

Local Members' Interest	
Clr Ian Wilkes	Newcastle- Audley and Chesterton

Countryside and Rights of Way Panel -

Wildlife and Countryside Act 1981

Application for the addition of an alleged Public Footpath from Stephens Way to Public Footpath 31, Audley

Report of the Director for Corporate Services

Recommendation

1. That the evidence submitted by the applicants and that discovered by the County Council is sufficient to show that a Public Footpath which is not shown on the Definitive Map and Statement for the District of Newcastle under Lyme subsists along the route shown marked A to B on the plan attached at Appendix B and should be added to the Definitive Map and Statement of Public Rights of Way as such.
2. That an Order 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 District of Newcastle under Lyme as a Public Footpath.

PART A

Why is it coming here – what decision is required?

1. Staffordshire County Council is the authority responsible for maintaining the Definitive Map and Statement of Public Rights of Way as laid out in section 53 of the Wildlife and Countryside Act 1981 ("the 1981 Act"). Determination of applications made under the Act to modify the Definitive Map and Statement of Public Rights of Way, falls within the terms of reference of the Countryside and Rights of Way Panel of the County Council's Regulatory Committee ("the Panel"). The Panel is acting in a quasi-judicial capacity when determining these matters and must only consider the facts, the evidence, the law and the relevant legal tests. All other issues and concerns must be disregarded.
2. To consider an application attached at Appendix A from Audley Parish Council under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981 for an Order to modify the Definitive Map and Statement for the District of Newcastle under Lyme. The lines of the alleged Public Footpath as claimed by Audley Parish Council 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

1. The application is supported by statements from 20 members of the public who claim to have used the alleged footpath over varying periods of time. Copies of the statements are attached as Appendix C to this report. The applicant has also submitted a Railway Deposited Plan- Book of Reference dated 1864 of the North Staffordshire Railways, Railway Plans dated 1864 of the North Staffordshire Railways, various Ordnance Survey maps and a statement from the previous owners of No 59 Stephens Way.
2. For the application to be successful, it will have to be shown that the public have used the alleged route, as of right and without interruption, for a period of at least 20 years prior to the status of the route being brought into question, or that it can be inferred by the landowner's conduct that he had actually dedicated the route as a public right of way, and the right of way had been accepted by the public.
3. In order for the right of the public to have been brought into question, the right must be challenged by some means sufficient to bring it home to the public that their right to use the way is being challenged.
4. In this instance there does not appear to be any challenge to the actual usage of the route by any person nor have there been any physical impediments.
5. Where there is no identifiable event which has brought into question the use of a way, Section 31 (7B) of the Highways Act 1980 (as amended by Section 69 of the Natural Environment and Rural Communities Act 2006) provides that the date of an application for a modification order under Section 53 can be used as the date at which the public's use was brought into question.
6. In the absence of any other major or identifiable challenge to the public's use of the claimed route the date of the application, 15 September 2016, will be used as the challenge date. Accordingly, the requisite 20 year period of use should be calculated retrospectively from this date. The years 1996 to 2016 are the 20 year period whereby the majority of users provide evidence of use.
7. A summary of the salient points from the user evidence forms has been compiled in a table. This is attached at Appendix D.
8. An examination of the forms will show that of the 20 submitted 17 users have over 20 years usage, which have all recorded usage that covers the relevant 20 year period, from 1996 to 2016.
9. Of the remaining 3 users, one of the user's evidence does not cover the alleged route. One users evidence covers a 2-year period and the remaining user's evidence is for a 6 year period. Therefore, even if the remaining two users' evidence of use was added together it would still not meet the requisite 20-year period of use. It can, however, be considered as evidence of reputation.
10. None of the users claim they were an owner, tenant ore related to anyone owning or tenanting the land crossed by the alleged route.
11. None of the 20 users have stated they were charged a monetary sum for using the alleged route.
12. 19 of the 20 users claim that there are stiles along the alleged route, with the majority of users marking on a map, that the stiles are located at either both ends of the route or at one end of the route. One user states that there is a stile not just at one end of the route but also approximately half way along the route.
13. 9 of the 20 users claim that there are gates along the alleged route, with the majority of users marking on a map, that the gates are located at either both ends of the route or at one end of the route. One user states that there is a gate not just at one end of

the route but also approximately half way along the route. 3 of the users specifically state that the gates have never been locked. The remaining users imply from their evidence that the gates were not locked and therefore there is no evidence that any gates along the alleged route have prevented members of the public from accessing the route.

14. 3 of the 20 users claim that at times their use of the route has been hindered by livestock. Mr Honiak claims that approximately 15 years ago there was cattle along the route, which meant that he was required to take a small diversion from the route to avoid them. He advises that the cattle were removed, and the hindrance is no longer in existence.
15. Mr Rhodes has also advised that cows have been an obstruction to the path, depending on the time of year. Mrs Rhodes has also advised that livestock has prevented use of the route, but this is intermittent and depends on the time of year. The evidence does not suggest that livestock was put along the route to specifically stop members of the public from accessing the route but as the route is near farmland, use of the route may have been affected by the use of the nearby land. Also, in light of the fact that only a small number of users have referred to livestock preventing access, this would suggest that this was not a widespread issue that was significantly affecting use of the route. Although, the users have not specified for how long use of the route was hindered for they imply that the hindrance was only temporary and overall did not have a significant or long lasting impact on their ability to use the route.
16. Mrs Deborah Hewitt claims to have used the alleged route between 1990 to 2016 but claims to have known of the route for 30 years. Mrs Hewitt is the secretary of Audley running club and she states that the running club have used the route for over 30 years.
17. Mr Kevin Chell claims to have used the alleged route between 1986 to 2016. He claims that he frequently walks the route with his dogs, and he sees other local people walking their dogs. He states that farmers have also seen him walk the route and he has never been challenged.
18. Mrs Christine Martin claims to have used the alleged route between 1953 to 2016. She claims that it is used as a regular route to and from local villages and access to use the route has never been blocked. She also states that a Public Footpath sign was erected at the Stephens Way end of the route when the housing estate was first built, however the sign went missing and was not replaced. She does not state specifically when the sign went missing or when the housing estate was built.
19. A letter has also been provided from a Mr & Mrs Harp who were the owners of number 59 Stephens Way and lived in this property from 1977- 2013. They state that for the 36 years that they lived there the footpath was in existence and it was used by the public openly, freely and without permission on a daily basis. Copy attached at Appendix E.
20. The width of the route does vary amongst the users, but the minimum would appear to be 1 metre with 1 user stating the width is 10 metres.
21. No user has stated that they have ever been turned back or told to seek permission.
22. The table shows that the frequency of use varies greatly with 10 users being weekly, 3 users being twice weekly, 2 users being daily and with the remaining users being best termed as occasional/seasonal.

Documentary Evidence Submitted by the applicant

23. The applicant has also submitted in support of their claim Railway Deposited Plans and Book of Reference dated 1864, North Staffordshire Railways. Copies attached at Appendix F.
24. The Railway Plan shows a plot numbered 153. A railway line, number 1 skirts through the southern border of plot 153. There are two single dotted lines running parallel to each other. There is no annotation on the plan and therefore nothing to depict what the route is. The line runs from the northwest end of the plot, going down in a south easterly direction, at which point it separates into two separate routes and continues into plot 154. There is a single dotted line through the northern part of the plot, annotated "Limit of Deviation".
25. The Book of Reference 1864 notes for plot 153, under section, "Description of Property", it states "field, occupation roads, ponds and public footpath". Under the section, "Owners or reputed owners", it states "Sir Thomas Fletcher, Fenton Boughey, Baronet, Surveyor of Highways".
26. The 1890 and 1920 maps show a route marked red running parallel and west to a railway line. Part of the route appears to be on the same line as the alleged route. The actual route on the maps cannot be seen clearly due to the red line covering the route and there is no key with either of the maps and nothing to indicate the status or the nature of any rights over the alleged route. The applicant states that the path follows the same contours as the plans from the Railway Deposited Plans dated 1864. Copies attached at Appendix G.
27. The 1942 map shows a route running along the line of the alleged route. The route is two lines running parallel to each other and the depiction FP is above the route. This is supportive evidence of the physical existence of a route with the status of a footpath along the line of the alleged route. However, this type of map does not distinguish between public and private routes and therefore this does not conclusively show that the route is a public footpath. The applicant again states that the path on this map follows the same contours as the plans from the Railway Deposited Plans dated 1864. Copy attached at Appendix H.
28. The applicant has also submitted a map dated from the 1970's showing the alleged route and change in the area due to housing development. Copy attached at Appendix I.

Evidence submitted by the Landowners

29. When the application was submitted, the applicant revealed three landowners for the whole of the land over which the application route runs.
30. Vanessa Clay responded via e-mail on 20 September 2016, advising that she had received notification of the application. She confirmed that the footpath crossed over her garden, and she strongly objected to the application. She stated that there had been no issue with walkers crossing over her land to access the field next to her house. She advised that a local resident had started up rumours that she was planning to block the entrance.

Comments received from statutory consultees

31. No responses have been received from any statutory consultees to date.

Comments on Evidence

32. Section 31 of the Highways Act 1980 sets out the test that must be satisfied under statute for a way to become a public highway through usage by the public.
33. It is clear from the available user evidence that there have been no interruptions to their use and that for 17 of the users this has been over the twenty year period. There does not appear to have been a specific challenge to use of the route and therefore the date of challenge is taken from the date of the application in 2016.
34. None of the users used force or sought permission to use the route and that usage has not been in secrecy prior to the challenge.
35. The path used by all the users is on the same line, apart from one user and there is no indication that they have deviated from that line. The evidence forms do not support any contention that the users are drawn from a particular section of society or that use is limited to members of a particular area. While it is usual for the evidence to come from people who live in a locality there is nothing to suggest that this is a prerequisite for use in this instance.
36. The statutory test refers to use of over 20 years and in the evidence submitted there are 17 users who have used the path over that period of time. The remaining evidence suggests use continues throughout that time but is for lesser periods.
37. Neither the legislation nor the applicable case law sets out a minimum level of user that is expected or required to support a claim that a route exists. The case law does suggest that the amount of usage should be such that it is enough to bring home to a reasonable landowner that the public are using a way and that use is as if it was a public highway, i.e. "as of right".
38. For a presumption of dedication under s31 of the Highways Act 1980 ("the 1980 Act") to be raised against a landowner the Court in *R v Redcar and Cleveland* [2010] 2 All ER 613 said that it must be brought home to a landowner that a right is being asserted across his land. It is how the matter would appear to a reasonable landowner who was present.
39. If the use was such that it would go unnoticed by a reasonable landowner, that is it was used by so few and so sporadic that it would not be apparent the way was being used, then it could be the case that no presumption of dedication would arise.
40. The frequency of use could be said to be fairly regular given that 10 of the users use the route weekly, 3 use it twice weekly and 2 use it daily. The use should have been enough to bring it to a landowner's attention if they were present.
41. The remaining part of the s31 test considers whether the landowner has undertaken any action to rebut the statutory presumption of dedication. Often this is evidenced by way of notices or obstructions to prevent people accessing or using the path. In this case there is no evidence that any obstructions have been erected that have prevented access to use of the route.
42. Whilst the landowner, Vanessa Clay has raised objections to the application, no evidence has been provided to show that as a landowner any action has been taken to prevent members of the public accessing the route or that anyone caught using the route has been stopped and turned back. Therefore, although an objection has been raised following the submission of the application there is no clear evidence that any action has been taken to rebut a presumption of dedication.
43. In considering whether a public highway of whatever description exists the evidence also needs to be considered not only under statute but the common law. The burden of proof is reversed, in that it is for the user to prove the owner dedicated the route

and the use does not have to be for twenty years. The former can be inferred from the use but as the judge in *Nicholson v Secretary of State* (1996) said, "...the more notorious it is the more readily will dedication be inferred...".

44. It is worth noting that the previous landowners of a property affected by the application route have provided a statement confirming that they are aware of the footpath's existence, and they were aware at the time of living at the property, that members of the public were using the alleged route in an open way and without seeking permission on a daily basis. Although this does not cover the full 20 year period as the owners lived in the property from 1977- 2013, it does cover a significant period of the relevant 20 years and it does show that during that time the landowner was prepared to acquiesce and therefore effectively dedicate the route to the public. This strongly supports the reputation of the route. It further supports the contention that the route has been used by the public as of right and without interruption for in excess of 20 years.
45. When the evidence of use from the users is considered, one could say that the use was such that it would have been so obvious that the owner must, if he was present have acquiesced and so there was inferred dedication.

Documentary Evidence

46. With regard to the Railway Plans, major works such as the construction of canals and railways have normally been authorised by private Acts of Parliament. Consequently, where there was a canal or railway planned the intended route was surveyed. From the surveys, plans and books of reference were compiled which showed who owned the land crossed by the proposed canal or railway. This then formed part of an Act of Parliament.
47. Statute required, from 1838, that the plans of these works and the accompanying book of reference were deposited with the local public authorities. This was true for routes that never came to fruition as well as for those that were constructed.
48. In compiling the plans for the route of the railway, or canal, the surveyors drew up a map showing the intended line of the construction with the limits of deviation from that line. It was not the primary purpose of deposited plans to record highways of any description but came about as a consequence of the need to survey the land.
49. The plan allotted plot numbers to each strip of land affected by the passing of the canal or railway. The Book of Reference listed who owned the land crossed and the type of land. In this case the Book of Reference lists the owners of the land crossed as Sir Thomas Fletcher, Fenton Boughey, Baronet, and the Surveyors of Highways. In the case of public highways, the landowner or person responsible for maintenance may be listed as the Surveyor of Highways which would indicate the way was public. In this case, the Surveyors of Highways is listed as jointly liable with a landowner. This may be where the liability for one party is higher than the others.
50. The process, including the plans and books of reference were open to public inspection and objections could be made which resulted in corrections. There were many vested interests involved and in the case of highways the surveyor, or the parish, would not have wanted to take on unwanted maintenance responsibilities.
51. The map accompanying the railway plans shows two single dotted lines running parallel to each other, running through plot 153 and along the line of the alleged route, however there is no annotation on the plan and therefore nothing to depict what the route is. The fact that the route is depicted as two single dotted lines, would suggest that the route was not considered a major highway. In the Book of Reference, it refers

to occupation roads and a public footpath, but it is not clear from the plan whether the alleged route is classified as an occupation road or as the public footpath. Due to the way the route is depicted on the plan and the fact that it is not depicted as a major highway, separate from adjacent landholdings would suggest that the alleged route is most likely to be the public footpath, although this is not conclusive.

52. In relation to the 1890 and 1920 maps, they don't provide any supporting evidence as to the nature of any rights over the alleged route, they only support the physical existence of a route.
53. The 1942 map however does depict a route along the line of the alleged route with the annotation FP above it, which strongly supports the contention that this route was a footpath, however it does not provide any evidence as to whether the route is public or private.
54. The evidential value of these types of maps is limited to supporting evidence of the physical existence of a way. The Planning Inspectorate Consistency Guidelines section 12 para 45 quote Christine Willmore regarding old maps: "*What is looked for is a general picture of whether the route seemed important enough to get into these documents fairly regularly. A one-off appearance could be an error... consistent depiction over a number of years is a positive indication*". This approach has been approved by the courts.
55. When the maps are considered alongside the Railway Deposited Plans and Book of Reference, they do provide supporting evidence of the existence of a route that is more than likely to have the status of a public footpath, but this is not conclusive.

Burden and Standard of Proof

56. An application for a modification order based upon evidence of use can be made under either s53(3)(b) or (c). It is usual that s53(3)(b) is used where use has ceased either as a consequence of a challenge or physical prevention. In this case there has been no specific challenge to use of the alleged route.
57. Officers consider that the application should be more properly considered under s53(3)(c)(i) and that this should be considered the relevant section for determination purposes.
58. 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 on the balance of probabilities either:
 - (a) The alleged right subsists or;
 - (b) Is reasonably alleged to subsist.
59. 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.
60. 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".
61. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

Summary

62. The application is made under Section 53(2) of the 1981 Act, relying on the user evidence specified in 53(3)(c)(i) of the Act.
63. The relevant statutory provision, in relation to the dedication of a public right of way, is found in Section 31 of the Highways Act 1980.
64. 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 twenty 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.
65. 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 twenty years. In this case, there was no specific challenge to the public's right to use the way and that the years of usage are from 1996 to 2016.
66. In this instance your officers consider that the use is sufficient to satisfy the test set out in s31 when considered on the balance of probabilities.
67. It is evident from the user evidence that well over 20 years usage of the route has taken place and no clear overt actions have come to light that would indicate a clear intention not to dedicate. The evidence shows that the route has been used by a significant number of people on a fairly regular basis and evidence provided by previous landowners demonstrates that for in excess of 20 years, although not entirely within the relevant 20 year period, they were aware that the route was being used by the public as of right and no action was taken to prevent a presumption of dedication. Even when the landowners change there is no evidence that any specific action was taken to prevent members of the public from using the route.
68. With regard to the second part of the relevant section, whether the route can reasonably be alleged to subsist, your officers consider that the test would be satisfied, when considering the user evidence.
69. Regarding the historical evidence, the maps do support the existence of a physical route along the line of the alleged route which may have had the status of a footpath, although this evidence does not show if the route was public or private. The Deposited Railway Plan also shows the existence of a route along the line of the alleged way, which is more likely than not to have had the status of a public footpath. Therefore, when the historical evidence is reviewed together it can be reasonably alleged that a public footpath subsists along the line of the alleged route.
70. When the historical and user evidence is reviewed in totality it can be said that on a balance of probabilities a public footpath subsists along the line of the alleged route.

Conclusion

71. In light of the evidence, as set out above, it is your officer's opinion that the evidence shows that a public right of way, with the status of footpath, which is not shown on the map and statement subsists.
72. It is the opinion of your officers that the County Council ought to 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 District of Newcastle under Lyme.

Recommended Option

73. To accept the application based upon the reasons contained in the report and outlined above.

Other options Available

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

Legal Implications

75. The legal implications are contained within the report.

Resource and Financial Implications

76. The costs of determining applications are met from existing provisions.
77. 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

78. 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 15 of the 1981 Act. The Secretary of State would appoint an Inspector to consider the matter afresh, including any representations or previously unconsidered evidence.
79. 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.
80. 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.
81. 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

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

J Tradewell

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INDEX TO APPENDICES

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Appendix B	Plan of claimed route
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Appendix G	Copies of maps dated 1890 and 1920
Appendix H	Copy of map dated 1942
Appendix I	Copy of map dated from the 1970's