

Local Members' Interest		
Cllr M Worthington	Staffordshire Moorlands- Valley	Churnet

Countryside and Rights of Way Panel -

Wildlife and Countryside Act 1981

Application for an alleged Public Footpath at the rear of Ox Pastures, Cheddleton

Report of the Director of Corporate Services

Recommendation

1. That the evidence submitted by the applicants and that discovered by the County Council is sufficient to show that a Public Footpath which is not shown on the Definitive Map and Statement for the District of Staffordshire Moorlands subsists along the route shown marked A to B on the plan attached at Appendix B and should be added to the Definitive Map and Statement of Public Rights of Way as such.
2. That an Order 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 Staffordshire Moorlands 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 Cheddleton Parish Council 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 Footpath as claimed by Cheddleton Parish Council 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 application is supported by statements from 24 members of the public who claim to have used the alleged footpath 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 20 years prior to the status of the route being brought into question, or that it can be inferred by the landowners 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 physical impediments.
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, 24 October 1995, will be used as the challenge date. Accordingly, the requisite 20 year period of use should be calculated retrospectively from this date. The years 1975 to 1995 are the 20 year period whereby the majority of users provide evidence of use.
7. A summary of the salient points from the user information sheets has been compiled in a table. This is attached at Appendix D.
8. An examination of the forms will show that of the 24 submitted 13 users have over 20 years usage, which have all recorded usage that covers the relevant 20 year period, from 1975 to 1995.
9. Four users, Jill Proffitt, Richard Ball, Keith Walker and Kevin Edwards, also provide evidence of use between 1977 and 1995, which when combined makes another 20 year period, as two or more user's evidence of usage which overlaps can be added together to produce a cumulative effect of usage over the 20 year period. Jill Proffitt has used the route between 1983 to 1995. Richard Ball has used the route between 1980 to 1995. Keith Walker has used the route between 1977 to 1995 and Kevin Edwards has used the route between 1982 to 1995. Therefore, it can be said that 14 users have over 20 years of uninterrupted use of the alleged route.
10. 23 of the 24 users claim they were not an owner, tenant or related to anyone owning or tenancing the land crossed by the alleged route. The exception is Mrs Beryl Linnell who claims that she was the owner of 57 Ostlers Lane from 1965 to 1988. She advises that on buying the property they were informed the path was used by the caretaker of St Edwards Church. She advises that the path has been in existence for over 50 years. Although Mrs Linnell claims to be an owner of the land crossed by the alleged route, she has not provided any evidence that this is the case. There are several users who live on Ostler Lane and have provided evidence of usage, but they do not own the land. It is likely that the land ran near to Mrs Linnell's property but there is no evidence that she has ever owned any part of the alleged route. Her period of use is from 1965 to the present day of completing the public rights of way information sheet, which is dated 25 September 1995. This does meet the requisite 20 year period and it is likely that the use was as a member of the public and not as an owner.
11. Mr Keith Walker states his use is from 1977 to 1995 which in any event only covers 18 years of the period of use. He states that he considers the route to be public as a

footpath and that the path is used on a regular basis by children and parents going to and from school.

12. Mr Eric Parfitt states his use is from 1933 to 1995 which covers the requisite 20 year period. He states that he considers the route to be public and the path is in regular use by residents of Ox Pasture and Ostlers Lane and also by parents and school children from various village locations.
13. Sheila Walker states her use is from 1977 to 1995, which falls short of the relevant 20 year period by 2 years. She states that she considers the route to be public as a footpath and the path is used for going to church, the community centre, graveyard and as part of a circular walk.
14. Marjorie Edwards states her use is from 1965 to 1995, which covers the relevant 20 year period. She states that she considers the route to be public as a footpath and the path is used for safety reasons and is frequently used by her children aged 11 and 5 years to visit relatives and to avoid the roads.
15. None of the users apart from Alma Crosby allege that there have been any gates or obstructions along the alleged route, which has prevented use of the route at any point during the relevant 20 year period. Alma Crosby states that there is a gate at the top of Higherfields, but when looking at the map this does not appear to affect the alleged route.
16. The table shows that the frequency of use varies, however 11 users have claimed to use the alleged route on a weekly basis. 3 users claim to have used the alleged route twice a week and 4 users claim to use the alleged route daily. 1 user claims to use the alleged route 3-4 times a week. Another user claims that for 12 years they used the route twice a week, Monday to Friday but now uses it 3 times a week.

Evidence submitted by the Landowners

17. When the application was submitted, the applicant revealed two landowners for the whole of the land over which the application route runs.
18. Mr Bowcock completed an owner evidence form on 24 November 1995 and correspondingly wrote a letter. Mr Bowcock states that the land in question is a private footpath and was described as such in a Conveyance of 23 July 1931 between the late Solomon Bowcock and the late George Arthur Lymer whose descendants own the triangular pasture field immediately to the north. The private footpath land is vested in the Executors of the late Philip Thornley Bowcock. They confirm that no signs were erected as the land is a private footpath and has not been used by the public at large. Bowcock & Pursaill Solicitors act for the Executors of the late Philip Thornley Bowcock.
19. Mr Lymer completed an owner evidence form on 26 January 1996. Mr Lymer confirmed that he is the freehold owner of the adjoining field to the north of the alleged route. He advises that there has never been a need to erect signs as the land is a private footpath. He states that the path has been obstructed by vegetation and garden waste deposited by residents of dwellings on Ox Pasture backing onto the path. My Lymer is of the opinion that the footpath is a private right of way and whilst it has been in existence for more than 20 years its use has not been uninterrupted.
20. There was further correspondence between Cheddleton Parish Council and Bowcock & Pursaill Solicitors enquiring as to whether Mr Bowcock would be willing to sell the path to the Parish Council. A letter dated 28 December 1999 confirmed that the Executors did not wish to sell the land in question to the Parish Council.

21. Copies of the above correspondence are attached at Appendix E.

Comments received from statutory consultees

22. The secretary of the Staffordshire Moorlands branch of the Ramblers Association, Brian Rich responded on 12 November 1995 with a letter stating that due to his personal knowledge of the footpath he sees the benefits gained from putting the path on the Definitive Map.
23. The Peak and Northern Footpaths Society has indicated that it has no evidence to submit either in support or against the application.
24. The Leek and District Footpath Preservation and Ramblers Group responded on 28 November 1995 with a letter stating that this well used and useful path to the local school would indeed benefit the community and walkers by being put on the Definitive Map.
25. Staffordshire Moorlands District Council responded on 28 March 1996 with a letter stating that the council's planning committee resolved that the County Council should be urged to make an order amending the Definitive Map by giving footpath status to the alleged route.
26. Copies of the above correspondence are attached at Appendix F.

Comments on Evidence

27. 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.
28. It is clear from the available user evidence that there have been no interruptions to their use of the alleged way and therefore the date of challenge is taken from when the application was made in October 1995. For 14 of the 24 users this uninterrupted use of the alleged way has been for over the twenty year period.
29. There is no evidence that any of the users have used force to use the route and that usage has not been in secrecy.
30. The path used by all the 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, although it is clear from the evidence that it is predominantly used by local people. 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.
31. The statutory test refers to use of over 20 years and in the evidence submitted there are 14 users who have used the path over that period of time. The remaining evidence suggests use continues throughout that time but is for lesser periods.
32. 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 is as if it was a public highway, i.e. "as of right".
33. The frequency of use is relatively high, given that 11 users claim to use the route every week, 3 users claim to use the route twice a week and 4 users claim to use it every

day. This usage should have been enough to bring it to a landowner's attention if they were present.

34. However there is conflicting evidence as one of the landowner's, Mr Lymer has advised that the alleged route had rarely been used until 2 to 3 years prior to the application being made in 1995 and that during the summer months the route was overgrown with vegetation and therefore access was impossible to achieve. He also advises that residents from Ox Pasture use the path to deposit garden waste, which also obstructs use of the way. Therefore, he argues that it has not been possible for the public to have used the way uninterrupted for 20 years. This is also supported by Mr Bowcock.
35. The evidence from the landowners certainly brings into question the evidence from the users but in light of the fact that 14 of the 24 users claim to have used the alleged route uninterrupted for 20 years would suggest that this is a route that has been accessible by members of the public. Also, the remaining users all claim to have used the route but for lesser periods of time. However, the user evidence should still be looked at with caution.
36. 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.
37. In the case of *R v Redcar and Cleveland* [2010] 2 All ER 613 the court said that for a presumption of dedication to be raised it must be brought home to a landowner that a right is being asserted across his land. It is how the matter would appear to a reasonable landowner who was present.
38. If the use was such that it would go unnoticed by a reasonable landowner, that is it was used by so few and so sporadic that it would not be apparent the way was being used, then it could be the case that no presumption of dedication would arise. The landowners intimate from their evidence that this was the case as they argue the route was not passable on foot but they do concede that in the two to three years prior to the application being submitted there was some evidence of use, although no steps were taken to prevent usage of the way. If the user evidence is to be believed the whole of the alleged route could be accessed uninterrupted for the twenty year period.
39. Once a presumption of dedication is raised then the burden lies with the owner to demonstrate by his actions that there was no intention to dedicate. In this case there is no evidence that there have been any obstructions to prevent members of the public from using the alleged route. Mr Bowcock and Mr Lymer advise that the route has always been a private path when described in a conveyance of 23 July 1931. However, it does not appear that any signs or notices have been erected to make members of the public aware that this is a private path and therefore it could be argued that the landowner has not acted to show that there was no intention to dedicate the path.
40. In considering whether a public highway of whatever description exists the evidence also needs to be considered not only under statute but the common law. Under common law, the burden of proof is reversed, in that it is for the user to prove the owner dedicated the route and the use does not have to be for 20 years. The former can be inferred from the use but as the judge in *Nicholson v Secretary of State* (1996) said, "*the more notorious it is the more readily will dedication be inferred*".
41. As already stated there is conflicting evidence between the landowners and users as to the feasibility of using the route but when considering the evidence as a whole one

could say that the use would have been so obvious that the owner must, if he was present, have acquiesced and so there was inferred dedication.

Burden and Standard of Proof

42. An application for a modification order based upon evidence of use can be made under either s53(3)(b) or (c). It is usual that s53(3)(b) is used where use has ceased either as a consequence of a challenge or physical prevention. In this case there has been no specific challenge or prevention of use of the alleged route.
43. Officers consider that the application falls more properly under s53(3)(c)(i) and that this should be considered the relevant section for determination purposes.
44. 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
45. 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.
46. 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".
47. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

Summary

48. The application is made under Section 53(2) of the 1981 Act, relying on the user evidence specified in 53(3)(c)(i) of the Act.
49. 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.
50. 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.
51. 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.
52. 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.
53. There is no clear evidence that the users were unable to use the alleged route uninterrupted for the twenty year period and in light of the number of users who came forward to provide evidence of use this is supportive of the usage of the alleged route for the relevant period. Also, no clear overt actions have come to light that would indicate a clear intention not to dedicate.

54. 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 be satisfied.
55. It is clear from the user evidence supplied by the applicant that this route is held in strong belief that it is public. The legal tests seem to have all been met and evidence points to the fact that there has been uninterrupted use of the claimed route on foot during the period of use from 1975 to 1995.

Conclusion

56. In light of the evidence, as set out above, it is your officer's opinion that the evidence shows that a public right of way, with the status of footpath, which is not shown on the map and statement subsists.
57. 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 Staffordshire Moorlands.

Recommended Option

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

Other options Available

59. 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

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 15 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 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

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

J Tradewell

Director of Corporate Services

Report Author: Hannah Titchener

Ext. No: 854190

Background File: LE614G

INDEX TO APPENDICES

Appendix A	Copy of application and associated submitted letters and documents
Appendix B	Plan of claimed route
Appendix C	User evidence forms
Appendix D	Table of Usage
Appendix E	Copies of the landowner's responses
Appendix F	Copies of the comments of the User Groups/Councils