

Local Members' Interest	
Jeremy Pert	Eccleshall
John Francis	Stafford Trent Valley
Jonathan Price	Stafford North

Countryside and Rights of Way Panel – Tuesday 3 December 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 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, is reasonably alleged to subsist along the route shown marked A to B to C to D on the plan attached at Appendix J 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 J and marked A to B to C to D 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 application route 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.

Evidence submitted by the applicant

1. The applicant has submitted in support of his claim evidence from a traced version of the Marston Tithes 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.
2. 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, there is a recording of a "field" only.
3. 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 plotted by applicant.
4. 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.
5. The accompanying records to the 1845 railway plans show that the alleged footpath runs through plots 30, 61 and 63. The owner is described as being "the Surveyor of the Highways for the Township". These are attached at Appendix G.
6. Officers have inspected all of the documents submitted and have verified their veracity.
7. 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.

Other evidence discovered by the County Council

8. Officers have conducted research at the Council's records office and have been unable to locate any further evidence that supports or refutes the application.

Evidence submitted by the Landowners

9. The landowners, Mrs Stubbs, Mr & Mrs Baker and Mrs Brandon have submitted landowner questionnaires, copies of which are attached at Appendix H.
10. 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 no footpaths in the area at all.
11. In Mr & Mrs Baker's questionnaire they comment that the right of way does not exist.
12. 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

13. Stafford Borough Council have replied stating that they have no comments on the application.
14. 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:

15. The Tithe map of Marston Parish 1839 displays only a short section of the Northern most part of the alleged route.
16. 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.
17. Minor ways such as footpaths might be shown as dotted lines crossing various plots.
18. 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.
19. The best that can be adduced from the Tithe maps is that there was a physical feature the surveyors 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.
20. The Tithe Maps may be a record of the physical existence of a route however they are not evidence of the legal boundries of the highway as stated in *Webb v Eastleigh Borough Council 1957*.

Deposited Railway Plans:

21. The Deposited Railway records of 1844 provide a description of the plots in which the claimed route passes through. The records also provide an account 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. Nonetheless, plot 5 and 27a mention a public footpath.
22. Statute required, from 1838, that the plans of these works and the associated 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.
23. 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.
24. 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.

25. 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.
26. In respect of the 1844 plans it is difficult to determine whether the alleged route was public as the Railways Clauses Consolidation Act was not introduced until a year later.
27. Conversely, the 1845 railway plans may well 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.
28. The 1845 railway plan refers to 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 “footpath”.
29. 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 railway 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 a potential railway would mean that a manned crossing may have been required to allow the public to pass and re-pass over it safely.
30. For both sets of records it was the responsibility of the Railway Surveyor to carry out a survey(s) in order to assess the suitability of the land for the construction of a potential railway line. The Railway Surveyor would have made enquiries and physically assessed the land for existing highways crossing the proposed line of deviation.
31. It was the Railway Surveyor who recorded the status of a highway in his survey. The landowner may have informed the Railway Surveyor of the status of a route passing over his land but the decision to record its status lay with the Surveyor. There is no record of the landowners admitting the accuracy of the Surveyors records, therefore less weight can be attached to this particular set of evidence.
32. On the other hand, both sets of records show that a public footpath was recorded by the Surveyor in 1844, and a year later in 1845. The corroboration of the records indicates that there must have been a feature worth recording by the Surveyor on both occasions; in this instance a public footpath.
33. The Highways Act 1835 set out that all public highways 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.
34. 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.

35. However, from viewing OS maps dated from 1881 to 1925 Officers have been unable to locate any historical 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. The absence of a line would indicate that this particular railway plan was never brought to fruition.
36. 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.

Comments on draft report

37. Prior to the Panel meeting on 9 August 2019 Officers discovered evidence that would have an impact upon the route applied for.
38. The accompanying deposited railway map of 1844 shows a dotted line from Marston Lane in the North which heads Southwards to the original 'point A' marked on Appendix B.
39. However, upon closer examination, the dotted line (which portrays a footpath) continues to extend further south to where it meets Common Road.
40. Officers contacted the applicant notifying him that the matter would be deferred to allow for further investigations to take place. Mr Reay responded and stated it may be best to pursue the claimed route from Marston Lane all the way to Common Road.
41. The relevant landowners in which the additional section of route passes have been notified of the application.
42. It is your Officer's opinion that it is reasonable to assume that, during the drafting of the 1844 railway plan, a public footpath existed. The dotted line forms part of the same route linking Marston Lane to Common Road.
43. Although there is no reference to the plots of land in the book of reference at the south of the railway map, one can reasonably assume that the entirety of the route has the status of a public footpath. This is because the railway surveyor was only concerned with land surrounding the line of deviation where the proposed railway line would be. Therefore, the alleged public footpath must have been a significant feature to the surveyor.
44. A copy of the proposed extended route can be found at Appendix J and point A is marked as commencing at Common Road and the route concludes at point D at Marston Lane.
45. A copy of the proposed extended route can be found at Appendix J. The route would commence at point A at Common Road and conclude at point D. Point A to point B displays the additional length of footpath.
46. The Panel have also raised the issue that the evidence submitted is the same as that in the recently determined application LJ607G (application to add an alleged footpath from Marston Lane to Bridleway No.8). Officers can confirm that the same set of evidence was submitted for both applications. Although the routes for both applications are in very close proximity they must be determined separately.

47. It is your Officer's opinion that, after viewing all available evidence, that an additional section of route is reasonably alleged to subsist from point A commencing at Common Road to point B as shown on Appendix J.
48. After the report was sent out with the recommendation for an additional section of route, several of the landowners responded.
49. Firstly, landowner Mr Watson raised concerns that as the owner of a scrapyard any public footpath crossing the site would be unworkable and financially unsustainable. Therefore, he objected to the Officers recommendation. However, if the route were to fall short of his land then no objection would be raised. Mr Watson also enquired as to what accommodation would be made for any footpath crossing his land however, Officers could not clarify this as the matter has not yet been determined.
50. The solicitor for landowner Boiling Investments Limited has objected to the proposed route and states that there is no physical evidence of any footpath across the land.
51. Finally, Mr and Mrs Brandon's solicitors have objected to the Officer's recommendation. A copy of their letter can be found at Appendix K and the Officer's response at Appendix L.
52. All correspondence has been sent to the applicant. Mr Reay has commented in respect of the OS map submitted by Mr and Mrs Brandon and their comments that the route has not been used in living memory. Mr Reay states that these matters cannot be given any weight and that the law is once a highway always a highway unless stopped up by legal event or process.

Burden and Standard of Proof

53. 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.
54. 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.
55. 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.
56. 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".
57. If the conclusion is that either test is satisfied, then the Definitive Map and Statement should be modified.

Summary

58. 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 titheable as stated in *Merstham Manor Ltd v Coulsdon and Purley Urban District Council* [1937] 2 KB 77.

59. 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.
60. 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. Conversely if a route does not appear on a map it does not necessarily mean it did not exist. One could reasonably assume that the footpath does continue South towards Common Road when viewed in conjunction with other evidence.
61. The Tithe Map was submitted alongside Deposited Railway plans and records from the 19th Century. 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.
62. 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.
63. 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.
64. In the absence of further supporting evidence the railway plans and books of reference may be sufficient, dependant upon the particular document, to reasonably allege a public highway subsists.

Conclusion

65. 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.
66. 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.
67. 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.
68. 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.
69. 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 – C – D on Appendix J and not the line shown on Appendix B to the Definitive Map and Statement of Public Rights of Way.

70. It is the Panel's decision, as to whether a modification to the Definitive Map and Statement should be made based upon the totality of the evidence. However, the Panel can determine a route which differs from the original application i.e. to add a greater length of route or decide upon a different status than applied for such as a bridleway rather than a footpath.

Recommended Option

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

Other options Available

72. To decide to reject the application to add a public footpath to the definitive map.
73. To only add the claimed route.

Legal Implications

74. The legal implications are contained within the report.

Resource and Financial Implications

75. The costs of determining applications are met from existing provisions.
76. 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

77. 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.
78. 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.
79. 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.
80. 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.
81. There are no additional risk implications.

Equal Opportunity Implications

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

J Tradewell

Director of Corporate Services

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Background File: LG608G

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