

<b><i>'Local Members' Interest</i></b>	
CLlr Alan White	Lichfield Rural East

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

### **Wildlife and Countryside act 1981**

#### **Application for an Alleged Public Footpath Between Chestnut Lane and Coneyberry Stile, Clifton Campville**

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

#### **Recommendation**

1. That the evidence submitted by the applicant at Appendix A is sufficient to show that a Public Footpath which is not shown on the Definitive Map and Statement subsists along the route marked A to B on the plan attached at Appendix B to this report and should be added to the Definitive Map and Statement of Public Rights of Way as such.
2. That an Order should be made to add the alleged right of way shown on the plan attached at Appendix B and marked A to B to the Definitive Map and Statement of Public Rights of Way for the District of Lichfield with a minimum width of 1 metre.

### **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 made by Rita Salt of the local Residents Association for an order to modify the Definitive Map and Statement for the area by adding an alleged public footpath from Chestnut Lane to Coneyberry Stile, Clifton Campville under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981. The line of the alleged Public Footpath as claimed by the applicant is shown on the plan attached at 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. The route applied for is shown between points A-B on the plan attached at Appendix B between Chestnut Lane and Coneyberry Stile, Clifton Campville.

2. In support of the application the applicant Mrs Rita Salt on behalf of the local Residents Association submitted 16 user evidence forms. The evidence forms they completed are attached to this report at Appendix C.
3. A summary of the salient points from the user evidence forms has been compiled in a table. This is attached at Appendix D.
4. 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 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.
5. 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.
6. There was an identifiable challenge to the public's use of the claimed route in April 1993 when new signage was erected on the land and a new occupier verbally challenged its use. Accordingly, the requisite 20-year period of use should be calculated retrospectively from this date.
7. The 16 user evidence forms were completed between July-August 1993 and the application was submitted in November 1993. Consequently, the period 1973-1993 is the relevant 20-year time frame within which the users seek to demonstrate use. An examination of the forms shows that users used the path until 1993 and that their evidence continues up to that time.
8. An examination of the forms shows that all 16 users have known the path for a period of over 20 years. Of these 11 users claim to have used the path throughout the relevant 20-year period. These are Mrs Green, Mrs Cuffe, Mr Mander, Mr Purchase, Mrs R Salt, Mr Littleford, Mrs Richardson, E Quartermaine, Mrs Whorwood, Mr Bartlam and Mrs Hinds.
9. Two users Mrs Dunn and Mrs Mc Dermot who used the path between 1985-1993 and 1977-1993 respectively do not have the required 20-year period of usage although Mrs Dunn claimed to have known of the path's existence for 29 years.
10. Further examination of the forms shows that of the 16 submitted, 8 state there are stiles or gates on the path, where stated this is recorded to be at the point the path enters the churchyard. No users refer to any locked gates and the gate is referred to as a kissing gate.
11. All 16 users state they have used the path on foot.
12. The width of the route appears to be very consistent among the 13 users who give a minimum width in their evidence forms. Of these 13 given widths, 8 state the path to have a minimum width of 2 feet, 2 state a minimum width of approximately 2 and a half feet, one records a width of 1 and a half feet and one states, "the width of a footpath". If the latter is taken to be the standard minimum width of a definitive right of way (1 meter) then this also exceeds 2 feet. The final given width in the user evidence forms states 1 yard and this is equivalent to 3 feet. With an overall range therefore of 1.5 – 3.0 feet the majority of users – 8 out of 13 – stated a given minimum width of 2 feet.
13. Two users refer to permissions being granted to them for use of the path, one Mr Bartlam stated a previous tenant, a Mr Briscoe, had given him permission to use the path – but he had since died. Mrs Green also stated that "as a child we were given permission by the Rector to use the footpaths as the rights of a villager.

14. Mrs Rita Salt (the Applicant) stated she had used the path between 1967-1993 for pleasure purposes, twice daily on foot. She states that she has always believed the path is a right of way as both parents and teachers used it when taking them for walks. Stating "I now walk these paths twice daily with my dog and have done so for the past 26 years and until April of this year (1993) I have never been stopped."
15. The Applicant states that in addition to the 16 users who submitted completed forms there are an additional "12 people who walk the paths daily but have only been in village between 2-14 years. They have not been stopped until April of this year".
16. Mrs V.F.Mc. Dermott stated in her user evidence form that she had never been challenged on the path "until recently" (April 1993), when she was "aggressively told not to stop or talk on the path". She also stated that her daughter "was harassed whilst talking to some other villagers on the path".
17. Mr.K.J. Bartlam stated that he had been challenged by "the woman who now rents the field for her horses, but only in the last 6 months".
18. Mrs C.A. Green stated that only within the last few months had "anyone been told not to go across this way". This land has always been walked by village people. This land has always been grassland and as a child along with all the other children of the village in the 1940's and 1950's we would use this land as common land to play on when we lost our playing field in 1947".
19. Mrs W.A. Littleford stated that "there have never been any notices until just recently."
20. Mrs Joyce Duggins stated she has always lived in Clifton and had "used the footpath for a good many years" adding in 1993 that the use had been "more frequent in the last three years". However, that she had been chased by horses in the appropriate field".
21. Two users stated use above 70 years. The first user aged 81 years of age claimed she had used the route for 76 years since age of 5 years. The second user aged 79 years claimed she had used the route for 74 years since age of 5 years. Both users state the usage was regular to visit or take flowers to the church.
22. Miss Dorothy Salt stated to have walked the route from 1958-1994 and had been "taken for walks by parents, and school nature walks and assumes a right of way was given many years ago".
23. Mrs C Hinds in a letter to Staffordshire County Council stated that she had "walked that particular path referred to above, without (legitimate) hinderance and indeed continue to do so." She highlighted work carried out along the route of the footpath by the Conyberry Millennium Green Trust which had been "left intact and not ploughed up". A copy of the letter is attached at Appendix E.

#### **Evidence Submitted by the Landowner/s**

24. When the application was submitted, the applicant revealed two landowners for the whole of the land over which the application route runs.
25. The landowners identified by the applicant were Mr P J Afford of "Cobwebs" Lichfield Road, Tamworth and the Rev A Solomon of St Andrews Rectory, Clifton Campville.

26. Mr Peter John Afford the freehold owner as Trustee (since June 1976) stated that he did not know if previous landowners from 1973 (the start of the relevant 20-year period) to 1976 had erected signage on the land.
27. P J Afford also stated that it had “not been practical” to take steps to prevent the public’s access to the land adding that “field gates are locked”.
28. P J Afford stated that he had “redirected” people using the path “as and when” he had been present. The redirection of people was the only step he had taken to prevent the presumed dedication of the path as a public right of way. A copy of the response is attached at Appendix F.

### **Comments Received From Statutory Consultees**

29. Clifton Campville With Thorpe Constantine Parish Council on receipt of the application had no objections to the path running along the side of the field of Chestnut Lane, however, were concerned that a path running through the middle of the field from Coneyberry stile would perhaps at a later date cause problems. Mrs K Grubb, Clerk of the Parish Council stated the reason for this being that the Parish Council were trying to rent the field from the landowners as a recreational area with dog free areas for children to play safely and if a path were running through the middle of the field it “would not make a recreational area viable for all members of the parish to enjoy.” A copy of the response is attached at Appendix G.
30. Whilst responses were received from various other organisations none presented any evidence or had any comments that would support or rebut the application.

### **Comments on Evidence**

31. 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.
32. In 1932 the Rights of Way Act introduced the statutory presumption of dedication by the landowner of a public right of way which could be proven by evidence of 20 years usage as of right and without interruption. This presumption could be rebutted by the landowner proving that he had no such intention. However, the onus is on the landowner to do so. The land that the path crosses is not of a character that would prevent the dedication of a way.
33. It is clear from the available user evidence that that there have been no interruptions to their use over the relevant 20-year period. The application was made as a consequence of a challenge that was made in 1993 to members of the public using the way. There were no previous challenges. Nor have any of the users used force or sought permission to use the route and that usage has been open and not hidden from view.
34. From the attached user map evidence, the path used by all the users is on the same line and there is no indication that they have deviated from this 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 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 – although

several users do refer to using the route to visit the churchyard, post office or shops.

35. The statutory test refers to use over 20 years and in the evidence submitted there are 11 users who have used the path throughout that specific period of time. Of the remaining 5 users, 2 cannot demonstrate use of any 20-year period although claim to have known of the route for over 20 years. The other 3 users do not state which specific years they used the path.
36. 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, ie. "as of right". This was affirmed by the Court of Appeal in *R v Redcar and Cleveland* (2010) 2 All ER 613 where it was said that it must be brought home to a landowner that a right is being asserted across his land. This is true even where the owner is absent or cannot be identified. It is how the matter would appear to a reasonable landowner who was present.
37. The amount of user evidence that spans the relevant period of 20 years is over half of the amount of submitted users. This could be considered sufficient to bring that use home to a landowner.
38. Of the 16 users a total of 5 claimed to have used the path on a daily basis. A further 5 claimed to have used the path at least once per week and one user claimed a usage of once per month. The remaining usage was so infrequent as to pass notice. Again, however the frequency of use – often on a daily basis – could be considered significant enough to have brought itself to the landowner's attention.
39. A number of users, 7 in total – refer to either a stile, gate or both being present on the route. However, 9 of the users do not mention any gates at all. Why there is this discrepancy in the evidence is unclear, it may be that those persons who failed to mention them did not consider them to be an obstacle obstruction. It is clear from the user evidence that any gates that do exist have not been placed there by an owner to prevent or hinder use.
40. The core period of usage appears to be between 1967-87 with most users accessing the path over this period of time, however counting back from 1993, the year of challenge, there is also a continuous 20- year period of use, 1973-1993. In this case the relevant period will be from 1973-1993.
41. The fact that one user evidence statement stated that the local reverend once gave permission to use the path "as the rights of a villager" most probably refers to the use of the gate in the boundary wall/fence of the churchyard. This is supported by the fact that Mr P J Afford states he is the only landowner concerned.
42. All user evidence forms are consistent in that use was only challenged on the footpath in 1993 when a new tenant arrived on the land in question.
43. All user evidence forms are consistent in that any notices attested to by the landowner were only erected in 1993 when a new tenant arrived on the land in question.
44. Given the strength of reaction noted in the user evidence form at the point at which the footpath was challenged in 1993 and the fact nothing was raised prior to 1993 suggests the path was being regularly used by a significant number of users.

45. It was the tenant or occupier that appears to have challenged use of the path in 1993 and not the landowner direct. There is no evidence to say whether this “challenge” was also the view of, or with the approval of, the landowner or whether the tenant/occupier was acting independently. However, there is also no evidence to the contrary from the landowner and so it can be reasonably assumed that the landowner was in agreement with the tenant with regard to the challenge.

#### **Comments on All Available Material**

46. There is no evidence that we are aware of which would support any higher rights than those applied for.
47. The material when taken together appears to be consistent. Added to this is the landowners evidence supports the evidence provided by the users in that people were using the claimed route.

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

48. With regard to the status of the route, the burden is on the applicant to show, that on the balance of probabilities, that it is more likely than not, the way subsists. The existing situation must remain unless and until the Panel is of the view that the Definitive Map and Statement should be amended. If the evidence is evenly balanced, then the existing Definitive Map and Statement prevails.
49. The question also 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”.
50. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

#### **Summary**

51. The application is made under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in 53(3)(b) of the Act.
52. 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 (“the 1980 Act”) which sets out the requirements for both the statutory test and common law dedication.
53. The test requires consideration of whether there has been use of a way by the public, as of right 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.
54. 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 period of twenty years. In this case, the view taken was the status of the route was brought into question in 1993.

55. Therefore, it needs to be demonstrated that there was public use for 20 years prior to the challenge being made and use between 1973 to 1993 is taken to satisfy the first part of the statutory test. In total 11 out of the 16 users have over 20 years recorded usage that covers the relevant 20-year period. This is over half of all users and therefore significant enough to have alerted the landowner to its use.
56. Turning to the question of dedication or the lack of it the issue of what constitutes lack of intention to dedicate was discussed in the Godmanchester case where Lord Hoffman said *"It should be first noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said there would seldom be any difficulty in satisfying such a requirement without any evidence at all. It requires "sufficient evidence" that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J in Billson's case) it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience."*
57. When one considers this test, which is objective in its nature, then it is clear from the available evidence that there is nothing to substantiate a case that there was a lack of intention to dedicate. Until the challenge no owner had taken any steps whatsoever.
58. If the test in the first part of Section 31 is considered as to 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".
59. In this instance your officers consider that the use is sufficient to satisfy the statutory test set out in s31 when considered on the balance of probabilities.
60. An implication of dedication may also be shown at common law level 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.
61. For clarification all points appear to be satisfied in this case, there is a "way over land", the character of the land does not prohibit use by statute, it has been enjoyed by the public, and in sufficient numbers over a sufficient period of time. It has been used without force, secrecy and permission. It could be said that a common law dedication may have taken place.

## **Conclusion**

62. In light of the evidence, as set out above, it is your Officers opinion that the evidence does show that on the balance of probabilities a public right of way subsists.
63. It is the opinion of your officers that the County Council should 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 Lichfield with a minimum width of 1 metre.

## **Recommended Option**

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

## **Other Options Available**

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

## **Legal Implications**

66. The legal implications are contained within the report.

## **Resource and Financial Implications**

67. The cost of determining applications are met from existing provisions.
68. 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**

69. 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.
70. 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.
71. 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.

72. 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**

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

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**Background File:** LC615G

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### **INDEX TO APPENDICES**

Appendix A	Copy of Application
Appendix B	Plan of claimed route
Appendix C	User Evidence Forms
Appendix D	Summary of User Evidence
Appendix E	Supporting letter
Appendix F	Landowners Responses
Appendix G	Statutory Consultee Response