

Local Members' Interest	
Jeremy Pert	Eccleshall

Countryside and Rights of Way Panel -

Wildlife and Countryside Act 1981

Application to realign Public Footpath 34 Swynnerton Parish

Report of the Director of Strategy, Change and Governance

Recommendation

1. That the evidence submitted by the applicant and that discovered by the County Council is sufficient to show that an error on the Definitive Map of Public Rights of Way for the District of Stafford exists
2. That an Order be made to amend the Definitive Map and Statement of Public Rights of Way for the District of Stafford so as to realign the line of PF 34 Swynnerton Parish to that shown and marked as application alignment on the map contained in Appendix C and which is the subject of this application.
3. That as part of the Order an amendment be made to the Definitive Statement of Public Rights of Way for the District of Stafford so as to more accurately and properly describe the line of Public Footpath 34 Swynnerton Parish.

PART A

Why is it coming here – what decision is required?

1. Staffordshire County Council is the authority responsible for maintaining the Definitive Map and Statement of Public Rights of Way as laid out in section 53 of the Wildlife and Countryside Act 1981 (“the 1981 Act”). Determination of applications made under the Act to modify the Definitive Map and Statement of Public Rights of Way, falls within the terms of reference of the Countryside and Rights of Way Panel of the County Council’s Regulatory Committee (“the Panel”). The Panel is acting in a quasi-judicial capacity when determining these matters and must only consider the facts, the evidence, the law and the relevant legal tests. All other issues and concerns must be disregarded.
2. To consider an application attached at Appendix A from Mr and Mrs Dixon for an Order to modify the Definitive Map and Statement for the District of Stafford. A copy of the current Definitive Map is attached at Appendix B showing the current line of Public Footpath 34 Swynnerton Parish. The effect of such an Order, should the application be successful, would alter the line of Public Footpath 34 Swynnerton Parish onto the line marked as application alignment as shown on the map contained in Appendix C.
3. To decide, having regard to and having considered the Application and all the available evidence, and after applying the relevant legal tests, whether to accept or reject the application.

Background

1. Public Footpath 34 was added to the Draft Definitive Map and Statement of Public Rights of Way after the Parish Survey undertaken in 1951. No objections to its inclusion were received and therefore it was included in the First Definitive Map and Statement of Public Rights of Way. The path has subsequently been shown on all editions of the Definitive Map and Statement of Public Rights of Way since that time.
2. The line of PF 34 Swynneton Parish is currently shown as passing through the property known as Gorse Cottage to the front of the buildings as shown on the map at Appendix B.
3. At present the line of the path physically follows that shown as being the alleged correct alignment on the map attached at Appendix C

Evidence submitted by the applicant

4. The applicant has submitted in support of their application various documents purporting to show that PF34 is currently shown incorrectly on the Definitive Map. A submission statement made by their agent summarising the various points that these documents illustrate or show is attached at Appendix D.
5. Copies of various Ordnance Survey maps have been submitted to show the physical features of the land which includes the line of a footpath recorded by the Ordnance Survey.
6. The 1880 OS map (Appendix E) shows a double dashed line running through Plot 1654 under the tree cover and along what would now be the drive to Gorse Cottage. It appears to sweep towards the south-eastern edge of the plot. Reference is made to the root of a hedge running along the side of the drain or ditch that the path joins.
7. The drain runs between and divides the plot 954, where Gorse Cottage is now located, from Plot 1654. The drain continues along the rear of Plot 1655, The Gorse, separating it from Plot 955 which is a narrow strip of land between The Gorse and the field to the rear, Plot 959, before joining the road adjacent to the Smithy.
8. It would seem from the map that Plot 955 is open from the highway adjacent to the Smithy and may constitute an entrance. There is a dashed line, indicating an unfenced path, running south from The Gorse to join with this plot. Similarly there is a dashed path running directly south from the site of Gorse Cottage to join Plot 955. Other paths are shown running around the buildings of both properties. These paths are internal to these properties but the southerly routes terminate at the junction with Plot 955.
9. A footpath is shown crossing the field Plot 959 to the rear of The Gorse and is consistent with the line of PF34 although it does not follow the field edge.
10. The 1901 OS map (Appendix F) shows similar physical features with a couple of exceptions along with changed plot numbers. The paths around the buildings are no longer shown with the only internal paths depicted being those running to join the narrow land strip referred to in 7 above.
11. The path from the plot containing Gorse Cottage, Plot 913, now shows a path running directly south that is comprised of solid lines. This would indicate that the path is fenced or enclosed in some fashion. Nonetheless it is in the same position as the 1880 map.
12. The path running west from the road to Gorse Cottage plot is now shown clear of any trees passing clearly through Plot 1501. The absence of the vegetation shows that the path curves towards the southeast joining the drain.
13. The 1924 OS map (Appendix G) is again broadly similar to the 1901 OS map, apart from changes in plot numbers, but with two significant differences. The depictions of the paths that were inside the building plots are no longer shown.
14. The major difference is that the path running across the east field, Plot 928, does not terminate when it joins the narrow land strip, Plot 929. It continues into that plot and is

shown by a dashed single line appearing to form a headland path with the boundary of Plot 913, which contains Gorse Cottage. It directly joins Plot 1502 crossing over the drain but does not have a definite line extending to that plot.

15. In the 1959 OS Map (Appendix H) the paths within the plots containing the buildings are no longer recorded. The footpath is shown running from the west through plot 8956 towards the Plot 9356 which contains Gorse Cottage. There is a dashed line showing the path that terminates at the drain. To the rear of Plot 9251, The Gorse, the strip of land between this and Plot 9849, the east field, has a dashed line running along part of its length. This commences at the boundary of Gorse Cottage land following a southerly line and terminating on the road adjacent to the building entitled the Smithy on the 1880 and 1901 maps. At the boundary of Gorse Cottage land the dashed line curves slightly towards the east field, Plot 9849. The footpath is shown commencing at the boundary of the east field but again is not depicted as a headland path.
16. The 1963 OS map (Appendix J) is similar in aspect to the 1959 OS Map although a couple of the plot numbers have changed. Further the buildings comprising the Smithy have increased in size and coverage. The footpaths are shown in the same manner.
17. The applicant has provided copies of extracts from the Swynnerton Tithe Map and Apportionment of 1848 along with that from Eccleshall of 1845. Copies are attached at Appendix K.
18. The Swynnerton Tithe Map shows the land encompassing Gorse Cottage as Plot 1111 which in the accompanying Apportionment is listed as a house and garden. As this falls on the edge of the area covered by the Tithe it only shows those properties and their environs that are relevant.
19. The Tithe Map seems to show that there is an access from the highway along a strip of land to the rear of The Gorse to the site of the plot containing Gorse Cottage. It is shaded in the same colour as roads and highways that are depicted on the remainder of the Tithe Map
20. On the Eccleshall Tithe Map the remainder of the land in the vicinity is shown and comprises The Gorse as Plot 18 which is referred to as house and garden in the Apportionment. Plot 19 is listed as a blacksmiths which would correlate with being described as The Smithy on the OS maps referenced above in paragraphs 7 onwards.
21. The strip of land to the rear of Plot 19 is coloured in the same shade as roads and highways shown on the Tithe Map with a spur crossing into the Gorse Cottage land.
22. A copy of the Definitive Statement which describes the route has been provided and is attached at Appendix L. The description of the path on the statement is brief and only lists the starting point and terminus.
23. The applicant has included a copy of the Parish Survey record card for Swynnerton which was undertaken in 1951. A copy is attached at appendix M. A copy of an extract from the accompanying map is attached at Appendix N.
24. The survey card records a description of the route as set down by the persons carrying out the survey for the parish of Swynnerton and thus the record commences from the Parish boundary as it was then. At that time this ran along the drain which separated The Gorse from the field to the west as described in paragraph 7 above and shown on the various OS maps.
25. The description states that the path enters the parish from the Norton Bridge Road at the small brook by the Gorse Cottages. The reference to the brook would seem to apply to the drain referenced above.
26. The description states that the path is obstructed and there are no stepping stones. The next sentence states that the path crosses the private pathway to the Gorse Cottages

before accessing the field called Brick Kiln. The remainder of the description does correspond with the line of the rest of the public path.

27. An aerial photograph (Appendix P) has been submitted although the exact date of it is uncertain but is claimed to be before 1987. In the photo there would appear to be no entrance to Gorse Cottage from the road as currently exists along the driveway unless this is covered by the hedge. The hedge in front of Gorse Cottage has no break in it to allow for a path to enter from in front of the cottage to the field.
28. A clearly defined path can be seen running at the edge of the field passing along in front of Gorse Cottage's hedge through a clear break in the north/south hedge and then appearing to sweep to towards the north around Gorse Cottage's boundary.
29. A copy of the transcript from a walking guide produced by the County Council has been provided at Appendix R. the description refers to the path turning right at the end of the drive before reaching the cottage. The accompanying map does appear to indicate the route does not cross into the cottage's immediate curtilage.
30. The submission by the applicant's agent makes reference to all the above material. This can be summarised as follows.
31. First, that none of the maps referenced, including the Tithe maps. show a path crossing into Gorse Cottage as depicted on the current Definitive Map and Statement of Public Rights of Way.
32. Secondly, that the path, once it reaches the boundary of Gorse Cottage, does in actuality turn towards the south onto the strip of land that runs to the rear of The Gorse before turning again into the field it currently passes through. This strip once formed an access to Gorse Cottage from the road adjacent to The Smithy as mentioned in para 7 above.
33. Third, that the 1951 Parish Survey supports this interpretation as it states that the path crosses the private pathway to Gorse Cottage, a clear reference to the entrance referred to above.
34. Fourth, that the aerial photo clearly proves that the line of the hedge to the front of Gorse Cottage, as well as that which runs parallel to the road, has no break in it and that the path never passed into Gorse Cottage environs.
35. Fifth, that the walking survey supports the parish council survey in that the description mentions turning right before reaching Gorse Cottage. This would have taken the walker onto the rear strip of land mentioned above.

Research undertaken by the County Council

36. Officers have not conducted research into historical documentation at the County Council's Record Office as the applicant has provided copies of all the relevant Ordnance Survey maps.
37. Officers have looked at the aerial photos held in the records office dating from circa 1946 but the resolution is too low to make out any real physical features to either support or refute the claim.
38. Officers have obtained copies of the original parish surveys that added the route to the Definitive Map and Statement of Public Rights of Way from the Rights of Way section. The path was contained in two parishes in 1951 and was referenced as PF 71 Eccleshall Parish and PF 34 Swynnerton. Copies of the extracts from the parish survey cards and the accompanying maps are attached at Appendix S.
39. There was no accompanying description of the route of PF 71 Eccleshall Parish on the survey card.

40. Copies of the first Definitive Map of Public Rights of Way for Stone Rural District dated 1954 and the 1969 Definitive Map are attached at Appendix T.

Comments received from statutory consultees

41. As of the compilation of this report no responses had been received.

Comments on Evidence

42. Ordinarily the Ordnance Survey maps are approached with caution and are of little use in establishing public rights of way especially with regard to the status of any physical feature that they show. The same could be said of Tithe Maps and Awards; more often than not they simply provide evidence of a physical feature rather than of status.

43. This application is not concerned with the existence of a public path; that is not in dispute, it is rather the line of that highway that is being put to the question. Nor is the Definitive Statement alleged to be incorrect, it is only the Definitive Map that it is claimed is in error.

44. In this instance it is records that depict, record or indicate the physical line of a route that are of use and therefore both the OS maps and the Tithe can be of assistance along with the material provided by the parish survey that included the highway on the Definitive Map and Statement of Public Rights of Way.

45. The line of the path once it reaches the field to the rear is not in contention, the issue is whether the route passes through the curtilage of Gorse Cottage to the front of the property or whether it turns at the boundary and onto the alignment claimed by the applicant.

46. For the sake of clarity, the line shown on the Definitive Map and Statement of Public Rights of Way will be referred to in this report as the "definitive line" whilst the claimed alignment will be referred to as the "claimed way".

47. An examination of the maps, both Tithe and OS, shows that there was an entrance to The Gorse and Gorse Cottage from the road. This entrance was adjacent to the Smithy and in respect of Gorse Cottage was located to the rear of The Gorse and separated the field from The Gorse.

48. This would appear to be the only entry to Gorse Cottage until the current drive was constructed. Your officers have enquired as to when the drive to Gorse Cottage was constructed. The applicant has been unable to provide a definite date for this but there was a conveyance dated 1981 in which rights of access were granted to allow for a drive to be constructed and an entrance from the road made. Accordingly, the drive could only be said to date from after that time.

49. From this the inference can be drawn that the only route over the land to the west of Gorse Cottage that could have existed in 1951 was the footpath from the road.

50. It is clear from the available maps that there was a footpath to the boundary of Gorse Cottage land but none of these maps show the line continuing into and passing by the buildings of Gorse Cottage.

51. The path seems to have been subsumed on the mapping into the area of land containing the drain or ditch and then into the strip of land between The Gorse and the rear field. The 1924 OS map does show a continuation of the path from the rear field into the land to the rear of the Gorse and to the south of Gorse Cottage, as described in para 14 above.

52. This latter feature would support a contention that the path ran from the road towards Gorse Cottage, turned southwardly and into the land to the south of Gorse Cottage and then into the field, never passing through the land of the latter. In effect on the line of the claimed way rather than the definitive line.

53. The Parish Survey that was carried out took place in two parishes as the parish boundary at the time passed along the boundary of the land at Gorse Cottage. The Eccleshall parish survey is of little use in this instance simply recording that the path commenced at the county road north of The Gorse and terminated at the parish boundary north of The Gorse.
54. Conversely the Swynnerton parish survey does have a detailed description of the path on the rear of the card. In respect of the line of the path the crucial element is contained in the third sentence which reads, "*crossing the private pathway to The Gorse Cottage access to Brick Kiln Field is over a low fence*".
55. This indicates that the path runs over the pathway leading to Gorse Cottage. At this time, in 1951, the only egress to Gorse Cottage was through the strip of land to the rear of The Gorse. There was no entrance to Gorse Cottage from the road to the west where the drive now runs. Accordingly, the writer must have been talking of a path running to Gorse Cottage along that strip of land.
56. The 1924 OS map does show a double dashed line running from the road along the strip of land to the rear of The Gorse which might indicate the pathway to Gorse Cottage running through this piece of land. If that were the case then it might be the pathway mentioned in the parish survey description.
57. Further there is no mention of passing through Gorse Cottage land but rather moving directly into the field from the private pathway via a low fence. This would take the line of the path onto the route of the claimed way as opposed to the definitive line.
58. The description would also correspond more closely with the detail in the OS maps especially in the case of the 1924 map which shows a path crossing the strip of land in front of Gorse Cottage.
59. The extracts of the maps that accompanied the parish surveys are at too large a scale and the marks made too imprecise to draw any useful conclusions.
60. In the aerial photograph there is a break in the field hedge that runs southwards which is where the low fence may well be located. It would certainly tie in with the description. The line of the worn track that can be seen would also more closely correlate with the description than the definitive line.
61. With regard to the walking circular not much weight can be attached to this material although it could be said to reflect the wording of the survey. It also reflects the situation on the ground and so could be said to be a summary of the physical features that exist rather than being supportive.

Comments on Draft Report

62. Mr Beeston, the owner of Green Gorse Cottage, which is the southernmost property shown on the maps, submitted comments on the original report. These and the accompanying photographic attachments are included at Appendix U. For ease of reference and clarity Mr Beeston's attachments are referenced as Photo rather than appendix.
63. References are made within this material to disputes over the ownership of land, the sale of the property, rights of way signage and other matters. Whilst this is pertinent and relevant to the two landowners it is not applicable to the question in front of the Panel, where does the correct line of the path lie. As a result this material will be disregarded and not commented on by Officers.
64. In his response Mr Beeston has provided three statements from local people attesting to the line of the route being that shown on the current Definitive Map and Statement of Public Rights of Way. These are at Photo A, D and H.

65. Mr Peace (Photo A) states that he lived at Green Gorse Cottage from 1957 to 1970 and attests that the route was at that time on the definitive line, that is, through the front garden of Gorse Cottage. He has provided a sketch to illustrate this, a copy is attached at Photo B.
66. Mr Foxley (Photo D) states in his letter that he is a long-standing resident and at one point in time rented the fields in the vicinity of Gorse Cottage. He contends that the path ran approximately 6 feet from the front of Gorse Cottage, passed through the hedge and then into the rear field continuing towards Yarnfield. A sketch of this is contained within his letter.
67. At Photo H is a letter from a Mr and Mrs Hughes who state that they used the route from 1976. At that time the route passed directly in front of the cottage windows which they felt was an invasion of privacy. When the route was moved they thought that this had been a diversion carried out by the County Council.
68. The issues raised surrounding the sale of the property by the applicant are irrelevant when considering where the correct line of Public Footpath 34 lies.
69. Mr Beeston refers to a ROW officer meeting them on site in 2013 who informed them that the line of the path had been moved, supplied a copy of the Definitive Map showing the definitive line passing through Gorse Cottage and that he was entitled to block the path on their land.
70. There is also reference to the various contacts with the ROW department and the material that is in their possession. Officers have made enquires of this material and it relate to the fact that the line is disputed and that there have been numerous dealings with this issue for over 15 years. There is no material within that archive that would assist in determining where the correct line is.
71. There are also Photos showing the block paving which now covers the brook or drain. Mr Beeston makes reference to ownership of the land over which this paving runs as well as alleged encroachment onto land in other ownership and a dispute at the Land Registry. This material does not relate to the line of the path although it could be said to indicate changes to the physical topography of the area. The question of the ownership of the land does not have any bearing on where the path lies and so this material will be disregarded.
72. There is a reference to Appendix H, the 1959 OS map, stating that this shows no right turn from the driveway. The appendix is summarised at para 15 above.
73. Mr Beeston states that Appendix P, the aerial photo, referenced at para 27 above and commented on at para 60, is unclear and there is no date provided. Further that the circular walk, Appendix R, summarised at para 29 and commented on at para 61 is unclear and undated.
74. Appendix T, the copies of the Definitive Map referenced at para 40 and commented on at para 59, Mr Beeston considers do not show the area in detail.
75. There is a reference to planning permission granted for works at Gorse Cottage. Within the application responses from the Ramblers Association and SCC ROW section raised no objections provided the path was kept open. Mr Beeston contends that these comments would not have been made had the path been in its current position; that is on the claimed way as the works would not have affected it. This would only have been the case if it was on the definitive line.
76. Mr Beeston refers to Photo L which shows part of the hedge forming the boundary between the two properties. The vegetation is sparse and Mr Beeston contends that this is because the path ran through the hedge at that point.

77. Leaving aside all the other references to the sale and purchase of Gorse Cottage Mr Beeston makes reference to the signage. He states that this should have been erected by the ROW section and that the finger post was removed.
78. Mr Dixon, the applicant, was given the opportunity to comment upon Mr Beeston's submissions and did so. A copy of the reply by his representative and the rebuttal is attached at Appendix
79. The response focuses upon the issues surrounding the ownership of the land, any proposed sale and the opposing arguments as to what was or was not said or done by either party. Additionally, Mr Dixon's representative asks for the dismissal of Mr Beeston's evidence as it is alleged that part of it is incorrect.
80. Mr Taylor, Mr Dixon's representative, refers to the three statements made in Mr Beeston's submission and referred to at paras 65 to 67 above. He states that they are not open to cross-examination and so may be regarded as having less worth. He also queries Mr Peace's (Appendix U Photo A) statement as being factually incorrect. Finally he questions the accuracy and independence of Mr Foxley's evidence (Appendix U Photo D) as he is alleged to be a close friend.
81. Reference is also made to Photo L with the alternative explanation that the sparsity of growth may have been due to intervention by their children or that it has simply died off.
82. As to the planning permission Mr Taylor puts forward the argument that had the path been on the definitive line then a temporary closure would have been required to protect members of the public. The fact that the comments were that the path should remain open are in his opinion indicative that at that time the path was on the claimed way.
83. Finally, Mr Taylor has submitted copies of the search that was carried out at the time of the property purchase in 1986. This he contends supports Mr Dixon's case that the line has been on the claimed way for a number of years and that this weakens any argument to the contrary. He also argues that despite the search plan not being in line with the Definitive Map there must have been grounds for the district council marking the route on the claimed way as opposed to the definitive line.
84. Mr Beeston was given the opportunity to comment upon the above and a copy of that reply is attached at Appendix W. Again there are references relating to the ownership of land, exchange of land and any proposed sale. This will be discounted.
85. Mr Beeston refers to the evidence given by Mr Foxley and Mr Peace stating that the former has been provided as a consequence of being a farmer of the adjacent land with the attendant subsequent knowledge. As for Mr Peace he is making reference to the ditch not the filled in culvert.
86. There is reference to the boundary of Gorse Cottage having been moved, a factor that could result in the path being on land that is in disputed ownership. However it is not contended that this has resulted in the path being moved.
87. Mr Beeston has also attached two photos showing what he states is Gorse Cottage showing the path in front of the building and the wicker gate. He also advances the argument that the explanation for the gap in the hedge has no basis.
88. A copy of Mr Beeston's further representations was forwarded to the applicant's agent who questioned the clarity of the photos and whether they did indeed show Gorse Cottage.
89. Since the report was originally circulated Swynnerton Parish Council have responded stating that they are given to understand the path has been moved and wish to see it reinstated on the definitive line. A copy of their response is attached at Appendix Y.

Comments on all the available material

- 90.** The question that is to be answered in this application is what is the correct line of the path? Two sections of it can be said to be in no doubt as in the map at Appendix Z. From the road, Point A, to the brook or drain, Point B, is accepted. From the field to the rear, Point C, and thence north easterly towards Yarnfield is again not in doubt. It is the line between Points B and C that is in contention.
- 91.** Since the first report was circulated a great deal of comments and further material has been introduced and this needs to be addressed.
- 92.** With regard to the issues that both Mr Dixon and Mr Beeston have raised in respect of land ownership, any sale, the question of what has been said by one party and so forth, this is material that is outside the scope of the Panels' deliberations. As such it must be disregarded. Similarly the request by Mr Dixon's representative referenced at para 79 above has no bearing and is not a suitable matter for consideration. It is not for the panel to decide upon the merits or demerits or the truth or veracity and probity of one party's arguments or contentions in relation to those disputes or to rule that one side or the other has acted improperly. It must contain itself to evidence relating to the path's alignment. To do otherwise would involve the Panel in deliberations that do not appertain to the question at hand, the correct line of the path and are outside its remit.
- 93.** The planning permission that has been mentioned does not provide any assistance. Both arguments presented have merit. If the line of the path was on the claimed way then it is true that it would only be marginally affected; if on the definitive line more so. Notwithstanding whatever the position actually was, one part of the path was affected nonetheless, that leading from the road to Gorse Cottage. Any work would have had an impact upon this section. Further should the route need to be temporarily closed that is not a matter for the local planning authority but one that is within the remit of the highway authority, the County Council. The fact that none appears to have been applied for and that the user organisation had no great concern does not lend support to either case.
- 94.** Nor do the various photos purporting to show Gorse Cottage. None can be said to date from either 1951 or before. If they are later then the situation they show cannot be said to reflect the correct line as they could support either argument.
- 95.** Concerning the ROW officer who met Mr Beeston on site as mentioned in para 69 above the statement the officer made is correct, the definitive line is shown passing through Gorse Cottage not through the adjacent land. Accordingly Mr Beeston is entitled to close that line off as it is not a path shown to be a public highway on the Definitive Map and Statement of Public Rights of Way.
- 96.** The Definitive Map and Statement of Public Rights of Way are set out in legislation as being conclusive evidence of what they show. They cannot be amended or altered unless by a legal order or legislation. The County Council has two roles in relation to the Map and Statement. Firstly, in its role as Highway Authority it has a duty to keep the public highways clear and open for use. In its capacity as the Surveying Authority, it has a statutory duty to keep the map up to date and in the case of applications make Orders to amend the Map and Statement where this is proven to be required.
- 97.** Where there is a dispute over the existence of a path, or the correct line, as in this instance, and a s53 application has been made, the courts have said that the Council ought to more properly decide the latter application before seeking to enforce what is shown on the Map and Statement.
- 98.** A great deal of the material held by the ROW section is in respect of the above, where does the line lie and the dispute between the two landowners over this issue. As stated above this question has been in contention for over 15 years and none of the material that has been collected over that time provides evidence of whether the

definitive line or the claimed way is correct. It is because it cannot be said with certainty that the Definitive Map is correct that no action has been taken. As a consequence the Rights of Way Section's file on this path is of no assistance.

99. The three statements provided by Mr Beeston do support the argument that the definitive line is the correct one and that it has been moved at some point since. However, there are discrepancies between them. The two that have knowledge close to 1951 when the route was added are Mr Pearce and Mr Foxley.
100. Mr Peace states he was tenant at Green Gorse Cottage and maintained the hedge and ditch during that period from 1957 to 1976, a period of 19 years. In the sketch drawn by him (Appendix U Photo B) he shows the line of the path entering from the brook into the grounds of Gorse Cottage through a wicker gate, proceeding at a diagonal, exiting into the land between Gorse Green Cottage via another wicker gate and thence into the rear field over a stile.
101. Mr Foxley, (Appendix U Photo D, includes a bridge over the brook before entering into Gorse Cottage's environs via a gate where it then passes along the front of the house before once more crossing into the land to the rear of Green Gorse and over a stile into the field.
102. The difference is that there is a bridge over the brook which is not mentioned in any other documentation. Whilst this discrepancy is a minor one there is no mention in the parish survey of any street furniture or bridge. The survey card (Appendix S) states that the path over the stream has no stepping stones. In addition the way is obstructed by a fence, the description then says that the route crosses the private pathway to Gorse Cottage and the access to the rear field is over a low fence. If the route passed through the path next to the cottage there is no mention of that unless the words "private pathway" is intended to have that meaning. However, the wording is "private pathway to" which may be more suited to the argument in para 55 above.
103. Additionally the sketch drawn by Mr Foxley and Mr Peace would mean that the route passed through two gaps in the hedge around Gorse Cottage and only then over a stile into the field. Yet the parish survey mentions that the path is obstructed at point A by a fence and then mentions no gap, fence or any other hindrance until it crosses over the low fence.
104. One explanation could be that there was no need as the entrance to Gorse Cottage was along the rear strip of land and that there was no hindrance crossing from Gorse Cottage onto the path that led to it. that could be said to match the description as much as the alternative in para 55.
105. The fact that in 1951 there was no mention of stiles in the description or of any other street furniture is not indicative that the route drawn by Mr Foxley and Mr Peace did not at some latter stage have such installed. If this was the case then this would have taken place only after the draft definitive map became the first definitive map which would have been some time in the early 1960's. the intervening years between the conclusion of the Parish Survey, the subsequent issue of the draft map and statement until the first map and statement became conclusive was taken up with appeals against omission, inclusion or status. Accordingly if this evidence is correct in all its details then this may have arisen some time after the original survey.
106. It could be said that the evidence from 3 local people and the physical features such as the gap shown in Photo L at Appendix U do lend support to the contention that the definitive line was at some point physically along the one shown on the current map. If that is the case then it could be that this is also incorrect. The current map shows the line crossing in front of Gorse Cottage and exiting into the rear field and not turning at an angle to take into the land to the rear of Green Gorse as drawn by Mr Foxley and Mr Peace.

107. There is also the allegation that the boundaries of the properties have altered. Leaving aside the merits of whether this is lawful, an encroachment or indeed has actually occurred, if this is the case then the physical characteristics of the area as it is may not assist. It raises an element of doubt.
108. The only way to ascertain if there has indeed been an alteration would be to undertake a full survey and compare that to the older maps. That may prove inconclusive as the boundary line as drawn on the maps can be a metre to one side or the other which may well render any survey useless.
109. The old Definitive Maps at Appendix T are of little assistance and as Mr Beeston pointed out provide little detail. At best it could be said that a route exists in the vicinity but the line drawn in 1951 is too thick to be of use.
110. The OS mapping has been analysed in para 47 and following paragraphs. The maps do not show the line of the path crossing into the environs of Gorse Cottage and thence into the rear land.
111. That leaves the Parish Survey to weigh into the mix and the interpretation that may accord with the lack of a continued line into Gorse Cottage on the OS is that advanced in para 55.

Burden and Standard of Proof

112. The application is made under under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in the second part of s53(3)(iii) of the Act, that any other particulars contained in the map and statement require modification.
113. With regard to the status of the routes, the burden is on the applicant to show, on the balance of probabilities, that it is more likely than not, that the Definitive Map is wrong. The existing depiction of the line of the path must remain unless and until the Panel is of the view that the Definitive Map is wrong.
114. If the evidence is evenly balanced then the existing depiction of the route currently shown on the Definitive Map prevails.

Summary

115. The courts have considered amendments to the Definitive Map and Statement of Public Rights of Way in many instances. In the case of deletions they have ruled that the initial presumption for any court or tribunal must be that the Definitive Map and Statement of Public Rights of Way are correct.
116. They have gone on to say that the standard of proof is indeed the balance of probabilities but that in considering that balance some substantive evidence must be found or provided if it is to outweigh that initial presumption
117. That approach is carried over into those applications that seek to amend the particulars; something of sufficient weight to tip the balance of probabilities away from that initial presumption must be placed into consideration.
118. The Planning Inspectorate has also issued guidance on the approach to be taken and this reflects the position taken by the courts. The evidence of itself must be persuasive.
119. The question is not where the path was at any point since the Parish Survey was carried out but rather where was the line of the path that was recognised as existing at that point in time. It should be borne in mind that the 1949 Act was not creating new rights but recognising these that were already in existence.
120. If one strips away the material to be disregarded there is one hand the evidence of 3 local residents and the current Definitive Map. On the other there is the interpretation

that the applicant has placed upon the OS mapping and the wording of the Parish Survey.

121. The material that predates the parish survey is the OS mapping and it is to that combined with the wording of the survey that your officers have directed their attention to.
122. That wording when considered with that map evidence supports the contention that the parish survey intended that the way should not pass through the curtilage of Gorse Cottage but rather follow more closely its boundary.
123. In isolation the material of itself does not have sufficient cogency but rather it is when looked at in combination that it is more than strongly suggestive that the current definitive line is incorrect.

Conclusion

124. In light of the evidence, as set out above, it is your officer's opinion that the evidence is sufficient to find, on the balance of probabilities, that the line of Public Footpath 34 Swynnerton Parish is incorrectly depicted on the Definitive Map and Statement of Public Rights of Way. It has to be said that it is your officer's opinion that this is finely balanced.
125. It is the opinion of your officers that the County Council should make an order to amend the line of Public Footpath 34 Swynnerton Parish to reflect the line claimed by the application.
126. Your officers also consider that the Definitive Statement should also be amended in that the Statement should more accurately and properly describe the line of the path.

Recommended Option

127. To accept the application based upon the reasons contained in the report and outlined above.

Other options Available

128. To decide to reject the application as not having provided sufficient evidence to overturn the initial presumption that the Definitive Map is correct.

Legal Implications

129. The legal implications are contained within the report.

Resource and Financial Implications

130. The costs of determining applications are met from existing provisions.
131. There are, however, additional resource and financial implications if decisions of the Registration Authority are challenged by way of appeal to the Secretary of State for Environment, Food and Rural Affairs or a further appeal to the High Court for Judicial Review.

Risk Implications

132. In the event of the Council making an Order any person may object to that order and if such objections are not withdrawn the matter is referred to the Secretary of State for Environment under Schedule 15 of the 1981 Act. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence.
133. The Secretary of State may uphold the Council's decision and confirm the Order; however there is always a risk that an Inspector may decide that the County Council

should not have made the Order and decide not to confirm it. If the Secretary of State upholds the Council's decision and confirms the Order it may still be challenged by way of Judicial Review in the High Court.

134. Should the Council decide not to make an Order the applicant may appeal that decision under Schedule 14 of the 1981 Act to the Secretary of State who will follow a similar process to that outlined above. After consideration by an Inspector the County Council could be directed to make an Order.

135. If the Panel makes its decision based upon the facts, the applicable law and applies the relevant legal tests the risk of a challenge to any decision being successful, or being made, are lessened. There are no additional risk implications.

Equal Opportunity Implications

136. There are no direct equality implications arising from this report.

J Tradewell

Director of Strategy, Change and Governance

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Background File: 013586

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