

Local Members' Interest	
Gill Heath	Staffordshire Moorlands – Leek Rural

Countryside and Rights of Way Panel – 6 March 2020

Wildlife and Countryside Act 1981

Application to upgrade Footpath 11 in Heaton Parish to a Restricted Byway

Report of the Director of Corporate Services

Recommendation

1. That the evidence submitted by the applicants and that discovered by the County Council is sufficient to show that, on a balance of probabilities, FP 11 should be added as a highway of a different description, namely a restricted byway to the Definitive Map and Statement of Public Rights of Way for the District of Staffordshire Moorlands.
2. That an Order be made under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to modify the Definitive Map and Statement by upgrading public Footpath 11 Heaton Parish to a restricted byway 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 Julie Turner of the Staffordshire Moorlands Bridleways 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 11 Heaton Parish to a restricted byway 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 restricted byway 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 a copy of Heaton Inclosure Award for Beard Mill Road, Inclosure Award Map (Plan 1) and a copy of the Definitive Map.

Documentary Evidence

Heaton Inclosure Award Map and Statement

2. Inclosure Awards are legal documents that usually consist of a written description of the awards and other content with a map of an area attached.
3. Awards resulted from a desire by the landowners to gather together their lands and fence in the common land. A Local Act of Parliament was needed to authorise the procedure and an Inclosure Commissioner was appointed as a result to oversee the compilation of the award and map.
4. Land was divided into individual plots and fields and redistributed amongst the owners listed in the award.
5. Inclosure 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 provided they had the power to do so.
6. Inclosure 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 Inclosure Award and Statement can be found at Appendix C.

Other evidence discovered by the County Council

7. Officers have conducted research into historical documentation at the County Council's Record Office.
8. The Parish Survey Cards were discovered and after officers examined the cards it was found that the alleged route was formerly a RUPP (Road Used as a Public Path). Copies can be found at Appendix D.
9. A RUPP was one of the three types of public right of way (along with footpaths and bridleways) introduced by the National Parks and Access to the Countryside Act 1949.
10. The Countryside Act 1968 required all highway authorities to reclassify RUPP's in their area, initially as public footpaths unless public vehicular rights were demonstrated to exist in which case it would become a Byway Open to All Traffic (BOAT).
11. In Staffordshire the County Council had already undertaken a review into the reclassification of RUPPs and as this was advanced the Council applied to the Secretary of State for permission to conclude the exercise. After a number of public inquiries which continued into the 1980's the review was concluded and a new Definitive Map and Statement for the various districts issued which included all the changes to the routes that had previously been classified as RUPPs.

12. As the council cannot undertake another RUPP reclassification the correct approach to determining whether a route has bridleway or higher rights is to consider the matter under the provisions of s53 of the 1981 Act and evaluate all the available evidence. Reliance cannot be placed solely upon the fact a route once had the status of a RUPP to prove higher rights exist.

Evidence submitted by the Landowners

13. Miss Kathleen Bellfield of Whiteshaw Farm considers the route to be public. She describes the route as either a footpath, bridleway or restricted byway. She claims to have seen people using the way on foot, horse and bike on a daily basis. She also states there are two stiles and two gates on the claimed route, however also states there are no other obstructions. She has given permission to running clubs and charity rides. She finally concludes with the route was formerly a RUPP and was downgraded to a footpath. A copy can be found at Appendix E.
14. Mr Keith Tideswell of Hawksley Farm also considers the route to be public as a bridleway. He has seen people on foot and horseback on a weekly basis. He states he has not given anyone permission to use the claimed route. He further states there are no stiles on the route however there are gates. He concludes with there are no obstructions on the route. A copy can be found at Appendix F.
15. No other landowner who was consulted have responded to the application.

Comments received from statutory consultees

16. Heaton Parish Council and Staffordshire Moorlands District Council were consulted regarding the application; however, we have not received any response to support or refute the application to date.

Comments on Evidence - Documentary Evidence

Heaton Inclosure Award and Statement 1820

17. The Heaton Inclosure award again shows the claimed route in its entirety. A copy of the Inclosure Award and Statement can be found at Appendix C.
18. When considering an award, the wording, powers and context all must be taken into consideration to determine its evidential value.
19. The terms of the relevant act were considered to establish the extent of the Commissioner's powers in relation to highways and other roads. If the awarded highway in question does not fall within the scope of those powers, it should be regarded as ultra vires.
20. In this case the Inclosure Award makes reference to the 1801 General Inclosure Act which sets out the powers of stopping up, diverting and the setting out of highways by the Commissioners.
21. The Award lists Bearda Mill Road as a '*Public Carriage Road, 30 Feet Wide*'. The applicant transcribes the Award as '*From the north easterly and of the lane leading from the Macclesfield Old Road on Rudyard Moor in its present or north easterly and northerly direction over Heaton Common into the southern end of Jaggars Lane, and from there continuing in its present or northerly and north westerly direction down the said Jaggars Lane to Beard Mill Road and leading towards Dane Bridge and Winkle*'.

22. The Highway Act 1773 was in force at the time the Inclosure Award was drafted, accordingly section XV states ‘ *And be it further enacted, that the said Surveyors of the Highways shall, and they are hereby required to make, support and maintain, or cause to be made, supported and maintained, every public Cartway leading to any Market Town, twenty feet wide at the least and every public Horseway or Driftway, eight feet wide at the least, if the ground between the fences inclosing the same will admit thereof*’. This was further endorsed in the Highway Act 1835 in section LXXX.
23. In the Inclosure Award, the Commissioners appointed stated that the ‘Public Carriage Road’ to be 30 feet wide. While the 1773 Act stipulated 20 feet wide it also said no vegetation etc. to be present within 15 feet of the centre line, add the two together and you have 30 feet.
24. It can be assumed they intended for the claimed route to be used as a main public carriageway leading to and from various Market Towns.
25. In current terms a ‘Public Carriage Road’ would indicate a road used by motor vehicles. And so, the claimed route could have higher rights than a restricted byway; it may perhaps be a byway open to all traffic (BOAT).
26. In December 2003 the Government carried out a review of its policy on the use of motor vehicles on rights of way and published a consultation paper titled “Use of mechanically propelled vehicles on rights of way”.
27. The main proposal in the consultation was to limit the basis on which rights of way for mechanically propelled vehicles may be acquired and end the situation whereby historic use by non-mechanically propelled vehicles, such as horse-drawn vehicles, can give rise to a right of use by modern mechanically propelled vehicles. The consultation document sets out the rationale for this.
28. In January 2005 the Government published a document titled “The Government’s framework for action”. In this document it sets out the intention to legislate to limit claims for vehicular rights, where those claims derive from historic use and dedication for use by non-mechanically propelled vehicles. These proposals now form the basis of Part 6 of the Natural Environment and Rural Communities Act 2006 (NERC).
29. The effect of NERC is to extinguish vehicular rights of way on commencement of 2 May 2006, subject to certain exceptions, including the date of the application and date of the determination.
30. It is appropriate firstly to determine whether vehicular rights subsist and secondly, whether any exceptions apply. If vehicular rights subsist but the exceptions do not apply, then the appropriate status is a restricted byway.
31. The exceptions are contained in section 67, subsections (2) to (8) of the NERC Act. Any route that qualifies under any one, or more, of these exceptions would not have its public rights of way for mechanically propelled vehicles extinguished. In this case none of the exceptions do apply. And so, accordingly the alleged route cannot be a BOAT.

Burden and Standard of Proof

32. 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

33. 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. Therefore, the Panel need to be satisfied that, on the balance of probabilities, the evidence that has been discovered shows that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
34. The Heaton Inclosure Award shows the alleged route in its entirety. It confirms the Commissioners had the powers to set out highways, referring to the 1801 General Inclosure Act.
35. Bearda Mill Road is listed as a 'Public Road, 30 feet wide'.
36. The Highway Act 1773 was in force at the time the Inclosure Award was drafted. It stated *that 'the said Surveyors of the Highways shall, and they are hereby required to make, support and maintain, or cause to be made, supported and maintained, every public Cartway leading to any Market Town, twenty feet wide at the least and every public Horseway or Driftway, eight feet wide at the least, if the ground between the fences inclosing the same will admit thereof'*.
37. It can be presumed they intended for the claimed route to be used as a main public carriageway leading to and from various Market Towns.
38. In present terms a 'Public Carriage Road' would show a road used by motor vehicles. And so, the claimed route could have higher rights than a restricted byway; it may possibly be a byway open to all traffic (BOAT).
39. In deciding whether the alleged route is a BOAT the exceptions in the NERC Act must be given consideration. In this instance none of the exceptions do apply and so the route evidently is a restricted byway.

Conclusion

40. Considering 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 restricted byway, which is not shown on the map and statement subsists.
41. It is the opinion of your officers that the County Council ought to make a Modification Order to add the restricted byway 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

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

Other options Available

43. To decide to reject the application to upgrade the footpath to a restricted byway.

Legal Implications

44. The legal implications are contained within the report.

Resource and Financial Implications

45. The costs of determining applications are met from existing provisions.

46. 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

47. 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.

48. 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.

49. 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.

50. 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.

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Equal Opportunity Implications

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

J Tradewell

Director of Corporate Services

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Appendix B	Plan of claimed route
Appendix C	Heaton Enclosure Award Map and Statement
Appendix D	Parish Survey Cards
Appendix E	Landowner Evidence Form of Miss Kathleen Bellfield
Appendix F	Landowner Evidence Form of Mr Keith Tideswell