

Cllr Huckfield	D	Newcastle – Keele, Knutton and Silverdale
-------------------	---	--

## Countryside and Rights of Way Panel

### Wildlife and Countryside Act 1981

#### Application for Alleged Public Footpath Between A525 Keele Road and Lymes Road, Keele

#### Report of the Director for Corporate Services

### Recommendation

1. That the evidence submitted by the Applicant at Appendix A is **sufficient** to show that a Public Footpath subsists on the balance of probabilities along the route marked A to D on the plan attached at Appendix B to this report.
2. That an Order **should** be made to add the alleged right of way shown on the plan attached at Appendix B and marked A to D to the Definitive Map and Statement of Public Rights of Way for the Borough 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 in 1998 by Mr Martin Reay for an Order to modify the Definitive Map and Statement for the area by adding a public footpath between the A525 Keele Road and Lymes Road, Keele under the provisions of Section 53(3)(c)(i) 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. In support of the Application the Applicant has submitted a Quarter Session Order dated 1814. This can be found at Appendix C.
5. The Applicant has further submitted an annotated plan indicating where other public rights of way were, in the vicinity of the alleged route together with an exposition stating when these were stopped up. This can be found at Appendix D.

### **Evidence Discovered by Staffordshire County Council**

6. The Quarter Session Orders at Staffordshire County Records Office from 1814-1847 were examined by Officers.
7. These relate to a network of paths in the immediate vicinity and connecting to the alleged route and for completeness these can be found at Appendix E.
8. The Tithe Map at Staffordshire County Council was examined by Officers. This can be found at Appendix F.

### **Evidence Submitted by the Landowners**

9. Keele University submitted evidence through Knights Solicitors and Consultant Mike Taylor. This can be found at Appendix G.
10. The Estate Manager at Keele University (Mr Protheroe) submitted a response form and further landowner response forms were received from Mr Summerfield, Dr S C Mc Bain and Mr G T Williams. These can be found at Appendix H.

### **Comments Received From Statutory Consultees**

11. Newcastle Borough Council did not submit any evidence to either support or refute the claim, although believed it was not reasonable to claim the right of way due to presence of new buildings along the route. This letter can be found at Appendix I
12. Keele Parish Council responded stating that the route had not existed since it was stopped up by Quarter Session in 1840, and submitted extracts from a book, entitled "History of Keele" with highlighted reference to the Quarter Session (1834), Quarter Session (1840), Quarter Session (1847) and Tithe Map (1849). This can be found at Appendix J.

### **Comments on Evidence**

13. Section 53 (3) (c) (i) of the Wildlife and Countryside Act 1981 sets out the legislation through which a route may be added to the Definitive Map and Statement based solely on documentary or historical evidence.
14. The legislation accepts that the route may no longer be visible on the ground and that there may be no physical features remaining of the route.

15. In this case there are no physical features remaining on the ground and the route passes through an area of modern buildings.
16. This obscuring of the route has been identified by the Parish Council as being potentially problematic to its reinstatement, although this has no bearing on its legal status.
17. The Application rests on the evidence of a Quarter Session Order dated 1814 which diverted the route of an existing footpath onto the claimed route. This can be found, as stated, at Appendix C.
18. There was a Notice of Completion for this Order and as such it came into being as a public highway. This again can be found at Appendix C.
19. Although no further evidence was submitted pertaining to the claimed route itself, further Quarter Session Orders were identified for public routes in the immediate vicinity.
20. These were submitted for completeness and to place the Application route into context - the routes in some cases joining to or crossing the alleged route. These can be found at Appendix D.
21. The Applicant believes that this shows the records were complete and that the absence of any subsequent Orders affecting the route is more likely due to its *non-existence* rather than to its *misplacement*.
22. The Applicant provided a large scale and detailed map containing all routes in the immediate vicinity affected by Quarter Sessions Orders and this can be found at Appendix E.
23. Revealing there were five orders at Keele, the Applicant shows that there were five new routes created from these orders and he has annotated these as routes "A" to "E".
24. Taking each route in succession it can be seen that "Route A" is the claimed route created in 1814, the Order retains its certificate of completion, and this is evidenced at Appendix C.
25. "Route B" was also created in 1814, although it was subsequently diverted in 1839 to run along the line of "Route C" on the same plan.
26. "Route C" as stated was created in 1839 while the same Order stopped up "Route B", the former is now Public Bridleway 11 (Keele).
27. "Route D" and "Route E" were both created in 1834 and appear on the Order plan for that year.
28. The Applicant further states that "none of the Orders, B, C, D, E or F affect the claimed route 'A'...".

29. The Orders created in 1814, 1834 and 1839 are therefore held to be a complete record of the history of the status of the paths in the vicinity of Keele Hall.
30. Turning to the plan it can be seen that route "A" - the claimed route, runs from the main road in the north in an approximate *south-westerly* direction to join route "D".
31. It bisects routes "B" and "C" in the process and clearly places the claimed route at the centre of all the routes referred to, although merely contextual it supports the contention that the records for that area have survived and are complete.
32. No evidence has been submitted or discovered to support the contention that the route was stopped up - or diverted - after 1814.
33. The probity of Quarter Session evidence is significant and can be decisive when accompanied with a certificate of completion.
34. A certificate of completion exists for the claimed route and so enhances the probity of the evidence.
35. In the absence of any subsequent legal order affecting the claimed route, the legal position is that the status of the claimed route remains as set out in the 1814 Quarter Session Order.
36. The Rights of Way Law Review of November 1993, section 9.3 states that "*quarter sessions records...are conclusive evidence of those matters which the court actually decided*".
37. The relevant Tithe Map was examined by Officers although it was found that the alleged route was not shown.
38. This lack of inclusion on the Tithe Map does not conclusively mean the route did not exist. They carry less legal weight than a Quarter Sessions record and are regarded more as supporting evidence.
39. Tithe Maps and Awards were designed to record productive land that was tithable – a highway crossing land would reduce its productivity and therefore its value.
40. A route of a higher status was more likely to impact on productivity than say a footpath or bridleway as the ground could still be cultivated despite people - or horses - walking across it.
41. As the alleged route is held to have no higher status than that of footpath, then its omission from the Tithe Map is not necessarily fatal to the claim – its absence would have been more relevant had the route been of a higher status.
42. Turning to the question of the exact line of the route as depicted by the Applicant on the plan at Appendix B.
43. There appears to have been some disparity between the line of the route in the original Application as submitted by the Applicant, and the line of the route in the 1814 Quarter Sessions Record.

44. This was noted initially by a Ms R Leach, a local resident who attended a meeting with Officers including the spatial mapping team.
45. The spatial mapping team, on examination of the evidence agreed with Ms Leach and plotted the line more accurately to the west of Holly Lodge.
46. This important factor showed that the route did not in fact affect the properties in the Larchwood area of Keele as was originally believed.

**Consideration of Evidence Submitted by Keele University – through Knights Solicitors**

47. The overall contention of the landowner is that the claimed route was closed – or stopped up – around 1840.
48. They further contend that the evidence submitted does not show the line of the alleged route accurately.
49. No further exposition is given on these points although the University stated that they hoped to “locate evidence” to support the closure of the route.
50. A disparity between the line on the original Application and that on the 1814 Quarter Sessions Order was put to the Applicant, and clarity was sought in this respect.
51. A more accurate line was determined by the Spatial Mapping Team at Staffordshire County Council and plotted onto a modern map. This was considered by the Applicant to be a true and accurate representation of the correct line of the alleged route.
52. Keele University contend that the route *cannot be said to subsist* – or *be reasonably alleged to subsist*, noting what they refer to as “factual errors” in the evidence which they contend defeats the claim.
53. The most relevant points raised have been duly considered and each of these points is given below – annotated with the corresponding number from the submission.
54. Firstly, [Point 4] of the submission from Knight Solicitors dated July 3<sup>rd</sup> 2018 refers to the Quarter Sessions Records held at Staffordshire Records Office. These were indeed examined by Officers for the period 1814-1840 – and show Officers did investigate the matter thoroughly.
55. Reference is also made at [Point 4] to extracts from the book entitled “History of Keele” together with evidence forms provided by the landowner. Much weight is given to this work by the landowner. These same extracts were also submitted by the Parish Council and to avoid duplication they have been included at Appendix J under the statutory responses.

56. The extracts from the book are not legal evidence of the existence - or not - of a public right of way. Such extracts are limited to interpretations and opinions and cannot be relied on to prove a case.
57. Reference is also made to the Sneyd manuscripts in the Raymond Richards Collection at the Library of the University of Keele. However, copies of these have not been provided and officers have not therefore been able to draw any conclusions from them.
58. [Point 5] contends that the claimed route is not the one which resulted out of the 1814 Quarter Session (diversion) Order, as the Applicant has only claimed part of the alleged route, noted on the plan as the "green line". While the "red line" the remaining southernmost section of the route is not included in the claim.
59. The reason given by the Applicant for not including this section is that it terminates at what is now the M6 motorway - and which would effectively result in the creation of a cul-de-sac or dead-end route. However, no evidence has been submitted or discovered to show that this part of the route was extinguished when the M6 was constructed, or at any other time, and consequently, the legal status of that part of the route remains as set out in the Quarter Sessions Order.
60. Section 53(3)(c) of the Wildlife and Countryside Act 1981 provides that the discovery of evidence by the authority that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land is an event which would trigger a modification to the map and statement. As that part of the route is clearly shown in the Quarter Sessions Order, and no evidence has been discovered of any subsequent legal order either stopping up or diverting the route, then this would trigger a modification of the map and statement, whether or not it formed part of the Applicant's claim.
61. [Point 7] indicates that they have examined the Sneyd Manuscripts at the University of Keele Library as well as the Quarter Sessions Records at Staffordshire County Records Office, and they have set out their findings numbered in italics from (i) to (vi).
62. These sub-points include reference to the 1814 Quarter Session records at sub-points (i) and (ii) which bear reference to the diversion of the old route and the creation of the new one.
63. The certificate of completion dated 13 January 1814 is also referred to, again reiterating that this existed.
64. At sub-point (iii) the Diversion of the Turnpike Road is highlighted as affecting the northernmost end of the claimed route, and an extract from a letter dated 1832 from Ralph Sneyd (the then landowner) is given as evidence in this respect. This can be seen at Appendix 'O'.
65. The letter is somewhat anecdotal in that it is not evidence of a legal document or a court order, rather a narrative describing the aspirations of the writer, although this is not supported by any legal evidence. As such its probity is limited.
66. The remaining sub-points (iv) to (vi) contain details of Moore Lane being stopped up and diverted onto the road known as Three Mile Lane, the adjoining bridleway

being delivered onto the new route and ultimately the creation of the Lymes Road bridlepath in 1840 which is not the subject of this claim.

67. [Point 8] states that material dating from 1838-40 relating to public rights of way at Keele has not been considered.
68. Your officers contend that the material submitted has been considered and is not considered to be sufficient to prove that the claimed route as set out in the Quarter Sessions Order has been stopped up or diverted.
69. The landowners' solicitors contend that the route created by the 1814 Quarter Session ceased to exist as a public right of way due to it later becoming inaccessible from both ends.
70. They have cited case law to support this, *Bailey v Jamieson* (1876) and quote *Halsbury's Laws* stating, "*A length of highway, moreover though not itself expressly diverted or stopped up, will be extinguished if public access to it at both ends is cut off by the destruction or lawful stopping up of the only highways leading to it.*"
71. However, in the case of Keele, the turnpike road still exists (although no longer a turnpike road) and so it has not been destroyed and secondly there is no evidence that the turnpike road was ever "lawfully stopped up".
72. The contention rests on the alleged diversion of the route which is referred to in the letter from the landowner dated 1832 – however this is merely anecdotal and does not constitute a document of any legal probity.
73. [Point 12] suggests that not all of the original documentation may have survived within the records of Staffordshire County Records Office and cites several incidences of missing paperwork.
74. However, the Application can only be assessed on the basis of the available evidence, and not on a baseless contention that the relevant evidence may have gone astray.
75. [Point 13] goes on to highlight a number of alleged omissions in the Officers Report. Prime amongst these is the lack of comment (by Officers) on the Tithe Map evidence. Comments on the Tithe Map evidence are included at point 37 above.
76. Reference is also made to letters in the University of Keele Library, however, copies of these letters have not been provided and officers have not therefore been able to draw any conclusions from them.
77. The submission also suggests that there are legal errors in the report, primarily that the officers' presumption, *that a way exists - until it is removed by order* - is wrong.
78. [Point 18] contends that from the 1834 diversion of Moore Lane it was no longer possible to access the alleged footpath from either end. However, this statement relies on the probity of the Sneyd letter of 1832 that the turnpike road had also been diverted.

79. The Applicant counters this by highlighting that the 1814 order plan confirms that the route commenced on the Newcastle to Nantwich turnpike road. It then followed the turnpike road for around 400 yards before turning towards the south-west.
80. The Applicant counters this and identifies the point where the alleged route joined the turnpike road at point 'A' on the 1814 order plan – asserting that if no changes were made to the turnpike road *at this particular point*, then the alleged route remained connected to the road.
81. The Applicant agrees that maps after 1832 support the landowner's contention that a section of the turnpike road was moved to the north as asserted – however it is clear that these alterations took place to the west of the point marked 'A' on the plan at point 106 above. This assertion is supported by the 1870-1900 Keele Estate Plan, published by Keele University. This shows the alterations to the turnpike road took place to the west of point 'A' referred to above.
82. The Applicant overlaid acetate copies of the 1829 and 1870-1900 plans to the 1814 order plan, which confirmed that the point 'A' commencement of the 1814 order and the highway to the east of it remain unaltered.
83. This was further ratified by showing that the 1898 OS map at 25 inches to the mile when compared with the current map show that point 'A' on the 1814 order plan has not moved off the public highway network.
84. [Point 20] follows on from their contention in respect of Moore Lane and this is dealt with above.
85. The final [Point 21] states again that the Quarter Session records are incomplete - and that a stopping up order "can no longer be located or evidenced".
86. They rely on the "History of Keele" book and anecdotal letters to support this perspective - neither of which has sufficient legal probity.
87. Within this submission they highlight a copy of a plan dated 1869 titled "Plan of the Keele Estate Situate in the Parishes of Keele...." From the Sneyd Manuscripts at Keele University Library. In Fig 9 – "Landscapes and Gardens" the alleged route is not shown and the area of the alleged route is covered by extensive planting.
88. Reference is again made to the probable omission of the alleged route from the Tithe Map.
89. Notwithstanding, the probity of these last two pieces of evidence has very limited evidential value – less so in the shadow of the Quarter Session record and Order of 1814.
90. [Point 22] suggests that the Plan annexed to the report was "insufficient" and they highlight this by indicating that as there are no suitable remaining reference points on the ground it is questionable that the plotted route is accurate.
91. On examination of the evidence provided by the Applicant it can however be ascertained that the alleged route and the route created in 1814 are the same. The



Applicants response to the letter from Knights Solicitors can be found at Appendix 'M'.

92. In summation and in their conclusion at [Point 23] they contend that the Officers report is erroneous as the Application does not seek to claim the whole length of the alleged route as it appears on the 1814 Order. This is explained above at paragraph [59], regarding the discovery of evidence.
93. Regarding [point 24], the County has considered all of the evidence which has been submitted. The most relevant piece of evidence is the Quarter Sessions Order dated 1814 which is conclusive evidence that the footpath was created by this order. No evidence has been submitted or discovered which proves that the footpath has since been stopped up or diverted.
94. [Points 25 and 26] suggest that the County has taken the wrong approach in law in respect of a highway ceasing to exist. Officers have commented on this in paragraph 80 and demonstrate the alleged route was never detached from the wider highway.
95. [Point 28] of the submission sets out the landowner's intention to object to the confirmation of an order should the Panel determine that an order should be made to add the footpath to the Definitive Map, and that further evidence may be introduced at that time.

#### ***Consideration of Evidence Submitted by the Estate Manager at Keele University***

96. The Estate Manager did return a landowner response form on behalf of the University of Keele.
97. S G Protheroe (Estate Manager), stated that they did not consider the Application line to match the 1814 order line.
98. The Estates Manager also noted that *"the great majority of the features shown on the 1814 map, which would identify the route have disappeared, and of the few that remain, none can be made to correspond with features on the modern map with any degree of certainty"*.
99. This situation was rectified by the expert opinion of the spatial mapping team and replotted on the plan attached at Appendix B of this report.
100. The Applicant agreed that the revised line of the route was the accurate one and this position was supported by the totality of the evidence available.
101. Although the Estates Manager queried the alignment, it was also noted that the University believed the route shown on the 1814 map was closed at a later date (c1840).
102. Despite this contention no evidence has been provided of the 1840 closure.

103. It seems that there was a general belief that the 1814 route had been stopped up in 1840. It is assumed that this belief had originated from the book "History of Keele", as no other evidence has been submitted to support this contention.
104. The University attested to signage being erected in 1986 on the route and supplied a facsimile copy of this which read "*Private Grounds, these roads are private, no public right of way, vehicles enter and remain at owners' risk, (Highways Act 1980 S31 (3) applies, by order of the Registrar.*"
105. The University also indicated that the route had been obstructed at a number of points by fences and buildings – and they attached a plan showing the buildings and the dates of their construction.
106. However, as the claimed route came into existence as a public right of way by virtue of the Quarter Sessions Order 1814, such later actions would have no effect in law in stopping up or diverting a route, and the public rights over the route would continue to subsist.

**Consideration of Evidence Submitted by Keele University – Through Consultant – Mike Taylor**

107. The County Council received a detailed report from Access Countryside Consultancy Limited, being an "Investigation of the Schedule 14 Application to Register a Path at Keele University, Staffordshire. This report was compiled by Mike Taylor a Consultant for Access Countryside Consultancy Ltd and was dated 15<sup>th</sup> January 2019. This can be found at Appendix G.
108. The report accepts that the Application is based entirely on documentary evidence being the Quarter Sessions Order and Plan of 1814, and clarifies that this was a matter determined by a "Spécial Session" explaining that Special Sessions were called to determine one particular or specific highway matter.
109. The report also concedes that the "strongest evidence" is provided by a court order - as is the case in hand - and that it is binding unless a further legal event diverts or extinguishes the highway in question.
110. Under his analysis of the evidence, Mr Taylor makes a number of points.
111. Taking these in sequence, paragraph 3.2 states that the plan accompanying the order "exhibits many defects" and indicates that it is "little more than a "sketch plan" making its use to locate the alignment on the ground "problematic".
112. This point has already been addressed by the spatial mapping team and an accurate representation of the route has succeeded the original one and is attached at Appendix B.

The point is acknowledged and accepted by both the Council and the Applicant, as is the revised line on which the report is based.

113. The report proceeds to para. 3.3 indicating that the plan has no scale or compass bearing and that there is a lack of geographic and topographic accuracy and questions whether the Council can indeed make an Order based on it.
114. The Council contends however that after careful examination of the evidence the revised line now plotted on the plan at Appendix B is sufficiently accurate for an Order to be decided.
115. At para.3.4 there is a concern that there is a *lack of contemporary and subsequent mapping* - that supports the Order plan.
116. The Council hold that this is not the case as the contemporary map on the 1814 plan is sufficient and indeed fit for purpose, while the subsequent mapping is based on the electronic spatial mapping of experienced officers.
117. It is highlighted by officers that the plan of 1814 was the subject of a legal order and as such there is no reason to doubt its accuracy, even though it may be a singular piece of evidence.
118. At the same para.3.4 reference is made to the extensive re-landscaping and re-development of the estate and that it rendered the area completely changed and unrecognisable.
119. Although this is accepted it does not detract from the fact that a right of way passed through the area from 1814 – and by legal order. It does not affect the legal existence of the alleged route.
120. Under an *Analysis of Later Plans and Maps* at para. 4.1 the report lists a number of other maps for Keele including Orders from 1834 and 1840, an 1837 and 1840 plan of roads and the 1849 Keele Tithe Map.
121. These are held to be evidence of features and boundaries although their relevance to the Application is limited to plotting its location – and this as stated has already been achieved by the spatial mapping team.
122. The report does accept that the Tithe Map is only a skeleton map due perhaps to the fact that virtually all land was in the possession of the Sneyd family – a singular landowner.
123. As such the Tithe Map once again neither supports or refutes the Application.
124. Again, at para.4.1 reference is made to Ordnance Survey maps and although they are only held to demonstrate the extensive changes that had taken place on the estate during the 19<sup>th</sup> century.
125. The OS maps may record the changes and even the planting of the pleasure grounds, but they do not have any bearing on the legal status of the alleged route – irrespective of whether it is shown or not.

126. At para. 4.2 4.3 and 4.4 and 4.5 there is a continuation of the concerns around accurately plotting the line of the route, conceding that the southernmost end may indeed be plotted with some accuracy at Lymes Road, however the sections north and south of this are less ascertainable.
127. Under the heading Commentary on the Committee Report at para. 5.1 it is suggested that no forensic analysis of the evidence submitted by the Applicant has been undertaken, and that the route cannot be accurately plotted.
128. However, The County has had the 1814 Order Plan examined by the spatial mapping team who have plotted the route on a modern-day Ordnance Survey map.
129. That said, the report goes on to admit that the 1814 Order is strong evidence *"as the 1814 Order is a matter of legal fact and so cannot be disputed"*.
130. At para. 5.3 it is highlighted that the alleged route extends much further south – and beyond the Byway Open to All Traffic (BOAT 11, Keele).
131. This point has already been considered by officers and the report has been amended to accommodate it.
132. A Legal Background is given at point 6.0 and the cases of Perkins v DEFRA and Hampshire County Council 2009 and Roxlena Ltd v Cumbria County Council 2017 are cited.
133. These highlight one factor in that the ruling in both cases was that it was up to the order making authority or an inspector to make a judgement on the best evidence they had - rather than for the courts to interfere.
134. This report considers all of the evidence which has been made submitted to the council.
135. In summation the objections from Keele University form several key points.
136. Firstly, the University contend that the location cannot be defined with sufficient accuracy and that the 1814 Order is no more than a sketch plan.
137. Officers are of the opinion that the 1814 plan forms part of the legal Order and that this plan is sufficient for the council's spatial mapping team to determine an accurate line on an up to date Ordnance Survey map.
138. The University suggest that the Council have not explained the methodology or technology employed to map the route.
139. The process included overlaying maps to the right scale from different periods – is meticulous in its approach and employs this in conjunction with physical reference points on the ground.
140. A comprehensive presentation describing this process was given by the spatial mapping team to Officers and Panel members in 2020 and the intricate

practices involved demonstrated how very little room there was for error. As such Officers are satisfied that the methods and technologies involved are sufficient in this matter – and that these have been sufficiently explained.

141. Officers can confirm that all statutory consultees including Newcastle-under-Lyme Borough Council have been consulted and have received a draft copy of this report.

### ***Consideration of Evidence Submitted by Keele Parish Council***

142. The evidence submitted by the Parish Council constitute extracts from the book "History of Keele". They rely on the same evidence which was submitted on behalf of Keele University and discussed above - which again can be found at Appendix J.
143. The Parish Council offer additional photocopied pages from the book – Page 85 of which refers to the alleged route stating, "*He (Ralph Sneyd) began in 1832 by planting an avenue of Sweet Chestnuts from the stables 200 yards down to the then existing public right of way from Keele to Butterton which had run across the park since 1814.*". It goes on to say that "In 1837 a new right of way was surveyed although it was not opened, as Lymes Road, until 1840
144. Page 86 of the book relates that in 1847 the turnpike road through Keele was rerouted to "*ease its gradient and remove sharp bends.*". However, there is no further exposition on this point in regard to the specific area in question. At best it supports the contention that the road was indeed altered, at least in places, but little more.
145. More interestingly at Page 87 there is a map annotated as Fig 9 "Keele Park in 1870 – with alterations made up to 1900". The Parish Council have annotated this map with the words "*showing new (post 1840) rearrangement of paths and roads*".
146. This map does not show the alleged route, although it must be said that it dates from 1870 and was almost certainly drawn up at the request of the landowner, it is an *estate map*, and these tended to show what the landowner intended them to show, and for this reason are not good evidence as to the existence or not of a public right of way.
147. This is true also of the map highlighted by the Parish Council on Page 89 – again they indicate a "*surviving fragment of path of 1814.*" Again, this is from an estate map dated 1877 and as such is likely to reflect the landowner's opinion of the estate, which may not necessarily match the legal record of the estate.
148. At Page 95 of the book there is a photograph at Fig 20 titled "The Ribbon Borders". It shows part of the parkland planted by Ralph Sneyd as a pleasure ground. The Parish Council annotate this stating "*this view transects the line of the path claimed*".

149. From the photograph, it is not clear whether or not that this is the case, however, if it is the case, then the fact that the pleasure ground was constructed over part of the route does not mean that the route no longer exists in law.
150. The legal maxim "once a highway, always a highway" would prevail unless there is evidence that a legal event occurred, such as a stopping up order or diversion order which affects the claimed route. If not the highway rights will continue to subsist in law, despite any physical changes to the surrounding land.
151. The Parish Council have also highlighted the references at Page 100 onwards, these at reference numbers 63,82,84,85,86.87 and 93 all reflect the details already considered – none bear reference to a stopping up order on the said route.
152. The additional handwritten note by the Parish Council referring to Quarter Sessions papers held by the Parish Chair are stated to contain an entry and a plan indicating a closure. However, these have not been submitted for consideration and so officers are unable to comment on them.
153. The plan on Page 105 of the book titled Fig 1, Keele Village, 1828-30 does not cover area of the alleged route but is held to demonstrate the extensive changes that were taking place on the estate at this time.
154. The plan on Page 106 of the book titled Fig 2, Keele Village 1849 is taken from the Tithe Map, which - as already stated - does not show the route.
155. The plan on Page 108 of the book titled Fig 3 Keele Village 1869 again does not add anything either for or against the application, nor does the highlighted section at Page 111 noting that "*After realignment of the turnpike in 1847 (there was)...levelling (of the) ground to accommodate the new height of the turnpike road and stocking with trees and shrubs, the course of the former road*".
156. This clearly relates to the section of the turnpike road, which was altered, and its former course being planted with trees and shrubs, however it has already been demonstrated that only parts of the turnpike road were altered – and not the section that joined the claimed route.
157. Again, this might be considered contextual background information as it relates to the estate, but it is not specific enough to relate to the route in question.
158. The final points perceived to be relevant by the Parish Council are highlighted in the references at Page 122. References 20 and 29 relate to account books, letters and extracts from the Staffordshire Advertiser. On scrutiny none of these relate to the route in question.

### ***Consideration of Evidence Submitted by Newcastle-under-Lyme Borough Council***

159. Newcastle-under-Lyme Borough Council have commented that the alleged route now runs through various buildings and as such that it was not reasonable to claim that a right of way subsists. This can be found at Appendix I.

160. The presence of buildings on the route is in no way fatal to the claim. The legal maxim "once a highway, always a highway" would prevail. Unless there is evidence that a legal event occurred, such as a stopping up order or diversion order which affects the claimed route, then the highway rights will continue to subsist in law, despite any physical changes to the surrounding land.

### ***Consideration of Evidence Submitted by Other Landowners***

161. Several other landowners – those owning property affected by the route – provided further evidence against the claim.

162. Dr S C Mc Bain claimed that no one had ever been seen using the route, and they had no awareness that it had ever been a right of way. They added that it was not appropriate to open up a right of way as it passed through a number of private dwellings.

163. Dr Mc Bain also suggested an alternative (diverted route) along the hard surfaced footways and submitted a plan with a blue dotted line to this effect.

164. Hinson & Parry Solicitors acting for the owners of Paddocks Farm stated that their client disagreed with the existence of the footpath - although this was addressed by Officers stating that it was a claim based on historical evidence.

165. Ms J Swann, another property owner affected by the alleged route objected to the claim stating that she was not aware that a public footpath existed when she purchased the property from the Keele Estate.

166. She added that she – "*has dogs, rhododendrons would need to be cut down, and a flower and vegetable beds would need to be removed, along with access created as the path would run through her garden.*"

167. Again, these points although respectfully acknowledged by Officers, are not relevant to the legal subsistence of the route.

168. GT Williams provided a landowners response form although again nothing turns on the evidence provided.

### ***Consideration of Evidence Submitted by Elected Members***

169. On the 22<sup>nd</sup> June 2018 Cllr Jones, of Staffordshire County Council and Cllr Kearon of Newcastle-under-Lyme Borough Council met with the Keele Estates Manager and the Summerfield family of Paddocks Farm – the two main landowners concerned.

170. This resulted in a statement from both Councillors in respect of the said Application.

171. On the 3<sup>rd</sup> July 2018 Cllr Kearon stated that he was the member for Keele on Newcastle-under-Lyme Borough Council and that the Parish Council and

himself were making a submission on behalf of the Summerfield family of Paddocks Farm and other householders concerned.

172. Cllr Kearon highlighted that the properties in the Church Plantation and The Covert were significantly affected by the Application, that there would be a significant infringement of business operations (Paddocks Farm), a significant negative impact on residents whose houses and gardens were trans versed by the alleged route and that users would be very dissatisfied with their experience of the walk.
173. Cllr Jones in his letter to Officers stated that he had met with the owners of Paddocks Farm and the University of Keele, while indicating that he had spoken with all the landowners concerned.
174. The unanimous opinion was that the alleged route, if claimed, would be detrimental to living conditions, would fail to provide an aesthetically pleasing route, would be an infringement of business operations and would cross university buildings, halls of residence, fences and walls. .
175. Cllr Jones added that *"should in light of evidence the Panel be minded to accept the S53 application and request that an Order be sought to add the footpath to the Definitive Map, I request the Panel take into account the suggestion provided by a number of landowners to re-route the footpath"*.
176. This re-routing of the line rests separately from this matter, and any future re-routing or diversion of the route could only be considered once the Panel decision has been made.
177. The Councillors Responses can be found at Appendix 'N'.

### **Consideration of Evidence Submitted by Paddocks Farm**

178. The Summerfield family of Paddocks Farm also submitted a statement entitled "Statement of Rights Re: Proposed Right of Way from Lymes Road to A525 Through Keele University Campus."
179. This statement immediately highlighted the fact that this was an objection, and that closure of the route may have taken place at the request or dictation of the Sneyd Estate and the record of that event may have been misplaced or absent from the public record.
180. This point as raised by the Summerfield family is duly noted although again it is reiterated that a closure of a public highway can only come about through legal order – or in certain cases - through its physical destruction or disconnection.
181. The mere request or dictation of the landowner – in this case the Sneyd family – would not constitute the legal closure of the route.
182. The Summerfield statement adds that there has been no evidence of a right of way during the previous 70 years that they have owned and occupied the farm, although once more it is reiterated that this is a claim based on historical and *not* user evidence.



183. The fact that there is no evidence on the ground is immaterial to the claim.
184. The Summerfield statement added that they supported the initiative presented by the University of Keele to re-route the alleged path – and this sentiment mirrors that of the Cllrs Jones and Kearon.
185. Lastly the Summerfield statement indicates that Paddocks Farm is a working farm, and the alleged route would pass through fields used for calving. The safety of walkers is queried in relation to this as is the perceived risk to livestock and farm machinery.
186. An express point of the same statement refers to general security and the safety of the family following an earlier incident and the erection of electric gates as a result. All of these factors would be compounded by the addition of the alleged route.
187. From a legal perspective none of the points within the Summerfield statement are of material relevance to the claim – whether the route exists or not – and so from an evidence perspective nothing turns on these.

#### ***Clarification of Properties Affected***

188. During the course of the Application the line of the route was amended from the version originally submitted by the Applicant. This entailed that the properties at Larchwood were no longer affected as indicated at the start of the application process.
189. The resultant properties along the revised line of the alleged route were identified as being, the University of Keele, including buildings numbered 11, 20, 21 and 22 within the University confines, Paddocks Farm, numbers 9, 10, 18 and 19, Church Plantation, and numbers 57 and 58 The Covert, all within Keele. This evidence can be found at Appendix "K".
190. The responses received from these landowners has already been considered in the preceding paragraphs – although the most detailed of these has been provided by the University itself.

#### **Legal Background and Relevant Case Law**

191. The question then arises as to which case law would be most relevant to the matter.
192. This problematic question presents itself as the Application appears to have no close precedent.
193. The nearest guidance we find are in the cases *Kotegaonkar v (1) Secretary of State for Environment, Food and Rural Affairs* (2) *Bury Metropolitan Borough Council - 2010*.

194. This case raised the question as to whether a public right of way can exist across land that has no public access at either end, in the Kotegaonkar case this was a line of paving stones between a privately owned shopping parade and a health centre.
195. An Order was made to add the route, but Dr Kotegaonkar objected as the addition of the route would prevent a development upon the land for which he already had planning permission.
196. The key points being that the route did not join two highways or two places of public access, both the health centre and shop users being there effectively by licence.
197. The outcome of the case was that Mr Justice Hickinbottom concluded that *"as a matter of law, on principle and authority, I do not consider that a way to which the public has no right of entry at either end or at any point along its length can be a public highway at common law."*
198. Hickinbottom continued *"In my judgement to be a highway, it is insufficient for a way to be linked to a place to which "the public would have a reasonable expectation to go" or "a place to which the public may resort".*
199. Critically he added that *"a highway, by definition, requires to be linked to a highway or to other land to which the public have a right of access".*
200. On this basis the Claim was allowed, and the Order quashed.
201. The perceived relevance to the current matter is that the case established the precept that a highway cannot exist if it does not join another highway – or other place of public access, however this may not be pertinent to the matter based on the 1814 Quarter Session order.
202. The difference is that in the Kotegaonkar case the route had never existed as a public footpath – it had never been on the definitive map. This was a route *claimed* on user evidence rather than one *created* by a court order.
203. Furthermore, and as a consequence of point 196 above it had never joined a public highway, this is a fundamental distinction that sets it apart from the Keele case.
204. Keele did indeed join a public highway (at each end) and as the Applicant has shown was never disconnected from this highway.
205. Much is made of the character of the way in Kotegaonkar and its use "as of right" but none of these apply to the Keele case, the two are materially different.
206. Its very existence from 1814 by legal order at once negates the questions arising from the Kotegaonkar case.
207. The other main case which is cited as being of relevance to Keele is that of *Bailey v Jamieson (1875-6)*.

208. This case at once appears to have a greater relevance in that it concerns the isolation of a public footpath by stopping up orders affecting the surrounding routes it was connected to.
209. Keele University states that this is what happened to the footpath created by the 1814 Quarter Sessions order.
210. *Bailey v Jamieson* concerned a footpath isolated by Orders stopping up its connecting routes. The only access to the route would, as the landowner alleged in Keele, be by trespass over private land.
211. As in Keele the maxim "once a highway, always a highway" was cited, and a parallel was drawn with Keele in that the only way it could cease to be was through its own stopping up order.
212. In the Bailey case however, the court discharged the rule holding that "A way ceases to be a public highway where the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up".
213. The book "Highway Law" 4<sup>th</sup> Edition (2011), Sauvain, states at paragraph 1-18 that "*The need for a public terminus at either end (a terminus a quo and a terminus ad quem) has been considered in the past as a necessary characteristic of a highway*".
214. This was true of the Bailey case.
215. However, the question of whether a public highway which becomes isolated from all its connecting paths remains a public right of way in law, even though the public have no access to it.
216. This is held to be evidentially important where it is relevant to the need for evidence of 'public use' in order to establish public user (evidence). However, it is not an essential attribute of a highway.
217. In citing the Bailey case against the Keele case there would appear to be a parallel from the landowners' perspective – and indeed this could be the case if the Keele route had in fact become isolated due to the stopping up of its connecting paths.
218. However the route was not disconnected at any time from the turnpike road, and the interpretation of the Bailey case could actually support the position that an isolated path can continue to exist in law.
219. As such the Bailey case cannot be applied to the Keele case, and guidance cannot easily be sought from it.
220. Full details of these cases can be found at Appendix L

## Comments on All Available Material

221. The matter rests on the 1814 Quarter Sessions order that brought the alleged route into existence, and the absence of a subsequent legal order removing it.
222. The alleged route is not shown on the Tithe Map although given that it was never held to have a status higher than a footpath this is not fatal to the claim.
223. The extracts from the book – History of Keele – although somewhat protracted – do not add materially to the claim beyond placing the alleged route into its historical context.
224. The same can be said of the other Quarter Sessions orders that followed the 1814 diversion order. Again, they place the alleged route into its historical context and demonstrate the completeness of the record.
225. The points raised about the line of the alleged route passing through property are respectfully acknowledged although are not a matter for this tribunal of fact.
226. The material when taken together supports the subsistence of the alleged route and its status as a public footpath.

## Burden and Standard of Proof

227. 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 to subsist as a footpath than not.
228. 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.
229. The burden is also on the Applicant to show whether a reasonable person could reasonably allege a right of way subsists having considered all the relevant evidence available to the Council.
230. 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”.
231. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.
232. The Application is made under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in 53 (3)(c)(i) of the Act.
233. 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.

234. 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.

## Summary

235. The test requires the evidence to show that the route seemed important enough to be shown on maps or plans in various distinct documents which when taken together provide persuasive evidence of its existence.

236. Or that the route appears in a definitive legal document, particularly an Inclosure Award - or legal order.

237. The evidence in this case is limited to one source – the Quarter Sessions record of 1814 – and although it is a singular piece of evidence it constitutes the strongest evidence available - a legal order.

238. The only way the alleged route could cease to exist would be through another legal order – for which there is no evidence - and therefore the alleged route can be safely said to subsist on the balance of probabilities.

239. With regard to the landowner's contention that the route had become disconnected from the wider highway network through the legal stopping up of its linking routes - rendering it isolated and without public access, it has to be said that on scrutiny of the evidence this stance is not supported.

240. The alleged isolation of the route is countered by demonstrating that the alterations to the turnpike road did not affect the northernmost section of the route – or its termination point.

241. This has been carefully checked and plotted by those qualified and experienced in such matters – and who do so on a regular and professional basis.

242. The case law offers guidance on this point in that it is down to the order making authority to provide the best interpretation of the evidence - and Officers are satisfied that this has been the case.

243. As it is clear that the alleged route was never separated from the wider highway network then it cannot be held that the route ceased to exist through inaccessibility.

244. Furthermore, as no stopping up order has been produced by any party the matter is conclusive.

245. For clarification all points appear to be satisfied in this case – the matter rests on the quarter sessions record of 1814 which, after scrutiny, was found to be extant.

246. This is a legal order and its existence can neither be refuted nor denied, as indeed can be the absence of a subsequent legal order.

247. As such it is matter of legal fact that the alleged route came into being in 1814 and still exists today.

### **Conclusion**

248. In light of the evidence, as set out above, it is your Officer's opinion that the evidence does show that a public right of way **subsists** on the balance of probabilities along the route marked A to D on the plan attached at Appendix B.

249. It is the opinion of your Officers that the County Council should make a Modification Order to add the public footpath which is the subject of this Application to the Definitive Map and Statement of Public Rights of Way for the Borough of Newcastle-under-Lyme and to a standard minimum width of **1 metre** throughout its length.

250. This 1 metre width is defined by the original route being a cross field path.

### **Recommended Option**

251. To accept the Application based upon the reasons contained in the report and outlined above.

### **Other Options Available**

252. To decide to reject the Application and not to make an Order to add the route to the Definitive Map and Statement of Public Rights of Way.

### **Legal Implications**

253. The legal implications are contained within the report.

### **Resource and Financial Implications**

254. The cost of determining applications are met from existing provisions.

255. 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**

256. 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.

257. 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.

258. 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.

259. 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

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

J Tradewell

Director for Corporate Services

**Report Author:** David Adkins

Ext 276187 **Background File:** LH610G

## Appendices

Appendix 'A'	Application ( <i>Form 1 – First Plan and Amended Plan</i> )
Appendix 'B'	Application Plan
Appendix 'C'	Quarter Sessions Order 1814
Appendix 'D'	Annotated Plan From Applicant
Appendix 'E'	Quarter Sessions Orders 1814-47
Appendix 'F'	Tithe Map
Appendix 'G'	Knights Solicitors & Mike Taylor Consultants Report
Appendix 'H'	Landowner Response Forms
Appendix 'I'	Newcastle-under-Lyme Borough Council Letter
Appendix 'J'	Statutory Consultation Response/s
Appendix 'K'	Revised Plan and Notes of Affected Properties
Appendix 'L'	Relevant Legal Cases
Appendix 'M'	Response to Knights Solicitors Report – M Reay
Appendix 'N'	Cllr Responses to Draft Report
Appendix 'O'	Letter from Ralph Sneyd