Local Members' Interest	
Ann Beech	Audley and Chesterton

Countryside and Rights of Way Panel

Wildlife and Countryside Act 1981

Application for Definitive Map Modification Order Claimed Public Bridleway from High Lane in the Parish of Audley to Apedale Road (including the upgrading of Footpaths Newcastle Town Nos 44 (pt) 46, 49 & 50(pt) to bridleway)

Report of the Director of Corporate Services

Recommendation

1 That the evidence submitted by the applicant is sufficient to conclude that Public Bridleway rights do, on balance of probability subsist along the route shown marked N-M-L-J-H-G on Plan 1 attached at **Appendix A** to this report.

2 That a Definitive Map Modification Order be made be made to add the alleged public bridleway, shown N-M-L-J-H-G on Plan 1 attached at **Appendix A**, to the Definitive Map and Statement of Public Rights of Way.

Why is it coming here – what decision is required?

1 Staffordshire County Council is the Surveying Authority for the purposes of reviewing and maintaining the Definitive Map and Statement of Public Rights of Way (hereafter referred to collectively as "the Definitive Map") in accordance with, and pursuant to, Section 53 of the Wildlife and Countryside Act 1981 ("the 1981 Act").

2 The determination of applications to modify the Definitive Map fall within the terms of reference of the Countryside and Rights of Way Panel of the County Council's Regulatory Committee ("the Panel"). When determining such applications, the Panel acts in a quasi-judicial capacity and must only consider the relevant facts, evidence, law and the legal tests. All other issues and concerns must be disregarded.

3 In 2002 Mrs P Whalley submitted a number of applications for Definitive Map Modification Orders to the County Council. Mrs Whalley subsequently transferred responsibility for the applications to the North Staffordshire Bridleways Association.

4 The applications sought to add various alleged bridleways, in and around the Apedale area of Newcastle under Lyme, to the Definitive Map. A number of other applications were also submitted which sought to upgrade, from footpath to bridleway, a number of other routes in the vicinity. Fifteen of these applications are currently being investigated by external consultants who are assisting the Authority. All of the fifteen routes under investigation are shown on **Plan 2** in **Appendix A.** All of the applications rely on evidence of public use.

5 The purpose of this report is to consider four of the applications (attached at **Appendix B**) which together form a single route (the Application Route) which is shown N-M-L-J-H-G on **Plan 1** at **Appendix A**. The Application Route comprises some sections which

are not currently recorded on the Definitive Map and other sections which are currently recorded as public footpaths.

6 The Panel are asked to decide, having considered all of the available and relevant evidence against the relevant legal tests, whether to accept or reject the applications.

Evidence Submitted by the Applicant

1 The Applicant submitted six user evidence forms in support of each of her applications, copies of which are included in the document bundle at **Appendix C, D, E & F**. The same witnesses have completed user evidence forms in respect of each application.

Other Evidence Discovered by the County Council

2 As part of the investigation the Consultant has also obtained relevant extracts from Ordnance Survey Maps (**Appendix G**) which help to identify which areas were subject to open cast works commenced circa 1987 (see Temporary Closure Order at **Appendix H**) and prior to the establishment of Apedale County Park. These are helpful in confirming the physical existence of the Application Route.

Evidence Submitted by the Landowners as part of the Investigation

3 One objection to the applications has been submitted on behalf of the owners of land crossed by or adjacent to the Application Route. A copy of these objections are attached to the report at **Appendix I**.

Comments received from Consultees

4 Newcastle under Lyme Borough Council have been consulted on the draft report and have no comments to make.

5 Audley Parish Council have been consulted on the draft report and are generally supportive of the applications

6 The Applicants, any objectors and landowners have been consulted on the draft report and no further comments have been received.

Legal Test for User Evidence Based Cases

7 Section 31 of the Highways Act 1980 states:

> *"(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."*

8 The period of 20 years referred to above is calculated retrospectively from the date when the right of the public to use the way is brought into question.

Character of the Way

9 In general terms, an essential characteristic of a highway is that it has a point of public terminus at either end (e.g. it may be expected to run between two other highways of equal or higher status. The exception to this is, of course a cul-de-sac highway which might usually be expected to lead to a place of public resort.

10 In this particular case the Application Route does run between two highways, namely High Road and Apedale Road. It should be noted that Apedale Road is not recorded on the County Council's List of Streets Maintainable at Public Expense, but it clearly is a highway to which the public enjoy (or enjoyed) unrestricted access. In the absence of any evidence to the contrary it would therefore be reasonable to infer that the Application Route is of a character that is consistent with public highway status.

Date of Challenge or "Bringing into Question" & the Relevant 20-Year Period

11 In *Fairey v Southampton County Council [1956]* 2QB 439 456 Lord Denning set out that:

> " *In order for the right of the public to be brought into question, the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it*."

12 Read literally and out of context, that passage might seem to indicate that the public's right can only be brought into question by the landowner, but in his Rights of Way Law Review article "Section 31 Update" (Section 6.3 Page 52 (April 1998)) David Bramham QC advises that this is not the law. It is in fact, any action, by any person, which brings into question the existence of the public's right to use the way will qualify. This view is shared by the Planning Inspectorate in their guidance to Inspectors, and by Lord Scott, at paragraph 70, in the "Godmanchester" case.

13 In *R v SoS for the Environment ex parte Dorset County Council* [1999] NPC the Judge further considered the *Fairey* test, he stated that the test:

> *"clearly does not require that every user should be told by the owner of the challenge, or even that it be shown that every user has been made aware of the challenge by other means, for example by reading a notice in a local newspaper. But whatever means are employed, they must be sufficient to make it likely that some of the users are made aware that the owner has challenged their right to use the highway. Anything less will not satisfy the need identified by Denning L.J. to bring home to the users the owner's challenge, so that they are given the opportunity to meet it."*

14 If the above tests have not been satisfied, Sections 31(7A) and (7B) provide that the twenty-year period can be calculated retrospectively from the date of the submission of a duly made application for a Definitive Map Modification Order.

15 All of the user witnesses state that they stopped using the section N-M-L of the Application Route when the area became subject to open cast mining works. The Order for the temporary suspension of public rights of way in the area (**Appendix H**) confirms that this occurred in 1987. The remainder of the Application Route however remained available and continued to be used until circa 2000 when it was blocked off by Staffordshire County Council presumably following the restoration of the site and establishment of the Apedale Country Park.

16 The combination of the Temporary Closure Order (**Appendix H**) which clearly defines all of the routes in the area as footpaths, and the actual physical closure of the route

to facilitate the open cast mining works, may be considered sufficient to qualify as a bringing into question within the meaning of Section 31 of the Highways Act 1980.

17 In view of the above the requisite twenty-year period would be 1967 to 1987.

Comments on User Evidence

18 In total six user witnesses have submitted evidence in support of the Application, albeit they have filled in separate user evidence forms in respect of different sections of the Application Route. Copies of the User Evidence Forms are attached to this report under **Appendices C-F**. A summary of the User Evidence is also attached at **Appendix J**.

19 In order for a presumption of dedication to arise under Section 31 of the 1980 Act, there must be actual use of the alleged route, and such use must be by the public. In determining who constitutes "the public" paragraph 5.12 of the Planning Inspectorate's Definitive Map Consistency Guidelines advises that:

> "*5.12 There appears to be no legal interpretation of the term 'the public' as used in s31. The dictionary definition is "the people as a whole, or the community in general". Hence, arguably, use should be by a number of people who together may sensibly be taken to represent the community. However, Coleridge LJ (as he was then) in R v Southampton (Inhabitants) 1887 said that "user by the public must not be taken in its widest sense ... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge."*

20 Taking this guidance into account, use wholly or largely by local people may be sufficient to satisfy the statutory test use by the public, but this will depend on the circumstances of the case. For instance, it is unlikely that use confined to members of a single family and their friends would be sufficient to represent 'the public'.

21 An assessment of the user evidence suggests that all of those completing the user evidence forms may be considered to be members of the general public.

22 With regard to the number of members of the public who must use a route for it to become a public rights of way, there is no statutory minimum however use must be by a sufficient number of people to show that it was use by 'the public'. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e., its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.)

23 It was held in *Mann v Brodie (1885)* that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. It is generally applicable that in remote areas the amount of use of a way may be less than a way in an urban area. Lord Watson said:

> *"If twenty witnesses had merely repeated the statements made by the six old men who gave evidence, that would not have strengthened the respondents' case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence."*

24 Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more (*Davis v Whitby (1974)). H*owever, use of a way by trades-people, postmen, estate workers, etc., generally cannot be taken to establish public rights.

25 Of the six witnesses who completed user evidence forms three witnesses[1] gave evidence of use throughout the relevant twenty-year period (1967-1987).

26 The remaining three witnesses, Mr and Mrs Callanan used the Application Route for 17 years (1970 – 1987); Joanne Green used it for 12 years (1975-1987); and Helen Taylor used it for 5 years (1982-1987).

27 Notwithstanding the above, all users claim to have continued to use parts of the Application Route not subject to open casting (i.e. Section L-J-H-G) until circa 2000 when this was fenced off by Staffordshire County Council, presumably as part of the restoration of the adjoining open cast mining site and subsequent establishment of Apedale Country Park. This adds a further thirteen years unchallenged use to that section of the Application Route, albeit after the date of bringing into question.

28 For such use to be considered to be "*as of right*" it must be without force, without secrecy and without permission. On the matter of defining use that is "*as of right*", a long line of authority, which was derived from an aside of Tomlin J in *Hue* v *Whiteley [1929] 1 Ch 440*, had been taken to import an additional requirement of the subjective belief of the user that he was using a public right of way. I*n R v Oxfordshire County Council and others, ex parte Sunningwell Parish Council UKHL 28; [2000] 1 AC 335; [1999] 3 ALL ER 385; [1999] 3 WLR 160,* Lord Hoffman saw that this reading of Tomlin J's judgment was unsupported by previous authority or the English law of prescription:

> *"A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not."*

29 The User Evidence Forms suggest that all of the witnesses were using the Application Route in a manner that may reasonably be considered to be "as of right".

30 In *Redcar*[2] in the Court of Appeal, Dyson LJ (at para 35) referred to *Hollins and Verney* quoting Lindley LJ.:

> "*… no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term … the user is enough at any rate to carry to the mind of a reasonable person…the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such a right is not recognised, and if resistance is intended*".

31 In *Nicholson v Secretary of State* (1996), the court said

> "*..the more notorious it [use] is the more readily will dedication be inferred..*".

32 All of the user witnesses claim regular use of the Application Route. Pauline Whalley, Susan Mountford and Jennifer Hambleton all indicate use on a daily to weekly basis; and Joanne Green and Helen Taylor indicate use on a weekly basis. Mr and Mrs Callanan indicate that they used the Application Route all year round but do not indicate their frequency of use. Taken in the whole this suggests a regular and reasonably frequent level of equestrian use.

33 The User Evidence Forms suggest that use of the Application Route was sufficiently notorious to suggest that a continuous right to enjoyment was being asserted.

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[1] Whalley, Mountford & Hambleton

[2] Lewis, R (on the application of) v Redcar and Cleveland Borough Council & Anor [2009] EWCA Civ 3 (15 January 2009)

34 Taking the user evidence in the whole, there is a body of use which spans over the full period 1967 to 1987 which was "as of right" and "without interruption". It may therefore be reasonable to conclude that there is, on balance of probability, a prima facie, case in favour of a presumption of dedication of the claimed public bridleway rights over the Application Route. Such a presumption may however be overturned if there is evidence of the landowner's lack of intention to dedicate.

35 With regard to any implied dedication arising under the Common Law, there is no evidence of any positive acts, from which dedication may be inferred, on behalf of the owner of the land. A case at common law is therefore only likely to succeed if the user evidence is considered to be sufficient to allow an implication of dedication to be inferred.

Evidence of the Landowner's Lack of Intention to Dedicate

36 Before any landowner has to demonstrate a "lack of intention to dedicate", the initial presumption of dedication (as set out above) must arise.

37 The issue of what constitutes lack of intention to dedicate was discussed in *R (on the application of Godmanchester Town Council) (Appellants) v. Secretary of State for the Environment, Food and Rural Affairs (Respondent) and one other action [2007] UKHL 28,* and summarised by Lord Hoffmann at paragraph 33 of the judgment:

> *"33. It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be any difficulty in satisfying such a requirement without any evidence at all. It requires "sufficient evidence" that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J in Billson's case) it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience."*

38 When this objective test is applied to the application under consideration, nobody with a landowning interest has provided any evidence of acts which may be considered demonstrate a "lack of intention to dedicate" within the requisite twenty-year period.

39 Matters such as privacy, security, suitability, desirability, and even public safety, whilst all genuine concerns, are not matters that can lawfully be taken into account as part of the decision-making process.

Standard of Proof

40 Parts of the Application Route (i.e. N-M-L except where it coincides with Footpath 50) is not currently recorded on the Definitive Map, and therefore can be considered under the legislative test set out in Section 53(3)(c)(i) of the 1981 Act namely:

> "*that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists*"

41 This section of the Act introduces a two-stage test for triggering the Council's duty to make an Order. The first of those tests is triggered is, having considered all of the available and relevant evidence the Council is satisfied that, on "balance of probability", the claimed rights subsist. However, if the "balance of probability" test is not met, but

the Council considers that there is still a "reasonable allegation" in favour of the existence of the alleged public right of way, they are still obliged to make an Order.

42 Whilst the duty to make an Order under Section 53(3)(c)(i) of the 1981 Act is triggered if there is a "reasonable allegation" (a relatively low evidential threshold) in favour of the existence of a public right of way, the test for confirmation of the Order remains that the rights must be shown "on balance of probability" to subsist.

43 Notwithstanding the above, the remainder of the Application Route is already recorded on the Definitive Map as public footpaths. These sections must be considered under the legislative test set out in Section 53(3)(c)(ii) of the 1981 Act namely:

> *"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"*

44 Under this section of the 1981 Act the test for both making and confirming Orders is the same, namely "on the balance of probability".

45 Given the different tests that must be applied to different parts of the Application Route it is possible that the Panel may conclude that an Order should be made for parts of the Application Route and not for others. This would however only apply if they considered that the "balance of probability" test had not been satisfied, and therefore they had to rely upon the "reasonable allegation" test.

Summary

46 The Council's duty to make a Definitive Map Modification Order is triggered in respect of certain parts of the Application Route if there is a reasonable allegation that the alleged Public Bridleway rights subsist. For other parts of the Application Route this duty is only triggered if it is demonstrated, on balance of probability that the alleged Public Bridleway rights subsist. However, in both instances an Order can only be confirmed if it is determined that on balance of probability the alleged rights subsist. Notwithstanding that the Court of Appeal have in R (Roxlena Ltd) v Cumbria County Council [2019] said that the consideration of evidence at this stage of the Modification Order process was "*necessarily less intense*" than at confirmation stage. The evidence might or might not be satisfactory sustained when the Order comes to be confirmed but that does not mean one cannot be lawfully made at this juncture.

47 The existence of public bridleway rights was brought into question in 1987 when access was closed off to facilitate open cast mining works. The relevant twenty-year period for the purposes of Section 31 of the Highways Act 1980 is therefore 1967-1987.

48 There is a body of evidence which indicates that the Application Route has been used, as of right and without interruption, by the public on horseback, for the full period 1967-1987, and this use was sufficiently notorious to give rise, on balance of probability to a presumption of dedication of public bridleway rights.

49 There is no evidence of any actions by, or on behalf of, the owners of the land crossed by the Application Route, during the period 1967-1987 which would indicate a lack of intention to dedicate.

Conclusion

50 In determining the Application, the Panel has to be satisfied, on balance of probability, that the alleged public bridleway rights subsist.

51 The test for confirmation of any subsequent Order is also, on balance of probability, that the alleged public bridleway rights subsist.

52 There is sufficient evidence of qualifying public equestrian use, coupled by the absence of any evidence to demonstrate a lack of intention to dedicate on the path of the landowners, to give rise, on balance of probability to a presumption of dedication of a public bridleway under Section 31 of the Highways Act 1980.

53 It is therefore the Consultant's view that a Definitive Map Modification Order should be made to add the Application Route to the Definitive Map, also as a Public Bridleway.

Recommended Option

54 It is recommended that the applications are accepted for the reasons contained in the report and outlined above, and that a Definitive Map Modification Order be made to record the Application Route (N-M-L-J-H-G) in the Definitive Map and Statement as a Public Bridleway.

Other Options Available

55 If the Panel are not satisfied that the required legislative tests have been met, the application should be refused, and the Applicants advised of their right to appeal.

Legal Implications

56 Section 53 of the Wildlife and Countryside Act 1981 placed a Statutory Duty on the County Council, in their role as "Surveying Authority" to keep the Definitive Map for their area under continuous review, and to update and amend it as they consider necessary. Such updates and amendments are made by legal orders known as Definitive Map Modification Orders. Failure to comply with this Statutory Duty would mean that the County Council would be acting "ultra vires" and be open to Judicial Review.

57 More specifically in reference to this case Section 53(3)(c) places a duty on the Surveying Authority to make a Definitive Map Modification Order upon the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic

(ii) 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

58 Schedule 14 of the Wildlife and Countryside Act 1981 makes provision for any person seeking to modify the Definitive Map to make applications for such amendments and afford the applicant a right of appeal is their application is not determined within 12 months of submission. Applicants also have a right to appeal if their application is refused. Both appeal mechanisms are dealt with by the Planning Inspectorate on behalf of the Secretary of State for Environment, Food and Rural Affairs.

Resource and Financial Implications

59 The cost of determining applications, and the making of any subsequent Definitive Map Modification Orders, are met from existing provisions.

60 There are additional resource and financial implications if the Authority refuse an application and the applicant appeals; or if an Order is made and objections are subsequently received. These may include an exchange of written representations, a hearing or local public inquiry, or in exceptional circumstances an application to the High Court for Judicial Review.

Risk Implications

61 If the County Council do not determine an application within twelve months of receipt, the applicant has a right to appeal to the Secretary of State for Environment, Food and Rural Affairs and request that the Authority be directed to determine the application within a defined timescale. Failure to comply with such a direction may leave the Authority open to challenge by way of a complaint to the Local Government Ombudsman or application for Judicial Review in the High Court.

62 If the Council decide to refuse and applicant and not make an Order, the applicant has a right to appeal that decision to the Secretary of State. The Secretary of State will then appoint an Inspector who will review the case and may direct the County Council to make an Order.

63 In the event of the Council making an Order any person may object, and if such objections are not withdrawn the Order must be referred to the Secretary of State for determination. The Secretary of State would appoint an Inspector to consider the matter by way of an exchange of written representations, a hearing or a local public inquiry.

64 Having considered all of the available and relevant evidence, the Secretary of State may uphold the Council's decision and confirm the Order; or may decide that the test for confirmation of the Order have not been met and decide not to confirm it. The Secretary of State's decision may still be challenged by way of Judicial Review in the High Court, but only on very limited grounds.

65 If the Panel makes its decision based upon the facts, the evidence, 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 Opportunities Implications

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

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Background Files: LM627G
LM630G
LM632G
LM636G

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