

<b>Local Members' Interest</b>	
Mark Winnington	Gnosall and Doxey (Stafford)

## **Countryside and Rights of Way Panel – 8 November 2019**

### **Wildlife and Countryside Act 1981**

#### **Application for a Public Right of Way between the B5405 to path at Whitley Heath, Gnosall and Ellenhall**

#### **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 conclude that a Public Footpath which is not shown on the Definitive Map and Statement subsists on the balance of probabilities along the route shown marked A to B on the plan attached at Appendix A 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 A 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 attached at Appendix B from Mr Martin Reay for an Order to modify the Definitive Map and Statement for the area by adding an alleged Public Footpath from the B5405 to path at Whitley Heath, Gnosall and Ellenhall 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 B. The line of the alleged Public Right of Way is shown on the plan attached at Appendix A 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**

#### Finance act 1910

4. The applicant has submitted in support of his claim evidence from the 1910 Finance Act. The applicant has submitted three field book entries in support of his application along with the relevant accompanying OS maps. Copies of which are attached at appendix C and D.
5. Firstly, there is field book, entry reference no.145. The book refers to an “alleged Public Footpath” and a deduction has been made for Public Rights of Way or User of £20
6. The accompanying OS map shows part of the route which passes through OS plots 101, 49 and 198. This shows approximately 40% of the entire route. The path passes through OS plot 198 which is the path referred to in field book entry reference no.145.
7. The applicant has also submitted another field book, entry reference no.712 from the Finance Act 1910. Reference is made to a “Public Footpath” through field plot 230.
8. The accompanying OS map shows a very short part of the route passing through the area 712, field plot no.230. This shows the first 5% of the route which runs north into part 728.
9. The final field book entry in respect of the Finance Act 1910 is for reference no.728. It describes “Public footpaths through fields no.96, 100, 101 and 49”. A restriction for a footpath of £10 has been made.
10. The accompanying OS map shows nearly the entire route, approximately 95% of it. A very short section of the path is not shown at the most northerly point of the route. The route passes through field plots 96, 100, 101 and 49 which mirrors the description in the field book entry.

#### Parish Surveys

11. The Applicant has also submitted Parish Surveys of Gnosall and Ellenhall to support his evidence however these are not enclosed within the application. Officers have obtained these from Staffordshire County Council records and they are attached at appendix E
12. For the Parish Survey of Gnosall (1951) the path is No.4. The path is described on the survey card as starting at “A5 No.4. 36 N.W Gorse Covert” and finishes at “Whitley Heath”.
13. On the accompanying maps path No.4 is highlighted as “Gnosall FP4”. The path begins along the B5405 and runs north for approximately 0.2 miles where the route veers north east until it reaches the Parish boarder between Gnosall and Ellenhall.

#### Inclosure Award

14. The Applicant has also submitted a tracing from the Inclosure Award of 1811 which shows a very short length of the alleged route, approximately 5% of the route, running north opposite Gnosall Road.
15. The applicant has also provided a transcription of the accompanying Award. The description is as follows, "One public footway leading out of the Newport and Stafford Road northwardly over allotment to John Bentley". Copies of the above are attached at appendix F. Although the copy provided is a transcription Officers can confirm that the tracing is a true reflection of the original contained within the Records Office.

#### OS maps

16. The applicant has submitted the 1<sup>st</sup> edition OS map dated 1891, 6 inch to 1 mile. The map shows the entirety of the alleged route and a copy is attached at appendix G.
17. The applicant has stated that the 3<sup>rd</sup> and 4<sup>th</sup> editions of the OS map 1902 are not available from the County Record Office but will be held at Kew. Copies of these have not been submitted or obtained since the application was made.

#### Tithe Map

18. The applicant states that The Knightley Tithe Map does not show the alleged route and this is not enclosed within the application.

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

19. Officers have conducted research and obtained OS maps from Staffordshire County Council Records Office. The OS maps from 1963 (25 inch to 1 mile) for the Parishes of Gnosall and Ellenhall shows the entirety of the alleged route and is attached at appendix I.
20. Officers have also obtained OS maps from 1879, 1900 (revised) and 1922 (revised) all 6 inch to 1 mile. Copies of which are attached at appendix H.
21. Officers have also obtained a transcript from the Knightley Inclosure Award 1811 setting out the commissioners powers which is attached at appendix J.
22. Officers have also obtained a copy of the map of objections for the parishes of Gnosall and Ellenhall. The map shows near the entirety of the alleged route and shows there was an objection to the route which is attached at appendix K.
23. Officers have also obtained a list of objections which relates to the above document. The alleged public footpath is numbered '4' and the objection number is '1423'. The nature of the objection is described as "This path is not a legal right of way". A copy is attached at appendix L.

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

24. The Landowners, Mr Braithwaite and Mr Haszard have submitted landowner questionnaires, copies of which are attached at Appendix M and N respectively. Mr Wych, Mr Galaszia and Mr Edwards, who are the other landowners, have not responded.
25. In Mr Braithwaites questionnaire he comments that during his time on the farm there was no attempt by anyone to use the route as a public right of way. He also comments that the previous farmer to him, Mr Talbot, had also not experienced its use.
26. In Mr Haszards questionnaire he comments that to the best of his knowledge no member of the public has ever been on the alleged route. He states that the path does not exist now and has not existed for the past 22 years where he has managed the estate.

27. Mr Wych has responded by his solicitor. He has stated that there are two eight feet high hedges and a deep stream which would block the use of any alleged public right of way. Mr Wych also states that throughout his ownership he has never seen any person attempt to use the alleged public right of way.
28. Officers have responded to Mr Wych's solicitor explaining that the application is based on historical evidence rather than that of usage. In essence the applicant is alleging that at some point in legal memory, that is at some time since 1196, there was a public highway in existence. Consequently, as a result of the passage of time there may be obstructions in situ today which would prevent a member of the public from using the alleged route, nevertheless the legal maxim that is applicable is "once a highway, always a highway".

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

29. Gnosall Parish Council have replied stating that the Parish Council has no evidence in its records, either in support of or against the claim
30. The Ramblers' Association have replied stating that they have felt for some time that there is a "missing link" here and it is difficult to see the justification there would have been for the inclusion of Ellenhall Footpath 6 at the time the definitive map was being created if the right of way did not continue along the line of the claimed path. The Association also states that they strongly support the claim.
31. Peak & Northern Footpaths Society have replied stating that they are unable to offer any additional information but they would support Mr Reay's application

### **Comments on Evidence**

#### The Finance Act 1910

32. The 1910 Finance Act is often referred to as the "Second Domesday Book" as it was concerned with mapping lands throughout the United Kingdom for the purposes of taxation. This took place between 1910 and 1920.
33. The plan was based upon a large-scale Ordnance Survey Map. The plans are annotated, and they show the land divided into plot numbers which correspond with the entries in the field books.
34. The landowner could claim tax relief for public rights of way and the deductions would be shown in the Field Books. The deduction entry would not describe the route but can provide evidence of its existence across the land holding.
35. Where the OS surveyors recorded that a track or path physically existed across an individual OS plot, this when viewed in conjunction with the entry, provides strong evidence of the existence of a way. In this instance the alleged route is shown on both OS maps which accompany the Field book entries.
36. Any claims for deductions were looked into by the valuers of the land to ensure they were valid. The legislation set out that it was an offence to make a false claim under the Act and was punishable by a fine and up to 6 months imprisonment. Therefore, it is unlikely that a landowner would have made a false claim.
37. The plans indicate that public highways existed and therefore provides good evidence of their public status. The entry in the field book for reference no.728 describes there being public footpaths running through field plot numbers 96, 100, 101 and 49.

38. The entry in the field book for reference no.712 also describes there being a public footpath running through field plot 230, at the most southerly point of the alleged route.
39. In the field book reference no 145 there has been a deduction for “Public Rights of Way or User”. However, there is no reference to a specific field plot and there are several footpaths running through area no 145. One could reason that as the footpath continues from field plot 49 into field plot 198 that the field book is in fact referring to a public right of way that continues from field plot 49 to field plot 198, at the most northerly point of the route.
40. The surveys would have been carried out under statute by a public body and misrepresentation would have had severe criminal penalties. Evidence of a public right of way is given considerable weight. However, the recording of rights of way was not the primary purpose of the survey.
41. The Finance Act material does not provide sufficient evidence for a modification of the Definitive Map and Statement when assessed in isolation but must be considered alongside other supporting evidence. The Finance Act records are “simply one part of the jigsaw puzzle” (Fortune v Wiltshire CC, 2012).

### Parish Surveys

42. Under the National Parks and Access to the Countryside Act 1949 Parish Surveys were undertaken which produced correspondence and entries in the minutes of parish meetings, in addition to the parish survey cards and maps.
43. The parish records are also of great importance, particularly those relating to the Parish Survey from which the Definitive Map followed. These usually include a statement which accompanied the Draft Map, a survey card and also the relevant contemporary parish council minutes.
44. However, an objection was made to the route in question as shown on the map attached at appendix K and the route was subsequently omitted from the definitive map. The list of objections also provide a brief description of the reasons why. In respect of footpath 4 it is noted that “This path is not a legal right of way”. No further explanation is given for the objection. It is unlikely that the surveyors would have accessed the historical documentation submitted in this application.
45. When a route can clearly be identified the Parish Surveys can be the deciding factor in determining its status. However, on their own the Surveys would not provide enough evidence to modify the Definitive Map and Statement.

### Inclosure Award Map

46. The Inclosure Act was designed to enclose the old commons, manorial waste and smaller holdings in order to increase agricultural productivity. They were often promoted on behalf of the bigger landowners to enable them to increase the profitability of their land.
47. The local Inclosure Act empowered an Inclosure commissioner to survey and divide up the land, allotting it to named individuals, including the setting out of highways. After all of the procedures had been followed and completed the commissioner would issue the final Award and accompanying Award Map.
48. The Inclosure Commissioners had to follow laid down procedures to ensure their actions were legal. If they had not then the Award itself, and its provisions, would not be valid.

49. The Act either laid down the powers of the Inclosure Commissioners in relation to highways, both public and private, or made reference to the general act. They may have been able to create, divert, stop up and list existing routes as well as determining who was liable for their maintenance.
50. The significance of the Inclosure Award arises from the evidential value of the awards as a legal document. The Awards and maps may also provide supporting evidence of other matters, such as the existence or status of public rights of way over land adjacent to but just outside the awarded area.
51. The tracing of the Inclosure Award Map which the applicant has submitted shows a small section of the start of the alleged route. Although a short section is shown the Award describes it as "One public footway heading out of the Newport Road and Stafford Road northwardly". Part of the route is not shown on the map this omission is not fatal to the case as it may be appropriate to consider the possibility that public acceptance of an awarded highway, if supported by the evidence, occurred nevertheless.
52. The fact that they had been set out within the Award would also imply dedication as a public route, (*Secretary of State for the Environment, ex parte Andrews*(1993) 71 P & CR 1)
53. A short part of the alleged route is shown on the Award map. The same section is also described within the Award. This provides good evidence of the existence of a way. However a presumption can only be made in this instance as to whether or not the route continues as alleged by the applicant. The Inclosure Award evidence must be looked at in conjunction with other supporting evidence.
54. Officers have also obtained an extract from the 'pre-amble' section of the Award. This particular extract sets out the powers that the commissioner, Samuel Botham in this instance, had the power for "setting out, dividing, and allotting the said Common Fields and Waste Lands". This was confirmed in *R (on the application of Andrews) v Secretary of State for Environment Food and Rural Affairs* (2015) EWCA Civ 669 where the Court found that an Inclosure Commissioner was authorised to set out and appoint public bridleways and footpaths in an award.
55. It is not clear from the Award whether the commissioner was creating or setting out the alleged public footpath. However, it has been recorded within the Award by the commissioner as a "public footway".

### Ordinance Survey Maps

56. The applicant has also submitted a separate OS map from the OS maps which accompany the Finance Act evidence. It is dated 1891, 6 inch to 1 mile (1<sup>st</sup> edition) which shows the entirety of the alleged route.
57. Officers have also obtained OS maps from 1963 (25 inch to 1 mile) and OS maps from 1879, 1900 and 1922 (6 inch to 1 mile) which all show the alleged route.
58. The OS maps purpose is to show physical features and the contours of the ground. OS maps show ways which range from footpaths to Highways however they do not distinguish between public and private rights of way. In *Norfolk CC v Mason* [2004] NR205111, Cooke J observed "*Throughout its long history the OS has had a reputation of accuracy and excellence..... It has one major, self-imposed, limitation; it portrays physical features, but it expresses no opinion on public or private rights*"
59. The OS map of 1963 shows nearly the whole of the alleged route however this is a more contemporary map compared to those published in the early 20<sup>th</sup> and late 19<sup>th</sup> Century. This would indicate that the physical feature of a footpath existed at this

time but it does not give any indication as to whether the path is a public right of way.

60. Although OS maps have no evidential weight they can be supportive of an application by showing that there was a physical feature on the ground (*Attorney General v Antrobus, 1905*).
61. In respect of this application the OS map provided by the applicant and those obtained by Officers do show evidence that a route existed. However, as set out above the maps do not distinguish between public and private rights of way. All of the OS maps therefore must be viewed in conjunction with all other supporting evidence.

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

62. 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.
63. 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.
64. 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.
65. 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".
66. If the conclusion is that either test is satisfied, then the Definitive Map and Statement should be modified.

### **Summary**

67. The recording of public rights of way was not the primary purpose of the Finance Act 1910 however where the plans do show public highways this provides good evidence of their public status, *Robinson Webster Holdings v Agomber* [2002] EWHC 510. The Finance Act documents submitted by the applicant provide much stronger evidential value when viewed in conjunction with all other evidence.
68. The Parish Surveys clearly show the alleged route and is described on the cards. However, the alleged route was later objected to and omitted from the definitive map bringing into question its evidential weight. They would not be admissible as evidence on their own however must be viewed alongside other supporting evidence and can be the deciding factor in determining applications.
69. The Inclosure Award and map does show the start of the alleged route however this is only a very short section. If a route is shown on an Award Map and described or referred to within the Award it can provide good supportive evidence of the existence of a way. One can reasonably assume that when viewed alongside all other evidence that the route set out in the Award continued northwardly in the same direction as the alleged route.

70. All of the OS maps submitted by either the applicant or discovered by Officers show the entirety of the alleged footpath. OS maps only show the existence of a physical feature on the land. They do not give an indication as to the status of a route, whether it be private or public. The OS maps should not be considered as evidence on their own but must be looked at in conjunction with other supporting evidence.

### **Conclusion**

71. 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.
72. 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.
73. The evidence provided by the applicant and by Officers is good evidence and there is no conflicting evidence to show that these were in error or that any admitted public footpath has since ceased to exist. This absence of conflicting evidence could be taken to mean that the application has passed the test on the balance of probabilities.
74. 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.
75. 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**

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

### **Other options Available**

77. To decide to reject the application to add a public footpath between the B5405 to path at Whitley Heath, Gnosall and Ellenhall

### **Legal Implications**

78. The legal implications are contained within the report.

### **Resource and Financial Implications**

79. The costs of determining applications are met from existing provisions.
80. 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**

81. 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.

82. 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.
83. 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.
84. 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.
85. There are no additional risk implications.

### **Equal Opportunity Implications**

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

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J Tradewell

Director of Corporate Services

**Report Author: Dale Garside-Chell**

Ext. No: 276747

**Background File: LL613G**

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