

Local Members' Interest	
Cllr G Heath	Staffordshire Moorlands-Leek Rural

Countryside and Rights of Way Panel -

Wildlife and Countryside Act 1981

Application for the upgrading of Public Footpath 35, Ipstones to a Bridleway

Report of the Director for Corporate Services

Recommendation

1. That the evidence submitted by the applicant and that discovered by the County Council is insufficient to show that, on a balance of probabilities, public bridle rights exist along the line of Public Footpath No 35 Ipstones.
2. That Public Footpath No 35 Ipstones which is subject to the claim remains as a footpath as currently shown on 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 Staffordshire Moorlands Bridleways 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 Public Footpath No 35 Ipstones to Public Bridleway status on the Definitive Map and Statement of Public Rights of Way under the provisions of Section 53(3)(c)(ii) of the Wildlife and Countryside Act 1981. The line of the Public Footpath which is the subject of the

application is shown highlighted and marked A- B on the plan attached as 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 applicant has submitted in support of the claim evidence of a Bradnop Inclosure Award of 1769, a copy of the Countryside Act 1968 Definitive Map, a copy of Cary's map of 1787, a copy of C.Smith's map of 1801 and a copy of Ordnance Surveyors drawing circa.1840.
2. The copy of the Ordnance Surveyors Drawing circa 1840 shows the alleged route marked in orange. A copy is attached at Appendix C. The top part of the route in the north appears to be a carriageway, it is two single lines running parallel to each other. The remaining part of the route is a single line. There is nothing on the map to indicate the status of the route or the nature of any rights over the route.
3. Cary's map of 1787 highlights the alleged route, which is called Brown Edge Lane. A copy is attached at Appendix D. The route appears to be a carriageway, it is two single lines running parallel to each other. There is nothing on the map to indicate the status of the route or the nature of any rights over the route.
4. The copy of C. Smith's map of 1801 also shows the alleged route as Brown Edge Lane. A copy is attached at Appendix E. This shows the northern part of the alleged route as a single line. There is nothing on the map to indicate the status of the route or the nature of any rights over the route.
5. The Countryside Act 1968 Definitive Map shows the entire length of the route as a single dotted line with arrows along the route. A copy is attached at Appendix F.
6. The applicant has provided a transcript of the Bradnop Inclosure Award of 1769. A copy is attached at Appendix G. The transcript refers to a "Public Horse Carriage and Drift Road" adjoining Brown Edge Lane, which is the alleged route.
7. Officers have reviewed the Bradnop Inclosure Award of 1769 at Staffordshire Records Office. The document is very old and in parts is difficult to read. Parts of the Award are missing and part of the wording of the preamble is missing.
8. Parts of the preamble that can be read state: "commissioners are appointed" "by virtue of an act of Parliament". The name of the Act given in the preamble is: "An Act for dividing and inclosing the several commons...in the Manor of Bradnop...in the county of Stafford". Parts of the text of the title is missing.

Evidence submitted by the Landowners

9. To date none of the landowners have responded to the application.

Comments received from statutory consultees

10. The Peak & Northern Footpaths Society have advised that they do not have any evidence to support the claim, however they would not object to any upgrading of footpath 35.
11. The Byways and Bridleways Trust have stated that they support the application.

Comments on Evidence

12. What is not in dispute is the fact that the route is a public highway, the question relates to the status and nature of the public rights over it.
13. Inclosure Acts were designed to enclose the old commons, manorial waste and smaller holdings to increase agricultural productivity. The Bradnop Inclosure Award is dated 1769, which is before the first General Inclosure Act, which was made in 1801 and was intended to standardise the clauses used in inclosure acts.
14. The local Inclosure Act empowered an inclosure commissioner to survey and divide up the land, allotting it to named individuals, including the setting out of highways. After all the procedures were followed and completed the commissioner would issue the final Award and accompanying Award Map.
15. The transcript of the award refers to the alleged route as Brown Edge Lane and it refers to "one other Public Horse carriage and Drift Road Number 85" connecting to an ancient lane called Brown Edge Lane.
16. On review of the Inclosure Award, the condition of the original text was in places very poor and it was difficult to ascertain what was set out in the preamble and what powers the commissioners had. The fact an Act of Parliament is referred to indicates that this is a local Inclosure Act, which were often limited in application and were promoted by individual Members of Parliament.
17. In the main body of the text, it states: "do award, set out and appoint...public and private roads". The text provided by the applicant falls under the section "Allotment". It appears that the Award is clarifying and setting out who has responsibility for existing routes, rather than creating new routes. It is clear that the alleged route is an existing route, as it is described as an ancient lane.
18. There is nothing in the text that specifically clarifies the status of Brown Edge Lane, other than it connects to a Public Horse Carriage and Drift Road. It is unlikely that a highway would be connected to a route with lesser rights and therefore based on the award there is a significant likelihood that Brown Edge Lane would have been used as a "Public Horse Carriage Road" and therefore have bridle rights over it but this is not conclusive.

- 19.** In relation to the Ordnance Surveyors Drawing, the purpose of Ordnance Survey maps was to show physical features, and the contours of, the ground. They do not distinguish between public and private rights of way. The map appears to show the northern part of the route as a carriageway, as it is depicted as two single lines running parallel to each other, with the remaining part of the route as a single line. There is no depiction along the route to indicate what the status may be.
- 20.** During the 16th and 17th centuries there were several maps drawn up by private individuals. These maps are often known by the name of the person who was responsible for drawing or surveying them as shown with the Cary map of 1787 and Smith's map of 1801.
- 21.** Both the Cary map of 1787 and the Smith's map of 1801 show the physical existence of the route. There is nothing on the maps to indicate the status of the route or the nature of any rights over the route. The evidential value of these maps is limited to supporting evidence of the physical existence of the route but not the nature of any rights over the alleged route.
- 22.** The Planning Inspectorate has confirmed that "*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.
- 23.** The above maps only provide evidence of the physical existence of the way, which is not in dispute as it has already been proven that the route exists, but they do not provide any supportive evidence as to any rights over the alleged route.
- 24.** The copy of the Countryside Act 1968 Definitive Map shows the entirety of the route as a single dotted line with arrows along the route. This indicates that at the time the map was completed the route was classified as a Road Used as a Public Path.
- 25.** The Parish Survey Card for Ipstones 35, which was undertaken as part of the National Parks and Access to the Countryside Act 1949 records the path as "RP", indicating that it was classified as a Road Used as a Public Path. There is nothing in the text of the description of the route to indicate how the route was being used.
- 26.** The 1949 National Parks and Access to the Countryside Act set out the definition for a RUPP as follows: "*a highway, other than a public path, used by the public mainly for the purposes for which footpaths or bridleways are so used*". Even with these classifications the types of rights appertaining were not easily identifiable; the notation could just as well be a descriptive term for the path's appearance rather than a reference to any rights enjoyed.
- 27.** This unsatisfactory classification was addressed in the 1968 Countryside Act which stated all RUPPs should be reclassified as footpath, bridleway, or a new category Byway Open to All Traffic.

- 28.** The County Council prepared its First (General) and Special Review of the Definitive Map in 1969. The ramification of which was that the reclassification of RUPPs was completed on the 30 September 1969 and the proposals were advertised in 1971 inviting the submission of recommendations and objections. It would appear that as part of this review the decision was made to reclassify the alleged route to a footpath and at that time there was no objection to this reclassification.
- 29.** A decision was made in the case of Hood that RUPPs could not be reclassified as having public rights lower than bridleway unless there was evidence to the contrary. The authority was bound by the presumption under s32(4)(b) of the 1949 Act that the public has a right of way on horseback, or leading a horse, over such a path.
- 30.** However, the contention that a reclassified RUPP would support evidence of actual bridle rights is on its own insufficient. In the case of *Trevelyan v Secretary of State for the Environment* [2002] 2 PLR 49, Latham J stated that the relevant question is posed by Section 53(3)(c): *"is there evidence, which when considered with all other evidence, shows the correct classification of a way. This would involve a "careful evaluation" of all of the available evidence to determine, on the balance of probabilities, the correct status of the way.* He went on to say *"it seems to me that there is no room for any assumptions or presumptions. The Act specifically refers to evidence...the fact of the inclusion of the right of way on the Definitive Map is obviously some evidence of its existence. But the weight to be given to that evidence will depend on an assessment of the extent to which there is material to show its inclusion was the result of inquiry, consultation, or the mere ipse dixit of the person drawing up the relevant part of the map..."*. The relevance of the fact that a way was previously shown as a RUPP does not mean that the route should be automatically upgraded to a bridleway.
- 31.** As Lord Purchas commented in the case of *R v Secretary of State for the Environment ex parte Simms v Burrows* [1990] 3 All ER 490 the purpose of Section 53 is to ensure that the map is *"capable of revision of all kinds in order to ascertain the true state of affairs on the ground"*. Accordingly, all the available evidence should be investigated to address the correct status of the route.
- 32.** Therefore, even though the route is shown on the Definitive Map to be a Road Used as a Public Path, this does not automatically mean that the route has bridleway status. Even when reviewing the Definitive Map alongside the 1769 Inclosure Award evidence, it is not conclusive that the route explicitly had bridleway status, even though it is unlikely that a route that is described as a "Public Horse Carriage and Drift Road" would be connected to a route whose status had lesser rights over it.

Comments on report

- 33.** Following circulation of the report comments were received from the applicant, Staffordshire Moorlands Bridleways Group providing objections to

the recommendation. They also provided further documentation. They disagree with officers' interpretation of the Inclosure Award. They are of the opinion that the description of the route as an ancient lane and the fact that it connects to a Public Horse Carriage and Drift Road is evidence that the route is significantly likely to have had the same status and therefore the route should at least be upgraded to a public bridleway. They refer to several old maps which they are of the opinion shows the route with rights over it higher than a footpath. They have also stated that the alleged route connects to two publicly maintainable highways, and this again shows that the alleged route must have the same status. Whilst their comments have been noted, officers' recommendation remains unchanged. Copies of the correspondence from the Staffordshire Moorlands Bridleways Group and copy of officers' response is attached at Appendix H.

- 34.** On receipt of officer's letter in response to the further documentation submitted by the applicant, we received further correspondence from the applicant disagreeing with officers' interpretation and response. The applicant also sent through 5 user evidence forms from members of the public claiming to have used the alleged route on horseback in excess of 20 years. The evidence of use ranges from 1976 to 2022. The user evidence has been assessed and evaluated against the relevant tests.
- 35.** 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. For the application to be successful based on user evidence, 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 landowners 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.
- 36.** 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. In this instance there does not appear to be any challenge to the actual usage of the route by any person nor has there been any physical impediments. 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. In the absence of any other major or identifiable challenge to the public's use of the claimed route the date of the application, 10 May 2012, will be used as the challenge date. Accordingly, the requisite 20-year period of use should be calculated retrospectively from this date. The years 1992 to 2012 are the 20-year period whereby the majority of users provide evidence of use.
- 37.** 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. The path used by all the users is on the same line and there has been 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.

- 38.** The statutory test refers to use of over 20 years and from the evidence submitted 2 users have used the path over that period of time. The remaining evidence suggests use continues throughout that time but is for lesser periods or do not fall into the period of use. 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 was using a way and that use is as if it was a public highway, i.e., "as of right".
- 39.** The frequency of use could be said to be sporadic in that only 1 user claimed to use the route monthly and the remaining users at best could be said to have used the route seasonally. Therefore, it could be argued that this level of usage would not have been enough to bring it to a landowner's attention if they were present.
- 40.** The remaining part of the s.31 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 does not appear to be any evidence that a landowner has taken any steps to show an intention not to dedicate the route to the public, although this could be because they were not aware of the use due to the low level of usage of the route.
- 41.** 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. Whilst the terms of use do not have to span that set out in statute it must still be sufficient to raise the awareness of an owner that the land is being used as a public path. The number of years the route has been used is sufficient in that all the users claim to have used the route in excess of 20 years but the number of users who have used the route is low and is unlikely to have been enough to bring it home to a landowner that a right was being asserted across their land.
- 42.** It is also necessary for the owner to prove that the owner dedicated the route. This can be inferred by the use and as the judge in *Nicholson v Secretary of State* (1996) said, "...the more notorious it is the more readily will dedication be inferred". In this case the level of use has not been high and therefore it can be argued that it is not significant enough to have brought it home to a reasonable landowner and that they therefore acquiesced and so there was inferred dedication. Overall, it is officers' opinion that the user evidence is not sufficient to pass either the statutory law or common law tests, based on the balance of probabilities.
- 43.** Furthermore, the applicant disagrees with officer's interpretation regarding the path symbol shown on the Parish Survey Card. The applicant believes the symbol to be "CRF" not RP. On review of the Parish Survey Card, it appears that the letter C has been crossed out and the remaining two letters

are "RP". It is possible that the P was originally an F but was then subsequently changed to a P. The description for the acronyms "CRF" and "CRB" is not dissimilar to the description of a RUPP as both definitions refer to ways that could be used by vehicles but were mainly used as footpaths or bridleways. Even with the use of symbols the types of rights appertaining were not easily identifiable; the notation could just as well be a descriptive term for the path's appearance rather than a reference to any rights enjoyed. Whilst these terms were used as descriptions neither had any legal standing nor were suitable for inclusion on the Definitive Map and Statement. Our view regarding the Parish Survey Card remains unchanged. A copy of the further evidence provided by the applicant, including the user evidence forms and a copy of officer's response is attached at Appendix I.

44. Overall, when all the evidence, that being the historical and user evidence is reviewed in totality officers' recommendation remains unchanged and officers are of the opinion that on the balance of probabilities the evidence is not sufficient to show that the alleged route has bridle rights over it.

Burden and Standard of Proof

45. With regards to the status of the route, the burden is on the applicant 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 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

46. The Panel need to be satisfied that, on the balance of probabilities, the evidence that has been discovered shows that a highway shown on the map and statement as a highway of a particular description ought to be there shown as a highway of a different description.
47. Once shown on a definitive map then the route is a public right of way until and unless evidence can be provided to prove otherwise. This is also true of its status.
48. The route claimed is shown on several old maps, which supports the physical existence of the way. Although, as already mentioned the existence of the way is not in question. The key issue here is that the maps do not provide any evidence as to the status of the way or any rights over the way and therefore does not provide any evidence that the route has bridle rights over it.
49. Whilst the copy of the Countryside Act 1968 Definitive Map shows the claimed route as a Road Used as a Public Path this does not automatically mean that the route has bridle rights over it. There needs to be evidence in this case to show that bridle rights exist over the route.

50. As for the Inclosure Award, it states that a route that is a "Public Horse Carriage and Drift Road" adjoins the alleged route, Brown Edge Lane. It is unlikely that a route would be connected with another route that had different rights over it. Therefore, as the alleged route connects with an existing route that has bridleway status, this is suggestive that the alleged route would also have bridle rights over it.
51. However, when all of the evidence is considered together it is not conclusive that the route has bridleway status and therefore the evidence is insufficient to support any status other than already recorded.

Conclusion

52. The question is not whether Public Footpath 35 is a public highway but rather what is the nature of the public rights over the route.
53. The evidence to overturn the current designation on the map must satisfy the civil legal test, that of the balance of probabilities.
54. In light of the evidence, as set out above, it is the opinion of your officers that based upon the balance of probabilities the route which is the subject of the application is more likely than not a public footpath.
55. It is the opinion of your officers that the County Council should not make a Modification Order to upgrade the route to bridleway status on the Definitive Map and Statement of Public Rights of Way.

Recommended Option

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

Other options Available

57. To decide to accept the application to upgrade Public Footpath 35 Ipstones to Public Bridleway status.

Legal Implications

58. The legal implications are contained within the report.

Resource and Financial Implications

59. The costs of determining applications are met from existing provisions.
60. 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

- 61.** 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.
- 62.** 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.
- 63.** 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.
- 64.** 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

- 65.** There are no direct equality implications arising from this report.

J Tradewell

Director for Corporate Services

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INDEX TO APPENDICES

Appendix A	Copy of application and associated submitted letters and documents
Appendix B	Plan of claimed route
Appendix C	Copy of Ordnance Surveyors Drawing circa 1840
Appendix D	Copy of Cary's map of 1787
Appendix E	Copy of C. Smith's map of 1801
Appendix F	Copy of Countryside Act 1968 Definitive Map
Appendix G	Copy of Bradnop Inclosure Award of 1769
Appendix H	Copy of correspondence from SMBG with comments in response to draft report and copy of officer's response
Appendix I	Copy of further correspondence from SMBG, including user evidence forms and copy of officer's response.