

| Local Members' Interest | | |
|-------------------------|------|----------------------|
| Cllr Northcott | Paul | Newcastle-under-Lyme |

Countryside and Rights of Way Panel

Wildlife and Countryside Act 1981

Application for a Public Footpath from Hulme Close Across The Field To Outer Perimeter of Keele Golf Course

Report of the Director for Corporate Services

Recommendation

1. That the evidence submitted by the Applicant at Appendix A is **not** sufficient to show that a Public Footpath which is not shown on the Definitive Map and Statement subsists on the balance of probabilities or is reasonably alleged to subsist along the route marked A to B on the plan attached at Appendix B to this report and should not therefore be added to the Definitive Map and Statement of Public Rights of Way as such.
2. That an Order should **not** be made to add the alleged right of way shown on the plan attached at Appendix B and marked A to B to the Definitive Map and Statement of Public Rights of Way for the 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 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 24th April 2011 by Mr Thomas Mellon for an Order to modify the Definitive Map and Statement for the area by adding a public footpath from Hulme Close Across the Field to Outer Perimeter of Keele Golf Course under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981. The line of the alleged public footpath as claimed by the Applicant is shown on the plan attached at Appendix B.
3. To decide, having regard to and having considered the Application and all the available evidence, and after applying the relevant legal tests, whether to accept or reject the application.

Evidence Submitted by the Applicant

4. The Applicant has submitted 16 x user evidence forms in support of the claim. These can be found at Appendix “C”

Evidence submitted by the Landowners

5. The Applicant identified Newcastle under Lyme Borough Council as the owner and the Jack Barker Golf Company as the occupier.
6. Neither owner or occupier have submitted any evidence to either support or refute the claim.

Comments Received Following the Circulation of the Draft Report

Comments on Evidence

7. The claimed route is a “circular” route that runs around the perimeter of Keele Golf Course from the edge of the field adjoining Hulme Close.
8. At its south-easterly point a section of the claimed route appears to be follow a similar (although not the same) line as existing public footpaths.
9. At its most westerly point the alleged route runs along the edge of Redheath Plantation – a semi wooded area – and then continues along the perimeter of the golf course passing the cricket ground to re-join the commencement of the route.
10. The Application is based on user evidence and the salient points from the 16 x user evidence forms can be found in the table at Appendix D.
11. In order for the claim to be successful the Applicant needs to show a continual 20-year period of unchallenged use of the route, as of right, and this use needs to have been without secrecy, force or permission.
12. On examination of the forms a clear 20-year period exists from 1981-2001, the period during which the greatest use of the alleged route occurred.
13. This therefore will be the relevant period for the application running from 1981-2001.
14. During this relevant period 8 of the 16 users - or 50% - testified to using the route “as of right” throughout this 20-year timeframe.
15. As such these 8 “*relevant users*” will form the main body of evidence to support the claim, and it will be the probity of this evidence upon which the matter will rest.
16. The evidence of the remaining 8 non-relevant users will not be totally discounted although can only be considered from a contextual point of view – adding little in the way of probity to the claim.
17. It should be added that of the 8 *non-relevant* users none overlapped sufficiently to create any additional combined users and so the number of relevant users remains the same.

Consideration of Matters Arising in the User Evidence Forms

18. Turning to the reasons people were accessing the alleged route, it would appear that this was consistent throughout the user evidence with *pleasure use* and *dog walking* being the overriding interests.

19. The Applicants user evidence form, in line with the other user evidence forms, stipulates that he used the route for pleasure purposes.
20. The Applicant had also used the route for work purposes and this access had been by vehicle, although there is not sufficient evidence of vehicular – or equestrian – use of the alleged route to build a case for any status higher than a footpath.
21. One user evidence form did state the route was believed to be a bridleway -although this is an incidental reference, anecdotal and nothing further can be gleaned from it.
22. Again, the historical use by “mine workers” from Keele going to Silverdale Pit is of limited legal value as these users did not provide any user evidence forms and so the details are merely anecdotal.
23. Ramblers, students and university workers are also cited as regular users of the alleged route and again their usage appears in more than one user evidence form.
24. Ms Killat stated in her user evidence form that people used the way “purely for pleasure” and to “pass the time chatting to friends”. She also testified to seeing ramblers, students and university workers using the route.
25. Mrs Barnes stated in her user evidence form that the route was “a commonly used footpath, used by fishermen using the colliery wastewater ponds”. However, she added that she also used the path herself on a weekly basis for pleasure purposes.
26. Mr Lucas stated that the route had been used for as long as he can remember for walkers going to both Keele Hall and Keele village.
27. It also seems that people had accessed the route to reach the “spring pool” for fishing – and a short spur of path is shown leading from the claimed route to the pool itself, although this additional spur does not form part of the application.
28. The reasons for usage, however, are not material to the claim and are merely contextual in nature, the more significant fact being that the route was used at all.
29. The Applicant also goes on to provide various details relating to safety concerns on the existing definitive public footpaths in the area.
30. The nearest existing public footpath is described as going part way around the golf course and running between two hedgerows meaning that people using it cannot be seen.
31. These comments relate to PF20 (Silverdale) linked to PF112 (Newcastle) and these can be seen running along the outer edge of the eastern section of the application route.
32. The situation is said to be complicated further by the route progressing through a wooded area, which is highlighted on more than one of the user evidence forms.
33. This lack of visibility is held to be a potential risk to safety and the Applicant states “*I would not let my wife and children walk between two hedgerows and through a wood as this would put them at risk in more ways than one*”.
34. The user evidence of Bryan Clowes supports this contention stating that the definitive route through the wooded area is dangerous due to a steep bank, flooding, diverted water from the golf course, and the risk of molestation for female users.
35. The user evidence of Mrs Hoskins supported that of the Applicant in that she stated that the existing footpath was dangerous to walk where it passed through the wooded area with a “steep” and “dangerous” incline on one side.

36. Mrs Hoskins also added that the existing or definitive route became “waterlogged” making it “muddy” and “slippy” (sic) underfoot.”
37. She stated that it was not fit for purpose due to the poor drainage from the golf course, adding that both she and her children did not feel safe using the route.
38. Clearly this is referring to the existing definitive route and although health and safety concerns cannot be considered in a S53 application, they possibly explain why people started to use the claimed route.
39. Turning to the question of any challenge, it is clear from the evidence that there has never been a viable challenge to use of the alleged route within the relevant period and that prohibitive signage has ever been erected along it.
40. The incidental references to public footpath signs were likely – as the users themselves intimate – related to existing definitive footpaths in the area.
41. Without evidence of a challenge, be it verbally or by physical obstruction, and without gates or barriers then it appears that the usage was indeed “as of right” and without force.
42. Taken together with the fact that the frequency of use suggests it could not have escaped the notice of the landowner – with almost daily usage by the relevant users. The use “as of right” appears to be upheld.
43. Turning therefore to the question of whether or not the landowner had showed an intent to dedicate the route it is clear that no signage had been erected and no statutory declaration lodged with the Council.
44. Taken all of these points together it would seem that the landowner had shown an intent to dedicate the route, and this had in turn been accepted by the public.
45. However, the caveat of implied permission may also be relevant here.
46. Implied permission is not express permission, although it may carry equal weight. If the golf course had been run by the district council and was open to the public generally, then there could have been an expectation of public access.
47. It appears that the public were accessing the golf course from various points around the perimeter suggesting that it was an open access course, and if so the question of an implied permission is pertinent.
48. This implied permission would affect the claim in exactly the same way as an express permission and if proven could be fatal to the claim.
49. Without detailed evidence for this however little more can be said of it.
50. Notwithstanding the *user evidence plans* can be shown to have had a definite impact on the claim and an exposition of this is given in the following paragraphs.

Consideration of the User Evidence Plans

51. Turning to the plans submitted with the user evidence forms a number of inconsistencies were immediately apparent.
52. The plan of the Applicant – Thomas Mellon - clearly shows the eastern section of the claimed route running parallel to the existing definitive public footpath - PF20 – and along the outer perimeter of the golf course before joining a section of the said definitive path as it emerges from the southernmost boundary of the wood.
53. However, this differs markedly to the original application plan submitted by the Applicant.

54. On that particular plan the claimed route *does* appear to enter parts of the wooded area but conversely does *not* join or run along the same line of the emergent definitive footpath PF20, but merely parallel to it.
55. It differs further in that on the Applicants original application plan the alleged route does not enter the Redheath Plantation in the north westerly section but merely runs along the edge of it.
56. In the Applicant's user evidence form however the plan shows the route entering the plantation and running through it - and at a significant distance *away* from the edge of the golf course.
57. A further difference between the Applicants original application plan and his user evidence plan is that the section of the alleged route that crosses the field diagonally to link Hulme Close with the perimeter of the golf course was absent from the Applicant's first plan, but included on the user plan, albeit in a different colour.
58. Clearly these differences – or anomalies - between the two plans are significant as they suggest the evidence is not consistent and does not support the other.
59. The user evidence plans of the remaining 7 relevant users would therefore need to be clear and consistent in order to support the claim.
60. Turning to these other plans, the plan of James Lucas is shown to be markedly different to that of the Applicant.
61. The prime difference being that the circular route is not shown to join the highway at Hulme Close but instead clearly joins the highway at PF7 at the south-westerly section of the route.
62. In addition, the user evidence plan of Mr Lucas includes an approximate additional 400-metre section of alleged route - needed to enable it to join PF7.
63. The plan of Mr Lucas and that of the Applicant - Mr Mellon – are therefore markedly different which does nothing to increase the probity of the evidence.
64. Turning to the plan of Mrs Hoskins we find that it too differs from both the plans of the Applicant and Mr Lucas.
65. A large section- again approximately 400 meters long - is missing from the south-westerly section of the alleged route.
66. This effectively means the perimeter route is broken and incomplete – with Mrs Hoskins apparently accessing an additional circular path to the east of the claimed route that appears to loop back to join the existing definitive line.
67. Although this second perimeter route is shown on the Applicants plan it is not shown on Mr Lucas plan - and its depiction on the Applicants is also distinct from the line of the claimed route. It is also not included in the claim and was not shown on the Applicant's original application plan.
68. The user evidence plan of Mr Steven Barber is different again and does not include the section along the north-western line of the route.
69. A distance of over 100 metres is missing from the claimed route – which seems to link instead to another - as yet undecided S53 application route - referenced on the plan as LH620G.
70. Even if the other S53 application LH620G did find a route existed here – then the question has to be why this stretch of path was not included within these user evidence forms – which appear to incorporate it.
71. The form of Steven Barber is somewhat indicative of this position.

72. However, without this missing section of the alleged route being highlighted on the plan it cannot be taken as evidence of use and results in an obvious anomaly in the claim.
73. It is only possible to reach a recommendation on the evidence presented and if that evidence is not provided it is impossible to fill in the gaps with conjecture or supposition.
74. Furthermore, the section of the alleged route that passes down the eastern side of the golf course has not been highlighted at all – again suggesting that this section had not been used.
75. Again, with over 400 metres of the alleged route missing it differs markedly from the other plans submitted by the other relevant users.
76. The user evidence plan of Bryan Clowes again differs from the other plans – this plan actually includes part of another circular walk on the land to the east of the claimed route.
77. It is shown as one continuous line and does not include the short section that crosses the field diagonally to Hulme Close.
78. Although it depicts a continuous route with no gaps it does not join to the highway at all – excepting where it crosses PF20 in two places along its eastern line – and at one place tentatively to the northeast near the allotment gardens – although the latter is unclear.
79. Mr Clowes then goes on to provide additional plans showing alternative routes that he has used across the golf course.
80. One such plan gives a smaller and more central circular walk, apparently joining to Ashbourne Drive in the northwest.
81. Although noted these additional routes do little to enhance the probity of the claim – and arguably detract from it - potentially demonstrating that people were walking multiple routes across the golf course throughout the relevant period.
82. The user evidence plan of Peter Bagnall *does* show a complete circular route that partly matches that of the Applicant's user evidence plan, although it does not show the diagonal section crossing the field to Hulme Close.
83. Instead, it appears to join the wider highway network at Ashbourne Drive.
84. Again, this user evidence plan differs markedly from the others.
85. Finally, the user evidence plans of Nancy Killat and Anne Barnes differ from not only the other plans but also the application plan.
86. As can be seen the user evidence plans differ markedly and this of course introduces an element of doubt as to the exact line of the alleged route - a critical element of the claim.
87. Had all the plans been consistent and shown exactly the same route – or at least a near identical route – then it would have been strong evidence to support the claim.
88. As such the user evidence plans when taken together do not show a consistently used route and so the exact line of the alleged route is brought into question.
89. More significantly the Applicants primary application plan visible at Appendix B to this report does *not* include the shorter section of path that crosses the field to join Hulme Close.

90. This point was investigated by your officers who forwarded a copy of the said plan to the Applicant for his confirmation that the depicted route was accurate.
91. The correspondence relating to this can be found at Appendix E and consisted of a letter from Mr Murphy of Staffordshire County Council, a copy of the Applicants plan and the Applicants response.
92. For clarity the Applicant stated in his reply that – “I confirm that the route on the map you have sent me is the extent of the route that I am claiming”.
93. The reply is signed by the Applicant and dated 18/08/11.
94. For clarity the reply confirmed a map or plan that merely showed the circular route – a route completely detached from the surrounding highway network.
95. This in its own right is sufficient to defeat a claim based on user evidence as an alleged route cannot be said to exist if it does not connect to the wider highway network – users having to have crossed private land to access it resulting in an act of trespass.
96. Even if we accept the disparity between the Applicants *application plan* and the Applicants *user evidence plan* - and allow for the additional section that joins Hulme Close, the other user evidence plans do not support it with any degree of consistency.
97. Based on the inconsistencies in the user evidence plans the exact line of the alleged route therefore is brought into question.
98. Furthermore, the question of whether the alleged route is physically isolated from the wider highway network is open to conjecture.
99. The Application plan suggests that this may be the case, with users trespassing across the field adjoining Hulme Close.
100. Some of the user evidence plans however do include the section across the field to Hulme Close – although not all of them.
101. On balance however, as the Application plan itself does *not* include the adjoining field then the likelihood is that the evidence does indeed show the alleged route was detached from the wider highway network.
102. Again, the inconsistencies in the evidence and anomalies in the plans are of sufficient probity to defeat the claim.

Consideration of Evidence in the Non- Relevant User's Evidence Forms

103. Although the users of the route outside of the relevant period add little probity to the claim itself, they are still signed statements that offer a degree of contextual information.
104. The evidence of Mr Marcus-Heron states that the alleged route was used by fishermen and by workers at the National Coal Board to access the Spring Pool area to pump water to Silverdale Colliery.
105. This supports the contention of users who accessed the alleged route during the *relevant period*.
106. The user evidence of Mr Carson confirms that a variety of users accessed the route including “regular dog walkers”, “club rambles (sic), students, people working at Keele University and those going to the hotel.

107. In addition, Mr Carson states that the community police officers used the route as “part of their beat” so they could “keep an eye on the community”. As this was used as part of a regular beat – and not in response to an emergency, then it of course suggests that there were sufficient numbers of people using it to require a patrolling officer.
108. Mr Carson added that the village elders had stated that the alleged route had been in use since the golf course was created some 30 years ago and added “verbal evidence” from the village people stating they had crossed the land before it became a golf course.
109. There is a lengthy statement given by Mr Carson suggesting that the inaccessibility of the definitive route brought about the use of the claimed route.
110. Mrs Carson also supplied a user evidence form which again highlighted the dangers of the definitive route during wet weather but despite this added that she had never known the alleged route “*not*” to be a public right of way.
111. Mr Heeland supplied a user evidence form indicating that he had used the route for dog walking and pleasure purposes and interestingly considered the route was a bridleway rather than a footpath.
112. Ms Brookes user evidence stated that she had seen ramblers, students, people going fishing, dog walkers and university workers using the alleged route – she herself having accessed it twice a week for pleasure purposes.
113. Again, all of these details support the evidence presented by the users of the route during the relevant period.

Burden and Standard of Proof

114. There is a two-stage test, one of which must be satisfied before a Modification Order can be made. All the evidence must be evaluated and weighed, and a conclusion reached whether:
 115. (a) on the balance of probabilities, the alleged right subsists.
Or that.
(b) it is reasonably alleged to subsist.
116. Thus, there are two separate tests. For the first test to be satisfied, it will be necessary to show that on the balance of probabilities the right of way does exist.
117. For the second test to be satisfied, the question is whether a reasonable person could reasonably allege a right of way exists having considered all the relevant evidence available to the Council. The evidence necessary to establish a right of way which is “reasonably alleged to subsist” over land must be less than that which is necessary to establish the right of way “does subsist”.
118. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.
119. With regard to the status of the routes, the burden is on the applicants to show, on the balance of probabilities, that it is more likely than not, that the Definitive Map and Statement are wrong. The existing classification of the routes, as footpaths, must remain unless and until the Panel is of the view that the Definitive Map and Statement are wrong. If the evidence is evenly balanced, then the existing classification of the routes on the Definitive Map and Statement prevails.

Summary

120. The application is made under under Section 53(2) of the 1981 Act, relying on the occurrence of the event specified in 53(3)(C)(i) of the Act.
121. This requires consideration of whether there has been use of a way by the public, as of right and without interruption, for a period of 20-years prior to its status being brought into question and, if so, whether there is evidence that any landowner demonstrated a lack of intention during this period to dedicate a public right of way.
122. If it is decided that the statutory test fails or is inapplicable, consideration should be given to the issue of common law dedication; that is, whether the available evidence shows that the owner of the land over which a way passes has dedicated it to the public.
123. An implication of dedication may be shown at common law if there is evidence from which it may be inferred that a landowner has dedicated a right of way and that the public has accepted the dedication. Evidence of the use of a way by the public as of right may support an inference of dedication and may also be evidence of the acceptance of a dedication by the public.
124. Before a presumption of dedication can be raised under statute, Section 31 of the 1980 Act requires that a way must be shown to have been actually used by the public, as of right and without interruption, and for this use to have continued for a full period of 20- years.
125. Therefore, it needs to be demonstrated that there was public use between 1981 and 2001 to satisfy the first part of the statutory test.

Conclusion

126. In light of the evidence, as set out above, it is your officers' opinion that the evidence shows that a public right of way, with the status of a public footpath, which is not shown on the map and statement does **not** subsist on the balance of probabilities.
127. Nor is the evidence sufficient to show that the route can be reasonably alleged to subsist.
128. The inconsistencies in the user evidence plans show that the 8 relevant users were accessing somewhat different routes – or parts of routes - throughout the relevant period.
129. The anomalies show the alleged route either connecting to different highways - Ashbourne Drive or Hulme Close – or not connecting to highways at all.
130. Some plans – including the application plan – as expressly confirmed by the Applicant himself – show the alleged route to be completely detached from the wider highway network.
131. As a highway must commence and terminate at a public highway or a place of public resort then the discrepancy in the plans is significant enough to be fatal to the claim.
132. Had all the plans been consistent, followed the same route and joined to the highway in all cases, then the application would doubtless have succeeded.
133. As it stands there appears to have been public access and use along several different routes – varying slightly in some cases (as in the vicinity of the woodland on the western side of the route) – to varying significantly (as on the eastern side of the route).

134. Any variation detracts from the probity of the claim and when added to the plans with sections of route missing the overall contention is that it cannot be strong enough to support the claim.
135. It is the opinion of your officers therefore, that the County Council should **not** make a Modification Order to add the route the Definitive Map and Statement of Public Rights of Way for the Borough of Newcastle-under-Lyme.

Recommended Option

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

Other options Available

137. To decide to accept the application and add the route with the status of a public footpath to the definitive map and statement.

Legal Implications

138. The legal implications are contained within the report.

Resource and Financial Implications

139. The costs of determining applications are met from existing provisions.
140. 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

141. 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.
142. 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.
143. 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.
144. 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

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

J Tradewell

Director for Corporate Services

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