

Local Members' Interest	
Gill Heath	Leek Rural (Staffordshire Moorlands)

Countryside and Rights of Way Panel – Friday 8 November 2019

Wildlife and Countryside Act 1981

Application to upgrade Footpath 21 from Heaton Village to Hawksley Farm & County Road to a Bridleway

Report of the Director of Strategy, Change and Governance

Recommendation

1. That the evidence submitted by the applicants and that discovered by the County Council is sufficient to show that the alleged public bridleway Heaton Village footpath 21 to Hawksley Farm and County Road subsists.
2. That the evidence submitted by the applicants and that discovered by the County Council is sufficient to show that, on a balance of probabilities, FP 21 should be added as a highway of a different description, namely a bridleway to the Definitive Map and Statement of Public Rights of Way.
3. That an Order be made under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to modify the to the Definitive Map and Statement by upgrading public footpath 21 at Heaton Village to a public bridleway along the route shown between points A to B on the plan attached at Appendix B.

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 Pat Amies of the Border Bridleways Association for an Order to modify the Definitive Map and Statement for the District of Staffordshire Moorlands. The effect of such an Order, should the application be successful, would:
 - (i) upgrade footpath 21 at Heaton Village as a bridleway on the Definitive Maps of Public Rights of Way under the provisions of Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981.
 - (ii) The lines of the alleged Bridleway 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. In support of the application the applicant submitted 14 user evidence forms, three County Maps, eight Ordnance Survey Maps, 1910 Finance Act material, Enclosure Award & Statement and an Estate Plan by Charles Heaton.

User Evidence

2. The evidence of use takes the form of 14 user statements made by members of the public who claim to have used the route over varying periods of time. Copies of their statements are attached at Appendix C.
3. 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.
4. 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 home to the public that their right to use the way is being challenged.
5. 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.
6. 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.
7. In the absence of an identifiable challenge to the public's use of the claimed route the date of the application, June 2003 will be used as the challenge date. Accordingly, the requisite 20-year period of use should be calculated retrospectively from this date.
8. Your officers have examined all the user evidence and the relevant twenty-year period for this application has been calculated from 1983 to 2003. This period of time is where the most usage has occurred.
9. A summary of the salient points from the user evidence forms has been compiled in table. This is attached at Appendix D.
10. Under examination of the forms it shows that of the 14 submitted users 11 state the claimed route is gated. The remaining 3 users claimed there is no gate on the route, in which 1 of those 3 users state there is no gate however there is a piece of string across the route to prevent cattle escaping.
11. 9 of the 14 users have used the claimed route on horseback only, whereas the remaining 5 users have used the route on horseback and foot, no users have used the route on foot alone.
12. Further examination of the forms shows the frequency of use as sporadic. 5 users claim to use the route on a weekly basis, a further 5 users use the route seasonally, 2 users use the route 2-4 times annually. Of the remaining 2 users, 1 stated they had used the claimed route once and the outstanding user did not state the frequency whatsoever.
13. Further inspection of the forms shows 7 of the 14 users claim to have seen 1-8 people using the route, 3 users have not stated whether they have seen people using the route and 2 users state they have seen 2-3 people using the route. The

remaining 2 users, 1 stated they had 'heard' of people using the route and the outstanding user stated they had not seen anyone using the route.

14. Final inspection of the forms shows only 2 users out of the 14 have had 20 years plus usage. S. Hine details 25 years of use from 1972 to 1997, however only 14 of those years fell into the relevant twenty-year period. L. Egerton claims to have used the alleged route for 20 years from 1979 to 1999, 16 of those years fall into the relevant twenty-year period.
15. 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. In this case there is no other user evidence that can be combined to establish the requisite 20-year period. Consequently, this evidence does not go towards providing proof of the route's existence.

Documentary Evidence

Estate Plan of Heaton 1817

16. These were maps drawn up for the owners of private estates for their own use and some maps are very detailed whilst others are limited to extensive outlines.
17. They may provide physical evidence of a route in a similar manner to ordnance survey maps however they need to be approached with some caution as they were drawn up with a specific purpose, for the owner. A copy of the Estate Plan can be found at Appendix E.

Heaton Enclosure Award and Statement

18. Enclosure Awards are legal documents that usually consist of a written description of an area with a map attached.
19. Awards resulted from a necessity by the landowners to gather together their lands and fence in their common lands. A Local Act of Parliament was needed to authorise the procedure and an Enclosure Commissioner was appointed as a result to oversee the compilation of the award and map.
20. Land was divided into individual plots and fields and redistributed amongst the existing owners.
21. Enclosure Awards provide statutory evidence of the existence of certain types of highway. They enabled public rights of way to be created as necessary, confirmed and endorsed and occasionally stopped up.
22. Enclosure Commissioners surveyed land that was to be enclosed and had the power to 'set out and appoint public and private roads and paths that were often situated over existing ancient ways. A copy of the Heaton Enclosure Award and Statement can be found at Appendix F.

Ordnance Survey Maps

23. Eight Ordnance Survey Maps were produced by the applicant. Ordnance Survey Maps date back to the early 1800's and their purpose is to show physical features on the ground. In doing so they included all manner of ways from tracks leading only to remote properties, footpaths crossing fields, as well as the main highway.
24. They do not distinguish between public and private rights of way. There may be annotations next to some minor routes such as FP or BP, however they again do not indicate whether the way was public or private. Such an annotation might indicate that the route was only capable of having that type of traffic use but would only be supporting evidence, not conclusive.

25. They may provide supporting evidence alongside other material, however on their own they are of limited value. Copies of the maps can be found at Appendix G.

The Finance Act 1910

26. The Finance Act 1910 involved a national survey of land by the Inland Revenue so that an incremental value duty could be levied when ownership was transferred. Land was valued for each owner/occupier and this land was given a hereditament number.
27. Landowners could claim tax relief where a highway crossed their land. Although the existence of a public right of way may be admitted it is usually described or a route shown on the plan. This Act was repealed in 1920.
28. Two sets of plans were produced, the working plans for the original valuation and the record plans once the valuation was complete. Two sets of books were produced to accompany the maps, the field books, which record what the surveyor found at each property and the 'Domesday Book', which was the complete register of properties and valuations. A copy of the Finance Act plan and field book can be found at Appendix H.

County Maps

29. Three County maps were submitted by the applicant. These maps, like the Ordnance Maps referred to above, are evidence of the existence of routes on the lines shown on the maps. They are not, however, evidence as to the status of those routes. Copies of these can be found at Appendix I.

Other evidence discovered by the County Council

30. Officers have conducted research into historical documentation at the County Council's Record Office.

Evidence submitted by the Landowners

31. Mr Heathcote of Heaton Hall has had an interest in the affected land for 60 years and considers the alleged route to be a public bridleway. He has stated he has never erected any signs prohibiting the use of the route nor has he turned anyone away from using it. A copy of the owner/occupier form can be found at Appendix J.
32. Mr Woolley of Earlsway House is a retired farmer and has had an interest in the land for 14 years at the time of the application. He considers the claimed route to be a public bridleway. He also states that he has never erected any signage to prevent the use of the route neither has he turned away anyone using it. A copy of the owner/occupier form can be found at Appendix K.
33. Mr Tideswell of Hawksley Farm has had an interest in the affected land for 40 years. He considers the route to also be a public bridleway. He also has stated he has at no time erected any signage to prevent the use or turned anyone away from using the route. A copy of the owner/occupier form can be found at Appendix L.
34. Norgrove- Moore, the owners of Toft Hall have had an interest in the affected land for 6 years. They consider the claimed route to be a public footpath. They state they have no objections to the route, however if it is to be upgraded to a bridleway, they state the route would need to be made suitable to accommodate horse riders. A copy of the owner/occupier form can be found at Appendix M.

Comments received from statutory consultees

35. Heaton Parish Council was consulted regarding the application; however, we have not received any response to support or refute the application to date.

Comments on Evidence - User Evidence

36. If the test for statutory dedication under Section 31(1) of the 1980 Act fails, public rights may nevertheless have been dedicated at common law. For a route to have been dedicated at common law it must be decided whether there was express or implied dedication of public rights by the landowners, and also whether there was an acceptance of such rights by the public. Unlike statutory dedication, there is no fixed minimum period of use that must be satisfied in order to prove an inference of dedication at common law.

37. In the case of *Nicholson v Secretary of State for the Environment*, (1996) Dyson J. stated:

“It is common ground that it is a condition of dedication, whether by statute or at common law, that there has been open, uninterrupted user as of right. What differences are there between the conditions that will found a dedication by statute and those that will found a dedication at common law? First, a period of 20 years is required for the purposes of statutory dedication. At common law there is no fixed minimum period which must be proved in order to justify an inference of dedication and no fixed maximum period which compels such an inference. It all depends on the facts of the case. Prima facie the more intensive and open the user and the more compelling the evidence of knowledge and acquiescence, the shorter the period that will be necessary to raise the inference of dedication at common law. Secondly, the burden of proof is different. By statute, after 20 years, the legal burden of proof shifts to the owner to disprove an intention to dedicate, provided that the other conditions are satisfied. At common law the legal burden rests on the user throughout to prove dedication. The evidential burden, however, shifts once presumption of dedication has been raised.”

Further on in his judgement Dyson J. says:

“The relevant criteria so far as the quality of the user is concerned are the same in both cases. The use must be open, uninterrupted and as of right. The notoriety of the use is relevant for common law purposes in the sense that the more notorious it is, the more readily will dedication be inferred if the other conditions are satisfied. But notoriety is also relevant for the purposes of the statute, since the more notorious it is, the more difficult it will be for the owner to show that there was no intention to dedicate.”

38. So, for common law dedication no minimum period of use is required to raise such an inference, but there must be evidence which is sufficient to infer that there was an intention to dedicate a public right of way.
39. Under the common law test the person claiming a public highway exists must prove that there has been an intention to dedicate by a landowner. This is the reverse of the s31 test where the statute sets out a rebuttable presumption that after 20 years use there has been a landowner dedication and it is then for the landowner to disprove.
40. For a common law dedication to have taken effect there has to be a landowner capable of dedicating the route to the public. This can be inferred from long user where the start of the user is lost in the mists of time.

41. Scott LJ in Jones v Bates [1938] 2 AER 237 summarised the principle in the common law by stating *“the sole origin of a public highway was dedication to the public use by the owners of the land over which it ran, and in consequence that, in case of dispute, the public right could be established only by such evidence as would justify an inference of fact that the way has at some date, known or unknown, been so dedicated. The corollary followed that, on this as on all others issues of fact, the tribunal had to decide, once there was some affirmative evidence before it of user, whether or not on balance it was sufficient to establish dedication...”*
42. Therefore, it is possible that the above-mentioned presumption may apply in this case as all the landowners except for one, have declared the route is considered to be a public bridleway. In the circumstances consideration of common law dedication has been satisfied.

Comments on Evidence - Documentary Evidence

Estate Plan of Heaton 1817

43. The estate plan of Heaton dated 1817 shows the claimed route in its entirety. It is shown with black boundary lines on either side for all its length.
44. The evidential value is limited to supporting evidence of the physical existence of a way.
45. Some estate plans may distinguish between public and private ways. Where the estate owner has listed a way as public it would add to the supporting evidence but could not be relied upon to prove dedication.
46. In this case the estate owner did not list the route as public. A copy of the Estate Plan can be found at Appendix E.

Heaton Enclosure Award and Statement 1820

47. The Heaton Enclosure award again shows the claimed route in its entirety. However, there is no mention of the actual claimed route in the award. Considering the road is already set out and in existence it would not be necessary to award it.
48. When considering an award the wording, powers and context all have to be taken into consideration to determine its evidential value. Any extract should not be evaluated on its own but rather considered with the remainder of the award.
49. In this case as stated previously there is no mention of the claimed route however the Enclosure award clearly does and so, we could only take this to be supporting evidence of the physical existence of the claimed route. A copy of the Enclosure Award and Statement can be found at Appendix F.

Ordnance Survey Maps

50. The eight Ordnance Survey maps submitted by the applicant show the claimed line of the route.
51. The evidential value of Ordnance Survey Maps has been considered by the courts to be limited solely to being evidence of whether there was a visible feature on the ground at the time of the survey.

52. They may provide supporting evidence alongside other material but on their own are of limited value. Copies of the Ordnance Survey Maps can be found at Appendix G.

The Finance Act 1910

53. The Finance Act map supports the physical feature of the route in its entirety. The alleged route passes through fields 84, 78, 81 and 89. However, the only field book located is for plot 84. A copy of the Finance Act material can be found at Appendix H.
54. The field book entry for plot 84 refers to a deduction regarding a footpath. It does not state whether this is public or private.
55. The applicant refers to the map as being "*marked with red lines and includes split bracings at either end. These are used to indicate public roads and will be seen repeated on all surrounding public vehicular highways*". When the bracing is across a road and it is split (i.e. it does not cross the road), then it is indicative of a public highway however, this is not conclusive. It also means that the parcels of land either side of the road are in the same ownership.

County Maps

56. Some of the County Maps are not of the best quality. The Teesdale 1831 and 1832 is of the poorest quality. Whereas the Greenwoods 1820 and Yates 1775 it can be seen in its entirety.
57. Once more this evidence only supports the physical feature of the route and does not indicate the rights over it. Copies of the County Maps can be found Appendix I.

Burden and Standard of Proof

58. Regarding the status of the routes, the burden is on the applicants to show, on the balance of probabilities, that it is more likely than not, that the Definitive Map and Statement are wrong. The existing classification of the routes, as footpaths, must remain unless and until the Panel is of the view that the Definitive Map and Statement are wrong. If the evidence is evenly balanced, then the existing classification of the routes as a footpath on the Definitive Map and Statement prevails.

Summary

59. The application is made under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in 53(3)(c)(ii) of the Act.
60. 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.
61. This test 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.
62. 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 in 2014.

63. Therefore, it needs to be demonstrated that there was public use between 1994 to 2014 to satisfy the first part of the statutory test. 7 out of the 16 users have over 20 year's recorded usage that covers the relevant 20-year period. This creates concern as to whether the evidence shows that it is sufficient to alert a landowner to the use.
64. If one considers the test in the first part of Section 31, 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.*"
65. In this instance your officers consider that the use is insufficient to satisfy the test set out in s31 when considered on the balance of probabilities.
66. If it is decided that the statutory test has failed, consideration is given to the issue of common law dedication; that is, whether the available evidence shows that the owner of the land over which a way passes has dedicated it to the public.
67. An implication of dedication may be shown at common law 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.
68. No evidence has been submitted to show that the usage has been challenged by the land owners or that there has been an intention not to dedicate during the 20-year period. In light of this it can reasonably be considered that there has been a common law dedication of the route as a public bridleway.
69. On the balance of probabilities, it can be said that the test set down under the common law has been satisfied.
70. The 1949 Act required that every route should be recorded as either a 'public footpath', a 'public bridleway', or a road used as a 'public path'.
71. What can be said from the old maps is that the route may have physically existed but that any public rights may have been no more than those currently recorded. They do not provide evidence of rights higher than a public footpath.

Conclusion

72. In light of the evidence as a whole, it is your officer's opinion that the evidence shows that a public right of way, with the status of a public bridleway, which is not shown on the map and statement subsists at common law.
73. 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 Council.

Recommended Option

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

Other options Available

75. To decide to reject the application to upgrade the footpath to a bridleway.

Legal Implications

76. The legal implications are contained within the report.

Resource and Financial Implications

77. The costs of determining applications are met from existing provisions.
78. 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

79. 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.
80. 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.
81. 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.
82. 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

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

J Tradewell

Director of Corporate Services

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