

Local Members' Interest	
Councillor John Francis	Stafford – South East

Countryside and Rights of Way Panel -

Wildlife and Countryside Act 1981

Application for alleged footpath from Church Lane FP6 to FP3, Gayton

Report of the Director of Corporate Services

Recommendation

1. That the evidence submitted by the applicants and that discovered by the County Council is not sufficient to show that, on a balance of probabilities a public footpath which is not shown on the Definitive Map and Statement to subsist along the route shown A-B-C-D on the plan attached at Appendix B and should not be added to the Definitive Map and Statement of Public Rights of Way.
2. That the evidence submitted by the applicants and that discovered by the County Council is sufficient to show that, on a balance of probabilities an alleged restricted byway from Church Lane FP6 to FP3 in Gayton subsists.
3. That an Order under Section 53(3)(c)(i) be made to add the alleged right of way shown on the plan attached at Appendix B to the Definitive Map and Statement of Public Rights of Way for the District of Stafford.

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 Martin Reay for an Order to modify the Definitive Map and Statement for the District of Stafford. The effect of such an Order, should the application be successful, would:
 - (i) Add a Public Footpath from Church Lane FP6 to FP3 in Gayton.
 - (ii) The lines of the Public Footpath which are the subject of the application are shown highlighted and marked A-B-C-D on the plan attached as Appendix B.
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 the applicant submitted a Deposited Railway Plan dated 1845 (Q/Rum/182), Gayton Tithe Map dated 1850 (D705/PT/2A) and two Ordnance Survey Maps dated 1882 and 1836-40. Officers have verified this documentation viewing the originals at Staffordshire Records Office.
2. The applicant states that Church Lane is an existing public road up to Gayton BrookFP6. He asserts that he has made the application for an addition of a public footpath leading from the end of Church Lane/FP6 proceeding across Gayton Brook to FP3.

Deposited Railway Plan 1845

3. The applicant states this shows the claimed route as a public road by the Surveyors of Highways. A copy of this is attached at Appendix C.

Gayton Tithe Map & Ordnance Survey Maps

4. He states these both show the route each side of Gayton Brook and crossing it via a ford. A copy of the Gayton Tithe Map is attached at Appendix D and copies of the Ordnance Survey Maps are attached at Appendix E.

Other evidence discovered by the County Council

5. Officers have conducted research into historical documentation at the County Council's Record Office. No historical evidence was found.
6. Officers did discover from the County Councils internal records that the alleged route from points C-D and continuing from this point is shown as an unclassified road on the list of streets and is a highway maintained at the public's expense (HMPE). The road is called Church Lane. A copy of the map showing the extent of the HMPE is attached at Appendix F.
7. The County Council's list of streets which are publicly maintainable highways has been drawn up under the Highways Act 1980, section 36(6).
8. A highway over which the public have a right of way for vehicular and all other kinds of traffic but is generally used by the public mainly on foot or horseback is known as a Byway Open to All Traffic (BOAT).
9. Restrictions on the recording of mechanically propelled vehicles have been made by the enactment of section 66 and 67 of the Natural Environment and Rural Communities Act 2006 (NERC).
10. The rights of way provisions in this Act curtail the future scope for establishing and recording such rights. As an alternative they will be recordable as restricted byways, a new category of highway introduced by the Countryside and Rights of Way Act 2000. Restricted byways carry rights of way on foot, horseback and also for non-mechanically propelled vehicles such as horse-drawn carriages and bicycles.
11. However, there are some exceptions contained in section 67, subsections (2) to (8) of NERC. Any route that qualifies under any one, or more, of these exceptions would not have its public rights of way for mechanically propelled vehicles extinguished.

12. It is appropriate firstly to determine whether vehicular rights subsist and secondly, whether any exceptions apply. If vehicular rights subsist but the exceptions do not apply, then the appropriate status is a restricted byway.
13. One of the exceptions which does apply in this case is a route that is both recorded on the list of streets, is maintainable at public expense and is not recorded on the Definitive Map and Statement as a right of way.
14. Inclusion of a route on the list of streets is not conclusive evidence of what rights it carries and there can be no presumption that any highway shown on the list carries vehicular rights. Each case must be considered on its own merits. In this instance only part of the route is on the list (C-D).

Evidence submitted by the Landowners

15. The applicant identified two landowners whose land is affected by the claimed route, Mr Wardle and Mr Bailey.
16. Mr Wardle of Moat Farm was sent an owner's/occupier's evidence form. To date no response has been received from Mr Wardle.
17. Mr George Bailey of Brook Farm completed an owner's/occupier's evidence form. In the form he states he considers the alleged route to be public. He claims he has not prevented public access or turned anybody away from using the alleged route. A copy of Mr Bailey's form is attached at Appendix G.
18. Mr Bailey concludes with "Where Church Lane ends and meets Gayton Brook is a ford and this is the main access to the fields either side of the cul-de-sac (known as Wood Lane) and the only access to fields at the end of the cul-de-sac. My point is that large machinery has to go through the ford especially at harvest time and therefore stress that any footbridge should be erected well to the side of the ford preferably to the right as you stand at the end of Church Lane".
19. Mr Bailey also states that he is a tenant in common and therefore Harrowby Estates need to be informed of the application.
20. Additionally, Mr Baileys ownership ceases at the cricket ground side of the route and so the other landowners who may be affected need to be identified and notified.
21. Following this Officers wrote to the applicant and informed him he would need to identify and serve the application on Harrowby Estates and any other landowner who is affected.
22. The applicant identified Lord Harrowby of Harrowby Estates as being the only landowner affected. Officers sent out owner's/occupier's evidence forms to Lord Harrowby. To date no response has been received.

Comments received from statutory consultees

23. Weston with Gayton with Fradswell Parish Council and Stafford Borough Council were consulted regarding the application however neither Council's have responded to date.
24. Peak & Northern Footpaths Society were consulted regarding the application. They stated they do not have any evidence of value in this case.
25. The Rambler's Association were consulted as above. They state the applicant has their full support from the Association.

26. The Trail riders responded to the application. They claim the alleged route should be recorded as a Byway Open to All Traffic (BOAT). They state that the evidence the applicant has submitted confirms the alleged is a public road therefore as stated should be a BOAT. Copies of all responses from the statutory consultees are attached at Appendix H.

Comments on Evidence

Deposited Railway Plan 1845

27. Railway Plans had to be produced and deposited prior to a railway company obtaining an Act of Parliament authorising the construction of their intended railway.
28. The maps covered a corridor of land defining the limits of deviation either side of the line of the intended railway, with plot numbers for the land and public and private routes, which are referred to in a book of reference.
29. They showed the status of routes divided by the proposed line, the accuracy of which would have been in the interest of those affected.
30. The plans were drawn to comply with parliamentary requirements. The Bill and plans were open to consultation and debate and as such, they carry good evidential weight, though it is not conclusive.
31. The Book of Reference for a railway which was proposed but not actually built can also provide persuasive evidence for the existence of public rights over a way. This is based on the fact that the application was open for public scrutiny and objection.
32. On the Deposited Railway Plan of 1845 submitted by the applicant, it shows the route from A-B as a public road on the attached map. This is listed as owned and was completed by the railway surveyor. The former must have concurred otherwise he would have had it removed or amended.
33. Surveyors of Highways were appointed by the parish and they kept a record of the maintenance and repair.
34. Footpaths were not automatically publicly maintainable after 1835 and it was rare for them to be maintained and mentioned in the record. Further the fact that it is listed as a "public road" is indicative that the route is of a higher status than footpath. Consequently, this indicates that the applicant's contention that a footpath exists on the route is supplanted by the evidence of higher rights.

Gayton Tithe Map

35. Tithe Maps and Awards were prepared under the Tithe Commutation Act 1836, which commuted the payment of a tax (tithe) in kind, to a monetary payment.
36. Routes, whether public or private, were not always subject to tithe rent charges. This was because a route was regarded as unproductive land from which no titheable income arose, and it was therefore generally tithe free. The charge of tithe rent on a route may indicate either that the foliage growing upon it was extensive enough to be valued and used for animal grazing, or that its use as a way of passage postdates the tithe commutation.

37. It is not uncommon for routes to be omitted from some areas of land either because the land was not titheable, or where it had no material effect on the amount of tithe payable.
38. Footpaths are rarely shown on tithe maps. This is because the existence of a footpath over a field did not affect the level of tithe rent apportioned on the field.
39. The Gayton Tithe Map shows the alleged route on either side of Gayton Brook and there is a ford linking both sides. There was a tithe payable on plot numbers 22, 365 and 364. On plot number 18 there was no payable tithe. This shows that the former plots were excluded from the land holdings.
40. There is no annotation indicating that the route was a road, however an inference can be drawn from the fact that plot 18 (which was not titheable) was used to as a road to the nearest hamlet.

Ordnance Survey Maps

41. Ordnance Survey (OS) 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 so 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.
43. They are evidence only of the physical existence of a way on the ground at the date of the survey. There may also be annotations next to some minor routes such as FP or BP however they do not indicate whether the way was public or private.
44. They do not have any evidential weight but may be supportive of an application by showing that there was a physical feature on the ground.
45. The OS Maps submitted by the applicant shows the route in its entirety however as stated above this only shows the existence of a physical feature and does not show the status of the route.

Burden and Standard of Proof

46. 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.
47. 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".
48. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

Summary

49. 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.

50. Part A-B on the attached map is supported by the Deposited Railway Plan of 1845. The Railway Surveyor stated it is a 'public road' and it appears the Surveyor of Highways did not object to its inclusion, status and maintenance liability. In 1845 a public road would mean passage by horse or horse and carriage. This would indicate the status to be a restricted byway.
51. There is no evidence to support parts B-C on the attached map. The Tithe Map and OS maps show the route either side of Gayton Brook.
52. Parts C-D on the attached map is shown as stated on the list of streets as an unclassified road. This satisfies one of the exceptions under the NERC Act indicating the route to be a BOAT.
53. There can only be a BOAT to Gayton Brook. The exception under the NERC Act applies to the rest. It can be justified that the whole route being a restricted byway as it was horse and cart originally. Otherwise you would have a BOAT to Gayton Brook and then a restricted byway after.
54. In *Fortune v Wiltshire Council [2012]* it states that evidence cannot be viewed in isolation but must be considered as part of the overall jigsaw. In this instance Officers have concluded that the status of a restricted byway exists taking the evidence as a whole.

Conclusion

55. In light of the evidence, as set out above, it is your officers' opinion that the evidence shows that, on the balance of probabilities a public right of way, with the status of a restricted byway, which is not shown on the map and statement subsists.
56. It is the opinion of your officers that the County Council should make a Modification Order to add the route as a restricted byway status on the Definitive Map and Statement of Public Rights of Way

Recommended Option

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

Other options Available

58. To decide to reject the application to add a public footpath to the Definitive Map and Statement of Public Rights of Way.
59. To decide to reject the application to add a public footpath or restricted byway completely.

Legal Implications

60. The legal implications are contained within the report.

Resource and Financial Implications

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

63. 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.
64. 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.
65. 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.
66. 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

There are no direct equality implications arising from this report

J Tradewell

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