

Local Members' Interest	
Jeremy Pert	Eccleshall

Countryside and Rights of Way Panel – 6 March 2020

Wildlife and Countryside Act 1981

Application for Definitive Map Modification Order to add a Byway Open to All Traffic from Harley Thorn Lane to Public Road leading underneath A519

Report of the Director of Corporate Services

Recommendation

- 1 That the evidence submitted by the applicant is sufficient to conclude, that a Restricted Byway which is not shown on the Definitive Map and Statement, shown marked A to B on the plan attached at Appendix A to this report is reasonably alleged to subsist.
- 2 That an order be made to add the alleged public right of way, shown A to B on the plan attached at Appendix A, to the Definitive Map and Statement of Public Rights of Way as a Restricted Byway.

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 a Definitive Map Modification Order to modify the Definitive Map for the area by adding the Byway Open to All Traffic shown A-B on the Plan at Appendix A (the Application Route) to the Definitive Map.
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 a copy of the 1910 Finance Act map which shows the entirety of the alleged route and can be found at appendix C
2. The applicant submitted further evidence on 12 December 2000. A tracing of the Map of the Newcastle and Eccleshall Road line of improvement 1822 has been provided. Officer’s have obtained a clearer version of the map from the Councils records office, which can be found at appendix D.

Other evidence discovered by the County Council

3. Officers have conducted research into historical documentation at the County Council's Record Office and obtained the following.
4. Tithe Award Map of the Parish of Swynnerton 1849 which shows the entirety of the alleged route and is attached at appendix E.
5. Tithe Award Map of the Township of Beech 1850. This shows near the entirety of the route and is attached at appendix F.
6. Officers have also obtained several OS maps dating between 1878 And 1924 which also show the entirety of the alleged route and are attached at appendix G.

Evidence submitted by the Landowners

7. On 19 March 1999 a letter was received from John German Chartered Surveyors who represented Lord Stafford's Estates. The letter states that they are presently researching the position. They state that the lane referred to had been blocked for many years until Lord Stafford's Estates cleared the road in October 1998. They also dispute that the road should be classed as a BOAT.

Comments received from statutory consultees

8. The North Staffordshire Bridleways Association have responded and enclosed several evidence forms in support of the application. These are attached at Appendix H. They do not form part of the original application from Mr Reay however they have been considered as part of the report.

Comments on evidence

Finance Act 1910

9. The 1910 Act provided for the levying of tax ('Increment Value Duty') on the increase in site value of land between its valuation as at 30 April 1909 and, broadly speaking, its subsequent sale or other transfer. There was a complex system for calculating the 'assessable site value' of land, which allowed for deductions for, among other things, the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user and to the right of common and to any easements affecting the land (Section 25(3)).
10. Harley Lane is shown as being separate from the surrounding land holdings and is not included in any plot.
11. Evidence of the possible existence of a public right of way in Finance Act documentation usually arises in one of two ways; reference to it in one or more of the various documents forming part of the valuation process, or exclusion of a route from the assessable parcels of land shown on the map record.
12. As the parcel of land is shown on the map as being separate from the surrounding land there is a possibility that the landowners may not have declared the land as they may have assumed the land was not under their ownership or it was a private way.
13. Furthermore, there were penalties for making false representations or statements. If found liable for the above the person(s) could have received a summary conviction to imprisonment for a term not exceeding six months.

14. The Finance Act 1910 used contemporary OS maps from that period. The supporting maps may show the existence of a route at the time however they show nothing more. Public rights of way cannot be inferred from the accompanying maps alone. The purpose of the map was not to record rights of way, but to allot the land.

Ordinance Survey Maps

15. Ordinance Survey Maps provide excellent evidence of the physical existence of the features they show at the time of their survey, but they are generally silent on matters of status. From the 1880's onwards the maps included a disclaimer to the effect that the depiction of any path, track or way is not evidence of the existence of any public rights of way. In *Moser v Ambleside Urban District Council* (1925) 89 JP 118 at 119, Pollock MR stated: "If the proper rule applicable to ordinance maps is to be applied, it seems to me that those maps are not indicative of the rights of the parties, they are only indicative of what are the physical qualities of the area which they delineate.....".
16. The alleged route is consistently depicted and named on a range of Ordnance Survey County plans from the 1880's to 1924. This is not surprising given that it is shown on earlier documents and still exists in physical form today.
17. Although the route is named on various maps as Harley Lane, this does not infer any public status only its reputation as a local route in the area.
18. The OS maps 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 should therefore be viewed in conjunction with all other supporting evidence.

Map of the Newcastle under Lyme and Eccleshall Road

19. The applicant has also provided a tracing of the Newcastle under Lyme and Eccleshall Road.
20. The map displays the 'present' line of the route which is how the route lay in 1822. The proposed line of improvement coloured red and this is how the road lies today, which is the A519. There is no evidence to suggest that the route was ever stopped up or diverted, conversely there is no evidence to suggest that it wasn't.
21. Although the map shows no indication of the status of the route it does show that Harley Lane once formed part of the highway. The plan was brought to fruition as evidenced by the existence of the road today. It is not known whether the route was originally public or private before the construction of the new road.
22. Although the 'yellow line' on the map shows where the original route lay it does not infer any public rights of way. Only assumptions can be made as to whether the route was public or private.
23. The document is dated 1822 which pre-dates the 1835 Highways Act. Before 1835 a landowner could dedicate a road as a public right of way, and it would automatically become the liability of the public to repair it. Under the 1835 Highways Act, if a landowner proposed to dedicate a road as a public highway then notice would have to be given to the Surveyor of the Highways.
24. The route was a connection between Newcastle and Eccleshall. It was a link between two market towns and would fit the kind of route set out in the 1773 Highways Act. It is therefore more likely to have been public in nature although

who was liable to maintain it in 1822 is not certain. After 1835 it would have become maintainable at public expense by virtue of pre-existing the statute.

Tithe Maps

- 25.** Tithe maps and their accompanying apportionments (books of reference) were produced for the purposes of commuting tithes from a payment in goods to a monetary value. They were not concerned with matters such as the status of roads etc, only whether or not the land was productive and therefore subject to tithe payments. They do however provide some of the earliest accurate large-scale mapping and can provide very good evidence of the physical existence of a route.
- 26.** The route in question is coloured sienna on the Tithe maps. The colouring of a road (usually sienna) on a tithe map is not, in itself good evidence of public rights. It is therefore important to establish whether there is a key or other information in the tithe documents which provides an explanation. However, in this instance the absence of such an explanation and any other corroborative evidence, the colouring is arguably of little evidential value in itself.
- 27.** The Tithe Maps themselves would not support a modification to the Definitive Map and Statement and must be looked at in conjunction with other available evidence.

User evidence

- 28.** User evidence can form the basis of an application to register a public right of way without the need for any reference to historical documentary evidence. Such user evidence would however need to be of sufficient quality and quantity to give rise to a presumption of dedication. However, when modern-day user evidence is considered alongside historical evidence it may be considered to constitute evidence of the reputation of existing (albeit unrecorded) public rights.
- 29.** The relevant legislation states that where there is no identifiable event which has brought into question the use of 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 use was brought into question.
- 30.** In this instance the application was made in 1999 and that action brought the status of the claimed route into question. There is no evidence of any earlier challenge and so in evaluating the evidence of use any that took place must be confined to before 1999.
- 31.** The optimum period of usage for the purposes of the 20-year period as provided for under s31 of the Highways Act 1980 is from 1979 – 1999.
- 32.** The evidence must be consistent and not contradictory. There may be minor inconsistencies which do not have a detrimental effect on the overall evidence.
- 33.** From the eight user evidence forms only four indicate that they have used the route by horse and carriage. All of the eight user evidence forms claim usage on horseback. One user claims to have used the way on foot and none of the users indicate use by a mechanically propelled vehicle.
- 34.** No user states that they have ever been given permission to use the route and there have never been any stiles or gates blocking the way and there is no indication of any signs or notices prohibiting usage of the route.

35. Out of the eight user evidence forms, two have the requisite 20 years usage. Firstly, Mrs Eld has used the route for 39 years on horseback and Mrs Knowe has used the route for 25 years on horseback and on foot.
36. When individually assessed, the remaining six user evidence forms do not indicate use of the alleged route for over 20 years. However, two or more users' evidence which overlaps may also be combined to produce a cumulative effect of usage over a 20-year period.
37. In effect, another user can be created when combining more than one of the user evidence forms. Mrs Williams claims 3 years usage on horseback, Mrs Wilson claims 10 years usage on horseback and Mrs Farrington claims 7 years of use on horseback and horse and carriage. When combined the period of use totals 20 years.
38. Mr Seabridge claims 10 years of use on horseback and horse and carriage, Mrs Seabridge claims 6 years of use on horseback and horse and carriage and Mr Farrington claims 7 years of use also on horse and horse and carriage. When combined, the period of use totals 23 years.
39. Therefore, there are four periods of qualifying usage which meet the requisite 20-year period of use. There is no statutory minimum number of users required to show sufficient use to raise a presumption of dedication. Instead use should have been by a sufficient number of people to show that it was used by 'the public' and this may vary from case to case. There have been instances where the Secretary of State has accepted evidence of use from as few as six persons to substantiate the existence of a way.
40. The forms appear to be consistent with one another. All users indicate travelling along the same route and many considered the route to be a continuation of Harley Thorn Lane running all the way to the A519. However, there are discrepancies in respect of how the route has been used.
41. There does not appear to be any evidence to support the status of a BOAT; no user has claimed use by mechanically propelled vehicle. There are also only four of the eight user evidence forms which state that they have used the route by horse and carriage.
42. There is however, evidence to suggest that the route would support the existence of a restricted byway or bridleway as all of the users indicate usage on horseback and several on horse and carriage. There are two individual 20-year periods of use, and a further two periods of over 20 years usage (when the remaining user evidence is combined)
43. Although there are a small number of user evidence forms, they must be considered as part of the decision-making process.

Burden and Standard of Proof

44. There are two separate tests. For the first test to be satisfied, it will be necessary to show that on the balance of probabilities the right of way does exist.
45. For the second test to be satisfied, the question is whether a reasonable person could reasonably allege a right of way exists having considered all the relevant evidence available to the Council. The evidence necessary to establish a right of way which is "reasonably alleged to subsist" over land must be less than that which is necessary to establish the right of way "does subsist".
46. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

Summary

47. The application is made under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in 53(3)(c)(i) of the Act.
48. The application is for the status of a Byway Open to All Traffic which is defined in Section 66(1) of the Wildlife and Countryside Act 1981 as highway "over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purposes for which footpaths and bridleways are so used".
49. Under the Natural Environment and Rural Communities Act 2006 (NERC) subsection (1), restrictions have been placed on the recording of public rights of way for mechanically propelled vehicles on the Definitive Map and Statement. However, this is applicable to those applications for a BOAT after 2006.
50. Section 67 of the NERC Act subsections (2) to (8) provides exceptions to the extinguishment of certain unrecorded rights of way for mechanically propelled vehicles. One exception is if, before the 'relevant date' (subsection (4), 20th January 2005), an application had been made for the Definitive Map Modification Order to show a Byway Open to All Traffic, subsection (3)(a). This application was made before the 'relevant date' and consequently this exception could apply.
51. The Planning Inspectorate's Consistency Guidelines quote Christine Willmore when dealing with old maps: "*What is looked for is a general picture of whether the route seemed important enough to get into these documents fairly regularly. A one-off appearance could be an error ... consistent depiction over a number of years is a positive indication.*"
52. In *Fortune v Wiltshire* the Courts approved this approach, and what is looked for is just that, the various pieces of evidence are analogous to parts of a jigsaw and all the material needs to be considered together to come to a clear picture/conclusion.
53. The Finance Act 1910 Map shows that the lane was part of a separate parcel of land however without any other supporting evidence one can only make assumptions as to whether or not the way is public or private. The map therefore only shows the physical existence of a route at the time.
54. The alleged route is shown on several OS maps from the late 19th Century and early 20th Century. The maps show only that there was a physical feature which existed at the time, but they do not provide evidence of public rights of way. They simply show that a route existed at this location however one cannot ascertain if the route was public or private in nature.
55. The Map of the Newcastle and Eccleshall Road proposed line of improvement from 1822 shows the present line of the road at the time and the new proposed route. The map infers no public rights of way over the alleged route. It only shows that it existed as a physical feature on the land in 1822.
56. This route would have been a main highway and, if public, would have carried higher rights than that of a footpath or bridleway. The reason for the line of improvement is hard to establish from the passage of time but clearly it was intended to remove the bend and straighten the road out.
57. The alleged route is also shown on Tithe maps for the area however, they do not provide any commentary of the status of the route, and any brown colouring is not

indicative of highway status, it simply indicates that it was not subject to tithe (i.e. it was non-productive land).

58. The user evidence forms indicate that the route is in use by the public. The user evidence shows that the route has been used by foot, horseback and horse and carriage. While there is not a high volume of evidence forms the quality of them is sufficient to advocate that the route has the status of a public nature, particularly that of a bridleway. As in the case of *Bagshaw v Norton*, once all of the available evidence has been considered, and if there is no evidence to put in the balance against the case to add a route, then a reasonable allegation is made out.
59. When the totality of the evidence is considered it does not suggest a picture of a route that has the status of a BOAT. There is no evidence to suggest use by mechanically propelled vehicles and there is nothing other than physical features which predominate the evidence or inference to suggest status of the way. However, when the evidence is considered in its totality, including the user evidence forms, then it is reasonable to allege that a route with the status of a Restricted Byway subsists. Historically, the route was used more in line with that of a Restricted Byway rather than a BOAT.
60. The category of Restricted Byway was introduced under the Countryside and Rights of Way Act 2000. The application pre-dates this legislation and it could be a reason why a route with the status of a BOAT was applied for.

Conclusion

61. In determining the Application, the Panel must be satisfied that, on balance of probability, the alleged public rights subsist, or if this test is not met, that there is a reasonable allegation in favour of the existence of the public right of way.
62. When all available evidence is considered it is finely balanced as to whether it would satisfy the first part of the test as set out in s53(3)(c)(i), that is whether on the balance of probabilities a BOAT subsists.
63. Upon deliberation of the available evidence Officers consider that there is not a sufficient weighting of evidence to satisfy either of the above tests in respect of the status of a BOAT.
64. However, after consideration of all the available evidence, it is your Officers opinion that a route which is not shown on the map and statement, with the status of a Restricted Byway, is reasonably alleged to subsist.
65. 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 right of way of a different status than that applies for such as a Restricted Byway instead of a BOAT.

Recommended Option

66. To make an order to add the claimed route as a Restricted Byway to the Definitive Map and Statement of Public Rights of Way for the District of Stafford.

Other options Available

67. To decide to accept the application to add the application route as a BOAT.
68. To decide to reject the application

Legal Implications

69. The legal implications are contained within the report.

Resource and Financial Implications

70. The costs of determining applications are met from existing provisions.
71. 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

1. 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.
2. 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.
3. 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.
4. 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.
5. There are no additional risk implications.

Equal Opportunity Implications

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

J Tradewell

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