

<b>Local Members' Interest</b>	
Cllr G Heath	Staffordshire Moorlands- Leek Rural

## **Countryside and Rights of Way Panel -**

### **Wildlife and Countryside Act 1981**

#### **Application for upgrading to a Restricted Byway part of Public Footpath 12, Grindon Parish between Fleets Lane and BW9 Grindon**

#### **Report of the Director for Corporate Services**

#### **Recommendation**

1. That the evidence submitted by the applicants and that discovered by the County Council is insufficient to show that Public Footpath 12 between Fleets Lane and BW9 Grindon should be upgraded to a Restricted Byway.
2. That no Order under Section 53(3)(c)(ii) be made to upgrade part of Public Footpath 12, Grindon shown on the plan attached at Appendix B to the Definitive Map and Statement of Public Rights of Way for the District of Staffordshire Moorlands as a Restricted Byway.

#### **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 Louise Redfern on behalf of Staffordshire Moorlands Bridleways Group 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 part of Public Footpath 12, between Fleets Lane and BW9 Grindon to a Restricted Byway to 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 lines of the alleged Restricted Byway which are the subject of the application are 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 her claim evidence of an OS one inch map, OS Manual, OS 25-inch map and a 1929 Handover Map for Leek Rural.
2. The OS one inch map shows the alleged route as a highway, as it is depicted as two single lines running parallel to each other. The northern part of the route is more clear and runs along the same line as the northern part of Public Footpath 12, which does not form part of this claim. The alleged part of the route is very faded on the map. A copy is attached at Appendix C.
3. The Ordnance Survey Manual is by JB Harley and page 55 of the manual has been provided. The section of the manual provided deals with Ordnance Survey benchmarks. The applicant has highlighted the following section: "Before 1929, bench mark levels were given to one decimal of a foot, but thereafter to two decimals of a foot, for example, BM 574-35, after 1929 surface heights were shown along roads in the manner +392". A copy is attached at Appendix D.
4. The OS 25-inch map shows a carriageway adjacent from separate landholdings, running passed several plots of land, along the same line as the alleged route. There are numbers depicted along the alleged route that have been highlighted by the applicant but unfortunately the map in parts is not very clear and the numbers are difficult to decipher accurately. It appears that the numbers relate to bench marks, as they all have BM preceding the number. It appears the numbers are as follows: at the northern end of the route BM 1055.5, further down the route in a southerly direction- BM1026.9, then BM 568.4, although this cannot be confirmed with certainty. The last number at the very southern part of the route is too unclear and cannot be made out. The map is not dated but it is assumed that it is prior to 1929, given what is said about bench marks in the Ordnance Survey Manual. It is alleged that because the numbers alongside the alleged route either exceed or fall in the category BM 574-35, then this signifies the route is a road because this is the category surface heights were shown along roads. This map needs to be reviewed in conjunction with the Ordnance Survey Manual. A copy of the map is attached at Appendix E.
5. The 1929 Handover Map shows a way running along the same line as the alleged route. The route is marked in a turquoise colour. There is no key with the map and there is no indication as to the status of the route or any rights over the alleged route. A copy is attached at Appendix F.

## **Evidence submitted by the Landowners**

- 6.** Two landowners were identified as part of the application. Landowner 1 submitted a landowner questionnaire, a copy of which is attached at Appendix G. In this they comment that they consider the route to be a footpath only. They advise that there are "Footpath only" and "Keep to the footpath" signs in place, as well as a County Council stile and route signs from Fleets Lane. They state that they have stopped pedal/motor cyclists using the footpath from Grindon along Fleets Lane. They object to the application on the grounds that there is an existing bridleway over the land, which is approximately 250 yards from the proposed application route and is parallel to the existing route. They also state that it will lead to an increase in disturbance to livestock. On the map provided by landowner 1 a stile is marked towards the northern part of the route and a stile and locked gate towards the middle part of the route.
- 7.** A landowner questionnaire was submitted by Landowner 2, a copy of which is attached at Appendix H. They advise that they consider the route to be public but only as a footpath. They stated that the land is used as a wildflower meadow, managed in accordance with the Natural England Higher Level Stewardship Scheme.
- 8.** They stated that in 2010 signs were erected saying: "No motorcyclists or Horses, footpath only". They confirmed that the signs are no longer in place as they have been stolen 5 times over a period of 9 years. They stated that there is a locked gate due to persistent motorcyclists attempting entry and riders use the footpath via Fleets Lane to cross their land. Landowner 2 strongly objects to the application. The map provided by landowner 2 shows a stile and gate towards the middle part of the route and a gate at the very southern part of the route.
- 9.** An e-mail was also received from another owner of land in the ownership of Landowner 2, outlining their objections to the application. They advised that the field in question is a conservation field, as it is a wildflower, butterfly, and bird field and unmotorised vehicles would destroy the field. They consider that Fleet Lane is only a footpath and there is already a bridleway going through the farm to the road up to Grindon.
- 10.** Whilst it is not our intention to belittle any legitimate concerns raised, the courts have decided that issues relating to safety, security, privacy, suitability, future maintenance and wildlife concerns cannot be taken into consideration. Only evidence regarding the existence or not of a public right of way can be taken into consideration.

## **Comments received from statutory consultees**

- 11.** Staffordshire Moorlands District Council have replied stating that the site is within the Peak District National Park and the National Park Authority deal with all matters for that area.
- 12.** Grindon Parish Council responded, advising that they had no comments to make regarding the application.

- 13.** The Peak & Northern Footpath Society replied stating that they have no evidence for or against the claim, however they do support the claim.
- 14.** The Byways and Bridleways Trust responded advising that they support the application. They are of the opinion that the route is an old road, which was used regularly in the 1970s and 1980s by members of the North Midland Group of the TRF.

### **Comments on Evidence**

- 15.** 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.
- 16.** Under the Local Government Act 1929 the 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 of.
- 17.** Maps and lists were created showing the routes the Rural District Councils believed they had a maintenance liability for. These became known as the "handover maps" and 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.
- 18.** The term Unclassified County Roads came to be applied to these routes. This moniker has no legal status although some have assumed that it meant or indicated that such routes had vehicular rights. The legal definition of a "road" is a highway which is a generic term defined in law as covering routes from a footpath to a major highway.
- 19.** The 1929 Handover map for Leek Rural shows the physical existence of the route. There is no key or list with the map so there is no indication as to the status of the route. The handover map is only concerned with liability for maintenance, not with the type of public user.
- 20.** This document only supports the routes physical existence as a public right of way, as it shows liability for the route, but it does not attest to the nature of the public rights and therefore it does not provide any evidence that the alleged route is a restricted byway.
- 21.** The OS 25-inch map needs to be reviewed in conjunction with the OS Manual, as the OS map has bench mark numbers depicted alongside the route and the section of the manual provided refers to primary levelling and bench marks.
- 22.** Ordnance Survey bench marks are survey marks made by Ordnance Survey to record height above Ordnance Datum. If the exact height of one Bench mark is known, the exact height of the next can be found by measuring the difference in heights, through a process of spirit levelling. Most commonly, the bench marks are found on buildings or other semi-permanent features. Bench marks are the visible manifestation of Ordnance Datum Newlyn, which is the national height system for mainland

Great Britain and forms the reference frame for heights above mean sea level.

- 23.** Therefore, the purpose of bench marks is not to distinguish or depict the status of routes shown on the map but merely to represent height.
- 24.** The numbers depicted on the OS 25-inch map relate to the description of the bench marks set in the manual, in that they fall between 574- 35. The numbers depicted alongside the route would seem to match the bench mark levels that were given to surface heights that were shown along routes that were classified as roads.
- 25.** Whilst there is a reference number given to show the bench mark level shown along roads from the Ordnance Survey Manual, this cannot be taken as strong evidence of the status of a route, as this was not the purpose of bench mark levels. It perhaps provides some supporting evidence that the alleged route is likely to be a road, but as previously stated a road is a highway, which covers footpaths to major highways. There is no annotation on the map to indicate the status of the route.
- 26.** The OS one inch map shows the physical existence of the route, but it does not identify the nature of any rights over the alleged route. It is not clear from the map that the alleged part of the route is a carriageway because it is faded on the map. It cannot be determined with certainty that the alleged route is a road that has vehicular rights over it and therefore it should be re-classified as a restricted byway.

### **Comments on draft report**

- 27.** Following circulation of the report comments were received from the applicant objecting to officers' recommendation and further evidence was submitted. A copy of the applicant's correspondence and officers response is attached at Appendix I. The applicant submitted several ordnance survey maps depicting the route as a minor road and unfenced in parts, which supports the physical existence of the route and is supportive of the route having higher rights over it than a footpath. However, ordnance survey maps are not considered to be evidentially strong pieces of evidence and therefore further evidence would be needed to support the routes status being higher than a footpath.
- 28.** The applicant also submitted a table listing the mileage of public highways regarding rural district roads (not main roads) within different parishes. The document makes no reference to the alleged route and therefore does not provide any evidence as to the nature of the rights over the alleged route. The applicant contends that Handover material proves the existence of public vehicular rights. Officers contend that Handover evidence is only concerned with liability for maintenance, not with the type of user. Therefore, the evidence supports that the route is public, but this is not in dispute as the route is already recorded as a public right of way on the Definitive Map and Statement of Public Rights of Way.

- 29.** Officers obtained a copy of the Parish Survey Card for Public Footpath 12 Grindon, which shows that the path was recorded as "CRF- Footpath (FP)". In the description section of the card, the alleged route is referred to as a footpath. The parish survey card is supportive of the route being a public footpath, there is no mention or suggestion of higher rights over the route.
- 30.** The applicant also submitted a copy of a Waterfall Tithe Map, which depicts the current D1129 Back o' th' Brook Road. The route stops at the parish boundary between Grindon and Waterfall. Officers have had the map georeferenced onto current day mapping and this has shown that the route on the Tithe map would connect to existing Public Bridleway 9 Grindon. The Tithe Map does not show the alleged route. Public Footpath 12 Grindon connects to Public Bridleway 9 Grindon, but Public Footpath 12 is not a continuation of Public Bridleway 9. Officers have viewed Grindon Tithe Map dated 1839, which shows a route running along the same line as existing Public Bridleway 9 Grindon, but this route is not depicted in the same manner as the route on the Waterfall Tithe Map. The route is shown as two single broken lines running parallel to each other. The section of Public Footpath 12 Grindon that has been applied for is also depicted as two broken lines running parallel to each other. There is no suggestion from the Grindon Tithe Map that Public Bridleway 9 or Public Footpath 12 Grindon are public roads. Therefore, it is officers' opinion that the tithe award documentation does not provide evidence of the route subject to this application being a public road and therefore having rights over it higher than a footpath.
- 31.** User evidence has been submitted in the form of 2 user evidence forms from members of the public claiming to have used the alleged route. In order to establish a right of way under section 31 of the Highways Act 1980 there needs to be evidence of use "as of right" without interruption for a period of 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 they had actually dedicated the route as a public right of way, and the right of way had been accepted by the public. This means that the use will need to have been without force, without secrecy and without permission.
- 32.** 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 case there is an identifiable challenge to use of the route with users referring to a locked gate along the route from 2001. Accordingly, the requisite 20 year period of use is from 1981- 2001. Only one of the users has used the alleged route for the requisite 20 year period on horseback. 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. As only two members of the public have provided evidence of use of the route, this is not enough to bring to the attention of the landowner that a right was being asserted across their land.

- 33.** There is also evidence that the landowner has taken action to rebut the statutory presumption of dedication, as both users state that a locked gate was along the route from 2001. 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 the common law test the applicant must prove that there has been an intention to dedicate by a landowner. No minimum period of use is required to raise such an inference, but there must be evidence which is sufficient to infer that there was an intention to dedicate a public right of way. 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. In this case there does not appear to be any evidence that the landowner has acquiesced and dedicated the route to the public and the level of evidence of use is low to show to a landowner that a right was being asserted cross their land.
- 34.** We note that the Byways and Bridleways Trust have stated that they are aware that members of the public have used the alleged route in the 1970's and 1980's as if it was a road, but no specific evidence has been provided to clarify the level of use, the exact timespan of the use or how the route was specifically used. It is officers opinion that the evidence of use is insufficient to meet the relevant legal tests either under statute or the common law.
- 35.** Whilst the further evidence is noted officers' opinion remains unchanged and therefore the recommendation that the evidence is insufficient to show on a balance of probabilities that a Restricted Byway exists along the line of the alleged route remains.
- 36.** Comments were also received from Grindon Parish Council advising that they object to the application, however, the council did also receive comments from residents who do support the application.

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

- 37.** With regard 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 is 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**

- 38.** The application is made under Section 53(2) of the 1981 Act. Therefore, 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.

39. The 1929 Handover Map is evidence of the public nature of the route; however this is not in dispute as the route is already a public footpath, however it does not attest to the nature of the public rights over the route.
40. The evidential value of Ordnance Survey Maps has been considered by the courts to be limited solely to being evidence of whether there was a visible feature on the ground at the time of the survey, as stated in the case of Attorney- General v Antrobus [1905] 2 Ch 188.
41. The fact that there are bench marks depicted alongside the alleged route on the OS 25-inch map and from the description in the OS Manual that these bench marks are consistent with them being numbered alongside a route that is classified as a road, this does not provide significant evidence as to the nature of the rights over the alleged route and therefore that it has vehicular rights over it. The main purpose of bench marks was not to show the status of a road or the nature of any rights over a route.
42. Therefore, when all of the documentation is reviewed together it does not support the contention that the route has vehicular rights over it and that the route should be re-classified to a restricted byway.

### **Conclusion**

43. The question is not whether part of Public Footpath 12 is a public highway but rather what is the nature of the public rights over the route.
44. The evidence to overturn the current designation on the map must satisfy the civil legal test, that of the balance of probabilities.
45. 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.
46. 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**

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

### **Other options Available**

48. To decide to accept the application to upgrade part of Public Footpath 12 Grindon Parish to a Restricted Byway.

### **Legal Implications**

49. The legal implications are contained within the report.



## **Resource and Financial Implications**

- 50.** The costs of determining applications are met from existing provisions.
- 51.** 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**

- 52.** 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.
- 53.** 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.
- 54.** 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.
- 55.** 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**

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

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J Tradewell

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**Background File:** 017019

## INDEX TO APPENDICES

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Appendix F	1929 Handover Map for Leek Rural
Appendix G	Landowner questionnaire from Landowner 1
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