

<i>'Local Members' Interest</i>	
Cllr Simon Tagg	LF609G – District Newcastle-Under-Lyme

Countryside and Rights of Way Panel

Wildlife and Countryside act 1981

Application for an Alleged Public Footpath Between Keele Road and Paris Avenue, Westlands, Newcastle-under-Lyme

Report of the Director of Corporate Services

Recommendation

1. That the application at appendix A along with the evidence submitted by the applicant and that discovered by the County Council is not sufficient to show that a Public Footpath which is not shown on the Definitive Map and statement subsists along the route marked A to B on the plan attached at Appendix B to this report and should not therefore be added to the Definitive Map and Statement of Public Rights of Way.
2. That an Order should not be made to add the alleged right of way shown on the plan attached at Appendix B and marked A to B to the Definitive Map and Statement of Public Rights of Way for the District of Newcastle-under-Lyme.

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 made by Paul J Martin for an order to modify the Definitive Map and Statement for the area by adding an alleged public footpath from Keele Road to Paris Avenue, Westlands, Newcastle-under-Lyme under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981. The line of the alleged Public Footpath as claimed by the applicant is shown on the plan attached at 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

4. The route applied for is shown between points A-B on the plan attached at appendix B between Keele Road and Paris Avenue, Westlands, Newcastle-under-Lyme.
5. In support of the application the applicant, P.J.Martin submitted 10 user evidence forms. The evidence forms they completed are attached to this report at Appendix C

6. A summary of the salient points from the user evidence forms has been compiled in a table. This is attached at Appendix D.
7. 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, or that it can be inferred by the landowner's conduct that he had actually dedicated the route as a public right of way, and the right of way had been accepted by the public.
8. 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 it home to the public that their right to use the way is being challenged.
9. The date of the application, in this case 1996, will be the relevant date in the absence of an identifiable and contemporaneous challenge. Accordingly, the requisite 20 year period of use should be calculated retrospectively from this date.
10. The 10 x user evidence forms would appear to have been completed in April and May 1996 and the application was submitted in May 1996. Consequently, the period 1976-1996 is the relevant 20-year time frame within which the users seek to demonstrate use. An examination of the forms shows that users used the path until 1996 and that their evidence continues up to that time.
11. An examination of the forms shows that 8 users have known the path for a period of 20 years or over. Of these 6 users claim to have used the path throughout the relevant 20 year period. These are C Clowes, J Fielding, KGM Olsen, M Martin, PJ Martin and K Smallman.
12. Two users CL Randall and B Dean do not have the required 20 year period of usage, having 18 and 16 years usage respectively.
13. The remaining 2 users both have over 20 years usage although not within the relevant time period, being Michael Barr and Susan Barr 1974-1995 and 1974-1994 respectively.
14. Further examination of the forms shows that of the 10 submitted, 6 state there was wire or barbed wire erected over the path during the relevant 20 year period. Although there is no reference to any stiles or gates along the route it is significant that over half the users, including the applicant, state that a barbed wire obstruction was erected on the path.
15. The users who refer to a date are consistent that the barbed wire obstruction was erected during the early 1980s. One stating 1981, one stating 1983, one stating 1980-83, one stating 1982-83 and one stating the early 1980s. One user does not give a date.
16. The applicant himself states in relation to this obstruction that the "barbed wire" was at the "Keele Road start to the walk" but that "this was soon pulled down".
17. Of the other users who reported the barbed wire obstruction one stated that it was "subsequently torn down" and the other that "it was removed".
18. All 10 users state they have used the path on foot.
19. The width of the path is consistent among the 10 users who all give a minimum width of approximately 3 feet (1 metre) in their evidence forms.
20. The applicant P J Martin stated in his user evidence form that the path is "used by a lot of dog walkers" and is "well marked and used". He also states it is "shown on the A to Z map".
21. C L Randall in her user evidence form states that "the footpath through the wood has always been used by the public for pleasure walks and for dog walking".

22. B J Dean in her user evidence form states that “it has been used always as a through route on to Keele road.”
23. Four photographs provided by the applicant shown various sections of the route in 1996.
24. Photograph One – this is annotated on the reverse stating “New barbed wire obstructing access to path at Keele Road”. The photo clearly shows two strands of barbed wire at an estimated height of approximately 2.5 – 3.0 feet. Beneath the double stranded fence there is an approximately 2-foot-high length of sheep netting. This along with the barbed wire strands appears to extend across the whole width of the alleged route – with an estimated length of 20 feet visible on the photograph.
25. Photograph Two – this is annotated on the reverse stating “South end of the path”. This photo clearly shows a track running through a semi-wooded area.
26. Photograph Three – this is annotated on the reverse stating “Path at junction with Butts Walks near (Turning?) Point”. This photo clearly shows the character of the land changing from a wooded area to an open area.
27. Photograph Four – this is annotated on the reverse stating “Middle section of path looking north”. This photo clearly shows a track through a wooded area.
28. Following the applicant (P J Martin’s) death the Thistleberry Residents Association headed by its Chair Dr A Drakakis-Smith communicated with the County Council supplying a series of photocopied historical maps and annotations as additional supporting information.

Other Evidence Discovered By the County Council

29. On examination of the user evidence plans the upper (Keele Road) and wooded area of the route would not be consistent with the public open space area referred to as the Butts Walk in the ownership of Newcastle under Lyme Borough Council. The non-wooded lower (Paris Avenue) section of the route would however appear to form part of the public open space area referred to as the Butts Walk.
30. Alice Coleman contacted the County Council direct (by telephone) after the landowner Mr G J Webb called her after seeing a notice relating to the application posted on one of the trees on the land. She confirmed to the County Council direct that Mr G J Webb is the landowner, that he lived in Spain and that he had a care-of address Rosemary Wood Cottage, Rosemary Wood, Keele Road, Newcastle under Lyme ST5 5AA. Alice Coleman stated that Mr G J Webb would be getting in touch with his solicitors and requested that the County Council should contact him through the said solicitors.

Evidence Submitted By the Landowner/s

31. When the application was submitted the applicant revealed there were two landowners for the whole of the land over which the application route runs.
32. The applicant was only able to identify one of the landowners. This was Newcastle under Lyme Borough Council. The applicant referred to the unknown landowner as the “Owner / Occupier”.
33. The Owner /Occupier was found to be Mr G J Webb.
34. Newcastle Borough Council provided evidence relating to the Butts Walks, Westlands as recorded in their Byelaws of Parks, Public Walks, Pleasure Grounds, Open Spaces, Recreation Grounds and Playgrounds.

35. The Butts Walks are referred to at Part 1 of Schedule 1 on page 6 being Grounds in Respect of which Byelaws are Made Under Section 164 of The Public Health Act 1875. These were reaffirmed in 1980.
36. Newcastle under Lyme Borough Council stated they bought the land known as Butts Walks on 31st August 1956.
37. Mr G J Webb the other landowner stated that he acquired his interest in the property at the end of 1995 and that he is the freehold owner.
38. Mr G J Webb stated, through solicitors Bailey, Wain and Curzon that he had spoken to previous owners and they had informed him that “the land has always been regarded as totally private” and that “no trespassing signs have been in position for many years”.
39. Mr G J Webb added that the former owner erected barbed wire around the boundaries and that this was not limited to 1983 as alleged by the applicant and others and “it is correct that barbed wire has been ripped down on numerous occasions”.
40. Mr G J Webb objected to the application through his solicitors Bailey, Wain and Curzon.
41. During a site meeting between County Council Officers and Mr G J Webb on 08/04/97 the latter gave a statement in respect of his ownership of the land”.
42. Within the Owner /Occupier Questionnaire Mr G J Webb stated that both he and the previous owner had erected signage on the land. These had been “Private -Keep Out” signs. Mr Webb states in the Owner / Occupier Questionnaire that he had “given permission to various people” to use the path and that he had stopped or turned back users “on many occasions”.
43. Regarding any obstructions on the land Mr G J Webb stated within the Owner /Occupier Questionnaire that he had erected the “fence adjacent to Keele Road”. This being the fence visible in the applicants photograph of 1996.

Comments Received From Statutory Consultees:

44. Newcastle under Lyme Borough Council in its capacity as landowner provided the details referred to above in the comments from landowner’s section.
45. Whilst responses were received from various other organizations none presented any evidence or had any comments that would support or rebut the application.

Comments on Evidence

46. Section 31 of the Highways Act 1980 sets out the test that must be satisfied under statute for a way to become a public highway through usage by the public.
47. In 1932 the Rights of Way Act introduced the statutory presumption of dedication by the landowner of a public right of way which could be proven by evidence of 20 years usage as of right and without interruption. This presumption could be rebutted by the landowner proving that he had no such intention. However, the onus is on the landowner to do so. The land that the path crosses is not of a character that would prevent the dedication of a way.
48. It is clear from the user evidence that that there have indeed been interruptions to their use over the relevant 20 year period. During the early 1980’s over half of the users reported that a barbed wire fence had been erected on the path at one or both

ends. As the relevant 20 year period runs from 1976-1996 the erection of barbed wire on the path in the 1980s clearly falls within this time frame.

- 49.** From the attached user map evidence, the path used by all the users is on the same line and there is no indication that they have deviated from this line. The evidence forms do not support any contention that the users are drawn from a particular section of society or that use is limited to members of a particular area. While it is usual for evidence to come from people who live in a locality there is nothing to suggest that this is a prerequisite for use in this instance.
- 50.** The statutory test refers to use over 20 years and in the evidence submitted by the 10 users there are 6 users who have used the path throughout the specified and relevant period of time.
- 51.** Of the remaining 4 users, it can be seen that 2 of these cannot demonstrate usage for any 20 year period. These are B Dean and CL Randall with 16- and 18-years usage respectively. Both of these used the path up to and including 1996, however neither could claim a usage back to 1976 – the start of the relevant period. While M Barr and S Barr who did not continue to use the path up until 1996 – the end of the relevant period nevertheless had both done so since 1974.
- 52.** If therefore the usage of B Dean and M Barr is combined, we have a continuous usage (of 20 years) throughout the relevant period 1976-1996, and if the usage of S Barr and CL Randall are combined, we have a continuous usage (of 20 years) throughout the relevant period 1976-1996. By combining their usage, it is therefore possible to add 2 more users to the 6 who had individually used the path for the relevant 20 year period. This gives a total of 8 user evidence forms that can demonstrate use over the relevant 20 year period – 6 of these being produced by one individual and 2 of these being produced by two individuals combined.
- 53.** Neither the legislation nor the applicable case law set out a minimum level of user that is expected or required to support a claim that a route exists. The case law does suggest that the amount of usage should be such that it is enough to bring home to a reasonable landowner that the public are using a way and that use is as if it was a public highway, ie. “as of right”.
- 54.** Out of the 10 user evidence forms a total of 4 claimed to have used the path on a daily or almost daily basis. The remaining 6 users only claiming use occasionally or several times per year. The latter may have been so insignificant as to pass notice as only 4 of the 10 users appear to have used the path enough to have brought this to the landowner’s attention.
- 55.** No users refer to any gate or stile on the path although 6 of them attest to wire or barbed wire being present as an obstruction during the relevant period. It is clear from the evidence that only the landowner would have an interest in fencing off the land with wire and one user stated that it was only the wooded area that had been fenced off. The wooded area being in the possession of one of the two landowners of the route.
- 56.** All user evidence forms are consistent where they mention the barbed wire fence as an obstruction. All are consistent with the date for this, being in the early 1980’s and well within the relevant 20 year period.
- 57.** The Statutory Test under Section 31 (1) of the Highways Act 1980 states that the usage should be “without force, secrecy or permission”. In this case the user evidence forms including that of the applicant himself refer to the barbed wire fence or obstruction being torn down during the relevant period. This would clearly demonstrate that the way had indeed been used “with force” and therefore the Statutory Test in this case cannot be satisfied. The user evidence forms and the

landowner's questionnaire both reference the barbed wire fence and support each other in this respect.

58. The landowner claims to have erected signage and to have stopped or turned users back where seen, as he claims the previous landowner did. However, no tangible evidence is supplied for this. He also states that he has on occasion given permission to use the path – although again no evidence for this has been supplied.
59. The only overt action taken by the landowner to prevent dedication within the relevant 20 year period was the erection of the barbed wire fence in the early 1980's. Given the varying dates for this in the user evidence it is probable that there were several replacement barbed wire fences that were erected and then subsequently "torn down" - as attested to by the landowner in his Owner /Occupier questionnaire.
60. The section of the path owned by Newcastle under Lyme Borough Council and known as the Butts Walks is the non-wooded section of the route at the Paris Avenue end. This section of path is an open space and forms part of a larger circuit and network of paths freely available for public use and all forming the said Butts Walks. It is from the lower most path on the Butts Walks that a connection appears to have been made into the wooded area onto the land belonging to Mr G J Webb.

Comments on All Available Material

61. There is no evidence that we are aware of which would support any higher rights than those applied for.
62. The material when taken together appears to be consistent and the landowners evidence appears to support the evidence provided by the users.
63. The section of path at the Paris Avenue end that forms part of the Butts Walks is already a public open space and freely available for public use. The Butts Walks is a circuit of paths in the ownership of Newcastle under Lyme Borough Council and its status as a public open space recorded in the Bye Laws of the Council.

Burden and Standard of Proof

64. With regard to the status of the route, the burden is on the applicant to show, that on the balance of probabilities, that it is more likely than not, the way subsists. The existing situation must remain unless and until the Panel is of the view that the Definitive Map and Statement should be amended. If the evidence is evenly balanced, then the existing Definitive Map and Statement prevails.
65. The question is also 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".
66. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

Summary

67. 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.
68. 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.

69. The test requires consideration of whether there has been use of a way by the public, as of right 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.
70. 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 period of twenty years. In this case the date of the application is 1996 and this becomes the relevant year from which the 20 year period is calculated retrospectively.
71. Although it can be demonstrated that the path was used over the relevant 20 year period it can also be demonstrated that this use was not without interruption as over half of the users stated they had encountered a barbed wire fence obstructing the path during the said period. The erection of a barbed wire fence was also referred to by the landowner in his questionnaire and as such both the landowner and user evidence support each other The fact that this barbed wire fence was then torn down in order for the route to continue to be used cannot satisfy the test of “without force”.
72. Although the path was used over the said 20 year period its usage appears to have been of a relatively low frequency. Only 3 out of the 10 users claimed to use the route on a daily basis (a further 1 user claiming several times per week) with the majority claiming only occasional use on as little as a once yearly basis.
73. If the test in the first part of section 31 is considered as to whether the way subsists on 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”.
74. In this instance it would also be problematic to show that the landowner had dedicated the way at common law level. The available evidence shows that the owner of the land has indeed attempted to challenge the use of the way as stated by all parties on both the user evidence forms and the landowner’s questionnaire. The landowner also states he has both stopped or turned back users on the path and at other times granted his permission. Although there is no independent evidence of this when taken together with the erection of the barbed wire fence it would seem to be a probable occurrence.
75. For clarification the erection and subsequent removal of the barbed wire fence during the relevant 20 year period means the route was not used without force. The erection of the fence can be said to be a challenge and evidence of the landowner having no intention to dedicate. When taking this into consideration it is also more likely than not that the landowner has indeed turned users back or granted permission at different times as stated in his evidence.

Conclusion

76. In light of the evidence, as set out above, it is your Officers opinion that the evidence does not show that on the balance of probabilities a public right of way subsists.
77. In light of the evidence, as set out above, it is your Officers opinion that the evidence does not show that a public right of way can be reasonably alleged to subsist.
78. It is the opinion of your Officers that the County Council should not make a Modification Order to add the path which is the subject of this application to the Definitive Map and Statement of Public Rights of Way for the District of Newcastle under Lyme.

Recommended Option

79. To reject the application based upon the reasons contained in the report and outlined above.

Other options Available

80. To decide to accept the application and make an Order to add the route to the Definitive Map and Statement of Public rights of way.

Legal implications

81. The legal implications are contained within the report.

Resource and Financial Implications

82. The cost of determining applications are met from existing provisions.
83. 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

84. 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.
85. 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.
86. 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.
87. 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

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

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