

Local Members' Interest	
Cllr Francis	Stafford Trent Valley

Countryside and Rights of Way Panel -

Wildlife and Countryside Act 1981

Application for an alleged Public Footpath from Fradswell Lane to FP0.1410 (A) Fradswell

Report of the Director for Corporate Services

Recommendation

1. That the evidence submitted by the Applicant and that discovered by the County Council is sufficient to reasonably allege that a public footpath subsists.
2. That an Order be made to add the alleged Public Right of Way shown on the map marked "A to B" at Appendix B of this report 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. The purpose of this investigation is to establish what public rights, if any, exist even though they are not currently recorded on the Definitive Map and statement of Public Rights of Way.
3. To consider an application attached at Appendix A for an Order to modify the Definitive Map and Statement for the Borough of Stafford. The effect of such an Order, should the application be successful, would:
 - (i) Add a Public Footpath from Fradswell Lane to FP0.1410 (A) Fradswell

(ii) The line of the alleged footpath which is the subject of the application is shown highlighted and marked "A to B" on the plan attached at Appendix B.

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.

Application Details

1. In support of the application the Applicant has submitted the following historical evidence:
2. A tracing of the deposited railway plan and book of reference for the proposed Staffordshire and North Midland junction railway. Q/Rum/182 (1845). This can be found at Appendix C.
3. A tracing of the Colwich, Staffordshire: Fradswell Tithe Map (1845) B/A/15/503. This can be found at Appendix D.
4. Ordnance Survey Maps: 6in to 1-mile 1879, 1 inch to 1 mile (reprint) 1836-40 and a 25inch to 1 mile 1901. This can be found at Appendix E.

Comments on Documentary Evidence

Proposed Staffordshire and North Midland Junction Railway Deposited Railway Plan 1845 (Appendix C)

5. The deposited railway plan and book of reference for the proposed Staffordshire and North Midland Junction Railway refers to the existence of a "parish road" overseen by the Surveyor of Fradswell. The alleged route runs from Fradswell Lane in an easterly direction to public footpath 0.1410 (A) Fradswell.
6. The evidence is submitted as a tracing of the deposited railway plan which has also been viewed by your officers at Stafford Records Office for clarity and confirmation. Photographs of the railway plan and book are also attached at Appendix C.
7. The plan shows a section of the alleged route in the plot 46a.
8. The details of the owners and occupiers are consistent with those which typically accompany deposited plans and referred to within the associated book of reference.
9. Statute required, from 1838, that the plans of these works and the accompanying book of reference were deposited with the local public authorities. This was true for routes that never came to fruition as well as for those that were constructed.
10. Surveyors compiled details of landowners and landholdings which then formed part of an Act of Parliament. However, it was not their primary

purpose to record highways of any description, but they were typically included as a consequence of surveying the land.

11. Where there was a proposed railway in the 18th and 19th century, the intended route would be surveyed in order to assess the suitability of the land for the construction of a railway. The surveyor then created plans and books of reference which ultimately recorded highways and showed who owned the land and where the proposed railway was to cross the land.
12. The plan would allot plot numbers to each strip of land affected by the proposed railway while the book of reference listed who owned or had responsibilities over the plot and a brief description of its use.
13. The book of reference which accompanies the plan refers to plot 46a as a "Parish Road". The recorded owner of plot 46a is "Surveyor of Fradswell". The notation of Surveyor of Fradswell is highly suggestive that the way was public.
14. The railway plan can be said to show that the Surveyor of Fradswell did not object to the description of the route when they had the opportunity to do so at the end of the first survey.
15. The Surveyor of Fradswell would appear to be of the opinion that the alleged route was a parish road that was publicly maintainable.
16. The plot on the map marked 47, adjoining plot 46a, is an existing highway, Fradswell Lane, and the book of reference identifies this plot as being the "same" as the reference to plot 46a.
17. Railway deposited plans recorded the details of the land to be crossed by the intended construction and therefore as a result, only parts of the affected land were shown. This may explain why the easterly section of the claimed way is shown but not in its entirety.

Fradswell Tithe Map 1841 (Appendix D)

18. The Applicant submitted a copy tracing of the Colwich, Fradswell Tithe map dated 1841. The Tithe map shows the length of the claimed route as tithable and is coloured sienna the same as other public routes in the area.
19. The alleged way is shown separate from the land holdings and has the plot number 96a assigned to it.
20. The Tithe map clearly identifies the claimed route in its entirety, coloured sienna, numbered and separate from landholdings connecting with other routes throughout the parish.
21. This could suggest that the alleged route is of higher status than footpath, as it is shown by two solid lines and entirely separate from the adjoining landholdings, in a similar way to other highways.

22. In this case, the entire length of the alleged route was shown separate from the adjoining taxable land holdings. The alleged route has a plot number apportioned to it suggesting that the land was titheable.
23. The award book lists the use of plot 96a as a "Lane" with the owner Elizabeth Bree.
24. Whilst the status of such rights are not conclusive from this evidence, it is suggestive that a public right of way existed over the alleged route.
25. It should be noted, however, that tithe awards and maps were mainly concerned with identifying tithable lands and not highways or their status and cannot be used as conclusive evidence of the status of a route. Such evidence is not on its own conclusive proof and therefore must be considered alongside all other evidence as stated in *Maltbridge Island Management Co. v Secretary of State for the Environment* [1998] EGCS 134.

Ordnance Survey Maps (Appendix E)

26. The Ordnance Survey Maps dated 1836 - 1901 show a through route on the same line subject to the claimed route.
27. Ordnance Survey Maps provide evidence of the physical existence of the features they show at the time of the survey, they are generally unable to provide evidence of status. From the early 1880's the maps included a disclaimer to the effect that the depiction of any path, track or way was not evidence of the existence of any public rights of way.
28. The application route is shown along the claimed route on the Ordnance Survey Maps each are detailed as two parallel lines.

Evidence Submitted by the Landowners (Appendix G)

29. Landowners have been consulted in connection with the claimed route, and they returned a landowner evidence form at Appendix G.
30. The evidence form clarifies that the land is (and has been) owned by a charitable organisation since 1967. The landowner considers the alleged claimed route to be private and has indicated that there are locked gates and signs in place to indicate that the way is private. This has been the case for 56 years and these remain in place at either end of the way.
31. Officers have identified that there is a landowner declaration in place over the land owned by charity. This declaration prevents new rights of way being claimed on user evidence. However, this application is based on historical evidence and therefore the declaration is not fatal to the claim.
32. The landowner states that there are other public footpaths in the area and is of the belief that this route has always been a private right of way.

33. It was averred that evidence against the claim could be found “in every map produced over history”. However these have not been submitted for consideration as part of the application and officers have been unable to establish the maps referred to when compiling a search of the local archives online catalogue.
34. As it is suggested that the route has not been used by the public for at least 56 years, since the purchase of the land by the charity – it should be highlighted that this is not evidence in itself to suggest that the route was not considered public in 1845.

Comments Received from Statutory Consultees

35. The Byways and Bridleways Trust commented on the application and supported the claim in principle, however they are of the opinion that a higher status exists along the alleged route. There has been no evidence submitted in support of this claim. Their letter can be found at appendix F.

Comments on Draft Report

36. Following circulation of the report comments were received from the landowner objecting to officers’ recommendation. A copy of the landowner’s correspondence and officers’ response is attached as an addendum to the report at appendix H.

Comments on the Evidence

37. The alleged route is the subject of a claim made by the Applicant to add the route to the Definitive Map and Statement for Staffordshire.
38. The evidence relies mainly upon the Staffordshire and North Midland Junction Railway Deposited Plan of 1845 (as proposed) and is supported by the Tithe Map dated 1841 and Ordnance Survey plans.
39. Deposited railway plans are good evidence of a public route, although are not conclusive. However, the status of a route would have had a considerable impact on the cost of the line, and it would therefore be against their interests to show a private route as a public one.
40. The route is depicted in the book of reference as a “Parish Road” under the responsibility of the “Surveyor of Fradswell”, which is good evidence to suggest that the alleged route was considered a public right of way at the time the plans and book of reference were deposited in 1845.
41. The majority of the route is indicated on the deposited railway plan, and whilst the most easterly section of the route is not shown, there is enough of the route recorded to indicate that this route is commensurate with the ones shown on the Tithe Map and Ordnance Survey maps.

42. The entirety of the length of the route is supported by the Fradswell Tithe Map, which is shown in its entirety, coloured sienna and numbered 96a with the description of "Lane" allotted to it.
43. The sienna colouring of the route is again suggestive of a public route especially as the wider public network is coloured the same and these routes are connected.
44. The landowner has pointed out that there has been gates and signage in place across the route and that permission for use has never been granted. However, the route in question is a historical one and therefore whilst these comments are noted, these details have no effect on the claim.
45. The landowner purports that "there is a well signposted public footpath that is well used to the direct right of the private path, the private path is locked, it has signage saying it is private and has had for generations. The private path is not used by the public". (sic)
46. Again, the information does not detract from the historical evidence which has been submitted with the application and is not sufficient to counter the historical legal evidence of a public right of way.
47. The legal maxim "once a highway, always a highway". Once a highway has come into being by whatever means it continues indefinitely no matter whether it is used or not. In the case of *Harvey v Truro RDC* ([1903] 2 Ch 638) Mr Justice Joyce said, "Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper".

Legal tests

48. 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 the route:
 - (a) subsists on the balance of probabilities
 - or;
 - (b) is reasonably alleged to subsist.
49. 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.
50. 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”.

51. If a conclusion is reached that either test is satisfied, then the Definitive Map and Statement should be modified.

Summary

52. In this instance the applicable section of the Wildlife and Countryside Act 1981 is section 53(3)(c)(i).
53. The railway plan, despite not being implemented, makes reference to the alleged highway, the section of the route shown on the plan is depicted the same way as the claimed route and that of the Tithe map.
54. The designation of the route in the deposited railway plan is listed as the Surveyor of Frasdwell, and the route is described as a Parish Road which is suggestive that the route is a public right of way.
55. The deposited railway plan is supported by the Tithe Map and Ordnance Survey Maps, all of these documents show the alleged route as a through road connecting public routes in the parish.
56. County Officers have not discovered any evidence to suggest that this route was extinguished or stopped up.
57. The probity of the documentary evidence presented in this case shows the existence of a right of way across the land on the alignment of the alleged route.
58. Consequently, it is officers’ opinion that the second test would succeed as the evidence adduced is such that it is reasonable to allege that a public right of way subsists over the claimed route.
59. With regard to the question of “reasonably alleged to subsist” as laid down in Section 53(c)(i), this has been discussed in the case of R-v-Secretary of State, ex parte Bagshaw and Norton [1995] JPEL 1019. In that case Owen J. stated that the “the wording of the section indicates, as I consider, that the evidence necessary to establish that a right of way is reasonably alleged to subsist must be less than that which is necessary to establish that a right does subsist.

Conclusion

60. Whilst it is a matter for the Panel to consider all of the relevant evidence available, your Officers conclude, in light of the evidence as set out above, that the evidence is sufficient to reasonably allege that a public right of way, shown at “A to B” on the map attached at Appendix B, with the status of public footpath is reasonably alleged to subsist.

61. Officers recommend that the County Council should make a Modification Order to add the claimed route on the Definitive Map and Statement of Public Rights of Way for the Borough of Stafford.

Recommended Option

62. To accept the application based upon the reasons contained in the report and outlined above and to decide to make an Order to add the alleged route to the Definitive Map and Statement of Public Rights of Way for the Borough of Stafford.
63. Officers further recommend that this should be to the minimum width of 1.5 metres throughout its length.

Other options Available

64. To reject the application and not make an Order to add the alleged route to the Definitive Map and Statement of Public Rights of Way for the Borough of Stafford.

Legal Implications

65. The legal implications are contained within the report.

Resource and Financial Implications

66. The costs of determining applications are met from existing provisions.
67. 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

68. 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.
69. 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.
70. Should the Council decide not to make an Order the Applicant may appeal that decision under Schedule 14 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.

71. 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

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

J Tradewell

Director for Corporate Services

Report Author: Laura James

Background File: LJ662G

INDEX TO APPENDICES

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Appendix B	Plan of claimed route
Appendix C	Proposed Staffordshire and North Midland Junction Railway Deposited Railway Plan and Record Book
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Appendix F	Byways and Bridleway Trust letter
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Appendix H	Landowner comments and SCC responses on report consultation