

Local Members' Interest	
Councillor	Stafford Borough
Mr Mark Winnington	

## Countryside and Rights of Way Panel

### Wildlife and Countryside Act 1981

#### Application for an alleged Public Footpath between Public FP No.11 & Public Bridleway No.0.1287, Castle Church

#### Report of the Director for Corporate Services

#### Recommendation

1. That the evidence submitted by the Applicant is sufficient to show that a Public Footpath which is not shown on the Definitive Map and Statement for the Borough of Stafford, **is reasonably alleged to subsist** along the route shown marked 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 **should** be made to add the alleged right of way shown on the plan attached at Appendix 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 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").
2. 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.
3. To consider an application made on 26 June 2006 by Mr Martin Reay for an Order to modify the Definitive Map and Statement for the Borough of Stafford by adding a public footpath from Public Footpath 11, to Public Bridleway No 0.1287, Castle Church Parish, under the provisions of Section 53(3) of the Wildlife and Countryside Act 1981.
4. 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. In support of the application, Appendix A, the Applicant submitted eighteen user evidence forms made by members of the public who claim that the route has been used by them on foot and was still being used up to the date of the application. Copies of the user evidence forms are attached at Appendix C.
2. In addition to their evidence the Applicant included a covering letter which refers to planning permission given to proposed purchasers of the land over which the alleged route crosses, Stafford Grammar School, which is included at Appendix D to this report.
3. The salient points of the user evidence forms are given in a matrix which can be found at Appendix E.
4. The Applicant has submitted photographic evidence with the application which shows physical features of the route on the ground. The photographs submitted do support that, at the time the application was submitted, there was a way on the ground that could be and appeared well used by the public as a footpath. Appendix F.

## **Evidence Submitted by the Landowners**

5. The owner of the land over which the alleged route runs, at the time of the application returned a Landowner response from which can be found at Appendix G.
6. Stafford Grammar School purchased the land over which the alleged route runs in 2013 and returned a completed landowner response form with a detailed plan and photographs. This can be found at Appendix H.

## **Comments on all Evidence**

7. 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.
8. In 1932 the Rights of Way Act introduced the statutory presumption of dedication by the landowner of a public right of way which could be proven by evidence of twenty-years usage as of right and without interruption.
9. This presumption could be rebutted by the landowner providing that he had shown that he had no such intention to dedicate the route. However, the onus was on the landowner to do so.
10. 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 twenty-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.
11. 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.
12. 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.

13. In the absence of any other major or identifiable challenge to the public's use of the claimed route, the date of the application, 26<sup>th</sup> June 2006, will be used as the challenge date. In this case the requisite twenty-year period of use should be calculated retrospectively from this date. Therefore, the relevant years being 1986 to 2006.
14. The evidence of use is from eighteen persons who claim to have used the way on foot during the twenty-year period.
15. The Applicant included nine user evidence forms with the original application in 2006 and provided a further nine user evidence forms in support of the application in 2009.
16. An examination of the forms will show that of the eighteen submitted forms, ten users have over twenty years uninterrupted usage of the route, which have all recorded usage that covers the relevant twenty-year period, from 1986 to 2006.
17. This equates to 55.6% of the total user evidence submitted, which is over half and therefore significant to the claim.
18. An examination of the remaining forms will show that the other users have accessed the alleged route during the relevant twenty-years period although not throughout its entirety.
19. Two users claim to have used the route but on examination of their submitted form, it appears that they have only used part of the claimed route and they have deviated from it.
20. All of the users have suggested the presence of a gate along the route, although none have indicated that the gate has interrupted their use of the route during the twenty-year period in question, 1986-2006. Therefore, this cannot be considered a challenge to the use of the route.
21. Two users, User P and User I infer on their user forms that the gate was locked, by the farmer, however they have not indicated that this affected their use of the route or provided dates when the gate was locked and therefore cannot be taken into consideration in this case as detailed below.
22. Of the eighteen user evidence forms, all users assert that the alleged route was used on foot and "as of right".
23. Turning to the frequency of use it can be seen from the evidence available that five users claim their usage of the route was weekly, nine being daily, two being seasonally, one being monthly, and one user claimed their usage to be 'often'.
24. This would indicate a high frequency of use during the twenty-year period.
25. In this case, nine of the users submitted evidence forms in 2009, sometime after the original application in 2006. These users describe challenges and obstacles on the route whereby they were turned back in 2008 following the purchase of the land by Stafford Grammar School. These challenges and obstacles occur following the original application and fall outside the requisite twenty-year period. Therefore, notation of these challenges has no bearing to the claim.
26. No user has stated that they have ever been turned back or told to seek permission during the twenty-year period of usage. Nor have any users mentioned any signage intended to discourage or prevent use or to challenge users.
27. The information provided indicates that seventeen of the eighteen users never sought or were given permission to use the route.

28. One user, User I stated in the user evidence form that he asked the farmer for permission to use the alleged route in 1992 to '*keep an eye on cattle and hay bales (sic)*'.
29. For clarification this was the user himself requesting permission rather than the landowner granting permission at his own behest. The fact that the user sought and was granted permission to use the route this evidence does not meet the principle without permission, and therefore cannot be considered, albeit this is only one piece of evidence of the eighteen submitted and therefore does not defeat the claim.
30. The information sheets 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, although from the evidence provided it is clear that the route is predominantly used by people living in the local area. This is not unusual and there is nothing to suggest that this is a prerequisite for use in this instance.
31. 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".
32. From the evidence that has been submitted, there appears to have been no interruptions or restrictions to use of the route during the twenty-year period claimed. No challenges were made to their use, nor has the route been used in secrecy.
33. Although two users have referred to a locked gate along the way in their evidence, the users have not advised this prevented use of the alleged route, which is contradictory as it would be expected that a locked gate would prevent usage, therefore there is no clear evidence that use of the route during the relevant twenty-year period has been challenged.
34. The statutory test refers to use of over twenty-years and in the evidence submitted there are ten uses who have frequented the route over that period of time with no interruptions. The remaining evidence suggests use continues throughout that time but is for lesser periods.
35. For this application to be successful, it will have to show that the alleged route has been used as of right and without interruption for a period of at least twenty-years. There are ten user forms that satisfy the twenty-year usage period prior to the application.
36. All the submitted user evidence suggests that the route has been used on foot although three out of the eighteen users have stated that they have also seen members of the public on the route on horseback.
37. Although this equestrian use is reported in the evidence forms it is merely anecdotal and nothing more can be gleaned from it.
38. Turning to the width of the route users have a stated range of between three and eight feet although it is accepted that this varied somewhat along its length.
39. The alleged route claimed by all users is on the same line and although there has been mention of "wandering across the fields" by some users, sixteen users claim to have used the route in its entirety, only two users claimed to have only used part of the alleged route. There has been no indication on the maps provided by the users that they have deviated from the line of the alleged route.

40. 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 nothing to suggest any owner has taken such steps; no overt action appears to have been taken prior to the application being made as detailed below.
41. For a presumption of dedication under s31 of 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. This is true even where the owner is absent or cannot be identified. It is how the matter would appear to a reasonable landowner who was present. Often this is evidenced by way of notices or obstructions to prevent people accessing or using the path.
42. During this period the route was clearly used “as of right” as no challenges by any landowner were made, no signage was erected, and no obstacles were encountered.
43. The frequency of use is relatively high, given that eighteen users claim to use the route frequently. It is considered that this usage would have been enough to bring it to a landowner’s attention if they were present.
44. As detailed below the evidence from the landowners certainly brings into question the evidence from the users but in light of the fact that ten of the eighteen users claim to have used the alleged route uninterrupted for twenty-years would suggest that this is a route that has been accessible by members of the public. Also, the remaining users all claim to have used the route but for lesser periods of time.
45. Once a presumption of dedication is raised then the burden lies with the owner to demonstrate by his actions that there was no intention to dedicate. In this case whilst two users mention locked gates, there is no evidence that any obstructions to prevent members of the public from using the alleged route during the twenty-year period. It does not appear that any signs or notices have been erected to make members of the public aware that this is private land and therefore it could be argued that the landowner has not acted to show that there was no intention to dedicate the path.
46. The above evaluation is concerned with the test as laid down in s31 of the 1980 Act, but consideration should also be given as to whether a common law dedication has taken place
47. 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. Under 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*”.
48. As already stated, there is conflicting evidence between the landowners and users as to the feasibility of using the route but when considering the evidence as a whole one could say that the use would have been so obvious that the owner must, if he was present, have acquiesced and so there was inferred dedication.
49. None of the users mention any challenge to the use before the date of the application and use was continuing up to the date of application and s53(3)(c) (i) is applicable as usage has not been prevented or challenged as in the case of s53(3)(b).
50. The table also shows that out of the users who have submitted evidence forms, all eighteen of those have referred to a gate and stile being present on the claimed route.

Some of those users have indicated the location on a plan, it is the opinion of your Officers that this stile is on PF11 into Drumbles Wood.

### **Comments on the Landowner Evidence**

51. The landowner at the time of application returned a completed landowner form advising that that the land had been in the family ownership for 'many years' and the field in which the alleged route crosses was for the purpose of grazing cattle. The landowner evidence form is attached at Appendix G.
52. According to the landowner the tenant of the land, had farmed the land stated, "he had not consented to ramblers crossing the said fields as far back as the 1980's".
53. The landowner indicates that the farmhouse occupying the land was demolished when the M6 motorway was constructed, and the tenant was therefore no longer on site to apprehend walkers. However, no date has been given for this event and without a date, this information does not assist in providing any evidence as to whether use of the route would have been noticed during the relevant twenty-year period.
54. The landowner does not consider the way to be public and stated that locked gates were in place to prevent trespassers, however these were vandalised, "they were sawn off several times by vandals from the neighbouring housing estate nearby". As the tenant did not live at the property it was difficult to monitor the amount of use, "ramblers have chosen to trespass across the said field without permission".
55. Stafford Grammar School purchased the land over which the alleged route crosses in 2007. After the date of the application and requisite twenty-year period. A completed landowner response form is attached at appendix H.
56. Stafford Grammar School indicate that the gates along the route were locked by the tenant farmer due to cattle use on the field and that the gates were later removed due to vandalism and livestock was no longer farmed on the land and claims that open access to the areas has been caused by the demise of the tenant farmer and the removal of gates and vandalism of fences.
57. Staff at the Stafford Grammar School have removed people on motorbikes and vandalising fencing from the land since their purchase of the land in 2007.
58. An accompanying letter from Stafford Grammar School suggests that access to the alleged route has been "gained illegally removing gates and damaging fencing".
59. Both landowner evidence forms state that there were locked gates on the route locked by the tenant farmer due to livestock. It is noted that if these had been vandalised then arguably use of the route has been with force and therefore wouldn't meet the statutory test. It would be brought home to the users that their right is being challenged. This does not have to be made plain to every user, but the challenge must be sufficient to make some users aware that the right has been challenged.
60. The fact that only two of the eighteen users refer to a locked gate however neither user said that this has prevented their use of the alleged route suggests that there is not sufficient evidence to show a challenge to members of the public using the route or an intention not to dedicate.
61. It is not clear whether the gate was erected and locked to stop people using the route or whether it was solely to protect livestock. Also, it is not clear whether the

vandalism took place as a result of people trying to access the route or whether this was caused by anti-social behaviour.

62. Arguably as the vandalised gates were not replaced by the landowner or tenant it could be contended that they did not maintain an intention not to dedicate the route.
63. A gate must be intended to prevent public usage and not be solely for the purposes of controlling stock.

### **Comments on Landowner Evidence Following Consultation on Draft Report**

64. Following consultation on the draft report the Council received responses from Hyde Lea Parish Council. This can be found at Appendix I.
65. Hyde Lea Parish Council object to the alleged footpath indicating that the existing public footpath 11 allows walkers to walk to the village. The Parish Council have identified concerns in relation to health and safety and unsocial behaviour.
66. Stafford Grammar School responded to the consultation and echoed the comments made in the original Landowner response form submitted in 2007. Their response can be found at Appendix J.
67. The Grammar School suggest that walkers have been challenged however no dates or evidence of challenge has been alluded to and therefore the Council is unable to determine if this challenge has been during the relevant 20-year period of use.
68. Whilst reference has been made to signs being vandalised, again there is no evidence of the vandalism or when these signs were erected to establish if this effects to the application and the relevant 20-year period.
69. Further reference has been made to health and safety, safeguarding and anti-social behaviour over the alleged route.
70. The Council notes the comments made by the Parish Council and also those of the current Landowner and whilst it is not our intention to belittle any legitimate concerns or issues that have been raised relating to concerns or questions as to safety, suitability, privacy, maintenance or anything other than material relating to existence or otherwise of a public right or the status appertaining have to be disregarded under the law as it currently stands.

Whilst these concerns are not a matter for this existing section 53 application, the Council identifies that section 118B and 119B of the Highways Act 1980 provides schools with stronger rights if such use of the route is subject to safeguarding concerns. However, this would be a matter for the school and not a matter for this panel in determining this application under section 53 of the Wildlife and Countryside Act 1981.

Although the comments made by the landowner and parish council officers have been noted your Officer's recommendation remains unchanged on submission of the further evidence.

### **Comments On All Available Material**

71. There is no significant evidence that we are aware of that would support any higher rights than those applied for.
72. In summation the totality of the evidence appears to be consistent.

73. The evidence is presented in a detailed and cogent way which clearly supports the claim.
74. When the evidence is taken together there is more to say that a public way is reasonably alleged to subsist than there is to say that a public way does *not* subsist.
75. The user evidence provided, and the probity of such evidence outweighs the fact that no overt steps appear to have been taken during the twenty-year period by the landowner.

### **Burden and Standard of Proof**

76. An application for a modification order based upon evidence of use can be made under either s53(3)(b) or (c)(i) and that this should be considered the relevant section for determination purposes.
77. 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:
  - (a) on the balance of probabilities, the alleged right subsists; or
  - (b) is reasonably alleged to subsist.
78. 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.
79. 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”.
80. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

### **Summary**

81. 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.
82. 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.
83. In considering the evidence of use by the public in this case the claimed use was sufficient to draw attention to the landowner that a public right of way was being asserted over the land.
84. 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.
85. 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.

86. 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, the view taken was that the status of the route was brought into question by the making of the application and that the relevant years of usage are from 1986 to 2006.
87. With regard to the second part of the relevant section, whether the route can be said to be reasonably alleged to exist, your officers consider that the test would be satisfied.
88. There is no contrary evidence refuting use or objecting to it during the requisite twenty-year period. As the judge set out in *ex parte Bagshaw* if it is reasonable to accept one set of evidence and reasonable to reject the other and by doing so the right could be said to exist then the test of reasonable allegation would be satisfied. Here there is only one set of evidence to weigh in the balance and with nothing to offset it can be reasonably alleged that the route subsists.
89. There is no clear evidence to suggest that the users were unable to use the alleged route uninterrupted for the twenty-year period and in light of the number of users who came forward to provide evidence of use this is supportive of the usage of the alleged route for the relevant period. Also, no clear overt actions have come to light that would indicate a clear intention not to dedicate.
90. It is clear from the user evidence supplied by the Applicant that this route is held in strong belief that it is public and evidence points to the fact that there has been uninterrupted use of the claimed route on foot during the period of 1986 to 2006.
91. Once a presumption of dedication is raised then the burden lies with the owner to demonstrate by his actions that there was no intention to dedicate. Here there is no evidence of any acts by a landowner to rebut the presumption of dedication in the 1980 Act during the requisite twenty-year period.
92. Whilst the landowner evidence indicates that gates were in place to control livestock, these were vandalised and never replaced. Although the tenant was not "on site" there were no signs, or obvious measures taken to prevent use over the land by the public for the requisite twenty-year period.
93. On review of the evidence, due to the slight contradictions between the landowner and user evidence, it is your Officers' opinion that the evidence isn't sufficient to meet the test on balance of probabilities, but when considering the lower test of reasonable allegation the evidence is sufficient for the reasons set out above.

## Conclusion

94. 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 the addition of a footpath.
95. 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 **is reasonably alleged to subsist**.
96. 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 Stafford.

### **Recommended Option**

97. To accept the application based upon the reasons contained in the report and outlined above.
98. That the width of the route shall be to the standard width of **1.5 metres** throughout its length.

### **Other options Available**

99. 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**

100. The legal implications are contained within the report.

### **Resource and Financial Implications**

101. The costs of determining applications are met from existing provisions.
102. 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**

103. 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.
104. 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.
105. 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.
106. 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**

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

Director for Corporate Services

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**Background File:**

LR610G

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