

<b>Local Members' Interest</b>	
Mark Anthony Deaville	Staffordshire Moorlands – Cheadle and Checkley

## **Countryside and Rights of Way Panel -**

### **Wildlife and Countryside Act 1981**

#### **Application for the addition of an alleged footpath from Coney Greave Lane to Public Footpath 19 Cheadle**

#### **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 conclude that a Public Footpath which is not shown on the Definitive Map and Statement is reasonably alleged to subsist along the route shown marked A to B on the plan attached at Appendix A to this report and should be added to the Definitive Map and Statement of Public Rights of Way as such.
2. That an Order be made to add the alleged public footpath at Coney Greave Lane to the Definitive Map and Statement of Public Rights of Way for the District of Cheadle.

### **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 Mrs C Towle for an Order to modify the Definitive Map and Statement for the District of Cheadle. The effect of such an Order, should the application be successful, would:
  - (i) add an alleged footpath at Covey Greave Lane to Public Footpath 19 Cheadle to the Definitive Map of Public Rights of Way under the provisions of Section 53 (3)(c) (i) of the Wildlife and Countryside Act 1981. The line of the alleged footpath is shown marked A-B on the plan attached as Appendix B to this report.
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. In support of the application Mrs Towle originally submitted 11 user evidence forms completed by members of the public who claim that the route has been used by them on foot from the 1930s and was still being used up to the date of the application. Copies of their statements are attached at Appendix C.
2. A further 8 user evidence forms were submitted to the Council at a later date, copies of these statements are also attached at Appendix C.
3. In order 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 20 years prior to the status of the route being brought into question, or that it can be inferred by the landowners 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.
4. 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.
5. In this case, one of the users describes a challenge whereby they were turned back. This was in 2013 which is after the application was received by the Council. There is no mention of any notices challenging use or stating the path is private. Several of the users mention a notice stating Footpath with a directional arrow.
6. 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. In this case this would be 17<sup>th</sup> March 2009 and accordingly, the requisite 20 year period of use should be calculated retrospectively from this date.
7. Your officers have examined all the user evidence and the relevant twenty year period for this application has been calculated retrospectively from 1989 to 2009. This period of time is where the most usage has occurred.
8. A summary of the salient points from the user evidence forms has been compiled and attached at Appendix D.
9. On examination of the user evidence forms there are 19 members of the public who claim to have used the way on foot for a combined period of over 20 years.
10. However, from the 19 user evidence forms provided, only 11 of these meet the relevant continuous 20 year period.
11. 14 users refer to 3 stiles on the route, 5 evidence forms dated 2013/2014 state the stiles were removed in 2013 which is after the challenge date. 2 user forms submitted in 2013/2014 refer to a locked gate on the route.
12. The width of the route varies amongst users but seems to be around 3 metres.

### **Documentary Evidence Submitted**

13. OS Map Second Edition 1990 – the applicant states the alleged route is shown as footpath on the OS Map. Having reviewed the map the footpath detailed on the OS map does not appear to follow the route of the alleged footpath and therefore this document does not support the application for the addition of the alleged public right of way.
14. The applicant has submitted the 1831 Plan of Allotment on the Little Common and Draycott Common, Cheadle Award, which it is claimed shows part of the alleged footpath. When the plan has been considered with the map of the alleged route it

does not appear to show the same route and therefore is not supportive of the application.

15. The documentary evidence is attached at Appendix E.

### **Evidence submitted by the Landowners**

16. Part of the route is not registered with land registry and the owner is unknown.
17. The landowner for the rest of the route at the time the application was submitted was Mr Campbell. Mr Campbell completed a landowner questionnaire whereby he stated he had lived at the property for over 60 years and was always aware of the public footpath, the form is attached at Appendix F.
18. The landowner is now Mr Hartley. Mr Hartley has completed a landowner questionnaire form whereby he states that there is no need for the footpath and that he has planning permission for an agricultural building in the field the footpath crosses. The form is attached at Appendix G.

### **Comments received from statutory consultees**

19. Staffordshire Moorlands District Council has indicated that it has no adverse comments to make regarding the application.
20. National Grid Gas Distribution has indicated that it has no objections and no apparatus in the area.
21. Copies of the above correspondence are attached at Appendix H.

### **Comments on Evidence**

22. The date of the right to use the way which is being brought in to question is 2009 and therefore the use needs to be calculated retrospectively from this date. The optimum period of usage for the purposes of the twenty year period as provided for under s31 of the Highways Act 1980. The evidence of use from the applicant supports the use having occurred from 1989 to 2009.
23. The evidence of use is from 19 members of the public who claim to have used the path on foot for a combined period of over twenty years.
24. None of the users mention any challenge to the use before the date of the application and use was continuing up to the date of application and s53(3)(i) is applicable as usage has not been prevented or challenged as in the case of s53(3)(b).
25. It is clear from the user evidence that there have been no interruptions to their use and that 11 of the users have been using the route for over 20 years. Further, 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 character that would prevent the dedication of a way.
26. It is also evident that the path used by all the users is on the same line and there is no indication that they have deviated from that line. The user evidence does 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. Whilst 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 over 20 years and in the evidence submitted there are 11 users who have used the path over that periods of time. The remaining evidence suggests use continues throughout that time but the use is for lesser periods of time.

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".

### **Burden and Standard of Proof**

29. With regard to the addition of a public right of way both sections 53(3)(b) and section 53(3)(c)(i) of the Act apply. It is usual that s53(3)(b) is used where use has ceased either as a consequence of a challenge or physical prevention. In this case the use was continuing until the application was made. Officers consider that the application falls under s53(3)(c)(i) and that this should be considered the relevant section for determination purposes.
30. 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.
31. 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.
32. 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".
33. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

### **Summary**

34. In order 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 20 years prior to the status of the route being brought into question, or that it can be inferred by the landowners conduct that he has actually dedicated the route as a public right of way, and the right of way had been accepted by the public.
35. With regard to the addition of a public right of way both sections 53 (3) (b) and section 53(3)(c)(i) of the Act apply.
36. It is important to note that under s53 (3)(b) the legal test is the usual civil law test on the balance of probabilities whilst s53(3)(c)(i) can be based on the fact that the route can be reasonably alleged to subsist which is a lesser legal test.
37. Section 53 (3)(c)(i) relates to the discovery of evidence of two separate events:
- (a) Evidence that a right of way which is not shown on the map subsists; or
  - (b) Evidence that a right of way which is not shown on the map is reasonably alleged to subsist.
38. For the first test to be satisfied will be necessary to show that on a *balance of probabilities* the public right of way *does* subsist.
39. For the second test to be satisfied the question is *whether a reasonable person could reasonably allege* a public right of way subsists, 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 is less than that which is necessary to establish the right of way “does subsist”.

40. One of the two tests must be satisfied before a Modification Order can be made to add the public right of way. Judgment must be made based upon evaluation of the evidence provided by the applicant alongside all other material and evidence. If either test is satisfied, the Definitive Map and Statement should be modified.
41. 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.
42. If it is decided that the statutory test fails or is inapplicable, consideration should be given to the issue of common law dedication; that is, whether the available evidence shows that the owner of the land over which a way passes has dedicated it to the public. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. Evidence of the use of a way by the public as of right may support an inference of dedication, and may also be evidence of the acceptance of a dedication by the public.
43. 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 in 2009 and the relevant years of usage are from 1989 to 2009.
44. In considering the use by the public in this case, it is clear from the user evidence referred to above that the amount of use was sufficient for the landowner to be aware of the use.
45. The totality of the evidence is finely balanced as to the first part of the Section 53(3) ie whether the way subsists on 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*”.
46. On examination of the evidence in this application and on applying the test on the balance of probabilities, your officers consider that the use is sufficient to satisfy the test set out in s31 of the 1980 Act.
47. 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 be satisfied.
48. When considering the question of the presumption of dedication weight has to be given in favour of the application. The previous landowner, Mr Campbell, states that he considered the route to be a public footpath. By accepting the existence of the public highway this raises an inference that at some point the landowner dedicated the highway to the public.
49. When this is considered in addition to the user evidence it could be said to have tipped the scale in favour of satisfying the test of balance of probabilities.
50. Once a presumption of dedication is raised then the burden lies with the owner to demonstrate by his actions that there was no intention to dedicate. Here there is

no evidence of any acts by the landowner to rebut the presumption of dedication in the 1980 Act, rather conversely he accepts the route exists.

51. In this instance the evidence of use is continuous for a number of years extending before the 1989 date required for satisfaction of the s31 test.
52. The above evaluation is concerned with the test as laid down in s31 of the 1980 Act but consideration should also be given as to whether a common law dedication has taken place.
53. When considering whether a right has arisen under the common law test it should be borne in mind the significant differences. The burden of proof is reversed, in that it is for the user to prove the owner dedicated the route and the use does not have to be for 20 years, dependent upon circumstances it could be a greatly reduced timescale. The former, the dedication, can be inferred from usage but as the court stated in *Nicholson v Secretary of State (1996)* “...the more notorious it is the more readily will dedication be inferred..”
54. In this instance the common law test may well have been satisfied.

### **Conclusion**

55. 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.

### **Recommended Option**

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

### **Other options Available**

57. To decide to reject the application to make an order to add the alleged footpath to the Definitive Map and Statement of Public Rights of Way.

### **Legal Implications**

58. The legal implications are contained within the report.

### **Resource and Financial Implications**

59. The costs of determining applications are met from existing provisions.
60. 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**

61. 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.
62. 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.

63. Should the Council decide not to make an Order the applicants 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.
64. 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**

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

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J Tradewell

Director of Strategy, Change and Governance

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**Background File:**

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