

Local Members' Interest	
Mark Deaville	Staffordshire Moorlands - Cheadle and Checkley

Countryside and Rights of Way Panel -

Wildlife and Countryside Act 1981

Application for an alleged Public Footpath from Draycott/Cheadle Road to New Haden Road (Huntley Lane) Cheadle

Report of the Head of Strategy Governance and Change

Recommendation

1. That the evidence submitted by the applicant and that discovered by the County Council is sufficient to show that a Public Footpath which is not shown on the Definitive Map and Statement for the District of Staffordshire Moorlands subsists along the route shown marked A to B to C to D on the plan attached at Appendix A and should be added to the Definitive Map and Statement of Public Rights of Way as such.
2. That an Order made be made to add the alleged right of way shown on the plan attached at Appendix A and marked A to B to C to D to the Definitive Map and Statement of Public Rights of Way for the District of Cheadle as a Public Footpath.

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 B from a Mrs Christine Towle made under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981 for an Order to modify the Definitive Map and Statement for the District of East Staffordshire Borough Council. The line of the alleged Public Footpath as claimed by Mrs Towle is shown on the plan attached at Appendix A.
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.

Evidence submitted by the applicant

1. The application is supported by statements from twenty four members of the public who claim to have used the alleged footpath over varying periods of time. Copies of the statements are attached as Appendix C to this report.
2. For the application to be successful, it will have to be shown that the public have used the alleged route, as of right and without interruption, for a period of at least twenty years prior to the status of the route being brought into question, or that it can be inferred by the landowner's conduct that he had actually dedicated the route as a public right of way, and the right of way had been accepted by the public.
3. In order for the right of the public to have been brought into question, the right must be challenged by some means sufficient to bring it home to the public that their right to use the way is being challenged.
4. In this instance there does not appear to be any challenge to the actual usage of the route by any person nor have there been any obstructions put in place to prohibit or restrict use during the twenty years prior to the application date. There is however mention of some signs that were allegedly erected by the owners of the quarry some years ago but it is not clear when or what was stated on them.
5. Where there is no identifiable event which has brought into question the use of a way, Section 31(7B) of the Highways Act 1980 (as amended by Section 69 of the Natural Environment and Rural Communities Act 2006) provides that the date of an application for a modification order under Section 53 can be used as the date at which the public's use was brought into question.
6. In the absence of any other major or identifiable challenge to the public's use of the claimed route the date of the application, 17th March 2009, will be used as the challenge date. Accordingly, the requisite twenty year period of use should be calculated retrospectively from this date.
7. A summary of the salient points from the user evidence forms has been compiled in a table. This is attached at Appendix D.
8. An examination of the forms will show that of the twenty five submitted only eleven users have over twenty year usage. The majority of user evidence forms would appear to have been completed in 2009. These have all recorded usage that covers the relevant twenty year period, from 1989 to 2009. The majority of this use is on foot and is weekly use.
9. Of the remaining users, four users do not have the requisite twenty years period of usage but when combined, does actually form a full twenty year period of use. S Hulme and M Weston, when combined, add up to a twenty year period of use weekly on foot. Additionally, C Wright and Mr Glaziers use combined also forms a twenty year period of use which is also weekly and on foot. Therefore there are a total of thirteen periods of twenty year usage.
10. A further two users, A Salt and MW Salt also claim a period of use of fourteen years from 1991 to 2005. This use is weekly and on foot.
11. Two users claim to have used the route but on examination of their submitted form, it appear that they have only used part of the claimed route and then they have deviated from it.
12. Finally five users claim a period of usage within the abovementioned time period between 1989 and 2009 however their usage does not span the entire twenty year period. The usage here is between eleven and fourteen years. This is also weekly and on foot.
13. The width of the route does vary amongst the users but the minimum would appear to be one and half feet with some users stating it widens to six feet.

14. No user has stated that they have ever been turned back or told to seek permission. Nor have any users mentioned any signage intended to discourage or prevent use or to challenge users.
15. The table shows that the frequency of use mainly is on foot with a couple of user also claiming to have used the route on horseback too.
16. The table also shows that out of the users who have submitted evidence forms, twelve of those have referred to stiles being present on the claimed route. Some of those users have indicated the location on a plan.

Documentary evidence submitted by applicant

17. The applicant has also submitted photographic evidence with the application which shows physical features on the route but this evidence does not provide any indication that the route is public or private.
18. The applicant also submitted further evidence after the date of the application in 2009. This evidence details obstructions on the route in the way of fencing however, as this evidence relates to a period of time after 2009, it cannot be taken into account. A copy is attached at Appendix E.
19. The applicant has submitted in addition to the user evidence forms, a copy of a railway plan from 1888 which shows part of the claimed route. Also submitted is the accompanying Book of Reference. The Book of Reference listed the part of the claimed route shown on the plan as an occupation road. Also submitted is a second edition OS map from 1901. The OS map shows part of the claimed route but not the whole length. A copy of the documentary evidence is attached at Appendix F.
20. Whilst the documentary evidence submitted may be an indication of a physical feature, it does not indicate whether the route is public or private and therefore does not add any weight to the claim. This application should therefore be considered on the basis of the user evidence submitted.

Evidence submitted by the Landowners

21. In 2009 when the application was received, landowners were contacted. A response was received from two landowners who stated that they did not believe that the route was public. A copy of their responses is attached at Appendix G.
22. One of the landowners has changed in recent years and they have been written to asking for their comments on the claimed route. To date, no response has been received.

Comments received from statutory consultees

23. Whilst responses were received from various organisations none presented any evidence or had any comments that would support or refute the application.

Comments on Evidence

24. Section 31 of the Highways Act 1980 sets out the test that must be satisfied under statute for a way to become a public highway through usage by the public.
25. It is clear from the available user evidence that there have been no interruptions to their use and that there have been thirteen periods of twenty year use. The application was not made as a consequence of a challenge to members of the public using the way. Nor have any of the users used force or sought permission to use the route and that usage has not been in secrecy. The land that the path crosses is not of a character that would prevent the dedication of a way.
26. The path used by the majority of users is on the same line and there has been no indication that they have deviated from that line, with the exception of the two users mentioned at paragraph 11. The evidence forms do not support any contention that

the users are drawn from a particular section of society or that use is limited to members of a particular area. While it is usual for the evidence to come from people who live in a locality there is nothing to suggest that this is a prerequisite for use in this instance.

27. The statutory test refers to use of over twenty years and in the evidence submitted there are eleven users who have used the path over that period of time. The remaining evidence suggests use continues throughout that time but is for lesser periods.
28. Neither the legislation nor the applicable case law set out a minimum level of user that is expected or required to support a claim that a route exists. The case law does suggest that the amount of usage should be such that it is enough to bring home to a reasonable landowner that the public are using a way and that use is as if it was a public highway, i.e. "as of right". In this case the majority of the usage is weekly and this would be sufficient to bring it to the attention of the landowner.
29. The remaining part of the s31 test considers whether the landowner has undertaken any action to rebut the statutory presumption of dedication. Often this is evidenced by way of notices or obstructions to prevent people accessing or using the path. In this case there is nothing to suggest any owner has taken such steps; rather the contrary is true, no overt action appears to have been taken prior to the application being made.

Burden and Standard of Proof

30. An application for a modification order based upon evidence of use can be made under either s53(3)(b) or (c). Officers consider that the application falls be more properly considered under s53(3)(c)(i) and that this should be considered the relevant section for determination purposes.
31. There is a two stage test, one of which must be satisfied before a Modification Order can be made. All the evidence must be evaluated and weighed and a conclusion reached whether on the balance of probabilities either:
 - (a) the alleged right subsists or;
 - (b) is reasonably alleged to subsist.
32. Thus there are two separate tests. For the first test to be satisfied, it will be necessary to show that on the balance of probabilities the right of way does exist.
33. For the second test to be satisfied, the question is whether a reasonable person could reasonably allege a right of way exists having considered all the relevant evidence available to the Council. The evidence necessary to establish a right of way which is "reasonably alleged to subsist" over land must be less than that which is necessary to establish the right of way "does subsist".
34. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

Summary

35. The application is made under under Section 53(2) of the 1981 Act, relying on the occurrence of the evidential event specified in 53(3)(c)(i) of the Act.
36. The Panel will be aware of the requirements for both the statutory test and common law dedication. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980.
37. This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of twenty years prior to its status

being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.

38. Before a presumption of dedication can be raised under statute, Section 31 of the 1980 Act requires that a way must be shown to have been actually used by the public, as of right and without interruption, and for this use to have continued for a full period of twenty years. In this case, the view taken was that the status of the route was brought into question by the making of the application and that the years of usage are from 1989 to 2009.
39. If one considers the test in the first part of the section, i.e. whether the way subsists and the balance of probabilities, the courts have indicated that this can be satisfied by considering whether it is more probable, or more likely, than not. As Lord Denning in the case of *Miller* said "*If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.*"
40. In this instance your officers consider that the use is sufficient to satisfy the test set out in s31 when considered on the balance of probabilities.
41. With regard to the second part of the relevant section, whether the route can be said to be reasonably alleged to exist, your officers consider that the test would also be satisfied.
42. There is no contrary evidence refuting use or objecting to it. As the judge set out in *ex parte Bagshaw* if it is reasonable to accept one set of evidence and reasonable to reject the other and by doing so the right could be said to exist then the test of reasonable allegation would be satisfied. Here there is only one set of evidence to weigh in the balance and with nothing to offset it can be reasonably alleged that the route subsists.

Conclusion

43. In light of the evidence, as set out above, it is your officers opinion that the evidence shows that a public right of way, with the status of footpath, which is not shown on the map and statement subsists.
44. It is the opinion of your officers that the County Council ought to make a Modification Order to add the public footpath which is the subject of this application to the Definitive Map and Statement of Public Rights of Way for the District of Staffordshire Moorlands with a width of 1.5 metres.

Recommended Option

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

Other options Available

46. To decide to reject the application and not make an Order to add the route to the Definitive Map and Statement of Public Rights of Way

Legal Implications

47. The legal implications are contained within the report.

Resource and Financial Implications

48. The costs of determining applications are met from existing provisions.
49. 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

50. 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 14 of the 1981 Act. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence.
51. 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.
52. Should the Council decide not to make an Order the applicants may appeal that decision 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.
53. 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

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

J Tradewell

Director of Corporate Services

Report Author: Clare Gledhill

Ext. No:

Background File: LU603G

INDEX TO APPENDICES

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Appendix B	Copy of application
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