

<b>Local Members' Interest</b>	
Ian Lawson	Biddulph North

## **Countryside and Rights of Way Panel – 7 August 2020**

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

#### **Application for an alleged Public Bridleway from Wedgwood Lane (near Marshfield Farm) to Hill Lane (near Acorn Lodge) Gillow Heath**

#### **Report of Director of Corporate Services**

#### **Recommendation**

1. That the evidence submitted by the applicant and that discovered by the County Council is sufficient to show that a Public Bridleway which is not shown on the Definitive Map and Statement for the District of Staffordshire Moorlands subsists along the route shown marked 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 to the Definitive Map and Statement of Public Rights of Way for the District of Staffordshire Moorlands as a Public Bridleway.

#### **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 Border Bridleway Association 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 Staffordshire Moorlands. The line of the alleged Public Bridleway as claimed by Border Bridleways Association 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 bridleway 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 the alleged bridleway becoming overgrown and difficult to use in more recent years.
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, 15<sup>th</sup> January 2016, 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 four submitted only thirteen users have over twenty year usage. The majority of user evidence forms would appear to have been completed in 2015. These have all recorded usage that covers the relevant twenty year period, from 1995 to 2015. The recorded use for all of the users is on horse back although four users out of the thirteen have stated that they have also used the claimed route on foot and/or with a cycle.
9. The remaining ten users do not have the requisite twenty years period of usage. However, when combined, the evidence from Simpson and Twigg do actually form a full twenty year period of use on horseback. Therefore there are a total of fourteen periods of twenty year usage.
10. Five users of the remaining ten users claim a period of use of fifteen years from 2000 to 2015. This use is on horseback with 2 users stating they also use the claimed route on foot and with a cycle.
11. One user does not state the time period of usage and only state on their form that they have used the claimed route on horseback and the remaining three users have usage of eighteen, sixteen and eleven years respectively also on horseback.
12. The final 3 users have usage periods of 18 years, 16 years and 11 years respectively. This use is between 1997 and 2015. The recorded use is on horseback for these users.

13. The width of the route does vary amongst the users but the minimum would appear to be one and half metres with some users stating it widens to five metres.
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 horseback with a handful of users stating that they have also use the claimed route on foot or with a cycle.

#### **Documentary evidence submitted by applicant**

16. The applicant has submitted in addition to the user evidence forms the following pieces of documentary evidence
  - a copy of a Finance Act plan from 1910, a copy of which is attached at Appendix E. The Finance Act plan does show the claimed route and it is separate from the adjoining landholdings. However, this is not an indication that the route is public. It could well have been a private route which served a number of properties.
  - a copy of the Biddulph/Gillow Heath Inclosure Award from 1841, a copy of which is attached at Appendix F. The claimed route is not shown in its entirety on this plan.
  - a first edition OS map from 1889, a copy of which is attached at Appendix G. The claimed route is shown in its entirety.
17. 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 significant weight to the claim. This application should therefore be considered on the basis of the user evidence submitted.
18. The applicant also submitted copies of email correspondence relating to the status of the route and the correspondence revealed that the route was not currently maintained by the County Council as a Highway.

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

19. In 2016 when the application was received, landowners were contacted. A response was received from one landowner who stated that they believed that the route was public. A copy of their response is attached at Appendix H.

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

20. The Council have not received any responses from the various organisations who were consulted on this application.

#### **Comments on User Evidence**

21. 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.
22. It is clear from the available user evidence that there have been no interruptions to their use and that there have been fourteen 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.
23. The path used by all users is on the same line and there has been no indication that they have deviated from that line. 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.

24. The statutory test refers to use of over twenty years and in the evidence submitted there are fourteen periods of twenty year use along the claimed route. The remaining evidence suggests use continues throughout that time but is for lesser periods.
25. 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.
26. 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**

27. 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 to be more properly considered under s53(3)(c)(i) and that this should be considered the relevant section for determination purposes.
28. 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.
29. 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.
30. 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".
31. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

#### **Summary**

32. The application is made 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.
33. 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.

34. 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.
35. 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 1995 to 2015.
36. 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.*"
37. 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.
38. 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.
39. 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**

40. 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 bridleway, which is not shown on the map and statement subsists.
41. It is the opinion of your officers that the County Council ought to make a Modification Order to add the public bridleway 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 three metres.

### **Recommended Option**

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

### **Other options Available**

43. 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**

44. The legal implications are contained within the report.

### **Resource and Financial Implications**

45. The costs of determining applications are met from existing provisions.
46. 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**

47. 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.
48. 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.
49. 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.
50. 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**

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

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J Tradewell

Director of Corporate Services

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**Background File:**

11813

## INDEX TO APPENDICES

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