

Local Members' Interest	
Cllr V Wilson	South Staffs- Kinver

Countryside and Rights of Way Panel -

Wildlife and Countryside Act 1981

Application for the addition of an alleged Public Footpath between Kingsford Lane and Compton Road

Report of the 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 the alleged public footpath at Kingsford Lane to Compton Road, Kinver subsists.
2. 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 South Staffordshire as a Public Footpath.

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 Kinver. The effect of such an Order, should the application be successful, would:
 - (i) add an alleged Public Footpath from Kingsford Lane to Compton Road, Kinver 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.
 - (ii) The lines of the alleged Public Footpath which are the subject of the application are shown highlighted and marked A – B 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. The applicant has submitted in support of his claim evidence of an Inclosure Award dated 1774 and a Kinver Tithe Map dated 1856.
2. The applicant has provided a tracing from Kinver Compton Common Inclosure Award 1774. A copy is attached at Appendix C. The tracing of the Award Map shows a double dotted line connecting from Compton Road running across two plots of land in a south easterly direction connecting to what appears to be another main carriageway, although this is not named on the tracing.
3. The route runs through plot XXI Ambrose Jevon and plot XXIII Humphrey Bate. The route also runs passed two other plots, which are identified as belonging to F Waldron and John Hodgetts.
4. Alongside the Award Map is the Award itself. The Award states: “And we do hereby set out and appoint one public foot road out of the Compton Road at the west end thereof into the allotment No. XXI hereafter allotted to the said Ambrose Jevon along the same by the side of old inclosures belonging to the same by the side of old inclosures belonging to the said Francis Waldron and John Hodgetts to the east corner thereof from thence in a straight direction across the said last mentioned allotment and allotment No. XXII Hereinafter allotted to Humphrey Bate to the east corner thereof from thence in a straight direction across the said Kingsford Road...”.
5. The Award indicates that the double dotted line running through plots XXI and XXII was classified as a public foot road, therefore indicating that this was a pathway that could be used on foot.
6. The applicant has provided a tracing from the Plan of the Parish of Kinver in the County of Stafford Tithe Award 1856. A copy is attached at Appendix D. The Plan shows a single dotted line running through plots 982 and 983. The route connects to two separate carriageways, although there is nothing on the Plan to identify the carriageways.
7. There is no key or apportionment with the tracing of the map and there is nothing to confirm what the route is or what its status is.

Evidence submitted by the Landowners

8. An application was initially submitted to D Hough and T Ives of Vale Head Farm and to the National Trust, Attingham Park, Shrewsbury.
9. Trevor Ives completed an owner/occupier questionnaire evidence form and sent a letter dated 27th July 1998. Copies attached at Appendix E. Mr Ives advised that he does not own or occupy the land involved. Mr Ives view is that the alleged path is unnecessary as there is a path running from the car park on Kingsford Lane to the private lane running to Vale Head Farm. The walk goes through the beech woods belonging to the National Trust. Mr Ives stated in his letter: “Although it may not be a public path it is used by many people every day who use my lane to obtain access to Compton Road”. He advised that a Mr R Brown of Pigeon House Farm, farms the field in question.
10. An application was sent to Mr R Brown of Pigeon House Farm but there has been no response.
11. There has been no response from the National Trust in relation to the application.

Comments received from statutory consultees

12. Kinver Parish Council have advised that their members have no knowledge of such a path and are unable to comment on whether there was a path there prior to the

setting up of Kinver Parish Council in 1894. They have not provided any documentary evidence to refute or support the claim.

13. The Ramblers Association have advised that they have no documentary evidence of the existence of the alleged footpath, but they believe that public footpath 38 & 15 would have a continuation path to the West. They have confirmed that they support the claim.

Comments on Evidence

14. Inclosure Acts were Acts of Parliament designed to enclose the old commons, manorial waste and smaller holdings in order to increase agricultural productivity. On review of the documentation provided it appears that this relates to a Local Act, which meant that in this case it was specific to the area of Kinver. A commissioner was appointed to oversee the Act.
15. The preamble to the Act has not been included with the documentation. The preamble sets out the commissioners' powers, including whether they can create, divert or extinguish public and private highways.
16. The Award clearly describes the creation of "one public foot road", as they state that they "set out" and "appoint", which is suggestive of the creation of a new route rather than referring to an existing route. The Award also confirms that the "public foot road" connects with what appears to be two pre-existing routes, Compton Road and Kingsford Road and describes the plots of land that the new route will go through. The Map would often use pre-existing highways to assist in orientating the land allotted.
17. There is no indication from the Award or Map as to whether Compton Road and Kingsford Road are public or private highways. However, it is unlikely that the commissioners would connect a public highway to a private way or route with lesser rights.
18. No evidence has been provided such as a court order to advise that the route should not have been created or was extinguished. The fact that the route is shown on the award map and referred to as a "public foot road" within the award is supportive evidence of the existence of a public right of way along the alleged route.
19. The sole purpose of the tithe documentation was to identify land subject to paying the tithe. Commissioners would often use highways to orientate the map and locate the plots shown but their primary purpose was not concerned with highways. Some awards did show footpaths and bridleways as they affected the value of the land and carriageways were shown as separate.
20. On review of the tracing provided there is a single dotted line running through two separate plots of land and connecting to two separate carriageways. However, there is nothing to distinguish the status of the route that is depicted by the single dotted line or whether it is a public or private route. There is no apportionment and nothing to confirm the status of the two separate carriageways.

Comments on Report

21. Following circulation of the report comments were received from South Staffordshire Council, advising that no objections or comments have been made by their local members.
22. Comments were also received from the landowner, Mr Brown of Pigeon Farm.

23. Mr Brown advises that the proposed line now crosses a 26 acre block of arable land used for rotational cropping including potatoes, oilseed and cereals for human consumption. This employs modern machinery of autonomous operations including the use of pre-programmed automatic irrigation.
24. He also refers to a well-used footpath which runs approximately parallel to the proposed line and has been enhanced by the National Trust with benches and a quiet country lane on the other side.

Burden and Standard of Proof

25. In this instance the applicable section of the Wildlife and Countryside Act 1981 is section 53 (3) (c) (i). This section 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.
26. Thus there are two separate tests, one of which must be satisfied before a Modification Order can be made. To answer either question must involve an evaluation of the evidence and a judgement on that evidence.
27. For the first test to be satisfied it will be necessary to show that on a balance of probabilities the right of way does subsist.
28. For the second test to be satisfied the question is whether a reasonable person could reasonably allege a 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 must by definition be less than that which is necessary to establish the right of way "does subsist".
29. If the conclusion is that either test is satisfied then the Definitive Map and Statement should be modified.

Summary

30. An Inclosure Award has been determined by the courts to be conclusive evidence in respect of public highways in the absence of later legal events such as Quarter Session Orders, as shown in the case of *Dunlop v Secretary of State for the Environment and Cambridgeshire CC* (1995) 94 LGR 427. No evidence has been provided to show that the alleged route that was appointed in the 1774 Inclosure Award was not legitimate.
31. When considering an award the wording, powers and context all have to be taken into consideration and the Award needs to be considered in its totality.
32. The preamble was not included with the documentation and therefore there is no clear evidence to verify that the commissioner had the power to create a public footpath as set out in the Award. However, with no documentary evidence to the contrary it could be reasonably alleged that the footpath created along the alleged route was legitimate.
33. On their own tithe maps and awards are not evidence as to the public nature of a particular route but they may add supporting evidence, as stated in the case of *Maltbridge Island Management Co v Secretary of State for the Environment* [1998] EGCS 134.

34. In relation to the tithe documentation provided there is no evidence as to the status of the route depicted by the single dotted line. On its own the documentation does not provide any weight that the alleged route is a public footpath but when reviewed in conjunction with the Inclosure Award it is supportive that a route existed along the alleged way that was likely to have had a public right of way status.

Conclusion

35. The application is to be considered under s53 (3) (c) (i) as mentioned above, and so the question of whether the application should succeed needs to be evaluated against both tests in that section.
36. When the totality of the evidence is considered it is finely balanced as to whether it would satisfy the first part of the test set out in s53 (3) (c) (i) above, that is whether on the balance of probabilities a public footpath subsists.
37. The Inclosure Award evidence is good evidence that a public footpath was created along the alleged route and it is unlikely that the footpath would have connected to two separate carriageways that did not have the same or similar status. The documentation does not include the preamble and therefore it is not conclusive that all correct procedures were followed, and the appointed commissioner had the power to create a new public footpath. Therefore, it is your officer's opinion that the application has failed the test on the balance of probabilities.
38. When the lesser test is considered, that of reasonable allegation, that is satisfied. Taking into consideration both the Inclosure Award and Tithe Award evidence it is reasonable to allege that a public footpath with rights of way status does exist.
39. Taking everything into consideration it is apparent that the evidence shows that a public right of way, with the status of footpath, which is not shown on the map and statement is reasonably alleged to subsist.

Recommended Option

40. To make an order adding the public footpath, on the lines shown on the map attached at Appendix B, to the Definitive Map and Statement.

Other options Available

41. To reject the application and refuse to make an Order to add the claimed way to the Definitive Map and Statement.

Legal Implications

42. The legal implications are contained within the report.

Resource and Financial Implications

43. The costs of determining applications are met from existing provisions.
44. 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

45. 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.
46. 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.
47. 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.
48. 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

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

J Tradewell

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INDEX TO APPENDICES

Appendix A	Copy of application and associated submitted letters and documents
Appendix B	Plan of claimed route
Appendix C	Kinver Compton Common Inclosure Award 1774 submitted by the applicant
Appendix D	Tithe Award 1856 submitted by the applicant
Appendix E	Landowner questionnaire from Mr Ives dated 27 th July 1998