

Local Members' Interest	
Cllr I Parry	Stafford- Stone Rural

Countryside and Rights of Way Panel

Wildlife and Countryside Act 1981

Application for a Public Footpath from Public Footpath 15, Milwich, to Public Footpath 2, Leigh

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 which is not shown on the Definitive Map and Statement can be said to **subsist** on the balance of probabilities along the route marked A to B on the plan attached at Appendix B to this report and should therefore be added to the Definitive Map and Statement of Public Rights of Way as such.
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 B to the Definitive Map and Statement of Public Rights of Way for the Borough of Stafford.

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 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 on the 28th of November 2002 by Mr Martin Reay for an Order to modify the Definitive Map and Statement for the area by adding a public footpath from Public Footpath 15, Milwich, to Public Footpath 2, Leigh, under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981. The line of the alleged public footpath as claimed by the applicant is shown on the plan attached at Appendix B.
3. To decide, having regard to and having considered the Application and all the available evidence, and after applying the relevant legal tests, whether to accept or reject the application.

Evidence Submitted by the Applicant

4. In support of the application the Applicant has submitted the following documents:
5. (i) Milwich Inclosure Award and Plan (1787), (ii) Finance Act (1910). (iii) Tithe Map, (iv) Ordnance Survey Maps (1882 & 1901), (v) Parish Plan (1833), (vi) Estate Sale Plan (1920)
6. These can be seen at Appendix C and marked as Appendices (i) to (vi).

Evidence Submitted by the Landowners

7. The Applicant identified five landowners in relation to the application.
8. Three of these landowners, Mr Silvester, Mr D C Carr and Mr E B Pattison, returned a Landowner Response Form and Plan.
9. The two remaining landowners, Mr Bowers and Mr Whewall did not return Landowner Response Forms or Plans.
10. These can be seen at Appendix D and marked as Appendices D(i) to D(iii).

Comments Received from Statutory Consultees

11. Milwich Parish Council stated that the alleged route was "*not recognised by parishioners as a footpath*".
12. The Ramblers Association stated that they supported the application believing that there did appear to be a need for "*a link between the path systems*".
13. These can be seen at Appendix E and marked E(i) to E(ii).

Evidence Submitted by Applicant for Potential Diversion of Route

14. The Applicant submitted evidence for a potential diversion of the claimed route, if the application were to be accepted, and this can be found at Appendix F and marked F(i) to F(vi).

Comments on Evidence

15. Section 53 (c) (i) of the Wildlife & 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.
16. 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.
17. The route in this case runs between PF15 Milwich and PF2 Leigh.
18. Of the six pieces of evidence presented by the applicant all, in whole or in part, rely on historical maps or plans.
19. The Planning Inspectorate Consistency Guidelines section 12 paragraph 45 indicates that when dealing with old maps and plans it is the consistent occurrence of a route in successive documents that strengthens the evidence for its existence, a one-off

appearance could, it suggests be an error and that “consistent depiction over a number of years is a positive indication”.

20. Each of the pieces of evidence should therefore be considered independently and a legal weight attributed to each.
21. Firstly, the Milwich Inclosure Award of 1787 sets out the route as a “public footway” and it is even described as “The Uttoxeter Way”. The Award relates the following:
 22. *“One other public footway branching out of Coton Road at North Common of said encroachment, before allotted to A Thacker, no 14 and from there leading in an east direction on south side of allotment herein after made to trustees of the will of J Nicholls, no 147 to the east corner encroachment here before allotted to J Thacker no. 15 and from there in a straight direction to and from a stile in an ancient enclosure in part of Birchwood Park Estate and we do call the same the Uttoxeter Way.”*
23. Critically the Commissioners who were responsible for overseeing the 1787 Award had been granted the necessary authority validating that they had the powers necessary to set out the highways. This is given in the preamble as follows:
 24. *“And it was further enacted that we the said commissioners or any two of us...are thereby authorised and requested to set out ascertain and appoint public and private roads, highways, and footways in, over and through the commons and waste grounds of such breadths as we in our judgement should think necessary.”*
25. Inclosure Award evidence carries significant legal weight and in this case the Award sets out the route as a “public footway”. The intimation of the Inclosure Award is significant as this is often the superior evidence of any claim.
26. This is ratified in this case by the accompanying Inclosure Plan which also clearly sets out the route. The points on the Plan correspond to those in the Award and each supports the other.
27. The next most significant piece of evidence submitted is the Finance Act (1910).
28. The path is indicated on the associated plan as “FP” (footpath) and runs through plot 2423, however there is no further reference to this in the Field Book.
29. Curiously the alleged path continues through plot 630 on the Finance Act Plan which does have an entry in the Field Book stating “Restrictions...*footpath*...£40”
30. For clarity, Plot 630 does not form part of the claimed route and so it is not of evidential value to the Claim.
31. Taking the above points into account therefore the Finance Act evidence is inconclusive in determining that this was a public path.
32. The Applicant also submitted two Ordnance Survey plans for the years 1882 and 1901, however these OS maps merely show the physical line of the route although again it lends little weight to any legal status.
33. Again, these at best can only be taken as supporting evidence that a route existed on the ground, and nothing further can be deduced from them.
34. The Applicant submitted a copy of the Fradswell Estate Sale Plan of 1920 along with the Milwich Tithe Map and a Parish Plan dated 1833, although none of these show the route in question.
35. As such the evidence is limited to the superior evidence of the Inclosure Award tentatively supported by the Finance Act Plan and Ordnance Survey maps.

36. Although the evidence is somewhat limited, the probity of the Inclosure Award is good, and given that both the Award and Plan are clear and each supports the other, there is enough to posit that the route subsist on the balance of probability.

Potential Diversion if Application Succeeds

37. The Applicant also suggested that the route if claimed could be diverted onto a nearby lane - the route he had initially considered for the application.

38. The intention had been to link the footpaths in the parishes of Milwich and Leigh, the lane in question running from "Overpark to Summerhill".

39. The Applicant submitted evidence to show that the lane had a somewhat contradictory history and that its status may have changed from "private" to "public" at some point following Inclosure.

40. Given the strength of the Inclosure Award evidence it is unlikely that an initial claim on this route would have been successful.

41. The Milwich Inclosure Award (1787) sets it out as a "private carriage and drift road" and although this evidence carries significant weight the Applicant goes on to suggest this status may have changed through time.

42. This suggestion is based on the other available - and later evidence - which appears to support the fact that the status of the route had later changed from a "private" to "public" status.

43. Firstly, the Finance Act plan of 1910 shows the lane as separate from the taxable land holdings. This is a good indication that the route had public rights.

44. Secondly, the Tithe Map shows the lane passing between plots 672 and 808, and between plots 671 and 809. It is shown as an untaxed road - again a good indication of public rights along the route.

45. Thirdly, the parish plan of Milwich dated 1833 shows the lane in the same way as it is depicted on the Tithe Map – again suggestive of it having public rights.

46. Fourthly, the Fradswell Estate Sale Plan of 1920 shows the lane passing between plots 195 and 197 and leading to Birchwood Park.

47. From these estate plan details it is clear that it is not part of the land to be sold. Again, this shows that it is separate to the land of the most likely (adjacent) owner – tentatively indicating a public route.

48. Fifthly, a series of county maps are highlighted as supporting evidence for the route having public rights. These are the Teesdale County Map (1832), J & C Walkers Map (mid-1800s), Geographia Map (late 1800s), Bacons Map (1870), Greenwoods Map (1820) and Wright & Charringtons' Map (late-1800s).

49. All of these maps show the route either as a "crossroad" or "other road subject to a right of way". Again, this is highly suggestive of the lane being a public route.

50. Sixthly, the 1- and 2-inch Ordnance Survey Maps are also identified as showing the lane during the 1820's and 1830s. However, although supportive they merely confirm the existence of the lane upon the ground.
51. The evidence relating to this alternative route can be seen at Appendix F and marked as Appendices F(i) to F(vi).
52. Taking all the above together the evidence is highly suggestive that the route later came to have public rights – although it cannot counter the Inclosure Award that sets it out as a “private carriage and drift road”.
53. The Applicant clarifies the matter by stating, *“It may be better if the claimed path through Myotts Wood could be diverted onto this lane. The public already use the lane as access to the footpaths at Overpark and there seems to be no challenge to this usage”*.
54. As such the claimed route should remain as originally outlined by the Applicant, with the tentative suggestion of a subsequent future diversion.

Comments On All Available Material

55. There is no evidence that we are aware of that would support any higher rights than those applied for.
56. The material when taken together appears to be consistent.
57. The evidence is presented in a detailed and cogent way which clearly supports the validity of the claim.

Burden and Standard of Proof

58. With regard to the status of the route, the burden is on the Applicant to show, that on the balance of probabilities, that it is more likely than not, the way subsists. The existing situation must remain unless and until the Panel is of the view that the Definitive Map and Statement should be amended. If the evidence is evenly balanced, then the existing Definitive Map and Statement prevails.
59. The question is also 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 be less than that which is necessary to establish the right of way “does subsist”.
60. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified
61. The route in question is an addition and as such will be considered under each test.

Summary

62. The Application is made under Section 53(2) of the 1981 Act relying on the occurrence of the event specified in 53 (3)(i) of the Act.
63. If the test is considered in the first part of the section, that is whether the way subsists on the balance of probabilities, the courts have indicated that this can be satisfied by considering whether it is more probable, or more likely than not. As Lord Denning in the case of Miller said, “if the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged, but if the probabilities are equal, it is not.”

64. In this instance your Officers consider that the evidence is sufficient to show that the route subsists on the **balance of probabilities**. The evidence of the Inclosure Award and Plan are clear.

Conclusion

65. It is open to the Panel when considering applications to come to a decision on the matter other than that which is the subject of the Application. In this instance the claim is for a Public Footpath, but it is open to the Panel to decide if the evidence suggests a different status.

66. Taking everything into consideration it is apparent from the evidence that a right of way, with the status of a public footpath and which is not shown on the Definitive Map, does **subsist** on the balance of probabilities.

Recommended Option

67. To make an Order to add the claimed route as a Public Footpath to the Definitive Map and Statement of Public Rights of Way for the Borough of Stafford.

68. That the width of the route shall be to the standard width of **1.5 metres** throughout its length.

Other options Available

69. To reject the Application.

Legal Implications

70. The legal implications are contained within the report.

Resource and Financial Implications

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

72. 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

73. 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, Food and Rural Affairs under Section 14 of the Wildlife and Countryside Act 1981. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence. 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.

74. 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.

75. 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.

76. 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.

77. There are no additional risk implications.

Equal Opportunity Implications

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

John Tradewell

Director for Corporate Services

Report Author: David Adkins

Background File: LM650G

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