



DEVELOPMENT CONTROL AND REGULATORY BOARD

22 AUGUST 2013

**PROPOSED ADDITION OF FOOTPATH ON LAND BETWEEN
FRISBY ON THE WREAKE AND ASFORDBY**

REPORT OF THE CHIEF EXECUTIVE

PART A

Purpose of the Report

1. The purpose of this report is to seek the Board's approval of this Application for the addition of a footpath to the Definitive Map of Public Rights of way between Frisby on the Wreake and Asfordby.

Recommendation

2. It is recommended that an Order be made to add a footpath to the Definitive Map as shown on the Plan No. 919 attached as Appendix A to this report.

Reason for Recommendation

3. The evidence appears to show that the route meets the criteria in Section 53 of the Wildlife and Countryside Act 1981 for a public footpath.

Equal Opportunities Implications

4. None discernable

Background Papers

5. Chief Executive's File HTWMT/1745

Circulation under the Local Issues Alert Procedure

6. Mr J. T. Orson, CC

Officer to Contact

7. Alan Glenn, Chief Executives Department
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PART B

8. The Application

- 8.1 The application to have the claimed footpaths added to the Definitive Map has been submitted to the County Council by Rachael Spencer and Melody Mitchell “with support from Frisby and Asfordby Parish Councils and local residents”. The application has been objected to by the Landowners who have submitted their own case which is also referred to in this report.
- 8.2 The route of the claimed footpaths is shown on Appendix A which is a copy of the map attached to the application.

9. Description of the route

- 9.1 Public bridleway H37 which is an existing right of way runs along the eastern perimeter of the site. The claimed route which is the subject of this application joins public bridleway H37 as it enters the site from Frisby on the Wreake and leaves the site to go on to Asfordby. The claimed routes follow well worn paths around two lakes (“Frisby Lakes”). Part of the route follows a vehicle access track between the two lakes, part runs along the top of the embankment which retains the water and separates the lakes from the River Wreake. There are four handgates along the route and two stiles at either end of a pedestrian bridge over the weir. There are numerous other “less well used routes” on the site. There are signs on the site referring to fishing rights and two signs are displayed - one at either end of the southern stretch of the route referring to a prohibition of horse riding.

10. Planning History

- 10.1 Sand and gravel extractions had a great impact on the landscape of the River Wreake and surrounding villages. Pre-dating the extraction off Hoby Road, the villages of Frisby on the Wreake and Asfordby were linked by a right of way (now known as bridleway H37) which crossed the railway, former canal, river and two agricultural fields.
- 10.2 Planning permission for a sand and gravel extraction on the site was first granted in 1946. Permission was renewed on different parts of the site throughout the 1950s and 1960s until in June 1970 an application was made to use the land for recreational purposes. Planning permission for the sailing club house was granted in March 1974.
- 10.3 The application appears to have been prompted by recent proposals to redevelop the land which have now in fact been put off following further events. Proposals to develop the land for the siting of a luxury Lodges Park was put forward in agreement with the landowners and led to works being carried out on site

including the building of bunds and cutting of channels. Public access to the route, insofar as it has been claimed by the public, was then brought substantially to an end and although the proposed redevelopment of the land has now apparently been reconsidered and the owners of the land have, as part of public statements, indicated a wish to see the land returned to a use associated with recreational and angling facilities, access along the route is now physically difficult.

11. **Setting the application**

- 11.1 The essence of the case being put forward by the applicants is that at least since the early 1970s public access around the lakes has been taking place without interruption or challenge. Their case therefore is that this use has raised a presumption that in law a public right of way exists.
- 11.2 Although the applicant and those who supported the application refer to gates and stiles, there is no reference that these were forming a substantial physical barrier to the use of the routes in question.
- 11.3 The objector's case is that the land has been held substantially within one family ownership (the Cowman Family) for at least 70 years. They have been in control of the land since that time and have become increasingly concerned about public access. Their case to some extent relies on the apparent abuse of the right claimed by local residents and particularly in relation to dog fouling. Although the owners of the land have now indicated a wish to look at other recreational uses, they have stated that they are not prepared to allow public use of the land due to the need for site security and also public liability insurance issues.
- 11.4 In order to establish the best evidence which could be made available for the Board's consideration, both the applicant and the owners have been asked to submit their cases in full.
- 11.5 The applicants rely upon user statement forms from local residents claiming use since the early 1970s, although not before then on any substantial basis.
- 11.6 The owners point out that no reference is made in the applicants' user statements to the closure of the footpath arising from the Foot and Mouth crisis in 2001 nor to the signposting which the Council displayed during this time. None of the applicants have made reference to the occasions that the claimed footpath was in part submerged by water and difficult to traverse. However the letter from the Environment Agency dated 24th January 2013 states that from its Overspill Records Frisby Lakes has exceeded 3.51m on 65 days between 19 May 1994 and 27 September 2012 (the duration of their records) There would be no more than 12" (300mm) of water on the overspill

- 11.7 This report summarises the case of the applicant and the objectors. There is a substantial amount of evidential material, full copies of which have been placed in the Members Group Rooms.
- 11.8 Members may wish to note that although the landowners have been allowed access to all documentation of the applicants (suitably redacted in terms of the Data Protection Act 1998) the owners have not been prepared to offer the applicants the same facility.

12. **Legal considerations**

- 12.1 The application is submitted to the County Council under the provisions of Section 53(5) of the Wildlife and Countryside Act 1991. This procedure allows any person to apply to the County Council to have a right of way added to the Definitive Map and Statement (a Definitive Map Modification Order or 'DMMO'). The application and evidence must satisfy the County Council it meets the tests. Under Section 53(3)(c) which are the discovery by the Authority of evidence which (when considered with all other relevant evidence) available to them shows -
- i) 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.
- 12.2 Members therefore have to be satisfied when they consider the evidence available, whether the case for the application satisfies either of the 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.
- 12.3 Test A and B arise from the well known case of Regina v Secretary of State for the Environment ex parte Bagshaw, Regina v same ex parte Norton and Bagshaw (1994).
- 12.4 To meet Test A members would have 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 would think that the case for the existence of a footpath has been reasonably alleged. Members will appreciate that this is a somewhat more indistinct area of law and often causes some considerable difficulty. Generally speaking, authorities are generally reluctant to make an Order on the basis of Test B only, if only because the Secretary of State in considering any appeal against the making of an Order, it is likely only to apply Test A and a stricter standard of proof.

- 12.5 However, although Section 53 helps the County Council to decide whether an Order should be made it does not provide any assistance in terms of whether a highway has been shown to exist or of the status claimed (i.e. a footpath).
- 12.6 Those provisions are to be found only in the statutory provisions of Section 31 of the Highways Act 1980 or the common law which predated the statutory provision.
- 12.7 Section 31 of the Highways Act 1980 states:-
- (1) Where a way over any land, other than a way of such a 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.
 - (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 a notice such as is 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 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.
 - (4) 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.

- (5) 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 a 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.
- (6) 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. It is the users who must be made aware of the landowners intentions.
- (7) 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 consider if the landowner has successfully rebutted any such implied decision.

12.8 The common law also provides for the dedication of a way, i.e. implied dedication arising from longstanding public use but on a more restricted basis. Generally speaking, the common law of England may provide a short period of use sufficient to create a right of way but also requires a higher level of proof that landowners intended to dedicate a way.

12.9 For most purposes, it is sufficient to consider the provisions of Section 31 of the Highways Act 1980 to see whether the evidence meets the statutory tests which are set out in that provision.

13. **Evidence in support**

13.1 The evidence provided in the User Evidence Forms has been provided by the applicants in support of their application. The names of the individual witnesses have been removed due to Data Protection Principles but full copies of the User Evidence Forms have been placed in the Member Group Rooms for perusal.

13.2 The evidence forms are dated 2011 and therefore the times given by individuals as to their use of the footpath counts back from that time.

- 13.3 Under the provisions of Section 31 Highways Act 1980, the Board has to decide whether it is appropriate to take back the time when claimed use started because of the provisions to find a “brought into question” date for the purposes of deciding if there has been a sufficient period of 20 years. Generally speaking, that arises when the right to use a way is first brought into question by an act usually by the landowner to challenge such use. In this case, the case being put forward by the applicants are that only at the time when works began on site to prepare for the installation of the lodges was their use brought into question.
- 13.4 The Board will note that there are 33 evidence forms which refer to use of at least a minimum of 20 years on the route in question. Although users noted the existence of gates and stiles these were not said to have been locked nor does it appear that they impeded the use of the way in question.
- 13.5 It is important that persons believed that they used the way “as of right” not by permission as that would obviously indicate that the landowner had no intention to dedicate a right of way. Of the user evidence forms submitted two refer to use which may have been not “as of right”. Evidence form user 42 refers to such use being concessionary but does not explain what that means. User evidence form 43 refers to land being privately owned, and that consent for their use was granted by leaseholders.
- 13.6 A leaseholder of course would not have permission or authority to grant use of land as such consent could only have been granted by the owner of the land. However, members will note that the overwhelming number of persons who submitted a user evidence form believe they had a right to use the public right of way and that the action had been taken at the time to carry out works on the site, which included placing bunds and also erecting signs, was the first time that they appear to suggest that there is any open act of challenge to their right to use the way.
- 13.7 Works have been carried out on the land, some of which appear to have had the effect of preventing public access. Photographs of this and of the signage will be shown at the Board meeting.
- 13.8 When looking at the question of whether people believe they used a way “as of right” members will understand that this can be a complicated area of law. Obviously, the first persons who may have started to use the way in question may not have believed they had any right or at least they had no knowledge that such a right did exist for them to exercise. The law on this can be quite complicated but nevertheless when a body of people use a way in question over some years and do so in the belief that others have done so as of right and that they themselves are also exercising a like right the general

presumption would be that over a period of time people acquire such a right of user.

- 13.9 In that sense, it is not necessary that persons believe each and every occasion they are using a way that they are doing so “as of right” as the matter will not necessarily have come to their consideration. In most cases, people will simply use a way because they have done so for some time, and because they have seen others doing so and therefore believe that the way in question has some rights for them to exercise as members of the public rather than as guests or invitees of the landowner.

14. **Map and historical evidence**

- 14.1 The 1959 edition 1: 2500 scale Ordnance Survey Map shows sand and gravel extraction north eastern corner of the site. On the 1971 edition, 1:2500 scale Ordnance Survey Map the pits are shown as disused but no established tracks are illustrated. By 1987 the Ordnance Survey Map shows the site much as it is today with tracks shown between and to the south of the two lakes. Of the maps attached to the User Evidence Forms, 11 submitted matched the claimed route in all parts. 10 of the maps show slight variations in the route that people have used, particularly the form of site officer and the Sailing Club at the point where the south eastern end of the route joins bridleway H37. The lakes are linked to the River Wreake via a weir and there is a building on the southern perimeter of the site operated by the Environment Agency. A pedestrian bridge with step over stiles has been constructed over the weir.

15. **Objectors case**

- 15.1 The landowners have submitted a number of statements from individuals and copies of these have been placed in the Member Group Rooms. This report provides extracts of the more relevant parts and where appropriate a comment.
- 15.2 Solicitors for the landowners have also submitted a lengthy written Objection which includes an analysis of the evidence and also of the appropriate legal provisions that have to be applied to applications such as this.
- 15.3 Again, a copy of this written Objection has been placed in the Group Rooms for consideration. The main points raised in it are referred to in paragraphs 15 .9(ii) (a) – (k) of this report.
- 15.4 A number of the points raised in the objections are not relevant to the issues that the Board has to consider, because they are not the sort of reasons that ought to be taken into consideration when determining applications for definitive map modification orders.

- 15.5 The application has to be determined on the basis that at the time the right to use the path or paths was first brought into question there already existed a public right of way.
- 15.6 Therefore objections based on potential problems for the landowners with security, land management or insurance implications are not relevant to the decision that has to be taken by the Board. That decision depends on whether members are satisfied that the application submitted to the County Council provides sufficient and relevant evidence, even if only due to past use by the public, that a public footpath does exist and should be added to the definitive map.
- 15.7 Similarly, representations that the path would be of benefit to the public or would achieve better access to the countryside for the public must also be discounted as these are not relevant under the legislation on the key issue before the Board.
- 15.8 That key issue is in essence a narrow legal issue and the Board acts in a quasi-judicial capacity and its decision must depend solely on whether the application meets all the relevant legal and evidential requirements of section 31 of the Highways Act 1980 or alternatively the similar criteria contained in the Common law.
- 15.9 The Board is advised to read the statements available in full so that the full significance of these can be taken into account. Detailed extracts are also given in this report below with comments

i). **Viktorya Lazenby**

States she is the Managing Director of Celtic Lakes Resorts Frisby Limited.

She objects to the application for the following reasons:

a) **Wildlife conservation**

“The Wildlife and Countryside Act 1981 remains one of the most important pieces of wildlife legislation in Great Britain. Not only does it protect wildlife but also conserves areas of special scientific interest.

The entire area around Frisby lakes has been identified as a wildlife site at district level and surveys have been carried out relating to its botanical interest and its value as a wildlife habitat”

She further refers to the recovery of flora “ ...once the decline due to the randomly walked areas by local residents are now beginning re-establishment, particularly bird’s foot trefoil which is the food plant of common blue butterfly”

I see the closures of the said accesses as part of the management of the site specifically for wildlife benefits, along with the protection of the site boundary hedgerows, which again the local council put into place”

Comment: Although this point emphasises that the exclusion of public access is resulting in some wildlife protection benefits, this is not a valid or relevant reason for refusing an application that in fact demonstrates that this is a natural attraction for walkers over the years claimed in the application.

b) Dog fouling and the control of dogs

She comments that the management now operates a system of dog walkers signing in and out and complying with provisions such as dog leads, poop scoop bags and adhering to designated areas. She points out that a number of these dog walkers have signed a petition objecting to the application because of other dogs being let loose and not kept on a lead.

Comment: This is a land management issue and although the landowners also refer in other parts of their case about the undesirable loose dogs (on land where angling is a regular and active pastime) this is again not a relevant reason to refuse the application.

c) Security of both the public and the business

She states

“Crimes committed against businesses can have a very high cost. Valuable stock and equipment are lost, premises are damaged and staff morale can be affected. Although, rare, in the worst cases staff themselves can be injured or even killed. Therefore it makes sense to take appropriate security measures to protect our business. Currently, there are two businesses operating from Frisby lakes a) fishing and b) a luxury lodge park.

A clean and tidy environment gives a good and first impression and increases the feeling of security for staff and visitors. Our recent security survey which was undertaken in order to implement security measures showed that the biggest weakness was the perimeter and how someone could gain access to the premises both during the day and night. As we do not have 24 hr security patrolling the boundaries, the security survey proved the best way was to secure it by the best means possible and keep access to one entrance for the public which is to be opened and closed at the publicised times in order to supervise the well-being of footfall and our property.

Along with the security of the environment (land, water and life and keeping it free of litter, fires (lit by teenagers illegally drinking alcohol) and noise, it is our duty to ensure the well being of our visitors and paying anglers.

The biggest danger is the water. Any activity involving water needs measures of common sense and with again reference to our current policy, every visitor can be accounted for. This is especially significant in winter when individuals are tempted to walk on frozen, or apparently frozen stretches of water, which not only puts people's lives in real danger, but also the lives of their would be rescuers.

All aspects of Health & Safety would need to be readdressed. Signs that have been erected in the past (which one believes is documented in further submissions by others against this addition) were destroyed by those local to us and if one considers the amount of time, effort and money spent on these signs in order to keep the public safe from harm and aware of dangers, both by the Environment Agency and us, then these acts of vandalism demonstrate a lack of respect both for our business and authoritative bodies."

Comment: Again, these are land management issues that may arise from the consequences of public access but are not relevant.

However, the presence of signage during the relevant period of claimed use that could be seen by users as challenging the existence of any public right to access the land or the footpath as claimed by local residents could clearly be relevant. This aspect, with the additional comments provided by other individuals which is referred to in paragraphs (ii) (iv) (vi) (vii) and (ix) of this report, is covered further in this report and in the conclusions to this report (paragraph 19).

d) Effect on business

"Anglers visiting the park are not only local but come from afar. Repeat business is essential not only for us but for the local leisure and tourism industry as those from other counties stay in local bed and breakfasts and their families spend money in and around the town for the duration of a weekend. If the impression of the park is not a good one, then the simple fact is an angler will not return. The angling community is a prolific one and our reputation is currently being built as to one of the best carp fisheries in Leicestershire. One of the biggest "pet hates" of an angler is an uncontrolled dog and in general disturbance in and around the peg that they fish from. Dogs love bait and to have such annoyances as this, along with volumes of footfall passing makes for a very disappointing experience and in

essence just one incidence of this will deter an angler returning. Night time fishing is now, but wasn't before, one of our biggest assets due to the sheer serenity of the park, along with the security of being able to sleep without fear and the knowledge their car is safe and in a locked inaccessible car park. Again allowing said footpath would jeopardise this.

The Lodge Park is currently undergoing development and provisions have been put in place in order to segregate this area of the park in order to enhance its exclusivity. This segregation only consists of a 2-3ft high boundary which incorporates grass-snake fencing approved by the Council and was deemed appropriate as to not interfering with the aesthetics of the park, nor hindering the view of the lake from each lodge. Prices of the lodges start from £99,995 to upwards of £200,000 for those with lake frontage”.

She then refers to the park's two selling points as its location as a retreat and security.

Comment: Again, if the application does show a public footpath already exists then these issues associated with the business activities would not override the public rights to use a footpath within the site.

Conclusion

She concludes by stating

“On simple terms, Frisby Lakes allows public access via its main entrance to those wishing to use its facilities on a daily basis. One believes that this is more than adequate and the signatures on the petition signed by our visitors undeniably prove this. As a Council, one cannot also deny that the implications for their goodselves will be both monetary and time consuming regarding their responsibilities that changes to the definitive map will bring and I am positive these consumptions could be used elsewhere in the community and Borough as a whole”.

Comment: A number of Luxury Lodges that had been placed on site have now apparently been removed. It is believed that proposals to develop the site by Celtic Lakes Resorts Frisby Ltd have been abandoned although the reasons for that are unclear. The Company is not believed to have ever had legal ownership of any of the land.

In a press article, (November 22nd 2012) it is reported that the owners were said to have stated that they were now *“...focussing on bringing the lakes back to life and getting our fishing community back up and running”.*

ii. **Richard Cowman**

- (a) His statement is attached to this report as Appendix C. It is a detailed statement and refers to a number of points where he states that public access was either under challenge (because of signs) or because the land was secured against trespass or simply not walkable as claimed because of major works as part of the Melton Mowbray Flood Scheme reservoir and, later, has been subject to regular flooding as part of a scheme to relieve pressure on the River Wreake.
- (b) Some of the salient points made by Mr Cowman are that he is an owner of part of the land and also a Director of two companies that also have some landownership interests. He refers to his knowledge of the site since 1961.
- (c) He later says he was on the site on a daily basis between 1961 to 1975 and less often up to 2012 but was still a person with overall responsibility for overseeing the site.
- (d) He states quarrying started in 1946 and then moved across the land. Firstly, this started on land on the north of the site and within a circuit A-B-C-D-E to A which can be seen on the plan RC1 attached to his statement.
- (e) He states that this land was worked between 1946-1960 and latterly on land between B-C-B in the years 1960-1980.
- (f) The plan (RC1) is a plan that was produced by the County Council for consultation purposes and that itself was taken from the plan submitted with the application.
- (g) He states public access was actively prohibited through sign posting and fencing/gates to protect members of the public and the machinery.
- (h) He says between 1961 to 1997 the site was a working quarry and Ready Mixed Concrete Works. He says signs were displayed around the site and he refers to aerial photographs of that and that these signs were checked by the Mines and Quarries Inspectorate.
- (i) Between 1961 -1986/87 he says it was impossible to walk around the western lakes as there were steep banks and dykes (Attachment RC3 to his statement). In addition there was a scrap yard on the land and he produces a title plan (again RC3 to his statement).

- (j) He then refers to the Melton Mowbray Flood Scheme Reservoir. His comment is that only after this work and the provision of the stone road which now runs between the two lakes (B-D on his Attachment RC1) by the National Rivers Authority in the mid 1990's was it possible to gain access.
- (k) He then refers to signs around the land and it appears to be his recollection that these signs had been in place from the time of the quarrying activity and thereafter, but have been removed and vandalised.

iii. **Steven Hearn**

States that he worked on the land in the former Old Quarry Repair Shed and Concrete Works at Hoby Road {Asfordby} from 1991 to 2009. Knew of the site previously.

He says he often was sent to challenge dog walkers whom he believed were not allowed on the site. He says people ignored signs that were there.

iv. **David Hearn**

Says he is an ex-tenant of Frisby Water Parks Ltd and worked at the Repair Shed and Concrete Works at Hoby Road from 1973 to 2009.

He states that from 1973 to 1987 people were unable to walk round the lakes as there was not a circular walk, until Severn Trent carried out the Reservoir Construction for the Flood Scheme of Melton Mowbray.

He says over the years signs were put up around the quarry asking people to keep out but they did not last long.

Walkers were challenged but would become aggressive and would claim that "they had their rights".

v. **Mr & Mrs Carney – Members of Staff**

Refer to an event when a dog walker was asked by a Mr Chay Jackson, Fishery Manager, to leave the land (24th June 2011).

vi. **David Irving**

States he is an ex-tenant of Frisby Water Parks Ltd having traded as Pit Stop garage from 1978 to 2009 at Hoby Road Asfordby.

He says he was told by Mr Cowman, Senior, that he “did not want any walkers on the area as the dogs were always in the fishermen’s bait boxes”.

He says many signs were put over the years around the site and signs were placed at all gateways and entrances stating “Private keep out-private land” and “Private fishing-keep out no day tickets”.

He also refers to chains being taken off gates or people taking the gates off their hinges, allowing sheep to escape.

vii. **Derek Jones**

Says he has been a regular angler at the lake for forty years. He says "when we fished there we never saw anything like fifty or sixty 'movements of the public, more likely ten at most with no control over the numbers of people and dogs walking around the lakes". He also refers to problems for angling if there was a footpath and theft of fishing equipment.

viii. **Mark Slade – Fishing Manager and Local Resident**

States where the attached has (been) marked blue (D-E) , D to B and B to C are closed by flood waters every time the river gate is closed by the Environment Agency. He says in his opinion it is dangerous to walk round the lakes when the gate is closed as there is no early warning system.

ix. **Statement on behalf of the Staff of Celtic Lakes Resort from Developer to local residents**

A further statement has been submitted on behalf of the management of the site. A copy has been placed in the Member Group Rooms.

The statement refers to criminal damage on site involving buildings etc and also to a number of incidents involving confrontations between staff and walkers. However, as the references to damage would not be relevant to the issue to be determined by the Board (whether a footpath already exists) and the apparent challenges/confrontation are more recent and these appear to post date the time when the objectors state that they had already (by the erection of signs and challenges) brought the rights of the public to use the route as a footpath in question.

16. **Petition**

16.1 A petition with 81 signatories which was collected by the landowner was submitted by the landowners legal advisors on 19th September 2012. The petition is entitled “Petition against a

public footpath around Celtic Lakes Resort Frisby Hoby Road, Asfordby, Leicestershire, LE14 3TL.

17. **Legal submission**

- 17.1 The landowners' legal advisors have also submitted a case against the application. Again a copy of this is available in the Member Group Rooms.
- 17.2 Some of the more significant points are set out below with a comment where appropriate.
- a) The extract from the Ordnance Survey map of the area from 1986 shows no paths other than the existing public footpath H37 in the vicinity of the application site.
 - b) Clause 3 of the contract produced as attachment RC6 (*to Mr Cowman's statement*) indicates Severn Trent's stated intention was to flood the land from time to time and a rough plan showing the location of spillways where water floods on to the land is attached as Appendix 6. Also, a letter (again in Appendix 6) from the Environment Agency confirming the number of days that the Frisby Storage Reservoir (as the lakes are known) had been used since 1994. This was 490 days which equates to over 25 days per annum.
 - c) With other land uses and the presence of gates and stiles the solicitors doubt that people could have used the whole route as claimed.
- 17.3 On the legal criteria that applies to these applications, the solicitors point out (in particular) that use of a way must be "as of right" and therefore "not by force, nor stealth nor licence of the owner".
- 17.4 This is recognised as a fundamental requirement of the law relating to the acquisition of public rights and therefore any access to a way that involves the need to break down fencing or to use force to get onto the land will defeat a claim that the use would be recognised as a right that had been legitimately acquired.
- 17.5 Also, the use of force to get onto or move along a path would seem to be clear evidence the landowner had no intention to dedicate a way as a public footpath.
- 17.6 The solicitors refer to the statements submitted by the landowners (referred to in paragraphs 15(9)(i) (vii) and (ix) above) as showing that walkers were causing damage to gates, and signs together with the challenges to walkers and the abusive responses of walkers. If so, the solicitors assert that

these events show the landowners had no intention to allow a public footpath to be created.

17.7 In essence, the solicitors case is that not only was the route claimed physically impossible to use over the years claimed but also that in so far as use by the public was sufficient as to raise a rebuttable presumption under section 31 of the Highways Act 1980 that the landowners had done enough over the years to demonstrate they had no intention to dedicate the land for the use of the public as a public footpath.

18. **Consultations**

18.1 Gas and electric suppliers, water and sewage undertakers and providers have been consulted and have confirmed that they do not have any apparatus which would be affected by the proposal.

18.2 User organisations have been unable to provide any further evidence but both the Ramblers' Association and Leicestershire Footpath Association are fully supportive to the proposal.

19. **Conclusion**

19.1 The application is supported by a sufficient number of people who have provided User Evidence Forms to satisfy Section 31 of the Highways Act 1980 that there has been use by the public for a minimum period of 20 years. The number of forms and what they have said appears sufficient to show that people believed they were exercising a public entitlement to use the routes around the lakes as a footpath.

19.2 Their use of the routes for walking even with dogs is a use that the law recognises as a legitimate activity when using a public footpath. They should not, of course, have allowed their dogs to be loose off the footpath and onto adjoining land but that is a matter between them and the owner of the land.

19.3 Under section 31 what the landowner has to show is sufficient evidence that there was no intention by him to dedicate the land as a footpath.

19.4 The question what is sufficient should be determined on the balance of probabilities. That is, does the Board consider that it is more likely than not that the landowners did enough to show they opposed the use.

19.5 Here, the landowners claim to have produced evidence that use of the way was so interrupted because it was not physically possible to have walked the route as claimed.

- 19.6 In particular, that since the Flood Scheme was completed there has been flooding of the route claimed, as the gates have been opened to allow water to flood the lakes area as part of a Storage Reservoir.
- 19.7 The strongest evidence for the landowners is the evidence of those who had been active on the land since the end of the quarrying activities (approximately in 1971) or any period of use cannot amount to 20 years use (that could satisfy the test under section 31 of the Highways Act 1980) because such use has been constantly challenged by alleged confrontations with walkers. The landowners are saying there was no single period of 20 years since then during which such use was not interrupted or unchallenged.
- 19.8 If the claimed signs were removed by people, the landowners could have relied on section 31 (5) to inform the County Council that this was happening. This was not done.
- 19.9 There is no doubt, however, that a sign erected on land that states "Private land" is enough in law to show there is no intention to tolerate what would be trespass. This often occurs alongside paths to stop people straying. The difficulty of course is deciding whether there were such signs at the relevant time and why they were not seen by users, as the only signs recorded by walkers appear to be signs that were intended to convey information, such as no horse riding, but not directed at walking as such.
- 19.10 The Board may consider that the evidence provided by the landowners about the history of the land, the consequences of the Flood works, the erection of signs and the consistent references to walkers being challenged, are sufficient to show that, on a balance of probabilities, the landowners, knowing that local people would be present on their land, did enough to try to control or stop this activity, if only because of the nuisance caused by loose dogs.
- 19.11 It is considered that the evidence does not satisfy Test A as set out in Norton -v- Bagshaw, because the application does not, on the balance of probabilities, show that a public right of way does subsist over the land.
- 19.12 Test B permits still allows the County Council to accept the application provided that the evidence shows that a right of way has been reasonably alleged to subsist over the land.
It is considered that the uncertainty about the physical availability of the route during the relevant years (1971 to 2011) and the case presented by the landowners to protect their land is nevertheless sufficient to show there was an implied intention to dedicate a path by the landowner and it is recommended that an Order be made to add a footpath to the Definitive Map as

shown on the Plan No.919 attached as Appendix A to this report.

Resource Implications

20. There are no discernible resource implications.

Crime and Disorder Implications

21. There are no apparent crime and disorder implications.

Appendices

Appendix A - Plan showing the route of the claimed footpath

Appendix B - 1959 1:10,000 Ordnance Survey Map

- 1971 1:10,000 Ordnance Survey Map

- 1987 1:10,000 Ordnance Survey Map

Appendix C - Statement of Richard Cowman

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