

Local Members' Interest	
CLlr Heath	Staffordshire Moorlands

Countryside and Rights of Way Panel

Wildlife and Countryside Act 1981

Application to upgrade FP76 Waterhouses to a Restricted Byway (Stoney Lane to Main Road A523)

Report of the Director for Corporate Services

Recommendation

1. That the evidence submitted with the application for an upgrade to a Restricted Byway of the current PF76 Waterhouses at Appendix A, and that discovered by the County Council is insufficient to show that the footpath currently on the Definitive Map and Statement, subsists as a Restricted Byway along the route marked A to B on the plan attached at Appendix B.
2. The relevant section to be satisfied for an upgrade of the footpath to a Restricted Byway is that of section 53(3)(c)(ii) and the required test to be satisfied is only the balance of probabilities. Your officers consider that the evidence submitted by the Applicant and that discovered by the County Council is insufficient to show that on the balance of probabilities, FP76 should be shown as a highway of a different description, namely a Restricted Byway to the Definitive Map and Statement of Public Rights of way.
3. That an Order should **not** be made under Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981 to upgrade the route shown at A to B on the plan attached at Appendix B to the Definitive Map and Statement of Public Rights of Way for the District of Staffordshire Moorlands.

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 Mr Brian Smith on behalf of the British Horse Society for an Order to modify the Definitive Map and Statement for the District of Staffordshire Moorlands. The effect of such an Order, should the application be successful, would:
 - (i) Upgrade Waterhouses FP 76 from Stoney Lane to the Main Road (A523) to a Restricted Byway on the Definitive Map of Public Rights of Way under the provisions of Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981.
 - (ii) The line of the alleged Restricted Byway which is the subject of the application is shown highlighted and marked A to B 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 test, whether to accept or reject the application to upgrade the route.

Evidence submitted by the Applicant

4. In support of the application the Applicant has submitted the following evidence:
 - A copy of the Definitive Map
 - Copy of the Schedule of Roads undertaken by the County Council under the Local Government act 1929 (LGA1929)
 - Copy of working drawings associated with LGA 29 (maps 1 & 3)
 - Copy of 1925 25"/mile Ordnance Survey Map, (Map 2)
 - Schedule to Map 2 showing balance of probabilities.

A copy of this documentation can be found at Appendix C.

Other evidence discovered by the County Council

5. Officers have considered the Calton Township Tithe map of 1844.
6. Officers have obtained Staffordshire County Council's current section 36 Highways plan (showing highways currently maintainable at public expense) for the route. Officers also discovered documentation relating to a s36 application for the route to be given ancient highway status (and thus to be maintainable at public expense) which was determined in 2004.
7. Your Officers have obtained a copy of an 1881 map of the area. Its origins are unknown.
8. Officers considered the Parish Survey Cards for the area, which were drafted in 1951.
9. A copy of this documentation can be found at Appendix D.

Comments received from Landowners

10. The Applicant initially identified a Landowner who was living in Brassington, Matlock, Derbyshire in 2015. Officers were subsequently notified by an email dated 12th December 2016 from the Applicant that the Landowner had passed away. The Applicant subsequently submitted a

further Form 3 dated 12th December 2016 identifying a married couple who were the Landowners/occupiers in addition to a further named person.

11. In July 2021 all parties required to be contacted by Statute were approached as part of the initial consultation. A Parish Councillor from Waterhouses Parish Council subsequently contacted your Officers in response to the consultation. The Councillor advised that his family were Tenant farmers of the land over which the claimed upgrade ran, and he also identified the Landowner as being the same as that identified in the Form 3 in 2015 (although she is now a sole surviving widow). The land is unregistered.
12. The Tenant has provided some research into the claimed route within the immediate area. The Tenant has advised that he believes that if the route is upgraded the access would be a safety risk for horses because the end of the claimed upgraded route is directly onto the main road. He also raised concerns about the possible release of livestock onto the main road should any gate not be properly closed. The Tenant has forwarded photos of the gate leading onto the A523. As the panel will be aware, this is not a consideration that can be taken into account for the purposes of this report, although of course this does not detract from the Tenant's legitimate concerns. The email and photos from the Tenant farmer may be found at Appendix E
13. A Senior Rural Chartered Surveyor from Bagshaws LLP contacted your Officers as Agent to the Landowner. The Agent advises that the Landowner strongly opposes the claimed upgrade and refers to a previous proposal to upgrade the route. (Your Officers believe that this was likely to be enquiries concerning the section 36 application made in 2004, information of which is provided below). The Agent explained that the Landowner is also concerned about the safety of having bridleway access onto the main road and the increase in use of the right of way which would further the risk of gates being left open. Her objections also relate to the concerns for the inconvenience to her Tenant. The email from Bagshaws can be found at Appendix E.

Comments received from statutory consultees

14. Waterhouses Parish Council was consulted. The Council addressed the section 53 application upgrade at their meeting of 26th September 2022. The Council determined that they wished to object to the application to upgrade based on safety concerns, although no evidence was provided. Their response can be found at Appendix F.
15. The Secretary of the local Ramblers Association contacted your Officers. He advised that the organisation didn't have any evidence for or against the upgrade although they were concerned that the footpath comes out on the busy A523. Again, no evidence was provided, and the response can be found at Appendix F.
16. Staffordshire Moorlands Bridleway Group indicated that they would forward supporting evidence, but nothing further has been received.

Comments on Evidence

17. The Applicant has submitted a copy of the Definitive map. This shows the route of current Footpath 76 between Stoney Lane and the A523.
18. The Applicant has submitted the 1929 "Handover map" for the area which comprises a page from a Field Book and its accompanying plans. The copy from the Field Book shows a page headed "Mileage of Public Highways. Rural District Roads (not main roads)". This shows entry 34 stating "Stoney to Milkhill House" and classifies the route as comprising gravel or flint and the total mileage of the length of the route being 0.46 of a mile.
19. It will be noted that the route has two separate sections either side of the A523 which today have two different statuses. This application is to upgrade the section between Stoney Lane and the A523 which is the current footpath 76. The section between the A523 and Milkhill House (which is not being considered in this application) is currently classified as a "green lane" and is maintainable at public expense.
20. The handover Field Book and map that the Applicant has used as his evidence for the upgrade is the result of the Local Government Act 1929 in which responsibility of Rural District Councils for the publicly maintainable highways in their area was transferred to the County Council. This resulted in the first lists and plans showing routes for which the Authority believed it was responsible for the maintenance. They were internal documents for use by County Surveyors. No objections to a route's inclusion or exclusion could be made nor to any notes made regarding the way.
21. Despite the title of the Field Book being "Mileage of Public Highways. Rural District Roads (not main roads)" The term Unclassified County Roads came to be applied to these routes. (By 1929 County Councils were already responsible for "main roads"). The moniker "road" however has no legal status although some have assumed that it meant or indicated that such routes had vehicular rights. A footpath can also be defined as a road.
22. Furthermore, the Field Book and maps were only concerned with liability for maintenance, not with the type of public user. Thus, they do not prove any particular rights or status as both roads and footpaths were in the past, publicly maintainable.
23. The accompanying handover maps (working drawing map 1 and working drawing map 3) show a black line the length of the claimed upgrade to the route. Nothing further however can be gleaned from them with regard to status, only that the route was maintainable at public expense.
24. It is not clear at the time that the handover occurred whether the two sections of "road" had different status' although your Officer contends that this is most likely. Both stretches either side of the A523 are "roads" – one a footpath and one with higher rights. Consideration of the documents

referred to below including the Tithe map, the map of 1881 and even the Applicant's own Ordnance Survey map suggest from the physical features on the ground that the length between Stoney Lane the A523 and that between the A523 and Milkhill House have always had different status. The A523 to Milkhill House has historically had higher user rights.

25. Your Officer therefore considers that the Field Book and maps are not good evidence that the application route has higher rights.
26. The Applicant has provided an Ordnance Survey map dated 1925 in which the Applicant has coloured the route yellow and placed letters A to C along the claimed upgrade. On consideration of the Ordnance Survey map of 1925 there is a physical feature along the route comprising two parallel broken lines. In the Applicant's document headed "Balance of Probabilities" which refers to the Ordnance Survey map, the Applicant has pointed out that "you will note that footpaths are marked FP, no such mark is shown on the claimed route. The claimed route is shown as parallel dotted lines which indicate an unfenced track or cart width, there are no buildings of any sort on the claimed route and is clearly a through route from Stoney Lane".
27. Your officers contend that although the physical feature on the OS map does not have the required abbreviation of "FP" next to the claimed upgrade, the claimed upgrade to the route has the same physical annotation as the footpaths to the north and south of this route (which are marked with "FP") and so your officer contends that the draftsman simply did not consider it necessary.
28. The document headed "Balance of Probability" which the Applicant has used to support his application has listed distances and elevations of three points on the Ordnance Survey map notably points A, B and C. It is unclear as to the relevance to your Officers of the distances and elevations with regard to the status of the claimed route.
29. Your officers considered the Tithe Map of 1844 to see whether there had been any traces of public rights which had been lost. It may be noted that there is no evidence of any physical features suggesting any rights along the claimed upgraded route (lying between field parcels 66 and 73), when the Tithe map was drafted.
30. Highways Authorities are required under s36(6) of the Highways Act 1980 to keep a list of the highways maintained at public expense. Officers were made aware of an application in 2003 for the route to be given Ancient Highway status (potentially with the status of a Byway open to all Traffic (BOAT)) and therefore to be added to the County Council's s36 list. Documentation in connection with this has been obtained from the Council's Land Charges Department.
31. The records show that in 2004 the route was maintainable at public expense although indicated that the way was nothing more than a public

footpath. The Corporate Director (Resources) did not consider that it should be on the list of publicly maintainable highways and that the route should remain as a Public Footpath. It appears from the limited documentation that your Officers have received, that the application for the route having the status of an Ancient Highway (and acquiring the status of a BOAT) was turned down.

32. Officers have a copy of the current list which can be found in Appendix D and shows that currently the route is not classed as a highway maintainable at public expense.
33. The plan dated 1881 was found on file. Its origins are unknown. As already referred to, it does appear to show a physical feature on the ground highlighted by two dotted parallel lines leading from Stony Lane to the A523 suggesting a footpath.
34. The Parish Survey Cards were considered. They were drawn up in 1951. It appears that Path 76 commenced at the A523 "via a stone gap stile..... and leads on to Stony Lane through a cartgate and stone gap stile". This reference to stone gap stiles strongly suggests that the route was perceived to be a footpath with the sole "cartgate" off the quieter Stony Lane perhaps a secondary use as a field access.

Burden and Standard of Proof

35. With regard to the status of the route, 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 incorrect. The existing classification of the route, as a footpath, 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 Route as a footpath on the Definitive Map and Statement prevails.

Summary

36. The main evidence which the Applicant has relied on are the handover Field Book and map of 1929 and the OS map of 1925. The handover maps purpose was to show ways which were publicly maintainable highways in 1929 and although the field book is titled "Rural District Roads", the definition of a road can include footpaths as well as vehicular routes. The higher status of the route therefore cannot be inferred with any certainty from this evidence.
37. The Applicant has used as evidence the 1925 OS plan showing the lack of the abbreviation "FP" on the plan which he believes to be evidence that this route has higher rights than the unclaimed links to the north and the south of the claimed route. His understanding of the claimed upgrade is that the parallel dotted lines indicate an unfenced track of cart width and the lack of buildings along the claimed route shows the route to have higher rights.

38. Your officers consider that the evidence provided by the Applicant is not sufficiently compelling to suggest any higher rights than that of a footpath. Furthermore, all of the evidence which your officers have discovered has not shown the route to have any higher rights than that which the route currently has.
39. 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)(ii) of the Act.
40. The Panel need to be satisfied that, on the balance of probabilities, the evidence that has been discovered shows that a highway shown in the map and statement as a highway of a particular description ought to be shown as a highway of a different description.
41. For the test to be satisfied it will be necessary to show that on a balance of probabilities the additional rights do subsist.
42. To answer the question it must involve an evaluation of the evidence and a judgement on that evidence.
43. If the conclusion is that the balance of probabilities test is satisfied then the Definitive Map and Statement should be modified.

Conclusion

44. It is the opinion of your officers that based upon the balance of probabilities and in light of the evidence, as set out above, that a public right of way, with the status of restricted byway, which is not shown on the map and statement does **not** subsist.
45. It is the opinion of your officers that the County Council should not make a Modification Order to upgrade the route to a restricted byway on the Definitive Map and Statement of Public Rights of Way

Recommended Option

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

Other options Available

47. To decide to accept the application to upgrade to that of a restricted byway the current PF76 between Stony Lane and the A523.

Legal Implications

48. The legal implications are contained within the report.

Resource and Financial Implications

49. The costs of determining applications are met from existing provisions.
50. 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

51. 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.
52. 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.
53. Should the Council decide not to make an Order the Applicant may appeal that decision under Schedule 15 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.
54. 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

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

J Tradewell

Director for Corporate Services

Report Author: Stephanie Clarkson

Ext. No: 276292

Background File: 012193

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