowing it to be established that the route shown on the proposal plan, is within reasonable tolerance as accurate as it can be.

95. The trodden-out width of alleged Footpath C109a through the woodland was in the main less than one metre wide but in several places widened out to 2 metres or more.
96. No cycle tracks in the earth were observed on either path, so current use appears to be confined to use by pedestrians.
97. The visual evidence from the site survey suggested that the routes have been heavily used by the public in recent years.

Consultations

98. Consultations were carried out between the 18th July 2019 and 16th August 2019. User groups, the Parish Council, District Council, utility companies and landowners were all consulted. There were no objections other than the ones referred to above.
99. The Parish Council responded by email in support of the application. This is attached as Appendix L.
100. Miller Homes Ltd., the owners of the field to be developed through which part of alleged Footpath C109 passes, made no response to the consultation.
101. During this consultation period 30 letters and emails from members of the public were received, supporting the application. Some provided information concerning use of the paths concerned and reference to seeing other people using the path while others merely gave their endorsement of the application. Generally, the information provided was not specific enough to add great weight to the evidence, so therefore, these thirty correspondents were later written to, and invited to fill in user evidence forms.
102. As previously mentioned in paragraph 31 above, nine of the thirty correspondents submitted completed user evidence forms, and these are considered in the sections above relating to user evidence.
103. No other relevant responses to the consultation were received. All responses can be viewed in background papers if required.

Conclusion

Has the claimed route been used for a period of 20 years or more?

104. Evidence provided within the twenty-one user evidence forms suggests that counting back from the date of application in 2018 there has been well over 20 years of public use as of right. Even if the use was interrupted in 2013,

and it is not clear that it was, there is still evidence of 20 years use prior to that, going back as far as 1972.

Was use as of right without forced entry or secretive?

105. Use was not secretive as the landowners' representative states his clients were aware of it.
106. There is a question as to forced entry. An electric fence is stated to have been placed across alleged Footpath C109. However, none of the users of the path recall a fence having interrupted their use.
107. There is also evidence that a fence was erected across the southern entrance of alleged Footpath C109a in 2013. This appears to have been removed by a person or persons unknown. This could be construed as forced entry. However, of the twenty-one statements submitted only two make reference to this structure and they describe it as a stile, which suggests that the majority of users either climbed over it or it was removed before they walked the path and were not aware of its existence. Therefore, there is not any firm evidence of forced entry by the wider public.

Have the landowners demonstrated by the erection and maintenance of signs or other acts an intention not to dedicate the routes as a public rights of way?

108. No disclaimer signs were noted on the site visits. None of the witnesses refer to signs in their statements and the landowners' representative offers no evidence of signs being erected either.
109. There is no record of a Section 31 (6) Deposit of Statement and Plan being submitted to the Highway Authority to negate claimed public rights of way.
110. Therefore, on the balance of evidence it does not appear that the landowners have taken sufficient actions to demonstrate an intention not to dedicate the routes as public rights of way.

Objections

111. The landowners raise several objections; the safety of the public while in the wood, landowner liability and road safety issue when exiting the wood. Although understandable concerns, they are not ones that an Order Making Authority can consider when determining an application for a Definitive Map Modification Order. Nor are issues relating to the suitability or desirability of the paths or suggested alternatives.
112. This leaves two relevant issues; the electric fence said to have been erected across alleged Footpath C109 and the fence erected across alleged Footpath C109a. These issues are addressed fully in paragraphs 65-70, 85-88 and 107-108 above. Suffice to say it is not possible to state with any degree of confidence that they acted to prevent or deter public use or interrupted public use or that one can conclude the public forced entry onto the land.

Recommendation

113. On balance of evidence it seems reasonable to allege that public rights of way on foot do exist along the claimed routes and furthermore, it can also be reasonably concluded that such rights of way do exist. Therefore, both Legal Test A and Legal Test B aforementioned (Paragraphs 17 and 18 above) have been met.
114. In conclusion, it is recommended that a Definitive Map Modification Order should be made adding Footpaths C119 and C119a at Glen Gorse Spinney, Great Glen to the Definitive Map and Statement as public footpaths.

Equality and Human Rights Implications

115. The E.U. Convention Rights and the Articles that set out the rights of individuals (such as respect for family life) can impact on certain decisions where the County Council is making decisions or setting policy of public access and Rights of Way issues. However, this impact is confined to the exercise of those powers and functions the County Council has to exercise discretion about proposals that require a balance between the benefits of the scheme and the potential adverse implications for landowners and others.
116. On Rights of Way applications, proposals to divert a Right of Way or to use statutory powers to compulsorily create a new Right of Way should have reference to the Convention of Human Rights and take these issues into account when deciding if that scheme should proceed.
117. However, applications submitted to the County Council under the Wildlife and Countryside Act 1981 for a Definitive Map Modification Order have limited discretion. These applications do not create new footpaths etc, but only grant recognition of existing Rights of Way that, in this case, may have been deemed to have been dedicated by the landowner, even if only by default. For that reason, arguments based on a potential breach of any of the Article rights have no relevance to such applications. The Secretary of State has indicated that objections based on such rights will not be regarded as relevant.

Background Papers

1. 21 x User Evidence Forms
2. User Evidence Table
3. 30 Letters/emails in support
4. Extract from the Existing Definitive Map and Statement
5. Tree Preservation Notice

Appendices

- Appendix A – Proposal Plan No. M1134-C
- Appendix B – Completed Application
- Appendix C – Development Plan No. 19_01478
- Appendix D – 2017 Aerial Photograph
- Appendix E – User Evidence Graph V2
- Appendix F – Initial Letter from Craig Mitchell
- Appendix G – Email from Craig Mitchell
- Appendix H – Mr. Mitchell's Photographs
- Appendix I – Fencing Invoice
- Appendix J – Site Photographs
- Appendix K – Site Survey Plan
- Appendix L – Letter from Great Glen Parish Council