

Local Members' Interest	
Paul Northcott	Newcastle Rural

Countryside and Rights of Way Panel – 6 March 2020

Wildlife and Countryside Act 1981

Application for a Byway Open to All Traffic between the A51 at Blackbrook and Public Footpath 4, Maer

Report of the Director of Corporate Services

Recommendation

1. That the evidence submitted by the applicants and that discovered by the County Council is insufficient to show that a Byway Open to All Traffic subsists or is reasonably alleged to subsist.
2. That no Order be made to add the alleged public right of way to the Definitive Map and Statement of Public Rights of Way for the District of Newcastle.

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 Mr Martin Reay for a Definitive Map Modification Order to modify the Definitive Map for the area by adding the Byway Open to All Traffic shown A-B on the Plan at Appendix A (the Application Route) to the Definitive Map.
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 applicant has submitted in support of his claim evidence from the Maer Inclosure Award and Map 1810. The applicant has provided a tracing of the Award Map however, Officers have obtained a clearer copy from the County Council’s records office, which is attached at appendix C. The Award map shows the entirety of the alleged route.

2. The Award describes several routes on the map as Public Carriageways. There is a detailed description of the route which is described as being "From Road B to Cowen Cottage & allotments 41 & 129". A copy of which is attached at appendix D.
3. The applicant has also submitted a copy of the Greenwood Map of 1820. A clearer copy has been obtained from the County Council's records office and is attached at appendix E. The map shows the entirety of the alleged route.
4. A copy of the Teesdale map has also been submitted. A clearer copy has been obtained by Officers from the records office and a copy is attached at appendix F. The entire length of the alleged route is also shown.
5. Finally, the applicant has submitted an OS map from 1831. A copy of which is attached at appendix G. The entire length of the route is shown on the map.
6. Officers have verified the veracity of each of piece of evidence above in the County Council's records office.

Other evidence discovered by the County Council

7. Officers have conducted research into historical documentation at the County Council's Record Office and have found the following:
8. A transcript from the Maer Heath Inclosure Award 1810 setting out the Commissioners powers in respect of setting out and dividing land. A copy of which can be found at Appendix H.

Evidence submitted by the Landowners

9. Mr Pearce has written to the Local Authority stating that the lane has been privately owned and maintained by the Maer estate since he came to work on the estate in 1965. Mr Pearce also states that if the lane is taken over it will turn into a dumping ground and will be taken over by the general public and this will lessen the security of his wood yard.
10. Mrs Pearce has written more recently with a further letter opposing the application. She states that the lane is a private way and does not want the way to be opened to the general public. She states that there will be a danger to the public as there are big machines in the area. There would also be a disturbance to wildlife.
11. Dr Martin Tommey has submitted a landowner evidence form. He states that there is no public right of way and that it is a private road. He states there are signs in place marking the way as private. He has witnessed people walking along the route and there is a stile at the top of the claimed route where it meets with the existing public footpath in Maer Hills.
12. Mrs Kariviotis has submitted a Section 31(6) Declaration dated 1997. She states that no additional ways have been dedicated over her land (edged red on the adjoining map). The only ways which are dedicated are marked as bold black dashed lines.
13. Lady Wharton has also submitted a Section 31(6) Declaration dated 1997. She jointly owns the land known as Maer Hills with Mrs Kariviotis and also states that no highways other than footpaths (as marked) have been dedicated as highways.

Comments received from statutory consultees

14. Maer and Aston Parish Council have responded stating that they are not in favour of the application. They state that as the alleged route leads only to a footpath then vehicles would have to either park or turn around. This could lead to restricted access for residents and could affect the operation of the wood yard.
15. Newcastle under Lyme Borough Council have responded and state they have no comments to make on the application.
16. The Peak and Northern Footpaths Society have responded and state they have no comments to make on the application.
17. A former Ward Councillor, Dr Brian Swynnerton has responded to the application. He states that this footpath has existed along with many other rights of way for many years and believes it has also been used as a bridleway. He also states that the area was once common ground and if it remained so there would be no need for rights of way problems.

Comments on Evidence

Inclosure Award and Map

18. As mentioned above the applicant has submitted evidence from the Inclosure Award of Maer dated 1810.
19. The Inclosure Act was designed to enclose the old commons, manorial waste and smaller holdings in order to increase agricultural productivity. They were often promoted on behalf of the bigger landowners to enable them to increase the profitability of their land.
20. The local Inclosure Act empowered an Inclosure commissioner to survey and divide up the land, allotting it to named individuals, including the setting out of highways. After all of the procedures had been followed and completed the commissioner would issue the final Award and accompanying Award Map.
21. The Inclosure Commissioners had to follow laid down procedures to ensure their actions were legal. If they had not then the Award itself, and its provisions, would not be valid.
22. The Act either laid down the powers of the Inclosure Commissioners in relation to highways, both public and private, or made reference to the general act. They may have been able to create, divert, stop up and list existing routes as well as determining who was liable for their maintenance.
23. Within the Award a passage sets out the powers of the Commissioner, "...for the benefit and on behalf of all the said persons parties thereto, Joseph Fenna of Baddiley in the county Palatine of Chester, land surveyor, or the person or persons to be appointed in his place as thereafter mentioned, should set out allot and divide the same in such manner as he in his discretion should think proper, according to the rights and interests of the said several persons parties thereto in the said common and waste ground..."
24. The significance of the Inclosure Award arises from the evidential value of the awards as a legal document. The Awards and maps may also provide supporting evidence of other matters, such as the existence or status of public rights of way over land adjacent to but just outside the awarded area.
25. The schedule referred to by the Award describes several Public Carriage Roads in the area.

26. A route which matches the description of the application route is set out within the schedule. Although the schedule is titled “Public Carriage Roads” there is an annotation further down the page which reads: “The Roads designated by the Letters U and W are only occupation Roads to Cottages & particular Lands”. An occupation road is (and was) used to describe a road laid out for the benefit of the occupiers of adjoining properties and not a public highway. Route ‘W’ is the route in question in respect of this application. The Commissioner has specifically set out that this route is not a public highway and is a private highway for residents and landowners.
27. This particular award would have fallen under the 1773 Inclosure Act. The legislation set out within this act was far less stringent than those of later acts. The Commissioner could have set out that a route was public without the approval of the Surveyor of the Highways. However, even with the ability to set out a route as public the Commissioner still recorded the route as an occupation road, meaning that the occupants would have had the burden of the cost of maintaining the route.
28. There is no other evidence within the Award to contradict the statement in respect of the occupation road. As the Inclosure Award was a legal document and specific procedures had to be followed it provides strong evidence that a private right of way existed along this particular route and not a public right of way.

Greenwood Map

29. Although the Greenwood map is on a small scale it does show the entirety of the alleged route.
30. During the 16th, 17th and 18th Centuries there were several maps drawn up by private individuals. These maps are often known by the name of the person who was responsible for drawing or surveying them.
31. The evidential value is limited to supporting evidence of the physical existence of a way, though if the map predates 1835 the map may, with other evidence, be supporting evidence for the existence of an “ancient highway”.
32. The courts have considered the evidence of old maps and found that while the weight of evidence attached to these was small, they were suggestive of higher rights than footpath.
33. It is not surprising that the route is shown on the Greenwood map. The road provided access for residents to their dwellings and lands at the end of the route. The map, however, does not indicate any public status of any routes depicted on it but it does provide a useful topography of the area.
34. On the other hand, the route is shown on the map which could also indicate that it had higher rights than that of a footpath. The map must be looked at in conjunction with all other evidence. On its own it would not be supportive of the existence of a public highway.

Teesdale’s map

35. The applicant has also submitted a copy of the Teesdale’s map of Staffordshire dated 1831 - 1832.
36. Although the map is a clear copy and shows many highways in the area there is a tear through part of the map. This appears to have slightly obscured the route however it does appear to show a significant length of it.

37. The Teesdale's map is another of many old maps which were produced in the early 19th Century.
38. As with the Greenwood's map the evidential value is limited to supporting evidence. The map does not depict any public rights of way. There is however a suggestion that if a route is shown on old maps such as the Teesdale's then it could be suggestive of rights higher than that of a footpath.
39. The Teesdale's map must be assessed alongside all other supporting evidence.

OS Map

40. The applicant has also submitted an OS map of the area dated 1831. The map shows the entirety of the alleged route. Again, this is not surprising as the route exists today.
41. Ordnance Survey Maps date back to the early 1800's and their purpose is to show physical features on, and the contours of, the ground. In so doing they included all manner of ways from tracks leading only to remote properties, footpaths crossing fields, as well as the main highway.
42. They do not distinguish between public and private rights of way. From 1888 the maps carried a disclaimer that the depiction of a way on a map did not mean it was public; a practice continued into modern times along with a proviso advising individuals to consult the local definitive map for public rights of way.
43. The map does not hold any evidential weight in support of the application. It merely shows that there was a physical feature on the ground at the time it was surveyed. However, the physical existence of the route is not disputed, as it exists today.

Burden and Standard of Proof

44. 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.
45. 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".
46. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

Summary

47. The application is made under under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in 53(3)(c)(i) of the Act.
48. The application is for the status of a Byway Open to All Traffic which is defined in Section 66(1) of the Wildlife and Countryside Act 1981 as a highway "over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purposes for which footpaths and bridleways are so used.
49. Under the Natural Environment and Rural Communities Act 2006 (NERC) subsection (1), restrictions have been placed on the recording of public rights of

way for mechanically propelled vehicles on the Definitive Map and Statement. However, this is applicable to those applications for a BOAT after 2006.

50. Section 67 of the NERC Act subsections (2) to (8) provides exceptions to the extinguishment of certain unrecorded rights of way for mechanically propelled vehicles. One exception is if, before the 'relevant date' (subsection (4), 20 January 2005), an application had been made for the Definitive Map Modification Order to show a Byway Open to All Traffic, subsection (3)(a). This application was made before the 'relevant date' and consequently this exception could apply.
51. The Panel need to be satisfied that, on the balance of probabilities, the evidence that has been discovered that a right of way which is not shown on the Definitive Map and Statement subsists or, reasonably alleged to subsist.
52. The Inclosure Award lists the application route in the corresponding schedule as a public carriage road. This would usually be very strong evidence of the existence of an historical public right of way as an Inclosure Award is a legal document. However, within this particular award the commissioner has noted that this route is an occupation road only. The commissioner made it explicit that all routes were of a public nature apart from this route. This would indicate the route was always intended to be a private way.
53. The Teesdale's and Greenwood maps do show a route which matches that of the application route. This is not surprising as the route is still in existence today. However, both maps are not indicative of the status of the route but are useful in assessing the topography of the area.
54. Likewise, the OS map is useful in providing evidence of the physical existence of a route. It does not however, provide any indication of public rights over a route. An assertion cannot be made as to the nature of a route when the OS maps are viewed in isolation but must be considered alongside all other evidence.

Conclusion

55. In light of the evidence, as set out above, it is your Officers opinion that the evidence fails to show that a public right of way subsists.
56. There has been no evidence forthcoming or discovered which meets either the test of the balance of probabilities or reasonable allegation.
57. The evidence fails to show any evidence of the existence of any highway with any public rights over it, whether this be a footpath, bridleway, restricted byway or BOAT.
58. It is the opinion of your officers that the County Council should not make a Modification Order to upgrade the routes to bridleway status on the Definitive Map and Statement of Public Rights of Way.

Recommended Option

59. To reject the application based upon the reasons contained in the report and outlined above.

Other options Available

60. To decide to accept the application to add a BOAT to the Definitive Map and Statement.

Legal Implications

61. The legal implications are contained within the report.

Resource and Financial Implications

62. The costs of determining applications are met from existing provisions.
63. 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

64. 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, Food and Rural Affairs under Section 14 of the Wildlife and Countryside Act 1981. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence. 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.
65. 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.
66. 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.
67. 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.
68. There are no additional risk implications.

Equal Opportunity Implications

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

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Background File: LH614G

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Appendix H	Transcript from Inclosure Award of Commissioners powers