

<b>Local Members' Interest</b>	
Jeremy Pert	Eccleshall ED
John Francis	Stafford Trent Valley ED

## **Countryside and Rights of Way Panel – 20 September 2019**

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

#### **Application for a Public Right of Way from Beaconside to Marston Lane, near Marstongate Farm, Hopton and Marston Parish**

#### **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 conclude that a public footpath which is not shown on the Definitive Map and Statement is reasonably alleged to subsist along the route shown 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 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 Stafford 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 from Mr Martin Reay, for an order to modify the Definitive Map and Statement for the area by adding an alleged Public Footpath from Beaconside to Marston Lane under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981. A copy of Mr Reay’s application is attached at Appendix A. The line of the alleged Public Right of Way is shown on the plan attached at Appendix B and marked A – 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.

#### **Background**

1. The applicant has submitted historical evidence only in support of his claim to add a public footpath to the definitive map.
2. The applicant has referred to the fact that the alleged public footpath is shown on historical documents and maps.
3. Whilst it is necessary to consider the different types of evidence separately, the determination of the application must be upon all the evidence collectively.

#### **Evidence submitted by the applicant**

4. The applicant has submitted in support of his claim evidence from a traced version of the Marston Tithe Award of 1839. A tracing of the map is attached at Appendix C. The alleged footpath is shown as a dotted line and a short section of the northern most part of the alleged path is shown.
5. The applicant has also submitted deposited railway plan records of 1844. These indicate that a public footpath was recorded over plots 27a and 5. In plot 6, which the alleged route also runs through, no public rights of way are recorded.
6. The accompanying maps to the 1844 railway plans are attached at Appendix E and show the full footpath by way of a dotted line which matches the alleged route of the applicant.
7. The applicant has also submitted the deposited railway plan maps of 1845. These show a footpath by way of a dotted line which matches the railway plan map of 1844. There is also an annotation along the dotted line which describes it as a footpath. This dotted line shows the entire alleged route. A copy is attached at Appendix F.
8. The accompanying records to the 1845 railway plans show that the alleged footpath runs through plots 61, 63 and 30. The owner is described as being “the Surveyor of the Highways for the Township”. These are attached at Appendix G.

#### **Other evidence discovered by the County Council**

9. Officers have conducted research at the Councils records office and have obtained a copy of the Hopton and Coton Tithe Map however the alleged route does not appear.
10. Officers have obtained a copy of the planning application boundary in respect of land north of Marstongate Farm, Marston Lane, Stafford. The applicant had raised concerns that the proposed development would compromise the alleged route however from the map attached at Appendix I this is not the case.

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

11. The landowners, Mrs Stubbs, Mr & Mrs Baker and Mrs Brandon have submitted landowner questionnaires, copies of which are attached at Appendix H.
12. In Mrs Stubbs questionnaire she comments that there is no knowledge of the alleged footpath from village residents. Mrs Stubbs also comments that her father-in-law moved into their farm in 1903 and claimed there were not any footpaths in the area at all.

13. In Mr & Mrs Bakers questionnaire they comment that the right of way does not exist.
14. In Mrs Brandon's questionnaire she comments that there are already three public footpaths on her farm which are portrayed on the definitive map and does not believe the alleged route to exist. Mrs Brandon also states that there is no path of any description on any documents in her possession such as old maps and sale particulars.

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

15. Stafford Borough Council have replied stating that they have no comments on the application.
16. Marston Parish has also replied stating that they oppose the addition of the alleged footpath but has not submitted any evidence.

### **Comments on Evidence**

#### Tithe Maps:

17. The Tithe Map of Marston Parish 1839 shows only a short section of the alleged route.
18. On their own, tithe maps and awards are not evidence as to the public or private nature of a particular route but may add to the supporting evidence. Their purpose was to show what land was tithable as stated in *Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77*
19. The courts have said that the evidence may be supportive of the existence of a public right of way but the weight to be given to such documents is a matter for the tribunal of fact, in this case the Panel. Such evidence is not on its own conclusive proof and therefore must be considered alongside all other evidence as stated in *Maltbridge Island Management Co. v Secretary of State for the Environment [1998] EGCS 134*.
20. The Tithe maps and awards were not intended to be records of highways and more often used the latter as a mechanism for orienteering the map to assist in locating the titheable land and allotments.
21. Minor ways such as footpaths might be shown as dotted lines crossing various plots.
22. The Tithe maps were intended to be a record of the productivity of the land and as a consequence the amount of tithe that would be payable. The impact of Footpaths on any cultivated land would be lessened and so there would be less reason to exempt the land from the tithe. It might give rise to a reduction in the tithe payable to allow for inference but such reductions are not always apparent.
23. The best that can be adduced from the Tithe maps is that there was a physical feature that they considered worth recording. As to whether that way had public or private rights is open to conjecture but could at the very least be construed as supporting evidence of physical existence.
24. The Tithe Maps may be a record of the physical existence of a route however they are not evidence of the legal boundaries of the highway as stated in *Webb v Eastleigh Borough Council 1957*.

### Deposited Railway Plans:

25. The deposited railway records of 1844 provide a description of the plots in which the claimed route passes through. The records also provide a description of who is the owner of each plot. In this instance plots 5 and 6 are owned by Earl Talbot and plot 27a is owned by Thomas William Giffard.
26. Statute required, from 1838, that the plans of these works and the accompanying book of reference were deposited with the local public authorities. This was true for routes that never came to fruition as well as for those that were constructed.
27. In compiling the plans for the route of the railway the surveyors drew up a map showing the intended line of the construction with the limits of deviation from that line. It was not the primary purpose of deposited plans to record highways of any description but came about as a consequence of the need to survey the land.
28. In the case of public highways the landowner or person responsible for maintenance may be listed as the Surveyor of Highways which would indicate the way was public. The Surveyor of Highways may also be listed as jointly liable with a landowner. For the 1844 records the plots were under private ownership therefore it cannot be determined if the path was public or private.
29. The first set of railway plans are dated 1844. However, it was not until The Railways Clauses Consolidation Act 1845 was introduced that the requirements for railways were expanded, with public rights of way which cross the route of a railway to be retained unless their closure has been duly authorised. Although it was not the primary purpose of the deposited plans they can show whether a route was public or not.
30. In respect of the 1844 plans it is difficult to determine whether or not the alleged route was public as the Railways Clauses Consolidation Act was not introduced until a year later and the section of the alleged route, which passes through plot 6, has no description of any public right of way.
31. The 1845 railway plans may have been published in 1845 but that does not necessarily mean that they were drawn up at the same time as the Railways Clauses Consolidation Act. The plans would have taken time to draw up and so it is unlikely that the act would have been taken into consideration at this point.
32. In the 1845 railway plan references who owns each plot which the alleged route passes through. The owner is described as being "the Surveyor of the Highways for the Townships". The paths are also described as being "public". There is also a further annotation on the accompanying maps which describe the route as a "public footpath".
33. The financial implication that a railway line would have had on a public highway must also be taken into consideration. There were potential penalties for not providing public crossing points where there was a public highway. The railways surveyor undertaking the plans would have needed to be accurate in his plans as there were great financial implications in place. Whoever funded the construction of a railway would have wanted to know the precise costs. A public footpath crossing the potential railway would mean that a manned crossing may have been required to allow the public to pass and re pass over it safely.

34. The Highways Act 1835 set out that all roads except for turnpike roads were maintainable at public expense and the parish was to maintain them. However footpaths were not automatically publicly maintainable after 1835 and it was rare for them to be maintained and mentioned in records.
35. The Highways Act 1835 also set up the new procedures for Railway planning and creation in that they could no longer set out new highways or that they were in fact publicly maintainable without the agreement of the surveyor of the highways.
36. However from viewing OS maps from 1881, 1889, 1902, 1922 and 1925 Officers have found no record of any railway lines which run through the area in which the footpath is alleged. There is also no contemporary record of any disused railway lines on OS maps. This would indicate that the proposed railway lines plans were never brought to fruition. Conversely the absence of a feature on the map does not mean it did not exist.
37. Where schemes were not completed, the plans were still produced to form the basis for legislation and were still in the public domain. Whilst they are likely to provide useful topographical details, they may not be as reliable as those that have passed through the whole parliamentary process. As above, the weight to be attached will need to be determined alongside all the other available evidence.

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

38. 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.
39. 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.
40. 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.
41. 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”.
42. If the conclusion is that either test is satisfied then the Definitive Map and Statement should be modified.

### **Summary**

43. Tithe Maps submitted on their own are not reliable as evidence for a modification order. They make no distinction as to whether or not a route is public or private as stated in *Merstham Manor Ltd v Coulsdon and Purley Urban District Council* [1937] 2 KB 77. However they may be useful with other supporting evidence.

44. The Tithe Map of Marston Parish only shows a short section of the northern most part of the route however on the adjoining Tithe Map of the Parish of Hopton and Coton the alleged footpath is not shown. However just because the southerly most part of the alleged route does not appear on any maps this does not necessarily mean it did not exist. One could reasonably assume that the footpath does continue south towards Stafford, when viewed in conjunction with other evidence.
45. The Tithe Map was submitted alongside deposited railway plans and records. The alleged route is shown on the all of the deposited railway maps and is also noted in the accompanying books of reference. This would indicate that the route did exist in some capacity.
46. The deposited railway plans indicate that there was a public footpath which follows the same way as the claimed route. Even though the railway was never constructed it was important that the railway surveyors be as accurate as possible with their plans due to the financial implications they could have had.
47. As the footpath is shown on the railway plans as public this is strong evidence that it was indeed a public right of way as footpaths were not automatically maintainable at public expense and the surveyor of highways could have objected to its inclusion within the records.

### **Conclusion**

48. 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.
49. 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.
50. However when the lesser test is considered, that of reasonable allegation, that is clearly satisfied. As the courts have indicated, if it is reasonable to consider any conflicting evidence and reasonable to accept the evidence of existence then an order should be made and the material be tested during that process. Here there is no conflicting evidence to weigh in the balance and so it does clearly satisfy the test.
51. 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.
52. It is the opinion of your officers that the County Council should make a Modification Order to add the alleged public footpath marked A – B on appendix B to the Definitive Map and Statement of Public Rights of Way.

### **Recommended Option**

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

### **Other options Available**

54. To decide to reject the application to add a public footpath to the definitive map from Beaconside to Marston Lane

### **Legal Implications**

55. The legal implications are contained within the report.

## **Resource and Financial Implications**

- 56. The costs of determining applications are met from existing provisions.
- 57. 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**

- 58. 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, Food and Rural Affairs under Section 14 of the Wildlife and Countryside Act 1981. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence. 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.
- 59. 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.
- 60. 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.
- 61. 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.
- 62. There are no additional risk implications.

## **Equal Opportunity Implications**

- 63. 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: LG607G**

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