

Local Members' Interest	
Cllr P Atkins, OBE	East Staffordshire- Uttoxeter Rural

Countryside and Rights of Way Panel -

Wildlife and Countryside Act 1981

Application for the addition of an alleged Public Footpath between Smallwood Manor and Buttermilk Hill Gate, Marchington

Report of the Director of Corporate Services

Recommendation

1. That the evidence submitted by the applicant and that discovered by the County Council is sufficient to show that the alleged public footpath between Smallwood Manor and Buttermilk Hill Gate, Marchington subsists on the lines marked C to D and E-F on the map attached at Appendix B.
2. That an Order be made to add the alleged right of way shown on the lines marked C to D and E-F on the plan attached at Appendix B to the Definitive Map and Statement of Public Rights of Way for the District of East Staffordshire as a Public Footpath.

PART A

Why is it coming here – what decision is required?

1. Staffordshire County Council is the authority responsible for maintaining the Definitive Map and Statement of Public Rights of Way as laid out in section 53 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). Determination of applications made under the Act to modify the Definitive Map and Statement of Public Rights of Way, falls within the terms of reference of the Countryside and Rights of Way Panel of the County Council's Regulatory Committee ("the Panel"). The Panel is acting in a quasi-judicial capacity when determining these matters and must only consider the facts, the evidence, the law and the relevant legal tests. All other issues and concerns must be disregarded.
2. To consider an application attached at Appendix A from Mr Martin Reay for an Order to modify the Definitive Map and Statement for the District of Marchington. The effect of such an Order, should the application be successful, would:
 - (i) add an alleged Public Footpath between Smallwood Manor and Buttermilk Hill Gate, Marchington to the Definitive Map of Public Rights of Way under the provisions of Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981.
 - (ii) The lines of the alleged Public Footpath which are the subject of the application are shown highlighted and marked A-B, B-C, C-D, D-E and E-F on the plan attached as Appendix B. Parts of the claimed route marked B-C and D-E already have the status of a public footpath and therefore these sections do not need to be determined. Therefore the sections marked A-B, C-D and E-F need determining to connect the route as a whole.
3. To decide, having regard to and having considered the Application and all the available evidence, and after applying the relevant legal tests, whether to accept or reject the application.

Evidence submitted by the applicant

1. The applicant has submitted in support of his claim evidence of a First Inclosure Award dated 1805 and Inclosure Award dated 1811 and a Highway Order dated 1826.
2. The First Inclosure Award dated 1805 is accompanied by the Award and map. A copy is attached at Appendix C. The map shows a single dotted line marked as Footway A, connecting from Buttermilk Hill Gate in the south and running in a northerly direction, although it does not show where the route connects to. The route runs through the land belonging to the “heirs of late Thomas Pickering”. The route appears to continue passed Buttermilk Hill Gate in the south and through land belonging to Lord Bagot. This only shows part of the alleged route, specifically the southern part of the route, marked C-D, D-E and E-F on Appendix B. Outlined earlier in the report the section marked D-E is already an existing footpath and therefore this part of the route does not need to be determined.
3. The first paragraph of the 1805 award does not refer to the alleged route. The second paragraph refers to the alleged route as: “...the present footway leading from Uttoxeter to Newborough along the same over the said land now off late Thomas Pickering to the south east corner thereof and reusing a small corner of allotment 1 at Buttermilk Hill Gate into ancient inclosures of Lord Bagot at the stile at the said Uttoxeter Newborough footway along the north east fence of the said land of Lord Bagot to Road G and along the same allotment 5 to be continued in our final award”. The award then goes on to say: “Which last described footway or part thereof we have set out and appropriated in lieu of our footway hereto for use from Moat Spring over ancient inclosures to new field green and of all footways over allotment 1 which we hereby order and direct shall hereby be discontinued and stopped up”.
4. The applicant interprets the 1805 award as stating that the section that covers the alleged route should remain public, as this section is part of the Uttoxeter to Newborough footway.
5. The 1811 Inclosure Award Plan shows a single dotted line annotated as a “footway” running through landholdings and west of a separate carriageway annotated as being called “Long Chimney”. The carriageway Long Chimney stops at what is now Hodge Lane, but the “footway” continues in a southerly direction, although it does not show where the “footway” connects to.
6. The 1811 Award states: “Public Carriage and Drift Roads and Footway through ancient inclosures which the order and direct to be discontinued and stopped up as follows: ... So much of the public set out our first award as leads from a stile at the Northeast route of an ancient inclosure belonging to Lord Bagot near Buttermilk Hill gate along the Northeast route of the said inclosure to a road marked to in our first award”. A copy is attached at Appendix D. The 1811 Award covers the section of the route marked A-B on Appendix B.
7. The 1826 Highway Order is a “Justice Order for Stopping Up a Highway called Long Chimney Lane, Uttoxeter Woodlands and Marchington Woodlands”. The Justice Order states: “We do hereby order the said public highway called Long Chimney Lane to be forthwith stopped up and the land and soil thereof to be sold by the surveyors of the highways of the said Townships of Uttoxeter Woodlands and Marchington Woodlands...”. This suggests that the land that was Long Chimney Lane was being sold and therefore Long Chimney Lane would cease to exist as a public highway.

8. The Notice states: "...purpose of Stopping Up a certain useless and unnecessary Public Highway called Long Chimney Lane lying in several Townships of Uttoxeter Woodlands and Marchington Woodlands". It goes on to say: "...leading from a certain Road and Public Highway in the said Township of Uttoxeter Woodlands called Great Newlands Lane in a southwardly direction to a certain other road on Public Highway in the said Township on Marchington Woodlands called Hodge Lane otherwise the Bank House Road".
9. The Plan accompanying the Highway Order shows Long Chimney Lane connecting from Hodge Lane otherwise Bank House Road and running in a north westerly direction to another highway, which is not named. The route runs through Smallwood Manor, The Trustees for the Poor of Marchington Woodlands and Marchington, Long Chimney Farm, Little Newland Farm and Great Newlands Farm. There are no footpaths shown on the map. A copy is attached at Appendix E.
10. The applicant is of the opinion that Long Chimney Lane is not the alleged route, but this runs alongside the highway and as it is not mentioned in the Highway Order the applicant is of the opinion that the alleged footpath has not been stopped up.

Evidence submitted by the Landowners

11. One of the landowners, a Mr Wilfred Davies, has submitted a landowner questionnaire, a copy of which is attached at Appendix F. In this Mr Davies comments that he does not consider the route to be public and there are no signs or obstructions in place, as during the many years he has lived at Twenty Acres he has never known any person to have used this length of footpath.
12. Another landowner, Mr Knobbs, has also submitted a landowner questionnaire, a copy of which is attached at Appendix G. In this Mr Knobbs comments that he does consider the route to be public and there are no signs or obstructions in place, hindering use of the route.
13. The remaining five landowners have not responded to the application to date.

Comments received from statutory consultees

14. Marchington Parish Council have responded to the application and are of the opinion that the footpath should be reinstated. However, the map shows the footpath running through a private garden, and therefore the council believe that this should be avoided and advise that the footpath could run alongside the property towards Tinkers Lane. A copy is attached at Appendix H.

Comments on Evidence

15. The alleged route starts at the southern edge of Smallwood Manor and runs in a southerly direction until it reaches Twenty Acres and Hodge Lane. The route then continues passed Hodge Lane and follows the same line as Public Footpath 30. However, the alleged route continues in a southerly direction and connects with Public Footpath 36, instead of turning east and connecting to Tinker's Lane as Public Footpath 30 does. The route continues in a southerly direction until it reaches the northern tip of Marchington Woodlands and continues in a westerly direction until it reaches Buttermilk Hill Gate and what is now Public Footpath 46. The route has been separated into sections to reflect the parts of the route that are already existing public footpaths and those sections that need to be determined. The sections marked A-B,

C-D and E-F need to be determined and the sections marked B-C and D-E are existing public footpaths on the map at Appendix B.

16. Inclosure Acts were designed to enclose the old commons, manorial waste and smaller holdings in order to increase agricultural productivity.
17. The local Inclosure Act empowered an inclosure commissioner to survey and divide up the land, allotting it to named individuals, including the setting out of highways. After all the procedures were followed and completed the commissioner would issue the final Award and accompanying Award Map.
18. The Inclosure Commissioners had to follow laid down procedures to ensure their actions were legal. If they had not then the award itself, and its provisions, would not be valid. Commissioners may have been able to create, divert, stop up and list existing routes. As confirmed in the case of *Logan v Burton* (1826) 108 ER 191 the powers of the commissioners under the provisions of the Act did extend to diverting and stopping up all manner of highways including footpaths and bridleways. However, this power did not take effect unless the commissioners had obtained the agreement of two magistrates. Effectively this meant that where routes were to be stopped up in an Inclosure Award the extinguishment did not necessarily take place unless the set-out procedures were followed.
19. The Court of Appeal confirmed in 2015, in the case of *R (on the application of Andrews) v Secretary of State for Environment Food and Rural Affairs*, that the 1801 Act did grant the powers to commissioners to create footpaths and bridleways, even if not specifically granted in a local act. The effect of this decision is that where commissioners set out a footpath or bridleway and the local Inclosure Act in question does not specifically authorise the setting out of such ways but references the 1801 Act those routes could come into existence.
20. Neither of the Inclosure Awards provided give the full text of the Award and from the text provided neither reference the 1801 Act but this does not signify conclusively that the commissioners did not have the necessary powers in the 1805 and 1811 Awards to create and stop up routes.
21. The First Inclosure Award of 1805 appears to be setting out a new public footway from Newfield Green and connecting it to an existing footway, which is marked as "footway a" on the map that leads from Uttoxeter to Newborough. "Footway a" forms part of the alleged route that runs from C to D, D-E and E-F on the map at Appendix B.
22. The nature of the rights over "footway a" are not recorded in the Award but as the new route from Newfield Green is recorded as a public footway, this supports the contention that public rights, of at least similar status, exist over "footway a", as the commissioners would be unlikely to connect a public route to a private way or route with lesser rights. Therefore, it could be taken that "footway a" has public status, which would support the contention that this part of the route can be classified as a public footpath.
23. The remainder of the 1805 Award does refer to the discontinuation and stopping up of footways but it is your officer's opinion that this does not refer to "footway a" as this appears to fall just outside the boundary of allotment 1. Therefore, it can be said that "footway a" was not extinguished as part of this Award and any rights over the route remained.
24. In relation to the 1811 Inclosure Award the plan shows a single dotted line annotated as a "footway". The "footway" runs from Uttoxeter in the north and parallel to a separate carriageway called "Long Chimney". The plan does not state where the

“footway” connects to in the south. The “footway” on the 1811 plan runs along the same line as the alleged route marked A to B on the map at Appendix B.

25. There is nothing on the 1811 Plan to indicate whether the “footway” has public or private status. The Award refers to the discontinuation and stopping up of a way that runs along “the Northeast route of an ancient inclosure belonging to Lord Bagot near Buttermilk Hill Gate along the Northeast route of the said inclosure to a road marked to in our first award”. On review of the map of the 1805 First Inclosure Award it appears that the 1811 Award is referring to a route from “Road G” to Woodroffe Cliffe Road and therefore the extinguishment is not in relation to the alleged route.
26. When reviewing the 1805 map the alleged route does connect with “Road G” but in the 1811 Award the route is just referred to as the “Northeast route” and therefore it does not provide any indication as to whether the alleged route and “footway” on the 1811 Plan has public or private status.
27. Therefore, whilst the 1811 Inclosure documents support the contention that the alleged route, marked A to B on the map is a footpath, it does not identify whether it has public or private rights over it.
28. The Highway Order is for the stopping up of a highway called Long Chimney Lane, Uttoxeter Woodlands and Marchington Woodlands, which was delivered on 27 May 1826. The Justice Order states: “We do hereby order the said public highway called Long Chimney Lane to be forthwith stopped up and the land and soil thereof to be sold by the surveyors of the highways of the said Townships of Uttoxeter Woodlands and Marchington Woodlands”. The Notice states: “...purpose of Stopping Up a certain useless and unnecessary Public Highway called Long Chimney lying to being in several Townships of Uttoxeter Woodlands and Marchington Woodlands”.
29. The Plan accompanying the Highway Order shows a separate carriageway called Long Chimney Lane running through landholdings from Marchington in the north to Hodge Lane otherwise Bank House Road in the south.
30. When the Plan is viewed alongside the 1811 Inclosure Award map, both show Long Chimney Lane running along the same line. The 1811 map shows another route depicted as a single dotted line and annotated as a footway running parallel and east to Long Chimney Lane. It is reasonable to allege that the footway is the alleged route.
31. There is no mention of the footway in the Highway Order and therefore, although the Order does not refer to a footway being stopped up, there is nothing to indicate whether the footpath was still in existence by 1826.
32. The fact that the footway is running alongside what is referred to in the Order as a “Public Highway”, may indicate that the footway would have had similar status but there is nothing to conclusively confirm whether the footway was private or public. The 1826 Highway Order only relates to the northern part of the route from Smallwood Manor to Hodge Lane. There is no information in relation to the rest of the alleged route.

Comments on Draft Report

33. Following circulation of the report comments were received from Mr D W T Davies on behalf of his late father Mr Wilfred Davies of Twenty Acres. Mr Davies states that his mother, Mrs Davies has lived at Twenty Acres for eighty years and she has never been aware of a footpath through their farmyard and no one has ever attempted to walk through the farmyard or asked to do so.

34. Mr Davies further states that people have walked along the Old Burton Road. He refers to a footpath that comes out approximately 20 yards below the farmyard entrance, which continues down the road approximately 97 yards along Smallwood Manor Drive, also the Old Burton Road that leads to Uttoxeter.
35. Mr Davies then goes on to state that the original Smallwood Manor was built below the church before the church even existed. It is assumed that Mr Davies is referring to St John's Church. The Manor was moved closer to the now existing Smallwood Manor site, which was known as Long Chimneys. This was then demolished, and a new Smallwood Manor was built over the Old Burton Road footpath, which could be accessed from the Marchington main road, which presumably is the B5017. The documentation already referred to in this report, particularly the Inclosure award dated 1811 and the Notice of Stopping Up dated 1826 have already shown that Long Chimney Lane highway was extinguished. There is no evidence as to what happened to the footpath that ran alongside Long Chimney Lane but as already established there is nothing to confirm that the footpath was a public footpath and therefore the recommendation for the northern part of the route, marked A – B on the map is that no public footpath should be included on the Definitive Map and Statement and therefore this does not affect the recommendation for this part of the alleged route.
36. It is also noted in Mr Davies's response that Tinkers Lane was a main junction and there is a footpath which takes members of the public from the Moat to Tinkers Lane, which comes out below Twenty Acres. It is assumed that Mr Davies is referring to Public Footpath 30.
37. Mr Davies concludes that his family objects to the addition of this footpath through their farmyard, as they consider it to be an invasion of both privacy and security. A copy of the correspondence is attached at Appendix I. Factors regarding privacy and security cannot, as a matter of law, be taken into consideration when determining whether the claimed route should be added to the Definitive Map and Statement. Members must confine themselves to the evidence relating to the existence, or not, of the alleged footpath.
38. Comments were also received from Councillor Atkins OBE, advising that he concurs with the recommendation and agrees there is no public right of way. He further advises that Smallwood Manor was built in 1886 as a residence before becoming a school in the 1920's. He also confirmed that he attended Smallwood Manor as a pupil and during his time there he never saw anyone using the alleged path.
39. Marchington Parish Council have responded advising that they fully concur and support the conclusion and recommended option.

Burden and Standard of Proof

40. In this instance the applicable section of the Wildlife and Countryside Act 1981 is section 53(3)(c)(i). This section relates to the discovery of evidence of two separate events:
 - (a) Evidence that a right of way which is not shown on the map subsists; or
 - (b) Evidence that a right of way which is not shown on the map is reasonably alleged to subsist
41. Thus, there are two separate tests, one of which must be satisfied before a Modification Order can be made. To answer either question must involve an evaluation of the evidence and a judgement on that evidence.

42. For the first test to be satisfied it will be necessary to show that on a balance of probabilities the right of way does subsist.
43. For the second test to be satisfied the question is whether a reasonable person could reasonably allege a right of way subsists, having considered all the relevant evidence available to the Council. The evidence necessary to establish a right of way which is “reasonably alleged to subsist” over land must by definition be less than that which is necessary to establish the right of way “does subsist”.
44. If the conclusion is that either test is satisfied then the Definitive Map and Statement should be modified.

Summary

45. When considering an Inclosure Act Award, the wording, powers and context all have to be taken into consideration to determine its evidential value. In relation to the 1805 and 1811 Inclosure Awards, extracts have been provided, along with the relevant maps but neither provide the full text of the Award.
46. In order for commissioners to be able to create and stop up routes there needs to be clear authority provided in the enabling Act. There is nothing to indicate that in this case the commissioners did not have the necessary powers to create or stop up routes, as there is no evidence of other legal events such as Quarter Session Orders. However, without the full text of the Award this is not conclusive.
47. In relation to the 1805 Inclosure Award “footway a” forms part of the alleged route, marked C to D, D-E and E-F. The Award makes reference to a public footway connecting to the present footway of “footway a”. Although there is nothing to indicate from either the map or Award whether “footway a” has public or private rights over it, the fact that a public footway is connecting to it would suggest that it has public rights over it, as it is unlikely that a commissioner would connect a public way to a private way. Therefore, it can reasonably be alleged that the route marked C to D and E-F is a public footpath. The section marked D-E is already public footpath number 30.
48. In relation to the 1811 Inclosure Award this relates to the northern part of the alleged route, marked A to B. Whilst the map shows and supports the existence of the alleged route as a footpath there is nothing to indicate from either the map or the Award whether the footpath has public or private status and therefore it cannot be determined with any certainty that the northern part of the route marked A to B is a public footpath.
49. In relation to the Highway Order dated 1826 this does not provide any supporting evidence of the existence of the alleged route or the nature of any rights over the route. The map is very similar to the 1811 Inclosure Award Map, in that it shows Long Chimney Lane. The Order and Notice do not refer to the alleged route and the map does not show the alleged route. This may be because the route no longer existed by 1826 or it was not deemed relevant to the Order and therefore not included.

Conclusion

50. The application is to be considered under s53(3)(c)(i) as mentioned above, and so the question of whether the application should succeed needs to be evaluated against both tests in that section.

51. When the totality of the evidence is considered it is your officer's opinion that it would not satisfy the first part of the test set out in s53(3)(c)(i) above, that is whether on the balance of probabilities a public footpath subsists.
52. When reviewing the evidence in relation to section A to B of the alleged route, whilst there is evidence of the existence of a footpath shown on the 1811 Inclosure Award documents, there is no evidence that the footway had public rights over it and therefore it cannot be said to have passed the test on the balance of probabilities. In relation to sections C to D and E to F, again there is evidence of the physical existence of a footpath along the line of the alleged route shown on the 1805 Inclosure Award but neither the map nor the Award confirm that the footpath is public.
53. When the lesser test is considered, that of reasonable allegation, this is also not satisfied in relation to section A to B of the alleged route, as stated there is no evidence that the footpath identified had public rights over it. In relation to sections C to D and E to F the evidence provided supports the existence of a footpath along the line of the alleged route, although it does not clarify the nature of the rights. The Award confirms that the route connects to a "public footway" and therefore it can reasonably be alleged that the footpath is public as it is unlikely that a public way would be connected to a way with different rights.
54. Taking everything into consideration it is apparent that the evidence does not show that a public right of way, with the status of footpath, which is not shown on the map and statement does subsist, between points A to B on the map attached at Appendix B. However, it can be reasonably alleged that a public right of way, with the status of footpath, which is not shown on the map and statement does subsist, between points C to D and E to F on the map attached at Appendix B.

Recommended Option

55. To not make an order adding the public footpath, on the line marked A to B on the map attached at Appendix B. To make an order adding the public footpath, on the lines marked C to D and E to F on the map attached at Appendix B to the Definitive Map and Statement.

Other options Available

56. To reject the recommendations as outlined above.

Legal Implications

57. The legal implications are contained within the report.

Resource and Financial Implications

58. The costs of determining applications are met from existing provisions.
59. 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

60. 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.
61. 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.
62. 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.
63. 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

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

J Tradewell

Director of Corporate Services

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Background File: LG650G

INDEX TO APPENDICES

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Appendix G	Landowner questionnaire from Mr Knobbs dated 14 February 1998
Appendix H	Copy of response from Marchington Parish Council
Appendix I	Landowner- Mr Davies's response to Draft Report